



## NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 10 | Number 2

Article 3

Spring 1985

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### Recommended Citation

Steven A. Bernholz, Martin J. Bernholz & G. N. Herman, *International Extradition in Drug Cases*, 10 N.C. J. INT'L L. & COM. REG. 353 (1985).

Available at: <http://scholarship.law.unc.edu/ncilj/vol10/iss2/3>

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# International Extradition in Drug Cases

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The United States Justice Department is engaged in a zealous program to locate and apprehend alleged offenders of United States narcotics laws who reside in foreign countries.<sup>1</sup> Requests for extradition of these offenders must comport with fundamental tenets of international jurisprudence, principles of treaty construction, and nuances of foreign law. While the subject of international extradition has been addressed in numerous scholarly works,<sup>2</sup> virtually nothing has been written from the standpoint of the criminal defense bar. Attempting to address such an oversight, this article focuses on the drug defendant. Much of the discussion directly or analogously also may apply to criminal offenders of other persuasions.

## I. Basic Principles and Procedure

The United States has entered into more than eighty extradition treaties,<sup>3</sup> which constitute the legal authority for international extradition.<sup>4</sup> These treaties typically share a set of principles and procedural rules that define the rights of the "contracting" countries and the accused. A discussion of these principles and procedures illustrates how they apply when the United States seeks extradition of an alleged drug offender.

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<sup>1</sup> See *Reagan's Speech to Justice Department on Plan to Combat Drug Trafficking*, N.Y. Times, Oct. 15, 1982, at A20, col. 3.

<sup>2</sup> See, e.g., M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (1983); M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* (1968).

<sup>3</sup> This principle was established in *Holmes v. Jennison*, 39 U.S. 540 (14 Pet.) (1840), and adhered to in *Rauscher v. United States*, 119 U.S. 407 (1886), and *Factor v. Laubenthal*, 290 U.S. 276 (1933).

<sup>4</sup> See 18 U.S.C. § 1381 (1982).

The principle of "double criminality" and the doctrine of "specialty" are the most fundamental doctrines of international extradition law. Double criminality provides that the offense for which extradition is sought must be punishable under the laws of both the requesting and requested countries by a specified term of imprisonment, usually one or two years.<sup>5</sup> Specialty precludes the requesting country from prosecuting the defendant for an offense for which he was not extradited.<sup>6</sup> Thus, the requested country contractually agrees to extradite a defendant for those offenses that its laws recognize as criminal in consideration for the requesting country's promise not to prosecute the defendant for crimes that are not recognized by the extraditing country.

Treaties typically also preclude extradition for offenses that would subject the defendant to double jeopardy or result in his punishment under an *ex post facto* law. For example, most treaties prohibit the extradition of a defendant for an offense for which he has already been prosecuted and acquitted by the requesting or requested country or, if convicted, has fully served his sentence.<sup>7</sup> Some treaties further prohibit extradition if the defendant already has been punished by a third country for the same offense.<sup>8</sup> In addition, if prosecution of the defendant is barred by lapse of time under the laws of the requesting country, extradition will be refused.

Procedurally, the extradition request must be made to the government of the requested country through proper diplomatic channels. The request generally must be accompanied by a description of the defendant, a statement of the facts, and a text of the laws of the requesting country that define the offense, including the punishment and any applicable limitation on legal proceedings. When the extradition request relates to a person who has not yet been convicted in the requesting country, the request must be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting country, along with evidence that, under the laws of the requested country, would justify the defendant's committal for trial if the offense had been committed there. As to an already convicted defendant, the judgment of conviction and a statement showing how much of a sentence has been served must accompany the request.<sup>9</sup>

Under many treaties, the requesting country may apply for the provisional arrest of the defendant pending the presentation of a for-

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<sup>5</sup> I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 137 (1971).

<sup>6</sup> *Id.* at 146; M. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 352-53 (1974).

<sup>7</sup> This rule, known as *nemo bis in idem debet vexari audis*, is based on considerations of humanity and the policy against double prosecution. S. BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 171 (1966).

<sup>8</sup> *Id.*

<sup>9</sup> See M. BASSIOUNI, *supra* note 6, at 511-12.

mal extradition request. If such application is made, the requested country must be provided information that would justify issuing a warrant for the defendant's arrest if the offense had been committed in that country.<sup>10</sup> Most importantly, a defendant provisionally arrested in the requested country must be freed from custody if the formal extradition request and the requested documents are not received within a specified time from the date of the arrest.<sup>11</sup>

Typically, a magistrate determines whether there is sufficient evidence to justify the defendant's extradition. The magistrate decides whether the evidence submitted by the requesting country would, under the laws of the requested country, establish a *prima facie* case of guilt in the sense that a reasonable jury could render a guilty verdict.<sup>12</sup> Under appellate or habeas corpus review, a higher court can determine whether the offense charged is extraditable under the treaty, and whether the evidence was sufficient to justify extradition.<sup>13</sup>

The particular procedures and determinations of an extradition request vary among treaties. The principles of double criminality and specialty, however, are universal and the subjects of most litigation. Therefore, examining how these doctrines apply is integral to representing effectively the rights of an alleged drug offender or other criminal defendant whose extradition is sought by the United States.

## II. The Principle of Double Criminality

### A. Generally

Double criminality is the keystone of international extradition law. Under this principle, an act is not extraditable unless it constitutes a crime under the laws of both the requesting and requested countries.<sup>14</sup> Double criminality attempts to ensure that a defendant's liberty is not restricted because of offenses not recognized as criminal in the requested country.<sup>15</sup>

Double criminality is expressly embodied in all United States extradition treaties in one of two forms. The traditional and most common form limits the offense for which extradition may be granted to those offenses punishable under the laws of both countries by a specified minimum term of imprisonment and listed as extraditable of-

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<sup>10</sup> See S. BEDI, *supra* note 7, at 118.

<sup>11</sup> *Id.* at 127.

<sup>12</sup> See, e.g., *Schtracks v. Gov't of Israel*, [1962] 3 All E.R. 529, 533.

<sup>13</sup> *Id.* at 549-50; see also *Regina v. Governor of Brixton Prison ex parte Kolczynski*, [1955] 1 Q.B. 540, 1 All E.R. 31.

<sup>14</sup> See I. SHEARER, *supra* note 5, at 137.

<sup>15</sup> *Id.*

fenses in the treaty.<sup>16</sup> The second form<sup>17</sup> also limits the offense, but omits a particular list of extraditable offenses. As a practical matter, when the United States seeks extradition for drug offenses, the particular form in which the applicable treaty defines double criminality is inconsequential.

When the treaty embodying double criminality lists extraditable offenses, it is important not to confuse the list with the principle. For example, the treaty may list "an offense against the laws relating to narcotics, dangerous drugs or psychotropic substances."<sup>18</sup> This item constitutes only a category of prohibited behavior to which the specific crime must be applied. The categories of offenses under the treaty do not make a particular crime extraditable until that crime is shown to be (a) within one of the listed categories, and (b) punishable in the requested country.

Most treaties contain provisions that prevent an overly restrictive application of double criminality by acknowledging that extraditable crimes may be categorized or defined differently between the contracting countries. For instance, a treaty may state that "extradition shall also be granted for aiding, abetting, counseling, or procuring the commission of, being an accessory before or after the fact to, or attempting or conspiring to commit any of the offenses [specifically listed in the treaty]."<sup>19</sup> Such a provision is intended primarily to reach the conspiracy case.

Similarly, the treaty may provide that an offense is also extraditable if "the laws of both Contracting Parties . . . would place that offense within the same category of offenses made extraditable [under the Treaty] and whether or not the laws of the requested State denominates the offense by the same terminology."<sup>20</sup> This latter provision is illustrated by the British decision in *Ex parte Budlong & In re Kember*,<sup>21</sup> in which the United States sought defendants' extradition on burglary charges. While the elements of burglary in Great Britain and the United States essentially are identical, the British

<sup>16</sup> This form sometimes is referred to as the "Montevideo" type after the Seventh Inter-American Conference at Montevideo in December 1933. See, e.g., Extradition Treaty, Jan. 21, 1977, United States-Great Britain and Northern Ireland, appended schedule, 28 U.S.T. 227, T.I.A.S. No. 8468; Extradition Treaty, Mar. 22, 1976, United States-Canada, art. 2(1), 27 U.S.T. 983, T.I.A.S. No. 8237; Extradition Treaty, Sept. 15, 1972, United States-Argentina, art. 2, 23 U.S.T. 3501, T.I.A.S. No. 7510; Extradition Treaty, June 16, 1971, United States-Spain, art. II(A), 22 U.S.T. 737, T.I.A.S. No. 7136; Extradition Treaty, Dec. 8, 1970, United States-New Zealand, art. II, 22 U.S.T. 1, T.I.A.S. No. 7035; Extradition Treaty, Dec. 17, 1964, United States-Brazil, art. II, 15 U.S.T. 2093, T.I.A.S. No. 5691; Extradition Treaty, Dec. 5, 1963, United States-Israel, art. II, 14 U.S.T. 1708, T.I.A.S. No. 5476; Extradition Treaty, Dec. 3, 1963, United States-Sweden, art. II, 14 U.S.T. 1845, T.I.A.S. No. 5496.

<sup>17</sup> See, e.g., I. SHEARER, *supra* note 5, at 219-23 (citing treaties of this form).

<sup>18</sup> Extradition Treaty, May 14, 1974, United States-Australia, art. II(1)(28), 27 U.S.T. 957, 962, T.I.A.S. No. 8234 [hereinafter cited as U.S.-Australia Treaty].

<sup>19</sup> *Id.* at art. II(4).

<sup>20</sup> *Id.* at art. II(5).

<sup>21</sup> *Regina v. Governor of Pentonville Prison ex parte Budlong*, [1980] 1 All E.R. 701.

Theft Act also contains the element of "entry as a trespasser," which is not an element of the United States definition of burglary. Defendants contended that double criminality precluded their extradition on the burglary charges because the elements of the crime were not identical in the two countries. The court rejected this argument, holding that double criminality was satisfied because the crime was "substantially similar" in both countries.

*Budlong* follows the rule that extradition treaties should be construed liberally rather than narrowly. Such a rule originated in 1896 in *In re Arton (No. 2)*.<sup>22</sup> France successfully extradited a defendant from Great Britain on the crime of "falsification of accounts," which was deemed substantially the same as "forgery" under British law. Decisions such as *Budlong* that have adopted the view that double criminality is satisfied when the offense is "substantially similar" under the laws of both countries, however, should not be read to nullify the principle. It is the gravamen of the offense that is at issue and not simply whether the elements of the crime defined by the contracting countries correspond.<sup>23</sup>

"Substantially similar" crimes are those that substantially prohibit a special type of criminal behavior that each country seeks to proscribe. This substantial similarity was lacking in *Freedman v. United States*,<sup>24</sup> where Canada sought defendant's extradition from the United States on a bribery charge, analogous to modern day "commercial bribery." *Freedman* reversed the magistrate's extradition ruling because the crime of commercial bribery was unknown to either state or federal United States law. While United States law proscribed bribery of private individuals, the purpose of the crime did not apply in a commercial context in the United States. Thus, the two species of bribery were not substantively the same.

The principle of double criminality is especially important when the extradition request is made for an offense that contains a number of separately recognized predicate crimes.<sup>25</sup> Recognition of such predicate crimes by the requested country does not automatically make the comprehensive offense extraditable, because double criminality requires that the offense be punishable by the requested country. While that country separately may provide punishment for certain predicate crimes contained within the offense for which extradition is sought, the requested country's laws may not punish a foreign offense that is composed chiefly of a conglomeration of distinct and separately punishable crimes.

Finally, despite a generally liberal approach toward double crim-

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<sup>22</sup> [1896] 1 Q.B. 509.

<sup>23</sup> See Feller, *The Significance of the Requirement of Double Criminality in the Law of Extradition*, 10 ISR. L.R. 66 (1975).

<sup>24</sup> 437 F. Supp. 1252 (N.D. Ga. 1977).

<sup>25</sup> See, e.g., 21 U.S.C. § 848(b) (1982); Racketeer Influenced and Corrupt Practices Act, 18 U.S.C. §§ 1961-1968 (1982).

inality, some countries continue to adhere to a more restrictive view. Recently, for example, in *Attorney General v. Cohen*<sup>26</sup> the United States sought the extradition of a defendant for committing an oral act of sex with a fourteen-year-old girl. Because the treaty list made extraditable only the "unlawful carnal knowledge of a girl under age," the Jerusalem district court held that extradition was limited to the offense of sexual intercourse with a minor, and thus, extradition could not extend to other forms of prohibited sexual contact.<sup>27</sup>

### B. Application of Double Criminality to CCE and RICO

Double criminality has special significance when applied to complex United States drug crimes such as Continuing Criminal Enterprise (CCE)<sup>28</sup> and the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>29</sup> A drug offender convicted of CCE in the United States faces a prison term of not less than twenty years and as long as life, without the possibility of parole.<sup>30</sup> For single RICO violations, imprisonment may be as long as twenty years.<sup>31</sup> In some cases, based on the defendant's same unlawful conduct, CCE and RICO convictions have been combined to produce extraordinarily severe sentences.<sup>32</sup> Because CCE and RICO are solely creatures of United States law, a defendant whose extradition is sought by the United States on such charges may argue successfully that the foreign country cannot extradite him, because these crimes do not constitute extraditable offenses under the treaty.

There are five elements of CCE. First, the defendant must have violated one of the substantive drug crimes under Title XXI of the United States Code, such as manufacturing, distributing, dispensing, possessing with intent to manufacture, distribute, or dispense a controlled substance,<sup>33</sup> conspiracy to commit the foregoing,<sup>34</sup> importation of controlled substances,<sup>35</sup> manufacturing or distributing a controlled substance intending that such substance will be imported unlawfully,<sup>36</sup> or conspiracy to commit the foregoing relative to im-

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<sup>26</sup> Misc. App. 369/80 (unpublished), cited and discussed in M. GOULDMAN, *TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE* 182 (1983).

<sup>27</sup> *Id.*

<sup>28</sup> 21 U.S.C. § 848(b) (1982).

<sup>29</sup> 18 U.S.C. §§ 1961-1968 (1982).

<sup>30</sup> 21 U.S.C. § 848(a)(1)(c) (1982). The average CEE sentence is 35 years. See Kadish, *The Continuing Criminal Enterprise Statute: A Powerful Weapon for Federal Prosecutors*, 19 TRIAL 66 (1983).

<sup>31</sup> 18 U.S.C. § 1963 (1982).

<sup>32</sup> See, e.g., *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981) (defendants who had no significant prior criminal records received sentences of 33, 53, and 64 years on RICO and CCE convictions).

<sup>33</sup> 21 U.S.C. § 841(a) (1982).

<sup>34</sup> *Id.* § 846.

<sup>35</sup> *Id.* § 952.

<sup>36</sup> *Id.* § 959.

portation.<sup>37</sup> Second, the substantive drug crime must be part of a continuing series of drug violations. Third, the defendant must have undertaken the series of violations in concert with five or more other persons. Fourth, the defendant must have been an organizer, supervisor, or other type of manager. Finally, the defendant must have obtained substantial income or resources from the violations.<sup>38</sup>

When the United States seeks extradition of a defendant on a CCE charge, which is not recognized in the requested country, the argument for extradition most likely will be based upon a treaty provision similar to that found in the United States-Australia Treaty:

Extradition shall also be granted for any offense against a federal law of the United States of America of which one of the [offenses listed as extraditable in the treaty] is a substantial element, even if transporting or transportation or the use of the mails or of interstate facilities is also an element of the specific offense.<sup>39</sup>

Based on this language, the United States may argue that CCE is an extraditable offense, although it is not recognized by the requested country. For instance, substantive drug crimes such as importation, manufacturing, and possession with intent to distribute controlled substances, which are clearly punishable in the United States and the requested country, are extraditable because they fall within the listed treaty category of "offenses against the laws relating to narcotics, dangerous drugs or psychotropic substances."<sup>40</sup> Furthermore, the extraditable offenses of importation, manufacturing, and possession with intent to distribute controlled substances are "substantial elements" of CCE, thus making CCE extraditable under the Australian provision. Finally, the Supreme Court in *Jeffers v. United States*<sup>41</sup> held that conspiracy is a lesser included offense of CCE, because proof of acting in concert with five or more persons necessarily requires proof of a conspiracy. Because conspiracy to violate the narcotics laws is both an extraditable offense and a substantial element of CCE, the Australian Treaty provision thus makes CCE an extraditable offense.

This argument is based logically upon a literal reading of the Australian Treaty. It is erroneous, however, because it ignores the intent of the Treaty provision when compared to similar provisions in other treaties and their negotiating histories. For example, the United States-New Zealand Treaty has a similar provision at article II:

Extradition shall also be granted for any offense of which one of the [offenses listed as extraditable in the treaty] is the substantial element, when for purposes of granting jurisdiction to the United

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<sup>37</sup> *Id.* § 963.

<sup>38</sup> *Id.* § 848(b)(2)A-B.

<sup>39</sup> U.S.-Australia Treaty, *supra* note 18, at art. II(3).

<sup>40</sup> *Id.* at art. II(1)(28).

<sup>41</sup> 432 U.S. 137 (1977).



States Government, transporting or transportation is also an element of the specific offense.<sup>42</sup>

In the Letter of Submittal from the United States President to the Senate in connection with the ratification of the New Zealand Treaty, it is said that with respect to article II, "the jurisdictional elements on which United States Federal offenses are often based—the transporting or transportation elements—shall be viewed as jurisdictional elements only and not as the offense itself . . . . This provision permits extradition for such Federal offenses when a listed offense is a substantial element of the Federal offense."<sup>43</sup> The Letters of Submittal accompanying the United States extradition treaties with Spain,<sup>44</sup> Japan,<sup>45</sup> and Mexico<sup>46</sup> are in accord.

Therefore, any argument by the United States that provisions like those found in the Australian and New Zealand treaties create a new category of extraditable offenses beyond those that are punishable in both countries and are listed as extraditable crimes in the treaty is untenable. These types of provisions are purely jurisdictional and are designed solely to make offenses extraditable that otherwise satisfy double criminality but contain additional jurisdictional elements, such as interstate transportation, use of interstate facilities, or use of the mails, which are necessary to invoke United States federal jurisdiction but are not found in foreign law. In the absence of treaty provisions that provide for these elements, the United States could not request extradition for most of the listed offenses, because the United States would not have jurisdiction over them.

Because these types of treaty provisions are solely jurisdictional in nature, however, they cannot be relied upon to make CCE an extraditable offense. None of the five elements of CCE requires proof of a special jurisdictional element, such as use of the mails or other means of interstate facilities or transport, to satisfy federal criminal jurisdiction requirements under United States law. Accordingly, these provisions will not apply to determine whether CCE is an extraditable crime.

For purposes of double criminality, the remaining question is whether CCE falls within the list of extraditable offenses in the treaty and is a crime under the laws of the requested country. While CCE requires proof of a series of substantive narcotics violations, among

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<sup>42</sup> Extradition Treaty, Jan. 12, 1970, United States-New Zealand, art. II, 22 U.S.T. 1, 3, T.I.A.S. No. 7035.

<sup>43</sup> Pres. Nixon's Letter of Submittal, Dep't of State (Feb. 5, 1970).

<sup>44</sup> Extradition Treaty, May 29, 1970, United States-Spain, art. II(d), 22 U.S.T. 737, 740, T.I.A.S. No. 7136.

<sup>45</sup> Extradition Treaty, Mar. 3, 1978, United States-Japan, art. II(1), 31 U.S.T. 892, 894, T.I.A.S. No. 9625.

<sup>46</sup> Extradition Treaty, May 4, 1978, United States-Mexico, art. 2, para. 4(b), 31 U.S.T. 5059, 5062-63, T.I.A.S. No. 9656.

other elements, the determination of whether it is recognized as punishable in the requested country must be made with reference to CCE as a whole and not its separate parts. Extradition is sought, granted, or denied on the basis of the overall crime.

In addition to the commission of a series of violations against United States narcotics laws, CCE contains the elements of acting in concert with five or more persons, occupying a position of organizer, supervisor, or other position of management, and obtaining substantial income or resources.<sup>47</sup> According to CCE's legislative history and case law, the latter elements make the crime a special and distinct offense from underlying drug offenses, such as manufacturing, distribution, possession, importation, or conspiracy.<sup>48</sup> CCE is primarily directed not at "concerted drug violations," but at those who make substantial profits from illicit drug activity in a highly organized business enterprise.<sup>49</sup>

When the elements of CCE are combined, it is clear that the offense is an exclusive genus of United States criminal law. Because it is not punishable in foreign countries, it cannot satisfy double criminality, and thus, does not qualify as an extraditable offense.

Double criminality also may apply when extradition is sought on RICO charges. The analysis is made more difficult, however, in light of the Canadian Supreme Court decision in *Sudar v. United States*<sup>50</sup> that RICO is an extraditable offense even though it is not recognized under Canadian law.

In *Sudar* the United States sought extradition of defendant on a RICO indictment charging him with engaging in an enterprise and a pattern of racketeering with respect to murder, threats of murder, arson, and extortion.<sup>51</sup> The court observed that under RICO the prosecutor must prove the existence of an enterprise, a pattern of activity, and an effect on interstate commerce, along with the illegal activities of such an enterprise. While the court conceded that RICO was unknown to Canadian law, it reasoned that an "enterprise" has been construed by United States courts as being synonymous with

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<sup>47</sup> 21 U.S.C. § 848(b)(2) (1982).

<sup>48</sup> See *United States v. Jeffers*, 532 F.2d 1101, 1110-11 (7th Cir. 1976) (purpose of 21 U.S.C. § 848 is to punish those who make a substantial income through violation of drug laws); H.R. REP. NO. 1444, 91st Cong., 2d Sess. 4, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4566, 4575 (statute said to be different in character and purpose from other federal drug laws).

<sup>49</sup> H.R. REP., *supra* note 48, reprinted in 1970 U.S. CODE CONG. & AD. NEWS at 4575. See also *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974) (holding indictment not defective merely because names of five people acting in concert were not specified); *United States v. Manfredi*, 488 F.2d 588, 602 (2d Cir. 1973) (describing § 848 as a severe regulation aimed at drug trafficking on a continuing, serious, widespread, supervisory, and substantial basis); *United States v. Fry*, 413 F. Supp. 1269, 1272 (E.D. Mich. 1976) (suggesting that statute be read broadly to effectuate its purposes).

<sup>50</sup> 25 S.C.R.3d 183 (1981).

<sup>51</sup> 18 U.S.C. §§ 1961, 1962(c)-(d) (1982).

"conspiracy," which is clearly an extraditable offense, and that the element of "affecting interstate commerce" was important only as "an internal concern in [the United States],"<sup>52</sup> and thus, was not the gravamen of RICO. Finally, the court noted that there was no question that murder, threats of murder, and extortion were extraditable offenses. Accordingly, the court held that RICO was an extraditable offense within the meaning of article 2(3) of the United States-Canada Treaty.<sup>53</sup>

The principal flaw in the *Sudar* reasoning is its failure to account properly for the key elements of a RICO offense that make the crime peculiar to United States law.<sup>54</sup> RICO punishes both the legal<sup>55</sup> and illegal<sup>56</sup> acquisition of an enterprise with money derived from a pattern of racketeering activity, the illegal acquisition, other than by money, of an interest in an enterprise through a pattern of racketeering,<sup>57</sup> and the operation of an enterprise through a pattern of racketeering.<sup>58</sup> In the context of drug offenses, racketeering refers to "dealing in narcotics or other dangerous drugs" under both state and federal law.<sup>59</sup> To satisfy federal jurisdiction requirements, it must be shown only that the activities of the enterprise affect interstate commerce.<sup>60</sup>

The pattern and enterprise components of a RICO offense have been held to be separate elements.<sup>61</sup> Defining these elements has been confounded by judicial legislation and controversy. According to the language of RICO, a pattern means that the defendant committed at least two acts of racketeering activity within ten years of each other.<sup>62</sup> Additionally, some courts have required proof of a common scheme, plan, or motive relating to the racketeering acts,<sup>63</sup> while other courts make it necessary to show only a nexus between

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<sup>52</sup> 25 S.C.R.3d at 187.

<sup>53</sup> *Id.*; Extradition Treaty, Dec. 3, 1971, United States-Canada, art. 2(3), 27 U.S.T. 983, 986, T.I.A.S. No. 8237 states:

Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed [as extraditable in the treaty] is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

*Id.*

<sup>54</sup> For the most erudite article on RICO, see Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983).

<sup>55</sup> 18 U.S.C. § 1962(a) (1982).

<sup>56</sup> See *United States v. Turkette*, 452 U.S. 576, 587 (1981).

<sup>57</sup> 18 U.S.C. § 1962(b) (1982).

<sup>58</sup> *Id.* § 1962(c).

<sup>59</sup> *Id.* § 1961(1)(a) & (d).

<sup>60</sup> *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981).

<sup>61</sup> *Turkette*, 452 U.S. at 583.

<sup>62</sup> 18 U.S.C. § 1961(5) (1982).

<sup>63</sup> See, e.g., *United States v. Starnes*, 644 F.2d 673, 678 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981).

the racketeering activities and the enterprise.<sup>64</sup>

Courts have been even more divergent in their definitions of the enterprise element. The Supreme Court has stated that an enterprise involves "a group of persons associated together for a common purpose of engaging in a course of conduct," and "an on-going organization, formal or informal, in which the various associates function as a continuing unit."<sup>65</sup> Interpreting this definition, the Fourth Circuit stated that an illegal enterprise must have a "separate existence," which must be proved by a "common purpose" with evidence of a unit characterized by "continuity, unity, shared purpose and identifiable structure."<sup>66</sup>

On the other hand, the Eighth Circuit<sup>67</sup> and the Justice Department<sup>68</sup> have taken the view that an enterprise must have a formal "ascertainable" structure directed toward an economic goal that has an existence apart from the commission of the predicate acts constituting the pattern of racketeering activity.

The *Sudar* ruling confuses the racketeering acts underlying a RICO offense with the pattern and enterprise elements that make the offense distinct from the racketeering acts. RICO does not become an offense merely upon proof of racketeering acts. When standing alone, the *Sudar* racketeering acts of murder, threats of murder, and extortion give rise to three separate offenses, but without more, do not make up a RICO offense. *Sudar* ignores decisions holding that the pattern requirement in RICO makes the crime separate from the predicate racketeering offenses that may establish the pattern.<sup>69</sup> Although *Sudar* recognizes that a pattern of racketeering activity is an element of RICO, it ignores the meaning of that element, which requires proof of a common plan or motive relating to the racketeering acts or a nexus between those acts and the enterprise.

Similarly, *Sudar* misapprehends the enterprise element of RICO. Under United States law, conspiracy may be a predicate offense to racketeering.<sup>70</sup> *Sudar* construes the Supreme Court<sup>71</sup> definition of "enterprise" as being synonymous with conspiracy,<sup>72</sup> which is erroneous. Construing the enterprise element as being equivalent to conspiracy is tantamount to eliminating the enterprise element from RICO.

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<sup>64</sup> See, e.g., *United States v. Weisman*, 624 F.2d 1118, 1122-23 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

<sup>65</sup> *Turkette*, 452 U.S. at 576.

<sup>66</sup> *United States v. Griffin*, 660 F.2d 996, 999-1000 (4th Cir. 1981).

<sup>67</sup> *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980).

<sup>68</sup> UNITED STATES ATTORNEY'S MANUAL, § 9.110.101 (Mar. 9, 1984).

<sup>69</sup> See, e.g., *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir. 1981).

<sup>70</sup> *Weisman*, 624 F.2d at 1123-24.

<sup>71</sup> *Turkette*, 452 U.S. at 576.

<sup>72</sup> *Sudar*, 25 S.C.R.3d at 186.

The Supreme Court, however, has said that the pattern and enterprise elements of RICO are distinct.<sup>73</sup> Because the pattern of racketeering element is deemed to be separate from predicate racketeering acts that may establish the pattern,<sup>74</sup> and the pattern and enterprise elements of RICO are distinct, the enterprise element under RICO syllogistically cannot mean merely conspiracy. Thus, *Sudar* again confuses the pattern and enterprise elements of RICO with the underlying racketeering acts that serve as predicates to the offense.

*Sudar* properly views the requirement of an "effect on interstate commerce" as an internal jurisdictional element covered by article 2(3) of the United States-Canada Treaty.<sup>75</sup> *Sudar's* simple, neat analysis of RICO, however, logically cannot support the warrant for extradition on that peculiar United States offense by stretching the elements to fit something that is wholly unknown to Canadian criminal law. The *Sudar* analysis succeeds only if article 2(3) is read literally and without regard to the intent.

Thus, under the principle of double criminality, because RICO is unknown to foreign law, the requested country should not grant extradition of an alleged drug offender for a RICO offense. At best, the requested country should grant extradition only on the predicate drug offense underlying the RICO charge, assuming it is recognized and punishable under the laws of that country.

### III. The Doctrine of Specialty

Specialty provides that a defendant may be tried in the requesting country only for an offense for which the requested country specifically extradited him. If the requesting country seeks to prosecute the defendant for a different offense, the defendant must first be allowed to leave the country to which he was extradited.<sup>76</sup> The doctrine is concomitant with double criminality because, if a particular offense is not extraditable under the applicable treaty, the defendant cannot be prosecuted for that offense after he returns to the requesting country.<sup>77</sup>

Five factors underlie the specialty doctrine. First, the requested country can refuse extradition if it knows that the defendant will be prosecuted for an offense other than that for which extradition is granted. Second, the requesting country does not have in personam jurisdiction over the defendant except for the requested country's surrender of him. Third, the requesting country cannot prosecute the defendant without securing his surrender from the requested

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<sup>73</sup> *Turkette*, 452 U.S. at 583.

<sup>74</sup> *Boylan*, 620 F.2d at 361.

<sup>75</sup> See *supra* note 53 and accompanying text.

<sup>76</sup> See I. SHEARER, *supra* note 5, at 146.

<sup>77</sup> See M. BASSIOUNI, *supra* note 6, at 354.

country. Fourth, the requesting country must rely on the requested country's laws to effectuate surrender. Finally, the requested country undertakes extradition in reliance on the representations made by the requesting country.<sup>78</sup> In light of these factors, any violation of the specialty doctrine effectively could destroy the extradition relations between the countries involved.<sup>79</sup>

Specialty usually is embodied expressly in the treaty. Different treaties, however, provide different limitations on the doctrine. For example, a particular treaty may limit the requesting country's prosecution of the defendant to: (1) the specific offenses for which extradition was granted only; (2) to "any extraditable offense" in addition to the offense for which extradition was granted;<sup>80</sup> or (3) to both the offense for which extradition was granted and to "any offense for which the person could be convicted upon proof of the facts upon which the request for extradition was based."<sup>81</sup>

The first two provisions are classic expressions of the specialty doctrine. It should be noted that under the third provision, the requesting country still could not prosecute the defendant for an offense that does not satisfy double criminality. In construing provisions of the third type, the defendant

can be tried for any offense established by the facts supporting the original request, provided it is a kindred offense which is based on the same facts but which would be an extraditable offense and satisfy the requirement of double criminality . . . . Any variance from the above will be deemed a violation of the Doctrine of Specialty.<sup>82</sup>

Where there is no express treaty provision embracing specialty, the doctrine nevertheless is adhered to as a rule of international or municipal law. For example, Germany has upheld the doctrine as a rule of international law even though the relevant treaty was silent on the point. Thus, a defendant could not be prosecuted in Germany for an offense for which he was not extradited.<sup>83</sup>

In *United States v. Rauscher*<sup>84</sup> the Supreme Court adopted the doctrine of specialty as a rule of United States municipal law. Accordingly, in *In re Woodhall*,<sup>85</sup> when the United States requested extradition of a defendant from England pursuant to a treaty that was silent about specialty, the British court rejected the defendant's contention that there was no certainty that she would not be tried for

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<sup>78</sup> *Id.*

<sup>79</sup> See Feller, *Reflections on the Nature of the Specialty Principle in Extradition Relations*, 12 *ISR. L.R.* 471 (1977).

<sup>80</sup> *Id.* at 492-94.

<sup>81</sup> See U.S.-Australia Treaty, *supra* note 18, at art. XIV(1).

<sup>82</sup> See M. BASSIOUNI, *supra* note 6, at 356-57.

<sup>83</sup> See Bataclan, *An Analysis of the Philippine-Indonesian Extradition Treaty*, 54 *PHIL. L.J.* 63, 76 (1979).

<sup>84</sup> 119 U.S. 407 (1886).

<sup>85</sup> 57 L.J.M.C. 72 (1888).

offenses other than those for which extradition would be granted because *Rauscher* had clearly established the doctrine as the law in the United States.

While a number of United States treaties expressly prohibit trying a defendant for an offense for which extradition is not granted, a majority contain provisions under which the requested country may waive the specialty doctrine and consent to the trial of a defendant for offenses not specifically included in the extradition order.<sup>86</sup> The precise wording of these provisions and the municipal law of the requested country are crucial in determining whether there may be a total waiver of the doctrine, or whether it may be waived with respect only to offenses that satisfy double criminality.

For example, assume that Italy requests that the United States consent to the trial of an Italian defendant for an offense for which extradition was not granted, and the particular offense is not a crime in the United States. The United States-Italy Treaty of 1973 provides that the requested country may consent to the trial of a defendant "for an offense other than that for which extradition was granted."<sup>87</sup> This provision does not contain language limiting consent only to offenses that satisfy the principle of double criminality. Thus, the United States could waive completely the doctrine of specialty.

The result does not change because of conflicting language in United States municipal law, which authorizes only the Secretary of State to order the surrender of a defendant to a foreign government "to be tried for the offense charged" in the extradition request.<sup>88</sup> If the Italian defendant contended that this statute precludes the United States from consent to his trial in Italy for an offense that neither was granted nor recognized as a crime in the United States, he probably would lose in United States courts. Language in the municipal law is wholly incompatible and antagonistic to the consent provision in the treaty, and hence, the later treaty would be regarded as repealing the earlier statute by implication.<sup>89</sup>

Assume, however, that the United States requests that Australia consent to the trial of a United States citizen for an offense for which extradition was not granted and which does not satisfy the principle of double criminality because it is not punishable in Australia. The United States-Australia Treaty provides that the requested country may consent to the trial of a defendant for an offense other than that for which extradition has been granted when the offense "is an of-

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<sup>86</sup> See George, *Toward a More Principled Approach to the Principle of Specialty*, 12 CORNELL INT'L L.J. 309, 311-13 (1979).

<sup>87</sup> Extradition Treaty, Jan. 18, 1973, United States-Italy, art. XV, para. 3, 26 U.S.T. 493, 503 T.I.A.S. 8052.

<sup>88</sup> 21 U.S.C. § 3186 (1982).

<sup>89</sup> *Id.*; see *Johnson v. Browne*, 205 U.S. 309, 320-21 (1907).

fense mentioned in Article II."<sup>90</sup> Because article II of the treaty makes an offense extraditable only if it is listed in that article and is punishable by both Australia and the United States, the consent provision may apply only to offenses that fall within the list and satisfy double criminality. Moreover, this result is substantiated by Australian municipal law, which permits the Attorney General of that country to consent to the surrender of a defendant on "any other extradition crime."<sup>91</sup> An "extradition crime" is defined as one listed in the treaty and punishable in both countries.<sup>92</sup>

The foregoing examples underscore the differences in the consent provisions of particular treaties and the municipal laws of requested countries. If the requested country can waive the specialty doctrine only with respect to offenses that satisfy the principle of double criminality, a United States defendant charged with CCE or certain fiscal crimes<sup>93</sup> not recognized as offenses in the foreign country or under the treaty should be protected by the doctrine and cannot be tried on those offenses after being extradited to the United States. This result arguably would be different, however, if the consent provision contained language similar to that in the United States-Italy Treaty. In such cases, a defendant is relegated to the much weaker argument that a requested country's total waiver of the specialty doctrine is impermissible, because it essentially nullifies the internationally recognized principle of double criminality.

United States case law on the specialty doctrine also is enlightening for a defendant faced with the possibility of being tried for offenses for which he was not extradited. For example, in *Rauscher*<sup>94</sup> defendant, a United States seaman, was indicted in federal court for assault and unlawful infliction of "cruel and unusual punishment" upon another person. He fled to England and subsequently was extradited to the United States. The extradition request, however, was not on the basis of assault and cruel and unusual punishment, but murder. Defendant was tried in the United States and convicted of inflicting cruel and unusual punishment. The Supreme Court reversed the conviction after finding that the extradition treaty between the United States and Great Britain did not embrace the crime of cruel and unusual punishment, and therefore, under the specialty doctrine, defendant could not be extradited for murder. The Court stated:

That right, as we understand it, is that he shall be tried only for the

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<sup>90</sup> See U.S.-Australia Treaty, *supra* note 18, at arts. VI, XI(3).

<sup>91</sup> Extradition (Commonwealth countries) Act of 1966, Austl. L.C. Acts, Ch. 75, part II, § 11(3)(a)(ii).

<sup>92</sup> *Id.* § 4(1)(a).

<sup>93</sup> See, e.g., 31 U.S.C. §§ 5316, 5322 (1982) (transporting U.S. currency without reporting); 26 U.S.C. § 7201 (1982) (income tax evasion).

<sup>94</sup> *Rauscher*, 119 U.S. at 407.



offense with which he is charged in the extradition proceedings, and for which he was delivered up; and that, if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.<sup>95</sup>

*Rauscher* stands for the rule that United States courts will not try a defendant extradited from another country for a crime not listed in the applicable treaty,<sup>96</sup> as well as for those crimes listed in the treaty but for which extradition, for whatever reason, was not granted by the requested country.<sup>97</sup> Modern litigation under *Rauscher*, however, generally has focused on whether the offense for which the government seeks prosecution falls outside the scope of the foreign country's extradition decree.<sup>98</sup>

Some cases suggest a liberal approach toward permitting prosecution. For example, in *Fiocconi v. Attorney General of the United States*<sup>99</sup> the United States sought defendants' extradition from Italy on charges of conspiring to import heroin. Because narcotics crimes were not listed in the extradition treaty between the two countries, the extradition request was based upon comity, under which Italy could grant extradition if the offenses constitute crimes in Italy. Italy extradited defendants on charges of conspiracy. After being returned to the United States, however, defendants also were charged with receiving, concealing, selling, and facilitating the transportation, concealment, and sale of heroin. Defendants challenged these charges under the specialty doctrine on the ground that Italy's extradition decree referred only to conspiracy.

Rejecting the challenge, the court held that a trial on the additional charges would not constitute a "breach of faith" by the United States toward Italy's extradition decree. The court reasoned that in the absence of "any affirmative protest from Italy," it was unlikely that Italy would oppose the prosecution of defendants for the additional charges, which were "of the same character" as the conspiracy charge for which the defendants were specifically extradited.<sup>100</sup>

Similarly, in *United States v. Paroutian*<sup>101</sup> the court upheld the conviction of a defendant on charges of receipt and concealment of heroin. These counts, however, were not included in the indictment charging conspiracy to traffic in narcotics, which was the basis of defendant's extradition from Lebanon. The court did not believe "that the Lebanese, fully apprised of the facts as they were, would consider

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<sup>95</sup> *Id.* at 424.

<sup>96</sup> *See, e.g., Shapiro v. Ferradina*, 478 F.2d 894, 905 (2d Cir.), *cert. denied*, 414 U.S. 881 (1973).

<sup>97</sup> *See Johnson*, 205 U.S. at 309.

<sup>98</sup> *See United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976).

<sup>99</sup> 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

<sup>100</sup> *Id.* at 481.

<sup>101</sup> 299 F.2d 486 (2d Cir. 1962).

that Paroutian was tried for anything else but the offense for which he was extradited, namely, trafficking in narcotics."<sup>102</sup>

The *Fiocconi* and *Paroutian* decisions should not be construed to mean that United States law does not honor the specialty doctrine as established by the *Rauscher* court. A proper reading of the *Fiocconi* case is that the doctrine does not apply when extradition is granted on the basis of comity—where there is no applicable treaty, or extradition is granted independent of a treaty.<sup>103</sup> While there have been some exceptions, United States law generally professes exclusive adherence to treaties as the sole basis for extradition,<sup>104</sup> and rendition of defendants through comity has not been employed often.<sup>105</sup>

*United States v. Flores*<sup>106</sup> illustrates how a defendant may be best protected against prosecution in the United States for offenses for which he was not extradited. In *Flores* the extradition country, Spain, stated in its extradition order that the grant of extradition was "limited solely and exclusively" to the alleged crime of conspiracy, "and it is understood that the extradition is contingent upon the formal promise of the United States Government that the [defendant] will not be prosecuted for previous offenses or offenses foreign to this extradition request unless he expressly consents to such prosecution."<sup>107</sup> In a formal note from the United States embassy to the Spanish Government, United States authorities promised that "[the defendant] will not be prosecuted . . . for prior infractions or infractions different than those which are concretely referred to by the decision portion of the dictated decree . . . ."<sup>108</sup> The *Flores* court held that the language of Spain's extradition decree, combined with the promise of the United States Government, precluded defendant's prosecution for previous offenses or offenses for which extradition was not granted.

A defendant's best protection against being tried in the United States for an offense for which he was not extradited is in the language of the requested country's extradition decree. This is particularly true because United States law has viewed the specialty doctrine as a privilege of the surrendering country rather than a right that may be raised by the accused.<sup>109</sup>

Thus, the defendant should seek to secure an extradition decree from the requested country that: (1) expressly conditions extradition upon a promise by the United States Government that there will

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<sup>102</sup> *Id.* at 490-91.

<sup>103</sup> M. BASSIOUNI, *supra* note 6, at 355.

<sup>104</sup> 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 732-37 (1968).

<sup>105</sup> See M. BASSIOUNI, *supra* note 6, at 43.

<sup>106</sup> 538 F.2d at 939.

<sup>107</sup> *Id.* at 941.

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., 478 F.2d at 894.

not be prosecution in federal or state courts for offenses for which he was not extradited; (2) provides that if the promise is not made formally by the United States Government, he will not be released to the United States; (3) expressly refers to the relevant article(s) in the applicable treaty that embraces the doctrine of specialty; (4) acknowledges the Supreme Court decision of *United States v. Rauscher*; and (5) provides that strict compliance with the terms of the extradition decree will assure good faith between the United States and the requested country in the discharge of extradition pursuant to the treaty.

#### IV. Dealing with Conspiracy Charges

In dicta, United States courts occasionally have expressed disfavor with prosecutorial "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."<sup>110</sup> Such statements, however, are belied by the judicial expansion of United States jurisdiction over extraterritorial narcotics conspiracies, and the laxity that United States courts have taken to the pleading requirements in conspiracy indictments.

By operation of double criminality, a narcotics conspiracy alleged to have occurred wholly outside the United States may not be an extraditable offense under the laws of a foreign country. The boilerplate form for conspiracy indictments used by many United States prosecutors may fail to set out the charge in a way that enables the foreign country to determine whether there is sufficient evidence to support the warrant for extradition. In certain circumstances, therefore, double criminality and nuances in foreign conspiracy law may provide significant defenses for one whose extradition is sought on a narcotics conspiracy charge against United States laws.

The recent expansion of United States jurisdiction over extraterritorial narcotics conspiracies is exemplified by *United States v. Ricardo*<sup>111</sup> and *United States v. Mann*.<sup>112</sup> In *Ricardo* the district court determined it had jurisdiction over defendants charged with conspiracy to import marijuana, even though the conspiracy took place entirely outside the United States and was thwarted before any marijuana was imported. The court ruled that the United States narcotics conspiracy laws had extraterritorial reach as long as defendants intended to violate those laws and to have the effects occur within the United States.<sup>113</sup> Similarly, in *Mann* the court ruled that "[w]hen a conspiracy statute does not require proof of overt acts

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<sup>110</sup> *Grunewald v. United States*, 353 U.S. 391, 404 (1957); see *United States v. Grassi*, 616 F.2d 1295 (5th Cir. 1980) (referring to conspiracy law as a "dragnet").

<sup>111</sup> 619 F.2d 1124 (5th Cir. 1980).

<sup>112</sup> 615 F.2d 668 (5th Cir. 1980).

<sup>113</sup> *Ricardo*, 619 F.2d at 1128-29.

[such as narcotics conspiracies under 21 U.S.C. §§ 846 and 963], the requirement of territorial effect may be satisfied by evidence that the defendants intended their conspiracy to be consummated within the nation's borders,"<sup>114</sup> even though the conspiracy took place outside the United States.

*Ricardo* and *Mann* base this claim of jurisdiction upon the "objective territorial theory" under which courts may assert jurisdiction over defendants who have committed offenses extraterritorially, causing harmful effects within the United States.<sup>115</sup> It has been noted, however, that in cases in which narcotics conspiracies were thwarted wholly outside the United States, "the objective territorial theory cannot be the vehicle for the assertion of jurisdiction, inasmuch as no harmful effect has actually occurred on the asserting state's territory."<sup>116</sup>

It is significant that claims of jurisdiction similar to those in *Ricardo* and *Mann* may not give rise to extradition of a defendant charged with a narcotics conspiracy that was consummated and thwarted entirely outside the territorial borders of the United States. For example, the treaty may provide that "[w]hen the offense for which extradition has been requested has been committed outside the territory of the requesting State, [the requested country] shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances."<sup>117</sup> This requires that the basis of jurisdiction must satisfy the principle of double criminality.

France currently does not follow the jurisdictional rationale of *Ricardo* and *Mann*. It does not recognize the objective territorial theory when a conspiracy is consummated and thwarted extraterritorially, because no effect of the crime has occurred on French territory.<sup>118</sup> Rather, French law affords jurisdiction over an extraterritorial conspiracy only when one or more material elements of the offense occurs within France.<sup>119</sup> "Thus, [under the principle of double criminality], in a case of a thwarted extraterritorial narcotics conspiracy to import narcotics into the United States, France would not approve an extradition request based upon an objective territorial theory of jurisdiction."<sup>120</sup>

In addition to this narrow jurisdictional defense, acute differ-

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<sup>114</sup> *Mann*, 615 F.2d at 671.

<sup>115</sup> *Ricardo*, 619 F.2d at 1128; *Mann*, 615 F.2d at 671.

<sup>116</sup> See Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY, 1109, 1145 (1982).

<sup>117</sup> See U.S.-Australia Treaty, *supra* note 18, at art. IV.

<sup>118</sup> C. Blakesley, *Comparativistic Ruminations Upon the Expansion of Jurisdiction Over Extraterritorial Crime* 17 (Mar. 19, 1984) (unpublished manuscript).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 18.

ences between United States and foreign law as to the content and form of conspiracy indictments can give rise to a more widely applicable defense that may prevent extradition on such charges. Unlike the United States, a number of foreign countries are particularly antipathetic to conspiracy charges that are duplicitous, multiplicitous, or excessively vague. A conspiracy indictment fraught with such defects may make it impossible for the foreign tribunal to understand the precise nature of the conspiracy charges to determine whether there is sufficient evidence to support a warrant for extradition.

United States law, like much of foreign jurisprudence, recognizes that an indictment is duplicitous when it joins two or more distinct and separate offenses in a single count. A general verdict of guilty will not reveal which crimes the defendant was found guilty of, which may prejudice the defendant in sentencing, obtaining appellate review, and in protection from double jeopardy. A multiplicitous indictment is one that charges the same offense in several counts and may lead to multiple sentences for the same offense.<sup>121</sup> United States case law, however, generally has refused to uphold objections to narcotics conspiracy indictments that are, by strict definition, duplicitous or multiplicitous.<sup>122</sup> Rather, a defendant faced with a duplicitous indictment may move to have the Government elect which of the multiple offenses charged in the same count will be relied upon and proved.<sup>123</sup> In the case of a multiplicitous indictment, the remedy is to require the government to elect the particular count upon which it wishes to proceed and dismiss the others.<sup>124</sup>

United States law also has tended to absolve vague conspiracy indictments on practical grounds.<sup>125</sup> A conspiracy indictment usually is sufficient if it contains merely the essential elements of the offense so that the defendant is informed of the charges against him.<sup>126</sup> Details need not be described with the same particularity

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<sup>121</sup> 2 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 142 (1982).

<sup>122</sup> See, e.g., *United States v. Croucher*, 532 F.2d 1042 (5th Cir. 1976) (three separate agreements alleged in one conspiracy count held not duplicitous); *United States v. Robertson*, 562 F. Supp. 463 (W.D. La. 1983) (allegations of multiple conspiracies in single count of indictment held not duplicitous); *United States v. Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980) (separate charges of conspiracy and attempt to import controlled substances found in single section of indictment held not multiplicitous); see also *United States v. Murray*, 618 F.2d 892 (2d Cir. 1980); *United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980); *Overstreet v. United States*, 321 F.2d 459 (5th Cir. 1963); *Brown v. United States*, 299 F.2d 438 (D.C. Cir. 1962) (conspiracy counts charging violation of more than one federal statute held not duplicitous).

<sup>123</sup> See, e.g., *Thomas v. United States*, 418 F.2d 567, 568 (5th Cir. 1969); *United States v. Goodman*, 285 F.2d 378, 380 (5th Cir. 1960).

<sup>124</sup> See, e.g., *United States v. Universal C.I.T. Credit Co.*, 344 U.S. 218, 225 (1952).

<sup>125</sup> See *United States v. Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981); *United States v. Willis*, 583 F.2d 203, 207 (5th Cir. 1978); *United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

<sup>126</sup> See, e.g., *United States v. Hajecate*, 683 F.2d 894 (5th Cir. 1982); *United States v. Mouton*, 657 F.2d 736 (5th Cir. 1981).

that is required in charging substantive offenses.<sup>127</sup> Indeed, a conspiracy indictment may properly refer to unidentified co-conspirators.<sup>128</sup>

In contrast to the United States, some countries are more strict about duplicitous, multiplicitous, or vague conspiracy indictments. Under British law, for example, it is axiomatic that a conspiracy count comply with the general rule of charging one offense only.<sup>129</sup> "As has been said again and again, there must not be wrapped up in one conspiracy charge what is, in fact, a charge involving two or more conspiracies."<sup>130</sup> Thus, in numerous British cases courts have quashed convictions of defendants charged under duplicitous indictments where two separate offenses were charged in one count or, in particular, where multiple conspiracies were found and only one conspiracy was charged.<sup>131</sup>

Similarly, in Australia the court in *Gerakiteys v. The Queen*<sup>132</sup> upheld quashed convictions on two conspiracy counts where the Crown attempted to subsume several conspiracies within the single conspiracy charged in each count of the indictment. Judge Murphy said that "conspiracy must not be allowed to become so amorphous that it will create a real danger of concealed duplicity of charges, so that the accused may be convicted despite the lack of unanimity among the jury members."<sup>133</sup>

The courts of Australia and Great Britain have expressed special antipathy to prosecutorial attempts to juxtapose conspiracy charges with substantive counts when such substantive counts are used as predicates for establishing the conspiracy charges or vice versa. For example, in *Regina v. Hoar*<sup>134</sup> the Australian High Court was concerned that defendant could be subjected to multiple sentences on the same offense when the prosecution had charged him with numerous substantive offenses, most of which constituted overt acts of the conspiracy for which he was convicted. Observing that "[i]t has long been established that prosecutions for conspiracy and for a substantive offense ought not to result in a duplication of penalty,"<sup>135</sup> the *Hoar* court warned that "[g]enerally speaking it is undesirable that

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<sup>127</sup> See *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir. 1981); *United States v. Inryco*, 642 F.2d 290, 295 (9th Cir. 1981); *United States v. Wander*, 601 F.2d 1251, 1260 (3d Cir. 1979); *United States v. Geise*, 597 F.2d 1170, 1178 (9th Cir. 1979), *cert. denied*, 444 U.S. 979 (1980).

<sup>128</sup> *United States v. Booty*, 621 F.2d 1291, 1300 (5th Cir. 1980).

<sup>129</sup> See, e.g., *Rex v. Disney*, [1933] 2 K.B. 138; *Rex v. Molloy*, [1921] 2 K.B. 364.

<sup>130</sup> *Regina v. Ardalán*, [1972] All E.R. 257, 261.

<sup>131</sup> See *Regina v. Nicholls*, [1960] 2 All E.R. 449, 450; *Regina v. Dawson*, [1960] 1 All E.R. 558, 564; *Regina v. Davey*, [1960] 3 All E.R. 553, 540; *Rex v. West*, [1948] 1 K.B. 709, 712.

<sup>132</sup> Judgment of Feb. 24, 1984, Austl. L.R. (currently unpublished).

<sup>133</sup> *Id.* at 5.

<sup>134</sup> 37 Austl. L. R. 357 (1981).

<sup>135</sup> *Id.* at 361-62.

conspiracy should be charged when a substantive offense has been committed and there is a sufficient and effective charge that this offense has been committed."<sup>136</sup> Likewise, British courts repeatedly have disapproved of using substantive counts as predicates for establishing a conspiracy.<sup>137</sup>

Finally, foreign courts have been particularly opposed to excessively vague conspiracy charges. For example, a British court has said that "each count of the indictment should be so framed as to enable the jury to put their fingers on any specific part of the conspiracy as to which they are satisfied that the particular defendant is proved to have been implicated and to convict him of that offense only."<sup>138</sup> This is so because "[i]t is not competent for the prosecution to invite the jury to wander through the wilderness of evidence in the expectation that if they do not find one conspiracy proved they may possibly find another."<sup>139</sup> The need for precision in conspiracy indictments has therefore been expressed consistently in British cases.<sup>140</sup>

Under Australian law, the reason for precise indictments is that "[t]oo often, those prosecuting appear to adopt the view that an accused person must be guilty of something but rather than identifying what that something is, choose a conspiracy charge as a dragnet."<sup>141</sup> For example, in *Gerakiteys* it was alleged in separate counts that between a specified period of time, defendant had conspired with one Harrison and "divers other persons to cheat and defraud divers insurance companies," and second, conspired with that same individual "and divers other persons to defraud the Commonwealth."<sup>142</sup> The High Court quashed defendant's conviction on the two conspiracy counts, because they were so vague and amorphous that each purported to allege one overall conspiracy where multiple conspiracies were apparent, and that apart from the lack of sufficient evidence it was never alleged that the "divers other persons" knew of, or participated in, a single, all-encompassing conspiracy.<sup>143</sup>

In large drug indictments, United States prosecutors have tended to adopt boilerplate language in framing conspiracy charges that invokes all the foregoing vices to which foreign courts typically

<sup>136</sup> *Id.*

<sup>137</sup> See *Regina v. Griffiths*, [1966] 1 Q.B. 589, 599; *Regina v. Dawson*, [1960] 1 All E.R. 558, 563; *Rex v. Partridge and Ors*, 30 N.S.W. St. R. 410, 414 (1930); *Rex v. Luberger*, 19 Crim. App. 133 (1926).

<sup>138</sup> *Rex v. West*, [1948] 1 K.B. 709, J.L.R. 241, 243.

<sup>139</sup> *Rex v. Partridge and Ors*, 30 N.S.W. St. R. at 414.

<sup>140</sup> See, e.g., *Queen v. King*, [1844] 7 Q.B. 782.

<sup>141</sup> See *supra* note 132, at 5; see also *Regina v. Hoar*, 37 Austl. L.R. 357, 363-64 (1981). The *Hoar* court stated, "The allurements of conspiracy charges are very great. The imprecision of the charges, the vagueness of the evidentiary rules, the tendency of committal hearings to turn into fishing expeditions, often prove attractive to prosecutors . . . ."

<sup>142</sup> See *supra* note 132, at 18.

<sup>143</sup> *Id.*

are antipathetic. The following abbreviated hypothetical is illustrative:

**COUNT 1 (21 U.S.C. Sec. 963) CONSPIRACY TO IMPORT MARIJUANA:**

- (A) From on or about [X date], the exact date being unknown to the Grand Jury and continuously thereafter up to and including the date of this indictment in the District of [Y], and divers other districts, the defendants [20 defendants are then listed] did conspire with each other and with other various persons, both known and unknown, to unlawfully import marijuana.
- (B) **MANNER AND MEANS:** As part of the conspiracy, the defendants played different roles, took upon themselves different tasks and participated in the affairs of the conspiracy through various criminal acts. The roles assumed by these defendants were interchangeable at various times throughout the conspiracy. Some of the roles which these defendants assumed and carried out are as follows: [10 different roles are then listed from "Financier or Owner" to "Currency Courier"].
- (C) **OVERT ACTS:** In furtherance of the conspiracy, the defendants and certain unindicted co-conspirators performed certain overt acts in the District of [Y] and elsewhere, including the following: [50 different overt acts then set out]. All such Acts are in violation of 21 U.S.C. Sec. 963.

\* \* \*

**COUNT 2 (21 U.S.C. Sec. 846) CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DISTRIBUTE:**

- (A) [Assume that this Section is nearly identical in content to Count 1].
- (B) **MANNER AND MEANS:** The manner and means alleged in Count 1 are realleged herein and incorporated by reference.
- (C) **OVERT ACTS:** The overt acts alleged in Count 1 are realleged herein and incorporated by reference. All such acts are in violation of 21 U.S.C. Sec. 846.

\* \* \*

[Assume further that the full indictment goes on to allege 30, separate, substantive counts which reallege most of the "Overt Acts" listed in Counts 1 and 2.]<sup>144</sup>

The significance of these hypothetical conspiracy counts is that they might be quashed under the laws of countries such as Great Britain and Australia. If the counts, as framed, were presented as the basis of an extradition request by the United States, their duplicity, multiplicity, and excessive vagueness should preclude extradition.

The duplicity of the hypothetical counts is evident, because the "Manner and Means" and "Overt Acts" sections of each comprehend a series of different conspiracies, between different people, at different times, in different roles, and with different purposes. On the other hand, Count 1 purports to charge only a single conspiracy to import marijuana, and Count 2 purports to charge only a single

<sup>144</sup> The hypothetical is drawn from *United States v. Riley*, No. 83-166 (D.S.C. 1983).



conspiracy to possess marijuana with intent to distribute. Apart from the patent confusion presented by the form of these counts, both run afoul of the rule that it is duplicitous to wrap up a charge involving multiple conspiracies in one conspiracy charge.

The multiplicity of the hypothetical counts also is clear. Both Counts 1 and 2 are embellished with the same fifty "Overt Acts," which are alleged again in most of the thirty substantive counts. In this way, the United States Government has sought to charge many of the thirty substantive counts in each of the conspiracy counts in derogation of the rule that it is impermissible to charge the same offense in more than a single count. As observed by the British Court in *Regina v. Griffiths*, "far too often . . . accused persons are joined in a charge of conspiracy without any real evidence from which a jury may infer that their minds went beyond committing with one or more other persons the one or more specific acts alleged against them in the substantive counts."<sup>145</sup>

In addition to the duplicity and multiplicity problems raised by the hypothetical conspiracy charges, the inherent vagueness of the charges makes it impossible for a foreign tribunal to determine whether there is sufficient evidence to support extradition. Typically, committal for extradition is warranted only if the foreign magistrate finds such evidence as would, in his opinion and according to the requested country's law, justify the trial of the accused if the acts constituting the crime[s] had taken place within the requested country.<sup>146</sup> The magistrate usually must determine "whether, if the evidence stood alone at trial, a reasonable jury properly directed could accept it and find a verdict of guilty."<sup>147</sup> This application necessarily must be undertaken with reference to "the offense with which the [accused] is charged" under the treaty.<sup>148</sup> Thus, the contents of each conspiracy count by which the accused is charged is integral to defining the offense to which the foreign magistrate must apply the evidence. If a particular count is so vague and amorphous that the offense cannot be determined or defined clearly, a magistrate cannot apply the evidence, and the count must fail.

The hypothetical conspiracy Counts 1 and 2 are so vague and uninformative that it is impossible to determine precisely what is being charged. The counts mention twenty co-conspirators along "with various other persons, both known and unknown." The counts allege that the conspiracies were carried out by a variety of means whereby "the defendants played different roles, took upon themselves different tasks, participated . . . through various criminal

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<sup>145</sup> [1966] 1 Q.B. 589, 599.

<sup>146</sup> See, e.g., U.S.-Australia Treaty, *supra* note 18, at art. VI, 27 U.S.T. at 966-67.

<sup>147</sup> *Schtracks*, [1962] 3 All E.R. at 533.

<sup>148</sup> See, e.g., U.S.-Australia Treaty, *supra* note 18, at art. VI, 27 U.S.T. at 964.

acts . . . [and assumed roles that] were interchangeable at various times throughout the conspiracy." Ten different roles are then listed, and the counts list fifty overt acts, concluding that "all such acts are in violation of 21 U.S.C. 963 [and] 21 U.S.C. 846."

Each count appears to allege that at least fifty separate conspiracies existed to import marijuana, and another fifty separate conspiracies existed to possess marijuana with intent to distribute. Moreover, none of the fifty overt acts allege any "agreement" to do an unlawful act between two or more persons, because those acts merely are repeated allegations of other offenses contained in the indictment.

Even if this confusion could be resolved by construing Counts 1 and 2 as separate, single conspiracies, the charges are still defective. For example, under Australian law, if a general conspiracy is alleged, "each defendant must be shown to have been in communication with [the other defendants] not for a purpose individual and special to the individual but for a common design, a design common to all of them to bring about [the crimes] on a grand scale."<sup>149</sup> The vague factual allegations in Counts 1 and 2 do not show any common conspiratorial purpose, design, or knowledge between the twenty co-defendants. Rather, the "Overt Acts" and the "Manner and Means" sections of the counts allege wholly different activities and roles between different defendants at different times and places.

Given the confusion as to whether each count alleges a single conspiracy or multiple conspiracies, along with the patent vagueness of each of the counts however they are construed, it is clear that they fail to charge clearly defined offenses to which a foreign magistrate could apply the evidence. The foreign magistrate cannot and should not serve as a prosecutor and be expected to construct charges based upon the evidence. It is the requesting country's responsibility to articulate its charges with sufficient precision so that the magistrate of the requested country can determine whether there is enough evidence to support extradition on the charges. Thus, the hypothetical conspiracy counts should not support a warrant for extradition.

Finally, if the content and form of the conspiracy counts are insufficient to support extradition, or if the evidence by itself is insufficient, there is no curative remedy on appeal or application for habeas corpus available in foreign countries. On appellate or habeas corpus review, the court typically is limited to examining whether the magistrate had jurisdiction, whether the offense charged is extraditable, whether there was sufficient evidence to justify committal of the accused on the warrant, and whether there is no other bar to extradition under the applicable treaty.<sup>150</sup>

<sup>149</sup> *Ex parte Caffey*, 1 N.S.W.L.R. 434, 446 (1971).

<sup>150</sup> *See, e.g., Regina v. Governor of Brixton Prison*, [1955] 1 Q.B. 540, 1 All E.R. 31;

## V. Alternatives to Extradition

While the United States professes to seek rendition of fugitives under the "legal" authority of extradition treaties,<sup>151</sup> historically it has circumvented such formal procedures through a variety of other methods, such as kidnapping, exclusion, deportation, and comity.<sup>152</sup> These alternatives usually have been employed when there was no applicable treaty, when formal extradition would have been time-consuming and expensive, when the government had a weak case, or where the double criminality principle would have barred extradition.<sup>153</sup> Such alternative methods of rendition may apply to alleged drug offenders.

The leading example of kidnapping is *Ker v. Illinois*,<sup>154</sup> in which the United States sought extradition of defendant from Peru on larceny charges. A warrant for extradition was prepared pursuant to the treaty, and President Arthur directed a messenger to present the warrant to the Peruvian authorities. Instead of doing so, the messenger pocketed the warrant, kidnapped defendant, and brought him back to the United States. Defendant argued that he could be removed from Peru to the United States only in accordance with the treaty. The Court, however, held that because defendant was not brought to the United States pursuant to the treaty, he had no rights under it. Rather, his sole redress would be to sue the messenger for trespass and false imprisonment. Peru then could seek extradition of the messenger on kidnapping charges.

The *Ker* case has withstood subsequent challenge. For example, in *United States v. Sobell*<sup>155</sup> defendant protested his kidnapping, which was effectuated by collaboration between FBI agents and Mexican police. The court of appeals upheld the district court's jurisdiction to try defendant on espionage charges saying that:

it can hardly be maintained . . . that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive [in *Ker v. Illinois*].<sup>156</sup>

While *Ker* and its progeny do not provide a deterrent to kidnapping as an alternative to formal extradition, overzealous abductors may find themselves subject to an extradition request on kidnapping charges by the foreign country where the crime was committed. For

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*Regina v. Governor of Holloway Prison, in re Siletti*, 71 L.J. Rep. 933 (1902); *Schtracks*, [1962] 3 All E.R. at 549-50.

<sup>151</sup> See *Factor*, 290 U.S. at 287.

<sup>152</sup> *Evans, Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, in BRIT. Y.B. INT'L L. 77-104 (vol. XL, 1966).

<sup>153</sup> *Id.*

<sup>154</sup> 119 U.S. 436 (1886).

<sup>155</sup> 244 F.2d 520 (2d Cir. 1957).

<sup>156</sup> *Id.* at 525.

example, in *Vaccaro v. Collier*<sup>157</sup> officials of the United States and Canada agreed to allow a United States narcotics agent and his informant to entice two suspected drug smugglers to cross from Canada into the United States and sell drugs to the agents who would then arrest the smugglers. The plan was foiled partially when one of the smugglers declined to participate. In the ensuing events one smuggler was killed, and the one who had initially declined to participate was taken by force into the United States. Subsequently, the Canadian Government sought extradition of the United States agent and his informant on charges of kidnapping, murder, and larceny. Ultimately, the United States agent was extradited on the kidnapping charge.<sup>158</sup>

It should be noted, however, that the deterrent suggested by *Vaccaro* may be vacuous where the acts of a United States agent are characterized as an "act of state." If they are so characterized, extradition might be precluded on grounds of immunity.<sup>159</sup> This leaves the *Ker* kidnapping method subject only to the academic admonition "that the use of such methods can become sufficiently notorious to lead to political or other public repercussions, embarrassing to the governments of both countries concerned . . . [and] result in an ambivalent attitude toward an aspect of the administration of law which has international as well as national ramifications."<sup>160</sup>

While the century-old *Ker* case continues to stand for the rule that the jurisdiction of United States courts over a criminal defendant is not impaired by the manner in which he was brought from another country,<sup>161</sup> *Ker* may be distinguished to produce a different result in at least one situation. For example, if the United States actually commences extradition proceedings pursuant to a treaty and then kidnaps the defendant, it is arguable that jurisdiction should be declined. This follows from the principle in *United States v. Rauscher* that "the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of [a] treaty . . . ."<sup>162</sup>

Thus, where a treaty provides that "the person whose extradition is sought shall have the right to use such remedies as are provided by [the] law [of the requested state],"<sup>163</sup> and that "a person extradited under this Treaty shall not be detained, tried or punished in the territory of the requesting State for an offence other than that

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<sup>157</sup> 38 F.2d 862 (D. Md. 1930), *aff'd in part and rev'd in part*, 51 F.2d 17 (4th Cir. 1931).

<sup>158</sup> *Collier*, 51 F.2d at 17.

<sup>159</sup> See Dep't of State Ms. File No. 211.42 (which raised that possibility).

<sup>160</sup> Evans, *supra* note 152, at 102-03.

<sup>161</sup> 21 AM. JUR. 2D *Criminal Law* § 381 (1965).

<sup>162</sup> 119 U.S. 407, 419 (1886); see also *Head Money Cases*, 112 U.S. 580, 598 (1884).

<sup>163</sup> See U.S.-Australia Treaty, *supra* note 18, at art. X, 27 U.S.T. 957 at 970.

for which extradition has been granted,"<sup>164</sup> it may be argued that because extradition was never granted on any offense due to the supervening kidnapping, United States courts have no jurisdiction over the defendant.<sup>165</sup> In contrast to the facts in *Ker*, in this example the United States already has commenced formal extradition proceedings such that the treaty has become the "law of the land" to be enforced by the courts as they would enforce any act of Congress.<sup>166</sup>

Practically, any attempt to distinguish *Ker* is frustrating. It is, however, fundamentally inconsistent with the antipathy that both federal and state courts have taken to circumstances where parties in *civil* cases have attempted to invoke jurisdiction by unlawful acts. For example, in *Ruggieri v. General Well Service, Inc.*<sup>167</sup> the court declared that jurisdiction should be denied where a defendant is enticed unfairly into a state and served with process. It is hard to imagine how courts can condemn attempts to invoke jurisdiction by unlawful acts in civil actions, and condone such acts when jurisdiction is claimed in criminal cases. The *Ker* reasoning that the accused may not object to jurisdiction because the kidnapping occurred outside the United States belies the rationale adopted by courts in civil actions that as a matter of policy, courts should deny jurisdiction over persons or matters by becoming a *de facto* party to those who seek to invoke jurisdiction by criminal acts.

The United States occasionally has sought to induce foreign countries to exclude or deport criminal defendants as alternative methods to extradition. The method of "exclusion" simply takes the form of convincing a foreign country to prevent the accused from entering its borders, thereby forcing him to return to the United States to face prosecution. For example, the United States requested Argentina to exclude a defendant charged with bigamy when the treaty between the two countries did not list bigamy as an extraditable offense.<sup>168</sup> Similarly, when the offenses were not extraditable under a treaty, the United States separately has requested various countries to deport defendants on charges of conspiracy to smuggle

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<sup>164</sup> *Id.* at art. XIV(2), 27 U.S.T. 957 at 981.

<sup>165</sup> *But cf. Shapiro*, 478 F.2d at 906 (holding that the specialty principle whereby defendant may not be tried in requesting state for an offense for which he was not extradited was not a right that could be raised by defendant).

<sup>166</sup> *Rauscher*, 119 U.S. at 419.

<sup>167</sup> 535 F. Supp. 525, 530 (D. Colo. 1982); *see also* *Emert v. Groomer*, 131 Okla. 58, 268 P.2d 204 (1980) (in which court declared that "[w]e are unwilling to lay down the rule that officers of the law, by strong arm methods, may make their unlawful acts the basis for seizure of property to support court jurisdiction"); *Sawyer v. LaFlamme*, 123 Vt. 229, 185 A.2d 466 (1962) (stating that "[a] court will refuse to exercise its jurisdiction in favor of a party that has used unlawful means to obtain service").

<sup>168</sup> *Dep't State Ms. File No. 235.11 C. 51* (Argen. 1921). The United States also requested exclusion by Great Britain and Guatemala in connection with a fugitive charged with violations of the Sherman Antitrust Act. *See Dep't State Ms. File No. 241.11 M. 132* (U.K. 1934); *Dep't State Ms. File No. 212.11 L. 16* (Guat. 1923).

liquor,<sup>169</sup> fraud by use of the mails,<sup>170</sup> assault on a federal agent,<sup>171</sup> and extortion by impersonation of a police officer.<sup>172</sup>

Finally, the United States occasionally has used comity as an alternative to formal extradition.<sup>173</sup> Requests for rendition based on comity have been employed when there was no extradition treaty, or when the treaty did not cover the offense for which rendition was sought. For example, comity was the basis for rendition of United States citizens from Italy on nonextraditable charges of importing narcotics and conspiring to import heroin.<sup>174</sup>

Similarly, in *United States v. Paroutian*<sup>175</sup> defendant was surrendered to the United States from Lebanon on narcotics conspiracy charges in the absence of any extradition treaty between the two countries. By definition, comity seems to imply reciprocal cooperative relations between the requesting and requested countries. The method used by the United States, however, typically has been one-sided: the policy of the State Department has been to warn the requested country that reciprocity cannot be assured by the United States in similar circumstances.<sup>176</sup>

As circumventions to formal extradition procedure, these alternatives do not afford protection for the accused. The use of such methods as substitutes for treaty procedure not only denigrates due process, but reflects a wanton disregard for international law. While the rendition of alleged criminals is an important international effort, the rights of the accused should not be ignored for the sake of administrative or judicial convenience. Thus, strict adherence to formal extradition procedure in accordance with the principles of double criminality and specialty always should be observed. This should be true particularly for western democracies that hold themselves out as venerable protectors of individual liberties.

## VI. Conclusion

For most practitioners, international extradition is a footnote to criminal defense law. Generally, the United States has gone to the trouble of seeking extradition only in cases deemed most worthy of prosecutorial pursuit. Particularly in the context of alleged drug offenders, however, requests for international extradition are likely to become more routine because of current political attitudes and ex-

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<sup>169</sup> Dep't State Ms. File No. 244 E.11 (Bahamas 1932).

<sup>170</sup> Dep't State Ms. File No. 212.11 (Mex. 1939).

<sup>171</sup> Dep't State Ms. File No. 212.11 (Mex. 1940-41).

<sup>172</sup> Dep't State Ms. File No. 242.11 (Can. 1935-36).

<sup>173</sup> N.Y. Times, Nov. 14, 1963, at 28, col. 1.

<sup>174</sup> *Fiocconi*, 462 F.2d at 475.

<sup>175</sup> 299 F.2d 486 (2d Cir. 1962).

<sup>176</sup> See Letter from Acting Secretary of State (Smith) to Lester Sandles (Apr. 23, 1953) (Dep't State Ms. File No. 254, 115 Bender, Ludwig/4-253).

pectations, and because the stringency of United States laws may induce sought-after drug offenders to take their chances in a foreign country. Thus, what still is a footnote of criminal defense law may soon become common nomenclature for domestic defense lawyers.