

6-1-1991

# International Extradition and the Medellin Cocaine Cartel: Surgical Removal of Colombian Cocaine Traffickers for Trial in the United States

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## Recommended Citation

Steven Y. Otera, *International Extradition and the Medellin Cocaine Cartel: Surgical Removal of Colombian Cocaine Traffickers for Trial in the United States*, 13 Loy. L.A. Int'l & Comp. L. Rev. 955 (1991).

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# International Extradition and the Medellín Cocaine Cartel: Surgical Removal of Colombian Cocaine Traffickers for Trial in the United States

## I. INTRODUCTION

As the United States enters the 1990s, illicit drugs, particularly cocaine, have stampeded their way to the forefront of the problems confronting this country. President Bush recently declared cocaine, once proclaimed as an aphrodisiac, a solution to morphine addiction, and a glamorous means of escape “like flying to Paris for breakfast,”<sup>1</sup> to be “the quicksand of our entire society,”<sup>2</sup> and “the gravest domestic threat facing our nation today.”<sup>3</sup> The President further declared that “[o]ur most serious problem today is cocaine and, in particular, crack.”<sup>4</sup> Though some may characterize these statements as political rhetoric, they highlight the war-like character of the United States’ campaign against drug trafficking.

During the 1980s, eighty percent of the refined cocaine<sup>5</sup> and between fifty and sixty percent of the marijuana available on the United States market came from Colombia.<sup>6</sup> In the minds of many Americans, Colombia has become synonymous with drug trafficking.<sup>7</sup> The source of most of the cocaine reaching the United States is the Colombian city of Medellín. From this hub, the Medellín drug trafficking cartel controls the processing and distribution of cocaine from a virtually “untouchable” position. Relying on violence, intimidation, and

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1. G. GUGLIOTTA & J. LEEN, *KINGS OF COCAINE* 17 (1989).

2. Remarks on the Upcoming National Drug Control Strategy Address, 25 *WEEKLY COMP. PRES. DOC.* 1303 (Sept. 5, 1989).

3. Address to the Nation on the National Drug Control Strategy, 25 *WEEKLY COMP. PRES. DOC.* 1304 (Sept. 5, 1989); see Morgenthau, Miller & Contreras, *Now It's Bush's War: The President Offers His Strategy Against Drugs—But He Needs Help from the States and Colombia*, *NEWSWEEK*, Sept. 18, 1989, at 22.

4. Address to the Nation on the National Drug Control Strategy, 25 *WEEKLY COMP. PRES. DOC.* 1304 (Sept. 5, 1989).

5. Kohn, *Company Town*, *ROLLING STONE*, Apr. 6, 1989, at 68; see *L.A. Times*, Oct. 15, 1989, at A1, col. 6.

6. Bagley, *Colombia and the War on Drugs*, 67 *FOREIGN AFF.* 70 (Fall 1988).

7. Rosenberg, *The Kingdom of Cocaine*, *NEW REPUBLIC*, Nov. 27, 1989, at 27. Although Colombia grows only about 15% of the total coca crop used in the business, Colombia dominates cocaine’s processing and export. *Id.*

threats, the Medellín cartel has incapacitated many fundamental Colombian institutions, including the judiciary.<sup>8</sup> Additionally, the cartel's entrenched position in Colombian society has affected the desire of the Colombian citizenry to pursue and prosecute the traffickers.<sup>9</sup> In short, putting one trafficker in jail is not worth the bombings, murders, and threats that the cartel will inflict on the Colombian people while the law enforcement process takes place.

International extradition promises to be one of the most powerful weapons the United States and Colombia have at their disposal to battle the Medellín cartel and cocaine trafficking. Extradition in effect will surgically remove the drug traffickers from their "untouchable" niche in Colombian society and place them in the United States, where they cannot manipulate the criminal justice system. Additionally, extradition to the United States will transport the cocaine traffickers into an unintimidated society vehemently opposed to cocaine and drug trafficking.

Though extradition plays a vital role in the battle against the drug traffickers, actual extradition to the United States is only one step in the lengthy legal process required to incarcerate these criminals. First, Colombian law enforcement officials must identify and capture the *narcotraficantes*.<sup>10</sup> This is not an easy task. Second, United States prosecutors must successfully develop cases against the traffickers to support their extradition to the United States for trial. During this process, Colombia must hold the traffickers while they await extradition. Only after these steps have taken place can extradition serve its purpose.

This Comment will first show why extradition to the United States occupies such an important position in the prosecution of the Medellín cartel members and explain the general procedures and doctrines behind the international extradition process. Next, this Comment will analyze the United States-Colombia extradition treaty in light of these doctrines and procedures and suggest methods to circumvent doctrinal obstacles that may hinder extradition of cartel members. Furthermore, it will discuss relevant case law concerning the extradition treaty to illustrate the trends that United States courts are following in extradition proceedings involving Colombian drug traffickers. Finally, this Comment will propose improvements and

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8. *Id.*

9. *Id.*

10. See Bagley, *supra* note 6, at 70.

modifications to the treaty that could facilitate extradition.<sup>11</sup>

## II. HISTORICAL BACKGROUND: THE ROLE OF INTERNATIONAL EXTRADITION IN CONTEXT

In order to fully understand the role that international extradition can play in prosecuting the Medellín cartel members, one must examine three factors in Colombia's history. First, analysis must focus on the scope of the drug problem in Colombia. While it may not surprise some people that cartel members occupy positions of immense power in Colombia, it may shock others to discover that the traffickers enjoy positions of prestige. An understanding of the nature and source of the traffickers' power in Colombia is fundamental to appreciating the significance of extradition to the United States. Second, attention must focus on the inability of existing Colombian governmental institutions to battle the drug trafficking problem. Extradition of cartel members to the United States assumes tremendous importance when Colombia's executive and judiciary cannot effectively prosecute and incarcerate its own offenders. Third, one must examine the history of the United States-Colombia extradition treaty to understand both the fear that cartel members have regarding extradition and the treaty's importance in the extradition process.

### A. *The Medellín Cartel*<sup>12</sup>

Colombia exports nearly all of the cocaine that reaches the United States. The Colombian cocaine industry is considered to be the most profitable business in the world.<sup>13</sup> Although Colombia grows relatively little coca, the plant from which cocaine is refined, it dominates cocaine processing and distribution.<sup>14</sup> In Colombia, ten or twelve highly organized cartels control cocaine trafficking from the initial purchase of coca leaves from Peruvian and Bolivian peasants to the retail distribution of the processed drug in the United States.<sup>15</sup>

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11. This Comment will not address other strategies designed to curb drug trafficking including direct military interdiction, domestic drug education designed to eradicate the demand for cocaine, and monetary aid to Colombia.

12. In Colombia, the cartels are referred to as "mafia." In reality, these organizations are not truly cartels, because they cannot control their product's price. Rosenberg, *supra* note 7, at 27.

13. *Id.* at 28.

14. Welch, *The Extraterritorial War on Cocaine: Perspectives from Bolivia and Colombia*, 12 SUFFOLK TRANSNAT'L L.J. 39, 60 (1988).

15. *Id.* Although there exist several Medellín cartels, these organizations will be referred to collectively for convenience.

Medellín, a city of two million people located in northwest Colombia,<sup>16</sup> serves as the center of the international cocaine industry.<sup>17</sup> The Medellín cartel continues to amass immense fortunes by processing and selling cocaine as a mass-market drug.<sup>18</sup> In fact, *Forbes* magazine recently ranked several of the billionaire members of the Medellín cartel among the richest people in the world.<sup>19</sup>

### 1. The Medellín Cartel's Impact in Colombia

A large part of the traffickers' power and influence in Colombia stems from the cartel's ability to threaten and intimidate Colombian law enforcement authorities and citizens with violence.<sup>20</sup> Since 1980, drug assassins have gunned down 178 judges, including eleven of the twenty-four members of the Colombian Supreme Court in 1986.<sup>21</sup> The *narcotraficantes* have also assassinated two Colombian Justice Ministers and a Colombian Attorney General.<sup>22</sup> In the first six months of 1989, the city of Medellín recorded 2,338 murders, reflecting the pervasive violence confronting Colombia.<sup>23</sup> Seventy percent of the murder victims were between fourteen and nineteen years of age.<sup>24</sup> In comparison, Washington, D.C. recorded a relatively paltry 303 murders in the same six-month span.<sup>25</sup>

Apart from the cartel's violence and intimidation, another pri-

16. Kohn, *supra* note 5, at 68.

17. Welch, *supra* note 14, at 60.

18. *Id.* at 61.

19. *Recent Developments in Colombia: Hearing before the Comm. on Foreign Affairs House of Representatives*, 100th Cong., 2d Sess. 3 (1988) [hereinafter *Hearing: Recent Developments*] (statement of Benjamin A. Gilman, Co-Chairman, House Task Force on International Narcotics Control).

20. See Rosenberg, *supra* note 7, at 30. Commenting on the violence created by the drug trafficking industry, Rosenberg writes:

If one overwhelming problem stands out among Colombia's sea of troubles, it is murder. Colombia has long been a lawless place, a violent society where state institutions, particularly the justice system, are generally ignored. It never took much in the past to spark violence; in 1948 the assassination of a populist political leader set off a dispute among the two major political parties that killed 200,000 to 300,000 people over the next five years. In addition to corruption and drug addiction, cocaine has brought back Colombia's violence, producing an almost complete collapse in the rule of law.

*Id.*

21. Church, *Going Too Far: The Drug Thugs Trigger a Backlash in Colombia and Kennebunkport*, TIME, Sept. 4, 1989, at 12.

22. *Id.*

23. Contreras, *Anarchy in Colombia*, NEWSWEEK, Sept. 11, 1989, at 31.

24. *Id.* Reportedly, assassins may be hired for as little as ten dollars in Colombia. *Id.*

25. *Id.*

mary source of the *narcotraficantes*' power in Colombia remains the apathy of the Colombian citizenry toward the drug traffickers. While the Colombian government may have committed itself to extraditing these criminals, the people of Colombia do not possess this same zeal. The pursuit, capture, and extradition of the cartel members is too costly for the Colombian populace. Colombian citizens blame the wave of bombings, murders, and violence overtaking the country on stiff law enforcement and the prosecution of the traffickers.<sup>26</sup> Polls consistently show that most Colombians oppose the extradition of drug traffickers.<sup>27</sup> The assassination of Luis Carlos Galan, a Colombian presidential candidate,<sup>28</sup> and the subsequent crackdown on the *narcotraficantes* initially engendered some support for extradition. However, this enthusiasm is now waning, as Colombians tire of the traffickers' violent response to the crackdown.<sup>29</sup> Even a Galan aide recently commented, "The price is becoming too high[;] [i]f the stability of the country requires dialogue with the narcotics traffickers, we should do it."<sup>30</sup>

One explanation for this mind-set is that a prosperous cocaine industry is in the Colombians' interest. The drug trafficking industry employs many Colombian people and generates enormous revenue for the country's treasury.<sup>31</sup> Ironically, while serving this fiscally-based

26. Rosenberg, *supra* note 7, at 31.

27. *Id.* The traffickers are using the wave of violence to promote one of their old themes—that it is not drug trafficking that causes violence, but the repression of drug trafficking that engenders the violence. *Id.*

28. One observer described Galan to be "as beloved a symbol of hope in Colombia as Robert Kennedy was in the United States." *Id.* at 30.

29. *Id.* at 31.

30. *Id.* Authorities have noted that this sentiment mirrors the attitude of most Colombians. Rosenberg writes:

The amazing thing about fighting cocaine in Colombia is not that it hasn't worked, but that it takes place at all. Colombians fight cocaine partly because openly defying the United States would carry high political costs, and partly because many people still consider the traffickers to be bad people and are ashamed that their country is identified with drugs. In short, because they still have values. But as the traffickers raise the costs of such a battle, which they can do indefinitely, fewer and fewer Colombians will be willing to become martyrs for a cause they see as not their own.

... There are many, many people in Colombia who are not ready, for reasons of nationalism, economic self-interest, or physical self-preservation, to fight cocaine. The more the United States tries to force Colombia to fight, the stronger resistance will become. And the more the United States tries to force Colombia to turn its already crippled political institutions against an organization that is stronger than the government, the weaker these institutions will become.

*Id.* at 32.

31. *Id.* at 26. Colombia's per capita external debt is one of the lowest in Latin America, partly due to the drug trafficking industry. *Id.* at 28.

interest in drug trafficking, cocaine has destroyed, via corruption or violence, the Colombian institutions capable of fighting it. Now, many Colombians accept drug trafficking, while some even admire it.<sup>32</sup> Every segment of Colombian society, including the military, the Colombian guerrillas, the banks, the Catholic Church, industry, the courts, and the police have some sort of relationship with the traffickers.<sup>33</sup>

Medellín cartel members have risen to "untouchable" positions with respect to accountability to the laws in Colombia.<sup>34</sup> This elevation is due to the lack of general support for their prosecution, their wealth,<sup>35</sup> and the concomitant power<sup>36</sup> that this wealth bestows. Cartel members respond to unfavorable newspaper editorials by assassinating the author. A similar fate awaits the judge who renders an adverse court judgment.<sup>37</sup> The cartels recently declared "total and absolute war on the [Colombian] government, on the industrial and political oligarchy, the journalists who have . . . insulted us . . . and everyone else that has persecuted us."<sup>38</sup> As this threat suggests, Co-

32. *Id.* at 26-27. The drug trafficking industry especially appeals to the poor. *Id.* at 29. A job in the cocaine industry pays many times the wages of a similar job in the legitimate job market. Further, the cocaine industry offers a smart slum-dwelling youth the chance for advancement. A successful "mule," or drug runner, can hire a mule of his own and soon become an independent trafficker. In this way, many Colombian youths have risen to positions of power. *Id.*

33. *Id.* at 27.

34. In the early days of the trafficking, it cost the traffickers the peso equivalent of \$30,000 for a criminal charge to be dismissed in Colombia. Recently, the cost has risen to \$50,000. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 243.

35. In commenting on the traffickers' wealth, Rosenberg writes:

The traffickers do not own everything in Colombia, but they own everything they want to own. Colombia's factories do not attract them; factories are long-term investments and a poor way to launder dollars. The money has gone into farms, luxury goods, and glamour businesses that are largely outside government regulation, such as soccer teams, hotels, discos, contraband cigarettes and fighting bulls. The shopping centers of Medellín and Cali are filled with leather goods or dress boutiques run by traffickers' wives or girlfriends. A boutique is a traditional birthday gift.

Rosenberg, *supra* note 7, at 29.

36. Colombian cocaine traffickers have their own air fleet, marina, and security force, as well as maintenance crews, drivers, mechanics, lawyers (including four former justices of the Colombian Supreme Court), accountants, financiers, and insurance writers. Further, the traffickers have their own private armies of assassins, known as *sicarios*. Typically, the *sicarios* are comprised of two 16-year-olds riding a motorcycle and wielding machine pistols. *See id.* at 28.

37. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 243. If the judge refuses to take a bribe, the traffickers might attempt to make threats or to pay a clerk to steal the briefs. Sometimes the judge is beaten. If none of these strategies work, the traffickers may kill the judge. *Id.*

38. Morgenthau, Miller, Sandza, Contreras, Land & DeFrank, *Hitting the Drug Lords: With Colombia Fighting for its Life, Bush Escalates the U.S. Effort to Break the Cocaine Cartels*, NEWSWEEK, Sept. 4, 1989, at 18.

Colombia faces an "extraordinary challenge to the survival of its long-standing democratic system."<sup>39</sup> As efforts to retaliate against the Medellín cartel mount, the drug traffickers consciously "do whatever is necessary to save their lives and their lifestyles even if the result is the destruction of the judicial foundation of that [democratic] system."<sup>40</sup>

In an ominous announcement, the United States Federal Bureau of Investigation ("FBI") and Drug Enforcement Administration ("DEA") stated in 1989 that the Colombian cartels are no longer content to simply sell cocaine to middlemen in the United States who then distribute the drug on the streets.<sup>41</sup> Instead, the cartel now directly distributes cocaine in the United States.<sup>42</sup> Federal law enforcement officials maintain that cartel kingpins have established smuggling, marketing, and money-laundering operations that extend throughout the United States.<sup>43</sup> The financial returns from these undertakings are astronomical. A 1988 report estimated that the United States public's expenditures on cocaine ranged from \$100 to \$150 billion per year.<sup>44</sup> The cartel's combined gross wholesale revenues may be as high as \$5 billion per year.<sup>45</sup> By comparison, coffee, Colombia's largest legal retail export, brought in only \$1.7 billion in 1988.<sup>46</sup>

## 2. The Medellín Cartel's Impact in the United States

Between 1980 and 1988, the United States spent over \$10 billion to fight cocaine trafficking.<sup>47</sup> These funds primarily went to Colombia to limit its drug trafficking. The money was used to destroy the coca crop, increase police and military efforts, arrest cartel members, dis-

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39. *Hearing: Recent Developments, supra* note 19, at 24 (statement of Richard S. Gelbard, Deputy Assistant Secretary, Bureau of Inter-American Affairs, Department of State). In attempting to exploit and weaken democracies through perverted interpretations of the law, drug traffickers try to find Colombian judges willing to interpret the law to their advantage. *Id.* at 34.

40. *Id.*

41. Morgenthau, Sandza & Miller, *Cocaine's 'Dirty 300'*, NEWSWEEK, Nov. 13, 1989, at 36.

42. *Id.* The character of the drug trafficking has transformed. Previously, hundreds of traffickers would independently transport small loads of cocaine into the United States. Now, the cartel exports multi-ton shipments into the United States. *Id.*

43. *Id.*

44. *Hearing: Recent Developments, supra* note 19, at 8 (statement of Representative Charles B. Rangel, Chairman, Select Committee on Narcotics Abuse and Control).

45. Morgenthau, Sandza & Miller, *supra* note 41, at 37.

46. Rosenberg, *supra* note 7, at 28.

47. *Id.* at 26.



mantle cocaine labs, gather cocaine and its ingredients in Colombia, keep the drug from crossing borders, and arrest drug traffickers and users in the United States.<sup>48</sup> The goal of these measures was to make cocaine either prohibitively expensive or unavailable to users in the United States.<sup>49</sup> However, in the same eight-year span, the number of coca fields in the Andes mountains increased by 250%,<sup>50</sup> and the supply of cocaine in the United States increased tenfold.<sup>51</sup> Because of the large supply of cocaine in the United States, the drug's black market price dropped to twenty percent of its 1980 level.<sup>52</sup> At the same time, the drug's purity rose.<sup>53</sup> Between April 1988 and August 1989, Colombian law enforcement officials seized twenty-one tons of cocaine and destroyed 300 processing laboratories.<sup>54</sup> However, when viewed in terms of the price and quantity of cocaine available in the United States, these actions had little effect. In August 1989, after the crackdown in Colombia, cocaine cost \$11,000 per kilogram in Miami, close to the United States' all-time low.<sup>55</sup>

While Colombia remains a "democratic, pro-Western, very civilized, very capable, respectable country with good leaders, a constitution [and] good laws,"<sup>56</sup> it cannot effectively deal with the drug trafficking industry. The Colombian judiciary's powerlessness in the face of the cartel is the heart of the problem. Extraditing cartel members for trial in the United States becomes important only when Colombia itself cannot effectively arrest, try, and sentence cartel members for their crimes. Thus, an analysis of extradition's importance in curbing the drug trafficking problem must begin with an examination of the debilitated Colombian judiciary.

### *B. The Colombian Judiciary's Impotence: The Ochoa Incident*

By 1985, the cartel leaders recognized the judiciary to be the

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48. *Id.*

49. *Id.* President Bush's campaign against drugs possesses goals largely identical to these aims. *Id.*

50. *Id.* at 26.

51. *Id.* Columbia currently produces more than seven times the amount of cocaine that the United States market can afford. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* The price of cocaine has risen intermittently in the past. After each Colombian crackdown on trafficking, including the crackdown after Galan's assassination, the price of cocaine rose and the supply dropped. *See id.*

56. *Hearing: Recent Developments, supra* note 19, at 15 (statement of Representative Lawrence J. Smith, Chairman, Task Force on International Narcotics Control).

weakest link in Colombian drug enforcement.<sup>57</sup> Colombian judges are overworked, underpaid, badly protected, and heavily maligned by the media and other public officials.<sup>58</sup> Representative Charles Rangel, Chairman of the Select Committee on Narcotics Abuse and Control, commenting on the intense pressure confronting Colombian jurists, noted that "it is abundantly clear that either you are going to get intimidated or you are going to be killed if you attempt to enforce the law [in Colombia], especially the extradition laws."<sup>59</sup> Desperately reacting to the violence, Colombia's 4,600 judges threatened to strike on September 24, 1989, if the government did not provide them better protection.<sup>60</sup> The judges repeated their earlier demands for bullet-proof cars and vests, and guards with metal detectors at their offices, as well as other precautions.<sup>61</sup>

The circumstances surrounding the attempted extradition of Jorge Luis Ochoa fully illustrate the truth of Representative Rangel's statement. In the early 1980s, Ochoa emerged as one of the foremost Medellín cartel kingpins.<sup>62</sup> In the autumn of 1984, Spanish law enforcement authorities identified Ochoa, together with another cartel member, Gilberto Rodriguez-Orejuela, in Spain.<sup>63</sup> United States law enforcement officials sought Ochoa pursuant to a south Florida indictment connecting him to illegal cocaine traffic through Nicaragua.<sup>64</sup> Additionally, law enforcement authorities in Los Angeles and New York sought Rodriguez-Orejuela on drug trafficking warrants.<sup>65</sup> After their identification in Spain, the United States Department of Justice prepared extradition requests for Ochoa and Rodriguez-Orejuela.<sup>66</sup> The Department of Justice forwarded the requests to the Department of State, which, in turn, sent them to the United States

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57. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 244.

58. *Id.*

59. *Hearing: Recent Developments, supra* note 19, at 22.

60. L.A. Times, Sept. 25, 1989, § 1, at 10, col. 3.

61. *Id.*

62. See G. GUGLIOTTA & J. LEEN, *supra* note 1, at 85. Ochoa continues to possess a lofty position in the cartel hierarchy. He is now chief executive officer of his family's cocaine business. In terms of wealth, political influence, and "legal invincibility," he rivals Pablo Escobar Gaviria. Escobar is the leader of the Medellín cartel and possesses a personal fortune estimated at \$2 billion. See Church, *supra* note 21, at 14.

63. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 190-91. Before their arrest, Spanish police observed Ochoa and Rodriguez-Orejuela for two and a half months. *Id.* at 191.

64. *Id.* at 193.

65. *Id.* at 191.

66. *Id.*

embassy in Madrid.<sup>67</sup> Spanish judicial police officers arrested Ochoa and Rodriguez-Orejuela on November 15, 1984.<sup>68</sup> Shortly after the arrest, the United States requested extradition.<sup>69</sup>

On January 15, 1985, the Colombian government submitted its own request to the Spanish authorities for Ochoa's extradition to Colombia.<sup>70</sup> Colombia's extradition request charged Ochoa with falsifying a public document—namely, a license to import 128 Spanish bulls into Cartagena, Colombia.<sup>71</sup> Ochoa's arrest and the possibility of his extradition represented a major victory for Colombia and the United States in their battles against the drug traffickers. It also provided a great political victory for the Reagan administration.<sup>72</sup> Thus, United States law enforcement authorities had a keen interest in extraditing Ochoa and trying him in the United States before returning him to Colombia for adjudication on the charges of bull smuggling.<sup>73</sup>

The United States initially appeared to have a stronger position than Colombia in Ochoa's extradition proceedings because drug trafficking was a more serious offense than bull smuggling.<sup>74</sup> At first, Spanish authorities favored the United States' request, which had been filed before the Colombian request.<sup>75</sup> Ochoa's defense team recognized the United States' advantage.<sup>76</sup> In an attempt to undermine that advantage, an Ochoa henchman sent an indictment to the Colombian district court in Medellín that was identical to the prior indictment against Ochoa in southern Florida.<sup>77</sup> As a result, Colombia had two extradition requests to the United States' one, including a request encompassing an offense just as serious as the United States'

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67. *Id.*

68. *Id.* at 192. In addition to arresting Ochoa and Rodriguez-Orejuela, the Spanish judicial police arrested the men's wives. The Spanish authorities also froze all of their bank accounts and seized \$90,000 cash found in their residences. Additionally, the judicial police found an account book in Rodriguez-Orejuela's hotel room, detailing a 1983 sale involving more than four metric tons of cocaine. *Id.*

69. *Id.* at 194. The Spanish government examined the United States' extradition documents and, on January 10, 1985, submitted them to the Spanish national court, the *Audiencia Nacional*. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 192. Less than four months earlier, the United States government, in a criminal indictment, named Ochoa and the Medellín cartel criminal partners of the Nicaraguan Sandinista government—a regime that the Reagan administration actively opposed. *See id.*

73. *See id.*

74. *Id.* at 194-95.

75. *Id.*

76. *See id.* at 195.

77. *Id.*

charge.<sup>78</sup>

On September 24, 1985, in extradition proceedings before the Spanish *Audiencia Nacional*, or National Court,<sup>79</sup> Spanish judges voted unanimously to deny the United States' extradition request.<sup>80</sup> The United States immediately filed an appeal with the *Audiencia Nacional*.<sup>81</sup> On appeal, seven of the *Audiencia Nacional*'s judges examined the evidence pertaining to the extradition requests by the United States and Colombia.<sup>82</sup> After reviewing the appeal, the *Audiencia Nacional* reversed itself by a vote of four to three, agreeing to extradite Ochoa to the United States.<sup>83</sup> Ochoa's defense team then appealed, charging that the prosecution's actions were unconstitutional.<sup>84</sup> This time, the *Audiencia Nacional* again ruled in favor of the Colombian extradition request.<sup>85</sup> Accordingly, Spain extradited Ochoa to Colombia pursuant to the Colombian bull smuggling charge.<sup>86</sup>

On August 1, 1986, after a lengthy delay, a court in Cartagena, Colombia indicted Ochoa for the bull smuggling offense and re-

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78. *Id.* Rodriguez-Orejuela used the same ploy. *Id.*

79. Spain's judicial system has no state or provincial subdivisions. Thus, the *Audiencia Nacional* hears numerous cases that United States courts would parcel out among several different jurisdictions. *Id.* at 196.

80. *Id.* at 198. The basis for the *Audiencia Nacional*'s denial of the United States' extradition request was "political context." The court noted that granting the United States extradition request could possibly aggravate Ochoa's situation because of "political considerations." *Id.* The court further noted that a United States informant had testified against Ochoa in exchange for a pardon of his ten-year sentence by the United States government. *Id.* Finally, the *Audiencia Nacional* found that the connection between Ochoa and alleged cartel trafficking activity in Nicaragua was unconvincing, given the animosity between the United States and Nicaragua. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 199. In reversing its decision, the *Audiencia Nacional* noted that, in addition to the American informant's testimony, the United States had presented evidence from two agents. Further, the court ruled on the United States' argument linking Ochoa to cartel activity in Nicaragua, stating that animosity between the United States and Nicaragua should not impede Ochoa's extradition. *Id.*

84. *Id.* at 255.

85. *Id.*

86. *Id.* at 257-58. In its final ruling, the *Audiencia Nacional* concluded that the Colombian extradition requests had greater weight than the United States' petitions. *Id.* at 258. Although the United States made its request first, Colombia had two requests to the United States' one. The court stated that because the charges in the requests were equally serious, the deciding factor was nationality. The court reasoned that from a standpoint of "fundamental rights," Ochoa would receive in Colombia a trial conducted in his native language. Furthermore, his prosecution would take place in a familiar environment where he could more easily receive full judicial protection. *Id.*

manded him to jail to await trial.<sup>87</sup> On August 15, 1986, the court found Ochoa guilty and sentenced him to twenty months in jail.<sup>88</sup> However, unknown to virtually everyone in the country, the presiding judge had released Ochoa on 2.3 million pesos (\$11,500) bond two days before his trial.<sup>89</sup>

In November 1987, Colombian police apprehended and booked Ochoa for breaking parole and jumping bail on his bull smuggling conviction.<sup>90</sup> Fearing that Ochoa might flee, thereby escaping all charges, Colombian officials decided to hold Ochoa on the bull smuggling charge while they arranged for extradition to the United States.<sup>91</sup> Responding to this fear, the United States government sent a six-member legal team from the Departments of State and Justice to help facilitate Ochoa's extradition.<sup>92</sup>

Since the Colombian Supreme Court had declared the existing extradition treaty between the United States and Colombia void in 1987,<sup>93</sup> there were no legally effective means of extraditing Ochoa.<sup>94</sup> As a result of this legal vacuum, Colombian officials had to delay the extradition until they could reformulate the existing extradition documents in order to assemble some procedure that could expeditiously get Ochoa to the United States.<sup>95</sup> During this delay, the United States legal team left Colombia.<sup>96</sup>

In December 1987, the leader of Ochoa's defense team, Humberto Barrera, ironically a former justice of the Colombian

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87. *Id.*

88. *Id.* at 259.

89. *Id.* The judge who released Ochoa was Customs Judge Fabio Pastrana Hoyos. *Id.* at 258. Justice Minister Enrique Parejo Gonzalez had ordered Pastrana not to release Ochoa. However, Pastrana did release Ochoa with the stipulation that he was to check in every two weeks. Ochoa never checked in after his release. *Id.* at 258-59.

90. *Id.* at 310. Traffic police initially stopped Ochoa at a toll booth. Ochoa offered a 100 million peso (\$400,000) bribe to the officers to release him, but the policemen did not accept the bribe. *Id.* at 309-10.

91. *See id.* at 311. President Barco and his top advisors knew that Colombian law enforcement would have difficulty holding Ochoa. They decided to hold Ochoa pursuant to the bull smuggling charge under the jurisdiction of the Cartagena customs judge. *Id.*

92. *Id.* at 311-12. In the eyes of the cartel, Ochoa's extradition was more serious than the extradition of Carlos Lehder, another cartel kingpin. Ochoa was the leading provider for the biggest crime family in Medellín and a close associate of Pablo Escobar, another cartel kingpin. *Id.* at 312-13.

93. *See infra* text accompanying notes 128-29.

94. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 311.

95. *Id.*

96. *Id.* at 315.

Supreme Court,<sup>97</sup> met with Colombian judges regarding Ochoa's confinement.<sup>98</sup> On December 30, 1987, Barrera persuaded a Bogotá criminal court judge to sign a writ of habeas corpus for Ochoa. Barrera argued that if Ochoa's jail stints were aggregated, he would have already served his sentence for the bull smuggling offense.<sup>99</sup> Ochoa's legal team took Ochoa's writ to the prison in which Ochoa was jailed and called for his release. Warden Alvaro Camacho attempted to stall Ochoa's team, but eventually released Ochoa, stating that he had no legal basis to hold Ochoa further.<sup>100</sup> One commentator characterizing the events simply explains that "Ochoa bribed his way out" of prison.<sup>101</sup> After his release, Ochoa reportedly fled to Brazil.<sup>102</sup>

In response to Ochoa's release, Robert S. Gelbard of the United States Department of State commented that:

Ochoa's legally questionable release from prison is an indication of the strength of the [drug] traffickers in Colombia. We do not doubt that the highest levels of the Colombian Government were sincerely looking for a way to legally extradite Ochoa . . . .

Let there be no doubt, however, that the Colombian Government confronts a formidable foe in the Medellín Cartel. And let there be no doubt that the cartel fears extradition to stand trial before US courts above all else. It is no secret that the cartel members have used their enormous wealth to corrupt Colombian judicial and governmental officials or, when they could not corrupt, have intimidated officials to do their bidding.<sup>103</sup>

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97. *Id.* at 314.

98. *Id.* at 315.

99. *Id.* Barrera presented this argument in a meeting with Bogotá criminal court judge Andres Martinez Montanez. Barrera stated that he had made this same point to the judge who sat on the bull smuggling trial, in Cartagena, but that judge was now on vacation. Montanez signed the writ of habeas corpus after hearing that no arrest orders were pending against Ochoa. *Id.*

100. *Id.* While he stalled, Camacho called his superior, National Director of Prisons, Guillermo Ferro. Ferro stated that he could not aid Camacho at that time because he was at another prison trying to contain an uprising which had begun an hour earlier. *Id.*

101. Bagley, *supra* note 6, at 87. Robert S. Gelbard of the Department of State noted that: [Ochoa] did not simply attempt to bribe the wardens or to shoot his way out of jail. Instead, he sought, and eventually found, a judge willing to twist the law to provide a legal fig leaf for his release. Unless Colombians can act in self-defense to prevent this kind of perversion, the paralysis of their judicial system will solidify into reality.

*Hearing: Recent Developments, supra* note 19, at 34 (prepared statement of Robert S. Gelbard, Deputy Assistant Secretary, Bureau of Inter-American Affairs, Department of State).

102. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 316.

103. *Hearing: Recent Developments, supra* note 19, at 29-30 (prepared statement of Robert S. Gelbard, Deputy Assistant Secretary, Bureau of Inter-American Affairs, Department of State). After Ochoa's release, Washington ordered sanctions against Colombia, including ar-

C. *Extradition to the United States: The Cartel's Worst Nightmare*

The United States Congress has recognized that the Medellín cartel members' greatest fear is extradition to the United States.<sup>104</sup> As early as 1982, extradition quietly became the *narcotraficantes'* central concern and the only thing that they feared.<sup>105</sup> This is because once extradited to the United States, cartel members cannot terrorize and intimidate judges and juries with the ease that they can in their native country.<sup>106</sup>

On another level, extradition plucks the trafficker from a familiar society which looks on him as a part of daily life and places him in the United States, a culture vehemently opposed to drug trafficking. Once extradited, the *narcotraficante* must contend with a judicial system whose processes are unfamiliar and implacable. Recognizing extradition's effectiveness, the United States and Colombia have actively pursued extradition of the drug traffickers as a means of coping with the cartel's violence, production, and distribution. Congress has articulated extradition's role in curtailing the drug problem. Benjamin Gilman, co-chairperson of the House Task Force on International Narcotics Control, recently stated that:

[i]f we are really going to convict any of these drug lords down there, we are going to have to extradite them and get them back here in our nation because it is apparent the courts down there [in Colombia] cannot do it or are intimidated or are afraid of doing it.<sup>107</sup>

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duous customs checks for travelers and products arriving in the United States. These actions spurred nationalism and anti-United States sentiment in Colombia and led many Colombians to believe that the United States did not understand the Colombian predicament. As recently as early 1988, there existed little support in Colombia for a renewal of extraditions. In May 1988, Justice Minister Enrique Low Mutra announced that the Barco administration was studying the possibility of unilaterally repudiating the treaty. Bagley, *supra* note 6, at 88.

104. L.A. Times, Aug. 19, 1989, § 1, at 11, col. 2. Gugliotta and Leen note that extradition would take

traffickers out of the familiar, malleable Colombian ambience and put them in a place where judges spoke English, didn't investigate cases, and were treated like gods. The whole legal system in the United States was different, and most Colombians thought, merciless. Put a Colombian in a gringo court on drug charges, and he would be sent away forever. In Colombia nobody wanted to try drug cases; in the United States it seemed as though courts were competing for the opportunity.

G. GUGLIOTTA & J. LEEN, *supra* note 1, at 244-45.

105. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 99. Gugliotta and Leen comment that "[f]or the traffickers, the extradition treaty was like a cross to a vampire; they came to hate and fear it as they feared nothing on earth." *Id.* at 100.

106. Church, *supra* note 21, at 13.

107. *Hearing: Recent Developments*, *supra* note 19, at 22 (statement of Benjamin A. Gilman, Co-Chairperson, Task Force on International Narcotics Control).

The United States and Colombia may only pursue extradition under a valid extradition treaty.<sup>108</sup> Survival of the United States-Colombia extradition treaty in the face of pressure from the cartels and the Colombian citizenry is a key issue, given the erratic and checkered history of the instrument. A historical analysis of the treaty elucidates the cartel's fear of extradition, its vehement opposition to the treaty, and the difficulty of pursuing extradition in the face of this opposition.

*D. The United States-Colombia Extradition Treaty: Its Birth, Death, and Resurrection*

1. The Birth of the Treaty

In 1979, the United States and Colombia entered into the Extradition Treaty between the United States of America and the Republic of Colombia.<sup>109</sup> Following the treaty's signing, the Medellín cartel mounted a propaganda campaign<sup>110</sup> against its implementation.<sup>111</sup> The campaign succeeded. By 1983, the United States had made dozens of requests for extradition under the treaty. However, Colombia's then President Belisario Betancur did not sign a single extradition order.<sup>112</sup> In the fall of 1983, Justice Minister Rodrigo Lara Bonilla initiated an arrest campaign of "extraditable" drug traffickers.<sup>113</sup> On March 10, 1984, a joint raid by the DEA and the Colombian Police seized 27,500 pounds of cocaine with an estimated street value of \$1.2 billion.<sup>114</sup> At the time, this was the largest cocaine seizure on record.<sup>115</sup> The cartel retaliated by putting out a contract on Lara's

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108. The United States will only pursue extradition if a valid treaty is in force. 18 U.S.C. § 3181 (1982). See *id.* for a list of extradition treaties to which the United States is a party.

109. Extradition Treaty between the United States of America and the Republic of Colombia, Sept. 14, 1979, reprinted in I. I. KAVASS & A. SPRUDZS, *EXTRADITION LAWS AND TREATIES: UNITED STATES* 140.3 (1985) [hereinafter *Extradition Treaty*]. The Extradition Treaty was entered into force on March 4, 1982. It is not yet published in T.I.A.S. I. I. KAVASS & A. SPRUDZS, *supra*, at 140.1.

110. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 245-46. The propaganda campaign focused on cultural differences and racism. The cartel claimed that it was impossible for a Colombian to obtain a fair trial in the United States. The cartel stated that the DEA and the media had stereotyped Colombians as "wiry, beady-eyed little brown men and savage killers." *Id.* at 245.

111. Riding, *Cocaine Billionaires*, N.Y. TIMES MAGAZINE, Mar. 8, 1987, at 30.

112. *Id.* President Betancur took office in 1982 with misgivings about conducting an active war on drugs. He refused, on nationalistic grounds, to honor the treaty, preferring to try Colombian drug traffickers in Colombia. Bagley, *supra* note 6, at 81.

113. Riding, *supra* note 111, at 32.

114. Bagley, *supra* note 6, at 81.

115. *Id.*



life.<sup>116</sup> Medellín cartel hitmen assassinated Lara on April 30, 1984.<sup>117</sup>

In response to the public outrage caused by this shooting, President Betancur's government declared war on the traffickers. Betancur invoked state-of-siege powers that produced a wave of arrests, confiscations of property, and destruction of drug-processing labs.<sup>118</sup> Over the next thirty months, Betancur signed, and the Colombian Supreme Court approved, extradition orders for thirteen traffickers. In response, the cartel killed thirteen judges.<sup>119</sup>

## 2. The Death of the Treaty

On November 19, 1985, guerrillas of the left-wing group, M-19 (April 19 Movement) in alliance with the drug cartels, seized the Palace of Justice in Bogotá and destroyed the office that handled extraditions.<sup>120</sup> The M-19 group is a leftist guerrilla organization that was established on April 19, 1970.<sup>121</sup> The group claims to consist of revolutionary nationalists committed to democracy and people's rights in Colombia.<sup>122</sup> The ensuing battle between the M-19 guerrillas and the army killed one hundred people, including eleven justices of the Colombian Supreme Court.<sup>123</sup>

On December 12, 1986, the Colombian Supreme Court declared the treaty's enabling legislation unconstitutional on the ground that an interim president, and not the president of Colombia himself, had signed the legislation into effect.<sup>124</sup> On December 14, 1986, newly-

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116. *Id.*

117. *Id.*

118. Riding, *supra* note 111, at 32. Betancur's crackdown forced some of the cartel leaders to go into hiding in Panama, where they paid Panamanian strongman Manuel Noriega between four and five million dollars for protection. Bagley, *supra* note 6, at 82. Jorge Ochoa and Pablo Escobar, two of Colombia's most powerful exiled kingpins, contacted former Colombian president Lopez, who was in Panama at the time and denied that they precipitated the Lara killing. Ochoa and Escobar claimed to control seventy to eighty percent of the South American cocaine traffic and offered to withdraw from the business, get out of politics, and repatriate billions of dollars back to Colombia. In exchange, Ochoa and Escobar sought reincorporation into Colombian society. In a secret meeting in Panama City on May 28, 1984, Ochoa and Escobar suggested to Attorney General Carlos Jimenez Gomez that the extradition treaty be revised to bar retroactive prosecution. *Id.*

119. Riding, *supra* note 111, at 32. Seventeen suspected drug traffickers were extradited from Colombia to the United States between January 1985 and February 1987. *L.A. Times*, Aug. 19, 1989, § 1, at 11, cols. 2-3.

120. Welch, *supra* note 14, at 67-68.

121. *Id.* at 68 n.164.

122. *Id.*

123. *Id.* at 68.

124. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 300; see Bagley, *supra* note 6, at 85. Then

elected President Virgilio Barco Vargas signed the treaty, bringing it back into effect.<sup>125</sup> On February 4, 1987, Colombian police captured Carlos Lehder, one of the most ruthless and feared cartel members, and extradited him directly to United States authorities in Florida.<sup>126</sup> Lehder's arrest and extradition was the high point of Colombia's campaign against the Medellín cartel. However, Lehder's extradition, which the cartel must have viewed as an example of its potential fate, also served to cement the cartel's resolve to defeat the treaty.<sup>127</sup>

In June 1987, the Colombian Supreme Court again bowed to the cartel's intimidation and threats by holding that the treaty's enabling legislation was unconstitutional, despite Barco's re-signing.<sup>128</sup> Although Barco promised to continue the extradition campaign, the Colombian Supreme Court's action postponed extradition proceedings indefinitely.<sup>129</sup>

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president Julio Cesar Turbay Ayala agreed to the treaty in 1979. However, a minister of government, rather than Turbay himself, signed the treaty into effect. *See generally Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearing before the Comm. on Foreign Affairs, House of Representatives, 100th Cong., 1st Sess. 61-62 (1987) (statement of Mary V. Mochary, Deputy Legal Adviser, Department of State) [hereinafter *Hearing: Worldwide Review*].*

125. Bagley, *supra* note 6, at 85.

126. Welch, *supra* note 14, at 69.

127. *Id.* at 70.

128. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 301. The cartel filed nine lawsuits challenging President Barco's power to re-sign the treaty's enabling legislation back into effect. The suits stated that Barco had either exceeded his authority or should be required to submit the enabling legislation to the Colombian Congress for ratification. *See* Bagley, *supra* note 6, at 87. The constitutional challenge to the treaty split the 24-member Colombian Supreme Court 12 to 12 in April 1987. Welch, *supra* note 14, at 70. Colombian law provides that an independent judge may cast the deciding vote in the event of a deadlock in the supreme court. Three of the four judges selected to break the tie declined to participate. *Id.* In June 1987, however, a selected judge voted against the treaty, thereby invalidating it. *Id.* Gugliotta and Leen state that the moment the treaty's survival depended on the ruling of a single person, in this case the alternate justice, the treaty was doomed. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 304.

129. Bagley, *supra* note 6, at 85. The future of extradition in Colombia appeared grim, as reflected by the following excerpt from a congressional report on narcotics control.

It would appear that the possibility of reviving the 1979 extradition treaty between the United States and Colombia, which was invalidated in 1987 by an intimidated Supreme Court, is virtually nil in the near future. The perceived costs to Colombian society of revisiting the extradition issue are viewed as too great for society to bear. A further obstacle to implementing the extradition treaty is the extreme legalistic nature of Colombian institutions: both the Supreme Court and the Congress can declare the actions of a President illegal, the Council of State can challenge the actions of all three, and the Attorney General can declare the actions of any of the previous four illegal. However, the study mission was informed that if a state of siege were declared in Colombia, extradition would be legally permissible.

### 3. The Treaty's Resurrection: The Galan Assassination and Subsequent Extraditions

The violence continued on August 18, 1989, when gunmen killed Senator Luis Carlos Galan, the leading presidential candidate in Colombia's May 1990 presidential election, and an outspoken opponent of the drug cartels.<sup>130</sup> Responding to the assassination, President Virgilio Barco Vargas resurrected the treaty through his state-of-siege powers,<sup>131</sup> in an emergency decree on August 19, 1989.<sup>132</sup> With this act, Barco vowed to drive the drug traffickers from his country.<sup>133</sup>

Barco's use of his state-of-siege powers allowed him to extradite cartel members to the United States without first obtaining a judge's signature on the extradition order.<sup>134</sup> The first Medellín cartel member's extradition after the treaty's reinstatement occurred on September 13, 1989. On that date, Colombia extradited Eduardo Martinez Romero, the reputed money manager for the Medellín cartel, to the United States.<sup>135</sup> Law enforcement officials in Atlanta, Georgia pur-

LIVIA, COLOMBIA, AND MEXICO: AN UPDATE, H.R. DOC. NO. 382-12, 101st Cong., 1st Sess. 25 (1989).

130. L.A. Times, Aug. 19, 1989, § 1, at 1, col. 5. Galan's assassination came only a few hours after gunmen killed a police chief in Medellín. Galan was a Colombian senator and protégé of current president Virgilio Barco Vargas. Church, *supra* note 21, at 12.

131. Riding, *supra* note 111, at 30.

132. L.A. Times, Aug. 23, 1989, § 1, at 10, col. 2. The day after Galan's assassination, President Bush released the following statement:

Last night President Barco announced a number of actions aimed at narcotics traffickers including the reinstatement of the extradition treaty between the U.S. and Colombia which had been suspended by the nation's courts. He is using his powers under Colombia's state of siege to do so. I welcome this courageous move by President Barco. The U.S. is ready to coordinate the extradition of these criminals as expeditiously as possible. I have instructed the Departments of State and Justice to begin working on this immediately.

Statement on the Assassination of Luis Carlos Galan and the Reinstatement of the Colombia-U.S. Extradition Treaty, 25 WEEKLY COMP. PRES. DOC. 1261 (Aug. 19, 1989).

133. Serrill, *Passing the Extradition Test*, TIME, Sept. 18, 1989, at 48. The Medellín cartel's actions directly following Barco's resurrection of the treaty affected the mindset of the Colombian citizenry. Colombians looked to Galan as a symbol of hope, much as United States citizens viewed Robert F. Kennedy. After the assassination and Barco's actions, the traffickers bombed newspapers, political party headquarters, schools, restaurants, and shopping centers. This strategy purposefully victimized ordinary Colombians. As a result, Colombian newspapers reported that many people felt that the government could not fight the traffickers. They also felt that a government in this state should not have provoked the cartel. Rosenberg, *supra* note 7, at 30-31.

134. See Church, *supra* note 21, at 13.

135. Serrill, *supra* note 133, at 48. United States law enforcement officials exulted in this extradition. Attorney General Richard Thornburgh stated, "I applaud the extraordinary courage of President Virgilio Barco and the government of Colombia in their effort to restore the rule of law." *Id.*

sued Martinez for his involvement in a \$1.2 billion money laundering operation.<sup>136</sup> Responding to this action against Martinez, cartel gunmen murdered a former investigator with the Colombian attorney general's office, the wife of a Colombian police major, and the wife of a Colombian intelligence officer.<sup>137</sup>

The next extradition occurred on October 14, 1989. In that proceeding, Colombia extradited Bernardo Pelaez Roldan, Ana Rodriguez de Tamayo, and Roberto Carlini Arrico, three more members of the Medellín cartel.<sup>138</sup> Additionally, on October 29, 1989, Colombia sent Jose Abello Silva, the Medellín cartel's "master smuggler" and the fifth most important drug trafficking suspect ever extradited from Colombia, from Bogotá to the United States to await trial.<sup>139</sup>

### III. THE MECHANICS OF INTERNATIONAL EXTRADITION<sup>140</sup>

Extradition's historical background illustrates its position in facilitating the prosecution of *narcotraficantes*. After Colombia has captured a drug trafficker, successful extradition under international law depends on two factors. First, the treaty must be in force before the United States and Colombia may pursue extradition proceedings. Second, the two countries must follow the treaty's provisions in effecting extradition.

International extradition involves intergovernmental legal assistance in the prosecution and punishment of criminal offenders.<sup>141</sup> A requested government, pursuant to treaty obligations or an act of international comity, sends a fugitive to the requesting state to stand trial for offenses for which the fugitive is charged.<sup>142</sup> In the United

136. *Id.*

137. *Id.*

138. L.A. Times, Oct. 15, 1989, § 1, at A1, col. 6.

139. L.A. Times, Oct. 30, 1989, § 1, at A4, col. 4.

140. The following section will address international extradition issues using the United States and Colombia as a model.

141. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE 319 (1987).

142. *Hearing: Worldwide Review*, *supra* note 124, at 6-7 (statement of Mary V. Mochary, Deputy Legal Adviser, Department of State). Mochary defines extradition as:

The process whereby a requested government, pursuant to a treaty obligation or as an act of international comity, sends a fugitive to the requesting state to stand trial on offenses for which he is charged. In general, extradition of a fugitive is done pursuant to bilateral extradition treaties which establish a reciprocal obligation to extradite fugitives from the requested treaty partner to the requesting treaty partner. Extradition treaties define the scope of the obligation to extradite (e.g., defining extraditable offenses, setting forth exceptions to extradition) and set up procedural mechanisms whereby extradition can be carried out (e.g., describing the documents and evidence

States, the federal government has sole authority over international extradition.<sup>143</sup> As with most common law countries, the United States does not pursue extradition in the absence of a treaty.<sup>144</sup> Extradition treaties define the scope of the obligation to extradite.<sup>145</sup> In most cases, the document defines extraditable offenses, sets forth exceptions to extradition, and describes procedural mechanisms through which extradition may occur.<sup>146</sup>

The extradition process in the United States begins with an application for extradition to the United States Secretary of State.<sup>147</sup> If a state court has jurisdiction over the offense, the governor must make the request.<sup>148</sup> If the offense violates federal law, the United States Attorney General must make the request.<sup>149</sup> The application must allege that the individual sought has committed one of the offenses that the treaty defines and that the fugitive is located in the requested country.<sup>150</sup> The Secretary of State then may decide whether the offense calls for extradition.<sup>151</sup> If the Secretary of State decides the circumstances warrant extradition, the Secretary will route the request to the Colombian government.

As the Medellín cartel's conduct illustrates, drug trafficking activities often cross international borders.<sup>152</sup> Indeed, in some cases, the traffickers may commit crimes in countries where they have never been.<sup>153</sup> In other cases, the traffickers may flee to countries where

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required for extradition, providing for the provisional arrest of fugitives expected to flee) . . . .

*Id.*

143. *Factor v. Laubheimer*, 290 U.S. 276 (1933); *United States v. Rauscher*, 119 U.S. 407, 408 (1886); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840).

144. 18 U.S.C. § 3181 (1982) (list of extradition treaties in which the United States is a party).

145. *Hearing: Worldwide Review*, *supra* note 124.

146. *Id.*

147. Barnett, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT'L & COMP. L. 285, 299 (1985).

148. *Id.* at 299 n.107.

149. *Id.*

150. *Id.* at 299.

151. *Id.*

152. *Hearing: Worldwide Review*, *supra* note 124, at 6 (statement of Mary V. Mochary, Deputy Legal Adviser, Department of State).

153. *Id.* In characterizing the scope of the contemporary criminal, Mochary notes that: The activities of modern criminals—whether drug traffickers, “white collar criminals”, terrorists or others—extend across international borders and such criminals do not respect the sovereign boundaries or authorities of any country. Sometimes their crimes are committed in countries where they have never been actually present. Other times they flee to countries where no crimes have been committed. Extradition of such criminals to a country with criminal charges pending

they have committed no crimes.<sup>154</sup> Further, narcotics traffickers often use international financial transactions to conceal their profits.<sup>155</sup> Therefore, while the Medellín cartel has its headquarters in Colombia, the repercussions from its activities can extend around the globe. In addition, due to the cartel members' great wealth, international travel poses no problem, allowing them to further the international drug trade and making flight more likely.<sup>156</sup>

These factors, coupled with the cartel's stranglehold on the Colombian judiciary, help illustrate the importance of extradition in the prosecution of drug traffickers. In plain terms, the Medellín cartel members are analogous to a cancer which has already overtaken Colombia and stands poised to spread. International extradition represents the mechanism that can surgically remove this cancer from Colombia, where trial and prosecution remain unlikely. It will also place the cartel members on trial in the United States, a venue where they cannot affect the outcome of the proceedings.

In extraditing members of the Medellín cartel, one must recognize that extradition requires the cooperation of both the United States and Colombia. Colombian law enforcement authorities must pursue and capture wanted cartel members. At the same time, United States law enforcement agencies must successfully develop cases against the traffickers. These agencies include the United States Department of Justice, the United States Attorneys' offices, federal investigative agencies such as the Drug Enforcement Agency, the Federal Bureau of Investigation, the United States Marshal's Service, the United States Customs Service, and local law enforcement authorities.<sup>157</sup>

The foundation of the United States' effort to extradite the Medellín cartel members is adherence to general principles and proce-

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against them becomes an important part of international cooperation in anti-criminal activity.

*Id.*

154. *Id.*

155. *Id.* at 29 (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division). Richard notes that it is inevitable that most major drug trafficking cases will have an international aspect. *Id.* First, since cocaine is not produced in the United States, it must be imported. Therefore, it is common for evidence, defendants, or both to be located outside the United States. Second, drug traffickers use international financial transactions both to launder and to conceal profits from their activities. Third, international flight to avoid prosecution is relatively easy for drug traffickers. *Id.*

156. *Id.*

157. *Id.* at 11 (statement of Mary V. Mochary, Deputy Legal Adviser, Department of State).

dures of international extradition. Two principles that act as cornerstones of international extradition law are "dual criminality" and "specialty."<sup>158</sup>

### A. Dual Criminality

#### 1. The Doctrine of Dual Criminality

The doctrine of dual criminality provides that no offense is extraditable unless it is a crime in both the country requesting extradition and the country from which extradition is requested.<sup>159</sup> Thus, if the United States desires to extradite a cartel member, both United States and Colombian law must classify the defendant's conduct as criminal. The doctrine attempts to safeguard the defendant's liberty from restriction for offenses not recognized as criminal in the requested country.<sup>160</sup> The doctrine benefits the defendant in that he or she can avoid prosecution in the state where the offense was allegedly committed if the extraditing nation does not deem the same conduct criminal.<sup>161</sup> Dual criminality is, in essence, a reciprocity requirement intended to assure each nation that it can rely on corresponding treatment of its citizens when one of the requesting nation's own nationals becomes a target of extradition.<sup>162</sup>

Section 3 of article 2 of the United States-Colombia extradition treaty embodies the principle of dual criminality, stating that:

Extradition shall be granted in respect of an extraditable offense only if the offense is punishable under the laws of both Contracting

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158. "The principle of 'double criminality' and the doctrine of 'specialty' are the most fundamental doctrines of international extradition law." Bernholz, Bernholz & Herman, *International Extradition in Drug Cases*, 10 N.C.J. INT'L & COM. REG. 353, 354 (1985) [hereinafter Bernholz].

159. See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 280 (1933); *Collins v. Loisel*, 259 U.S. 309, 311 (1921); *Kelly v. Griffen*, 241 U.S. 6 (1915); *Pettit v. Walshe*, 194 U.S. 205, 217 (1904).

160. I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 137 n.5 (1971).

161. M.C. BASSIOUNI, *supra* note 141, at 325-26.

162. Barnett, *supra* note 147, at 300. In considering dual criminality, Bassiouni comments:

"Double criminality" is in effect a reciprocity requirement which is intended to ensure each of the respective states that they (and the relator) can rely on corresponding treatment, and that no state shall use its processes to surrender a person for conduct which it does not characterize as criminal. The requirement of "double criminality" does, of course, benefit the relator, insofar as he can avoid the processes of justice of the state in which the conduct was allegedly committed, if (depending on the interpretative formula) the same conduct is not also deemed criminal in the requested state.

M.C. BASSIOUNI, *supra* note 141, at 325-26.

Parties by deprivation of liberty for a period exceeding one year. However, when the request for extradition relates to a person who has been convicted and sentenced, extradition shall be granted only if the duration of the penalty still to be served amounts to at least six months.<sup>163</sup>

While the treaty does list extraditable offenses, these items constitute only one category of prohibited behavior. First, a particular offense is extraditable only when a party can show that the defendant's crime falls within one of the listed categories. For instance, the United States may pursue an individual for a jewel theft committed in New York City. In order for this theft to constitute an extraditable offense, the United States must show that the act was "robbery" as defined in the treaty. Second, the United States must also show that both Colombian and United States laws categorize jewel theft as criminal.<sup>164</sup>

## 2. Dual Criminality and Extraditable Offenses

Without regard to the legal basis for extradition, the alleged offense for which extradition is requested must appear among the treaty's enumerated extraditable offenses.<sup>165</sup> Thus, three institutions must consider the alleged offense criminal—United States law, Colombian law, and the treaty. The treaty's appendix provides a list of extraditable offenses. Among the listed offenses appear several classes of conduct relevant to the drug trafficking offense. They are:

- (21) Offenses against the laws relating to the traffic in, possession, or production or manufacture of, narcotic drugs, cannabis, hallucinogenic drugs, cocaine and its derivatives, and other substances which produce physical or psychological dependence . . . .
- (22) Offenses against public health, such as the illicit manufacture

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163. Extradition Treaty, *supra* note 109, art. 2(3), at 140.3.

164. See Bernholz, *supra* note 158, at 356. When the extradition treaty lists extraditable offenses, one must not confuse this list with the principle of dual criminality. For example, the extradition treaty may list "sexual relations with a minor" in its extraditable offenses. This item only constitutes "a category of prohibited behavior to which the specific crime must be applied." *Id.* The listed offenses in the extradition treaty do not make a particular crime extraditable until that crime meets two criteria. First, the crime must be shown to fall within one of the extradition treaty's listed categories. Second, the crime must be punishable in the requested country. *Id.*

165. M.C. BASSIOUNI, *supra* note 141, at 328. Bassiouni states that two rationales support the designation of extraditable offenses. First, defining extraditable offenses avoids using a cumbersome and costly procedure like extradition for minor offenses. Second, defining extraditable offenses avoids having the requested state decline surrender of the offender on public policy grounds because the requested state does not classify the conduct as criminal. *Id.* at 333.



of or traffic in chemical products or substances injurious to health

....

....

(35) Any offense against the laws relating to international trade and transfers of funds.<sup>166</sup>

However, it should be noted that the treaty does not define the extraditable offenses as criminal under Colombian or United States law, but only names the offenses and establishes formulas for identifying them.<sup>167</sup> Therefore, the body determining whether or not to extradite the offender, usually an extradition magistrate, must apply substantive criminal law to the offense in determining whether the conduct is extraditable.<sup>168</sup> For example, the treaty classifies murder as extraditable.<sup>169</sup> However, lawful extradition for murder will only result when the United States can show that the defendant has committed murder under United States and Colombian law. The extradition magistrate in Colombia must apply principles of Colombian criminal law to determine whether the act committed, the alleged murder, constitutes an extraditable offense.

In ruling on diverse extradition issues, the United States Supreme Court and the circuit courts of appeal have determined the scope and effect of the dual criminality requirement. In *Collins v. Loisel*,<sup>170</sup> the Supreme Court stated that the doctrine of dual criminality does not require that the definition of the defendant's conduct in the requested and requesting state possess exactly the same characteristics.<sup>171</sup> Classification of the conduct as criminal under each country's law satisfies the dual criminality doctrine.<sup>172</sup> Article 2, section 2 of the treaty

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166. Extradition Treaty, *supra* note 109, app. at 140.11-12.

167. M.C. BASSIOUNI, *supra* note 141, at 336. Extraditable offenses are interpreted in either of two ways. On one hand, the nations may require that the offense charged be identical to the offense listed in the extradition treaty. On the other hand, the party states could require only that the conduct that supports the charge correspond to an offense listed in the extradition treaty. *Id.* at 329.

168. *Id.* at 336.

169. Extradition Treaty, *supra* note 109, app. at 140.13.

170. 259 U.S. 309 (1922).

171. See *In re Edmondson*, 352 F. Supp. 22 (D. Minn. 1972) ("minor variances in the technical definition of the crime are not fatal").

172. The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

*Collins*, 259 U.S. at 312. Collins was charged with obtaining property by false pretenses. Indian authorities sought extradition of Collins to India from the United States. The British Consul General's affidavit charged Collins with "cheating." *Id.* at 311. Collins argued that

reflects this concept, stating that “[f]or the purposes of this Article, it does not matter whether or not the laws of the Contracting Parties place the offenses or denominate an offense by the same terminology.”<sup>173</sup> This section focuses on whether acts performed in the United States constituting an offense also legally constitute an offense under Colombian laws. Article 2 also considers whether the offense under evaluation remains extraditable under the treaty, regardless of the actual offense charged by the requested state.<sup>174</sup> The requested state, here Colombia, examines the category and type of offense charged to determine a counterpart under its own laws.<sup>175</sup>

In *Factor v. Laubenheimer*,<sup>176</sup> the United States Supreme Court expanded the scope of dual criminality as defined in *Collins*.<sup>177</sup> In this case, Great Britain sought extradition of Factor from the United States for knowingly receiving fraudulently-obtained money.<sup>178</sup> The extradition proceedings took place in Illinois, where Factor lived and committed the offense.<sup>179</sup> Factor argued that because Illinois criminal law did not specifically cover the offense for which Great Britain sought extradition, his extradition violated dual criminality and should be voided.<sup>180</sup> The Court disagreed with Factor’s argument and upheld the extradition.<sup>181</sup>

The *Factor* Court first recognized the requirement of dual criminality—that “an offense is extraditable only if the acts charged are criminal by the laws of both countries.”<sup>182</sup> In discussing extradition treaty interpretation, the Court stated that, where two possible conflicting constructions exist, courts should avoid a narrow interpretation in favor of a liberal one.<sup>183</sup> Thus, the Court concluded that

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this offense was not in the list of offenses enumerated in the United States-Great Britain extradition treaty. He claimed that this offense differed from the offense of obtaining property by false pretenses. The Court upheld Collins’ extradition. *Id.* at 317.

173. Extradition Treaty, *supra* note 109, art. 2(2), at 140.3.

174. See M.C. BASSIOUNI, *supra* note 141, at 329.

175. See *id.*

176. 290 U.S. 276 (1933).

177. M.C. BASSIOUNI, *supra* note 141, at 337.

178. *Factor*, 290 U.S. at 276.

179. *Id.* at 282.

180. *Id.*

181. *Id.*

182. *Id.* at 280.

183. The Court’s exact words were:

In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of trea-

principles controlling the interpretation of international agreements, diplomatic relations between nations, and the good faith inherent in the establishment and use of treaties require a liberal interpretation of the extradition treaty's provisions.<sup>184</sup> This sort of liberal construction, according to the Court, would give effect to the parties' intention to ensure equality and reciprocity.<sup>185</sup> In subsequently evaluating the *Factor* analysis, one court has stated that "the courts must approach challenges to extradition with a view towards finding the offenses within the treaty."<sup>186</sup>

Thus, under the *Factor* analysis, if a gray area exists as to whether a defendant's crime could be considered extraditable or nonextraditable, liberal construction of article 2 pushes courts toward construing the conduct as extraditable.<sup>187</sup> In essence, *Factor* mandates that in interpreting articles 2 or 3, any "close calls" should be resolved in favor of extradition. Despite traditional recognition of dual criminality as "central to extradition law,"<sup>188</sup> authorities have noted that the dual criminality requirement possesses limited potency as a weapon with which to challenge extradition.<sup>189</sup>

### 3. Dual Criminality and Predicate Offense Crimes

Dual criminality assumes a more immediate importance in extra-

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ties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason, if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

*Factor*, 290 U.S. at 293.

184. *Id.*

185. *Id.* The Court also stated that treaty interpretation often entails looking beyond the written words to the negotiations and diplomatic correspondence of the contracting parties regarding the treaty and to the parties' own practical considerations of it. *Id.* at 294-95.

186. *McElvy v. Civiletti*, 523 F. Supp. 42, 48 (S.D. Fla. 1981); see *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984) ("extradition treaties are to be construed liberally to effect their purpose," which the court defined as "the surrender of fugitives"); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980) (dual criminality requirement met even if the state where the defendant resides is the only state in which the act is illegal).

187. Article 2, section 2 states that, "[f]or the purposes of this Article, it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offenses or denominate an offense by the same terminology." Extradition Treaty, *supra* note 109, art. 2(2), at 140.3. Article 2, section 3 states that "[e]xtradition shall be granted in respect of an extraditable offense only if the offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year . . ." *Id.* art. 2(3), at 140.3.

188. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1461 (1988). Kester states that the dual criminality requirement has little meaning, largely because court opinions have limited the requirement and applied it inconsistently. *Id.*

189. *Brauch*, 618 F.2d at 847.

dition involving federal, rather than state offenses.<sup>190</sup> Due to the international character of the Colombian narcotics traffickers' activities, federal prosecutors file most of the charges against the traffickers in federal court. Accordingly, federal prosecutors may take advantage of any number of federal statutes in prosecuting the traffickers. Drafters have structured these federal statutory crimes, such as the predicate offense crimes, much differently than their common law antecedents.<sup>191</sup> Because of this difference in structure, the laws of foreign countries often possess no direct counterpart.<sup>192</sup>

Thus, the dual criminality doctrine assumes an especially important role where authorities request extradition for a crime containing several separately recognized predicate offenses, such as the Continuing Criminal Enterprise ("CCE")<sup>193</sup> and the Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>194</sup> Recognition of the predicate crimes (the included offenses that comprise the entire offense) does not automatically make the comprehensive offense extraditable. This is so because dual criminality requires that the offense as a whole must be punishable in the requested country.<sup>195</sup>

Colombia may punish some or all of the predicate crimes contained in predicate offense crimes. However, it may not punish a foreign United States offense, such as RICO or CCE, composed of several separately punishable offenses.<sup>196</sup> Because CCE and RICO are uniquely United States offenses, a cartel member fighting extradition may argue that Colombia may not extradite him because these crimes do not constitute extraditable offenses under the treaty. United States courts, however, have examined and disposed of the argument with respect to CCE, finding that the treaty does encompass CCE.<sup>197</sup> In *United States v. Lehder-Rivas*,<sup>198</sup> the United States District Court for the Middle District of Florida stated that the treaty

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190. Kester, *supra* note 188, at 1462.

191. *Id.*

192. *Id.*

193. 21 U.S.C. § 848 (1982). A drug offender, convicted in the United States, faces a sentence of not less than 20 years, and as long as life imprisonment without the possibility of parole. *Id.*

194. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982).

195. See Bernholz, *supra* note 158, at 358.

196. *Id.*

197. See *United States v. Alvarez-Moreno*, 874 F.2d 1402 (11th Cir. 1989); *United States v. Lehder-Rivas*, 668 F. Supp. 1523 (M.D. Fla. 1987) (upheld offender's extradition for CCE even though the treaty did not specifically list this offense).

198. 668 F. Supp. 1523 (M.D. Fla. 1987).

“may be reasonably construed to include participation in a continuing criminal enterprise as an offense subject to extradition.”<sup>199</sup>

A further possibility in the extradition of drug traffickers is the treaty's failure to list several important offenses connected to the production and trafficking of cocaine. The treaty covers extradition for straightforward narcotics trafficking offenses. However, it does not specifically list important related crimes, such as money laundering<sup>200</sup> and currency and tax evasion offenses, which pertain to the financial aspects of the narcotics trafficking and the profits it generates.<sup>201</sup> United States court decisions have viewed these offenses, particularly money laundering offenses, as extraditable.

### B. Specialty

In the context of international extradition, the doctrines of dual criminality and specialty operate arm in arm. In fact, offenders subject to extradition most often claim treaty rights under the specialty doctrine.<sup>202</sup> While the dual criminality doctrine states that the extradited defendant must have committed an offense classified as criminal in both nations,<sup>203</sup> the specialty doctrine provides that the requesting nation may not prosecute the extradited defendant for any offense other than that for which the surrendering state agreed to extradite.<sup>204</sup> The United States Supreme Court, in *United States v. Rauscher*,<sup>205</sup> defined specialty, stating that:

[A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the

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199. *Id.* at 1529.

200. The Schedule of Offenses, contained in the appendix to the treaty, lists as extraditable offense number 35 “[a]ny offense against the laws relating to international trade and transfers of funds.” Although this offense does not specifically refer to money laundering, it appears that federal prosecutors would argue that this definition encompasses the money laundering offense. Extradition Treaty, *supra* note 109, at 140.12.

201. *Hearing: Worldwide Review*, *supra* note 124, at 27 (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division). Many countries have resisted extradition for “fiscal” offenses, such as money laundering, tax evasion, and currency crimes. Prosecutors frequently use these crimes to attack drug traffickers. *Id.*

202. Kester, *supra* note 188, at 1467.

203. *Collins v. Loisel*, 259 U.S. 309, 311 (1921).

204. Restated, the principle of specialty means that the requesting state, which secures the surrender of the offender, can prosecute that person only for the offense for which he or she was surrendered by the requested state, or allow that person an opportunity to leave the prosecuting state. M.C. BASSIOUNI, *supra* note 141, at 359-60.

205. 119 U.S. 407 (1886).

offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.<sup>206</sup>

Specialty is considered a privilege of the requested state, and is designed to protect its dignity and interests.<sup>207</sup> It rests on five broad foundational themes. First, the requested state can refuse extradition if it knows that the requesting state will prosecute the defendant for an offense other than the extradited offense. Second, the requesting state would not have personal jurisdiction over the defendant, but for the requested state's surrender of the defendant. Third, the requesting state cannot prosecute the defendant without securing his surrender from the requested state. Fourth, the requesting state may not abuse a formal process to secure the surrender of the defendant by relying on the requested state. And fifth, the requested state undertakes extradition in reliance on the representation of the requesting state.<sup>208</sup> The extradition treaty between Colombia and the United States incorporates the specialty doctrine.<sup>209</sup>

### 1. Circumventing the Specialty Doctrine

Specialty could arise in various situations in the extradition of cartel members. First, in post-extradition criminal proceedings in the United States, prosecutors may wish to try the defendant on a crimi-

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206. *Id.* at 430.

207. *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir. 1973).

208. M.C. BASSIOUNI, *supra* note 141, at 360.

209. Article 15 of the treaty states:

(1) A person extradited under the Treaty shall not be detained, tried or punished in the territory of the Requesting State for an offense other than that for which extradition has been granted, nor be extradited by that State to a third State, unless:

(a) That person has left the territory of the Requesting State after that person's extradition and has voluntarily returned to it; or

(b) That person has not left the territory of the Requesting State within 60 days after being free to do so; or

(c) The Executive Authority of the Requested State has consented to that person's detention, trial, or punishment for another offense, or to extradition to a third State, provided that the principles of Article 4 of this Treaty shall be observed.

(2) If the offense for which the person was extradited is legally altered in the course of the proceedings, that person may be prosecuted or sentenced provided:

(a) The offense under the new legal description is based on the same set of facts contained in the extradition request and its supporting documents, and

(b) The defendant is subject to be sentenced to a period of incarceration which does not exceed that provided for the offense for which that person was extradited.

Extradition Treaty, *supra* note 109, art. 15, at 140.8.

nal offense not listed in the extradition request. On its face, specialty bars such prosecution. Second, after the defendant has been extradited for a criminal offense, the United States may wish to prosecute the cartel member for a civil offense. Again, this prosecution appears to be precluded by the doctrine of specialty. United States courts have confronted these issues and presented some detours around a strict reading of the specialty requirements.

*a. The Separate Offense: United States v. Paroutian*

In 1962, the Second Circuit, in *United States v. Paroutian*,<sup>210</sup> held that formal differences between the extradition request and the actual indictment do not violate the specialty doctrine.<sup>211</sup> This is because specialty applies to the substantive nature of the crime and not to the underlying facts supporting extradition.<sup>212</sup>

Initially, the United States indicted Paroutian for knowingly and unlawfully receiving and concealing heroin and for conspiring to import the drug into the United States.<sup>213</sup> Lebanon extradited Paroutian to the United States to answer the indictment.<sup>214</sup> Paroutian subsequently challenged his extradition.<sup>215</sup> Paroutian's extradition papers included a copy of an indictment issued in the Southern District of New York.<sup>216</sup> However, he later stood trial pursuant to an indictment issued in the Eastern District of New York.<sup>217</sup> Paroutian used the two different indictments to argue that his extradition was invalid for violating specialty.<sup>218</sup> The court of appeals disagreed, stating that specialty, as set out in *Rauscher*, focuses on protecting "the extraditing government against abuse of its discretionary act of extradition."<sup>219</sup> The court recognized that specialty "would forbid trial of Paroutian for murder or some other offense totally unrelated to the traffic in narcotics."<sup>220</sup> However, it stated that the test for whether trial relates to a separate offense (an offense upon which specialty would bar trial) "should not be some technical refinement of local law, but whether

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210. 299 F.2d 486 (2d Cir. 1962).

211. *Id.*

212. M.C. BASSIOUNI, *supra* note 141, at 365 n.129.

213. *Paroutian*, 299 F.2d at 487.

214. *Id.*

215. *Id.* at 490.

216. *Id.*

217. *Id.*

218. *Paroutian*, 299 F.2d at 490.

219. *Id.*

220. *Id.*

the extraditing country would consider the offense actually tried 'separate.'<sup>221</sup>

Hence, attacks on extradition based on specialty must establish that Colombia would consider the offense separate from that defined in the extradition papers. For extradited cartel members, *Paroutian* indicates that federal prosecutors may at least argue that violations related to the offense contained in the defendant's extradition papers may be prosecuted. In addition, *Paroutian* suggests that extradited cartel members may not argue that procedural missteps, such as mismatched indictments, should block extradition on the basis of specialty.

*b. The Consent Exception: United States v. Najohn*

Judicial efforts at limiting the effect of the specialty doctrine did not end with *Paroutian*. In *United States v. Najohn*,<sup>222</sup> the Ninth Circuit held that a defendant may stand trial on a charge separate from the extradited offense if the requested country consents.

Najohn was originally indicted in the Eastern District of Pennsylvania on several counts of interstate transportation of stolen property.<sup>223</sup> The United States embassy in Bern, Switzerland requested Najohn's extradition to the United States.<sup>224</sup> Swiss police arrested Najohn and the Swiss government extradited him to the United States pursuant to the United States-Switzerland extradition treaty.<sup>225</sup> Najohn subsequently pleaded guilty to one count of the Pennsylvania indictment and received a four-year sentence.<sup>226</sup>

While serving the Pennsylvania sentence, the Northern District of California indicted Najohn on three additional offenses: interstate transportation of stolen property, receipt of stolen property, and con-

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221. *Id.* at 490-91. Under this test, the Second Circuit did not believe that Lebanon, fully cognizant of the facts surrounding the case, would consider that Paroutian was tried for anything besides the offense for which he was extradited. See *United States v. Cuevas*, 847 F.2d 1417, 1428 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) ("the appropriate test is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited").

222. 785 F.2d 1420 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 1009 (1986).

223. *Id.* Najohn's alleged offenses violated 18 U.S.C. § 2314 (1982). *Id.*

224. *Id.*

225. *Id.* For full text of the United States-Swiss extradition treaty, see Treaty between the United States and Switzerland for the Extradition of Criminals, May 14, 1900, 31 Stat. 1928, T.S. No. 354.

226. *Najohn*, 785 F.2d at 1421.



spiracy.<sup>227</sup> The Magistrate of the District of Zurich and the Swiss ambassador to the United States requested prosecution,<sup>228</sup> agreeing to suspend specialty.<sup>229</sup> Arguing against the California indictment, Najohn nevertheless cited the specialty doctrine and moved to dismiss.<sup>230</sup>

In considering Najohn's arguments, the Ninth Circuit noted that specialty usually bars prosecution for offenses other than those for which the defendant was originally extradited.<sup>231</sup> However, the court addressed the specialty doctrine's "specific exception."<sup>232</sup> Under this exception, the extradited individual may stand trial for a crime other than that for which he was surrendered "if the asylum country consents."<sup>233</sup> Because the Swiss authorities manifested consent, the Ninth Circuit reasoned that specialty should not bar Najohn's extradition and upheld the validity of the second prosecution in California.<sup>234</sup>

Thus, it appears that the United States may prosecute an extradited cartel member for offenses other than those for which he was extradited. In so doing, however, the United States must first obtain the consent of the Colombian courts prior to this second prosecution. The *Najohn* consent exception could prove vital in prosecuting cartel members for offenses that initially may not be extraditable. Furthermore, *Najohn* indicates that after securing Colombia's consent, prosecutors may proceed against extradited defendants for offenses not listed in the treaty. Ultimately, this consent exception could aid the United States in overcoming difficulties posed by the specialty and dual criminality doctrines.

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227. *Id.* Najohn's alleged receipt of stolen property violated 18 U.S.C. § 2315 (1982) and his conspiracy offense violated 18 U.S.C. § 371 (1982). *Najohn*, 785 F.2d at 1421.

228. *Najohn*, 785 F.2d at 1422.

229. *Id.* Najohn argued that these letters were insufficient to allow his prosecution in California, because the United States-Switzerland extradition treaty bound the United States without regard to the consent of Swiss authorities. The Ninth Circuit disagreed. *Id.*

230. *Id.* at 1421.

231. *Id.*

232. *Id.* at 1422.

233. *Najohn*, 785 F.2d at 1422 (quoting *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979)). The *Najohn* court reasoned that the United States-Switzerland extradition treaty "does not purport to limit the discretion of the two sovereigns to surrender fugitives for reasons of comity, prudence, or even as a whim." *Id.* The court held that in view of the absence of Najohn's efforts to obtain Swiss judgment prohibiting this consent to further prosecution, the Swiss authorization for further prosecution was valid and Najohn's California conviction should stand. *Id.* at 1423.

234. *Id.* The court noted that to do otherwise would forsake the precept that courts do not intermeddle in foreign affairs. *Id.*

For example, the United States may wish to prosecute a cartel member for both drug trafficking and tax evasion. Drug trafficking appears in the treaty's schedule of extraditable offenses. Tax evasion does not.<sup>235</sup> Thus, the United States may extradite and prosecute the individual on drug trafficking. Under current definitions, this falls within the boundaries of specialty and dual criminality. Subsequent prosecution on tax evasion would ostensibly violate both doctrines. However, if the United States could obtain Colombia's permission to prosecute for tax evasion, the prosecution would be valid under the *Najohn* exception. Given Colombia's professed positive attitude toward extradition and prosecution of drug traffickers, it appears unlikely that the Colombian government would withhold consent for prosecution of offenses that do not appear in the treaty. This remains especially true with regard to nonlisted offenses connected to the drug trafficking offense, like the tax evasion offense.

c. *Prosecution on Post-Criminal Indictment Civil Lawsuits: Van Cauwenberghe v. Biard*

In 1988, the Supreme Court decided *Van Cauwenberghe v. Biard*.<sup>236</sup> Switzerland extradited Van Cauwenberghe to the United States to stand trial on criminal fraud charges.<sup>237</sup> One week prior to the fraud trial, Biard, the victim of the fraud, filed a separate civil suit against Van Cauwenberghe.<sup>238</sup> This civil suit involved many of the same facts pleaded in the criminal action.<sup>239</sup> Two weeks after sentencing in the criminal action, Van Cauwenberghe was served with the civil summons and complaint. In opposing the subsequent civil charges, Van Cauwenberghe argued that the specialty doctrine shielded him from the civil service of process.<sup>240</sup> Expressly declining

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235. Extradition Treaty, *supra* note 109, at 140.11.

236. 486 U.S. 517 (1988).

237. *Id.* at 520.

238. *Id.*

239. *Id.* The complaint asserted a civil RICO claim, a common-law fraud claim, and other pendent state law claims. *Id.*

240. *Id.* at 523. Van Cauwenberghe made two arguments in the district court to dismiss the suit. First, he asserted that since his presence in the United States was a result of extradition, he was immune from civil service of process. Second, Van Cauwenberghe argued that the court should dismiss the complaint on the grounds of *forum non conveniens*. The district court denied both claims. *Id.* at 520-21. In the Supreme Court, Van Cauwenberghe argued that the principle of specialty requires immunity from criminal prosecutions for offenses other than the offense for which he was extradited. Van Cauwenberghe also argued that specialty guarantees the extradited person the right to be "free from any judicial interference," including a civil action. *Id.* at 523.

to rule on this argument,<sup>241</sup> Justice Marshall stated that the only issue on which the Court granted certiorari was whether denial of Van Cauwenberghe's motion to dismiss on the grounds of immunity from service of process is immediately appealable.<sup>242</sup>

Although the Court explicitly reserved judgment on the specialty issue, it did state in dicta that "[t]he right not to be burdened with a civil trial itself is not an essential aspect of [the specialty doctrine's] protection."<sup>243</sup> The Court reasoned that the principle of specialty fundamentally affects treaty obligations between countries.<sup>244</sup> It operates to ensure that the requesting state does not abuse the extradition processes of the requested state.<sup>245</sup> The Court concluded that a civil trial involving an offender, prior to any binding judgment being rendered against him or her, does not trigger the specialty doctrine's protection.<sup>246</sup>

This language suggests that, if forced to rule on the issue, the Court would likely hold against the extradited defendant and allow prosecution on the civil charges. The Court's dicta indicates that the United States may concurrently prosecute the cartel members in civil suits, after extradition for criminal violations, without fear of violating the specialty doctrine. *Van Cauwenberghe*, like *Najohn*, could operate as a loophole through which the United States could prosecute the cartel members for civil offenses, not listed in the extradition order. For example, in pursuing prosecution of a cartel member, the United States might only be able to effect valid extradition for drug trafficking offenses. Before or during the course of this criminal prosecution, federal prosecutors could also file a civil breach of contract suit against the cartel member. Under a strict reading, the specialty

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241. *Van Cauwenberghe*, 486 U.S. at 524.

242. *Id.*

243. *Id.* at 525.

244. *Id.*

245. *Id.*

246. *Van Cauwenberghe*, 486 U.S. at 525.

The conduct of a civil trial, prior to any attempt to subject the defendant to a binding judgment of the court, does not significantly implicate the receiving state's obligation under the [specialty] doctrine. Unlike a criminal prosecution, in which the coercive power of the state is immediately brought to bear, the state's involvement in the conduct of a private civil suit is minimal. The state's role is simply to provide a forum for the resolution of a private dispute. In the absence of an explicit agreement obligating the United States to protect the extradited person from the burdens of a civil suit, we believe that there is little potential that the extraditing state, in this case Switzerland, will view the mere conduct of a private civil trial as a breach of an obligation by the United States not to abuse the extradition process.

*Id.*

doctrine bars this civil action. However, based on *Van Cauwenberghe*, courts might allow the civil suit to proceed.

Note, however, that in *Van Cauwenberghe*, a private individual filed the civil complaint against Van Cauwenberghe.<sup>247</sup> In the event that Medellín cartel members face subsequent civil charges in the United States after the institution of criminal proceedings, those charges will likely be brought by the United States itself. Though the Supreme Court did not provide any specific indication in its dicta, it is possible that having the United States as plaintiff could be seen as exerting a greater “coercive power of the state”<sup>248</sup> on an extradited drug trafficker. *Van Cauwenberghe*, however, leaves the door open for bringing civil charges after the filing of criminal charges. It remains the courts’ responsibility to interpret the case and either allow or disallow subsequent civil prosecution based on the particular issue at bar. Given the United States’ general antipathy towards drug traffickers, application of the *Van Cauwenberghe* exception appears promising.

#### IV. EXTRADITION UNDER THE UNITED STATES-COLOMBIA TREATY

##### A. Extradition Procedure Under the Treaty

In pursuing extradition of cartel members, the United States must adhere not only to case law doctrine, but to the procedures specifically set forth in the treaty. While case law provides a general overview of the requisite formalities, the treaty gives a more detailed roadmap of the procedure that United States prosecutors must follow in extraditing the *narcotraficantes*.

Article 9 of the treaty lays out the procedural framework the United States must follow in extraditing cartel members. This article describes the necessary evidence and documents that must accompany an extradition request. Article 9, section 2 states that in all cases, four additional items must accompany the extradition request.<sup>249</sup> First, there must be documents describing the identity and location of the person sought.<sup>250</sup> Second, there must be an accompanying statement of the facts of the case.<sup>251</sup> Third, the text of the laws

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247. *Id.* at 519.

248. *Id.* at 525.

249. Extradition Treaty, *supra* note 109, art. 9(2), at 140.5.

250. *Id.*

251. *Id.*

describing the essential elements of the offense must be included.<sup>252</sup> Fourth, the text of the laws describing the offense's punishment and the statute of limitations on the prosecution and punishment of the offense must accompany the request.<sup>253</sup>

Section 3 encompasses situations where extradition relates to a nonconvicted offender. In this situation, a copy of the indictment issued by a judge of the requesting country, as well as evidence proving that the person named in the indictment is the person sought for extradition must also be included with the extradition request.<sup>254</sup> Additionally, evidence showing probable cause under the laws of the requested state, establishing that the person sought committed the offense for which the requesting state seeks extradition, must accompany the request.<sup>255</sup>

Section 4 relates to extradition of offenders already convicted in Colombia. In this case, the extradition request must accompany a copy of the conviction issued by a court of the requesting state and evidence proving that the person sought for extradition is the person that the conviction lists. If the offender has also been sentenced, the extradition request must also include a copy of the sentence and a statement evidencing the remainder of the sentence yet to be served.<sup>256</sup>

Section 5 provides that all documents submitted by the requesting state must be translated into the requested state's language.<sup>257</sup> Section 6 outlines when the documents accompanying the extradition request shall be introduced into evidence.<sup>258</sup> Extraditing cartel members from Colombia can occur in only one way. A United States judge, magistrate, or other judicial officer must sign the extradition request.<sup>259</sup> This request must be authenticated by the Department of State's official seal and certified by a diplomatic or consular officer of Colombia.<sup>260</sup>

Section 7 requires that the requested state review for legal sufficiency the documentation supporting extradition prior to presenting it

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252. *Id.*

253. *Id.*

254. *Id.* art. 9(3), at 140.6.

255. *Id.*

256. *Id.* art. 9(4), at 140.6.

257. *Id.* art. 9(5), at 140.6.

258. *Id.* art. 9(6), at 140.6.

259. *Id.*

260. *Id.*

to their judicial authorities.<sup>261</sup> This section also directs Colombia to provide legal representation to protect the interests of the requesting state—the United States—before Colombia’s authorities.<sup>262</sup>

### B. *Extradition of Colombian Nationals*

The limitation on the extradition of nationals by some countries remains one of the major obstacles facing the international extradition process.<sup>263</sup> This potential limitation is important in the extradition of Medellín cartel members because most cartel members are Colombian nationals. The United States has historically extradited its nationals in compliance with treaty requirements as a matter of policy.<sup>264</sup> In contrast, the constitutions of civil law countries, either prohibit the extradition of their nationals entirely or only permit extradition under extraordinary circumstances.<sup>265</sup> Like other civil law countries, Colombia usually prohibits the extradition of Colombian nationals but prosecutes them in Colombia for offenses committed abroad.<sup>266</sup>

Article 8 of the treaty attempts to reconcile the different traditions existing in civil law countries, such as Colombia, and common law nations, like the United States.<sup>267</sup> Authorities consider article 8 to be an “innovation.”<sup>268</sup> It imposes an obligation on the requested state to extradite all persons, including its nationals, where the offense committed is punishable in both the requesting and the requested country, and the offense was intended to be consummated in the re-

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261. *Id.* art. 9(7), at 140.6.

262. *Id.*

263. *Hearing: Worldwide Review*, *supra* note 124, at 9 (statement of Mary V. Mochary, Deputy Legal Adviser, Department of State).

264. *Id.* at 10.

265. *Id.* Civil law countries generally have the domestic legal authority to prosecute their nationals for crimes committed abroad. In cases where fugitives have fled the United States and headed for their own countries, civil law countries can prosecute the national locally for offenses committed in the United States. *Id.* Modern extradition treaties between the United States and civil law countries resolve this problem in one of two ways. In some instances, the United States has convinced its treaty partner to extradite their nationals to the United States, at least for egregious offenses. In other instances, the United States has negotiated treaties containing “extradite or submit for prosecution clauses.” These clauses provide that when a country refuses to extradite because the fugitive is a national, it will submit the case to its own authorities for a determination with regard to prosecution based on evidence that the United States government provides. *Id.* at 10-11.

266. S. EXEC. REP. NO. 34, 97th Cong., 1st Sess. (1981), *reprinted in* I. I. KAVASS & A. SPRUDZS, *EXTRADITION LAWS AND TREATIES: UNITED STATES* 140.13, 140.16 (1985) [hereinafter S. EXEC. REP. NO. 34].

267. *Id.* at 140.14.

268. *Id.*

questing state.<sup>269</sup> Under this provision, the Colombian government would be obligated to extradite Colombian national cartel members regardless of traditional civil law practices if both United States and Colombian law punish the offense and the perpetrator intended to consummate his offense in the United States.

Section 2 of article 8 states that if Colombia denies extradition on the basis of nationality, it still must submit the case to competent authorities for prosecution.<sup>270</sup> However, Colombia must have jurisdiction over the offense for which extradition has been sought.<sup>271</sup> Once the competent Colombian judicial authorities have reviewed the case, its disposition remains subject to prosecutorial discretion.<sup>272</sup>

The importance of article 8, as applied to cartel members, lies in the fact that Colombia could extradite a drug trafficker to the United States even if the trafficker has never left Colombia.<sup>273</sup> This section has immense value to the United States because prosecutors can request extradition of any individual they can implicate in a drug trafficking offense, regardless of where the trafficker commits his crime.<sup>274</sup> In *In re Russell*,<sup>275</sup> the Fifth Circuit noted that article 8 clearly provides for the extradition of nationals at the Colombian executive's discretion.<sup>276</sup>

## V. RECENT CASE LAW INVOLVING THE UNITED STATES-COLOMBIA EXTRADITION TREATY

Several recent United States district courts and courts of appeals,

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269. *Id.*

270. Extradition Treaty, *supra* note 109, art. 8(2), at 140.5.

271. S. EXEC. REP. NO. 34, *supra* note 266, at 140.14.

272. *Id.* Article 8 provides that:

- (1) Neither Contracting Party shall be bound to deliver up its own nationals, but the Executive Authority of the Requested State shall have the power to deliver them up if, in its discretion it be deemed proper to do so. However, extradition of nationals will be granted pursuant to the provisions of this Treaty in the following instances:
  - (a) Where the offense involves acts taking place in the territory of both States with the intent that the offense be consummated in the Requesting State; or
  - (b) Where the person for whom extradition is sought has been convicted in the Requesting State of the offense for which extradition is sought.

- (2) If extradition is not granted pursuant to paragraph (1) of this Article, the Requested State shall submit the case to its competent judicial authorities for the purpose of initiating the investigation or to further the related prosecution, provided that the Requested State has jurisdiction over the offense.

Extradition Treaty, *supra* note 109, art. 8, at 140.5.

273. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 100.

274. *Id.*

275. 805 F.2d 1215 (5th Cir. 1986).

276. *Id.* at 1218.

have dealt with extradition in the context of the treaty. As extradition proceedings will likely proliferate after the treaty's resurrection, examination of these decisions will aid in predicting how United States courts will deal with cartel members' objections centering around extradition doctrines. Further, as most of the future extradition cases will likely involve predicate offense crimes, such as CCE or RICO, these cases will act as potential guidelines for tailoring the existing treaty to facilitate the extraditability of these offenses.

#### A. *The Lehder Case*

On February 4, 1987, an elite Colombian anti-narcotics police unit arrested Medellín cartel kingpin Carlos Lehder and fifteen of his bodyguards.<sup>277</sup> Lehder had gained notoriety in 1985 when he publicly offered to pay \$350,000 to anyone who could kill or capture the head of the DEA.<sup>278</sup> In March 1985, while he was in hiding, Lehder gave an interview in which he appealed to discontented Colombian military officers and Marxist revolutionaries and asked them to join him in what he termed the "cocaine bonanza . . . the arm of the struggle against America . . . the Achilles' heel of American imperialism."<sup>279</sup>

The Barco government quickly extradited Lehder to the United States, fearing that he would either bribe or break his way out of prison.<sup>280</sup> The United States government filed twelve counts against Lehder, including one which charged him with engaging in a CCE. Lehder challenged his extradition on two grounds.<sup>281</sup> First, he asserted that the Colombian Supreme Court decision which had approved the extradition request failed to mention the CCE charge and that this omission thereby excluded the charge from judgment.<sup>282</sup> Second, Lehder argued that he could not be extradited for the CCE charge under the treaty due to the doctrine of dual criminality.<sup>283</sup> He contended that the CCE offense was "so uniquely American" that it could not satisfy the treaty's dual criminality clause.<sup>284</sup>

In deciding the *Lehder* case, the court first stated that interpret-

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277. Bagley, *supra* note 6, at 86.

278. *Id.*

279. *Id.*

280. *Id.* After Lehder's extradition, cartel members threatened to kill five citizens of the United States for every Colombian extradited to the United States. Fortunately, the cartel members did not carry out this threat. *Id.*

281. *United States v. Lehder-Rivas*, 668 F. Supp. 1523, 1525 (M.D. Fla. 1987).

282. *Id.*

283. *Id.*

284. *Id.* at 1527.



ing the documents which authorized the extradition necessarily preceded any ruling on the validity of Lehder's arguments.<sup>285</sup> The *Lehder* court noted that when the extraditing country has not expressly stated an objection to prosecution, the court must still inquire "whether the surrendering state would regard the prosecution at issue as a breach."<sup>286</sup> In responding to its own inquiry, the court gave due consideration to the fact that the Colombian authority had not written its extradition decree with the knowledge that United States courts would later scrutinize it.<sup>287</sup> The *Lehder* court then focused on the treaty to determine if the CCE charge was an extraditable offense.<sup>288</sup>

### 1. Lehder's First Argument: Extradition on the Basis of the CCE Charge

The court first noted that it believed Lehder's focus on the Colombian Supreme Court's decision to extradite him was misdirected.<sup>289</sup> The court stated that upon granting favorable judgment regarding the extradition, the Colombian Supreme Court was thereby granting the Colombian President "authority to consider the extradition request *without reservation*."<sup>290</sup> From that point on, the decision of whether or not to extradite Lehder rested in the hands of the Colombian executive.<sup>291</sup>

Moreover, the court emphasized that even if the Colombian Supreme Court did have the final say as to whether or not the extradition should be ordered, it possessed full knowledge of the range of charges for which Lehder was indicted in the United States and had not objected to any of them.<sup>292</sup> Although Lehder had the opportunity to object to any of these charges, the record showed no evidence that he had objected to the CCE charge on specialty grounds.<sup>293</sup>

The *Lehder* court recognized that the Colombian Supreme Court had not been entirely clear in describing some of the offenses. For example, it defined one of the offenses as "participating in a criminal

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285. *Id.* at 1525.

286. *Lehder-Rivas*, 668 F. Supp. at 1525 (quoting *United States v. Jetter*, 722 F.2d 371, 373 (8th Cir. 1983)).

287. *Id.*

288. *Id.* at 1525-26.

289. *Id.* at 1526.

290. *Id.*

291. *Lehder-Rivas*, 668 F. Supp. at 1526.

292. *Id.*

293. *Id.*

enterprise continuously with other persons (narcotics traffic).”<sup>294</sup> The court stated that although this definition may be imprecise, “Colombian courts cannot be expected to be centers of American legal scholarship.”<sup>295</sup> The charges, as set forth in the opinion of the Colombian Supreme Court, were therefore held to provide a sufficient basis for extradition.<sup>296</sup>

The court added that its analysis entailed interpreting the language of the Colombian extradition opinion in light of the circumstances under which the Colombian Supreme Court had rendered its decision.<sup>297</sup> Based upon its analysis, the court concluded that the CCE charge had not been excluded from the judgment regarding the extradition request.<sup>298</sup> The *Lehder* court reasoned that “[t]he absence of explicit language denying extradition on the CCE charge compels the conclusion that the charge was included in the approval of Lehder’s extradition.”<sup>299</sup> The court noted that documents from the Colombian President indicated that his favorable judgment on Lehder’s extradition included the CCE charge.<sup>300</sup> Further, the court stated that if the CCE charge did not fall within the approval of the extradition request, the treaty requires that Colombia explain the reasons for refusing extradition under article 12 of the treaty.<sup>301</sup>

## 2. Lehder’s Second Argument: Dual Criminality

In his second argument, Lehder contended that the CCE charge was not one of the enumerated offenses in the treaty and had no comparable counterpart in Colombian law.<sup>302</sup> Thus, Lehder reasoned that

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294. *Id.*

295. *Id.*

296. *Lehder-Rivas*, 668 F. Supp. at 1526.

297. *Id.* “[We] can do no more than look to the language of the Colombian opinion, in the circumstances under which it was rendered, and conclude that the CCE charge was not excluded from the ‘favorable judgment’ on the extradition request.” *Id.*

298. *Id.*

299. *Id.* The court stated that a final reason for confidence in the conclusion to uphold extradition on the CCE charge was the Colombian government’s lack of objection. The Colombian government had warned the United States that it would closely monitor this trial so that Lehder’s human rights would receive protection. Further, the court noted that Colombia “has a record of vigilance in matters concerning the rule of specialty.” *Id.* at 1526-27. Under these circumstances, the court felt that the absence of protest by Colombia “further evidences the correctness of finding that the CCE charge is included in the approval of extradition.” *Id.* at 1527.

300. *Id.* at 1526.

301. *Lehder-Rivas*, 668 F. Supp. at 1526.

302. *Id.* at 1527.

the charge violated the principle of dual criminality.<sup>303</sup> The United States countered that CCE was a form of conspiracy related to narcotics trafficking which possessed a different name and different elements than simple conspiracy.<sup>304</sup> The government based its counterargument on three theories. First, the treaty's appendix lists narcotics trafficking as an extraditable offense.<sup>305</sup> Second, article 2, section 4(a) of the treaty specifically approves of conspiracy prosecutions.<sup>306</sup> Third, pursuant to *Collins v. Loisel*<sup>307</sup> and article 2, section 2 of the treaty, offenses need not contain the same terminology and definition in both countries to qualify for extradition.<sup>308</sup>

In considering the dual criminality issue, the court acknowledged the plausibility of Lehder's contention that the treaty bars extradition because CCE was not a punishable offense in Colombia.<sup>309</sup> However, the court added that Lehder's argument relied on the premise that whether CCE remains punishable in Colombia must be determined with reference to the offense as a whole and not its separate, predicate parts.<sup>310</sup> Citing *Collins*, the court stated that this contention lacked legal precedent in the United States.<sup>311</sup>

The *Lehder* court also noted that the determination of whether CCE was subject to extradition under the treaty depended on interpretation of the treaty.<sup>312</sup> The court quoted *Factor v. Laubheimer*,<sup>313</sup> which stated that "if a treaty fairly admits of two constructions, one restricting rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."<sup>314</sup> In this vein, the court reasoned that extradition treaties are to be construed liberally to effect their purpose—the surrender of fugitives for trial on their alleged offenses.<sup>315</sup> The court further noted that both the United States and Colombia negotiated the treaty in-

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303. *Id.* The court noted that the determination of whether CCE is extraditable under the treaty is "squarely a matter of interpretation of this particular document." *Id.*

304. *Id.*

305. *Id.*

306. *Lehder-Rivas*, 668 F. Supp. at 1527.

307. 259 U.S. 309 (1921).

308. *Lehder-Rivas*, 668 F. Supp. at 1527.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. 290 U.S. 276 (1933).

314. *Lehder-Rivas*, 668 F. Supp. at 1527 (quoting *Factor v. Laubheimer*, 290 U.S. 276, 293-94 (1933)).

315. *Id.* (quoting *United States v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984)).

tending liberal extradition provisions.<sup>316</sup> This context supported the reasoning that the “loose language of the Treaty was intended to include extradition under that important statute [CCE].”<sup>317</sup> The *Lehder* court added that, through its extradition request to Colombia, the United States proffered its belief that the treaty covered CCE offenses.<sup>318</sup> By approving the extradition without reservation, Colombia reaffirmed this construction of the treaty.<sup>319</sup> The court stated that “when parties act as if CCE is within the category of crimes subject to extradition, this Court is not positioned to disagree.”<sup>320</sup>

In considering the specialty doctrine, the court reasoned that the actual extradition of Lehder could be viewed as an exception to specialty, which the treaty outlines in article 15, section 1(c).<sup>321</sup> Further, the court cited *Najohn* and stated that “[p]rosecution on the CCE charge could be viewed as an act of comity” between the United States and Colombia.<sup>322</sup> In *Najohn*, the Ninth Circuit held that an “extradited [offender] may be tried for a crime other than that for which he was surrendered *if the asylum country consents*.”<sup>323</sup> Since the Colombian President consented to extradition, this act of comity barred any objection to the extradition.<sup>324</sup> The court also cited the Amended Convention on Narcotic Drugs<sup>325</sup> and stated that any elements of the CCE offense not covered by the treaty would be covered by the broader scope of that document.<sup>326</sup>

In conclusion, the court held that one could reasonably construe

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316. *Id.* at 1527-28. The court noted that while negotiating the treaty, President Carter had pledged to control the drug influx into the United States by enlisting the help of the traffickers' headquarter countries. *Id.* at 1527.

317. *Id.* at 1528.

318. *Id.*

319. *Lehder-Rivas*, 668 F. Supp. at 1528.

320. *Id.*

321. *Id.* Article 15, section 1(c) provides that specialty does not apply when “[t]he Executive Authority of the Requested State has consented to that person's detention, trial, or punishment for another offense, or to extradition to a third State, provided that the principles of Article 4 of this Treaty shall be observed.” Extradition Treaty, *supra* note 109, art. 15(1)(c), at 140.8.

322. *Lehder-Rivas*, 668 F. Supp. at 1528.

323. *United States v. Najohn*, 785 F.2d 1420 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 1009 (1986) (citing *Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979)). The *Lehder* court's interpretation of *Najohn's* consent exception states that the “requested government may waive specialty on additional charges not listed in the extradition request.” *Lehder-Rivas*, 668 F. Supp. at 1528.

324. *Lehder-Rivas*, 668 F. Supp. at 1528.

325. Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 26 U.S.T. 1441, T.I.A.S. No. 8118.

326. *Lehder-Rivas*, 668 F. Supp. at 1528.

the treaty to include participation in a CCE as an extraditable offense.<sup>327</sup> The court also stated that the treaty's specialty exception could encompass prosecution on the CCE charge.<sup>328</sup> Subsequently, the court found Lehder guilty and sentenced him to life in prison plus 135 years.<sup>329</sup>

The *Lehder* court's analysis indicates that a reasonable construction of the treaty provides for extradition of CCE offenses. Though the *Lehder* reasoning is persuasive, no guarantees exist that every United States court will follow this construction, since the treaty does not specifically provide for the extradition of those engaged in CCE. This absence of a specific provision for CCE offenses is one of the treaty's shortcomings.

## B. *The Cabrera-Sarmiento*<sup>330</sup> Case

### 1. *Cabrera I*

Before February 1986, Jose Antonio Cabrera-Sarmiento, a resident of Colombia, was a fugitive from prosecution on several indictments pending in the Southern District of New York, the Southern District of Florida, and the State of Florida.<sup>331</sup> On February 14, 1986, Colombia extradited Cabrera and four others to the United States.<sup>332</sup> Cabrera and a co-defendant were taken to the Metropolitan Correctional Center, located in the Southern District of New York, after a stop for a medical exam and change of aircraft in Miami, Florida.<sup>333</sup> Upon his arrival in New York, an examination of the extradition papers showed that they only authorized Cabrera's prosecution on charges pending in the State of Florida, not on charges pending in the Southern District of New York.<sup>334</sup> The mistaken transportation to New York constituted the basis of Cabrera's arguments.<sup>335</sup>

Cabrera argued that since his extradition only authorized prosecution on the Florida charges, the transportation to, and arraignment in, New York violated the treaty, as well as the specialty doctrine.

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327. *Id.* at 1529.

328. *Id.*

329. G. GUGLIOTTA & J. LEEN, *supra* note 1, at 336; see L.A. Times, Oct. 15, 1989, at A11, col. 2.

330. *United States v. Cabrera-Sarmiento*, 659 F. Supp. 169 (S.D.N.Y. 1987).

331. *United States v. Warden, Metro. Correctional Center*, 629 F. Supp. 699 (1986).

332. *Id.*

333. *Id.*

334. *Id.* at 700.

335. See *Cabrera*, 659 F. Supp. at 170.

Thus, the Southern District of New York lacked personal jurisdiction over him.<sup>336</sup> He further contended that the New York arraignment denied the State of Florida the right to trial because Florida waived its right to proceed by knowingly permitting his transportation to the Southern District of New York.<sup>337</sup> Accordingly, Cabrera petitioned for a writ of habeas corpus praying for his return to Colombia.<sup>338</sup>

The United States government conceded that it transported Cabrera to New York incorrectly. However, it denied that in so doing, it violated the treaty.<sup>339</sup> The government argued that it did not violate the specialty doctrine and that, in any event, Cabrera possessed no standing to raise these issues.<sup>340</sup>

The court denied Cabrera's application for a writ of habeas corpus.<sup>341</sup> The court stated that the Colombian government evinced its view that the United States had not violated the treaty in a diplomatic note received from the Colombian embassy in connection with these proceedings.<sup>342</sup> From the tenor of the diplomatic note, the court

336. *Warden*, 629 F. Supp. at 700.

337. *Id.* Cabrera also complained of mistreatment by United States government officials in the course of his transportation from Colombia to New York. An affidavit of Kenneth Hill, Supervisory Inspector of the United States Marshal's Service, related the circumstances under which Cabrera was transported. This affidavit persuaded the court that Cabrera was not mistreated at the hands of United States personnel. *Id.* n.1.

338. *Id.* at 699.

339. *Id.* at 700.

340. *Id.*

341. *Warden*, 629 F. Supp. at 700.

342. *Id.* Cabrera impleaded the Colombian government in the case. On February 26, 1986, a Colombian representative visited Cabrera at the Metropolitan Correctional Center. After the visit, the Colombian embassy addressed a diplomatic note to the United States, which read:

[I]n accordance [with] instructions from the Minister of Justice, Enrique Paraj Gonzalez, [the Ambassador] transmits herewith . . . the official position of the Colombian Government with regard to one Colombian citizen Jose Antonio Cabrera-Sarmiento.

1) According to Executive Resolutions 339 of November 20, 1985 and 43 of February 12, 1986, Mr. Cabrera can only be judged in the United States for [Florida indictments and charges specified].

2) The Government of Colombia is aware that Mr. Cabrera-Sarmiento is presently detained in New York City, where he was taken on his arrival from Colombia to United States territory.

3) The Government of Colombia reiterates, once more, that Mr. Cabrera Sarmiento can only be judged for the above-mentioned counts, which are in the competence of the State of Florida, not of the Court of the State of New York.

4) The Government of Colombia wishes to state that the Extradition Treaty between Colombia and the United States will be honored if Mr. Cabrera-Sarmiento is tried for the charges of the Court of Florida, not for the charges of the State of New York. The Embassy of Colombia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

reasoned that Colombia found no violation in the current proceedings and that Cabrera's transportation to Florida for trial satisfied the treaty.<sup>343</sup> The court focused on the fourth paragraph of the diplomatic note to support its reasoning. This paragraph stated that "[t]he Extradition Treaty between Colombia and the United States will be honored if Mr. Cabrera-Sarmiento is tried for the charges of the Court of Florida, not for the charges of the State of New York."<sup>344</sup>

With regard to the specialty doctrine, the court stated that Cabrera's extradition and transportation to New York did not violate article 15 of the treaty, which embodies specialty.<sup>345</sup> The court reasoned that since Cabrera was neither tried nor punished in this district, his de facto detention did not violate specialty.<sup>346</sup> According to the court, the New York detention was not for offenses other than those for which Cabrera had been charged in Florida.<sup>347</sup> Further, the New York detention resulted from the United States government's original lack of knowledge<sup>348</sup> regarding the terms of the extradition and Cabrera's own request that United States officials allow him to remain in the Southern District of New York pending the determination of his petition for habeas corpus.<sup>349</sup> Finally, even though Cabrera appeared and was arraigned before a Magistrate in the Southern District of New York prior to determining the scope of the extradition papers, he still had not undergone trial or punishment for any charge.<sup>350</sup> Thus, the court reasoned that Cabrera's transportation and arraignment in the Southern District did not violate the specialty doctrine.<sup>351</sup>

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343. *Id.* at 700-01. The court stated that "the government of Colombia finds no violation in what has occurred to date and confirms that the treaty will be satisfied if Cabrera is transported to and tried for the charges pending in Florida." *Id.*

344. *Id.* at 700.

345. *Id.* at 701.

346. *Warden*, 629 F. Supp. at 701.

347. *Id.*

348. It was this lack of knowledge that resulted in Cabrera's mistaken transportation. *Id.* at 700.

349. *Id.* at 701. Two reasons existed for the United States' lack of awareness of the extradition's limitations to the Florida charges. First, communications with the United States Department of Justice Office of International Affairs led the government to believe that the Colombian Supreme Court had approved Cabrera's extradition on the charges pending in the Southern District of New York. Second, the Colombian government provided the United States Marshals with documents written in Spanish, despite the marshals' inability to read Spanish. *Id.* n.3.

350. *Id.*

351. *Warden*, 629 F. Supp. at 701. The court also agreed with the United States govern-

## 2. Cabrera II

On January 26, 1987, following the conclusion of Cabrera's prosecution in Florida, he returned to the Southern District of New York on a writ of habeas corpus *ad prosequendum*.<sup>352</sup> In this proceeding, Cabrera renewed his argument that the specialty doctrine barred any prosecution in the state of Florida and the Southern District of New York.<sup>353</sup>

In his first argument, Cabrera claimed that sworn affidavits from certain Assistant United States Attorneys in support of the United States' extradition request stated that if acts which resulted in his extradition to Florida were identical to those charged in the Southern District, the government would not prosecute the New York indictment.<sup>354</sup> Cabrera argued that if the United States Attorneys made these promises in order to obtain extradition on the New York indictment by satisfying Colombia's concern over double jeopardy, the specialty doctrine would bar federal prosecution for the same acts which the Florida prosecution alleged.<sup>355</sup> In response, the court examined the affidavits in camera and found no promise or assurance from the United States to the government of Colombia that the United States would not prosecute Cabrera in the Southern District for the same acts charged in Florida.<sup>356</sup>

In his second argument, Cabrera contended that the Colombian executive resolution of March 18, 1986 authorizing his extradition had no validity.<sup>357</sup> Cabrera claimed that when the resolution was is-

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ment, stating that Cabrera did not possess standing to raise issues of treaty violation or specialty doctrine violation. *Id.*

352. *United States v. Cabrera-Sarmiento*, 659 F. Supp. 169, 171 (S.D.N.Y. 1987). The court noted that on March 18, 1986, the Colombian President signed Executive Resolution No. 92, which authorized Cabrera's extradition on the indictment pending in New York. On January 26, 1987, Cabrera returned to New York on the writ of habeas corpus *ad prosequendum*. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* The court stated that one of the affidavits contained a discussion of the Justice Department's *Petite* policy regarding federal prosecutions of violations that have already been prosecuted at state level. *See Petite v. United States*, 361 U.S. 529 (1960). However, this affidavit made no promises of nonprosecution to the Colombian government. The court stated that, from the face of the affidavit, the government reserved the right under the *Petite* policy to prosecute the defendant in both jurisdictions. Accordingly, the court rejected Cabrera's argument that his extradition did not authorize his prosecution on the Southern District of New York indictment. *Cabrera-Sarmiento*, 659 F. Supp. at 171.

357. *Cabrera-Sarmiento*, 659 F. Supp. at 172.



sued, he was under United States custody pursuant to an earlier extradition order.<sup>358</sup> Accordingly, Cabrera argued that he had no opportunity to challenge his extradition in Colombia.<sup>359</sup> The court disagreed. The court supported the government's position that Cabrera could have appealed his extradition to the Southern District of New York, since he could have appealed through counsel in Colombia who represented him in the extradition proceedings there.<sup>360</sup>

*Cabrera I* and *II* illustrate a key point. United States courts give great deference to communications that indicate Colombia's willingness to extradite an offender. *Cabrera I* relied on a diplomatic note from Colombia to uphold Cabrera's extradition and to reject his specialty doctrine claim. This type of ancillary consent to extradition by Colombia could prove of great value in trials where an extradited offender challenges the validity of his or her extradition.

### C. *The Alvarez-Moreno Case*

In contrast to *Cabrera I* and *II*, *United States v. Alvarez-Moreno*<sup>361</sup> is significant in post-extradition trials. In many instances, extradited defendants will attempt to limit the scope of evidence the government seeks to introduce against them.

In 1981, the DEA initiated "Operation Swordfish" to identify and apprehend narcotics money launderers. To facilitate this operation, the DEA created a sham corporation, Dean International Investments, to make the sort of money transfers that are attractive to drug traffickers.<sup>362</sup> In the course of the operation, Dean Investments attracted associates of Alvarez-Moreno, a drug trafficker, who ran his operations from Colombia.<sup>363</sup>

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358. *Id.*

359. *Id.*

360. *Id.* In reaching this conclusion, the *Cabrera* court relied on *United States v. Jetter*, 722 F.2d 371 (8th Cir. 1983). In *Jetter*, the defendants argued that they were denied due process when authorities failed to bring them before a judge in Costa Rica prior to extradition. The Eighth Circuit stated that this contention possessed no merit. The court could not discern a violation of the United States-Costa Rica extradition treaty because the treaty did not prohibit appearance without counsel. In considering the due process argument, the court stated that even if the defendant's rights were infringed, this did not deprive the district court of jurisdiction. The court could find no shocking conduct on the part of the United States that would militate against an exercise of jurisdiction. *Id.*

361. 874 F.2d 1402, 1403 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1484 (1990).

362. *Id.*

363. *Id.* at 1405. The facts of this case leading up to Alvarez-Moreno's arrest and extradition are convoluted. The DEA established Dean Investments in 1981. Frank Chellino, a DEA agent, posed as Frank Dean and ran the business, which specialized in money transfers. *Id.* at

In January 1982, the Colombian government arrested Alvarez-Moreno in Bogotá.<sup>364</sup> On October 14, 1982, the grand jury charged Alvarez-Moreno and others<sup>365</sup> in a fourteen-count indictment.<sup>366</sup> The indictment named Alvarez-Moreno in six charges, including engaging in a CCE.<sup>367</sup>

In February 1985, the Colombian government ordered the extradition of Alvarez-Moreno and two of his associates to the United States.<sup>368</sup> Pursuant to the extradition order, the Colombian government prohibited the United States from prosecuting the defendants on three of the charges.<sup>369</sup> Subsequently, the United States only tried Alvarez-Moreno on conspiracy to import cocaine, conspiracy to possess with intent to distribute cocaine, and engaging in a continuing criminal enterprise.<sup>370</sup>

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1403. In addition, two informants, Roberto Darias and Felipe Calderon, worked with Dean Investments to recruit individuals to launder money. *Id.* at 1404. In July 1981, Chellino, posing as Dean, met Manuel Sanchez, assistant vice president at the Bank of Miami. Later that month, Sanchez referred Lionel Paytubi to Dean Investments. Paytubi informed Dean that a woman named Marlene Navarro was interested in using Dean Investments to exchange a million dollars a week from small bills to large bills. *Id.* After a successful first transfer, Navarro took part in twenty to twenty-one transactions, according to government evidence. In January 1982, Carlos Alvarado, another associate of Navarro and Alvarez-Moreno, met with Darias, stated that he transported cash to Colombia for Alvarez-Moreno and offered Darias 100 kilograms of cocaine. *Id.* at 1405. In June 1982, Darias met with Oscar Garcia and Richard Jatter. Navarro told Darias that Jatter distributed cocaine in California for Alvarez-Moreno and that Garcia supervised cocaine distribution into the United States for Alvarez-Moreno. After several attempts to get Darias involved in illicit drug trafficking in the United States, the money transactions continued. In January 1982, the Colombian government arrested Alvarez-Moreno in Bogotá. *Id.* at 1406.

364. *Id.* at 1406.

365. Oscar Garcia Jatter and Ricardo Jatter were also indicted. The brothers were associates of Alvarez-Moreno who helped him distribute cocaine in the United States. *Id.* at 1405-06.

366. *Alvarez-Moreno*, 874 F.2d at 1407.

367. *Id.* The counts were as follows: Count I, conspiracy to violate the Travel Act in violation of 18 U.S.C. §§ 371, 1952; Count X, conspiracy to import cocaine into the United States in violation of 21 U.S.C. §§ 952(a), 963; Count XI, conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846; Count XII, using a communication facility in the commission of a conspiracy to distribute cocaine in violation of 21 U.S.C. § 843(b); Count XIII, using a communication facility in the commission of a conspiracy to import cocaine in violation of 21 U.S.C. § 843(b); and Count XIV, engaging in a CCE in violation of 21 U.S.C. § 848. *Id.*

368. *Id.*

369. *Id.* The Colombian government prohibited the United States from prosecuting the Travel Act violations and using communication facilities for drug distribution. *Id.*

370. *Id.* The jury in the United States District Court convicted Alvarez-Moreno and his associates on all counts of the indictment. The district court sentenced Alvarez-Moreno to ten years in prison for conspiracy to import cocaine, ten years in prison for conspiracy to possess

In the Eleventh Circuit, the key issue with regard to extradition was "whether the district court violated the extradition treaty when it admitted evidence of Alvarez-Moreno's arrest and prior money seizures."<sup>371</sup> Alvarez-Moreno argued that evidence of prior Colombian arrests and previous involvement in criminal drug trafficking violations breached provisions of the treaty.<sup>372</sup> In essence, Alvarez-Moreno argued that the specialty doctrine barred any introduction of evidence from offenses not listed in the extradition order.<sup>373</sup>

The Eleventh Circuit rejected the defendant's arguments and stated that article 15 of the treaty, which embodies the specialty doctrine, did not support Alvarez-Moreno's arguments.<sup>374</sup> The court held that once the grand jury has indicted a defendant and the court has begun trial for the offense listed in the extradition order, the specialty doctrine cannot limit the scope of admissible proof in the requesting state's forum in any way.<sup>375</sup>

The Eleventh Circuit concluded that the district court possessed broad discretion in determining the admissibility of evidence.<sup>376</sup> The court noted that the district court properly admitted evidence of Alvarez-Moreno's Colombian arrest because it related to the present of-

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cocaine with the intent to distribute, and twenty-five years in prison for the CCE violations. The terms were to run consecutively. *Id.*

371. *Alvarez-Moreno*, 874 F.2d at 1407. In November 1980, United States Customs Service agents arrested three associates of Alvarez-Moreno as their aircraft prepared to leave Opa Locka, Florida. *Id.* at 1406. In the aircraft, agents seized a duffel bag and five shoe boxes containing \$1.6 million in cash. The pilot had an additional \$64,000 in his suitcase. *Id.* In January 1982, the Colombian government arrested Alvarez-Moreno in Bogotá. Police found three bags of cocaine and Alvarez-Moreno's business card. Charges were later dismissed. *Id.*

372. *Id.* at 1413.

373. *See id.*

374. *Id.* The court stated that "[n]either the doctrine of specialty nor the articulation of Article 15 lends support to the appellant's argument that the evidence obtained is inadmissible to prove their respective roles in the enterprise." *Id.* at 1413-14.

375. *Id.* at 1414.

When a grand jury indicts a defendant, and the defendant is tried for the precise offense contained in the extradition order, the doctrine of specialty does not purport to regulate the scope of proof admissible in the judicial forum of the requisitioning state.

*Id.*; see also *United States v. Archbold-Newball*, 554 F.2d 665, 685 (5th Cir.), *cert. denied*, 434 U.S. 1000 (1977) (allowing introduction of evidence to prove a conspiracy count and holding that specialty does not permit foreign intrusion into the evidentiary or procedural rules of the requesting state); *United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976).

376. *Alvarez-Moreno*, 874 F.2d at 1414. The court stated that at pre-trial, the government argued that the Opa Locka seizure and Alvarez-Moreno's Colombian arrest were admissible as extrinsic evidence under Federal Rule of Evidence 404(b). The court admitted the evidence on this ground. *Id.*

fense for which the defendant was being tried.<sup>377</sup> The district court also allowed the government to present evidence of Alvarez-Moreno's Colombian arrest because it bore on the narcotics conspiracies charges and because the offense occurred in the same time period.<sup>378</sup> The court held that the district court properly admitted the evidence of Alvarez-Moreno's past violations to reflect the scope of the conspiracies, to prove intent, and to aid the jury in determining the character of the offenses charged.<sup>379</sup>

*Alvarez-Moreno* demonstrates that once extradited, the defendant cannot use the defense of specialty as a shield to limit the introduction of evidence against him. Further, in combination with *Lehder* and *Cabrera I and II*, this case also represents the current attitude of United States courts toward specialty doctrine arguments mounted by extradited defendants, in the context of the treaty. In all four of these cases, the defendants argued that specialty should either bar or limit some aspect of their extradition from Colombia. All four courts rejected these arguments. Although these cases possibly reflect a trend toward nonrecognition, or at least a dilution, of the specialty doctrine, the United States and Colombia should not rely on the courts to facilitate extradition of cartel members. In examining these cases and the treaty, several "holes" have been discovered. Three avenues exist whereby the United States and Colombia can remedy these shortcomings.

## VI. PROPOSALS TO STRENGTHEN THE TREATY

One of the treaty's major shortcomings is its failure to list analogs to the United States' CCE and RICO offenses. In attempting to solve this problem, three solutions become evident. Though proposed in the specific context of dealing with the failure to list CCE and RICO, these solutions also have a general relevance in different aspects of extradition of the *narcotraficantes*.

First, in dealing directly with CCE and RICO, the United States and Colombia could amend the treaty's schedule of offenses to include predicate offense crimes such as CCE and RICO. This proposal may encounter dual criminality problems, since Colombian law does not specifically provide for CCE and RICO offenses. Alternatively, or additionally, the United States and Colombia could amend article 2 of

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377. *Id.*

378. *Id.*

379. *Id.*

the treaty, which deals with extraditable offenses. The two countries could add a section to this article allowing for extradition for predicate offense crimes. Although these predicate offense crimes may possess no direct counterpart in Colombia, this proposed section could provide for extradition if Colombian law makes the balance of the predicate offenses extraditable.

Second, in effecting extradition of cartel members, Colombia could provide the United States with written documentation authorizing extradition for CCE, RICO, and any other offense that the two countries may want to prosecute. Such ancillary documentation of the countries' intent proved invaluable in *Cabrera*. The *Cabrera* court utilized a Colombian diplomatic note which stated that no treaty violation had occurred in allowing Cabrera's trial to proceed in the Southern District of New York.<sup>380</sup> In a slightly different context, the *Lehder* court relied on a Colombian Supreme Court decision that lacked a specialty doctrine objection to Lehder's CCE charges in holding that Lehder's extradition for CCE was valid.<sup>381</sup> Further, the Ninth Circuit gave this sort of ancillary consent favorable review in *Najohn*, stating that letters from the Swiss government allowed prosecution of the extradited offender. One clear advantage of this proposal is that it circumvents the dual criminality problems that the first proposal might produce. Since the text of the treaty plays no role in this solution, extradited defendants cannot argue that the text does not list the extradited offense. This proposal could circumvent specialty doctrine arguments by showing the requested country's consent to prosecution on charges other than that for which the offender was extradited.

Third, the United States and Colombia could leave the treaty unchanged and rely on the recent pro-extradition interpretation given by United States courts. The district courts and courts of appeals have seemingly adopted a position favoring extradition of cartel members, as exhibited in *Lehder*, *Cabrera I* and *II*, and *Alvarez-Moreno*. The *Lehder* court, in particular, seemed to go out of its way to support extradition in holding that CCE was an extraditable offense.<sup>382</sup> However, it seems unwise to risk valid extradition of drug traffickers in courts whose rulings may vary. Although there seems to be an expanding body of law favoring extradition, the United States and Co-

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380. *Warden*, 629 F. Supp. at 700-01.

381. *Lehder-Rivas*, 668 F. Supp. at 1526.

382. *See id.* at 1526-27.

Colombia should leave nothing to chance and adopt either or both of the first two proposed solutions.

## VII. CONCLUSION

Extradition is one of the most potent weapons that the United States and Colombia have in their battle against the Medellín cartel's cocaine trafficking. It offers a method to remove cartel members from their "untouchable" position in Colombia and place them on trial in the United States, where their wealth and political power have less influence. Several factors make extradition an extremely important facet in the prosecution of these criminals. First, the Medellín cartel has corrupted and incapacitated the Colombian judiciary. Second, the Colombian people, in general, have no desire to pursue, capture, and place the traffickers on trial because of what this process will cost them and their homeland.

Extradition remains the medium through which United States and Colombian law enforcement authorities can collaborate and transport the drug traffickers to a venue—the United States court system—that will effectively neutralize the cartel members' power and influence. However, in the general framework of the capture and prosecution of the *narcotraficantes*, one must recognize that extradition to the United States stands as only one step in the process. Colombian law enforcement authorities must first hunt down and capture the cartel members—no small task given the wealth, power, and mobility that the traffickers possess. Only at this point does extradition become a viable option.

Doctrines of international extradition and shortcomings in the treaty itself present obstacles to a quick and easy transport of drug traffickers to the United States. Given the rapidly evolving sophistication of the cartels, the United States and Colombia should take steps to amend the treaty to ensure that important offenses such as money laundering, tax evasion, CCE, and RICO become expressly extraditable.

In the final analysis, the future success of the extradition of cartel members will depend on the commitment of the two participating countries. Colombia faces far more pressure than does the United States in the campaign against the traffickers. The onus firmly remains on Colombia to continue the campaign against the traffickers in the face of unrelenting threats, intimidation, and violence. The attitude of Colombia's citizenry, while understandable, presents a prob-

lem to this campaign. On the other hand, President Barco's prompt resurrection of the treaty and the Colombian government's quick extradition of Eduardo Martinez Romero after Luis Carlos Galan's assassination illustrate the strength of the Colombian government's resolve. Ultimately, the battle against the Medellín cartel may turn into a waiting game, with the cartel gambling that their power can outlast the Colombian government's commitment to extradition.

*Steven Y. Otera\**

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\* This Comment is dedicated to my father, whose support and encouragement have been invaluable.