

Traffic in the Traffickers: Extradition and the Controlled Substances Import and Export Act of 1970

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On March 15, 1971, Auguste Joseph Ricord¹ was indicted in the United States District Court for the Southern District of New York² as the leader of a narcotics smuggling conspiracy³ responsible for a sizable share of the United States drug market. Ricord, himself, was characterized at the time by United States Attorney Whitney North Seymour as "one of the most important, if not the most important, source"⁴ of United States heroin in recent years.

Since Ricord, a French citizen residing in Paraguay, was outside United States territory, his trial on these charges became dependent upon the success of United States efforts to obtain his custody.⁵ Accordingly, the State Department on April 3, 1971, sought Ricord's provisional arrest in Paraguay⁶ and on May 24, 1971, made a formal request for his extradition.⁷

The United States request was based on the 1913 Extradition

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1. Ricord went by many names. He was initially indicted as Andre Ricord. Other aliases included Andre Cori, Lucien Darguelle, and Lucien Cegelles. Affidavit of Paul Boulad, Special Agent, United States Treasury Department, April 12, 1971, at 6, attached to Indictment, United States v. Ricord, Crim. No. 71-290 (S.D.N.Y., filed March 16, 1971) [hereinafter cited as Indictment].

2. United States v. Ricord, Crim. No. 71-290 (S.D.N.Y.), *aff'd in open court*, 478 F.2d 1397 (2d Cir.), *cert. denied*, 42 U.S.L.W. 3352 (U.S. Dec. 11, 1973).

3. Ricord was charged with violations of 21 U.S.C. §§ 173-74 (1964), *repealed*, Act of Oct. 27, 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1291 (conspiracy to unlawfully import, transport and sell, or facilitate the transportation and sale of, narcotics), Indictment, *supra* note 1, at 1.

4. Affidavit of Whitney North Seymour, May 20, 1971 (Application for Warrant of Arrest), at 2, Indictment, *supra* note 1.

5. Government sources have indicated that the Bureau of Narcotics and Dangerous Drugs initially suggested that Ricord be kidnapped from Paraguay rather than formally extradited. However, this method was strongly opposed by the United States Ambassador in Asunción and by the State Department.

Where such techniques have been used in the past, subsequent convictions of the kidnapped offenders have been upheld by United States courts even though such abductions on foreign soil by government officials are clearly violations of international law. See, e.g., *Ker v. Illinois*, 119 U.S. 436 (1886); *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir. 1957), *cert. denied*, 355 U.S. 873 (1958). See generally Cardozo, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961).

6. United States Embassy, Asunción, Note No. 124 (Apr. 3, 1971).

7. United States Embassy, Asunción, Note No. 186 (May 24, 1971).

Traffic in the Traffickers

Treaty with Paraguay⁸ which provided for the surrender of fugitives charged with any of a list of enumerated offenses, where the acts charged were committed within the jurisdiction of the requesting state and constituted a crime under the laws of both states.⁹ When the Ricord extradition request came before the Paraguayan District Court in Asunción, it was argued that none of these criteria had been met. Violations of narcotics laws were not listed as treaty offenses; Ricord admittedly had never been inside the United States but had directed his smuggling ring from abroad; and, finally, Paraguayan law had no counterpart to the United States statutes under which Ricord was charged. The Paraguayan Court found for Ricord and denied extradition.¹⁰

In many respects the position of the court was consistent with contemporary extradition practice. Indeed, it is extremely doubtful in light of previous cases whether the United States itself would have been willing or able to grant extradition under similar circumstances. Nonetheless, the official United States reaction to the Paraguayan decision was extremely critical and the episode touched off a campaign of some 14 months' duration during which the United States pressured the Paraguayan government in a heavy-handed effort to overturn the lower court's decision.¹¹ Whether or not the result of these tactics, the district court's decision was reversed by the Paraguayan Court of Appeals¹² and the request for Ricord's extradition was granted.

The Ricord affair, aside from reinforcing the Latin view that "gun-boat diplomacy" is not dead,¹³ illustrates the complex conceptual and practical difficulties that often arise where states are faced with criminal conduct that transcends national boundaries.

8. Oct. 16, 1913, 38 Stat. 1754 (1915), T.S. No. 584 (effective Jan. 17, 1949).

9. *Id.* art. I.

10. The district court opinion is unreported. A synopsis of the decision is available from the State Department file on the Ricord Case.

11. Among other things the United States closed down substantial lines of credit to Paraguay. *TIME*, August 28, 1972, at 24.

12. Decision of August 15, 1972, copy on file at the Department of State.

13. The inference is not difficult to draw when the reaction of the United States in the Ricord affair is compared with the attitude taken in two contemporaneous cases in which extradition requests involving drug traffickers were refused by the United Kingdom.

In August 1969, in the case of Egan and Hill, the United Kingdom declined to extradite two members of an Australian based narcotics smuggling ring that was claimed by the Department of State to have been responsible for the illegal importation of sizable quantities of heroin into the United States. Egan and Hill were charged with violations of the same statutes involved in the Ricord request and the United Kingdom refused extradition on the same basis as the Paraguayan lower court in Ricord, having no counterpart to such offenses in its own law.

On June 20, 1972, the United Kingdom also refused extradition of Jo Ann Tannehill Ewasko charged with the illegal importation of a sizable quantity of hashish into the

I. Overview

A. *Transnational Criminal Conduct*

International attitudes toward the treatment of multistate criminal conduct remain fairly primitive. The often rigid adherence of nations to ancient notions of sovereignty has substantially retarded the development of any significant system of international criminal justice.¹⁴ Thus, the definition and punishment of crime, regardless of its international implications, is treated primarily as a problem to be approached at the municipal level. Yet, even here, nations are frequently limited in their ability to deal with multistate crime by a highly artificial understanding of prescriptive competence¹⁵ often framed in terms of the capacity of a state to regulate particular conduct, an ability traditionally thought to require some sovereign connection with either the person or the activity concerned.

The *Harvard Research on Jurisdiction with Respect to Crime*

United States. As in Ricord, this request was denied on the grounds that the acts charged did not constitute a treaty offense.

In both Egan and Hill, and Ewasko, the matter was dropped by the United States once extradition was denied. The description of these two cases is based upon correspondence on file at the Department of State.

14. Movement in this direction has been urged periodically by scholars in the field but little has come of it. A good general discussion of the problem can be found in Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBLEMS 263 (1950), reprinted in O. MUELLER & E. WISE, INTERNATIONAL CRIMINAL LAW 3 (1965).

Most agreement on internationally recognized standards of criminal law has been found in the areas of genocide and other offenses thought to be violative of the peace and security of mankind. See, e.g., Mueller, *The United Nations Draft Code of Offenses Against the Peace and Security of Mankind: An American Evaluation*, in O. MUELLER & E. WISE, *supra* at 597. One interesting step in the direction of an international criminal jurisprudence is the as-yet unadopted Draft Statute for an International Criminal Court prepared under the auspices of the United Nations Commission on International Criminal Jurisdiction in 1953, 9 U.N. GAOR, Supp. 12, U.N. Doc. A/2645 (1954). For a discussion of the Draft Statute, see Klein and Wilkes, *United Nations Draft Statute for an International Criminal Court: An American Evaluation*, in O. MUELLER & E. WISE, *supra* at 526. An excellent historical background is also found in a 1949 study of the area prepared under the auspices of the United Nations. Historical Survey of the Question of International Criminal Jurisdiction, Memorandum submitted by the Sec. Gen., U.N. Doc. A/GN.4/7/Rev. 1 (1949).

15. The term prescriptive competence is used in this article to mean the power of a state (or other lawful entity) to make rules that are authoritative. This usage of the term stems from the work of Professor McDougal and his associates, although it is used in this article in a slightly broader sense than Professor McDougal might recognize. For a recent and eloquent statement of their position and their use of the term see McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

The term prescriptive competence intentionally contrasts with the older terms of legislative and adjudicatory competence which were always confined to the role implicit in the words. These older terms were never sufficiently descriptive, or accurate for that matter, inasmuch as courts frequently legislate and legislatures frequently adjudicate. The companion term to prescriptive competence is applicative competence, used to mean the power to apply one's law to an individual or set of individuals.

Traffic in the Traffickers

has identified five general theories upon which states have, from time to time, claimed prescriptive competence.

These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.¹⁶

With the possible exception of the universality principle, all of the above theories for the justification of prescriptive competence are the outgrowth of notions of state sovereignty. The ability of a state to control conduct occurring within or having a substantial effect upon its territory; the capacity of a state to regulate the conduct of its citizens and the power to attach consequences to behavior injurious to them; the competence to protect vital national interests; all are claimed as incidents of sovereignty. Thus, prescriptive competence is thought to be allocated to national bodies, not with a view toward the promotion of any functional concerns of the international community at large, but rather as a result of an unyielding adherence to sovereignty-oriented thinking.

This becomes most evident where conflicts arise between states having concurrent jurisdiction over a particular activity. As a Reporter's Note in the *Restatement of Foreign Relations Law of the United States* points out:

16. *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935). The *Harvard Research* contains the following comments on the five principles:

Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

Id.

A state that has made its law applicable to particular conduct has expressed a state policy with respect to that conduct. If another state has by its law dealt in a contrary way with the same conduct, a conflict arises between the policies of the two states. In this policy conflict international law is normally neutral, provided both states have bases of jurisdiction that international law recognises.¹⁷

As a result of this failure of international law to provide any real guidance for the functional allocation of prescriptive competence, states have tended to rely upon the territoriality, and to a lesser degree, nationality, principles as primary bases for the assumption of such competence. The definition and punishment by a state of conduct occurring within its own territory, or the conduct of its nationals anywhere, is less likely to affect the interests of any other state and thus create diplomatic difficulties.

One consequence of this fairly rigid conception of prescriptive competence has been the consistent refusal by national courts to enforce foreign penal law to punish behavior which has occurred or was focused abroad. As the United States Supreme Court explained in *The Antelope*:¹⁸

No principle of general law is more universally acknowledged than the perfect equality of nations. . . . It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself but its legislation can operate on itself alone. . . . The courts of no country execute the penal laws of another.¹⁹

At the same time the conventional understanding often leads to a similar reluctance on the part of nations to apply domestic criminal law to foreign activities in which no identifiable local interest is involved. Hence a violation of foreign law is rarely assimilated to a violation of domestic law in these cases.²⁰

The result is not particularly satisfying. A criminal able to place himself outside of the territory of a state in which he has committed a crime generally places himself beyond the reach of the law he has

17. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 39, Reporter's Note 1, at 113 (1965) [hereinafter cited as RESTATEMENT].

18. 23 U.S. (10 Wheat.) 66 (1825).

19. *Id.* at 122-23.

20. This is particularly true of common law countries. Where civil law jurisdictions are concerned, however, there may be some movement toward a view of penal law more in keeping with the realities of twentieth century mobility. The German Penal Code provides one example of this approach. See StGB § 4(2), German Penal Code of 1871, as amended June 11, 1957 (Mueller & Buergethal transl. 1961).

Traffic in the Traffickers

violated. Hence, a sizable impediment to the effective regulation of criminal activity emerges, based not on any recognizable concern of states to protect such conduct, but rather on what is in many respects an artificial allocation of jurisdictional competence.

The traditional solution for this particular problem has been the device of extradition, that is, the surrender of an offender by a state having control of him to a state jurisdictionally competent to try and punish the offenses charged. Where narcotics crimes are concerned, this process has become increasingly important to the United States in recent years,²¹ although, as the Ricord case indicates, its operation has not always provided a smooth and simple answer to the problem.

B. *Narcotics Offenses*

Increased United States reliance upon extradition has resulted largely from the growing use of United States statutes to reach narcotics traffickers operating abroad. Prior to 1970 the government relied principally on conspiracy statutes such as that involved in the Ricord case.²² With the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970,²³ however, the legislative attack on foreign based traffickers was substantially broadened.

Title III of the new statute,²⁴ known as the Controlled Substances Import and Export Act, deals with the international aspects of drug control and contains those provisions intended to have extraterritorial effect. One section in particular breaks new ground for United States penal legislation by extending the force of United States narcotics law to a degree not heretofore seen; that provision is § 1009. It reads:

It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II--

- (1) intending that such substance be unlawfully imported into the United States; or
- (2) knowing that such substance will be unlawfully imported into the United States.

21. Government sources report that United States requests for extradition based upon narcotics violations have soared in recent years and today take up the majority of time spent by the State Department on extradition matters.

22. See, e.g., *Marin v. United States*, 352 F.2d 174, 177 (5th Cir. 1965); *United States v. Eliopoulos*, 45 F. Supp. 777, 779 (D.N.J. 1942). In at least one instance an alien conspirator acting abroad has been convicted on both conspiracy and substantive counts. See *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967).

23. Act of Oct. 27, 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections of 21 U.S.C. and 42 U.S.C.).

24. 21 U.S.C. §§ 951-66 (1970).

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.²⁵

When broadly viewed, § 1009 applies to an unusually large variety of individuals and offenses. In proscribing the manufacture and distribution of narcotics based solely upon the knowledge that such substances, or the intention that such substances, will be imported into the United States, the section is conceivably applicable to conduct occurring abroad regardless of both the nationality of the persons involved and the actual effect of such activity within the United States.²⁶

The expansiveness of this new section will undoubtedly require even wider use of extradition to bring offenders to United States courts. Whether contemporary extradition theory and practice is capable of accommodating the approach is, however, another matter.

II. The Framework for Extradition in Contemporary Practice

Although a number of early publicists, including Grotius and Vattel,²⁷ had suggested that international law placed an affirmative obligation upon states to extradite criminal offenders, the definition and use of extradition has occurred largely through the treaty process.²⁸ Thus, it is commonly recognized today that states have no obligation to extradite absent a treaty.

While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled, and it has been said that it is under a moral duty to do so, . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when created by treaty.²⁹

25. 21 U.S.C. § 959 (1970) [hereinafter cited as § 1009]. Controlled substances are defined and listed in 21 U.S.C. §§ 802(6), 812 (1970).

26. The provision is additionally complicated by § 1013 of the Act, 21 U.S.C. § 963 (1970), which prohibits attempts or conspiracies to commit violations of title III, presumably including § 1009.

27. See, e.g., H. GROTIUS, *DE JURE BELLI AS PACIS* 528 (2 Carnegie Classics of International Law transl. 1925); E. VATTEL, *LE DROIT DES GENS* 212, 311-13 (1 Carnegie Classics of International Law transl. 1916).

28. 1 J. B. MOORE, *A TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 8-20 (1891) [hereinafter cited as MOORE].

29. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

Traffic in the Traffickers

Nevertheless, a number of states surrender fugitives, even in the absence of a treaty obligation, as an act of comity, although in some instances domestic laws authorizing surrender are conditioned upon factors such as reciprocity or the existence of dual criminality. At the time of the *Harvard Research in International Law* the extradition law of Sweden provided, for example, that:

At the request of the government of a foreign State a person who resides in the Kingdom and who is suspected of, charged with, or sentenced for a crime, may be extradited to the foreign State as provided in this law.

Extradition may take place even though the requisition in the matter is not based upon an agreement with the foreign State, provided, however, that unless special circumstances occasion an exception, extradition in such cases may be granted only on the condition that the foreign State promise to grant a requisition made by Sweden in a similar case.³⁰

Additionally, the following provision is found in the law of Thailand:

The Royal Siamese Government may at its discretion surrender to foreign States with which no extradition treaties exist persons accused or convicted of crimes committed within the jurisdiction of such States, provided that by the laws of Siam such crimes are punishable with imprisonment of not less than one year.³¹

The United States, on the other hand, is not presently able to extradite in the absence of a treaty. As a result, the State Department has taken the position that it will neither grant nor request extradition as a matter of comity from governments with which the United States has no treaty in force.

Generally, this Government does not request surrender as an act of comity, since in the few cases where it has done so, it has been necessary to point out to the government of the asylum country that this Government would be unable to comply with such a request if it should receive one. Such a statement usually has the effect of causing the requested government to decline surrender.³²

30. Law Regarding the Extradition of Criminals § 1 (unofficial transl. in *Harvard Research in International Law, Extradition*, 29 AM. J. INT'L L. 414 (Supp. 1935)).

31. Art. 4, Extradition Act B.E. 2472 (Dec. 15, 1929) (official transl. quoted in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 736 (1968) [hereinafter cited as 6 WHITEMAN]).

32. Letter from Acting Secretary of State Smith to Lester Sandles, Apr. 23, 1953, quoted in 6 WHITEMAN 737. There may be some movement away from this position, however. In recent years the United States has seemed more willing to request extradition of narcotics offenders as a matter of comity and has had some success in this

There appears to be no policy justification or constitutional imperative that compels such rigidity. The Supreme Court has recognized that, while the Executive has no inherent authority to surrender persons accused of crimes to requesting states, either a treaty or an act of Congress may confer such a power.³³ Nevertheless, existing United States legislation expressly requires that its provisions

relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.³⁴

The origin of this requirement can be traced back to 1848,³⁵ the year of the first federal enactment on the subject and an era in which the United States had extradition agreements only with France and Great Britain. Extradition has become considerably more important in the interim; yet, no effort has yet been made to bring existing legislation into conformity with current needs.

Where the obligation to extradite is secured by treaty, such agreements are traditionally of a bilateral nature, although an increasing number of multilateral arrangements, largely on a regional basis, have been concluded in recent years.³⁶ Existing treaties either specify a list of offenses for which extradition must be granted or provide generally that for a crime to give rise to extradition it must be a crime under the laws of the requesting and requested states, punishable generally by imprisonment in excess of a specified period.³⁷ With the single exception of the multilateral Montevideo Convention of 1933,³⁸ United States extradition treaties have been of the

regard. For example, in 1971 the United States successfully extradited Charles Laurent Fioconi and Jean Clude Kella from Italy for their part in a conspiracy to import heroin into the United States in violation of 21 U.S.C. § 174 (1964) (repealed by Act of Oct. 27, 1970, Pub. L. No. 91-51, 84 Stat. 1236, 1291). Since the United States extradition agreement with Italy does not cover narcotics offenses, Italian cooperation with the United States was accomplished as a matter of comity. *See Fioconi v. Attorney General*, 462 F.2d 475, 476-77 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

33. *See, e.g.*, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

34. 18 U.S.C. § 3181 (1970).

35. Act of August 12, 1848, ch. 167, § 5, 9 Stat. 303. "[T]his act shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer."

36. An excellent example of such a bilateral approach is the European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 273.

37. *Id.* art. 2(1).

38. Multilateral Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111 (1936), T.S. No. 882 (effective Jan. 25, 1935). Article 21 of the Convention provides, however, that: "The present Convention does not abrogate or modify the bilateral or collective treaties, which at the present date are in force between the signatory States. Nevertheless, if any of said treaties lapse, the present Convention will take effect and

Traffic in the Traffickers

list variety. The enumeration of extraditable crimes has one principal drawback: The list of offenses can usually be changed or enlarged only by negotiated supplementary agreements.³⁹ The absence of a particular offense from the treaty list will normally preclude extradition of offenders charged with such crimes. Indeed, this was a major problem in the Ricord case discussed earlier.⁴⁰

The United States is currently a party to extradition agreements involving over 90 countries.⁴¹ Of these, 56 recognize violations of the narcotics laws as extraditable offenses.⁴² In addition, the recently signed Protocol⁴³ amending the Single Convention on Narcotic Drugs⁴⁴ contains the following proviso with regard to a long list of various narcotics offenses:

- (i) Each of the offences enumerated in . . . shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

become applicable immediately among the respective States, if each of them has fulfilled the stipulations of the preceding article.

Id. art. 21.

The United States currently has pre-existing extradition treaties with each of the signatories to the Convention. Thus the agreement is presently not operative for the United States. Other parties to the Montevideo Convention are Argentina, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama.

In the text and footnotes to follow all statements that indicate the number of extradition treaties in force are based on U.S. DEP'T OF STATE, TREATIES IN FORCE (1973).

39. For example, nearly half of those United States extradition treaties now having provisions concerning narcotics offenses required amendment through this process in order to bring narcotics crimes within their scope.

40. See p. 707 *supra*.

41. This figure is somewhat misleading since more than 28 countries arguably are covered by the Extradition Treaty with the United Kingdom, Dec. 22, 1931, 47 Stat. 2122 (1933), T.S. No. 849 (effective June 24, 1935), as a result of their former status as British colonies. See note 42 *infra*.

42. Aside from former British colonies, such treaties exist with the following countries: Albania; Argentina; Belgium; Brazil; Canada; Colombia; Cuba (extradition not presently available); Ecuador; France; Germany, Federal Republic of; Greece; Guatemala; Honduras; Iraq; Israel; Liberia; Lichtenstein; Lithuania (extradition not presently available); Luxembourg; Mexico; Monaco; New Zealand; Norway; South Africa; Sweden; Switzerland; Spain; and United Kingdom.

Those former British Colonies to which the State Department considers the Extradition Agreement with the United Kingdom applicable are: Australia; Barbados; Botswana; Burma; Ceylon; Cyprus; Fiji; Gambia; Ghana; Guyana; India; Jamaica; Kenya; Lesotho; Malawi; Malaysia; Malta; Mauritius; Nauru; Nigeria; Pakistan; Sierra Leone; Singapore; Swaziland; Tanzania; Tonga; Trinidad and Tobago; and Zambia. Letter from Knute E. Malmberg, Assistant Legal Adviser for Administration and Consular Affairs, U.S. Dep't of State, to Raymond P. Schafer, Chairman, National Commission on Marihuana and Drug Abuse, Aug. 10, 1971.

43. Protocol Amending the Single Convention on Narcotic Drugs 1961, March 25, 1972, T.I.A.S. No. 6289 (ratified by the United States Oct. 24, 1972) (not yet in force) [hereinafter cited as Protocol].

44. Single Convention on Narcotic Drugs 1961, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298 (effective June 24, 1967) [hereinafter cited as Single Convention].

(ii) If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences enumerated Extradition shall be subject to the other conditions provided by the law of the requested Party.

(iii) Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences enumerated . . . as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party.

(iv) Extradition shall be granted in conformity with the law of the Party to which application is made, and . . . the Party shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.⁴⁵

While this provision operates to ensure that various types of narcotics offenses⁴⁶ will be recognized as extraditable crimes among the signatories, the surrender of offenders under it must be accomplished within the existing framework of the extradition process. In this regard there exist several significant problem areas. Among these are difficulties relating to the jurisdictional competence of the requesting state, the characterization of the acts for which the request is made, and the nationality of the person requested.

A. *Jurisdictional Competence*

As with the ability to prosecute crime generally, the capacity to demand extradition of an offender has traditionally depended upon the competence of a requesting state to exercise prescriptive competence over the offense for which a request is made. The reasoning is simple enough. If the conduct involved is not recognized as within the proper regulatory sphere of a requesting state, that state cannot validly attach penal consequences to such conduct. Where this is the case, there is thought to be no acceptable basis upon which extradition can be granted in light of the traditional rationale for the process.

The concept is complicated by current treaty practice on the sub-

45. Protocol art. 14(2)(b)(i-iv).

46. Single Convention art. 36(1) lists the offenses condemned by the Convention. This article is discussed in detail at p. 736 *infra*.

ject. Since many extradition agreements require a far more restrictive jurisdictional nexus with the acts for which extradition is sought than that necessary even under commonly recognized principles of international law, extradition may not be available in a large variety of cases even where there may be an admittedly valid basis for the application of a requesting state's penal law to the conduct involved.

A United States request for extradition based upon § 1009 of the Controlled Substances Import and Export Act illustrates many of the difficulties with these rules. Since § 1009 applies to the manufacture or distribution of narcotics with the knowledge that such substances, or the intention that such substances, will be unlawfully imported into the United States, the conduct proscribed by this statute is such that violations of it will normally occur outside the territory of the United States.⁴⁷ Whether extradition is available for offenses based on the statute thus becomes dependent upon the willingness of other nations to recognize this attempt by the United States to extend the force of its laws abroad.

Whether an application of § 1009 to a given set of circumstances will be recognized by other nations as an acceptable exercise of jurisdiction on the part of the United States hinges upon a number of factors. In particular, the status of the individual and the nature and effects of the acts involved are important considerations.

1. *Application of § 1009 to United States Nationals Acting Abroad*⁴⁸

Insofar as § 1009 is applied to American citizens, it can be based upon the commonly accepted principle of prescriptive competence that permits a state to regulate the conduct of its nationals no matter where they be. Indeed, the statute could have gone further than it did in the regulation of the conduct abroad of United States citizens. It might have prohibited United States nationals anywhere in the

47. One exception would be a situation in which narcotics or other controlled substances are lawfully produced in the United States by an American manufacturer but exported abroad with the knowledge or intent that all or a portion of the drugs involved will be diverted into illicit channels and smuggled into the United States for unlawful sale here. For the most part, however, the statute, as expressly stated, is intended to cover foreign acts of manufacture or distribution:

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States.
21 U.S.C. § 959 (1970).

48. This section is written with traditional theories of prescriptive competence in mind. Were the international community to allocate jurisdiction on a truly functional basis without reference to the bias of earlier eras, it is not unlikely that principles of jurisdiction over a nation's own nationals might be developed in line with the broader considerations discussed in the sections which follow on jurisdiction over nonnationals. Since this is manifestly not the case, the treatment here relies upon existing standards and previously articulated principles.

world from manufacturing or distributing a controlled substance, either under certain conditions or absolutely, regardless of whether such substances were destined for import into the United States. The Supreme Court has recognized that such an exercise of prescriptive competence is constitutionally valid as well as consonant with generally recognized principles of international law.⁴⁹ A leading case on the subject is *Blackmer v. United States*.⁵⁰ A United States national permanently residing in France was punished in a contempt proceeding for failure to answer a subpoena directed to him under a United States statute requiring citizens out of the country to return and testify when subpoenaed in criminal cases. On review of his conviction the Supreme Court rejected the claim that the United States had no legislative power to impose its laws upon nationals abroad.

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook v. Tait*, 265 U.S. 47, 54, 56. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. *United States v. Bowman*, 260 U.S. 94, 102.⁵¹

While the United States has not acted with any great frequency to extend the force of its own legislation to citizens overseas, there are a few statutes extant which do apply by their terms to the conduct of nationals anywhere.⁵² Moreover, in certain areas, such as

49. See, e.g., *United States v. Bowman*, 260 U.S. 94 (1922) (conspiracy indictment).

50. 284 U.S. 421 (1932).

51. *Id.* at 436-37. As mentioned, the exercise of this extraterritorial prescriptive power over one's own nationals is limited by international law where appropriate. For example, an effort to enforce limitations on freedom of speech on one's national for conduct occurring outside of his own nation is arguably unlawful based on the expectations of the world's people which underlie the Universal Declaration of Human Rights. G.A. Res. 217A(III), U.N. Doc. A/811 (1948). More specifically most extradition treaties exempt "political" offenses. 6 WHITEMAN, *supra* note 31, at 800. Article 6 of the Extradition Treaty with the United Kingdom is illustrative:

A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character.
Extradition Treaty with the United Kingdom, Dec. 22, 1931, 47 Stat. 2122 (1933), T.S. No. 849 (effective June 24, 1935).

52. For example, the Logan Act provides that:

Any citizen of the United States, wherever he may be, who, without authority of

economic regulation, courts have construed statutes which do not specifically indicate the extent of their application, but rather are framed in broad language, to apply also to the conduct of nationals out of the country.⁵³ Such interpretations have been based largely on the view that Congress intended in each act to regulate to the full extent of its capability to do so.⁵⁴ In the majority of cases, however, United States statutes are, as indicated in *Blackmer*, interpreted "to apply only within the territorial jurisdiction of the United States,"⁵⁵ unless an extraterritorial focus is expressly indicated by the Congress as in § 1009.

The United States approach is somewhat conservative when compared to the position taken by many civil law countries which generally consider their domestic law to be binding almost in its entirety on citizens abroad. The German Penal Code is illustrative of the Continental understanding:

Sec. 3. Applicability to Germans

1. German criminal law applies to the deed of a German citizen, no matter whether it was committed within Germany or abroad.
2. German criminal law is not applicable to a deed committed but not punishable abroad, if this deed is no offense abroad by reason of special conditions obtaining there.

the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or any agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

18 U.S.C. § 953 (1970). The statute is of 1799 vintage and may be of questionable constitutional validity today in light of contemporary notions of freedom of speech and travel. See, e.g., *United States v. Laub*, 385 U.S. 475 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958). But see *Zemel v. Rusk*, 381 U.S. 1 (1965). For an excellent discussion of the Logan Act, including its constitutional ramifications, see Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268 (1966). Regardless of its validity in this respect, the statute remains a useful example of the extent of regulatory jurisdiction over nationals and appears to be a reasonable exercise of legislative competence insofar as this issue is concerned.

53. See, e.g., *Steele v. Bulova*, 344 U.S. 280 (1952) (trademark violation under Lanham Act); *Branch v. F.T.C.*, 141 F.2d 31 (7th Cir. 1944) (violation of Federal Trade Commission Act).

54. See *Steele v. Bulova*, 344 U.S. at 287.

55. 284 U.S. at 437. For an interesting discussion of a recently proposed statute which would prescribe general rules of statutory construction by specifying situations in which broad United States statutes would specifically extend abroad, see Note, *Extraterritorial Jurisdiction—Section 208 of the Proposed New Federal Criminal Code*, 13 HARV. INT'L L.J. 346 (1972).

3. A deed is committed at every place where the perpetrator has acted, or, in case of omission, where he should have acted, or where the result became, or should have become, effective.⁵⁶

With nationality jurisdiction so firmly established in modern state practice, there is good reason to believe that § 1009 of the 1970 drug control act, at least insofar as it is applied to the extraterritorial conduct of citizens of the United States, will be viewed on the international level as consonant with commonly accepted principles of prescriptive competence.

2. *Application of § 1009 to Nonnationals of the United States Acting Abroad*

When directed to the conduct of nonnationals of the United States, acting entirely outside United States territory, § 1009 presents a somewhat more complicated question of prescriptive competence. Although states have generally accepted the exercise of extraterritorial jurisdiction over nationals by their home countries, considerably more reluctance has been displayed where foreign law has purported to reach the conduct of nonnationals abroad. This view stems largely from the territorial bias toward prescriptive competence that has dominated thinking on the subject.

The territorial view, however, has several defects. First, it presupposes that criminal activity may be conveniently localized in a single jurisdiction even at a time when technological advances make such notions of localization increasingly unrealistic. Second, by tying conduct and consequences to a territorial regime, the legal systems artificially allocate jurisdictional competence without regard to legitimate functional concerns that may be involved in any set of particularized circumstances. Thus, it is becoming generally recognized today that the strict territorial theory of prescriptive competence is not adequate to meet the realities of modern society. As a result, in recent years the strict territorial approach has been evolving to encompass the recognized need of each state to deal adequately with conduct which, while occurring outside of its geographic boundaries, produces serious effects within it.

This approach has been termed "objective territorial."⁵⁷ The

56. StGB § 3, German Penal Code of 1871, as amended Aug. 4, 1953 (Mueller & Buergenthal transl. 1961).

57. *Harvard Research in International Law, Jurisdiction With Respect to Crime*, *supra* note 16, at 487.

The Harvard Draft Convention, unlike the *Restatement* formulation to be discussed *infra*, provides:

Restatement of the Foreign Relations Law of the United States has attempted the most recent definition of the principle:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

- (a) the conduct and its effects are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
- (b) (i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.⁵⁸

Section 1009 is not without problems under the *Restatement* approach. The principal difficulty is that the statute does not require the prohibited conduct to occur in part or have any actual effect within the United States.⁵⁹ It acts to prohibit the manufacture or distribution of narcotics regardless of whether any attempt is ever actually made to import such substances into the United States, as long as they are manufactured or distributed by a person intending that they be, or knowing that they will be, so imported. In order to meet the territorial requirements of the *Restatement* the section might be redrafted to read:

Sec. 1009. It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II—
(1) intending that such substance will be unlawfully imported

A State has jurisdiction with respect to any crime committed in whole or in part within its territory. This jurisdiction extends to

- (a) Any participation outside its territory in a crime committed in whole or in part within its territory; and
- (b) Any attempt outside its territory to commit a crime in whole or in part within its territory.

Id. at 439. It might be possible to argue that § 1009 is merely an “attempt” statute and therefore fits into the Harvard formulation.

58. RESTATEMENT, *supra* note 17, § 18.

59. Effects can be direct or indirect, large or small. Certainly any increase in the supply of narcotics even without an intent to import into the United States would have some impact in the United States by increasing world supply. But such an effect seems insufficient to make a claim for jurisdictional competence to make and apply law. On the other hand, manufacture with an intent to import, followed by actual illicit importation into the United States, would constitute an impact sufficient to give the United States jurisdiction. For a discussion of de minimis effects versus jurisdictional effects see Judge Learned Hand’s opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416, 441-42 (2d Cir. 1945). The notion that an “effect” or an “impact” can confer jurisdiction is upheld in the *Lotus* case to be discussed later. See pp. 723-24 *infra*.

into the United States *and such substances are so imported into the United States*; or
(2) knowing that such substance will be unlawfully imported into the United States *and such substances are so imported into the United States*.

Whether this approach is necessary remains to be determined. The understanding that prescriptive competence when based on the objective territorial principle always demands some sort of territorial nexus may not be entirely justified by existing practice.

A decision that is particularly interesting in this regard is *Lauritzen v. Larsen*.⁶⁰ In *Lauritzen* Justice Jackson in a lengthy opinion considered the applicability⁶¹ of American maritime law to Larsen, a Danish seaman, injured in the course of his employment while his ship, a Danish vessel owned by a Dane, was in port at Havana, Cuba. There were only two "contacts" between these events and the forum United States. First, Larsen had signed on to the ship when it was in New York harbor. The ship's articles did, however, specifically provide that the contract of employment would be interpreted in accordance with Danish law. Second, the ship regularly came to the United States.

It appeared that under the laws of Denmark, Larsen was, or at least could have been, compensated under a scheme analogous to American workmen's compensation.⁶² If United States law were applied,⁶³ however, Larsen would have recovered damages for his injury based upon the fault principle of tort liability in accordance with the Jones Act. The district court applied United States law and awarded the plaintiff \$4267.50⁶⁴ damages and the Second Circuit affirmed.⁶⁵

In a studied opinion Justice Jackson rejected the notion that a complex matter, such as that raised by Larsen's claim, could be resolved by reference to one single principle or policy of national or international law.⁶⁶ Rather, the task of a court in such matters was, as Jus-

60. 345 U.S. 571 (1953).

61. Other instances of the application or attempted application of forum law to foreign nationals can be found in the context of cases interpreting economic regulatory statutes. See generally H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 829-1028 (1968). See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

62. 345 U.S. at 575-76.

63. 46 U.S.C. § 688 (1970).

64. 345 U.S. at 573.

65. *Larsen v. Lauritzen*, 196 F.2d 220 (2d Cir. 1952).

66. 345 U.S. at 583.

tice Jackson saw it, the reconciliation of the various national interests involved with a view toward "accommodating the reach of [United States] laws to those of other maritime nations."⁶⁷ Thus, Justice Jackson selected and considered various connecting factors⁶⁸ arising from the facts of the case and concluded that the interest of the United States in regulating the transaction was not sufficient to support an assumption of jurisdiction.⁶⁹

Jackson's approach and the approach followed by other courts since the end of World War II suggest that any single contact or territorially oriented nexus is at once too narrow and too broad a basis for jurisdiction.⁷⁰ Rather an assumption of prescriptive competence by a state requires an analysis of wider considerations stemming both from the legitimate interests of the nations concerned as well as the demands of the international order.

Illustrative of this position is the opinion of the Permanent Court of International Justice in the *Case of the S.S. "Lotus."*⁷¹ In the *Lotus*, the Permanent Court set out to determine the position of international law on the subject of penal competence. In so doing it described two possible approaches to the question:

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which would include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.⁷²

67. *Id.* at 577.

68. *Id.* at 583-91.

69. *Id.* at 593.

70. For an example of an approach that is similar to Jackson's see the opinion of Judge Herlands in *Air Lines Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 173 F. Supp. 369 (S.D.N.Y. 1959). See also *Naim Molvan v. Attorney General for Palestine*, [1948] App. C. 351 (P.C.) (Palestine).

71. [1927] P.C.I.J., ser. A, No. 9.

72. *Id.* at 20.

Of the two views presented, the Court effectively chose the first,⁷³ thus adopting the position that, in the absence of any explicit allocation of legislative competence within the international community, states may exercise prescriptive competence where local interests demand, providing they do not infringe upon interests of other states protected under customary international law.

If this understanding is accepted, and indeed it has been criticized,⁷⁴ the principal consideration, where an assumption of penal jurisdiction is questioned, should not be whether a territorial nexus with the conduct exists, but rather whether the regulating state has a substantial interest in the subject matter and whether such jurisdiction is consonant with the legitimate regulatory concerns of other states involved. Where the interests of states in the suppression of certain conduct are consistent, penal competence might reasonably be asserted by a state based upon factors other than the existence of a tangible effect within its territory from the conduct prohibited. In this type of case, intent or knowledge, such as that required by § 1009, could suffice to provide a sufficient concern upon which prescriptive competence might be exercised.⁷⁵

Viewed in this light, there may be a reasonable basis in international law for the application of § 1009 to the manufacture and distribution of certain narcotic substances by persons intending that they be, or knowing that they will be, unlawfully imported into the United States, even though such persons are aliens acting abroad and such importation fails to occur. The interest of the United

73. *Id.* at 21.

74. See, e.g., Berge, *The Case of the S.S. "Lotus,"* 26 MICH. L. REV. 361 (1929); Brierly, *The 'Lotus' Case,* 44 L.Q. REV. 154 (1928).

75. Indeed it was a similar recognition of such a catholicity of interest on the part of states that was responsible for the development of the now commonly accepted principle of universal jurisdiction over the crime of piracy.

The jurisdiction of the State to prosecute and punish for piracy *juris gentium* though committed outside the territory is everywhere recognized. Most of the principal maritime States have enacted legislation making piracy a special ground of jurisdiction, while in other States it is included in a more comprehensive competence which the State asserts over various offences committed by aliens abroad. The principle is one of universality. The piratical act need not have been committed within the territorial jurisdiction of the State. The pirate need not be a national or one assimilated thereto. If the crime is one "which constitutes piracy by international law" the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence. Jurists who have written on the jurisdiction of crime are practically unanimous in affirming the competence.

Harvard Research in International Law, Jurisdiction with Respect to Crime, supra note 16, at 563-64.

If the illicit traffic in narcotics is properly understood to affect the universal concern of nations in a manner similar to piracy there should be little by way of a conceptual obstacle to prevent its prosecution by states based on the kind of concerns expressed in § 1009—a basis considerably more limited than the universality approach.

Traffic in the Traffickers

States in prohibiting this conduct can be based upon the not unreasonable view that the manufacture and distribution of narcotics with the United States in mind creates a sizable reservoir of drugs, some of which ultimately must find their way onto the United States market. The prosecution of primary manufacturers and distributors having the requisite knowledge or intent thus becomes important, whether their activity can be shown to result in actual import into the United States customs territory or not. Finally, in view of the expressed concern of states that narcotics trafficking in general be suppressed, it does not appear that any regulatory interest of other nations conceivably involved is impaired by the exercise of jurisdiction over such conduct.

Although not strictly analogous the various war crimes trials after World War II reveal that at least with regard to so-called international crimes any responsible member of the world community has the competence to try a war criminal regardless of national status or location of the acts charged. In *In re Yamashita*⁷⁶ the United States Supreme Court upheld the jurisdiction of an American military tribunal to try the former Japanese commander in the Philippines for crimes committed primarily against the civilian inhabitants of the Philippines in addition to crimes against prisoners of war. The Nuremberg Judgment and the Eichmann trial are further evidence of this practice.⁷⁷

Of course the war crimes trials were supposedly trials of international crimes. This does not render these cases inapplicable to § 1009 offenses. The Single Convention of 1961 is notice, indeed perhaps better notice, to international offenders of world expectations on the matter of narcotic drugs than General Yamashita ever had of his responsibility for the actions of his subordinates.

Indeed the Single Convention of 1961 did come close to defining the manufacture and distribution of narcotic drugs as an international crime, permitting universal penal competence in the area. This approach was considered at length at the 1961 Conference, convened by the United Nations Economic and Social Council for the purpose of considering the Single Convention.⁷⁸ Among the proposals received

76. 327 U.S. 1 (1964). *But see* the dissenting opinions of Justice Murphy, *id.* at 26, and Justice Rutledge, *id.* at 41.

77. *See* Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30-Oct. 1, 1946, *reprinted in* 41 AM. J. INT'L L. 172 (1947); H. ARENDT, EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL (1964).

78. *See* note 44 *supra*. The Conference was attended by some 77 nations and met in New York from January 24 to March 25, 1961. The Single Convention was its Final Act.

by the Conference was the following section concerning the enforcement of narcotics laws:

serious offenses committed abroad either by nationals or by foreigners shall be prosecuted by the state in which the offender might be found if otherwise the offender might escape prosecution.⁷⁹

Although the Conference undoubtedly was of the sentiment that serious offenders should not escape prosecution, the proposed section was criticized by some delegates. For example, the Indian representative was of the view that the proviso

was contrary to the normal principle of criminal jurisprudence that an offender should be punished in the country where the crime was committed. Under Indian law, it would not ordinarily be possible to punish an alien in India for a crime committed outside the country. He expressed the hope that that provision would be deleted.⁸⁰

As a result of this and other criticism, the proposal was eventually abandoned.⁸¹

There was certainly no reason from a legal standpoint why the Conference could not have applied the universality approach to illicit trafficking. Seventy-three nations acting in convention are quite capable of altering international jurisdictional principles. Moreover, since the Conference had already defined with reasonable clarity the offenses it considered worthy of prohibition,⁸² it would have been simple enough to limit the assumption of universality jurisdiction to these particular acts. The fact is that the Conference chose not to do so. Nonetheless, the decision to leave prosecutorial competence in the hands of the individual states cannot be used as evidence to deny those same states criminal jurisdiction in appropriate circumstances; nor should the result of the Conference's deliberations be utilized

79. See 2 Official Records, United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs (Jan. 24 to Mar. 24, 1961), U.N. Doc. E/Conf. 34/24, at 17 (1964) [hereinafter cited as Official Records].

80. See 1 Official Records, *supra* note 79, at 126. A similar position was taken by the Norwegian delegate who stressed that

[t]he territorial principle generally prevailed in international criminal law; he could accept the principle of universality only in a limited number of cases, such as piracy on the high seas.
See 2 *id.* at 233.

81. It is interesting to note that one of the stronger critics of the proposal was the delegate from the United States. See, e.g., 1 *id.* at 123.

82. See Single Convention, *supra* note 44, art. 36(1). The section is quoted at p. 736 *infra*.

to reaffirm outmoded concepts of territoriality and sovereignty where narcotics crimes are concerned. If the requirement of a territorial nexus is recognized as having its functional basis in the desire to ameliorate international tension where divergent regulatory views conflict, the absence of such conflict should serve to lessen the need for the requirement.

3. *Treaty Standards for Jurisdictional Competence*

Assuming, *arguendo*, that § 1009, even as broadly construed, will be recognized as a permissible exercise of prescriptive competence on the part of the United States, it remains to be determined whether current treaty practice is capable of subsuming such a construction. As indicated earlier the ability of the United States to extradite or request extradition has in the past been determined solely by its treaties on the subject. Each of these extradition agreements contains its own jurisdictional requirements and such requirements often differ in scope from treaty to treaty. As will be seen these requirements are often considerably more stringent than those necessary for the exercise of prescriptive competence under public international law generally.

Requirements of prescriptive competence are expressed in existing United States extradition treaties in a number of ways. Some agreements, such as the recent treaty with New Zealand,⁸³ permit extradition only where the acts of the accused were committed within the territory of the requesting state.

Each Contracting Party agrees to extradite to the other, in circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with or convicted of any of the offences mentioned in Article II of this Treaty committed within the territory of the other.

. . . .

A reference in this Treaty to the territory of a Contracting Party is a reference to all the territory falling under the jurisdiction of that Contracting Party, including territorial waters, and the airspace thereover belonging to or under the control of one of the Contracting Parties, and vessels and aircraft belonging to one of the Contracting Parties, or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas⁸⁴

83. Extradition Treaty with New Zealand, Jan. 12, 1970, [1971] 22 U.S.T. 1, T.I.A.S. No. 7035 (effective Dec. 8, 1970).

84. *Id.* arts. I & III.

Others, while expressing a territorial bias, provide for extradition for crimes based upon acts not actually occurring within the territory of the requesting state under certain circumstances. The newly negotiated agreement with Argentina⁸⁵ is illustrative of this approach.

The Contracting Parties agree to extradite on a reciprocal basis to the other, in the circumstances and subject to the conditions established in this Treaty, persons found in the territory of one of the Parties who have been charged with or convicted by the judicial authorities of the other of the offenses mentioned in Article 2 of this Treaty committed within the territory of such other, or outside thereof under the conditions specified [below]. When the offense for which extradition has been requested has been committed outside the territory of the requesting Party, the executive authority of the United States or the judicial authority of the Republic of Argentina, as appropriate, shall have the power to grant extradition if the laws of the requested State provide for the jurisdiction over such an offense committed in similar circumstances.⁸⁶

Finally, a number of treaties of earlier vintage, such as that with Ecuador,⁸⁷ provide as follows:

The Government of the United States and the Government of Ecuador mutually agree to deliver up such persons as may have been convicted of or may be accused of the crimes set forth in the following article, committed within the jurisdiction of one of the contracting parties, and who may have sought refuge or be found within the territory of the other, it being understood that this is only to be done when the criminality shall be proved in such manner that, according to the law of the country where the fugitive or accused may be found, such persons might be lawfully arrested and tried, had the crime been committed within its jurisdiction.⁸⁸

It would seem that of all these treatments of jurisdictional competence to demand extradition, the last allows the widest latitude. It would permit the surrender of offenders for any extraditable offense falling within the parameters of prescriptive competence under international law.

85. Extradition Treaty with Argentina, Jan. 21, 1972, T.I.A.S. No. 7510 (effective Sept. 15, 1972).

86. *Id.* arts. I & III.

87. Extradition Treaty with Ecuador, June 28, 1872, 18 Stat. 199 (1875), T.S. No. 79 (effective Dec. 24, 1873).

88. *Id.* art. I.

The liberality of the language of the Ecuadorian treaty is not indicative of prevailing practice. In a number of cases both foreign offices and courts have interpreted the word "jurisdiction" to mean jurisdiction in a territorial sense, thus equating it with boundaries.⁸⁹ A recent example of such a case occurred in 1971. It involved a United States request to the United Kingdom for the extradition of two American citizens, Irene and Charles Terhune.

The Terhunes had been indicted in the Central District of California on February 17, 1971,⁹⁰ for multiple counts of fraud⁹¹ and bribery of a United States official.⁹² These charges stemmed from their participation in the widely publicized Army open mess scandal and were based on acts that had occurred entirely outside the territory of the United States. When the Terhune extradition request came before the Bow Street Magistrates Court,⁹³ the question was raised whether extradition was available under the 1931 Extradition Treaty with Great Britain⁹⁴ in view of the language of the agreement requiring that the acts charged be committed "within the jurisdiction"⁹⁵ of the requesting state.

Counsel for the United States argued that this language required only that the activity for which extradition was sought be within the prescriptive competence of the state seeking extradition as delineated by commonly accepted principles of international law. The court did not accept this view. The magistrate hearing the case, while of the opinion that the application of United States law to the Terhunes would be a valid exercise of legislative jurisdiction on the part of the United States under this standard, concluded that the treaty required more. The court interpreted the treaty language as neces-

89. See, e.g., 6 WHITEMAN, *supra* note 31, at 899-904. The concept of territory includes affiliated ships on the high seas and any crimes committed on them. For an example of a case where the crime was committed on the high seas but the flag had to request extradition by the nation of the ship's next port of call, see *R. v. Gov. of H.M. Prison Brixton, Ex Parte Minervini*, [1958] 3 All E.R. 318.

90. *United States v. Terhune*, Crim. No. 71-7500 (C.D. Calif., filed Feb. 17, 1971).

91. 18 U.S.C. § 371 (1970).

92. 18 U.S.C. § 201 (1970).

93. The Bow Street Magistrates Court is generally the court of jurisdiction for extradition hearings in England. See Extradition Act of 1870, 33 & 34 Vict., c. 52, §§ 9, 26; Extradition Act of 1895, 58 & 59 Vict., c. 33, § 1. While there is some confusion in the area, appeals by requesting states from a refusal by a magistrate to commit an individual for extradition do not appear to be permissible. See *United States v. Atkinson*, [1963] 3 W.L.R. 1074, 1089 (H.L.). There are a number of advantages in having one court charged with the responsibility of hearing extradition matters, particularly since this subject requires a certain amount of expertise. Nevertheless, no similar centralization exists in the United States.

94. Treaty of Extradition with Great Britain, Dec. 22, 1931, 47 Stat. 2122 (1933), T.S. No. 849 (effective June 24, 1935).

95. *Id.* art. 1.

sitating a showing that the acts charged actually occurred within the physical territory of a requesting state. Extradition was denied.⁹⁶

The decision should not have come as a great surprise to the United States. The State Department has interpreted this type of treaty clause in the same manner as the English court did. One example of such a case is described by Hackworth:

Ignacio Moran, while Mexican Consul at Berlin, was said to have embezzled funds belonging to the Mexican Government. When he was found in New Orleans a request was made for his provisional arrest and detention with a view to his extradition to Mexico. The Mexican Government took the position that as the offense was committed in the discharge of the official duties of a Mexican Consul it was beyond doubt committed within the jurisdiction of the United Mexican States within the meaning of article I of the convention of 1899 between the United States and Mexico (*ante*). The Secretary of State was of the opinion that the word *jurisdiction* as contained in the convention referred to places under the sovereign power of the contracting parties and that therefore Moran's offense was not committed within the jurisdiction of Mexico.⁹⁷

There is no discernible policy reason for such a restrictive construction of the term "jurisdiction," especially in light of the goals that extradition is designed to achieve.

This view seems, however, presently to be in a state of flux. For example, United States State Department officials currently contend that, regardless of past cases, they no longer adhere to the restrictive interpretation of the term "jurisdiction" where extradition is requested from the United States, although there is little by way of concrete evidence to support the claim. Moreover, in at least one instance, the United States has obtained extradition of an offender based on a liberal interpretation of such a jurisdictional requirement. Whiteman describes the case:

[I]n 1965 the United States requested the extradition from Austria, under the United States-Austrian Extradition Treaty of 1930 . . . , of a United States soldier who was charged by United States military authorities with the robbery of an American Express Company safe at a United States military base at Berchtes-

96. The opinion is unreported. A synopsis of the decision is available from the State Department file on the Terhune case.

97. 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 70 (1942) (emphasis in original) [hereinafter cited as HACKWORTH].

gaden, Germany, and who was arrested by Austrian authorities for offenses subsequently committed in Austria. Germany did not seek to assert jurisdiction to try the accused for the robbery. The Treaty of 1930 provides for extradition for crimes "committed within the jurisdiction of one of the High Contracting Parties, whenever such person shall seek an asylum or shall be found within the territories of the other." Extradition was granted by Austria and the accused was delivered to United States military authorities at the Austria-German border.⁹⁸

The limitations upon extradition imposed by the various treaty approaches to prescriptive competence obviously present substantial problems where a request is based upon a violation of § 1009 of the 1970 drug control act. Under the strict territorial standard used in treaties such as the New Zealand agreement⁹⁹ it does not appear that requests under § 1009 could be granted, although the Ricord case presents an exception in this regard.¹⁰⁰ The same would result under the unreasonably narrow construction often applied to the term "jurisdiction" as used in treaties such as that with Ecuador¹⁰¹ although there is room for a more liberal interpretation here. It is only under the more recent approach, exemplified by the agreement with Argentina,¹⁰² that the possibility of extradition for a § 1009 offense appears slightly more likely. Yet even here difficulties are certain to arise.

The Argentine treaty, in providing for discretionary extradition in respect of offenses committed abroad "if the laws of the requested State provide for the jurisdiction over such an offense committed in similar circumstances,"¹⁰³ utilizes a standard that, of course, must vary from case to case. However, in treaties taking this direction it should be possible, in some instances, to extradite United States citizens accused of violations of § 1009. The bulk of civil law jurisdictions, as indicated earlier, tend to apply their penal codes to offenses of nationals everywhere. Thus, a request involving the surrender of a United States citizen could meet the requirement of similar jurisdictional treatment embodied in the formula established by the Argentine Treaty, providing offenses in the nature of those

98. 6 WHITEMAN, *supra* note 31, at 896-97.

99. See note 83 *supra*.

100. See p. 707 *supra*.

101. See p. 728 *supra*.

102. See note 85 *supra*.

103. Extradition Treaty with Argentina, Jan. 21, 1972, T.I.A.S. No. 7510, art. III (effective Dec. 24, 1973).

prohibited by § 1009 are recognized in the criminal law of the country involved.¹⁰⁴

On the other hand, where the violation concerns the activity of an alien acting abroad, a somewhat greater problem arises. In this case all of the arguments applicable to the exercise of prescriptive competence are likely to arise in each entity framing laws for the treatment of extraterritorial conduct. Thus some states may, and others may not, assume jurisdiction in similar circumstances. Indeed, of those that do so, many may limit the application of their laws only to such offenses actually having an effect within their territory. As a result, the ability of the United States to utilize the extradition process to secure the prosecution of these § 1009 offenders is at best uncertain, even under most recent attempts to revitalize existing extradition machinery.

It is only in respect of those countries exercising universal penal jurisdiction over narcotics traffickers,¹⁰⁵ that the extradition of § 1009 offenders would be accomplished most easily within the parameters established by the Argentine Treaty. For example, the Argentine formula would likely encompass nearly all violations of § 1009, even under a broad reading, where the Federal Republic of Germany was the requested state because of the treatment of narcotics offenses by the German Penal Code:

Regardless of the law of the place of commission, the German criminal law is applicable to the following offenses committed by a foreigner abroad: . . .

(8) unlawful narcotics traffic;¹⁰⁶

Nevertheless, the broad approach of the German code is not widely followed. Hence, the availability of extradition for an alien engaged in activity prohibited by § 1009 remains a conspicuous problem even under most recent formulations of extradition standards. Where the great majority of existing United States agreements are concerned, the extradition of violators of § 1009 may be unavailable, not only for aliens, but United States citizens as well—thus rendering the section practically unenforceable.

104. This problem of characterization is discussed in detail beginning at p. 733 *infra*.

105. At the 1961 United Nations Conference which considered and adopted the Single Convention on Narcotic Drugs, a proposal was advanced which would have treated narcotics crimes as universally punishable in much the same way as piracy. The proposal was not adopted, however. For discussion of this aspect of the Conference, see pp. 725-26 *supra*.

106. SrGB § 4(3)(8), German Penal Code of 1871, as amended June 11, 1957 (Mueller & Buergenthal transl. 1961).

Traffic in the Traffickers

While it is possible to develop a new treaty standard for extradition that might obviate the difficulties posed by these often artificial jurisdictional barriers, some additional problems need consideration before a thorough reevaluation of the process is practicable.

B. *Characterization of the Acts for Which Extradition is Requested*

1. *In General*

Characterization plays a prominent part in extradition matters largely as a result of the requirement of dual criminality, a significant aspect of extradition procedure. A state from which extradition is asked will rarely honor such a request if the acts upon which the request is founded are not recognized by it as criminal in its own system. This dual criminality principle derives from a variety of social policies: strong preferences for the application of local standards; distrust of foreign expressions of public policy; and notions of reciprocity. Thus, in each case where extradition is at issue, it becomes necessary to ascertain whether the particular conduct charged can be successfully characterized as a crime under both the laws of the requesting and requested states. This requirement of dual criminality is expressed in virtually all contemporary extradition treaties either by a precise statement of the standard¹⁰⁷ or through the use of a list of named offenses.¹⁰⁸

As indicated earlier, the enumerative or "list" treaty is the prevailing form of agreement in United States treaty practice. While the use of this method can lead to a fair amount of inflexibility and may often preclude extradition in those cases where a particular crime is not found in the list of treaty offenses,¹⁰⁹ it does have the advantage of establishing with some specificity the areas of conduct which the parties generally agree will constitute a crime in their various jurisdictions. Yet, even here, problems of interpretation often arise.

Since every nation's criminal law is ultimately the result of its own

107. See p. 714 *supra*.

108. Because of the nature of the enumerative or "list" type agreement, a precise statement of the dual criminality standard is relatively rare in such treaties, although such clauses can occasionally be found. For example, the Extradition Treaty with Iraq while containing a list of offenses provides as well that:

Persons shall be delivered up according to the provisions of this Treaty, who shall have been charged with or convicted of any of the following crimes if they are punishable by the laws of both countries
Extradition Treaty with Iraq, June 7, 1934, 49 Stat. 3380 (1936), T.S. No. 907 (effective Apr. 23, 1936).

109. See p. 715 *supra*.

perception of the social and political needs of the community, a fair degree of difference exists in the penal laws of various countries. Thus, even where the parties to an enumerative agreement fix certain offenses as extraditable in the abstract, the elements of these particular offenses can differ significantly from country to country. As a result, certain acts may be characterized as constituting a treaty offense in one state while the same acts may constitute no crime at all in another, or if unlawful, may constitute an entirely different offense.¹¹⁰

Where narcotics crimes are concerned, United States treaties contain a variety of definitions. For example, some, such as the 1931 agreement with Greece,¹¹¹ provide merely for extradition for "crimes or offenses against the laws for the suppression of traffic in narcotics."¹¹² Others, such as the 1961 agreement with Brazil,¹¹³ provide more specifically for the extradition of individuals charged with "crimes or offenses against the laws relating to the traffic in, use of or production or manufacture of narcotic drugs or cannabis."¹¹⁴ Still others, such as the 1962 agreement with Israel,¹¹⁵ speak only of "of-

110. An example of the interpretative problems that can arise under such a statute has occurred in connection with the offense of rape. While most treaties to which the United States is a party include rape as an extraditable offense, they do not define the term with any degree of particularity. Whiteman describes a case in which this kind of abstract definitional usage has led to a difference in interpretation. 6 WHITEMAN, *supra* note 31, at 776-77.

In 1951 the American Embassy in Canada had occasion to inquire of the Canadian Department of External Affairs whether the crime of statutory rape under New York law would be considered as an extraditable offense by Canada under the then-existing extradition agreement between the two countries. The Embassy reported that:

The [Canadian] Department of Justice has informed us that the crime of second degree rape, or statutory rape as defined in the New York statutes, is not in all cases an extraditable crime in Canada. They point out that where the crime of rape in New York is also a crime under Canadian law then it would be an extraditable crime. But where an act which constitutes a crime of rape in New York law, is not rape under Canadian law it would not be looked upon as an extraditable crime by the Canadian authorities.

An example of when the offence might be considered to be an extraditable crime in Canada is when a person carnally knows a girl under the age of fourteen years, or carnally knows any girl of previous chaste character under the age of sixteen and over the age of fourteen years, not being his wife. On the other hand, an example of what Canadian law would consider to be a non-extraditable crime, would be the case where a girl, being over the age of fourteen years and under the age of sixteen years, but not having a previous chaste character, consents to the act. Another example of a non-extraditable crime would be in the case of a girl over the age of sixteen years and under the age of eighteen years who consents to the act.

Dispatch No. 1447, American Embassy, Ottawa, to the Department of State (May 9, 1951), *quoted in* 6 WHITEMAN, *supra* note 31, at 776-77. Extradition with Canada was, at the time, carried on under the Extradition Treaty with Great Britain.

111. Extradition Treaty with Greece, May 6, 1931, 47 Stat. 2185 (1933), T.S. No. 855 (effective Nov. 1, 1932).

112. *Id.* art. II(26).

113. Extradition Treaty with Brazil, Jan. 13, 1961, [1963] 15 U.S.T. 2093, T.I.A.S. No. 5691 (effective Dec. 17, 1964).

114. *Id.* art. II(27).

115. Extradition Treaty with Israel, Dec. 10, 1962, [1962] 14 U.S.T. 1707, T.I.A.S. No. 5476 (effective Dec. 5, 1963).

fenses against the laws relating to dangerous drugs.”¹¹⁶ Regardless of the definitional approach used, the difference in the treatment of drug offenses in various national systems, especially where importation is involved, is bound to lead to some interpretive confusion. An excellent illustration of the difficulties that can arise occurred recently in an extradition request directed to the United Kingdom for the surrender of Jo Ann Tannehill Ewasko.

Ewasko was indicted in the United States District Court for the District of Massachusetts on September 30, 1971,¹¹⁷ for unlawful importation into the United States of a huge quantity of hashish.¹¹⁸ The indictment charged that Ewasko had been one of two individuals who attempted to claim a trunk shipped from abroad which, during the process of customs inspection, was found to contain the drug. Ewasko was able to escape capture and fled to the United Kingdom. When her whereabouts was discovered, the United States requested extradition.¹¹⁹

The extradition request was based upon the 1931 agreement with Great Britain¹²⁰ which listed as a treaty offense:

Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.¹²¹

In reply to the United States extradition request, Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs explained that the illegal importation of dangerous drugs, such as occurred in the Ewasko case, was not an offense in English law against any enactment relating to dangerous drugs, but rather was an offense in violation of the Customs and Excise Act; thus, it was not an extraditable crime within the meaning of the treaty, customs offenses not being included in the treaty list.¹²² As a result, the request was denied.

The English approach to the problem of characterization, as exemplified by the Ewasko case, is somewhat less than enlightened. Such a restrictive reading of treaty requirements serves no good purpose if effective enforcement of multinational narcotics laws is the

116. *Id.* art. II(31).

117. *United States v. Ewasko*, Crim. No. 71-471 (D. Mass., filed Sept. 30, 1971).

118. Ewasko was charged under Act of July 18, 1956, Pub. L. No. 84-728, § 106, 70 Stat. 570.

119. *United States Embassy, London*, Note No. 12 (June 1, 1972).

120. *Extradition Treaty with Great Britain*, Dec. 22, 1931, 47 Stat. 2122 (1933), T.S. No. 849 (effective June 24, 1935).

121. *Id.* art. 3(24).

122. *United Kingdom, Foreign and Commonwealth Office*, Note No. 304 (June 20, 1972).

goal. Nonetheless, this pecksniffian view is not unique in extradition matters, and, absent any movement toward uniformity in national criminal legislation, is an attitude likely to continue.

One development that may tend to alleviate this problem to some degree, at least insofar as drug enforcement is concerned, is the 1961 Single Convention on Narcotics Drugs.¹²³ The Single Convention obligates its signatories to enact generally uniform legislation with respect to narcotics control. For example, it provides that the parties shall require the licensing of both private manufacture¹²⁴ and distribution¹²⁵ of narcotic substances and "shall not knowingly permit the export of drugs to any country . . . except . . . [i]n accordance with the laws and regulations of that country"¹²⁶ Moreover, the Convention obligates the parties to:

adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.¹²⁷

Adherence to this requirement should eventually lead to a fair amount of similarity among various national laws with respect to the definition of narcotics offenses. Where this is the case, the characterization problem that arises from the dual criminality concept should diminish considerably for the narcotics area.

2. *Characterization and § 1009 Offenses*

Even where narcotics crime ultimately becomes defined with a reasonable amount of specificity and on a fairly uniform basis among countries, extradition for violations of § 1009 of the Controlled Substances Import and Export Act may still be something of a problem. As indicated earlier,¹²⁸ the unique jurisdictional scope of this par-

123. See p. 715 *supra*.

124. Single Convention, *supra* note 44, art. 29(1).

125. *Id.* art. 30.

126. *Id.* art. 31(1)(a).

127. *Id.* art. 36(1).

128. See p. 712 *supra*.

ticular section causes it to be applied to activities not normally regulated by most nations. The conceptual problems that § 1009 is likely to present, where dual criminality is concerned, stem from this unusual jurisdictional approach.

Since § 1009 operates to proscribe the manufacture and distribution of narcotics outside the territory of the United States, it may be viewed by some nations as an approach to narcotics control having no counterpart in their criminal law, particularly where the states involved take a strict territorial view toward penal legislation. Such an understanding can undoubtedly lead to refusals of extradition requests for § 1009 violations.

The difficulty with this view, although it is no doubt likely to appear from time to time, is that it fails to separate the jurisdictional aspects of § 1009 from its substantive elements. The fact that § 1009 applies to extraterritorial conduct should be irrelevant where the substantive elements of the crime are concerned, although, as discussed earlier,¹²⁹ this factor may be quite significant for other reasons.

Most nations are likely to penalize the unlawful manufacture and distribution of narcotics, just as § 1009 does, even where they limit the prohibition solely to territorial offenses. Where this is the case there is no compelling logical necessity to refuse an extradition request based on § 1009 merely because the criminal law of a requested state may be more limited in jurisdictional scope.

While the dual criminality principle serves the important and necessary function of protecting human rights where the societal perceptions of criminal systems vary strikingly,¹³⁰ adherence to the expectations underlying such a policy do not require an exact identity of offenses where no real difference in values exists.¹³¹ The standard should

129. See p. 717 *supra*.

130. For example, certain nations might legalize the consumption and manufacture of marihuana. If the United States sought extradition of a foreign national manufacturing marihuana, even for importation into the United States, the dual criminality principle could rightly be empowered to bar such extradition.

131. This understanding is underscored when viewed in the context of various other limitations upon extradition which arise even in cases where the dual criminality standard is satisfied. For example, the exception for "political crimes" has long been recognized among states to prohibit extradition even in those instances where the crime charged is extraditable under the laws of the requested state. See Evans, *Reflections upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1 (1963); Garcia-Mora, *Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. PITT. L. REV. 371 (1953). Additionally, the principle of "speciality" normally operates to prohibit extradition from a requested state or to prevent trial in a requesting state for any offense other than that upon which the extradition request was granted. A contemporary example of this arose during the recent hearings in the Bahamas on the United States request for the extradition of Robert Vesco. In deciding against the extradition of Vesco the Bahamian magistrate presiding over the case hinted that his

be met where the penal approach of both countries involved is sufficiently similar to equate for extradition purposes the criminal acts which the laws of each seek to prohibit. Thus, if the substantive elements of § 1009 are viewed apart from their jurisdictional means, the type of conduct proscribed by the section ought to be susceptible of characterization as criminal by most nations having reasonably developed penal codes. Whether this will in fact occur remains, of course, a matter of the future.

C. *Extradition of Nationals of the Requested State*

The final and perhaps most difficult problem area for extradition stems from the consistent refusal of many nations to extradite their own citizens. This refusal has a long history.¹³² Prohibitions against the extradition of nationals are found in the domestic laws of a significant number of countries.¹³³ Only the United States and the United Kingdom can be said to have persistently refused to adopt this approach. As a result, most extradition treaties contain clauses specifically exempting nationals from their operation.

The United States has attempted to avoid such clauses in its extradition agreements with other governments but has had a notable lack of success in this regard. Of all the extradition treaties to which it is a party, only five contain no specific exemption for nationals,¹³⁴

refusal to extradite was based in some measure upon a belief that the American government was seeking extradition for crimes other than those enumerated in the affidavits submitted. *N.Y. Times*, Dec. 8, 1973, at 1, col. 1. Although the result in the Vesco case may not be wholly desirable the inquiry on this issue seems in line with protecting the rights of those sought.

132. The refusal of nations to extradite their own citizens is generally traced by writers as far back as the fourteenth century Brabantine Bull. In the eighteenth century, however, France became a leader in the practice and established the exemption firmly in civil law thinking. See MOORE, *supra* note 28, at 152 *passim*. Perhaps the most common reason for the practice lies in the fear that citizens of one country will be at a disadvantage when tried in the courts of another, a fear generally groundless today. See I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 118-25 (1971).

133. See examples set out in 6 WHITEMAN, *supra* note 31, at 865.

134. Agreements with Canada, Ecuador, Italy, Union of South Africa, and United Kingdom. Under two of these, however, extradition of nationals is at best a difficult proposition. While the Extradition Treaty with Ecuador, June 28, 1872, 18 Stat. 199 (1875), T.S. No. 79 (effective Dec. 24, 1873), and the Extradition Treaty with Italy, Mar. 23, 1968, 15 Stat. 629 (1869), T.S. No. 174 (effective Sept. 17, 1868) both contain no exemption for nationals, the domestic laws of each militate against the surrender of citizens absent a specific obligation to do so. The law of Ecuador provides that "Ecuador is not under an obligation to surrender its subjects whose extradition is requested . . ." Law Concerning Foreigners, Extradition and Naturalization, proclaimed at Quito, Oct. 18, 1921, art. 41. The law of Italy, on the other hand, provides: "Extradition of citizens is not granted unless specifically provided for in international conventions." Penal Code art. 13(4), *reprinted in Harvard Research in International Law, Extradition, supra* note 30, at 408.

In a number of previous cases, the Italian government has refused the extradition of nationals to the United States based on the provision of its law quoted above. For

Traffic in the Traffickers

and only one, the 1962 agreement with Israel,¹³⁵ provides categorically that "a requested Party shall not decline to extradite a person sought because such person is a national of the requested Party."¹³⁶ Thus, in the great majority of cases, the United States is rarely able to make a successful request for the extradition of a foreign national from his home country.

None of the treaties to which the United States is a party actually prohibits the extradition of nationals as some European agreements do;¹³⁷ rather, the exception for nationals in United States agreements is often framed in terms similar to those found in the Extradition Treaty with Brazil:¹³⁸

There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.¹³⁹

The discretionary nature of this approach is largely illusory. It is principally the result of an effort by the United States, which is generally willing to extradite citizens in appropriate cases, to avoid the consequences of its inability to do so as a matter of comity.¹⁴⁰

a description of some of these cases see W. RAFUSE, EXTRADITION OF NATIONALS 93-106 (1939). This difficulty seems to have been ameliorated, however, by an understanding reached between the United States and Italy in which the Italian government agreed "to the provision of Article 1 of the said Convention also being applied, under conditions of reciprocity, to individuals having Italian citizenship." Exchange of Notes at Rome, April 16 and 17, 1946, 61 Stat. 3687-88 (1947), T.I.A.S. No. 1699 (effective May 1, 1946). The problem raised by the Ecuadorian legislation quoted above has, however, never been resolved.

135. Extradition Treaty with Israel, Dec. 10, 1962, [1962] 14 U.S.T. 1707, T.I.A.S. No. 5476 (effective Dec. 5, 1963).

136. *Id.* art. IV.

137. See, e.g., Extradition Convention between Austria and Israel, Oct. 10, 1961, art. 2(1), 448 U.N.T.S. 161.

138. Extradition Treaty with Brazil, Jan. 13, 1961, [1963] 15 U.S.T. 2093, T.I.A.S. No. 5691 (effective Dec. 17, 1964).

139. *Id.* art. VII.

140. Earlier United States extradition treaties, such as that with France, which has only recently been amended, had provided simply:

Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.

Extradition Treaty with France, Jan. 6, 1903, art. V, 37 Stat. 1526 (1913), T.S. No. 561 (effective July 26, 1911); amended by Supplementary Convention, February 12, 1970, 22 U.S.T. 407, T.I.A.S. No. 7075 (effective Apr. 3, 1971). This language presented a problem for the United States in those cases where it might desire to extradite a United States citizen under such a treaty since the Supreme Court in *United States v. Valentine ex rel. Neidecker*, 299 U.S. 5 (1936), had viewed the Executive as having no constitutional power to do so absent a clear statutory or treaty authorization. *Id.* at 7-8. Thus, the express grant of discretionary power to extradite nationals found in treaties such as that with Brazil is principally an attempt to overcome this disability.

That this discretionary power is likely to be similarly used by foreign governments party to such agreements is doubtful at best.¹⁴¹

Regardless of its historical rationale, a blanket nationality exception is of doubtful value today. Violations of § 1009 may be an example of why this is true. Since this section is directed principally toward extraterritorial conduct, it is likely to encompass the activities of individuals acting in their home states in a sizable number of instances. If extradition is not available in these cases, the effectiveness of the section is significantly diminished.

One solution that has been offered to the enforcement hiatus created by the nationality exception is the development of a treaty approach which establishes a positive obligation on those nations refusing to extradite nationals to punish such offenders under their own domestic law.¹⁴² Language which imposes such a prosecutorial obligation has begun to appear with increasing frequency in extradition agreements between a number of European states.¹⁴³ Both the Hague Convention of 1970 on the Unlawful Seizure of Aircraft¹⁴⁴ and the 1961 Single Convention on Narcotic Drugs employ this approach. The Hague Convention is particularly emphatic in this regard. Article 7 of the Convention provides:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.¹⁴⁵

The principal drawback to this approach, if applied to the drug field, arises from the current lack of uniformity on the part of nations regarding the nature of conduct punishable as a narcotics offense. This lack of uniformity, coupled with the general reluctance

141. Indeed the constitutional and statutory framework for extradition in most such countries would preclude any exercise of discretion in this regard.

142. Most nations refusing to extradite their own citizens have statutory authority to prosecute them under domestic law for criminal acts committed abroad. *See, e.g.*, § 3 of the German Penal Code set out at pp. 719-20 *supra*. Whether this authority results in effective prosecution in many cases is, of course, another matter. *But see* cases cited in 6 WHITEMAN, *supra* note 31, at 877-83.

143. *See, e.g.*, Extradition Convention between Austria and Israel, Oct. 10, 1961, 448 U.N.T.S. 161.

144. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, [1971] 22 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971).

145. *Id.* art. 7.

Traffic in the Traffickers

of states to enforce foreign penal law,¹⁴⁶ can cause considerable confusion as to the law to be applied where domestic prosecution of a foreign offense is desired. Indeed, in some cases, a nation refusing extradition may be entirely unable to prosecute the conduct involved for lack of a similar domestic criminal law applicable to such activity, even where its penal code purports generally to extend to the offenses of nationals abroad.

Perhaps in recognition of this problem, the Single Convention did not adopt for the narcotics area the same sort of rigorous approach to domestic prosecution of nationals where extradition is refused as did the Hague Convention. A somewhat more qualified requirement was utilized:

2. Subject to the constitutional limitations of a Party, its legal system and domestic law . . . (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.¹⁴⁷

Whether this standard will offer much in the way of a solution for the difficulties caused by the nationality exception remains to be seen.

An alternative means of dealing with the question has been suggested by Dr. Ivan Shearer of the University of Adelaide in a recent book on extradition problems.¹⁴⁸ Dr. Shearer's approach would bifurcate the extradition process into a two step procedure where nationals of a requested state are involved. Under this method states adhering to the nationality exception would agree to turn over citizens accused of crimes abroad to requesting states for the limited purpose of trial and judgment on the offenses charged. Requesting states, in return, would agree to remit offenders convicted under this procedure to the home state for execution of any sentence imposed.¹⁴⁹ Dr. Shearer explains:

The main purpose of the proposal is to secure to the most appropriate forum jurisdiction over crime and at the same time to secure to the most appropriate organs the task of corrective

146. *See, e.g.*, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

147. *Single Convention*, *supra* note 44, art. 36(2).

148. *See* I. SHEARER, *supra* note 132.

149. *Id.* at 126.

punishment and rehabilitation. These latter organs, it is suggested, are those of the prisoner's home State.

Despite this basic purpose and philosophy, the fact need not be disguised that a secondary effect of returning a convicted offender to his home State would be to permit the possibility of his release from imprisonment in the rare case where a miscarriage of justice might be considered to have occurred. It is envisaged that treaty provisions would reserve all powers to the national State after return of the sentenced prisoner, and that the sentence would be treated in that State in all respects as though it were a sentence of a competent national court, subject perhaps to consultation between the authorities of the two countries. This provision would thus admit the right of the national State to exercise its executive prerogative of mercy by way of pardon or partial remission of the penalty, as well as the right of the national State to apply its own laws and procedures relating to probation, parole and other corrective and rehabilitative aids. It is suggested that, in this light, many of the objections presently raised against the extradition of nationals would disappear.¹⁵⁰

There is a great deal of merit to this suggestion, although it admittedly adds additional time and expense to the process of law enforcement. Nevertheless, such a procedure, if available in those cases where neither outright extradition nor home state prosecution is possible, could be a substantial beginning toward meaningful cooperation in the area.

Conclusion

Extradition remains today a fairly unwieldy mechanism. It is expensive, time consuming, and suffers from a number of highly formalized and largely outmoded conceptions. Unfortunately, given the traditional attitude of states toward international criminal law cooperation, there is little by way of an alternative to the process that would protect human rights in the imperfect world order we have. One suggestion that has been advanced, however, particularly with regard to narcotics offenses, has been the wider use of the concept of universal penal jurisdiction.

Yet as discussed earlier¹⁵¹ the 1961 Single Convention on Narcotic Drugs did not adopt the universality principle as a basis for the exercise by states of prescriptive competence over the illicit nar-

150. *Id.* at 127.

151. *See pp. 725-26 supra.*

Traffic in the Traffickers

cotics trade. Instead it retained the territorial concept as the primary means of allocating competence to punish narcotics trafficking and turned to the device of extradition as the principal tool to assure its effectiveness.

If extradition is to achieve this goal, a number of modifications of contemporary practice seem advisable. A beginning step in this regard would be the use of more flexible standards than now exist in current extradition agreements. This is particularly true with respect to jurisdictional requirements. Where certain serious crimes are concerned, new treaties should provide for the surrender of offenders to any nation having an adequate basis in customary international law for the application of its penal legislation to the conduct involved.

Another concept obviously needing a good deal of reevaluation is the nationality exemption. Whether this exemption is necessary any longer is certainly open to question. In any case its clearly undesirable features should be significantly moderated whenever possible. Thus, thought must be given to more effective ways to assure the prosecution of individuals exempt from extradition as a result of this concept. Perhaps it might be worthwhile to mandate that states prosecute citizens they refuse to extradite under their own domestic laws. Dr. Shearer's remedy for the nationality exemption is probably the most attractive approach to the problem and it should be seriously considered.¹⁵²

Finally, in addition to extradition by treaty, extradition as a matter of comity should be used more widely. This is clearly true as far as the United States is concerned. The time has certainly come for a reevaluation of United States practice in this regard and the preparation of a new and comprehensive extradition statute would be a good first step.¹⁵³

152. See p. 738 *supra*.

153. Certainly, such an approach is far preferable to that which has been seemingly adopted in recent days by United States policymakers. For example, after the coup d'état by the armed forces in Chile the new government imprisoned a Uruguayan national, Adolphus Sobocki Tobias, who had been indicted earlier in New York for illegally conspiring to import narcotic drugs. NEWSWEEK, Dec. 17, 1973, at 38. The United States-Chilean extradition treaty is very old and narcotics offenses are not covered. Extradition Treaty with Chile, April 17, 1900, 32 Stat. 1850 (1900), T.S. No. 407 (effective June 26, 1902). It is unclear whether the United States had officially requested the Allende government to extradite Sobocki on the basis of comity in derogation of past American practice that required explicit treaty coverage. In any event Sobocki remained free until the coup. After holding him prisoner for two weeks the new government deported Sobocki to Uruguay. He was met at the Montevideo airport by agents of the Uruguayan and American governments and then, apparently without any attempt to observe normal procedures, was put on a plane to New York with the American agent. He is now in custody awaiting trial in New York. The

Until such time as many of the foregoing problem areas have been adequately treated, the accommodation of various state interests through the extradition process will remain a difficult proposition. Thus expansive approaches to narcotics crime such as that found in § 1009 of the Controlled Substances Import and Export Act are not likely to meet with an inordinate amount of success where extradition is required to secure their enforcement.

presence of the American agent lends some weight to an interpretation of these events that would indicate that in the case of serious drug offenders the American government has deserted its long-held view on the strictness with which extradition matters should be treated.

In addition to Sobocki, it appears that Chile deported five or six other individuals, not nationals of the United States, to the United States because of pending indictments for drug-related offenses. *TIME*, Dec. 24, 1973, at 75. This, when coupled with the difficulties inherent in the extradition process, may indicate a trend away from formal transnational dealing on the matter of removal for trial. In these two cases, as in the case of Auguste Ricord with which this article began, there is of course a smell of "gun-boat" diplomacy. All three governments in Latin America—Chile after the coup, Uruguay, and Paraguay—have been closely identified with the interests of the American government.

There can be no doubt that these cases undermine, just as seriously as the cases in which extradition is denied for technical reasons, efforts to develop an international law of crimes and eventually an international order more stable than the one we possess. These cases are ample illustration of the possible conflict between rationalization of extradition procedures and protection of human rights. Extradition should not be granted after deals have been worked out between collaborating chanceries trying to dump undesirables onto the jurisdiction most anxious to try them. It should be a part of a world process that adequately protects the human rights of all potential offenders while providing protection of all peoples from what common expectations and practice have defined as transnational crimes.