Notes

Challenging Extradition:
The Doctrine of Specialty in Customary
International Law

The doctrine of specialty, a fundamental feature of extradition law, provides that a state may only prosecute an extradited individual for the offenses agreed to by the sending state. The doctrine, which protects a state’s sovereign right to limit its surrender of an individual, is widely codified in bilateral extradition treaties. Absent a treaty, when extraditions take place on the basis of comity or executive agreement, U.S. and foreign courts differ on whether specialty applies as a matter of customary international law. Moreover, multilateral treaties containing an obligation to extradite do not include specialty provisions, raising the question of whether states would be bound to respect the doctrine when extraditing pursuant to such treaties.

This Note examines jurisprudence in the United States, foreign courts, and international tribunals, and demonstrates that specialty is not applied consistently as a norm of customary international law. To the contrary, while national courts have relied on national legislation or read specialty into a bilateral treaty which was silent on the matter, few courts have maintained that the doctrine applies in the absence of a treaty, and those that have did not conduct a traditional customary international law analysis. Although this conclusion comports with the historically contractual nature of extradition, recent jurisprudence also
shows an increased willingness to decline jurisdiction over individuals obtained illegally. This Note concludes that a customary norm of specialty would become a necessary corollary should an obligation either to refuse jurisdiction in certain circumstances, or to prosecute or extradite, emerge in customary international law.

INTRODUCTION

Extradition, the process of requesting and sending a fugitive offender to a state for prosecution, has been a feature of relations between states for centuries. Modern extradition law contains several widely recognized rules, including the doctrine of specialty. This

doctrine, which is codified in numerous bilateral extradition treaties and regional extradition schemes, provides that after receiving a fugitive through extradition, a state may only prosecute the individual for the offenses agreed to by the sending state as the basis for extradition. Specialty serves as a safeguard against prosecutions for political offenses and violations of other substantive rules of extradition law, such as the requirement that an extraditable offense be proscribed in both states and the principle of non bis in idem, protection from being tried twice for the same crime.

While the doctrine of specialty is often included in extradition treaties, extraditions can also take place on the basis of comity between nations or treaties that do not expressly include specialty. In such cases, scholars and courts disagree as to whether specialty should apply. Several scholars assert that specialty is now a norm of customary international law but do not analyze modern practice.


while others dispute the existence of a customary rule. The debate is particularly important given the rise of multilateral treaties containing an obligation to prosecute or extradite or otherwise allowing for extradition. These treaties, which range in subject matter from human rights to corruption, usually provide that, in the absence of a bilateral treaty, the multilateral treaty can serve as a basis for extradition for enumerated crimes. Such provisions inherently provide for dual criminality, as the treaties define the extraditable crimes, but frequently do not include a specialty limitation. Instead, treaties simply state that extraditions are subject to the domestic law of the

that it has customary international law status . . . ”); BASSIONI, supra note 1, at 538 (“Speciality is frequently referred to as a principle because it is so broadly recognized in international law and practice that it has become a rule of customary international law.”); Jacques Semmelman, The Doctrine of Speciality in the Federal Courts: Making Sense of United States v. Rauscher, 34 VA. J. INT’L L. 71, 79 (1993) (“Speciality, however, remains a principle of customary international law . . . .”).

10. See Asian-African Legal Consultative Committee, Articles Containing the Principles Concerning Extradition of Fugitive Offenders, in REPORT OF THE FOURTH SESSION, TOKYO, 1961 at 31–32 (1961) (“The rule of speciality is usually embodied in extradition treaties but there is no universally recognized rule of customary international law in this matter and State practice is widely divergent.”); M. CHERIF BASSIONI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 546 (6th ed. 2014) (discussing new U.S. case law on specialty and finding, in contrast to the conclusion in the 2007 edition of his book, that “because of conflicting court decisions, it is unclear whether the principle of speciality is part of CIL [or customary international law], and the discussion is not yet finished”); NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 222 (2012) (“[Speciality] has been claimed to be customary, but in some legal systems if the particular treaty or national law does not specifically enforce specialty, it may not be applied.”); Mark A. Summers, Rereading Rauscher: Is It Time for the United States to Abandon the Rule of Speciality?, 48 DUQ. L. REV. 1, 3 (2010) (“[S]peciality has never been more than a rule of international comity.”).

11. See BASSIONI, supra note 1, Appendix I, for a list of treaties including an obligation to punish or extradite.

sending state.\textsuperscript{13} With the status of specialty in customary international law undefined, states may find their expectations that the principle will apply frustrated with regard to extraditions based on silent treaties or comity. This, in turn, undermines the goal of effective transnational law enforcement.

American jurisprudence demonstrates the import of this question. The Supreme Court recognized the doctrine of specialty in 1886 in \textit{United States v. Rauscher}, in which it read the doctrine into a bilateral extradition treaty without an express specialty provision.\textsuperscript{14} Circuit courts interpreting \textit{Rauscher} have reached varying conclusions on when the doctrine can be invoked, and the Supreme Court has not subsequently addressed specialty.\textsuperscript{15} The primary and much-discussed issue is standing, with circuits split on when an individual has the right to raise the doctrine as codified in a treaty.\textsuperscript{16} The few circuits that have addressed the applicability of specialty to extraditions outside of treaties have reached divergent conclusions on whether the principle exists under customary international law.\textsuperscript{17} Whether the United States may add additional charges after an extradition based on comity, or a treaty lacking an express specialty provision, therefore varies widely by jurisdiction.

An examination of domestic and international applications of the doctrine of specialty outside of bilateral treaties demonstrates that the doctrine of specialty is not applied consistently. Part I of this Note discusses the function of the doctrine in extradition law and offers a framework for assessing specialty in customary international law. Part II examines jurisprudence in the United States, foreign courts, and international tribunals, focusing on cases addressing the application of specialty to extraditions outside of treaties. Part III considers the ramifications of the conclusion that specialty is not an independent customary norm both for U.S. extradition law and for

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\textsuperscript{13} See, e.g., UNCAC, \textit{supra} note 12, art. 44(8).
\textsuperscript{14} See \textit{United States v. Rauscher}, 119 U.S. 407, 430 (1886).
\textsuperscript{15} See \textit{infra} Part III.A.
\textsuperscript{17} See \textit{United States v. Valencia-Trujillo}, 573 F.3d 1171, 1179 (11th Cir. 2009); \textit{United States v. Kaufman}, 858 F.2d 994, 1007 n.4 (5th Cir. 1988); \textit{Fiocconi v. Att’y Gen. of the U.S.}, 462 F.2d 475, 479 n.8 (2d Cir. 1972).
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multilateral instruments that do not expressly embrace the doctrine.

I. THE DOCTRINE OF SPECIALTY AND THE DEVELOPMENT OF EXTRADITION LAW

States have long utilized extradition as a means of obtaining fugitives. Some early scholars argued that international law required states to either extradite or punish criminals domestically, characterizing extradition as an obligation. From the nineteenth century onward, governments and legal experts regarded extradition as a sovereign act, to which states could consent either by agreement with another state or through their own national legislation. Agreements to extradite in the nineteenth and twentieth centuries primarily took the form of bilateral extradition treaties between states.

The specialty doctrine is incorporated in many of these treaties. The principle emerged from the French concept of spécialité, or particularity. The United Nations Model Treaty on Extradition, adopted by the General Assembly as a framework for states in negotiating bilateral agreements, includes a suggested specialty provision:

1. A person extradited under the present Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than: (a) An offence for which extradition was granted; (b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Treaty.

By agreeing to surrender an individual to another state on cer-

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18. See HUGO GROTIIUS, DE JURE BELLII AC PACIS ch. 21, §§ 3–4 (2d ed. 1631); 2 EMMERICH DE VATTI, LE DROIT DES GENS ch. 6, §§ 76–77 (1758).

19. See BASSIOUNI, supra note 1, at 7, 25 (noting that the obligation to prosecute or extradite is now discussed in the context of international crimes).

20. See id. at 24.


22. See BASSIOUNI, supra note 1, at 538 (noting that “speciality” is also called “speciality” in some jurisdictions and is referred to in different jurisdictions as a principle, doctrine, and rule).

tain charges, an extraditing state confirms that those charges meet the relevant treaty or legislative requirements, which typically include dual criminality and limitations on extraditable offenses.\textsuperscript{24} The substantive requirements of extradition are thus “only as strong as the extent to which the principle of specialty is observed.”\textsuperscript{25} Specialty serves to protect against misuse of the extradition process.

\textbf{A. Modern Extradition Regimes}

The specialty doctrine was incorporated in early extradition treaties in the nineteenth century and in many bilateral treaties developed in the twentieth century. The International Law Commission (ILC) noted in 2013 that specialty is now a feature of the “extradition law of most, if not all, States.”\textsuperscript{26} More recently, specialty has also been codified in regional multilateral extradition treaties. The European Convention on Extradition, adopted in 1957 by the Council of Europe, proscribes states from prosecuting an extradited individual “for any offense committed prior to his surrender other than that for which he was extradited,” unless the sending state consents.\textsuperscript{27} The 1981 Inter-American Convention on Extradition likewise provides that an individual extradited under the Convention shall not be tried “for an offense, committed prior to the date of the request for extradition, other than that for which the extradition has been granted,” absent approval by the sending state.\textsuperscript{28}

Despite the increase in extradition agreements, extraditions continue to take place outside of treaties on the basis of comity, as seen in U.S. jurisprudence.\textsuperscript{29} Additionally, a range of multilateral treaties now codify an obligation to extradite—or, in some cases, to either extradite or prosecute—and provide that the offenses enumerated in the treaty must constitute extraditable offenses between the states parties.\textsuperscript{30} However, these treaties largely do not specify procedural requirements, noting only that extradition is subject to the laws

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\item \textsuperscript{24} See BASSIOUNI, supra note 1, at 490–91.
\item \textsuperscript{25} Griffith & Harris, supra note 7, at 51.
\item \textsuperscript{26} Report of the Int’l Law Comm’n, supra note 2, ¶ 28.
\item \textsuperscript{27} European Convention on Extradition, supra note 5, art. 14.
\item \textsuperscript{28} Inter-American Convention on Extradition, supra note 5, art. 13.
\item \textsuperscript{29} See, e.g., United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988); Fiocconi v. Att’y Gen. of the U.S., 462 F.2d 475 (2d Cir. 1972).
\item \textsuperscript{30} For a list of treaties that include an obligation to punish or extradite, see generally BASSIOUNI, supra note 1, Appendix I. See also Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, supra note 12, art. 8.
\end{itemize}
of the sending state. The Genocide Convention states that genocide and related crimes cannot be considered political crimes and requires parties to "pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force." The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) codifies an obligation to extradite, and it provides that the enumerated offenses must be regarded as extraditable offenses under any extradition treaties between states parties or under non-treaty extradition procedures, "subject to the conditions provided by the law of the requested State." This construction is found in a number of other international conventions.

For states parties to these conventions, the dual criminality requirement and political offense exception are inherent in the text, as the treaties specify the extraditable offenses. However, for treaties that are silent with regard to specialty, the principle would only apply if it were either implicit in the treaty or bound states as a norm of customary international law. A recent International Court of Justice (ICJ) case on the obligation to extradite or prosecute provides an example of a situation in which this question could arise. The ICJ held Senegal responsible for failing to extradite or prosecute Hissène Habré, the former president of Chad accused of using torture, under Senegal’s obligation as a party to the CAT. While the ICJ focused on Senegal’s failure to prosecute, Senegal could alternatively have extradited Habré to Belgium, the state party that brought the case. Senegal and Belgium do not have a bilateral extradition treaty. Whether Belgian courts would have agreed to a specialty request

32. CAT, supra note 12, art. 8.
33. See International Convention for the Suppression of the Financing of Terrorism, supra note 12, art. II; International Convention Against the Taking of Hostages, supra note 12, art. 10; Montreal Hijacking Convention, supra note 12, art. 8; see also UNCAC, supra note 12, art. 44 (noting additionally that an extradited individual is guaranteed fair treatment throughout the process, including “all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present”); United Nations Convention Against Transnational Organized Crime, supra note 12, art. 16 (same language as UNCAC).
34. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422 (July 20).
35. See id. ¶ 122.
36. See id. ¶ 118–21.
from Senegal to limit Belgium to prosecuting only requested crimes codified in the CAT is uncertain.

B. Customary International Law, Treaties, and Comity

The primary challenge of establishing customary norms relating to extradition law is the contractual nature of the modern extradition regime. Customary international law is formed by widespread and consistent state practice with corresponding *opinio juris*, a belief that the practice is required by a rule of law.\(^{38}\) Custom, unlike treaties, binds all states, and thus applies in the absence of a treaty.\(^{39}\) For specialty to be a norm of extradition law, states must both widely utilize the doctrine and express that they do so out of a “sense of legal duty.”\(^{40}\)

Treaties can play significant roles in formulating custom. Treaties and custom are independent sources of international law and may be co-extensive, with a provision of a treaty also existing separately as a customary norm.\(^{41}\) The ICJ noted that a treaty may simply codify preexisting custom, cause a customary norm to crystallize, or serve as *opinio juris* for the emergence of a subsequent rule.\(^{42}\) Customary norms have crystallized through the adoption of treaties following a negotiation process between states resulting in agreement on a previously unresolved principle.\(^{43}\) Whether a treaty serves as evidence of a custom thus depends on the nature of the treaty and subsequent state practice concerning the relevant treaty provision.

The widespread inclusion of specialty provisions in bilateral treaties may serve as evidence of custom\(^{44}\) and demonstrate a wealth of state practice, but it does not necessarily establish *opinio juris*.\(^{45}\)

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38. See *North Sea Continental Shelf Cases* (Ger./Den., Ger./Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).


40. *North Sea Continental Shelf Cases*, *supra* note 38.


45. See *id.*
Extradition is historically a state prerogative, rather than an obligation.\textsuperscript{46} While extradition itself is optional, however, customary norms can emerge concerning the substantive requirements to which states must adhere when they choose to extradite.\textsuperscript{47} Accordingly, an assessment of specialty as a rule of customary international law must survey state practice, treaties, and statements concerning the principle, including extraditions pursuant to comity or based on treaties that are silent concerning specialty.

Scholars asserting that specialty is custom\textsuperscript{48} have not conducted a traditional customary international law analysis.\textsuperscript{49} Likewise, the ILC, discussing treaties codifying an obligation to prosecute or extradite, notes that most states follow specialty but does not assess whether they do so out of treaty or customary obligations.\textsuperscript{50} The widespread use of specialty might lead the ILC or other observers to determine that the principle is custom or assume that it is inherent in extradition treaties silent on the issue. Split jurisprudence among U.S. courts, which have reached divergent conclusions concerning the application of specialty to comity-based extraditions, demonstrates the unsettled nature of the doctrine.\textsuperscript{51}

II. SPECIALTY IN NATIONAL AND INTERNATIONAL PRACTICE

A. The United States’ Conflict on Specialty

Specialty is a longstanding point of contention within American jurisprudence. The federal extradition statutes do not include a judicial obligation to respect specialty.\textsuperscript{52} The statute in relation to the

\textsuperscript{46} See BASSIOUNI, supra note 1, at 25.
\textsuperscript{47} See Summers, supra note 10, at 21.
\textsuperscript{48} See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 319 (5th ed. 1998) ("[S]ome courts, in giving extradition in the absence of a treaty, have abstracted from existing treaties and municipal provisions certain ‘general principles of international law.’ The two leading principles are that of double criminality . . . and that of specialty, according to which the person surrendered shall be tried and punished exclusively for offences for which extradition had been requested and granted."); see also BASSIOUNI, supra note 1, at 538; Semmelman, supra note 9, at 141.
\textsuperscript{50} See Report of the Int’l Law Comm’n, supra note 2, ¶ 28.
\textsuperscript{51} Compare Fiocconi v. Att’y Gen. of the U.S., 462 F.2d 475 (2d Cir. 1972), and United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988), with United States v. Valencia-Trujillo, 573 F.3d 1171 (11th Cir. 2009).
rights of the accused provides that the President has the power to take necessary measures to protect an extradited individual “until the final conclusion of his trial for the offenses specified in the warrant of extradition,” but it does not refer to limitations on the jurisdiction of courts over additional offenses. Instead, specialty provisions are typically codified in bilateral extradition treaties.

The seminal decision on specialty, and the only Supreme Court case to address the doctrine, is United States v. Rauscher, issued in 1886. Great Britain extradited Rauscher to the United States to stand trial for murder committed on an American ship on the high seas under the extradition clause of the bilateral Webster-Ashburton Treaty, which did not contain a specialty provision. When Rauscher was instead charged with the lesser offense of cruel and unusual punishment, he argued that the U.S. courts lacked personal jurisdiction over him because the charge was outside the scope of the extradition order. The Supreme Court determined that despite the absence of an express provision, “a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition.” The Court held that because this doctrine was implicit in the treaty, U.S. courts lacked jurisdiction over Rauscher with regard to the lesser charge.

After stressing that extradition is not an obligation under in-

54. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 678 n.18 (1992) (stating that the precursor statutes containing similar language cited in United States v. Rauscher “do not contain any language purporting to limit the jurisdiction of the court; rather, they merely provide for protection of the accused pending trial”); Fiocconi v. Att’y Gen. of the U.S., 462 F.2d 475, 482 (2d Cir. 1972) (“No different conclusion is called for by 18 U.S.C. § 3192. Despite the narrower phrase used in the statute, we read the references to a predecessor act in Rauscher . . . as considering the statute to be merely congressional recognition of the principle that a person who has been extradited should not be tried for an offense which the foreign country would consider to be outside the limits of its act of extradition.”).
57. See id. at 409–11.
58. See id. at 409.
59. Id. at 430.
60. See id. at 433.
ternational law, the Court noted that the concept of specialty complemented the discretionary nature of extradition, as it would be unreasonable in the absence of a treaty obligation to expect a state to surrender an individual to another state “without any limitation, implied or otherwise, upon its prosecution of the party.” The Court also surveyed works of “publicists and writers on international law,” which maintained that a receiving state had no right to charge an offender for any offense other than the one for which he was specifically surrendered. In concluding that the Webster-Ashburton treaty incorporated this principle, the Court explained that it was “very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties.

The Rauscher opinion has divided courts and academics on a range of issues. An ongoing debate concerns standing: circuit courts have reached varying conclusions on when a defendant has standing to raise an objection based on a specialty provision in a bilateral treaty. The Rauscher decision has also split courts on the question of

61. See id. at 412.
62. Id. at 419.
63. Id.
64. Id. at 420.
65. A number of circuits have found that specialty is a right of the sending state, rather than an individual, holding that a defendant only has standing to the extent that the sending state has objected. See, e.g., United States ex rel. Saroop v. Garcia, 109 F.3d 165 (3d Cir. 1997); United States v. Munoz-Solarte, 28 F.3d 1217 (7th Cir. 1994), cert. denied, 115 S. Ct. 600 (1994). Other circuits allow a defendant to raise the doctrine to the extent that the state would be able to invoke the doctrine, even when a state is silent, as long as the state has not explicitly waived the right. See, e.g., United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995); United States v. Andonian, 29 F.3d 1432 (9th Cir. 1994); United States v. Thirion, 813 F.2d 146 (8th Cir. 1987). These courts emphasize that extradition is based on “principles of international comity” and thus that an individual should be able to object—and spare the sending state from having to formally object and potentially spur diplomatic tensions—unless the sending state unequivocally approves the prosecution. Andonian, 29 F.3d at 1435; Thirion, 813 F.2d at 151. One circuit, citing Rauscher’s description of specialty as “a right conferred upon persons,” found that a defendant has standing to challenge specialty without discussion of the protest or waiver by the sending state. United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990). This circuit split is enduring and well documented. See, e.g., Bassiouuni, supra note 1, at 543, 556–75; Semmelman, supra note 9, at 137–40; Iraola, supra note 16 at 90–93; Mary-Rose Papandrea, Comment, Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign, 62 U. Chi. L. Rev. 1187 (1995); Michael Bernard Bernacchi, Comment, Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights, 25 Loy. L.A. L. Rev. 1377 (1992); David Runtz, Note, The Principle of Specialty: A Bifurcated Analysis of the Rights of the Accused, 29 Colum. J. Transnat’l L. 407, 411–12 (1991); Jonathan George, Note, Toward
whether specialty is a principle of customary international law and thus applicable to extraditions outside of treaties.

Federal legislation provides that, pursuant to comity, the United States may both request\textsuperscript{66} and surrender\textsuperscript{67} individuals outside of an extradition treaty. In the absence of a contrary legislative pronouncement, U.S. courts may apply customary international law as a form of federal common law.\textsuperscript{68} A customary norm of international law concerning extradition could thus apply\textsuperscript{69} and potentially create rights for both the surrendered individual and the surrendering state, either outside of an extradition treaty or when a treaty is silent with regard to specialty.

Circuits applying \textit{Rauscher} to such extraditions have reached divergent conclusions. In \textit{Fiocconi v. Attorney General}, the Second Circuit considered an individual extradited by Italy to the United States on the basis of comity and found the principle of specialty applicable.\textsuperscript{70} Writing for the court, Judge Friendly summarized the Supreme Court’s reasoning in \textit{Rauscher}, explaining that the Court found “a rule of international law required that the receiving country should not try an extradited person for an offense for which the surrendering country would not have granted extradition; the treaty was important only as clarifying what offenses were or were not extraditable.”\textsuperscript{71} The Second Circuit then characterized \textit{Rauscher}’s challenged second prosecution as a violation of U.S. foreign relations law.\textsuperscript{72} As the object of the doctrine was to prevent the United States

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\textsuperscript{67} See 18 U.S.C. § 3181(b) (2014) (limiting surrender in the absence of a treaty to persons “other than citizens, nationals, or permanent residents of the United States[,] who have committed crimes of violence against nationals of the United States in foreign countries”).

\textsuperscript{68} See \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900) (“International law is part of our law . . . . [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .”); Harold Hongju Koh, \textit{International Law as Part of Our Law}, \textit{98 Am. J. Int’l L.} 43 (2004); Semmelman, \textit{supra} note 9, at 141. For a contrary view arguing that customary international law should not be considered federal law, see generally Curtis A. Bradley & Jack L. Goldsmith, \textit{Customary International Law as Federal Common Law: A Critique of the Modern Position}, 110 \textsc{Harv. L. Rev.} 815 (1997).


\textsuperscript{70} See \textit{Fiocconi} v. Att’y Gen. of the U.S., 462 F.2d 475 (2d Cir. 1972).

\textsuperscript{71} Id. at 479.

\textsuperscript{72} See \textit{id}.
from violating its international obligations, a defendant only had standing to raise the doctrine, even under customary international law, to the extent that “the surrendering state would regard the prosecution at issue as a breach.” Finding it unlikely that Italy would have objected in the case, the Second Circuit concluded that the defendant lacked standing, although the doctrine itself was not limited to the treaty context.74

Twelve years later, the Fifth Circuit considered and broadly adopted the Fiocconi reasoning in United States v. Kaufman.75 Two of the Kaufman defendants, Perry and Paddy Franks, were arrested by U.S. Drug Enforcement Agency agents and Mexican federal police in Mexico and returned to the United States on a commercial flight.76 The Franks were taken to Louisiana and charged with participation in a narcotics conspiracy and later brought to Texas and charged with additional drug trafficking offenses.77 The defendants argued that their removal from Mexico to Louisiana constituted an extradition and that the specialty provision in the U.S.-Mexico extradition treaty barred the subsequent charges in Texas.78 The Fifth Circuit declined to determine whether the Franks’ removal constituted an extradition, finding that under Fiocconi, Mexico likely would not have objected to the Texas prosecution, and thus it would not constitute a violation of either the treaty or an independent rule of customary international law.79 Citing Fiocconi, the court found, in dicta, that “[t]he rule of specialty is a general rule of international law which applies with equal force whether extradition occurs by treaty or comity.”80

Most recently, the Eleventh Circuit considered specialty in United States v. Valencia-Trujillo, a case concerning an extradition from Colombia to the United States.81 The Colombian Constitution contains a provision limiting extraditions to events taking place after December 17, 1997.82 The Colombian government confirmed Valencia-Trujillo’s extradition on four requested counts in an Executive

73. Id. at 480.
74. See id. at 481–82.
75. See United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988).
76. See id. at 1006.
77. See id.
78. See id. at 1007.
79. See id. at 1007–08.
80. Id. at 1007 n.4.
81. See United States v. Valencia-Trujillo, 573 F.3d 1171 (11th Cir. 2009).
82. See id. at 1174.
Resolution, which stated that the United States could try Valencia-Trujillo only for acts taking place after December 17, 1997. The Eleventh Circuit, noting that neither the U.S. extradition request nor the Colombian government’s resolutions referenced the U.S.-Colombia extradition treaty, determined that Valencia-Trujillo was not extradited pursuant to the treaty and could not raise a defense under the treaty’s specialty provision. The court then held that “the rule of specialty applies only to extraditions pursuant to treaty,” and that extradition documents, such as the Executive Resolution, did not constitute treaties. Interpreting Rauscher to stress the importance of treaties, the Eleventh Circuit refused to recognize a customary legal obligation to observe specialty.

The debate over whether specialty applies to extraditions on the basis of comity is particularly important given the U.S. approach to prosecuting individuals who have been surrendered to the United States outside of the context of extradition. On the same day the Supreme Court decided Rauscher, it also issued a decision in Ker v. Illinois, a case concerning a U.S. citizen who was kidnapped from Peru and forcibly returned to the United States to stand trial for crimes allegedly committed in the United States. In contrast to Rauscher, the Supreme Court held in Ker that the United States had jurisdiction over Ker regardless of the circumstances of his entry and was not limited to prosecuting specific charges. Taken together, Rauscher and Ker provide that an individual brought to the United States from abroad “may not be prosecuted for crimes for which he has not been surrendered—except when he has not been surrendered for any crime, in which case he may be prosecuted for every crime.” This rationale was reinforced by the Supreme Court’s 1992 ruling in United States v. Alvarez-Machain, which held that an individual kidnapped from Mexico was not entitled to the protections of the U.S.-
Mexico extradition treaty. The Court specifically distinguished *Rauscher*, noting that Rauscher was extradited pursuant to a treaty and that reading specialty into a treaty was “a small step to take.”\(^93\) In contrast, implying the notion that the U.S.-Mexico treaty prohibits obtaining an individual by other means is “a much larger inferential leap,” and one the Court declined to take.\(^94\) While an abduction may be legally distinguishable from an extradition based on comity, and a customary rule of specialty could still apply to the latter, the *Alvarez-Machain* decision underscores a judicial reluctance to recognize protections not expressly granted by treaty.

The U.S. jurisprudence on specialty demonstrates, at a minimum, considerable uncertainty concerning the assertion that specialty is a provision of customary international law. Although the Supreme Court’s opinion in *Rauscher* has been interpreted as holding that specialty is a customary norm,\(^95\) the decision itself may have been tailored to the specific political circumstances.\(^96\) Reviews of the literature cited by the *Rauscher* Court and contemporary state practice question whether specialty was custom at any point in the nineteenth century, and particularly at the time of the Webster-Ashburton Treaty.\(^97\) Subsequent U.S. decisions emphasizing the contractual nature of extradition support the claim that because “extradition itself is a matter of binding international law only insofar as nations have chosen to codify it by treaty, the doctrine of specialty should similarly carry legal force only when included in that codification.”\(^98\) An assessment of whether a customary norm has emerged, which would apply to extraditions executed outside of treaties, must look to global practice and particularly *opinio juris* on this point.

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93. Id. at 669.
94. Id.
95. See BASSOUNI, supra note 1, at 543; see also Michell, supra note 69, at 395.
96. See Semmelman, supra note 9, at 114, 132–37.
97. See Summers, supra note 10, at 12–13, 20; see also Semmelman, supra note 9, at 104–06.
98. Case Note, Customary International Law, supra note 88, at 579.
B. Foreign Jurisprudence

A number of foreign courts have also considered the question of specialty outside of a treaty regime, either directly or indirectly.99 Comparatively early cases provided support for the contention that specialty was a customary norm of international law.100 In the 1929 Hungary and Austria (Extradition) Case, the Hungarian Supreme Court considered the status of a defendant who had been extradited from Austria to Hungary in the absence of any bilateral treaty.101 The court determined that Hungarian courts could only include additional offenses committed prior to the extradition if Austria consented, noting that the defendant himself could not waive this condition.102 In the same year, the District Court of Amsterdam ruled on specialty in relation to an extradition from Finland.103 In rejecting the defendant’s claim of a specialty violation, the court explained that a more precise formulation of the charge in the court papers than in the pretrial documents does not violate the “rule of customary international law according to which a prosecution is allowed only for those crimes for which extradition has been granted.”104

The Venezuelan Federal and Cassation Court addressed specialty two decades later in In re Dilasser.105 Although Venezuela and France had no extradition treaty in force, Venezuela agreed to extradite Dilasser, a French citizen, to France on the basis of reciprocity.106 After the extradition, France requested that Venezuela allow Dilasser to be tried for an offense that had not originally formed the basis of his extradition.107 The Venezuelan court refused, turning in the absence of a treaty to “principles of international law governing the subject under consideration.”108 The court found “a rule, domi-

99. In some jurisdictions the doctrine of specialty is referred to as “speciality.” For clarity, the quotes in this section retain the original spelling used in the cited jurisdiction.
100. See United States v. Rauscher, 119 U.S. 407, 415–31 (1886), for an overview of state practice through 1886; see also Summers, supra note 10, for a recent assessment of the sources considered by the Rauscher court and other literature and commentary of states on specialty prior the Rauscher decision.
102. See id.
103. Dist. Ct. Amsterdam, 5 Ann. Dig. 275, 276 (1929) (Public Prosecutor/S. Liebermann) (Neth.).
104. Id.
106. See id.
107. Id.
108. Id.
nant in doctrine, in international practice, and as a principle vigorously defended by publicists, that a person may be tried only for the offence for which he was extradited unless it has been agreed otherwise.”

The decision then noted that the principle was contained in several bilateral treaties and laws in force in Venezuela, and that although these provisions did not bind the country in the present case, the principle must apply.

These cases broadly accord with Rauscher and the conclusion that specialty applies in the absence of an express treaty provision. More recent cases, however, cast doubt on the status of specialty in customary international law. In 1974, the Supreme Court of Israel rejected an extradition request from South Africa pursuant to a bilateral treaty without a specialty provision, holding that the extradition would violate a domestic law providing that a person could not be extradited without a specialty agreement in place.

Although South Africa, the requesting state, had a domestic provision requiring courts to adhere to specialty, the Israeli court considered this insufficient given the legislative requirement of a specialty agreement. The court determined that the specialty limitation was not yet binding customary international law, pointing to “a lack of clarification with regard to the scope and details of the rule.” Finally, the court noted that had the legislature considered customary international law a sufficient guarantee, it would not have required that specialty be ensured by agreement, as the principle would have necessarily bound both states.

Australian courts have addressed the applicability of specialty to non-treaty extraditions in multiple cases. While some support can be drawn from Australian jurisprudence for specialty as a principle of international law, the Australian courts have stopped short of finding specialty to be a binding customary norm. The High Court of Australia implicitly decided the issue in 1974 in Barton v. Commonwealth when it determined that the Extradition Act of 1966–1973 did not bar the state from requesting and accepting extraditions from states with which it lacked an extradition treaty. Although the

109. Id.
110. See id. at 378.
112. See Cowan, 29(1) PD at 593.
113. Id. at 596.
114. See id.
court ultimately construed the Act to permit Australia to seek extradition from a non-treaty state, it expressed significant skepticism that such was the intent of the Act, noting that, in the absence of a treaty, “there would be no speciality to protect the fugitive when he had been brought here,” among other common extradition treaty protections.116

Subsequent Australian legislation and jurisprudence has provided support for the existence of an international law norm, however. The Australian Extradition Act of 1988, which remains in force, codified the specialty doctrine.117 The Act does not distinguish extraditions based on treaty from those based on comity, providing that an extraditable person surrendered to Australia shall only be tried for “any offence in respect of which the person was surrendered.”118 In AB v. The Queen, the High Court of Australia referred to specialty as a “rule of international practice.”119 The defendant had been extradited to Australia pursuant to the U.S.-Australia extradition treaty. In discussing the defendant’s waiver of his specialty rights under the treaty, the Court noted that the doctrine of specialty was a longstanding feature of extradition law.120

The Australian High Court considered specialty again in Truong v. The Queen.122 The Truong case concerned an extradition from the United Kingdom to Australia under a bilateral extradition treaty on offenses of conspiracy to kidnap and conspiracy to commit murder.123 Once in Australia, Truong was charged with kidnapping and murder, rather than conspiracy, and argued that these charges violated the principle of specialty guaranteed by the 1988 Extradition Act.124 The appellate court had concluded that the specialty provision of the Act was drafted to comply with Australia’s international obligations and accordingly discussed the question of specialty in international law at length.125 Judge Ormiston, whose opinion was endorsed by the other two appellate judges, surveyed practice and scholarship on specialty, including both the Rauscher decision and

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116. Id. at 488.
117. See Extradition Act 1988 (Cth) (Austl.).
118. Id. s. 42.
120. See id. ¶¶ 5–6.
121. Id. ¶ 41.
122. See Truong v. The Queen [2004] HCA 10 (Austl.).
123. See id. ¶ 1.
124. See id. ¶ 2.
the Bassiouni treatise, but concluded that “notwithstanding the broader statements of some of the text writers, there cannot be said to be any uniform rule, whether of international law or municipal law, embodying the principle of speciality.”\(^\text{126}\) Stressing the range of formulations of and qualifications attached to the principle in different treaties and legislative provisions, Judge Ormiston found that “the lack of uniformity makes it impossible to construe the principle embodied in [the Act] by reference to any supposed general principle of speciality.”

On review, the High Court dismissed the appeal without endorsing Judge Ormiston’s perspective on specialty.\(^\text{127}\) Judge Kirby emphasized that the provision in the Act should be construed such that it “conforms to the rule of speciality in international law.”\(^\text{129}\) Judge Kirby stressed that Australia followed the doctrine not only because of legislative requirements, but also because “so much is required by Australia’s self-respect and national honour in dealing with other nations with which it has extradition arrangements”\(^\text{130}\) and because of the importance of speciality to a successful international extradition system.\(^\text{131}\) Additionally, Judge Hayne noted that “it may or may not be possible to discern some principles about speciality which find general acceptance internationally or find acceptance in a number of other jurisdictions” but did not find it necessary to resolve the question in the disposition of this case.\(^\text{132}\)

The Australian cases reflect some disagreement about the status of speciality in international law. Despite Judge Kirby’s description of speciality as a rule of international law, he did not survey scholarship or international practice aside from \textit{Rauscher}\(^\text{133}\), and national honor as a motivation for state action is distinct from acting out of a sense of legal obligation. His observations may thus speak more to the prevalence of speciality in treaties and legislation, rather than to speciality as a binding custom.

Other recent considerations of the status of speciality in international law differ in significant respects. Canada rejected the notion

\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) See \textit{Truong v. The Queen [2004] HCA 10, ¶¶ 40 (Gleeson, C.J., McHugh, J., Heydon, J.), 112 (Gummow, J., Callinan, J.), 199 (Hayne, J.) (Austl.).}
\(^{129}\) Id. ¶ 121.
\(^{130}\) Id. ¶ 124.
\(^{131}\) See \textit{id.} ¶ 125.
\(^{132}\) Id. ¶ 185.
\(^{133}\) See \textit{id.} ¶¶ 121–30.
of specialty as customary international law. The Supreme Court of Canada discussed the doctrine in *R. v. Parisien*, involving an extradition from Brazil.\(^\text{134}\) The Canadian Extradition Act of 1970, in force at the time, provided that an individual extradited to Canada “in pursuance of any extradition arrangement” would not be prosecuted for any offenses “for which he should not, under the arrangement, be prosecuted.”\(^\text{135}\) Brazil and Canada did not have an extradition treaty, but Canada agreed to comply with the doctrine of specialty as required in order to extradite under Brazilian law.\(^\text{136}\) After his trial in Canada, Parisien, a Canadian citizen, served out his sentence and then left to visit Portugal.\(^\text{137}\) Parisien then returned to Canada, whereupon he was arrested and indicted on charges that had been barred under the specialty agreement.\(^\text{138}\)

In determining whether a specialty violation occurred, the Supreme Court found that “[t]here is no rule of international law that requires states to surrender fugitives from justice within their jurisdiction to countries where they have been accused or convicted of a crime.”\(^\text{139}\) Instead, the court explained, specialty is implicit in extradition treaties because any surrender of an individual to another state carries specialty as an implied condition.\(^\text{140}\) While “this is seen by some as a customary rule of international law,” the court stressed that this result stemmed from “a proper construction of the treaty,” citing the *Rauscher* and *In re Dilasser* decisions.\(^\text{141}\) Because the Extradition Act defined “extradition arrangement” broadly to include ad hoc arrangements, the same logic would apply in the case of an informal arrangement, such as the one with Brazil.\(^\text{142}\)

The Canadian Supreme Court confirmed this understanding four years later in *United States v. McVey*, involving an extradition request from the United States.\(^\text{143}\) Emphasizing that customary international law does not impose any obligation to extradite, the court explained that “international writers have for convenience identified certain principles,” which may serve as helpful labels, but “in the end

\(^{134}\) See *R. v. Parisien*, [1988] 1 S.C.R. 950 (Can.).

\(^{135}\) *Id.* at 957.

\(^{136}\) See *id.* at 953.

\(^{137}\) *Id.* at 954.

\(^{138}\) *Id.*

\(^{139}\) *Id.* at 956.

\(^{140}\) *Id.*

\(^{141}\) *Id.* at 957.

\(^{142}\) *Id.* at 956.

\(^{143}\) See *United States v. McVey*, [1992] 3 S.C.R. 475 (Can.).
the international duty must be found in the terms of the appropriate treaty.” Canada does not appear to recognize any extradition obligations, including specialty, beyond those found in either a treaty or other extradition agreement, as defined in Canadian law.

By contrast, both South African and Indian courts have lent support to the concept of specialty as custom. In the 2002 Harksen case, the South African High Court dismissed the defendant’s challenge to an extradition order authorizing his extradition to Germany. As South Africa and Germany did not have an extradition treaty in force, and Germany had not stated the specific charges it intended to lodge, the defendant argued that the extradition order was not sufficiently limited, even though the order contained a specialty provision. The High Court, rejecting this argument, noted that the defendant had argued in his affidavit that specialty should be binding on Germany under international law. Because there was no reason to believe “that the German authorities will ignore or bypass the international law and custom relating to the principle of specialty,” South Africa did not have to obtain further authorities from Germany prior to extradition.

Likewise, the Supreme Court of India recognized a customary norm of specialty in Daya Singh Lahoria v. Union of India. The defendant had been extradited from the United States to India under an extradition treaty and challenged the jurisdiction of the Indian courts over him with regard to an Indian terrorism statute, to which the U.S. extradition order made no reference. Looking to both the treaty and the domestic extradition act’s specialty provision, the Supreme Court found for the defendant, noting that “[e]xtradition treaties between nations, draft conventions and national laws and practices have revealed that some customary rules of international law have developed in the process.”

144. Id. at 508.
145. The 1999 Extradition Act—the current extradition law in force—contains similar provisions to the 1970 Act, including a broad definition of “extradition agreement” (c. 18, s. 2) and a specialty provision applying to all such agreements (c. 18, s. 80). See Extradition Act, S.C. 1999, c. 18 (Can.).
147. See id. ¶ 19.
148. See id. ¶ 40.
149. Id.
151. See id. at 1–2.
152. Id. at 7.
doctrine of speciality is yet another established rule of international law relating to extradition,” which was then codified in India’s domestic extradition law.  

C. International Tribunals

International courts have addressed the doctrine of specialty but largely within the treaty context. Additionally, the application of the specialty doctrine by international tribunals must be considered in light of the vertical relationship between such tribunals and states, in contrast to the horizontal nature of bilateral state relations. The International Criminal Tribunal for the Former Yugoslavia (ICTY) recognized this distinction with particular regard to specialty. The ICTY Appeals Chamber considered a defendant’s argument that the addition of new counts violated the customary international law principle of specialty. While declining to resolve whether such a principle exists, the Appeals Chamber determined that if there is “such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal.” In a hearing in a later case, Judge Orie of the ICTY noted that “the rule of specialty seems to be more or less well established customary law.” However, the Referral Branch of the ICTY, including Judge Orie, subsequently reiterated that “ordinary principles of extradition law,” including specialty, do not bind the Tribunal, as surrenders to the ICTY are distinct from extraditions between states.

The Rome Statute of the International Criminal Court (ICC) includes a specialty provision, although it follows a slightly different formulation from that traditionally seen in bilateral treaties. Under Article 101, the ICC may not proceed against an individual for any conduct prior to surrender “other than the conduct or course of con-

153. Id.
155. Id.
156. Id. ¶ 37.
157. Prosecutor v. Mrkšić et al., Case No. IT-95-13/1, Transcript of Motion Hearing (Int’l Crim. Trib. for the Former Yugoslavia May 12, 2005).
duct which forms the basis of the crimes for which that person has been surrendered.”

The focus in the Rome Statute is thus on conduct, rather than specific charges or offenses. While the ICC rejected an application of the specialty principle in the Mbarushimana decision, the Court only considered the principle as described by the statute and did not opine on its status under customary international law.

The European Court of Human Rights has considered specialty in cases concerning extradition under the European Convention on Extradition. In Woolley v. United Kingdom, the European Court deferred to domestic interpretations of the European Convention on Extradition’s specialty provision, holding that “it is not for this Court to resolve what is essentially a diplomatic dispute.” Although the European Court was only considering specialty in the context of the relevant treaty, the characterization of the dispute as “diplomatic” implies an understanding of extradition law as contractual, rather than customarily binding.

III. CURRENT LIMITS ON SPECIALTY AND EMERGING PRINCIPLES

Although specialty is a standard feature of extradition law around the globe, opinio juris on specialty is scarce. A number of courts have asserted that specialty is a principle of international law and in a few cases even invoked the principle in the absence of a treaty, but none of these courts engaged in a customary international law analysis. Two early cases, the Hungarian ruling in the Hungary and Austria (Extradition) Case and the Venezuelan decision in In re Dilasser, applied the principle of specialty to bar additional charges following a non-treaty-based extradition. In more recent cases, courts have emphasized the doctrine’s status in international law but ultimately did not apply specialty based solely on custom: they discussed the doctrine in the context of obligations on the requesting...
state, based the application of the principle on national legislation, or declined to apply the doctrine on the basis of standing.

In contrast, the highest courts of Israel and Canada, along with the United States’ Eleventh Circuit, rejected the application of specialty doctrine in the absence of a treaty or other binding agreement. Additionally, the varying formulations of specialty in different jurisdictions, as noted by the Australian appellate courts in Truong, make it difficult to identify the content of any such norm. Overall, the jurisprudence reveals a lack of cohesive opinio juris on specialty. Courts at both the national and international levels continue to emphasize the diplomatic and contractual nature of extradition, as governed by domestic law. Although states frequently follow the specialty principle pursuant to treaties, the limited state practice outside of treaty regimes, along with the uncertain opinio juris of national and international courts, indicates that specialty has not yet crystallized into a norm of customary international law.

This conclusion corresponds with traditional international approaches to jurisdiction. Historically, states have had jurisdiction over individuals within their territory, regardless of how these individuals came to enter the country. The doctrine of *male captus bene detentus* (“wrongfully caught, lawfully detained”), a longstanding doctrine in international law, provides that even when an individual is brought into a state in an unlawful way, such as through abduction, the state retains jurisdiction.

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states agree to extradite in exchange for limiting the receiving state’s jurisdiction to certain offenses. In instances where specialty is invoked under a treaty, the treaty itself binds the domestic courts and serves as a bar to domestic jurisdiction. If a customary norm of specialty emerged, a key challenge would be defining the limits of its applicability, because it would cut against the traditional customary conception of states retaining jurisdiction over all persons within their territory. The Australian Supreme Court of Victoria’s observation that specialty is codified and applied in different formulations recognizes this concern: it is not clear what form a non-treaty agreement would have to take to be protected by a customary international law norm of specialty.

A. Implications for U.S. Law

Absent acceptance of a customary norm of specialty, American courts recognize a bright-line rule: a court’s jurisdiction over an individual brought to the United States from another country may only be limited by a treaty. This understanding comports with the Supreme Court’s 1886 holdings in Rauscher and Ker, in which the Court contrasted the implicit protections guaranteed to Rauscher by the U.S.-U.K. extradition treaty with the absence of any such protections for Ker, who was illegally returned to the United States outside the color of any treaty. The Alvarez-Machain decision reinforced this rule, holding that even though the U.S. government may have been involved in the defendant’s abduction and Mexico had protested the U.S. courts’ exercise of jurisdiction, U.S. courts were only limited by the U.S.-Mexico extradition treaty. Finding that the treaty did not prohibit abduction and thus could not divest courts of jurisdiction, the Court reserved to the Executive Branch “the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty.” Treaties, unlike executive agreements, become law in the United States and thus are the only binding source of rights related to extradition.

In light of this strict adherence to the contractual view of extradition, the emergence of a customary specialty obligation would

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176. Id. at 669.
pose particular challenges for U.S. courts. The Second and Fifth Circuits discussed a customary rule of international law as applying to an extradition based on comity. Without a treaty to clearly identify an extradition, the doctrinal divide between extraditions and other scenarios, such as deportation, luring, and kidnapping would narrow. U.S. courts would have to determine which comity-based extraditions fall under the rule of specialty and distinguish between the types of transfer agreements that benefit from such a rule and those transfers that continue to fall under the Alvarez-Machain doctrine.

Although the U.S. approach, in the absence of a customary norm, does not contradict international law, it does represent a particularly restrictive approach to extradition. Unlike states that have codified specialty protections for both treaty- and comity-based extraditions, the United States’ federal extradition statute does not expressly provide for specialty. The Rauscher Court pointed to statutory provisions concerning the protection of a surrendered individual “until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition” as evidence that specialty should apply, but described this formulation as “undoubtedly a congressional construction of the purpose and meaning of extradition treaties.” Without recourse to an international norm of specialty, U.S. courts have no basis, in either custom or statute, for extending the concept of specialty to informal extradition agreements.

The limits of this approach are demonstrated by the Eleventh Circuit’s refusal to consider the Colombian Executive Resolution as a sufficient basis for specialty in the Valencia-Trujillo case. Following Valencia-Trujillo, countries must be wary of extraditing individuals to the United States under either comity or outside of a treaty regime. By contrast, the Canadian Supreme Court in Parisien refused to find a customary principle of specialty while still holding that under domestic legislation, an extradition agreement, in addition to a formal treaty, provided specialty protections that defendants could invoke in court.

181. Id. at 424.
182. See United States v. Valencia-Trujillo, 573 F.3d 1171 (11th Cir. 2009).
Amending the U.S. statute to include a specialty guarantee for all extradition agreements, including those made in the absence of a treaty, would allow U.S. courts to uphold informal agreements and avoid invoking international law without looking to international practice. Because custom does not appear to have crystallized, a legislative provision would be the surest way of guaranteeing that countries’ expectations are met when they agree to extradite an individual to the United States. Although treaties remain the clearest recourse, the United States does not currently have extradition treaties with a number of countries and retains an interest in maintaining international willingness to extradite to the United States. A legislative specialty provision would bridge the legal gap between extraditions under a treaty and abductions, and serve as a safeguard for countries agreeing to extradite to the United States absent a treaty.

B. Implications for International Extradition

1. Emerging Custom

Under current international law, states are not obligated to adhere to specialty. As a result, they may lodge charges without the consent of the sending state, absent a specific treaty provision. The increasing recognition of the dangers of failing to provide guarantees to states and individuals concerning extradition and of retaining jurisdiction over unlawfully obtained defendants suggest that such a norm may be emerging, however. The international community has increasingly relied on extradition as a means of transnational law enforcement. Multilateral extradition regimes, multilateral treaties with extradition provisions, and codifications of an obligation to extradite or prosecute, while still treaty-based, reflect a move away from bilateral and ad hoc arrangements and states’ interests in effective and streamlined international extradition procedures.

Moreover, recent national and international jurisprudence has moved away from the strict conception of treaties as the only basis for national courts to decline jurisdiction. The U.S. Supreme Court’s decision in *Alvarez-Machain* was met with a hailstorm of criticism from the international community, which viewed the decision as an affront to traditional notions of sovereignty. Since *Alvarez-Machain*, several national courts that previously upheld the *male captus* doctrine have declined jurisdiction in certain cases where defend-

nants were abducted, finding that such means of procurement constituted an abuse of process. 185 One such case is the United Kingdom House of Lords’ 1993 decision in *Ex Parte Bennett*. 186 The defendant in the case was forcibly returned from South Africa to England as a result of collusion between the police forces in both countries and subsequently arrested in London. 187 South Africa and England had no extradition treaty in force, although English legislation provided for special agreements in such situations. 188 While English courts traditionally refused to inquire into the circumstances by which defendants entered their jurisdiction, 189 the *Bennett* court determined that an exercise of jurisdiction would constitute an abuse of process due to the irregular circumstances of the defendant’s entry. 190 Lord Griffiths grounded his decision in the individual rights protected by extradition procedures:

Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable

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186. See R v. Horseferry Road Magistrates’ Court (*Ex parte Bennett*), [1993] UKHL 10, [1994], 1 A.C. 42 (H.L.) (appeal taken from Eng.). See id. at 42.

187. See id.

188. See id.


190. See *Ex parte Bennett*, 1 A.C. at 42.
that in such circumstances the court should declare itself to be powerless and stand idly by.\textsuperscript{191}

The invocation of the abuse of process doctrine in this case supports the notion of a right to specialty outside the confines of a treaty. Additionally, both domestic and international courts have been particularly willing to apply the doctrine where the state from which the defendant was surrendered or otherwise obtained protests, indicating that the consent of the sending state is relevant to the decision of whether to exercise jurisdiction.\textsuperscript{192} International criminal tribunals have likewise considered,\textsuperscript{193} and in one case applied,\textsuperscript{194} the abuse of process doctrine.

Although recognized by a number of courts, the abuse of process doctrine does not divest courts of jurisdiction: it is a discretionary power that courts may apply in situations when the exercise of jurisdiction would run counter to the rule of law, such as transnational abductions or other circumventions of extradition procedures.\textsuperscript{195} The increased application of the doctrine following \textit{Alvarez-Machain}, however, indicates rising concern about extralegal means of gaining custody of defendants.\textsuperscript{196} If a custom emerges requiring the sending state’s consent for courts to exercise jurisdiction over individuals, thus superseding the \textit{male captus} doctrine, a logical corollary would be a customary international law norm of specialty.

2. Multilateral Treaties and the Obligation to Extradite or Prosecute

In addition to extraditions based on comity, extraditions based on multilateral treaties may not be given the protection of specialty. Many multilateral treaties require that states parties rely on the treaty

\textsuperscript{191}  \textit{Id.} at 62.
\textsuperscript{195}  \textit{See} Michell, \textit{supra} note 69, at 500.
\textsuperscript{196}  \textit{See} Wilske & Schiller, \textit{supra} note 184, at 237.
as a basis for extradition for the specified crimes, subject to the domestic law of the surrendering state with regard to procedural guarantees. Likewise, treaties codifying an obligation to prosecute or extradite do not specify whether specialty applies.

Unlike with comity-based extraditions, state practice indicates that courts would be more likely to find specialty implicit in multilateral treaties. Both Rauscher, in which the Court read a specialty provision into a treaty silent on the matter, and the Canadian Supreme Court decision in Parisien, stressed that specialty was implied as a matter of treaty interpretation. Multilateral treaties, unlike bilateral treaties, do not seek to define the limits of extradition between parties, however, so a court could reason that a multilateral treaty does not include the same inherent limits. With no customary obligation to serve as a safeguard and the continued inconsistency among judicial opinions with regard to specialty, states could better protect themselves by including express specialty provisions in such treaties. An express guarantee would also allow parties to clarify the nature and scope of the specialty provision.

Finally, the absence of a customary norm to apply specialty has consequences for the question of an emerging customary obligation to prosecute or extradite. In the 2012 Obligation to Prosecute or Extradite case before the ICJ, Belgium asserted that Senegal had an obligation to prosecute or extradite the defendant, who was accused of torture, based both on a provision in the Convention Against Torture and on the customary prohibition of torture, a jus cogens norm. The ICJ held that Senegal had an obligation to extradite or

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197. See, e.g., UNCAC, supra note 12, art. 44; United Nations Convention Against Transnational Organized Crime, supra note 12, art. 16; International Convention Against the Taking of Hostages, supra note 12, art. 10; Montreal Hijacking Convention, supra note 12, art. 8; International Convention for the Suppression of the Financing of Terrorism, supra note 12, art. II.

198. See, e.g., CAT, supra note 12.


200. See, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 667–69 (1992) (emphasizing that the Court would not imply a prohibition requiring a large “inferential leap with only the most general of international principles to support it”).

201. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422 (July 20).
prosecute based on the CAT but found that it lacked jurisdiction to decide the custom question. In a separate opinion, however, Judge Abraham stressed that no such customary obligation yet exists in international law. Because the obligation to extradite or prosecute has been clearly established only in the treaty context, states are still fundamentally contracting with regard to the extradition regime. The ILC has noted that such an obligation may emerge, however, particularly in relation to *jus cogens* crimes—the most severe international crimes, from which no derogation is permitted.

If a customary obligation to extradite or prosecute were to crystallize, customary limitations on extradition would be particularly important. Although an obligation to extradite for certain crimes may logically carry with it the implied condition that the requesting state may not prosecute for additional violations, the reluctance of courts to view comity-based and treaty-based extraditions in the same way demonstrates that such a condition may not be enforced. The emergence of a customary obligation to extradite or prosecute would necessarily require certain customary rules with regard to extradition, and may cause an obligation to observe specialty to similarly crystallize. With regard to emerging custom, the ILC and other scholars should consider the application of specialty, along with other procedural requirements, in more depth, rather than assume the applicability of such principles.

**CONCLUSION**

While scholars routinely describe specialty as a norm of customary international law, a survey of judicial opinions concerning specialty outside of the context of express treaty provisions demonstrates that no such norm definitively exists. Courts describing specialty as a principle of international law do not assess state practice or *opinio juris*, and recent court decisions have stressed the importance of national legislation or treaty construction as the bases for finding a specialty restriction. Under U.S. law, only treaties serve to restrict the exercise of jurisdiction by domestic courts with regard to extrad-
tion, and assumptions that either custom or informal agreements will provide the same level of protection have led to frustrated expectations.

At a minimum, states should be aware that absent an express treaty provision, they are not inherently guaranteed specialty protections under current customary international law, and adherence to such a limitation largely depends on the judicial system of the receiving state. More broadly, recent jurisprudence demonstrates recognition of and increasing interest in deterring illegal means of obtaining suspected criminals. A normative shift away from the traditional conception of jurisdiction as unrelated to the procedure by which the defendant was obtained to one that recognizes the importance of state consent may lead to the emergence of a customary international law obligation to observe specialty. A broader application of specialty, either through custom or national legislation, would promote willingness to enter into ad hoc extradition arrangements, support the effective transfer of suspected criminals, and correspondingly decrease incentives to gain custody of defendants by extralegal means.

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