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Beyond the Reach of Legal Process – Lessons from United States v Rafiekian

By: Vivian M. Williams

After a failed coup d'état in Türkiye, the government of President Recep Tayyip Erdogan, directed its fury to a dissident exiled in the United States. It accused Fetullah Gulen of instigating antigovernment sentiments and violence in Türkiye that led to the attempt on the President's life. Because Gulen was beyond the reach of legal process in Türkiye, an extradition request was made. When that request was stalled, prosecutors in the U.S. say Türkiye hatched a plot to dilute Gulen's influence. They allege that Bijan Rafiekian was retained as a foreign agent to accomplish that mission. Rafiekian published an op-ed in *The Hill*, the Feds came knocking, and ***United States v Rafiekian***ⁱ was born. The case provides a lens to review a decision by Guyana, an emerging oil giant, to send local police to serve criminal summonses in the United States.

Like Türkiye, the government of Guyana has grown increasingly dissatisfied with dissidents in the United States. Just as Türkiye branded Fetullah Gulen a criminal, officials in Guyana have branded a political foe in New York, a criminal. The country's Vice President, Bharat Jagdeo, uses his weekly press conferences to direct his fury at the government's foe in New York. In the past, the country's Attorney General, Anil Nandlall, hinted on his weekly talk show that moves are afoot to return the dissident to Guyana.

Unlike Türkiye, it is not known that Guyana made an extradition request to the U.S. Department of Justice. Instead, a Guyanese police officer entered the United States and retained a New York process server to serve criminal summonses on the dissident. Subsequently, the Guyana Police Force (GPF) announced that this procedure will be used to go after loudmouths across the world who cross the line between free speech and criminal conduct.

Limitations on the Reach of Criminal Courts

Serving judicial orders and documents in other countries is a common practice. The [Hague Convention](#)ⁱⁱ and the laws of sovereign states provide for it. The *U.S. Marshal Service* is the designated agency for international service in the United States under the Convention. However, the Hague Convention only covers civil and commercial matters. Like the Hague Convention, the criminal procedure laws of Guyana and the United States do not provide for international service of criminal summonses upon individuals.

Rule 4(c)(2) of the U.S. Criminal Procedure Law, provides that a criminal summons must be served upon an individual "*within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest*"ⁱⁱⁱ. Consequently, criminal defendants outside the United States are deemed to be "*beyond the reach of legal process*"^{iv}. This international norm is necessary for the avoidance of global chaos and hostilities between and among nations. The language "*anywhere else a federal statute authorizes an arrest*" accommodates the Military Extraterritorial Jurisdiction Act which permits arrests of military and Department of Defense personnel overseas.

For its part, Guyana's Criminal Law Procedure Act^v requires the "*police or other constable*"^{vi} to serve a criminal summons. Notably, while no provision is made for servicing criminal process out of the country,

the country's Civil Procedure Rules expressly provides for international service of civil documents^{vii}. Why is international service of process against individuals provided for in civil matters but not in criminal matters? The answer lies in the difference between criminal and civil proceedings.

Criminal process is the means through which a country exercises its sovereign authority against its subjects. It is therefore brought in the name of the State as the agent of the collective and indivisible sovereign authority of a country. Criminal matters are therefore acts of State. On the other hand, civil matters do not involve exercise of sovereign authority, so they are not acts of State.

It falls to reason, that a State cannot exercise its sovereign authority beyond its territorial jurisdiction. That is why neither the Hague Convention nor the criminal procedure laws of Guyana and the United States, provide for service of criminal summonses on individuals in other countries. It is also the reason persons out of the territorial jurisdiction of the United States are deemed to be ***beyond the reach of legal process***.

When a country wants to pursue a criminal accused who is beyond the reach of its legal process, it does as Türkiye did in its beef with Gulen - make an extradition request to the country the accused is in. That is a request for a country to invoke its sovereign jurisdiction on behalf of another. If the country agrees to the extradition request, it initiates its own criminal process which is handled by domestic prosecutors. If the extradition process succeeds, then the accused is handed over to the requesting State which assumes jurisdiction when the accused enters its territory. The process consummates sovereign cooperation and respect that is the bedrock of the community of nations. Additionally, it creates a system of checks and balances on countries extending their laws beyond their borders. An alternative path is known as extraordinary rendition which Guyanese may be familiar with through cases such as *United States v Shaheed Roger Khan*^{viii} and *United States v Peter Morgan*^{ix}.

Consequently, if a state declines an extradition request, no criminal process could be initiated within its territory. This was the roadblock the Turkish government ran into when U.S. prosecutors alleged it hatched a propaganda plot to discredit Gulen to bolster its prospect of persuading the Department of Justice to approve its extradition request. The policy announced by the GPF is an attempt to sidestep this process.

What a World That Allows International Service of Criminal Summonses Would Look Like?

Imagine a world where a country could obtain criminal jurisdiction by serving a summons on a subject in another State without the consent of that State.

In that world you are imagining, when a country is angered by someone in another country, it could comb through its laws, find an appropriate offense, and charge its foe. It then acquires jurisdiction over the person by sending a police officer who will retain a private process server to serve the summons in another country. In this world, prominent government officials, political figures, activists and even entrepreneurs could be criminal defendants and convicts in multiple states, many of which they never even set foot in.

Take it a little further and imagine a world where sitting Presidents are defendants and convicts in several countries. In that world, a country could institute criminal proceedings against a sitting President that is its foe. There is no need for an extradition request. Your President will be served the summons in his own country by a process server. He cannot claim presidential immunity in the other country so, if he doesn't attend his criminal trial, a conviction is obtained in absentia.

This is the world we would have if criminal courts could acquire jurisdiction over foreign subjects in the way the GPF plans to. A criminal summons doesn't merely serve to notify an accused of pending criminal proceedings. More importantly, it gives a court jurisdiction over a person. A world where there could be extraterritorial service of criminal process would be one where countries could impose their laws on persons anywhere in the world. In that world, you would have to check the criminal laws of all the countries in the world before you make a viral social media post. If you don't, you may wake up the following day to process servers serving criminal summonses on behalf of countless countries.

A Dangerous Path

Recognition and respect of the sovereignty of nations would lead us to conclude that a judicial officer in one country cannot authorize the police in that country to serve criminal process in another. Common sense would lead to the conclusion that the Guyana Police Force cannot delegate police functions to a private citizen in the United States.

In the United States, private action is treated as that of a State if there is close nexus between the State and the challenged action^x. How then could rational men argue that the performance of a delegated police function in the United States, is not an Act of State? What would it take for rational men to recognize that the path Guyana is taking, creates a slippery slope for the global community, where small, weak States would suffer the greatest intrusion of their sovereignty?

Recognition and respect for the sovereignty of nations has led even significant global actors such as Türkiye and the powerful United States, to recognize that there is such a thing as "*beyond the reach of legal process*". Why would rational men in a small state such as Guyana not recognize this? Why would a country that is facing an existential threat to its territorial integrity be eager to lower a long-standing guardrail of sovereignty? Why would it do so at a time when its own survival depends on how well it galvanizes global conscience on sovereign rights?

References

ⁱ [United States v. Rafiekian, 991 F.3d 529, 534](#)

ⁱⁱ The Hague Convention of 1965

ⁱⁱⁱ Fed Rules Crim Pro rule 4

^{iv} [United States v. Marchant, 774 F.2d 888, 892](#)

^v Criminal Law (Procedure) Act of Guyana, section 52(4)

^{vi} Criminal Law (Procedure) Act of Guyana, section 52(4)

^{vii} Civil Procedure Rules 7.5 of Guyana

^{viii} USA v Khan 06-cr-cr-225. Discussion on extraordinary rendition is deferred to a subsequent article.

^{ix} USA v Morgan, 07-cr-00181

^x Brentwood Academy v Tennessee Secondary School Athletic Ass'n, 531 US 288, 121 S Ct 924, 148 L Ed 2d 807
[2001]