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Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights

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I. INTRODUCTION

James Mitchell is suddenly awakened in the middle of the night by a pounding on the door of his London flat. When he answers, he is met by two English detectives who inform him that he is being arrested pursuant to a warrant issued by the United States government. Some time later he goes before an English Magistrate, who, after careful scrutiny of the evidence against him, determines that there is enough evidence to extradite the defendant to the United States to stand trial for arson. Once in the United States, Mitchell's court-appointed lawyer informs him that because a woman died in the fire he allegedly set, the prosecutor is also charging him with felony murder. His lawyer assures him however that the additional charge will almost certainly be dismissed because the United States extradition treaty with the United Kingdom specifically prohibits either nation from charging an extradited defendant with a crime for which he was not extradited. Unfortunately, Mitchell's attorney never reaches the merits of whether the additional charge violates the extradition treaty, for the court rules that the defendant does not have standing to invoke the treaty provision.

Charging individuals with crimes for which they were not extradited is a violation of the internationally accepted doctrine of specialty.[1] The doctrine of specialty is based on the principle that "the State to which a person has been extradited may not, without the consent of the requisitioned State, try a person extradited save for the offence for which he was extradited."[2] This rule was recognized as part of American jurisprudence by the United States Supreme Court in *United States v. Rauscher*,[3] and subsequently has been incorporated into almost all United States extradition treaties.[4]

Like the fictitious Mitchell, many defendants extradited to the United States find themselves facing charges added on to, or used in lieu

1. 2 D.P. O'CONNELL, INTERNATIONAL LAW 731 (2d ed. 1970).
2. *Id.*
3. 119 U.S. 407 (1886).
4. *See infra* notes 21-24 and accompanying text.

of, the originally extraditable offense.[5] Though such conduct by the United States government often violates the terms of an extradition treaty,[6] several circuits still refuse to acknowledge that an extradited individual has standing[7] to protest the legality of facing these additional charges.[8] These courts reason that the doctrine of specialty is "a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused."[9]

This Comment argues that such reasoning is erroneous. The purpose of the specialty doctrine is to protect the interests and dignity not only of the asylum state but also of the individual being extradited.[10] Thus, Article VI of the Constitution, which makes treaties the supreme law of the land, explicitly gives the defendant standing by virtue of the fact that a law of the United States which directly affects his or her personal rights has been violated.[11] This position was adopted by the United States Supreme Court in *United States v. Rauscher*[12] when it recognized the doctrine of specialty as a principle affecting individual rights.[13] Given this duality of purpose, extradited defendants should be able to raise those rights given to them under American law even in the absence of the asylum nation's protest.[14]

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5. *See* Leighnor v. Turner, 884 F.2d 385, 387 (8th Cir. 1989) (lengthening defendant's parole requirements because of escape—though defendant extradited only for crime of fraud); United States *ex rel.* Cabrera v. Warden, Metro. Correctional Ctr., 629 F. Supp. 699, 700 (S.D.N.Y. 1986) (attempting to try defendant on charges in both New York and Florida—though defendant extradited only to face charges in Florida).

6. *See infra* notes 158-59 and accompanying text.

7. "Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

8. *See, e.g.*, United States v. Kaufman, 874 F.2d 242 (5th Cir.) (holding that only nations signing treaty may raise its violation), *cert. denied*, 493 U.S. 895 (1989); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985) (stating that "right to insist on application of the principle of specialty belongs to the requested state"), *cert. denied*, 475 U.S. 1016 (1986).

9. *Cabrera*, 629 F. Supp. at 701.

10. *See infra* notes 178-204 and accompanying text.

11. The United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

U.S. CONST. art. VI, cl. 2.

12. 119 U.S. 407 (1886).

13. *See infra* notes 192-97 and accompanying text.

14. *See infra* notes 205-18 and accompanying text. The purpose of this Comment is not to debate the merits of individual defendants' specialty claims. Rather, the issue presented in this Comment is whether or not defendants have the right to have such claims heard by a United States court. The distinction between whether a claim is meritorious and whether it should be

II. BACKGROUND: THE DOCTRINE OF SPECIALTY

A. The Use of the Specialty Doctrine in Extradition

The United States' primary method of obtaining jurisdiction over a defendant outside its territorial reach is through extradition.[15] The power to extradite fugitives to and from foreign states lies solely with the federal government.[16] By law the federal government may not extradite an individual *from* the United States in the absence of a treaty, although it may sometimes obtain jurisdiction over a defendant without formal extradition proceedings in the asylum country.[17] Accordingly, the United States government is currently a party to ninety-four bilateral extradition treaties.[18] Pursuant to these treaties, hundreds of individuals are extradited from foreign countries to the United States every year on the basis of charges levied against them by the United States government.[19]

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heard is crucial. *See* Leighnor v. Turner, 884 F.2d 385, 388-89 (8th Cir. 1989) (granting defendant standing to raise specialty violation although claim subsequently found meritless).

15. M. Cherif Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 5-7 (1968). Extradition is "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902).

16. *Rauscher*, 119 U.S. at 414; M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 29-30 (1974).

17. Congress enacted legislation which mandates that extradition of fugitives *from* the United States be done through a treaty, and subject to federal court jurisdiction. 18 U.S.C. §§ 3181-3195 (1988 & Supp. 1990). While the legislation does not preclude the United States from seeking a defendant's return to this country even in the absence of a treaty (i.e., deportation by asylum nation), almost all American extradition treaties are bilateral. *Id.* § 3181 (listing all extradition treaties to which United States currently is party).

18. *Id.*

19. *See* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1441 n.2 (1988) (noting that in 1983 alone United States government made over two hundred extradition requests).

1. Defining the doctrine

The doctrine of specialty has been incorporated into United States municipal law[20] in two ways.[21] The most common is the doctrine's inclusion in extradition treaties, which, by virtue of the Constitution, are deemed the equivalent of statutes.[22] The doctrine has also been recognized as part of United States foreign relations law,[23] a body of municipal law that has been devised by the legislature and the courts to help implement America's foreign obligations and duties.[24] The specialty provisions generally hold that the requesting state[25] may not try an extradited individual for any crime other than that for which he or she was extradited.[26] If, however, the extradited individual has been given the time and opportunity to leave the requesting state and does not, the specialty

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20. As used in this Comment, the term "municipal law" (also referred to as domestic law) is meant to help distinguish the law of the United States from international law. *See generally* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 863-66 (1987) (clarifying distinctions between international law and United States domestic law). In order to understand the distinction between international law and United States domestic law a brief explanation about their relationship is necessary.

There are two schools of thought concerning the effect of international law on United States domestic practices: "monism" and "dualism." Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988). Monists believe that international law is completely incorporated into domestic legal systems. Henkin, *supra*, at 864. The judicial, legislative and executive branches of government under a monist system must give full effect to the rules of international law, "anything in the domestic constitution or laws to the contrary notwithstanding." *Id.*

Dualists view international law as a separate and distinct system. International law governs the conduct between nations, operating exclusively at the international level. *Id.* If a nation's international obligations are related to considerations that are of a domestic nature, effectively carrying out such obligations will sometimes contradict domestic law. *Id.* This problem may be rectified by changes through domestic legislation, or by adopting international law as part of the nation's domestic law and giving it full effect. *Id.* at 864-65.

While the United States legal system has some strains of monism, it is primarily a dualist system. *Committee of United States Citizens Living in Nicar.*, 859 F.2d at 937.

21. Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 478-79 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

22. *See* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (holding that treaties are equivalent to laws of United States and are given authoritative effect by courts).

23. *Fiocconi*, 462 F.2d at 479.

24. *Id.* Foreign relations law of domestic origin is primarily comprised of federal common law and statutes. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. b (1987) (describing function of United States foreign relations law) [hereinafter RESTATEMENT].

25. The term "requesting state" refers to the nation that requests another sovereign power to seize and turn over an individual within its territorial jurisdiction. *See generally* 2 O'CONNELL, *supra* note 1, at 720-22 (explaining framework of extradition process).

26. 4 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 42-45 (1942).

doctrine does not apply.[27] Similarly, if the individual voluntarily returns to the requesting state after the trial, he or she may face additional charges for crimes he or she committed prior to the original trial.[28] Furthermore, the accused is liable for all crimes he or she commits in the extraditing state subsequent to his or her extradition.[29]

The doctrine of specialty is one of many basic rights, limitations and defenses of international law that are almost universally embodied in our extradition treaties.[30] For example, most United States extradition treaties also contain such staple provisions as: (1) jurisdictional clauses;[31] (2) double criminality clauses;[32] and (3) political crime clauses.[33] While inclusion of some of these provisions reflects "America['s] attitude towards the concept of sovereignty, . . . others are designed to safeguard the fugitive's individual rights."[34]

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27. 4 *id.* at 42.

28. 4 *id.*

29. 4 *id.* The *Restatement (Third) of the Foreign Relations Law of the United States* characterizes the specialty doctrine as follows:

> Under most international agreements, state laws, and state practice:
> (1) A person who has been extradited to another state will not, unless the requested state consents:
> (a) be tried by the requesting state for an offense other than one for which he was extradited; or
> (b) be given punishment more severe than was provided by the applicable law of the requesting state at the time of the request for extradition;
> (2) A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state.

RESTATEMENT, *supra* note 24, § 477.

30. For a discussion of the almost universal application of these provisions, see Bassiouni, *supra* note 15, at 7-19.

31. *E.g.*, Treaty Between the United States of America and the Republic of Panama, Providing for the Extradition of Criminals, May 25, 1904, U.S.-Pan., art. I, 34 Stat. 2851, 2851-52; Bassiouni, *supra* note 15, at 7. Jurisdictional clauses usually hold that extraditable offenses must have occurred in the territorial jurisdiction of the requesting state and that the offender must be found within the territorial jurisdiction of the requested state. *Id.* For a discussion on the ever-expanding definition of territorial jurisdiction, see *id.* at 7-10.

32. *E.g.*, Treaty of Extradition, Jan. 19-21, 1922, U.S.-Venez., art. V, 43 Stat. 1698, 1703; Bassiouni, *supra* note 15, at 12. Double criminality clauses provide that a fugitive will only be extradited if the charges against the individual in the requesting country are also offenses in the territory where he or she has asylum. *See* United States v. Lehder-Rivas, 668 F. Supp. 1523, 1529 (M.D. Fla. 1987) (rejecting defendant's argument that charge had no sufficient counterpart in Columbian law).

33. *E.g.*, Treaty between the United States and Nicaragua for the Extradition of Criminals, Mar. 1, 1905, U.S.-Nicar., art. IV, 35 Stat. 1869, 1873-74; Bassiouni, *supra* note 15, at 16. Political crime clauses prohibit the surrender of a fugitive to face charges that are of a political character. Quinn v. Robinson, 783 F.2d 776, 793-94 (9th Cir.) (holding that pure political offenses such as treason and espionage do not require extradition), *cert. denied*, 479 U.S. 882 (1986).

34. Bassiouni, *supra* note 15, at 7.

2. The scope of the doctrine

Although the specialty doctrine appears to prohibit a court's subject matter jurisdiction, it actually governs a tribunal's personal jurisdiction over extradited defendants.[35] The reason for this is that the requesting state[36] would not have the defendant in its custody except for the grace of the asylum state.[37] When the asylum state remands the fugitive to face trial on certain charges it implicitly limits the foreign tribunal's jurisdiction over that defendant to the charges specified.[38] This in turn restricts an American tribunal's ability to require the defendant's presence to face additional charges.[39]

Thus, the maxim of American law that a defendant may not challenge the method used to secure his or her presence before a tribunal[40] is not applicable when jurisdiction is obtained by the violation of an extradition agreement.[41] The United States Supreme Court made this distinction in *Ker v. Illinois*.[42] In *Ker* the Court held that defendants extradited by treaty "[come] to this country clothed with the protection which the nature of such proceedings . . . and the true construction of the treaty [give them]."[43] Noting that Ker was not brought to America by treaty but rather was kidnapped by a private party, the Court distinguished the case at hand by stating: "But it is quite a different case when the plaintiff

35. United States v. Vreeken, 803 F.2d 1085, 1088 (10th Cir. 1986) ("The specialty rule may initially appear to limit the courts' subject matter jurisdiction, because it bars trial of an extradited defendant on some charges but not on others. But the extradition process is one whereby a court gains personal jurisdiction over a defendant."), *cert. denied*, 479 U.S. 1067 (1987).

36. The asylum state (also referred to as the extraditing or requested state) is the nation that seizes an individual within its territorial jurisdiction for the purposes of turning him or her over to another nation to answer for crimes committed in that nation. *See generally* 2 O'CONNELL, *supra* note 1, at 720-22 (explaining framework of extradition process).

37. Bassiouni, *supra* note 15, at 15.

38. *Id.*

39. Ker v. Illinois, 119 U.S. 436, 443 (1886).

40. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) (holding that defendant's person in criminal cases may never be suppressed); United States v. Crews, 445 U.S. 463, 474 (1980) (stating that despite illegal detention, defendant's presence before court is not suppressible); Frisbie v. Collins, 342 U.S. 519, 522-23 (1952) (holding that defendant who was knocked unconscious in Michigan and transported to Illinois must still face charges); *Ker*, 119 U.S. at 443 (holding that defendant kidnapped from foreign country to stand trial in United States must still face charges). See also Bassiouni, *supra* note 15, at 12, in which the author, in reference to American law, states: "[T]he courts have tacitly accepted for purposes of jurisdiction such practices as disguised extradition, abduction and kidnapping, fraud, and false pretenses; all have passed the legal test." *Id.*

41. *Ker*, 119 U.S. at 442.

42. 119 U.S. 436 (1886). *Ker* involved a defendant who protested that his presence before an American court was the result of being illegally abducted from Peru. *Id.* at 438.

43. *Id.* at 443.

in error comes to this country in the manner in which he was brought here, clothed with no rights which a *proceeding* under the treaty could have given him . . . ."[44]

In order to more fully understand the application of the doctrine in this country, it is necessary to discuss the doctrine's origin in the international community and its adoption in the United States.

B. Origin of the Specialty Doctrine

1. The origin of the doctrine in the international community

The practice of extraditing fugitives was rarely followed until recent times. In fact, "until well into the nineteenth century the surrender of fugitives was the exception rather than the rule, and a matter of grace rather than of obligation."[45] Gradually the need for international cooperation in capturing fugitives was realized[46] and extradition treaties between nations became more prevalent.[47] With the advent of modern extradition treaties arose the problem of nations trying extradited individuals for offenses other than those for which they were extradited.[48] Eventually the recognition that such breaches by the requesting state violated the interests and dignity of the aslyum state and thus implicitly the personal rights of the defendant caused scholars and statesmen to endorse the doctrine of specialty as a means of eliminating such abuses.[49]

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44. *Id.* (emphasis added). The Court noted that the abduction was done both *without* the authority of the United States government and *outside* the extradition treaty between the two countries. *Id.* at 442-43.

45. 2 O'CONNELL, *supra* note 1, at 720. Although the doctrine of specialty has been recognized both in the United States and the international community for many years, the doctrine's significance has increased tremendously in recent years. This is due to the ever-increasing technical advances of modern society. With modes of transportation available to suspects that can enable them to flee the jurisdiction of a country in hours (in some instances even minutes), the possibility of fugitive flight is greater then ever. *See* 2 *id.* at 721. Professor O'Connell notes: "[R]eticence in the matter of surrender of criminals was due, no doubt, to the infrequency with which they were able to escape beyond the jurisdiction, but [modern transportation] altered the situation in a dramatic way and stimulated bilateral agreement." 2 *id.*

46. 2 *id.* The author states:

> The law of extradition . . . is founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the community of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.

2 *id.* (quoting *In re* Arton, 1 Q.B. 108, 111 (1896)).

47. 2 *id.*

48. *See, e.g.*, United States v. Lawrence, 26 F. Cas. 879 (S.D.N.Y. 1876) (No. 15,573); United States v. Caldwell, 25 F. Cas. 295 (S.D.N.Y. 1871) (No. 14,707); Adriance v. Lagrave, 59 N.Y. 110 (1874).

49. *See* United States v. Rauscher, 119 U.S. 407, 410-12 (1886) (outlining acceptance of specialty doctrine by world community).

Although the need for the doctrine was well recognized, the enforcement of the doctrine was a point of contention among scholars.[50] The question was whether "violations of international law have domestic legal consequences."[51] The answer to that question often depends on the approach each nation takes to how international law regulates a state's status, rights and obligations among other states.[52] In *United States v. Rauscher*[53] the Supreme Court first recognized the doctrine of specialty by implying it "from the manifest scope and object of the [extradition] treaty."[54]

2. Adoption of the doctrine in the United States: *United States v. Rauscher*

United States v. Rauscher[55] involved an individual extradited from Britain for murder under the 1842 extradition treaty.[56] The defendant, who was second mate on a high seas ship,[57] was indicted by a grand jury for inflicting cruel and unusual punishment on a crew member.[58] The defendant protested being charged with the crime of cruel and unusual punishment when he was extradited for murder.[59]

The Supreme Court noted that the treaty contained no specific provision forbidding an extradited individual from being charged with crimes other than those for which he or she was extradited.[60] However,

50. Several late nineteenth century legal scholars argued that charging such additional offenses was a violation of international law. *See generally* William B. Lawrence, *The Extradition Treaty*, 14 ALB. L.J. 85 (1876) (examining debate over status of specialty doctrine under American law).

51. Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988).

52. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964) (noting that while international law traditionally involves state-to-state diplomacy, United States has also incorporated it into its domestic law).

53. 119 U.S. 407 (1886).

54. Johnson v. Browne, 205 U.S. 309, 317 (1907).

55. 119 U.S. 407.

56. *Id.* at 409.

57. The ship was American and thus within the admiralty and maritime jurisdiction of the United States. *Id.*

58. *Id.*

59. *Id.* One possible reason the United States requested extradition of Rauscher for murder instead of cruel and unusual punishment is that the latter was not one of the crimes requiring extradition under the 1842 treaty. Thus, while the crime of murder may have been sufficient to extradite the defendant, it might have been too difficult to prove, requiring the charges to be reduced to cruel and unusual punishment. For a discussion of crimes extraditable under the 1842 treaty, see *id.* at 411.

60. *See id.* at 410-11. Today almost all extradition treaties contain specialty provisions. *See* BASSIOUNI, *supra* note 16, at 311 (noting rules of extradition now almost all derive from treaty sources).

it ruled that the treaty's enumeration of specific extraditable offenses implied that the requirement of specialty was to be met.[61] The Court held:

> [T]he weight of authority and of sound principle are in favor of the proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition . . . .[62]

The *Rauscher* decision also focused on the rights of individuals extradited under the treaty.[63] Its language implied that the right to specialty (as conceived from the treaty) was meant to inure to the benefit of the defendant.[64] The Court noted that the judiciary was an appropriate forum for an aggrieved individual to seek redress for violations of his or her rights under the treaty.[65] The Court explained that, while in most countries the only mode of enforcing extradition treaties is through the executive branch of the government, in the United States treaties are the supreme law of the land.[66] Thus, the executive department need not interfere with this nation's judiciary to ensure that the United States' obligations to the extraditing state are met,[67] for the defendant has the right to invoke the treaty of his or her own volition.[68]

Although seemingly contradicted by *Rauscher*, some subsequent court holdings have suggested that extradition treaties confer no rights on individuals.[69] Thus, the question of who may raise the violation still remains: the defendant, the asylum state or both?

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61. *Rauscher*, 119 U.S. at 430.

62. *Id.* Although in *Rauscher* the Court interpreted the doctrine of specialty as applying only to the prosecution of those crimes not listed in the treaty, subsequent case law has extended the doctrine to prohibit any charge other than that for which extradition was granted. Johnson v. Browne, 205 U.S. 309, 320 (1907); Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

63. *See infra* notes 192-97 and accompanying text.

64. *Rauscher*, 119 U.S. at 430-31 (both *Rauscher* and *Ker* were decided on same day).

65. *Id.* at 430.

66. *Id.*

67. *Id.*

68. *Id.* at 430-31; *see also* Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 479 (2d Cir.) (noting that Supreme Court provided Rauscher with judicial remedy—prohibition of additional charges), *cert. denied*, 409 U.S. 1059 (1972).

69. For example, in *Ex Parte* Coy, 32 F. 911 (W.D. Tex. 1887), decided approximately one year after *Rauscher*, a federal district court seemingly rejected the premise that an individual may have rights under an extradition treaty. *Id.* at 917. For a discussion of more recent cases, see *infra* notes 110-28 and accompanying text.

C. *Diverging Views on an Individual's Right to Invoke the Specialty Doctrine in United States Courts*

Although all federal courts recognize the doctrine of specialty as a means of preventing additional and substitute charges,[70] there is confusion and disagreement among the courts over whether a defendant has standing to raise such claims.[71] The Second, Fifth and Sixth Circuits hold that an individual does not have standing to assert the doctrine because the obligation not to try the defendant is primarily meant to protect the asylum state's sovereignty.[72] Conversely, Eighth, Ninth and Eleventh Circuit opinions suggest that the individual has standing, subject only to the asylum country's express waiver of the right.[73] Still other judicial holdings, mostly district court opinions, appear to view the specialty provision as unilaterally conferring a right on the extradited party.[74] Given the confusing status of an individual's rights under the specialty doctrine, it is little wonder that at least one circuit has called for an *en banc* decision to resolve the issue.[75]

1. The individual's unilateral right to assert a specialty claim

Following the broad language of *Rauscher*, some district court opinions have implied that individuals have standing to raise specialty claims completely independent of the asylum state.[76] Such a view, when interpreted broadly, suggests that an individual should be able to invoke the doctrine even when the asylum state expressly waives its rights under the treaty.[77]

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70. *See Rauscher*, 119 U.S. at 407 (recognizing doctrine of specialty as part of American law).

71. *See* Leighnor v. Turner, 884 F.2d 385, 388 & n.4 (8th Cir. 1989) (collecting cases).

72. *See, e.g.*, United States v. Kaufman, 874 F.2d 242, 243 (5th Cir.) (only offended nations may complain of treaty violation), *cert. denied*, 493 U.S. 895 (1989); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985) (application of specialty is solely right of asylum state), *cert. denied*, 475 U.S. 1016 (1986); United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962) (same).

73. *See, e.g.*, United States v. Diwan, 864 F.2d 715, 721 (11th Cir.) (defendant may raise whatever objections asylum state may raise), *cert. denied*, 492 U.S. 921 (1989); United States v. Thirion, 813 F.2d 146, 151 & n.5 (8th Cir. 1987) (same); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (same), *cert. denied*, 479 U.S. 1009 (1986).

74. *See, e.g.*, United States v. Sensi, 664 F. Supp. 566, 570 (D.D.C. 1987) (dicta) (specialty provision in treaty is supreme law of United States, violation of which affects rights of defendant), *aff'd on other grounds*, 879 F.2d 888 (D.C. Cir. 1989).

75. *Leighnor*, 884 F.2d at 388 (calling for *en banc* decision to settle standing issue).

76. *See, e.g.*, United States v. Vreeken, 603 F. Supp. 715, 718 (D. Utah 1984), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

77. For example, in United States v. Najohn, 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986), the court rejected the defendant's argument that the specialty provision in the treaty between the United States and Switzerland "binds the United States regardless of

One of the most unequivocal assertions of such a right was articulated by the District Court for the District of Columbia in *United States v. Sensi*.[78] In *Sensi* the court took the position that the specialty doctrine in the treaty was meant to directly confer rights upon the individual as well as the government of the asylum state.[79] Sensi was extradited by treaty from Great Britain on charges of interstate transportation of stolen property.[80] The defendant objected to the indictment on the grounds that the charges were not those for which the British magistrate had agreed to extradite him.[81] The United States government contended that the defendant had no standing to raise the issue.[82] The court rejected this contention.[83] Although noting that the extradition treaty containing the specialty provision is a contract between the governments of the United States and the United Kingdom, the court recognized that "it is also the supreme law of this land by virtue of the Constitution (Article VI)."[84] Thus, the violation of the treaty would not only breach the agreement between the nations, but would also be " 'a matter directly involving [the defendant's] personal rights.' "[85] It concluded that because a law directly affecting the defendant had allegedly been violated by the government, that individual should have the right to challenge the government's action in court.[86] On appeal, the United States Court of Appeals for the District of Columbia Circuit upheld Sensi's conviction.[87] It refused, however, to go as far as the district court did in recognizing a right conferred on the defendant, stating that the question of standing need not be resolved since the defendant's "arguments [were] without merit."[88]

Similarly, in *United States v. Vreeken*[89] the District Court for the District of Utah noted that, while as a general rule the defendant was

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the consent of the Swiss authorities." *Id.* at 1422. See *infra* notes 103-07 and accompanying text for a discussion of the *Najohn* case.

78. 664 F. Supp. 566 (D.D.C. 1987).

79. *Id.* at 570.

80. *Id.* at 568.

81. *Id.* at 569.

82. *Id.* at 570.

83. *Id.*

84. *Id.*

85. *Id.* (quoting *Ex Parte* Hibbs, 26 F. 421, 431 (D. Or. 1886)).

86. *Id.* Although the defendant claimed that the charges in the indictment were not those for which the English magistrate had agreed to extradite him, the court ultimately found that the doctrine of specialty had not been breached. *Id.* at 569-70.

87. United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989).

88. *Id.* at 892 n.1.

89. 603 F. Supp. 715 (D. Utah 1984), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987). Vreeken initially fought extradition from Canada. However, realizing

without recourse to challenge his or her presence before a United States court,[90] he or she may make a challenge when such presence is secured through a violation of an international treaty that confers rights on the defendant.[91] The court pointed to *United States v. Rauscher* for support, noting that the *Rauscher* Court "specifically held that the rule of specialty is a right that may be enforced by the person who was extradited."[92]

2. The individual's right to assert a specialty claim subject only to an express waiver by the asylum state

The Eighth, Ninth and Eleventh Circuits have held that an individual has standing to invoke the specialty provision in an extradition treaty subject only to an express waiver by the asylum state.[93] These decisions suggest that the compacting states' interest in incorporating the specialty provision was not only out of concern for their territorial and procedural sovereignty, but also out of concern for the extradited individual. The specialty provision thus imposes on the extraditing state enforceable legal duties that may be asserted by the individual. In essence, these decisions seem to treat the extradited individual as a third-party beneficiary of the specialty provision.[94] However, because the individual's rights are limited to and defined by the requesting state's international obligations to the asylum state,[95] a subsequent waiver by the asylum state extinguishes any benefit that the individual may have derived from the specialty provision.[96]

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that an extradition fight would be costly, he signed a waiver of extradition and voluntarily returned to the United States. *Id.* at 716. Upon his return he was indicted on a second set of charges for tax fraud. *Id.* at 717.

90. *Id.* The court ultimately held that the extradition treaty was inapplicable because Vreeken was not extradited, but rather voluntarily returned to the United States. *Id.* at 719.

91. *Id.* at 717-18. The appellate court refused to address the standing issue, holding that Vreeken "failed to raise the [specialty issue] in a timely manner." United States v. Vreeken, 803 F.2d 1085, 1088 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

92. *Vreeken*, 603 F. Supp. at 718. The *Vreeken* court also cited with approval *Rauscher*'s construction of the American Extradition Act, now 18 U.S.C. § 3192 (1988), noting that the Supreme Court had concluded that the statute showed Congress's "construction of the purpose and meaning of the rule of specialty, and that it conferred a right on those extradited under such a provision." *Id.*; *see also* United States v. Rauscher, 119 U.S. 407, 433 (1886) (Gray, J., concurring) ("political department . . . has clearly manifested its will, in the form of an express law"). See *infra* note 197 for a more complete discussion of the statutory provision.

93. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355 n.13 (9th Cir. 1991).

94. *See infra* notes 215-18 and accompanying text.

95. United States v. Diwan, 864 F.2d 715, 721 (11th Cir.) (purpose behind letting defendant raise specialty provision is to protect asylum state's interest), *cert. denied*, 492 U.S. 921 (1989).

96. *Id*; *see also infra* notes 216-19 and accompanying text.

In *United States v. Diwan*[97] the Eleventh Circuit Court of Appeals articulated this position. Diwan was arrested by British authorities and held for extradition on mail fraud charges.[98] Upon her formal extradition, the defendant sought to dismiss the conspiracy charges on the grounds that the British magistrate had viewed them as non-extraditable under British law.[99] In response, the United States government produced written correspondence from the British government indicating that it had no objections to the additional charges.[100] The court held that while a defendant *has standing* to protest additional charges in absence of comment from the asylum state, given the affirmative approval by the British government, defendant's claim was meritless.[101] The court stated:

> In *Rauscher*, the precedent on which Diwan relies, the Supreme Court fashioned a remedy for the accused threatened with prosecution for offenses other than those for which extradition had been granted. However, the objective of the rule is to insure that the treaty is faithfully observed by the contracting parties. The extradited individual, therefore, can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty. Therein lies the demerit of Diwan's argument.[102]

The Ninth Circuit Court of Appeals in *United States v. Najohn* reached a similar conclusion.[103] In *Najohn* the defendant protested a subsequent indictment in the District Court for the Northern District of California for interstate transportation of stolen property.[104] Pursuant to the original extradition request between Switzerland and the United States, he was only to face charges in the District Court for the Eastern District of Pennsylvania.[105] The court noted that the primary purpose of the specialty doctrine is to satisfy obligations owed to the asylum state, which relinquishes jurisdiction over the individual based on the promises

97. 864 F.2d 715 (11th Cir. 1989).

98. *Id.* at 720. Defendant was extradited pursuant to the treaty between the two countries. *See* Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227.

99. *Diwan*, 864 F.2d at 720.

100. *Id.*

101. *Id.* at 721. One of the factors that swayed the court was the affirmance of the additional charges by the British Home Secretary, who, under the British system of government, is responsible for extradition matters. *Id.* at 721 & n.6.

102. *Id.* at 721 (citations omitted).

103. 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

104. *Id.* at 1421.

105. *Id.*

made to it.[106] Thus, while the defendant could "raise whatever objections the rendering country might have," because Switzerland had agreed to suspend the specialty provision in this instance, Najohn could not assert these rights under the treaty.[107]

The Eighth Circuit Court of Appeals also took this view in *United States v. Thirion*.[108] There the court held that the individual being extradited is entitled to all defenses that the asylum country might raise as long as that country does not consent to "extradite the defendant for offenses other than those expressly enumerated in the treaty."[109]

3. The individual has no right to assert a specialty claim

Although clearly contradicted by *Rauscher*, some recent court holdings have suggested that extradition treaties confer no rights on individuals.[110] Specifically, the Second, Fifth and Sixth Circuits have denied standing to individuals, suggesting that the purpose of the doctrine is solely to protect the asylum state's sovereignty.[111] Accordingly, there can be no justiciable violation of the specialty provision unless the asylum state affirmatively protests the additional charges.[112] Such opinions suggest that the defendant is at best an incidental beneficiary of the

106. *Id.* at 1422.

107. *Id.* at 1422-23.

108. 813 F.2d 146 (8th Cir. 1987).

109. *Id.* at 151. *Thirion* involved a defendant who fled the United States just before being indicted on conspiracy and mail fraud charges. *Id.* at 150. He was later apprehended in Monaco. *Id.* Monaco, pursuant to its extradition treaty with the United States, extradited the defendant for all charges listed in the extradition request, save the conspiracy count. *Id.* Monaco refused to extradite on the conspiracy count because the underlying wrong involved a fraud against the United States that was not an extraditable offense under the treaty. *Id.* at 150 n.4; *see also* Extradition Treaty, Feb. 15, 1939, U.S.-Monaco, art. II, 54 Stat. 1780, 1781-83 (listing extraditable offenses). Once in the United States, Thirion's request to dismiss the conspiracy count was denied. *Thirion*, 813 F.2d at 151. On appeal, Thirion argued that the specialty clause in the extradition treaty between the United States and Monaco forbade the United States from charging him with conspiracy. *Id.*

110. *E.g.*, United States v. Kaufman, 874 F.2d 242, 243 (5th Cir.), *cert. denied*, 493 U.S. 895 (1989); United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962); *see also* Kester, *supra* note 19, at 1465 (arguing some cases have "loose language suggesting that extradition treaties grant rights only to the countries that adopt the treaties").

111. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355 n.13 (9th Cir. 1991); *see also* United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) (extradition treaties are solely for benefit of compacting governments); United States v. Evans, 667 F. Supp. 974, 979 (S.D.N.Y. 1987) (specialty rights from treaty belong to asylum state); United States *ex rel.* Cabrera v. Warden, Metro. Correctional Ctr., 629 F. Supp. 699, 701 (S.D.N.Y. 1986) (defendant has no standing to invoke either treaty or rule of specialty).

112. *Cordero*, 668 F.2d at 37-38.

provision—no more entitled to invoke the doctrine than a completely disinterested party.[113]

A recent case that articulates this view is *United States v. Molina-Chacon*.[114] *Molina-Chacon* involved a defendant who was indicted in the United States for trafficking in heroin.[115] Upon his arrest in Bermuda, the defendant waived extradition and was returned to the United States.[116] Once extradited, he protested that the superseding indictment listed crimes that were different from and more severe than the indictment in existence when he agreed to waive extradition.[117] The court held that the doctrine of specialty had not been violated because the defendant had waived extradition and he was subsequently deported.[118] However, it noted in dicta that the defendant had "misconstrue[d] the purpose of the doctrine."[119] A defendant being extradited has no right to challenge the government's conduct under the treaty.[120] The doctrine exists as a "privilege of the asylum state, not the individual right of one accused of a crime. . . . If there has been any violation of international law in this case it is incumbent upon the offended country to raise it, not the defendant herein."[121] *Molina-Chacon* seemed to reinforce the Second Circuit's view that the doctrine of specialty "is designed to protect the extraditing government against abuse of its discretionary act of extradition."[122]

The ability to deny an individual access to the protection that an extradition treaty might otherwise afford is a powerful weapon that the United States government has used successfully in recent years. In *United States v. Kaufman*[123] the defendants claimed they were improperly denied "the benefits of the rule of specialty contained in the treaty between the United States and Mexico" by the appellate court hearing

113. *See* Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.D.C. 1979). Therein the court stated: "While conditions such as this [specialty provision in the treaty] provide an added degree of protection for the extradited party, courts have been clear in their analysis that the rule of specialty is not a right of the accused but is rather a privilege of the asylum state by which its interests are protected." *Id.*

114. 627 F. Supp. 1253 (E.D.N.Y. 1986), *aff'd in part sub nom.* United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987).

115. *Id.* at 1255.

116. *Id.* at 1258.

117. *Id.* at 1263.

118. *Id.* at 1264.

119. *Id.*

120. *Id.* (dicta).

121. *Id.* (citations omitted) (dicta).

122. United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962).

123. United States v. Kaufman, 874 F.2d 242, 243 (5th Cir.), *cert. denied*, 493 U.S. 895 (1989).

their appeal.[124] In deciding on the defendants' motion for a rehearing *en banc*, the Fifth Circuit Court of Appeals emphasized the State Department's view that "only an offended nation can complain about the purported violation of an extradition treaty."[125] Finding that Mexico had not protested, the court rejected the defendant's motion.[126] This view was supported in *Demjanjuk v. Petrovsky*,[127] wherein the Sixth Circuit Court of Appeals stated: "The right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested."[128]

The judiciary's approach to individuals asserting standing claims is fragmented and inconsistent. A final reconciliation of the conflict cannot be attained until a consensus emerges among the courts as to whether or not the specialty doctrine is intended to benefit the extradited individual.

III. ANALYSIS: STANDING TO INVOKE THE DOCTRINE OF SPECIALTY

A. Clarifying the Intent of Specialty Provisions in Treaties

As a general rule treaties are compacts between nations and thus do not confer rights on persons.[129] However, sometimes treaties contain provisions granting benefits to individuals.[130] In the United States, all treaties become part of this country's municipal law by virtue of the Con-

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124. *Id.*

125. *Id.*

126. *Id.*

127. 776 F.2d 571 (6th Cir. 1985). *Demjanjuk* is distinct from most specialty cases in that it involves a defendant being extradited *from* the United States. *Id.* at 575. In such cases it is difficult for the court to rule on the issue of specialty because its opinion would only be advisory. The judiciary has no way of forcing the foreign government to adhere to the principles of the specialty doctrine. Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). Nevertheless, the question of whether the specialty provision is intended to accrue to the benefit of the extradited individual is the same in either situation.

128. *Demjanjuk*, 776 F.2d at 584.

129. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422-23 (1964). Therein the Court states:

> The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.

Id.

130. *See* Cook v. United States, 288 U.S. 102, 121-22 (1933) (vessel seizure allows owners to invoke treaty rights).

stitution.[131] Thus, an individual may invoke a treaty provision in United States courts as long as two requirements are met. First, the treaty or treaty provision must be self-executing[132] and second, the treaty provision must have been meant to confer enforceable rights on that individual.[133]

The United States legal system has recognized two types of treaties: executory treaties[134] and self-executing treaties.[135] Executory treaties, although signed by the President and ratified by the requisite two-thirds of the Senate,[136] require implementing legislation before they become part of our municipal law.[137] Self-executing treaties, which may be effectuated without the need for domestic legislation, become part of American municipal law as soon as they are signed by the executive and ratified by the Senate.[138] "Extradition treaties by their nature are deemed self-executing and thus are enforceable without the aid of implementing legislation."[139]

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131. The Constitution proclaims treaties to "be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see supra* note 11.

132. Head Money Cases, 112 U.S. 580 (1884). There the Court noted that "when such rights [emanating from a treaty] *are of a nature to be enforced* in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.* at 599 (emphasis added).

133. Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937-38 (D.C. Cir. 1988).

134. United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

135. *Id.*

136. The United States Constitution authorizes the chief executive "by and with the Advice and Consent of the Senate, to make treaties provided that two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 1.

137. *See* Foster v. Neilson, 27 U.S. 253, 314 (1829) (noting some treaties require implementing legislation before they become justiciable in United States courts); *Caro-Quintero*, 745 F. Supp. at 606 (noting certain treaties are not self-executing); Camacho v. Rogers, 199 F. Supp. 155, 158 (S.D.N.Y. 1961) (holding United Nations Charter is not self-executing). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.7 (4th ed. 1991) (discussing treaty-making power).

138. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (noting some treaties do not require implementing legislation before they may become judicially cognizable); *Caro-Quintero*, 745 F. Supp. at 606 (defining self-executing treaty). *See generally* NOWAK & ROTUNDA, *supra* note 137, § 6.7 (discussing treaty-making power). The importance of whether a treaty is self-executing or executory is regarded as crucial in determining whether a person may raise a claim under it in United States courts. *Caro-Quintero*, 745 F. Supp. at 606. *See generally* Russell G. Donaldson, Annotation, *United Nations Resolution as Judicially Enforceable in United States Domestic Courts*, 42 A.L.R. FED. 577 (1979) (discussing rights of individuals under United Nations treaties).

139. *Caro-Quintero*, 745 F. Supp. at 607 (citing 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, § 4.1, at 71-72 (2d ed. 1987)). For a

Merely because an extradition treaty is self-executing does not mean that an individual may invoke the specialty provision incorporated therein.[140] As noted above, the extradited individual must prove that the treaty provision meant to confer a right on him or her in order to invoke it.[141] Thus, an individual will not have standing to assert a provision under the treaty if the court believes that "the plaintiff's claim to relief rests on the legal rights of third parties."[142] This prohibition, known as the "zone of interest test," is a prudential requirement for standing.[143]

1. The necessity of the extradited individual being an intended beneficiary of the specialty provision

The zone of interest prudential standing requirement demands that the interest sought to be protected be within the sphere of interests the statute or law is designed to protect.[144] As the Court held in *Warth v. Seldin*:[145] "Essentially, the standing question in such cases [claims under

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discussion of the historical debate in the United States over whether extradition treaties were self-executing, see BASSIOUNI, *supra* note 16, at 30-31.

140. Whether or not a treaty is self-executing is closely related to, "but analytically distinct," from the question of standing. Diggs v. Richardson, 555 F.2d 848, 850 (D.C. Cir. 1976).

141. Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988). United States courts have been almost universal in their failure to articulate precisely why defendants lack standing to assert a specialty claim. However, to the extent that they focus on whether or not a right is conferred on the defendant, they are using the prudential standing requirement that individuals be within the protected class of the statute or rule being asserted. *See, e.g.*, United States v. Vreeken, 603 F. Supp. 715, 717 (D. Utah 1984) (noting that when defendant's specialty claim is based on treaty, it is necessary to examine treaty to determine if right is conferred), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

142. Warth v. Seldin, 422 U.S. 490, 501 (1975).

143. All constitutional requirements for standing are clearly met in specialty cases. Article III of the United States Constitution mandates that the individual show: (1) a "distinct and palpable injury"; and (2) a "fairly traceable causal connection between the claimed injury and the challenged conduct." Valley Forge Christian College v. Americans United, 454 U.S. 464, 471-72 (1982). The additional charges the defendant faces clearly constitute concrete and palpable injuries. United States v. Sensi, 664 F. Supp. 566, 570 (D.D.C. 1987) (extra charges are violation of individuals' *personal* rights), *aff'd on other grounds*, 879 F.2d 888 (D.C. Cir. 1989). A court may remedy the injury simply by disallowing the additional charges. *See id.*

144. Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 157 (1970). In *Data Processing* the plaintiff asserted he had standing to contest a rule promulgated by the Comptroller of the Currency. *Id.* at 151. The ruling had enabled local banks and their customers to use the data processing services of national banks. *Id.* at 152. The plaintiff, who also sold data processing services, claimed that the Comptroller's action violated the statutory restrictions imposed on national banks. *Id.* at 157 n.2. The majority found that the plaintiff had standing because the statute restricting the activities of the national banks was intended to include the plaintiff in its sphere of protectable interests. *Id.* at 157.

145. 422 U.S. 490 (1975). In *Warth* various parties petitioned the Court to redress injuries allegedly suffered due to the restrictive zoning regulations of the city of Penfield, New York.

statutes] is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[146]

Diggs v. Shultz[147] represents the application of the test to treaty violations. In *Diggs* exiled citizens of Southern Rhodesia asked the court to enjoin United States importation of strategic metal from that country, though an act of Congress allowed importation.[148] Plaintiffs sought the injunction on the grounds that importation was banned by a United Nations Security Council agreement to which the United States was a party.[149] The appellate court dismissed the action on the ground that Congress had the power to abridge treaty obligations by enactment of domestic legislation.[150] The court did, however, reject the lower court's contention that the plaintiffs lacked standing to bring suit.[151] In focusing on whether the plaintiffs were in the United Nations resolution's zone of interest, the court stated that the resolution "was-and-is an attempt by means of concerted international pressure to turn the Rhodesian Government away from the course of action which has resulted in the adverse circumstances experienced by appellants. They are unquestionably within the reach of its purpose and among its intended beneficiaries."[152]

Id. at 493. Of particular importance was the Court's denial of standing to a group which claimed that as a consequence of Penfield's zoning laws some of its members who resided in the city were deprived of "the benefits of living in a racially and ethnically integrated community." *Id.* at 512. The group claimed that such a violation constituted a "palpable injury" under the Civil Rights Act of 1968. Finding no intent under the Civil Rights Act to protect the plaintiffs, the Court denied standing. *Id.* at 514.

146. *Id.* at 500.

147. 470 F.2d 461 (D.D.C. 1972), *cert. denied*, 411 U.S. 931 (1973).

148. *Id.* at 463-64.

149. *Id.* at 463.

150. *Id.* at 465.

151. *Id.* at 464.

152. *Id.* *But see* Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988). In *Committee of United States Citizens Living in Nicaragua* the plaintiffs urged the court to grant injunctive and declaratory relief prohibiting the funding of the "Contra" rebel force attempting to overthrow the Nicaraguan government. *Id.* at 932. The plaintiffs argued that the funding violated a United Nations treaty to which the United States was a party. *Id.* (Article 94 of the United Nations Charter mandates that members of the United Nations that undertake adjudication by the International Court comply with its decision. The United States had earlier agreed to adjudicate its dispute with Nicaragua before the court, but withdrew its claim on jurisdictional grounds.) The court in dictum noted that even if the alleged treaty breach was justiciable in United States courts, the plaintiffs did not have standing to raise the issue. *Id.* at 937 (dicta). The "[t]reaty clauses must confer such rights in order for individuals to assert a claim 'arising under' them." *Id.* (citing U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331 (1982)). The court concluded that it was not the intent of the signatories of the United Nations Charter to create a right for citizens of its members "to enforce an ICJ [International Court of Justice] decision against their own government." *Id.* at 938.

Thus, the answer to the threshold question of who is meant to benefit from provisions in extradition treaties will depend on how the judiciary interprets the treaty. More specifically, the outcome will be determined by whether it construes the language of the specialty provision as conferring a right on individuals.[153]

2. Examining the language of specialty provisions to determine if they confer a right on the extradited individual

Because an extradited individual's challenge to the court's personal jurisdiction over him or her is based on the treaty's specialty provision, a court is obligated to examine the provision's language to determine whether it confers a right on the individual.[154] Unfortunately, even a cursory examination of America's bilateral extradition treaties will quickly show that the specialty provisions are vague, contradictory and often unvoiced as to whether they intend to confer a benefit on the extradited individual.[155] "[T]reaties are of little or no assistance to a court attempting to determine whether specialty is a right of the accused or of the surrendering state."[156]

For example, several extradition treaties to which the United States is a party contain language in their specialty provisions that strongly suggests that the defendant is a prime beneficiary.[157] Such treaties give the defendant the ability to waive the right not to face additional charges even in the face of protest by the asylum state. An example of such a provision is contained in the United States extradition treaty with Panama.[158] The specialty provision in that treaty states:

> No person surrendered by either of the high contracting parties to the other shall, without his consent, freely granted and publicly declared by him, be triable or tried or be punished for any crime or offense committed prior to his extradition, other than that for which he was delivered up, until he shall have had an

153. Jonathan George, Comment, *Toward a More Principled Approach to the Principle of Specialty*, 12 CORNELL INT'L L.J. 309, 309 (1979).

154. *See* United States v. Decker, 600 F.2d 733, 737 (9th Cir.) (responsibility for interpretation of treaties and enforcement of individual rights arising from them is with judiciary), *cert. denied*, 444 U.S. 855 (1979).

155. George, *supra* note 153, at 311; *see also* BASSIOUNI, *supra* note 16, at 565 (extradition treaty provisions often purposely left vague and ambiguous).

156. George, *supra* note 153, at 311.

157. *Id.* at 311-12; *see infra* notes 158-62 and accompanying text.

158. Treaty Between the United States of America and the Republic of Panama, Providing for the Extradition of Criminals, May 25, 1904, U.S.-Pan., art. VIII, 34 Stat. 2851, 2855.

> opportunity of returning to the country from which he was surrendered.[159]

Allowing the defendant the ability of waiver suggests that a right under the treaty has been afforded to him or her.[160] If the principle of specialty is only concerned with relations between states, then it makes no sense to allow the defendant to waive a right that was never his or hers to invoke.[161] As one commentator has noted: "Since it would be anomalous for an individual to be able to deprive a nation of a sovereign right, it is reasonable to assume that these treaties provide the accused some kind of personal right under the principle of specialty which he may waive or retain."[162]

Conversely, when language in the specialty clause allows the asylum state unilaterally to waive additional charges, some scholars have argued that, at least implicitly, the provision holds that the defendant has no rights under it.[163] An example of such a provision is contained in the United States extradition treaty with Mexico.[164] That provision states:

> A person extradited under the present Treaty shall not be detained, tried, or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:
>
> . . . .
>
> (c) The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.[165]

If additional charges violate the treaty provision and the asylum state is allowed to waive such violations, it is difficult to ascertain what benefit the original parties intended to confer on the defendant.[166]

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159. *Id.*

160. BASSIOUNI, *supra* note 16, at 358.

161. *See id.*

162. George, *supra* note 153, at 312.

163. *See* 2 O'CONNELL, *supra* note 1, at 732 (examining relevance of asylum country's right of waiver).

164. Treaty on Extradition, May 4, 1978, U.S.-Mex., art. XVII, 31 U.S.T. 5059 [hereinafter Treaty on Extradition—Mexico]; *see also* Treaty on Extradition, May 29, 1970, U.S.-Spain, art. XIII, 22 U.S.T. 737, 744 (waiver is solely right of asylum state).

165. Treaty on Extradition—Mexico, *supra* note 164, art. VIII, 31 U.S.T. at 5071.

166. 2 O'CONNELL, *supra* note 1, at 732. The author states:

> If the basis of the rule is merely comity . . . then, if municipal law is silent on the matter, there would seem to be no reason why the consent of the extraditing State should not overcome any difficulties. If, on the other hand, the rule of specialty is one of international law, then . . . the accused would not be subject to the prosecution whether the extraditing State consented or not.

To further compound the problem of interpretation, many specialty clauses are ambiguous as to their intent,[167] or suggest that their intention is to confer benefits on both the individual and the asylum state.[168] Such language only adds to the confusion the judiciary already faces in determining whether individuals have standing to assert specialty claims.

B. Interpreting the Underlying Intent of the Specialty Provision

Generally, when the terms of a treaty are ambiguous a court may look beyond the face of the provision "to effect the apparent intentions of the parties."[169] To do this, the court must examine the circumstances surrounding the provision's incorporation into the treaty.[170] This can be done by ascertaining the reason behind the rule and investigating the customs commonly adhered to by the parties in regards to that subject matter.[171] "When interpreted in the light of these circumstances, the sense attached by the parties to the terms of a treaty, which otherwise seems obscure and ambiguous, can be ascertained."[172] Accordingly, the analysis must be expanded to look at the purpose behind the specialty doctrine and the reason for its incorporation into United States extradition treaties.[173]

Id.

167. BASSIOUNI, *supra* note 16, at 565; *see, e.g.*, Treaty on Extradition, Jan. 19-21, 1922, U.S.-Venez., art. XIV, 43 Stat. 1698, 1706 ("No person shall be tried for any crime or offense other than that for which he was surrendered.").

168. *See* Treaty between the United States and Nicaragua for the Extradition of Criminals, Mar. 1, 1905, U.S.-Nicar., art. III, 35 Stat. 1869, 1873. Article III states in pertinent part:

> A person surrendered under this convention shall not be tried or punished in the country to which his extradition has been granted, nor given up to a third power for a crime or offense, not provided for by the present convention and committed previously to his extradition. . . .
>
> The consent of that Government shall likewise be required for the extradition of the accused to a third country; nevertheless, such consent shall not be necessary when the accused shall have asked of his own accord to be tried or to undergo his punishment, or when he shall not have left within the space of time above specified the territory of the country to which he has been surrendered.

Id.

169. Factor v. Laubenheimer, 290 U.S. 276, 293 (1933).

170. *See, e.g.*, Ford v. United States, 273 U.S. 593, 612 (1927) (purpose of treaty was to help protect America against importation of liquor, thus treaty not meant to grant smugglers immunity from prosecution).

171. YI-TING CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS 74 (AMS ed., AMS Press 1968) (1933).

172. *Id.*

173. Valentine v. United States, 299 U.S. 5, 10-11 (1936); *Factor*, 290 U.S. at 293-94. This can be done by construing the terms according to certain criteria such as the underlying intent of the specialty doctrine and how it generally has been applied in this country. *See generally* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRAC-

1. The aslyum state's benefit

The explanation most often cited as the purpose behind the specialty doctrine is that the requesting state owes a duty to the asylum state not to try the defendant for any charges other than those listed in the extradition agreement.[174] This duty derives from several factors: (1) the asylum state has no duty to extradite other than those duties that are self-imposed (i.e., treaties, comity, etc.); (2) the asylum state's waiver of its absolute right to grant asylum was done in consideration that procedures outlined in the treaty would be followed; (3) prosecution of the accused for charges not mentioned in the treaty would be a breach of the agreement with the asylum state and a violation of international law.[175] Thus, the asylum state, having acquired personal jurisdiction over the defendant by virtue of his or her presence in its territory, retains a special interest in the individual even after extradition.[176] Acceptance of this rationale, that specialty is meant solely to protect the extraditing state, precludes extradited individuals from raising a violation of the doctrine as they are not intended beneficiaries of the provision.[177]

2. The individual's benefit

It is also argued that at least one fundamental reason for the rule's existence lies in its concern for the individual. This concern may derive from the fact that the individual is now an active and constructive member of the asylum state's society,[178] or it may reflect a concern for the individual who, having sought refuge in the asylum state and the protec-

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TICE, § 4.3, at 78-79 (2d ed. 1987) (listing several factors that courts consider in interpreting treaties).

174. *E.g.*, United States v. Molina-Chacon, 627 F. Supp. 1253, 1264 (E.D.N.Y. 1986), *aff'd in part by* United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987).

175. BASSIOUNI, *supra* note 16, at 352-53. Professor Bassiouni explains:

> The rationale for the doctrine [of specialty] rests on . . . (1) The requested state could have refused extradition if it knew that the relator would be prosecuted or punished for an offense other than the one for which it granted extradition. (2) The requesting state did not have *in personam* jurisdiction over the relator, if not for the requested state's surrender of that person. (3) The requesting state could not have prosecuted the offender, other than *in absentia*, nor could it punish him or her without securing that person's surrender from the requested state. (4) The requesting state would be abusing a formal process to secure the surrender of the person it seeks by relying on the requested state who will use its processes to effectuate the surrender. (5) The requested state would be using its processes in reliance upon the representations made by the requesting state.

Id.

176. *See supra* notes 35-39 and accompanying text.

177. BASSIOUNI, *supra* note 16, at 354.

178. *See* Sally Weinraub, Note, *Double Criminality in Extradition Proceedings*—Shapiro v. Ferrandina, *478 F.2d 894 (2d Cir. 1973)*, 40 BROOK. L. REV. 1016, 1028-29 (1974) (sovereign power of state is partly for purpose of protecting individuals in its jurisdiction).

tion of its laws, is now being given up through its processes.[179] The intent of the doctrine's incorporation into extradition treaties thus is not only to protect the asylum state's sovereignty, but also to protect the individual from indiscriminate prosecution at the hands of the requesting state.[180]

a. protection from indiscriminate prosecution

Extradition treaties are predominately entered into for two reasons: (1) to expedite the orderly inter-nation transfer of fugitives;[181] and (2) to protect each compacting nation's territorial and procedural sovereignty.[182] However, once the asylum nation agrees to surrender a fugitive to the requesting nation pursuant to an extradition agreement, the two nations have formed a contract of extradition with "respect to that particular individual."[183] At this point, certain safeguards and defenses incorporated into the treaty come into effect.[184] Some of these provisions clearly are meant to protect the defendant's individual rights.[185] For example, the primary purpose of the political offense provisions' inclusion into extradition treaties is to protect the individual.[186] The rationale is that the political offender's actions affect the tranquility and security of

179. *See* BASSIOUNI, *supra* note 16, at 357 ("This restrictive view [sole benefit to the extraditing state] of the rule of specialty fails to take into account the relator as a participant in the extradition process and his right to uphold such a doctrine when a demanding state acts at variance with such obligations regardless of whether or not the surrendering state protests such actions.").

180. Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 481 (2d Cir.) ("The 'principle of specialty' reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government."), *cert. denied*, 409 U.S. 1059 (1972).

181. Georg Schwarzenberger, *The Problem of an International Criminal Law*, *in* 3 CURRENT LEGAL PROB. 272 (George W. Keeton & Georg Schwarzenberger eds., 1950).

182. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355 (9th Cir. 1991) ("Extradition treaties provide a comprehensive means of regulating the methods by which one nation may remove an individual from another nation.").

183. *Id.* at 1356 (citing government's argument). Logically, in those cases in which the treaty has been circumvented, the individual should not have standing to invoke the treaty, for the treaty gives no right to be extradited in accordance with its provisions. *See* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (extradition treaty *does not* create individual right to be taken from asylum country only "in accordance with the provisions of the treaty"), *cert. denied*, 479 U.S. 1009 (1986). However, in cases in which an extradition treaty has been circumvented by the United States government without the asylum country's consent, the asylum nation may protest thus giving the individual derivative standing. *See Verdugo-Urquidez*, 939 F.2d at 1355-56 (if nation from which individual has been kidnapped objects to violation of extradition treaty, individual has standing to contest personal jurisdiction).

184. *See supra* notes 30-34 and accompanying text.

185. *See supra* note 34 and accompanying text.

186. Quinn v. Robinson, 783 F.2d 776, 793 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986).

the demanding government, making a fair adjudication of his or her crime difficult.[187] Consequently, the defendant always has standing to raise this provision as a defense to his or her extradition.[188]

Like the political offense exception, the doctrine of specialty is also meant to protect the individual.[189] It reflects a fundamental concern of nations that individuals should not have to suffer the possibility of indiscriminate prosecution once they are extradited.[190] Indeed, if the specialty doctrine is not meant at least partly to confer a benefit on the defendant, then it makes little sense to incorporate it into bilateral extradition treaties. It would surely be more efficient, less cumbersome and more expeditious to the world public order if the doctrine was not incorporated into treaties. If the additional charges were not ones for which the asylum state would have set its processes in motion, then this is more than compensated for by the fact that the requesting nation will reciprocate if and when the situation is reversed. Thus, the doctrine's incorporation makes little sense, unless, as one commentator has noted: "In effect, the referred-to sovereignty of the asylum state is its power to protect the accused . . . whom it has delivered up as an act of discretion, [from] prosecution for crimes other than those for which the extradition was granted."[191]

b. a liberal exposition of private rights is preferred

Over one hundred years ago the United States Supreme Court focused on the rights of the individual when it handed down the *United States v. Rauscher* decision.[192] Justice Miller, writing for the majority,

187. *Id.*

188. *See id.* (recognizing defendant's right to raise treaty's political offense exception). By contrast the jurisdictional clauses found in extradition treaties seem clearly to be "predicated upon the sovereignty of the state." Bassiouni, *supra* note 15, at 8. Consequently, an extradited individual should have no right to invoke such a clause as a defense.

189. Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 481 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

190. *Id.*

191. Weinraub, *supra* note 178, at 1029.

192. 119 U.S. 407 (1886). Some courts have suggested that in *Rauscher* the defendant's standing actually derived from a "prolonged controversy" over the issue between the United States and Great Britain. Ford v. United States, 273 U.S. 593, 615 (1927); United States v. Kaufman, 858 F.2d 994, 1008-09 (5th Cir. 1988), *cert. denied*, 493 U.S. 895 (1989); United States v. Caro-Quintero, 745 F. Supp. 599, 608 n.12 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). Such an argument, while perhaps factually valid, fails to view the *Rauscher* decision as a whole. First, the language of the decision clearly shows that the Court's intent was to recognize the defendant's rights under the treaty. *See infra* notes 193-97 and accompanying text. Indeed, the *Rauscher* Court clearly could have indicated that the defendant's rights were at best derivative from the asylum nation's protest, but it did not. Furthermore, the *Rauscher*

started his opinion by rhetorically asking whether "the prisoner, under the extradition treaty with Great Britain . . . acquire[s] a right to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain."[193] After a brief examination of the American judiciary's previous holdings concerning individuals invoking treaties,[194] the Court concluded: "The treaty of 1842 [was] the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty . . . ."[195]

The majority opinion intimated that such individual rights derived from the asylum nation's natural concern about sending individuals who had sought its protection away with no rights or recourse other than those given at the whim of the extraditing state.[196] Thus, strict adherence to the rules governing the extradition of the individual should be followed. To do otherwise, the Court argued, would be "an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition."[197]

The *Rauscher* opinion is not an aberration; indeed, it is consistent with how the doctrine has been customarily viewed in this country. For example, our State Department had once unequivocally taken the position that under United States law, extradition treaties also create rights

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Court based its decision in part on previous state case law. *Rauscher*, 119 U.S. at 424-28. In at least some of these cases there is no indication that a sovereign government in any way protested. *See Rauscher*, 119 U.S. at 418-19 (citing with approval New York Supreme Court case that held extradition treaty with France conferred rights on individuals).

193. *Rauscher*, 119 U.S. at 409.

194. *Id.* at 418-19 (citing Head Money Cases, 112 U.S. 580, 598-99 (1884)).

195. *Id.* at 419.

196. *Id.*

197. *Id.* at 422. The Court interpreted the applicable extradition statute, now 18 U.S.C. § 3192 (1988), as expressing congressional intent to abide by the principle of specialty, and as conferring a right "upon persons brought from a foreign country into this under such proceedings." *Rauscher*, 119 U.S. at 424. Section 3192 states in pertinent part:

> Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition . . . .

18 U.S.C. § 3192 (1988). Indeed, Justice Gray's concurrence in *Rauscher* seems to rest on the existence of the extradition statute, which he believed endowed the defendant with a judicial remedy for America's breach of the specialty doctrine. *Rauscher*, 119 U.S. at 433-34 (Gray, J., concurring); *see also* Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 478 n.5 (2d Cir.) (discussing Justice Gray's concurrence in *Rauscher*), *cert. denied*, 409 U.S. 1059 (1972).

for the individual.[198] The executive branch stated that the belief that extradition treaties " 'create rights only between the Governments concerned' . . . certainly is not the law of the United States."[199] Likewise, the *Restatement (Third) of the Foreign Relations Law of the United States* recognizes a benefit conferred on the individual. It states that: "[B]oth the person extradited and the extraditing state are beneficiaries of the doctrine."[200] Furthermore, a review of the American judiciary's traditional approach to individual standing claims under other international agreements suggests that a right should be found to accrue to individuals invoking specialty provisions.[201] American courts have long advocated liberal interpretation of treaty provisions when individual rights are involved.[202] As the Supreme Court noted in *Shanks v. Dupont*:[203] "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"[204]

3. The individual as an intended third-party beneficiary of the specialty provision

An examination of the underlying purpose of the specialty doctrine suggests there are two distinct rationales: (1) the doctrine is meant to benefit extradited individuals; and (2) the doctrine protects the interests of the asylum state.[205] One possible way of reconciling these two seem-

198. Kester, *supra* note 19, at 1467 (citing 4 JOHN B. MOORE, DIGEST OF INTERNATIONAL LAW § 601, at 321 (1906)).

199. *Id.* (quoting Secretary of State).

200. RESTATEMENT, *supra* note 24, § 477 cmt. b. The *Restatement* goes on to comment: "[W]hile the case law in the United States and elsewhere is not consistent, it appears that the person extradited has standing to raise the issue of variance between the extradition request and the indictment by motion during or in advance of his trial." *Id.*

201. *See* Asakura v. Seattle, 265 U.S. 332 (1924) (court allowed Japanese national to invoke provision in treaty that allowed each nation's citizens to engage in free trade and to own real property as defense to state prosecution of operating business without license); Chew Heong v. United States, 112 U.S. 536 (1884) (defendant able to invoke treaty ensuring aliens right to leave country and return). *See generally* RESTATEMENT, *supra* note 24, § 131 cmts. g, h (1987) (discussing individual standing claims under international agreements).

202. *See generally* RESTATEMENT, *supra* note 24, § 131 cmts. g, h (1987).

203. 28 U.S. (3 Pet.) 242, 249 (1830).

204. *Id.* Some treaties have provisions specifically denying the rights of individuals to invoke their terms. *See* United States v. Davis, 767 F.2d 1025, 1029-30 (2d Cir. 1985) (mutual assistance treaty specifically stated it extended no rights to individuals). Such a tactic could have been readily available to the contracting parties of the various American extradition treaties, if this indeed was their wish.

205. *See supra* notes 174-204 and accompanying text.

ingly inapposite views is to analogize the specialty provision's incorporation into treaties to that of a third-party beneficiary contract.[206]

The comparison must begin with the premise that the extraditing nation has incorporated into the treaty certain procedural safeguards that intend to protect both the individual from indiscriminate prosecution at the hands of the requesting state, and the asylum state from procedural abuse.[207] The specialty provision's purpose is then, at least partly, to confer a benefit on the third-party individual.[208] The asylum nation would thus take the position of the promisee, the extraditing state that of the promisor, and the extradited individual that of the intended third-party beneficiary.[209]

When the United States extradites an individual from another nation pursuant to an extradition treaty, it is in fact utilizing a contract previously made with that nation "to surrender fugitives to one another under certain circumstances."[210] This "contract" exists as a method by which each state may determine whether it has been wronged under international law.[211] If the treaty incorporates a provision that is meant to explicitly or implicitly enumerate rights protecting individuals being extradited, the extraditing state is bound to follow it, or be in breach.[212] In the United States, this contract with the foreign sovereign also becomes part of the country's municipal law.[213] As such, any violation of the provision by the American government is also justiciable in the courts of this country by the individual being extradited.[214]

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206. *See* Tucker v. Alexandroff, 183 U.S. 424, 437 (1902) (treaty's "meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts" (quoting 1 KENT, COMMENTARIES 174 (14th ed. 1901))).

207. RESTATEMENT, *supra* note 24, § 477 cmt. b.

208. Under a general third-party beneficiary theory, a dual purpose for incorporating the provision by the promisee will not prevent the third-party from asserting his or her rights. Beverly v. Macy, 702 F.2d 931, 941 (11th Cir. 1983) (mixed motives of promisee will not necessarily refute intent to benefit).

209. Contract law does not require the third-party beneficiary to be determined at the time the promise is made; it is sufficient that the "identity can be determined at the time the promise is to be performed." E. ALLAN FARNSWORTH, CONTRACTS § 10.3, at 750 (2d ed. 1990).

210. United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

211. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964).

212. *See* United States v. Yunis, 681 F. Supp. 909, 916 (D.D.C.) (dicta), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988).

213. *See supra* note 11.

214. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). "A treaty is in its nature a contract between two nations . . . . In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded . . . as equivalent to an act of the legislature . . . ." *Id.* at 314.

This analogy would actually comport quite well with how the Eighth, Ninth and Eleventh Circuits have been deciding the standing issue in specialty cases. Their decisions have been premised on a belief that "once there has been a formal extradition proceeding in the requested state, that nation's agreement to extradite only on specific charges must be construed as the equivalent of a formal objection to his trial on the charges."[215] Although these circuits allow a subsequent affirmative waiver of the specialty doctrine by the asylum state,[216] this in no way frustrates the analogy. The extradited individual's rights are limited to and defined by the requesting state's obligations to the asylum state.[217] Like a private party to a contract, a signatory to a treaty may waive any obligations required of the other signatory.[218]

IV. RECOMMENDATION

The doctrine of specialty should be found to exist as a right of both the extraditing state and the individual undergoing extradition. When the specialty doctrine is incorporated into United States extradition treaties, the provision becomes part of our municipal law by virtue of the Constitution.[219] At that point it is enforceable by both the asylum state and by the individual being extradited.[220] The asylum state is a party to the treaty as well as a beneficiary of its requirements. When a breach

215. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355 n.13 (9th Cir. 1991).

216. *Id.*

217. *See* Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 480 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972). The *Fiocconi* case was unique in that it did not involve individuals extradited by treaty, but rather defendants who were given up as an act of comity (discretion) by the Italian government. *Id.* at 477. In *Fiocconi*, Judge Friendly noted that while a primary purpose of the doctrine is to protect the accused from indiscriminate prosecution at the hands of the requesting state, *id.* at 481, "the underlying substantive wrong . . . is only to the [surrendering government]," *id.* at 479 n.8. Accordingly, it became essential to determine what the asylum nation would consider to be a breach of the United States' obligation under international law not to try the defendants on additional charges. *Id.* at 480. By contrast, when extradition takes place pursuant to a treaty, the formal extradition proceeding in the asylum nation is considered specifically to prohibit the individual from being charged with any crime other than those listed in the extradition order. *Verdugo-Urquidez*, 939 F.2d at 1355 n.13; Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *see also* Weinraub, *supra* note 178, at 1024 (noting Judge Friendly's holding in *Shapiro* limited his *Fiocconi* decision).

218. *Verdugo-Urquidez*, 939 F.2d at 1352. The third party is not hurt by the asylum state's subsequent waiver because he or she would have been extradited regardless of whether the treaty incorporated a specialty provision. Thus, he or she did not in fact rely on the provision to his or her detriment. Price v. Pierce, 823 F.2d 1114, 1122 (7th Cir. 1987) (parties may change terms of contract until beneficiary adversely relies on agreement), *cert. denied*, 485 U.S. 960 (1988).

219. *See supra* note 11.

220. *See supra* notes 205-18 and accompanying text.

occurs the sovereign may render an official protest with the executive branch of the United States government,[221] or champion its case before an international tribunal.[222] The extradited individual, while not a party to the compact, is an intended beneficiary of its specialty provision.[223] The treaty's violation is not only a breach of the agreement between the nations but also a matter directly involving the extradited individual's personal rights.[224] The individual may thus challenge the government's actions in court.

This view was originally adopted by the Supreme Court in *United States v. Rauscher*.[225] However, the idea that the specialty doctrine has a duality of purpose has never been uniformly accepted.[226] Several commentators have suggested alleviating this problem by either rewriting treaty provisions to specifically confer a benefit on the defendant,[227] or in the alternative, recognizing the individual's right to bring a claim under international law.[228] Such remedies are too cumbersome and complicated to effectuate a solution to this problem any time soon.[229] All that is needed to properly effectuate the intent of the specialty doctrine is to revise the applicable extradition statute. Congress should amend 18 U.S.C. § 3192[230] so that it confers a right on individuals extradited pursuant to a treaty to be free from prosecution of crimes for which they were not extradited. Specifically, the revised statute should include language which unequivocally states that the right to be free from additional charges inures not only to the asylum state but also to the individual being extradited.[231]

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221. Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

222. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422-23 (1964) (nation-to-nation problems are often matter of international adjudication).

223. *See* United States v. Sensi, 664 F. Supp. 566, 570 (D.D.C. 1987), *aff'd on other grounds*, 879 F.2d 888 (D.C. Cir. 1989).

224. *Id.*

225. 119 U.S. 407 (1886).

226. *See supra* notes 110-28 and accompanying text.

227. George, *supra* note 153, at 322-24.

228. *See* Weinraub, *supra* note 178, at 1029. *See generally* PETER P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL (1960) (evaluating role of individual in international law).

229. That it would be time-consuming and cumbersome for the United States to renegotiate all of its bilateral extradition treaties is self-evident. With regards to the international law claim, in *United States v. Rauscher*, the Court indicated that the specialty doctrine was applicable to the defendant even in the absence of a treaty. However, such a view has been emasculated by subsequent opinions. *See* BASSIOUNI, *supra* note 16, at 355-57.

230. 18 U.S.C. § 3192 (1988).

231. Section 3192 of title 18 could be revised as follows:

V. CONCLUSION

The judiciary's approach to extradited individuals asserting claims against the United States government for violations of the doctrine of specialty is fragmented and inconsistent. A final reconciliation of this schism will not be attained until a consensus emerges among courts as to whether the specialty doctrine is intended to benefit the extradited individual.

This Comment has argued that the doctrine of specialty, as recognized in the United States, does confer a benefit on the individual; its purpose being twofold: to protect the defendant and to protect the processes of the asylum state.[232] Nevertheless, courts have continued to either misapply or purposely circumvent the specialty doctrine. Although the mechanisms already exist in this country to allow defendants to raise specialty claims,[233] without proper judicial interpretation they provide no useful purpose.

Finally, it is important to put this problem in context. Standing is merely the ability to assert the claim.[234] Simply because an individual has the right to raise an alleged violation of an extradition treaty does not mean that such a violation occurred. The defendant must always, however, have the ability to utilize every right given to him or her in order to equitably adjudicate the charges against him or her.

Michael Bernard Bernacchi *

> Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. *If charges not in the warrant of extradition are filed against such person, the person or the country which extradited the person (pursuant to a treaty) may immediately petition the court for a writ of mandate to adjudicate the legality of the charges against him.*

See id. (proposed changes in italics).

232. Fiocconi v. Attorney Gen. of the United States, 462 F.2d 475, 479-80 n.8 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); RESTATEMENT, *supra* note 24, § 477 cmt. b.

233. *See supra* notes 205-18 and accompanying text.

234. *See supra* note 7.

* This Comment is dedicated to my parents, whose love and support made completion of this undertaking possible.