The Extra in Extradition: The Impact of *State v. Pang* on Extraditee Standing and Implicit Waiver

I. INTRODUCTION

The world is shrinking. With each successive day the importance of mutual respect for international boundaries becomes more apparent. In the past, international comity has governed what should and should not be done when a sovereign state deals with another sovereign state.[1] International comity, also known as the comity of nations, is defined as:

> [t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.[2]

Today, times have become more complicated, and *international duty* has become merely a catch phrase tossed about by politicians. In the criminal realm, the international scene has become the forum of choice. Due to little standardized regulation[3] and a plethora of technicalities,[4] it is becoming more apparent that cooperation is necessary to successfully prosecute criminals. Extradition treaties[5] were established to help foster this cooperation, but due to the complexity of crimes and varying circumstances, they have been reevaluated and reexamined in an endless loop of interpretation.[6] The inter-

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1. *See* United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988) (noting general rules of international law); United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 1 (3rd ed. 1996) (noting that without treaties or pacts, comity and reciprocity were used for extradition); Arthur E. Shin, Note and Comment, *On the Borders of Law Enforcement — The Use of Extraterritorial Abduction as a Means of Attaining Jurisdiction Over the International Criminal*, 17 WHITTIER L. REV. 327, 383 (1995) (noting that when there is no treaty, the government will pursue the fugitive via international comity); Mark S. Weinstein, Casenote, *A License to Mislead:* United States v. Abello-Silva, 24 U. MIAMI INTER-AM. L. REV. 161, 164 (1992) (noting that general rules of international comity will control specific doctrines when extradition treaties are not available).

2. BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

3. There is concern that international crime requires a separate set of international statutes or in most cases individual treaties between sovereign nations. Since an agreement must exist between each pair of sovereign nations over what is criminalized, regulation becomes more difficult due to the lack of standardization. *See also* Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 422 (1997) ("Beyond the employment law context, state regulation of international business conduct has typically been less aggressive and less effective than federal initiatives. Every state has various criminal or civil penalties for commercial bribery and unfair competition, though apparently none specifically address bribery in international business transactions; almost all are limited to actions committed within the state's borders."); Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1030 (6th Cir. 1990) (noting the lack of state laws proscribing bribery in international business transactions).

4. These technicalities include conflict of law problems between sovereign nations as well as interpretation problems concerning criminal laws.

5. Extradition treaties are mutually beneficial contracts between nations which allow the request and transfer of international criminals while ensuring the protection of national sovereignty.

6. There is much debate concerning the problems of extradition treaties and the doctrine of

national extradition treaty is only as effective as the will to enforce it by its sponsoring nations. Often times a criminal can circumvent jurisdiction by strategically selecting an asylum country after commission of grievous crimes. What happens when a party takes advantage of the confusion by seeking asylum in a country for the sole purpose of escaping prosecution? What happens when a man intends to fraudulently obtain insurance money by setting fire to a business building, where four innocent lives are trapped and killed?[7] Should this man who clearly escapes to a country with favorable criminal laws be judged any differently than had he remained in the United States?

In January of 1995, the Mary Pang Products warehouse in Seattle, Washington, was the site of an unnerving incident. Four firefighters died of smoke inhalation and suffocation in the course of fighting a sudden fire, when the floor collapsed and trapped all four in the sub-basement.[8] Investigators who later examined the burn patterns and physical evidence determined that the fire was set deliberately. Due to correspondence with several of his acquaintances before and after the event, Martin Shaw Pang[9] became the prime suspect. The burn patterns, physical evidence, and corroboration led the King County Prosecutor to charge Martin Pang with four counts of first degree murder.[10] Pang, fearing the results of such a prosecution and claiming that he was framed by his ex-wife and her new husband, fled the country and sought refuge in Brazil.[11] Approximately two months after the fire, Pang was arrested in Rio De Janeiro.[12] The next day, King County Prosecutors amended the information to include a charge of arson in the first degree.[13] While in custody, Pang confessed that he had started the fire.[14]

In July of 1995 the United States requested that Brazil extradite Pang to the State of Washington to be prosecuted for four counts of first degree murder and one count of first degree arson.[15] Six months later, the Federal Supreme Court of Brazil granted extradition for the "crime of arson in the first degree, resulting in four deaths and the consequences thereof under U.S. law . . . without the additional charge of four counts of first-degree murder."[16] Although there is no felony murder[17] under Brazilian crim-

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specialty. Most of these concerns center around the individual's relation to the state. This Note examines specific theories in connection with the *Pang* case. *See generally* BASSIOUNI, supra note 1, at 383-494; Christopher J. Morvillo, *Individual Rights and the Doctrine of Specialty: The Deterioration of* United States v. Rauscher, 14 FORDHAM INT'L L.J. 987 (1991); Mary-Rose Papandrea, *Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship Between the Individual and the Sovereign*, 62 U. CHI. L. REV. 1187 (1995).

7. State v. Pang, 940 P.2d 1293 (Wash.), *cert. denied*, Washington v. Pang, 118 S. Ct. 628 (1997).

8. A basement located below the true basement of a building.

9. Son of Harry and Mary Pang of Mary Pang Products, Inc.

10. *Pang*, 940 P.2d at 1301.

11. *Id.*

12. *Id.* at 1302.

13. *Id.*

14. *Id.*

15. *Id.* at 1303.

16. *Id.* at 1304.

17. Black's Law Dictionary describes felony murder as follows:

> At common law, one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder. . . . [T]oday the law of felony murder varies substantially throughout the country. . . . Jurisdictions have limited the rule in one or more of the following ways: (1) by permitting its use only as to certain types of felonies; (2) by more strict interpretation of the requirement of proximate or legal cause; (3) by a narrower construction of the time period during which the felo-

inal law, Article 258[18] indicates that if there is serious bodily injury resulting in death during the course of arson the prison sentence is doubled.[19] Article 258 of the Brazilian Code explains why there was extradition for first degree arson resulting in four deaths but not for murder.[20] Correspondence continued on this point between the two governments, and the United States eventually requested a clarification from the Federal Supreme Court of Brazil, which was denied.[21] Brazilian Minister of State for Justice, Nelson A. Jobim, wrote to United States Attorney General Janet Reno stating that:

> It will be incumbent upon the justice system of the United States of America to establish a suitable punishment for the crime of arson in the first degree, resulting in four deaths and the consequences thereof, under U.S. law. It goes without saying that the precise interpretation of this language, used by the Brazilian court in its decision, and the determination of how it might best be adapted to U.S. law, are for the justice system of your country to decide.[22]

Pang, after being turned over to the United States, motioned to sever the four counts of first degree murder based on the mandates of the extradition order. The King County Superior Court denied the motion. The court held that although Brazil does not extradite for felony murder, both Brazil's failure to object to the U.S. murder charges and the statements of Minister Jobim created an implicit waiver and removed Pang's standing to object.[23] On appeal the Supreme Court of Washington, in *State v. Pang*,[24] reversed and held that an extradited person may raise any objections to post-extradition proceedings which the rendering country might have raised,[25] and that Brazil did not explicitly or implicitly waive any objection.[26] Additionally, the Washington Supreme Court expressed its doubts on whether implicit waiver would be sufficient at all.[27] In light of this holding, Pang escaped liability for the deaths of four innocent American citizens.

Is *Pang* correct in propagating the idea that an admittedly guilty person may escape rightful prosecution if he is clever enough to flee to a country that limits extra-

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ny is in the process of commission; (4) by requiring that the underlying felony be independent of the homicide.

BLACK'S LAW DICTIONARY 617 (6th ed. 1990). The Washington statute on felony murder required that the defendant must "in the course of and in furtherance of [the felony] and in immediate flight therefrom" cause the death of a "human being who was not a participant in the crime." Arson in the first degree was one of the felonies which qualified for felony murder. Wash. Rev. Code § 9A.32.030(1)(c) (19__).

18. C.P., Article 258.

19. *Pang*, 940 P.2d at 1339.

20. Essentially, Brazil cannot extradite a suspect for murder because Brazil and the United States do not agree on the definition of murder. Brazil requires that murder be a specific intent to kill while the United States does not, as in the case of felony murder where the intent is to commit a felony. Despite the lack of consensus, Brazil still has heightened penalties for deaths caused in commission of a felony such as first degree arson, and thus the language in the extradition treaty allows for the prosecution of arson, that results in four deaths.

21. *Pang*, 940 P.2d at 1307.

22. *Id.* at 1312.

23. Reporter's Verbatim Report of Court's Oral Decision, November 12, 1996, at 8-10.

24. State v. Pang, 940 P.2d 1293 (Wash.), *cert. denied*, Washington v. Pang, 118 S. Ct. 628 (1997).

25. *Id.* at 1316-22.

26. *Id.* at 1317-18.

27. *Id.* at 1318 (noting that it is "not convinced an implied waiver, even if made, would overcome the standing of Petitioner Pang in this case").

dition to exclude the murder based on comparative technicalities? Such a result would mean that the criminal does not have to suffer the consequences for his wrongful acts because he was able to escape the jurisdiction of the prosecuting country. In *Pang*, Brazil had no stake in the prosecution. No crimes were committed in Brazil, nor were any Brazilian citizens involved. The United States was the only country with an interest in the crimes committed and was the only jurisdiction which could have held Mr. Pang accountable for his actions. If the United States did not pursue its interest, Mr. Pang could have completely escaped liability. The *Pang* decision raises the need for more uniform and equitable international agreement on extradition laws.

This Note explains the split in authority over an extraditee's standing to object based on the extradition order and implicit waiver to objections by asylum nations. Part II introduces and discusses the doctrines of specialty and dual criminality. Part III further examines the aforementioned authority split. Finally, Part IV offers some specific recommendations. Essential in this discussion is an understanding of the doctrine of specialty and its companion, the doctrine of dual criminality, which are laid out below.

II. DOCTRINES OF INTERNATIONAL COMITY

A. Doctrine of Specialty

The doctrine of specialty covers concerns of national sovereignty and ensures that a state will not seek extradition on one charge and then convict on completely different charges. The doctrine of specialty limits the requesting state's prosecution ability to only those crimes for which the criminal was extradited.[28]

United States v. Rauscher[29] is the primary basis of the doctrine of specialty. Rauscher was a sailor who escaped to Britain after committing a homicide within United States jurisdiction. Britain extradited Rauscher for the prosecution of murder, but he was convicted in the United States for inflicting cruel and unusual punishment on another sailor. The Court overturned this conviction, reasoning that Rauscher was extradited only for murder, and the United States should respect the terms of the extradition. In essence, the Court noted that it would protect those seeking asylum from persecution not aligned with the asylum country's principles, or crimes which are not enumerated in the asylum country's laws. This assures that when a person is extradited for prosecution, he will not suffer arbitrary prosecution which the asylum state would not have carried out absent extradition. The asylum state accomplishes this protection by requiring specific charges on demand, limiting charges to those enumerated in the extradition treaty, and putting restrictions on the extradition order all of which limit the scope of prosecution. As explained by the Court, the doctrine of specialty was incorporated into the United States-Britain treaty without reference:

> It is unreasonable to suppose that any demand for rendition, framed upon a general representation to the government of the asylum that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged . . . yet such is the effect of the construction that the party is properly liable for any other

28. United States v. Van Cauwenberghe, 827 F.2d 424, 428 (9th Cir. 1987); United States v. Miro, 29 F.3d 194, 199 (5th Cir. 1994).

29. United States v. Rauscher, 119 U.S. 407 (1886).

> offense than that for which he was demanded and which is in the treaty.[30]

The Court clarified that "the party shall not be delivered up by his government to be tried for any other offense than that charged in the extradition proceedings."[31] This holding is a product of the doctrine of specialty.

The doctrine of specialty is included in the United States-Brazil treaty. The primary question in the *Pang* case thus concerns whether a country's punishment of a crime turns on a nominal distinction or whether such punishment, in fact, focuses on the conduct involved. The doctrine of specialty accords prosecution based on the superficial title of crimes, meaning that where the crime being prosecuted has the same title as that which is enumerated in the extradition order, the doctrine of specialty is satisfied. This Note advocates utilizing the similar conduct standard in the doctrine of specialty. The similar conduct standard focuses on the conduct involved in the crime rather than the title. This is embodied in the doctrine of dual criminality.

B. Doctrine of Dual Criminality

The doctrine of dual criminality covers many varying standards and is used to ensure that one state can rely on the fairness of another state's corresponding treatment of criminals who are extradited. Thus, a state should never be put in a position where it will have to surrender a person for a reason which has no criminal basis in its local laws. Bassiouni,[32] a well-known international criminal law academic, proposes three different standards to determine compliance with the doctrine of dual criminality:

> 1) whether the act is chargeable in both states as a criminal offense regardless of its prosecutability;
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> 2) whether the act is chargeable and also prosecutable in both states; and
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> 3) whether the act is chargeable, prosecutable, and could also result in a conviction in both states.[33]

Although all of these standards are in use, Bassiouni notes that most states utilize the first approach. In support of this, Professor Gurulé[34] notes that "dual criminality refers to whether the criminal conduct constitutes an offense under the laws of both the asy-

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30. *Id.* at 420-21.

31. *Id.* at 424.

32. M. Cherif Bassiouni has been involved for over 25 years in international criminal law and is a well respected academic and participant in the field. He has served in various United Nations positions including United States Rapporteur to the Tenth International Congress on Penal Law, Vice-Chair of the United Nation's General Assembly Ad-Hoc Committee for the Establishment of an International Criminal Court, and Vice-Chair of the Preparatory Committee on the Establishment of an International Criminal Court. He has published several books on international criminal law including the book on international extradition referenced in this Note.

33. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 390 (3rd ed. 1996).

34. Professor Jimmy Gurulé was Assistant Attorney General, U.S. Department of Justice, Office of Justice Programs, where he served from 1990 to 1992. Prior to joining the Notre Dame Law School faculty Professor Gurulé was an Assistant United States Attorney in Los Angeles and was the Deputy Chief of the Major Narcotics Section. He was largely responsible for the successful prosecution in the highly publicized case involving the torture and brutal murder of a Drug Enforcement Administration special agent in Mexico. In addition, Professor Gurulé has prosecuted complex criminal cases in Washington, D.C., and Miami, Florida. At Notre Dame, he teaches criminal law, complex criminal litigation, international criminal law, and criminal trial advocacy.

lum and requesting states" and "does not require that the two countries have identical statutes."[35] It is the conduct which is important in satisfying the dual criminality requirement in extradition, not whether there are equivalent statutes or elements.[36] This similar conduct approach should be incorporated into the doctrine of specialty. The court in *Pang* should have found the doctrine of specialty satisfied since the arson and four deaths for which Brazil wishes to hold Mr. Pang accountable, is the same conduct that the United States wishes to prosecute. The question, however, is still more complicated.

Even if the similar conduct standard is not adopted in the doctrine of specialty, as it is in the doctrine of dual criminality, there is still confusion concerning whether it is the extraditee or the asylum country that has standing to object to possible violations in the extradition order. There is a split in the federal circuit courts as to this question.

III. DISCUSSION ON THE AUTHORITY SPLIT

A. Standing

1. Extraditee Has Standing to Object to Possible Deviance from Terms in Extradition Order.

There is almost an equal split on whether an extraditee may raise possible extradition violation issues when the asylum country does not raise the objections. The cosmopolitan theory of international relations explains standing by stating that the international society is actually a society of individuals.[37] Extradition treaties would then exist to protect the individual from the state. In favor of such standing are the Eighth, Ninth, Tenth, and Eleventh Circuits. This seems to be the majority view. However, a substantial minority favors another view, to be discussed in the next section.

The Eighth Circuit in *United States v. Thirion*,[38] a case involving the extradition of a person from Monaco, relied on *Rauscher*[39] and opined that the defendant could raise any objections Monaco might have raised. Additionally, the court recognized that the asylum state may consent to the prosecution of further crimes not listed in the treaty. The United States-Monaco extradition treaty[40] specifically noted that "no person surrendered . . . shall be prosecuted . . . for any crime or offense . . . other than the offense for which his surrender was accorded."[41] Basing its decision entirely on *Thirion's* rationale, the Eighth Circuit in *Leighnor v. Turner*[42] held that the defendant had standing to object.[43] The *Leighnor* court noted "that in light of the genuine debate surrounding this important issue it is one which arguably merits consideration."[44] Rec-

35. JIMMY GURULÉ, COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME 420-21 (1996).

36. United States v. Khan, 993 F.2d 1368, 1372 (9th Cir. 1993); Collins v. Loisel, 259 U.S. 309, 312 (1922); United States v. Sensi, 879 F.2d 888, 894 (D.C. Cir. 1989). These cases hold that conduct not labels for crimes is the determining factor in satisfying the doctrine of dual criminality.

37. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 84-86 (1977).

38. United States v. Thirion, 813 F.2d 146 (8th Cir. 1987).

39. *Rauscher*, 119 U.S. at 424.

40. Treaty Respecting Extradition with Monaco, Feb. 15, 1939, U. S.-Monaco, 54 Stat. 1780, T.S. No. 959.

41. *Thirion*, 813 F.2d at 151.

42. Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989).

43. *Id.* at 388.

44. *Id.*

ognition of the increasing relevance of this issue is important. Standing in international extradition is not an isolated issue, rather it is one which will only become more generally important.

The Ninth Circuit held that standing existed in *United States v. Najohn.*[45] Najohn was extradited from Switzerland as per treaty requirements and faced charges from the Eastern District of Pennsylvania and the Northern District of California.[46] After pleading in Pennsylvania, Najohn challenged the California charge because its order was an extension beyond the four corners of the Swiss court's extradition order.[47] The court held that additional charges could be brought and prosecuted if the asylum state consents.[48] In a letter to the United States, the Swiss Embassy agreed that Najohn could be subjected to additional prosecution.[49] The court specifically stated that the extradition treaty, which Najohn used as a basis to object to the consent, "[did] not purport to limit the discretion of the two sovereigns to surrender fugitives for reasons of comity, prudence, or even as a whim."[50] Consequently, the court felt justified in "regarding the statement of the executive branch as the last word of the Swiss government."[51] Referring to *Fiocconi v. Attorney General*,[52] the court reaffirmed the notion that absence of an objection from the asylum state is sufficient consent to additional prosecution where the additional crimes are similar to one for which extradition was obtained.[53] This seems to suggest a contrary theory than which *Najohn* supported.

The Ninth Circuit has continually manipulated *Najohn* as a basis for affirming a defendant's standing to object to anything the asylum country could have objected to concerning post-extradition. But *Najohn* actually seems to suggest that consent by the asylum nation will remove the defendant's standing as discussed below, and that an absence of objection by the asylum country suffices for consent when the additional crimes charged do not vary from the crimes for which the defendant was extradited. If the Ninth Circuit misinterpreted its own precedent, one can only conclude that many other cases regarding extraditee standing have been misconstrued as well. For example, although the Ninth Circuit in *United States v. Cuevas*[54] accepted the Second Circuit's doctrine of specialty to be a privilege of the asylum state rather than a right of the accused, it also steadfastly sided with *Najohn* in upholding standing for the defendant. The Ninth Circuit's holding seems to be part of a chain reaction, as the court based its *United States v. Fowlie*[55] opinion on *Cuevas* in holding that the defendant may raise whatever objections the asylum state, Mexico, could have raised in the absence of consent. Again in *United States v. Andonian*,[56] the Ninth Circuit stated that it was

45. United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986).
46. *Id.* at 1421.
47. *Id.*
48. *Id.* at 1422 (citing Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.D.C. 1979) ("[T]he extradited party may be tried for a crime other than that for which he was surrendered if the asylum country consents.")).
49. *Najohn*, 785 F.2d at 1422.
50. *Id.* at 1422.
51. *Id.* at 1423.
52. Fiocconi v. Attorney Gen., 462 F.2d 475 (2d Cir. 1972).
53. *Najohn*, 785 F.2d at 1423.
54. United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988).
55. United States v. Fowlie, 24 F.3d 1059, 1064 (9th Cir. 1994).
56. United States v. Andonian, 29 F.3d 1432 (9th Cir. 1994).

protecting the wishes of the extraditing country.[57] The Ninth Circuit explicitly agreed with the Second Circuit's holding in *United States v. Paroutian*[58] that the test for whether prosecution is outside the scope of the extradition order is "whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he is extradited."[59] In *Andonian*, the court noted that this protection is limited and only exists to the extent of anticipated protection surrendered by the asylum country. After suggesting that the right of objection belongs solely to the asylum state, the Ninth Circuit mysteriously held that an extradited person may raise any objections the asylum country could raise citing *Cuevas* and *Najohn* as precedent.[60]

In *United States v. Levy*,[61] the Tenth Circuit likewise held that standing is available for the defendant to object to post-extradition prosecution problems. In *Levy*, the court cited *Rauscher* in support of its finding that the defendant had standing to object to prosecution.[62] In *United States v. Abello Silva*,[63] the Tenth Circuit specifically acknowledged that the doctrine of specialty is traditionally reserved for the asylum state to raise, but then receded to accept the ruling in *Levy* allowing the defendant to raise objection.[64]

The Eleventh Circuit has recently held that individuals have standing to object to extradition. In *United States v. Herbage*,[65] the court assumed that Herbage had standing to raise objection without actually deciding the issue. The court openly acknowledged that there is a debate concerning the validity of standing for the defendant. In *United States v. Puentes*,[66] the court subsequently outlined reasons in support of the notion that an individual has standing to object. The court first stated that a defendant has standing to object to anything the asylum state could object to where the asylum state does not waive its right to object, and cited *United States v. Alvarez-Machain*[67] where the Supreme Court explained that "if the extradition treaty has the force of law . . . it would appear that a court must enforce it on behalf of an individual."[68] The Puentes court also cited *Rauscher* noting that the Court in *Rauscher* did not place any importance on whether Great Britain, the asylum state, had formally protested.[69]

2. Extraditee Does Not Have Standing to Object to Possible Deviance from Terms in Extradition Order.

A growing number of courts have posited that an extraditee does not have standing to object to possible violations of extradition treaties, extradition orders, or the doctrine of specialty. Some believe this view is an outgrowth of political realism.[70]

57. *Id.* at 1435.
58. United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962).
59. *Id.* at 491.
60. *Andonian*, 29 F.3d at 1435.
61. United States v. Levy, 905 F.2d 326 (10th Cir. 1990).
62. *Id.* at 328 n.1.
63. United States v. Abello Silva, 948 F.2d 1168 (10th Cir. 1991).
64. *Id.* at 1173 n.2.
65. United States v. Herbage, 850 F.2d 1463, 1466 (11th Cir. 1988).
66. United States v. Puentes, 50 F.3d 1567, 1575 (11th Cir. 1995).
67. United States v. Alvarez-Machain, 504 U.S. 655 (1992).
68. *Puentes*, 50 F.3d at 1575 (citing *Alvarez-Machain*, 504 U.S. at 667).
69. *Alvarez-Machain*, 504 U.S. at 655-56 (1992) (citing *Rauscher*, 119 U.S. at 407).
70. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual*

Political realism concerns the relationship between states.[71] Since international law deals exclusively with states, extradition treaties are contracts not among individuals but between nations. Thus, an individual does not have standing to raise objections to possible violations in international law. Courts opposed to an extraditee having standing to object are the First, Second, Fifth, Sixth, Seventh and D.C. Circuits.

The First Circuit in *United States v. Cordero*[72] explicitly stated that "extradition treaties are made for the benefit of the governments concerned" and thus "it is the contracting foreign government, not the defendant, that would have the right to complain about a violation."[73]

In *Fiocconi v. Attorney General*,[74] the Second Circuit focused on the language of the extradition treaty. The court suggested that if the asylum country wants to limit prosecution to those crimes for which it extradited an individual, it could easily have stated this restriction in the treaty.[75] In this case, however, the treaty actually limited prosecution to those crimes "for which his surrender is asked."[76] In *Shapiro v. Ferrandina*[77] the Second Circuit held that "as a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused."[78] The court further noted that the language of the treaty implied that the asylum state has the power by limiting prosecution to the crimes for which extradition was granted rather than more generally creating a limit to crimes enumerated in the treaty.[79]

In *United States v. Kaufman*,[80] the Fifth Circuit cited its holding in *United States v. Zabaneh*[81] that an individual did not have standing to generally raise extradition treaty violations. However, concerning standing to raise objections to the doctrine of specialty, the court deferred to the Second Circuit's decision in *Fiocconi*. *United States v. Cadena*,[82] the seminal authority regarding standing to raise objection to the doctrine of specialty, came to the same conclusion as *Fiocconi* but concerned United Nations Conventions on the High Seas. In *Cadena*, the court held that a defendant does not have standing to raise specialty objections absent objection from the asylum state.[83] In *United States v. Miro*,[84] the Fifth Circuit specifically followed *Kaufman* and stated that a "criminal defendant has no standing to argue the specialty doctrine when the asylum state has failed to raise an objection to the proceeding."[85]

Agenda, 87 AM. J. INTL. L. 205, 207 n.5 (1993).

71. P.E. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES 53 (1951).
72. United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981).
73. *Id.* at 38-39.
74. Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972).
75. *Id.* at 481.
76. *Id.* (quoting Extradition Convention Between the United States and Italy, March 23, 1868, U.S.-Italy, art. III, 15 Stat. 629, 631).
77. Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973).
78. *Id.* at 906.
79. *Id.*
80. United States v. Kaufman, 858 F.2d 994, 1007 n.3 (5th Cir. 1988).
81. United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988).
82. United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978).
83. *Id.* at 1260-61.
84. *Miro*, 29 F.3d 194 (5th Cir. 1994).
85. *Id.* at 200 & n.5.

The Sixth Circuit also left the privilege of objection to the asylum state. In *Demjanjuk v. Petrovsky*,[86] the court noted that "[t]he right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested."[87] Additionally, the court explained that extradition is a decision left to the Executive branch.[88]

In *Matta-Ballesteros v. Henman*,[89] the Seventh Circuit stated that "[i]t is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved."[90] Citing *United States ex rel. Lujan v. Gengler*[91] and *United States v. Zabaneh*[92] as authority, the court explained that individual rights which accrue from international treaties are traditionally derived through the states.[93] Treaties, in general, exist for the protection of sovereign nations.[94] Therefore, it is for the sovereign nation, not for the individual, to determine if there are violations which do not promote its best interests. The court further noted that Honduras' cooperation in releasing the defendant and their lack of official objection clearly demonstrated the nation's acquiescence.[95] Any other determination "would be denying the sovereignty of the Republic of Honduras."[96]

In *Kaiser v. Rutherford*,[97] the District of Columbia District Court advocated the dual criminality doctrine, thereby reaffirming the idea that the underlying conduct must be an offense in both countries to satisfy the doctrine, and not merely a mirror image charge, crime, or required element. The court also noted that the rule of specialty is a privilege of the asylum state, not of the accused. The opinion required the fulfillment of two criteria to satisfy the doctrine of specialty: (1) prosecution must be based on the same facts as in the extradition request; and (2) that the "charges must be extraditable under the Treaty."[98] If these requirements were enacted, many problems concerning prosecution of crimes inside and outside the four corners of extradition orders could be avoided.[99]

Brazil did not raise an objection to Pang's prosecution for the additional four counts of murder. It was Pang who objected. The Supreme Court of Washington held Pang's individual objection valid, but Brazil could have easily ratified the objection and clarified the situation. There is no reason for the United States government to anticipate the wishes of the Brazilian government when Brazil does not explicitly voice an objection. Minister Jobim's letter indicated that Brazil did not intend for Pang to escape liability for his crimes just because the Brazilian Code was superficially different from the United States Code. If Brazil intended this result, it was free to formally

86. Demjanjuk v. Petrovsky, 776 F.2d. 571 (6th Cir. 1985).
87. *Id.* at 584.
88. *Id.* at 584 (citing Escobedo v. United States, 623 F.2d 1098, 1105 (1980)).
89. Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990).
90. *Id.* at 259.
91. United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975).
92. United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988).
93. *Matta-Ballesteros*, 896 F.2d at 259.
94. *Id.*
95. *Id.* at 259-60.
96. *Id.* at 260.
97. Kaiser v. Rutherford, 827 F. Supp. 832 (D.D.C. 1993).
98. *Id.* at 835.
99. State v. Pang, 940 P.2d 1293 (Wash.), *cert. denied*, Washington v. Pang, 118 S. Ct. 628 (1997).

vocalize this intent. Pang should not have standing to object to possible violations of a treaty between two sovereign nations.

The question of standing has a further complication. If the asylum country explicitly waives any objection, then the extraditee, regardless of standing, cannot object to possible violations of the treaty, the extradition order, or the doctrine of specialty. Though this explicit waiver concept is established,[100] there is question as to the degree of explicitness required for the asylum country's waiver. Is there a certain level of action which would implicitly waive objection? There is significant split in authority over this point as well.

B. Waiver

1. Implicit Waiver by Asylum Country is Not Sufficient to Remove the Extraditee's Option to Object to Extradition Treaty or Specialty Violations.

The Washington Supreme Court in *Pang*[101] took the position that Brazil neither explicitly nor implicitly waived its right of objection.[102] It has been thoroughly established that explicit waiver divests the extraditee of standing to object.[103] The Washington Supreme Court based their decision on the absence of an explicit or implicit waiver finding instead of discrediting the implied waiver theory.[104] However, the court noted that even if implicit waiver was made, it would still question the sufficiency of that waiver.[105]

In *United States v. Khan,*[106] the Ninth Circuit noted that an affirmative statement concerning what could be prosecuted was required from the asylum state due to its language in *Quinn v. Robinson,*[107] which restricted prosecution to counts extradited. Additionally, the *Khan* court cited *United States v. Merit,*[108] where the South African Supreme Court affirmed the defendant's extradition on two counts of the indictment but was ambiguous on the other twelve counts.[109] That court found that since clarification on what should be prosecuted must be obtained to satisfy the doctrine of specialty, the need for an affirmative statement of prosecutable offenses was required.[110] Since an affirmative statement was required for each count to be prosecuted, the *Khan* court reasoned that implied waivers cannot exist. The *Khan* court stated that Pakistan ambiguously agreed to extradite Khan on two contested counts leading to an implied waiver. The magistrate judge in *Khan* found an implied waiver in that "the commissioner's report does not suggest that Khan ought not to be extradited on the charge contained in [the contested count]." But the court reversed, refusing to find an implied waiver, and noted that it "[would] not infer an agreement to extradite from Pakistan's silence concerning [a contested count]."[111] Even though the extradition or-

100. United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986).
101. State v. Pang, 940 P.2d 1293 (Wash.), *cert. denied,* Washington v. Pang, 118 S. Ct. 628 (1997).
102. *Id.* at 1317-18.
103. *Najohn,* 785 F.2d at 1422.
104. *Pang,* 940 P.2d at 1317-18.
105. *Id.* at 1318.
106. United States v. Khan, 993 F.2d 1368 (9th Cir. 1993).
107. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).
108. United States v. Merit, 962 F.2d 917 (9th Cir. 1992).
109. *Id.* at 923.
110. *Id.*
111. *Khan,* 993 F.2d at 1374.

der stated Khan could be "surrendered over to the authorities in the United States for trial under the relevant American Law,"[112] it is noted that Pakistan might have been referring to an uncontested count. Since an implied waiver could not exist, the court found the doctrine of specialty to be in violation.

2. Implicit Waiver by the Asylum Country is Sufficient to Remove the Extraditee's Option to Object to Violations of the Extradition Treaty and Specialty.

The District of Columbia Circuit Court noted in *United States v. Sensi*[113] that the validity of a waiver should be based on "whether the requested state has objected or would object to prosecution."[114] If the state expressly objects to prosecution for a particular crime, this constitutes an express waiver, but when the state is silent an implied waiver may arise.

The Second Circuit in *Fiocconi*[115] utilized a test dictated by *Paroutian*[116] in determining the meaning of the separate offense test. The *Fiocconi* court then drew a parallel between this separate offense test and the test which should be used to determine implicit waiver, noting that one could assume waiver absent a protest from the asylum country since they "[did] not believe that [the asylum government] would regard the prosecution of [extraditees] for subsequent offenses of the same character as the crime for which they were extradited as a breach of faith by the United States."[117] *Fiocconi* thus suggests that where there is no affirmative protest from the asylum country and the additional prosecution is of the same character as the extradited offense, waiver should be implied.

In *United States v. Andonian*,[118] the Ninth Circuit broadened the ability to prosecute despite the lack of express consent of an asylum country. First, the court rejected *Kahn's* suggestion that silence cannot be consent.[119] The court then limited *Khan*'s and *Rauscher*'s affirmative statement standard to "a class of cases in which an ambiguous extradition order creates a risk that a defendant will be prosecuted for an offense which is unrecognized in the surrendering country."[120] On the contrary, the extradition order in *Pang* expressly allowed prosecution for arson and the resulting four deaths. While Brazil did not extradite Pang on murder charges, the country likewise did not object to Pang's accountability for the four deaths resulting from the arson. The trial court in *Pang* noted that Brazil had numerous opportunities to object and yet did not.[121] Thus, the question that should be answered is whether anything can be gained from assuming objection as opposed to assuming waiver. As was noted in

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112. *Id.*

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

114. *Id.* at 895 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. b).

115. Fiocconi v. Attorney Gen., 462 F.2d 475 (2d Cir. 1972).

116. *Paroutian*, 299 F.2d at 490-91. *See supra* text accompanying note 57. The *Paroutian* court stated that "the test whether trial is for a 'separate offense' should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate.'" *Paroutian*, 299 F.2d at 490-91.

117. *Fiocconi*, 462 F.2d at 481.

118. United States v. Andonian, 29 F.3d 1432 (9th Cir. 1994).

119. *Id.* at 1436.

120. *Id.*

121. *Pang*, 940 P.2d at 1313.

Sensi,[122] if it reasonable to assume that the asylum country would not object, and in this case they did not object, there should be an implied waiver.

IV. RECOMMENDATIONS

In *Pang*, the United States-Brazil extradition treaty is deficient in specifying what should and should not be prosecuted in relation to an extradition order under the treaty. The court noted that the United States-Brazil extradition treaty allows for the prosecution of crimes which are requested, and not for those crimes which are merely enumerated in the extradition order. Clarifying this by amendment would better serve extradition at a later date. This does not, however, resolve problems with extraditions concerning other countries. Since it would be inefficient and impracticable to attempt to clarify every extradition treaty ever written, there must be another solution.

The basic principle of the doctrine of dual criminality is concerned more with the criminal conduct proscribed as the basis of extradition than with the name or elements of the crime. If the conduct being punished is the same in both states, the doctrine of dual criminality is satisfied. Why should this not be the overriding principle in the doctrine of specialty? We are primarily concerned with the principle that one state cannot impinge on the sovereignty of another by prosecuting for a crime not recognized in the requested state. This principle is not violated by focusing on criminal conduct rather than superficial names and elements. If the nation from which extradition is requested believes its wishes are not being served, it may object. With clear objection, the requesting nation loses jurisdiction to prosecute for the objectionable crimes.

In *Pang*, a U.S. citizen committed a U.S. crime against four other U.S. citizens on U.S. soil. Pang's sole reason for seeking asylum in Brazil was to avoid lawful prosecution within the State of Washington. Based on Minister Jobim's letter and the extradited crime of aggravated arson, Brazil obviously intended that Pang remain accountable for the crimes which he committed, including the four deaths. The fact that Brazil did not recognize felony murder is merely a technicality which does not affect international comity or the mutual respect between sovereign nations. The United States can hold Pang accountable for the four deaths while remaining respectful of Brazil's intentions and wishes. If Brazil believes that its ban on murder prosecution is violated by the State of Washington's conduct in carrying out the prosecution for felony murder, it may object. An explicit objection by Brazil removes any question of intent. This is not a question of guilt. Pang confessed to the crime while in custody. The primary conduct which Brazil seeks to punish and that which the United States wishes to punish are one and the same. If Brazil feels differently, it has every right to object. Pang's objection should be verified by Brazil or overruled. The agreement for Pang's extradition to the United States even recognized that "in [Brazil's justice] system, the resulting death in the case of a [crime of] common danger, [such as arson], acts as an enhancement, aggravating the penalty."[123] On the other hand, "in the [United States'] system, it is [an] autonomous [crime]."[124] This further illustrates that Brazil intended for Pang to be accountable for the four deaths. The *Pang* dissent[125] introduces another interesting point. Even if the extradition order is limited to arson, the

122. United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989).
123. *Pang*, 940 P.2d at 1341.
124. *Pang*, 940 P.2d at 1341.
125. *Pang*, 940 P.2d at 1326-34, (Durham, C.J., dissenting).

treaty with Brazil notes that "[a] person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request."[126] The United States requested that Pang be extradited on four counts of felony murder as well as arson. Since both felony murder and arson were the crimes which gave rise to the request, there was no violation.

V. CONCLUSION

International extradition is extremely complex. The doctrines of specialty and dual criminality attempt to guide nations through the process while respecting their sovereignty. Depending on the circumstances, circuit courts have decided differently on cases of extraditee standing and the validity of an asylum nation giving implicit waiver. Whether this is for each nation to determine or for an international body such as the United Nations to determine is not an easy question to answer and may be best decided by experience. If the debate continues without action, however, criminals like Pang will escape justice by seeking asylum in a country with more favorable criminal sanctions. We should not reward criminals for their ability to manipulate technicalities, thereby utilizing the international venue as an escape from domestic prosecution. The world is shrinking and we must work with other countries to make sure this movement toward unity and peace is not abused by those who are so inclined. It is no longer enough to see the world as a collection of individuals who should limit their inquiries to their own country. All countries are neighbors, and we should do to other countries as we hope they will do unto us.

*Ha Kung Wong**

126. Treaty of Extradition Between the United States of America and the United States of Brazil, Jan. 13, 1961, U.S.-Braz., art. XXI, 15 U.S.T. 2093, entered into force Dec. 17, 1964.

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