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Collaring Drug Kingpins: International Extradition and Continuing Criminal Enterprise in United States v. Levy

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COLLARING DRUG KINGPINS: INTERNATIONAL EXTRADITION AND CONTINUING CRIMINAL ENTERPRISE IN *UNITED STATES v. LEVY*

INTRODUCTION

In the fervent conduct of its declared war against illegal drugs and all those who traffic in them, the United States Department of Justice has increasingly relied upon measures such as the Continuing Criminal Enterprise Act (CCE),[1] commonly referred to as "kingpin" statutes.[2] These kingpin statutes are aimed at the leaders of criminal operations that grow, manufacture, export and sell drugs, and have proven highly successful in guaranteeing convictions of these individuals. However, because many of the bosses of international criminal drug operations, or cartels, reside outside the United States, the Department of Justice must first apprehend them before they can be prosecuted and subsequently jailed in the United States. Thus, the United States must obtain the extradition of these drug lords to the United States from the nations in which they reside.

To obtain international extradition in such cases, an extradition treaty must exist between the United States and the nation in which the drug lord resides.[3] Bound not only by the language of these treaties, but also by a set of international legal principles and procedural rules which dictate how and when extradition can take place, the United States has encountered difficulty extraditing individuals accused of CCE violations.[4]

In determining the merit of an extradition request from the United States, the nation in which the accused resides must decide whether two of the fundamental principles of extradition exist— "double criminality" and "specialty." The doctrine of double criminality, also known as dual criminality, requires that the "offense with which [the accused] is charged . . . [be] punishable as a serious crime in *both* the request-

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1. 21 U.S.C. § 848 (1982 & Supp. V 1989).

2. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982), is another "kingpin" statute.

3. Barbara Sicalides, *RICO, CCE, and International Extradition*, 62 TEMP. L. REV. 1281, 1291-92 (1989) [hereinafter *CCE and Extradition*]. While almost all common law nations, including the United States, require the extradition of an accused criminal to be based upon treaty, in some exceptional cases the transfer of an individual can be based upon comity or reciprocity. *See* Factor v. Laubenheimer, 290 U.S. 276 (1933); United States v. Accardi, 342 F.2d 697 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965); United States v. Lehder-Rivas, 668 F. Supp. 1523 (M.D. Fla. 1987).

4. *CCE and Extradition*, *supra* note 3, at 1283.

ing and requested state[s]."[5] The doctrine of specialty prohibits the requesting nation from prosecuting the accused for crimes other than those upon which the extradition request was based.[6]

Because the United States is unique in its statutory creation of CCE, this statute's ability to satisfy the requirements of double criminality and specialty has been challenged.[7] Those extradited under this statute argue that double criminality is thwarted by the absence of comparable CCE statutes in the nations from which they were extradited. They also allege that specialty is lacking when they are extradited for the "underlying predicate offenses [which make up CCE, and] which are recognizable in the requested country, and later prosecute[d] . . . for substantive . . . CCE violations."[8]

United States v. Levy[9] reveals an increased judicial willingness to sanction international extradition based upon the CCE statute. In sustaining the extradition in this case, the United States Court of Appeals for the Tenth Circuit broadly interpreted the principle of double criminality, focusing "not on how the crime is defined in the particular statutes the defendant is accused of violating, . . . [but] on the underlying criminality of the defendant's alleged conduct."[10]

In addition, the Levy court refused to bar the defendant's conviction under CCE, despite "the fact that the order surrendering him to American authorities neither mentioned CCE by name, nor recited all of the elements of the crime."[11] The court expressed its belief "that Hong Kong intended to extradite Levy not only on [the named charges], but also on the CCE charge,"[12] and asserted that the extradition request satisfied specialty by analogizing CCE to the requested nation's own criminal statutes.[13]

This note will recount the historical basis of extradition in general and the history of the CCE act, focusing particularly on double criminality and specialty. Furthermore, this note will argue that *Levy* serves as the most recent guidepost in the federal bench's continuing journey toward a broader interpretation of extradition requirements. While

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5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476(1)(c) (1987) (emphasis added) [hereinafter RESTATEMENT].

6. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 352-53 (1974) [hereinafter BASSIOUNI].

7. *CCE and Extradition*, *supra* note 3, at 1284.

8. *Id.*

9. 905 F.2d 326 (10th Cir. 1990).

10. *Id.* at 328.

11. *Id.*

12. *Id.* at 329.

13. *Id.* at 328-29.

some commentators may interpret extraditions based upon CCE violations as departures from the previous path of precedent in extradition law, this note concludes that the *Levy* decision merely accelerates the pace of the federal bench down the path of increasingly broader interpretations of extradition requirements, a path it has followed for most of this century. Finally, this note cautions that, even if this brisk pace is justified by the exigent circumstances inherent in fighting a wearisome drug war, the courts must take care not to overlook the basic rights and liberties of nations and individuals upon which the procedural requirements of extradition are based.

I. FACTS OF THE CASE

Lawrence Louis Levy, the reputed leader of one of the largest cocaine distribution rings in the history of Colorado, was indicted in 1985 on nineteen federal charges involving the sale of more than $12 million worth of cocaine.[14] Included among the nineteen charges were possession of cocaine with intent to distribute, conspiracy to commit the same crime, and operating a continuing criminal exercise (CCE).[15]

Mr. Levy was apprehended and jailed in Hong Kong on June 6, 1986, for attempting to board an international flight from Hong Kong to Tokyo, Japan, with a false passport.[16] Upon learning of this, the United States immediately requested Mr. Levy's extradition based upon his indictment for a number of drug related crimes, in addition to CCE.[17] The acting governor of Hong Kong, noting that this extradition request was the first seeking extradition for CCE under the United States-United Kingdom Extradition Treaty,[18] translated the CCE charge into five separate elements, each of which qualified as a crime in Hong Kong, and referred the case to a magistrate.[19]

The Hong Kong magistrate agreed with the acting governor's reformulation of the CCE charge into analogous crimes in Hong Kong, and ordered Mr. Levy's extradition based upon the underlying criminal conduct inherent in Mr. Levy's actions, rather than a direct correspon-

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14. Karen Odom, *Drug 'Kingpin' Statute Applied in Attempted Extradition*, NAT'L L.J., Nov. 24, 1986, at 14 [hereinafter Odom].

15. *Levy*, 905 F.2d at 327.

16. Odom, *supra* note 14, at 14.

17. All extraditions from Hong Kong to the United States are covered by the Treaty on Extradition, Jan. 21, 1977, U.S.-U.K., 28 U.S.T. 227 [hereinafter Treaty], as Hong Kong is a member-state of the British Commonwealth.

18. CCE, as statutorily created in the United States, has no counterpart in the United Kingdom or the British Commonwealth. *See supra* note 17.

19. Odom, *supra* note 14, at 14.

dence between the CCE charge and specific statutory crimes in Hong Kong.[20] The magistrate grounded his decision on the belief that limiting extradition to those crimes where the statutory language was identical in both the requesting and requested nations, "taken to its literal or technical meaning, would limit and frustrate the obvious purpose of the two nations contracting in the treaty of extradition."[21]

Upon his forced return to the United States, Mr. Levy was convicted in the United States District Court for the District of Colorado on two counts of possession of cocaine with intent to distribute, and one count of operating a CCE.[22] He appealed only the CCE conviction, arguing "that his extradition and trial on the CCE charge violated the doctrines of dual criminality and specialty."[23]

II. Reasoning of the Court of Appeals

In deciding *United States v. Levy*,[24] the Tenth Circuit cited the specific language of the extradition treaty between the United States and the United Kingdom, as well as judicial precedent which interpreted the doctrines of double criminality and specialty. Circuit Judge Stephen Anderson, writing for the court, found the focus of the double criminality requirement of extradition to be "the criminality of the defendant's alleged conduct,"[25] a broad and encompassing focus which would disregard "how the crime is defined in the particular statutes the defendant is accused of violating."[26]

In asserting this interpretation of double criminality in the *Levy* case, Judge Anderson cited the actual language of the extradition treaty between the two nations, which states that "[e]xtradition shall be granted for an *act* or omission[,] the *facts of which* disclose an offense."[27] He then cited language from *Demjanjuk v. Petrovsky*,[28] a

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20. *Id.*

21. *Id.*

22. *Levy*, 905 F.2d at 327.

23. *Id.* at 328. Mr. Levy also attacked the validity of the CCE count of his original indictment on the grounds that the Government violated Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2510-21 (by presenting to the grand jury witnesses discovered through electronic surveillance whose testimony was relevant to the CCE count, without the requisite judicial approval), and that it failed to sufficiently set out the continuing series of violations necessary for a CCE charge. While neither argument has any bearing on the international extradition emphasis of this note, it should be noted that both were rejected. *Levy*, 905 F.2d at 329-30.

24. 905 F.2d 326 (10th Cir. 1990).

25. *Levy*, 905 F.2d at 328.

26. *Id.*

27. Treaty, *supra* note 17, art. III(1), 28 U.S.T. at 229 (emphasis added).

28. 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

case involving the extradition from the United States to Israel of a man accused of being the infamous Nazi concentration camp guard, "Ivan the Terrible." The court in *Demjanjuk* asserted that "[i]f the *acts* upon which the charges of the requesting country are based are also proscribed by a law of the requested nation, the requirement of double criminality is satisfied."[29]

To buttress the court's focus on the criminality of the acts themselves, rather than the statutory definition of the crimes within each country, Judge Anderson quoted the Restatement of the Foreign Relations Law which notes, "the fact that a particular act is classified differently in the criminal law of the two states . . . or that different requirements of proof are applicable in the two states does not defeat extradition . . . ."[30] Thus, Judge Anderson hinged the court's conclusion that the extradition "satisfie[d] the doctrine of dual criminality,"[31] on its belief that the acts of which Mr. Levy was accused, namely leading a cocaine trafficking operation, were considered criminal in both Hong Kong and the United States.[32]

The court was equally unswayed by Mr. Levy's argument on appeal that, as he was never extradited on the CCE charge, the doctrine of specialty, which provides that "once extradited, a person can be prosecuted only for those charges on which he was extradited,"[33] would bar his trial on the CCE charge. The court summarily dismissed Mr. Levy's reliance "upon the fact that the order surrendering him to American authorities neither mentioned CCE by name nor recited all of the elements of the crime."[34] Judge Anderson maintained in his opinion that "the Hong Kong courts clearly considered whether Levy could be extradited on [CCE], and concluded both that it was an extraditable crime and that the evidence showed probable cause to believe that the elements were present."[35] This led the Tenth Circuit, after considering the "totality of the circumstances,"[36] to conclude that

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29. *Levy*, 905 F.2d at 328 (quoting *Demjanjuk*, 776 F.2d at 579-80) (emphasis added).

30. *Id.* (quoting the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 cmt. d (1987)).

31. *Id.*

32. This was the same conclusion reached by Frank Gardner, the Magistrate in Hong Kong who ordered the extradition.

33. United States v. Sensi, 879 F.2d 888, 892 (D.C. Cir. 1989).

34. *Levy*, 905 F.2d at 328.

35. *Id.* at 329.

36. The Court extracted this test from United States v. Flores, 538 F.2d 939, 945 (2d Cir. 1976), a case where specialty was satisfied in a prosecution following an extra-

"Hong Kong intended to extradite Levy not only on the conspiracy and possession with intent to distribute charges, but also on the CCE charge."[37]

III. ANALYSIS

A. Statutory Definition of Continuing Criminal Enterprise

The Continuing Criminal Enterprise Act (CCE),[38] commonly referred to as a "kingpin statute," was enacted in 1970 in an effort to combat drug cartels by directly attacking their leadership.[39] Congress believed that by severing the head of a narcotics operation, the body would wither and die.[40] If the director of an illegal narcotics organization is convicted under the CCE act, he could be sentenced to a prison term of not less than twenty years to life, without the possibility of parole.[41] In addition to the real threat of a lengthy incarceration,[42] CCE also authorizes the seizure of the kingpin's ill-gotten monetary gains,[43] thus draining his criminal operation of working capital and resources and preventing one of the convicted drug lord's lieutenants from assuming control of the organization.[44]

In order to prosecute an individual accused of organizing a continuing criminal enterprise, the government must establish five predicate elements. First, the defendant must have "violated one of the substantive drug crimes under Title XXI of the United States Code . . . ."[45]

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dition from Spain to the U.S.. While the *Flores* court did not specifically refer to a "totality of the circumstances" test, it implied that presumptions as to the extraditing nation's purposes behind extradition could be used to satisfy specialty.

37. *Levy*, 905 F.2d at 329.

38. 21 U.S.C. § 848 (1982 & Supp. V 1989).

39. *See* Garret v. United States, 471 U.S. 773, 781 (1985); United States v. Sinito, 723 F.2d 1250, 1261-62 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); United States v. Webster, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 456 U.S. 935 (1982).

40. *See* H.R. Rep. No. 1444, 91st Cong., 2d Sess. 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576.

41. Steven Bernholz et al., *International Extradition in Drug Cases*, 10 N.C. J. INT'L L. & COM. REG. 353, 358 (1985) [hereinafter Bernholz]. *See* 21 U.S.C. § 848(a)(1)(c) (1982).

42. The average sentence for those convicted of CCE is 35 years. Bernholz, *supra* note 41, at 358 n.30.

43. 21 U.S.C. § 848 (1982 & Supp. V 1989). *See CCE and Extradition*, *supra* note 3, at 1289 n.62.

44. *CCE and Extradition*, *supra* note 3, at 1305 n.175 and accompanying text.

45. Bernholz, *supra* note 41, at 358. These crimes include manufacturing, distributing, dispensing, possessing with the intent to manufacture, distribute, or dispense a

Second, the defendant must be "engaged in a continuing series of federal drug felony violations."[46] Third, this series of violations must be conducted in concert with five or more people.[47] Fourth, the defendant must have served as an organizer, supervisor or some other type of leader within this operation.[48] Lastly, the defendant must have derived substantial income or resources from the criminal operation.[49]

While the CCE statute unquestionably provides prosecutors with the means to effectively battle drug kingpins, its method of forging the CCE violation from a series of underlying predicate offenses raises questions concerning the doctrine of double criminality and specialty if the United States attempts to extradite and try crime lords from other nations.[50] Such questions cannot be answered without first exploring the underlying principles and rationales of extradition.

B. Principles of International Extradition

In order to prosecute an individual for a criminal offense, a government must have jurisdiction over both the crime that was committed and the individual accused of committing that crime.[51] A government has jurisdiction over a crime if it is committed within the government's

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controlled substance, 21 U.S.C. § 841(a); conspiracy to commit the aforementioned acts, *Id.* § 846; importing of controlled substances, *Id.* § 952; manufacturing or distributing a controlled substance with the intent to illegally import that substance, *Id.* § 959; conspiracy to commit the aforementioned acts with the intent to illegally import that substance, *Id.* § 963.

46. 21 U.S.C. § 848(c)(1). *See CCE and Extradition, supra* note 3, at 1289. The continuing series requirement has been defined as three or more federal narcotics violations. *See* United States v. Ordonez, 737 F.2d 793, 806 (9th Cir. 1984); United States v. Brantley, 733 F.2d 1429, 1436 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); United States v. Phillips, 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

47. 21 U.S.C. § 848 (c)(2)(A). *See CCE and Extradition, supra* note 3, at 1289.

48. 21 U.S.C. § 848 (c)(2)(A). *See CCE and Extradition, supra* note 3, at 1289. Courts have defined the terms organizer, manager, and supervisor according to common sense, practical and ordinary meaning considerations. *See* United States v. Wilkinson, 754 F.2d 1427, 1431 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985).

49. 21 U.S.C. § 848(c)(2)(B). *See CCE and Extradition, supra* note 3, at 1289. The term "substantial income" has been defined as "what any reasonable person would consider to be considerable or ample funds" from engaging in a continuing activity of drug distribution while "income" is defined as "money or other material resources or property received or gained directly from illegal narcotics transactions." U.S. v. Jeffers, 532 F.2d 1101, 1116 (7th Cir. 1976), *modified*, 432 U.S. 137, *reh'g denied*, 434 U.S. 880 (1977).

50. *See CCE and Extradition, supra* note 3, at 1290.

51. RESTATEMENT, *supra* note 5, § 475 cmt. d.

territories or results in injurious repercussions within that government's territories, even if the crime was committed outside of those territories.[52] A crime committed outside of a government's territories, however, usually means that the individual committing that crime is also outside of the government's jurisdiction. In order to establish personal jurisdiction over that individual, the government must request his or her extradition.[53]

In 1902, the United States Supreme Court defined extradition as 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."[54] In common law countries, the legal basis for extradition is usually founded upon a bilateral extradition treaty.[55] In fact, the Supreme Court declared in *Factor v. Laubenheimer*[56] that:

> While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled [based upon a moral duty] . . . the legal right to demand his extradition and the correlative duty to surrender him . . . exists only when created by treaty.[57]

The United States is a party to over one hundred extradition treaties.[58] Each treaty establishes a legal basis for determining whether a contracting party may extradite an individual to or from its country.[59] Whether an extradition is achieved through treaty or by a nation's voluntary surrender of an individual, however, the requirements of double criminality and specialty apply.[60]

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52. *Id.* at n. 1.

53. *Id.* § 475.

54. Terlinden v. Ames, 184 U.S. 270, 289 (1902).

55. *See CCE and Extradition, supra* note 4, at 1292.

56. 290 U.S. 276 (1933).

57. *Id.* at 287.

58. IGOR KAVASS & ADOLF SPRUDZS, A GUIDE TO UNITED STATES TREATIES IN FORCE 404-05 (1986). This guide lists the United States' extradition treaties, which are greater in number than any other country.

59. While there have been recent efforts to create multilateral conventions dictating international extradition to aid in the prosecution of international drug crimes, "bilateral treaties remain the prevailing international practice." *CCE and Extradition, supra* note 3, at 1292; *see also* BASSIOUNI, *supra* note 6, at 322.

60. *CCE and Extradition, supra* note 3, at 1294.

When another nation makes an extradition request to the United States, a federal judge or magistrate determines whether there is sufficient evidence to justify the accused's extradition.[61] The role of a magistrate "is not to decide guilt or innocence but to determine whether there is competent legal evidence to justify holding the accused for trial."[62] Because a magistrate's "certification of extraditability is not a 'final order,' "[63] there can be no direct appeal to a federal court. Thus, a federal court's review of a magistrate's decision occurs only upon a petition for writ of habeas corpus.[64]

The scope of a federal court's inquiry into these cases, therefore, is "limited to determining 'whether the magistrate had jurisdiction, whether the offense charged is within the treaty and by a somewhat liberal construction, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.' "[65] It is important to note that the courts' determination of whether the offense charged is within the treaty involves judicial review of the principle of double criminality. This review to determine whether double criminality has been satisfied "is a 'purely legal question' to be reviewed *de novo*."[66]

Likewise, when a defendant is extradited to the United States, as is the case in *Levy*, an appeal is available only after a trial on the charges upon which extradition was based. On appeal, however, the court may examine the sufficiency of the accused's extradition through *de novo* review of both the principles of dual criminality and specialty.

American courts have traditionally refused to recognize another nation's extraterritorial exercise of jurisdiction over an accused residing in the United States unless the extradition request is reasonable. In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,[67] the U.S. Circuit Court for the District of Columbia Circuit evaluated the reasonableness of an extradition request for crimes which had injurious repercussions in the requesting nation by first measuring the severity of

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61. Bernholz, *supra* note 41, at 355.

62. *In re* Extradition of Russell, 789 F.2d 801, 802 (9th Cir. 1986).

63. *Id.* at 803.

64. *See* Fernandez v. Phillips, 268 U.S. 311, 312 (1925). However, habeas corpus is a remedy open to the accused. In the event of an unfavorable ruling by a magistrate, the government may refile the extradition request with a different judge. *In re* Mackin, 668 F.2d 122, 128 (2d Cir. 1981).

65. Brauch v. Raiche, 618 F.2d 843, 847 (1st Cir. 1980) (quoting *Fernandez*, 268 U.S. at 312).

66. Peters v. Egnor, 888 F.2d 713, 718 (10th Cir. 1989) (quoting Quinn v. Robinson, 783 F.2d 776, 791 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986)).

67. 731 F.2d 909 (D.C. Cir. 1984).

those repercussions within that nation. The court stated that "[a]s long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law, prescriptive jurisdiction is legitimately exercised,"[68] and concluded that "[j]urisdiction exists only when significant effects were intended within the prescribing territory."[69] Only when the territorial effects are minimal and when there is no intent by the accused to cause detrimental harm to the requesting nation, are American courts likely to refuse extradition.[70]

1. Doctrine of Double Criminality

Double criminality is often referred to as the "keystone of international extradition law."[71] As defined by the court in *Levy*, the "doctrine of dual criminality provides that a person shall not be extradited 'if the offense with which he is charged . . . is not punishable as a serious crime in both the requesting and requested state[s].' "[72] Traditionally, double criminality is "expressly embodied in all United States extradition treaties in one of two forms."[73] The first form limits the offenses for which extradition may be granted to those specifically listed in the treaty. This is known as the "enumerative method."[74] The second, known as the "eliminative method," limits extraditable offenses to those punishable by a sentence of agreed upon severity.[75] The extradition treaty between the United States and the United Kingdom, which was binding in the *Levy* case,[76] is both enumerative and eliminative. It not only lists twenty-nine extraditable offense in a schedule annexed to the treaty,[77] but also includes a provision whereby extradition between

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68. *Id.* at 923.

69. *Id.*

70. Republic of Fr. v. Moghadam, 617 F. Supp. 777, 787 (N.D. Cal. 1985).

71. Bernholz, *supra* note 41, at 355.

72. United States v. Levy, 905 F.2d 326, 328 (10th Cir. 1990)(quoting Peters v. Egnor, 888 F.2d 713, 718 (10th Cir. 1989) (quoting RESTATEMENT, *supra* note 5, § 476(1)(c)).

73. Bernholz, *supra* note 41, at 355.

74. David Levy, *Double Criminality and the U.S.-U.K. Extradition Treaty: Hu Yau-Leung v. Soscia*, 8 BROOK. J. INT'L. L. 475 (1982) [hereinafter *Double Criminality*].

75. *Id.*

76. Hong Kong, as a member of the British Commonwealth, is bound by all treaties to which the United Kingdom is a party.

77. Treaty, *supra* note 17, 28 U.S.T. at 235. The crimes enumerated in this schedule run the gamut from murder, to bigamy, to piracy, to the unlawful seizure of an aircraft (hijacking). The twelfth offense listed on the schedule names "[a]n offense

the two nations can be achieved for those criminal acts which are "punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty,"[78] even though the acts are not enumerated in the treaty. The "laws" alluded to by this provision of the treaty have been interpreted to include both federal and/or state law.[79]

Courts in different nations and different eras have not always concurred in their interpretations of the double criminality requirement intrinsic in each extradition treaty. When a court strictly interprets a treaty's double criminality requirements, it prohibits extradition in any case where the label attached to an offense, or its legal elements, are not identical in both the requesting and requested nations.[80] Strict interpretations of this nature are rare,[81] however, as most nations choose to apply a liberal interpretive method.[82]

Courts choosing a liberal interpretation of double criminality requirements[83] "focus on the criminal nature of the alleged conduct, regardless of its specific label or whether its elements correlate in both the requesting and requested nations."[84] The Supreme Court in *Collins v. Loisel*[85] interpreted the Webster-Ashburton Treaty of 1842, an ear-

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against the law relating to narcotic drugs, . . . cocaine and its derivatives, and other dangerous drugs" as an extraditable offense. *Id.* It should be noted that although this treaty was formulated after the enactment of the CCE statute, CCE is not specifically named as an extraditable offense.

78. *Id.* at 229, art. III(1)(a).

79. *See* Wright v. Henkel, 190 U.S. 40, 58-59 (1903); Hu Yau-Leung v. Soscia, 649 F.2d 914, 918 (2d Cir.), *cert. denied*, 454 U.S. 972 (1981); Brauch v. Raiche, 618 F.2d 843, 851 (1st Cir. 1980).

80. *CCE and Extradition*, *supra* note 3, at 1297.

81. Requiring identical names and elements of criminal offenses in order to justify extradition has resulted in absurd outcomes which often defeat the intent of the parties to the extradition treaty. Normally, a strict interpretation is given to the double criminality requirements of extradition treaties only if "a foreign relations conflict between [two] states over a separate issue [exists], and [the requested state decides to] prohibit extradition to a hostile requesting nation." *Id.*

82. A severe and rigid application of double criminality "would frustrate the main objective of extradition, the administration of justice. Countries employing the liberal interpretative method do so because, in their view, the benefits of international cooperation in the suppression of crime outweigh the importance of the sovereignty doctrine [in which the strict interpretation theory is couched]." *Id.* at 1298.

83. The liberal method of interpreting double criminality requirements originated in Great Britain, in a case where a British court analogized the French crime of "falsification of accounts" to the British crime of "forgery." *See In re* Arton (No. 2), 1 Q.B. 509 (1896).

84. *CCE and Extradition*, *supra* note 3, at 1297-98.

85. 259 U.S. 309 (1922).

lier United States-United Kingdom extradition treaty, by stating:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.[86]

This focus on the acts of the accused, rather than the statutory definition of the criminal activity prevents

> [t]he fact that defenses may be available in the requested state that would not be available in the requesting state, or that different requirements of proof are applicable in the two states . . . [from] defeat[ing] extradition under the double criminality principle.[87]

Throughout most of this century, American courts have been unreceptive to "overly defined arguments that seek to distinguish domestic crimes from [their] foreign counterparts."[88] Most recently, a federal circuit court reaffirmed this principle in its interpretation of the current United States-United Kingdom extradition treaty.[89] In *United States v. Sensi,*[90] cited by the court in *Levy*, the Court of Appeals for the District of Columbia Circuit asserted that " '[a]lthough the charges of the indictment may not correspond exactly to English offenses, it is the *facts* or underlying conduct supporting the charges which must correlate.' "[91]

While U.S. courts ruling on double criminality have not required statutes to be identical, they have required the crimes, as defined in the requesting and requested nation, to be "substantially analogous."[92] Statutes are substantially analogous "when they 'punish conduct falling within the broad scope' of the same 'generally recognized crime.' "[93] It

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86. *Id.* at 312.

87. Restatement, *supra* note 5, at § 476, cmt. d.

88. *CCE and Extradition, supra* note 3, at 1298 n.130. *See also* BASSIOUNI, *supra* note 6, at 322.

89. Treaty, *supra* note 17.

90. 879 F.2d 888 (D.C. Cir. 1989).

91. *Id.* at 894 (quoting the lower court in the same case, United States v. Sensi, 664 F. Supp. 566, 570 (D.D.C. 1987)) (emphasis in original).

92. Brauch v. Raiche, 618 F.2d 843, 851 (1st Cir. 1980).

93. Peters v. Egnor, 888 F.2d 713, 719 (10th Cir. 1989)(quoting *Brauch*, 618 F.2d at 848 n.7, 852).

is important to note, however, that this line of American precedent, which has focused on the criminal act rather than its statutory definition when determining double criminality, largely deals with a single charge for each criminal transaction.

In *Levy*, the United States requested extradition on the predicate drug offenses which make up CCE, as well as CCE itself. Hong Kong, however, only had crimes that were analogous to the predicate drug offenses upon which the CCE charge was based. Thus, the United States sought to tie two distinct charges into one criminal transaction.

2. Doctrine of Specialty

Directly related to the principle of double criminality is the doctrine of specialty.[94] The *Levy* court characterized specialty as the precept "which provides that 'once extradited, a person can be prosecuted only for those charges on which he was extradited.' "[95] Implicit in this doctrine is the idea that a nation surrenders its sovereignty only as to the offenses upon which it extradites, and no others.[96] The doctrine of specialty guarantees the rights of the asylum state, not the rights of the defendant.[97] Thus, an asylum nation may waive its right to limit any post-extradition prosecutions,[98] or it may "consent to extradite the defendant for [specific] offenses other than those expressly enumerated in the treaty,"[99] and the defendant will be unable to claim the protection of the doctrine of specialty. Because every extradition is based upon a "reliance on the representations made by the requesting country,"[100]

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94. There are five rationales underlying the doctrine of specialty: (1) the requested nation would have refused extradition if it had anticipated a prosecution for an offense not included in the extradition request; (2) the requesting nation lacks in personam jurisdiction over the defendant, thus necessitating the extradition request; (3) prosecution and punishment are made possible by the requested nation's surrender of the defendant; (4) use of the requested nation's processes to effectuate extradition for an offense not included in the extradition request would constitute an abuse of that nation's process; and (5) the requested nation undertakes the extradition based upon its reliance on the terms of the requesting nation's extradition request. *See* Bernholz, *supra* note 41, at 364-65; *CCE and Extradition*, *supra* note 3, at 1299.

95. *Levy*, 905 F.2d at 328 (quoting *Peters*, 888 F.2d at 720 n.9).

96. *See* Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979).

97. United States *ex rel.* Donnelly v. Mulligan, 76 F.2d 511, 513 (2d Cir. 1935) (extradition treaties are for benefit of the contracting nations; thus, rights of asylum and immunity belong to the contracting nations and not the accused).

98. *See Berenguer*, 473 F. Supp. at 1197.

99. United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987) (quoting United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986)).

100. Bernholz, *supra* note 41, at 365.

deviations from the doctrine of specialty are likely to chill further extraditions between the two nations.[101]

The Supreme Court first recognized that U.S. extraditions were bound by the doctrine of specialty in *United States v. Rauscher.*[102] Since then, U.S. courts have been willing to interpret specialty as liberally as they have double criminality, and have often limited post-extradition prosecutions under specialty only when the asylum nation's extradition order specifically prohibited, by name, the offense for which the defendant was tried.[103] A number of courts have employed a less absolute, and more subjective analysis "[i]n determining whether the principle [of specialty] has been abrogated in a given instance."[104] This approach inquires "whether the surrendering state would regard the prosecution [for offenses not listed in the indictment] . . . as a breach."[105] Using this method in *United States v. Diwan,*[106] a federal appellate court found that a prosecution for charges not listed in an extradition request from the United States to the United Kingdom would not have been regarded by Great Britain as an "affront to its sovereignty."[107] The court based this determination on the English authorities' subsequent endorsement of the prosecution.[108] Likewise, the court in *Levy* found that the Hong Kong magistrate's actions prior to Levy's extradition, and the absence of governmental protest following Levy's conviction on CCE, were sufficient to imply a waiver by Hong Kong of its rights under the rules of specialty.[109]

C. CCE as an Extraditable Offense

CCE has proven to be a highly successful weapon in the ongoing drug war. By utilizing a variety of narcotics offenses as the predicates of the greater CCE offense, wise prosecutorial use of CCE has enabled the United States Justice Department to strike at the heart of the large

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101. S.Z. Feller, *Reflections on the Nature of the Specialty Principle in Extradition Relations*, 12 ISR. L. REV. 466 (1977).

102. 119 U.S. 407 (1886).

103. *See generally* United States v. Flores, 538 F.2d 939 (2d Cir. 1976).

104. United States v. Jetter, 722 F.2d 371 (8th Cir. 1983).

105. Fiocconi v. Attorney General of the United States, 462 F.2d 475, 480 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972). *See also* United States v. Paroutian, 299 F.2d 486, 491 (2d Cir. 1962).

106. 864 F.2d 715 (11th Cir. 1989).

107. *Id.* at 721.

108. *Id.*

109. *Levy*, 905 F.2d at 329.

international drug cartels.[110] While the uniqueness of the CCE statute has been a boon to prosecutors once a drug kingpin is in custody, this singularity has also proved to be a source of great confusion when the same prosecutors seek to extradite those kingpins.[111] The fact that no other nation has enacted a parallel statute, combined with the absence of CCE's mention in most extradition treaties, leads courts to question CCE's ability to satisfy the requirements of double criminality and specialty.

The United States Court of Appeals for the Tenth Circuit answered that question in *Levy* by liberally interpreting the focus of double criminality, as well as the intentions of the extraditing nation. By expanding the focus of dual criminality beyond the statutory definition of a crime to encompass the "criminality of the defendant's alleged conduct",[112] the *Levy* court seized upon a pronounced willingness of American courts to concentrate on "[t]he essential character of a [criminal] transaction."[113] Additionally, the *Levy* court exhibited a willingness to allow the number of offenses tied to the criminal transaction for which the defendant was extradited, to be enlarged after extradition.

In determining that double criminality had been satisfied, the *Levy* court concentrated on the acts which the defendant was accused of committing, namely "being the leader of a cocaine trafficking operation."[114] These acts, the court concluded, consisted of conduct "illegal in both Hong Kong and the United States."[115] The fact that such acts were defined and punished as severe crimes in a certain way in the United States, and in another, but equally severe way in Hong Kong, was enough to satisfy the requirements of double criminality.[116] Thus, the Court in *Levy* followed the principle that "[d]ouble criminality does not require that an offense have the same name in the two states at issue . . . or . . . the same terms or that every element of the crime in both the requesting and requested states correspond identically."[117]

It significantly expanded this concept by applying it to CCE, a

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110. United States v Sinito, 723 F.2d 1250, 1261-62 (6th Cir. 1983); United States v. Webster, 639 F.2d 174 (4th Cir. 1981).

111. *CCE and Extradition*, *supra* note 3, at 1309.

112. *Levy*, 905 F.2d at 328.

113. Wright v. Henkel, 190 U.S. 40, 58-59 (1903).

114. *Levy*, 905 F.2d at 328.

115. *Id.*

116. *See* United States v. Casamento, 887 F.2d 1141, 1185 (2d Cir. 1989), *cert. denied* 110 S. Ct. 1138 (1990); United States v. Leder-Rivas, 668 F. Supp. 1523 (1987). *See also* Artukovic v. Rison, 784 F.2d 1354, 1356 (9th Cir. 1986).

117. *CCE and Extradition*, *supra* note 3, at 1312.

crime which has no true counterpart in other jurisdictions and which is built from predicate offenses. The court was satisfied that the criminal acts which constituted the predicate offenses to CCE were illegal in Hong Kong, and would allow for extradition to the United States by satisfying double criminality. However, this expansion ignored the extradition requirement espoused by the Ninth Circuit in *Cucuzzella v. Keliikoa*.[118] The *Cucuzzella* court prohibited extradition without a decision on "the extraditability of each offense[,] and not just each transaction."[119]

Cucuzzella's added attention to the charges themselves and the number of charges tied to each criminal transaction, was also asserted in *Shapiro v. Ferrandina*.[120] In *Shapiro*, the court distinguished between specialty as applied to situations involving "a mere lack of parallelism in nomenclature, . . . [or] with crimes so factually intertwined as to constitute a logical whole, . . . [and] multiple characterizations of the acts charged [so as to] raise potential problems of greatly increased punishment through successive sentences."[121] Extraditions in CCE prosecutions, by the very nature of their dependence on predicate offenses and the prospect of severe punishment upon conviction, demand the greater scrutiny called for in *Shapiro* and *Cucuzzella*.

The *Levy* court ignored the distinctions highlighted in *Shapiro*, and instead concentrated on the intentions of the extraditing nation through a consideration of the "totality of the circumstances."[122] Levy contended that the doctrine of specialty barred his prosecution on CCE as "the order surrendering him to American authorities neither mentioned CCE by name nor recited all of the elements of the crime."[123] Nevertheless, the *Levy* court looked at the Hong Kong magistrate's decision to extradite the defendant, and presumed, without explicit support, that the magistrate "clearly considered whether Levy could be extradited on [CCE], and concluded both that it was an extraditable crime and that the evidence showed probable cause to believe that the elements were present."[124]

The *Levy* court, convinced by the Hong Kong magistrate's attempts to analogize CCE to statutory offenses within its own jurisdic-

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118. 638 F.2d 105 (9th Cir. 1980).

119. Matter of Extradition of Prushinowski, 574 F. Supp. 1439 (E.D.N.C. 1983) (citing *Cucuzzella*, 638 F.2d at 107).

120. 478 F.2d 894 (2d Cir. 1973).

121. *Id.* at 908-09.

122. *Levy*, 905 F.2d at 329.

123. *Id.* at 328.

124. *Id.* at 329.

tion, based its reliance on the significance of such analogies on *United States v. Herbage*.[125] In *Herbage*, the court found that specialty was not violated when the defendant was prosecuted for a U.S. statutory violation known as misuse of the mails, which a British magistrate had analogized to fraud in the extradition order.[126] The *Levy* court was also willing to overlook the absence of any mention of CCE in the extradition order, because the "totality of the circumstances" indicated that the extraditing magistrate had considered CCE in his decision to extradite.[127]

The *Levy* court's reliance on the Hong Kong magistrate's vague consideration of CCE would not meet the standard established by the Ninth Circuit in *Caplan v. Vokes*.[128] The court in *Caplan* stated that:

> [A]n adequate extradition proceeding must include in its record a specific delineation, as to each charge, of the legal theories under the requesting country's law by which the accused's conduct is alleged to constitute an extraditable offense, together with an identification of the corresponding offenses in this country relied on to show that the "dual criminality" requirement has been met.[129]

Because exacting findings of this nature were missing in that case, the court in *Caplan* voided the defendant's extradition. The absence of similar findings in *Levy*, however, did not convince the court to grant the defendant relief.

The *Levy* court based it refusal to separate CCE from its predicate parts on similar actions by a number of other courts. In *United States v. Lehder-Rivas*,[130] a federal district court in Florida determined that an extradition on CCE did not violate the doctrine of double criminality. The court in *Lehder-Rivas* rejected the contention that " 'the determination of whether [CCE] is recognized as punishable in the re-

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125. 850 F.2d 1463 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1158 (1989).

126. *Id.* at 1466.

127. The decision cited United States v. Jetter, 722 F.2d 371, 373 (8th Cir. 1983)(a case which, upon consideration of all the circumstances, allowed a prosecution for conspiracy even though conspiracy was omitted from the extradition order), and United States v. Lehder-Rivas, 668 F. Supp. 1523 (M.D. Fla. 1987)(a case where specialty was found in the converse situation when the extraditing nation did not consider the CCE charge in its extradition proceedings, but did include it in the extradition order).

128. 649 F.2d 1336 (9th Cir. 1981).

129. *Id.* at 1344.

130. 668 F. Supp. 1523 (M.D. Fla. 1987).

quested country must be made with reference to CCE as a whole and not its separate parts.' "[131] The *Lehder-Rivas* court interpreted double criminality to require a "substantially analogous" standard, rejecting a "strict congruity of offenses" standard.

Furthermore, like the court in *Flores*,[132] the *Lehder-Rivas* court looked at the "totality of the circumstances," including the negotiations which preceded the treaty and the asylum nation's actions in responding to the extradition request, and applied them to a liberal construction generally given to extradition treaties.[133]

Thus, the *Levy* court was satisfied that the requirements of double criminality and specialty had been met, as exhibited by the implications of Hong Kong's actions prior to and subsequent to Levy's extradition. The court was unpersuaded by Levy's technical distinctions between Hong Kong's analogies of the CCE charge and its definition in the United States.

CONCLUSION

Nations have increasingly demonstrated a willingness to subordinate the principles of double criminality and specialty to the necessities of fighting the international drug war. These countries recognize that if these statutes are "defined in over-technical terms [they] would preclude extradition by reason of technical differences between legal systems notwithstanding that the acts alleged against the accused involve serious criminality under the law of both requesting and requested states."[134]

Nowhere is this more apparent than in the willingness of the *Levy* court to broadly focus on the criminality of the defendant's acts rather than the criminal accusations tied to those acts in relation to the double criminality requirement. Perhaps more disturbing is the court's equally cavalier divination of the extraditing nation's purposes for extraditing. Even without a reference to a specific crime in the extradition order, the court in *Levy* was willing to scour the record of the extradition proceedings to find the suggestion it needed to meet the requirement of

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131. *Id.* at 1527 (quoting Bernholz, *supra* note 41, at 361).

132. United States v. Flores, 538 F.2d 939, 945 (2d Cir. 1976).

133. *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933) (if a treaty fairly admits of two constructions, one restricting rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred). *See also* United States v. Wiebe, 733 F.2d 549, 554 (8th Cir. 1984) (extradition treaties are to be construed liberally to effect their purpose, i.e., the surrender of fugitives to be tried for their alleged offenses).

134. Riley v. Commonwealth, 60 A.L.G.R. 106, 111 (Austl. 1985).

specialty. While the court's actions in *Levy* may not have been egregious due to the unsympathetic nature of the defendant and the facts of the case, the precedent established may allow future courts to construct an answer to questions of specialty based upon nothing more than their own desire to affirmatively answer such questions.

Levy's defense might have been more effective had it directed the court's attention to the dangerous potential for cumulative and repetitive charges which could have been brought under this precedent against U.S. citizens extradited to foreign lands for individual offenses. The *Levy* court's willingness to rely generally on the purpose behind extradition treaties, and specifically on the absence of objection by Hong Kong to Levy's prosecution under CCE, however, indicates that the Tenth Circuit was unwilling to prevent the extradition of defendants based upon strict interpretations of the underlying doctrines of international extradition. The court in *Levy* seemed satisfied to rely on the notion of comity, or reciprocal courtesy between nations, upon which extradition is fundamentally based, to prevent the misuse of extraditions by contracting nations.

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