PROBLEMS WITH CURRENT INTERNATIONAL AND NATIONAL PRACTICES CONCERNING EXTRATERRITORIAL ABDUCTIONS

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Against a background of increasing raison d'Etat *this paper reviews the state of international law on the question of extraterritorial abductions and examines whether international and national human rights instruments offer sufficient protection to the abducted criminal in the light of recent practice by international bodies and national courts. Part II briefly describes the general principles of international law governing extraterritorial abductions, including the circumstances when a state may be held responsible for abduction, the consequences facing the abducting state and the extent to which consent or irregular handing over by the state of refuge may preclude the wrongfulness of the act. Part III examines whether abduction and irregular rendition threaten the human rights of the abducted criminal and, if so, whether the captured individual may raise their violation on the international plane and obtain reparation for the injury suffered. Part IV deals with the impact of developments of international law on the jurisdiction of national courts to prosecute the abducted criminal when custody is obtained through illegal means. In conclusion, Part V reflects on the need to combat impunity as well as the necessity of preserving the rights of the individual and suggests a few solutions to the problems highlighted.*

C'est dans le cadre d'un appel croissant à la raison d'Etat que cet article examine la position du droit international en matière d'enlèvements extraterritoriaux. La pratique récente des institutions internationales et des tribunaux nationaux y est répertoriée et la principale question discutée est de savoir si le droit international traditionnel et les instruments de droits de l'homme offrent une protection suffisante au présumé criminel victime d'un enlèvement.

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Apres une brève introduction, l'auteur passe en revue les principes généraux de droit international applicables aux enlèvements extraterritoriaux, les situations dans lesquelles l'enlèvement peut être imputable aux autorités étatiques, les circonstances faisant disparaître la violation des règles de droit international et les modes de réparation du préjudice causé à l'Etat sur le territoire duquel l'enlèvement a été perpétré. Puis, l'auteur se consacre à la question des droits de l'homme et examine la possibilité pour la victime de se prévaloir des recours existants à l'échelle mondiale et régionale afin d'obtenir réparation pour l'enlèvement. Finalement, l'auteur s'interroge sur l'effet des développements récents sur la juridiction des tribunaux nationaux lorsque la comparution du présumé criminel résulte d'un acte illégal.

En guise de conclusion, l'auteur offre quelques réflexions sur la nécessité de combattre le crime tout en préservant les droits de l'individu et tente d'esquisser quelques solutions aux divers problèmes soulevés dans l'article.

I INTRODUCTION

From time to time, individuals, governments or political organisations engineer abductions in contravention of national or international law in order to obtain in exchange a ransom or some other form of concession. Occasionally, a state resorts to similar methods with a view to bringing a criminal offender located abroad to stand trial before its courts. This paper will focus on the latter category. It is concerned with the extraterritorial abduction or irregular extradition of individuals sought in connection with an offence over which the abducting state wishes to exercise jurisdiction.[1]

Traditionally, three main reasons explain why states proceed to extraterritorial abductions. First, existing extradition arrangements might not cover the offence for which the request is made or the individual may raise a legitimate objection to their application.[2] An example is the political offence exception.[3] Second, the authorities of the state of refuge either are unwilling to prosecute the

1 This article was written prior to the *Alvarez-Machain v United States* decision by the United States Court of Appeals (9th Cir) released 3 June 2003.

2 See American Law Institute, *Restatement of the Law, Third, Restatement of the Foreign Relations of the United States* [hereafter *Restatement Third*] (1987), § 486 for a list of grounds for refusing extradition.

3 See *In re Castioni* [1891] 1 QB 149 which contains the classical definition of "political offence". In that case, a British court considered an extradition request from Switzerland in respect of the murder of a cantonal official in the course of a political riot. The court determined that the act had been committed during a political disturbance and that the person sought was part of a political movement involved in the disturbance. Extradition was refused on the ground that the offence charged was an offence of political character.

alleged offender or are unable to do so.[4] Third, some states widen the reach of their laws beyond their borders in response to expanding transnational criminal activities and are ready to go to great lengths to obtain custody of an alleged criminal wherever the latter sought asylum.[5] The latter reason, in particular, may create tensions between the prosecuting state and the state of refuge as the conduct might not qualify as a crime in the state where it is performed, making extradition from that state impossible. Furthermore, different bases for jurisdiction could open the door to conflicting claims among two or more states. In all these circumstances, it might be tempting for a state to fall back on abduction as an extreme measure when it considers that it is essential to submit an alleged offender to the process of its courts.

While few canons of international law have met with wider support than the principle that a state cannot exercise jurisdiction in the territory of another state without the latter's consent,[6] government-sponsored abductions still continue to hit the headlines.[7] Individuals are removed either forcibly, or with consent of the local authorities, in absence of any procedural safeguards, to stand trial in the prosecuting state. The capture of Abdullah Öcalan by Turkish special agents in Kenya in 1999,[8] the much-publicised arrest and surrender of former President Milosevic to the

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4 For instance, the national constitution forbids the extradition of nationals. For a historical account of the subject, see Michael Plachta (1999) "(Non-) Extradition of Nationals: A Never-ending Story" 13 Emory Int'l L Rev 77.

5 See The International Crimes and International Criminal Court Act 2000, a New Zealand statute that includes a number of offences against the administration of justice for which extraterritorial jurisdiction is asserted against New Zealand citizens; Antiterrorism and Effective Death Penalty Act 18 USC §§ 2339A, 2339B (1996) a United States statute making material support to foreign organisations engaged in terrorist activities unlawful.

6 See *The Case of the SS Lotus* (France/Turkey) (1928) PCIJ (Series A) No 10, 18-19; *Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua/United States) [1986] ICJ Reports 14, 111 para 212.

7 See "Jackal goes on trial" (1997) <http://news.bbc.co.uk/1/hi/world/39142.stm> (last accessed 1 June 2003); Weiner (1997) "U.S. Seizes the Lone Suspect In Killing of 2 CIA Officers" New York Times <http://query.nytimes.com/gst/abstract.html?res=F40916FE3C5A0C7B8DDDAF0894DF494D81>(last accessed 25 May 2003); Bowen (1999) "The story of Ocalan's arrest" <http://news.bbc.co.uk/1/hi/world/from_our_own_correspondent/283189.stm> (last accessed 1 June 2003).

In the 1990s, a number of landmark cases re-ignited the debate on the legality of abductions: see *State v Ebrahim* [1991] 2 SA 553 (App Div) translated and annotated in (1991) 31 *ILM* 888; *United States v Alvarez-Machain* 112 SCt 2188 (1992); *Bennett v Horseferry Road Magistrates' Court and another* [1993] 3 AllER 138 (HL); Decision on the Motion for Release by the Accused Slavko Dokmanovic, Case No IT-95-13a-PT, Trial Chamber, 22 October 1997, reproduced in 111 ILR 459.

8 Kelly (1999) "Case Studies 'Ripe' for the International Criminal Court: Practical Applications for the Pinochet, Öcalan, and Libyan Bomber Trials" 8 Journal of International Law and Practice 21, 33.

International Criminal Tribunal for Yugoslavia in June 2001[9] and the capture and imprisonment of alleged Taliban and Al Qaeda fighters in the aftermath of the tragic events of 11 September 2001[10] show the topical character of the subject. These episodes raise fundamental questions about the level of protection to which alleged international criminals are entitled once captured. Even if a growing trend has emerged in the legal literature favouring the protection, at the international level, of the rights of the abducted criminal against arrest and prosecution in circumstances disclosing an irregular apprehension,[11] a minority of commentators believe international law does not prevent the practice or at least excuse it in view of the gravity of the crimes concerned.[12] The all-out war against terrorism and the ability of a powerful country like the United States to act unilaterally introduces another layer of concern for those who believe that due process matters.

II EXTRATERRITORIAL ABDUCTIONS AND STATE RESPONSIBILITY UNDER INTERNATIONAL LAW

International crimes shock the conscience and terrorist acts provoke indignation and anger. Although the exercise of enforcement jurisdiction over an alleged criminal represents the natural

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9 Simons and Gall (2001) "Milosevic is Given to U.N. for Trial in War-Crime Case" New York Times http://www.nytimes.com/2001/06/29/world29/CND-Hague.html (last accessed 25 May 2003).

10 "US to hold detainees at Guantanamo Bay" (2001) <http://www.cnn.com/2001/US/12/27/ret.holding.detainees/index.html> (last accessed 1 June 2003); "US prepares Cuba base for Afghan prisoners" (2002) <http://www.cnn.com/2002/US/01/06/ret.guantanomo.prisoners/index.html> (last accessed 1 June 2003).

11 There is an abundant literature on the subject. Here is a brief list of some of the relevant works on the subject: Morgenstern (1952) "Jurisdiction in Seizures Effected in Violation of International Law" 29 BYIL 265; O'Higgins (1960) "Unlawful Seizure and Irregular Extradition" 36 BYIL 279; de Schutter (1965) "Competence of the National Judiciary Power in Case the Accused Has Been Unlawfully Brought Within the National Frontiers" 1 Revue Belge de Droit International 88; Feinrider (1980) "Extraterritorial Abductions: A Newly Developing International Standard" 14 Akron Law Review 27; Quigley (1988) "Government Vigilantes at Large: The Danger to Human Rights From Kidnapping of Suspected Terrorists" 10 Human Rights Quarterly 193; Mann (1990) "Reflections on the Prosecution of Persons Abducted in Breach of International Law" in Mann (ed) *Further Studies in International Law* 339; Gilbert (1991) *Aspects of Extradition Law* ch 7; Abramovsky (1991) "Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok" 31 Va J Int'l L 151; Rayfuse (1993) "International Abduction and the United States Supreme Court: The Law of the Jungle Reigns" 42 ICLQ 882; Ruiz-Bravo (1993) "Monstrous Decision: Kidnapping is Legal" 20 Hastings Constitutional Law Quarterly 833; Mitchell (1996) "English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain" 29 Cornell International Law Journal 283; Wilske and Schiller (1998) "Jurisdiction Over Persons Abducted in violation of International Law in the Aftermath of US v Machain" U Chicago Law School Roundtable 205.

12 See Kane (1987) "Prosecuting International Terrorists in United States Courts: Gaining the Jurisdiction Threshold" 12 Yale J Int'l L 294; Kash (1993) "Abductions of Terrorists in International Airspace and on the High Seas" 8 Fla J Int'l L 65; Wu (1998) "Saddam Hussein as Hostes Humani Generis? Should the U.S. Intervene?" 26 Syracuse J Int'l L & Com 55; Supernor (2001) "International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice" 50 Air Force L Rev 215.

complement to the state's power to make laws, international law, as it stands, preserves the principles of state sovereignty and territorial integrity and prohibits the conduct of enforcement functions, including abductions, without the consent of the territorial sovereign.

A Abductions Breach the Sovereignty and Territorial Integrity of the State of Refuge

A state cannot send agents abroad to abduct an alleged criminal. An abduction carried out by agents instructed by the state within the territory of another state is a violation of international law. This rule is firmly rooted in the principle of respect for territorial sovereignty and integrity of other states and in the ensuing obligation of non-intervention in the internal and external affairs of another state.[13] A long-standing practice confirms that such exercise of sovereign powers beyond the state's boundaries is contrary to international law and could a priori engage the international responsibility of the abducting state.[14] In 1935, the Harvard Research had already recorded this as a universally accepted principle: "[i]t is everywhere agreed, of course, that 'recourse to measures in violation of international law or international convention' in obtaining custody of a person charged with crime entails international responsibility".[15] In the *Eichmann* case, for instance, Argentina claimed that the abduction of the former Gestapo official performed on its territory by Israeli agents amounted to a violation of its sovereignty and territorial integrity. The UN Security Council adopted a resolution condemning the violation of Argentina's sovereignty and deploring the acts undertaken by Israel.[16]

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13 See Charter of the United Nations, 1 United Nations Treaty Series xvi, Art 2(1), 2(2), 2(4); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, United Nations General Assembly Resolution 2625 (XXV) UN Doc A/5217 (1970).

14 See *Restatement Third,* above, § 432(2); Lowenfeld (1990) "US Law Enforcement Abroad: The Constitution and International Law, Continued" 84 AJIL 444, 472; Townsend (1997) "State Responsibility for Acts of de facto Agents" 14 Arizona J Int'l & Comp L 635, 661-673. See also, the *Jacob* case, discussed in Preuss (1936) "Settlement of the Jacob Kidnapping Case (Switzerland-Germany)" 30 AJIL 123, 123-124, where a journalist abducted under false pretences from Switzerland by German agents was later returned after the German government admitted its responsibility. See also, the *Vincenti* case, where the United States authorities apologised to Britain following the arrest by United States Customs officers of an individual within waters under the jurisdiction of Great Britain despite the fact that the accused had been removed without the knowledge or approval of the United States government: Hackworth (ed) *Digest of International Law* (1940) Vol I, 624.

15 See Harvard Research in International Law (1935) "Draft Convention on Jurisdiction With Respect to Crime" 29 AJIL Special Supplement Part II 435, 623-624 [hereafter Harvard Research].

16 United Nations Security Council Resolution 138 UN Doc S/4349 (23 June 1960), 15 UN SCOR Res and Decl 4.

There is also ample support for the view that extraterritorial abductions violate the obligations undertaken by a state under the terms of an extradition treaty.[17] There is only limited interest in discussing this issue since treaties must be interpreted in the light of the general principles of international law mentioned above. The absence of reference to a prohibition to abduct individuals in extradition treaties does not *a contrario* legitimise such acts.[18]

The injured state is entitled to demand that such conduct cease and to obtain reparation for the infringement of its sovereignty.[19] Normally, the remedy should involve the return of the abducted individual to the state of refuge.[20] The injured state may further raise a claim for damages or demand another form of compensation.[21] In the *Eichmann* case, the Security Council Resolution requested Israel "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law".[22] Nevertheless, the Argentine government chose to

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17 The legal adviser of the State Department Abraham Sofaer, in *Bill to Authorize Prosecution of Terrorists and Others Who Attack US Government Employees and Citizens Abroad: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong, 1st Sess (1985), 63, expressed the following view: "[i]n general, I would say that seizure by US officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of a foreign state, and could violate local kidnapping laws ... Such acts might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations".

18 See Glennon (1992) "State-Sponsored Abduction: A Comment on *United States v Alvarez-Machain*" 86 AJIL 746, 747-748; Ruiz-Bravo, above, 851-852. Baker and Roben (1993) "To Abduct or to Extradite: Does a Treaty Beg the Question? The *Alvarez-Machain* Decision in U.S. Domestic Law and International Law" 53 ZaöRV 655, 672-673.

19 It is accepted that a breach of an international obligation gives rise to a duty to make reparation. See *Spanish Zones of Morocco Claims* (Spain/United Kingdom) II R.I.A.A. 615, 641 (1925); *Chorzow Factory (Indemnity) Case* (Merits) (Germany/Poland) (1928) PCIJ (Series A) No 17, 47-48.

20 See Oppenheim, *International Law. A Treatise* (8 ed, Lauterpacht, 1955) Vol I, 295 n 1; *Restatement Third*, above, 329, comment c to § 432. See also, the Lawler case, where a convict who had escaped from Gibraltar was brought back following the intervention of a British agent on Spanish territory. The Law Officers recommended that the convict be allowed back to Spain in order to restore the aggrieved state: see McNair, International Law Opinions (1956) Vol I, 78-79. In the Mantovani case, Swiss authorities sought and obtained the release of an Italian national arrested in Lugano and forcibly taken to Italy: see Rousseau (1965) "Chronique des faits internationaux" 69 Revue Generale de Droit International Public 761, 834-835.

21 See Harvard Research, above, 624; O'Higgins, above, 319; Mann, above, 344.

22 United Nations Security Council Resolution (1960) 138 UN Doc S/4349 15 UN SCOR Res and Decl 4.

forego its claim, expressing satisfaction at Israel's formal apology.[23] In some cases, the prosecuting state has accepted to extradite the agents responsible for the abduction to the state of refuge.[24]

What remains subject to argument is whether an extraterritorial abduction carried out by private individuals may be imputed to the prosecuting state. The problem is particularly acute in the US, where bounty hunters and bail bondsmen travel across state lines or abroad to abduct criminals who have fled or jumped bail and return them to the relevant court for trial. The International Court of Justice held in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, that the adoption or approval of private acts by state authorities translates these "into acts of that State".[25] The state thereby assumes responsibility for the acts as its own. The International Law Commission in its draft articles on state responsibility reaches the same conclusion.[26] Thus, while the responsibility of the state is not prima facie engaged following a private kidnapping,[27] continued custody of the abducted individual and the ensuing prosecution does in fact entail ratification of the abduction by the state and the latter assumes responsibility for the violation of the sovereignty and integrity of the state of refuge.[28] Despite some debate in the United States literature, bounty hunters ought to be considered de facto state agents. First, they render a service to

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23 See the joint statement of 3 August 1960 which closed the diplomatic incident officially, mentioned in Fawcett (1962) "The *Eichmann* Case" 38 BYIL 181, 199, and in Silving (1961) "In re Eichmann: A Dilemma of Law and Morality" 55 AJIL 307, 318. Eichmann was consequently prosecuted in Israel and convicted. Argentina was not concerned with the condition of the abducted Eichmann, but with the violation of its sovereignty.

24 See *Kear v Hilton* (1983) 699 F 2d 181 (4th Cir) where a bounty hunter was extradited from the US at the request of the Canadian authorities for forcefully abducting a Canadian citizen in Toronto.

25 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Judgment) (United States/Iran) [1980] ICJ Reports 3, 34-35 para 73-74.

26 International Law Commission, *Draft articles on the Responsibility of States for Internationally Wrongful Acts,* Art 11, in Report of the International Law Commission on the work of its Fifty-Third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), chp IV.E.1.

27 See Morgenstern, above, 267; O'Higgins, above, 305.

28 See O'Higgins, above, 297; Silving, above, 316-317; de Schutter, above, 99-100; Mann, above, 340. The International Criminal Tribunal for Yugoslavia, however, found that an abduction performed by bounty hunters did not violate the sovereignty of any state and the abducted criminal could be prosecuted: Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v Dragan Nikolic,* 9 October 2002, para 97-105.

the courts.[29] Secondly, the prosecution of the abducted criminal by the courts of the state transforms the seizure of the criminal into a state abduction.[30]

B Exceptions to the Rule

No violation of sovereignty, however, occurs when the state of refuge grants permission to, or allows, foreign agents to proceed with an arrest within its borders.[31] Similarly, agents of the state of refuge may, either willingly or mistakenly, surrender the alleged criminal to the prosecuting state, in which case "there is no rule of International Law imposing ... any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power".[32] States will sometimes co-operate in circumventing the rendition of an alleged criminal, thus preventing individuals from challenging the legality of the extradition or deportation before a tribunal. Reference can be made to the surrender by the Sudanese authorities of the alleged terrorist Carlos "the Jackal" Illich Ramirez to France[33] and to the rendition by the Yemeni government of one of his closest collaborators, Johannes Weinrich, to the German police.[34] Both men were handed over in the absence of a formal extradition procedure. Another case in line relates to the arrest of Abdullah Öcalan by Turkish agents in Kenya, where the Kenyan authorities were at least aware of the presence of these foreign agents and probably helped the latter succeed in their operation.[35]

There is also abundant practice and legal opinion differentiating between forcible abduction and the luring of an individual from the state of refuge. Luring is found to be less objectionable since it

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29 See Seaman (1985) "International Bountyhunting: A Question of State Responsibility" 15 Cal W Int'l L J 397. But see *Jaffe v Smith* (1987) 825 F 2d 304, 307 (11th Cir), where the Court of Appeal held that the conduct of bounty hunters was not attributable to the state.

30 But see *Jaffe v Miller* (1993) 13 O R 3d 745 (CA), where the Ontario Court of Appeal decided that foreign government agents were immune for alleged involvement in an abduction.

31 See Harvard Research, above, 631; Giuliano, Scovazzi and Treves, *Diritto internazionale* (2 ed, 1983) Vol II, 525. In one of its judgments, the German Federal Constitutional Court held that public international law does not prohibit co-operation between states and that it, therefore, tolerates acts of sovereignty exercised by other states within the borders of a consenting state: 63 BVerfGE 343 at 361 (decision of 22 March 1983).

32 See the award of the Permanent Court of Arbitration in *Savarkar Case* (France/United Kingdom) XI RIAA 243, 254 (1911).

33 See Riding "Carlos's Run of Terror Is Ended; He Faces Murder Trial in France", *International Herald Tribune*, 16 August 1994, 1.

34 AP "Auslieferung des Terroristen Weinrich? Bemühungen der Staatsanwaltschaft in Berlin", *Neue Zürcher Zeitung*, 3-4 June 1995, 3.

35 "Turks Jubilant Over Ocalan's Capture" <http://www.cnn.com/WORLD/europe/9902/16/ocalan.turkey.reax/> (last accessed 1 June 2003).

involves no use of force or flagrant violation of the territorial sovereignty of the state of refuge.[36] Although this argument contradicts past practice,[37] it does, however, find some comfort in the practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[38] Slavko Dokmanovic was indicted in 1996 on charges of complicity in the execution of 260 patients taken forcibly from a hospital in Vukovar in Eastern Croatia.[39] Instructions to the UN peacekeeping forces in Croatia to arrest him did not prevent his escape to the Federal Republic of Yugoslavia (FRY). The government of FRY being unwilling at the time to execute arrest warrants, the ICTY sent one of its investigators to meet with him in Belgrade. On the false belief that the administrator of Eastern Slavonia (Croatia) wanted to meet with him to discuss compensation for the property he had been forced to abandon, and with the guarantee of a safe conduct, Dokmanovic travelled to Croatia where he was arrested and advised of his rights and charges against him. He was then flown to The Hague and handed over to the ICTY. Dokmanovic lodged a pre-trial motion in which he alleged that the arrest was illegal as the method used amounted to kidnapping. His arrest, he argued, "violated the sovereignty of FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent state authorities".[40] The motion was rejected. The ICTY acknowledged that it might dismiss a case against someone brought before it in violation of international law. It did find, however, that there was no forcible abduction here. After a lengthy review of national and international practice, the ICTY came to the conclusion that the

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36 Scharf (1998) "*The Prosecutor v Slavko Dokmanovic:* Irregular Rendition and the ICTY" 11Leiden J of Int'l L 369, 374.

37 In the *Colunje* claim, a man accused of fraudulent use of the Unites States mail advertising a love charm in the Panama Canal Zone was enticed into the Zone from Panama by a Zone policeman who arrested him there. Despite an argument that the actions of the policeman were of a personal nature as he was unauthorised to act outside the Zone, the United States were held liable as the false pretences amounted to an exercise of authority within Panama: *Guillermo Colunje v United States of America* (Panama/United States) VI RIAA 342, 343-344 (1933).

38 The formation of the ICTY in 1993 marked the first attempt of the international community since the end of the Second World War to prosecute international criminals in an international judicial setting. Established through Security Council Resolution 827, the ICTY represents a subsidiary organ of the Security Council with delegated enforcement powers within the terms of art 29 of the UN Charter. The ICTY has powers to issue arrest warrants and all members of the UN should comply with these warrants without undue delay (art 29 ICTY Statute). The Dayton Peace Agreements further highlighted the duty of Bosnia, Croatia and Yugoslavia to "cooperate fully with all entities involved in implementation of this peace settlement … including the International Tribunal for the former Yugoslavia." This provision was part of Annex 1-A of the Peace Agreement. IFOR's mandate set forth in Security Council Resolution 1031 provided IFOR with the authority to "take such actions as required, including the use of necessary force, to ensure compliance with Annex 1-A of the Peace Agreement."

39 See *Prosecutor v Slavko Dokmanovic* Decision on the Motion for Release by the Accused Slavko Dokmanovic, Case No IT-95-13a-PT, Trial Chamber, 22 October 1997, reproduced in 111 ILR 459.

40 *Prosecutor v Slavko Dokmanovic*, above, para 16-18.

means used to perform the arrest warrant neither "violated principles of international law nor the sovereignty of the FRY".[41]

The creation of international tribunals and the fight against terrorism could well bring to the surface a number of other exceptions to the basic rule. In the past, commentators from time to time have defended the use of extra-legal means to acquire jurisdiction over a criminal. One argument has been that the use of force is not aimed against the political independence and territorial integrity of the asylum state and, therefore, no violation of the UN Charter occurs.[42] It has also been argued that the apprehension of international criminals such as Saddam Hussein or other unsavoury characters is consistent with a major purpose of the UN Charter – the promotion of human rights, and should be permitted in specific circumstances.[43] Finally, abductions have also been defended as a means of deterring future attacks against the state or its nationals abroad, as an application of the principle of protection of nationals abroad[44] or as an act of self-defence.[45] These arguments either show a poor understanding of the basic principles of international law or attempt to build on practice that could hardly, at this stage, modify well-established rules of international law. For example, the *Lotus* case clearly distinguished between the territorial character of enforcement jurisdiction and the extraterritorial assertion of prescriptive jurisdiction.[46] Moreover, claims by Israel that the interception of a number of aircraft as a measure of self-defence were rejected by the Security Council.[47] The arrest in the territory of another state constitutes an interference in the internal affairs of that state and, irrespective of the actual use of force, represents a sovereign act illegally performed in the absence of consent.[48] It is reassuring that the majority of US commentators who ask the question whether abduction is a proper alternative to a failed attempt to

41 *Prosecutor v Slavko Dokmanovic*, above, para 88.

42 See Gurulé (1994) "Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad" 17 Hastings Int'l & Comp. LR 457, 486.

43 See Izes (1997) "Drawing Lines in the Sand: When State-sanctioned Abductions of War Criminals Should Be Permitted" 32 Col J L & Soc Probl 1, 14-15.

44 See Kash, above, 65.

45 See Sofaer (1989) "Terrorism, the Law and the National Defense" 126 Military L Rev 95; O'Connell (2002) "Lawful Self-Defense to Terrorism" 63 U Pitt L Rev 889.

46 *The Case of the SS Lotus* (France/Turkey) (1928) PCIJ (Series A) No 10, 19.

47 See UN SCOR, 28th Sess, 1738th Meeting, UN Doc S/PV.1738 (1973). In 1986, following the interception of a Libyan aircraft by Israel, the United States Representative on the Security Council did argue that there might be circumstances that justify a state "whose territory or citizens are subject to continuing terrorist attacks … to defend itself against further attacks" (UN SCOR, 41st Sess, 2655th Meeting, UN Doc S/PV.2655/Corr.1.

48 See United Nations Security Council Resolution 638, UN Doc S/RES/638 (31 July 1989), condemning all acts of hostage-taking and abduction as "offences of grave concern to all States and serious violations of international law".

extradite a fugitive generally conclude in favour of the respect for international law and extradition procedures.[49]

C A New Dimension to the Debate

The foregoing considerations are based on traditional international law, which only takes into account the mutual rights and obligations of the states concerned. This position is echoed in the Harvard Research, in particular in a provision of a draft convention on the criminal jurisdiction of the state that prohibits the exercise of jurisdiction over a person who has been illegally seized: [50]

> [i]n exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

This is unhelpful from the point of view of the individual, whose fate is left in the hands of the state of refuge: the latter may decline to bring an international claim, it may refrain from asking for the release of the offender as just reparation, or subsequently consent to the return of the individual to the abducting state. Where there is collusion between states, the protection of the individual is at risk under traditional international law. This situation is best illustrated by the apprehension, following a gun battle, of the former President of Yugoslavia, Slobodan Milosevic, from his home by special Yugoslav forces. He was subsequently rushed to The Hague to stand trial on charges related to the conflict in Kosovo.[51] The decision to use force was deemed necessary, as no mechanism existed for his extradition under the Yugoslav constitution.[52] Some of the details

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49 See Cardozo (1961) "When Extradition Fails, Is Abduction the Solution?" 47 AJIL 127, 135; Quigley (1988) "Government Vigilantes at Large: The Danger to Human Rights From Kidnapping of Suspected Terrorists" 10 HRQ 193, 208.

50 Harvard Research, above, art 16.

51 *Milosevic* (IT-02-54) <http://www.un.org/icty/indictment/english/milii990524e.htm> (last accessed 8 July 2003). Milosevic was indicted in May 1999 on four counts by the ICTY. The arrest came despite a previous policy to the contrary expressed by President Kostunica and in the midst of intense US pressure to deliver ICTY suspects or risk losing out on a generous package of financial aid.

52 The Hague District Court has since rejected an application for release filed by Milosevic (*Milosevic v The Netherlands*, KG 01/975, 31 August 2001). The court held that the Dutch courts had no jurisdiction to decide on Milosevic's application for release. The court noted that the Agreement of 29 July 1994 between the Netherlands and the UN (the so-called "Headquarters Agreement") transferred the jurisdiction to hear an application for release from detention from the Dutch courts to the ICTY. The court held that Milosevic's direct or indirect return to Yugoslavia would "in effect mean that the plaintiff would no longer be detained to answer the charges brought by the Prosecutor of the Tribunal". The court concluded that all the claims submitted by Milosevic, such as the illegality of his extradition to the ICTY and immunity from prosecution, fell within the exclusive competence of the ICTY. Milosevic appealed this ruling at first, but then withdrew the appeal on 17 January 2002.

concerning the arrest of Milosevic remain obscure, but it is clear his arrest was performed by state agents and involved no violation of state sovereignty. However, his apprehension to stand trial abroad was illegal under Yugoslav law since it occurred outside the existing extradition framework. The legality of the apprehension from a human rights perspective is also questionable.

In view of the attitude of Yugoslavia and of the broad mandate of the ICTY, the only defence available to Milosevic stems from the possible violation of his human rights. After all, it is increasingly accepted that, by resorting to extra-legal means to obtain custody of the alleged criminal, states might be acting in breach of their international obligations under human rights instruments.[53] Part III examines whether the fundamental rights of the abducted criminal could be threatened as a result of his abduction or illegal rendition from one state to another.

III INTERNATIONAL PROTECTION OF THE RIGHTS OF THE ABDUCTED INDIVIDUAL

The arrest of an alleged criminal following an abduction or through other irregular methods of rendition raises potential violations of human rights. In most cases, a forcible abduction involves a degree of physical abuse, some restraint on the freedom of movement and a threat to personal integrity. The victim may be drugged, transported in a closed container or unable to understand the motives and identity of his aggressors.[54] In addition, the deprivation of liberty that follows a forcible abduction fails to be in accordance with procedures established by law, certainly until the abducted criminal is informed of the charges laid against him. Furthermore, such acts are generally performed in contravention of the domestic criminal law of the state of refuge. The same can be said of those instances where two states collude to allow the return of the criminal to the prosecuting state. Disguised extradition occurs in the absence of respect for the rule of law and extradition legislation.

The legality of the detention of the abducted individual by the prosecuting state is, therefore, open to doubt. The rights of the accused are endangered whenever a national court proceeds with the prosecution of an alleged offender whose custody has been obtained through illegal conduct involving state authorities. With the emerging recognition and development of international standards of human rights, the prime focus increasingly shifts from the respect of the sovereignty and territorial integrity of the state to that of the protection of the rights of the person. Thus, it is necessary to evaluate whether an individual is vested with rights - that have crystallised into human rights - against prosecution following his illegal seizure or forcible removal from another state, and

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53 See Bassiouni *International Extradition. United States Law and Practice* (2 ed, 1987) Vol I, 195; Halberstam (1992) "In Defense of the Supreme Court Decision in *Alvarez-Machain*" 86 AJIL 736, 744-745.

54 See Evans (1964) "Acquisition of Custody Over the International Fugitive Offender -- Alternatives to Extradition: A Survey of United States Practice" 40 BYIL 77, 98-104; Feinrider, above, 37-42; Quigley, above, 198-203; Rayfuse, above, 890-892; Baker and Roben, above, 678-682.

if so, whether he may raise them on the international plane and obtain reparation for an injury consequent to their violation, even in the absence of protest by the state of refuge.

A Protection in International Treaties

No international treaty explicitly recognises an individual human right against forcible abduction or irregular rendition. Yet, such a right has been read into the provisions of regional and international human rights instruments relating to the right to liberty and security of the person and to protection against torture or other degrading treatment. The review here is of recent practice of international human rights bodies regarding abductions to instances of physical abuse and arbitrary detention. This does not mean that other instruments and rights might not also be jeopardised by an abduction.

1 1966 International Covenant on Civil and Political Rights[55]

Articles 7 and 9 of the 1966 Covenant may be invoked in support of a claim that an abduction in the territory of another state may violate the human rights of the fugitive offender. Article 7 provides that no one is to be "subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 9(1) relates to arbitrary arrest and detention and provides that such deprivation of liberty may only take place in accordance with a procedure prescribed by law, while Article 9(2) imposes an obligation upon the arresting authorities to inform the individual of the charges laid against him "at the time of his arrest".

In *Celiberti de Casariego v Uruguay*,[56] the Human Rights Committee set up to monitor the Covenant observed that an extraterritorial abduction violates the right to personal integrity and liberty of the victim. Article 9 was deemed applicable to the case of a person who had been arrested in Brazil by Uruguayan agents with the connivance of Brazilian police officials and later forcibly taken to Uruguay. In deciding this application, the Human Rights Committee did also clarify the scope *ratione loci* of the Optional Protocol to the 1966 Covenant. The Committee found that it was not barred from hearing the case even if the initial acts had taken place outside Uruguayan territory since agents of the kidnapping state carried out the abduction. In particular, Article 1 of the Protocol referred "to the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, *wherever they occurred*".[57] The kidnapping being an assertion of jurisdiction by Uruguayan authorities, the Committee concluded that the "abduction into

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55 999 UNTS 171 [hereafter 1966 Covenant].

56 Communication No R13/56, Decision of 29 July 1981 reproduced in 68 ILR 41.

57 Communication No R13/56, above, 45 (emphasis added). The Committee went on to observe that, under article 2 of the 1966 Covenant, states are obliged to respect the rights of all persons found to be in their territory or under their jurisdiction, and they can be "held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state whether with the acquiescence of the Government of that State or in opposition to it" (Communication No R13/56, above, 45-46).

Uruguayan territory constituted an arbitrary arrest and detention", and that appropriate remedy would include compensation to the victim and permission for the latter to leave the country.[58] The Committee made similar observations in *Lopez v Uruguay*, where the abduction of an Uruguayan refugee from Argentina and his treatment by Uruguayan security officers amounted to torture under Article 7 and to an arrest and detention in violation of Article 9(1) of the Covenant.[59]

Article 13 has also been used by the Human Rights Committee to protect the rights of an individual extradited outside the terms of a formal extradition arrangement. In *Giry v Dominican Republic*,[60] a French citizen prevented by the Dominican authorities from boarding a flight to the Antilles was instead flown to the United States to stand trial on drug charges, despite the existence of an extradition treaty in force between the United States and the Dominican Republic. The Committee remarked that in the absence of recourse to the proper extradition procedure, the victim's expulsion did not fulfil the legal requirements and that the Dominican Republic acted in violation of Article 13 of the 1966 Covenant.[61]

The 1966 Covenant makes it clear that abduction or irregular extradition from one country to another may violate the rights of the individual.

2 1950 European Convention on Human Rights[62]

Articles 3 and 5 of the European Convention are relevant. According to Article 3, nobody should be "subject to torture or to inhuman or degrading treatment or punishment". An argument based on Article 3 could be raised if the abducting agents subject the individual to inhuman or degrading treatment.[63] In the absence of such conduct Article 5 guarantees the right to liberty and

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58 Communication No R13/56, above, 46.

59 Communication No R12/52, Decision of 29 July 1981 reproduced in 68 ILR 29. See also *Canon Garcia v Ecuador* UN Doc CCPR/C/43/D/319/1988, Decision of 5 November 1988. A Colombian citizen on holiday in Ecuador was abducted by local authorities acting on behalf of the United States government. He was then transferred to the United States to stand trial. The Committee held that the Ecuadorian government's participation in the kidnapping amounted to a violation of the freedom from arbitrary arrest and deprivation of liberty under article 9 of the 1966 Covenant.

60 UN Doc CCPR/C/39/D/193/1990, Decision of 20 July 1990.

61 Art 13 reads as follows: "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall ... be allowed to submit the reasons against his expulsion and to have his case reviewed by ... the competent authority".

62 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 223 (1950) [hereafter European Convention]. In addition to Art 3 and 5, mention should be made of the right to life (Art 2) and the right to a fair trial (Art 6).

63 See Gilbert, above, 188.

security of the person[64] and enumerates the only occasions when deprivation of liberty is permitted, the procedure underlying such exceptions requiring a legal basis.

The organs created under the European Convention have had the opportunity to deal with methods of rendition that breach Article 5. Although that provision does not protect a person against extradition or deportation,[65] it guarantees that the only procedures that may deprive an individual from liberty must be prescribed by law.[66] The European Court of Human Rights (ECHR) has not hesitated to condemn states failing to abide by the legal prescriptions of Article 5.[67] Concerning abductions, the Court accepts the argument that state-sponsored abductions violate Article 5. In *Stocké v. Federal Republic of Germany*, a fugitive businessman accused of fraud was enticed to return to Germany by an individual who acted privately but with the promise by German authorities of a reduced term of imprisonment for non-related crimes.[68] Stocké was persuaded to fly in a private jet from Strasbourg to Luxembourg regarding an alleged business proposition. The police was informed that the plane would make an unexpected stop in Saarbrücken (Germany) and Stocké was arrested upon landing. The ECHR acknowledged that state-sponsored abduction and luring breach the individual's right to liberty. In this particular case, however, the ECHR refused to uphold Stocké's claim since the German authorities had not participated in the preparation and perpetration of the abduction.[69]

A few years later, the European Commission of Human Rights entertained an application by Carlos Illich Ramirez following his conviction by a French court on charges of murder and several

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64 de Schutter, above, 121, believes that "protection against prosecution of an individual whom an international legal rule protects against the action of internal jurisdiction" is guaranteed by the international legal order, and in particular by Art 5 of the European Convention. Gilbert, above, 188-189, Gilbert argues that Art 5 embraces both abductions and irregular methods of rendition. Fawcett, *The Application of the European Convention on Human Rights* (2 ed, 1987) 87, has defended the view that the continued detention of a person seized abroad, even if found unlawful and therefore contrary to Art 5, was not illegal if it was in accordance with its relevant paragraphs. He accepts, however, that the continued detention could be invalidated where the arrest outside the jurisdiction rendered "the detention unlawful under domestic law" (above, 87).

65 See *X v The Netherlands*, Application No 1983/63, Decision of 13 December 1965, (1965) 8 Yearbook 228, 260; *Becker v Denmark*, Application No 7011/75, Decision of 3 October 1975, 4 Dec & Rep 215, 233.

66 See *Lynas v Switzerland*, Application No 7317/75, Decision of 6 October 1976, 6 Dec & Rep 141, 167; *Caprino v United Kingdom*, Application No 6871/75, Decision of 3 March 1978, 12 Dec & Rep 14, 20.

67 See *Bozano Case* (1986) ECHR (Series A) Vol 111, 25-27, where the European Court of Human Rights held that the forcible deportation of an Italian citizen from France to Switzerland with the connivance of the local police forces then followed by his extradition to Italy represented a disguised extradition designed to circumvent the otherwise unsuccessful extradition request presented by the Italian government to the French authorities.

68 (1991) ECHR (Series A) Vol 199, 7-8.

69 (1991) ECHR (Series A) Vol 199, 18-19.

other terrorist acts.[70] Carlos claimed that he was abducted in August 1994 by several men from a villa in Khartoum (Sudan) where he was recovering from surgery. He was then placed on a plane that took him to France,[71] thus depriving him of his right to liberty and security under Article 5(1) of the Convention through what he termed an "unlawful arrest".[72] The Commission rejected the application. In its view, French and Sudanese authorities cooperated in the arrest. Accordingly, the arrest could not be viewed as unlawful.[73] The Commission hinted that an apprehension without the consent of the state of refuge might violate Article 5(1).

In both cases, it could be objected that the organs of the ECHR erred in implying that the intervention of the abducting state or the lack of consent of the state of refuge is necessary for a claim to be considered. As noted earlier, by prosecuting the individual, the state ratifies the act of the abductors.[74] It is also difficult to accept that such acts conducted with the apparent active assistance of police officials could not be imputable to the state.

The treatment of Abdullah Öcalan following his abduction by Turkish agents in Kenya in 1999 has provided another opportunity to the ECHR to clarify the law on the subject. For years, Turkey had attempted to obtain extradition of the prominent leader of the Kurdistan Workers' Party, an alleged terrorist accused of killing thousands of Turks in the past twenty years and of promoting the secession of a part of the Turkish territory.[75] The precise circumstances of his arrest are not clear. Nevertheless, images in the media of Öcalan being taken blind-folded in a private jet by Turkish agents and the proud announcement by the government of this snatch operation make it clear that Öcalan was not taken to Turkey through traditional extradition channels.[76] After his conviction by a Turkish special tribunal, he lodged an application against Turkey with the ECHR in which he alleged a violation, inter alia, of Articles 3 and 5 of the European Convention. A Chamber of seven judges from the First Section of the ECHR declared the application partly admissible, rejecting for instance the complaint based on a violation of Article 5(2).[77] The Chamber found that Öcalan was aware of the reasons for which Turkey wanted him. Accordingly, the failure to disclose the reasons for the arrest did not deprive him of any rights. Acknowledging a right for the authorities not

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70 Cour d'appel de Paris (Chambre d'accusation) (1994-11-07) Bulletin Criminel (1995) 74, 174.

71 *Illich Ramirez Sanchez v France* Appl No 28780/95, Decision of 24 June 1996, Dec & Rep 86, 2.

72 *Illich Ramirez Sanchez v France* Appl No 28780/95, Decision of 24 June 1996, Dec & Rep 86, 6.

73 *Illich Ramirez Sanchez v France* Appl No 28780/95, Decision of 24 June 1996, Dec & Rep 86, 11.

74 *Case Concerning United States Diplomatic and Consular Staff in Tehran* [1980] (Judgment) (United States/Iran) ICJ Reports 3, 34-35 para 73-74.

75 *Öcalan v Turkey* (2000) (Decision as to Admissibility), 46221/99.

76 *Öcalan v Turkey*, above, para I A.

77 *Öcalan v Turkey*, above, para IV B.

divulge the reasons of the arrest to the accused represents a dangerous precedent. No accused should be denied the right to be informed of the reasons of his arrest. The accused might genuinely ignore the specific charges made against him. Moreover, he might make comments that may be taken against him.

Before the ECHR, Öcalan argued again that he had been victim of an extraterritorial abduction by Turkish agents. The court expressed the view that "an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the persons individual rights to security under Article 5(1) of the convention".[78] In this case, however, the cooperation of Kenya with Turkey for handing over the accused in the absence of an extradition treaty did not result in a violation of Article 5(1). The ECHR also found that the arrest by Turkish officials in Kenya did not interfere with Kenya's territorial sovereignty under international law. The Court did, however, find that Articles 5(3) and 5(4) had been violated as Öcalan had not been brought promptly before a judge and the lawfulness of his detention had not been decided upon speedily by a court, despite the fact that the detention was lawful under Turkish law.[79] Furthermore, the Court observed a number of infringements in the right to a fair trial, proper legal assistance and impartiality under Article 6. The ECHR finally held that Öcalan suffered inhuman treatment under Article 3 by being sentenced to death following an unfair trial.[80]

Once again, the ECHR has failed to take the opportunity to explicitly condemn all de facto and de jure state action designed to forcibly and illegally obtain custody of any alleged criminal, no matter how serious the crime might be. The role of the ECHR is to secure the human rights of all individuals, including those who have perpetrated very serious crimes. While its observations on Articles 3 and 6 are to be welcome, the lessons of the judgment could only apply to exceptional circumstances as in this case.

3 1969 American Convention on Human Rights[81]

Two main provisions of the American Convention protect the rights of the abducted individual. Article 5(1) imposes a duty upon the states parties to respect the "physical, mental and moral integrity" of the person and Article 5(2) protects the latter against torture, "cruel, inhuman, or degrading punishment or treatment." Article 7(1) provides the right to liberty and security, which may only be impaired, according to Article 7(2), pursuant to a valid domestic or constitutional provision "established beforehand". Arbitrary arrest or imprisonment is explicitly prohibited under Article 7(3).

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78 *Öcalan v Turkey* (2003) Judgment (Merits and just satisfaction) 00046221/99 Series A No 135, 26.

79 *Öcalan v Turkey*, above, para 256.

80 *Öcalan v Turkey*, above, para 256.

81 1144 UNTS 1444 [hereafter American Convention].

The Inter-American Court of Human Rights has never addressed a case relating to an extraterritorial abduction. Yet, Article 7 may be used in defence of an individual abducted by state or private agents on behalf of the government. In *Velasquez Rodriguez*,[82] the issue at stake concerned the kidnapping and torture of a Honduran opposition leader by the local authorities. The court stated that the "forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee".[83] Concerning Article 7, the court held that as a result of the kidnapping, the victim's right to liberty had been infringed "without legal cause and without a determination of the lawfulness of his detention by a judge or competent tribunal".[84] In two other cases, the court found that kidnappings carried out by individuals who act under cover of public authority are attributable to the state if there is sufficient proof that they acted under state orders.[85]

There is no reason why the court's conclusion should be any different in the case of extraterritorially abducted individuals since Article 1(1) stipulates that "States Parties ... undertake ... to ensure to all persons subject to their jurisdiction the free and full exercise of these rights and freedoms". This proposition is supported by a legal opinion of the Inter-American Juridical Committee concerning the case of a Mexican doctor abducted by de facto United States agents to stand trial in the United States (a case discussed in Part IV). The Committee highlighted the "incompatibility of the practice of abduction with the right of due process to which every person is entitled, no matter how serious the crime they are accused of, a right protected by international law".[86]

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82 *Velasquez Rodriguez*, Decision of 29 July 1988 reproduced in (1988) 9 Human Rights Law Journal 212.

83 *Velasquez Rodriguez*, above, 238 para 155.

84 *Velasquez Rodriguez*, above, 243-244 para 186.

85 In the *Saul Godinez Cruz* case, Case 7951, Inter-Am CHR 156, para 192, ser C, doc 6 (1989), the Court held Honduras responsible for the disappearance of Godinez. In the case of *Francisco Farien Garbi and Yolanda Solis Corrales*, Case 8097, Inter-Am CHR 130, para c, ser C, doc 5 (1989), the Court found the evidence insufficient to attribute the disappearance to Honduras.

86 Doc CJI/RES.II-15/92 reproduced in (1992) 13 Human Rights Law Journal 395, 397. Encouragement can also be derived from the Inter-American Convention on the Forced Disappearance of Persons, reproduced in (1994) 33 ILM 1529, negotiated under the auspices of the Organisation of American States. Whilst the Convention is principally aimed at criminalising kidnappings effected by states within their own borders, states parties undertake "not to practice, permit, or tolerate the forced disappearance of persons" (Art I(a)). In addition, the Convention emphasizes the threat caused by such actions to the rights of the abducted person and it recognises that individuals may only be deprived of their liberty in accordance with applicable domestic law, and that they must be brought before a competent judicial authority without delay (Art II and XII).

4 1981 African Charter on Human and Peoples' Rights[87]

Article 6 of the African Charter establishes the right to liberty and security of the person.[88] In general, this provision has been criticised in the legal literature because of its vagueness[89] and its failure to define the reasons and conditions entitling the authorities to deprive an individual of his liberty and security.[90]

There is little doubt that an individual abducted by one of the state parties could invoke Article 6 since this provision reflects the wording used in the human rights conventions previously discussed. This liberal interpretation is further enhanced by a reference to Article 60, which provides that the African Commission on Human and Peoples' Rights "shall draw inspiration from international law on human and peoples' rights". According to Robertson and Merrills, this means that other human rights instruments could be used in order to "fill out the more enigmatic parts of the Charter and keep its limiting provisions within sensible bounds".[91] The possibility, for instance, to refer to the relevant provisions of the European Convention and of the 1966 Covenant and to the practice of their respective organs should enable the African Commission to hold that extraterritorial abductions breach the individual's right to liberty and security under Article 6. It will be interesting to see how the recently established African Court will fare on this issue.[92]

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87 OAU Doc CAB/LEG/67/3/Rev 5 (1981) [hereafter African Charter].

88 African Charter, above, Art 6: "[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained". See also Art 4 and 5, respectively dealing with respect for life and integrity of the person and with protection against torture and cruel, inhuman and degrading treatment.

89 Robertson and Merrills *Human Rights in the World. An Introduction to the Study of the International Protection of Human Rights* (3 ed, 1989) 209, point out that the African Charter does not explain what is meant by "arbitrarily".

90 See Gittleman (1982) "The African Charter on Human and Peoples' Rights: A Legal Analysis" 22 Virginia J Int'l L 667, 693. Gittleman describes the protection afforded under Article 6 as "deficient" since the right to liberty is subject to national law and, therefore, no external restraint on the power of the government to enact legislation that contravenes the scope of the right is supplied by the African Charter. In his view, the absence of precise legal guidelines "seriously undermines the effectiveness of Article 6 and the individual is given no greater protection than he would have under domestic law" (ibid, 694). Welch (1992) "The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment" 14 Human Rights Quarterly 43, 46, notes that the wording of most provisions of the African Charter "essentially confine the Charter's protections to rights as they are defined in national law".

91 Robertson and Merrills, above, 209-210.

92 The Conference of Heads of State and Government of the OAU (now the African Union), gathering in Ouagadougou, Burkina Faso, adopted, on 9 June 1998, the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court of Human Rights, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III). There is no doubt that such a judicial mechanism represents a positive addition to the protection of human rights in Africa. About fifteen ratifications are necessary for the Protocol to come into force making the Court a reality. So far, only six countries have ratified it.

B Is there a Customary Principle of Protection against Abduction?

International human rights treaties suffer from many limitations. First, if the state carrying out an abduction is not party to a treaty, it will not be bound by its provisions. Second, only the European Convention gives the right to all persons who have suffered an alleged violation of a right contained therein to lodge a complaint against a state party to the Convention. In the other cases, the right of individuals to bring petitions against a state depends on the consent of the state. Third, the application might be rejected on the basis of a procedural defect.[93] Finally, some of the international bodies may only make remarks and their views lack binding force. It is useful then to ask whether abducted criminals may be afforded some guarantees of due process deriving from customary principles of international human rights law.

Irregular methods of rendition usually involve violation of personal liberty and security, degrading treatment, or some other irregularities in the judicial process.[94] Such situations gave rise to international claims even before the emergence of modern human rights law.[95] The Universal Declaration of Human Rights[96] and many other non-binding instruments have since developed the scope of individual procedural and substantive rights. Articles 3, 5, 8, 9 and 10 of the Universal Declaration relate to the right to liberty and security of the person, protection against inhuman treatment, arbitrary arrest and the fairness of the judicial procedures to be brought against the accused.[97] Article 25 of the American Declaration of the Rights and Duties of Man also guarantees

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93 This situation is best illustrated by the application filed by Slobodan Milosevic against the Netherlands before the ECHR (*Milosevic v The Netherlands* 77631/01, 19 March 2002). Milosevic complained, inter alia, under Art 5 of the ECHR that his detention on Netherlands territory was illegal under Netherlands domestic law, that the ICTY's establishment pursuant to a United Nations Security Council Resolution was unlawful, and that he enjoyed immunity from prosecution as a former head of state. The ECHR held, however, that Mr Milosevic did not "make use of the opportunities offered by Netherlands law" to challenge the findings of The Hague Regional Court. The ECHR rejected Mr Milosevic's argument that the Regional Court's judgment demonstrated that he was left without "adequate and effective" domestic remedies, and reiterated that the existence of "mere doubts" as to the prospects of success of a particular remedy was not a valid reason for failing to exhaust domestic remedies.

94 See Quigley, above, 205-206.

95 See *Quintanilla v United States of America* (Mexico/United States) IV RIAA 101, 102-103 (1926) holding the state liable for the cruel and unlawful treatment of an individual in custody; *Chattin v United Mexican States* (United States/Mexico) IV RIAA 282, 295 (1927) concerning the failure of the authorities to inform the apprehended person of the charges against him; *Parrish v United Mexican States* (United States/Mexico) IV RIAA 314, 315-316 (1927) on denial of prompt arraignment. See also Harvard Research, above, Art 9.

96 UN GA Res 217A UN Doc. A/810 (1948) [hereafter Universal Declaration].

97 These provisions could certainly apply to state-sponsored abductions and other forms of irregular rendition between consenting agents of two or more states. This interpretation is supported by O'Higgins, above, 291-292; Feinrider, above, 38; *Restatement Third*, above, 330, Reporters' Note 1 to § 432; Lowenfeld, above, 474; Baker and Roben, above, 678.

a right to protection from arbitrary arrest.[98] In the 1990s, UN organs have condemned forcible abductions. The General Assembly adopted a Resolution and Declaration on the Protection of all Persons from Enforced Disappearance.[99] This document establishes that the enforced disappearance of an individual represents a flagrant violation of the human rights developed in international instruments, mainly the right to security of the person and the protection against torture and other cruel treatment.[100] It also stresses that detention must be in accordance with the law[101] and that, in the event of unlawful deprivation of liberty, there must be complete rehabilitation of, or monetary compensation to, the victim.[102] The Working Group on Arbitrary Detention of the Human Rights Commission has taken the position that the respect for territorial sovereignty of the state prevents a state from engaging in unilateral law enforcement activity in the territory of another state.[103] The Working Group also condemned the detention of abducted individuals as arbitrary.[104]

None of the documents mentioned in this section are binding. Nonetheless, the customary character of the rights they contain is enhanced by the recital in all human rights conventions of the Universal Declaration[105] and the finding of the International Court of Justice that arbitrary detention violates applicable rules of general international law.[106]

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98 Res XXX, Final Act, Ninth International Conference of American States, OAS Off Rec OEA/Ser.L/V/II.23/Doc.21/Rev. 6 (1948):

> [e]very accused person is presumed to be innocent until proved guilty. Every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws, and not to receive cruel, infamous or unusual punishment.

99 UN GA Res 47/133 (1992) reproduced in (1993) 32 ILM 903.

100 UN GA Res 47/133 (1992), above, Art 1(1), (2).

101 UN GA Res 47/133 (1992), above, Art 9 and 10.

102 UN GA Res 47/133 (1992), above, Art 19. See also Art 11, which provides that all persons "deprived of liberty must be released in a manner permitting reliable verification that they have actually been released ... ."

103 Report of the Working Group on Arbitrary Detention, UN ESCOR, Hum Rts Comm, 50th Sess, Agenda Item 10, 139-140, UN Doc E/CN.4/1994/27 (1993).

104 Report of the Working Group on Arbitrary Detention, above.

105 See Feinrider, above, 41-42; Bassiouni, above, 233; Quigley, above, 207.

106 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Judgment) (United States/Iran) [1980] ICJ Reports 3, 41-42 para 90. The Court went on to say (42 para 91):

> [w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.

Altogether, these instruments illustrate the emergence of some kind of international due process of law. The obligation of the state to provide procedural and substantive guarantees should include the arrest process and the treatment of the victim prior to his appearance before the judge. As Bassiouni puts it:[107]

> the general right that every accused is entitled to due process of the law ... is not stated specifically in human rights documents but is inferred therefrom. It emanates from the total fabric of human rights treaties and doctrines and from specific protections. ... There are many provisions in the international instruments ... which relate to the judicial process and its fairness, and it is the cumulative effect of these provisions which gives rise to this right.

C Concluding Remarks on Human Rights and Abductions

The foregoing developments supply evidence that the government should not be allowed to take advantage of its own unlawful conduct by exercising jurisdiction over the abducted offender. This position is echoed in the literature, encapsulated in the maxim *ex injuria non oritur actio*.[108] Extraterritorial abductions and other irregular methods of rendition violate the object and purpose of human rights treaties. It is equally evident that the provisions of international human rights instruments and customary principles of international law regarding physical abuse and personal integrity protect the abducted criminal. Unfortunately, the existence of a right at the international level does not necessarily mean that the individual can enforce it. The intervention of the national state is still required for a case to proceed before the ICJ[109] and the state's accession to petition mechanisms, in international or regional conventions, is usually a prerequisite to confer to the individual a right to bring a claim against a state before an international body.[110] Nevertheless, the absence of recognition of the individual as a proper subject of international law should not cast doubt on the obligation of the state to refrain from prosecuting the abducted criminal. The above

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107 Bassiouni, above, 231. According to Mann, above, 347-348, "the human rights defined in international documents are deemed to be the *alter ego* of the civil rights included in many constitutions where they are described by such principles as the dignity of the person, the rule of law, due process of law and many similar headings. These universally recognised principles of municipal law constitute important evidence of State practice and, therefore, supplement the international texts…"

108 See Morgenstern, above, 279; Garcia-Mora (1957) "Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study" 32 Indiana Law Journal 427, 446; de Schutter, above, 123; Mann, above, 347.

109 Statute of the International Court of Justice, in *Documents of the United Nations Conference on International Organisation* (1945) Vol 15, Art 34.

110 See Art 1 of the First Optional Protocol to the 1966 Covenant, 999 UNTS 302 (1966), which provides that a state becoming a party to that Protocol "recognises the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant". See also Ninth Protocol (1990) to the European Convention, Art 5.

considerations, however, highlight the need to work towards a more positive development: an individual right against prosecution following an illegal removal from another state.

Because of the limited locus standi recognised to the individual before international bodies, in most cases the only recourse available is before domestic courts of the abducting state. It is, therefore, necessary to examine whether the national legal system of the abducting state will enable the abducted criminal to ask the court to divest itself of its jurisdiction in the case on the basis of the unlawful circumstances leading to his apprehension and of the violation of his fundamental human rights.

IV JURISDICTION OVER AN ABDUCTED INDIVIDUAL: THE POSITION OF NATIONAL COURTS

One of the major reasons why states are not deterred from illegally apprehending alleged offenders is that in most legal systems the mere presence of the accused before the court is sufficient to give the latter the necessary personal jurisdiction to hear the case.[111] The real issue before the municipal courts is whether the judge should exercise jurisdiction over the abducted criminal, and whether this decision is influenced by the interaction between international law and municipal law within the domestic legal order. Whereas the leading doctrine takes the view that the courts of the prosecuting state should, either proprio motu or on application by the accused, raise the illegal character of the apprehension and refuse to hear the case, most national courts have traditionally applied the maxim *mala captus bene detentus* and prosecuted the accused notwithstanding the circumstances leading to the arrest.[112] This position is not unanimous. In a number of cases, judges have divested themselves of their jurisdiction and refused to condone the irregular method of rendition used by the state to secure custody of the accused.

A The Traditional Position of the Courts

Over the past two hundred years, domestic judges have overwhelmingly held that they acquire jurisdiction ratione personae at the moment the accused appears before the court, no matter how custody was secured. The landmark decision is *Ker v Illinois*.[113] Ker escaped to Peru after being indicted in Illinois for larceny and embezzlement. An agent was sent by the US Department of State to Peru with a valid warrant to obtain physical jurisdiction over him, pursuant to the extradition treaty in force between the two countries. As Chilean forces were occupying Peru's territory at the

111 See *R v Lee Kun* (1916) 11 Cr App R 293, 300; Morgenstern, above, 267; *Restatement Third*, above, § 422(2).

112 See Garcia-Mora, above, 436-437; Henkin (1989) "International Law: Politics, Values and Functions. General Course on Public International Law" 216 Recueil des Cours 9, 305; Brownlie *Principles of Public International Law* (5 ed, 1998) 320; Gilbert, above, 194.

113 (1886) 119 US 436. Earlier cases had already reached the same conclusion: see *Ex parte Susannah Scott* (1829) 9 B. & C. 446, 448 Lord Tenterden CJ; *States v Brewster* (1835) 7 Vt 118, 121-122.

time, the agent was unable to produce the said warrant to the Peruvian authorities, which had fled the capital. Without consulting the State Department, the agent simply decided to forcibly return Ker to the United States, where the latter was incarcerated and convicted. Ker contested the personal jurisdiction of the lower courts on the grounds that he was denied due process of law and that the agent's conduct and the ensuing prosecution had violated the extradition treaty. The Supreme Court rejected the argument that the accused was denied due process of law, insisting that due process "is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled".[114] It further held that no violation of the extradition treaty occurred as the kidnapping took place outside the terms of the said treaty and was carried out without the permission of the United States government.[115] Finally, the Court did not accept that mere irregularities in obtaining his custody were sufficient to prevent prosecution. It concluded that a "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court".[116]

Ker stands for the view that any malfeasance prior to trial is not within the scope of the court's decision and it has been expanded to suggest that a forcible abduction does not preclude a court from trying the abducted accused.[117] It has been followed emphatically in the United States.[118] For instance, in the *Yunis* case,[119] an alleged Palestinian terrorist, Fawaz Yunis, was lured from Lebanon to Cyprus. There, he was invited onto a motorboat under the false pretence that he would meet drug traffickers and enter into an important narcotics deal. Once the boat reached the international waters, he was taken to a United States military vessel and flown to the United States where he was indicted and eventually convicted on terrorism-related crimes. Before United States courts, counsel for Yunis argued that the government's stratagem to lure his client to international waters precluded the courts from exercising their jurisdiction over his client.[120] The District Court did not object to the means employed to secure personal jurisdiction over him. The court held that once the individual had been brought within the jurisdiction of the court, he could be charged under

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114 *Ker v Illinois*, above, 440.

115 *Ker v Illinois*, above, 443.

116 *Ker v Illinois*, above, 444.

117 See *Frisbie v Collins* 342 US 519, 522 (1952).

118 See *Mahon v Justice* 127 US 700, 714-715 (1888); *United States v Insull* 8 F Supp 310, 311-312 (ND Ill, 1934); *Frisbie v Collins* 342 US 519, 522 (1952); *Gerstein v Pugh* 420 US 103, 119 (1975); *United States v Crews* 445 US 463, 474 (1980).

119 *United States v Yunis* (1988) 681 F Supp 896 (DDC).

120 *United States v Yunis*, above, 899.

the statute, but that the government "cannot act beyond the jurisdictional parameters set forth by principles of international law and domestic statute".[121] It appears that underlying the decision of the court was the fact the capture took place in international waters, so that the United States were actually acting within the constraints imposed by international law. The *Ker* doctrine was also applied to counter Manuel Noriega's argument that United States courts lacked jurisdiction over him since the former Panamanian leader was arrested by United States forces during their intervention in Panama and taken to Florida to face drug-related charges. His efforts to challenge the jurisdiction of the courts were unsuccessful,[122] the court declaring that it was well established "that the manner by which a defendant is brought before the court normally does not affect the ability of the government to try him".[123]

Most national courts have either explicitly or implicitly supported the *Ker* principle, consistently holding that a person kidnapped in violation of general principles of international law may still be submitted to the process of the courts of the abducting state.[124] In *Ex parte Elliott*, British officers accompanied by Belgian policemen arrested the accused in Belgium and forcibly took him back to England where he was charged with desertion. He contested his arrest as contrary to Belgian law. On behalf of the Court of Appeal, Lord Goddard CJ held that once the accused is in lawful custody in Britain, courts have no power to question the circumstances leading to his arrest

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121 *United States v Yunis*, above, 906. Upholding his conviction in 1991, the United States Court of Appeals for the District of Columbia ruled that the circumstances of his seizure did not void the trial court's jurisdiction over him. The court stated that "while the government's conduct was neither picture perfect nor a model for law enforcement behavior", it had not reached the level of outrageousness necessary to sustain the defendant's jurisdictional argument: *United States v Fawaz Yunis* (1991) 924 F 2d 1086, 1094 (DC Cir).

122 *Noriega v United States* (1992) 808 F Supp 791 (SD FL) affirmed, (1997) 117 F 3d 1206 (11th Cir).

123 *Noriega v United States,* above, 1529.

124 See *R v Walton* (1905) 10 Can Crim Cas 269, 275 (CA); *Afouneh v Attorney General of Palestine* (1941-1942) 10 Annual Digest 327, 328; *Lemmel v Rex* (1953) 18 ILR 232 (CA); *Attorney-General v Eichmann* (1961) 36 ILR 5 68-71 (DC), (1962) 305-306 (Supreme Court); *Re Argoud* 45 ILR 90, 95-97 (French Cassation Court 1964). But see Preuss (1935) "Kidnapping of Fugitives from Justice on Foreign Territory" 29 AJIL 502, 502-503 n 1, according to whom *Ker* is only an authority for the idea that an "individual cannot resist trial, not that kidnapping does not give rise to an obligation to restore". The widespread reliance of national courts on the *Ker* case is misleading. The case was brought to the Supreme Court on a writ of error, and the procedural rules at the time did not allow the Court to consider questions relating to customary international law on such appeal. Furthermore, historical accounts point to the fact that Ker was actually handed over by the Chilean forces occupying the Peruvian territory. No extraterritorial abduction did in fact occur. *Ker* amounted to a surrender of a fugitive offender by one state to another outside the terms of an extradition arrangement, in the absence of any violation of the general principles of international law: see Fairman (1953) 'Ker v Illinois Revisited' 47 AJIL 678.

abroad.[125] In *Abrahams v Minister of Justice and Others*, a South African court similarly stated that where there is a lawful detention, the circumstances of the arrest and capture are irrelevant.[126]

Furthermore, courts have refused to hold the state responsible for an abduction carried out by private individuals or where custody was obtained through the informal cooperation of the state of refuge. In the *Argoud* case, the accused was kidnapped in Germany by private agents and "found" in Paris by the police. In the absence of any involvement of the French government in the abduction of the accused, the *Cour de cassation* refused to consider the argument that Argoud's capture represented in fact a disguised extradition, performed in violation of extradition law.[127] In relation to Carlos, a French Court of Appeal found that the irregular or informal apprehension of the accused to France does not per se affect the proceedings before the French courts.[128] In *Nduli,* a South African case,[129] Rumpff CJ drew a distinction between state authorised and unauthorised acts committed in the territory of another state. While the power of the courts to try the abducted accused was not affected in the first instance following the reasoning adopted in *Ker*, the jurisdiction of the courts could not be challenged in the second, "since ... [the state] itself does not perform or purport to perform any act of sovereignty in ... [the other state]".[130]

In any event, courts have generally refused to consider the alleged violation of either international law or human rights, and they have preferred to defer the matter to the Executive, considering that the manner in which custody was obtained affected "the relations between the two countries concerned alone."[131] Attempts by the state of refuge to intervene in favour of the accused before the national courts of the prosecuting state have also been unsuccessful.[132] When the accused has tried to raise the existence of an extradition treaty in defence, courts have held that the sovereign rights of the state, not the individual rights of the alleged offender, are affected by an irregular rendition.[133] Moreover, courts in the abducting state have refused to consider the validity

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125 *R v O/C Dépôt Battalion, RASC, Colchester, Ex parte Elliott* [1949] 1 All ER 373, 377-378 [hereafter *Ex parte Elliott*].

126 [1963] 4 SA 452, 545-546 (Prov Div).

127 *Re Argoud* 45 ILR 90, 97-98.

128 Cour d'appel de Paris (Chambre d'accusation) (1994-11-07) Bulletin Criminel (1995) 74, 174.

129 *Nduli and Others v Minister of Justice and Others* [1978] 1 SA 893, 909-911 (App Div).

130 *Nduli and Others v Minister of Justice and Others,* above, 909.

131 *Attorney-General v Eichmann* 36 ILR 5, 70. See also *Re Argoud* 45 ILR 90, 96.

132 See *Ex parte Lopez* (1934) 6 F Supp 342, 344 (SD Texas).

133 See *Deltil*, Recueil Sirey 1887 (Part I) 188; *State v Brewster* 7 Vt 118, 122 (1835); *Re Argoud* 45 ILR 90, 96; *United States v Valot* (1980) 625 F 2d 308, 310 (9th Cir); *United States v Cordero* (1981) 668 F 2d 32, 37-38 (1st Cir); *Joint Customs Post Case* 86 ILR 525, 530-531.

of the measures taken by the state of refuge,[134] claiming that this amounts to interference in a foreign domestic process.[135]

Overall, judges have closed their eyes on events occurring prior to the official arrest.[136] In return, they have stressed the need to give the abducted criminal a fair trial. The domestic court sets forth the rights available to the accused, and the latter can only rely on the protection afforded by the local legal system. Consequently, civil remedies open to the accused against his abductors or against the state have been regarded as adequate reparation for the damage suffered.[137]

This determination to try the accused at almost any cost derives from the following proposition: the discharge of the accused represents a too important price to pay simply because illegal means were used to bring him to trial. The social need for crime repression should not be frustrated by the illegalities surrounding the seizure.[138]

B The Ker *Doctrine Revisited: the Guadalajara Drug Cartel Cases*

A majority of the United States Supreme Court in 1992 reaffirmed the traditional approach in the landmark case of *Alvarez*.[139] This case relates to the arrest of a number of members of a Guadalajara drug cartel accused of the torture and murder of a United States Drug Enforcement Administration (DEA) agent in 1985. Two of them, Renato Verdugo-Urquidez and Dr Alvarez-Machain, were taken forcibly from Mexico to the United States to stand trial. The capture of Verdugo-Urquidez involved the co-operation of the Mexican police. That of Alvarez-Machain, on the other hand, represented an outright abduction sponsored by the Justice Department of the

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134 Cour d'appel de Paris (Chambre d'accusation) (1994-11-07) Bulletin Criminel (1995) 74, 174.

135 See *Geldof v de Meulemeester et Steffen*, Pasicrisie belge 1961(Part I) 674, 676 (Belgian Cassation Court); *Extradition (Jurisdiction) Case*, (1935-1937) 8 Annual Digest 348, 349 (German Supreme Court). In the *Pohle* case, the German Federal Constitutional Court held that the decision regarding the extradition by the Greek authorities to Germany of an alleged terrorist "was solely within the sphere of Greek domestic jurisdiction and as such it is, in accordance with the general rules of international law, not subject to re-examination by the German courts": translated (extracts) in Green, *International Law Through the Cases* (4 ed, 1978), 383.

136 See Cowling (1992) "Unmasking 'Disguised Extradition' -- Some Glimmer of hope" 106 South African Law Review 241, 244.

137 See *Ker v Illinois* (1886) 119 US 436, 444; *Ex parte Elliott* [1949] AllER 373, 376; *Re Argoud* 45 ILR 90, 97; *The Queen (Quinn) v Ryan* [1965] IR 70, 121-122; *Sami v United States* (1979) 617 F 2d 755, 772-774 (DC Cir).

138 See Stephan (1980) "Constitutional Limits on International Rendition of Criminal Suspects" 20 Va J Int'l L 777, 797-799.

139 *United States v Alvarez-Machain* (1992) 112 S Ct 2188.

United States,[140] to which the Mexican government immediately protested as an act "in violation of the procedure established in the extradition treaty in force".[141]

In the absence of an official protest by the Mexican government, the District Court denied a motion brought by Verdugo-Urquidez to challenge the personal jurisdiction of the court based on the method of acquisition.[142] Mexico protested against the abduction, but only after the denial of the motion. As the issue was not raised on appeal, Verdugo was convicted. The Court of Appeals granted a de novo appeal and held that the courts were entitled to question the methods used in securing custody in "cases in which the government of the nation from which a defendant has been kidnapped protests the kidnapping".[143] The court concluded that extradition treaties prohibit government-sponsored kidnappings of individuals from the territory of one signatory state in order to prosecute them in the courts of the other, a view that is comforted by reference to accepted principles of international law on state sovereignty and territorial integrity.[144] The proper remedy for such violation would be the dismissal of the indictment and repatriation of the defendant to Mexico.[145]

In *Alvarez-Machain*, the District Court judge held that the acts performed in accordance with, or in violation of, an extradition treaty are reviewable by the courts, when the defendant is brought into a Federal court by means of a unilateral and extra-legal rendition despite the existence of an extradition treaty, and the asylum country does protest against his abduction.[146] In other words, the defendant acquires derivative standing rights to invoke a violation of the terms of the treaty.[147] The proper remedy, according to the District Court, should be nothing less than repatriation.[148] The court distinguished this case from the celebrated *Ker* judgment, observing that here, Mexico had protested and demanded Alvarez-Machain's return, and therefore, the act of abduction could be

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140 *United States v Caro-Quintero* (1990) 745 F Supp 599, 603-604 (CD Cal). This case is the trial court level where Alvarez was initially tried with other defendants in the murder case of a DEA agent.

141 *United States v Caro-Quintero*, above, 604 (quoting a diplomatic note issued by the Embassy of Mexico in Washington).

142 *United States v Verdugo-Urquidez* (1991) 939 F 2d 1341, 1343 (9th Cir).

143 *United States v Verdugo-Urquidez,* above, 1349.

144 *United States v Verdugo-Urquidez,* above, 1349-1352. The Court of Appeals ruled that the extradition treaty precluded any means to secure the custody of the alleged offender other than an official extradition request as the foreign government protested the abduction (*United States v Verdugo-Urquidez,* above, 1359-1360).

145 *United States v Verdugo-Urquidez,* above, 1360- 1362.

146 *United States v Caro-Quintero*, (1990) 745 F Supp 599, 606-609 (CD Cal).

147 *United States v Caro-Quintero*, above, 607-608.

148 *United States v Caro-Quintero*, above, 614.

construed as a violation of federal law under the extradition treaty.[149] The traditional doctrine, he added, had survived only because in subsequent cases relying on *Ker*, no protest nor request for the return of the defendant were made by the state of refuge.[150] On the basis of its judgment in *Verdugo-Urquidez* the Court of Appeals affirmed the District Court's judgment, as the government had not disputed that the accused had been abducted by paid agents on behalf of the DEA and the Mexican government constantly demanded his return.[151]

Both cases reached the Supreme Court on appeal. In a rather succinct judgment, Chief Justice Rehnquist, on behalf of the majority, upheld the *Ker* doctrine in *Alvarez-Machain*. After stating that the only factual difference with *Ker* concerned the involvement of the government in the *Alvarez-Machain* case,[152] he went on to interpret the terms of the extradition treaty between the United States and Mexico. According to him, the treaty only provided the procedure to be followed in some predetermined sets of circumstances. For instance, Article 9 did not "purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution".[153] In addition, the practice and history of the treaty showed that an abduction is not prohibited unless the signatory states expressly provided that such action would not be permitted. He inferred this reasoning from the fact that the Mexican government had always been aware of the *Ker* doctrine, but that the "current version of the Treaty ... does not attempt to establish a rule that would in any way curtail the effect of *Ker*".[154]

As the treaty contained no express prohibition of abductions, the remaining question was whether "the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty".[155] According to Chief Justice Rehnquist, the general principles of international law provide no basis for interpreting the treaty as including an implied term prohibiting international abductions as they are too vague to be applied to the specific context of an extradition treaty.[156]

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149 *United States v Caro-Quintero*, above, 608-611.

150 *United States v Caro-Quintero*, above, 611. The court also stated that the existence of an extradition treaty does not prohibit by negative implication the abduction of suspects in a manner which offends the sovereignty of another state, but only when that state raises no objection.

151 *United States v Alvarez-Machain* (1991) 949 F 2d 1466, 1466-1467 (9th Cir).

152 *United States v Alvarez-Machain* (1992) 112 US 2188, 2193.

153 *United States v Alvarez-Machain*, above, 2194.

154 *United States v Alvarez-Machain*, above, 2194.

155 *United States v Alvarez-Machain*, above, 2195.

156 *United States v Alvarez-Machain*, above, 2196.

Justice Stevens, for the minority, vehemently criticised the interpretation of the extradition treaty offered by the majority, which would make of the treaty "an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process".[157] He also found that even implicitly, extradition treaties did provide the respondent with protection from prosecution.[158] He further viewed the express authorisation of the abduction as a serious violation of treaty obligations as well as of general principles of international law, insisting that neither case law nor doctrine supported the "Court's admittedly 'shocking' disdain for customary and conventional international law principles".[159] Finally, he asserted the view that the interest of the Executive Branch in punishing the respondent in the United States, notwithstanding the gravity of the committed crime, "provides no justification for disregarding the Rule of Law".[160]

This Supreme Court judgment has far-reaching effects. The rule *mala captus bene detentus* exposed in *Ker* has been extended to official conduct by United States organs and their representatives. By refusing to read the provisions of the extradition treaty in the light of the general principles of customary international law underlying the issues relating to abductions, the Supreme Court has tolerated a violation of the territorial integrity and sovereignty of another state and engaged the international responsibility of the United States. The majority did, however, point out that the possible violation of international law should be addressed at the executive level.[161] Such a position seems to limit the reach of this case to domestic legal considerations and, therefore, would hopefully have little impact on the international plane. It is nonetheless difficult to agree with the view that the guarantees of due process could still be limited to the fairness of the trial process and not include the circumstances surrounding the appraisal of the alleged offender, especially in the light of recent developments in human rights law. The judgment was criticised in the legal literature,[162] condemned by most states[163] and denounced by international human rights

157 *United States v Alvarez-Machain*, above, 2199. In his view, the extradition treaty involved "a mutual undertaking to respect the territorial integrity of the other contracting party" *United States v Alvarez-Machain*, above, 2199).

158 *United States v Alvarez-Machain*, above, 2201.

159 *United States v Alvarez-Machain*, above, 2205.

160 *United States v Alvarez-Machain*, above, 2205.

161 *United States v Alvarez-Machain*, above, 2196.

162 See Strauss (1994) "A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in Alvarez-Machain" 67 Temple L Rev 1209; Aceves (1996) "The Legality of Transborder Abductions: A Study of United states v Alvarez-Machain" 3 Southwestern J L & Trade Am 101.

163 For a good overview of the reactions outside the United States, see Zaid (1997) "Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout" 19 Hous J Int'l L 829.

organisations.[164] The case, once remanded to the District Court, was dismissed since the evidence presented by the prosecution failed to support the charges against Alvarez-Machain.[165] He was allowed to return to Mexico and filed a civil suit in California against his abductors and the United States government. At time of writing, the Court of Appeals had just released its judgment.[166] The Ninth Circuit held, 6-5, that the arrest and detention of Alvarez-Machain was arbitrary and in violation of the law of nations. The court held that he could seek a civil remedy in federal courts pursuant to the Alien Tort Claims Act and the Federal Tort Claims Act for violations of the law of nations.[167]

C Challenges to the Traditional Position

The traditional approach has been challenged on a number of occasions. French practice prior to the *Argoud* case reveals that courts would refuse to proceed with the prosecution of an individual illegally surrendered, considering the subsequent arrest null and void and requesting the release of the accused.[168] In the landmark case of *Toscanino*,[169] an Italian citizen kidnapped in Uruguay by American agents was taken to Brazil. There, he was allegedly tortured before being flown out to the United States. The Court of Appeals analysed the *Ker* doctrine in the light of the Supreme Court's expansion of 'due process' from the guarantee of a fair trial to the protection from pre-trial police misconduct. In its decision, the court rejected the classical view by holding that respect of the due process in obtaining a conviction was a greater goal to achieve than the actual conviction. Its conclusion was that due process now "required a court to divest itself from jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights".[170] The judgment has, however, been narrowed down to instances where agents representing the government committed a "cruel, inhuman and outrageous treatment" and *Toscanino* has never been followed in the United States.[171]

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164 Amnesty International (12 August 1992) "USA: Kidnapping of criminal suspects sanctioned by United States Supreme Court" AI Index: NWS 11/32/92.

165 See (1993) "Should Government Sponsored Forcible Abduction Render Jurisdiction Invalid? United States v Alvarez-Machain" 23 Case Western Int'l LJ 395, 414.

166 *Alvarez-Machain v United States* (3 June 2003) (9th Cir) 99-56762.

167 *Alvarez-Machain v United States,* above.

168 See *Jolis*, Recueil Sirey 1934 (Part II) 105, 106.

169 *United States v Toscanino* (1974) 500 F 2d 267 (2nd Cir).

170 *United States v Toscanino*, above, 275.

171 See *United States, ex rel Lujan v Gengler* (1975) 510 F 2d 62, 66 (2nd Cir); *Davis v Muellar* (1981) 643 F 2d 521, 527 (8th Cir); *United States v Darby* (1984) 744 F 2d 1508, 1531 (11th Cir).

In cases where the traditional position has been challenged, courts have mainly set aside proceedings on the basis of an abuse of process resulting in an infringement of the individual's rights. In *Hartley*, the New Zealand Court of Appeal was faced with a case of disguised extradition. The accused was arrested in Melbourne and returned to New Zealand by Australian police officers in the absence of an extradition process. The court held that the judge is entitled to enquire into the methods used to secure the presence of the accused to see if there has been a misuse of powers by the authorities, and that the judge possesses an inherent jurisdiction "to prevent anything which savours of abuse of process".[172] In *Levinge v Director of Custodial Services*, an Australian court declined jurisdiction over an accused criminal whose custody was obtained irregularly. The court did, however, indicate that it was vested with undoubted jurisdiction over such cases, subject to discretion.[173] An official protest by the state of refuge has sometimes been deemed a condition sine qua non before the court could stay the proceedings to enable the governments to reach a political settlement or allow the individual to raise the violation of an extradition treaty.[174]

More recently, the Appellate Division of the South African Supreme Court and the House of Lords in Great-Britain have further weakened the traditional approach. Until the *Ebrahim* case, South African courts had affirmed their jurisdiction ratione personae notwithstanding the forcible abduction of the accused from a foreign country.[175] In *Ebrahim*, however, the Appellate Division of the Supreme Court unanimously reversed a conviction secured by the forcible abduction of the appellant from his home in Swaziland by two individuals claiming to be police officers.[176] The kidnappers, once in Pretoria, contacted a high-ranking police official who arranged for the abducted individual to appear at the police headquarters where he was officially arrested on charges of treason.[177] The Swaziland government did not protest to South African authorities over the alleged abduction, in which the police denied any involvement. Steyn J, for the court, held that the "manner in which the appellant was abducted provides a clear indication of the involvement of ... [a state]

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172 *R v Hartley* [1978] 2 NZLR 199, 216 CA (Woodhouse J). See *Moevao v Department of Labour* (1980) 1 NZLR 464, 470 (CA), where Richmond P emitted some doubts that a forcible abduction of its own could entitle a court to stay proceedings.

173 *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546; (1987) 89 FLR 133; (1987) 27 A Crim R 163.

174 See a German Decision of 19 December 1986 [1987] 2 NJW 3087; *United States v Zabaneh* (1988) 837 F 2d 1249, 1261 (5th Cir).

175 *Abrahams v Minister of Justice and Others* [1963] 4 SA 452, 545-546 (Prov Div).

176 *State v Ebrahim* [1991] 2 SA 553 (App Div) translated and annotated in (1991) 31 ILM 888, 890.

177 *State v Ebrahim*, above, 891.

agency. State involvement in such action is not dependent on knowledge and approval by the highest authority in the state".[178]

The question at issue here, he went on to say, was not "what the relevant rules of international law are, but what those of our own law are".[179] Reviewing the sources of South African common law, he found in several provisions of the Digest and in a decree of Justinian evidence dating back to the Roman Empire that a conviction and sentence could not stand "when they were the result of an abduction of a criminal from one province on the order or with the co-operation of the authority of another province".[180] Turning next to Roman-Dutch law, he stressed the uniform support of sixteenth and seventeenth century jurists for the rule that a judge lacked power to effect an arrest outside his jurisdiction. He concluded that "the unlawful removal of a person from one jurisdiction to another was regarded as an abduction and as a serious breach of the law in Roman-Dutch law".[181] Moving on to analyse whether this rule was still part of South African law, Steyn J concluded that no statute grants or denies jurisdiction with respect to extraterritorial abductions or is in conflict with the rules of Roman-Dutch law on the subject[182] and that courts had previously either faced a different situation than the one occurring in the case at issue or ignored the existence of those rules and applied the principles of English common law.[183] Having reached the conclusion that the rules of Roman-Dutch law still govern South African law on this topic, Steyn J, quoting from the *Toscanino* case, defined their content:[184]

> [s]everal fundamental legal principles are contained in these rules, namely the protection and promotion of human rights, good inter-state relations and a healthy administration of justice. The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be

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178 This finding allowed him to distinguish the case from the *Nduli* case, where the kidnappers had acted in breach of their commanding officer's orders and the South African authorities had therefore not committed a violation of international law (*State v Ebrahim*, above, 892).

179 *State v Ebrahim*, above, 892.

180 *State v Ebrahim*, above, 894.

181 This rule, according to Steyn J, would have been pointless if the authorities could have ignored it and proceeded against the abducted accused. In addition, a case of 1662 proved that "in Roman-Dutch law a court of one state had no jurisdiction to try a person abducted from another state by agents of the former state" (*State v Ebrahim*, above, 895).

182 *State v Ebrahim*, above, 895.

183 *State v Ebrahim*, above, 895-896.

184 He relied at length on the *Toscanino* case to prove that these principles have been followed in other national courts. He remarked that the conclusion reached in *Toscanino*, that tolerating an abuse of the criminal process would debase the processes of justice, "is an idea to a large extent apparent in the rules of our own law" (*State v Ebrahim*, above, 899).

> avoided in order to protect and promote the integrity of the administration of justice. This applies equally to the state. When the state is a party to a dispute, as for example in criminal cases, it must come to court with 'clean hands'. When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean.

The Court reversed the previous case law as wrongly decided in contravention of the applicable rules of common law.[185]

Respect for human rights and promotion of the integrity of the administration of justice are important objectives threatened by abductions. The case shows that the repression of crime does not grant unlimited powers to government agencies in bringing to justice alleged criminals, even in the absence of a protest by the authorities of the state of refuge. Unfortunately, it seems the real motivation behind Steyn J's judgment was his concern for the respect of the domestic rule of law and the danger of an abuse of power by the authorities. He stated that he was deciding the case on the basis of national legal principles, therefore refraining from assessing the question as to whether such a principle exists on the international plane. Moreover, he implied that the involvement of the public authorities was necessary for staying the proceedings.[186] This contradicts the principles applicable in international law. As discussed in Part II, even when the state denies any involvement in the abduction, the better view is that the state ratifies the act by prosecuting an accused who has been illegally seized.

In the United Kingdom, it is only since the 1980s that courts have questioned the traditional approach. Relying on the reasoning of the New Zealand Court of Appeal in *Hartley*, the Divisional Court, in *Ex parte Mackeson*,[187] decided to look into the methods used in apprehending a British citizen residing in Zimbabwe and in bringing him back to stand trial in England. Lord Lane viewed the removal to England as a disguised extradition in the absence of an extradition arrangement between the two states and held that while the jurisdiction was not ousted by the illegal manoeuvres of the authorities, the circumstances called for the discharge of the accused.[188] The case was, however, rejected in *Ex parte Driver*, where the Court of Appeal concluded, on the basis of *Ex parte Elliott*, that no discretion is vested in a court to annul proceedings instituted against a person brought before it by illegal means.[189]

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185 *State v Ebrahim*, above, 899: "It follows that according to our common law, the trial court had no jurisdiction to hear the case against the appellant. Consequently, his conviction and sentence cannot stand".

186 In *S v Mabena* [1993] 2 SACR 295 (Bophutswana Gen Div), *Ebrahim* was interpreted as requiring official involvement, use of force or deception and lack of knowledge or consent on the part of the state of refuge.

187 *R v Bow Street Magistrates, ex parte Mackeson* (1982) 75 Cr App R 24.

188 *Ex parte Mackeson*, above, 32-33.

189 *R v Plymouth Magistrates' Court, ex parte Driver* [1985] 2 All ER 681, 697-698.

The House of Lords finally clarified the law in *Bennett*.[190] The case involved the disguised extradition of an individual accused of fraud-related offences from South Africa to Great-Britain in the absence of a legal process. A majority of the House of Lords ruled that British courts might take cognizance of the circumstances surrounding the return of an alleged criminal to England in disregard of the extradition process and in breach of international law and foreign domestic laws and refuse to act where a serious abuse of power had been committed. Lord Griffiths stated that while the accused had been given all the guarantees for a fair trial, the judiciary had the "responsibility" of preventing any abuse of the rule of law and of basic human rights.[191] He concluded:[192]

> In my view, your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our police, prosecuting or other executive authorities have been a knowing party.

Lord Bridge stated that the rule of law requested that the court take cognisance of the circumstances by which custody is secured[193] and further held "inadequate" the civil and criminal remedies open to the individual "[s]ince the prosecution could never have been brought if the defendant had not been illegally abducted, the whole processing is tainted".[194] Lord Lowry indicated that a court may stay criminal proceedings if these were to occasion an abuse of the court's own process, either because of the impossibility to provide a fair trial to the accused, or because, in the circumstances, the trial would offend "the court's sense of justice and propriety".[195] Finally, Lord Slynn agreed with Lord Griffiths, saying that courts should have competence, in such circumstances, "to investigate the illegality alleged, and if satisfied as to their illegality to refuse to proceed to trial".[196]

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190 *Bennett v Horseferry Road Magistrates' Court and another* [1993] 3 All ER 138 (HL).

191 *Bennett v Horseferry Road Magistrates' Court and another*, above, 150-151. He held that:

> [t]he courts have ... no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

192 *Bennett v Horseferry Road Magistrates' Court and another*, above, 151.

193 *Bennett v Horseferry Road Magistrates' Court and another*, above, 155.

194 *Bennett v Horseferry Road Magistrates' Court and another*, above, 156.

195 *Bennett v Horseferry Road Magistrates' Court and another*, above, 163. He further stated that where irregularities arise but the perspectives of a fair trial is preserved, "the court ought not to stay the proceedings merely 'pour encourager les autres'".

196 *Bennett v Horseferry Road Magistrates' Court and another*, above, 169.

Only Lord Oliver dissented. Relying upon the traditional view that a civil remedy is available to the abducted accused and that the interest of society in the prosecution of the case outweighs that of the individual, he concluded that the abducted individual should not escape just punishment for his crimes.[197] Furthermore, he believed that an assessment of the handling of the case by the executive authorities was outside the role of the courts unless this affected the fairness of the trial process,[198] and that the courts were not concerned with the violation of foreign laws, nor were any of the rights of the accused in English law infringed by the events taking place abroad.[199]

The House of Lords pronounced a stay of proceedings on the basis of a misuse of powers by the competent authorities, with only a very timid – and vague – reference to the principles of international law and to the potential violation of the laws of the state of refuge, and ordered the release of the accused as the only remedy against the abuse of the legal process by government authorities. The decision thus appears to set aside the rule developed in *Ex parte Elliott* and revived temporarily in *Ex parte Driver*. This decisive shift, in fact espousing the approach in *Ex parte Mackeson*, emphasises the participation of the executive and the use of force as key factors in a decision to stay the proceedings.

Soon after, the House of Lords refused to extend the *Bennett* case to extradition proceedings. In *Schmidt*,[200] a German national was lured from Ireland to England under false pretences to stand extradition proceedings over serious drug offences committed in Germany. British authorities were informed by the German government of the presence of Schmidt in Ireland, from where he could not be extradited to Germany. Schmidt was invited by British police to come to England to clear his name in a cheque fraud scheme. He eventually accepted the invitation and was detained upon arrival pending extradition proceedings to Germany.[201] His application for writ of habeas corpus and judicial review of the Secretary of State's decision to order the magistrate to extradite him to Germany was refused by a unanimous House of Lords.[202] While the supervisory jurisdiction of the High Court represented the only protection against abuse of process and executive misconduct, the

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197 *Bennett v Horseferry Road Magistrates' Court and another*, above, 156.

198 *Bennett v Horseferry Road Magistrates' Court and another*, above, 158.

199 *Bennett v Horseferry Road Magistrates' Court and another*, above, 160. He concluded:

> the arrest and detention of the accused are not part of the trial process upon which the criminal court has a duty to embark ... I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

200 *Re Schmidt* [1995] 1 AC 339 (HL).

201 *Re Schmidt*, above, 345-346.

202 *Re Schmidt*, above, 368-380 (HL) Lord Jauncey.

procedure surrounding extradition proceedings contained other protections while the argument of abuse of process should be heard by the courts in the requesting state.[203]

The case law shows that domestic courts are in no doubt as to their jurisdiction to try an abducted criminal. According to the traditional approach, domestic courts only examine the treatment of the accused once he has been officially arraigned and they will not review the events surrounding the arrest. In most cases, the suppression of crime overrides any other consideration. The judge will not pass judgment on the acts of foreign authorities or on the consequences of the conduct of state officials as regards a potential violation of international law and human rights. While much criticism has been laid on *Ker* and its progeny, it should be borne in mind that even in those cases where the traditional approach has been challenged, the need to respect international law and human rights principles has hardly been the motive underlying the refusal of the courts to exercise jurisdiction over the abducted criminal. The threat to the good administration of justice was the decisive factor in *Hartley* and in *Bennett*. In *Ebrahim,* South Africa's highest judicial organ only looked at the possible breach of human rights following an extraterritorial abduction only from the point of view of domestic law. In Germany, good neighbourly relations have been the main reason for the stay of proceedings against abducted criminals. Only in *Toscanino* and *Bennett* did the courts emphatically refuse to exercise its jurisdiction, relying on the expansion of international human rights law and its impact on the concept of due process.

D Regulating Abduction through the Doctrine of Abuse of Process

The contribution of the courts to the development of a notion of abuse of process is valuable. It stresses the supervisory role of the judiciary in maintaining the rule of law by refusing to legitimise official conduct "where it is only by the abuse of power that legal process has become possible".[204] In doing so, courts have set out important criteria: the abduction must involve coercive official conduct entailing a serious violation of domestic or foreign law in bringing a person before domestic courts by circumventing extradition arrangements in force between those states.

Unfortunately, such definition opens the door to a plethora of exceptions. First, the courts will require a degree of official involvement.[205] Second, the act must involve coercion, thus setting aside the case where the individual is lured to the jurisdiction.[206] Third, custody must be obtained

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203 *Re Schmidt*, above, 378-379.

204 *Re Schmidt*, above, 357 (HC) Sedley J.

205 *State v Ebrahim* [1991] 2 SA 553 (App Div) translated and annotated in (1991) 31 ILM 888, 890, 892.

206 *United States v Yunis* (1988) 681 F Supp 909, 899 (DDC).

through the circumvention of the extradition arrangements in place.[207] Finally, courts must be satisfied that domestic proceedings could not have originated otherwise.[208]

Another problem relates to differing concepts of abuse of process. A number of domestic legal systems enable members of the public to arrest an individual on "reasonable grounds"[209] or provide that an unlawful arrest does not by itself vitiate a subsequent prosecution if the sole purpose of the arrest is to bring the defendant into custody.[210] Furthermore, in the wake of the events of 11 September 2001, there has been a shift towards the prevention of terrorism. This has translated in tougher laws that further empower state authorities while limiting the rights of individuals. Such developments could restrict the notion of abuse of process.[211] The notion of due process will also be informed by the constitutional protections in force in the state.[212] Finally, as it has been mentioned before, a number of jurisdictions have also been satisfied that a fair trial with due process adequately protects the rights of the accused while preserving the court's immaculate image of fairness and justice.

It seems clear that even those judges who have intervened to stay the proceedings have assessed the facts surrounding the arrest of the accused against their conceptions of due process and good administration of justice, with little recourse to accepted principles of international law. In fact, the diverging views revolve around the question of whether the judge should refrain from exercising his powers where the personal jurisdiction over the accused has been obtained through irregular means.

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207 *Bennett v Horseferry Road Magistrates' Court and another* [1993] 3 All ER 138, 151 (HL) Lord Griffiths.

208 *Bennett v Horseferry Road Magistrates' Court and another*, above, 156 (HL) Lord Bridge.

209 See Police and Criminal Evidence Act 1984 (UK), s 24(5). In New Zealand, for instance, the Crimes Act, s 315, provides a power of arrest without warrant where "there is good cause to suspect" that someone has or is about to commit an offence, whereas generally, the criterion for issue of a warrant is "reasonable grounds for believing" that an offence is about to be committed.

210 See *Wong Sun v United State*s (1963) 371 US 471, 491.

211 A good example is the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (USA PATRIOT) Act of 2001, Pub L No 107-56, 115 Stat. 272 (codified as amendments to various sections of US Code). For an analysis of the potential infringements of the USA Patriot Act on human rights, see Gross (2002) "The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001" 28 N C J Int'l L & Com Reg 1.

212 See Tuerkheimer (2002) "Globalization of US Law Enforcement: Does the Constitution Come Along?" 39 Houston L R 307 for a good review of the application of the constitutional guarantees in the Fourth, Fifth and Sixth Amendments to executive conduct outside the United States. The Supreme Court of Canada has hinted in *Regina v Terry* [1996] 135 SCC 214 (4th DLR) that the Canadian Charter on Rights and Freedoms may apply to the acts of Canadian agents abroad.

E The Role of International Law in Domestic Case Law

It is now important to merge the two principal themes of the paper. Parts II and III have shown that international law condemns both extraterritorial abductions and irregular methods of rendition, either as a violation of customary international law, of a treaty obligation or of human rights duties owed directly to the individual. Legally speaking, however, it must be borne in mind that the extent to which international law permeates a domestic legal system is governed by the state's constitutional arrangements. Accordingly, any critical assessment of the municipal judge requires an evaluation of the relationship between international law and municipal law.

It is beyond the scope of this paper to conduct such a study.[213] Suffice it to say that in common law countries, principles of customary international law are part of the common law and are applied by domestic courts unless a conflict with a statute arises[214] whereas treaties are only enforceable before the courts if they have been implemented through an act of Parliament.[215] In the United States, the courts must apply customary international law unless there is a treaty, an executive act or Congress legislation to the contrary;[216] a treaty is equivalent to any other act of the Congress "whenever it operates of itself without the aid of any legislative provision".[217] Continental European legal systems provide various solutions. Article 10 of the Italian Constitution[218] and Article 25 of the German *Grundgesetz* provide that general principles of international law take precedence over current and subsequent laws and create rights and duties for the citizens directly enforceable before national courts.[219] In both countries, though, treaties require transformation through legislation to acquire the same status as ordinary statutes.[220] Under French law, treaties,

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213 See Oppenheim *International Law. A Treatise* (9 ed, Jennings and Watt, 1992) Vol I, 54-81 for a good overview of the position around the world.

214 See *Polites v The Commonwealth of Australia* (1945) 70 CLR 60 (HC), 74 (Rich J), 79 (McTierman J); *Kaffraria Property Co v Government of Zambia* [1980] 2 SA 709, 715 (Sup Ct Easter Cape Div).

215 See *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347-348 (PC); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA), 224 (Cooke J), 229 (Richardson J); *East African Community v Republic* 51 ILR 414, 423 (CA).

216 See *The Paquete Habana* 175 US 677, 700 (1900); *Restatement Third*, above, §115(1)(b).

217 See *Foster and Elam v Neilson* 2 Pet 253, 314 (1829); *Restatement Third*, above, §111(3).

218 See Brownlie, above, 50.

219 See Oppenheim, above, 64.

220 See Brownlie, above, 50; Oppenheim, above, 65.

once ratified, have priority over contradicting legislation[221] while the position regarding customary law is not clear.[222]

Discrepancies as to extent to which international norms have been integrated in the domestic legal order have a major impact on the abducted criminal, whose rights might not be protected equally depending on the legal system in force in the prosecuting state. Hence, the words spoken by Preuss over sixty years ago to the effect that "whether the courts or the executive shall give effect to the international obligation is purely a matter for national regulation"[223] still reflect the practice of the courts today.

It should be noted, however, that municipal judges tend to hesitate to apply international law, even where they are explicitly entitled to do so. This arises partly from their aversion to tackling issues traditionally left to the discretion of the Executive, and to some extent, from a limited understanding of the principles underlying the international legal system. In *Ker*, for instance, the United States courts ignored the circumstances behind the surrender and the violation of the sovereignty of the aggrieved state was deferred to the attention of the federal authorities. Where the irregular rendition was orchestrated with the consent of the authorities of the state of refuge, as in *Ex parte Elliott*, domestic courts seem to have used *Ker* to condone the violation of the extradition process.

These views, which make of the rights of the abducted accused a secondary issue, may have been adequate for the requirements of the international community some time ago. However, as Professor Lowenfeld commented in regard to *Ker*, such a decision is hardly arguable more than a century later, "when both our concepts of due process and our understanding of individual rights under international law are much more developed".[224] Moreover, the rule of law should not be interpreted as being confined solely to domestic boundaries. As mentioned earlier, there is increasing recognition that the rule of law permeates the international sphere.

It is contended that a judge should refuse to proceed where custody of the accused has been obtained by illegal methods for policy and legal reasons. An abduction represents *per se* an illegal act under the municipal law of both the prosecuting state and the state of refuge and abuse of executive power if not of process. Such conduct should not be able to bear fruit and the judge should not legitimise government behaviour that fails to respect the most basic procedural guarantees. Moreover, courts need to interpret domestic law in the light of international law so as to

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221 See Pouille, *Le pouvoir judiciaire et les tribunaux* (1975) 155.

222 But see Oppenheim, above, 65, arguing that customary international law is applicable by French judges due to the reference in the preamble of the 1958 Constitution of the preamble of the 1946 Constitution.

223 Preuss, above, 505.

224 Lowenfeld, above, 463.

render it compatible with the state's international obligations.[225] By ignoring the infringement of another state's sovereignty and then prosecuting the individual, the judge engages the international responsibility of the state. The evolution of the concept of human rights and the recognition that protection against irregular methods of rendition is contained in many human rights instruments make it even more difficult today for a judge to refuse to look into apparent irregularities surrounding the arrest of the fugitive. The political underpinnings of the decision to abduct an individual should not render such conduct immune from the legal scrutiny of the courts. While the judges must not enter the political arena, they should not abdicate their functions to the detriment of the individual's fundamental rights and to the obvious benefit of the government.[226]

As a matter of international policy, the main problem lies in the different legal protection offered to abducted individuals depending on the state where they are held in custody and on the gravity of the crime committed. Hence, in the absence of a unanimous will on the part of the executive authorities of all states to act solely according to legal methods of surrender, it is for the courts to assume a uniform interpretation of the law. Otherwise, the only relief afforded to the abducted criminal, once convicted, is to challenge the conduct of the state and its organs before the international human rights bodies, a long and costly process.

V CONCLUDING REMARKS

To this day, the international legal order and the doctrine appear to provide a clear bias towards the respect of the human rights of the abducted individual. Nevertheless, this is not reflected in the practice of national courts. On the national plane, there is no uniform set of rules to deal with extraterritorial abductions. Judges are still reluctant to take into account the impact of abductions on their jurisdiction to prosecute the abducted offender. The need to adopt clear guidelines whereby states shall refrain from prosecuting a person whose appearance in court has been secured by forcible means is evident. Unless methods used to bring the fugitive to trial are characterised by the respect of some minimum legal standards, the rights of the individual are likely to vary from state to state.

The best solution is to discourage states from embarking on illegal activities in order to lay their hands on alleged offenders located abroad. By integrating the relevant principles of international law into their reasoning, domestic courts could set a precedent against the use of such methods by staying proceedings in cases involving an unlawful apprehension. The real problem lies in the reluctance of national courts to consider the interaction between domestic and international law and

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225 See *Murray v Schooner Charming Betsy* (1804) 2 Cranch 64, 118 where the United States Supreme Court held that a statute should be construed, if possible, so as not to conflict with international law. Should this be the wish of the legislative body, however, the courts could be obliged to apply domestic law in contravention of the State's international obligations.

226 Morgenstern, above, 280. See also Dickinson (1934) "Jurisdiction Following Seizure or Arrest in Violation of International Law" AJIL 231, 237.

the threat to the human rights of the abducted criminal. Until national judges take into account the general principles of international law and human rights, the abducted individual will be deprived of any effective legal – unless perhaps civil – remedy. In the luckiest case, an agreement at the governmental level might imply repatriation to the state of refuge.

On the international plane, a more effective application of the mechanisms provided for in extradition arrangements or a specific obligation contained in multilateral treaties in order to force the rendition of a person guilty of an international crime would facilitate the requesting process and could ensure that states comply with the scope and terms of such agreements. Another solution would be the elaboration of a convention on the subject of extraterritorial abductions clearly stating the rights and duties of states in that regard. Although this latter option might sound far-fetched, it should be remembered that the Harvard Research raised the idea over 70 years ago in an attempt to render the need to resort to extraterritorial abductions unnecessary.[227]

The conclusions reached in this paper presume that abducted criminals should be treated on the same footing, whether they are drug traffickers, fraudsters, terrorists or war criminals. The fight against terrorism and international crimes is a legitimate preoccupation of the international community. In the name of state security interests, governments are willing to take extreme measures to protect their institutions and their citizens. This is a primary objective and one with which no one would take issue.

The problem arises when the fight against crime under its various shapes translates into the abduction of alleged criminals from other states. Such conduct threatens international peace and security. It also collides with the most basic notions of human rights to which one would expect to apply to every human being, not only to nationals. The war against terrorism and the more comprehensive fight against impunity do not create a special category of crimes demanding that alleged offenders be prosecuted at any cost.

The problem encountered by the recognition of an international protection of the rights of an alleged criminal rests, in the end, on an ethical or philosophical choice. The international community has an interest in bringing to justice those responsible for horrendous crimes, in preserving individual rights and the territorial integrity of the state and in maintaining the rule of law. Granting rights to individuals who commit horrendous crimes might be perceived as acting against the interests of the international community and as being morally wrong. The use of illegal methods to obtain custody of a person who has breached the law could also be counterproductive and serve as an incentive to act outside the law. The latter view suggests that where the rule of law prevails, it is better to let a criminal walk free than legitimising a wrongful exercise of

227 See *Harvard Research*, above, Art 16. Such a convention should naturally be updated to include a specific reference to the protection of human rights.

jurisdiction.[228] Legalistic and simplistic as it may sound, respect for the basic principles underlying the common interests of the international community - sovereignty, territorial integrity, equality, and fundamental human rights - demands that states, no matter how powerful, act within the realm of the law.

228 Quigley, above, 208. Abductions cannot be justified on any grounds and he concludes that reliance on extradition is preferable to the use of illegal means of surrender, even if this means that some guilty individuals might go free in the process.