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Responsibilities and Jurisdiction Subsequent to Extraterrirotial Apprehension

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I. INTRODUCTION

On April 2, 1990, Dr. Humberto Alvarez-Machain, a Mexican national, was forcibly abducted from his medical office in Guadalajara, Mexico. He was taken on board an airplane and flown to El Paso, Texas. He was then arrested by officials of the U.S. Drug Enforcement Administration (DEA) and indicted for allegedly participating in the torture and murder of DEA field agent Enrique Camarena-Salazar. Alvarez-Machain allegedly injected Camarena with the stimulant lidocaine, prolonging his life so that Camarena's capturers could continue to torture and interrogate him.[1]

The DEA apparently authorized and sponsored the abduction of Alvarez-Machain without prior consent of the Mexican Government. Mexico made several, specific, formal diplomatic protests to the U.S. Government stating that the abduction violated the Mexico-U.S. Extradition Treaty as well as general principles of international law. The Mexican Government repeatedly demanded his immediate release and return to Mexico and added that it would try, prosecute, and punish Dr. Alvarez-Machain upon his repatriation. Mexico also demanded extradition of those U.S. agents responsible for the abduction to be tried in Mexico.

On August 10, 1990, the U.S. District Court for the Central District of California[2] found that the kidnapping violated the Treaty of Extradition between the United States and Mexico[3] and, therefore, that it lacked jurisdiction to try Dr. Alvarez-Machain. The Court or-

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1. *See* William Branigin, *Mexico to Seek Extradition of Alleged Kidnap Leader; Ex-policeman Living in Los Angeles Named*, WASH. POST, Apr. 29, 1990, at A21; Michael Isikoff, *Extradition of DEA Agent, Informant Sought; Mexico's Request Surprises, Concerns U.S. Officials*, WASH. POST, Jul. 21, 1990, at A4; *See also* Larry Ronter, *Mexico Detains 4 Officers in Abduction of Doctor in U.S.*, N.Y. TIMES, Apr. 27, 1990, at A8.

2. United States v. Caro-Quintero, et al., 745 F.Supp. 599, 614 (C.D. Cal. 1990).

3. Extradition Treaty, May 4, 1978, United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656.

dered the release and repatriation of Dr. Alvarez back to Mexico.[4] On October 18, 1991, on appeal by the United States, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision. The Ninth Circuit believed that there remained "no question about the adequacy of Mexico's protests . . . or about Mexico's demand for repatriation"[5] and emphasized that Dr. Alvarez-Machain "must be returned" because his "forcible abduction from Mexico by agents of DEA violated the 1980 [Extradition] Treaty" between the United States and Mexico.[6]

On June 15, 1992, upon further appeal by the United States, the U.S. Supreme Court reversed the appellate court's holding, holding that the U.S. Government may abduct wanted criminals abroad (including foreign nationals) and prosecute them in the courts of the United States, even if the abduction violates international law. The Court further stated that the exercise of jurisdiction over individuals so abducted would be barred only if it was expressly prohibited by an applicable extradition treaty and if the offended foreign state demanded the return of the abducted individual.[7]

A State that conducts, authorizes, supports, or sponsors extraterritorial abduction violates a well established principle of international law. When one State exercises its police power in the territory of another State, it exceeds its sphere of jurisdiction permitted under international law, and it violates a fundamental tenet of international law, the respect for the sovereignty and territorial integrity of States.[8] This article considers whether a State may exercise jurisdiction over an abducted individual or otherwise continue to take advantage of the initial illegality of the abduction.

The U.S. Supreme Court held that the abducting State does not divest itself of jurisdiction simply because the abduction violates "general international law principles." Instead, jurisdiction is barred only

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4. *Caro-Quintero*, 745 F.Supp. at 614.

5. United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991) [hereinafter *Alvarez-Machain*].

6. *Id.*

7. United States v. Alvarez-Machain, 112 S.Ct. 2188, 2196-2197, 119 L.Ed.2d 441, 60 U.S.L.W. 4523 (1992) [hereinafter *Alvarez-Machain II*].

8. *See, e.g.*, 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 295 (8th ed., Hersch Lauterpacht 1955); JOSEPH G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 100-101 (10th ed. 1989); MALCOLM N. SHAW, INTERNATIONAL LAW 135 (2nd ed. 1986); WESLEY GOULD, AN INTRODUCTION OF INTERNATIONAL LAW 373 (1957); DOMINIQUE CARREAU, DROIT INTERNATIONAL ¶¶ 843 *et seq.* (1986). *See also* Charter of the United Nations, *signed* June 26, 1945 at San Francisco, *effective* Oct. 24, 1945, 59 Stat. 1031, 145 B.F.S.P. 805, T.S. 993, art. 2(4); Charter of the Organization of American States, *signed* Apr. 30 1948 at Bogota, *effective* Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, arts. 1, 3, 10, 11, 18 and 20; Draft Declaration on Rights and Duties of States (ILC, 1949), art. 3; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 432(2) (Revised, 1987).

where "a term prohibiting international abductions" is specifically included in the applicable treaty of extradition.[9] Dissenting Justice Stevens called this holding "shocking" and "monstrous" and stated that it would "deeply disturb . . . most courts throughout the civilized world."[10]

In *Alvarez-Machain II*, the court seems to have either ignored the existence of customary international law or denied its binding force. This article advises that all domestic courts, being a part of the government of the State, should take judicial notice of and give effect to the rules and principles of both customary and conventional international law, and should refrain from exercising jurisdiction over individuals seized or abducted by means in violation of international law. Extraterritorial abduction in violation of international law does not give rise to any right, including the "right" to exercise jurisdiction. In addition, the offended State is entitled to remedies, and the offending State is obligated to undo its wrongs, regardless of whether the offended State protests or demands remedies.

The purpose of this article is not to challenge the existence of jurisdiction of a State over individuals whom it deems to have violated its domestic laws. Rather, this article questions the exercise of such jurisdiction *following an illegal abduction* and seeks to nullify both the initial act of abduction and the subsequent prosecution by arguing as follows.

A State may exercise its jurisdiction to subject an offender to its law by means that do not violate international law, but it may not exercise jurisdiction over an individual by means that infringe upon the territorial sovereignty of another State. This violates international law because the offending State lacks jurisdiction to abduct and apprehend the individual. As a result, the boundary of jurisdiction of municipal courts stops where the jurisdiction of the State stops. Since the abducting State is obligated to return the abducted individual and otherwise undo its wrong, it would be a further international wrong for the courts of the abducting State to try and prosecute an individual who was illegally abducted.

II. THE KER-FRISBIE DOCTRINE AND THE ROOTS OF ALVAREZ-MACHAIN II

A. *Historical Background*

The holding of *Alvarez-Machain II* is not without precedent. Rather, it is another improper application of the unfounded doctrine that a

9. *Alvarez-Machain II*, 112 S.Ct. at 2196.

10. *Id.* at 2205, 2206 (Stevens, J., dissenting, joined by Justices Blackmun and O'Connor).

court may try and prosecute a defendant who was abducted by irregular means, that the court retains jurisdiction despite such irregularity, and that the decision to repatriate the abducted should be made solely by the executive branch of the Government.

Several early English and American cases held in favor of exercising jurisdiction over illegally seized persons or things. For example, in *Ex parte Susannnah Scott*,[11] the illegal arrest by a British policeman in Brussels was held not to vitiate the jurisdiction of the English court, though it may be that Belgium had agreed to the arrest. In *The Ship Richmond* case,[12] an American warship entered the territorial waters of East Florida, then under the sovereignty of Spain, and seized a U.S. private vessel. The vessel was then forfeited to the United States government for the violation by its owner of the Non-Intercourse Act of 1809. Chief Justice Marshall of the U.S. Supreme Court wrote that

> [t]he seizure of an American vessel within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This court can take no cognizance of it; and the majority of the court is of opinion that the law does not connect that trespass . . . with the subsequent seizure by the civil authority, under the process of the District Court, so as to annul the proceedings of that court against the vessel.[13]

Similarly, in *The Merino* case,[14] U.S. military authorities seized American vessels in the bay of Pensacola, Florida, still under Spanish sovereignty, and the vessels were forfeited for the violation of laws prohibiting the trade in slaves. The Court held that the trespass on Spanish territory was not so connected with the subsequent seizure as to defeat the jurisdiction of the District Court.[15]

In *State of Vermont v. Brewster*,[16] Vermont authorities entered Canada and forcibly abducted a Canadian and removed him to the United States to stand indictment and trial. The accused moved for

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11. Ex parte Susannnah Scott, 9 B. & C. 446 (1829). *See also* R. v. Plymouth Justices, ex parte Driver [1986] Q.B. 95, [1985] All E.R. 611, 77 I.L.R. 351.

12. In re The Ship Richmond, 9 Cr. 102 (1815).

13. *Id.* at 104.

14. In re The Merino, 9 Wheat 391 (1824).

15. Both *The Ship Richmond* and *The Merino* cases were relied on by the U.S. Supreme Court in *Alvarez-Machain II*, 112 S.Ct. at 2196 n. 15. Dickinson criticized the court for its decisions in *The Ship Richmond* and *The Merino* cases, stating that Justice Marshall "was clearly wrong, in the light of later authorities, for the courts have no hesitation in ordering restoration or release against the executive, where the case has been submitted to the court and a clear violation of accepted international law is admitted or proved." Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L. L. 231, 241 (1934).

16. State of Vermont v. Brewster, 7 Vt. 118 (1835).

dismissal of the indictment due to the extraterritorial nature of the abduction. The Vermont Supreme Court held that "[i]t becomes immaterial whether the prisoner was brought out of Canada" by means that violate the sovereignty of Canada. The court further stated that

> [t]he illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain[s], it is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of this court.[17]

In 1886, the United States Supreme Court decided the well-known case of *Ker v. Illinois*.[18] Frederick M. Ker, a U.S. citizen, was wanted in Illinois on charges of larceny and embezzlement, so he fled to Peru. The Governor of Illinois, in accordance with an extradition treaty between the U.S. and Peru, dispatched an agent to request Ker's extradition to stand trial in Illinois. The agent was unable to execute the request for extradition to the Peruvian government because Chilean forces occupied Lima at the time. The agent requested assistance from the military governor appointed by Chile, personally arrested Ker, and took him back to Illinois, where he was convicted of larceny. The Illinois Supreme Court affirmed the conviction, and Ker appealed to the U.S. Supreme Court.

Ker alleged that the Illinois court lacked jurisdiction because he had been kidnapped in Peru and forcibly brought to Cook County without the proper process of extradition. The U.S. Supreme Court rejected the argument that Ker's arrest and conviction violated the extradition treaty between the United States and Peru. The court held that the "mere irregularities in the manner in which [Ker was] ... brought into the custody of the law" did not entitle him to escape prosecution.[19] The court also rejected the argument that the U.S.-Peruvian extradition treaty protected Ker from being taken out of Peru. Instead, it held that the treaty merely limited the extent to which a government may voluntarily grant asylum to a fugitive, and the parties to the treaty simply agreed that upon proper demand and proceedings the asylum State had a duty to transfer the fugitive to the demanding party State.[20] The court upheld jurisdiction, stating that the proper remedy for the breach of international law was at the diplomatic level, and the physical presence of the accused before the Court, no matter how he had been brought there, sufficed to validate the proceedings.[21]

In 1952, U.S. Supreme Court again applied this principle in *Frisbie v. Collins*, which involved the forcible abduction of a criminal

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17. *Id.*
18. Ker v. Illinois, 119 U.S. 436 (1886).
19. *Id.* at 440.
20. *Id.* at 442.
21. *Id.*

from one constituent state of the United States to another.[22] Collins was indicted in the State of Michigan for murder, and he fled to Chicago, Illinois to escape from justice. Michigan authorities sent police officers to Chicago, and they "forcibly seized, handcuffed, blackjacked, and took" Collins back to Michigan where he was convicted of murder and sentenced to life in prison. Collins filed a federal *habeas corpus* action, claiming that his conviction should be declared null and void because his trial violated the due process clause and the Federal Kidnapping Act.[23] The U.S. Supreme Court affirmed the conviction, stating that

> [t]his Court has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by [manner] of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[24]

After *Frisbie*, the *Ker* doctrine became known as the *Ker-Frisbie* doctrine.[25] *Frisbie*, however, was solely a domestic case without any international significance. It did not involve any issue of international law at all. It concerned the abduction and removal of an individual from one internal territorial unit of a federal State and his subjection to the jurisdiction of another such internal territorial unit. It is difficult to see any reason why the *Frisbie* case has frequently been cited along with *Ker* in the discussion on the exercise of jurisdiction following seizures in violation of international law. Indeed, the so-called *Ker-Frisbie* doctrine would be better read simply as the *Ker* doctrine, as *Frisbie* has no bearing upon cases involving forcible or fraudulent abductions in violation of international law. Reference to the case of *Frisbie* should in fact disappear from future international law literature.

In any event, the *Ker-Frisbie* doctrine has frequently been applied and cited as authority for the proposition that the manner in which an individual is physically brought within the reach of a State's authority is irrelevant to the court's exercise of jurisdiction over him.[26] Both *Ker*

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22. Frisbie v. Collins, 342 U.S. 519 (1952).

23. *Id.* at 519-20.

24. *Id.* at 522.

25. *See, e.g.*, Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L. L. 678-86 (1953); Andrew Campbell, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385 (1990).

26. *See, e.g.*, United States v. Unverzagt, 299 Fed. 1015 (1925), Ann. Dig., 1919-1942 (Suppl. vol.), Case No. 53; Collier v. Vaccoro, 51 F.2d 17 (1931); United States v. Insull, 8 F.Supp. 310 (1934), Ann. dig., 1933-1934, Case No. 75; U.S. v.

and *Frisbie*, however, implied the condition that the doctrine does not apply where the irregularity of acquiring a criminal would divest the court of its jurisdiction, such as where the irregularity amounts to a violation of international law.

B. *Critique of the Ker-Frisbie Doctrine*

In *Alvarez-Machain II*, the Supreme Court relied on the *Ker-Frisbie* doctrine, stating that "the court need not inquire as to how [Dr. Alvarez-Machain] came before it."[27] The *Ker-Frisbie* doctrine, however, does not apply when the abduction violates international law, so it should not apply to the *Alvarez-Machain II* case. The doctrine is limited to allowing the State to bring an individual before the court by any means up to the point of violating international law.[28]

In *Ker*, the unauthorized seizure of the accused was made by an Illinois official who acted "without any pretence of authority" from the government of the United States; the Illinois agent acted outside of his scope of authority. He was sent to execute a request for Ker's extradition, not to abduct him. The *Ker* court upheld jurisdiction over Ker under a necessary assumption that since the agent acted in excess of his scope of authority, neither the state of Illinois nor the United States was in breach of international law. As a result, the *Ker* doctrine is inapplicable in any abduction case that involves a violation of international law.

The *Ker-Frisbie* doctrine is an ironic holding "coming as it does from the courts of a country where treaties are the supreme law of the land."[29] Felice Morgenstern argues that one of the probable reasons for the doctrine might be that courts "have been misled by the sweeping terms of decisions in cases where the seizure of a fugitive, though irregular, was not in violation of international law." The courts in

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Rosenberg, 195 F.2d 583 (2nd Cir. 1952), *rehearing denied* in no. 22201, April 18, 1952; U.S. v. Sobell, 244 F.2d 520 (2nd Cir. 1957); United States v. Winter, 509 F.2d 975, 985-86 (5th Cir. 1974), *cert. denied sub nom.* Parks v. United States, 423 U.S. 825 (1975); Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (refusing to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction") *citing Frisbie v. Collins*, 342 U.S. 519 (1952), *Ker v. Illinois*, 119 U.S. 436 (1886); Stone v. Powell, 428 U.S. 465, 485 (1976); United States v. Crews, 445 U.S. 463 (1980); United States v. Reed, 639 F.2d 896, 901-02 (2d Cir. 1981); INS v. Lopez-Mendoza, 468-U.S. 1032, 1039-1040 (1984) (foreign national summoned to deposition hearing following illegal arrest); United States v. Evans, 667 F.Supp. 974, 980 (S.D.N.Y. 1987); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988); Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir. 1990).

27. Alvarez-Machain II, 112 S.Ct., at 2193.

28. The illegality of the means of recovery of a criminal under the domestic law of the court may also divest the court of its jurisdiction, but that topic is not within the scope of this article.

29. Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L. L. 265, 269 (1952).

these cases have "used phraseology of general applicability which is both misleading and indicative of the lack of awareness on the part of these tribunals that there are circumstances in which the illegality of the seizure vitiates the jurisdiction of the court."[30]

Morgenstern notes an abundance of "cases in which there has been a seizure of a fugitive by authorized officials of the pursuing state on the territory of the state of refuge in clear violation of one of the most fundamental rules of customary international law." She further comments that the refusal or failure of the courts "to consider the manner in which an accused individual was brought before them has sometimes been due to an imperfect appreciation of the implications of the exercise of jurisdiction after an illegal seizure." In addition, Morgenstern notes that there have been times in which courts in this connection have relied

> on earlier decisions in which the seizure was not a violation of international law ... [Where] courts have occasionally failed in this sphere to affirm their readiness to enforce international law, they have done so for reasons unconnected with the merits of the subject under discussion. Their decisions thus cannot be said to affect the principle . . . that *an arrest in violation of international law can have no legal effect* (emphasis added).[31]

The so-called *Ker-Frisbie* doctrine, as Justice Stevens said in *Alvarez-Machain II*, is based on a common law principle that "any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize."[32] Under that principle, the assumption is that a government has the authority under law to authorize the seizure of forfeitable property. For a government to subsequently ratify private conduct done without authority, there must be a premise that the government *had the actual authority to authorize* that conduct in the first place, no matter whether it actually exercised that authority. If the government does not have the authority to pre-authorize an act, then it certainly does not have the subsequent authority to sanction or ratify the act, and such sanction or ratification in that circumstance would certainly constitute a breach of the law, domestically, internationally, or both.

In the *Ker* example, suppose that the United States had reached a prior agreement with Peru that in the event the extradition of a crimi-

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30. *Id.* at 269, 270.

31. *Id.* at 273-274.

32. Alvarez-Machain II, 112 S.Ct. at 2203 (Stevens, J., dissenting) (citing Gelston v. Hoyt, 3 Wheat. 246, 310, 4 L.Ed. 381 (1818); Taylor v. United States, 3 How. 197, 205-206, 11 L.Ed. 559 (1845)).

nal should become impossible due to war or similar situation, the requesting party State might, at its own peril and expenses, send agents to the territory of the other party State to apprehend and remove an extraditable criminal. Further suppose that it had been known and acknowledged that the Chilean military occupation of Peru's capital would be likely to make it impossible to effectuate Ker's extradition. In that case, the United States would have possessed the power to authorize the Illinois agent to kidnap Ker in Peru and take him back to the United States. If the United States had the authority to authorize Ker's abduction, but did not exercise that authority to allow the Illinois agent to apprehend Ker prior to his dispatch, then it would still have been able to subsequently ratify Ker's apprehension despite the irregularity of his seizure. In this situation, the doctrine stated in *Ker* would be valid and might apply.

The *Ker* doctrine, however, should not have been applied even to *Ker* itself. Neither the state of Illinois nor the United States had the power under international law, the extradition treaty, or any other agreements between the United States and Peru to authorize the abduction of Ker in Peru. As a result, neither Illinois nor the United States had the authority to give subsequent approval or ratification of the unauthorized apprehension. When the United States failed to return Ker to Peru and exercised jurisdiction over him, it effectively ratified the unauthorized apprehension. Since the United States *ab initio* lacked the power to authorize the abduction, it violated the sovereignty and territorial integrity of Peru, a violation of international law and of the U.S.-Peruvian extradition treaty then in force. The doctrine stating that the manner in which a criminal is brought to justice is immaterial and, therefore, is wrongly applied in *Ker* and in many subsequent cases.

In *Ker*, the U.S. Supreme Court failed to address Ker's alternative argument that forcible abduction of an individual from a foreign State violated customary international law and therefore constituted a bar to the exercise of jurisdiction over such individual by the courts of the abducting State following the forcible abduction.[33] Its further failure to order the return of Ker to Peru constituted a true breach of international law.

A unique abduction case in the history of international law is presented in the famous *Eichmann* Incident.[34] Former Gestapo Chief

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33. *Ker*, 119 U.S. at 444.

34. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM 219-231 (1963); Hans W. Baade, *Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400 (1961); J.E.S. Fawcett, *The Eichmann Case*, 38 BRIT. Y.B. INT'L. L. 181 (1962); L.C. Green, *Aspects juridiques du procès Eichmann*, 1963 ANNUAIRE FRANÇAIS 150; L.C. Green, *The Eichmann Case*, 23 MODERN L. REV. 507 (1960) [hereinafter Green, *Eichmann*]; D. Lasok, *The Eichmann Trial*, 11 I.C.L.Q. 355 (1962); Matthew Lippman, *The Trial*

Adolf Eichmann fled to Argentina after World War II. In May 1960, he was kidnapped in Argentina by Israeli officials and/or agents — in the name of "private volunteers" — and was eventually brought to Israel where he was charged with crimes against the Jewish people, crimes against humanity, crimes of war, and crimes of membership in hostile organizations. In December 1961, Eichmann was convicted on all charges and sentenced to death.[35] On May 29, 1962, the Supreme Court of Israel affirmed the decision of the lower court, and Eichmann was hanged on May 31, 1962.[36]

While doubt remains, few have challenged the jurisdiction of the Israeli court to try Eichmann as a war criminal. Indeed, the *Eichmann* case "was so extreme, so unique, so horrendous" that a court before which Eichmann appeared "could not possibly be expected not to exercise [jurisdiction] or even to ask whether it should be exercised."[37] The "singular character" of Eichmann's crime rendered "the exercise of jurisdiction a duty, but at the same time *should not in any sense be allowed to supply the standard applicable in other, different cases* (emphasis added)."[38]

The uniqueness of the *Eichmann* case exists in the following facts: First, Israeli authorities alleged that they were not involved in the initial kidnapping, and the abduction was planned for and carried out solely by its private citizens. Second, Israel's apology and Argentina's renouncement of its claim to Eichmann served to strengthen Israel's exercise of jurisdiction over him. Third, and most important, Eichmann's crimes were such that his capture, trial, and death penalty were overwhelmingly welcomed at the time. There has been no comparable case worldwide. Neither *Ker* nor the *Alvarez-Machain* case bears any resemblance with, nor did the U.S. Supreme Court in *Alvarez-Machain II* seem to have relied on, the *Eichmann* case.

The following section of this article examines the responsibilities of states under international law when conduting abductions of ac-

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of Adolph Eichmann and the Protection of Universal Human Rights under International Law, 5 HOUS. J. INT' L. 1 28 (1982) (the Israeli government authorized the kidnapping); PETER PAPADATOS, THE EICHMANN TRIAL (1964); Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L. L. 307 (1961).

35. Att.-Gen. of Israel v. Eichmann, Judgment of Dec. 11, 1961 of the District Court of Jerusalem, *translated and reprinted in* 36 I.L.R. 18-276, at 273-276, 56 A.J.I.L. 805 (1962).

36. Att.-Gen. of Israel v. Eichmann, Judgment of May 29, 1962 of the Supreme Court of Israel, *translated and reprinted in* 36 I.L.R. 277, at 342. A summary of the judgments of the District Court of Jerusalem and of the Supreme Court of Israel appears at 36 I.L.R. 5.

37. F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law, in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 407-422, 414 (Yoram Dinstein & Mala Tabory, eds., 1989).

38. *Id.*

cused criminals in other sovereign States.

III. ABDUCTION UNDER INTERNATIONAL LAW

In terms of the degree of responsibility and international consequence, there is a distinction between a wrongful seizure by a private citizen or an official acting *extra vires* and an abduction expressly authorized or sponsored by the government of a State.[39] Abduction under the direct authorization or sponsorship of a Government is presumably subject to more severe international consequences than seizures conducted solely by private citizens or unauthorized State officials or agents subsequently ratified by the Government. Nevertheless, whether initially authorized, sponsored, or subsequently adopted or ratified by the Government, unauthorized extraterritorial abductions violate the territorial sovereignty of the offended State and should not have any legal effect under international law – i.e., no jurisdiction may be based on an act that violates international law.

A. *Responsibilities Arising out of State-Sponsored Abduction*

After an unauthorized international abduction has occurred, the first obligation of the abducting State is to undo its wrong by returning the abducted individual to his country of refuge or residence. Where the abducted individual comes before the court of the abducting State, the court must minimize the consequence of the abduction by ordering the return of the individual to the State where he was abducted.

On the "consequences of violation of territorial limits of law enforcement," the official comment to section 423(2) of the Restatement of Foreign Relations Law of the United States correctly states this rule:

> If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and *international law requires that he be returned* (emphasis added).[40]

The Statute of the International Court of Justice authorizes the International Court of Justice to issue the equivalent of an injunction against the abducting State in the form of an Order providing interim measures of protection. The Court may then order the return of the abducted individual in order to re-establish the *status quo ante*.[41] Ac-

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39. *Cf.* Alvarez-Machain II, 112 S.Ct. at 2203 (Stevens, J., dissenting).

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 423(2), cmt. c (Revised, 1987).

41. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. Article 41(1) of the Statute provides that "[t]he Court

cording to the Permanent Court of International Justice, "[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[42] The Court may order reparation by way of damages should the return of the kidnapped criminal no longer be possible.[43]

An abducting State committing an international wrong must make appropriate restitution to the offended State.[44] The law of remedies at international law requires that under no circumstances may forcible and fraudulent abduction in violation of international law be forgiven or go unpunished. Remedies to the offended State include restoration, public apology, a promise not to commit acts of the same nature again, extradition (upon request) of the abducting officers or responsible individuals, and damages to the injured State. The most important remedies, however, are the repatriation of the abducted individual to the country where the abduction took place and the punishment or extradition of officials or "private citizens" committing or responsible for the abduction. As Laurence Preuss stated, "a violation of foreign territory undoubtedly engages the responsibility of the State of arrest, which is under a clear duty to restore the prisoner and to punish or extradite the offending officers."[45] In addition,

> [e]very state that commits an international tort against another state is bound by customary international law to make reparation therefor, [and it is] well established by state practice that the state on whose territory a purported fugitive from justice has been forcibly abducted by agents of another state can demand of the latter the return of the person abducted, and the disciplinary or criminal punishment of the abductors.[46]

Several early examples show such State practice. In 1807, the British man-of-war *Leopard* attacked an American frigate, the *Chesapeake*, while searching for and arresting deserters from the Royal Navy. The British Government subsequently offered to take disciplinary measures against the captain of the *Leopard*, to pay money dam-

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shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

42. Chorzów Factory Case (Merits) (Germany v. Poland), 1928 P.C.I.J. (ser. A), No. 13, at 47.

43. *See* Georg Schwarzenberger, *Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 353-354 (1955).

44. *See, e.g.*, 1 GEORG DAHM, VÖLKERRECHT 250-251 (1958); 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 562-564 (3rd ed., 1957); Chorzów Factory (Germany v. Poland), 1927 P.C.I.J. (ser. A), No. 9, at 21; Corfu Channel Case (Great Britain v. Albania), 1949 I.C.J. Rep. 4, at 23.

45. Laurence Preuss, *Kidnapping Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502, 505 (1935).

46. Baade, *supra* note 34, at 406.

ages to those injured, and to restore to the United States those individuals removed from the *Chesapeake*.[47] In 1841, the British Government returned to the United States a *Grogan* who had been seized by British soldiers on the territory of the United States and taken to Canada.[48]

The British Law Officers also advised that in cases where foreign nations seized or arrested individuals or vessels in British territory or territorial waters without prior consent from Great Britain, the British Government had the right to claim their restoration.[49] In the matter of *Patrick Lawler*,[50] a fugitive escaped from prison in Gibraltar, Great Britain and was recaptured by a British prison officer in Algeciras, Spain. The Law Officers of the Crown advised that an

> order ought to be given for setting Lawler at liberty immediately . . . . If any doubt exists, as to what the circumstances really were, inquiry should of course be made; but, for the present, we assume that M. Isturitz has been correctly informed of the facts. If so, a violation of Spanish territory was committed by the Warder Nicholls, in removing Lawler over and out of Spanish ground . . . for the purpose of restoring him to a penal custody at Gibraltar, from which he had escaped into Spain. For we regard the removal, if effected as alleged by means of drugging or intoxication, as being a removal clearly without consent, and as involving the same international consequences, as if it had been accomplished by force. A plain breach of international law having occurred, we deem it to be the duty of the state, into whose territory the individual thus wrongfully deported was conveyed, to restore the aggrieved state, upon its request to that effect, as far as possible to its original position. . . . [T]herefore, . . . we recommend that notice be given to the Spanish authorities that, at a given time and place (the place being a convenient spot on the Spanish confines) Lawler will be set at liberty, and allowed to choose his own course: and he should be disposed of accordingly.[51]

In the 1860 *Trent* Incident, two commissioners from the then Confederate States of America and their secretaries, on their way to Europe, were apprehended and removed from the Royal Mail-Packet *Trent* by the United States Federal Navy. A correspondence from a high-level British official to Lord Lyons, the British ambassador in Washington, dated November 30, 1860, stated as follows:

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47. *See* Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L. L. 279, 293-294 (1960).

48. *See* Preuss, *supra* note 45, at 505-506, *citing* 1 JOHN BASSET MOORE, TREATISE ON EXTRADITION AND INTERSTATE RENDITION 282-283 (1891).

49. 1 LORD MCNAIR, INTERNATIONAL LAW OPINIONS 80-82 (1956).

50. In re Patrick Lawler, 1 MCNAIR, *supra* note 49, at 78-79.

51. 1 MCNAIR, *supra* note 49, at 78-79. *See also* In re McClure, 1 MCNAIR, *supra* note 49, at 76-77.

> It thus appears that certain individuals have been taken from on board a British vessel, the ship of a neutral Power, while such vessel was pursuing a lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law . . . . Her Majesty's Government, therefore, trust[s] that when this matter [has] been brought under the consideration of the Government of the United States, that Government will, of its own accord, offer to the British Government such redress as alone would satisfy the British nation, namely, the liberation of the four gentlemen, and their delivery to your Lordship, in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed.[52]

In certain cases between the United States and Mexico, in the latter part of the 19th century,[53] and in the *Vincenti* case between the United States and the United Kingdom in 1920,[54] "the normal practice was to terminate the proceedings against the kidnapped offender and . . . often to offer to return him to the state from which he had been brought and to extradite the kidnappers in accordance with the treaty, if their extradition should be requested."[55] For instance, in the 1887 *Nogales* Incident, a Mexican officer committed an offense on the United States side of the international boundary with Mexico and was arrested by the local police. A Mexican officer and two soldiers crossed the boundary and rescued him by force. The U.S. Government demanded the return of the offending Mexican officer and stated that "it becomes . . . the simple international duty of the Mexican Government to undo the wrong committed by its own soldiery, by restoring the rescued prisoners [sic] to the jurisdiction from which they had been wrongfully taken."[56]

In 1935, Jacob Salomon, an ex-German Jew then residing in Switzerland, was kidnapped by Nazi agents and taken from Switzerland to Germany, but the Swiss government subsequently obtained his release.[57] More recently, in September 1981, two professional bondsmen kidnapped Sidney L. Jaffe, a bail skipper, from his residence in Cana-

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52. Correspondence respecting the Seizure of Messrs. Mason, Slidell, McFarlland and Eustis, from on aboard the Royal Mail-Packet *"Trent"* by the Commander of the U.S. Ship *"San Fancinto,"* 52 Parl. Pap. 607 (1862). *See also* H.W. Malkin, *The Trent and the China*, 5 BRIT. Y.B. INT'L. L. 66 (1924).

53. For such cases, see 2 GREEN HAYWORD HACKWORTH, DIGEST OF INTERNATIONAL LAW 309-312 (1941).

54. *Id.* at 320.

55. Green, *Eichmann, supra* note 34, at 510.

56. 2 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW 376 (1906). The demand was subsequently withdrawn when Mexico offered to try the offender.

57. For comments on the kidnapping of Herr Jacob-Salomon by German agents from Switzerland in 1935 and his release, see Preuss, *supra* note 45; Laurence Preuss, *Settlement of the Jacob Kidnapping Case (Switzerland-Germany)*, 30 AM. J. INT'L L. 123 (1936); Lasok, *supra* note 34, at 355 n.4.

da and took him back to Florida.[58] Jaffe was tried, convicted, and sentenced to consecutive prison terms totalling 145 years.[59] Canada, which maintained an extradition treaty with the United States, protested against the abduction and trial and filed an action in the U.S. District Court in Florida.[60] Following the Canadian protests, U.S. Attorney General William French Smith and Secretary of State George M. Shultz petitioned the Florida Probation and Parole Commission for a hearing to consider granting an early parole release date for Jaffe.[61] In 1983, after Jaffe had been jailed for two years, a Florida appeals court overturned Jaffe's fraud conviction because of procedural errors and ordered Jaffe's release from prison in September 1983.[62] Jaffe was subsequently paroled in November 1983.

In the *Alvarez-Machain* trial, the U.S. District Court rightfully ordered the repatriation of Dr. Alvarez-Machain to Mexico,[63] and, on the first appeal, the U.S. Appellate Court properly affirmed that order.[64] The trial court stated that "[i]t is axiomatic that the United States or Mexico violates its contracting partner's sovereignty, and the extradition treaty, when it unilaterally abducts a person from the territory of its contracting partner without the participation of or authorization from the contracting partner where the offended state registers an official protest."[65] While a protest is not essential to the nature of illegal abduction and its consequences, the court correctly held that the remedy in that case should have been "the immediate return of Dr. Alvarez-Machain to the territory of Mexico."[66]

Not only are States precluded from abducting individuals in the territory of another State, they also may not utilize the territory of another State to transport a criminal captured in its own territory or in the territory of a third State. The duty to return the captured individual may arise in either situation. For example, in the opinion of the Law Officers of the British Crown, where British authorities conveyed a criminal through the territory of the United States without having obtained prior consent, the British Government could not resist an American claim for his surrender.[67] In the matter of *Martin*, a British subject, who was allegedly a naturalized U.S. citizen, was convicted of

58. *See* Jaffe v. Boyles, 616 F.Supp. 1371, 1373 (D.C.N.Y. 1985).

59. *Id.* at 1374.

60. *Id.* at 1374 (referring to *In re Application of Canada* 83-661-Civ-j-16).

61. Letter from Secretary of State Shultz to Florida Probation and Parole Commission (July 22, 1983). *See Return of Land-sales Figure for Florida Jailing is Assailed*, N.Y. TIMES, Aug. 9, 1983, at A6. *See also* Fred Barbash, *Parole of Convicted Canadian Becomes an International Issue*, WASH. POST, July 27, 1983, at A2.

62. *See* Jaffe v. Boyles, 616 F.Supp. at 1374.

63. United States v. Caro-Quintero, 745 F.Supp. at 614.

64. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

65. Caro-Quintero, 745 F.Supp. at 610.

66. *Id.* at 614.

67. In re Martin, 2 MOORE, *supra* note 56, at 371, 373.

assault and escape from custody at Laketon, British Columbia and was sentenced to jail in Victoria. As he was conveyed in custody from Laketon to Victoria, "a portion of the journey [passed] through Alaska." The United States demanded his return on the ground that his transportation through Alaska was "a violation of the Sovereignty of the United States which rendered his further detention unjustified." The opinion of the British Law Officers advised that the United States had the full right "to demand the liberation of the prisoner even after he has left those territories in which he was detained and from which he has been taken without the authority and in violation of the law of the country," and that such right to request the release of the prisoner from the foreign power is "not affected by the fact that the prisoner is a subject of that foreign power."[68]

The rationale for returning an abducted individual to his country of refuge is not that his alleged violation of the law of the abducting State should not be made subject to the criminal proceedings of that State, but that the abducting State should not have acquired custody of the accused individual *by means in violation of the territorial sovereignty of another nation and of international law.* The violation of international law is a much more serious offense than the individual's violation of the law of the abducting State.

The State whose domestic law had allegedly been violated might have otherwise been entitled to take custody of and exercise jurisdiction over the alleged individual offender had there been no offense against another State or violation of international law. For example, where an extradition treaty applies, the State that wishes to try an individual abroad may assume jurisdiction by following procedures established under the treaty, short of forcible abduction. In the absence of an extradition treaty, jurisdiction may be exercised only under the following circumstances: (1) where prior consent and/or cooperation of the State of refuge or residence had been obtained; or (2) where the wanted individual, voluntarily and free from force or fraud, happened to be travelling (a) in the territory of the wanting State, (b) in the territory of a third State where the arresting State had acquired consent or cooperation, or (c) in international areas, such as on the high seas, where the abducting State might exercise the right of hot pursuit or similar rights permitted under international law. Under these circumstances, there would be no violation of the territorial sovereignty of the country where the arrested individual had been residing or seeking refuge. The arresting State could lawfully subject the accused to local proceedings, and it would not be under any obligation to return the individual to his country of residence or refuge.

Jurisdiction, however, becomes divested, voided, and nullified

68. 1 MCNAIR, *supra* note 49, at 79.

whenever it is acquired, realized, or exercised in violation of international law. The justification, however magnificent it might be at domestic law, for acquiring, trying, and punishing a wanted criminal must yield to the rules of international law. This is particularly so when the offended State lodges formal protests and demands the return of the individual abducted in violation of its territorial sovereignty, although the duty to return is not necessarily contingent upon such demands. J.E.S. Fawcett, though frequently referring to a "right" of the kidnapping State to try the abductee, acknowledges that "the demand for the reconduction of the offender must prevail over the right of the State having custody of him, to try him for an offence against its law, for the practical reason that the State cannot both comply with the demand and retain him for trial."[69] The word "demand" must be read to include both a "formal demand" by the offended State and the "implied demand" by the requirement of international law to return. As Lord McNair pointed out, the remedy under international law "for the wrongful recapture of an escaped prisoner was the *restitutio in integrum* of the aggrieved State, whose territory had been violated, by releasing the prisoner."[70]

Abductions might also entail the request by the offended State for extradition of the kidnappers, and the kidnappers may face criminal or civil charges in either the kidnapping State or the State where the kidnapping took place.[71] The *Ker v. Illinois* court, while sustaining jurisdiction over the criminal abducted abroad, held that Peru could seek extradition of the kidnapping Illinois agent on charges of abduction, and stated that the kidnappers might be prosecuted for illegal abduction in a foreign country.[72]

There have been cases in which individuals who had forcefully abducted criminal fugitives or suspects abroad to the United States eventually found themselves to be standing trial for such extraterritorial abductions. For example, in the *Collier* case[73] American and Canadian officials, for the purpose of suppressing narcotics trade, ad-

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69. Fawcett, *supra* note 34, at 199. *See also* In re Blair, *reported in* 1 MOORE, *supra* note 48, at 285, concerning the release, upon the demand of the United States for return, of Blair, an offender who had been irregularly taken to England from the United States. The Blair case is discussed at length in O'Higgins, *supra* note 47, at 305-307.

70. 1 MCNAIR, *supra* note 49, at 78.

71. Brandon S. Chabner, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law against Terrorist Violence Overseas*, 37 UCLA L. REV. 985, 1020 (1990). *See also* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 243 nn. 497, 498 (1991); John Quigley, *Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 193, 211 (1988).

72. *Ker*, 119 U.S. at 444.

73. Vaccaro v. Collier, 38 F.2d 862 (D.Md. 1930), *aff'd* in part, *rev'd* in part *sub nom.* Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931).

vanced a scheme whereby an American official and his informer would induce two suspected smugglers to cross the border and sell drugs to these officials, who would then take the smugglers into custody. The scheme failed due to the cautiousness of the smugglers. The American agents killed one of the suspected smugglers and forcibly took the other into the United States. Despite the prior inducement arrangement, Canada protested that its sovereignty had been violated by the American agents and requested the extradition of the two American agents on charges of murder, kidnapping, and larceny. The U.S. Court of Appeals for the Fourth Circuit, reversing the district court's denial of extradition on kidnapping charges, held that a U.S. federal officer might be found guilty of kidnapping by a Canadian court.[74]

In *Kear v. Hilton*,[75] a case connected to the *Jaffe* incident, the court affirmed the decision of the District Court for the Middle District of Florida that Daniel Kear and Timm Johnsen, the two "bounty hunters" who had kidnapped Jaffe in Canada and brought him back to Florida, were extraditable to Canada under the U.S.-Canada Extradition Treaty. On June 9, 1986, Kear and Johnsen were sentenced to 21 months in prison for the abduction of Jaffe.[76]

In the *Rainbow Warrior* incident, a Greenpeace vessel was sunk in New Zealand internal waters as a result of the acts of French agents. It was generally held that the French Government, by authorizing such acts, had committed a breach of international law and that, apart from the responsibility of France itself, the individual agents could not be exonerated by the so-called "immunity of attribution" doctrine as committing state-like acts because these acts were committed in time of peace. Eventually, the individual agents responsible were duly tried and convicted, and they received sentences imposed by a New Zealand court.[77]

In a fourth example, *Villareal and Hernandez v. Hammond*,[78] Mexico requested the extradition of the offenders on a charge of kidnapping under the U.S.-Mexico Extradition Treaty of 1899.[79] In that case, the offenders sought to avoid extradition on the ground that they had not removed the victim, Lopez, for an "unlawful end," as described by the Treaty, but for the purpose of bringing him to the United States for trial. The Fifth Circuit, affirming the judgment of the District

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74. *Collier*, 51 F.2d, at 19.

75. *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

76. *See 2 Men Imprisoned in Abduction Case*, WASH. POST, June 10, 1986, at C5.

77. *See* STARKE, *supra* note 8, at 101. On a German abduction case, see Stefan Riesenfeld, *Jurisdiction over Foreign Flag Vessels and the U.S. Courts: Adrift Without a Compass?*, 10 MICH. J. INT'L L. 241 n. 46 (1989). *See also* Matthias Herdegen, *Die Achtung fremder Hoheitsrechte als Schranke nationaler Strafgewalt*, 47 Z.A.O.R.V. 221, 239 (1987).

78. Villareal et. al. v. Hammond, 74 F.2d 503 (5th Cir. 1934).

79. Extradition Treaty (1899), U.S.-Mexico, 31 Stat. 1818, art. 2(16).

Court for the Southern District of Texas, found that these abductors were motivated more by a desire to collect the reward offered for the capture of Lopez than by a concern for carrying out justice.[80]

The duty to repatriate the victim is firm and does not depend on any treaty obligations, but the duty to punish or extradite the abductors must be based on the existence of an extradition treaty. As L.C. Green put it,

> [s]hould the kidnapping be purely the result of private enterprise, the state from which the individual had been abducted would have to seek its remedy by requesting the surrender of the kidnappers from the state to which they had gone, and at the same time to request the return of the victim. There would be a legal obligation to surrender the kidnappers only if there were an extradition treaty, specifying kidnapping as an extraditable crime, between the two countries concerned.[81]

Damages for illegal kidnapping on foreign territory have been awarded in certain cases, including *The Chesapeake* case[82] and the *Colunje* case. In the *Colunje* case,[83] the Arbitration Commission awarded damages of $500 for the illegal seizure of Colunje and the unlawful criminal proceedings subsequently brought against him. This holding indicates that damages may be claimed and awarded for the illegal exercise of jurisdiction by the courts of the abducting State.[84] In the case of *Napper Tandy*, the municipal government of Hamburg agreed to pay France 4,000,000 marks in damages for violating international law by surrendering two French officers to Great Britain.[85]

It follows that remedies should cover not only the original violation of international law — the act of abduction itself — but also any subsequent violations, including the failure to make reparation and the assertion of jurisdiction. In *Ker*, the court held that Ker could have an action against the abducting Illinois agent for trespass and false imprisonment.[86] Following the *Jaffe* incident, the kidnapped individual

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80. Villareal and Hernandez, 74 F.2d, at 506.

81. Green, *Eichmann, supra* note 34, at 508. *See* THE TIMES, July 22, 1960 (concerning the refusal of an Argentine court to extradite Jan Durcansky based on the lack of an extradition treaty between Argentina and Czechoslovakia).

82. *See supra* note 47 and accompanying text.

83. Guillermo Colunje (Panama) v. U.S., Claim, June 27, 1933, Ann. Dig. 1933-34, Case No. 96, 6 R. Int'l Arb. Awards 342 (1933).

84. *See* O'Higgins, *supra* note 47, at 297.

85. 4 KARL MARTENS, CAUSES CÉLÈBRES DU DROIT DES GENS 106 (2nd ed., 1858-61). The *Napper Tandy* case is also discussed in detail in O'Higgins, *supra* note 47, at 297-300. Napoleon insisted upon the release of Tandy by Great Britain and instructed that the Treaty of Amiens was not to be signed until Tandy was restored to France. The Crown eventually gave Tandy a pardon, and, in March 1802, Tandy arrived in France. *See* O'Higgins, *supra* note 47, at 300.

86. *Ker*, 119 U.S. at 444.

brought a civil tort action in the state court of New York against the bonding company and the kidnapping bondsmen who were acting as the company's agents in their mission to abduct and bring Jaffe from Canada to Florida for trial.[87] These cases further indicate that forcible or fraudulent abduction may incur civil actions brought by the illegally abducted individual.

B. *Responsibilities Arising out of Non-State-Sponsored Abduction*

The remedies available for abductions by private individuals or by unauthorized initiative may be different than for state-sponsored abductions. In the *Eichmann* case, for example, Green argues that because the kidnappers were "private individuals indulging in private enterprise, no international responsibility arises"; if they were "state representatives, [and] should Israel decline to surrender Eichmann or his captors, any claim by Argentina could be expiated."[88]

A State is not directly responsible for what its citizens have done, but it is directly responsible for its own conduct. Abductions ordered, authorized, or sponsored by the State involve an *ab initio* violation of international law. The responsibility of the abducting State starts at the moment the abducting act occurs, and the offending State, in addition to returning the abducted individual to the State of refuge or residence, must apologize or openly admit that it violated the territorial sovereignty of the offended State, and/or it must make other appropriate reparations.

Forcible abductions conducted by purely private individuals without government involvement give rise to no violation of international law. They do, however, constitute a violation of the internal law of the offended State by the abducting individuals, and the State whose private citizens or unauthorized officials conducted the abduction abroad does not bear international responsibility for the private or unauthorized act of abduction itself unless it subsequently "adopts" or "ratifies" the act,[89] fails to return or order the return of the abducted individual to his country of refuge or residence, or fails to comply with a demand for the extradition of the abducting individuals where an extradition treaty applies.

As a result, in both Government-sponsored and non-Government-sponsored abductions, the offending State has the duty to return the abducted individual or order his return. Where appropriate, and in the presence of an extradition treaty, the offending State has a duty to punish or extradite the abductors or others responsible for the abduction. In non-government-sponsored abductions alone, however, the

87. Jaffe v. Boyles, 616 F.Supp. 1371 (W.D.N.Y. 1985), at 1371.
88. Green, *Eichmann, supra* note 34, at 515.
89. *Cf.* Mann, *supra* note 37, at 407.

State whose nationals "privately" captured the abducted individual abroad has no duty beyond effectuating the return of the abductee and possibly punishing or extraditing the abductors.

International responsibility on the part of the State starts from the moment when the State fails to return or order the return of the abducted individual, and further responsibility would incur only when the State arrests the abducted individual and subjects him to the local proceedings upon his "arrival," forced by the "private" captors. Whether the captors are government officials or private citizens, and whether the abduction is originally authorized or sponsored by the government, the State whose unauthorized agents or private citizens engage in extraterritorial captures assumes its responsibility as soon as it adopts, sanctions, or takes advantage of the private or unauthorized kidnapping activities. A State that fails to return the abducted individual and then arrests and prosecutes the individual has the same responsibilities as in a State-sponsored abduction.

IV. WRONGFUL ABDUCTION REQUIRES DIVESTMENT OF JURISDICTION

A. *The Duty to Return Requires the Divestment of Jurisdiction*

Since an abducting State has a duty to return illegally abducted individuals to their country of refuge or residence, courts of the abducting State must refrain from exercising jurisdiction on the merits. Professor Daniel O'Connell maintains that, although in certain cases courts of the abducting State have "assert[ed] jurisdiction over a person irregularly seized in foreign territory, the seizing State is in breach of international law in exercising its jurisdiction, . . . and there is ground for asserting that, as a corollary, it owes a duty to the aggrieved State to return the offender thereto."[90] Further, "[i]n cases involving kidnapping of individuals across international boundaries, the general state practice is either to release the individual, . . . or to refuse totally to exercise jurisdiction where individuals were brought before the courts." Where courts of the United States accept *in personam* jurisdiction over defendants apprended in wrongful abductions, those courts "commit a further internationally wrongful act: the denial of justice."[91]

The Harvard Research Draft Convention on Jurisdiction with Respect to Crime[92] proposes a duty on a kidnapping State to return the kidnapped criminal to the place where he was seized and not to

90. 2 DANIEL PATRICK O'CONNELL, INTERNATIONAL LAW 833 (1970).

91. Fletcher N. Baldwin, *Some Observations concerning External Power of Decentralized Units within the Context of the Treaty Making Powers of Article II and Corresponding Transnational Implications*, 2 FLA. J. INT'L L. 159, 198-199 (1986).

92. Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. SUPP. 435, art. 16, at 623-632 (1935).

"prosecute" or "punish" him. Article 16 of the Draft states that

> [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.[93]

The comment to Article 16 explains that "resort to measures in violation of international law or international convention" in obtaining custody of a person charged with crime "entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured state, or otherwise."[94]

The requirement to "release or restore the person taken" leads necessarily to the conclusion that the abducting State and its municipal courts are precluded from exercising further jurisdiction over the individual abducted abroad.

B. *The Principle ex injuria jus non oritur Requires the Divestment of Jurisdiction*

The late Professor Mann properly pointed out that the question "courts of the world have . . . failed to face . . . is not whether jurisdiction exists, but whether jurisdiction should be exercised."[95] The illegality of the initial abducting act renders the subsequent exercise of jurisdiction *legally impossible*. Illegal seizure of an accused in violation of the territorial sovereignty of a State deprives the captors of the power to try him, though their right to do so might not have been in doubt had there been no abnormal circumstances.

It is a long established legal principle that an illegal act does not give rise to any right (*ex injuria jus non oritur*). Since the act of abduction itself is illegal and invalid under international law, the abducting State does not have a right to subject the abducted individual to its laws and proceedings following such illegal abduction. Instead, it must return the abducted individual to the place of his removal and make other reparations as appropriate. No matter how much a suspect in a foreign country is wanted at home, or how "international" an offender's crime is, the abducting State may not establish and acquire its jurisdiction over such suspect or offender until the time when the abducted individual is given an opportunity to be orderly and legally transferred.

The transfer of an accused criminal must follow the procedure es-

93. *Id.* at 623.
94. *Id.*
95. Mann, *supra* note 37, at 414.

tablished by the applicable extradition treaty or other agreements. The State obtains jurisdiction when the released abductee voluntarily turns himself in to the wanting State or when he voluntarily enters into an area where the abducting State may apprehend him without violating international law. Where the executive branch of the abducting government has not returned the abducted individual, the judicial branch is under a duty to divest itself of jurisdiction over the abductee and return him or order his return to the State where he was abducted.

Several legal theorists have corroborated this view. For instance, Professor O'Connell convincingly states that where persons and things are brought within the territorial jurisdiction of a particular State by means constituting a violation of international law, or by means offensive to an extradition treaty or to the municipal law of another State, "*[a] priori* one would suppose that the solution of the problem [of the court's jurisdiction] would be found in the application of the maxim *ex injuria jus non oritur*."[96]

Another commentator maintains that "abduction . . . violates international law by injuring the sovereignty of a foreign state . . . [and] "*should . . . not bear the fruit of the unlawfully gained advantage*" (emphasis added).[97] If the presence of the abducted individual may be interpreted as "evidence," the application of an exclusionary rule under the U.S. law "must reestablish the situation which the defendant was in before he was kidnapped." In other words, "the criminal prosecution must be preliminarily dismissed, and the prosecuting country may then make a request for extradition."[98] The rules of international law "(a) make removal of persons conditional on the existence of a treaty; (b) require formal extradition proceedings; and (c) obligate the prosecuting country, in cases of abduction, to return the individual to the country from which he was abducted."[99]

Regarding *Jaffe*, Baldwin notes that the abduction and removal by U.S. citizens "acting under apparent color of state authority" violated Canadian territorial sovereignty, the United States-Canada Extradition Treaty, and "the personal rights of the fugitive guaranteed under customary and conventional international law and by the domestic law of Canada, . . . thereby depriving the violating state of jurisdiction."[100]

Morgenstern argued that the logical conclusion would be that "municipal courts would decline to exercise jurisdiction over persons

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96. 2 O'CONNELL, *supra* note 90, at 831-832.

97. Wilfried Bottke, *"Rule of Law" or "Due Process" as a Common Feature of Criminal Process in Western Democratic Societies*, 51 U. PITT. L. REV. 419, 453 (1990).

98. *Id.* at 453-454.

99. *Id.*

100. Baldwin, *supra* note 91, at 199.

and things brought before them in violation of international law [because] in exercising jurisdiction in such circumstances the court fails to give effect to the rule of international law prohibiting the seizure; *it not only condones but gives effect to the violation of international law*" (emphasis added).[101] Morgenstern further stated that in "declining jurisdiction which results directly from the original violation of international law, courts would merely uphold the fundamental maxim *ex injuria jus non oritur*."[102] Morgenstern maintained that a violation of customary international law "cannot give rise to legal consequences in relation to any party."[103] In addition, Morgenstern pointed out that

> [p]rinciple demands . . . [that] municipal courts should decline to exercise jurisdiction over persons or property which have been seized in violation of international law. In acting thus, the courts would enforce the rule of international law prohibiting the seizure, and give effect to the general jurisprudential maxim *ex injuria jus non oritur*.[104]

State practice also supports the view that jurisdiction does not follow illegal abductions. There are numerous cases in which courts have declined jurisdiction following the abduction of persons or the seizure of things in violation of international law. For instance, it is an established practice in France that vessels seized in the territorial waters of a neutral State may not become the object of prize proceedings.[105] In an 1832 case concerning the arrests of a Sardinian vessel and its crew members in violation of a rule of customary international law, the French Court of Appeal of Aix held that "the arrests constituted a violation of the law of nations, that they must, accordingly, be considered null and void, and that the persons arrested must be released and conducted to Sardinian territory."[106]

Similarly, the German Supreme Prize Court, in the case concerning the capture of the *Ambiorix*, held that where the capture of an enemy vessel "took place within the limits of the sovereignty of a neutral State, the act of capture is null and void, and the seizing State can deprive no rights therefrom."[107] In addition, in Great Britain, prize

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101. Morgenstern, *supra* note 29, at 265.

102. *Id.* at 266.

103. *Id.* at 276.

104. *Id.* at 279.

105. *See, e.g.*, In re Le Saint Michel (1792), *in* 1 ALPHONSE DE PISTOYE & CHARLES DUVERDY, TRAITÉ DES PRISES MARITIMES 123 (1855); In re The Christiana (1799), *id.* at 99 (1855); In re Le Frei (1871), *in* HENRI MARTIN BARBOUX, JURISPRUDENCE DU CONSEIL DES PRISES 66 (1872); In re The Heina (1915), *in* 1 PAUL FAUCHILLE, JURISPRUDENCE FRANÇAISE EN MATIÈRE DE PRISES MARITIMES 119 (1916); and In re The Tinos, *id.* at 309.

106. *Cited in* [1832] 1 Sirey, *Jurisprudence* 578; Morgenstern, *supra* note 29, at 279.

107. The Ambiorix, *in* PAUL FAUCHILLE & CHARLES DE VISSCHER, JURISPRUDENCE ALLEMANDE EN MATIÈRE DE PRISES MARITIMES 131 (1924).

courts have widely held that the seizure of enemy vessels within the territorial waters of a neutral State constitutes a violation of international law and that such neutral State is entitled to claim the release of vessels thus seized.[108]

Courts of the United States have followed these rulings in cases involving the capture of vessels in violation of a treaty or in the territorial waters of another State in general and in cases involving the capture of enemy vessels in the territorial waters of a neutral State in particular.[109] For example, in *United States v. Ferris*,[110] members of the crew (consisting of British subjects) of a Panamanian ship were prosecuted for conspiracy to violate the U.S. Prohibition and Tariff Acts following seizure of the ship 270 miles off the west coast of the United States. The court found that it lacked jurisdiction to try the crew members and that *a fortiori* a vessel seized in violation of an international treaty and brought by force within reach of the court's process should be released. The court stated that

> as the instant seizure was far outside the limit (laid down by the Treaty of 1924 between the United States and Panama), it is sheer aggression and trespass . . . contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to the defendants . . . . A decent respect for the opinions of mankind, national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed – require that treaties shall not be reduced to mere scraps of paper . . . . It seems clear that, if one legally before the court cannot be tried because therein a treaty is violated, for greater reason one illegally before the court, in violation of a treaty, likewise cannot be subjected to trial. Equally in both cases is there absence of jurisdiction.[111]

Another famous example is *Cook v. United States*.[112] In that case, officers of the United States Coast Guard boarded and seized a British vessel, *The Mazel Tov*, at a point eleven and a half miles off the Massachusetts coast and charged it with a violation of the U.S. Tariff Act of 1930. The seizure was found to be in violation of territorial limits fixed by a treaty then in force between the United States and Great Britain. The U.S. Supreme Court rejected the contention

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108. *See, e.g.*, The Twee Gebroeders, 3 C. Rob. 162 (1800); The Anna, 5 C. Rob. 373 (1805); The Pruissima Conception, 6 C. Rob. 45 (1805); The Valeria, [1921] 1 A.C. 477; The Pellworm, [1922] 1 A.C. 292.

109. *See, e.g.*, The Anne, 3 U.S. (Wheat.) 435 (1818); The Lilla, 2 U.S. (Sprague) 177 (1862); The Sir William Peel, 5 U.S. (Wall.) 517 (1866); The Adela, 6 U.S. (Wall.) 266 (1867).

110. *U.S. v. Ferris*, 19 F.2d 925 (1927).

111. *Id. See also* Dickinson, *supra* note 15, at 239 n. 23.

112. Cook v. United States, 288 U.S. 102 (1933).

that the illegality of the seizure was immaterial. The Court held instead that the U.S. Government's subsequent action for forfeiture of the vessel in the court of the United States was properly dismissed since under the U.S.-U.K. treaty the forcible seizure was incapable of giving the U.S. court power to adjudicate title to the vessel, regardless of the vessel's physical presence within the court's jurisdiction. The court stated that

> the objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made . . . [but] that the Government itself lacked power to seize, since by the Treaty [of 1924 between the United States and Great Britain] it had imposed a territorial limitation upon its authority . . . . [The U.S. Government also] lacked power, because of the Treaty, to subject the vessel to [U.S.] laws.[113]

The court held that in the absence of any act done within territorial waters, or of an intention or attempt to do any act within territorial waters, there was no basis for a proceeding against the vessel under the United States Prohibition Act, stating that "[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty," and that "[t]he ordinary incidents of possession of the vessel and the cargo [must] yield to the international agreement."[114]

The underlying principle in these cases is the same as that relied upon in cases involving forcible or fraudulent abduction of individuals: the principle that persons or things seized in violation of international law may not be subjected to the jurisdiction of the courts of the seizing State.

General State practice further supports this proposition. In *Dominguez v. State*,[115] a Texas court held against the exercise of jurisdiction over an individual wrongly seized in Mexico in violation of a U.S.-Mexico treaty and of international law. There, a U.S. expeditionary force had been sent into Mexico in "hot pursuit" of bandits. Having apprehended a Mexican, the force discovered upon its return that he was not one of the bandits pursued and he was thereupon surrendered to local Texas authorities who proceeded to prosecute him for a murder previously committed in Texas. It was contended on behalf of the accused that the Texas court was without jurisdiction to prosecute him for the murder until he had been allowed an opportunity to return to Mexico. The court held that, since the expeditionary force was acting under instructions from the U.S. Department of War,

113. *Id.* at 121.
114. *Id.* at 122.
115. Dominguez v. State, 90 Tex. Crim. 92 (Tex.Crim.App 1921).

it must be presumed that an agreement between Mexico and the United States had been reached, and consequently the rule of the extradition cases was applicable. The entry of the expeditionary force into Mexico for the purpose of apprehending bandits would have been "a violation of Mexican territory contrary to the law of nations in the absence of consent of the Mexican Government." As a result, the court held, the accused might resist trial for the murder until such time as he should voluntarily subject himself to the jurisdiction of the United States or until the consent of Mexico should be obtained.[116] The court concluded that the same obligation that would restrain the United States Government from breaking the implied limitations placed upon it under its treaty with Mexico "would necessarily prevail" with reference to the agreement on the basis of the "comity of nations," and if the legal obligation was the same, the abducted individual could not be held for the offense "without the opportunity to return to his country . . . [in order to] determine whether he shall be surrendered for trial under the treaty of extradition."[117]

Similarly, in the well-known case of *In re Jolis*,[118] French officials had kidnapped a Belgian national in Belgian territory and taken him to France to face prosecution. The French Tribunal Correctionnel d'Avesnes held that the accused had a right to be released on the ground that "the arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was completely null and void"; that the court must take judicial notice of that "nullity being of a public nature;" and that, therefore, "[t]he information leading to the proceedings of arrest . . . , the proceedings themselves, the commitment to prison on the same date, the remand order, and all that followed thereon must accordingly be annulled."[119]

Another example is the *Colunje* claim.[120] There, a policeman of the Panama Canal Zone entered the territory of Panama, and by false pretence induced Colunje, a Panamanian, to go to the Canal Zone. Colunje was arrested by the police of the Zone and was subsequently charged with a criminal offense before a Canal Zone court. The U.S.-Panama commission held that "the police agents of the Zone by inducing Colunje by false pretence to come with them to the Zone with the intent of arresting him there unduly exercised authority within the jurisdiction of the Republic of Panama to the prejudice of a Panamanian citizen." Because a police agent was acting in the performance of

116. *Id.* at 97.

117. *Id.* at 98-99.

118. In re Jolis, Tribunal correctionel d'Avesnes, July 22, 1933, Ann. Dig. 1933-1934, Case No. 77; [1934] 2 Sirey, *Jurisprudence* 103, 105 (with note by Rousseau).

119. *Id.*

120. Guillermo Colunje (Panama) v. U.S., Claim, June 27, 1933, Ann. Dig. 1933-34, Case No. 96, 6 R. Int'l Arb. Awards 342 (1933).

his functions, the United States of America should be held liable.[121]

An especially significant example is the controversial case of *United States v. Toscanino*[122]. Toscanino was an Italian citizen and a resident of Uruguay. He was lured from his home in Montevideo by a telephone call placed by a local policeman named Hugo Campos Hermedia. Hermdedia "was acting *ultra vires* in that he was the paid agent of the United States government." Toscanino and his wife, seven months pregnant at the time, were taken to a deserted area where Hermedia and six other men abducted Toscanino, knocked him unconscious with a gun, threw him into a car, bound and blindfolded him, and drove him to the Uruguayan-Brazilian border. Toscanino alleged that the U.S. agents then tortured and interrogated him for three weeks before he was transported to the United States. Toscanino alleged that the agents beat him, kept him awake for prolonged periods of time, injected fluids into his eyes and nose, and administered electric shocks to his ears, toes, and private parts.[123]

Toscanino subsequently stood trial before the U.S. District Court for the Eastern District of New York and was sentenced to 20 years in prison and fined $20,000 on narcotics counts. Toscanino moved to vacate the verdict, dismiss the indictment, and order his repatriation to Uruguay. On November 2, 1973, the district court denied the motion without a hearing, and, relying on the *Ker-Frisbie* doctrine, held that the manner in which Toscanino was brought into the territory of the United States was immaterial to the court's power to proceed, provided that he was physically present at the time of trial.[124] The Court of Appeals of the United States for the Second Circuit reversed, holding that the *Ker-Frisbie* doctrine does not apply to situations where criminals were brought into the U.S. court by means of forcible abductions in violation of an international treaty, and that "abduction by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped."[125] The appellate court reasoned that, although the abduction of Toscanino from Uruguay did not violate the extradition treaty between Uruguay and the United States, the abduction violated two other treaties: the U.N. Charter and the Organization of American States Charter, which require the United States to respect the territorial sovereignty of Uruguay.[126] It also held that a U.S. court must "divest itself of jurisdiction over the person of a defendant where it had been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional

121. *Id. See also* R. v. Garrell, 86 L.J. (K.B.) 894, 898 (per Lord Reading, 1917).
122. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).
123. *Id.* at 269-271.
124. *Id.* at 267-277.
125. *Id.* at 278.
126. *Id.*

rights."[127] The court noted that

> when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct . . . . [The Government should be barred] *from realizing directly the fruits of its own deliberate and unnecessary lawlessness* in bringing the accused to trial (emphasis added).[128]

Accordingly, courts should "decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud."[129] In so holding, the court upheld the principle that "the government should be denied the right to exploit its own illegal conduct,"[130] and the principle of international law that "the territory of a State is inviolable" and "may not be the object, even temporarily, . . . [of] measures of force taken by another state, directly or indirectly, on any grounds whatever."[131]

The judicial holdings in other recent abduction cases are also instructive. In the case of *S. v. Ebrahim*, involving the abduction by agents of South Africa of an accused in the territory of another State,[132] the Court of Appeal of the Republic of South of Africa dismissed the prosecution on the ground that "abduction represents a violation of the applicable rules of international law, that these rules are part of our law, and that this violation of the law deprives the Court . . . of its competence to hear [the accused's] case."[133]

In *United States v. Verdugo-Urquidez*,[134] the U.S. Court of Appeals for the Ninth Circuit held that the forcible abduction of Rene Martin Verdugo-Urquidez with the authorization or participation of the United States violated the "purpose" of the Extradition Treaty between the United States and Mexico. The court said that the violation, together with Mexico's protest, would give the accused the right to invoke the Treaty to defeat jurisdiction of the U.S. court.[135] Verdugo-Urquidez had been indicted for the murder of U.S. DEA Special Agent Enrique Camarena-Salazar. The Ninth Circuit remanded for an evidentiary hearing as to whether Verdugo-Urquidez's abduction had been authorized or participated by U.S. authorities.[136] The court stated that because the principle of specialty prohibits the trying of an ex-

127. *Id.* at 275, 281.
128. *Id.* at 275.
129. *Id.*
130. *Id.*
131. *Id.* at 277, *quoting* Charter of the Organization of American States, *supra* note 8, art. 17.
132. S. v. Ebrahim, S. Afr. L. Rep. (Apr.-June 1991).
133. *Id.* at 8-9.
134. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).
135. *Id.* at 1356-57.
136. *Id.* at 1362.

tradited person for a crime other than that for which he was extradited, "if an individual has been kidnapped by a treaty signatory – i.e., if he has not been extradited for any offense at all – he may not be detained, tried, or punished for any offense without the consent of the nation from which he was abducted."[137] The court noted that the purpose of extradition treaties, in part, is to safeguard the sovereignty of signatory States and to ensure fair treatment of individuals. The court, from the individual's enforcement of the specialty doctrine, concluded that the individual had standing to raise a violation of the treaty as a whole.[138]

Indeed, no matter whether the illegally seized subject matter is an individual or an object, the violation of international law precludes the delinquent State from proceeding to try and dispose of the subject matter. The only choice for the delinquent State and/or its courts is to divest jurisdiction by releasing or ordering the release of the illegally seized subject matter. As noted by Morgenstern, the rules and principles arising from the seizure of vessels in foreign territorial waters are "essentially the same as those arising from the seizure of individuals in foreign territory" – both kinds of seizure constitute a "violation both of the sovereignty of the foreign state and of the rule of international law which prohibits the exercise of acts of authority within the territorial jurisdiction of other states." As a result, the courts of the seizing State should "decline to give effect to such a seizure and thereby enforce the rule of international law prohibiting it,"[139] and, unless the seizure is authorized under international law, "the court lacks jurisdiction to deal with the merits of the case."[140]

C. *The Jurisdiction of Municipal Courts Can Be No Higher than that of their State*

The extent of the jurisdiction of a State limits the competence and therefore jurisdiction of its municipal courts. Where the State does not have the authority under international law to exercise its national jurisdiction over a certain individual or thing, the courts of its subdivisions do not have such jurisdiction either. Under no circumstances, as far as international law is concerned, can the jurisdiction of municipal courts be broader than that of their State as a whole. If the State itself does not have the authority to abduct individuals, then its municipal courts may not assume and exercise jurisdiction either because the extent of the courts' jurisdiction can never go higher than that of the State itself.

Dickinson, on the jurisdiction of municipal courts over illegally

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137. *Id.* at 1351.
138. *Id.* at 1356-57.
139. Morgenstern, *supra* note 29, at 274.
140. *Id.* at 275.

seized persons or things, stated that

> [i]t may be urged that only the injured foreign state is in a position to protest against the violation of international law and that, in any case, the alleged violation of international law presents an issue which should be resolved by international negotiation or in an international forum. On the other hand, . . . since the seizure or arrest was made in excess of the state's proper competence, and in violation of the rights of a foreign state, there is in consequence no national competence to invoke local process or to subject the thing or the person to local law. *If there is no national competence, obviously there can be no competence in the courts, which are only an arm of the national power.* To hold otherwise . . . would go far to defeat the purpose and nullify the efficacy of international law (emphasis added).[141]

Dickinson maintained that "[i]f the original arrest or seizure is illegal because in violation of treaty, it is logical to conclude that no competence is acquired thereby . . . [and] [i]f the original arrest or seizure is in violation of treaty, it would be shortsighted policy which permitted the court to draw a dark curtain before the wrong done by one nation to another, however desirable it may be to impose a well-merited penalty or forfeiture upon the individual concerned."[142] "In terms of American precedents," Dickinson continued, "this means that the underlying principle of *United States v. Rauscher* is correct and that the distinction attempted in *Ker v. Illinois* is arbitrary, unsound, and should be repudiated; that the principle of *The Mazel Tov* is unimpeachable; and that such cases as *The Ship Richmond* and *The Merino* must be relegated to the category of cases discredited and overruled."[143] He concluded that

> [t]o hold otherwise would go far to nullify the purpose and effect of the salutary principle, well established in Anglo-American jurisprudence. 'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'[144]

In *The Schooner Exchange v. M'Faddon*, Justice Marshall stated that "[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power."[145] What the judiciary, being merely an arm of the State, is authorized to do is no more than what the State is permitted to do under international law. In this regard, the U.S. Supreme Court in the *Cook* case correctly held

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141. Dickinson, *supra* note 15, at 231.
142. *Id.* at 236.
143. *Id.* at 244-245.
144. *Id.* at 245 (*quoting* The Paquete Habana, 175 U.S. 677, 700 (1900)).
145. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 13 (1812).

that, since the U.S. "Government itself lacked power to seize," due to a U.S.-Britain treaty, it "lacked power . . . to subject the [illegally seized] vessel to our laws," and that it would further "nullify the purpose and effect of the Treaty" should the "wrongful seizure" be followed by "adjudication" — that is, the exercise of jurisdiction by the court on the merits.[146] As Dickinson commented on that decision, the objection in that case "was not to the jurisdiction of the court alone, but to 'the jurisdiction of the United States'" as a whole.[147]

D. *Silence of the Offended State Does Not Authorize Abduction and Subsequent Proceeding*

There are some who suggest that a court should divest itself of jurisdiction only when there is a protest from the offended State. One author, for example, states that the "prevailing practice" in international law is that "states refrain from trying fugitives illegally brought within their jurisdiction *when there is a protest* from the state of abduction demanding return" (emphasis added); such practice in the United States "seems to be suggested in *Lujan*, and, to some extent, in *Toscanino*."[148] Another author argues that if an injured State objects to the jurisdiction of the abducting State, "then [its] government could have explicitly demanded [the kidnapped to be] return."[149] As a result, in the *United States v. Verdugo-Urquidez*,[150] since Mexico failed to demand return, as it also did in the *Alvarez-Machain* case, the court could have exercised jurisdiction, and the "striking difference" between Mexico's responses to the Alvarez-Machain and Verdugo-Urquidez abductions "lends credence to the U.S. government's view that Mexico intended its action to lead to a diplomatic resolution of the *Verdugo-Urquidez* matter."[151]

In *United States ex rel. Lujan v. Gengler*,[152] the court acknowledged that no nation enjoys unbridled discretion in obtaining personal jurisdiction over criminals residing in a foreign country. Nevertheless, the court held the conduct of U.S. agents must be "of the most outrageous and reprehensible kind" to result in the denial of due process, and *only where the offended State protested* could the court divest itself of jurisdiction over illegally abducted criminals.[153] The court, relying

146. *Cook*, 288 U.S. at 121-22.

147. Dickinson, *supra* note 15, at 235.

148. Larry A. McCullough, *International and Domestic Criminal Law Issues in the Achille Lauro Incident: A Functional Analysis*, 36 NAVAL L. REV. 53 nn. 371-373 (1986).

149. Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L.J. 907, 928 (1992).

150. United States v. Verdugo-Urquidez II, 939 F.2d 1341 (9th Cir. 1991).

151. Matorin, *supra* note 149, at 928-29.

152. United States *ex rel* Lujan v. Gengler, 510 F.2d 62 (2nd Cir.1975).

153. *Id.* at 65.

on the proposition that "consent or acquiescence by the offended State waives any right it possessed and heals any violation of international law,"[154] found that neither Argentina nor Bolivia, the countries where the forcible abductions had occurred, had declared that its sovereignty had been violated, and such failure to protest was "fatal" to the abductee's attempt to rely on the Charter of the United Nations.[155]

There are other cases to the same effect. In *United States v. Reed*, the U.S. Court of Appeals for the Second Circuit stated that "absent protest or objection by the offended sovereign [the accused] had no standing to raise violation of international law as an issue."[156] On December 19, 1986, the Federal Supreme Court of Germany also held that international law did not preclude the prosecution of an accused seized by fraud, but the offended foreign nation had a right of restitution founded on international law that "could preclude the exercise of German jurisdiction."[157] The defendant involved in that decision had been induced by a German agent in the Netherlands to enter the territory of the Federal Republic of Germany, where he was arrested and sentenced to eleven years in prison. On October 23, 1985, the German Federal Supreme Court rejected the accused's appeal on the merits. On January 6, 1986, the Dutch Government demanded "the immediate restoration" of the accused. On June 3, 1986, the German Federal Constitutional Court initially refused leave to appeal.[158] The defendant later was able to re-appeal to the German Federal Supreme Court, and on December 19, 1986 secured an order that stayed the proceedings so that the Federal government could comply with the demand of the Netherlands.[159] In essence, the German Supreme Court held that the court could exercise jurisdiction in the absence of demand from the Dutch Government for the abductee's return.

In the *Re Argoud* case, involving the kidnapping of a French rebel by French agents in Munich, a special French Court of State Security held similarly.[160] In February 1963, former French Colonel Antoine Argoud, who had joined the Secret Army that plotted in the early 1960s to frustrate President de Gaulle's efforts to end the war between France and Algeria by granting independence to the latter, was abducted from Munich by French agents and forcibly brought back to France to stand trial. The special Court of State Security, based on a declara-

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154. *Id.* at 67.

155. *Id.* at 65.

156. United States v. Reed, 639 F.2d 896, 902 (2nd Cir. 1981).

157. *See* Mann, *supra* note 37, at 421, n. 72, *citing* [1987] NJW 3087.

158. *See* Mann, *supra* 37, at 421, n. 72, *citing* [1986] NJW 3021.

159. *See* Mann, *supra* 37, at 421, n. 72, *citing* [1987] NJW 3087.

160. 92 JOURNAL DE DROIT INTERNATIONAL PUBLIC (CLUNET) 93 (1965); 1964 BULL. CRIM. 420, 45 I.L.R. 90 (Cass. Crim. June 4, 1964). *See also* Mann, *supra* note 37, at 413; ANDRE COCATRE-ZILGIEN, L'AFFAIRE ARGOUD: CONSIDÉRATIONS SUR LES ARRESTATIONS INTERNATIONALEMENT IRRÉGULIÈRES (1965).

tion by the French Foreign Ministry that no communication had been received from the West German Government, rejected Argoud's contention that he had been abducted in violation of international law. The special Court convicted and sentenced him to life imprisonment for insurrection. The court held that Argoud "who claims to be injured . . . lacks the right or capacity to plead in judicial proceedings a violation of international law, *a fortiori* when the State concerned makes no claim."[161]

The position that the French court could exercise jurisdiction over Argoud in the absence of a protest from the German Government was merely a subterfuge, however, because Argoud's defense was again rejected even after the German Government had demanded his return. On November 16, 1963, the German Federal Parliament requested the German Federal Government to demand Argoud's return,[162] but the Court of State Security refused to accept Argoud's submission of the German official representation as evidence. On December 28, 1963, upon appeal, the French Cour de Cassation, notwithstanding the irregularity and the express German demand, upheld the jurisdiction to try Argoud. It held that "even accepting that Argoud had been abducted on the territory of the Federal Republic of Germany in violation of the rights of that country and of its sovereignty, it would be for the Government of the injured State alone to complain and demand reparation." Further, Argoud as an individual "has no capacity to plead a contravention of the rules of public international law and could not claim to find in them a personal basis for immunity from judicial proceedings."[163]

The propositions made by these courts and authors, however, are dubious. First, a fair reading of the *Toscanino* case does not lead to the conclusion that the court intended to divest itself of jurisdiction *only* where the offended State had lodged a protest.[164]

Second, in an abduction case, the abducted individual often could hardly know whether the offended State had lodged a protest, and the abducting State must disclose the absence or existence of a protest.[165] Even if the abducted individual is informed that there is no protest from the country whose territorial integrity has been impugned, it is still difficult to infer that the offended country has consented to his abduction and trial. At the least, it must be established that the offended State had prior knowledge of the plan and the actual operation of the abduction and failed to either approve or disapprove and such failure

161. 92 CLUNET, *supra* note 160, at 96; 45 I.L.R. at 94.

162. *See* Carl Doehring, *Restitutionsanspruch, Asylrecht und Auslieferungsrecht im Fall Argoud*, 25 Z.A.Ö.R.V. 209 (1965).

163. 92 CLUNET, *supra* note 160, at 100; 45 I.L.R. at 97-98.

164. *See supra* notes 122-131 and accompanying text.

165. *See* Mann, *supra* note 37, at 410.

amounted to acquiescence or consent. The burden of proof, therefore, should be on the prosecuting State to show acquiescence or consent.

Third, it is extremely difficult for the abducting State to prove that the mere antecedent and subsequent silence constitutes a form of consent. The best view would be that only where the arresting State had acquired *prior express and affirmative consent* (though not necessarily written) from the State of refuge or residence can it justify its extraterritorial apprehension and subsequent proceedings. Subsequent silence (or even approval) does not alter the illegal nature of the abduction and cannot be counted as a basis for the act of abduction itself and for subsequent proceedings. In a recent comment, Professor Andreas Lowenfeld notes that "too much is made of the assertion of protest by the foreign government in abduction cases." Lowenfeld further states that "silence on the part of the foreign state should not be construed as giving consent to an abduction."[166]

Fourth, the presence or absence of protest or consent must also yield to human rights considerations. In his article "U.S. Law Enforcement Abroad," Professor Lowenfeld points out that "acting under authority of the United States on foreign soil contrary to the will of the foreign state is wrong under international law," and that "silence or even consent by a foreign state cannot make right what is not right, either under the international law of human rights or . . . under the U.S. Constitution."[167]

> The emphasis . . . on the lack of protest by foreign states when suspects are abducted from their territory is disquieting. For one thing, the states that do not protest tend to be, if not client states, at any rate states that have various reasons not to make formal protests. For another, even when silence can be fairly interpreted as consent – which . . . is often hard to tell – such consent cannot extend to violation of the rights of the accused.[168]

As Chabner notes, there are certain municipal cases suggesting that even in the absence of a formal protest by the asylum country whose territorial sovereignty was violated, "an abducted individual would have standing to argue that the United States failure to extradite according to the terms of an existing treaty should divest a court of its personal jurisdiction."[169]

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166. Andreas F. Lowenfeld, *Still More on Kidnapping*, 85 AM. J. INT'L L. 655, 661 (1991).

167. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 451 (1990).

168. *Id.* at 489.

169. Chabner, *supra* note 71, at 1020. *Cf.* United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987) (rejecting the argument based on alleged lack of standing); Jaffe v. Smith, 825 F.2d 304, at 307-08 (11th Cir. 1987) (holding that the kidnapping of the defendant from Canada "constitutes a treaty violation" where government actors were involved, indicating that Canada's protest was not necessary for the kidnapping

In a case involving the abduction in Argentina by Uruguayan security and intelligence forces of a Uruguayan citizen, the U.N. Human Rights Committee held that the abduction violated Article 9 of the International Covenant on Civil and Political Rights,[170] and, accordingly, the abducting State had a duty to make effective reparations, including the immediate release of the abducted individual.[171] As a result, from the point of view of the international law of human rights, whether the offended State keeps silent, whether its silent amounts to acquiescence, or even whether it has expressly renounced its right to demand reparations is irrelevant, for the wrongfully abducted individual is entitled to due process of law and remedies under relevant and applicable international treaties.

Moreover, the duty of the offender to make reparation to the offended State is also independent of the presence or absence of the offended State's formal protest and demand. The major purpose of reparations is to correct wrongs *and* to diminish, eliminate, and prevent further international wrong-doing. Should the wrong-doer be excused from making reparations simply because the offended party did not protest, was unable or unwilling to protest, or dared not to do so, international misconduct would be further encouraged and promoted, and the international society would be likely to turn into a more and more lawless and violent anarchy.

For various practical reasons, offended States have often kept silent after an affront to their sovereignty had occurred, but this silence is not a controlling factor. As Mann said, "acquiescence presupposes knowledge of all the relevant facts and cannot be inferred from mere silence," and even if the offended State "had deliberately and in knowledge of all relevant facts decided to ignore the incident, this would not have abolished the breach of customary or conventional international law."[172] For example, Panama's new government, as the political foe of ousted General Noriega and installed with the armed assistance of the United States force, naturally did not and would not protest against the forcible abduction and removal from Panama or the subsequent conviction and imprisonment of Noriega, who is understandably labeled as a "dictator." The lack of "protest" from the new

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to constitute a "treaty violation").

170. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. (No. 16), U.N. Doc. A/6316 (1967). Article 9(1) of the Covenant provides that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." *Cf.* Article 9 of the Universal Declaration of Human Rights, G.A. Res. 217A(III), UN Doc. A/810, at 71 (1948) (providing that "[n]o one shall be subjected to arbitrary arrest, detention or exile").

171. Views of Human Rights Committee on Complaint of López, July 29, 1981, 36 U.N. GAOR Supp. (No. 40), at 176-184, UN Doc. A/36/40 (1981).

172. Mann, *supra* note 37, at 410.

Panamanian government *may not* be interpreted to suggest that no violation of the Panamanian sovereignty had ever occurred at all and that the U.S. federal courts could therefore have lawfully exercised jurisdiction over General Noriega.[173]

Finally, to nullify an illegal extraterritorial apprehension and to prohibit subsequent prosecution, the form of protest the injured State adopts is insignificant, and whether the injured State formally protests at all is immaterial. What is important is that where the nation as a whole does not have jurisdiction to abduct an individual from abroad and subject him to its law by such illegal means, its courts do not have jurisdiction to try the abducted either. It is even more important for all States to abandon or abstain from the practice of forcible abduction overseas in the absence of prior and express consent from the country concerned. Whether the offended State protests or demands the return of the abducted individual is totally irrelevant to the question whether the court of the abducting should exercise its jurisdiction.[174]

Nonetheless, despite the stated objections to the proposition that a court may divest itself of jurisdiction in an abduction case only where the offended State protests or demands for the return of the abductee, it is best advised that an offended State *always* formally protest against the abduction and demand the return of the abducted individual. Where appropriate, the country should also demand the extradition of the abductors or other responsible individuals. Formal and express protests and demands may facilitate the offending nation to better realize the unlawful nature of its conduct and the consequences under international law and admonish it to refrain from further misconduct.

V. THE DUTY TO OBSERVE AND GIVE EFFECT TO INTERNATIONAL LAW

In some of the cases in the *Ker* line, the courts do not seem to have completely ignored the illegality of the unauthorized seizures from foreign soil and the consequences of such illegality. Nevertheless, they refused to order the return of the illegally seized individuals to

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173. For an analysis of the invasion of Panama and the arrest of General Noriega, see Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494, 502 (1990) (stating that "the U.S. action [in Panama] was in disregard of the pertinent norms and principles of international law on the use of force" and was "evidently dictated by political considerations, in disregard of faithful adherence to the existing norms on the use of force"); Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503 (1990); Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

174. *See* Mann, *supra* note 37, at 411 (stating that "[t]here is . . . no justification for the suggestion which has sometimes been intimated . . . that it is relevant to the question of the court's jurisdiction whether a demand for the return has been made.").

the State of refuge. The courts failed to abstain from exercising jurisdiction over the seized individuals on the ground that any adjustment to the situation would be made between the governments of the offending State and the offended State and that questions involving international law should be left for the executive department of the government.

For instance, in *The Ship Richmond* case, the U.S. Supreme Court held that an offense against a foreign power in whose territorial waters the U.S. naval force seized an American vessel "must be adjusted between the two governments" and that the court "can take no cognizance of it."[175] The Supreme Court of Vermont stated that the violation of the sovereignty of another State "is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of [the] court."[176] According to the *Ker* court, the remedy for the breach of international law is at the diplomatic level, and the court has nothing to do with it.[177] In *Alvarez-Machain III*, the court also held that "the decision of whether [the abducted individual] should be returned to Mexico, as a matter outside of the [Extradition] Treaty, is a matter for the Executive Branch."[178]

The division of powers among the administrative, legislative, and judicial branches of the government does not provide any basis for the courts of a State, nor for any other branch of its government, to dishonor the obligations of the State as a whole under international law.[179] According to Starke, a State — including its municipal courts, of course — cannot rely on provisions of its domestic law to avoid its international obligations, nor can it plead that "its domestic law exonerated it from performing obligations imposed by an international treaty"; in fact, a State is required "to pass the necessary legislation to fulfill its international obligations."[180]

The opinion of the *Finnish Ships Arbitration* case states that "[a]s to the manner in which its municipal law is framed, the State has under international law, a complete liberty of action, and its municipal law is a domestic matter in which no other State is entitled to concern itself, provided that the municipal law is such as to give effect to all the international obligations of the State."[181] The Draft Declaration of

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175. The Ship Richmond v. The United States, 13 U.S. 102, 104 (1815).

176. Vermont v. Brewster, 7 Vt. 118, 121-22 (1835).

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

178. *Alvarez-Machain II*, 112 S.Ct., at 2196. *See also Ex Parte* Lopez, 6 F.Supp. 342, 344 (1934).

179. *See* Jianming Shen, *Revisiting the Disability of the Non-Recognized in the Courts of the Non-Recognizing States and Beyond: The Departure of the In re Guanghua Liay Courts from the Rules*, 5 FLA. INT'L L.J. 401, 461-462 (1990).

180. STARKE, *supra* note 8, at 88-89 (1989). *See also Advisory Opinion on the Jurisdiction of the Courts of Danzig* (1928), P.C.I.J. (Ser. B), No. 15, at 26-27.

181. 3 R. Int'l Arb. Awards 1484. *See also Advisory Opinion on the Exchange of*

Rights and Duties of States prepared by the International Law Commission in 1949 provides, in relevant part, that "[e]very State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[182]

In *United States v. Rauscher*,[183] the U.S. Supreme Court upheld the specialty principle incorporated in a treaty of extradition. The Court stated that the treaty was "the supreme law of the land, which the courts are bound to take judicial notice of and to enforce in any appropriate proceeding the rights of persons growing out of that treaty."[184] In *Dominguez v. State*, the Texas court also stated that an extradition treaty "is part of the law of the land, binding upon courts and available to person having rights secured or recognized thereby, and may be set up as a defense to a criminal prosecution established in disregard thereof."[185]

Courts of other nations have held similarly. The Supreme Court of South Africa recently recognized that rules of international law prohibiting international abduction "are part of our law," and the deviation from such rules would divest the court of its jurisdiction to try an abducted individual.[186] In *Fiscal v. Samper*, the Supreme Court of Spain maintained that

> [t]he extradition treaty between Spain and Portugal . . . must be considered . . . as a constituent part of Spanish legislation and, consequently, of sufficient force to regulate the matter which it covers, not only as to the international relations of the contracting States, but also as to the juridical situation of those extradited from Portuguese Republic upon a request made by the Spanish courts . . . . Article 9 of the treaty provides that individuals delivered by virtue of the said convention may not be tried for any previous crime different from that which was the basis of extradition . . . . [T]he crime considered [in the present case] is distinct from that which underlay the extradition . . . . Accordingly, the appellant cannot be condemned.[187]

Professor Dickinson opined that a court should not avoid giving effect to an applicable treaty simply because the other signatory State "is not a party to the litigation" and that the circumstance "that the

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Greek and Turkish Populations (1925), P.C.I.J. (Ser. B), No. 10, at 20.

182. Draft Declaration on Rights and Duties of States, Report of the ILC covering its First Session 12 April-9 June 1949, U.N. G.A.O.R., 4th Sess., Supp. No. 10 (A/925), at 7 ff., art. 13.

183. United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886).

184. *Id.* at 422.

185. Dominguez v. State, 90 Tex. Crim. 92, 99 (1921).

186. *S. v. Ebrahim*, S. Afr. L. Rep. (Apr.-June 1991), at 8-9.

187. Fiscal v. Samper, Ann. Dig., 1938-1940, Case No. 152.

injured nation is not a party to the litigation" should not be heavily weighed.[188] Once the issue "has been submitted to the court . . . [and] the property or person which the injured nation is entitled to protect is before the court," the court should not lose "the opportunity to undo the wrong by restoring the property or releasing the person."[189] Dickinson maintained that insisting that the decision to restore the illegally seized property or to release the wrongly abducted individual "belongs to a higher forum . . . is to abdicate a function which the court, particularly the court of a country in which international law and treaties are regarded as part of the law of the land, ought unhesitatingly to perform, . . . [since] [t]he question is not political, but is one clearly within the competence of the national court."[190]

Accordingly, the judicial branch of the Government, like its executive and legislative counterparts, is under an obligation to carry out the State's duties under international law and enforce that law domestically where applicable. A municipal court may not excuse itself from observing established rules of international law and applicable treaty provisions by simply leaving international law issues to the political branch of the Government. Refusal of municipal courts to take judicial cognizance of and give effect to rules and principles of international law would amount to another wrong in addition to the initial breach of international law committed by the executive branch.

The respect for law, international and domestic, by both the people and the Government, is an important element of any modern society. The use of illegal means to achieve the "just" end of enforcing the law constitutes an abuse of power and in the end increases the disrespect for the law. It is well-established at common law that the abuse of power may result in the staying of any criminal proceedings.[191] In *R. v. Bow Street Magistrates, ex parte Mackeson*, an English court held that the institution of criminal proceedings against an individual illegally abducted from Zimbabwe was an abuse of process and that the proceedings had to be stayed.[192] In *R. v. Harley*,[193] the New Zealand Court of Appeal refused to allow the prosecution to proceed against an accused who, in violation of an existing extradition treaty, had been illegally abducted from Australia. The court maintained that "this must never become an area where it will be sufficient to consider that the end has justified the means," and that "the means which were adopted to make a trial possible were 'so much in conflict with one of the most important principles of the rule of law' that the discharge of

188. Dickinson, *supra* note 15, at 236.

189. *Id.*

190. *Id.* at 236-237.

191. *See, e.g.*, Connelly v. Director of Public Prosecutions, A.C. 1254 (1964); Director of Public Prosecutions v. Humphreys, 2 All. E.R. 497 (1976).

192. R. v. Bow Street Magistrates, ex parte Mackeson, 75 Cr.App. R. 24 (1981).

193. R. v. Harley, [1978] 2 N.Z.L.R. 199.

the prisoner was unavoidable."[194] Justice Brandeis, in *Olmstead v. United States*, thoughtfully stated that

> government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . . If the government becomes a lawbreaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution.[195]

The practice of combatting terrorism, drug trafficking, and other transnational crimes by illegal means "is a great danger" to society and potentially innocent people, and,

> for this reason alone, neither society nor the law must allow a departure from the great principle that no illegality must ever bear fruit . . . . It is the underlying moral force, the respect for the law, that should prevail. Hardly any idea is greater than that of government by law rather than expediency, . . . [and] law includes international law. Consequently, whether or no[t] the injured State protests or otherwise objects, the abduction of the accused from its territory, by force or by stealth, should be treated . . . as a misuse of [the] exercise [of jurisdiction].[196]

When the accused so abducted is brought before the court, the court, as an arm of the Government, has an opportunity, and a duty, to take notice of and give effect to rules and principles of international law and to undo the nation's wrong by ordering the restoration of the accused. By refusing to exercise jurisdiction on the merits until the accused is obtained through due process of law they serve that purpose. In so doing, and only in so doing, may the court better help achieve the goal of promoting the respect for and observation of the law, domestic and international.

VI. CONCLUSIONS

The *Alvarez-Machain II* court and the courts in similar cases wrongly applied and interpreted the so-called *Ker-Frisbie* doctrine. The initial proposition that the court will not divest itself of jurisdiction simply because of an irregularity in the mode of the accused's appre-

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194. *Id. Cf.* Connelly v. Director of Public Prosecutions, [1964] A.C., at 1354 (per Lord Devlin) (stating the "[t]he courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.").

195. Olmstead v. United States, 277 U.S. 438, 485 (1928). *See also* Rochin v. California, 342 U.S. 165 (1951).

196. Mann, *supra* note 37, at 419.

hension applies only to the extent that no violation of international law is involved. The proposition does not apply, and should not have been applied, to cases of transnational abduction involving a violation of (1) the territorial sovereignty of another nation; (2) applicable international treaties, if any; or (3) international law. The *Ker-Friesbie* doctrine, therefore, ought to be superseded or abandoned in its entirety insofar as international abduction cases are concerned.

The municipal courts of a State have a duty to take judicial notice of and give effect to international law, and this duty requires the courts to nullify the unauthorized abductions by the State and to order the return of the abducted individual to his refuge State. The courts' exercise of jurisdiction over such individual not only amounts to a failure to give effect to international law but also constitutes an approval, sanction, and effectuation of the State's original violation of international law.

When a violation of international law has in fact been committed, the offending nation (and its courts) must take such measures as appropriate to correct its wrongs, including measures of restitution. If courts fail to do so, they take advantage of that violation and thereby commit another wrong under international law. In forcible abduction cases, the abducting State, particularly through its court system, has the opportunity to redress its violation by restoring the situation to its prior status — e.g., by returning the abducted individual to the State where he was removed. As Mann pointed out, "the return of the abducted person does not eliminate the initial wrong (as is shown by the fact that a claim for damages may be pursued by the injured State even after the return), [but] the failure to comply with a request for the return of the abducted person is a separate wrong which is quite independent of the original one."[197] The word "request," however, should be understood to include the requirement of international law to return and to make other reparations, not merely a demand made by the offended State.

The State whose private citizens or unauthorized officials have abducted an individual in a foreign country is also under an obligation possibly to punish or extradite the abductors, even if it is not directly responsible for the private act of abduction itself unless and until it adopts, ratifies, or otherwise bears the fruits of such "private" abduction. When the State takes advantage of an unauthorized private abduction, the difference between a Government-sponsored abduction and a non-Government-sponsored abduction becomes irrelevant, and in either case the offending State bears its international responsibilities virtually at the same level.

While the act of abduction itself is an exercise of the abducting

197. *Id.* at 411.

State's jurisdiction in the territory of another State – an apparently illegal act under international law – the subjection of the individual thus abducted to the laws and proceedings of the abducting State constitutes a *continuation* of this invalid extention of its jurisdiction, as well as a continuation of its infringement upon the territorial sovereignty of the latter State.

The jurisdiction of the courts of the abducting State is no broader than that of their State itself. Since the abducting State does not have the competence and jurisdiction necessary to abduct an individual abroad and to subject him to laws and proceedings through such means, its municipal courts do not possess the competence and jurisdiction necessary to try the individual following his abduction either.

Finally, and most importantly, no rights flow from an illegal act. The maxim *ex injuria jus non oritur* should be the governing principle such that no illegal act may bear the fruit of advantages gained by means of illegality. If abduction is *ab initio* illegal, null, and void under international law, no alleged subsequent "right" deriving from the act of abduction can be legally established and exercised under international law. The illegality of the prior act of abduction renders all subsequent acts of trial and prosecution unlawful, defective, and invalid as well.

The duty of a court to order the return of an abducted individual and to divest itself of jurisdiction is not premised upon the existence of the offended State's protest or demand for reparation. The proposition that the court should divest itself of jurisdiction where the injured nation protests or demands is a more rational and progressive one than the proposition that insists upon the court's "right" to exercise jurisdiction, irrespective of the mode of the accused's apprehension even if the offended State protests and demands for his release. The first proposition, however, is still a step away from the logical conclusion of the maxim *ex injuria jus non oritur* that illegal abduction does not give rise to the right to exercise jurisdiction irrespective of whether the offended nation protests against the abduction and/or requests for the release of the abductee.

The offended State's protests or express demands for the return of the abducted individual are declaratory of the illegal nature of forcible or fraudulent abduction and serve to intensify the existing duty of the courts of the abducting State to refrain from exercising jurisdiction over the abducted individual. While it is advisable that the offended State should always protest any and all abduction activity in its territory, such protests or demands are certainly not required for the courts of the offending State to carry out the duty to divest themselves of jurisdiction and to order the return of the individual concerned.