FEDERALLY SPONSORED INTERNATIONAL KIDNAPPING: AN ACCEPTABLE ALTERNATIVE TO EXTRADITION?

In terrorism prosecutions, the issue is not gathering evidence, like in other criminal cases, but in getting the defendants and doing something about it.[1]

Mr. Barcella's statement summarizes the shared goals and frustrations of the international community in dealing with terrorism.[2] Although nations can employ international law and formal extradition procedures to gain custody over common criminals,[3] most states refuse to permit the extradition of political offenders.[4] Terrorists have attempted to blur the distinction between political offenses and common crimes by cloaking fundamentally criminal activities under a mantle of political legitimacy. In so doing, terrorists take advantage of the lack of consensus among sovereign nations as to what constitutes an extraditable offense and thus escape formal rendition.[5] In response to this tactic, the United States has considered bypassing formal extradition procedures in favor of kidnapping terrorists in order to bring them to justice.[6]

This Note examines the desirability of state-sponsored kidnapping as

1. E. Lawrence Barcella Jr., Assistant United States Attorney for the District of Columbia, *quoted in U.S. Wrestles with Idea of Abducting Terrorists*, St. Louis Post Dispatch, Jan. 20, 1986, at B1, col. 1 [hereinafter cited as Post Dispatch].

2. No universally accepted definition of "terrorism" exists. *See* INTERNATIONAL TERRORISM AND POLITICAL CRIMES XIV (M. Bassiouni ed. 1975) (defining international terrorism as "[i]ndividual or coercive conduct employing strategies of terror-violence which contain an international element or are directed against an internationally protected target and whose aim is to produce a power oriented outcome.") [hereinafter cited as INTERNATIONAL TERRORISM]. *See also* 1984 Act to Combat International Terrorism, § 3071, 18 U.S.C. § 3077(1) (1985) (defining terrorism).

3. *See* FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 487-88 (Tent. Draft No. 5, 1984) [hereinafter cited as FOREIGN RELATIONS] (INTERPOL links national police forces in 138 nations to identify and arrest criminal fugitives). "Extradition is the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment to the state under whose law he has been charged or convicted." *Id.* at 63.

4. *See infra* notes 12-15 and accompanying text.

5. Under extradition treaties, nations often reserve the right to determine whether the alleged criminal act constitutes a political offense. French courts have refused to extradite United States nationals charged with hijacking because the hijackers claimed membership in the Black Panther movement. *See* FOREIGN RELATIONS, *supra* note 3, at 88. *See also infra* note 16. *See generally* V. WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION (1980); Abramovsky & Eagle, *United States Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?*, 57 OR. L. REV. 51 (1977).

6. *See* Post Dispatch, *supra* note 1.

an alternative to extradition. Part I analyzes extradition law and exposes its shortcomings when applied to terrorist activities. Part II considers judicial treatment of kidnapping as a means to gain jurisdiction. Part III concludes that, although government-sponsored kidnapping is an appealing alternative, it is neither a legal nor ultimately desirable substitute for formal extradition.

I. EXTRADITION

Sovereign nations long have relied on some form of extradition to obtain custody over alleged criminals seeking refuge in other states.[7] Until recently, governments viewed extradition as a moral duty and freely granted extradition requests.[8] Today, however, nations only grant extradition when mutual extradition treaties obligate them to do so.[9] Most extradition treaties require some showing that the alleged offender committed an act that both states recognize as criminal, that the crime constitutes an extraditable offense,[10] and that the requesting state has jurisdiction over the offender.[11]

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7. The first extradition treaty the United States signed was the Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 105. After the expiration of this treaty in 1806, the United States waited until 1842 to again enter an extradition treaty, also with Great Britain. Webster-Ashburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

8. *See* FOREIGN RELATIONS, *supra* note 3, at 64.

9. *See* Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) ("the principles of international law recognize no right to extradition apart from treaty"); Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936) (noting that in the absence of an extradition treaty expressly authorizing extradition in the situation, an individual cannot be extradited). Extradition treaties are premised on adherence to "reciprocity," by which sovereign nations exchange mutual extradition favors. *See generally* I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 1 (1971); M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (1983).

10. An extradition treaty may enumerate the specific crimes for which an individual may be extradited. Alternatively, such treaties may adopt standard of proof requirements to determine if an individual can be extradited. *See* Note, *The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition*, 14 GA. J. INT'L. AND COMP. L., 357, 363 (1984). The formulation of the standard of proof required to justify extradition may vary between nations. *See* FOREIGN RELATIONS, *supra* note 3, at 77.

The "double criminality" requirement poses obvious problems. For example, treaties between the United States and South American nations do not include narcotics offenses as extraditable offenses. *See* Abramovsky & Eagle, *supra* note 5, at 51 n.1. *See also* Jacob, *International Extradition: Implications of the Sister Case*, 59 YALE L.J. 622, 622 n.3 (noting an English court's refusal to extradite a German national to stand trial for perjury in the United States because the individual's actions did not constitute perjury under British law).

11. *See infra* notes 26-58 and accompanying text. In addition, the "specialty doctrine" requires the requesting state to try the alleged offender only for those crimes for which he was extradited, *see*

A. The Political Offense Exception

Until the nineteenth century, states used extradition almost exclusively against political and religious offenders rather than common criminals.[12] Since then, however, the world climate of political and religious tolerance has transformed extradition from "a means of international political repression [to] . . . a method of international crime control."[13] The "political offense exception"[14] now protects political nonconformists. This exception assumes that political crimes do not violate international law and thus precludes the extradition of alleged political offenders.[15] Because each nation defines political offenses according to its own legal system,[16] the exception operates as a major obstacle to the extradition of terrorists. Terrorists employ increasingly violent tactics, which ordinarily would fall outside of the political offense exception, to accomplish political goals.[17] These goals thus serve to shield otherwise criminal actions from extradition.

Legal scholars, in an attempt to narrow the scope of the political offense exception, have distinguished "pure" political offenses from "relative" offenses. Pure political offenses, such as treason and espionage, involve non-violent actions, which do not victimize private citizens, directed against incumbent governments.[18] Most nations find that such

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United States v. Ranscher, 119 U.S. 407 (1886), or any crime arising out of the same circumstances if the additional offense is also extraditable, *see* I. SHEARER, *supra* note 9, at 146-47. Finally, extradition treaties may exclude citizens of the requested nation from extradition. *See, e.g.*, Extradition Treaty, Jan. 13, 1961, United States-Brazil, 15 U.S.T. 2093, T.I.A.S. No. 5691.

12. *Research In International Law Under the Auspices of the Harvard Law School, I. Extradition*, 29 AM. J. INT'L L. 15, 35-37, 108 (1935) (political and religious non-conformists were viewed as dangerous to the stability of all nations).

13. Skelding & Sternberg, *State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law*, 15 CASE W. RES. J. INT'L L. 137, 138 (1983).

14. The "political offense exception" refers to treaty provisions in which nations reserve the right to refuse to extradite political offenders. V. WIJNGAERT, *supra* note 5, at 1 n.1. For a comprehensive list of such treaties, see *id.* at 1 n.2.

15. *See* Skelding & Sternberg, *supra* note 13, at 138-39 (noting that western society accepts political rebellion against oppression and views the offender as posing a threat only to his own government). *See also* V. WIJNGAERT, *supra* note 5, at 3 (noting that political offenses are not inherently criminal because the offender acts out of a sense of social consciousness).

16. *See* V. WIJNGAERT, *supra* note 5, at 47. *See also* 4 FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL CONTROL 87 (1984) (documenting state-sponsored international terrorism and noting that defining extraditable political "crimes" becomes impossible in the face of such state support).

17. *See* Note, *Politics of Extradition*, 13 N.Y.U. J. INT'L. L. & POL. 617, 634 (1981) (political terrorism has changed its focus from traditional governmental targets to innocent civilians).

18. Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L.

activities fall within the traditional political offense category and refuse to extradite the offenders.

Relative political offenses, by contrast, involve acts traditionally considered criminal, but which derive a political flavor from the surrounding circumstances or the offender's political motivation.[19] Relative political offenders, including terrorists, have forced nations to reevaluate their extradition policies.[20] In response, many nations have adopted an exclusionary approach to extradition designed to protect legitimate political activism and control purely terrorist tactics. Under this approach, extradition treaties expressly exclude certain acts, such as war crimes and hijacking, from coverage under the political offense exception.[21] In adopting an exclusionary approach, the party nations assume that the seriousness of certain crimes outweighs the values that the political offense exception protects.[22]

All treaties, however, do not contain exclusionary provisions, and all nations do not willingly extradite individuals who have committed acts that would be excluded from the political offense exception under such provisions. Some governments and commentators have expressed a fear that a concerted "war" on terrorism will quash the legitimate political activities of dissident and separatist groups.[23] In addition, many nations

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REV. 495 (1984) [hereinafter cited as *Extradition Reform*]. "Pure" political offenses also include sedition, conspiracy to overthrow the government, prohibited speech or press, and unlawful assembly. *Id.* at 549.

19. *Id. See also* FOREIGN RELATIONS, *supra* note 3, at 84.

20. *See* Final Document, Conference on Terrorism and Political Crimes, 30, Syracuse, Sicily, 1973; INTERNATIONAL TERRORISM, *supra* note 2, at XII (attempting to distinguish between "legitimate rebellion and indiscriminate terror tactics"), *cited in* Skelding & Sternberg, *supra* note 13, at 171 n.213. *But see* V. WIJNGAERT, *supra* note 5, at 24 n.127 (noting that any terrorist act can be justified on political grounds).

This reevaluation generally involves an attempt to define terrorism. Nations have defined specific criminal acts as terrorism *per se. See* International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979), *reprinted in* 18 INT'L LEGAL MAT. 1456 (1979).

21. *See, e.g.*, Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227; Supplementary Treaty, June 25, 1985 (defining political offense to exclude aircraft highjacking, hostage taking, murder and kidnapping among others). Other treaties exclude genocide, apartheid, and drug offenses. *See Extradition Reform, supra* note 18, at 550.

22. *See* FOREIGN RELATIONS, *supra* note 3, at 86 (noting that this perception led to the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and to a general reappraisal of the political offense exception).

23. *See* E. EVANS, CALLING A TRUCE TO TERROR 97 (1979). A coalition of Arab, Asian, African and communist States opposed a 1972 Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, 27 U.N. GAOR, U.N. Doc. A/C.6/L.850 (1972), *reprinted in* 67 DEPT. OF STATE BULL. 431 (1972). The nations feared that "action against terrorism

view state-sponsored terrorism as the only effective method for overcoming threats to their national autonomy.[24] Finally, application of the political offense exception has lacked consistency, creating additional barriers to easy extradition.[25]

II. KIDNAPPING AS AN ALTERNATIVE TO EXTRADITION

A. *United States Law and Jurisdictional Barriers*

In light of the problems inherent in formal extradition procedures, kidnapping appears as an attractive, expedient alternative means of bringing terrorists to justice.[26] Nevertheless, some barriers to the use of kidnapping for such purposes do exist. Before it may criminally prosecute any individual the United States government must establish subject-matter and personal jurisdiction. United States courts have had little trouble finding that they possess jurisdiction over kidnapped offenders.

1. *Subject-Matter Jurisdiction*

The Government can establish subject-matter jurisdiction over alleged terrorists under several alternative theories. Subject-matter jurisdiction exists over non-resident aliens whose acts have deleterious effects within

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could potentially interfere with wars of national liberation." E. EVANS, *supra*, at 97. *See also* 1 FRIEDLANDER, *supra* note 16, at 45-46 n.110 (statement of Zendi Labib Terzi, the PLO's chief observer at the United Nations, that "[v]iolence is an essential part of a liberation movement.") (citing Kirk, *PLO's Mild-Mannered Aggressor,* Chicago Tribune, April 4, 1976, § 2 at 2, col. 4).

The United Nations has occasionally condoned terrorism in the context of national liberation movements. *See, e.g.,* Basic Principles of the Legal Status of the Combatants Struggling Against Criminal and Alien Domination and Racist Regimes, G.A. Res. 3103 (xxvii), 28 U.N. Doc. A/9102 (1973).

24. *See* 4 FRIEDLANDER, *supra* note 16, at 87 (noting that many states refuse to condemn state-sponsored terrorism when used as an anti-imperialist tool). *See also* E. EVANS, *supra* note 23, at 101 (arguing that terrorism is a political rather than humanitarian issue to many United Nation member states).

25. The decisions of United States courts demonstrate the sometimes arbitrary attempts to define the political offense exception. *Compare* In re Mackin, Mag. No. 80 Cr. Misc. (S.D.N.Y.) (refusing to extradite member of Irish Republican Army charged with planting a bomb that injured a British soldier at a bus station), *appeal denied,* 688 F.2d 122 (2d Cir. 1981) *with* Eain v. Wilkes, 641 F.2d 504 (7th Cir.) (allowing extradition of a member of the Palestinian Liberation Organization charged with planting a bomb in an Israeli market that killed or injured thirty-eight people), *cert. denied,* 454 U.S. 894 (1981).

These conflicting decisions provided the impetus for the introduction of several extradition reform bills in Congress. *See Extradition Reform Bills See the Light,* 6 Nat'l L.J., Dec. 12, 1983, at 14, col. 1.

26. *See* Post Dispatch, *supra* note 1. *See also Fighting Fire with Fire: The Extralegal War,* St. Louis Post-Dispatch, April 10, 1986, § B, at 2, col. 1.

the United States[27] or injure a national interest,[28] whether or not those acts are actually committed within the United States. In addition, United States courts possess penal jurisdiction when the alleged offender[29] or the victim of the offense[30] is a United States citizen. Finally, the perpetrators of certain offenses are considered universal enemies, which any nation has the right to prosecute.[31] These principles make a finding of subject-matter jurisdiction relatively perfunctory in most cases.

2. *Personal Jurisdiction*

In *Ker v. Illinois*,[32] the Supreme Court first considered the propriety of government-sanctioned kidnapping as a means to obtain personal jurisdiction. In *Ker*, the defendant committed a larceny in Illinois and fled to Peru. A United States messenger kidnapped the defendant and forcibly returned him to Illinois to stand trial.[33] The Court rejected Ker's claim that he had been denied due process of law.[34] The Court held that a fair trial in itself satisfies due process,[35] and "irregularities in the manner in which [the defendant] may be brought into the custody of the law" are insufficient to defeat jurisdiction.[36]

In *Frisbie v. Collins*,[37] the Court reaffirmed its *Ker* holding in the context of domestic kidnapping. Law enforcement agents kidnapped an alleged murderer in Chicago and returned him to Michigan to stand trial.[38] The Court found that personal jurisdiction existed despite the highly un-

27. This principle is known as "objective territoriality." *See* Note, *The Constitutional Rights of Non-Resident Aliens Prosecuted in the United States*, 3 FORDHAM INT'L L. FORUM, 221, 223 (1980). *See also* Abramovsky & Eagle, *supra* note 5, at 89, 96-97 n.90.

28. This principle is known as the "protective principle." *See* Note, *supra* note 27, at 223 n.17.

29. This principle is known as "nationality." *See* Abramovsky & Eagle, *supra* note 5, at 80 n.91-92.

30. This principle is known as the "passive personality" principle. *Id.* at 53 n.8.

31. This principle is known as "universality." Id. at 82 n.100.

32. 119 U.S. 436 (1889).

33. *Id.* at 438.

34. *Id.* at 442. Ker also alleged that his abduction violated the extradition treaty between the United States and Peru. The Court found that Ker had no rights under the treaty. *Id.*

35. *Id.* at 440.

36. *Id.* The Court formally incorporated the maxim mala captus, bene detentus—an illegal apprehension does not preclude jurisdiction—into American law. *See* Note, *Constitutional and International Kidnapping—Government Illegality as a Challenge to Jurisdiction*, 50 TUL. L. REV. 169, 171 (1975).

37. 342 U.S. 519 (1951), *reh'g denied*, 343 U.S. 937 (1952).

38. *Id.* at 520.

orthodox manner the state had used to bring the defendant to trial.[39]

In *United States v. Toscanino*,[40] the Second Circuit suggested that some limits to the *Ker-Frisbie* doctrine exist. American agents abducted Toscanino in Uruguay, transported him to Brazil, tortured him for three weeks, drugged him and flew him to the United States to stand trial for conspiring to import drugs.[41] The court noted that recent Supreme Court opinions had expanded the due process protections afforded criminal defendants.[42] The court concluded that the *Ker-Frisbie* doctrine could not be reconciled with this expansion, and due process "protects the accused against pretrial illegality by denying the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part."[43]

In the following year, however, the Second Circuit narrowed its *Toscanino* holding. In *United States ex rel. Lujan v. Gengler*,[44] the court held that, absent allegations of torture or brutality, abduction alone was insufficient to divest the court of jurisdiction.[45] The court recognized the existence of some limits on the *Ker-Frisbie* doctrine, but stated that it would tolerate some irregularity in the circumstances leading to an accused's presence in the jurisdiction.[46] The court restricted the application of *Toscanino* to instances of "shocking governmental conduct."[47] Thus, the *Ker-Frisbie* doctrine remains well entrenched in American jurisprudence, allowing courts to exercise personal jurisdiction despite unorthodox rendition.[48] Personal jurisdiction requirements, therefore, do

39. *Id.* at 522. The Court again held that due process is satisfied if the government apprises the defendant of the charges and the defendant receives a fair trial. *Id.*

40. 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974).

41. *Id.* at 270-71.

42. *Id.* at 275. *See* Rochin v. California, 342 U.S. 169 (1952). In *Rochin*, the Supreme Court broadened its due process interpretation and held inadmissible evidence obtained through an illegal search and seizure. *Id.* at 173. The *Rochin* holding cast some doubt on the continued validity of the *Ker-Frisbie* doctrine. *See* Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957).

43. 500 F.2d at 275. *See also* United States v. Edinous, 432 F.2d 577 (2d Cir. 1970) (questioning continued validity of *Ker-Frisbie* doctrine); Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n.2 (3d Cir. 1970) (noting that "the validity of the *Frisbie* doctrine had been seriously questioned because it condones illegal police conduct").

44. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

45. *Id.* at 66.

46. *Id.*

47. *Id.*

48. *See, e.g.*, United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (distinguishing *Toscanino* and finding jurisdiction because Chilean police, not United States agents, abducted and tortured the de-

not presently represent an obstacle to the kidnapping of terrorists.

B. International Agreements as Legal Barriers to State-Sponsored Kidnapping

Currently, United States courts refuse to find that extradition treaties and other international agreements permit individual defendants to object to the use of kidnapping as an alternative to extradition. In *United States v. Cordero,*[49] the First Circuit held that a criminal defendant lacks standing to challenge a violation of formal extradition procedures.[50] In *Cordero,* Panamanian officials seized the defendant at the behest of United States agent and returned him to Puerto Rico to stand trial for conspiracy to import cocaine.[51] The procedure employed differed significantly from the one provided by the United States-Panamanian extradition treaty.[52] Nevertheless, the court concluded that "extradition treaties are made for the benefit of the governments concerned," and a defendant has no right to complain of treaty violations.[53]

Similarly, in *Lujan,* the defendant claimed that his abduction violated the charters of the United Nations and Organization of American States.[54] The court stated that the provisions allegedly violated protect the sovereignty of nations and, in the absence of an objection by an offended state, a violation cannot occur.[55] The court distinguished *Toscanino,* in which the defendant had made a similar argument, on the ground that the offended state had itself condemned such methods of apprehension.[56] The *Lujan* court suggested that a defendant could suc-

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fendant); United States v. Herrera, 504 F.2d 859 (5th Cir.) (rejecting *Toscanino*), *cert. denied,* 421 U.S. 1001 (1975).

49. 668 F.2d 32 (1st Cir. 1982).

50. *Id.* at 37-38.

51. *Id.* at 32.

52. *Id.* at 37.

53. *Id.* at 37-38. The court also noted that nothing in the treaties required the countries to follow the procedures provided. *Id.* The defendant also sought to rely on *Toscanino.* The court, however, held that the *Toscanino* exception to the *Ker-Frisbie* doctrine applies only if there is egregious conduct by United States agents. *Id.* at 37.

54. 510 F.2d at 66. Both documents recognize territorial integrity as inviolable. *See* U.N. CHARTER art. 2, para. 5 (obligating members to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any State"); Charter of the Organization of American States, opened for signature April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361 at art. 17 ("the territory of a State is inviolable").

55. 510 F.2d at 67.

56. *Id.* The court noted that Lujan's failure to allege that either Argentina or Bolivia protested his abduction "is fatal to his reliance upon the charters." *Id.*

cessfully claim a defense based on a violation of international law if the offended state registered an official protest with the United States Department of State.[57] The court noted that even a treaty granting a specific benefit, such as fishing rights, allows redress only through the state.[58]

Thus, *Lujan* and *Condero* makes clear that current judicial interpretations of international agreements and extradition treaties accept kidnapping as a legal alternative to extradition.

III. OBJECTIONS TO THE LEGITIMACY OF GOVERNMENT-SPONSORED KIDNAPPING

Current judicial analyses of the legality of kidnapping as a means to acquire jurisdiction ignore five important arguments against the legitimacy of this practice. Arguably, courts attending to even one of these arguments would be forced to find that state-sponsored kidnapping, although effective, is not a legal alternative to extradition.

A. Legal Objections to Government-Sponsored Kidnapping

1. Avoidance of Extraordinary Measures

The first of these arguments arises from the legal principle that prohibits resort to extraordinary measures until ordinary means fail.[59] This principle would prohibit the use of kidnapping to obtain jurisdiction until extradition procedures have been attempted without success. Although this principle appears to bar the kidnapping of terrorists, the fact that the political offense exception makes extradition utterly futile in many situations limits the principle's applicability.[60]

2. Lawful Jurisdiction Must Flow From Lawful Means

Courts sanctioning kidnapping as a means to acquire personal jurisdiction also overlook the legal maxim that a lawful situation cannot arise

57. *Id.* at 67 n.8.

58. *Id.* (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1965)).

59. This principle is a direct translation of the Roman maxim, "*Nunquam decurritur ad extraordinarium sed ubi deficit ordinarium.*" *See* INTERNATIONAL TERRORISM, *supra* note 2, § 5-1.

60. *See supra* notes 14-16 and accompanying text.

from an unlawful one.[61] Thus, an illegal abduction cannot result in a valid assertion of personal jurisdiction. The force of this argument, as applied to state-sponsored kidnapping, depends upon whether abducting and transporting a person across national borders is technically illegal under international law.[62] American courts have refused to recognize international agreements as bars to personal jurisdiction in such cases.[63] Nevertheless ample authority exists for the proposition that such abductions are at least disfavored, if not prohibited, by customary international law. International abduction violates the sovereignty and territorial integrity of the asylum state, thus contravening a fundamental tenet of customary international law.[64] The United Nations has codified this principle of customary international law and specifically condemns kidnapping.[65]

3. *Implications from International Law*

The third objection to the use of international kidnapping to acquire jurisdiction follows from the second. The United States, as a member of the United Nations and a dominant world power, presumably has a responsibility to respect the sovereignty of other nations and abide by the tenets of customary international law.[66] If United States courts should

61. This principle is based on the Roman legal maxim, "*ex injuria ius non oritur.*" *See* INTERNATIONAL TERRORISM, *supra* note 2, at § 5-1.

While most legal scholars disapprove of courts asserting jurisdiction obtained through illegal means there is not apparent judicial trend toward abolishing the practice. *See, e.g.*, *id.* at V § 4-18; V. WIJNGAERT, *supra* note 5, at 61.

62. *See infra* note 65 and accompanying text.

63. *See supra* notes 49-58 and accompanying text.

64. *See* I. SHEARER, *supra* note 9, at 75 ("abduction is such a manifestly extralegal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition in securing custody of fugitive offenders.") Even United States courts have found that international abduction violates a "long-standing principle of international law," territorial integrity. *See Toscanino*, 500 F.2d at 277-78.

65. The best-known United Nations condemnation of kidnapping was a resolution issued on the abduction of Adolph Eichmann, an accused Nazi war criminal. Israel sent "volunteers" to Argentina to kidnap Eichmann and bring him back to Israel to stand trial for his alleged war crimes. Eichmann was kidnapped, tried, convicted, and hung in Israel. Argentina protested the kidnapping as violative of its sovereignty. The United Nations Security Council condemned kidnapping and said the practice would only create an atmosphere of insecurity and distrust which is incompatible with world peace. *See* 15 U.N. SCOR (868th mtg.) 1, U.N. Doc. s/p.v. 868 (1960).

66. The United Nations Charter (Department of State, Treaties in Force 402-03 (1973)) obligates all members "to refrain . . . from the threat or use of force against the territorial integrity or political independence of any State . . . ." U.N. CHARTER art. 2, para. 5.

The United States is also a member of the Organization of American States (O.A.S.). The O.A.S. Charter (Department of State, Treaties in Force 359 (1973)) provides that "the territory of a State is

hold, in light of this responsibility, that international kidnapping violates international law, they must then determine the extent to which federal law incorporates international law.[67] The Supreme Court some eighty years ago in *The Paquette Habana*,[68] held that customary international law governs unless preempted by a contrary federal statute. No federal statute recognizes kidnapping as a legal alternative to extradition nor has the validity of the Supreme Court holding ever been questioned. Consequently, American courts should incorporate the international-law prohibition on kidnapping into our national jurisprudence.

B. Policy Objections to Government-Sponsored Kidnapping

1. Human Rights Concerns

Courts accepting the legitimacy of international kidnapping also ignore the increased focus on human rights in the world and domestic arenas, which demands a broader definition of individual due process rights. American courts, although recognizing constitutional due process guarantees in international kidnapping cases, largely overlook internationally protected human rights.[69] The United Nations Charter,[70] the Universal Declaration of Human Rights,[71] and various multilateral treaties[72] all

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inviolable, it may not be the object even temporarily, . . . of . . . measures of force taken by another State, directly or indirectly, on any grounds whatever . . . ." *See* Charter of the Organization of American States, opened for signature, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361 at art. 17.

67. Even if international kidnapping violates international law, American courts need not incorporate international legal standards unless the Supreme Court so mandates. Treaties, however, are constitutionally incorporated into federal law. U.S. CONST., art. VI, § 2.

68. 175 U.S. 677 (1900). The Supreme Court stated:

> International law is part of our law, and must be ascertained and administered by the Courts of justice of appropriate jurisdiction, as often questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

Id. at 700.

69. *See supra* notes 32-48 and accompanying text.

70. U.N. Charter art. 1(3), 13(1)(b), 55(c), 62(2) (provisions specifically referring to respect for human rights as an international State obligation). *See generally* M. BASSIOUNI, *supra* note 9, at V § 5-1 (discussing state responsibility under human rights provisions).

71. G.A. Res. 217 A (III), 10 Dec. 1948 (guaranteeing "the right to life, liberty, and the security of persons").

72. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), Dec. 16, 1966 (guaranteeing right to liberty and freedom of person for citizens and aliens); the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 262; The InterAmerican Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records Serv. XVI/1.1 Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

guarantee universal respect for human rights and fundamental freedoms. These rights include "the right to life, liberty, and security of persons" and freedom from "arbitrary arrest, detention or exile."[73] Even where international charters, agreements and treaties do not explicitly ensure due process rights, courts should interpret human rights provisions in these documents as implicit guarantees of such rights. Although courts have refused to recognize private causes of action based upon international law,[74] they should extend these implicit due process protections to individual defendants who are subject to state prosecution. Courts should view such protections as self-executing components of international agreements.

2. *Respect for Territorial Sovereignty*

The failure of courts ruling on the validity of international kidnapping to consider such acts as possible affronts to territorial sovereignty is egregious and potentially dangerous. Respect for territorial sovereignty is crucial to the maintenance of world order, and disregard for the territorial integrity of other nations invites disregard for our own sovereignty and the rights of our citizens.

Courts should interpret international agreements and treaties that recognize the inviolate territorial sovereignty of the party nations as implicit prohibitions against actions, such as kidnapping, which fail to respect that sovereignty.[75] At a minimum, courts should place the burden on the prosecuting government to prove acquiesence by the asylum nation amounting to compliance with international law.[76] In the absence of such proof, courts should refuse to exercise jurisdiction.

Such an approach to international law would encourage the government to pursue ordinary extradition means before resorting to the extraordinary. In addition, such an approach would encourage international agreements and treaties. Countries desiring the United States to hold their sovereignty involate could further that desire through treaty provisions or international accords. Moreover, this approach

73. *See* U.N. CHARTER arts. 3 & 9.

74. *See supra* notes 49-58 and accompanying text. *See also* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th Cir. 1985) (noting that the human rights provisions of the U.N. Charter do not provide a basis for a private lawsuit).

75. The court in *Lujan* suggested that an objection by the violated state would have allowed the court to find a violation of international law. 510 F.2d at 67.

76. *See id.* In *Lujan* the court noted that "consent or acquiesence by the offended state . . . heals any violation of international law." *Id.*

strikes a balance between the need to respect world order and territorial sovereignty and the need to bring alleged terrorists to justice. Although terrorists have attempted to manipulate the extradition process, United States courts should not recognize lawful jurisdiction obtained through unlawful means.

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