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English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After *Alvarez-Machain*

Paul Michell*

I. Transnational Forcible Abduction and the Role of Domestic Courts in the International Legal Order

A. Introduction

May a domestic court try an individual who has been abducted from abroad and brought before it in violation of international law? The traditional Anglo-American rule is that it must, denying the court supervisory jurisdiction over unlawful executive conduct. This controversial doctrine, encapsulated in the maxim *male captus bene detentus,¹* has recently been revisited in both the United States and the United Kingdom, but with starkly different results. In *United States v. Alvarez-Machain,* the U.S. Supreme Court reaffirmed the traditional rule in holding that a Mexican citizen, abducted from Mexico by U.S. agents to face trial in a federal court in California, could not challenge the court's jurisdiction based on the illegality of the arrest.²

Only a year later, the United Kingdom's House of Lords emphatically rejected the *male captus bene detentus* rule in *Regina v. Horseferry Road Magistrates' Court (Ex parte Bennett).*³ The Law Lords held that a New Zealand citizen, forcibly returned to England from South Africa, could obtain a stay of the criminal proceedings against him in England. In a subsequent decision, *In re Schmidt,*⁴ the House of Lords clarified the position it had taken in *Bennett II* by considering the neglected but important question of whether an individual can challenge extradition proceedings against him on the basis that he was brought illegally into the jurisdiction seeking to extradite him. The divergence of opinion between the U.S. Supreme Court and the House of Lords requires some explanation.

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¹. This maxim translates as "improperly caught, well detained."


The domestic legal effects of transnational forcible abduction have engendered considerable academic activity. The controversial Alvarez-Machain decision has been the subject of extensive commentary, the majority of which has been hostile, although it has not been without its support-


While Alvarez-Machain may be a deeply flawed decision, the onus is upon those who disagree with its reasoning to offer realistic alternatives for the regulation of transnational forcible abduction, rather than merely issuing blanket condemnations. In Bennett II and Schmidt II—decisions which have received little attention outside of the United Kingdom—the House of Lords has progressed somewhat toward achieving this goal. This Article builds in part upon that foundation and provides an alternative account of the role and responsibility of domestic courts when an individual has been brought before them by way of a transnational forcible abduction.

This section provides a brief introduction to the nature of the problem of transnational forcible abduction. Section II considers the origin and development of the male captus bene detentus rule in the United States up to the leading case, Alvarez-Machain. It also examines the status of transnational forcible abduction in public international law. Section II then explores the possibility of establishing a customary norm requiring the return of an abducted individual upon the protest and request of the injured state. Furthermore, it suggests that domestic courts, and not the executive, are best placed to ensure that the international legal obligations of states with regard to transnational forcible abduction are fulfilled.

Section III contends that transnational forcible abduction is unlawful under international human rights law and considers some domestic impli-

Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined, 30 COLUM. J. TRANS- 
MAT'L. L. 513 (1992); Jacques Semmelman, Case Comment, 86 AM. J. INT'L. L. 811 (1992); 
Brigitte Stern, L'Extraterritorialité Revisitée, 38 ANN. FR. DE DR. INT'L. 239 (1992); 
Jonathan A. Gluck, Note, The Customary International Law of State-Sponsored Interna-

7. For positive treatments of Alvarez-Machain, see Jimmy Gurule, Terrorism, Territo-
rial Sovereignty, and the Forcible Apprehension of International Criminals Abroad, 17 HAS-
tnings INT'L & COMP. L. REV. 457 (1994); Malvina Halberstam, Agora: International 

8. See David H. Herrold, Note, A New, Emerging World Order: Reflections of Tradition 
and Progression Through the Eyes of Two Courts, 2 TULSA J. COMP. & INT'L. L. 143 (1994). 
On Bennett II, see Andrew L.-T. Choo, International Kidnapping, Disguised 
Extradition and Abuse of Process, 57 MOD. L. REV. 626 (1994); Vaughan Lowe, Circum-
venting Extradition Procedures is an Abuse of Process, 52 CAMBRIDGE L. J. 371 (1993); 
Susan Nash, Abduction and Extradition, 144 New L.J. 1235 (1994); G. Ossman, The Doc-
trine of Abuse of Process of the Court: Its Impact on the Principles of Extradition Without a 

9. On the use of the term "injured state," see Draft Articles on State Responsibility, 
[1985] 2 (pt. 2) Y.B. INT'L. L. COMN'T. 24, 25 (Article 5 of the draft defines an injured 
State as "any State a right of which is infringed by the [internationally wrongful] act of 
another State.").
cations of this international illegality. With this foundation, Section IV contrasts the U.S. rule with the history and present status of the Commonwealth rule. Courts in New Zealand, Australia, South Africa, Canada, and the United Kingdom have distanced themselves from the traditional rule to which U.S. courts still cling. The emerging Commonwealth rule is more faithful to public international law and international human rights law, as well as more consonant with domestic law. Finally, Section V sets out a framework that a domestic court should follow when an individual has been brought before it through forcible abduction from another state.

In conclusion, the Article maintains that a domestic court is under a duty to refuse to allow a trial to proceed where an individual has been brought before it in violation of international law. In this manner, domestic courts must regard themselves as agents of the international legal order and must not abdicate the responsibility for ensuring that domestic criminal law procedures comply with international legal norms.11

The concept of domestic courts acting as agents of the international legal system must not be misunderstood. This Article does not propose that domestic courts, in adjudicating transnational forcible abduction cases, should consider themselves beholden to some indeterminate, woolly entity called "the international legal system." Domestic courts are constituted by, and responsible to, domestic law. In general, where international legal norms and domestic legal norms differ, domestic courts are bound to follow the latter.

Yet matters are rarely so simple. Only infrequently are international norms and domestic norms obviously opposed. The boundary separating domestic and international law is, in many cases, a porous one. International law, whether conventional or customary, may enter or influence domestic law, whether statutory or common law, in various forms. Some of these forms are familiar, such as international conventions directly incorporated into domestic law by domestic legislation. Others are less familiar, particularly the potential influence of customary international law and unincorporated international human rights law upon domestic legal norms. Indeed, the familiarity of many courts with incorporated treaties fuels their contempt for the more nuanced ways in which international law can affect domestic law. More attention to the mechanics of the proposed model will be made below; it suffices here only to emphasize that the issue is complex.

This Article advances the specific argument that courts adjudicating transnational forcible abduction cases should consider customary interna-
tional law and international human rights law when structuring and interpreting domestic constitutional, statutory and common law doctrines, so as to render decisions which vindicate both international and domestic norms. In particular, international legal norms provide useful guidelines by which the domestic abuse of process doctrine may be structured and exercised in transnational forcible abduction cases. In this way, domestic courts act as agents of the international legal system by ensuring that international legal norms are, so far as possible, used to inform domestic common law doctrine.

This Article also establishes a framework within which domestic courts may determine jurisdictional issues concerning abducted individuals. In deciding whether to exercise jurisdiction over an abducted individual, a domestic court must take into account three factors. First, it must consider the public international law status of the abduction; specifically, whether there has been a breach of the territorial sovereignty of another state, of a treaty obligation, or of human rights obligations owed to another state. Second, it must look to both international human rights law and the domestic constitutional rights of the abducted individual. Finally, its decision must be guided by reference to international rule of law values and a concern for the protection of the court's process. Domestic conceptions of abuse of process, therefore, must be informed by international law.

When faced with a fugitive who has been abducted from abroad and brought before it for trial, a domestic court must consider the rule of law. The term "rule of law" has often been abused, so it must be carefully defined. The rule of law is not only formal in nature, but has important substantive elements as well. It is used in this Article to describe three related concepts. The first is a traditional concern with the prevention of executive unlawfulness under domestic law. Simply put, the courts must be prepared to exercise judicial review to ensure that the domestic executive acts according to the ordinary law of the land. The second strand of the rule of law embodies a concern that the domestic authorities comply with international legal norms. This element of the rule of law is the one most directly connected with the proposal that domestic courts must take more seriously their rule as agents of the international legal system. The third component of the rule of law relates to the concern domestic courts should display in ensuring that the domestic executive does not violate individual human rights, derived as they are from both international and domestic law.

These three elements of the rule of law, though conceptually distinct (and often treated as such by the courts), are closely connected in practice. A breach of international human rights norms may be a violation of domestic law, and vice versa. Where the domestic executive observes international legal norms, a healthy respect for both international human rights and domestic law is the likely result. Justice Steyn of the Appellate Divi-

cision of the Supreme Court of South Africa recognized the links between these three ideas in *State v. Ebrahim*, when he referred to the fundamental legal principles of the preservation and promotion of human rights, friendly international relations and the sound administration of justice. Justice Stevens, dissenting in *Alvarez-Machain*, adopted a similar approach. Respect for one of the three principles normally entails observance of the others.

B. Transnational Forcible Abduction: Why and How?
The process of returning a fugitive from one state to another is generically described as “rendition.” Rendition may be subdivided into three categories: extradition, deportation, and abduction. States resort to transnational forcible abduction because bringing fugitives to trial is a difficult business. The ease of international travel makes it relatively simple for an individual to escape from a state's prosecuting authorities by fleeing abroad. Once abroad, the obstacles to the return and prosecution of a fugitive are numerous. The usual method of securing the fugitive’s presence for trial is through extradition, either by treaty or through reciprocity. A state seeking to prosecute a fugitive who has fled to another state may request that the asylum state either extradite him or prosecute him domestically. However, in the absence of an extradition treaty, the asylum state

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15. “Fugitive” is a convenient, if at times misleading, shorthand. Its use is not intended to imply that the individual is necessarily guilty of an offense (although he may be), or that he has actually fled from one state to another and is thus a “fugitive” from the former (although this is common enough). For the purposes of this Article, a “fugitive” is an individual sought by the abducting state for the purpose of charging him with criminal offenses, or punishment for a conviction previously entered. See Extradition Act, R.S.C. ch. E-23, § 2 (1985) (Can.). Situations where states intervene to evacuate their own nationals from another state (e.g., the 1976 Entebbe rescue) are thus excluded because there the intent is protection rather than prosecution. Generally, a state is unlikely to abduct an individual from abroad unless it intends to try him for criminal offenses under its own domestic law. However, an individual could be abducted or induced to leave state X to state Y with the intention of extraditing him to state Z. See *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989), aff’d, 910 F.2d 1063 (2d Cir. 1990), *stay denied*, 111 S. Ct. 23 (1990) (irregular rendition from Venezuela to United States for extradition to Israel); *Schmidt II*, [1995] 1 App. Cas. at 343-45 (Eng. H.L. 1994) (fugitive lured from Ireland to England to be extradited to Germany); Liang-siriprasert v. United States, [1991] 1 App. Cas. 225, 231 (P.C.) (appeal taken from Hong Kong) (individuals lured from Thailand to Hong Kong to be extradited to the United States); *Bozano v. France*, 9 Eur. H.R. Rep. 297 (1987) (Eur. Ct. H.R.) (rendition from France to Switzerland for extradition to Italy).


is under no international legal obligation to either extradite or prosecute a fugitive.\textsuperscript{18}

Even the existence of an extradition treaty between the requesting state and the asylum state is no guarantee of successful recovery of a fugitive. Several barriers may prevent the return of a fugitive from abroad through the extradition process. First, the asylum state may decline to extradite a fugitive if it views the offense with which he has been charged as political in nature.\textsuperscript{19} Second, many states refuse to extradite their own nationals for offenses committed abroad.\textsuperscript{20} Third, there is a requirement of double criminality.\textsuperscript{21} Most extradition treaties provide that extradition is available only for certain specified offenses. Finally, the extradition process can be painfully slow.\textsuperscript{22} Faced with a foreign state's reluctance to extradite a fugitive, other options may appear more attractive to the requesting state, including the forcible abduction of the fugitive from abroad to face trial.

A transnational forcible abduction consists of four elements. This Article focuses upon transnational forcible abductions with the understanding that each of these four elements is present, while recognizing that cases may stray from this paradigm. By setting out guidelines for the model case, a solution for less clear cases may be derived by analogy.

The first element of a transnational forcible abduction requires there to be a fugitive, an individual suspected (or already convicted) of having


\textsuperscript{19} For an in-depth analysis of this defense, see Christine Van den Wijngaert, The Political Offense Exception to Extradition (1980).

\textsuperscript{20} Ian Brownlie, Principles of Public International Law 317 (4th ed. 1990); Ivan A. Shearer, Extradition in International Law 94-96 (1971). States which do not extradite their nationals usually prosecute on the basis of the nationality principle. Therefore, even though the fugitive is not extradited, he may be prosecuted under the laws of the asylum state. A state's willingness to extradite its nationals tends to vary directly with the scope of the adjudicative competence which it claims under the nationality principle. José Francisco Rezek, Reciprocity as a Basis of Extradition, 52 Brit. Y.B. Int'l L. 171, 184-85 (1981).

\textsuperscript{21} It is a common treaty provision that the offense for which the fugitive is sought must be a criminal offense in both states. United States v. Lépine, 1 S.C.R. 286, 297 (Can. 1994).

\textsuperscript{22} Cardozo, supra note 5, at 128-32.
committed a criminal offense in one state, who has fled to another state. The nationality of the fugitive is unimportant. The only requirement is that the fugitive be physically present in one state and be sought by the authorities of another state. The second substantive element is that the fugitive must have been abducted by force. A state may also use the threat of force or similar sanctions in order the secure the presence of a fugitive within its jurisdiction. Third, there must be an aspect of extraterritorial enforcement by the abducting state. The abducting state must have acted outside its own territory. The fourth element requires that the abduction has been carried out by state agents, either state employees or private individuals working under state direction.

Transnational forcible abduction must be distinguished from the prac-

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tice of "disguised extradition," with which it has some similarities. Disguised extradition occurs when an individual is deported by state X to state Y, state Y seeks his return for prosecution, and state X deports the individual in order to bypass the regular extradition process between the two states. Extradition and deportation are conceptually distinct procedures with different purposes. The purpose of deportation is to expel unwanted immigrants. In theory, a state which deports an individual has no preference as to her destination—it simply wants her to leave. Extradition, by contrast, is concerned with the transfer of an individual to a specific foreign state so that she may be prosecuted there for specified offenses. There are a number of other important distinctions between extradition and deportation. Only aliens may be deported, whereas a state may extradite both aliens and nationals. Further, extradition arises from the request of a foreign state, whereas deportation is in theory a unilateral act of the deporting state. Finally, disguised extradition by way of deportation necessarily involves the consent and participation of the officials of the deporting state, whereas a transnational forcible abduction may or may not.

Deportation to a specific foreign state may give rise to the suspicion that "disguised extradition" is taking place, thus depriving the individual of the procedural protections inherent to formal extradition proceedings. Deportation decisions, which are themselves subject to controls in both domestic and international law, cannot be made in a vacuum. An individual who is to be deported must be deported to some other state, and in many cases only one or two states may be willing to accept the deportee. The receiving state may wish to press criminal charges against the individual.

Although the problem is worthy of concern, the term "disguised extradition" should not be used too broadly. The mere fact that an individual has been deported from state X to state Y, and Y seeks to prosecute him, is neither inherently objectionable nor a violation of international law. It


only becomes objectionable when $X$ deports the individual to $Y$ with the intent of circumventing extradition proceedings, or perhaps where extradition would ordinarily be unavailable. The key question involves the circumvention of extradition procedures by means of deportation. This Article argues that rendition which circumvents an extradition treaty violates both international and domestic law, and that the appropriate remedy for the violation is a stay of the proceedings against the fugitive and his return to the injured state.

The following sections survey the origin and development of the *male captus bene detentus* doctrine, under which courts do not question how the accused came to be physically before them. Traditionally, the rationale underlying the *male captus bene detentus* principle has been threefold. First, the rule satisfies domestic due process guarantees. According to this view, a criminal defendant is entitled only to a fair trial, and forcible abduction does not affect the fairness of the trial itself. Second, there is a strong public interest in the prosecution of crime. The rule ensures that alleged offenders are brought to trial. Finally, the judiciary traditionally has held the view that courts are not the appropriate forum to adjudicate alleged violations of public international law by the executive. Instead, courts have adopted the position that any difficulties arising from an irregular arrest are best resolved diplomatically.

The *male captus bene detentus* doctrine faces severe challenges, however, from domestic constitutional norms as well as international human rights instruments. Developments in domestic and international human rights protection weaken the due process rationales underpinning the doctrine. The doctrine's second rationale is challenged by the development of a supervisory jurisdiction over executive lawlessness by federal courts and the need to protect the process of the courts from abuse. The third justification is undermined by the argument that domestic courts are under an obligation to follow certain international norms.

This Article assumes that as a matter of international law domestic courts must ensure that a state's international legal obligations are carried out. Accordingly, courts are under a duty to stay proceedings against a fugitive who has been brought before them in violation of international law. The existence of this duty is the central issue in the cases which follow. However, the discussion of this duty takes several forms and can lead to confusion. Most U.S. cases, and many of the earlier English decisions,
discuss the duty in terms of whether the domestic court may exercise jurisdiction over the fugitive. American courts traditionally have held that the manner in which an individual is brought before them does not affect their ability to exercise jurisdiction over him. They have also assumed that once jurisdiction is established over an individual it may not be displaced by other considerations.

Conversely, more recent Commonwealth decisions distinguish between the court’s formal jurisdiction to try the defendant, which they do not deny is present in cases of transnational abduction, and its discretion to stay charges against the defendant. These courts are essentially asking whether they have a duty to prevent the trial from proceeding. The true issue is not whether the court has jurisdiction over the defendant, but rather, given the existence of this jurisdiction, should the court allow the trial to proceed? The resolution of the first issue does not determine the second. Regrettably, most of the U.S. jurisprudence does not distinguish between the two questions.

II. The Male Captus Bene Detentus Rule in the United States

A. Origin of the American Rule: Ker v. Illinois

The American variant of the male captus bene detentus rule originated in Ker v. Illinois. Ker committed larceny in Illinois and fled to Peru. A warrant for his arrest was issued to a messenger, Julian, who was entrusted with bringing it to the Peruvian authorities so that Ker might be extradited back to the United States. Julian arrived in Peru, but took it upon himself to abduct Ker and return him to Illinois to stand trial instead of going to the Peruvian authorities. The U.S. Supreme Court affirmed Ker's conviction by the trial court, rejecting Ker's argument that his arrest and forcible return to Illinois had deprived him of due process of law. Ker argued unsuccessfully that by virtue of the U.S.-Peru Extradition Convention he had a right of asylum which he could assert to prevent the Illinois court from exercising jurisdiction over him. The Court also rejected Ker's argument that his kidnapping violated the Convention, ruling that Ker

29. 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.9(a) (2d ed. 1987).
30. Mann, supra note 5, at 414.
32. Id. at 437.
33. Id. at 438. See Extradition Convention, Sept. 12, 1870, U.S.-Peru, T.S. No. 283, at 1427.
34. Ker, 119 U.S. at 438. It has been suggested that the warrant was never served to the Peruvian authorities because there was no functioning Peruvian government in Lima due to a war with Chile. Charles Fairman, Ker v. Illinois Revisited, 47 Am. J. Int'l L. 678, 685-86 (1953). Moreover, with no functioning government in Peru to protest, there may have been no international illegality in this case. Id. at 686.
35. Ker, 119 U.S. at 437.
36. Id. at 440.
37. Id. at 441.
38. Id.
could not invoke the protection of the Convention because his rendition to the United States was entirely outside its scope.\textsuperscript{39} The Illinois court's jurisdiction over Ker was unaffected by the fact that his presence before it had been obtained by means of forcible abduction.\textsuperscript{40}

While Ker is often cited in support of the assertion that the illegal arrest of a defendant is no bar to a court's ability to exercise criminal jurisdiction over him,\textsuperscript{41} there is little support for such an interpretation in the case itself. Ker's limitations should be noted. First, the kidnapping was not government-sponsored.\textsuperscript{42} As such, it was not attributable to the United States, no state responsibility arose, and the abduction did not violate customary international law. Second, the lack of a functioning Peruvian government made regular channels of extradition inoperative, and thus the Extradition Convention was not given full consideration. It also prevented Peru from protesting the abduction and requesting Ker's return. Finally, Ker was based upon an 1886 conception of due process, requiring only a fair indictment and trial. Later developments in due process call into question Ker's continuing authority.

B. Limiting Ker's Scope: \textit{United States v. Rauscher}

In \textit{United States v. Rauscher},\textsuperscript{43} decided on the same day as Ker, the Supreme Court held that a fugitive extradited to the United States under an extradition treaty is entitled to the procedural protections contained in the treaty. A violation of the treaty by the requesting state enables a fugitive to challenge criminal proceedings against him in the requesting state.\textsuperscript{44} Rauscher had been extradited from Great Britain under the Webster-Ashburton Treaty on a charge of murder,\textsuperscript{45} but upon his arrival in New York he was charged with the separate offense of inflicting cruel and unusual punishment upon a crew member. The Supreme Court held that Rauscher could not be charged with this latter offense even though the evidence presented in Great Britain during the extradition proceedings for murder likely would have supported extradition for this new charge. Although there was no evidence of a British protest, the Court held that the "specialty principle" applied, according to which the fugitive could not be tried for an offense other than that for which he was extradited to the United States.\textsuperscript{46}

The specialty principle limits the jurisdiction of domestic courts, preventing the exercise of jurisdiction which would sanction the breach of

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 444.
\textsuperscript{42} Ker, 119 U.S. at 443.
\textsuperscript{43} United States v. Rauscher, 119 U.S. 407 (1886).
\textsuperscript{44} Id. at 430-31.
\textsuperscript{46} Rauscher, 119 U.S. at 430.
an extradition treaty. The Rauscher Court derived the specialty principle from customary international law and read it into the Treaty. The fugitive could advance a defense grounded in a violation of the Webster-Ashburton Treaty even though the extraditing state had not protested. The Court in Rauscher operated within a statist framework in holding that the controlling treaty was the source of any rights possessed by the fugitive. Rauscher's focus on the treaty as the primary source of the rights of the fugitive, while initially protective of fugitives, exercised an unfortunate influence on the development of the law governing forcible abduction. In retrospect, it inhibited the subsequent evolution of a broader approach to the problem of transnational forcible abduction.

However, the Ker Court ruled that the doctrine of specialty—and thus by analogy any other procedural considerations contained in an extradition treaty—did not apply where the fugitive was not returned to the United States under color of an extradition treaty. It is difficult to reconcile Rauscher with Ker. Rauscher is based on the assertion that the specialty principle ensures respect for treaties: pacta sunt servanda. Considerations of good faith require that a state not prosecute a fugitive, over whom jurisdiction was gained via an extradition treaty, for a criminal offense other than that for which he was extradited.

Moreover, Rauscher suggests that the best way to ensure fidelity to extradition treaties is not to leave treaty breaches to diplomatic resolution, but instead to allow a fugitive to raise any breach as a barrier to his prosecution in the requesting state. These considerations should have applied


48. Even opponents of Alvarez-Machain acknowledge that Rauscher is as unsteady as Ker, and criticize the Court's derivation of the specialty principle from weak evidence of state practice. See Bush, supra note 6, at 946. See generally Semmelman, supra note 47.

49. But see Rauscher, 119 U.S. at 435-36 (Waite, C.J., dissenting) (arguing that only the extraditing state may protest and that the fugitive's rights under the treaty are purely derivative).

50. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 8 I.L.M. 679 (hereinafter VCLT) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

51. O'Higgins, Unlawful Seizure of Persons by States, supra note 5, at 301. Neither may the requesting state re-extradite the fugitive to a third state without the express consent of the requested state, where to do so would violate a procedural provision of an applicable extradition treaty. United States ex rel. Donnelly v. Mulligan, 74 F.2d 220 (2d Cir. 1934). A similar rule is expressly contained in many extradition treaties. E.g., European Convention on Extradition, Dec. 13, 1957, art. 15, 359 U.N.T.S. 273. This re-extradition rule is itself closely linked to the specialty rule. Viera, supra note 18, at 298.

52. A similar argument might apply to a case in which extradition has been granted on the basis of a fraudulent application by the requesting state. But see United States v. Peltier, 585 F.2d 314, 334-35 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1978). In Peltier, the defendant, extradited from Canada to the United States to face murder
equally to Ker. Good faith surely requires that states not violate each other's territorial sovereignty by way of abduction. A duty in international law is no less weighty if it arises through custom than if it arises as a treaty obligation. Furthermore, there is no principled reason as to why a domestic court should grant broader procedural protections to a fugitive brought before it under an extradition treaty than to a fugitive who has been illegally abducted. Indeed, an abducted fugitive is particularly in need of procedural protection.

Rauscher undermines Ker's putative guiding principle—that a court will not inquire as to how an accused came before it. Under Rauscher, courts will inquire as to the means by which an extradited fugitive was delivered to trial, and whether these means were consistent with the controlling extradition treaty. Despite this contrast, Ker continued to be applied in a boilerplate fashion in later cases involving transnational abductions as well as domestic abductions and non-abduction cases.

charges, argued that the U.S. extradition application consisted of false affidavits. Therefore, his presence in the United States was secured in violation of the Canada-U.S. Extradition Treaty, and the court did not possess jurisdiction over him according to the Rauscher principle. The court rejected this argument on the ground that he had not been extradited on the basis of the affidavits alone. Id. See also United States v. Levy, 25 F.3d 146, 159 (2d Cir. 1994).

53. *Draft Articles on State Responsibility*, [1979] 2 (pt. 1) Y.B. Int'l L. COMM'N 91, 92 (article 17). Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994); Fairman, *supra* note 34, at 679. The answer may lie in the fact that treaties become U.S. law directly, whereas the role of custom in U.S. law is more controversial. See The Paquete Habana, 175 U.S. 677 (1900) (holding that international law is federal law unless superseded by statute or controlling executive act or judicial decision). This different rule of reception of the elements of public international law into domestic law may affect domestic courts' perception of the limits of their own powers.


54. See Adams v. New York, 192 U.S. 585, 592 (1904) ("The law does not concern itself with the method whereby a criminal is brought to the bar . . ."); In re Johnson, 162 U.S. at 125 ("[I]n criminal cases, a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense . . ."); Mahon v. Justice, 127 U.S. 700, 708 (1888) ("The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it.").

55. See Johnson v. Brown, 205 U.S. 309 (1907). The defendant in Johnson was convicted of conspiracy in the United States and fled to Canada. The U.S. extradition request was refused because the offense of conspiracy was not an extradition crime under the Canada-U.S. Treaty. The United States amended the request and the defendant was extradited. The United States then brought proceedings against the defendant under the initial conspiracy charge. Violation of the treaty provision entitled the defendant to challenge the proceedings against him. Id. at 309-12.

56. In one such case, Salvadoran defendants were granted asylum on a U.S. vessel, but were subsequently refused permission to leave. When the vessel returned to the United States they were served with arrest warrants. The court held that their "abduction" to the United States did not displace its jurisdiction, and the defendants could not
However, a close reading of these subsequent cases suggests that the Ker doctrine is not as broad as it might first appear, and that it may only apply to domestic abductions. The Rauscher limitation upon the Ker doctrine was reinforced in Cook v. United States, one of a series of cases which defined the extent of U.S. law enforcement interdiction powers during the Prohibition era. Britain and the United States had agreed by treaty that each state could search the other's vessels outside their territorial limits but within one hour's sailing time from their respective coasts. In Cook the U.S. Coast Guard seized a British vessel carrying liquor 11.5 miles off the U.S. coast. The master of the vessel was charged with smuggling offenses, but claimed that the seizure was illegal because it was made on the high seas. The vessel had been seized not only outside the three-mile limit, but also outside the sailing-time limit established by the treaty. The United States thus had no resist extradition to El Salvador. In re Ezeta, 62 F. 964 (N.D. Cal. 1894). However, the defendants later avoided extradition on the basis of the political offense exception. In re Ezeta, 62 F. 972 (N.D. Cal. 1894). See also The Kidnapping of Antonio Martinez, 2 Foreign Rel. U.S. 1121 (1906). In Martinez, the defendant was kidnapped from Mexico and delivered to U.S. authorities. The United States later extradited the kidnapper to Mexico. Mexico protested the abduction, but the United States said that the case was governed by Ker, and that the executive could not interfere with federal judicial proceedings. Id. See also Ex parte Wilson, 140 S.W. 98 (Tex. Crim. 1911). In Wilson, the defendant was brought from Mexico to the United States by Mexican officers. The court concluded that the U.S. arrest was valid, but if it were shown that U.S. officers had been parties to "the illegal conduct of the citizens of Mexico, a different question might be presented." Id. at 99. For further commentary, see Charles C. Hyde, Notes on the Extradition Treaties of the United States, 8 Am. J. Int'l L. 487, 499-501 (1914). 57. See Cook v. Hart, 146 U.S. 183 (1893) (Wisconsin court had proper jurisdiction over defendant forcibly brought from Illinois); Pettibone v. Nichols, 203 U.S. 192 (1906) (federal court could not discharge defendant brought from Colorado to Idaho). 58. See In re Johnson, 162 U.S. 120 (1896) (domestic case, no abduction); Adams v. New York, 192 U.S. 585 (1904) (domestic illegally-acquired evidence case). 59. Mahon v. Justice, 129 U.S. 700 (1887) (in domestic interstate abduction, the court's jurisdiction is unaffected by the manner in which the accused is brought before it). But see id. at 715 (Bradley and Harlan JJ., dissenting) (suggesting that Ker applies only where there is no extradition treaty). 60. Lascelles v. Georgia, 148 U.S. 537 (1893) (holding specialty principle inapplicable to interstate rendition and suggesting that Ker rule is inapplicable to international rendition). 61. Cook v. United States, 288 U.S. 102 (1932). 62. See Ford v. United States, 273 U.S. 593 (1927); Cunard Steamship Co. v. Mellon, 262 U.S. 100 (1923). These cases are discussed in 2 Daniel P. O'Connell, The International Law of the Sea 1049-52 (L.A. Shearer ed., 1984). 63. In its efforts to stem the liquor traffic, the United States entered into a number of bilateral treaties with other states whereby each state would mutually recognize the other's ability to conduct searches of each other's vessels outside the then-recognized three-mile territorial limit, i.e., on the high seas. In 1924, Great Britain had reluctantly agreed to the so-called "Liquor Treaty," which allowed British vessels to be searched when they were within one hour's sailing time of the U.S. coast. Convention for Prevention of Smuggling of Intoxicating Liquors, May 22, 1924, U.S.-U.K., 43 Stat. 1761, 27 L.N.T.S. 182. These treaties did not bestow jurisdictional competence where it would not otherwise exist. The parties merely bound themselves not to protest what otherwise would be unlawful searches and seizures of their vessels by the other party on the high seas. See Edwin D. Dickinson, Are the Liquor Treaties Self-Executing?, 20 Am. J. Int'l L. 444 (1926).
basis in international law for the exercise of criminal enforcement jurisdiction over the ship.

The Supreme Court held that the United States had limited its territorial jurisdiction by treaty, and that a U.S. court could not exercise jurisdiction over an individual seized outside of U.S. territory in violation of international law as established by this treaty.\textsuperscript{64} The treaty contained no specific provision prohibiting the United States from exercising enforcement jurisdiction outside its three-mile limit. Nonetheless, the Court, as it did in \textit{Rauscher}, read into the treaty an implied prohibition against such enforcement actions because they would otherwise vitiate the purpose of the agreement.

This principle may be extended to cover transnational forcible abductions.\textsuperscript{65} Although few treaties explicitly limit the territorial jurisdiction of the abducting state, the principle of territorial sovereignty is so basic to international law that it must form part of the backdrop against which treaty formation takes place.\textsuperscript{66} \textit{Cook} cannot easily be reconciled with \textit{Ker}. The former prohibits a court from exercising jurisdiction when a seizure has been effected in violation of international law; the latter permits it. The alleged distinction is that \textit{Cook} (and \textit{Rauscher}) concerned the breach of a treaty, whereas \textit{Ker} did not concern a treaty but instead the violation of a principle of customary international law. Yet this distinction is illusory: a violation of customary international law is no less a violation of international law than the breach of a treaty.\textsuperscript{67} The approach in \textit{Cook} and \textit{Rauscher} is preferable. However, later decisions have limited the application of \textit{Cook} to cases concerning treaties delineating territorial limits to U.S. jurisdiction, rendering it largely inapplicable.\textsuperscript{68} Nevertheless, \textit{Cook} supports the proposition that a U.S. court cannot exercise adjudicative jurisdiction under domestic law without having enforcement jurisdiction under inter-

\textsuperscript{64} \textit{Cook}, 196 U.S. at 119-22 (treaty held to be self-executing, therefore depriving the United States and its courts of subject matter jurisdiction which they might ordinarily possess). \textit{See also} Ford v. United States, 273 U.S. 593 (1927). In \textit{Ford}, a British vessel was seized on the high seas. The Court rejected the U.S. government's interpretation of the \textit{Ker} doctrine—that an illegal seizure could not oust a court's jurisdiction to try criminal defendants. The Court emphasized that \textit{Ker} did not concern a treaty violation, unlike \textit{Ford}. \textit{Id.} at 605-06. However, the jurisdictional objection was not raised at an early stage and therefore could not be advanced in this case. \textit{Id.} at 606. In United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927), the owner of a ship seized on the high seas by the U.S. Coast Guard argued that the seizure was illegal and violated the 1924 U.S.-Panama Treaty. Convention Between the United States and Panama for the Prevention of Smuggling Intoxicating Liquors, June 6, 1924, 43 Stat. 1875. This treaty is similar to U.S.-U.K. treaty at issue in \textit{Ford} and \textit{Cook}, supra. The court held that "as the instant seizure was far outside the limit, it is sheer aggression and trespass (like those which contributed to the War of 1812), contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to defendants." \textit{Id.} at 926.

\textsuperscript{65} \textit{See} Edwin D. Dickinson, \textit{Jurisdiction Following Seizure or Arrest in Violation of International Law}, 28 Am. J. Int'l L. 231 (1934).

\textsuperscript{66} For further discussion of this issue, see \textit{infra} text accompanying notes 161-63.

\textsuperscript{67} \textit{See supra} note 53 and accompanying text.

\textsuperscript{68} \textit{See}, e.g., United States v. Alvarez-Machain, 504 U.S. 655, 661 n.7 (1992); Autry v. Wiley, 440 F.2d 799, 802 (1st Cir. 1971).
Despite Rauscher and Cook, the Ker doctrine persevered and was reconfirmed in Frisbie v. Collins. In Frisbie, Michigan police officers kidnapped the defendant in Illinois and brought him to Michigan to face trial, violating both the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act. Justice Black, writing for the Court, stated 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 reason of a 'forcible abduction.'" The Court reasoned that Frisbie's due process rights had not been violated because due process required only that he be given fair notice of the charges made against him and a fair trial.

Frisbie, however, did not concern an international kidnapping. Moreover, unlike Alvarez-Machain, Frisbie did not involve an extradition treaty. Finally, and perhaps most surprising, the Court in Frisbie took no notice of its earlier decision in Rochin v. California. In Rochin, the Court repudiated the view adopted in Frisbie that pre-trial police misconduct does not affect the fairness of the trial.

C. The Road Not Taken: United States v. Toscanino

The Ker-Frisbie doctrine, as it became known, was followed in later cases.

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72. 18 U.S.C. § 1201 (1988). While the Federal Kidnapping Act may allow charges to be levied against the officers who kidnapped Frisbie, it cannot bar a state from prosecuting persons "wrongfully brought to it by its officers." Frisbie, 342 U.S. at 523.

73. Frisbie, 342 U.S. at 522 (citation omitted).

74. Id. at 520 (citing In re Johnson, 162 U.S. 120 (1897), for the proposition that Ker applies to criminal cases because the public interest in bringing fugitives to trial outweighs infringements of their rights).

75. Rochin v. California, 342 U.S. 165 (1952) (narcotic evidence obtained by forcing tube down accused's throat and pumping emetic solution into his stomach to induce him to vomit excluded from state criminal trial).

76. Id.

and was not challenged until 1974, when *United States v. Toscanino*\textsuperscript{78} appeared to revolutionize the American law governing the ability of courts to exercise jurisdiction over fugitives abducted from abroad. *Toscanino* is remarkable for its lucid understanding of the role which domestic courts play in the international legal order, as well as for its broad interpretation of domestic constitutional rights. In *Toscanino*, an Italian challenged his conviction for conspiracy to import narcotics into the United States. He alleged that U.S. agents had, *inter alia*, kidnapped him from his home in Uruguay, taken him to Brazil, tortured him, and finally brought him to the United States to face trial, all with the knowledge of U.S. authorities. He claimed that the illegality of his arrest and rendition to the United States, combined with his torture and interrogation, ousted the court’s jurisdiction to try him. The district court, relying upon *Ker-Frisbie*, ruled that its jurisdiction was unaffected by the manner of the accused’s rendition to the United States.

On appeal, the Second Circuit reversed. Judge Mansfield concluded that the *Ker-Frisbie* doctrine’s narrow conception of due process—requiring a fair trial, but not concerned with the manner in which the accused is brought to trial—rewarded “police brutality and lawlessness.”\textsuperscript{79} Moreover, developments in the federal judiciary’s interpretation of due process of law superseded the narrow approach contained in *Ker-Frisbie*.\textsuperscript{80} In particular, “due process” had been extended to bar the admission of evidence gained by pre-trial police misconduct.\textsuperscript{81}

Judge Mansfield acknowledged that many of the cases which he had cited to support his assertion that the *Ker-Frisbie* doctrine could not be reconciled with the Supreme Court’s expansion of the right to due process of law concerned the exclusion of illegally-obtained evidence\textsuperscript{82} and not the

\begin{itemize}
\item \textsuperscript{78} United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), reh’g denied, 504 F.2d 1380 (2d Cir. 1974), on remand, 398 F. Supp. 916 (E.D.N.Y. 1975).
\item \textsuperscript{79} Id. at 272.
\item \textsuperscript{80} Judge Mansfield suggested that the decisions of the U.S. Supreme Court in *Rochin v. California*, 342 U.S. 165 (1951), and *Mapp v. Ohio*, 367 U.S. 643 (1961): [U]nmistakably contradict its pronouncement in *Frisbie* that “due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional safeguards.” The requirement of due process in obtaining a conviction is greater. It extends to the pre-trial conduct of law enforcement authorities.
\item \textsuperscript{81} *Toscanino*, 500 F.2d at 274. Several court of appeals decisions had suggested in *obiter* that the *Ker-Frisbie* rule probably was not good law because it could not be reconciled with the Supreme Court’s broader conception of due process. See, e.g., *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970) (finding *Ker* and *Frisbie* no longer persuasive because they were decided before *Mapp* applied the Fourth Amendment to the states); *Government of Virgin Islands v. Ortiz*, 427 F.2d 1043, 1045 n.2 (3d Cir. 1970) (recognizing that “the validity of the *Frisbie* doctrine has been seriously questioned because it condones illegal police conduct”).
\item \textsuperscript{82} *Miranda v. Arizona*, 384 U.S. 436 (1966) (confession inadmissible unless defendant voluntarily waives Fifth Amendment protection against self-incrimination); *Wong Sun v. United States*, 371 U.S. 471 (1963) (declarations made after arrest without probable cause excluded as “fruits” of unlawful police action); *Mapp*, 367 U.S. 643
wholesale rejection of the court’s ability to exercise jurisdiction over the defendant. Yet in these cases the exclusion of evidence was not an end in itself. Rather, it was a means to vindicate the underlying goal of the expanded conception of due process, namely that the government should not benefit from its own illegal conduct. Judge Mansfield held that the forcible abduction and rendition of a fugitive in violation of the Fourth Amendment constituted such illegal conduct. The appropriate remedy was the return of the fugitive to the state from which he had been seized. Judge Mansfield said: “[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights.”

Judge Mansfield held that Toscanino’s allegations of governmental misconduct, if sustained, would amount to a denial of due process. The court thus recognized the existence of a duty upon domestic courts to uphold both international legal norms as well as domestic constitutional rights, which may themselves be informed by international human rights law. *Ker* and *Frisbie* were distinguished on the basis that they concerned abductions which did not violate an international treaty, whereas the forcible abduction and rendition of Toscanino violated the guarantees of territorial sovereignty codified in both the U.N. Charter and the O.A.S. Charter. Judge Mansfield interpreted these treaties as demonstrating an agreement by the United States not to violate Uruguay’s territorial sovereignty, thus supporting a reliance upon *Cook* rather than *Ker*. Judge Mansfield did not rely upon the U.S.-Uruguay Extradition Treaty, perhaps because it did not include drug trafficking as an extradition offense.

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83. *Toscanino*, 500 F.2d at 275.
84. Id. (emphasis added).
85. U.N. CHARTER art. 2, ¶ 4. Judge Mansfield cited the U.N. Security Council’s reaction to the Eichmann kidnapping to suggest that “international kidnappings such as the one alleged here violate the U.N. Charter,” and that the appropriate remedy was the return of the abducted individual. *Toscanino*, 500 F.2d at 277-78 (citing U.N. Doc. S/4349 (1960)).
87. “*Ker* does not apply where a defendant has been brought into the district court’s jurisdiction by forcible abduction in violation of a treaty.” *Toscanino*, 500 F.2d at 278 (citing *Ford*, 273 U.S. at 605-06) (emphasis added).
88. The same was true of the U.S.-Bolivia Extradition Treaty. Treaty Between the United States and Bolivia for the Extradition of Fugitives from Justice, Apr. 21, 1900, U.S.-Bol., 32 Stat. 1857. See United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975). However, Judge Mansfield noted that the alleged police misconduct in *Toscanino* was unnecessary for the capture of the fugitive because the fugitive’s rendition could have been achieved via the U.S.-Uruguay Extradi-
Judge Anderson concurred in the result but would have disposed of the case solely upon due process grounds. He suggested that the defendant could successfully challenge the court's jurisdiction if he could demonstrate that he had been brought to trial in violation of the Fourth Amendment. He rejected Judge Mansfield's extended application of the Fourth Amendment to the acts of American law enforcement officers abroad, and also rejected the argument that Toscanino could "clothe" himself in any treaty rights, either under the U.S.-Uruguay Extradition Treaty, or the U.N. and O.A.S. Charters. Nevertheless, although these treaties could not be invoked as personal defenses, Judge Anderson suggested that their violation would be "indicative of the denial of due process." Thus, Judge Anderson accepted that both customary international law and treaties can inform domestic constitutional norms. He also emphasized the supervisory jurisdiction of the court over acts of the executive as a basis for his decision.

The case was remanded to the district court to determine whether there was sufficient evidence concerning Toscanino's allegations to justify a stay of proceedings against him.

The potentially broad application of the rule in Toscanino never developed because the case was distinguished, circumscribed, or ignored by subsequent courts. Indeed, even Justice Stevens, dissenting in Alvarez-Machain, referred to the case only in passing and then only for rhetorical flourish rather than for the strength of its legal analysis. In United States ex rel. Lujan v. Gengler, decided soon after Toscanino, the same court (including two of the same judges) which had decided Toscanino limited it severely. Subsequent decisions held that a fugitive must establish three

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90. Toscanino, 500 F.2d at 282 (Anderson, J., concurring).

91. Id. at 281 ("The courts... no longer completely disregard the behavior of our police agents when they are operating outside of the national boundaries.").


93. A notable exception is Benally v. Marcum, 553 P.2d 1270 (N.M. 1976). In Benally, the court ruled that the arrest of a Navajo Indian by state police on Navajo land violated Navajo sovereignty and that an extradition request should have been made. Police conduct came within Toscanino's "outrageous conduct" exception, and due process principles could be invoked to bar prosecution. Id. at 1273-74.

94. Alvarez-Machain, 504 U.S. at 2206 n.37 (Stevens, J., dissenting).

95. Lujan, 510 F.2d 62.

96. Other courts rejected Toscanino outright. See United States v. Matta, 937 F.2d 567, 568 (11th Cir. 1991); Matta-Ballesteros v. Henman, 896 F.2d 255, 261 (7th Cir.)
elements for the Toscanino prohibition against the exercise of jurisdiction to apply. First, the governmental conduct in question, i.e., the abduction, must amount to "grossly cruel and unusual barbarities" or "shock the conscience."97 Second, the abduction must have been the work of state agents.98 Third, there must be a protest by the injured state.99 Indeed, these later interpretations suggest incorrectly that Toscanino was primarily a "torture" case rather than a "forcible abduction" case.100 This view imposes a virtually insuperable evidentiary burden upon the fugitive, as he will rarely be able to advance conclusive evidence of torture, or to demonstrate that government agents were directly responsible for his abduction. More importantly, it is entirely unclear why a fugitive should have to demonstrate that he was tortured. Federal courts have generally not relinquished jurisdiction over fugitives on the basis of the Toscanino exception,101 although several cases have suggested in dicta that evidence of a protest by a foreign state would preclude application of the Ker-Frisbie rule.102

Toscanino contained two main limitations. First, it purportedly relies upon the Due Process Clause of either the Fifth or Fourteenth Amendments, but in reality relies on Mapp v. Ohio and other Fourth Amendment exclusionary rule decisions.103 Second, the threshold of government conduct which the Toscanino rule as subsequently interpreted requires the defendant to demonstrate is too high. Still, the constraints which the Second Circuit faced must be recognized. Certainly, it would have been difficult for the court to expressly overrule Ker-Frisbie.


Toscanino’s greatest virtue was that it took its consideration of forcible abduction at least partially outside the treaty paradigm, within which U.S. courts—from Ker to Alvarez-Machain, and including Rauscher and Cook—continue to operate. Under the Toscanino due process approach the protest or consent of the injured state is not a conclusive factor because the focus is largely upon the rights of the fugitive. The court attempted to decouple the protection of the fugitive’s due process rights from the injured state’s advancement of the fugitive’s claim on the international plane. Indeed, as the “injured” state is often complicit in the abduction, there is little hope that it will actually pursue its claim. Further, Toscanino contains the seeds of a supervisory jurisdiction framework for analysing forcible abduction cases, an approach which the English House of Lords developed more fully in Bennett II.

D. Ker Revisited: United States v. Alvarez-Machain

In what is now the leading U.S. case on forcible abduction by government agents, Alvarez-Machain, a Mexican physician was indicted in the United States on charges relating to the kidnapping, torture, and murder in Mexico of an undercover U.S. Drug Enforcement Agency (DEA) agent and a Mexican pilot. The U.S. government alleged that the fugitive had administered drugs to the agent to prolong his life so that he could be tortured and interrogated. The United States commenced negotiations with Mexico regarding the extradition of the fugitive, but these negotiations proved fruitless. The DEA then arranged to have Mexican agents kidnap the fugitive in Mexico and fly him in a private airplane to Texas, where DEA officials arrested him. From Texas, he was transported to California and brought before a federal district court.

At trial, Judge Rafeedie held that there was no evidence of physical abuse, torture, or mistreatment to bring the case within the narrow Toscanino exception. However, Judge Rafeedie upheld the claim that the abduction and rendition to the United States violated the U.S.-Mexico Extradition Treaty, and held that the Ker doctrine does not apply where an international treaty has been violated. The court noted that the United States had never made a formal extradition request to Mexico for Alvarez-Machain; it had attempted only informal negotiations. The trial court held


105. Although DEA officials did not personally kidnap or transport the fugitive to U.S. territory, the district court concluded that they had arranged the kidnapping. Caro-Quintero, 745 F. Supp. at 603. This was not disputed in the higher courts. Alvarez-Machain, 504 U.S. at 657. See Brief for the United Mexican States as Amicus Curiae in Support of Affirmance in United States v. Alvarez-Machain, 31 I.L.M. 934, 940 (1992) [hereinafter Mexico’s Amicus Curiae Brief]. The DEA offered a reward of $50,000 (U.S.) to anyone who would deliver Alvarez-Machain to the United States to face trial. Caro-Quintero, 745 F. Supp. at 603.


107. Id. at 605-06.

that the Treaty was self-executing, i.e., that it was enforceable in domestic law without the need for implementing legislation.

While Judge Rafeedie conceded that Mexico alone had standing to raise the violation of the Extradition Treaty, Mexico's express protest was sufficient to allow the fugitive to invoke the issue of the Treaty's breach. The fugitive established the responsibility of the United States because of its integral involvement in the abduction. There was no evidence of Mexican involvement in or consent to the abduction. The court discharged the fugitive and ordered that he be repatriated to Mexico. The Ninth Circuit affirmed, emphasizing that Mexico had made several diplomatic protests.

The U.S. Supreme Court reversed. Chief Justice Rehnquist, writing for the majority, considered two issues: first, whether criminal proceedings are permissible when the defendant has been brought to trial in violation of an extradition treaty; and second, whether a defendant can challenge the court's jurisdiction to try him on criminal charges when he has been brought to trial by forcible abduction. The Court accepted the government's argument that the case was governed by , and that applied only where a fugitive was brought to trial in violation of an extradition treaty. Thus, the majority believed that its primary task was to determine whether the abduction violated the U.S.-Mexico Extradition Treaty. It seems clear that had the Court found that the Extradition Treaty had been violated, the defendant would have succeeded. Conversely, with no violation of the Extradition Treaty, would apply, "and the court need not inquire as to how [the] respondent came before it." The majority simply assumed that and remained good law, thus avoiding consideration of the due process issues before the Court.

The Court acknowledged that could be distinguished from in two ways. First, did not involve governmental action, whereas there was evidence of government involvement in . Second, Peru had not objected to Ker's abduction, whereas


112. Alvarez-Machain, 504 U.S. 655 (1992). Rehnquist, C.J., was joined by White, Scalia, Kennedy, Souter, and Thomas, J.J. Stevens, J., dissented and was joined by Blackmun and O'Connor, J.J.

113. Id. at 662.

114. Historical research on the case suggests that there may have been government involvement in Ker's rendition to the United States, although this does not appear in the reports of the case. Ker, 119 U.S. at 443. See Fairman, supra note 29, at 679-80.
Mexico had protested Alvarez-Machain's kidnapping. The defendant argued that these distinctions were sufficient to make the Ker rule inapplicable to Alvarez-Machain. But Chief Justice Rehnquist did not allow these distinguishing factors to control the case even though the Court of Appeals had invoked these very distinctions to justify its view that Ker-Frisbie did not control in Verdugo-Urquidez II.

The majority began its interpretation of the Extradition Treaty with a startling assertion: "The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs." In the Court's view, the Extradition Treaty did not "cover the field" of U.S.-Mexico extradition relations. Instead, the Treaty merely provided a mechanism for the rendition of fugitives. To bolster this claim, Chief Justice Rehnquist explored the history of negotiation and practice under the Treaty. He emphasized that Mexico was aware of the Ker doctrine as early as 1906, yet had not attempted to insert a provision explicitly forbidding transnational forcible abduction into the 1978 Extradition Treaty. Therefore, the proper implication was that Mexico had acceded to the U.S. interpretation of the Treaty.

Moreover, the Court reasoned that Mexico and the United States did not agree on such a provision, given that they did not expressly adopt the one provided in the 1935 Harvard Law School Draft Convention on Jurisdiction with Respect to Crime, which stated clearly that forcible abduction of individuals on a foreign state's territory violates international law. Thus, the Court concluded that the Treaty does not prohibit abductions outside of its terms. Because there was no Treaty violation, the Ker rule applied, and the case was remanded to the district court for trial. Ironically, the charges against the defendant were later thrown out for lack of evidence.

The Court's majority opinion identified what it took to be an inconsistency in the defendant's argument. He had challenged the Court's jurisdiction by arguing that he had been brought to trial in violation of the

115. Alvarez-Machain, 504 U.S. at 662. The lack of a functioning Peruvian government ruled out a protest and rendered the regular extradition channel inoperative. Fairman, supra note 34, at 685-86.
117. Alvarez-Machain, 504 U.S. at 663.
118. Id. at 665 n.11 (citing Martinez, 2 Foreign Rel. U.S. 1121 (1906)).
119. Id. at 666 (citing Harvard Research, 29 Am. J. Int'l L. 442 (Supp. 1935)).
120. Id. at 666.
121. Id. at 670 (forcible abduction does not bar criminal trial in U.S. federal court).
122. The Court of Appeals for the Ninth Circuit refused a later motion to file a supplemental brief which argued that customary international law alone would justify the district court's original repatriation order. United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992).
Extradition Treaty. He conceded that his rights under the Extradition Treaty were derivative of Mexico's. Nonetheless the Court concluded that either the United States or Mexico would be at liberty, as a matter of domestic law, to render an individual in their country to the other state "on terms completely outside of those provided in the Treaty," such as by deportation or expulsion.\textsuperscript{124} The Court suggested that Mexico must assert the defendant's claim under the Extradition Treaty for that claim to be successful. In fact, the Court of Appeals had expressed the view that a formal protest by the injured state was essential to a finding of international illegality.\textsuperscript{125} The \textit{Alvarez-Machain} majority contended that by agreeing with the assertion that an individual's rights under the Extradition Treaty were derivative of the state's rights, the defendant had undercut another strain of his own argument, which was that the Extradition Treaty conferred procedural protection upon individuals independent of states' rights under the Extradition Treaty.\textsuperscript{126}

Yet it is perfectly consistent to view extradition treaties as creating rights which may be exercised by individuals as well as states. More importantly, in \textit{Alvarez-Machain} (as in \textit{Verdugo-Urquidez II}) Mexico did protest and request the fugitive's return. Therefore, on the facts of the case, the Court's argument was inapplicable. But it does highlight the concern noted earlier, namely that if Mexico had neither protested nor requested Alvarez-Machain's return, it would have been considerably more difficult for him to have mounted a defense based upon an alleged violation of the Extradition Treaty. Indeed, what made \textit{Alvarez-Machain}'s case one of first impression was that the Supreme Court had never before addressed a transnational forcible abduction case where the injured state had protested and requested the fugitive's return. However, several lower courts had suggested that the specialty principle could be advanced by a fugitive regardless of whether the extraditing state protested, indicating that a fugitive should be able to raise a violation of an extradition treaty even when the state from which he was abducted did not protest.\textsuperscript{127}

According to the three dissenting judges, \textit{Alvarez-Machain} involved "this country's abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty."\textsuperscript{128} The dissent agreed with the lower courts' interpretation of the Extradition Treaty. This interpretation, combined with Mexico's formal protests to the United States requesting the defendant's return, meant that the forcible abduction violated both the Extradition Treaty \textit{and} customary international law, so that U.S. courts were obligated to refuse to exercise jurisdiction over him and to order his

\begin{itemize}
  \item \textsuperscript{124} \textit{Alvarez-Machain}, 504 U.S. at 667.
  \item \textsuperscript{125} \textit{Alvarez-Machain}, 504 U.S. at 667 (citing \textit{Verdugo-Urquidez II}, 939 F.2d at 1357).
  \item \textsuperscript{126} In \textit{Rauscher}, the issue of Britain's protest was considered irrelevant in the determination that the defendant could benefit from the specialty principle. \textit{Rauscher}, 119 U.S. at 407.
  \item \textsuperscript{127} \textit{See infra} note 166.
  \item \textsuperscript{128} \textit{Alvarez-Machain}, 504 U.S. at 670-71.
\end{itemize}
return to Mexico. The dissent accepted that the district court had jurisdiction over the defendant, yet argued that it was under a duty to refuse to exercise it.

Justice Stevens concluded that the Extradition Treaty was designed “to cover the entire subject of extradition” between Mexico and the United States. To accept the view that the Extradition Treaty was merely an optional framework by which one state could seek the extradition of a fugitive from the other, while at the same time reserving the right to enter the other state and forcibly remove the fugitive, would transform the provisions into “little more than mere verbiage.” Justice Stevens preferred a purposive approach to treaty interpretation, and argued that there was an implied provision in the Extradition Treaty prohibiting forcible abductions from each other’s territory. Concluding that the abduction violated this implied provision of the Extradition Treaty, Justice Stevens suggested that the rule in Rauscher should apply, to the exclusion of the Ker doctrine. Just as the defendant in Rauscher had been permitted to claim the procedural protections of the U.S.-U.K. Extradition Treaty, the defendant in Alvarez-Machain was entitled to claim the more extensive procedural protections contained in the U.S.-Mexico Extradition Treaty.

Justice Stevens also argued that the abduction violated customary international law. He did not share the majority’s reluctance to read the customary international law prohibition on transnational forcible abduction into the Extradition Treaty. Indeed, he saw a stronger case for doing so here than in Rauscher, a move which the majority had described as “a small step to take.” The principle that a state must not violate the territorial integrity of another state was well recognized in both domestic and international law, and formed an independent basis for ordering a stay of proceedings. The dissent also seized on the majority’s failure to distinguish Ker (in which the abduction and rendition had nominally been the work of a private citizen) from Alvarez-Machain (where the kidnapping and rendition were undertaken by U.S. agents). The majority failed to recognize that this distinction meant that Ker could not control

129. Id. at 673.
130. Id.
131. Justice Stevens referred to the “consensus of international opinion that condemns one Nation’s violation of the territorial integrity of a friendly neighbour” as evidence that “[i]t is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party’s territory.” Id. at 678-79 [citations omitted].
132. Id. at 682.
133. Id. at 669.
135. 1 Oppenheim’s INTERNATIONAL LAW 295 (Hersch Lauterpacht ed., 1955); OAS Charter, supra note 86, art. 17; U.N. CHARM, art. 2(4); Mann, supra note 5, at 407.
136. Subsequent research suggests that Ker may also have concerned a state-sponsored abduction. Fairman, supra note 34, at 678.
the result in Alvarez-Machain. Justice Stevens noted that it was precisely this distinction which led Justice Miller in Rauscher to distinguish that case from Ker itself. The majority’s failure to distinguish private abductions from government-sponsored kidnapping meant that its argument was “thus entirely unsupported by case law and commentary.”

Justice Stevens insisted that bringing fugitives to trial does not justify violations of international law. Such pursuit of short-term justice would violate the rule of law, which in the long term would be neither in the interests of the executive nor the country as a whole. Justice Stevens noted with no little irony that the South African Court of Appeal in Ebrahim had looked to the evolving U.S. jurisprudence on transnational forcible abduction in determining that the trial of a fugitive kidnapped abroad and brought to South Africa for trial must be halted. He warned that the majority decision was “monstrous” and would be recognized as such, that it sanctioned international lawlessness, and that it was bad law and unsound policy.

The dissent’s concept of the rule of law appears to contain three distinctive elements. The first is a concern with the protection of the court’s process from abuse at the hands of the executive. Equally important is the dissent’s account of a broader, “international” rule of law. This is a concern both with the maintenance of international systems of public order, in particular the territorial sovereignty of states and the network of bilateral and multilateral extradition treaties, as well as international human rights concepts.

The remainder of this Article addresses four reasons why the existing U.S. approach to transnational forcible abduction, as represented by the Alvarez-Machain holding, is flawed. It is guided by the three strands of the rule of law outlined in Section I and identified by Justice Stevens in Alvarez-Machain.


140. This decision was indeed heavily criticized. See, e.g., Stephen Bindman, McDougall Warns U.S. on Kidnapping, CALGARY HERALD, June 17, 1992, at B7; Stephen Bindman, Kidnap Ruling Shocks Justice Minister, CALGARY HERALD, June 16, 1992, at A2; Maxwell Cohen & Donald McRae, “Kidnap Ruling” Hijacks the Law, TORONTO STAR, July 23, 1992, at A23; John Hay, Canada and the Law: U.S. Supreme Court ruling that kidnapping is tolerable undermines Canadians, MONTREAL GAZETTE, July 20, 1992, at B3. The then-Secretary of State for External Affairs, Hon. Barbara McDougall, stated in response to a question in the Canadian House of Commons:

[we continue to believe that the appropriate way for U.S. authorities to obtain custody of a criminal suspect is through a request to authorities of other countries, to Canadian authorities for example, under the extradition treaty that exists between our two countries. Any attempt to abduct someone from Canadian territory we would continue to regard, as we have in the past, as a criminal act.


Machain. First, the majority’s assumption that the jurisdiction of the court can be set aside only where there has been a treaty violation is unwarranted. There is a customary international law norm prohibiting transnational forcible abduction which requires the return of the fugitive upon the injured state’s protest and request. Second, the majority’s argument that the abduction did not violate the Extradition Treaty is unfounded. Third, the majority failed to take into account the international human rights dimensions of the case. Fourth, although it did not arise in the majority’s opinion in Alvarez-Machain itself, U.S. federal courts have often relied upon a “justiciability” framework in transnational forcible abduction cases. This Article contends that such an approach is misguided: the proper course for courts to take in such cases is to exercise their supervisory jurisdiction over unlawful executive conduct.

III. Transnational Forcible Abduction in International Law

Customary international law clearly prohibits transnational forcible abduction. Custom requires that where the injured state protests the abduction of a fugitive from its territory and demands his return, the abducting state is obliged to return the fugitive. Three issues will now be examined in turn. First, what are the international legal consequences of an abduction? Second, what is the appropriate remedy for the breach of international law occasioned by an abduction? Finally, what are the effects upon domestic law of a finding of international illegality?143

A. The International Legal Consequences of a Forcible Abduction

A transnational forcible abduction may violate one or more of three distinct international obligations. The first of these is respect for the territorial sovereignty of the injured state. The exercise of law enforcement by one state upon the territory of another without the latter’s consent violates its sovereignty. The second consideration is that forcible abduction may breach a treaty, most likely an extradition treaty, with the injured state. Where the abducting state and the injured state have entered into a treaty regulating their extradition relations, the rendition of a fugitive outside of the terms of the treaty may violate the treaty. Third, an abduction, in violating the human rights of the fugitive, may also violate duties owed to the state of which the fugitive is a national. States incur international responsibility for harm done to foreign nationals by their agents. Beyond the abduction itself, trial of the fugitive may constitute a separate international

Transnational Forcible Abduction Violates Territorial Sovereignty

It is beyond controversy that a state violates customary international law by sending its agents into another state to abduct an individual for trial. Respect for the territorial integrity of other states is a fundamental principle of international law. While a state's ability to proscribe certain conduct outside of its territory with criminal sanctions is undisputed, the exercise of enforcement jurisdiction in the territory of another state is prima facie wrongful. It would make a mockery of state sovereignty, a principle at the very foundation of the international legal order, if states were free to send their agents into other states to abduct fugitives. Thus, extraterritorial forcible abduction, absent a conventional right, is presumptively illegal under customary international law. The injured state

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145. 2 Restatement (Third) of Foreign Rel. Law § 432(2) (1987); Satya Deva Bedi, Extraterritoriality in International Law and Practice 21 (1966); Herbert W. Briggs, The Law of Nations 312 (2d ed. 1952); Shearer, supra note 20, at 72-75; Coussirat-Coustère & Eisemann, supra note 5, at 348-49; Marchand, supra note 5, at 244.


147. The United States does not recognize the exercise of enforcement jurisdiction by other states on its territory. Kasenkina Case, 19 Dep't of State Bull. 251, 261-62 (1948); Edwin Borchard, The Kasenkina Case, 42 Am. J. Int'l L. 858 (1948) (Soviet attempt to abduct Soviet citizen from the United States). Case of Converse and Blatt, [1912] Foreign Rel. U.S. 971. In Converse and Blatt, U.S. citizens in the service of Mexican revolutionaries were captured by Mexican troops in the United States. The U.S. government protested, arguing that the abduction was "a clear and a grave violation of the sovereign rights of the United States" and an "international wrong." Id. at 973-74. These citizens were released and brought claims for damages. Id. at 971-72. See also Cantú Case, [1914] Foreign Rel. U.S. 900 (Mexican abducted from United States by Mexico, but released upon U.S. protest and demand for his return).

148. Some treaties allow hot pursuit on land, although there is no customary rule to this effect. See, e.g., Schengen Agreement on the Gradual Suppression of Common Frontier Controls, Belg.-Fr.-F.R.G.-Lux.-Neth., 30 I.L.M. 68; Agreement, June 14, 1985, 30 I.L.M. 73; Convention, June 19, 1990, art. 41, 30 I.L.M. 84. But see Peter Conradi, Europe's Borders Refuse to Fade Away, Sunday Times (London) Apr. 30, 1995, at 15 (noting that the hot pursuit arrangement has proven difficult and controversial). Similarly, states may agree by treaty to allow enforcement by foreign agents on their territory. See, e.g., Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813 (U.K.); Boundary In the Tunnel, Times (London), Feb. 2, 1995, at 23 (British citizens arrested by British police in France under Channel Tunnel agreement). Note also that secret treaties existed between South Africa and the "Bantustans" allowing each state's police to operate in the other's territory. See J. T. Schoombee, A Licence for Unlawful Arrests Across the Border?, 101 S. Afr. L.J. 713 (1984) (questioning constitutional status of the treaties). For further examples, see J. John Basset Moore, A Treatise on Extradition and Interstate rendition § 188 (1891).

149. In rare situations, a state may be able to justify a forcible abduction and thus preclude international wrongfulness if it can advance a "circumstance precluding
may bring a claim against the abducting state, regardless of the nationality of the fugitive or the reason for his presence in the injured state.\footnote{150}

The majority opinion in \textit{Alvarez-Machain} (and indeed, the dissent as well) considered only whether the Extradition Treaty was violated. There are, of course, strong arguments which suggest that it \textit{was} violated,\footnote{151} but the majority was simply wrong in viewing the Treaty as the sole source of controlling law. The customary international legal norm prohibiting forcible abduction exists independently of treaties, so that a forcible abduction may violate customary international law even where there is no extradition treaty.\footnote{152} The majority in \textit{Alvarez-Machain} completely ignored this pro-

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\textit{Draft Articles on State Responsibility}, supra note 53, at 93-94 (articles 29-34, especially article 30 (counter-measures) and article 34 (self-defense)). It may be argued, for example, that states are under a positive obligation to ensure that their territory is not used by private citizens to attack other states. Richard B. Lillich \& John M. Paxman, \textit{State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities}, 26 Am. U. L. Rev. 217 (1977). While state responsibility does not lie where a state's nationals commit an international wrong without its sanction, it may be argued that a state violates international law by allowing its territory to be used as a base from which private individuals commit international wrongs. Island of Palmas Case (U.S. v. Neth.) 2 R.I.A.A. 829, 839 (1928). \textit{See also} Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, U.N. GAOR, 25th Sess., (Supp. No. 28), at 121, U.N. Doc. A/8028 (1971). Knowledge of such activities combined with inaction on the part of the harbouring state indicate the violation of a due diligence obligation. In the face of such a violation, a state which was a victim of such attacks could argue that the forcible abduction of offenders who were committing international wrongs would be justified as a self-help measure. J. Walcott \& A. Pasztor, \textit{Reagan Ruling to Let CIA Kidnap Terrorists Overseas is Disclosed}, \textit{Wall St. J.}, Feb. 20, 1987, at 1, 14 (possible justification of kidnappings as anticipatory self-defense under U.N. Charter art. 51); Halberstam, supra note 7, at 736 n.5; Glennon, supra note 6, at 749, 755. However, the U.N. collective security system restricts the lawful use of force to self-defense and collective police actions under U.N. control. \textit{Ian Brownlie, International Law and the Use of Force By States} (1963); Oscar Schachter, \textit{The Lawful Use of Force by a State Against Terrorists in Another Country}, 19 Isr. Y.B. Hum. Rts. 209 (1989). The abducting state would have to demonstrate that the fugitive was engaging in an "armed attack" against it, a difficult burden to discharge. \textit{See} Military and Paramilitary Activities Case, 1986 I.C.J., at ¶ 195. In addition, it is likely that the fugitive would have to be state supported (and not merely a private individual) for article 51 to apply. Lowenfeld, 84 Am. J. Int'l L., supra note 143, at 488.


\textit{151.} \textit{See infra} text accompanying notes 154-71.

\textit{152.} \textit{See Brief of the Government of Canada as Amicus Curiae in Support of Respondent in} \textit{United States v. Alvarez-Machain}, 31 I.L.M. 919, 924 (1992) \[hereinafter Canada's \textit{Amicus Curiae Brief}\]. In many ways, Canada's \textit{Amicus Curiae Brief} was an attempt to re-litigate Jaffe \textit{v. Smith}, 825 F.2d 304, 307 (11th Cir. 1987). In \textit{Jaffe}, a private bail bond agency arranged to have private individuals kidnap a Canadian businessman from Toronto and bring him to the United States. The Court's jurisdiction was unaffected by his abduction, and there was no violation of the U.S.-Canada Extradition Treaty. \textit{Id.} \textit{Jaffe} did not involve government action; the actions of the bail agency bounty hunters were neither supported nor condoned by either the United States or Florida. \textit{Id.} at 307-08. The agency relationship is a matter of debate. \textit{See} Lewis, supra note 5, at 359-56, 360. \textit{U.S. Secretary of State Schultz appealed for Jaffe's early release, expressing concern that the case was souring U.S.-Canadian relations. State Territory and Territorial Jurisdiction, 78 Am. J. Int'l L. 207 (1984).}
bition, giving no acknowledgment to Mexico's formal protest and demand for Alvarez-Machain's return.153

2. Transnational Forcible Abduction Violates Extradition Treaties

In addition to the customary prohibition against violations of territorial sovereignty, the abducting state will incur international responsibility if the abduction violates a treaty with the injured state.154 Through an extradition treaty, a state may partially limit its exclusive jurisdiction over its inhabitants by agreeing to extradite them for certain crimes committed in another state. Extradition treaties serve the interests of states in law enforcement. When two or more states enter an extradition treaty, they agree to establish a procedural framework by which one state may request that a fugitive present in the other state be extradited to the requesting state to face charges relating to offenses committed there.155 Extradition treaties also protect the rights of individuals,156 and thus regulate the transfer of fugitives between states. If one state secures the presence of a fugitive from a state with which it has an extradition treaty by means of forcible abduction and rendition, there is a prima facie violation of the treaty.

Thus, the majority's conclusion that the Extradition Treaty was not violated in Alvarez-Machain is incorrect. A careful reading of the Treaty provides a further explanation. Article 9 of the treaty provides that neither state is required to extradite its own nationals, but a state exercising its discretion not to extradite a fugitive is obligated to prosecute him for the alleged offense under its domestic law. The abduction of a fugitive from the other state's territory violates this provision because it deprives the injured state of its right to decide whether to extradite the fugitive or to prosecute him domestically.157 To view forcible abduction as a permissible activity outside the scope of the Treaty would vitiate the purpose of the Treaty.158 As Justice Stevens noted in dissent, article 9 would serve no purpose if a state's decision not to extradite a fugitive to the requesting state simply could be overridden by the latter's decision to abduct the fugitive and bring him to trial before its courts.

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153. See Mexico's Amicus Curiae Brief, supra note 105, at 938-39.
154. In most cases, this will be an extradition treaty, but states may also have limited their jurisdiction by separate treaty. See Cook v. United States, 286 U.S. 102 (1932); Ford v. United States, 273 U.S. 593 (1927).
155. See generally GEOFF GILBERT, ASPECTS OF EXTRADITION LAW (1991); SHEARER, supra note 20.
156. See Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, supra note 143, at 473.
157. Recall that in Alvarez-Machain, unlike Ker, the defendant was a national of the state from which he was abducted. Peru could not have refused to extradite Ker on the basis of his nationality, whereas Mexico might have refused to extradite Alvarez-Machain on such a basis. Forcible abduction thus deprived Mexico of its right to exercise this discretion under the Extradition Treaty.
158. See Mexico's Amicus Curiae Brief, supra note 105, at 934. See also Canada's Amicus Curiae Brief, supra note 152, at 923, 932.
Moreover, the Extradition Treaty would not prevent one state from deporting an individual to another state merely because the individual is sought for criminal offenses in the latter state. Of course, this issue could not have arisen in Alvarez-Machain, because there the fugitive was a national of Mexico and thus could not have been deported from Mexico. But imagine that Alvarez-Machain had been a U.S. national. The Alvarez-Machain majority suggests that because the Extradition Treaty does not "cover the field" of rendition, and thus does not outlaw deportation of individuals between the two states, it could not be said to outlaw another alternative to extradition, forcible abduction. It is true that the deportation of an individual from one state to the other would not automatically violate the terms of the Extradition Treaty. Yet deportation would violate the Treaty in circumstances of "disguised extradition," where deportation is used to circumvent the more formal procedures contained in the Extradition Treaty. It is the element of circumvention which violates the Extradition Treaty. As discussed above, deportation is an action of the deporting state. Unlike forcible abduction, deportation does not involve a violation of the territorial sovereignty of the deporting state. As a result, the Alvarez-Machain Court's deportation argument should be rejected. But it is not surprising, given the majority's views, that subsequent case law has interpreted Alvarez-Machain as rejecting the argument that a treaty must be interpreted so that attempts to circumvent the treaty are violations of the treaty.

Chief Justice Rehnquist in Alvarez-Machain was correct in stating that the Extradition Treaty does not contain a clause specifically prohibiting extraterritorial abduction. The Extradition Treaty also lacked specific provisions to limit the exercise of enforcement jurisdiction, as were present in the treaty at issue in Cook. However, the absence of such provisions does not mean that a forcible abduction engineered by one state on the territory of the other party is permissible under the Treaty. The better view is that a prohibition upon forcible abduction, which is a clear rule of customary international law, formed part of the normative background against which the Extradition Treaty was made. International abductions are "so clearly prohibited in international law" that to include a clause to that effect in the Extradition Treaty would have been redundant, even absurd.

159. See supra text accompanying notes 25-28.
160. E.g., Kreimerman v. Casa Veerkamp, 22 F.3d 634, 643 (5th Cir. 1994); Chapa-Garza, 62 F.3d 118, 120-21 (5th Cir. 1995).
161. Vázquez, supra note 53, at 1158 n.318.
162. Alvarez-Machain, 504 U.S. at 666. The general rule of interpretation of the Vienna Convention on the Law of Treaties is:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose

3. There shall be taken into account, together with the context:

(c) any relevant rules of international law applicable in the relations between the parties.
Moreover, treaties should be interpreted in a purposive manner. The customary international law norm must inform interpretation of the Extradition Treaty, leading to the inevitable conclusion that a forcible abduction violates the Treaty.

The Court claimed that there was no basis in state practice to conclude that the United States and Mexico entered the Extradition Treaty with the prohibition of forcible abduction in mind. Notwithstanding that in Rauscher the Supreme Court had implied the specialty principle into the Webster-Ashburton Treaty ("because of the practice of nations with regard to extradition treaties"), the majority in Alvarez-Machain claimed that it would be too ambitious for the Court to imply a term into the Extradition Treaty derived from "the practice of nations with regards to international law more generally." The majority's reference to Rauscher is ironic, given that courts have interpreted Rauscher to allow a defendant to advance the specialty principle as a defense even where the extraditing state does not make a formal protest, suggesting that the principle is not the prerogative of states alone. Moreover, Canada's *amicus curiae* brief cited ample

VCLT, *supra* note 50, art. 31 (emphasis added). Thus, the customary international law rule becomes an implied term of the treaty. This argument was also advanced in Mexico's *Amicus Curiae* Brief, *supra* note 105, at 942. It is conceded that the same argument does not apply to the specialty principle. The specialty principle is also arguably a customary norm, which suggests that it would be redundant to write it into the treaty. Nevertheless, there is a treaty provision dealing with it. The apparent inconsistency is illusory, however. Treaties often contain provisions addressing issues already "covered" by customary norms, often with the intention of structuring and clarifying them, and providing a procedural framework by which they may be recognized. By contrast, the customary norm against transnational forcible abduction is so clear that it does not require clarification via a provision in an extradition treaty. Indeed, Rauscher, 119 U.S. 407, held that the specialty principle is implicit in all extradition treaties signed by the United States, and since Rauscher, all U.S. extradition treaties have included it explicitly. 163. VCLT, *supra* note 50, art. 31(1). Compare Fothergill v. Monarch Airlines, [1981] App. Cas. 251, 282 (Eng. H.L.) (treaties to be interpreted by reference to public international law rules of treaty interpretation); Thomson v. Thomson, [1994] 3 S.C.R. 551, 577-78 (Can.) (same); Regina v. Parisien, [1988] 1 S.C.R. 950 (Can.) (extradition treaties to be interpreted by reference to VCLT); *In re* Regina and Palacios, 45 O.R. 2d 269, 277 (Ont. (Can.) C.A. 1984) ("The principles of public international law and not domestic law govern the interpretation of treaties.").


165. Id. at 668. The Court said that inferring the specialty principle into the Webster-Ashburton Treaty in Rauscher was "a small step to take," whereas implying the proposed principle into the U.S.-Mexico Extradition Treaty would involve "a much larger inferential leap." Id. at 669. This rationale is opaque at best.

166. 1 *Restatement (Third) of Foreign Rel. Law* § 477 cmt. b, rep. n.1 (1987). Admittedly, the federal courts are divided into three schools of thought on this point. The first school argues that individuals do not have standing to raise the specialty defense unless the requested state protests the violation. See United States v. Kaufman, 874 F.2d 242, 243 (5th Cir. 1989) (per curiam); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973), cert. denied, 414 U.S. 884 (1973); Kaiser v. Rutherford, 827 F. Supp. 832, 835 (D.D.C. 1993). The second school contends that individuals may raise the specialty defense independently of whether the requested state protests. See United States v. Levy, 905 F.2d 326, 328 (10th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); Lehman v. Turner, 884 F.2d 385 (8th Cir. 1989); United States v. Cuevas, 847 F.2d 1417, 1426-27 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989). The third approach
evidence of such international practice and opinio juris to support the existence of a customary norm against transnational forcible abduction.\textsuperscript{167}

The Court's argument seems to have been that it is incoherent to view the Extradition Treaty as a prohibition against a violation of general principles of international law, such as the prohibition against the exercise of police power in the territory of another state. By way of example, the Chief Justice suggested that it would be absurd to view an invasion of the United States by Mexico as a violation of the Extradition Treaty.\textsuperscript{168} Of course, this assertion is in one sense true. No one would argue seriously that any violation of customary or general principles of international law by a state,

suggests that the individual has standing to raise the specialty defense where the requested state might have done so but did not. It does not require that the requested state protest as a precondition to allowing the individual to invoke the defense, but it does preclude the individual from raising the specialty principle where the requested state waives the provisions of the extradition treaty and consents to charging the individual with offenses other than that for which he was extradited. See United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995); United States v. Fowlie, 24 F.3d 1059, 1064 (9th Cir. 1994); United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991); United States v. Diwan, 864 F.2d 715 (11th Cir. 1989), cert. denied, 492 U.S. 921 (1989); United States v. Van Cauwenbergh, 827 F.2d 424, 428 (9th Cir. 1987), cert. denied, 484 U.S. 1042 (1988); United States v. Thirion, 813 F.2d 146, 151 n.5 (8th Cir. 1987); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986), cert. denied, 479 U.S. 1009 (1986) (individual may raise specialty principle, but not if requested state waives treaty's procedural requirements). Recent decisions indicate that a more individual-focused approach may be evolving. United States v. Saccoccia, 58 F.3d 754, 767 n.6 (1st Cir. 1995) (noting that because the specialty doctrine is based on international comity and not on individual rights it may be waived by the requested state, but acknowledging that "the side that favors individual standing has much to commend it"). See generally Papandrea, supra note 47 (arguing that individuals should have standing to raise the specialty doctrine defense only where the requested state is not a liberal democracy which guarantees due process and is representative of its citizens); Semmelman, supra note 6.

\textsuperscript{167} Canada's Amicus Curiae Brief, supra note 152, at 924-28. Canada surveyed existing domestic decisions and also conducted a survey of the legal advisors from Western states (including Australia, Austria, Britain, Finland, Germany, The Netherlands, Norway, New Zealand, Sweden, and Switzerland) in order to demonstrate that the U.S. interpretation of international extradition treaties was not supported by state practice. The survey respondents unanimously viewed forcible abduction as a violation of international law. This position is reinforced by the hostility with which Alvarez-Machain has been received in the international community. See Communiqué of Commonwealth Law Ministers, in 64 Bmr. Y.B. INT'L L. 615 (1993); Organization of American States Permanent Council, Legal Opinion on the Decision of the Supreme Court of the United States of America, OEA/ser. G/CP/doc.2302/92 (Sept. 1, 1992), reprinted in 4 CRIM. L. FOR. 119 (1993). Many of the states surveyed by Canada indicated that they would consider such an abduction to violate a bilateral extradition treaty, and most insisted that the appropriate remedy in cases of transnational forcible abduction would be the return of the fugitive to the injured state. Canada concluded that the U.S. position in Alvarez-Machain "diverges substantially from generally accepted conduct" and also contradicted the custom between Canada and the United States. Canada's Amicus Curiae Brief, supra note 152, at 925.

\textsuperscript{168} The choice of this example is unfortunate, since such an invasion would violate the Extradition Treaty if in its course, an individual were abducted and brought back to face trial in the abducting state. The irony is that this example is not as fantastic as might be hoped. See, e.g., The Panamanian Revolution: Diplomacy, War and Self-Determination in Panama - Extraterritorial Law Enforcement and the "Receipt" and Trial of Noriega: Toscanino and Beyond (II), 84 PROC. AM. SOC. INT`L L. 236 (1990).
entirely unrelated to the subject matter of a treaty, would violate that
treaty.

However, the central issue is the nexus between the international law
violation and the treaty's purpose. Rauscher indicates that a violation of
those general principles or customary norms which have a close nexus to
the treaty's subject matter is a violation of the treaty. In these circum-
cstances, customary international law and general principles of interna-
tional law must guide treaty interpretation. Therefore, it is difficult to
understand how a treaty governing extradition relations cannot be said to
"cover the field," at least to the extent of including the customary interna-
tional legal norms against forcible abduction. Interestingly, the Court
conceded that the abduction at issue in Alvarez-Machain may well have
been "shocking" and a violation of international law. But as there was
no violation of the Extradition Treaty, there was consequently no violation
of domestic law, and the Court felt that any alleged violations of interna-
tional law were best left to diplomatic channels for resolution.

3. Transnational Forcible Abduction Violates Obligations Owed to the State
of Which the Abducted Individual Is a National

A third consideration which may ground state responsibility is that an
abduction may violate a duty owed to the state of which the individual is a
national. This consideration is often overlooked, although of course it
is inapplicable when a state abducts one of its own nationals from another

169. The better view is that of Judge Rafeedie in the district court:
The government's contention in the present case that a state violates an extradi-
tion treaty when it prosecutes for a crime other than that for which the individ-
ual was extradited (the doctrine of specialty), but not when a state unilaterally
flouts the procedures of the extradition treaty altogether and abducts an individ-
ual for prosecution on whatever crimes it chooses, is absurd. It 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 con-
tracting party where the offended state registers an official protest.

Caro-Quintero, 745 F. Supp. at 610 (emphasis added). See also Riley v. Commonwealth,
159 C.L.R. 1, 15 (Austl. 1985) ("Treaties dealing with a specific subject, such as extradi-
tion, must also be construed in the light of any particular principles of international law
and of any particular standards accepted by member states of the international commu-
nity in relation to that subject.").

170. As supporters of the Alvarez-Machain decision note, the U.S. Supreme Court con-
ceded that the case may well have given rise to a violation of public international law.
Halberstam, supra note 7, at 736. However, the Court's refusal to consider the status of
the abduction under customary international law is more difficult to understand. See Bush, supra note 6, at 939.

171. See infra text accompanying notes 225-32.

172. Reparations Case (Reparation for Injuries Suffered in the Service of the United
1924 P.C.I.J. (ser. A) No. 2, at 12. One may argue that international human rights
norms are obligations owed to all other states ("erga omnes") (see Barcelona Traction,
Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3), although the category of obligations so
covered is the subject of considerable debate. Theodor Meron, Human Rights and
Humanitarian Norms as Customary Law 192-201 (1989); Yoram Dinstein, The Erga
state. When a state abducts a national of the injured state, the violation of this duty may be obscured by the breach of an extradition treaty or the violation of the injured state's territorial sovereignty. Despite its low profile, it may be an important consideration where state X abducts a national of state Y from the territory of state Z. A separate duty may be owed by state X to state Y for mistreatment of state Y's national, regardless of where this mistreatment occurred. Moreover, the individual abductors may be liable to criminal prosecution under the criminal law of state Y. This consideration was not a factor in Alvarez-Machain, where the fugitive was a national of the injured state, but it may play a role in cases where the fugitive is a national of a third state. It is noted here only to provide a complete account of the international legal consequences of transnational forcible abduction.

B. The Appropriate Remedy for a Forcible Abduction in Violation of International Law

Once a breach of an international obligation has been established, attention must turn to the appropriate remedy. In choosing a remedy, the attitude of the injured state is largely determinative. Following a determination that an international wrong or delict has been committed, custom requires reparation. The general principle of reparation is that the


176. Bennett II, [1994] 1 App. Cas. 42 (Eng. H.L. 1993) (New Zealand citizen abducted from South Africa to United Kingdom); Ex parte Driver, [1986] Q.B. 95 (Australian sent to United Kingdom from Turkey); Toscanino, 500 F.2d 267 (Italian abducted from Uruguay and Brazil to the United States). Cochrane Case (1984), in Sean Fine, Fugitives Can Be Snatched From Canada, GLOBE & MAIL (TORONTO), June 19, 1992, at A1 (Briton lured to United States from Canada). There was no protest in these cases by the fugitive's state of nationality. See The Koszta Case (1853), in 3 John Bassett Moore, INTERNATIONAL LAW DIGEST 820, 820-54 (U.S. citizen abducted from Turkey, brought to Austrian warship, and released and returned to the United States, upon U.S. protest).

177. 2 RESTATEMENT (THIRD) OF FOREIGN REL. LAW § 901 (1987).

offending state should return the injured state to the status quo ante. In the context of forcible abduction, three possible remedies exist: satisfaction (official apologies and/or declarations of the wrongfulness of the impugned act), indemnity (a money payment to the injured state), or restitution (the return of the fugitive to the injured state). The prevailing view is that if the host state objects to the abduction and demands the return of the fugitive, then the abducting state is required to effect restitution. The injured state has a choice of remedies, and the return of the fugitive seems most appropriate. However, if the host state makes no such objection, then the requirement of restitution is waived. There also may be an obligation for the abducting state to either punish the abductors domestically or extradite them to the injured state.

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179. Rodriguez, 95 I.L.R. at 314, ¶ 26; Texaco v. Libyan Arab Republic, 53 I.L.R. 389, 497-508 (1977); Chorzów Factory (Indemnity) (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, ¶ 47 (“[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.”).


181. Indemnity is the most common form of reparation in international law, generally because in many cases restitution is impossible due to a change in circumstances since the wrongful act took place. Moreover, most acts of wrongfulness can be compensated for in money. Lusitania (U.S. v. Ger.), [1923] 7 R.I.A.A. 32, 34; Colunje (Pan. v. U.S.), [1933] 6 R.I.A.A. 342 (U.S.-Pan. Gen. Claims Comm’n). In Colunje, the defendant, induced to enter the Canal Zone from Panama on false pretences, was arrested and charged with mail fraud. The court required the United States to pay Panama $500 on his behalf. Note, however, that the individual had already been released, and the charges against him dropped. The payment of $500 was made in addition, and not as an alternative, to restitution. Id. However, where restitution is possible, it takes remedial precedence over indemnity. Texaco, 53 I.L.R. at 502-04. Generally, indemnity is an inappropriate remedy in the case of a forcible abduction because it does not restore the status quo ante as effectively as restitution.


183. Mann, supra note 5, at 411; 3 Maurice Travers, LE DROIT PENAL INTERNATIONAL 161 (1921). See also de Aréchaga, supra note 182, at 285 (suggesting that as restitution is the primary remedy, indemnity is appropriate only where restitution is not possible). See Arangio-Ruiz, supra note 182, at 36-39. More generally, see Maximiliano Bernard Alvarez de Eulate, La "Restitutio in Integrum" en La Practica y en La Jurisprudencia Internationales, 29-32 TEMAS: REVISTA DE CIENCIA Y TECNICA JURIDICAS 11 (1971-72).


185. The injured state may seek the extradition of the private abductors (kidnapping is a common extradition crime) in order to try them for the abduction. Ker v. Illinois, 119 U.S. 436, 444 (1886) (suggesting that kidnapper could be extradited at Peru’s request); Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983) (bondsman who kidnapped and transported Canadian citizen to the United States was extradited to Canada to face kid-
1. **If the Injured State Consents, There Is No Wrong**

The customary rule prohibiting the exercise of police power upon the territory of another state does not apply where the injured state consents to the intrusion upon its territorial sovereignty.\(^{186}\) An abduction may take place with the tacit assistance or active participation of the host state.\(^{187}\) Alternatively, the host state may grant permission to abduct the fugitive.\(^{188}\) The consent must be express\(^{189}\) and free of defects (such as fraud, kidnapping charges); Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934) (private citizens extradited to Mexico to face kidnapping charges for abduction of a Mexican citizen to the United States from Mexico); Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931) (kidnapper extradited to Canada for abduction of U.S. citizen from Canada to the United States); Regina v. Kear and Johnson, 51 C.C.C. 3d 574 (Ont. (Can.) C.A. 1989) (bondsman convicted of kidnapping); Martinez case, [19061 2 FOREIGN REL U.S. 1121-22 (United States extradited kidnappers of Mexican citizen to Mexico); Clair Case (1986), in Fine, supra note 176, at A1 (bounty-hunters convicted of kidnapping in Canada). Ordinarily, only private abductors would be subject to extradition, while state agents would be protected by the doctrine of sovereign immunity. But see Jeffrey J. Carlisle, *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping*, 81 CAL. L. REV. 1541 (1993) (arguing that U.S. federal courts should warrant the extradition of government agents to injured states in state-sponsored abduction cases).

186. For consent as a circumstance precluding wrongfulness, see *Draft Articles on State Responsibility,* [1979] 2 (pt. 2) Y.B. INT'L L. COMM'N 91, 106-15. Further:

Mention should also be made, again in the context of action taken by organs of a State in the territory of another State, of cases of arrests made by the police of a State on foreign soil. There is no doubt that such arrests or abductions normally constitute a breach of an international obligation towards the territorial State. But it is clear from international practice and judicial decisions that the same actions cease to be wrongful if the territorial State consents to them. Id. at 111.

187. United States v. Valot, 625 F.2d 308 (9th Cir. 1980) (abduction to United States with Thai assistance and consent); United States v. Lira, 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1975) (Chile cooperated in abduction and did not protest); \(^{188}\) Cotten, 471 F.2d 744 (1973), cert. denied, 411 U.S. 936 (1973) (Vietnamese officials involved in arrest); United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), aff'd 244 F.2d 520 (2d Cir. 1957), cert. denied, 355 U.S. 873 (1957), reh'g denied, 355 U.S. 920 (1958) (Mexican police brought defendant to Texas); United States v. Insull, 8 F.Supp. 310 (N.D. Ill. 1934) (Turkish police abducted individual from Greek vessel, handed him to U.S. agents for rendition to the United States); in re Károly R., [1927-28] 4 Ann. Dig. 345 (Budapest (Hung.) Royal Hung. Crim. Ct.) (Egyptian police brought individual from Egypt to Italy, from which he was deported to Hungary).

188. United States v. Toro, 840 F.2d 1221 (5th Cir. 1988) (Panama did not protest abduction of defendant to the United States); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (Bahamas did not protest or seek return of abducted individual, despite existence of extradition treaty); United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979), cert. denied, 444 U.S. 831 (1979) (defendants arrested in Haitian territorial waters with Haitian consent); Rex v. Garrett, 86 L.J.K.B. 894 (Eng. C.A. 1917). In *Garrett*, Russian citizens were arrested on a Danish ship in an English port and convicted. Neither Denmark nor Russia protested.

189. Several cases suggest that mistaken consent is valid. Savakar Case (France v. Gr. Brit.), 6 BRITISH DIGEST OF INTERNATIONAL LAW 487-95 (Clive Parry ed., 1965) [hereinafter Parry]. In *Savakar*, a French Gendarme returned a fugitive who had escaped from a British vessel in French waters. The court held that because France had voluntarily returned the fugitive to the British, Britain had no obligation to return him to France. Id. at 494-95. It would seem, however, that the gendarme was acting under a mistake which negated French consent. McNair, supra note 17, at 193 (suggesting that *Savakar* was not a case of mistaken surrender because France had agreed with Britain that *Savakar*
tion, or coercion) in order to be valid. Consent from local officials is sufficient, even if it is mistaken or ultra vires. Moreover, consent must be given before or contemporaneous with the abduction. Consent provided after the abduction does not preclude wrongfulness; it amounts to a waiver of the right to claim reparation for the wrong. Conversely, if a state initially consents to the exercise of police power within its territory by another state, its subsequent change of heart after the latter state has abducted a fugitive is irrelevant. Where there is no effective government in the host territory, no offense, consent, or protest is possible. Thus, an abduction will engender no state responsibility on the abducting state’s part.

190. Draft Articles on State Responsibility, supra note 186, at 112; Marchand, supra note 5, at 253 (same); O’Higgins, supra note 5, at 311-12 (mistake induced by fraud or deception should result in a duty to return).


194. Aunis Case, [1979] 2 Y.B. INT’L L. Comm’N 111. In Aunis, the Prefect of Genoa arrested five fugitives aboard a French vessel with French permission. The French Consul later reversed his position and sought their return. Italy refused, arguing that France had consented to their arrest. Id.

195. Ker v. Illinois, 119 U.S. 254 (1886), may be such a case (no operational Peruvian government to lodge protest with the United States). See also Iva Ikuko Toguri D’Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) (“Tokyo Rose”); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950) (U.S. citizen brought to the United States from Germany and charged with treason. Because the U.S.-Germany Extradition Treaty was inapplicable, the accused could not object to her forcible transfer to the United States); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), cert. denied 336 U.S. 918 (1949), reh’g denied, 336 U.S. 947 (1949) (defendant brought from occupied Germany to the United States to face charges of treason); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990); Afouneh v. Attorney-General, [1941-42] 10 Ann. Dig. 327 (Palestine) (defendant brought from Allied-occupied Syria to British Mandate Palestine outside regular extradition proceedings). Similarly, there is no state to protest an abduction or seizure from a stateless vessel on the high seas, although in theory the individual’s state of nationality could exercise its rights of diplomatic protection. See supra text accompanying notes 172-74. See also United States v. Monroy, 614 F.2d 61 (5th Cir. 1980); United States v. Cortez, 588 F.2d 106 (5th Cir. 1979); Volkan v. A.-G. for Palestine, [1948] App. Cas. 351 (P.C.).
2. **The Injured State Does Not Consent, But Does Not Protest**

Where a forcible abduction is met with silence from the injured state, the presumption against the violation of the injured state's territory is not displaced. However, the lack of protest likely affects the remedy required under international law. Custom usually will require an official apology to the injured state, and perhaps financial compensation as well. State practice suggests that there is no duty upon the abducting state to return the fugitive to the injured state in the absence of a protest, or at least a request for his return.

3. **The Injured State Does Not Consent, But Does Not Request the Individual's Return**

There may be a diplomatic solution to an incident of transnational forcible abduction, as in the famous *Eichmann* case. *Eichmann* was seized from Argentina by Israeli agents and brought to Israel to face trial for war crimes and crimes against humanity. Argentina protested vigorously and requested that the U.N. Security Council convene to consider the issue.

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196. United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (no protest from Belize or Guatemala when Belize citizen was abducted from Guatemala); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975) (no Canadian protest); United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), aff'd sub nom. Unverzagt v. Ben, 5 F.2d 492 (9th Cir. 1925), cert. denied, 269 U.S. 566 (1925) (no Canadian protest where alleged abduction from Canada by U.S. officials); State v. Brewster, 7 Vt. 118 (1835) (no Canadian protest).


198. Gluck, supra note 6, at 624 (injured state's silence should result in a presumption of consent); Semmelman, supra note 6, at 552-53 (same); Maurice Travers, *Des arrestations au cas de venue involontaire sur le territoire*, 13 REVUE DE DROIT INTERNATIONALE PRIVE [R.D.I.P.] 627, 643 (1917) (silence should be construed as consent). But see Lowenfeld, supra note 143, at 489; Mann, supra note 5, at 409 (silence should not be construed as consent, although it affects remedy). Silence is not so much consent as it is a waiver of the right to a remedy. *Verdugo-Urquidez II*, 934 F.2d at 1352.

199. 2 *RESTATEMENT (THIRD) OF FOREIGN REL. LAW § 432, cmt. c, rep. n.3 (1987); Re Argoud, 45 I.L.R. 90 (Cass. crim. (Fr.) 1964). In Re Argoud, French agents kidnapped a French fugitive from Germany. In France, he was arrested and brought to trial. Irregular jurisdiction did not affect court's ability to hear the case. Although the abduction might have violated Germany's territorial sovereignty, there was no evidence of a German protest. The court held that the fugitive had no standing to make such a claim. *Id.* at 47-48. See *André Cocatre-Zilgien, L'AFFAIRE ARGOUl*: *CONSIDERATIONS SUR LES ARRESTATIONS INTERNATIONALEMENT IRRÉGULIÈRES* (1965); Karl Doehring, *Restitutionsanspruch, Asylrecht und Ausliefersrecht im Fall Argoud*, 25 ZEIT. FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 209 (1965); 39 NEUE JUR. WOCH. 1427 (1986) (Ger. Fed. Const. Ct. 1985) (abductee may be tried if injured state does not protest or demand return). See also Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990); Canadian *Amicus Curiae* Brief, supra note 152, at 928.

The Security Council adopted a resolution which required Israel to make "appropriate reparation" to Argentina, but crucially, did not require Eichmann's return.\(^{201}\) Argentina initially sought Eichmann's return, but later dropped this demand.\(^{202}\) Eichmann was tried in Israel, and his objection to jurisdiction was rejected.\(^{203}\) He was convicted, condemned to death, and hanged. The case concerned crimes of such a unique and grave nature that it would be imprudent to abstract general principles from it.\(^{204}\) Moreover, its precedential value is clouded by a possible universality principle exception to enforcement jurisdiction.\(^{205}\) However, it does demonstrate

202. Argentina and Israel issued a joint communiqué on Aug. 3, 1960, in which they indicated that they considered the matter closed, while acknowledging that the incident had "infringed the fundamental rights of the State of Argentina." Eichmann, 36 I.L.R. at 59 (District Court decision).
203. Id. at 57-71. Eichmann, 36 I.L.R. at 304-08 (Supreme Court decision).
204. Mann, supra note 5, at 414. At the Security Council, Israel argued that "this isolated violation of Argentine law must be seen in the light of the exceptional and unique nature of the crimes attributed to Eichmann." U.N. SCOR, 15th Sess., 866th mtg., at 1, 4, U.N. Doc. S/PV.866 (1960) (Mrs. Meir, Israel). See Arendt, supra note 200, at 264 (noting argument that abduction might be justified by the unprecedented nature of the crime); Lowenfeld, 84 Am. J. Int'l L. 444, supra note 143, at 490 (Eichmann case "bigger than law").
205. A possible "Eichmann exception" to the rule against the exercise of police power within another state's territory might be grounded in the universality principle, which permits states to prescribe certain crimes and to try persons for them, regardless of where the offenses were committed, or the nationality of the offenders. Piracy is the classic example of a crime prescribed on the basis of the universality principle. The class of crimes which are susceptible to universal jurisdiction has expanded to include slavery, hijacking and skyjacking, genocide and crimes against humanity, and some forms of terrorism. 1 Restatement (Third) of Foreign Rel. Law § 404 (1987); Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785 (1988). However, there is considerable disagreement among states as to what this list should include. The major limitation is that the universality principle applies only to offenses which are "crimes under international law," a relatively narrow category. See Brownlie, supra note 20, at 304-05 (distinguishing universality jurisdiction from jurisdiction over crimes under international law). Although the universality principle is the basis for prescriptive and not enforcement jurisdiction, in cases where the fugitive is accused of war crimes or crimes against humanity, it is arguable that the presumption against enforcement jurisdiction within the territory of another state may be realigned. States may be able to abduct a fugitive from another state and charge him with crimes under international law without incurring international responsibility for the violation of the latter's territorial sovereignty, particularly where the asylum state has refused to either extradite or prosecute a fugitive accused of an international crime. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, arts. 5-7, Dec. 9, 1948, 78 U.N.T.S. 277 (states have an obligation to prosecute or extradite individuals in their jurisdiction accused of genocide). The abducting state's violation of the injured state's territorial sovereignty may be outweighed by both the abducting state's and injured state's jus cogens obligation to prosecute the fugitive for international crimes. See Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, 30 I.L.M. 1585, 1594 (1991) ("A State in whose territory an individual is alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him."). Such an approach is implied in Barbie, Judgment of Oct. 6, 1983, Cass. crim., 78 I.L.R. 125, 131 (Fr.). See Rosalyn Higgins, Problems and Process: International Law and How We Use It 72-73 (1994) (arguing that in the case of "universally condemned offenses," the issue of the fugitive's abduction should be "decoupled" from his subsequent trial, so that the illegality of the former would not
that in the absence of a specific request for the fugitive's return, a protest may not require restitution. Here, reparation amounted to censure of Israel and an Israeli apology to Argentina.\textsuperscript{206}

4. The Injured State Does Not Consent, Protests, and Requests the Individual's Return

Where the injured state does not consent to the abduction, but instead protests to the abducting state, there is a strong presumption that the fugitive must be returned to the injured state.\textsuperscript{207} A protest must be accepted at face value.\textsuperscript{208} It seems, however, that the injured state must specifically request his return.\textsuperscript{209} The duty to return is an established rule of custom-

\begin{itemize}
\item affect the abducting state's ability to proceed with the latter, and allowing an "Eichmann exception". For a similar view, see Fawcett, supra note 150, at 199-200. The abducting state would still be obligated to provide a remedy to the injured state, but this would not necessarily involve the return of the fugitive. An "Eichmann exception" should be limited to extremely grave crimes. The difficulty is that the range of universality offenses is malleable. It is arguable, for example, that the defendant's alleged involvement in torture in \textit{Alvarez-Machain} would justify his abduction under this exception. However, this concern might be met by the requirement that at the very minimum the would-be abducting state must exhaust all other avenues to secure the return of the fugitive before resorting to abduction, which clearly did not take place in \textit{Alvarez-Machain}. See Baker & Röben, supra note 6, at 676-77. But see Henkin, supra note 144, at 313 (rejecting any such "universality exception"). It is difficult not to sympathize with the concern that any Eichmann exception would be open to abuse. Nevertheless, it is one way to rationalize the caselaw.


\textsuperscript{207} Canada argued that the United States and Canada "have traditionally subscribed to the principle that—in the face of protest—an official transborder abduction must result in repatriation." Canada's \textit{Amicus Curiae} Brief, supra note 152, at 925. Interestingly, Canada's amicus brief cited Regina v. Walton, 10 C.C.C. 269 (Ont. (Can.) C.A. 1905) (Canadian fugitive brought from United States to Canada by Canadian policeman to face criminal charges; court rejected fugitive's jurisdictional challenge), but distinguished Walton on the grounds that there was no U.S. protest, and that it was a pre-Charter decision, implying strongly that under the Charter a different result would have been reached. Canada's \textit{Amicus Curiae} Brief, supra note 152, at 925. See La Forest, supra note 16, at 46-48 (arguing that pre-Charter jurisprudence would likely not be followed). Canada expressed concern that two recent incidents suggested divergent interpretations of the U.S.-Canada Extradition Treaty as the exclusive instrument for the conduct of U.S.-Canada extradition relations. \textit{Id.} at 926-27 (citing Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987), and Derrick Hills Case (1991), \textit{reprinted in} 31 I.L.M. 932 (1992)). Canada believed that \textit{Alvarez-Machain} provided the U.S. Supreme Court with the opportunity to confirm that U.S. law was in line with what Canada viewed as constituting international custom. \textit{Id.} at 928.

\textsuperscript{208} Contra Thomas L. Horan, Case Comment, 21 GA. J. INT'L & COMP. L. 525 (1991) (suggesting that court should look behind protest of foreign state and conduct inquiry into its validity). It is true, however, that the protest must emanate from the injured state itself. Peltier v. Henman, 997 F.2d 461, 474-75 (8th Cir. 1993) ("protest" of 49 members of Canadian Parliament does not amount to official protest).

\textsuperscript{209} See 1 Moore, supra note 148, § 193 (discussing case in which, following abduction of fugitive in Mexico by Texas sheriff, Mexican government requested that abductors be charged for their unlawful acts, but made no request for the return of the fugitive). One commentator indicates in the context of a general discussion of reparation in international law that "[i]n certain situations the simple payment of compensation would be inappropriate." Brownlie, supra note 184, at 235. He describes a situation in which
ary international law. This custom is demonstrated through state practice, specifically in cases involving: Canada and the United States; the United Kingdom and the United States; Mexico and the United

“the reparation could only take the form of the return of the victim and the punishment of the officials concerned.” Id. See also Brownlie, supra note 20, at 317 n.6 (“Much depends upon . . . a waiver of a claim to reconduction.”).


211. For examples of U.S. abduction coupled with Canadian demand, see Walters Case (1985), discussed in Fine, supra note 161, at A10 (Canadian forced onto airplane by unidentified abductors, flown to the United States. Canada protested, individual released by United States); Cochrane Case (1984), discussed in Fine, supra note 176, at A10 (British lured from Canada to U.S., released upon Canadian protest); Anderson Case (1974), discussed in C.V. Cole, Extradition Treaties Abound But Unlawful Seizures Continue, Int'l. Perspectives, Mar.-Apr. 1975, at 40, 42, reprinted in 9 L. Soc. Upp. Can. Gaz. 177 (1975) (U.S. Army deserter, arrested by U.S. police in Canada, brought back to the United States but returned upon Canadian protest); Kohosed Case (1960), discussed in Cole, supra, at 41; Bratton Case (1872), reprinted in 1 Moore, supra note 148, § 190 (U.S. returned individual who had been abducted from Canada to the United States). In Kohosed, two Canadian Indians were arrested by Michigan police on the St. Clair River. There was a dispute as to what side of the border they were on at the time of arrest. Canada argued that they should have been released and returned, although they pleaded guilty to the charges. Kohosed Case, supra.

For cases involving Canadian abduction coupled with U.S. demand, see Derrick Hills Case (1991), reprinted in 31 LL.M. 932 (1992). In Derrick Hills, a U.S. citizen was arrested by Canadian police on the U.S. side of the Detroit-Windsor Tunnel. After the United States protested, Canada stayed its proceedings and returned Hills to U.S. officials. Canada subsequently made an extradition request to the United States for his return. See the discussion of the case in Roy Carleton Howell, International Extradition: The Canadian Example of Justice and Fair Play, 4 Pace Y.B. Int'l. L. 147 (1992). See also Marker Case (1909), reprinted in 4 Hackworth, supra, at 226-27; Lafond Case (1908), reprinted in 4 Green H. Hackworth, Digest of International Law 224 (accused allegedly abducted from Illinois to Canada, charged with larceny and returned to the United States upon U.S. request). Marker involved an alleged abduction from North Dakota to Saskatchewan by two plainclothesmen, one of whom identified himself as “a constable of the North West Mounted Police of Canada.” Marker Case, supra, at 226. When the fugitive was charged with theft in Canada, the United States expressed concern. The British Ambassador reported that the Saskatchewan Attorney-General had agreed to stay the charges, release the fugitive, and give him an opportunity to leave the country. Id. at 227. See also Martin Case (1876) in 1 Moore, supra note 148, § 192 (U.S. citizen released upon U.S. protest after capture on U.S. territory); Wilson Case (1863), 1 Foreign Rel. U.S. 559 (1863) (two defendants abducted from Michigan by Canadian officers, the United States protested, and Canada agreed that they should be returned); 4 John Bassett Moore, Digest of International Law 328-32 (1906).

212. For cases involving British abduction and U.S. demand, see Blair Case (1876), discussed in 1 Moore, supra note 148, § 191 (Britain offered to return Englishman abducted from United States, also discussed in Lawrence Preuss, Settlement of the Jacob Kidnapping Case, 30 Am. J. Int'l. L. 123 (1936); 3 Travers, supra note 183, at 158-59; 6 Parry, supra note 189, at 482-83; Grogan case (1841), discussed in 1 Moore, supra note 148, § 189 (Britain returned fugitive abducted from United States to Canada by British soldiers). Regarding U.S. abduction and British demand, see Vincenti Case (1920), reprinted in 1 Green H. Hackworth, Digest of International Law 624 (Britain protested kidnapping of U.S. citizen from Bahamian territorial waters, resulting in return of prisoner to British authorities); Tyler Case (1863), 1 Foreign Rel. U.S. 524 (1863) (abduction from Canada by U.S. soldiers ends in agreement with British demands for release and return); Trent Case (1861), in 7 John Bassett Moore, Digest of Interna-
States; Spain and the United States; Germany and Switzerland; France and Germany; Italy and Switzerland; and the United Kingdom and South Africa.

In all of these incidents the fugitive was returned by the abducting state to the injured state upon protest and a request for his return. Cases where the abducting state made this determination, either by the executive or its domestic courts, support the viability of this doctrine.

Tional Law 768-79 (1906) (Confederate officers abducted from British vessel. Britain protested and the United States released the officers.).

213. For cases on Mexican abduction and U.S. demand, see Blatt and Converse Case (1911), 2 Hackworth, supra note 212, at 309 (Mexico returned defendants to United States); Gonzales Case (1872), 1 Foreign Rel. U.S. 448 (1872) (U.S. government demanded return of individual abducted from United States by Mexican officer); Nogales Case (1887), discussed in 1 Moore, supra note 148, § 196 (Mexican officer under arrest in the United States was rescued by Mexican soldiers and brought to Mexico, only to be returned upon U.S. demand and Mexican consent.). Regarding U.S. abduction and Mexican demand, see Martinez, 2 Foreign Rel. U.S. 1121 (1906); Ex parte Lopez, 6 F. Supp. 342 (1934); Alvarez-Machain, 504 U.S. 655 (1992) (Mexico was unsuccessful in each case). Compare Two Texas Fugitives Case (1878), in 1 Moore, supra note 148, § 194 (U.S. supports Mexican demand for return of two fugitives illegally rendered to Texas from Mexico).

214. Rueda Case (1891), in 4 Moore, supra note 211, at 330 (Spain agrees to return U.S. citizen abducted from Florida to Cuba by Spanish agents).

215. Jacob-Salomon Case, discussed in Lawrence Preuss, Kidnapping of Fugitives from Justice on Foreign Territory, 29 Am. J. Int’l L. 502 (1935) (German agents kidnapped German from Switzerland, Germany later returned him after Swiss demand). In the Schnaebelé Case, a French policeman was lured into Germany under false pretences by German officials, arrested, and imprisoned. Germany returned him upon protest. Schnaebelé Case, in 3 Travers, supra note 183, at 152-54.


217. Higgs Case (1964), reprinted in British Practice in International Law—1964, at 185 (Eliehu Lauterpacht ed., 1966). In Higgs, a Briton was abducted from Northern Rhodesia (now Zambia) and transported to South Africa, where he was taken into police custody. Northern Rhodesia protested to the United Kingdom. After U.K. officials confronted the South African government regarding the matter, Higgs was released to the British ambassador in South Africa for return to Northern Rhodesia.

218. Arangio-Ruiz, supra note 182, at 18 n.61. See Florida Case (1864), reprinted in 7 Moore, supra note 212, at 1090-91 (U.S. vessel towed Confederate ship from Brazilian waters to U.S. When Brazil protested, the United States apologized and released crew.). See 1 McNair, International Law Opinions 78-79 (1956) ("The remedy recommended 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.").

220. Jérôme Case (1885), in 3 Travers, supra note 183, at 141 (French deserter arrested in Germany, deported to France with collusion of French authorities, and returned to the frontier by French authorities.).

221. In re Jolis, [1933-1934] 7 Ann. Dig. 191 (1933) (Trib. Correctionnel d’Avesnes (Fr.)). In Jolis, a Belgian citizen, followed into his home country from France, was arrested by French police officers, returned to France, imprisoned, and charged with theft. When Belgium protested and demanded his return, the French court ordered his release, declaring that his arrest by the French police was "of no legal effect." Nollet Case, 18 J. Du Dr. Int’l 1188 (1891) (Cour d’appel de Douai (Fr.)). In Nollet, a Belgian citizen was arrested in Belgium by French police and then handed over to Belgian authorities, who mistakenly transferred him to French police at the border. The French
Until Alvarez-Machain, the U.S. Supreme Court had never denied this rule of customary international law. In fact, federal appellate courts had never refused to return a fugitive when there was a protest and request for the fugitive's return. Moreover, the rule is well-grounded in opinio juris. Thus, the assertion that there is no rule of customary international law requiring the return of a fugitive is inaccurate. Only the broad formulation of the rule (i.e., without the stipulations that the injured state must protest and request the fugitive's return) is inaccurate. Where there is a violation of territorial sovereignty by state agents, and the injured state protests and requests the return of the fugitive, customary international law requires that the fugitive be returned to the state from which he was abducted.

C. Domestic Law Consequences of International Illegality

1. Rejecting the Justiciability Myth

The previous section established the existence of a rule of customary international law prohibiting transnational forcible abduction and requiring abducting states to return the abducted individual upon the injured state's protest and request for his return. However, this important issue remains: which branch of the domestic government in the abducting state is responsible for ensuring that this international obligation is carried out? This
Article posits that in the case of the customary international norm regulating transnational forcible abduction, domestic courts are the most appropriate branch of the state to oversee its implementation in domestic law.225

The Alvarez-Machain Court decided otherwise. At the core of the majority decision in Alvarez-Machain was the view that a refusal to exercise jurisdiction over the fugitive, and/or to order the return of the fugitive to Mexico, would intrude upon the executive's conduct of foreign affairs.226 The majority adopted elements of a "justiciability" framework which suggests that legal issues with an international dimension are matters for the executive, and not the courts, to decide.227 Granted, the majority did not decline to decide the case on the grounds that the issue presented to it was non-justiciable. However, consistent with earlier case law, the Court remained reluctant to engage in the supervision of executive action in foreign affairs.228 In the event of a forcible abduction of an individual from one state to stand trial for criminal charges in another, the domestic courts of the latter state should not deal with the matter by refusing to exercise jurisdiction over the abductee. Instead, the issue should be resolved on the "higher stage" of interstate relations. Why? Because domestic courts in

225. See, e.g., CONFORTI, supra note 11, at 8-9 ("Compliance with international law relies not so much on enforcement mechanisms available at the international level, but rather on the resolve of domestic legal operators such as public servants and judges to use to their limits the mechanisms provided by municipal law to ensure compliance with international norms.").

226. Alvarez-Machain, 504 U.S. at 669 ("the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch") (footnote omitted).

227. The Alvarez-Machain majority suggested that the issue of a possible international law violation was not justiciable. Rather, it involved a "political question," or matter to be resolved on the diplomatic plane. Yet the Alvarez-Machain majority did not explicitly invoke the political question doctrine. See Xiao v. Reno, 837 F. Supp. 1506, 1547 (N.D. Cal. 1993). A similar reliance upon a justiciability framework has been taken in other cases. See, e.g., Unverzagt v. Benn, 5 F.2d 492 (9th Cir. 1925); United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956); United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934); State v. Brewster, 7 Vt. 118 (1835). However, Martinez, [1906] 2 FOREIGN RL. U.S. 1121, shows that this approach rings hollow. There the State Department attempted to shift responsibility to the federal courts, telling Mexico that Ker bound its hands, and that the separation of powers prevented it from interfering with a federal judicial decision. Id. at 1122. This undermines the claim that assigning the issue to the executive will ensure its resolution.

228. The reluctance is based largely upon the U.S. Constitution's implicit allocation of responsibility for the conduct of foreign relations to the executive branch. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). See generally RANDALL, supra note 205, at 785. See Ex parte Lopez, 6 F. Supp. 342 (S.D. Tex. 1934). In Lopez, the defendant was abducted from Mexico and charged with narcotics offenses in Texas. Mexico sought his release and indicated that it would hold him, awaiting a proper extradition request from the U.S. authorities. However, the court rejected this request: "The intervention of the Government of Mexico raises serious questions, involving the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this Court has no jurisdiction." Id. at 344 (citation omitted). This judicial reluctance to tread upon what is perceived to be executive territory can be traced as far back as Edye v. Robertson, 112 U.S. 580 (1884). See also The Ship Richmond, 13 U.S. (8 Cranch) 102 (1815); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). It has been criticized. See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).
several arguably analogous situations don't inquire into international relations, often showing deference to either the executive or legislature.\textsuperscript{229}

This approach is an abdication of both the international legal obligation to vindicate international law, and the domestic legal obligation to supervise executive conduct. The question before the Court in \textit{Alvarez-Machain} certainly contained a significant international dimension, but it was in essence a criminal case, an area inherently within the competence of the judiciary. The mere fact that a case has a foreign relations element to it does not render it non-justiciable.\textsuperscript{230}

Indeed, it is the exercise of jurisdiction by the abducting state's domestic courts in transnational forcible abduction cases which is likely to embroil that state in an international controversy. By turning a blind eye to violations of international law, a domestic court actually encourages such conduct, thereby resulting in further international controversy. This is not to deny the existence of a "political question" or "non-justiciability" doctrine.\textsuperscript{231} The real issue, however, is whether a criminal trial following a transnational forcible abduction is an appropriate ground for its exercise.\textsuperscript{232} Surely it is not. There is an important distinction between evaluating the legality under domestic or international law of the actions of a


\textsuperscript{232} Verdugo-Urquidez II, 938 F.2d at 1357. See Bennett II, [1994] 1 App. Cas. at 78 (Lord Lowry) (refusing to leave forcible abduction cases to the executive or diplomatic plane for resolution); RANDALL, supra note 11, at 107-13; Note, \textit{Judicial Enforcement of International Law Against the Federal and State Governments}, 104 HARV. L. REV. 1269 (1991).
foreign state and assessing the legality of the acts of the domestic executive. The former is likely to be considered non-justiciable, whereas the latter should be adjudicated.

2. The Demise of Supervisory Powers?

U.S. federal courts possess an inherent supervisory power to control the administration of justice before them.\(^2\) This power goes beyond merely ensuring that due process requirements have been satisfied.\(^3\) The supervisory power arises from the need to protect the integrity of the judicial process. It acts as "a remedy designed to deter illegal conduct."\(^4\) The supervisory power acts as an important check over executive conduct and has been relied upon by lower courts in the forcible abduction context to justify refusing to exercise jurisdiction over an abducted individual.\(^5\) Although in recent years the Supreme Court has sharply bounded the federal courts' power of supervisory jurisdiction,\(^6\) it remains at least in theory a viable route by which the federal courts may ensure that executive lawlessness is not permitted to taint the judicial process.

A picture of where the law governing transnational forcible abduction after Alvarez-Machain is headed may be gleaned from the recent decision of the Ninth Circuit in United States v. Matta-Ballesteros.\(^7\) U.S. marshals, assisted by Honduran paramilitary troops, abducted a Honduran fugitive involved in drug-trafficking from Honduras and brought him to the United States for trial. The U.S. government did not dispute that it had abducted the fugitive from Honduras, but disputed his claims that he had been beaten and burned by U.S. agents in the process. The fugitive brought an application for habeas corpus on jurisdictional grounds, but it was

\(^3\) Id. at 340.
\(^5\) Toscanino, 500 F.2d at 276 ("the supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process"); United States v. Caro-Quintero, 745 F. Supp. 599, 615 (C.D. Cal. 1990) (although the court did not rest its decision on the exercise of its supervisory jurisdiction). See also the concurring judgment by Oakes, J., in United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) ("To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law."). But see United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (refusing to exercise supervisory jurisdiction in forcible abduction cases); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990); United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988).
\(^6\) See United States v. Williams, 112 S. Ct. 1735, 1741 (1992) (supervisory power is limited to control of court's own process); United States v. Hasting, 461 U.S. 499, 506-09 (1983) (supervisory power does not extend to disciplining prosecutors in cases of harmless error); United States v. Payner, 447 U.S. 727, 735-36 (1980) (supervisory power does not allow court to exclude evidence on the basis that it was served unlawfully from a third party). See also Sara Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 COLUM. L. REV. 1433 (1984) (arguing that the supervisory power doctrine should be abandoned and replaced by narrower constitutional and statutory heads of authority).
\(^7\) United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995).
refused. He was then convicted of federal narcotics offenses in Florida, convictions which were upheld on appeal.

Following his conviction in Florida, the fugitive was brought to California to face charges of conspiring to kidnap and murder D.E.A. agent Camarena, the victim of Alvarez-Machain’s alleged crimes. At trial he was acquitted of murder, but convicted of conspiring to and participating in the kidnapping of a federal agent, and violations of federal racketeering legislation. He appealed the convictions on the same jurisdictional grounds which had supported his earlier challenge; namely, that his abduction from Honduras by U.S. agents violated the extradition treaty between Honduras and the United States, and that the circumstances of his abduction and the treatment to which he had been subjected were sufficiently egregious that the court was divested of jurisdiction over him.

The Ninth Circuit dismissed the fugitive’s appeal. Judge Poole, with whom Judge Browning joined, considered three possible grounds upon which the fugitive’s jurisdictional challenge could succeed. The first was that the U.S. government’s abduction of the fugitive violated the U.S.-Honduras Extradition Treaty. The fugitive argued that Alvarez-Machain stood for the proposition that a federal court could not exercise jurisdiction over a fugitive brought before it in violation of an extradition treaty. The court did not disagree with this characterization, but noted that the Supreme Court in Alvarez-Machain had been careful to state that an extradition treaty would only be so violated where forcible abduction was specifically prohibited by the express terms of the treaty. Unsurprisingly, as with its Mexico-United States counterpart, there were no such express terms in the Honduras-United States Extradition Treaty, and thus, according to the controlling authority of Alvarez-Machain, no violation of the extradition treaty.

The second was that the U.S. government’s treatment of the fugitive was so shocking as to invoke a Toscanino-like due process exception to the Ker-Frisbie rule. Judge Poole held that the old Ker-Frisbie doctrine applied in the absence of an extradition treaty violation. He read Alvarez-Machain as having snuffed out the lingering Toscanino due process exception.

The final possibility was that the court would decline to exercise jurisdiction over the fugitive. Judge Poole held that the court could exercise its “inherent supervisory powers” to order dismissal for only three reasons:

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241. Matta-Ballesteros, 71 F.3d at 762.
242. Id.
243. Id. at 754.
244. Id. at 772.
245. Id.
246. Id. at 762.
247. Id. at 763.
248. Id. at 764.
(1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct. Given this narrow scope of the supervisory powers, the circumstances surrounding the fugitive's abduction, while "disturbing," did not meet these criteria. In light of Alvarez-Machain, the purported actions of the U.S. marshals had "violated no recognized constitutional or statutory rights." The only circumstances in which the court could exercise its supervisory powers would be where the fugitive could demonstrate governmental misconduct "of the most shocking and outrageous kind." The fugitive had not done so, even though he had adduced evidence that he had been shocked with stun guns. Accordingly, there was no ground for the exercise of the court's supervisory powers. With this, Judge Poole reluctantly rejected the fugitive's jurisdictional objections and proceeded to affirm the district court's decision on substantive grounds.

Judge Noonan wrote a concurrence which is remarkable for its clarity, yet ultimately disappointing because of its timorousness. Judge Noonan focussed his attention solely on the supervisory powers. He began by distinguishing the case before him from similar precedents. The involvement of government abductors rather than private agents, and the abduction of the fugitive for trial in federal rather than state court distinguished Ker. The transnational as opposed to interstate nature of the case distinguished Frisbie. Unlike Noriega, the fugitive was not the head of a foreign state abducted by U.S. military forces acting on behalf of the President in his capacity as commander in chief. The case did not turn on a treaty violation (Alvarez-Machain), nor an alleged violation of customary international law (Alvarez-Machain on remand), and Honduras did not protest (Matta-Ballesteros v. Henman).

To the contrary, the case was about a violent abduction, in breach of domestic and international law, by U.S. agents and their Honduran associates, of a fugitive for trial in the United States. Judge Noonan was particularly concerned that the court was being asked to lend its assistance to the abduction. These considerations reinforced his conclusion that the court could invoke its inherent supervisory powers to dismiss prosecutions.

249. Id. at 763 (citing United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991)).
250. Id. at 763.
251. Id. at 763-64.
252. Id. at 764 (citing United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (internal quotes omitted)). This is the Toscanino standard.
253. Id. at 761.
254. Id. at 772.
255. Id.
256. Id.
257. Id.
258. Id.
259. Id. at 773.
in order to deter illegal conduct. Indeed, Judge Noonan was of the view that the supervisory power could be invoked even where there was no constitutional or statutory violation. Mindful of the limits which had developed as to the exercise of supervisory powers, Judge Noonan emphasized the involvement of U.S. marshals in the abduction, so that the exercise of supervisory powers over the conduct of U.S. marshals could be said to amount only to control over the administration of justice rather that a more-wide-ranging power over executive misconduct.

Judge Noonan was, accordingly, willing to exercise the supervisory powers of the court to dismiss the prosecution, save for one technicality. As noted above, after being brought into the United States, the fugitive had been convicted for various drug offenses. The fugitive had not advanced the supervisory jurisdiction argument before the Eleventh Circuit, and so in Judge Noonan's view, he had waived that argument. The conviction of the fugitive by the Eleventh Circuit had “broken the confinement caused by the abduction.” Accordingly, the fugitive “stands before us not as the victim of abduction (which he once was) but as a lawfully-held prisoner,” so that the court need not dismiss the case against him.

For observers hoping for a reinvigoration of the federal courts' supervisory jurisdiction in the transnational forcible abduction context, the Ninth Circuit's decision in Matta-Ballesteros is a great disappointment. The majority accepted that Alvarez-Machain had effectively foreclosed arguments based upon violations of an extradition treaty, other than where a specific provision of the treaty expressly prohibits abduction. Similarly, Alvarez-Machain had sounded the death-knell for the Toscanino due-process exception, even if it did not explicitly overrule Toscanino. On these first two grounds, it is difficult to find fault with the majority's reasoning, given Alvarez-Machain.

Given the majority's almost unassailable conclusions on the first and second arguments, its clouded exposition of the court's inherent supervisory powers is very troubling. The majority was prepared to exercise its inherent supervisory powers, but concluded that such exercise would be inappropriate in this case. Yet the test set out by the majority reveals that its due process analysis clouded its thinking on the issue of supervisory powers. It is particularly difficult to understand how the transnational forcible abduction at issue in the case can be said to have violated no constitutional or statutory rights.

Judge Noonan, on the other hand, outlined a more robust account of the court's inherent supervisory powers, but then abruptly declined to set them in motion on the basis of a technicality of questionable merit. Given the tenor of most of Judge Noonan's opinion, his concluding paragraphs are unexpected. His conclusion that the intervening decision of the Ele-

260. Id. at 774.
261. Id.
262. Matta, 937 F.2d at 567.
263. Matta-Ballesteros, 71 F.3d at 775.
264. Id.
enth Circuit precluded the fugitive from raising a jurisdictional objection before the court was unsupported by reference to authority. Judge Noonan's resolution of the case is particularly surprising given that the majority itself rejected such analysis on the issue of collateral estoppel. Judge Poole indicated that there was simply no authority for the proposition that the earlier decisions in the Seventh and Eleventh Circuits precluded the fugitive from raising a jurisdictional challenge before the Ninth Circuit.265

The continued vitality of the inherent supervisory power of the federal courts in the transnational forcible abduction context is thus an open question after Matta-Ballesteros. But it will take another case to set the supervisory power on stronger footing. In a sense, the circumstances of the case were inopportune: had the fugitive been before a U.S. court for the first time after his abduction to the United States, Judge Noonan's technical objection would have fallen away, and his view of the court's inherent supervisory power might have commanded more support. Yet the general picture is dispiriting. The majority's account of the supervisory power was confused, and even Judge Noonan's account of the supervisory power was dependent upon the involvement of U.S. marshals. Any attempt to revitalize the supervisory power should look abroad, to the experience of the courts in Commonwealth jurisdictions.

3. The Role of Domestic Courts

There is an increasing awareness that domestic courts have a special role to play in the enforcement of international law as it relates to human rights.266 In particular, they are obliged to enforce applicable customary international norms.267

From the viewpoint of the international legal system, domestic courts are part of the political apparatus of states.268 States are responsible in international law for the acts of all of their officials, including the judiciary.269 Given this responsibility, domestic courts must enforce the interna-

265. Id. at 762 n.2.
266. Higgins, supra note 205, at 218; Henkin, supra note 144, at 303; Note, supra note 232, at 1269.
267. See Falk, supra note 11, at 9-10, 12. Richard Falk supports the application of public international norms by domestic courts where the norm has strong support from the community of states, but favors deference to the executive where there is a "significant diversity of outlook among major nations." Id. at 177. However, customary norms by definition require general, if not universal, support in international practice. See North Sea Continental Shelf, 1969 I.C.J. 3. Therefore, if a customary norm can be demonstrated to exist—such as that prohibiting transnational forcible abduction and in favour of certain remedies—it should be applied by domestic courts in the absence of conflicting federal legislation.
268. Internal constitutional considerations, such as the separation of powers, are irrelevant for the purposes of state responsibility. VCLT, supra note 50, art. 27; Draft Articles on State Responsibility, [1979] 2 (pt. 1) Y.B. INT'L. COMM'N 91; Henkin, supra note 144, at 103.
tional legal obligations of their own state. If they do not, the judiciary will be a partner in or an agent of the state's illegal international acts. When a state violates international law by forcibly abducting a fugitive for trial, it is incumbent upon its courts as a matter of international law to ensure that the violation ceases. When a state does not have valid enforcement jurisdiction under international law, it may even be argued that its courts cannot exercise adjudicative jurisdiction under domestic law.

If a domestic court makes a decision incompatible with international law, the state of which it is a part will incur international responsibility. At the least, this requires a duty to stay proceedings against the fugitive, and more likely, a duty to order the fugitive's return to the state from which he was abducted. These international law duties should not be confused with the duties of domestic courts under national law. Indeed, the central difficulty is that domestic law may seem to compel such courts to act in a way which places their state in violation of its international legal obligations. On the international plane, a failure of domestic courts to fulfill a state's international obligations will place the state in breach of those obligations.

How then might the customary international law norm against transnational forcible abduction enter domestic law? Customary international law is part of domestic common law by virtue of the doctrine of incorporation (or adoption, as it is sometimes known). The position is slightly different in the United States, where customary international law is part of federal law under the Constitution. However, conflicting domestic (federal) legislation prevails over customary international law.

270. See Morgenstern, supra note 5, at 265, 267, 279. But see In re Karoly R., [1927-28] 4 Ann. Dig. 345 ("There is no rule of public international law according to which courts of a State have no right to conduct criminal proceedings against an accused who returned from abroad by any means other than extradition.").

271. 1 RESTATEMENT (THIRD) OF FOREIGN REL. LAv § 432, cmt. a (1987); Edwin D. Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 Am. J. Int'l L. 231, 244 (1934); Garcia-Mora, supra note 5, at 445.

272. Jimenez de Arechaga & Tanzi, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, supra note 192, at 365 ("the case of a fugitive offender being dealt with contrary to a provision of an extradition treaty . . . [is an example of] judicial decisions which constitute direct breaches of international law").


As discussed above, in the forcible abduction context customary international law prohibits one state's exercise of enforcement jurisdiction within the territory of another state without the latter's consent. The appropriate remedy for such a violation is dependent upon whether the injured state protests and requests the return of the fugitive. The court must also determine whether there is conflicting domestic legislation (or a "controlling executive act" in the United States) which would preclude the application of the customary rule. If there is such legislation, the customary rule cannot apply. However, if there is no such legislation, and if the abduction violates customary international law, a domestic court should order the return of the fugitive to the injured state. The existence of such legislation (or in the United States, "controlling executive act") in violation of customary international law would not, of course, relieve the state of its international obligations.

Many forcible abduction situations, however, do not involve a clear violation of the customary rule. Where there is no protest by the injured state, or indeed active cooperation in the abduction by the injured state, the customary rule is inapplicable. Similarly, there may be uncertainty as to whether the abduction was state-sponsored as opposed to the work of private individuals. As to the remedial issue, where the injured state does not request the return of the fugitive, custom does not require that the abducting state return him. In such cases, the customary rule provides little guidance to a domestic court. Answering these problems requires an examination of the role of the international human rights framework in domestic law.

IV. Transnational Forcible Abduction in International Human Rights Law

A. The International Human Rights Law Framework

A third major criticism of the majority's reasoning in *Alvarez-Machain* is that the U.S. Supreme Court assumed a statist framework and ignored the international human rights dimension to the case. The dialogue between the majority and the dissent omitted any mention of international human rights law. Moreover, the *Alvarez-Machain* Court declined to consider whether domestic constitutional guarantees might be informed by international human rights jurisprudence. This section concludes that the U.S.

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*violate customary international law* with Michael J. Glennon, *Can the President Do No Wrong?*, 80 Am. J. Int'l L. 923 (1986); Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321 (1985) (President may violate customary international law with the authorization of Congress); Louis Henkin, *The President and International Law*, 80 Am. J. Int'l L. 930 (1986); and Henkin, *supra* note 53, at 878 (president acting as commander in chief or under foreign affairs power may violate customary international law). But no one doubts that Congress (and in Canada, the federal Parliament) can legislate in violation of customary international law. It is also likely that Canadian provincial legislatures may legislate in violation of custom, at least in provincial heads of jurisdiction.
Supreme Court made a grave error in *Alvarez-Machain* by ignoring the international human rights norms against transnational forcible abduction.

Classical international law views illegal abduction as a violation of states' rights. As a result, its protection of individual human rights is subject to the vagaries of diplomatic compromise and state discretion. Earlier discussion in this Article illustrates that in the case of a *prima facie* violation of international law, the attitude of the injured state is a central consideration. This focus may be desirable in that it lends flexibility and a spirit of compromise to the international legal system which a more rigid approach to remedies would preclude. Invariably, however, this flexibility is gained at the expense of the abducted individual, whose fate is entirely dependent upon whether the injured state is inspired to espouse his case. A state's decision whether to protest an abduction is purely discretionary and may be influenced by politics rather than principle.277

Happily, in some cases the fugitive benefits from the injured state's protest. However, even where it does protest, the injured state may opt for a remedy other than return or restitution (as Argentina did in *Eichmann*). Under customary international law, the fugitive is then without recourse. Moreover, the injured state may not protest because it is unaware that the abduction ever took place. The classical framework, with its state-centered approach, is a poor guarantee of the rights of individuals.

Nevertheless, since the end of the Second World War there has been a groundswell of development in international human rights law with a focus on the inalienable rights of individuals as distinct legal actors. International human rights law thus provides—at least in theory—a more comprehensive protection of the human rights of individuals than is contemplated by customary international law. This section explores the question of whether the abduction of an individual from one state and his rendition to face trial in another can be considered a violation of the rights of the individual under international human rights law, as well as the related issue of how international human rights law informs the interpretation of domestic civil liberties.

Transnational forcible abduction is an alternative to, and a circumvention of, extradition. Traditionally, it was said that extradition treaties regulate relationships and create obligations between states alone,278 but there is growing recognition that there is a human rights aspect to extradition.279 Much debate has raged as to whether extradition treaties create

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276. Regarding a state's discretion as to whether to protest an international wrong, see *Barcelona Traction*, 1970 I.C.J. 3, ¶ 78-83. It is conceivable that this discretion could be subject to judicial review under domestic law.

277. John Dugard, *No Jurisdiction Over Abducted Persons in Roman-Dutch Law: Male Captus, Male Detentus*, 7 S. Afr. J. Hum. Rts. 199, 201 (1991) (Protest "has proved to be ineffective in the Southern African context as states have generally failed to protest against the actions of their more powerful neighbour [South Africa].").


279. H.F. van Panhuys, *Le traité d'extradition en tant que source de droits pour les individus*, in *LE DROIT PÉNAL INTERNATIONAL: RECUEIL D'ÉTUDES EN HOMMAGE À JACOB MAAR-
Extradition treaties protect the interests of states in regulating the transfer and rendition of fugitives, but also ensure that fugitives will be extradited only in accordance with provisions of such treaties. Developments in extradition law—such as the specialty principle, the principle of double criminality, and the political offense exception—indicate an increasing concern for the due process rights of individuals. Indeed, these developments are not easily explained otherwise. Thus, it may be argued that circumvention of the regular extradition process by means of transnational forcible abduction is itself a violation of the human rights of the fugitive because it denies him the procedural protections which would be available under an extradition treaty.

However, the debate as to whether individuals possess rights under extradition treaties obscures the larger issue of the legality of forcible abduction, because it places undue emphasis upon the existence and proper interpretation of extradition treaties, whereas human rights exist independently of extradition treaties. The better approach is to recognize that a state does injustice to an individual by exercising jurisdiction over the individual in an inappropriate manner. Instead, a state must look to both public international law and human rights law to determine the legality of the prosecuting state’s exercise of jurisdiction. Once the debate shifts its focus to this account, the task of domestic courts is clarified considerably. This is not to suggest that the scope of individual rights under extradition treaties is insignificant, but only that it is a separate issue.

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280. See generally United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (extradition treaties exist for the benefit of states alone and do not confer rights upon individuals); United States v. Valot, 625 F.2d 308 (9th Cir. 1980); United States v. Yunis, 681 F. Supp. 909, 916 (D.D.C. 1988); CHRISTINE CHINK N, THIRD PARTIES IN INTERNATIONAL LAW 120-33 (1993) (discussing rights of individuals as third parties under treaties); Yoram Dinstein, Some Reflections on Extradition, 36 GE. Y.B. INT’L L. 46, 54 (1993) (extraditing state’s ability to waive formalities under an extradition treaty indicates that extradition treaties do not create rights in individuals other than those derived from states); Morgenstern, supra note 5, at 271 (individuals have no rights under extradition treaties); United States ex rel. Lujan, 510 F.2d 62 (2d Cir. 1975). But see Bennett II, [1994] 1 App. Cas. at 62 (Lord Griffiths) (“Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country.”).

281. See United States of America v. Lépine, 111 D.L.R. 4th 31, 37-38 (Can. 1994) (La Forest, J.) (Doctrines of double criminality and specialty “are the procedures adopted by the high contracting parties to protect the individual.”); United States of America v. McVey, [1992] 3 S.C.R. 475, 519 (Can.); United States of America v. Cotroni, 48 C.C.C. 3d 193, 219 (Can. 1989) (La Forest, J.) (“Extradition practices have been tailored as much as possible for the protection of the liberty of the individual.”).

282. Henkin, General Course, supra note 144, at 304-05. See also JEAN-GABRIEL CASTEL, EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND U.S.A. PRACTICES COMPARED 24-25 (1988) (arguing that emerging doctrine of customary international law deems an exercise of jurisdiction to be unlawful when it is unfair, arbitrary, or unreasonable).
From the viewpoint of the fugitive, the international human rights framework offers two important advantages over the classical international law system. First, it does not require the injured state to protest in order for the fugitive to invoke the protection of international human rights norms. The invocation of these norms is not discretionary; they guarantee rights which are inalienable and thus unaffected by the consent of the injured state. Under international human rights law, individuals have legal rights and duties; they are not stand-ins or beneficiaries of rights derived from states. Thus, individuals may assert their own rights and need not wait for the injured state to do this for them. Second, fugitives need not rely upon the violation of an extradition treaty to show that their abduction violates international law norms. It is not the circumvention of extradition proceedings (although this should weigh as an important factor) so much as it is the improper exercise of jurisdiction over individuals which violates their human rights. Obviously, this violation is of particular importance when an abduction takes place in the absence of an extradition treaty. Again, the emphasis is upon rights distinct from and independent of extradition treaties.

The two main sources of international human rights law are custom and convention. This Article primarily concerns the latter. Although there is a range of international human rights instruments, the most important ones in the present context are the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol and the


European Convention on the Protection of Human Rights and Fundamental Freedoms ("European Convention").\textsuperscript{287} Canada is a signatory to both the ICCPR and its Optional Protocol.\textsuperscript{288} The United States is a signatory to the ICCPR but not its Protocol,\textsuperscript{289} although at the time of Alvarez-Machain’s abduction the ICCPR was not yet in force under American law.\textsuperscript{290} While neither Canada nor the United States is a signatory to the European Convention, the Convention is nonetheless an important source of human rights jurisprudence due to the cultural, social, and political similarities between North America and the European states. Moreover, the European Convention is the most comprehensive international system for the articulation, interpretation, and enforcement of human rights.

B. Forcible Abduction Under the ICCPR

The United Nations Human Rights Committee, which is charged with interpreting the ICCPR and Optional Protocol, has held in four decisions (Celiberti de Casariego,\textsuperscript{291} López Burgos,\textsuperscript{292} Almeida de Quinteros,\textsuperscript{293} and


\textsuperscript{288} Canada acceded to both the ICCPR and the Optional Protocol on May 19, 1976; both treaties entered into force for Canada on Aug. 19, 1976.


\textsuperscript{290} The ICCPR would now preclude the United States from engaging in transnational forcible abduction. Theodor Meron, Extraterritoriality of Human Rights Treaties, 89 Am. J. Int’l L. 78, 80 (1995); John Quigley, Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights, 6 Harv. Hum. Rts. J. 59, 86 (1993) (noting that the extent of U.S. adherence to the ICCPR is an open question, but will nonetheless demand the attention of U.S. prosecutors); Timothy D. Rudy, Did We Treaty Away Ker-Frisbie?, 26 St. Mary’s L. J. 791, 792 (1995) (arguing that the U.S. ratification of the ICCPR ultimately may change the American courts’ disregard for the manner in which a defendant is brought before it).

\textsuperscript{291} Case of Lilian Celiberti de Casariego, U.N. GAOR, 36th Sess., Supp. No. 40, at 185, U.N. Doc. A/36/40 (1981), reprinted in 68 I.L.R. 41 (1981) [hereinafter Casariego]. In Casariego, a Uruguayan/Italian citizen was abducted from Brazil by Uruguayan agents with the connivance of Brazilian police, brought to Uruguay, detained, and charged with subversive activities. The U.N. Human Rights Committee (HRC) determined that the abduction violated ICCPR article 9(1) and that Uruguay was obligated to release and compensate de Casariego and allow her in leave the country. \textit{Id.}

\textsuperscript{292} Case of Sergio Ruben López Burgos, U.N. GAOR, 36th Sess., supp. No. 40, at 76, U.N. Doc. A/36/40, reprinted in 68 I.L.R. 29 (1981) [hereinafter López Burgos]. In López Burgos, a Uruguayan exile in Austria brought an application on behalf of her husband, who had been abducted from Argentina by Uruguayan agents with the assistance of Argentine paramilitaries. He had been brought to Uruguay, detained, and tortured. The HRC found that the forcible abduction violated ICCPR article 9(1) and ordered that López Burgos be released, compensated, and permitted to leave Uruguay. \textit{Id.}

\textsuperscript{293} Case of Almeida de Quinteros, Comm. No. 107/1981, July 21, 1983, reprinted in 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 138 (1990) [hereinafter Almeida de Quinteros]. A Uruguayan national was abducted from the grounds of the Venezuelan embassy in Montevideo, Uruguay, by Uruguayan troops. Her mother, in exile in Sweden, brought an application before the HRC. Uru-
the Cañón Garcia case\(^{294}\)) that forcible abduction of an individual from one state to another for the purposes of his rendition to face a criminal trial (or torture) violates article 9(1) of the ICCPR.\(^{295}\) The Human Rights Committee has also been careful to indicate that the fact that a state acts outside its territory (e.g., by sending its agents abroad to abduct an individual) does not preclude application of the ICCPR.\(^{296}\) Thus, the ICCPR has extraterritorial effect and applies to all actions of agents of states parties, wherever they may take place.\(^{297}\)

In Giry v. Dominican Republic,\(^{298}\) the Human Rights Committee considered the role played by the rendering state in a deportation case. By analogy, Giry indicates the responsibilities of a state involved in a forcible abduction from its territory. A French citizen was detained by Dominican officials at an airport in the Dominican Republic and prevented from taking a flight to the Netherlands Antilles. Instead, he was deported to Puerto Rico to face drug trafficking charges. The Committee held that the Dominican Republic's expulsion of Giry to the United States violated the procedural protections contained in the U.S.-Dominican Republic Extradition Treaty as well as article 13 of the ICCPR.\(^{299}\) The Dominican explanation of events—that it had arrested Giry with the sole intention of deporting him—was viewed with suspicion, given that Giry had been at the airport to take a flight out of the country when he was detained. Some Committee members were of the opinion that there had also been a violation of ICCPR article

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\(^{294}\) Cañón Garcia v. Ecuador, Hum. Rts. Comm., 43d Sess., Annex, U.N. Doc. CCPR/C/43/D/319/1988 (1991) [hereinafter Cañón Garcia]. In Cañón Garcia, a Colombian citizen was abducted in Ecuador by Ecuadorian agents at the behest of the U.S. Drug Enforcement Agency (DEA), and deported to the United States to face drug trafficking charges. As a non-signatory, no action could be brought against the United States under the ICCPR. However, the HRC found Ecuador in violation of ICCPR article 9(1). Ecuador conceded that there were administrative and procedural irregularities and gave assurances that it was investigating the matter. Id.

\(^{295}\) ICCPR, supra note 285, art. 9(1) ("Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.").

\(^{296}\) Casariego, supra note 291, at 188; López Burgos, supra note 292, at 182-83.

\(^{297}\) Compare Verdugo-Urquidez I, 494 U.S. 259 (1990) (Fourth Amendment has no extraterritorial application to non-resident aliens).


\(^{299}\) Article 13 of the ICCPR states:

An alien lawfully in the territory of a state Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.
9(1). Thus, Giry suggests that a state which assists in a forcible abduction from its territory will violate human rights obligations owed to the abducted individual.

The Committee has been remarkably vigilant in its protection of the human rights of abducted individuals. In all five cases the Committee found for the applicant. The Committee reinforced the customary international law rule prohibiting forcible abduction and transplanted the rule into the human rights context, protecting individuals qua individuals. This focus on the individual is heightened by the fact that the absence of protests by the injured state, of cardinal importance under customary international law, was not even considered in these cases. In fact, the active collusion in the abductions by agents of the host states would amount to consent by those states to the abductions under customary international law and preclude a finding of an international wrong.

C. Forcible Abduction Under the European Convention

The European Court of Human Rights has ruled on the issue of disguised extradition on two occasions. Both decisions offer persuasive evidence of an emerging international human rights norm against forcible abduction. In addition, the European Commission on Human Rights has considered a number of applications in cases of alleged abduction or disguised extradition, although in each case it has declared the application to be inadmissible.301 As a preliminary matter, it also should be noted that the European

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300. Giry, 95 Int'l L. Rep. at 326 (individual opinion of Ms. Chanet and Messrs. Urbina, Ando, Wennegren) ("[T]he arrest of Mr. Giry and his enforced boarding of [a]... flight... constitute unlawful and arbitrary arrest within the meaning of article 9, paragraph 1, of the Covenant.").

Court, like the U.N. Human Rights Committee,\(^3\) has determined that the territorial scope of the application of the European Convention's human rights guarantees is not limited to the national territory of signatory states.\(^3\) Thus, a transnational forcible abduction carried out by agents of a signatory state outside its national territory would still engage the responsibility of the abducting state under the Convention.\(^3\)

In Bozano v. France,\(^3\) an Italian court had convicted the applicant in absentia and sentenced him to life imprisonment for offenses including abduction, murder, and indecent assault. He fled to France, where he was arrested. A French court refused Italy's request for the applicant's extradition, and he was eventually released from custody. The applicant claimed that soon after his release, he was abducted by plain-clothes police officers, served with a deportation order, driven to the Swiss border, escorted to a Swiss police station, and informed that Italy was seeking his extradition. He was later extradited to Italy and imprisoned there.

Bozano challenged his abduction, both under French domestic law\(^3\) and through applications to the European Commission.\(^3\) In his application against France, he argued that his deportation to Switzerland had violated his rights to personal liberty and freedom of movement, contrary to article 5(1) of the European Convention\(^3\) and article 2(1) of Protocol No. 302. See supra text accompanying notes 296-97.


306. Bozano sought an injunction in the French courts requiring the French Interior Minister to seek his return from the Swiss authorities. The Tribunal held that while it did not have jurisdiction to hear the case because it "[put] relations between States in issue," his arrest was riddled with irregularities, and appeared to have been prearranged with the Swiss police. Upon his application, the deportation order was set aside. Bozano, 9 Eur. H.R. Rep. at 305.

307. Bozano brought an application against Switzerland complaining of his arrest on French territory by Swiss police. Bozano v. Switzerland, App. No. 9009/80, 39 Eur. Comm'n H.R. Dec. & Rep. 58 (1984). The Commission considered the application to be partly admissible and partly inadmissible, but held that Switzerland could not have avoided its treaty obligation to extradite the fugitive to Italy, even if he had been unlawfully deported to Switzerland from France. Id. at 70. Bozano also brought an application against Italy, complaining that the in absentia proceedings against him there were unlawful. This application was deemed inadmissible, and Bozano's allegations that the Italian authorities had corroborated with their counterparts in France and Switzerland to secure his return were deemed to be "manifestly ill-founded." Bozano v. Italy, App. No. 9991/82, 39 Eur. Comm'n H.R. Dec. & Rep. 147, 157 (1984). Finally, Bozano brought an application against France, which the Commission declared to be admissible. Bozano v. France, App. No. 9990/82, 39 Eur. Comm'n H.R. Dec. & Rep. 119 (1984).


Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

\[\ldots\]
The Commission upheld his complaint, and the court found his deportation to be unlawful and incompatible with the "right to security of the person" contained in article 5(1). The court thus concluded that France had acted unlawfully in circumventing regular extradition proceedings, so that there was insufficient justification for the detention of the applicant. While the court held that it did not have the power to order his release, it did order that he be financially compensated.

There was, however, some dissent at the Commission which is instructive for the present discussion. Mr. Sperduti dissented on the basis that a state's deportation decision is a matter of purely domestic jurisdiction. Mr. Schermers' dissent, indicative of a strain of argument which we shall see recurring in the cases which follow, was premised on the argument that extradition law has been unable to cope with the lowering of border obstacles within Europe. While fugitives are increasingly mobile within Europe and are able to move between its states as if they were borderless, law enforcement is hampered by the imposition of traditional borders. Mr. Schermers was concerned that both European unity and the rule of law would suffer if an individual could "get greater protection when he moves from one national jurisdiction to another than when he stays within one jurisdiction."

In Stocké v. Germany, a German resident in France alleged that he had been lured back into Germany by a German police agent on false pretences. He had boarded a private airplane in France, ostensibly to fly to Luxembourg. Instead, the airplane landed in Germany, where Stocké was arrested, convicted of tax offenses, and imprisoned. After unsuccessfully

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

309. Bozano, 9 Eur. H.R. Rep. at 308; Protocol No. 4 to the European Convention, art. 2(1): "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

310. Bozano, 9 Eur. H.R. Rep. at 317-20 ("Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition" in violation of article 5(1). The court declined to rule on the other alleged violations.).

311. Because the application had been brought against France and not Italy, where the applicant was detained, no challenge was before the court concerning the criminal proceedings or imprisonment in Italy, the notional "requesting" state.


314. Id. at 326; see also Lord Oliver's dissenting opinion in Bennett II, [1994] 1 App. Cas. 42, 72-73 (Eng. H.L. 1993) (Lord Oliver, dissenting).

315. Bozano, 9 Eur. H.R. Rep. at 326 (Mr. Schermers, dissenting). On this view, "Special legal protection against extradition may be sound when the extradition is to a foreign country, but for re-extradition within Europe (one could call it intradition) such protection should not be necessary." A similar view is evident in Lord Jauncey's majority opinion in Schmidt II, [1995] 1 App. Cas. 339, 362 (Eng. H.L. 1994). The Schengen Agreement, supra note 148, highlights these concerns. Cf. United States of America v. Cotroni, [1989] 1 S.C.R. 1469, 1485 (Can.) (LaForest, J.) ("The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities.").

challenging his arrest and conviction in the German courts, Stocké applied to the Commission, arguing that the German police had arranged the scheme, which amounted to kidnapping, in violation of French sovereignty and his personal rights under articles 5(1) (unlawful detention) and 6 (unfair trial) of the Convention. Both the Commission and the court dismissed the allegations as unproved. However, the Commission indicated that a violation of article 5(1) would have been established had the allegations been proven.\textsuperscript{317} It said:

An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Art. 5(1). The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.\textsuperscript{318}

The Commission thus recognized that two strains of international illegality must be discerned in forcible abduction cases: the customary international law concern with the territorial sovereignty of the injured state, violations of extradition treaties, and injury to foreign nationals, as well as the international human rights law concern as to the violation of the rights of the individual. By decoupling the latter concern from the former, the Commission has indicated a route which, this Article argues, domestic courts should themselves adopt.

Neither the U.N. Human Rights Committee nor the European Convention system have hesitated to assert expansive conceptions of the right to liberty and security of the person. But at the same time, there is a countervailing strain of argument, represented by Mr. Schermers' dissent in Bozano, which suggests that considerations of international comity and public protection must be weighed against the rights of fugitives. But these concerns are not mutually exclusive, and should not obscure the recognition that the overwhelming weight of authority in international human rights law is on the side of an expansive interpretation of the rights of abducted individuals. The accommodation of individual and social interests takes place when the domestic court fashions an appropriate remedy.

What is the impact in domestic law of the determination that transnational forcible abduction is a violation of international human rights law? International human rights law may enter domestic law directly in one of two ways: through the domestic implementation of an international convention, or through the incorporation of customary principles of human rights law. It may also enter domestic law indirectly as an interpretive aid to domestic legislation, constitutional provisions, and common law.

Where there has been a violation of an international human rights convention, the abducted individual may file an application seeking relief

\textsuperscript{317} 13 Eur. H.R. Rep. 126, 129, ¶ 168 (1991) (Commission report) ("The Commission considers that such circumstances may render this person's arrest and detention unlawful within the meaning of article 5(1) of the Convention.").

\textsuperscript{318} Id. at 129, ¶ 167.
before the appropriate body. However, several preconditions apply. First, the abducting state must be a party to the relevant convention to be constrained by that convention. Second, international human rights conventions are typically not self-executing, but must be implemented through domestic legislation to have the force of domestic law. Few states have implemented any applicable human rights treaties into their domestic law, with the result that such treaties do not ground a cause of action in domestic courts. Third, individuals typically face an obligation to exhaust local remedies in the domestic courts of the abducting state before commencing proceedings before an international human rights body. Fourth, there is likely to be considerable expense and delay associated with an application by an individual under an international convention. Finally, even if successful, the abducted individual may face the possible reluctance of the abducting state to abide by an unfavorable result, despite the fact that this would place the abducting state in breach of its international obligations.

A more promising route may be to argue that applicable norms of international human rights law have acquired the status of customary law, and thus have the force of domestic law in the absence of conflicting domestic legislation. Neither the majority nor the dissent in Alvarez-Machain considered whether any human rights which have attained the status of customary international law might be applicable. The problem is that most international human rights law is commonly thought to be confined to treaty. Conventional law can contribute to the development of customary international law norms where it demonstrates a broad consensus among states as to the creation of such norms. The customary human rights norms which have developed so far are generally thought to be limited to the prohibition of conduct which is incontrovertibly and universally rejected. Cumulatively, decisions by the U.N. Human Rights Committee and the European Court of Human Rights on the issue of forcible abduction provide clear evidence of constant and uniform practice, as well as opinio juris, so that it arguably constitutes custom.

319. Even if not implemented into domestic law, international human rights obligations remain binding upon the states party to an international convention. Moreover, it may be argued that states have an obligation "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full employment of human rights." Velásquez Rodríguez (Merits), 95 I.L.R. 295, ¶ 166.


321. 1 Restatement (Third) of Foreign Rel. Law § 404 (1987). Higgins, supra note 205, at 70 (arguing that forcible abduction and removal violate human rights which have attained the status of custom).

However, even if the international human rights prohibition against abduction cannot be said to have entered custom, there may be another role for customary international law or international human rights law in the domestic arena. Domestic courts should look to international legal principles—both customary and conventional human rights law—as interpretive aids in fleshing out the content and scope of domestic civil liberties and constitutional protections.³²³ This interpretative assistance would be particularly important where an individual has been abducted from one state and brought to trial in another, but the injured state either consents to the abduction, does not protest it, or does not request the return of the abducted individual, so that there is no violation of classical international law. A mixture of domestic and international norms has led to a reconsideration of the *male captus bene detentus* doctrine in a number of Commonwealth states. The evolution of this reconsideration is examined in the next section.

V. The Commonwealth *Male Captus Bene Detentus* Rule

Until 1978, Commonwealth courts followed the American approach to the *male captus bene detentus* rule. Since 1978, however, a series of judicial decisions in New Zealand, Australia, South Africa, and the U.K. indicate that the *male captus* rule is no longer good law in these countries. Other developments suggest that the rule is probably no longer valid in Canada. This Section outlines the origin and development of the traditional English rule, traces its fate in various Commonwealth states, and examines the recent decisions of the House of Lords in *Bennett II* and *Schmidt II*.

Throughout, it emphasizes the different approach of the Commonwealth courts relative to their American counterparts.

An examination of the development of the Commonwealth rule provides the basis for a critique of the fourth element of the majority decision in Alvarez-Machain, namely, the Court's abdication of its supervisory jurisdiction to control executive lawlessness. Within the Commonwealth, supervisory jurisdiction developed in a distinct fashion and so avoided the current impasse in the U.S. law.

A. The Origin and Development of the English Male Captus Bene Detentus Rule

The English male captus bene detentus rule originated in ex p. Scott. The accused, under indictment in England for perjury, was apprehended in Belgium and returned to England by an English police officer, where she was arrested. Lord Tenterden, C.J., held that the court would not divest itself of jurisdiction over an individual detained on a criminal charge. That her arrest may have violated Belgian law did not bar her prosecution in England, even though she may have retained a right of action against the English police officer for wrongful arrest in Belgium.

Similar cases followed Scott. In Regina v. Sattler, the accused committed larceny in England and escaped to Hamburg, then an independent city. There was no extradition treaty between Hamburg and England. An English police officer went to Hamburg, and without a warrant arrested Sattler with the assistance of the local police. Sattler was brought aboard an English steamer and killed the English police officer while the steamer was on the high seas. Upon his return to England, he challenged the court's jurisdiction over him on the basis that he had been illegally arrested and brought on board the English vessel. At trial, he was convicted of murder. Lord Campbell, C.J., upheld the conviction: because the killing had taken place upon an English ship, the defendant was amenable to an English criminal court's jurisdiction, regardless of the lawfulness of his initial capture and subsequent detention. However, the Sattler court was not con-

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324. 9 B. & C. 446, 447-48, 109 Eng. Rep. 166, 166-67 (K.B. 1829) [hereinafter Scott]. England has a long history of transnational forcible abduction cases. For a discussion of the abduction of John Story, the first Regius Professor of Civil Law in the University of Oxford and later a Catholic refugee from Elizabeth I, from Flanders by English merchants, see A DECLARATION OF THE LYFE AND DEAm OF JOHN STORY, LATE A ROMISH CANonicALL DOCTOR, BY PROFESSYON (1571).

325. Scott, 9 B. & C. at 448, 109 Eng. Rep. at 167: The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.


cerned with the original charge of larceny, but rather with the murder of the English police officer. If anything, *Sattler* stands for the proposition that a wrongful arrest does not justify a subsequent murder.\(^{328}\) The court did not determine whether Sattler could be tried for larceny; indeed, it is arguable that his illegal arrest would prevent his trial on the count of larceny. But in time, the English rule came to be that the illegality of an arrest could not affect the court's jurisdiction over the accused.\(^{329}\)

Scotland adopted the nascent English rule in *Sinclair v. H.M. Advocate.*\(^{330}\) The fugitive, charged in Glasgow with theft, embezzlement, and breach of trust, was arrested and detained in Portugal by local authorities acting without a warrant. There was no extradition treaty between Portugal and the United Kingdom. The Portuguese police took the fugitive aboard a British ship in the presence of a Scottish detective, whence he was brought to and imprisoned in Scotland. The fugitive argued that his illegal arrest and imprisonment divested the court of jurisdiction over his person. The court held that any alleged irregularities on the part of foreign officials in his arrest were not cognizable by the court and could not affect the fugitive's trial; the domestic authorities had not acted unlawfully. Any impropriety in his transfer to the British vessel in Portugal was actionable in damages against the detective alone, or against the Portuguese authorities in the Portuguese courts; the court was not concerned with the manner in which the fugitive had come into its jurisdiction. His transfer onto the British ship was a matter of diplomatic rather than judicial concern, and the Portuguese authorities had not objected to the transfer.

Lord McLaren joined the majority in following *Scott* and *Sattler* in denying the fugitive's challenge to the court's jurisdiction over him, but argued that the court would intervene to prevent the exercise of criminal jurisdiction where there had been "substantial infringement of right." However, "the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention."\(^{331}\) It is unclear, however, why the case before him did not involve such a "substantial infringement of right." Nevertheless, Lord McLaren's suggestion that courts would refuse to allow criminal proceedings in certain circumstances suggests that the *male captus bene detentus* doctrine was not absolute.

The crowning case in the *Scott* line of decisions was *Elliott.*\(^{332}\) British army officers accompanied by Belgian policemen arrested a British army deserter in Belgium. The accused was brought to England and charged with desertion. On a writ of *habeas corpus*, he argued the illegality of his arrest under Belgian law precluded the court from exercising jurisdiction

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\(^{328}\) But see The Queen v. Anderson, [1868] 1 L.R. 161, 162 (Cr. Cas. Res.) (Blackburn, J.) (stating in oral arguments that "Sattler's Case decides that even if wrongly brought here, it makes no difference").

\(^{329}\) The Queen v. Hughes, [1879] 4 Q.B.D. 614, 629 (Cr. Cas. Res.).

\(^{330}\) 17 R. (Ct. of Sess.) 38 (H.C.J. 1890).

\(^{331}\) Id. at 44.

over him. Lord Goddard, C.J., rejected this argument as "entirely false."

Dismissing the application, he stated:

If a person is arrested abroad and he is brought before a court in this coun-
try charged with an offence which that court has jurisdiction to hear, it is no
answer for him to say, he being then in lawful custody in this country: "I was
arrested contrary to the laws of the State of A or the State of B where I was
actually arrested."333

In the event of an illegal arrest, the applicant would have a civil action
against those who had arrested him. However, the court's jurisdiction over
him could not be challenged because the court would have no power to
inquire into the circumstances by which the defendant was before it.334

Three features of this line of cases should be noted. First, in all four
cases there was little awareness or discussion of the international law
dimension to the abductions at issue. No effort was made to determine
whether the foreign state had protested, although in each case the fact that
the abduction had been made in concert with local police suggests that the
abductions were made with the consent of the respective foreign states.
Certainly, there was no mention of a protest by the foreign state in any of
them. There would thus seem to have been no violation of international
law. Moreover, the cases echo the American approach in their view that
resolution of any international conflict was best achieved at the diplomatic
level. A very different result might have obtained had one of the arrests
been followed by a protest and demand for the return of the abducted indi-
vidual. It is also important to note that none of the cases provide support
for Alvarez-Machain; not one affirms a court's jurisdiction to try the defend-
ant in the face of a foreign protest.

Second, in each case the court acknowledged that the abduction may
have violated the domestic law of the foreign state. But this was not consid-
ered to be relevant, except insofar as the defendant might retain a cause of
action in the foreign state against his abductor(s).335 Finally, later cases
echo Lord McLaren's recognition in Sinclair that the male captus bene
 detentus rule is inherently limited in scope. In particular, the Toscanino
"outrageous conduct" exception limits the force of male captus bene deten-
tus.336 Regrettably, this traditional English rule was influential outside of
the U.K.337 But as developments in domestic and international law eroded

333. Id. at 376.
334. Id. at 376-77. However, Lord Goddard, C.J., noted somewhat cryptically that "it
may influence the court if they think there was something irregular or improper in the
arrest," suggesting that in certain (unspecified) circumstances a stay of proceedings
would be ordered. Id.
335. See discussion infra notes 499-500.
337. Ker v. Illinois, 119 U.S. 436 (1886); Afouneh v. Attorney-General, 10 Ann. Dig.
327 (Palestine 1941-42); Youssef Saa'd Abu Dourrah v. Attorney-General, 10 Ann. Dig.
331 (Palestine 1941-42); Attorney-General v. Eichmann, 36 I.L.R. 18 (Isr. Dist. Ct. 1961),
aff'd 36 I.L.R. 277 (Isr. 1962); Abrahams v. Minister of Justice, [1963] 4 S.A.I.R. 542 (S.
Afr. C.P.D.); The King v. Walton, 10 C.C.C. 269 (Ont. (Can.) C.A. 1905); Re Argoud, 45
I.L.R. 90 (Fr. Cass. crim. 1964); Emperor v. Vinayak Damodar Savarkar, 13 Bombay L.R.
the rule, it came into question in several Commonwealth states.

B. Emerging Developments in the Commonwealth

1. New Zealand

The New Zealand Court of Appeal moved away from the restrictive English *male captus bene detentus* rule in *Regina v. Hartley*. The fugitive, a New Zealander wanted in connection with a murder in New Zealand, fled to Australia. At the instigation of the New Zealand police, he was arrested by Australian authorities and forcibly placed on a flight back to New Zealand, where he was arrested upon arrival and later convicted. The fugitive appealed his conviction on two grounds. First, that the trial court did not have, or should have declined, jurisdiction over him because his arrest and detention in Australia and rendition to New Zealand were illegal. Second, that his statements during the extended interrogation after his return had been extracted illegally.

Although Woodhouse, J., held—following Scott, Sinclair, and Elliott—that the court unquestionably had jurisdiction over the fugitive, he further considered whether the court possessed the discretion to stay the proceedings, contemplating a supervisory jurisdiction for the court over executive conduct. Woodhouse, J., held that the court could not turn a "blind eye" to the fact that the fugitive had been brought into its jurisdiction in violation of existing extradition arrangements. The central consideration was not that the Australian police had returned the fugitive in a manner which circumvented extradition procedures, but that they had done so at the instigation of the New Zealand authorities. The court was concerned with the unlawful behaviour of the domestic executive, and ruled that it was within the court's discretion to view the manner in which the fugitive had been brought before it as an abuse of process. The fugitive's conviction was overturned.

While *Hartley* was the first decision to reject the traditional English approach to forcible abduction, it had limited force. First, *Hartley* was decided not on the basis of the fugitive's forcible abduction alone, but upon the combination of the forcible abduction and his subsequent interrogation. In a later case, Richmond, P., expressed doubt that forcible abduction alone would provide a sufficient basis for the exercise of the

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339. Id. at 216, following Connelly v. D.P.P., [1964] App. Cas. 1254, 1354 (Eng. H.L.) (Lord Devlin) ("[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."). Woodhouse, J., held that "this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society." Id. at 217.
341. Id. at 217 (declining to decide the case on the first ground alone).
court's discretion to stay proceedings. Nevertheless, in the same case Woodhouse, J., reaffirmed his reasoning in Hartley. Second, the court of appeal did not consider the international law dimensions of the case. In particular, its decision on whether to stay proceedings was not explicitly influenced by the possible illegality of the forcible abduction under international law. Australia's consent to the abduction suggests that there was no international illegality, forcing the court to rely upon the ground of domestic executive illegality. Third, the possible international human rights elements of the case eluded comment. Despite these limitations, Hartley remains influential and it is now well established that superior courts possess an inherent jurisdiction in criminal matters to prevent abuses of process.

2. Australia

Australia soon followed New Zealand's lead in calling the male captus bene detentus doctrine into question. In Levinge, the fugitive faced trial for numerous dishonesty offences in New South Wales. He claimed that he had been arrested by Mexican police at his home in Mexico, brought to the American border, and delivered into the custody of U.S. FBI agents who then brought him into the U.S. and held him until he was extradited to Australia. He argued that this forcible abduction rendered his subsequent extradition to Australia unlawful and an abuse of process, such that proceedings against him in Australia should be stayed. Moreover, he alleged that the Australian authorities had been aware of and even involved in his abduction from Mexico.

The court held that there was no evidence to connect the Australian authorities with the fugitive's transfer from Mexico to the United States. Yet Kirby, P., conceded (and McHugh, J.A., assumed arguendo) that the fugitive may well have been removed illegally from Mexico to the United States. Even so, the court found that to be a matter for the American and not the Australian courts. McHugh, J.A., rejected the argument that the fugitive's extradition from the United States to Australia was made unlawful by his alleged abduction from Mexico. In his view, Australia had followed all of the proper procedures.

Kirby, P., and McHugh, J.A., approved of Hartley and Mackeson, and held that the court could stay proceedings in order to prevent an abuse of

343. Id. at 470.
344. Id. at 475-76.
347. 9 N.S.W.L.R. 546.
Kirby, P., suggested two conceptual bases for this power to stay proceedings. First, the executive should be estopped or deterred from relying upon its own misconduct in bringing a case to trial. Second, the court must exercise its power to protect the integrity of its own processes. While precedent tended to favor the first argument, Kirby, P., preferred that the court's power be grounded upon the second rationale.

However, the court would only order a stay where it could be demonstrated that the executive had been "either a party to the unlawful conduct or connived at it." Here, there was no evidence of Australian involvement or connivance in the fugitive's expulsion from Mexico. McHugh, J.A., noted that there is no unfairness in the trial of a forcible abduction case:

So it is necessary to balance the public interest in having the charge or complaint determined. This is not to say that the end can justify the means and that the more serious the charge the greater is the scope for the prosecution to engage in unlawful conduct. But conduct which might be regarded as constituting an abuse of process in respect of a comparatively minor charge may not have the same character in respect of a serious matter.

Australia was the unwitting beneficiary of the FBI's conduct, itself lawful under U.S. law. The FBI's conduct could not be imputed to Australian officials. McHugh, J.A., and Kirby, P., held that the court possessed an inherent jurisdiction to stay proceedings to prevent an abuse of process, but would not exercise this power on these facts.

McLelland, A.-J.A., applied the *male captus bene detentus* rule to reject the fugitive's claim that the court did not have jurisdiction over him, although he did not doubt that the court possessed the power to prevent an abuse of process. In this case, however, Australian authorities were not involved in the abduction of the fugitive from Mexico to the United States, and McLelland, A.-J.A., thus found it unnecessary to determine whether a *Hartley-* or *Mackeson*-like rule existed in New South Wales.

*Levinge* is particularly important with respect to the domestic legal effects of forcible abduction. The majority, fleshing out the *Hartley* rationale, recognized that the issue of jurisdiction is distinct from the question of whether a court *should* try an abducted fugitive. Equally important

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348. 9 N.S.W.L.R. at 556, following Herron v. McGregor, 6 N.S.W.L.R. 246 (New S. Wales (Austl.) C.A. 1986) (power of courts to stay proceedings in disciplinary tribunals where institution or continuation of proceedings would be harsh and oppressive and an abuse of process).
349. 9 N.W.S.L.R. at 565.
350. Id.
351. *Levinge* was followed in Regina v. Fan, 98 F.L.R. 119 (New S. Wales (Austl.) Crim. Div. 1989) (The fugitive alleged that New South Wales police colluded with Hong Kong police to return him to New South Wales to face narcotics charges. The court found no evidence of Australian executive impropriety because the fugitive had returned voluntarily to New South Wales. *Levinge* was held to stand for the proposition that abuse of process could be alleged only where an extradition treaty had been circumvented by the prosecuting authorities or with their connivance.). *See also* Re Lessur-Millar a.k.a. *Levinge*, 47 A. Crim. R. 111 (Austl. Fed. Ct. 1990) (rejecting similar application for a stay on abuse of process grounds).
was Kirby, P.'s, contention that the need to protect the court's processes from abuse, rather than deter police misbehavior, justified the court's power to order a stay. Both factors were subsequently reflected in the majority speeches of the Law Lords in Bennett II. Australian courts have since gone on to develop a fuller conception of the abuse of process doctrine.352

3. South Africa

After a long history of adherence to the traditional English rule,353 South Africa became the third jurisdiction—after New Zealand and Australia—to move decisively away from male captus bene detentus. In Ebrahim,354 two men identifying themselves as South African police officers seized a South African member of the military wing of the African National Congress from Swaziland; Swaziland did not protest this abduction. Ebrahim was bound, gagged, blindfolded, and brought to Pretoria and charged with treason. He applied for release, alleging that his abduction had been orchestrated by the South African police. South African authorities denied these allegations. Ebrahim argued that his abduction and rendition violated international law, and that the trial court was thus incompetent to try him because international law was a part of South African law.

The court found that the strong circumstantial evidence of direct police involvement made it highly likely that the abductors were "agents of

353. Ex p. Ebrahim, [1988] 1 S.A.L.R. 991 (Transvaal Prov. Div.) (illegal capture of fugitive in foreign state and return to face trial could not affect South African court's jurisdiction over him); Nkondo v. Minister of Police, [1980] 2 S.A.L.R. 894 (Orange Prov. Div.) (holding that court cannot question validity of arrest or order release of detainee where detainee on airplane grounded in South Africa by bad weather, took bus to Lesotho, and was arrested by South African police at the border); Nduli v. Minister of Justice, [1978] 1 S.A.L.R. 893 (S. Afr. App. Div.) (holding that court had jurisdiction over defendants kidnapped from Swaziland by South African police contrary to their commanding officer's instructions and where Swaziland protested and demanded their return, so long as South Africa did not expressly authorize the abduction); Nhlovu v. Minister of Justice, [1976] 4 S.A.L.R. 250 (Natal Prov. Div.) (holding that court had jurisdiction over defendants even if they were abducted from Swaziland); S. v. Ramotse (unreported), summarized in ANN. SURV. S. AFR. L. 1970, at 80 (1970) (rejecting jurisdictional challenge where defendant allegedly had been arrested by Rhodesian soldiers in Botswana, brought to Rhodesia, interrogated by Rhodesian and South African police, brought to South Africa and charged with terrorism); Abrahams v. Minister of Justice, [1963] 4 S.A.L.R. 542 (Cape Prov. Div.) (holding that the circumstances of a fugitive's arrest and capture are irrelevant if the fugitive is properly detained, where applicant claimed he was arrested in Bechuanaland by South African police, brought to South West Africa, and then arrested and charged); Regina v. Robertson, 1912 S.A.L.R. 10 (Transvaal Prov. Div.) (Holding that court's jurisdiction unimpaired where a defendant was arrested in Natal and brought to the Transvaal to be extradited to Scotland on a faulty warrant: "Whether he was brought here legally or illegally, this court has nothing to do with."). See Schoombee, supra note 148; JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 142-47 (1994).
the South African state." Steyn, J.A., concluded that neither Roman nor Roman-Dutch law would allow a court to try a person brought before it from another state by means of state-sponsored abduction. Distinguishing earlier cases which had followed the English male captus bene detentus rule, he held that the English common law influence had never altered the Roman-Dutch rules. These rules embodied fundamental legal principles, including "the preservation and promotion of human rights, friendly international relations, and the sound administration of justice." He continued:

The individual must be protected from unlawful arrest and abduction, jurisdictional boundaries must not be exceeded, international legal sovereignty must be respected, the legal process must be fair towards those affected by it and the misuse thereof must be avoided in order to protect and promote the dignity and integrity of the judicial system. This applies equally to the State. When the State is itself party to a dispute, as for example in criminal cases, it must come to court "with clean hands" as it were. When the State is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean.

The court strongly approved of Toscanino. It allowed the appeal, ordering that the conviction and sentence be set aside on the basis that the trial court did not have jurisdiction over the fugitive. Ebrahim demonstrates that domestic courts are under a duty to vindicate international law principles as well as domestic law considerations, and that domestic courts are agents of the international legal system. That the lack of a Swazi protest was not fatal to Ebrahim's claim suggests that the court looked beyond classical international law to international human rights law. Ebrahim subsequently pursued a successful action for damages for unlawful abduction, arrest, and detention.

Ebrahim represents a path which other jurisdictions may find attractive. It has been argued that the case can be distinguished entirely from

356. Id. at 441-42. But see Hercules Boosens, Jurisdiction to Try Abducted Persons and the Application of International Law in South African Law, 16 S.A. Y.B. Intr'L L. 133, 138 (1990/91) (arguing that Ebrahim is based on weak Roman-Dutch authority).
357. Ebrahim, 95 I.L.R. at 441.
358. Id. at 441-42.
359. Id. at 442.
361. But see Dermott J. Devine, The Relationship Between International Law and Municipal Law in Light of the Interim South African Constitution 1993, 44 Intr'L & Comp. L.Q. 1, 3 (1995) (arguing that the court in Ebrahim did not rely upon international law in coming to its decision). Nevertheless, the reasoning in Ebrahim is clearly informed by international law considerations. See M. G. Cowling, Unmasking 'Disguised' Extradition—Some Glimmer of Hope, 109 S. Afr. L.J. 241, 249-250 (1992) (acknowledging that it is unfortunate that the court did not rely more squarely upon public international law and international human rights law); see also Dugard, supra note 353.
Alvarez-Machain, a contention which is unconvincing. Nevertheless, Ebrahim is not above criticism. Like the U.S. courts, the Ebrahim court failed to adequately distinguish between the possession of jurisdiction and the discretion to exercise it. Yet by recognizing that even where there is no violation of customary international law there may be powerful reasons for preventing the criminal trial of an abducted fugitive, Ebrahim provides a potent precedent for courts in other jurisdictions.

Subsequent cases have placed some important interpretive glosses upon Ebrahim. Regrettably, a more recent case appears to have circumvented Ebrahim's reasoning. In S. v. Mahala, Ciskei police arrested and then detained a fugitive in Ciskei until South African police could return him to South Africa. South African police then arrested a second fugitive in Ciskei with the cooperation of the Ciskei police. There was no Ciskei protest in either case. The court held that it had the jurisdiction to try both of the fugitives because the Ciskei police had consented to their removal, despite the fact that the Ciskei police were without authority to give such consent. The court determined that there had been no forcible removal of the fugitives, and thus distinguished Bennett II as a case concerning "forcible" and "unlawful" removal of a fugitive from a foreign state.

The court in Mahala ignored the important decision in S v. Wellem, where three Ciskei citizens were arrested in Ciskei by Ciskei authorities on charges including murder and robbery. One was told that he would be held in Ciskei pending extradition to South Africa unless he voluntarily accompanied the South African police to South Africa. He agreed to go to South Africa, and upon his arrival he was arrested. The following day he

363. Semmelman, Case Comment, supra note 360, at 137. Semmelman contends that Ebrahim's Roman-Dutch law foundations render it unsuitable for transplant into other jurisdictions. Yet the principles underlying Ebrahim can flourish in foreign soil, as Bennett II demonstrates. Semmelman's attempt to distinguish Ebrahim as a treason case is similarly dubious because his implication that the fugitive in Ebrahim would never have been extradited to South Africa applies with equal force to Alvarez-Machain, where, it will be recalled, the fugitive was a Mexican national.

364. These cases have concerned rendition between South Africa and the so-called Bantustans or "TCVB states" (Transkei, Ciskei, Venda, and Bophutatswana), the formerly independent homelands which have since been reincorporated into South Africa. Andries Cilliers, Reincorporation of Bophutatswana and Certain Other States into the Republic of South Africa, 19 S. Afr. Y.B. Int'1 L. 93 (1993/94). The world community never recognized the Bantustans, and their independence from South Africa was always more notional than real. Dugard, supra note 353, at 77-81. Certainly, the South African police did not accord them much respect, in the sense that the police crossed the border with virtual impunity to arrest fugitives. Schoombie, supra note 148. Nevertheless, the courts of both South Africa and the Bantustans have recently provided some measure of procedural protection to fugitives returned to stand trial by carefully observing each other's independence and territorial integrity. Thus, a recognition of the borders of the Bantustans, while generally objectionable, may have had beneficial effects for the rule of law in this particular context.


returned to Ciskei with South African police and identified for the police the other two accused. All were arrested, agreed to return to South Africa immediately rather than await formal extradition in Ciskei, and signed statements to this effect. They subsequently challenged the South African court’s jurisdiction over them.

The court held that the Extradition Convention between South Africa and Ciskei (and the other TCVB states)\(^\text{368}\) provided the exclusive means by which the presence of fugitives could be obtained from those states party to the Convention. The court further held (following Ebrahim, and the minority in Alvarez-Machain) that the circumvention of the Convention rules made the resulting arrests and renditions unlawful. The court placed particular emphasis on the unlawful nature of the extraterritorial police acts. Moreover, the court found that the consent of the fugitives to waive the protection offered by formal extradition proceedings\(^\text{369}\) had not been fully informed, and was thus invalid. The fugitives had been led to believe that there was little difference between informed rendition and extradition. Regardless, the court was of the view that overriding considerations of public policy would have displaced even valid consent: consent of the fugitives could not cure the unlawful nature of the actions by the South African police. The court declined to exercise jurisdiction over the fugitives, and the fugitives were released.

The applicant in S v. Mabena\(^\text{370}\) argued that South African and Bophuthatswanan police illegally arrested him in South Africa and then brought him to Bophuthatswana. The court interpreted Ebrahim to require three elements before a court’s jurisdiction would be displaced: first, the removal of an individual from one state by the agents of another; second, the use of force or deception; and third, lack of knowledge on the part of the injured state. It is doubtful that these requirements flow from Ebrahim itself. Nevertheless, the court held that the applicant had not made out the second and third grounds and dismissed the appeal.

In S v. Mofokeng,\(^\text{371}\) one of five individuals accused of theft and attempted robbery challenged the South African court’s jurisdiction on the basis that her presence in South Africa had been obtained through deception by the South African authorities. A South African police officer had taken statements from the accused and others in Bophuthatswana. The officer returned some days later asking the accused to accompany him to South Africa to make a witness statement, to which she agreed. In South Africa she gave a statement which implicated herself, and she was also


\(^{369}\) In particular, protection from the death penalty: the extraditing state could as a condition seek assurances from the requesting state that the death penalty would not be imposed upon an individual.


implicated by another witness. She voluntarily repeated her statement to a magistrate and was arrested.

There was no evidence of force or deception on the part of the South African police. The accused had voluntarily come to South Africa and had not been lured into the country on false pretences. There was no protest from Bophuthatswana. Crucially, the court found that the police had acted lawfully and dismissed the accused's plea. Even if the police presence had been technically illegal, the court was of the view that there was no causal connection between the accused's removal from Bophuthatswana and her subsequent arrest in South Africa. The accused had not been brought to South Africa as a suspect, and the court would have distinguished *Ebrahim* on this basis.

One of three fugitives charged with murder challenged the jurisdiction of the court in *S v. Buys*[^72]. The three were arrested in Bophuthatswana by Bophuthatswanan police and returned to South Africa by South African police at the request of the Bophuthatswanan police. In South Africa, they were arrested and charged with murder. The fugitives had agreed to the transfer to South Africa, and there had been no bad faith on the part of the South African police. The court distinguished *Ebrahim* on the grounds that the South African police had acted lawfully and in good faith. Because Bophuthatswana had voluntarily surrendered the fugitive to the South Africans, any violation of Bophuthatswanan law by the Bophuthatswanan police was irrelevant. Nevertheless, the court agreed with *Wellem* that the Extradition Convention and Extradition Act were the sole means by which individuals could be returned to South Africa. Again, the court (as in *Wellem*) emphasized that the waiver of extradition treaty rights by the fugitive had not been properly informed. Accordingly, as the South African authorities had complied with neither the Extradition Act nor the Extradition Convention, the court did not have jurisdiction over the fugitive.

The South African courts have thus gone a considerable distance in elaborating the framework first set out in *Ebrahim*. The subsequent decisions, however, have been surprisingly inconsistent, given *Ebrahim*'s strict rule against transnational forcible abduction. Part of the explanation for the murky state of the South African law after *Ebrahim* may simply be the reluctance of some judges to let go of the *male captus bene detentus* rule. This reluctance may also be inspired by the strictness of the *Ebrahim* doctrine itself, which requires that courts divest themselves of jurisdiction. Where the facts are not as stark as in *Ebrahim*, judges may seek to avoid having to apply such a strict rule. The more flexible approach to abuse of process advocated in this Article seeks to avoid such doctrinal rigidity.

4. *Canada*

Historically, the limited Canadian jurisprudence has followed the tradi-

tional Anglo-American rule. In Regina v. Walton, a U.S. police officer arrested a Canadian in Buffalo, New York, on the basis of a telegram from the Toronto police. The fugitive was detained in New York until a detective from Toronto took custody of him and returned him to Toronto. The fugitive argued that his arrest and imprisonment were unlawful and a violation of the Canada-U.S. Extradition Treaty. Osler, JA., following Ker and Scott, held that the circumstances by which the fugitive had been brought to trial did not concern the court and did not affect its exercise of jurisdiction over him. The proper remedy was either for the United States to espouse his claim in international law (which it had not done), or for the fugitive to bring a civil suit against the detective for wrongful arrest and detention.

In Hartnett, Canadian authorities lured the applicants into Canada under the guise of having them testify before the Ontario Securities Commission, and then arrested them and charged them with fraud. The applicants argued that the fraudulent misrepresentations made by the Canadian authorities violated their right to natural justice and due process of law under the Canadian Bill of Rights. They contended that to allow their trial to proceed would constitute an abuse of process and a circumvention of the extradition process. Hughes, J., held that "an illegal arrest does not deprive a Judge of jurisdiction to entertain the prosecution of the victim," and denied the applications. He reasoned that luring the applicants into Canada on false pretenses could not violate due process because there is no right to an extradition proceeding within one's own jurisdiction.

Nevertheless, should a transnational forcible abduction case come before a Canadian court today, the court would possess the power to order a stay of proceedings where warranted. The revolution in Canadian

373. Law Reform Commission of Canada, Extraterritorial Jurisdiction (Working Paper No. 37) 135 (1984); Brian H. Greenspan, Illegal Arrest, Irregular Rendition and Extradition, Canadian Council on International Law, Proceedings of the Tenth Annual Conference 53, 55 (Ottawa, Oct. 29-31, 1981); see The Ship North v. The King, 37 S.C.R. 385, 396-97 (Can. 1906) (analogizing seizure of foreign fishing vessels to irregular rendition and indicating that the proper remedy was a protest by the injured state, followed by resolution on the diplomatic plane); Rex v. Whitesides, 8 O.L.R. 622 (Ont. (Can.) C.A. 1904) (allowing trial of accused arrested in one county and conveyed to another without proper warrant).

374. The King v. Walton, 10 C.C.C. 269 (Ont. (Can.) C.A. 1905). There was no evidence of a U.S. protest, and the involvement of the U.S. police officer indicates that such a protest was unlikely.

375. As Ker was followed by Frisbie; so Walton was followed by Rex v. Isbell, 63 O.L.R. 384 (Ont. (Can.) App. Div. 1928) (holding that jurisdiction unaffected where accused, charged with conspiracy and fraud, alleged that he had been abducted from Montreal to Toronto, but noting that the accused retained a wrongful arrest claim in Quebec).


378. 1 O.R. at 209.

criminal law instigated by the Canadian Charter of Rights and Freedoms has extended both to the exclusion of evidence and to the ability of courts to order a stay of proceedings in order to protect the integrity of the judicial process. Moreover, the negative Canadian reaction to the Jaffe case may spark a re-examination of the traditional Canadian *male captus bene detentus* rule. Finally, the considerable attention given by the Supreme Court of Canada to the procedural protections accorded fugitives facing extradition from Canada suggests a similar concern as to the manner in which fugitives are brought into Canada. 

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**381.** Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987). The irony is that the situation which inspired the Canadian authorities to intervene as *amicus curiae* in *Alvarez-Machain* could well have arisen in Canada. Few of the Canadians criticizing the Jaffe incident noted that the comparable Canadian law is substantially similar. For an exception, see L.C. Green, *International Law-Wrongful Removal-Extradition and the Jaffe Case*, 61 CAN. BAR REV. 713 (1983). Given its long and relatively porous border with the United States, Canada has a particular interest in ensuring both that extraterritorial abduction is prohibited by international law, and that the domestic law of other states (and the United States in particular) reflects this.


**383.** However, discussion of this latter point as a matter of domestic law has been limited. See WILLIAMS & CASTEL, supra note 99, at 144-48; Williams, supra note 5. The Charter rights of individuals who are to be extradited from Canada are closely connected to forcible abduction. If the minority position advocated in the extradition cases noted above, supra note 382, were to become influential so that, for example, Canadian courts refused to extradite individuals to states where they might face the death penalty or other forms of punishment, a requesting state would have an incentive to go outside the extradition system and abduct such individuals. See Sharon A. Williams, *Extradition to a State that Imposes the Death Penalty*, 28 CAN. Y.B. INT’L. L. 117, 167 (1990). But see Van den Wyngaert, supra note 279 (arguing that increased human rights guarantees are
While Canadian courts are unable to prevent the prosecution of an accused person, they do possess an inherent right to stay proceedings where there has been an abuse of process.\textsuperscript{384} The power to order a stay of proceedings is distinct from the power to exclude illegally-obtained evidence.\textsuperscript{385} Yet in both instances the issues are broadly similar: the courts must protect both the judicial process from the taint of unlawful police conduct, and the public by ensuring that serious crime does not go unpunished. The courts may now stay proceedings when police misconduct amounts to an "abuse of process."\textsuperscript{386} In particular, pre-trial police activities (especially the investigative process) are now considered part of the administration of justice. Where the conduct of the police is an affront to the court's sense of fair policy and decency, even where the conduct is not technically unlawful, it may outweigh the societal interest in the prosecution of crime.

In exercising their power to stay proceedings, courts are guided by section 24(2) of the Charter. Thus, courts should consider whether the impugned police conduct would bring disrepute to the administration of justice.

\textsuperscript{384} This power antedates the Charter, Regina v. Osborn, 4 C.C.C. 185 (Ont. (Can.) Ct. App. 1969), reversed, [1971] S.C.R. 184 (Can.), although the Charter expands it considerably. In Regina v. Jewitt, [1985] 2 S.C.R. 128, 136-37 (Can.), the Canadian Supreme Court held that courts possess a residual common law power to stay proceedings where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" (adopting Regina v. Young, 13 C.C.C. 3d 1, 31 (Ont. (Can.) Ct. App. 1984) (Dubin, J.A.)). The court was of the view, however, that the discretion to order a stay should be used only in the "clearest of cases." \textit{Id.} The court has consistently reaffirmed this view. Regina v. O'Connor, [1995] 4 S.C.R. 411, 468 (Can.). See generally Derek R. S. Jonson, \textit{Abuse of Process and the Charter}, 37 CRIM. L. Q. 309 (1995).

\textsuperscript{385} The Charter entrenches both substantive due process (section 7), as well as the exclusion of illegally-obtained evidence (section 24(2)). Kent Roach, \textit{Constitutional Remedies in Canada} ch. 10 (1994). The difficulty with the Charter section 24(2) exclusionary rule is that the exclusion of illegally-obtained evidence may provide an inadequate remedy (from the accused's point of view) for the breach of certain Charter rights, especially sections 7, 9, and 11(b). Gary T. Trotter, \textit{Judicial Termination of Criminal Proceedings Under the Charter}, 31 CRIM. L. Q. 409, 410 (1989); David Paciocco, \textit{The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept}, 15 CRIM. L. J. 315 (1991). In effect, the fugitive in a forcible abduction case would seek to have himself "excluded" on the basis that his very presence before the court was illegally acquired. The U.S. Supreme Court has rejected the argument that an accused himself can be excluded (or "suppressed") as being illegally-obtained evidence. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never suppressible as a fruit of an unlawful arrest."); Payton v. New York, 445 U.S. 575, 592 n.34 (1980); United States v. Crews, 445 U.S. 463, 474 (1980) ("Respondent is not himself a suppressible 'fruit'. . . "). A Charter breach in a transnational forcible abduction case would likely be of section 7. A fugitive whose section 7 rights have been violated through forcible abduction must look to section 24(1), with its broad remedial provisions, for a satisfactory remedy.

justice rather than the need to discipline or deter the police or prosecution, although this may be the ancillary result:387 the goal of the courts should be to protect the integrity of the judicial process.388 A central consideration for the courts is the nexus between the breach of the Charter rights and the appropriateness of continuing the criminal proceedings. The doctrine of abuse of process unites the court's concern to protect the rights of individuals, the need to guard the process of the court from abuse, and the imperative to protect the integrity of the administration of criminal justice.389 As such, it is closely linked to the concept of the rule of law set out in Section I above. Though it should be noted that application of the doctrine of abuse of process has been relatively rare,390 it would have at least prima facie applicability in a transnational forcible abduction case.

C. The Demise of the English Rule: The Bennett Litigation

1. The Traditional Rule Is Challenged

Under the traditional English rule a court need not—indeed, may not—divest itself of criminal jurisdiction over an illegally arrested accused. However, domestic and international influences—in particular, the Hartley decision—weakened this rule. During this transitional period the law was in a state of considerable uncertainty. In Mackeson,391 the English authorities sought the return of the fugitive from Zimbabwe/Rhodesia on fraud charges. English authorities made no formal request for his extradition: not only was Zimbabwe/Rhodesia in civil revolt, but the United Kingdom did not even recognize the Rhodesian government. English police informed local authorities that the fugitive was wanted in England. The local authorities arrested him and made out an order for his deportation. The Zimbabwe/Rhodesia authorities sent the fugitive's passport to England, where it was revalidated for a single month and for a one-way trip back to the United Kingdom. All of this took place without the fugitive's knowledge. The fugitive challenged the deportation order in the Zimbabwe/Rhodesia courts on the basis that it amounted to an unlawful disguised extradition.392 He succeeded on his initial application,393 but this was overturned on appeal.394 The fugitive was deported to England and arrested there upon his arrival.

392. Based upon Regina v. Governor of Brixton Prison (Ex parte Soblen), [1963] 2 Q.B. 243 (Eng. C.A.) (holding that deportation is unacceptable as a means of circumventing extradition procedures).
393. Mackeson v. Minister of Information, Immigration and Tourism, [1980] 1 S.A. 747 (Zimbabwe/Rhodesia Div.) (detention unlawful because its purpose was to effect illegal extradition to the United Kingdom).
In England, the fugitive sought *certiorari* to quash the charges against him and an order of prohibition against further proceedings, alleging that his presence in England had been secured through an unlawful deportation from Zimbabwe/Rhodesia. Lord Lane, C.J., followed *Hartley* in holding that the court had jurisdiction to try the fugitive as well as the discretion to stay proceedings against him. Because the purpose of Mackeson’s rendition had been to circumvent regular extradition processes, the court issued a prohibition order to prevent further proceedings. *Mackeson* thus seemed to incorporate *Hartley* into English law. Yet *Mackeson* is not as clear as *Hartley*. In *Hartley*, the illegal actions of the domestic authorities constituted the abuse of process. In *Mackeson*, the abuse of process resulted from a mixture of the actions of the domestic and foreign authorities: the court found that the Zimbabwe/Rhodesia authorities did not act solely at the instigation of the English police.

*Driver*, however, reiterated the *male captus bene detentus* rule. English police sought the return of an Australian charged with murder who had fled to Turkey. There was no extradition treaty between England and Turkey. At the instigation of the English police, the fugitive was arrested and detained but subsequently released by Turkish authorities. Australian embassy officials gave him a ticket to fly unaccompanied to Heathrow airport, where he was arrested upon arrival by English police officers. He alleged that his presence in England had been acquired by illegal means, viz., “disguised extradition,” and that the court, while possessing jurisdiction over him, should exercise its inherent power to stay proceedings.

Stephen Brown, L.J., held that the fugitive had been lawfully arrested in England upon his arrival from Turkey, and that the court did not possess the power to stay proceedings. Moreover, even had the court possessed such a power, it would not have exercised it here. The results in *Driver* and *Mackeson* appear irreconcilable, and whether an English court had the power to inquire into the circumstances by which an individual

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396. *Id.* at 30 ("[I]t seems clear to me that the object of this exercise was simply to achieve extradition by the back door. It seems equally plain to me that the English police authorities were, to say the least, concurring in that exercise."). The actions of the English authorities in relation to the invalidation of the fugitive’s passport appear to have been decisive considerations for the court.
399. *Driver*, [1986] Q.B. at 114, following Regina v. O./C. Depot Battalion, R.A.S.C. Colchester (Ex parte Elliott), [1949] 1 All E.R. 373 (K.B.), and Sinclair v. H.M. Advocate, 17 R. (Ct. of Sess.) 38 (H.C.J. 1890) ("[T]he court has no power to inquire into the circumstances in which a person is found in the jurisdiction for the purpose of refusing to try him.").
400. *Driver*, [1986] Q.B. at 95, 96 (holding that irregularities outside the jurisdiction of the court would not amount to an abuse of process in the absence of improper dealing by British authorities).
had been brought into its jurisdiction for trial remained an open question.401

2. Bennett: Revitalizing the Rule of Law

In Bennett II,402 the House of Lords settled the issue in favour of Mackeson by holding that a transnational forcible abduction which circumvents extradition proceedings is an abuse of process such that a court should exercise its discretion to enter a stay of proceedings against the fugitive. The Law Lords explicitly rejected the approach taken by the majority of the U.S. Supreme Court in Alvarez-Machain. In Bennett, a New Zealander was charged in England with criminal offenses arising from his purchase of a helicopter, having allegedly raised financing under false pretences and defaulting on repayment. The English police discovered that the fugitive had moved to South Africa. There was no extradition treaty between the United Kingdom and South Africa, and the police did not seek his extradition through the normal channels.403 The fugitive alleged that the English police had colluded with the South African authorities to have him arrested and forcibly returned to the United Kingdom to stand trial.404

South African detectives arrested the fugitive and placed him in police custody. After being told that he was to be deported to New Zealand, and flown as far east as Taiwan, he was returned to South Africa and put on an airplane to Heathrow airport, handcuffed to his seat. English police arrested him upon his arrival at Heathrow. He alleged that his rendition was in violation of an order of the Supreme Court of South Africa. The English police denied any collusion with the South African police, although they acknowledged that the South Africans had informed them that the fugitive was being sent through Heathrow en route to New Zealand.

The trial court refused the fugitive an adjournment to prepare a challenge to the court's jurisdiction. On an application for judicial review, the divisional court held that fugitive's allegations of police misconduct did not provide an adequate basis to challenge the court's criminal jurisdiction.405 The divisional court followed the traditional male captus bene detentus rule, holding that the manner in which a fugitive is brought before a court of competent jurisdiction does not affect its exercise of criminal jurisdiction.

403. At the time of the fugitive's rendition, there were no extradition proceedings in force between South Africa and the United Kingdom. Any extradition would have had to have been arranged through special extradition arrangements under section 15 of the U.K. Extradition Act of 1989. But see Ossman, supra note 8 (arguing that no such extradition would have been possible under South African law).
The majority in the House of Lords held that it would constitute an abuse of process to allow the criminal charges against the fugitive to proceed, given the manner in which he had been brought to trial. The case was remitted to the divisional court for resolution. The Law Lords did not dispute that the English courts properly had jurisdiction over the fugitive. But they held that this did not exhaust the matter. The Law Lords held that the high court could invoke its supervisory jurisdiction to inquire into how the fugitive had been brought before it. If the fugitive was brought into the jurisdiction through the circumvention of extradition procedures, the court could stay the proceedings and order his release.

In Lord Griffiths's view, the issue was what circumstances should cause a court to decline to exercise its jurisdiction. The discretion to stay proceedings in a criminal trial was found to be latent in the inherent jurisdiction of the court to prevent an abuse of process. Previous cases had indicated that an abuse of process occurred where the prosecution had manipulated or misused the process of the court at the defendant's expense. The principle underlying this rule is that the court should ensure that its processes are used to ensure fair trials. Yet in Bennett, as in many abduction cases, there was no indication that the fugitive would not receive a fair trial once he had been forcibly returned to England. Lord Griffiths argued that proceedings should be stayed not only where the trial itself would be unfair, but also where it would be unfair to even put the accused on trial. Given the public interest in ensuring that the process of the court not be abused, Lord Griffiths proposed that the concept of abuse of process be extended to encompass Bennett. While recognizing that one effect of his decision might be to deter pre-trial police misconduct, Lord Griffiths did not justify his judgment upon this rationale, one of the major—if controversial—principles to have informed the extension of the constitutional due process guarantees in the United States. Instead, his

406. Lord Griffiths, Lord Bridge of Harwich, Lord Lowry, and Lord Slynn of Hadley. Lord Oliver of Aylmerton dissented and would have dismissed the appeal. Lord Slynn concurred with Lord Griffiths.

407. Note that the Law Lords were determining the jurisdictional question alone, and thus assumed the veracity of the fugitive's allegations. The decision of the divisional court is discussed infra text accompanying notes 432-33.


411. See Paul Denis Godin, A Comparative Study of the Exclusionary Rule and Its Standing Threshold in Canada, the United States, and New York State: The Relation of Purpose to Practice, 53 U. TOR. FAC. L. REV. 49 (1995). Lord Lowry also rejected the "police deter-
concern was to protect the integrity of the judicial process. Lord Griffiths held that the Law Lords bore a responsibility "to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." In the face of executive misconduct, it was "unthinkable" that a court "should declare itself to be powerless and stand idly by." Lord Griffiths continued:

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party. If extradition is not available very different considerations will arise on which I express no opinion.

Thus, in the extradition context, executive unlawfulness violates the twin pillars of "basic human rights" and the rule of law.

Lord Bridge of Harwich concurred with Lord Griffiths, and put the issue thus:

When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state, and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing?

While most previous English and Scottish decisions answered this question with a resounding "no," foreign decisions were more mixed, ranging from Ebrahim to the Ker-Frisbie line of cases, with its culmination in Alvarez-Machain. Lord Bridge expressed sympathy for the reasoning in Hartley. To give effect to the rule of law, he held that a court must not "turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction." It would be an abuse of process to allow a trial to proceed against
a fugitive seized and brought to England in violation of international law, because there would have been no such trial but for the English authorities' illegal action.\footnote{Id. at 68 (Lord Bridge). See also Lord Lowry opinion. Id. at 76.} “To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused," said Lord Bridge, “[M]ay be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.”\footnote{Id. at 68 (Lord Bridge).}

Lord Lowry held that abuse of process was “a misuse or improper manipulation of the process of the court.”\footnote{Id. at 73, citing Archbold's PLEADING EVIDENCE AND PRACTICE IN CRIMINAL CASES 430, ¶¶ 4-44 (43rd ed. 1993).} Yet he was concerned that “abuse of process” should not be stretched so broadly as to become too imprecise.\footnote{Bennett II, [1994] 1 App. Cas. at 73-74. Lord Lowry approved of Laskin, C.J.C.'s, warning in Rourke v. R., [1978] 1 S.C.R. 1021, 1038, 1041 (Can.), that while “[the court] is entitled to protect its process from abuse,” there was “the danger of generalizing the application of the doctrine of abuse of process.” Bennett II, [1994] 1 App. Cas. at 73-74.} Lord Lowry favored the requirement that “the process of the court is itself being wrongly made use of.”\footnote{Bennett II, [1994] 1 App. Cas. at 74 (Lord Lowry), approving of Moevao v. Department of Labour, [1980] 1 N.Z.L.R. 464, 471 (C.A.) (Richmond, P.) (emphasis added).} Lord Lowry rejected the Ker-Frisbie doctrine’s contention that due process of law is satisfied if the accused has received a fair trial, without regard for the circumstances by which the accused was brought to trial. He held that in certain situations an otherwise fair trial would be an abuse of process.\footnote{Id. at 73. Lord Lowry indicated that it would be abusive to try an accused while ignoring proof of a previous conviction or acquittal. It would also be abusive to try an accused who had already been bound over and the summons withdrawn (citing Regina v. Grays Justices (Ex parte Low), [1990] 1 Q.B. 54 (Eng, Q.B. Div'l Ct.)) or where the magistrates had already found no case to answer (citing Regina v. Horsham Justices (Ex parte Reeves), 75 Crim. App. 236 (Eng, Q.B. Div'l Ct. 1980)). Bennett II, [1994] 1 App. Cas. at 74.} A case of forcible abduction would be just such a situation. Lord Lowry distinguished the U.S. cases culminating in Alvarez-Machain as they concerned jurisdiction, whereas in Bennett II the issue was not whether the court had jurisdiction (the majority in Bennett II held that the court clearly did have jurisdiction), but whether the court should order a stay to prevent an abuse of process.\footnote{Bennett II, [1994] 1 App. Cas. at 74.} Lord Lowry recognized that Bennett II would have a “significant” impact upon the executive’s conduct of international relations\footnote{Id. at 76.} by deterring the police from circumventing extradition procedures when arranging
the return of fugitives to England for trial. Yet the Bennett II rule, it is argued below, is not a strict exclusionary rule. Rather, it contemplates a contextual “balancing” approach to the determination of whether a stay of proceedings is appropriate.

Lord Oliver of Aylmerton, the lone dissenter, would have dismissed the appeal. While he agreed that it was essential that an accused receive a fair trial, he believed that the other Law Lords had given insufficient weight to the public interest in the prosecution and punishment of crime. Lord Oliver felt that in the absence of an unfair trial a court should exercise its discretion to stay criminal proceedings only upon narrow grounds, and should not concern itself with pre-trial police impropriety which did not affect the fairness of the trial itself. In his view, while executive unlawfulness was to be regretted, the proper remedy was civil or criminal proceedings against the wrongdoers, rather than freeing the fugitive. Lord Oliver argued that executive misconduct should be punished directly, and not indirectly by way of a stay of proceedings. Beyond this, Lord Oliver’s feared that a general supervisory power would tend to “hopeless uncertainty.”

Lord Oliver also rejected the contention that there is a special quality to forcible abduction cases necessitating a duty to supervise the executive. He did not accept the argument that an English court should signal its disapproval of the invasion of the rights of a foreign state. As a matter of institutional competence, he felt that such issues should be resolved within the diplomatic sphere. Lord Oliver argued that domestic courts should not concern themselves with investigating the legality of acts committed abroad under foreign law. But this assertion is too broad to withstand scrutiny. While domestic courts are not competent to investigate the lawfulness of the acts of foreign officials under foreign law, the rule of law must surely demand that they consider the legality of the domestic executive’s actions abroad under foreign or domestic law. This is the true meaning of the broader conception of the rule of law outlined by the Bennett II majority.

426. Id. at 77. He was thus more comfortable with grounding his decision upon a police deterrence rationale, unlike Lords Griffiths and Lowry.
427. Id. at 69.
428. Id. at 71. A similar argument is often made in the United States. E.g., United States v. Matta-Ballesteros, 71 F.3d 754, 765 n.6 (9th Cir. 1995); Paul B. Stephan III, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va. J. Int’l L. 777, 799-800 (1980) (arguing that allowing for civil liability “strikes a reasonable balance between society’s interests in punishing wrongdoers and both the public and private interests in penalizing government misconduct”). But the record of civil liability as a vehicle for protecting the judicial process and deterring police illegality has been weak. See Bush, supra note 6, at 974-75. There is no reason to believe that it will be an effective remedy in cases of abuse of process.
429. But Lord Griffiths noted: “The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.” Bennett II, [1994] 1 App. Cas. at 62.
430. Id. at 71.
431. Id. at 72-73.
Moreover, Lord Oliver rejected the assertion that irregular rendition violated a right of the fugitive to be returned to the abducting state only through the extradition process. He argued that the very fact that a fugitive could be returned by a foreign state to the United Kingdom by processes other than extradition (e.g., through deportation) and without the involvement of the English authorities showed that no such right exists, notwithstanding the U.K. Extradition Act of 1989. The alleged involvement of English authorities in a disguised extradition would not alter this conclusion.

Lord Oliver's dissent recalls Chief Justice Rehnquist's conclusion in *Alvarez-Machain* that an extradition treaty cannot be said to "cover the field" with respect to the transfer of individuals between states. However, deportation and abduction are distinguishable: deportation takes place upon the consent of the deporting state, whereas abduction often does not. More importantly, international human rights law, as we have seen, has much to say concerning the treatment of individuals and the wrongful exercise of jurisdiction over them.

3. **The Aftermath of Bennett**

In the Divisional Court, the fugitive's allegations were subsequently made out, although the court's decision is rather unsatisfactory. As well, the length and complexity of the hearing provides some indication that the development of the Bennett II doctrine comes at a price. Mann, L.J., noted that the South African authorities had discovered the fugitive in South Africa in 1991 and had regarded him as an illegal immigrant. After they unsuccessfully attempted to deport the fugitive to Taiwan, the English police became aware of his presence in South Africa. Mann, L.J., was of the same view as the House of Lords: although there was no extradition treaty in force between the United Kingdom and South Africa, the fugitive's return could have been secured under special extradition arrangements. As a result, Mann, L.J., regarded the deportation of the fugitive to New Zealand via England as colorable, both because the route was "not an obvious one," and because no arrangements had been made by the South Africans to transfer the fugitive from Heathrow airport to Gatwick airport, from which the flight to New Zealand was allegedly to depart. Mann, L.J., also regarded an internal Crown Prosecution Service memorandum as evi-

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433. As discussed above, this view has been questioned. See Ossman, supra note 8. The further discussion infra at text accompanying notes 452-53, however, suggests that Mann, L.J., was correct on this point.
idence of collusion between the English and South African authorities. The court thus held that the fugitive had come to the United Kingdom in defiance of regular extradition proceedings due to collusion between English and South African authorities. Despite this holding, there was actually very little evidence of collusion, and the memorandum in question provides circumstantial evidence at best.

Aside from the English charges against him, Bennett also faced fraud charges in Scotland. The progress of his case before the Scottish courts provides an intriguing counterpoint to the English decisions. The question arose as to whether the Scottish warrant for the arrest of Bennett on the Scottish charges could be executed in England, given the disposition of the case by the English courts. Bennett sought an injunction to prevent the execution of the Scottish warrant in England. In Regina v. Commissioner of Police of the Metropolis, ex p. Bennett, the English divisional court held that it did not have jurisdiction to hear an application for judicial review of the decision to execute a Scottish warrant against Bennett in England. The court held that the arrest was not an abuse of the English court's trial process, and the English court would not concern itself with the issue of the possible abuse of the process of the Scottish courts: that would be for the Scottish courts to determine for themselves. The decision reinforces the conclusion that the court's focus should be upon the possible abuse of its own process.

The Scottish warrant against Bennett remained outstanding after it was determined that the finding of the English divisional court on the merits of Bennett's allegations did not bind a Scottish court. The Scottish court, while acknowledging the weakness of the male captus bene detentus rule after Bennett II, interpreted the facts of the case differently than the English divisional court. The Scottish court found that South Africa's initial attempts to deport the fugitive to New Zealand via Taiwan had been foiled because the fugitive had destroyed his passport on the flight to Taiwan. Because no airline would take him to New Zealand upon his arrival in Taiwan, he had to be returned to South Africa. The court also held that the difficulty of travel to and from South Africa in 1991 (when the country was still subject to international sanctions) made the South African claim that it was attempting to deport the fugitive to New Zealand via the United Kingdom more plausible than it might have appeared at first blush. Because there were no direct flights from South Africa to New Zealand at the time, deportees from South Africa had to be routed through a third state.

The Scottish court held that the memorandum sent to the English police by the South African authorities merely reported to them the independent South African decision to deport Bennett. The court also disputed the English divisional court's finding that the Crown Prosecution

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Service memorandum demonstrated collusion between the English and South African authorities. The South African authorities, mindful that the assistance of the English authorities would be required to transfer the fugitive from Heathrow airport to Gatwick airport, informed their English counterparts of their plan. The English authorities never made such transfer arrangements because they planned to arrest the fugitive upon his arrival at Heathrow. Moreover, even had the English authorities acted improperly, there was no evidence that the Scottish authorities had also acted improperly. The unlawfulness of the actions of the English police under English law could not affect Scottish proceedings. Bennett’s jurisdictional challenge was dismissed.

So the actual result of the Bennett litigation is very similar to that in Levinge: the Scottish courts are not concerned with alleged misconduct by foreign government officials where domestic authorities were not involved in arranging the abduction. The Scottish court did indicate that had there been evidence of collusion between the domestic authorities and foreign authorities for the purpose of circumventing regular extradition procedures, a different result might have been reached. Scottish criminal appeals do not go to the House of Lords, so there is no possibility that the Law Lords will rehear the case on appeal from Scotland.436

4. What Bennett Decided

A number of questions arise from the decision of the House of Lords in Bennett II. First, the Law Lords were ambiguous as to whether there is a duty to refuse to exercise jurisdiction over an individual who has been brought unlawfully before a court, or merely a discretion to do so. The majority of the Law Lords suggested that there is a discretion through such language as: "[the court] may stay the prosecution;"437 "the court may decline to exercise its jurisdiction;"438 "I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity,"439 and finally:

[A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.440

438. Id. at 68 (Lord Bridge) (emphasis added).
439. Id. at 77 (Lord Lowry).
Lord Griffiths, however, also spoke of a duty: "[O]ur courts will refuse to try him, and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it." The majority is surely right in its view that the courts possess discretion. In deciding whether to exercise its power to stay proceedings, a court must weigh many factors. The House of Lords was not clear, however, about what factors a court should consider in exercising its discretion to order a stay. This is considered further in Section VI, below.

A second issue concerns how the House of Lords viewed its role as a domestic court in implementing international rule of law ideals. In part, this issue is connected with the Law Lords' view that on the assumed facts there had been a violation of international law. The assumed facts of the case—no action by English agents on South African territory, and more importantly, no South African protest at the fugitive's "abduction," no request for his return and no New Zealand protest (Bennett was a citizen of that state)—suggest that there was no violation of customary international law. Moreover, it will be recalled that at the time of the abduction there was no extradition treaty in operation between South Africa and the United Kingdom, so the abduction could not be said to have violated a treaty. Indeed, these considerations suggest that Bennett II presented an unfavourable set of facts upon which to overturn the *male captus bene detentus* rule, especially when compared with *Alvarez-Machain*, where there was a protest by the injured state, an extraterritorial forcible abduction, and, in the view of this author, the violation of an extradition treaty.

Despite these shortcomings, the Bennett II majority alluded several times to a violation of international law. Lord Bridge's judgment suggests a broader, international conception of the rule of law. Given that the case involved no violations of either customary international law or of a treaty, Lord Bridge's statement that there had been a violation of international law suggests an international human rights dimension to the case. Lord Lowry implicitly views domestic courts as agents of the international legal system, even if the international legal system is understood in terms of the legal order or rule of law more generally. Lord Lowry also argued that there was a violation of international law in Bennett II, but does not explain his position. He seems to have asserted that the executive violated international law. As with Lord Griffiths, Lord Lowry's judgment is coherent only if one accepts that there was a violation of international human rights

444. *Id.* at 77. Lord Lowry was careful to note that "[t]he abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context." Moreover, unlike Lord Oliver, Lord Lowry did not accept that such issues were best resolved at the diplomatic level; South African complicity would preclude an acceptable resolution in Bennett's case.
445. *Id.* at 76:
law in Bennett II, because the case did not disclose a violation of customary law or treaty. Lord Griffiths placed particular emphasis upon the procedural protection which extradition treaties accord to fugitives. This argument finds support in the fact that two subsequent cases considering Bennett II in the context of possible violations of international law have declined to find an abuse of process for lack of a violation of international law.446

Alternatively, it may be that the Law Lords believed that the English police had violated the domestic law of South Africa. It seems likely that the Law Lords took a dim view of what they saw as an attempt to circumvent an order of the South African Supreme Court forbidding the removal of the fugitive from South Africa.447 But again, there was no South African protest, and thus no violation of customary international law. The inchoate international human rights violation thus remains the sole possible ground upon which to base the Law Lords’ contention that the fugitive’s rendition to England violated international law.

Importantly, Lord Griffiths rejected the “justiciability” argument implicit in the majority judgment of the U.S. Supreme Court in Alvarez-Machain. The House of Lords indicated that it would not hesitate to act as a check against executive acts which violate domestic or international law. There was, however, no discussion of the duty of English courts to give effect to international law rules on abduction, although it may be that these considerations informed Lord Griffiths’ understanding of “basic human rights” and “the rule of law.”448

The third issue is whether extradition was actually available in Bennett II. This question is of cardinal importance because the majority assumed that extradition was available and that the illegality resulted from the efforts of the English authorities (in collusion with the South Africans) to circumvent regular extradition proceedings.449 This implies that the rule

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447. But note Mann, LJ.’s, finding that there was no evidence that the South African authorities were “in any respect contumacious” in acting in disregard of the order. Bennett III, [1995] 1 Crim. App. at 149.

448. Lord Griffiths considered the supervisory jurisdiction of the High Court to be broader in cases with a transnational element than under purely domestic law cases: “it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures.” Bennett II, [1994] 1 App. Cas. at 64.

449. Id. at 62 (Lord Griffiths). Lord Griffiths assumed arguendo that the English police “took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country.” Id. at 52. Lord Bridge suggested that the illegality was the executive’s resort to abduction
in Bennett II applies only where extradition proceedings are available but circumvented.450 Bennett II thus seems to support the proposition that the domestic executive must endeavor to make use of available extradition arrangements in securing the return of fugitives from foreign states. When it procures the return of a fugitive by means of informal processes and extradition was available, a stay of proceedings may be ordered. Thus, there is some uncertainty as to the application of Bennett II to situations such as that in Driver, where extradition proceedings were unavailable.451

Moreover, it has been argued that extradition procedures were actually unavailable in Bennett II. Ossman contends that not only was there no extradition treaty between South Africa and the United Kingdom, but also that the "special proceedings" extradition mechanism of section 15 of the U.K. Extradition Act of 1989 could not have been invoked because South African law does not allow extradition without a conventional obligation to do so.452 The point is of particular importance because Lord Griffiths indicated that his opinion would have been different had extradition been unavailable.453 In a way, then, the House of Lords did not entirely distance itself from the familiar U.S. "extradition treaty paradigm" at work in Alvarez-Machain. At the very least, given that the application of the abuse of process doctrine set out in Bennett II presupposes the circumvention of an extradition treaty, care must be taken to determine whether such a treaty (or a more murky "relationship") did in fact exist.

The fourth issue arising from Bennett II concerns its final result: what exactly does the House of Lords' decision require? Clearly, a stay of proceedings should be ordered once the facts underlying the fugitive's allegations of unlawful executive conduct are made out. But what happens at that point? Lord Lowry indicated that the fugitive should be released and given the opportunity to "escape."454 But this does not prevent the fugitive instead of regular extradition proceedings, which assumes that extradition was available but was deliberately circumvented by the executive. Id. at 68. Similarly, Lord Lowry's reasoning implies the existence of an extradition treaty with South Africa. Id. at 74. See also Schmidt II, [1995] 1 App. Cas. 339, 375 (Eng. H.L. 1994) ("special arrangements could have been made").

452. Ossman, supra note 8, at 78-79. But see the South African Extradition Act of 1962, § 3(2), which empowers the president to surrender an individual accused or convicted of an offense in a foreign state which would be an offense if committed in South Africa to a foreign state upon request, even where South Africa has no formal extradition relationship with that state. See Hiranter v. Minister of Law and Order [1992] 1 S.A.C.R. 414 (W.).
454. Id. at 81. See Trimbole v. Governor of Mountjoy Prison, [1985] I.R. 465, 493 (Ir. H.C., S.C.) (where extradition of fugitive was denied because of abuse of process, fugitive was given seven weeks from the date of his release during which he could not be rearrested in order to be extradited); Rauscher, 119 U.S. at 430 (fugitive could not be tried again until given a reasonable time and opportunity to return to the foreign state from which he had been forcibly removed); Sinclair v. H.M. Advocate, 17 R. 38, 43 (Scot. 1890) (Lord Adam) (allowing sufficient time for individual to return); but see 17 R. at
from being properly pursued in the future.\textsuperscript{455} As in the Derrick Hills incident, the fugitive should be returned to the state from which he had been abducted, with the domestic authorities free to make a subsequent formal extradition request for his return.\textsuperscript{456}

The release of the fugitive does not mean that he can never be properly extradited. If the fugitive refused to return to South Africa, he could be validly prosecuted in England after a reasonable period of time on the grounds that he had submitted to English jurisdiction.\textsuperscript{457} But this rule would not resolve a case in which extradition proceedings were unavailable. While Bennett II would logically suggest that the fugitive should be released and returned to the injured state from which he had been abducted even where extradition is unavailable, it should be recalled that Lord Griffiths suggested that other considerations might then apply.

D. Extradition and Abuse of Process: Schmidt

1. Schmidt

Bennett II does not address the issue as to whether executive or police conduct not amounting to force, but nevertheless leading to the presence of a fugitive within England, could also be considered an abuse of process. This is an important question in its own right.\textsuperscript{458} In Schmidt II,\textsuperscript{459} the

\begin{itemize}
\item 42, 44 (Lord Justice-Clerk and Lord McLaren holding that individual could be immediately rearrested upon release).
\item 455. In Bennett, had the fugitive returned to South Africa, the English authorities could have made an extradition request for him under section 15, the "ad hoc" provision of the U.K. Extradition Act of 1989.
\item 456. Derrick Hills Case (1991), reprinted in 31 LLM. 932 (1992) (Canada returned fugitive who had been arrested on U.S. side of border to the United States, and later made a formal extradition request for his return.); see also Higgs Case (1964), reprinted in British Practice in International Law—1964, at 185 (Elihu Lauterpacht ed., 1966) (South Africa subsequently requested extradition of Higgs from Northern Rhodesia, although Higgs had by this time gone to the United Kingdom, with which South Africa did not have an extradition treaty.).
\item 457. Sinclair v. H.M. Advocate, 17 R. 38 at 43 (Lord Adam): "After a certain time, no doubt, he would be held to be staying here of his own free will, and so liable to be apprehended."
\item 458. In re Ezeta, 62 F. 972 (N.D. Cal. 1894); Liangisiriprasert v. United States, [1991] 1 App. Cas. 225 (P.C.) (appeal taken from Hong Kong C.A.); In re Extradition of David, 390 F. Supp. 521 (E.D. Ill. 1975). Facing extradition from the United States to France, the fugitive in David alleged that he had been kidnapped from Brazil by U.S. agents. The court applied Ker-Frisbie, and distinguished Toscanino on the basis that the alleged government conduct was insufficiently "outrageous." In subsequent proceedings, 395 F. Supp. 803 (E.D. Ill. 1975), the fugitive alleged that his case fit within the Toscanino rule because he had been tortured. The court then distinguished extradition proceedings from a criminal trial on the basis that the former did not involve a determination of guilt. On this view, even outrageous government conduct sufficient to allow the fugitive to invoke the Toscanino rule in a criminal trial would not apply to extradition proceedings. See also David v. Attorney General, 699 F.2d 411 (7th Cir. 1983), cert. denied, 464 U.S. 832 (1983) (court held Toscanino rule inapplicable to extradition proceedings because France would be penalized for the allegedly unlawful conduct of U.S. agents if the court were to divest itself of jurisdiction). In re Matter of Extradition of Atta, 706 F. Supp. 1032 (E.D.N.Y. 1989) (Fugitive sought for terrorist attacks in Israel was deported to United States from Venezuela and tried to resist extradition to Israel on the basis of
\end{itemize}
House of Lords determined that an individual who has been lured into England from abroad by the police under false pretenses may be lawfully extradited to face criminal charges in a third state. *Schmidt II* is also significant because Lord Jauncey left little doubt that the position he adopted in that case would also apply to the propriety of a criminal trial where an individual has been lured into the jurisdiction by fraud. *Schmidt II* thus goes some distance towards fleshing out the limits of the *Bennett II* principle.

In *Schmidt II*, a German faced criminal charges in Germany for serious drug offenses. He moved to Ireland, from which the German authorities unsuccessfully sought his extradition. The German authorities later informed their English counterparts that the fugitive was making frequent visits to the United Kingdom from Ireland under false passports and requested that he be located and arrested. The English police decided to investigate. An English detective contacted the fugitive and his solicitor in Ireland under the false pretense that he was investigating a check fraud scheme, and that he wished to exclude the fugitive from his inquiries. The fugitive was lured to England on the false premise that the police wished to interview him there. He was told that if he refused to come to England for the interview he would be suspected of having committed the offense and would be arrested upon his next visit to the United Kingdom. Faced with these options, the fugitive came to England with his solicitor, and was arrested and committed to custody pending extradition to Germany.

The fugitive brought proceedings in the High Court seeking a writ of *habeas corpus* and judicial review of the Secretary of State’s decision to order the magistrate to extradite him to Germany. The House of Lords refused the motion, holding that the general supervisory jurisdiction which it had outlined in *Bennett II* in the context of a criminal trial did not apply to extradition proceedings. Moreover, the Law Lords held that even if there had been such a supervisory power, it would not have been invoked in *Schmidt’s* case.

The central question in *Schmidt II* was whether the supervisory jurisdiction over criminal trials set out in *Bennett II* should be extended to proceedings to extradite an individual from England. The House of Lords


460. Schmidt had been arrested by the Irish police and pled guilty to drug possession. A German extradition request was refused by the Irish authorities on the ground that the extradition warrant was not in order.

was of the view that it should not. The fugitive argued that the manner in which he had been induced to enter England amounted to an abuse of process and executive power, and that a stay of proceedings should be ordered. The government contended that the High Court had no such inherent supervisory jurisdiction with respect to extradition proceedings, and that its statutory jurisdiction under section 11(3) of the U.K. Extradition Act of 1989 was inapplicable here. The statutory extradition scheme excluded any supervisory jurisdiction. The divisional court rejected the application, and on appeal, the House of Lords affirmed. Lord Jauncey of Tullichettle wrote the unanimous decision, holding that Bennett II was strictly limited to criminal trials and did not extend to extradition proceedings. He held that the High Court did not possess the inherent supervisory power for which the fugitive had argued, and that this case could not be brought within the scope of the provisions of section 11(3) of the U.K. Extradition Act of 1989 which granted the High Court supervisory jurisdiction in limited circumstances.

Lord Jauncey agreed that there was the potential for injustice if a fugitive were to be extradited to a state which would convict him through improper means. But he argued that different considerations applied to a pending criminal trial than to pending extradition proceedings. In the case of a pending trial in England, the supervisory jurisdiction of the High Court (as set out and extended in Bennett II) would provide the sole protection for the accused from abuse of process and executive misconduct. However, in the case of pending extradition proceedings, additional protections were afforded to a fugitive. The first of these was the Secretary of State’s discretion (under section 12 of the U.K. Extradition Act of 1989) to refuse to surrender the fugitive for extradition. Second, Lord Jauncey argued that the courts of many states possess the same sort of powers as the House of Lords had outlined in Bennett II: to order a stay of proceed-

467. Schmidt II, [1995] 1 App. Cas. at 378-79. Section 11(3) provides that the High Court shall order the discharge of the applicant (a) if the offense for which he is sought is trivial; (b) by reason of passage of time; or (c) because the charges made against him are not made in good faith. It was thus inapplicable in this case.
468. Id. at 379. This argument is presumably founded on the basis that extradition proceedings do not involve a determination of the guilt or innocence of the fugitive. See In re Extradition of David, 390 F. Supp. 521. See also Kindler v. Canada, [1991] 2 S.C.R. 779, 844 (Can.) (McLachlin, J.).
ings in the face of irregularities in the manner in which a fugitive has been brought to stand trial. Under this view, a fugitive extradited by a U.K. court to such a state would have his abuse of process argument heard at trial in the requesting state rather than at the extradition stage in the United Kingdom.

In *Schmidt II*, Lord Jauncey emphasized the importance of the European Convention on Extradition, under which the fugitive was being extradited to Germany.  

The purpose of the Convention was to facilitate and expedite the extradition process between the contracting states, a process which required that each state "rely upon the genuineness and bona fides of a request made by another one." This purpose would be defeated if national courts were free to review the substantive circumstances of each case. The Convention requires that national courts extradite fugitives upon a simple request and trust that justice will ultimately be done in the criminal courts of the requesting state. Indeed, unlike under most bilateral extradition treaties, there is no obligation under the Convention for the requesting state to make out a prima facie case in order to secure the extradition of a fugitive. It may be, then, that *Schmidt II* is limited in its application to extradition proceedings under the European Convention on Extradition. In a case where extradition is sought by a non-Convention state there may be less room for the trust in the quality of foreign justice expressed in *Schmidt*. As a corollary, there should be a greater willingness on the part of the extraditing court to consider the circumstances by which the fugitive came before it.

2. *After Schmidt*

It is to be regretted that the House of Lords in *Schmidt II* did not extend *Bennett II* to include extradition proceedings, although it is conceded that the Law Lords had little choice as a matter of statutory interpretation.

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475. Recall that a similar issue arose in *Bennett VII*, [1995] Q.B. 313, where the English divisional court held that it was unable to prevent the execution of a Scottish warrant in England, even though the fugitive had been brought into England unlawfully. The approach advocated in this Article would suggest that the English court take a broader view of its powers.

Schmidt II emphasizes the residual common law nature of the doctrine of abuse of process by its holding that the doctrine may be displaced by statute. Extradition can no longer be seen as a matter of purely executive discretion, unguided by rule of law considerations and human rights norms. Rather, it raises two related questions. First, do courts possess the discretion to determine how individuals come within their jurisdiction? Second, should a court exercise its discretion to stay proceedings upon a determination that the domestic executive has acted unlawfully? Those issues are entirely distinct from the question of whether the individual will get a fair trial in the requesting state, itself an important consideration.

It is clearly inappropriate for an extradition judge to exercise the full jurisdiction of a trial court. Yet an extradition judge should possess the jurisdiction to determine whether the executive abused the process of the court by securing the presence of a fugitive by unlawful means, and if so, to order the return of the fugitive to the state from which he was taken. Schmidt II's denial of any supervisory jurisdiction to the extradition judge means that the English police could have forcibly abducted Schmidt from Ireland without affecting his subsequent extradition to Germany because the English courts would have been powerless to order a stay. That cannot be right.

Furthermore, where the requesting state is not a signatory to the European Convention on Extradition, its courts may not possess the power to investigate the manner in which a fugitive is brought before them.

Lord Jauncey noted that Lord Griffiths in Bennett II had made reference to Sinclair, [1991] 2 App. Cas. 64 (Eng. H.L.), without casting aspersions as to its continued vitality. See Walton v. Gardiner, 177 C.L.R. 378, 395 (Austl. 1993). This would not be the case in Canada, where the doctrine arguably has a constitutional foundation, and accordingly cannot be excluded by statute.

477. See supra notes 473-74.


479. See supra notes 473-74.


482. In Bennett II the Law Lords recognized that the courts of some states (notably the United States, as evidenced by Alvarez-Machain) will not inquire into the manner in which they obtain jurisdiction. Indeed, so long as there has been no unlawful action by the domestic authorities, this is the view put forward in Lavinge v. Director of Custodial Services, [1987] 9 N.S.W.L.R. 546 (New S. Wales (Austl.) S. Ct.) and Bennett VIII, 1994 S.C.C.R. 902 (H.C.J.). See also Geldof v. Meulemeester and Steffen, 33 I.L.R. 385 (Belg. Ct. cass. 1961); Extradition Jurisdiction Case, 8 Ann. Dig. 348 (Ger. 1936); Extradition (Germany and Italy) Case, [1929-1930] Ann. Dig. 270 (Ger. Reichsgericht in Crim. Matters) (court in requesting state incompetent to review decision of extraditing state).
Indeed, even the courts of some Convention states may not possess this power. It is perhaps even more significant that many states whose courts do possess such a power will not exercise it where the domestic executive has not acted unlawfully.\footnote{483 \textit{Lord Jauncey's argument that a court of the requesting state would take into account the manner in which the fugitive came before it is thus open to some doubt. In \textit{Schmidt II}, it would seem unlikely that a German court would stay proceedings against the fugitive in Germany unless he could show that the German authorities had been responsible for his allegedly unlawful return to England. The extraditing court cannot be expected to determine the position which the fugitive would face before the courts of the requesting state. Given the approach adopted in this Article, the question is ancillary. The extraditing court must be concerned with the abuse of its own process, and should not turn a blind eye when it is alleged that a fugitive is before it only through unlawful executive conduct.}}

3. \textit{Schmidt and Trimbole: A Broader Conception of Abuse of Process}

A final consideration is illustrated by Schmidt's subsequent suit in the Irish courts against the British Home Secretary, the Commissioner of the Metropolitan Police, and the English detective in his own personal capacity. Schmidt alleged trespass to the person, false imprisonment, conspiracy, and breach of constitutional rights as a result of having been lured to England from Ireland on false pretences.\footnote{484 \textit{The Irish High Court threw the case out on the basis that the defendants enjoyed sovereign immunity, as they were acting in their official capacities in exercising British policy. Thus, it is evident that abductors who are also state agents are unlikely to face justice in the injured state due to application of the doctrine of sovereign immunity. The Law Lords' refusal in \textit{Schmidt II} to admit that the abuse of process by the domestic executive is relevant to the extradition process is thus particularly troubling: foreign courts are likely to view acts by the officials of other states as being beyond their concern. Fugitives will be the victims of this game of mutual deference. It is accordingly up to the domestic courts to prevent the domestic authorities from abusing the process of those courts.}} The Irish High Court threw the case out on the basis that the defendants enjoyed sovereign immunity, as they were acting in their official capacities in exercising British policy. Thus, it is evident that abductors who are also state agents are unlikely to face justice in the injured state due to application of the doctrine of sovereign immunity. The Law Lords' refusal in \textit{Schmidt II} to admit that the abuse of process by the domestic executive is relevant to the extradition process is thus particularly troubling: foreign courts are likely to view acts by the officials of other states as being beyond their concern. Fugitives will be the victims of this game of mutual deference. It is accordingly up to the domestic courts to prevent the domestic authorities from abusing the process of those courts.

The Law Lords' decision in \textit{Schmidt II} contrasts unfavourably with the Supreme Court of Ireland's approach in \textit{The State (Trimbole) v. The Gover-
nor of Mountjoy Prison. In that case, the Australian government sought a fugitive Australian citizen for offenses committed in Australia. Irish police arrested him in Ireland under color of legislation intended to protect the state from overthrow by its enemies. At the time of his arrest, the Irish government had not yet made an order under the relevant provisions of the Irish extradition legislation applying that legislation to Australia. The Irish government made an order applying its extradition legislation to Australia one day after the fugitive was detained. As such, the Irish authorities had arrested him before they had established a legal basis to extradite him.

The fugitive challenged his detention and the attempt to extradite him to Australia on two bases. First, that his arrest was illegal. Second, that the Irish authorities had arrested him in a colorable effort to detain him so that he could be held pending the coming into force of the relevant extradition order. Both the High Court and the Supreme Court agreed that the illegal nature of the fugitive’s arrest tainted his subsequent detention. They held that the arrest of the fugitive had been a conscious and deliberate violation of his constitutional rights, carried out as a precaution to ensure that he did not leave Ireland before the order applying Irish extradition legislation to Australia could be put in place. The courts ordered that the fugitive be released immediately. The Supreme Court concluded that it had a duty to protect individuals against the invasion of their constitutional rights; to ensure that individuals whose rights had been violated were restored so far as possible to the status quo ante; and to ensure that the executive could not enjoy the fruits of unlawful invasions of the rights of individuals. The Court followed Mackeson and Hartley in asserting the existence of an inherent supervisory jurisdiction to protect against an abuse of process.

The approach of the Irish courts in Trimbole is more consonant with the logic of Bennett II than Schmidt II. Trimbole demonstrates a level of awareness of the need to vindicate domestic constitutional rights and to ensure that the fruits of domestic executive illegality do not accrue to the state when it attempts to invoke the process of the courts, whether for a trial or extradition. It reinforces the conclusion that courts should possess the power to discharge individuals brought before them by unlawful means.

VI. Regulating Transnational Forcible Abduction: What Is the Scope of the Bennett Principle?

A. Introduction
This section aims to identify principles for the development of the law governing the exercise of the abuse of process jurisdiction in transnational forcible abduction cases in the post-Bennett II and Schmidt II era. Three main principles should guide domestic courts in deciding whether to order a stay of proceedings. First, they should consider whether there has been a

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violation of customary international law or of an extradition treaty, and apply the appropriate remedy. Second, human rights considerations should influence domestic courts. A transnational forcible abduction may violate international human rights obligations. Moreover, domestic courts should allow the domestic legal concept of abuse of process to be informed and influenced by international human rights norms. Finally, domestic courts must be prepared to supervise extraterritorial executive conduct. In this way the rule of law is extended to the international plane, executive unlawfulness is discouraged both at home and abroad, and the proceedings of domestic courts are protected from abuse.

As indicated in the previous section, the Law Lords in Schmidt II put an interpretive gloss upon their earlier Bennett II decision. Having dismissed Schmidt's appeal on the ground that the High Court did not possess the supervisory jurisdiction to order a stay of the extradition proceedings for abuse of process, Lord Jauncey, in obiter, considered whether the facts of Schmidt II would have provided appropriate circumstances for the exercise of such a power had it existed. Clearly, Lord Jauncey's thoughts on the subject are of direct application to a Bennett scenario, in which the High Court possesses supervisory jurisdiction where a fugitive has been brought before it to face a criminal trial.

At the divisional court in Schmidt I, Roch, L.J., had found the police conduct at issue to be unobjectionable, or at least not warranting court intervention. However, Roch, L.J., was of the view that the court would intervene where there was a "serious abuse of power." By contrast, Sedley, J., saw coercion which would have brought the case within the Bennett II principle had Schmidt concerned a criminal trial rather than extradition proceedings. Sedley, J., read Bennett II broadly as stating that the exercise of the inherent supervisory power of the courts was not limited to cases involving the use of physical coercion by or at the behest of the domestic authorities. Executive lawlessness, not physical force, was the critical factor. Bennett II outlined a power "to inquire into the circumstances by which a person has been brought within the jurisdiction." Sedley J. continued:

In my judgment what the doctrine of Bennett's case strikes at is an act on the part of the executive government of the United Kingdom: (a) which violates the laws of the foreign state, international law or the legal rights of the individual within that state, and thus offends against the principle of comity; (b) which circumvents extradition arrangements made with that state; (c) which instead brings the suspect by coercion into the jurisdiction of the United Kingdom's courts; and (d) but for which the domestic proceedings could not have been initiated . . .

488. Id. at 356. "The principle will not be confined to cases where there has been an application of physical force to the person of the detainee in the foreign country, but will embrace cases where there have been threats or inducements of a serious and grave nature." Id. at 353 (Roch, L.J.).
489. Id. at 356.
In total, the decision of the House of Lords enlarges the concept of abuse of process to embrace serious abuses of power where it is only by the abuse of power that legal process has become possible. It articulates the supervisory obligation of the High Court to maintain the rule of law as something different from and greater than the maintenance of individual rules of law. In constitutional terms the decision, it seems to me, is of the highest importance, establishing a principle which will take time to be worked out in our jurisprudence.\(^9\)

The principles set out by Sedley, J., in the divisional court in *Schmidt I* provide a useful framework by which domestic courts may determine whether a transnational forcible abduction warrants the exercise of the power of the court to order a stay of proceedings to prevent an abuse of process. I propose to examine each element of this framework in turn. As a preliminary consideration, it should be recognized that the fugitive bears the onus of demonstrating on a balance of probabilities that his presence before the court was acquired unlawfully, such that it would be an abuse of process to allow the trial to proceed.\(^9\)

**B. The Need for Domestic Executive Action**

Domestic authorities must act before a judicially cognizable abuse of process exists. *Domestic executive lawlessness* is the essential factor.\(^9\) In the absence of action by the domestic executive there is no unlawfulness sufficient to give rise to a stay of proceedings.\(^9\) The abduction must have been carried out by state agents, either state employees or private individuals working under state direction.\(^9\) The distinction between abduction by state agents and private citizens is important because international wrongfulness and state responsibility depend upon an agency relationship.\(^9\) This distinction may also affect the civil liability of the abductors.

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\(^{90}\) Id. at 357.


92. *Schmidt I*, [1995] 1 App. Cas. at 356 (Sedley J.), noting that Lord Griffiths in *Bennett II* made "not physical force but executive lawlessness the critical factor." This provides protection against the fraudulent luring of fugitives. See *Regina v. Hartley*, [1978] 2 N.Z.L.R. 199 (N.Z. C.A.); *Levinge*, [1987] 9 N.S.W.L.R. at 565 ("before a stay can be granted the prosecution must have been either a party to the unlawful conduct or connived at it").

93. *Bennett II*, [1994] 1 App. Cas. at 77 (Lord Lowry) ("The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved."). *See also* *Bennett VIII*, 1994 S.C.C.R. at 917; *Sinclair v. H.M. Advocate*, 17 P. (Cl of Sess.) at 41; *StockE v. Germany*, 13 Eur. H.R. Rep. at 853.


95. An abduction carried out by state agents is attributable to the state. Velásquez Rodríguez Case (Merits), 95 I.L.R. 259, 296, ¶ 170 (Inter-Am. Ct. Hum. Rts. 1988); Theodor Meron, *International Responsibility of States for Unauthorized Acts of Their Offi-
under the domestic law of the abducting state.\textsuperscript{496} The legal position is less clear where private persons\textsuperscript{497} are involved or where the abducting state enlists officials of the injured state as agents.\textsuperscript{498}

Where a fugitive is abducted from one state and brought to another by private individuals acting without the knowledge of the latter state, there is no violation of customary international law. However, there may be a violation of the domestic law of the injured\textsuperscript{499} or abducting states,\textsuperscript{500} and of

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  \begin{enumerate}
    \item An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.
  \end{enumerate}

  A state may also incur responsibility if it fails to exercise due diligence to prevent its territory from being used to facilitate abductions by private individuals. See Brownlie, supra, at 165-66; Jiménez de Aréchaga, supra note 193, at 558-61.

  \textsuperscript{496} Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975) (domestic state agents immune from civil suit for acts carried out in furtherance of official duties).

  \textsuperscript{497} Jaffe v. Smith, 825 F.2d 304, 307 (11th Cir. 1987) (conduct of bail bondsmen not attributable to state); Shearer, supra note 20, at 72 (“question ‘unresolved’”); Jerry J. Seaman, International Bountyhunting: A Question of State Responsibility, 15 CAL. W. INT’L L.J. 397 (1985) (arguing that acts of bounty-hunters are attributable to the state which sets the bounty).

  \textsuperscript{498} Where state A bribes officials of state B to transfer an individual to A, state A likely incurs state responsibility. O’Higgins, Unlawful Seizure, supra note 5, at 303.

  \textsuperscript{499} The abductors may face criminal charges in the injured state. See Regina v. Kear, 51 C.C.C. 3d 574 (Ont. (Can.) C.A. 1989). In addition, the abducted individual would retain the right to a civil action (for false imprisonment, deceit, assault, etc.) in the injured state, although this is of questionable benefit given his likely imprisonment in the prosecuting state. See Ker v. Illinois, 119 U.S. 436, 444 (1886); Ebrahim v. Minister of Law and Order, [1993] 2 S.A. 559; Bennett II, [1994] 1 App. Cas. 42, 67-68 (1993) (Lord Bridge); id. at 68 (Lord Oliver, dissenting) (recognizing civil remedy as not “ideal”); Regina v. O/C. Depot Battalion, R.A.S.C. Colchester (Ex parte Elliott), [1949] 1 All E.R. 373, 376 (K.B.); Re Parisot, 5 T.L.R. 344 (Eng. Q.B. Div’l Ct. 1890); Ex parte Scott, 9 R. & C. 446, 109 Eng. Rep. 166, 176 (K.B. 1829). As well, such suits will likely be blocked by the doctrine of sovereign immunity when the abductors are agents of a foreign state. Walker v. Bank of New York, 16 O.R.3d 504 (Ont. (Can.) C.A. 1994), leave to appeal refused, 19 O.R.3d xvi (Can. 1994); Schmidt III, [1995] 1 I.L.R.M. 301 (Ir. H. Ct.).

  \textsuperscript{500} The abducted individual may pursue a civil suit in the abducting state. Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985). The abducted individual may be able to sue the abducting state for false imprisonment and kidnapping. Drug Agency Is Sued Over the Kidnapping of a Mexican Doctor, N.Y. Times, July 10, 1993, at 26 (discussing Alvarez-}
course, a possible violation of international human rights law as well. Moreover, the action of private abductors, while not initially engaging its responsibility, may become attributable to a state if subsequently ratified by it. Finally, only state agents are entitled to foreign sovereign immunity from prosecution in the injured state.

C. The Action Must Be Illegal

1. Domestic Law

Not specifically mentioned by the Law Lords in Schmidt II (although suggested in Bennett II), a serious violation of domestic law by the executive in abducting an individual from abroad would weigh strongly in favor of a stay. The domestic authorities may well have no statutory authorization to abduct fugitives from abroad. Conversely, a technical or relatively minor violation of domestic law may be insufficient, barring additional considerations, to justify invocation of abuse of process jurisdiction.

2. The Laws of a Foreign State

The abduction of an individual from a foreign state will almost invariably violate the criminal law of that state (though not, it seems, in Schmidt II itself). While courts are often reluctant to judge the legality of acts under foreign law, this concern should not be exaggerated in the forcible abduction context. First, kidnapping statutes are remarkably similar in

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501. Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 35 (Iran liable for occupation of U.S. Embassy and consulates due to its adoption of private acts). See Commentary on I.L.C. Draft Articles, [1974] 2 (pt. 1) Y.B. Int'l L. COMM'N 284 (Eichmann, Argoud, Jacob-Salomon cited as examples of the imputability of the acts of private individuals to a state); Draft Articles on State Responsibility, supra note 9, art. 11 (conduct of persons not acting on behalf of the state); Maurice Bourquin, Crimes et délits contre la sûreté des états étrangers, 16 RECUEIL DES COURS 162 (1927-1) (state incurs international responsibility by taking custody of abducted individual from volunteers); Mann, Reflections, supra note 5, at 407-08 (same).


503. Note that the domestic executive might act in a foreign state in compliance with the law of that state, yet still violate its own domestic law. Francis Piggott, Extradition: A TREATISE ON THE LAW RELATING TO FUGITIVE OFFENDERS 35 (1910) (although conceding that the male captus bene detenus rule applies to individuals arrested abroad).

504. Greenspan, supra note 373, at 54. It may also be possible to imagine a "good faith" exception to this element of the test.


506. The Irish High Court, in Schmidt III, [1995] 1 I.L.R.M. at 301, did not determine this issue.
most states. Therefore, the fear of being unable to accurately evaluate and apply foreign law should not deter a domestic court from determining whether there has been a prima facie violation of foreign law. Moreover, liability under foreign or domestic law would not necessarily arise from such a determination. Rather, the domestic court would only use the violation of foreign law as a threshold for the invocation of the abuse of process doctrine. Where domestic authorities have violated foreign law in securing the return of a fugitive from abroad, the domestic court should strongly consider finding an abuse of process. Note that it must be the acts of the domestic authorities, and not those of foreign authorities or private citizens, which violate foreign law.

How then to determine whether there has been a violation of foreign law? Ideally, a fugitive would be able to advance evidence that the domestic authorities were convicted in the foreign (injured) state of violating its criminal law. In the majority of cases, however, this will not be possible, because the domestic authorities will be either immune to suit or not amenable to trial in the foreign state. Courts will thus be forced to rely upon expert evidence to determine whether the domestic authorities violated foreign law. This should not present undue difficulties: courts in conflict of laws cases must often interpret and consider foreign law. It must be emphasized that the domestic court would not be applying foreign law for the purpose of determining the liability or responsibility of the parties; it would only be for the purpose of determining whether an abuse of process has taken place.

The real importance of this factor is that it establishes that the domestic authorities acted extraterritorially. Determining whether the abducting state acted extraterritorially may be troublesome in some cases, particularly where the agency relationship between the prosecuting state and the abductors is unclear, where foreign police were involved, or where the individual was lured into the prosecuting state. It is particularly difficult in cases like Schmidt II, where the domestic authorities do not at first blush appear to have acted extraterritorially at all. Yet elementary conflict of laws principles which locate a tort can be of assistance in establishing the

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509. But note that the Irish High Court, in Schmidt III, [1995] 1 I.L.R.M. at 304-05, had no doubt that the tort in that case (the fraudulent luring of Schmidt from Ireland) had been committed in Ireland.
existence of an extraterritorial act on the part of the domestic executive.\(^5\) Accordingly, one can be said to act in state X even if one remains physically present in state Y. In the clearest cases, such as *Alvarez-Machain*, the abducting state arrests an individual outside its own territorial jurisdiction and brings him before its domestic courts to face criminal charges. In most cases, abductions will be from another state's territory, although they may also take place in international waters\(^5\) or airspace.\(^5\) The key aspect is that the abducting state must have acted outside its own territory in some fashion.

In *Schmidt II*, the English police do not seem to have violated Irish criminal law.\(^5\) Moreover, there was no forcible abduction or other physical act in Ireland by either English or Irish officials.\(^5\) But it does seem clear that extradition proceedings were circumvented: because the English police did not seek to press charges against Schmidt, U.K.-Ireland extradition proceedings could not have been invoked to secure his presence in England.

At the House of Lords, Lord Jauncey distinguished *Schmidt II* from *Bennett II* on the grounds that there had been no abduction in *Schmidt II*, and that the fugitive in *Schmidt II* had not been forced to come to England. In his view, the fugitive could simply have chosen to remain in Ireland, suggesting that Schmidt's decision to come to the United Kingdom was voluntary. Thus, Lord Jauncey would not have stayed proceedings even if the court had possessed the supervisory jurisdiction to do so. By implication, Lord Jauncey would not have stayed proceedings against the fugitive under the *Bennett II* principle had the fugitive been lured into England in

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511. United States v. Yunis, 681 F. Supp. 909 (D.D.C. 1988), aff'd, 924 F.2d 1086 (D.C. Cir. 1991) (no protest from Lebanon or Cyprus where Lebanese lured onto a yacht in international waters and abducted by U.S. agents to face trial for hijacking and destroying Jordanian airplane in Beirut). See also United States v. Postal, 589 F.2d 862 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979) (seizure outside 12 mile territorial sea); United States v. Winter, 509 F.2d 975 (5th Cir. 1975), cert. denied, 423 U.S. 825 (1975) (seizure 35 miles from Florida, nearest land was a Bahamian island 11.9 miles away); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) (seizure of vessel 200 miles from U.S. coast); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (Coast Guard has authority to search beyond 12-mile limit).

512. For example, the apprehension of the *Achille Lauro* hijackers in 1985. There the United States intercepted Palestinians in international airspace and forced them to land at a NATO base in Italy. Four of the five hijackers were tried and convicted in Italy. See G.V. Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158 (1987).


order to face a criminal trial there because the police conduct in question would not have been sufficiently "grave or serious as to warrant intervention." This was so despite the fact that in Schmidt II there was uncontroverted expert testimony that the acts of the English police amounted to the tort of deceit under Irish law.

3. International Law

Under the rules of international law, domestic courts have clear authority to find an abuse of process, especially given the existence of a clear customary rule against transnational forcible abduction. There are alternative bases for this authority: the territorial sovereignty of the foreign state; treaty obligations, particularly under extradition treaties, owed to the foreign state; human rights duties owed to foreign states; and international human rights obligations owed directly to individuals. A fugitive should be permitted to advance evidence that his entrance to a court's jurisdiction took place in violation of international law. If the fugitive can discharge this burden, this factor should weigh in favor of a stay of proceedings. Because the court is examining the legality of the acts of the domestic executive under international law, justiciability concerns will not arise.

4. The Legal Rights of the Individual in the Foreign State

The legal rights of the individual in a foreign state are a function of the civil law of the foreign state. The decision as to whether to order a stay should be influenced by a finding that the domestic authorities violated the rights of the fugitive under foreign civil law. Conflict of laws cases routinely deal with this sort of question, so it should not create problems for domestic courts in the present context. In Schmidt II, for example, the fugitive asserted that his right to liberty and right to access to the courts under Irish constitutional law had been violated. In large measure, then, domestic courts should be concerned with violations of the fugitive's rights and reasonable expectations under foreign civil law. Individual rights under foreign civil law could also have constitutional or international human rights dimensions.

D. State Action Must Circumvent Extradition Relations With the Foreign State

In many forcible abduction cases the executive illegality at issue is the circumvention of extradition relations with the foreign state from which the fugitive was abducted. As noted above, there can be little doubt that this question formed a central element of the grounds for decision in Bennett II and was also an important consideration in Levinge and Fan. Bennett II supports the proposition that where an extradition treaty or relationship

516. Id. at 358; see also Schmidt III, [1995] 1 I.L.R.M. 301 (torts of trespass to the person, false imprisonment, breach of constitutional rights, conspiracy to deprive plaintiff of free movement).
exists, requests by the domestic authorities for the return of a fugitive from a foreign state must be made pursuant to the treaty or existing processes. But what of forcible abduction where no extradition proceedings have been circumvented? Cases in which there is no operative extradition treaty (Driver, Liangsiriprasert, Latif and Shahzad, perhaps Bennett II itself), where there is no functioning extradition relationship (Mackeson), or where extradition is unavailable because the individual has committed no extradition offense (Schmidt II), present a particular problem, because the Law Lords in Bennett II placed a premium upon the determination that extradition proceedings had been circumvented.\textsuperscript{518} Does the Bennett II rule apply where no extradition treaty was circumvented? The Law Lords expressly declined to decide this point in Bennett II itself. Roch, L.J.'s, balancing in Schmidt I was made "against the background that no legal process existed whereby the presence of the applicant could have been secured from Eire within this jurisdiction."\textsuperscript{519} Extradition was simply unavailable.

A domestic court must take into consideration any violation of customary international law in determining whether a stay of proceedings is appropriate. It is self-evident that an individual could not have a treaty right not to be expelled from a state not a party to a valid extradition treaty with the state seeking the individual's return or capture.\textsuperscript{520} Moreover, where there is no extradition treaty to circumvent, there can be no unlawfulness \textit{per se} in having the domestic authorities request that the fugitive be deported to them by the asylum state.\textsuperscript{521} Indeed, the unlawfulness identified in Bennett II seems to rest upon the circumvention of regular extradition arrangements.

But courts should not rely too heavily upon extradition treaties. Under closer scrutiny, Bennett II suggests that in the absence of an extradition treaty abduction should not remain beyond the scope of the supervisory jurisdiction of the courts. Instead, customary international law and international human rights law must both play roles. Circumvention of extradition arrangements should be viewed as a sufficient but not necessary instance of executive unlawfulness. It is merely a common and obvious example of unlawful activity on the part of the domestic executive. Provided that the other elements of the test are also made out, a stay should be ordered when extradition arrangements have been circumvented. However, even in the absence of treaty circumvention, a stay of proceedings should be ordered where other factors establish sufficient unlawful activity on the part of the domestic executive.\textsuperscript{522}


\textsuperscript{519} Schmidt II, [1995] 1 App. Cas. at 354.


\textsuperscript{522} In Regina v. Latif and Shahzad, [1996] 1 W.L.R. 104 (Eng. H.L. 1995), the Law Lords did not suggest that the abuse of process doctrine was inapplicable because there
Abduction has been presented as a legitimate option of "last resort." If extradition proceedings are unavailable, or the foreign state refuses to extradite despite treaty obligations, it is suggested that abduction is justified as a residual self-help measure. Indeed, it has been argued that Alvarez-Machain itself was such a case. States are understandably frustrated by their inability to obtain the custody of fugitives through lawful channels. Though the impulse to adopt self-help remedies can be overwhelming, it must be resisted. Transnational forcible abduction is unlawful as a self-help measure. The requesting state may always make a claim against the requested state for a breach of an extradition treaty. Indeed, though its success is unlikely, the requesting state could seek a Security Council resolution requiring the return of the fugitive. Otherwise, a transnational forcible abduction cannot be justified where there are grounds under an extradition treaty for a refusal to extradite. The test for ordering a stay of proceedings should have the effect of requiring the domestic authorities of the requesting state to exhaust all local remedies in the requested state before abducting a fugitive.

Moreover, a state's refusal to extradite is often more complicated than it may first appear. As discussed above, many foreign states do not extradite their own nationals. But such states may prosecute domestically, and extradition treaties with such states commonly provide that the price of a state's decision not to extradite a national is to prosecute that national domestically. Extradition treaties often provide for grounds upon which a requested state can decline to comply with an extradition request. When a treaty grants the requested state the right to refuse to extradite, the requesting state can hardly complain if the requested state chooses to exercise that right.

E. Bringing the Individual Within the Jurisdiction of the Domestic Courts by Coercion

The focus here is upon what constitutes "coercion" for the purpose of invoking the abuse of process doctrine in the transnational forcible abduction context. Schmidt I suggests that there are cases which do not involve the use of force, but which may still amount to an overbearing of the will of the fugitive. To this end it may prove difficult to distinguish the forcible abduction of a fugitive from the coerced or fraudulent luring of a fugitive.
into a jurisdiction. Force and fraud should be viewed as being on a continuum of coercion. While abduction by force will almost certainly create a strong presumption in favour of issuing a stay, the status of an abduction by fraud is less clear. As the Privy Council recognized in Liangsiriprasert, the police must be accorded a certain leeway to combat sophisticated international criminal activity through the use of ruses and tricks. The real question is how far the police may go before their conduct becomes objectionable.

At one extreme is the situation where the domestic police exercise extreme duress upon a fugitive, such as threatening to harm the fugitive or the fugitive's family, so that he enters the country where he would not otherwise have done so. Such conduct is clearly objectionable under the Bennett II rule as interpreted in Schmidt I. At the other extreme are cases where the fugitive is lured into the jurisdiction by the promise of gain, as in Liangsiriprasert, where the fugitives entered Hong Kong to pick up payment for drug shipments of their own free will “not because of any unlawful conduct of the authorities but because of their own criminality and greed.” In such cases, it cannot be said that the police exercised


529. Schmidt I, [1995] 1 App. Cas. at 359 (Sedley, J.) (“What is objectionable about fraud, actual or constructive, is that it robs the victim of the power of autonomous decision and action as surely as does physical coercion.”); Walker v. Bank of New York, 15 O.R. 3d at 602-03; S v. Wellem, [1993] 2 S.A.C.R. 19, 31 (E. Cape Div.). But see Bush, supra note 6, at 979 (arguing that fraud is acceptable, but force may not be). See also civil cases discussed supra note 23.

530. Liangsiriprasert v. United States, [1991] 1 App. Cas. 225 (that defendants agreed to sell heroin in Thailand to U.S. D.E.A. agent for export to United States. American agents lured defendants to Hong Kong, ostensibly to collect payment, where they were arrested upon arrival. United States sought their extradition. Defendants could not have been extradited from Thailand to the United States because relevant extradition treaty made no provision for drug offences. The Judicial Committee held that it was not an abuse of process to allow the defendants to be extradited after having been lured into Hong Kong.).

531. Id. at 243.

If the courts were to regard the penetration of a drug dealing organisation by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red-letter day for the drug barons.

Id. Compare Lord Jauncey in Schmidt II, [1995] 1 App. Cas. at 380 (noting that Schmidt faced multiple drug trafficking charges in Germany: “To bring such a person to justice the police and other drug enforcement agencies may from time to time have to tempt him to enter their fief.”) (emphasis added). Accord, Regina v. Latif and Shahzad, [1996] 1 W.L.R. 104, 111-13 (Eng. H.L. 1995). In the domestic context, see Regina v. Christou, [1992] Q.B. 979 (Eng. C.A.) (evidence gathered from shop set up by police to trap those selling stolen merchandise not excluded). In the international context, see Regina v. Latif and
duress upon the fugitives.

*Schmidt II* presents a case between these poles. There was evidence that the fugitive did come to England on a semi-regular basis for business purposes, and this likely influenced Lord Jauncey's view that the fugitive had not been coerced into coming to England. The fugitive argued, and Sedley, J., in the divisional court agreed, that "but for" the ruse he would not have entered the country, and thus the jurisdiction of the English court was based on fraud. What made the ruse objectionable, in Sedley, J.'s, view, was that the fugitive had been threatened with serious adverse consequences—i.e., arrest upon his next visit to the United Kingdom—if he did not come to the United Kingdom to meet with English authorities. In such circumstances the English police knew "that this was an offer that the applicant could not refuse." Sedley, J.'s, primary objection was not to a ruse per se, but to the degree of duress which this particular ruse involved. He also objected to that fact that the fraud violated Irish law. Sedley, J., would allow the police to tempt or lure a fugitive into the jurisdiction by appealing to his greed, but not to coerce or threaten the fugitive with adverse consequences.

Lord Jauncey took a different view. He saw the police ruse in *Schmidt II* as more akin to that at issue in *Liangsiriprasert* than that in *Bennett II*:

"At the very worst, he was tricked into coming to England but not coerced." This Article is inclined to side with Lord Jauncey on this point. Police conduct like that in *Schmidt II* should probably be found acceptable and should not give rise to the operation of the abuse of process doctrine, but the police should not be allowed to go much further. It is important to note that fraudulent luring is not a customary international law violation, although it may be a violation of international human rights obligations. Clearly, much depends upon the nature of the fraud.

The force-fraud distinction has been supported on the basis of policy arguments, namely, that fraud does not violate the territorial sovereignty of foreign states, and does not present the risk of violence to the fugitive or third parties. While the latter point may be accurate, it is not determin-
native of the issue. Further, the former point is simply untrue. According
to conflict of laws rules, a fraud perpetrated upon a person located in a
foreign state occurs in that state. Although fraud is not strictly
equivalent to sending police agents into the territory of a foreign state, it
still amounts to a wrong committed by domestic authorities in that foreign
state.

*United States v. Wilson* presents an extreme example of fraudulent
inducement. In *Wilson*, the fugitive was lured by U.S. agents into the
Dominican Republic through false representations. Upon his arrival, local
authorities placed him on a commercial flight to the United States, where
he was arrested upon arrival. In the view of the court, because “Wilson was
the victim of a non-violent trick,” the case did not provide grounds for
deprivation from the Ker-Frisbie doctrine. But the presence or absence of
violence should not be the litmus test of the legality of a fraudulent induce-
ment. It certainly is not for Canadian domestic kidnapping jurispru-
dence. The key question is the degree of duress imposed by the police
upon the fugitive: the greater the duress, the more likely it is that a stay
will be appropriate.

F. Forcible Abduction as the Source of Domestic Jurisdiction

A final element of the proposed test is one of causation. In order to secure
a stay, the fugitive must demonstrate that she would not have been amena-
able to the jurisdiction of the domestic courts but for unlawful executive
acts. The test is simply one of "but for" causation. It seems clear (as
counsel for the accused in *Driver* conceded) that there is no abuse of
process, and no rationale for a stay of proceedings, where a fugitive enters
a jurisdiction voluntarily. This is explored in the next section.

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540. Schmidt III, [1995] 1 I.L.R.M. at 304-05. See discussion of this point at text
accompanying notes 508-10.

541. 732 F.2d 404 (5th Cir. 1984).

542. Id. at 411. See also Charron v. United States, 412 F.2d 657 (9th Cir. 1969)
(Court's jurisdiction unaffected where the defendant was lured into jurisdiction by
fraud. Defendant flew from Toronto to Mexico City via Detroit. The defendant alleged
that upon his arrival, Mexican officials (at the instigation of the United States) refused
him permission to remain and sent him back to Toronto, again via Detroit. He was
induced to leave the plane in Detroit and was arrested there.).

543. See, e.g., Criminal Code, R.S.C. 1985, ch. C-46, sec. 279 (Can.); Regina v. John-
son, 65 N.S.R. 2d 54 (Nova Scotia (Can.) C.A. 1984), leave to appeal refused, 67 N.S.R.
2d 180 (Can. 1985); Regina v. Metcalfe, 10 C.C.C. 3d 114 (B.C. (Can.) C.A. 1983), leave
to appeal refused, 54 N.R. 320 (Can. 1984); Regina v. Brown, 8 C.C.C. 2d 13 (Ont. (Can.)
force or fraud provides an essential element to kidnapping).

544. This element stems directly from *Bennett II*. According to Sedley, J.: “The last of
these requirements, a 'but for' test of causation, emerges clearly from the language used
by Lord Bridge, at p. 68 and Lord Lowry, at p. 76, and is implicit in the reasoning of
Lord Griffiths.” *Schmidt I*, [1995] 1 App. Cas. at 334. Also, Lord Lowry in *Bennett II*,
[1994], 1 App. Cas. at 76, argued that the very reason that unlawful acts by the executive
constituted an abuse of process was that “they are the indispensible foundation for
the holding of the trial.”

85, 94 (Q.B. Div'l Ct. 1985).
1. The Individual Voluntarily Enters Jurisdiction

Where a fugitive consents to return to the jurisdiction seeking to prosecute him, the causation element of the proposed test is not satisfied, and a stay of proceedings should generally not be ordered. This would also include cases in which the fugitive has waived the benefit of formal extradition proceedings. But a stringent approach to consent should be adopted. The South African cases on informed consent suggest an analogy with waiver of rights in domestic constitutional law, and emphasize that such waiver is valid only when the fugitive is informed of the consequences of waiver. Waiver must thus be clear and informed. In cases of ambiguity, recognition of a waiver should be denied.

The legal standards which determine whether a stay of proceedings will be granted in cases of transnational forcible abduction should discourage informal rendition even in circumstances where it is not in itself unlawful. The rights of a fugitive are more likely to be violated when he is returned for trial by informal means, outside the scope of the procedural protections offered by formal extradition arrangements.

While lack of consent to forego formal extradition processes should be a factor in the stay equation, the fact that the fugitive did consent cannot cure what would otherwise be unlawful extraterritorial activity by domestic police. The police possess a certain jurisdictional competence under domestic law which cannot be expanded or rendered immune from judicial supervision by the consent of third parties. Thus, the fact that foreign authorities may have consented to or even aided in the forcible abduction of a fugitive by domestic authorities will not render lawful that activity where it is prohibited by domestic law.

2. Where the Individual Returns to the Jurisdiction Through Unplanned or Unintended Events

The causation element of the proposed test is not satisfied where the fugitive's presence in the jurisdiction is fortuitous. For example, suppose that Bennett had decided to take a trip to New York from South Africa, unaware of the fact that his flight would travel via Heathrow, and he was arrested by

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547. A fugitive who agrees to return to the requesting state voluntarily and waive an applicable extradition treaty does not benefit from the procedural protections of the treaty, such as the specialty principle. Regina v. Gagnon, 117 C.C.C. 61 (Que. (Can.) S. Ct. 1957); Regina v. Liberty, [1930] 1 D.L.R. 892 (Alta. (Can.) S. Ct. App. Div. 1929); Regina v. Flannery, [1923] 3 D.L.R. 689 (Alta. (Can.) S. Ct. App. Div.) (although refusing to remit the case for a new trial on a nonextraditable offense). See also United States v. DiTommaso, 817 F.2d 201, 211-12 (2d Cir. 1987).


English police at Heathrow.\(^{550}\) Similarly, suppose that he intended to fly to Ireland, but that due to bad weather his airplane was forced to land in England. In both cases he could be validly arrested and tried in England for offenses committed there.\(^{551}\) However, the picture is very different where the fugitive has been deliberately misled.\(^{552}\) Where the presence of fugitive has been accomplished only because of the domestic authorities' deception, that presence may not be considered fortuitous. An inquiry into how the fugitive was tricked into coming into the jurisdiction must be made. If the fugitive was threatened with adverse consequences, her presence is unlikely to be considered voluntary. Conversely, if she was lured into the jurisdiction by the prospect of gain, her consent cannot (without more) be challenged.

3. **Jurisdiction Through Deportation Without Irregular Action by the Police of the Receiving State**

The causation test is satisfied by the fugitive only when the domestic authorities have acted unlawfully. The mere fact that a fugitive has been returned to the jurisdiction through a deportation which is unlawful under foreign law cannot in itself amount to an abuse of process, even when extradition might have been available.\(^{553}\) Rather, there must be evidence of action taken by domestic authorities to circumvent formal extradition procedures,\(^{554}\) and the fugitive cannot rely upon a violation of foreign law by foreign authorities alone.\(^{555}\) There must be evidence of unlawfulness

\(^{550}\) Cf. Walker v. Bank of New York, 15 O.R. 3d 596 (Ont. (Can.) Gen. Div. 1993), rev'd on other grounds, 16 O.R. 3d 504 (Ont. (Can.) C.A. 1994). The plaintiff was arrested in New York as part of a U.S. Treasury Department "sting" operation. He alleged that he had been given an airplane ticket to fly from Canada to the Bahamas, but did not realize until he was on the airplane that there would be a stopover in New York. For an alternative explanation of the case, see Janet Walker, *Immunity for Extraterritorial Enforcement Measures in Canada: The Supreme Court Declines to Decide*, 1 CAN. INT'L LAWYER 17 (1994).


\(^{553}\) Stevenson v. United States, 381 F.2d 142 (9th Cir. 1967) (finding no violation of U.S.-Mexico Extradition Treaty where defendant deported from Mexico to United States because deportation not initiated by United States); Bennett VIII, 1994 S.C.C.R. at 921; Bennett II, [1994] 1 App. Cas. 42 (Eng. H.L. 1993) (Lord Lowry) ("The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved . . ."); Sinclair v. H.M. Advocate, 17 R. (Ct. of Sess.) 38 (C.J. 1890).

\(^{554}\) Judgment of Dec. 22, 1988 (Amedien), Cass. Crim., 93 Rev. Gen. De Dr. Int'l Pub. 696 (Fr. 1987) (not allowing a challenge to the court's jurisdiction where defendant was returned to France via informal rendition, but noting that disguised extradition with the participation of the domestic police would ground a jurisdictional challenge, particularly if an extradition treaty was breached in the process); BLAKESLEY, supra note 28, at 279.

\(^{555}\) Otherwise, foreign officials would be subjected to domestic legal and constitutional standards for acts carried out within their own territory. See United States v. Pelaez, 930 F.2d 520 (6th Cir. 1991) (defendant sent to U.S. from Columbia, but without involvement of U.S. officials); United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975) (defendant expelled from Mexico to United States where U.S. officials were waiting for him at border); United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972) (fugitive returned to United States by Canadian border officials; alleged illegality of return under
on the part of the domestic executive, usually evidence that the violation of
foreign law came at the instigation of the domestic authorities.\footnote{556} Proof of
actual intention on the part of the domestic authorities to circumvent extra-
dition proceedings may not be required, however.\footnote{557} It may be sufficient
to demonstrate that the domestic authorities were ambivalent or uncon-
cerned as to whether extradition proceedings have been circumvented, i.e.,
acting with willful blindness. Thus, rendition without extradition by for-
eign authorities to the requesting state is acceptable, but the same at the
instigation of the domestic authorities is not.\footnote{558}

However, it is important to specify exactly what is meant by "at the
instigation of the domestic authorities." The mere fact that the domestic
authorities have made inquiries about a fugitive in a foreign state should
not be considered "instigation."\footnote{559} Neither should the fact that the foreign
authorities have advised domestic officials that they intend to deport an
individual to the latter state be taken as proof of a disguised extradition.\footnote{560}


\footnote{559} It has been claimed that the distinction between initiation and co-operation is too murky to provide a useful standard. See Colin Warbrick, Irregular Extradition, Pub. L. 269, 273 (1983). Also unhelpful as a standard for "instigation" is whether domestic authorities merely requested the fugitive's return, see App. No. 10893/84 v. Germany, 9 Eur. H.R. Rep. 124, 125 (1987) (Commission report), unless the request is ultra vires or specifically prohibited under domestic law, as in S. v. Wellem, [1993] 2 S.A.C.R. 19 (E.C.D.). See also Lira, 515 F.2d at 71; Bennett VIII, 1994 S.C.C.R. at 921.

Admittedly, the distinction between deportation and disguised extradition may at times prove to be very fine. There are terrible difficulties in determining whether domestic officials have "instigated" action by foreign authorities or merely "co-operated" with them. Nonetheless, there is a clear conceptual distinction between co-operation and agency, even though it is not always obvious in practice. In most cases it will be difficult for a fugitive to prove such "instigation," as the sort of documentary evidence relied upon in the subsequent proceedings in Bennett III (internal memos, etc.) are likely to be both rare and difficult to gain access to. Moreover, as the Bennett litigation demonstrates, such evidence is often amenable to multiple interpretations. However, a bare assertion of "disguised extradition" is easily made by a fugitive, and courts should in general insist that fugitives advance clear evidence of connivance or instigation by the domestic executive in order to stay proceedings. But courts should not hesitate to draw inferences from executive behaviour in appropriate circumstances. Indeed, in some circumstances, willful blindness on the part of domestic authorities as to the legality of the rendition of a fugitive may be sufficient. In the end, much will depend upon the willingness of domestic courts to make such determinations.

G. Other Factors

Commentators suggest three additional factors which should influence a court's decision regarding a stay order: the use of violence in the rendition, whether the police acted in "circumstances of emergency," and the seriousness of the offense.

1. Whether Violence Was Used in the Rendition

It is suggested that if the fugitive was brought into the jurisdiction by

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562. S. v. Ebrahim, 95 LL.R. 417, 424 (1992) (drawing the inference that the abductors were agents of the South African government). See also Bennett II, [1994] 1 App. Cas. at 77 (Lord Lowry) (noting that "[i]n practice, the transporting of a wanted man to the United Kingdom from elsewhere (by whatever method) will nearly always take place in consequence of a request by the executive here"). But see Healy, [1983] 1 W.L.R. at 113 (Eng. Q.B. Div'l Ct.).


564. Bush, supra note 6, at 980-81; Choo, International Kidnapping, supra note 8, at 631.

means of violence, "this would weigh heavily in favour of a stay."\textsuperscript{566} Violence in a rendition on the part of the domestic authorities should be considered a \textit{prima facie} ground for ordering a stay of prosecution. But this rule will resolve only a few relatively easy cases; violence is merely an indicator of extreme lawlessness.

A major concern (as the Law Lords recognized in \textit{Bennett II}) about reliance upon violence as a factor in the abuse of process equation is that it will make the use of physical force a prerequisite for the finding that an abduction was illegal. This might lead courts to take the route established by the U.S. federal courts after \textit{Toscanino}, declining to order stays unless the evidence established extreme violence on the part of the police. This Article contends that the issue of violence is often a red herring. Many transnational forcible abductions do not involve much violence. For example, limited violence was used in \textit{Alvarez-Machain}, while hardly any violence at all was used in \textit{Bennett}, \textit{Hartley}, and \textit{Schmidt}. But it cannot be suggested that the degree of violence itself should have dictated the results of those cases. Violence should be viewed as a sufficient but not necessary factor in establishing the illegality of an abduction. Where an abduction involves violence, the court should order a stay of proceedings, so long as the other elements of the \textit{Bennett II} equation are made out. But a court should be able to order a stay on the basis of other factors, even where no violence was present.

2. \textbf{Whether the Police Acted in "Circumstances of Emergency"}

It is contended that circumstances of necessity should be considered a mitigating factor in determining whether the abuse of process doctrine should be invoked. But it is unclear what is meant by an "emergency" in the context of a forcible abduction: the term seems to imply "force majeure" or another "circumstance precluding wrongfulness."\textsuperscript{567} While states should be able to invoke necessity in extreme circumstances, the scope of such a doctrine should be confined to the definition of a "circumstance precluding wrongfulness" under international law. The invention of an "emergency" should not involve a subjective determination on the part of the domestic executive itself, but should instead be amenable to judicial examination. Otherwise, the emergency factor seems amenable to infinitely elastic and expedient definition. Transnational forcible abduction is not likely to be a common method of returning fugitives from abroad, and the danger is that its relative rarity could be used to justify any situation in which it is employed as being an "emergency." The circumstances in which an emergency or necessity doctrine may be properly invoked must be very narrowly circumscribed.

\textsuperscript{566} Choo, \textit{International Kidnapping}, supra note 8, at 631.

\textsuperscript{567} The concept of a "circumstance precluding wrongfulness" in the law of state responsibility is discussed supra note 149.
3. The Seriousness of the Offense

It is also argued that the more serious the alleged offense, the less appropriate it is that a stay should be ordered. Conduct on the part of the domestic authorities amounting to an abuse of process in the case of a lesser offense might not amount to such an abuse where the alleged offense was more serious. There was no explicit mention of this factor in Bennett II itself, although it might be implied from Lord Lowry's suggestion that not every "venial irregularity" should result in a stay.668 Roch, L.J., in Schmidt I did consider it a factor, however.669 It emerges more clearly from cases such as Eichmann. In part, this factor will be tied into the "emergency" factor, because an emergency will only arise where there has been an offense of the highest gravity, or the threat thereof.670

The most difficult cases will involve threats to national security, offenses against universally accepted principles, and war crimes. The possible existence of an "Eichmann" exception, canvassed above, may play a role, although the requirement that the abducting state have exhausted all possible routes to secure the fugitive's return by normal processes should bestringently upheld by the courts of the abducting state. It should also be noted that states are generally under treaty obligations to prosecute or extradite for many offenses against universally accepted principles. The more serious the offense and the potential consequences of a conviction for that offense, the more strictly courts should demand that the government adhere to procedural protections in apprehending the defendant. Because transnational forcible abduction (which is both expensive and likely to have adverse political consequences abroad)671 is unlikely to be used other than in cases involving serious offenses, the usefulness of the "seriousness" factor is limited: it will be present in the majority of transnational forcible abduction cases. Nonetheless, it may still be employed as a factor.672

Conclusion

Domestic courts must accept their role as agents of the international legal system. This role requires them to determine whether a particular transnational forcible abduction has violated international law. If it has, a domestic court is under an international and domestic legal duty to order a stay of proceedings against the fugitive and to order his return to the state from which he was abducted. Moreover, the domestic court must determine

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668 Bennett II, [1994] 1 App. Cas. at 77. See also Regina v. Latif and Shahzad, [1996] 1 W.L.R. at 113 ("Realistically, any criminal behavior of the customs officer was venial compared to that of Shahzad.").
669 Schmidt II, [1995] 1 App. Cas. at 354 (discussing a "balancing between the gravity of the alleged offences" and the improper conduct of the police).
671 Bush, supra note 6; Gurulk, supra note 7, at 490-91.
672 Regina v. Latif and Shahzad, [1996] 1 W.L.R. at 113; Regina v. Colarusso, [1994] 1 S.C.R. 20, 78 (Can.) (seriousness of offense a factor to be considered in determining whether evidence should be excluded).
whether the abduction violated treaty obligations owed to a foreign state, customary international law, or international human rights obligations owed to either a foreign state or the fugitive. Such a violation should strongly encourage the ordering of a stay.

The distinction between lacking the jurisdiction to try an abducted individual, and possessing such jurisdiction but being under a duty not to exercise it is chimerical and should be ignored. The better approach is to admit that jurisdiction to try abducted fugitives exist, but to allow the international legal status of transnational forcible abduction (both in customary law and the nascent international human rights law) to structure and guide the exercise of discretion by courts to order a stay when faced with fugitives who have been brought before them in an irregular manner.

As we have seen, however, in many cases of transnational forcible abduction there are other reasons why a domestic court may wish to order a stay of proceedings against a fugitive. To this end, it is my argument that domestic courts possess a discretion to stay proceedings against a fugitive brought before it in violation of the law of a foreign state; or in circumvention of regular extradition proceedings; or in order to prevent unlawfulness on the part of the domestic executive. In exercising its discretion to order a stay the court must weigh and evaluate the circumstances through which the fugitive came before it. The finding that there was no violation of customary international law (e.g., because the injured state consented to the abduction) should not prevent a domestic court from refusing to have its processes tainted by the executive’s illegal conduct. The rule of law rationales opposing the male captus bene detentus principle—that it brings the administration of justice into disrepute, encourages lawlessness, violates state sovereignty, disregards international human rights law, and undermines the international extradition network—are overwhelming.