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Trumpeting Justice: The Implications Of U.s. Law And Policy For The International Rendition Of Terrorists From Failed Or Uncooperative States

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I. Introduction

A. Overview

The barbarous attacks of September 11th brought unforgettable fear, shock, and suffering upon the people of the United States. In coordinated attacks, international terrorists hijacked two U.S. airliners and crashed them into New York's World Trade Center Towers, collapsing both buildings. Moments later, a third hijacked airliner rammed into the side of the Pentagon. A fourth hijacked airliner went down in a field outside Pittsburgh, causing speculation that the doomed flight was aimed for the U.S. Capitol.[1] Approximately 2,700 people died as a result of these attacks.[2]

America has seen war, but this was the first time in over 130 years, since the Civil War, that war was waged on the soil of the continental United States. The attack on Pearl Harbor during World War II showed that the United States is not immune from attack, but September 11th awakened the nation to the dangers of attacks on innocent civilians. By striking the World Trade

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[1] American Airlines Flight 11 crashed into the north tower of the World Trade Center at 8:45 a.m., United Airlines Flight 175 hit the south tower at 9:03 a.m., American Airlines Flight 77 collided into the Pentagon at 9:43 a.m., and United Airlines Flight 93 went down in Somerset County, Pennsylvania at 10:10 a.m. *See September 11: Chronology of Terror, at* http://www.cnn.com/2001/US/09/11/chronology.attack.

[2] Frank J. Murray, *September 11 Defrauders Sought Out, Police have Arrested 37 Suspected in Lost-Relative Scams*, WASH. TIMES, Jan. 4, 2003, at A2, *available at* 2003 WL 7703411.

Center and the Pentagon, international terrorists sought to strike the economic and military power centers of the United States and, in doing so, committed heinous crimes that killed innocent civilians. In the days following the terrorist attacks, President Bush announced the commencement of a war on terror. In his address to the nation on September 20, 2001, President Bush stressed that the United States would either bring its enemies to justice or bring justice to its enemies.[3]

B. Framework for Discussion

Advanced communications, increased transportation capabilities, and international commerce make it possible for terrorists to violate U.S. laws while living outside our borders. Recent captures of terrorists around the world, as well as U.S. intelligence reports, indicate that terrorists are hiding in some foreign states that have dysfunctional central governments or are led by regimes unwilling to cooperate with the United States.[4] The United States is therefore confronted with situations in which international terrorists may operate from either "failed" or uncooperative states.

This essay explores the issues of obtaining custody of international terrorists from either failed or uncooperative states. This discussion will focus on bringing international terrorists to the United States for criminal prosecution. It will not discuss the issue of obtaining custody of suspected terrorists to hold as "detainees" for interrogation purposes.[5]

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[3] President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

[4] *See generally* Alan Sipress, *U.S. Says War Effort Remains Intense*, WASH. POST, Jan. 27, 2002, at A14, *available at* http://www.washingtonpost.com/wp-adv/archives/front.htm.

[5] *See* Kenneth Anderson, *What to do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 621 (2002)for a discussion about the detainees at the Guantanamo Naval Base.

II. Jurisdiction To Try International Terrorists

A. Overview

An inquiry into jurisdiction is the first-step in determining whether international terrorists may be brought from a foreign state to the United States to face criminal prosecution. It is important to examine the issue of whether the United States has extraterritorial jurisdiction over terrorists through the following two-step analysis. It must first be determined whether relevant U.S. constitutional and statutory law authorizes the exercise of extraterritorial jurisdiction to prosecute terrorists. The second step is to determine whether customary international law, in so far as it is part of U.S. law, limits the extraterritorial application of U.S. law.[6]

B. The Constitution Permits Congress to Exercise Jurisdiction over International Terrorists

The exercise of extraterritorial jurisdiction to carry out the war on terror, to prosecute international terrorists, is consistent with U.S. domestic law. The U.S. Constitution does not include any express limits on the reach of congressional authority.[7] Rather, it grants Congress the power to "make all laws which shall be necessary and proper." [8] Since the Constitution grants Congress the power to regulate commerce with foreign nations,[9] the legislative power could be used to make criminal laws necessary and proper for carrying out the

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[6] This analysis applies to criminal prosecution of terrorists before U.S. courts and not in front of international tribunals.

[7] *See* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 881 (1989). *See also* United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (1991) (holding that "generally there is no constitutional bar to the extraterritorial application of United States penal laws.")

[8] U.S. CONST. art. I, § 8, cl. 18.

[9] U.S. CONST. art. I, § 8, cl. 3.

regulation of commerce. [10] The Constitution specifically authorizes Congress to act extraterritorially through the power to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." [11] The Constitution also clearly contemplates the exercise of extraterritorial criminal jurisdiction since it grants Congress the power to direct the location of trials for crimes committed outside U.S. territory that violate U.S. law. [12] Accordingly, Congress has exercised extraterritorial jurisdiction over international terrorists. There is a general presumption against the extraterritorial application of a statute unless Congress manifests its intent for the law to reach outside U.S. territory.[13]

Under 18 U.S.C. § 2331, international terrorism is defined as including "activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State."[14] Such acts are subject to U.S. criminal jurisdiction even when they transcend national boundaries. Examples include, if the mail system is used to carry out the crime, if there is an effect on interstate or foreign commerce, if the victim or intended victim is the U.S. government or an agent of the government, if property involved is owned or leased by the U.S. government, or if the offense is committed in the territorial sea of the U.S.[15]

Congress also specifically exercises jurisdiction over any person who uses or attempts, threatens, or conspires to use a weapon of mass destruction against the United States or U.S. nationals abroad.[16] Jurisdiction is also asserted over any person

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[10] Lowenfeld, *supra* note 7, at 881.
[11] U.S. CONST. art. I, § 8, cl. 10.
[12] U.S. CONST. art. III, § 2, cl. 3.
[13] United States v. Usama Bin Laden, 92 F. Supp. 2d 189, 193 (2000).
[14] 18 U.S.C. § 2331(1)(A) (2002).
[15] 18 U.S.C. § 2332b(a) (2002).
[16] 18 U.S.C. § 2332a(a)(1)-(3) (2002).

who harbors or conceals a terrorist,[17] or who provides material support to terrorists[18] or designated terrorist organizations.[19] These provisions, which apply to anyone within the United States or subject to U.S. jurisdiction, could therefore apply to foreign aliens who provide support to terrorists or terrorist organizations. U.S. law specifically covers U.S. nationals who kill or attempt to kill U.S. nationals while outside U.S. territory.[20] In addition, Congress exercises jurisdiction over any person who kills any officer or employee (including members of the military) of the United States.[21]

C. Jurisdiction under Customary International Law

The next step in this jurisdictional analysis is to examine whether the assertion of extraterritorial jurisdiction over international terrorists complies with the accepted principles of international law. The five bases of jurisdiction recognized by customary international law are territoriality, nationality, the protective principle, universality, and passive personality.[22] Each of the principles will be addressed in turn below.

Territoriality can be divided into two principles, ordinary and objective. The ordinary territorial principle permits the United States to assert jurisdiction over criminal acts committed

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[17] 18 U.S.C. § 2339(a) (2002).
[18] 18 U.S.C. § 2339A (2002).
[19] 18 U.S.C. § 2339B (2002).
[20] 18 U.S.C. § 1119(b) (2002).
[21] 18 U.S.C. § 1114 (2002).
[22] *See* Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. 443, 445 (Supp. 1935). The Harvard Research Project analyzed national criminal statutes, criminal procedure, and the writings of international scholars and jurists, to attempt to resolve the problem of gaps in overlapping jurisdiction. Based upon their inquiry into international criminal jurisdiction, the researchers produced the *Draft Convention on Jurisdiction with Respect to Crime.*

within its territory.[23] For example, because the terrorist attacks on New York and Washington, D.C. occurred on U.S. soil, jurisdiction over these terrorist attacks is valid under the ordinary territorial principle.

The objective territorial principle permits the United States to exercise extraterritorial jurisdiction for acts of terrorism that are initiated or planned outside the United States, but either occur in or have effects that intrude into U.S. territory.[24] The terrorist attacks of September 11th appear to have been planned, at least in part, outside U.S. territory. Investigators have successfully traced the planning of the conspiracy to operatives in Malaysia, Germany, Afghanistan, Pakistan, and the United Arab Emirates.[25] Thus, jurisdiction to bring the planners of the

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[23] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987) [hereinafter RESTATEMENT]. *See also* 1 LASSA OPPENHEIM'S INTERNATIONAL LAW § 143 (H. Lauterpacht ed., 8th ed. 1955) [hereinafter OPPENHEIM].

[24] *See* Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 204-09 (1983). Also referred to as the *effects doctrine*, the objective territorial principle has roots as early as *The Case of the S.S. Lotus*. On August 2, 1926, the *Lotus*, a French mail steamer, and the *Boz-Kourt*, a Turkish coal carrying vessel, collided. As a result of the collision, the *Boz-Kourt* sank, killing eight Turkish nationals. When the *Lotus* reached Constantinople, the Turkish authorities began criminal proceedings against the French officer on watch duty at the time of the collision, and ultimately, convicted him of manslaughter. France sued Turkey in the Permanent Court of International Justice challenging Turkey's claim of jurisdiction to prosecute the French officer as inconsistent with the principles of international law. The Court held that international law permits a state to apply its criminal statutes to acts that are planned or take place outside its territory, as long as the effects of the act occur on the state seeking to apply its criminal laws. The Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A)A No.10, *reprinted in*; 2 Hudson, World Ct. Rep. 20, 32-40 (1935).

[25] Dan Eggen, *FBI Says Malaysia was site of Sept. 11 Planning*, WASH. POST, Feb. 1, 2002, at A15, *available at* 2002 WL 10945091.

September 11th attacks to justice is valid under the objective territorial principle.[26]

Under the nationality principle, the United States may lawfully exercise jurisdiction over its nationals who commit or are involved in terrorist acts regardless of the target or where the defendant was when he acted.[27] The case of John Walker Lindh illustrates the lawful exercise of U.S. jurisdiction under the nationality principle. Lindh, a U.S. national, converted to Islam in 1997, traveled through Central Asia, trained at a terrorist training camp, and fought alongside al Qaeda and Taliban forces before being captured in Afghanistan.[28]

The United States transported Lindh back to the United States to face charges for helping terrorist organizations and conspiring to kill Americans abroad. One of the counts in the federal indictment charged Lindh with violating 18 U.S.C. § 2332(b), which makes it a crime for U.S. nationals to kill or attempt to kill U.S. nationals while outside U.S. territory.[29] Lindh plead guilty to supplying services to the Taliban in violation of 50 U.S.C. § 1705(b), 31 C.F.R. § 545.204, and 31

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[26] *See* RESTATEMENT, *supra* note 23, § 402(1)(c). While the objective territorial principle is recognized by international law, it is also somewhat controversial and many foreign governments do not recognize it. Controversy exists with extension of the objective territorial principle to actions that are intended to have effects within a state, but ultimately do not (i.e. a terrorist plot that is planned and financed, but is aborted). The Restatement recognizes the objective territorial principle, but requires the conduct to have or is intended to have *substantial* effects. *See also* Alan Hyde, *Rights for Canadian Members of International Unions Under the (U.S.) Labor-Management Reporting and Disclosure Act*, 61 WASH. L. REV. 1007, 1023 (1986).

[27] OPPENHEIM, *supra* note 23, § 330.

[28] *See* David Johnston, *A Nation Challenged: The American Prisoner; Walker will Face Terrorism Counts in a Civilian Court*, N.Y. TIMES, Jan. 16, 2002, at A1, *available at* 2002 WL 11164322.

[29] *See* Lindh's plea bargain agreement, United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002), *available at* http://www.usdoj.gov/ag/pleaagreement.htm. Note specifically the section entitled "Unlawful Enemy Combatant Status."

C.F.R. § 545.206(a), as well as carrying an explosive during the commission of a felony in violation of 18 U.S.C. § 844(h)(2).[30] Lindh pled guilty in exchange for a 20-year sentence in federal prison.[31] The government entered into the plea bargain after Lindh agreed to disclose everything he knew about the Taliban and Osama bin Laden.[32] The agreement was reached at 2:00 a.m. on the day that the trial court was set to hear challenges to the evidence against Lindh in open court.[33] At the sentencing hearing, Judge Ellis noted that the evidence linking Lindh to al Qaeda was not strong and there was no evidence tying Lindh to the death of Johnny Michael Spann, a C.I.A. officer, as the government had indicated.[34] Despite Judge Ellis's ruling, this case demonstrates that U.S. assertion of jurisdiction over Lindh was proper under the nationality principle.

The protective principle permits a state to exercise extraterritorial jurisdiction for "conduct outside its territory by persons not its nationals that is directed against the security of the state."[35] It provides for jurisdiction over acts committed outside a state's territory directed to interfere with the state's "governmental functions," provided that the acts are also a violation of the laws of the host state.[36] The protective principle is generally invoked to assert jurisdiction over politically motivated acts, but it is not limited to acts that have political purposes.[37] The Second Circuit Court of Appeals recently

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[30] *Id.*

[31] Richard Harrington, *Earle's Lindh Song Hits Sour Note in Nashville,* WASH. POST, July, 23, 2002, at C1, *available at* 2002 WL 23855432.

[32] John Johnson, *Lindh Begins Sentence at Prison in Victorville*, L.A. TIMES, Feb. 20, 2003, at B1, *available at* 2003 WL 2386516.

[33] *See* Jane Mayer, *Why did the Government's Case against John Walker Lindh Collapse?*, NEW YORKER, Mar.10, 2003, at 50.

[34] *'I Made a Mistake by Joining the Taliban'; Apologetic Lindh Gets 20 Years*, WASH. POST, Oct. 5, 2002, at A1, *available at* 2002 WL 101066004.

[35] RESTATEMENT, *supra* note 23,§402(3).

[36] In re Marc Rich & Co., 707 F.2d 663, 666 (2d Cir. 1983).

[37] United States v. Yousef, 327 F.3d 56, 110 (2d Cir. 2003).

upheld jurisdiction over Ramzi Ahmed Yousef, an alleged terrorist, citing the protective principle of customary international law.[38] Yousef was convicted in the District Court for the Southern District of New York for his involvement in the February 1993 bombing of the World Trade Center, as well as his involvement in a plot to bomb U.S.-flagged airliners in Southeast Asia in 1994-1995.[39] The court stated that Yousef's plots were intended to influence U.S. foreign policy, the making of which constitutes a "governmental function."[40] The September 11th attacks on the World Trade Center and Pentagon were clearly meant to interfere with the functioning of the U.S. government. Therefore, extraterritorial jurisdiction over the international terrorists involved in the planning of these attacks is valid under the protective principle.

Under the universality principle, a state may exercise extraterritorial jurisdiction to "enforce its criminal laws that punish universal crimes."[41] It permits states to prescribe and prosecute certain offenses recognized by the international community as crimes of universal concern.[42] U.S. criminal statutes cover terrorism, but it is debatable whether terrorism is yet considered a universal crime. In affirming jurisdiction over Yousef, the Second Circuit Court of Appeals held that the

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[38] *Id.*

[39] *Id.* at 83. On February 26, 1993, Yousef was one of the terrorists who drove a van filled with explosives into the parking garage below the World Trade Center. The bombs were set to explode by timer, and killed six people and injured over a thousand individuals. Approximately a year and a half later, Yousef orchestrated a plot to bomb U.S. airliners. According to the plan, five terrorists would place bombs aboard twelve U.S.-flagged airliners in Southeast Asia, construct the bombs on the aircraft, and de-plane during the first layover. The plot was discovered in 1995 and Yousef was arrested in Pakistan and returned to the U.S. to face charges for his involvement in these crimes.

[40] *Id.* at 110.

[41] RESTATEMENT, *supra* note 23, § 423.

[42] United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

District Court erred in finding jurisdiction on the basis of the universality principle.[43] The court said that customary international law does not permit prosecution for terrorist acts because there is not currently a consensus on the definition of terrorism.[44] It noted that the class of crimes subject to universal jurisdiction, which traditionally include only acts of piracy, has been expanded to include war crimes and crimes against humanity.[45] The court said that even if aircraft hijacking is considered a crime against all nations, it is improper for a court to draw a judicial analogy between hijacking and placing a bomb aboard an aircraft.[46] Some international legal scholars, however, do recognize that the universality principle could apply to certain acts of terrorism.[47] This assertion of jurisdiction is based on the fact that the crimes are so heinous that they are of universal concern. The Second Circuit's recent decision, however, provides some indication that U.S. courts would probably be hesitant to find the universality principle as a basis of jurisdiction over international terrorists.

Finally, the passive personality principle permits a state to exercise jurisdiction over offenses committed against their nationals abroad.[48] It is the most controversial basis for jurisdiction under international law.[49] In the past, the United

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[43] *See* Yousef, 327 F.3d 56, at 91.

[44] *Id.* at 97.

[45] *Id.* at 104. *See also* Yunis, 924 F.2d 1086, at 1091 (stating that the universal principle covers piracy, slave trade, attacks on or hijacking aircraft, genocide, war crimes, and certain acts of terrorism).

[46] *See* Yousef, 327 F.3d 56, at 98-99.

[47] *See* Tyler Raimo, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT'L L. REV. 1473, 1490 (1999). *See also* United States v. Yunis, 681 F. Supp. 896, 901-02 (1988) (recognizing that some international legal scholars recognize that terrorist acts can be considered heinous crimes for purposes of asserting universal jurisdiction).

[48] Yunis, 681 F. Supp. 896, at 901.

[49] *Id.*

States had objected to the assertion of jurisdiction on the grounds of the passive personality principle out of fear that it would lead to indefinite criminal liability for U.S. citizens.[50] This fear was premised on the notion that foreigners visiting the United States should comply with U.S. laws and should not be able to transport the laws of their state with them.[51] The Restatement recognizes that the passive personality principle has not been generally accepted, but it is increasingly being accepted with regards to terrorists.[52] The United States now recognizes this principle.

For example, the United States relied on the passive personality principle when it sought the extradition of Muhammed Abbas Zaiden, a terrorist who killed an American citizen when he hijacked the Achille Lauro, a vessel in Egyptian waters.[53] Additionally, based partly on the passive personality principle, the U.S. District Court for the District of Columbia affirmed jurisdiction over Fawaz Yunis, a terrorist who hijacked a Jordanian aircraft in the Middle East that had U.S. nationals aboard.[54] Because the international community is increasingly accepting the passive personality principle with regards to terrorists, it is likely that the United States may continue to use the principle to assert jurisdiction over international terrorists who harm U.S. nationals abroad.

In determining whether it is lawful for the United States to exercise extraterritorial jurisdiction over terrorists, U.S. courts must determine whether the United States has the legal authority to reach the conduct in question, and whether the relevant

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[50] 2 J.B. Moore, International Law Digest § 201, at 228 (1906) (reporting Cutting's Case, where in 1887 the U.S. Government objected to Mexico asserting its jurisdiction over an American national who was prosecuted for writing an article criticizing a Mexican national in a Texas newspaper).

[51] Yunis, 681 F. Supp. 896, at 902 (The United States does not want its nationals prosecuted for acts they did not know were illegal under a foreign state's laws).

[52] RESTATEMENT, *supra* note 23, § 402(g).

[53] Yunis, 681 F. Supp. 896, at 902-03.

[54] *Id.* at 903.

statutes have extraterritorial effect.[55] It is well established that "international law is part of our law,"[56] and as such courts, when reviewing U.S. assertions of jurisdiction over international terrorists, must interpret U.S. laws and actions consistently with international law.[57]

III. Extradition

A. Overview

Extradition is the formal process with which the state surrenders a criminal suspect to another state for prosecution or punishment.[58] Extradition is premised on the fundamental principle of international law that requires States to respect the territorial integrity and sovereignty of other States.[59] Generally, agents of one State may not enter another State to apprehend a criminal suspect without the host State's permission.[60] The process of extradition is formal and obligations are defined through treaties.[61] Two fundamental aspects of extradition treaties are reciprocity and comity. These principles refer to friendly cooperation between states. Reciprocity involves a foreign government granting an extradition request on the

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[55] United States v. Noriega, 746 F. Supp. 1506, 1512 (1990).

[56] The Paquete Habana, 175 U.S. 677, 700 (1900).

[57] *See* Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804) (stating that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

[58] *See* OPPENHEIM, *supra* note 23, § 327. *See also* Terlinden v. Ames, 184 U.S. 270, 289 (1902) (defining extradition in detail as the "surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender").

[59] *See* United States v. Alvarez-Machain, 504 U.S. 655, 672 n.4 (1992).

[60] *See* Raimo, *supra* note 47, at 1505.

[61] *See* United States v. Rauscher, 119 U.S. 407, 411 (1886) (describing the formalities required by the extradition treaty between the United States and Great Britain in 1842).

promise that their future extradition requests will be honored.[62] Comity is an act of courtesy by which States mutually recognize each other's legislative, executive, and judicial actions on extradition requests.[63]

The United States obtains criminal suspects from abroad almost entirely through individually negotiated bilateral extradition treaties.[64] The Constitution recognizes treaties as the supreme Law of the Land.[65] Treaties are compacts between independent nations, which impose reciprocal obligations equivalent to an act of the legislature.[66] By relying on extradition treaties to obtain criminal suspects, the United States attempts to act consistently with international law by not violating the territorial integrity of other States.[67] Generally, U.S. law only permits extradition to other states when a treaty is in force between the two states.[68] An exception to the treaty requirement is stated in 18 U.S.C. § 3181(b), which provides for extradition of non-U.S. citizens to stand trial for violent crimes against Americans abroad.[69]

The United States has over 110 bilateral extradition treaties with foreign states, and these states frequently grant U.S. extradition requests.[70] In some cases, extradition requests have resulted in criminal suspects being returned to the United States through expulsion or deportation as opposed to formal

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[62] *See* M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 17 (3d ed. 1996).
[63] *Id.*
[64] *Report on International Extradition*, Submitted to the Congress Pursuant to Section 211 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (106 Pub.L. 113), at 1 [hereinafter Report].
[65] U.S. CONST. art. VI, § 2.
[66] Rauscher, 119 U.S. 407, at 411.
[67] Raimo, *supra* note 47, at 1504-05.
[68] United States Attorney Manual § 9-15.100 (Sept. 1997).
[69] 18 U.S.C. § 3181(b).
[70] Report, *supra* note 64, at 3.

extradition.[71] Formal extradition has not been very useful in dealing with international terrorists. According to the U.S. Department of State, thirteen international terrorists were returned to the U.S. for prosecution between 1993 and 1999.[72] Of the thirteen terrorists, only four were formally extradited.[73]

B. Extradition Requests

Extradition of suspected criminals is only sought from foreign states with which the United States has an extradition treaty.[74] Requests for extradition have to go through a formal process to be carried out. Through its Office of International Affairs ("OIA"), the U.S. Department of Justice ("DOJ") coordinates all foreign extradition requests.[75] Extradition requests for international terrorists begin at either the federal or state level of government.[76] Because these requests have foreign policy implications, they are not forwarded until the OIA reviews them.[77] The OIA assists prosecutors with preparation of extradition requests, paperwork, and affidavits consistent with the particular treaty and domestic law of the asylum state.[78] The extradition request is then transmitted to the U.S. Department of State for translation into the native language of the asylum state before it is sent to the U.S. Embassy in that state.[79] The extradition request is then presented to the foreign government

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[71] *Id.*

[72] Department of State, *Extraditions/Rendition of Terrorists to the United States 1993-1999*, Electronic Archive (2001), *at* http://www.state.gov/s/ct/rls/pgtrpt/2000/2466.htm.

[73] *Id.*

[74] See 18 U.S.C. § 3181 for a list of countries with which the United States has extradition treaties.

[75] United States Attorney Manual, *supra* note 64,§ 9-15.210.

[76] Report, *supra* note 64, at 2.

[77] United States Attorney Manual, *supra* note 68, § 9-15.100.

[78] *Id.* § 9-15.240.

[79] United States Attorney Manual, *supra* note 68, § 9-15.250.

under the cover of a diplomatic note formally requesting extradition.[80]

C. Problems with Extradition

U.S. extradition requests are limited by the conditions found in extradition treaties and the laws of foreign states. Some states place restrictions on the extradition of their nationals.[81] France, Germany, and Brazil, for example, are prohibited by their domestic laws from extraditing their nationals.[82] Israel only permits extradition if its nationals are permitted to serve-out any criminal sentence in Israel.[83] Some states will also not extradite criminal suspects if the statute of limitations has been exceeded[84] or if the crime charged is a political offense.[85]

Many states, including the members of the European Union, will not extradite a criminal suspect unless it receives assurances that the United States will not seek the death penalty.[86] This is because many states regard the death penalty as a violation of human rights.[87] Some states take this position a step further. Mexico, for example, has recently refused to extradite criminal suspects to the United States because life in prison was a possible punishment.[88]

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[80] *Id.* § 9-15.300.

[81] Report, *supra* note 64, at 4.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 7.

[85] *See* Roberta Smith, *America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 CARDOZO J. INT'L & COMP. L. 249, 252-253 (1997) (discussing that suspects accused of terrorism have claimed they are engaged in political acts and cannot be extradited because of the political offense exception).

[86] Report, *supra* note 64, at 6.

[87] *Id.*

[88] *See* Hugh Dellios, *Mexico, U.S. Cultural Split Complicates Extradition*, CHI. TRIB., June 14, 2002, at A1, *available at* 2002 WL 2665253.

The success of U.S. extradition requests is often dependent on diplomatic relations. This is imperative since extradition requests are made under the cover of a diplomatic note and require the foreign state's cooperation.[89] Extradition treaties may be suspended due to a severance of diplomatic relations if "the existence of diplomatic or consular relations is indispensable for the application of the treaty."[90] The suspension of a treaty is not automatic.[91] However, a change in circumstances between the treaty's signatories could be a basis for suspension of the treaty.[92]

In the context of international terrorists, exclusive reliance on the formal process of extradition is problematic. The United States may be faced with questions of whether there is an extradition treaty in force after a change in government.[93] For example, the United States never signed an extradition treaty with Pakistan.[94] Had the U.S. government sought the return of Ahmed Omar Saeed Sheikh for his role in the kidnap and murder of Wall Street Journal reporter Daniel Pearl, the lack of a treaty could have been problematic. Both governments, however, have recognized an extradition treaty that was signed between the United States and the U.K. in 1931, and ratified by both states in

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[89] United States Attorney Manual, *supra* note 68, § 9-15.300.

[90] Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331, Article 63.

[91] *See* Clark v. Allen, 331 U.S. 503, 508 (1947) (stating that the outbreak of war does not necessarily suspend or abrogate a treaty).

[92] *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331, Article 62.

[93] Linnas v. Immigration and Naturalization Service, 790 F.2d 1024 (2d Cir. 1986) (recognizing the lack of an extradition treaty between the United States and the U.S.S.R.). Change of governments is different from legal issues involved with state succession. It must be noted that there was no extradition treaty between the United States and the U.S.S.R. Therefore, the problem of state succession, as it relates to extradition, presumably does not apply to the former Soviet Republics.

[94] *See* Ari Fleischer, White House Press Briefing (Feb. 25, 2002), *at* http://www.whitehouse.gov/news/releases/2002/02/20020225-16.html.

1932.[95] Pakistan accepted the obligations of the extradition treaty in 1952.[96] The Pakistani government tried Saeed instead of extraditing him to the United States.[97]

Pakistan's decision to prosecute Saeed instead of extraditing him does not indicate a lack of cooperation. President Pervez Musharraf insisted on Saeed being tried in Pakistan before considering a U.S. extradition request.[98] His decision allowed Pakistan to cooperate with the United States in prosecuting Saeed, while avoiding any backlash by dissidents if the Musharraf government was seen as too eager to cooperate with the United States.[99] Musharraf also wanted the Islamic extremists in his country to witness a Pakistani court trying and punishing terrorists for a horrific crime.[100]

In order to satisfy an extradition state, extradition treaties require sufficient evidence that the suspect committed a crime.[101] Since the United States seeks to try the suspects before U.S. courts, the evidence must establish probable cause. There are two potential problems with this requirement. First, no matter how compelling the evidence presented is, the asylum

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[95] *See* 47 Stat. 2122; TS 849; 12 Bevans 482; 163 LNTS 59; 1932 WL 31047.

[96] *See* Richard Boucher, Department of State Briefing (Feb. 26, 2002), *at* http://www.state.gov/r/pa/prs/dpb/2002/8495.htm. *See also* United States v. Khan, 993 F.2d 1368, 1372 (9th Cir. 1993) (stating that the U.S.-U.K. extradition treaty is the operative treaty between the United States and Pakistan).

[97] *See 2 Victories—No Shots Fired*, L.A. TIMES, July 16, 2002, at B12, *available at* 2002 WL 2490125. *See also Pearl Killing – Handover Hitch*, Belfast News Letter, Mar. 16, 2002, at 17, (stating that the U.S. indicted Saeed out of concern that Pakistan may have released him).

[98] Keith B. Richburg, *11 Charged in Pearl Killing; Prosecutor Voices Confidence; 7 Suspects at Large, with True Identities of Some Unclear*, WASH. POST, Mar.22, 2002, A14, *available at* 2002 WL 17584870.

[99] *2 Victories—No Shots Fired, supra* note 98.

[100] *Id.* at B12.

[101] *See* United States Attorney Manual, *supra* note 68, § 9-15.240 (listing documents required in support of request for extradition). *See also* Report, *supra* note 64, at 7.

could nonetheless deny an extradition request by citing a lack of evidence. Second, the United States may not be willing to share all of its evidence with the asylum state.

After the September 11th attacks, the Taliban suggested that it would consider turning Osama bin Laden over to a neutral country if it was given proof that bin Laden was indeed the mastermind of the attacks.[102] The U.S. government, however, was not willing to share its evidence and intelligence gathering capabilities with the Taliban. The United States did not want this information conveyed to terrorist organizations.[103] U.S. national security could be harmed if terrorist organizations were aware of U.S. intelligence capabilities.

IV. Informal Surrender

Often referred to as disguised extradition, informal surrender involves a foreign state's cooperation with the request for custody of a criminal suspect. This is done without the formal process of extradition. Informal surrender often occurs where the suspect is not a citizen of the host state and is surrendered by a deportation or expulsion. For example, Pakistani authorities informally surrendered Ramzi Ahmed Yousef, one of the masterminds behind the 1993 World Trade Center bombing.[104] On February 7, 1995, Yousef was apprehended in Islamabad, Pakistan, and turned over to FBI

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[102] Dmitry Kirsanov, *Taliban Ready to Extradite bin Laden*, ITAR-TASS News Agency, Oct. 3, 2001. If the Taliban turned bin Laden over to another country, it would have done so through deportation or expulsion since bin Laden is a national of Saudi Arabia. Moreover, Pakistan was the only state that had diplomatic relations with the Taliban regime.

[103] Ari Fleischer, White House Press Briefing,(Oct. 2, 2001), *at* http://www.whitehouse.gov/news/releases/2001/10/20011002-11.html#taliban-demand.

[104] U.S. DEPARTMENT OF JUSTICE, TERRORISM IN THE UNITED STATES 9 (1997), *at* http://www.fbi.gov/publications/terror/terr97.pdf.

Special Agents.[105] He was transported to the United States the following day, without a formal extradition request or proceeding.[106]

Another example of informal surrender is the March 1, 2003 apprehension of Khalid Shaikh Mohammed, the alleged mastermind of the September 11th attacks.[107] Mohammed's other terrorist plots are believed to include the 1993 World Trade Center bombing and the 2002 attack on the USS Cole.[108] He was indicted in the Southern District of New York in 1996 for the 1993 World Trade Center bombing.[109] After his capture by Pakistani authorities, he was turned over to U.S. authorities and is being detained at the U.S. air base at Bagram, Afghanistan.[110]

V. Luring

The U.S government has relied upon luring international terrorists into its grasp as an alternative to traditional extradition. In 1985, Fawaz Yunis, along with four other men, hijacked a Royal Jordanian Airlines flight from Beirut, Lebanon.[111] Wearing civilian attire, the hijackers carried military rifles and grenades aboard the aircraft.[112] While Yunis seized control of the cockpit, the remaining hijackers incapacitated Jordanian air

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[105] *Id.*

[106] *Id.*

[107] *See* Liz Sly, *Threat from bin Laden's Followers is Lower, Officials Say*, CHI. TRIB., Mar. 21, 2003, at 16, *available at* 2003 WL 17254163.

[108] Testimony of Robert S. Mueller, III, Director, FBI, before the U.S. Senate Committee on the Judiciary on March 4, 2003. *The War Against Terrorism: Working Together to Protect America: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 1 (2003) *at* http://judiciary.senate.gov/testimony.cfm?id=612&wit_id=608.

[109] Michael Daly, *In our Grasp Years Earlier*, N.Y. DAILY NEWS, Mar. 2, 2003, at 2, *available at* 2003 WL 4067029.

[110] This is different from the situation with the detainees in Guantanamo Bay because Mohammed was indicted prior to being taken into custody. *See* Anwar Iqbal, *Pakistani Agents Raid Suspect's Home Again*, UNITED PRESS INT'L, Mar. 4, 2003.

[111] Yunis, 924 F. 2d 1086, at 1088-89.

[112] *Id.* at 1089.

marshals on the aircraft.[113] The hijackers informed the passengers and crew that their destination was Tunis, the location of the Arab League's headquarters.[114] The two attempts they made at landing in Tunis were thwarted by authorities who blocked the runway.[115] After a series of flights that saw stops in Cyprus, Palermo, Sicily, and other locations along the Mediterranean, Yunis and the other terrorist hijackers released the airline passengers in Beirut, Lebanon, blew up the plane, and fled the airport.[116] The FBI captured Yunis, a Lebanese citizen, by luring him onto a yacht in the Mediterranean Sea under the guise of a drug deal.[117] Once the vessel reached international waters, the FBI agents arrested Yunis and transported him back to Washington, D.C. where he was arraigned on federal charges relating to conspiracy, hostage taking, and aircraft damage.[118] Yunis was convicted, and the U.S. Court of Appeals for the District of Columbia affirmed the conviction despite Yunis' jurisdictional challenge.[119]

VI. Forcible Abduction

A. Overview

Formal extradition is not always viable. Successful extradition is dependent upon diplomatic cooperation between two states pursuant to the rules of international law. For criminal suspects to be extradited there has to be a functioning government in the asylum state that is able and willing to cooperate with the state seeking extradition.[120]

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 1090.
[120] Under international law, a state may refuse to extradite a criminal suspect if doing so would violate a provision of the extradition treaty or their domestic law. *Id.*

If an asylum state is unable or unwilling to extradite international terrorists to the United States, there are still several alternatives to the formal extradition process.[121] First, the asylum state can prosecute the international terrorist in its own courts, and the United States could urge them to do so.[122] Second, the asylum state can expel or deport the wanted person under its immigration laws.[123] Third, with the assistance of agents of the asylum state, the terrorist can be surrendered without any formal procedures.[124] Finally, U.S. agents can abduct the terrorists.[125]

B. Current U.S. Policy

U.S. policy recognizes impediments in extradition and provides for alternative modes of rendition. Two months after the bombing of the Federal Building in Oklahoma City in 1995, President Clinton issued Presidential Decision Directive-39 ("PDD-39"), articulating policy and guidelines for bringing international terrorists to justice.[126] PDD-39 appears to establish a hierarchy of modes of rendition.[127]

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[121] *See* Ethan Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 813-14 (1993).

[122] *Id.* at 813.

[123] *Id.*

[124] *Id.* at 813-14.

[125] *Id.* at 814.

[126] See Presidential Decision Directive-39: U.S. Policy on Counterterrorism (June 21, 1995), *at* http://www.fas.org/irp/offdocs/pdd39.htm.

[127] We shall vigorously apply extraterritorial statutes to counter acts of terrorism and apprehend terrorists outside of the United States. When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, where possible and appropriate, through negotiation and

According to PDD-39, once the United States determines that it has extraterritorial jurisdiction over a criminal suspect and seeks to bring him to the United States for trial, it first seeks the cooperation of the asylum state.[128] The asylum state may cooperate by agreeing to a formal U.S. extradition request or by enforcing domestic immigration laws and deporting or expelling the suspect. Under PDD-39, the United States will "take appropriate measures to induce cooperation."[129] Presumably these measures would include both economic and diplomatic sanctions. For example, when Libya refused to hand over the suspects (Fhimah and Megrahi) of the Pan Am 103 bombing in 1988, both the United Nations and the United States applied economic sanctions on Libya.[130] The sanctions were applied to induce Libya to turn the suspects over for prosecution. Nearly eleven years after the Pan Am bombing, Libya agreed to extradite the suspects to the United Kingdom under an agreement to have them tried by an international tribunal under Scottish law at The Hague.[131]

> conclusion of new extradition treaties. If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government.

Id.

[128] *Id.*

[129] *Id.*

[130] *See* Peter Finn, *Libyan Begins Appeal of Lockerbie Conviction: New Evidence Cited on Bomb's Origin*, WASH. POST, Jan. 24, 2002, A17, *available at* 2002 WL 10942910.

[131] *See* Rachel Blackburn, *Lockerbie Timetable*, PRESS ASS'N., May 29, 2002. The international community applied substantial diplomatic and economic pressure on Col. Gaddafi and the Libyan government. The terrorist suspects were transported by United Nations aircraft from Libya to Camp Zeist, deemed to be Scottish territory for the trial in The Hague. The proceedings lasted 84 days. Al Megrahi was convicted of mass murder and sentenced to 20 years to life incarceration. Fhimah

Economic and diplomatic sanctions are tools used to induce a state to turn criminal suspects over for trial. According to PDD-39, if an asylum state does not cooperate, U.S. agents may forcibly return suspects to the United States for prosecution.[132] This mode of rendition, sometimes referred to as irregular rendition, is an alternative to formal extradition and, as such, it takes place outside the parameters of extradition treaties.[133] U.S. courts have upheld forcible abductions as a means of bringing criminal suspects to trial in the United States.[134]

Forcible abduction is the most controversial category of irregular rendition, because although permitted by U.S. courts, it violates customary international law.[135] An example of forcible abduction is the kidnapping of Adolf Eichmann in 1960. Israel's secret service, the Mossad, apprehended Eichmann, an SS officer for the Nazis, near Buenos Aires, Argentina, in May 1960 and transported him back to Israel for trial.[136] Although Argentina protested Israel's breach of its borders as a violation of sovereignty under international law, it was satisfied with an

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was found not guilty and set free.

[132] PDD-39, *supra* note 126.

[133] *See* Melanie M. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice through Irregular Rendition and Other Quasi-legal Options*, 26 J. LEGIS. 315 (2000).

[134] *See* Alvarez-Machain, 504 U.S. 655.

[135] *See generally* Jonathan A. Gluck, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 DUKE L. J. 612 (1994).

[136] *See* Major Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 226 (2001). Eichmann was an SS officer who rounded up persons of Jewish ancestry and transported them to concentration camps as part of Adolf Hitler's Final Solution. In the aftermath of World War II, Eichmann escaped from a U.S. P.O.W. camp and moved to Argentina in 1958. Israeli agents forcibly abducted Eichmann and transported him back to Israel. He was found guilty of crimes against humanity, and was executed on May 31, 1962.

apology from Israel.[137]

Another example of forcible abduction involves the case of John Surratt, an alleged co-conspirator of John Wilkes Booth in the assassination of President Abraham Lincoln.[138] Law enforcement officers apprehended Surratt after he fled to Alexandria, Egypt.[139] He was returned to the United States and tried for his alleged involvement in the assassination.[140] The trial resulted in a deadlocked jury and Surratt was freed from custody.[141]

VII. Current Law

A. U.S. Law

In *Ker v. Illinois*, the U.S. Supreme Court ruled on the legality of extraterritorial abduction.[142] While living in Peru, Frederick Ker was indicted by the State of Illinois for embezzlement and larceny.[143] The Governor of Illinois requested that the U.S. Secretary of State issue a warrant for Ker's extradition from Peru, pursuant to the treaty between the United States and Peru.[144] The President issued the warrant and directed a messenger, Henry G. Julian, to present the warrant to the Peruvian government and take custody of Ker.[145] Instead of following the requisite treaty procedures, Julian forcibly

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[137] Marian Nash Leich, *U.S. Practice: Contemporary Practice of the United States Regulating International Law*, 84 AM. J. INT'L L. 724, 726 (1990).
[138] *See* Shuey v. United States, 92 U.S. 73 (1875).
[139] *Id.* at 74.
[140] *Id.*
[141] Frederick N. Rasmussen, *Booth's Female Conspirator; Doubt Still Lingers about Mary Surrat, Executed in 1865*, BALT. SUN, Apr. 19, 2003, at 2D, *available at 2003 WL 17686916.*
[142] Ker v. Illinois, 119 U.S. 436 (1886).
[143] *Id.* at 437-38.
[144] *Id.* at 438.
[145] *Id.*

abducted Ker and placed him on a ship bound for the United States.[146] Ker was tried and convicted in Illinois.[147]

The U.S. Supreme Court held that forcible abduction was not a sufficient reason to divest the court of jurisdiction once Ker was brought before the court.[148] The Court reaffirmed this rule in the interstate abduction case of *Frisbie v. Collins*,[149] in which it held:

> The power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction . . . Due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[150]

The Ker-Frisbie doctrine stands for the general rule that regardless of the means by which U.S. agents obtain custody of criminal suspects from foreign states, U.S. courts will not be divested of jurisdiction.[151] It is important to note that in neither

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[146] *Id.* at 439.

[147] Matthew W. Henning, *Note: Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents*, 22 B.C. INT'L & COMP. L. REV. 347, 362 (1999).

[148] Ker, 119 U.S. 436 at 444. *See also id.* at 440 (holding that "mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment).

[149] Frisbie v. Collins, 342 U.S. 519, 520 (1952). Michigan police forcibly seized Collins from Illinois and brought him to Michigan to stand trial.

[150] *Id.* at 522.

[151] *See* Henning, *supra* note 147, at 363. *See also* Bassiouni, *supra* note 63, at 228 (recognizing that U.S. courts traditionally uphold in personam jurisdiction over criminal suspects, even when secured

case did the sovereign state lodge a complaint, aside from failure to follow formal extradition procedures, on the breach of its territorial sovereignty.[152] Additionally, in *Ker*, the forcible abduction was carried out by a private agent rather than a government agent, as is typically the case.[153]

In *United States v. Toscanino*, the Second Circuit imposed an important qualification on the Ker-Frisbie doctrine.[154] Toscanino, an Italian citizen residing in South America, was abducted from Montevideo, Uruguay and brought to Brazil.[155] Toscanino claimed that the police tortured him in Brazil for seventeen days, and subjected him to extensive interrogation before he was drugged and flown to New York where he was tried and convicted on charges that he conspired to import narcotics into the United States in violation of U.S. law.[156]

The *Toscanino* court held that the Ker-Frisbie doctrine could no longer bar an examination into the due process issues surrounding a defendant's forcible abduction back to the United States. That court stated that it viewed "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."[157] A year later, the same court of appeals, albeit a different panel, narrowed the *Toscanino* holding. In *United States ex rel. Lujan v. Gengler*, the court held irregularities in the means by which a defendant is brought before a criminal court is by itself insufficient to divest a court of

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through illegal methods, including forcible abduction).

[152] George B. Newhouse, Jr., *The Long Arm of the Law: The United States has Statutory Authority to Pursue Terrorists Wherever they may be Found Throughout the World*, L.A. LAWYER Aug. 25, 2002, at 35.

[153] *Id.* at 35.

[154] United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974).

[155] Henning, *supra* note 147, at 365.

[156] *Id.* at 365-66.

[157] Toscanino, 500 F.2d 267.

jurisdiction.[158] The court narrowed its holding in *Toscanino* to circumstances of "shocking governmental conduct."[159] It is important to note that the U.S. Supreme Court has not endorsed the *Toscanino* exception. *Toscanino*, to the extent that it is good law, permits defendants who are forcibly brought to the United States to make a due process argument that the courts should discuss the charges against them if they find shocking government misconduct.[160]

In *Alvarez-Machain*, the U.S. Supreme Court held that forcible abductions did not violate the U.S.-Mexico extradition treaty because the treaty did not prohibit abductions.[161] In 1985, a U.S. Drug Enforcement Administration ("DEA") agent named Kiki Camarena was kidnapped, tortured, and murdered in Guadalajara, Mexico. Dr. Humberto Alvarez-Machain, a gynecologist, was indicted in the United States for his involvement.[162] In December 1989, through a paid informant, DEA agents began negotiating with officials from the Mexican Federal Judicial Police ("MFJP") for the informal surrender of Alvarez-Machain.[163] The DEA agreed to pay the Mexican officials a $50,000 reward as well as the expenses for transporting Alvarez-Machain to the United States. On April 2, 1990, Alvarez-Machain was abducted from his office in Guadalajara, Mexico and flown to El Paso, Texas, where DEA agents arrested him.[164] It was later learned that the MFJP told the DEA that the Mexican Attorney General supported the informal surrender of Alvarez-Machain, but preferred to keep the

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[158] *See* United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975).

[159] *See id.* at 66. *Contra* Matta-Ballesteros v. Henman, 896 F. 2d 255, 263 (7th Cir. 1990) (rejecting the Toscanino court's rationale to the extent that it creates an exclusionary rule).

[160] *See* Toscanino, 500 F.2d 267, at 275.

[161] *See* Alvarez-Machain, 504 U.S. 655, at 663.

[162] *Id.* at 657.

[163] Henning, *supra* note 147, at 363.

[164] Alvarez-Machain, 504 U.S. 655, at 657.

arrangements secret to avoid negative public reaction. [165] Through diplomatic channels, the Mexican government officially protested against the U.S. Department of State for the kidnapping of Dr. Alvarez-Machain. [166] The Mexican government protested on the grounds that the United States disregarded its obligations under the U.S.-Mexico Extradition Treaty, and that the U.S. kidnapping violated customary international law.[167]

The Court held that kidnapping did not violate the terms of the U.S.-Mexico treaty because the treaty's language did not explicitly prohibit abductions.[168] The Court then applied the Ker-Frisbie doctrine and held that Alvarez-Machain could stand trial in the U.S.[169] The *Alvarez-Machain* case was remanded for trial, where Alvarez-Machain was acquitted and then returned to Mexico.[170] In 1993, Alvarez-Machain filed a civil suit, under the Alien Tort Claims Act ("ATCA") against the United States, the DEA agents, and the Mexican officials involved in his abduction, detention, and torture.[171] While his abduction might not have violated U.S. law in so far as divesting the courts of in personam jurisdiction, the Ninth Circuit held that Alvarez could nonetheless bring this civil suit for damages.[172]

B. International Law

Although the U.S. courts may assert jurisdiction despite the mode of rendition, it does not mean that forcible abductions do not violate international law.[173] In upholding the abduction of

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[165] Henning, *supra* note 147, at 363-64.

[166] Brief for Respondent Humberto Alvarez-Machain at 3, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (No. 91-712).

[167] *Id.*

[168] *See* Alvarez-Machain, 504 U.S. 655, at 663.

[169] *Id.*

[170] Alvarez-Machain v. United States, 266 F.3d 1045,1049 (9th Cir. 2001).

[171] *Id.*

[172] *See id.* at 1064

[173] *See* Alvarez-Machain, 504 U.S. 655, at 668-670.

Alvarez-Machain from Mexico, the Supreme Court even acknowledged that transborder abductions may violate principles of general international law.[174]

Extraterritorial abductions violate customary international law.[175] It is a fundamental principle under international law that a violation of a state's territory is a violation of its sovereignty.[176] A state may not exercise its power within the territory of another State without consent.[177] The United Nations ("U.N.") Charter does not expressly prohibit extraterritorial abductions. It does, however, recognize a state's territorial integrity.[178] After Israel's kidnapping of Eichmann from Argentina, the U.N. passed a non-binding resolution condemning the abduction.[179] The resolution states that extraterritorial abduction, without the consent of the asylum state, is a violation of state sovereignty and the U.N. Charter.[180]

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[174] *Id.* at 669.

[175] *See* Kristin Berdan Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 459, 473 (1994)(discussing customary international law).

[176] *See* The Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute").

[177] *See* The Case of the S.S. Lotus (France v. Turkey), P.C.I.J. Ser. A No. 9 at 18; 2 Hudson, World Ct. Rep. 20, 27-28 (1927). *See also* RESTATEMENT, *supra* note 23, § 432(2).

[178] See U.N. CHARTER Art. 2, para. 4., (stating that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.") *Available at* http://www.un.org/aboutun/charter.

[179] *See* U.N. SCOR, 15th Sess., 865th mtg, at 4, U.N. Doc. S/INF/15/Rev.1 (1960)

[180] *Id. See also* Weissman, *supra* note 175, at 473 (discussing that the resolution states that Article 2 of the U.N. Charter prohibits extraterritorial abductions).

VIII. Responses to Extraterritorial Abductions

Forcible abduction may not automatically disturb a U.S. court's jurisdiction, but that does not mean that either the abducted individual or the asylum state do not have remedies available to them.[181] To the extent that *Toscanino* is good law, the abducted suspect could argue that the U.S. courts lack jurisdiction because there was shocking government misconduct involved in the abduction.[182] As was the case with Alvarez-Machain, the abducted individual may bring a civil suit against the U.S. government under the ATCA[183] for claims relating to the kidnap, detention, and any possible mistreatment.[184] There may also be a claim against any agents from the asylum state that may have assisted in the abduction.[185]

There are various diplomatic remedies available to an asylum state when its rights under international law are violated. The asylum state may protest the abduction as a violation of international law.[186] In the case of *Alvarez-Machain*, the Mexican government lodged a formal protest with the U.S. Department of State, and filed an amicus brief with the U.S. Supreme Court.[187] Such action can lead to an apology from the abducting state or reparations as compensation for the violation

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[181] *See* Jeffrey J. Carlisle, *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping*, 81 CALIF. L. REV. 1541, 1555 (1993).

[182] *See* Toscanino, 500 F.2d 267, at 275.

[183] 28 U.S.C. § 1350 (2003) (stating that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[184] *See* Alvarez-Machain, 504 U.S. 655, at 1064.

[185] Carlisle, *supra* note 181, at 1558.

[186] RESTATEMENT, *supra* note 23, § 432(2) rept. note 1. *See also* Henning, *supra* note 148, (where the Mexican government protests the U.S. agents' abduction of Alvarez-Machain from Mexico).

[187] *See* Brief for Respondent Humberto Alvarez-Machain *supra* note 166.

of international law.[188] The asylum state may request the abducted person be returned. The Restatement of Foreign Relations Law provides that "the state from which the person was abducted may demand return of the person, and international law requires that he be returned."[189] Another possibility is the prosecution of the agents who abducted the suspect. This is premised on the notion that the agents from the abducting-state have violated both international law and the municipal law of the asylum state, where the abduction occurred.[190]

IX. Discussion: Failed States vs. Uncooperative States

A. Overview

Rendition of international terrorists raises three possibilities. First, it is possible that no one can find the suspected terrorist.[191] Second, the United States can find the suspect with the assistance of the asylum state. Third, if the asylum state is unable or unwilling to cooperate, the U.S. may operate unilaterally to obtain custody of the suspect and return him to the U.S. for trial.

B. Uncooperative States

When a suspect's location is ascertained, an asylum state may cooperate by extraditing the suspect pursuant to a treaty, or handing him over to U.S. authorities by deportation or expulsion. A problem emerges when the asylum state does not cooperate with methods of rendition, including, but not limited to, extradition. In the case of *Alvarez-Machain*, Mexico denied U.S. requests for extradition.[192] After Mexico's decision, U.S. agents

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[188] *See* Carlisle, *supra* note 176, at 1557-1558 (discussing diplomatic remedies for a violation of international law).

[189] RESTATEMENT, *supra* note 23,§ 432(2).

[190] Carlisle, *supra* note 181, at 1558-1559 (discussing prosecution of government agents for municipal law violations).

[191] Report, *supra* note 64, at 8.

[192] *See* Royal J. Stark, *Comment: The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and United States Sponsored*

abducted Alvarez-Machain, without the consent of the Mexican government, and returned him to the United States for trial.

Another possibility is where the United States does not have an extradition treaty with an asylum state. Without an extradition treaty, a state has no general duty under international law to extradite.[193] For example, the asylum state may be providing sanctuary for criminal suspects, such as Afghanistan's harboring of Osama bin Laden and al Qaeda operatives. In the aftermath of the September 11th attacks, evidence pointed to Osama bin Laden and al Qaeda as potential suspects. However, Afghanistan's Taliban regime, which was sympathetic to al Qaeda, refused to cooperate with U.S. authorities in extraditing those suspected of involvement in the September 11th attacks.

In the case of an uncooperative state, the United States first tries to induce cooperation through diplomacy, economic sanctions, or even through disguised extradition, such as luring. PDD-39 indicates that the United States may return suspects by force, without the cooperation of an asylum state.[194] While forcible abduction of criminal suspects from foreign states will not divest U.S. courts of jurisdiction, it nonetheless violates international law.[195]

There could be serious international consequences for the United States if it were to forcibly abduct a suspect from an uncooperative foreign state. For instance, it could face a claim before the International Court of Justice for violating the asylum state's territorial integrity.[196] The United Nations could also take

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Kidnapping of Foreign Nationals Abroad, 9 CONN. J. INT'L L. 113, 149 (1993) (discussing that Mexico did not violate international law by declining to extradite Alvarez-Machain to the United States).

[193] *Id.* at 149-150.

[194] Presidential Decision Directive-39, *supra* note 126.

[195] *See* BASSIOUNI, *supra* note 62, at 223 (explaining that although forcible abduction violates international law, other informal modes of surrender do not. With informal modes of surrender there is no violation of the asylum state's sovereignty or territorial integrity).

[196] *See* Michael Gunlicks, *Citizenship as a Weapon in Controlling the*

up the matter and condemn the abduction, as it did following Israel's abduction of Eichmann from Argentina in 1960.[197] However, it is unlikely that the Security Council could pass such a resolution, as the United States is a permanent member and has veto power. Another possibility is a military response by the asylum state to the unauthorized abduction.

C. Failed States

A problem emerges when the suspect's location in an asylum state is known, but the government of that state is unable to cooperate because it is incapable of discharging basic governmental functions in regards to its populace and territory. Here, the asylum state is known as a failed state.[198] International law defines a state as an entity that has a defined territory and a permanent population, under the control of its own government, and has the capacity to engage in formal relations with other states.[199] Key to this definition in the context of extradition is the ability to conduct international relations with other states.[200] Because there is a loss of the institutional capability of the government in a failed state, laws are not made, cases are not decided, and international agreements and treaties are not honored.[201]

Flood of Undocumented Aliens: Evaluation of Proposed Denials of Citizenship to Children of Undocumented Aliens Born in the United States, 63 GEO. WASH. L. REV. 551, 566 (1995) (discussing potential consequences for violations of international law).

[197] *See* U.N. SCOR, *supra* note 179, at 4.

[198] *See* Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 533 (1999). *See also* Henry J. Richardson, III, *"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1, 2 (1996) (discussing the emergence of the concept of "failed states" in the early 1990s).

[199] *See* RESTATEMENT, *supra* note 23, § 201. *See also* Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995) (providing the definition of a state).

[200] Gordon, *supra* note 198.

[201] *Id.* at 533-34.

In examining the roots of failed states, the World Bank has identified three "pathologies of state collapse:"

> [1] States that have lost (or failed to establish) legitimacy in the eyes of most of the population nationally under their authority, and are therefore unable to exercise that authority
> [2] States that have been run into the ground by leaders and officials who are corrupt, negligent, incompetent, or all three
> [3] States that have fragmented in civil war, and in which no party is capable of reestablishing central authority.[202]

Somalia is a classic example of a failed state. It has been without an effective central government since President Mohamed Siad Barre was ousted from power in 1991.[203] It is a nation that disintegrated because of a violent and bloody civil war between various clans.[204] What most states would consider rudimentary government services, such as education, medical care, and infrastructure maintenance, barely exist in Somalia.[205] It is a land divided, as local clans in the north declared the Republic of Somaliland in 1991, and clans in the northeastern region declared a self-governing Puntland in 1998.[206] In the Somali capital of Mogadishu, various factions have engaged in a tug-of-war power struggle for control of the city.[207] Since Somalia does not have a functioning central government, the

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[202] WORLD BANK, 1997 World Development Report 158 (1997).
[203] Osman Hassan, *Rival Somali Clans Kill at Least 6*, ASSOCIATED PRESS, Feb. 13, 2002, *available at* 2002 WL 13775855.
[204] Gordon, *supra* note 198, at 534
[205] *Id.*
[206] Central Intelligence Agency, The World Fact Book 2003 (2003), *available at* http://www.cia.gov/cia/publications/factbook/geos/so.html).
[207] *Id.*

United States would be unable to rely upon extradition to obtain custody of international terrorists from Somalia.

The case of Abdi Dhere illustrates the complexities of international rendition from a failed state. Dhere, a well-known local hitman in Somalia, assassinated Sean Devereauz, a British teacher providing humanitarian aid to the people of Somalia.[208] The local police force, which was newly formed in 1993, was afraid to arrest Dhere because he was well connected to the clan faction controlling that area of Somalia.[209] The police feared that Dhere's arrest would make the police a target for attack.[210] There was a plan for U.S. troops to apprehend Dhere and take him to Britain for trial, but the legal implications of abduction caused the United States to abandon that idea.[211] There was no extradition treaty between the U.K. and Somalia, but even if a treaty existed, it would not have been useful since Somalia had no functioning government to ratify or enforce it.[212] U.S. troops and international peacekeepers withdrew from Somalia without having arrested or prosecuted Dhere for the murder of the British teacher.

Because failed states do not have functional governments, the only ways the United States may obtain custody of a suspect is by either luring the suspect out of the state's territory or by abduction. This approach differs from obtaining custody of a suspect from an uncooperative state, where the requesting state can use diplomatic tools to persuade the asylum state to cooperate. Since failed states do not have functional governments, diplomatic tools cannot be used.

A fundamental principle of international law is the nonintervention in the internal affairs of another state.[213]

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[208] *See* Keith B. Richburg, *Getting Away with Murder in Somalia*, WASH. POST, Apr. 8, 1993, at A31, *available at* http://www.washingtonpost.com/wp-adv/archives/front.htm.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] Ruth Gordon, *United Nations Intervention in Internal Conflicts:*

However, in the past decade there has been an increasing recognition of the permissibility of international intervention in certain limited circumstances, such as when a state faces a massive influx of refugees.[214] Whether this relaxation of attitudes towards the nonintervention principle could ever extend so far as to cover unilateral abduction of a suspected criminal in a failed state is unclear, but given the somewhat reluctant international response to the humanitarian crisis in Iraq following the first Gulf War, such a position seems unlikely.[215]

X. Conclusions

When criminal suspects are brought before U.S. courts, by forcible abduction or any other means of rendition, the courts will not be divested of jurisdiction.[216] While this provides flexibility to U.S. law enforcement agents in bringing criminal suspects to justice, forcible abduction violates customary international law.[217] The September 11th attacks demonstrated that international terrorists are capable of planning and carrying out terrorist acts against the United States from abroad, particularly from failed or uncooperative states.[218] This discussion has shown that there may be times when the United States wants to obtain custody of suspects who are located within these types of states. In some cases, the only way to do so is through unilateral action to abduct the suspect. Therefore, forcible abduction may be a useful device in the war against terrorism.

PDD-39 states that the United States should exhaust all possibilities of cooperation before it forcibly returns a suspect to this country for trial.[219] However, since failed states do not have functioning central governments, the only way to obtain custody

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Iraq, Somalia, and Beyond, 15 MICH. J. INT'L L. 519, 520 (1994).

[214] *Id.* at 548-549

[215] *Id.*

[216] *See* Alvarez-Machain, 504 U.S. 655, at 661.

[217] *Id.* at 669.

[218] Sipress, *supra* note 4.

[219] PDD-39 *supra* note 126.

of a suspect is through abduction. On the other hand, there are political, diplomatic, and legal consequences that the United States needs to consider before it engages in unilateral action to return a suspect from an uncooperative state. Forcibly returning a suspect without the host state's consent could seriously harm U.S. prestige and credibility, as well as exhaust necessary political capital required to persuade other states to cooperate on rendition matters.