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Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?

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Special Issues and Topics

Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?

JOHN M. ROGERS*

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I. INTRODUCTION

After the United States Navy diverted to Italian territory a civil airliner carrying the *Achille Lauro* hijackers,¹ the United States immediately sought extradition from the Italian government.² The Italian government clearly had jurisdiction under international law to try the hijackers, because the crimes had been committed on board a vessel of Italian registry.³ The United States also may have had jurisdiction to try them under the International Convention against the Taking of Hostages.⁴ At least that Convention could have provided the basis for

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1. N.Y. Times, Oct. 12, 1985, at A9, col. 1. See generally Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L. L. 723, 745-47 (1986).

2. N.Y. Times, Oct. 12, 1985, at A6, col. 6. See 24 INT'L LEGAL MATERIALS 1509-57 (1985).

3. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); Convention on the High Seas, Apr. 29, 1958, art. 6, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

4.—Dec. 17, 1979, — U.S.T. —, T.I.A.S. No. —, — U.N.T.S. —, reprinted in 18 INT'L LEGAL MATERIALS 1457 (1979) (entered into force on June 3, 1983, entered into force for the United States on January 6, 1985). Article 5 of the convention requires each state party to establish criminal jurisdiction over each offense of hostage taking, as defined in the convention, committed "in order to compel that State to do or abstain from doing any act; or . . . with respect to a hostage who is a national of that State, if that State considers it appropriate." — U.S.T. —, T.I.A.S. No. —, — U.N.T.S. —, reprinted in 18 INT'L LEGAL MATERIALS at 1458. In compliance with the convention, a federal statute, the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2186 (codified at 18 U.S.C. § 1203), makes hostage taking a federal crime when either of the above conditions is met with respect to the United States.

rebutting any argument that the United States had an insufficient connection with the crime to warrant the trial of a foreign citizen for a crime committed outside United States territory.⁵

If a terrorist were extradited to the United States pursuant to a treaty, however, he could only be tried for the crime or crimes upon which the extradition was based.⁶ In other words, the international law principle of "specialty" is applied by the United States courts.⁷

5. Under customary international law, states may exercise criminal jurisdiction when the crime occurred within the state's territory (territoriality principle); when the criminal is a national of the state exercising jurisdiction (nationality principle); when the crime was against the governmental functions of the state exercising jurisdiction, e.g., counterfeiting money (protective principle); or when the crime is one against mankind in general, e.g., piracy or war crimes (universality principle). RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 10-36 (1965); Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32 (1967); Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, at 17-34 (M. Bassiouni & V. Nanda eds. 1973); Harvard Research in International Law, *Introductory Comment, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935); Sarkar, *The Proper Law of Crime in International Law*, in INTERNATIONAL CRIMINAL LAW 50 (G. Mueller & E. Wise eds. 1965); Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1089-1103 (1974).

These limits are imposed by American criminal courts under the canon of construction that statutes, including criminal statutes, should be interpreted, if possible, to be consistent with the international legal obligations of the United States. See, e.g., *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982), *cert. denied*, 459 U.S. 1114 (1983); *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979); *United States v. Pizzarusso*, 388 F.2d 8, 9-10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961); *cf. Demjanjuk v. Petrovsky*, 776 F.2d 571, 581-82 (6th Cir. 1985) (international law limits on foreign state's criminal jurisdiction used to interpret federal statute (18 U.S.C. § 3184) providing for international extradition).

It should be noted that the United States has consistently rejected the idea that the victim's nationality is sufficient to give the victim's state jurisdiction. See *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1161, 1179 n.38 (E.D. Pa. 1980); Letter from Mr. Bayard, Secretary of State, to Mr. Connery, Chargé to Mexico, 1887 FOREIGN REL. U.S. 751; 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 232-40 (1906); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 30(2); Harvard Research in International Law, *supra*, at 445.

But see Chapter 113A of Title XII of the recent Omnibus Diplomatic Security and Antiterrorism Act, providing for extraterritorial jurisdiction over certain crimes against United States nationals. 18 U.S.C. § 2331 (1986). The crimes are homicide, attempt or conspiracy to commit homicide, and intentional physical violence or physical violence that results in bodily injury. Prosecution is permitted, however, only if the Attorney General, the Deputy Attorney General, or the Associate Attorney General certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population." 18 U.S.C. § 2331(e); see also H.R. REP. NO. 494, 99th Cong., 2d Sess. 87, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1865, 1960. For a more extensive discussion of this Act, see Note, *Extraterritorial Jurisdiction over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987).

6. *United States v. Rauscher*, 119 U.S. 407, 430 (1886); *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

7. See generally I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 146-47 (1971).

But if a terrorist were brought to the United States directly, without resort to any extradition treaty, there would be no comparable limit upon the jurisdiction of the United States to try him—that is, no limit based upon the manner of apprehending and producing the defendant. This proposition would be true regardless of whether the apprehension was wrongful under international law.⁸

Thus, if the Navy had somehow diverted the terrorists' airliner all the way to the United States, the United States courts trying them would not have to examine the international legality of the Navy actions. While strong arguments could be made that the actions of the Navy in the *Achille Lauro* affair were consistent with international law,⁹ contrary arguments could also be made,¹⁰ and it would be easier for a United States court simply to rely upon the principle that apprehension contrary to international law does not preclude trial of the person so apprehended. A court applying this principle may assume for the sake of argument that the apprehension was contrary to international law.

Given this assumption, what sense does it make to say that courts cannot allow violation of the extradition principle of "specialty," but that they can permit the trial of persons whose very presence before the court is a result of a violation of customary international law? Is treaty law somehow superior to customary international law?¹¹ If not, is it consistent for our courts to enforce

8. See *infra* note 27 and accompanying text.

9. See Note, *An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice*, 9 *FORDHAM INT'L L.J.* 328, 357-62 (1986); see also *Recent Developments, Use of Force: Interception of Aircraft*, 27 *HARV. INT'L L.J.* 761 (1986); McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and its Exercise*, 16 *GA. J. INT'L & COMP. L.* 435 (1986); McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 *TENN. L. REV.* 691 (1985).

10. See Note, *supra* note 9, at 363-65.

11. Professor Trimble argues as much. See Trimble, *A Revisionist View of Customary International Law*, 33 *UCLA L. REV.* 665 (1986). Of course, article VI of the Constitution makes self-executing treaties the law of the land in a way that does not apply to customary international law. But for a number of purposes, international law is used by domestic courts, and would be used, even without article VI. Courts, for instance, use international law as a canon of statutory construction. See *supra* note 5. Second, they use international law as a source of federal law when no other is available. See, e.g., *New Jersey v. Delaware*, 291 U.S. 361 (1934). Third, they use international law when it is incorporated by reference in a statute. See, e.g., *United States v. California*, 381 U.S. 139 (1965). For these purposes, it makes little sense to distinguish customary international law from treaty law. Both are equally binding on the international plane, and the considerations that make treaty law relevant apply as well to customary law.

Arguments based on the greater democratic controls on treaty-making neglect the fact that it is the executive—a politically responsible branch—which takes most of the actions on the part of the United States that establish customary international law. It is not necessary to

the obligation not to deceive another country by saying that we will try an extradited person for only one crime, while refusing to enforce the obligation not to kidnap suspects from the territory of a sovereign foreign state?

II. WHEN INTERNATIONAL LAW PRECLUDES TRIAL BECAUSE OF THE MANNER OF APPREHENSION

The answer to these questions lies not in the difference between treaty law and customary international law, but rather in the nature and extent of the particular international obligations imposed upon states by treaty and custom. In other words, it is not simply because a treaty is involved that the principle of specialty applies, but rather because the extradition treaties involved are interpreted to impose the principle of specialty as an obligation. A valid extradition treaty could conceivably be interpreted *not* to require application of the principle of specialty, and in that case a United States court presumably would not need to limit the scope of the prosecution to any specific crimes. On the other hand, the principle of specialty, because it is based upon treaty interpretation, simply does not come into play when there has been no treaty-based extradition.

The international law limit upon the ability of a state to try an extradited person, and the contrasting absence of a limit on the ability to try a person who has been apprehended in contravention of another nation's sovereignty, are reflected in a pair of cases decided by the Supreme Court of the United States in 1886. The Court's decisions in *United States v. Rauscher*¹² and *Ker v. Illinois*,¹³ decided on the same day, with both majority opinions written by Justice Miller, suggest that the Supreme Court viewed the holdings of the two cases as being perfectly consistent.

Rauscher, a ship's officer, had been extradited from Great Britain to the United States pursuant to the extradition treaty then in force between the two countries, upon the charge of having murdered a member of the crew.¹⁴ He was tried, however, upon the lesser charge of inflicting cruel and unusual punishment upon the victim.¹⁵ The Court held that the treaty precluded the trial of Rauscher for an

denigrate the efficacy or relevance of customary international law to assert that domestic courts are not empowered to insure the executive's compliance with customary international law. See Rogers, *Domestic Legal Challenges to U.S. Policy in Nicaragua*, 6 ST. LOUIS U. PUB. L. REV. 77 (1987).

12. 119 U.S. 407 (1886).

13. 119 U.S. 436 (1886).

14. *Rauscher*, 119 U.S. at 409-10.

15. *Id.* at 409.

offense different from that for which he had been demanded from Great Britain, and held that the lower federal courts therefore lacked jurisdiction to try him on the charge of inflicting cruel and unusual punishment.¹⁶

In contrast, Ker, the defendant in the second case, was a fugitive brought to the United States without having been formally extradited.¹⁷ Ker was kidnapped in Peru, brought to the United States against his will, and tried in Illinois for larceny committed in that state.¹⁸ The American who took Ker into custody had the proper extradition papers with him when he arrived in Lima, but did not present them to any officer of the Peruvian government, or make any demand on that government for Ker's surrender.¹⁹ He forcibly brought Ker to San Francisco, whereupon Ker was extradited to Illinois.²⁰ The Court held that neither constitutional due process,²¹ nor the treaty between Peru and the United States,²² warranted a reversal of Ker's conviction. The Court found that another issue presented to it—whether customary international law would preclude trial in a state court following a forcible abduction—was not a federal question, and that it was thus beyond the Court's appellate jurisdiction.²³

16. *Id.* at 409-10, 433.

17. *Ker*, 119 U.S. at 438.

18. *Id.* at 437-38.

19. *Id.* at 438. A fact of the case that was available to the Court, but was not mentioned in its opinion, was that the Peruvian government had at the time only a nominal existence in the mountains 85 miles from Lima. Lima was occupied by Chilean forces, and the military governor of Lima had dispatched an officer to assist the American messenger in putting Ker on his way back to the United States. Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 685 (1953).

20. *Ker*, 119 U.S. at 438-39.

21. *Id.* at 439-40.

22. *Id.* at 441-43.

23. *Id.* at 444. More recent lower court opinions, to the effect that customary international law is ipso facto federal common law, appear to have ignored *Ker's* precise holding. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 n.4 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-89 (2d Cir. 1980). Commentators assuming that customary international law is federal common law have also failed to reconcile the *Ker* holding. See, e.g., L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 223 (1972); Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321, 343-48 (1985); Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 291-97. Of course, customary international law may be used as the rule of decision when a court has jurisdiction over a dispute and has no other legal basis upon which to decide the case. See, e.g., *New Jersey v. Delaware*, 291 U.S. 361, 383-84 (1934); *The Paquete Habana*, 175 U.S. 677, 700 (1900). But this conclusion does not imply that customary international law supersedes state law because it is "federal law," any more than customary international law supersedes other sources of federal law. See Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984). *But cf.* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-97 (1983) (customary

The Court's refusal to treat customary international law as federal law in this context suggests that the Court based its decision on the difference in the *domestic* effect between treaties and customary international law. In dictum, however, the Supreme Court indicated that even if it *were* to apply customary international law, prosecution would be appropriate despite Ker's apprehension in violation of the sovereign rights of a foreign state:

There are authorities of the highest respectability which hold that such 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, and presents no valid objection to his trial in such court.²⁴

The *Ker* decision has come to serve as the leading precedent for this principle both as a matter of international law,²⁵ and as a matter of United States law.²⁶

international law codified by statute is federal law for the purposes of the "arising under" clause of article III); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-22, 425 (1964) (act of state doctrine—which is not a principle of customary international law—is a matter of federal common law).

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

25. For example, in response to a request from Mexico for the return of one Martinez, who had been improperly brought into the United States in order to stand trial for an offense against the laws of California, the United States relied on *Ker* to maintain that "the irregularity in the manner of bringing the defendant within the jurisdiction was not a defense which could be pleaded as a valid bar to trial for a crime upon a regular indictment . . ." Letter from the Acting Secretary of State to the Mexican Chargé, [1906] 2 FOREIGN REL. U.S. 1121-22. In addition, 4 J. MOORE, A DIGEST OF INTERNATIONAL LAW 311, 331 (1906), relies upon *Ker* for the same principle, and the United States has relied on *Ker* at the international level to refuse requests to return kidnapped fugitives. 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 152, 321 (1941); see also 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1080-81 (1968); *Afouneh v. Attorney-General*, [1941-42] Ann. Dig. 327 (No. 97) (Sup. Ct. of Palestine sitting as a Court of Criminal Appeal, 1942) (relying upon J. MOORE, A DIGEST OF INTERNATIONAL LAW); *Attorney-General v. Eichmann*, 36 INT'L L. REP. 18, 59-71 (Dist. Ct., Israel 1961), *aff'd.*, 36 INT'L L. REP. 277 (Sup. Ct. of Israel sitting as a Court of Criminal Appeal 1962) (relying upon *Ker*).

26. See *United States v. Darby*, 744 F.2d 1508, 1530-31 (11th Cir. 1984); *United States v. Cordero*, 668 F.2d 32, 36-37 (1st Cir. 1981); *United States v. Cadena*, 585 F.2d 1252, 1259-60 (5th Cir. 1978); *United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976) (per curiam); *Waits v. McGowan*, 516 F.2d 203, 207 (3d Cir. 1975); *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 64-65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Winter*, 509 F.2d 975, 985-86, 988-89 (5th Cir.), *cert. denied sub nom. Parks v. United States*, 423 U.S. 825 (1975); *United States v. Cotton*, 471 F.2d 744, 748 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *Autry v. Wiley*, 440 F.2d 799, 801-02 (1st Cir.), *cert. denied* 404 U.S. 886 (1971); *People v. Garner*, 57 Cal. 2d 135, 141, 367 P.2d 680, 683, 18 Cal. Rptr. 40, 43 (1961), *cert. denied*, 370 U.S. 929 (1962); see also *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

The *Ker* principle has also been applied to interstate delivery of fugitives. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Hines v. Guthrie*, 342 F. Supp. 594, 595-96 (W.D. Va. 1972); *Hein v. Ramsden*, 36 Misc. 2d 345, 232 N.Y.S.2d 633 (Sup. Ct. 1962).

The Supreme Court held in *Rauscher*, however, that the defendant could not be tried for a crime that was not the basis for his extradition.²⁷ This decision was based not simply on the fact that a treaty governed extradition matters between the United States and Great Britain, but on a finding that the treaty, properly interpreted, directly prohibited such a trial.

After explaining at some length that extradition is a federal and not a state matter,²⁸ the Court devoted the bulk of its opinion to demonstrating that the treaty amounted to an undertaking by the United States and Great Britain not to try extradited persons for crimes other than those that served as the basis for the extradition.²⁹ In so doing, the Court relied upon diplomatic exchanges between the United States and Great Britain concerning the proper interpretation of the treaty,³⁰ the works of English and American publicists,³¹ canons of construction for treaties,³² federal statutes dealing with extradition treaties,³³ and state court interpretations of similar treaties.³⁴ Throughout its analysis the Court was clearly concerned with the question of whether the United States had undertaken as a matter of treaty law not to try a person for a crime that was not the basis for extradition. The Court answered the question affirmatively, noting that it would be "unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party."³⁵

This reasoning suggests that in the case of an extradition treaty there is a quid pro quo. A nation agrees to give up certain persons for trial, but expects in return that the person will be tried only for the offense upon which the extradition is based. In the absence of such a treaty, there is left only the general international legal obligation not to infringe upon the territorial sovereignty of the foreign state, but no corollary obligation not to try a person obtained in violation of that sovereignty. Thus, the *Ker* Court distinguished the *Rauscher* case on the ground that *Ker* did not come "to this country clothed with the protection which the nature of [extradition] proceedings and the true

27. *Rauscher*, 119 U.S. at 409-10.

28. *Id.* at 412-15.

29. *Id.* at 415-30.

30. *Id.* at 415-16.

31. *Id.* at 416-17.

32. *Id.* at 420-21.

33. *Id.* at 423-24.

34. *Id.* at 424-29.

35. *Id.* at 419.

construction of the treaty gave [Rauscher]."³⁶

Stated simply, the United States has an international obligation to foreign states not to invade their territory to obtain fugitives. If we do, we may pay reparation,³⁷ apologize,³⁸ or even extradite the kidnapers themselves.³⁹ But there is no obligation not to try the kidnapped person. Indeed, the foreign state may have little interest in protecting the kidnapped fugitive, inasmuch as he may not be a national of that state.⁴⁰ If, however, in order to have a foreign state deliver up a fugitive, which the foreign state is not otherwise obligated to do, the United States promises by treaty not to try him for crimes other than those serving as the basis for his extradition, then to try him for such an additional crime obviously violates that international obligation, and is not permitted domestically by virtue of the constitutional supremacy of treaties.⁴¹

The above distinction is not one between customary international law and treaty law, but between the scope of obligations that each happens to contain. Thus, if nations come to feel obliged to refrain

36. *Ker*, 119 U.S. at 443.

37. When Nazi war criminal Adolf Eichmann was kidnapped in Argentina, allegedly by agents of the Israeli government, and forcibly brought to Israel, Argentina lodged a complaint with the Security Council of the United Nations. In response, the Security Council passed a resolution requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law." S.C. Res. 138, 15 U.N. SCOR (868th mtg.) at 4, U.N. Doc. S/4349 (1960).

38. In lieu of an apology, a nation may accept an acknowledgement that its sovereign rights were violated. In response to the resolution referred to in the preceding footnote, the governments of Israel and Argentina issued a joint communiqué on August 3, 1960, resolving "to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina." *Attorney-General v. Eichmann*, 36 INT'L L. REP. at 59.

39. In refusing the request of Mexico to return a person improperly brought to the United States to stand trial, the United States government relied, in part, on the fact that the man's kidnapper had been surrendered to the government of Mexico. Letter from the Acting Secretary of State to the Mexican Chargé, [1906] 2 FOREIGN REL. U.S. 1121-22. More recently, the United States has extradited to Canada two "bounty hunters" who, acting as agents of a company that had posted a bond for a Florida criminal defendant, had allegedly kidnapped the defendant in Toronto, Canada, and brought him back to Florida. *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

40. Customary international law limitations on a state's criminal jurisdiction over the person are maintained internationally by the state of nationality of the person. *See, e.g., S.S. Lotus (Fr. v. Turk)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Indeed, it is generally only the state of nationality that may bring an international claim in respect of an injury to a particular person. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6); *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion of Apr. 11).

41. U.S. CONST. art. VI. Of course, a treaty must be self-executing to apply domestically without implementing legislation. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313-14 (1829); *infra* text accompanying notes 89-98. The *Rauscher* Court easily found the extradition treaty to be self-executing in this regard. 119 U.S. at 419.

from trying kidnapped fugitives,⁴² then customary international law could change, and at least as a matter of international law, the result of *Ker* would have to be different.⁴³ Similarly, an extradition treaty might be construed to provide for extradition of certain persons, *without* any obligation on the requesting state to limit the bases for criminal trial once the fugitive has been extradited.⁴⁴ Indeed, the issue presented to the *Rauscher* Court was recognized to be simply whether the treaty in that case should be so construed.⁴⁵

The possibility that a particular treaty dealing with territorial sovereignty might not limit the right of a state to try a person obtained in violation of that sovereignty apparently escaped the United States Court of Appeals for the Fifth Circuit in *United States v. Postal*.⁴⁶ As a result, the court engaged in a strained and questionable,⁴⁷ but unfortunately influential,⁴⁸ analysis to conclude that the treaty involved in the case was not self-executing.

42. Such a development is not inconceivable. Canada recently protested to the United States over the alleged kidnapping from Canada to the United States of Florida criminal defendant Sidney Jaffe on September 24, 1981, by "bounty hunters" acting as agents of the company that had posted bond for Mr. Jaffe. See *Kear v. Hilton*, 699 F.2d 181, 182-83 (4th Cir. 1983); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1374 (W.D.N.Y. 1985). In addition to obtaining extradition of the bounty hunters to Canada, the United States Secretary of State filed a statement with the Probation and Parole Commission of the State of Florida urging that Mr. Jaffe be granted parole in order to avoid "a generally deleterious effect on our relations with Canada." Statement of George P. Schultz, Secretary of State, to the Probation and Parole Commission, State of Florida (July 22, 1983) (In re: Sidney Leonard Jaffe, Inmate No. 082007).

43. Indeed, in *Autry v. Wiley*, 440 F.2d 799 (1st Cir.), *cert. denied*, 404 U.S. 886 (1971), the court of appeals suggested that *Rauscher* might apply even in the absence of an extradition treaty, "where the country of asylum delivers up a fleeing criminal, expressly or impliedly attaching certain conditions to the return." *Id.* at 801.

44. Courts have held, under article IV, section 2, clause 2 of the Constitution, that extradition within the United States from one state to another does not limit the basis for criminal prosecution. See *Siegal v. Edwards*, 566 F.2d 958, 960 (5th Cir. 1978).

45. *Rauscher*, 119 U.S. at 415-16.

46. 589 F.2d 862 (5th Cir. 1979).

47. For criticism of the *Postal* court's non-self-executing analysis, see Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980); Note, *United States v. Postal: Lost on the High Seas*, 31 MERCER L. REV. 1081 (1980); Note, *Treaties—Article 6 of the Convention on the High Seas Is Not Self-Executing*, 55 NOTRE DAME LAW. 293 (1979).

48. Federal courts often refer to *Postal* when discussing whether a treaty is self-executing. See, e.g., *United States v. Gonzalez*, 776 F.2d 931, 938 (11th Cir. 1985); *Frolova v. USSR*, 761 F.2d 370, 373 (7th Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Green*, 671 F.2d 46, 50 (1st Cir. 1982); *United States v. Liles*, 670 F.2d 989, 992 n.8 (11th Cir.), *cert. denied*, 456 U.S. 1008 (1982); *British Caledonian Airways v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981); *EDS Corp. Iran v. Social Security Org. of Iran*, 651 F.2d 1007, 1011 (5th Cir. 1981); *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1406 (D.D.C. 1985); *Vigile v. Sava*, 535 F. Supp. 1002, 1018 n.28 (S.D.N.Y. 1982); *In re Alien Children Education*

The defendants in *Postal* were tried for conspiracy to import marijuana, following their arrest by the United States Coast Guard on a British flag vessel⁴⁹ on the high seas.⁵⁰ The Fifth Circuit concluded that the boarding of the vessel violated international law⁵¹ under article 6 of the Convention on the High Seas, which provides that a ship on the high seas is "subject to [the] exclusive jurisdiction" of the flag state.⁵² Because the international law violation was a treaty violation, the court reasoned that *Ker* would only apply if the treaty was not self-executing, and thus had no independent domestic force.⁵³ But *Ker* could have been applied regardless of whether the treaty was self-executing by interpreting the substance of the treaty as not precluding the trial of defendants arrested in violation of the exclusive jurisdiction established by the treaty.

The Fifth Circuit apparently felt unable to apply *Ker* in this way because of two Supreme Court cases that distinguished *Ker*.⁵⁴ Both *Ford v. United States*⁵⁵ and *Cook v. United States*⁵⁶ involved the same bilateral treaty between the United States and Great Britain. This treaty permitted the United States to board and seize British flag vessels to enforce liquor prohibition laws, but only within the distance from the coast of the United States that a vessel could traverse in one

Litigation, 501 F. Supp. 544, 589-90 (S.D. Tex. 1980); Centre for Independence of Judges v. Mabey, 19 Bankr. 635, 647 n.15 (D. Utah 1982).

The en banc Fifth Circuit in *United States v. Williams*, 617 F.2d 1063, 1082 (5th Cir. 1980), described the self-execution analysis in *Postal* with approval, although four judges in their concurring opinion stated that they "differ with the majority . . . discussion of self-executing treaties." *Id.* at 1094 n.2 (Rubin, J., concurring).

49. The vessel was of Grand Cayman registry. *Postal*, 589 F.2d at 868 n.8. The Grand Cayman Islands are a British territory. The court determined that under United Kingdom practice treaties entered into by the United Kingdom apply to all its territories unless there is a provision to the contrary. There was no such contrary provision in the British ratification instrument for the High Seas Convention. *Id.*

50. The boarding took place approximately sixteen and three-tenths miles from the nearest United States coastline. *Postal*, 589 F.2d at 867. The court determined that this location was on the high seas, and not within the twelve-mile contiguous zone for the prevention and punishment of certain types of offenses. *Id.* at 868-70; see Convention on the High Seas, opened for signature April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, (entered into force Sept. 30, 1962), arts. 1-6; Convention on the Territorial Sea and the Contiguous Zone, opened for signature April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 499 U.N.T.S. 311 (entered into force Sept. 10, 1964), arts. 1, 24.

51. The court found that the boarding did not meet the requirements for "hot pursuit" authorized by article 23 of the Convention on the High Seas. *Postal*, 589 F.2d at 872-73.

52. Convention on the High Seas, *supra* note 50, 13 U.S.T. at 2315, T.I.A.S. No. 5200 at 2315, 450 U.N.T.S. at 86.

53. *Postal*, 589 F.2d at 873-76.

54. *Id.* at 874-76.

55. 273 U.S. 593 (1927).

56. 288 U.S. 102 (1933).

hour.⁵⁷

In *Ford* the defendants had been tried for conspiracy to violate the prohibition laws by importing liquor.⁵⁸ Their British flag vessel had been seized five and seven-tenths miles from United States territory.⁵⁹ Among the questions resolved by the Court were the following: First, whether the seizure of the vessel was in accordance with the treaty;⁶⁰ and second, if it was, whether the treaty prohibited prosecution of the British subjects on board the seized vessel, in view of the fact that although the treaty permitted boarding and seizure, it did not expressly permit prosecution.⁶¹

On the first question, the courts below had found that the vessel had been seized within the distance specified by the treaty.⁶² The defendants argued that the validity of the seizure should have been submitted to the jury.⁶³ The government responded that even if the seizures were illegal, under *Ker* that fact would not deprive the court of jurisdiction to try the defendants.⁶⁴ The Supreme Court refused to apply *Ker*, however, because *Ker*'s precise holding—that the validity of a trial after seizure in violation of customary international law “was not a matter of federal cognizance”—did not apply where a treaty was involved.⁶⁵ As we have seen, however, *Ker* has come to stand for what was only suggested in the actual *Ker* opinion: that trial after seizure in violation of customary international law is permitted under international law, and accordingly under domestic law.⁶⁶ The *Ford* Court did not reject the application of the *Ker* principle to cases in which the arrest had been in violation of treaty law. Nonetheless, the Fifth Circuit appears to have read the *Ford* Court's treatment of *Ker* in that way.⁶⁷ In fact, the *Ford* Court rejected the defendants' contention that the validity of the seizure should have

57. Convention for the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, United States-Great Britain, art. II, 43 Stat. 1761, T.S. No. 685.

58. *Ford*, 273 U.S. at 601.

59. *Id.* at 603.

60. *Id.* at 600.

61. *Id.* The Supreme Court also determined that the treaty authorized prosecution not only for the substantive offense of illegal importation or attempt to import, but also for conspiracy to effect it. *Id.* at 600, 616-19. Finally, the Court determined that persons outside the United States, conspiring and cooperating to violate its laws with other persons within the United States and to commit overt acts therein, could be prosecuted when subsequently apprehended in the United States. *Id.* at 600-01, 619-24.

62. *Id.* at 604-05.

63. *Id.* at 605.

64. *Id.*

65. *Id.* at 605-06.

66. See *supra* note 25.

67. *Postal*, 589 F.2d at 874-75.

been submitted to the jury on the entirely different ground that the issue had been improperly raised below.⁶⁸ Thus, the Court's dictum regarding *Ker* in no way precludes application of a *Ker*-like principle when an arrest violates treaty law.

More important is the *Ford* Court's resolution of the second question. The defendants had argued that the treaty, by permitting boarding and seizure of the vessel, precluded prosecution of persons on board,⁶⁹ on the theory of *expressio unius est exclusio alterius*.⁷⁰ The Court rejected this argument, in part by referring to the treaty provision that "the vessel may be seized and taken into a port of the United States . . . for adjudication in accordance with such laws," and inferring therefrom the intent "that both ship and those on board are to be subjected to prosecution on incriminating evidence."⁷¹ In other words, the Court read the treaty not only as permitting boarding and arrest, but also as an implicit grant of jurisdiction to prosecute offenders. In this sense, therefore, the treaty operated like an extradition treaty; the United States was permitted to try someone taken from the quasi-territorial jurisdiction of Great Britain.

It is more instructive to examine the *Ford* Court's distinction of *United States v. Rauscher* in this connection,⁷² rather than its distinction of *Ker*. The *Rauscher* Court had interpreted the Anglo-American extradition treaty in the case as precluding trial for a crime that had not served as a basis for the extradition.⁷³ The *Ford* Court distinguished *Rauscher* solely on the ground that the liquor treaty did permit trial of liquor smugglers arrested on vessels seized under the treaty.⁷⁴ The Court even suggested that the defendants could not have been tried for other crimes: "If it were attempted to try the defendants or to forfeit the cargo that was brought into port, for smuggling of forbidden opium, a different question might possibly be presented."⁷⁵ Thus, the treaty involved in *Ford* was like the extradition treaty in *Rauscher*, in that it permitted prosecution of defendants apprehended for certain crimes and precluded prosecution for other crimes. The only reason that *Rauscher* did not apply was because the defendants in *Ford* were being tried for crimes covered by the treaty.

The idea that the liquor treaty precluded trial when the arrest

68. *Ford*, 273 U.S. at 606.

69. *Id.* at 607.

70. *Id.* at 611.

71. *Id.* at 610.

72. *Id.* at 614-16.

73. See *supra* text accompanying notes 27-35.

74. *Ford*, 273 U.S. at 616.

75. *Id.*

was illegal is further reflected in the Supreme Court's holding in *Cook v. United States*.⁷⁶ A British vessel, the *Mazel Tov*, had been boarded and seized by the Coast Guard more than one-hour's sailing distance from the United States coast, with a cargo of intoxicating liquor intended for the United States.⁷⁷ The federal government instituted libel proceedings against the vessel and its cargo to enforce penalties for the failure to include the liquor in the manifest of a vessel bound for the United States, a violation of the Tariff Act.⁷⁸ The Supreme Court held that the libels were properly dismissed.⁷⁹

The government had argued that it was immaterial that possession of the vessel and its cargo had been acquired by a wrongful act where the United States had filed a libel bill to enforce a forfeiture resulting from a violation of its law.⁸⁰ The Court rejected this argument, noting that the doctrine rested on a common law rule by which the government, by its forfeiture proceeding, could ratify and therefore legitimate a seizure of property made by one without authority.⁸¹ The common law rule was held not to apply when the lack of authority resulted from the violation of treaty limitations.⁸² By permitting seizure in certain conditions, the Treaty precluded seizure, and subsequent adjudication of such seizure, under other conditions:

The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare *United States v. Rauscher*⁸³

This passage—especially the reference to *Rauscher*—certainly permits the conclusion that the liquor treaty affirmatively prohibited adjudica-

76. 288 U.S. 102 (1933).

77. *Id.* at 107-08.

78. *Id.* at 108.

79. *Id.* at 120. The main issue in the case was whether a federal statutory provision permitting Coast Guard seizures within twelve nautical miles of the coast had been superseded by the liquor treaty, inasmuch as the *Mazel Tov* had been boarded eleven and five-tenths miles from the coast. The Court held that the treaty was intended to limit boardings to the area covered by one hour's sailing time, even if within twelve miles. *Id.* at 111-18. Further, the Court found that the treaty was self-executing, and that the treaty thus superseded the earlier federal statute. *Id.* at 118-20.

80. *Id.* at 121.

81. *Id.*

82. *Id.*

83. *Id.* at 121-22 (citation omitted).

tions of seizures not allowed by the treaty, and that the Supreme Court was relying upon that fact.

Thus neither *Ford* nor *Cook* actually held that an arrest following a seizure in violation of treaty law would invalidate a subsequent criminal prosecution. To the extent that dictum in *Ford*, or a parallel analysis in *Cook*, would imply that conclusion, such a conclusion would necessarily be based on an affirmative limitation on criminal prosecution found in the 1924 liquor treaty. Whether this is a fair interpretation of the treaty may be argued; the important point is that in any event the Supreme Court appeared to interpret the treaty that way.

Nothing requires the inference of a comparable affirmative limitation in every treaty delineating territorial or comparable jurisdiction. A treaty establishing a new boundary between two countries, for instance, would not necessarily preclude the trial of a person kidnapped across the new border, even though the kidnapping itself might have violated the border treaty. If a state has the right, recognized by customary international law at least since *Ker*, to try a criminal defendant despite an arrest in violation of another state's legally protected sovereignty, it ought to be able to modify the boundaries of its territory without giving up that right.

Similarly, a state should be able to modify by treaty the conditions under which it can exercise territorial or quasi-territorial jurisdiction, without giving up the right recognized in *Ker*. Of course, a state may wish to give up this right, and the Supreme Court has held that such a relinquishment is generally to be inferred in extradition treaties. The first step, however, for a United States court with a defendant obtained in violation of an international treaty is to determine whether the treaty not only disallows the arrest, but also forbids a subsequent trial. Apart from extradition treaties, there is no reason to presume that a treaty will have such an intent.

The Fifth Circuit skipped this step in *Postal*, and apparently assumed that the boarding of the vessel in violation of article 6 of the Convention on the High Seas meant that prosecution of the defendants would also violate the treaty.⁸⁴ Nothing in the language of article 6, however, supports such an interpretation. Article 6 provides: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high

84. 589 F.2d at 878.

seas.”⁸⁵ This provision reflects the international legal principle that ships are, in most jurisdictional respects, like the land territory of the flag state.⁸⁶ This provision is thus analogous to a border treaty. It does not refer to the turning over of fugitives or criminals at all, and it would be difficult to infer such a reference without attributing more to the words “exclusive jurisdiction” than the jurisdiction that a state has with respect to its own territory. Indeed, some of the *Postal* court’s analysis purporting to show that article 6 is not self-executing is more persuasive as a demonstration that article 6 did not have the effect of overturning the international law principle of *Ker*.⁸⁷

The danger of the *Postal* court’s failure to distinguish *Ford* and *Cook* lies not just in a possible misinterpretation of article 6 of the Convention of the High Seas, but in the possibility that terrorists apprehended in violation of the territorial sovereignty of other states may escape criminal prosecution. The United States is, of course, vigorously opposed to terrorist actions around the world. It is not hard to envisage further actions to bring terrorists to justice in the United States. And, although a United States court should not try a foreigner with whom there is no sufficient nexus to the United States under international law,⁸⁸ it is not in the public interest to permit terrorist defendants to make broad-based international law challenges to the manner in which they were apprehended. Of course the extradition law principle of specialty should be enforced, as in *Rauscher*,⁸⁹ but a challenge based on a friendship treaty, a border treaty, or a jurisdiction-allocating treaty, such as a law of the seas treaty, should not be considered by a United States court unless the treaty is shown not just to deal with the legality of the method in which the defendant was obtained, but also to limit subsequent criminal prosecution.

85. Convention on the High Seas, art. 6, 13 U.S.T. at 2315, T.I.A.S. No. 5200 at 2315, 450 U.N.T.S. at 86.

86. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7); *United States v. Flores*, 289 U.S. 137, 155 (1933); *Wilson v. McNamee*, 102 U.S. 572, 574 (1880); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 26-28 (1965).

87. For instance, the *Postal* court distinguished the findings in *Ford* and *Cook* that the liquor treaty was self-executing on the ground that “it was assumed that Great Britain would assert the rights of its vessels and their crews under international law not to be subjected to [United States] adjudication.” *Postal*, 589 F.2d at 883. The same observation better supports the conclusion that the liquor treaty simply precluded adjudication, unlike the High Seas Convention.

88. *E.g.*, *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979).

89. In *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985), the court questioned whether a fugitive has standing to assert the principle of specialty. Without referring to *Rauscher*, the court stated that the “right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested,” and cited *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979).

If *Ford* and *Cook* were applied to every alleged treaty violation, trials of terrorists could too readily be turned into trials of the government action in obtaining the terrorists. This would not only hinder effective prosecution, but it would also be inconsistent with the constitutional allocation to the executive branch of primary authority to determine how the United States will comply with international law. This primary responsibility is reflected in the principle that the courts defer to the President in the interpretation of treaties,⁹⁰ in the act of state doctrine,⁹¹ and in the political question⁹² and other justiciability doctrines.⁹³

III. WHEN INTERNATIONAL LAW LIMITS ON TRIAL ARE APPLICABLE IN UNITED STATES COURTS

A second untoward effect of the *Postal* court's failure to interpret article 6 of the Convention on the High Seas as not limiting criminal prosecutions was that in order to uphold the conviction the court was compelled to hold that article 6 was not self-executing as a matter of domestic law.⁹⁴ The court's analysis in this connection undermines important policies furthered by the supremacy clause of the Constitution.⁹⁵

In a penetrating critique of this aspect of *Postal*,⁹⁶ Professor Riesenfeld has argued that a treaty is self-executing as a matter of domestic law (i.e., the treaty provisions are applicable law in a United States court without implementing statutes) if the treaty was intended, as a matter of international law, to stipulate the immediate creation of rights cognizable in domestic courts.⁹⁷ For instance, a treaty might provide certain types of emissaries with immunity from a specified

90. See *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933).

91. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-33 (1964); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 802-04 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358-61 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

92. See *O'Reilly DeCamara v. Brooke*, 209 U.S. 45, 52 (1908); *Tel-Oren*, 726 F.2d at 803; *United States v. Berrigan*, 283 F. Supp. 336, 342 (D. Md. 1968), *aff'd*, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 90 (1970).

93. E.g., *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986). See generally Rogers, *Domestic Legal Challenges to U.S. Policy in Nicaragua*, 6 ST. LOUIS U. PUB. L. REV. 77 (1987).

94. *Postal*, 589 F.2d at 876-84. In contrast, the liquor treaty in *Ford* and *Cook* was easily found to be self-executing. *Cook*, 288 U.S. at 118-19.

95. U.S. CONST. art. VI.

96. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980).

97. *Id.* at 896-97, 900-01; see also Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

class of civil suits.⁹⁸ State *A*, with a domestic law system that admits of no self-executing treaties, could accede to such a treaty, and comply by passing legislation to establish the required immunity. The United States also could accede to the same treaty, and article VI of the Constitution would automatically make the immunity enforceable in a United States court.⁹⁹ Such automatic applicability is desirable in a constitutional system such as ours where the treaty-making power (President plus two-thirds of the Senate) is distinct from the lawmaking power (majority of two Houses, subject to presidential veto).

On the other hand, a second treaty might require each contracting state "to take such measures as may be necessary to establish its jurisdiction" over certain criminal offenses.¹⁰⁰ State *B*, with a domestic legal system in which courts can define criminal jurisdiction without legislative action, may not need further legislation to comply with the treaty. In the United States, however, compliance with such an international treaty obligation would require legislation, and to this extent such a treaty would clearly not be self-executing as a matter of domestic law.¹⁰¹

Thus the question of whether a treaty is self-executing as a matter of United States law may depend on the nature of the international obligation. This is not to say, however, that whether a treaty is self-executing in the United States depends upon whether other states intend it to be self-executing in their territories as well. State *A* intends that the first treaty not be self-executing, but the treaty is nonetheless clearly self-executing in the United States. State *B* intends that the second treaty be self-executing, but that treaty is nonetheless clearly not self-executing in the United States.

The *Postal* court, in contrast, assumed that because some states

98. See, e.g., Vienna Convention on Diplomatic Relations, April 18, 1961, art. 31 (1), 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, (entered into force on Apr. 24, 1964, entered into force for the United States on Dec. 13, 1972).

99. The self-executing nature of the Vienna Convention on Diplomatic Relations, *supra* note 98, is incontrovertible insofar as the United States is concerned, in view of subsequent federal legislation extending its provisions to diplomats of nonparties to the convention, without expressly implementing the convention with respect to diplomats of states parties. 22 U.S.C. § 254b (1982).

100. See, e.g., International Convention against the Taking of Hostages, art. 5, Dec. 17, 1979, __ U.S.T. __, T.I.A.S. No. __, __ U.N.T.S. __, reprinted in 18 INT'L LEGAL MATERIALS at 1458 (entered into force on June 3, 1983, entered into force for the United States on January 6, 1985).

101. Congress and the President clearly considered the provision for the establishment of criminal jurisdiction in the International Convention against the Taking of Hostages as not being self-executing. The President informed Congress that he would not submit the instrument of ratification until legislation had been passed establishing the criminal jurisdiction required by the convention. 20 Weekly Comp. Pres. Doc. 590.

that are parties to the Convention on the High Seas have domestic law systems in which treaties are never self-executing, there cannot have been a common intent that the treaty be self-executing. This analysis ignores the relevant inquiry, which is whether the parties have obligated themselves to provide judicially enforceable rights to individuals, and not whether the parties expect the particular obligation to apply domestically in the territory of all parties without further legislation. Moreover, the implication of the argument is that multilateral treaties are rarely, if ever, self-executing. If the President, with the concurrence of two-thirds of the Senate, is unable to enter into treaties providing immediately enforceable rights to individuals, without first obtaining majority approval of both Houses of Congress, then the clear policy of article VI of the Constitution, making valid treaties the law of the land, would obviously be undercut.

Other aspects of the *Postal* court's non-self-executing analysis are also troubling. For instance, the court relied upon a demonstration that "a self-executing interpretation would severely curtail the traditional practice of the United States in exercising jurisdiction on the high seas."¹⁰² The court had already determined that an international law violation had occurred, and it was apparently of the opinion that the treaty obligated the United States not to exercise criminal jurisdiction over the crew.¹⁰³ In effect, the court was thus making the remarkable suggestion that a treaty was not self-executing because the United States became a party with no intention of complying with the obligations of the treaty in the first place.

The *Postal* court also noted that "the [non-self-executing] interpretation we approve today leaves to the injured state the option of deciding whether it wishes to object."¹⁰⁴ It is difficult to see how this statement could not be applied to every allegedly self-executing treaty.

The danger of the *Postal* analysis lies not in the mere holding that article 6 of the Convention on the High Seas is not self-executing. Indeed, as demonstrated above, it is unlikely that article 6 was intended in any case to preclude trial following illegal seizure. But if it were, it should have been enforced. Otherwise the United States will have difficulty entering into multilateral conventions that require certain limitations to be immediately applicable in domestic courts.

It is ironic that such a difficulty could have an adverse impact on our fight to control terrorism. This impact occurs, however, because the primary international legal tool against terrorism is the multilat-

102. *Postal*, 589 F.2d at 878-81.

103. *Id.* at 878.

104. *Id.* at 884.

eral treaty regarding a specific type of terrorist act, such as airplane hijacking,¹⁰⁵ airplane sabotage,¹⁰⁶ harming diplomats,¹⁰⁷ and taking hostages.¹⁰⁸ These treaties serve in part as multilateral extradition treaties.¹⁰⁹ The principle of specialty accordingly applies, and a terrorist extradited to the United States for a crime defined in one of these treaties should not, under *Rauscher*, be tried for another crime. But if a United States court can distinguish *Rauscher* on the ground that a multilateral treaty is involved, and reason that a non-self-executing interpretation leaves to injured states the decision whether to object, there is the logical possibility that the principle of specialty will not be applied by United States courts in some cases. Such holdings would weaken efforts of the United States to obtain wide accession to these treaties, and to negotiate other treaties of this type.

IV. CONCLUSION

If an alleged terrorist is tried in the United States, he should be able to argue against the jurisdiction of the court if there is no internationally recognized nexus between his action and the United States. His mode of apprehension, however, is irrelevant unless he can show that the United States, by trying him, is violating a treaty obligation not to prosecute him. The fact that the apprehension alone may have violated a treaty obligation is not enough. If, on the other hand, there is a treaty obligation not to prosecute, such as the principle of specialty in typical extradition treaties, factors such as the multilateral nature of the treaty should not prevent the obligation from being self-executing and thus from being applied by United States courts.

105. Convention on the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105.

106. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177.

107. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.

108. Convention against the Taking of Hostages, Dec. 17, 1979, ___ U.S.T. ___, T.I.A.S. No. ___, U.N.T.S. ___, reprinted in 18 INT'L LEGAL MATERIALS at 1456.

109. Art. 8, Hague Convention, *supra* note 105; art. 8, Montreal Convention, *supra* note 106; art. 8 New York Convention, *supra* note 107; art. 10, Convention against the Taking of Hostages, *supra* note 108.