AUTHORITY OF THE UNITED STATES TO EXTRATERRITORIALLY APPREHEND AND LAWFULLY PROSECUTE INTERNATIONAL DRUG TRAFFICKERS AND OTHER FUGITIVES

INTRODUCTION

An "extraterritorial arrest" is the abduction of a fugitive wanted by the United States, performed by the United States or its agents, within the borders of a foreign country.[1] The concept of conducting an extraterritorial arrest without the consent of the foreign country is controversial because it involves a non-consensual intrusion on a foreign country's sovereignty.

Recently, President Bush has expressed an interest in the extraterritorial arrest as a tool to be used in his administration's war on drugs.[2] On June 21, 1989, assistant Attorney General William Barr issued a legal opinion entitled *Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities.*[3] The content of the Barr opinion is being withheld from the public on the grounds that the State Department and the President enjoy an attorney-client privilege regarding their private consultations.[4] While this recent opinion is as yet unpublished, its title suggests that the Bush administration supports the non-consensual extraterritorial arrest as a tool to apprehend international drug traffickers wanted by the United States.

This issue was previously addressed by the State Department in the late 1970s when a Wall Street financier, wanted by the FBI, fled to the Bahamas.[5] The fugitive financier used a portion of the 200 million dollars he fleeced from his mutual-fund's investors to entice the Bahamian government into foregoing the usual and customary extradition proceedings.[6] The illicit payoff successfully

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1. BLACK'S LAW DICTIONARY 528 (6th ed. 1989) (extraterritoriality).
2. L.A. Times, Oct. 13, 1989, at 1, col. 7; San Diego Tribune, Oct. 13, 1989, at 1, col. 5.
3. L.A. Times, Oct. 14, 1989, at 1, col. 7.
4. Telephone interview with the office of the Attorney General (Oct. 18, 1989).
5. L.A. Times, Oct. 13, 1989, at 1, col. 7.
6. Extradition is the surrender of a criminal by a foreign state to which the criminal has fled for refuge from prosecution. Surrender is made to the state within whose jurisdiction the crime was committed, upon the demand of the latter state, in order that the fugitive

stymied the FBI's efforts to bring the financier to justice in the United States.

After this incident, the Carter administration ordered that a memorandum be issued by John Harmon, head of the Office of Legal Counsel, addressing the legal implications of executing an extraterritorial arrest of the fugitive.[7] This arrest was to be made without the consent of the Bahamian government, and in violation of its sovereignty. The opinion, published on March 30, 1980, plainly advised that the FBI must respect "customary international law" by stating that "U.S. agents have no law-enforcement authority in another nation unless it is the product of the other nation's consent."[8] As a result, the Carter administration did not authorize the extraterritorial arrest of the financier.

President Bush's interest in the viability of the extraterritorial arrest was surely heightened by the April 1990 announcement by President Virgilio Barco to halt extradition of Medellin drug cartel leaders such as Pablo Escobar. Barco's decision came one day after twelve Colombian police officers were murdered, another eight were wounded, and a Colombian senator was kidnapped by cartel assassins.[9] In the seven months prior to this assault, the Barco government had extradited fifteen drug trafficking suspects to the United States.[10]

The new non-extradition policy of the Colombians raises serious doubt as to whether these fugitives will ever be brought to justice. Without the express permission of the country where the fugitive is located, apprehension of the fugitive outside the extradition process by the United States would raise serious questions of customary international law. In fact, the United States has not prosecuted an extraterritorially apprehended fugitive after a formal protest has been lodged by the foreign country for nearly 55 years.[11]

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might be dealt with according to its laws. Extradition may be granted as a matter of comity, or may take place under treaty stipulations between the two nations. Terlinden v. Ames, 184 U.S. 270, 289 (1901).

7. L.A. Times, Oct. 13, 1989, at 1, col. 7; San Diego Tribune, Oct. 13, 1989, at 1, col. 5.

8. 4 Op. Off. Legal Couns. 543, 547 (1980). A customary international law is the manifestation of an international custom which accepts a general practice among nations as the law. International Court of Justice, art. 38(1)(b).

9. San Diego Tribune, Apr. 4, 1990, at 1, col. 5.

10. *Id.*

11. *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934). *See also* United States v. Caro-Quintero, 745 F. Supp. 599 C.D. Cal. (1990) (holding that when the United States violates an extradition treaty between the U.S. and Mexico by unilaterally abducting the defendant from his homeland, and when Mexican authorities subsequently file an objection, then the district court lacks personal jurisdiction to try the defendant).

Both the 1980 and the 1989 opinions were written by the United States Office of Legal Counsel, and they are separated only by the passing of the presidency from the Carter administration to the Reagan/Bush administration. The apparently contrary conclusions of law presented in the two opinions suggest that issues raised by the prospect of the non-consensual extraterritorial arrest are unsettled. Herein lies the reason for this Comment. This Comment analyzes the two key issues that underlie the non-consensual extraterritorial arrest controversy. The first is whether a fugitive who is abducted by the FBI inside a foreign country's borders without the consent of that country may be successfully prosecuted in the United States, regardless of the clear violation of that country's sovereignty. The second question is how to remedy the violation of the foreign country's sovereignty. This Comment concludes that the United States can lawfully prosecute such a fugitive, and proposes two potential remedies for the sovereignty infringement.

First, this Comment reviews the opinion published by the State Department in 1980. Second, the scope of the FBI's jurisdiction regarding international criminal activity is examined. Third, the constitutional rights of the extraterritorially apprehended individual are evaluated. Fourth, the effects that a treaty and customary international law can have on the prosecution of fugitives apprehended via an extraterritorial arrest are assessed. Within this discussion, this Comment exposes the broad powers possessed by the United States, as a self-determined sovereign, to conduct itself as it chooses in both domestic and international matters. Finally, proposals are included for both a political solution and an international legal solution to the violation of sovereignty issue.

I. THE 1980 OPINION PUBLISHED BY THE OFFICE OF LEGAL COUNSEL

The 1980 opinion addresses the question of when does the FBI, as a matter of United States law, have the authority to make an extraterritorial arrest.[12] The opinion addresses several key sub-issues in determining that the FBI has lawful authority to make an extraterritorial arrest only when the state in which the fugitive is abducted consents to the proposed apprehension.[13]

The first sub-issue addresses the effect of the arrest on the court's

12. 4 Op. Off. Legal Couns. 543 (1980).
13. *Id.* at 547.

ability to prosecute the alleged criminals.[14] The opinion states that "in the absence of an international law violation, a federal district court will not ordinarily divest itself of jurisdiction in a criminal case."[15] However, the opinion reserved judgment on whether an international law violation should result in the relinquishment of criminal jurisdiction over the person abducted.[16]

Secondly, the opinion states that a non-consensual extraterritorial arrest may have implications of civil liability for the arresting agents if the FBI is not authorized to conduct the operation under international law.[17] The three theories of civil liability set forth are constitutional violations by international agents, false imprisonment, and violations of international law.[18] The opinion notes that FBI agents may enjoy an absolute or qualified immunity if sued for damages.[19] The opinion cites *Norton v. United States*,[20] which holds that an FBI agent enjoys qualified immunity when his actions are within the outer limits of the FBI's authority and the arrest is conducted in good faith. The opinion concludes that the *Norton* test is satisfied only when the arrest has the acquiescence of the country in which the fugitive is captured.[21]

The opinion then addresses the potential for criminal kidnapping charges for the FBI agents who carry out the arrests.[22] The opinion states that a foreign country's charge of kidnapping, accompanied by its demand for extradition of the FBI agent, would be a point of diplomatic embarrassment to the United States because of the lack of a prior agreement authorizing the FBI action.[23] Ultimately, the opinion advises that an extraterritorial arrest should not be authorized without the foreign country's consent, because of this potential for embarrassment.[24]

The 1980 opinion's recommendation that the United States should not conduct non-consensual extraterritorial arrests is set forth with only measured certainty and without absolute conviction.[25] Accordingly, the door is not closed to another exploration or

14. *Id.* at 543.
15. *Id.* at 545.
16. *Id.*
17. *Id.* at 546.
18. *Id.*
19. *Id.* at 546-47
20. Norton v. United States, 581 F.2d 390 (4th Cir. 1978).
21. 4 Op. Off. Legal Couns. 543, 547 (1980).
22. *Id.* at 549.
23. *Id.* at 550.
24. *Id.*
25. For instance, the opinion states that an extraterritorial arrest is "an impermissible

interpretation of the legality of a non-consensual extraterritorial arrest. Hence, a fresh analysis of the issue is set forth below.

II. AUTHORITY OF THE UNITED STATES TO APPREHEND AND LAWFULLY PROSECUTE INTERNATIONAL DRUG TRAFFICKERS AND OTHER FUGITIVES BY EMPLOYING THE EXTRATERRITORIAL ARREST

The Constitution, as well as the executive, legislative, and judicial branches of the United States government, all provide for limitations on the authority under which federal agencies such as the FBI may act. Each branch of government exercises dominion over the many different steps involved when a fugitive operating on an international scale is brought to justice in the United States. This process includes the apprehension of the fugitive and his subsequent transport to the U.S., compliance with international customary laws and treaties, protecting the fugitive's civil rights, and determining if the judiciary has jurisdiction over the matter. These procedures are studied in detail below.

A. The Non-Consensual Extraterritorial Arrest

The jurisdiction of a nation within its own boundaries is exclusive and absolute.[26] It is not susceptible to any limitation that is not self-imposed.[27] Consequently, all exceptions to the complete and full power of a nation within its territories must be traced to the consent of the nation itself.[28] Therefore, only the government's domestic laws, and the international agreements to which the government is a signatory, can circumscribe a sovereign's power to law-

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invasion of the territorial integrity of another state" and cites only the dicta in United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), a case upholding an extraterritorial arrest. 4 Op. Off. Legal Couns. 543, 546 (1980). The opinion only speculates in stating that "[t]he best assumption for the purpose of analyzing the implications of the [non-consensual extraterritorial arrest] is that . . . it would violate international law," and "[t]he Second Circuit . . . has explicitly declined to define the implications of an international law violation on criminal jurisdiction." *Id.*

Furthermore, when meritoriously discussing the potential civil and criminal implications for the FBI agents as abductors, the conclusions drawn were ambiguous. Examples include, "the action would probably depend upon the moral aspects of the case which we cannot here consider," and "we . . . recommend that any [FBI operations] strictly adhere to local law and function with . . . at least tacit approval of the country involved." *Id.* at 546, 550. Both statements were made in spite of the fact, cited in the same opinion, that the FBI is not geographically restricted when detecting and prosecuting crimes, no matter where the action is undertaken. *Id.* at 548. *See* 28 U.S.C. § 533 (1989).

26. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812).

27. *Id.*

28. *Id.*

fully prosecute a fugitive abducted by extraterritorial arrest.[29]

The U.S. courts determine the weight to be given a foreign sovereign's formal protest of the abduction of a fugitive within that sovereign's borders. They do so by deciding whether the United States, as a self-directed and sovereign country, has imposed any jurisdictional limitations upon itself with regard to an arrest within the foreign country's boundaries.[30] In such matters, the general rule is that a court of the United States will decide cases before it by choosing the rules appropriate for the decision among the various sources of law.[31] These sources of law include domestic law, the United States Constitution, treaties, and customary international law.[32] These sources are addressed in detail below.

1. Congressional Authority for the FBI to Perform the Extraterritorial Arrest. This section explores whether the FBI has jurisdiction to apprehend fugitives within a foreign country. A federal agency may only carry out such acts as are authorized and intended by Congress. Hence, the crux of this issue is whether it was the intent of Congress that the FBI have authority to apprehend fugitives in foreign countries.

The Congress has authorized the FBI to conduct investigations regarding official matters under the authority of the Department of Justice and the Department of State, as may be directed by the Attorney General.[33] Pursuant to Title 28 of the United States Code, the FBI is commissioned to "detect and prosecute crimes against the United States."[34] This statute is without express or implied geographical restrictions or limitations. However, considerations of courtesy and mutuality require courts to construe domestic legislation in a way that minimizes interference with the purpose and effect of foreign law, absent an expression of congressional intent to the contrary.[35] Hence the question, "when and where may the FBI act in international matters?" The following cases support the conclusion that the FBI's authority to conduct international arrests depends upon the matter it is investigating.

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29. *Id.*
30. *Id.*
31. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764 (1972).
32. *Id.*
33. 28 U.S.C. § 533(3) (1989).
34. 28 U.S.C. § 533(1) (1989).
35. *See* Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487 (D.C. Cir. 1984); Lauritzen v. Larsen, 345 U.S. 571, 576-78 (1952); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

In *Commodities Futures Trading Commission v. Nahas*,[36] the defendant challenged the federal court's jurisdiction to enforce an investigative subpoena served by a federal agency, the Commodities Futures Trading Commission, on a foreign citizen in a foreign land. The defendant was wanted for allegedly fraudulent acts that occurred within the United States. The subpoena, served pursuant to 7 U.S.C. section 15,[37] required the defendant to appear and produce documents in Washington D.C. When Nahas did not comply, the district court found him in contempt of court, and froze his assets in the United States.[38] The court of appeals stated that "an important canon of statutory construction teaches 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' "[39] The court stated that 7 U.S.C. section 15 does not expressly empower the Commission to serve subpoenas on foreign nationals in foreign countries.[40] Moreover, the court reasoned, the legislative history does not indicate that Congress intended to clothe the Commission with the power to serve and investigate subpoenas extraterritorially.[41] Furthermore, the act constituted an exercise of one sovereign within another and that, absent the consent of the foreign nation, is a violation of international law.[42] The court stated that:

> [b]ecause an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, . . . we are unwilling to infer enforcement jurisdiction absent a clearer indication of congressional intent. We emphasize that this case does not pose a question about the authority of Congress; rather, it poses a question about the congressional intent embodied in 7 U.S.C. section 15. Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international laws.[43]

The court held that a valid, unambiguous mandate was lacking in 7 U.S.C. section 15 and vacated the lower court's order for contempt

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36. *Nahas*, 738 F.2d 487.

37. 7 U.S.C. § 15 (1989) sets forth in pertinent part that for the purposes of enforcing the provisions of Title 7, the Agriculture Act, witnesses may be subpoenaed when the Commission deems it relevant to their inquiry.

38. *Nahas*, 738 F.2d at 489.

39. *Id.* at 493; *see also* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1948).

40. *Nahas*, 738 F.2d at 493.

41. *Id.*

42. *Id.* at 497.

43. *Id.* at 495 (quoting FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980)).

and released the defendant's assets.[44]

Congress may assert extraterritorial jurisdiction, as long as such jurisdiction does not abridge constitutional provisions or this nation's international agreements. In *United States v. Wright-Barker*,[45] the United States Coast Guard boarded a Panamanian freighter in international waters approximately 200 miles east of the New Jersey coast. The crew of the freighter were citizens of countries other than the United States. A search of the vessel uncovered twenty-three tons of marijuana, and the defendants were arrested and charged with, among other things, possession of a controlled substance with the intent to distribute.[46] The issue in the case was whether the United States courts had jurisdiction to enforce the federal narcotics laws extraterritorially.

The court stated that one "hurdle is the traditional requirement of international law that a state apply criminal jurisdiction to acts committed outside its territorial borders only where an effect occurs within those borders."[47] The court cleared this hurdle by determining that the importation and distribution of twenty-three tons of marijuana would clearly have a harmful effect in the United States; and thus the situation justified federal law enforcement.

The court, relying upon *United States v. Bowman*,[48] stated that the nature of the defendant's offense inferred extraterritorial jurisdiction because to limit the locus of his crime to a strictly territorial jurisdiction would greatly curtail the law's usefulness. The court's reasoning focused on the criminal's ability to commit the crime with a like degree of effort either at home, on the high seas, or in a foreign country. *Bowman* sets forth in pertinent part:

> If punishment [for crimes such as robbery or arson] is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. . . . But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially

44. *Nahas*, 738 F.2d at 496.
45. United States v. Wright-Barker, 784 F.2d 161 (3rd Cir. 1986).
46. *See* 21 U.S.C. § 841 (1989).
47. *Wright-Barker*, 784 F.2d at 167 (quoting Stassheim v. Daily, 221 U.S. 280, 285 (1911)).
48. United States v. Bowman, 260 U.S. 94 (1922).

> if committed by its own citizens, officers, or agents. . . . [Some offenses] are such that to limit their *locus* to the strictly territorial jurisdiction would be to greatly curtail the scope and usefulness of the statute. . . . In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[49]

The *Wright-Barker* court then stated that federal statutes forbidding possession of a controlled substance with the intent to distribute or import the substance were "intended [by Congress] to have extraterritorial application. . . ."[50] The court held that Congress' intent to apply the enumerated statutes extraterritorially was reasonable, and affirmed the defendant's conviction.[51]

Similarly, the Sixth Circuit held that the FBI's investigative authority lawfully extends into foreign countries while investigating activities having an effect inside the U.S.[52] Additionally, the Fifth Circuit held that an FBI agent is authorized to investigate an incident outside United States boundaries and take the suspect into custody both under the FBI's general power to arrest and under international principles of jurisdiction.[53]

In conclusion, the FBI may have jurisdiction to perform extraterritorial arrests under the direction of the Attorney General, as authorized by Congress, only when the following elements are in place: First, the assertion of jurisdiction cannot abridge the provisions of the U.S. Constitution; second, the jurisdiction does not abridge a binding treaty to which the United States is a party; third, the fugitive's alleged crime must have a past, present, or future impact inside the territory of the United States (the territorial impact test); and fourth, there is a clear congressional mandate that the statute be enforced internationally, or the crime is of a nature that it can be committed with similar ease in either a foreign country, on the high seas, or at home (the congressional mandate test). As expressed in *Wright-Barker*, the crimes that are central to President Bush's war on drugs probably satisfy the

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49. *Id.* at 98.

50. *Wright-Barker*, 784 F.2d at 168. Specifically, the statutes cited were 21 U.S.C. §§ 952(a), 960(a)(1), 955a(d)(1), 960(a)(2), 841(a)(1), and 841(b)(6).

51. *Wright-Barker*, 784 F.2d at 168.

52. Jabara v. Webster, 691 F.2d 272, 276 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983)(FBI gathered information oversees in investigating an attorney active in various Arab organizations).

53. *In re* Chan Kam-shu, 477 F.2d 333, 337 (5th Cir. 1973); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988).

territorial impact and congressional mandate tests above. The importation of illegal narcotics has negatively impacted the United States. Moreover, the crime, by nature, is routinely carried out in foreign countries and on the high seas. Thus, the first two elements, the constitutional rights of the fugitive and the international ramifications of the extraterritorial arrest, are explored in sections two and three, below.

2. The Extraterritorial Arrest and the Constitution. Honoring the civil rights of the fugitive is the central issue involved in performing an extraterritorial arrest within the strictures of the U.S. Constitution. This issue encompasses the extraterritorial fugitive's right to procedural due process, equal protection, and to be secure from unreasonable searches and seizures.

An FBI abduction of an international fugitive in a foreign country necessarily involves taking the fugitive into custody, thereby depriving the fugitive of his liberty and freedom. The Bill of Rights of the U.S. Constitution sets forth limits upon the authority of the government to infringe upon a person's individual rights to freedom and liberty.[54] These constitutional limitations bind the government even when it takes actions that affect citizens outside the country's territory.[55]

The Constitution requires that the government shall not deprive any person of liberty "without due process of law."[56] Due process is rendered when the accused is regularly indicted by a grand jury, has a fair trial, and is not deprived of rights he is lawfully entitled to at trial.[57] When applied to incidents involving an extraterritorial arrest, this well-settled rule of constitutional law is commonly referred to as the Ker-Frisbie doctrine.[58]

Today, the 2nd, 4th, 5th, 7th, 8th, 9th, 10th, and 11th Circuit Courts have held that due process is satisfied in matters of extraterritorial arrest when a person is apprised of the charges against him and is given a fair trial.[59] In many cases, the fugitive's right to due

54. *See* U.S. CONST. amends. I - X.

55. Reid v. Covert, 354 U.S. 1, 5 (1957); Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1985)

56. U.S. CONST. amend. XIV.

57. Ker v. Illinois, 119 U.S. 436, 440 (1886); Frisbie v. Collins, 342 U.S. 519, 522 (1951).

58. The hyphenation Ker-Frisbie is derived from the two watershed cases in this area, Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1951).

59. United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975); Brown v. Fogel, 387 F.2d 692, 696 n.7 (4th Cir. 1967); United States v. Herrera, 504 F.2d 859, 860

process is not even affected when seemingly inappropriate methods of apprehension are used to bring the defendant under the jurisdiction of a United States court.[60] For example, the Eleventh Circuit held that even though a person was captured at gunpoint in Honduras by an American agent, put on a plane against his will, and flown to Miami, such procurement does not deprive the court of personal jurisdiction over him.[61] Similarly, the Fifth Circuit ordered the prosecution of a defendant even though federal agents tricked him into believing he was taking a plane trip from Libya to the Dominican Republic, when in fact he boarded a commercial airline bound for the United States.[62] Thus, a defendant cannot categorically say he is denied due process of law because he has been brought to the court's jurisdiction by means of a forcible or unscrupulous extraterritorial abduction.[63]

However, courts have found that due process of law is not completely heedless of the means by which a fugitive is obtained.[64] In *United States v. Toscanino*, the Second Circuit limited the Ker-Frisbie doctrine and stated that a court must now "divest itself of jurisdiction over the person . . . where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[65] The court stated that "[m]ethods too close to the rack and screw" that "of-

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(5th Cir. 1974); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988); United States v. Vicars, 467 F.2d 452, 456 (5th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326, 328 (7th Cir. 1971); Sewell v. United States, 406 F.2d 1289, 1292 n.2 (8th Cir. 1969); Tynan v. Eyman, 371 F.2d 764, 766 (9th Cir. 1967), *cert. denied*, 393 U.S. 954; United States v. Sherwood, 435 F.2d 867 (10th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

60. Autry v. Wiley, 440 F.2d 799, 801 (1st Cir. 1971); United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979); United States v. Cadena, 585 F.2d 1252, 1257 (5th Cir. 1978) (questionable abduction on the high seas outside of territorial waters); United States v. Williams, 617 F.2d 1063, 1073-74 (5th Cir. 1980); United States v. Darby, 744 F.2d 1508, 1531-32 (11th Cir. 1984).

61. *Darby*, 744 F.2d at 1531 (apprehension of a drug smuggler with acquiescence of the Honduran government).

62. United States v. Wilson, 732 F.2d 404, 410 (5th Cir. 1984) (no reference to Libyan complicity with the apprehension; however, the arrest was apparently made after the plane the defendant was flying on, accompanied by the undercover agents, had left Libya); *see also* United States v. Reed, 639 F.2d 896, 901-02 (2d Cir. 1981) (bail-jumper abducted in Bimini).

63. *Wilson*, 732 F.2d at 410.

64. Rochin v. California, 342 U.S. 165, 172 (1952); United States v. Yunis, 681 F. Supp. 909, 918 (D.C. Cir. 1988); United States v. Cotroni, 527 F.2d 708, 711 (2d Cir. 1975); United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981).

65. United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974); *see* United States v. Romano, 706 F.2d 370 (2d Cir. 1983) (drug transaction initiated by an American informant and involving Italian defendant, where the government supplied the drugs, was not outrageous conduct).

fend a sense of justice" cannot be used to bring about convictions.[66] To assist in the eradication of "torture, brutality, or similar outrageous conduct" by the federal agents, a court must divest itself of jurisdiction over a person arrested in this fashion because such acts are violative of the person's constitutional rights to due process and equal protection.[67] This broader interpretation of due process bars the government from realizing the fruits of its unnecessary lawlessness when apprehending fugitives, and is applicable to instances of extraterritorial arrest.[68]

Another relevant constitutional consideration is whether the extraterritorial arrest is an unreasonable seizure of the fugitive's person, in violation of the fourth amendment of the Constitution.[69] A violation of the fugitive's fourth amendment rights may constitute a basis for the dismissal of the indictment, even though the fugitive is outside the boundaries of the United States.[70]

Once any fugitive is subjected to criminal prosecution, he is entitled to the protection of the fourth amendment.[71] It is well settled that the seizure of a person for whom there is a valid and proper warrant outstanding is both authorized and reasonable within the modern interpretations of the fourth amendment.[72] Thus, the seizure of the fugitive is not violative of his constitutional rights when there is a valid and outstanding warrant for his arrest.[73]

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66. *Toscanino*, 500 F.2d at 267 (kidnapped in Uruguay by U.S. agents, Toscanino's nourishment was provided intravenously in precise life-preserving increments, his captors pinched his fingers with pliers, flushed his eyes and nose with alcohol, administered jarring bolts of electricity to his genitals, and utilized the Chinese hall-walking torture, etc., with intermittent participation by a member of the Bureau of Narcotics and Dangerous Drugs); Rochin v. California, 342 U.S. 165 (1952) (without a warrant, defendant's bedroom was forcibly entered by police. He was than assaulted and hand-cuffed, and subsequently had a vomit-causing solution forced down a tube in his nose, in order to obtain two capsules which were swallowed in an officer's presence); United States v. Russell 411 U.S. 423, 431-32 (1972) ("[w]e may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . ."); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

67. Mapp v. Ohio, 367 U.S. 643, 649 (1961); *Toscanino*, 500 F.2d at 271.

68. *Toscanino*, 500 F.2d at 272; *Russell*, 411 U.S. at 430.

69. U.S. CONST. amend. IV.

70. *Cadena*, 585 F.2d at 1261. *But see* United States v. Verdugo-Uriquidez, 110 S. Ct. 1056, 1059 (1990), where the Court held that the fourth amendment does not apply to search and seizure by United States agents of property that is owned by a nonresident alien located in a foreign country.

71. *Reid*, 354 U.S. at 1; Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States v. Winter, 509 F.2d 975 (5th Cir. 1975).

72. U.S. CONST. amend. IV; *see* Wong Sun v. United States, 371 U.S. 471 (1962); Gerstein v. Pugh, 420 U.S. 103 (1974). *But see Verdugo-Urquidez*, 110 S. Ct. at 1059, and *supra* note 70.

73. For the sake of brevity, the collateral matter of when an arrest is valid without a

In conclusion, a properly performed extraterritorial arrest will not violate the fugitive's constitutional rights to due process, equal protection, and protection from unlawful search and seizure. To be properly performed, the abduction must be conducted in a humane manner, exclusive of violent harm to the fugitive's person, and there should be a valid warrant for the fugitive's arrest.

3. A Treaty's Effect on the Jurisdiction of the United States. The constitutional requirements having been fulfilled, the following is a discussion concerning the effects that a treaty may have on a domestic court's jurisdiction. The United States Constitution declares that treaties made under the authority of the United States shall be the supreme law of the land.[74] The President has the power to make treaties, provided two-thirds approval by the Senate.[75] A treaty is on the same footing and is equally binding as an act of legislation.[76] The treaty acts as a contract between the signatories with regard to the specific matters addressed in the body of the agreement.[77] If a treaty and a federal statute are inconsistent, the last in date will control.[78] In such situations, Congress need not justify legislation that modifies the treaty, and such modification is not a matter for judicial attention.[79] Consequently, such a treaty may void jurisdiction over a fugitive apprehended via an extraterritorial arrest if the treaty were given the effect of law.[80]

The Supreme Court addressed the issue of a binding treaty limiting the court's jurisdiction in *Cook v. United States*.[81] In *Cook*, the United States Coast Guard seized a British ship which was eleven and one-half miles from the U.S. coastline. The Tariff Act of 1922 authorized the search of all vessels within twelve miles of the coast.[82] The defendants were arrested and indicted for smuggling liquor because the ship's log did not register the liquor as cargo.

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warrant will not be discussed here. For the purposes of arresting known international drug traffickers, it will be assumed that a valid arrest warrant has been issued and there is probable cause of a crime having been committed.

74. U.S. CONST. art. VI.

75. U.S. CONST. art. II, § 2.

76. Whitney v. Robertson, 124 U.S. 190, 194 (1887); Blanco v. United States, 775 F.2d 53, 61 (2d Cir. 1985); Cal-Fruit Suma Int'l v. United States Dep't of Agric. 698 F. Supp. 80, 83 (E.D. Pa. 1988).

77. *Whitney*, 124 U.S. at 77; U.S. CONST. art. VI.

78. *Whitney*, 124 U.S. at 194.

79. *Id.*

80. *Id.*; Foster v. Neilson, 27 U.S. (2 Pet.) 253, 311 (1829); *Postal*, 589 F.2d at 875.

81. Cook v. United States, 288 U.S. 102 (1932).

82. *Id.*

The defendants argued that a 1924 treaty that both Britain and the United States had signed proscribed the Coast Guard's boarding of British ships beyond ten miles of the U.S. coast. Therefore, it was argued, the search and subsequent arrests were unauthorized because the 1924 treaty modified the 1922 Act, and thus the case should be dismissed.

The Court held that the 1924 Treaty, being later in date than the Act of 1922, superseded any inconsistencies between the two bodies of law.[83] The court then dismissed the case, holding that "the government lacked the power to seize, since by the treaty it had imposed a territorial limitation upon its own authority."[84]

More utopian reasons for honoring a binding treaty were given by Judge Bourquin in *United States v. Ferris*, when he stated that "[a] decent respect for the opinions of mankind, national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented in treaties shall be scrupulously observed."[85] Cases of a more recent vintage uphold Judge Bourquin's sentiments.[86] Not all treaties, however, bind a court to follow its strictures as law.[87] Rather, a court is obligated to adhere to a treaty's stipulations only when the treaty is self-executing in nature or is given effect by congressional legislation.[88]

a. The Self-Executing Treaty Doctrine and the Executory Treaty. Not all treaties addressing the issue of national sovereignty will have an effect on a United States court's ability to prosecute an extraterritorially apprehended fugitive. Rather, only those treaties that are self-executing or contain an executory provision may bind the United States when it prosecutes fugitives who have fled the country.[89]

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83. *Id.* at 121.
84. *Id.*
85. United States v. Ferris, 19 F.2d 925, 927 (S.D. Idaho 1927).
86. *See* United States v. Quemener, 789 F.2d 145 (2d Cir. 1986) (seizure of British sail-boat transporting marijuana was allowed because the seizure did not violate a treaty between the United States and Britain); Floyd v. Eastern Airlines, 872 F.2d 1462, 1470 (11th Cir. 1989) (valid claim under the Warsaw Convention preempts the contrary state law); Vorhees v. Fischer & Krecke, 697 F.2d 574, 575 (4th Cir. 1983) (plaintiff given a reasonable opportunity to affect valid service in a manner complying with the Hague Convention because a self-executing treaty is of equal dignity with acts of Congress); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1443 (D.C. Cir. 1988) (provisions of the Oklahoma Indian Welfare Act granting tribes the right to organize courts repealed the previously enacted Curtis Act which proscribed such courts).
87. *Cook*, 288 U.S. at 120.
88. *Id.*
89. Fernandez v. Wilkerson, 505 F. Supp. 787, 796 (D. Kan. 1980), *appeal decided*

A self-executing treaty can have full force and effect of law without express legislative adoption if the language in the treaty expresses that the treaty will become the law of the signatories.[90] When the issue is presented in litigation, the question of whether a treaty is self-executing is a matter of interpretation for the courts.[91] The parties' intent may be determined by the language of the treaty, or, if the language is ambiguous, may be ascertained by the circumstances surrounding the treaty's promulgation.[92] The courts may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.[93] The court will then attempt to discern the intent of the parties regarding the agreement, so as to carry out their manifest purpose.[94]

If the treaty is not self-executing, it may contain an executory provision.[95] The executory provision is a stand-alone clause in the treaty.[96] The clause directs the legislatures of one or more of the parties to adopt the treaty's stipulations as that nation's own law. Even without a stand-alone executory provision, treaties with express language directing that the treaty be given effect by congressional legislation have uniformly been declared as executory.[97] The United States adoption of the treaty's language is consummated upon congressional ratification of the treaty.[98]

In summary, only treaties that are self-executing or that contain

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654 F.2d 1382 (10th Cir. 1981).

90. *Whitney*, 124 U.S. at 194; *Cook*, 288 U.S. at 119.

91. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(1) (1965); United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979). There are four factors relevant to determining whether a treaty is self executing. They are: (1) the purposes of the treaty and the objective of its creators; (2) the existence of objective procedures and institutions appropriate for direct implementation; (3) the availability and feasibility of alternative enforcement methods; and (4) the immediate and long range social consequences of self or non-self-execution. *See* People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985).

92. *Cook*, 288 U.S. at 112; Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976); *Postal*, 589 F.2d at 876.

93. Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943); *Saipan*, 502 F.2d at 97.

94. A. MCNAIR, LAW OF TREATIES 365 (1961); *Postal*, 589 F.2d at 876.

95. An executory provision is a special provision within a treaty which expressly provides that congressional legislation will be recommended and forthcoming so as to statutorily bind the U.S. courts to the treaty's jurisdictional stipulations.

96. A stand-alone provision in a treaty is a written clause which is separate from the main body of the agreement, but is nevertheless a part of the agreement, or attached to the agreement document.

97. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 311-12 (1829).

98. *Id.*

an executory provision have the force and effect of law. In a case involving extraterritorial arrest, only these treaties can divest U.S. courts of jurisdiction over the matter and/or the fugitive, if such is the intent of the treaty.[99]

b. The United Nations Charter. The United Nations Charter is an important document in determining the rights of nations concerning international matters.[100] The Charter is a treaty and its relevance is generally conditioned upon the asylum state joining with the United States as a signatory to the treaty.[101] Commentators have stated that violating the sovereignty of a member state, such as conducting an extraterritorial arrest within the member's borders, is incompatible with the United Nations Charter.[102] Moreover, all signatories to the United Nations Charter promise to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.[103]

While the United States is in fact a signatory to the treaty, U.S. courts have held that the provisions of the United Nations Charter are not self-executing. Furthermore, the Charter does not have an executory clause.[104] Accordingly, U.S. courts are not bound by the Constitution or common law precedent to adhere the Charter's guidelines. Consequently, the Charter's importance is greatly diminished as a determinative factor in this Comment because the courts are not required to relinquish jurisdiction over a fugitive abducted in violation of the Charter's tenets.

c. The Extradition Treaty. Another important treaty in matters of extraterritorial apprehensions is the implicated country's extradition treaty.[105] The United States has extradition treaties with many countries.[106] Nevertheless, it is well established that the existence of

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99. *Cook*, 288 U.S. at 112; Ford v. United States, 273 U.S. 593, 610 (1927).

100. 4 Op. Off. Legal Couns. 543, 545 (1980).

101. When foreign nationals are seized in violation of a treaty, only the signatory nations and not the individual citizens can protest the treaty. *Lugan*, 510 F.2d at 67.

102. Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Adduction, or Irregular Rendition?*, 57 OR. L. REV. 51, 63 (1977); Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961).

103. U.N. CHARTER, art. 2, ¶ 4.

104. *Id.*

105. 4 Op. Off. Legal Couns. 543 (1980).

106. *See Ker*, 119 U.S. at 444; Waits v. McGowan, 516 F.2d 203, 206-208 (3rd Cir. 1975); United States v. Sobell, 244 F.2d at 524-25 (2d Cir. 1957), *cert. denied*, 355 U.S. 873 (1957).

an extradition agreement does not defeat the United State's jurisdiction over a fugitive apprehended outside the extradition mechanism.[107] Essentially, jurisdiction is upheld because the purpose of an extradition treaty is more closely tailored to the needs of the signatory nations rather than the needs of an asylum-seeking fugitive.[108] In other words, the extradition laws are intended to benefit the nation that wants to apprehend the fugitive, instead of aiding a fugitive in his flight from the pursuing nation. The treaty regulates asylum status and extradition by limiting the fugitive's right to asylum, not by guaranteeing such a right.[109] Furthermore, a fugitive lacks standing to raise the treaty as a basis for challenging the court's jurisdiction because he is not a party to the treaty.[110] Generally, extradition treaties do not express that the United States will yield jurisdiction over nationals who have committed crimes in this country simply because they obtained refuge in the asylum state.[111] In addition, the right of a sovereign state to voluntarily give a fugitive asylum in that country is quite apart from a unilateral right of the fugitive to demand asylum and remain in the state.[112] Extradition guidelines merely provide that one who is proven to be a criminal fleeing justice may, on proper demand of the fugitive's country of citizenship and proceedings therein, be delivered to the country where the crime was committed.[113]

Therefore, the laws regulating asylum and extradition do not "entitle" a fugitive to asylum in the country where he has fled.[114] As a consequence, a fugitive's personal aspirations concerning asylum status or his immunity from extradition are not determinative in the extraterritorial arrest issue.

In conclusion, the existence of an extradition treaty does not provide a per se prohibition of employing alternative means to bring wanted fugitives to justice, such as the extraterritorial arrest.

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107. *Ker*, 119 U.S. at 444.
108. *Id.*
109. *Id.*
110. United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (acting on a complaint based upon an informant's tip, DEA agents flew to Guatemala and abducted Zabaneh, a citizen of Belize, at the airport. He was strip-searched and detained and flown back to Texas, where he was formally arrested. When Zabeneh argued that international extradition treaties deprived the U.S. courts of jurisdiction, the court held that treaties are contracts among nations, that neither Guatemala nor Belize protested Zabeneh's abduction and removal to the United States, and therefore Zabeneh lacked standing to raise the treaties as a basis for challenging the court's jurisdiction).
111. *Ker*, 119 U.S. at 444.
112. *Id.* at 442.
113. *Id.*
114. *Id.*

Rather, the extradition treaty provides a method or system for the conventional and orderly transfer or exchange of fugitives held in one country and wanted by another country.

d. Unilateral Amendment of a Binding Treaty. There are methods by which the limiting language in a treaty may be circumvented. Employing one of these methods allows a treaty signatory that does not wish to be bound by one or more of a treaty's strictures to amend any undesirable language.

For instance, if a signatory is dissatisfied with the treaty, it may present its complaint to the executive head of the other signatory's government.[115] Another effective method of circumvention is the unilateral legislative modification, which withholds the execution of one or more of the treaty's clauses.[116] Similarly, a congressional amendment to a treaty cannot be challenged on the grounds that it violates customary international law.[117] Congress remains free to legislate with respect to extraterritorial conduct, and is subject only to the limitations of the Constitution.[118] The treaty will be deemed abrogated or modified by a later statute only if such purpose has been clearly expressed by Congress.[119] Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its enactment.[120] Such modifications do not alter the effectiveness of the unamended portion of the treaty.[121] Lastly, these modifications are not judicial matters; rather, they are controlled by to the legislative and executive branches of the government.[122]

Congress' motivation for making post-signatory modifications is wholly immaterial. The duty of the courts is to construe and give effect to the latest expression of the sovereign's will, as expressed by either the treaty or Congress.[123] Therefore, judicial interpretation of a treaty is subject to such acts as Congress may pass for its enforcement, modification, or repeal.[124] Finally, this ability to pre-

115. Whitney v. Robinson, 124 U.S. 190, 194 (1888).
116. *Id.* at 194-95.
117. Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988).
118. U.S. v. Biermann, 678 F. Supp. 1437, 1445 (N.D. Cal. 1988).
119. *Cook*, 288 U.S. at 120.
120. *Id.*
121. *Whitney*, 124 U.S at 195.
122. *Id.*
123. *Id.*
124. *Id.*

empt a prior and contradictory treaty applies to customary international law as well.[125]

One exception to Congress' ability to unilaterally amend international agreements deals with peremptory norms. Peremptory norms of international law, or *jus cogens*, enjoy the highest status within international law and are absolutely binding upon the U.S. as a matter of domestic law.[126] Examples of peremptory norms include the prohibition of slavery, torture, genocide, and racial discrimination.[127] Peremptory norms are recognized by the international community as a whole, and no derogation is permitted.[128] According to the Vienna Convention on the Law of Treaties, any legislative modification of a treaty which violates a peremptory norm is void.[129]

Clearly, an extraterritorial arrest, in and of itself, is not an indignity of a similar class as the examples of peremptory norms listed above. Therefore, a unilateral legislative modification of a treaty to permit an extraterritorial arrest would not violate a peremptory norm of international law.

In conclusion, a self-executing or executory treaty may effectively prevent the lawful performance of an extraterritorial arrest, if that is the purpose of the document. Extradition treaties, while providing for an orderly extradition of a signatory's fugitives, do not prevent the return of the fugitives by means outside of the extradition mechanism. Congress may unilaterally amend any treaty at any time, unless the modification would violate peremptory norms of international law. This ability to amend a treaty gives the United States great latitude in tailoring any binding treaty to conform to changes in policy such as the utilization of the extraterritorial arrest in apprehending international drug traffickers and other fugitives who have fled the country.[130]

4. Authority of the United States Courts to Prosecute Fugitives Apprehended in Violation of Customary International Law. Detractors of the non-consensual extraterritorial arrest argue that even if the act does not violate the Constitution or a binding treaty,

125. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

126. *Reagan*, 859 F.2d at 940.

127. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). Tel-oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1985).

128. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 203-07 (2d ed. 1984).

129. *Id.*

130. *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976).

the intrusion on a raided country's sovereignty is a violation of *customary international law*, and as such, the court should repudiate jurisdiction over the fugitive. This section details customary international law as it pertains to the non-consensual extraterritorial arrest issue. Both the political and domestic law aspects of customary international law are discussed. Lastly, there is a discussion regarding the potential for modification of customary international law by an executive act.

"Customary international law" is the manifestation of an international custom that accepts a general practice among nations as law. It is the result of a general and consistent practice that is followed by nations from a sense of legal obligation.[131] A state may opt out of a customary international law during its formative stage by refusing to consent to it.[132] Once the practice has acquired the status of law, the law is obligatory for all states that have not objected to it.[133]

There is a widely held conviction or "custom" among nations that no state shall prosecute or punish any person who has been brought within its territory by measures in violation of international law without first obtaining the consent of the state whose rights have been violated.[134] In *Lugan v. Gengler*,[135] the court plainly stated that the abduction of a fugitive from another country, without that country's consent, is indeed a violation of customary international law.[136] However, the court expressly reserved judgment as to whether such a violation alone would require dismissal of an indictment.[137] Hence, the crux of this issue is whether a fugitive apprehended via a non-consensual extraterritorial arrest, and in violation of customary international law, may be subjected to prosecution by a United States court.

To the extent possible, U.S. courts must construe American law so as to avoid violating general principles of international law.[138] However, the concept of a sovereign enforcing its domestic laws,

131. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).
132. Anglo-Norwegian Fisheries (U.K. v. Nor.) 1951 I.C.J. 116, 160-62 (Dec. 18).
133. *Id.*
134. Dickinson, *Jurisdiction With Respect To Crime*, 29 AM. J. INT'L L. SUPP. 439, 623-24 (1935).
135. United States *ex rel.* Lugan v. Gengler, 510 F.2d 62 (2d Cir. 1975).
136. *Id.* at 68; *see also* FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1316 (D.C. Cir. 1980).
137. *Id.*
138. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch), 64, 101-02 (1804); Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

although contrary to international law, is a fundamental aspect of the international law's accommodation to principles of national sovereignty.[139] The Nuremburg tribunal articulated this sentiment in *United States v. Altstoetter*,[140] when it stated:

> [t]his universality and superiority of international law does not necessarily imply universality of its enforcement . . . . The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus, notwithstanding the paramount authority of the substantive rules of common international law, the doctrines of national sovereignty have been preserved through the control of enforcement machinery.[141]

Hence, if the United States were considered to be absolutely bound to *enforce* all customary international law without the possibility of exception, our country's sovereignty would be in danger of abrogation by international law. Thus, U.S. courts are obliged to give deference to customary international law, but contrary international laws do not control the courts as binding precedent.

a. Classifying the International Law Violation as a Matter for Political Resolution. In the United States, there is a line of cases that deal with the prosecution of individuals apprehended in violation of customary international law, regardless of the accomanying formal international protest. These cases hold that the courts may interdict or overrule the enforcement of the international law by classifying the violation as an international and political matter that would best be addressed by the executive branch of the government, as distinguished from a domestic matter within a court's jurisdiction.[142]

For example, in *Ex Parte Lopez*,[143] the defendant was abducted from Mexico by U.S. agents for violation of narcotics laws. During the trial in Texas, the government of Mexico intervened and demanded that the accused be delivered into its custody because the abduction was in violation of international agreements between the two governments. The court dismissed the intervention, holding

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139. Handel v. Artukovic, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985).

140. *Id.* at 1427 (citing United States v. Altstoetter) (The "Justice case") III Trials of War Criminals, U.S. Gov't Printing Off., Wash. D.C. (1951)).

141. *Id.*

142. *See generally Garcia-Mir*, 788 F.2d at 1455; The Paquete Habana, 175 U.S. 677 (1900); and Dickinson, *supra* note 134, at 628.

143. *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934).

that while the government of Mexico raises a serious complaint, that being a violation of its sovereignty, the district court had no jurisdiction over the complaint.[144] Rather, Mexico's complaint should be presented to the Executive Department of the United States.[145] The court held that it indeed had jurisdiction to adjudicate the alleged criminal violation.

In *State v. Brewster*, a Canadian was forcibly taken against his will from Canada to the United States for prosecution.[146] The defendant moved for dismissal of the indictment because of the extraterritorial nature of the abduction. The court responded:

> [i]t becomes immaterial, whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there were anything improper in the transaction, it was not that the prisoner was entitled to the protection on his own account. The illegality, if any, consists in the violation of the sovereignty of an independent nation. If that Nation complains, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court.[147]

The court upheld jurisdiction over the defendant.

In *The Ship Richmond v. United States*,[148] the United States Supreme Court held that seizing a vessel within the territorial jurisdiction of a foreign power is certainly an offense against that power.[149] Yet, the Court held that "[t]his court can take no cognizance of it; . . . the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel."[150] The jurisdiction of the court was upheld.[151]

The Supreme Court, in *Cook v. United States*,[152] distinguished the violation of a binding treaty from a violation of customary international law. The *Cook* Court referred to *The Ship Richmond*[153] and *The Merino*[154] where the forfeitures of vessels seized in viola-

144. *Id.* at 343.
145. *Id.*
146. State v. Brewster, 7 Vt. 118 (1835).
147. *Id.* at 121-22.
148. The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102 (1815).
149. *Id.* at 103.
150. *Id.*
151. The Court reiterated this policy of separating political issues from judicial issues nine years later in The Merino, 22 U.S. (9 Wheat.) 391, 398-401 (1824).
152. Cook v. United States, 288 U.S. 102 (1932).
153. *The Ship Richmond*, 13 U.S. (9 Cranch) 102.
154. *The Merino*, 22 U.S. (9 Wheat.) 391.

tion of international law were upheld.

> There, the vessels seized were of American registry; and the seizures did not violate any treaty, but were merely violations of the law of nations because made within the territory of another sovereign. In those actions it was held that the illegality of the seizures did not affect the venue of the action or the process of the court. Here, the objection is more fundamental.[155]

In *United States v. Blanco*,[156] Blanco, a Colombian national, was arrested in California ten years after her indictment for drug trafficking was filed. Federal agents had Blanco under surveillance throughout the ten year period, but decided not to arrest her for a variety of reasons.[157] Blanco claimed this delay denied her right to a speedy trial under the sixth amendment. Blanco argued, among other things, that the U.S. had an affirmative duty to seize her while she was in Colombia. The agent had not arrested Blanco there because Colombia had a policy of refusing to extradite its citizens to the United States, and Colombia had not consented to Blanco's seizure. In response, the Second Circuit stated that "[w]hile the government's illegal seizure of a defendant in another country does not, standing alone, automatically deprive the courts of jurisdiction over the defendant . . . it surely does not follow that the government had a duty to make such a seizure."[158] This passage could be interpreted to state affirmatively that a non-consensual extraterritorial arrest in violation of customary international law, without more, does not divest the court of jurisdiction over the abducted fugitive.

In conclusion, the court may prosecute the extraterritorially apprehended fugitive by classifying the international law violation as a matter for political resolution, as distinguished from a domestic matter within its jurisdiction. By classifying the violation of international law as a matter outside its purview, the court may then disregard the violation as irrelevant to the instant proceeding. Thus, several older cases, as well as the recent dicta of the judiciary, indicate that a violation of customary international law does not neces-

155. *The Ship Richmond*, 13 U.S. (9 Cranch) at 122.

156. United States v. Blanco, 861 F.2d 773 (2d Cir. 1988).

157. *Id.* at 778-779. The reasons that Blanco was not arrested earlier include: (1) Blanco lived a portion of the time in Colombia which has a policy of not extraditing its citizens; (2) while Blanco was in America, Government agents were afraid of endangering the life of an informant; and (3) the agent feared Blanco's arrest would jeopardize an investigation of Blanco's sons.

158. *Id.* at 779.

sarily divest a United States court of jurisdiction over the domestic issues presented in the case.

b. Overriding Customary International Law with the Executive Act. Classifying the international law violation as a political matter is not the sole theory upon which a United States court may prosecute a person apprehended in violation of international law. Rather, customary international law is controlling only "where there is no treaty and no controlling executive or legislative act or judicial decision."[159] Thus, the "executive act" is another theory under which the courts may prosecute those apprehended in violation of international law.

In 1986, the Eleventh Circuit held that an executive act by the Attorney General may, in certain circumstances, overrule contrary international law.[160] In *Garcia-Mir*, the plaintiff, a Cuban Mariel refugee, was arbitrarily detained as a result of an order by the Attorney General. The plaintiff argued that the court should grant an order releasing him from custody, claiming that his current detention was unlawful. In his argument, the plaintiff stated that the principles of customary international law forbade the prolonged arbitrary detention of aliens. Furthermore, the plaintiff argued, there had not been an affirmative legislative grant of authority to detain, nor was there a controlling executive act which might override the international law violation.

In its analysis, the court noted that the governing deportation statute did not restrict the power of the Attorney General to detain aliens indefinitely. The court then stated:

> [t]he President, "acting within his constitutional authority, may have the power under the Constitution to act in ways that constitute violations of international law by the United States." The Constitution provides for the creation of executive departments, and the power of the President to delegate his authority to those departments to act on his behalf is unquestioned. . . . [T]he power of the President to disregard international law in the service of domestic needs is reaffirmed. Thus we hold that the executive acts here evident constitute a sufficient basis for . . . finding that international law does not control.[161]

The court then stated: "[t]his reflects the obligation of the courts to

159. *Paquete Habana*, 175 U.S. at 700.
160. *Garcia-Mir*, 788 F.2d at 1446.
161. *Id.* at 1454-55.

avoid any ruling that would 'inhibit the flexibility of the political branches of government to respond to changing world conditions. . . .' "[162] The court held that the plaintiff was not entitled to parole revocation hearings on the basis of international law since any rights that previously existed had been extinguished by the Attorney General, acting on behalf of the President.[163]

Just as Congress did not restrict the Attorney General from arbitrarily detaining aliens, Congress has not restricted the power of the Attorney General to authorize the extraterritorial arrest.[164] The FBI may conduct investigations as may be directed by the Attorney General.[165] Thus, it may be argued, an order by the Attorney General that authorizes the extraterritorial arrest would constitute an executive act. This executive act would control any contrary international laws, and facilitate the prosecution of the arrested individual.

In conclusion, a series of older cases expressly state that arrests made in violation of customary international law are political matters, and as such, the violations are not within the purview of the domestic courts. More recently, a federal court stated in dicta that international law violations, without more, may not divest the court of jurisdiction. Finally, customary international law can be interdicted or overruled by an executive act of the President or the Attorney General.

III. PROPOSALS FOR INTERNATIONAL CONSIDERATION

As detailed above, the United States, as a self-determined and sovereign country, has claimed the right to prosecute international fugitives such as drug traffickers within its courts. While this "right" should prove advantageous in President Bush's war on drugs, the ability to prosecute those apprehended does not address the second key issue of the extraterritorial arrest. That is, whether there is a remedy for the political agitation that inevitably follows a non-consensual extraterritorial arrest. This Comment sets forth proposals for both a short term political solution and a long term international legal solution.

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162. *Id.* at 1455; *see also* Mathews v. Diaz, 426 U.S. 67, 81 (1976).
163. *Garcia-Mir*, 788 F.2d at 1454.
164. *See* 28 U.S.C. § 533(c) (Supp. 1990).
165. *Id.*

A. A Political Remedy

Commentators agree that the sovereign nation whose laws have been violated by another sovereign nation is entitled to relief.[166] However, the courts are not in a position to adjudicate such a violation. Courts are merely an arm of a nation, and they maintain a jurisdiction that can rise no higher than the jurisdiction of the nation itself.[167] Thus, a domestic court is not the proper forum for an international political conflict of this nature.[168] On the contrary, these international disputes require an international political solution because the violation is essentially political in nature.[169]

This political remedy regarding the infringement on sovereignty issue would call for the trespassing nation paying reparations in the form of money damages to the nation whose sovereignty has been violated. The amount of the settlement could be determined by a neutral third party such as the United Nations. This view is by no means a novel one. The Restatement (Third) of the Foreign Relations Law of the United States sets forth in pertinent part that "if a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparations from the offending state."[170]

In 1960, Israeli nationals abducted a fugitive from Argentina and Argentina formally protested the act. The United Nations requested that the Government of Israel make "appropriate reparations" in accordance with the United Nations Charter and international law.[171] A U.N. demand that the Israelis return the fugitive to Argentina was conspicuously absent from the resolution, as was a demand to punish the fugitive's captors. It is possible that the United Nations was proposing a money settlement from the Israelis in favor of Argentina for their obvious violation of Argentina's sovereignty.[172] Israel refused to admit any wrongdoing. Instead, Israel responded with a conditional apology stating that *if* any laws were broken, they wished to express their regrets.[173]

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166. Dickinson, *supra* note 134, at 628.
167. Dickinson, *Jurisdiction Following Search or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 233 (1934).
168. *Id.*
169. Dickinson, *supra* note 134, at 628.
170. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 432 (1987).
171. Silving, *supra* note 102, at 312-15.
172. *Id.*
173. *Id.* at 318.

In conclusion, the invasion of sovereignty issue may best be remedied by a monetary settlement that is negotiated and arbitrated within the existing international political framework of the United Nations. The concept of monetary reparations has been indirectly proposed by the U.N. in previous disputes. Moreover, this solution has been endorsed in the Restatement (Third) of Foreign Relations Law.

B. A Proposal for International Jurisdiction over Drug Traffickers

International law recognizes universal jurisdiction over certain heinous offenses. This "universality principle" of jurisdiction is based upon the assumption that some crimes are so universally condemned that the perpetrators are enemies of all the world's people.[174] As defined by Section 404 of The Restatement (Third) of the Foreign Relations Law of the United States, Tentative Draft No. 5 (1984): "A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hi-jacking of aircraft, genocide, war crimes, and perhaps terrorism. . . ."[175] Any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses.[176] This principle is a departure from the general rule that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.[177] Universal jurisdiction found acceptance in the aftermath of World War II, when numerous defendants were convicted of "war crimes" and "crimes against humanity." The offenses which were tried at Nuremburg were, for the most part, committed outside the territories of the four Allies who prosecuted these criminals.[178] The alleged criminals were prosecuted in several forums and in a number of instances the Allies exercised extraterritorial jurisdiction over the accused.[179] The defendants objected to the assertion of extraterritorial jurisdiction, but these objections were uniformly rejected.[180]

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174. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985).
175. *Id.*
176. *Id.*
177. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
178. *See In re* Extradition of Demjanjuk, 612 F. Supp. 544, 556-57 (C.D. Ohio 1985). The four Allies were Great Britain, France, the United States, and Russia.
179. *Id.* at 556.
180. *Id.* at 557.

The United States has been forced to consider drastic measures such as the non-consensual extraterritorial arrest because the country is not winning its "war on drugs." A potential international solution is to elevate the disdain for international drug traffickers to the level of a heinous offense, thus bringing the traffickers within the purview of "universal jurisdiction."

The crime of drug trafficking has consequences similar to genocide, a crime that has traditionally justified the imposition of universal jurisdiction. Genocide has been defined as "killing" and "causing serious bodily harm committed with the intent to destroy" a nation, or a specific race of people.[181] Likewise, no one would dispute the fact that drug traffickers are responsible in whole or in part for killing and causing serious bodily harm to millions worldwide. Furthermore, the traffickers have apparently targeted a specific race of people, American minorities, in the perpetration of their crimes. Thus, international drug trafficking could be included as a heinous crime worthy of universal jurisdiction.

An international tribunal could be established that would exert universal jurisdiction over known drug traffickers. Participating countries would then enjoy extraterritorial jurisdiction to apprehend and prosecute these criminals. A check and balance on this wholesale grant of extraterritorial jurisdiction would be an exacting arrest warrant procedure, based upon the fourth amendment of the United States Constitution. The lawfulness of the arrest of the suspect would be dependant upon the issuance of a warrant. The participating countries' law enforcement agencies, such as the FBI, could be deputized by the tribunal to carry out customary law enforcement duties such as investigation, apprehension, and transportation of the traffickers. The burden of incarcerating those convicted by the tribunal could be distributed pro rata among the participating countries. Similarly, the tribunal could find funding and resources throughout the world community.

While this solution is merely hypothetical, the Nuremburg trials of the past have demonstrated the viability of this approach to apprehend and prosecute international criminals. While there would inevitably be difficulties in coordinating such a tribunal, perhaps now is the time to begin entertaining such ideas.

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181. *Id.* at 557-58.

V. CONCLUSION

The United States is involved in a "war on drugs" with international drug traffickers. The FBI and the courts are central to the government's ability to win this war because these institutions are responsible for the apprehension and prosecution of the drug traffickers. In a bid to bolster the FBI's capability in this war, the Bush Administration has recently considered authorizing the FBI to perform extraterritorial arrests and override customary or other international law in doing so. These extraterritorially apprehended fugitives could be prosecuted within constitutional guidelines.

The Bush administration's position in this matter is not a novel one. However, the carrying out of these arrests is destined to create international unrest. This unrest will not divest the United States of jurisdiction over the matter, but the prosecution of the individual would surely offend the international community because of the sovereignty infringement issues.

A policy of permitting the FBI to make wholesale non-consensual extraterritorial arrests can only be rationally implemented if accompanied by a political remedy for the violations of the raided nation's sovereignty. One such solution is the paying of reparations to the country. These monetary settlements could be negotiated and arbitrated by a neutral third party such as the United Nations. A more radical approach would consist of elevating the perpetration of international drug trafficking to the level of a heinous crime. Heinous crimes are currently subject to universal jurisdiction. Once labeled as a heinous crime, participating nations could, under the auspices of an international tribunal, carry out the apprehension, prosecution, and punishment of international drug traffickers.

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