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Jurisdiction After International Kidnapping: A Comparative Study

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I. INTRODUCTION

The arrest of a criminal suspect by officials of one state on the territory of a foreign state violates the tenet of international law that a state may not perform acts of sovereignty on the territory of another state.[1] Each state's exclusive jurisdiction over its inhabitants is limited only by provisions of extradition treaties in which the state agrees to surrender criminal suspects according to specified procedures.[2] When one state's officials resort to kidnapping or other measures outside the extradition treaty procedures to effect the return of a criminal suspect, such conduct violates the sovereignty of the foreign state and substitutes expediency for the rule of law in international affairs.[3]

Courts have come to different conclusions about their power to try a defendant kidnapped from another state by officials of the prosecuting state.[4] The rule established in English and U.S. common law asserts the court's power to exercise jurisdiction over the kidnapped individual.[5] The major nineteenth century precedents [6] for this traditional rule have been subject, however, to judicial exceptions and scholarly criticism in the last several decades,[7] and the

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1. 1 L. OPPENHEIM, INTERNATIONAL LAW 295-96 (Lauterpacht 8th ed. 1955); T. WALKER, A MANUAL OF PUBLIC INTERNATIONAL LAW 50 (1895); Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L. J. 427, 428-29 (1957).

2. United States v. Rauscher, 119 U.S. 407, 411-12 (1886) (prior to extradition treaties, state's surrender of criminal suspects was discretionary, based only on principle of comity). *See also* Ker v. Illinois, 119 U.S. 436, 442 (1886).

3. *See supra* note 1. *Cf.* Garcia-Mora, *supra* note 1, at 439-40, where the author stated:

> [T]he primary demands of peaceful and orderly co-existence of the States in the world society outweigh the doubtful benefits that can be derived from the exercise of jurisdiction over persons secured by force or fraud in foreign territory. . . . there is an imperative need to adequately regulate an otherwise fluid and disorderly situation.

4. *See, e.g., Ker*, 119 U.S. at 444; *Ex parte* Scott, 9 B. and C. 446, 109 E.R. 166 (K.B. 1829); Attorney-General v. Eichmann, 36 I.L.R. 5, (Dist. Ct. Jerusalem 1961), *aff'd sub nom.* Eichmann v. Attorney-General, 36 I.L.R. 277 (Supreme Court 1962); Fiscal v. Samper, 7 Ann. Dig. 402 (Supreme Court of Spain 1934); *In re* Jolis, [1933-34] Ann. Dig. 191 (No.77) (France, Tribunal Correctionnel d'Avesnes 1933); R. v. Hartley, [1978] 2 N.Z.L.R. 199, 217 (N.Z. Ct. App. 1977).

5. *See, e.g., Ker*, 119 U.S. at 444; *Ex parte* Scott, 9 B. and C. 446; *Ex parte* Elliott, 1 All. E.R. 373, 376 (K.B. 1949).

6. The two cases commonly cited for the proposition that a court's jurisdiction is not impaired by the manner in which it was obtained are *Ex parte* Scott, 9 B. and C. 446 and *Ker*, 119 U.S. at 444.

7. Exceptions to the rule that a court has jurisdiction over a kidnapped defendant were carved out in *Rauscher*, 119 U.S. 407; Cook v. United States, 288 U.S. 102 (1932); and United States v. Toscanino, 500 F.2d 267 (2d Cir.), *cert. denied*, 420 U.S. 990 (1974). For a discussion of these exceptions *see infra* § §

rule is by no means universal.[8] Concern for the rights of the kidnapped individual,[9] the integrity of the sovereignty of the asylum state,[10] and the rule of law in international affairs[11] has persuaded some courts to refrain from exercising jurisdiction over the kidnapped defendant.[12]

In view of the threat to international peace and order posed by international official kidnappings,[13] a court's decision whether to exercise jurisdiction over the kidnapped individual or restore the *status quo ante* takes on great importance.[14] This Comment examines the way in which courts of various countries have decided the question. The Comment first examines the traditional U.S. rule that asserts jurisdiction over the kidnapped defendant and the three established exceptions to this rule. The second section of the Comment considers the traditional English rule which, like the U.S. rule, calls for the court's exercise of jurisdiction over the kidnapped defendant. The author then contrasts the Anglo-American rule with the decisions of other nations' courts to refrain from exercising jurisdiction over a defendant whose presence was secured by state officials adopting illegal or irregular methods. The section ends with an examination of recent cases in which the court declined to exercise jurisdiction over a kidnapped defendant. Finally, the author concludes that the traditional U.S. rule is not consistent with respect for the sovereignty of other nations and the rule of law in international affairs.

II. TRADITIONAL PRACTICE OF THE UNITED STATES AND ENGLAND

A. *The* Ker *Precedent*

The traditional rule followed by U.S. courts asserts the court's power to try a defendant, regardless of how the defendant's presence in the jurisdiction was

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II.B.1, 2 & 3. For scholarly criticism of the rule see generally Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265 (1952); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953); Garcia-Mora, *supra* note 1; Sponsler, *International Kidnapping*, 5 INT'L L. 27 (1971).

8. *See, e.g.*, Fiscal v. Samper, 7 Ann. Dig. 402 (Supreme Court of Spain 1934); Case of Nollet, as digested in 18 JOURNAL DU DROIT INTERNATIONAL 1188, 1189 (Cour d'appel de Douai 1891); *In re* Jolis, [1933-34] Ann. Dig. 191; *Hartley*, [1978] 2 N.Z.L.R. at 217; *Ex parte* Mackeson, 75 Crim. App. R. 24, 33 (1981).

9. *See, e.g.*, Fiscal v. Samper, 7 Ann. Dig. at 402; *Toscanino*, 500 F.2d at 275.

10. *See, e.g.*, Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL at 1188; *In re* Jolis, [1933-34] Ann. Dig. at 191.

11. *Hartley*, [1978] 2 N.Z.L.R. at 217; *Mackeson*, 75 Crim. App. R. at 33.

12. *See supra* notes 9-11.

13. The problem of kidnappings engineered by private parties is beyond the scope of this Comment.

14. *See* United Nations Security Council Resolution, 15 U.N.SCOR supp. Apr.-June 1960, at 35, U.N. Doc. S/4349 (emphasizing the threat to international peace, security, and the harmonious co-existence of states posed by international official kidnappings). For a discussion of the resolution, see *infra* § III.B.

secured.[15] The major precedent for this practice, *Ker v. Illinois*,[16] has withstood criticism for nearly one hundred years and is still controlling in most international kidnapping cases in the United States.[17]

In *Ker*, the defendant had embezzled funds while working as a clerk for a Chicago bank.[18] The bankers engaged a detective, who followed Ker from Panama to Lima, Peru.[19] The extradition papers the detective was carrying were useless in Peru because Chilean forces occupied Lima and the papers could not be served.[20] The detective forcibly abducted Ker from Peru and brought him back to the United States to stand trial in Illinois.[21]

The Supreme Court affirmed Ker's conviction over his objections that the kidnapping violated his rights of due process and his rights under the extradition treaty with Peru.[22] According to the Court in 1886, due process is not violated by a defendant's forcible abduction into the jurisdiction as long as the defendant is properly indicted and tried.[23] The Court also found that since the

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15. *See Ker*, 119 U.S. at 443. The *Ker* principle was reaffirmed in Frisbie v. Collins, 432 U.S. 519, 522 (1952). *See also* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); United States v. Sobell, 244 F.2d 520 (2d Cir. 1957).

16. 119 U.S. 436 (1886). Courts of other countries have cited *Ker* as established authority for the proposition that the circumstances of a forcible abduction do not impair the court's jurisdiction over the defendant. *See, e.g., Eichmann*, 36 I.L.R. at 65-66, Afouneh v. Attorney-General, 9 Law. Rep. Palestine 63, 65-66 (S.Ct. Palestine 1942), digested in [1941-42] Ann. Dig. 327, 327 (no. 97).

17. *See supra* note 15. Although *Ker* represents the general rule, *see* United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Reed, 639 F.2d 896, 901 (2d Cir. 1981), it does not control in all cases of irregular rendition of criminal suspects. Three limited exceptions have emerged. *See infra* § II.B. If a defendant is unable to plead the special circumstances necessary to fit one of the exceptions, *Ker* governs and the court's jurisdiction to try the defendant remains unimpaired. United States *ex rel.* Lujan v. Gengler, 510 F.2d at 69 (Anderson, J., concurring). *See also* United States v. Deaton, 448 F. Supp. 532, 535 (N.D. Ohio 1978).

18. *Ker*, 119 U.S. at 438-39; Statement of Illinois Attorney General Hunt, Brief for the Defendant in Error, *quoted in* Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 684 (1953).

19. Fairman, *supra* note 18, at 684-85.

20. *Id.* at 685.

21. *Ker*, 119 U.S. at 438. A possible alternative view of *Ker*, based on the facts recited in Fairman, *supra* note 18, is that the incident was more like a private kidnapping than one engineered by U.S. officials. Mere possession of official government papers may not be sufficient to make the detective, privately employed by the bankers, a state actor. The opinion itself lends some support to this view:

> In the case before us, the plea shows, that, although [the detective] Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru . . . that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. . . . the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States.

Ker, 119 U.S. at 442-43.

Under this view, then, the United States owed no duty to Peru under the treaty or under international law principles, since the violation of the sovereignty of a foreign state can only be committed by another sovereign, not a private party.

22. *Ker*, 119 U.S. at 440, 443.

23. *Id.* at 440. The Court stated:

> The "due process of law" . . . guaranteed [by the Fourteenth Amendment] is complied with

defendant had not been extradited under the treaty with Peru, he could not claim any violation of rights under that treaty.[24] The Court stated that rights under an extradition treaty cannot be claimed "when the [defendant] comes to this country in the manner in which [Ker] was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty."[25]

Courts regard *Ker* as the major precedent for the broad rule that, given a defendant's later arrest within the jurisdiction and his presence before the court, the court may exercise jurisdiction over him.[26] Much criticism has been levelled at the *Ker* rule because it may condone violations of international law.[27] The rule allows a court to disregard completely the violation of a foreign state's sovereignty committed by U.S. officials in the arrest and removal of a criminal suspect from the foreign state.[28] A better rule, however, would allow a court to give effect to the international legal condemnation of international kidnapping by declining to exercise jurisdiction over the kidnapped defendant.[29]

Notwithstanding scholarly criticism, the *Ker* rule is still controlling in most U.S. cases of international kidnapping.[30] Three main exceptions to the *Ker* rule have emerged, but are limited to factual situations closely resembling the cases establishing the exceptions.

> when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. . . . [F]or mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment.

Id.

24. *Id.* at 443.

25. *Id.*

26. *See, e.g.*, Autry v. Wiley, 440 F.2d 799, 802 (1st Cir. 1971); United States v. Deaton, 448 F. Supp. 532, 535-36 (N.D. Ohio 1978).

27. *See, e.g.*, Dickinson, *supra* note 7, at 238, where the author states: "The result in *Ker* . . . is unsatisfactory in both its procedural and its substantive aspects. . . . [Ker] should have had, in relation to the United States, a right to be released from detention procured by a violation of the universally accepted principles of international jurisprudence." *See also* Scott, *supra* note 7, where the author commented:

> It seems that the courts have simply fallen into the habit of repeating, parrot-like, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle. In these days of low moral standards among public officials . . . it is especially important to re-establish public respect for law. This simply cannot be done if the very people who enforce the law are themselves guilty of serious violations of law.

Id. at 107. *Cf.* Sponsler, *supra* note 7, at 34.

28. Dickinson, *supra* note 7, at 238.

29. *See* Scott, *supra* note 7, at 107; Sponsler, *supra* note 7, at 51-52.

30. In Frisbie v. Collins, 342 U.S. 519, 522 (1952) and Gerstein v. Pugh, 420 U.S. 103, 119 (1975), the Supreme Court reaffirmed the *Ker* rule. *See also* Garcia-Mora, *supra* note 1, at 435 (the *Ker* principle "has been extended to include every conceivable situation lying outside the provisions of an extradition treaty").

B. *Exceptions to the General Rule under* Ker

1. *Rauscher*: the Specialty Principle

In *United States v. Rauscher*,[31] decided the same day as *Ker* and written by the same Justice, the Supreme Court held that an extradited suspect may be tried for only those crimes for which he was extradited.[32] Rauscher, a ship's officer, was extradited from Great Britain under a charge of murder on the high seas of a crew member.[33] In New York, however, Rauscher was charged with cruel and inhuman punishment instead of with murder.[34] Although the evidence presented on the murder charge in the extradition proceedings in Great Britain would have supported extradition for cruel and inhuman punishment, the Supreme Court held that Rauscher could not be tried on the second charge.[35]

The "specialty principle"[36] illustrated in *Rauscher* limits the jurisdiction of the court to those specific charges for which the asylum state extradited the suspect.[37] The scrupulous adherence to the letter of the extradition treaty proceedings commanded by the specialty principle is based on the importance of good faith dealings between the co-equal sovereigns who signed the treaty.[38] Where the state granting asylum did not consent to the suspect's extradition on a particular charge, good faith dealing requires the court of the prosecuting state

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31. 119 U.S. 407 (1886).

32. *Id.* at 430.

> [A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

Id.

33. *Id.* at 409.

34. *Id.* at 409-10.

35. *Id.* at 430, 432.

36. The rule limiting a court's jurisdiction to those offenses that are the subject of the extradition in the specific case is generally known, in the extradition laws of most countries, as the "specialty principle." *Eichmann*, 36 I.L.R. at 65.

37. *Rauscher*, 119 U.S. at 432; *see also* Dickinson, *supra* note 7, at 231-32.

38. *Rauscher*, 119 U.S. at 422. Justice Miller wrote:

> As this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

Id. at 422. *See also* Johnson v. Browne, 205 U.S. 309, 321 (1907) ("[w]hile the escape of criminals is, of course, to be greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith").

to refrain from trying the suspect on a new charge.[39] A defendant charged with a crime other than that for which he was extradited may raise this issue in his defense, even though the rights abrogated were the rights of the asylum state, not of the defendant.[40] The prosecuting state's obligation of good faith and its respect for the sovereignty of the asylum state require strict compliance with the extradition treaty procedures, regardless of whether the asylum state asserts its rights in the court of the prosecuting state.[41] Thus, the proceedings under the extradition treaty in *Rauscher* clothed that defendant with the right not to be prosecuted on a charge for which he was not extradited.[42]

The reasoning in *Rauscher* seems at odds with the way *Ker* has been interpreted. In *Rauscher*, the Court was concerned with the bad faith shown to the asylum state when a suspect it has surrendered for a limited and defined purpose is tried on charges exceeding that purpose.[43] In *Ker*, however, the defendant was abducted, not extradited, and therefore had no rights to claim under the extradition treaty with Peru.[44] Critics of the *Ker* decision argue that bad faith is shown to the asylum state when a suspect is kidnapped and thus has not been "surrendered" by the asylum state for any purpose.[45] The requirement of good faith, critics contend, should not be limited to cases where extradition proceedings were instituted; rather, it should extend to all cases where the involvement of U.S. officials effects the rendering — regular or irregular — of criminal suspects from the territory of a foreign state.[46]

Subsequent cases have shown that the question of whether *Ker* or *Rauscher* controls turns on whether extradition proceedings were instituted.[47] An extra-

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39. *See supra* note 38.

40. *See* Dickinson, *supra* note 7, at 232.

> While it is conceded that the individual, as such, has no right of asylum in the foreign state, his objection to the jurisdiction serves as a foil to remind the court of the nation's international obligation. . . . [T]he individual is permitted to make an issue of the right of the state from which he was surrendered to have the extradition treaty respected.

Id.

41. *See id.*

42. *Rauscher*, 119 U.S. at 430.

43. *Rauscher*, 119 U.S. at 422.

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

45. *See generally* Dickinson, *supra* note 7, at 238; Fairman, *supra* note 23, at 679. Fairman noted:

> What saved Rauscher was not any merit of his own, but the consideration of national good faith toward Great Britain: to avoid a breach by the United States of its obligations under the extradition treaty, the municipal courts should forego proceeding against one who, otherwise, was justly subject to trial. Should not Ker have been let off by a like consideration of national good faith toward Peru?

Id.

46. *See, e.g.*, O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279, 301 (1960) (good faith requires that each treaty signatory restrict itself to the recovery of fugitive criminals only within the terms of the treaty).

47. *See, e.g.*, United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("Reed lacks standing to complain about the fact that he was abducted rather than extradited from the Bahamas. The existence of an extradition treaty provides an individual with certain procedural protections only when he is

dited defendant can claim certain rights under the treaty; a kidnapped defendant cannot. Cases since *Rauscher* have held that a kidnapped defendant lacks standing to plead that a violation of the extradition treaty bars the court's exercise of jurisdiction over him.[48] Thus, *Rauscher* provides only a narrow exception to the broad *Ker* principle that, given the defendant's presence before the court, the court may exercise jurisdiction over him.[49]

2. *Cook*: Limits to Jurisdiction Imposed by Express Treaty Provisions

A second exception to the *Ker* rule, established by *Cook v. United States*,[50] applies only to cases involving a treaty that, by its own terms, sets a specific territorial limit to jurisdiction.[51] In *Cook*, a British vessel, the Mazel Tov, was seized by the U.S. Coast Guard eleven and one-half miles off the coast of Massachusetts.[52] The Supreme Court found that specific provisions of a 1924 treaty between Great Britain and the United States for the prevention of liquor smuggling imposed a territorial limitation on the U.S. government's power to seize vessels.[53] Since the seizure of the vessel was made beyond the limit set by the treaty, the Supreme Court declared that the United States lacked the power to subject the vessel to domestic laws.[54] As the Court explained: "To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty."[55]

The *Ker* rule allows a court to try a kidnapped defendant as long as that defendant was lawfully arrested within the jurisdiction and brought before the court.[56] According to *Cook*, a seizure or arrest in violation of express treaty provisions cannot be cured by a later lawful arrest or detention within the court's jurisdiction.[57] Some commentators have extended the analysis in *Cook* to situations where the wrongful arrest was made in violation of international law.[58] The obligations of the United States under a treaty are no more compelling than the

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extradited."); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980).

48. *See supra* note 47.

49. *E.g.*, Autry v. Wiley, 440 F.2d 799 (1st Cir. 1971).

50. 288 U.S. 102 (1932). *See also* Ford v. United States, 273 U.S. 593 (1927).

51. *See* Autry v. Wiley, 440 F.2d at 802.

52. *Cook*, 288 U.S. at 103-04.

53. *Id.* at 121. The treaty in question set a one-hour sailing rule for the seizure of a vessel off the coast of the United States. *Id.*

54. *Id. See also* United States v. Ferris, 19 F.2d 925 (1927), where, in a prosecution of crew members of a foreign ship seized 270 miles off the West Coast, the court held that the seizure was "sheer aggression and trespass (like those which contributed to the War of 1812), contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to the defendants." *Id.* at 926.

55. *Cook*, 288 U.S. at 121-22.

56. *Ker*, 119 U.S. at 440.

57. *Cook*, 288 U.S. at 120-22.

58. See *e.g.*, Dickinson, *supra* note 7, at 237, 244.

obligations of the United States and all other sovereign states under general principles of international law.[59] It follows that if a court lacks power to try an individual whose arrest violated a treaty, it similarly lacks power to try an individual whose arrest by kidnapping violated international law.[60]

The potentially broad application of *Cook*, however, has been limited by U.S. courts to those cases involving a treaty that specifically sets territorial limits on the jurisdiction of the United States.[61] Thus, a court is required to refrain from exercising jurisdiction over a defendant only when the arrest violated express provisions of a treaty, and not when it violated general principles of international law.[62]

3. *Toscanino*: "Shocking Conduct" of U.S. Officials in Defendant's Kidnapping

The third exception to the *Ker* rule, carved out by the Second Circuit in *United States v. Toscanino*,[63] applies to cases in which the conduct of U.S. officials is so shocking that the court divests itself of jurisdiction over the defendant.[64] Toscanino, an Italian citizen, claimed he was lured from his home in Montevideo, Uruguay by a telephone call, abducted, knocked unconscious, and driven to Brasilia where he was tortured and interrogated incessantly for seventeen days.[65] Toscanino claimed that during this time the U.S. government and the U.S. Attorney for the Eastern District of New York were aware of the interrogation and had received reports of its progress.[66] Toscanino also claimed that U.S. officials from the Department of Justice and the Bureau of Narcotics and Dangerous Drugs were present and participating in the interrogation and tor-

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59. *See* Sponsler, *supra* note 7, at 45-46, where the author points out:

> The extradition cases [following *Rauscher*] evidence an acknowledgment by the courts that fugitives brought before the courts in a fashion violative of conventional international law deprive the court of jurisdiction to proceed. The cases flowing from the *Ker* decision, however, demonstrate a belief that actions violative of customary international law require a different result. The fact that both conventional and customary international law are important components of the total corpus juris in operation among nations, has apparently not impressed itself upon the courts in such a way as to require a consistent approach.

Id. See also Fairman, *supra* note 18, at 679, where the author emphasizes: "Duty under a treaty may seem more specific and concrete, but it is no more real than duty arising from the general principles of international law." *Id.*

60. *See, e.g.*, Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL 1188 (Cour d'appel de Douai 1891), *In re* Jolis, [1933-34] Ann. Dig. 191 (No. 77) (Tribunal Correctionnel d'Avesnes 1933), *infra* notes 221-29 and accompanying text, where both French courts found that an illegal abduction on foreign territory rendered subsequent prosecutions against the defendant null and void.

61. *See, e.g.*, Autry v. Wiley, 440 F.2d at 802.

62. *See id. See also* Sponsler, *supra* note 7, at 45-46.

63. 500 F.2d 267 (2d Cir.), *cert. denied*, 420 U.S. 990 (1974).

64. *Id.* at 275. *Cf.* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

65. *Toscanino*, 500 F.2d at 268-70.

66. *Id.* at 270.

ture.[67] Toscanino was drugged and flown to the United States, where he was arrested by U.S. officials before being taken off the plane.[68]

The Second Circuit held that due process requires a court to divest itself of jurisdiction over the defendant when the defendant's presence was obtained by the government's invasion of the defendant's constitutional rights.[69] The constitutional right of due process "has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial."[70] Toscanino's shocking allegations, if proven, would amount to a denial of due process;[71] in such a case, the court decided, "the government should as a matter of fundamental fairness be obliged to return him to his *status quo ante*."[72]

Subsequent cases have limited the potentially broad application of the *Toscanino* holding. One year after *Toscanino* was decided, the Second Circuit in *United States ex rel. Gengler v. Lujan*[73] found that a simple abduction by U.S. officials does not in itself oblige the court to return the defendant to his *status quo ante*.[74] After *Lujan*, if the defendant's treatment at the hands of the abductors is no worse than the treatment endured by lawfully extradited suspects, the court will not find that a violation of due process has occurred.[75] As a result of the Second Circuit's retreat from the broad language of *Toscanino*, courts have limited this exception to factual situations as brutal and shocking as the situation alleged by Toscanino.[76] It is questionable whether any defendant will be able to

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67. *Id.* at 268-70.

68. *Id.* at 270.

69. *Id.* at 275. *But cf.* Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777 (1980) (analysis of the problem of foreign nationals, like Toscanino, claiming the protection of provisions of the U.S. Constitution).

70. *Toscanino*, 500 F.2d at 272. The Second Circuit based its exception to the *Ker* rule on the Supreme Court decisions of Mapp v. Ohio, 367 U.S. 643 (1961), and Rochin v. California, 342 U.S. 165 (1952), which broadened the interpretation of the due process clause in criminal cases. *Toscanino*, 500 F.2d at 272-73. The court also relied on an analogy to civil defendants brought into the jurisdiction by force or fraud. *Id.* at 275 (citing *In re* Johnson, 167 U.S. 120, 126 (1897) ("The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim.")). The doctrine is well settled that, in civil cases, courts may decline jurisdiction over a defendant whose presence was secured by force or fraud. *Toscanino*, 500 F.2d at 275.

71. *Id. But see Ker*, 119 U.S. at 440 (rejection of defendant's due process claim).

72. *Toscanino*, 500 F.2d at 275.

73. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

74. *Id.* at 66.

75. *Id.*

76. *Id. See* United States v. Lovato, 550 F.2d 1270, 1271 (9th Cir.) (*per curiam*), *cert. denied*, 423 U.S. 985 (1975) (*Ker* rule applies unless defendant "makes a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States"); United States v. Reed, 639 F.2d 896, 901-02 (2d Cir. 1981) (U.S. agents used a gun and threatening language to force defendant onto plane; conduct was not "gross mistreatment," but similar to use of gun in ordinary arrest to guard against escape). *See also* Note, *Forcible Abduction of a Fugitive in Foreign Country Does Not Violate Due Process*, 6 SUFFOLK TRANSNAT'L L. J. 357, 364-65 (1982) (summarizing the *Toscanino* standard after *Reed*). *Cf.* United States v. Lira, 515 F.2d 68, 70 (2d Cir. 1975) (to constitute a violation of due process the shocking acts must be committed by U.S. officials or at their direction).

plead and prove the extraordinary, brutal facts necessary to fit this exception.[77]

If a defendant is kidnapped from a foreign state by U.S. officials or at their direction and is unable to plead the special circumstances necessary to fit one of the three exceptions, *Ker* governs and the court's jurisdiction to try the defendant will remain unimpaired.[78] To apply the *Rauscher* exception, the court must find that the defendant was the subject of extradition proceedings and is now charged with an offense for which the asylum state did not surrender him.[79] To apply the *Cook* exception, the court must find that a treaty to which the United States is a party sets specific jurisdictional limits that were exceeded in the defendant's arrest or capture.[80] To apply the *Toscanino* exception, the court must find that the conduct of U.S. officials in the defendant's torture and abduction was brutal and shocking.[81]

The *Toscanino* exception focuses on the violation of the individual defendant's due process rights when that person is kidnapped by U.S. officials or agents on the territory of a foreign state.[82] The *Rauscher* and *Cook* exceptions, on the other hand, focus primarily on the obligations of the United States under international treaties.[83] None of the exceptions, however, attend to the obligation of the courts of the United States to give effect to the rule of customary international law that prohibits the violation of another state's sovereignty by official international kidnapping.[84]

4. Rights of the Protesting Asylum State

Case law offers some support for a fourth exception to the *Ker* rule.[85] The

77. Remarks of Sharon A. Williams, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, April 18, 1980, panel (John S. Simms, Reporter), AM. SOC. INT'L LAW PROC. 274, 288 (1980) ("With the 'backtracking' taking place in subsequent cases the *'Toscanino* exception' has been narrowed so as to apply in cases of the most extreme torture. Such a case is yet to appear in the United States, because the threshold for such conduct has been set inordinately high.").

78. *See Lujan*, 510 F.2d at 69 (Anderson, J., concurring); *Deaton*, 448 F. Supp. at 535.

79. *See supra* § II.B.1.

80. *See supra* § II.B.2.

81. *See supra* § II.B.3.

82. One significant point to be noted about the *Toscanino* exception is that, unlike a breach of treaty, the violation of an individual's due process rights cannot be cured by acquiescence on the part of the asylum state. Whereas under the *Rauscher* principle, the asylum state can accomodate the prosecuting state by consenting to the suspect's trial on a charge other than the one for which he was extradited, *see e.g.*, Fiocconi v. Attorney General, 462 F.2d 475, 481 (2d Cir. 1972), under *Toscanino*, no agreement between the asylum state and the United States can cure the violation of the defendant's constitutional rights.

83. *See Rauscher*, 119 U.S. at 430; *Cook*, 288 U.S. at 121.

84. *See* O'Higgins, *supra* note 46, at 301.

> The distinction drawn by U.S. courts between seizures in violation of customary international law and seizures in violation of international convention has been criticized as illogical. But it does seem to be clear that U.S. courts have held explicitly that a seizure in violation of customary international law is no bar to their exercising jurisdiction.

Id.

85. *See* dicta in *Toscanino*, 500 F.2d at 277, 278; *Lujan*, 510 F.2d at 67, 68; *Lira*, 515 F.2d at 72, 73 (Oakes, J., concurring).

kidnapping of a criminal suspect from the territory of the foreign state is a violation of that state's sovereignty and a violation of international law.[86] Such a violation, one might argue, should persuade a court to decline jurisdiction over the kidnapped defendant.[87]

In 1900, the Supreme Court declared: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[88] The rule of international law violated by official international kidnapping[89] was upheld by the United States when, after an attempted abduction by Soviet officials of a Soviet citizen in the United States, the U.S. State Department declared: "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government."[90]

Although courts of the United States traditionally have held that an arrest in violation of customary international law is no bar to their exercise of jurisdiction over the arrestee,[91] a rule to the contrary could find precedential support. For example, in his concurring opinion in *United States v. Lira*,[92] Judge Oakes commented:

> [T]here is a very strong policy which would be operative if the abduction here were from an objecting country . . . or in violation of a treaty. That policy is of course respect for the law of nations, the requirements of world society, and the integrity and independence of other nations, not only under formal charters . . . but as unwritten obligations of international law.[93]

Thus, a violation of customary international law in the kidnapping of a criminal suspect might persuade a court to redress the violation by returning the kidnapped defendant to his *status quo ante*.

Defendants' arguments to this effect, however, have often failed on the ground that no violation of customary international law occurs when the asylum state acquiesces in the kidnapping.[94] Abduction by U.S. officials or agents of a criminal suspect from a foreign state violates the rights of the asylum state, not

86. OPPENHEIM, *supra* note 1, at 295-96; WALKER, *supra* note 1, at 50.

87. *See Toscanino*, 500 F.2d at 277, 278; *Lujan*, 639 F.2d at 67, 68.

88. The Paquete Habana, 175 U.S. 677, 700 (1900).

89. OPPENHEIM, *supra* note 1, at 295-96; WALKER, *supra* note 1, at 50.

90. Borchard, *The Kasenkina Case*, 42 AM. J. INT'L L. 858, 19 DEP'T ST. BULL. 251 (1948).

91. O'Higgins, *supra* note 46, at 301.

92. 515 F.2d 68 (2d Cir. 1975).

93. *Id.* at 72-73 (Oakes, J., concurring). *See also Toscanino*, 500 F.2d at 277, 278; *Lujan*, 510 F.2d at 67, 68. *See generally Harvard Research in International Law, Draft Extradition Treaty*, art. 16, 29 AM. J. INT'L L. SUPP. 631 (1935).

94. *See, e.g.*, United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("absent protest or objection by the offended sovereign, Reed has no standing to raise violation of international law as an issue"); *Lujan*, 510 F.2d at 67.

those of the individual defendant.[95] If the asylum state acquiesces in the abduction, the breach of international law is cured.[96] U.S. courts have considered acquiescence by the asylum state to include not only participation in or approval of the abduction, but also mere lack of protest or objection.[97] If the breach of international law is cured, the individual defendant has no ground to argue for release.[98]

If, however, the asylum state chooses not to acquiesce in the abduction, the violation of the rule of international law might persuade a court to order the defendant's release. A recent U.S. case, which may decide this question, involves the abduction of Canadian businessman Sidney Jaffe from Canadian territory by two U.S. bounty hunters.[99] The bounty hunters brought Jaffe to Florida where he was tried and convicted for unlawful land sales practices and failure to appear at trial.[100] The Canadian government is protesting the abduction and requesting Jaffe's return.[101] It has filed an application in federal district court for a writ of habeas corpus, challenging Jaffe's detention in the United States.[102] If Canada succeeds in proving that the abduction constituted a violation of international law, the court may order Jaffe's release to redress the violation.[103]

The traditional *Ker* rule would mandate the court's exercise of jurisdiction over Jaffe, given his presence before the Florida court.[104] Like Ker, Jaffe cannot

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95. *See Lujan*, 510 F.2d at 67.

96. O'Higgins, *supra* note 46, at 280. *See also* comment to art. 16 of the *Harvard Research in International Law, Draft Extradition Treaty*, *supra* note 93, which states:

> [B]y no means every irregularity in the recovery of a fugitive from criminal justice is a "recourse to measures in violation of international law or international convention." If the state in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality.

Id.

97. *See, e.g.*, *Reed*, 639 F.2d at 902 ("The Bahamian government has not sought [Reed's] return or made any protest . . ."); *Lujan*, 510 F.2d at 67 ("unlike Toscanino, Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction").

98. *See Lujan*, 510 F.2d at 67. *See also* Attorney-General v. Eichmann, 36 I.L.R. 5 (District Court Jerusalem 1961, Supreme Court, sitting as a Court of Criminal Appeal, 1962), *infra* text accompanying notes 153-62.

99. Application of Canada for a Writ of Habeas Corpus, regarding detention of Sidney L. Jaffe, a Canadian citizen v. Wainwright, No. 83-661-Civ-J-16 (USDC Middle Dist. Fla. Jacksonville Div. - filed 6/27/83); Canada's Memorandum of Law in Support of Petition for Writ of Habeas Corpus, at 5-31.

100. Canada's Memorandum in Support of Petition, *supra* note 99, at 5-31.

101. Petition for Writ of Habeas Corpus, *supra* note 99, at 4-5.

102. *Id.*

103. *See Toscanino*, 500 F.2d at 278, where the court noted a "long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped." *See also Lira*, 515 F.2d at 72-73 (Oakes, J., concurring).

104. *See* United States v. Cordero, 668 F.2d 32, 36 (1st Cir. 1981); *Reed*, 639 F.2d at 901. One of Canada's most interesting arguments concerns the element of state action in the abduction. If the court found that the original abduction was not state action, the defendant's continued incarceration in the

claim any right of asylum in the country from which he was forcibly taken.[105] Unlike Rauscher, Jaffe was not the subject of extradition proceedings[106] and therefore cannot claim that, in good faith to the asylum state, he should be returned to that state.[107] Nor can Jaffe avail himself of the *Cook* exception, as the express terms of the extradition treaty between Canada and the United States were not abrogated by Jaffe's kidnapping.[108] Jaffe's treatment at the hands of his abductors was not the shocking brutality necessary to fit the *Toscanino* exception.[109] Thus, considering the traditional *Ker* rule and the three established exceptions to it, Jaffe's kidnapping does not bar the court's exercise of jurisdiction over him. Nevertheless, based on the strong policy of "respect for the law of nations, the requirements of world society, and the integrity and independence of other nations,"[110] the court may consider Jaffe's release appropriate redress for the violation of international law.

C. *The English Precedent*

Traditionally, English courts emphasized the defendant's presence before the court, whether it was obtained legally or illegally.[111] As long as the defendant had been properly charged and brought before a court where proceedings could be held to determine the facts of the case, the traditional view did not call for the return of the defendant to the place of abduction.[112]

In the 1829 case *Ex parte Scott*,[113] Susannah Scott had been arrested in Brussels by an English police officer with a warrant for her arrest on a charge of perjury.[114] Scott argued that the English court did not have jurisdiction to try her

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United States, showing approval and endorsement of the abduction, rendered it state action. Canada's Memorandum in Support of Petition, *supra* note 99, at 56-58 (citing Case Concerning the U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3, 69-77 (General List No. 64 of May 24, 1980) (Iran's refusal to restore the status quo regarding the two hostages who were not diplomats constituted a breach of Iran's treaty obligations.)).

105. *See Ker*, 119 U.S. at 443.

106. Canada's Memorandum in Support of Petition, *supra* note 99, at 10-11.

107. *See supra* note 38.

108. The extradition treaty sets out extradition procedures and lists extraditable offenses, but it does not expressly set territorial limits on the jurisdiction of the parties. *Id.* Canada - U.S. Extradition Treaty, Dec. 3, 1971, 27 U.S.T. 983, T.I.A.S. No. 8237.

109. *See* Canada's Memorandum in Support of Petition, *supra* note 104, at 24-27, relating Jaffe's allegations as to the force used by his abductors in his arrest and detention, such as handcuffing and physically restraining him when he attempted to escape from the car in which he was driven over the border into the United States. To fit the *Toscanino* exception, Jaffe would have to allege that he suffered treatment worse than that ordinarily encountered by suspects who are lawfully extradited. *Lujan*, 510 F.2d at 66.

110. *Lira*, 515 F.2d at 72-73 (Oakes, J., concurring).

111. *Ex parte* Scott, 9 B. and C. at 448; *Ex parte* Elliott, 1 All E.R. at 376-78.

112. *See supra* text accompanying notes 5 and 6.

113. 9 B. and C. 446, 109 E.R. 166 (K.B. 1829).

114. *Id.* at 448.

because of how she had been brought into the country.[115] The court decided that it could not inquire into the circumstances of her arrival in the jurisdiction.[116] If the laws of Belgium gave Scott a cause of action against the English police officer, she might bring suit against him, but the English court would not inquire into the police officer's conduct in order to determine its jurisdiction over Scott.[117]

In *Ex parte Elliott*,[118] decided 120 years after *Scott* and commonly cited with that case, the English court again found it had the power to try a defendant kidnapped by state officials from the territory of another state.[119] Elliott, a private in the Royal Army Service Corps, was arrested at Antwerp, Belgium, by British officers accompanied by two Belgian police officers.[120] The British officers escorted Elliott to British Army quarters in Germany and then to England, where Elliott was charged with desertion.[121] Elliott argued that the British officers had no power to arrest him in Belgium and that his arrest was contrary to Belgian law.[122] The court, citing *Ex parte Scott*, found that Elliott was not entitled to be released since the offense was against English law and he was before the English court.[123]

Scott and *Elliott* have been cited by non-English courts for the broad proposition that a court may exercise jurisdiction over a defendant lawfully arrested and brought before the court, regardless of whether a kidnapping by state officials from the territory of another state took place.[124] Although the language of the English cases supports that proposition, the facts of *Scott* and its progeny actually support a narrower proposition, since none of the cases involved a violation of customary international law.[125] Customary international law is violated when officials of one state kidnap a criminal suspect from the territory of another state,[126] unless that other state acquiesces in the kidnapping.[127] In those English cases where state officials had so kidnapped the defendant, acquiescence by participation in the kidnapping by officials of the asylum state cured the

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115. *Id.*
116. *Id.*
117. *Id.*
118. 1 All E.R. 373 (K.B. 1949).
119. *Id.* at 373.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* As in *Ex parte* Scott, the court suggested that Elliott might have a remedy against the person who had arrested and detained him. *Id.* The court also suggested that the arrest and detention "may influence the court if they think there was something irregular or improper in the arrest." *Id.* This suggestion that the court may be influenced to exercise some discretion in the case was developed later in *Ex parte* Mackeson, 75 Crim. App. R. 24, *see infra* text accompanying notes 255-72.
124. *See, e.g.*, Abrahams v. Minister of Justice, 4 S. Afr. L. R. 542, 545; *Eichmann*, 36 I.L.R. at 59-60; Afouneh v. Attorney-General, [1941-42] Ann. Dig. 327, 328 (No. 97) (Supreme Court of Palestine 1942).
125. O'Higgins, *supra* note 46, at 281.
126. OPPENHEIM, *supra* note 1, at 295-96; WALKER, *supra* note 1, at 50.
127. O'Higgins, *supra* note 46, at 280. *See also* comment to art. 16 of the *Harvard Research in International Law, Draft Extradition Treaty*, *supra* note 93.

breach.[128] Thus, strictly speaking, English case law provides support for the narrower proposition that an arrest made in breach of the municipal law of England or the asylum state is no bar to the jurisdiction of the English court.[129] In spite of the broad language in *Scott* and its progeny, one scholar concludes, it is not entirely certain whether an English court will exercise jurisdiction over a defendant kidnapped in violation of customary international law.[130]

III. THE PRACTICE OF OTHER NATIONS

The courts of various countries have come to different conclusions about their power to try an individual who was brought into the jurisdiction by unlawful or irregular means.[131] Traditionally, the courts of both the United States and England assert their power to exercise jurisdiction over a defendant lawfully arrested and brought before the court, regardless of whether a kidnapping by state officials took place.[132] The English and U.S. precedents have been relied on by courts of other countries to support their exercise of jurisdiction over a kidnapped defendant.[133]

Some courts have chosen, however, to decline the exercise of jurisdiction over a kidnapped defendant.[134] Recently, courts in New Zealand and England have created precedents for the release of defendants whose presence before the court was secured by illegal or irregular means.[135] These decisions may evidence an emerging rule, which will not allow courts to countenance illegal or even irregular methods of returning criminal suspects to the prosecuting state.[136]

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128. O'Higgins, *supra* note 46, at 281, 288.

129. *Id.* at 288.

130. *Id. See infra* text accompanying notes 91-103, discussing cases containing language which would support a U.S. court's decision to decline jurisdiction over a defendant kidnapped in violation of customary international law.

131. *Compare* cases asserting jurisdiction over a defendant kidnapped by state officials on the territory of another state, *e.g.*, *Ex parte* Scott, 9 B. and C. 446 (K.B. 1829); Ker v. Illinois, 119 U.S. 436 (1886); *Eichmann*, 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961) *with* cases declining jurisdiction over a kidnapped defendant, *e.g.*, Fiscal v. Samper, 7 Ann. Dig. 402 (Supreme Court of Spain 1934); *In re* Jolis, [1933-34] Ann. Dig. 191 (No. 77) (France, Tribunal Correctionnel d'Avesnes 1933); *Ex parte* Mackeson, 75 Crim. App. R. 24 (1981).

132. The major English precedents supporting the traditional view are *Ex parte* Scott, 9 B. and C. 446, and *Ex parte* Elliott, 1 All E.R. 373 (K.B. 1949).

133. *See, e.g.*, Abrahams v. Minister of Justice, 4 S. Afr. L. R. 542, 545 (South Africa, Cape Provincial Division 1963); *Eichmann*, 36 I.L.R. 5; and Afouneh v. Attorney-General, [1941-42] Ann. Dig. 327, 328 (No. 97) (Supreme Court of Palestine 1942).

134. *See, e.g.*, Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL 1188 (France, Cour d'appel de Douai 1891); *In re* Jolis, [1933-34] Ann. Dig. 191 (No. 77) (France, Tribunal Correctionnel d'Avesnes 1933); and Fiscal v. Samper, 7 Ann. Dig. 402 (Supreme Court of Spain 1934).

135. R. v. Hartley, [1978] 2 N.Z.L.R. 199 (New Zealand, Ct. App. 1977); *Ex parte* Mackeson, 75 Crim. App. R. 24 (1981).

136. *See infra* text accompanying notes 239-71.

A. *Decisions of Other Courts in Accord with English Precedent*

In *Abrahams v. Minister of Justice*,[137] a South African case echoing the English precedents, the defendant alleged he had been granted political asylum in Bechuanaland Protectorate (now Botswana), before he was kidnapped by South African police, brought by force to South West Africa, and formally charged under the Suppression of Communism Act.[138] The South African court, relying on *Ex parte Elliott*, decided that once there is a lawful detention, the circumstances of the arrest and capture are irrelevant.[139]

The South African court's opinion does not state whether the authorities in Bechuanaland Protectorate protested Abrahams's abduction. If the protectorate authorities did lodge a protest of the kidnapping, then the holding in this case goes beyond the English precedent in that the South African court would then be trying a defendant kidnapped in violation of international law.[140] If the protectorate authorities did not protest the kidnapping, then the holding is reconcilable with English precedent, given the asylum state's acquiescence by silence.[141]

Another case in accord with English precedent is *Re Argoud*,[142] in which the French court, contrary to French precedent,[143] held that the defendant's prosecution in France was not conditional upon his voluntary return or regular extradition.[144] In 1961 Argoud was sentenced to death *in absentia* for illegal political activities.[145] In 1963 he was abducted in Munich and taken to Paris, where he was tried and sentenced to life imprisonment.[146] Argoud argued that because he had been granted asylum by the Federal Republic of Germany, his abduction without extradition proceedings violated international law and rendered his subsequent prosecution a nullity.[147] The court found that since Argoud was not the subject of extradition proceedings, he could not argue a violation of

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137. 4 S. Afr. L. R. 542 (South Africa, Cape Provincial Division 1963).

138. *Id.* at 543-44.

139. *Id.* at 545-46.

140. As pointed out by O'Higgins, *supra* note 46, at 281, an examination of English case law does not reveal a single case where the court held that it would exercise jurisdiction over a defendant kidnapped in violation of customary international law.

141. *See* O'Higgins, *supra* note 46, at 280; comment to art. 16 of the *Harvard Research in International Law, Draft Extradition Treaty, supra* note 93.

142. 45 I.L.R. 90 (France, Cour de Cassation 1964).

143. *See* Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL 1188 (France, Cour d'appel de Douai 1891); *In re* Jolis, [1933-34] Ann. Dig. 191 (No. 77) (France, Tribunal Correctionnel d'Avesnes 1933), discussed *infra* text accompanying notes 221-38.

144. *Re* Argoud, 45 I.L.R. at 97.

145. *Id.* at 90.

146. *Id.* at 90-91.

147. *Id.* at 95-96.

the extradition treaty between France and the Federal Republic, which expressly excludes political offenses from its scope.[148]

The French court also found that, if a violation of the sovereignty of the Federal Republic had occurred, only the injured state could complain and demand reparation.[149] Thus, the defendant Argoud was not entitled to plead a violation of the rules of public international law as a personal basis for immunity from judicial proceedings.[150] This holding would allow a court to exercise jurisdiction over a defendant kidnapped in violation of international law while the asylum state simultaneously attempts, successfully or unsuccessfully, to obtain redress in the form of the defendant's release.[151]

The Israeli court in *Attorney-General v. Eichmann*[152] relied expressly on English and U.S. precedent in asserting its power to try the defendant Eichmann.[153] Eichmann was abducted from Buenos Aires by Israeli agents and put on trial in Israel for war crimes and crimes against humanity committed in Germany and other Axis countries and occupied areas from 1939 to 1945.[154] The Israeli court concluded that, under existing law in Israel, England, and the United States, the defendant could not claim immunity from prosecution on the basis of his abduction from Argentina.[155]

Argentina lodged a complaint with the Security Council of the United Nations, requesting reparation, Eichmann's return, and punishment of his abductors, for the violation of its sovereignty.[156] Following the Security Council's adoption of a

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148. *Id.* at 97. The court noted that a defendant could argue a violation of an extradition treaty only "in a case in which it had been shown that the person in question had been surrendered by the foreign State in fraud of the stipulations of the treaty and therefore appeared to have been the subject of a *disguised extradition*." *Id.* (emphasis original). This point accords with the specialty principle as it is illustrated in *Rauscher*, discussed *supra* text accompanying notes 31-49.

149. *Re* Argoud, 45 I.L.R. at 97. "Individuals have no capacity to plead in judicial proceedings a contravention of international law. The putting in issue of international responsibilities concerns only relations between State and State, without individuals being entitled to claim to intervene." *Id. See also* Travers, *Des arrestations au cas de venue involuntaire sur le territoire*, 13 REVUE DE DROIT INTERNATIONAL PRIVE ET DE DROIT PENAL INTERNATIONAL 627, 643 (1917)(If the asylum state acquiesces in the irregularity of rendition of the defendant, the defendant cannot argue the irregularity as a jurisdictional bar because, first, the defendant cannot speak in the name of the sovereign state, and, second, the sovereign state is free to ratify all irregular acts. Silence on the part of the state constitutes a presumption of ratification.).

150. *Re* Argoud, 45 I.L.R. at 97.

151. The court suggested that, regardless of the final sentence on Argoud, the "sentence could not be an obstacle to a future agreement between the Governments concerned on the fate of the accused." *Id.* at 96. In other words, the violation of international law is a matter to be resolved by the governments of the two states involved, not by the court that tries the kidnapped defendant.

152. 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961) *aff'd sub nom.* Eichmann v. Attorney-General, 36 I.L.R. 277 (Supreme Court 1962).

153. *Id.* at 59-62.

154. *Id.* at 5, 8-9.

155. *Id.* at 76.

156. 15 U.N.SCOR supp. Apr.-June 1960, at 26, U.N. Doc. S/4334. Argentina complained:

> [T]he power of a state to exercise its authority over all persons resident and things situated in its territory is an inalienable attribute of the exclusive jurisdiction essential to its very right to

resolution requesting Israel to make appropriate reparation,[157] the two governments reached an agreement and issued a joint communiqué, 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."[158]

The Israeli court relied on the settlement of the dispute between Argentina and Israel in dismissing Eichmann's contention that he was immune from prosecution. The case against Eichmann began after Argentina had exonerated Israel for violating her sovereignty, and the breach of international law was thereby cured.[159] In these circumstances, the court decided, "the accused cannot presume to speak, as it were, on behalf of Argentina and claim rights which that sovereign State had waived."[160] The Israeli court's reasoning accords with English precedent insofar as the settlement of the dispute between the two countries cured the violation committed by the Israeli state agents.[161] The question remains, however, whether absent acquiescence by the asylum state, the individual defendant may raise a.violation of international law in defense against the court's jurisdiction.[162]

Several cases involving irregular extradition proceedings also accord with the line of English cases following *Ex parte Scott*.[163] In *Afouneh v. Attorney-General*[164] a murder suspect who had escaped from Palestine to Syria was apprehended in Damascus,[165] handed over at the frontier, and arrested on the Palestine side.[166] Extradition papers had been forwarded to Syria, but arrived only after the suspect had been returned to Palestine.[167] The Supreme Court of Palestine held that the defendant could not plead that, due to procedural irregularities, the

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> independence, and . . . the corollary to that right is the duty of every State to refrain from performing, through its organs or agents, any act which may entail any violation of the sphere of exclusive jurisdiction of another State.

Id. at 25.

157. Security Council Resolution of June 23, 1960, 15 U.N.SCOR supp. Apr.-June 1960, at 35, U.N. Doc. S/4349.

158. Joint communiqué *quoted in Eichmann*, 36 I.L.R. at 59.

159. *Eichmann*, 36 I.L.R. at 63.

160. *Id.*

161. *See* O'Higgins, *supra* note 46, at 280; comment to art. 16 of the *Harvard Research in International Law, Draft Extradition Treaty*, *supra* note 93.

162. Like the early English cases of *Ex parte* Scott and *Ex parte* Elliott, the Israeli *Eichmann* case does not decide this issue. *See also supra* text accompanying notes 85-110 (discussion of a possible exception to the general U.S. rule allowing a court to decline jurisdiction over a defendant kidnapped in violation of customary international law).

163. *See* Afouneh v. Attorney-General, [1941-42] Ann. Dig. 327 (No. 97) (Supreme Court of Palestine 1942); Extradition (Jurisdiction) Case, [1935-37] Ann. Dig. 348 (No. 165) (Germany, S. Ct. of the Reich 1936); Geldof v. Meulemeester, 31 I.L.R. 385 (Belgium, Cour de Cassation 1961).

164. [1941-42] Ann. Dig. 327 (No. 97) (Supreme Court of Palestine 1942).

165. Syria at the time was occupied by the Allied Forces, and the suspect was apprehended in Damascus by a British sergeant. *Id.* at 327.

166. *Id.*

167. *Id.*

asylum state should not have extradited him.[168]

In two other cases involving irregular extradition proceedings, *Extradition (Jurisdiction) Case* (Germany)[169] and *Geldof v. Meulemeester* (Belgium),[170] the courts found that they had no authority to review the irregularity of extradition proceedings conducted by the asylum state.[171] If the asylum state and the prosecuting state voluntarily arrange for the return of a fugitive, no violation of the rights of the asylum state occurs, even when the arrangements depart from regular extradition procedures outlined in a treaty.[172]

Thus, the traditional view of courts in the United States, England, Israel, and several other countries permits the exercise of jurisdiction over a defendant whose presence was obtained in an illegal or irregular manner.[173] The courts do not articulate strong policy reasons for assuming jurisdiction over kidnapped or irregularly extradited defendants; these defendants are simply classed with all other criminal defendants found within the territory of the prosecuting state. The courts' inquiry focuses on the failure of the defendants' arguments that they should be treated differently as a result of their illegal or irregular return.[174] The narrow scope of the specialty principle affords protection only to those defendants charged with a crime other than the one for which they were extradited.[175] Some immunity from prosecution may also be available to those defendants who can show that their kidnapping violated the rights of a non-acquiescing asylum state, thus violating international law.[176] However, absent such special circumstances, a defendant whose presence before the court was obtained by illegal or irregular means will be prosecuted in the courts of states following the traditional English rule.

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168. *Id.* The Palestine court noted, however, that the defendant could not have been tried for an offense other than the one for which he was extradited, in accordance with the specialty principle as generally recognized among nations. *See supra* text accompanying notes 31-49. *See also Eichmann*, 36 I.L.R. at 76.

169. [1935-37] Ann. Dig. 348 (No. 165) (Germany, S. Ct. of the Reich 1936).

170. 31 I.L.R. 385 (Belgium, Cour de Cassation 1961).

171. *Id.* at 385; Extradition (Jurisdiction) Case, [1935-37] Ann. Dig. at 349 ("It is the task of the authorities of the extraditing State, not that of the German courts, to watch over the correct application of foreign extradition law.").

172. *See* Travers, *supra* note 149, at 643. *But see* R. v. Hartley, [1978] 2 N.Z.L.R. 199 (New Zealand Ct. App. 1977); *Ex parte* Mackeson, 75 Crim. App. R. 24 (1981), discussed *infra* text accompanying notes 239-71.

173. *See, e.g.*, Ker v. Illinois, 119 U.S. 436 (1886), reaffirmed in Gerstein v. Pugh, 420 U.S. 103 (1975); *Ex parte* Scott, 9 B. and C. 446; and *Eichmann*, 36 I.L.R. 5.

174. *See, e.g., Ex parte* Elliott, 1 All E.R. at 377-78 ("[W]e have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here."); *Eichmann*, 36 I.L.R. at 76.

175. *See Re* Argoud, 45 I.L.R. at 97; Afouneh v. Attorney-General, [1941-42] Ann. Dig. at 327; and *Eichmann*, 36 I.L.R. at 76 (specialty principle was recognized, but found to be not applicable).

176. *See supra* text accompanying notes 85-110 and 124-30.

B. *U.N. Security Council Statement on the Threat to International Peace and Order Posed by International Kidnapping*

The Security Council Resolution concerning the *Eichmann* case is an important articulation of the larger concerns arising from a state-sponsored kidnapping of a suspect from another state's territory.[177] The Security Council noted that violation of state sovereignty is incompatible with the United Nations Charter and the principles upon which international order is founded.[178] The resolution emphasized the threat to international peace, security, and the harmonious coexistence of states posed by violations of sovereignty such as the Eichmann abduction.[179] Although it recognized the importance of bringing Eichmann to trial, the Security Council requested Israel "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law."[180]

The Security Council Resolution raises concerns over state-sponsored international kidnapping that may persuade a court to divest itself of jurisdiction over such a kidnapped defendant.[181] A court that refuses to allow state officials to take advantage of their action in violation of international law upholds the rule of law in the international arrest of criminal suspects.[182] The threat to international peace, security, and the harmonious coexistence of states posed by state-sponsored international kidnappings counsels strict adherence to the rule of law rather than a rule of expediency.[183]

C. *International Kidnapping Incidents Settled by the Return of the Person Kidnapped*

In some incidents of international official kidnapping, the governments of the states involved settled the dispute amicably by the release of the kidnapped defendant.[184] These extra-judicial settlements demonstrate recognition by various countries of the impropriety of such kidnappings and the importance of the kidnapped individual's release.[185]

In 1876, a British citizen named Blair fled from England to the United States, where he was kidnapped and brought back to England by a private detective

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177. 15 U.N. SCOR supp. Apr.-June 1960, at 35, U.N. Doc. S/4349.

178. *Id.*

179. *Id.*

180. *Id.* The U.S. Second Circuit has noted that the Security Council Resolution "merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped." *Toscanino*, 500 F.2d at 278.

181. *See Lira*, 515 F.2d at 72-73 (Oakes, J., concurring). The concerns articulated in Judge Oakes's opinion are similar to those articulated in the Security Council Resolution, *supra* note 177.

182. *See* Scott, *supra* note 7, at 107.

183. *See* Garcia-Mora, *supra* note 1, at 439-40.

184. Sponsler, *supra* note 7, at 46.

185. *Id.*

apparently acting in complicity with English officials.[186] When the U.S. government protested the kidnapping, the English government returned Blair to the United States.[187]

In 1924, a French police official, Schnaebele, was lured into Germany by a letter from a German police official requesting a meeting and purporting to grant a safe-conduct.[188] German officials arrested and imprisoned Schnaebele upon his arrival.[189] After the French government lodged a protest, Prince Bismarck ordered Schnaebele's release because of the involvement of German officials in luring Schnaebele into Germany.[190]

In 1935, a Swiss citizen named Jacob-Salomon[191] was kidnapped from Basel, Switzerland, by two German nationals who drove him across the border into Germany, where he was arrested.[192] The Swiss government lodged a diplomatic protest with the German government, charging that the abductors had acted with the connivance of German officials.[193] Germany initially refused to release Jacob-Salomon, alleging that no evidence had been found to support the contention that German officials participated in the abduction.[194] Both governments agreed to submit the dispute to arbitration, but before the arbitration tribunal rendered a decision, Germany conceded and returned Jacob-Salomon to Switzerland.[195]

In 1965, Italian police arrested an Italian national, Mantovani, coming out of a restaurant in Lugano, Switzerland, and transported him to the Italian territory of Campione.[196] Swiss local police, alerted by a witness, brought Mantovani back into Swiss territory.[197] When the Attorney-General of the Swiss federal government met with Swiss and Italian police, it became clear that the incident had been caused by the excessive zeal of an Italian police officer assigned to arrest Mantovani at Campione.[198] Two high officials of the Italian police apologized officially for the violation of Switzerland's territorial sovereignty.[199] They assured the Swiss that everything was being done to prevent a repetition and that the guilty

186. *The Blair Case* (1876), described in Preuss, 30 AM. J. INT'L L. 123, 124 n.6 (1936).

187. *Id.*

188. *The Schnaebele Case*, described in III TRAVERS, LE DROIT PENAL INTERNATIONAL (Paris 1924) No. 1302.

189. *Id.*

190. *Id.*

191. *The Jacob-Salomon Case*, described in Preuss, *Kidnaping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502, 502-04 (1935).

192. *Id.* at 502.

193. *Id.* at 503.

194. *Id.* at 504.

195. Preuss, *Settlement of the Jacob Kidnaping Case*, 30 AM. J. INT'L L. 123 (1936).

196. Affaire Mantovani, Italie et Suisse, Rousseau, *Chronique des Faits Internationaux*, 69 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 761, 834-35 (1965).

197. *Id.* at 835.

198. *Id.*

199. *Id.*

subordinates had acted without the knowledge of their superiors.[200] The Swiss federal authorities considered the affair closed.[201]

In August 1974, when Ronald Anderson was crossing the border from Canada into the United States, U.S. customs officials identified him as a U.S. Army deserter and attempted to detain him for further examination.[202] Anderson ran back across the border, pursued by U.S. customs officials, who captured him a short distance into Canadian territory and turned him over to the Federal Bureau of Investigation.[203] The Canadian government formally requested Anderson's return, maintaining that his arrest was incompatible with Canadian sovereignty and contrary to international law and practice.[204] Anderson was returned to Canadian jurisdiction within a week of his apprehension.[205]

From the reported international incidents, it appears that some of the same states whose courts try defendants kidnapped in violation of the sovereignty principle have recognized, at least on a diplomatic level, that release of the kidnapped individual is appropriate.[206] The courts of these states should not, however, leave settlement or discord over the matter of an official international kidnapping to the respective governments.[207] If the governments involved have not addressed the problem, the court faced with a case of official international kidnapping should determine whether the rule of law in international affairs requires the defendant's release.[208]

IV. ANALYSIS OF DECISIONS IN CONFLICT WITH ANGLO-AMERICAN PRECEDENT

Courts in some countries have declined to exercise jurisdiction over a defendant whose presence before the court was secured by illegal or irregular means.[209] The Spanish Supreme Court rested its decision in *Fiscal v. Samper* on the importance of confidence and order in international relations.[210] The court overturned the conviction of a defendant who had been extradited from Por-

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200. *Id.*

201. *Id.*

202. *The Anderson Case*, described in Cole, *Extradition Treaties Abound But Unlawful Seizures Continue*, INT'L PERSPECTIVES 40 (March-April 1975).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Compare Ex parte* Scott, 9 B. and C. 446; *Re* Argoud, 45 I.L.R. 90; *Ker*, 119 U.S. 436 *with The Blair Case*, 30 AM. J. INT'L L. 124 n.6; *The Schnaebele Case*, III TRAVERS, LE DROIT PENAL INTERNATIONAL No. 1302; *The Anderson Case*, Cole, *supra* note 202.

207. Garcia-Mora, *supra* note 1, at 437-38.

208. *Id.* at 438. *See also* Dickinson, *supra* note 7, at 244. *But see supra* text accompanying note 151.

209. *See* Fiscal v. Samper, 7 Ann. Dig. 402; Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL 1188; *In re* Jolis, [1933-34] Ann. Dig. 191; R. v. Hartley, [1978] 2 N.Z.L.R. 199; and *Ex parte* Mackeson, 75 Crim. App. R. 24.

210. 7 Ann. Dig. 402 (Supreme Court of Spain 1934).

tugal on one charge, but tried in Spain on a second charge.[211] This case could easily have been decided on the specialty principle that a defendant may only be prosecuted on the charge for which he was extradited.[212] The Spanish court, however, went much farther in its rationale, finding that a criminal suspect who takes refuge in a foreign country, and who relies on legislation that promises the suspect protection, acquires a right to that protection.[213] To disregard the defendant's right "would tend to weaken the law of nations and to introduce lack of confidence into international relations."[214]

The Spanish court's reasoning in *Fiscal v. Samper* rejects the traditional Anglo-American rule that jurisdiction is not impaired by the circumstances attending a defendant's arrest and capture on foreign territory. More importantly, the court discarded the idea that individuals cannot plead a right of asylum or protection under an extradition treaty.[215] Indeed, the court tied recognition of the defendant's individual right to the strength of international relations.[216]

This recognition of a defendant's right of asylum or protection under extradition treaties is completely at odds with the U.S. Supreme Court decision in *Ker*.[217] The *Ker* Court found that the defendant could not claim a right to asylum in Peru or to an assurance of proper extradition proceedings for his removal from that state.[218] The Court pointed out that the asylum state, Peru, could have legally surrendered Ker without resort to extradition proceedings and concluded that the only right of asylum was the right of Peru to grant asylum to Ker if it chose.[219] The Spanish court in *Fiscal*, by contrast, chose to recognize the defendants' right to protection under the extradition treaty and overturned their convictions.[220]

The French courts used a different rationale for ordering the release of defendants who had been abducted from a foreign country by French officials. In the 1891 *Case of Nollet*,[221] a Belgian fugitive from France was arrested in Belgium by French officials and turned over to the Belgian police who, thinking the fugitive was French, turned him over to the French authorities at the border.[222] The court of appeal at Douai released Nollet, holding the arrest

211. *Id.*
212. Had the Spanish court decided the case on the basis of the specialty principle, it would have been very much in accord with United States precedent under *Rauscher*. *See supra* text accompanying notes 36-42.
213. Fiscal v. Samper, 7 Ann. Dig. at 402.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Ker*, 119 U.S. 436, *see supra* text accompanying notes 15-26.
218. *Id.* at 441.
219. *Id.* at 442.
220. Fiscal v. Samper, 7 Ann. Dig. at 402.
221. 18 JOURNAL DU DROIT INTERNATIONAL 1188 (Cour d'appel de Douai 1891).
222. *Id.* at 1188.

invalid, as if no arrest had occurred, since the defendant would not be before the court had the French officials acted lawfully.[223]

In the 1933 case of *In re Jolis*,[224] French authorities suspected the defendant of having stolen money from a cafe in France. They abducted him from a town in Belgium.[225] The court at Avesnes ordered his release on the ground that "the arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was completely null and void."[226]

The two French cases suggest the rationale found in U.S. case law under the *Cook* exception.[227] The French courts, faced with a defendant forcibly abducted by state officials from the territory of another state, refused to disregard the events which brought the defendants before them. The arrests on foreign territory were found to have rendered later prosecutions null and void.[228] Similarly, according to the rationale in *Cook*, arrests made in excess of the state's proper competence preclude later prosecutions.[229]

The difference between these French precedents and the *Cook* exception is that in the former, the arrests violated customary international law, whereas in the latter, the arrest violated specific provisions of an international treaty.[230] The *Cook* exception seems unnecessarily confined to cases of treaty violation.[231] Jurisdiction cannot be acquired by a violation of customary international law any more than it can be acquired by a violation of an extradition treaty.[232] The two French cases make the simple statement that an arrest in violation of international law — customary or conventional — renders any later criminal proceedings null and void.[233]

The rationale of the French cases can also be likened to U.S. case law under the *Rauscher* exception.[234] The idea that the court lacks competence to try a

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223. *Id.* at 1188-89.

224. [1933-34] Ann. Dig. 191 (No. 77) (Tribunal Correctionnel d'Avesnes 1933).

225. *Id.* at 191.

226. *Id.* Although the Belgian government lodged an official protest with the French government through diplomatic channels, the rationale of the court's decision was not based on the rights of Belgium, but on the incapacity of the court to try a defendant whose arrest was null and void due to an illegal abduction. *Id.* The distinction is important because the court's rationale would allow the release of a defendant even where the asylum state does not officially protest. *Contra* United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975); and Attorney-General v. Eichmann, 36 I.L.R. 5, 63 (District Court Jerusalem 1961, Supreme Court 1962).

227. Cook v. United States, 288 U.S. 102 (1932), discussed *supra* at § II.B.2.

228. *See supra* text accompanying notes 223 and 226.

229. *Cook*, 288 U.S. at 121. *See also* Dickinson, *supra* note 7, at 244.

230. The French cases found the arrests to be illegal because the French officials had violated the Belgian border in arresting the suspects on Belgian territory. *See* text accompanying notes 223 and 226. The arrest in *Cook* was illegal because it was made beyond the territorial limit on jurisdiction specifically set down in a treaty. *Cook*, 288 U.S. at 121.

231. *See* Sponsler, *supra* note 7, at 45-46; Fairman, *supra* note 23, at 679.

232. *See supra* note 238.

233. *See supra* text accompanying notes 223 and 226.

234. *Rauscher*, 119 U.S. 407, discussed *supra* at § II.B.1.

defendant is manifested in cases where the defendant is brought to trial on a charge different than the one for which extradition was granted.[235] In such an instance, the court lacks competence to try the defendant on the new charge.[236] Here too, the exception to the general U.S. rule seems unnecessarily narrow.[237] If a court lacks competence to try a defendant on a particular charge, because the asylum state did not surrender the individual for that purpose, it follows logically that the court lacks competence to try a defendant whom the asylum state did not surrender for any purpose. The French cases offer a broader and more logical rule that the court lacks competence to try a defendant who was not properly surrendered by the asylum state for that purpose.[238]

In two recent cases from England and New Zealand,[239] the courts employed a very different rationale to discharge a defendant abducted from another state with the help of the other state's officials. In *R. v. Hartley*,[240] New Zealand authorities suspected that a man named Bennett was involved in a murder.[241] Bennett left for Melbourne, Australia; local police found him there, brought him to the airport, and returned him by plane to New Zealand, where he was taken into custody by the New Zealand police.[242] The New Zealand police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne police by telephone to put Bennett on the next plane back to New Zealand.[243]

The New Zealand Court of Appeal found that it did indeed have jurisdiction to try the defendant, but further found that the trial judge would have been justified in exercising his discretion to direct that the defendant be discharged.[244] The initial question of jurisdiction was decided on the authority of *Ex parte Elliott*,[245] since the defendant was eventually lawfully arrested within the country and then brought before the court by due process of law.[246] The court considered, however, that the departure from lawful extradition proceedings by the

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235. *See* Dickinson, *supra* note 7, at 231-32 (citing *Rauscher*, 119 U.S. at 430).

236. *See id.*

237. *See id.* at 238; Fairman, *supra* note 18, at 679; O'Higgins, *supra* note 46, at 301.

238. *See supra* text accompanying notes 223 and 226. *Cf.* Morgenstern, *supra* note 7, at 267, where the author contends that the decision in *In re* Jolis "is the only attitude consonant both with the requirements of international law and with the principles of the municipal law of most states regarding the enforcement of international law in municipal courts."

239. R. v. Hartley, [1978] 2 N.Z.L.R. 199 (New Zealand Ct. App. 1977); *Ex parte* Mackeson, 75 Crim. App. Rep. 24 (1981).

240. [1978] 2 N.Z.L.R. 199.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 215, 217.

245. 1 All E.R. 373. *See supra* text accompanying notes 125-30.

246. [1978] 2 N.Z.L.R. at 215.

New Zealand police constituted an abuse of process, which would justify the court in refusing to allow the case to go to trial.[247]

The New Zealand court's decision was not based on policies articulated in the cases discussed in this Comment.[248] The court clearly acknowledged its competence to exercise jurisdiction over the defendant.[249] But, because of the role of extradition treaties in the surrender of fugitives from one country to another, the court was unwilling to try a defendant whose presence had been secured by resort to measures outside the extradition treaty.[250] The role of extradition treaties, according to the court, is to protect the public by demanding "the sanction of recognized Court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another."[251] Violations of or deviations from proper extradition procedures threaten the freedom of society.[252] The actions of the New Zealand police were "so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law" that the trial court, in its discretion, could have discharged the defendant.[253]

The Court of Appeal in England, in *Ex parte Mackeson*,[254] relied on the reasoning of the *Hartley* case in discharging the defendant, who argued that his presence in England had been obtained by deportation from Zimbabwe in circumstances that amounted to a disguised extradition.[255] Mackeson, an English

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247. *Id.* at 216. The court relied on the inherent jurisdiction of a court to prevent abuse of its own process. *Id.*

248. *See, e.g.*, the good faith principle in *Rauscher*, *supra* text accompanying note 38; the adherence to treaty provisions in *Cook*, *supra* text accompanying notes 53-55; the due process rights of an individual not to be treated with brutality by state officials in *Toscanino*, *supra* text accompanying notes 73-78; the right of a fugitive to protection and asylum under an extradition treaty in Fiscal v. Samper, *supra* text accompanying notes 210-16; the lack of judicial competence to prosecute a defendant arrested in violation of customary international law in *Case of Nollet* and *In re* Jolis, *supra* text accompanying notes 223 and 226.

249. *Hartley*, [1978] 2 N.Z.L.R. at 215.

250. *Id.* at 216.

251. *Id.*

252. The court declared:

> Some may say . . . that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. . . . In the High Court of Australia Griffith CJ referred to extradition as a "great prerogative power, supposed to be an incident of sovereignty" and then rejected any suggestion that it "could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished." The reasons are obvious.

Id. at 216-17 [citation omitted].

253. *Id.* at 217.

254. 75 Crim. App. R. 24 (1981).

255. *Id.* at 24. Extradition was not available from Rhodesia to England from 1967 to 1979. *Id.* at 33. However, extradition could have been resorted to in 1979 when Mackeson was declared a prohibited immigrant. *Id.*

baronet, had been declared a prohibited immigrant by Zimbabwe because of three fraud charges levelled against him in the United Kingdom.[256] Mackeson's passport was sent, without his knowledge, to London, where it was revalidated for one month for a single journey to the United Kingdom.[257] Mackeson contested the deportation order in Zimbabwe, but on appeal, the order was held valid.[258] Zimbabwe authorities escorted Mackeson by air to England and maintained their arrest of him at the airport until the English authorities arrived to take him into custody.[259]

The English Court of Appeal found that the Zimbabwe and English authorities had worked together to effect Mackeson's extradition "by the back door."[260] Relying on the authority of *Ex parte Elliott*, the court found that the fraud or illegal means by which Mackeson's presence in England was obtained did not in any way remove the jurisdiction of the court.[261] In its discretion, however, the court ordered the defendant's discharge, holding that the English police, without any conscious intent to do wrong, transgressed the line between acceptable and unacceptable methods of producing criminal suspects.[262]

Mackeson's arguments would have failed in most other jurisdictions.[263] In the United States, for example, the general rule under *Ker* would call for the exercise of jurisdiction over the defendant since he had been lawfully arrested and brought before the court and since he could not plead one of the three narrow exceptions to the general rule.[264] Mackeson was not the subject of extradition proceedings; he was not tried on a charge other than the one for which he had been surrendered.[265] In Mackeson's case, no treaty existed specifying territorial limits on jurisdiction, as in *Cook*.[266] Mackeson's treatment by the Zimbabwe officials was not an egregious violation of due process by the *Toscanino*

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256. *Id.* at 26.

257. *Id.* at 27.

258. *Id.* at 28.

259. *Id.* at 30.

260. *Id.* The court found that the legality of a deportation order depends on its purpose: if the purpose was to remove one whose presence was not conducive to the public good, the order would be lawful; if the purpose was to surrender the defendant as a fugitive to another state because that state requested it, the order would be unlawful and would amount to a disguised extradition. *Id.* at 28-29.

261. *Id.* at 32.

262. *Id.* at 33.

263. Under Fiscal v. Samper, 7 Ann. Dig. 402 (Supreme Court of Spain 1934), Mackeson may have been released if he could show he had taken refuge in Zimbabwe, relying on legislation that promised him protection. *See supra* notes 213-14. The distinction between Fiscal v. Samper and *Ex parte* Mackeson is that the Spanish court vindicated the rights of an individual defendant to have protection under an extradition treaty, whereas the English court vindicated the right of the general public to have extradition treaties respected by state officials. In either case, the defendant is discharged.

264. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 69 (2d Cir.) (Anderson, C.J., concurring), *cert. denied*, 421 U.S. 1001 (1975); United States v. Deaton, 448 F. Supp. 532, 535 (N.D. Ohio 1978).

265. *See supra* text accompanying note 32.

266. *See supra* text accompanying notes 53 and 54.

standard.[267] Even under the French precedents of *Case of Nollet* and *In re Jolis*, Mackeson may not have been released, as customary international law was not violated in the arrangements made by the two states for the defendant's return.[268]

In spite of the fact that the state officials' conduct in *Hartley* and *Ex parte Mackeson* violated neither the rights of the asylum state nor the rights of the individual defendant, the courts in those cases held that the defendant's release was justifiable.[269] In both cases the court found the informal arrangements made between the officials of the asylum state and the prosecuting state unacceptable.[270] These cases, adamantly insisting on adherence to extradition procedures, may evidence an emerging rule that refuses to countenance unlawful methods for returning suspects.[271] This rule may eventually emerge in the United States, as foretold by Judge Oakes:

> Finally it should be said that, regardless of the abstract doctrine *Ker* . . . [is] said to stand for, and we can reach a time when in the interest "of establishing and maintaining civilized standards of procedure and evidence," we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power [to remedy abuses of a district court's process] . . . . To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law.[272]

V. CONCLUSION

The traditional rule in the United States countenances almost any conduct by state officials in their efforts to secure the presence of a defendant before a court in the United States. Government officials and agents may disregard the procedures set down in extradition treaties, kidnap a criminal suspect from the territory of a foreign sovereign state, and treat the suspect in any manner short of shockingly brutal, without fear that the court will be persuaded to restore the *status quo ante*.

The decisions of other nations' courts offer some support for the conclusion that the traditional U.S. rule should yield to the criticisms and exceptions en-

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267. *See supra* text accompanying notes 76 and 77.

268. The participation of the asylum state authorities in the surrender of a suspect cures any violation of the sovereignty of the asylum state. *See supra* text accompanying notes 95-98.

269. *Hartley*, [1978] 2 N.Z.L.R. at 215; *Mackeson*, 75 Crim. App. R. at 32.

270. *Hartley*, [1978] 2 N.Z.L.R. at 216; *Mackeson*, 75 Crim. App. R. at 33.

271. In *Mackeson*, Justice Davies noted that "the principles to be applied in a case of this nature are now well established." *Mackeson*, 75 Crim. App. R. at 34 (Davies, J.).

272. United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring) (citations omitted).

countered over the past century. A better rule would grant the defendant's return to the asylum state where the defendant has been ill-treated or the sovereignty of the asylum state has been affronted. The best rule, however, exemplified by recent decisions in New Zealand and England, requires the court to give effect to the rule of law in international affairs by declining to exercise jurisdiction where it has been first obtained by unlawful means.

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