

Self-Help Is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists

Andrew J. Calica

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Self-Help Is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists

Andrew J. Calica †

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Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of

† B.A. 2001, Wesleyan University; J.D. 2004, Cornell Law School, 2004. Special thanks to Craig Waldman. We are forever reminded of the lasting consequences of government action by "the Boss," who sang:

Down in the shadow of the penitentiary
Out by the gas fires of the refinery
I'm ten years
I'm fifteen years
I'm twenty-five years burnin' down the road
I got nowhere to run now
I got nowhere to run now
I was born in the U.S.A.

Bruce Springsteen, *Born in the U.S.A.*, on BRUCE SPRINGSTEEN & THE E STREET BAND—LIVE IN NEW YORK CITY (Sony 2001).

*funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make: Either you are with us, or you are with the terrorists.*¹

-President George W. Bush

Introduction

Imagine for a moment that the United States, or for that matter any country whose nationals perished as a result of the attacks of September 11, 2001, knew that Osama bin Laden had survived the siege at Tora Bora, Afghanistan,² and planned to travel on a common carrier to a nonextradition country from which he would launch renewed attacks. Assume further that the United States had the ability to intercept this carrier and capture bin Laden, albeit only by infringing upon international air space, and only through covert action that excluded the involvement of the vehicle's host nation—one which failed to prosecute him. How should the United States respond? Should it refrain from self-help and allow a wanted terrorist to escape to a safe haven that will neither prosecute nor extradite him—to a nation from which he can create more terror?³ No. Instead, should the United States seize the opportunity to remove a wanted terrorist from circulation and thereby deter other potential threats? Yes.

In addressing an actual or imminent terrorist attack, the Bush Doctrine endorses a policy of preemptive action and sets forth a policy of hunting down and eliminating known terrorists, and of targeting terrorist-

1. President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1142 (Sept. 20, 2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_presidential_documents&docid=PD24se01_txt-26.pdf; see also President George W. Bush, Commencement Address at the United States Military Academy in West Point, New York, 38 WEEKLY COMP. PRES. DOC. 944, 946-47 (June 1, 2002), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_presidential_documents&docid=pd10jn02_txt-5.pdf [hereinafter Address at the United States Military Academy] (articulating the "Bush Doctrine," which allows for preemptive strikes based on the theory that "[i]f we wait for threats to fully materialize, we will have waited too long").

2. Philip Smucker, *Bin Laden in Pakistan, Source Claims*, CHRISTIAN SCI. MONITOR (Boston), Dec. 13, 2001, at 2, available at <http://csmonitor.com/2001/1213/p1s1-wosc.html> (reporting that Osama bin Laden escaped the siege at Tora Bora); Dana Bash, *Bin Laden Will Be Caught, White House Vows* (Dec. 16, 2003), at <http://www.cnn.com/2003/US/12/16/wh.bin.laden/index.html> (describing continued search for bin Laden); see also Jack Kelley, *Officials: Voice on Tape Is bin Laden*, USA TODAY, Nov. 13, 2002, at A1 (reporting that after conducting a preliminary intelligence analysis, U.S. officials expressed confidence that a tape featuring bin Laden, which had been aired on Al-Jazeera, was authentic). But see *Terrorism Notebook*, SEATTLE TIMES, Nov. 30, 2002, at A4 (reporting that Swiss voice recognition experts doubted the authenticity of the audiotape after they compared it with ninety minutes of known recordings of bin Laden's voice).

3. See generally Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States' Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 YALE J. INT'L L. 121, 141 (1990) (noting that Article 8 of the Hostage Taking Convention requires the state in which the offender is found to either extradite or prosecute the accused).

sponsoring states by seeking to limit their development of weapons of mass destruction.⁴ The Doctrine's aggressive counterterrorist position would seem to encompass measures like forcible abduction⁵ as a means for capturing and prosecuting terrorists. The Executive's intolerance for uncooperative nations, its commitment to thwarting terrorism, and the international presence of terrorist organizations suggest that forcible abduction is likely to become both an increasingly feasible tactical option as well as a potentially effective method for disrupting terrorist activity.⁶ Indeed, the Solicitor General's response filed to the Supreme Court certifying the Alien Tort Claims Act ("ATCA") portion of the *Alvarez-Machain* case reflects the Administration's desire to reserve the right to use this form of self-help in the war on terror.⁷ Given the United States government's receptiveness to the idea of abducting terrorists as a means to ensure security, the question becomes whether forcible abduction has a proper place within international law.⁸

4. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3-4 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> ("America will hold to account nations that are comprised by terror, including those who harbor terrorists The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn."); see also Thomas J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359, 359 (2002) (suggesting that the United States' parachuting troops into countries to seize suspected terrorists is a measure falling within the Bush Doctrine); Address at the United States Military Academy, *supra* note 1, at 945-48.

5. See Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 174 (1994) (defining abduction as "the forcible, unconsented removal of a person by the agents of one State from the territory [or jurisdiction] of another State"); see also Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 389-90 (1996) (defining abduction as consisting of four primary elements: (1) a fugitive present in one State who is suspected or has been convicted of committing a crime in another state; (2) state-sponsored abduction of this fugitive by means of force or threats of force; (3) an extraterritorial aspect to this act of law enforcement; and (4) involvement of state agents).

6. See Adam W. Wegner, Note, *Extraterritorial Jurisdiction Under International Law: The Yunis Decision as a Model for the Prosecution of Terrorists in U.S. Courts*, 22 LAW & POL'Y INT'L BUS. 409, 411 (1991) (discussing the increase of terrorism since the early 1970s).

7. The Solicitor General's brief indicated that "transborder arrests without the other government's consent . . . are exceedingly rare, [but that] threats to the nation's security are now, more than ever, transnational phenomena." Petition for a Writ of Certiorari at 15-16, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 03-485). The Solicitor General's brief concluded that the executive branch, not the courts, is the proper place for decisions involving national security to be made. *Id.* at 29-30; see also Robert S. Greenberger, *High Court to Rule on Arrest Abroad: U.S. Cites Terrorism Fight; Suspect's Lawyer Says Security Wasn't at Stake*, WALL ST. J., Dec. 2, 2003, at A6 (discussing the U.S. government's position in *Alvarez-Machain*).

8. Compare Douglas Kash, *Abducting Terrorists Under PDD-39: Much Ado About Nothing New*, 13 AM. U. INT'L L. REV. 139 (1997) (arguing that forcible abduction is justified when all other avenues of obtaining jurisdiction over a fugitive have been exhausted), Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHN'S L. REV. 551, 563 (1993) (arguing that international law should not prohibit all transnational abductions of criminal fugitives because the constitutional and human rights of defendants to be free from for-

Traditionally, two principal justifications have been offered to support the use of force when abducting terrorists: first, that a state seeking to protect its nationals may seize a terrorist if this measure is likely to prevent the terrorist from engaging in future attacks and if the mission is strictly limited to apprehension;⁹ and second, that abduction is a form of self-defense so long as it satisfies the requirements of necessity and proportionality, and so long as the abducting state can show complicity by the territorial state.¹⁰ Both justifications allow for cross-border incursions to capture fugitives and excuse any violation of the territorial state's sovereignty. Critics of forcible abduction, however, emphasize the severity of infringements of territorial integrity, violation of international law, the potential for error, retaliation, and the costs of incurring the ire of the international community.¹¹ Still, the Ninth Circuit recently reiterated that "[its] review of the international authorities and literature reveals no specific binding obliga-

cible abduction must be weighed against the rights of victims to an effective remedy in front of a domestic tribunal), Theodore C. Jonas, Note, *International "Fugitive Snatching" in U.S. Law: Two Views from Opposite Ends of the Eighties*, 24 CORNELL INT'L L.J. 521, 561 (1991) (arguing that abductions of fugitives, while constituting violations of international law, are within the President's constitutional powers over law enforcement and foreign affairs), and Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 348 (1967) (arguing that forcible abductions of fugitives are permissible only where necessary to prevent or redress grave violations of human rights), with Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992) (conceding that state-sponsored abductions may be an effective law enforcement measure, but reasoning that, since such measures would "discard[] altogether . . . international stability," the United States should not employ this practice), Aaron Schwabach & S.A. Patchett, *Doctrine or Dictum: The Ker-Frisbie Doctrine and Official Abductions Which Breach International Law*, 25 U. MIAMI INTER-AM. L. REV. 19, 44 (1993) (arguing that forcible abductions of criminal defendants without the consent of the host country violate customary international law), Stephan Wilske & Teresa Schiller, *Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain*, 5 U. CHI. L. SCH. ROUNDTABLE 205, 211-12 (1998) (analyzing judicial decisions of various countries and concluding that abductions of fugitives constitute violations of customary international law), Jacques Semmelman, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 551-552 (1992) (arguing that a court would violate customary international law by continuing to exercise jurisdiction over an abducted defendant when the country from which that defendant had been abducted had formally protested the abduction and had demanded the return of the defendant), and Scott S. Evans, *International Kidnapping in a Violent World: Where the United States Ought to Draw the Line*, 137 MIL. L. REV. 187, 195 (1992) (arguing that international abduction infringes on the territorial integrity and sovereignty of another state, that it violates basic human rights, and that it disrupts world public order).

9. Douglas Kash, *Abductions of Terrorists in International Airspace and on the High Seas*, 8 FLA. J. INT'L L. 65, 79 (1993).

10. *Id.*

11. See generally Wilske & Schiller, *supra* note 8, at 212-41 (noting that international organizations, including the Inter-American Juridical Committee acting on behalf of the Organization of American States, as well as several countries such as England, South Africa, and France, have found forcible abductions to be a violation of international law); Farah Hussain, Note, *A Functional Response to International Crime: An International Justice Commission*, 70 ST. JOHN'S L. REV. 755, 766 & n.46 (1996) (arguing that forcible abductions infringe on state sovereignty, a right that is reiterated in the Restatement (Third) of the Foreign Relations Law of the United States, Introductory Note to Part

tion, express or implied, on the part of the United States or its agents to refrain from transborder kidnapping”¹²

After September 11th, the traditional justifications seem even more forceful given the expanded reach of terrorist organizations and the reality of sudden large-scale attacks; however, they are also susceptible to overreaching. As such, the practice of abducting terrorists is better justified as a form of efficient breach,¹³ which functions as a crisis management

I (1987)); Michell, *supra* note 5, at 410 (describing forcible abduction as a violation of international human rights law).

12. *Alvarez-Machain v. United States*, 331 F.3d 604, 619 (9th Cir. 2003). The majority concluded that “[b]ecause a human rights norm recognizing an individual’s right to be free from transborder abductions has not reached a status of international accord sufficient to render it ‘obligatory’ or ‘universal,’ it cannot qualify as an actionable norm under the ATCA.” *Id.* at 620. The court ultimately found for Alvarez-Machain on the grounds that the “unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA.” *Id.*

13. Efficient breach is the claim of law and economics scholars that first, there are circumstances where breach of a particular contract is more efficient than performance, and second, that where this is true, the law ought to encourage breach because all parties will benefit. See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 31 (1999); see also Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 95-96 (4th ed. 1992); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 578 (1977) (“In the absence of evidence of unfairness or other bargaining abnormalities, efficiency would be maximized by the enforcement of the agreed allocation of risks embodied in a liquidated damages clause.”); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 AM. U. L. REV. 1, 34-43 (1999) (describing the “strong” and “weak” forms of law and economics theory); Richard Morrison, *Efficient Breach of International Agreements*, 23 DENV. J. INT’L L. & POL’Y 183, 184-85 (1994). Morrison explains the theory of efficient breach as applied to international agreements in the following way:

In determining whether a party will comply with a contract, a common assumption is that the non-breaching party will act rationally. A party will break the contract if the cost of breaching the contract is less than the cost of compliance with the contract; conversely, a party will comply with the contract if the cost of breaching the contract exceeds the cost of compliance. The legal remedy for breach affects a party’s decision to breach. If the penalty is high, few breaches will occur; if the penalty is low, breaches will occur more frequently. Thus, the legal system can achieve an optimal rate of contract breach by awarding the appropriate measure of damages.

There are two legal avenues that permit efficient breach. First, there are a number of domestic legal doctrines, such as impossibility, that completely forgive contractual performance. Second, a party can breach a contract if it is willing to pay the cost of breach, including paying a judgment or a settlement fee. In an efficient breach, the costs of breach will not exceed its benefits, and the party will choose to breach the contract.

Id. at 184-85 (footnotes omitted).

To illustrate this point, Morrison discusses the following example:

[S]uppose that a manufacturer (the “seller”) agrees to sell a machine for \$100. Assume that the machine costs \$80 to make. Suppose further that the seller finds another buyer who is willing to pay \$130 for the machine. If the seller breaks his contract with the original buyer and sells to the second buyer, the seller will earn a profit of \$50 instead of a profit of \$20. The benefit to the seller for breaching the contract is the incremental increase in profit of \$30. Assume that the original buyer could have earned \$110 from the machine. Breach will

model.¹⁴ Under this justification, forcible abduction is optimal in a scenario where the terrorist threat is imminent, the opportunity for abduction is fleeting, the target nation is unwilling to extradite or prosecute, the international community is gridlocked, the territorial infringement is reasonably limited, the operation involves minimal threat to bystanders, and the accused receives humane treatment and a fair trial.¹⁵

The theory of efficient breach justifies self-help and takes into account both a country's need to protect its nationals as well as the self-defense justification. Self-help benefits the international community by removing serious threats from circulation, deterring terrorist travel and therefore terrorist activity, and breaking international stalemates. So justified, forcible abductions are less susceptible to charges of lawlessness or the arbitrary exercise of self-defense. Indeed, an analysis of historical examples bears out that the practice is subject to both self-regulation and international regulation, including the assessment of damages, which help to ensure that states will engage in self-help only where the benefits exceed the costs.¹⁶ International actors and institutions should recognize these efficiencies and therefore should encourage breach where preconditions are satisfied and assess appropriate damages for nonperformance of custom or treaty. On the strength of this justification, forcible abduction, as a means of self-help, is a legitimate counterterrorist measure in a post-September 11th world.

Part I of this Note presents the jurisdictional issues in international law relevant to self-help and provides an overview of states' approaches to forcible abduction. Part II discusses the contours of the efficient breach justification and then applies the model to historical cases of state-authorized abduction. Part III examines the outer bounds of the justification and addresses some potential counterarguments. This Note concludes by proposing that self-help would be an appropriate and justifiable response to the introductory hypothetical. Ultimately, the theory of efficient breach justifies forcible abduction as a method of combating terrorism when existing methods of international resolution have failed.

cause the original buyer to lose the \$110 benefit of owning the machine. But because the original buyer will not have to pay the \$100 purchase price, the original buyer's net loss resulting from the breach is \$10. Under contract law, the seller would pay \$10 to the original buyer in damages (assuming a replacement machine cannot be found at the contract price). Because the seller can gain \$30, the seller will breach the contract and pay the \$10 in damages and still be \$20 better off. No party is worse off.

Id. at 185 n.4.

14. For a discussion of efficient breach in the international law context see Dunoff & Trachtman, *supra* note 13.

15. See discussion *infra* Part II.A.

16. See discussion *infra* Part II.A-B.

I. International Law and State Practice

A. Defining Terrorism and the Bases of Extraterritorial Jurisdiction

The initial problems in any discussion involving terrorism are definitional. Who qualifies as a state actor? What constitutes an armed attack? How does one determine whether the act is political?¹⁷ While these are critical questions, for the purposes of this Note, the term terrorism shall refer to acts currently recognized as criminal under international law and with a nonstate bin Laden-type figure as the offender. With the notable exceptions of the Eichmann¹⁸ and the Noriega abductions,¹⁹ forcible abductions usually target nonstate actors who have engaged in or planned specific incidents of terrorism.²⁰ Moreover, as the discussion of Yunis²¹

17. It is a cliché that one man's terrorist is another man's freedom fighter. Professor Mallison summarizes the problem of defining these terms: "Terror and terrorism are not words which refer to a well-defined and clearly identified set of factual events. Neither do the words have any widely accepted meaning in legal doctrine. Terror and terrorism . . . do not refer to a unitary concept in either law or fact." W.T. Mallison & S.V. Mallison, *The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values*, 18 HOW. L.J. 12, 12 (1974). The U.S. Department of State defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience." COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, PUB. NO. 10610, PATTERNS OF GLOBAL TERRORISM 1998 (1999). In the United Nations Charter, terrorism is defined thus: "[I]nternational terrorism . . . endangers or takes innocent human lives or jeopardizes fundamental freedoms, . . . and is caused by misery, frustration, grievance and despair, which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes." G.A. Res. 3034, U.N. GAOR, 27th Sess., Supp. No. 30, at 19, U.N. Doc. A/8730 (1972). For some of the voluminous discussion on the definition of terrorism see Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97-101 (2001); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law*, 7 ILSA J. INT'L & COMP. L. 391, 391-98 (2001); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 9-30 (1999); Louis René Beres, *The Legal Meaning of Terrorism for the Military Commander*, 11 CONN. J. INT'L L. 1 (1995); and Guy Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 248-53 (1987). See also U.N. SCOR 56th Sess., 4385th mtg. at 2, U.N. Doc. S/Res/1373 (2001) (prohibiting direct and indirect support of terrorists, such as by providing safe havens or allowing funds or other resources to flow to terrorists, terrorist-owned or -controlled entities, or persons acting on behalf of terrorists).

18. See discussion *infra* Part I.C.2.

19. On January 3, 1990, General Manuel Noriega surrendered to U.S. troops, who had invaded Panama, and was subsequently turned over by them to U.S. drug enforcement agents. See Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should Be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 14, 30-34 (1997) (calling for international legal approval of state-sanctioned abductions of war crime suspects and discussing in detail Noriega's abduction and his subsequent trial in the United States); see also Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867, 901 (1992) (discussing Noriega's abduction).

20. See generally Beck & Arend, *supra* note 5, at 218 (concluding that terrorists and terrorist-sponsoring states are two permissible targets for a self-defense response and discussing the circumstances in which that response would be permissible).

21. See discussion *infra* Part I.C.1.

later indicates, the practice of self-help may be assessed by focusing on the defendant's actions rather than his intentions or the political ramifications of the act.²² Focusing on acts condemned by treaty or convention and on actors associated with nonstate groups allows for an assessment of forcible abduction as a self-help measure that is tangible and that addresses ramifications and criticisms, but does not require a reconceptualization of the entire subject.

International law pertaining to forcible abduction covers limits on state action, the nature of universally condemned crimes, and the principles under which a state may assert jurisdiction over an offender. Article 2(4) of the United Nations (UN) Charter prohibits member states as well as non-member states from threatening to use or actually using force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.²³ Further, Article 2(3) of the Charter prohibits behavior that jeopardizes international peace and security.²⁴ However, Article 51 of the Charter does allow for necessary and proportional acts of self-defense, stating that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."²⁵ Apart from this limited exception, international law is generally thought to prohibit incursions on the territorial sovereignty of another state.²⁶

States seeking to capture, extradite,²⁷ or prosecute terrorists or other

22. Wegner, *supra* note 6, at 437-38. Discussion of definitional issues relating to terrorism could expand beyond the limits of this exercise; indeed, other articles are devoted entirely to this topic. See *supra* note 17 and accompanying text. Therefore, the term is here limited in order to facilitate broader discussion of forcible abduction as a practice.

23. U.N. CHARTER art. 2, para. 4.

24. U.N. CHARTER art. 2, para. 3.

25. U.N. CHARTER art. 51.

26. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 295 n.1 (H. Lauterpacht 8th ed., 1955); see also *Bill to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S. 1373, S. 1429 & S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 63 (1985)* (statement by Abraham Sofaer, Legal Adviser to the State Department). When questioned at a congressional hearing, Sofaer resisted the notion that such seizures were acceptable:

Can you imagine us going into Paris and seizing some person we regard as a terrorist . . . ? [H]ow would we feel if some foreign nation—let us take the United Kingdom—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, . . . because we refused through the normal channels of international, legal communications, to extradite that individual?

Id.

27. When states succeed in extraditing a criminal defendant, it is usually under a bilateral treaty with the state in which the defendant is located. See Elizabeth Chien, *United States v. Humberto Alvarez-Machain: Government-Sponsored International Kidnapping as an Alternative to Extradition?*, 15 U. HAW. L. REV. 179, 184-185 (1993). In fact, "extradition is the only regular system devised to restore fugitive criminals to the jurisdiction of a court competent by municipal and international law to try them." See IVAN A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 67 (1971). Although many states extradite pursuant to a treaty, customary international law does not require a formal

international criminals must first demonstrate an appropriate connection to the crime before establishing jurisdiction.²⁸ According to the 1935 Harvard Research Draft,²⁹ there are five generally accepted principles empowering a nation to exercise jurisdiction over crimes perpetrated extra-territorially: (1) territorial jurisdiction based on the place where the offense occurred; (2) national jurisdiction arising from the offender's nationality; (3) protective jurisdiction based on injury to national interest; (4) universal jurisdiction, which covers crimes that are so universally condemned that jurisdiction is conferred upon any nation that obtains custody over the offender regardless of the nationality of the accused or the victims; and (5) passive personality jurisdiction based on the nationality of the victim.³⁰ The passive personality principle enables a country to extend its jurisdiction to offenses committed by individuals in foreign territories if the victim is one of the country's nationals.³¹ The principle is premised on a state's duty to protect its nationals abroad and is concerned with the effect of the crime as opposed to its situs.³²

How then have states engaging in forcible abductions applied these principles? The United States has traditionally relied only on universal jurisdiction, but recently, also on passive personality jurisdiction.³³ Universal jurisdiction does not require an actual nexus between the state prosecuting the alleged crime and the state where the offense occurred; the prosecuting state only needs to show that the crime is universally condemned.³⁴ Universal jurisdiction initially developed under customary law to cover the crime of piracy but has expanded to encompass additional offenses and is now largely covered by treaties.³⁵ For example, the Restatement (Third) of Foreign Relations Law of the United States recognizes universal jurisdiction over the offenses of piracy, attacks on or hijacking of aircrafts, genocide, war crimes, slave trade, and perhaps certain acts of ter-

extradition. Therefore, where a state has no formal extradition agreement with another state, and the latter refuses to extradite the fugitive voluntarily, forcible abduction is an alternative means.

28. *Research in International Law, Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437, 573 (Supp. 1935) [hereinafter *Harvard Research Draft*]. "Jurisdiction to prescribe" is a state's authority to promulgate law applicable to persons or activities. "Jurisdiction to adjudicate" refers to the authority of a state to subject persons or things to its judicial power. Lastly, "jurisdiction to enforce" concerns a state's authority to compel compliance with its law. See JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 329-30 (2002).

29. See *Harvard Research Draft*, *supra* note 28.

30. See Dunoff & Trachtman, *supra* note 13, at 123; Abramovsky, *supra* note 3, at 123; Wegner, *supra* note 6, at 417.

31. *Harvard Research Draft*, *supra* note 28, at 445.

32. See John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combating International Terrorism*, 13 *FORDHAM INT'L L.J.* 298, 300-02 (1989-1990).

33. See discussion *infra* Part I.C.1.

34. Wegner, *supra* note 6, at 421. For a comprehensive analysis of universal jurisdiction, see generally Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Against International Crime*, 9 *MICH. ST. U. DETROIT C.L.J. INT'L L.* 1 (2000).

35. Wegner, *supra* note 6, at 421-23.

rorism.³⁶ Furthermore, a number of significant conventions, including those noted below, universally condemn terrorist activities and outline principles of enforcement, although it must be said that some States Parties have expressed reservations or accepted terms only on a limited basis.³⁷

The United States has not been entirely consistent in its policy towards universal jurisdiction. In pursuing the war on terror, the Bush Administration has engaged in what one commentator terms “unilateral multilateralism”—supporting international institutions that advance U.S. interests while actively discouraging or restraining other states from asserting extra-territorial jurisdiction.³⁸ For example, the Bush Administration has objected to the Rome Statute of the International Criminal Court (“ICC”),³⁹ fearing that Article 12 could allow the ICC to exercise jurisdiction over nationals of nonparty states such as the United States, thereby potentially exposing U.S. military personnel to prosecution.⁴⁰ In addition to passing domestic legislation that restricts cooperation with the ICC,⁴¹ the United States has pressured States Parties to sign Article 98 agreements, pursuant to which each country agrees not to surrender a U.S. national to the ICC should the court make such a request.⁴² Furthermore, the Bush Administration pressured Belgium into amending its domestic human rights law that had provided for universal jurisdiction after complaints were filed against the President and General Tommy Franks in April 2003, calling for a war crimes investigation.⁴³ Yet, as evidenced by the

36. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

37. *Id.*

38. See Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT’L L.J. 415, 416 (2003).

39. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999, available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) [hereinafter Rome Statute]. Although President Clinton made the United States a signatory to the Rome Statute, the Bush Administration subsequently informed the United Nations that the United States no longer intended to become a party. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 63-64 (2002). Notably, while the Rome Statute confers jurisdiction over genocide, war crimes, and crimes against humanity, it does not directly address terrorism. See Rome Statute, *supra*.

40. See Orentlicher, *supra* note 38, at 419. Article 12 limits the ICC to assertion of jurisdiction for crimes committed (a) on the territory of a state that is a party to the Rome Statute, or (b) where the state of which the accused is a national is a party to the Rome Statute. See Rome Statute, *supra* note 39, art. 12.

41. American Servicemembers’ Protection Act of 2002, 22 U.S.C. §§ 7401-7433 (2002).

42. See Colum Lynch, *U.S. Confronts EU on War Crimes Immunity Pact*, WASH. POST, June 10, 2003, at A17. Article 98(2) of the Rome Statute prevents the Court from requesting the surrender of a suspect when such surrender would conflict with other international agreements, such as status of forces agreements, which require host states of military forces to obtain the cooperation of the sending state before surrendering a suspect to the ICC. See Rome Statute, *supra* note 39, art. 98(2); see also Orentlicher, *supra* note 38, at 423.

43. See *Belgium Moves to Limit War Crimes Law, Repair U.S. Ties*, L.A. TIMES, Aug. 2, 2003, at A6. In 1993, Belgium enacted a law allowing any person to file a criminal complaint against any other person in a Belgian court provided only that the plaintiff

Solicitor General's position with respect to the Alvarez-Machain abduction, noted above, the Bush Administration's "unilateral multilateralism" does not appear to preclude the United States from endorsing universal jurisdiction where the abduction of terrorists is concerned.

Since the United States has traditionally refrained from prosecuting foreign nationals for conduct occurring wholly outside the United States, the passive personality principle has been the basis least relied upon for assertions of extraterritorial jurisdiction.⁴⁴ It has also been the most heavily criticized—in part because it confers authority on a state simply because its nationals were victims of an attack, even if they were not the intended targets and even if the attack occurred in a foreign country.⁴⁵ However, the passive personality principle has arguably become a tool for the executive to assert jurisdiction in domestic courts. For example, in *United States v. Benitez*,⁴⁶ a case involving conspiracy charges against a Colombian national to murder U.S. drug enforcement agents engaged in the performance of official duties, the Eleventh Circuit concluded that Congress intended a victim's nationality to serve as a sufficient predicate

allege a violation of an international human right that is guaranteed by certain enumerated international conventions. Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 [Law of the 16th of June 1993 Concerning Punishment for Grave Breaches of the Geneva Conventions], *Moniteur Belge*, Aug. 5, 1993, at 17751 (Belg.) amended by and renamed to Loi relative à la répression des violations graves de droit international humanitaire [Law Concerning the Punishment for Grave Breaches of International Humanitarian Law], *Moniteur Belge*, Mar. 23, 1999, at 9286 (Belg.), translated in 38 I.L.M. 918 (1999). The law did not require that the plaintiff or the defendant be a resident or a citizen of Belgium, or that the crime have occurred in Belgium. *Id.* Although on its face, the law appears to allow almost any plaintiff to seek redress for violations of any one of a broad range of human rights violations, only four persons were tried and convicted pursuant to it: four Rwandans were sentenced to prison terms between twelve and twenty years for committing genocide. Keith B. Richburg, *Rwandan Nuns Jailed in Genocide, Jury Sentences Also Two Others*, WASH. POST, June 9, 2001, at A1. In response to pressure from the United States, the Belgian legislature limited the broad sweep of the statute to passive personality jurisdiction in two steps: First, in April 2003 the legislature amended the law to give Belgian prosecutors complete discretion not to prosecute criminal complaints that are unrelated to Belgium. Further, in response to the complaints that had been filed in Belgian courts against several foreign leaders, including President Bush, the legislature also provided that prosecutors should refrain from prosecuting a complaint where prosecution might show a lack of respect for Belgium's international obligations. In June 2003, the legislature replaced the 1993 law with one far more limited in scope: Pursuant to the new law, Belgian courts will exercise jurisdiction over criminal complaints of human rights violations only where the suspect or the victim is a Belgian national or resident. Further, the prosecutor retains the discretion not to prosecute a complaint where respect for Belgium's international obligations requires. See Fiona McKay, *U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORNELL INT'L L.J. 455, 459 n.18 (2003).

44. Abramovsky, *supra* note 3, at 123-24.

45. McCarthy, *supra* note 32, at 301 ("The passive personality principle is the most controversial of the five accepted bases of jurisdiction in international law."); see also Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 715 (1984) (stating that the passive personality theory of jurisdiction is "generally considered to be anathematic to United States law").

46. *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984).

for assertion of jurisdiction if the victim was a U.S. government official.⁴⁷ Additionally, many states including Germany, Israel, Italy, Mexico, Japan, Turkey, and France have incorporated passive personality jurisdiction into their domestic criminal statutes to cover offenses committed against their nationals while traveling or living abroad.⁴⁸

B. Establishing an International Prohibition of the Alleged Offense

In addition to proper jurisdiction, a state seeking to justify abduction and prosecution should demonstrate that the alleged offense is prohibited by international agreement or custom.⁴⁹ Consider the hijackings of September 11, 2001,⁵⁰ or the hostage-taking at the 1972 Olympics in Munich.⁵¹ Both of these terrorist acts are prohibited by several treaties. Hijackings are prohibited by the 1963 Convention on Certain Offenses and Certain Other Acts Committed on Board Aircraft⁵² (Tokyo Convention), the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft⁵³ (Hijacking) (Hague Convention), and the 1971 Convention for the Suppres-

47. *Id.* at 1316; *see also* Abramovsky, *supra* note 3, at 126. The Eleventh Circuit concluded that the district court's authority to try Benitez arose from both the protective principle and the passive personality principle. *Benitez*, 741 F.2d at 1317. The circuit court relied almost exclusively on the protective principle, citing the threat to U.S. interests created by Benitez's actions. *Id.*; *see also* Abramovsky, *supra* note 3, at 126. Thus, the Eleventh Circuit avoided the issue of whether the passive personality principle is a sufficient basis for jurisdiction. *Id.* at 126; *see also* United States v. Columba-Colella, 604 F.2d 356 (5th Cir. 1979) (denying that the passive personality principle is sufficient by itself to create jurisdiction).

48. *See* Wegner, *supra* note 6, at 429.

49. Universal jurisdiction requires such a demonstration. *See infra*. While states have offered domestic legislation with extraterritorial reach as a justification for extraterritorial law enforcement, a state seeking to take the drastic action of forcibly abducting an individual from the territory of another state would do well to show international condemnation of the alleged offense to buttress its case.

50. On September 11, 2001, terrorists linked to Osama bin Laden's al Qaeda organization hijacked four California-bound airliners. Two planes crashed into the World Trade Center in New York City, causing both towers to collapse. The third plane originating at Dulles Airport crashed into the Pentagon. The final plane crashed some eighty miles outside of Pittsburgh after passengers rushed the cockpit. *See* Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1.

51. At the 1972 Olympic Games in Munich, five members of the terrorist group "Black September" captured nine Israeli athletes and held them hostage after killing two others. The group was formed in September 1970 by Fatah, the military arm of the Palestine Liberation Organization, after King Hussein turned his army against the Palestinian groups in Jordan, driving them into exile. The terrorists demanded the release of 200 Palestinian prisoners jailed in Israel. All nine hostages and five terrorists were later killed in a rescue attempt by the West German police. *See* David Binder, *Nine Israelis on Olympic Team Killed with Four Arab Captors as Police Fight Band that Disrupted Munich Games: A Twenty Three Hour Drama: Two Others Are Slain in Their Quarters in Guerrilla Raid*, N.Y. TIMES, Sept. 6, 1972, at A1.

52. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

53. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

sion of Unlawful Acts Against the Safety of Civil Aviation⁵⁴ (Sabotage) (Montreal Convention). The 1958 Geneva Convention on the High Seas (Geneva Convention)⁵⁵ and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation⁵⁶ outlaw the related offense of piracy. Hostage-taking is prohibited by the 1979 International Convention Against the Taking of Hostages.⁵⁷ Other international agreements apply to both hijackings and hostage-takings: The 1971 Organization of American States Convention on Terrorism⁵⁸ and the 1977 European Convention on the Suppression of Terrorism⁵⁹ condemn aircraft piracy as well as hostage-taking, and thus would prohibit acts such as the September 11 hijackings and the Munich hostage-taking. In addition, the 1998 International Convention for the Suppression of Terrorist Bombings⁶⁰ provides that signatory states enact legislation prohibiting individuals from placing, discharging, or detonating an explosive in a place of public use.⁶¹

Furthermore, the Hague and Montreal Conventions, but not the Tokyo Convention, include clauses that require signatory states to establish jurisdiction where the alleged offender is present in their territory.⁶² The Hague and Montreal Conventions, as well as the Convention Against the Taking of Hostages and the Convention for the Suppression of Terrorist Bombings, require participating states to prosecute offenders found within their borders if that state elects not to extradite the accused.⁶³ This mandate is relevant to forcible abduction because states are often motivated to exercise self-help when their counterparts refuse to prosecute or extradite terrorists found within their borders.⁶⁴

In the absence of a treaty or Security Council Resolution, there is no international legal obligation to extradite or to prosecute in default of extradition.⁶⁵ Finally, recent Security Council action, particularly Resolution

54. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177.

55. Convention on the High Seas, Apr. 29, 1958, 12 U.S.T. 2312, 450 U.N.T.S. 82.

56. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668.

57. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

58. Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1986 U.N.T.S. 195.

59. European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93.

60. International Convention Against the Taking of Hostages, *supra* note 57.

61. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249.

62. See Wegner, *supra* note 6, at 423.

63. See *id.* (discussing the duty of signatory states under the Hague and Montreal Conventions); International Convention Against the Taking of Hostages, art. 8(1), *supra* note 60, at 207; European Convention on the Suppression of Terrorism, art. 6(1), *supra* note 59, at 94.

64. See discussion *infra* Part II.A.

65. See Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 INT'L LAW 289, 300 (2000). The U.S. government confronted this issue when the

1373—which appears to deny terrorist-sponsoring states the ability to prosecute their nationals domestically—suggests there may be an emerging trend that could justify abduction even in the absence of a convention.⁶⁶

C. Analyzing the Judicial Response to Forcible Abduction

1. *United States: From Ker-Frisbie and Toscanino to Yunis and Alvarez-Machain*

The United States grounds its support for forcible abduction on judicial decisions rather than on legislative acts. Judicial sanctioning of forcible abduction finds its genesis in the *Ker-Frisbie* doctrine. In *Ker v. Illinois*,⁶⁷ an Illinois court sought extradition of Ker, a U.S. citizen residing in Peru, on state charges of larceny and embezzlement.⁶⁸ President Chester A. Arthur directed an agent to contact the Peruvian authorities and to transmit a request for extradition.⁶⁹ Peru was in a state of war with Chile, however, making it impossible for the agent to locate any authorities; therefore, the agent requested permission from the Chilean general leading the occupation of Peru to extradite Ker.⁷⁰ The general assented and commissioned an officer to help the agent, who forcibly arrested Ker and brought him to the United States to stand trial.⁷¹ Ker challenged the jurisdiction of the U.S. court, arguing that his abduction violated the extradition treaty between the United States and Mexico.⁷² However, the Supreme Court concluded that although the United States did not pursue arrest under the extradition treaty, failure to resort to its provisions did not constitute a violation of the treaty and did not require denial of jurisdiction.⁷³ The Court reasoned that “mere irregularities in the manner in which he may be brought into the custody of the law” do not operate to prevent

Libyan government refused to extradite two Libyan intelligence officers whom the U.S. had indicted for the bombing of Pan Am Flight 103 over Lockerbie, Scotland in December 1988. See, e.g., Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222 (1993) (examining the shortcomings of the international extradition process and addressing whether the U.N. Security Council's imposition of sanctions against Libya for its failure to comply with the Security Council's requests for cooperation in the international investigation of the Lockerbie incident could be an effective measure for bringing terrorists to justice).

66. Jonathan A. Frank, *A Return to Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action*, 30 DENV. J. INT'L L. & POL'Y 532, 543-45 (2002) (suggesting that post-September 11th Security Council action establishes precedent for forcible abduction, bypassing the conventions in place, as well as the principle of state sovereignty).

67. *Ker v. Illinois*, 119 U.S. 436 (1866).

68. *Id.* at 437-38.

69. See *id.* at 438.

70. See *id.*

71. Charles Fairman, Comment, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 684-85 (1953).

72. *Ker*, 119 U.S. at 437.

73. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 157 (1991).

indictment.⁷⁴

The Supreme Court faced a similar jurisdictional issue in *Frisbie v. Collins*.⁷⁵ In *Frisbie*, the Court addressed whether the Michigan police contravened the Federal Kidnapping Act by forcibly transporting Shirley Collins from Illinois to Michigan to stand trial for murder.⁷⁶ In reaffirming *Ker* and rejecting Collins's claim that her abduction and subsequent conviction violated the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act,⁷⁷ the Court concluded that forcible abductions do not impair the power of a court to try a person for a crime.⁷⁸ Despite the unusual factual circumstances in *Ker*,⁷⁹ over time the two cases have come to stand for a judicial sanction of the policy of forcible abduction.⁸⁰

Although the *Ker-Frisbie* doctrine carves out expansive authority for engaging in extraterritorial abductions, it is not without judicially imposed limitations: In *United States v. Toscanino*, for example,⁸¹ the Second Circuit noted that a more expanded notion of due process had developed since *Ker-Frisbie*, and therefore a court should divest itself of jurisdiction where law enforcement authorities had utilized methods that shock the conscience or had engaged in a "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights" to effect the abduction.⁸² In *Toscanino*, the Uruguayan police, on the urging of the United States, abducted an Italian national from his home in Montevideo and delivered him to U.S. authorities at the Brazilian border.⁸³ Once in U.S. custody, U.S. law enforcement officials subjected Toscanino to various degradations, including denying him sleep and nourishment, forcing him to walk up and down a hallway for seven hours, flushing his eyes and nose with alcohol, and electrocuting him through his ears, toes, and genitals.⁸⁴

Toscanino represents an abducting state's self-imposed regulation.⁸⁵ The notion of self-imposed regulation buttresses both the traditional justifications for self-help—protecting citizens and self-defense—and the efficient breach arguments because regulation of law enforcement officials by the

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

75. *Frisbie v. Collins*, 342 U.S. 519 (1952).

76. *Id.* at 520-22.

77. *Id.* at 522.

78. *Id.*

79. See Brigitte Belton Homrig, Comment, *Abduction as an Alternative to Extradition—A Dangerous Method to Obtain Jurisdiction Over Criminal Defendants*, 28 WAKE FOREST L. REV. 671, 680 (1993) (indicating that commentators have described *Ker* as an anomaly given that Peru never protested the abduction and that arguably Peru's territorial sovereignty was never violated since Chilean forces controlled Peru at the time of the abduction).

80. Abramovsky, *supra* note 73, at 157-58.

81. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

82. *Id.* at 275.

83. *Id.* at 269-70; Abramovsky, *supra* note 73, at 158.

84. Abramovsky, *supra* note 73, at 158.

85. See Michell, *supra* note 5, at 400-04. But see Abramovsky, *supra* note 73, at 160 (stating that the reluctance of courts to invoke the *Toscanino* exception renders it virtually meaningless).

domestic courts assures the international community that the accused will receive humane treatment.⁸⁶

Relying upon *Ker-Frisbie* as a foundation, two leading cases define modern U.S. judicial policy: *United States v. Yunis*⁸⁷ and *United States v. Alvarez-Machain*.⁸⁸ *Yunis* arose out of the following facts: On June 11, 1985, Lebanese national Fawaz Yunis and four other members of the Lebanese Amal Militia hijacked a Royal Jordanian airliner at the Beirut International Airport, taking hostage more than fifty passengers, including two Americans.⁸⁹ The group, armed with assault rifles and hand grenades, directed the pilot to fly to Tunis, Tunisia, where a conference of the Arab League was in progress.⁹⁰ Nearly a day and a half later, after the plane had landed, refueled in Cyprus and Italy, and attempted without success to land in Tunisia and Syria, Yunis forced the plane to return to Beirut.⁹¹ After the plane landed, the hostages were released, and the hijackers held a press conference, in which Yunis delivered an address originally intended for the Arab conference in Tunis.⁹² Following the speech, the hijackers blew up the aircraft and disappeared into the streets of Beirut.⁹³ In September 1987, the U.S. Federal Bureau of Investigation ("FBI") commenced Operation Goldenrod in response to the hijacking.⁹⁴ The FBI lured Yunis onto a yacht in the eastern Mediterranean Sea by promising him a lucrative drug deal. The agents then directed the ship into international waters where they arrested Yunis and charged him with the hijacking of the Royal Jordanian airliner.⁹⁵

The circuit court in *Yunis* first turned to the question of jurisdiction.⁹⁶ Although Judge Mikva explained that "[the court's] duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law,"⁹⁷ the court affirmed the district court's reasoning that universal jurisdiction is appropriate for the crimes of aircraft piracy and hostage-taking given the treaties discussed above, the Restatement of the Foreign Relations Law, and legal scholarship.⁹⁸ The district court had relied on these declarations as evidence that the international community held a strong commitment to punish hijackers in its holding that universal jurisdiction was warranted.⁹⁹

The circuit court in *Yunis* also upheld the district court's reliance on

86. *But see* Abramovsky, *supra* note 73, at 203 (expressing concern for the lack of boundaries and the potential for ad hoc decisions in U.S. abduction policy).

87. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

88. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

89. *Yunis*, 924 F.2d at 1089; *see also* Wegner, *supra* note 6, at 421.

90. *United States v. Yunis*, 681 F.Supp. 896, 899 (D.D.C. 1988).

91. *Id.* at 899.

92. *Id.*

93. *Id.*

94. *Yunis*, 924 F.2d at 1089.

95. *Id.* at 1089; *United States v. Yunis*, 859 F.2d 953, 955 (D.C. Cir. 1988).

96. *Yunis*, 924 F.2d at 1090.

97. *Id.* at 1091.

98. *Id.* at 1092.

99. *Yunis*, 681 F.Supp. at 901.

the passive personality principle as a basis for jurisdiction.¹⁰⁰ The government asserted that because U.S. citizens were among the hostages, passive personality jurisdiction was appropriate, while Yunis contended that international and domestic law frowned upon the principle.¹⁰¹ The district court, however, concluded that the principle was both viable and applicable,¹⁰² citing *Benitez*, the Restatement of Foreign Relations, the *Achille-Lauro* affair,¹⁰³ and the latitude provided by relevant conventions and treaties.¹⁰⁴

Next, the circuit court turned to the question of whether the domestic statute empowered the court to try an individual who had been forcibly abducted. Judge Mikva concluded that Congress intended the language of the Destruction of Aircraft Act,¹⁰⁵ which states that punishment applies to hijackers later “found in the United States,” to parallel the Hague Convention’s “present in [a contracting state’s] territory” language.¹⁰⁶ Furthermore, Congress enacted the statute to fulfill U.S. responsibilities under the Convention, and given that it understood the Convention as having expressed no reservations regarding how the accused had come within U.S. territory, the court concluded, consistent with *Ker*, that assertion of federal jurisdiction was proper.¹⁰⁷ Lastly, the court rejected Yunis’s assertion that, under *Toscanino*, it should decline to exercise jurisdiction.¹⁰⁸ The court reasoned that, while the government’s conduct was not a model for law enforcement behavior—for instance, fracturing Yunis’s wrists while subduing him—the discomfort experienced by the accused did not sufficiently shock the conscience to divest the court of jurisdiction.¹⁰⁹

In *United States v. Alvarez-Machain*,¹¹⁰ U.S. government agents forcibly abducted a Mexican national from Mexico in connection with charges of kidnapping, torturing, and murdering an undercover U.S. drug enforcement agent.¹¹¹ Chief Justice Rehnquist, writing for the majority, considered two central issues: first, whether a court could try a criminal brought before it in violation of an extradition treaty; and second, whether a defendant could challenge the court’s jurisdiction where his presence had been

100. *Id.* at 903.

101. *Id.* at 901–02.

102. *Id.* at 902–03, *aff’d Yunis*, 924 F.2d 1086, 1092.

103. The *Achille-Lauro* affair is discussed *infra* Part II.B.

104. Act for the Prevention and Punishment of the Crime of Hostage Taking, 18 U.S.C. § 1203(a) (1988) (applicable to persons committing acts against U.S. citizens where the only connection to the United States is the nationality of the victim); Omnibus Diplomatic Security and Antiterrorism Act (Antiterrorism Act), 18 U.S.C. § 2331 (1988) (same). For discussion of the reach of the Antiterrorism Act, see Patrick L. Donnelly, Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987).

105. Destruction of Aircraft Act, 18 U.S.C. § 32 (1988).

106. *Yunis*, 924 F.2d at 1091–92.

107. *Id.* at 1092.

108. *Id.* at 1093.

109. *Id.* at 1092–93.

110. *Alvarez-Machain*, 504 U.S. at 655.

111. *Id.* at 657; Michell, *supra* note 5, at 404.

secured through forcible abduction.¹¹²

The majority concluded that no violation of the U.S.-Mexico Extradition Treaty had occurred and that *Ker* therefore controlled.¹¹³ According to the majority, the treaty's silence on the contracting parties' obligation to refrain from forcible abductions indicated that the parties did not intend to prohibit such conduct.¹¹⁴ The majority noted that the treaty did not cover the entire universe of U.S.-Mexico relations and that it therefore did not explicitly bar abductions occurring outside of its terms.¹¹⁵ Rehnquist reasoned that since Mexico was aware of the *Ker-Frisbie* doctrine and had not contracted around it, it had implicitly acceded to the U.S. interpretation of the treaty that allowed abductions.¹¹⁶ In dispensing with the jurisdictional challenge, the majority concluded that because Alvarez-Machain had conceded that his rights under the treaty were derivative of Mexico, and because Mexico had not asserted a violation of the treaty, Alvarez-Machain could not argue that the treaty conferred procedural protections directly upon citizens of contracting states.¹¹⁷

Considered against the background of *Ker-Frisbie*, *Yunis* and *Alvarez-Machain* suggest consistent U.S. judicial authorization for forcible abduction. That is, U.S. courts pay little heed to how presence in the United States was secured as long as the accused does not suffer outrageous abuse, view terrorism as a universally condemned crime, and find jurisdiction where the offenses victimized U.S. citizens. *Yunis* suggests that courts will read domestic legislation to cover defendants who were brought before the court by abduction and will conclude that such legislation is in accord with international conventions. *Alvarez-Machain*, moreover, stands for the proposition that extradition treaties that do not explicitly prohibit abduction will not act as a bar to the practice and further suggests that defendants lack standing to claim a violation of due process that is based on a state's failure to extradite under the provisions of an existing treaty.

112. See Michell, *supra* note 5, at 405; see also Abramovsky, *supra* note 73, at 195-201 (discussing the development of U.S. law on abduction and examining the 1976 Mansfield Amendment to the Foreign Assistance Act of 1961, which prohibited federal agents from participating in arrests in foreign countries).

113. *Alvarez-Machain*, 504 U.S. at 662. While on its facts *Ker* was distinguishable as a case involving private abduction—though with government assent—the majority nevertheless treated it as binding precedent. See *id.*

114. *Id.* at 663-65.

115. In *United States v. Rauscher*, 119 U.S. 407, 430 (1886), the Court found that the doctrine of specialty—according to which an extradited person can only be tried on a charge for which the person was extradited—should be read into the treaty in question and that, so read, the treaty barred the arrest or trial of Rauscher for other offenses “until a reasonable time and opportunity [had] been given him . . . to return to the country from whose asylum he had been forcibly taken . . .” *Id.* In *Alvarez-Machain*, however, the Court sidestepped the *Rauscher* exception, found no violation of the Mexican-American extradition treaty, and asserted jurisdiction over Alvarez-Machain. See *Alvarez-Machain*, 504 U.S. at 658-60; see also Wilske & Schiller, *supra* note 8, at 210.

116. *Alvarez-Machain*, 504 U.S. at 665.

117. Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 (entered into force Jan. 25, 1980); see also *Alvarez-Machain*, 504 U.S. at 667-669 (implying that an individual's rights under a treaty are derivative of a state's rights).

Despite judicial backing, official government reaction to forcible abductions has sometimes appeared inconsistent with its practice. Most notably, the United States has condemned Israeli self-help efforts that are indistinguishable from U.S. abductions later upheld by U.S. courts. However, should the Bush Doctrine express itself in the form of forcible abduction, it will fit comfortably within settled domestic judicial doctrine.¹¹⁸

The *Ker-Frisbie-Yunis-Alvarez-Machain* approach has been subject to many of the same, and some additional, criticisms as the necessity and self-defense justifications.¹¹⁹ Commentators have articulated the following concerns: that nations who sponsor terrorism may reciprocate with their own forcible abductions;¹²⁰ that the approach may eviscerate treaty law;¹²¹ that the U.S. nexus to the act of terrorism is tenuous;¹²² that it establishes precedent for ignoring established international law, including respect for territorial sovereignty; and that it violates the UN Charter's Article 2(3) prohibition against actions threatening international peace.¹²³ Additionally, one could criticize *Alvarez-Machain*, although not *Ker* or *Yunis*, for its failure to accord proper respect to the protests of the affected nations.¹²⁴

2. *Israel: Justifying Abduction*

The United States is not alone in its approval of the forcible abduction of international offenders; Israel has also established a model endorsing forcible abduction. For instance, on May 11, 1960, Israeli agents abducted infamous Nazi war criminal Adolf Eichmann from Argentina to stand trial for war crimes in Israel.¹²⁵ Although Israel claimed that Eichmann had

118. See, e.g., *Alvarez-Machain*, 331 F.3d at 619.

119. See Michell, *supra* note 5, at 409 n.140 (citing numerous critics of the *Alvarez-Machain* majority); see also Hector H. Cardenas, Jr., Casenote, *United States v. Alvarez-Machain: Result Oriented Jurisprudence*, 16 Hous. J. INT'L L. 101, 133-36 (1993) (criticizing the majority's opinion as undermining relations with Mexico and encouraging retaliatory abductions by other nations).

120. See Abramovsky, *supra* note 3, at 139; see also Charles Biblowit, Case Comment, *Transborder Abductions and United States Policy: Comments on United States v. Alvarez-Machain*, 9 N.Y. INT'L L. REV. 105, 115 (1996) (considering a scenario in which Iran, citing *Alvarez-Machain* as precedent, abducts Salman Rushdie from U.S. territory).

121. Homrig, *supra* note 79, at 704; see also William A. Galston, *Why A First Strike Will Surely Backfire*, WASH. POST, June 16, 2002, at B1 (arguing that preemptive action against Iraq would "end the system of international institutions").

122. Abramovsky, *supra* note 3, at 138 (stating that the absence of a weightier nexus increases the danger of provoking retaliation from unfriendly nations, setting unsound precedent for other nations, and undermining respect for relations among nations).

123. Kash, *supra* note 9, at 92; see also John Quigley, Commentary, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain*, 68 NOTRE DAME L. REV. 723, 734-36 (1993) (arguing that abduction violates the prohibition in human rights law against arbitrary detention).

124. See Michael Slattery, Note, *Government Sanctioned Abductions: United States v. Alvarez-Machain*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 159, 163 (1996) (detailing Mexico's diplomatic response to the abduction).

125. See Att'y Gen. of Israel v. Eichmann, 36 I.L.R. 277, 304 (Isr. S. Ct. 1962) (sitting as court of criminal appeals).

been abducted by a group of volunteer citizens,¹²⁶ Argentina, suspicious of Israeli government involvement, filed a formal complaint with the Security Council of the United Nations.¹²⁷ During Security Council discussions, Argentina expressed concern about future abductions and violations of its territorial sovereignty but did not specifically protest Eichmann's abduction.¹²⁸ The Security Council, with U.S. support, passed a resolution warning that repeated violations of sovereignty would endanger international peace.¹²⁹

Eichmann claimed that the Israel Supreme Court could not assert jurisdiction over him because Israel had abducted him without Argentina's consent.¹³⁰ Unlike the situation in *Alvarez-Machain*, no extradition treaty was in place between Israel and Argentina, and therefore Argentina had no binding obligation to extradite. Similar to U.S. judicial analysis, the Israeli Supreme Court first concluded that universal jurisdiction, which it believed extended beyond piracy, served as an appropriate basis for jurisdiction.¹³¹ The court then suggested that disputes regarding breaches of international sovereignty were nonjusticiable and should be resolved through vehicles in the international sphere.¹³² Because Argentina had

126. *Att'y Gen. of Israel v. Eichmann*, 36 I.L.R. 18, 50-51 (Jm. D.C. 1961) (Isr.), *aff'd* 36 I.L.R. 277 (Isr. S. Ct. 1962).

127. *Id.* at 58.

128. *See id.* at 70-71.

129. Question Relating to the Case of Adolf Eichmann, S.C. Res. 138, U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960), *reprinted in* 1960 U.N.Y.B. 198, U.N. Doc. S/4349 (1960). Security Council Resolution 138 states:

The Security Council,

Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic, Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations,

Having regard to the fact that reciprocal respect for and the mutual protection of the sovereign rights of States are an essential condition for their harmonious coexistence,

Noting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace,

Mindful of the universal condemnation of the persecution of the Jews under the Nazis and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused,

Noting at the same time that this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused,

1. Declares that acts such as that under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security;

2. Requests the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law;

3. Expresses the hope that the traditionally friendly relations between Argentina and Israel will be advanced.

Id. (footnote omitted)

130. *Eichmann*, 36 I.L.R. at 279.

131. *Id.* at 298-304.

132. *Id.* at 305. Apparently the Court would refer the matter to state diplomacy, the United Nations, or rely on non-judicial elements of comity.

secured a UN resolution, the court considered Argentina's claims pertaining to Eichmann waived and treated the issue as resolved.¹³³ Furthermore, the Israeli Supreme Court, in upholding its jurisdiction to adjudicate, denied Eichmann any individual right to object and noted: "It is an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State."¹³⁴ Eichmann was convicted and hanged.¹³⁵

3. *South Africa: A Contrary Approach*

One might interpret the Israeli and U.S. approaches to suggest that customary international law supporting forcible abduction is beginning to form.¹³⁶ However, South Africa has adopted a contrary approach, as *South Africa v. Ebrahim*¹³⁷ demonstrates. In *Ebrahim*, South African agents had abducted a member of the African National Congress, who was living in Swaziland at the time of the abduction, to prosecute him for treason in South Africa.¹³⁸ The South African court concluded not only that it had

133. *Id.* at 306.

134. *Eichmann*, 36 I.L.R. at 59.

135. *Eichmann*, 36 I.L.R. at 342.

136. State practice and *opinio juris* are the two main requirements for establishing customary international law. Homrig, *supra* note 79, at 694.

The practice of states consists of diplomatic acts, public measures, and official statements. Practice is not limited to an affirmative showing since "inaction may constitute state practice." *Opinio juris* exists when nations act or do not act out of a sense of legal obligation. Thus, omissions can fulfill either requirement.

The purpose of these requirements is to insure that there is solid evidence of consent to create a legal norm. Custom reflects "gradualism" and "avoids grand formulas and abstract ideals." In this way, customary international law, imposed on all states, merely makes official what states already do and believe they are obligated to do.

The practices of powerful states are given more weight in the determination of customary international law; consequently, such powerful states have a special responsibility. The showing of a custom recognizing their actions or omissions "create[s] expectations that effective power will be restrained." To avoid the uncertainties and interpretive difficulty that can arise due to the inexact nature of such customary rules, therefore, the creation of a treaty is often preferable to mere custom because states are treated as equals, and because treaties have the practical benefit of being in black and white.

Sources of customary international law include judicial and arbitral decisions of international judicial fora and treaties. However, merely entering a treaty should not establish a custom. Similarly, a moral obligation to take action does not establish an *opinio juris*. When the United States accidentally shot down Iranian flight 655 and decided to pay the survivors due to humanitarian concerns, no legal obligation existed. If such payments established a customary international law, then states would be deterred from making them.

Id. at 694-95 (footnotes omitted). Wilske & Schiller, *supra* note 8, at 213 provide a comprehensive overview of the customary law of forcible abduction, yet note that "there are no cases from international judicial or arbitral tribunals which directly focus on the question of jurisdiction over kidnapped persons"; Kash, *supra* note 8, at 139 (arguing in favor of forcible abduction).

137. *S. v. Ebrahim*, 1991 (2) SALR 553 (A).

138. *Id.* at 553-55.

the authority to refuse to exercise jurisdiction but that it could not exercise jurisdiction over an abducted defendant because doing so would violate sovereignty and threaten comity between nations.¹³⁹ This approach resonated with Justice Stevens, who in his dissent in *Alvarez-Machain* cited *Ebrahim* as the appropriate judicial response to forcible abduction and warned that the majority's reasoning sanctioned international lawlessness.¹⁴⁰ Stevens criticized the majority for neglecting the "rule of law" and portrayed the decision as "monstrous" and as one that would find little support among other nations in the "civilized world."¹⁴¹ Costa Rica has also rejected the *Alvarez-Machain* holding, citing the harm to "international law and state sovereignty."¹⁴² Finally, Zimbabwe also endorsed the South African approach in *State v. Beahan*.¹⁴³

4. The English, Canadian, and German Responses

England traditionally followed the rule of *male captus, bene detentus*¹⁴⁴

139. *Ebrahim*, 1991 (2) SALR at 556-59.

140. *Alvarez-Machain*, 504 U.S. at 687-88 (Stevens, J., dissenting).

141. *Id.*

142. Wilske & Schiller, *supra* note 8, at 228-229 (citing Secretaria de Relaciones Exteriores, 2 Limits to National Jurisdiction: Documents and Judicial Resolutions on the *Alvarez Machain Case* 7, 81-82 (1993)). The justices stated:

Because of the profound harm to the rules of international law and to sovereignty of States that the resolution implies, this Court resolves to establish evidence so it be known in this way, of the inadmissibility of such pronouncement, and has no doubt that shortly, it will be amended by the same Court who has issued it, in support of supremacy of law and mutual respect that must rule between the United States and all other States with whom—under the principle of good faith—it subjected its relation, in what concerns, to extradition treaties, which must be construed, not only according to its content, but to practice of law, teachings, and jurisprudence that inform it.

Id.

143. *S. v. Beahan*, 1992 (1) SACR 307, 317 (A). Chief Justice Gubbay stated:

In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual.

Id.

Note, however, that as the case addressed a consensual departure from the extradition process rather than a kidnapping, the court's language is *dicta*. Nevertheless it represents one court's disapproval of the exercise of jurisdiction when presented with facts similar to those of *Alvarez-Machain*. See Wilske & Schiller, *supra* note 8, at 207.

144. Under this principle of extradition law, courts may assert jurisdiction over defendants even if they were illegally arrested and abducted from a state where the defendant was entitled to legal protection from such abduction. Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS J. 13, 19 n.33 (2003).

(wrongly captured, properly detained).¹⁴⁵ However, currently, the House of Lords' decision in *Ex parte Bennett* governs English doctrine.¹⁴⁶ In *Bennett*, the Lords determined that English courts have discretion to stay the trial of a criminal defendant if English authorities disregarded the protections of formal extradition and illegally seized a defendant living or traveling abroad.¹⁴⁷ Thus, according to *Bennett*, forcible abduction does not categorically bar jurisdiction.¹⁴⁸ Although a court is not prohibited from asserting jurisdiction over such a defendant, court dicta indicates that forcible abduction will likely lead to a stay in the trial:¹⁴⁹ Indeed, Lord Lowry admonished, "if British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, of the comity of nations, and of the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed."¹⁵⁰

145. See *Ex parte Susannah Scott*, 109 Eng. Rep. 166 (K.B. 1829). Chief Justice Lord Tenderden stated:

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

Id.

146. *R. v. Horseferry Rd. Magistrates' Ct., (Ex parte Bennett)* [1993] 3 P, 138 (H.L.). *Ex parte Bennett* concerned a defendant located in South Africa whom English law enforcement officials wanted on fraud charges. Wilske & Schiller, *supra* note 8, at 218. There was no extradition treaty in force between South Africa and England, but England's Extradition Act allowed for extradition under special arrangements. *Id.* English law enforcement officials, however, did not pursue the special procedure under the Extradition Act, but rather reached an informal agreement with their South African counterparts. *Id.* Bennett later protested at his trial in England that South African law enforcement officials had kidnapped him, forced him onto a flight bound for New Zealand via Taipei, intercepted him in Taipei and had flown him back to South Africa, and finally flown him to England, even though the South African Supreme Court had enjoined the abduction. *Id.* In finding that they could stay Bennett's trial, the Law Lords did not investigate whether the authorities of the countries through which Bennett had passed—South Africa and Taiwan—had protested or acquiesced in the forcible abduction, or whether physical brutality had been used in the abduction. *Id.*

147. *Id.* at 139c.

148. *Id.*; see also Wilske & Schiller, *supra* note 8, at 219.

149. *Contra* Andrew L.-T. Choo, *International Kidnapping, Disguised Extradition and Abuse of Process*, 57 *Mod. L. Rev.* 626, 632 (1994). Choo argues:

One wonders how willing a court would be to stay a prosecution for mass murder on the basis that the English police circumvented the relevant extradition procedures in securing the return of the accused to England. Yet a stay is precisely what Lord Griffiths would seem to require even in this situation.

150. *Ex parte Bennett*, [1993] 3 P. at 163c. Consider also the practice of Australia in *Levinge v. Director of Custodial Services* (1987) 9 N.S.W.L.R. 546. *Levinge* did not directly concern issues of international law; however, the court indicated that the fact that the defendant was abducted would provide sound support for staying criminal proceedings to avoid abuse of process. *Levinge*, 9 N.S.W.R. at 556G-557A; see also Wilske & Schiller, *supra* note 8, at 223. The Court concluded:

Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with

Canada also has historically followed the *male captus, bene detentus* rule, but in contrast to England, has continued to apply this rule in the twentieth century.¹⁵¹ In *In re Hartnett*, Canadian authorities lured the defendants into Canada by telling them they were required to testify before

him or her. But it also has discretion not to do so, where to exercise its discretion would involve an abuse of the court's process. [Circumstances where the court should not exercise discretion may include the prosecuting authorities'] wrongful [or] unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorized and unlawful removal of criminal suspects from one jurisdiction to another.

Levinge, 9 N.S.W.R. at 556G-557A.

Further, consider the discretionary approach to jurisdiction followed by the New Zealand court in *R. v. Hartley*, [1978] 2 N.Z.L.R. 199. *Hartley's* reasoning would seem to fully apply to a forcible abduction scenario. The court reasoned:

Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: 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.

Id. at 216-17. In addition, the French Tribunal Correctionnel d'Avesnes required that the circumstances surrounding the abduction of a defendant be reviewed before jurisdiction is granted. *In re Jolis*, 7 Ann. Dig. 191 (1933-34). However, the force of this position seems limited in light of the judgment of the Cour de Cassation in *Re Argoud*, 45 I.L.R. 90 (Cass. Crim. 1964), where the court held:

[I]n international law, the State which is entitled to complain of damage suffered by one of its nationals or protected persons exercises a right of its own when it seeks reparation. It follows that the individual who claims to be injured . . . is without any right or capacity to plead in judicial proceedings a violation of international law, *a fortiori* when the State in question makes no claim.

Id. at 95; *see also* Wilske & Schiller, *supra* note 8, at 228. While one might read *Argoud* to establish the rule that defendants cannot complain of abduction where the nation whose territorial sovereignty was violated has not objected, French legal scholars have not accorded it this reading. Wilske & Schiller, *supra* note 8, at 227. Instead, *Argoud* is viewed as a case involving abduction by private parties, and the rule announced in *Jolis* is treated as good law for purposes of abduction by state actors. *Id.* NGUYEN QUOC DINH, *DROIT INTERNATIONAL PUBLIC* 448 (4th ed. Librairie Général de Droit et de Jurisprudence 1992); PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 48 (Dalloz 2d ed. 1992). Hence, French courts cannot assert jurisdiction over defendants abducted from foreign countries. Wilske & Schiller, *supra* note 8, at 227.

Switzerland reviews the circumstances surrounding a forcible abduction in deciding whether to grant an extradition request. *Id.* at 228. In a 1982 case, the Swiss Federal Court of Lausanne found that it would be unlawful for Switzerland to grant extradition to a third state, where an individual had entered Switzerland as the result of fraud propagated by the country requesting extradition. *See* Belgischer Staatsangehöriger, gegen Bundesanwaltschaft, 1983 *Europäische Grundrechte-Zeitschrift* 435 (1983).

151. *See* *R. v. Walton*, [1905] 10 O.L.R. 94 (Can.). In this case, U.S. officials detained a Canadian citizen in Buffalo, New York until the Toronto police arrived and transported him back to Canada. The accused alleged that his arrest constituted a violation of the U.S.-Canada extradition treaty. However, Judge Osler, following *Ker*, held that the circumstances by which the defendant had been brought before the court did not affect the court's jurisdiction. The court reasoned that the defendant had other remedies at his disposal, including a civil suit against the police for wrongful detention. Furthermore, the court held that only the United States could make a claim on the defendant's behalf under international law, as indicated by the extradition treaty. *Id.*; *see also* Michell, *supra* note 5, at 460 (discussing *Walton*).

the Ontario Securities Commission and then arrested them on charges of fraud.¹⁵² The applicants argued that the Canadian authorities' fraudulent misrepresentations violated their right to justice and due process of law under the Canadian Bill of Rights.¹⁵³ They contended that to allow their trial to proceed would constitute an abuse of process and a circumvention of the extradition process.¹⁵⁴ Justice Hughes, however, held that "an illegal arrest does not deprive a Judge of jurisdiction to entertain the prosecution of the victim"¹⁵⁵ and denied the applications. He reasoned that fraudulently luring the applicants into Canada could not violate due process because there is no right to an extradition proceeding within one's home jurisdiction.¹⁵⁶ Yet, should the Canadian court face a forcible abduction case again, the court, similar to English practice, would possess the power to order a stay in the proceedings.¹⁵⁷

Although English and Canadian courts disagree on whether they are required to respect customary international law that prohibits them from exercising jurisdiction over an abducted defendant, they agree that such customary international law does in fact exist. The Federal Constitutional Court of Germany, however, held that no customary rule of international law prevented the assertion of jurisdiction following abduction in the first place.¹⁵⁸ The Court ruled that an abducted person only needs to be returned when the victim nation objects to the abduction.¹⁵⁹ As a result, in a subsequent abduction case, the German Supreme Court held that proceedings should be stayed after the Netherlands complained that German officials had illegally apprehended an individual from the Netherlands.¹⁶⁰ It should be noted, however, that the decisions occurred in 1986, well before *Alvarez-Machain*, and that the court might reconsider the issue if faced with another abduction case.¹⁶¹

152. *In re Hartnett*, [1973] 1 O.R.2d 206, 207 (Can.).

153. Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, ch. 44, 1960 S.C. 519 (Can.) (granting the right not to be deprived of life, liberty, or security of the person except by due process of law).

154. *Hartnett*, 1 O.R.2d at 208.

155. *Id.* at 209.

156. *See R. v. Sunila*, [1986] 71 N.S.R.2d. 300 (Can.) (noting the traditional rule that illegal arrest does not displace a court's jurisdiction, but observing that the rule may be subject to Charter challenge).

157. *Id.* While the Canadian government is empowered to legislate with extraterritorial effect, the courts have read the Charter as limited to territorial application. *See R. v. A, B & C*, [1990] 1 S.C.R. 995 (Can.); *Singh v. Canada*, [1985] 1 S.C.R. 177; Canadian Council of Churches v. R., [1990] 2 F.C. 534, *aff'd on other grounds* [1992] 1 S.C.R. 236; *Ruparel v. Canada*, [1990] 3 F.C. 615; *see also Michell, supra* note 5, at 461 ("While Canadian courts are unable to prevent the prosecution of an accused person, they do possess an inherent right to stay proceedings where there has been an abuse of process . . .").

158. 39 *Neue Juristische Wochenschrift* 1427 (1986) (Ger. Fed. Const. Ct. 1985).

159. *Id.* at 1428; *see also Wilske & Schiller, supra* note 8, at 223.

160. 40 *Neue Juristische Wochenschrift* 3087 (1987) (Ger. S. Ct. Dec. 19, 1986); *see also Wilske & Schiller, supra* note 8, at 223-25 (discussing the German court's approach).

161. *See Wilske & Schiller, supra* note 8, at 224 (noting that legal scholars criticized the Federal Constitutional Court decision for being narrow).

The preceding section demonstrates that there are two main points of contention: First, whether there exists customary international law forbidding a court to exercise jurisdiction over an abducted defendant—England and Canada arguing that there is and Germany finding that there is not—and second, whether regardless of customary international law, it is proper for a court to exercise jurisdiction over an abducted defendant—the United States, Israel, and Germany finding that it is, and South Africa, Costa Rica, and Zimbabwe insisting that it is not. As such, the soundness of the practice is ripe for further discussion.

II. The Efficiency Justification: A Proper Role for Forcible Abduction

A. A Model for Crisis Management

This section applies the efficient breach justification, which is based on the tenets of law and economics, to the realm of international law and, more specifically, to forcible abduction.¹⁶² The justification serves as a crisis management model where traditional mechanisms fail. In essence, under the efficient breach justification, forcible abductions of terrorists are optimal because the benefits to the breaching nation and to the international community outweigh its costs.¹⁶³ Furthermore, fear of foreign retaliation and of eroding international institutions and peace provides a check on states that embrace forcible abduction and ensures that these states do not abduct defendants without carefully weighing the costs and benefits.¹⁶⁴

Under the efficient breach justification, detaining and prosecuting known terrorists is preferable to allowing terrorists to remain at large out of a fear of infringing on international law or the UN Charter. So long as the abducting nation can claim a jurisdictional interest and the target nation, if not the international community as a whole, has failed to act or is incapable of doing so, abduction of the terrorist defendant is efficient and therefore supportable.

162. See Morrison, *supra* note 13, at 183. Morrison writes:

Economic theory suggests that when the benefits of breaching an agreement exceed the costs of complying with an agreement, the system governing the agreement should allow a party to breach the agreement. On the other hand, when the costs of breach outweigh the benefits of breach, the governance mechanisms should create an incentive for a party to comply with the agreement. The theory of efficient breaches predicts that parties will attempt to forge mechanisms that allow efficient breaches and deter inefficient breaches.

Id.; see also BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE: THE STRATEGIC ORGANIZATIONAL APPROACH 56 (1992); William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 995 (1996) (arguing that an interdisciplinary approach which merges transaction cost economics with legal analysis is helpful for understanding problems of international cooperation).

163. See Dunoff & Trachtman, *supra* note 13, at 4 (suggesting that economic analysis may be useful for understanding international problems of institutional choice and that this analysis is not limited to wealth maximization questions).

164. See discussion *infra* Part II.A-B.

Because the efficient breach doctrine encourages breach where the resulting benefits exceed the damages, the existence of customary international law favoring or opposing forcible abduction, while informative, is not ultimately determinative.¹⁶⁵ The existence of customary international law on this point, rather, is relevant for determining under which circumstances an abduction would constitute a breach and triggers an analysis of whether such breach can be justified as efficient. As such, the contours of customary international law limit and define the class of abductions to which the efficient breach theory can apply. Where abduction would constitute a breach of international law, breach is efficient if (1) the terrorist threat appears imminent and the opportunity for abduction is fleeting;¹⁶⁶ (2) the target nation is unwilling to extradite or prosecute; (3) the operation involves minimal threat to bystanders; (4) the territorial infringement is reasonably limited; and (5) the accused will receive humane treatment and a fair trial. Under these conditions, efficient breach functions alongside the existing international order during moments of distress without necessitating a fundamental change in the structure of international law.¹⁶⁷

The Israeli model and portions of U.S. jurisprudence reflect this approach.¹⁶⁸ In the Eichmann abduction, a known offender was captured with minimal infringement on state sovereignty, and the event was marked by the absence of harm to the accused or civilians. The Israeli court favored universal jurisdiction over adherence to its obligation not to violate another state's territory; it was more concerned with providing an effective judicial remedy and less concerned with how the presence of Eichmann was secured. Moreover, in spite of the forcible abduction, the defendant received due process in the form of a full and fair trial. Argentina's grievance about the territorial infringement was redressed through a complaint to the UN, which sternly warned Israel, the offending nation. Dispute resolution facilitated by an international body, such as the UN, and initiated by a complaint from the aggrieved nation represents the damages portion of the efficient breach equation.¹⁶⁹

165. *But see Alvarez-Machain*, 331 F.3d at 619 (indicating that no specific binding obligation prohibits the United States from engaging in transborder abductions).

166. *See infra* note 175 and accompanying text.

167. The U.N. General Assembly's main weakness is that, being composed of nations with differing views on the best approach to combating terrorism, it is unable to formulate and pursue a consistent antiterrorism policy. *See* Phillip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool Against State Sponsored Terrorism*, 39 NAVAL L. REV. 221, 234 (1990); *see also* W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643 (1984).

168. Although Eichmann posed no imminent threat, the gravity of his crimes and the limited opportunity for capture might nevertheless justify abduction. *See* LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 885 (2d ed. 1986) (discussing the possibility of permissive enforcement of universal jurisdiction against particularly heinous criminals who are the targets of abduction). The contours of the imminence prong are discussed *infra* Part III.C.

169. *See* Dunoff & Trachtman, *supra* note 13, at 31. The authors noted: [E]fficient breach theory presupposes effective adjudicatory and enforcement mechanisms that, in the absence of a liquidated damages clause, can determine

To be sure, resort to the doctrine of reprisal infringes on territorial integrity and contravenes international law, but it does preserve international order.¹⁷⁰ Under this doctrine, a state may commit an otherwise illegal act (assuming for the moment the illegality of forcible abduction) if it commits the act in retaliation for an international delinquency.¹⁷¹ In this regard the breach serves as a gap-filler, redressing the breach of the harboring nation when traditional remedies fail. Here, Argentina provided sanctuary to a war criminal, Israel redressed this breach through abduction, and the international community criticized the infringement and restored balance.¹⁷²

Still, commentators have indicated the difficulties of measuring appropriate damages—how should the international community quantify the costs of territorial infringement in monetary terms, and what enforcement mechanisms are in place to ensure proper damages are paid?¹⁷³ Two par-

and compel payment of the appropriate level of damages in the event of a breach. That is, where there are no institutions that can provide for payment of damages, an “efficient breach” rule cannot be operationalized.

Id.

170. See John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L & COMP. L. REV. 241, 265 (1994). Quigley states:

Reprisal is the use of armed force, undertaken in response to a past use of armed force by another state, but where there was no ongoing attack and hence no need of force for self-defense purposes. Force could be used, under the doctrine of reprisal, as a response to a prior and already completed use of force. The doctrine of reprisal was accepted in international law in the pre-UN Charter era, when no international mechanism existed to respond to a threat to the peace. Force could be used in reprisal, either to deter future attacks or as retribution for past attacks, so long as the level of the force used did not exceed that of the prior force.

Id. (footnotes omitted). The doctrine of reprisal, however, did not survive the creation of the UN Charter, whose Article 2(4) prohibits the use of force subject only to an Article 51 exception. *Id.* at 266. But see Seymour, *supra* note 167, at 232-33 (arguing that reprisals do not disturb the vitality of Article 51 because they are not aimed at the political independence of states, and alternatively that, at the least, if a state is repeatedly targeted by state-supported or -sponsored terrorism and has no other effective means of responding it should no longer have a duty to refrain from peacetime reprisals against the state supporting or sponsoring the attacks against it).

171. See J.G. STARKE, INTERNATIONAL LAW 520 (1989); Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 10 (1972).

172. Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 978 (1993) (suggesting that where a known offender resides in a country that refuses to make a good faith effort to arrest him and bring him to justice, there is a compelling argument for forcible abduction); see also Seymour, *supra* note 167, at 237-40 (stating that if an offending state refuses or fails to meet another state's demands, the claimant state may undertake an act of reprisal when it is necessary to obtain redress and it is proportionate to the original injury).

173. See Dunoff & Trachtman, *supra* note 13, at 31; see also Morrison, *supra* note 13, at 190. Morrison explains:

Typically, international agreements involve transfers of legal obligations, not transfers of money. Such transfers are discrete rather than continuous. For example, it would be difficult for Germany to pay Russia \$25 billion to compensate Russia for the risk that Germany might breach a trade agreement. Thus, we are left with a situation in which even an efficient breach would result in an uncompensated risk to the non-breaching party.

ties could, of course, agree to submit a territorial infringement suit to the International Court of Justice, which could levy appropriate damages that would be enforceable by the UN.¹⁷⁴ Alternatively, if the abduction materially violated an existing treaty obligation to extradite, as the defendant alleged in the *Alvarez-Machain* case, the nonbreaching party could, under the Vienna Convention on the Law of Treaties, suspend operation of the treaty by refusing to extradite any accused criminal or by withdrawing entirely and seeking to renegotiate terms.¹⁷⁵

The best recourse, however, is to seek relief directly from the UN because it has historically been the institution of choice for aggrieved nations following forcible abductions¹⁷⁶ and because its assessment of damages is the most likely to be obeyed, or failing that, enforced. By resolution, the UN can demand that the breaching party pay reparations, impose trade sanctions, or inflict reputational loss.¹⁷⁷ Although it may seem inconsistent that a nation can breach the tenets of the UN but then rely on the dignity of that same institution to assess and enforce damages fairly, it is in fact not inconsistent. Breach of the obligation to refrain from infringing on another country's territorial sovereignty is efficient only because that country's failure to extradite or prosecute creates a breach of a treaty-based duty or a danger (cost) in excess of the damage caused by the abduction, or both, and the UN is unable to respond swiftly to this danger—not because territorial sovereignty or UN principles are not important to respect. After it becomes more efficient for a country to breach an international agreement or international custom because of exceptional circumstances, the UN can do what it is best at—restoring order and respect for international institutions and agreements through a broadly supported resolution. There remains the question of how to properly assess the damages owed by the abducting state, but valuing the property damaged or destroyed by the abduction and adding thereto a negotiated compensation

Id.

174. Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055. The United States modified its acceptance of the ICJ's Article 36(2) jurisdiction when Nicaragua filed suit in 1984. Under the UN Charter, the Security Council can enforce a judgment by the International Court of Justice against a member of the United Nations. Article 94 of the UN Charter states as follows:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

U.N. CHARTER, art. 94. While the Security Council's recommendations are nonbinding, its decisions may give rise to enforcement measures. *Id.* art. 93. In order to pass such an enforcement measure, the Security Council must have an affirmative vote of seven members and the concurrence of all permanent members. *Id.* art. 27.

175. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 56, 60, 1155 U.N.T.S. 331.

176. See, e.g., Question Relating to the Case of Adolf Eichmann, *supra* note 128.

177. See Morrison, *supra* note 13, at 196 n.49 (describing loss of reputation as a form of sanction).

for any insult caused by territorial infringement does not appear to be an impossible task for the UN.

Capturing a grievous offender and condemning the heinous crimes he committed benefits the international community by removing a threat and discouraging other potential criminals from committing similar offenses. After Israel's breach of its obligation under customary international law to respect territorial sovereignty remedied Argentina's breach of its obligation not to provide safe harbor to war criminals, institutions remedied Israel's breach. This end is achieved without lengthy and fruitless debate over self-defense or strained readings of international conventions or treaties that were prevalent in *Yunis* and *Alvarez-Machain*; instead, the court can defer to existing international institutions that successfully quell any outrage.¹⁷⁸ So long as countries remain committed to international comity, criticism of the use of forcible abduction will constrain the practice and prevent it from completely eroding the foundations of existing international agreements and institutions, yet effectively tolerate it where abduction is efficient.

The application of efficient breach to international law is not without detractors: Professor Harold Hongju Koh, responding to the events of September 11, 2001, suggests that "over the years we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored at a time like this."¹⁷⁹ Professor Koh suggests that maintaining the "higher moral ground" requires nations to seek justice by locating and abiding by the applicable laws.¹⁸⁰ Under his view, efficient breaches and other departures from existing norms only lead to troubling outcomes and lack legitimacy. However, his analysis fails to consider that in a catch-and-snatch self-help scenario, efficient breach is deployed because of international paralysis. Resort to diplomacy and existing norms is ineffective where the host nation refuses to prosecute or extradite and where the condemnation of an international tribunal does little to prevent terrorist movement or activity.

Further, Professor Koh's analysis undervalues the element of necessity

178. See *id.* at 207. Morrison explains how the imposition of a penalty through an international institution will impact the decision of a country contemplating forcible abduction:

[C]onsidering the case of a mandatory penalty, . . . breach will occur if the benefits exceed the mandatory penalty. If the penalty is greater than the cost, an efficient breach will be deterred. If the penalty is less than cost, an inefficient breach will be allowed to occur. However, if the penalty is equal to cost, only efficient breach occurs.

179. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 23 (2002). Professor Koh indicates that forceful, targeted military action in response to September 11th is both proper and legitimate under the UN charter system, but cautions that the more unilateral, indiscriminate, and prolonged the use of force is, the more likely it is to violate both the letter and the spirit of international law. *Id.* at 24-29.

180. *Id.* at 23, 39.

when a terrorist attack is imminent.¹⁸¹ The efficient breach method seeks to maximize both short-run and long-run utility¹⁸²—measured by the continued existence and peaceful interaction of states, which ensures the opportunity for citizens to live peaceful and productive lives. In the short run, the international interest is furthered by preventing future terrorist acts. In the long run, so long as mechanisms exist to constrain the practice, efficient breach serves as a gap-filler, regulating delinquent states. Thus, the theory of efficient breach counters Professor Koh's appeal to the legitimacy of the rule of law and disdain for actions that undermine existing norms with a claim of necessity, self-preservation and protection of international peace, and a consequentialist morality¹⁸³ measuring the utility of forcible abduction by its outcomes; if no future terrorism occurs then the abduction is justifiable. Indeed, the justification might also be framed as honoring the territorial integrity of a host nation by removing a threat to the victim nation's existence.¹⁸⁴ This is true especially where a host nation is incapable of self-policing due to corruption, civil strife, famine, or budgetary or structural limitations. The *Achille-Lauro* affair illustrates the utility of forcible abduction in this rubric.

B. The *Achille-Lauro* Incident: An Illustration

On October 7, 1985, members of the Palestine Liberation Front ("P.L.F.") hijacked an Italian cruise ship and demanded the release of prisoners held by Israel.¹⁸⁵ The alleged mastermind was Mohammed Abbas, the group's leader and a known terrorist.¹⁸⁶ After a series of failed negotiations between the P.L.F. and West Germany, Italy, and Egypt, the vessel docked in Port Said, Egypt.¹⁸⁷ Once there, all hostages were released except for Leon Klinghoffer, who had been shot and thrown overboard while the ship was at sea.¹⁸⁸ Despite repeated U.S. requests to prosecute

181. See Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 *YALE J. INT'L L.* 609, 648 (1992) ("Regardless of the relative strength of the terrorist group, a state that hesitates to act against terrorists may lose the opportunity to act at all.").

182. "The principle of utility . . . approves or disapproves of every action . . . according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question[.]" JEREMY BENTHAM, 1 *JEREMY BENTHAM'S WORKS* 1-2 (1843).

183. See Theodore P. Seto, *The Morality of Terrorism*, 35 *LOY. L.A. L. REV.* 1227, 1240-41 (2002) (defining "consequentialism" as a moral system that holds that an act is morally right if its consequences are desirable and arguing that it provides little practical guidance when applied to politically motivated violence).

184. *But cf.* Dunoff & Trachtman, *supra* note 13, at 46-47 (describing the difficulty of measuring the value of harm or benefit to another state in monetary terms).

185. John Tagliabue, *Ship Carrying 400 Seized*, *N.Y. TIMES*, Oct. 9, 1985, at A1. The group threatened to kill the vessel's passengers, beginning with U.S. nationals, unless Israel promptly released fifty imprisoned Palestinians. Beck & Arend, *supra* note 5, at 175.

186. See Kash, *supra* note 9, at 89 (stating that Italy tried and convicted Abbas in absentia for masterminding the hijacking).

187. Beck & Arend, *supra* note 5, at 175.

188. *Id.* at 176. Klinghoffer was a U.S. citizen—hence the U.S. interest in prosecuting the hijackers. See *id.*

the offenders, Egypt resisted and even attempted to deceive the United States by insinuating that the hijackers had already left its territory.¹⁸⁹ However, on October 10th, an airliner chartered by the Egyptian government sought to deliver the Palestinians to Tunis, Tunisia.¹⁹⁰ U.S. naval forces intercepted the airplane and forced it to land at an Italian North Atlantic Treaty Organisation (NATO) base in Sicily.¹⁹¹ There, U.S. troops surrounded the airliner and, in turn, were surrounded by Italian troops.¹⁹² Following a tense standoff, the American and Italian governments reached an agreement allowing the Italian forces to take custody of the hijackers including Abbas.¹⁹³ The Italian government prosecuted the hijackers but refused to detain Abbas, who traveled to Yugoslavia, then to South Yemen, and eventually to Iraq, which denied extradition.¹⁹⁴ Abbas remained at large until April 2003, when a U.S. special operations team captured him in Baghdad during Operation Iraqi Freedom.¹⁹⁵

While the Italian government complained of violations of its airspace, international reaction to the U.S. self-help was, on the whole, muted.¹⁹⁶ The Security Council discussions did not address the United States' use of force.¹⁹⁷ Predictably, a Palestinian representative labeled the action as "air piracy," while the Israeli delegate described the intervention as "courageous."¹⁹⁸ The Secretary General of the Organization of the Islamic Conference described U.S. action as "a matter which has legal implications which [he did] not intend to address."¹⁹⁹

Arguably, U.S. self-help was necessary in the *Achille-Lauro* incident in order to fill a void in international law. Italy, Yugoslavia, South Yemen, Iraq, and particularly Egypt, which harbored the terrorists and then lied about it, had all breached a duty to prosecute or extradite the offenders. All conditions necessary to justify an efficient breach in the form of reprisal were present: a prior international delinquency and an unsatisfied demand for prosecution or extradition. The reprisal was a proportional response, and self-help was utilized only because all reasonable alternatives had been exhausted.²⁰⁰ One international law expert observed that the U.S. response was justified even if the interception constituted a violation of

189. Judith Miller, *Egypt Says It Gave Gunmen to P.L.O.*, N.Y. TIMES, Oct. 11, 1985, at A11.

190. See Beck & Arend, *supra* note 5, at 176. Tunisia and Greece denied the aircraft permission to land. *Id.*

191. *Id.*

192. Kash, *supra* note 9, at 89.

193. *Id.*

194. *Id.*

195. See Douglas Holt, *U.S. Captures Achille Lauro Mastermind*, CHIC. TRIB., Apr. 16, 2003, at 22. Abbas stated in an interview that the Achille Lauro hijacking and murder of Klinghoffer were mistakes. See *id.* "Nobody is without mistakes . . . My main goal now is to say that we need peace." *Id.*

196. See Beck & Arend, *supra* note 5, at 176.

197. See generally U.N. SCOR, 40th Sess., 2622nd mtg. at 38-46, 53-55, U.N. Doc. S/PV.2622 (1985).

198. See *id.*

199. U.N. Doc. S/PV.2622, *supra* note 199, at 32-38.

200. See Seymour, *supra* note 167, at 237-39.

international law (though he did not believe it did) because it redressed the "worse breach" by Egypt.²⁰¹ The efficiency justification points to the success in deterring terrorism and in redressing the breach of other nations that refused to prosecute or extradite the terrorist, and emphasizes that international relations suffered no permanent harm, as evidenced by the tone of the Security Council discussions and the fact that the United States was not required to pay damages.²⁰²

Abduction would be most effective if the abducting state sought to remove dangerous terrorists from circulation without injuring bystanders, was able to assert jurisdiction over abducted terrorists in domestic courts under the passive personality principle (although universal jurisdiction would also suffice), and at the same time afforded the accused the benefits of a full and fair trial. Such an arrangement would fit comfortably in the *Ker-Yunis* line without violating *Toscanino* because under *Ker-Yunis* the reach of jurisdiction trumps concerns over presence and because international response to imminent threats is impotent. Indeed, one commentator, although troubled by the United States' apparent lack of understanding of international principles and by its failure to comply with extradition treaties, suggested that the incident could be described as good crisis management because the terrorists had already taken hostages and the abduction was not preemptive.²⁰³ He further argued that U.S. interception could be justified because other states had failed to act in accordance with their duties under international law and because any tension between Egypt, Italy, and the United States was short-lived.²⁰⁴ In summary, efficient breach, in the form of reprisal, quashes an immediate threat without causing derogation or collapse of the existing system; the injured nation redresses a harm that the UN cannot, and the UN operates effectively to maintain harmony.

III. The Israeli Interceptions and *Alvarez-Machain*: Testing the Boundaries of the Efficiency Justification

A. Israeli Self-Help: Within the Bounds of Acceptability

The heavily criticized Israeli self-help efforts and *Alvarez-Machain* present harder cases for the efficient breach doctrine. Consider the following incident: On August 10, 1973, an Israeli aircraft intercepted a flight from Beirut to Iraq and forced it to land in Israel because Israel believed that

201. See Stuart Taylor, Jr., *Capture of Hijackers: Plane Diversion Raises Legal Issues*, N.Y. TIMES, Oct. 11, 1985, at A11 (quoting Andreas Lowenfeld).

202. See Morrison, *supra* note 13, at 190. Morrison argues:

The failure to compensate injuries resulting from efficient acts does not make a system untenable. As an illustration, consider the common law of negligence. A plaintiff cannot recover for a defendant's action if the benefits of the action outweigh the risk to the plaintiff since such action is reasonable and, therefore, not actionable in a court of law.

203. See Gerald P. McGinley, *The Achille Lauro Case: A Case Study in Crisis Law, Policy and Management*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 323, 359-60 (M. Cherif Bassiouni ed., 1988).

204. *Id.*

Palestinian terrorists were on board the aircraft.²⁰⁵ After hours of questioning the crew and the ninety passengers, Israeli officials determined that no terrorists were on board and allowed the flight to resume.²⁰⁶ During subsequent UN Security Council meetings, the Israeli representative contended that the action was justified on self-defense grounds because Israel possessed the inherent right to protect its people from future terrorist attacks.²⁰⁷ Unconvinced, the Security Council, with U.S. support, assessed damages and passed a unanimous resolution condemning the action.²⁰⁸

In a similar incident on February 4, 1986, Israel intercepted a Libyan airliner in an effort to effect a forcible abduction of terrorists believed to be on board the aircraft.²⁰⁹ The Israelis again determined that no terrorists were on board and permitted the flight to continue.²¹⁰ During discussions following the incident, Israeli officials again justified their actions as self-defense.²¹¹ This time, the U.S. government, perhaps in response to its experience in the *Achille-Lauro* affair, refused to accept a Security Council Resolution condemning the interception of the aircraft as wrongful *per se*.²¹² Instead, the United States suggested that while it opposed forcible intervention generally and specifically opposed the Israeli action, which it thought was based on inadequate evidence of prior terrorist action specifically, exceptional circumstances could justify intervention.²¹³ U.S. Ambassador to the United Nations Vernon Walters commented that on Article 51 grounds, "[a] State whose territory or citizens are subjected to continuing terrorist attacks may respond with the appropriate use of force to defend itself against further attacks."²¹⁴

Lastly, on July 28, 1989, Israeli helicopters landed in a Lebanese village, where commandos kidnapped Sheik Abdul Karim Obeid from his home.²¹⁵ Officials alleged that the Sheik had incited and planned attacks against Israel and that he had provided shelter to terrorist members of Hezbollah.²¹⁶ During the mission, one of Obeid's neighbors was killed by gunfire.²¹⁷ The abduction aroused severe international criticism: a unanimous Security Council resolution, although explicitly mentioning neither

205. See Beck & Arend, *supra* note 5, at 174-75.

206. *Id.* at 175.

207. U.N. SCOR, 28th Sess., 1738th mtg., U.N. Doc. S/PV.1738 (1973).

208. *Id.*

209. See Beck & Arend, *supra* note 5, at 176-77.

210. *Id.* at 177.

211. U.N. SCOR, 41st Sess., 2651st mtg. at 19-20, U.N. Doc. S/PV.2651 (1986).

212. U.N. SCOR, 41st Sess., 2655th mtg. at 112-13, U.N. Doc. S/PV.2655/Corr.1 (1986).

213. *Id.*

214. *Id.*

215. Beck & Arend, *supra* note 5, at 177. Shiite Muslim leader Sheik Obeid, who is closely aligned with Iran, is suspected of having planned the kidnapping of Colonel William Higgins, which took place in February 1988. Abramovsky, *supra* note 73, at 202-03.

216. See Beck & Arend, *supra* note 5, at 177-78.

217. *Id.*

Israel nor Sheik Obeid, condemned all acts of hostage taking or abduction.²¹⁸

While the Obeid abduction is a closer case because of the loss of civilian life²¹⁹—an issue that does not arise in the other interceptions—Israel could make a plausible efficiency theory argument that it chose the lesser international evil: Obeid was a leading figure of a violent movement, and Lebanon provided him refuge with no apparent intent to prosecute him. Arguably, Israel could legitimately claim passive personality and universal jurisdiction over his crimes.

Nonetheless, there are two main concerns with the Israeli abductions. First, there is a concern about the loss of civilian life. Even though a direct incursion into another state's territory is of course the riskiest, this does not justify civilian casualties. In fact, the social utility of the self-help decreases as the risk of injury to innocents increases. However, the other instances of self-help, many of which involved large numbers of hostages or bystanders but did not lead to civilian casualties, demonstrate that the practice need not invariably cost innocent lives. In any case, this criticism applies only to a single case and is insufficient to undercut the justification or invalidate the practice.

The second concern, voiced by the United States, is that Israel had not sufficiently demonstrated that Obeid had a history of terrorist activity—the same criticism that it had levied against the 1986 interception, and also similar to Justice Stevens's charge of lawlessness in *Alvarez-Machain*. However, in both instances Israel sought repeat offenders, whom it believed to be traveling free from any restraint by their host nations. Further, given the repeated attacks by terrorists connected to Obeid, Israeli claims that they were facing an imminent threat were at least as persuasive as U.S. claims of imminent threats in *Yunis* or the *Achille-Lauro* incident—cases in which U.S. courts did or would likely have sanctioned government-sponsored abduction of the defendants and which pass muster under the efficiency justification.²²⁰ Israel did not behave wantonly. It allowed both crew and passengers to resume their travel after it determined that the targeted individuals were not on board; and though Israel presented a self-defense justification, it nevertheless accepted the UN's criticism without further protest or resistance.²²¹ International institutions succeeded in regulating Israel's use of self-help—thirteen years separated the two incidents—without limiting Israel to the use of prolonged extradition or deportation procedures to obtain jurisdiction over terrorists from nonextradition nations, an effort that would have done little to prevent imminent

218. *Id.*

219. See *id.* at 191 (contrasting the absence of casualties in the 1973, 1985, and 1986 aircraft interceptions, with, *inter alia*, the 1986 U.S. air strike against Libya which killed the stepdaughter of the Libyan leader Colonel Qadhafi).

220. Imminence is discussed in detail *infra* Part III.C.

221. See Beck & Arend, *supra* note 5, at 177-78.

attacks.²²²

Moreover, the critical U.S. reactions to the 1973 interception and the Obeid abduction are incompatible with its own behavior in the *Yunis* and *Alvarez-Machain* cases, and with the *Achille-Lauro* affair and the *Ker-Frisbie* doctrine generally. Even its response to the 1986 action, approving a limited role for abduction on self-defense grounds yet still condemning the Israeli action, appears inconsistent with *Yunis* and *Alvarez-Machain*. Israel's lack of success in capturing any terrorists may lie at the root of U.S. criticism. A failed operation by an ally is harder to justify to international counterparts, especially when that country seeks to broker peace in the affected region. This is supported by a comparison to the aftermath of "successful" U.S. air strikes against Libya in 1986, where instead of being outraged, Western nations instituted sanctions and condemned Libya's sponsoring of terrorism.²²³ Yet, the Israeli episodes represented harmless failures; indeed a deterrence argument might even label them as successes.²²⁴ Under the efficient breach theory, the Israeli abductions fall within the bounds of acceptability. The government, intending to defend its security, targeted threats from noncooperative states, thus preserving international order by recognizing and punishing the breach. Therefore, lack of success is not fatal to a self-help attempt under the efficiency justification.

B. *Alvarez-Machain*: An Unjustifiable Abduction

Alvarez-Machain, however, posits conditions arguably outside the appropriate scope for forcible abduction. In this instance, the victim state's inaction does not temper the criticism that the abducting country's claim to jurisdiction is tenuous. Rather, in this case, an extradition treaty was in force, and the targeted nation had not refused a request to prosecute or extradite.²²⁵ Unlike Egypt in the *Achille-Lauro* affair, Mexico harbored no ulterior motives, nor did it engage in deception; instead, the United States violated sovereignty solely on the basis of a tortured reading of treaty law. Additionally, the situs of the crime and the host nation's interest in prosecuting defendant-nationals argue in favor of Mexico as the forum conveniens. Even if the target was a group of terrorists rather than a criminal, the damage to international comity exceeds the imminent harm, and the failure to request extradition or to exhaust alternatives leaves the preconditions to reprisal unsatisfied.

222. See Dunoff & Trachtman, *supra* note 13, at 31 (indicating that the efficient breach theory presupposes effective enforcement mechanisms that can determine and compel payment in the event of a breach).

223. See Seymour, *supra* note 167, at 239.

224. See Morrison, *supra* note 13, at 209-10 (observing that a country will often retaliate when another country breaches its obligations under a treaty in order to deter future breaches and arguing that this practice can give "teeth" to international law).

225. See Biblowit, *supra* note 120, at 105 (indicating that, while informal discussions had occurred, at no time had the United States entered a formal request with Mexican officials for extradition).

Indeed, the South African court's concern for international order is more consistent with the efficient breach doctrine than the U.S. Supreme Court's liberal reading of treaty obligations. Despite the objective "success" in *Alvarez-Machain* and the comparative "failure" of the Israeli interceptions, efficiency theory supports the Israeli interception because it was in response to an imminent threat, exhibited jurisdictional self-restraint, promoted good international relations, and did not breach to a greater extent than necessary, all of which cannot be said for the U.S. abduction in *Alvarez-Machain*; in that case there was no threat to national interest, no necessity for self-defense, and therefore no efficiency justification.

C. A Question of Imminence

The *Alvarez-Machain* majority opinion can be interpreted to support efficient breach. Although the Court's approach does not say so explicitly, its reasoning suggests that treaty law does not prevent efficient breach any more than UN provisions do. The *Alvarez-Machain* case also focuses discussion on the level of imminence necessary to legitimate a forcible abduction. Under the dominant view of anticipatory defense, the feared attack must be imminent.²²⁶ Secretary of State Daniel Webster provided the classic articulation of this standard during the famous *Caroline* incident in the nineteenth century.²²⁷ According to Webster, self-defense should "be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."²²⁸ Preparation alone is insufficient. The Nuremberg Tribunal spoke approvingly of this principle when it evaluated (and rejected) Germany's claim that its invasion of Norway in 1940 constituted legitimate self-defense.²²⁹

Traditional self-defense analysis counsels hesitation and exhaustion of defensive measures before taking any preemptive action.²³⁰ Under this view, imminence is relative: as defensive options become more limited or

226. See Schmitt, *supra* note 181, at 647.

227. In 1837, a group of armed men took over Navy Island, which is on the Canadian side of the Niagara River but also close to New York. The men were among the many U.S. nationals who assisted the Canadian rebels. Navy Island served as a base from which to attack mainland Canada and supply weapons to the rebels. The *Caroline*, an American steamer, transported men and weapons between New York and Navy Island. A British commander attacked the *Caroline* while she was in U.S. territory. Two U.S. nationals were killed, and the *Caroline* was burned and sent over Niagara Falls. The United States protested the attack, but Britain denied any wrongdoing and defended the attack as necessary to enforce its laws along the frontier and therefore a legitimate exercise of self-defense. In response, American Secretary of State Webster renewed his protest setting forth the concepts now known as the *Caroline* doctrine. JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW § 217, at 409-14 (1906).

228. Letter from Daniel Webster, U.S. Secretary of State, to Lord Alexander B. Ashburton, U.K. Ambassador, Destruction of the *Caroline*, Aug. 6, 1842, in MOORE, *supra* note 228, § 217, at 411-12 (1906).

229. International Military Tribunal (Nuremberg), Judgment and Sentences, *reprinted* in 41 AM. J. INT'L L. 172, 205 (1947).

230. For the position of the Bush Doctrine on preemptive action see *supra* note 1 and accompanying text.

less likely to succeed, preemptive action becomes more acceptable.²³¹ However, terrorism cripples this analysis. Terrorists are difficult to locate and track, their activities are by definition clandestine, and—Resolution 1373 notwithstanding—they are not subject to the constraints of international law or custom. Therefore, regardless of the strength of the terrorist group, a state that hesitates to act against terrorists may lose the opportunity to act at all.²³² Thus, the proper standard for imminence is “more likely than not” rather than “beyond the shadow of a doubt.”

This preponderance standard allows a threatened nation to protect itself but prevents wanton and reckless activity. Before resorting to self-help, a state would have to perform a rational calculation, which would entail considering the feasibility of alternative remedies, the risk of error or harm to civilians, and the credibility of the threat. The standard also retains a temporal element, which considers how soon the attack is likely to occur. A claim of an imminent threat must be supported by documentation of past terrorist activity, strong evidence of a future attack, or both, lest a government abuse the self-help justification—for example, to remove political enemies. Additionally, while imminence is a powerful factor, a government must also assess the issue of international gridlock and the potential effects on international stability and peace when weighing the costs and benefits of self-help as applied to the particular situation. Under this modified imminence standard, the “ticking time bomb” scenario²³³ is sufficiently imminent, while the *Alvarez-Machain* case is not because the defendant’s offense was relatively limited in scope, there was no evidence suggesting the defendant would commit future offenses, and the United States had failed to exhaust existing remedies. Generally, traditional means of resolving international conflicts are more useful when a threat is less imminent—that is, the more time remains before the threat will be actualized. Nonetheless, so long as there is credible evidence of a serious threat, there should be a strong presumption in favor of respecting the decision of a state that it is necessary to abduct a terrorist defendant.

The Israeli interceptions qualify as imminent under a more likely than not standard because there was strong evidence of past attacks, despite U.S. claims to the contrary, and the likelihood of future terrorism was strong. Meeting the imminence standard, therefore, does not require objective success; the accused could have been plotting to attack a different target than the one presumed or might ultimately not be on board the carrier, and the imminence standard would still be satisfied. For example, if the wanted terrorist had been on board during one of the Israeli interceptions

231. Schmitt, *supra* note 181, at 647; *see also* Kash, *supra* note 8, at 147 (“[A] state can seize a terrorist in another country as long as the capture is necessary to prevent future harm to its citizens . . .”).

232. Schmitt, *supra* note 181, at 648.

233. *See, e.g.*, ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002); Interview by Greta Van Susteren with Alan Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School, for Fox on the Record (Sept. 3, 2002), available at 2002 WL 5,600,476 (supporting judicially regulated state torture of a detainee, where authorities know that there is a ticking bomb).

but was targeting a different interest from that which intelligence evidence had suggested, the principle would still be satisfied because there would have been an imminent threat, although not that which intelligence authorities had suspected. The preponderance standard ensures that the practice will be used carefully, yet it recognizes the inherent limits on the evidence available where secretive terrorist activity is involved.

The standard is not overly rigid: a threat might not be very imminent, yet the practice could still be justifiable on efficiency grounds. For instance, if a terrorist cell had been dormant, the threat would not be imminent; yet, if the harm it had caused in the past was grave, if there was significant potential for deterrence, if traditional international means of conflict resolution had failed, if the territorial violation was limited, and if the mission was precise, a forcible abduction might be justified or even required, low level of imminence notwithstanding.

Critics warn that an increase in forcible abductions will generate violent retaliation rather than resort to formal complaint.²³⁴ However, fears of rampant lawlessness and unregulated abductions have not been validated by actual practice; one commentator notes that only Israel and the United States have used force in response to terrorism.²³⁵ Political capital is too limited, resources too scarce, and the risk too high to entertain an extensive program of forcible abduction. The efficiency theory would encourage objectors, like the South African court, to try abducted defendants on criminal charges and to rely upon international impetus to resolve sovereignty concerns, even if they object to the reasoning of *Alvarez-Machain*. Countries should—and have—used transnational forcible abduction as legitimate self-help and not as a broad mandate for subduing politi-

234. For example, on July 3, 1988, the guided missile cruiser U.S.S. *Vincennes*, under command of Captain Will Rogers III, shot down an Iranian aircraft over the Persian Gulf after the American crew had determined that the airbus was about to attack the cruiser. A year later, a bomb exploded under the car of Captain Rogers's wife. Prior phone calls strongly suggest that the attempt on her life was connected to the Iranian airbus incident. Abramovsky, *supra* note 73, at 201-02; see also Richard A. Serrano & Jane Fritsch, *FBI Puts Top Priority on Bombed Van*, L.A. TIMES, Mar. 12, 1989, at A1; see also *Iran OKs Law Allowing American Arrests Abroad*, L.A. TIMES, Nov. 1, 1989, at P1; see also Tyler Raimo, Notes and Comments, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT'L L. REV. 1473, 1502-04 (1999) (discussing the potential for retaliation); *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103rd Cong. 16, 41 (statement of Abraham Sofaer, Legal Adviser, U.S. Department of State). Another nation might invoke the U.S. legal position, which approves of expanded international jurisdiction for law enforcement agencies against the United States. *Id.* For example, Russia, acting through the KGB, might assert jurisdiction to investigate alleged terrorists in the United States, possibly without U.S. consent. *Id.* at 41-44. *But see* Bush, *supra* note 172, at 969-71 (arguing that the cost in political capital limits governments' ability to use abduction and reprisal as in law enforcement on a regular basis).

235. See Beck & Arend, *supra* note 5, at 191. *But see* Michael J. Bazylar, *Capturing Terrorists in the 'Wild Blue Yonder': International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685, 695 (1986) (discussing an incident in which two South Yemeni fighters intercepted a Djibouti commercial airliner over the Red Sea and forced it to land at an airport in South Yemen).

cal opponents. Admittedly, the “prosecute or extradite” method is preferable where all nations involved are willing participants. However, when the threat is high, jurisdiction is present, other nations are not cooperating, or international bodies are ineffective, forcible abduction is justifiable as a lesser breach that yields a better outcome.

In a post-September 11th environment where the international reach of terrorism is clear, and the anti-terrorist rhetoric targets both terrorist organizations and the states that harbor terrorists, self-help and forcible abduction, in particular, may enjoy an expanded role. Some states, notably the United States and Israel, have endorsed this method by favoring an expanded application of universal and passive personality jurisdiction. These nations have also shown a willingness to interpret both customary and treaty law to permit or even endorse abduction. The South African court, on the other hand, has declined to assert jurisdiction over abducted individuals for fear of disregarding international comity.

Countries that have adopted a policy of forcible abduction rely on traditional justifications for infringing on territorial sovereignty, including self-defense and prevention of future attacks by the particular target; however, criticisms that the practice encourages retaliation, violates customary law, and that the abducting state lacks sufficient nexus with the crime linger. A third and more convincing justification allows for forcible abduction when it maximizes utility internationally—notably in cases where there is an imminent threat and where other nations have breached their duty to prosecute or extradite accused terrorists.

Conclusion

The self-help deployed in the *Achille-Lauro* and *Yunis* cases as well as in the Israeli interceptions demonstrates that the efficient breach theory has operated effectively in practice. In those cases, all the elements of the efficient breach theory were met: (1) the abducting country had a legitimate jurisdictional claim; (2) other states had failed to act; (3) the threat was imminent; (4) the actions did not result in harm to bystanders or the accused; (5) the actions were minimally intrusive; (6) a dangerous figure was neutralized yet still enjoyed a fair trial; and (7) when there was protest, international order was restored through official warning. The limits of the theory are discernible, as evidenced by *Alvarez-Machain*—a case that arguably tests those limits—but do not defeat its persuasiveness. The efficiency justification obviates the need for formalistic interpretations or creative extensions of state or international law as seen in *Alvarez-Machain*. Instead, the practice is effectively regulated by existing instruments and, as a result, has generally been used in a careful, targeted manner. Under this theory, the United States could interrupt bin Laden’s travel without any legal discomfort and could help protect international interests, all without damaging international relations. Reliance on reprisal would be justified

because here, self-help would ensure the neutralization of an international threat to peace and security, and existing international bodies could respond effectively to any protest. Thus, forcible abduction has a proper role within both the Bush Doctrine and international law.

