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International Kidnapping

A number of students attending schools throughout the world mysteriously disappear and thereafter appear in their native lands to face charges of espionage; a former Nazi war criminal is secretly seized in a Latin American republic and removed from that country to face charges of genocide; a prominent African leader in exile is kidnapped from his private jet over the Mediterranean and dragged before a court for an extradition hearing. Plots in a weekly adventure series on television? Possibly, but in the world community as it is presently constructed, such incidents unfortunately are also quite real. It is the purpose of this inquiry to examine situations such as these, situations in which one state resorts to force or fraud to capture an individual in another, in order to try him before its own tribunals.

The practice of employing force or fraud to secure control over an individual is one consequence of the division of the world into approximately 140 territorial units,[1] each exercising authority and control over a particular portion of the earth's surface. The presence of the fugitive outside the effective control of the state wishing to try him, immediately presents a motive to resort to whatever measures will insure his return to the jurisdiction of the trying state. In many instances, treaties of extradition or informal arrangements have permitted the return of the fugitive. This is, of course, the preferable practice. In some cases, however, the absence or inapplicability of such treaties or arrangements has motivated the state seeking to obtain the individual to resort to extra-legal means to achieve the same end. Resort to such means has an unsettling effect on international relations; it disrupts the expected lawful flow of commerce by making uncertain the safety of normal means of transportation; and it deprives individuals of the security of knowing that they may rely upon the established framework of a state sovereignty and state boundaries in carrying on their personal and political activities.[2]

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[1]United Nations, 24 Monthly Bulletin of Statistics, # 4 at pp. 1-4 (April, 1970).

[2]The subject of this inquiry, the kidnapping of individuals by agents of the government whose courts are asked to exercise jurisdiction over them, is to be distinguished from the more frequent and recently very serious problem of kidnapping and hijacking by individuals not acting as agents for any government.

Modern instances of such illegal practices have usually concerned kidnapping of individuals. Earlier occurrences presenting essentially similar problems concerned seizure of ships of an enemy belligerent in the territorial waters of neutral states. English prize courts very early held that such captures, although made in violation of the rights of the neutral states, and hence of international law, did not prevent the courts from exercising jurisdiction over the vessels.[3]

American courts took a similar position, relying upon cases involving vessels forfeitable to the government, but which had been seized by individuals lacking authority to make such seizures. In such cases the courts viewed the acceptance of the vessel by the government, and the prosecution of the forfeiture proceedings, as "relating back" to legitimatize the illegal seizures.[4] This concept of a "relation back" to legitimatize the improper seizure of the property was applied to chattels as well as to vessels.[5]

In modern times, however, United States courts have been less willing to exercise jurisdiction in cases in which the ship was seized under circumstances of doubtful legality. Several cases arising under United States tariff laws, and cases involving importation or transportation of alcohol in violation of Prohibition laws, evidence greater caution. In two such cases the courts permitted seizure and condemnation of the ships involved, but in each case expressed doubt that such a result would obtain if the ship, which in each case had been captured on the high seas, had been a foreign ship.[6]

The existence of a treaty with the foreign power whose ship was seized, brought a distinction and a change in result in these cases arising during the Prohibition era. On one case, for example, the Supreme Court explicitly made the jurisdiction of the court dependent upon the manner of seizure of the vessel.[7] Great Britain had agreed, by treaty, to consent to the seizure of British ships on the high seas by the United States to enforce the Prohibition laws, but only if the ship were found within one hour's sailing distance from the coast of the United States. Confronted with the seizure of a British vessel beyond the one-hour sailing limit specified by the treaty, the Supreme Court, discussing the older prize cases and their theory of "relation back," commented:

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[3]The Purissima Conception, 6 C.Rob. 45 (1805); The Twee Gebroeder, 3 C.Rob. 162 (1800).

[4]The Caledonian, 17 U.S. (4 Wheat.) 100 (1819). *See also:* Gelsoon v. Hoyt, 16 U.S. (3 Wheat.) 246, 310 (1810).

[5]Wood v. U.S., 41 U.S. (16 Pet.) 342, 359 (1842).

[6]The Homestead, 7 F.2d 413 (S.D. N.Y. 1925); The Underwriter, 13 F.2d 433 (2d Cir. 1926).

[7]Cook v. United States, 288 U.S. 102 (1933).

> . . . The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had fixed the conditions under which a vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power because of the Treaty to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.[8]

This willingness to recognize the disabling effects of an improper seizure in an exercise of jurisdiction, remained limited to cases involving disability stemming from a bilateral treaty. Anglo-American practice generally failed to recognize the protest of the owner of a vessel, or the protest of an enemy belligerent state, whose vessel was seized in neutral waters in violation of customary international law.

French and German prize courts, on the other hand, have for some time released ships seized in neutral waters after a protest by the owners.[9] German courts, in fact, in the period between the world wars developed a rule by which the burden of proof as to the legality of the seizure of a vessel to be condemned rested upon the captor.[10]

American Interstate Experience

The presence of a federal system of government within the United States has provided a rich line of cases concerning problems of jurisdiction not unlike those present in the international community. Since the American states enjoy closer cooperation and greater trust, it might be expected that resort to illegal practices would be less likely. Yet, here too, experience has revealed a resort to force and fraud to secure jurisdiction over fugitives.

The problem of exercise of jurisdiction over the fugitive whose return to the trying state was secured improperly, has arisen frequently in criminal cases in which the defendant has been brought into the state, generally by force, without the benefit of the normal procedures for interstate rendition derived from the United States Constitution.[11] The presence of this con-

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[8]*Id.* at 121.

[9]GARNER, PRIZE LAW DURING THE WORLD WAR 227 (1927).

[10]Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 1952 BRIT. YB. INT'L. L. 272.

[11]U.S. CONST. art. IV, sect. 2: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

stitutional provision and its interpretation by the courts have provided an element only incipient in the international system. The American interstate cases thereby present in microcosm, as it were, the same policy considerations which are relevant in the international forum.

Early state cases involving pleas to the jurisdiction of the court on the ground that the defendant had been brought forcibly into the jurisdiction, uniformly resulted in the assertion of the jurisdiction. The courts often pointed out in such cases that the guilt of the defendant was in no way affected by the means by which he was brought into the jurisdiction, and therefore the court's power to dispose of the case was in no way affected.[12] The language of the courts in these early cases often resembled that used in the still older cases concerning seizure of ships in violation of international law.[13]

Nor did the presence of Article IV, Section 2 of the Constitution, with its provision for an orderly return of fugitives to the requesting state, deter these early courts from asserting jurisdiction in such cases. One court construed the Constitutional provision as indicating a preference for the policy of asserting jurisdiction over criminals, and since the defendant would ultimately be returned to the trying state in either case, the policy favored by the Constitution is served by the exercise of jurisdiction.[14] If the state from which the fugitive was seized is unhappy about the means used, it could always invoke the Constitution to request surrender of the kidnapper who brought the defendant into the applying state in the first place. Another court echoed this reasoning and indicated that the defendant might be released to the state from which he was taken if that state requested his release.[15] This result, however, would obtain under principles of interstate comity, and not through any defect in the power of the court to continue to exercise jurisdiction. But another court hinted that a request from the governor of the asylum state might result in the release of the defendant, but that nothing in the Constitution was intended to benefit the defendant.[16]

In contrast to these cases, were occasional decisions which looked beyond the specific wording of the Constitution, and took into account wider policies which would require different results when the fugitive was brought into the jurisdiction by improper means. A United States district

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[12]State v. Ross & Mann, 21 Ia. 467 (1866); *In re* Miles, 52 Vt. 609 (1880).

[13]Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 239 (1934).

[14]State v. Smith, 1 Bailey (S.C.) 283 (1829).

[15]Kingen v. Kelly, 2 Wyo. 566 (1891).

[16]Dow's Case, 18 Pa. St. 37 (1851).

court in Tennessee, for instance, released a criminal defendant in a habeas corpus proceeding on the ground that he was brought into the State by the use of fradulent extradition papers.[17] Discussing the rule of international law that the defendant will not be tried for a crime other than that for which he was surrendered by the asylum state, the court concluded:

> Such a case is not altogether analogous to the one in hand, but it tends to show the good faith required between nations. Certainly the same character of faith should obtain between the executive authorities of the different states of this nation, which in many respects are foreign to each other. It seems to me that such authority should not be held to the seizure and removal were procured by fraud, falsehood and imposition.[18]

Two states, Nebraska and Kansas, for a time adhered to a policy of refusing to exercise jurisdiction in any such cases involving use of illegal measures to return a fugitive to the state. Nebraska, in a case in which the fugitive was brought into the state in flagrant violation of the normal interstate rendition procedures, refused to exercise jurisdiction, basing its decision on "reason" and a preference for honesty and fair dealing.[19] A Kansas court followed a similar rule in a case in which the defendant had been kidnapped in Nebraska and brought forcibly into Kansas for trial.[20] In this case, however, the court articulated more carefully the considerations present in such a situation:

> It would not be proper for the courts of this state to favor, or even to tolerate, breaches of the peace committed by their own officers in a sister state, by sustaining a service of judicial process procured only by such a breach of the peace. Indeed it would not be proper for any court in any state to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundations of all organized society, and which are necessary in the very nature of things to hold society together.[21]

The efficacy of these decisions was short-lived, however, as both Kansas and Nebraska later fell into line with the majority rule, and permitted jurisdiction over persons brought illegally into the state.[22]

The conclusions of state courts in such cases received confirmation in the United States Supreme Court. In the first case in which that Court

[17]Tennessee v. Jackson, 36 F. 258 (D.C. E.D. Tenn. 1888).

[18]*Id.* at 260.

[19]*In re* Robinson, 29 Neb. 135, 45 N.W. 267, 8 L.R.A. 398 (1890).

[20]State v. Simmons, 39 Kan. 262, 18 Pa. 177 (1888).

[21]*Id.* at 265-65.

[22]The Kansas case was overruled *sub silento* in Foster v. Hudspeth, 170 Kan. 338, 224 P.2d 987 (1951). The Nebraska rule was expressly overruled in Jackson v. Olson, 146 Neb. 885, 22 N.W. 2d 124, 165 A.L.R. 932 (1946).

specifically dealt with the problem, the defendant had been kidnapped while a request for his surrender to the state which had indicted him was under consideration.[23] Denying habeas corpus, the Court indicated that there is no means in the United States judicial system to restore the person thus wrongfully kidnapped. Whether or not Congress could adopt such a system by legislation was not at issue. The Court concluded:

> It would indeed be a strange conclusion if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated because other parties had done violence to him and also committed an offense against the laws of another state.[24]

This ruling was approved more recently in a case in which the defendant had been seized, handcuffed and blackjacked in Chicago and taken forcibly to Michigan for trial.[25] Admitting that such behavior may well constitute a violation of the federal kidnapping act, the Court nevertheless could see no alternative to prosecution of the defendant in the Michigan court, since there appeared to be nothing unfair in the conduct of that trial.

International Cases

On the global level, the actions of the various states have given rise to fairly well established expectations that orderly procedures will be employed in seeking to secure fugitives from the territory of other states. Nevertheless, the use of force or fraud to obtain jurisdiction over individuals occurs with unexpected frequency.

Nothing in international law places a duty upon a state to deliver up a criminal fugitive to another state upon request,[26] and only rarely have officials of one state permitted agents or citizens of another state to arrest persons within its borders.[27] To remedy this situation, systematic procedures have been worked out for surrender of such fugitives. Such procedures are embodied in extraditon treaties and the negotiation of such treaties appears to be increasingly common.[28] The need for careful adherence to these treaties has given rise to the well-known rule of international law that the fugitive cannot be tried by the extraditing country for any crime other than that for which he was delivered up by the surrendering country.[29]

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[23]Mahon v. Justice, 127 U.S. 700 (1887).

[24]*Id.* at 712.

[25]Frisbie v. Collins, 342 U.S. 519.

[26]4 HACKWORTH, DIGEST OF INTERNATIONAL LAW 1 (1942); 4 MOORE, INTERNATIONAL LAW DIGEST 245-48 (1906); 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968).

[27]1 MOORE, EXTRADITION AND INTERSTATE RENDITION, 281 (1891)

[28]Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought From a Foreign Country by Force of Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957).

[29]Dickinson, *supra* note 13 at 233.

This rule gained prominence in the United States in a Supreme Court decision in *United States v. Rauscher* involving a seaman extradited from Great Britain for the murder of a crew member of a United States ship.[30] Upon his arrival in the United States, the defendant was tried for inflicting cruel and unusual punishment upon the man whose death he caused. The Court, after pointing out that in the absence of a treaty there was no obligation on the part of Great Britain to deliver up the defendant, reversed the conviction on grounds that his trial for a charge other than that for which he was extradited was in contravention of the treaty and a wrong to all involved:

> . . . it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition.[31]

It is significant that the Court identified the interests of the fugitive as being relevant. Also significant was the fact that the Court reached its conclusion despite the absence of any specific provision in the treaty requiring such a result. The Court justified its conclusion partially on the grounds that such a rule relieves tension between the political organs of the two governments concerned. The Court also indicated that before he could be charged with a separate offense, the defendant would have to be released and permitted to leave the country.

This solicitude for the spirit as well as the letter of extradition treaties has continued, and the defense that a different charge has been made has been frequently raised, often with success.[32]

The chief policy underlying these decisions interpreting extradition treaties, appears to be that since the principle of the treaties represents a notable departure from the exclusive jurisdiction exercised by each party to the treaty over individuals found within its borders, a greater surrender of exclusive jurisdiction than provided by the treaty ought not to be sanctioned by the decision of a court when lawless actions have occurred. This interest in adhering to the regular procedures contained in the extradition treaties would be expected to be reflected in those cases in which the fugitive was forcibly returned to the control of the trying state in complete absence of any extradition treaty. But this has not been the case.

American practice, with a few exceptions, has been strikingly uniform.

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[30]United States v. Rauscher, 119 U.S. 407 (1886).

[31]*Id.* at 421-22.

[32]For some cases in which imaginative defenses have been presented on the basis of extradition treaties, *see:* Collins v. O'Neill, 214 U.S. 113 (1909); Johnson v. Browne, 205 U.S. 309 (1907); Cosgrove v. Winney, 174 U.S. 64 (1899); Greene v. United States, 154 F. 401 (5th Cir. 1907); People ex rel. Stilwell v. Hanley, 240 N.Y. 455 (1925).

The first court to face the problem squarely affirmed its right to exercise jurisdiction over a defendant brought into this country against his will from Canada without permission from the Canadian Government.[33] Admitting the illegality of the kidnapping procedure, the court remained adamant in its exercise of jurisdiction, and renounced all responsibility for the ill effects of such a decision upon American-Canadian relations, relegating that delicate matter to the executive.

The same reasoning and result obtained in other state decisions[34] and received ultimate sanction in the United States Supreme Court. In *Ker v. Illinois*,[35] decided on the same day as *United States v. Rauscher*, in an opinion written by the same Justice,[36] the Court held that a state court was free to exercise jurisdiction over a defendant who had been kidnapped and brought into the United States when the officer sent to pick him up could find nobody to whom he could deliver his extradition papers. The Court concluded that nothing in the treaty with Peru, the country in which the defendant was kidnapped, gave him the right to asylum. Nor did the Constitution or laws of the United States provide a remedy. The Court never considered the issue as to the legality of the action in terms of international law.

Subsequent American cases involving pleas to the jurisdiction of the Court by fugitives brought into the country by force, relied firmly on the Supreme Court's decision in *Ker*, usually with a suggestion that the improper action, if any, is a matter solely for the offended state and the executive department.[37] This phenomenon of the courts' abjuring all responsibility for the illegality of the apprehension of the defendant, and of leaving any question of international illegality to the executive, has permitted the courts to avoid facing up to the question of their responsibility for enforcing international law applicable to such cases, and, in at least one case, has permitted the executive to avoid responsibility by relying on the court's decision as conclusive.[38]

In a number of cases presenting only a slight variation of these facts, the courts have consistently exercised jurisdiction, although the defendant claimed he was seized illegally in a foreign state by the foreign authorities acting as agents of the United States, and delivered to American author-

[33]State v. Brewster, 7 Vt. 118 (1835).

[34]*See, e.g.*, People v. Rowe, 4 Parker Cr. 253 (N.Y. 1858).

[35]119 U.S. 436 (1886). For a suggestion that the facts of the Ker case might not have involved an illegal removal of the defendant to the United States, *see:* Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953).

[36]Mr. Justice Miller.

[37]*See, e.g.*, United States v. Insull, 8 F.Supp. 371 (N.D. Ill. 1934).

[38]The Kidnapping of Antonio Martinez, 2 FOREIGN RELATIONS OF THE UNITED STATES 1121-22 (1906).

ities at the border. The courts have uniformly failed to impute any improper action to the United States or one of its subdivisions, and have usually remarked that even if this were the case, the *Ker* decision would permit exercise of jurisdiction.[39]

Another variation of the classic case of forcible kidnapping concerns the use of fraud to entice the fugitive into the jurisdiction seeking to apply its law to him. Although it is generally assumed that the principles applying to the use of force would apply equally to the use of fraud, few instances of fraud can, in fact, be discovered. Two such cases have appeared, however, both in the United States, and both resulting in the expected exercise of jurisdiction by the court as in the cases in which force was employed.[40]

The sole American case in which the defendant was released by the court and jurisdiction declined because of the manner in which the fugitive was brought into the jurisdiction of the court presents an example of contorted reasoning used to reach a desirable result.[41] The case concerned an instance of American troops pursuing Mexican bandits back across the border into Mexico. While on one of these forays the force arrested the defendant by mistake and brought him back to the United States as a bandit. After arrival in this country it was discovered that the prisoner was not one of the bandits whom the troops were seeking, but that he was wanted for a murder committed some years before. By pre-arrangement he was released and immediately rearrested by the Texas Rangers on the murder charge. The state urged that even though the accused had been kidnapped *illegally,* relying on the *Ker* case, he could nevertheless be prosecuted on the murder charge.

The court held instead that since the troops entered Mexico under orders from the War Department, it was obvious they must have had Mexican consent, a fact not proved in the case; and since the troopers were limited on their expedition to the capture of bandits, the resulting situation was not unlike an extradition treaty which the United States had breached by charging the defendant with a crime other than banditry. The court held that under the *Rauscher* rationale, the defendant could not be tried for any crime but banditry, and must therefore be discharged from the murder prosecution. It might be pointed out that a rule of law which

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[39]*Ex parte* Wilson, 140 S.W. 98 (1911); U.S. v. Sobell, 142 F.Supp. 515 (S.D.N.Y. 1956), *aff'd* 244 F.2d 520 (2d Cir. 1957), *cert. denied,* 355 U.S. 873 (1957), *rehearing denied,* 335 U.S. 926 (1958).

[40]In *Ex parte Brown, 28 F. 653 (N.D. N.Y. 1886) the defendant was defrauded into entering the United States from Canada. In Ex parte* Ponzi, 106 Tex Crim. 58 (1926) the defendant was lured from an Italian ship in New Orleans by a Texas deputy sheriff with the assistance of an officer of the ship. He was then brought to Texas for removal to Massachusetts.

[41]Dominquez v. State, 90 Tex. Crim. 92 (1921).

requires a state to advance the illegality of its measures of apprehension to sustain the trial court's jurisdiction over a fugitive, and the court to resort to such elaborate fictions to reject such an argument, can hardly be described as rational.

British domestic courts have likewise declined to abstain from exercising jurisdiction in such cases. The British rule was laid down as early as 1829 in *Ex porte Scott,* a case involving a woman who was forcibly apprehended in Brussels and brought by British authorities back to England to face a perjury charge.[42] The court expressly refused to examine the manner by which she was brought before the court. This decision has remained the law in Britain and was, in fact, introduced into Canada,[43] and into the Palestine Mandate during World War II where it later figured in the Eichmann case.[44]

While Anglo-American courts have been willing to proceed in the face of questionable measures used to produce a defendant before the court, the continental courts have shown reluctance to exercise jurisdiction under such circumstances. Three such cases stand out in sharp contrast to the consistent holdings in the Anglo-American cases. The first, a French case arising in 1891, concerned a fugitive arrested in Belgium by French authorities.[45] He was then handed over to the Belgian police who in turn brought him to the border and returned him to the French authorities, thinking he was a Frenchman, when in fact he was a Belgian. The French court reasoned that he would not be before the court at all if the French authorities had not violated the Belgian border; and the court acted as though the arrest never occurred at all and released the defendant.

The second case, again in France, involved the arrest of a fugitive by French authorities in Belgium.[46] This time the defendant was brought into France directly by the French police. Again the court ordered the release of the defendant on the ground that the arrest by French police in foreign territory could have no legal effect whatsoever, and was therefore null and void. The third case, decided by the Spanish Supreme Court in 1934, involved a fugitive who fled from Spain to Portugal.[47] Spain sought extradition of the fugitive on one charge which Portugal refused, then sought extradition on a second charge. Portugal surrendered the fugitive for trial

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[42]9 B & C 446 (1829).

[43]Cutler, *The Eichmann Trial,* 4 CAN. B.J. 352, 355 (1961).

[44]Afouneh v. Attorney-General, 9 Law Reports of Palestine 63 (1942), 10 Ann. Dig. 191, 327 (1941-42) (Supreme Court of Palestine Sitting as a Court of Criminal Appeal).

[45]Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL PRIVE 1188 (Court of Appeal of Dorial, 1891).

[46]*In re* Jolis, [1933-34] Ann. Dig. 191 (Tribunal Correctional d'Avesnes 1933).

[47]Fiscal v. Samper, 7 Ann. Dig. 402 (Supreme Court of Spain 1934).

on the second charge, but the government prosecuted him on the first charge. The Supreme Court reversed the conviction in an opinion which is unusual for its declaration concerning the right of the fugitive to refuge in the foreign state:

> Accordingly, the appellant cannot be condemned, since he could not be sentenced for a crime for which he could not be tried. This is so because delinquents who take refuge in a foreign country relying on legislation which promises them protection have acquired a right, disregard of which would tend to weaken the law of nations and to introduce lack of confidence into international relations.[48]

The Spanish court's solicitude for the rights of the fugitive in such a situation is a marked departure from the attitude of most courts and states. Concern with an affront to the state whose territory has been intruded upon has marked most such controversies, with little thought given to the rights of the person kidnapped. This phenomenon was epitomized in one instance in which two persons were abducted into Canada.[49] Upon a complaint by the United States, Canada expressed regrets and offered to return the men. The United States accepted the apology, and waived return of the fugitives.

In many other such cases, however, the illegality of the means of securing the fugitives was admitted, and return accomplished in negotiations between the interested states.[50] One such case occurred when agents of Nazi Germany kidnapped a former German national from Switzerland.[51] The Swiss protested, and arbitration had been agreed by the parties when Germany offered to settle the case by return of the individual to Switzerland with an apology, and an indication that the state agents responsible for the incident had been punished. Other settlements have involved not only return of the fugitive to the asylum state, but extradition of the kidnapper to the aslyum state for trial, a practice inevitably upheld by courts in attacks upon the extradition proceedings.[52]

The submission of such cases of kidnapping to international tribunals has not been a frequent occurrence since bilateral negotiations have proven generally effective. In one case in which this problem was indirectly touched upon, however, a tribunal of the Permanent Court of Arbitration held that Britain was not obligated to release an Indian political offender

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[48]*Id.* at 405.

[49]MOORE, INTERNATIONAL LAW DIGEST 329 (1906).

[50]*Id.*, and *see* 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW 224 (1942).

[51]Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502 (1935); *Settlement of Jacob Kidnapping Case (Switzerland-Germany)* AM. J. INT'L L. 123 (1936).

[52]Collier v. Accaro, 51 F.2d 17 (4th Cir. 1931); Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934).

escaped in a French port of call.[53] A French policeman apprehended the fugitive, and believing himself bound to do so, surrendered him to the British authorities. Subsequent British refusal to surrender the prisoner despite French protests, was held to be justifiable since the slight irregularity involved when custody of the prisoner was secured through a mistake of a minor officer of the asylum state was not of such importance as to require surrender of the fugitive. Although the issue of improper seizure was not directly discussed, implied, of course, was the need to surrender the fugitive if the apprehension had not involved so minor an irregularity.

A case more in point, the *Colunje Claim,* arising before the American and Panamanian General Claims Arbitration, concerned a man accused of fraudulent use of the mails for advertising a love charm in a newspaper circulated in the Panama Canal Zone.[54] A Zone policeman, employing fraudulent inducements, lured the fugitive into the Zone from Panama and there arrested him. The United States denied liability for the incident, claiming that since the policeman was unauthorized to act outside the Zone, his actions were strictly of a personal nature. The Arbitration Commission made an award to Panama on this claim without explanation.

The most famous case of recent times involving the kidnapping of an international fugitive concerned the Nazi criminal, Adolf Eichmann. Eichmann, one of the principal architects and administrators of the German policy of genocide, was discovered by Israeli agents in the Spring of 1960 to be living, under an assumed name and with false papers, in Argentina.[55]

Although the exact details of the capture are not certain, it appears that the Israeli agents captured Eichmann on May 11, 1960, in Suarez, and transported him to Israel in an Israeli airplane.[56]

On May 23, 1960, Premier Ben Gurian, announced the capture of Eichmann to the Israeli Parliament, provoking a protest by Argentina which demanded the return of Eichmann and punishment of the kidnappers.[57] Israel responded that the location and removal of Eichmann had been effected by private individuals for whose actions Israel was in no way responsible. Israel further produced a signed statement from Eichmann himself stating, in effect, that he went willingly to Israel.[58] Subsequent

[53]Savarkar, (France v. Great Britain) in SCOTT, HAGUE COURT REPORTS, 275 (Perm. Ct. Arb. 1911).

[54]The Colunje Claim, U.S. Department of State, Arbitration Series, No. 6, American and Panamanian General Claims Arbitration Under the Convention between the United States and Panama of July 28, 1926 and December 17, 1932. Report of Bert L. Hunt, Agent for the United States (Washington, 1934).

[55]Comer, *The Eichmann Trial: Historic Justice?,* 23 GEORG. B.J. 491 (1961).

[56]Bede, *The Eichmann Trial: Some Legal Aspects,* 1961 DUKE L.J. 400 (1961).

[57]L 5 U.N. SCOR, Supp. Apr.-June, 1960, at 24, U.N. Doc. S/4334 (1960).

[58]Comer, *supra* note 55.

statements indicated that Israeli agents had in fact perpetrated the removal of Eichmann to Israel.[59] Upon failure of Israel to meet Argentina's demands, that nation placed the matter before the Security Council under the terms of Article 33 of the Charter of the United Nations, claiming that the invasion of its sovereignty constituted a threat to international peace and security.[60] A Security Council Resolution of June 23, 1960 reprimanded Israel:

> [The Security Council] . . . 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. . . 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.[61]

The failure of the United Nations to demand the return of Eichmann and the tepid efforts of Argentina in his behalf, (Germany, where Eichmann served as a government official, and Austria, the country of his nationality, made no effort to help him, permitted a fairly simple political settlement.[62] Israel apologized for the incident and in a joint communique on August 3, 1960, the two countries officially put the matter to rest.[63] Final settlement of the political differences permitted start of the actual trial on April 11, 1961 in the Jerusalem District Court. After a lengthy trial, in which Eichmann was afforded an opportunity to submit evidence in his own behalf and take the stand, final judgment was handed down during the week of December 11, 1961. He was found guilty of 15 counts of the indictment, but was acquitted of several miscellaneous allegations not proven beyond a reasonable doubt. He was sentenced to die by hanging. Appeal was taken from the trial court directly to the Supreme Court of Israel, which affirmed the conviction and sentence on May 29. A plea for clemency to the President of Israel was denied, and immediately thereafter, at midnight on May 30, 1962, Eichmann was hanged.[64]

The Eichmann case has aroused a great deal of scholarly interest and comment concerning both the legality of the assertion of the court's jurisdiction in the face of the defendant's kidnapping from Argentina, and the trial by a state not existing at the time of the charged crimes and acting

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[59]O'Higgins, *Unlawful Seizure and Irregular Extradition,* 1960 BRIT. YB. INT'L L. 279, 296 (1960).

[60]U.N.SCOR, Supp. Apr.-June, 1960, at 30 U.N. Doc. S/4342 (1960).

[61]U.N.SCOR, Supp. Apr-June, 1960, at 35, U.N. Doc. S/4349 (1960).

[62]Kittire, *A Post Mortem of the Eichmann Case-The Lessons For International Law,* 55 J.CRIM. L., C. & P.S. 16, 17 (1964).

[63]Leary, *The Eichmann Trial and the Role of Law.* 48 A.B.A.J. 820 (1962).

[64]*Id.,* at 820, note 2.

without the international mandate sanctioning the Nurenberg trials.[65]

Those who sought to justify the action of the Israeli Court pointed to the United Nations Resolution, and the subsequent Israeli-Argentine settlement, as removing any objection to the continued retention of Eichmann and exercise of jurisdiction over him. These actions, it was felt, removed any taint from the Israeli actions which might otherwise have been present. The Israeli Court itself, when challenged by the defense on the ground that the kidnapping had robbed it of jurisdiction, ruled that even if the government of Israel had participated in the removal of Eichmann from Argentina (and this was not conceded), the court's jurisdiction was not affected, a ruling based on the British rule in the *Scott* case which had been imported into Palestine law during the Mandate period and which continued in Israeli law.[66]

A more recent case of international kidnapping, and one with more blatantly political overtones, was the kidnapping of the former Congolese Premier, Moise Tshombe. Tshombe, leader of rebellious Katanga Province in the early 1960's, served as Premier of the Congo for a time, only to be deposed and forced into exile after a bloodless coup staged by now President Mobutu in November, 1965.[67] Tshombe took up residence in Spain apparently occupying himself with schemes to return to power in the Congo, while Mobutu staged a trial of Tshombe and several of his former henchmen, charging the former with high treason, subversive propaganda, inciting and organizing rebellion, recruiting foreign mercenaries for use against the Congo, selling the Congo's mineral wealth to foreigners, and taking part in the murder of the Congo's first President, Lamumba.[68] Tshombe, who had declined the government's offer of free air passage to the Congo to attend the trial in person, was convicted and sentenced to death *in absentia,* a verdict that apparently took but ten minutes for the court to reach.[69]

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[65]Among the more valuable discussions of various phases of the Eichmann case *see:* Silving, *In Re Eichmann: A Dilemma of Law and Morality,* 55 AM. J. INT'L L. 307 (1961): Cardozo, *When Extradition Fails, Is Abduction the Solution?,* 55 AM. J. INT'L L. 127 (1961); Cutler, *The Eichmann Trial,* 4 CAN.B.J. 352 (1961); Bode, *The Eichmann Trial: Some Legal Aspects,* 1961 DUKE L.R. 400 (1961); Woetzel, *The Eichmann Case in International Law,* 9 CRIM. L.R. 671 (1961); Leary, *The Eichmann Trial and the Rule of Law,* 48 A.B.A.J. 820 (1962); Lippert, *The Eichmann Case and the Nuremberg Trials,* 48 *A.B.A.J.* 738 (1962); Green, *The Eichmann Case,* 23 MOD. L.R. 507 (1960); Kittrie, *A Post Mortem of the Eichmann Case-The Lessons for International Law,* 55 J. CRIM.L., C. & P.S. 16 (1964); Comer, *The Eichmann Trial: Historic Justice?,* 23 GEORG. B.J. 491 (1961); O'Higgins, *Unlawful Seizure and Irregular Extradition,* 1960 BRIT. YB. INT'L L. 279 (1960); Schwarzenberger, *The Eichmann Judgment, An Essay in Censorial Jurisprudence,* 15 CURRENT LEGAL PROBLEMS 248 (1962).

[66]*Supra,* note 42.

[67]N.Y. Times, July 14, 1967, at 19.

[68]*Id.,* March 8, 1967 at 4.

[69]*Id.,* March 14, 1967 at 14.

Tshombe remained safely in exile until June 30, 1967, when his rented private British jet was hijacked en route from the island of Ibinza off the coast of Spain, to Palma, Majorca, where he was then staying. The plane, containing Tshombe, his Spanish bodyguards, and various friends and business associates, was forced to land in Algeria when one of the passengers pulled a gun on the two British pilots and ordered them to change course.[70] The exact origin of the kidnapping plan is uncertain.

Algeria claimed to be taken by surprise by the move,[71] and various reports have credited Mobutu with having instigated the kidnapping.[72] Once Tshombe reached Algeria, Congolese officials moved to secure his extradition to the Congo to face execution under the March sentence.[73] At this point, a revolt was staged by mercenaries in the Congo. The cities of Kisangani and Bukavu were seized, and the Congo was plunged into yet another of its periodic crises.[74] The United States Department of State, among others, viewed the turmoil in the Congo as an attempt by Tshombe's supporters to put pressure on the Congolese government to discontinue attempts to return Tshombe to the Congo for execution.[75]

Tshombe's case was brought before the Algerian Supreme Court on July 19 in a secret four-hour session.[76] On July 22, the Court ruled that the government could extradite Tshombe to the Congo if it wished, rejecting the argument that he had been tried *in absentia* for political crimes. The Algerian Constitution explicitly forbids the extradition of a fugitive charged with commission of a political offense. The Court indicated that the charges against Tshombe were not of a political nature, and that the Court could not "condone murder and theft," referring, no doubt, to the charges that Tshombe had been involved in the murder of Lamumba, and that he had left the Congo with a goodly portion of the Congolese treasury.[77] The Court apparently never considered the question of its own jurisdiction over a person brought before it in such a fashion. The Algerian government, caught in the political cross-currents created by the Tshombe kidnapping, never did return him to the Congo. Although the other passengers on the Tshombe plane were released, Tshombe remained a prisoner in Algeria until his death on June 29, 1969.[78]

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[70] *Id.*, July 9, 1967 at 9.
[71] *Id.*, July 3, 1967 at 1.
[72] *Id.*, July 6, 1967 at 1.
[73] *Id.*, July 3, 1967 at 1; July 4, 1967 at 5; July 5, 1967 at 13.
[74] *Id.*, July 6, 1967 at 1.
[75] *Id.*, July 7, 1967 at 13.
[76] *Id.*, July 20, 1967 at 20.
[77] Abduction in the Air, 90 Time 19-20 (1967).
[78] N.Y. Times, Sept. 24, 1967 at 20; Oct. 1, 1967 at 10.

The Tshombe kidnapping presented one of the most spectacular instances of the use of force to secure control of an individual and of the consequences of a court's exercise of jurisdiction over him. In addition, the case amply demonstrated the extreme vulnerability of the individual who is made the victim of such actions. Despite Spain's grant of asylum to Tshombe, the Spanish government made no overt move to secure his release, or to protest his capture. Nor did the British government intervene publicly, although a British plane was involved. The protection of the individual only by intercession by his national state, as has been the practice in many such cases of international kidnapping, obviously is deficient when the interests of the fugitive's state are furthered by the kidnapping as in the Tshombe case. For this reason, the Tshombe case demonstrated all of the problems inherent in such situations and exhibited many dangers fortunately not present in the majority of them.

Another similar incident which resulted in political difficulties concerned the kidnapping of a number of South Korean students studying abroad. From June 16-20, 1967, at least fourteen South Korean students were rounded up and removed from various West German cities to South Korea.[79] Eight students were removed from France, one from the United States, and one from Australia.[80] The South Korean government announced that each of the students returned voluntarily to South Korea where they were charged with being involved in a large-scale Communist espionage network originating in 1958 in East Berlin.[81] The United States Department of State announced that it had been notified in June of 1967 that the Korean government was attempting to interview South Koreans in the United States, and that it was later learned that several of those interviewed had left for South Korea. There was no evidence that any United States laws were broken in these incidents.[82]

Reaction was more severe in West Germany, however. The government protested the actions to South Korea; protests were voiced in the Bundestag; and the Foreign Ministry provided police protection to South Koreans who requested it.[83] West German authorities eventually made arrests of South Koreans in West Germany who were involved in the alleged kidnapping, and demanded the recall of three South Korean diplomats involved, as well as the return of all South Koreans who had been removed from West Germany.[84] France also protested the removal, under sus-

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[79] *Id.*, July 5, 1967 at 8.
[80] *Id.*, July 9, 1967 at 1.
[81] *Id.*, July 6, 1967 at 9; July 9, 1967 at 1.
[82] *Id.*, July 13, 1967 at 5.
[83] *Id.*, July 5, 1967 at 8.
[84] *Id.*, July 14, 1967 at 8.

picious circumstances, of some Koreans from France.[85] South Korea immediately apologized to France and indicated that the individuals involved would be permitted to return to France.[86]

Relations between West Germany and South Korea remained strained for some time however, and when a South Korean appellate court handed down severe sentences to the individuals who had been returned from West Germany, anti-Korean student protests broke out in Bonn and the West German government expressed shock at the sentences.[87] Relations between the two nations were eventually normalized when South Korea agreed to lenient treatment for those involved within the limits of South Korean laws, in return for resumption of financial aid from West Germany.[88] This incident, although successfully settled, resulted in the imprisonment of the persons kidnapped, and a serious, although temporary, disruption of normal diplomatic relations among the states involved.

Appraisal and Recommendation

A survey of cases concerning the use of force or fraud to apprehend a fugitive so that the state may try him, reveals an all-too-frequent lack of discussion and understanding of the policies inherent in such problems, and a readiness to follow, without question, past decisions which may themselves have been based on incomplete understanding of these policies, or on no articulated policies at all. This is especially evident in the cases of the early ship seizures in which the courts repeated the rule that a seizure was legitimized by the government when the government invoked the court's jurisdiction, and that whatever the nature of the original seizure, its adoption by the government cured any illegality, and protected any person whose actions might otherwise have made him liable.

It is difficult to justify such a ruling in view of its obvious disruptive effects upon settled expectations concerning proper procedures for government interference with otherwise private rights. In effect, the rule has the effect of deputizing all private citizens to take what might otherwise be unlawful action, with the hope that ratification by the government will result in their justification, and the promotion of the government policy involved. This vigilante operation, if widespread, cannot fail to have a disastrous effect upon commercial channels, exercise of private rights, and formation of public attitudes about the proper roles of law enforcement. The episodes concerning the kidnapping of the South Korean students exemplify the kind of trouble that may arise.

[85] *Id.*, July 23, 1967 at 5.
[86] *Id.*, Aug. 4, 1967 at 7.
[87] *Id.*, Dec. 6, 1968 at 16.
[88] *Id.*, Jan. 19, 1969 at 4.

With increase in the danger of conflict among states and the greater deference given by courts and other municipal decision-making bodies to international values and considerations, the trend of decision has shifted slightly in favor of greater deference to orderly procedures. Refusal of courts to entertain jurisdiction of the cases brought before them in a manner believed to be in violation of proper procedures, a practice prevelant for some time in the European courts, has appeared in American decisions, albeit in a limited way, in the Prohibition Cases.

The American interstate cases are anomalous in various ways, but their frequent citation by courts in cases of international import requires their consideration.

Given the presence of the American federal system, it might be expected that the disposition of cases involving officially conducted interstate kidnappings within the United States could serve as a model for eventual international emulation. The presence of a constitutional provision providing for interstate cooperation in such matters would lead one to expect an enlightened policy. Further, the changes wrought by the Supreme Court in recent years to effectuate the constitutional provisions protecting individuals from arbitrary treatment in the criminal process, and the increased concern for the individual and his rights throughout American society, would further lead one to expect a model rule to become operative, a rule that would also merit international emulation. Unfortunately, such is not the case. As the unanimous decision of the Supreme Court in *Frisbie v. Collins*[89] demonstrates, the American judiciary has been unable to come to grips with the official kidnapping problem in a manner satisfactory to its own principles of proper balancing of individual rights and community interests.

The American interstate cases, in the final analysis, present the courts with situations of unfortunate governmental action early in the criminal procedure, which, although obviously condemnable in their disregard for proper procedures, do not, in fact, deprive the accused of the various safeguards provided him in any criminal proceeding subject to the due process safeguards. In view of the constitutional requirement that the defendant be tried in the state and district in which the crime was committed,[90] and in view of the application of constitutional safeguards to state

[89]342 U.S. 519 (1952).

[90]U.S. Const. Art. III. Sec. 2, par. 3: The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed. U.S. Const. Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

as well as federal criminal proceedings, the defendant may be assured of a fair trial despite the manner of his apprehension. He may not, in view of the interstate rendition provisions of the Constitution, hope to better his position by flight to another American jurisdiction, unless he hopes to avoid apprehension altogether, or unless his is one of those rare cases in which the state executive declines for humanitarian reasons to accede to an extradition request of executive authorities of another state.

Accordingly, two considerations present on the international scene—disruption of the certainty of the flow of commerce, and protection of individual rights—are lacking in the American interstate cases. For this reason, these cases cannot be said to be concerned with identical policies which must be considered by decision makers dealing with cases of international kidnapping, and therefore cannot be said to be persuasive in their reasoning or result.

In the cases of international implication, the willingness of courts to exercise jurisdiction over the fugitive despite the illegality of the means by which he has been brought before the court, appears to be based in part on blind adherence to the earlier cases of ship seizures and American interstate rendition cases despite the inapplicability of these cases to the facts at hand and their entirely different policy considerations. Determinative, however, of courts' opinions in such cases appears to be the complete lack of understanding of the role of municipal courts in creating and enforcing international law. These courts fail to identify themselves with those processes, and to understand that whatever decisions are made in such cases give rise to international law. Pious declarations concerning the unfortunate means employed to apprehend the fugitive, combined with an explanation that the executive should deal with such international implications as the case may contain, evidence a failure of the court to realize its role in the creation and application of international law, although it in no way prevents the court's decision and opinion from filling that role anyway.

This partial abdication by the courts is most evident in the unreal distinction drawn between the extradition cases and the kidnapping cases. The very fact that the two cases most precisely articulating this thinking, the *Ker* and *Rauscher* decisions, were decided on the same day and their opinions written by the same judge, presents striking evidence of this phenomenon.

The extradition cases evidence an acknowledgment by the courts that fugitives brought before the courts in a fashion violative of conventional international law deprive the court of jurisdiction to proceed. The cases flowing from the *Ker* decision, however, demonstrate a belief that actions violative of customary international law require a different result. The fact

that both conventional and customary international law are important components of the total corpus juris in operation among nations, has apparently not impressed itself upon the courts in such a way as to require a consistent approach. This becomes increasingly disappointing in view of the frequently voiced statement that international law is part of the law of the individual states, and hence is to be applied by domestic courts along with domestic law.[91]

The numerous cases of international official kidnapping which have been settled amicably by the states involved, and which have included surrender of the fugitive, as contrasted with the small number of such decisions by international tribunals, demonstrate nevertheless, the widespread recognition of the impropriety of such kidnapping endeavors and the vital law-making functions of such settlements.

The Eichmann case, for all its notoriety and emotional impact, contributed little to the development of international law on this difficult problem, especially in view of the particular problems in that case which made it unique.

Eichmann's continued peaceful existence could understandably be expected to arouse the deepest feelings among those who suffered in some manner from his past actions, and those in whose minds the horrors of the Nazi era will not easily be eroded. The removal of Eichmann by force to Israel for trial obviously still must be acknowledged as a violation of the right of Argentina to exercise sovereignty within her own borders, and despite the possibility that Argentina might not act, in absence of any actual refusal of Argentina to bring Eichmann to trial or to make him available for trial, the kidnapping cannot be justified on the ground that the country failed to abide by its international responsibilities.

Yet, the very uniqueness of the Eichmann case disqualifies it as convincing precedent for future cases of international kidnapping. Eichmann, in the final analysis, was an enemy of mankind and should have found refuge nowhere. His removal to Israel, although the subject of a protest by Argentina and censure by the United Nations, was ultimately tacitly agreed to by Argentina. He was given a fair trial and executed in a humane manner. He cannot appear in history as a victim of political intrigue or of wanton disregard for individual rights. Accordingly, it cannot be said that the fate of Eichmann disrupts world expectations concerning the established flow of commerce, makes less secure individuals in their expectations of individual security, or threatens to provide precedent for numerous future incidents concerning individuals in similar positions.

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[91] *See, e.g.*, The Paquete Habana, The Lola, 175 U.S. 677 (1900).

The Tshombe case, on the other hand, contains the potential for much graver events in the future. Whatever the merits of Tshombe's position while in the Congo, or the wisdom of his policies, there can be little doubt that he represented legitimate political groups within the Congo and within Africa generally. Nor can there be doubt as to the political nature of the actions which were charged against him as crimes, or the political nature of the charges themselves and the reasons for bringing them. For individuals such as Tshombe the division of the world into separate sovereignties presents an opportunity for escape from the oft-times violent convulsions of domestic politics with its competing policies and personalities. The universal presence throughout history of political murder, revolution, execution and mass slaughter arising from domestic political turmoil, eloquently testifies to the need for some humanitarian means for permitting those who have thwarted the controlling elements of a given state at a given time to seek refuge with some semblance of safety.

The recognition of such a need exists through the body of customary international law, from the honoring of asylum in embassies and other public buildings of foreign states, or the granting of political asylum to opponents of another state's foreign or domestic policies, to the existence of the doctrine of non-extradition of political offenders.[92] The fear, usually justified, that the return of individuals accused of political crimes will result in unfair or unduly harsh treatment has commended such policies to most states. Such policies are in keeping with humanitarian considerations, and also operate to promote legitimate political activity by assuring that those who seek asylum will secure protection from ugly political sentiment then existing toward them in their native lands.

Such considerations were present in the Tshombe case in abundant measure. The charges against Tshombe arose from his activities as leader of secessionist Katanga province, and later as Premier of the Congo. There had been some suggestion that the trial of Tshombe *in absentia* was originally intended as a means of insuring his continued absence from the Congo, but that his scheming to return to power resulted in a decision to kidnap him and end the threat he embodied to the Mobutu Government.[93]

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[92]The problem of the political offenses in international law has likewise provoked a great deal of comment. Among the more interesting recent discussions of this problem are the following: Garcia-Mora, *The Nature of Political Offense: A Knotty Problem of Extradition Law*, 48 V.L.R. 1226 (1962); Evans, *Reflections Upon the Political Offense in International Practice*, 57 AM. J. INT'L L. 1 (1963); Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U.PITT.L.REV. 371 (1953); Garcia-Mora, *Treason, Sedition and Espionage as Political Offense Under the Law of Extradition*, 26 U.PITT.L.REV. 65 (1964).

[93]Kyle, *Plot and Counter Plot, What Happened in the Congo*, 157 New Republic 13, 14 (1967), and *Moise Tshombe on the Way to His Kidnapping*, Life, July 14 (1967), at 28D.

The political climate in the Congo, along with the summary manner in which his trial had been conducted in March 1967, caused most observers to fear that return to the Congo would mean immediate execution for the former leader without the benefit of further trial, a belief borne out by President Mobutu's own declaration to that effect after the decision of the Algerian Supreme Court.[94]

The considerations present in the Tshombe case were therefore entirely different from those in the Eichmann case. In the case of Tshombe, the charges leveled against the fugitive, although containing elements of a non-political nature, were basically political charges motivated by political considerations; while in the case of Eichmann, the charges were those which the vast majority of nations had approved to be condemnable violations of international law, and had pressed against other similar leaders at the Nuremberg Trials and before other forums. Then too, Tshombe had already been tried *in absentia,* with all the unfairness attendant upon such practices, and had been sentenced to death with no reasonable hope of escaping that penalty; whereas Eichmann, although unlikely to secure an acquittal, was brought to Israel to a lengthy and apparently fair trial with ample legal assistance and every procedural protection afforded him.

The Algerian Court's decision to proceed with the merits of the Congo government's request to extradite Tshombe despite the manner by which he was brought before them, immediately justified the wisdom of the use of hijacking and international kidnapping to secure his person, and assisted in the perpetuation of this form of action as a viable tactic in cases in which the state is embarrassed by the continued freedom of a particular individual. To this extent, the Court's decision further imperils all those who may run afoul of any government, or, indeed the safety of all who engage in international travel. As one American journal noted: "What is at stake is a delicate issue of international law, the right of political asylum and the essential human right of freedom to travel without fear of being kidnapped at gunpoint."[95]

While recent events demonstrate that non-governmental hijacking remains the prime problem, additional kidnappings such as took place in the Tshombe case, or in less spectacular cases concerning criminal fugitives of a more common variety, are likely to reoccur unless the trend of decisions in such cases is modified. The question of what alternative courses to take depends naturally on the relevant policies involved in such situations. These policies can briefly be identified as follows: (1) Deference to the legitimate demands by states to enforce public policy decisions, as those

[94]N.Y. Times, July 22, 1967 at 6.
[95]America, August 5, 1967 at 125.

decisions apply to individuals who escape the effective control of the state concerned; (2) Deference to the legitimate claims of states for recognition of their sovereignty over their own territory without forcible interference by foreign states, or by individuals whose actions are adopted by foreign states; (3) Deference to the basic human rights of individuals, including the right to engage in legitimate political activities, and to secure asylum in foreign states without fear of forcible extra-legal return to the native state to face prosecution for those political activities; and (4) Deference to widely held expectations concerning peaceable and conventional means of transferring effective control over fugitives sought by one state from another.

One such suggestion for the effectuation of such policies has been the establishment of international tribunals for consideration of such problems.[96] Other suggestions, frequently and eloquently made, concern the use of international procedures similar to the historic Anglo-American writ of habeas corpus to inquire into the legality of the detention of individuals in situations in which, their rights appear to have been violated.[97] Such employment of international tribunals and organizations is in keeping with the increasing reliance upon such organizations in dealing with problems of international import, the increasing international concern with human rights, and the expression of belief that the individual should have direct access to international tribunals without the need to be represented by his national state.[98]

While such suggestions are valuable, and may in fact ultimately reach fruition, the realities of modern political considerations and the history of the reluctance of nation-states to resort to international tribunals when confronted with a claim by one of their own nationals, indicates that operation within the existing institutional framework may, in the short run, provide the most effective answer to the problems presented by the use of force and fraud in securing jurisdiction over individual persons and proper-

[96]Kittrie, *supra* note 62.

[97]Kutner and Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty In a World of Diverse Systems of Public Order*, 22 U.PITT.L.R. 469 (1961); Kutner, *World Habeas Corpus For International Man: A Credo for International Due Process of Law*, 36 U.DET.L.J. 235 (1959): Kutner, *World Habeas Corpus: A Legal Absolute for Survival*, 39 U. DET. L.J. 279 (1961); Kutner, *World Habeas Corpus and International Extradition*, 41 U.DET.L.J. 525 (1964). Mr. Kutner was retained by Mrs. Tshombe to present the case of her husband to the United Nations. *See* N.Y. Times, July 24, 1967 at 9; July 26, 1967 at 12; July 27, 1967 at 6; July 28, 1967 at 64.

[98]*See, e.g.*, Cormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, Part I, 41 U.DET.L.J. 282 (1963); Cormley, *An Analysis of the Future Procedural Status of the Individual Before International Tribunals*, 39 U.DET.L.J. 38 (1961); Brennan, *International Due Process and the Law*, 48 VA.L.R. 1258 (1961); Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 11 INT. COMP. L.Q. 701 (1962).

ty. The present international political system, composed as it is of a variety of decision-making bodies, some of which exist as judicial tribunals of separate states, applying both domestic law, and, upon occasion, international law, presents a horizontal ordering of authority which may, if imbued with an understanding of the policies at stake in such cases, and if possessed of the desire to do so, may effectuate a just and fair delimitation of individual state power.

As one distinguished commentator has pointed out: "It is quite likely that progress towards a more rational delimitation of jurisdiction will result from efforts to improve the horizontal methods of allocating legal competence rather than from efforts to centralize authority in such a way as to make possible effective vertical institutions of order."[99] Such an improvement of horizontal methods of allocating legal competence, depends, in good measure, upon self-restraint in exercising less jurisdiction in some case than can actually be exercised. "Horizontal order then is conditioned upon the grasp of the claimant State as well as upon its reach." [100]

Specifically, the most logical recommendation concerning this problem, and one which appears most effective in achieving the previously articulated policies at stake, is that judicial decision-makers decline to exercise jurisdiction over individual persons or property brought before them by means of force or fraud in violation of conventional and traditional international law. Such a policy would render due deference to basic human rights by shielding the individual from application of the state's laws when he has been seized improperly. It would show due respect for the legitimate claims of foreign states by recognizing their sole right to exercise effective control over their own territory and prevent any group from benefiting from violation of those rights.

This would reassure all participants in the flow of world commerce of continued security in the conduct of their affairs in accordance with established principles. It would decrease the arbitrary results of dealing with such problems as political considerations. Perhaps, most important of all, it would eliminate crises of dangerous proportions between and among states by denying the benefits to be obtained by such illegal activities, thereby encouraging the establishment of orderly procedures of international extradition through bilateral or multilateral treaties or understandings. This would, no doubt, promote ultimately the ease of transference of fugitives from state to state in accordance with proper procedural safeguards and,

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[99]Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP.L.Q. 295 (1961).

[100]*Id.* at 315.

therefore, render greater deference to legitimate claims of individual states to enforce their own system of public order.

Sporadic decisions by judicial bodies in a variety of cases have provided legal precedent to support the adoption of such policies. Specific decision-makers have even articulated the relevant policies, eloquently calling for a more humane and rational approach to such problems. A fine example of this is the dissenting opinion of Mr. Justice Bradley in the decision of the United States Supreme Court in *Mahon v. Justice,* a case in which the Court refused to release a defendant kidnapped and brought from one state to another while the official request for his extradition was under consideration.[101]

> But the Constitution provides a peaceable remedy for procuring the surrender of persons charged with crimes and fleeing into another state. This provision of the Constitution has two objects: the procuring possession of the offender, and the prevention of irritation between states, which might arise from giving asylum to each other's criminals, and from violently invading each other's territory to capture them. It clearly implies that there shall be no resort to force for this purpose. The Constitution was made to 'establish justice' and insure domestic tranquility'; and to attain this end as between the States themselves the judicial power was extended 'to controversies between two or more states,' and they were enjoined to deliver up to each other fugitives from justice when demanded, and even fugitives from service. This manifest care to provide peaceable means of redress between them is utterly irreconcilable with any right to redress themselves by force and violence; and, of course, what is unconstitutional for the States is unconstitutional for their citizens. It is undoubtedly true that occasional instances of unlawful abduction of a criminal from one State to another for trial, have been winked at; and it has been held to be no defense for the prisoner or his trial. Such precedents are founded on those which have arisen where a criminal has been seized in one country and forcibly taken to another for trial, in the absence of any international treaty of extradition. It is obvious that such cases stand on a very different ground. It is there a question between independent nations bound by no ties of mutual obligation on the subject, and at liberty to adopt such means of redress and retaliation as they please.

The very eloquent reasoning provided by Mr. Justice Bradley in the context of an interstate kidnapping case should now apply to international kidnapping cases. Instead of a single national constitution, the international system, including as it does, the Charter of the United Nations, does more now than "clearly [to] imply that there shall be no resort to force," it has prohibited force, thereby limiting the "liberty to adopt such means of redress and retaliation." The elaborate system of peace-keeping machinery now present in the United Nations and in bilateral and multilateral conventional law, the widely held expectations concerning proper means for states to employ in dealing with one another, and the availability of peace-

[101] 127 U.S. 700, 713 (1887).

ful procedures to achieve all of the relevant policies involved in the consideration of such kidnappings—all of this is totally "irreconcilable" with the continued exercise of jurisdiction by decision-makers in cases in which a fugitive has been brought before them in violation of law; and all of this militates for the enlightened refusal of those decision-makers to perform, in the future, the adjudicative role requested of them in such cases.