

Snatch and Grab Ops: Justifying Extraterritorial Abduction

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I. INTRODUCTION

The United States government is actively engaged in a search for individuals believed to have killed American citizens and destroyed American property. As most of these individuals live openly in foreign states hostile to the United States, achieving extradition often proves impossible. Despite repeated diplomatic efforts to secure the transfer of these terrorists to America, many continue to operate in foreign states under the protection of the host country's continued denial of the terrorist's presence within their borders. For example, Imad Fayeze Mugniyah—head of security for the Lebanese group Hizballah, and listed on the Federal Bureau of Investigation's (FBI) most wanted list—is wanted by the United States for his role in the hijacking of TWA Flight 847.¹ Despite substantial evidence presented by the United States indicating that Mugniyah is in Lebanon, the Lebanese Government has persistently argued otherwise.² Further, the United States has consistently pursued the extradition from Lebanon of Mohammad Ali Hamadi, who spent eighteen years in a German prison for his role in the TWA hijacking, only to have the request repeatedly denied.³

The problem of bringing these individuals to justice is further complicated by the fact that the United States is rarely able to pinpoint their precise location. Terrorists typically reside in host countries where it is nearly impossible to find them amongst citizens of those countries. Thus, the broad question is what tools are available to the U.S. government if it was to actually find a terrorist's location? Considering the inherent difficulty in finding that individual again, and the strong likelihood that leaving the individual to his own devices will yield further attacks on the United States, what ought the U.S. President do to preserve the peace and safety of American citizens? Specifically, are the options of the U.S. military restricted by international law trends? Not at all.

The government of the United States must be permitted to breach another nation's sovereignty in an effort to defend its citizens from future attacks. This Article addresses these questions by specifically discussing whether a terror suspect who was forcibly abducted may be prosecuted by the United States despite possible territorial violations under the doctrine of

¹ U.S. DEPT. OF STATE, MIDDLE EAST AND NORTH AFRICA OVERVIEW 141, <http://www.state.gov/documents/organization/65472.pdf> (last visited Nov. 18, 2006).

² *Id.*

³ *Id.*

male captus, bene detentus.⁴ The Article directly addresses whether territorial sovereignty can trump an effort to capture a terrorist who is planning future attacks.

This topic is not only germane to today's world as the conflict with terrorism is ongoing, but more specifically, both the Bush Administration's unwillingness to tolerate uncooperative nations and its determination to eliminate terrorism suggest that forcible abductions are likely to be the most effective and common means of carrying out the government's duty to defend its citizenry.⁵ Based on the likelihood that such acts will become more common, it is now our burden to determine if such actions are legally permissible, and if so, under what legal regime.

As Thomas Jefferson opined:

A strict observance of the written laws, is doubtless one of the highest duties of a good citizen: but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.⁶

At the very core of this question are the United States' interests in enforcing its own laws and protecting American citizens. Juxtaposed against these interests is the process of balancing the considerations of other nations' rights, as well as international human rights.⁷ This question becomes even more complex when one attempts to determine the practical limitations of a nation's adherence to the rule of law in a dynamically changing and dangerous environment.⁸

⁴ "Improperly captured, properly detained." Jonathan A. Bush, *How Did We Get Here? Foreign Abductions After Alvarez-Machain*, 45 STAN. L. REV. 939, 952 (1993).

⁵ See Adam W. Wegner, *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).

⁶ Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in XII WRITINGS OF THOMAS JEFFERSON, MEMORIAL EDITION 418 (Lipscomb ed., 1903).

⁷ Scott Evans, *International Kidnapping in a Violent World: Where the United States Ought to Draw the Line*, 137 MIL. L. REV. 187, 188 (1992).

⁸ *Id.*

II. THE CURRENT CONFLICT

Prior to entering the specific discussion of extraterritorial kidnappings, it is necessary to discuss the general facts on the subject. On September 11, 2001 the United States was forced into the world of terrorism in a way never before imagined. The U.S. government responded in the halls of Congress, the White House, the courts, and the Armed Forces. Shortly after the September 11th attacks, a coalition formed by the United States demanded that the Taliban turn over Osama bin Laden.⁹ Upon the failure of the Taliban to produce bin Laden, this U.S.-led coalition used military force to overthrow the Taliban in Afghanistan. This was consistent with President Bush's September 12th commitment that the United States would no longer distinguish between the perpetrators of the terrorist attacks and those who harbor them.¹⁰ The Taliban government was overthrown in less than two months by this coalition.¹¹ This conflict, and the ensuing search for members of Al Qaeda throughout South Asia, forced the Administration to address the question of how best to deal with captured terror suspects.

On November 13, 2001 the President issued an executive order which asserted the authority to establish and use military commissions to try terrorism suspects captured by the United States.¹² The military commissions were designed to be conducted unilaterally by the United States military under a more lenient procedural system than typical in domestic courts.¹³ As time has progressed, more procedural safeguards have been added by the administration.¹⁴

These procedural developments give rise to essential questions of both U.S. domestic law as well as the development of the international community's response to terrorism. David Cole articulates the main line of criticism, noting that the Justice Department's practices, taken together, amount to a policy of "lock up first, ask questions later, and presume that an alien is dangerous until the FBI has a chance to assure itself that the

⁹ For a chronological timeline of the War in Afghanistan, see Afghanistan Timeline, <http://www.mapreport.com/countries/afghanistan.html> (last visited Aug. 3, 2006).

¹⁰ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Military Order, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

¹¹ See Afghanistan Timeline, *supra* note 9.

¹² See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,834 (Nov. 13, 2001).

¹³ *Id.*

¹⁴ See Military Commission Order No. 1, Dep't of Defense (Mar. 21, 2002), available at <http://defenselink.mil/news/mar2002/d20020321ord.pdf> (last visited Aug. 3, 2006).

individual is not.”¹⁵ However, while these criticisms of the initial detention process contain elements of truth, it must be kept in mind that the government was thrust into a situation for which planning was impossible.

The cases against “enemy combatants”¹⁶ from the Guantanamo Bay military commissions have raised many new and dynamic legal questions. Specifically, the U.S. government must find new applications for existing law regarding the treatment of enemy combatants, the acceptable methods of punishment, the necessary procedures to guarantee fairness, and the proper forums for objections. The specific question this Article addresses arises when the United States wants to capture and prosecute a “kingpin” terrorist. This kingpin is no run-of-the-mill messenger of the terrorist organization, but is, rather, an individual of greater rank, such as the aforementioned head of security for Hizballah. Because of his higher rank, the United States has a greater interest in his capture. In order to capture the “kingpin,” the government may find it necessary to enter the sovereign territory of a foreign state.

Is such capture and subsequent detention acceptable under domestic and international law? The way the United States finally resolves this issue of extraterritorial abduction will have a profound impact on issues of national security, human rights, and international law in general. If an enemy combatant raises the defense that the U.S. government lacks jurisdiction because of an improper abduction, the Government’s strongest argument will be the *male captus, bene detentus* doctrine consistent with the following analysis.

III. LEGAL DISCUSSION

It is clear that the “kingpin” terrorist will never physically come into an American court’s jurisdiction voluntarily. Thus, when this suspected terrorist is located beyond the physical jurisdiction of the court, a major problem arises. Under domestic and international law, what methods of gaining jurisdiction are available to the United States in such a situation? One option that the United States has considered in the past, and must do again, is extraterritorial abduction. However, if the United States were to exercise this option and extraterritorially abduct a person to try him or her in the United States, a jurisdictional conflict may arise. The enemy combatant may raise the argument that the use of extraterritorial kidnapping strips the U.S. government of jurisdiction because of the breach of another nation’s

¹⁵ David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-65 (2002) (describing the campaign of secret preventative detentions).

¹⁶ The U.S. Supreme Court defines an enemy combatant as “an individual who, the government alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

sovereignty during the abduction. The U.S. government, in exercising extraterritorial abduction, has four pillars on which to claim its authority: (1) customary international law, (2) international rules, (3) decisions from U.S. courts, and (4) decisions from foreign courts.

A. Customary International Law

A defendant making an *ultra vires* jurisdiction argument could first argue that customary international law prohibits such extraterritorial abductions. However, as the following discussion will show, this objection is untenable and inconsistent with customary international law.

Customary international law is “based upon the common consent of nations extending over a period of time of sufficient duration to cause it to become crystallized into a rule of conduct.”¹⁷ Customary international law is thus the proper place to begin an inquiry of what the norms are within the international community. Article 38(1) of the Statute of the International Court of Justice articulates the various sources of international law; subsection (b) refers to “international custom, as evidence of a general practice accepted by law.”¹⁸ Thus, customary international law originates out of the general and consistent practices of nations.¹⁹

Customary international law, similar to common law in the United States, does not originate from written statute, but rather, is formed under two requirements: (1) state practice and (2) *opinio juris*.²⁰ The first requirement to evidence a customary international law norm, “state practice,” can be shown through public measures, official statements, and diplomatic acts.²¹ It is important to keep in mind, though, that state practices on their own only indicate the way in which states believe they should act domestically; such actions do not automatically establish an international custom. For a customary international norm to exist, the state must choose its course of action based on a belief that such action is an international obligation. The second requirement to evidence a customary international

¹⁷ MELQUIADES J. GAMBOA, A DICTIONARY OF INTERNATIONAL LAW AND DIPLOMACY 155 (1973) (quoting 1 HACKWORTH, DIG. OF INT'L L. 1 (1940)).

¹⁸ Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

¹⁹ North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 2, 43 (Feb. 20) (“[T]he passage of only a short period of time [i]s not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”).

²⁰ Beverly Izes, *Drawing Lines in the Sand: When State-Sanctioned Abductions of War Criminals Should Be Permitted*, 31 COLUM. J.L. & SOC. PROBS. 1, 6-7 (Fall 1997).

²¹ *Id.*

law norm, *opinio juris*, is thus found if the members of the international community act or refrain from acting because of a legal obligation.²²

A state's action that is based on an international legal obligation, and not simply its domestic standards, is typically evidenced in three sets of circumstances:

1. Diplomatic relations between states—Acts or declarations by representatives of states, press releases, or official statements by governments may all constitute evidence of practices followed by states.
2. Practice of international organizations—The practice of international organizations, whether by conduct or declaration, may lead to the development of customary rules of international law concerning their status, or their powers and responsibilities.
3. State laws, state courts [sic] decisions, and state administrative practices—A concurrence, although not necessarily a parallelism, of state laws or of judicial decisions of state courts or state administrative practices may indicate so wide an adoption of similar rules as to suggest the general recognition of a broad principle of law.²³

The Restatement of Foreign Relations sets out a four part test for determining whether a customary international principle has been established:

[I]n determining whether a rule has become international law, substantial weight is accorded to: (a) judgments and opinions of international judicial and arbitral tribunals, (b) judgments and opinions of national judicial tribunals, (c) the writings of scholars, and (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.²⁴

²² *Id.*

²³ Stephan Wilske, *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, 212-13 (1998).

²⁴ RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) (1987).

One further customary international law argument which may be raised against a state's practice is that such practice violates a *jus cogens* norm.²⁵ *Jus cogens* norms are "nonderogable and preemptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty."²⁶ In other words, *jus cogens* norms are universal standards held throughout the civilized world. United States courts have gone to lengths to restrict what will satisfy the international law view of *jus cogens* norms.²⁷ American courts have stated that these norms "encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhumane, or degrading punishment."²⁸

If an enemy combatant were to argue that his extraterritorial abduction eviscerates jurisdiction based on customary international law, such argument would be promptly refused because the two requirements of customary international law are not satisfied. As the following sections indicate, there may be international norms which tangentially, but not explicitly, apply to extraterritorial kidnapping. Further, modern decisions of various members of the international community disapproving of extraterritorial abduction do not satisfy the *opinio juris* requirement, but rather are decisions based solely on their nation's domestic law.²⁹

B. Codified International Rules

A primary tenet of international law is that states may not threaten to use, or actually use, force against the territory of any other state.³⁰ The United Nations (U.N.) Charter broadens this standard to prohibit any behavior that would jeopardize international peace and security.³¹ However,

²⁵ The Vienna Convention on the Law of Treaties holds that these "preemptory norms" supersede any agreements between nations as such norms are held to be universally applicable. Vienna Convention on the Law of Treaties arts. 53, 64, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

²⁶ *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 (9th Cir. 1995) (citing *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934-40 (D.C. Cir. 1988)) (finding that prohibition against official kidnapping is not a *jus cogens* norm such as prohibitions against torture, slavery, or genocide).

²⁷ See *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) (where the Cuban government shot down two civilian planes over international waters).

²⁸ *Id.* at 1252 (quoting *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1531, 1542 (N.D. Cal. 1987)).

²⁹ See *infra* at Part III.E generally for a discussion of foreign state treatment of extraterritorial abductions, and specifically for a showing that any foreign state's disapproval of extraterritorial abduction was based solely on domestic law.

³⁰ U.N. Charter art. 2, para. 4.

³¹ U.N. Charter art. 2, para. 3.

Article 51 of the U.N. Charter permits necessary and proportional acts of self-defense by 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 U.N.”³² This provision articulates an important exception to the general prohibition against breaches of territorial sovereignty.

According to a former U.S. Department of State legal advisor, the right to self-defense includes “the right to rescue American citizens and to take action in a foreign State where that State is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens.”³³ In 1986, the U.S. Ambassador to the U.N. 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.”³⁴ Thus, the U.S. government can develop a specific international law argument justifying extraterritorial abduction using the Article 51 exception to the rule against infringing on the territorial sovereignty of another nation.

There are five internationally accepted jurisdictional justifications the United States can invoke when it chooses to exercise extraterritorial abduction:³⁵ (a) territorial jurisdiction based on the place where the offense occurred, (b) national jurisdiction arising from the offender’s nationality, (c) protective jurisdiction based on injury to national interest, (d) universal jurisdiction, covering 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, and (e) passive personality, which is based on the nationality of the victim.³⁶ This last principle enables a country to extend its jurisdiction to any foreign territories if the victim was one of the country’s nationals.³⁷

³² U.N. Charter art. 51.

³³ *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on the Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 100th Cong. 35 (1989) (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dept. of State).

³⁴ U.N. SCOR, 41st Sess., 2655th mtg. at 112-13, U.N. Doc. S/PV.2655/Corr.1 (Feb. 6, 1986).

³⁵ Edwin D. Dickinson, *Draft Convention on Jurisdiction with Respect to Crime*, 39 AM. J. INT’L L. SUPPLEMENT 435, 573 (1935) [hereinafter *Research Draft*].

³⁶ 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, 123 (1990).

³⁷ See *Research Draft*, *supra* note 35.

Of these five justifications, the United States has historically argued that its extraterritorial jurisdiction is achieved through universal jurisdiction.³⁸ Under the doctrine of universal jurisdiction, there is no requirement of 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.³⁹ The doctrine of universal jurisdiction has broadened beyond its status as an international norm and is now recognized in treaties and codified rules. For example, the Restatement (Third) of Foreign Relations recognizes universal jurisdiction over offenses of piracy, hijacking, genocide, war crimes, and certain acts of terrorism.⁴⁰

When a state relies upon one of the five internationally accepted jurisdictional justifications, that state must still show that the alleged offenses violate international norms and agreements in order to justify the violation of another state's territorial sovereignty.⁴¹ The U.S. government can satisfy this requirement by charging alleged terrorists with participation in terror-related activities. Such acts satisfy the requirement that the offense violates international norms and agreements, specifically international agreements that proscribe acts of terrorism. The Tokyo Convention⁴² and the Hague Convention⁴³ prohibit hijackings. The Geneva Convention prohibits acts of piracy.⁴⁴ The International Convention on Hostage Taking prohibits the taking of hostages.⁴⁵ An expansive reading of U.N. Security Council Resolution 1373 suggests that the international community may even explicitly approve of extraterritorial jurisdiction in response to a terrorist attack.⁴⁶ Resolution 1373 denies terrorist-sponsoring states the ability to

³⁸ See discussion *infra* Part III.C.

³⁹ Wegner, *supra* note 5, at 421.

⁴⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 404 (1987).

⁴¹ Andrew J. Calica, *Self-Help is the Best Kind: The Efficient Breach Justification for Forcible Abduction of Terrorists*, 37 CORNELL INT'L L.J. 389, 400 (2004).

⁴² 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.

⁴³ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

⁴⁴ Geneva Convention on the High Seas, Apr. 29, 1958, 12 U.S.T. 2312, 450 U.N.T.S. 82.

⁴⁵ International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205.

⁴⁶ Calica, *supra* note 41, at 401-02.

prosecute their nationals domestically, thus suggesting that this emerging trend could implicitly justify abduction as a way of obtaining jurisdiction.⁴⁷

These aforementioned international agreements, among others,⁴⁸ enumerate certain acts which are against international norms. The acts of September 11, 2001 included violence, hostage-taking, and terrorism on board an aircraft. Thus, it is not difficult for the U.S. government to show that such acts violated the above cited international norms and necessitated immediate action.

As the above cited international rules do not explicitly prohibit extraterritorial abduction, it cannot be argued that extraterritorial abductions are a *per se* violation of international law. The U.S. government can overcome general prohibitions against the violation of territorial sovereignty by arguing that these general prohibitions are waived under both the self-defense and universal jurisdiction justifications.⁴⁹ However, efficient breach is an even stronger argument for jurisdiction, as discussed later.⁵⁰

C. Responses from Domestic Courts in the United States

While the United States may be skeptical about the applicability of international law, the following discussion shows that domestic case law strongly approves of extraterritorial abduction as a means of gaining jurisdiction.

1. The *Ker-Frisbie* Doctrine

Extraterritorial jurisdiction was initially discussed in U.S. jurisprudence in *Ker v. Illinois*.⁵¹ In *Ker*, an Illinois court sought the extradition of Frederick M. Ker, a U.S. citizen living in Peru, based on charges of larceny and embezzlement.⁵² President Arthur directed an agent of the U.S. government to contact Peruvian authorities in Peru to communicate this

⁴⁷ 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).

⁴⁸ See 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; European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93.

⁴⁹ See Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 388-96 (2001), for a discussion of the contours of both self-defense and universal jurisdiction.

⁵⁰ See discussion *infra* Part III.E.

⁵¹ *Ker v. Illinois*, 119 U.S. 436 (1866).

⁵² *Id.* at 437.

extradition request.⁵³ Given that Peru was at war with Chile, the U.S. agent asked the Chilean general then in charge of the occupation of Peru to extradite Ker.⁵⁴ Before obtaining a response from the general, the agent forcibly abducted Ker, bringing him back to the United States to stand trial.⁵⁵

At his trial, Ker claimed that U.S. courts did not have jurisdiction because of the extraterritorial abduction. The U.S. Supreme Court held that although the United States did not pursue arrest under the existing extradition treaty, failure to do so did not constitute violation of the Treaty itself, and that valid jurisdiction existed.⁵⁶ The Court held that “mere irregularities in the manner in which [a defendant] may be brought into custody of the law” do not operate to prevent indictment.⁵⁷

The Supreme Court faced a similar question sixty years later in *Frisbie v. Collins*.⁵⁸ In *Frisbie*, the Court addressed whether Michigan state police violated the Federal Kidnapping Act by forcibly taking defendant Shirley Collins from Illinois to Michigan to be tried for murder.⁵⁹ The U.S. Supreme Court reinforced *Ker*, holding that forcible abduction from one state to another in violation of the Federal Kidnapping Act did not, on its own, vitiate jurisdiction in the second state.⁶⁰

When read together, these two cases form the *Ker-Frisbie* doctrine establishing the historical justification for extraterritorial abductions. In short, this doctrine holds that a court may assert jurisdiction over an indictee without regard to the manner in which his physical presence in the court’s jurisdiction was attained.⁶¹

2. Limitations on the *Ker-Frisbie* Doctrine

After the establishment of the *Ker-Frisbie* doctrine, American courts have slowly imposed limitations and qualifications on the power of courts to

⁵³ *Id.* at 438.

⁵⁴ *Id.*

⁵⁵ Charles Fairman, Comment, *Ker v. Illinois Revisited*, 47 AM. J. INT’L L. 678, 684-85 (1953).

⁵⁶ Abraham Abramovsky, *Extraterritorial Abductions: America’s “Catch and Snatch” Policy Run Amok*, 31 VA. J. INT’L L. 11, 157 (1991).

⁵⁷ *Ker*, 119 U.S. at 440.

⁵⁸ *Frisbie v. Collins*, 342 U.S. 519 (1952).

⁵⁹ *Id.* at 520-22.

⁶⁰ *Id.* at 522.

⁶¹ *Ker*, 119 U.S. at 436.

exercise jurisdiction when the jurisdictional challenge involves an extraterritorial abduction. These case-law developments are important to show that the *Ker-Frisbie* doctrine has not become obsolete in any courts. The following discussion shows that American courts have had numerous opportunities to overturn the doctrine, and have continually chosen to impose only slight qualifications while reaffirming the doctrine itself.

The first extraterritorial abduction case to arise in American courts after the *Ker-Frisbie* doctrine was *United States v. Toscanino*.⁶² In *Toscanino*, an Italian citizen was charged with conspiracy to bring narcotics into the United States. In order for the United States to obtain custody of Toscanino, the Uruguayan police forcefully abducted the Italian national from his home, drugged him, and delivered him to the American authorities.⁶³ Once in the custody of the United States, law enforcement officials subjected Toscanino to multiple degradations by denying him sleep and nourishment, flushing his eyes and nose with alcohol, and electrocuting him through his ears, toes, and genitals.⁶⁴

Toscanino was subsequently convicted in an American court. On appeal, the *Toscanino* court held that a due process violation had occurred and jurisdiction was prohibited if a defendant was subjected to conduct that “shocks the conscience.”⁶⁵ The court did not, however, expound significantly upon what they thought constituted treatment that “shocks the conscience.”⁶⁶ The *Toscanino* court only alluded to what might satisfy such a standard when noting that where jurisdiction had been attained by “the government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights,” due process requires a court to divest itself of jurisdiction.⁶⁷

This progression to a “shocks the conscience” test is not a repudiation of the *Ker-Frisbie* doctrine. Rather, it demonstrates the judiciary’s developing standard of due process. At the time of the *Ker-Frisbie* doctrine, due process was understood under the *Pennoyer v. Neff* standard where questions of

⁶² *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

⁶³ *Id.* at 269-70, 275.

⁶⁴ *Id.* at 270.

⁶⁵ *Id.* at 273.

⁶⁶ *Id.* Judge Mansfield left a broad range of conduct open for censure. “Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.” *Id.*

⁶⁷ *Toscanino*, 500 at 275.

jurisdiction turned on the issue of physical presence.⁶⁸ The expanded view of due process evidenced in *Toscanino* is tied to the changes in due process jurisprudence evidenced in *Rochin v. California*⁶⁹ and *Mapp v. Ohio*,⁷⁰ both of which retreated from *Pennoyer*'s due process standard.⁷¹ The Court's decision in *Ker* is based on an early understanding of due process jurisprudence applied through the Fourteenth Amendment, an amendment which had only been passed eighteen years earlier.⁷² The *Toscanino* decision is of particular importance, though, as it shows that even under the modern understanding of due process, extraterritorial abductions are still permitted so long as the methods used do not "shock the conscience."⁷³

The broad language of *Toscanino*'s "shocks the conscience" test has been refined in subsequent case law. The court in *United States v. Gengler* followed the *Toscanino* court's view that the method of gaining jurisdiction could no longer be ignored.⁷⁴ However, the *Gengler* court held that only convictions achieved as a result of "torture, brutality and similar outrageous conduct" in the process of achieving jurisdiction warranted overturning convictions.⁷⁵ The *Gengler* court went further to hold that the *Ker-Frisbie* doctrine applied in the face of other "irregularities."⁷⁶ The *Gengler* court indicated that the *Rochin* view of due process only protects people from actions during arrest

⁶⁸ *Pennoyer v. Neff*, 95 U.S. 714, 733-34 (1877) ("[T]o subject the property of a non-resident to valid claims against him in the State, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'").

⁶⁹ *Rochin v. California*, 342 U.S. 165 (1952) (holding that evidence obtained by pumping a suspect's stomach was inadmissible because it had been obtained in a manner shocking to the conscience).

⁷⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961) (the 1961 opinion in which the Supreme Court applied the Fourth Amendment exclusionary rule to the states).

⁷¹ *Evans*, *supra* note 7, at 205. (explaining that *Toscanino*'s revised notion of due process likely was the result of the decisions handed down in *Rochin v. California* and *Mapp v. Ohio*, retreating from the reading of due process exemplified by *Pennoyer v. Neff*).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *United States v. Gengler*, 510 F.2d 62, 65 (2d Cir. 1974) (stating absent "government conduct of a most shocking and outrageous character" the *Ker-Frisbie* doctrine stands).

⁷⁵ *Id.*

⁷⁶ *Id.* at 65 ("Yet in recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court.").

which “offend the canons of decency and fairness which express the notions of justice of English-speaking peoples.”⁷⁷

3. Modern Treatment

Arising under the *Ker-Frisbie* doctrine, two recent cases show the modern American jurisprudence regarding extraterritorial abductions: *U.S. v. Yunis*⁷⁸ and *U.S. v. Alvarez-Machain*.⁷⁹ These cases are of particular importance here as they show that modern courts have not retreated from the *Ker-Frisbie* doctrine. In *Yunis*, the defendant was a Lebanese citizen who, along with four others, boarded an airplane in Beirut destined for Jordan. The five men hijacked the plane with grenades and rifles and demanded to be taken to Tunis, the location of the Arab League summit.⁸⁰ Two of the hostages on the plane were American citizens.⁸¹ After twice being refused permission to land in Tunis, the plane returned to Beirut.⁸² Once on the ground in Beirut, the hijackers got off the plane, released the hostages, all uninjured,⁸³ and detonated explosives, destroying the plane.⁸⁴

In response to this hijacking, the FBI commenced “Operation Goldenrod.”⁸⁵ The FBI soon learned that Yunis was living openly in Beirut, and the U.S. Government decided that this would likely be its only opportunity to apprehend him. The FBI first charged him with hostage taking, hijacking, and the destruction of a plane.⁸⁶ According to one U.S. official, the goal of capturing Yunis was to “teach them a lesson far beyond what the threat of force could convey. We will get the terrorists on our turf, on our law.”⁸⁷

⁷⁷ *Id.*

⁷⁸ *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

⁷⁹ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

⁸⁰ *United States v. Yunis*, 681 F. Supp. 896, 899 (D.D.C. 1988).

⁸¹ *Yunis*, 924 F.2d at 1089.

⁸² *Yunis*, 681 F. Supp. at 899.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Yunis*, 924 F.2d at 1089.

⁸⁶ *See* 18 U.S.C. §§ 1203(b), 32(a)-(b) (1996).

⁸⁷ Steven Emerson & Richard Rothschild, *Taking on Terrorists*, U.S. NEWS & WORLD REP., Sept. 12, 1988, at 26, 28.

The FBI's plan to apprehend Yunis involved a fake drug deal in international waters to entice Yunis to come to the FBI. The U.S. government opted to carry out this action on international waters because officials were concerned about the current legal standard regarding territorial sovereignty. The government was also concerned about the risk that any action on foreign soil might involve the sovereign government, leading to Yunis being tipped off.⁸⁸ Once Yunis made his way onto the FBI's boat, he walked around to the stern where two FBI officers grabbed his arms, kicked his feet out from under him, and handcuffed him, fracturing both of his wrists.⁸⁹ Immediately thereafter, Yunis was strip-searched, placed in a harness, shackled, and detained on the ship for several days in the ship's mail room.⁹⁰

The appellate court in *Yunis* first discussed jurisdiction, noting 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*."⁹¹ The court then affirmed the doctrine of universal jurisdiction as the appropriate jurisdictional response to crimes of aircraft piracy and hostage taking.⁹² The *Yunis* court also went beyond universal jurisdiction to apply passive personality as a further justification for this action,⁹³ as two of the hostages were U.S. citizens.⁹⁴ It is important to the application of the *Yunis* case to note that since the court did not specifically repudiate the conduct used, it can be inferred that the particular conduct used does not violate the "shocks the conscience" standard.

The second modern case dealing with extraterritorial abduction is *United States v. Alvarez-Machain*. In *Alvarez-Machain*, the U.S. Supreme Court reinforced the *Ker-Frisbie* doctrine despite the due process developments in *Toscanino*.⁹⁵ In *Alvarez-Machain*, a Mexican doctor was abducted from Mexico by Mexican agents⁹⁶ and taken to the United States because of his

⁸⁸ Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 445 (1990).

⁸⁹ *Yunis*, 681 F. Supp. at 906.

⁹⁰ *Id.* at 914.

⁹¹ *United States v. Yunis*, 924 F.2d 1086, 1090 (D.C. Cir. 1991) (emphasis added).

⁹² *Id.* at 1092.

⁹³ *Yunis*, 681 F. Supp. at 903.

⁹⁴ *Yunis*, 924 F.2d at 1089.

⁹⁵ *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992).

⁹⁶ *Id.* at 657 (indicating that "[t]he District Court concluded that DEA agents were responsible for respondent's abduction, although they were not personally involved in it.")

alleged participation in the torture and murder of a U.S. Drug Enforcement Agency (DEA) agent.⁹⁷ Despite the fact that an extradition treaty then existed between Mexico and the United States, the Court held that since the treaty did not *directly* prohibit abductions, the District Court had jurisdiction.⁹⁸ Specifically, in *Alvarez-Machain* the Court concluded that since the governments of both the United States and Mexico were aware of the *Ker-Frisbie* doctrine, they would have explicitly drafted provisions regarding abductions if they wished to deviate from the accepted practice. Since they did not do so, the Court held the absence of provisions covering abductions to be an implicit approval of such abductions.⁹⁹

There was significant domestic and international criticism of the *Alvarez-Machain* decision aimed at weakening its power.¹⁰⁰ Specifically, critics of the *Alvarez-Machain* decision argued that the Court side-stepped the real issue of extraterritorial abduction by basing its decision on a technicality.¹⁰¹ Justice Stevens' dissent in the case further weakens the *Alvarez-Machain* decision, by calling the majority opinion "monstrous."¹⁰² Adding further controversy to the decision was the fact that Alvarez-Machain was ultimately acquitted.¹⁰³ Amidst the controversy, the U.S. Justice Department issued a memo that stated, "the *Alvarez-Machain* decision does not constitute a 'green light' for unrestricted efforts to secure custody over persons abroad without regard to international extradition treaties, or the laws of foreign states, or

⁹⁷ *Id.* at 657 (indicating the DEA's belief that defendant took actions to prolong the life of the DEA agent to permit him to be subject to further torture).

⁹⁸ *Id.* at 668-70.

⁹⁹ *Id.* at 665.

¹⁰⁰ Wilske, *supra* note 23, at 207-08.

¹⁰¹ That is, the Court may have side-stepped the question of the actual extraterritorial abduction by basing its decision on the technicality of the treaty language. *See generally*, M. Brooke Waldman, *A New Vision of Justice: Sosa v. Alvarez-Machain and the Alien Tort Claims Act*, 15 TEMP. POL. & CIV. RTS. L. REV. 251, 284 (2005) ("In *Sosa v. Alvarez-Machain*, the Supreme Court has improperly attempted to limit the recognition of claims under the Alien Tort Claims Act."); A. Dan Tarlock, *The Influence of International Environmental Law on the United States Pollution Control Law*, 21 VT. L. REV. 759, 765 (1997) ("[T]he likelihood that doctrines such as the precautionary principle will be applied is slight if the Court continues to display the level of hostility and disdain toward customary international law that it did in the infamous and incorrect *Alvarez-Machain* decision."); and Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 413 (1996) ("[T]he majority's conclusion that the Extradition Treaty was not violated in *Alvarez-Machain* is incorrect.")

¹⁰² *United States v. Alvarez-Machain*, 504 U.S. 655, 687 (1992) (Stevens, J., dissenting).

¹⁰³ *Id.*

international law.”¹⁰⁴ Over time, the discussion regarding the *Alvarez-Machain* decision has not dissipated. However, a presidential directive issued by President Clinton lessened the impact of the Justice Department memo by offering implicit support of the decision, stating, “[I]f we do not receive cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation.”¹⁰⁵

Despite criticism of the *Alvarez-Machain* decision, courts have reaffirmed the decision. In *Kasi v. Virginia*,¹⁰⁶ the U.S. Supreme Court had an opportunity to back away from the holding of *Alvarez-Machain* and the *Ker-Frisbie* doctrine in general. In *Kasi*, the defendant was arrested, tried, and convicted of capital murder for the shooting of two federal workers outside of CIA headquarters.¹⁰⁷ However, in rejecting certiorari, the U.S. Supreme Court implicitly endorsed the *Ker-Frisbie* doctrine while rejecting Kasi’s argument that his arrest in Pakistan by FBI agents violated the Fourth Amendment.¹⁰⁸

The courts of the United States have had many opportunities to repudiate the *Ker-Frisbie* doctrine, but have never done so. Thus, as the *Ker-Frisbie* doctrine remains strong, extraterritorial abductions are a valid option so long as they pass the *Toscanino* and *Yunis* prohibitions on actions that “shock the conscience.” Specifically, so long as the acts used to bring a terror suspect into American jurisdiction are not torturous in nature or in direct violation of an explicit extradition provision, the *Ker-Frisbie* doctrine stands to justify jurisdiction.

4. Available Court Remedies

Although it is the position of the authors that a court should not grant an objection based on extraterritorial abduction, it is important to discuss what remedies may be available to a defendant if a domestic court were to permit a jurisdictional challenge. To begin, dismissal should not be considered as an option. The International Criminal Tribunal for Yugoslavia (ICTY) dealt with this very inquiry where the question was whether an objection to the method of abduction should result in the termination of the proceedings.¹⁰⁹ The ICTY held that although dismissal is not wholly excluded, it should not be used

¹⁰⁴ U.S. Dep’t of Justice Memo on *United States v. Alvarez-Machain*, Jan. 1993, 32 I.L.M. 277.

¹⁰⁵ John Diamond, *U.S. Will Take Terrorists By Force*, BALT. SUN, Feb. 5, 1997, at 5A.

¹⁰⁶ *Kasi v. Virginia*, 508 S.E.2d 57, cert. denied, 527 U.S. 1038 (1999).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Prosecutor v. Nikolic, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal (Oct. 9, 2002).

lightly given the nature of the accusations which typically precipitate such an abduction.¹¹⁰

Further, it is not a settled rule that a defendant can even raise *any* objection about his abduction, as an abduction is not an infringement against him personally, but rather, against the territorial sovereignty of the harboring nation. U.S. courts, for instance, denied a defendant's right to personally object to jurisdiction in *U.S. v. Noriega*.¹¹¹ In examining the process by which Noriega was abducted, the court examined the potential infringement of Panama's territorial sovereignty. The court denied that territorial infringements were violations of Noriega's individual rights, thus precluding Noriega from personally objecting to jurisdiction.¹¹²

A second example of a court addressing the question of whether a defendant may personally object to jurisdiction based upon a violation of territorial sovereignty came before the Israeli Supreme Court. In the *Eichmann* case,¹¹³ discussed *infra*, the Israeli Supreme Court upheld jurisdiction and denied Eichmann a right to personally object to the methods of his arrest, holding that "it is an established rule of law that a person being tried for an offense against the law 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."¹¹⁴

A defendant may also attempt an alternative objection to jurisdiction if there was an extradition treaty in place at the time of abduction. Although this objection is not likely to arise with the terror suspects currently being held by the U.S. government, it is still worth discussion should it be made by future detainees. The main consideration is whether an individual has standing to raise an objection for the violation of an extradition treaty. Ordinarily, only a state may make a claim that a treaty has been violated.¹¹⁵

Based on the above discussion, an objection based on a territorial violation should not be handled in the courts; rather, such issues should be

¹¹⁰ Goran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 946 (2003).

¹¹¹ *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990).

¹¹² *Id.* at 1533.

¹¹³ Att'y Gen. of Israel v. *Eichmann*, 36 I.L.R. 5 (D.C. Jer. 1961) (*Eichmann* District), *aff'd*, 36 I.L.R. 277 (S. Ct. Isr. 1962) (*Eichmann* Supreme).

¹¹⁴ *Id.*

¹¹⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 902 cmt. (a) (1987).

discussed between states in the international community.¹¹⁶ The only justifiable objection under domestic law would take the form of a complaint regarding the amount of force used to abduct the individual under the *Toscanino* “shocks the conscience” standard.

D. Foreign Court and Foreign State Reaction to Forcible Abductions

A detainee objecting to an extraterritorial abduction may not argue that his abduction strips jurisdiction under the theory that foreign state jurisprudence disapproves of such abductions. The following discussion of various states’ responses to extraterritorial abductions shows that many nations have historically used extraterritorial abduction to gain jurisdiction. Although some of these states have begun to criticize the use of extraterritorial abductions, it is important to recall that such a decision on its own does not establish a standard of customary international law, as there is no *opinio juris* requirement.¹¹⁷ This specific argument, combined with the lack of customary international laws prohibiting such abductions, can be used to show that there are no international rules precluding extraterritorial abductions.

1. Israel: Forcible Abductions are Alive and Well

A discussion of counter-terrorism measures around the world rightly begins with Israel. One would be hard pressed to find a modern state with more experience in counter-terrorism, both militarily and judicially. The *Eichmann* case provides an initial example of a situation in which Israel endorsed forcible abduction along the lines of American jurisprudence.¹¹⁸ As this case also gave the United Nations an opportunity to comment on forcible abductions, the *Eichmann* case also can represent a general international opinion regarding extraterritorial abductions.¹¹⁹

On May 11, 1960, Israeli agents abducted the Nazi war criminal Adolf Eichmann from his residence in Argentina to stand trial for war crimes

¹¹⁶ Although such arguments are typically held between states, the political impact of the Supreme Court’s recent decision in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), remains to be seen. At the present time, the Bush Administration has put forward a brief arguing that, if there are to be any Geneva Convention complaints made by detainees, such complaints must only be heard in the D.C. Circuit. See Scotusblog, Government: Detainee Cases Must Start Over, (http://www.scotusblog.com/movabletype/archives/2006/08/government_deta_1.html) (last visited Aug. 3, 2006). Thus, the decision in *Hamdan* may in fact alter the scene regarding detainees’ historic inability to raise these arguments typically held between states.

¹¹⁷ See discussion *supra* Part III.A.

¹¹⁸ Att’y Gen. of Israel v. Eichmann, 36 I.L.R 5 (D.C. Jer. 1961) (*Eichmann* District), *aff’d*, 36 I.L.R 277 (S. Ct. Isr. 1962) (*Eichmann* Supreme).

¹¹⁹ Izes, *supra* note 20, at 16.

allegedly committed during the Holocaust.¹²⁰ The Argentinean government protested, arguing that Eichmann's abduction violated Argentina's sovereignty, and demanded Eichmann's release.¹²¹ After Israel refused to release Eichmann, Argentina filed a complaint with the U.N. Security Council.¹²² At the Security Council hearings, however, Argentina did not complain specifically of Israel's purported involvement in Eichmann's abduction; rather, Argentina only expressed concern about future abductions and territorial infractions.¹²³ Following this hearing, the U.N. Security Council passed Resolution 138, with the United States' support, warning that repeated violations of sovereignty could endanger international peace.¹²⁴

Before Eichmann's trial began in Israel, the governments of Argentina and Israel ended the ongoing political conflict by releasing a joint communication on August 3, 1960, which read:

The Governments of Argentina and Israel, animated by a desire to give effect to the resolution of the Security Council of June 23, 1960, in so far [sic] as they hope was expressed that the traditionally friendly relations between the two countries will be advanced, resolve to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina.¹²⁵

At his trial, Eichmann claimed that his extraterritorial abduction stripped the Israeli courts of jurisdiction.¹²⁶ It is important to note here that there was no extradition treaty in place between Israel and Argentina, and thus there was no obligation on Argentina to extradite Eichmann. Therefore, the Israeli Supreme Court noted that extraterritorial abduction was likely to be the only method of obtaining jurisdiction.¹²⁷

¹²⁰ *Eichmann* Supreme, 36 I.L.R. at 304.

¹²¹ *Id.*

¹²² Calica, *supra* note 41, at 408.

¹²³ *Eichmann* District, 36 I.L.R. at 70-71.

¹²⁴ S.C. Res. 138, U.N. Doc. S/4349 (June 23, 1960), *reprinted in* 1960 U.N.Y.B. 198 (1960).

¹²⁵ *Eichmann* District, 36 I.L.R. at 59.

¹²⁶ *Eichmann* Supreme, 36 I.L.R. at 279.

¹²⁷ *Id.* at 298-304.

The Israeli Supreme Court began by upholding the doctrine of universal jurisdiction.¹²⁸ The Court then held that Eichmann's claims regarding territorial violations are nonjusticiable in courts of law, but are to be handled through the international community.¹²⁹ In reaching its decisions, the *Eichmann* Court specifically looked at recent history, in which Argentina had filed a complaint in the international community. The international community decided the issue by a joint communication stating that the territorial issue was resolved.¹³⁰ Eichmann was then tried, convicted, and executed.¹³¹

The *Eichmann* case stands in support of the extraterritorial abduction principle. This Article has cited the case for its most applicable holding: that a defendant may not dispute the jurisdiction of a court because of an extraterritorial abduction,¹³² as it is a general rule that a defendant is without standing to challenge his detention based purely on territorial infringement.¹³³ Further, it is important to keep in mind the specific facts of the *Eichmann* affair. Courts and the international community were more likely to side with Israel on the territorial issue given the horrific nature of Eichmann's war crimes.¹³⁴ Acts of terrorism should be viewed in the same light as were Eichmann's war crimes. Thus, the most applicable standard from the *Eichmann* case for the purposes of this discussion is that a complaint regarding a territorial infraction may only be raised in the international community. When the detainee is accused of such heinous acts as war crimes or organizing terrorism, the jurisdiction should not be questioned in the courts.

As Israel is one of the best laboratories for examining counter-terrorism measures, it is valuable to look at other instances in which Israel has attempted to use forcible abductions as a self-help answer in its fight against terrorism. In 1973, an Israeli aircraft was en route from Beirut to Iraq when Israeli soldiers forced the plane to land in Israel upon the belief that

¹²⁸ *Id.*

¹²⁹ *Id.* at 305.

¹³⁰ *Id.* at 306.

¹³¹ Calica, *supra* note 41, at 409.

¹³² Wilske, *supra* note 23, at 225.

¹³³ *Eichmann District*, 36 I.L.R. 5, *aff'd*, *Eichmann Supreme*, 36 I.L.R. 277.

¹³⁴ Wilske, *supra* note 23, at 225.

Palestinian terrorists were among the passengers.¹³⁵ Israeli soldiers questioned the crew and passengers for hours, after which the soldiers determined that no terrorists were on board and permitted the flight to proceed.¹³⁶ When Israel's actions were brought before the U.N. Security Council, the Israeli representative argued that Israel's actions were permitted by the theory of an inherent right to self-protection against future terrorist attacks.¹³⁷ The Security Council, however, was not convinced and passed a unanimous resolution condemning Israel's actions.¹³⁸

In 1986, Israel again found itself defending its counter-terrorism actions before the Security Council. That year, Israel intercepted a Libyan airliner in an attempt to forcibly abduct Palestinian terrorists supposedly on the airplane.¹³⁹ The Israeli soldiers again determined that no terrorists were on board and allowed the flight to continue.¹⁴⁰ During the subsequent Security Council debate, however, the United States refused to support a resolution condemning Israel's actions.¹⁴¹ The United States instead commented that although the American government was generally opposed to forcible intervention, and specifically opposed to Israel's actions in this instance, exceptional circumstances could still justify such an intervention.¹⁴²

A final incident occurred in 1989 when Israeli helicopters landed in a Lebanese village to kidnap Sheik Obeid from his home.¹⁴³ The Israeli government argued that the Sheik was guilty of inciting terrorism and helping members of Hizbollah, a terrorist organization.¹⁴⁴ This situation differs from the two previously mentioned, however, because during this mission, one of Obeid's neighbors was killed by gunfire.¹⁴⁵ The international

¹³⁵ 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, 174-75 (1994).

¹³⁶ *Id.* at 175.

¹³⁷ U.N. SCOR, 28th Sess., 1738th mtg., U.N. Doc. S/PV.1738 (Aug. 14, 1973).

¹³⁸ *Id.*

¹³⁹ Calica, *supra* note 41, at 422.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² U.N. SCOR, 41st Sess., 2655th mtg. at 112-13, U.N. Doc. S/PV.2655/Corr.1 (1986).

¹⁴³ Beck & Arend, *supra* note 135, at 177.

¹⁴⁴ *Id.* at 177-78.

¹⁴⁵ *Id.*

community quickly condemned this action due to the civilian casualty. Thus, the Obeid affair is often cited to show that the international community will not support a forcible abduction which results in the loss of civilian life.¹⁴⁶ However, if a state finds itself in a similar situation as Israel was in the Obeid affair, that state can argue that the government chose the lesser evil when it abducted a terrorist from a state providing refuge, and minimal collateral damage is an acceptable, although unfortunate, reality.¹⁴⁷

These three Israeli cases show two primary international concerns regarding forcible abductions. First, the international community is very concerned with the loss of civilian life. However, this critique is evidenced only in the limited circumstances of the Obeid affair, which is insufficient to bar the use of forcible abductions. Rather, the international community did not explicitly condemn Israel's actions in the first two cases which inconvenienced many innocent people. The second critique offered also is specific to the Obeid affair, where critics argue that Israel had not sufficiently demonstrated that Obeid had a history of terrorist activity; therefore, collateral damage is unwarranted. From these incidents, it is evidenced that stronger authorization is given for a forcible abduction when the individual has a long known history of terrorist activity.

2. England: A Changing Trend

Historically, England has also exercised the doctrine of *male captus, bene detentus*, and English courts have held that the detention and subsequent trial of an abducted individual are valid despite the way in which physical jurisdiction was obtained.¹⁴⁸ However, as the following discussion shows, English courts may be retreating from this position. Although there may be a changing trend, the English courts have acknowledged that jurisdictional questions regarding extraterritorial abductions are still an open and undecided matter. The traditional English view was that pretrial malpractice had no effect on the trial itself.¹⁴⁹ The aforementioned changing trend, however, has not risen out of cases involving war criminals or terrorists, but rather, cases of fraud and conspiracy.¹⁵⁰ In *R. v. Gilmore*, for instance, the

¹⁴⁶ Calica, *supra* note 41, at 42.

¹⁴⁷ *Id.*

¹⁴⁸ Andrew L.-T. Choo, *Ex Parte Bennett: The Demise of the Male Captus, Bene Detentus Doctrine in England?*, 5 CRIM. L.F. 165 (1994).

¹⁴⁹ *Id.* See also *R. v. Sang*, [1980] A.C. 402 (holding that a trial judge could exclude improperly obtained evidence only if the evidence were unreliable or if it had been obtained in a manner that compromised the defendant's right against self-incrimination).

¹⁵⁰ See generally *R. v. Bow Street Magistrates, Ex Parte Mackeson*, 75 Cr. App. R. 24; *R. v. Hartley*, [1977] 2 N.Z.L.R. 199 (C.A.).

defendant, Gilmore sold a car that he had improperly obtained.¹⁵¹ The English Court of Appeals commented that although case law left the decision regarding jurisdiction after a forcible abduction to the discretion of the trial judge, it was, in fact, still an open question as to whether this discretion actually existed.¹⁵²

It was under this evolving rubric of English case law that *Ex Parte Bennett* arose. Prior to *Bennett*, English case law had not explicitly answered the question of whether criminal proceedings could be stayed because of a forcible abduction.¹⁵³ In *Bennett*, the defendant was a New Zealand citizen wanted by the English government for crimes in connection with the purchase of a helicopter. The British government asserted that Bennett raised the funds to purchase the helicopter under false pretenses and then defaulted on the repayments.¹⁵⁴ The English police traced Bennett to South Africa and convinced the South African police to arrest Bennett under the auspices of an agreement to deport him to New Zealand via London's Heathrow airport.¹⁵⁵ However, English authorities arrested Bennett upon his arrival at Heathrow airport and brought him to trial.¹⁵⁶

After the Divisional Court held that it did not have the authority to examine the circumstances under which Bennett came into its presence, the case was appealed to the House of Lords for disposition.¹⁵⁷ In the House of Lords, the majority held that the judiciary did in fact possess the power to stay a trial made possible by a forcible abduction.¹⁵⁸ The majority in the House of Lords opined that the judiciary must "accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law."¹⁵⁹ Lord Bridge, of the House of Lords, argued that to take the view that a court "may turn a blind eye to executive

¹⁵¹ Case Comment, *R. v. Gilmore*, Crim. L.R. 1992, Jan, 67-68 (Eng.C.A. Aug. 19, 1991).

¹⁵² *Id.* ("It was an open question whether the court had power to enquire into the circumstances in which a person was found in the jurisdiction for the purpose of refusing to try him here.")

¹⁵³ Choo, *supra* note 148, at 172.

¹⁵⁴ *Id.* at 172.

¹⁵⁵ *Id.* at 173.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Ex Parte Bennett*, [1994] 1 A.C. 42 (1993) (appeal taken from QB).

¹⁵⁹ *Id.* at 62 (Lord Griffiths).

lawlessness beyond the frontiers of its own jurisdiction is an insular and unacceptable view.”¹⁶⁰

Although *Ex Parte Bennett* may be cited for the end of the *male captus, bene detentus* doctrine in England, there are two important aspects of the circumstances surrounding the *Bennett* decision which distinguish the ruling from the situations now prevalent in the war on terrorism. First, although no extradition treaty existed between England and South Africa, “special arrangements could have been made for [Bennett’s] extradition under the Extradition Act of 1989.”¹⁶¹ Thus, a *de facto* extradition treaty existed between the two states. Lord Griffiths of the House of Lords specifically noted in his opinion that “if extradition is not available, very different considerations will arise on which I express no opinion.”¹⁶² Thus, the current circumstances are quite different, as there is not likely to be an option for extradition between the United States and the nations which harbor members of Al Qaeda or other terrorists. The situation of a detainee who was extraterritorially abducted would be more on point with *Ex Parte Bennett* where Lord Griffiths indicated that the court made no ruling for the lack of an extradition treaty.¹⁶³

A second distinguishing feature of the *Bennett* case is that the crime charged was for improperly obtaining funds to purchase a helicopter. In contrast, the crimes charged in the “war against terrorists” are acts of terrorism. The *Bennett* court may have been skeptical of a forcible abduction for someone charged with a financial crime. A more comprehensive rule would be that a state cannot use forcible abduction to conduct regular police work or to capture the common criminal. However, when the offense is particularly heinous in nature, like that of terrorism, this factor ought to weigh heavily in favor of allowing the prosecution to continue. Rather than reading *Bennett* to establish a mandatory stay in any case where a prosecution was commenced by way of a forcible abduction, a discretionary standard is needed to weigh all relevant circumstances.¹⁶⁴

Thus, the *Ex Parte Bennett* ruling has no weight in a current extraterritorial abduction case because, first, there is no extradition treaty between the United States and states that harbor Al Qaeda, and second, because of the particularly heinous offenses with which the detainees are charged. The proper balancing approach that should be used in reference to

¹⁶⁰ *Id.* at 67 (Lord Bridge).

¹⁶¹ Choo, *supra* note 148, at 172.

¹⁶² *Ex parte Bennett*, 1 A.C. at 62.

¹⁶³ *Id.*

¹⁶⁴ Choo, *supra* note 148, at 177.

Bennett is whether there was excessive physical violence, whether the police were acting in urgency, emergency, or necessity, and whether the charged offenses were particularly heinous.¹⁶⁵

3. Other State Approaches

Other states around the world have dealt with forcible abductions in varying ways. In a 1986 extraterritorial abduction case in Germany, the Federal Constitutional Court of Germany held that no customary rule of international law prevented jurisdiction following such an abduction.¹⁶⁶ The German court held that it should examine only the facts of an abduction when the territorial country objects, and then the international community should handle that objection.¹⁶⁷

A differing approach comes from the South African courts. While the Israeli and U.S. standards suggest that a customary international law norm in support of abductions might be starting to form, *South Africa v. Ebrahim*¹⁶⁸ suggests a different trend. Prior to *Ebrahim*, South Africa had followed the rule of *male captus, bene detentus*.¹⁶⁹ In *Ebrahim*, South African agents abducted a member of the African National Congress then residing in Swaziland in an effort to bring him to trial on charges of treason. In this case, there was once again an extradition treaty between South Africa and Swaziland which could have been used, but was not.¹⁷⁰ The *Ebrahim* court decided that it not only had the authority to refuse to exercise jurisdiction, but that it could not exercise jurisdiction over an abducted defendant because doing so would support a violation of territorial sovereignty.¹⁷¹

The goal of this preceding discussion of foreign state treatment of extraterritorial abduction is to determine whether these state decisions may be cited by a detainee as forbidding jurisdiction after an extraterritorial abduction. Thus, as discussed above in reference to customary international

¹⁶⁵ This is the same balancing approach taken by both Canada (*see R. v. Collins*, [1987] 56 C.R.3d 193 (Can.); *In Re Hartnett* [1973] 1 O.R.2d 206, 207 (Can.) (“[A]n illegal arrest doesn’t deprive a judge of jurisdiction to entertain the prosecution of the victim.”)) and Australia. *See Burning v. Cross*, (1978) 19 A.L.R. 641 (Austl.). For a discussion of Australian decisions see Guy Green, *Basic Values and the Criminal Law*, 17 CRIM. L. J. 229 (1993).

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

¹⁶⁷ *Id.*

¹⁶⁸ *S. v. Ebrahim* 1991 (2) SA 553 (S. Afr.).

¹⁶⁹ *See Regina v. Robertson* 1912 SA 10 (S. Afr.); *Abrahams v. Minister of Justice* 1963 (4) SA 542 (S. Afr.); and *Ndhlovu v. Minister of Justice* 1976 (4) SA 250 (S. Afr.).

¹⁷⁰ *Wilske*, *supra* note 23, at 220.

¹⁷¹ *Ebrahim*, 1991 (2) SA at 556-59.

law, it is important to note whether these foreign courts were making their decisions based on their own law or on international law. The *Ebrahim* court, for instance, did not reach a discussion of international law. It made its decision solely based on Roman-Dutch common law.¹⁷² The fact that the *Ebrahim* court based its ruling on a particular domestic standard is specific evidence that the holding is inapplicable outside of the court's specific jurisdiction. All of the courts discussed above were making their decisions for their own state, not based on a belief of how the international community should operate. Thus, the above discussed rulings are inapplicable to the U.S. courts' adjudication of terrorism cases, regardless of whether the case arises under military commissions, courts-martial, or Article III courts.

4. International Alternatives for Aggrieved Nations

It has been stated numerous times that any complaints regarding an extraterritorial abduction are to be handled in the international community.¹⁷³ The arguments are to be made by states, not individuals, as the protections of territorial sovereignty apply to states, and thus there is no protected personal right of territorial sovereignty. The ideal venue for an aggrieved state is the United Nations, as it historically has been the institution for aggrieved nations following territorial violations.¹⁷⁴ The United Nations has the power to respond by demanding reparations or trade sanctions.¹⁷⁵ If the abduction violates a specific treaty, the non-breaching party also could act under the Vienna Convention on the Law of Treaties and suspend operation of the treaty by refusing to extradite any criminals in the future.¹⁷⁶ Lastly, the two parties also could agree to submit the territorial infringement to the International Court of Justice, which possesses the power to levy damages enforceable by the United Nations.¹⁷⁷

5. What Do the Foreign Decisions Mean?

The large amount of case law addressing the jurisdictional question after an extraterritorial abduction raises two questions that the international community must address. First, should there be a customary international law norm forbidding a court to exercise jurisdiction over an abducted

¹⁷² Wilske, *supra* note 23, at 220.

¹⁷³ Calica, *supra* note 41, at 417.

¹⁷⁴ *Id.*

¹⁷⁵ Richard Morrison, *Efficient Breach of International Agreements*, 23 DENV. J. INT'L L. & POL'Y 183, 196 n. 49 (1994).

¹⁷⁶ Vienna Convention on the Law of Treaties, arts. 56, 60, May 23, 1969, 1155 U.N.T.S. 331.

¹⁷⁷ Statute of the International Court of Justice, arts. 36, 59, June 26, 1945.

defendant? Second, regardless of international law trends, is it proper for a court to exercise jurisdiction over an abducted defendant accused of particularly heinous acts? Although the international community has indirectly commented on forcible abductions through the United Nations, it has never explicitly outlawed the practice. The foreign courts that have addressed extraterritorial abductions and held that the courts have the power to investigate the abduction process have never based their decision on international law, but rather on their own nation's traditions and laws.¹⁷⁸ Thus, there is still a void in international law concerning the validity of extraterritorial abductions.

The trend in foreign law is even less applicable in the context of extraterritorial abduction for war criminals, terrorists, and others who pose a threat to a nation or to international peace and security.¹⁷⁹ This is evidenced particularly by the fact that when a foreign court has decided against the use of extraterritorial abduction, the consequences imposed have been negligible or non-existent, thus making calls for an absolute ban on such practice even less convincing.¹⁸⁰

Specifically, global terrorism has emerged as a debilitating weapon against humanity, and such a threat creates a credible exception to any notion of an international law norm against extraterritorial abductions.¹⁸¹ The ability to apprehend terrorist leaders is so vital to international peace, stability, and security that it requires accepting minor sovereignty violations in an effort to ensure protection from future terrorist acts. States harboring terrorists will never take steps to apprehend these individuals themselves, and thus, permitting territorial violations in a small set of circumstances promotes international security.¹⁸² Permitting minor territorial breaches for the greater good of global security leads to the primary argument that the United States should make in justification of prosecuting abducted terrorists: *efficient breach*.

E. Efficient Breach as Justification for Extraterritorial Abductions

As indicated earlier, historically, the most common American response to an objection to jurisdiction after an extraterritorial abduction has been

¹⁷⁸ Wilske, *supra* note 23, at 229.

¹⁷⁹ See Izes, *supra* note 20, at 37 (“[T]here is an urgent need for . . . ratification of rules governing state sanctioned abductions.”).

¹⁸⁰ Mary Alice Kovac, *Apprehension of War Crimes Indictes: Should the United Nations’ Courts Outsource Private Actors to Catch Them?*, 51 CATH. U. L. REV. 619, 640-41 (2002).

¹⁸¹ *Id.* at 643.

¹⁸² Izes, *supra* note 20, at 1 (arguing that abduction may be the only means for courts to obtain personal jurisdiction).

universal jurisdiction. Universal jurisdiction provides that all states have subject matter jurisdiction over select offenses that are internationally recognized as raising universal concerns.¹⁸³ However, the U.S. government should consider the strength of the efficient breach justification as it employs a more substantial test, which applies directly to extraterritorial abductions. The efficient breach model holds that forcible abductions of terrorists are justified because the minor costs of a territorial infraction are outweighed by the benefits to the international community. Further, efficient breach holds that prosecuting known terrorists is preferable to allowing terrorists to remain at large solely out of a fear of infringing on territorial sovereignty.¹⁸⁴

The efficient breach model has particular weight because it does not come across as a “cop-out” defense; rather, it has a very specific seven-part test which applies directly to the facts of an extraterritorial abduction. Under this model, extraterritorial abduction is permissible where (1) the terrorist threat is imminent, (2) the opportunity for abduction is fleeting, (3) the target nation is unwilling to extradite or prosecute, (4) the international community is gridlocked, (5) the territorial infringement is reasonably limited, (6) the operation involves minimal threat to bystanders, and (7) the accused receives humane treatment and a fair trial.¹⁸⁵ Efficient breach, or “self-help,” specifically benefits the acting nation by protecting its citizenry, as well as the international community, by removing a serious threat from international travel and action.¹⁸⁶ As the international community benefits from the efficiency of this model, international efforts should be spent encouraging such actions and organizing an international law framework under which efficient breach extraterritorial abductions may be exercised.

The efficient breach model is already implicitly incorporated into many extraterritorial abductions. In the *Eichmann* abduction, for instance, a known offender was abducted with limited infringement on a foreign state’s sovereignty, and the event was marked by the absence of harm to either the accused or innocent civilians.¹⁸⁷ The *Eichmann* court was rightly more concerned with providing an effective judicial remedy than they were concerned with the process by which the defendant came before them.

¹⁸³ Izes, *supra* note 20, at 3.

¹⁸⁴ Jeffery L. Dunhoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1 (1999).

¹⁸⁵ Calica, *supra* note 41, at 394.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 415.

Furthermore, in the *Eichmann* affair, the defendant received a fair trial, and the territorial grievance was handled by the international community.¹⁸⁸

Efficient breach has further value in that its use also remedies an existing international wrong. In the *Eichmann* affair, again, Argentina was breaching international peace by harboring a war criminal, and Israel redressed this wrong through extraterritorial abduction, thus restoring international balance.¹⁸⁹ Efficient breach is a valuable justification for jurisdiction over an abducted individual because the capture of such a heinous actor and the ensuing criminal process benefits the international community by removing a threat as well as by discouraging others from committing similar crimes.¹⁹⁰

Critics may argue that the efficient breach justification of extraterritorial abduction will establish a standard that permits states to overreach their national prerogatives. However, if efficient breach were adopted as the prevailing international rule, the detailed test coupled with the naturally intense international scrutiny would constrain the practice and prevent it from completely eroding the foundations of international law, all the while permitting appropriate abductions.¹⁹¹

The efficient breach model implicitly considers the heinous nature of the offender's act, justifying a territorial breach of another state's sovereignty. Thus, efficient breach is not proper for a run-of-the-mill terror suspect. The imminence requirement would not be satisfied through an abduction of the run-of-the-mill terror suspect, but rather such a requirement would be fulfilled only for the highly influential terrorist.

This discussion does, however, leave the international community with unanswered questions. First, would efficient breach permit preemptive abduction of someone who has never committed a crime? The United States would likely argue that the current preemptory self-defense argument, which supplants the need for a specific crime to have been committed, would justify such an action. Second, the international community may ask whether an increase in forcible abductions would decrease international stability by generating violent retaliation rather than resulting in states resorting to formal complaints. Although forcible abductions do require the use of some force, extraterritorial abductions will likely result in a decrease of violence in the world as each efficient breach rids the international community of violent actors. Lastly, the international community may ask whether efficient breach

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 416.

¹⁹⁰ Calica, *supra* note 41, at 418.

¹⁹¹ *Id.* at 419.

requires there to be an imminent attack, and if so, how imminent the attack will be. Under the doctrine of preemptory self-defense, the feared action must have some imminence, but the threshold amount remains an unsettled question.¹⁹² The general international standard for imminence may be met by a “more likely than not” test, as opposed to a “beyond the shadow of a doubt” test.¹⁹³ This would permit a threatened nation, on the one hand, to protect itself, while on the other hand, to still prevent reckless acts.¹⁹⁴

IV. CONCLUSION

In the post-September 11th world of counter-terrorism, the United States has chosen to proactively combat the evil of terrorism that brought about the September 11th attacks. In the event that an enemy combatant argues for a lack of jurisdiction based on an extraterritorial abduction, the government can argue that the abduction is justified so long as there is no abuse or torture involved. The U.S. government should first argue under universal jurisdiction, where subject matter jurisdiction is worldwide in response to terrorism. Then, to the international community, the United States should argue efficient breach in support of a violation of territorial sovereignty. This argument would bring the international community's focus to promoting the extradition or prosecution of war criminals and terrorists, rather than a criticism of minor territorial violations.

A defendant does not have a right to object personally to a territorial violation, because such a violation is committed only against the sovereign state. If such an objection is permitted, however, the extraterritorial abduction is still permissible under the doctrine of *male captus, bene detentus* under customary international law, codified international rules, U.S. jurisprudence, and foreign state decisions.

It will greatly benefit the international community to codify exactly what will warrant extraterritorial abductions and specifically how such actions may be used. Given the likelihood that the United States and other countries such as Israel will increase their use of extraterritorial kidnapping, the international community should act proactively to address the issue. Until the international community does codify the specific circumstances under which extraterritorial kidnapping is permissible, the United States is justified in exercising extraterritorial abductions under universal jurisdiction, passive personality, and finally, efficient breach.

¹⁹² See Michael N. Schmitt, *State-Sponsored Assassination in Int'l and Domestic Law*, 17 YALE J. INT'L L. 609, 648 (1992).

¹⁹³ Calica, *supra* note 41, at 426

¹⁹⁴ *Id.* at 650.