EXTRATERRITORIAL ABDUCTIONS: A NEWLY DEVELOPING INTERNATIONAL STANDARD

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I. INTRODUCTION

GOVERNMENTS seek to apprehend, prosecute, and convict criminals to protect themselves and their citizenry from the perpetrators of illegal acts. Historically, there has been a need to protect both suspected criminals and innocent citizens from the excessive actions of overzealous crime-fighters. This has usually been accomplished through domestic constitutional safeguards. In recent years, however, this protection has also been attempted through the establishment of international norms of human rights and international implementational machinery.

As improvements in communication and transportation technology have caused the globe to shrink, criminals and their activities have become less confined by national frontiers. In response, the fight against crime has become transnational in scope. This creates an increasing need for municipal legal systems to develop methods for the apprehension of suspects beyond their borders.

The usual and legal method for the international apprehension of suspected criminals is through the process of extradition.¹ This is either provided for by bilateral treaty, or occurs simply on the basis of international comity.² It is not unknown, however, for States to resort to extralegal methods of extraterritorial apprehension.³ These methods of apprehension include: 1) abduction by State agents acting unilaterally; 2) abduction by State agents acting with the aid or connivance of the asylum State; 3) abduction by private individuals in the employ of the apprehending State; 4) abduction by police agents of the asylum State in the employ of the

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² Evans, Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice, 40 Brit. Y.B. Int'l L. 77, 78 and 78 n.3 (1964) [hereinafter cited as Evans, A Survey].

³ Id. at 77.
apprehending State; 5) abduction by "volunteers"; 6) delivery of the suspect by asylum State agents to agents of the apprehending State outside of the channels of the extradition process; and, 7) expulsion of the suspect through improper applications of immigration laws so that the suspect is "delivered" to waiting State agents at the port of entry of the apprehending State. Most of these methods of apprehension are clearly summary in character, and are illegal under the laws of the asylum State. Such methods will be referred to here as extra-legal extraterritorial apprehensions. Those which occur without the participation of the asylum State are violations of traditional international law in that they violate the sovereignty of the asylum State. Those that occur with the participation of the asylum State, however, are not, since the asylum State is itself involved in the act of apprehension and cannot complain of a violation of its sovereignty. In both cases, any rights the suspect may have under international law or the laws of the asylum State are transgressed. Extra-legal extraterritorial apprehensions, and their status under international law, will be the subject of this study. Here, the focus will be on the question of protection against acts of outright abduction. The conclusions reached in this study, however, would be applicable to any extra-legal extraterritorial abduction in which the apprehending State could be considered to be guilty of complicity. It is the problem of the extraterritorial violation of human rights that is to be addressed.

While international abductions are a violation of traditional international law, the practice of the courts of most nations has been not to allow the illegality of the apprehension to interfere with their exercise of jurisdiction over the suspect. The rationale has been, in one way or another, the Roman Law maxim of mala captus bene detentus. For a discussion of the varying levels of United States participation in extraterritorial apprehensions, see Abramovsky and Eagle, supra note 1, at 54-62. For an excellent survey of pre-1964 United States cases involving extraterritorial apprehensions, see Evans, A Survey, supra note 2.


Bassiouni, supra note 1, at 33.

*2 Id. at 33, 65. See, Note, United States v. Quesada, 7 U. TOL. L. REV. 723, 749 (1967) [hereinafter cited as Note, Quesada].

II. TRADITIONAL INTERNATIONAL LAW AS APPLIED TO EXTRATERRITORIAL ABDUCTIONS

While extraterritorial abductions are a violation of customary international law in that they involve the violation of another nation's sovereignty, and while they may also violate conventional proscriptions in this regard, the traditional notion that only States, and not individuals, are subjects of international law leaves kidnapped suspects without standing to complain of these violations of international law. Traditional international law views extradition treaties as being for the benefit of States and thus not conferring any rights or standing upon individuals. Some have argued, using the principle inclusio unius est exclusio alterius, that the availability of extradition, especially as provided for by bilateral treaties, means that international law prohibits by implication alternative methods of obtaining suspects from within the jurisdiction of other nations. This line of reasoning, however, still confers no rights directly upon the suspect.

Bassiouni contends that reliance upon the Roman Law maxim mala captus bene detentus is misplaced. He argues that its “improper application results from the judicial disregard of two higher Roman Law principles,” nunquam decurritur ad extraordinarium sed ubi deficit ordinarium, and, ex injuria ius non oritur. Whatever the validity of Bassiouni’s contentions, this argument also assigns no rights under international law to the suspect; he remains deprived of any standing to raise the issue of violations of international law in domestic courts.

III. UNITED STATES LAW AS APPLIED TO EXTRATERRITORIAL ABDUCTIONS

Since 1815 the United States Supreme Court has held that a violation of customary international law is not relevant to the question of jurisdiction. The question of an extra-legal extraterritorial apprehension

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9 Bassiouni, supra note 1, at 27, 45. The maxim mala captus bene detentus stands for the proposition that an improper capture results in a lawful detention.

10 United States v. Toscanino, 500 F.2d 267, 277-78 (2d Cir. 1974), rehearing denied, 504 F.2d 1380 (2d Cir. 1974). See also Garcia-Mora, supra note 1, at 427-28.


12 Bassiouni, supra note 1, at 25, 34. Garcia-Mora, supra note 1, at 436.

13 Garcia-Mora, supra note 1, at 427-28, 428 n.10. Professor Thomas Franck has offered this analysis in his lectures in Public International Law at the New York University School of Law (Nov. 28, 1979).

14 Bassiouni, supra note 1, at 45.

15 “Never resort to the extraordinary until the ordinary fails.”

16 “No right can arise from the violation of law.”

17 The Ship Richmond, 13 U.S. (9 Cranch) 102, 104 (1815).
of a suspected criminal was first raised in the United States in Ker v. Illinois.\textsuperscript{18} In Ker the Court held that “mere irregularities” in the apprehension of the suspect do not deprive the trial court of jurisdiction.\textsuperscript{19} The Court stated:

“due process of law” . . . is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.\textsuperscript{20}

While Ker involved a situation where the apprehending agent was carrying extradition papers but was unable to present them to the proper authorities in the asylum State because of the presence of an occupying foreign army, “its applicability has been extended to include every conceivable situation outside the provisions of an extradition treaty.”\textsuperscript{21} Its effect has been to “immunize governmental misconduct” in the extraterritorial apprehension of suspected criminals.\textsuperscript{22} Ker has been controlling law in the United States since 1886, and has often been cited by the courts of other nations\textsuperscript{23} to support the proposition \textit{mala captus bene detentus}.

In 1952, in Frisbie v. Collins,\textsuperscript{24} a case involving a domestic extra-legal inter-state apprehension, the Supreme Court of the United States specifically upheld its ruling in Ker.\textsuperscript{25} In spite of the revolution in the jurisprudence of due process that was already beginning, the Court held that due process was not violated when a suspect was forcibly kidnapped by police agents acting outside of their jurisdictional boundaries.\textsuperscript{26} Justice Black wrote, “[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.”\textsuperscript{27} With one possible exception, which will be discussed below,\textsuperscript{28} the Ker-Frisbie rule has been followed faithfully by the courts of the United States. It has been cited with approval by the Supreme Court as recently as 1975.\textsuperscript{29}

\begin{itemize}
  \item \textsuperscript{18} 119 U.S. 436 (1886).
  \item \textsuperscript{19} Id. at 440.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Garcia-Mora, supra note 1, at 435.
  \item \textsuperscript{22} Note, \textit{Apprehensions Abroad of Alien Criminal Defendant in Violation of Fourth Amendment Ousts Trial Court of Jurisdiction to Hear Charges}, 43 \textit{Fordham L. Rev.} 634, 637 (1975) [hereinafter cited as \textit{Apprehensions Abroad}].
  \item \textsuperscript{23} Bassiouni, supra note 1, at 27 n.6.
  \item \textsuperscript{24} 342 U.S. 519 (1952).
  \item \textsuperscript{25} Id. at 522.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} United States v. Toscanino, 500 F.2d 267. See notes 33-72 infra, and accompanying text.
  \item \textsuperscript{29} Gerstein v. Pugh, 420 U.S. 103, 119 (1975).
\end{itemize}
Late in the 1960's and in the 1970's, partially in response to the growing problem of international drug trafficking, United States police agents increasingly resorted to extra-legal extraterritorial apprehension. Suspects appeared in increasing numbers before federal trial courts alleging that they had been extraterritorially kidnapped. There were also allegations that United States police agents, especially agents of the Drug Enforcement Agency, had participated in illegal electronic surveillance and torture abroad.

In 1974, in what appeared to be a radical departure from the Ker-Frisbie rule, the Second Circuit Court of Appeals held in United States v. Toscanino that the district court should divest itself of jurisdiction if the defendant could prove his allegations of participation by United States police agents in kidnapping and torture. Citing widespread judicial and academic criticism of the Ker-Frisbie rule, the Toscanino court held that "the Ker-Frisbie rule cannot be reconciled with the Supreme Court's expansion of the concept of due process," and that "due process . . . now require[s] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."

The Toscanino decision has received a great deal of attention in the

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20 Abramovsky & Eagle, supra note 1, at 52-55; Poisonous Tree, supra note 5, at 681; Sarasody, supra note 5, at 1439. See TIME, Dec. 2, 1974 at 98; N.Y. Times, Oct. 13, 1974, at 53, col. 1; N.Y. Times, Jan. 9, 1975, at 26 col. 1; NEWSWEEK, Aug. 16, 1976 at 56-57. In Toscanino, the government indicated that its action in that case had been part of an on-going program of "informal cooperation . . ." Petition of United States Attorney for Rehearing or Rehearing En Banc at 6, United States v. Toscanino, 500 F.2d 267.


32 E.g., United States v. Toscanino, 500 F.2d 267; United States v. Lopez, 542 F.2d 283 (5th Cir. 1976); United States v. Lara, 539 F.2d 495 (5th Cir. 1976); United States v. Conroni, 527 F.2d 708 (2d Cir. 1975); In Re Weir, 520 F.2d 662 (9th Cir. 1975); United States v. Lira, 515 F.2d 68 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1975); United States v. Orman, 417 F. Supp. 1126 (D. Colo. 1976).

33 500 F.2d at 275-76.

34 Id. at 272-73.

35 Id. at 275. Compare with note 61 infra.

36 Id.
academic literature. Its result has been widely praised, but its analysis and reasoning have been extensively criticized, even by its supporters. The court declared itself against the philosophy that the “end” justifies the “means,” and made it clear that it would not “countenance ‘trials which are the outgrowth or fruit of the Government’s illegality.’” The legal basis for the Second Circuit’s ruling in Toscanino, however, was not at all clear. Its decision has been described as “vague,” “enigmatic,” “overbroad,” and “inadequate” in analysis.

The Second Circuit faced several problems in crafting its decision in Toscanino. The court was going against the weight of settled law, and it was attempting to deal with governmental extraterritorial action against an alien, a situation for which domestic courts are singularly unsuited. Its holding, that the government “having unlawfully seized the defendant . . . should as a matter of fundamental fairness be obligated to return him to his status quo ante,” was based on a variety of alternative lines of analysis and distinction, all of which involved novel extensions of settled law. The decision was further complicated by a rather bizarre and unseemly fact pattern. Toscanino, an Italian citizen and resident of Uruguay, alleged that he had been kidnapped in Uruguay by Uruguayan police acting as

31 See Abramovsky & Eagle, supra note 1; Sarasody, supra note 5; Poisonous Tree, supra note 5; Note, Quesada, supra note 7; Apprehensions Abroad, supra note 22; International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law, 47 U. COLO. L. REV. 489 (1976) [hereinafter cited as Overreaching]; Comment, United States v. Toscanino: An Assault on the Ker-Frisbie Rule, 12 SAN DIEGO L. REV. 865 (1975) [hereinafter cited as An Assault]; 88 HARV. L. REV. 813 (1975); 10 TULSA L.J. 479 (1975); 15 VA. J. INT’L L. 1016 (1975).

32 See supra note 5, at 682 (“Toscanino: A Step Forward”); Note, Quesada, supra note 7; Apprehensions Abroad, supra note 22, at 646 (“the court was fully justified”); Overreaching, supra note 37, at 501 (“the court’s conclusion . . . seems completely reasonable”); An Assault, supra note 37, at 888 (“the decision in Toscanino exemplifies the most enlightened view of the role and power of a court”); 10 TULSA L.J. 479 (1975) (“a significant decision”).

33 E.g., Sarasody, supra note 5, at 1450 (“the premise of the Second Circuit’s due process analysis in Toscanino is of highly doubtful validity”); Poisonous Tree, supra note 5, at 685, 693 (“Vague . . . language . . . in need of refinement”; “hampered by a dearth of analytical ammunition”); Apprehensions Abroad, supra note 22, at 646 (“arguably incorrect analyses”); Overreaching, supra note 37, at 495 (“objectionable . . . for its analysis and use of broad language”); An Assault, supra note 37, at 881 (“not entirely explicit . . .”); 88 HARV. L. REV. at 824 (the court’s problem . . . was not so much what to decide as how”); 10 TULSA L.J. at 485 (“possibly over-zealous and overbroad”).

40 500 F.2d at 274, quoting the dissenting opinion of Mr. Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 484-85 (1928).


42 Poisonous Tree, supra note 5, at 693.

43 Id. at 695.

44 10 TULSA L.J. at 485.

45 88 HARV. L. REV. at 817.

46 500 F.2d at 275.
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paid agents of the United States, taken to Brazil at the connivance of the United States government, tortured in Brazil in the presence of a member of the United States Department of Justice by Brazilians acting as agents of the United States, drugged and placed on a flight bound for the United States and delivered into “the waiting arms of the United States government.”

The holding in Toscanino seemed to have been based either on a finding that extraterritorial kidnapping by government agents is a violation of due process, or on a narrower due process finding that extraterritorial kidnapping and torture violated the Rochin standard of “conduct that shocks the conscience” and “offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples,” or on a finding that “Ker does not apply where a defendant has been brought into the district court’s jurisdiction in violation of a treaty.” The authority for the remedy of divestiture of jurisdiction was found either in an unprecedented extension of the constitutionally-based “exclusionary rule” or in the court’s discretionary “supervisory power over the administration of criminal justice in the district courts” pursuant to the McNabb rule. The Toscanino court’s use of language such as “Ker and Frisbie . . . would not necessarily apply,” and “[i]f distinctions are necessary,” exacerbated the confusion over the legal basis for its holding.

The Toscanino court’s application of traditional international law was, indeed, creative, but without much precedent. The court held that the government had violated its obligation, undertaken in the United Nations Charter and in the Charter of the Organization of American States, not to violate the sovereignty or territorial integrity of other nations by actions such as the abduction of Toscanino. It found a violation of international law and thus held Ker to be inapplicable. Interestingly, the court did not make any reference to a Uruguayan protest of the violation of its sovereignty, and did not specify any basis for Toscanino’s ability to invoke the injury to Uruguay for his own benefit. The only reasonable explanation of the Toscanino court’s application of international law is that it found the

47 Id. at 268-70.
48 Id. at 275.
49 Id. at 273, quoting Rochin v. California, 342 U.S. 165, 172-73 (1952).
50 Id. at 278.
51 See id. at 273-75.
52 Id. at 276. See McNabb v. United States, 318 U.S. 332 (1943).
53 Id. (emphasis added).
54 Id. at 277 (emphasis added).
55 Id.
56 Id. at 278.
Charters of the United Nations and the Organization of American States to confer rights directly on individuals and to be self-executing. The issue of self-execution _vel non_, however, was never dealt with by the court. The _Toscanino_ court relied on two Supreme Court decisions to support the proposition that a violation of a treaty should lead to a divestiture of jurisdiction. _United States v. Rauscher_, which was handed down on the same day as _Ker_, held that under the doctrine of "specialty" a court may not exercise jurisdiction over a defendant for a crime other than that which he had been extradited for. In _Rauscher_ the Court did not hold that individuals had rights under extradition treaties, but that the United States had accepted limitations upon itself with regard to those defendants who were brought within its jurisdiction through the use of an extradition process provided for by treaty. In _Cook v. United States_ the Court held that jurisdiction over a vessel (not a person) would not be exercised when that vessel had been seized in clear violation of the limits imposed upon United States jurisdiction by a self-executing bilateral treaty that had been concluded for the specific purpose of dealing with that question. Neither _Cook_ nor _Rauscher_ support the proposition that individuals have rights under extradition treaties, or that individuals may, on their own behalf, invoke the violation of international law that occurs in the injury to a State.

_Toscanino_ cannot be analyzed and understood standing alone. In _Lujan v. Gengler_, decided less than six months after the _Toscanino_ decision was handed down, the Second Circuit "clarified," narrowed, and retrospectively reinterpreted _Toscanino_. Announcing that _Toscanino_ "scarcely could have meant to eviscerate the Ker-Frisbie rule," the _Lujan_ panel narrowed the exception to Ker-Frisbie to cases involving conduct violating the _Rochin_ standard. The _Lujan_ court held that "mere" kidnapping, without allegations of torture, does not present a "complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process." Furthermore, the _Lujan_ court explained that the violations of the Charters of the United Nations and the Organization of American States, which proscribed the use of force by one State against the territory of another, could not be invoked by _Lujan_ because "unlike Toscanino, Lujan fails to allege that either Argentina or

57 Sarasody, _supra_ note 5, at 1446-47; _Overreaching, supra_ note 37, at 509.
58 119 U.S. 407 (1886).
59 288 U.S. 102 (1933).
61 _Id._ at 65. Compare with note 35, _supra_.
62 _Id._
63 _Id._ at 66 (emphasis added).
Bolivia in any way protested or even objected to his abduction." This holding in *Lujan* has been described as establishing the unprecedented concept of "conditional self-executing" treaties, and is as untenable as was the international law holding in *Toscanino*.

Since the Second Circuit's ruling in *Toscanino*, courts in other circuits that have been faced with cases involving extraterritorial abductions have either strictly followed *Ker-Frisbie* or interpreted *Toscanino* as providing only the narrow exception explained in *Lujan*. Without going into further analysis of the domestic law bases of *Toscanino*, it is fair to say that its vitality as support for divestiture of jurisdiction does not go beyond cases involving extraterritorial abduction and torture and the application of the *Rochin* standard thereto. In addition to the rejection of *Toscanino's* original analysis by the *Lujan* panel and the courts of other circuits, the academic community has severely questioned its expansion of due process, its extension of the exclusionary rule, its utilization of the supervisory power, and its application of international law. *Toscanino's* vitality has been described as a "closed door" to due process, a "cul-de-sac."

IV. THE INADEQUACIES OF DOMESTIC LAW AND TRADITIONAL INTERNATIONAL LAW

Neither traditional international law nor the domestic law of most nations affords any measure of adequate protection to the criminal defendant who has been extraterritorially kidnapped. "[A]ccording to international

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64 Id. at 67. Compare with the text following note 56, supra.
65 Overreaching, supra note 37, at 512.
66 E.g., United States v. Winter, 509 F.2d at 986-87; United States v. Quesada, 512 F.2d at 1045; United States v. Lara, 539 F.2d at 495; United States v. Lopez, 542 F.2d at 284-85; United States v. Cadena, 585 F.2d at 1259; United States v. Postal, 589 F.2d at 874 n.17. (All of these cases are from the Fifth Circuit).
68 E.g., Sarasody, supra note 5, at 1450; Poisonous Tree, supra note 5, at 693-97; Apprehensions Abroad, supra note 22, at 643; 88 HARV. L. REV. at 816; Contra, e.g., Overreaching, supra note 37, at 507.
69 E.g., Sarasody, supra note 5, at 1451-58; Apprehensions Abroad, supra note 22, at 642; Overreaching, supra note 37, at 502; 10 TULSA L. REV. at 485. Contra, e.g., Poisonous Tree, supra note 5, at 698.
70 E.g., Sarasody, supra note 5, at 1462; Overreaching, supra note 37, at 507; 88 HARV. L. REV. at 820; 15 VA. INT'L L. at 1019. Contra, e.g., Poisonous Tree, supra note 5, at 713; Apprehensions Abroad, supra note 22, at 645.
71 E.g., Overreaching, supra note 37, at 510-11; 88 HARV. L. REV. at 820-21; 15 VA. INT'L L. at 1021-23.
72 Sarasody, supra note 5, at 1449, 1459.
law, the individual cannot complain of the manner in which he was brought to the jurisdiction of the prosecuting State, since he really has no rights under extradition treaties." Thus, the defendant is, under traditional international law, left only with the "pious hope" that the asylum State will protest his kidnapping through diplomatic channels. The suggestion that this can afford any real protection "is a mode of intellectual argument which is more sham than real, for the state of refuge's main concern is to obtain redress for the violation of its sovereignty and not to protect the victim of the seizure." 

Domestic legal systems are incapable of protecting the victim of an extraterritorial kidnapping for several reasons. First, the law of the asylum State cannot be effective for the obvious reason that the victim of an extraterritorial kidnapping, once removed from the jurisdiction of the asylum State's courts, is outside of its geographical sphere of protection. Second, the laws of the apprehending State are designed to protect the nationals of that State. Courts are faced with a conceptual contradiction when they are asked to extend their umbrella of protection to persons and places that are normally outside of their jurisdiction. National laws are written to protect individuals against the exercise of national power; they are not readily applicable to actions that are outside of the definitional limits of what nations do. Third, the usual reduction of the issue to a procedural question of whether or not to exercise jurisdiction leaves the substantive issue of the illegal kidnapping beyond the court's purview. (This of course, is equally applicable to domestic inter-state abductions and explains the Frisbie part of the Ker-Frisbie rule.) Fourth, courts confronted with a defendant who alleges that he has been extraterritorially apprehended in an extra-legal manner face a severe problem of proof. Evidence and witnesses are located in a foreign jurisdiction which is often thousands of miles away, and the apprehending government is not likely to admit to its illegal behavior. This problem is particularly acute in cases in which the government defends itself by claiming that the defendant was delivered to it by agents of the asylum State. Fifth, domestic courts have been limited in their ability to invoke international law to protect the victim of an extraterritorial apprehension by the traditional notion, discussed above, of the State as the sole subject of international law.

73 Garcia-Mora, supra note 1, at 436.
74 Evans, A Survey, supra note 2, at 102.
75 Garcia-Mora, supra note 1, at 437.
76 On geographical and jurisdictional limits to the application of United States constitutional rights, see Apprehensions Abroad, supra note 22, at 639-41, 640 n.43.
77 See id. at 637-38.
78 See Abramovsky and Eagle, supra note 1, at 53 n.2; Bassiouni, supra note 1, at 34; 88 HARV. L. REV. at 818 n.31; 15 VA. J. INT'L L. at 1026.
In the United States, for the reasons set out above, the extraterritorially apprehended defendant "has little protection for his own personal rights." While Toscanino offered a glimmer of hope that the inequities of the Ker-Frisbie rule had been overcome, Lujan has disabused us of that notion. It seems accurate to conclude that, taken together, "the Second Circuit's decisions in Toscanino and Lujan have not significantly expanded the defenses available to the internationally abducted defendant."

V. Changes in International Law

Toscanino's "back door" approach to international law having proved to be inadequate, it remains to be seen whether there are other provisions of international law, not considered in Toscanino, which may afford protection and relief to the victims of extraterritorial extra-legal abductions. There has been a major development in international law which justifies a further search for international protection for the victims of extraterritorial abductions: the development, over the past several decades, of international human rights law and the concommitant change in status of the individual into a subject of international law. This development was not considered by the Toscanino court or by any of the courts which have subsequently faced the issue. It is submitted that the changes in the human rights norms of customary and positive international law not only offer the possibility of a new and different analysis, but mandate the divestiture of jurisdiction by domestic courts facing cases in which the defendant has been apprehended through extra-legal extraterritorial means.

The following sections of this article will examine: 1) the state of human rights norms as a part of customary international law; 2) the development of the status of the individual as a subject of international law; 3) the conventional obligations of the United States under positive international law; and, 4) the application of international law in United States domestic courts.

VI. Human Rights and Customary International Law

A norm arises to the level of international custom when there is "evidence of a general practice accepted as law." There are thus two compon-
ments to the process of the formation of customary international law: State practice; and opinio juris. In the North Sea Continental Shelf Case the International Court of Justice set out guidelines for determining whether or not a given international instrument had, through State practice, grown in legal significance to the point where it could be seen as reflecting customary international law. Among the factors listed were: the number of States adhering to the document; the extent to which those States reflect various different constituencies within the international legal community; the extent to which the norms set out may be derogated from; the length of time the document had been in existence; and, the extent to which State practice may be seen as indicating a "belief that this practice is rendered obligatory by the existence of a rule of law requiring it." These criteria should be kept in mind as the development of international human rights law is reviewed below.

In 1948, the General Assembly of the United Nations, with the socialist bloc abstaining, unanimously passed the Universal Declaration of Human Rights as the first part of an envisioned International Bill of Rights. Although it was originally meant to be an aspirational statement setting out a "common standard of achievement" for humankind, "[m]any international lawyers now say that, whatever the intentions of its authors may

82b It has been argued that State practice is not a necessary prerequisite to the creation of customary international law but only indicates the existence of opinio juris. Thus, if there were indications, such as General Assembly resolutions, of the widespread acceptance of a given norm by the community of nations, then State practice in support of the opinio juris would be unnecessary. See Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law? 5 INDIAN J. INT'L L. 23 (1965) [hereinafter cited as Cheng].


84 Id. at paras. 70-77, 77.


The provisions of the Universal Declaration of Human Rights which may be relevant in cases of extra-legal extraterritorial apprehensions include the right to life, liberty and the security of person (art. 3); the proscription of "torture or . . . cruel, inhuman or degrading treatment" (art. 5); "the right to an effective remedy . . . for acts violating the fundamental human rights" (art. 8); the right of everyone "to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights" (art. 10); the right to "protection of law" against "arbitrary interference with . . . privacy, family, home or correspondence" (art. 12); the right "to freedom of movement and residence within the borders of each State" (art. 13); "the right to seek and to enjoy in other countries asylum from persecution" (art. 14); and, "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in [the] . . . Declaration can be fully achieved." (art. 28).


87 Universal Declaration, supra note 85, preamble.
have been, the Declaration is now binding as part of customary law."88 In March of 1968 the unofficial Montreal Assembly for Human Rights stated that the "Universal Declaration for Human Rights . . . has over the years become a part of customary international law."89 Two months later, the official International Conference on Human Rights, meeting in Teheran, proclaimed that "the Universal Declaration of Human Rights . . . constitutes an obligation for the members of the international community."90 The Proclamation of Teheran, of which the above quoted passage was a part, was endorsed by the General Assembly of the United Nations.91

In 1971, Judge Fuad Ammoun of the International Court of Justice wrote in his separate opinion to the Advisory Opinion on the . . . Continued Presence of South Africa in Namibia that "[a]lthough the affirmations of the Declaration are not binding qua international convention . . . they can bind States on the basis of custom . . . , whether because they constituted a codification of customary law . . . , or because they have acquired the force of custom through a general practice accepted as law . . . ."92 The Universal Declaration of Human Rights has "exercised a significant influence on national constitutions and on municipal legislation,"93 and has been cited by the courts of many nations.94 High-level spokesmen for the United

94 See UNITED NATIONS, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS (1974); Schwelb, supra note 93, at 226-228. Schwelb, writing in 1959, lists cases from The United States, Belgium, France, the Netherlands, Italy, the Phillipines, and international courts which cited the Universal Declaration during the first ten years of its existence.
States have often referred to the binding human rights obligations of the United Nations Charter\(^96\) (of which the Declaration is an authoritative interpretation\(^96\)) and have cited the Declaration itself as part of the United States campaign of human rights advocacy. The recent entering into force, in 1976, of the other components of the International Bill of Rights (the International Covenant on Civil and Political Rights\(^98\) and its Optional Protocol,\(^99\) and the International Covenant on Economic, Social, and Cultural Rights\(^100\)) further confirms the status of the Declaration as part of customary law. Furthermore, the Covenants, the International Convention on the Elimination of All


Unilateral statements by high-level governmental officials, in addition to being evidence of State practice, can be the basis of binding obligations under international law if other nations have been expected to rely upon them. Nuclear test case (New Zealand v. France), [1974] I.C.J. 437, 472; Legal Status of Eastern Greenland (Denmark v. Norway), [1933] P.C.I.J. Rep. Ser. A/B No. 53. Whether a unilateral statement can be the basis of binding legal obligations to individuals if those individuals could have been expected to rely upon them is, however, not quite the same issue.


Recently, Manfred Lachs, Judge and former President of the International Court of Justice, during his General Course at the Hague Academy of International Law, stated that the Universal Declaration is "quite rightly viewed as an authoritative interpretation of the Charter." Lachs, *The General Course, 1980 Recueil des Cours d'Academie de Droit international* (forthcoming).


The provisions of the International Covenant on Civil and Political Rights which may be relevant in cases involving extra-legal extraterritorial apprehensions include: the right to an effective remedy (art. 3); the proscription of torture, or cruel, inhuman or degrading treatment (art. 7); the right to liberty and security of person (art. 9); the right to prompt judicial determination of the lawfulness of an arrest or detention (art. 9(4)); the right of liberty of movement and freedom to choose a residence (art. 12); the right of an alien to contest an order of expulsion (art. 13); the right to protection of the law against arbitrary or unlawful interference with privacy, family, home or correspondence (art. 17). Article 7 may not be derogated from. The others may be derogated from "in time of public emergency which threatens the life of the nation . . . [and then only] to the extent strictly required by the exigencies of the situation. . . ." (art. 4).

Forms of Racial Discrimination, the [European] Convention on Human Rights and Fundamental Freedoms, and the American Convention on Human Rights all cite the Universal Declaration in their preambles. The reaffirmation and definition of many of the norms set out in the Declaration, in the Covenants and in the two regional human rights conventions, must be seen, in view of the large number of States-parties thereto, as substantial State practice evidencing the Declaration’s status as customary law.

It should be noted, therefore, that the norms set out in the Universal Declaration have been reaffirmed many times in the more than thirty years since its adoption. Extensive State practice in support of the Declaration is indicated by the widespread adherence to the various human rights covenants and conventions which are its progeny. The strict limits set upon the

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103 The provisions of the [European] Convention on Human Rights and Fundamental Freedoms which may be relevant in cases involving extra-legal extraterritorial apprehensions include: the proscription of torture and inhuman or degrading treatment (art. 3); the right to liberty and security of person (art. 5); the right to a prompt judicial determination of the lawfulness of an arrest or detention (art. 5(4)); the proscription of illegal interference with the right to privacy, family life, home, and correspondence (art. 8); the right to an effective remedy (art. 13); and, the right to liberty of movement and freedom to choose residence (Fourth Protocol). Article 4 may not be derogated from. Obligations undertaken with respect to the other above cited articles (and Protocol) may be derogated from “in time of . . . public emergency threatening the life of the nation . . . and then only to the extent strictly required by the exigencies of the situation.” (Art. 15).


The provisions of the American Convention on Human Rights which may be relevant in cases involving extra-legal extraterritorial apprehensions include: the right to humane treatment (art. 5); the right to personal liberty (art. 7); the right to prompt judicial determination of the lawfulness of an arrest or detention; the right to a fair trial (art. 7(6)); the right to freedom of movement and residence including the right to seek and be granted asylum (art. 22); and, the right to judicial protection and remedy (art. 25). It should be noted that while States-parties only undertake to ensure these rights to “persons subject to their jurisdictions,” they also undertake a more general obligation to “respect the rights and freedoms recognized” in the Convention (art. 1). The obligations undertaken with respect to the above cited articles may only be derogated from “in time of . . . emergency that threatens the independence or security of a State Party . . . , to the extent strictly required by the exigencies of the situation.” (Art. 27).

105 Compare notes 85, 98, 102, and 103, supra.

106 As of Jan. 15, 1980, The Treaty Section of the Office of Legal Affairs of the United Nations had recorded the following number of ratifications or accessions:

- Covenant on Civil and Political Rights .............................................. 61
- The Optional Protocol ........................................................................ 22
- Covenant on Economic, Social, and Cultural Rights ..................... 63
- Racial Discrimination Convention .................................................. 106

As of Jan. 15, 1980, The Secretariat of the Organization of American States had recorded 20 signatures and 15 ratifications to the American Convention.
right to derogate from human rights norms indicate the legal significance of these norms. Finally, the reference in each of the covenants and conventions to the inherent and inalienable nature of human rights is a clear indication of the belief that the obligations undertaken in human rights treaties are required by the existence of a rule of (natural) law. Thus, many of the provisions of human rights law must now be seen as part of customary law.  

The various human rights documents that have been discussed here not only set out norms, but also clearly reflect a change in the status of the individual in international law. Not only has the individual been seen as having his own rights under international law, but the provisions for implementational machinery in several of the documents also indicate that the individual is now a subject of international law with standing to seek relief under it.

VII. UNITED STATES OBLIGATIONS UNDER POSITIVE INTERNATIONAL LAW

If the human rights obligations of customary law are not sufficiently persuasive, then it is submitted that the United States also has specific human rights obligations under positive international law. The United Nations Charter has seven specific references to human rights which the President of the United States has recognized as legally binding obligations. The principles of the Charter reflect the general principles of the laws of civilized nations, and are supported by “the lengthy practice of the United Nations.” They have provided the basis for taking the consideration of human rights out of the United Nations Charter’s proscription of interference “in matters which are essentially within the domestic jurisdiction of any state...”

The United States, as a member of the Organization of American States (O.A.S.), has undertaken an obligation to respect the rights set

106 See notes 98, 102, and 103 supra.
106a Eric Suy, the Legal Counsel to the United Nations, has suggested that fundamental human rights are not only customary law but jus cogens. E. Suy, Le droit des traites et les droit de l’homme, INAUGURAL LECTURE OF THE ELEVENTH STUDY SESSION OF THE INTERNATIONAL INSTITUTE OF HUMAN RIGHTS, Strasbourg, France (June 30, 1980).
106b The European Convention on Human Rights (Art. 25), the American Convention on Human Rights (Art. 24), the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 14), and the Optional Protocol to the International Covenant on Civil and Political Rights all provide for the filing of petitions or complaints by individuals who allege that their human rights have been violated by a State party. The two regional conventions also provide for actual adjudication of the complaints.
107 Humphrey, supra note 86, at 41-46.
EXTRATERRITORIAL ABDUCTIONS

out in the American Declaration of the Rights and Duties of Man. Judge Buergenthal, before his elevation to the Inter-American Court on Human Rights, persuasively argued that the 1967 Protocol of Buenos Aires, in amending the Charter of the Organization of American States, incorporated by reference the normative provisions of the American Declaration into the Charter of the O.A.S. The rights set out in the Declaration were thereby raised to the level of binding international obligations.

In recent years the United States has signed a number of international human rights conventions including the International Covenant on Civil and Political Rights and the American Convention on Human Rights. The latter two have been submitted to the United States Senate for consent to ratification. While the United States has not yet ratified either of these documents, it has, by virtue of signing them, undertaken an international obligation with respect to them. The Vienna Convention on Treaties, which has been called "the cement that holds the world community together," provides that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty. . . ."

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The provisions of the American Declaration on the Rights and Duties of Man which may be relevant in cases of extra-legal extraterritorial apprehensions include: the right to life, liberty and security of the person (art. I); the right to residence and movement (art. VIII); the right to inviolability of the home (art. IX); the right to basic civil rights (art. XVII); the right of every person to "resort to the courts to ensure respect for . . . legal rights" (art. XVIII); the right to judicial protection from "acts of authority that . . . violate any fundamental constitutional rights" (art. XVIII); the right of a person to not "be deprived of his liberty except in the cases and according to the procedures established by preexisting law" (art. XXV); the right to due process of law (art. XXVI); and, the right of asylum. (art. XVII).

112 See Buergenthal, Revised O.A.S. Charter and the Protection of Human Rights, 69 AM. J. INT'L L. 828 (1975). The Inter-American Commission on Human Rights is now accepting complaints based upon alleged violations of the rights set out in the American Declaration on the Rights and Duties of Man, against member States of the O.A.S., such as the United States, who have not yet ratified the American Convention on Human Rights. Statute of the Inter-American Commission on Human Rights Art. 24 para. 1; Regulations of the Inter-American Commission on Human Rights Chap. III.


114 June 1, 1977.


While this provision of the Vienna Convention is usually seen as intended to insure that the very purpose of a treaty is not negated by the actions of a party before the treaty has come into force, it must be realized that there is an essential difference between "regular" treaties and human rights treaties. This distinction is recognized in the Vienna Convention in the exemption of human rights treaties from the provisions which allow
The preambles to the International Covenant and the American Convention both recognize that human rights attach directly to the individual person under international law. The enumeration of specific rights in both documents, and the provision for individual-petition implementational machinery in the American Convention, go towards defining the object and purpose of the documents, that every individual has inalienable rights which States must not violate.

It is true that each of the human rights treaties provides jurisdictional limits with regard to the obligations undertaken. While the International Covenant provides that each State party undertakes to ensure the rights set out therein "to all individuals within its territory and subject to its jurisdiction," and the American Convention provides that each State party undertakes to ensure the rights set out therein "to all persons subject to their jurisdiction," neither document sets similar jurisdictional limits on the obligation to "respect" the rights listed in the respective documents. There can be no doubt that extraterritorial abductions are disrespectful of human rights and therefore in violation of the "object and purpose" of the obligations undertaken in the Covenant and the American Convention. In addition, the word "jurisdiction" in the American Convention must be interpreted within the spirit and purpose of the Convention and therefore should be read to include all situations in which an individual is subject to the coercive power of the State. Accordingly, extraterritorial exercises of State power in violation of an individual's human rights are proscribed by the American Convention.

It should be noted that the right to a judicial remedy and the right to a judicial determination of the lawfulness of an arrest are rights that attach to individual defendants when they are, or should be, before a court. They would thus be rights of extraterritorially kidnapped defendants who are within the boundaries of jurisdiction established in the human rights treaties.

When a State becomes a party to a human rights treaty it renounces termination or suspension of a treaty because of a material breach. Art. 60(5). The recognition of this distinction, and the fact that human rights treaties do not merely create reciprocal legal obligations among states but also confer protection upon individuals (see Austria v. Italy, 1961 Y.B. Eur. Conv. on Human Rights 140 (European Commission on Human Rights)), seems to imply that the term "object and purpose," and the protection afforded to "object and purpose" under international law, would necessarily receive a broad interpretation when applied to a human rights treaty.

117 See notes 98 and 103, supra.
118 International Covenant on Civil and Political Rights, supra note 99, art. 2.
119 American Convention, supra note 103, art. 1.
120 See notes 118 and 119, supra,
the supposed right to treat the inhabitants of its territory as it wishes. If another State party to the same human rights treaty invades the territory of one of the State parties and violates the human rights of an inhabitant, thereby doing what the sovereign may not do, the extraterritorial act must be seen as subverting the “object and purpose” of the treaty. If the individual has certain rights against the unlawful exercise of power by the sovereign, then, a fortiori, he must also have rights against the unlawful exercise of power by a foreign nation.

Extraterritorial abductions are a violation of the “object and purpose” of human rights treaties since they involve distinct violations of human rights and they subvert guarantees provided by treaties to the inhabitants of other State parties. Furthermore, the “object and purpose” is also violated when domestic United States courts refuse to afford relief to individuals for violations of international law. One of the clear purposes of human rights treaties is to confer upon the individual the status of a subject of international law and the concomitant right to relief.

Although the timetable for Senate consideration of consent to ratification of the Covenants and the American Convention is not predictable, those documents will become binding United States law when constitutional procedures have been complied with and they have been ratified. At

121 It should be noted that whether or not a treaty directly becomes part of United States law is dependent on whether it is self-executing. Foster v. Neilson, 2 Pet. 253, 314 (1929). The issue is often framed in terms of whether the treaty provisions are sufficiently clear and definite so as to be judicially enforceable. Sei Fujii, 38 Cal.2d 718, 242 P.2d 617. While the International Covenant requires State parties to take necessary steps “where not already provided for by existing legislative or other measures” (art. 2(2)), and while the American Convention has a similar provision (art. 2), the raison d'etre of the treaties and their specific definitions of the rights set out would appear to support an argument interpreting them (or at least, most of their provisions) as self-executing. See Goldman, The Protection of Human Rights in the Americas, CENTER FOR INTERNATIONAL STUDIES POLICY PAPER 20-31 (1972). While the United States did issue a statement indicating that it did not regard the Part I provisions of the American Convention to be self-executing, this was explained as permitting the United States to apply, among other things, “our court decisions . . . in carrying out the obligations of the Convention.” U.S. Dept. of State, Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights, San Jose, Costa Rica, November, 1969 (mimeo 1970). (The United States has made a similar declaration with regard to the Covenant.) On the legal questions raised by the self-serving nature of United States reservations and declarations to human rights treaties, see Schacter, The Obligation of the Parties to Give Effect to the Convention on Civil and Political Rights, 73 AM. J. INT'L L. 462, 464 (1979). The question of whether these human rights treaties are self-executing is the subject of dispute in scholarly circles. This author, however, stands with those who see the Covenant and the American Convention, once ratified, as directly enforceable in American courts. The details of this question, with regard to each of the provisions of these treaties are beyond the scope of this paper. The question of self-execution is not directly central, however, to the issue of whether the normative provisions of these treaties are part of customary international law. Also, the issue of self-execution vel non would not appear to have a controlling influence on the recognition of the existence of enforceable rights and the concomitant change in status of the individual under international law; that is, the application of international law by United States courts is not entirely dependent on whether the positive international law commitments of the United States have been directly incorporated into domestic law.
that point, the victim of an extra-legal extraterritorial abduction will certainly have a right of action and definitive protection.

VIII. APPLYING “NEW” INTERNATIONAL LAW IN THE UNITED STATES

International law is part of the law of the United States. Treaties, according to the Constitution, are part of the law of the land, and may, like congressional legislation, supersede, or be superseded by, conflicting laws. To the extent that contradictory domestic laws or contradictory positive international laws do not exist, customary law is also part of the law of the United States. United States courts should, therefore, apply both customary and positive international law in cases involving extraterritorial abductions. Under international law, as it has developed in recent years, individuals have rights and standing. The application of the “new” international law of human rights by domestic courts should provide protection and relief to the victims of extraterritorial abductions.

IX. CONCLUSION

The problem of extraterritorial abductions “is inextricably linked with the position that the individual occupies in both the internal and the international legal order.” The traditional approach of courts has been “deeply rooted in antiquated notions whose present day vitality is seriously questioned.” Garcia-Mora, writing twenty-three years ago, predicted that the “strength of the argument for rejecting the jurisdiction of the courts in cases of abduction will depend upon the degree of recognition accorded the individual as a subject of extradition treaties.” Unfortunately, international law has not yet recognized the rights of individuals in the process of extradition. International human rights law, however, has recognized the standing and rights of individuals in the broader context.

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128 U.S. Const. art. VI, cl. 2 states: The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; . . .

124 Schroeder v. Bissell (The Over the Top), 5 F.2d 838 (D. Conn. 1925). But it has long been settled that where possible United States courts will interpret United States law to be in conformity with American obligations under international (positive and customary) law. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804).

125 The Pacquete Habana, 175 U.S. 677 (1900). It should be noted here that no law of the United States authorizes or permits extra-legal extraterritorial apprehensions.

129 Garcia-Mora, supra note 1, at 448.

127 Id.

128 Id. at 449 (emphasis added).

129 See Bassiouni, supra note 1, at 25.
While the result in *Toscanino* was laudable, the attempt to support it with arguments based on traditional international law was doomed to failure. The practice of extraterritorial abductions is illegal under traditional international law, but there is no right or remedy provided for the individual. To the knowledge of the author, no court has yet attempted to deal with an extraterritorial abduction in light of the new international law of human rights, but the time is ripe. Some court must be the first to apply human rights law, and a case of extraterritorial abduction presents the perfect opportunity. Under the international law of human rights courts should find a sound basis for the remedy of divestiture of jurisdiction.

International law, after centuries of development, has finally recognized the rights of individuals. It is time to put those rights into practice and to afford protection against the practice of State kidnapping. As Professor Evans has observed, "a civilized system of law should be . . . concerned with the protection of the interest of the accused. . . ." International human rights law can now be the basis for turning concern into protection in the difficult cases of extraterritorial abduction.

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180 Evans, *A Survey*, supra note 2, at 98.