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Title	Extraterritorial abduction under the framework of international law: Does irregular mean unlawful?
Author(s)	McDermott, Helen
Publication Date	2014-05-09
Item record	<a href="http://hdl.handle.net/10379/4486">http://hdl.handle.net/10379/4486</a>

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EXTRATERRITORIAL ABDUCTION UNDER THE  
FRAMEWORK OF INTERNATIONAL LAW:  
DOES IRREGULAR MEAN UNLAWFUL?

A Thesis Submitted for the Degree of Ph.D. to the National  
University of Ireland, Galway by:

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February 2014

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## TABLE OF CONTENTS

Declaration of Originality.....	1
Acknowledgments.....	2

### INTRODUCTION

1. Research Question and Contribution.....	5
2. Outline of Study.....	9

### Chapter 1: State Cooperation in the Transfer of Suspects

Introduction.....	20
1. History of Extradition.....	22
1.1 Antiquity.....	23
1.2 Eighteenth and Nineteenth Centuries.....	24
1.3 Modern Day.....	25
1.3.1 Counterterrorism.....	27
1.3.2 International Criminal Justice.....	31
2. The Basis of International Cooperation.....	35
2.1 Theories on International Relations.....	37
2.2 The Obligation to Act in Good Faith.....	40
2.3 Extraterritorial Jurisdiction.....	43
2.4 The Duty to Extradite or Prosecute.....	46
3. Difficulties with the Existing Framework.....	51
3.1 The Political Offence Exception.....	51
3.2 Dual Criminality.....	56
3.3 Evidentiary Requirements.....	57
3.4 Non- Extradition of Nationals.....	59
4. The Extradition Relationship between Colombia and the United States.....	61
Conclusion.....	64

## **Chapter 2: Kidnapping**

Introduction.....	67
1. The Modalities of Forcible Abduction.....	71
2. Kidnapping under Public International Law.....	78
2.1 The Threshold of Force.....	80
2.2 Against the Territorial Integrity and Political Independence..	83
2.3 Self-Defense.....	88
3. The Application International Humanitarian Law to Kidnapping.....	95
3.1 Classification of The Afghan Conflict.....	96
3.1.1 Al-Qaeda as an Armed Group.....	98
3.2 Territorial Scope of Armed Conflict.....	101
3.3 Categories of Individuals in an Armed Conflict.....	104
3.3.1 Loss of Civilian Immunity.....	107
3.4. The Relocation of Fighters.....	109
4. Kidnapping under International Human Rights Law.....	116
4.1 The Human Rights Committee.....	120
4.2 The European Court of Human Rights.....	121
4.3 Extraterritorial Applicability of Human Rights Law.....	125
Conclusion.....	129

## **Chapter 3: Luring**

Introduction.....	132
1. Modalities.....	134
2. Luring under Public International Law.....	138
2.1 The Principle of Non-Intervention.....	141
2.1.1 Luring as Intervention.....	144
2.1.2 The Threshold for Non-Intervention.....	148
3. Luring under International Human Rights Law.....	150
3.1 The Right to Liberty and Security of the Person.....	152
3.1.1 Deprivation of Liberty.....	153
3.1.2 Arbitrary Arrest and Detention.....	156
Conclusion.....	161

## **Chapter 4: Disguised or De Facto Extradition**

Introduction.....	163
1. Modalities.....	165
1.1 Immigration Control.....	168
1.2 Deportation and Exclusion.....	171
2. Disguised or De Facto Extradition under International	
3. Human Rights Law.....	178
2.1 European Court of Human Rights.....	179
2.2 The Principle of <i>Non Refoulement</i> .....	183
2.3 Diplomatic Assurances.....	187
Conclusion.....	192

## **Chapter 5: Legal Consequences of Extraterritorial Abduction**

Introduction.....	195
1. Jurisdiction.....	197
1.1 Domestic Courts.....	197
1.2 International Courts.....	208
2. State Responsibility for Extraterritorial Abduction.....	225
2.1 Attribution of Conduct.....	227
2.1.1 Direction or Control.....	229
2.1.2 Acknowledges and Adopts.....	232
2.2 Private Individuals.....	234
3. Consent Precluding Responsibility.....	237
4. Reparations and Remedies.....	240
4.1 Human Rights Violations.....	247
Conclusion.....	251

<b>CONCLUSION</b> .....	253
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Bibliography.....	263
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Table of Selected Cases.....	280
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## **DECLARATION OF ORIGINALITY**

I, Helen McDermott, do hereby declare that the work submitted for examination is my own and that due credit has been given to all sources of information contained herein. With this declaration, I certify that I have not obtained a degree at National University of Ireland Galway or elsewhere on the basis of this work. I acknowledge that I have read and understood the Code of Practice dealing with Plagiarism and the University Code of Conduct of the National University of Ireland Galway and that I am bound by them.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## **ACKNOWLEDGEMENTS**

I would like to offer particular thanks to my supervisor, Dr. Shane Darcy, for his support, encouragement and advice. This work would not have been possible without the benefit of his guidance and careful supervision. I also wish to convey my deepest gratitude to the Irish Centre for Human Rights for the financial support that I received in the form of a Doctoral Fellowship.

I am greatly indebted to all of my friends from the Irish Centre for Human Rights who discussed and offered feedback on chapters of the work especially Alexis Bushnell, Amina Adanan, Yingxi Bi and Yvonne McDermott. I would also like to thank Annabel Brody, Ciara McLaughlin and Kate Doran for their camaraderie and encouragement.

A special word of thanks is owed to my brother, John, my sister Eileen, and my parents, John and Margaret. My parents have never wavered in their faith in me. I thank them for their support, love and encouragement throughout this project and it is my great pleasure to dedicate this thesis to them.

## INTRODUCTION

Do the interests of justice and the fight against terrorism justify extraterritorial abductions by states of persons they wish to interrogate or submit to trial? From the kidnapping of Eichmann in Argentina in 1960 to the snatching of Abu Anas al-Libi in Libya in 2013, irregular forms of apprehension continue to be employed as a tool to satisfy state interests in the prosecution and suppression of international crimes and terrorism-related offences.<sup>1</sup> This dissertation explores and analyses the use and legality of such practices through the lens of international law.

States have gone to great lengths to develop and improve systems of cooperation in the prosecution of international and transnational crime. Numerous bilateral and multilateral instruments have been negotiated to facilitate the transfer of criminal suspects between states, international institutions have been set up to prosecute international criminals and states have recognized a right, and in some cases an obligation, to submit the perpetrators of grave offences to their judicial systems regardless of where those acts were committed. Despite these efforts, the formal transfer of individuals from one jurisdiction to another is oftentimes frustrated; a treaty may not exist between the territorial state and the requesting state; the crime or suspect in question may be non-extraditable or it may be the policy of the requested government not to extradite nationals.<sup>2</sup> Other factors that can

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<sup>1</sup> *The Attorney-General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, 'Judgment', 12 December 1961, Criminal Case No. 40/61 (36 International Law Reports 1968, pp. 18-276); *Adolf Eichmann v. The Attorney-General of the Government of Israel*, Supreme Court of Israel, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61 (36 International Law Reports 1968, pp. 277-342); 'US capture Libyan al-Qaida leader Anas al-Liby officials say', *The Guardian*, (6 October 2013), available at: <http://www.theguardian.com/world/2013/oct/06/us-capture-al-qaida-leader-anas-liby-libya>.

<sup>2</sup> 'Lebanon- 2 Year Sentence in Plot to Blow up Hudson River Tunnels', *The New York Times*, (17 February 2012) available at: <http://www.nytimes.com/2012/02/18/world/middleeast/lebanon-2-year-sentence-in-plot-to-blow-up-hudson-river-tunnels.html>; The United States does not have extradition agreements with many states in which those suspected of terrorism are often located-Afghanistan, Libya, Lebanon, Somalia and Syria. See Title 18 United States Code §3181; Charles Kallenbach, 'Plomo O Plata Irregular Rendition as a Means of Gaining Jurisdiction over Colombian Drug Kingpins', 23 *International Law and Politics* (1990)



impede the formal process include, a risk that suspects will be alerted to the request giving them time to flee; the host state may not possess an effective police force and so may not be capable of locating persons within their borders or the requested state may simply be reluctant to comply with transfer requests.<sup>3</sup> When extradition fails or is unavailable, a state seeking to gain custody of a suspect is left with two options; it can consider the case closed or, it can employ methods outside the formal framework. In situations where the individual in question is wanted for serious crimes, the latter alternative may very well be the chosen option. Irregular methods of extraterritorial apprehension can be divided into three categories, kidnapping, luring and disguised or de facto extradition.

The apprehension of individuals outside an extradition framework would suggest that formal mechanisms for the transfer of suspects from one state to another or to an international court or tribunal are unable to satisfy the demands of bringing criminals to justice, and/or that states are unwillingly to be bound by such frameworks. Recognizing the importance of efforts to safeguard national and international security and to ensure justice for international crimes and terrorism-related offences, a question arises as to whether irregular methods of apprehension are legal under international law. In circumstances where formal procedures of extradition or surrender exist and are capable of satisfying these demands, the answer may seem obvious but consideration must be given to the fact that in some cases, extraterritorial abduction may constitute the only means by which those responsible for serious crime can be brought before a court.

One cannot deny the right of a state to protect itself from conduct that threatens peace and security and to take steps towards the prosecution and suppression of serious crime. In fact, the Security Council has called on

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169, at 170; Michael Plachta, '(Non-) Extradition of Nationals: A Neverending Story', 13 *Emory International Law Journal* (1999) 77.

<sup>3</sup> The Lebanese government has often refused extradition requests from the United States; See Gregory McNeal and B.J. Field, 'Snatch and Grab Ops: Justifying Extraterritorial Abduction' 16 *Transnational Law and Contemporary Problems*, (2007) 491, at 492.

states to take measures to this effect.<sup>4</sup> In saying that, the exercise of this right is not synonymous with an unbridled discretion to track down and apprehend perpetrators of serious crime wherever located. Regardless of the legitimacy of a state's interest in the fight against terrorism and the prosecution of international crime, international law demands that the methods chosen to realize these objectives conform to certain principles and rules. Accordingly, state interests, however strong, do not extinguish their international legal obligations. This thesis provides a comprehensive examination and assessment of the lawfulness of extraterritorial abduction under the framework of international law and a critical analysis of the practical legal consequences of its use.

## **1. RESEARCH QUESTION AND CONTRIBUTION**

The research question underpinning this project is whether extraterritorial apprehensions conducted outside formal procedures violate international law; in other words does irregular mean illegal? To answer this, the thesis identifies the international legal frameworks that apply to the different forms of the practice, clarifies the principles and rules triggered within each framework and considers the way in which national and international courts and tribunals have dealt with the issue.

The development of a sound and comprehensive answer to the research question posed demands consideration of a series of pertinent issues that underlie the issue of extraterritorial abduction. A determination as to the motivations for extraterritorial abduction begins with an examination of formal systems of extradition and surrender. This analysis raises the following questions: what is the basis of state cooperation in the transfer of suspects between jurisdictions? What aspects of the formal mechanisms established for the transfer of suspects lead to the employment of extraterritorial abduction? An understanding of the factors that contribute to

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<sup>4</sup> Security Council Resolution 1373 (2001); Security Council Resolution 1438 (2002); Security Council Resolution 1440 (2002); Security Council Resolution 1530 (2004); Security Council Resolution 1611 (2005).

the bypassing of formal procedures provides a foundation upon which an assessment of the legality of methods of extraterritorial abduction can be undertaken. To set the stage for the legal assessment, it is necessary to ask, what are the legal frameworks that regulate extraterritorial abduction? Upon identification of the frameworks, the next step is to consider, what are the primary international legal rules and principles triggered by extraterritorial abduction? The results discerned from the questions posed thus far will allow for the establishment of the legal status of extraterritorial abduction under the framework of international law. At this point, the issue that remains to be addressed relates to the legal consequences of extraterritorial abduction. This undertaking requires consideration of the following, what approaches have domestic and international courts used in applying international law to extraterritorial abduction? Establishment of the lawfulness of extraterritorial abduction under international law and the legal consequences that follow its use warrants the formulation of observations and suggestions as to how this area would benefit from improvement. This exercise necessitates contemplation of the following, can a balance be struck between the rights of the individual and the legitimate interests of states? Are there aspects of the existing framework for the transfer of suspects that if revised could reduce the incentive to employ extraterritorial abduction? Are there areas of the international system that could be strengthened to restrain state action and encourage compliance with international legal obligations in relation to the transfer of suspects between jurisdictions?

Recognizing that resort to extraterritorial abduction is likely to continue, especially in circumstances where national or international security is thought to be threatened, this thesis complements existing commentary in the area by highlighting the discontinuity between law and practice and identifying aspects of the existing system of extradition and surrender that if addressed, would promote adherence to established procedures and reduce incentives for resort to extraterritorial abduction. This project will approach the subject by examining its use, legality and acceptance in the

contexts of counterterrorism operations and the enforcement of international criminal justice.

Extraterritorial abduction has been condemned as a violation of international law but a comprehensive evaluation of the international legal frameworks applicable to the practice, and a delineation of the specific rules and principles violated by its use through the lens of counterterrorism operations and the enforcement of international criminal justice has not been offered. Christophe Paulussen's text, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court* is devoted to the issue of extraterritorial abduction.<sup>5</sup> This book deals extensively with apprehension and transfer of individuals to both domestic and international courts and tribunals; the relationship between extraterritorial abduction and the applicable international legal frameworks are addressed but it is not the focus of the study. Rather than an analysis of the legality of the practice itself and the factors that can influence its use, the discussion concentrates on determining the approach the International Criminal Court will take when presented with individuals brought before it by irregular means. The present study considers the issue of extraterritorial abduction from a different angle. The approach of international courts and tribunals to extraterritorial abduction is a fundamental part of the research undertaken but unlike Paulussen's text, it is but one of a number of components explored in addressing the central research question outlined above.

There are books that address extraterritorial abduction but the discussion of the issue is usually part of a text dealing with broader issues of international law. A number of works focusing on extradition law including Shearer, *Extradition in International Law*, Bassiouni, *International Extradition: United States Law and Practice* and Stanbrook & Stanbrook, *Extradition Law and Practice*, devote a section to abduction.<sup>6</sup> A section in Duffy, *The War on Terror and the Framework of International*

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<sup>5</sup> Christophe Paulussen, *Male Captus Bene Detentus: Surrendering Suspects to the International Criminal Court*, (2010).

<sup>6</sup> Cherif Bassiouni, *International Extradition: United States Law and Practice*, (2002); Stanbrook & Stanbrook, *Extradition Law and Practice*, (2000); Shearer, *Extradition in International Law*, (1971).

Law, deals with irregular rendition in the context of counterterrorism operations.<sup>7</sup> A number of academic articles focus on specific aspects of extraterritorial abduction.<sup>8</sup> Many of these works such as those by Quigley and Borelli focus on the human rights principles violated by the practice.<sup>9</sup> Another set of articles concentrate on the legality of the practice under United States law.<sup>10</sup> A number of authors have examined the justifications for the use of extraterritorial abduction and some have provided suggestions in relation to the future of irregular apprehensions. This research project complements and expands upon the work done in the area by engaging in an evaluation of the competing interests that arise in the context of the apprehension of suspected terrorists, alleged criminals and international fugitives.<sup>11</sup> The present study clarifies the law applicable to extraterritorial

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<sup>7</sup> Helen Duffy, *The 'War on Terror' and the Framework of International Law*, (2005).

<sup>8</sup> Abramovsky, A. & Eagle, S., 'U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?' 57 *Oregon Law Review* (1977); Aceves, W., 'The Legality of Transborder Abductions: A Study of *United States v. Alvarez Machain*', 3 *South Western Journal of Law and Trade in the Americas* (1996) 101; Baker, A.W., 'Forcible Transborder Abduction: Defensive versus Offensive Remedies for *Alvarez-Machain*', 48 *Saint Louis University Law Journal* (2003-2004); Bassiouni, M. C., 'Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition', 7 *Vanderbilt Journal of Transnational Law* (1973-1974) 25; Cordozo, M.H., 'When Extradition Fails, Is Abduction the Solution?' 55 *American Journal of International Law* (2002); Evans, A., 'Acquisition of Custody over the International Fugitive Offender-Alternatives to Extradition: A Survey of the United States Practice', 40 *British Yearbook of International Law* (1964) 82; Glennon, M.J., 'State-Sponsored Abduction: A Comment on *United States v. Alvarez-Machain*' 86 *American Journal of International Law* (1992); Gluck, J., 'The Customary International Law of State-Sponsored International Abduction and United States Courts' 44 *Duke Law Journal* (1994) 612; Grant, 'On the Borders of Law Enforcement-The Use of Extraterritorial Abduction as a Means of Attaining Jurisdiction over the International Criminal' 17 *Whittier Law Review* (1995-1996) 327; Grassie, Y., 'Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?' 64 *Washington University Law Quarterly* (1996) 1205; Gray, J., 'International Kidnapping and the Constitutional Rights of the Accused', 44 *Rutgers Law Review* (1991) 165; Kallenbach, C., 'Plomo O Plata: Irregular Rendition as a Means of Gaining Jurisdiction over Colombian Drug Kingpins' 23 *International Law & Politics* (1990) 169; McNeal, G., & Field, B., 'Snatch-and Grab Ops: Justifying Extraterritorial Abduction' 16 *Transnational Law & Contemporary Problems* (2007) 491.

<sup>9</sup> Borelli, 'Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Cooperation' 16 *Leiden Journal of International Law* (2003) 803; John Quigley, 'Government Vigilantes at Large: the Danger to Human Rights from Kidnapping of Suspected Terrorists' 10 *Human Rights Quarterly* (1988) 193.

<sup>10</sup> Jeffrey Loan, '*Sosa v Alvarez Machain*: Extraterritorial Abduction and the Rights of the Individual under International Law' 12 *Journal of International & Comparative Law* (2005) 253; Daniel Pines, 'Rendition Operations: Does U.S. Law Impose Any Restrictions?' 42 *Loyola University Chicago Law Journal* (2011) 523.

<sup>11</sup> Gregory McNeal and B.J. Field, 'Snatch and Grab Ops: Justifying Extraterritorial Abduction' 16 *Transnational Law and Contemporary Problems*, (2007) 491.

abduction and in so doing, provides a foundation upon which further research can be undertaken. A delineation of the frameworks and principles triggered by extraterritorial abduction lays the groundwork for the formulation of recommendations as to how this area can be better regulated and how the rights of states and individuals can be safeguarded.

The rate at which states engage in the apprehension of individuals outside any formal extradition framework indicates that existing mechanisms are inadequate to meet the demands of states in the transfer of suspects between jurisdictions and/or states are unwilling to be bound by the framework. In light of the fact that states will likely continue to engage in this practice in circumstances in which national or international security is thought to be threatened, a better understanding of the issue of extraterritorial abduction and its legality under international law is warranted.

## **2. OUTLINE OF THE STUDY**

Appreciating the importance and continuing relevance of the issue of extraterritorial abduction requires an understanding of the centrality of cooperation in the transfer and surrender of suspects within domestic and international criminal justice systems. The key to comprehending why extraterritorial abduction is sometimes resorted to when formal methods do not satisfy the demands of the party seeking to prosecute is recognizing that the apprehension of suspects is integral to securing justice for serious crime. These issues, which are the focus of Chapter 1, lay the groundwork for the assessment of the modalities and legality of methods of extraterritorial abduction undertaken in Chapters 2, 3 and 4.

By tracing the origins and evolution of extradition, section 1 considers state reliance on systems of cooperation to ensure the successful apprehension and subsequent prosecution of criminal suspects from antiquity to its modern day form. What is discerned from this exercise is that these systems are continuously evolving in response to the changing demands of the international community. Counterterrorism and the

enforcement of international criminal justice are two contexts that have prompted changes to established procedures so as to ensure effective cooperation and in turn, the suppression of crime.

Consideration of the evolution of state cooperation illustrates the shape of modern extradition and informs the debate as to *how* states cooperate. This leads the discussion to the inquiry undertaken in section 2: *why* do states cooperate in transferring suspects to a jurisdiction that wishes to prosecute? The results discerned from a survey of international relations theories that form the basis of state cooperation illustrate that states act largely out of self-interest. This does not mean that the decision to extradite is purely discretionary; as is discussed in the final part of section 2, international law places certain obligations on a state that necessitates compliance with treaty obligations and demands cooperation in the prosecution of certain crimes.

Having established how and why states cooperate in the transfer of suspects between jurisdictions, section 3 goes on to consider some of the factors that can lead to frustration of the formal transfer of suspects between states. The discussion in this section is central to the thesis as it sets the stage for the inquiry into the position of kidnapping, luring and disguised extradition under the framework of international law which is undertaken in Chapters 2, 3 and 4 respectively. The delineation of the factors that sometimes lead to the bypassing of formal procedures allows for the identification of gaps and shortcomings in the existing framework that if addressed, could reduce the incentives for resort to extraterritorial abduction.

Having outlined the design of state cooperation in the transfer of suspects, the aims of the formal system and the difficulties associated with it, Chapter 1 uncovers the main motivations underlying the resort to irregular methods of apprehension. The results garnered and conclusions drawn set the stage for an analysis of the modalities and legal position of these methods, which are collectively referred to as 'extraterritorial abduction'. The term extraterritorial abduction encompasses kidnapping, luring and disguised or

de facto extradition. These categories of apprehension differ in relation to their form and legality but what they all have in common, is the fact that they are conducted outside conventional systems of extradition and surrender.

Kidnapping is the physical apprehension of an individual outside of a state's territory; this method of extraterritorial abduction is the focus of Chapter 2. The identification of the elements of the practice and the contexts in which it is carried out allows for a determination of the legal frameworks applicable to kidnapping. Drawing on the cases of Eichmann and Abu Omar, the examination in section 1 lays the groundwork for a consideration in later sections of extraterritorial kidnapping under the frameworks of public international law, international humanitarian law and international human rights law.<sup>12</sup>

Having established the frameworks triggered, the legal analysis of kidnapping proceeds with an assessment of the elements of the practice under the principles and rules of public international law. A consideration of the extent to which the conduct involved constitutes a use of force within the meaning of Article 2(4) of the United Nations Charter is undertaken in section 2. The conclusion drawn from the analysis, that under certain circumstances kidnapping can constitute a violation of the prohibition, necessitates the subsequent consideration of potential justification under the right to self-defense and a clarification of the distinction between the *jus ad bellum* and the *jus in bello*.

The discussion moves on to investigate the application of international humanitarian law to the use of kidnapping. To illustrate the various issues that arise in determining whether the framework is applicable to a particular operation, section 3 considers its use in the context of the United States' counterterrorism efforts against al-Qaeda. Against the backdrop of the Afghan conflict, the territorial scope of an armed conflict and the application of international humanitarian law to abduction

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<sup>12</sup> *Eichmann*, *supra* note 1; *Amnesty International*, 'Italian Appeals Court convicts three former CIA officials in Abu Omar kidnapping case', Public Statement, AI Index: EUR 30/002/2013, (6 February 2013).



operations conducted in neutral states are examined. Having established that the framework can apply to operations carried out in states beyond that in which there is an ongoing armed conflict, the discussion turns to the categories of individuals in an armed conflict. This is followed by a clarification of the criterion used for determining whether international humanitarian law is applicable to the capture of an individual in the context of a non-international armed conflict. The final part of this section applies the prevailing approaches to two recent operations involving the targeting of suspected al-Qaeda affiliates by United States agents in Libya and Somalia.<sup>13</sup> This exercise illustrates the continuing usage of extraterritorial abduction in the context of counterterrorism and the importance of understanding when the framework of international humanitarian law applies to the practice.

The final framework under which the legality of extraterritorial kidnapping falls to be assessed is that of international human rights law. Section 4 measures the practice against the primary rights affected; the right to liberty and security of the person and the prohibition on arbitrary arrest and detention. Having established that the conduct involved can constitute a violation of Article 9 International Covenant on Civil and Political Rights and Article 5 European Convention on Human Rights, the approaches followed by the Human Rights Committee and the European Court of Human Rights are visited.<sup>14</sup> What is discerned from this inquiry is that judicial determinations regarding the human rights of the abductee sometimes hinge upon whether the state from which the individual has been taken has protested the abduction or has been complicit in the operation.

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<sup>13</sup> See Christian Henderson, 'The Extraterritorial Seizure of Individuals under International Law – The Case of al-Liby: Part I,' *Blog of the European Journal of International Law*, (6 November 2013), available at: <http://www.ejiltalk.org/the-extraterritorial-seizure-of-individuals-under-international-law-the-case-of-al-liby-part-one/>.

<sup>14</sup> ECtHR, *Öcalan v Turkey*, (Grand Chamber), Application No. 46221/99, 'Judgment', (12 May 2005); HRC, *Lilian Celiberti de Casariego v Uruguay*, Communication No. R.13/56, (29 July 1981), UN Doc Supp. No. 40 (A/36/40), at 185; HRC, *Sergio Ruben Lopez Burgos v. Uruguay*, Communication No. R.12/52, (29 July 1981), UN Doc. Supp. No. 40 (A/36/40) at 176; HRC, *María del Carmen Almeida de Quinteros et al. v Uruguay*, Communication No. 107/1981, (21 July 1983), UN Doc. CCPR/C/OP/2 at 138; HRC, *Cañón García v Ecuador*, Communication No. 319/1998 (5 November 1991), UN Doc. CCPR/C/43/D/319/1998, at 90; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, 'Judgment', 13 December 2012.

This finding leads to the conclusion that although a kidnapping may constitute a *de jure* violation of specific provisions, the pronouncements of the institutions charged with overseeing state compliance with human rights obligations can render the practice permissible *de facto*. A consideration of the extraterritorial reach of a state's obligations under the framework is imperative to understanding the application of international human rights law to kidnapping. The evidence drawn from the judgments of the European Court of Human Rights and the Human Rights Committee leads to the conclusion that a state's obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights are applicable to operations involving the kidnapping of an individual in a foreign state.

Luring and abduction by fraud are terms to describe the use of deception, tricks or ruses to entice an individual to a location where jurisdiction to arrest is then exercised.<sup>15</sup> The legality of this method of extraterritorial abduction is addressed in Chapter 3. The identification of the international legal frameworks applicable to the practice is facilitated in section 1 by an examination of cases from both national and international systems. This exercise illustrates the different shapes luring operations can take and in turn provides a delineation of the elements of the practice. Having established that public international law and international human rights law are the primary frameworks triggered, the proceeding sections measure the conduct involved against the applicable international legal rules and principles.

The legal examination of luring begins with a consideration of the conduct involved under the framework of public international law. The way in which luring can affect the state from which the individual is taken and

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<sup>15</sup> Arrest carried out in international airspace: House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 A.C. 339 (Decision of the Divisional Court pp. 342-362, '*Schmidt I*', Decision of House of Lords p. 362, '*Schmidt II*'), ECtHR, *Stocké v. Germany*, Application No. 11755/85, 'Judgment', (19 March 1991); Arrest carried out in international waters: U.S. District Court, District of Columbia, *United States v. Yunis*, Crim. No. 87-0377, 681 F. Supp. 909 (23 February 1988); Transported to a third country for subsequent extradition: ECtHR, *Bozano v France*, Application No. 9120/80 'Judgment', (18 December 1986); *Liangstriprasert v United States* [1991] 1 App. Cas. 225, 231 (P.C.).

the extent to which this affect constitutes a violation of the principle of non-intervention is considered in section 2. This analysis allows for the identification of a threshold for determining whether conduct rises to the level of intervention. Applying this threshold to luring, it is established the conduct involved will constitute unlawful intervention if: (1) state agents physically conduct police powers within the territory of another state for the purpose of inducing the individual or, (2) communications transmitted to the individual, whether from within or outside the state, constitute coercion in so far as the individuals free will is overborne.

Moving on to consider the legal status of luring under the framework of international human rights law, the primary rights affected are determined at the outset of section 3; the right to liberty and security of the person and the prohibition against arbitrary arrest and detention. Measuring the elements involved against Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights, it is established that luring will constitute a violation of these provisions when: (1) the conduct involved constitutes a deprivation of liberty; (2) the specific operation was not carried out in accordance with procedures established by law. The results discerned from an analysis of relevant decisions handed down by the Human Rights Committee, the European Court of Human Rights and the European Commission of Human Rights, lead to the determination that luring will not violate the right to liberty and security of the person and the prohibition against arbitrary arrest and detention if the operation in question is: (1) in conformity with domestic and international law (2) appropriate and proportionate under the circumstances and (3) limited to inducements which do not overcome the will of the individual so as to constitute a deprivation of liberty.

The use of immigration laws to deny a foreign national the privilege of entering or remaining in a territory for the purpose of having them transferred to a state that wishes to exercise jurisdiction over them is known

as disguised or de facto extradition.<sup>16</sup> The legality of this method of extraterritorial abduction is assessed in Chapter 4. An examination of the modalities of the practice undertaken in section 1 establishes that international human rights law is the principal framework triggered by the conduct. Principles of general international law are also applicable as it is from these that state authority to control its immigration policy derives. The source of this authority and its enforcement via the processes of exclusion and deportation are explored. A consideration of situations in which immigration procedures have been used in lieu of extradition reveals that the detection of disguised or de facto poses a serious barrier to regulation of the practice. This leads to the determination that although the deliberate bypassing of formal extradition procedures may constitute a de facto violation of international legal principles, the gap between the processes of immigration and extradition can mask the illegality and in practice, render the conduct permissible.

Having shown that the right to exercise immigration control derives from the principle of territorial sovereignty, the discussion turns to consider limitations on this authority. The international human rights principle of *non refoulement* and the general international law doctrine of good faith act as restraints on a state's ability to enforce immigration policies. The main finding of this exercise is that adherence to the prohibition on *refoulement*, although not preventing the employment of disguised or de facto extradition can reduce the harmful effects of its use.

The relationship between disguised or de facto extradition and principles of international human rights law is examined in section 2. The way in which the European Commission of Human Rights and the European Court of Human Rights have decided on applications that allege

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<sup>16</sup> U.S. District Court, Southern District of New York, *United States v. Badalamenti*, 7 January 1986, No. 84 Cr. 236, (626 F.Supp. 658); ECmHR, *Bozano v. France*, Application No. 9990/82 'Decision of 12 July 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 147-157; English Court of Appeal, *R v. Brixton Prison (Governor), Ex Parte Soblen*, (1962) 3 A11 E.R. 641; US Court of Appeals, *McMullen v. United States*, 953 F.2d 761, 763 (1992); US District Court, Southern District of New York, *Matter of Doherty*, 599 F. Supp. 270, 277 (1984); EcmHR, *C v. the Federal Republic of Germany*, Application No. 10893/84, 'Decision of 2 December 1985 on the admissibility of the application', *Decisions and Reports*, No. 45, pp. 198-204.

the practice violated their rights under Article 5 of the European Convention on Human Rights is considered. From this analysis, the difficulty of proving the circumvention of formal extradition is discerned and the weight given by the Strasbourg Court to the interests of state cooperation in suppressing crime is observed. This section concludes that disguised or de facto extradition can violate the rights of the abductee but the realization of those rights may be hampered by the inability to prove mala fides and the degree of deference afforded to state cooperation by the overseers of those rights.

Kidnapping, luring and disguised extradition are three categories into which extraterritorial abduction can be divided; the distinction being based on the modalities of the operation. The use of these categories facilitated the delineation of the international legal principles and rules triggered by extraterritorial abduction and more generally, the identification of the lawfulness of the practices under the framework of international law. Chapter 5 addresses the legal consequences for the different forms of irregular apprehension presented and discussed in Chapters 2, 3 and 4. This discussion begins with an examination in section 1 of the effect of extraterritorial abduction on the jurisdiction of the court hearing the case. The results garnered from a survey of domestic and international decisions establish that there is a growing shift away from the *male captus bene detentus* approach. They also reveal that despite a marked willingness to examine the pre-trial treatment of the accused in both the domestic and international sphere, a *bene detentus* outcome is nevertheless likely to follow, especially in cases where the accused is charged with serious offences. Recognizing that the dismissal of charges may be a disproportionate remedy in cases where the interests in trying the individual are strong, it is suggested that an all or nothing model should not be applied. In order to uphold the integrity of the proceedings, advance the interests of justice and vindicate the rights of the individual, a more logical and balanced approach would be to acknowledge the violation of the rights of

the suspect and provide a remedy along the lines of a reduction in sentence or financial compensation.

Section 2 considers the legal consequences for a state implicated in unlawful abduction and sets forth the following criteria for determining when state responsibility for an internationally wrongful act attaches: (1) there is an international legal obligation between two or more states; (2) that obligation has been breached and (3) the breach is attributable to the state. A delineation of the different types of abductors, state agents and private individuals sets the stage for an analysis of how conduct can become attributed to a state for the purposes of legal responsibility. The inquiry into the meaning of direction or control and an examination as to how the conduct of private agents can be subsequently adopted by a state indicates that the trial of an abductee may warrant the attribution of the wrongful conduct to the state despite the fact that it was undertaken by private individuals.

The consideration of circumstances precluding the attachment of responsibility is followed in section 4 with an examination of reparations and remedies available for breaches of international law. Determining the consequences of sovereignty violations necessitates an examination of instances in which repatriation of the abductee has been ordered by the court before which the abductee is brought. An inquiry into the appropriateness of this remedy in the case of serious offences leads to the determination that in practice, repatriation may be disproportionate in certain contexts and that courts may not be willing to grant it. This realization begets a discussion of alternative remedies such as apology to the injured state and the prosecution or other reprimand of the kidnappers. The ultimate conclusion drawn in this section is that because injured states rarely lodge a formal protest or instead resolve any such dispute through diplomatic channels, an official remedy does not follow the majority of international law breaches. Moving on to discern the legal consequences of human rights violations, consideration is first given to the extent to which private kidnappers can be held individually responsible. This examination reveals that the vertical relationship between state and individual created by

the human rights regime does not engender horizontal application. The impact of this on the ability of abductees to secure a remedy for human rights breaches is somewhat reduced by a state's positive obligations to protect those within its jurisdiction and to punish, investigate and redress such violations.

International law is developed by nations to guide inter-state relations and to promote peaceful coexistence and cooperation in the resolve of problems. The essence of the framework lies in its endeavour to maintain peace and security amongst the international community, although it increasingly addresses states' treatment of their own citizens. The unilateral use of force on the territory of other states and the failure to prevent and address human rights violations raises a question as to whether the underlying rationale for international law remains intact in the present day. It is true that international law evolves in tandem with the needs and interests of states but the aspiration that underpins its creation is of perpetual duration. In order to retain its authority, states must be willing to abide by their obligations and must insist upon and enforce compliance from other states.

Allowing state interests to override their legal obligations risks the creation of a breeding ground for recurring violations of international law. This would undermine the purpose of post-Charter international law, which is the maintenance of peace and security, and could ultimately lead to the weakening and deterioration of the international legal system. Extraterritorial abduction is one of many issues in the field of international law that illuminates the impact state interests can have on the realization of rights and the enforcement of legal duties. The tension between two fundamental components; the need to prosecute serious crime and the duty to respect the rights of individuals and that of other states, serves to illustrate the challenge faced by international law in restraining state action. No one can deny the right of a state to submit the perpetrators of crime to trial but this right is by no means absolute. To avoid regularizing the disregard of international law in the exercise of this right, it is necessary to

identify the rules and principles offended therein and to remind states of the fundamental importance of adhering to their international legal obligations.

What will be discerned from the research undertaken is whether, and in what circumstances, extraterritorial abduction violates principles and rules of international law and what are the legal consequences of these violations. What may ultimately be determined is that although irregularities involved in an extraterritorial abduction constitute *de jure* violations of international law, the treatment of the issue by those charged with overseeing compliance may render the conduct involved permissible *de facto*.



# CHAPTER 1

## INTERNATIONAL COOPERATION IN THE TRANSFER OF SUSPECTS

### INTRODUCTION

Extradition plays a paramount role not only in regular criminal law matters, but also in the suppression of transnational and international crimes.<sup>1</sup> In order to secure the prosecution of crimes, especially those of a transnational or international nature, states endeavor to develop an effective system of mutual assistance and cooperation in the surrender of criminal suspects. Extradition has been defined as:

an act of international legal help and co-operation for the purpose of repressing criminal activity, consisting of the handing over of an individual, accused or convicted of a criminal offence, by one State to another in order that he may be tried by the latter's courts, or that he may suffer in the latter's country a penalty already imposed upon him.<sup>2</sup>

There are a number of factors that can hamper the success of the extradition process. For example, a treaty may not exist between the territorial state and the requesting state. In 2006, Assem Hammound, an alleged al-Qaeda operative wanted in connection with a plot to attack underground transit links in New York and New Jersey was arrested in Lebanon but could not be extradited as there was no agreement between the United States and Lebanon.<sup>3</sup> In some cases, there may be a treaty but the crime or suspect in question may be non-extraditable. This could be due to application of the

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<sup>1</sup> M. Cherif Bassiouni, 'Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition', 7 *Vanderbelt Journal of Transnational Law* (1973-1974) 25, at 25.

<sup>2</sup> J. Hendrik & W. Verzijl, *International Law in Historical Perspectives: Nationality and Other Matters* (1972), at 269.

<sup>3</sup> 'Lebanon- 2 Year Sentence in Plot to Blow up Hudson River Tunnels', *The New York Times*, (17 February 2012) available at: <http://www.nytimes.com/2012/02/18/world/middleeast/lebanon-2-year-sentence-in-plot-to-blow-up-hudson-river-tunnels.html>; The United States does not have extradition agreements with many states in which those suspected of terrorism are often located- Afghanistan, Libya, Lebanon, Somalia and Syria. See Title 18 United States Code §3181.

political offense exception or the crime for which the individual is suspected may not be on the list of extraditable offences.<sup>4</sup> It may be the policy of the requested government not to extradite nationals.<sup>5</sup> Colombia is one example of a state that exercises such a policy.<sup>6</sup> Other factors that can frustrate the formal process include, a risk that extradition targets will be alerted to the request giving them time to flee; the host state may not possess an effective police force and so may not be capable of locating persons within its borders; the foreign government may simply be reluctant to comply with extradition requests or extradition may be barred by the non-fulfilment of a formality in the treaty.<sup>7</sup> If the existing system fails to satisfy the demands of criminal justice, states seeking to exercise jurisdiction over suspects located in other territories have sometimes resorted to methods outside the formal extradition process.

Irregular methods of apprehension can be divided into three categories, kidnapping, luring and disguised or de facto extradition. These practices may run counter to obligations imposed upon states and individuals by international human rights law, international humanitarian law and public international law. Each of these methods of extraterritorial abduction and the frameworks that regulate their use will be considered in Chapters 2, 3 and 4 respectively. As will be discussed in Chapter 5, although the irregularities involved in extraterritorial abduction may constitute violations of international law, this is not always reflected in the pronouncements of courts and tribunals before which abductees have been brought. Accordingly, although irregular methods of apprehension may technically be unlawful, use of these tactics are often found permissible in practice.

This Chapter will provide an overview of the formal system of extradition that has been created to facilitate cooperation in the

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<sup>4</sup> See section 3.1 *infra*.

<sup>5</sup> See Michael Plachta, '(Non-) Extradition of Nationals: A Neverending Story', 13 *Emory International Law Journal* (1999) 77.

<sup>6</sup> Charles Kallenbach, '*Plomo O Plata* Irregular Rendition as a Means of Gaining Jurisdiction over Colombian Drug Kingpins', 23 *International Law and Politics* (1990) 169, at 170; See sections 3.4 & 4 *infra*.

<sup>7</sup> The Lebanese government has often refused extradition requests from the United States. See Gregory McNeal and B.J. Field, 'Snatch and Grab Ops: Justifying Extraterritorial Abduction' 16 *Transnational Law and Contemporary Problems*, (2007) 491, at 492.

apprehension and transfer of international, transnational and domestic criminal suspects. Section 1 will trace the evolution of extradition from antiquity to its modern day form. By considering developments in the areas of international cooperation in counterterrorism and international criminal justice, the way in which the system of extradition evolves to meet the needs of states will be discerned. This discussion will be followed in section 2 with an examination of the legal and theoretical bases of state cooperation in the areas of mutual assistance and extradition. The reason why states accede to extradition requests and the international legal obligations placed upon them to do so will be examined. The final section will consider some of the impediments that can frustrate the attempts of states to have a suspect extradited. A survey of these factors will assist in identifying some of the motivations underlying the resort to extraterritorial abduction. This will in turn set the stage for an inquiry into the position of kidnapping, luring and disguised extradition under the framework of international law which will be undertaken in subsequent chapters.

## 1. HISTORY OF EXTRADITION

Debate surrounds the issue as to whether extradition was practiced before the nineteenth century.<sup>8</sup> Studies have confirmed that such arrangements did in fact exist.<sup>9</sup> In saying this, the extradition process that developed in antiquity bears little resemblance to that which we have today. It is nevertheless helpful to consider the origins of the practice as such an analysis provides an informative insight into the evolution of international cooperation in the suppression of crime. The history of extradition can be

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<sup>8</sup> C. L. Blakesley, 'The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History', 4 *Boston College International & Comparative Law Review* (1981) 39, at 42-45.

<sup>9</sup> P. O'Higgins, 'The History of Extradition in British Practice', 13 *Indian Yearbook of International Affairs* (1964) 78, at 108.

divided into three stages: (1) antiquity; (2) eighteenth and nineteenth centuries; (3) modern day.<sup>10</sup>

## 1.1 ANTIQUITY

Up until the 1660's, the majority of extradition arrangements, which were generally incidental to a larger treaty, focused on the surrender of political enemies rather than common criminals.<sup>11</sup> In the first period, states concerned with the stability of political order within their territories, sought the surrender of political offenders.<sup>12</sup> Before the French Revolution, the most serious crimes were considered to be offences committed against the state. The first codification of an extradition arrangement can be traced back to 1280 BC.<sup>13</sup> The treaty, which was concluded by Ramses II of Egypt and the Hittite prince Hattusili III, provided for the surrender of "great men," meaning political opponents. This agreement reflects the general structure of extradition arrangements that existed during this period in that the provision was a feature of a larger treaty concerned with peace and alliance. Further evidence pointing to the existence of a system of extradition in antiquity can be found in Roman times, in ancient Egypt and in the Hindu Code of Manu.<sup>14</sup> In Europe, the first treaty that provided for extradition was drawn up in 1174 AD between England and Scotland.<sup>15</sup>

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<sup>10</sup> M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, (2007) at 33; Shearer and F. von Martens make similar divisions, Shearer, *Extradition in International Law*, (1971), at 7-19.

<sup>11</sup> For a historical discussion of the treatment of the political crimes, see Christian Van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individuals and the International Public Order*, (1980), at 4-18.

<sup>12</sup> *Ibid.*

<sup>13</sup> S. Langdon & Alan H. Gardiner, 'The Treaty of Alliance between Hattusili, King of the Hittites and the Pharaohs Rames II of Egypt', 6 *Journal of Egyptian Archaeology* (1920) 179; Shearer, *supra* note 10, at 5.

<sup>14</sup> W. A. Buser, 'The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition', 14 *George Journal of International and Comparative Law* (1985) 357, at 358; Blakesley, *supra* note 8, at 47.

<sup>15</sup> G. Gilbert, *Responding to International Crime*, (2006), at 18.

## 1.2 EIGHTEENTH AND NINETEENTH CENTURIES

The foundations of the modern day system of extradition lie in the eighteenth century.<sup>16</sup> It was not until this period that states began to look beyond their borders in matters concerning the apprehension of criminals and suspected criminals. According to Martens, ninety-two treaties concerning fugitives were drawn up between 1718 and 1830.<sup>17</sup> These arrangements were largely negotiated between neighboring states, as travel to foreign lands was minimal. During this period, the focus of extradition agreements was on the transfer of military deserters.<sup>18</sup> Such persons were seen as undermining the purpose of the state, which at this time, was mainly the conduct of war.<sup>19</sup>

In the eighteenth century, France took the lead in developing the formal system of extradition.<sup>20</sup> This period is marked by the proliferation of treaty negotiations. The rise of the nation state and the notion of co-equal sovereignty spurred the promulgation of treaties in various areas including extradition.<sup>21</sup> Shearer has suggested that the sharp increase in instruments dealing with the surrender of common criminals can be explained by the increased mobility of individuals, an erosion of the importance placed on the community structure and a shift away from the belief that the state's interest in suppressing crime extended only to securing the departure of the individual from its territory.<sup>22</sup>

During the latter part of the eighteenth century, the need for mutual assistance amongst states in the extradition of criminals and suspected criminals increased. Developments in the areas of transport and communications created a situation in which states found it difficult to

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<sup>16</sup> Shearer, *supra* note 10, at 6.

<sup>17</sup> G.F. de Martens, *Recueil de Traités*, etc., 7 vols. (1801-26) as cited in Shearer, *supra* note 10, at 8.

<sup>18</sup> V. Epps, 'The Development of the Conceptual Framework Supporting International Extradition', 25 *Loyola Los Angeles International & Comparative Law Review* 369 (2003), at 375.

<sup>19</sup> Epps notes that the historical practice of extradition reflects the changes in the concept of the state, *ibid*, at 374-375.

<sup>20</sup> Gilbert has stated that France was the "founder of modern extradition practice", *supra* note 15, at 19; Blakesley has similarly noted that France was "the catalyst for the development of the law of extradition," *supra* note 8, at 51.

<sup>21</sup> Gilbert, *ibid*, at 19.

<sup>22</sup> Shearer, *supra* note 10, at 7.

control the movement of individuals across borders. The Jay Treaty was negotiated between the United States and Great Britain in 1794.<sup>23</sup> A number of its provisions such as the list of extraditable offences and the requirement of a showing of a *prima facie* case of guilt continue to appear in modern instruments.<sup>24</sup>

The Revolutions in France and America spawned a new concept of the state, the idea of government by the people emerged.<sup>25</sup> This concept was set out in the French Declaration of the Rights of Man and the Citizen, the American Declaration of Independence, the Bill of Rights and the United States' Constitution. The influence of these instruments led to the incorporation of protections of the individual into subsequent extradition arrangements. The nineteenth century saw the birth of the political offence exception. The Belgians and the French were the first to incorporate the exception into their extradition arrangements.<sup>26</sup> The most notable treaty negotiated in this period was between Britain and France in 1852. Although it never actually came into force, this instrument went further than the Jay Treaty in terms of creating a blueprint for subsequent extradition agreements.<sup>27</sup> It included the political offence exception, the non-extradition of nationals, the principle of specialty, an expanded the list of extraditable offences and an extension of the scope of the treaty to accused as well as convicted criminals.

### 1.3 MODERN DAY

Since 1948, there has been a surge in the negotiation of bilateral and multilateral instruments dealing with extradition.<sup>28</sup> Up until this period, extradition treaties were traditionally negotiated between two states.

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<sup>23</sup> Jay Treaty, 8 Stat. 116, 129 (1794).

<sup>24</sup> The political offence exception, double jeopardy and the principle of specialty did not feature in the Jay Treaty.

<sup>25</sup> Epps *supra* note 18, at 375.

<sup>26</sup> Belgian Extradition Act of October 1, 1833, *cited* in Van den Wijngaert, *supra* note 11, at 12.

<sup>27</sup> The Parliament of the United Kingdom would not approve it because of the requirement for a *prima facie* evidence of guilt; Shearer, *supra* note 10, at 15.

<sup>28</sup> The United States currently has extradition treaties with 109 countries. List available on U.S. Department of State website: <http://www.state.gov/s/l/treaty/faqs/70138.htm>.

Bilateral agreements were favored because crime was generally the concern of individual states rather than that of the larger international community; if an offender fled across an international border, the state in which the criminal was found would return him to the requesting state. Due to an increase in the movement of people, the suppression of crime took on an international element. The first multilateral extradition treaties were those between the American States in 1879 and 1911, the Council of Europe Convention on Extradition in 1957 and the Inter-American Convention on Extradition in 1981.<sup>29</sup>

Extradition is part of a wider network of systems of cooperation in law enforcement. As well as the negotiation of extradition treaties, a number of other mechanisms for the suppression of transnational and international crime have been developed. States have entered into mutual legal assistance treaties for the purposes of cooperation in criminal investigations.<sup>30</sup> These instruments generally deal with the following: the acquisition of bank records and other financial information; questioning witnesses and taking statements and testimony; obtaining copies of government records; serving documents; transferring persons in custody; conducting searches and seizures and the freezing of assets. The Extradition Agreement between the European Union and the United States entered into force in February 2010.<sup>31</sup> This agreement complements existing bilateral instruments between

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<sup>29</sup> For a full list of multilateral treaties and conventions on extradition among American states see Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions*, (2006); Treaty on Extradition, signed at Lima on March 27, 1879 at the American Congress of Jurists; 1911 Agreement of Extradition, signed at Caracas on July 18, 1911 at the Bolivarian Congress, Agreement to Interpreting the Agreement on Extradition of July 18, 1911; Council of Europe, European Convention on Extradition, 13 December 1957, ETS 24; Inter-American Convention on Extradition, signed at Caracas February 25, 1981 at the Inter-American Specialized Conference on Extradition convoked by the Organization of American States.

<sup>30</sup> UN General Assembly, United Nations Convention against Transnational Organized Crime, adopted by the General Assembly, 8 January 2001, A/RES/55/25; UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422; Inter-American Convention on Mutual Assistance in Criminal Matters, adopted at the twenty-second regular session of the Organization of American States (OAS) General Assembly meeting on May 23, 1992.

<sup>31</sup> Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America.

the United States and individual European Union member states. A similar instrument has been negotiated between the European Union and Japan.<sup>32</sup> It provides for mutual legal assistance in criminal matters including cooperation in the areas of testimony and the exchange of bank information. Steps have also been taken toward enhancing cooperation between national police agencies. INTERPOL is an administrative agency that acts as a global communication network between domestic law enforcement authorities.<sup>33</sup> There are currently 190 members.<sup>34</sup> INTERPOL uses a system of red 'wanted' notices that allows for the circulation of an arrest warrant to the police forces of other INTERPOL member States.

In response to the growing concern with transnational and international crimes, the international system of extradition has had to adjust. The rise in terrorism-related offences has spurred a number of developments in the area of extradition law including a shift away from the political offence exception and the lowering of evidentiary standards. As well as this, the emergence of international courts and tribunals has led to the creation of a separate, albeit related system of transfer involving the surrender of indicted criminals to international courts and tribunals.

### 1.3.1 COUNTERTERRORISM

A number of international instruments dealing with the suppression of terrorism have been negotiated.<sup>35</sup> The United Nations currently oversees

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<sup>32</sup> Council Decision 2010/616/EU 7 October 2010 on the conclusion of the Agreement between the European Union and Japan on mutual assistance in criminal matters.

<sup>33</sup> See Interpol website: <http://www.interpol.int>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); European Convention on the Suppression of Terrorism (1977); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1979); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); International Convention for the



sixteen international counterterrorism instruments.<sup>36</sup> Amongst the events that have contributed to the international community's heightened concern with addressing terrorism related offences are, the bombing in Oklahoma City in 1995, gas attacks on the Tokyo underground in 1995, bombing of United States embassies in Nairobi, Kenya and Dar es Salaam in 1998, bombing of the USS Cole in Yemen in 2000, attacks on the World Trade Center in 1993 and 2001, the bombing of the London underground in 2005 and the recent bombings at the finish line of the Boston Marathon. The United Nations has called on states to take a serious approach toward the suppression of terrorism.<sup>37</sup> New extradition and mutual legal assistance treaties have been concluded for the purposes of expediting the extradition process, strengthening intelligence-sharing efforts and enhancing cooperation between national law enforcement agencies.<sup>38</sup> One of the most notable responses has been the adoption by the European Union of the Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States.<sup>39</sup> The Decision is based on the principle that Member States automatically recognize each other's judicial decisions ordering the arrest of a suspect. This system has simplified the procedures for surrender between states and in turn, expedited the process. The agreement does not include the double criminality requirement, states cannot refuse to extradite based on the principle of the non-extradition of nationals and the political offense exception has been removed.

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Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); International Convention for the Suppression of Acts of Nuclear Terrorism (2005); Amendment to the Convention on the Physical Protection of Nuclear Material (2005); Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005); Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010).

<sup>36</sup> *Ibid.*

<sup>37</sup> UN Security Council, Resolution 1368, 'Threats to international peace and security caused by terrorist acts,' (12 September 2001), S/RES/1368 (2001).

<sup>38</sup> Agreement on extradition between the European Union and the United States of America, 7 July 2003; Agreement on mutual legal assistance between the European Union and the United States of America, 7 July 2003, published in OJ L 181, 19 July 2003.

<sup>39</sup> European Union: Council of the European Union, Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States, 13 June 2002; For a discussion on EU-US cooperation in the suppression of terrorism see Kristin Archick, 'US-EU Cooperation against Terrorism', *Congressional Research Service*, (2 May 2011).

These developments illustrate the way in which the international system of extradition adapts to respond to contemporary challenges. In practice, the framework only proves effective when the states behind it cooperate. There have been a number of recent cases where states have cooperated in the successful extradition of individuals wanted on terrorism related offences. Many of these followed lengthy proceedings in the requested state. In January 2013, Abid Naseer was extradited to the United States to face charges associated with the plotting of attacks in the United Kingdom and the United States.<sup>40</sup> Naseer was indicted by a New York federal court in 2010 but fought extradition until it was granted in 2013.<sup>41</sup> Following an eight-year legal battle involving appeals to the European Court of Human Rights [*hereinafter* ECtHR], Abu Hamza and four others were extradited to the United States in 2012 to face terrorism-related charges.<sup>42</sup> The lengthy proceedings that led to the transfer of Abu Qatada to Jordan from the United Kingdom in July 2013 further illustrate how the formal extradition process can sometimes prove complex.<sup>43</sup> Abu Qatada, a radical cleric charged with conspiracy to carry out a terrorism-related attack in Jordan claimed that if he were returned to Jordan, evidence obtained through torture would be used against him at trial. The proceedings involved recourse to the ECtHR, the drafting of a new mutual assistance treaty between the two states and an estimated £1.7 million in legal aid and government costs.<sup>44</sup>

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<sup>40</sup> Helen Pidd, 'Suspected al-Qaida Terrorist Extradited from Britain to US', *The New York Times*, (3 January 2013), available at: <http://www.theguardian.com/world/2013/jan/03/suspected-terrorist-extradited-britain-us>.

<sup>41</sup> Mossi Secret, 'Abid Naseer Extradited to NY from Britain to Face Terrorism Charges', *The New York Times*, (3 January 2013), available at: <http://www.nytimes.com/2013/01/04/nyregion/abid-naseer-extradited-on-terror-charges-to-new-york-from-britain.html>.

<sup>42</sup> Owen Bowcott, 'Abu Hamza Extradition to US goes ahead after Court Defeat', *The Guardian*, (6 October 2012), available at: <http://www.theguardian.com/world/2012/oct/05/abu-hamza-loses-extradition-appeal>

<sup>43</sup> 'Timeline: Abu Qatada', *The Guardian*, (7 July, 2013), available at: <http://www.theguardian.com/uk/2008/jun/18/uksecurity.terrorism>.

<sup>44</sup> *Othman (Abu Qatada) v. The United Kingdom*, Application Number 8139/09 [2012] ECHR 56 (17 January 2012); James Melkle, 'Abu Qatada Extradition Battle has Cost Taxpayers 1.7, says Theresa May', *The Guardian*, (Friday 14 June, 2013), available at: <http://www.theguardian.com/world/2013/jun/14/abu-qatada-extradition-theresa-may>.

A further point that sometimes renders formal extradition impractical for the apprehension of terrorist suspects is the fact that it may not be the intention of the abducting state to bring the individual before a court. Although the Obama Administration has shifted the United States' counterterrorism policy away from the use of extraordinary rendition, it is still necessary to consider the practice. Extraordinary rendition focuses on the collection of intelligence rather than the trial of individuals suspected of committing or conspiring to commit acts of terrorism.<sup>45</sup> Those thought to possess information about key operatives have been apprehended in various parts of the world and transferred to detention facilities for the purposes of interrogation.<sup>46</sup> The United States has not acted alone in carrying out such operations, many states including the United Kingdom, Poland, Germany and Ireland have been implicated in facilitating its use.<sup>47</sup> The involvement of such states ranges from hosting detention facilities and participation in detainee interrogations to allowing airports and airspace to be used by aircrafts carrying out rendition flights.

In 2009, the President of the United States condemned the use of torture, pledged to close Guantanamo Bay and issued an executive order to shut down CIA detention facilities.<sup>48</sup> This policy shift has been welcomed but there is still some scepticism that the extraordinary rendition program has not been entirely extinguished. The ability to transfer individuals to other countries for detention has been retained. On its face, this is a perfectly sound policy option but in practice, some of the countries to

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<sup>45</sup> For a discussion of the practice *see* Centre for Human Rights and Global Justice, The Committee on International Human Rights of the Association of the Bar of the City of New York, *Torture by Proxy: International and Domestic Law Applicable to Extraordinary Renditions* (2004).

<sup>46</sup> *El-Masri v the former Yugoslav Republic of Macedonia*, ECtHR, application no. 39630/09, (13 December 2012).

<sup>47</sup> Parliamentary Assembly, Council of Europe, *Alleged Secret Detentions in Council of Europe Member States*, Dick Marty, (26 January 2006); Open Society Foundation, *Globalizing Torture CIA Secret Detention and Extraordinary Rendition* (2013).

<sup>48</sup> *White House*, Executive Order 13492, 'Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,' (January 22, 2009), available at: [http://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities); *The White House*, Executive Order 13491, 'Ensuring Lawful Interrogations,' (January 22, 2009), available at: [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations).

which individuals are sent have records of torture and detainee mistreatment.<sup>49</sup> Reliance on diplomatic assurances and post monitoring of detainee treatment has been criticized for not going far enough to satisfy states obligations under the principle of *non refoulement*.<sup>50</sup> A recent decision handed down by the ECtHR indicates that provided the assurances received are sufficiently reliable, agreements regarding the post transfer treatment of the accused will comply with a state's human rights obligations even in the context of transfers to countries where there is a record of torture.<sup>51</sup>

In the face of failed extradition requests and the potential for lengthy procedures, states have occasionally resorted to self-help options to gain custody of suspected terrorists.<sup>52</sup> The United States' recent abduction of Abu Anas al-Libi in Libya and its failed attempt to apprehend a senior leader of al-Shabaab militant group in Somalia indicate that despite improvements in the areas of extradition and mutual assistance, the occasional resort to extraterritorial abduction is likely to continue.<sup>53</sup> Extraterritorial abductions carried out in the context of counterterrorism will be returned to at various points in this study. The principle of *non refoulement* and the issue of diplomatic assurances is explored further in Chapter 4.

### 1.3.2 INTERNATIONAL CRIMINAL JUSTICE

Recent decades have seen a growing focus on securing accountability for

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<sup>49</sup> Amnesty International, *Dangerous Deals: Europe's Reliance on "Diplomatic Assurances" Against Torture*, Index: EUR 01/012/2010, (2010).

<sup>50</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, UN Doc A/HRC /13/39, 9 February 2010, p. 18, para. 67.

<sup>51</sup> *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 44.

<sup>52</sup> See D. Cameron Findlay, "Abducting Terrorists Overseas for Trial in United States: Issues of International and Domestic Law", 23 *Texas International Law Journal*, (1988), 1, Findlay opined that extradition proved an ineffective policy with regard to combating terrorism. Based on three studies Findlay states that "very few terrorists are extradited for trial", at 8.

<sup>53</sup> D. Kirkpatrick, N. Kulish & E. Schmitt, 'US Raids in Libya and Somalia Strike Terror Suspects', (5 October, 2013), *The New York Times*, available at: [http://www.nytimes.com/2013/10/06/world/africa/Al-Qaeda-Suspect-Wanted-in-US-Said-to-Be-Taken-in-Libya.html?\\_r=0](http://www.nytimes.com/2013/10/06/world/africa/Al-Qaeda-Suspect-Wanted-in-US-Said-to-Be-Taken-in-Libya.html?_r=0).

international crimes. Such crimes, which include genocide, crimes against humanity and war crimes are characterized by their gravity and the immense effect they have not only on direct victims, but also on the international community.<sup>54</sup> A range of tools including international and national prosecutions, truth commissions and victim compensation schemes have been utilised in the aftermath of these grave offences. Although the concept of universal jurisdiction attaches to international crimes, very few states have been willing to exercise it.<sup>55</sup> One of the major solutions to impunity has been the creation of international courts and tribunals with jurisdiction over the most serious offenses. Considering the fact that extradition usually involves a state-to-state arrangement, the creation of these international institutions has necessitated the development of a new regime for the surrender of individuals charged with international crimes.

The apprehension of suspected international criminals is one of the most challenging obstacles in relation to securing international criminal justice. One author has stated:

[t]he arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials, no development of the law by the courts; and ultimately, no international justice.<sup>56</sup>

Unlike national systems, international institutions do not possess their own police force and so cannot affect the arrest of a suspect absent the cooperation of states.<sup>57</sup> The International Criminal Court is charged with ending impunity for the “most serious crimes of concern to the international

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<sup>54</sup> Dinstein, ‘International Criminal Law’ 20 *Israel Law Review* (1985) 206.

<sup>55</sup> Amnesty International, *Universal Jurisdiction A Preliminary Survey of Legislation Around the World*, Index: IOR 53/004/2011, (2011).

<sup>56</sup> Gavin Ruxton, ‘Present and Future Record of Arrest War Criminals; the View of the Public Prosecutor of the ICTY’, in W.A.M. van Dijk and J.L. Hovens (eds), *Arresting War Criminals*, (2001), at 19.

<sup>57</sup> Antonio Cassese wrote, with respect to the refusal of state authorities to cooperate with the ICTY, that the Tribunal remains ‘a giant without arms and legs’, Cassese, ‘On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Law’, 9 *European Journal of International Law* (1998) 13; Cedric Ryngaert, ‘The International Prosecutor: Arrest and Detention’, *Leaven Centre for Global Governance*, Working Paper No. 24, (April 2009).

community as a whole”.<sup>58</sup> Efforts to fulfil this mandate have been hampered by shortcomings in the surrender regime and the reluctance of some states to cooperate with its requests. The fact that the Rome Statute and the Statutes of most internationalised courts including the *ad hoc* Tribunals do not provide for trials *in absentia* heightens the necessity to secure the presence of the accused before it and in turn increases reliance upon national jurisdictions.<sup>59</sup>

The inability of the International Criminal Court to gain custody over Sudan’s President, al-Bashir, is illustrative of the difficulties sometimes encountered in the apprehension of indictees.<sup>60</sup> Bashir was indicted in 2009 and again in 2010 on charges of war crimes, crimes against humanity and genocide.<sup>61</sup> The Sudanese President has travelled openly and been hosted at diplomatic meetings in countries including, China, Egypt, Kenya, Nigeria and Uganda. Despite the issuance of two arrest warrants and demands for cooperation with the Court, Bashir remains at large. In 2013, reports revealed Bashir’s intention to travel to the United States to attend the General Assembly.<sup>62</sup> Although the trip was ultimately cancelled, it would have been interesting to see if the United States, which is not a party to the International Criminal Court, would have afforded Bashir immunity or acceded to the Court’s demands to arrest him.<sup>63</sup>

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<sup>58</sup> Rome Statute, 17 July 1998, UN Doc. A/CONF.183/9, Article 5, para. 1; See C. Gosnell, ‘The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan’, 6 *Journal of International Criminal Justice* (2008) 841, at 845.

<sup>59</sup> S.D. Roper & L.A. Barria, ‘State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects’, 21 *Leiden Journal of International Law* (2008) 457, at 458.

<sup>60</sup> UN News Centre, ‘International Criminal Court indictees remain at large and Darfur crimes continue, Security Council told,’ (13 December 2012) available at: <http://www.un.org/apps/news/story.asp?NewsID=43764&Cr=darfur&Cr1=criminal+court#.UlgWvr9oBLQ>.

<sup>61</sup> Bashir’s Indictments available on the International Criminal Court website: [http://www.InternationalCriminalCourt-cpi.int/en\\_menus/InternationalCriminalCourt/situations%20and%20cases/situations/situation%20InternationalCriminalCourt%200205/related%20cases/InternationalCriminalCourt02050109/Pages/InternationalCriminalCourt02050109.aspx](http://www.InternationalCriminalCourt-cpi.int/en_menus/InternationalCriminalCourt/situations%20and%20cases/situations/situation%20InternationalCriminalCourt%200205/related%20cases/InternationalCriminalCourt02050109/Pages/InternationalCriminalCourt02050109.aspx).

<sup>62</sup> Human Rights Watch ‘UN Members: Oppose Al-Bashir’s Visit’, (September 18, 2013) available at: <http://www.hrw.org/news/2013/09/18/un-members-oppose-al-bashir-s-visit>.

<sup>63</sup> Colum Lynch, ‘Sudan’s Omar al-Bashir Cancels U.N. Trip’, *Foreign Policy*, (September 25 2013), available at: [http://thecable.foreignpolicy.com/posts/2013/09/25/sudans\\_omar\\_al\\_bashir\\_cancels\\_un\\_trip](http://thecable.foreignpolicy.com/posts/2013/09/25/sudans_omar_al_bashir_cancels_un_trip).

In light of these challenges, the *ad hoc* Tribunals and the International Criminal Court have taken assistance from international organisations in the apprehension of indictees.<sup>64</sup> The subsequent methods used to secure the presence of the accused have on occasion led to claims of forcible abduction being pleaded before the judges.<sup>65</sup> In these circumstances, the court or tribunal is presented with the dilemma as to whether it should call for the continuation of the trial or accede to principles of fairness, human rights and the integrity of the proceedings and demand that jurisdiction be refused. Considering the gravity of international crimes and the necessity to combat impunity for such acts, a strong argument for the continuation of the proceedings exists. These issues will be explored in Chapter 5.

By looking at the evolution of extradition, a number of conclusions can be drawn about international cooperation in the transfer of suspects and suppression of crime. Up until the nineteenth century, states were mainly concerned with combating crime within their borders. With the development of transport and communication systems, states began to seek the negotiation of bilateral treaties for the return of criminal suspects. The shift from a system concerned with the surrender of political criminals to one conferring protections upon such persons illustrates the way in which international cooperation adapts to serve the needs of states. Modern developments in the area of extradition evince the creation of a system to facilitate the suppression of international crimes and terrorism-related offences. States have negotiated numerous instruments in a bid to eliminate safe havens for perpetrators and end impunity for serious offences. Such efforts have improved the system but success is dependent upon the

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<sup>64</sup> For a discussion on the involvement of NATO troops in the apprehension of individuals indicted by the ICTY see Han-Rou Zhou, 'The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC', 4 *Journal of International Criminal Justice* (2006) 202.

<sup>65</sup> ICTY, *Prosecutor v Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavako Dokmanović', Case No. IT-95-13a-PT, 22 October 1997; ICTY, *Prosecutor v Simic*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9, 18 October 2000; ICTY, *Prosecutor v Nikolić*, 'Decision on the Defense Motion Challenging the Exercise of Jurisdiction by the Trial Chamber', Case No. IT-94-2-PT, 9 October 2002.

willingness of states to adhere to their obligations. The following section will consider the interests and legal duties that influence state cooperation in the area of extradition.

## 2. THE BASIS OF INTERNATIONAL COOPERATION

International extradition is a system of cooperation between states in the surrender of convicted and suspected criminals. Bassiouni has stated “[e]xtradition is probably the most significant instrument of international cooperation in criminal law.”<sup>66</sup> Such agreements may be based on treaty, bilateral or multilateral, or in the event that a treaty has not been concluded, may be carried out pursuant to the principle of reciprocity.<sup>67</sup> There are a number of theories that come to mind when considering the reasons why states engage in extradition. The most common rationale given for its use is the idea that all states share a common interest in suppressing crime.<sup>68</sup> As Lord Russel C.J. stated in *In Re Arton*:

The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilized communities that crimes acknowledged to be such should not go unpunished and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.<sup>69</sup>

This is a broad argument and although true, it does little more than scratch the surface of this inquiry.<sup>70</sup> In order to grasp the motivations underlying the use of extradition, it is necessary to consider the theories that form the basis of international cooperation.

Every state has an interest in punishing crime that injures it and/or its nationals. In some cases, the perpetrator commits the act while physically in the injured state and then flees across an international border. In others, the

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<sup>66</sup> Bassiouni, *supra* note 10, at 280.

<sup>67</sup> J. Francisco, ‘Reciprocity as a Basis of Extradition’ 52 *British Yearbook of International Law* 1 171.

<sup>68</sup> This view has been attributed to Grotius. C. Bassiouni & E. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, (1995), at 26.

<sup>69</sup> *In Re Arton* 1 QB 108 [1896], Lord Russel C.J., at 111.

<sup>70</sup> In considering the purpose of extradition, Wise has said that this theory is “too tenuous to stand as a complete warrant for the practice of extradition”. E. M. Wise, ‘Some Problems of Extradition’ 17 *Wayne Law Review* (1968-1969) 709, at 710.



conduct is carried out from a remote location with the offender never actually setting foot in the state. States subject wrongdoers to their criminal justice systems in order to satisfy the theories of punishment namely, retribution, deterrence, incapacitation and rehabilitation.<sup>71</sup> If an individual convicted or suspected of an offence is located in a foreign land, extradition provides a means by which that person can be brought to justice. This mechanism, if used correctly, frustrates the wrongdoer's ability to elude the criminal justice system by fleeing to another state. By eliminating sanctuaries, an effective system of international extradition constitutes a powerful tool in the suppression of crime. As Beccaria has stated, "the belief that one cannot find a patch of ground where crimes are condoned would be the most efficacious means of preventing them."<sup>72</sup>

Having established that the overarching aim of extradition is the suppression of crime, the theories that form the basis of inter-state cooperation must be considered. This inquiry, although related, differs from the preceding discussion in that it provides insight into *why* states cooperate with one another in the suppression of crime. It is obvious that every individual state is concerned with maintaining peace and order in their own territories and prosecuting any wrongdoing that may occur there but what is the basis for a state's interest in assisting other nations in the suppression of crime? Many theorists have explored the relationship between states in terms of how they interact at the international level.<sup>73</sup> The ideas that have emerged provide useful tools for understanding compliance with extradition requests.<sup>74</sup>

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<sup>71</sup> For a discussion on the traditional theories of punishment see Siegel, *Introduction to Criminal Justice*, (2010), at 491-497; Cyndi Banks, *Criminal Justice Ethics: Theory and Practice*, (2004), at 103-127.

<sup>72</sup> C. Beccaria, *Dei Delitti E Delle Pene* (1764), translated in Graeme R. Newman & Pietro Morongiu, *Crimes and Punishments* (Fifth Ed.), at 95.

<sup>73</sup> Martin Wight, *Four Seminal Thinkers in International Theory: Machiavelli, Grotius, Kant, and Mazzini*, (2005).

<sup>74</sup> In a broader sense, these theories are also relevant to understanding why states cooperate in other areas of mutual assistance.

## 2.1 THEORIES ON INTERNATIONAL RELATIONS

Wight identifies three paradigms for interpreting international relations.<sup>75</sup> These paradigms can be divided into the following schools of thought: Machiavellians, Grotians and Kantians.<sup>76</sup> For the Machiavellian school, which includes Clemenceau, Fredrick, Hobbes and Hegel, there is no such thing as an international community. Instead, states are motivated by self-interest.<sup>77</sup> According to this theory, a relationship of conflict exists among sovereigns and each state acts alone in the pursuit of its own interests; there are no moral rules restraining states in their interactions with each other and no universal concept of crime.<sup>78</sup> The Hobbesian tradition denies that common values, rules and institutions bind states. This theory does not support the idea that cooperation in the eradication of crime is undertaken for the benefit of the international community. For the Grotians on the other hand, the concept of *civitas maxima* guides the relationships between states, “international law commands human beings to combine for the repression of everything which is gravely injurious to the bases of social life.”<sup>79</sup> This approach, which rests on the assumption that all of humanity comprises one global community, envisages a shared concern amongst states with the suppression of crime wherever committed.<sup>80</sup> This shared concern promotes the trial of offenders or extradition to a state willing to prosecute. The third paradigm that can be used to understand interstate cooperation is associated with the Kantian school of thought.<sup>81</sup> The ideology that emerges from this

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<sup>75</sup> Martin Wight, *International Theory: The Three Traditions*, Royal Institute of International Affairs (1992); H. Bull, ‘Martin Wight and the Theory of International Relations: The Second Martin Wight Memorial Lecture’, *British Journal of International Relations* 2 (1976) 101.

<sup>76</sup> *Ibid.*

<sup>77</sup> G.F. Hegel, *Philosophy of Right*, “Each self-dependent state has the standing of a particular will and it is on this alone that the validity of treaties depends”, (Translated by S.W. Dyde) (2008), at 198.

<sup>78</sup> Hobbes stated, “[w]here no society is, there is no crime.” Thomas Hobbes, *Leviathan*, 190 (1651).

<sup>79</sup> William Edward Hall, *A Treatise on International Law*, (8<sup>th</sup> ed) (1924), at 68; For an overview of Grotius’ ideas see Claire Cutler, ‘The ‘Grotian Tradition’ in International Relations’, 17 *Review of International Studies* 1 (1991) 41; Also see, Hedley Bull, ‘The Grotian Conception of International Society’ in H. Butterfield and M. Wight (eds), *Diplomatic Investigations: Essays on the Theory of International Politics*, (1966) at 51.

<sup>80</sup> Gerhard Mueller, ‘International Criminal Law: *Civitas Maxima*- An Overview’, 15 *Case Western Reserve Journal of International Law* (1983) 1.

<sup>81</sup> Wight, *supra* note 75.

camp is based on the concept of a “society of states.”<sup>82</sup> Unlike *civitas maxima*, it envisages a community of states rather than that of individuals. According to this theory, the cooperation of states is based on principles of accommodation and toleration.<sup>83</sup>

None of these three paradigms provide a complete narrative on international relations. Instead, they offer generalizations of the leading theories on state interaction. International relations are not static and so the factors that guide state behavior change over time. Applying these theories to international cooperation in the suppression of crime, the concept of *civitas maxima* would hold that states engage in extradition with the overall interests of the world community in mind. This argument offers an idealistic view of international relations. It is doubtful that states enter into and comply with obligations in order to serve the interests of the world community. As Bassiouni has pointed out:

Extradition is still not viewed as a process serving the overall interests of the world community. That failing is the consequence of the diverse political interest of states and the absence of commonly shared interests and values in enforcing international criminal law as well as certain violations of national criminal law.<sup>84</sup>

Instead of adhering to the concept of *civitas maxima*, states are influenced by self-interest. It would go too far to say that they exist in a Hobbesian state of nature where there are no moral values; the provision of humanitarian aid to populations in need of assistance negates any such argument. Instead, states do act with the interests of other nations in mind but their own interests influence their willingness to enter into and comply with treaties.

Each state has an interest in receiving individuals who have violated their laws. Although entering into an extradition arrangement may not benefit the extraditing state immediately, cooperation with a request may secure a favorable response in the event that the extraditing state seeks the surrender of an individual from the requesting state in the future. The

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<sup>82</sup> Bassiouni & Wise, *supra* note 68, at 31.

<sup>83</sup> *Ibid.*

<sup>84</sup> Bassiouni, *supra* note 10, at 57.

extradition relationship between the United States and Russia provides an example of how the refusal of a state to comply with an extradition request can potentially influence future cooperation.

In 2008, Viktor Bout, a Russian citizen, was arrested in Thailand on an international arrest warrant for conspiracy to kill Americans and United States officials and for the supplying of arms to the Revolutionary Armed Forces of Columbia (FARC).<sup>85</sup> Thailand extradited Bout to the United States where he was subsequently convicted in a federal court.<sup>86</sup> In 2010, Konstantin Yaroshenko, also a Russian citizen, was apprehended in Liberia and handed over to the United States.<sup>87</sup> He was taken to the United States and convicted of drug trafficking offences. The United States has refused Russia's requests to have the two returned to Russia to carry out their sentences. The United States is now seeking the return of Edward Snowden from Russia. The whistleblower, who is wanted by the United States on charges of espionage and other related offences, has been granted temporary asylum in Russia.<sup>88</sup> Statements by Russian officials suggest that refusals by the United States to return Russian citizens in the past have influenced its reluctance to cooperate in transferring Snowden.<sup>89</sup>

If a state's willingness to negotiate extradition arrangements and cooperate in the transfer of suspects is based on satisfying its own interests, does that mean that the decision to extradite is purely discretionary? The following

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<sup>85</sup> Duncan Campbell & Ian MacKinnon, 'Lord of War' Arms Trafficker Arrested', *The Guardian*, (Friday 7 March, 2008), available at: <http://www.theguardian.com/world/2008/mar/07/thailand.russia>

<sup>86</sup> Chris McGrael, 'Victor Bout, Suspected Arms Dealer Extradited to New York', *The Guardian*, (Tuesday 16 November, 2010), available at: <http://www.theguardian.com/world/2010/nov/16/russian-arms-dealer-extradited>.

<sup>87</sup> Mansur Mirovalev, 'Russia accuses US of Kidnapping Pilot in Liberia', *The Washington Post*, (July 22, 2010), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072105817.html>.

<sup>88</sup> Steven Lee Myers & Anderw E. Kramer, 'Defiant Russia Grants Snowden Year's Asylum', *The New York Times*, (August 1, 2013), available at: <http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html>.

<sup>89</sup> Danier Herszenhorn, 'Russia Cites Extradition as a Sore Point with U.S.', *The New York Times*, (July 22, 2013), available at: <http://www.nytimes.com/2013/07/23/world/europe/russia-cites-extradition-as-sore-point-with-us.html>.

section will consider the extent to which international law places an obligation on states to cooperate in the suppression of crime.

## 2.2 THE OBLIGATION TO ACT IN GOOD FAITH

The principle of good faith is a fundamental canon of general international law that underlies the relationship between states in the execution of their rights and obligations.<sup>90</sup> It is not a source of rights or obligations but instead, it acts as a means of guiding state behavior in the exercise of their existing and future undertakings. The requirement of good faith places a limit on sovereignty in that it prohibits conduct that runs counter to treaties, agreements or duties that a state has entered into or has otherwise undertaken to comply with.

Pursuant to the rule of *pacta sunt servanda*, treaties carry an obligation that the signatories will perform their undertakings in good faith.<sup>91</sup> The Permanent Court of Arbitration has described the scope of the rule in the following terms:

According to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject matter to such acts as are consistent with the treaty.<sup>92</sup>

Article 31 of the Vienna Convention on the Law of Treaties provides that treaties be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>93</sup> Applying the principle to an extradition treaty, it would follow that efforts to transfer a suspect between the signatory states should be carried out pursuant to the terms of the agreement. Any attempt to

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<sup>90</sup> Hersch Lauterpacht (ed), *International Law- being the collected papers of Hersch Lauterpacht*, vol. 1, (1970) at 68-69; Malcolm Shaw, *International Law*, (6th edn 2008) at 98; *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253; Michel Virally, ‘Review Essay: Good Faith in Public International Law’, 77 *American Journal of International Law* (1983) 130.

<sup>91</sup> United Nations, Vienna Convention on the Law of Treaties, (23 May 1969), United Nations, Treaty Series, vol. 1155, p. 331, Article 26; Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs*, (1990), at 62.

<sup>92</sup> The North Atlantic Coast Fisheries Case, *Great Britain v United States*, Award, (1961) XI RIAA 167, p. 188.

<sup>93</sup> Vienna Convention, *supra* note 91, Article 31.

apprehend an individual outside the established framework would be a violation of the principle of good faith; the object and purpose of the instrument clearly precludes extraterritorial abduction. Extradition arrangements are negotiated between states to provide a formal procedure for the transfer of suspects. Their purpose is threefold, to facilitate the enforcement of criminal law, protect the sovereignty of the contracting parties and safeguard the rights of individuals whose transfer is sought.<sup>94</sup> In providing for the satisfaction of evidentiary requirements, adherence to rules pertaining to specialty, political offence and dual criminality and conferring on states the discretion to refuse transfer of their own nationals, the existence of an extradition treaty implies a prohibition against unilateral abductions.

In 1990, the United States Supreme Court handed down a decision that disregards the fundamental principle of good faith. In the infamous *Alvarez Machain* case, it was held that the abduction of the accused was not illegal because the 1978 treaty between the United States and Mexico did not prohibit extraterritorial abduction.<sup>95</sup> The majority based its finding on a literal reading of the instrument; the fact that methods beyond formal extradition were not explicitly prohibited was taken as proof that such conduct was permissible. If this reasoning were to be followed, it would mean that rather than creating a formal scheme for the transfer of suspects, extradition agreements merely represent a policy option for states. This judgment has been met with a considerable degree of criticism.<sup>96</sup>

It could be argued that the use of extraterritorial abduction does not violate an extradition treaty in force as the conduct is taken outside the instrument and so its application is not triggered. Article 26 of the Vienna Convention provides that “[e]very treaty in force is binding upon the parties

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<sup>94</sup> Ruth Wedgewood, ‘The Argument Against the International Abduction of Criminal Defendants: Amicus Curaie Brief Filed by the Lawyers Committee for Human Rights in *United States v Humberto Alvarez Machain*,’ 6 *American University Journal of International Law* (1991) 537, at 537-538.

<sup>95</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992).

<sup>96</sup> *Ibid*, dissenting Opinion of Justice Stevens; Jordan Paust, ‘After *Alvarez-Machain*: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims’, 67 *St. John’s Law Review*, (1993) 551, at. 563-564; Wedgewood, *supra* note 94.

to it and must be performed by them in good faith.”<sup>97</sup> This can be interpreted to mean that the existence of an extradition agreement binds the contracting party to undertake their endeavors pursuant to the agreed upon scheme. The element of good faith also implies that contracting parties must refrain from conduct that defeats the purpose of the treaty. This latter point was included in the International Law Commission’s original draft Article of 1964.<sup>98</sup> Article 55 of the draft states that good faith requires that “a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.”<sup>99</sup> It follows from this that although resort to methods outside an instrument may not directly violate the express terms of the treaty, the bypassing or ignoring of procedures established therein may nevertheless constitute a violation of the customary international law principle of *pacta sunt servanda*.

Article 31(3)(c) of the Vienna Convention provides that “any relevant rules of international law applicable in the relation between the parties shall be taken into account when a treaty is interpreted”.<sup>100</sup> This approach was applied by the International Court of Justice in the *Case Concerning Right of Passage over Indian Territory*.<sup>101</sup> It was held that treaties should be interpreted in conformity with existing principles of international law.<sup>102</sup> Pursuant to this, the violation of international legal principles and rules by extraterritorial abduction would demand that the instrument in question be interpreted to include a prohibition against such conduct. Making the finding of a violation of an instrument contingent upon the contravention of an express prohibition against unilateral abduction would violate the doctrine of *pacta sunt servanda*.

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<sup>97</sup> Vienna Convention, *supra* note 91, Article 26.

<sup>98</sup> ‘Law of Treaties’, Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Vol. II, 1964, A/CN.4/167 and Add.1-3, Article 55, *Yearbook of the International Law Commission* at 7.

<sup>99</sup> *Ibid*, Article 55, Commentary, at 8.

<sup>100</sup> Vienna Convention, *supra* note 91, Article 31(3)(c).

<sup>101</sup> *Case Concerning Right of Passage over Indian Territory*, (*Portugal v India*), ‘Judgment’, 12 April 1960.

<sup>102</sup> See *United States v Rauscher* the Supreme Court of the United States referred to principles of international law to imply the doctrine of speciality into the extradition treaty, 119 U.S. 407 (1886).

It is true that states can transfer individuals to another state absent a treaty. In such cases, their actions must be undertaken in conformity with rules and obligations placed upon them by other treaties and customary international law. Public international law, international human rights law and international humanitarian law constrain states in their relations with each other and with individuals. The application of each of these frameworks to transfers taken outside the formal extradition framework will be considered in Chapters 2, 3 and 4 of this work.

### 2.3 EXTRATERRITORIAL JURISDICTION

Before submitting an individual for trial, a valid basis for jurisdiction must be established. In situations where the offence for which the individual is suspected was directed against the requesting state or its nationals, the question of jurisdiction is relatively straightforward. Every state has an interest in the maintenance of peace and order and the suppression of crime committed on its soil. Under international law, the principle of territoriality confers upon states, the authority to proscribe and enforce laws within its own borders.<sup>103</sup> Pursuant to this, states have the right to exercise criminal jurisdiction over acts occurring and persons present in their territories.<sup>104</sup> The territorial principle is the most commonly used and the least controversial basis of jurisdiction; it is grounded in the fundamental principle of state sovereignty. Jennings has stated:

The first principle of jurisdiction is that in general every State is competent to punish crimes committed upon its own territory. This rule requires no authority to support it; it is “everywhere regarded as of primary importance and of fundamental character.”<sup>105</sup>

When considering the theoretical basis for punishment within a state, the foremost explanation that comes to mind is the suppression of crime and the

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<sup>103</sup> *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para 46-47.

<sup>104</sup> For a discussion on the traditional bases of jurisdiction *see* Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’, 45 *Harvard International Law Journal* (2004) 183.

<sup>105</sup> R. Y. Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’, 33 *British Yearbook of International Law* (1957) 146, at 148.



pursuit of justice. State power derives from the people and it is in their interests that the justice system acts. Chehtman has put this point forward:

a state's prima facie power to punish an offender is based on the collective interest of individuals in that state in its criminal laws being in force. This is because having a system of criminal rules in force constitutes a public good that contributes to the well-being of individuals who live under it in a certain way.<sup>106</sup>

The enforcement of criminal rules within a territory instills a sense of dignity and security within a state.<sup>107</sup> In relation to offences perpetrated on foreign soil, a question arises as to the rationale for the exercise of jurisdiction. Why should a state seek the extradition of individuals who commit offences that do not directly injure them or their nationals?

The issue of extraterritorial jurisdiction, in particular, the concept of universal jurisdiction, relates to the competence of the requesting state to exercise jurisdiction and the incentive for extradition in situations in which the state where the suspect is present has itself the right to prosecute. The principle gives a court jurisdiction over offences committed anywhere in the world.<sup>108</sup> This type of jurisdiction is not based on a particular connection between the crime and the state seeking to exercise jurisdiction. According to the International Law Association:

Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.<sup>109</sup>

It has been argued that universal jurisdiction is part of customary international law.<sup>110</sup> Its applicability to certain international offences such as genocide, crimes against humanity and war crimes is relatively settled.<sup>111</sup>

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<sup>106</sup> Alejandro Chehtman, *Philosophical Foundations of Extraterritorial Punishment*, (2010), at 31.

<sup>107</sup> *Ibid*, at 41.

<sup>108</sup> K.C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) 785, at 788.

<sup>109</sup> International Law Association, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', Committee on International Human Rights Law and Practice, London Conference, 2000, at 2.

<sup>110</sup> Gilbert, *supra* note 15, at 91.

<sup>111</sup> ICTY, *Prosecutor v. Tadic*, 'Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction', Case No. IT-94-1-AR72, 2 October 1995, paras 9-48; Amnesty International Report, *supra* note 55.

Conferring a right to prosecute certain extraterritorial crimes on every state aims to ensure rules prohibiting such acts are adhered to and safe havens for international criminals are eliminated. As Chehtman points out, “there are certain criminal rules [...] which cannot be in force in the territory of a state unless at least some extraterritorial authority holds a concurrent power to punish those who violate them.”<sup>112</sup> The authority of states and institutions to prosecute conduct carried out extraterritorially contributes to the security of individuals within a state as it is those in power that perpetrate the majority of international crimes. This was the case in Cambodia, Kenya, Sudan, the Republic of Cote d’Ivoire and Libya to name but a few. If jurisdiction to prosecute were limited to the situs of the crime, there is a risk that those responsible for the commission of atrocities against their populations would enjoy impunity from the law.

The right to prosecute crimes committed extraterritorially must be distinguished from the obligation to prosecute or extradite. The former affords states an authority to try those accused of certain core crimes wherever committed whilst the latter is a duty to submit such individuals present on their soil to justice or in the alternate, to extradite them to a state willing to prosecute. Pursuant to the principle of universal jurisdiction, every state has jurisdiction to submit individuals accused of torture or other international crimes to their criminal justice systems. In saying that, if a state seeking to prosecute cannot gain physical jurisdiction over the suspect, the right conferred by the principle cannot be realized. Such a situation may motivate the state seeking custody to resort to extraterritorial abduction. The *Eichmann* case, which will be discussed in Chapter 2, provides an illustrative example of this.<sup>113</sup> In that case, Israeli agents forcibly abducted Eichmann from Argentina and submitted him to trial on fifteen counts of crimes against the Jewish people, war crimes, crimes against humanity, and membership in a hostile organization. It is important to note that although Argentina protested the violation of its sovereignty by Israel, the authority

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<sup>112</sup> Chehtman, *supra* note 106, at 118.

<sup>113</sup> *Attorney General of Israel v. Eichmann*, *supra* note 7.

of the Israeli District Court to exercise jurisdiction over the crimes for which Eichmann was charged was not challenged.

Motivated by a desire to ensure that those suspected of serious crimes do not elude punishment, states have resorted to extraterritorial abduction when extradition fails. The concept of *aut dedere aut judicare* may provide an acceptable substitute to extradition in situations where transfer of a suspect cannot be attained. When the principle applies, the failure of the extradition process would not automatically mean that justice has gone undone; the refusing state would be obliged to submit the individual to trial. If effectively enforced, the obligation to extradite or prosecute would remove the main incentive for extraterritorial abduction. The following section will consider the scope of this obligation.

#### **2.4 THE DUTY TO EXTRADITE OR PROSECUTE**

Vattel has argued that international law imposes a duty upon states to extradite serious criminals.<sup>114</sup> The duty to extradite or prosecute is also known as *aut dedere aut judicare*.<sup>115</sup> The writings of Bodin and Grotius provide that pursuant to international law, states have a “natural duty” to extradite or prosecute fugitives found within their borders.<sup>116</sup> Grotius has asserted that the state in which the individual is present has a duty to either return the individual to the requesting state or, punish him under its own laws.<sup>117</sup> Bassiouni has gone so far as to refer to the obligation as *jus cogens*.<sup>118</sup> This is not the majority view. The thrust of the academic literature holds that the duty is based on treaty and that states are under no

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<sup>114</sup> E de Vattel, *The Law of Nations*, Book II VI, (1916), at 136-137.

<sup>115</sup> The term ‘*aut dedere aut judicare*’ is a modern adaptation of a phrase used by Grotius: ‘*aut dedere aut punire*’ (either extradite or punish), see Bassiouni & Wise, *supra* note 68, at 4.

<sup>116</sup> J. Bodin, *Les Six Livres de la Republique*, (1576), *The Six Books of a Commonweale* (K. D. McRae ed. 1962), at 100-11; H. Grotius, *II De Jure Belli Ac Pacis*, (1646) (F. Kelsey, translation 1952), at 527; List of scholars accepting the “natural view” of extradition includes: Heineccius, Burlamaqui, Rutherford, Schmelzing, Kent.

<sup>117</sup> *Ibid*, Grotius was only concerned with individuals who had already been convicted.

<sup>118</sup> M. C., Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ 43 *Virginia Journal of International Law* (2001) 81.

obligation to extradite absent a binding agreement.<sup>119</sup> There is debate as to whether customary international law imposes an obligation upon states to extradite or prosecute those suspected of certain international crimes when found on their territories.<sup>120</sup>

Proponents of the view that customary international law obliges states to extradite or prosecute genocide, crimes against humanity and war crimes base this finding on the *jus cogens* nature of these offences.<sup>121</sup> The argument goes that violation of a preemptory norm gives rise to an *obligatio erga omnes* i.e. an obligation owed by states to the international community to prosecute or extradite.<sup>122</sup> This reasoning finds support in the *Furundzija* case. The ICTY stated that:

One of the consequences of *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under their jurisdiction.<sup>123</sup>

A close look at the wording of the ICTY's judgment illustrates that the Chamber found that states had an entitlement to investigate, prosecute and punish or extradite, not an obligation to do so. This reading finds further support in International Court of Justice opinion in *Belgium v Senegal*.<sup>124</sup> In February 2009, Belgium filed an application requesting that the Court

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<sup>119</sup> Wise has criticized Bassiouni's argument that the duty to extradite or prosecute in the context of international crimes is *jus cogens*, he opines that this is "gilding the lily", Edward Wise, 'The Obligation to Extradite or Prosecute', 27 *Israel Law Review* (1993) 268, at 280; Pufendorf, *The Elements of Universal Jurisprudence*, BK. VIII, paras 23-4 cited in Shearer, *supra* note 10, at 24; Bassiouni & Wise, *supra* 61, at 1-23; Jennings & Watts, *Oppenheim's International Law*, vol. 1, (1992), at 950.

<sup>120</sup> See generally, Bassiouni & Wise, *supra* note 68.

<sup>121</sup> *Pinochet Ugarte, re.* [1999] 2 All ER 97, at 108-109; In the Lockerbie Case, Judge Weeramantry characterized the principle as a "rule of customary international law". *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Ariel Incident at Lockerbie (Libya v. UK)*, 14 April 1992, I.C.J. Reports, 1992, (Judge Weeramantry dissenting) at 51; Bassiouni & Wise, *supra* note 68, at 52; Guy S. Goodwin-Gill, 'Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute', in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law, Essays in Honor of Ian Brownlie* (1999), at 213, 220.

<sup>122</sup> M. Cherif Bassiouni, 'International Crimes *Jus Cogens* and *Obligatio Erga Omnes*', vol. 59(4) *Law and Contemporary Problems* (1996) 63.

<sup>123</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, (10 December 1998), para. 156.

<sup>124</sup> *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) Request for the Indication of Provisional Measures*, Order of 28 May 2009, I.C.J. Reports 2009, p. 156.

declare that Senegal was obliged to try Mr. Habré, a former President of Chad, for violations under the Convention against Torture, or extradite him to Belgium to face trial there. The Court found that pursuant to the Convention, Senegal had an obligation to initiate proceedings or in the event that prosecution was not possible, to extradite him to another state which had jurisdiction pursuant to Article 5 of the Torture Convention. The Court acknowledged that the prohibition on torture is a preemptory norm but the decision implies that a duty to extradite or prosecute does not necessarily flow from this. From the finding that the duty extended only to acts perpetrated after the entry into force of the Torture Convention, it can be inferred that the International Court of Justice viewed the obligation as deriving from the instrument rather than customary international law.

It is submitted that the *jus cogens* character of international crimes does not automatically create a customary international law obligation on states to prosecute or extradite those accused.<sup>125</sup> As was pronounced by the International Court of Justice in the *North Sea Continental Shelf* case, the establishment of a rule of customary international law is dependent upon the existence of state practice and *opinio juris*.<sup>126</sup> A recent report by the Working Group on the International Law Commission found that although an increasing number of states provide for universal jurisdiction for international crimes, only about twenty-five have included an obligation to extradite.<sup>127</sup> There have been numerous resolutions issued by UN bodies that could be drawn on to substantiate its customary status however, these alone are not proof of the establishment of a customary international law rule.<sup>128</sup>

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<sup>125</sup> R. Steenberghe, 'The Obligation to Extradite or Prosecute, Clarifying its Nature', 9 *Journal of International Criminal Justice* (2011) 1089, at 1092.

<sup>126</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, (20 February 1969) I.C.J. Reports 1969, p.3, para 73-74.

<sup>127</sup> Kriangsak Kittchaisaree, 'Working Paper on the Obligation to Extradite or Prosecute', *International Law Commission*, (5 April 2013).

<sup>128</sup> UN General Assembly Resolution 2840 (XXVI), 18 December 1971; UN General Assembly Resolution 3074 (XXVIII), 3 December 1973, UN Security Council Resolutions 1318 (2000), 1325 (2000), 1379 (2001), 1612 (2005), 1674 (2006), 1820 (2008); ECOSOC Resolution 1989/65, 24 May 1989; Inter-Parliamentary Union (IPU) Resolution, 112th IPU Assembly, 8 April 2005, Doc. No. 13; Organization of American States General Assembly

The Genocide Convention does not contain a clause on *aut dedere aut judicare*.<sup>129</sup> Article VI provides that persons charged with genocide are to be tried by a competent tribunal of the territorial State, or by such international penal tribunal as may have jurisdiction. Pursuant to Article VII, Contracting Parties pledge to grant extradition in accordance with their laws and treaties in force.<sup>130</sup> In the *Bosnian Genocide case*, the International Court of Justice considered Serbia and Montenegro's obligations under the Genocide Convention.<sup>131</sup> It was held that Serbia and Montenegro had violated the duty to prevent genocide but not the obligation to punish. The Court based this finding on the fact that the Srebrenica massacre had not occurred on its territory and was not perpetrated by its officials. It did not expressly address whether there was an *aut dedere aut judicare* obligation. In saying that, the determination that failure to punish or prosecute those on its territory who were accused of carrying out genocide did not violate international law implies that neither the Convention nor customary international law contains such an obligation.

According to a report published by Chatham House in 2013, there are currently over sixty multilateral treaties providing for extradition and prosecution as alternative procedures.<sup>132</sup> In relation to the core crimes, genocide, crimes against humanity and war crimes, a conventional obligation to prosecute or extradite only attaches to grave breaches of the Geneva Conventions and Protocol I.<sup>133</sup> In *Prosecutor v. Tihomir Blaskic*,

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Res. 2225 (XXXVI-0/06), 6 June 2006, p. 252.

<sup>129</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature on 9 December 1948 and entered into force on 12 January 1951, 78 UNTS 277.

<sup>130</sup> *Ibid*, Article VII

<sup>131</sup> ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Decision on the Merits), 26 February 2007.

<sup>132</sup> Miša Zgonec-Rožej and Joanne Foakes, 'International Criminals: Extradite or Prosecute?' *Chatham House*, IL BP 2013/01, (July 2013); An obligation to extradite those accused or convicted of certain international crimes is explicitly contained in: the Genocide Convention, *supra* note 125; International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); Geneva Conventions of 1949; Protocol I to the Geneva Conventions; United Nations Convention Against Torture (1984); European Convention on the Suppression of Terrorism.

<sup>133</sup> Article 49 of the First Geneva Convention; Article 50 of the Second Geneva Convention; Article 129 of the Third Geneva Convention; Article 146 of the Fourth

the ICTY indicated that states are under a customary law obligation to try or extradite persons who have been accused of committing grave breaches of international humanitarian law.<sup>134</sup>

Although there is authority for the idea that customary international law obliges states to extradite or prosecute certain core crimes, it is submitted that absent a treaty, no such duty exists.<sup>135</sup> As customary international law is established by state practice and *opinio juris*, this obligation may emerge over time but for now, it seems that the duty is dependent on conventional law.<sup>136</sup> Having established in the previous section that state cooperation is largely based on self-interest, the fact that absent a treaty there is no duty to extradite or try those accused of international crime, presents a barrier to the suppression of crime. In the event that the extradition of a suspect is refused, the state seeking to prosecute may resort to methods outside the formal framework to apprehend the individual. If the refusing state was obliged to prosecute following the failed extradition attempt, justice would be served and the incentive to employ extraterritorial abduction would be reduced.

Every state has an interest in punishing transnational and international crimes. As was discussed in the preceding sections, states have gone to great lengths to develop and improve the system of cooperation in criminal matters. Efforts have included the negotiation of bilateral and multilateral treaties, the creation of new institutions, the codification of crimes, calls for mutual assistance and the exercise of universal jurisdiction. Typically, the prosecution of suspects located in a foreign state is made possible by extradition. This system, the success of which depends upon international

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Geneva Convention; Article 85 of the Additional Protocol I.

<sup>134</sup> ICTY, *Prosecutor v. Tihomir Blaskic*, 'Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II', IT-95-14-AR, 18 July 1997.

<sup>135</sup> Miša Zgonec-Rožej and Joanne Foakes, *supra* note 132; This view is confirmed by several judges at the ICJ for example, the Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar and the dissenting judgments of Judge Bedjaoui and Judge El Koshi in the *Lockerbie* Case, *supra* note 121, at 25, 38, 109, 137, 148 and 214. Also see, Hersch Lauterpacht, *Oppenheim's International Law: A Treatise. Vol. II: Disputes, War and Neutrality*, (7th ed.), (1952), at 589; Ian Brownlie, *Principles of Public International Law* (6th ed.), (2003), at 313.

<sup>136</sup> Kittchaisaree, *supra* note 127.

cooperation, is not without its problems. The formalities and complexities inherent in the process can result in the frustration of a state's attempt to have a suspect transferred. The failure of the system to meet the demands of the state seeking to prosecute may be followed by the resort to irregular forms of apprehension. Before moving on to consider the methods of extraterritorial abduction and their position under the framework of international law, the following section will examine some of the factors that can impede the successful extradition of suspects.

### 3. DIFFICULTIES WITH THE EXISTING FRAMEWORK

#### 3.1 THE POLITICAL OFFENSE EXCEPTION

The political offence exception provides that no person shall be extradited under the treaty if the alleged conduct is regarded as a political offence.<sup>137</sup> The prohibition against the surrender of political offenders first appeared in an 1834 extradition treaty between Belgium and France and was incorporated into the majority of subsequent instruments.<sup>138</sup> The original purpose of the exception was the protection of political and religious refugees from oppression and the safeguarding of their right to asylum.<sup>139</sup> The idea that individuals should not be punished for revolting against an oppressive state emerged from the French Revolution and the resulting influence of constitutionalism. One author has stated the purpose of the exception:

To surrender unsuccessful rebels to the demanding State would surely amount to delivering them to their summary execution or, in any event, to the risk of being tried and punished by a justice colored by political passion.<sup>140</sup>

The exemption has often led to the refusal of extradition requests for international criminal suspects and those accused of terrorism-related

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<sup>137</sup> For an analysis of the political offence exception *see generally*, Van Den Wyngaert, *supra* note 11.

<sup>138</sup> The clause was introduced by Belgium as a response to the *Jacquin* case. For a short description of the facts of the case *see* Van Den Wyngaert, *supra* note 11, at 14.

<sup>139</sup> Shearer, *supra* note 10 at 175; Ivor Stanbrook and Clive Stanbrook, *Extradition Law and Practice*, (2<sup>nd</sup> ed. 2000), at 66.

<sup>140</sup> Garcia-Mora, 'The Present Status of Political Offenses in the Law of Extradition and Asylum', 14 *University of Pittsburgh Law Review* (1952-1953) 371, at 373.



offences. In 1957, the United States declined a request from the Yugoslavian government for the extradition of a former Croatian official charged with war crimes.<sup>141</sup> The refusal was based on a liberal application of the incidence test. This test which was developed by the House of Lords in *In Re Castioni* provides that in order for the exception to attach, there must be (1) a political disturbance, and (2) the political offense must be incidental to or form a part of that disturbance.<sup>142</sup> Efforts by the United Kingdom to secure the transfer from the United States of suspected members of the Provisional Irish Republican Army during the 1980s demonstrates, not only the application of the exemption, but also the importance of its retention.

In *In re Mackin*, the United Kingdom's request for the transfer of an alleged member of the Provisional Irish Republican Army wanted for the shooting of a British soldier in Belfast was refused by the New York District Court.<sup>143</sup> The magistrate used the incidence test to determine whether the individual sought could invoke the political offence exception. In *Mackin*, it was decided that there was an uprising within the vicinity at the time of the alleged act, and that the acts committed against the soldier were incidental to that uprising and so the political offence exception attached.<sup>144</sup> In the *Doherty* case, an Irish citizen convicted *in absentia* for the killing of a British officer in Belfast avoided extradition from the United States based on the political offence exception.<sup>145</sup> These two cases illustrate how the exception can protect those accused or convicted of political crimes from extradition. In saying that, they also illustrate that regardless of the existence of the exception and a court's willingness to apply it, the executive may seek alternative methods to satisfy a request for the transfer

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<sup>141</sup> *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom; Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), vacated and remanded, 355 U.S. 393 (1958), surrender denied on remand sub nom; *United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959).

<sup>142</sup> *In Re Castioni*, [1891] 1 Q.B. 149.

<sup>143</sup> *In re Mackin*, No. 80 Cr. Misc. 1, p. 54, slip op. at 2 (S.D.N.Y. Aug. 13, 1981), habeas corpus denied, 668 F.2d 122 (2d Cir. 1981).

<sup>144</sup> *Ibid*, at 42-43.

<sup>145</sup> *Doherty v. U.S. Dep't of Justice*, INS, 908 F.2d 1108, 1111 (2d Cir. 1990); *Matter of Doherty*, 599 F. Supp. at 272.

of an individual. In the *Doherty* case, the State Department of the United States communicated to the court, “the application of the political offence doctrine to deny extradition could cause damage in relations between Great Britain and the United States.”<sup>146</sup> Although this warning did not sway the court in its determination, in an attempt to secure transfer to the United Kingdom, the resort to immigration procedures followed both judgments. Following the initiation of deportation proceedings against Doherty, he designated the Republic of Ireland as the state to which he should be sent.<sup>147</sup> The Attorney General and the Immigration and Naturalization Service appealed the immigration judge’s order to deport him to the Republic of Ireland on the ground that it would be prejudicial to United States interests.<sup>148</sup> This case will be considered in the context of disguised or de facto extradition in Chapter 4.

Since the end of the 1970s, the international community has become increasingly cautious about incorporating the political offence exception into treaties. There has been a growing trend towards the refinement and possible abolition of the exception. This shift is due to a heightened concern with terrorism-related crimes and the potential for the exception to shield perpetrators from extradition.<sup>149</sup> The European Arrest Warrant does not include political crimes as a ground for refusal of extradition amongst members of the European Union.<sup>150</sup> The 1977 European Convention on the Suppression of Terrorism excludes a number of acts that are oftentimes considered political crimes from coming within the exception.<sup>151</sup> In 1972, an extradition treaty signed between the United States and the United Kingdom included a standard political offense exception.<sup>152</sup> In response to the refusal of the courts to grant extradition in *Mackin* and *Doherty*, a

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<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, at 1111.

<sup>148</sup> *Ibid.*, at 1112.

<sup>149</sup> G. Gilbert, ‘Terrorism and the Political Offence Exemption Reappraised’, 34(4) *International and Comparative Law Quarterly* (1985) 695.

<sup>150</sup> European Arrest Warrant, *supra* note 39.

<sup>151</sup> Council of Europe, *European Convention on the Suppression of Terrorism*, 27 January 1977, ETS No. 90, Article 1.

<sup>152</sup> Extradition Treaty, June 8 1972, United States - United Kingdom- Northern Ireland, 28 UST 227, TIAS No. 6428.

Supplementary Treaty was signed between the two states in 1985.<sup>153</sup> This instrument narrows the definition of a political offense under the 1972 agreement by excluding specific crimes. The crimes excluded include air piracy, kidnapping, the use of firearms to resist arrest, reckless endangerment and attempts to commit any of the enumerated crimes.

The view that the political offence exception does not attach to international crimes is now commonly held.<sup>154</sup> The International Convention on the Suppression and Punishment of the Crime of Apartheid provides that certain acts of apartheid specified in the Convention “shall not be considered political crimes for the purposes of extradition.”<sup>155</sup> The Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide and the other crimes against humanity listed in Article 3 of the Convention shall not fall within the political offense exception.<sup>156</sup> The current attempts by the United States to gain custody of Edward Snowden provide an example of how the political offence could potentially act as a bar to extradition. Snowden has been charged by the United States with offences related to the leaking of information about its surveillance program. Espionage is recognized as a ‘pure’ political offence and states have in the past refused to grant the extradition of individuals charged on these grounds. In the *Soblen* case, which will be discussed in Chapter 4 in the context of disguised or de facto extradition, Dr. Robert Soblen was convicted under the Espionage Act on charges of spying for the Soviet Union.<sup>157</sup> Although he was eventually transferred to the United States by way of immigration procedures, he avoided extradition based on the exception. In April 2013, Sweden refused to extradite a United States citizen who was accused of spying for Cuba.<sup>158</sup> The reason for the refusal

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<sup>153</sup> Supplementary Extradition Treaty with the United Kingdom, June 26, 1986, United States-United Kingdom, EXEC. REP. No. I 99-17, 99th Cong., 2nd session (1986).

<sup>154</sup> Duffy, *The ‘War on Terror’ and the Framework of International Law* (2007), at 109.

<sup>155</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 128.

<sup>156</sup> Genocide Convention, *supra* note 129.

<sup>157</sup> *R v. Brixton Prison (Governor), Ex Parte Soblen*, English Court of Appeal, [1962] 3 All E.R. 641

<sup>158</sup> Jim Popkin, ‘Woman Indicted in Cuba Spy Case is in Sweden and Out of U.S. Reach’, *The Washington Post*, (25 April 2013), available at:

was that “[e]spionage is considered a ‘political offense’ that, therefore, falls outside the scope of Sweden’s extradition treaty.”<sup>159</sup>

It is true that the political offence exception can pose a barrier to extradition. However, it must be understood that the doctrine serves a very important purpose in relation to the protection of the individual sought. The central difficulty with the exception is not that it exists at all but that it is without a clear definition. Bassiouni has referred to the term political offence as a “descriptive label of doubtful legal accuracy.”<sup>160</sup> Many other authors have also noted its obscurity.<sup>161</sup> Rather than abolish the exception, a better solution would be the creation of a negative definition of political offence. This would satisfy the demands of states as acts of terrorism and international crimes would be listed as conduct falling outside the exception. At the same time, true political offenders would remain protected from return to states against which they have rebelled. Although democratic institutions have replaced many of the tyrannical governments of the eighteenth and nineteenth centuries, the right to self-determination of all peoples must continue to be safeguarded. This right is contained in human rights conventions such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>162</sup> The Supplementary Treaty between the United States and the United Kingdom and the European Convention on the Suppression of Terrorism are examples of instruments that incorporate a negative list of political offences.<sup>163</sup>

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[http://articles.washingtonpost.com/2013-04-25/world/38817504\\_1\\_extradition-treaty-ana-belen-montes-indictment](http://articles.washingtonpost.com/2013-04-25/world/38817504_1_extradition-treaty-ana-belen-montes-indictment).

<sup>159</sup> *Ibid* quoting United States Justice Department spokesman Dean Boyd.

<sup>160</sup> Bassiouni, ‘The Political Offence Exception in Law and Practice’ in *International Terrorism and Political Crimes* (1977) at 408.

<sup>161</sup> Stanbrook & Stanbrook, *supra* note 135, at 68; G. Gilbert, *Aspects of Extradition Law* (1991) at 115; Wijngaert, *supra* note 11, at 95-102.

<sup>162</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 1; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 1.

<sup>163</sup> Supplementary Extradition Treaty, *supra* note 153; Convention on the Suppression of Terrorism *supra* note 151.

### 3.2 DUAL CRIMINALITY

The principle of dual criminality provides that an offence is not extraditable unless the alleged conduct is criminalized under the laws of both the requesting state and the host state. It is incorporated into most extradition instruments either explicitly or implicitly and is regarded by some as a customary rule of international law.<sup>164</sup> Such provisions, which are grounded on the premise of reciprocity, are closely related to the requirement that the conduct for which the individual is accused is an extraditable offence.<sup>165</sup> Extraditable offences are those which are either expressly enumerated in the treaty or fall into this category following the application of a formula provided in the instrument. Taken together, the requirements of dual criminality and extraditable offences safeguard the individual from transfer to a jurisdiction for punishment in cases where the conduct in question does not offend the criminal code of the requested state and/or does not warrant extradition.

The dual criminality requirement has on occasion impeded the extradition of criminal suspects. During the early 1970s, efforts by United States law enforcement officials to extradite drug traffickers from Latin America were frustrated because the treaties did not provide for drug offences.<sup>166</sup> In May 2010, a French Court of Appeals rejected the United States request for the extradition of Majid Kakavand, an Iranian national indicted for exporting to an embargoed country, money laundering and goods smuggling.<sup>167</sup> The Court decided that the activities for which the suspect was accused did not violate French law; the dual criminality requirement was not satisfied. It should be noted that the decision of the

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<sup>164</sup> Shearer, *supra* note 10, at 138; Bassiouni, *supra* note 10, at 475.

<sup>165</sup> “Dual criminality is intended to ensure to each of the respective states that they can rely on corresponding treatment, and that no state shall use its processes to surrender a person for conduct which it does not characterize as criminal”- Bassiouni, *supra* note 10, at 467.

<sup>166</sup> Ethan A. Nadelmann, ‘The Evolution of the United States Involvement in International Rendition of Fugitive Criminals’ 25 (1993) 813, at 847; Jonathon O. Hafen, ‘International Extradition: Issues Arising under the Dual Criminality Requirement’, *Brigham Young University Law Review*, (1992) 191.

<sup>167</sup> Steven Erlanger & Nadim Audi, ‘France Won’t Extradite Iranian Sought by U.S.’, *The New York Times*, (5 May 2010), available at: [http://www.nytimes.com/2010/05/06/world/europe/06france.html?\\_r=0](http://www.nytimes.com/2010/05/06/world/europe/06france.html?_r=0).

French court is suspected to be based not only on the application of dual criminality, but also on political interests. Although France has denied allegations, speculation remains as to whether the refusal of Kakavandi's extradition to the United States and his subsequent release and return to Iran was connected to the almost simultaneous freeing of a French national who was serving a sentence for spying in Tehran.<sup>168</sup>

Whatever the real reason underlying a refusal, it is clear that the dual criminality requirement can be raised as a barrier to extradition. There has been a shift from applying an *in concerto* interpretation of the requirement to the use of an *in abstracto* method.<sup>169</sup> The latter approach is more flexible as it considers the criteria satisfied once the conduct is deemed criminal in both jurisdictions. A strict comparison of the elements of the crime in the requested state with that of the legal codes in the state seeking extradition is no longer required. In a report prepared by the Council of Europe's Committee on Crime Problems, it was suggested that double criminality be replaced with double prohibition.<sup>170</sup> The dual prohibition requirement does not demand that the conduct be punished by the same offence in both states; it is satisfied once the behavior is prohibited under the legal system of the requesting state.

### **3.3 EVIDENTIARY REQUIREMENTS**

The formal extradition process requires the requesting state to provide evidence regarding the guilt of the accused. This requirement is essential to safeguarding the rights of the suspect. In practice, extradition has sometimes failed due to a state's inability to satisfy the evidentiary standards. In response to this, efforts have been made to reduce the level of evidence required. This has streamlined the extradition process especially in the case of the United States and the United Kingdom but at the same time,

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<sup>168</sup> Steven Erlanger, 'France Prepares to Release Iranian Assassin', *The New York Times*, (17 May 2010), available at: <http://www.nytimes.com/2010/05/18/world/europe/18paris.html>.

<sup>169</sup> S.Z. Feller, 'The Significance of the Requirement of Double Criminality in the Law of Extradition', 10 *Israeli Law Review*, (1975) 51, at 66-76.

<sup>170</sup> Council of Europe, European Committee on Crime Problems, 'Possible Ways to Reduce the Double Criminality Requirement: From Double Criminality to Double Prohibition', Otto Lagodny, PC-TJ (2005) 06, (4 July 2005).

such developments run the risk of jeopardizing the rights of the suspect.

The European Arrest Warrant requires only the provision of basic “information,” rather than “evidence,” about the alleged crime.<sup>171</sup> The 2003 extradition treaty between the United States and the United Kingdom also reduces the level of evidence required before extradition can be granted.<sup>172</sup> A request by the United Kingdom to the United States must include “such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested.”<sup>173</sup> The new standards have been criticized in the United Kingdom.<sup>174</sup> Calls for a revision of the 2003 agreement have shown unease with the fact that a request from the United States does not require provision of *prima facie* evidence.<sup>175</sup>

An example of how evidentiary requirements can bar the successful transfer of a suspect is the case of Lotfi Raissi.<sup>176</sup> Raissi, an Algerian national was detained in the United Kingdom following a request from United States authorities for his extradition. He was suspected of having been involved in training the pilots responsible for the September 11 2001 attacks on the World Trade Centre. In 2002, Raissi was detained in the United Kingdom for five months and eventually released following the United States’ failure to provide evidence to substantiate its claims. This case demonstrates how evidentiary requirements can frustrate the extradition process; it also illustrates the importance of maintaining a certain level of evidentiary criteria. The request for Raissi’s extradition was taken prior to the entry into force of the 2003 Treaty between the United

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<sup>171</sup> European Arrest Warrant, *supra* note 39.

<sup>172</sup> Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, U.S.-U.K., Mar. 31, 2003, S. Treaty Doc No. 108-23.

<sup>173</sup> *Ibid.*

<sup>174</sup> Parliamentary Human Rights Joint Committee, *The Human Rights Implications of UK Extradition Policy*, (7 June 2011); “UK Extradition Arrangements,” a backbench debate in the House of Commons on December 5, 2011; Parliamentary Home Affairs Committee *The US–UK Extradition Treaty*, (March 27, 2012). For a defense of the treaty see Sir Scott Baker, “Review of the U.K.’s extradition arrangements” (30 September 2011).

<sup>175</sup> *Ibid.*

<sup>176</sup> Paul Lewis, ‘The Lotfi Raissi Case: How Links to al-Qaeda Kept Innocent Algerian in Jail’, *The Guardian*, (22 November 2009), available at: <http://www.theguardian.com/uk/2009/nov/22/lotfi-raissi-algerian-pilot-case>.

States and the United Kingdom. Had this request been taken under the new standards, it is likely that Raissi would have been transferred to the United States.

### 3.4 NON-EXTRADITION OF NATIONALS

Many extradition treaties contain a provision providing for the non-extradition of their nationals.<sup>177</sup> These clauses either take the form of an absolute bar on the transfer of nationals or provide the state with the option to refuse extradition. The majority of states with a common law system do not exclude the extradition of their own nationals.<sup>178</sup> For example, the 2003 Treaty between the United States and the United Kingdom expressly states that nationality shall not be a bar to extradition.<sup>179</sup> Under the Framework Decision on the European Arrest Warrant, European States cannot invoke the nationality of the accused or convicted person as a ground for refusing surrender.<sup>180</sup>

The principle of non-extradition of nationals has led to the refusal of numerous extradition requests and presents one of the most challenging barriers to extradition.<sup>181</sup> Mexico for example, has continuously refused requests to extradite its own nationals.<sup>182</sup> Many other Latin American countries such as Ecuador have amended their constitutions to bar the extradition of nationals.<sup>183</sup> The rationale behind the provision may include a state's interest in protecting its own citizens, lack of confidence in the fairness of foreign judicial proceedings and the disadvantages associated with trial and detention in a foreign jurisdiction.<sup>184</sup> In 2010, a panel of judges of the European Union Rule of Law Mission sitting in a District Court in Kosovo ruled that Bajram Asllani, could not be extradited to the

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<sup>177</sup> Shearer, *supra* note 10, at 95.

<sup>178</sup> Christopher L. Blakesley, "The Law of International Extradition: A Comparative Study", 62 *International Review of Penal Law* (1991) 449 at 451-459.

<sup>179</sup> U.S.-U.K Treaty, *supra* note 172.

<sup>180</sup> European Arrest Warrant, *supra* note 39.

<sup>181</sup> Robert Rafuse, *The Extradition of Nationals*, (1939).

<sup>182</sup> Joshua S. Spector, 'Extraditing Mexican Nationals in the Fight Against International Narcotics Crimes', 31 *University of Michigan Journal of Law Reform*, (1998) 107.

<sup>183</sup> Constitution of the Republic of Ecuador, (October 20, 2008), Article 79.

<sup>184</sup> Nadelmann, *supra* note 162, at 847.



United States.<sup>185</sup> A United States District Court charged the Kosovo national with supplying material support to terrorists and conspiring to murder, kidnap, maim and injure persons abroad.<sup>186</sup> The judges of the European Union Rule of Law Mission rejected the case on a number of grounds including the validity of the 1901 extradition treaty between the United States and the Former Kingdom of Serbia and the insufficiency of evidence presented by the United States. It was decided that even if the treaty were valid, it would not provide for the transfer of nationals; Asllani was subsequently released.

Provisions for the non-extradition of nationals serve a legitimate purpose. They safeguard a state's right to exercise jurisdiction over their nationals without outside interference. These clauses also protect individuals from submission to foreign jurisdictions. Without underestimating the importance of maintaining sovereignty, the potential for the non-extradition of nationals to shield perpetrators of serious crimes from justice must be recognized. It is difficult to strike a palatable balance between all of the interests at stake. In order to safeguard the right of the state to exercise jurisdiction over its nationals, the interests of the individual in remaining within the jurisdiction of his state of nationality and the desire of the requesting country and the international community in bringing criminals to justice, it is necessary to strengthen the obligation on states to prosecute or extradite. If this were achieved, the refusal of a state to transfer a national would frustrate the requesting state's attempts to gain custody of the individual but at the same time, the underlying aim of extradition would be satisfied i.e. the suppression of crime. In saying that, there are factors beyond treaty formalities that can pose barriers to successful prosecution. The refinement and exclusion of certain provisions can streamline the extradition process but in practice, the system will never be effective unless

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<sup>185</sup> EULEX Kosovo, Press Office, 'Mitovica District Court Rejects U.S. Extradition Demand', (16 July 2010), available at: <http://www.eulex-kosovo.eu/en/pressreleases/0080.php>.

<sup>186</sup> U.S. Department of Justice, Office of Public Affairs, 'Kosovar National Charged with Terrorism Violations', (17 June 2010), available at: <http://www.fbi.gov/charlotte/press-releases/2010/ch061710.htm>.

the states involved are willing and able to follow through on their obligations. The following section will use the case of Columbia to illustrate how the relationship between the states involved and the political climate within a country can hinder the effectiveness of the process.

#### 4. THE EXTRADITION RELATIONSHIP BETWEEN COLOMBIA AND THE UNITED STATES

In June 1971, former President of the United States, Richard Nixon, declared a 'war on drugs'.<sup>187</sup> Over 4 decades later, the battle against the proliferation of drug related crimes is still ongoing.<sup>188</sup> According to the 2013 *International Narcotics Control Strategy Report*, 90% of the cocaine seized in the United States is transited through the Central America/Mexico corridor.<sup>189</sup> It is estimated that during the 1980s, 70-80% of refined cocaine and 50-60% of marijuana available on the U.S. market came from Colombia.<sup>190</sup> In the late 1970s and early 1980s, the United Nations negotiated a number of treaties aimed at combating drug crime. These instruments, which include the United Nations Convention on Narcotics Trafficking, aim to streamline the processes of information exchange and extradition. The first treaty governing extradition of Colombians to the United States entered into force on 1982.<sup>191</sup>

Throughout the 1980s, efforts by the United States to extradite Colombian nationals wanted for drug offences were met with great opposition.<sup>192</sup> Drug traffickers supported a campaign of violence and

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<sup>187</sup> Richard Nixon, 'Special Message to the Congress on Drug Abuse Prevention and Control', (17 June 1971), The American Presidency Project, available at: <http://www.presidency.ucsb.edu/ws/?pid=3048#axzz2fFDicp7U>

<sup>188</sup> Ed Vulliamy, 'Nixon's 'war on drugs' began 40 years ago, and the battle is still raging', *The Observer*, (24 July 2011), available at: <http://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years>

<sup>189</sup> International Narcotics Control Strategy Report, (INCS Report), Volume 1, (2013), at 235.

<sup>190</sup> Bruce Bagley, 'Colombia and the War on Drugs', 67 *Foreign Affairs* 1 (1988) 70.

<sup>191</sup> Extradition Treaty with the Republic of Colombia, Sept. 14, 1979, U.S.-Colom., S. Treaty Doc. No.97-8 (entered into force March 4 1982).

<sup>192</sup> Bagley, *supra* note 186, at 73; Joshua H. Warmund, 'Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic', 22 *Fordham International Law Journal* 5 (1988) 2373.

corruption in order to ensure the failure of pro-extradition policy.<sup>193</sup> Colombia's efforts to comply with extradition requests were seriously hampered by corruption in all branches of the government and by threats of violent repercussions. Pablo Escobar, the former leader of the Medellin Cartel, initiated a campaign of bribery, extortion, violence and murder in order to avoid extradition to the United States. This resulted in the death of hundreds of political figures, members of the judiciary and journalists who supported the eradication of drugs in Colombia. In February 1984, Gonzales Vidales, the former Deputy Minister of Justice and anti-drug lawyer, was killed. The same year, following a call for a "world pact" against drugs and the implementation of universal extradition procedures, former Colombian Attorney General, Rodrigo Lara Bonilla was assassinated. In a speech at Bonilla's funeral, President Betancur declared his intention to retract his opposition to the extradition of nationals and facilitate the extradition of Colombian drug traffickers to states seeking to prosecute. This was a significant pronouncement as Colombia's civil law preference against extradition of nationals represented a major barrier to the transfer of traffickers and suspects.

The first traffickers were extradited from Colombia to the United States in 1985. This move was followed by a number of assassinations and threats, which in 1987, culminated in the annulment of the extradition treaty between the United States and Colombia.<sup>194</sup> In 1991, the Colombian Supreme Court declared the bilateral extradition treaty between the two states unconstitutional forcing the United States to release over seventy individuals awaiting trial on drug charges. In 1997, the Colombian government passed a constitutional amendment allowing for extradition of nationals.<sup>195</sup>

In recent years, there has been major political change in Colombia. This shift, which began in the 1990s, brought with it the introduction of a pro-extradition movement. Between 2000 and 2010, 1,121 individuals were

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<sup>193</sup> Warmund, *ibid*, at 2386-2387.

<sup>194</sup> *Ibid*.

<sup>195</sup> Acto Legislativo Numero de 01 1997 (16 December 1997).

extradited to the United States for drug related offences.<sup>196</sup> The enhanced level of cooperation between the two states in relation to the transfer of suspects represents a major advancement towards combating drug crime. In saying that, the willingness of the Colombian government to hand over these individuals has been looked upon with suspicion. Critics argue that rather than the eradication of drug crime, Colombia's commitment to the extradition process is based on political motives.<sup>197</sup>

On May 13, 2008, fourteen of the most powerful paramilitary leaders were extradited from Colombia to the United States where they faced drug trafficking and other criminal charges.<sup>198</sup> In practice, the removal of these individuals from the state undermined the Justice and Peace Law process in Colombia. A number of those extradited had expressed a willingness to provide information regarding human rights violations in Colombia and their links to politicians and military figures. It has been suggested that these extraditions are motivated by a desire to avoid the revelation of details regarding collaboration between the United Self-Defense Forces of Colombia (FARC) and Colombian politicians.

The system of formal extradition is not always capable of delivering the results for which it has been created. Although the machinery for its functionality may be firmly set in place, its effectiveness is dependent upon the will of the states involved. The case of Colombia represents a prime example of how the formal system can be susceptible to politics, violence and corruption. Although the rate of extraditions from South American countries has increased in recent years with Mexico, for example, extraditing a reported 587 suspects to the United States between 2007 and 2012, the changeable political climate in certain states means that the degree of cooperation can fluctuate.<sup>199</sup> The desire to prosecute individuals

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<sup>196</sup> INCS Report, *supra* note 189.

<sup>197</sup> Juan Carlos Palou, Steven Dudley, Mariana Diaz Kraus, Sebastian Zuleta, Juan Sebastian Rengifo, 'The Uses and Abuses of Extradition', *Fundacion Ideas para la Paz*, Policy Brief 1, (20 April 2009).

<sup>198</sup> *Ibid.*

<sup>199</sup> Tamara Audi and Nicholas Casey, 'A Test of Drug War Teamwork—U.S. Awaits Mexican Response to Request for Extraditions of Major Cartel Suspect,' *Wall Street*

suspected of having committed serious crime coupled with the ineffectiveness of the formal extradition process has, on occasion, led states to seek alternative methods of apprehension.

## CONCLUSION

Extradition is a fundamental tool in the suppression of international and transnational crime. Over time, this system of international cooperation has evolved in order to respond to the demands of the international community. Extradition, which was once devoted to the transfer of political offenders between neighboring states, has developed into a practice that bears little resemblance to its modern day form. States have placed an increased reliance on the system to bring the perpetrators of transnational and international crimes to justice. It is clear from the above that states have a strong interest in suppressing crime and submitting wrongdoers to justice. This may seem like an obvious conclusion to draw but its significance is paramount to the present study. States have gone to great lengths to develop and improve cooperation in the prosecution of international and transnational crime. Numerous bilateral and multilateral instruments have been negotiated to facilitate the transfer of criminal suspects between states, international institutions have been set up to prosecute international criminals and states have recognized a right, and in some cases an obligation, to submit the perpetrators of grave offences to their judicial systems regardless of where the act was committed. Despite these efforts, the system is only as powerful as the force that states place behind it.

Considering that states act largely based on self-interest, the existence of an extradition agreement does not ensure that a state's request will be granted. It also does not mean that a state will abstain from seeking alternative methods of rendition should the formal system fail. Recognizing the extent of these efforts and the degree of time, research and resources that continue to be invested into improving the system of cooperation is

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*Journal*, (2 April 2013), available at: <http://online.wsj.com/news/articles/SB10001424127887324096404578356912948343322>.

vital to understanding the importance states place on ensuring perpetrators are brought to justice. When extradition fails or is unavailable, a state seeking to gain custody of a suspect is left with two options; it can consider the case closed or, it can employ methods outside the formal framework. In situations where the individual in question is wanted for serious crimes, the latter alternative may very well be the chosen option.

The political offence exception often poses as an impediment to extradition. Efforts have been made to refine, and in some cases remove, the exception. These changes may facilitate the interstate transfer of suspects but it is important to ensure that this is not done at the expense of the genuine political offender. The continuing importance of protecting this category of individuals is illustrated by the situations of Edward Snowden and Julian Assange. In order to strike a balance between the needs of the state and the rights of the suspect, a more palatable solution would be the development of a negative definition of political crimes. This approach would protect the true political offender while at the same time ensuring that international criminals and the perpetrators of terrorism-related offences are not shielded by the exception.

As well as reviewing the political offence exception, states have attempted to streamline the extradition process by entering into more agreements, lowering evidentiary standards, reducing the requirements of dual criminality and encouraging the extradition of nationals. The issue of non-extradition of nationals is one area that could be revised. A potential alternative to this is the creation of a system of cooperation between the judicial system of the requesting and requested state. This could come in the form of judicial cooperation agreements whereby the individual remains in his state of nationality but the judicial system undertakes to submit the suspect to trial.

Despite the improvements made, there will always be situations where formal extradition is not possible. As was illustrated in the case of Colombia, it is not always the system itself that frustrates the process; political factors can also prove detrimental to securing the transfer of suspects. In order to fill some of the gaps created by the shortcomings in the

formal extradition framework, it is suggested that the obligation to extradite or prosecute be given renewed support. The duty has reached customary status in the context of war crimes and its application to torture, crimes against humanity, genocide and terrorism-related offences is becoming increasingly accepted. In order to ensure that the perpetrators of international and transnational crimes do not elude punishment when extradition proves fruitless, states should endeavor to incorporate the obligation to extradite or prosecute into existing and future extradition agreements. As well as advancing the interests of states in suppressing crime, this would also reduce the incentive to employ extraterritorial abduction. As will be discussed in Chapters 2, 3, and 4, the three methods of extraterritorial abduction, kidnapping, luring and disguised extradition, can violate principles of public international law, international human rights law and international humanitarian law. Identifying efforts that can improve the formal system, and in turn reduce the need for extraterritorial abduction, will facilitate the suppression of crime, safeguard the sovereignty of states and protect the rights of the individual

## **CHAPTER 2**

### **KIDNAPPING**

#### **INTRODUCTION**

Kidnapping or abduction by force is the physical apprehension of an individual outside of a state's territory. This type of operation can be affected with or without the complicity or knowledge of the state from which the individual is taken. The actual presence of foreign agents and the exercise of police powers on the soil of another state mean that the impact of this method on the principle of territorial sovereignty is more apparent than in the case of luring and disguised or de facto extradition, which will be discussed in Chapters 3 and 4. In relation to the rights of the individual, the element of force associated with this type of apprehension makes the application of existing human rights provisions slightly more straightforward than that of inducement or the prejudicial enforcement of immigration laws, which feature in luring operations and disguised or de facto extradition.

The illegalities associated with kidnapping are more visible than that of luring and disguised or de facto extradition. This is not to say that it is the gravest form of irregular rendition; evidence or even suspicion that an individual's arrest was made possible by luring or disguised extradition may never arise. The connection between the events in the foreign state leading to the departure of the individual and his subsequent arrest may go undetected; arrival in the abducting state following disguised or de facto extradition may be attributed to standard immigration procedures and in the case of luring, the abductee's own free will. With kidnapping, the entry of agents onto the soil of another state and the physical taking of an individual across a territorial border makes the involvement of the apprehending state harder to conceal and in turn, the chain of events easier to record.

There are a number of documented examples of states and international



institutions employing or supporting kidnapping in order to secure the apprehension of an individual.<sup>1</sup> The capture of Abu Anas al-Libi in Libya by United States' agents in October 2013 is the most recent instance.<sup>2</sup> The alleged al-Qaeda operative, who is wanted in connection with the 1998 bombings of United States' embassies in Kenya and Tanzania, has been transferred to New York for trial. Al-Libi's capture and the failed mission to apprehend Mohamed Abdulkadir, a high ranking Shabaab operative, in Somalia may be a sign that the United States' counterterrorism policy is shifting away from targeted killings and towards the use of capture operations to neutralize terrorist suspects.<sup>3</sup> This highlights the continued importance of establishing the correct legal framework that guides extraterritorial abductions in the context of counterterrorism.

Kidnapping warrants consideration under the rubric of public international law, international human rights law and international humanitarian law. The United Nations Charter is the primary framework for the regulation of interstate force.<sup>4</sup> The prohibition contained in Article 2(4) would seem to forbid, outright, the unjustified use of this type of operation on the territory of another state.<sup>5</sup> The articles states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United

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<sup>1</sup> US Supreme Court, *Kerr v Illinois*, 6 December 1886, (119 US 436); ECtHR, *Öcalan v Turkey*, (Grand Chamber), Application No. 46221/99, 'Judgment', (12 May 2005); HRC, *Lilian Celiberti de Casariego v Uruguay*, Communication No. R.13/56, (29 July 1981), UN Doc Supp. No. 40 (A/36/40), at 185; HRC, *Sergio Ruben Lopez Burgos v. Uruguay*, Communication No. R.12/52, (29 July 1981), UN Doc. Supp. No. 40 (A/36/40) at 176; HRC, *María del Carmen Almeida de Quinteros et al. v Uruguay*, Communication No. 107/1981, (21 July 1983), UN Doc. CCPR/C/OP/2 at 138; HRC, *Cañón García v Ecuador*, Communication No. 319/1998 (5 November 1991), UN Doc. CCPR/C/43/D/319/1998, at 90; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, 'Judgment', 13 December 2012.

<sup>2</sup> 'US capture Libyan al-Qaida leader Anas al-Liby officials say', *The Guardian*, (6 October 2013), available at: <http://www.theguardian.com/world/2013/oct/06/us-capture-al-qaida-leader-anas-liby-libya>.

<sup>3</sup> Mary De Rosa and Marty Lederman, 'The President's May 23<sup>rd</sup> NDU Speech in Action: The Broader Significance of the al-Liby and Ikrima Operations', *Just Security Blog*, (15 October 2013), available at: <http://justsecurity.org/2013/10/15/23d-ndu-speech-action-broader-significance-al-liby-ikrime-operations/>; Micah Zenko, 'The Known Unknowns of Counterterrorism Ops', *Foreign Policy*, 8 October 2013, available at: [http://www.foreignpolicy.com/articles/2013/10/08/the\\_known\\_unknowns\\_of\\_counterterrorism\\_ops](http://www.foreignpolicy.com/articles/2013/10/08/the_known_unknowns_of_counterterrorism_ops).

<sup>4</sup> Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>5</sup> *Ibid*, Article 2(4).

Nations.<sup>6</sup>

An analysis as to the legality of abduction cannot, however, limit itself to a literal reading of the provision. In order for conduct to come within the ambit of Article 2(4), it must rise to a certain level. The threshold is not expressly set out in the instrument and so the scope of the prohibition is largely down to interpretation. Elucidating the correct meaning to be given to the concept of “force” and the effect of the terms “against the territorial integrity or political independence of any state” and “any other manner inconsistent with the Purposes of the United Nations”, requires consideration of the drafting history of the provision, its underlying purpose and circumstances in which it has been invoked.<sup>7</sup> These issues will be considered in section 1.

The capture of members of an opposing party is an integral component of the conduct of hostilities during time of armed conflict. Military operations must conform to the principles of proportionality, distinction and necessity but beyond that, the attack, apprehension and detention of belligerents are legitimate acts of war. Outside of an armed conflict, international humanitarian law does not apply and international human rights law is the appropriate framework. Navigating between these two frameworks is not always a clear-cut exercise. Contemporary conflicts sometimes defy geographical limits and so the boundary between armed conflict and a situation of peace can become blurred. The spillover of military operations into neighboring countries and in some cases, to remote locations, complicates the establishment of the applicable framework. This is particularly true in the context of the conflict in Afghanistan. Individuals associated with this conflict have been targeted in Afghanistan, Iraq, Pakistan, Yemen, Italy and Somalia. Many of these operations are governed by international humanitarian law, some constitute law enforcement measures regulated by international human rights law, whilst others do not fall neatly into either category. The recent capture of Anas al-Libi in Libya,

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

the failed operation to apprehend Mohamed Abdulkadir in Somalia and the killing of Bin Laden in Pakistan in 2011 provide examples of the interaction between the frameworks. Section 2 of this Chapter will map out the scope of regulation of international humanitarian law in the context of extraterritorial abductions undertaken in countries other than that in which an armed conflict is principally occurring.

Kidnapping typically involves a degree of physical coercion, restraint on freedom of movement and a threat to the personal integrity of the individual. The main rights triggered by such conduct are the right to liberty and security of the person and the right not to be subjected to arbitrary arrest or detention. As the arrest is carried out on foreign soil, it is necessary to consider the extent to which a state's human rights obligations attach to extraterritorial operations. These issues will be addressed in section 4. Complaints of torture and/or cruel, inhuman or degrading treatment often accompany allegations of forcible abduction. Treatment following apprehension will be touched on for the purposes of context but the focus of the study is on the law applicable to the capture itself.

As was the situation in *Eichmann* and in all cases where irregularities of surrender have been raised before international courts and tribunals, the suspect is usually someone accused of having committed serious crimes. In such cases, the interests of bringing the individual to justice has influenced determinations as to the affect of extraterritorial abduction on the rights of the abductee and on the jurisdiction of the court to try the individual. Although the gravity of the offence may influence determinations of guilt and the availability of remedies, it does not alter the legality of the practice itself. The present Chapter will lay the groundwork for the consideration of these issues in Chapter 5.

## 1. THE MODALITIES OF FORCIBLE ABDUCTION

As was noted above, there have been a number of documented cases of extraterritorial kidnapping.<sup>8</sup> The modalities of the practice can differ from operation to operation. Some involve the cooperation of the state in which the individual is captured whilst others are unilateral missions. The kidnapping of Adolf Eichmann is the most commonly cited example of an extraterritorial kidnapping.<sup>9</sup> Eichmann, wanted for his role in the Holocaust, was charged with crimes against humanity, war crimes and membership of a criminal organization. In 1960, he was tracked down, captured on Argentinean soil and subsequently transported to Israel for trial. The notoriety of the operation is down to the gravity of crimes for which he was wanted and the controversy it caused between the states involved. The facts of the case illustrate the modus of forcible abduction carried out without the knowledge or cooperation of the state from which the individual is taken.

The operation that led to Eichmann's capture was a highly organized affair involving a great degree of planning and coordination. At the time of his apprehension, Eichmann was living in Buenos Aires.<sup>10</sup> Mossad agents travelled to Argentina on false papers to investigate his whereabouts.<sup>11</sup> Once located and identified, Eichmann was placed under surveillance. In May 1960, the team positioned themselves around Eichmann's home.<sup>12</sup> On his approach, a car breakdown was staged and Eichmann was seized. The details reveal that great care was taken to conceal the mission from the Argentinean authorities. The operation coincided with the 150<sup>th</sup> anniversary celebrations of Argentinean independence. The timing ensured that the presence of an Israeli aircraft, which was later used to transport Eichmann,

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<sup>8</sup> See fn 1.

<sup>9</sup> District Court of Jerusalem, *The Attorney General of the Government of Israel v. Eichmann*, 'Judgment', 12 December 1961, Criminal Case No. 40/61 (36 *International Law Reports* 1968 pp. 18-276); Supreme Court of Israel, *Attorney General of the Government of Israel v. Eichmann*, 'Judgment', 29 May 1962, Criminal Appeal No. 336/61 (36 *International Law Reports* 1968, pp. 277-342).

<sup>10</sup> Holocaust Education and Archive Research, 'Adolf Eichmann: His Escape and Capture in Argentina', available at: <http://www.holocaustresearchproject.org/trials/eichmanntrialcapture.html>.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

did not raise suspicions. In order to clear security, Mossad agents disguised themselves as flight crew. On boarding the plane, Eichmann was allegedly sedated, passed off as a sick employee and subsequently flown to Israel for trial.<sup>13</sup>

The unilateral entry onto Argentinean soil by Israeli agents and their exercise of enforcement powers triggered the framework of public international law. Argentina claimed that the operation was a violation of its sovereignty and submitted a complaint to the Security Council.<sup>14</sup> The Security Council issued a resolution condemning the apprehension and stated that acts such as that under consideration “*may, if repeated, endanger international peace and security.*”<sup>15</sup> The inter-state dispute was resolved with the issuance of a joint statement by Israel and Argentina declaring the matter closed.<sup>16</sup> The statement also acknowledged that the operation violated the rights of Argentina.<sup>17</sup>

As well as the rights of Argentina, the rights of Eichmann under international human rights law were also at issue. Eichmann argued that international law granted him an independent right to freedom and personal security. The Supreme Court of Israel opined that under international law, the right violated was that of Argentina.<sup>18</sup> Holding that the issue of the violation of sovereignty had been settled, it rejected the claim that the accused had a separate right to freedom and personal security.<sup>19</sup> The Supreme Court then went on to consider whether extraterritorial abduction deprived a court of jurisdiction. It affirmed the finding of the District Court that jurisdiction could be sustained pursuant to the maxim *male captus bene detentus*.<sup>20</sup> The words of Attorney General Hausner demonstrate the application of the doctrine in *Eichmann*:

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<sup>13</sup> *Ibid.*

<sup>14</sup> U.N. Doc. No. S/PV. 865, 22 June 1960.

<sup>15</sup> UN Security Council, Resolution 138 (1960) of 23 June 1960, 3 June 1960, S/RES/138 (1960).

<sup>16</sup> Joint Communiqué, 3 August 1960, quoted in Judgment of District Court of Jerusalem, *supra* note 9, at 59.

<sup>17</sup> *Ibid.*, at 57.

<sup>18</sup> Judgment of Supreme Court of Israel, *supra* note 7, at 308.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

[T]he circumstances of the Accused's detention, his seizure and his transfer are not relevant for competence and they contain nothing which can affect this competence, and since they are not relevant, they should not be considered and evidence concerning them should not be heard.<sup>21</sup>

The fact that the Security Council's condemnation of the abduction had no bearing on Israel's exercise of jurisdiction demonstrates that although extraterritorial abduction may involve violations of international law, state interests in the prosecution of certain crimes can serve to override international legal obligations and render conduct permissible before a court. If an exception were to be made in the context of crimes of a certain magnitude, one could argue that following the 1945 bombing of Dresden, it would have been acceptable for German agents to enter onto British soil, capture those responsible and bring them to Germany for trial. This is a dangerous precedent to set as it allows the question of legality to be obscured by the seriousness of the crime. The Eichmann case illustrates the modus of extraterritorial kidnapping and how the international legal frameworks apply to such operations. The judgment will be drawn on throughout this study but for now, understanding the form of a unilateral extraterritorial abduction and the issues raised in the subsequent adjudication is sufficient.

The case of Abu Omar provides an example of an extraterritorial kidnapping undertaken with the assistance of agents of the state from which the individual is taken.<sup>22</sup> This operation was conducted pursuant to the "war on terror."<sup>23</sup> Omar, a member of an extremist Egyptian organization

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<sup>21</sup> The Trial of Adolf Eichmann, Record of Proceedings in the District Court of Jerusalem, Vol. 1, Session 1, available at: <http://www.nizkor.org/hweb/people/e/eichmannadolf/transcripts/Sessions/Session-001-05.html>.

<sup>22</sup> John Hooper, 'Italian court finds CIA agents guilty of kidnapping terrorism suspect', *The Guardian*, (4 November 2009), available at: <http://www.theguardian.com/world/2009/nov/04/cia-guilty-rendition-abu-omar>; Rachel Donadio, 'Italy Convicts 23 Americans for CIA Rendition', *The New York Times*, (5 November 2009) at A15.

<sup>23</sup> For accounts of other kidnappings in the context of the 'war on terror' see, Matteo M Winkler, 'When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program', 30 *Loyola of Los Angeles International Comparative Law Review* (2008) 33.

and suspected associate of key al-Qaeda affiliates was allegedly kidnapped on a street in Milan in 2003 by CIA agents. On his way to the local Mosque, he was approached by plain-clothes Italian military police officers and asked to produce immigration documents. He claims to have been bundled into a vehicle, sedated and transported to a United States airbase in Aviano, Northeast Italy. Omar was subsequently flown to Egypt where he was detained for seven months and allegedly subjected to torture. Omar was released in April 2004, re-arrested in May 2004 and subjected to a form of house arrest in Alexandria in February 2007.

In June 2007, a criminal trial began in Milan against United States and Italian agents accused of having been involved in the kidnapping.<sup>24</sup> Extradition requests for the indicted American citizens were sent to the Italian Ministry of Justice but the Ministry refused to forward them to the United States. In 2009, 21 CIA agents and an Air Force colonel were sentenced to five years in prison; CIA Milan base chief, Robert Seldon Lady, received an eight-year sentence.<sup>25</sup> Jeff Castelli, former CIA Rome station chief and two others were acquitted on grounds of diplomatic immunity. The Italian Supreme Court confirmed this verdict in 2010.<sup>26</sup> In 2013, an appeals court overturned the decision of the lower court and sentenced Castelli to seven years in prison and the other two agents to six years.<sup>27</sup> Most recently, Italy's former intelligence chief, Courtolo Pollari, his former deputy and three Italian secret service officials were convicted of complicity in Omar's kidnapping.<sup>28</sup>

The Italian court was the first to hand down a conviction for the practice of extraordinary rendition. A number of rendition cases have been refused in the United States based on the state secrets privilege. The United

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<sup>24</sup> Donadio, *supra* note 22.

<sup>25</sup> Hooper, *supra* note 22.

<sup>26</sup> Elisabetta Povoledo, 'Rendition Convictions of 23 Americans Upheld in Italy', *The New York Times*, (19 September 2012), available at: <http://www.nytimes.com/2012/09/20/world/europe/rendition-convictions-of-23-americans-upheld-in-italy.html>.

<sup>27</sup> *Amnesty International*, 'Italian Appeals Court convicts three former CIA officials in Abu Omar kidnapping case', Public Statement, AI Index: EUR 30/002/2013, (6 February 2013).

<sup>28</sup> Gaia Pianigiani, 'Italy Jails Ex- Officials for Rendition', *The New York Times*, (12 February 2013), available at: [http://www.nytimes.com/2013/02/13/world/europe/former-italian-military-officials-sentenced-in-abduction-of-abu-omar.html?\\_r=0](http://www.nytimes.com/2013/02/13/world/europe/former-italian-military-officials-sentenced-in-abduction-of-abu-omar.html?_r=0).

States Supreme Court refused review of *El-Masri v Tenet* in 2007 and again in 2011 in relation to *Mohamed v Jeppesen Dataplan Inc.*<sup>29</sup> A string of cases have been filed in the ECtHR against states for their alleged role in facilitating extraordinary rendition. These filings include *Al-Nashiri v. Romania* and *Abu Zubaydah v. Poland*.<sup>30</sup> The latest case before the European Court was scheduled to hear submissions from counsel for Guantánamo detainee, Abd al-Rahim al-Nashiri, in December 2013. The applicant has filed a suit against Poland for its role in facilitating his detention, torture, and transfer to the facility.<sup>31</sup>

Turning back to the Abu Omar case, the decision was a welcome development but in practice, it may represent little more than a judicial denouncement of extraordinary rendition. Although five Italian officials have been imprisoned, it is questionable that the United States agents will ever serve their sentences. Diplomatic cables released by WikiLeaks reveal that the governments of the United States and Italy cooperated in attempts to obstruct the judicial investigation and suppress extradition requests for those convicted. A cable from 2006 states:

Justice Minister Mastella has so far kept the lid on recurring judicial demands to extradite presumed CIA officers allegedly involved in a rendition of Muslim cleric Abu Omar.<sup>32</sup>

The cooperation of the Italian government in the matter was likely influenced by the United States' insistence that:

Nothing would damage relations faster or more seriously than a decision by the government of Italy to forward warrants for arrests.<sup>33</sup>

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<sup>29</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667); *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir.), *amending* 563 F.3d 992 (9th Cir.), *reh'g granted*, 586 F.3d 108 (9th Cir. 2009); See Margaret Satterthwaite, 'The Story of *El Masri v. Tenet*: Human Rights and Humanitarian Law in the 'War on Terror'', (December 4, 2008) in Human Rights Advocacy Stories, Hurwitz, Satterthwaite, & Ford, (eds.), 2009.

<sup>30</sup> *Al-Nashiri v. Romania*, Application no. 33234/12, 18 September 2012; *Abu Zubaydah v. Poland*, Application no. 7511/13, 28 January 2013; *Abu Zubaydah v. Lithuania*,

<sup>31</sup> *Al-Nashiri v. Poland*, Application no. 28761/11, 6 May 2011.

<sup>32</sup> 'Italy: New Under Secretary to the PM Calls Relationship with US "Essential," Says Italy will be Supportive on Israel, Will Stick with EU on Iran', *WikiLeaks*, (Reference ID: 06ROME1590; Cable Date: Wednesday, 24 May 2006 15:43 UTC) Embassy Rome, available at: <http://www.cablegatesearch.net/search.php?q=06rome1590&qo=0&qc=0&qto=2010-02-28>.

<sup>33</sup> *Ibid.*



A subsequent communication concerning Romano, the Air Force colonel sentenced in 2009, describes the Italian government's criticism of its judicial system and its prediction that the conviction would be overturned on appeal.<sup>34</sup> Although this prediction was incorrect and the convictions were subsequently upheld, there is further evidence indicating that the United States agents will not face justice. The Italian government granted pardon to Colonel Romano who was sentenced to five years in 2009. Robert Seldon Lady has recently submitted a request for pardon to the Italian government.<sup>35</sup> Lady, who is subject to an international arrest warrant issued by an Italian Court, was arrested in Panama in February 2013.<sup>36</sup> Refusing Italy's request to extradite him, Lady was returned to the United States. Considering the cooperation between the United States and Italy on the matter, it would be surprising if any of the United States officials ever serve their sentences.

Although not directly related to the current discussion, it is interesting to draw a parallel between the situation of Robert Seldon Lady and that of Edward Snowden. The United States requested Edward Snowden's extradition from Hong Kong, cooperation from countries in denying him entry onto their territories and Russia's assistance in returning him to the United States.<sup>37</sup> It is hard to imagine how a state can expect cooperation in returning a suspect while at the same time actively assisting its own

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<sup>34</sup> 'Secdef Meeting with Italian Prime Minister Silvio', (Reference ID: 10ROME174; Cable Date: 2010-2-12 13:27) Embassy *WikiLeaks*, Rome, available at: <http://wikileaks.org/cable/2010/02/10ROME174.html>.

<sup>35</sup> *Amnesty International*, 'Italy must not Pardon former CIA Agent Involved in Rendition', (13 September 2013), available at: <http://www.amnesty.org/en/news/italy-must-not-pardon-former-cia-agent-involved-rendition-2013-09-13>.

<sup>36</sup> Scott Shane, 'Panama: Former Spy Returns to U.S.', *New York Times*, (19 July 2013), available at: <http://www.nytimes.com/2013/07/20/world/americas/panama-former-spy-returns-to-us.html>.

<sup>37</sup> Gerry Mullany & Scott Shane, 'U.S. Petitions for Extradition in N.S.A. Case', *The New York Times*, (22 June 2013), available at: [http://www.nytimes.com/2013/06/23/world/asia/arrest-of-nsa-leaker-seen-as-easier-than-transfer-to-us.html?\\_r=0](http://www.nytimes.com/2013/06/23/world/asia/arrest-of-nsa-leaker-seen-as-easier-than-transfer-to-us.html?_r=0); *The Washington Post*, 'Suspicion of Manhunt Follows Snowden Case', Greg Miller, (July 3 2013), available at: [http://articles.washingtonpost.com/2013-07-03/world/40349774\\_1\\_bolivian-cochabama-aymara-indian](http://articles.washingtonpost.com/2013-07-03/world/40349774_1_bolivian-cochabama-aymara-indian); Full text of United States request to Venezuela for the extradition of Snowden should he arrive there, 'US Request for Extradition of Edward Snowden', *The Guardian*, (6 July 2013), available at: <http://www.theguardian.com/world/interactive/2013/jul/06/us-request-extradition-edward-snowden>.

national in avoiding transfer to Italy to serve a sentence. As was discussed in Chapter 1, state cooperation in the suppression of crime is influenced by self-interest. The United States has a greater interest in protecting its nationals from a foreign judgment than seeing the perpetrators of serious crime against a foreign national punished. This highlights the vulnerability of the international system of cooperation and the way in which states sometimes disregard international arrest warrants and valid extradition requests.

Both of the cases outlined above involve the physical presence of agents on the territory of another state, the forcible apprehension of the suspect and his transfer overseas. Omar's kidnapping is an example of an extraterritorial abduction carried out in the context of counterterrorism. The operation differs from that which led to the capture of Eichmann in that the state from which the individual was taken was complicit and the purpose of the apprehension was not the return of a suspect for trial. The convictions handed down by the Italian courts were based on violations of domestic law; principles of international law were not considered. Nevertheless, unlike Argentina, Italy could not have argued that the operation violated its sovereignty and so the framework of public international law as it relates to the use of force would not apply. In relation to Omar's rights, international human rights law would justify consideration of the prohibition on torture, the principle of *non refoulement* and the right to liberty and security of the person.

These two incidents are only samples of extraterritorial abductions; there have been numerous cases of rendition to justice and rendition for the purposes of interrogation.<sup>38</sup> What can be discerned from these cases are the possible reasons why states sometimes bypass the formal extradition process and the manner in which courts and governments handle allegations of such conduct. Because the motive behind the apprehension of such persons may be detention without trial rather than an adjudication of guilt,

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<sup>38</sup> See *fn* 1; Winkler, *supra* note 23.

conventional channels of extradition may not be viable. In the case of individuals wanted for serious crimes, the benefits of gaining custody of the suspect may be felt to outweigh the risks involved in alerting the authorities of the state in which the target is present and any violation of the rights of that state or the accused. The response of the state in which the abduction is carried out can hinder efforts to punish those responsible for the abduction and the realization of the abductee's rights. Issues of state responsibility, the effect of extraterritorial abduction on the jurisdiction of the court and the remedies available to abductees and injured states will be dealt with in Chapter 5. Although kidnapping may not be pronounced as unlawful or a violation of the rights of the abductee by a court, it does not mean that it is compatible with the principles and rules of international law. The frameworks of public international law, international human rights law and international humanitarian law inform the debate as to the legal status of extraterritorial abduction.

## **2. KIDNAPPING UNDER PUBLIC INTERNATIONAL LAW**

Unlike luring and disguised or de facto extradition, kidnapping will always involve the presence of foreign agents on the territory of another state. Instead of inducing the target or employing immigration procedures, the departure of the individual is affected by way of physical force. In the case of luring, as will be discussed in Chapter 3, the absence of foreign agents or physical coercion carried out on the soil of another state raises questions about the ability to quantify conduct as a violation of the prohibition on non-intervention. Absent consent, extraterritorial forcible abduction will always constitute an unlawful intervention. The element of physical coercion and the exercise of police powers on another state's soil warrant an assessment against the more specific proscription, the prohibition on the use of force.

Article 2(4) of the United Nations Charter contains the most solid formula for the regulation of inter-state force. This Article, which has been

referred to as representing “one of the bedrocks of modern day international order,” contains within it a *jus cogens* rule of international law from which no derogation is permitted.<sup>39</sup> The prohibition, which has been recognized as reflecting customary international law, obliges Members to, “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations.”<sup>40</sup> This may be the most absolute pronouncement of the prohibition however, “[t]he paragraph is complex in its structure, and nearly all of its key terms raise questions of interpretation.”<sup>41</sup> A degree of flexibility is beneficial in that it allows for the development of the prohibition in unison with state practice but a drawback to its ambiguity is that it renders the task of determining the legality of abduction quite complex and open to potential abuse. Injured states have sometimes denounced the practice as a violation of its sovereignty but diplomatic channels usually resolve such matters.<sup>42</sup> Pronouncements of the Security Council in this area have largely focused on the prohibition’s application to larger scale operations. Legal commentary has addressed issues relating to the meaning of force and type of conduct to which the term applies but its relevance to abduction operations has received limited analysis.<sup>43</sup>

If the sending of agents onto the territory of another state to capture a target does in fact constitute force within the meaning of Article 2(4), the conduct may nevertheless be excused if consent was given by the foreign state, there was Security Council authorization for the operation or if it was a lawful exercise of self-defense.<sup>44</sup> In order to determine whether this type of operation constitutes a use of force and in turn, triggers Article 2(4), the

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<sup>39</sup> Noam Lubell, *The Extraterritorial Use of Force against Non-State Actors*, (2010), at 26; ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits), ‘Judgment’, June 27 1986, para 190.

<sup>40</sup> UN Charter, Article 2(4), *supra* note 4.

<sup>41</sup> Oscar Schachter ‘The Right of States to Use Armed Force’ 82 *Michigan Law Review* (1984), 1620 at 1624.

<sup>42</sup> Eichmann, *supra* note 9.

<sup>43</sup> Bert V. Roling, ‘The Ban on the Use of Force and the U.N. Charter’, in Cassese, *The Current Legal Regulation of the Use of Force*, (eds.) (1986).

<sup>44</sup> UN Charter, Article 2, *supra* note 4.

following section will investigate the meaning of force and consider its qualifying threshold.

## 2.1 THE THRESHOLD OF FORCE

There are a number of points that can be put forward to challenge an assertion that abduction operations constitute force within the meaning of the Charter. Extraterritorial abduction is typically carried out by way of in-and-out operations. These surgical missions are generally small-scale in terms of their duration, scope and the man-power used. One could argue that extending the term force to include conduct of this kind would weaken the prohibition, which should instead be reserved for initiatives that are more serious. One author has warned: “[e]xtension of the applicability of the provision of Article 2(4) to cover all kinds of force would deprive states of “any possibility of enforcement”.”<sup>45</sup> Another view is that “even temporary and limited incursions described as ‘in-and-out operations’ are [...] an infringement of the principle contained in Article 2(4).”<sup>46</sup> The rationale underlying the latter theory is that there is no hierarchical test, if the conduct constitutes “force” within the meaning of Article 2(4), it is subject to the prohibition. It is submitted that this approach is more favorable as it offers a greater degree of legal clarity and in turn, reduces the potential for abuse.

The Charter does not enumerate the types of acts to which the prohibition on the use of force attaches. An examination of the *travaux préparatoires* is helpful in establishing what it *does not* cover.<sup>47</sup> Proposals put forward in the drafting stage to bring conduct of an economic and political character within the scope of Article 2(4) were rejected.<sup>48</sup> The non-applicability of the term to activities of this nature was reaffirmed during the proceedings that led to the UN General Assembly’s Declaration on

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<sup>45</sup> Albrecht Randelzhofer, ‘Use of Force’ *Encyclopedia of Public International Law*, vol. 4, (1982), at 258.

<sup>46</sup> Lubell, *supra* note 39, at 28.

<sup>47</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 32.

<sup>48</sup> United Nations Conference on International Organization, Doc. 2, G/7(e)(4), 3 U.N.C.I.O. Docs. 251, (1945), 253-54.

Friendly Relations.<sup>49</sup> In practice, the economic embargo against Cuba in the 1960s and the 1973 Arab oil embargo and sanctions against South Africa were not categorized as uses of force. Such conduct may instead come under the heading of unlawful intervention. Intervention will be considered in Chapter 3 in the context of luring operations but for the current discussion, it is sufficient to note that conduct failing to meet the threshold of force is likely to come within the broader prohibition on intervention.

Some authorities have concluded that the prohibition contained in Article 2(4) is limited to conduct constituting “armed force.”<sup>50</sup> This approach finds support in the wording of the Charter. The preamble and Articles 41, 42 and 51 speak of armed force and armed attacks.<sup>51</sup> This interpretation would extend regulation to kinetic acts such as the dropping of bombs, drone strikes, the firing of artillery and possibly kidnapping. Conduct such as cyber-attacks and the sending of arms to opposition groups would fall outside the prohibition. Simma has endorsed the restrictive approach:

the prohibition is in principle restricted to armed force, but this restriction is to be interpreted broadly to encompass every kind of armed force in the international relations between States.<sup>52</sup>

It is tempting to subscribe to this line of reasoning as limiting the prohibition to armed force creates a sort of litmus test against which conduct can be easily measured; if the act does not involve active force, it is beyond the scope of Article 2(4). Despite its convenience, it is difficult to accept this position as a true representation of the intention of the drafters. There are certain forms of activity that although not constituting armed force, can nevertheless cause serious injury and destruction. The proceedings before the UN General Assembly’s Declaration on Friendly

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<sup>49</sup> U.N. GAOR Special Committee on Friendly Relations, U.N. Doc. A/AC.125/SR.114 (1970); Also see ‘Report of the Special Committee on Friendly Relations’, U.N. Doc. A/7619 (1969).

<sup>50</sup> Hersch Lauterpacht, *Oppenheim’s International Law: A Treatise. Vol. II: Disputes, War and Neutrality*, (7th ed.), (1952), at 153-154; Bert V.A. Roling, ‘The Ban on the Use of Force and the UN Charter in the Current Legal Regulation of the Use of Force’, 3 (A. Cassese ed., 1986).

<sup>51</sup> UN Charter, *supra* note 4.

<sup>52</sup> Bruno Simma, *The Charter of the United Nations: A Commentary*, (1994), at 233.

Relations and dicta of the International Court of Justice do not support the limiting of the prohibition to armed force.<sup>53</sup> In the Nicaragua case, the Court categorized acts not amounting to armed force as possible violations of the prohibition:

[W]hile arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, that is not necessarily so in respect of all assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua [...] does not itself amount to a use of force.<sup>54</sup>

Although neither the wording of the Charter or the *travaux préparatoires* explicate a definitive threshold for the use of force, the following can be discerned:

[t]he threshold for a use of force [...] lie[s] somewhere along the continuum between economic and political coercion [...] and acts which cause physical harm [...]<sup>55</sup>

A kidnapping operation may not involve the firing of weapons, destruction of property or physical injury but it could nevertheless meet the threshold implicit in Article 2(4). The thrust of academic opinion on the topic endorses a broad interpretation of the prohibition that encompasses extraterritorial abductions. As Dinstein has stated, “the correct interpretation of Article 2(4) [...] is that any use of inter-state force by Member States for whatever reason is banned, unless explicitly allowed by the Charter.”<sup>56</sup> This threshold is not static; a determination as to whether abduction constitutes force will fall to the Security Council or the International Court of Justice. This judgment will in turn be contingent upon the willingness of the injured state to submit a complaint to that organ for consideration. It is not possible to say with certainty how these institutions would pronounce on the matter. The Security Council resolution

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<sup>53</sup> U.N. GAOR Special Comm. on Friendly Relations, U.N. Doc. A/AC.125/SR.114 (1970); See also Report of the Special Committee on Friendly Relations, U.N. Doc. A/7619 (1969).

<sup>54</sup> *Nicaragua*, *supra* note 39, para 228.

<sup>55</sup> Michael N. Schmitt, ‘Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Attack’ in *Proceedings of a Workshop on Detering Cyber attacks: Informing Strategies and Developing Options for U.S. Policy* (2010), at 155.

<sup>56</sup> Yoram Dinstein, *War, Aggression and Self-Defense*, (2005), at 87-88.

issued in response to the abduction of Eichmann condemned the conduct of the Israeli agents but did not explicitly qualify it as a use of force. Resolution 318 provides:

Acts such as that under consideration which affect the sovereignty of a Member State and therefore cause international friction, *may, if repeated*, endanger international peace and security.<sup>57</sup>

At most, the Resolution can be interpreted as a condemnation of the violation of the sovereignty of a Member State and a warning that extraterritorial abductions *could* violate the purposes of the Charter, which may in turn trigger Article 2(4).

It submitted that the term force is broad enough to cover extraterritorial abduction. If a restrictive interpretation is followed, rather than fall outside the provision, kidnapping will nevertheless constitute unlawful intervention. Unlawful intervention will be considered in Chapter 3 in the context of luring operations.

## **2.2 AGAINST THE TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF ANY STATE**

The phrase “against the territorial integrity or political independence of any State” raises a question as to whether force directed against an individual falls beyond the scope Article 2(4). The motivation behind extraterritorial abduction is often the apprehension of a non-state actor; neither the state nor its institutions are the target of the operation. Bowett argues that sending agents into a state’s territory to specifically target a criminal does not violate the territorial integrity or political independence of the state.<sup>58</sup> Another approach does not consider the terms “political independence” and “territorial sovereignty” as restricting the scope of the prohibition.<sup>59</sup> The

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<sup>57</sup> UNSC Res 138, *supra* note 15.

<sup>58</sup> D. Bowett, *Self Defense in International Law*, (1958), at 55; See Sir Ian Beckett on behalf of the United Kingdom, I.C.J Pleadings, *Corfu Channel Case*, iii 295-296, cited in Brownlie, *International Law and the Use of Force*, (1963), at 4.

<sup>59</sup> Simma, *supra* note 52, at 215; Lubell, *supra* note 39, at 27; Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*,



original Dumbarton Oaks proposal did not contain the phrase. It read:

All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.<sup>60</sup>

An amendment to include the words “against the territorial integrity or political independence of any State” met with opposition from delegates who feared that the insertion had the potential of creating legal loopholes.

Rather than acting as a qualifier, one author has stated that:

The phrase was not intended to limit the scope of the prohibition but instead was adopted at the insistence of many smaller states to give more effect to the general prohibition against the use force in interstate relations.<sup>61</sup>

Followers of an expansive Article 2(4) prohibition posit that the term “integrity” is synonymous “inviolability.”<sup>62</sup> This interpretation extends regulation to any kind of forcible trespassing. According to this approach:

an incursion into the territory of another State constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation.<sup>63</sup>

In practice, the significance of the phrase is made somewhat redundant by the final words of the provision. The second part of Article 2(4) requires states to refrain from any threat or use of force that is “inconsistent with the Purposes of the United Nations.” The main Purpose of the United Nations is contained in Article 1(1) of the Charter:

To maintain international peace and security, and to that end: to take collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.<sup>64</sup>

These closing words create a sort of catch-all provision that widens the net to include almost any unilateral act on the territory of another state.<sup>65</sup> The

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(2005), at 29-30; *Oppenheim's International Law*, *supra* note 46, at 152; Akehurst, *Modern Introduction to International Law*, (1997), at 309.

<sup>60</sup> ‘Proposals for the Establishment of a General International Organization’, in *Foreign Relations* (1944), at 890-900.

<sup>61</sup> Bowett, *supra* note 58, at 150-152; Maogoto, *supra* note 59.

<sup>62</sup> Maogato *ibid*, at 29-30.

<sup>63</sup> *Ibid*.

<sup>64</sup> UN Charter, *supra* note 4, Article 1(1).

<sup>65</sup> Dinstein, *supra* note 56, at 86; Brownlie, 265-269; Maogato, *supra* note 59, at 30.

United States' delegate at the United Nations Conference on International Organization stated that "the intention of the author of the original text was to state in the broadest terms and absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to ensure that there should be no loopholes."<sup>66</sup> It is submitted that the words "any other manner" extend the prohibition to every use of force that is not authorized within the four corners of the Charter.<sup>67</sup>

In order for conduct to trigger Article 2(4), it must constitute force within the meaning of the provision. If the conduct crosses this threshold, it will then fall to be measured against the "territorial integrity or political independence or any other manner inconsistent with the Purposes of the Charter" criteria. Every use of force is judged individually based on the circumstances in which it is carried out.<sup>68</sup> Although this approach may not be conducive to legal clarity, it allows for the evolution of the regulatory framework in unison with the changing demands of the international community. One way of resolving the ambiguity surrounding the scope of Article 2(4) would be to apply a rebuttable presumption to uses of force not authorized by the Charter.<sup>69</sup> The burden would then shift to the actor to justify its actions.

The capture of Adolf Eichmann is the only instance of extraterritorial abduction that the Security Council has pronounced upon. As was mentioned above, the Resolution that followed condemned the act as a violation of Argentina's sovereignty but it did not go so far as to classify the conduct as a violation of 2(4). It is interesting to note that the Resolution acknowledged the gravity of the crimes committed by the abductee and the interest of the international community in bringing him to

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<sup>66</sup> United Nations Conference on International Organization, UN Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 335 (1945).

<sup>67</sup> Michael N. Schmitt, *Essays on the Law and War at the Fault Lines*, (2012), at 15; Dinstein, *supra* note 56.

<sup>68</sup> W. Michael Reisman, 'Criteria for the Lawful Use of Force in International Law', 10 *Yale Journal of International Law* (1985) 279, at 282; Schmitt *Ibid*, at 17.

<sup>69</sup> Schmitt, *ibid*, at 17.

justice. This raises a question as to whether extraterritorial abductions can be reconciled with the Charter in situations in which the purpose of the operation is to serve the interests of the international community. For example, the Security Council has condemned acts of international terrorism as constituting threats to international peace and security.<sup>70</sup> If a state engages in the extraterritorial abduction of an individual who is suspected of having committed acts of terrorism or international crimes, states and the Security Council, although not condoning the forcible measure, may not expressly classify the operation as a violation of the Charter.<sup>71</sup> This does not mean that the conduct is therefore legal; Bowett considered this outcome in the context of reprisals.<sup>72</sup> He noted that while reprisals remain illegal *de jure*, they become accepted *de facto*.<sup>73</sup>

Regardless of whether an act is officially condemned by a court or other institution, the fact that it is a violation of international law remains. As set out in the preamble, the purpose of the United Nations Charter is to maintain international peace and security. The prohibition on the use of armed force against other nations is imperative to the realization of this aim however, it is oftentimes disregarded. The frequency with which the United States has used force on the territory of neutral states for the purposes of neutralizing non-state actors in the context of counterterrorism illustrates Doswald-Beck's premise that "the progressive disrespect of the rules prohibiting force in the UN Charter has led to an increased acceptance by many nations, and other groups, of the use of force."<sup>74</sup> She posits that the prevention of the negative effects brought about by armed conflict depends not on respect for international humanitarian law but instead, on adherence to the prohibition in Article 2(4), "IHL cannot take the place of the original

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<sup>70</sup> See SC Res. 1373 (2001); SC Res. 1438 (2002); SC Res. 1440 (2002); SC Res. 1530 (2004); SC Res. 1611 (2005).

<sup>71</sup> Cassese *International Law* (2005), at 362. Lubell, *supra* note 39, at 59.

<sup>72</sup> Derek Bowett, 'Reprisals Involving Recourse To Armed Force', 66 *American Journal of International Law* (1972) 1, at 10-11.

<sup>73</sup> *Ibid.*

<sup>74</sup> Louise Doswald-Beck, 'Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation', 11 *Santa Clara Journal International Law* 1 (2012).

intention of the UN Charter which was to prohibit the use of armed force against other nations.<sup>75</sup>

In the context of the use of force, the apprehending state will be in violation of international law unless, the state from which the individual is abducted consented, the Security Council authorized the operation or, it was a lawful exercise of self-defense. The doctrine of hot pursuit has also been put forward to justify extraterritorial unilateral measures. In 1986, South Africa attempted to rely on the doctrine in relation to limited breaches of Article 2(4) in the form of incursions into foreign territory as part of the ongoing pursuit of offenders.<sup>76</sup> The Security Council rejected this argument and denounced South Africa's practice of hot pursuit.<sup>77</sup> The doctrine, which could potentially constitute a justification for extraterritorial apprehensions, has generally received little support.<sup>78</sup>

Before considering the circumstances that give rise to a state's right to use force in self-defense, it is necessary to understand the relationship between the *jus ad bellum* and the *jus in bello*.<sup>79</sup> The *jus ad bellum* refers to the law regulating the resort to force whilst the *jus in bello* pertains to the regulation of the conduct of the parties to the conflict. In practical terms, the former encompasses interstate aspects such as sovereignty and self-defense and the latter is concerned with issues such as the methods and means of warfare and the treatment of prisoners. Although the two frameworks will sometimes apply simultaneously, they operate independently. When an individual is captured in a neutral territory, international humanitarian law,

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<sup>75</sup> *Ibid*, at 3.

<sup>76</sup> Kwakwa, 'South Africa's May 1986 Military Incursions into Neighboring African States', 12 *Yale Journal of International Law* (1987) 421; A similar argument was made by Rhodesia in the 1970s: see Luttig, 'The Legality of the Rhodesian Military Operations inside Mozambique- the Problem of Hot Pursuit on Land', 3 *South African Yearbook of International Law* (1977) 136.

<sup>77</sup> UN Security Council, Resolution 568 (1985) Adopted by the Security Council at its 2599th meeting, on 21 June 1985, S/RES/568 (1985).

<sup>78</sup> Christine Gray, *International Law and the Use of Force*, (2008), at 137; Singh, 'The Right of Hot Pursuit on Land: an Inaccurate and Unfortunate Analogy from Law of Sea', 42 *Civil & Military Law Journal on Rule of Law, Military Jurisprudence and Legal Aid* (2006) 71.

<sup>79</sup> For a discussion on the distinction between the two concepts see Lubell, *supra* note 39, at 7-11.

if applicable, will dictate the legality of tactic as it affects the abductee whilst the United Nations Charter framework will determine whether the carrying out of the operation violated the sovereignty of the state and the law governing the use of force.

### 2.3 SELF-DEFENSE.

Absent consent, the legality of an extraterritorial abduction constituting force rests on the ability to establish a legitimate right to self-defense.

Article 51 provides, in part:

[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.<sup>80</sup>

In justifying the extraterritorial use of force against non-state actors, the United States has relied on both armed conflict and self-defense as legal justifications.<sup>81</sup> As will be discussed in section 3, the viability of the argument that the United States is engaged a non-international armed conflict with al-Qaeda involving multiple countries and actors is doubtful. Recognizing this, Kenneth Anderson proposes avoiding the application of international humanitarian law altogether by seeking justification in self-defense:

Self-defense gives the discretionary ability to attack anywhere in the world where a target is located, without having to make claims about a state of armed conflict everywhere and always across the world.<sup>82</sup>

This interpretation is problematic as it stretches the right to self-defense too far and is not in keeping with the interpretations given to the principle by

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<sup>80</sup> UN Charter, Article 51, *supra* note 4.

<sup>81</sup> Harold Hongju Koh, Legal Adviser, U.S. Department of State, 'Keynote Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law' (Mar. 25, 2010); Opposition to Plaintiff's Motion for Preliminary Injunction & Memorandum in Support of Defendants' Motion to Dismiss at 4–5, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No.10-cv-1469(JDB)), 2010 WL 3863135.

<sup>82</sup> Kenneth Anderson, 'More Predator Drone Debate, in the Wall Street Journal, and What the Obama Administration Should Do as a Public Legal Position,' (9 January 2010), available at: <http://www.volokh.com/2010/01/09/more-predator-drone-debate-in-the-wall-street-journal-and-what-the-obama-administration-should-do-as-a-public-legal-position/>

the International Court of Justice or the underlying purpose of the United Nations Charter framework.<sup>83</sup>

Pursuant to Article 51 of the Charter, self-defense is triggered by an “armed attack.” A strict reading of the provision necessitates that the right to self-defense crystallizes *after* the armed attack occurs.<sup>84</sup> Preclusion of anticipatory action from the scope of self-defense was in fact the intention of the drafters of the Charter.<sup>85</sup> A number of commentators and the majority of states have criticized limiting self-defense in this way and scholars hold that the right may also be triggered by an imminent threat of an armed attack.<sup>86</sup> The 2004 UN ‘Report of the Secretary General’s High Level Panel on Threats, Challenges and Change’ recognized that:

[...] a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.<sup>87</sup>

Considering Article 51 does not encompass anticipatory action, authority for the extension of the right finds support in the “inherent” right of self-defense.<sup>88</sup> In its *Advisory Opinion on the Wall*, the International Court of Justice noted, “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State.”<sup>89</sup> According to Dinstein, “the customary right of self-defense is also accorded to States as a preventive measure, taken in

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<sup>83</sup> Doswald-Beck, *supra* note 74, at 10.

<sup>84</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963), at 275-278; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, (1951), at 797-798; Michael Bothe, ‘Terrorism and the Legality of Pre-Emptive Force’, 14 *European Journal of International Law* 2 (2003) 227; Brownlie, *Ibid*, at 275-278.

<sup>85</sup> Minutes of the 48<sup>th</sup> meeting of US delegation, SF (20 May 1945) 1 Foreign Relations of the US (1945) 813, 818, quoted in Lubell, *supra* note 39, at 56.

<sup>86</sup> Oscar Schachter, ‘The Right of States to Use Armed Force’, 82 *Michigan Law Review* (1984) 1620, at 1634; Derek Bowett, ‘Reprisals Involving Recourse to Armed Force’, 66 *American Journal of International Law* (1972) 1, at 4.

<sup>87</sup> Report of the Secretary General’s High-level Panel on Threats, Challenges and Change, ‘A More Secure World: Our Shared Responsibility’, UN Doc, A/59/565, 2004, at 188.

<sup>88</sup> ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ‘Advisory Opinion’, 9 July 2004, at 139; Rosalyn Higgins, ‘The Attitudes of Western States Towards Legal Aspects of the Use of Force’ in Cassese (ed), *The Current Legal Regulation of the Use of Force* (1986), at 442.

<sup>89</sup> *Ibid*.

“anticipation” of an armed attack.”<sup>90</sup> The requirements giving rise to this customary right were enunciated in the widely cited *Caroline* incident.<sup>91</sup> The formulation put forward recognized the necessity of anticipatory self-defense in situations where a threat is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>92</sup>

As there is no settled approach to determining the lawfulness of anticipatory self-defense, it seems appropriate to conclude, “while anticipatory action in self-defense is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on the facts of the situation.”<sup>93</sup> According to Jennings and Watts, the matter will depend upon the seriousness of the threat, the necessity of action and whether it is the only way of avoiding the threat.<sup>94</sup> This approach strikes a fair balance between a restrictive reading of Article 51 to exclude any form of action taken before an armed attack and an interpretation that could result in the right being invoked to justify action against threats that are not imminent. It recognizes that in some cases, a state will have no choice but to resort to anticipatory self-defense. At the same time, the requirement that the threat be imminent prevents the overzealous use of force against obscure threats that could be thwarted by lesser means.

For an extraterritorial forcible abduction to come within the self-defense exception and in turn avoid violation of Article 2(4), the operation must have been taken in response to an armed attack or to prevent an imminent threat. In the majority of instances, a finding that the apprehension of an individual from a foreign state constitutes a lawful act of self-defense will not be made out. The reason for this is that most extraterritorial abductions are undertaken for the purpose of bringing individuals to justice for crimes committed rather than to repel an armed attack. It could be argued that the commission of international crime and

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<sup>90</sup> Dinstein, *War, Aggression and Self-Defense*, (2001), at 165.

<sup>91</sup> Letter from Mr. Webster to Lord Ashburton, August 6, 1842, cited in Lori F. Damrosch et al., *International Law: Cases and Materials* (2001), at 923.

<sup>92</sup> *Ibid.*

<sup>93</sup> Jennings and Watts (eds), *Oppenheim's International Law Ninth Edition, vol 1, Peace*, (1992) at 421-422.

<sup>94</sup> *Ibid.*

terrorism-related offences constitute an attack against which every state has a right to defend itself.<sup>95</sup> This approach stretches the meaning of armed attack and the scope of self-defense too far. All states have an obligation to prosecute those who commit crimes of concern to the international community however, international law does not confer upon states the right to carry out law enforcement operations on the territory of another state.<sup>96</sup>

Following the attacks on the World Trade Centre on September 11, 2001, the United States invoked self-defense to justify military intervention in Afghanistan.<sup>97</sup> The extent to which non-state actors can be the authors of an “armed attack” and the ability of September 11<sup>th</sup> to satisfy this criteria have been extensively debated.<sup>98</sup> The response of the Security Council and NATO can be interpreted as support for the contention that September 11 was accepted as an armed attack to which the right to self-defense could be invoked.<sup>99</sup> The Charter provides that a state upon which an armed attack has been launched has a right to defend itself until the attack is repelled or until the Security Council takes measures to end it.<sup>100</sup> The argument that extraterritorial abductions and targeted killings carried out against non-state actors in neutral territories continue to be covered by the same right to self-defense that justified military intervention in Afghanistan in October 2001 has been criticized by legal experts.<sup>101</sup> The immediacy requirement would

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<sup>95</sup> See Beverly Izes, ‘Drawing Lines in the Sand: When State-sanctioned Abductions of War Criminals Should Be Permitted,’ 32 *Columbia Journal of Law & Social Problems* (1997) 1, at 14-15.

<sup>96</sup> Lubell, *supra* note 39, at 77.

<sup>97</sup> Letter, dated 7 October 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN SCOR 56<sup>th</sup> session at 1; UN Doc S/2001/946 (2001).

<sup>98</sup> Lubell, *supra* note 39, at 30-36; Christopher Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq,’ 4 *San Diego International Law Journal* (2003) 7, at 17.

<sup>99</sup> *Ibid*, at 33-34; Security Council Resolution 1368 (2001) adopted by Security Council at 4370<sup>th</sup> meeting, 12 September 2001; Security Council Resolution 1373 (2001) adopted by the Security Council at its 4385<sup>th</sup> meeting, 28 September 2001; NATO Press Release, ‘Statement by North Atlantic Council’, (12 September 2001) available at: <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

<sup>100</sup> Malvina Halbertstam, ‘The Right to Self-Defense Once the Security Council Takes Action,’ 17 *Michigan Journal of International Law* (1995-1996) 229.

<sup>101</sup> United Nations General Assembly, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, ‘Heyns Report’, A/68/382, (September 13, 2013); SC Resolution 1368, *supra* note 89; SC Resolution 1373 *supra* note 89; Letter dated 7<sup>th</sup>



appear to negate this argument as it necessitates that “there must not be an undue time lag between the armed attack and the exercise of self-defense.”<sup>102</sup> Pursuant to this, force will only be legitimate in exceptional cases and certainly not as an on-going activity. An alternative approach that could be used to trigger application of the right to exercise self-defense is to consider al-Qaeda as a continuing threat that has proceeded to show a willingness and ability to commit imminent large-scale attacks on the United States.<sup>103</sup> The 2005 Chatham House Principles on the Use of Force by States reaffirm the International Court of Justice’s position that the use of force in self-defense can only be in response to a large-scale attack, and that response must be no more than is necessary to avert or end the attack.<sup>104</sup> They also insist “force may only be used when any further delay would result in an inability by the threatened state effectively to defend against or avert the attack against it.”<sup>105</sup>

The United States has opined that its right to self-defense extends beyond the borders of a single territory:

We would all be better if al Qaida limited itself to the territory of Afghanistan, but unfortunately, that is not the reality that we face. There is a principle of international law that limits a state’s ability to act in self-defense to a single territory when the threat comes from seas outside that territory as well.<sup>106</sup>

Stemming from this assertion is a question as to whether Article 51 limits a state’s right to exercise self-defense to the territory from which the “armed attack” was launched or, if it instead allows the injured state to follow the threat of future attacks across borders. Although the Charter does not expressly constrain the geographical scope of the right to self-defense, such a limitation may be read into the requirements imposed by the principles of

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October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council.

<sup>102</sup> Yoram Dinstein, *War, Aggression and Self-Defense* (3rd eds.) (2004), at 93-96.

<sup>103</sup> Davis Brown, ‘Use of Force against Terrorism After September 11<sup>th</sup>: State Responsibility, Self-Defense and Other Responses’, 11 *Cordozo Journal of International and Comparative Law* (2003-2004) 1.

<sup>104</sup> Elizabeth Wilmshurst, ‘Principles of International Law on the Use of Force by States in Self-Defence’, ILP WP 05/01, (October 2005).

<sup>105</sup> *Ibid*, at 4.

<sup>106</sup> John B Bellinger III, ‘Guantanamo Detainee Issues: Legal Issues in the War on Terror’, London School of Economics, October 31 2006, available at: <http://mauritania.usembassy.gov/legal.html>

necessity and proportionality.<sup>107</sup> In other words, even if it is accepted that unilateral operations conducted on the soil of neutral states such as Somalia, Yemen or Libya are in response to an armed attack that occurred on September 11<sup>th</sup> 2001, the principle of necessity would require a showing that the territorial state is unwilling or unable to put an end to the armed attacks; this test would have to be applied separately for each territory upon which force is used.<sup>108</sup>

Pursuant to the laws of neutrality, if the territorial state is unwilling or unable to suppress the threat posed by the non-state actor located on their territory, “the state acting in self-defense is allowed to trespass on the foreign territory, even when the attack cannot be attributed to the state from whose territory it is proceeding.”<sup>109</sup> The United States successfully relied upon this argument in the justification of the use of force in Afghanistan on October 7 2001 however, the latter operation followed a number of failed attempts to have the Taliban close down al-Qaeda camps on its territory and hand over Bin Laden to the United States.<sup>110</sup> Whether the right to invoke self-defense derives from an imminent threat posed by a non-state actor located on the territory of a neutral state or from the armed attack that occurred on September 11<sup>th</sup> 2001, it must be determined that there are no alternatives to the use of force as a means to deter or repel the threat. This requirement necessitates a showing that the state is “unwilling or unable” to stop the threat or attack before unilateral force can be resorted to.<sup>111</sup> If an operative is located in a state that has the law enforcement capacity to locate and apprehend him and is willing to do so, then the necessity

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<sup>107</sup> Lubell, *supra* note 39, at 67.

<sup>108</sup> Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’, 52 *Virginia Journal of International Law* (2013)

<sup>109</sup> A Randelzhofer, ‘Article 51’ in B Simma (ed.), *The Charter of the United Nations, A Commentary* (1994), at 661-78; Also see Ian Brownlie, International Law and the Activities of Armed Bands, 7 *International & Comparative Law Quarterly* (1958) 712, at 732.

<sup>110</sup> The Security Council called on the Taliban a number of times to close down al-Qaeda training camps, to stop supporting terrorist organizations and to surrender Bin Laden for criminal proceedings, see UN Security Council, Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999); UN Security Council, *Resolution 1333 (2000) / adopted by the Security Council at its 4251st meeting, on 19 December 2000*, 19 December 2000, S/RES/1333(2000).

<sup>111</sup> Deeks, *supra* note 108.

requirement will not be satisfied.<sup>112</sup> In situations where the individual is in a state that is unable or unwilling to prevent terrorists from attacking other states, the necessity requirement is more readily satisfied because exhaustion of peaceful means is easier to demonstrate.<sup>113</sup> Pakistan, for instance, has at times failed to act against non-state groups. On May 2, 2011, United States' agents entered Pakistan to capture or kill Osama Bin Laden. In the aftermath of the operation, the Government of Pakistan objected to the "unauthorized unilateral action" of the United States. In response to this, the United States Administration indicated that Pakistan's consent to the raid was not sought as advance notice could have compromised the success of the mission. Failure to notify Pakistan of its intentions to conduct the raid is evidence that the United States determined that Pakistan was indeed "unwilling or unable" to suppress the threat posed by Bin Laden.

It is clear from the above that extraterritorial forcible abduction can constitute a use of force within the meaning of the Charter. The apprehending state will be in violation of international law unless the state from which the individual is abducted consented, the Security Council authorized the operation or, it was a lawful exercise of self-defense. The scope of the right to self-defense continues to be the focus of academic debate, especially in the context of unilateral operations carried out against non-state actors on the territories of neutral states.

The use of force on the territory of a neutral state without consent does not automatically bring about an armed conflict.<sup>114</sup> Although it has been argued that the unconsented use of force on the soil of another state gives rise to an international armed conflict, this interpretation fails to distinguish between the *jus ad bellum* and the *jus in bello*.<sup>115</sup> As will be discussed in

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<sup>112</sup> Robert Chesney, 'Who May Be Killed? Anwar al-Awlaki as a Case Study in International Regulation of Lethal Force', 13 *Yearbook of International Humanitarian Law* (2010) 3, at 26.

<sup>113</sup> Dinstein, *supra* note 102, at 231-232.

<sup>114</sup> Noam Lubell, 'The War(?) against Al-Qaeda' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, 2012) 421.

<sup>115</sup> *Ibid*; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP, 2012) 421.

section 3, the existence of an armed conflict, whether it be international or non-international, hinges on the identification of parties to the conflict rather than consent.<sup>116</sup> If the alternate approach were applied, every extraterritorial operation constituting force within the meaning of Article 2(4) could be said to trigger the classification of an international armed conflict. This generates implausible results, for example, it could be argued that the unconsented use of force on Argentinian territory by Israeli agents in the kidnapping of Eichmann brought about an international armed conflict. The determination as to whether an extraterritorial forcible abduction constituted a violation under the *jus ad bellum* is separate from the *jus in bello* analysis; the latter exercise being concerned with the laws regulating the conduct of the parties. It is to this that the discussion will now turn.

#### **4. KIDNAPPING UNDER INTERNATIONAL HUMANITARIAN LAW**

When international humanitarian law is the regulating body, the lawfulness of conduct depends upon its compatibility with the legal regime that attaches to the status of the individual captured. Under international humanitarian law, members of a hostile party can be lawfully targeted, captured and detained. As apprehension and detention are permissible tactics in the conduct of hostilities, it may seem unnecessary to consider extraterritorial kidnapping in the context of international humanitarian law but this is not the case. Determining whether this framework governs a specific operation is central to establishing the body of rules applicable and in turn, the legality of the conduct. If the laws of armed conflict do not attach, international human rights law is the appropriate regime. The application of international humanitarian law to counterterrorism operations conducted in territories beyond that in which there is an ongoing armed conflict hinges upon the classification of the nature of the conflict between

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<sup>116</sup> Lubell, *supra* note 114.

the United States and al-Qaeda and the extent to which the framework is applicable to conduct taken against suspected terrorists extraterritorially.

Extraterritorial operations including kidnapping carried out against suspected terrorists abroad have been justified on the basis that there is an armed conflict with al-Qaeda and associated groups. As such, members and affiliates of these groups, wherever located, have been designated lawful military targets. The application of international humanitarian law to an extraterritorial apprehension presupposes that an armed conflict exists and that the operation in question is part of that conflict. As will be discussed below, the possibility of a global war against al-Qaeda outside Afghanistan is not an acceptable classification. Endorsement of this approach disregards the prohibition on the use of force and misinterprets the rules of international humanitarian law.<sup>117</sup>

Classifying extraterritorial operations against non-state actors involving multiple territories and groups is central to determining whether an armed conflict exists at all and, consequently, whether the laws of armed conflict regulate a specific operation. In order to establish the extent to which the laws of armed conflict govern abduction operations carried out in territories beyond that in which there is an ongoing armed conflict, this section will begin with an examination of the legal classification of the conflict between the United States and al-Qaeda. This analysis warrants a consideration of the extent to which al-Qaeda can be classified as an armed group for the purposes of establishing the existence of an armed conflict and the territorial scope of application of international humanitarian law. Having determined the nature of the current conflict, the discussion will move on to consider *who* can be captured under the rules of non-international armed conflict and *where* they can be targeted. As will be seen, the framework of international humanitarian law is applicable to some extraterritorial operations carried out against non-state actors while international human rights law dictates the legality of others.

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<sup>117</sup> Doswald-Beck, *supra* note 74.

### 3.1 CLASSIFICATION OF THE AFGHAN CONFLICT

Following the attacks on the World Trade Centre on September 11 2001, the United States declared a “global war on terror.”<sup>118</sup> Pursuant to this “war,” a number of extraterritorial forcible actions have been conducted against the Taliban, al-Qaeda and other terrorist networks.<sup>119</sup> These actions include, but are not limited to, military operations in Afghanistan and Iraq. International deliberations have arisen over the legal validity of a “war on terror”, or as it is now termed, an armed conflict between the United States and al-Qaeda, the Taliban and associated forces.<sup>120</sup> Although the phrase “war on terror” connotes the existence of an armed conflict, a transnational war against an abstract entity does not trigger the application of international humanitarian law. The United States has moved away from its previous administration’s categorization of its counterterrorism efforts as a “global war on terror.”<sup>121</sup> The nature of the conflict has been redefined as an armed conflict between the United States and al-Qaeda, the Taliban and associated forces.<sup>122</sup> This formulation may appear narrower and therefore more legally sound however, as with the war on terror paradigm, it fails to identify who the precise enemy is, where the conflict is taking place and when it will end.

An international armed conflict ensued on the territory of Afghanistan following the United States military intervention on 7 October 2001.<sup>123</sup> At

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<sup>118</sup> George W. Bush, ‘Address to a Joint Session of Congress’, *White House*, (20 September 2001).

<sup>119</sup> For example, the U.S. has carried out drone strikes in Yemen against alleged al-Qaeda operatives, see Norman Printer, ‘The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen’, 8 *UCLA Journal of International Law & Foreign Affairs* 2003, 331.

<sup>120</sup> Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (2007), at 249-250.

<sup>121</sup> Bush Address, *supra* note 118.

<sup>122</sup> Barack Obama, ‘Remarks by the President on National Security’, National Archives, Washington DC, (21 May 2009), available at: [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/); ‘Remarks by the President at the National Defense University’, Office of the Press Secretary, *The White House*, (May 23, 2013); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, ‘The Ethics and Efficacy of the President’s Counterterrorism Strategy,’ Woodrow Wilson International Center for Scholars, Washington DC, (30 April 2012).

<sup>123</sup> Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, ‘International Law and Non-State Actors in Afghanistan’, 93 *International Review of the Red Cross* (March 2011) 881, at 51; Stephane Ojeda, ‘US detention of Taliban fighters: some legal considerations’, in

that time, the parties to the conflict were the United States and its allies, and the Afghan government supported by al-Qaeda.<sup>124</sup> Following the destruction of the Taliban government in June 2002, the nature of the conflict changed. Currently, multinational forces are fighting with the consent of and in support of the Afghan government against the Taliban and other organized non-state armed groups, including al-Qaeda. The majority opinion is that the hostilities have transformed into a non-international armed conflict.<sup>125</sup> The existence of a non-international armed conflict is dependent upon the identification of organized parties to the conflict and the violence reaching a certain level of intensity.<sup>126</sup> Before considering the geographical scope of application of international humanitarian law and the extent to which the framework applies to the capture of non-state actors in locations beyond that in which an armed conflict is principally occurring, it is necessary to determine whether al-Qaeda constitutes an armed group for the purposes of classifying the hostilities as a non-international armed conflict.

### 3.1.1 AL-QAEDA AS AN ARMED GROUP

In order for the relationship between states and non-state actors to meet the criteria for an armed conflict, there must be a resort to force and the parties to the conflict must be identifiable and possess certain characteristics.<sup>127</sup> An authoritative definition of armed conflict was set out by the ICTY in the *Tadic* case:

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Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis, International Law Studies*, (2009), at 358–359. Also see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (2004), at 29.

<sup>124</sup> *Ibid.*

<sup>125</sup> David Turns, ‘Jus ad pacem in bello? Afghanistan, stability operations and international law relating to armed conflict’, 39 *Israel Yearbook on Human Rights* (2009), at 236; Christian Schaller, ‘Military Operations in Afghanistan and International Humanitarian Law’, *German Institute for International and Security Affairs*, SWP Comments, No. 7, (March 2010), at 2; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission to Afghanistan, A/HRC /11/2/Add.4; Dinstein, ‘Terrorism and Afghanistan’ in Schmitt, *The War in Afghanistan: A Legal Analysis*, at 102.

<sup>126</sup> Marco Sassöli, ‘Transnational Armed Groups and International Humanitarian Law’, Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series (2006) Number 6, at 11.

<sup>127</sup> ICTY, *Prosecutor v. Dusko Tadic*, Decision on the ‘Defense Motion for Interlocutory Appeal on Jurisdiction’, IT-94-1-A, (2 October 1995), para 70.

An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.<sup>128</sup>

The main obstacle to classification as a non-international armed conflict arises from the need to determine the nature of al-Qaeda as an organised armed group capable of being a party to the conflict.<sup>129</sup> The United States defines the term “associated force” as applying to an organized armed group that has entered the fight alongside al-Qaeda and is a co-belligerent with al-Qaeda in the sense that it engages in hostilities against the United States or its coalition partners.<sup>130</sup> In May 2013, the Armed Services Committee requested the Department of Defense to provide a list of al-Qaeda associates; this request was declined on the grounds that divulging such information could damage national security.<sup>131</sup>

The criterion for qualification as an armed group has been laid down by the jurisprudence of international courts and tribunals.<sup>132</sup> One of the main requirements that a transnational armed group must fulfill in order to become party to an armed conflict is a sufficient level of organization. This criteria encompasses the existence of a command structure, a headquarters and the ability to plan and carry out military operations.<sup>133</sup> The requirement is likely to be met by certain factions of al-Qaeda operating in Afghanistan and parts of Pakistan but it is doubtful that the entire al-Qaeda network constitutes one unified group.<sup>134</sup> Al-Qaeda includes central al-Qaeda operating in Afghanistan and Pakistan, al-Qaeda in the Islamic Maghreb, al-Qaeda in the Arabian Peninsula, al-Qaeda in Iraq, al-Shabaab in Somalia

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<sup>128</sup> *Ibid.*

<sup>129</sup> Lubell, *supra* note 114.

<sup>130</sup> Jeh Johnson, ‘National Security Law, Lawyers and Lawyering in the Obama Administration’, Dean’s Lecture at Yale Law School, (22 February 2012); Also *see* United States District Court for the District of Columbia, *Hamlily v. Obama*, (616 F. Supp. 2d 63) (2009).

<sup>131</sup> Jack Goldsmith, ‘Quick Reactions to Extraordinary Senate Armed Services Committee Hearing on the AUMF’, Lawfare Blog, (16 May 2013), available at: <http://www.lawfareblog.com/2013/05/quick-reactions-to-extraordinary-armed-services-committee-hearing-on-the-aumf/>.

<sup>132</sup> ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, ‘Judgment’, (30 November 2005), paras 94-134; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, ‘Judgment’ (14 March 2012), paras. 536-538.

<sup>133</sup> *Ibid.*

<sup>134</sup> Lubell, *supra* note 114.



and Jabhat al-Nusrah in Syria.<sup>135</sup> These are just examples of its known affiliates; there are many other groups with ties to al-Qaeda operating all over the world.<sup>136</sup> Considering its geographic span and loose associations, the classification al-Qaeda as a single organized armed group seems impossible.<sup>137</sup> As pointed out by Greenwood:

In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.<sup>138</sup>

Estimated to operate in approximately 100 countries, it would be illogical to regard the entire network as constituting an armed group for the purposes of international humanitarian law.<sup>139</sup> To say that membership can be established by a shared ideology or loose connections would render individuals in all parts of the globe potential military targets; this may be preferable to the opposing party in a conflict but it is not supported by international humanitarian law. In order to be assimilated to the armed group, there must be a sufficient nexus. In his recent report on extrajudicial, summary or arbitrary executions, the Special Rapporteur stated:

The established legal position is that, where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the groups.<sup>140</sup>

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<sup>135</sup> John Rollins, 'Al Qaeda and Affiliates: Historical Perspective, Global Presence and Implications for U.S. Policy', *Congressional Research Service*, (2013).

<sup>136</sup> *Ibid*; IRRC Report, *supra* note 123.

<sup>137</sup> Lubell, *supra* note 39, at 118; Kelisiana Thynne, 'Targeting the 'Terrorist Enemy': The Boundaries of and Armed Conflict against Transnational Terrorists', 16 *Australia International Law Journal* (2009) 161, at 171; For a contrary view see Peter Margulies, 'Networks in Non-International Armed Conflicts: Crossing Borders and Defining "Organized Armed Group"', 8 *International Law Studies* (2013) 55.

<sup>138</sup> Christopher Greenwood, 'War, Terrorism and International Law', 56 *Current Legal Problems* (2004) 505, at 529.

<sup>139</sup> Jayshree Bajoria, and Greg Bruno, 'Backgrounder: al Qaeda (a.k.a. al-Qaida, al-Qa'ida)', *Council on Foreign Relations*, (6 June 2012), available at: <http://www.cfr.org/terrorist-organizations-and-networks/al-qaeda-k-al-qaida-al-qaida/p9126>.

<sup>140</sup> Heyns Report, *supra* note 101 citing ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, 'Trial Chamber Judgment' (3 April 2008), at 144.

Accordingly, the hostilities between the United States, the Taliban, al-Qaeda and its associated forces does not describe a situation of armed conflict to which the rules of international humanitarian law apply at all times, even though armed conflicts have occurred from time to time. Instead, it describes a global counterterrorism effort that encompasses armed conflicts to which the laws of war apply and operations conducted in peacetime to which international human rights law attaches.

### 3.2 TERRITORIAL SCOPE OF ARMED CONFLICT

In *Prosecutor v. Tadic*, the Appeals Chamber of the ICTY considered the geographical scope of international humanitarian law. In response to the defendant's submission that there was no armed conflict in the Prijedor region of Bosnia Herzegovina at the relevant time, the Chamber held:

[...] International humanitarian law [...] appl[ies] in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>141</sup>

In the context of a non-international armed conflict, this interpretation extends the application of international humanitarian law to the whole territory under the control of a party. Pursuant to this, the framework attaches to operations carried out in any region of Afghanistan, whether or not there are active hostilities taking place there. The United States has claimed that military operations such as drone strikes and capture missions carried out in states bordering Afghanistan and beyond also come under the rubric of international humanitarian law.<sup>142</sup> It is easy to see the benefits of this argument; in terms of targeted killings and restrictions on liberty, international human rights law demands compliance with a much more stringent set of criteria. As the application of the frameworks are triggered by actual circumstances on the ground rather than policy choice, it is

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<sup>141</sup> *Tadic* Appeals Chamber, para. 70, *supra* note 127.

<sup>142</sup> Johnson Speech, *supra* note 130; John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law & Security: 'Strengthening our Security by Adhering to our Values and Laws' (Sept. 16, 2011); Curtis A. Bradley & Jack L. Goldsmith, 'Congressional Authorization and the War on Terrorism', 118 *Harvard Law Review* (2005) 2047, at 2117-2119; Robert Chesney, 'Who May Be Held? Military Detention Through the Habeas Lens', 52 *Boston College Law Review* (2011) 769, at 857-58.

necessary to consider the status of operations carried out in furtherance of the military effort albeit against individuals located in states where there is no armed conflict.

The Special Rapporteur on extrajudicial, summary or arbitrary executions has noted the difficulty of claiming the existence of a conflict with al-Qaeda outside Afghanistan and Iraq.<sup>143</sup> Professor Mary Ellen O’Connell posits that military operations carried out in a state that is not engaged in an armed conflict are impermissible regardless of the consent of the state in which they are conducted.<sup>144</sup> This approach holds that the scope of application of international humanitarian law is geographically limited to the state where the armed conflict is ongoing. Pursuant to this interpretation, international human rights law is the appropriate framework for regulating conduct that occurs elsewhere. The second approach begins by recognizing that conflicts can flow into other territories. Duffy has stated, “if a neutral territory is drawn into the area of war, and hostilities are conducted there, rival belligerents may also be entitled to take measures on that territory.”<sup>145</sup> Bassiouni has likewise recognized that in the context of an armed conflict, hostilities can spill over into other territories:

The fact that, historically, such conflicts were confined to the territory of a given state does not alter the legal status of the participants in that conflict and the international humanitarian law applicable to them. The laws of armed conflict are not geographically bound.<sup>146</sup>

Applying this to the Afghan conflict, it seems safe to conclude that international humanitarian law extends to some military activities carried out in the Federal Administrative Tribal Areas in Pakistan.<sup>147</sup> This approach

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<sup>143</sup> HRC, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston’ UN Doc. A/HRC/14/24/Add.6 (28 May 2010), para 53.

<sup>144</sup> Mary Ellen O’Connell, ‘The Bin Laden Aftermath: Abbottabad and International Law’, *Foreign Policy*, (May 4 2011); Mary Ellen O’Connell, ‘Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009’ in *Shooting to Kill: The Law Governing Lethal Force In Context*, (Simon Bronitt, ed.), Forthcoming; Notre Dame Legal Studies Paper No. 09-43.

<sup>145</sup> Duffy, *supra* note 120, at 223.

<sup>146</sup> Bassiouni, ‘Legal Control of International Terrorism: A Policy Oriented Assessment’ 83 *Harvard International Law Journal* (2009) 99, at 99.

<sup>147</sup> Jennifer Daskal, ‘Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone’ 161 *University of Pennsylvania Law Review* (Forthcoming) 2012, at 45.

is based on the premise that military operations conducted there are part of an existing armed conflict. According to Lubell, this reasoning relies on the argument that individuals belonging to parties to the conflict in Afghanistan are actively continuing to engage in hostilities from Pakistan.<sup>148</sup> Accordingly, even though there are no United States or NATO troops on the ground, it can be argued that operations against these militants is a ‘spill over’ from the Afghan conflict, and part of the on-going non-international armed conflict in Afghanistan. Pursuant to this, the laws of non-international armed conflict regulate the capture of militants in these regions.

If it is accepted that international humanitarian law can extend to operations carried out in states beyond that in which the armed conflict is principally occurring, a question arises as whether the framework governs extraterritorial abductions conducted in states that do not share a border with Afghanistan. It must be noted that if hostilities in a region reach a certain level of intensity and there are identifiable parties, a separate non-international armed conflict may arise. This still leaves questions as to the regime applicable to situations where this threshold is not met but individuals are nevertheless continuing to engage in ongoing hostile acts from that location.

One approach holds that the relocation of individuals does not automatically terminate the application of international humanitarian law. Instead of hinging on the location, the choice of framework is dependent upon the activities of the individual and their link to the conflict. Lubell recognizes that Taliban forces could relocate and operate from Pakistan whilst remaining part of the conflict in Afghanistan:

[I]t is a question of whether the conflict activities themselves have also relocated. In other words, only if the individual or group is continuing to engage in the armed conflict from their new location, then operations taken against them could be considered part of the armed conflict. This could be the case for Taliban fighters engaged in the Afghan conflict but operating from Pakistan.<sup>149</sup>

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<sup>148</sup> Lubell, *supra* note 114.

<sup>149</sup> Lubell, *supra* note 39, at 255.

Lubell's focus is on the kind of activities a party to the conflict takes after relocating. Thynne supports a similar approach based on the impact of the conduct on the hostilities.<sup>150</sup> Dehn also recognizes that fighters can relocate but in his view, "[t]he key to the applicability of [humanitarian law] is [...] the status of the attacker and the target."<sup>151</sup> According to Dehn, international humanitarian law is applicable when the attacker and target are "members of parties to, or sufficiently associated with the on-going hostilities of, an armed conflict."<sup>152</sup> For him, the determination is based on the degree of association between al-Qaeda and the group in question. Chesney offers a similar approach.<sup>153</sup> His theory considers the existence of an armed conflict sufficient to establish that attacks by one party against another party are subject to humanitarian law, regardless of location. Accordingly, if it can be shown that al-Qaeda in the Arabian Peninsula is part of al-Qaeda in Afghanistan, international humanitarian law will apply to attacks on members of AQAP in Yemen as part of the on-going armed conflict in Afghanistan. Section 3.4 will consider these theories in the context of the recent capture of al-Libi in Libya and the failed mission to apprehend Ikrimah in Somalia.

### 3.3 CATEGORIES OF INDIVIDUALS IN AN ARMED CONFLICT

The category of combatant and prisoner of war exist in the law of international armed conflict. Combatants have a right to actively participate in an armed conflict and are entitled to prisoner of war status upon capture.<sup>154</sup> They can be attacked at any time during hostilities unless they are *hors de combat*.<sup>155</sup> These categories do not appear in the rules regulating non-international armed conflict but as pointed out by the ICTY Appeal Chamber, Article 3 which is applicable to both international and non-

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<sup>150</sup> Thynne, *supra* note 137.

<sup>151</sup> John C. Dehn & Kevin Jon Heller, Debate, 'Targeted Killing: The Case of Anwar Al-Aulaqi,' 159 *University of Pennsylvania Law Review* (2011) 175, at 190-91.

<sup>152</sup> *Ibid.*

<sup>153</sup> Chesney *supra* note 112, at 37.

<sup>154</sup> Geneva Convention Relative to the Treatment of Prisoners of War, (Third Geneva Convention), 12 August 1949, 75 U.N.T.S. 153.

<sup>155</sup> Gabriel Swiney 'Saving Lives: The Principle of Distinction and the Realities of Modern War,' 39 *International Lawyer* (2005) 733.

international armed conflicts, “enshrines the prohibition against any violence against the life and person of those taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.”<sup>156</sup>

The Geneva Conventions and Additional Protocols do not provide for the category of unlawful or unprivileged combatants. Instead, international humanitarian law speaks of civilians and members of armed forces and others entitled to prisoner of war status. The terms unlawful and unprivileged combatants have been used to describe civilians who actively engage in hostilities, irregular or part-time combatants who do not fulfill the requirements for combatant privilege and those who forfeit their prisoner of war status by violating the laws regulating the conduct of hostilities.<sup>157</sup> Rather than creating a distinct category of individuals, the use of these terms merely describe the loss of combatant privilege or civilian immunity.<sup>158</sup> Article 4(1) of the Fourth Geneva Convention provides, “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>159</sup> This provision has been interpreted to extend the protection of the Conventions to every category of individuals, provided the nationality requirement is satisfied.<sup>160</sup> Pictet has stated that should partisans fail to fulfill the four criteria outlined in Article 4(A)(2), they “must be considered to be protected persons within the meaning of the

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<sup>156</sup> ICTY, *Prosecutor v. Mrksic et al. (Appeal Judgment)*, IT-95-13/1, (5 May 2009), para 70.

<sup>157</sup> Goldman and Tittlemore, ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’, *The American Society of International Law Task Force on Terrorism*, December 2011, at 4; Knut Dormann, ‘The Legal Situation of Unlawful/Unprivileged Combatants’, 85 *International Review of the Red Cross* (2003) 45, at 48-49.

<sup>158</sup> *Ibid.*

<sup>159</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), (12 August 1949), 75 UNTS 28, Article 4(1).

<sup>160</sup> *Ibid.*, Article 4.

[Civilian] Convention” as there is no “intermediate status”.<sup>161</sup> This interpretation finds support in the judgment of the ICTY in *Prosecutor v Delalic*.<sup>162</sup>

Additionally, Article 4 of the Fourth Geneva Convention states that persons protected by the Third Geneva Convention “shall not be considered as protected persons within the meaning of the present Convention.”<sup>163</sup> This can be taken to infer that anyone not protected by the Third Convention falls under the Fourth Convention. The United States Army Field Manual supports this position.<sup>164</sup> It provides that all persons engaged in hostile or belligerent conduct who are not entitled to Prisoner of War status are protected under the Civilian Convention.<sup>165</sup>

Article 13 (3) of Protocol II which is applicable to non-international armed conflicts, provides that civilians benefit from protection “unless and for such time as they take a direct part in hostilities.”<sup>166</sup> The International Committee of the Red Cross [*hereinafter* ICRC] has reiterated this point.<sup>167</sup> Pursuant to this, all persons who are not members of the armed forces of a state or members of organized armed groups of a party to the conflict are civilians by default. These individuals are protected from direct attack unless and for such time as they take a direct part in hostilities. What constitutes a direct part in hostilities and the temporal scope of loss of immunity from attack has been the focus of debate.<sup>168</sup> The ICRC has

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<sup>161</sup>J. Pictet, ‘Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War’, Geneva, ICRC (1958), at 51.

<sup>162</sup>ICTY, *Prosecutor v Delalic et al.*, Case no. IT-96-21-T, Trial Chamber ‘Judgment’, (16 November 1998), para 271.

<sup>163</sup> Geneva Convention IV, *supra* note 159, Article 4.

<sup>164</sup>U.S Departmentt of the Army, Field Manual No. 27-10, ‘The Law of Land Warfare’, para 247(b) (1956).

<sup>165</sup>*Ibid*; Marco Sassoli, ‘The Status of Persons Held in Guantanamo under International Humanitarian Law’, 2(1) *Journal of International Criminal Justice* (2004) 96, at 101; David Weissbrodt and Amy Berquist, ‘Extraordinary Rendition and the Humanitarian Law of War and Occupation’, 42 *Virginia Journal of International Law* (2006-2007) 295.

<sup>166</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (8 June 1977), 1125 UNTS 609.

<sup>167</sup> ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, *International Review of the Red Cross*, (31-12-2008) No. 872 Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009.

<sup>168</sup> Michael Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’ in *Essays on Law and War at the Fault Line*, (2012) 513;

developed an interpretive guide for resolving these issues and to this the discussion will now turn.

### 3.3.1 LOSS OF CIVILIAN IMMUNITY

The principle of distinction dictates that only military objectives can be the target of direct attack.<sup>169</sup> In order to distinguish between civilians who are immune from attack and military targets in the context of a non-international armed conflict, the status of “civilian directly participating in hostilities” has been created.<sup>170</sup> The ICRC has set forth a three-part test to determine when an individual can be considered to be directly participating in hostilities.<sup>171</sup> This test includes consideration of the threshold of harm, the causal link between the actions and potential harm to the opponent, and a nexus to hostilities.<sup>172</sup> Pursuant to this, it is not enough to contribute indirectly to the conflict. Instead, the individual must be in a position to bring about harm in “one causal step.”<sup>173</sup> The distinguishing feature here is the difference between direct participation and indirect participation. It is clear that someone posing an imminent threat such as a sniper would satisfy the criteria for direct participation. The ICRC has stated that the category is broader than involvement in the physical attack itself; preparatory and concluding activities may also qualify so long as the proximate causality criterion is met.<sup>174</sup> Conduct such as planning a belligerent act, recruiting, financing, formulating ideology or engaging in strategic decision-making would likely constitute indirect participation.<sup>175</sup>

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Dapo Akande, ‘Clearing the Fog of War? ICRC’s Interpretative Guidance on Direct Participation in Hostilities’, 59 *International Law Comparative Quarterly* 1 (2010), at 180.

<sup>169</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (8 June 1977), 1125 UNTS 3, Article 48; The same rule applies in non-international armed conflicts, Additional Protocol II, Article 13(2), *supra* note 166; *Tadic*, Appeals Chamber, *supra* note 127, para 110.

<sup>170</sup> ICRC Interpretive Guide, *supra* note 167.

<sup>171</sup> *Ibid*, at 46-65.

<sup>172</sup> *Ibid*, at 1016.

<sup>173</sup> *Ibid*, at 1021.

<sup>174</sup> *Ibid*.

<sup>175</sup> *Ibid*, at 1020; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, ‘Judgment’ (17 July 2008), paras 175–176.



In the *Targeted Killings* case, the Israeli Supreme Court found that “a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid” is taking an indirect part in hostilities.<sup>176</sup> Pursuant to this approach, an individual engaged in creating or distributing propaganda would not be targetable. The Court found that someone who sends others to take a direct part in hostilities or otherwise plans operations, however, to be lawfully subject to direct attack.<sup>177</sup> This seems to be a broader interpretation than that given by the ICRC, which considers the recruitment and training of fighters to constitute indirect participation because of a lack of an immediate causal link between the conduct and harm to the enemy.<sup>178</sup> According to the ICRC, in cases of doubt, the potential target must be presumed to be a civilian who is immune from direct attack.<sup>179</sup> Whichever interpretation is followed, an individual would not qualify as a lawful military target for the purposes of international humanitarian law based on suspected links or associations with a group in which a state is engaged in an armed conflict.

Another issue that arises in considering when an individual loses his civilian status is the duration for which he remains targetable. The ICRC interprets the loss of immunity as lasting “for such time as” they are directly participating in hostilities. The ICRC has drawn a distinction between members of armed groups carrying out a “continuous combat function” and civilians who take a direct part in hostilities.<sup>180</sup> The former “members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function”.<sup>181</sup>

The continuous combat function category strikes a more palatable balance between the principle of distinction and targeting. When an individual’s

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<sup>176</sup> Supreme Court of Israel, *The Public Committee Against Torture v. The Government of Israel*, HCJ 769/02 ‘Judgment’ (13 December 2006). (*Targeted Killings* case), at 35.

<sup>177</sup> *Ibid*, para 35.

<sup>178</sup> ICRC’s Interpretive Guide, *supra* note 167, at 1032.

<sup>179</sup> *Ibid*, at 1037.

<sup>180</sup> ICRC, *supra* note 167, at 1007.

<sup>181</sup> *Ibid*.

participation in hostilities is not “spontaneous, sporadic, or unorganized” but rather continuous, he will constitute a member of an organized armed group belonging to a party to the conflict.<sup>182</sup> Individuals who take up such a continuous combat function within an organized armed group lose their civilian status “for so long as they assume their continuous combat function.”<sup>183</sup> It is only once individuals disengage from the group or otherwise cease to perform a continuous combat function that they regain civilian status and immunity from direct attack is restored.<sup>184</sup>

### **3.4 THE RELOCATION OF FIGHTERS**

Having established that individuals can be attacked for such time as they directly participate in hostilities, or assume a continuous combat function, a question arises as to whether international humanitarian law regulates operations taken against those who relocate to a state beyond that in which the armed conflict is principally occurring. As will be seen, rather than the location of the individual, the application of the framework is dependent upon the individual’s activities and participation in the conflict and the extent to which operations taken against them can be considered to be part of the armed conflict.

Basing the determination on the link between an individual’s conduct and the existing armed conflict makes for a logical assessment. In practice, conflicts can spill over borders and fighters can continue to engage in hostilities remotely. With the rise of cyber warfare and remote weaponry, it has become increasingly possible for measures in furtherance of an armed conflict to be launched from other states. This is not to say that all individuals who support the military effort can be tracked down and seized under international humanitarian law wherever they are located. An overbroad interpretation could have the effect of rendering anyone thought to be connected with al-Qaeda a legitimate military target regardless of his location. On the other hand, a narrow interpretation that limits the scope of

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<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, at 1001.

international humanitarian law to operations conducted in the state where the armed conflict is on-going would give an unfair advantage by rendering fighters who cross a frontier immune from targeting. It is submitted that the majority of operations carried out beyond the state in which there is an armed conflict will be subject to international human rights law but there are cases where international humanitarian law continues to apply. Basing the determination of the appropriate framework on the nexus between the specific operation and the armed conflict closes the gap between a narrow approach that binds international humanitarian law by territorial borders and a broad interpretation that has the potential to create a global armed conflict.

The capture of al-Libi in Libya and the failed mission to apprehend Ikrimah in Somalia in 2013 represent recent extraterritorial abduction operations taken outside the armed conflict in Afghanistan. These operations may be a sign of the United States shifting away from targeted killings and towards the apprehension and trial of terrorist suspects. In his speech on May 23 2013, the President of the United States stated “the policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots.”<sup>185</sup> Unlike killings on a battlefield, those carried out in locations outside of Afghanistan are usually not in response to an imminent threat. Considering the distance from the conflict and the ability to plan the method and means of the attack, there is a strong argument that when feasible, preference should be given to capture over lethal force.<sup>186</sup> This approach advances a “least harmful means” or “least-restrictive-means” analysis.<sup>187</sup> Applying the test to operations carried out in locations beyond active hostilities, prior assessment of factors such as the seriousness of the threat; its imminence, the risks involved in capture and the likelihood of the

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<sup>185</sup> ‘Remarks by the President at the National Defense University’, *supra* note 118.

<sup>186</sup> *Targeted Killings Case*, *supra* note 176; Ryan Goodman, ‘The Power to Kill or Capture Enemy Combatants’, Public Law & Legal Theory Research Paper Series, Working Paper No. 13-02, (February 2013).

<sup>187</sup> Nils Melzer, *Targeted Killing*, (2008) at 289; *See generally* Daskal, *supra* note 147.

target to resist would be warranted.<sup>188</sup> If accepted, it would seem that the argument for the inclusion of the human rights based norm requiring resort to the least harmful means is stronger in situations where an individual is targeted outside the location of hostilities.<sup>189</sup> International humanitarian law may remain the guiding framework but the threat is less likely to be imminent than in a battlefield situation and so distance may allow for advanced assessment and planning of operational choices such as a capture mission.

In the May 23 2013 speech, the United States President, Barack Obama, also indicated, “beyond the Afghan theater, we only target al-Qaeda and its associated forces.”<sup>190</sup> As was discussed above, the term “associated forces” is too broad to be an acceptable category for determining who can be targeted. In order for the targeting of al-Libi and Ikrimah to come under the rubric of international humanitarian law, they must be found to qualify as “members of an organized armed group”; in other words, members of al-Qaeda in Afghanistan. In the alternate, their activities at the time of targeting must have constituted direct participation or they must have acquired a continuous combat function.

It was noted above that conflicts can and do spill over borders and that the framework of international humanitarian law does not cease to apply once a fighter crosses a frontier. As Lubell and Derejko state:

Neither the battlefield nor the hostilities relocate together with any individual who was on it or previously participating in it; if that were the case, it would be impossible to disengage from an armed conflict. Equally, however, by walking away from the primary combat zone, individuals cannot become immune from attack regardless of their status or the activity in which they engage.<sup>191</sup>

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<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.* For criticism of Melzer’s approach see Hays Parks, 42 ‘Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect Forum: *Direct Participation In Hostilities: Perspectives on the ICRC Interpretive Guidance* Direct Participation in Hostilities’, 42 *NYU Journal of International Law & Politics*, (2009) 769 at 810.

<sup>190</sup> *Ibid.*

<sup>191</sup> Noam Lubell & Nathan Derejko, ‘A Global Battlefield? Drones and Geographical Scope of Armed Conflict’ 11 *Journal of International Criminal Justice* (2011) 65, at 82.

Pursuant to this, the determination as to whether international humanitarian law applies is not based on the location of the individual but instead, the extent to which an individual's activities can be classified as part of the on-going armed conflict. There are different opinions as to how this nexus is established. Some would apply the ICRC's continuous combat function or direct participation criteria whilst others argue for a broader membership based approach.<sup>192</sup> Three habeas corpus cases brought in United States courts by Guantanamo detainees, *Bensayah v. Obama*, *Salahi v. Obama* and *Almerfedi v. Obama* involved capture in locations beyond an armed conflict; Bosnia, Mauritania and Iran respectively.<sup>193</sup> A "functional membership test" was employed by these courts to establish links with the forces in Afghanistan. Regardless of the choice of approach, both routes will usually arrive at the same result. Although the membership approach does not necessarily consider the activities of individual group members, it is likely that in practice, it will be used for operations against individuals involved at some level in the combat activities.<sup>194</sup> The targeted killing of Bin Laden in Pakistan, the recent extraterritorial abduction of Abu Anas al-Libi in Libya and the attempted capture of Ikrimah in Somalia provide examples against which these issues can be examined.

Although the targeting of bin Laden in Pakistan was a kill rather than a capture mission, the case is relevant to the present discussion as the issue here is the extent to which the framework of international humanitarian law attaches to extraterritorial operations rather than the regulation of the conduct itself. In relation to Bin Laden's killing, the United States stated that he had an "unquestioned leadership position within al Qaeda and [a] clear continuing operational role."<sup>195</sup> Data allegedly seized from Bin Laden's compound following the operation indicates that he was continuing

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<sup>192</sup> A.P.V. Rogers, *Law on the Battlefield*, (1996) at 8-9.

<sup>193</sup> *Bensayah v Obama*, 610 F.3d at 720; *Salahi v. Obama* 625 F.3d at 750; *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010).

<sup>194</sup> Lubell, *supra* note 191, at 84

<sup>195</sup> Harold Koh, Legal Adviser, U.S. Department of State, 'Lawfulness of U.S. Operation Against Bin Laden', *Opinio Juris*, available at: <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-Bin-Laden/>.

to plot attacks against the United States and that he maintained regular contact with al-Qaeda networks.<sup>196</sup> This information illustrates his continuing support of the al-Qaeda network but it does not provide evidence of direct participation in the hostilities in Afghanistan. The fact that Bin Laden's compound was approximately 120 miles from the Afghan border implies that he was relatively isolated in terms of his ability to directly contribute to the military effort. The degree of operational leadership Bin Laden provided at the time he was killed is unknown. It can be argued that his role was merely symbolic or ceremonial and that continued leadership of the global al-Qaeda network is not akin to the command and control of forces on the ground.

If the ICRC's continuous combat function approach is applied, the fact that Bin Laden was not, at the time of the operation, directly participating in hostilities would not render him immune from targeting unless he had disengaged. He was the recognized leader of al-Qaeda in Afghanistan and remained a lawful military target wherever located. It could be argued that his remote location constituted disengagement from the armed group but evidence that he continued to finance and communicate with al-Qaeda in Afghanistan is proof of his continued integration. If the membership approach were applied, the operation would again attract the application of international humanitarian law. As the leader of al-Qaeda in Afghanistan, he would be targetable regardless of location or activities at that time.

Al- Libi, who is alleged to be a senior al-Qaeda militant leader, was indicted in connection with the 1998 embassy bombings that killed over 220 people.<sup>197</sup> Ikrimah is a Kenyan who is allegedly part of al-Shabaab, a faction of al-Qaeda network in Somalia.<sup>198</sup> He is suspected of having

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<sup>196</sup> A handwritten notebook from February 2010 that discusses plans to attack a train, see Peter Walker, 'Osama Bin Laden Closely Involved in al-Qaeda Plots', *The Guardian*, (6 May 2011), available at: <http://www.theguardian.com/world/2011/may/06/osamabinladen-al-qaida>.

<sup>197</sup> Indictment reproduced by *New York Times*, available at: [http://www.nytimes.com/interactive/2013/10/05/world/africa/06libya-document.html?\\_r=0](http://www.nytimes.com/interactive/2013/10/05/world/africa/06libya-document.html?_r=0)

<sup>198</sup> Nicholas Kulish, Eric Schmitt & Mark Mazzetti, 'Target in U.S. Raid on Somalia is Called Top Shabab Planner of Attacks Abroad', *The New York Times*, (6 October 2013), available at: <http://www.nytimes.com/2013/10/07/world/africa/target-in-us-raid-on-somalia-is-called-top-shabab-planner-of-attacks-abroad.html>.

plotted a number of attacks in Kenya. To date, the United States has not pronounced upon the framework that guided this operation but a press release issued by the Department of Defense shortly after the capture of al-Libi states that he is “detained under the law of war.”<sup>199</sup> This implies that the position of the United States is that the apprehension was a military operation carried out as part of the armed conflict in Afghanistan. The classification of the operations against these men depends upon the approach used to determine their status. To reiterate, the fact that they were located away from the armed conflict in Afghanistan does not render international humanitarian law inapplicable *ab initio*. As was discussed above, a nexus to the current armed conflict in Afghanistan can be established through activities of the individual himself or by assimilation of the group with which he immediately identifies and the armed group engaging in the armed conflict.

Although their activities may have contributed to the overarching aims of al-Qaeda network, it is unclear whether either of these individuals played a direct or continuing role in supporting al-Qaeda in Afghanistan. In saying that, Ikrimah is reported to be the lead planner of a plot sanctioned by al-Qaeda’s core in Pakistan.<sup>200</sup> In relation to Ikrimah, it could be argued that al-Shabaab is so entwined with al-Qaeda in Afghanistan that its members are targetable under international humanitarian law. The United States has made statements indicating that it views al-Shabaab as part of the armed conflict with al-Qaeda.<sup>201</sup> This is an unconvincing theory as these groups operate pursuant to independent organizational and command structures.

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<sup>199</sup> ‘Statement by the Pentagon Press Secretary George Little on the Capture of Abu Anas al Libi’, *U.S. Department of Defense*, (6 October 2013), available at: <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16294>.

<sup>200</sup> Abdalle Ahmed & David Smith, ‘Kenyan Militant Commander Named as Target of U.S. Somali Raid’, *The Guardian* (8 October 2013), available at: <http://www.theguardian.com/world/2013/oct/07/us-navy-raid-somalia-target>; ‘Statement by the Pentagon Press Secretary George Little on U.S. Operation in Somalia’, *U.S. Department of Defense*, (October 7 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16297>.

<sup>201</sup> John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, ‘Ensuring al-Qa’ida’s Demise’, *White House*, Office of the Press Secretary, (29 June 2011) available at: <http://www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter>.

Al-Shabaab's activities are concentrated mainly in Somalia with some attacks being conducted in Uganda and Nairobi. The group has as its goal, the creation of a fundamentalist Islamic state in Somalia. In February 2012, al-Shabaab formally declared allegiance to al-Qaeda.<sup>202</sup> This lends some support to an argument for assimilation with al-Qaeda but the linkage is with al-Qaeda network rather than the factions that constitute armed forces for the purposes of international humanitarian law. Pursuant to this, a military operation against an al-Shabaab operational leader, whose attacks are focused on the internal conflict between al-Shabaab and the Transitional Federal Government in Somalia, would not warrant application of international humanitarian law stemming from the conflict in Afghanistan. The same conclusion can be reached in the case of operations carried out against al-Qaeda in the Arabian Peninsula [*hereinafter* AQAP] such as the targeted killing of Anwar Al-Aulaqi in September 2011.<sup>203</sup> Again, AQAP is a separate group with its own leadership that acts independently from al-Qaeda in Afghanistan. In order for international humanitarian law to attach to operations that target members of these groups, there would have to be separate conflicts between the United States and al-Shabaab in Somalia and the United States and AQAP in Yemen or in the alternate, the activities of the individuals would have to amount to direct participation in the ongoing hostilities in Afghanistan.

It is beyond doubt that the recent raid on a Nairobi shopping mall and the bombings of the embassies in 1998 constitute grave injustices that warrant prosecution. In saying that, these are criminal rather than military acts to which a law enforcement approach is required. This is not to say that international humanitarian law will not regulate any extraterritorial operations taken outside of Afghanistan; the choice of framework will depend upon the activities of the individual or group and their link to the on-going armed conflict in Afghanistan. .

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<sup>202</sup> Jonathon Masters, 'Backgrounder: Al-Shabaab', *Council on Foreign Relations* (23 September 2013), available at: <http://www.cfr.org/somalia/al-shabab/p18650>.

<sup>203</sup> John C. Dehn & Kevin Jon Heller, Debate, *supra* note 151.



Thus far, it has been established that in order to determine the applicability of international humanitarian law to an extraterritorial abduction, it is first necessary to consider whether there is an ongoing armed conflict and whether the operation in question is undertaken as part of that conflict. The conclusion suggested is that depending on the activities of the individual subject to the capture mission and his participation in the conflict, the framework may continue to apply regardless of location. The location of the target and the use of force there may raise questions of *jus ad bellum* which may affect the legality of resorting to these operations; it will not however affect the application of the laws of armed conflict to the conduct of hostilities.

In the absence of armed conflict, international humanitarian law is not applicable. A law enforcement framework found under international human rights law regulates the conduct of operations that are not part of an existing armed conflict but are instead part of the global war on al-Qaeda that does not satisfy the criteria for classification as armed conflict. Having said that, the extent to which human rights obligations apply to an extraterritorial operation is paramount to the application of the framework. As will be discussed in section 4 below, although there is growing support for the position that such obligations extend to operations beyond a state's own borders, uniform agreement has yet to be achieved.

#### **4. KIDNAPPING UNDER INTERNATIONAL HUMAN RIGHTS LAW**

The prohibition of enforced disappearance under Article 1 of the Convention on the Protection of All Persons from Enforced Disappearance encompasses abduction but the definition provided in Article 2 limits its application to those which are preceded by “a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the

disappeared person [...]”<sup>204</sup> A bilateral treaty to prohibit the use of abduction as a means to bring individuals to justice was drafted between Mexico and the United States in 1994.<sup>205</sup> The instrument, which emerged following the controversial *Alvarez Machain* case, has never entered into force.<sup>206</sup> The Convention on the Rights of the Child obliges states to ensure the rights set forth in the instrument, including protection from abduction, to children within their jurisdiction.<sup>207</sup> For the purposes of the Convention, a child is defined as a person under the age of eighteen, unless majority is attained earlier under the applicable law.<sup>208</sup> Following revelations that some of the detainees at Guantanamo Bay were children, human rights proponents accused the United States of violating its obligations under the Convention on the Rights of the Child.<sup>209</sup> The United States has signed the Convention but to date, it has not ratified it. International law confers upon signatories, the obligation to refrain from conduct that would undermine the object and purpose of the instrument. In the event that an individual coming within the scope of protection of the Convention alleges to have been the victim of abduction, the state would be under an obligation to investigate the claims. As well as the explicit protection from abduction in the

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<sup>204</sup> UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, (20 December 2006), Adopted by General Assembly resolution 61/177 on 12 January 2007, Article 1(1), Article 2.

<sup>205</sup> Treaty between the Government of the United Mexican States and the Government of the United States of America to Prohibit Transborder Abductions. Nov. 23, 1994, U.S.-Mex., 31, U.S.T. 5059, reprinted in Michael Abbell & Bruno A. Ristau, 4 *International Judicial Assistance*, Criminal (1995), § 13-4-1, at A-676.3.

<sup>206</sup> U.S. Supreme Court, *Sosa v. Alvarez-Machain et al.*, 542 U.S. 692 (2004) 29 May 2004.

<sup>207</sup> UN General Assembly, Convention on the Rights of the Child, (20 November 1989), United Nations, Treaty Series, vol. 1577, p. 3, Article 35.

<sup>208</sup> *Ibid*, Article 1.

<sup>209</sup> U.N. Commission on the Rights of the Child, ‘Written Replies by the Government of the United States of America Concerning the List of Issues’ (CRC/C/OPAC/USA/Q1) to Be Taken Up in Connection with the Consideration of the Initial Report of the United States of America Under Article 8, Paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC/C/OPAC/USA/1), at 29–31, U.N. Doc. CRC/C/OPAC/Q/1/Add.1/Rev.1 (2 June 2008); *Human Rights Watch* ‘Letter to Attorney General Eric Holder Regarding Guantanamo Detainee Review’, (25 March 2009) available at: <http://www.hrw.org/news/2009/03/25/letter-attorney-general-holder-regarding-guantanamo-detainee-review>; Melissa A. Jamison, ‘Sins of the Father: Punishing Children in the War on Terror’, 29 *University of La Verne Law Review* (2008) 88, at 99 ; A. Jamison, ‘Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children’, 9 *UC Davis Journal of Juvenile Law and Policy* (2005) 127.

Convention on the Rights of the Child, other human rights provisions have been interpreted to include extraterritorial kidnapping.<sup>210</sup>

As is the case with luring, the right to liberty and security and the right not to be arrested or detained arbitrarily are the two most prominent protections affected. Extraterritorial kidnapping is often followed by claims of mistreatment. The manner in which the individual is apprehended and the degree of force used may trigger the prohibition against torture and other inhuman or degrading treatment or punishment which is found in many human rights instruments.<sup>211</sup> The practice of extraordinary rendition, which involves abduction followed by transfer to an overseas detention facility for the purposes of interrogation, has been the subject of debate in both academic and governmental circles.<sup>212</sup> As this study is limited to an examination of the status of the apprehension itself, issues surrounding the individual's detention in the receiving state will not be considered.

Article 9(1) of the International Covenant on Civil and Political Rights provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his

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<sup>210</sup> Silvia Borelli, 'The Rendition of Terrorist Suspects to the United States: Human Rights and the Limits of International Cooperation', in Bianchi (ed.) *Enforcing International Law Norms Against Terrorism*, (2004) at 356; Alberto Costi, 'Problems with Current International and National Practices Concerning Extraterritorial Abductions' 9 *Revue Juridique Polynésienne* (2003) 57, at 69; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Articles 3, 5 and 9; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Articles 7 and 9; The absence of an explicit provision has been noted by a number of sources: Costi, at 69; Borelli, at 354.

<sup>211</sup> In *Öcalan*, the applicant claimed that circumstances in which his arrest had been effected amounted to degrading and inhuman treatment, ECtHR, *Öcalan v Turkey*, Application No. 46221/99, 'Judgment', (12 May 2005), para 177; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85; *Ibid*, Article 7 ICCPR (prohibition on torture); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (4 November 1950), ETS 5, Article 3.

<sup>212</sup> Irish Human Rights Commission, 'Extraordinary Rendition, a Review of Ireland's Human Rights Obligations', (December 2007); Council of Europe, 'Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees involving Council of Europe Member States', Doc 10957, (June 2006); M.L. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 *George Washington Law Review*, (2007); A. Bergquist & D. Weissbrodt, 'Extraordinary Rendition: A Human Rights Analysis', 19 *Harvard Human Rights Journal* (2006) 123; A. Bergquist & D. Weissbrodt, 'Extraordinary Rendition and the Torture Convention', 46 *Virginia Journal of International Law* (2006) 58.

liberty except on such grounds and in accordance with such procedure as are established by law.<sup>213</sup>

Article 5(1) of the European Convention of Human Rights contains a similar provision:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.<sup>214</sup>

The Universal Declaration on Human Rights and the American Convention on the Rights and Duties of Man also guarantee the right to liberty and security of the person and prohibit arbitrary arrest and detention.<sup>215</sup> States frequently engage in activities that deprive individuals of their liberty. Such actions do not violate the individual's rights in so far as they are carried out "in accordance with such procedures as are established by law" and are not "arbitrary".<sup>216</sup> The meaning of "arbitrariness" and the principle of "lawfulness" are considered in Chapter 3. In brief, in order to comply with the provision, an arrest or detention must be in conformity with both national and international law.<sup>217</sup> This means that an extraterritorial abduction that violates the sovereignty of the state in which it is carried out or circumvents an extradition treaty may automatically infringe the provision insofar as the deprivation of liberty is not in accordance with law.<sup>218</sup> This interpretation has the effect of rendering the majority of extraterritorial abductions unlawful. There may be a situation where the state in which the individual is apprehended has consented to the operation. This would vitiate any sovereignty issues but the arrest will still have to comply with established procedures such as the issuance of a valid arrest warrant and the notification of charges to the suspect.

In practice, there is no uniform criteria for determining whether an extraterritorial kidnapping constitutes a violation of a state's human rights

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<sup>213</sup> *Ibid*, Article 9, ICCPR.

<sup>214</sup> Article 5(1) ECHR, *supra* note 211.

<sup>215</sup> Organization of American States, American Convention on Human Rights, Pact of San Jose, Costa Rica, (22 November 1969); UDHR, *supra* note 210, Article 3.

<sup>216</sup> Article 9 ICCPR, *supra* note 210; Article 5 ECHR *supra* note 211.

<sup>217</sup> Manfred Nowak, *CCPR Commentary*, (2<sup>nd</sup> ed. 2005), at 224.

<sup>218</sup> *Öcalan v Turkey*, *supra* note 211, para 85.

obligations under a given instrument. The following section will draw on the decisions of the Human Rights Committee and the ECtHR to discern the approach taken in establishing the status of extraterritorial kidnapping under international human rights law.

#### 4.1 THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee has found violations of the international Covenant on Civil and Political Rights in situations in which the applicant was subject to extraterritorial kidnapping. In *Domukovsky and ors v. Georgia*, it held that the abduction of the applicants in Azerbaijan by Georgian agents constituted an unlawful arrest in violation of Article 9(1).<sup>219</sup> The applicants claimed that following a refusal by Azerbaijan to extradite them, they were kidnapped and taken to Georgia for trial. The respondent state argued that the apprehensions were carried out pursuant to warrants issued in Georgia and with the consent of Azerbaijan. The case turned on the fact that the Committee was not presented with evidence of an agreement between the two states.

The *Celiberti de Casariego v Uruguay* involved the arrest of a Uruguayan citizen in Brazil by agents of Uruguay with the cooperation of the Brazilian authorities.<sup>220</sup> The applicant was arrested and detained in her apartment before being driven to the Uruguayan border. The Committee held that “the act of abduction into the Uruguayan territory constituted an arbitrary arrest and detention.”<sup>221</sup> It found the alleged consent of the host state irrelevant in assessing the violations. It stated that the Covenant:

does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant that its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.<sup>222</sup>

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<sup>219</sup>HRC, *Domukovsky and ors v. Georgia*, Communications No. 623/1995, 624/1995, 626/1995, 627/1995, U.N. Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995, (29 May 1998).

<sup>220</sup>*Lilian Celiberti de Casariego v Uruguay*, *supra* note 1.

<sup>221</sup>*Ibid.*, at 185.

<sup>222</sup>*Ibid.*

Violations of Article 9 were found in two subsequent cases also involving Uruguay, *Lopez v Uruguay*<sup>223</sup> and *María del Carmen Almeida de Quinteros et al. v Uruguay*.<sup>224</sup> In the first of these cases, the applicant alleged that her husband was kidnapped by Uruguayan authorities in Argentina with the cooperation of Argentinean forces, detained in Buenos Aires and transported to Uruguay where he was subsequently arrested. In the second case, a Uruguayan national was kidnapped by Uruguayan authorities on the grounds of the Venezuelan Embassy. In *Cañón García v Ecuador*, a case involving the abduction and detention of a Colombian citizen, the Committee found that Ecuador had violated Article 9 of the Covenant.<sup>225</sup> Agents reportedly acting on behalf of Interpol and the United States Drug Enforcement Agency apprehended the applicant in Ecuador. He was then flown to the United States pursuant to an arrest warrant. Garcia's claim, which was accepted by the Committee, was that his arrest and transfer should have been carried out in accordance with the extradition treaty between Ecuador and the United States.

These cases illustrate that the Human Rights Committee considers extraterritorial kidnapping to be a violation of the right to liberty and security of the person regardless of whether the state in which the individual is apprehended has consented. As will be seen in the following section, the ECtHR has taken a somewhat different approach.

## **4.2 EUROPEAN COURT OF HUMAN RIGHTS**

The European Convention on Human Rights guarantees the right to liberty and security of the person. Article 5 enumerates this right and contains an exhaustive list of situations in which the deprivation of liberty may be permissible.<sup>226</sup> With the aim of ensuring that no one is dispossessed of his liberty in an "arbitrary fashion", the practical purpose of Article 5 is to

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<sup>223</sup> *Sergio Ruben Lopez Burgos v. Uruguay*, *supra* note 1, at 176.

<sup>224</sup> *María del Carmen Almeida de Quinteros et al. v Uruguay*, *supra* note 1, at 138.

<sup>225</sup> *Cañón García v Ecuador*, *supra* note 1, at 90.

<sup>226</sup> ECHR, Article 5, *supra* note 211.

exclude any form of arrest or detention carried out without lawful authority and proper judicial control.<sup>227</sup>

The ECtHR has held that extraterritorial apprehensions may violate the right to Article 5 of the Convention. The *Stocké* case will be looked at more closely in Chapter 3 as it involved a luring operation but the judgment is relevant to the present discussion as it speaks of arrest carried out on the territory of another state. The Court stated:

[a]n arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 para 1.<sup>228</sup>

Although the court acknowledged that extraterritorial abduction could violate the rights of the abductee under the Convention, it seems that such a finding would depend upon whether the state from which the individual was taken had consented to the operation. In the case before it, no violation was found as the German authorities had not participated in the operation. Subsequent decisions handed down by the court have followed this line of reasoning when determining cases of extraterritorial kidnapping.

In the case of Carlos Illich Ramirez (Carlos the Jackal), the applicant alleged that his abduction in Sudan and transfer to France constituted an unlawful arrest, which deprived him of his right to liberty and security under Article 5(1) of the Convention.<sup>229</sup> The Commission rejected Ramirez's application. It found that the French and Sudanese authorities had cooperated in the arrest and so the arrest did not violate the applicant's rights under the Convention.

The *Öcalan* case provides an illustrative example of the way in which the ECtHR applies arbitrariness and the principle of legality.<sup>230</sup> It also

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<sup>227</sup> ECtHR, *Engel v Netherlands*, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72A 22 'Judgment', (8 June 1976); ECtHR, *Storck v Germany*, Application No. 61603/00, 'Judgment' (16 June 2005). Jacobs, White and Ovey, *The European Convention on Human Rights*, (2010), at 209.

<sup>228</sup> ECtHR, *Case of Stocké v. Germany*, Application No. 11755/85, 'Judgment', (27 August 1992), para 167.

<sup>229</sup> ECmHR, *Illich Sanchez Ramirez v France*, Application No. 28780/95, 'Decision of 24 June 1996 on the admissibility of the application', *Decisions and Reports*, No. 86-B, pp. 155-162.

<sup>230</sup> *Öcalan v Turkey*, *supra* note 211.

demonstrates the court's continuing preoccupation with the relationship between the states involved in an extraterritorial abduction. In this case, the applicant claimed that his alleged abduction from Kenya by Turkish authorities violated Article 5 of the Convention. Öcalan, the leader of the Worker's Party of Kurdistan, was expelled from Syria and taken to Kenya. Arrest warrants had been issued by Turkish courts and a 'red notice' was circulated by Interpol for his role in the establishment of an armed group which had as its aim, the destruction of the Turkish state and the instigation of terrorist acts resulting in the loss of life. The applicant was escorted to the airport in a Kenyan vehicle and once on board the aircraft, arrested by Turkish officials. The Strasbourg court stated that "[t]he fact that a fugitive has been handed over as a result of cooperation between states does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5."<sup>231</sup> In determining the lawfulness of the arrest, the court noted that "provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin" even an "atypical" extradition would not violate Article 5.<sup>232</sup> Applying this to the case at hand, the court stated, "his arrest and detention complied with orders that had been issued by the Turkish courts [...]."<sup>233</sup> It then turned to consider whether the operation had breached Kenyan sovereignty. It was determined that the cooperation of the Kenyan authorities in delivering him to the aircraft was evidence of the fact that the arrest was not perceived as being a violation of Kenyan sovereignty. The court concluded that the arrest was in accordance with "a procedure proscribed by law" and so did not violate Article 5(1) of the Convention.<sup>234</sup> The court found violations of Article 5(3) and 5(4). It held that Öcalan had not been brought promptly before a judge and a court had not decided upon the lawfulness of his detention speedily. Turkey was also found to be in violation of Article 3 in relation to the imposition of the death sentence following an unfair trial.

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<sup>231</sup> *Ibid*, para 89.

<sup>232</sup> *Ibid*, para 92.

<sup>233</sup> *Ibid*, para 87.

<sup>234</sup> *Ibid*, para 99.



In deciding cases involving abduction and possible violations of the right to liberty and security, a distinction can be drawn between the approaches of the Human Rights Committee and the ECtHR. As is evinced by the *Öcalan* judgment, the decisions seem to pivot on the consent and/or involvement of the state where the arrest was carried out. This approach gives considerable weight to the “interests of all nations that suspected offenders who flee abroad should be brought to justice”.<sup>235</sup> It is beyond doubt that the prosecution of offenders is of paramount concern to states but it is outside the remit of the court. The mandate of the court is to ensure that states respect their obligations under the Convention; it does not extend to facilitating cooperation in the suppression of crime, however legitimate that interest might be.

From the above cases, it would seem that provided domestic procedures for arrest are followed by the abducting state and, there is no violation of territorial sovereignty, the ECtHR will not find an infringement of Article 5(1). The Human Rights Committee on the other hand, lends less weight to the relationship between the states involved. Whether or not the state in which the apprehension occurs cooperates is of little consequence to triggering Article 9. A number of commentators have supported the Committee for taking this approach and in turn, denounced the interpretation given by the Strasbourg court.<sup>236</sup> The thrust of the argument is that the rights of the individual under the framework of human rights law are not dependent upon those of the state. As one author has stated:

To make a breach of an individual’s rights dependent on there first being a breach of state sovereignty is to effectively limit the scope of the right to being no more than a derivative of a state’s right to inviolability.<sup>237</sup>

The evolution of international law has seen the development of a system that guarantees rights to individuals that are independent from those of the

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<sup>235</sup> *Ibid*, para 88.

<sup>236</sup> A. Kunzli, ‘*Öcalan v Turkey*: Some Comments’, 17 *Leiden Journal of International Law* (2004), 155, at 147-148; Borelli, ‘Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Cooperation’, 16 *Leiden Journal of International Law* (2003) 803, at 807.

<sup>237</sup> Jeffrey Loan, ‘*Sosa v Alvarez Machain*: Exterritorial Abduction and the Rights of the Individual under International Law’, 12 *Journal of International & Comparative Law* (2005) 253, at 282.

state. With this in mind, the interests of the states involved should not dictate determinations as to the legality of extraterritorial abductions.

Applying the interpretation of the Human Rights Committee to the recent extraterritorial abduction of al-Libi in Libya, it is likely that a violation of Article 9(1) of the International Covenant on Civil and Political Rights would be found.<sup>238</sup> There is no extradition treaty between the United States and Libya and so formal procedures were not technically by-passed. As of yet, there is no definitive answer as to whether Libya consented to the operation being carried out on its soil. If there was consent, no violation of sovereignty took place however consent is not a determining factor for the Human Rights Committee. Al-Libi was subject to an indictment and warrants had been issued for his arrest. This would constitute a valid legal basis for the arrest but consideration would also have to be given to adherence to procedural requirements such as whether he was informed of the reasons for the arrest and the charges against him. Even if the conduct did conflict with al-Libi's rights under Article 9, there can be no violation unless the obligations under the Covenant attach to conduct carried out extraterritorially. The following section will consider this issue.

### **4.3 EXTRATERRITORIAL APPLICABILITY OF HUMAN RIGHTS LAW**

The extent to which human rights law applies to extraterritorial operations carried out by a state has been the focus of debate.<sup>239</sup> Certain interpretations in this area could have the potential of allowing activities that would be unlawful if carried out within a state's own borders, to pass under the radar of human rights law. There are no standard rules by which to measure a state's human rights obligations when acting on a foreign territory. Courts and academics have consistently recognized that in circumstances in which a state undertakes activities on foreign soil, they may be bound by their

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<sup>238</sup> The ECHR is not directly relevant here as the United States is not a party to the instrument.

<sup>239</sup> See Shane Darcy, 'Human Rights Protections during the "War on Terror": Two Steps Back One Step Forward' 16 *Minnesota Journal of International Law* (2007) 353.

human rights obligations.<sup>240</sup> The practical application of this principle is, however, dependent on the interpretation that is given to the concept of authority and control and the meaning attributed to the tests prescribed in human rights treaties themselves.

Most human rights instruments contain a provision setting out the scope of its application. Article 2(1) of the International Covenant on Civil and Political Rights provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.<sup>241</sup>

The meaning of the words “within its territory and subject to its jurisdiction” has attracted academic debate.<sup>242</sup> The Human Rights Committee has attempted to delineate the scope of application of human rights treaties:

States parties are required by article 2, paragraph 1, to respect and ensure the Covenant's rights to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the *power or effective control* of that State Party [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.<sup>243</sup>

The Inter-American Commission on Human Rights has offered a similar interpretation. In a decision considering the detention of persons at Guantanamo Bay, the Commission found that the test was “whether, under the specific circumstances, that person fell within the state’s authority and control.”<sup>244</sup>

The ECtHR has interpreted the extraterritorial application of human rights obligations narrowly. In the *Bankovic* case, the Court held that

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<sup>240</sup> ICJ *Legal Consequences of the Construction of a Wall in the Occupied Territory*, ‘Advisory Opinion’, (9 July 2004), paras 107-113; ICJ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, ‘Judgment’, (19 December 2005), paras 219-20.

<sup>241</sup> ICCPR, Article 2(1), *supra* note 210.

<sup>242</sup> For a discussion of the interpretation of this phrase see Lubell, *supra* note 39, at 207-213.

<sup>243</sup> HRC, General Comment No. 31 UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 10.

<sup>244</sup> Inter-American Commission on Human Rights, *Precautionary Measures in Guantanamo Bay*, citing *Coard v the United States*, para 37.

persons killed outside an area under the effective overall control of a state by fire from an aircraft were not within the state's jurisdiction.<sup>245</sup> Equating the concept of "jurisdiction" in Article 1 of the Convention, with that of state jurisdiction to prescribe and enforce laws, the court found that the state did not have "authority and control." The ECtHR revisited the question of the extraterritorial application of human rights obligations in *Al-Skeini*.<sup>246</sup> Five of the applicants were allegedly killed by British troops on patrol in occupied Basra. The sixth applicant was held at a detention facility operated by the United Kingdom, allegedly mistreated and subsequently killed. The applicants' families asked for a full, independent and effective investigation, compliant with Article 2 of the Convention. The Court appeared to take a more expansive view of the scope of application of the Convention finding that all six applicants were under the United Kingdom's jurisdiction. This decision is, however, limited to situations where the state using force exercises some kind of "public powers." The court stated:

the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government. Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.<sup>247</sup>

The decision has been a welcome expansion of the court's approach in *Bankovic* although there has been some criticism over its retention of the exceptional standard in relation to situations in which human rights obligations can apply extraterritorially.<sup>248</sup>

The application of human rights law to extraterritorial abduction is much more straightforward than the general extension of obligations to territory

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<sup>245</sup> ECtHR, *Bankovic v Belgium*, Application No. 752207/99, 'Judgment', (12 December 2001).

<sup>246</sup> ECtHR, *Al-Skeini and Others v United Kingdom*, Application No. 55721/07, 'Judgment', (7 July 2011); For a critical discussion of the judgment see Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg,' 23 *European Journal of International Law* (2012).

<sup>247</sup> *Ibid*, *Al-Skeini v United Kingdom*, para 135.

<sup>248</sup> Milanovic, *supra* note 246, at 12.

outside the state. An individual who has been captured on foreign soil is clearly under the control of the state from which the agents were sent. In a number of cases involving extraterritorial abduction, the Human Rights Committee and the ECtHR have found that a state's obligations extend to arrests carried out abroad. In *Celiberti de Casargio v Uruguay*, the Committee explained:

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.<sup>249</sup>

An individual opinion appended to the Comment explains the rationale underlying the Committee's reasoning:

[...] it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>250</sup>

In the case of *Ramirez Sanchez*, the ECtHR considered the issue as to when an individual can be said to be within the jurisdiction of the apprehending state for the purposes of the Convention. It stated:

[...] from the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction of France, even if this authority was, in the circumstances, being exercised abroad.<sup>251</sup>

This interpretation was espoused by the Strasbourg Court again in the *Öcalan* case. The court noted:

[d]irectly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.<sup>252</sup>

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<sup>249</sup> *Celiberti de Casargio v Uruguay*, *supra* note 1, para 10.3

<sup>250</sup> *Ibid*, 'Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure Communication No. R.13/56'.

<sup>251</sup> *Illich Sanchez Ramirez v France*, *supra* note 229, at 161-162.

<sup>252</sup> *Öcalan v Turkey*, *supra* note 211.

Pursuant to this, once the abductee is in the custody of the authorities, wherever that may be, the state is bound by its obligations under the Convention. Returning to the circumstances of al- Libi's capture, the United States' obligations under the International Covenant on Civil and Political Rights were triggered from the moment of his apprehension on Libyan soil.

## CONCLUSION

Kidnapping is the most objectionable method of irregular apprehension. In relation to the rights of the state from which the individual is taken, the physical presence and subsequent exercise of law enforcement powers on foreign soil constitute an unlawful intervention and may amount to a use of force. The capture of members of a hostile party is a fundamental component in the conduct of hostilities. Considering the reformulation of the United States' counterterrorism policy and the possible shift towards capture such as the recent operations carried out in Libya and Somali, a clarification as to the international legal framework applicable to such efforts is imperative to identifying the appropriate regime of rights and privileges that should be afforded to individuals and states involved. As was discussed above, the possibility of a global armed conflict with al-Qaeda is impossible. Such an interpretation disregards the prohibition on the use of force and misinterprets the rules of international humanitarian law. Instead, it was determined that international human rights law will usually be the guiding paradigm for counterterrorism operations but in certain cases, an individual's connection with an ongoing armed conflict may render him a legitimate military target regardless of location.

In the case of killings, it is easy to see the attraction towards the invocation of international humanitarian law. The rules on deprivation of life are more lenient under this framework than under international human rights law.<sup>253</sup> Under ordinary human rights principles, based on a law-enforcement model with its guarantees of due process, use of lethal force to

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<sup>253</sup> See *McCann v. United Kingdom*, 21 Eur. Ct. H.R. 97 (1995) (noting that lethal force is disproportionate whenever non-lethal alternatives are available).

defend persons against unlawful violence is justified only when absolutely necessary. In saying that, there is growing recognition of the application of international human rights principles during an armed conflict.<sup>254</sup> This is a controversial issue, especially in the context of targeted killings.<sup>255</sup>

Judicial determinations regarding the human rights of the abductee have been influenced by the fact that a state has not protested the abduction and by evidence of state complicity in the operation. Rights and protections guaranteed to individuals by human rights law are independent from that of the state. Notwithstanding this, in considering kidnapping, many courts have followed the classical approach to international law. As illustrated by the *Eichmann* case, this approach makes the realization of the rights of the individual largely contingent upon the state. Although not requiring an official protest by the injured state, the case law of the ECtHR in this area has led to a somewhat similar result. Acknowledging the importance of state cooperation in suppressing crime, the Court has been reluctant to find a violation of the Convention in situations where both states are involved in carrying out the operation. As was discussed in Chapter 1, the suppression of crime is a legitimate goal but the interests and motivations of states should not affect the ability of an individual to justify a violation of rights under the Convention.

It is evident that extraterritorial kidnapping involves conduct that is unlawful under international law. The practice violates the prohibition on the use of force, misinterprets the scope of international humanitarian law and infringes the rights of the abductee. In practice, states do not often

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<sup>254</sup>*Nicaragua* case, para 65; HCJ 769/02 *Pub. Comm. Against Torture in Israel v. Gov't of Israel* 40 [2005] (Isr.); Noam Lubell, 'Challenges to Applying Human Rights Law to Armed Conflict' *International Review of the Red Cross*, Volume 87 Number 860 December 2005; G.I.A.D. Draper, 'The Relationship between the Human Rights Regime and the Laws of Armed Conflict,' *Israel Yearbook on Human Rights*, Vol. 1, 1971, p. 191; L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law,' *International Review of the Red Cross*, No. 293, (March-April 1993), p. 94; R.E. Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law,' *Yearbook of International Humanitarian Law*, Vol. 1, (1998), at 69-110.

<sup>255</sup>David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Self-Defence?' 16 *European Journal of International Law* 2 (2005) 175.

officially protest the violation of their sovereignty. This may be down to a reluctance to upset international relations, indifference to the removal of the individual, the state may be complicit in the operation or diplomatic efforts may resolve any disagreement. Whatever the reason, failure of states to formally object to such conduct means that there has been limited opportunity for courts and other international mechanisms to consider the relationship between abduction and state sovereignty. The unconsented entry onto Argentinian soil to capture Eichmann was condemned by the Security Council but the fact that this pronouncement had no bearing on the subsequent trial illustrates how states' interests in prosecuting crime can serve to override international legal obligations. Accordingly, although kidnapping may be unlawful under international law, the subsequent trial of the abductee and the refusal to remedy or condemn the illegalities involved can render such conduct acceptable in practice. This will be discussed further in Chapter 5.



## CHAPTER 3

### LURING

#### INTRODUCTION

Luring or abduction by fraud are terms to describe the use of deception, tricks or ruses to entice an individual to a location where jurisdiction to arrest is then exercised.<sup>1</sup> This type of operation is usually carried out without the contrivance or knowledge of the state in which the individual is present. Luring is distinguishable from kidnapping in that it does not involve the forcible removal of the individual. Instead, it is the influence or manipulation of the will of the suspect that leads to the subsequent apprehension. In comparison with kidnapping, this type of operation involves a lesser degree of intrusion onto the territory of the state insofar as the actual arrest is conducted beyond its sovereign borders. As one author has described, “[luring] avoids more direct insult to the territorial jurisdiction of the sovereign government.”<sup>2</sup> In relation to the rights of the individual, luring is arguably less objectionable than kidnapping.<sup>3</sup> The main reason for this lies in the distinction between physical force and

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<sup>1</sup> Arrest carried out in international airspace: House of Lords, *In Re Schmidt*, 30 June 1994, [1995] 1 A.C. 339 (Decision of the Divisional Court pp. 342-362, ‘*Schmidt I*’, Decision of House of Lords p. 362, ‘*Schmidt II*’), ECtHR, *Stocké v. Germany*, Application No. 11755/85, ‘Judgment’, (19 March 1991); Arrest carried out in international waters: U.S. District Court, District of Columbia, *United States v. Yunis*, Crim. No. 87-0377, 681 F. Supp. 909 (23 February 1988); Transported to a third country for subsequent extradition: ECtHR, *Bozano v France*, Application No. 9120/80 ‘Judgment’, (18 December 1986); *Liangstripasert v United States* [1991] 1 App. Cas. 225, 231 (P.C.).

<sup>2</sup> Ruth Wedgewood, ‘Responding to Terrorism: The Strikes Against Bin Laden’, *Yale Journal of International Law* (1999) 559, at 562.

<sup>3</sup> Michael Scharf, ‘The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal’, 49 *De Paul Law Review* (1999-2000) 925, at 970. Andre Klip & Göran Sluiter (eds.) *Annotated Leading Cases of International Criminal Tribunals*, 2001, at 152; Michael Scharf, ‘*The Prosecutor v Slavko Dokmanović: Irregular Rendition and the ICTY*’, 11 *Leiden Journal of International Law* (1998) 369, at 374; Alberto Costi, ‘Problems with Current International and National Practices Concerning Extraterritorial Abductions’ 9 *Revue Juridique Polynésienne* (2003) 57, at 64-65; Christophe Paulussen, *Male captus bene detentus? Surrendering suspects to the International Criminal Court*, (2010), at 47.

psychological inducement. On its face, the latter conduct does not involve the same level of coercion.

Although luring may be less objectionable than other forms of rendition, this does not mean that the use of the practice is in conformity with the principles and rules of international law. An inquiry into the legal aspects of luring presents a number of issues. One of the main issues derives from the fact that this type of operation can be performed without the actual presence of foreign agents on the soil of another state.<sup>4</sup> Rather than the employment of physical force, it is the use of tricks or misrepresentations, oftentimes transmitted from another jurisdiction that secures the departure of the individual. Determining whether conduct originating outside the state, but having an effect within it, constitutes a violation of international law necessitates an analysis of the scope of the principle of non-intervention. In cases in which foreign agents do in fact enter the territory of the state in order to induce the target, a breach of territorial sovereignty may not automatically follow.<sup>5</sup> There is no yardstick against which to measure the compatibility of certain conduct with the doctrine of non-intervention; the level of interference needed to trigger the principle has not been set out. The parameters of the doctrine can be drawn from an examination of legal opinions, academic writings and policy documents interpreting the principle.

Numerous authorities have categorically stated that luring is a violation of international law.<sup>6</sup> In determining whether luring is a legal alternative to formal extradition and surrender, it is necessary to delineate the elements of the practice and measure them against the legal rules and principles that regulate the area. It is also imperative to consider the context in which the operation is carried out. A rigid application of the legal frameworks may return a definitive answer as to the legality of the practice but an analysis of the motivations for the resort to luring, and the level of harm done in each

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<sup>4</sup> *In Re Schmidt II*, *supra* note 1.

<sup>5</sup> *United States v Yunis*, *supra* note 1.

<sup>6</sup> F.A. Mann, *Further Studies in International Law*, (1990), at 340; *Mutual Assistance in Criminal Matters: XVth Congress of International Penal Law Association Adopts Resolutions*, 10 *International Enforcement Law Reporter* 385, at 386 (1994); Paust *et al.* *International Criminal Law: Cases and Materials* (1996), at 443-445.

situation, will provide a helpful discourse upon which to build workable suggestions as to the reform of formal extradition and surrender procedures.

This Chapter will examine the legality of luring operations under the framework of international law. Section 1 will begin by introducing the practice of luring and considering some of the reasons for, and modalities of, its use. This account will be followed in section 2 with an examination of the principle of non-intervention and its application to luring operations. Section 3 will go on to address whether the conduct involved can constitute a violation of the right to liberty and security of the person.

### **1. THE MODALITIES OF LURING**

From the point of view of the luring state, the motivations for the use of this type of operation are apparent in circumstances in which formal processes do not return satisfactory results. As was discussed in Chapter 1, extradition and surrender regimes are oftentimes unfeasible or in some cases, do not exist at all. At first blush, it may seem that in comparison to kidnapping and disguised or de facto extradition, luring requires a lesser degree of planning, financial input, man-power and time. This is true in some cases but certainly not in all. At one end of the scale are operations limited to the transmission of telephone calls or emails from outside of the state while on the other, are those involving the physical entry of foreign agents, the recruitment of agent provocateurs, heavy surveillance and interagency cooperation.

From both a legal and a political standpoint, luring appears to be the least objectionable and most common alternative to formal extradition or surrender.<sup>7</sup> The encroachment on the rights of both the state and the individual is relatively small-scale. The reason for its frequency in comparison to other forms of capture is the luring state's desire to minimize the possibility of aggravating international relations and attracting reciprocal conduct. With the use of documented cases involving the luring

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<sup>7</sup> See fn. 3.

of individuals to locations where an arrest is subsequently carried out, this section will provide an overview of the modalities of such operations. Identifying the elements that compose the practice and understanding the different shapes that it can take will facilitate the application of the relevant legal frameworks in later sections.

The most commonly cited luring case is that of Fawaz Yunis.<sup>8</sup> Although every case differs in relation to its planning and execution, the details of Yunis' luring provide an illustrative example of the modalities of this type of operation. Yunis, a Lebanese Shiite, was wanted by the United States for his alleged involvement in the 1985 hijacking and destruction of a Jordanian airliner at Beirut International Airport.<sup>9</sup> The FBI along with other federal agencies designed 'Operation Goldenrod' for the purpose of apprehending Yunis and bringing him before a United States court on charges of air piracy and hostage taking.

Operation Goldenrod was organized in great detail. Jamal Hamdan, an acquaintance of Yunis, was recruited as an agent provocateur to assist in luring the target. At the instigation of federal agents, Hamdan allegedly engaged in meetings and phone conversations in order to build a rapport with Yunis. According to the account, Hamdan encouraged Yunis to accompany him to Cyprus where he had organized a meeting with a drug kingpin aboard a yacht in the Mediterranean. Yunis travelled from Lebanon to Cyprus where he boarded the yacht upon which he was later arrested. At the time of the arrest, the vessel was in international waters whereupon jurisdiction could be lawfully exercised.<sup>10</sup> Yunis was transferred to a U.S. munitions ship, the U.S.S. Butte, and subsequently flown to the United States to stand trial.

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<sup>8</sup> *United States v. Yunis*, *supra* note 1.

<sup>9</sup> *Ibid*, at 912.

<sup>10</sup> *Ibid*, at 913; U.S. Supreme Court, *Cunard Steamship Co. Ltd v Mellon*, 262 U.S. 100 (1923)- U.S. Supreme Court held that the high seas are located where there is no territorial sovereignty.

The facts of the case reveal that a great degree of planning and finance were invested into the execution of Operation Goldenrod.<sup>11</sup> It was a highly organized interagency effort reportedly involving the CIA, FBI, DEA and the United States' Department of Defense.<sup>12</sup> The scale of the operation illustrates the significance that states attach to the apprehension of suspects. The choice of luring as the method of rendition is evidence that states are mindful of the principle of territorial sovereignty. Employing measures least likely to undermine the sovereignty of another state reduces the risk of souring international relations and diminishes the possibility of liability attaching for breaches of international law.

The luring of a German national residing in Ireland provides a good example of a lower scale operation.<sup>13</sup> Schmidt was wanted in connection with serious drug offences. He had been arrested by Irish police and pled guilty. The German authorities communicated a request to their Irish counterparts for the issuance of a provisional arrest warrant. Due to the insufficiency of the supporting documents furnished by Germany, the warrant was not processed and no further efforts to extradite Schmidt from Ireland were made. Based on information provided by German authorities regarding Schmidt's activities in the United Kingdom, steps were taken to lure Schmidt into the United Kingdom for the purpose of arrest. Purporting to inquire about a check fraud, the authorities contacted Schmidt claiming to be in possession of documents and photographic evidence implicating him in their investigations. Schmidt was invited to attend an interview in the United Kingdom to discuss the matter. Schmidt's lawyer was informed that in the event that his client did not attend, a warrant for his arrest would be issued. He travelled to the United Kingdom. Following his arrival, he was transported to a police station where a formal arrest was executed.

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<sup>11</sup> Operation Goldenrod is reported to have cost \$20 million U.S. Dollars, *see* Stephen Grey, 'Profile Fawaz Younis', *History Commons*, available at: [http://www.historycommons.org/entity.jsp?entity=jamal\\_hamdan\\_1](http://www.historycommons.org/entity.jsp?entity=jamal_hamdan_1)

<sup>12</sup> *Ibid*: "During the motions hearing, government testimony identified the other agencies involved to be the Department of the Defense, Department of State, Department of Justice, and the Federal Bureau of Investigation. (Trans. of Oliver Revell, Jan. 28, 1988, at 168)."

<sup>13</sup> *Schmidt I* and *Schmidt II*, *supra* note 1.

In comparison to the facts of *Yunis*, the operation that led to the arrest of Schmidt was relatively small-scale. Efforts to entice the target into the jurisdiction of the United Kingdom were limited to the transmission of phone calls from out of state; at no point did foreign agents physically enter Irish territory. The operation was planned and orchestrated by local authorities based in the United Kingdom. There was a degree of cooperation between the authorities of Germany and the United Kingdom but this was limited to the sharing of information about the whereabouts and conduct of Schmidt.

Luring has also been employed to gain jurisdiction of a suspected international criminal indicted by the ICTY. *Prosecutor v Dokmanović* is the first case in which the apprehension of an accused was considered by an international tribunal.<sup>14</sup> Dokmanović, a Croatian Serb was under sealed indictment for alleged complicity in the 1991 beatings and murder of 261 non-Serb men at Vukovar hospital in Croatia.<sup>15</sup> At the time the arrest warrant was forwarded to the United Nations Transitional Administration in Eastern Slavonia [*hereinafter* UNTAES], Dokmanović was no longer in the territory over which UNTAES had jurisdiction. Following his communication with the Office of the Prosecutor, a number of attempts to arrange a meeting with Dokmanović in UNTAES territory were made. Because of his refusal to travel to these regions, an investigator conducted interviews with Dokmanović in the Federal Republic of Yugoslavia. A subsequent meeting between Dokmanović and UNTAES was arranged for the supposed purpose of discussing property compensation. The motive underlying this meeting was to lure the accused into the UNTAES territory in order to carry out his arrest. Upon arrival in a UNTAES region, Dokmanović was arrested and subsequently transported to Čepin airfield in Croatia and flown to The Hague for detention and trial.

In a pretrial motion, counsel for Dokmanović argued that the way in which the accused was brought before the Tribunal violated the Statute and

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<sup>14</sup> ICTY, *Prosecutor v. Mile Mrksić, Miroslav Radić, Veselin Šlijančanin and Slavko Dokmanović*, ‘Decision on the Motion for Release by the Accused Slavko Dokmanović’, Case No. IT-95-13a-PT, (22 October 1997), para 2.

<sup>15</sup> *Ibid.*

Rules of the ICTY, the sovereignty of the FRY and international law.<sup>16</sup> In relation to the permissibility of luring, the Chamber drew a distinction between “luring” and “forcible abduction.”<sup>17</sup> Trial Chamber II found that the accused had standing to raise these issues but rejected his arguments stating, “the means used to accomplish the arrest of Mr. Dokmanović neither violated principles of international law nor the sovereignty of the FRY.”<sup>18</sup> The Trial Chamber based its finding on the facts that, the OTP did not participate in the actual arrest, the treatment of Dokmanović amounted only to permissible luring, no extradition treaty governed the transfer and there was no violation of sovereignty.<sup>19</sup>

Considering that the term luring attaches to any apprehension affected by way of inducement of an individual to a location in which an arrest can be carried out, it is difficult to accept the automatic categorization of all forms of luring as violations of international law.<sup>20</sup> If this indiscriminate branding is to be afforded any credence, it must be based on substantive findings that the conduct involved is incompatible with international legal obligations placed on states or international forces. In order to test the veracity of this claim and determine whether the practice is unlawful or just irregular, the following sections will measure luring operations against principles of public international law and international human rights law.

## **2. LURING UNDER PUBLIC INTERNATIONAL LAW**

Public international law is based on the sovereign equality of states; it has developed to regulate the relationship between states and to facilitate the

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<sup>16</sup> *Dokmanović, ibid*, para 16-18.

<sup>17</sup> *Ibid*, Transcript of Trial Hearing, 8 September 1997, (testimony of OTP investigator), paras 62-76; *ibid*, para 143-153.

<sup>18</sup> *Ibid*, para 88.

<sup>19</sup> *Ibid*, para 480-491.

<sup>20</sup> *Resolutions of the Congresses of the International Association of Penal Law (1926-2004)*, Section IV ‘The regionalization of international criminal law and the protection of human rights in international cooperation procedures in criminal matters’, para 19.

achievement of the common aims of the international community.<sup>21</sup> In order to foster peaceful co-existence, this body of law places upon every state, the obligation to refrain from interfering in the internal and external affairs of other states.<sup>22</sup> In many luring cases, foreign agents do not physically enter the territory of a foreign state. Instead, the operation may be limited to the transmission of communications from outside of the state.<sup>23</sup> Here, it is the legal character of conduct carried out beyond the territorial limits of a state, albeit having an effect within it, which requires consideration. In the event that agents do in fact enter onto the soil of another state, their actions are typically confined to meetings and surveillance. Absent forcible or coercive conduct, the compatibility of such acts with the principle of territorial sovereignty must also be examined.

The majority of luring operations do not give rise to subsequent protests by the state from which the individual is taken and so courts have rarely tackled the issue.<sup>24</sup> This issue is discussed in Chapter 5. In *Guillermo v United States*, it was held that the inducement of Colunje with the intent of carrying out an arrest, the authorities “unduly exercised authority within the jurisdiction of the Republic of Panama [...]”<sup>25</sup> This case is one of the few that resulted in a finding of a public international law breach. Courts have largely avoided the issue holding that individuals do not have standing

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<sup>21</sup> PCIJ, *The Case of the S.S. Lotus (France v. Turkey)*, ‘Judgment’, (7 September 1927), *Publications of the Permanent Court of International Justice*, Series A- No. 10, Judgment No. 9, at 44.

<sup>22</sup> Montevideo Convention on the Rights and Duties of States, (Montevideo Convention), 165 LNTS 19, 49 Stat 3097, Adopted at the 7th International Conference of American States 1933, Article 8; Additional Protocol Relative to Non-intervention of 1936; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.)*, ‘Judgment’, (27 June 1986), [hereinafter *Nicaragua*], para 202; Charter of the Organization of American States, (OAS Charter) 119 U.N.T.S. 3, (30 April 1948), Articles 3 and 19; UN Docs: A/1236 [XII] (1957); A/2131 [XX] (1965 Declaration); A/Res 2225 [XXI] (1966); A/Res/2625 [XXV] (1970); A/Res/3281 [XXIX] (1970); A/Res/31/91 (1976 Declaration), A.Res/32/153 (1977), A/Res 33/74 (1978), A/Res/34/101 (1979), A/Res 35/159 (1980); A/Res/36/103 (1981 Declaration); A/Res/40/9 (1985).

<sup>23</sup> *Schmidt*, supra note 1.

<sup>24</sup> US Court of Appeals, *United States ex rel. Lujan v. Gengler*, (8 January 1975), No. 449, Docket 74-2084, (510 F.2d 62), at 67- Argentina and Bolivia did not protest the luring. But see German Federal Constitutional Court, In the Proceedings of the Constitutional Complaint of Mr. Al-M., and his Motion for Temporary Injunction, (Bundesverfassungsgericht, Order of the Senate of 5 November 2003, 2 BvR 1506/03), 43 *International Legal Materials* (2004), 774-788- protest by Yemini government.

<sup>25</sup> *Guillermo Colunje v United States of America, (Panama v United States)*, *Reports of International Arbitral Awards*, 342 (27 June 1933), at 343-344.



to raise the claim. In *Lujan v Gengler*, the applicant's claim that the method of his apprehension violated public international law was dismissed.<sup>26</sup> It was opined that the failure of Argentina or Bolivia to object precluded such a finding.<sup>27</sup> In *United States v Reed*, the Second Circuit Court held that "absent protest or objection by the offended sovereign Reed has no standing to raise violation of international law as an issue."<sup>28</sup> The French court in *Argoud* took the same approach.<sup>29</sup>

The scope of application of the principle of non-intervention is not explicit. It has been referred to as "[o]ne of the most potent and elusive of all international principles"<sup>30</sup> and "one of the vaguest branches of international law."<sup>31</sup> Judicial pronouncements on the issue do not provide strong guidance as to the relationship between luring operations and public international law. Instead of limiting their pursuits to the application of law to facts, courts are influenced by procedural considerations, the gravity of the offence for which the individual is charged and the position of the states involved.<sup>32</sup> The ICTY's decision on the irregular apprehension and surrender of *Dokmanović* is an illustrative example of the weight that is given to the gravity of the crime for which the accused is being tried.<sup>33</sup> In order to determine the legal character of luring operations and lay the groundwork for the discussion on how courts have dealt with the issue in Chapter 5, the following section will begin by analyzing the elements of the practice against the principle of non-intervention.

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<sup>26</sup> *Lujan v. Gengler*, *supra* note 24.

<sup>27</sup> *Ibid.*

<sup>28</sup> US Court of Appeals, *United States v. Reed*, (39 F.2d 896) 27 January 1981, at 902.

<sup>29</sup> Court of Cassation, *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45, pp. 90-107, at 97.

<sup>30</sup> Maziar Jamnejad & Michael Wood, 'Current Legal Developments: The Principle of Non-Intervention', 22 *Leiden Journal of International Law* (2009) 345, at 345.

<sup>31</sup> P.H. Winfield, 'The History of Intervention in International Law', 3 *British Yearbook of International Law* (1922-1923) 130.

<sup>32</sup> 2 *BvR*, *supra* note 24, para 61.

<sup>33</sup> *Dokmanović*, *supra* note 14.

## 2.1 THE PRINCIPLE OF NON-INTERVENTION

Sovereignty is the essence of statehood. The concept of sovereignty denotes the supremacy of a state's governmental institutions in relation to the regulation of its internal and external affairs; it signifies independence.<sup>34</sup>

From the notion of sovereignty flows exclusive authority over the territory and population of the state.<sup>35</sup> In order to foster peaceful coexistence and maintain the tradition of independence, states are under an international legal obligation not to interfere in the internal or external affairs of any other state.<sup>36</sup> This axiom, which has been referred to as the “mirror image of the sovereignty of States,” is the principle of non-intervention.<sup>37</sup> The principle of non-intervention is a fundamental maxim of international law and has reached the status of customary law.<sup>38</sup> In the *Nicaragua* judgment Judge Jennings stated:

There can be no doubt that the principle of non-intervention is an autonomous principle of customary law; indeed, it is much older than any multilateral Treaty regime in question.<sup>39</sup>

It has been codified in a number of instruments and articulated in academic texts, judgments and political statements.<sup>40</sup> The UN Charter does not

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<sup>34</sup> *Island of Palmas Case (The Netherlands v United States)* 2 *Reports of International Arbitral Awards* (1928) 829, at 839.

<sup>35</sup> Michael Shaw, *International Law*, (6<sup>th</sup> ed.) (2008), at 212; Jennings & Watts, *Oppenheim's International Law* (Vol. 1) (1992), at 382.

<sup>36</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI; Jennings & Watts, *ibid.*

<sup>37</sup> Michael Wood, ‘The Principle of Non-Intervention in Contemporary International Law: Non-Interference in a State's Internal Affairs used to be a Rule of International Law: Is It Still?’, *Chatham House International Law Discussion Group*, (28 February 2007).

<sup>38</sup> ICJ, *The Corfu Channel Case, (United Kingdom v. Albania)*, (Merits) ‘Judgment’, 9 April 1949, at 35; *The Case of the S.S. “Lotus”*, *supra* note 21, at 18-19; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (Merits), ‘Judgment’, 19 December 2005, paras. 164-165.

<sup>39</sup> ICJ, *Case Concerning Military and Parliamentary Activities in and against Nicaragua (Nicaragua v United States of America)* ‘Judgment’, 27 June 1986; For a criticism of the ICJ's determination that the principle has achieved customary status see Anthony D'Amato, ‘Trashing Customary International Law’ 81 *American Journal of International Law* (1987) 1.

<sup>40</sup> *See fn 22*; also see UN Charter, *supra* note 36, Article 2(7); 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95/23 UST 3227/55 *American Journal of International Law* 1064 (1961), Article 41; Vattel, E., *Droit des gens ou principes de la loi naturelle*, (1758), I, para. 37; Jamnejad & Wood, *supra* note 30; Jennings & Watts, *supra* note 35, at 427-451; Shaw, *supra* note 35, at 1147-1158; Ian Brownlie, *Principles of Public International Law*, (2008), at 292-294; Declaration by President Franklin Roosevelt and Secretary of State Hull, ‘Good- Neighbour Policy’, 4 March 1933, available at:

explicitly provide for the rule in the context of relations between states.

Article 2(7) speaks of the prohibition in the context of the UN:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>41</sup>

It has been argued that the prohibition contained in Article 2(7) embodies the general principle of non-intervention.<sup>42</sup> It is unlikely that Article 2(7) was intended to regulate interstate conduct.<sup>43</sup> In 1999, India argued before the Security Council that the bombing campaign against the Federal Republic of Yugoslavia amounted to a violation of Article 2(7).<sup>44</sup> The bombing, which was carried out by NATO states, was not authorized by the Security Council and so responsibility could not be attributed to the UN. The prohibition against intervention by states is instead indirectly provided for in Article 2(1) and Article 2(4) of the Convention.<sup>45</sup>

The prohibition on intervention was included in the 1948 constitution of the Organization of American States.<sup>46</sup> During the 1960s and 1970s, the United Nations played an active role in articulating the principle.<sup>47</sup> A number of resolutions dealing with non-intervention were adopted by the

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Encyclopaedia Britannica, *Peace and War: United States Foreign Policy 1931-1941*, 1943, pp. 323-329. <http://www.britannica.com/presidents/article-9116962>; 'Organization for Security and Co-operation in Europe, *Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki*, 1 August 1975, at IV; Tower, 'The Origin, Meaning and International Force of the Monroe Doctrine', *American Journal of International Law*, no. 1-2, (1920) at 16; Uloa, *La doctrina di Monroe*, Lima 1924; C. Barcia Trelles, *Doctrina di Monroe*, Madrid 1931.

<sup>41</sup> UN Charter *supra* note 36, Article 2(7).

<sup>42</sup> N. Ouchakov & P. Bertoud, 'La compétence nationale des Etats et l'Organisation des Nations Unies', *Annuaire suisse de droit international*, IV, (1947), 17-104 at 37; D McGoldrick, 'The Principles of Non-Intervention: Human Rights', in V Lowe and C Warbrick (eds.), *The United Nations and Principles of International Law* (1994).

<sup>43</sup> Momir Milojevic, 'The Principle of Non-Interference in the Internal Affairs of States', *Law and Politics*, Vol. 1, No. 4, 427 at 438-439; Simma, *The Charter of the United Nations: A Commentary*, Volume 1, (2012), at 284.

<sup>44</sup> UNSC, '3988<sup>th</sup> Meeting' (24 March 1999) UN Doc S/PV.3988, 15f.

<sup>45</sup> Milojevic, *supra* note 43; Hans Kelsen, *The Law of the United Nations*, (1951), at 770; Simma, *Ibid.*

<sup>46</sup> OAS Charter, *supra* note 22.

<sup>47</sup> *See fn* 22.

General Assembly.<sup>48</sup> The most notable documents are the 1965 Declaration on the Inadmissibility of Intervention,<sup>49</sup> the 1970 Friendly Relations Declaration,<sup>50</sup> and the 1981 Declaration on the Inadmissibility of Intervention and Interference.<sup>51</sup> The 1970 Declaration, which is one of the most authoritative interpretations of some of the principles of international law, states in part:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.<sup>52</sup>

The existence and importance of the doctrine is evidenced by its codification but its substance and scope has been largely down to judicial interpretation; mainly that of the International Court of Justice and its predecessor, the Permanent Court of International Justice. In the *S.S. Lotus* case, the Permanent Court of International Justice held that “the first and foremost restriction imposed by international law upon a State is that—failing a permissive rule to the contrary— it may not exercise its power in any form in the territory of another State.”<sup>53</sup> In 1949, the International Court of Justice recognized in the *Corfu Channel* case that “between independent States, respect for territorial sovereignty is an essential foundation [of international law].”<sup>54</sup> The Court ruled on the issue once again in the *Nicaragua* case stating that, “the principle of non-intervention

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<sup>48</sup> Jamnejad & Wood estimate that thirty-five resolutions specifically addressing intervention and interference were adopted by General Assembly between 1957 and 2009, *supra* note 30, at 350.

<sup>49</sup> ‘Declaration on Principles of Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UN Doc. A/2131 (XX) (1965).

<sup>50</sup> ‘Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations’, UN Doc. A/Res/2625 [XXV] (1970); For an overview of the negotiation process *see* R. Rosenstock, ‘Declaration on Principles of International Law concerning Friendly Relations: A Survey’, 65 *American Journal of International Law* 5 (1971) 713.

<sup>51</sup> ‘Declaration on the Inadmissibility of Intervention and Interference in the International Affairs of States, UN Doc. A/Res/36/103 (1981).

<sup>52</sup> The Special Committee adopted the wording of General Assembly Resolution 2131, *supra* note 39. The document explicitly states that it reflects international law.

<sup>53</sup> *S.S. Lotus* case, *supra* note 21, at 18.

<sup>54</sup> *Corfu Channel* case, *supra* note 38, at 35.

involves the right of every sovereign State to conduct its affairs without outside interference.”<sup>55</sup>

Little has been written on the relationship between luring operations and the sovereignty of the state in which they are conducted. A number of sources have stated that the practice violates international law but few have elaborated on the reasons for this conclusion.<sup>56</sup> The manipulation of the will of an individual within the jurisdiction of another state is contrary to the principle of good faith that underlies international law and international relations. There are certain types of conduct that automatically attracts the principle of non-intervention. One can easily determine that efforts aimed at overthrowing a government, economic coercion to force a change in policy and influencing political activities in another state constitute intervention.<sup>57</sup>

The Friendly Relations Declaration explicitly provides for such conduct:

No State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.<sup>58</sup>

The extent to which the luring of an individual out of a territory reaches the intended threshold will now be examined.

### 2.1.1 LURING AS INTERVENTION

The maxim, *quidquid est in territorio est etiam de territorio* holds that states have supremacy over all individuals and property within their territories.<sup>59</sup> Pursuant to the inherent right of independence, “[a] State’s domestic policy falls within its exclusive jurisdiction.”<sup>60</sup> It would be unrealistic to assume that the principle of non-intervention prohibits all types of interplay between states. Such an interpretation would be overbroad and would hinder state interaction. As Lawrence points out, “[i]f

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<sup>55</sup> *Nicaragua case*, *supra* note 39, at 202.

<sup>56</sup> Mann, *supra* note 6, at 340.

<sup>57</sup> *Nicaragua case* concerned the funding and supporting of a political group in opposition to a foreign government, *supra* note 39.

<sup>58</sup> UN Doc. A/Res/25/2625, *supra* note 50.

<sup>59</sup> Jennings & Watts, *supra* note 35, at 382-384.

<sup>60</sup> *Nicaragua*, *supra* note 39, at 131.

this doctrine means that a state should do nothing but mind its own concerns and never take an interest in the affairs of other states, it is fatal to the idea of a family of nations.”<sup>61</sup> An approach more compatible with the general scheme of international relations is the application of the principle to acts of a certain import.

Some have criticized the principle of non-intervention on the ground that it weakens the effectiveness of Article 2(4) and risks bringing serious breaches under the same heading as the “most innocent diplomatic practices.”<sup>62</sup> Concern for the potential over breadth of the doctrine was pointed out in the debates of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>63</sup> It is interesting to note that the United States took the position that the principle of non-intervention was limited to that set out in Article 2(7), which regulates intervention by the United Nations. The United States Representative argued that only Article 2(4) defined the scope of state intervention. In applying a narrow interpretation of the principle to luring operations, one could argue that a violation is dependent upon the physical entry of agents onto the territory of another state. In analyzing the decision of the ICTY in *Dokmanović*, Scharf challenged the Trial Chamber’s conclusion that because there was no physical violation of FRY territory, the luring of the accused was consistent with the principles of international law.<sup>64</sup> Scharf points out that this reasoning is incorrect as an agent of the Office of the Prosecutor did in fact enter FRY territory. He goes on to state that in order for the Chamber to have correctly arrived at this conclusion, efforts to lure the individual would have to have been “exclusively conducted over the phone, radio, email or fax.”<sup>65</sup> A determination that luring falls outside the ambit of the principle of non-intervention provided agents do not enter onto foreign territory would create a lucid test against

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<sup>61</sup> T.J., Lawrence, *The Principles of International Law* (5<sup>th</sup> ed. 1913), at 137.

<sup>62</sup> A-R., Gaetano, *The UN Declaration on Friendly Relations and the System of the Sources of International Law*, (1979), at 123.

<sup>63</sup> Special committee on principles of international law concerning friendly relations and co-operation among states, UN Doc. A/AC.119/SR.32 (1964).

<sup>64</sup> *Prosecutor v Dokmanović*, *supra* note 14; Scharf, *supra* note 3.

<sup>65</sup> *Ibid.*

which the legality of such operations could easily be measured. This is not, however, a helpful approach. The effect that the conduct has within the state must also be taken into consideration.

In *Nicaragua*, the International Court of Justice stated, “the concept of sovereignty [...] extends to the internal waters and territorial sea of every State and to the air space above its territory.”<sup>66</sup> It can be argued that the use of telephone calls and other modes of communication with the intent of inducing an individual are beyond the purview of intervention and so do not violate the sovereignty of the state to which they are transmitted. This issue has been addressed in the context of debates surrounding the growth of cyber technologies.<sup>67</sup> The ability of communication systems to reach global audiences without physically entering a territory poses a challenge to the traditional notion of sovereignty that attaches to the territory of the state.<sup>68</sup> In the case of emails, data is sent from a device located in one country and is then accessible anywhere in the world. The message is directed to a cyber-address rather than a physical location and so the transmission itself cannot constitute intervention. Instead, the principle may be triggered by the effect of the data insofar as it bears upon matters that a state is permitted to decide freely. Thus, force or even physical presence in a state is not a prerequisite to a finding of a breach of international law. As Knoops points out, “strict adherence to [the principle of non-intervention] implies that even if no physical violation of the foreign territory whatsoever took place [...] an infringement of international law *can* be present.”<sup>69</sup> Pursuant to this, it is the impact that the conduct has within the state that may attract the application of the doctrine. As stated by Mann:

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<sup>66</sup> *Nicaragua*, *supra* note 39, para 212.

<sup>67</sup> According to the International Humanitarian Law Institute, unauthorized intervention in the virtual domain of another State can be regarded as an unlawful intervention, *International Humanitarian Law Institute, Rules of Engagement Handbook* (September 2009).

<sup>68</sup> Henry H. Perritt Jr., ‘The Internet as a Threat to Sovereignty? Thoughts on the Internet’s Role in Strengthening National and Global Governance’ 5 *Indiana Journal of Global Legal Studies* 2 (1998) 423, refers to the growth of the cyber world as an “assault on sovereignty”, at 423.

<sup>69</sup> Knoops, *Surrendering to International Criminal Courts: Contemporary Practices and Procedures*, (2002), at 244-245.

[...] a violation of international law occurs also where the state or its agent [...] induces [the victim] by fraud or other illegal means to leave the country of refuge and proceed to some other country where he is apprehended. In such circumstances [...] the wrong is committed in the foreign State, because the illegal means are used or have their effect there.<sup>70</sup>

Recent revelations about the monitoring of communications in other states by the United States' National Security Agency [*hereinafter* NSA] and other national agencies could open a debate as to whether surveillance constitutes a violation of sovereignty.<sup>71</sup> It is beyond doubt that the issue has caused inter-state friction but the backlash has so far been confined to the diplomatic sphere. During her address to the UN General Assembly, Brazil's President, Dilma Rousseff, criticized the NSA's surveillance as a breach of international law.<sup>72</sup> In relation to reports that the president and her top aides had been under the agencies surveillance and that the Canadian Communications Security Establishment had spied on its mines and energy ministry, members of the Brazilian government stated that if true, such conduct would amount to an unacceptable violation of national sovereignty.<sup>73</sup>

In order to strike a balance between sovereignty and state interaction, the effect of the conduct within a state must cross a certain threshold. As will be discussed in the next section, a finding of intervention requires an element of coercion. This interpretation would likely place surveillance operations below the threshold of intervention. In saying that, such conduct

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<sup>70</sup> Mann, *supra* note 6, at 408-409.

<sup>71</sup> Mirren Gidda, 'Edward Snowden and NSA Files- Timeline', *The Guardian*, (26 July 2013), available at: <http://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline>.

<sup>72</sup> Julian Borger, *The* 'Brazilian President Rousseff: US Surveillance 'A Breach of International Law'', *Guardian*, (24 July 2013), available at: <http://www.theguardian.com/world/2013/sep/24/brazil-president-un-speech-nsa-surveillance>.

<sup>73</sup> Alissa J. Rubin, 'French Condemn Surveillance by N.S.A', *The New York Times*, (October 21 2013), available at: <http://www.nytimes.com/2013/10/22/world/europe/new-report-of-nsa-spying-angers-france.html>; Simon Romero & Randal Archibold, 'Brazil Angered over Report N.S.A. Spied on President', *The Guardian*, (2 September 2013), available at: <http://www.nytimes.com/2013/09/03/world/americas/brazil-angered-over-report-nsa-spied-on-president.html>.



nevertheless goes against principles of good faith that underlie international law.

### 2.1.2 THE THRESHOLD FOR INTERVENTION

According to Oppenheim, “[i]nterference pure and simple is not intervention [...] the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question.”<sup>74</sup> The idea that the conduct must involve a degree of coercion is also included in the International Court of Justice’s judgment in *Nicaragua*:

Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention is particularly obvious in the case of an intervention which uses force, either in the form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.<sup>75</sup>

The inclusion of a requirement that the conduct involve an element of coercion is a welcome development. This component narrows the scope of the principle of non-intervention to permit moderate state-to-state interaction. At the same time, it includes within its ambit, non-physical acts that have a coercive effect within the state.

Applying this to communications transmitted in the context of luring operations, a breach of the principle would be dependent upon a finding that the will of the individual was overborne. If this approach were applied to the facts of *Schmidt*, the absence of physical intrusion onto Irish soil and the limit of efforts to email communications would not automatically render the operation in conformity with the principle. Schmidt travelled to the United Kingdom based on the belief that failure to do so would result in the issuance of an arrest warrant. Instead of mere inducement, the content of the communication had the effect of overbearing Schmidt’s will; it constituted coercion. The line between misrepresentations that influence the

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<sup>74</sup> Jennings & Watts, *supra* note 35, at 428.

<sup>75</sup> *Nicaragua* case, *supra* note 39, para. 205.

will of an individual, and those that rise to the level of state coercion, has been drawn by the German Constitutional Court:

To the extent that in the case of the use of trickery, the prosecuted person's intended border crossing is also motivated by his or her own interests, and to the extent that the possibility exists that the prosecuted person decides against departure, the prosecuted person, as a general rule, is not object of state coercion [...]<sup>76</sup>

If an element of coercion is what distinguishes intervention from innocent encroachment, the permissibility of the communication depends upon the degree of compulsion placed on the individual. As Justice Sedley stated in *Lujan*:

[t]his deception amounted to more than temptation or inducement: it amounted to coercion [...]. It was a baited trap [...] if the applicant were to have been present in the United Kingdom for another reason the objection would fall away because the element of coercion would be absent.<sup>78</sup>

In the case of *Dokmanović*, one of the central issues considered by the Trial Chamber was when and where the arrest of accused took place.<sup>79</sup> This was an important aspect in relation to determining whether the method of apprehension breached the sovereignty of the FRY. The exercise of enforcement jurisdiction or police powers on the territory of another state constitutes a violation of the latter's sovereignty. As stated by the Working Group on Arbitrary Arrest and Detention:

respect for the territorial sovereignty [...] includes refraining from committing acts of sovereignty in the territory of another State, particularly acts of coercion or judicial investigation.<sup>80</sup>

Although the formal apprehension is carried out once the individual enters the jurisdiction of the luring state, the prior restraint upon the person's freedom of movement may nevertheless constitute the exercise of coercion within the territory of the foreign state.

Pursuant to this, misrepresentations that do little more than influence an individual to enter a jurisdiction will not constitute intervention. For

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<sup>76</sup> 2 BvR, *supra* note 24, at 60-62.

<sup>78</sup> *Lujan*, *supra* note 24, Justice Sedley, at 358-359.

<sup>79</sup> *Prosecutor v Dokmanović*, *supra* note 14.

<sup>80</sup> UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, (17 December 1993), E/CN.4/1994/27, at 139.

instance, if an individual enters a state for the purpose of attending a meeting or procuring payments, although the information upon which their decision to travel is based may be false, they are nevertheless acting on their own free will. If, on the other hand, the individual's movements are motivated by threats of repercussion, his will is overborne. The latter situation constitutes state coercion, which in turn violates the principle of non-intervention. This threshold test will not always be easy to apply. As one author has stated: "the boundary between luring someone out of a state by means of trickery and breaking someone's will by the use of force can be a fluid borderline area [...]"<sup>81</sup>

The principle of non-intervention is not static. Enforcement of the prohibition will depend upon the interpretation given by the overseeing body. As there are no set rules or threshold, this determination will be done on a case-by-case basis. It is submitted that luring operations violate the principle of non-intervention when: (1) state agents physically conduct police powers within the territory of another state for the purpose of inducing an individual or, (2) communications transmitted to an individual, whether from within or outside the state, constitute coercion in so far as the individual's free will is overborne. As will be discussed in Chapter 5, the violation of state sovereignty constitutes an internationally wrongful act for which state responsibility attaches. The following section will consider the practice of luring under the framework of international human rights law.

### **3. LURING UNDER INTERNATIONAL HUMAN RIGHTS LAW**

The classical state-centered approach to international law views irregular apprehensions primarily as a violation of the rights of the state.<sup>82</sup> This approach, which will be discussed in Chapter 5, has the effect of subordinating the rights of the individual to that of the state in that

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<sup>81</sup> 2 BvR, *supra* note 24, at 61.

<sup>82</sup> 1935 Harvard Research in International Law's Draft Convention on Jurisdiction with Respect to Crime, 'Apprehension in Violation of International Law', *American Journal of International Law Supplement* 29 (1935), Article 16.

reparation is dependent upon the injured state's decision to lodge a protest.<sup>83</sup> In relation to luring, the likelihood of securing redress is further diminished in cases in which the state is unaware of the operation or, chooses not to challenge the conduct for political reasons. Since the end of the World War II, the idea of the individual as the holder of inalienable rights has received heightened attention. The preamble of the United Nations Charter provides for the reaffirmation of faith in fundamental human rights and Articles 55 and 56 obligate all Member States to pledge cooperation with the Organization in the promotion of human rights and fundamental freedoms.<sup>84</sup> International human rights law confers rights and duties upon the individual independent from that of the state. The International Association of Penal Law has pointed out in relation to luring operations that:

[...] enticing a person under false pretenses to come voluntarily from another country in order to subject such person to arrest and criminal prosecution [...] entails the liability in respect of the person concerned and the State whose sovereignty has been violated.<sup>85</sup>

As was discussed in Chapter 2, the Convention on the Rights of the Child is the only human rights instrument that explicitly provides for abduction. The fact that it is not spelled out in a treaty or convention does not automatically render conduct permissible. The absence of a specific provision has not dissuaded courts from finding that the practice violates the rights of the individual. A number of broader provisions have been interpreted to prohibit luring operations. The most obvious protection that may be offended by the practice is the right to liberty and security of the person.<sup>86</sup> The extent to which efforts used in the foreign state to induce the individual to leave the territory can constitute a deprivation of liberty will be the focus of this section.

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<sup>83</sup> ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 5 February 1970, at 78-83.

<sup>84</sup> UN Charter *supra* note 36, Articles 55 & 56.

<sup>85</sup> 'Resolution on the Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings', *supra* note 20, para 19.

<sup>86</sup> Article 3 UDHR; Article 9 ICCPR; Article 5 ECHR; Article 6 ACHPR; Article 7 ACHR; Article 5 CISCHR; Article 5 and 8 ARACHR.

### 3. 1 THE RIGHT TO LIBERTY AND SECURITY

Although luring does not involve the physical removal of the individual from a state, it may nevertheless violate the individual's right to liberty and security. As was discussed in Chapter 2, the right to personal liberty and freedom from arbitrary arrest is guaranteed by a number of human rights instruments.<sup>87</sup> The Human Rights Committee has not yet ruled on the legality of luring operations.<sup>88</sup> The issue has come before the ECtHR and the ECmHR.

In *Stocké v. Germany*, a German national fled Germany while on provisional release for suspected tax offences.<sup>89</sup> Stocké was lured from Switzerland on the assumption that he would take part in a business deal in Luxembourg. The applicant boarded a plane for Luxembourg unaware that it would land in Germany. On arrival in Germany, he was arrested and brought before the court. Stocké claimed that his arrest and subsequent trial were unlawful due to the circumstances in which he was apprehended. He argued that the collusion between German authorities and an informer in luring him back to Germany violated Articles 5(1) and 6(1) of the Convention.<sup>90</sup> In considering the complaint, the Commission noted that:

[a]n arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve the State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Article 5 para. 1.<sup>91</sup>

Although the Commission acknowledged in this passage that an arrest made on foreign soil i.e. a forcible abduction could violate the Convention, it said nothing about the legality of those carried out in the home state. In the case of luring, the actual arrest is conducted in a location in which there is jurisdiction to arrest however, the actions that secure the presence of the individual are carried out elsewhere. The court ultimately refused to uphold

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<sup>87</sup> *Ibid.*

<sup>88</sup> Or disguised extradition but it has found abduction to violate the ICCPR, *María del Carmen Almeida de Quinteros et al. v Uruguay*, *supra* note 1, at 138; *Sergio Ruben Lopez Burgos v. Uruguay*, *supra* note 1, at 176.

<sup>89</sup> *Stocké v. Germany*, *supra* note 1.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, para 167.

the claim as there was insufficient evidence that German authorities colluded in the operation. The decision of the Commission is worrying in that it seems to imply that the finding of a violation is dependent upon the act being carried out unilaterally. This means that if officials of the state from which the individual is lured are complicit in the act, the individual will not be able to find relief under Article 5(1). As will be discussed in Chapter 5, consent need not be explicit; it can be implied by the involvement of state officials or by mere acquiescence. For the purposes of determining whether a luring operation constitutes a violation of the right to liberty and security of the person, two issues must be addressed, (1) whether the conduct involved constitutes a deprivation of liberty and (2) whether the specific operation was carried out in accordance with procedures established by law.

### 3.1.1 DEPRIVATION OF LIBERTY

The most obvious deprivation of liberty is a situation in which a person is detained in a prison cell or other locked facility. This is, however, not the only context in which a deprivation of liberty occurs. In *Guzzardi v Italy*, the Court stated that:

[d]eprivation of liberty may [...] take numerous other forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States.<sup>92</sup>

In *Storck v Germany*, the ECtHR explained that loss of liberty contains both an objective and a subjective element.<sup>93</sup> The objective element refers to “confinement in a particular restricted space for a negligible length of time.”<sup>94</sup> The subjective element requires that the detainee must not have validly consented to the confinement.<sup>95</sup> Forcible abduction satisfies this criterion as physical coercion is employed to restrict the departure of the

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<sup>92</sup> ECtHR, *Guzzardi v Italy*, Application No. 7367/76, ‘Judgment’, 6 November 1980, para 95.

<sup>93</sup> ECtHR, *Storck v Germany*, Application No. 61603/00, ‘Judgment’, 16 June 2005, para. 74.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

individual.<sup>96</sup> Luring on the other hand, is limited to the application of psychological influence. As Scharf puts it:

Unlike kidnapping, weapons are not used to get the suspect to the location where the arrest will occur. However, whether tricks can overbear the will of the individual just as much as a gun is a controversial issue.<sup>97</sup>

In *Dokmanović*, the Trial Chamber of the ICTY considered whether the luring of the accused amounted to a deprivation of liberty.<sup>98</sup> The Tribunal found that *Dokmanović*'s liberty was not restricted until his arrest in Erdut. The fact that he entered the UNTAES vehicle of his own free will, absent apprehension or fear of arrest and did not express his desire to stop or be let out, was taken as evidence that the officials had not "created the type of environment in which a person knows he is not free".<sup>99</sup> Basing its reasoning on domestic case law, the Trial Chamber acknowledged that "arrest at a minimum, requires some sort of restriction of liberty by government personnel, or their agents, of the individual". Deduced from its survey of domestic decisions was that an arrest requires some sort of physical act or in the alternate, a situation in which the individual is aware that he is no longer free to leave. The Chamber stated, "lesser actions by law enforcement officers are often considered less than a true arrest."<sup>100</sup> What this implies is that unless the individual is aware that he is not free to leave and protests the confinement, there will be no deprivation of liberty. The willingness of *Dokmanović* to enter the vehicle seems to have been treated by the Trial Chamber as being synonymous to consent. If consent to confinement is found, there is no deprivation of liberty as the subjective element espoused by the ECtHR in *Storck* would not be established. The case law of the ECtHR gives the concept of deprivation of liberty a broader interpretation than the ICTY; an approach that would likely encompass luring.

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<sup>96</sup> See discussion on kidnapping and its compatibility with Article 2(4) in Chapter 2.

<sup>97</sup> Scharf, *supra* note 3, p. 970.

<sup>98</sup> *Prosecutor v Dokamnovic*, *supra* note 14.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, at 29.

The decision in *Stockè* illustrates that there must be a high level of control over the individual in order for Article 5(1) to be triggered:

In the case of collusion between State authorities [...] and a private individual for the purpose of returning *against his will* a person living abroad, without consent of the State of his residence, to its territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the individual [...] [S]uch circumstances may render this person's arrest and detention unlawful within the meaning of Article 5 para 1 of the Convention.<sup>101</sup>

Pursuant to this, there must be a showing that the individual was taken against his will. The Commission did not elaborate on whether physical constraint is required to overbear the will of the individual. In *Walker v Bank of New York*, Walker brought a civil suit against the United States Government and customs officials for violations associated with a luring operation that led to his transfer from Canada to the United States.<sup>102</sup> The Canadian trial court found that restraint on a person is not limited to physical acts; the individual's will can be overcome by fraud or force. The decision of the ECtHR in *HL* illustrates further that the determining element is the degree of control exercised over the individual rather than physical constraint.<sup>103</sup> The case of *HL* involved the detention of a mentally ill person who had admitted to a hospital as an informal patient. The patient was under no obligation to stay at the facility and technically, could leave at any time. The ECtHR found that the existence of a regime of supervision and control together with evidence that those in charge would have detained the individual had he attempted to leave amounted to a deprivation of liberty. In order for this to attach to a luring operation, there would need to be proof that those carrying it out were, albeit without the knowledge of the individual, exercising complete and effective control over his movements and that he was, in reality, not free to leave. This standard might go too far in some cases as it requires that those carrying out the operation were prepared to physically intervene in the event that the individual did not comply with the operation; this element would have to be judged in light of

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<sup>101</sup> *Stockè v Germany*, *supra* note 1, para 168.

<sup>102</sup> *Walker v Bank of New York et al.*, 15 O.R. (3d); 1993 Ont. Rep.

<sup>103</sup> *H.L. v. United Kingdom*, Application No. 45508/99, 'Judgment', (5 October 2004), para 91.



the specific circumstances of the case. What can be taken from the *HL* decision is that despite the absence of physical restraint or protest by the individual, as was the situation in *Dokmanović*, the conduct may still violate Article 5(1).

The Principles and Guidelines developed by the Copenhagen Process differentiate between a restriction of liberty and the deprivation of liberty.<sup>104</sup> Although the document deals with detention in the context of non-international armed conflict, this distinction is relevant to the present discussion. If the use of misrepresentations and tricks to influence the movements of an individual does not rise to the level of deprivation of liberty, they could possibly constitute a restriction on liberty. A restriction on liberty will not be sufficient to warrant protection under the relevant provision but it may come within the scope of application of Article 2 Protocol 4 of the European Convention on Human Rights. In the *Guzzardi* case, the ECtHR distinguished between a deprivation of liberty and a restriction on liberty as “merely one of degree or intensity, and not one of nature or substance”.<sup>105</sup> In *Raimondo v Italy*, a house arrest in which the individual was required to remain at home between 9pm and 7am and report to the police before leaving the premise did not amount to a deprivation of liberty; it instead fell within the scope of Article 2 Protocol 4.<sup>106</sup>

### 3.1.2 ARBITRARY ARREST OR DETENTION

States frequently engage in activities that deprive individuals of their liberty.<sup>107</sup> Such actions do not violate the individual’s rights in so far as they are carried out “in accordance with such procedures as are established by law” and are not “arbitrary”.<sup>108</sup> Article 5 of the European Convention on

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<sup>104</sup> ‘The Copenhagen Process on the Handling of Detainees in International Military Operations, The Copenhagen Process: Principles and Guidelines’ (October 2012) (‘Copenhagen Principles’).

<sup>105</sup> *Guzzardi v Italy*, *supra* note 91, para 93.

<sup>106</sup> ECtHR, *Raimondo v Italy*, Application No. 12954/87, ‘Judgment’, 22 February 1994, para 39.

<sup>107</sup> Examples include lawful arrests and detention following conviction.

<sup>108</sup> *Ibid*, ICCPR, Article 9; Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (2005), pp. 223-228.

Human Rights enumerates this right and contains an exhaustive list of situations in which the deprivation of liberty may be permissible.<sup>109</sup> Although the International Covenant on Civil and Political Rights does not explicitly contain the prohibition on arbitrariness, this element has been incorporated into the case law.<sup>110</sup>

The first condition requires that the deprivation adhere to the principle of legality; it must be in conformity with both national and international law.<sup>111</sup> In the event that a luring operation is found to violate the sovereignty of the state in which it is carried out or an existing extradition treaty, it may run counter to this requirement.<sup>112</sup> If the conduct fails this test, it may be unnecessary to consider the more substantive human rights aspects as the conduct will breach the relevant provision *ab initio*. This will likely be the case with kidnapping as the sovereignty of the state is infringed by the unilateral physical entry of foreign agents onto the soil of another state but as was discussed above, luring will not always constitute a violation of public international law. In saying that, as was discussed in Chapter 1, if there is an extradition treaty in place between the states involved, circumvention of this agreement would be contrary to general principles of good faith that underlie international law and treaty interpretation.

The term arbitrary has been interpreted to include “elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality, as well as [...] due process of the law.”<sup>113</sup> Pursuant to this, even if an arrest is found to be in accordance with the law, it will nevertheless violate the rights of the individual if it is deemed not “appropriate and proportional in view of the circumstances.”<sup>114</sup> In the context of luring operations carried out for the purpose of prosecuting an individual for international crimes or terrorism-related offences, the second

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<sup>109</sup> ECHR, Article 5.

<sup>110</sup> ECtHR, *Case of Stasaitis v. Lithuania*, Application No. 47679/99, ‘Judgment’, (21 March 2002), para 58.

<sup>111</sup> Nowak, *supra* note 107, p.238.

<sup>112</sup> Noam Lubell, *The Extraterritorial Use of Force against Non-State Actors*, (2010), at 184-185.

<sup>113</sup> *Ibid*, at 225.

<sup>114</sup> *Ibid*, at 225.

requirement may be satisfied. Such a finding would view the level of harm done to the individual proportionate in relation to the gravity of the offence and appropriate in the event that formal extradition is unavailable. As Paust states:

What is “arbitrary” otherwise “unlawful” or “unjust” will have to be considered in context and with reference to other legal policies at stake. [...] [I]t may not be incompatible with reference to principles of justice, “unjust,” “unlawful” or otherwise “arbitrary” to abduct or capture an international criminal in a context when action is reasonably necessary to assure adequate sanctions against egregious international criminal activity.<sup>115</sup>

Applying this to luring, the conduct involved would fall to be measured against the gravity of the crime for which the individual is suspected. This is a dangerous standard to set as it affords the judiciary broad discretion in measuring the scale of the crime against the right to liberty and security. There is little doubt that a crime such as torture constitutes a serious offence but what about murder and rape? These are also grave offences that in the eyes of some would justify conduct that would, under other circumstances, constitute a violation of liberty and security.

It is clear from the above discussion that luring operations can violate fundamental principles of human rights law. In order for the conduct to avoid violation of the framework, efforts to apprehend the individual would have to be (1) in conformity with domestic and international law (2) appropriate and proportionate under the circumstances and (3) limited to inducements that do not overcome the will of the individual so as to constitute a deprivation of liberty. Proof of state complicity may also be required. The Court in *Stockè* found no violation of the Convention because there was insufficient evidence that the state had been involved in securing the applicant’s transfer to Germany.<sup>116</sup> The ECmHR, which referred the case to the Court, suggested that if there was in fact a finding of state involvement, there could have been a violation of Article 5(1).<sup>117</sup> Although

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<sup>115</sup> Paust, ‘After *Alvarez-Machain*: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims’, 67 *St. John’s Law Review* (1993) 551, at 563-564.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

conduct may encroach upon the rights and protections guaranteed by the framework of international human rights law, redress is dependent upon the interpretation followed by the judiciary. The decision of the court is often influenced by the gravity of the crime for which the individual is charged and so in some cases, justice for human rights abuses may not be secured. As was noted by the German Constitutional Court,

[...] recent state practice also takes the seriousness of the crime with which the person is charged into account, which means that in this respect, it takes proportionality into consideration. The protection of high-ranking legal interests, which has been intensified on an international level in recent years, can lend itself to justifying the violation of a state's personal sovereignty that possibly goes along with the use of trickery.<sup>118</sup>

In the case of luring, the absence of physical constraint on the individual or the exercise of police powers on foreign soil would suggest that this type of operation is proportionate when carried out for the purpose of apprehending an individual suspected of having committed international crimes or terrorism-related offences. The extraterritorial reach of the state's human rights obligations is also an issue that may pose a barrier to the success of the applicant's claim.<sup>119</sup> The applicability of human rights obligations to conduct carried out abroad was considered in the context of kidnapping in Chapter 2. It was established that the relevant provisions are triggered from the time the individual is in the custody of the authorities carrying out the operation. In the case of kidnapping, arrest occurs on the territory of a foreign state and so obligations attach to the operation from the time of the initial seizure. With luring, the actual arrest does not usually take place until the individual is in the territory of the apprehending state or in some other location where jurisdiction can be exercised. As was noted by the Trial Chamber in *Dokmanović*, there was no restriction on the liberty of the accused until he arrived in Erdut. If this narrow approach is followed, the obligations of the state under the relevant human rights instruments would not attach to the treatment of the individual in the foreign state; they would only be triggered following the actual arrest in the apprehending state.

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<sup>118</sup> 2B v R, *supra* note 24, para 62.

<sup>119</sup> This will be discussed in Chapter 5.

Balancing the interests of international criminal justice against the rights of suspects is not an easy task. This is especially true in cases involving international crimes. It is possible to pinpoint the legal frameworks applicable to such conduct and measure extraterritorial abduction against the relevant rules and principles. This exercise may determine the legality of the conduct but that does not necessarily mean that the rights of the injured state and individual will be vindicated. In other words, conduct that violates international legal principles and rules may, under certain circumstances, be deemed permissible.

Before a court or other international institution, the gravity of the crime and the interests in having justice served can influence determinations. This is evident in domestic proceedings and is particularly visible in the decisions of international courts. The ECtHR has also shown an inclination to such considerations. In the *Öcalan* case, the Court stated that it takes into account, “the interests of all nations that suspected offenders who flee abroad should be brought to justice” because “inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>120</sup> This is a worthy position but such considerations seem to extend beyond the mandate of the Court, which is to ensure state compliance with the Convention. A more palatable approach could be achieved if the Court limited itself to measuring the conduct against the protections of the Convention. Issues as to the general interest of the community in suppressing crime should be considered in the context of the remedies awarded to the applicant rather than in the determination itself. After all, a finding that an extraterritorial abduction violated the rights of an individual is not synonymous to saying that an individual should not be tried or if convicted, that he should be released.

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<sup>120</sup> ECtHR, *Öcalan v Turkey*, (Grand Chamber), Application No. 46221/99, ‘Judgment’, (12 May 2005), para 88.

## CONCLUSION

Luring is the least objectionable method of irregular apprehension. In relation to the rights of the state from which the individual is induced, encroachment is minimal. The transmission of misrepresentations to an individual within a state does not constitute a use of force and in some cases, may not even quantify as intervention. If the effect of the communication is akin to state coercion, there has been a breach of the principle of non-intervention and liability may attach. Such a finding will arise in cases in which the individual's movements are motivated by threats or fear of repercussion rather than self-interest. In the event that foreign agents physically enter the territory of another state in order to facilitate a luring, violation of the principle of non-intervention is more likely to ensue.

In practice, states have rarely protested the luring of an individual from their territory. The reason for this may be down to indifference, unawareness, or the desire to avoid disruption to inter-state relations. The failure of states to object to such conduct has meant that courts have had limited opportunity to consider the relationship between luring and state sovereignty. The lack of protest has also acted as a barrier to the vindication of the rights of the individual. This Chapter established that luring operations violate the principle of non-intervention when: (1) state agents physically conduct police powers within the territory of another state for the purpose of inducing an individual or, (2) communications transmitted to an individual, whether from within or outside the state, constitute coercion in so far as the individual's free will is overborne.

The rights and protections guaranteed to individuals by human rights law are independent from that of the state. Notwithstanding this, in considering luring operations, many courts have followed the classical approach to international law. This approach makes the realization of the rights of the individual contingent upon the state's decision to raise a protest. Luring will constitute a violation of the right to liberty and security of the person in circumstances in which the will of the individual is overborne by the threats of the apprehending state. In order for the practice

to be in conformity with a state's obligations, efforts to apprehend the individual would have to be (1) in conformity with domestic and international law (2) appropriate and proportionate under the circumstances and (3) limited to inducements that do not overcome the will of the individual so as to constitute a deprivation of liberty. In most cases, efforts to induce the target are synonymous to confinement and this in turn breaches the rights of the individual.

It is evident that luring operations are not, on the whole, a legitimate alternative to the formal extradition process. In saying that, the practice will not always be rendered unlawful either. This issue will be considered in great detail in Chapter 5.

## CHAPTER 4

### DISGUISED OR DE FACTO EXTRADITION

#### INTRODUCTION

The use of immigration laws to deny a foreign national the privilege of entering or remaining in a territory for the purpose of having them transferred to a state that wishes to exercise jurisdiction over them is known as disguised or de facto extradition.<sup>1</sup> States have resorted to immigration procedures when extradition has failed or is unavailable.<sup>2</sup> Disguised extradition developed from the practice of “voluntary deportation,” which involved states securing the agreement of individuals convicted of a crime to return to their state of nationality in lieu of punishment.<sup>3</sup> The purpose of the practice is to place the individual in a position “in which he or she falls or is likely to fall under the control of the authorities of the state that has an interest in subjecting that person to its jurisdictional control.”<sup>4</sup> The difficulty in assessing the legitimacy of this method of rendition lies in the fact that on its face, deportation and exclusion are perfectly legal exercises of a state’s immigration procedure.<sup>5</sup> In practice however, the state is using these powers in order to bypass the extradition framework. If a state

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<sup>1</sup> The term ‘disguised extradition’ comes from ‘extradition deguisee’ which was used to describe the practice by a French Court in 1860 Decocq, ‘La livraison des delinquants en dehors du droit commun de l’extradition’, 53 *R.C.D.I.P.* 411, 424 (1964); Shearer refers to the practice as ‘de facto extradition’ in that the intentions of the deporting authorities can only be presumed, Shearer, *Extradition in International Law*, (1971), p. 78.

<sup>2</sup> U.S. District Court, Southern District of New York, *United States v. Badalamenti*, 7 January 1986, No. 84 Cr. 236, (626 F.Supp. 658); ECmHR, *Bozano v. France*, Application No. 9990/82 ‘Decision of 12 July 1984 on the admissibility of the application’, *Decisions and Reports*, No. 39, pp. 147-157; English Court of Appeal, *R v. Brixton Prison (Governor)*, Ex Parte Soblen, (1962) 3 A11 E.R. 641; US Court of Appeals, *McMullen v. United States*, 953 F.2d 761, 763 (1992); US District Court, Southern District of New York, *Matter of Doherty*, 599 F. Supp. 270, 277 (1984); EcmHR, *C v. the Federal Republic of Germany*, Application No. 10893/84, ‘Decision of 2 December 1985 on the admissibility of the application’, *Decisions and Reports*, No. 45, pp. 198-204.

<sup>3</sup> Paul O’Higgins, ‘Voluntary Deportation’ *Criminal Law Review*, (1963) 680.

<sup>4</sup> M. Cherif Bassiouni, ‘Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition’, 7 *Vanderbilt Journal of Transnational Law* (1973-1974) 27, at 37.

<sup>5</sup> Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, (2012).



complies with the established immigration procedures and its human rights obligations, the underlying motivation to bypass extradition may only be presumed.

Disguised or de facto extradition can be limited to the sharing of information regarding an individual seeking entry, or illegally present in a state, for the purpose of immigration control. Although the intention of the communicating state may be the return of the individual, this does not in itself violate any laws or international legal rules. Other situations have involved an enhanced degree of collusion between states in effecting the transfer of the individual to a specific country.<sup>6</sup> States may be motivated to engage in disguised or de facto extradition in situations in which extradition has been refused, the offence for which the individual is wanted is non-extraditable or where extradition procedures are viewed as too lengthy or complex. Such impediments do not legitimize deviation from formal extradition but this does not necessarily render the subsequent deportation or exclusion unlawful. The problem with using immigration procedures to affect the transfer of an individual to a state wishing to prosecute or punish is that the individual is deprived of the protections and safeguards guaranteed by the extradition process.<sup>7</sup> Anyone facing deportation or exclusion, including those subject to disguised or de facto extradition, can claim protection from fear of persecution or torture. However, since these processes are designed for immigration control rather than criminal matters, the individual subject to such proceedings is not entitled to the procedural safeguards afforded by extradition.<sup>8</sup> These safeguards include the requirement that sufficient evidence to justify extradition be established and adherence to the rule on specialty.

Disguised or de facto extradition does not, on its face, violate the principle of territorial sovereignty. As will be seen, it is from this very

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<sup>6</sup> ECtHR, *Bozano v France*, Application No. 9120/80 'Judgment', (18 December 1986); *Soblen*, *supra* note 2.

<sup>7</sup> T. Stein, 'Extradition', in R. Bernhardt, R.L. Bindschedler and P. Macalister-Smith (eds.), *Encyclopedia of Public International Law, Vol. II*, (1995), at 327; Paul Michell, 'English Speaking Justice: Evolving Responses to Transnational Forcible Abduction After *Alvarez-Machain*', 29 *Cornell International Law Journal* (1996) 383, at 391.

<sup>8</sup> *Ibid.*

principle that the broad discretion in managing the entry and stay of non-nationals derives.<sup>9</sup> Although the practice may sit comfortably in the realm of inter-state relations, it goes against principles of good faith and may violate the rights of the individual who is subject to the misuse of immigration procedures. These issues will be dealt with in section 2. Considering dicta from domestic and international courts, section 3 will examine the relationship between international human rights law and disguised or de facto extradition. The principle of *non refoulement* places a non-derogable obligation on states to ensure that individuals are not transferred to territories where there is a risk of torture or inhuman and degrading treatment or punishment. The use of diplomatic assurances and post monitoring mechanisms has somewhat leveled the balance between the authority of a state to exclude or deport and the rights of individual. In saying that, reliance on such assurances will not always be sufficient to satisfy a state's obligation towards the individual. Before analyzing the status of the practice under the applicable international legal frameworks, an examination of the modalities of disguised or de facto extradition will be undertaken.

## **1. THE MODALITIES OF DISGUISED OR DE FACTO EXTRADITION**

Disguised or de facto extradition can take many forms. This type of rendition is usually initiated by a request from one state to another to deport or exclude a person from its territory. The requested state then determines the grounds upon which the individual has acquired or will attempt to acquire status in the state and how, pursuant to the immigration laws in force, that status can be withdrawn or refused.<sup>10</sup> In some cases, the state seeking custody of the individual may not explicitly request deportation or exclusion but may instead provide information relating to an individual who

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<sup>9</sup> Malcolm N. Shaw, *International Law* (5<sup>th</sup> ed 2003), at 574-577.

<sup>10</sup> M. C. Bassiouni, *International Extradition: United States Law & Practice*, (2002) Vol. I, at 195.

has gained entry, or will attempt to gain entry in violation of immigration laws. For example, in 1990, British police communicated to the United States' immigration authorities that an individual suspected of murder would attempt to enter the United States.<sup>11</sup> The individual was denied entry and subsequently returned to his point of departure, the United Kingdom.<sup>12</sup> Although the state communicating the intelligence may do so in the hope that the individual will be excluded or deported so that jurisdiction can be exercised over them, this practice is not illegal. In this case, the deporting state is not acting in bad faith. Every state has an interest in protecting its borders from those who have not satisfied its immigration standards. The deporting state has no obligation to inquire into the reason why another state imparted the information or whether judicial proceedings are pending in the state to which the individual will be sent. In *Muller v. Superintendent Presidency Jail, Calcutta*, the Supreme Court of India held that the right to expel an alien could be exercised even though he was wanted in his own country for a criminal offence.<sup>13</sup>

Under normal circumstances, the destination of the deportee is of little consequence to the deporting state.<sup>14</sup> For example, under the United States' immigration scheme, the individual has a right to designate a country.<sup>15</sup> This right can however be overridden by the executive on a number of grounds listed in the relevant sections.<sup>16</sup> The situation of Julian Assange demonstrates how the processes of deportation and extradition could potentially be manipulated to secure the return of a suspect to a requesting state.<sup>17</sup> Assange, who has been granted asylum in the Ecuadorian embassy in the United Kingdom, is wanted by Sweden in relation to sexual offence

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<sup>11</sup> Case discussed in Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, (1998), at 333-334.

<sup>12</sup> *Ibid.*

<sup>13</sup> Supreme Court of India, *Muller v. Superintendent Presidency Jail, Calcutta*, (1955) I.L.R. 497; *Soblen*, Lord Denning, *supra* note 2, at 279.

<sup>14</sup> M.G. Cowling, 'Unmasking 'Disguised' Extradition- Some Glimmer of Hope', 109 *South African Law Journal* (1992) 241, at 254.

<sup>15</sup> 8 United States Code § 1231 (b)(2)(A).

<sup>16</sup> *Ibid.*, § 1231 (b)(2)(C).

<sup>17</sup> *Amnesty International*, 'Sweden Should Issue Assurance it won't Extradite Assange to U.S.' (27 September 2012), available at: <http://www.amnesty.org/en/news/sweden-should-issue-assurance-it-won-t-extradite-assange-usa-2012-09-27>.

charges. Media sources and international organizations have speculated that the proceedings in Sweden are motivated by a desire to facilitate the transfer of Assange to the United States.<sup>18</sup> The United States has not officially charged Assange but data recently published by WikiLeaks suggests that a sealed indictment has been issued by a Virginia Court and will be transmitted to Sweden should Assange arrive there.<sup>19</sup> These circumstances may give off an air of bad faith but provided formal procedures are followed and Assange's rights are not violated, there would be no illegality on the part of the states involved.

Whatever the content of the immigration regime, its implementation must comply with the state's human rights obligations. Article 14 of the 1948 Universal Declaration on Human Rights recognizes the right of persons to seek asylum from persecution in other countries.<sup>20</sup> The United Nations Convention relating to the Status of Refugees represents the core instrument of international refugee protection.<sup>21</sup> The Convention is underpinned by the principle of *non refoulement*.<sup>22</sup> Pursuant to Article 33 of the Refugee Convention, an individual cannot be sent to a country where his "life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion".<sup>23</sup> The Convention provides an exception in cases where there are:

reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>24</sup>

The invocation of this exception to deny an individual entry or stay has

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<sup>18</sup> Nick Davies, '10 Days in Sweden the Full Allegations against Julian Assange', *The Guardian*, (17 December 2012), available at: <http://www.theguardian.com/media/2010/dec/17/julian-assange-sweden>.

<sup>19</sup> 'Press Release- Stratfor Emails: US has Issued Sealed Indictment against Julian Assange Tuesday 28<sup>th</sup> February 2012', *WikiLeaks, The Global Intelligence Files*, available at: <http://wikileaks.org/Stratfor-Emails-US-Has-Issued.html>.

<sup>20</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 14.

<sup>21</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>22</sup> *Ibid*, Article 33.

<sup>23</sup> *Ibid*; 8 U.S.C. § 1231 (b)(3)(A).

<sup>24</sup> *Ibid*, Article 33(2); 8 U.S.C § 1231 (b)(3)(B).

been the subject of legal proceedings. The decisions of the ECtHR illustrate that the *jus cogens* nature of the prohibition on *refoulement* demands broader protection than that contained in the Refugee Convention. These issues will be examined in section 3 but for now, it is sufficient to recognize that a state's authority to control immigration is not absolute.

Because of the desire to keep the motive behind the use of immigration procedures hidden, it is impossible to estimate the frequency with which disguised extradition is resorted to. States engaging in the practice will not openly admit to having been complicit in the process and so on its face, the circumstances preceding the transfer to the state interested in prosecuting the individual will appear legitimate. As will be discussed in later sections, some courts have looked behind the process by inquiring into the purpose of the transfer and unveiled the misuse of immigration procedures.

## 1.1 IMMIGRATION CONTROL

Immigration laws are enacted by nations to give effect to their “sovereign right of excluding aliens from their territory.”<sup>25</sup> The United States Supreme Court has held that the right to deport aliens is “an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.”<sup>26</sup> On this issue, the Court has also stated, “it is an incidence of every independent nation [...] If it could not exclude aliens it would be to that extent subject to the control of another power.”<sup>27</sup> In the *United States v. Cordero*, it went further to declare that “[n]othing in [an extradition] treaty prevents a sovereign nation from deporting foreign nationals for other reasons and in other ways should it wish to do so.”<sup>28</sup> The ECtHR has stated “as a matter of well established international law and subject to its treaty obligations, a State has the right to control the entry of

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<sup>25</sup> Shearer, *supra* note 1, p. 76.

<sup>26</sup> US Supreme Court, *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); US Supreme Court, *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889); See also, US Court of Appeals, *McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986).

<sup>27</sup> *Ibid*, *Chae Chan Ping v. United States*.

<sup>28</sup> US Court of Appeals, *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981).

non-nationals into its territory.”<sup>29</sup> The existence of the right is beyond doubt but it is not absolute.

Disguised extradition does not, on its face, violate state sovereignty. Foreign agents do not exercise police powers or force on the territory of the state from which the individual is deported or expelled. Instead, the practice is executed through active or tacit cooperation between the authorities of the states involved. The processes of extradition, deportation and expulsion were developed to protect not only the fundamental principle of territorial sovereignty but also the rights of individuals subject to them. International legal norms require that states do not intentionally bypass formal procedures. In response to the Decision of the United States Supreme Court in *Alvarez Machain*, the Inter-American Juridical Committee highlighted the requirement that states uphold extradition treaties in good faith.<sup>30</sup> Bassiouni has also opined that when a state uses informal transfer where formal methods exist, it “circumvents the intent of states who enter into extradition treaties for the specific purpose of avoiding disguised extradition” and as a result, “detrimentally affects the international rule of law.”<sup>31</sup> As well as general principles of international law, the practice of disguised extradition may violate a state’s obligations under human rights law. Before considering the constraints on state authority to carry out immigration policy, it is helpful to examine the processes of exclusion and deportation and how they have been used in lieu of extradition.

Immigration laws provide a statutory framework for the control of entry into, and removal from, a country. They are created to protect the interests of the state rather than to facilitate the inter-state transfer of individuals for

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<sup>29</sup> ECtHR, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Application No. 9474/81, ‘Judgment’, 28 May 1985, para 67; Also see ECtHR, *Vilvarajah and Others v United Kingdom*, Application No. 13448/87, ‘Judgment’, 30 October 1991, para 102-103; ECtHR, *Mamatkulov and Askarov v Turkey*, Application No. 46951/99, 4 February 2005, para 66.

<sup>30</sup> Organization of American States Permanent Council, ‘Legal Opinion on the Decision of the Supreme Court of the United States of America’, 4(1) *Criminal Law Forum* (1993) 119, at 131.

<sup>31</sup> M. C. Bassiouni, *International Extradition: United States Law & Practice*, (2002) Vol. IV, at 29.

the purposes of enforcing criminal justice.<sup>32</sup> While the central goal of the extradition process is the delivery of a person to a state that wishes to exercise jurisdiction over them, the purpose of deportation is satisfied once the individual is removed from its territory.<sup>33</sup> One author has set out the distinction between the two processes as follows:

The immigration laws of the United States provide for the exclusion or deportation of aliens who have been convicted of or who admit the commission of certain classes of crimes in foreign countries. These laws are separate and distinct from the laws and treaties relating to extradition. They are not enacted for the benefit of foreign governments or for the purpose of bringing fugitives to justice; rather, they are sometimes made by governments for the deportation by other governments of fugitives from justice, and occasionally steps are taken-especially in the absence of an extradition treaty to deport such persons.<sup>34</sup>

Extradition and immigration control are regulated by separate statutory regimes and are subject to separate decision making processes. Pursuant to this, a finding by the judiciary that an individual is not extraditable does not technically bar the subsequent initiation of immigration procedures against the same person. In 1892, the Institut de Droit International distinguished between the processes of extradition and expulsion; Article 15 of the rules on the admission and expulsion of aliens (*règles internationales sur l'admission et l'expulsion des étrangers*) provides, “the fact that extradition has been refused does not mean that the right to deport has been renounced.”<sup>35</sup> In a 1983 Resolution, the Institut reiterated its position by declaring that the “fact that the extradition of an alien may be forbidden by municipal law should not prevent his expulsion by legal procedures.”<sup>36</sup>

The processes of exclusion and deportation are the two prominent methods of ousting or preventing unauthorized or unwanted persons from a

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<sup>32</sup> Stein, *supra* note 7, at 32; Michell, *supra* note 7, at 391; John Francis Murphy, *Punishing International Terrorism*, (1983), at 81-82.

<sup>33</sup> States do however have an obligation to ensure that the individual will not be subjected to torture in the state in which they are being transferred. The principle of *non refoulement* will be discussed in Section 2.2.

<sup>34</sup> Hackworth, *Digest of International Law*, IV, 30 (1942).

<sup>35</sup> Institut de Droit International, *Règles internationales sur l'admission et l'expulsion des étrangers*, Session of Geneva, (9 September 1892), *Annuaire de l'Institut de Droit International*, vol. XII, 1892-1894, pp. 218 et seq, Article 15.

<sup>36</sup> Institut de Droit International, Resolution of 1 September 1983, *New Problems of Extradition*, Session of Cambridge, Article VIII, para. 2.

state. The unauthorized entry or presence of the individual is not a prerequisite to the initiation of these types of proceedings; the authority of the state is much broader. In some cases, individuals have been deported or excluded based on a finding that their presence is deemed not conducive to the public good.<sup>37</sup> This ground for refusal, which is recognized by the 1951 Refugee Convention, has the potential to act as a catch-all category that affords states the discretion to exclude or remove any individual regardless of their having entered the state legally. In practice, the principle of *non refoulement* acts as a constraint on a state's ability to abuse immigration procedures. Although it may not directly protect against disguised or de facto extradition, it ensures that those subject to it are not returned to states where there is a risk of persecution or torture. This principle and its relationship with disguised or de facto extradition will be considered in section 3.

## 1.2 DEPORTATION AND EXCLUSION

The exclusion process affords broad discretion to the authorities responsible for carrying out the procedure and as the individual seeking entry is not yet within the jurisdiction of the state, he is not entitled to due process. The right to refuse entry to non-nationals has been recognized as a fundamental component of territorial sovereignty.<sup>38</sup> In *Fong Yue Ting v. United States*, the Supreme Court held that the ability to exclude aliens is inherent in sovereignty.<sup>39</sup> In his concurring opinion in *Harisiades v. Shaughnessy*, Justice Frankfurter stated, “ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State.”<sup>40</sup> In *Oceanic Steam Navigation Co. v. Stranahan*, the United States Supreme Court stated, “[o]ver no conceivable subject is the legislative power of

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<sup>37</sup>Article 20(2)(b) Aliens Order, 1953; *Soblen*, *supra* note 2.

<sup>38</sup> *Shaw*, *supra* note 9, at 574.

<sup>39</sup> *Fong Yue Ting v. United States*, *supra* note 26.

<sup>40</sup> US Supreme Court, *Harisiades v. Shaughnessy*, 10 March 1952, (342 U.S. 580), at 596, (Frankfurter, J., concurring).



congress more complete than it is over [immigration and naturalization].”<sup>41</sup>

Ireland’s Immigration Act sets out a number of grounds pursuant to which an individual can be refused entry.<sup>42</sup> Section 4(3)(d) provides for non-nationals who have been convicted of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty. In practice, if a state seeking to gain custody of an individual communicates to the Irish Naturalization and Immigration Service that an individual seeking entry to the state has been convicted of such an offence, based on this intelligence, the Irish authorities may exclude him. Although the motivation behind the delivery of the information may be the desire of the communicating state to apprehend the individual, the basis for the decision is grounded in policy and the Irish state has a right to exclude the person seeking entry.

Immigration statutes generally do not explicitly provide for exclusion in cases where a person is wanted for trial in another state. In saying that, based on information that the individual has been indicted by a foreign court or is suspected of having committed an offence, the individual could nevertheless be excluded on other grounds. For example, section 4(3)(f)(iii) of the Irish Act provides for individuals whom the Minister has deemed that it would be conducive to the public good that he remain outside the state and section 4(3)(j) allows for the exclusion of those who could pose a threat to national security or be contrary to the public good. The 1951 Refugee Convention recognizes these grounds for exclusion. Ultimately, the Act provides a broad discretion to authorities in deciding whether to admit or exclude individuals. Although manipulating immigration proceedings in order to gain custody of an individual may be the motivation of the state communicating the information, it is understandable that a state will not be willing to jeopardize national security and inter-state relations for an

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<sup>41</sup> US Supreme Court, *Oceanic Steam Navigation v. Stranahan*, 1 June 1909, (214 U.S. 320).

<sup>42</sup> Irish Nationality and Citizenship Act 1956 (No. 26 of 1956) as amended by the Irish Nationality and Citizenship Act 1986 (No. 23 of 1986), the Irish Nationality and Citizenship Act 1994 (No. 9 of 1994), the Irish Nationality and Citizenship Act 2001 (No. 15 of 2001), the Irish Nationality and Citizenship Act 2004 (No. 38 of 2004) and the Civil Law (Miscellaneous Provisions) Act 2011 (No. 23 of 2011).

individual that it has no obligation to admit. As will be seen below however, a state's obligations under international human rights law may restrain its ability to exclude in certain circumstances.

The *Insull* case demonstrates the use of requests for exclusion to secure the return of an individual to a designated state. A United States court indicted Insull on charges of larceny and embezzlements.<sup>43</sup> He fled from France to Italy and then on to Greece. The United States requested his extradition from Greece. Following a finding by the Athen's Court of Appeals that the depositions received did not support the charges Insull was released. The United States initiated further efforts to have the individual extradited but these were again refused. Diplomatic cables between the United States Secretary of State and the Minister in Greece evince the cooperation between the two states in effecting the exclusion of Insull from Greece.<sup>44</sup> In December 1933, the Greek cabinet ordered his departure at the expiration of his residence permit. Applications for admission to Bulgaria and Rumania were rejected. The cables show that the United States Secretary of State lodged requests to Egypt and Turkey to detain Insull should he seek to gain entry onto their territories.<sup>45</sup> Pursuant to these requests, Turkish authorities detained Insull and granted extradition to the United States. Although the actual transfer of Insull to the United States was carried out by way of extradition, immigration laws were used to facilitate the process. Had Greece renewed his residence permit or Bulgaria accepted his application to enter, Insull may have eluded prosecution in the United States. It is interesting to note that the ratification of the extradition treaty signed by the United States and Turkey in 1923 and the arrival of Insull occurred simultaneously. This reaffirms that extradition is a tool of state cooperation. It is created for states and its strength and form are influenced by international relations. If the process was not so influenced,

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<sup>43</sup> United States Department of State, Foreign Relations of the United States Diplomatic Papers, (1934), 533-583, at 576; Charles Cheney Hyde, 'The Extradition Case of Samuel Insull SR., in Relation to Greece', 28, *American Journal of International Law*, No. 2, (1934) 307.

<sup>44</sup> Diplomatic Papers, Greece, *ibid.*

<sup>45</sup> *Ibid.*

the fact that the treaty between Turkey and the United States had not been ratified could have rendered Insull non-extraditable.

The *Soblen* case represents another situation in which exclusion was used to facilitate the transfer of an individual to a designated state.<sup>46</sup> Soblen, a naturalized citizen of the United States, was convicted of conspiring to provide information concerning the defense of the United States to the Soviet Union. Following refusal of his appeal application by the Supreme Court, Soblen fled to Israel. No extradition agreement existed between the United States and Israel. Instead, deportation was ordered following a determination that he did not qualify for Israeli citizenship.<sup>47</sup> Following his exclusion, Soblen was put on a “specially chartered plane” upon which United States officials were present.<sup>48</sup> The fact that Soblen was in the custody of United States officials while still on Israeli soil suggests the existence of a prearranged agreement between the two states. During a scheduled stopover in London, a British immigration official boarded the aircraft for the purposes of serving him with a notice of refusal for leave to land.<sup>49</sup> Extradition from the United Kingdom was not an option because of the political offense exception. A deportation order was made on the ground that Soblen had not legally entered the United Kingdom. Two petitions for *habeas corpus* were brought before the English Courts. The Court of Appeal considered whether the deportation order should be set aside based on the fact that its purpose was to secure the return of the individual to a particular state for the purpose of trial or detention. The Court acknowledged its power to look behind a deportation order in determining whether there was an ulterior motive.<sup>50</sup> Making a clear distinction between deportation and extradition, Lord Denning M.R. stated: “[i]n the absence of an extradition treaty, it is no answer for the Crown, to say that he wishes to send him off to another country to meet charges there [...]”<sup>51</sup> This principle

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<sup>46</sup> See Section 1.2.

<sup>47</sup> *Soblen*, *supra* note 2, at 373.

<sup>48</sup> *Ibid*, at 374 (per Lord Parker C.J.).

<sup>49</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, (1995), at 418.

<sup>50</sup> *Soblen Case*, *supra* note 2.

<sup>51</sup> *Soblen*, *supra* note 2, at 641.

was not, however, applied to the facts of the case before it. Instead, the Court ruled that sufficient evidence of the Home Secretary's use of deportation for an ulterior purpose had not been established. The fact that the United States had an interest in the return of Soblen and Czechoslovakia's willingness to allow Soblen entry did not warrant a finding of illegality. In the majority of deportation cases, individuals are returned to their home states; Soblen was a naturalized citizen of the United States. A state is under no obligation to consider pending charges or sentences when determining the destination of the deportee.<sup>52</sup>

Deportation provisions apply to persons who have been admitted to the state. Those subject to deportation are generally entitled to more rights and procedural safeguards than those facing exclusion. Typically, the onus will be on the deporting authorities to show that the individual is deportable. In *Gastelum-Quinones v Kennedy*, the United States Supreme Court held that the Immigration and Naturalization Service must establish deportability on "clear, unequivocal and convincing evidence."<sup>53</sup> It is interesting to note that the United States Attorney Manual recognizes the use of deportation as an alternative to extradition. Section 9-15.610 provides:

If the fugitive is not a national or lawful resident of the country in which he or she is located, the Office of International Affairs (OIA), through the Department of State or other channels, may ask that country to deport or expel the fugitive.<sup>54</sup>

In Ireland, the main instrument for the regulation of deportation procedures is the 1956 Immigration Act.<sup>55</sup> Before the issuance of the order, the individual is sent a fifteen-day letter containing details of the procedure and options available to him. The individual has the choice of making representations to the Minister for leave to remain, consenting to the deportation order or leaving voluntarily. After the passage of fifteen working days, the Minister for Defense can sign a deportation order. The

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<sup>52</sup> US Court of Appeals, *United States ex rel. Giletti v. Commissioner of Immigration*, 35 F. 2<sup>nd</sup> 687 (2<sup>nd</sup> Cir., 1929).

<sup>53</sup> US Supreme Court, *Gastelum-Quinones v. Kennedy*, 17 June 1963, (374 U.S. 469).

<sup>54</sup> United States' Attorney Manual, Section 9-15.610, 'Deportations Expulsions or other Extraordinary Renditions', available at: [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/15mcrim.htm#9-15.610](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrim.htm#9-15.610)

<sup>55</sup> 1956 Immigration Act, *supra* note 42.

majority of people to which such letters are addressed, make representations to the Minister outlining why they should be granted leave to remain in the state. In practice, few applicants are granted permission to stay.<sup>56</sup> Before a deportation order is signed, the Minister must ensure that it will not breach the principle of *non refoulement*. The individual concerned is then issued an ‘arrangements letter’ which sets out the details of the deportation. There is very limited scope to challenge deportation decisions in Ireland because there is no independent appeals body. Such orders can be submitted for judicial review if there are substantial grounds to prove that the Minister failed to disclose the basis upon which specific claims for asylum were rejected. In saying that, a judicial review in the High Court is restricted to narrow points of law about how a decision was taken rather than consideration of the merits of the decision itself.

In comparison with expulsion, it is much more difficult for a state to use deportation as an alternative to extradition. One potential barrier is the ability of the individual to designate a country to which he wishes to be deported. For example, the United States Code provides that if the country is willing to accept the individual “unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States,” he will be deported to his chosen state.<sup>57</sup> This provision would appear to mitigate the effects of disguised extradition in that the individual could nominate a state other than the one seeking to prosecute or detain. In practice however, its application is contingent upon the willingness of the chosen state to accept the individual and the interpretation given to such provisions by the authorities overseeing the deportation. The *Doherty* case is a good example of this.<sup>58</sup>

*Doherty* involved the deportation of a member of the Provisional Irish

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<sup>56</sup> ‘Preliminary Report on Deportation in Ireland: The Human and Economic Costs of Deportation’, *Anti Deportation Ireland*, Dublin 2012, available at: <http://antideportationireland.blogspot.ie/p/adi-report-publication.html>.

<sup>57</sup> 8 U.S.C. Section 1231 (b)(2)A).

<sup>58</sup> Also see *McMullen v INS*, *supra* note 26.

Republican Army from the United States to the United Kingdom.<sup>59</sup> Following the refusal of a United States court to grant Doherty's extradition, deportation proceedings were initiated and an action for review of the court's denial of extradition was filed. Doherty sought immediate deportation, designating Ireland as his chosen destination.<sup>60</sup> The Attorney General and the Immigration and Naturalization Service contested this stating, "deportation to the Republic of Ireland would be prejudicial to the interests of the United States in its relations with other nations concerning the fight against international terrorism."<sup>61</sup> Relying on the language of the Immigration and Nationality Act, the Attorney General argued that he had the authority to designate the United Kingdom as the country to which Doherty would be sent.<sup>62</sup> Finding that judicial intervention in decisions made by the political branches of government would be inappropriate, the United States Court of Appeals held, "apart from claims such as 'fraud, absence of jurisdiction, or unconstitutionality,' the determination of the Attorney General is essentially unreviewable."<sup>63</sup> Doherty was subsequently deported to the United Kingdom where he was to serve a life sentence. The circumstances of the case illustrate how a state can invoke immigration procedures when extradition does not return a favorable outcome. It also demonstrates the deference afforded to the executive in enforcing immigration control. Doherty had entered the United States on a false passport and so valid grounds for deportation did exist. In saying that, the fact that extradition was denied before the initiation of deportation proceedings would seem to imply that there was an ulterior motive for the transfer.

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<sup>59</sup> *Quinn v. Robinson*, No. C-82-6688 R.P.A. slip op. (N.D. Cal. Oct.3, 1983), vacated, 783 F.2d 776, (9th Cir.), cert. denied, 107 S.Ct. 271 (1986); US District Court, Southern District of New York, *Matter of Doherty*, (599 F. Supp. 270), (*Matter of Mackin*, 80 Cr. Misc. 1 (S.D.N.Y. 1981), appeal dismissed, 668 F.2d 122 (2d Cir. 1981); *In re Extradition of McMullen*, Mag. No. 3-78-1099 MG at 3 (ND. Cal. May 11, 1979).

<sup>60</sup> *Doherty v. Meese*, 808 F.2d 938, 940 (2d Cir. 1986). Doherty was able to designate his destination under 8 U.S.C. § 1253(a) (1982).

<sup>61</sup> *Ibid*, at 940-941.

<sup>62</sup> *Ibid*, at 941; INA § 243, 8 U.S.C. § 1253(a).

<sup>63</sup> *Ibid*, at 941- 944.

It is evident that a state has broad authority to exercise immigration policy. This authority, which stems from the principle of sovereignty, is not absolute. The principle of good faith is an international norm that guides interstate relations and the law of treaties. States have an obligation to adhere to treaties and to refrain from conduct that is contrary to their object and purpose. The use of immigration procedures to bypass extradition in order to satisfy interests for which the scheme was not intended is contrary to the concept of good faith. The High Court of Australia has held that there are “obvious objections to the use of immigration or expulsion powers as a substitute for extradition.”<sup>64</sup> The Constitutional Court of South Africa has similarly stated that deportation and extradition serve different purposes and that the differences in the procedures prescribed for either measure may be material in specific cases, particularly where the legality of the expulsion is challenged.<sup>65</sup>

Depriving an individual the privilege of formal extradition may also trigger specific provisions under international human rights law. In practice, the principle of *non refoulement* represents the strongest protection against disguised or de facto extradition. Although any individual faced with deportation, exclusion or extradition can forward a claim, this principle ensures that the individual will not be transferred to a state where there is a risk of torture, ill treatment or persecution.

## **2. DISGUISED OR DE FACTO EXTRADITION UNDER INTERNATIONAL HUMAN RIGHTS LAW**

Counterterrorism was an important policy objective of states long before the attacks on the World Trade Center on September 11<sup>th</sup>2001 but since that date, it has taken center stage. Heightened concerns have led to the tightening of immigration controls and increased difficulty for many seeking asylum or refugee status. The 1951 Refugee Convention provides

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<sup>64</sup> *Barton v The Commonwealth of Australia*, 48 ALJR 161; 3 ALR 70; 1974 WL 154212; 48 ALJ 434; 49 ALJ 116.

<sup>65</sup> Constitutional Court of South Africa, *Mohamed and Another v President of the Republic of South Africa and Others*, 28 May 2001, CCT 17/01, 2001 (3) SA 893 CC).

an exception whereby protection under the instrument can be refused on grounds of national security or public order. Although its purpose may be legitimate, an over-broad application has the potential of exposing individuals to serious human rights violations. The invocation of this exception and its relationship with the principle of *non refoulement* has been the focus of judicial proceedings at the national and international level. Applying the *jus cogens* rule of *non refoulement*, the majority of decisions have declined to uphold invocations of the exception where there is a risk of torture, death penalty or other ill treatment in the state to which the transfer would be made. The reasoning is not a result of a balancing exercise whereby the interests of the states are weighed against that of the individual. Instead, it is based on an application of the *non refoulement* principle in its non-derogable form and recognition that the protection it offers does not yield to the interests of states, however legitimate they may be.

As was discussed in Chapter 1 and throughout this work, the formal extradition process can pose barriers to the timely transfer of suspects. In light of this, immigration procedures can offer a quicker and less cumbersome avenue to gaining jurisdiction over individuals. Since underlying motivations and complicity in bypassing extradition is hard to prove, it is difficult to regulate the practice of disguised extradition. In saying that, the effective enforcement of human rights obligations can lessen the harmful effects its use can have on the individual.

## **2.1 EUROPEAN COURT OF HUMAN RIGHTS**

The decisions of the ECmHR and the ECtHR have not followed a consistent approach in deciding whether disguised extradition constitutes a violation of the Convention. As was discussed in Chapters 2 and 3 in the context of kidnapping and luring, the ECtHR lends considerable weight to state cooperation. This is also reflected in the cases concerning disguised extradition. The ECmHR refused two applications involving the alleged use of the practice to obtain jurisdiction over an individual sought for criminal charges in France. In both cases, the Commission underlined the



importance of inter-state cooperation in the context of serious crimes. In *Illich Sánchez Ramirez v. France*, the Commission stated, “even assuming the circumstances in which the applicant arrived in France could be described as a disguised extradition, this could not, as such, constitute a breach of the Convention.”<sup>66</sup> The same conclusion was reached in *Klaus Altmann v. France*.<sup>67</sup> The Commission acknowledged the irregularity of the transfers in both instances but this alone was not found to violate the Convention. The decision of the ECtHR in *Bozano* may mark a shift in the approach of the Court to claims of disguised extradition.

In *Bozano*, the applicant, a French national was tried in Italy *in absentia* and sentenced to life imprisonment for murder, abduction and indecent assault.<sup>68</sup> An international arrest warrant was issued and in 1979, Bozano was arrested by the French gendarmerie and taken into custody. Italy’s request for Bozano’s extradition from France was refused because the procedure for trial *in absentia* was found to be incompatible with French public policy. Soon after his release, the applicant claimed to have been apprehended, handcuffed and driven to police headquarters. He was served with a deportation notice stating that deportation was sought on the grounds that the “presence of [Bozano] on French territory is likely to jeopardize public order.”<sup>69</sup> It is interesting to note that the deportation order had been compiled over a month before its service on Bozano.<sup>70</sup> Bozano opposed deportation and requested to present before the Appeals Board. His request was refused and without the option to designate a country to which he would be sent, he was transported to the Swiss border and handed over to the Swiss authorities. Bozano was extradited to Italy from Switzerland in June 1980.

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<sup>66</sup> ECmHR, *Illich Sanchez Ramirez v France*, Application No. 28780/95, ‘Decision of 24 June 1996 on the admissibility of the application’, *Decisions and Reports*, No. 86-B, pp. 155-162, at 162

<sup>67</sup> ECmHR, *Klaus Altmann (Barbie) v France*, Application No. 10689/83, ‘Decision of 4 July 1984 on the admissibility of the application’, *Decisions and Reports*, No. 37, pp. 225-235, at 233.

<sup>68</sup> *Bozano v. France*, *supra* note 6.

<sup>69</sup> Reproduced in *Bozano v France*, *ibid*, para 24.

<sup>70</sup> U.N. General Assembly, International Law Commission, *Sixth Report on the Expulsion of Aliens*, A/CN.4/625, (19 March 2010), para 51.

Bozano submitted claims to the Strasbourg court against France, Italy and Switzerland; the deporting state, the extraditing state and the prosecuting state respectively.<sup>71</sup> The application against France was the only one found to be admissible. Bozano claimed that his deportation to Switzerland was an infringement of his right to personal liberty and freedom of movement guaranteed by Article 5(1) of the Convention and Article 2(1) of Protocol No. 4.<sup>72</sup> The Court held that:

[T]he applicant's deprivation of liberty [...] was neither 'lawful' within the meaning of Article 5(1)(f) nor compatible with the 'right to security of the person'. Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to 'detention' necessary in the ordinary course of 'action [...] taken with a view to deportation'.<sup>73</sup>

The Court recognized that the arrest and deportation constituted a breach Article 5(1)(f) of the European Convention on Human Rights, which requires the arrest or detention of a person with a view to deportation or extradition to be lawful; that is, it must be in keeping with domestic law and the Convention and must not be arbitrary. The ruling in Bozano was heralded as "a great step forward in that it contains the first unequivocal international judicial condemnation of deprivation of liberty for the purposes of disguised extradition." In saying that, the refusal of an application in *C v the Federal Republic of Germany* could mean that the *Bozano* case was an exception rather than evidence of a new approach.<sup>74</sup>

In *C*, the applicant, a German citizen, was sentenced to nine months imprisonment for offences including insulting the constitution and the

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<sup>71</sup> *Bozano v France*, Application No. 9990/82, 'Decision of 15 May 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 119-146; *Bozano v Italy*, Application No. 9991/82, 'Decision of 12 July 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 147-157; *Bozano v Switzerland*, Application no. 9009/80, 'Decision of 12 July 1984 on the admissibility of the application', *Decisions and Reports*, No. 39, pp. 58-70.

<sup>72</sup> *Bozano v France*, *supra* note 6.

<sup>73</sup> *Ibid*, para 60.

<sup>74</sup> Van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' 39 *International and Comparative Law Quarterly* (1990) 757, at 774; ECmHR (Plenary), *C v the Federal Republic of Germany*, Application No. 10893/84, 'Decision of 2 December 1985 on the admissibility of the application', *Decisions and Reports*, No. 45, pp. 198-204.

dissemination of propaganda for unconstitutional organizations.<sup>75</sup> Following his conviction, he fled to Belgium. Germany did not request the extradition of the applicant. In any event, such a request would have been rejected as the crimes for which he was sought were not extraditable offences under the German-Belgium agreement. He was subsequently arrested in Belgium, transported to the German border and handed over to German authorities. The German Court of Appeal confirmed a ruling of the lower court that the applicant had not presented sufficient evidence to establish that his removal from Belgium was carried out unlawfully at the instigation of the German authorities. A subsequent complaint to the Constitutional Court was rejected on the basis that the Constitution did not “prevent the German authorities from asking a foreign State to extradite a convicted person even though there existed no legal obligation for the State to extradite the person in question under an extradition treaty.”<sup>76</sup>

In relation to his submission to the ECtHR under Article 5 of the Convention, the Commission agreed with the German Constitutional Court that regardless of the fact that the offences for which the individual was convicted were non-extraditable under the applicable treaty, international law did not prevent the German authorities from seeking the transfer of the applicant.<sup>77</sup> The Commission made clear that it would not find a violation of the Convention in cases in which states cooperate in the expulsion of individuals:

There is nothing in the Convention to prevent a State from expelling a person to his home country even if criminal proceedings are pending against him in that country or if he has already been convicted in that country. Nor does the Convention prevent cooperation between the States concerned in matters of expulsion, provided that this does not interfere with any specific rights recognized in the Convention.<sup>78</sup>

As has been pointed out by Paulussen, the words of the Commission are “rather strange.”<sup>79</sup> Matters of expulsion are generally unilateral acts of a

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, at 201.

<sup>77</sup> *Ibid.*, at 203.

<sup>78</sup> *Ibid.*

<sup>79</sup> Paulussen, *Male Captus Bene Detentus: Surrendering Suspects to the International Criminal Court*, (2010), at 97-98

state outside the realm of state cooperation. The underlying rationale of expulsion or deportation is typically the ridding of an individual from a territory rather than the delivery of a suspect or fugitive to a designated state for the purpose of prosecution or punishment. It is interesting to note that Commission in *C* made a distinction between the case at hand and the circumstances of *Bozano*. In *Bozano*, the fact that expulsion of the applicant followed a determination that extradition was inadmissible tainted the subsequent immigration proceedings as *male fides* and lifted the veil on the deliberate circumvention of the extradition process, which in turn, was found to constitute a violation of the applicant's rights under Article 5 (1)(f).<sup>80</sup>

It is evident that the use of disguised or *de facto* extradition presents challenges to both the individual seeking vindication of their rights and courts attempting to decide on the conduct. Although inferences can be drawn from circumstances such as a prior refusal of extradition or the involvement of the state seeking transfer, establishing the facts and determining the rules violated have oftentimes proved unworkable. Ultimately, there is a heavy onus on the applicant to prove that immigration proceedings were used as a means of bypassing the formal extradition process.<sup>81</sup> The main safeguard available to those subject to the practice is the prohibition on *refoulement*. This principle is applicable to all transfers whether they are carried out pursuant to extradition or immigration procedures. Adherence to the rule ensures that an individual is not subjected to torture or other ill treatment upon return. Although this does not directly safeguard against the use of disguised extradition, it does ensure that the effects of the practice will not result in unfair treatment in the host state.

## **2.2 THE PRINCIPLE OF *NON REFOULEMENT***

Instances in which individuals have successfully argued that their deportation or exclusion constituted a disguised form of extradition have

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<sup>80</sup> *C v the Federal Republic of Germany*, *supra* note 74, at 203.

<sup>81</sup> *Bembenek v Ontario* (Minister of Employment and Immigration), Ontario Judgments: [1991] O.J. No. 2162.

been quite rare. In saying that, numerous judgments on the issue of *non refoulement* have been handed down by domestic and international courts. The principle of *non refoulement* is central to refugee protection and in practice, it represents the strongest safeguard in cases of disguised extradition. Under human rights and refugee law, individuals facing transfer through immigration procedures may forward claims if their return to the designated country would place them at risk of persecution, torture or ill treatment.

The prohibition against torture is recognized as a *jus cogens* rule of international law that cannot be derogated from.<sup>82</sup> The obligation that states refrain from transferring persons under their effective control to the custody of another state if the transfer would put the individual at a real risk of torture or cruel, inhuman or degrading treatment or punishment is explicitly provided for in Article 3 of the Convention Against Torture. It is implicit in Article 7 of the International Covenant on Civil and Political Rights. Article 33 of the 1951 Refugee Convention enumerates the rule but not in its non-derogable form.<sup>83</sup> A state has an obligation to ensure that its territory is not used to send any person to a country where there are “substantial grounds” for believing, or a “real risk”, that that person may be tortured. Article 33(1) prohibits states from transferring an individual to a country where his “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>84</sup> Article 33(2) excludes from the protection those “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>85</sup> There are no guidelines as to what constitutes a danger to the community and so it has been left to states to determine who falls into this category. In

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<sup>82</sup> Some authors consider the *non refoulement* rule to be a *jus cogens* norm. See Allain, ‘The *jus cogens* Nature of *non-refoulement*’, 13 *International Journal of Refugee Law* (2001) 533; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, ‘Judgment’, (10 December 1998), para. 156.

<sup>83</sup> Refugee Convention *supra* note 21.

<sup>84</sup> *Ibid*, Article 33(1).

<sup>85</sup> *Ibid*, Article 33(2).

the event that a state seeks to deport or exclude a specific individual at the request of another state, Article 33(2) provides a ground upon which the decision could be based. In saying that, courts have consistently held that this clause is to be construed narrowly, and even when applicable, individuals retain the protection against *refoulement* to the risk of torture and cruel treatment under international human rights law. In *Chahal*, the ECtHR recognized that protection under Article 3 is much broader than that afforded by the Refugee Convention.<sup>86</sup>

Article 6 of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life.<sup>87</sup> This provision, along with the general duty set out in Article 2 to respect and ensure the rights set out in the Covenant, impose an obligation on states not to transfer individuals to a risk of arbitrary deprivation of life.<sup>88</sup> This includes non-transfer to countries where extrajudicial execution will be carried out or the death penalty may be imposed in circumstances where basic procedural guarantees have not been observed. States that have abolished the death penalty cannot return individuals to states that retain it unless they first secure firm assurances that the transferee will not be subject to it.<sup>89</sup> The use of immigration control in lieu of extradition is usually motivated by a desire to prosecute or detain an individual in the requesting state. Interpreting the prohibition on *refoulement* to preclude return to countries where the death penalty may be imposed provides a fundamental safeguard to persons facing deportation or expulsion.

The ECtHR has addressed the issue of *non refoulement* in a number of cases. In the *Soering v. the United Kingdom*, the Court found for the first time that state responsibility could be engaged if it decided to extradite a person who risked being subjected to ill treatment in the requesting country.<sup>90</sup> It held that there would be a violation of Article 3 if the applicant

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<sup>86</sup> ECtHR, *Chahal v. The United Kingdom*, Application No. 22414/93, ‘Judgment and Merits’, 15 November 1996, at 30.

<sup>87</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 6.

<sup>88</sup> *Ibid.*, Article 2.

<sup>89</sup> ECtHR, *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989, para 98.

<sup>90</sup> *Ibid.*

were sent to the United States as there was a real risk that the death penalty would be imposed. The *Chahal* case concerned an order for the deportation to India of a Sikh separatist on national security grounds.<sup>91</sup> The Court's decision recognized the "immense difficulties States face [...] in protecting their communities from terrorist violence" but found that this did not trump the absolute prohibition on torture.<sup>92</sup> It opined that if substantial grounds are shown for believing that the individual would be at risk, his activities, "however undesirable or dangerous," cannot be a material consideration.<sup>93</sup> After a consideration of the conditions in India, the Court held that there would be a violation of Article 3 should the decision to deport to India be implemented. The reasoning of the Court has been consistently endorsed by subsequent judgments of the ECtHR. The ECtHR, whilst acknowledging the seriousness of terrorism and organized crime, has ruled that it is not possible to weigh the risk of ill treatment against the reasons put forward for the expulsion; Article 3 does not allow for derogation.<sup>94</sup>

The principle of *non refoulement* will not act as a bar to transfer in situations where the risk involved is not sufficient to trigger Article 3. An explicit threshold for determining when a risk will violate a state's obligations has not been put forward but the case law of the ECtHR indicates that conduct not amounting to torture may be sufficient. In *Chahal*, the Court did not distinguish between the various forms of ill treatment. The judgment stated that the "Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."<sup>95</sup> This is also the approach taken by the Human Rights Committee.<sup>96</sup> The ECtHR has found violations of Article 3 in situations involving return to a risk of torture, ill

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<sup>91</sup> *Chahal v United Kingdom*, *supra* note 86.

<sup>92</sup> *Ibid*, para 79.

<sup>93</sup> *Ibid*, para 149; Irrespective of behaviour (see, among other authorities, ECtHR, *Labita v. Italy*, Application No. 26772/95, 2000; ECtHR, *A.B. v. Russia*, Application No. 1439/06, 14 October 2010.

<sup>94</sup> ECtHR, *Saadi v Italy*, Application No. 37201/06, 'Judgment', 28 February 2008, para 138; *Chahal*, *supra* note 86, para 81

<sup>95</sup> Para 79-80; Similar passages can be found, for example, in ECtHR, *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, 2005; *Saadi v. Italy*- no distinction was made between torture and other forms of ill-treatment.

<sup>96</sup> HRC, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

treatment, the death penalty and most recently, denial of a fair trial. Not all treatment will warrant application of the principle. Determining the threshold depends on particular circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim.<sup>97</sup> In *Babar Ahmad and Others v. the United Kingdom*, conditions of detention in a “supermax” prison did not violate Article 3.<sup>98</sup> The applicants, who were the subjects of extradition requests made by the United States, alleged in particular that, if extradited and convicted in the United States, they would be at real risk of ill-treatment either as a result of conditions of detention at the United States’ Administrative Maximum Facility in Colorado (ADX Florence) or by the length of their possible sentences. It was held that the applicants had not demonstrated that there would be a real risk of treatment reaching the threshold of Article 3.

It is clear that in order to fall under Article 3, ill treatment must attain a minimum level of severity. This is an important assessment as although the principle of *non refoulement* is fundamental to ensuring the rights of the individual are not violated upon return, an overbroad application of the principle could restrict a state’s ability to exercise immigration control when the risk to the individual is not substantial. In order to remove the barrier posed by the rule whilst ensuring compliance with their human rights obligations, a system of obtaining diplomatic assurances when extraditing, deporting or expelling an individual has been adopted by a number of states.

### **2.3 DIPLOMATIC ASSURANCES**

The use of diplomatic assurances increased following the attacks on the

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<sup>97</sup> ECtHR, *Babar Ahmad and Others v. the United Kingdom*, Applications Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, ‘Judgment’, 10 April 2012, at 201 citing ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, at 162, and ECtHR, *Gäfgen v. Germany* Application No. 22978/05, 2010, at 88.

<sup>98</sup> *Ibid.*, *Babar Ahmad and Others v. the United Kingdom*.



World Trade Centre on September 11, 2001.<sup>99</sup> Amongst the states that have sought and accepted assurances regarding torture and ill treatment are Austria, Canada, the Netherlands, Sweden, Turkey, the United Kingdom and the United States.<sup>100</sup> Reliance on assurances has been a controversial issue especially with regard to transfer to states where there is evidence that torture is practiced. There have been instances in which such assurances have been received but torture and ill treatment have subsequently been alleged.<sup>101</sup> The ECtHR, a number of domestic courts and several international bodies have found assurances to be insufficient in determining whether to return an individual at risk of torture.<sup>102</sup> In his 2005 report, the Special Rapporteur on Torture suggested that any use of diplomatic assurances to counteract the threat of torture and ill treatment is impermissible:

It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated.<sup>103</sup>

The ECtHR has not stated outright that diplomatic assurances violate Article 3 of the Convention. It has instead “cautioned against reliance on

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<sup>99</sup> See *Amnesty International*, ‘Dangerous Deals Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture,’ EUR 01/012/2010, (2010).

<sup>100</sup> *Ibid.*

<sup>101</sup> For example, the case of Sami Ben Khemais Essid the details of which are set out in AI report *ibid.*, at 5.

<sup>102</sup> *Chahal v UK*, *supra* note 86, paras 80 and 105; ECtHR, *Ismoilov v Russia*, Application No. 2947/06, 24 April 2008, para 127; ECtHR, *Ryabikin v Russia*, Application No. 8320/04, 19 June 2008, para 119; *Saadi v Italy*, *supra* note 94, para 147; *Human Rights Watch*, ‘Empty Promises: Diplomatic Assurances against Torture No Safeguard Against Torture’, Vol. 16, No. 4 (D), (April 2004); HRC, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12; CAT, *Agiza v Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, para. 13.4; CAT, *Attia v Sweden*, Communication No. 199/2002, CAT/C/31/D/199/2002, 17 November 2003; International Commission of Jurists, ‘Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights’, (4 May 2009), at 167.

<sup>103</sup> Interim report of the Special Rapporteur on torture Manfred Nowak, A/60/316, (30 August 2005), para 51; The Special Rapporteur reiterated this view in his 2010 report, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC /13/39, (9 February 2010), para 67.

diplomatic assurances against torture from a state where torture is endemic or persistent.”<sup>104</sup> UN human rights bodies have set out minimum procedural rules governing the use of assurances against torture. Assurances that fall short of the threshold are considered violations of the sending state’s human rights obligations. According to the Human Rights Committee and the Committee Against Torture, there are three basic criteria for the use of assurances:

- (1) must be obtained using “clear” and established procedures.
- (2) must be subject to judicial review.
- (3) must be followed by effective post-return monitoring of the treatment of the individual returned subject to assurances.<sup>105</sup>

When dealing with countries that are known to systematically violate the Torture Convention, the Committee Against Torture has found that assurances may never be relied upon.<sup>106</sup> The Human Rights Committee has not taken such a hard line on the matter but it has indicated that the use of assurances in relation to such countries is unlikely to reduce the risk of torture upon return.

In *Mohammed Alzery v. Sweden*, the Human Rights Committee considered the removal of an Egyptian national to Egypt by Sweden, pursuant to diplomatic assurances that had been obtained from the Egyptian government.<sup>107</sup> On the merits of the case, the Committee found the transfer of the applicant amounted to a breach of Article 7 of the Covenant. It acknowledged that diplomatic assurances were a relevant fact to be considered in determining whether a real risk of proscribed ill treatment exists. In the case before it, the Committee noted that the assurances given contained no mechanism for monitoring their enforcement or implementation. In light of this, it held that the assurances procured were insufficient to eliminate the risk of ill treatment to a level consistent with the requirements of Article 7. This can be taken to mean that transfers to

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<sup>104</sup> ECtHR, *Ismoilov v. Russia*, *ibid*, para 127.

<sup>105</sup> Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: United States of America’, (2006), para. 10.

<sup>106</sup> *Ibid*, para 13.

<sup>107</sup> HRC, *Mohammed Alzery v. Sweden*, Communication No. CCPR/C/88/D/1416/2005, (10 November 2006).

countries known to engage in torture or other forms ill treatment by states party to the International Covenant on Civil and Political Rights will always be found impermissible.

The recent judgment of the ECtHR in the *Othman* case illustrates that under certain circumstances, assurances will satisfy a state's obligations under the Convention.<sup>108</sup> The applicant, a Jordanian national, was granted asylum in the United Kingdom in 1993. He was served with a notice of intention to deport. Meanwhile, in 1999 and 2000 the applicant was convicted *in absentia* in Jordan for conspiracy to carry out bombings. The evidence against the applicant that led to the conviction was based on statements of two co-defendants who had subsequently complained of torture. In 2005, the United Kingdom and Jordanian Governments signed a Memorandum of Understanding setting out a series of assurances of compliance with international human rights standards to be adhered to when an individual was returned from one state to the other. The applicant lodged an appeal to the United Kingdom's Special Immigration Appeals Commission claiming that if deported, he would be at risk of torture, lengthy pre-trial detention and a grossly unfair trial based on evidence obtained through torture. The appeal was dismissed. The Commission found that the diplomatic assurances would protect against torture and that the risk that evidence obtained by torture would be used in the criminal proceedings in Jordan would not amount to a flagrant denial of justice. An application was lodged with the ECtHR in 2009. Relying on Articles 3, 5, 6 and 13 of the Convention, the applicant alleged that he would be at a real risk of ill treatment and a flagrant denial of justice if deported to Jordan.<sup>109</sup>

Considering whether Article 3 would be violated by his return, the Court noted the reports of UN bodies and human rights organizations showing that torture was routinely used against suspected Islamist terrorists and that the courts or any other body in Jordan provided no protection against it. The Court went on to consider whether the diplomatic assurances

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<sup>108</sup> ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Application No. 8139/09, 'Judgment', 17 January 2012.

<sup>109</sup> *Ibid.*

obtained from the Jordanian Government were sufficient to protect Mr. Othman. It noted that the agreement was specific, comprehensive and given in good faith by the highest levels of the Jordanian Government. It held that there would be no risk of ill treatment and no violation of Article 3 if he were deported to Jordan. In relation to his claim under Article 6, it found that in the absence of any assurance by Jordan that the torture evidence would not be used against Mr. Othman, deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of the provision.<sup>110</sup> Following ratification of the Memorandum of Understanding, which included assurances that Othman would be given a fair trial and that evidence obtained through torture would not be used against him, Othman agreed to drop his legal challenge. Deportation proceedings were recommenced and after an eight-year fight against deportation, he was returned to Jordan in May 2013.

The principle of *non refoulement* acts as a safeguard against the return of an individual to a country where there is a risk of torture or ill treatment. Although the principle does not counter the use of immigration procedures in lieu of formal extradition, it ensures that certain baseline protections are maintained regardless of the process by which the individual is transferred. The increased reliance on diplomatic assurances should not be seen as jeopardizing the rights of the individual subject to immigration procedures. The use of such agreements may facilitate the transfer of individuals to states known to torture but, provided standards are strictly adhered to and post monitoring mechanisms are put in place, the system is a useful tool. As well as satisfying the interests of states in enforcing immigration control, the rights and protections of those facing deportation or expulsion are safeguarded.

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<sup>110</sup> *Ibid.*

## CONCLUSION

All countries have immigration laws prescribing conditions for the entry of foreign nationals. The right to exclude non-nationals is an inherent component of state sovereignty. The frequency with which immigration procedures are employed in lieu of extradition is impossible to calculate. In the majority of cases, the fact that exclusion or deportation was instituted pursuant to a request lodged by a state seeking to prosecute a specific individual may never become known. Diplomatic exchanges may be the only evidence of such arrangements and it is unlikely that a state will willingly disclose the existence or content of such communications. Although its rate of use cannot be estimated, the fact that such operations do in fact take place is beyond doubt. Some instances are limited to the furnishing of intelligence about an unauthorized individual to the authorities of the state in which that individual is present or seeking entry. Other operations extend to tacit cooperation between the authorities of the states involved in relation to the location and transfer of the individual. The burden of proving bad faith is extremely high and the fact that the authorities of the states involved worked together in deporting or excluding the individual will not in itself establish *male fides*; “[w]orking cooperation between officials, whose separate duties lead legitimately to the same practical result, is no evidence of bad faith.”<sup>111</sup> In cases where immigration procedures follow the refusal of an extradition request, the evidence of *male fides* may be too strong to ignore.<sup>112</sup>

Extradition and immigration are regulated and overseen by separate organs of the state. The rules and procedures applicable are different. The independence between the two, coupled with the substantial amount of discretion vested in those administering immigration control, provides an opportunity for authorities to exploit the gap between the two processes.<sup>113</sup> Deportation, when used as a disguised form of extradition, deprives the

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<sup>111</sup> *Bembenek v Ontario*, *supra* note 80, at 58.

<sup>112</sup> *Bozano v France*, *supra* note 6.

<sup>113</sup> *Bassiouni*, *supra* note 10, at 184.

deportee of the rights to which he would be entitled to had he been subject to extradition. Such protections include adherence to the principle of specialty, the political offence exception and dual criminality. As with the other forms of extraterritorial abduction, disguised or de facto extradition circumvents the intent of states that enter into extradition treaties. This runs counter to principles of good faith that underlie international law and treaty interpretation.

Many states have undertaken cooperative measures to assist with immigration control. In December 2011, Ireland signed an agreement with the United Kingdom to promote the exchange of information on fingerprinting, biometrics and biographical details as part of the visa issuing process.<sup>114</sup> According to the United Kingdom Border Agency, the agreement is likely to create “considerable savings” for both countries on removing foreign nationals with no right to stay.<sup>115</sup> A similar instrument was signed by the United States and Canada in December 2012.<sup>116</sup> These measures evince a shift towards enhanced cooperation in immigration matters. A procedure by which information regarding non-nationals can be requested and shared opens the channels of communication and in practice, could facilitate the use of disguised extradition. Formalizing the exchange of information regarding non-nationals normalizes the transmission of data that could have the effect of influencing the decisions of immigration authorities. This is not saying that such developments are negative; enhanced cooperation is beneficial to the suppression of crime and the apprehension of suspects.

Although the disguised nature of this form of extraterritorial abduction may render it difficult to regulate, it is possible to strengthen existing

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<sup>114</sup> Press Release, *Ireland- UK Accord to Further Secure the Common Travel Area*, Department of Justice and Equality, Irish Naturalization and Immigration Service, available at: [www.inis.gov.ie/en/INIS/Pages/IRELAND UK%20ACCORD%20TO%20FURTHER%20SECURE%20THE%20COMMON%20TRAVEL%20AREA](http://www.inis.gov.ie/en/INIS/Pages/IRELAND%20ACCORD%20TO%20FURTHER%20SECURE%20THE%20COMMON%20TRAVEL%20AREA).

<sup>115</sup>Johnson, ‘Crackdown on Illegal Immigrants as Ireland and Britain Agree to Share Information’, (20 December 2001) *Irish Independent*, available at: <http://www.independent.ie/irish-news/crackdown-on-illegal-immigrants-as-ireland-and-britain-agree-to-share-information-26803886.html>.

<sup>116</sup> U.S.-Canada Visa and Immigration Information Sharing Agreement, (December 2012).

mechanisms to ensure a minimum standard of protection is ensured to all individuals transferred between states. The principle of *non refoulement* represents the strongest protection in countering the negative effects of disguised or de facto extradition. Although the principle does not directly counter the use of immigration procedures in lieu of formal extradition, it ensures that certain baseline protections are maintained regardless of the process by which the individual is transferred. An additional mechanism that can be strengthened in order to safeguard the rights of the abductee is the authority of the judiciary to review the enforcement of immigration policy. Closing the gap between these two branches would promote transparency and accountability and dissuade the circumvention of extradition procedures.

**CHAPTER 5**  
**LEGAL CONSEQUENCES OF EXTRATERRITORIAL**  
**ABDUCTION**

**INTRODUCTION**

This Chapter addresses legal responsibility for the different forms of irregular apprehension presented and discussed in Chapters 2, 3 and 4. Luring, kidnapping and disguised extradition are three categories into which extraterritorial abduction can be divided; the distinction being based on the modalities of the operation. The use of these categories facilitated the delineation of the international legal principles, rules and rights triggered by extraterritorial abduction and more generally, the identification of the lawfulness of the practices under the framework of international law. The objective of an extraterritorial abduction is typically the trial of an individual suspected of having committed a crime in the apprehending state. Having established *what* is violated by the practice, the present Chapter will consider the legal consequences of extraterritorial abduction. This analysis will examine the effect that irregularities in the method of surrender have on the subsequent trial, to whom responsibility for violations associated with it attaches, and the remedies available to injured states and individuals.

In order to understand the practical consequences of extraterritorial abduction, section 1 will begin by surveying the way in which domestic and international courts have approached the issue. The extent to which the practice affects the subsequent trial and the factors taken into account by the judiciary will be considered. As will be seen, the doctrine of *male captus bene detentus*, meaning “wrongfully captured, properly detained,” is no longer the dominant approach of domestic and international courts. Moving away from procedural issues, the discussion will go on to consider



the allocation of state and individual responsibility for unlawful extraterritorial abductions.

Section 2 will delineate the categories of individuals that carry out such operations and examine the legal regime that attaches to each. Private individuals rather than state agents sometimes carry out extraterritorial abductions. The apprehension of Alvarez Machain in Mexico, Fawaz Yunis in international waters, Sidney Jaffe in Canada and Argoud in Germany were facilitated by the acts of private agents. International treaties and conventions are signed by states and addressed to states. Pursuant to this, the duty to respect territorial sovereignty and the obligation to guarantee human rights to those under its control belong to states. This raises a question as to whether the acts of an individual can constitute a violation of international law and under what circumstances the conduct will be attributed to the state.

Having addressed the issues surrounding the allocation of responsibility, the final section will consider the system of remedies and reparations available to injured states and abductees. Circumstances precluding responsibility, in particular the consent of the state from which the individual is abducted, will also be addressed. The difficulties encountered by international courts and tribunals in securing the presence of indictees highlight the continued importance of considering the consequences of extraterritorial abduction on the subsequent trial. For example, of the 36 individuals indicted by the International Criminal Court, ten remain at large. In the case of the Special Tribunal for Lebanon which opened in 2009, trials are due to commence in January 2014 but to date, none of the indictees are in the Tribunal's custody. As will be seen in section 1.2, in the context of these courts and tribunals, the gravity of the crimes for which the suspect is charged may lead to a situation whereby extraterritorial abduction, although recognized as a violation of international law, will nevertheless be treated as having no bearing on the jurisdiction of the court before which the abductee is brought.

## 1. THE JURISDICTION OF THE COURT

Previous Chapters have looked at specific violations associated with extraterritorial abduction and the way in which these violations have been interpreted by judicial organs. This section will examine the way in which national and international courts and tribunals have approached issues relating to the irregular manner by which an individual has been brought before it. The analysis will focus on the effect extraterritorial abduction has on the proceedings. Pursuant to the maxim *male captus bene detentus*, courts have been willing to exercise jurisdiction over individuals regardless of the method used to bring such persons before it.<sup>1</sup> This concept is based on the idea that “a court can properly detain a person [...] even if that person was brought into the power of that court in an irregular way.”<sup>2</sup> The District Court of Israel in the Eichmann case acknowledged the existence of the doctrine in the following words:

[t]he Courts in England, the United States and Israel have constantly held that the circumstances of the arrest and the mode of bringing of the accused into the territory of the State have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances.<sup>3</sup>

No standard rules or concrete patterns for determining when a court should divest itself of jurisdiction have emerged. What can be discerned from the case law is some of the factors that have influenced courts in deciding *male captus* cases. In the context of serious crimes, the gravity of the offence and the desire to submit the individual to justice will oftentimes outweigh irregularities in the surrender.

### 1.1. DOMESTIC COURTS

The majority of discussions of *male captus bene detentus* begin with a consideration of the *Ker-Frisbie* doctrine. The doctrine, which emerged

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<sup>1</sup> For a discussion on the origin of the maxim see Paulussen, *Male Captus Bene Detentus? Surrendering Suspects to the international Criminal Court*, (2010), at 20-28.

<sup>2</sup> *Ibid*, at 5.

<sup>3</sup> District Court of Jerusalem, *The Attorney General of the Government of Israel v. Eichmann*, ‘Judgment’, 12 December 1961, Criminal Case No. 40/61(36 *International Law Reports* 1968 pp. 18-276).

from the rulings of two cases in the United States, supports the exercise of jurisdiction over a defendant regardless of the manner by which he was brought before the court.<sup>4</sup> The first case, *Ker v Illinois* involved the forcible abduction of an American citizen from Peru.<sup>5</sup> Rejecting the argument that the manner of arrest and surrender deprived Ker of due process of the law, the United States Supreme Court affirmed the conviction entered by the lower court.<sup>6</sup> It found that the trial met the necessary due process requirements and that because the abductors acted without the authority of the United States, Ker could not invoke the protection of the extradition treaty.<sup>7</sup> The second case that makes up the doctrine is *Frisbie v. Collins*.<sup>8</sup> In this case, the defendant was kidnapped in Illinois and brought before a Michigan court for trial. In his habeas corpus petition, Collins argued that he should be released because of the forcible manner by which he came before the court. Refusing the argument, the court stated, “[t]his Court has never departed from the rule [...] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction.”<sup>9</sup> The main line of reasoning espoused by the court was that Frisbie’s due process rights had not been violated as the requirements that he be given fair notice of the charges and receive a fair trial had been satisfied. It must be noted that this case did not involve an extraterritorial abduction; the defendant was transferred across a state border.<sup>10</sup> The dicta and the resulting *Ker-Frisbie* doctrine are nevertheless relevant, as subsequent cases involving extraterritorial abduction have relied upon them.<sup>11</sup>

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<sup>4</sup> US Supreme Court, *Ker v. Illinois*, 6 December 1886, (119 U.S. 436); US Supreme Court, *Frisbie v. Collins*, 10 March 1952, No. 331 (342 US 519).

<sup>5</sup> *Ibid*, *Ker v Illinois*.

<sup>6</sup> *Ibid*, at 438.

<sup>7</sup> *Ibid*, at 441.

<sup>8</sup> *Frisbie v Collins*, *supra* note 4.

<sup>9</sup> *Ibid*, at 522.

<sup>10</sup> See US Supreme Court, *Larcelles v Georgia*, 3 April 1986 (148 US 537), the court suggested that *Ker* did not apply to international rendition.

<sup>11</sup> *United States v Crews*, 25 March 1980, No. 78-777, (445 US 463); US Supreme Court, *Gerstein v Pugh*, 18 February 1975, No. 73-477, (420 US 103); US Court of Appeals, *United States v Cotten*, (471 F.2d 744), (9<sup>th</sup> Cir. 1973), cert. Denied, (411 US 936) (1974).

Until the *Toscanino* case, the doctrine went largely unchallenged in the United States.<sup>12</sup> In 1974, an Italian citizen alleged that before being handed over to the United States Circuit Court, he had been forcibly apprehended in Uruguay by agents of the United States and taken to Brazil where he was interrogated and subjected to torture.<sup>13</sup> *Toscanino*'s argument that the circumstances of his arrest and transfer rendered the exercise of jurisdiction unlawful was rejected by the District Court.<sup>14</sup> On appeal, the Court noted that the *Ker-Frisbie* doctrine's interpretation of due process rewarded "police brutality and lawlessness"<sup>15</sup> Overturning the decision of the lower Court, Judge Mansfield stated:

[W]e view due process as now requiring 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.<sup>16</sup>

Whereas the Courts in *Ker* and *Frisbie*, considered the due process requirement satisfied by the fairness of the trial itself, the judgment in *Toscanino* extended its scope to include issues surrounding the pretrial treatment of the accused. The Court acknowledged that an individual brought before it by way of extraterritorial abduction can amount to a denial of due process.<sup>17</sup> The judgment marked a shift away from the *Ker-Frisbie* doctrine but its precedential value is relatively limited. The judgment distinguished the case before it from *Ker* and *Frisbie* on the basis that the circumstances of *Toscanino*'s apprehension involved breaches of the constitution and international treaties.<sup>18</sup> Subsequent decisions narrowed the application of *Toscanino* to cases where the abductee established evidence of torture.<sup>19</sup>

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<sup>12</sup> US Court of Appeals, Eastern District of New York, *United States v Toscanino*, 10 July 1975, No. 73 CR 194 (398 F. Supp. 916).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at 272.

<sup>16</sup> *Ibid.*, at 275.

<sup>17</sup> *Ibid.*

<sup>18</sup> See concurring opinion of Judge Anderson- violation of international treaties "indicative of the denial of due process." (Anderson, J. Concurring), *Ibid.*, at 282.

<sup>19</sup> US Court of Appeals, *United States ex rel. Lujan v. Gengler*, 8 January 1975, No. 449, Docket 74-2084 (510 F.2d 62); US District Court, District of Columbia *United States v. Yunis*, 23 February 1988, Crim. No. 87- 0377 (681 F.Supp. 909), p. 919.

In *United States ex rel. Lujan v. Gengler* for instance, the Court of Appeals dismissed a motion challenging the manner by which the defendant was brought before it.<sup>20</sup> The Court did not see fit to apply the rule in *Toscanino* as the irregularities alleged by the accused were not as serious: “[l]acking from Lujan’s petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process.”<sup>21</sup> The Court in *Lujan* clarified its position on the issue in the following words:

[I]n 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.<sup>22</sup>

It is clear from this that the United States Court of Appeals, whilst acknowledging that the *Ker-Frisbie* doctrine should not be applied uniformly to situations in which an accused alleges extraterritorial abduction, *Toscanino* did not displace it. Rather than developing a new standard for the determination of such cases, *Toscanino* instead created an exception.<sup>23</sup> Michell identifies three preconditions to the application of the *Toscanino* rule against the exercise of jurisdiction: (1) the abduction must amount to “grossly cruel and unusual barbarities” or “shock the conscience”; (2) it must be sponsored by the state; (3) the injured state must protest the abduction.<sup>24</sup> What emerges from the decision is the rule that unless the abduction is carried out by state agents, accompanied by serious mistreatment and followed by protest from the injured state, the trial can go ahead.<sup>25</sup>

The *Alvarez-Machain* decision is the most well known case supporting

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<sup>20</sup> *Ibid*, *Lujan*.

<sup>21</sup> *Ibid*, at 66.

<sup>22</sup> *Ibid*, at 65.

<sup>23</sup> See statement in *Yunis* judgment, *supra* note 19, at 919.

<sup>24</sup> See Michell, ‘English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After *Alvarez-Machain*’, 29 *Cornell International Law Journal* (1996) 383, at 403.

<sup>25</sup> *Yunis*, *supra* note 19, at 919.

the maxim of *male captus bene detentus*.<sup>26</sup> A Mexican physician was abducted from Mexico and transferred to the United States pursuant to an operation executed by Mexican agents and officials of the Drug Enforcement Administration. It was alleged that the defendant had been involved in the kidnapping, torture and murder of an agent of the United States' Drug Enforcement Administration. Alvarez-Machain argued that the District Court had no jurisdiction to try him.<sup>27</sup> He claimed that his abduction constituted outrageous governmental conduct that violated the extradition treaty between the United States and Mexico. The Court held that the circumstances did not warrant application of the *Toscanino* exception and that the violation of the United States-Mexico Extradition Treaty placed it beyond the scope of the *Ker-Frisbie* doctrine.<sup>28</sup> Noting that Mexico itself was the only party that could enforce the violation of the Extradition Treaty, it nevertheless found that Mexico's express protest and the responsibility of the United States was sufficient to afford the defendant the right to raise the breach.<sup>29</sup> The Court upheld Alvarez-Machain's motion to dismiss, holding that it lacked jurisdiction to try him. An order for his repatriation to Mexico was submitted and subsequently affirmed by the Ninth Circuit.<sup>30</sup>

The United States Supreme Court reversed the ruling.<sup>31</sup> Its decision pivoted on whether Alvarez-Machain's abduction from Mexico violated the 1978 Extradition Treaty.<sup>32</sup> It reasoned that if the treaty did not prohibit abductions, the *Ker-Frisbie* doctrine attached and it would not have to inquire into how the defendant came before it.<sup>33</sup> If, on the other hand, the treaty did prohibit forcible abductions, proceedings against the defendant

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<sup>26</sup> US District Court, Central District of California, *Caro-Quintero*, (745 F. Supp. 599); US Supreme Court, *United States v. Alvarez-Machain*, 15 June 1992, No. 91-712, (504 U.S. 655).

<sup>27</sup> *Ibid*, at 658.

<sup>28</sup> *Ibid*, at 605-606

<sup>29</sup> *Ibid*, at 609.

<sup>30</sup> US Court of Appeals, *Alvarez-Machain v United States*, 1991, (946 F.2d 1466).

<sup>31</sup> *Alvarez-Machain*, Supreme Court, *supra* note 24.

<sup>32</sup> Treaty of Extradition Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mexico, 31 U.S.T. 5059.

<sup>33</sup> *Alvarez-Machain v United States*, *supra* note 26, at 670.

would have to be dismissed.<sup>34</sup> The majority considered the argument put forward by Machain that the Treaty should be interpreted in light of international law.<sup>35</sup> In doing so, it examined whether the Extradition Treaty should be read to include an implied prohibition on prosecution where the individual is brought before the court by methods other than those envisaged in the instrument. The majority, while acknowledging that abduction may be in violation of general international law principles, found that it was not in violation of the Treaty and therefore, did not prohibit the continuance of the trial. It suggested that difficulties arising between the states involved should be resolved by diplomatic channels rather than by the judiciary.<sup>36</sup> In limiting itself to an examination of the wording of the Treaty, the Supreme Court acted contrary to the principle of good faith that underlies international law; a point averred to by the dissent. Lord Stevens noted that the “manifest scope and object of the treaty itself, plainly imply a mutual undertaking to respect the territorial integrity of the contracting party”.<sup>37</sup> Having determined that the extradition treaty did not prohibit forcible abductions, the court in *Alvarez-Machain* applied *Ker-Frisbie* holding that it “need not inquire as to how the respondent came before it.”<sup>38</sup> The case was remanded to the District Court.<sup>39</sup>

The majority opinion appears to stand for the proposition that in order for jurisdiction to be divested, the treaty in place must explicitly state that citizens of a signatory will not abduct citizens of the other signatory.<sup>40</sup> Some courts continue to follow the doctrine of *male captus bene detentus* on the basis that, irregular apprehension does not affect the fairness of the trial itself, the interests of justice demands the continuation of the proceedings and issues related to extraterritorial abduction of an individual

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<sup>34</sup> Relying on ruling in *United States v Rauscher* to allow an individual to raise breaches of an extradition treaty as a barrier to prosecution, US Supreme Court, *United States v Rauscher*, 6 December 1886, (119 U.S. 407).

<sup>35</sup> *Alvarez-Machain*, *supra* note 26, at 666

<sup>36</sup> *Ibid*, at 669

<sup>37</sup> *Ibid*, at 675

<sup>38</sup> *Ibid* at 662-666.

<sup>39</sup> Charges against the defendant were later dropped for lack of evidence, *see* Seth Mydans, ‘Judge Clears Mexican in Agent’s Killing’, *New York Times*, (15 December 1992), at A20.

<sup>40</sup> US Court of Appeals, *United States v Noriega*, 7 July 1997, Nos. 92-4687, 96-4471 (117 F.3d 1206), p. 1213.

should be resolved by diplomatic channels.<sup>41</sup> It is understandable, especially in situations involving serious crimes, that there is a strong interest in the continuation of proceedings. In *R v Latif*, the House of Lords described two competing interests that must be weighed when determining whether proceedings should continue:

If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weakness of both extreme positions leaves only one principled solution.<sup>42</sup>

The solution envisioned by Lord Steyn was for the court to use its discretion to balance the public interest in ensuring that those charged with grave crimes should be tried against the public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.<sup>43</sup> Applying this to the case before him, Lord Steyn found that applicants submission that the judge had erred in refusing to stay the proceedings had to be rejected.<sup>44</sup>

Although the decision in *Alvarez-Machain* continues to be applied in some *male captus* cases and in 1996 was considered the “leading U.S. case on forcible abduction by government agents,” it has been criticized by a plethora of authorities from academic, judicial and executive fields.<sup>45</sup> In 1992, the UN Working Group on Arbitrary Detention initiated an examination of the abduction of Machain.<sup>46</sup> Noting the obligation set out in Article 31 of the Vienna Convention, it stated, “the object and purpose of the Treaty, and an analysis of the context, led to the unquestionable conclusion that the abduction for the purpose of bringing someone in

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<sup>41</sup> Paul Michell, *supra* note 24, at 392.

<sup>42</sup> House of Lords, *Regina v. Latif*; *Regina v. Shazad*, 18 January 1996, 1 W.L.R. 104-117 (1996), at 112-113.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, at 113.

<sup>45</sup> Michell, *supra* note 24, at 404; Followed in US Court of Appeals, *United States v Chapa- Garza*, 1 March 2001, (62 F.3d) at 120; Commission on Human Rights ‘Report of the UN Working Group on Arbitrary Detention’, 50<sup>th</sup> Session, Agenda Item 10, E/CN.4/1994/27 (1993); OAS Inter-American Juridical Committee, ‘Legal Opinion on the Decision of the Supreme Court of the United States’, (15 August 1992), Rio de Janeiro, 4 *Criminal Law Forum* (1993) 119, at 125.

<sup>46</sup> *Ibid.*, Report on Arbitrary Detention.



Mexico or in the United States to a court of the requesting party is a breach of the 1978 Treaty.<sup>47</sup> The Inter-American Juridical Committee made the same observation and underscored the incompatibility of abduction with the right to due process “to which every person is entitled, no matter how serious the crime they are accused of [...]”.<sup>48</sup>

The House of Lords in the *Bennett* case rejected the *male captus bene detentus* rule.<sup>49</sup> The English Court held that it had the discretion to refuse to try a case “upon the grounds that it would be an abuse of process to do so.”<sup>50</sup> In exercising that discretion, the House of Lords opined that it had the “power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.”<sup>51</sup> This reasoning was based on the following considerations: (1) that a court should not countenance an executive’s abuse of process, (2) that the extradition procedure was laid out by statute, and (3) that Bennett’s liberty was impermissibly infringed. By extending the abuse of process doctrine to encompass pre-trial treatment and acknowledging the authority of the judiciary to examine the conduct of the executive, the decision stands as a welcome repudiation of the *male captus bene detentus* principle.

The discretion of the court to inquire into the manner by which the individual was brought before in determining whether there was an abuse of process was also acknowledged by the New South Wales Court of Appeal in *Levinge v Custodial Service* and the South African Court in *State v Ebrahim*.<sup>52</sup> Although there is support for the proposition that a court can stay proceedings when pretrial conduct amounts to an abuse of process, it is unclear what aspects will be taken into account in deciding this. In his

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<sup>47</sup> *Ibid.*, at 138.

<sup>48</sup> OAS Legal Opinion, *supra* note 45, at 125.

<sup>49</sup> House of Lords, *Regina v Horseferry Road Magistrates Court (Ex parte Bennett)*, 24 June 1993, (1993) *All England Law Reports* 138.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> New South Wales Court of Appeal, *Levinge v Director of Custodial Services, Department of Corrective Services*, 23 July 1987, 89 *FLR* 140-143; Supreme Court of South Africa, *State v Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992) pp. 888-899.

commentary on the *Bennett* case, Choo predicts that the following factors will be taken into consideration:

- (i) whether the illegal extradition of the accused was accompanied by physical violence (if so, this would weigh heavily in favor of a stay); (ii) whether the police were acting in circumstances of urgency (if so, this would weigh against a stay; and (iii) the seriousness of the offence with which the accused is charged (the more serious the offence, the less likely the court would be to stay the proceedings).<sup>53</sup>

The last point enumerated by Choo, which relates to the seriousness of the crime, is of particular relevance in the context of international courts and tribunals. Those brought before these institutions are accused of grave offences and practice has shown that securing the apprehension of indictees can prove challenging. If the gravity of the offence is a factor to be considered in determining whether a trial should proceed, it is unlikely that absent a showing of misconduct rising to the level of the *Toscanino* exception, the balance would fall in favor of an individual arguing irregularities in the method of his transfer. The approach of international courts and tribunals will be considered in the next section.

In the domestic realm, courts have examined the seriousness of the offence for which the individual is charged in determining whether there has been an abuse of process. In the cases of *In Re Schmidt*,<sup>54</sup> *R v Latif*<sup>55</sup> and *Somchai Liangsiriprasert v Government of the United States of America*,<sup>56</sup> the courts were confronted with the issue as to whether the luring of an individual charged with serious drug offences constituted an abuse of process. All three courts considered the gravity of the crimes involved and rejected the claimant's argument. In *Liangsiriprasert*, Lord Griffiths reasoned:

As to the suggestion that is oppressive or an abuse of process the short answer is that international crime has to be fought with international cooperation between law enforcement agencies [...] If the courts were to

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<sup>53</sup> Andrew L.-T. Choo, 'International Kidnapping, Disguised Extradition and Abuse of Process' 57 *The Modern Law Review* (1994), 626, at 631.

<sup>54</sup> House of Lords, *In Re Schmidt*, 30 June 1994, (1995) 1 A.C. 339 (Decision of the Divisional Court of the Queen's Bench Division: pp. 342-362. Decision of the House of Lords: pp. 362).

<sup>55</sup> *Latif*, *supra* note 42.

<sup>56</sup> Privy Council, *Somchai Liangsiriprasert v United States Government*, [1990] 2 All ER 866.

regard the penetration of a drug dealing organization by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process it would indeed be a red letter day for drug barons.<sup>57</sup>

All of these cases involved luring operations. As was discussed in Chapter 3, this method of apprehension is less objectionable than extraterritorial kidnapping as physical coercion is not used. If the applicants in these cases had been subjected to kidnapping, the decisions may have been different. In saying that, disguised extradition, which like luring does not involve physical coercion, has been found to warrant a subsequent prosecution unlawful. *R v Mullen* involved the disguised extradition of a suspect accused of facilitating an attempted bombing campaign in the United Kingdom.<sup>58</sup> Justice Rose recognized that account had to be taken of the nature of the offences but at the same time, considerable weight must be attached to the need to discourage unlawful deportation; a process it referred to as “a blatant and extreme failure to adhere to the rule of law”.<sup>59</sup> The English court held that the disguised extradition constituted an abuse of process that would have properly justified a stay of proceedings.<sup>60</sup>

A consistent formula for deciding whether to stay proceedings where extraterritorial abduction is alleged does not emerge from the case law. The *male captus bene detentus* principle continues to be applied in some instances but it is questionable whether it is still the dominant approach. Application of the principle relies on adherence to the non-inquiry rule and a restricted interpretation of a fair trial. A number of cases demonstrate a willingness to exercise discretion in inquiring into the manner by which the individual was brought before it. The expansion of the abuse of process doctrine to include pretrial treatment is to be welcomed. Not only does it contribute to the fairness of the proceedings but it also reduces the incentive to resort to unlawful methods of apprehension by state agents.

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<sup>57</sup> *Ibid*, at 535-536.

<sup>58</sup> Court of Appeal, Criminal Division, *Regina v. Mullen*, 4 February 1999, (2000) Q.B. 520.

<sup>59</sup> *Ibid*, (Rose LJ for the Court).

<sup>60</sup> *Ibid*.

In summary, a survey of the domestic case law demonstrates that courts have jurisdiction to continue the trial but they will exercise their discretion to divest themselves of that jurisdiction if the manner by which the individual was brought before it is so serious that to continue the proceedings would constitute an abuse of process. It can be discerned from the case law that the reasons for divestiture of jurisdiction in situations of extraterritorial abduction relate to the safeguarding of the rule of law;<sup>61</sup> the desire to avoid unfairness to the accused;<sup>62</sup> to ensure confidence and respect for the administration of justice;<sup>63</sup> to discourage breaches of state sovereignty<sup>64</sup> and to check the authority of the executive branch.<sup>65</sup>

Although consideration of pretrial conduct may be looked on as a shift away from *male captus bene detentus*, having investigated the pretrial aspects of the case, many courts have gone on to hold that the extraterritorial abduction is not serious enough to warrant a stay of proceedings. Such decisions generally pivot on balancing the gravity of the offences against the alleged abduction. This balancing exercise gives the courts a broad discretion in deciding whether to stay proceedings.<sup>66</sup> Flexibility is necessary as the circumstances of each case will differ in relation to the offences of which the individual is suspected and the degree of misconduct involved in the apprehension. Although it could be argued that a finding of extraterritorial abduction should result in the dismissal of the case *ab initio*, applying this approach across the board would have disproportionate results. This is especially true in the context of international crimes where strong arguments can be made for the continuation of the trial. International courts and tribunals have been confronted with *male captus* situations. As will be discussed in the

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<sup>61</sup> *State v Ebrahim*, *supra* note 52, at 442.

<sup>62</sup> *Ibid.*

<sup>63</sup> *State v Beahan* 1992 (1) SACR 307 (A) p.317.

<sup>64</sup> *Ebrahim supra* note 52, at 442.

<sup>65</sup> *Bennet, supra* note 49, at 130.

<sup>66</sup> Endorsed in *Levinge supra* note 52, at 151; Al- Moyad- German Federal Constitutional Court: In the proceedings on the Constitutional Complaint of Mr. AL-M., and his Motion for a Temporary Injunction (Bundesverfassungsgericht, Order of the Second Senate of 5 November 2003, 2 B v r 1506/03, B. I., para 3 b), 43 *International Legal Materials* (2004), p. 785; Court of Cassation (Criminal Chamber), *Barbie*, 6 October 1983, *International Law Reports*, Vol. 78 (1988), p. 130.

following section, the gravity of the crimes alleged has weighed heavily in favor of the continuation of the trial.

## 1.2. INTERNATIONAL COURTS

The apprehension of suspected international criminals is one of the most challenging obstacles in securing international criminal justice. One author has stated:

[t]he arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials, no development of the law by the courts; and ultimately, no international justice.<sup>67</sup>

Apprehension can be particularly problematic for international criminal courts and tribunals.<sup>68</sup> The inability of the *ad hoc* Tribunals and the International Criminal Court to hold trials *in absentia* heightens the necessity to secure the presence of the accused before it and in turn, increases reliance upon national jurisdictions.<sup>69</sup> Unlike national jurisdictions, these institutions do not have an associated police force and so the arrest of suspects is largely dependent upon the cooperation of states and other forces.<sup>70</sup>

The Rome Statute of the International Criminal Court distinguishes between states that are a party to it and those that are not. The obligation to cooperate is applicable only to the former. Article 86 contains a general obligation to “cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court”.<sup>71</sup> In many instances, the surrender regime has resulted in the timely appearance of

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<sup>67</sup> Gavin Ruxton, ‘Present and Future Record of Arrest War Criminals; the View of the Public Prosecutor of the ICTY’, in W.A.M. van Dijk and J.L. Hovens (eds), *Arresting War Criminals*, (2001), at 19.

<sup>68</sup> See Cedric Ryngaert, ‘The International Prosecutor: Arrest and Detention’, *Leaven Centre for Global Governance*, Working Paper No. 24, (April 2009).

<sup>69</sup> S.D. Roper & L.A. Barria, ‘State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects’, 21 *Leiden Journal of International Law* (2008) 457, at 458.

<sup>70</sup> Rome Statute, 17 July 1998, UN Doc. A/CONF.183/9, Article 5, para. 1; See C. Gosnell, ‘The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan’, 6 *Journal of International Criminal Justice* (2008) 841, at 845.

<sup>71</sup> *Ibid*, Rome Statute, Article 86; Robert Cryer, ‘The International Criminal Court and its Relationship to Non-Party States’, in Stahn C., & Sluiter, G., *The Emerging Practice of the International Criminal Court* (eds.), (2009).

indictees. Bahar Idriss Abu Garda surrendered himself to the International Criminal Court ten days after the issuance of a warrant for his arrest and Congolese authorities handed Lubanga over to the Court within a month of his indictment.<sup>72</sup> In the context of the Extraordinary Chambers in the Courts of Cambodia, the cooperation of the Cambodian police in 2007 and 2008 led to the successful execution of arrest warrants issued by the Co-Investigating Judges.<sup>73</sup>

Gaining custody over suspects is not, however, always this straightforward. Several African countries including Kenya and Sudan have refused requests to transfer suspects to the International Criminal Court.<sup>74</sup> In situations where suspects are located in territories experiencing or recently emerging from armed conflict, apprehension may prove particularly difficult. Post-conflict regions may not have a functioning government and if they do, it may nevertheless be ill equipped to locate and arrest suspects.<sup>75</sup> For instance, the Ugandan government originally referred a situation to the International Criminal Court involving mass atrocities allegedly committed by the Lord's Resistance Army.<sup>76</sup> Five warrants were issued; none of which have been executed.<sup>77</sup> In this climate, the issuance of

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<sup>72</sup> ICC, Situation in Darfur, *The Prosecutor v. Bahar Idriss Abu Garda*, Case no. ICC-02/05-02/09, Case Information Sheet, available at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/AbuGardaEng.pdf>; Situation in Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Case no. ICC-01/04-01/06, Case Information Sheet, available at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf>.

<sup>73</sup> Cedric Ryngaert, 'Arrest and Detention', in L. Reydams, J. Wouters and C. Ryngaert (eds.), *International Prosecutors*, (2012), at 652.

<sup>74</sup> ICC Situation in the Republic of Kenya, 'Government of Kenya's Application for Leave to Appeal the "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"', No.: ICC-01/09, 4 July 2011; ICC, Situation in Darfur, Sudan, the *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd al-Rahman*, 'Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan', Case No.: ICC-02/05-01/07, 25 May 2010.

<sup>75</sup> Ryngaert, *supra* note 73, at 654.

<sup>76</sup> ICC - President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, Press Release, ICC-20040129-44, (2004), available at: [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx).

<sup>77</sup> ICC, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen*, Case No. ICC-02/04-01/05, 'Warrants of Arrest', 8 July 2005, available at: <http://iccpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/>.

amnesties and the creation of domestic trials may be used to shield perpetrators. Following the opening of investigations into the region by the International Criminal Court in 2005, a Special National Criminal Court was established in Darfur.<sup>78</sup> None of the individuals indicted by the national court are high-ranking officials, and no charges of war crimes or crimes against humanity have been made. Efforts to hold the Lord's Resistance Army accountable have been hampered by peace negotiations between it and Ugandan government.<sup>79</sup> President Museveni has offered the rebels a full and guaranteed amnesty in return for their renunciation of violence.<sup>80</sup> Human Rights Watch estimates that over 12,000 members of the Lord's Resistance Army have received amnesty since the adoption of the Amnesty Act in 2000.<sup>81</sup>

Another barrier to surrender arises in cases in which the government itself is implicated in the alleged crimes or where the indictees continue to wield influence over the government or military. As was discussed in Chapter 1, Omar Al-Bashir, the Sudanese President who was indicted by the International Criminal Court in 2009 and 2010 for genocide and crimes against humanity still has not been rendered to the Court.<sup>82</sup> This is despite his many diplomatic visits to a number of states party to the Rome Statute and calls from the UN and other international organizations for his arrest.<sup>83</sup>

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<sup>78</sup> *Human Rights Watch*, 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division', (January 2012), at 4.

<sup>79</sup> *Ibid.*

<sup>80</sup> Amnesty Act (Ch 294), 21 January 2000, available at: [http://www.ulii.org/ug/legis/consol\\_act/aa2000111/](http://www.ulii.org/ug/legis/consol_act/aa2000111/) (accessed November 4, 2011), sec. 3(1)(b).

<sup>81</sup> *Human Rights Watch*, *supra* note 78, at 14.

<sup>82</sup> ICC, Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, No. ICC-02/05-01/09, available at: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx).

<sup>83</sup> *Amnesty International*, 'UN: Demand al-Bashir's surrender to the International Criminal Court', 20 September 2013, available at: <http://www.amnesty.org/en/news/un-demand-al-bashir-s-surrender-international-criminal-court-2013-09-20>; 'ICC requests Nigeria to arrest Sudan's President during visit to Abuj', (16 July 2013), *UN News Centre*, available at: <http://www.un.org/apps/news/story.asp/http<span%20class='pullme'>It%20has%20become%20increasingly%20clear%20that%20disasters%20are%20setting%20back%20efforts%20in%20development%20-%20they%20can%20cripple%20the%20economy,%20destroy%20infrastructure,%20and%20plunge%20more%20people%20into%20poverty</span>://www.unisdr.org/www.iaea.org/story.asp?NewsID=45419&Cr=Sudan&Cr1=#.Ut6F4hvFLsM>

Securing the surrender of Libyan indictees has also proved difficult for the International Criminal Court. The Court charged Saif Ghadaffi, son of Muammar Gaddafi, with crimes against humanity in 2011 but the Libyan government has been unable to comply with its obligation to surrender the accused.<sup>84</sup>

The ICTR and the ICTY have been established pursuant to a Chapter VII Security Council resolution; any state is therefore under an obligation to cooperate with the tribunals' requests for arrest and surrender.<sup>85</sup> Although failure to cooperate constitutes a violation of a state's international legal obligations, the Statutes do not provide for a remedy. The ICTY's Rules of Procedure and Evidence were amended to include a system by which non-cooperation could be reported to the Security Council and a mechanism whereby the indictments against accused who were not present could be reconfirmed.<sup>86</sup> In practice, these efforts did little to improve the effectiveness of the Tribunal in these areas.<sup>87</sup> In relation to the ICTY, securing the cooperation of the Croatian and Federal Republic of Yugoslavia governments presented significant challenges. A former President of the ICTY, Cassese, stated with respect to the refusal of state authorities to cooperate, that the Tribunal remains "a giant without arms and legs."<sup>88</sup> Success in this area was largely down to the imposition of coercive measures such as threats of sanctions for non-compliance and in the case of Croatia, requirements for accession to the European Union.<sup>89</sup> The Tribunal has gained custody over all 161 indictees with about two

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<sup>84</sup> Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC- 01/11-01/11, Case Information Sheet, available at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/SaifAllIslamSenussiEng.pdf>; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility'' 10 *Journal of International Criminal Justice* 2 (2012) 325.

<sup>85</sup> ICTR Statute Article 28(2); ICTY Statute, Article 29(2).

<sup>86</sup> Rules of Procedure and Evidence, adopted pursuant to Article 15 of the Statute, 14 March 1994, (as amended), Rule 7bis; Rule 61.

<sup>87</sup> James Sloan, 'Breaching International Law to Ensure its Enforcement: The Reliance by the ICTY on Illegal Capture' 6 *Yearbook of International humanitarian law* (2003) 319, at 320.

<sup>88</sup> Antonio Cassese, 'On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Law', 9 *European Journal of International Law* (1998) 13.

<sup>89</sup> Steven Woehrel, 'Conditions on U.S. Aid to Serbia', RS21686, *Congressional Research Service*, (2008); Christopher K. Lamont, *International Criminal Justice and the Politics of Compliance*, (2010), at 31-58.



dozen of these surrendering voluntarily.<sup>90</sup> In saying that, securing the presence of three of its most prominent defendants proved a lengthy process; Slobodan Milošević, former President of Yugoslavia and Serbia was transferred five years after an indictment was issued; Radovan Karadžić, Bosnian Serb President, was handed over thirteen years later and Radko Mladić, head of the Bosnian Serb Army, remained at large for sixteen years.<sup>91</sup>

Unlike the ICTY, the ICTR was tasked with the trial of individuals who are no longer in positions of leadership. In his report to the Security Council in 2011, the President of the Tribunal identified the arrest of fugitives as one of the main challenges to its completion strategy.<sup>92</sup> For the most part, the regime that succeeded the genocidal government in Rwanda was cooperative in transferring members of the former government to the Tribunal. As at 10 May 2013, the Tribunal had completed its work at the trial level with respect to all of the 93 accused with nine indictees remaining at large.<sup>93</sup> In relation to the Special Court for Sierra Leone, absence of mandatory cooperation has rendered it difficult to secure the apprehension of those responsible for the commission of humanitarian law breaches during the Sierra Leone civil war.<sup>94</sup> For example, Nigeria refused to surrender Charles Taylor, former leader of the National Patriotic Front of Liberia, following the issuance of an indictment in 2003 for war crimes, crimes against humanity, and other serious violations of international humanitarian law committed in Sierra Leone.<sup>95</sup> He was transferred to The

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<sup>90</sup> Woerhrel, *Ibid*, at 2-4.

<sup>91</sup> ICTY, *Prosecutor v Slobodan Milošević*, 'Initial Indictment' Case No. IT-02-54, 22 May 1999; ICTY, *Prosecutor v Karadžić*, 'Initial Indictment' Case No. IT-95-5/18-I, 24 July 1995; ICTY, *Prosecutor v Mladić*, 'Initial Indictment', Case No. IT-09-92, 24 July 1995.

<sup>92</sup> Address by Judge Khalida Rachid Khan, President of the ICTR, to the United Nations Security Council - Six monthly Report on the Completion Strategy of the ICTR, (December 7, 2011), available at: <http://www.unict.org/Portals/0/tabid/155/default%20.aspx?id=1244>.

<sup>93</sup> While nine accused persons indicted by the Tribunal remain at large, the responsibility for tracking and trials of all nine remains with Rwanda and the Residual Mechanism, *see* 'Report on the completion strategy of the International Criminal Tribunal for Rwanda', Security Council, S/2013/310, (23 May 2013), at 6.

<sup>94</sup> *Human Rights Watch*, 'Bringing Justice: The Special Court of Sierra Leone,' Vol.16, No. 8(A), 8 September 2004, at 11.

<sup>95</sup> *Ibid*, at 9-10; SCSL, *Prosecutor v Charles Taylor*, 'Prosecutor's Second Amended Indictment', Case No. SCSL-03-01-PT, 29 May 2007.

Hague for trial in 2006.<sup>96</sup>

Considering the challenges faced by international institutions in the arrest of suspects coupled with the gravity of the crimes for which justice is sought, a strong argument can be made for the continuation of the trial in situations where abduction is raised by the accused. The Office of the Prosecutor of the International Criminal Court acknowledged that situations might arise where alternative means of apprehension will be resorted to:

[S]ituations may arise where the Prosecutor is compelled, due to non-cooperation by a requested State or the sensitivity of “tipping off” the requested State, to explore ad hoc measures to effect arrest.<sup>97</sup>

International organisations, private individuals and other forces have assisted in apprehending indictees.<sup>98</sup> The decisions of the ICTY in this area have looked to domestic case law in determining the effect of irregular apprehension on the proceedings. Although it has never refused to exercise jurisdiction, the decisions of the Tribunal proceeded an inquiry into the manner by which the person was brought before it and so it is fair to say that the principle of *male captus bene detentus* has not been followed. It did not deal with abduction, but the *Barayagwiza* case before the ICTR demonstrates the willingness of that Tribunal to exercise its discretion to dismiss the proceedings where the pretrial treatment of the accused is so egregious that continuation would amount to an abuse of process.<sup>99</sup> There have been three instances in which the ICTY has been confronted with an accused alleging irregularities in the manner of surrender, *Prosecutor v*

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<sup>96</sup> Rory Carroll, ‘Charles Taylor Flown to The Hague to Face War Crimes Trial’ 21 June 2006, available at: <http://www.theguardian.com/world/2006/jun/21/westafrica.sierraleone>.

<sup>97</sup> OTP, ‘Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation’, (OTP 2003), para 89.

<sup>98</sup> ICTY, *Prosecutor v. Dragan Nikolić*, ‘Decision on Interlocutory Appeal Concerning Legality of Arrest’, Case No. IT-94-2-AR73, 5 June 2003; For a discussion on the involvement of NATO troops in the apprehension of individuals indicted by the ICTY see Han-Rou Zhou, ‘The Enforcement of Arrest Warrants by International Forces: From the ICTY to the International Criminal Court’, 4 *Journal of International Criminal Justice* (2006) 202.

<sup>99</sup> ICTR *Prosecutor v. Barayagwiza*, ‘Decision’, Case No. ICTR-97-19-AR72, 3 November 1999, para. 76; ICTR *Prosecutor v. Barayagwiza*, ‘Decision (Prosecutor’s Request for Review or Reconsideration)’, Case No. ICTR-97-19-A, 31 March 2000; For criticism of the Decision see William A. Schabas, ‘*Barayagwiza v. Prosecutor*’, 94 *American Journal of International Law* (2000) 536.

*Dokmanović, Prosecutor v Todorović and Prosecutor v Nikolić*.<sup>100</sup> This section will consider the approach taken by the ICTY in these cases and by the ICTR in *Barayagwiza*.<sup>101</sup> This is an important analysis as although the International Criminal Court has not yet had the opportunity to consider the matter directly, it is likely that it will be confronted with claims regarding irregular apprehension in the future. Discerning the approach emerging from the existing case law will assist in establishing how the International Criminal Court will handle similar allegations.

*Prosecutor v Dokmanović* was the first case involving claims of illegality of surrender to come before the *ad hoc* Tribunals.<sup>102</sup> The details of the case were set out in Chapter 3. To recap, Dokmanović complained before the ICTY that his arrest violated the Statute of the ICTY and its Rules of Procedure and Evidence, the sovereignty of the FRY and international law. The Trial Chamber dismissed the motion on a number of grounds. It based its finding on the following factors, the Office of The Prosecutor was not involved in the arrest;<sup>103</sup> Dokmanović's treatment amounted only to permissible luring;<sup>104</sup> there was no violation of sovereignty because the arrest was carried out after the accused arrived in the FRY;<sup>105</sup> no extradition treaty governed the transfer.<sup>106</sup> The Trial Chamber held that the luring of the accused was "consistent with the principles of international law and the sovereignty of the FRY."<sup>107</sup>

Distinguishing luring from kidnapping, it found that there was no physical violation of FRY territory and so violation of sovereignty was not an issue. The Trial Chamber based its distinction between the circumstances

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<sup>100</sup> ICTY, *Prosecutor v Slavko Dokmanović*, 'Decision on the Motion for Release by the Accused Slavako Dokmanović', Case No. IT-95-13a-PT, T.Ch. 11, 22 October 1997; ICTY, *Prosecutor v Simic*, 'Decision on Motion for Judicial Assistance to be Provided by SFOR and Others', Case No. IT-95-9, 18 October 2000; ICTY, *Prosecutor v Nikolić* 'Decision on the Defense Motion Challenging the Exercise of Jurisdiction by the Trial Chamber', Case No. IT-94-2-PT 85, 9 October 2002.

<sup>101</sup> *Barayagwiza*, *supra* note 99.

<sup>102</sup> *Dokmanović*, *supra* note 100.

<sup>103</sup> *Ibid*, at 480-481.

<sup>104</sup> *Ibid*, at 484-485, 489-490.

<sup>105</sup> *Ibid*, at 491.

<sup>106</sup> *Ibid*, at 490.

<sup>107</sup> *Ibid*, at 57.

before it with national cases that “frowned upon the notion of luring” on the fact that there was no extradition treaty in force between the FRY and the Tribunal.<sup>108</sup> As Scharf points out, although no system of extradition was in place, “the luring of Dokmanović *in lieu* of pursuing his surrender from the FRY through the formally established procedure [...] raises the same concerns as if the ICTY had acted in circumvention of an operational extradition treaty.”<sup>109</sup> The fact that the Trial Chamber accepted that *Dokmanović* had been subject to luring would indicate that this form of extraterritorial abduction would not lead to a divesture of jurisdiction unless it involved “cruel, inhumane and outrageous conduct.”<sup>110</sup> In determining whether the treatment of the accused warrants divesture of jurisdiction, the Tribunal averted to the threshold used in *Toscanino*.<sup>111</sup> In *Prosecutor v. Todorović*, the ICTY was again presented with the issue of irregular apprehension but this time, the circumstances involved a forcible abduction.<sup>112</sup>

In *Prosecutor v Todorović*, Todorović alleged that he was gagged, blindfolded and forcibly transferred from Serbia to Bosnia and Herzegovina where he was subsequently arrested by the Stabilization Forces with which the Office of The Prosecutor colluded.<sup>113</sup> The accused filed a Motion for Judicial Assistance to compel evidence regarding any knowledge of the circumstances of his arrest. The Trial Chamber granted the evidentiary request but a subsequent plea agreement meant that it never came to fruition. Todorović’ agreed to withdraw allegations regarding the unlawfulness of his arrest and all Motions pending before the Trial Chamber relating to the evidentiary hearing.<sup>114</sup> It is interesting to note that in considering the

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<sup>108</sup> *Ibid*, at 67.

<sup>109</sup> Michael Scharf, ‘*The Prosecutor v Slavko Dokmanović* : Irregular Rendition and the ICTY’, 11 *Leiden Journal of International Law* (1998) 369, at 376.

<sup>110</sup> *Dokmanović*, *supra* note at 100.

<sup>111</sup> *Ibid*; *Toscanino*, *supra* note 12.

<sup>112</sup> ICTY, *Prosecutor v Todorovic*’, ‘Sentencing Judgment’, Case No. IT-95-9/1-S, 31 July 2001.

<sup>113</sup> *Ibid*, at 47.

<sup>114</sup> *Prosecutor v Todorovic*’, Case Information Sheet: *Todorović* (IT-95-9/1), available at: [http://www.icty.org/x/cases/Todorovic'/cis/en/cis\\_Todorovic'\\_en.pdf](http://www.icty.org/x/cases/Todorovic'/cis/en/cis_Todorovic'_en.pdf)

jurisprudence of national courts, the Office of the Prosecutor argued that “the basis of the reasoning in these [latter] cases affords no valid analogy to the situation under consideration by this Trial Chamber in the present case.”<sup>115</sup> It justified the distinction on the following grounds: there was no violation of an extradition treaty in the present case; Todorovic’s apprehension was not carried out by agents of the prosecuting state or organization and there was no violation of Todorovic’s right to liberty and security of person.

What can be discerned from the decisions in *Dokmanović* and *Todorović* is that the ICTY has not endorsed the *male captus bene detentus rule*. Rather than disregarding the pre-trial treatment of the accused, the Tribunal has recognized its responsibility to review the full procedure including the circumstances of arrest. In relation to the Trial Chamber’s decision in *Dokmanović*, Sluiter noted:

[...] the Chamber, in my view, acknowledged the overall responsibility of the ICTY for these procedures. This responsibility is based on the duty incumbent upon the Trial Chamber pursuant to Article 20 to ensure that the accused receives a fair trial and on the vertical co-operation relationship between States, which enables the Tribunals to impose modalities of execution.<sup>116</sup>

The duty to examine the full circumstances of the procedure, including that which occurred outside the courtroom, has also been endorsed by the ICTR.

In *Barayagwiza*, the ICTR considered the effect of the accused’s pretrial treatment on the exercise of jurisdiction.<sup>117</sup> In this case, it was not the accused’s arrest and transfer that was at issue but instead, his detention and the violation of his rights to prompt information as to the charges against him and to *habeas corpus*. The Appeals Chamber acknowledged its

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<sup>115</sup> ICTY, *Prosecutor v Todorović*, ‘Prosecutor’s Response to the ‘Notice of Motion for Evidentiary Hearing on Arrest, Detention and Removal of Defendant Stevan Todorovic’ and for Extension of Time to Move to Dismiss Indictment’, filed by Stevan Todorovic’ on 10 February 1999, at para 33.

<sup>116</sup> Goran Sluiter, ‘Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v Mrksic, Radic, Slijvančanin and Dokmanović*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, Commentary’, in: A. Klip and G. Sluiter eds. *Annotated Leading Cases of International Criminal Tribunals: The Special Court for Sierra Leone 2003-2004*, at 155-156.

<sup>117</sup> *Barayagwiza*, *supra* note 99.

willingness to utilize the abuse of process doctrine to decline jurisdiction where “to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity.”<sup>118</sup> Noting that its supervisory powers serve three functions “to provide a remedy for the violation of the accused’s rights; to deter future misconduct; and to enhance the integrity of the judicial process”, the Chamber went on to consider whether it would “offend the Tribunal’s sense of justice to proceed to the trial of the accused”.<sup>119</sup> In its analysis, the Appeals Chamber found that the Prosecutor had failed in her duty to diligently prosecute the case and that the accused’s rights to be promptly informed of the charges against him and to *habeas corpus* had been violated.<sup>120</sup> In determining the appropriate remedy, the Chamber referred to the seriousness of Barayagwiza’s charges but found the “conduct to be so egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and resultant denial of his rights is to release the Appellant and dismiss the charges against him”.<sup>121</sup> The proceedings were terminated and Barayagwiza’s release was ordered.<sup>122</sup>

Barayagwiza was indicted for genocide, complicity in genocide, incitement to commit genocide, conspiracy to commit genocide and crimes against humanity. Schabas notes that the accused “stands out as one of the most heinously evil of those responsible for the Rwandan genocide- and not for want of competitors.”<sup>123</sup> Considering the gravity of the charges, it is difficult to see how the pretrial irregularities involved could warrant the remedy of release. The decision was met with fierce criticism; the Rwandan government suspended its cooperation with the Tribunal and concerns were expressed by international organizations.<sup>124</sup> The Prosecutor filed a Motion

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<sup>118</sup> *Ibid*, para 74.

<sup>119</sup> *Ibid*, at 76- 77.

<sup>120</sup> *Ibid*, at 78, 87 & 99.

<sup>121</sup> *Ibid*, at 106.

<sup>122</sup> *Ibid*, at 113.

<sup>123</sup> Schabas, *supra* note 81, at 564.

<sup>124</sup> *Ibid*, at 565.

for Review of the decision.<sup>125</sup> Upon review, the judges concluded that the “applicant’s rights were violated, and that all violations demand a remedy” but that based on new facts discovered, “the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded.”<sup>126</sup> Consequently, the remedy of release was changed; upon completion of the case, the Trial Chamber reduced Barayagwiza’s life sentence to 35 years imprisonment.<sup>127</sup> Although the 2000 review altered the remedy afforded to the accused, the reasoning of the 1999 decision regarding application of the abuse of process doctrine and the exercise of supervisory powers over violations of the accused’s rights remains intact.<sup>128</sup> The Appeals Chamber’s willingness to rely on the abuse of process doctrine if “in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court’s sense of justice,” was endorsed by the ICTY in the *Nikolić* case.<sup>129</sup>

In *Prosecutor v. Nikolić*, the accused filed a motion alleging that he was kidnapped in Serbia before being transferred to the custody of SFOR officers stationed in Bosnia and Herzegovina.<sup>130</sup> The Prosecutor acknowledged that the accused had been forcibly taken from Serbia and transported to Bosnia.<sup>131</sup> It was also established that unknown individuals who had no connection to the Stabilization Forces undertook the kidnapping.<sup>132</sup> The Trial Chamber divided the issues before it into two; whether the conduct of the alleged kidnappers was attributable to the SFOR or the Office of the Prosecutor and whether the irregular arrest amounts to

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<sup>125</sup> *Barayagwiza*, *supra* note 99.

<sup>126</sup> *Ibid*, at 74.

<sup>127</sup> ICTR, *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, ‘Judgment and Sentence’, Case No. ICTR-99-52-T, 3 December 2003.

<sup>128</sup> Goran Sluiter, ‘International Criminal Proceedings and the Protection of Human Rights’, 37 *New England Law Review* 4 (2003) 935, at 944-945.

<sup>129</sup> *Nikolić*, *supra* note 100, at 77.

<sup>130</sup> *Ibid*, at 15.

<sup>131</sup> *Ibid*, at 21.

<sup>132</sup> *Ibid*; the District Court in Smederevo convicted 7 individuals of offences in relation to Nikolić’s apprehension. See ‘Prosecution Response to Defense Motion of 17 May 2001,’ *citing* Agence France-Presse, ‘Seven Jailed by Yugoslav Court for Abducting War Crimes Suspect’, 24 Nov. 2000.

an obstacle to the exercise of jurisdiction over the accused.<sup>133</sup> The Trial Chamber rejected the argument that by receiving Nikolić the SFOR adopted the illegal conduct of the unknown individuals.<sup>134</sup> It held that regardless of the circumstances by which the accused came into the custody of the SFOR, Rule 59 of the Statute of the ICTY placed an obligation on the SFOR to deliver him to the Tribunal.<sup>135</sup>

In relation to the effect of unlawful arrest on its jurisdiction over the accused, the Trial Chamber considered the distinction between the domestic law approaches of *male captus bene detentus* and *male captus male detentus*. Although not explicitly ascribing to either, the Trial Chamber diverged from *male captus bene detentus*. In considering whether the remedy of a stay of proceedings was warranted, the Trial Chamber endorsed the reasoning in *Barayagwiza* and acknowledged that it had jurisdiction over the accused but it would exercise its discretion under the abuse of process doctrine where the rights of the accused “had been egregiously violated.”<sup>136</sup> In relation to the scope of the abuse of process doctrine, the Trial Chamber adopted a broad approach, which went beyond ensuring a fair trial for the accused. It recognized a duty to consider questions as to the conduct of the parties and the manner by which the accused had been brought before it.<sup>137</sup>

The Trial Chamber addressed potential violations of international law in relation to state sovereignty and the rights of the accused under international human rights law.<sup>138</sup> On the first issue, the Chamber adopted the reasoning in *Dokmanović*. It distinguished the case before it from domestic trials and acknowledged that a vertical relationship between the Tribunal and states and other entities existed. Pursuant to this, it found that there could be no violation of sovereignty.<sup>139</sup> In its consideration of alleged human rights violations, it undertook a balancing exercise in order to

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<sup>133</sup> *Nikolić supra* note 100, at 70.

<sup>134</sup> *Ibid*, para 32.

<sup>135</sup> *Ibid*, para 55

<sup>136</sup> *Ibid*, at 111

<sup>137</sup> *Ibid*, at 110-111.

<sup>138</sup> *Ibid*, at 96.

<sup>139</sup> *Ibid*, at 76, 100, 105.



“assess all of the factors of relevance in the case at hand and in order to conclude whether, in light of these factors, the Chamber can exercise jurisdiction over the accused”.<sup>140</sup> It looked at the seriousness of the alleged mistreatment and the issue as to whether SFOR or the OTP were involved. It found that based on the “assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals [...] was of such an egregious nature.”<sup>141</sup> It rejected the claim that continuing with the case would violate the principle of due process. On appeal, the decision of the Trial Chamber was upheld.<sup>142</sup>

The Appeals Chamber, assuming there had been a violation of sovereignty or the rights of the accused, considered under what circumstances the Tribunal would decline to exercise jurisdiction.<sup>143</sup> Following a survey of nine national cases, the Chamber discerned two principles:

First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognized and condemned [...] courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction.<sup>144</sup>

The first principle established by the Appeals Chamber was based on the decisions of *Eichmann* and *Barbie*.<sup>145</sup> The Chamber’s reliance on these cases has been criticized.<sup>146</sup> In *Eichmann*, the seriousness of the offences charged was considered in relation to the court’s ability to exercise universal jurisdiction rather than its authority to try an accused brought before it by way of irregular methods. In *Barbie*, the nature of the crimes was raised in response to a claim that the charges for which Barbie was tried lacked a proper legal basis; it did not go to the issue of extraterritorial

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<sup>140</sup> *Ibid*, at 112

<sup>141</sup> *Ibid*, at 114.

<sup>142</sup> ICTY, *Prosecutor v Nikolić*, ‘Decision on Interlocutory Appeal Concerning Legality of Arrest’, Case IT-94-2-AR73, June 5, 2003.

<sup>143</sup> *Ibid*, at 19.

<sup>144</sup> *Ibid*, at 24.

<sup>145</sup> *Barbie*, *supra* note 66, at 125.

<sup>146</sup> Sloan, *supra* note 87, at 229-331.

abduction and its effect on the jurisdiction of the court. In relation to the second principle delineated from its survey of domestic cases, Sloan criticizes the failure of the Chamber to acknowledge the reasoning of the Appeals Chamber in *Tadic* in its rejection of the argument that a defendant lacks *locus standi* to raise a violation of state sovereignty.<sup>147</sup> The Appeals Chamber, which was differently constituted than that in *Nikolić*, stated:

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defense, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defense based on violation of State sovereignty.<sup>148</sup>

Sloan also points out a flaw in the Chamber's argument that Serbia and Montenegro had acquiesced in the Tribunals exercise of jurisdiction. He notes that this assertion fails to recognize that there is no established procedure for a state to lodge a complaint in relation to a violation of its sovereignty.<sup>149</sup>

The Appeals Chamber acknowledged that the accused's human rights had been violated and that "certain human rights violations are of such a serious nature that they require the exercise of jurisdiction to be declined."<sup>150</sup> It did not, however, offer any insight into the type or level of conduct that would reach the threshold of seriousness so as to require divestiture of jurisdiction. The Appeals Chamber weighed the principle of state sovereignty and the rights of the accused against the "legitimate expectation [of the international community as a whole] that those accused of [universally condemned offences] will be brought to justice swiftly."<sup>151</sup> The defense lodged a petition for clarification as to the test used to determine whether a human rights violation is serious.<sup>152</sup> The Appeals Chamber rejected the petition and no elaboration of the criteria used was

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<sup>147</sup> *Ibid*, at 331.

<sup>148</sup> ICTY, *Prosecutor v Tadic*, Appeal on the Jurisdiction, Case IT-94-1-AR72, 2 October 1995, para 55.

<sup>149</sup> *Ibid*, at 332

<sup>150</sup> *Nikolić*, *supra* note 100, at 30.

<sup>151</sup> *Ibid*, at 26.

<sup>152</sup> *Prosecutor v Nikolić*, 'Decision on Motion Requesting Clarification', Case No. IT-94-2-AR73, 6 August 2003, p. 2.

offered. What it did indicate was that declining to exercise jurisdiction would “usually be disproportionate.”<sup>153</sup> Applying the tests elaborated to the facts of the case before it, the Appeals Chamber concluded, “the procedure adopted for [Nikolić’s] arrest did not disable the Trial Chamber from exercising jurisdiction.”<sup>154</sup>

In *Prosecutor v Lubanga*, the Appeals Chamber of the International Criminal Court considered the remedy of a permanent stay of proceedings in response to allegations that the accused had been illegally detained and ill treated by the Congolese authorities with the collusion of the Court. The Appeals Chamber held that:

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.<sup>155</sup>

The Appeals Chamber went on to find that breaches of the rights of the accused may affect the fairness of the trial and in such cases, proceedings can be stayed.<sup>156</sup> The concept of a fair trial has been interpreted broadly to include pre-trial treatment of the accused.<sup>157</sup> Pursuant to this, in response to allegations of extraterritorial abduction, the International Criminal Court may order a stay of proceedings. In saying that, this is a “drastic” and “exceptional” remedy.<sup>158</sup> In relation to the type of circumstances that warrant a stay of proceedings, “not each and every breach of the rights of the suspect and/or the accused [entails] the need to stay the relevant

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<sup>153</sup> *Nikolić*, *supra* note 100, at 30.

<sup>154</sup> *Ibid*, at 32.

<sup>155</sup> ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, 14 December 2006 (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006), para. 37.

<sup>156</sup> *Ibid*, at 39.

<sup>157</sup> *Ibid*, at 36; Kelly Pitcher, ‘Addressing Violations of International Criminal Procedure’ *Amsterdam Center for International Law*, Research Paper, (2013-2014), at 11.

<sup>158</sup> ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, 8 October 2010 (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010, ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’), para. 55.

proceedings” and “only gross violations of those rights [...] justify that the course of justice be halted.”<sup>159</sup> Citing *Nikolić*, the Pre Trial Chamber of the International Criminal Court found that absent concerted action by the Court, the abuse of process doctrine offers an additional safeguard to the rights of the accused. Interpreting the abuse of process doctrine in light of *Barayagwiza*, the Chamber stated that the requirement to decline exercise of jurisdiction has been “confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal.”<sup>160</sup> Noting allegations of torture or serious mistreatment had not been raised and that there was no concerted action between the Congolese authorities and the Court, it held that the defense’s challenge to jurisdiction was unfounded.<sup>161</sup>

The arrest and surrender regimes of international courts and tribunals differ from that of domestic systems. The vertical relationship that exists between the *ad hoc* tribunals and states has rendered allegations of the violation of an extradition treaty weak. In saying that, the circumvention of the rules and procedures that regulate the transfer regime between these institutions and states is synonymous to the violation of an extradition treaty.<sup>162</sup> The gravity of the offences for which the individual is charged has influenced the decisions of both domestic and international courts. As is the case of most national courts, the tribunals recognize that they have jurisdiction over an accused regardless of the manner by which he came before it but under the abuse of process doctrine, discretion to refuse jurisdiction can be exercised if the pretrial misconduct rises to a certain degree of seriousness.

It is understandable that a court will be reluctant to stay proceedings when the crimes involved are of a certain magnitude. In saying that, the majority of domestic and international decisions illustrate that regardless of

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<sup>159</sup> ICC, Situation in Democratic Republic of the Congo, *Prosecutor v. Callixte Mbarushimana*, 1 July 2011, (Decision on the ‘Defense request for a permanent stay of proceedings’), at 4-5.

<sup>160</sup> *Prosecutor v Lubanga*, *supra* note 158.

<sup>161</sup> *Ibid.*

<sup>162</sup> Scharf, *supra* note 109, at 376.

the gravity of the offences, an inquiry into the pretrial treatment of the accused will be undertaken. The adoption of a broad abuse of process doctrine is a welcome repudiation of the *male captus bene detentus* rule but in practice, both approaches may nevertheless lead to the same result. Pursuant to the abuse of process doctrine, if pretrial misconduct rises to a certain level, the court will exercise its discretion to divest itself of jurisdiction. It is unclear what type of pretrial conduct will warrant the dismissal of a case but it would seem that the threshold is somewhere along the lines of that alleged in *Toscanino*. Although the ICTR considered lesser conduct to warrant divestiture of jurisdiction in *Barayagwiza*, the subsequent revocation of the remedy and the criticism with which the decision was met indicates that dismissal and release should not be so readily applied. As Sluiter has pointed out, the remedy of termination of proceedings should “not be taken lightly”; in order to determine whether it is warranted, consideration must be given to the degree of attribution of the violation to the Tribunal and the nature of the violation of individual rights.<sup>163</sup> This seems to be the approach taken by the International Criminal Court in considering the defense’s challenge to the Court’s jurisdiction in *Lubanga*. In relation to the attribution of the conduct to the Tribunal, the ICTY Trial Chamber in *Karadžić* found substance in the Prosecution’s submission that, before being able to obtain remedy of a stay of proceedings, the Accused had to be able to attribute the infringement of his rights to the Tribunal or show that at least some responsibility for that infringement lay with the Tribunal.<sup>164</sup>

In the context of international crimes, it is hard to criticize the weight given to the interests of prosecuting international criminals. In saying that, it is questionable whether the rigid choice between the upholding and divestiture of jurisdiction is the only way to handle allegations of irregular surrender.<sup>165</sup> Regardless of the court’s willingness to consider the rights violated by the irregular surrender, an all or nothing approach has the

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<sup>163</sup> Sluiter, *supra* note 128, at 946-947.

<sup>164</sup> ICTY, *Prosecutor v Karadžić*, ‘Decision on the Accused’s Motion for Remedy for Violation of Rights in Connection with Arrest’, 31 August 2009, para. 6.

<sup>165</sup> Sluiter, *supra* note 128, at 947.

potential of rendering all cases involving the trial of international criminal suspects doomed to a *male captus bene detentus* outcome. As noted by the ICTR in *Barayagwiza* and confirmed in *Semanza*, “all violations demand a remedy.”<sup>166</sup> In order to ensure a more equitable balance is struck between the interests of justice, the integrity of the proceedings and the rights of the accused, an alternative approach would be to acknowledge the violations involved and provide remedies that better reflect the level of harm done.<sup>167</sup> The dismissal of the proceedings may be a disproportionate remedy in most cases, but a reduction in sentence in the case of conviction as was instituted in by the ICTR Trial Chamber in *Barayagwiza*, or an order for compensation in the event of acquittal, may strike a more equitable balance between the rights of the accused and the interests of justice.

## 2. STATE RESPONSIBILITY FOR EXTRATERRITORIAL ABDUCTION

Those who carry out extraterritorial abductions can be divided into two broad categories, private persons and state agents. Determining the category into which the abductor falls is crucial as it will dictate the regime to be followed in relation to the allocation of responsibility and the remedies, if any, available to the injured state and the abductee. Article 1 of the International Law Commission’s Articles on State Responsibility sets out the fundamental proposition that, “[e]very internationally wrongful act of a state entails its international responsibility”.<sup>168</sup> What constitutes an internationally wrongful act for the purposes of state responsibility is laid down in Article 2:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

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<sup>166</sup> *Prosecutor v Barayagwiza*, *supra* note 99, para 74; ICTR, *Laurent Semanza v The Prosecutor*, ‘Decision’, Case No. ICTR-97-20-A, 31 May 2000, para 125.

<sup>167</sup> *Prosecutor v Barayagwiza*, *supra* note 99, para 75.

<sup>168</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, (November 2001), Supplement No. 10 (A/56/10), chp.IV.E.1, Adopted by the International Law Commission at its fifty-third session (2001), Article 1.

(b) Constitutes a breach of an international obligation of the State.<sup>169</sup>

Article 12 goes on to state that “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”<sup>170</sup> According to the International Law Commission’s commentary, non-conformity is determined by measuring the conduct in question with the “conduct legally prescribed by the international obligation.”<sup>171</sup> International obligations encompass those “established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order.”<sup>172</sup> Pursuant to this, a state’s responsibility will be engaged when it can be established that: (1) there is an international legal obligation between two or more states; (2) that obligation has been breached and (3) the breach is attributable to the state.<sup>173</sup>

Someone who enters the territory of another state on his own initiative, apprehends an individual and transfers him across a border is a private abductor. This is a very rare scenario; in almost all cases, there will be some form of inducement or orders emanating from the state. The entry of a state’s law enforcement authorities onto foreign territory with directions to capture a target and deliver him to the state from which they came constitutes an act of the state; the abductors are state agents. Between the categories of private individuals and state agents, bounty hunters fall into a sort of grey area. This group acts without official orders or direction from the state but upon delivery of the individual to the authorities, payment is received.<sup>174</sup> The complicity of a state or its subsequent approval or adoption of acts carried out by private individuals may render the abduction

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<sup>169</sup> *Ibid*, Article 2.

<sup>170</sup> *Ibid*, Article 12.

<sup>171</sup> *Ibid*, Article 1 Commentary, at 33.

<sup>172</sup> *Ibid*, Article 12 Commentary, at 55.

<sup>173</sup> Malcolm Shaw, *International Law*, (5<sup>th</sup> ed. 2003), at 696.

<sup>174</sup> Gregory Townsend, ‘State Responsibility for De Facto Agents’, 14(3) *Arizona Journal of International Law and Comparative Law*, (1997) 636; Perry John Seaman, ‘International Bounty Hunting: A Question of State Responsibility’, 15 *California Western International Law Journal* (1985) 397.

attributable to the state. The following section will consider the two broad categories of actors and examine how to determine responsibility in situations that do not fall neatly into either.

## 2.1 ATTRIBUTION OF CONDUCT

Extraterritorial abductions undertaken by personnel of a state authority let it be the secret service, a law enforcement agency or the military, will be deemed an act of the state for the purposes of responsibility for international law breaches. As will be illustrated in the proceeding section, the link between the state and the abductor can be difficult to prove.

In order to avoid state responsibility and avert international condemnation, states have often claimed that private persons or volunteers carried out the apprehension.<sup>175</sup> In 1935, Berthold Jacob-Salomon, a German journalist was abducted in Switzerland by persons alleged by the Swiss to be acting on behalf of Germany.<sup>176</sup> Switzerland protested the abduction claiming that it was “carried out with the cooperation of German authorities [and] constitutes a grave violation of Swiss sovereignty.”<sup>177</sup> The Swiss government demanded the return of Jacob. Germany initially refused to repatriate him stating, “no evidence has been found that German official authorities participated either directly or indirectly in the events on Swiss territory.”<sup>178</sup> The German government later admitted its role and returned Salomon to Switzerland. Following the infamous abduction of Alvarez-Machain, the United States denied involvement.<sup>179</sup> In testimony before the United States Supreme Court, an agent of the United States’ Drug Enforcement Administration revealed that he had met with an informant who arranged the abduction in exchange for a promise that the Administration would pay a \$50,000 reward plus expenses for delivering

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<sup>175</sup> Townsend, *ibid*, at 661.

<sup>176</sup> Lawrence Preuss, ‘Kidnapping of Fugitives from Justice on Foreign Territory’, 29 *American Journal of International Law* (1935) 502, *citing* ‘Note of the Federal Council to the German Foreign Office’, (1 April 1935)- text in *Journal de Geneve* April 3 1935.

<sup>177</sup> *Ibid*, at 503.

<sup>178</sup> *Ibid*, NY Times, April 16 1935 *cited* by Preuss, at 504.

<sup>179</sup> *Alvarez-Machain v United States*, *supra* note 26.



Alvarez-Machain to the United States authorities.<sup>180</sup> In 1963, Argoud, a former colonel, was apprehended in Germany and taken to Paris.<sup>181</sup> Following an anonymous phone call as to his location, the French authorities took custody of Argoud and put him on trial for crimes against France related to Algerian independence.<sup>182</sup> Germany claimed France was responsible for the affair and sought the return of Argoud. France denied responsibility and refused to return Argoud. The issue was resolved diplomatically.<sup>183</sup> It is interesting to note that in its protest, Germany admitted that German officials might have been involved but that this would not relieve France of its responsibility; the German officials would have been acting as de facto agents of France.

Following the abduction of Eichmann, Israel initially claimed that Eichmann had left Argentina voluntarily, that the abductors were volunteers acting on their own initiative and that Israel was not complicit in the operation.<sup>184</sup> It nevertheless expressed its regret for any infringement of Argentine laws or Argentine sovereignty that might have been committed by the group of volunteers. The Argentine Government regarded this expression of regret as an admission of responsibility by the Government of Israel. It alleged that the operation had been carried out by secret agents of that Government and that even if the volunteers had acted without its knowledge, it had subsequently approved the act committed in violation of Argentine sovereignty and supported those responsible for it.<sup>185</sup> The Israeli Prime Minister, Ben-Gurion's, confirmation of the identity of the captors,

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<sup>180</sup> Joel R. Paul, 'The Argument Against International Abduction of Criminal Defendants', 6(4) *American University Journal of International Law and Policy* (1991) 527, at 528; Andreas Lowenfeld, 'Kidnapping by Government Order: A Follow-Up', 84 *American Journal of International Law* (1990) 712, at 714.

<sup>181</sup> Court of Cassation, *Re Argoud*, 4 June 1964, *International Law Reports*, Vol. 45, pp. 90-107.

<sup>182</sup> *Ibid*, at 92.

<sup>183</sup> Townsend, *supra* note 174, at 669 citing Ago, 'Third Report of State Responsibility', [1971] 2 *Yearbook of International Law*, Communication No. 269, U.N. Doc. A/9610/Rev.1, at 265.

<sup>184</sup> Israeli Foreign Minister Golda Meir, referred to Eichmann's captors as a "volunteer group", Official Records of the Security Council, Fifteenth Year, 866th meeting, (22 June 1960), para 18, *cited* in ILC commentary to Art 11.

<sup>185</sup> R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol II *supra* note 183, at 73.

resolved any uncertainty as to the involvement of the Israeli government.<sup>186</sup> In a letter published by the Israeli newspaper *Davar*, Gurion acknowledged the “extraordinary resource and skill of the staff of the Security Services.”<sup>187</sup>

It is clear from the above survey that states will often be reluctant to admit involvement in abduction operations. In most cases, the reason for denial will be to avoid reciprocal conduct by the aggrieved state, responsibility for breaches of international law and the deterioration of interstate relations. If it can be established that those who carried out the abduction acted at the instigation of the state, they will be considered de facto agents and their conduct will be attributed to the state for the purposes of establishing responsibility. The majority of extraterritorial abductions involve some degree of encouragement from the state authorities; absent orders or promise of financial gain, there would be little incentive for an individual to enter another territory to apprehend an individual for the purpose of having him stand trial. In the case of bounty hunters, the abduction is undertaken without the direction or control of state authorities but upon completion, the conduct may nevertheless be attributed to the state. If the abductee is subsequently detained or tried, this exercise of jurisdiction could constitute adoption of the illegal act by the state for the purposes of allocating responsibility.

#### 2.1.1 DIRECTION OR CONTROL

The majority of extraterritorial abductions are carried out at the behest of a state. The two bases of attribution under Article 8 of the International Law Commission’s Articles on State Responsibility are triggered when an individual acts (1) on the state’s instructions, or (2) under its direction or

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<sup>186</sup> UNSCOR, fifteenth year, 868<sup>th</sup> meeting, 23 June 1960, UN Doc S/P.V. 868 (1960), para 11, p. 3; Sidney Liskofsky, 'The Eichmann Case,' *American Jewish Yearbook* (1961) p. 199.

<sup>187</sup> Paul O’Higgins, ‘Unlawful Seizure and Irregular Extradition’, 36 *British Yearbook of International Law* (1960) 279, at 296.

control.<sup>188</sup> Article 8 reads:

The conduct of any State organ shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.<sup>189</sup>

The first base is quite straightforward. Acting under a state's instruction applies to situations where the state specifically orders the individual or group to undertake the conduct, which amounts to an internationally wrongful act. The ICTY and the International Court of Justice have considered the degree of direction or control necessary to attribute wrongful conduct to a state.<sup>190</sup> In the *Nicaragua* case, the International Court of Justice considered the degree of control required in order for conduct to be considered acts of the state.<sup>191</sup> The question before it was whether breaches of international humanitarian law perpetrated by the contras could be imputed to the United States. The Court held that the relevant standard was:

whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.<sup>192</sup>

The International Court of Justice found that the United States had financed, organized, trained, supplied and equipped the contras and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for violations of international humanitarian law committed by the contras. The Court held that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the

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<sup>188</sup> Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,' 18 *European Journal of International Law* (2007) 649, at 650.

<sup>189</sup> ILC Articles, *supra* note 148, Article 8.

<sup>190</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 26 February 2007; ICTY, *Prosecutor v. Tadić*, 15 July 1999, 'Judgment' Case No. IT-94-1; ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, 18 December 1996; ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (Nicaragua v. United States)*, 'Judgment', 27 June 1986.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, at 109.

contras as acting on its behalf.”<sup>193</sup> Pursuant to this, in order for conduct to be attributable to a state, there must be a showing of “effective control.”<sup>194</sup> This is a high threshold for attribution in that it requires a showing of “complete dependence.”<sup>195</sup>

The Appeals Chamber of the ICTY, although dealing with individual criminal responsibility and the application of international humanitarian law, put forward a less stringent test in the *Tadic* case.<sup>196</sup> Finding that the test in *Nicaragua* was too strict in its treatment of armed groups, the Tribunal identified two separate standards of control.<sup>197</sup> It found that the “effective control” test applies to acts performed by private individuals whilst an “overall control” test is applicable to acts of organized and hierarchical groups such as military or paramilitary units.<sup>198</sup> The International Court of Justice revisited the issue of attribution under Article 8 in the *Bosnian Genocide* case. Rejecting the overall control standard put forward in *Tadic*, the court reaffirmed the effective control test set out in *Nicaragua*.<sup>199</sup>

The high threshold for attribution is down to the legal implications of equating an individual or entity with state organs. Upon a finding of “direction or control,” the state becomes responsible for all acts; even those that go beyond the instructions given.<sup>200</sup> Applying this to extraterritorial abduction, if agents or de facto agents of a state enter onto a foreign territory and apprehend an individual outside the formal extradition framework, the resultant breach of territorial sovereignty, circumvention of obligations arising under an existing extradition treaty and violation of the rights of the abductee constitute internationally wrongful acts of the state itself. In the event that the conduct was not undertaken at the behest of the

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<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*, at 110.

<sup>195</sup> *Ibid.*

<sup>196</sup> ICTY, *Prosecutor v. Dusko Tadic*, ‘Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction’, 2 October 1995.

<sup>197</sup> *Ibid.*, at 115, 120-122.

<sup>198</sup> *Ibid.*, at 106

<sup>199</sup> ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, ‘Decision on the Confirmation of Charges’, ICC-01/04-01/06, 29 January 2007, at 210- 211; International Criminal Court, Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, ‘Judgment Pursuant to Article 74 of the Statute’, ICC-01/04-01/06, 14 March 2012, at 541.

<sup>200</sup> *Genocide Case*, *supra* note 190, at 397.

state but was subsequently endorsed by it, the entire operation, including the international law violations involved, may likewise become that of the state for the purposes of responsibility.

#### 2.1.2. ACKNOWLEDGES AND ADOPTS

Article 11 of the ILC Articles provides for conduct that was not or may not have been attributable to state at the time of commission, but is subsequently acknowledged and adopted as its own:

Conduct [...] shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.<sup>201</sup>

In the eighteenth century, de Vattel wrote that, “if a Nation, or its ruler, approve and ratify the act of the citizen, it takes upon itself the act, and may then be regarded by the injured party as the real author of the affront of which the citizen was perhaps only the instrument.”<sup>202</sup> In order for acts to be deemed that of the state and for international responsibility to attach, there must be evidence that the acts have been “adopted or ratified by the State.”<sup>203</sup>

In the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the International Court of Justice considered whether the occupation of the United States Embassy in Tehran and the holding of its occupants as hostages could be attributed to Iran, it held:

The policy [...] was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation [...] The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.<sup>204</sup>

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<sup>201</sup> ILC Articles, *supra* note 63, Article 11.

<sup>202</sup> Emmerich De Vattel, *The Law of Nations*, Book II, p. 162 .

<sup>203</sup> F.A. Mann, *Further Studies in International Law* (1990), at 339; Paul O’Higgins, *Unlawful Seizure and Irregular Extradition*, 36 *British Yearbook of International Law* (1960) 279, at 304; 1928 League of Nations Preparatory Committee proposed that “connivance” engages state responsibility; Preuss, *supra* note 176, at 507.

<sup>204</sup> ICJ, *United States Diplomatic and Consular Staff in Tehran (Iran v United States)*, 24 May 1980, para 74.

The test of attribution applied in the *Hostages* case was one of government approval. The Khomeini decree issued by the Iranian Government subsequent to the occupation of the Embassy transformed the acts of private individuals into that of the state; the militants were de facto agents of the state and so their conduct was attributable to Iran.

It is interesting to note that in its commentary to Article 11, the ILC drew on the *Eichmann* case to explain what is meant by “acknowledges and adopts the conduct as its own.”<sup>205</sup> Pursuant to this, receiving an individual that has been transferred from another state, holding him in custody and subsequently putting him on trial could arguably constitute ratification by the state. The explanation provided by the ILC and the dicta of international courts does not, however, support such a broad interpretation.

The ILC Commentary states that the term “acknowledges and adopts” requires “more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.”<sup>206</sup> This reasoning was endorsed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Nikolić* case.<sup>207</sup> The defense argued that “by not only ignoring the illegality but, by actively taking advantage of the situation and taking into custody the accused, SFOR’s exercise of jurisdiction over Nikolić was an adoption of the illegality.”<sup>208</sup> The Trial Chamber rejected the argument. In considering whether the acts of the individuals who delivered Nikolić to the SFOR should be attributed to the multinational military force, the Chamber concluded that the SFOR and the Prosecution had become the “mere beneficiary” of the rendition of the accused, which did not amount to an adoption or acknowledgement of the illegal conduct as their own.<sup>209</sup> Although the SFOR is not a state and so the question of attribution was not relevant for the purposes of state responsibility, the way in which the

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<sup>205</sup> Yearbook of the International Law Commission 2001, Vol II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-third session, United Nations, New York and Geneva 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 53.

<sup>206</sup> ILC Commentary, p. 93 para 4

<sup>207</sup> *Nikolić*, *supra* note 100.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Ibid.*, para 57.

Chamber applied the criteria to a situation involving abduction is relevant to the present study.

Contrary to the reasoning of the ICTY, a number of authorities have argued that the continued custody and prosecution of an individual constitutes ratification of conduct.<sup>210</sup> If this approach is applied to extraterritorial abduction, a question arises as to whether the whole operation can be made attributable to the state; will the infringement of territorial sovereignty, the circumvention of an existing extradition agreement and the violation of the rights of the abductee constitute internationally wrongful acts for which the state is responsible? In its Commentary to Article 11, the ILC explains that where the “acknowledgment and adoption is unequivocal and unqualified there is good reason to give it retroactive effect”.<sup>211</sup> In the context of extraterritorial abduction, this approach could lead to disproportionate results. An individual acting on private initiative cannot, absent state involvement, violate the sovereignty of a state or a treaty entered into by states. To say conduct that is not wrongful at the time of performance becomes unlawful because of the subsequent trial or detention of an abductee is hard to defend, even if it does avoid gaps in the law. This is not to say that acknowledgement or adoption should never be given retroactive effect. In so far as the trial and detention of an abductee can be seen as a continuation of the conduct which led to the gaining of jurisdiction, it would seem that the human rights violations alleged by the abductee should be attributed to the state.

## 2.2. PRIVATE INDIVIDUALS

For the purposes of determining responsibility for violations associated with extraterritorial abduction, it is necessary to consider the position of private individuals. Responsibility for breaches of human rights or public

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<sup>210</sup> Alberto Costi, ‘Problems with Current International and National Practices Concerning Extraterritorial Abductions’ 9 *Revue Juridique Polynésienne* (2003) 57, at 63; Mann, *supra* note 203, p. 408.

<sup>211</sup> ILC Commentary to Article 11, at 53, citing *Lighthouses* arbitration case *Affaire relative a la concession des phares de l’Empire ottoman*, UNRIIAA, vol. XII (Sales No. 63 V.3.) p. 155 (1956). 197-198.

international law rules does not attach to individuals. Although they can be held liable for domestic crimes such as kidnapping, the obligation to abide by international law is enforceable only against states.<sup>212</sup> These obligations may derive from custom or the consent to be bound by treaty or convention. The following discussion will consider the position of private abductors under international law.

In *S. v. Ebrahim*, a case involving the abduction of a South African citizen from Swaziland, the court acknowledged the difference between abductions carried out by private individuals and those executed by state officials:

It is clear from the authorities in English and in American law that the distinction made [...] between an unlawful abduction made by a private citizen of a person abroad and an abduction made with the connivance of the South African State or its officials is sound and logical. The latter is objectionable because it affects the comity of nations and the international obligations of sovereign States, the former does not.<sup>213</sup>

The South African court opined that extraterritorial abduction carried out by private individuals does not violate international law. The logic behind this finding is that states, and not individuals, are the subjects of international obligations. An argument can be made that private individuals can violate human rights and state sovereignty.<sup>214</sup> The Defense's submission to the Trial Chamber in *Nikolić* claimed that although the breaches occurred before delivery into the custody of SFOR and the Tribunal:

the forcible removal of the Accused from the FRY entailed a breach of both the sovereignty of the FRY and the Accused's individual due process guarantees.<sup>215</sup>

The third-party applicability of human rights, also known as *Drittwirkung*, has received a plethora of academic attention. The theory behind *Drittwirkung* is that certain human rights instruments place obligations not

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<sup>212</sup> But see discussion on *Drittwirkung* below; Individual criminal responsibility attaches to international crimes.

<sup>213</sup> Supreme Court of South Africa, *State v Ebrahim*, 16 February 1991, 31 *International Legal Materials* (1992) pp. 888-899.

<sup>214</sup> See Andrew Clapham, *Human Rights and Non-State Actors*, (ed.) (2013).

<sup>215</sup> ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić*, 'Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal', Case No. IT-94-2-PT, 9 October 2002, para 25.



only on states, but also on private entities. Paust has asserted that the language used in some human rights treaties reveals that the drafters may not have intended to limit the application of obligations to states.<sup>216</sup> The substance and parameters of *Drittwirkung* have yet to be settled as the debate, in particular that concerning the enforceability of human rights violations against private individuals, is still in its infancy. For the purposes of determining responsibility for breaches of international law in the context of extraterritorial abduction, it is submitted that although the conduct of a private individual may offend the rights of the abductee, such rights are not enforceable against the individual. The abductee may initiate proceedings based on domestic law violations but unless the conduct can be attributed to a state, the rights and protections guaranteed by international treaties cannot be realized. Having said that, states have a positive obligation to prevent and punish conduct that violates the rights of individuals. This issue will be considered in section 4.2.

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If it is established that an abduction operation is attributable to a state, the next step is to determine the consequences of this finding. The law on state responsibility does not address the scope and contents of a state's international obligations. Instead, it is limited to the rules of attribution. Mann has stated that, a "State is guilty of a violation of public international law [...] [for] abduction [...] by private volunteers whose acts have been adopted or ratified by the State."<sup>217</sup> This is not entirely true; establishing that conduct is attributable to a state does not automatically render the acts internationally wrongful. In order for responsibility to attach, (1) the conduct must be attributable to the state, and (2) the conduct must constitute a breach of an international obligation of that state. The status of luring, kidnapping and disguised extradition under public international law was discussed in Chapters 2, 3 and 4 respectively. It was established that the practices of luring and kidnapping can, depending on the specific

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<sup>216</sup> Jordan Paust, 'The Other Side of the Right: Private Duties Under Human Rights Law', 5 *Harvard Human Rights Journal* (1992) 51, at 52-53.

<sup>217</sup> Mann, *supra* note 203, at 339.

circumstances, violate the sovereignty of the state from which the individual is taken and the rights of the individual. Every form of unilateral apprehension also breaches the fundamental principle of good faith that underlies international law.

Unless a state can establish consent or other factors precluding responsibility, it will be obliged to make reparations to the injured parties; the state and the abductee. In relation to the rights of the abductee, if an individual falls within a state's jurisdiction, the state will have an obligation to provide an effective remedy for violations of his human rights. Before considering the remedies available to the injured parties and the positive obligations states owe to individuals, it is necessary to briefly consider how the consent of the state from which the individual is taken can preclude responsibility for otherwise internationally wrongful conduct.

### 3. CONSENT PRECLUDING RESPONSIBILITY

In the context of extraterritorial abduction, consent often negates the wrongfulness of the sending of agents into another state's territory to apprehend an individual. The issue of consent is at the heart of nearly every case of extraterritorial abduction; if the state from which the individual is taken permits the exercise of police power on its territory, responsibility for violations of state sovereignty does not arise. Article 20 of the ILC's Articles confirms this:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.<sup>218</sup>

Consent will preclude state responsibility whether it is given before or after the act occurs.<sup>219</sup> This consent "must be freely given and clearly established."<sup>220</sup> If there is a finding of fraud or coercion on the part of the

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<sup>218</sup> ILC Articles, *supra* note 148, Article 20; *Restatement (Third) of Foreign Relations Law of the United States*.

<sup>219</sup> ILC Articles, *ibid*, Article 20(3).

<sup>220</sup> International Law Commission, Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the work of its fifty-

apprehending state, consent may be negated.<sup>221</sup> In cases where there is no effective government, “abduction will engender no state responsibility on the abducting state’s part.”<sup>222</sup> This is because in the absence of an effective government, it is not possible for a state to obtain consent and, “the asylum nation has no political independence or territorial sovereignty to violate.”<sup>223</sup> The involvement of agents of the state upon which the operation takes place will be sufficient to constitute consent.<sup>224</sup> This reasoning was endorsed by the ILC in its commentary to the Articles on State Responsibility:

In cases involving arrests by organs of one State of persons who were in the territory of another State, it has sometimes been held that the action of the local police in co-operating in the arrest constituted, in those cases, a form of consent-tacit, but incontestable by the territorial State and that, consequently, there had been no violation of the territorial sovereignty of that State.<sup>225</sup>

The ILC cited the decision of the Permanent Court of Arbitration *Savarkar* as support for this proposition.<sup>226</sup> In that case, a prisoner escaped from a British ship while it was docked at a French port. The prisoner was apprehended by a French constable and returned to the ship. The Court held that the involvement of the French official in the apprehension precluded any finding that the sovereignty of France was violated.<sup>227</sup> A number of authorities that espouse this line of reasoning have opined that the status of the official in terms of his authority or rank is irrelevant to the determination of consent.<sup>228</sup> According to Brownlie, “it is now generally

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third session, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 73.

<sup>221</sup> *Ibid*; See ‘Award of the Permanent Court of Arbitration in the Case of Savarkar, between France and Great Britain, February 24, 1911’, reprinted in *American Journal of international Law*, Vol 5 (1911) pp. 522-533.

<sup>222</sup> Paul Michell, *supra* note 24, at 421; US Court of Appeals, US Court of Appeals, *Chandler v United States*, 3 December 1948, No. 4296, (171 F. 2d 921); See also Cameron Findlay, “Abducting Terrorists Overseas for Trial in United States: Issues of International and Domestic Law”, 23 *Texas International Law Journal*, (1988) 1, at 17.

<sup>223</sup> Kristin Berdan Weissman, ‘Extraterritorial Abduction: the Endangerment of Future Peace’, 27 *U.C Davis Law Review* (1994) 459, at 471.

<sup>224</sup> Michell, *supra* note 24, at 421.

<sup>225</sup> Report of the International Law Commission on the Work of its Thirty-First Session, at 112.

<sup>226</sup> *Case of Savarkar*, *supra* note 202.

<sup>227</sup> *Ibid*.

<sup>228</sup> J.A. Gluck, ‘The Customary International Law of State-Sponsored International Abduction and the United States Courts’, 44 *Duke Law Journal* (1994-1995) 612, at 623; But see Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs*, (1990), at 313 and F. De Sanctis, ‘The Practice of National and International Courts on Transnational

accepted that the position of an official in the internal hierarchy has no relevance to the question of state responsibility.”<sup>229</sup>

It can be established from the preceding paragraphs that consent, whether explicitly given or implied by the involvement of the authorities of the state from which the individual is taken, will preclude a finding of international responsibility for violations of sovereignty. Another situation that may lead to the same result is the acquiescence of the aggrieved state or its failure to protest the violation after the fact.<sup>230</sup> It must be noted that this will in no way remove the wrongfulness of the conduct; instead, it will constitute a waiver of the injured state’s right to seek reparation.<sup>231</sup> In *United States v. Verdugo-Urquidez*, the court held that

a nation may consent to the removal of an individual from its territory [...] after the fact, by failing to protest a kidnapping [...] Because the kidnapping violates the nation's rights [...] the nation may waive those rights.<sup>232</sup>

This reasoning was also followed in *Matta-Ballesteros v. Henman*, “[w]ithout an official protest, we cannot conclude that Honduras has objected to Matta's arrest.”<sup>233</sup> In *United States ex rel. Lujan v. Gengler*, the United States Court acknowledged the importance of a protest by the injured state. Absent protest or objection by Argentina or Bolivia, Lujan’s argument that his abduction violated the Charters of the United Nations and the Organization of American States was rejected.<sup>234</sup> The Supreme Court noted that in the circumstances of the case before it, neither had protested the defendant's abduction, which suggested that these countries had chosen

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Seizure: is a Fair Balance between Human Rights and Accountability Possible? 22 *Netherlands Quarterly of Human Rights* (2004) 529, at 553.

<sup>229</sup> Ian Brownlie, *System of Law of Nations: State Responsibility*, (1983), at 134.

<sup>230</sup> See *Eichmann* case, “such waiver may be explicit or by acquiescence.” Supreme Court of Israel, Supreme Court of Israel, *Attorney General of the Government of Israel v. Eichmann*, ‘Judgment’, 29 May 1962, Criminal Appeal No. 336/61 (36 *International Law Reports* 1968, pp. 277-342), at 305

<sup>231</sup> F.A. Mann argues that waiver must be explicit: “It is submitted that if the State does or says nothing, the illegality remains. It is impossible to infer consent from silence or inactivity,” *supra* note 203, at 98.

<sup>232</sup> US Court of Appeals, *United States v. Verdugo-Urquidez*, 22 July 1991, No. 88-5462 (939 F.2d 1341), at 1352.

<sup>233</sup> US Court of Appeals, *Matta-Ballesteros v. Henman*, 1 December 1995, No. 91-50336, (896 F.2d 255), at 260. *United States v Brewster*.

<sup>234</sup> *United States ex rel. Lujan v. Gengler*, *supra* note 29. Also see, Preuss, *supra* note 176, at 507.

to waive their right to assert responsibility.<sup>235</sup> It is logical to argue that if a state fails to protest a violation of its sovereignty, there will be no finding of responsibility. This is true even if the state did not consent *ab initio*. Unless an aggrieved state submits a claim to a court or arbiter, reparations will not be ordered.<sup>236</sup> It must be noted that non-protest goes to determinations as to whether reparations are due but it does not render the conduct in question lawful. As was discussed in Chapter 2 section 2 in the context of the use of force, the unlawfulness of an act does not depend upon an express pronouncement to that effect. In other words, conduct may be rendered permissible in so far as no protest or reparations are made but, the fact that it violated principles and rules of international law nevertheless remains.

Disputes are often resolved by way of diplomatic channels rather than official protests. Individuals in support of claims contesting the jurisdiction of the court usually raise arguments related to the violation of international law in the context of extraterritorial abduction. As will be discussed in section 4, in the majority of instances it has been held that individuals do not have standing to protest violations of public international law and that the inaction of a state constitutes a waiver of the state's right to seek reparation. The following section will consider the reparations and remedies available to injured states and abductees and the positive obligations placed on states to prevent and punish human rights violations.

#### 4. REPARATIONS AND REMEDIES

A state responsible for an internationally wrongful act is under an obligation to cease the conduct and to provide guarantees of non-repetition.<sup>237</sup> The obligation to make full reparation for the injury caused by the act is a generally accepted corollary of international law.<sup>238</sup> In the

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<sup>235</sup> *United States ex rel. Lujan v. Gengler*, *supra* note 29.

<sup>236</sup> ILC Articles, *supra* note 148, Article 42.

<sup>237</sup> *Ibid*, Article 30.

<sup>238</sup> *Ibid*, Article 31; Inter-American Juridical Comm., 'Legal Opinion on the Decision of the U.S. Supreme Court in the *Alvarez-Machain* Case,' 13 *Human Rights Law Journal* (1992) 395 at 397; Brownlie, *Principles of Public International Law*, (4th ed. 1990), at

*Eichmann case*, the Security Council Resolution requested Israel “to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.”<sup>239</sup> The ILC’s Articles list restitution, compensation and satisfaction as forms of reparation.<sup>240</sup> In general, it is for the injured state to specify the type of reparation that it seeks and to notify the responsible state of this.<sup>241</sup> The majority of cases in which a state has protested violations associated with extraterritorial abduction have been resolved by way of apology, assurance of non-repetition or compensation. In *Eichmann*, the Argentinian Government expressed satisfaction at Israel’s formal apology.<sup>242</sup> Following a finding that the United States was responsible for “undue exercise of police authority within jurisdiction of Republic of Panama”, the United States was ordered to pay \$500 in compensation to the Republic of Panama on behalf of the abductee.<sup>243</sup> In some cases, the aggrieved state has sought the extradition of the abductors or the repatriation of the abductee. These forms of reparation come under the heading of restitution; the purpose of which is to “wipe out the legal and material consequences of [the] wrongful act by re-establishing the situation that would exist if that act had not been committed.”<sup>244</sup> In the *Factory at Chorzow* case, the Permanent Court of International Justice explained:

[...] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; [...] such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>245</sup>

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434; See *Spanish Zones of Morocco Claims (Spain/United Kingdom)* II R.I.A.A. 615, 641 (1925).

<sup>239</sup> United Nations Security Council Resolution (1960) 138 UN Doc S/4349 15 UN SCOR Res and Decl 4.

<sup>240</sup> ILC Articles, *supra* note 148, Article 34.

<sup>241</sup> *Ibid*, Article 43

<sup>242</sup> See the joint statement of 3 August 1960 that closed the diplomatic incident.

<sup>243</sup> Guillermo Colunje (*Panama v. United States*), 6 R.I.A.A. at 343-344.

<sup>244</sup> Yearbook of the International Law Commission 2001, Vol. II, Part 2, Report of the Commission to the General Assembly on the Work of its fifty- third session, United Nations, New York and Geneva, 2007, A/CN.4/SER.A/2001/Add.1 (Part 2), p. 97.

<sup>245</sup> PCIJ, *Case Concerning the Factory at Chorzow (Germany v. Poland)*, ‘Judgment’, 13 September 1928, *Publications of the Permanent Court of International Justice*, Series A-No. 17, Judgment No. 13.

A rigid application of the principle of restitution in the aftermath of an extraterritorial abduction would, if a violation of sovereignty were established, support the repatriation of the abductee. Return of the individual would go the furthest in restoring the *status quo ante*. A number of authorities argue that repatriation is the proper form of reparation due in cases in which an individual is unlawfully seized.<sup>246</sup> Preuss has argued that “[s]uch a violation of foreign territory undoubtedly engages the responsibility of the state of arrest, which is under a clear duty to restore the prisoner [...]”<sup>247</sup> Mann has put forward a similar view: “[t]he normal and generally accepted remedy in the event of a wrongful abduction is the return of the victim.”<sup>248</sup> In saying this, the responsible state is under no obligation to return the individual on its own accord; it is for injured state to specify the reparation sought.<sup>249</sup> Abductees often seek repatriation to the country from which they were taken but absent a request from the injured state, return will rarely be granted. As Lowenfeld notes, requests for the return of the individual “have succeeded only intermittently and usually in a semi political, semi legal context.”<sup>250</sup> The reason why states often show a reluctance to repatriate the individual are twofold; the state from which the individual is taken does not request this remedy and so there is no obligation to do so or, its interest in prosecuting the abductee are seen to outweigh any diplomatic repercussions that may follow refusal. Bassiouni

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<sup>246</sup> Preuss, *supra* note 176, at 505; F.A. Mann, ‘Reflections on the Prosecution of Persons Abducted in Breach of International Law’, in *International Law at a Time of Perplexity*, 411 (Yoram Dinstein ed., 1989). A Highet & George Kahale III, *International Decisions*, 86 *American Journal of International Law* (1992) 811, at 815; Claire E. Lewis, ‘Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffe: A Case in Point’, 28 *Criminal Law Quarterly* (1985-1986) 341, at 368 Felice Morgenstern, ‘Jurisdiction in Seizures Effected in Violation of International Law’, 29 *British Yearbook of International Law* (1952) 265, at 265; Paul O’Higgins, ‘Unlawful Seizure and Irregular Extradition’, 36 *British Yearbook of International Law* (1960) 279 at 293 (Harvard Draft Convention on Jurisdiction with Respect to Crime and the Restatement (Third) of Foreign Relations; The commentary to Article 16 of the Harvard Convention states, 6 Draft Convention on Jurisdiction with Respect to Crime, 29 *American Journal of International Law*, 437, (1935), 623-24.

<sup>247</sup> Preuss, *ibid*, at 505.

<sup>248</sup> Mann, *supra* note 246, at 411.

<sup>249</sup> Preuss, *supra* note 176, at 507.

<sup>250</sup> Andreas F. Lowenfeld, ‘U.S. Law Enforcement Abroad’, 84 *American Journal of International Law* (1990) 444, at 475

notes that the remedy of return of an individual seized unlawfully has not yet been recognized.<sup>251</sup>

In the *Argoud* case, the defendant argued that since his apprehension violated international law, he should be returned to Germany.<sup>252</sup> The court rejected his plea and found that Germany's inaction constituted a waiver of any rights it might have because of the abduction.<sup>253</sup> The court stated:

[...] even accepting that Argoud had been abducted on the territory of the Federal Republic of Germany in violation of the rights of that country and of its sovereignty, it would be for the Government of the injured State alone to complain and demand reparation.<sup>254</sup>

Upon request of the injured state, there have been cases in which the abductee has been repatriated. In the *Mantovani* case, Swiss authorities sought and obtained the release of an Italian national arrested on its territory and forcibly taken to Italy.<sup>255</sup>

It must be noted that even if a state does protest, there will be no obligation to offer reparations if valid consent has been established. As was discussed above, the involvement of officials of the aggrieved state may constitute consent and preclude a finding of state responsibility. In *United States v. Sobell*, the court stated “even a diplomatic demand for the return of an illegally seized fugitive need not be honored where officials of the asylum state took part in the illegal seizure.”<sup>256</sup> In situations in which the abductors are private individuals and their conduct is not attributable to the state, there will be no violation of international law and in turn, no obligation to provide reparations however, as will be seen in section 4.2, a state has an obligation to remedy human rights breaches.

A number of courts have viewed the power to order the repatriation of an individual unlawfully seized as political in nature and outside the ambit

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<sup>251</sup> M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (1987), at 217.

<sup>252</sup> *Argoud*, *supra* note 181, at 71.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> ‘Affaire Mantovani, Italie et Suisse, Rousseau, Chronique des Faits Internationaux’, 69 *Revue Generale de Droit International Public*, (1965) 761, 834-35.

<sup>256</sup> US District Court, Southern District of New York, *United States v. Sobell*, 1956, (142 F. Supp. 515) at 523.



of the judiciary.<sup>257</sup> In *Sobell*, the court stated, “[t]he question of violation of international law [...] is to be left to the proper consideration of the political and executive branches of the government should the offended state choose to raise the issue.”<sup>258</sup> A similar approach was followed in *Brewster*, “[t]he illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complains, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court.”<sup>259</sup> This self-imposed restraint on the power of the judiciary to enforce international law is unfounded. In the *Paquete Habana* case, the Supreme Court of the United States held:

[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.<sup>260</sup>

Further support for this can be found in the Restatement (Third) of Foreign Relations, which provides that “[c]ourts in the United States are bound to give effect to international law and international agreements [...]”<sup>261</sup>

Another form of reparation that may follow extraterritorial abduction is the extradition of the abductors for the domestic crime of kidnapping. In *Ker v Illinois*, while sustaining jurisdiction over the abductee, the court stated that Peru could seek the extradition of the agent who conducted the apprehension on Peruvian soil.<sup>262</sup> The *Rainbow Warrior* incident did not involve extraterritorial abduction but the treatment of the individuals involved in the illegal conduct is relevant to the current discussion.<sup>263</sup> In that case, French agents caused the sinking of a Greenpeace vessel in New Zealand’s internal waters. It was held that the French Government, by

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<sup>257</sup> Gluck, *supra* note 228, at 646.

<sup>258</sup> *Sobell*, *supra* note 256; US District Court, *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), *affd sub nom. Unverzagt v. Benn*, 5 F.2d 492 (9th Cir.), *cert.denied*, 269 U.S. 566 (1925); *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 n.16 (1992) (noting the “advantage of the diplomatic approach”).

<sup>259</sup> *State v. Brewster*, 7 Vt. 118, 122-23 (1835).

<sup>260</sup> US Supreme Court, *Paquete Habana*, 8 January 1900, No. 895-896, (175 U.S. 677).

<sup>261</sup> *Restatement (Third) of Foreign Relations*, *supra* note 198.

<sup>262</sup> *Ker v Illinois*, *supra* note 4.

<sup>263</sup> *Rainbow Warrior (New Zealand v France)* (Arbitration Tribunal) (1990) 82 ILR. 499.

authorizing such acts, had committed a breach of international law and that as well as the responsibility of France itself, the individual agents could not be relieved of liability. A New Zealand court subsequently prosecuted the agents responsible for the incident.

In *Kear v Hilton* the United States complied with Canada's request for the extradition of a bounty hunter who was responsible for the abduction of a Canadian citizen in Toronto.<sup>264</sup> It is interesting to note that jurisdiction over the abductee was nevertheless maintained. In *Villareal v Hammond*, the Court of Appeals considered the extradition of a bounty hunter who had abducted an individual in Mexico and returned him to the United States to stand trial.<sup>265</sup> The court held that Mexico's sovereignty had been violated and found it insignificant that the abductor was not a state agent.<sup>266</sup> It recognized that injury to the state occurs regardless of the actor's status and the state that benefits from the acts should take responsibility to remedy the injury. The Court ordered the bounty hunters extradited to Mexico to stand trial for kidnapping.<sup>267</sup> In 1981, Sidney Jaffe was abducted near his home in Toronto by two United States' bounty hunters and taken to Florida to stand trial on charges of fraudulent land sales. The abductors were extradited to Canada whilst the Florida court retained jurisdiction over Jaffe.

In 1935, Berthold Jacob-Salomon, a German journalist was abducted in Switzerland.<sup>268</sup> The Swiss protested the abduction claiming that it was "carried out with the cooperation of German authorities [and] constitutes a grave violation of Swiss sovereignty."<sup>269</sup> The Swiss government demanded the return of Jacob. Germany refused to repatriate him stating, "no evidence has been found that German official authorities participated either directly or indirectly in the events on Swiss territory."<sup>270</sup> The Swiss government requested the matter be submitted for arbitration under the 1921 Treaty of

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<sup>264</sup> US Court of Appelas, *Kear v Hilton*, 1983, (699 F 2d 181).

<sup>265</sup> US Court of Appeals, *Villareal v Hammond*, 1934, (74 F.2d 503).

<sup>266</sup> *Ibid*, at 506.

<sup>267</sup> *Ibid*, at 505-506.

<sup>268</sup> Preuss, *supra* note 176, citing 'Note of the Federal Council to the German Foreign Office' (1 April 1935) in *Journal de Geneve*, 3 April 1935, summary in *New York Times* (3 April 1935).

<sup>269</sup> *Ibid*, at 503.

<sup>270</sup> *Ibid*, at 504.

Arbitration and Conciliation.<sup>271</sup> Germany accepted but the dispute was nevertheless resolved diplomatically. An agreement was concluded between the two governments whereby Jacob was returned to Switzerland.<sup>272</sup>

Rather than extradite the abductors, a state may offer satisfaction in the form of instituting proceedings in their own courts or otherwise reprimanding the individuals responsible. In the Jacob-Saloman case, the agent responsible was disciplined.<sup>273</sup> In 1920, United States officials were punished after they invited a United States citizen on board a vessel in the Bahamas and arrested him.<sup>274</sup> Following a British protest of the action, the United States government reprimanded the agents, suspended them and exonerated the abducted person from all further proceedings. In an 1884 case, German officers were punished following their arrest of a man in Switzerland without Swiss consent.<sup>275</sup>

It is submitted that the appropriate form of reparation for internationally wrongful acts associated with extraterritorial abduction will depend upon the circumstances of the case. To say that the return of the abductee is the proper remedy creates a rigid principle that in the context of serious crime could result in disproportionate results. If a state requests the return of the individual, repatriation should be considered but it may not necessarily be ordered. The reason why repatriation would not be favored by the state that has gained custody of the suspect is that the return of the individual could amount to impunity for the crimes charged. It is important that return of an individual is not confused with exoneration. In cases in which the abductee is suspected of having committed a crime, especially a serious crime, the state to which he is returned may have an obligation to try him. It would seem logical to conclude that a state that has custody of a suspect will be

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<sup>271</sup> 12 League of Nations Treaty Series, No. 320 p. 281.

<sup>272</sup> Lawrence Preuss, 'Settlement of the Jacob Kidnapping Case', 30 *American Journal of International Law* (1936) 123, at 124.

<sup>273</sup> *Ibid.*

<sup>274</sup> Jeffrey J. Carlisle, 'Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping', 81 *California Law Review* (1993) 1541, at 1554.

<sup>275</sup> *Ibid.*, at 1449.

more willing to comply with a request for repatriation if it is given an assurance that the individual will not escape justice upon return.<sup>276</sup>

#### 4.1 HUMAN RIGHTS VIOLATIONS

The doctrine of positive obligations encompasses duties of prevention and due diligence. The traditional view, which was espoused by Grotius, Vattel and Pufendorf, is that states are not responsible for the acts of private individuals unless the state is complicit.<sup>277</sup> Complicity in this sense is established through the notions of *patientia* and *receptus*.<sup>278</sup> *Patientia* refers to the state's failure to prevent the individual from committing a wrongful act while *receptus* refers to its failure to punish or otherwise remedy the wrongful act. Pursuant to the Grotian theory of culpa, "knowledge implies a concurrence of will" which in turn renders the conduct attributable to the state for the purposes of international responsibility.<sup>279</sup> A more modern theory of attribution for private acts sees state responsibility as a derivative of the duty to exercise due diligence over individuals within its jurisdiction. This school of thought, to which the majority of contemporary scholars in this area subscribe, differs from the traditional view in that the state does not become responsible for the wrongful conduct but instead, for its omission to prevent or punish it.<sup>280</sup> Ago has summarized the rule in the following words:

the state is internationally responsible only for the action, and more often for the omission, of its organs which are guilty of not having done everything within their power to prevent the individual's injurious action or to punish it suitably in the event that it has nevertheless occurred.<sup>281</sup>

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<sup>276</sup> J.E.S. Fawcett, 38 'The Eichmann Case', *British Yearbook of International Law* (1962) 181, at 199-200.

<sup>277</sup> J.A. Hassbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *New York University Journal of International Law and Politics* (2004), at 265; See R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC 1972*, Vol II, at 121-122.

<sup>278</sup> Hugo Grotius, *De Jure Belli ac Pacis* (1625), translated in A.C. Campbell, Kitchener: Batoche Books (2001), Book II, Chapter 21, para ii, p. 215-216.

<sup>279</sup> *Ibid.*

<sup>280</sup> C. Eagleton, *The Responsibilities of States in International Law*, (1928) at 77; Ago, *supra* note 277.

<sup>281</sup> Ago, *ibid.*, at 122-123.

What these theories illustrate is that apart from the obligation not to engage in internationally wrongful acts, states have a positive obligation to protect those within their jurisdiction and to punish, investigate and redress actions that violate human rights.<sup>282</sup> Ensuring an effective remedy for human rights violations is an essential feature of the human rights regime. The obligation to provide a remedy combats impunity for breaches and guarantees the realization of individual rights. Where a human right is being, or has been violated, a state has a positive obligation to ensure that the alleged violation is investigated and the individual is afforded the opportunity to challenge the conduct.

If it is established that there has been a breach, that person must be granted an appropriate resolution. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law set out the scope of a state's obligation as including a duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.<sup>283</sup>

Article 1 of the European Convention on Human Rights and Article 2(1) of the International Covenant on Civil and Political Rights provide that the

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<sup>282</sup> IACtHR, *Velazquez Rodriguez v Honduras*, 'Merits', 29 July 1988; Human Rights Committee, *Herrera Rubio v Colombia*, Communication No. 161/1983, 2 November 1987; ECtHR, *Egri v Turkey* Application Number 23818/94, 28 July 1998; ECtHR, *Timurtas v Turkey*, Application Number 23531/94, 23 June 2000; ECtHR, *A v UK*, Application No. 3455/05, 19 February 2009.

<sup>283</sup> UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, resolution adopted by the General Assembly, (21 March 2006), A/RES/60/147.

primary obligation for ensuring the protection of rights is imposed on the state. The Human Rights Committee has explained that:

[...] the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of the Covenant rights by its agents, but also against acts committed by private persons or entities [...]<sup>284</sup>

In the *Bosnian Genocide* case, the International Court of Justice held that a state's positive obligations extend to conduct carried out beyond its own territory.<sup>285</sup> Applying this to extraterritorial abductions, a state is obliged to punish the kidnappers and provide a remedy to the abductee. In relation to torture or cruel treatment, states have an explicit obligation to prohibit, punish and prevent torture. The obligation to prevent is provided for in Article 2(1) of Convention Against Torture.<sup>286</sup> It requires that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>287</sup>

The Human Rights Committee considers this obligation to be implied in Article 7 of the International Covenant on Civil and Political Rights. In General Comment 20, it stated:

it is not sufficient for the implementation of Article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.<sup>288</sup>

In addition to a duty to prevent acts of torture against persons within territory under its jurisdiction, a state also has a duty to "prevent such acts by not bringing persons under the control of other states if there are substantial grounds for believing that they would be in danger of being

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<sup>284</sup> General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 8.

<sup>285</sup> *Genocide Case*, *supra* note 190.

<sup>286</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 2(1).

<sup>287</sup> *Ibid.*

<sup>288</sup> UN Human Rights Committee (Human Rights Committee), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

subjected to torture.”<sup>289</sup> This is the principle of *non refoulement*, which was dealt with in Chapter 4.

As was discussed above, kidnappers have sometimes been prosecuted, extradited or otherwise punished. Such actions may satisfy a state’s obligation to punish but what about its obligation to provide a remedy? In the majority of cases discussed above, courts have upheld jurisdiction over individuals brought before them by way of extraterritorial abduction. It could be argued that in order to deter irregular apprehension, prevent recurrence and provide an effective remedy, the court should divest itself of jurisdiction. Technically this may be true but in cases where the suspect is wanted for international crimes, there is a tendency towards upholding jurisdiction.

The remedies available for violations of the right to liberty and security of the person and the right not to be subjected to arbitrary arrest or detention are financial compensation and release. Article 9 of the International Covenant on Civil and Political Rights and Article 5 of the European Convention on Human Rights provide that compensation shall be given in every case of unlawful arrest or detention. The remedy of release can be found in paragraph 4 of Article 9 of the Covenant and Article 5 of the Convention. These provisions are quite similar; they both require that the court decide on the lawfulness of the detention and if found unlawful, order the release of the individual. There is authority for the proposition that as well as considering the lawfulness of the detention, the judge must also examine the lawfulness of the arrest.<sup>290</sup> This argument is based on application of the remedy to the unlawful deprivation of liberty; a broader concept that encompasses arrest. Although not referring to arrest directly, Nowak uses the term deprivation of liberty in his commentary to the Covenant: “[t]he decision to remand proceedings relates exclusively to the

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<sup>289</sup> CAT, *supra* note 286; See Chapter 4, Section 3.2.

<sup>290</sup> Paulussen, *supra* note 1, at 161.

*lawfulness* of deprivation of liberty.”<sup>291</sup> Whether the remedy of release is limited to unlawful detention or extends to the arrest is down to interpretation. A court presented with a claim by an individual that the manner of his arrest warrants release would be justified in applying the literal meaning of the provision and limiting its application to unlawful detention. On the other hand, there is sufficient authority to support the extension of the remedy to other forms of deprivation of liberty, namely unlawful arrest should the judge chose to take a broader approach.

## CONCLUSION

Chapters 2, 3 and 4 identified the international legal frameworks applicable to extraterritorial abduction and the rules and principles triggered by its use. The present Chapter considered the consequences of these violations. In relation to the effect of extraterritorial abduction on the jurisdiction of the court, a survey of domestic and international decisions established that there is a growing shift away from the *male captus bene detentus* approach. Although courts have shown a willingness to examine the pretrial treatment of the accused, a *bene detentus* outcome is still likely, especially in the cases where the accused is charged with serious offences. The *bene detentus* result is not due to a determination by the judge that they cannot or will not look at pre-trial irregularities. Instead, having investigated the pre-trial stage, the alleged *male captus* is found not to be serious enough to divest jurisdiction. What can be discerned from the case law examined is that most courts would decline jurisdiction where (1) an abduction is accompanied by serious human rights violations or (2) is proceeded by a protest from the injured state.

It is understandable that a court would be reluctant to free a suspect in its custody if to do so would mean that justice is eluded. To strike a fairer balance between the right to an effective remedy and the interests of justice, divestiture of jurisdiction and repatriation of the abductee should not be

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<sup>291</sup> Manfred Nowak, *Commentary to the International Covenant on Civil and Political Rights*, (2<sup>nd</sup> ed. 2005).



synonymous to impunity. In the event that the misconduct involved warrants dismissal of the trial, the possibility of securing a judicial agreement with the state to which repatriation is ordered should be explored. Such an agreement would provide for the trial of the accused upon return. This would encourage the provision of an effective remedy to the victims of extraterritorial abduction while at the same time serving the interests of states in suppressing and punishing crime. Although dismissal of charges may be a disproportionate remedy in cases where the interests in trying the individual are strong, this does not mean that other remedies cannot be provided. In order to uphold the integrity of the proceedings, advance the interests of justice and vindicate the rights of the individual, a more logical and balanced approach would be to acknowledge the violation of the rights of the suspect and provide a remedy along the lines of a reduction in sentence or financial compensation.

State responsibility for an internationally wrongful act attaches when: (1) there is an international legal obligation between two or more states; (2) that obligation has been breached and (3) the breach is attributable to the state. The majority of extraterritorial abductions are carried out under the direction or control of the state. In rare cases in which a private abductor undertakes to bring an individual before a court in another state, the conduct will nevertheless be attributable to the state if it subsequently acknowledges and adopts it. The trial of an abductee may give rise to attribution.

The vertical relationship between state and individual that is created by the human rights regime does not engender horizontal application. Having said that, a state has positive obligations to protect those within its jurisdiction and to punish, investigate and redress conduct that violates human rights. Because injured states rarely lodge a formal protest or instead resolve any such dispute through diplomatic channels, an official remedy does not follow the majority of international law breaches. In practice, this means that the rights of those subjected to extraterritorial abduction often go unaddressed.

## CONCLUSION

The aim of this thesis has been to assess the lawfulness of extraterritorial abduction under the framework of international law and to determine the practical legal consequences of its use. This undertaking necessitated an examination of why states engage in irregular forms of apprehension, clarification of the legal frameworks applicable to the practice, an analysis of the specific rules and principles triggered and an assessment of the approaches taken by domestic and international courts and tribunals in relation to the issue. What has been discerned from the research is: (1) there are features of the formal system of extradition and surrender that sometimes lead to the employment of extraterritorial abduction, (2) depending on the circumstances of the case, the practice can violate a number of international legal rules and principles, (3) violation of the rights of the abductee and the injured state are often subordinated to the interests of states in the prosecution of international crimes and terrorism-related offences. The ultimate conclusion reached is that certain elements of extraterritorial abduction constitute violations of international law but in practice, the illegality involved sometimes goes without allocation of liability or vindication of the rights of injured parties.

The following sections will consider each of these points and suggest possible ways to approach the continued use of extraterritorial abduction. Identifying efforts that can improve the formal system, and in turn reduce the incentive to resort to extraterritorial abduction, will facilitate the suppression of crime, safeguard the sovereignty of states and better protect the rights of the individual.

## **1. FEATURES OF FORMAL SYSTEMS OF EXTRADITION AND SURRENDER AND THAT CAN LEAD TO EXTRATERRITORIAL ABDUCTION**

As was established in Chapter 1, state cooperation in the transfer of suspects and the suppression of crime is based largely on self-interest. Although states continue to develop systems of mutual cooperation, the existence of an extradition agreement does not ensure that requests will be granted. It also does not mean that a state will abstain from seeking alternative methods of rendition should the formal system fail. When extradition fails or is unavailable, a state seeking to gain custody of a suspect is left with two options; it can consider the case closed or, it can employ methods outside the formal framework.

The political offence exception is one of the main impediments to securing the extradition of suspects. Efforts have been made to refine, and in some cases remove, the exception. These changes may facilitate the interstate transfer of suspects but it is important to ensure that this is not done at the expense of the genuine political offender. It was suggested in Chapter 1 that a fair balance may be struck by the incorporation of a negative definition of political crimes into future and existing extradition arrangements. This approach would protect the true political offender while at the same time ensuring that international criminals and the perpetrators of terrorism-related offences are not shielded by the exception.

As well as reviewing the political offence exception, states have attempted to streamline the extradition process by entering into more agreements, lowering evidentiary standards, reducing the requirements of dual criminality and encouraging the extradition of nationals. It is submitted that caution should be taken in the area of evidence. The case of Lotfi Raissi illustrated the importance of maintaining such standards and denying extradition when they are not reached. In relation to the non-extradition of nationals, a shift away from such provisions should be encouraged. A potential alternative to this is the creation of a system of cooperation

between the judicial system of the requesting and requested state. This could come in the form of judicial cooperation agreements whereby the individual remains in his state of nationality but the judicial system undertakes to submit the suspect to trial.

Despite improvements made in relation to cooperation, there will always be situations where formal extradition is not possible. As was illustrated in the case of Colombia, it is not always the system itself that frustrates the process; the political environment within a state and relationship between the requesting and requested state can also prove detrimental to securing the transfer of suspects. In order to fill some of the gaps and reduce the incentives to employ extraterritorial abduction, it is suggested that the obligation to extradite or prosecute be given renewed support. The duty has reached customary status in the context of war crimes and its application to torture, crimes against humanity, genocide and terrorism-related offences is becoming increasingly accepted. To ensure that the perpetrators of international and transnational crimes do not elude punishment when extradition proves fruitless, states should endeavor to incorporate the obligation to extradite or prosecute into existing and future extradition agreements. As well as advancing the interests of states in suppressing crime, this would also reduce incentives to employ extraterritorial abduction.

## **2. INTERNATIONAL RULES AND PRINCIPLES VIOLATED BY EXTRATERRITORIAL ABDUCTION.**

As was discussed in Chapters 2, 3, and 4, the three methods of extraterritorial abduction, kidnapping, luring and disguised extradition, can violate principles and rules of international law. In relation to kidnapping, the entry onto the territory of another state and the exercise of police power may constitute a use of force within the meaning of Article 2(4) of the UN Charter. In the aftermath of the Eichmann abduction, the Security Council warned that this type of operation could endanger international peace and security, although the conduct of the Israeli agents on Argentinean soil was

not explicitly condemned as a violation of the Charter.<sup>1</sup> As noted in Chapter 2, this illustrates that although extraterritorial abduction violates rules of international law, the institutions charged with overseeing compliance may not officially deem the conduct unlawful. This does not render the conduct legal; it merely shows that absent a solid protest from the injured state, it may be tolerated.

Luring does not involve the same degree of intrusion as kidnapping but it may violate the broader prohibition against unlawful intervention when: (1) state agents physically conduct police powers within the territory of another state for the purpose of inducing an individual or (2) communications transmitted to an individual, whether from within or outside the state, constitute coercion in so far as the individuals free will is overborne. In practice, states have rarely protested the luring of an individual from their territory. The reason for this may be down to indifference, unawareness, or the desire to avoid disruption to inter-state relations. Failure to submit an official protest has acted as a barrier to the vindication of the rights of the individual.

In relation to the rights of the abductee, much depends upon the context in which the operation is carried out. As was discussed in Chapter 2, the distinction between law enforcement and military operations can sometimes become blurred. This is particularly true in cases involving the apprehension of individuals suspected of terrorism-related offences. The United States' counterterrorism policy against al-Qaeda, which encompasses the armed conflict in Afghanistan and law enforcement operations throughout the world, was used to illustrate the criteria for determining when international humanitarian law applies to an extraterritorial abduction. It was established that when international humanitarian law is the appropriate framework, apprehension of lawful military targets is a permissible tactic.

It was also established in Chapter 2 that the majority of abductions conducted outside Afghanistan and parts of Pakistan are regulated by

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<sup>1</sup> UN Security Council, Resolution 138 (1960) of 23 June 1960, 3 June 1960, S/RES/138 (1960).

international human rights law. The application of human rights law to extraterritorial abduction is much more straightforward than the general extension of obligations to territory outside the state. An individual who has been captured on foreign soil is clearly under the control of the state from which the agents were sent. In a number of cases involving extraterritorial abduction, the Human Rights Committee and the ECtHR have found that a state's obligations extend to arrests carried out abroad.

Under this framework, kidnapping violates the right to liberty and security of the person and the prohibition against arbitrary arrest and detention. In relation to luring, it was determined in Chapter 3 that efforts to apprehend the individual will not violate international human rights law if they are (1) in conformity with domestic and international law (2) appropriate and proportionate under the circumstances and (3) limited to inducements, which do not overcome the will of the individual so as to constitute a deprivation of liberty. Proof of state complicity may also be required.

Although the irregularities involved in an extraterritorial abduction may encroach upon the rights and protections guaranteed under the framework of international human rights law, redress is dependent upon the interpretation followed by the institution considering the legality of the conduct. As was discerned, the decisions of courts are often influenced by the gravity of the offences for which the individual is charged and the interests of states in suppressing crime. In the *Öcalan* case, the ECtHR stated that it takes into account, "the interests of all nations that suspected offenders who flee abroad should be brought to justice" because "inherent in the whole Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."<sup>2</sup> This is a worthy position but such considerations seem to extend beyond the mandate of the Court, which is to ensure state compliance with the Convention. A more palatable approach could be achieved if the court limited itself to measuring

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<sup>2</sup> ECtHR, *Öcalan v Turkey*, (Grand Chamber), Application No. 46221/99, 'Judgment', (12 May 2005), para 88.

the alleged conduct against the protections of the instrument over which it is charged with monitoring compliance. Determinations as to whether conduct violates the rights of an individual should not be overridden by the general interest of the international community in suppressing crime. Considering that the evolution of international law has seen the development of a system which guarantees rights to individuals that are independent from those of the state, it is submitted that determinations as to the effect of extraterritorial abduction on the rights of the abductee should not be dictated by the interests of the states involved. After all, a finding that an extraterritorial abduction violated the rights of an individual is not synonymous with saying that an individual should not be tried or if convicted, that he should be released.

In so far as disguised or de facto extradition is carried out pursuant to immigration procedures, it may appear to be the least objectionable form of extraterritorial abduction. As was determined in Chapter 4, this is not entirely true. The use of disguised or de facto extradition poses challenges not only to the rights of the individual subject to it, but also to the system of extradition itself. In comparison to luring and kidnapping, the misuse of immigration control can be difficult to prove and is often only presumed. This means that the practice is hard to regulate and almost impossible for individuals to seek redress from. As was discussed in Chapter 4, immigration procedures and systems of extradition are developed to deal with two very distinct sets of circumstances. They are generally overseen by two separate branches and follow distinct regimes in relation to the protections and privileges afforded to those subject to their enforcement. It was submitted that resort to immigration procedures when extradition proves fruitless or too cumbersome may, if repeated and unaddressed, render the very purpose of extradition obsolete. In practice, the use of extradition and immigration procedures could become a policy option for states when determining how to secure the transfer of suspects.

As was illustrated in Chapter 4, the distinction between the two processes means that the authority of the executive in administering immigration control can go unchecked by the judiciary. In order to enhance

transparency, discourage the use of disguised or de facto extradition and maintain the distinction between the processes of extradition and immigration, it was suggested that the judiciary be empowered to oversee immigration procedures. Furthermore, the development of a means to detect abuses by public officials would deter the use of immigration in lieu of extradition. It was also suggested that adherence to the principle of *non refoulement* represents one of the strongest protections against disguised or de facto extradition. Although it does not directly regulate its use, it can mitigate the negative effects of the practice by ensuring baseline protections for those facing transfer; whatever the procedure used.

### **3. APPROACHES TO ADDRESSING VIOLATIONS OF THE RIGHTS OF INJURED PARTIES**

It was established in Chapter 5 that state responsibility for an internationally wrongful act attaches when: (1) there is an international legal obligation between two or more states (2) that obligation has been breached and (3) the breach is attributable to the state. The majority of extraterritorial abductions are carried out under the direction or control of the state. In rare cases in which a private abductor undertakes to bring an individual before a court in another state, the conduct will usually be attributable to the state if it subsequently acknowledges and adopts it. As was determined, state responsibility for breaches of international law associated with extraterritorial abduction rarely attaches. This is down to the fact that the conduct is not protested by the injured state or diplomatic channels resolve the issue. This means that an official remedy does not follow the majority of international law breaches. In relation to the rights of the abductee, a state has positive obligations to protect those within its jurisdiction and to punish, investigate and redress conduct that violates human rights. In order to fulfill its obligations, states must exercise due diligence in ensuring human rights violations by foreign agents on their territories are investigated, prevented and redressed.

In relation to the effect of extraterritorial abduction on the jurisdiction



of the court, a survey of domestic and international decisions established that there is a growing shift away from the *male captus bene detentus* approach. Although courts have shown a willingness to examine the pretrial treatment of the accused regardless of whether there was a protest by the injured state, a *bene detentus* outcome is still likely. This is especially true in cases where the accused is charged with international crimes or other grave offences. In this case, the *bene detentus* result is not due to a determination by the judge that they cannot or will not look at pre-trial irregularities. Instead, having investigated the pre-trial stage, the alleged *male captus* is found not to be serious enough to divest jurisdiction. What can be discerned from the case law examined is that most courts would decline jurisdiction where abduction is accompanied by serious human rights violations or is followed by a protest from the injured state. Measuring the violations involved in the irregular method of apprehension against the gravity of the crimes for which the accused is charged is a legitimate exercise when determining whether to divest itself of jurisdiction. In saying that, it would be helpful if the judicial team undertaking this measuring exercise elaborated on the criteria used and the weight given to the factors considered. As was noted in Chapter 5, this would ensure transparency in the proceedings and contribute to the emergence of a more consistent approach to dealing with extraterritorial abduction.

Another suggestion that was offered in Chapter 5 related to the fate of an accused that is found to have been subjected to extraterritorial abduction. It is understandable that a court would be reluctant to free a suspect in its custody if to do so would mean that justice is eluded. To strike a fairer balance between the right to an effective remedy and the interests of justice, it was noted that divesture of jurisdiction should not be synonymous to impunity. In the event that the misconduct involved warrants dismissal of the trial and repatriation of the abductee, the possibility of securing a judicial agreement with the state to which repatriation is ordered should be explored. Such an agreement would provide for the trial of the accused upon return. This would encourage the provision of an effective remedy to the victims of extraterritorial abduction while at the same time serving the

interests of states in suppressing and punishing crime.

It is understandable that divesture of jurisdiction may be a disproportionate remedy in cases where the interests in trying the individual are strong but this does not mean that other remedies cannot be provided. In order to uphold the integrity of the proceedings, advance the interests of justice and vindicate the rights of the individual, a fairer and more balanced approach would be to afford the abductee other remedies when divesture of jurisdiction would be disproportionate. This approach would acknowledge the violation of the rights of the suspect and provide a remedy along the lines of a reduction in sentence for those convicted or financial compensation in cases of acquittal.

To answer the question posed in the title of this work, “does irregular mean unlawful?”, this thesis undertook a comprehensive examination, analysis and assessment of the status of extraterritorial abduction under the framework of international law. By identifying the international legal frameworks applicable to kidnapping, luring and disguised or *de facto* extradition, and measuring the legality of the conduct involved against the principles and rules triggered, it is evident that depending on the circumstances, irregularities can and often do constitute unlawful violations of international law. A survey of the approaches taken by institutions charged with overseeing state compliance with human rights obligations and domestic and international courts before which abductees have been brought reveal that there is a gap between the law and its enforcement. This gap has developed as a result of the discord between two competing factors; state interests in the prosecution of crime and state obligations under international law. In practice, the former has often served to outweigh the later. Accordingly, the rights of the state and individuals injured by unlawful extraterritorial abduction have often gone without vindication or redress. What this ultimately means is that although irregularities involved in an extraterritorial abduction may constitute *de jure* violations of international law, the treatment of the issue by those charged with overseeing compliance can render the conduct involved permissible *de*

*facto.*

No one can deny the right of a state to submit the perpetrators of crime to trial however, in order to avoid regularizing the disregard of international law in exercising this right, it is necessary to reduce the incentives to resort to unlawful extraterritorial abduction and encourage states to adhere to their international legal obligations. The suppression of terrorism-related offences and international crime are legitimate objectives but they do not trump the purpose of post-Charter international law, which is the maintenance of peace and security. It is this author's view that the progressive disregard of state obligations to respect the sovereignty of other states and the human rights of individuals has led to an increased acceptance by many nations, and other groups, of the use of extraterritorial abduction.

In an age where states have reaffirmed faith in fundamental human rights and pledged to coexist with one another as good neighbors, disregard for the obligations arising from treaties and other sources of international law should not be so readily condoned. In order to avoid the spreading of a culture of allowing state interests in the prosecution of crime to override international law, it is crucial that adherence to formal procedures be insisted upon. As was recognized above, work may need to be undertaken in order to ensure the effectiveness of formal procedures but in a climate of interdependence, reformulation of systems of cooperation for the transfer of suspects between jurisdictions is not an unrealistic objective. It is submitted that such an approach would go the furthest in striking a fair balance between the interests of states in submitting suspects to trial and the fundamental aim of securing peace and human dignity for all members of the international community.

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