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UNLAWFUL SEIZURES AND IRREGULAR RENDITION DEVICES AS ALTERNATIVES TO EXTRADITION

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Extradition is a legal device whereby a state requests from another the surrender of a person accused or convicted of a crime.[1] It is one of the modes of cooperation in penal matters between states. One rationale for extradition is that all states have an obligation to cooperate in the suppression of criminality and must, therefore, surrender to each other accused and fugitive offenders. This rationale is based on the maxim *aut dedere aut iudicare*.[2] Extradition law and practice have been slow to recognize the rights of those persons who are the objects of its proceedings. In fact, the whole process of extradition is considered as a relationship between states in which the individual has no rights other than those conferred on him or her by the requested and requesting states. This situation permits the violation of human rights and only recently has been challenged.[3] The processes of extradition involve the requested and requesting states, but there are two additional participants whose interests must be considered: the individual and the world community. For the first participant, certain minimum human rights must be protected; for the second, minimum world order must be preserved. So far, these two interests are not adequately recognized and extradition continues to be practiced as a matter solely concerning the respective states without regard for human rights and the impact of the practice on minimum world

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1. *See* Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1 (1968).

2. *See generally* Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709 (1969). This maxim is also stated *aut dedere aut punire* (literally, "either surrender or punish").

3. For the reports on extradition to the Xth International Penal Law Congress held in Rome in 1969, and the United States report and a proposal by this writer, see 39 REVUE INTERNATIONALE DE DROIT PENAL 495-518 (1969), *reprinted in* 15 WAYNE L. REV. 733 (1969).

order.[4] This article deals only with one of the facets of the problems of extradition law and practice, focusing attention on human rights and world community interests in the preservation of such rights, the integrity of the international legal process and the preservation of minimum world order.

I. TYPOLOGY AND RATIONALE

The outcome of extradition processes is the rendition of a person against his or her will by one state to another through certain legal formalities. Extradition is thus a formal legal process, but it is not always resorted to by states who are desirous of securing a person outside their jurisdiction. The means resorted to by states as alternatives to extradition are unlawful seizures and irregular rendition devices. The words "alternatives to extradition" do not mean extradition other than by treaty, although some states, such as the United States, who adhere to extradition only by treaty regard any other basis for extradition (such as reciprocity or comity) as an alternative to extradition. "Alternatives to extradition" here refers to those legal and extralegal rendition devices that do not fall within the framework of formal extradition. The outcome of any rendition device, be it extradition or any alternative thereto is the same; what is at issue, however, is not the result but the processes employed. These rendition techniques outside the framework of extradition fall into three categories: (1) the abduction and kidnapping of a person in one state by agents of another state; (2) the informal surrender of a person by agents of one state to another without formal or legal process; and (3) the use of immigration laws as a device to directly or indirectly surrender a person or place him in a position in which he or she can be taken into custody by the agents of another state.

Professor Paul O'Higgins has classified these situations as follows:[5]

> (1) the recovery of fugitive criminals in violation of international law—seizure in violation of customary international law or in violation of conventional international law;

4. *See* Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation,* in AKTUELLE PROBLEMS DES INTERNATIONALEN STRAFRECHTS (Oehler & Potz eds. 1970).

5. O'Higgins, *Unlawful Seizure and Irregular Extradition,* 36 BRIT. Y.B. INT'L L. 279, 280 (1960).

(2) the apprehension of a fugitive criminal in the territory of state B by private individuals, nationals of state A, with the connivance of the officials of state A;

(3) the apprehension of a fugitive criminal in the territory of state B by private individuals, nationals of state A, without the connivance of the officials of state A;

(4) the irregular apprehension of a fugitive criminal in state B by an official of state B prior to extradition to state A;

(5) the mistaken surrender of a fugitive criminal by one state to another.

This typology is important to the determination of the existence and extent of state responsibility, discussed below.

These various rendition techniques exist, in fact, because of the inappropriate application of the maxim *mala captus bene detentus*, by which municipal courts assert in personam jurisdiction without inquiring into the means by which the presence of the accused was secured.[6] Aside from the flagrant violation of the individual's human rights, these practices affect the stability of international relations and subvert the international legal process.

Most of the devices and strategies listed above are extralegal, either in form, in substance, or both, but there is no deterrent or sanction to prohibit them because their utilization produces legally valid results. When states can benefit from these practices, further violations are encouraged and voluntary observance of international law, whether by states or by individuals, is eroded. Consider, for example, the attempts to control individual terrorism and the inevitable argument that arises in the context of kidnapping—why is an act characterized as terrorism if it is committed by a private person acting alone or on behalf of a political group and not as terrorism when the same act is committed by agents of a state? At this stage in the development of international law it is

6. *Id.*; Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427 (1957); Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953). For a case cited by numerous countries as a landmark for the *mala captus bene detentus* rule see Ker v. Illinois, 119 U.S. 436 (1886). *See* Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934); Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953); Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502 (1935).

no longer possible to rationalize violations of international law on grounds of *raison d'etat* or to allow such violations to be perpetuated without an adequate deterrent-remedy.

The techniques stated above are extraordinary in the legal sense, since an ordinary legal process does exist, *i.e.* extradition. However, the recourse to these practices may well occur because of the frustration of the legitimate efforts of a requesting state following formal channels, leading one writer to ask, "When extradition fails, is abduction the solution?"[7] Indeed, there are numerous examples illustrating this unfortunate dilemma. The difficulties encountered in some instances by states desirous of securing a fugitive or convicted offender—difficulties producing failure to extradite for unwarranted reasons—have caused in part the resort to these alternatives to extradition. The delays and costs involved in formal extradition proceedings are often advanced as other reasons. The proper alternative, however, is to make extradition more workable and not to subvert it by resorting to unlawful means.

A. *Abduction and Kidnapping*

This device is characterized by agents of one state, acting under color of law, unlawfully seizing a person within the jurisdiction of another state, without its consent and in violation of its sovereignty and territorial integrity. Abduction and kidnapping must be distinguished from any other formal or quasi-formal means of rendition and from the erroneous exercise of a formal process, as when an unauthorized public official in one state acting under color of law surrenders or causes to be surrendered a fugitive who sought refuge in that state to the agents of another state.[8]

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7. Cardozo, *When Extradition Fails, Is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961).

8. For the classic example see Savarkar Case (France v. Great Britain), Hague Court Reports (Scott) 275, 276 (Perm. Ct. Arb. 1911). Other examples may be found in unpublished materials of the Department of State, which are cited in Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77 (1966). These materials will be cited hereinafter as Dep't State Ms. File No. —, together with the name of the country and the date. *See, e.g.*, Dep't State Ms. File No. 211.12 Hinojos, Efren/2 (Mexico 1936) (Governor of Chihuahua mistakenly assumed he was empowered by article IX of the Treaty of Extradition with Mexico, March 8, 1899, 31 Stat. 1818, T.S. No. 242, to extradite fugitives to the United States).

In another case, "[w]here a fugitive was removed to Canada without court

This device involves three distinct violations: disruption of world public order; infringement of the sovereignty and territorial integrity of another state; and violation of the human rights of the individual unlawfully seized. The most dramatic *causes célèbres* remain the *Soblen, Eichmann, Argoud, Ahlers* and *Tshombe* cases.[9] In these spectacular cases, the method by which each fugitive was sought and brought to trial can be characterized as exceptional, and violative of international due process of law.[10] The most

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order by representatives of the Canadian Government before he could appeal against the dismissal of his petition for habeas corpus in extradition proceedings, Canadian authorities returned him at the request of the United States. His appeal was then heard; the grant of extradition was affirmed." Evans at 89 n.1. *See also* Wentz v. United States, 244 F.2d 172 (9th Cir.), *cert. denied*, 355 U.S. 806 (1957) (illegal action by Mexican authorities in returning a fugitive to the United States did not oust the court of jurisdiction); People v. Pratt, 78 Cal. 345, 20 P. 731 (1889) (fugitive returned from Japan at the request of the Governor of California after the Department of State refused to request extradition in the absence of a treaty; court noted that Governor's action was probably illegal, but that this did not oust the court of jurisdiction over the fugitive).

9. For an analysis of the legal issues in the *Soblen* case see O'Higgins, *Disguised Extradition: The Soblen Case*, 27 MODERN L. REV. 521 (1964). The case has aroused considerable interest. *See id.* at 1 n.1. Dr. Soblen was party to the following cases: R. v. Secretary of State for Home Affairs, *Ex parte* Soblen, [1962] 3 All E. R. 373 (C.A.); R. v. Brixton Paison (Governor), *Ex parte* Soblen, [1962] 3 All E.R. 641 (C.A.); United States v. Soblen, 199 F. Supp. 11 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962). For a brief account of the Israeli phase of the case see *Soblen Case Summarized*, 5 THE ISRAELI DIGEST 8 (August 1962). "Deportation" in the broadest sense comprehends exclusion and expulsion among other methods for the ouster of aliens from a country. These are hardly terms of art, depending as they do for definition upon particular national law and practice. United States *ex rel.* Paktorovics v. Murff, 260 F.2d. 610 (2d Cir. 1958). For a discussion of *Eichmann* see Attorney General of Israel v. Adolf Eichmann, 36 I.L.R. 5 (D. Ct. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Supreme Court, Israel 1962). *See also* PAPADATOS, THE EICHMANN TRIAL (1964); Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 TEMP. L.Q. 1 (1961). For a discussion of *Argoud* see De Schutter, *Competence of the National Judiciary Power in Case the Accused has been Unlawfully Brought Within the National Frontiers*, 1 REVUE BELGE DE DROIT INTERNATIONAL 88-124 (1965). The decision in *Argoud* was rendered by the Cour de Suretè de l'Etat on December 28, 1963.

10. Argoud was a leader of the military revolt against President de Gaulle during the controversy over Algeria's independence, was kidnapped from Munich in February 1963, and later sentenced to life imprisonment. West Germany protested the kidnapping. N.Y. Times, Dec. 31, 1963, at 3, col. 4 (city ed.); *id.* Jan. 1, 1964, at 3, col. 5 (city ed.). Conrad Ahlers, one of the editors of *Der Spiegel*, fled to Spain after police raids on the magazine following his criticism of the state

recent case occurred in February 1973, when eleven persons were forcibly seized by Israeli armed forces in Lebanon and subsequently tried in Israel by a military tribunal. Seizure was justified on the grounds that the defendants belonged to an organization that caused harm or intended to cause harm to Israel; this justification apparently applied regardless where such acts actually occurred. In rejecting the arguments of the first defendant, a Turkish citizen named Faik Bulut, the military tribunal relied in part on the *Eichmann* case as valid precedent.[11] There are, of course, other cases possibly less notorious, but nonetheless equally violative of international law.[12]

As stated above, the inducement for the continuation of these

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of military preparedness in West Germany. He was summarily deported from Spain to Germany at the request of German authorities. Defense Minister Strauss was subsequently dropped from the Government for his part in the affair. In October 1964, Ahlers and two others were indicted for treason on the charge of publishing State secrets in the magazine. N.Y. Times, Oct. 28, 1964, at 3, col. 1; *id.* Nov. 9, 1964, at 11, col. 1; *id.* Nov. 11, 1964, at 6, col. 3. Charges against Ahlers and the publisher of *Der Spiegel* were dismissed by the Federal Supreme Court in May 1965. N.Y. Times, May 15, 1965, at 5, col. 5. For a discussion of the *Tshombe* case see INTERNATIONAL COMMISSION OF JURISTS, BULL. No. 32, at 30-31 (1967).

11. For the text of Argentina's protest against Israel for the kidnapping of Eichmann and the Security Council's action see 15 U.N. SCOR, U.N. Doc. S/4349. *See also* Brennan, *International Due Process and the Law*, 48 VA. L. REV. 1258 (1962).

12. For example, Egyptian agents attempted to kidnap Mordechai Luk, an alleged double agent for Egypt and Israel, by shipping him in a trunk to Egypt. Two Egyptian diplomats were expelled from Italy in the matter. Luk returned to Israel, apparently voluntarily, where he was wanted for military desertion. N.Y. Times, Nov. 18, 1964, at 1, col. 5 (city ed.); *id.* Nov. 19, 1964, at 1, col. 2; *id.* Nov. 25, 1964, at 6, col. 4. The disappearance of Professor Jesus de Galindez from New York in March 1956 has never been fully solved. It is believed that he was kidnapped by agents of the Trujillo regime, taken to the Dominican Republic and killed. *See* N.Y. Times, Mar.-Dec. 1956. *See also* 36 DEP'T STATE BULL. 1027 (1957). The particularly vigorous campaign for the "repatriation" of defectors, conducted in the late 1950's by the Soviet Union and other Communist-bloc states, can also be classed as a form of "irregular recovery." *See* Evans, *Observations on the Practice of Territorial Asylum in the United States*, 56 AM. J. INT'L L. 148, 151-53 (1962). Following the West German Government's offer of a $25,000 reward for the recovery of Martin Bormann, a Government official was reported to have pointed out that if Bormann were recovered by kidnapping, "the reward would be paid only if the country of hiding later gave its approval." N.Y. Times, Nov. 24, 1964, at 12, col. 4 (city ed.). *See also* McNair, *Extradition and Extraterritorial Asylum*, 28 BRIT. Y.B. INT'L L. 172 (1951).

illegal practices is the tendency of domestic courts to consider the physical presence of the fugitive sufficient cause for jurisdiction to attach to the person notwithstanding the manner in which that physical presence was secured. The case of *Ker v. Illinois*[13] is cited by almost every court before which such a case is presented; but all too often the facts are not analogous to *Ker* and a careful reading of *Ker* would reveal that it is not always applicable. One such inappropriate application of *Ker* was in the trial mentioned above of Faik Bulut, a Turkish citizen seized by Israeli armed forces in a Palestinian refugee camp located 100 miles inside Lebanese territory. Bulut was charged with a violation of an Israeli law purporting to apply to anyone, anywhere who participates in an organization intending to cause harm to the state or its citizens. Counsel for defendant Bulut raised a jurisdictional question on the grounds that Bulut and the other defendants were seized in violation of international law and that the Israeli law could apply to him only if he had committed a crime in Israel or against Israeli citizens. The military tribunal on July 23, 1973, rejected both arguments and cited *Eichmann* and *Ker* as authority.[14] Prescinding from the issue of unlawful seizure, the two cases were inappropriately relied on by the military tribunal because in *Ker*, Illinois had proper subject matter jurisdiction since a crime had been committed there (territoriality), and in *Eichmann*, there was universal jurisdiction for international crimes (Israel, however, had also improperly relied on the passive personality theory on the assumption that it represented the "Jewish people" everywhere, even if it existed as a state.). The inappropriate references to *Ker* and *Eichmann* illustrate the courts' confusion of subject matter jurisdiction with jurisdiction over the person, and of the power to prescribe with the power to enforce.

The United States courts have ruled inconsistently in abduction cases, but remain fixed to the *Ker* position,[15] provided there is

13. 119 U.S. 436 (1886). *See also* Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953).

14. *See* note 11 *supra* and accompanying text.

15. Frisbie v. Collins, 342 U.S. 519 (1952); United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957); *Ex parte* Campbell, 1 F. Supp. 899 (S.D. Tex. 1932); United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom.* Unverzagt v. Benn, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925); Lawshe v. State, 121 S.W. 865 (Tex. Crim. App. 1909); Converse and Blatt Case, FOREIGN REL. U.S. 606 (1918); Adsetts Case (1907), 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 14-

valid subject matter jurisdiction. This is also the position of England as enunciated in 1829 in *Ex parte Susannah Scott*.[16] The *Ker* principle was reaffirmed by a unanimous decision of the Supreme Court as late as 1952.[17] Many other countries have found themselves embroiled in the same application of the maxim *mala captus bene detentus*.

Arguably, to be unlawful under international law, the abduction must be executed by public agents or other persons acting under color of state law; they cannot be bona fide volunteers.[18] This argument relies on the notion that international law is designed to restrict state conduct and not to secure the integrity of a process violated by individuals acting in their private capacity. Presumably, that would be left to national legislation. This theory was presented in the *Eichmann* case, but it was established that those "private volunteers" were operating "with the connivance of the Israeli Government." *Eichmann* was nevertheless tried and convicted. In contrast, in the *Vincenti* case, United States Department of Justice agents unlawfully seized a United States citizen in England, but when the English Government complained, he was released and the United States apologized to Great Britain for the improper seizure, stating that the agents "acted on their own initiative and without the knowledge or approval of this Govern-

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15 (1945); Myers and Tunstall Case (1862), 4 J. MOORE, A DIGEST OF INTERNATIONAL LAW 332-34 (1906); State v. Brewster, 7 Vt. 118 (1835). For an excellent survey of United States practice see Evans, *supra* note 8.

16. 109 Eng. Rep. 166 (K.B. 1829). *See* Mahon v. Justice, 127 U.S. 700, 708 (1888) (Court relied on *Ex parte Susannah Scott*). *See also* O'Higgins, *supra* note 5. As for the practice between England and the United States, "the case of *Townsend*, concerning the kidnapping of an American national from the United Kingdom by an American police officer," is also instructive. "The Law Officers of the Crown, in an Opinion of 1865, did not challenge the validity of the jurisdiction so acquired; however, they did suggest that '. . . it would be proper and expedient that the attention of the Government of the United States should be called to this case, in order that such instructions may be given to their police authorities as may prevent the possibility of the repetition of similar proceedings.' In *Blair's* case involving the forcible removal of a British subject from the United States, the Law Officers in 1876 did not challenge the validity of jurisdiction so acquired as a matter of law, but questioned it as a matter of policy." Evans, *supra* note 8, at 90 n.2.

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

18. *See* Cardozo, *supra* note 7, at 132-34. For a critique of this position see Dickinson, *Jurisdiction Following Seizure of Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

ment."[19] If the rationalization that the practice is valid because committed by private volunteers is to stand, it would mean that states would only have to allow their agents to act as "private volunteers," and thereby avoid the whole problem. This, however, would not square with efforts to curb terrorism by private individuals who resort to the same technique. The paradox is quite interesting in that states on the one hand seek to curb terrorism (which includes kidnapping), and yet condone kidnapping when committed by their agents or by "private volunteers" if it is to their benefit. This dual standard is all too evident and leads only to further disregard of international law, which, after all, relies on voluntary compliance.

The question of connivance between officials may be classified as a form of abduction, but a distinction ought to be drawn between these two techniques. Abduction occurs only when the state of refuge or asylum is not a party to the plot; when two interested states through their agents, whether public or private, act under color of law or by official connivance, the instance should be placed in another category. This distinction is predicated on the difference between an abduction and an informal surrendering of a person by means approved by the respective states; when both states condone the method of surrender of the fugitive no violation of the territorial integrity or sovereignty of the state of refuge occurs and, consequently, there is little likelihood that the practice would lead to disruptive relations between the respective states. There remains, however, a violation of the human rights of the individual, and the legal doctrine expressed in the writings of scholars remains opposed to these practices and to the application of the maxim *mala captus bene detentus*.[20] The surrender of the fugitive by means agreed to by both states is referred to as informal rendition and is discussed below.

B. *Informal Rendition*

Informal rendition occurs when the officials of the state of refuge act outside the framework of a formal process or without authority to facilitate the abduction or cause the surrender of the fugitive.

19. Quoted in 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 624 (1940).

20. For citation to some of these cases, mostly from diplomatic archives, see Evans, *supra* note 8, at 90-92. *See also* Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931); *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934); Vaccaro v. Collier, 38 F.2d 862 (D. Md. 1930); 1 G. HACKWORTH, *supra* note 19, at 624.

Informal rendition practices, however, are difficult to document since they presuppose the connivance of the two governmental agencies which would otherwise bring the matter to the attention of the judiciary.[21] The existence of such cooperative undertakings by state agents, even though violative of international due process, evidences the cooperation and friendly relations of the respective states, except when the agents of the respective states are acting on their own, without their superiors' knowledge and approval and undertake such ventures on a purely personal basis. This kind of ultra vires activity is seldom documented in legal or diplomatic records available to researchers. Frequently, however, agents of neighboring states may seek to cut through the red tape of formal processes and act on their own; but usually, their conduct is either known or condoned by their superiors and their actions cannot be deemed private or personal ventures.

The present position of the individual in international law and in most states very likely prevents his being able to raise the issue of the validity of such practices in domestic courts. The plea of kidnapping by connivance between officers of the Federal Bureau of Investigation and Mexican Security Police was advanced unsuccessfully in *United States v. Sobell*, a case in which the Second Circuit Court of Appeals, sustaining the jurisdiction of the district court to try Sobell on espionage charges, said:

> But it can hardly be maintained, still assuming the truth of appellant's charges, that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive [in *Ker*]. We think the question presented is indistinguishable from that before the Supreme Court in Ker, and that our decision here is controlled by that case.[22]

Most informal renditions occur between neighboring states and, in particular, when the individual who is the object of these devices is a national of the state to whose agents he or she is delivered. The commonplace examples occur between the United States and Canada and the United States and Mexico.[23]

21. *See, e.g.*, O'Higgins, *supra* note 5; De Schutter, *supra* note 9. For a comparative view see 39 REVUE INTERNATIONALE DE DROIT PENAL (1968).

22. United States v. Sobell, 244 F.2d 520, 525 (2d Cir. 1957).

23. *See, e.g.*, Evans, *supra* note 8.

In *Ker*[24] and *Sobell*,[25] United States public agents participated in the abduction of a United States citizen in foreign countries—Peru and Mexico—with the assistance and cooperation of public agents of the two states. These facts distinguish *Ker* and *Sobell* from the pure abduction cases exemplified by *Eichmann* and others.

In the *Ker* case, a private detective from the United States, while in Peru, received duly executed extradition papers from the United States Government, conforming to the requirements of the extradition treaty between the United States and Peru. He did not use them, however, because he had no access to the proper government of Peru, which was disorganized as a result of military occupation of the capital city by Chilean forces. He secured the assistance of United States officers to force Ker aboard a United States vessel. At no time did Peru object to the proceedings. If Peru had protested, a question could have arisen whether the Chilean occupation had so deprived the Peruvian Government of dominion and control over the territory where Ker was found that it had no standing to object to police action by foreign authorities because its sovereignty and territorial integrity had not been impaired. It was just such a situation that enabled the United States Government in 1946 to have Douglas Chandler seized in Germany by United States military forces and forcibly returned to the United States for trial on charges of treason.[26] There was no state whose sovereignty was offended by the action of foreign officers on its soil.

In the *Sobell* case the abducting party in Mexico was allegedly made up originally of Mexican officers. Sobell was carried, against his will, to the border and there he was turned over to United States authorities even before crossing into United States territory. The latter authorities took him to New York, where he was tried for conspiracy to commit espionage and convicted. He lost in his efforts to obtain release on various grounds, including the claim that the extradition treaty had been violated. It seems clear that the collaboration of the Mexican police, like that of the French police in the *Savarkar Case*,[27] deprived Mexico of any basis for

24. Ker v. Illinois, 119 U.S. 436 (1886).

25. 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957).

26. Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

27. Savarkar Case (France v. Great Britain), Hague Court Reports (Scott) 275

complaint, even if it had wanted to raise an objection. Many years before, however, the Mexicans had protested vigorously against retention by the United States of one Martinez, who was forcibly taken from Mexico to the United States by another Mexican. The latter was extradited by the United States to stand trial in Mexico for kidnapping, but the United States refused to release Martinez.[28]

The delay and formalism surrounding extradition processes as well as the exclusive dependence on the decision-making process of the requested state arguably leave the requesting state with no choice but to seek other means to secure the return of the fugitive. The classic example when such an instance could have arisen, but did not, is the *Artukovic* case.[29] Indeed, suppose, as Professor Cardozo wrote, that headlines in United States press should state: " 'War Criminal Abducted from California Home: Spirited to Yugoslavia by Serbian Patriots.' Would we be outraged at the evident offense to our sovereignty? Or would we be glad to be rid of a fugitive who had been accused of responsibility for wartime atrocities on a massive scale under Nazi auspices? The questions are not just academic, for there lives in California one Andrija Artukovic, against whom the Yugoslavs level charges of enough murders of bishops, priests, rabbis, Serbs, Croats, Gypsies, Jews, women and children to brand him a major war criminal. Their efforts to have him formally extradited under treaty and statutory procedures have finally been frustrated by decisions of the United States courts. It would hardly be incredible if a group of Serbs, inspired by hatred, revenge, and patriotism, should try to emulate the 'volunteers' who successfully contrived to move Adolph Eichmann from his refuge in Argentina to a prison in Israel."[30] Artukovic was charged with war crimes and mass murder on a genocidal scale, but his extradition was denied after almost nine years of attempts by Yugoslavia to extradite him. He was not extradited because the United States courts found that the crimes alleged were within the "political offense exception" listed in the treaty between the

(Perm. Ct. Arb. 1911) (reprinted in 5 AM. J. INT'L L. 520 (1911) and C. FENWICK, CASES ON INTERNATIONAL LAW 420 (2d ed. 1951)).

28. Letter from the Acting Secretary of State to the Mexican Chargé, [June 22, 1906] 2 FOREIGN REL. U.S. 1121-22 (1906). See also *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934); Savarkar Case, *supra* note 27.

29. United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

30. Cardozo, *supra* note 7, at 127.

United States and the (former) Kingdom of Serbia, to which the new government of Yugoslavia was deemed to have succeeded. In cases involving "ideologically motivated offenders" (wanted more frequently than other fugitives), under treaty-imposed political offense exceptions, extradition is denied without recourse; the resort to one of the alternatives discussed in this article therefore becomes likely.

C. *Disguised Extradition*

Disguised extradition is the process by which a person is placed in a position in which he or she falls or is likely to fall under the control of authorities of the state that has an interest in subjecting that person to its jurisdictional control. The process is not illegal under international law since the fugitive is not abducted. It is not an informal rendition because agents of the interested state do not connive or plan the seizure of the person with agents of the asylum state, nor do they undertake it as a joint venture. Disguised extradition is a method by which a state uses or relies on its immigration laws and regulations to deny an alien the privilege of remaining in that state. This is accomplished by resorting to expulsion, deportation or the denial of a visa to place the person directly or indirectly within the control of the agents of another state. This device presupposes the use of immigration laws and regulations, when the individual is within the jurisdiction of a state in which he seeks refuge or asylum. After being denied a visa or asylum, the person is either removed (deported), required to leave (voluntary departure) or caused to leave (denied legal entry); and his "departure" is executed in a manner intended to cause him to fall within the control of agents of the interested state.

Such a person may even be ordered deported to the state seeking him or her. The right of a state to admit and extend residence privileges to an alien is part of its immigration laws and regulations and thus is within the province of municipal law. Some states consider that right as exclusive and deny the application of international law to immigration control. This is the position of the United States.[31] It must be noted, however, that this position is

31. *See, e.g.*, Scales v. United States, 367 U.S. 203, 222 (1961) (Harlan, J., referred to Congress' "plenary power over aliens"); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (Court stated that Congress' plenary power in alien expulsion cases "bristles with severities"); Ekiu v. United States, 142 U.S. 651 (1892) (holding that as an accepted maxim of international law, the powers of exclusion and

highly questionable in light of several treaties and other sources of international law that govern the rights of refugees and supersede municipal law.[32] A compelling case can be made under existing international law that rights conferred on a refugee entitle him or her to treatment equal to that granted nonrefugees and that injuries to aliens subject a state to international responsibility.[33] Professor Evans, writing about the problem, has stated:

> The potentiality of expulsion as a method for the rendition of fugitive offenders has been recognized by government officials for many years. The long borders with Canada and Mexico, the relative ease of crossing them, and the generally friendly relations prevailing between the United States and these two states have been conducive to the use of this method of rendition. For example, where a fugitive from justice in the United States has been known to be in prison in Canada, an indication to Canadian authorities of American interest in the prisoner's whereabouts upon the completion of his sentence might lead to his deportation with prior notice to interested federal or state officials of the time and place of his departure from Canada. Again, Mexican authorities, having been alerted by United States authorities to the presence in that country of a fugitive from the United States, might order his deportation on grounds of illegal

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expulsion are inherent in sovereignty); 8 U.S.C. §§ 1182, 1251(a)(1), 1251(e) (1970); *see* 1 C. HYDE, INTERNATIONAL LAW 216-26 (2d rev. ed. 1947); Chief, Visa Division (Warren), to Hugh H. Smythe, Washington, Aug. 20, 1941, Dep't State Ms. File No. 031.11 Smythe, Hugh H./4 ("[i]t is a universally recognized sovereign right of a State to admit or refuse to admit aliens of certain classes into its territory").

32. *See, e.g.*, 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW (1966).

33. For a state's responsibility toward aliens in international law compare 4 J. MOORE, A DIGEST OF INTERNATIONAL LAW 95 (1906), with 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 221 (1965). *See also* Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961); Spiegal, *Origin and Development of Denial of Justice*, 32 AM. J. INT'L L. 63 (1938). On the United States position and alien rights with respect to due process in exclusion cases see Chin Yow v. United States, 208 U.S. 8 (1908). *See generally* 66 HARV. L. REV. 643, 661-76 (1953); 37 MINN. L. REV. 440 (1953); 20 U. CHI. L. REV. 547, 551 (1953); 62 YALE L.J. 1000 (1953). In *Shaughnessy v. United States*, it was held that a 25-year resident who left the United States temporarily to visit his mother could on his return be excluded without a hearing and confined indefinitely on Ellis Island since no other state could be found to which he could be sent. 345 U.S. 206 (1953), *noted in* 34 B.U.L. REV. 85 (1954), 67 HARV. L. REV. 99 (1953), 51 MICH. L. REV. 1231 (1953), 37 MINN. L. REV. 453 (1953), 33 NEV. L. REV. 94 (1953), 28 N.Y.U.L. REV. 1042 (1953), 26 ROCKY MT. L. REV. 194 (1954), and 27 S. CAL. L. REV. 315 (1954).

> entry into Mexico. Expulsion might be suggested where extradition was not available as in the case of a known "confidence man" whose offense of using the mails to defraud was not covered by treaty with the United Kingdom, or as a relatively inexpensive and more convenient alternative to extradition. It might also be held in reserve in the event that extradition should fail.
>
> Apart from deliberate rendition by expulsion, it is possible that the strict execution of a deportation order would result in placing an individual in jeopardy of criminal process in the State of destination; however, both judicial and administrative authorities have held that such ultimate result constitutes no bar to expulsion.[34]

A landmark English case is *The King v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry*,[35] in which the validity of the use of the power of deportation in order to secure the return of the relator to France and place him within the control of the French military authorities was challenged. It was argued on his behalf that the Home Secretary had no power to order the deportation of an alien to a particular country, and that the relator was charged with a political offense for which extradition is to be denied. The Divisional Court found that immigration laws gave no power to the Secretary of State to order deportation to any particular named country.[36] Although the deportation order did not on its

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34. Evans, *supra* note 8, at 85. *See also* United States *ex rel.* Giletti v. Commissioner of Immigration, 35 F.2d 687 (2d Cir. 1929); Moraitus v. Delany, 46 F. Supp. 425 (D. Md. 1942); *In re* Banjeglav, 10 I. & N. Dec. 351 (1963); *In re* S—C—, 3 I. & N. Dec. 350 (1949); 4 G. HACKWORTH, *supra* note 15, at 30; 4 J. MOORE, *supra* note 15, at 259; Dep't State Ms. File No. 212.11 Steele, Robert (Mexico 1940-41); Dep't State Ms. File No. 242.11 Finkelstein, Sam (Canada 1937) (wanted in Illinois for a parole violation); Dep't State Ms. File No. 242.11 Cerafisi, Michael (Canada 1935) (wanted in New York for a parole violation); Dep't State Ms. File No. 259.11 Rosen, Samuel (Denmark 1931-33); Dep't State Ms. File No. 248.11 Long, John M. (Union of South Africa 1932); Dep't State Ms. File No. 211.41 (United Kingdom 1932); Dep't State Ms. File No. 211.55 D 47 (Belgium 1926); Dep't State Ms. File No. 242.11 B 17 (Canada 1922) (wanted for obtaining money under false pretenses). In *Johnson v. Eisentrager*, Justice Jackson noted that a "resident alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists." 339 U.S. 763, 775 (1950). And "[i]n the *Kendler* case, deportation was ordered on grounds that the allien had concealed a previous criminal record in Canada; he was 'turned over to the Royal Canadian Mounted Police, who wanted him on forgery charges.'" Evans, *supra* note 8, at 85 n.5.

35. [1917] 1 K.B. 552, *rev'd*, [1917] 1 K.B. 922 (C.A.).

36. *B.I.L.R.* 146 (1946). In this case the Attorney General admitted on behalf of the Home Office that there was no power to order deportation to a particular

face purport to prescribe the destination of the alien, it was nonetheless shown that immigration authorities admitted to the court that the decision of expulsion had been made for the purpose of returning the Duke to France. Chief Justice Lord Reading said: "In form the order is correct, but the Court must look behind the mere form, and, when there is no doubt that the intention is to deport the alien to a particular country, though the form of the order does not state that that is the object and intention of the Executive in making the order, we must treat it as if the order did in effect state that the alien was to be deported to France."[37]

On appeal, the Court of Appeal reversed this decision.[38] Its judgment is authority for a number of important principles:

> (1) The Secretary of State has no power to order the deportation of an alien to a foreign state specified in the deportation order.
> (2) Since, however, the Aliens Act entitled the Secretary of State to cause an alien to be detained and placed on board a particular ship selected by the Secretary of State and be there detained until the ship finally left the United Kingdom with the result that an alien may be obliged to disembark at the port to which the vessel sailed, the Secretary of State could lawfully, but indirectly by selecting the means of departure, effect what he had no power to do directly, *i.e.* secure an alien's deportation to a particular state. In the case of the Duke of Chateau Thierry, the order made against him was good. It did not purport to order his deportation to France. Although it was admitted that the executive intended under the order to send the Duke to France, this was immaterial provided the procedure employed was to specify the Duke's departure by a particular ship and not to require in the order

named country. Nonetheless the police and other authorities had indicated to the intended deportee that it was proposed to deport her to Czechoslovakia. *Cf.* Papadimitriou v. Inspector-General of Police and Prisons, [1943-1945] Ann. Dig. 231 (No. 68) (Supreme Court, Palestine 1944).

37. [1917] 1 K.B. 555-56. *Cf. The King v. Governor of Brixton Prison, Ex parte Sarno*, [1916] 2 K.B. 742, where Lord Reading, in dealing with the validity of an order for the deportation of a Russian, said: "If we were of opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers, this Court would have jurisdiction to deal with the matter." [1916] 2 K.B. at 749.

38. [1917] 1 K.B. 922. *See also* C. V. E. (1946) 62 T.L.R. 326; note 66 *infra*.

itself that he be deported to France.

(3) An alien's status as a political refugee, or the likelihood that he will be punished for a political offense in the country to which it is intended that he should, albeit indirectly, be deported, will not invalidate a deportation order made against him.[39] However, the authorities expressly disclaimed any intention of using deportation proceedings against political refugees: "It should, however, be stated that the Attorney-General on behalf of the Government expressly stated that the Executive had no intention whatever of taking advantage of their powers over aliens to deport political refugees."[40] The same view is held by the British Government today.[41]

(4) A court can invalidate a deportation order only on very limited grounds—principally, that the intended deportee is not an alien.

(5) The Court of Appeal took the view that the use of deportation proceedings to secure, in effect, the surrender of military deserters is quite lawful.[42] The following extracts from the judgments reveal this judicial opinion: "In July last inquiry was made at the request of the French Government as to the failure of the respondent (who is a Frenchman, within military age, whether reckoned according to the French or the British standard) to discharge his military duties. . . . These [French] authorities dispute that he is a political refugee; they state that his return to France is sought in connection with his 'irregular military situation' and for no other cause, and that he is not known to the French police for any other offense. An assurance has been given by the French Government that the respondent, if returned to France, would be treated as a military absentee, and not as liable to prosecution for any other offense. We were informed that there exists an agreement between this country and France by which this country undertakes to return to France subjects of that coun-

39. *Cf. Rex v. The Governor of H.M. Prison at Brixton and the Secretary of State for Home Affairs, Ex parte Sliwa*, [1952] 1 K.B. 169.

40. [1917] 1 K.B. at 929 (Swinfen Eady, L.J.).

41. See Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment, VI*, 7 INT'L & COMP. L.Q. 514, 553-55 (1958). *See also The King v. Secretary of State for Home Affairs, Ex parte Venicoff*, [1920] 3 K.B. 72; *The King v. Superintendent of Chiswick Police Station, Ex parte Sacksteder*, [1918] 1 K.B. 578, 586 (C.A.).

42. [1917] 1 K.B. at 928.

> try who are of military age and liable to military service, and that it was by reason of that agreement that the Secretary of State made this [deportation] order."[43]

Subsequently, in *Regina v. Superintendent of Chiswick Police Station, Ex parte Sacksteder*,[44] the Court of Appeal again upheld the validity of the use of deportation orders to secure the return of military deserters to France. Significantly, in the case of the surrender of the Duke of Chateau Thierry the states concerned admitted that the principles of specialty and nonsurrender of political offenders should apply. The states themselves treated the surrender as a special form of extradition to which the general rules governing extradition should be applied.

Notwithstanding the apparent ease and convenience of the "expulsion" device as a substitute for a formal process of extradition, the fugitive is still entitled to the benefits of the domestic legal process. For example, the alien first must be deportable, and that determination is subject to the limitation evidenced in the *Horne* case.[45] Horne was a prisoner in a federal penitentiary, wanted by Canadian authorities on charges of sabotage during the First World War. The Department of Justice at first was inclined

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43. [1917] 1 K.B. at 932.

44. [1918] 1 K.B. 578.

45. Horn v. Mitchell, 223 F. 549 (D. Mass. 1915), *aff'd*, 232 F. 819 (1st Cir. 1916), *appeal dismissed*, 243 U.S. 247 (1917). *But see* Stevenson v. United States, 381 F.2d 142 (9th Cir. 1967), wherein the court stated: "While the formalities of extradition may be waived by the parties to the treaty, Gluckman v. Henkel, 221 U.S. 508, 31 S.Ct. 704, 55 L. Ed. 830 (1910), a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, deporting or otherwise unilaterally removing unwelcome aliens. See Fong Yue Ting v. United States, 149 U.S. 698, 709, 13 S.Ct. 1016, 37 L. Ed. 905 (1893).

In the instant case the evidence shows that the removal of the appellants from Mexico was not initiated by the United States. At the hearing in the district court on the appellants' motion to dismiss, the Sonoita Chief of Police who had arrested the appellants in Mexico testified that to his knowledge no demand for extradition was ever made by the United States; that the appellants were deported by Mexican immigration authorities as undersirable aliens found in Mexico under suspicious circumstances; that it is the Mexican practice to refuse, in such circumstances, to permit aliens to remain in Mexico; that regardless of any interest of the United States in the appellants, they would have been returned to the Mexican-American border. The evidence showed that it was the Mexican authorities who first contacted American officials with regard to the appellants." 381 F.2d at 144.

to deport him on completion of his sentence to Canada as an enemy alien whose presence in the country constituted a threat to the safety of the United States. The Department, however, decided against this procedure, apparently doubting its legality as an alternative to extradition. Expulsion would not be an available remedy when the fugitive could show that he had entered the country legally, that he had not otherwise transgressed the immigration laws, that he was a national of the state from which deportation was proposed or sought, or that he was not actually implicated in an offense in the requesting state as alleged by the latter's authorities.

Thus, the alien was not surrendered to Canada because he was not deportable and was not extraditable under the treaty. There is always, however, the possibility of deporting the alien to the country of his own choice, and thereby avoiding his compulsory return to a country in which he might be liable to criminal prosecution. The discretionary powers of the executive in such cases are likely to be used to strike a bargain with foreign authorities. This occurred in 1941 in the deportation of Mikhail Gorin, and in the exchange of Colonel Abel and U-2 pilot Francis Gary Powers.[46]

The device of expulsion finds a counterpart in the device of exclusion, which is a measure designed to prevent the alien from staying in the country whether he had been temporarily admitted on a visa or on parole. The exclusion order can be executed by leaving the alien with limited options to depart and thus causing him or her to fall within the control of the agents of the interested foreign state. A state desirous of securing a person without resorting to extradition (or after the extradition process has failed to produce the expected results) may request another state (the state of refuge) and surrounding states to exclude the fugitive, thus leaving no alternative to the state of refuge excluding the alien but to remand him or her to the country of origin.[47] The landmark case

46. Memorandum by the Asst. Chief of the Division of European Affairs (Henderson) to the Under Secretary of State (Welles), [1941] 1 FOREIGN REL. U.S. 936, 937 (1958). Colonel Abel had been convicted in the United States on espionage charges; U-2 pilot Francis Gary Powers had been convicted in the U.S.S.R. for espionage by "overflight." *See* J. DONOVAN, STRANGERS ON A BRIDGE: THE CASE OF COLONEL ABEL 371 *et seq.* (1964). The return to Mexico of one Lopez, who had been kidnapped from Mexico by Hernandez and Villareal, in exchange for Mexico's dropping its extradition request for Hernandez, was suggested to the Mexican Government in 1935. Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934).

47. The *Insull* case provides a good example of the use of requests for exclusion

remains the *Soblen* case.[48]

Dr. Soblen was accused of espionage in the United States. Released on bond, he fled to Israel claiming asylum and citizenship as a Jew under the Israeli law of return. Israel, under United States pressure, found that he did not qualify for asylum or Israeli citizenship and he was placed on an El Al flight bound for New York. Interestingly, no other passengers were aboard except United States marshals. Near England, Soblen attempted suicide; the plane landed, and he was taken to a hospital. The United States wanted Soblen, but the crime he was accused of was clearly a political offense, nonextraditable under the Anglo-American treaty of 1931.[49] England determined that Soblen had not been "legally admitted" and ordered his departure on the first available flight of the day, presumably to be returned to Israel. It so happened that there were no Israel-bound flights that day—only a Pan Am flight, to New York, on which Soblen was to be placed (Instead, he died in an English hospital.). The legal process of extradition was sought to be evaded while the result desired by the states involved would have been attained.

In 1896, John Basset Moore, with what turned out to be a prophetic insight, drew attention to the possibility of the immigration laws of the United States being utilized for the purpose of extradition:

> It is, however, worthy of notice that the immigration laws of the United States require the return to the country from which they came, of all non-political convicts. Though this measure is not in the nature of an extradition treaty, the execution of which another government may require, its full significance, as affecting the subject of extradition, has, perhaps, hardly been appreciated. With such a provision in our statutes, it is difficult to set a limit to the extent to which the system of extradition may logically be carried.[50]

So long as there are no nationally enforced international law rules,

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addressed to countries in the vicinity of Greece in order to force the fugitive to return to face charges in the United States. *See* [1934] 2 FOREIGN REL. U.S. 566-83 (1951); [1933] 2 FOREIGN REL. U.S. 552-69 (1949).

48. *See* O'Higgins, *Disguised Extradition; The Soblen Case*, 27 MODERN L. REV. 521 (1964). The converse can also occur whenever expulsion is used to defeat extradition. *See* In re Esposito, [1933-1934] Ann. Dig. 332 (No. 138) (Supreme Court, Brazil 1932).

49. Treaty with Great Britain on Extradition, Dec. 22, 1931, 47 Stat. 2122 (1933), T.S. No. 849 (effective June 24, 1935).

50. 1 THE COLLECTED PAPERS OF JOHN BASSETT MOORE (H. Milford ed. 1944).

the most vulnerable person is the one who is sought for political reasons.[51]

II. Unlawful Seizures, State Responsibility and International Protection of Human Rights

A. *The Validity of Mala Captus Bene Detentus*

The importance of distinguishing among the types of unlawful seizures and irregular methods of rendition discussed above is to ascertain the existence and extent of state responsibility. It is useful prior to a discussion of the subject of state responsibility to consider the premise on which these alternatives to extradition rely, namely the maxim *mala captus bene detentus*. The application of this Roman law maxim by municipal courts in the past 100 years has been inconsistent with other Roman law maxims. The improper application results from the judicial disregard of two higher principles.

The first of these is procedural: *nunquam decurritur ad extraordinarium sed ubi deficit ordinarium*, or never resort to the extraordinary until the ordinary fails. Thus, valid resort to *male captus bene detentus*, an extraordinary process, must be preceded by an exhaustion of all ordinary procedures available and cannot be permitted as a surrogate procedure while existing ordinary channels are ignored. So long as the formal processes of extradition are available unlawful seizure and irregular rendition are improper.

The same principle of exhaustion of ordinary remedies is well established in international law, and was reaffirmed in the 1959 decision of the International Court of Justice in the *Interhandel*

51. *See* Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 De Paul L. Rev. 217 (1969); DeVries & Novas, *Territorial Asylum in the Americas: Latin-American Law and Practice of Extradition*, 5 Inter-Am. L. Rev. 61 (1963); Evans, *The Political Refugee in United States Law and Practice*, 3 Int'l Law. 204 (1969). Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h) (1970), provides that the political refugee who has been admitted into the country and is then found to be a deportable alien may request a temporary withholding of deportation on the plea that he would be subjected to persecution on account of race, religion, or political opinion in the country to which he is to be deported. Section 203(a)(7), which was added to the Act in 1965, provides for conditional entry of political refugees. The refugee is considered to be an excludable alien whose status can be adjusted to that of a permanent resident at the discretion of the Attorney General and subject to the approval of Congress. 8 U.S.C. § 1153(a)(7) (1970).

Case (Switzerland v. United States).[52] The Court held in *Interhandel* that when rights claimed by one state have been disregarded by another in violation of international law, all local remedies and means of redress must first be resorted to before recourse to the International Court of Justice is permitted. In other words, the ordinary must be exhausted before resorting to the extraordinary.

The second of the higher principles is substantive: the principle *ex injuria ius non oritur*. This principle was the Roman law's counterpart to the "exclusionary rule" developed in the United States[53] that certain violations of law could not ripen into lawful results. The principle was deemed under Roman law, as well as under some contemporary laws, an indispensible corollary to certain rights without which these rights would have no real significance. In Roman law, these protected rights were those interests the violation of which was considered an *injuria* (which is not to be confused with injury as understood in the common law of torts). Every *injuria* had a legal remedy apart from the general principle that no legal validity attached to consequences of an *injuria*. The author of an *injuria* had to redress in a prescribed manner the wrong committed; in addition, there could be no lawful consequences deriving from the transgression. The principle *ex injuria ius non oritur* was not, therefore, designed to redress the wrong perpetrated against a legally protected interest which had a specific remedy, but was intended to sanction the transgression of the law itself. The "law" was meant *lato senso*, the integrity of the law and the legal process.

A threshold question arises—whether the violations that take place by virtue of the practices discussed above constitute an *injuria* in international law. The peculiarity of international law compels us to examine this question in light of the existing law of state responsibility.

B. *State Responsibility*

Before considering the applicable principles of state responsibility, it is important to bear in mind the three categories of violations which are at issue in the practices discussed in this article. These categories of violations are: (1) violations of the sovereignty, terri-

52. [1959] I.C.J. 6.

53. For a discussion of the rule and relevant cases see C. BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES 370-76 (1969).

torial integrity and the legal processes of the state in which the extralegal acts occur; (2) violations of the human rights of the individual involved; and (3) violation of the international legal process. The law of state responsibility clearly has been applied to violations of the first category,[54] and also, in some respects, to violations of the second category;[55] but, tenuously at best to violations of the third category. It is the opinion of this writer that the general principles and policies of state responsibility are broad enough to encompass without doubt the three categories of violations stated above.[56] The following statement made by F.V. Garcia Amador, Special Rapporteur for the International Law Commission on the subject of state responsibility, supports this contention:

> An analysis of the traditional doctrine and practice shows that the acts or omissions which give rise to international responsibility fall into the one or other of the following two categories of wrongful acts: (*a*) acts which affect a State as such, i.e., those which injure the interests or rights of the State as a legal entity; and (*b*) acts which produce damage to the person or property of its nationals. The first category comprises the most diverse acts or omissions, some being ill-defined or even undefinable. Acts in this category include failure to comply with the terms of a treaty, whatever the nature or purpose of the treaty, failure to respect diplomatic immunities and, in general, the violation of any of the rights which are intrinsic attributes of the personality of the State—political sovereignty, territorial integrity, property rights. The second category includes acts or omissions which give rise to the "responsibility of States for damage done in their territories to the person or property of foreigners." This is the principal subject of the literature, private and official codifications and judicial decisions which treat of the responsibility of States.
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> As will be seen hereunder, the above classification, from the traditional point of view, is more concerned with form than with sub-

54. *See, e.g.*, Eichmann Case, 36 *I.L.R.* 5 (Supreme Court, Israel 1962); note 86 *infra*.

55. *See, e.g.*, Chattin Case (United States v. United Mexican States), 4 U.N.R.I.A.A. 282 (1927). For state responsibility towards aliens see Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), [1970] I.C.J. 3. The latest decision on Namibia (South West Africa) also stands for the proposition advanced. *See* Advisory Opinion on South West Africa (Namibia), [1971] I.C.J. 16. The case is discussed in the text of this section.

56. *See* C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); Bassiouni, *The Nationalization of the Suez Canal and the Illicit Act in International Law*, 14 DE PAUL L. REV. 258-63 (1965).

stance, for it has been said that, whichever category they fall into, the acts or omissions in question have this is common: they damage interests which, in the final analysis, vest in the State exclusively. Apart from this aspect of the question, . . . the classification may become meaningless in some cases which come within the scope of both categories. An example of such a case would be the nonperformance of a treaty, where the interests of the nationals of one of the contracting States are prejudiced and the claim is based on this prejudice. [W]e shall now consider what acts or omissions are more generally regarded as giving rise to an international responsibility on the part of the State.

. . . .

Within the second subdivision, too, the wrongful acts capable of giving rise to responsibility on the part of the State are not all of the same character. Although in these cases the international responsibility does not originate in the act itself but rather in the conduct of the State in relation to the act (failure to exercise due diligence, connivance, manifest complicity, etc.), the nature of the act committed by a private person or of acts committed during internal disturbances is bound to influence the way in which the law regards the State's conduct as a source of international responsibility. Typical examples of wrongful acts which can be committed by private persons are: attacks or insults against a foreign State, in the person of the head of that State, its agencies or diplomatic representatives; acts offensive to its national flag; and illegal acts—whatever their degree of seriousness may be—which cause damage to the person or property of the nationals of a foreign State. When disturbances occur in a State, the acts concerned are usually of a more serious character; in some cases, they are specifically intended to cause damage to the property or person of foreigners.

Although not exhaustive, the foregoing enumeration presents a fairly accurate picture of the acts and omissions which according to traditional doctrine and practice, give rise to international responsibility on the part of the State. In any case, it makes it possible to define the character of those acts and so to determine the type of responsibility to which they can give rise.[57]

The general statement quoted above indicates that state responsibility attaches to actions by the state through its agents for specific acts as well as for failures by a state to act, presumably whenever there is a preexisting legal obligation to do so. Two essential questions, therefore, arise in the context of the statement quoted

57. [1956] 2 Y.B. INT'L L. COMM'N 173, 181, U.N. Doc. A/CN.4/Ser. A/1956/Add. 1.

above: First, what is the connection which must be established between the state and its agents or between the agents of the state and individuals acting in their private capacity in order for state responsibility to attach? Secondly, is a state obligated merely to refrain from engaging in violative conduct, is there an obligation to prevent such conduct from occurring, or is a state an insurer of the lawful conduct of its agents?

As to the first question raised, state responsibility clearly attaches to acts committed by agents of a state or by private individuals acting for or on behalf of the state.[58] The connection that must be established between the individual (acting privately) and the state in order to impute that individual's act to the state is not very clear; customary international law does not provide us with reliable criteria. There is, however, no uncertainty in cases in which the state, through its agents, incites, encourages or induces private individuals to undertake such actions with a view to benefit the state. It is obvious that the less direct the connection between the state and the individual acting privately, the more difficult it will be to ascribe state responsibility for individual conduct even when that conduct inures to the benefit of the state.

As to the second question raised, a policy question arises in the context of the practices at issue, namely, whether responsibility is to be based only on positive conduct (when a state causes a given act to take place) or whether it extends also to passive conduct (when a state merely permits conduct to take place). Is there a duty on the part of a state to prevent unlawful conduct if it has the knowledge of impending illegalities or has the capacity to prevent unlawful conduct from occurring; or is a state to be held responsible, even without prior knowledge of the contemplated action or without the capacity to prevent it? The statement by Garcia Amador on state responsibility raises an inference that states are in some instances insurers, but in the context of alternatives to extradition that inference cannot be applied. The general statement by Garcia Amador would seem, however, to encompass a range of doctrines of responsibility, but neither customary nor conventional international law has applied these doctrines to the law and practice of extradition except in cases in which a state through its agents or private persons acting on its behalf have

58. "A state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction." C. EAGLETON, *supra* note 56, at 80.

committed abductions. The *Eichmann* case is probably the most illustrative example of this exception. The search for state responsibility criteria in this area leads this writer to suggest resorting to analogies with other aspects of state responsibility. A parallel would be the regulation of armed conflicts and general principles of international criminal responsibility from which applicable rules for state and individual responsibility for violations of international extradition law can be derived.[59] The writings of scholars, however, have never suggested this analogy, and, to the extent that it is a novel doctrine, it requires refinement. Consider, however, the applicability of this doctrine to problems of command responsibility and defenses such as the defense of obedience to superior orders.[60] If rules of individual responsibility would be made applicable to individual abductors, they would be considered responsible under international criminal law without benefit of the defense of obedience to superior orders; and superiors of the abducting agents would also be accountable under the command responsibility theory.

As stated above, state responsibility attaches under contemporary international law to unlawful seizures of persons committed by agents of a state or individuals acting for or on its behalf. Such responsibility attaches because an *injuria* has been perpetrated. The only established remedies are reparations and diplomatic apologies, and the return of the person seized unlawfully is not yet recognized as a required remedy, even though some courts have seen fit to require the return of the seized person. This remedial approach of denying a violation the chance to ripen into lawful outcomes is in keeping with the higher principle *ex injuria ius non oritur*. Indeed, without such a remedy the integrity of the international legal order would not be preserved.

C. *Human Rights and State Responsibility*

State responsibility hinges on the existence of an international right or duty the transgression of which would cause certain consequences requiring the attachment of a remedy and sanction. The existence of state responsibility for the second category of violations involved in the practices examined in this article—violations

59. *See generally* A TREATISE ON INTERNATIONAL CRIMINAL LAW pt. 4, § 2 (C. Bassiouni & V. Nanda eds. 1973).

60. *Id.* pt. 2, § 4.4, at 450, pt. 5, §§ 1-3.

of human rights—depends, therefore, on the answers to these questions: What are these rights? Where do they originate? What is their binding legal effect? What sanctions apply? Who applies them? In judicial terms, these questions require analysis of the following issues: (1) the legally binding nature of human rights; (2) the self-executing nature of obligations to preserve and protect human rights; (3) the penetration of international law into municipal law; and (4) the enforcement of human rights provisions. A complete treatment of all these questions is obviously beyond the scope of this analysis, but some general observations must be made.

An initial observation focuses on the attitudes of municipal courts toward internationally protected human rights. Time and again, decisions in cases containing allegations of unlawful seizures and irregular rendition practices distinguish between violations of international law and violations of municipal law. Once this dichotomy is accepted, it is relatively simple for municipal courts considering the issue to deem themselves jurisdictionally unimpaired by violations of international law and to proceed with the case as if the violation of international law did not exist.

The rationale sustaining this dichotomy between violations of internal law and violations of international law is predicated on one interpretative approach to the doctrine of separation of powers in municipal law. Under this approach violations of international law are deemed within the prerogatives of the executive, not the judiciary, and, furthermore, municipal courts assert that they have no enforceable sanctioning powers over such violations; only the executive can deal with such questions. Governments, on the other hand, also argue that human rights are nonenforceable by municipal courts for a variety of reasons, including the following:

> (1) Except as provided by treaty, there are no binding international sanctions for violations of human rights.
>
> (2) Except as provided by treaty, there are no existing binding obligations arising out of internationally enunciated human rights that are applicable to municipal courts.
>
> (3) Self-executing enforcement of internationally enunciated human rights would violate state sovereignty.

The validity of these assertions in the present state of international law is by no means as clear-cut as either the proponents of human rights or the proponents of state sovereignty claim. In fact, no other area of international law is as riddled with confusion between *lex*

lata and *legge ferenda* as is the literature on international protection of human rights. One may even occasionally find some arguments in the nature of *legge desiderata*, which are incorrectly advanced as *lex lata*.

The observations that follow by no means purport to exhaust the arguments debated on these issues, but are intended to present a cursory view of the present state of the law and its likely immediate development.

The central issue is not whether there are human rights,[61] but whether there are rules for the protection of human rights with enough specific content to be deemed legally binding on states and to require enforcement. Thus, there is a need to identify the sources of these rights, to determine whether these sources refer to a specific right with a sufficiently defined content requiring a sanction-remedy and applying to unlawful seizures and irregular rendition practices. The applicable sources of international law are: the United Nations Charter, the Universal Declaration on Human Rights, multilateral treaties, decisions of international courts, and United Nations resolutions. This classification is based on the degree of applicability and binding nature of specific obligations within the meaning of internationally protected human rights.

1. *The United Nations Charter.*—The Charter refers to respect for human rights in articles 1(3), 13(1)(b), 55(c), 62(2) and 76(c). The language of article 55 is quite revealing:

> With a view to the creation of conditions of stability and well being, which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:
>
> . . . .
>
> (c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

This language has been considered by some as a statement of principles or a goal; while others read it as stating Charter obligations. Article 56, however, states: "All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55."

61. *See* Bassiouni, *The "Human Rights Program:" The Veneer of Civilization Thickens*, 21 DE PAUL L. REV. 271 (1971). *See also* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973).

This clear statement does not define the specific content of the obligation but the existence of an obligation to "achieve[ment of] the purposes" of human rights cannot be questioned.

A comprehensive summary of the issues over the obligation imposed by the Charter and the arguments of the proponents of various positions has been made by Professor Schwelb in a recent article.[62] One answer appears in the position of the International Court of Justice in its Advisory Opinion on "The Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970),"[63] which was unequivocal in the recognition that the Charter imposes human rights obligations on member states and that the obligations are self-executing. The court in paragraph 129 of its opinion stated that South African apartheid laws and decrees "constitute a violation of the purposes and principles of the Charter of the United Nations."[64] In paragraph 130 the court held: "Under the charter of the United Nations, the former mandatory had pledged itself to observe and respect, in a territory on international states, human rights and fundamental freedoms for all without distinctions as to race. To establish, indeed to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute *a denial of fundamental human rights is a flagrant violation of the purposes and principles of the charter.*"[65] Thus, the Charter, by enunciating its purposes and principles on human rights, establishes self-executing obligations that acquire their specific content from the Charter as well as from other sources of internationally protected human rights.

The issue appears to be whether the Charter, having established certain general principles and purposes, can be said to incorporate by reference specific rights that by virtue of the evolutionary nature of human rights have developed and will continue to develop through various sources of international law. The answer is in the affirmative and, therefore, these specific rights must be ascertained to determine their applicability. As a proponent of human rights, this writer maintains that human rights should be consid-

62. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337 (1972).

63. [1971] I.C.J. 16.

64. [1971] I.C.J. at 57.

65. [1971] I.C.J. at 57 (emphasis added).

ered interpretive of the Charter and become self-executing under article 56.

2. *The Universal Declaration of Human Rights.*[66]—This document was adopted in 1948 as a General Assembly resolution and enunciates specific rights, some of which are affected by the practices of unlawful seizures and irregular renditions: article 3—"everyone has the right to life, liberty and the security of person"; article 9—"no one shall be subjected to arbitrary arrest, detention or exile"; and article 10—"everyone is entitled in full equality to a fair and public hearing by an independent and military tribunal, in the determination of his rights and obligations and of any criminal charge against him." These three specific provisions apply to the following instances: unlawful seizures such as abductions, connivance between agents of two states to seize a person without lawful means, and actions by private volunteers acting for or on behalf of a state.

The question of the legally binding effects of the Declaration, however, arises. One school of thought contends that as a General Assembly resolution the Declaration has no binding effect on states, while another claims that the Declaration interprets Charter obligations. The most persuasive argument is contained in the separate opinion of Vice President Ammoun of the International Court of Justice in the "Advisory Opinion on the Continued Presence of South Africa in Namibia (South West Africa)." Vice President Ammoun states:

> The Advisory Opinion takes judicial notice of the Universal Declaration of Human Rights. In the case of certain of the Declaration's provisions, attracted by the conduct of South Africa, it would have been an improvement to have dealt in terms with their comminatory nature, which is implied in paragraphs 130 and 131 of the Opinion by the references to their violation.
>
> In its written statement the French Government, alluding to the obligations which South Africa accepted under the Mandate and assumed on becoming a Member of the United Nations, and to the norms laid down in the Universal Declaration of Human Rights, stated that there was no doubt that the Government of South Africa had, in a very real sense, systematically infringed those rules and those obligations. Nevertheless, referring to the mention by resolution 2145 (XXI) of the Universal Declaration of Human Rights, it objected that it was plainly impossible for non-compliance with the

66. G.A. Res. 217A(111).

norms it enshrined to be sanctioned with the revocation of the Mandate, inasmuch as that Declaration was not in the nature of a treaty binding upon states.

Although the affirmations of the Declaration are not binding qua international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind states on the basis of custom within the meaning of paragraph 1(b), of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute. One right which must certainly be considered a preexisting binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.

It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom: "All human beings are born free and equal in dignity and rights."

From this first principle flow most rights and freedoms. The ground was thus prepared for the legislative and constitutional process which began with the first declarations or bills of rights in America and Europe, continued with the constitutions of the nineteenth century, and culminated in positive international law in the San Francisco, Bogota and Addis Ababa charters, and in the Universal Declaration of Human Rights which has been confirmed by numerous resolutions of the United Nations, in particular the above mentioned declarations adopted by the General Assembly in resolutions 1514 (XV), 2625 (XXV) and 2627 (XXV). The Court in its turn has now confirmed it.[67]

A quarter of a century ago the Declaration expressed the consensus of the member states and since then it has become part of those "General Principles of International Law recognized by civilized nations." Thus, the provisions of the Declaration can be construed as legally binding because they interpret the principles and purposes of the Charter and are applicable to member states as the embodiment of article 55, execution of which is required by article 56. Furthermore, as part of international law's "General Principles," the transgression of its norms could constitute a violation of international law to which state responsibility would attach.

67. [1971] I.C.J. at 76.

3. *Multilateral Treaties.*—In this category of specific norms of human rights the provisions applicable to unlawful seizures and irregular means of rendition are clear and unambiguous. The application of multilateral treaties can be viewed, as in the case of the Universal Declaration, as specific norms that interpret the principles and purposes of the Charter and, consequently, they could be considered as self-executing under article 56 of the Charter. In addition, because they are international treaties, they are part of conventional international law and derive their binding force from that source of international law. The following multilateral treaties contain provisions that apply to the unlawful seizures and rendition devices under consideration: The International Covenant on Civil and Political Rights;[68] The Convention Relating to the Status of Stateless Persons;[69] The Convention Relating to the Status of Refugees;[70] The European Convention for the Protection of Human Rights and Fundamental Freedoms;[71] and The Inter-American Convention on Human Rights.[72] The relevant provisions of these treaties are excerpted in the Appendix to this article.

In addition to the specific rights set forth in these conventions, there is the general right of every accused to the due process of the law. This general right is not stated specifically in human rights documents, but can be inferred from them. It emanates from the total fabric of human rights treaties and doctrines and from specific protections. It emerges as an overall concept of fairness that is inherent in the international scheme of human rights protection. Even though it is specifically mentioned in article 32 of the Convention Relating to the Status of Refugees, its absence from other specific provisions only underscores its obviousness. Indeed, what can specific rights signify in the absence of the basic framework of a lawful process? There are many provisions in the international instruments referred to above that relate to the judicial process and its fairness and it is the cumulative effect of these provisions that gives rise to this right to due process.

4. *Decisions of International Courts.*—The International Court

68. G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. 16, at 49, 54, U.N. Doc. A/6316 (1966).

69. U.N. ECOSOC Res. 526A (XVII).

70. G.A. Res. 429(V).

71. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

72. O.A.S. Treaty Series No. 36 (November 22, 1969).

of Justice dealt with the issue of human rights in its decisions on Namibia. In the latest Advisory Opinion, rendered in 1971, it made its position on the legally binding effects of human rights unequivocal.[73] The court thus affirmed the justiciability of human rights issues and interpreted Charter references to human rights as legally binding obligations that acquire their specific content from other international instruments such as the Universal Declaration on Human Rights.

The only other international court rendering judgments on human rights issues is the European Court of Human Rights, which was created by the European Convention on Human Rights. Since its creation, it has had the sole purpose and function of adjudicating disputes arising out of the Convention.[74] The European Court exercises jurisdiction over states subscribing to that jurisdiction under the Convention. This unique development augurs well for the development of human rights, particularly because it demonstrates that the barriers of state sovereignty can be lowered without any resulting shattering effects. When adjudicating human rights questions, the court decides only cases involving violations of human rights established in the Convention. The legally binding effects of the Convention's provisions are no longer at issue. The experience of European states ought to allay some of the apprehensions that arise about the justiciability of human rights issues.

A survey of this sort should not omit a reference to decisions of arbitral tribunals and national courts that add their weight to the recognition of state responsibility for violations of human rights. Such cases are plentiful in international law. One example is the *Chattin Case*[75] between the United States and Mexico in which violations of the human rights of a United States defendant in Mexican criminal proceedings were arbitrated between the two states and resulted in an award for damages to the individual. The protection of minorities in the post-World War I period arising out

73. *See* note 63 *supra* and accompanying text.

74. *See* The Annual Reports prepared by the Council of Europe, Commission on Human Rights, entitled "Stock-taking on the European Convention on Human Rights" (1965-1973); Linke, *The Influence of the European Convention of Human Rights on National European Criminal Proceedings*, 21 DE PAUL L. REV. 397 (1971).

75. Chattin Case (United States v. United Mexican States), 4 U.N.R.I.A.A. 282 (1927).

of the Minorities Treaty of 1919 and other decisions of the Permanent Court of International Justice as well as of arbitral tribunals offer an equally abundant source of precedents supporting the justiciability of human rights issues under principles of state responsibility.

5. *United Nations Resolutions.*—It is appropriate to state first the impact on the United Nations of the 1971 Advisory Opinion of the International Court of Justice on Namibia (South West Africa). The Security Council in a resolution of October 20, 1971, by a vote of thirteen in favor, none against, and two abstentions, expressed its appreciation to the court, and stated that it "agrees with the court's opinion expressed in paragraph 133 of the Advisory Opinion."[76] Shortly thereafter, the General Assembly in a resolution of December 20, 1971, stated that it "welcomed" the Advisory Opinion "as expressed in paragraph 133." This statement of approval was voted by 111 in favor, 2 against and 10 abstentions.[77] Clearly, there could be no stronger support for the applicability and binding effect of human rights under international law than the overwhelming endorsement of the International Court of Justice Advisory Opinion by the Security Council and the General Assembly.

United Nations resolutions emanate from the Security Council and the General Assembly. The significance of these resolutions, particularly those of the General Assembly, which are recommendatory, is their expression of a world community prescription. World community prescriptions, however, acquire their legal significance from the re-citation of these resolutions[78] and their relationship to further developments of the resolutions' subject matter through other international instruments. Such developments, combined with a record of consistent support by the General Assembly, exhibit and confirm the existence of "General Principles" as well as international customs—two of the sources of international law. There is no greater and more overwhelming record of support for the human rights program than that expressed by the General Assembly and other United Nations specialized agencies which have consistently referred to and upheld the recognition, application and, to the extent possible, implementation of the

76. S.C. Res. 301.

77. G.A. Res. 2871, 26 U.N. GAOR Supp. 29, U.N. Doc. A/8429 (1971).

78. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions,* 63 AM. J. INT'L L. 444 (1969).

principles and purposes of the Charter and other international instruments protecting human rights. The most important international instruments in the field of human rights have at first emerged as General Assembly resolutions. Among these are the Universal Declaration on Human Rights, the International Covenant for the Protection of Social and Cultural Rights, the International Covenant for the Protection of Civil and Political Rights, the Genocide Convention, and the Convention for the Elimination of All Forms of Racial Discrimination. There are many other instruments concerning refugees, labor and other subjects that also deserve special consideration within the topic of human rights.[79]

Conclusively, General Assembly resolutions that are consistently recited or relied on and that find tangible expression in other international law developments rank among those expressions of world community prescriptions that are among the sources of international law having legally binding effects on the world community.

D. *Remedies*

The sources mentioned above indicate that violations of certain specific internationally protected human rights give rise to internationally enforceable rights, and that such violations constitute *injuriae* to which state responsibility attaches and which cannot produce legitimate outcomes.

In the context of unlawful seizures and irregular rendition the first question is whether arbitrary arrest and detention falls within the category of serious violations of internationally protected human rights and can be considered an *injuria* warranting a legal remedy. The answer seems obvious; there can be no greater internationally protected human right, after the right to life, than the right to liberty. A second question relates to the extent of a state's obligation to protect such rights. Clearly, a state cannot infringe these rights without due process of law; but does this duty of non-infringement extend to an obligation on the part of the state to insure against such violations of due process by other states? Such a proposition is not yet recognized because of the relatively recent development of the law of human rights; but if this extended duty were recognized, then the state in which the violation occurred would be aggrieved in two ways. First, its obligation to secure for

79. *See, e.g.*, L. SOHN & T. BUERGENTHAL, *supra* note 61.

the individual the right of freedom from arbitrary arrest and detention would be violated by the actions of another state. Secondly, and as a logical consequence of the individual state's obligation, all states sharing a common duty to insure the safeguard of internationally protected human rights are collectively affected by a transgression of these commonly binding obligations. Under this argument, the rights of an injured state cannot be severed from those of the individual whose internationally protected rights were infringed. The remedy applicable to an international *injuria* should bar the ripening of such violations into lawful outcomes. An example when a remedy applicable to an *injuria* found its expression is the *Jacob-Solomon Case.*[80] In this case a former German citizen was taken into Germany from Switzerland by force and deceit. Under a 1921 treaty between Germany and Switzerland concerning unresolved disputes, the matter was submitted to an international court of arbitration.[81] Shortly after the case was initiated, Germany admitted error and returned Jacob to Swiss authorities.

Four other cases deserve mention. The first is a 1933 case, *In re Jovis*, in which a Belgian citizen was seized by French agents and brought to trial in France. The Tribunal Correctional d'Avesnes held[82] that the defendant should be returned to Belgium because he had been seized illegally. The defendant was returned immediately to Belgium. In a 1965 issue between Italy and Switzerland, the *Affaire Mantovani*,[83] an unlawfully seized person was returned to Switzerland and the Italian authorities extended their apologies to the Swiss Government. A third example is the 1962 case known as *The Red Crusader*,[84] which involved Denmark and the United Kingdom. The case concerned the illegal seizure of a fishing boat captain by Denmark, which sought to prosecute him for illegally fishing in its territorial waters, and resulted in the release of the accused and his return to England. The case of Kim Dae Jung involved Japan and South Korea. In August 1973, Jung was kidnapped from a Tokyo hotel room by Korean agents claiming to act

80. Settlement of the Jacob Kidnapping Case (Switzerland-Germany), in 30 AM. J. INT'L L. 123 (1936).

81. Treaty of Arbitration and Counciliation Between the Swiss Confederation and the German Reich, Dec. 3, 1921, No. 320, 12 L.N.T.S. 281.

82. [1933-1939] Ann. Dig. 191 (No. 77) (Tribunal Correctional d'Avesnes, France 1933).

83. In 69 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 761 (1965).

84. 35 I.L.R. 485 (Commission of Enquiry (Denmark-United Kingdom) 1967).

in their "personal capacity." After Japan's protest Korea agreed not to prosecute Jung and extended its apologies to Japan.[85]

These cases upheld and vindicated the principle *ex injuria non oritur*, which is also embodied in the unanimous resolution of the Security Council in the complaint of Argentina against Israel in the *Eichmann* case. The Council stated: "That acts such as that under consideration, which affect the sovereignty of another state and, therefore, cause international friction, may, if repeated, endanger peace and security. [The Council requests] the government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of International Law."[86]

Surely, Charter principles and rules of international law include international protection of human rights and proscribe the violation of those rights by the practices exemplified by the *Eichmann* case. The conclusions of this writer are:

> (1) States must abide by specific human rights and norms, and in spirit fulfill the principles and purposes of the Charter and those instruments that interpret it.
>
> (2) Unlawful and improper seizures in violation of international law mean renditions executed without benefit of a legal process insuring minimal standards of due process or in violation of specific human rights provisions; these seizures violate international law; sanctions include the following:
>
> (a) the perpetrators, their aiders and abettors and responsible superiors are to be held responsible for the international crime of kidnapping;
>
> (b) the person who was subjected to these practices is to be returned to the state from which he or she was seized and is entitled to damages;
>
> (c) the state in which the act occurred is entitled to reparations and apologies.
>
> (3) The International Court of Justice should be empowered (by a special supplement to its statute) to hear petitions by states on behalf of individuals who were the object of such treatment and should have compulsory jurisdiction over these states to decide the proper sanction-remedy. The Court should also be empowered to issue writs of habeas corpus.[87]

85. TIME, Nov. 12, 1973, at 72.
86. U.N. Doc. S/1439, June 23, 1960.
87. This proposal was made by the author to the Xth International Penal Law

III. An Appraisal of Rendition Devices as Alternatives to Extradition and World and Public Order

If the premise is accepted that extradition is the only legitimate process to secure rendition of a person sought by a state other than the state in which the fugitive sought refuge, then all other means of rendition are illegitimate. The alternatives to extradition discussed in this article are all irregular and extraordinary. They range from outright criminal means (abduction) to the irregular use of legal devices available under the immigration laws of the state of refuge. What, however, are the alternatives available when the only legitimate process, *i.e.* extradition, fails? This is only one of the questions raised by these irregular methods; others are: Is the individual entitled to have the requesting and requested states follow exclusively a single process, *i.e.* extradition, in the exercise of their mutual cooperation in penal matters? Can either state insist on that single process as the exclusive means of cooperation between them? Should international law prohibit the use of irregular devices to secure rendition? Should there be a formal alternative process to extradition? Should there be some other legal recourse or legal remedy in case extradition fails?

There is an obvious correlation between the resort to irregular methods of rendition and either the failure of the formal process of extradition or the stringency of its requirements. This conclusion tends to indicate the endemic weakness of a process that relies on many legal formalities and that is shrouded with a formalism that appears to have become inherent. As stated by Professor Evans:

> Accepting the premise that the established method of recovery of the international fugitive offender is by extradition proceedings which are ordinarily governed by both treaty and statute, it may be asked whether *Eichmann, Ahlers* and similar cases are the exceptions which prove the rule. If, however, resort to methods of recovery other than extradition is a common occurrence, it may be asked whether the extradition process is failing to serve its objective of providing a state with a formal method of acquiring custody of a fugitive offender in which the interests of the asylum state, the requesting state and of the accused are procedurally protected. In other words, does the relative stringency of the extradition process

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Congress. Bassiouni, 39 Revue Internationale de Droit Penal 518 (1968). *See also* L. Kutner, World Habeas Corpus (1962).

> make it an anachronism in an age of rapid communication? Again, approaching the issue from the broader context of that public concern with the recognition of the rights of the individual and their protection under international law which has gained increasing momentum during the past two decades, it may be asked whether the international fugitive offender has any right as against the asylum state to demand surrender only through extradition proceedings. Conversely, it may be asked whether the asylum state is under an obligation to disregard any request for surrender other than one through the formal channel of extradition and to refrain from using such legal processes as exclusion or expulsion as convenient substitutes for extradition and from condoning the use of irregular methods of recovery of fugitives by other states.
>
> The answers to these questions are not readily supplied, for each question tends to raise other questions about the scope of the territorial jurisdiction of the state, the plenary power of the state over the alien, the responsibility of the state for enforcing law and order by bringing criminals to justice, the right of the state to protect itself from becoming a haven for criminals. In the last analysis the answers must be found in information about the nature of state practice in the matter of acquiring custody over international fugitive offenders by methods other than extradition.[88]

In connection with the practices discussed that seem to indicate the need for informal rendition, consider the following policy factors that may well have brought about the practical necessity for these alternative devices: a large number of states grant extradition only on the basis of an existing treaty and not on the basis of reciprocity or comity; the requesting state's network of treaties has gaps usually known to the fugitive and exploited by him; the treaty itself may be limited or loosely worded, or provide in its language for ways of evading its application; the treaty may be simply not up to date to meet new contingencies; the extraditable offenses listed in the treaty may not cover the specific offense, and even if it could be construed to include that offense, the jurisprudence of the state of refuge could give it a *stricto sensu* interpretation; political and practical considerations in given cases may require a political barter between two persons sought by both states (these persons may be beyond the respective reach of each state or in the respective custody of each of the given states); commencement of formal proceedings are likely to give notice to the fugitive and provide him with time to flee the jurisdiction of the state of refuge,

88. Evans, *supra* note 8, at 78-79.

thus starting a merry-go-round chase from country to country; the length of the formal process, further delayed by appeals and collateral attack dilutes its certainty and swiftness; the cost of extradition for both states is often significant; the potential for use of executive discretion as a last resort to deny actual surrender after extradition has been judicially permitted is always present; the weaknesses of the requesting state's case at the time extradition is sought may be a bar to it; the necessity of the requesting state to withhold some of the evidence against the fugitive for trial strategy or other reasons may prevent extradition; and exceptions and exemptions such as the political offense exception may contribute to the dilution of the effectiveness of the process. All these considerations bear heavily on decision makers and contribute to making the process unattractive for the attainment of a swift result accomplished in an efficient and economic manner. The alternatives, therefore, become more appealing; and even though less legitimate in their means, the alternatives grow more acceptable to decision makers as a substitute to a legitimate process that becomes more cumbersome and less effective. At the policy level the dilemma is characteristic: It is a conflict between two processes, one that is *means*-oriented and the other that is *result*-oriented. The choice between these divergent policies will depend on the value-oriented goals of the system of justice administered in that particular state.

To preserve minimum world order, a distinction must be drawn between irregular situations that result from the cooperative undertakings of the respectively interested states and situations in which one state resorts to a method that violates the territorial integrity, sovereignty or legal processes of another state. In both situations, the main deterrent to their use would be the recognition of a principle of legality of process that would disallow the application of *mala captus bene detentus*, and establish the primacy of a formal legal process over any irregular processes by declaring any resort to the irregular practices unlawful under international law. Such a deterrent-remedy is still not well established in international law, even though the writings of publicists continue to decry violations of human rights and international due process of law. When one state acts without the cooperation or consent of another, threats to minimum world order have three dimensions: violation of the sovereignty, territorial integrity and legal process of the state of refuge; violation of the individual's right to freedom from arbitrary arrest and detention and to international due process and fairness; and violation of the integrity of the international process.

As to mutual cooperation and consent between agents of both interested states, threats to minimum world order are reduced to two levels: violation of the individual's right to freedom from arbitrary arrest and detention and to international due process and fairness; and violation of the integrity of the international process.

The factors involved in each of these threats to minimum world order demonstrates that the latter category is much less likely to cause disruption of world public order. In fact, in the latter category, the activities of both states exhibit a high level of cooperation not exhibited by the former category and, therefore, the mutual cooperation cases do not warrant the same level of apprehension of disruption of world public order as does the former category. Nonetheless, preservation of internationally protected human rights are impaired in both categories.

As to the fugitive who allegedly has committed a common crime and is legitimately sought to answer these charges and not for other concealed purposes, the question is whether the effectiveness of other means to secure him for prosecution or punishment supersedes all considerations of formal process to attain that same result. The following considerations should be taken into account in formulating a policy response to this inquiry: The integrity of the internationally recognized process of extradition should not be subverted for practical considerations, particularly when the very nature of the process is intended to achieve the same result as the irregular means; there is a recognized need to preserve the integrity of the judicial and legal processes of all states; the practical considerations of justifying invalid means by a purportedly valid end must be rejected; the premise that the fugitive is sought for a common crime otherwise extraditable (and not for a concealed purpose for which extradition would not be granted) cannot be presumed and its determination should properly be made by judicial proceedings; and the protection of individual human rights should be insured by the requested state and not deferred to the requesting state. The conclusion is clear—alternative devices to extradition should not be allowed, but extradition needs to be streamlined.

Experience reveals that this subsystem of alternative devices developed mainly because of the practical considerations stated above and that this subsystem subverts the formal process; if it is permitted to continue, it may well render the formal process obsolete and useless. One authority, however, has stated the problem (as applied to the United States) less emphatically:

Judging by available sources, the United States has resorted to, or acquiesced in other states' requests for, disguised extradition frequently enough during the past five decades to suggest that operating officials find in such quasi-formal methods as exclusion, expulsion, or special arrangements, practical alternatives to extradition. These "alternatives" supplement, but do not supplant, nor are they intended to supplant, the formal process of extradition. Founded upon bilateral agreements "tailored" to the particular conditions of law and legal procedure obtaining within each signatory state, not to speak of the diplomatic relations obtaining between them, extradition cannot meet all contingencies arising out of a fugitive's taking asylum abroad. The choice between seeing an accused person go free from answering the charges against him or an escaped convict remaining at large and resorting to some form of disguised extradition can be readily rationalized in the circumstances. But even in the period 1910-33 when exclusion, expulsion or special arrangements were utilized on behalf of the United States or by the United States at the request of other states often enough to approach to a policy, the point was made time and again that such measures of rendition were "not usual." That such "exceptional" measures continue to be used today is partly the fault of the extradition process itself, which like any other legal proceeding, tends to be cumbersome, for speed is not its *raison d'etre*; and partly the fault of operating officials whose zeal gets the better of their judgment, or who are attracted by the ease of informal methods especially in conditions prevailing in border states.[89]

89. Evans, *supra* note 8, at 103.

APPENDIX

RELEVANT EXCERPTS FROM INTERNATIONAL TREATIES

The International Covenant on Civil and Political Rights

Article 9

1. 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 liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 12

1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Convention Relating to the Status of Stateless Persons

Article 31

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with the process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

The Convention Relative to the Status of Refugees

Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee 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.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 5

1. 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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear [for] trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

The Inter-American Convention on Human Rights

Article 7

Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.