Jurisdiction over a Person Abducted from a Foreign Country: *Alvarez Machain* case Revisited

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I. Introduction

Unless a State is prepared to try a person *in absentia*, the exercise of enforcing jurisdiction[1] over individuals depends on their physical presence in the territory of the State seeking to exercise jurisdiction. There have been several cases where an individual has been abducted forcibly from the territory of one State to be tried in another. In such cases, the question which arises is whether the abduction bars a court from exercising jurisdiction.

II. *Male Captus* Rule and the Practice of Domestic Courts

The relevance of abduction in the assertion of jurisdiction can generally be said to be a matter for determination by the domestic court concerned. Some courts have refused to exercise jurisdiction over offenders brought before them by abduction. Some have insisted that how a person is brought before them is not a matter for them: *male captus, bene detentus* (improperly captured, properly detained). They

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[1] Jurisdiction is an aspect of sovereignty of a State and involves legislative, executive and judicial competence of a State. It includes the power to prescribe rules (prescriptive jurisdiction) and the power to enforce them (enforcement jurisdiction). The latter includes both executive and judicial enforcement. See Harris, DJ, *Cases and Materials on International Law* (London: Sweet & Maxwell, 6th ed, 2004) at p 265.

are only concerned with the fact of his presence and the need to establish a separate basis for jurisdiction.[2]

In the United States (hereafter "US"), the Supreme Court has been a staunch supporter of the *male actus, bene detentus* rule and has in a series of cases declined to set aside jurisdiction on the ground of the prior kidnapping of the defendant. The French court's view appears to be the same. On the other hand, the courts in the United Kingdom, South Africa, New Zealand and elsewhere do not support the *male captus* rule. There is no uniform and consistent practice of States on this issue.

A. The United States courts

In 1886, the US Supreme Court decided *Ker v Illinois.*[3] Ker, a US citizen, was wanted in Illinois on criminal charges, so he fled to Peru. The agent of the Governor of Illinois was unable to execute the extradition treaty between the US and Peru because Chilean forces occupied Lima at that time. The agent requested assistance from the Chilean military governor who personally arrested Ker and took him back to Illinois, where he was convicted. Ker appealed to the US Supreme Court.[4]

Ker alleged that the Illinois court lacked jurisdiction because he had been kidnapped in Peru and forcibly brought to the US without the proper process of extradition. The US Supreme Court rejected the argument that Ker's arrest and conviction had violated the extradition treaty between the US and Peru. The Court held that "mere irregularities in the manner in which [Ker was] ... brought into the custody

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[2] Many leading writers have vigorously contended that jurisdiction should not be asserted in these circumstances. See the important series of articles by Lowenfeld on this issue, "US Law Enforcement Abroad: The Constitution and International Law" (1989) 83 *AJIL* 880; "US Law Enforcement Abroad: The Constitution and International Law, Continued" (1990) 84 *AJIL* 444; "Kidnapping by Government Order: A Follow-Up" (1990) 84 *AJIL* 712; "Still More On Kidnapping" (1991) 85 *AJIL* 655.

[3] 119 US 436 (1886).

[4] See Lowenfeld, AF, "US Law Enforcement Abroad: The Constitution and International Law, Continued", *supra*, n 2 at p 461.

of the law" did not entitle him to escape prosecution.[5] The Court upheld its jurisdiction, stating that the proper remedy for the breach of international law was at the diplomatic level, and the physical presence of the accused before the Court, no matter how he had been brought there, sufficed to validate the proceedings.

Ker v Illinois has been followed by the American courts as an authority for more than a century. The most celebrated case on this issue in the US is *United States v Alvarez-Machain.*[6] A United States Drug Enforcement Administration (DEA) agent was killed in Mexico in 1985. Five years later, Dr Alvarez Machain, a Mexican citizen, was indicted by the United States Federal grand jury for having participated in the murder. At the request of the DEA agents, Alvarez Machain was taken by force from his office in Mexico by Sosa, a former Mexican policeman and three others, put on a private plane and flown to Texas, where he was immediately arrested by Federal agents.[7]

In the subsequent criminal proceedings, Alvarez Machain argued that the federal courts lacked jurisdiction to try him because of the manner by which he was apprehended. The trial court agreed, finding that the arrest violated the extradition treaty between the US and Mexico. The Ninth Circuit Court of Appeals confirmed the trial court's judgment.[8] The US Government appealed to the Supreme Court.

The US Supreme Court reversed the lower courts' decisions on the basis of the century-old "*Ker*" doctrine and held that the abduction did not violate the extradition treaty and, further, that although the abduction may have been a violation of international law (the territorial integrity of Mexico), a US court could still exercise jurisdiction over the matter.[9] The Court ordered Alvarez Machain to stand trial. But in

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[5] 119 US 436 at p 440.

[6] 31 ILM 902 (1992).

[7] Lowenfeld, AF, "Still More on Kidnapping", *supra*, n 2 at pp 655-656. Abduction of Alvarez Machain occurred on 2 April 1990. Mexico responded quickly and unequivocally and sent diplomatic notes of protest from the Embassy of Mexico to the United States Department of State.

[8] *United States v Alvarez Machain* 946 F 3d 1466 at pp 1466-67 (9th Cir 1991).

[9] *Alvarez Machain v United States* 504 US 655 (1992).

1992, the trial judge, granting a motion by Alvarez Machain's lawyers, acquitted him for lack of evidence.[10] Alvarez Machain returned to Mexico.[11]

The judgment in *Alvarez Machain's* case disappointed a number of advocates of international law and human rights activists and caused them to see the US Supreme Court as favouring the unprecedented extension of extraterritorial exercise of police powers by the US Government in total disregard of well-established principles of international law.

On 9 July 1993, Alvarez Machain brought civil suits against Francisco Sosa (who had abducted him) and his accomplices under the Alien Tort Claims Act (ATCA)[12] and against the US Government under the Federal Tort Claims Act (FTCA) for his abduction and arbitrary detention. The District Court dismissed the claim against the US Government but confirmed the same against Sosa and awarded Alvarez $25,000 as damages for his detention prior to his arrival in the United States. Alvarez and Sosa both appealed.

On 11 September 2001, in *Alvarez Machain v United States,*[13] the three-judge panel of the Ninth Circuit Court of Appeals in San Francisco affirmed the judgment in favour of Alvarez against Sosa and also held that the arrest of Alvarez Machain was a "false arrest" for which the Government of the United States was liable under the FTCA.[14] On 3 June 2003, the full Ninth Circuit Court of Appeals (*En Blanc* Court) confirmed the panel's decision and held that extraterritorial arrest and detention were arbitrary and in violation of international

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[10] *Alvarez Machain v United States* 107 F 3d 696 at p 699 (9th Cir 1996).

[11] See Bush, J, "How Did We Get Here? Foreign Abductions after Alvarez Machain" (1993) 45 *Stanford Law Review* 939 at p 940.

[12] Also known as Alien Tort Statute (ATS).

[13] *Alvarez Machain v US* 266 F 3d 1045 (9th Cir 9/11/2001).

[14] The decision was largely overlooked, having been made on the same day terrorists attacked the World Trade Center and Pentagon on 11 September 2001.

law.[15] The new ruling marks the first time that a Federal Appeals Court of the US has allowed a foreign national to sue the Government for abduction and arbitrary detention.[16]

However, the US Supreme Court granted *certiorari* in the two companion cases (*Alvarez Machain v US*; *Alvarez Machain v Sosa*). On 29 June 2004, in *Sosa v Alvarez-Machain*, the Supreme Court rejected Alvarez-Machain's claim and held that the Alien Tort Statute (ATS) provided an insufficient basis for the suit,[17] even if abducting the doctor from Mexico violated customary norms of international law.[18]

B. The French courts

In *Re Argoud*,[19] the accused, a French national who had been sentenced to death *in abstentia* by a French military court for his part in

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[15] 2003 WL 21264256 (9th Cir June 3, 2003). This ruling also has enormous implications for the popular *Unocal case* and all cases against transnational corporations under the ATCA. See *Doe v Unocal Corp*, No. 00-566603; *Roe v Unocal Corp*, No 00-566628. Unocal was sued in 1996 by Myanmar villagers who claimed that they and their families were assaulted, tortured and forced into labour by the Myanmar military, which provided security and other services for the construction of an oil pipeline by Unocal. On 14 September 2004, Judge Chaney ruled that the plaintiffs were entitled to a trial and set June 2005 for the date of a jury trial on the plaintiffs' claims of murder, rape, and forced labor. In March 2005, Unocal agreed to compensate the plaintiffs in a historic settlement that ended the lawsuits. See, "Final Settlement Reached in *Doe v Unocal*" at http://earthrights.org/news/unicalsettlefinal.shtml (last visited 23-10-2005).

[16] "Court Says Mexican Doctor Can Sue for Ordering His Abduction", *New Straits Times*, Thursday, 5 June 2003.

[17] The main issue was whether the Alien Tort Statute (ATS) creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

[18] *Sosa v Alvarez Machain*, US Supreme Court Judgment of 29 June 2004; 542 US (2004); 124 S Ct 2739. The Court stated that only a very limited set of well-established, clearly defined violations of international law could be the basis for ATS suits. At the time the Congress enacted the ATS, this would have included three crimes; violating safe conduct, infringing the rights of ambassadors and piracy.

[19] (1965) 45 ILR 90 (French Court of Cassation).

insurrectional activities and against whom a warrant for arrest was outstanding in respect of subsequent similar conduct, was arrested in Paris after being found there, bound and gagged, following a "tip off". In fact, he had been abducted in Munich and brought to Paris by persons who were taken to be French agents. After noting that the Federal Republic of Germany would have a claim to reparation and that no such claim had been presented, the court ruled that the illegality of the accused's abduction did not rob it of its jurisdiction.

C. The Israeli courts

In *Eichmann's* case (*Attorney-General of the Government of Israel v Eichmann*),[20] the accused, who was of German nationality, was the Head of the Jewish Office of the German Gestapo. He was the administrator in charge of the policy that led to the extermination of between 4,200,000 and 4,600,000 Jews in Europe. Eichmann was found in Argentina in 1960 by persons who were probably agents of the Israeli Government and abducted to Israel without the knowledge of the Argentinean Government. There he was prosecuted for war crimes, crimes against the Jewish people, the definition of which was modeled upon the definition of genocide in the Genocide Convention of 1948, and crimes against humanity. He was convicted and sentenced to death. His appeal to the Supreme Court of Israel was dismissed.[21]

In this case, one of the contentions of the defence counsel was that the trial of the accused in Israel following his kidnapping in a foreign land, is in conflict with international law and takes away the jurisdiction of the Israeli court. In fact, after the kidnapping of Eichmann from its territory, Argentina had lodged a complaint with the Security Council of the United Nations claiming that the act constituted a violation of its sovereignty and had requested appropriate reparation, namely the return of Eichmann, for which it set a time limit of one week, and the punishment of those guilty of violating Argentine territory. The

[20] (1961) 36 ILR 5 (District Court of Jerusalem).

[21] See Fawett, JEC, "The *Eichmann* Case", (1962) 38 *BYIL* 181; Green, LC, "The *Eichmann* Case", (1960) 23 *MLR* 507; Papadatos, P, *The Eichmann Trial*, Stevens & Sons (1964); Schwarzenberger, G, "The *Eichmann* Judgment", (1962) 15 *CLP* 248.

Supreme Court resolved that the act violated the sovereignty of Argentina and requested the Government of Israel to make appropriate reparation in accordance with international law.[22]

The Israeli court relied on the fact that the two governments had reached an agreement and regarded the incident as closed, to support its decision.[23] In fact, the Argentinean Government might have eventually agreed to close the matter so as not to jeopardise the traditionally friendly relations between the two countries. However, the undeniable fact is that the Security Council of the United Nations decided that the abduction of Eichmann was a clear violation of the Argentinean territorial sovereignty and was a violation of international law. The Israeli court also cited an old English case, *Ex p Elliott,*[24] as an authority. Nevertheless, the law has changed in the United Kingdom and the present United Kingdom law can be found in the House of Lords case of *R v ex parte Bennett.*[25] In this case, the House of Lords unequivocally held that abduction of an accused is an abuse of the process of law, and a violation of international law as well as the rule of law.

Therefore, the rationale in respect of the issue of abduction, of the Israeli court on the basis of *male captus, bene detentus* is rather doubtful. As some writers suggest,[26] the only reasonable argument for the Israeli court seems to be on the basis of universal jurisdiction because the crimes with which Eichmann was charged were, war crimes, genocide and crimes against humanity.

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[22] Security Council Resolution of 23 June 1960, Doc S/4349.

[23] Pursuant to the Security Council Resolution, the two governments reached agreement on the settlement of the dispute between them. On 3 August 1960, they issued a joint communiqué stating that the they resolved to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the sovereignty of the State of Argentina.

[24] [1949] 1 All ER 373.

[25] [1994] 1 AC 42 (House of Lords). See Wedgwood (1995) 89 *AJIL* 142.

[26] Dixon, M & McCorquodale, R, *Cases and Materials on International Law* (London: Blackstone Press Limited, 3rd ed, 2000) at p 310.

D. The South African courts

In *State v Ebrahim,*[27] the appellant, a South African citizen, was charged with treason. He had been abducted from Swaziland and was transported to South Africa, most likely by agents of the South African Government. This was a violation of international law as it was a violation of the territorial sovereignty of Swaziland, although Swaziland had not made an official protest. Ebrahim appealed against his conviction on the ground that the South African courts lacked jurisdiction because his appearance before them was brought about in violation of international law. The appeal was allowed and the conviction set aside. The Supreme Court of South Africa held at p 896 of the report that:

> The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice. This applies equally to the state. When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean.

E. The New Zealand courts

In *R v Hartley,*[28] by virtue of a request by telephone from the New Zealand police, the Australian police seized the accused by force in Australia and placed him on a plane to face a murder charge in New Zealand. The New Zealand court held that it lacked jurisdiction because the accused was brought to New Zealand by means of an abduction, an illegal manner.

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[27] 31 ILM 888 (1992).
[28] [1978] 2 NZLR 199.

F. The United Kingdom courts

In *Bennett v Horseferry Road Magistrate's Court and another,*[29] Benett, a New Zealand citizen, was wanted in the United Kingdom in respect of allegations of fraud. Benett was located in South Africa and the United Kingdom police asked the South African police to send him forcibly to the United Kingdom. This was done. There was no extradition treaty between the United Kingdom and South Africa, although special extradition arrangements could have been made under the United Kingdom Extradition Act 1989. The House of Lords held that, if Benett could prove his allegations, there would have been an abuse of the process because the manner by which he came before the United Kingdom courts would have been a violation of international law and the rule of law. Lord Bridge held at p 155 of the report:

> ... There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself ... To hold that the court may turn a blind eye to executive lawlessness ... is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted ...

As is common knowledge, customary international law is the law which has evolved from the practice of States; State practice and *opinio juris* are its two elements.[30] The formation of a customary rule requires a general (widespread) and consistent State practice. If State practice is substantially divided and conforms with two or more differing solutions on one issue, it is not sufficiently widespread and cannot amount to a general customary rule.

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[29] [1993] 3 All ER 138.

[30] See Art 38(1)(b) of the Statute of the International Court of Justice. See also *North Sea Continental Shelf* (1969) ICJ Rep 3 and *Continental Shelf (Libya v Malta)* (1985) ICJ Rep 29.

In determining whether there was an established rule of customary international law, the International Court of Justice in the *North Sea Continental Shelf* cases[31] ruled that State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform. Furthermore, in the *Asylum* case,[32] the World Court concluded at p 273 of the report that:

> [t]he facts brought to the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum ... that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule ...

The above analysis of the practice of various States clearly shows that the *male captus, bene detentus* rule is accepted by courts of some States and rejected by others. Since there is no widespread and consistent State practice in this respect, we can fairly conclude that it is not an established rule of customary international law.

III. Abduction In A Foreign Country: A Violation of International Law

As the cases of abduction involve elements occurring beyond the borders of the forum State, the principles of international law are relevant.[33] Violations of international law may occur in three ways: (1) violation of territorial sovereignty of another State; (2) violation of the fundamental human rights of the abducted person; and (3) violation of the extradition treaty.[34]

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[31] (1969) ICJ Rep 3.

[32] *Columbia v Peru* (1950) ICJ Rep 266.

[33] See Higgins, R, "Allocating Competence: Jurisdiction" in *General Course on Public International Law*, (1993) Vol 5, Ch IV, 89-114 at p 105.

[34] Lowenfeld, AF, "US Law Enforcement Abroad: The Constitution and International Law, Continued" (1990) 84 *AJIL* 444 at pp 472-475.

A. Violation of the territorial sovereignty of another State

If a defendant has been abducted from a foreign territory, a violation of that State's territorial sovereignty has occurred. Any exercise of law enforcement or police power by one State, without permission, on the territory of another is a violation of the latter's sovereignty.[35] In many of the leading cases, abduction has indeed occurred from another State's territory.[36] Sometimes, the abduction was carefully arranged to be committed in or over international waters, precisely to avoid violating the territorial sovereignty of another State.[37]

The concept of the "territorial sovereignty of States" is a long-standing and well-established rule of customary international law,[38] reaffirmed by Article 2(4) of the Charter of the United Nations. In *The Lotus* case,[39] the World Court declared that "the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State". The International Court of Justice, in the *Corfu Channel* case,[40] ruled that a British minesweeping operation done within the Albanian territorial waters without its approval was a violation of Albanian sovereignty.

Since abduction involves the exercise of police power by a State in the territory of another State and infringes the territorial sovereignty

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[35] See Mann, FA, "Reflections on the Prosecution of Persons Abducted in Breach of International Law" in Dinstein, Y (ed), *International Law at a Time of Perplexity* (Netherlands: Martinus Nijhoff Publishers, 1989) at p 407, reprinted in Mann, FA, *Future Studies in International Law*, 1990 at p 339.

[36] The *Eichmann* case is perhaps the most celebrated.

[37] See for eg, *United States v Yunis* (1991) 924 F 2d 1086.

[38] The American Law Institute summarised customary international law as follows: "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state".

[39] *Lotus* case (1927) PCIJ Series A, No 10.

[40] *Corfu Channel* case (1949) ICJ Rep 4.

of a State, there is no doubt that it is a clear violation of international law.

B. Violation of International Human Rights Law

The second argument is based on the proposition that forcible abduction carried out by a State is a violation of international human rights law. None of the international human rights declaration or conventions has yet stated this proposition expressly. However, the Universal Declaration of Human Rights[41] states that "no one shall be subjected to arbitrary arrest, detention or exile".[42] The International Covenant on Civil and Political Rights 1966, solemnly provides in Article 9(1) that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention".[43] The Human Rights Committee did hold in *Lopez* 's case that abduction of a Uruguayan refugee from Argentina by Uruguayan security and intelligence forces constituted a violation of Article 9 of the Covenant. It followed, the Committee held, that the State was under an obligation to provide effective remedies, including immediate release and permission to leave the country.[44]

C. Violation of the extradition treaty

The third argument is based on the proposition that extradition treaties not only serve the interest of States in law enforcement but such treaties also provide safeguards for persons whose arrest and transfer is sought. While States do from time to time extradite fugitives without a treaty on the basis of the principle of reciprocity, the argument is that

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[41] General Assembly Resolution 217A (III), 1948. The United States was a principal sponsor of the Universal Declaration.

[42] Universal Declaration on Human Rights, Art 9. See also Art 3 (right to security of person) and Art 5 (no one shall be subjected to torture or to cruel, inhuman or degrading treatment).

[43] International Covenant on Civil and Political Rights, 1966, Art 9(1). See also Art 9(4) (right to challenge lawfulness of detention before a court).

[44] Views of Human Right Committee on Complaint of Lopez, 29 July 1981, 36 UN GAOR Supp (No 40) at pp 176-84, UN Doc A/36/40 (1981).

when an extradition treaty is in force between two countries, then as a mater of international law the provisions of the treaty must be followed. If a party to the treaty forcibly abducts an accused from the territory of another party, it is a violation of the extradition treaty and hence an infringement of international law.

IV. Responsibility of States Under International Law for Abduction of Accused Criminals

A distinction can be drawn between an abduction authorised or sponsored by the government of a State and a wrongful seizure by a private citizen.

A. Responsibility Arising out of State-Sponsored Abduction

It has been established that abduction of a person from the territory of another State is a violation of international law and hence an internationally wrongful act.[45] The first obligation of a State responsible for the internationally wrongful act is to cease the wrongful act, if it is continuing and to offer appropriate assurances and guarantees of non-repetition.[46] After that, the abducting State must make appropriate "reparation" to the offended State.[47] Reparation may take the form of restitution, compensation and satisfaction, either singly or in combination.[48]

"Restitution" is the most important remedy under international law. The general rule is that a State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.

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[45] Art 1 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, (Doc A/CN.4/L.602/Rev 1).

[46] Art 30 of the Draft Articles on Responsibility of States, 2001.

[47] *Chorzow Factory* case (1927) PCIJ Series A, No 9 at p 21; *Corfu Channel* case (1949) ICJ Rep 4.

[48] Art 31, and also Arts 35 to 37, Draft Articles on Responsibility of States, 2001.

Restitution may take the form of material restoration or return of territory, person or property. Examples of material restitution include the release of detained individuals or the handing over to the State of an individual arrested in its territory.[49]

As far as abduction cases are concerned, the official comment to section 423(2) of the *Restatement (Third) of Foreign Relations Law of the United States* correctly states this rule as follows:

> If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand the return of the person, and *international law requires that he be returned.*[50]

Therefore, the most appropriate remedy in an abduction case is the repatriation of the abducted individual to the country where the abduction took place.[51] In the *Alvarez-Machain* trial,[52] the US District Court rightfully ordered the repatriation of Dr. Alvarez-Machain to Mexico, and, on the first appeal, the US Appellate Court properly affirmed that order.

The second appropriate remedy for an abduction case is "satisfaction". Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.[53] It may include the punishing of the guilty individuals. Abduc-

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[49] In the *Diplomatic and Consular Staff in Tehran* case, the International Court of Justice ordered Iran to immediately release every detained US nationals, see (1980) ICJ Rep 3 at pp 44–45.

[50] Restatement (Third) of the Foreign Relations Law of the United States, 1987. (Emphasis added).

[51] Lord McNair pointed out that "the remedy under international law for the abduction of an accused from a foreign country was the *restitutio in integrum* of the aggrieved State, whose territory had been violated, by releasing the person abducted": Lord Mcnair, *International Law Opinions*, Vol 1 (1956) at p 78. See also O' Higgins, P, "Unlawful Seizures and Irregular Extraditions" (1960) 36 *BYIL* 279, and Lord McNair, *International Law Opinions*, Vol 1 (1956) at pp 80-82.

[52] See 31 ILM 902 (1992).

[53] Art 37, Draft Articles on the Responsibility of States, 2001.

tions might, therefore, entail the request by the offended State for extradition of the kidnappers, and the kidnappers may face criminal or civil charges in either the kidnapping State or the State where the kidnapping took place.[54] The *Ker v Illinois* court, while sustaining jurisdiction over the criminal abducted abroad, held that Peru could seek extradition of the kidnapping Illinois agent on charges of abduction, and stated that the kidnappers might be prosecuted for illegal abduction in a foreign country.

In the *Rainbow Warrior* incident, a Greenpeace vessel was sunk in New Zealand internal waters as a result of the acts of French agents. It was generally held that the French Government, by authorising such acts, had committed a breach of international law and that, apart from the responsibility of France itself, the individual agents could not be exonerated. Eventually, the individual agents responsible were duly tried and convicted, and they received sentences imposed by a New Zealand court.[55]

B. Responsibility Arising out of Non-State-Sponsored Abduction

The remedies available for abductions by private individuals may be different from those for state-sponsored abductions. In the *Eichmann* case, for example, Professor Green argued that because the kidnappers were "private individuals no international responsibility arises", if they were "state representatives, [and] should Israel decline to surrender Eichmann or his captors, any claim by Argentina could be expiated".[56]

Forcible abductions conducted by purely private individuals without government involvement give rise to no violation of international law. They do, however, constitute a violation of the internal law of the offended State by the abducting individuals, and the State whose private citizens or unauthorised officials conducted the abduction abroad

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[54] Quigley, J, "Government, Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists" (1988) 10 *Human Rights Quarterly* 193 at p 211.

[55] See *Rainbow Warrior* Arbitration (1990) 20 *RIAA* 266.

[56] Green, LC, "The Eichmann Case" (1960) 23 *MLR* 507 at p 515.

does not bear international responsibility for the private or unauthorised act of abduction itself unless it subsequently "adopts" or "ratifies" the act,[57] fails to return or order the return of the abducted individual to his country of refuge or residence, or fails to comply with a demand for the extradition of the abducting individuals where an extradition treaty applies.

As a result, in both government-sponsored and non-government-sponsored abductions, the offending State has the duty to return the abducted individual or order his return.

C. Wrongful abduction requires divestment of jurisdiction

Since an abducting State has a duty to return illegally abducted individuals to their country of refuge or residence, courts of the abducting State must refrain from exercising jurisdiction on the merits. Professor Daniel O'Connell maintains that, although in certain cases courts of the abducting State have "asserted jurisdiction over a person irregularly seized in foreign territory, the seizing State is in breach of international law in exercising its jurisdiction ... and there is ground for asserting that, as a corollary, it owes a duty to the aggrieved State to return the offender thereto".[58] Further, "in cases involving kidnapping of individuals across international boundaries, the general state practice is either to release the individual ... or to refuse totally to exercise jurisdiction where individuals were brought before the courts". Where courts of the US accept *in personam* jurisdiction over defendants apprehended in wrongful abductions, those courts "commit a further internationally wrongful act: the denial of justice".

The Harvard Research Draft Convention on Jurisdiction with Respect to Crime[59] proposes a duty on a kidnapping State to return the

[57] Art 11, *supra,* n 53, provides that "conduct shall be considered an act of that State if and to the extent that the State acknowledges and adopts the conduct in question as its own". The best example of subsequent adoption by a State of a conduct of private individuals is the *US Diplomatic and Consular Staff in Tehran* case (1980) ICJ Rep 3.

[58] O' Connell, DP, *International Law* (London: Stevens, 2nd ed, 1970) at p 833.

[59] (1935) 29 *AJIL* 623.

kidnapped criminal to the place where he was seized and not to "prosecute" or "punish" him. Article 16 of the Draft states that:

> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

D. The Principle ex injuria jus non oritur

It is a long established legal principle that an illegal act does not give rise to any right; *ex injuria jus non oritur*. Since the act of abduction itself is illegal and invalid under international law, the abducting State does not have a right to subject the abducted individual to its laws and proceedings following such illegal abduction.

Several legal theorists have corroborated this view. For instance, Professor O'Connell convincingly states that where persons and things are brought within the territorial jurisdiction of a particular State by means constituting a violation of international law, or by means offensive to an extradition treaty or to the municipal law of another State, *"[a] priori* one would suppose that the solution of the problem would be found in the application of the maxim *ex injuria jus non oritur*".[60]

An especially significant example is the case of *United States v Toscanino*.[61] In that case, the appellate court ruled that, although the abduction of Toscanino from Uruguay did not violate the extradition treaty between Uruguay and the United States, the abduction violated two other treaties; the United Nations Charter and the Organization of American States Charter, which require the United States to respect the territorial sovereignty of Uruguay. It also held that a US court must "divest itself of jurisdiction over the person of a defendant where

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[60] O' Connell, *supra*, n 58 at pp 831-832; See to the same effect, Morgenstern, "Jurisdiction in Seizures Effected in Violation of International Law" (1952) 29 *BYIL* 265 at p 268.

[61] 500 F 2d 267.

it had been acquired as a result of the government's deliberate and unreasonable invasion of the accused's constitutional rights".

V. Conclusion

It is crystal clear from the above analysis that the *male captus, bene detentus* rule is accepted by some domestic courts and opposed by others. It has no basis at all in international law and is far from being an established principle of international custom.

A State that conducts, authorises, supports, or sponsors extraterritorial abduction violates a well-established principle of international law. When one State exercises its police power in the territory of another State, it exceeds its sphere of jurisdiction (jurisdiction to prescribe) permitted under international law, and it violates a fundamental tenet of international law, the respect for the sovereignty and territorial integrity of States.

In *Alvarez-Machain,* the US Supreme Court seems to have either ignored the existence of customary international law or denied its binding force. It is submitted that all domestic courts, being a part of the government of the State, should refrain from exercising jurisdiction over individuals seized or abducted by means which are in violation of international law. Extraterritorial abduction in violation of international law does not give rise to any right, including the "right" to exercise jurisdiction. In addition, the offended State is entitled to remedies under international law, and the offending State is obligated to undo its wrongs, regardless of whether the offended State protests or demands remedies. It would, therefore, be a further international wrong for the courts of the abducting State to try and prosecute an individual who has been illegally abducted.

Law and Ethics in the Malaysian Insurance Industry – A Review of Selected Practices

Nurjaanah Abdullah @ Chew Li Hua[*]

Introduction

The insurance industry, especially insurers, is one of the most regulated commercial entities. This is due to its unique role and impact on society. The very nature of its business is *sui generis* as insurance is in a class of its own. Thus, although it is a profit motivated industry like any other business, the health of the industry is determined to a certain extent by the ethical practices or lack of them in the daily running of the industry.

What has ethics to do with the insurance industry? This article explores the co-relations between law, ethics and practice in the insurance industry. The doctrine of *ubberimae fidei* and the principle of indemnity set a contract of insurance apart from other types of commercial contracts. Several examples of insurance industry practices which may fulfill the legal principles and requirements but may be ethically suspect will be discussed. These are practices in the formation of contract, the practices of insurance agents, the practice of inserting unfair terms in the form of the basis of contract clause and limiting the time frame to submit a claim, the practice of avoiding claims on the basis of absence of insurable interest, and the practice of prolonging delays unreasonably in the settling of claims.

Formation of Contract

Under the Contracts Act 1950,[1] a contract is formed when there is unconditional acceptance of the offer. The basic elements of a valid

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[1] Act 136 (Revised 1974).