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ABDUCTING TERRORISTS UNDER PDD-39: MUCH ADO ABOUT NOTHING NEW

DOUGLAS KASH*

[I]t is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace, from attacking them on the soil of other nations. . . . International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists or rescue its citizens when no other means is available.¹

—Former United States Secretary of State George Shultz

I. Introduction	139
II. Extraterritorial Abductions in a Historical Perspective	142
III. Justification for Extraterritorial Abduction of Criminals: The Use of Force	144
IV. U.S. Case Law	149
V. The Case for Abducting Terrorists	153
VI. Conclusion	155

I. INTRODUCTION

In early February 1997, headlines blared “U.S. OKs Kidnapping Terrorists: Directive Apparently Declassified in Error;”² “U.S.

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As a matter of policy, the Drug Enforcement Administration disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are the author's alone and do not necessarily represent the views of the United States Department of Justice, the Drug Enforcement Administration or any officer or entity of the United States Government.

1. Bureau of Pub. Aff., U.S. Dep't of State, Current Pol'y No. 783, Low-Intensity Warfare: The Challenge of Ambiguity 3 (1986).

2. *U.S. OKs Kidnapping Terrorists: Directive Apparently Declassified in Error*, CHI. TRIB., Feb. 5, 1997, at 10 (reporting that a presidential directive, inad-

Willing to 'Snatch' Terrorists Part of Directive Inadvertently Released,"³ "U.S. May Nab Terrorism Suspects, A Directive Indicates We Would Snatch Suspects From Another Country if Necessary,"⁴ "U.S. Authorities Allowed to Abduct Terrorists."⁵ These headlines referred to an unintentionally declassified presidential directive signed by President William J. Clinton on June 21, 1995. The Presidential Decision Directive, or PDD-39, stated in part:

We shall vigorously apply extraterritorial statutes to counter acts of terrorism and apprehend terrorists outside of the United States. When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing issue in bilateral relations with any state that harbors or assists them. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, *where possible and appropriate*, through negotiation and conclusion of new extradition treaties.⁶

Ironically, just before his inauguration, then President-elect Clinton reacted with a different attitude on extraterritorial abductions in the *Alvarez-Machain* case.⁷ In that case, U.S. drug agents were implicated in the seizure of a Mexican doctor involved in the tortuous murder of a U.S. drug agent.⁸ In response to the U.S. Supreme Court decision affirming U.S. jurisdiction, Clinton announced that the Court had gone,

way too far. . . . The Supreme Court ruled that unless the [extradition] treaty explicitly forbids it, our country was free to go into Mexico or into any other country that we had a similar treaty with and take someone out.

vertently made public, condones the abduction of terrorists by force from countries that refuse to cooperate in their extradition).

3. *U.S. Willing to 'Snatch' Terrorists Part of Directive Inadvertently Released*, COMM. APPEAL (Memphis, Tenn.), Feb. 5, 1997, at A4.

4. *U.S. May Nab Terrorism Suspects, A Directive Indicates We Would Snatch Suspects From Another Country if Necessary*, ORLANDO SENTINEL, Feb. 5, 1997, at A3.

5. John Diamond, *U.S. Authorities Allowed to Abduct Terrorists*, PLAIN DEALER (Cleveland, Ohio) Feb. 5, 1997, at 11A.

6. Presidential Decision Directive-39, June 21, 1995, § 2 (emphasis added). The language "where possible and appropriate" creates the option that the United States can act unilaterally without the consent, knowledge or assistance, of the harboring state should that state choose not to negotiate. *Id.*

7. *See Clinton Objects to Ruling on Extradition Treaty*, S.F. CHRON., Dec. 16, 1992, at A5.

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

My own opinion is that that is too broad a policy for our country to have.⁹

Before President Clinton publicly released PDD-39, it became apparent that he was reconsidering his position. On July 15, 1993, Federal Bureau of Investigation (FBI) agents, in cooperation with Nigerian authorities, abducted a Palestinian, Omar Mohammad Ali Rezaq, in Lagos after he was denied entry into Nigeria.¹⁰ A U.S. court issued an arrest warrant for Rezaq after he killed one American on a hijacked plane in 1985. Malta officials captured, convicted, and sentenced Rezaq to 25 years imprisonment. Under Libyan pressure, however, Malta officials released Rezaq who then fled to Ghana. The FBI arranged for Ghanaian authorities to ship Rezaq to Nigeria where, due to political upheaval, an abduction would have gone relatively unnoticed.¹¹

On June 15, 1997, subsequent to the presidential endorsement and publication of PDD-39, a team of FBI agents apprehended Mir Aimal Kansi in a hotel near the Pakistan-Afghanistan border.¹² The FBI suspected Kansi of being the gunman in a January 25, 1993 attack, which took place outside the Central Intelligence Agency (CIA) headquarters. The attack resulted in the killing of two CIA employees and the wounding of three others. White House officials refused to release specific details about the abduction and reasoned that possible future actions against other terrorists warranted silence on this matter. President Clinton said the episode underscored the nation's determination to pursue terrorism "no matter how long it takes, no matter where they hide."¹³ To date, many questions on the precise facts remain unanswered.

Many believe that the United States negotiated a highly unusual diplomatic agreement with Pakistan and, thus, enabled U.S. agents to enter its territory and abduct a Pakistani national. The fact that legal recourse was unavailable means that customary extradition procedures were suspended. The Pakistanis probably wanted to remove

9. *Clinton Objects to Ruling on Extradition Treaty*, *supra* note 7, at A5.

10. *See FBI Arrests Hijacker in Nigeria*, S.F. CHRON., July 16, 1993, at A10 (documenting the arrest of airplane hijacker Omar Mohammad Ali Rezaq).

11. *See id.*

12. *See* David Jackson, *U.S. Claims Victories in Terrorism Cases*, DALLAS MORNING NEWS, June 19, 1997, at 9A.

13. *Id.*

any official involvement because consent or willful blindness of this type of operation in a Muslim country is a highly sensitive matter, both politically and religiously. A second reason may be an effort by both countries to protect their sources from family vengeance. This operation was conducted as a direct result of PDD-39. Kansi's posting on the FBI's Ten Most Wanted List only seemed to confirm the Administration's justification of its actions based on PDD-39.

II. EXTRATERRITORIAL ABDUCTIONS IN A HISTORICAL PERSPECTIVE

The media's attention-grabbing headlines of this presidential directive are rather surprising, considering that incidents of international abductions before the U.S. courts date back as early as 1835.¹⁴ The practice of extraterritorial abductions developed from the international law theory of "reprisal," which occurs when a state forcibly takes something from another state or other entity in satisfaction for an injury suffered by the former and caused by the latter.¹⁵ Extraterritorial abductions can occur despite the existence of an extradition treaty between the two nations involved since most treaties do not obligate the asylum state to surrender the suspect to the requesting state.¹⁶ Despite the existence of over 102 extradition agreements between the United States and other nations, no international convention or U.S. law explicitly prohibits extraterritorial abductions.¹⁷ The only attempt at such a prohibition is a non-binding U. N. Resolution¹⁸ passed in response to the 1960 Israeli abduction of Adolph Eichmann from Argentina.¹⁹ In that Resolution, the U.N. proclaimed that Arti-

14. See *State v. Brewster*, 7 Vt. 118 (1835).

15. See Kristin Berdan Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 459, 465 (1994) (discussing the origins of extraterritorial abduction).

16. See *id.* at 468 (expressing the views of several commentators who opined that extradition tries as "an intent to abide by the customary international law precept of respect for international territorial boundaries.").

17. See *id.* at 467.

18. See HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 293-95 (1966) (explaining that unless the U.N. Security Council takes the necessary steps under Article 39 of the U.N. Charter, U.N. Resolutions remain non-binding on member states).

19. See U.N. SCOR 138, 15th Sess., at 4, U.N. Doc S/INF/15/Rev. 1 (1960) (proclaiming that extraterritorial abductions are incompatible with the U.N. Charter).

cle 2 prohibits extraterritorial abductions without the consent of the asylum nation.²⁰ To date, the U.N. has not amended its Charter or passed a declaration specifically prohibiting extraterritorial abductions.²¹ Further, the International Court of Justice has not heard any cases involving extraterritorial abductions, but it has analyzed territorial integrity in a number of cases.²² There is, however, a suggestion by some authors that international law prohibits one state from exercising its police power in the territory of another state.²³

The Restatement of the Foreign Relations Law provides the customary international law perspective that an agent of a state may not seize a person from another nation without first obtaining governmental consent from that nation.²⁴ Customary law also requires the abducting state to return the individual if the home state objects to the abduction and, thus, demands the return of the suspect.²⁵ This is not, however, the typical remedy. One commentator opined that "the only established remedies [for international abductions] are reparations and diplomatic apologies; the additional remedy of the return of the person seized unlawfully is not yet recognized, although some courts have seen fit to apply it."²⁶ Another commentator noted that calls for the return of those abducted "have succeeded only intermittently and usually in a semipolitical, semilegal context."²⁷

20. See Weissman, *supra* note 15, at 473.

21. See *id.* at 477 (noting that the lack of a binding agreement on extraterritorial abduction negatively impacts international peace and security).

22. See *id.* at 475 (explaining that the absence of an international agreement on extraterritorial abductions presents challenges for international courts in resolving these issues).

23. For a provocative note castigating international abductions, see Jonathon P. Gluck, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 DUKE L.J. 612 (1994) (examining the historical cases of state-sponsored international abduction). For purposes of clarity in this essay, a constant assumption will be that the United States is targeting a terrorist who previously attacked American interests or is planning to do so based on the reasoning that in many cases, those who attacked the United States are in a constant mode of planning new attacks.

24. See RESTATEMENT (THIRD) OF THE LAW FOREIGN RELATIONS LAW OF THE UNITED STATES, § 432(2) cmt. c (1987) [hereinafter RESTATEMENT].

25. See *id.*

26. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 217 (1987).

27. See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 475 (1990) (asserting three primary reasons in support of the author's argument that state-

Since no governing or judicial body has interpreted and conclusively ruled on extraterritorial abductions, countries that want to challenge an extraterritorial abduction must research the authority found in the annals of customary international law.

III. JUSTIFICATION FOR EXTRATERRITORIAL ABDUCTION OF CRIMINALS: THE USE OF FORCE

Customary international law provides that territorial sovereignty secures a state's exclusive control over everything within its territory.²⁸ States have a duty not to interfere in the internal affairs of another state or perform acts of sovereignty on its soil.²⁹ Consequently, it is a violation of customary international law to abduct someone in a foreign country. One commentator argues that the practice of international abduction violates international law by infringing upon sovereignty and territorial integrity of other states and, thus, disrupts world order.³⁰ This, however, is customary law, which is subject to change and modification by continued practice within the international community.³¹ In fact, changing attitudes on the abduction issue mean that this practice is now accepted under international law in limited instances.³²

In order to carry out an extraterritorial abduction, the abducting state must establish jurisdiction through prescriptive or enforcement jurisdiction.³³ Prescriptive jurisdiction authorizes a state to apply its

sponsored abduction violates international law).

28. See MANUAL OF PUBLIC INTERNATIONAL LAW 253 (Max Sorenson ed., 1968).

29. See D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1, 16 (1988) (discussing sovereignty and territorial integrity).

30. Terry Richard Kane, *Prosecuting International Terrorists in the United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 336 (1987) citing Bassiouni, *supra* note 26, (including abduction in a list of alternatives to extradition of international terrorists).

31. See Andrew Wolfenson, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 707 (1989-90) (discussing the relationship of international law to extraterritorial abductions).

32. See *id.* at 708 (asserting that the torture or mistreatment of an abductee by the abducting agent continues to be illegal under international law).

33. See RESTATEMENT, *supra* note 24, pt. IV introductory note (explaining the concepts of prescriptive and enforcement jurisdiction).

substantive law to specific persons and events. There are five types of prescriptive jurisdiction: protective (if a national interest is injured);³⁴ passive personality (nationality of the victim);³⁵ universal (whether the offense is considered particularly heinous and harmful to humanity);³⁶ territorial (place where the offense is committed);³⁷ and national (nationality of the actor).³⁸ Enforcement jurisdiction authorizes a state to take measures to induce or compel compliance with its laws.³⁹

According to one international law scholar, Derek Bowett, sending agents into a state's territory to specifically target a criminal does not violate the territorial integrity or political independence of the state.⁴⁰ In addition, Mr. Bowett gives an example of one state using due diligence in two situations: to prevent a terrorist attack on another state or if its nationals are unable to prevent groups from organizing or carrying out these activities. Since the state is using due diligence, it is not breaching any duty toward other states. Thus, the target state may not attempt any actions in self-defense. The target state, however, is not powerless because it may act in self-defense so long as it acts solely against the individuals responsible for the threat.⁴¹

Mr. Bowett further clarifies his position and argues that "[t]he action which it is necessary to take against an expedition still within the

34. *See id.* § 402 cmt. f (defining protective jurisdiction as the right of a state to punish offenses committed by non-nationals outside its territory if the integrity of that state's governmental function is threatened).

35. *See id.* cmt. g (commenting that this jurisdictional basis has not been accepted for ordinary torts or crimes and is only applicable to terrorist and other attacks on a state's nationals).

36. *See id.* § 403 (explaining that a state imposes punishment for certain offenses regardless of the territoriality of the act or the nationality of the actors and victims).

37. *See id.* § 402 cmt. c (describing the principle of territoriality as the most common basis for the use of prescriptive jurisdiction).

38. *See id.* cmt. e (stating that international law recognizes the right of a state to exercise jurisdiction based on domicile or residence as well as nationality).

39. *See id.* § 431 (noting that prescriptive jurisdiction is a prerequisite for enforcement jurisdiction).

40. *See* DEREK W. BOWETT, SELF DEFENSE IN INTERNATIONAL LAW 55 (1958) (discussing the use of forcible self-help against terrorists).

41. *See* BOWETT, *supra* note 40, at 56 (considering the role of self-defense in actions against individuals or groups); *see also* Findlay, *supra* note 29, at 29-30 (asserting that the inherent right of self-defense may justify an extraterritorial abduction).

jurisdiction of the state of its origin must not be considered as directed against the state so invaded.”⁴² Considering that the actions of espionage or law enforcement agents within a nation’s territory have never been considered a use of force under international law,⁴³ it follows that targeting a terrorist for abduction from another state is not necessarily a violation of international law. More accurately, this is an interpretation of a state’s right to defend itself.

Mr. Bowett’s reasoning also supports two other justifications for using force when abducting terrorists in another state. Under the first justification, a state can seize a terrorist in another country as long as the capture is necessary to prevent future harm to its citizens and the mission’s objectives are strictly confined to that task.⁴⁴ The capture and successful punishment of terrorists would not only prevent future attacks by the terrorists involved but would also deter other terrorists from targeting that state or its citizens again. Therefore, even if the terrorist has already struck, his abduction is justifiable as preventing a future attack.

The second justification is self-defense. Broadly construed, the use of force in extraterritorial abductions is considered self-defense if the abduction satisfies the requirements of necessity and proportionality and the abducting state acted in collaboration with the territorial state.⁴⁵ Necessity requires that the terrorist act be sudden and unexpected, therefore compelling an immediate response.⁴⁶ The proportionality element limits the measures so as to “not exceed in manner or aim the action provoking them.”⁴⁷ Therefore, a state may cross the border of another state in order to capture a terrorist without necessarily violating that state’s sovereignty. An abduction committed

42. BOWETT *supra* note 40, at 152 (asserting that a territorial invasion in self-defense is not a violation of territorial sovereignty or political independence).

43. *See id.* at 25 (commenting that some forms of non-violent self-help may be permissive in response to terrorist activities).

44. *See id.* at 29 (discussing the doctrine of humanitarian intervention as a justification for extraterritorial abduction).

45. *See id.* at 30 (describing when the abduction of terrorists constitutes an act in self-defense).

46. *See* JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906) (citing a letter from Daniel Webster to the British Minister at Washington discussing the exceptions to territorial sovereignty).

47. Findlay, *supra* note 29, at 27-28 (providing examples of proportionate responses to terrorist acts around the world).

externally of a state's borders, however, would qualify as aggression through the use of force because that type of conduct violates the *jus cogens*, or higher norms of non-intervention, as codified in the United Nations Charter.⁴⁸ Either justification, the prevention of future harm or self defense, might have been used by a state acting on the following series of events. French officials permitted George Habash, head of the Popular Front for the Liberation of Palestine, an extremist offshoot of the Palestine Liberation Organization, to enter and seek medical treatment in France.⁴⁹ Another terrorist, Ahmed Jibril, who heads the Popular Front for the Liberation of Palestine—General Command, boasted “that he, too, recently traveled for health reasons—twice to Switzerland and once to France.”⁵⁰ If countries such as France and Switzerland do not follow international conventions that provide the means to apprehend, prosecute, and/or extradite a terrorist, other states are left with little choice but to try and assert jurisdiction to avoid putting the harboring state in a position where it may be subjected to retaliation.

The classic *Caroline* case,⁵¹ which is the standard for using force as a measure of self-defense, provides insight into the reasoning of Secretary of State Daniel Webster. The *Caroline* incident was not actually a case, but rather a set of correspondences between Webster and the British Minister at Washington discussing a British violation of United States sovereignty. During an 1837 rebellion in colonial Canada, Americans volunteered and offered supplies to the Canadian colonists. The American ship *Caroline* carried men and supplies from the United States to Canada. Since American authorities did not intercede, British and Canadian loyalist troops crossed the border into the United States, boarded the *Caroline* docked at Fort Schlosser, and set her on fire. The ship then drifted over Niagara Falls and was destroyed. The attack resulted in the deaths of two Americans aboard

48. See U.N. CHARTER arts. 2, 7 (setting forth the general principles for which all member nations must follow).

49. See Charles Fenyvesi, *Washington Whispers*, U.S. NEWS AND WORLD REP., Feb. 24, 1992, at 26 (commenting on the medical treatment of two Palestinian terrorists in Western Europe).

50. *Id.*

51. See John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of State Responsibility*, 83 VA. L. REV. 1, 126 (describing generally the *Caroline* incident).

the ship, and, subsequently, U.S. officials arrested a Canadian loyalist for their murder. The British claimed that they destroyed the ship docked in the United States in self-defense⁵²

Secretary Webster explained that a state must demonstrate that the "necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁵³ The British argued that the attack was legal and conducted in compliance with Webster's definition of self-defense in response to the ship's previous activities, future threats posed by the *Caroline*, and the United States' unwillingness to take action. Although the Americans did not agree, they accepted British apologies and closed the case in 1842.

Necessity may be a difficult criterion to satisfy as it relates to abductions. In the context of abducting terrorists, however, an expansive understanding of this doctrine would no doubt conclude that a deliberate operation to abduct those, who by their nature are overly clandestine, could be necessary. One must also consider Webster's comments in a present-day context where "instant" and "overwhelming" have quite different meanings than they did 153 years ago. The imminence of the attack must be determined on a case-by-case basis. "The greater the relative threat, the more likely preemptive actions are to be effective, and therefore, the greater the justification for acting before the enemy can complete preparations and mount its aggressive attack."⁵⁴ The United States continues to adhere to Webster's principle argument that the threat of an imminent attack gives rise to the right of anticipatory self-defense.⁵⁵ The majority of criminal law theories provide a basis by which one may use force in order to defend oneself. If a person reasonably believes that he is in imminent danger of an unlawful bodily harm, he may use the amount of force that is reasonably necessary to prevent such harm. Most American jurisdictions reject the common law "duty to retreat" rule,

52. See MOORE, *supra* note 47, at 409-11 (describing the circumstances surrounding the destruction of the *Caroline*).

53. *Id.* at 412.

54. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 647 (1992) (concluding that each situation must be analyzed contextually before the standard of imminence can be determined).

55. See *supra* note 6 and accompanying text (discussing a presidential directive asserting the U.S. position on extraterritorial abduction).

whereby instead of using deadly force to defend oneself, one must retreat if a safe opportunity exists.

Proportionality is a criterion more difficult to measure since the terrorist attack may not have occurred at the time that a nation targets a terrorist for abduction. While a country such as the United States has greater military capabilities than a terrorist group, it still does not always have the luxury to wait and let other defensive measures run their course. It may be proposed, however, that the force used in a preemptive strike is a minimal amount necessary under the circumstances. If the United States delays, the opportunity to react might be lost and the result will be dead Americans.⁵⁶

While American criminal law has little bearing on international law *per se*, it does provide the basic components of an explanation for using force against a terrorist. Our military and intelligence services should be permitted under the law to prevent a terrorist attack in the same way that police officers stop a fleeing felon. As the tactics, weaponry, and targets of terrorists change, so should the legal parameters surrounding the use of force. It is irrational to suggest that a state must refrain from acting until a terrorist first attacks it. For over one hundred years, American jurisprudence wrestled with the issue of extraterritorial abductions. Many cases support the proposition of abducting terrorists from foreign countries, with or without the harboring state's consent, to bring the suspect before a court of competent jurisdiction.

IV. U.S. CASE LAW

In *Ker v. Illinois*,⁵⁷ the appellant fled to Peru following an indictment in Illinois for larceny and embezzlement.⁵⁸ The victim bank dispatched a private investigator with an extradition warrant. Since Chilean armed forces were occupying the capital, Peruvian authorities never received the warrant. A U.S. agent seized Ker and forced him to board a ship to Honolulu and then another ship to San Francisco.⁵⁹ Next, the agent turned Ker over to an agent of the Governor

56. See *id.* at 648 (asserting that the timing of a preemptive strike is critical).

57. 119 U.S. 436 (1886).

58. See *id.* at 437.

59. See *Ker*, 119 U.S. at 438 (explaining that United States agents refused to present extradition papers to Peruvian government officials).

of Illinois and transported him to Chicago. Ker contended that the agents violated his due process rights and Justice Miller wrote "For mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment."⁶⁰

In *Frisbie v. Collins*,⁶¹ Michigan police traveled to Chicago, then forcibly seized, handcuffed, and blackjacked the petitioner and returned him to Michigan to stand trial.⁶² The Court held that "[t]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible 'abduction.'"⁶³

The courts developed what is now referred to as the *Ker-Frisbie* doctrine. This doctrine holds that a forcible abduction neither offends due process nor requires a court to free a suspect seized in violation of international law.⁶⁴ Many courts follow the *male captus bene detentus* rule, which stems from the *Ker* and *Frisbie* cases.⁶⁵ This rule holds that a court need not divest itself of *in personam* jurisdiction over a defendant based on the methodology employed to arrest and bring a defendant before the court.⁶⁶ The Court further stated that while an arrest may be unlawful and unconstitutional, the exclusionary rule applies to evidence, not people.⁶⁷

Later, in *United States v. Toscanino*,⁶⁸ a jury convicted the defen-

60. *Id.* at 440.

61. 342 U.S. 519 (1952).

62. *See id.* at 520.

63. *See id.* at 522 (referring to the "rule announced" in *Ker*, 119 U.S. at 436).

64. *See generally* Lowenfeld, *supra* note 27, at 444 (describing the *Ker-Frisbie* doctrine as the ability of a U.S. court to "[t]ry a person brought before it for a crime over which it has jurisdiction—regardless of how the accused came before the court").

65. *See id.* at 465 (citing *Mahon v. Justice*, 127 U.S. 700, 715-17 (1888) (Bradley, J., dissenting) (basing its decision on the ruling in *Ker*, 119 U.S. 436 (1886))).

66. *See id.* (explaining that jurisdiction is not impaired by the manner in which the accused is brought before the Court).

67. *See id.* at 460 (justifying why the unlawful seizure of documents leads to annulment of the seizure, while the unlawful seizure of a person does not lead to annulment).

68. 500 F.2d 267 (2d. Cir. 1974), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

dant for conspiracy to import narcotics into the United States.⁶⁹ The defendant claimed that Uruguayan police acting on behalf of the United States brought him to Brazil.⁷⁰ Prior to Toscanino's transportation to the United States by United States agents, Brazilian officials tortured and drugged him. The Court held that jurisdiction could be lost in the United States only if the methods of abduction were "deliberate, unnecessary and [an] unreasonable invasion of the accused's constitutional rights."⁷¹

One year later in *United States ex rel. Lujan v. Gengler*,⁷² the Court refined the holding in *Toscanino* by stating that in order for a court to surrender its jurisdiction, the agent's "conduct [must be] of a most shocking and outrageous character,"⁷³ and limited to "torture, brutality and similar outrageous conduct."⁷⁴ In *Gerstein v. Pugh*,⁷⁵ the Supreme Court held that "an illegal arrest does not void a subsequent conviction."⁷⁶ In 1986, Congress authorized the FBI to exercise "long arm" jurisdiction to abduct terrorists located outside of U.S. borders.⁷⁷ Similarly, the Bush Administration embraced an advisory opinion that confirmed the FBI's ability to engage in extraterritorial abductions without the consent of the asylum state.⁷⁸ As if to confirm their authority, in June of 1989, the Department of Justice issued a legal opinion stating that federal law enforcement agents have legal authority to arrest suspected criminals overseas without

69. *See id.* at 268.

70. *See id.* at 269 (providing Toscanino's statement which states that he was lured from home by a telephone call placed by Hugo Campos Hermedia, who was "acting ultra vires in that he was the paid agent of the United States government").

71. *See id.* at 275 (holding that *Ker* and *Frisbie* must yield to the Supreme Court's expansion of due process "[w]hich now protects the accused against pre-trial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part").

72. 510 F.2d 62 (2d. Cir.), cert. denied, 421 U.S. 1001 (1975).

73. *Id.* at 65.

74. *Id.*

75. 420 U.S. 103 (1975).

76. *Id.* at 119.

77. *See* 18 U.S.C. § 2331 (1994).

78. *See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163 (1989) [hereinafter *F.B.I. Authority to Override International Law*]. The Opinion offered the position that the FBI could legally violate customary international law and U.N. Charter art. 2(4) while engaging in extraterritorial abductions. *See id.*

the consent of the country where the arrest is made.⁷⁹ As a general proposition, Justice Brandeis opined:

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.⁸⁰

In *United States v. Verdugo-Urquidez*,⁸¹ the Supreme Court gave the political branches of government wide discretion on the methodology used to bring a criminal to the United States. The court stated that “[i]f there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.”⁸² Clearly the U.S. Administration has the legal and political ability to use force in abducting a criminal. As long as the conduct involved is not “shocking,” the method used to capture the defendant rests with the executive branch of the government.

Finally, in the latest series of cases involving jurisdiction and abduction, the Court in *United States v. Alvarez-Machain*⁸³ questioned “whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country’s courts.”⁸⁴ The Court held that the presence of a treaty does not entitle a defendant to an automatic defense. Furthermore, the Court stated: “To infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice.”⁸⁵ The rationale of the Court was that “[t]he history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the

79. *See id.*

80. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

81. 494 U.S. 259 (1990).

82. *Id.* at 275.

83. 504 U.S. 655 (1992).

84. *Id.* at 657.

85. *Id.* at 668-69.

Treaty,”⁸⁶ and is, therefore, an option available to both parties.

V. THE CASE FOR ABDUCTING TERRORISTS

Transnational crimes such as the bombing of Pan Am Flight 103 illustrate how terrorists can literally and figuratively “get away with murder.” At times a unilateral effort to abduct the suspect extraterritorially may be the only method to effectuate an arrest and bring the suspect before the court. The formal extradition process is a laborious and generally inefficient procedure. In addition, the extradition of suspects may be in contravention of a state’s own laws and may also lead corrupt government officials to assist a suspect’s escape. Armed with legal justification, a state is entitled to engage in extra-territorial abductions. The U.S. has addressed this issue for nearly two centuries. To date, case law, executive orders, and domestic judicial policy all overwhelmingly support the seizure of a criminal suspect beyond the borders of the United States.

One of the goals or purposes of a government is to protect the lives of its citizens. To that end, the government has an obligation to use all of its resources to achieve that goal. Leaders cannot dwell on individual citizen objections to governmental counter-terrorism measures. The battle against terrorism is a continuous undertaking, and each measure must be part of an overall strategy. History has taught us that it is not a question of “if,” but “when” a terrorist will strike. Therefore, it is contingent upon the government to keep up the pressure on terrorists and to continually develop and execute irregular methods of countering terrorists. The government must exercise those measures even if the world community adversely reacts to the measures. Diplomatic outcries are usually self-serving pronouncements for the countries making them. Historically, these rhetorical exercises have not saved a single U.S. citizen from terrorists.

Beyond the political, social, and moral concerns of a civilized society, there is pragmatism. Pragmatism in conjunction with legal principles and norms of justice help a country define its options to act preemptively or reactively to a terrorist threat or attack against its citizens and interests.

President Clinton’s power to sign PDD-39 stemmed from his in-

86. *Id.* at 665.

herent authority in the executive branch of the government to enforce the law and proscribe the manner in which law enforcement is conducted.⁸⁷ Once an individual violates a law, agents of the U.S. Government acting on behalf of an executive, can seek out and arrest the suspect. The violation is then a matter for the courts to assess in light of a judicial interpretation of the underlying criminal offense. The judicial branch does not have jurisdiction to determine whether the manner used to bring the suspect before the court is legal. Instead, the courts have jurisdiction to review the constitutionality of the abduction and to question whether governmental officials violated the suspect's rights.⁸⁸

Abducting a terrorist from another country is a means of attaining jurisdiction without having to assess the impact or permissibility of jurisdiction under an extradition treaty.⁸⁹ If an extradition treaty is not present, then countries do not violate international law when they abduct individuals because the "law of nations" is not activated.⁹⁰

As a general principle, however, international law recognizes the right of a country to apply its law extraterritorially. Therefore, American law can apply beyond its borders.⁹¹ International law does not require a nation to remain silent and idle while terrorists attack its citizens. Without this right, international law would enable a foreign country to refuse extradition and, thus, protect a suspect wanted in the United States. Therefore, if a country invites U.S. law enforcement agents into its borders to investigate a crime, there should be no challenge to United States assertion of jurisdiction over the suspect. Further extending that logic, if a nation harbors and conceals a fugitive terrorist suspect, that nation should not then rise and proclaim a

87. See *F.B.I. Authority to Override International Law*, *supra* note 79, at 174 (stating that pursuant "to the constitutional command to 'take care that the laws be faithfully executed,' the president has the power to authorize agents of the executive branch to engage in law enforcement activities in addition to those provided by statute").

88. See *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974) (questioning whether the government used "deliberate" and "unnecessary lawlessness" and holding that due process protects accused against such illegality).

89. Arthur E. Shin, *On the Borders of Law Enforcement—The Use of Extraterritorial Abduction as a Means of Attaining Jurisdiction Over the International Criminal*, 17 WHITTIER L. REV., 327, 384-85 (1995).

90. See *id.*

91. See *id.* at 388.

violation of its sovereignty when the abduction is simply an effort to dispense justice, which inarguably would be attempted, supported, and defended by most nations.

President Clinton's execution of PDD-39 did not explore new legal grounds of attaining jurisdiction, nor did it create new tactics to bring terrorists before U.S. courts. It simply reaffirmed a legal theorem that has a 160-year history of practical applications. In assessing modern threats, one should not be lulled into automatically focusing on extraterritorial abductions of foreigners. Among some quarters within the United States, there is an apparent radical shift among extremist groups willing to carry out attacks against fellow Americans. It is not a stretch of one's imagination to envision a domestic attack carried out by an American citizen who then seeks and receives refuge in a rogue nation such as Syria, Libya, or Sudan. It is somehow easier to accept that a nation has a right to extraterritorially abduct one of its own, rather than a foreign national. The focus must remain on the nationality of the victim or target state, not on the citizenship of the attacker.

The abduction of Kansi illustrates the problem. Kansi fled the United States and was harbored by his wealthy family clan in Pakistan and Afghanistan. During the past four-and-one-half years official government authorities were disinterested, too corrupt, or otherwise unable to capture Kansi and return him to trial. Due to the largely unilateral measures undertaken by the United States, Kansi will finally be subject to the long overdue American brand of justice.

VI. CONCLUSION

The utilization of extraterritorial abductions is, and should remain, limited. This essay does not support the position that abducting terrorists should be a liberally exercised policy. Abductions should be exercised only in those situations when all other avenues of attaining jurisdiction have been exhausted. Abrogation of a nation's ability to abduct suspects wanted for heinous crimes, such as terrorism, only invites more such acts with the perpetrators seeking sanctuary in some sympathetic, anti-American, anti-justice nation. Any sovereign nation that has been attacked must, if all other diplomatic options have been exhausted, maintain the unilateral right to dictate the time, place, and manner in which it reaches out, captures the attackers, and

brings them into a court of law.

Due to modern political realities and global anti-American sentiment, abductions are at times the only viable option to bring a suspect within the criminal jurisdiction of the United States. As long as a person's illegal actions have harmful consequences within the United States, or against its global interests, that person is subject to the laws and penalties of the U.S. criminal code. To assume anything else, would create a *de facto* and *de jure* exemption from prosecution for those who seek to harm the United States. This is completely unacceptable.