ABDUCTIONS FROM FOREIGN STATES
('THE SKASE CHASE')

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Earlier this year Andrew Denton, the host of a television program by that name, proposed hiring a United States bounty hunter in order to secure the return of Christopher Skase to Australia. A good deal of money was pledged by viewers for that purpose, before the idea was abandoned following an on-air discussion with the Commonwealth Attorney General. The return of persons to states which have jurisdiction to try them ideally is effected through the process of extradition. However, an application for extradition may be frustrated by a number of factors, including the absence of a treaty or other reciprocal arrangement with the state of refuge, the procedural laws of the requested state, or successful reliance by the fugitive on one or other of the bars to extradition arising under either an extradition treaty or the domestic law of the requested state. Accordingly, there may be a temptation to resort to other means of securing the return of a fugitive, including abduction. This paper considers the legal implications of the use of abduction as an alternative to extradition and, in particular, whether any subsequent trial may thereby be thwarted on jurisdictional or other grounds.

Reliance On Abduction

The idea of resort to abduction to bring a person from a foreign state in order to face trial is not novel. There have been a number of precedents. For example, in 1935 German agents abducted a journalist, Berthold Jacob, from Switzerland and forcibly returned him to Germany;[1] while in 1960 Aldof Eichmann was abducted from Argentina and taken to Israel to stand trial on charges of crimes against the Jewish people, crimes against humanity and war crimes.[2] Both the Swiss and Argentinian Governments protested the abductions as a breech of their territorial sovereignty. Following the Argentinian protest and a declaration of the United Nations Security Council that such acts "affect the sovereignty of a Member State";[3]

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1 See J Starke, '*An Introduction to International Law*', 1950, p.75.

2 *Attorney - General of the Government of Israel v Eichmann (1961) 36 ILR 5*, affirmed 36 ILR 277.

3 Ibid at 59.

Israel offered a formal apology which was accepted by Argentina. The Israeli court rejected a submission that the illegality deprived it of jurisdiction[4] and Eichamann was tried and subsequently executed.

There have been a number of abductions effected in order to bring persons to trial in the United States; frequently as a response to terrorist attacks or at the instigation of the United States Drug Enforcement Agency.[5] At least in earlier times, this practice may have been encouraged by the latitude given bounty hunters, as reflected in the United States decision in *Taylor v Taintor*:[6]

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state."

However, of greater significance has been the support given by the United States executive to abductions by agents of the state and the sanctioning of this practice by the United States

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4 It was held that where an abduction violated international law, the right violated is that of the aggrieved state, not of the person abducted, and that the governments of Israel and Argentina had settled their dispute before the indictment was presented.

5 See, for example, *Ker v Illinios* 119 US 436 (1886); *Cook v Hart* 146 US 183 (1892); *Pettibone v Nichols* 203 US 192 (1906); *Frisbie v Collins* 342 US 509 (1952); *United States v Sherwood* 435 F 2d 867 (10th Cir 1970); *United States v Herrera* 504 F 2d 859 (5th Cir 1974); *United States v Toscanino* 500 F 2d 267 (2nd Cir 1974); *United States, Ex Rel. Lujan v Gengler* 510 F 2d 62 (2nd Cir 1975); *United States v Lovato* 520 F 2d 1270 (1975); *United States v Valot* 625 F 2d 308 (9th Cir 1980); *Matta-Ballesteros v Henman* 697 F Supp 1040 (SD Ill 1988); *United States v Verdugo-Urquidez* 939 F 2d 1341 (9th Cir 1991); *United States v Alvarez-Machain* 112 S.Ct 2188, 119 L. Ed 2d 441 (1992).

6 16 Wall S.C. 366, 372–373 (1873). Compare *Reese v United States* 76 US 13, 21–22 (1870), where it was held that the authority of a bondsman to enforce contractual rights is confined to the territory of the United States. See also Clare E Lewis, "Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffe: A case in Point" (1986) Crim LQ 341 at 359.

courts, particularly the Supreme Court. In 1986, then Secretary of State George Shultz stated:

> "It 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, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerillas. International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorist, or to rescue its citizens when no other means is available.[7]

It has also been suggested that in 1986 President Reagan signed a classified directive authorising the Central Intelligence Agency to abduct suspected terrorists in other countries in order to bring them to the United States to stand trial;[8] while in June 1989 the Justice Department issued an opinion giving the Federal Bureau of Investigation legal authority to "apprehend fugitives from United States law in foreign countries and return them to the United States without first obtaining the foreign state's consent".[9]

As suggested by the statement of Shultz, support for abduction is a reflection of the frustration felt by the executive in its inability to bring persons to justice, particularly those accused of terrorism or involvement in the drug trade.[10] Frequently, the political offence exception will provide a barrier to the extradition of alleged terrorists, while Jones notes that, to escape prosecution, "international drug traffickers often operate out of countries that refuse to extradite drug smugglers to the United States".[11] In other instances, political or procedural

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7 See D. Cameron Findlay, "Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law" (1988) 23 Texas Int'l LJ 1 at 2. See also John G Kester, "Some Myths of United States Extradition Law" (1988) 76 Geo LJ 1441 at 1453.

8 See Findlay, op cit. n. 8, at 2.

9 See Wilson G Jones, "The Ninth Circuit's Camarena Decisions: Exceptions or Aberrations of the *Ker–Frisbie* Doctrine" (1992) 27 Texas Int'l LJ 211 at 213n.

10 As to the suggested ineffectiveness of the extradition process in delivering alleged terrorists to states wishing to try them, see Findlay, op cit n.8, at 8.

11 Jones, op cit. n. 10, at 213.

considerations may arise. In 1977, Abu Daoud, who was suspected of involvement in the terrorist attack at the 1972 Munich Olympic Games, was arrested in France but extradition to both West Germany and Israel was denied on procedural grounds;[12] while in 1987, West Germany refused extradition to the United States of a person accused of hijacking TWA Flight 847 in June 1985, after Lebanese citizens seized two Germans in Beirut.[13] Accordingly, a view has emerged that "the United States is forced to use methods beyond formal extradition to obtain jurisdiction over foreign offenders when the harboring country fails to cooperate in the extradition process".[14]

On that view, state interest in the suppression of crime is paramount over the interest in preserving the rule of law and the territorial integrity of states.[15] It is a view that is shared by the United States Supreme Court. Since 1886[16] and as recently as 1992,[17] the United States Supreme Court has held that it will not inquire as to the circumstances in which an accused has been brought before the United States courts, even where there has been a breach of the general principles of international law, and that the constitutional guarantee of due process of law is satisfied where the accused is given a fair trial in the United States in accordance with constitutional procedural safeguards.[18]

The Question of Jurisdiction

In common law countries, the traditional view is that a court will not inquire into the legality

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12 Recent Development, "International Terrorism: Extradition" (1977) 18 Harv Int'l LJ 467 at 469; Findlay, op cit n 8, at 10.

13 Findlay, op cit. n. 8, at 10–11.

14 Jones, op cit. n. 10, at 213.

15 Compare the *Corfu Channel Case (United Kingdom v Albania)* (1949) ICJ 4, in with the International Court of Justice held that forcible self-help to restore injured rights is not premissible under the United Nations Charter.

16 *Ker v Illinios* 119 US 436 (1886).

17 *United States v Alvarez-Machain* 112 S Ct 2188, 119 L Ed 2d 441 (1992).

18 Ibid at 450

of the arrest or proceedings in a foreign country and will not be denied jurisdiction where the accused has been brought into the state through unlawful means.[19] The rationale for this approach appears in *R v Plymouth Justices, Ex parte Driver*.[20]

> "The basis of the principle is that it is in the public interest to try and punish crime, and that this predominates ... there is also the principle that if there is a breach of foreign sovereignty or of foreign law it is for the foreign state to vindicate its own law and for the complainant to prosecute his own wrong."

However, more recently, in a number of common law countries, while the courts have maintained the view that they do have jurisdiction where persons are brought before them through unlawful means,[21] there has been recognition of a capacity to decline to exercise jurisdiction on the basis of an inherent discretion to prevent an abuse of process of the court. That discretionary power is considered separately below.

On the other hand, the United States courts have not recognized any such discretion and have adhered to the view that they should not inquire into any alleged unlawful conduct in a foreign state. In the United States the matter is considered in the context of the guarantee of due process of law under the fifth and fourteenth amendments to the Constitution, and since

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19 *Ex parte Scott* (1829) 9 B & C 446, 109 ER 1656; *Ker v Illinois* 119 US 436 (1886); *Sinclair v H.M. Addvoate* (1890) 17 R (Ct Sess) 38; *R v Walton* (1905) 10 CCC 269 (Ont CA); *R v O C Department Battalion RASC Colchester, Ex Parte Elliott* [1949] 1 All ER 373; *Frisbie v Collins* 342 US 519 (1952); *Re Hartnett* (1973) 14 CCC (2d) 69; *R v Plymouth Justices; Ex parte Driver* [1986] QB 95; *United States v Alvarez-Machain* 112 S Ct 2188, 119 2Ed 441 (1992).

20 [1986] 1 QB 95 at 115. See also *R v Horseferry Road Magistrates' Court, Ex parte Bennett* (1994) 1 AC 42 at 72, where, in a dissenting judgment, Lord Oliver stated: "An English criminal court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state is, as it seems to me, a matter which can only properly be pursued on a diplomatic level between the government of the United Kingdom and the government of that state."

21 See, for example, *R v Hartley* (1978) 2 NZLR 199 at 215; *R v Horseferry Road Magistrates' Court, Ex Parte Bennett* [1994] 1 AC 43 at 59.

1886, in *Ker v Illinios*,[22] the Supreme Court has held that due process rights are not affected by an abduction from a foreign state. That view was reaffirmed by the Supreme Court in 1952 in *Frisbie v Collins*[23] and, again, in 1992 in *United States v Alvarez-Machain*.[24] In *Frisbie,* the Court stated:

> "This court has never departed from the rule ... that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[25]

However, a qualification to the so-called *Ker-Frisbie* principle was suggested by the Second Circuit of the United States Court of Appeals in *United States v Toscanino*.[26] Toscanino, an Italian citizen, was convicted of conspiracy to import narcotics and was sentenced to 20 years imprisonment. On appeal, Toscanino disputed the jurisdiction of the trial court, alleging that he had been kidnapped from Uruguay by United States agents and that he had been drugged, beaten and tortured before being brought to the United States to face trial.[27] In remitting the

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22 119 US 436 (1886).

23 342 US 519 (1952).

24 112 S Ct 2188, 119 L Ed 2d 441 (1992).

25 342 US 519, 522 (1952). As to an equivalent approach under the Canadian Bill of Rights, see *Re Hartnett* (1973) 14 CCC (2d) 62 and *Lewis* op cit. n. 7, at 364-365.

26 500 F 2d 267 (2nd Cir 1974).

27 The allegations included that he was knocked unconscious with a gun and incessantly tortured and interrogated for 17 days. He claimed that in the course of the interrogation he was denied sleep and nourishment for days at a time, nourishment being provided intravenously in an amount necessary to keep him alive, that he was forced to walk up and down a hallway for 7 or 8 hours at a time and that he was kicked and beaten. Further allegations included the use of pliers to pinch his fingers, the flushing of his eyes with

matter to the District Court, it was held that the interpretation of "due process" had been extended since *Frisbie*, so as to prevent the government "from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial".[28]

However, subsequent to that decision, the courts have tended either to decline to follow[29] or to limit the qualification in *Toscanino*. In *United States, Ex rel Lujan v Gengler*,[30] the Second Circuit limited its earlier decision by stating that it "did not intend to suggest that *any* irregularity in the circumstances of a defendent's arrival in the jurisdiction would vitiate the proceedings of the criminal court",[31] and that due process will be violated only where the accused establishes governemnt conduct "of a most shocking and outrageous character",[32] while in *United States v Lovato*[33] it was held that there must be "a strong showing of grossly cruel and unusual barbaraties inflicted upon him" by agents of the United States. In practice, the *Toscanino* qualification has been narrowly applied. For example, in *Matta-Ballesteros v Henman*,[34] it was held that the allegations of being beaten on the head, back and arms, and of the person's body, including his feet and testicles, being subjected to shock by use of a "double pronged electric", even if soley at the hands of United State agents, would not be sufficient to attract the qualification. Moreover, the qualification does not apply to fugitives

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alcohol, and the attaching of electrodes to his earlobes, toes and genitals and subjecting his body to electric shock.

28 500 F 2d 267, 272 (2nd Cir 1974).

29 See for example, *United States v Herrera* 504 F2d 859 (5th Cir 1974); *United States v Postal* 589 F2d 862 (5th Cir 1979); *United States v Darby* 744 F2d 1508 (11th Cir 1984); *United States v Wilson* 732 F2d 404 (5th Cir 1984); *United States v Rosenthal* 793 F2d 1214 (11th Cir 1986).

30 510 F2d 62 (1975).

31 Ibid at 65. See also, for example, *United States v Valot* 625 F2d 308 (9th Cir 1980); *Weddell v Meierhenry* 636 F2d 211 (8th Cir 1981); *United States v Cardero* 668 F2d 32 (1st Cir 1982); *David v Attorney-General* 699 F2d 411 (7th Cir 1983).

32 *United States, Ex Rel Lujan v Gengler* 510 F 2d 62,65 (2nd Cir 1975).

33 520 F2d 1270, 1271 (9th Cir 1975).

34 697 F. Supp 1040 (SD Ill 1988).

from justice; the distiction being between those who submit to the jurisdiction of a criminal court and then flee and those who have not appeared in any criminal proceedings.[35]

While in *United States v Alvarez-Machain* [36] the Supreme Court appears to suggest that even where an abduction is "shocking" the courts will not be denied jurisdiction, in a 1994 decision in *United States v Levy*,[37] the Second Circuit of the Federal Court of Appeals left open the possiblity of challenging jurisdiction on this ground.

International Law

Where there is an abduction there may be a breach of international law, arising from a violation of territorial sovereignty, a breach of human rights conventions, or from non-compliance with the terms of an extradition treaty. The concept of territorial sovereignty has been noted in the context of Eichmann's case. It is part of customary international law and means that a state has exclusive control over persons and property within its territory. Also, the United Nations Charter, Article 2 paragraph 4, provides:

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."[38]

Allied to the concept of territorial sovereignty is the principle that a state may determine whether or not to grant asylum to a person[39] or, subject to any binding treaty, whether or not

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35 *See Matta-Ballesteros v Henman* 697 F Supp 1040 (58 SD Ill 1988); *United States v Pelaez* 9930 F2d 520 (6th Cir 1991).

36 112 S Ct 2188, 119 L Ed 2d 441, (1992).

37 25 F 3d 146 (2nd Cir 1994).

38 As to the view that a state sponsored abduction violates the United Nations Charter, see *United States v Toscanino* 500 F 2d 267, 277-278 (2nd Cir 1974); *United States, Ex Rel Lujan v Gengler* 510 F 2d 62, 66 (2nd Cir 1975).

39 See Declaration of Territorial Assylum, Art 1: United Nation Resolution 2312 (XXII), 14 Dec 1967, UN GAOR Supp 16, UN Doc A/6716. See also Atle Grahl-Madsen, "*Territorial Assylum*", 1980, p. 42 Compare Arts 32 (1) & 33(1) of the 1951 Convention Relating to the Status of Refugees.

to grant an application for extradition. Extradition is a matter of comity rather than of obligation under international law.[40] Accordingly, it is a breach of international law for a state to be involved in the abduction of a person from a foreign state in order to face trial, even where the person is charged with a crime against international law.[41]

State practice is not consistent as to the implications for any subsequent trial where there has been a violation of the territorial integrity of a foreign state[42]. In *S v Ebrahim*[43], the South African Supreme Court held that where a person is abducted by the agents of one state from the territory of another state the court is deprived of jurisdiction. The applicant, a member of the military wing of the African National Congress, was abducted from his home in Swaziland by agents of the South African state and taken back to South Africa in leg irons and handcuffs, where he was handed over to the police and detained pursuant to security legislation. He was subsequently charged with treason, convicted and sentenced to 20 years imprisonment. In setting aside the conviction and sentence, the Supreme Court held that customary international law is part of the law of South Africa and that, under Roman and Roman-Dutch law, where an abduction is in breach of the principle of the sovereignty of nations the courts have no jurisdiction to try the person abducted. On the other hand, in the United States the Supreme Court has held that jurisdiction is not denied where there is a violation of "general international law principles".[44] In some other states, including Australia,

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40 *Hempel v Attorney-General (Cth)* (1987) 29 A Crim R 133 at 162; *Cheng v Governor of Pentonville Prison* (1973) AC 931 at 943; *Factor v Laubenheimer* 290 US 276, 287 (1933); *United States of America v McVey* 11 (1992) 97 DLR (4th) 193 at 198; *Questions of Interpretation & Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v USA),* "Request for Indication of Provisional Measures" (1992) 1 CJR 3.

41 I.A. Shearer, "Starke's International Law", 11th ed 1994, p. 144; *United States v Toscanino* 500 F 2d 267,278 (2nd Cir 1974, *United States v Alvarez-Machain* 112 S Ct 2188, 119 L Ed 2d 441, 462 (11992). Compare Findlay, op cit n 8, at 16–21.

42 See Shearer, op cit. n. 40, p. 92.

43 1991 (2) SA 553.

44 See *United States v Alvarez-Machain* 112 S Ct 2188, 119 L Ed 441, 455–456 (1992).

while it is accepted that jurisdiction is not thereby affected, it is considered that the court has a discretionry power to stay proceedings as an abuse of process of the court where illegality is shown; whether the illegality arises under international or municipal law.

A separate issue concerns the rights afforded individuals under certain international instruments; in particular the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, and the International Covenant on Civil and Political Rights, which was acceded to by Australia in 1980. Article 9 of the Universal Declaration of Human Rights provides that "no one shall be subjected to arbitrary arrest, detention or exile", while Article 9 of the International Covenant of Civil Political Rights states:

> "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".[45]

While the Universal Declaration of Human Rights represents an attempt to define the various human rights which ought to be respected,[46] and is couched in general terms, the International Covenant is concerned to set in place defined rights which are binding on signatory states.[47] Further, the First Optional Protocol to the Covenant, which Australia acceded to in 1991, recognises the competence of the United Nations Human Rights Committee to receive complaints from individuals who allege that they have been affected by a violation of the Covenant and to make recommendations to a State Party in relation to

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45 Bassiouni considers that an abduction by a state may violate the provisions of the Declaration and the Covenant: M Cherif Bassiouni, "*International Extradition: United States Law and Practice*" pp 225ff. See also Rosemary Rayfuse, "International Abduction and the United States Supreme Court: The Law of the Jungle Reigns" (1993) 42 ICLQ 882 at 890–892. Compare Findlay, op cit. n. 8, at 33–38. Findlay suggests that Article 9 (1) of the covenant "was intended to guard against unbridled police discretion, and arrest and detention in the absence of applicable law and adequate procedures": at 36.

46 Shearer, op cit. n. 40, p. 330.

47 Shearer, op cit n 40, pp 330, 334. Shearer notes that the Covenant "provides for a committee with the responsibilitiy of considering reports from state parties, and of addressing comments, if necessary, to these states and to the Economic and Social Council of the United Nations".

that complaint.[48] Any response to a recommendation would be a matter for the government of that state. Under Australian law treaties are not self executing and must be adopted by statute in order to confer rights and obligations enforcable before municipal courts.[49] In Australia, the International Covenant on Civil and Political Rights has not been incorporated into municipal law by legislation.

Extradition treaties are incorporated into Australian Law and it may be argued that an abduction breaches the express or implied terms of a relevant treaty. The Extradition Act provides for the application of the Act to those countries with which Australia has entered into treaties or other arrangements, and the Act applies subject to the terms of the treaty or arrangement. In the United States, it has been held that where an abduction violates a treaty between the United States and the state of refuge, and that state formally objects, then the courts will intervene.[50] The *Ker–Frisbie* principle is a constitutional doctrine, operating as a limitation on the application of the due process clauses of the Constitution. It has no application where there has been a breach of federal treaty law. The requirement for an objection from the state of refuge is premised on the notion of international law as regulating relations between states only[51] and, in the present context, of extradition treaties existing primarily for the benefit of the parties to the treaty; impossing mutual obligations to surrender

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48 Shearer, op cit. n. 40, p. 334. The complainant must first exhaust all remedies under municipal law.

49 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Barton v The Commonwealth* (1974) 131 CLR 477 at 488; *Koowarta v Bjelke–Petersen* (1982) 153 CLR 168 at 193; *Dietrich v The Queen* (1992) 177 CLR 292 at 305, 321. In *Simsek v MacPhee* (1982) 148 CLR 636 at 641–642, Stephen J explained that the reason "is to be found in the fact that in our constitutional system treaties are matters for the executive, involving the exercise of prerogative power, whereas it is for Parliament, and not the executive to make or alter muncipal law".

50 See, for example, *United States v Verdugo–Urquidez* 939 F 2d 1341, 1357 (9th Cir 1991), *Matta–Ballesteros v Henman* 697 F Supp 1040, 1043 (SD Ill 1988); *Peltier v Henman* 997 F 2d 461, 474–475 (8th cir 1993). Compare *United States v Alvarez–Machain* 112 S Ct 2188, 119 L Ed 441, 454 (1992);

51 Compare the view that, increasingly, individuals are seen as proper subjects of international law: see shearer, op cit n 40, pp 51ff; Findlay, op cit n 8, at 33; Rayfuse, op cit n 44, at 890.

fugitives in specified circumstances and, generally, promoting co-operation between states in the enforcement of criminal laws. In *United States v Cordero*;[52] it was stated that "extradition treaties are made for the benefit of the governemnt concerned ... And, under international law, it is the contracting foreign government, not the defendant, that would have the right to complain about the violation", while in *Matta-Ballesteros v Henman*[53] the court referred to the "well-recognized rule of international law ... that 'only sovereign nations have the authority to complain about violations of extradition treatees'". On that view, individual rights are only derivative through the state and depend on a formal complaint by the agrrieved state.[54] Accordingly, in *Matta-Ballesteros*, it was held that the appellant, who alleged that he had been taken from his home in Honduras and removed to the United States by federal agents to face criminal charges, lacked standing to assert violation of the extradition treaty between the United States and Honduras, in the absence of an official protest by the Government of that country.

Also, following the decision of the majority of the Supreme Court in *United States v Alvares-Machain*;[55] the occasion on which a breach of treaty will be found under United States law is likely to be rare. In that case, the defendant had been abducted from Mexico at the behest of agents of the United States Drug Enforcement Agency. A formal protest was lodged by Mexico. The court held that the use of abduction was not expressly or impliedly excluded by the terms of the treaty and that, as the matter fell outside the treaty, the question of whether the defendant should be returned to Mexico was the concern of the executive. In the majority judgment it is stated:

"The Treaty says nothing about the obligations of the United States and Mexico to

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52 668 F 2d 32, 37-38 (1st 1981). See also Warbrick, "Irregular Extradition" (1983) Pub L 269.

53 697 F Sapp 1040, 1043 (SD Ill 1988) See also *United States v Yunis* 681 F Supp 909, 916 (DDC 1988); *United States v Cornero* 668 F 2d 32, 37-38 (1st Cir 1981); *United States v Valot* 625 F2d 308 (9th Cir 1980).

54 See *United States, Ex rel Lujan v Gengler* 510 F 2d 62,67 (2nd Cir 1975); *United States v Diwan* 864 F 2d 715, 721 (11th Cir 1989); *Leighnor v Turner* 884 F 2d 385, 389 (8th Cir 1989).

55 112 S Ct 2188, 119 L. Ed 2d 441.

refrain from forciable abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs".

The court also rejected a submission that there was an implied treaty obligation not to violate the general principles of international law by securing the return of the fugitive by other, unlawful means. Accordingly, a breach of federal treaty law will arise only where a treaty expressly excludes resort to abduction and, absent that event, the orthodox common law approach, noted above, applies: that is, a court will not be denied jurisdiction where an accused in brought into the state through unlawful means.

The United States approach in relation to breach of federal treaty law is premised on the idea that a person obtains derivative standing where a foreign state formally objects to an abduction. On the other hand, in a dissenting opinion in *United States v Toscanino*;[56] Anderson J noted that as the accused had been abducted, he "did not enter this country pursuant to any treaty; he is, therefore, not 'clothed' in any treaty rights and cannot invoke the extradition treaty". That may be the approach taken by the Australian courts. In *Queensland v The Commonwealth*;[57] the High Court stated:

> "this Court has no jurisdiction the exercise of which can affect the existence under international law of any purported obligation imposed on Australia. In *Secretary of State for India v K B Sahaba* (1859) 13 Moo. P. C. C. 22 at 75 Lord Kingsdown said:
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> > 'The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they make.' "

However, the court added:

> "Although municipal courts do not administer international law, they take cognizance of international law in finding facts and they interpret municipal law so far as its

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56 500 F 2d 267, 281 (2nd Cir 1974). Certainly, a state is entitled to surrender a person without pursuing the formal extradition process, even where a treaty exists. In those circumstances, unless municipal law provides otherwise, the person to be surrendered would not have standing to insist on formal extradition proceedings.

57 (1989) 167 CLR 232 at 239.

terms admit, consistently with international law."

The approach in Australia, therefore, has been one of defining common law rights by reference to conventional and customary international law. For example, in *Jago v District Court (N.S.W.)*,[58] Kirby P., after questionning the usefulness of "raking over the coals of English legal procedures of hundreds of years ago", in search of common law rights, indicated a preferance for modern statements of human rights found in international instruments ratified by Australia:

> "I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures which may or may not have been adopted by the intinerant justices in eyre in parts of England in the reign of King Henry II."

Accordingly, where the executive is engaged in illegal conduct, or is in breach of international law, the approach has been one of recognizing a common law right to seek a stay of prosecution as an abuse of process of the court.

Abuse of Process

More than 100 years ago, in *Metropolitan Bank Ltd v Pooley*[59] , Lord Blackburn observed:

> "[F]rom early times ... the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the court had the right to protect itself against such an abuse".

Traditional notions of the concept of abuse of process are encapsulated in a statement of Hunt J in *Spautz v Williams*:[60]

> "[T]he legal process of a court is being abused when it is being used to exert pressure to effect an object not within the scope of the process ... or where it used for a purpose other than that for which the proceedings are properly designed and exist ...

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58 (1988) 12 N.S.W.L.R. 558 at 569.

59 (1885) 10 App Cas 210 at 220–221.

60 [1983] 2 NSWLR 506 at 539.

or where the plaintiff (or the informant) in those proceedings is seeking some collateral advantage beyond what the law offers".

However, for some time it was not clear whether the power of the courts was confined to protecting itself from abuse of process in this traditional sense, or whether the power extended to prevent unfairness generally or to ensure the preservation of the rule of law.[61] In *Jago v District Court of NSW*,[62] the High Court of Australia adopted the wider view as to the scope of the power, though Mason CJ noted that it did not matter whether the power was rationalised "by invoking a wide interpretation of the concept of abuse of process, or by saying that courts possess an inherent power to prevent their processes being used in a manner which gives rise to injustice".[63]

The nature of the injustice or unfairness required to invoke the inherent jurisdiction of the courts was considered by the High Court in *Walton v Gardiner*.[64] In that case it was submitted, and accepted by the minority,[65] that the unfairness must be such that it would necessarily result in an unfair trial or hearing. However, the majority concluded that the power to stay proceedings is wider:

"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and

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61 See, for example, *Connelly v DPP* [1964] AC 1254; *Atkinson v United States Government* [1971] AC 197 at 232; *DPP v Humphrys* [1977] AC 1; *Barton v The Queen* (1980) 147 CLR 75 at 95–97

62 (1989) 168 CLR 23. See also *Barton v The Queen* (1980) 147 CLR 75 at 95ff; *Williams v Spautz* (1992) 174 CLR 509 at 518–519.

63 Ibid at 31. Compare the view of Brennan J at 38ff. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 298, 324–325, 327, 357, 363–364; *Williams v Spautz* (1992) 174 CLR 509. In *Williams*, at 518, it is stated: "Although the term 'inherent jurisdiction' has acquired common usage in the present context, the question is strictly one of the power of a court to stay proceedings. That power arises from the need for the court to be able to exercise effectively the jurisdiction which the court has to dispose of the proceedings."

64 (1993) 177 CLR 378.

65 Per Brennan and Toohey JJ at 412ff and 421–422. See also per Brennan J in *Williams v Spautz* (1992) 174 CLR 509 at 531.

procedures of court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.[66]

Yet, it seems that the question of injustice is not considered in a vacuum. Rather, the power in this context "is derived from the public interest";[67] so that the question of whether there should be a permanent stay "falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations".[68] Principally, it involves a balancing of the requirements of "fairness to the accused" with the legitimate public interest in ensuring that persons charged with criminal offences are brought to trial;[69] and, overlapping both of these interests, the need to maintain public confidence in the administration of justice.[70]

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66 (1993) 177 CLR 378 at 392–393. Also, in *Williams v Spautz* (1992) 174 CLR 509 at 522, a majority of the High Court held: "In our view, the power must extend to the prevention of an abuse of process resulting in oppression, even if the moving party has a prima facie case or must be assumed to have a prima facie case." Equally, in relation to abuse of process in the traditional sense of improper purpose, it is not necessary to show that an unfair trail will ensue: *Williams v Spautz* (1992) 174 CLR 509 at 519.

67 See *Jago v District Court (NSW)* 168 CLR 23 at 30.

68 See *Walton v Gardiner* (1993) 177 CLR 378 at 395–396; *Williams v Spautz* (1992) 174 CLR 509 at 519–520; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 33, 61, 72 and 76; *Rogers v The Queen* (1994) 68 ALJR 688. Compare the strong criticism of such a process by Brennan J in *Walton v Gardiner* at 414–415. See also *Jago* at 54.

69 See *Walton v Gardiner* (1993) 177 CLR 378 at 395–396. In *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 399, Deane J stated that the "prima facie right to insist upon the exercise of jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person or organisation, regardless of rank, condition or official standing, is 'amenable to the jurisdiction' of the courts and other public tribunals".

70 This need could influence a determination either way: public confidence could be impaired should the criminal or other processes be hindered: *Williams v Spautz* (1992) 174 CLR 509 at 519; *Walton v Gardiner* (1993) 177 CLR 378 at 396, 416; or where the court processes become a vehicle for injustice or oppression: *Walton v Gardiner* at 394; *Williams v Spautz* at 520; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30.

Mindful of the public interest in allowing courts and other tribunals to exercise their jurisdiction when proceedings are initiated for a legitimate purpose, and of the risks of thwarting court processes through a plethora of applications to stay proceedings on the grounds of abuse of process, it has been held that a permanent stay will be granted only in "exceptional circumstances".[71]

It has been recognised in a number of common law jurisdictions that the use of unlawful procedures in order to bring a person to trial could give rise to an abuse of process. This is based on the premise that "the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law".[72] In *R v Hartley*,[73] the accused was unlawfully brought from Australia to New Zealand, with the connivance of the New Zealand police. While the Court of Appeal accepted that where a person is found within New Zealand and is then lawfully arrested it is not the concern of the New Zealand courts to inquire as to how a sovereign foreign state conducted its proceedings, it noted that it is another matter where the authorities of the receiving state are involved in any imporper dealings. The court took the view that had the trial judge been asked to exercise a discretion to discharge the accused on the basis of an abuse of process in the instant case, he probably would have been entitled to do so, and noted that:

> "There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion

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71 See *Walton v Gardiner* (1989) 177 CLR 378 at 392; *Williams v Spautz* (1992) 174 CLR 509 at 519–520; *Grassby v The Queen* (1989) 168 CLR 1 at 18; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 34, 60, 76, 78. See also *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219 at 272–273 and *Attorney-General (NSW) v Watson* [1987] 20 Leg Rep SL 1.

72 *R v Horseferry Road Magistraates' Court, Ex parte Bennett* [1994] 1 AC 42 at 62 per Lord Griffiths. See also at 67, per Lord Bridge, and 76, per Lord Lowry.

73 [1978] 2 NZLR 199.

there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute."[74]

The New Zealand decision has been followed in Australia[75] and England.[76] In *Levinge v Director of Custodial Services*,[77] the New South Wales Court of Appeal recognised an inherent jurisdiction of the courts to intervene in these circumstances on the basis of an abuse of process. Kirby P considered that this could arise where there is a "wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participating in unauthorised and unlawful removal of criminal suspects from one jurisdiction to another".[78] However, it is clear that some overt involvement in the unlawful conduct on the part of the authorities in this country is required in order to invoke the doctrine. Such involvement was not established in *Levinge*: at most the appellant could claim an inference "that the federal police knew of, and condoned" the alleged unlawful conduct.[79] In *R v Fan*,[80] Carruthers J

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74 Ibid at 216. See also *Moevao v Department of Labour* [1980] 1 NZLR 46; *R v Connell* [1985] 2 NZLR 233.

75 *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546; *R v Fan* (1989) 98 FLR 119. See also *Jarrett v Seymour* (1993) 46 FCR 521 at 544–545; 46 FCR 557 (Full Ct).

76 *R v Bow Street Magistrates; Ex parte Mackeson* (1981) 75 Cr App R 24; *R v Guildford Magistrates; Ex parte Healy* [1983] 1 WLR 108; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42. Compare *Liangsiriprasert v United States Government* [1991] 1 AC 225 at 241–243(PC), where it was held that there was no abuse of process where the fugitive had been enticed to Hong Kong, a country from which extradition was available to the United States. It was noted that he travelled to Hong Kong of his own free will.

77 (1987) 9 NSWLR 546. See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347 at 367.

78 (1987) 9 NSWLR 546 at 556–557.

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80 (1989) 98 FLR 119 at 121. It is unlikely that the court was suggesting that the remedy is available only where there is a breach of the treaty. Compare *R v Bow Street Magistrates' Court Ex parte Mackeson* (1981) 75 Cr App R 24, where no treaty was involved.

stated that there is no relief available on the ground of abuse of process unless it is established that "the traty was knowingly circumvented or the circumvention was the result of connivance by the prosecuting authorities in procuring an alleged offender to be brought within the jurisdiction to answer criminal charges".

After some doubt following the decision of the Divisional Court in *R v Plymouth Justices; Ex parte Driver*,[81] the House of Lords, in *R v Horseferry Road Magistrates' Court; Ex parte Bennett*,[82] has reaffirmed that, at least where extradition procedures are available[83], English courts will regfuse to try a person "if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party".[84] Lord Bridge explained the underlying rationale:

> "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance."[85]

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81 [1986] 1 QB 95.

82 [1994] 1 AC 42. For comment on this decision, see Steven Coren, "Disguised Extradition and Abuse of Process" (1994) 110 LQR 393.

83 [1994] 1 AC 42 at 62. It seeems that the different consideration which may arise is that where extradition is not available, there may be no breach of international law; ibid at 62, 67,76. Compare, above, n. 41 and related text.

84 [1994] 1 AC 42 at 62.

85 Ibid at 67. See also per Lord Lowry at 76.

Conclusion

Where there is complicity by Australian authorities in abducting a person from another state, at common law an Australian court has a discretion to stay any subsequent proceedings as an abuse of process of the court. This is based on the premise that the judiciary accepts responsibility for the maintenance of the rule of law and, in the present context, that the courts should not countenance behaviour of the executive which violates the territorial sovereignty of a foreign state or otherwise breaches international law. That approach is now taken in a number of common law jurisdictions, though in the United States the matter is considered in the context of constitutional guarantees and, under the *Ker–Frisbie* principle, due process is considered to be served where a fair trial is provided in accordance with constitutional procedural safeguards. While the *Ker–Frisbie* principle operates only as a limitation on the application of the due process clause of the Constitution and has no application where there has been a breach of federal treaty law, it is clear from the Supreme Court decision in *Alvarez–Machain* that the occasion on which a breach of treaty is likely to arise will be rare.

The United States approach, as well as having potential adverse affects on American foreign policy given the likely perception that the United States is "violating international law and running roughshod over other nations' interests";[86] has serious implications for the rule of law. The underlying rationale for a broader approach, one which does not place the executive above the law, was eloquently explained by Justice Brandeis in a dissenting opinion in *Olmstead v United States*:[87]

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the Government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. 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

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86 Findlay, op cit n. 8, at 52.

87 277 US 438, 485 (1928).

> 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. Against, that pernicious doctrine, this Court should resolutely set its face."

In a strong dissenting opinion in *Alvarez-Machain*, in which Justices Blackmun and O'Connor joined, Justice Stevens drew a distinction between the improper conduct of a citizen as arose in *Kerr* and that of the government itself:

> "A critical flaw pervades the courts entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorised by the executive branch of the government, which unquestionably constitutes a flagrant violation of international law, and in my opinion, also constitutes a breach of our treaty obligations".[88]

In relation to "private" abductions, it was also noted in *United States v Venduzo-Urquidez*[89] that "a non-government kidnapping does not violate an extradition treaty even if the government ultimately benefits thereby." Equally, in relation to a plea of abuse of process, the accused must show, at the very least, complicity by the executive in the unlawful procedures, otherwise a breach of international law does not arise.[90] However, the accused may have a cause of action against the abductors and, further, as in the *Sidney Jaffe* case,[91] the abductors may find themselves extradited on criminal charges to the country where the abduction occurred.

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88 112 S Ct 2188; L ed 2d 441, 463 (1992).

89 939 F 2d 1341, 1346 (9th Cir 1991).

90 See, for example, *S v Ebrahim* 1991(2) SA 553 at 556, 557, 559; *United States v Alvarez-Machain* 112 S Ct 2188, 119 2 Ed 2d 441, 464 (1992); *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 76, 77.

91 See *Kear v Hilton* 699 F 2d 181 (4th Cir 1983). A United States bail bond company hired Johnson and Kear, bounty hunters, to abduct Sidney Jaffe from Canada. Subsequently, Canada succeeded in extraditing Johnson and Kear to Canada on charges of kidnapping: see *Lewis*, op cit. n. 6, at 355, 358. However, the kidnap victim was tried and convicted in a Florida Court: *Jaffe v Smith* 825 F 2d 304 (11th Cir 1987).