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CRIMINAL JURISDICTION OF A STATE OVER FUGITIVES BROUGHT FROM A FOREIGN COUNTRY BY FORCE OR FRAUD: A COMPARTIVE STUDY

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The generally accepted practice whereby a State assumes jurisdiction over fugitives secured by force, fraud or deceit has been considered an illegal enforcement of the law.¹ While the rule in this connection is unmistakably clear in that seizure by force or fraud perpetrated in a foreign country does not deprive the courts of the offending State of jurisdiction over the person,² its validity can be seriously questioned on policy and legal grounds.³ Thus, it is the primary purpose of this article to examine critically the law dealing with the forcible seizure of fugitives in foreign countries with a view to revealing its present deficiencies and uncertainties. And it is hoped, in so doing, that some tentative suggestions will be made for future legal action.

I. *Principles of Extradition Law*

The normal and legal method of securing jurisdiction over a fugitive from justice who successfully escapes to a foreign country is through an extradition treaty or, in its absence, through reciprocity.⁴ Most extradition treaties specifically provide for a procedure through which the

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1. Plumb, *Illegal Enforcement of the Law*, 24 *CORNELL L.Q.* 337 (1939).

2. See in this connection, *United States v. Sobell*, 142 F. Supp. 515 (2d Cir. 1956), which represents the most recent application of this principle.

3. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 *AM. J. INT'L L.* 231 (1934); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 *BRIT. Y.B. INT'L L.* 1952 at 265, 267 (1953).

4. There is no dispute in respect to this principle; all publicists agree on it. See, JESSUP, *A MODERN LAW OF NATIONS* 83 (1948); BRIGGS, *THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES* 595-600 (2d ed. 1952); FENWICK, *INTERNATIONAL LAW* 330 (3d ed. 1948); LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 258-260 (6th ed. 1915); SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 45 (2d ed. 1950); and KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 249 (1952).

surrender of the fugitive will be effected.⁵ Although whether or not surrender will be finally granted largely depends upon the provisions of the treaty,⁶ it is nevertheless clear that the surrender of fugitives is a process carefully confined within the strict limits of the law. From this undisputed proposition, two consequences irresistibly follow which largely operate as a restriction upon the freedom of action of the States involved. First, the determination of the asylum State as to the extradition of the fugitive is by no means dependent upon the exercise of arbitrary discretion on its part.⁷ The discretion of the State of refuge must be exercised in conformity with conventional and general international law.⁸ Secondly, as to the requesting State, it should be similarly clear that its jurisdiction over the fugitive is conditioned upon the manner in which such jurisdiction was acquired. This is purely a matter of State competence and the latter is unmistakably regulated by the law of nations, at least in respect to matters in which the interests of other States are vitally involved.⁹ The net result of these two propositions forcibly suggests that neither the asylum nor the requesting state is legally authorized to depart in any way from the forms upon which an agreement has been reached.¹⁰

There can be no doubt that the foregoing observations necessarily follow from the purpose and nature of extradition treaties. As a practical matter, however, States have successfully attempted to short-cut the process either by abducting a fugitive in foreign territory or by bringing the fugitive into the State's jurisdiction by deceit or fraud.¹¹ The significant aspect of this practice lies in the fact that the abduction or fraud is consummated by the offending State's own authorities in the territory of the State of refuge. It will at once be seen that the practice

5. For the procedure in the United States, see 4 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 77-186 (1946). For other countries, see BILLOT, *TRAITÉ DE L'EXTRADITION* 135-296 (1874).

6. These technical problems are fully discussed in GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* c. 5 (1956).

7. MIELE, *PRINCIPI DI DIRITTO INTERNAZIONALE* 186 (1953).

8. 1 PODESTA COSTA, *DERECHO INTERNACIONAL PUBLICO* 298 (3d ed. 1955).

9. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 95-96 (1933); ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 224-225 (1953).

10. In this regard, Secretary of State Blaine said: "The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with a crime for trial within the jurisdiction of the other." 4 MOORE, *A DIGEST OF INTERNATIONAL LAW* 330 (1906).

11. Although there are fewer cases dealing with deceit and fraud, nevertheless the disposition of such cases warrants the conclusion that the principle invoked in cases of abduction equally applies.

thus outlined not only violates the sovereignty of the State of refuge¹² but also international engagements which may exist between the offending and the asylum States.¹³ The force of this contention reveals itself with all its cogency when considering that the competence of the abducting State has been exercised in derogation of treaty and other legal obligations making the exercise of jurisdiction by its courts an unlawful act.¹⁴ This argument cannot be met by suggesting that the obligations imposed by international law are less binding than those emanating from a treaty.¹⁵

Despite the unquestioned validity of these legal propositions, it nevertheless remains true that the courts of most countries insist upon assuming jurisdiction over fugitives seized in violation of the sovereignty of the State of refuge. So general is this domestic position that the courts have found no practical difficulty in giving to solutions reached the plausible appearance of valid legal rules.¹⁶ This conclusion is further strengthened by the unquestionable deficiencies of international law and the rapid breakdown of its traditional principles under the impact of political and social change.¹⁷ But even if this could be conclusively shown for national legal systems, it could scarcely be concluded that the practice of assuming jurisdiction over fugitives illegally seized is sanctioned by international law.¹⁸ This merely suggests the advisability of

12. The nature of this principle arises from the fundamental principle of international law that the jurisdiction of a nation within its own territory is exclusive and absolute. In line with this principle and in an attempted abduction of a Soviet citizen in the United States by Soviet authorities, the United States Department of State forcibly stated in the celebrated *Kasenkina* case that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 DEP'T STATE BULL. 251 (1948). For a discussion of this case, see Borchard, *The Kasenkina Case*, 42 AM. J. INT'L L. 858 (1948).

13. A different situation presents itself when the asylum State decides to extradite a fugitive without the formalities of an extradition treaty. The situation here is that the fugitive has been extradited without proceedings and not that he has been abducted. Thus, the demanding State is clearly without any international liability. See note 30 *infra*.

14. As Professor Dickinson has suggested, "if there is no national competence obviously there can be no competence in the courts which are only an arm of the national power." Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

15. Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 679 (1953).

16. Thus, in *United States v. Sobell*, 142 F. Supp. 515 (2d Cir. 1956), the Court said: "The rule [of international law] is that a seizure of a fugitive on foreign soil in violation of international law will not deprive the courts of the offending State of jurisdiction over the person of the fugitive when he is brought before them." *Id.* at 523. In *Frisbie v. Collins*, 342 U.S. 519 (1952), the Supreme Court said: ". . . 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'."

17. Friedmann, *Some Impacts of Social Organization on International Law*, 50 AM. J. INT'L L. 475 (1956); Jenks, *The Scope of International Law*, 31 BRIT. Y.B. INT'L L. 1954 at 1 (1956).

18. BILLOT, *op. cit. supra* note 5, at 237.

not inferring from the practice of domestic legal systems any general rule of international law which sanctions the assumption of jurisdiction in cases of abduction, for it has been persuasively shown that the limits on the power of domestic tribunals are precisely the limits imposed by international law.¹⁹ On this view, it logically follows that the municipal legal practice is at variance with the requirements of the law of nations and, thus, its very existence must be attributed to other factors.²⁰ These will be examined in analyzing the law of the States which have had considerable experience on the subject.

II. *The Law and Practice of the United States*

One of the earliest statements of the traditional law permitting the courts to assume jurisdiction over persons illegally seized in foreign countries was made by Mr. Justice Miller in the celebrated case *Ker v. Illinois*,²¹ which involved the abduction of a fugitive from American justice in Peruvian territory by agents of the United States. Asserting that the fugitive had not acquired a right of asylum in Peru by virtue of the extradition treaty of September 6, 1870, between the United States and Peru,²² the learned Justice continued:

“There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled. Indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. . . . The right of the Government of Peru voluntarily to give a party in Ker’s condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum.”²³

19. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 155 (1954).

20. Apparently, the “fathers of international law” never considered this practice. In the case of Grotius the reason why he was silent on the subject might have been that he asserted that a sovereign had a moral duty to extradite fugitives found within his territory. This duty was completely independent of agreement. In the absence of surrender, he maintained that the asylum State had the duty to punish the guilty person. See, GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* bk. 2, c.2, § 4(1) (Kelsey’s transl. 1925). In the case of Vattel, however, he forcibly argued in favor of the surrender of fugitives and did not entertain the possibility of punishment by the asylum State. See, VATTEL, *LES DROIT DES GENS* bk. 1, c. 19, § 233 (Chitty’s transl. 1861).

21. 119 U.S. 436 (1886).

22. For this treaty, see *COMPILATION OF TREATIES IN FORCE* 496 (1899).

23. 119 U.S. 436, 442 (1886). Professor Fairman has gone to great lengths to show that the action of the United States in abducting Ker in Peruvian territory “was no invasion of Peruvian sovereignty or other breach of international law.” He seems to

American courts have adhered to the foregoing principle with striking uniformity. A careful examination of subsequent decisions will immediately reveal that the *Ker* principle has been expanded to include three categories of cases. Apparently, these distinctions have not been well observed by the courts and commentators on the subject. In the first place, there are decisions which have applied the principle to cases of forcible abduction thereby remaining within the original setting of the *Ker* decision. Thus, in *United States v. Unverzagt*,²⁴ where an American citizen was abducted from British Columbia by officers of the United States, the court said:

“The defendant, even though abducted from British Columbia, was subsequently arrested in the United States on the indictment or complaint under the fugitive from justice statute He is now before the Courts of the United States. Canada is not making any application to this court in his behalf . . . and if Canada or British Columbia desires to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels.”²⁵

In like vein, in *Ex parte Campbell*,²⁶ it was held that a Mexican citizen, brought by force for trial into the United States, was not entitled to discharge on the ground that he was kidnapped in Mexico by agents of the United States.²⁷ And a similar result was reached in *Ex parte López*,²⁸ where, to the plea that the accused's arrest was carried out in Mexico by American agents and forcibly returned to the United States for trial, the court, invoking the *Ker* principle, held that a fugitive from justice who has been forcibly returned from a foreign asylum and held to answer an indictment in the country from which he fled is not entitled to discharge in habeas corpus proceedings.²⁹

base this conclusion on the apparent chaos then existing on account of the war between Peru and Chile. This reasoning, however, is far from persuasive, for certainly the extradition treaty between the United States and Peru remained in force despite hostilities between Peru and Chile. The United States and Peru were not belligerents as between themselves and, thus, it is difficult to see how the extradition treaty between these two countries would be temporarily suspended. See Fairman, *supra* note 15, at 686. Professor Dickinson's opinion that the holding in the case was rather “unsatisfactory in both its procedural and its substantive aspects” appears to be more acceptable. See, Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 238 (1934).

24. 299 Fed. 1015 (W.D. Wash. 1924).

25. *Id.* at 1016-1017.

26. 1 F. Supp. 899 (S.D. Texas 1932).

27. *Ibid.*

28. 6 F. Supp. 342 (S.D. Texas 1934).

29. *Id.* at 344. For other cases, see 1 MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 282 *et seq.* (1891).

In the second place, there are cases which similarly apply the principle of *Ker v. Illinois* to instances where the fugitive was arrested by the authorities of the asylum State and turned over to agents of the United States still within the territorial jurisdiction of the former. In these cases, although forcible abduction has been definitely pleaded as a defense against the court's jurisdiction, the excuse appears frankly unacceptable simply because the surrender of the fugitive was effected with the acquiescence of the State of refuge. Under this theory, therefore, no violation of international law has occurred and, thus, the prosecuting State has incurred no international liability.³⁰ A pertinent defense in this connection would appear to be the surrender of the fugitive without the formalities of an extradition treaty.³¹ The force of this contention is even greater when the extradition treaty between the United States and the foreign country involved clearly provides for a specified proceeding for surrender. Thus, in *United States v. Insull*,³² the accused was seized by the Turkish police on board a Greek vessel in Turkish territorial waters—hence, within the jurisdiction of Turkey—and delivered into the custody of an agent of the United States. He was then brought against his will into the jurisdiction of the United States and delivered for trial to the Marshal for the Northern District of Illinois. In supporting the Government's contention, the court decisively said:

“. . . it is plain, by weight of authority, that one charged with crime, and in the custody of the proper officer in the jurisdiction wherein the indictment against him is pending, cannot escape prosecution under the indictment by showing some irregularity, or even an unlawful kidnapping, by officers of the government, which results in placing him within the jurisdiction of the court where the indictment against him is pending.”³³

More recently, in *Chandler v. United States*,³⁴ the accused, who had broadcasted propaganda for the Nazi government during World War II,

30. This proposition is clearly illustrated by the *Savarkar* case between France and Great Britain, where an Indian prisoner was being transported in a British ship from England to India for trial. At Marseilles he escaped, was arrested by a French *gendarmierie* and handed over to British authorities. France demanded that the prisoner be returned to French jurisdiction. The Permanent Court of Arbitration distinguished this case from those involving forcible abduction and held that the surrender of a fugitive by the agents of the State of refuge without extradition proceedings does not involve the sovereignty of the latter and that, therefore, no legal grounds exist for demanding responsibility from the prosecuting State. See, SCOTT, THE HAGUE COURT REPORTS 276 (1916); 1 SCHWARZENBERGER, INTERNATIONAL LAW 114 (2d ed. 1949); and LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 88-90 (1933).

31. See note 13 *supra*.

32. 8 F. Supp. 310 (N.D. Ill. 1934).

33. *Id.* at 311.

34. 171 F.2d 921 (1st Cir. 1948).

was arrested in Germany by officers of the United States Army and brought back to the United States for trial without the formalities of the extradition treaty of July 12, 1930, between the United States and Germany.³⁵ It should be noted, however, that in this case, in supporting its jurisdiction, the court resorted to the apparently more acceptable doctrine that the extradition treaty involved had ceased to operate during the war and that even after the war had terminated the abnormality of the situation rendered inoperative the provisions of the treaty in question.³⁶ Finally, in *United States v. Sobell*,³⁷ Martin Sobell, convicted in 1951 for conspiring to commit espionage against the United States,³⁸ raised the manner in which he was brought back for trial in a motion to set aside the verdict. Although essentially his defense was an alleged abduction in Mexico by agents of the FBI, in reality the record discloses that he was arrested by the Mexican police and handed over to FBI agents within Mexican jurisdiction. The court, citing *Ker v. Illinois*, reaffirmed the familiar proposition that the seizure of a fugitive on foreign territory in violation of international law does not deprive the courts of the offending State of jurisdiction over the person of the fugitive,³⁹ and, significantly added, that the question of violation of international law is to be left to the proper consideration of the political branch of the government, should the offended State choose to raise the issue.⁴⁰ Other instances can be adduced where similar principles have been successfully applied.⁴¹

35. For the text of this treaty, see 47 STAT. 1862.

36. *Chandler v. United States*, 171 F.2d 921, 934-35 (1st Cir. 1948). This argument is acceptable in respect to Germany, since the United States and Germany were in a state of belligerency. But the failure to abide by the treaty in the *Ker* case cannot be supported by the same considerations. See note 23 *supra*.

37. 142 F. Supp. 515 (2d Cir. 1956).

38. 109 F. Supp. 381 (2d Cir. 1951).

39. 142 F. Supp. 515, 523 (2d Cir. 1956).

40. *Ibid.* It is believed that the Court erred on two counts: first, in assuming that the United States had violated international law by the fact that the arrest of the fugitive took place in Mexican territory. It should be observed that this was done with the consent of the Mexican Government; thus, the United States incurred no international responsibility. See in this connection, note 30 *supra*. And secondly, the Court also erred in assuming that Mexican sovereignty had been violated and, hence, that Mexico could raise the issue through diplomatic channels. Mexico was at liberty to surrender the fugitive without the formalities of the extradition treaty, although it may be argued that in so doing, the rights of the individual concerned were violated. On this view, the illegal action was carried out by Mexico, not by the United States. These facts distinguish the present case from *Ker v. Illinois*. For arguments supporting this proposition, see GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 133-136 (1956).

41. It may be added that the same principle has been applied between the states of the United States. Thus, in the most recent case, *Frisbie v. Collins*, 342 U.S. 519 (1952), the accused was tried in Michigan after having been illegally seized in Illinois. The Court found itself able to apply the principle of *Ker v. Illinois* in order to support its jurisdiction. Also in *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946), the Supreme

Finally, there is a residue of cases where the abduction of the fugitive in foreign territory was effected by private individuals without the knowledge and connivance of the authorities of the United States. This proposition is strikingly illustrated by the leading case of *Villareal v. Hammond*,⁴² where the appellants, acting under the incentive of a reward, kidnapped a fugitive in Mexican territory and brought him back to the United States for trial. While it appears that the United States court nevertheless assumed jurisdiction over the fugitive under the *Ker* principle, the kidnappers were extradited to Mexico for prosecution and punishment for the violation of the Mexican law.⁴³ It is significant that in this situation the court invoked the violation of Mexican sovereignty in somewhat doubtful terms:

"In violation of the sovereignty of the State where he [the fugitive] had sought asylum they seized him unlawfully, and with force and arms took him unlawfully out of that State and into another to dispose of him at their will and pleasure to obtain a reward."⁴⁴

It is clear of course that the kidnappers were extradited for violating the Mexican law, although the illegality here involved did not deprive the court of jurisdiction over the person of the fugitive.⁴⁵ Delving more deeply into the matter, it is difficult to see why the court would so readily recognize the violation of the sovereignty of the State of refuge and would refuse to do so in respect to abductions effected by governmental authorities. In fact, the legal position adduced by the court is open to criticism on two grounds. First, technically speaking, a violation of the sovereignty of a State is an action which proceeds from a foreign government and it is inconceivable that an individual acting in his purely private capacity could entail State responsibility.⁴⁶ The illegal action of a private individual is simply a violation of the law of the

Court of Nebraska held that "where a person accused of a crime is found within the territorial jurisdiction where he is charged, the right to put him on trial is not impaired by the fact that he was brought from another jurisdiction by illegal means." See also the older cases, *Mahon v. Justice*, 127 U.S. 700 (1888); *Lascelle v. Georgia*, 148 U.S. 537 (1892); and *In re Johnson*, 167 U.S. 120 (1896). This practice among the states of the Union has apparently been increasing with alarming proportions. See, Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953).

42. 74 F.2d 503 (5th Cir. 1934).

43. *Id.* at 506.

44. *Ibid.*

45. See also *Collier v. Vaccaro*, 51 F.2d 17 (4th Cir. 1931).

46. A violation of the sovereignty of a State by another would amount to intervention, but it is impossible for an individual, acting in his private capacity, to "intervene" in the affairs of another State. Intervention is a technical term in international law. See, BRIERLY, *THE LAW OF NATIONS* 308-314 (5th ed. 1955).

foreign State in question and, like any other common offender, his extradition would seem to be quite proper. Secondly, the court seems to suggest that while private and official abductions raise no jurisdictional problem in respect to the individual victim of the seizure, those involved in a private venture of this kind are nevertheless subject to extradition for violating the foreign law. Not so, however, in cases of official abduction, for the State is protected by its sovereign immunity⁴⁷ and there is no way to hold it liable unless the offended State protests through diplomatic channels. But, even then, there is no certainty that adequate satisfaction will be obtained.⁴⁸

Such appears to be the present status of the principle laid down in *Ker v. Illinois*. It has been seen that its applicability has been extended to include every conceivable situation lying outside the provisions of an extradition treaty. Despite the consistency with which the principle has been applied, it is submitted that it does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the courts to assume jurisdiction over persons illegally brought into their control.⁴⁹ To rest the power of jurisdiction on what are admittedly illegal actions in contradistinction to legal governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable criterion. Certainly, the essential nature of the problem cannot be hidden by an attempt to separate the jurisdiction of the courts from the competence of the State in matters of international concern.⁵⁰ These are manifestations of indivisible governmental power.

The judgments of the courts are not, however, without supporting propositions. In the mass of cases bearing on the subject two underlying

47. For the implications of this doctrine, see García-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 VA. L. REV. 335 (1956).

48. Thus, in *In re López*, note 28 *supra*, the United States Government refused to accede to the demands of the Mexican Government that the accused be returned to Mexico. The Mexican Government based its demand on the ground that "instead of being extradited by legal channels he was brought into American territory in a manner which constitutes an invasion of jurisdiction by American officials in Mexican territory." For the diplomatic correspondence between the two countries, see 4 HACKWORTH, *op. cit. supra* note 5, at 224-225.

49. Section 2255 of the Judicial Code permits a convicted prisoner to move to set aside the sentence if it was imposed in violation of the Constitution or laws of the United States, or if the sentencing court was without jurisdiction to impose the sentence. See 62 STAT. 967 (1948), as amended, 28 U.S.C. § 2255 (1952).

50. In this connection, Chief Justice Marshall said: "The jurisdiction of courts is a branch of that which is possessed by the nation as an independent power." *The Schooner Exchange v. MacFaddon*, 7 Cr. 116, 136 (1812); Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

rationales are clearly discernible, which roughly stem from criminal and international law. As to criminal law, apparently the rule of *Ker v. Illinois* is nothing more than a by-product of the rule of criminal jurisdiction according to which a court has jurisdiction of the person if it has jurisdiction of the crime charged.⁵¹ Conceived in these terms, jurisdiction *ratione materiae* clearly sustains jurisdiction *ratione personae*.⁵² Thus, in logic it follows that since the crime was committed within the jurisdiction of the demanding State, the latter has the power to exercise jurisdiction *in personam* when and if it can lay hands on the fugitive completely independent of the manner of his arrest.⁵³ As to international law, it is a familiar legal postulate that extradition treaties are not made for the benefit of the individual but rather of the contracting States.⁵⁴ Consequently, according to international law, the individual cannot complain of the manner in which he was brought to the jurisdiction of the prosecuting State, since he really has no rights under extradition treaties.⁵⁵ If any protest is in order, the right to do so belongs to the State of refuge, as *Ker v. Illinois* has clearly indicated.⁵⁶

However firmly one believes in the desirability of prosecuting and punishing wrongdoers, one must nevertheless entertain the gravest doubts

51. See, Comment, 39 YALE L. J. 889, 893 (1930).

52. See, *Goldstone v. Payne*, 94 F.2d 855-857 (2d Cir. 1938), where the Court said: "Where a court has jurisdiction over the subject matter of an action, a defendant may submit himself to the court and therefore confer upon it jurisdiction over his person. But, where the court lacks jurisdiction over the subject matter of a case, the defect is not cured by getting personal jurisdiction of the defendant."

53. Cf. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 156 (2d ed. 1938).

54. See, *Gulley v. Apple*, 213 Ark. 350, 210 S.W.2d 514 (1948), decided by the Supreme Court of Arkansas on April 19, 1948, where it was held that "the extradition provision is not for the benefit of the fugitive." This has also been held in foreign courts. In the recent French case, *In re Colman*, Court of Appeal of Paris, France (*Chambre des Mises en Accusation*), December 5, 1947, the Court said: ". . . the offender, who is not a party to the Convention, cannot rely on the silence of the Treaty, which was concluded, not in his interest, but in the interest of the contracting powers and their sovereignty." ANNUAL DIGEST AND REPORTS OF INTERNATIONAL LAW CASES 1947 at 139 (Lauterpacht ed. 1951). (Hereinafter cited as ANNUAL DIGEST.) There is, however, one case where the right of the individual under an extradition treaty was expressly recognized. This is *Fiscal v. Samper*, Spain, Supreme Court, June 22, 1934, where the accused was prosecuted for a crime different from that for which he was surrendered. The Court pointedly said: "Accordingly, the appellant cannot be condemned, since he could not be sentenced for a crime for which he could not be tried. This is so because delinquents who take refuge in a foreign country relying on a legislation which promises them protection *have acquired a true right*, disregard of which would tend to weaken the law of nations and introduce lack of confidence into international relations." ANNUAL DIGEST 1938-1940 at 402, 405 (1942). (Italics supplied.)

55. *United States v. Sobell*, 142 F. Supp. 515, 523 (2d Cir. 1956).

56. It was held in this connection that where a fugitive is wrongfully taken from the jurisdiction of another country, it belongs exclusively to the government of such country to complain of the violation of its territory; the fugitive cannot set it up, even though there exists an extradition treaty between the two countries, if he was not extradited under the treaty. *Ker v. Illinois*, 119 U.S. 436, 442, 443 (1886); 4 MOORE, A DIGEST OF INTERNATIONAL LAW 331 (1906).

whether the courts should undertake the duty to bring this about by assuming jurisdiction over fugitives secured in violation of the sovereignty of a foreign State.⁵⁷ It indeed goes amazingly far to hold that jurisdiction can be legally exercised on the basis of an undisputable illegal act. This is clearly a violation of the fundamental maxim of jurisprudence according to which *ex injuria jus non oritur*.⁵⁸ The fact that the individual illegally seized must be brought to account for a crime which he allegedly committed is too uncertain and shadowy to shape the course of justice. It must of necessity yield to the over-mastering need, so vital in a democratic polity, of preserving the rule of law in its purity against the inroads of illegal governmental action.⁵⁹ If the answer is that the courts of the forum must not inquire into the legality or illegality of the arrest,⁶⁰ then the choice is an easy one and decisions will invariably be reached without looking into the merits of each specific case. It seems as though the *Ker* principle has been mechanically applied by the courts without much thought as to whether changing conditions have made it any longer useful.⁶¹ It may be added that the courts are actually putting the stamp of judicial approval on the illegal actions of law enforcement officers.

It can of course be suggested that the fugitive is not left without any remedy since the asylum State has the undisputed right to protest of the manner in which its sovereignty was violated.⁶² This, however, is a mode of intellectual argument which is more sham than real, for the State of refuge's main concern is to obtain redress for the violation of its sovereignty and not to protect the victim of the seizure. Admittedly, the normal way of offering satisfaction is for the offending State to return

57. Comment, 39 YALE L. J. 889, 895 (1930).

58. Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 1952 at 266 (1953). See also LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 421 (1947).

59. John Stuart Mill refers to this as Liberty, which he defines as "the nature and limits of the power which can be legitimately exercised by society over the individual." He goes on to say that "the struggle between Liberty and Authority is the most conspicuous feature . . . in history." MILL, *ON LIBERTY* c. 1 (Castell ed. 1947). See also COHEN, *REASON AND LAW* 88 (1950), and HALL, *LIVING LAW OF DEMOCRATIC SOCIETY* 7 (1949). It may be added that Professor Maguire has summarized the matter in quite pertinent terms: "No wise person can doubt that private individuals and corporations need strong protections against the insolence of office." MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 126 (1947).

60. In *United States v. Insull*, 8 F. Supp. 310, 311 (N.D. Ill. 1934), it was held that "the court will not inquire into the method of his [the fugitive's] removal from one jurisdiction to another."

61. This is a typical example of what Dean Roscoe Pound has called "mechanical jurisprudence," which consists in deductions from concepts without looking into these concepts to see whether circumstances still warrant their application. See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

62. See note 56 *supra*.

the fugitive to the jurisdiction of the State of refuge. Even if this is said to be an established rule of law, we are immediately plunged into endless difficulties, for the practice of the United States in this regard is contradictory and confused. While the available evidence indicates that the United States has successfully demanded that fugitives forcibly taken from American jurisdiction be immediately returned to the United States,⁶³ the rule is not the same when American agents have abducted fugitives in foreign countries and the latter have protested to the United States through diplomatic channels.⁶⁴ The courts have declined to grant any relief because the matter is considered as political,⁶⁵ and the political department has likewise escaped responsibility by a unilateral construction of the extradition treaty involved.⁶⁶ Although it must be readily conceded that the courts should not invade the province of the political department of the government, it cannot reasonably be doubted that matters relating to the abduction of fugitives in foreign countries are of a strictly legal nature and, thus, there is no justifiable reason why such questions should be transferred from the regulatory province of the law to the discretionary domain of politics.⁶⁷ It will, therefore, be concluded that the individual has no protection against abduction in a foreign country, for the effectiveness of the available remedies totally depends upon the willingness, first of the State of refuge to make representations through diplomatic channels and, secondly, of the United States to accede to the demands of the foreign country in question. The present situation is therefore one of uncertainty and confusion. Not only is it doubtful whether the State of refuge will protest of the violation of its sovereignty thereby protecting the victim of the illegal seizure, but it also tends to be futile to do so in view of the reluctance of the United States to return the fugitive to his place of refuge. The only alternative course of action would seem to be for the courts to forego the exercise of jurisdiction over the person, holding that jurisdiction cannot exist where the relation giving birth to it has been illegally begun or illegally continued.

63. For numerous cases of this nature, see 4 MOORE, A DIGEST OF INTERNATIONAL LAW § 603 (1906) ; and 4 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 224-226 (1946).

64. See note 48 *supra*.

65. Thus, in *United States v. Unverzagt*, 299 Fed. 1015, 1018 (W.D. Wash. 1924), the Court said: "So, in this case the jurisdiction of the court is fixed by acts of Congress, and if a right of the defendant has been violated or the peace or dignity of British Columbia trespassed upon, that is not a matter for this court . . . that is a matter which rests between the defendant and the parties abducting him, or between the political powers of the British Columbia Government and that of the United States."

66. This unilateral construction of the treaty is clearly seen in *In re López*, note 48 *supra*.

67. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 75 (Corbett's transl. 1956).

It is believed to be important for an accurate consideration of this problem to distinguish cases of abduction from those in which the fugitive is tried for an offense other than that for which he was surrendered. It is a well established principle of international law that an extradited offender can only be prosecuted for acts specified in the request for extradition or described in the treaty.⁶⁸ This doctrine has been commonly known as the "doctrine of specialty" or "identity of extradition and prosecution," and has found its way into modern extradition treaties.⁶⁹ The *raison d'être* of this doctrine lies in the well founded apprehension that the principle whereby a State is not obliged to surrender political offenders would be of no practical value if States were free to prosecute an extradited fugitive for an act different from that for which his extradition was granted.⁷⁰ For, in principle, it would be quite simple for a State to demand the extradition of a fugitive for a common crime and once the accused is within its jurisdiction to prosecute him for a political offense.⁷¹ It is thus in recognition of these possibilities that there is an axiomatic principle of positive international law, repeatedly stressed by States and tribunals, that no jurisdiction whatsoever can be assumed which is not based on the same offense on which the fugitive was surrendered. The United States courts have remained faithful to this principle with impressive uniformity. The leading case in this connection is *United States v. Rauscher*,⁷² decided on the same day as *Ker v. Illinois*, in which a fugitive, extradited from England on the charge of murder, was tried in New York on an entirely different offense. The Court gave expression to the doctrine of specialty in unmistakable terms:

"A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in

68. BRIGGS, *THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES* 597 (2d ed. 1952).

69. See the following extradition treaties: Article 7 of the Treaty of April 20, 1942, between Great Britain (acting on behalf of the Sheik of Koweit) and Saudi Arabia, 10 U.N. TREATY SER. 99 (1947); Article 13 of the Treaty of March 29, 1946, between Iraq and Turkey, 37 U.N. TREATY SER. 369 (1949); Article 11 of the Treaty of February 25, 1938, between Brazil and Bolivia, 54 U.N. TREATY SER. 335 (1950); Article 171(a) of the Montevideo Convention on Extradition signed on December 26, 1933, between the American Republics, INTERNATIONAL CONFERENCE OF AMERICAN STATES, FIRST SUPP. 1933-1940 at 113 (Scott 1940). The principle was also incorporated in Article 377 of the Bustamante Code, which is the law among some 15 Latin American states. See, 3 BUSTAMANTE Y. SIRVÉN, *DERECHO INTERNACIONAL PRIVADO* 428 (2d ed. 1934).

70. CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 177 (1951).

71. For the problems involved in political offenses, see García-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum*, 14 U. OF PITTS. L. REV. 371 (1953).

72. 119 U.S. 407 (1886).

that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under these proceedings."⁷³

Against the background of the *Ker* decision, the foregoing holding reveals a striking contradiction, for in reality it means that the courts will forego the exercise of jurisdiction in instances where the fugitive is charged with an offense other than that for which his extradition was granted.⁷⁴ The court emphasized that a treaty was specifically involved and, that, being the supreme law of the land, was binding upon the courts.⁷⁵ It is undoubtedly in this connection that the Court was able to draw a line of distinction between the *Rauscher* and *Ker* decisions. Mr. Justice Miller, who wrote the majority opinion in the *Ker* case, was most explicit:

"In the case *United States v. Rauscher* . . . the effect of extradition proceedings under a treaty was very fully considered, and it was there held that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was, that he should be tried for no other offense than the one for which he was delivered under the extradition proceedings."⁷⁶

The difference could thus be resolved into the existence of a treaty provision in the *Rauscher* case. But, in both cases, it is contended, the decision is squarely based on law—in the *Rauscher* case, on the particular provision of the treaty in question; in the *Ker* decision, on the general rule of international law which gives the States discretion to exercise the power of jurisdiction in the absence of a specific legal obligation.⁷⁷

73. *Id.* at 422. See also *United States ex rel. Donnelly v. Mulligan*, 74 F.2d 220 (2d Cir. 1934) where the doctrine was reaffirmed.

74. It should be added that the same principle has been applied in cases of illegal seizure of ships. Thus, in *Cook v. United States*, 288 U.S. 102 (1933), the Supreme Court declined the exercise of jurisdiction over a British ship seized on the high seas in violation of international law. It should be observed, however, that here the treaty of 1924 between the United States and Great Britain was invoked.

75. 4 MOORE, A DIGEST OF INTERNATIONAL LAW 309 (1906).

76. *Ker v. Illinois*, 119 U.S. 436, 443 (1886).

77. In the celebrated *Lotus* case, the Permanent Court of International Justice said that "restrictions upon the sovereignty of States cannot be presumed." P.C.I.J., Ser. A, No. 10 at 18 (1927); 1 SCHWARZENBERGER, INTERNATIONAL LAW 57 (2d ed. 1949).

Though at first sight this argument appears convincing, its soundness can be attacked on three grounds. First, it assumes that a line of demarcation can be clearly drawn between the obligations of a treaty and those imposed by general international law. The obvious purpose of this distinction is to conclude that the obligations under a treaty are of a more binding character than those emanating from general international law.⁷⁸ It should be observed, however, that the drawing of the line is rendered the more difficult by the fact that not only treaties but the law of nations are the supreme law of the land.⁷⁹ Second, it assumes that what international law does not expressly require or prohibit is entirely left to the discretion of the States and, thus, any conduct based on such discretion becomes necessarily sound.⁸⁰ The fallacy of this assumption is patently clear, for it overlooks the common legal theory that in international matters the discretion of the State is granted by international law and that, consequently, a discretion so conferred must be exercised in conformity with the requirements of the law of nations.⁸¹ Finally, while it is undoubtedly correct that under present international law the individual does not have a right of asylum,⁸² of perhaps more immediate practical importance is the large element of bad faith introduced in the relations between nations not only in cases of prosecution for different offenses but of forcible abduction as well. This argument commends itself most cogently in practice, for it is indissolubly linked with the respect which States owe to each other at all times. Disregard of this seriously weakens the law of nations and introduces lack of confidence into international relations.⁸³ Though the claims of the individual may be rather tenuous and ineffectual, the requirements of the world society are too strong to be ignored. It is, therefore, concluded that the primary demands of peaceful and orderly co-existence of the

78. Fairman, *supra* note 15, at 679.

79. American courts have consistently held that "international law is part of our law." See *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Lusitania*, 251 Fed. 715, 732 (S.D. N.Y. 1918). Also 1 HACKWORTH, *op. cit. supra* note 63; at 25-30 (1946); Wright, *Treaties as Law in National Courts with Especial Reference to the United States*, 32 IND. L. J. 1, 2 (1956); Borchard, *Relation between International Law and Municipal Law*, 27 VA. L. REV. 137 (1940); Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. OF PA. L. REV. 26, 792 (1952, 1953). Judge Lauterpacht expresses surprise at the assumption of jurisdiction in States like the United States where the courts "are committed to the doctrine of incorporation of international law as part of the law of the land." LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 31 n. 13 (1950).

80. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 160 (1954).

81. FIORE, *INTERNATIONAL LAW CODIFIED* 157 (Borchard's transl. 1918).

82. Cf. GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* cc. 8, 9 (1956).

83. See, *Fiscal v. Samper*, Spain, Supreme Court, June 22, 1934, *ANNUAL DIGEST 1938-1940* at 402, 405 (1942).

States in the world society outweigh the doubtful benefits that can be derived from the exercise of jurisdiction over persons secured by force or fraud in foreign territory. There is accordingly no visible reason why the principle laid down in the *Rauscher* case should not be extended to cases involving forcible abduction of fugitives.⁸⁴ It should have been already obvious that there is an imperative need to adequately regulate an otherwise fluid and disorderly situation.

III. *The Law and Practice of Other Countries*

It will immediately be seen that the law and practice of other countries substantially conform to the law of the United States. The courts of foreign countries have expressed similar principles in strikingly similar tones and for roughly similar reasons. Thus, in the early English case, *Ex parte Scott*,⁸⁵ a fugitive was arrested in Brussels by the British police. Although the illegality of the arrest was clearly raised in the proceedings, the court sustained its jurisdiction on the ground that it could not inquire into the legality or illegality of the seizure.⁸⁶ The similarity between this case and *Ker v. Illinois* cannot be open to doubt. In fact, the *Ker* opinion cites the *Scott* decision with approval.⁸⁷ More recently, in *The King v. Corrigan*,⁸⁸ a fugitive was handed over by the French police to the English police in French territory.⁸⁹ Though it should be clear that no abduction could be pleaded, the record discloses that the formalities of the extradition treaty of August 14, 1876, between England and France were not observed. It is similarly clear, however, that the court supported its jurisdiction on the ground that the fugitive voluntarily agreed to return to England for prosecution, thereby rendering unnecessary the application of the treaty.⁹⁰ Therefore, the voluntary agreement of the fugitive seems to be controlling in dispensing with the formalities of the treaty

84. It is hoped that as in the case of illegally obtained evidence, eventually the same considerations will move the courts to decline the exercise of jurisdiction over persons illegally seized. In respect to the development of the doctrine concerning the inadmissibility of illegally obtained evidence, see *Weeks v. United States*, 232 U.S. 383 (1914); *Wolff v. Colorado*, 328 U.S. 25 (1949); *Rochin v. People of California*, 342 U.S. 165 (1952). *Contra*: *Irvine v. People of California*, 347 U.S. 128 (1954). See also, 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940); McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE c. 14 (1954).

85. 9 B & C 446 (1829).

86. *Ibid.* See also note 60 *supra*.

87. *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

88. ANNUAL DIGEST 1931-1932 at 319 (1938).

89. This case would properly fall within the second category of cases following the holding of *Ker v. Illinois*. As will be recalled, such cases include, *United States v. Insull*, note 32 *supra*; *Chandler v. United States*, note 34 *supra*; and *United States v. Sobell*, note 37 *supra*.

90. ANNUAL DIGEST 1931-1932 at 321 (1938).

and in conferring jurisdiction upon the court.⁹¹ The novelty of this doctrine is at once plain. It is truly a singular doctrine, seeking to resolve a practical problem with the aid of still more uncertain conceptions. The theory of consent is grounded on a curious contradiction which reflects the inadequacy of traditional rules. On the one hand, the discussion of the traditional law has clearly shown that in cases of forcible abduction the individual cannot claim the right to challenge the jurisdiction of the court, for it is well established that the right to protest belongs to the State of refuge.⁹² Yet, on the other, the English case under consideration unmistakably implies that if the individual consents to be returned, the formalities of the treaty need not be observed. Conceived in these terms, the right of the State of refuge to protest accordingly disappears. This position is quite untenable on the basis of what appears to be the existing law.⁹³ However, the recurrence of substantially similar doctrine, particularly in connection with the doctrine of specialty discussed in relation to the *Rauscher* case,⁹⁴ has introduced conflicting elements into the law, for cases abound in Continental jurisprudence where the renunciation by the individual of the right not to be tried for an offense other than that for which his extradition was granted has been interposed against the protests of the offended State.⁹⁵ On this view, prosecution for a different offense would be lawful if the individual agreed to such prosecution.⁹⁶ So far is this from being the case in the presence of forcible abduction that the protests of the individual are totally ignored by the prosecuting State. Certainly, this distinction between the two results has no acceptable basis.

91. See note 52 *supra*.

92. *Ker v. Illinois*, 110 U.S. 436, 442 (1886).

93. This is precisely the reason why the United States is unwilling to recognize the Calvo Clause, because it is claimed that it amounts to waiving by the individual of the right which a government has to protect its citizens abroad. See, 2 HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 994-998 (2d ed. 1951); SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* 37-45 (1955); and García-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 214 (1950).

94. *United States v. Rauscher*, 119 U.S. 407 (1886).

95. For other cases illustrating this proposition, see *In re Tirpitz, Belgium*, Court of Cassation, February 8, 1937, ANNUAL DIGEST 1938-1940 at 401 (1942); *In re Arietto, Italy*, Court of Criminal Cassation, February 7, 1933, ANNUAL DIGEST 1933-1934 at 334 (1940). See also the diplomatic correspondence between the United States Department of State and the British Foreign Office in reference to one McIntire, prosecuted in the United States for an offense different from that for which he was surrendered. 4 HACKWORTH, *DIGEST OF INTERNATIONAL LAW*, at 239 (1946).

96. It is interesting that such a possibility is foreseen in extradition treaties. Thus, the Extradition Convention of March 29, 1946, between Iraq and Turkey, after providing for the doctrine of specialty in Article 13, stipulates that ". . . if the person surrendered agrees to be tried, the consent of the State which surrendered him is no longer required; notice shall merely be sent to that State." For the text of this treaty, see 37 U.N. TREATY SER. 369 (1949).

Finally, the Supreme Court of Palestine relied on the decision in *Ker v. Illinois* in *Afouneh v. Attorney General*⁹⁷ in order to answer the fugitive's plea against the jurisdiction of the court. Although there could be no doubt that the fugitive was irregularly apprehended in Syrian territory by the British police, the court incorporated in its decision the pertinent part of the *Ker* opinion in remarkably similar terms:

"Where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought back within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights."⁹⁸

To the observations already made in regard to the law of the United States on the subject, a few more comments may be added on the basis of the foregoing opinions. It is believed that the fallacy of the position by which judicial authorities assert their duty to assume jurisdiction over fugitives seized in violation of international law would be most explicitly seen by carefully analyzing the apparently well accepted distinction between the jurisdiction of the courts and the competence of the State.⁹⁹ While it must be readily conceded that the jurisdiction of the courts stems from the territorial sovereign, on the other hand, the competence of the State proceeds from international law.¹⁰⁰ On the basis of this dichotomy, it has been assumed that the courts are only bound to apply international law when the duty to do so proceeds directly from the State.¹⁰¹ Moreover, there is respectable authority for the view that if the State legislature violates its duty by prescribing rules inconsistent with the tenets of international law, the courts must still obey the legislative command, however undesirable the result may be.¹⁰² But, these

97. Palestine, Supreme Court, February 11, 1942, ANNUAL DIGEST 1941-1942 at 327 (1945).

98. *Id.* at 328. This paragraph is taken verbatim from 4 MOORE, A DIGEST OF INTERNATIONAL LAW 311 (1906). For another case applying similar principles, see Yousef Said Abu Dourrah v. The Attorney General, Palestine, Supreme Court, January 20, 1941, ANNUAL DIGEST 1941-1942 at 331 (1945).

99. FIORE, *op. cit. supra* note 81, at 157-158.

100. *Id.* at 158.

101. Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 1952 at 265 (1953).

102. As to the United States, see *Hilton v. Guyot*, 159 U.S. 113 (1895); *Head Money Cases*, 112 U.S. 580 (1884); and *Moser v. United States* 341 U.S. 41 (1951). Also Wright, *Treaties as Law in National Courts with Especial Reference to the United States*, 32 IND. L. J. 1, 3 (1956). As to England, see *Mortensen v. Peters*, 8 Sess. Cas.

rules are obviously founded on the erroneous belief that between the jurisdiction of the courts and the competence of the State a clear and definitive demarcation can be made. The absurdity of this position will be immediately apparent, for, though courts are national instrumentalities, their jurisdiction must of necessity partake of the limitations which international law has imposed upon the competence of the State.¹⁰³ It seems sufficiently apparent from these observations that the jurisdiction of the courts is an institution of public law in the internal legal order and, in so far as international law is concerned, it is a matter which not only belongs to the sovereignty of the state, but which at least in principle is "essentially within the domestic jurisdiction of the State."¹⁰⁴ But, surely, it will not be seriously contended that the extradition of offenders between States is a problem of indisputable international interest and that, therefore, there are certain legal boundaries which a State cannot cross without violating international law. There is, therefore, no tenable position in holding that the courts are only concerned with national law as regards their jurisdiction, for, as Professor Dickinson has pointedly remarked, "if there is no national competence obviously there can be no competence in the courts which are only an arm of the national power."¹⁰⁵ It is indeed misleading to believe that there is some sort of legal principle enabling us to fix *in abstracto* and in conclusive terms the line of demarcation between the competence of the state and the jurisdiction of the courts. It would be rather precarious to attempt to erect a wall of separation between the two.¹⁰⁶

The conclusion is thus inescapable that, strictly speaking, the courts lack jurisdiction over fugitives irregularly apprehended in foreign countries simply because the arrest was procured in violation of the sovereignty of the asylum State and, consequently, in violation of the international legal order. Indeed, it requires no greater effort to realize that to assume jurisdiction in such cases amounts to usurping the competence which the law of nations has conferred upon another State. If the State has the exclusive right to exercise its sovereignty throughout its entire territorial domain, it also has the correlative duty to abstain from exercising its powers within the jurisdiction of a foreign State,¹⁰⁷ unless

(5th Ser.) 93, 14 *Scotts Law Times* 227 (1906). For other countries, see Preuss, *On Amending the Treaty-Making Power: A Comparative Study of the Problems of Self-Executing Treaties*, 51 *MICH. L. REV.* 1117 (1953).

103. ROUSSEAU, *DRIT INTERNATIONAL PUBLIC* 233-239 (1953).

104. To borrow a provision of the U.N. Charter art. 2, § 7.

105. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 *AM. J. INT'L L.* 231 (1934).

106. *Contra*: DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 102-105 (Corbett's transl. 1956).

107. *Id.* at 196.

such a right has been granted by an international convention.¹⁰⁸ This proposition being unquestioned,¹⁰⁹ it inevitably follows that the proceedings held against fugitives illegally seized in foreign territory are null and void *ab initio* and, therefore, productive of no legal effect.

IV. *New Directions*

The preceding observations, it is submitted, constitute the rock of reason and policy upon which a revision of the law must necessarily be based. Notwithstanding the tenacity of States in adhering to the traditional view, contemporary developments have cast serious doubts upon its wisdom and validity. Four significant changes may be particularly noticed. First, with the breakdown of the theory of absolute sovereignty, the primacy of international law in the world community has become increasingly accentuated.¹¹⁰ Thus, the fact must squarely be faced that the creation of a truly cohesive society of States presupposes the abandonment of most of the principles on which the practice of the States presently rests.¹¹¹ Second, although the law of extradition has been largely concerned with the rights of the State, the post-war period has witnessed an increasing emphasis upon the rights of the individual precisely in recognition of the human rights and values vitally at stake.¹¹² On this basis, it has been persuasively argued that in cases of abduction in a foreign country the individual should have the right to be released for the violation of his legal rights.¹¹³ To enforce this right, the only alternative course of action is for the courts to forego the exercise of jurisdiction over the person. Third, under present-day human persecution, the unprecedented exodus of political refugees makes it imperative to insure their safety in places of asylum. The far-reaching power of totalitarian governments has profoundly changed the nature of the problem, for it gives rise to the well founded apprehension that the grant of asylum to political refugees would become illusory if the capture of fugi-

108. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 166-167 (1933); and CORBETT, *LAW AND SOCIETY IN THE RELATIONS OF STATES* 91 (1951).

109. It is in fact a part of general international law. The Permanent Court of International Justice said in this connection:

"Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." *The S.S. Lotus*, P.C.I.J., Ser. A, No. 10 at 18 (1927).

110. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* c. 14 (1954).

111. POLITIS, *LES NOUVELLES TENDANCES DU DROIT INTERNATIONAL* c. 2 (1927); and Corbett, *op. cit. supra* note 108, at 12.

112. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 31 (1950).

113. Morgenstern, *supra* note 101, at 279.

tives within the territory of the State of refuge continues to be sanctioned by the law.¹¹⁴ It is rather naive to believe that governments will only resort to abduction in the case of common criminals. But, even if a guarantee could be obtained in this regard, the fact cannot be altered that the State would be exercising its jurisdiction in an extra-territorial fashion. And finally, the emphasis upon the maxim of jurisprudence that *ex injuria jus non oritur*¹¹⁵ under a modern law of nations lends powerful support to the inadmissibility of an illegal arrest as a ground of jurisdiction in much the same way as it did in regard to illegally obtained evidence.¹¹⁶ These developments undermine the efficacy of the traditional rules and have been reflected in the emergence of new rules more in accord with the requirements of contemporary life.

Intermediate between the imperative demands of sovereignty and the requirements of the world society is a small group of cases which give expression to the above considerations. Thus, in *In re Jolis*,¹¹⁷ where a Belgian subject was kidnapped by French officials in Belgian territory and taken to France for trial, the French Tribunal Correctionnel d'Avesnes held that the accused had a right to be released because his arrest was *illégal et non valable*. This finding was significantly expressed as follows:

"The arrest, effected by French officers on foreign territory, could have no legal effect whatsoever, and was completely null and void. This nullity being of a public nature, the judge must take judicial notice thereof. The information leading to the proceedings of arrest . . . the proceedings themselves, the commitment to prison of the same date, the remand order, and all that followed thereon must therefore be annulled."¹¹⁸

A similar decision was reached by the United States-Panama Claims Commission in the *Columje Claim*,¹¹⁹ involving a Panamanian citizen who, by false pretenses, was induced to go into the Canal Zone, where he was arrested by police agents of the Zone. As the Government of Panama protested against the illegality of the arrest, the Commission deciding the case held:

114. See the unsuccessful attempt of the Soviet Government to abduct a Soviet citizen within the jurisdiction of the United States. Note 12 *supra*.

115. For a treatment of this doctrine, see LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 421-425 (1948).

116. See note 84 *supra*.

117. France, Tribunal Correctionnel de Avesnes, July 22, 1933, *ANNUAL DIGEST* 1933-1934 at 191 (1940).

118. *Id.* at 191.

119. United States-Panama Claims Commission, June 27, 1933, *ANNUAL DIGEST* 1933-1934 at 250 (1940).

"It is evident that the police agent of the Zone by inducing Colunje by false pretenses to come with him to the Zone with the intent of arresting him there unduly exercised authority within the jurisdiction of the Republic of Panama to the prejudice of a Panamanian citizen, who, as a result thereof, suffered the humiliation incident to a criminal proceeding. For this act of a police agent in the performance of his functions, the United States of America should be held liable."¹²⁰

The above shows that this rather involves State responsibility for the acts of its law enforcement officers. However, the novelty of the decision lies in the recognition that an illegally arrested fugitive is entitled to a legal remedy which is enforceable by his own government. The decision further illustrates that in cases of abduction the responsibility of the abducting State is clearly involved simply because of the commission of an international wrong.

There can be little doubt that these decisions are sound when tested by the requirements of the law of nations. It should be observed, however, that even in these two cases the individual is only incidentally considered, for the main concern of the decisions is to give satisfaction to the State of refuge for the violation of its sovereignty. Nevertheless, the new climate of policy reflected in the *Jolis* and *Colunje* cases is the more striking because it squarely puts the exercise of jurisdiction by the courts within the framework of international law. The grounds for the decisions actually amount to an insistence that the legal basis of jurisdiction cannot possibly exist when a fugitive has been seized by means of an international wrong.

V. Conclusion

The evidence presented in this article leads to the inescapable conclusion that the law regarding assumption of jurisdiction over fugitives illegally apprehended in foreign countries is indefinite and inadequate. Conceptions in this field are deeply rooted in antiquated notions whose present-day validity is seriously questioned. It has been particularly emphasized that there is no justification for the view according to which the courts are legally permitted to exercise jurisdiction over irregularly apprehended fugitives completely independent of the manner of their arrest. Such a legal postulate is neither sound nor practical and the time has come for its abandonment. But, it seems sufficiently apparent that this problem is inextricably linked with the position that the individual

120. *Id.* at 250-251.

occupies in both the internal and the international legal order. It would appear, therefore, that the strength of the argument for rejecting the jurisdiction of the courts in cases of abduction will depend upon the degree of recognition accorded the individual as a subject of extradition treaties.¹²¹ Though there is scant judicial support for the contention that the courts lack jurisdiction over fugitives illegally seized,¹²² surely one can entertain the hope that the courts will reconsider their assumptions and finally recognize the unsoundness of their position. Unless this alternative is erected into a legal postulate, the effectiveness of the rule of law in a democratic society will surely fall far behind reasonable expectations and might finally go down in history as a victim of the arbitrariness of law enforcement officers

121. It has been seen that under present international practice, individuals have no rights under extradition treaties. See note 54 *supra*.

122. Actually, the *Jolis* and *Cokunje* cases seem to be the only cases giving recognition to this idea. For reference to these cases, see notes 117 and 119 *supra*.