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Timothy D. Rudy

DID WE TREATY AWAY *KER-FRISBIE*?

TIMOTHY D. RUDY*

I. INTRODUCTION

Resembling vigilantes and posses of the nineteenth century Wild West,[1] United States law enforcement champions, as a matter of domestic law, an extraterritorial ability to kidnap defendants overseas and return them for trial in a U.S. court. The century-old legal doctrine known as the *Ker-Frisbie* rule provides that the irregular

* Legislative Assistant to the Minority Whip in the Ohio House of Representatives and Assistant Legal Counsel to the House Democratic Caucus; B.A., University of Chicago; M.S.J., Northwestern University; J.D., University of Akron; LL.M., Georgetown University Law Center.

1. *See* Martin B. Sipple, Note, *The Wild, Wild Western Hemisphere: Due Process and Treaty Limitations on the Power of United States Courts to Try Foreign Nationals Abducted Abroad by Government Agents*, 68 WASH. U. L.Q. 1047, 1047 (1990) (comparing abduction of criminal defendants living abroad to law enforcement tactics of Old West).

manner in which a defendant comes before the court does not affect the court's jurisdiction or violate notions of due process.[2] The three branches of the federal government tacitly adhere to this extraterritorial reach in our "jurisdiction to enforce."[3] The recent U.S. ratification of the International Covenant on Civil and Political Rights (Civil and Political Covenant)[4] may ultimately, and perhaps unintentionally, change that policy.[5]

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2. *See* Ker v. Illinois, 119 U.S. 436, 444 (1886) (concluding that power of courts is not impaired when faced with criminal defendant seized by "forcible abduction"); *accord* Frisbie v. Collins, 342 U.S. 519, 523 (1952) (asserting that Constitution does not prohibit finding of guilt when criminal defendant is forcibly abducted).

3. Jurisdiction to enforce is defined in the current *Restatement*:

> (1) A state may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§ 402 and 403.
>
> (2) Enforcement measures must be reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of violation and must be proportional to the gravity of the violation.
>
> (3) A state may employ enforcement measures against a person located outside its territory
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> (a) if the person is given notice of the claims or charges against him that is reasonable in the circumstances;
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> (b) if the person is given an opportunity to be heard, ordinarily in advance of enforcement, whether in person or by counsel or other representative; and
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> (c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 (1987).

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1967) [hereinafter Civil and Political Covenant]. The United States Senate gave its advice and consent on April 2, 1992. 138 CONG. REC. S4781–84 (daily ed. Apr. 2, 1992). The instrument of ratification was deposited at the United Nations on June 8, 1992, and the Covenant entered into force for the United States on September 8, 1992. David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 77 & n.1 (1993).

5. *See* John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1292 (1993) (stating that "[t]he Covenant may also affect the U.S. practice of kidnapping a suspect abroad for trial in the United States"); *see also* John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Alvarez-Machain, 68 NOTRE DAME L. REV. 723, 737–38 (1993) (quoting Covenant language that, "[e]veryone has the right to liberty and security of person" and "anyone detained unlawfully shall have an enforceable right to compensation").

The executive branch approved extraterritorial detentions when the Justice Department's Office of Legal Counsel (OLC) in 1989[6] reversed an earlier OLC opinion that disapproved of the practice.[7] The OLC maintained that the policy was not really changed.[8] Indeed, U.S. armed forces intervened in Panama in 1989 in part to capture the de facto leader of that country and return him to face trial in the United States.[9] In June 1992, in *United States v. Alvarez-Machain*,[10] the Supreme Court of the United States, without directly deciding the validity of the *Ker-Frisbie* doctrine, held that a federal court need not divest jurisdiction over a defendant forcibly

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6. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 95 (1992) (statement of Rep. Edwards) (noting Judiciary Committee's displeasure with 1989 opinion); Michael Isikorr, *U.S. "Power" on Abductions Detailed*, WASH. POST, Aug. 14, 1991, at A14 (detailing 1989 OLC opinion).

7. *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B OP. O.L.C. 543 (1980), *reprinted in FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 75–90 (1989).

8. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 7 (1992) (statement of Abraham D. Sofaer, former State Department Legal Advisor) (noting "[t]hat conclusion in an OLC opinion does not state the policy of the United States with respect to a subject, and that was made clear at the time"). In November of 1989 Sofaer testified that, under international law, nonconsensual arrests overseas could only be justified by self-defense. *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 37 (1989) (statement of Abraham D. Sofaer, former State Department Legal Advisor); *see also Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 1, 5, 95 (1992) (statement of William P. Barr, Assistant Attorney General) (stating that 1989 opinion did not change Department of Justice policy). The White House issued a statement in October 1989 that, despite the new OLC opinion, "[t]here will be no arrests abroad that have not been considered through [an] interagency process." Notice to the Press, the White House (Oct. 13, 1989) (on file with the *St. Mary's Law Journal*). No evidence demonstrates that President Bush or any high-ranking government official authorized the abduction of Dr. Alvarez-Machain from Mexico less than six months later. Carlos M. Vazquez, *Misreading High Court's* Alvarez *Ruling*, LEGAL TIMES, Oct. 5, 1992, at 29 (declaring that Drug Enforcement Agency paid Mexican nationals to kidnap Alvarez-Machain). The OLC has not drafted another legal opinion on international abductions. Telephone Interview with Betty Farris, OLC Paralegal (Feb. 25, 1994).

9. *See* United States v. Noriega, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990) (reciting stated goals of intervention as safeguarding American lives, restoring democracy, preserving Panama Canal treaties, and seizing Noriega).

10. 112 S. Ct. 2188 (1992).

abducted from Mexico to stand trial in the United States.[11] Rather, the *Alvarez-Machain* Court considered only the issue of whether an extradition treaty with Mexico specifically outlawed abductions.[12]

During the international uproar following *Alvarez-Machain*, Bush Administration officials continued to insist that policy had not changed.[13] The Administration upheld the legality of international snatching in extraordinary cases, citing the right of self-defense, the President's inherent powers in foreign affairs, and the President's law enforcement powers to combat terrorism and narcotics trafficking.[14] The White House issued a public statement upholding international law and promising interagency review of such activities in the future.[15] The Clinton Administration may be rethinking the policy,[16] but Congress has taken no action to pass legislation revoking any supposed presidential authority to order overseas kidnappings.[17]

Several months after the Court rendered its decision in *Alvarez-Machain*, the Civil and Political Covenant entered into force for the United States. The Court's decision did not refer to this treaty or its provisions. More than 100 state parties to the Covenant[18] have agreed that recognition of human rights "is the foundation of

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11. *Alvarez-Machain*, 112 S. Ct. at 2197. *But see* Malvina Halberstam, *Agora: International Kidnapping: In Defense of the Supreme Court Decision in* Alvarez-Machain, 86 AM. J. INT'L L. 736, 736 (1992) (writing that Supreme Court did not hold kidnapping defendant overseas legal).

12. *See Alvarez-Machain*, 112 S. Ct. at 2195, 2197 (concluding Alvarez-Machain's abduction did not violate extradition treaty between Mexico and United States).

13. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 105 (1992) (statement of Alan J. Kreczko, State Department Deputy Legal Advisor) (declaring that "[t]he short answer is that the United States has not changed its policy").

14. *Id.* at 127 (statement of Andrew G. McBride, Special Assistant United States Attorney); *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 6–8 (1989) (statement of William P. Barr, Assistant Attorney General).

15. *See* Statement by the Press Secretary, 28 WEEKLY COMP. PRES. DOC. 1063 (June 15, 1992) (explaining that U.S. policy is to work in cooperation with foreign governments).

16. *See* Don J. DeBenedicts, *Scant Evidence Frees Abducted Doctor*, A.B.A. J., Feb. 1993, at 22 (reporting statement made by Mexican President to one of Alvarez-Machain's defense attorneys regarding President Clinton's questioning of Supreme Court ruling).

17. Telephone Interview with a staff member of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee (Apr. 28, 1994).

18. *See* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV.

freedom, justice and peace in the world."[19] The Covenant is considered part of the International Bill of Rights, along with the International Covenant on Economic, Social and Cultural Rights, which the Senate has not yet ratified,[20] and the Universal Declaration of Human Rights.[21] Both covenants are considered definite expressions of the human rights obligations[22] that Member States of the United Nations undertook to promote and facilitate when they signed the U.N. Charter.[23]

Congress conducted hearings on ratification of the Civil and Political Covenant in 1989, before the Panama invasion, and in 1992, in the aftermath of *Alvarez-Machain*.[24] Not surprisingly, no witnesses cited U.S. obligations under the Covenant in discussing international abductions[25] because the Senate did not ratify the Covenant until April of 1992.[26] However, the treaty entered into force for the United States in September of 1992—only three months after *Alvarez-Machain*—and Article 9 of that treaty plausibly could prevent international abductions. During Senate Foreign Relations Committee hearings, though, witnesses spoke of the

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HUM. RTS. J. 59, 59 (1993) (reporting that, as of February 1993, 116 members of United Nations had acceded to treaty).

19. Civil and Political Covenant, *supra* note 4, 999 U.N.T.S. at 172, 6 I.L.M. at 368.

20. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into force Jan. 3, 1976). In 1977, President Jimmy Carter signed this treaty on behalf of the United States, but at the time of this writing it is still pending.

21. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

22. *See* South West Africa (Eth. v. S. Afr., Lib. v. S. Afr.), 1966 I.L.J. 6, 293 (July 18, 1966) (Tanaka, J., dissenting) (declaring that Universal Declaration of Human Rights was designed to create rights and give those rights content); THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 29–30 (1988) (commenting that Universal Declaration of Human Rights is recognized as establishing legal duties for member states).

23. *See* U.N. CHARTER arts. 2, ¶ 2, 55(c), 56 (providing that members shall promote respect for fundamental rights and take joint and separate action to achieve goals).

24. *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 1–307 (1992); *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 1–127 (1989).

25. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 1–193 (1992) (addressing many concerns, but not abductions); *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 1–71 (1989) (failing to address abductions).

26. 138 CONG. REC. S4781–84 (daily ed. Apr. 2, 1992).

Covenant's effect on the death penalty and First Amendment rights. No one mentioned or discussed how ratification of the Covenant might affect the *Ker-Frisbie* rule.[27]

At least three subsections of Article 9 of the Covenant are relevant. First, Article 9(1) states that "[e]veryone 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."[28] Second, Article 9(4) states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[29] Third, Article 9(5) states that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[30] In addition, Article 2 obligates parties to the Covenant to adopt those measures necessary to make the rights asserted in the Covenant effective domestically.[31]

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27. *See International Covenant on Civil and Political Rights: Hearings Before the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 1–184 (1991) (failing to discuss Civil and Political Covenant's effect on *Ker-Frisbie* rule).

28. Civil and Political Covenant, *supra* note 4, art. 9(1), 999 U.N.T.S. at 175, 6 I.L.M. at 371.

29. Civil and Political Covenant, *supra* note 4, art. 9(4), 999 U.N.T.S. at 176, 6 I.L.M. at 371.

30. Civil and Political Covenant, *supra* note 4, art. 9(5), 999 U.N.T.S. at 176, 6 I.L.M. at 371.

31. Article 2 provides:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, . . .
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
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> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

Under international law, abducting defendants from overseas is a question of a nation's jurisdiction to enforce.[32] The *Ker-Frisbie* doctrine implicitly grants such jurisdiction to state and federal courts. Additionally, the *Ker-Frisbie* doctrine has withstood attack on due process grounds, has overcome the Fourth Amendment's exclusionary rule, and has survived attempts to have federal courts divest jurisdiction based on their supervisory powers or based on principles of customary international law.[33] Courts have not considered either the *Restatement*'s rule of reasonableness[34] or the Covenant's power to curb this exercise of extraterritorial jurisdiction.

This Article explores whether U.S. ratification of the Civil and Political Covenant provides the American judiciary with solid international law norms to jettison the *Ker-Frisbie* doctrine, as it applies to overseas abductions, or to permit kidnapped fugitives compensation.[35] The Supreme Court recently denied certiorari in a case involving the issue of whether to recognize and enforce a Canadian court judgment against bounty hunters in favor of the spouse of a Florida fugitive.[36] The Florida courts rejected the judgment as violative of public policy.[37]

This Article concludes that whether Article 9 of the Covenant is self-executing is a close question; thus, Article 9 may be available to a kidnapped defendant challenging jurisdiction. The political branches attached language to the Covenant's ratification, in the form of a Senate declaration, indicating that the treaty is not self-executing. Additionally, no implementing legislation is planned. However, the only available remedy, federal habeas corpus relief,

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(c) To ensure that the competent authorities shall enforce such remedies when granted.

Civil and Political Covenant, *supra* note 4, art. 2, 999 U.N.T.S. at 173, 6 I.L.M. at 369.

32. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987) (declaring that state's law enforcement officers may exercise their functions in territory of another state only with consent of other state, given by duly authorized officials of that state).

33. *See* discussion *infra* parts II(B), III(B) and accompanying notes.

34. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

35. Whether Article 9 could also be invoked to change *Ker-Frisbie* as it applies to domestic interstate abductions is beyond the scope of this Article.

36. Jaffe v. Snow, 610 So. 2d 482, 483–84 (Fla. Dist. Ct. App. 1992), *review denied*, 621 So. 2d 432 (Fla. 1993), *cert. denied*, 114 S. Ct. 2724 (1994).

37. *Id.* at 485.

does not offer the same results as those envisaged by Article 9. If the United States does not forego use of the *Ker-Frisbie* doctrine, or provide an effective remedy for those kidnapped abroad, then the country will violate its international obligations arising from a major human rights treaty.

Part II briefly acquaints the reader with the customary norm of international law that supposedly forbids, and the American rule which permits, forcible abductions overseas. Part II also reviews whether extraterritorial abductions violate customary international law. Despite many assertions in the affirmative, some doubt remains (including that in the *Alvarez-Machain* majority) whether a prohibition on kidnapping defendants reflects *opinio juris*. Finally, this Part briefly reviews American case law upholding the *Ker* rule.

Part III discusses the applicability of the Civil and Political Covenant to the *Ker-Frisbie* doctrine and details difficulties in litigating Article 9. The executive and legislative branches consider the Covenant a non-self-executing treaty, but courts must find otherwise for defendants abducted overseas to have standing to litigate any article of the Covenant. This Part will also discuss decisions of the United Nations Human Rights Commission on international abductions. While those decisions are not binding on American courts, judges may find them instructive or persuasive in interpreting the Covenant. Part III concludes with a brief discussion of remedies—divesting court jurisdiction in criminal cases, tort recovery for abductees, the use of international fora to complain of American abductions, and why habeas corpus relief is not an attractive method of implementing Article 9.

Part IV discusses several policy reasons for jettisoning the *Ker-Frisbie* doctrine, using the Covenant as the basis for doing so. Part V concludes that, at the end of the twentieth century, individuals are fit subjects of international law and that the Covenant should compel the United States to fashion a rule forbidding international abductions of criminal defendants.

II. International Practice and the American Rule on Abductions

A. *Customary International Law*

Abducting defendants overseas is not always a violation of international law. To constitute a violation of international law, the

traditional view requires violation of a nation's sovereignty.[38] One state is not permitted under international law to perform sovereign acts in the territory of another state.[39] If the other state acquiesces, however, international law is not violated.[40] Thus, U.S. agents who seize and arrest a fugitive or potential defendant in a foreign country, known as the asylum[41] or refuge[42] state, commit a prima facie violation of international law unless the refuge state does not object.[43] Additionally, international law is not violated if officials of the asylum nation assist in the irregular arrest[44] or if private individuals kidnap an individual without the complicity of the requesting state.[45] Use of force in the territory of another nation is prohibited by the U.N. Charter unless the acting state has a valid claim of self-defense.[46]

The U.N. Security Council has affirmed that nonconsensual kidnapping in one nation by agents of another violates international

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38. 1 L. OPPENHEIM, INTERNATIONAL LAW § 128 (H. Lauterpacht ed., 8th ed. 1955).

39. The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); *see* Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51, 71 (1977) (explaining that when one country apprehends individual in another country, customary international law is violated).

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

41. *Id.*

42. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 127 (1974).

43. Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279, 280 (1960); *see* Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77, 89 (1964) (describing kidnapping as "patent illegality"). In a recent case, the defendant was seized in international waters, which precluded him from relying on the notion of territoriality. United States v. Yunis, 681 F. Supp. 909, 916 n.11 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988).

44. *See* Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279, 307 (1960) (stating international law is not violated when officials from asylum nation assist in irregular arrest because extradition treaty may keep separate and distinct surrender of fugitives by asylum nation and surrender of fugitives to that nation).

45. *See id.* at 305 (explaining that no violation of international law occurred when British creditors seized British citizen, who was wanted on charges of embezzlement and fraudulent bankruptcy, in Holland).

46. U.N. CHARTER, arts. 2(4), 51; *see also FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 37 (1989) (statement of Abraham D. Sofaer, former State Department Legal Advisor) (asserting that self-defense is sole justification for arrests in foreign states absent consent).

law, even when the victim of the kidnapping is a notorious war criminal.[47] For example, the Security Council ordered Israel to make reparations to Argentina for abducting Adolph Eichmann from the streets of Buenos Aires in 1960.[48]

International law is found in treaties, conventions, customary international law, general principles of law recognized by civilized nations, and the writings of publicists.[49] Customary international law is based on both objective and subjective factors.[50] To rise to the status of customary international law, the norm—in this case a prohibition against extraterritorial kidnappings of criminal defendants—must be a widely-recognized practice of nations that states follow out of a sense of legal obligation.[51] These widely recognized practices are termed *opinio juris*. A state is not bound if it consistently objects to such a norm.[52]

In *United States v. Alvarez-Machain*, the Supreme Court of the United States expressed doubt concerning whether a prohibition on international abductions constitutes a practice of nations that is so strong a rule of customary international law that an implied term should be read into the extradition treaty with Mexico forbidding kidnappings.[53] American courts often appear reluctant to enforce customary international law.[54] The *Alvarez-Machain* Court, however, had grounds for questioning whether prohibiting abductions constituted *opinio juris*. Courts in other countries have also

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47. *See* S.C. Res. 138, U.N. SCOR, 15th Sess., 868th mtg. at 4, U.N. Doc. S/4349 (1960) (noting that resolution in no way condoned "odious crimes" of which Adolph Eichmann was accused); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 175 (1974) (explaining that resolution enunciated principle *ex injuria non oritur*).

48. U.N. SCOR, 15th Sess., 868th mtg. at 1, U.N. Doc. S/PV.868 (1960).

49. *See* Statute of the International Court of Justice art. 38 (detailing types of authority court should apply).

50. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27) (recognizing that "rigorous conformity" to customary rule is not required).

51. North Sea Continental Shelf (F.R.G. v. Den., Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

52. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277–78 (Nov. 20).

53. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992).

54. *See* Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 7, 19 (1993) (noting that lower court judges adopt hesitant attitude toward utilizing international law); Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal: *Win at Any Price?*, 74 AM. J. INT'L L. 892, 904 (1980) (emphasizing that recent case law reflects hostility of U.S. courts in applying international law).

upheld personal jurisdiction over a defendant kidnapped from another country.[55]

U.S. practice is mixed at best. Courts have generally upheld the *Ker-Frisbie* rule,[56] though some diplomats and officials have recognized abductions as violations of customary international law.[57] Importantly, the United States did not exercise a veto in the Security Council when that international organ condemned Israel's ab-

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55. *See Re* Argoud, 45 I.L.R. 90, 98 (Cass. Crim. 1964) (Fr.) (denying prosecutorial immunity to defendant abducted from Germany); Attorney General of Israel v. Eichmann, 36 I.L.R. 5, 65–67 (Dist. Ct. 1961) (Isr.) (basing personal jurisdiction over abducted defendant in United States case law), *aff'd*, 36 I.L.R. 277, 342 (S. Ct. 1962); Martin Feinrider, *Extraterritorial Abductions: A Newly Developing International Standard*, 14 AKRON L. REV. 27, 28 (1980) (asserting that foreign courts generally uphold detentions resulting from improper captures); *see also* I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 73–75 (1971) (discussing jurisprudence of civil- and common-law countries upholding jurisdiction for extraterritorially abducted defendants).

56. *E.g.*, *Alvarez-Machain*, 112 S. Ct. at 2188; United States v. Toro, 840 F.2d 1221 (5th Cir. 1988); United States v. Rosenthal, 793 F.2d 1214 (11th Cir.), *modified*, 801 F.2d 378 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Valot, 625 F.2d 308 (9th Cir. 1980); United States v. Lara, 539 F.2d 495 (5th Cir. 1976); United States v. Winter, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States v. Quesada, 512 F.2d 1043 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States v. Cotten, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); United States v. Caramian, 468 F.2d 1370 (5th Cir. 1972); Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970); United States v. Sobell, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957); United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990); Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040 (S.D. Ill. 1988); United States v. Wilson, 565 F. Supp. 1416 (S.D.N.Y. 1983), *aff'd*, 750 F.2d 7 (2d Cir. 1984), *cert. denied*, 479 U.S. 839 (1986); United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934); *Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934); *Ex parte* Campbell, 1 F. Supp. 899 (S.D. Tex. 1932); United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom.* Unverzagt v. Benn, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925).

57. *See FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 32 (1989) (statement of Abraham D. Sofaer, former State Department Legal Advisor) (stating that "[t]he United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity"); *id.* at 37 (declaring that arrests overseas without consent are not justified except in self-defense). *But see id.* at 35 (noting that "the international community seems willing to take into account particular circumstances in assessing a violation of territorial integrity"); Carlos M. Vazquez, *Misreading High Court's* Alvarez *Ruling*, LEGAL TIMES, Oct. 5, 1992, at 29, 30 (noting that justice and state departments are conceding that official foreign kidnapping violates customary international law in most cases).

duction of Eichmann from Argentina.[58] Government witnesses at post-*Alvarez-Machain* congressional hearings contended that a policy permitting forcible abductions may be based on the President's inherent authority in foreign affairs,[59] though no evidence exists that President Bush made the decision to abduct Dr. Alvarez-Machain.[60]

Even if no sufficient customary norm forbidding extraterritorial abductions exists, or if the United States is considered a persistent objector to such a norm, the government could be obligated under conventional international law if a treaty duly ratified by the Senate recognizes this norm. Otherwise, international law appears problematical as a source for invalidating the *Ker-Frisbie* rule.

B. *The* Ker-Frisbie *Doctrine*

1. *Ker* and *Frisbie*

For more than 100 years, American courts routinely have invoked what has come to be called the *Ker-Frisbie* rule.[61] The name arises from the nineteenth century case, *Ker v. Illinois*,[62] and a mid-twentieth century case, *Frisbie v. Collins*.[63] *Ker* involved the abduction of a defendant overseas. *Frisbie* involved an interstate kidnapping. The *Ker-Frisbie* rule permits courts to exercise personal jurisdiction over a defendant regardless of the illegal manner in which the defendant was brought before the court.[64] The *Ker-Frisbie* rule is a modern formulation of the Roman maxim *mala captus bene detentus*—an improper capture results in a lawful detention.[65]

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58. U.N. SCOR, 15th Sess., 868th mtg. at 1, U.N. Doc. S/PV.868 (1960).

59. *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 115–16 (1992) (statement of Alan J. Kreczko, State Department Deputy Legal Advisor); *id.* at 121–22 (statement of Andrew G. McBride, Special Assistant U.S. Attorney).

60. *Id.* at 243 (statement of Paul L. Hoffman, counsel for Alvarez-Machain).

61. *See* State v. Brewster, 7 Vt. 117, 121 (1835) (concluding that taking refuge in foreign country does not produce immunity from punishment).

62. 119 U.S. 436 (1886).

63. 342 U.S. 519 (1952).

64. *See Frisbie*, 342 U.S. at 522 (finding no persuasive arguments to justify overruling rule); *see also* Richard P. Shafer, Annotation, *District Court Jurisdiction over Criminal Suspect Who Was Abducted in Foreign Country and Returned to United States for Trial or Sentencing*, 64 A.L.R. FED. 292, 293–94 (1983) (suggesting that neither forcible abduction nor illegal arrest will impair power of court over person brought within its jurisdiction).

65. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 122, 143–45 (1974); Martin Feinrider, *Extraterritorial Abductions: A Newly Develop-*

While commentators have frequently criticized the rule,[66] courts in this country[67] and elsewhere[68] generally follow its rationale.

The Supreme Court has never directly decided whether the rule applies in federal court, though *Alvarez-Machain* strongly suggests that it does. The parties in that case did not argue the validity or invalidity of the doctrine, but rather the interpretation of an extradition treaty.[69]

Ker v. Illinois,[70] decided in 1886, is noteworthy for a limited view of due process. Though the Court said the facts in *Ker* showed "a clear case of kidnapping within the dominions of Peru,"[71] academic research years later showed that this assertion was not true.[72] The

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ing International Standard, 14 AKRON L. REV. 27, 28–29 n.9 (1980); Jacques Semmelman, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The* Ker-Frisbie *Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 514 (1992).

66. *See, e.g.*, Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 964 n.125 (1993) (advocating reversal of *Ker* as archaic, useless doctrine); Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 244 (1934) (asserting that principle underlying *Ker* decision is arbitrary and unsound); Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427, 435 (1957) (criticizing principle as insufficient in dealing with court's constitutional power to invoke jurisdiction); Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 279 (1952) (concluding that courts should refuse to exercise jurisdiction over individuals captured in violation of international legal principles); Austin W. Scott Jr., *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 100 n.40 (1953) (suggesting that rule may be overturned by Supreme Court in light of high standards imposed on enforcement officers).

67. *See supra* note 56 (listing federal cases that have upheld courts' exercise of jurisdiction over individuals illegally seized).

68. *See supra* note 55 (referring to foreign courts' reliance on *Ker* doctrine in denying immunity to abducted defendants).

69. Carlos M. Vazquez, *Misreading High Court's* Alvarez *Ruling*, LEGAL TIMES, Oct. 5, 1992, at 29, 30.

70. 119 U.S. 436 (1886).

71. *Ker*, 119 U.S. at 443.

72. Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 686 (1953). Ker was a clerk for a Chicago bank in the early 1880s. Instead of returning from a New Orleans vacation in 1883, Ker mailed his employers a letter confessing that he had embezzled $56,000 worth of bonds and bank money. Ker headed for South America, and the bankers hired a Pinkerton agent to find him. *Id.* at 684. The agent, one Julian, traced Ker to Panama and then to Lima, Peru, where he befriended Ker while awaiting an extradition warrant from the U.S. Secretary of State. *Id.* at 684–85. Cook County authorities, in the meantime, indicted Ker for larceny and embezzlement. *Ker*, 119 U.S. at 437. When the warrant arrived requesting Ker's extradition on a charge of larceny, Lima was under Chilean military occupation in the War of the Pacific. *Id.* at 438. Chilean authorities aided

Pinkerton agent who seized Ker in Peru had valid extradition papers, but never used them.[73] The *Ker* opinion implies that the agent ignored the Peruvian government and preferred to kidnap Ker.[74] Research shows the agent actually received help from the Chilean military, which controlled parts of Peru during the War of the Pacific.[75] Illinois eventually convicted Ker for larceny.[76]

The Court found that extraterritorial kidnapping was not sufficient to divest the Illinois court of jurisdiction over Ker. Justice Miller stated that Fourteenth Amendment due process is satisfied

> when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment.[77]

Justice Miller also found that Ker lacked any right to asylum because the United States and Peru had an extradition treaty.[78] The Court noted, however, that Ker was abducted outside the provisions of the treaty.[79] The Court distinguished *United States v. Rauscher*,[80] decided the same day, which held a federal trial to be void because the defendant had been extradited from Great Britain under an extradition treaty on a charge different from the one he faced at trial.[81] That case illustrates the doctrine of specialty in ex-

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Julian in placing Ker on a U.S. man-of-war in a Peruvian harbor. Charles Faiman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 685 (1953). The opinion stated that Julian arrived in Lima with the extradition papers, "but, without presenting them to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him." *Ker*, 119 U.S. at 438.

73. *Ker*, 119 U.S. at 438.

74. *Id.* at 442–43.

75. Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 685 (1953).

76. *Ker*, 119 U.S. at 437.

77. *Id.* at 440.

78. *Id.* at 442.

79. *See id.* at 443 (explaining that agent never relied on treaty provisions and, therefore, seizure did not assume pretext of arrest).

80. 119 U.S. 407 (1886).

81. *Rauscher*, 119 U.S. at 431–33.

tradition law. Thus, the result in *Ker* would have been different if Ker had been extradited for larceny, but convicted of embezzlement.[82]

The *Alvarez-Machain* Court acknowledged that the Court was justified in implying the specialty term in the *Rauscher* case one hundred years ago, but specifically declined to find that any international practice forbidding abductions should lead to an implied term in the extradition treaty with Mexico in 1992.[83] It is not clear from the 1992 opinion whether that reluctance arose out of grave misgivings that international law actually forbids the practice or out of ambivalent feelings about adjudicating customary international law. *Alvarez-Machain* strongly indicates that the Supreme Court will not imply such a norm in extradition treaties, and no human rights treaties specifically address the prohibition.

Courts have cited *Ker* for the proposition that a court will not divest itself of jurisdiction over a defendant brought before it in violation of customary international law.[84] However, the facts of *Ker* indicate that no international law violation occurred because the Pinkerton agent arrested Ker with the help of the local authorities in control of the Peruvian capital.[85]

The *Ker* Court concluded its opinion by stating that the question of when abduction from another nation could vitiate a trial in the United States "is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection."[86] Ratification of the Civil and Political Covenant, of course, impacts the "transaction" in a different manner because that treaty guarantees anyone found within its territory the protections of the Covenant. In any event, the rule stated in *Ker* was dicta.[87] The Court

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82. *Ker*, 119 U.S. at 443. Ker would have had a different case altogether if his lawyers had not argued that he had a right to asylum under a treaty that was disregarded. One commentator called that tactic "a complete misconception" and noted that the Court was correct in that part of its holding. Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 680–81 (1953).

83. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992).

84. Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 269–70 (1952).

85. Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 685–86 (1953).

86. *Ker*, 119 U.S. at 444.

87. Gary W. Schons, Comment, United States v. Toscanino*: An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865, 867–68 n.8 (1975).

said that reviewing a state court's finding of personal jurisdiction in contravention of customary international law was not a federal question.[88] The opinion noted that the state's decision to uphold jurisdiction was based on

> authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offence, and presents no valid objection to his trial in such court.[89]

The Court also noted that Ker could sue the agent for trespass and false imprisonment and that Peru could ask for the agent's extradition on a kidnapping charge.[90]

The other half of the *Ker-Frisbie* rule is derived from an interstate abduction case from the mid-twentieth century. In *Frisbie v. Collins*,[91] Michigan police seized, blackjacked, and handcuffed Collins in Chicago.[92] Afterward, they took him to Michigan, where he was convicted of murder and sentenced to a life term in prison.[93]

The Supreme Court rejected Collins's argument that his trial and conviction violated the Fourteenth Amendment's Due Process Clause and the Federal Kidnapping Act.[94] In doing so, the Court reaffirmed *Ker* in one paragraph without analyzing the brutal treatment or the kidnapping.[95] The Court noted that "[n]o persuasive reasons [were] presented to justify overruling" *Ker* and its progeny[96] despite the passage of more than sixty years:

> [These cases] 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

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88. *Ker*, 119 U.S. at 444; Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1105 (1974).

89. *Ker*, 119 U.S. at 444.

90. *Id.*

91. 342 U.S. 519 (1952). Ironically, the Court appointed a lawyer named Kerr to represent Collins. *Id.*

92. *Frisbie*, 342 U.S. at 520.

93. *Id.*

94. *Id.*

95. *See id.* at 522 (omitting references to physical treatment of defendant in holding).

96. *Frisbie*, 342 U.S. at 572.

rightfully convicted to escape justice because he was brought to trial against his will.[97]

2. *Toscanino* and Its Progeny

The United States Court of Appeals for the Second Circuit broke with the tradition of automatically applying the *Ker-Frisbie* rule in *United States v. Toscanino*.[98] While critics disagree with the court's reasoning,[99] *Toscanino* changed judicial scrutiny of pretrial practices when defendants seized overseas are hauled into federal court.[100] *Toscanino*'s holding was broad: due process requires a court to divest jurisdiction when it was obtained "as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[101]

Toscanino found that the *Ker-Frisbie* rule was irreconcilable with the Supreme Court's expansion of due process rights.[102] Kidnapping and forcibly returning a defendant to the court violates the Fourth Amendment.[103] The court found the exclusionary rule to provide an applicable remedy in egregious circumstances.[104] Be-

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97. *Id.*

98. 500 F.2d 267 (2d Cir. 1974).

99. *Compare* Martin Feinrider, *Extraterritorial Abductions: A Newly Developing International Standard*, 14 AKRON L. REV. 27, 32 (1980) (acknowledging criticism of decision as "not at all clear") *with* Gary W. Schons, Comment, United States v. Toscanino*: An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865, 888 (1975) (contending that decision represents "most enlightened view" of courts' power).

100. *See Toscanino*, 500 F.2d at 274 (emphasizing significance of pretrial due process requirements); Gary W. Schons, Comment, United States v. Toscanino*: An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865, 880 (1975) (noting that *Toscanino* and other cases extended judicial scrutiny into area of pre-trial procedures).

101. *Toscanino*, 500 F.2d at 275.

102. *Id.*

103. *Id.* The court stated:

> [W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, . . . the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*. *Id.*

104. *See id.* (stating that court must divest itself of jurisdiction over defendant when government made deliberate, unnecessary, and unreasonable invasion of accused's constitutional rights); United States v. Edmons, 432 F.2d 577, 586 (2d Cir. 1970) (using exclusionary rule to reverse convictions due to illegal arrests); *see also* Randall L. Sarosdy, Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439, 1445 n.36 (1976) (asserting that divesting jurisdiction is only way to dissuade police kidnapping).

sides the constitutional violation, the court also found that due process was violated under the *Rochin* test of "shocks the conscience"[105] and the *Russell* test[106] of illegal law enforcement.[107] The court appeared to rely more on the former test, finding that the paid American agents who kidnapped and tortured Toscanino violated the Federal Kidnapping Act and the charters of the United Nations and the Organization of American States (OAS).[108] As an alternative holding, the court stated that the *McNabb*[109] standard, which implicates the federal courts' supervisory authority over the administration of criminal justice, could be used to prevent courts from "debasing" the justice system.[110]

No American court has ever gone so far as *Toscanino* in rejecting the *Ker-Frisbie* doctrine. Indeed the Second Circuit limited the *Toscanino* holding in *United States ex rel. Lujan v. Gengler*[111] and *United States v. Lira.*[112] For example, the *Lujan* court reworked[113] the *Toscanino* holding as resting on the *Rochin* standard alone.[114] The court said Lujan did not allege "shocking governmental conduct sufficient to convert an abduction which is simply

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105. *See* Rochin v. California, 342 U.S. 165, 172 (1952) (determining that agent's action of pumping accused's stomach to obtain evidence was conduct that "shocks the conscience").

106. United States v. Russell, 411 U.S. 423, 435 (1973) (accepting that Congress does not intend to punish criminals who are induced by law enforcement officers to commit crime).

107. *Toscanino*, 500 F.2d at 273, 276.

108. *Id.* at 276; *see* Gary W. Schons, Comment, United States v. Toscanino: *An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865, 882 n.81 (1975) (distinguishing tests for finding due process violations).

109. McNabb v. United States, 318 U.S. 332 (1943).

110. *Toscanino*, 500 F.2d at 276; *see* Note, *The Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents*, 50 N.Y.U. L. REV. 681, 708 (1975) (explaining that *McNabb* Court's authority to hold statements inadmissible when defendant was not promptly arraigned was based on federal courts' traditional role of making rules of evidence).

111. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

112. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

113. Note, *The Effect of Illegal Abductions by Law Enforcement Officials on Personal Jurisdiction*, 35 MD. L. REV. 147, 163 n.98 (1975) (declaring that "*Lujan*'s reading of *Toscanino* is improbable").

114. *See Lujan*, 510 F.2d at 65–66 (stating that Toscanino's cruel treatment brought case within *Rochin* principle); *see also* Randall L. Sarosdy, Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439, 1444 n.34 (1976) (recognizing apparent conflict between *Ker-Frisbie* rule and *Rochin*).

illegal into one which sinks to a violation of due process."[115] Lujan was unable to plead any violation of international law because no country had protested his abduction.[116] In fact, the Second Circuit in *Lujan* stated that *Toscanino* "scarcely could have meant to eviscerate" the long unbroken precedent of the *Ker-Frisbie* rule.[117]

In *Lira*,[118] the Second Circuit held that if American agents do not undertake conduct which shocks the conscience, *Toscanino* is inapplicable.[119] The debate in the Second Circuit became whether a case fell on the *Toscanino* or the *Lujan* side of the line.[120] The Second Circuit, and courts following its example and the *Restatement* formula,[121] permit a limited exception to *Ker-Frisbie* that avoids Fourth Amendment protection for kidnapped defendants.[122] Some circuits permit an evidentiary hearing in the trial court,[123] but this judicial device does not divest jurisdiction.[124]

3. *Noriega*

In *United States v. Noriega*,[125] General Manuel Noriega, the deposed Panamanian leader, relied on the *Toscanino* exception rather than attacking the *Ker-Frisbie* rule directly.[126] The United States District Court for the Southern District of Florida declined

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115. *See Lujan*, 510 F.2d at 66 (emphasizing that "Lujan disclaims any acts of torture, terror, or custodial interrogation of any kind").

116. *See id.* at 67 (providing general rule that consent or acquiescence by offended state waives rights and heals international law violations).

117. *Id.* at 65.

118. *Lira*, 515 F.2d 68 (2d Cir.).

119. *See id.* at 70 (stressing need for existence of gross mistreatment for *Toscanino* to apply).

120. *Id.* at 72 (Oakes, J., concurring) (deciding that case falls on *Lujan* side).

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 433(2) (1987). According to the *Restatement*, "[a] person apprehended in a foreign state, whether by foreign or by United States officials, and delivered to the United States, may be prosecuted in the United States unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society." *Id.*

122. *See* Note, *The Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents*, 50 N.Y.U. L. REV. 681, 713–14 (1975) (concluding that Second Circuit provides air of legitimacy to kidnapping by government officials).

123. *See* United States v. Lara, 539 F.2d 495, 495 (5th Cir. 1976) (discussing findings of trial court's evidentiary hearing).

124. *See* post-1974 cases cited *supra* note 56.

125. 746 F. Supp. 1506 (S.D. Fla. 1990).

126. *Noriega*, 746 F. Supp. at 1530.

to dismiss a multi-count RICO, drug dealing, and conspiracy indictment in the face of several challenges by Noriega and his co-defendant.[127] For example, the court found that Noriega was not entitled to head-of-state immunity or diplomatic immunity,[128] that the act-of-state doctrine was inapplicable,[129] and that the Geneva Convention relative to the treatment of prisoners of war and the extradition treaty with Panama did not compel the court to divest itself of jurisdiction.[130] Regarding the last ground, the court stated that the Geneva Convention could not be read to divest the jurisdiction of domestic courts because "[t]he Supreme Court has . . . held that in order for an international treaty to divest domestic courts of jurisdiction, the treaty must expressly provide for such limitation . . . ."[131] The court found no such limitation in the Geneva Convention.[132]

The *Noriega* decision is noteworthy because the judge declined to upset the *Ker-Frisbie* rule under constitutional or prudential challenges. The court found *Toscanino* inapplicable because Noriega could not allege that the American invasion of Panama violated any due process rights personal to him.[133] The court also found that Noriega had asserted third-party due process rights, but that case law required some "physical violation of the defendant's person."[134] The court further denied that Noriega's abduction violated certain provisions of the U.N. Charter, the OAS Charter, the Hague Convention, the first Geneva Convention, or the Nuremberg Charter.[135] The *Noriega* court stated that individual defend-

127. *See id.* at 1510 (detailing charges in indictment and defendant's reasons for dismissal of indictment).

128. *Id.* at 1521, 1525.

129. *Id.* at 1523.

130. *See Noriega*, 746 F. Supp. at 1529 (expounding that purpose of Geneva Convention is to prevent prosecution of prisoners of war for conduct associated with armed conflict and not violation of narcotics laws). However, the court also noted that the present extradition treaty between the United States and Panama permits extradition for narcotics offenses. *Id.*

131. *Id.* at 1528.

132. *See id.* at 1529 (explaining that Geneva Convention strives to protect prisoners of war against prosecution for customary conduct in armed conflicts).

133. *See id.* at 1531 (noting that defendant did not claim mistreatment with respect to his arrest that approached egregious physical abuse in *Toscanino*).

134. *See Noriega*, 746 F. Supp. at 1532 (finding no indication of such violations in defendant's case).

135. *Id.* at 1532–33.

ants lack standing to raise such treaty challenges when the concerned foreign government does not lodge a protest,[136] and that a treaty will not be construed as creating enforceable private rights unless it expressly or impliedly provides a private right of action.[137]

Finally, the court declined to exercise its supervisory powers when Noriega claimed his prosecution should be prevented because it was tainted by the government's alleged misconduct in invading Panama to bring Noriega to trial.[138] The court found that this prudential doctrine is "a harsh remedy" applicable only to "flagrant or repeated abuses which are outrageous or shock the conscience"[139] and that it requires a greater showing of misconduct on the part of the government than what is needed to establish a constitutional or statutory violation.[140]

4. *Verdugo-Urquidez* and *Alvarez-Machain*

United States v. Verdugo-Urquidez[141] and *United States v. Alvarez-Machain*[142] both arose from the murder of a U.S. Drug Enforcement Administration (DEA) agent in Mexico. In neither case, though, did the Supreme Court find that forcible abductions overseas are always legal as a matter of domestic law.

In *Verdugo-Urquidez*, the Court held that the protections of the Fourth Amendment do not apply to overseas aliens tried for violations of federal law in the United States.[143] Thus, an alien defendant abducted overseas would lose any Fourth Amendment challenge to the *Ker-Frisbie* doctrine. Chief Justice Rehnquist's opinion specifically declined to address the merits of any due process or Fifth Amendment challenge by alien defendants. Furthermore, the Court noted that the Fourth and Fifth Amendments operate differently—a violation of the former occurred in Mexico, but a violation of the latter must occur in the United States at

136. *See id.* at 1533 (noting that rights conferred by international common law belong to states and not individuals).

137. *See id.* (providing rationale that self-executing treaties confer individual rights).

138. *Noriega*, 746 F. Supp. at 1535.

139. *Id.*

140. *See id.* at 1536 (concluding that deciding otherwise would render supervisory authority doctrine meaningless).

141. 494 U.S. 259 (1990).

142. 112 S. Ct. 2188 (1992).

143. *Verdugo-Urquidez*, 494 U.S. at 261.

trial.[144] Thus, *Ker-Frisbie* closes the door on a due process challenge by an alien defendant, and *Verdugo-Urquidez*, if anything, shuts the door more tightly, unless one finds some hope in dicta suggesting a treaty exception to the *Verdugo-Urquidez* rule.[145]

However, the Court eliminated any implied treaty exception to *Ker-Frisbie* two years later in *Alvarez-Machain*. *Alvarez-Machain* was essentially a case of first impression because the Court had never ruled on the validity of a *Ker-Frisbie*-type practice when the offended government had objected to the abduction.[146] Dr. Alvarez Machain was kidnapped from his office in Guadalajara, Mexico and flown by private plane to El Paso, Texas to stand trial for the Camarena murder.[147] The parties did not argue the validity of the *Ker-Frisbie* rule, but instead asserted different interpretations of the extradition treaty.[148] The Court found by a six-to-three vote that extraterritorial abductions are not disallowed specifically by the treaty and that an implied term prohibiting international abductions cannot be read into the treaty.[149] The Court reversed the decisions of both lower courts, which had ordered Alvarez-Machain's repatriation to Mexico.[150] Ironically, Dr. Alvarez-Machain could have been tried in Mexico. Like extradition treaties with most civil-law countries, extradition of one's nationals was not

144. *Id.* at 264.

145. *See id.* at 275 (stating that "[i]f there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation").

146. *See* Terry L. Traveland, Note, United States v. Alvarez-Machain: *The Price of an Aggressive War on Drugs*, 45 BAYLOR L. REV. 185, 188 (1993) (noting Supreme Court's holding that court's jurisdiction is not barred by due process violations or extradition treaty). The *Alvarez* case differed from *Ker* in at least four respects: (1) Ker was abducted by a private agent, not under government instruction; (2) Peru did not object in *Ker*, but Mexico did object in *Alvarez-Machain*; (3) Ker was a U.S. citizen accused of a crime committed in the United States, while Alvarez-Machain was a citizen of Mexico who committed a crime in Mexico; and (4) no treaty was violated in the Ker abduction. *Id.* at 206–07.

147. *Alvarez-Machain*, 112 S. Ct. at 2190.

148. *See id.* at 2195 (noting respondent's argument that international law prohibiting abductions is so established that such clause is implied in treaty itself). "Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms." *Id.*

149. *Id.* at 2196–97.

150. *Id.* at 2197.

required.[151] Furthermore, Mexico prosecuted more than twenty-four individuals implicated in the Camarena murders.[152]

Alvarez-Machain upheld the U.S. practice of extraterritorial abduction of putative defendants without specifically considering whether that policy violates customary international law. The Supreme Court admitted that abductions "may be in violation of general international law principles."[153] The Court relied on two precedents more than a century old.[154] The *Alvarez-Machain* majority stated that the extradition treaty with Mexico could not be interpreted with an implied term forbidding abduction because that represented a giant inferential leap "with only the most general of international law principles to support it."[155] In contrast, the dissent accused the majority of a " 'shocking' disdain" for international law because the abduction was carried out by federal agents and not private parties.[156] The dissent relied on *Rauscher* and customary international law, finding that government agents violated Mexico's territorial integrity, which entitled Alvarez-Machain to dismissal of the case.[157]

According to the majority opinion, any Mexican protest needed to be resolved by the executive branch.[158] Ironically, Alvarez-Machain was returned to Mexico by further judicial action when the district court, on remand, dismissed the government's case for

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151. *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 192 (1992) (statement of Michael Abbell, former Justice Department official).

152. Gail D. Cox, *Drug War's Big Showcase Falls Apart*, NAT'L L.J., Feb. 1, 1993, at 8; *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 237 (1992) (statement of Paul L. Hoffman, American Civil Liberties Union and counsel for Dr. Alvarez-Machain).

153. *Alvarez-Machain*, 112 S. Ct. at 2196.

154. *See* Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 968 (1993) (stating that "[a] universe of legal issues was reduced to one treaty and two cases decided on the same day a century ago"). Bush noted that the majority opinion in *Alvarez-Machain* relied on *Ker v. Illinois*, 119 U.S. 436 (1886), and the treaty, whereas the dissent used *United States v. Rauscher*, 119 U.S. 407 (1886), and the treaty in forming their conclusions. *Id.*

155. *Alvarez-Machain*, 112 S. Ct. at 2196.

156. *Id.* at 2203–05 (Stevens, J., dissenting).

157. *Id.* at 2200–03 (Stevens, J., dissenting).

158. *Id.* at 2196.

lack of evidence.[159] Subsequently prosecutors disclosed exculpatory evidence that Alvarez-Machain may not have been the doctor present at the DEA agent's torture.[160] The OAS also referred the Supreme Court opinion to its juridical committee.[161] The legal opinion issued by the Inter-American Juridical Committee of the OAS described the *Alvarez-Machain* decision as an additional violation of Mexico's territorial sovereignty.[162]

Due process attacks on international abductions have consistently failed[163] under the Court's reasoning in *Ker* and *Frisbie*. Use of the Fourth Amendment exclusionary rule or the federal courts' supervisory powers received some support from the Second Circuit in *Toscanino*, but that case was restricted in subsequent opinions and may not be considered good law in light of *Alvarez-Machain*. In fact, the Supreme Court failed to discuss the *Toscanino* exception[164] in *Alvarez-Machain*.

If attacked on constitutional or prudential grounds, the *Ker-Frisbie* rule will probably be upheld unless advocates can fashion an argument based on binding international law. In view of the American judiciary's reluctance to litigate international law is-

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159. *See* Gail D. Cox, *Drug War's Big Showcase Falls Apart*, NAT'L L.J., Feb. 1, 1993, at 8 (reporting prosecution's failure to streamline case so that jury could determine guilt or innocence).

160. *See Judge Says U.S. Was Told It Held Wrong Doctor in Agent's Killing*, N.Y. TIMES, Dec. 17, 1992, at A27 (noting prosecution's assertion that source of information was not reliable).

161. *See* Carlos M. Vazquez, *Misreading High Court's* Alvarez *Ruling*, LEGAL TIMES, Oct. 5, 1992, at 29 (noting OAS's plan to take issue of official foreign kidnapping to juridical committee).

162. Inter-American Juridical Committee's Opinion of the U.S. Supreme Court Decision [In U.S. v. Alvarez-Machain] 3–4, *reprinted in Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 267–70 (1992) (attachment C to statement of Paul L. Hoffman, American Civil Liberties Union); *see* John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Alvarez-Machain, 68 NOTRE DAME L. REV. 723, 735 (1993) (explaining that kidnapping violated Mexico's territorial sovereignty).

163. *See* Jacques Semmelman, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The* Ker-Frisbie *Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 533–51 (1992) (explaining Supreme Court's reversal of lower court's decision).

164. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 433(2) (1987) (addressing *Toscanino* exception).

sues,[165] a binding treaty obligation will need to supply the convincing argument to overturn the practice of international abductions.

III. Application of the Civil and Political Covenant to Abductions

A. *Human Rights Attacks on International Abductions*

Commentators have noted the possible applicability of human rights as a source of customary international law. Theoretically, human rights should lead courts around the world to divest themselves of jurisdiction over extraterritorially kidnapped defendants. Security of one's person, freedom from arbitrary detention or arrest, and fair trials have been invoked as policies behind divesting jurisdiction.[166]

One commentator asserted that these international norms bind national courts.[167] Under Articles 2, 55, and 56 of the U.N. Charter,[168] a government must promote the observance of human rights.

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165. *See* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 Mich. J. Int'l L. 1, 83–89 (1992) (noting courts' willingness to defer to Legislature on issues of fundamental rights found in international law); *supra* note 54.

166. *See* M. Cherif Bassiouni, International Extradition and World Public Order 154–67 (1974) (discussing international documents that establish these norms); Randall L. Sarosdy, Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 Tex. L. Rev. 1439, 1463–65 (1976) (citing U.N. Charter, arts. 1(3), 55(c), 56; Universal Declaration of Human Rights, arts. 3, 9, 10; Civil and Political Covenant, arts. 9, 12, 13, 21; and American Convention on Human Rights for definitive establishment of international law of human rights as legal obligation).

167. Professor Dickinson noted that a court

> is an arm of the nation and its jurisdiction can rise no higher . . . than the jurisdiction of the nation which it represents. If there was no jurisdiction in the nation to make the original seizure or arrest, there should be no jurisdiction in the court to subject to the nation's law.

Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 Am. J. Int'l L. 231, 244 (1934). Note that the *Toscanino* court did not adopt this argument. Gary W. Schons, Comment, United States v. Toscanino*: An Assault on the* Ker-Frisbie *Rule*, 12 San Diego L. Rev. 865, 883 n.88 (1975).

168. The U.N. Charter provides:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
>
> . . . .
>
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

The U.N. General Assembly's ratification in 1948 of the Universal Declaration of Human Rights represented an authoritative explication of that duty.[169]

No international treaty dealing with human rights, however, explicitly forbids forcible abductions or irregular extraditions.[170] Professor Quigley recently suggested that most international abductions violate the Civil and Political Covenant's Articles 7, 9, 12(1), and 12(4), which concern freedom to immigrate and emigrate, and Article 13, which concerns the right to lawful deportation.[171] Any abduction, however, depending on its facts, is not a

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U.N. CHARTER, art. 2, ¶ 2.

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

U.N. CHARTER, art. 55(c).

"All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER, art. 56.

169. *See* South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6, 293 (July 18) (Tanaka, J., dissenting) (stating that purpose of Universal Declaration was to formulate rights and provide them with concrete content); THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 29–30 (1988) (noting that international lawyers understand Universal Declaration of Human Rights creates legal duties among member states); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 582 (1990) (asserting that treaties composing International Bill of Human Rights "have become authoritative interpretations of Article 55 and 56 [of the U.N. Charter] and, accordingly, lend sufficient specificity to render those articles self-executing").

170. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 reporters' note 1 (1987).

171. John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Alvarez-Machain, 68 NOTRE DAME L. REV. 723, 734–44 (1993); *see* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 83 (1993) (indicating that forcible abductions often involve inhumane and cruel treatment prohibited by Civil and Political Covenant). Without analyzing the self-execution question, however, Professor Quigley summarily concluded that abductees would be able to use the Covenant in jurisdictional challenges even if the Covenant did not create a private right of action. John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Alvarez-Machain, 68 NOTRE DAME L. REV. 723, 744–45 (1993). Professor Quigley did review whether the Covenant was enforceable in U.S. courts. *See* John Quigley, *The International Covenant on Civil and Polit-*

per se violation of Article 7's prohibition against torture or cruel, inhuman, and degrading punishment.[172]

Article 9(1) of the Covenant, which forbids arbitrary arrests and detentions, is more to the point and would be applicable to all extraterritorial kidnappings.[173] The other possibilities cited by Professor Quigley might be implicated only in certain egregious cases[174] or are not considered sufficiently normative in the mid-1990s.

Article 9 most likely will lead U.S. courts to declare at least a portion of the Covenant to be self-executing and available to abducted defendants. Although an arrest and detention begin overseas, both continue once a defendant arrives within U.S. jurisdiction. In fact, a defendant is often formally arrested once he enters American airspace or jurisdiction. Article 9(4) also requires that anyone arrested or detained "shall be entitled" to immediate court proceedings to determine the lawfulness of the arrest.[175] Furthermore, Article 9(4) requires that the court order an immediate release if the detention is deemed unlawful,[176] and Article 9(5) states that those unlawfully arrested or detained "shall have an enforceable right to compensation."[177]

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ical Rights and the Supremacy Clause, 42 DEPAUL L. REV. 1287, 1300 (1993) (stating that Covenant is self-executing treaty).

172. *See* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 83 (1993) (noting that abductions are likely to involve use of considerable force and may impinge on Covenant's provisions).

173. *See id.* at 81–82 (citing authorities which have concluded that abduction of suspects implicitly violates Covenant). In a footnote in another article, Professor Quigley suggested that Article 9(1)'s prohibition of arbitrary detention alone may force the United States to re-evaluate the *Ker-Frisbie* rule. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1292 n.33 (1993).

174. *See* discussion *supra* Part II(B)(2) and accompanying notes.

175. Civil and Political Covenant, *supra* note 4, art. 9(4), 999 U.N.T.S. at 176, 6 I.L.M. at 371.

176. *Id.*

177. Civil and Political Covenant, *supra* note 4, art. 9(5), 999 U.N.T.S. at 176, 6 I.L.M. at 371. Article 9(5) is subject to a Senate understanding formulated at the time of ratification. The understanding notes that the United States considers the right to compensation mentioned in the Covenant to require only "the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity." 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (understanding number two).

B. *Self-Executing vs. Non-Self-Executing Treaties*

Many human rights norms represent customary international law. U.S. courts are bound to apply customary international law unless a controlling executive, legislative, or judicial act holds to the contrary.[178] However, American courts are reluctant to adjudicate claims of customary international law, and a debate has developed on whether the executive branch can disregard customary international law.[179] U.S. courts often hold that the U.N. Charter and other multilateral treaties are not self-executing.[180] In fact, one commentator suggested upholding the *Ker-Frisbie* rule except when a foreign government lodges a protest, in which case the defendant is repatriated, unless high level officials of the executive branch formally repudiate that protest as a controlling executive act.[181] This approach, however, ignores the defendant's interests and the subsequently ratified Civil and Political Covenant.

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178. The Paquete Habana, 175 U.S. 677, 700 (1900). The Court asserted:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

Id.

179. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 122 (1992) (statement of Andrew G. McBride, Special Assistant U.S. Attorney) (advocating that President can deviate from international law in carrying out constitutional duty); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 8289 (1992) (criticizing American courts' refusal to rigidly adhere to customary international law); Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 954–55 (1993) (discussing aversion of American courts to customary international law).

180. *See, e.g.*, Frolova v. USSR, 761 F.2d 370, 374 (7th Cir. 1985) (noting that fair number of decisions conclude U.N. Charter is not self-executing); Filartiga v. Pena-Irala, 630 F.2d 876, 881 & n.9 (2d Cir. 1980) (recognizing that both U.N. Charter and OAS Charter, while not self-executing, evidence international law principles); Sei Fujii v. California, 242 P.2d 617, 620–22 (Cal. 1952) (concluding that Articles 55 and 56 of U.N. Charter are not self-executing so as to automatically supersede local law). *But see* United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974) (holding that international abductions violated U.N. Charter, which court held to be self-executing).

181. *See* Jacques Semmelman, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The* Ker-Frisbie *Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 558–65, 576 (1992) (finding that executive exception prevents nations from using international law to shield drug traffickers or terrorists).

U.S. ratification of the Covenant presents these international human rights norms in a new light. The Covenant is binding under the Supremacy Clause of the United States Constitution.[182] The argument is no longer whether kidnapped defendants can litigate customary international law because ratification of the Covenant makes it applicable law. The current argument is whether international abductions are now banned as a matter of treaty law.

Whether the Covenant bans abductions, and creates private rights or remedies for abductees, revolves around an American judicial distinction between self-executing and non-self-executing treaties.[183] The former represents law that can be invoked by private parties, and the latter denies private defendants standing to invoke treaty law. A clause is self-executing when a court can directly apply it without further legislation.[184] One commentator recently opined that the Covenant is one of only three human rights instruments the United States has ratified that is susceptible to convincing arguments of self-execution.[185] A treaty clause is non-self-executing if that is what the parties intended or if further implementing legislation is needed.[186]

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182. *See* U.S. CONST. art. VI, cl. 2 (stating that Constitution, laws of United States, and all treaties made under U.S. authority are supreme law binding upon all U.S. courts).

183. *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 766–67 (1988) (commenting that judicial tests applied to treaty law "are patently inconsistent with the text of the Constitution, the predominant expectations of the Framers and early judicial opinions").

184. *See generally* Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 516 (1991) (recognizing that distinction is made by courts rather than Constitution); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 627–86 (1986) (explaining that self-executing treaties can be directly applied by courts or executive agencies without further measures, need not create individual rights, and may be self-executing in some situations but not others).

185. Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 12 (1993).

186. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987). As expressed by the *Restatement*:

> (4) An international agreement of the United States is "non-self-executing"
>
> (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation,
>
> (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or
>
> (c) if implementing legislation is constitutionally required.

Id.

Upon ratification of the Civil and Political Covenant, the Senate approved a declaration stating that Articles 1 through 27 are non-self-executing.[187] However, a declaration, rather than a reservation, has no conclusive international legal effect.[188] During hearings before the Senate Foreign Relations Committee, witnesses and senators expressed concerns about adhering to an international human rights treaty containing possibly ambiguous norms that would upset American constitutional jurisprudence.[189] The Committee's report stated that the declaration's intention was "to clarify that the Covenant will not create a private cause of action in U.S. courts."[190] One State Department lawyer later noted that this declaration was included in the instrument of ratification so that domestic implementation of the Covenant would be controlled by the executive and legislative branches, not by state and federal judiciaries.[191] In contrast, Professor Damrosch argued that, if U.S. law and a treaty are in substantial conformity, then non-self-execution is an artificial barrier, and if the treaty offers greater protection than U.S. law, then self-execution is all the more important.[192]

Whether a treaty is considered self-executing or non-self-executing is an ambiguous determination.[193] Separate provisions of the

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187. 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

188. Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal*: Win at Any Price?*, 74 AM. J. INT'L L. 892, 901 (1980).

189. *See International Covenant on Civil and Political Rights: Hearings Before the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 1 (1991) (statement of Sen. Helms) (calling Covenant "seriously flawed"); *id.* at 30 (statement of Ronald D. Rotunda, Professor of Law, University of Illinois) (expressing concern that Convention undercuts Bill of Rights); *id.* at 43 (statement of Harold W. Anderson, Chairman of the World Press Freedom Committee) (asserting that Covenant threatens journalistic freedom).

190. S. REP. NO. 23, 102d Cong., 2d Sess. 19 (1992).

191. David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 79 (1993).

192. *See* Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 522 (1991) (responding to same State Department lawyer concerning Torture Convention).

193. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 310 (1829) (stating that "[t]he Court will not attempt to conceal the difficulty which is created by these articles"); *Frolova*, 761 F.2d at 373 (listing factors courts consider in deciding issue); United States v. Postal, 589 F.2d 862, 873–84 (5th Cir. 1979) (considering relationship between domestic and international law); Diggs v. Richardson, 555 F.2d 848, 850–51 (D.C. Cir. 1976) (explaining need to examine circumstances surrounding execution when treaty's intent is unclear); People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 101 (9th Cir. 1974) (Trask, J., concurring) (finding "little definitive case law elucidating the issue of self-implementation").

same treaty can be self-executing while other clauses are not self-executing.[194] Many nations that have ratified the Civil and Political Covenant permit enforcement of the Covenant's rights in their courts.[195] U.S. courts, however, are most likely to find that the Covenant is non-self-executing out of deference to the decisions of the executive and legislative branches.[196]

The executive branch is bound by conditions that the Senate imposes in its role of rendering advice and consent to a treaty.[197] While a Senate reservation is part of a treaty and is considered U.S. law,[198] the non-self-executing provision at issue here was a declaration and not a formal reservation.[199]

The *Restatement*, however, notes that even "[a] treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law *subject to that understanding.*"[200] The *Restatement* lists a declaration regarding the self-executing nature of a treaty as one example of the many conditions the Senate can attach to its advice and consent of a treaty.[201] The *Restatement* view is that any condition "having plausible relation to the treaty, or to its adoption or implementation, is presumably not improper," though its authors admit that "no accepted doctrine" governs improper Senate conditions on treaty ratification.[202]

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194. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

195. John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 64 (1993).

196. Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 526–27 (1991); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 665–70 (1986); *see* Sullivan v. Kidd, 254 U.S. 433, 442 (1921) (relying on previous executive interpretations to interpret treaty). *But see* Warren v. United States, 340 U.S. 523, 526 (1951) (concluding that ILO Convention is self-executing treaty because general maritime law recognized treaty's exceptions).

197. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. b (1987).

198. *Id.*

199. *See id.* § 313 (defining treaty reservations and describing their operation).

200. *Id.* § 314 cmt. d (emphasis added).

201. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (1987).

202. *Id.*; *see* Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 516 (1991)

U.S. accession to international human rights treaties has been controversial since the 1950s, when Senator John Bricker (R-Ohio) nearly succeeded in having the Senate pass a constitutional amendment limiting the treaty power. Since then, Democratic and Republican administrations have requested that the Senate ratify treaties with some sort of non-self-executing declaration.[203] To justify a finding of non-self-execution regarding the Civil and Political Covenant, a court might accept the declaration at face value, or it might simply look to Article 2 and find that the government has promised to take further action to implement the treaty. Thus, the *Ker-Frisbie* rule appears to remain valid.

Judicial deference to the Senate's non-self-execution declaration should not be automatically assumed,[204] however, especially when the subject matter of the treaty involves human rights justiciable in the American legal system. Even if the Covenant is deemed to be non-self-executing, courts are still free to indirectly incorporate Covenant norms and provisions into American jurisprudence.

(questioning whether arbitrary Senate conditions undermine efficacy of treaties); Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 534 (1991) (noting that Senate's power to condition its consent to treaties is rooted solely in custom); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 584–85 (1991) (declaring that Senate's power to condition consent to treaties is "assumed" by law).

203. Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 518–19 (1991).

204. John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 63 (1993); *see* Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901) (refusing to defer to Senate declaration regarding treaty); Power Auth. v. Federal Power Comm'n, 247 F.2d 538, 541–42 (D.C. Cir.) (denying that Senate reservation to 1950 treaty had any substantive effect), *vacated as moot sub nom.* American Pub. Power Ass'n v. Power Auth., 355 U.S. 64 (1957); Charles H. Dearborn, III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 233–34 (1979) (arguing that non-self-executing declarations are of dubious validity and probably do not bind U.S. courts). Moreover, Senate declarations are inappropriate evidence of the intent of all parties to a treaty. Charles H. Dearborn, III, *The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 248 (1979). Some scholars argue that a Senate non-self-execution declaration

> is not a true reservation; it does not vary the legal obligations under a treaty and is not a part of the treaty. It merely expresses the Senate's *belief* that the treaty is not self-executing. The declaration is therefore not binding on the courts under the supremacy clause. Furthermore, there is no authority for the proposition that the treaty *must* fall if the courts deny effect to the Senate's declaration.

Id. at 245.

Therefore, courts might invalidate the *Ker-Frisbie* rule as promoting arbitrary detentions.[205] Treaties should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[206]

The *Restatement* opines that self-execution is determined by either the government's intention that the treaty be considered self-executing or whether implementing legislation is needed.[207] In *Foster v. Nielson*[208] the Supreme Court stated that a treaty clause is self-executing "whenever it operates by itself without the aid of any legislative provision."[209] The Supreme Court declared the treaty at issue in *Foster* to be non-self-executing, but held the same treaty to be self-executing in *United States v. Percheman*[210] after considering its Spanish text.[211] A strong presumption exists that a treaty is self-executing when the Executive does not request implementing legislation and Congress does not enact such legislation.[212] "In that event, a finding that a treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided."[213] Furthermore, "[i]f a treaty is not self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations."[214]

In the case of the Covenant's ratification, the Executive has not requested implementing legislation, but no strong presumption exists because of the Senate declaration. The *Restatement*'s view, in fact, is that "agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, *unless a contrary intention is mani-*

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205. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 781–82 (1988).

206. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340. The United States has not ratified this Convention.

207. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 cmt. h (1987).

208. 27 U.S. (2 Pet.) 253 (1829).

209. *Foster*, 27 U.S. at 314.

210. 32 U.S. (7 Pet.) 51 (1833).

211. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (1987).

212. *Id.*

213. *Id.*

214. *Id.*

fest."[215] Here, a contrary intention is apparent in the Senate declaration; however, the judiciary could readily give effect to Article 9 without further legislation.

Ultimately, courts must decide whether the Covenant is self-executing.[216] The language of Articles 9(4) and 9(5) support the view that the drafters of the Covenant intended to provide individuals with judicial recourse and a private right of action. The United States might argue that Article 9(4) only provides for a habeas corpus action, under either 28 U.S.C. § 2254 for state defendants, or 28 U.S.C. § 2255 for federal defendants. However, drafts of the Covenant limiting Article 9(4) court proceedings to habeas actions were either deleted or withdrawn during negotiations.[217] Article 9(4) also speaks of "immediate release" if Article 9(1) is violated,[218] and a federal court would not grant the writ if *Ker-Frisbie* is still viable. The habeas rules normally require exhaustion before the writ may be sought,[219] meaning that the abducted defendant might be required to exhaust all appeals before petitioning for release. This process could require years in prison, a result contrary to the plain language of Article 9(4).

Professor Riesenfeld has advocated a three-part test for determining whether human rights treaties are self-executing. He argued that a human rights treaty should be considered self-executing if it "(a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by

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215. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (1987) (emphasis added).

216. *See id.* § 111 cmt. h (noting that, in absence of other agreement, U.S. must determine its international obligations); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 582–84, 608 (1991) (discussing division of powers to execute and interpret treaties among different governmental branches).

217. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 213–14 (1987).

218. Civil and Political Covenant, *supra* note 4, art. 9(1), 999 U.N.T.S. at 175, 6 I.L.M. at 371.

219. *See* Rose v. Lundy, 455 U.S. 509, 515–20 (1982) (reviewing legislative history of habeas statutes and policies underlying exhaustion doctrine); *cf.* McCleskey v. Zant, 111 S. Ct. 1454, 1461–71 (1991) (tracing historical development of habeas writ and determining standard for abuse).

the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision."[220]

Article 9 unquestionably involves the rights of defendants and the duties of government officials. Whether the Covenant itself covers a subject requiring legislative action is an interesting question. Witnesses told the Senate Foreign Relations Committee that one reason the United States should ratify the Covenant was that it covered civil and political rights already guaranteed in the United States.[221] However, witnesses urged the Senate to ratify the Covenant to improve the image of the United States and to involve the U.S. government in the clarification and elaboration of Covenant norms.[222] While the Senate gave its advice and consent to the Genocide Convention[223] and the Torture Convention,[224] these treaties could not be formally ratified until Congress passed implementing legislation.[225] The U.S. government, though, did not handle the Civil and Political Covenant's ratification similarly. The instrument of ratification was deposited two months after the Senate gave its advice and consent, and the Covenant went into force for

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220. Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971).

221. *See International Covenant on Civil and Political Rights: Hearings Before the Senate Comm. on Foreign Relations* 102d Cong., 1st Sess. 5 (1991) (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs) (noting that Covenant's guarantees parallel those found in Western, liberal, democratic tradition); *id.* at 26 (statement of Louis B. Sohn, Chairman-Elect, ABA Section on International Law and Practice) (declaring that Covenant's freedoms are consistent with Bill of Rights).

222. *International Covenant on Civil and Political Rights: Hearings Before the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 4–7 (1991) (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs); David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 77 (1993).

223. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). The Senate gave its advice and consent in 1986. 132 CONG. REC. S1377 (daily ed. Feb. 19, 1986).

224. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 23 I.L.M. 1027 (1984), *as modified*, U.N. Doc. A/39/5124, 24 I.L.M. 535 (1984) (entered into force June 26, 1987). The Senate has given its advice and consent to the Torture Convention. 136 CONG. REC. S1748601 (daily ed. Oct. 27, 1990). The United States recently ratified this convention on October 21, 1994. Telephone Interview with the Treaty Office, Department of State (Apr. 5, 1995).

225. David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 78 nn.5 & 6 (1993).

the United States in September 1992.[226] As of this writing, no implementing legislation is planned or is presently before the congressional judiciary committees.[227]

Arguably, discretion was not left to state parties in applying most of Article 9's provisions. However, the United States made specific reservations to several provisions: not to further restrict First Amendment rights;[228] to retain the right to impose the death penalty, even on juveniles, though not on pregnant women;[229] and to limit U.S. obligations under Article 7, which forbids cruel, inhuman, or degrading treatment or punishment, to U.S. court interpretations under the Fifth, Eighth and Fourteenth Amendments.[230] A reservation was also made regarding certain juvenile provisions under Articles 10 and 14.[231] The United States also made a reservation allowing defendants to be sentenced to a penalty applicable at the time the offense was committed, while the Covenant mandates imposing subsequently enacted, lighter penalties.[232]

Aside from the understanding concerning the Article 9(5) right to compensation,[233] the Senate adopted other understandings related to Covenant provisions on equal protection and discrimination, the mix of prison populations, the federalism issue, and certain rights of criminal defendants.[234] The fourth understanding, which deals with rights of criminal defendants, fails to address arbitrary arrests or detentions.[235] Neither the instrument of ratification

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226. *Id.* at 77 n.1.

227. Theoretically, litigants could have raised Article 9 as evidence of customary law or as binding on the government after President Carter signed the treaty in 1977. However, such a tactic would have failed. *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 579 (1990) (noting that "U.S. courts have not applied Article 18 [of the Vienna Convention, which requires that signatories who have yet to ratify must not defeat the object and purpose of the treaty,] to treaties the U.S. has signed but not ratified," but instead "they have looked to them as evidence of customary law or as aids in interpreting provisions of U.S. law").

228. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (reservation number one).

229. *Id.* (reservation number two).

230. *Id.* (reservation number three).

231. *Id.* (reservation number five).

232. 138 CONG. REC. S4783 (daily ed. Apr. 7, 1992) (reservation number four).

233. *Id.* (understanding number two).

234. *Id.* at S4783–84 (understandings one, three, four, and five).

235. *Id.* (understanding number four). The fourth understanding states:

> That the United States understands that subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the de-

nor the Senate debate refer to abductions, *Ker-Frisbie*, or Article 9 in general.[236]

The Senate also adopted four declarations and one proviso, three of which arguably are relevant to the discretion analysis. Besides the non-self-execution declaration,[237] the Senate declared:

> That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, Article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to Article 19, paragraph 3, which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.[238]

U.S. courts should reconsider *Ker-Frisbie* as a limitation on rights granted under Article 9 because the United States requests that all signatories not limit Covenant rights, even when the Covenant permits a limitation.[239] The travaux preparatoires concerning Article 9's drafting do not mention or discuss international abductions.[240] The drafters were concerned about the meaning of "arbi-

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fendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause. *Id.*

236. 138 CONG. REC. S4783–84 (daily ed. Apr. 2, 1992).

237. *Id.* at S4784 (declaration number one).

238. *Id.* (declaration number two).

239. *See International Covenant on Civil and Political Rights: Hearings Before the Senate Comm. on Foreign Relations*, 102d Cong., 1st Sess. 47 (1991) (statement of Louis B. Sohn, Chairman-Elect, ABA Section on International Law and Practice) (advocating ratification to expand rights to include those embodied in Covenant); *id.* at 63 (statement of Michael H. Posner, Executive Director, Lawyers Committee for Human Rights) (welcoming increased protection of rights).

240. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 187–221 (1987).

trary" in the second sentence of Article 9(1) and whether the second and third sentences of that provision were redundant if arbitrary meant only contrary to national law.[241]

The United Nations Human Rights Committee (HRC), which interprets the provisions of the Covenant globally, held that abductions of people from Argentina and Brazil to Uruguay constituted arbitrary arrests and detentions violating Article 9(1).[242] The United States has not ratified the Optional Protocol,[243] which permits HRC adjudication of individual petitions after exhaustion of domestic remedies,[244] but the United States did accept the HRC's competence to adjudicate state-by-state complaints.[245] Indeed the United States ratified the Covenant to impact the HRC's development and interpretation of human rights law.[246] While U.S. courts would not cite the two HRC cases as binding authority, they could rely on those decisions as persuasive authority in judging whether a *Ker-Frisbie*-type situation violated Article 9(1) and required judicial intervention under Article 9(4). The non-self-executing declaration, ironically, may impede the ability of the United States to

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241. *Id.* at 197.

242. *Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 176, U.N. Doc. A/36/40 (1981) (the *Lopez* complaint). Uruguayan security and intelligence forces, aided by Argentine paramilitary groups, abducted a trade unionist recognized by the HRC as a political refugee in Buenos Aires and secretly detained him for two weeks before sending him to Uruguay, where he was held incommunicado for three months before a formal arrest. *Id.* at 176–77. The HRC decided in part that Uruguay violated Article 9(1) "because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention" and that it should immediately release him, grant him compensation, and grant him permission to leave Uruguay. *Id.* at 183. In a separate case, Uruguayan agents and two Brazilian police officials seized a woman of Uruguayan and Italian descent and held her in her apartment for a week before driving her to Uruguay for further detention. *Id.* at 185–86 (the *Celiberti* complaint). The HRC held in part that her abduction into Uruguayan territory was an arbitrary arrest and detention in violation of Article 9(1). *Id.* at 188. The HRC viewed the best solution as her immediate release, an award of compensation, and permission to leave Uruguay. *Id.*

243. *See* John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 62 (1993) (reporting that 67 countries had acceded to Optional Protocol).

244. Optional Protocol to the International Covenant on Civil and Political Rights, arts. 2, 5, 999 U.N.T.S. 302, 302–03, 6 I.L.M. 383, 383–84 (1967) (entered into force Mar. 23, 1976).

245. 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992) (understanding three).

246. David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77, 77 (1993).

contribute to the evolution of human rights norms if the Covenant cannot be litigated in domestic courts.[247]

The ratification's legislative history also contains unrebutted remarks by Senator Daniel Patrick Moynihan (D-N.Y.), made on the Senate floor during the debate immediately preceding ratification, in which he stated that no one should assume "that a vote for the [C]ovenant is equivalent to acquiescence in any particular domestic practice."[248] He concurred that the Covenant was non-self-executing, but noted that "these will now become binding international obligations of the United States."[249] Senator Moynihan urged his fellow senators to ratify the treaty though they might disagree with some parts of the Administration's package of reservations, understandings, and declarations.

> The administration has not taken a blanket, or catchall reservation. It has not said that our domestic practices, wherever they differ from the [C]ovenant, are always superior. Rather, it has undertaken a meticulous examination of U.S. practice to insure that the United States will in fact comply with the obligations that it is assuming. This can certainly be viewed as an indication of the seriousness with which the obligations are regarded rather than as an expression of disdain for the obligations.[250]

Finally, the non-binding proviso by Senator Jesse Helms (R-N.C.), which is not contained in the actual instrument of ratification, states that the Covenant does not authorize legal changes prohibited by the Constitution.[251] The government cannot use the treaty power in a way that violates the Constitution, at least when the subject touches on individual rights.[252] Even if the proviso is binding, it does not limit the discretion of U.S. courts to find that the Covenant disfavors *Ker-Frisbie* because the Constitution does not prohibit divesting domestic court jurisdiction when a defendant is abducted.

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247. Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 532 (1991) (noting that, "if U.S. courts do not apply international treaties, then they lose the opportunity to contribute constructively to the evolution of international practice").

248. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

249. *Id.*

250. *Id.*

251. *Id.* at S4784.

252. *See* Reid v. Covert, 354 U.S. 1, 15–19 (1957) (plurality) (requiring that international treaties comport with Constitution).

U.S. courts can find that Articles 9(1) and 9(4) are self-executing clauses of the Covenant[253] unless, prior to such a finding, the government introduces implementing legislation related to extraterritorial abductions. However, legislation codifying *Ker-Frisbie* may violate the U.S. declaration on restricting Covenant rights and might also violate Article 5,[254] if not Articles 2(2) and 2(3).[255]

In another line of treaty cases relevant to the abduction problem, courts have found treaties self-executing without those instruments creating individual rights per se,[256] even though the subject involved criminal offenses.[257] *United States v. Noriega*[258] discussed the need for specific mention of divestiture of jurisdiction in a treaty,[259] but the district court was only partially correct. American courts will vitiate a prosecution when some treaties are violated without specific mention of whether the treaties are self-executing.[260]

In *Cook v. United States*,[261] for example, the Supreme Court dismissed two libels against the *Mazel Tov* and its cargo because the Coast Guard had seized the vessel in violation of a treaty.[262] The

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253. *See Saipan*, 502 F.2d at 97–98 (ruling that rights in trusteeship agreement were judicially enforceable because enforcement did not require domestic innovations and obstacles with alternative forum that made rights practically unenforceable).

254. The Covenant states:

> 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
>
> 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Civil and Political Covenant, *supra* note 4, art. 5, 999 U.N.T.S. at 174, 6 I.L.M. at 370.

255. *See supra* note 31 and accompanying text.

256. Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 647 (1986).

257. *Id.* at 676.

258. 746 F. Supp. 1506 (S.D. Fla. 1990).

259. *Noriega*, 746 F. Supp. at 1528.

260. *See* Cook v. United States, 288 U.S. 102, 103 (1933) (dismissing libel charge because of lack of government power to seize ship and subject ship to laws); United States v. Rauscher, 119 U.S. 407, 414–15 (1886) (discussing treaty supplemented by congressional enactments, but failing to mention self-execution); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927) (noting that defendant facing extradition for one offense cannot be tried for another offense, as was decided by Court in *Rauscher*).

261. 288 U.S. 102.

262. *Cook*, 288 U.S. at 120–21.

1924 treaty between Great Britain and the United States permitted the United States to board and seize a private British ship off the U.S. coast, beyond U.S. territorial waters, if the ship was within one hour's sailing of the coast and the vessel's crew was attempting to import alcoholic beverages into the United States.[263] The treaty superseded congressional legislation that authorized the Coast Guard to search and seize vessels within twelve miles of the U.S. coast.[264] The Court stated:

> [T]he Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. . . . Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.[265]

Divesting court jurisdiction upholds the principle that an arrest which violates a treaty or some principle of international law has no legal effect[266] and seemingly satisfies the immediate release criterion of Article 9(4). Indeed, before the ratification of the Covenant, many commentators indicated that divesting jurisdiction was the only practical remedy to control such practices and to provide adequate relief.[267] While it is unlikely that U.S. courts will divest jurisdiction in view of the Senate declaration, precedent does not bind courts to follow the *Restatement* view that Senate or executive action precludes a finding that Article 9 of the Covenant is self-executing.

C. *Remedies*

To avoid defaulting on its international obligations under the Civil and Political Covenant, the United States could void the *Ker-Frisbie* rule as it applies to the abduction of putative defendants overseas or provide those abducted with some sort of judicial rem-

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263. *Id.* at 109–11.

264. *Id.* at 107, 118–19.

265. *Id.* at 121–22.

266. Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 274 (1952).

267. Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427, 437–38, 446 (1957); Felice Morgenstein, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 276–77 (1952).

edy, either through a writ of habeas corpus or a civil tort action.[268] The former approach must depend on the Covenant, most probably Article 9, because previous constitutional and prudential arguments aimed at weakening *Ker-Frisbie* have failed.[269] Importantly, under American law, an illegal arrest does not void a subsequent conviction.[270]

Certainly, the norm of "liberty and security of person" in Article 9(1) is ambiguous on its face.[271] However, the following clause is more specific, stating that "[n]o one shall be subjected to arbitrary arrest or detention."[272] Additionally, the last sentence of Article 9(1) is instructive: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[273]

The United States could argue that extraterritorial abductions do not run afoul of Article 9(1) because any resulting deprivation of liberty accords with legal procedures. The Federal Bureau of Investigation's right to arrest persons overseas is considered legal under domestic law,[274] and the practice of nations is not considered sufficiently precise to controvert this right in customary international law.[275] However, if a U.S. court finds that the intent behind the adoption of Article 9(1) was to prescribe a rule against extra-

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268. *See* Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 974–75 (1993) (asserting that proposals should focus on divestiture of court jurisdiction, at least when treaty and foreign protest are involved, rather than rely on tort actions); *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 166 (1992) (statement of Steven M. Schneebaum, Director of International Human Rights Law Group) (stating that "[t]he only appropriate judicial remedy for an illegal abduction is repatriation").

269. *See* discussion *infra* Part II(B).

270. *See* Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (recognizing established rule that detention or illegal arrest does not void subsequent conviction).

271. Civil and Political Covenant, *supra* note 4, art. 9(1), 999 U.N.T.S. at 175, 6 I.L.M. at 371.

272. Civil and Political Covenant, *supra* note 4, art. 9(1), 999 U.N.T.S. at 175, 6 I.L.M. at 371.

273. Civil and Political Covenant, *supra* note 4, art. 9(1), 999 U.N.T.S. at 175, 6 I.L.M. at 371.

274. *See FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 2–8 (1989) (statement of William P. Barr, Assistant Attorney General) (commenting that 1989 OLC opinion offered analysis of FBI's authority to extraterritorially arrest individuals under domestic law).

275. *See* discussion *infra* Part II(A).

territorial abductions, enforceable by private individuals, then Article 9(1) could be considered self-executing, and an illegal arrest overseas could void the entire prosecution.

The United States could also argue that the kidnapping occurred outside its territory and, therefore, the Covenant was not violated, though the deprivation of liberty may not accord with international legal procedures. Two arguments counter this position. First, the HRC specifically found against such a position in both *Lopez* and *Celiberti* because the abductions "were perpetrated by Uruguayan agents acting on foreign soil."[276] Second, Article 5[277] and the Senate's second declaration[278] support the United States's intention that the Covenant should not be weakened by finding lesser obligations.[279]

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276. *Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 182, U.N. Doc. A/36/40 (1981) (the *Lopez* complaint). The HRC said that Article 1 of the Optional Protocol ("individuals subject to its jurisdiction") and Article 2(1) of the Covenant ("individuals within its territory and subject to its jurisdiction") were no bar to admissibility. *Id.*; *id.* at 188 (the *Celiberti* complaint). The United States is not a party to the Optional Protocol. The HRC explained the jurisdictional solution:

> 10.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.
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> 10.3 Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. . . . In line with this, it would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

Id. (emphasis added).

277. *See supra* note 254.

278. 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

279. Christian Tomuschat wrote separately in *Lopez* and *Celiberti*, asserting that the HRC's holding was too broad. Tomuschat wrote that Article 5 could not extend the scope of the Covenant, but in these two cases the Covenant did "not even provide the pretext for a 'right' to perpetrate" the abductions and detentions. *Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 189, U.N. Doc. A/36/40 (1981). He continued:

Article 9(4) requires that an individual deprived of liberty by any arrest or detention is entitled to court proceedings where he can challenge that detention "in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[280] American practice does not exactly correspond to this provision, and the Senate made no reservation, understanding, or declaration precisely on point. Arrestees in the United States are entitled to either state or federal habeas corpus proceedings. However, federal habeas review, as judicially construed in recent years, is increasingly procedural in nature and is unlikely to be resolved in the defendant's favor.[281] An abductee will most certainly want to raise his *Ker-Frisbie* challenge in pretrial proceedings, but a writ of habeas corpus, if issued, probably

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To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad. Consequently, despite the wording of article 2(1), the events which took place outside Uruguay come within the purview of the Covenant.

Id.

280. Civil and Political Covenant, *supra* note 4, art. 9(4), 999 U.N.T.S. at 176, 6 I.L.M. at 371.

281. *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) (discerning no inequity in requiring client to bear risk of lawyer error that results in procedural default); Smith v. Murray, 477 U.S. 527, 538–39 (1986) (holding that enforcing procedural default rules is not "fundamentally unfair"); Murray v. Carrier, 477 U.S. 478, 487 (1986) (resting procedural default standard on need to deter intentional defaults); Wainwright v. Sykes, 433 U.S. 72, 9091 (1977) (stating that "cause and prejudice" standard affords adequate guarantees to defendants for federal constitutional claims); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2091 (1992) (relating that Congress provides guidelines for federal appellate review); Yale L. Rosenberg, *Kaddish For Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 371 (1991) (explaining impact of recent federal habeas corpus decisions).

could not be obtained until after his appeals are exhausted.[282] In any event, whether an abductee challenges his illegal arrest before, during, or after trial, the abductee will not obtain relief or release as long as the *Ker-Frisbie* doctrine is valid because the detention will not be ruled unlawful. On collateral review, a challenge to *Ker-Frisbie* will not be considered on the merits because its rejection would constitute a new rule under habeas retroactivity jurisprudence.[283] Note that the HRC considers an immediate release of the prisoners, as well as compensation, to be an international obligation of the detaining government.[284]

The *Ker-Frisbie* rule allows the abductee to sue his abductors in tort for kidnapping or false imprisonment. The Senate understanding to Article 9(5)'s requirement of an "enforceable right to compensation"[285] states that the U.S. obligation is only to provide the opportunity to seek recovery.[286] However, this understanding, in the context of extraterritorial abductions, arguably thwarts the object and purpose of Article 9.[287] Suits against federal law enforcement agents[288] appear to be barred under immunity doctrines, as law enforcement agents may argue that these extraterritorial arrests were lawful as outlined in the Department of Justice memo-

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282. *See* Rose v. Lundy, 455 U.S. 509, 522 (1982) (requiring dismissed of habeas petitions with exhausted and unexhausted claims); *cf.* McCleskey v. Zant, 499 U.S. 467, 477–93 (1991) (applying abuse of writ doctrine in denying habeas relief).

283. *See* Teague v. Lane, 489 U.S. 288, 294–99 (1989) (refusing to apply new rule of criminal procedure on collateral review); *see also* Saffle v. Parks, 499 U.S. 484, 494–95 (1990) (denying relief sought under new rule because relief did not apply on collateral review); Butler v. McKellar, 494 U.S. 407, 415–16 (1990) (rejecting application of new rule on collateral review because of failure to fall within recognized exceptions); Penry v. Lynaugh, 492 U.S. 302, 313–14 (1989) (discussing retroactivity exceptions).

284. *See Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 188, U.N. Doc. A/36/40 (1981) (desiring to prevent similar violations in future).

285. Civil and Political Covenant, *supra* note 4, art. 9(5), 999 U.N.T.S. at 176, 6 I.L.M. at 371.

286. 168 CONG. REC. S4783 (daily ed. Apr. 2, 1992) (understanding number two).

287. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691–92 (1969) (entered into force Jan. 27, 1980) (declaring that treaty shall be interpreted in good faith and terms shall have meaning given context and in light of treaty's objects and purposes).

288. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389–90 (1971) (alleging damages for humiliation and mental suffering following search and arrest).

randum.[289] The abductee's suit probably would not survive the government's motion for summary judgment. Suits against private individuals, such as bounty hunters, may face other difficulties. For example, *Jaffe v. Snow*[290] shows that state courts may not grant recognition and enforcement to a foreign civil judgment against private abductors when the state's public policy is offended because a fugitive is suing.[291]

The abductee can also attempt to have his government raise the abduction before the U.N.'s Security Council or the Economic and Social Council (ESC). The United States, however, did not ratify the Optional Protocol to the Covenant, so an abductee cannot lodge an individual complaint with the HRC as was done in the *Lopez* and *Celiberti* cases. Under ESC Resolutions 1235 and 1503, the HRC may investigate government violations of the Covenant in confidential or public sessions.[292] One abduction is insufficient to trigger those procedures, which require a showing of "a consistent pattern of gross and reliably attested [human rights] violations."[293] An aggrieved foreign government raising an abduction before the U.N. human rights system undoubtedly will have protested to the United States government.

Recourse to international fora, such as the HRC or the Inter-American Commission on Human Rights, also requires that all domestic remedies be exhausted.[294] This exhaustion requirement does not provide a quick proceeding facilitating immediate release,

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289. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 95–96 (1992) (statement of Rep. Edwards) (detailing Attorney General's reluctance to produce Office of Legal Counsel memorandum).

290. 610 So. 2d 482 (Fla. Dist. Ct. App. 1992), *review denied*, 621 So. 2d 432 (Fla. 1993), *cert. denied*, 114 S. Ct. 2724 (1994).

291. *Jaffe*, 610 So. 2d at 487.

292. *See* E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8–9, U.N. Doc. E/4832 (1970) (providing for confidential review); E.S.C. Res. 1253, U.N. ESCOR, 42d Sess., Supp. No. 1, at 17–18, U.N. Doc. E/4393 (1967) (detailing public proceedings). *See generally* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 101–143 (outlining background, development, and procedures contained in ECOSOC Resolutions 1235 and 1503).

293. E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832 (1970); *see also* THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 68–72 (1988) (discussing ESC procedures related to human rights investigations).

294. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 2, 5(4), 999 U.N.T.S. 302, 6 I.L.M. 383–84 (entered into force Mar. 23, 1976).

and decisions by these bodies need not be obeyed by the United States. Therefore, international adjudication of international kidnapping would not be considered an effective remedy. Governments that have ratified the Covenant are required to provide an effective remedy for those whose Covenant rights are violated.[295]

As long as the U.S. practice of extraterritorial abductions is valid under the *Ker-Frisbie* rule and judicial relief is only a theoretical possibility—because of the Senate understanding on Article 9(5) and the fact that the theoretical availability of habeas proceedings or a civil tort suit often will not provide a meaningful remedy—the United States may be in violation of its international obligations under the Covenant.

IV. POLICY CONSIDERATIONS

U.S. Secretary of State Warren Christopher recently told the World Conference on Human Rights in Vienna, Austria, that, in the effort to expand democracy and human rights in the post-Cold War world, "words matter, but what we do matters much more."[296] The conference declaration stressed, in non-binding language, that democracy, development, and respect for human rights are "interdependent and mutually reinforcing" goals.[297]

A government policy permitting the kidnapping of defendants on foreign soil for trial within the United States thwarts the goal of promoting human rights. Continued adherence to *Ker-Frisbie* raises an issue whether the means justify the ends, especially given the competing concerns of doing justice, punishing wrongdoers, and enhancing respect for the rule of law.[298] Concern over *Ker-Frisbee* is not simply an attack of moralism. The practice of kid-

295. *See* Civil and Political Covenant, *supra* note 4, art. 2(3)(a), 999 U.N.T.S. at 173, 6 I.L.M. at 369 (providing that each signatory "undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity").

296. Warren Christopher, Address Before the World Conference on Human Rights (June 21, 1993), *in* 4 DEP'T ST. DISPATCH (no. 25) 441 (1993).

297. Vienna Declaration and Programme of Action, U.N. GAOR, at 5, U.N. Doc. A/Conf.157/23 (1993).

298. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 127, 181 (1974); Fred C. Pedersen, Note, *Due Process Rights of Foreign National Defendant Abducted from Native Country by Federal Agents*, 7 U. TOL. L. REV. 723, 752–53 (1976).

napping defendants should concern a country that purports to put great stock in rules of law at home and abroad.[299]

When a case involves an abduction from a foreign country, the defendant is left without an effective remedy in U.S. courts. Statements from the Bush Administration promising interagency review before engaging in extraterritorial arrests suggest some debate between means and ends.[300] Professor Bassiouni emphasized that kidnapping defendants involves three separate violations: disrupting world public order, infringing on another nation's sovereignty and territoriality, and violating the human rights of defendants.[301] The *Ker-Frisbie* rule ignores all these violations.

A nineteenth century expert on democracy, Alexis de Tocqueville, noted that Americans were a practical people whose idealism was "self-interest properly understood."[302] This perceptive historian's apt phrase offers an old prism through which to view the debate on enforcing international law in national courts:

> The doctrine of self-interest properly understood does not inspire great sacrifices, but every day it prompts some small ones; by itself it cannot make a man virtuous, but its discipline shapes a lot of orderly, temperate, moderate, careful, and self-controlled citizens. If it does not lead the will directly to virtue, it establishes habits which unconsciously turn it that way.[303]

Though de Tocqueville was speaking of private pursuits, substitution of the word "nations" for "man" and "citizens" suggests that disciplined behavior in the international arena may lead to a more stable world order.

The U.S. practice of international abduction is a self-interest that could alienate allies and endanger international efforts to control international criminal activity.[304] Such a practice could also endan-

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299. Fred C. Pedersen, Note, *Due Process Rights of Foreign National Defendant Abducted From Native Country by Federal Agents*, 7 U. TOL. L. REV. 723, 748 (1976).

300. *See supra* note 8.

301. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 124 (1974) (noting that kidnapping and abduction occurs when nation's agent purports to act within law, yet unlawfully seizes person without consent).

302. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 525–28 (J. Mayer ed., 1969).

303. *Id.* at 527.

304. *See* 138 CONG. REC. S14123 (daily ed. Sept. 18, 1992) (statement of Sen. Moynihan) (referencing remarks of Michael Abbell, former Justice Department lawyer and expert on extradition law). Senator Moynihan stated:

ger Americans living abroad and at home.[305] For example, Iran indicated interest in seizing an American military officer in the wake of disclosure of the Federal Bureau of Investigation's authority to make arrests overseas.[306] Perhaps new treaties and international arrangements will eliminate the perceived need for the *Ker-Frisbie* rule as international cooperation in law enforcement increases.[307]

American courts divesting jurisdiction over abducted defendants could strengthen respect for international law in general and the Civil and Political Covenant in particular. Though national courts in other countries have followed the *Ker-Frisbie* precedent, they would most likely not continue to do so if the United States abandoned the rule. Courts probably would signal their governments that respect for law extends beyond national borders.

V. CONCLUSION

Extraterritorial abductions of criminal defendants by U.S. agents or private persons has not been an obstacle to prosecution in U.S. courts for more than a century. The *Ker-Frisbie* rule, however, is not on solid ground, even after the Supreme Court's recent decision in *United States v. Alvarez-Machain*,[308] because of the U.S. government's subsequent ratification of the International Covenant on Civil and Political Rights. Though a prohibition against forcible abductions may have weakened over the years as a cus-

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> Not only is the position of the administration and of the Supreme Court legally and morally wrong, but, ironically it is also antithetical to the long-term law enforcement interests of the United States. . . . [T]he decision to embrace kidnapping is harmful to law enforcement, not helpful. It will not assist the United States in combatting crime. On the contrary, it will diminish the very international cooperation against crime which is essential to success against drug traffickers and other criminals.

Id.

305. *See* Randall L. Sarosdy, Comment, *Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate*, 54 TEX. L. REV. 1439, 1469–70 (1976) (addressing various other considerations in international kidnapping).

306. *See* Ed Blanche, *Iran Threatens to Arrest U.S. Citizens Anywhere: Parliament Says Its New Law Answers American Terrorism*, AKRON BEACON J., Nov. 2, 1989, at A3 (finding that Iranian radicals saw U.S. action aimed at Iran).

307. *See* Fred Strasser, *Crime Has No Borders, So Countries Close Ranks*, NAT'L L.J., Oct. 30, 1989, at 1 (explaining need for integration of world's law enforcement measures to effectively curb transnational crime).

308. 112 U.S. 2188 (1992).

tomary norm of international law, American courts are bound by treaty law, and Article 9 of the Covenant addresses the problem.

Courts throughout the world will revisit *Ker-Frisbie* practices as countries prosecute international crimes, such as terrorism and drug trafficking. The question for the American judiciary is whether Article 9's prohibition of arbitrary arrests and detentions can be considered a self-executing provision which in turn demands that courts divest jurisdiction over abductees or permit them compensation. Legal rules supporting a right to kidnap persons in foreign countries are inimical to international peace and security. Individuals are considered fit subjects of international law at the end of the twentieth century.[309] Rather incongruously, individuals in the world's premier democracy lack a viable remedy in American courts for such a violation of international law. Habeas petitions and civil tort suits provide only theoretical relief to most abductees. Troublesome too, and likewise calling for re-evaluation of *Ker-Frisbie* in the United States, is the fact that the doctrine is used principally against Latin Americans, and not Europeans.[310]

However, the judiciary most likely will not entertain these policy considerations, deferring instead to the wishes of the executive and legislative branches. The political branches sought ratification of the Civil and Political Covenant on the assumption that it would be a non-self-executing treaty unavailable for domestic implementation in piecemeal litigation. To fulfill our international obligations under the Covenant, all branches of the U.S. government should re-examine the desirability of international abductions. In appropriate cases, federal judges need not hesitate to find self-executing language in Article 9 and rule that extraterritorial governmental kidnapping violates the law.

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309. *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 163 (1992) (statement of Steven M. Schneebaum, Director, International Human Rights Law Group); Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After* Alvarez-Machain, 45 STAN. L. REV. 939, 967–68 (1993); Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746, 754 (1992).

310. *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 89 (1992) (statement of Rep. Washington).