

# COMMENT

## Extraterritorial Abduction: The Endangerment of Future Peace\*

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\* The title of this Comment is derived from President Roosevelt and Prime Minister Churchill's 1941 Atlantic Charter, which stated: "[the nations party to this Charter] believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. . . . [N]o future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers."

## INTRODUCTION

On July 15, 1993, FBI agents abducted a Palestinian in Nigeria and transported him on a U.S. government plane to Washington, D.C.<sup>1</sup> The Palestinian, Omar Mohammed Ali Rezaq, had hijacked an Egypt Air flight from Athens to Cairo in 1985.<sup>2</sup> During the hijacking, Rezaq shot three passengers, killing one American and injuring another.<sup>3</sup> Rezaq was captured in Malta, where the plane had stopped for refueling. A Maltese court subsequently convicted him and sentenced him to twenty-five years' imprisonment.<sup>4</sup> However, allegedly under pressure from Libya, Malta released Rezaq, who then fled to Ghana.<sup>5</sup> A U.S. court issued a warrant for his arrest.<sup>6</sup>

U.S. authorities then devised a plan for Ghanaian authorities to transport Rezaq to Nigeria.<sup>7</sup> The United States likely chose Nigeria because it was undergoing violent political upheaval at that time.<sup>8</sup> The chaos may have made Rezaq's abduction less visible and the Nigerian government less able to contest it.<sup>9</sup> When Rezaq arrived in Lagos, Nigerian officials refused him entry.<sup>10</sup> FBI officials then abducted Rezaq and put him on a plane to the United States.<sup>11</sup> The operation was carefully planned; reports have indicated that the Clinton Administration promised not to seek the death penalty for Rezaq in exchange for diplomatic cooperation among the sev-

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<sup>1</sup> *FBI Arrests Hijacker in Nigeria*, S.F. CHRON., July 16, 1993, at A10 [hereafter *Hijacker*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *Nigeria: Soldiers Deployed to Quell Fresh Riots*, Inter Press Serv., July 8, 1993, available in LEXIS, NEXIS Library, Wires File (describing political violence taking place in Nigeria beginning July 5, 1993); *Nigeria: Armed Forces Control Lagos Streets*, Inter Press Serv., July 7, 1993, available in LEXIS, NEXIS Library, Wires File; *Nigeria: Political and Civil Unrest*, Reuter Textline: Lloyds List, July 8, 1993, available in LEXIS, World Library, Textline & Key NEXIS Sources File.

<sup>9</sup> See *infra* notes 100-03 and accompanying text (explaining significance of consent in evaluating extraterritorial abduction).

<sup>10</sup> *Hijacker*, *supra* note 1.

<sup>11</sup> *Id.*

eral nations involved in the extraterritorial abduction.<sup>12</sup> Regarding this operation, an unidentified U.S. government official declared, "It's a great day in the international fight against terrorism."<sup>13</sup>

Before his inauguration, President Clinton appeared to disagree with the Reagan and Bush Administrations' exercise of extraterritorial abduction.<sup>14</sup> In reaction to *United States v. Alvarez-Machain*,<sup>15</sup> the most recent extraterritorial abduction case the U.S. Supreme Court has considered, Clinton declared that the Court had

[gone] way too far . . . . The Supreme Court ruled that unless the [extradition] treaty explicitly forbids it, our country was free to go into Mexico or into any other country that we had a similar treaty with and take someone out. My own opinion is that that is too broad a policy for our country to have.<sup>16</sup>

However, Rezaq's abduction indicates that the Clinton Administration intends to continue the Reagan and Bush Administrations' policy of authorizing extraterritorial abductions<sup>17</sup> to enforce U.S. law.

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<sup>12</sup> *U.S. Won't Seek Death Penalty for Hijacking; Suspect Denied Bail*, 7 AIR SAFETY WK., Aug. 9, 1993; Stephen Engelberg, *Hijacker's Arrest Laid to Diplomacy*, N.Y. TIMES, July 17, 1993, at 3; *Hijacker*, *supra* note 1.

<sup>13</sup> *Hijacker*, *supra* note 1.

<sup>14</sup> *Clinton Objects to Ruling on Extradition Treaty*, S.F. CHRON., Dec. 16, 1992, at A5 [hereafter *Clinton Objects*].

<sup>15</sup> 112 S. Ct. 2188 (1992); *see infra* notes 178-82 and accompanying text (discussing *Alvarez-Machain*).

<sup>16</sup> *Clinton Objects*, *supra* note 14.

<sup>17</sup> Extraterritorial abduction occurs when one nation's agents enter another nation to seize an individual suspected of committing a crime against the abducting nation or its citizens. *See* Stephen Engelberg, *U.S. Says France Missed Chance to Seize Beirut Hijacking Suspect*, N.Y. TIMES, Mar. 14, 1986, at A1 (U.S. Secretary of State George P. Shultz describes extraterritorial abduction as use of "moderate force . . . to abduct and bring before American courts suspects"). The abducting nation usually seizes the individual so that she may stand trial there. *Id.* Recently, the U.S. government was a party to two highly-publicized cases that involved extraterritorial abduction. *See infra* notes 178-82 and accompanying text (discussing *Alvarez-Machain*); *infra* notes 183-94 and accompanying text (discussing *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990)). In *Alvarez-Machain* and *Noriega*, U.S. government agents abducted defendants from territories of other nations and brought them back to the United States for trials in U.S. courts. *See infra* notes 178-82 and accompanying text (discussing *Alvarez-Machain*); *infra* notes 183-94 and accompanying text (discussing *Noriega*).

The issue of jurisdiction lies at the heart of any discussion on extraterritorial abduction. *See infra* (examining jurisdiction and extraterritorial abduction). If the abducted individual does not make a jurisdictional challenge, the question of authority for abduction does not arise. *See Alvarez-Machain*, 112 S. Ct. at 2190 (presenting defendant's jurisdictional challenge to his abduction

and Court's rejection of it); *Noriega*, 746 F. Supp. at 1509 (presenting defendant's jurisdictional challenge to indictment). In fact, the traditional U.S. doctrine regarding extraterritorial abduction derives from two cases in which the defendant challenged jurisdiction. See *Ker v. Illinois*, 119 U.S. 436 (1886) (establishing *Ker-Frisbie* doctrine); *Frisbie v. Collins*, 342 U.S. 519 (1952) (affirming *Ker-Frisbie* doctrine); see also *infra* notes 152-77 and accompanying text (explaining *Ker*, *Frisbie*, and doctrine in detail).

The legality of extraterritorial abduction is essential to determine whether U.S. courts have jurisdiction to try a foreign national brought to the United States. D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1 (1988) (discussing relevance of jurisdiction to extraterritorial abduction). In the aftermath of *Alvarez-Machain*, some commentators insist that the case did not condone extraterritorial abduction. Michael J. Glennon, *Agora: International Kidnaping: State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 748 (1992); Malvina Halberstam, *Agora: International Kidnaping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736, 736 (1992). They contend that *Alvarez-Machain* only reiterated the principle that a defendant cannot successfully raise a jurisdictional challenge based on the illegality of her abduction. Glennon, *supra*, at 750; Halberstam, *supra*, at 736-37. However, considering the inseparable connection between jurisdiction and extraterritorial abduction, and the outraged reaction of the international community, this may not be a meaningful distinction. See *supra* (discussing connection between jurisdiction and extraterritorial abduction). Furthermore, both the media and foreign governments have interpreted the decision as an approval of extraterritorial abduction. See, e.g., Halberstam, *supra*, at 736 n.4 (listing numerous newspaper articles referring to Supreme Court's ruling "upholding the United States's [sic] right to kidnap a criminal suspect"); see also *infra* notes 215, 223-24 and accompanying text (discussing reaction of Mexican and Canadian governments to *Alvarez-Machain* case).

Two types of jurisdiction are at issue in extraterritorial abduction: prescriptive jurisdiction and enforcement jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV introductory note at 230-31 (1987) [hereafter RESTATEMENT]. Prescriptive jurisdiction gives a nation authority to apply its substantive laws to particular persons and circumstances. *Id.* Enforcement jurisdiction gives a nation authority to enforce its laws. *Id.* Five traditional principles grant nations authority to exercise prescriptive jurisdiction over crimes. *Id.* § 402. The first, territorial jurisdiction, depends on the place where the individual commits the offense. *Id.* The second, national jurisdiction, hinges upon the nationality of the offender. *Id.* The third, protective jurisdiction, concerns whether the crime impairs a government function. *Id.* The fourth, universal jurisdiction, depends on whether the offense is particularly heinous and harmful to humanity. *Id.* § 404. If so, the forum that obtains physical custody of the suspect has jurisdiction. *Id.* The fifth, passive personality jurisdiction, stems from the nationality of the victim. *Id.* § 402. See also JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 193-200, 224-26 (9th ed. 1984) (explaining jurisdictional concepts in greater detail).

The Clinton Administration may have found support for its decision to utilize extraterritorial abduction in two recent developments. First, judicial decisions like that in *Alvarez-Machain* implicitly approve of extraterritorial abduction.<sup>18</sup> Second, an advisory opinion produced by the Office of Legal Counsel<sup>19</sup> in 1989 concluded that the United States can extraterritorially abduct, in spite of the fact that such acts may violate international law.<sup>20</sup> Consequently, Rezaq's abduction renews the fundamental question of whether the United States should engage in extraterritorial abduction.

Rather than focusing on a specific case, this Comment analyzes extraterritorial abduction as a concept. Part I of this Comment pro-

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Two types of prescriptive jurisdiction pertain to individuals that the U.S. government commonly targets for extraterritorial abduction. See CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* 91-170 (1992) (presenting traditional bases of extraterritorial jurisdiction). The first is universal jurisdiction. *Id.* at 137-49. The second is protective jurisdiction. *Id.* at 117-24. As of yet, the entire international community does not agree that certain crimes, such as terrorism, belong to the class of universal crimes. RESTATEMENT, *supra*, § 404 cmt. a. As a result, terrorists often evade prosecution because extradition treaties are ineffective in reaching them. See *infra* note 211 (defining terrorism). Jurisdiction to prescribe laws, however, allows nations to prohibit such highly offensive crimes as slavery and war crimes through the concept of universal jurisdiction. BLAKESLEY, *supra*, at 117-22. Protective jurisdiction applies simply when a crime impairs governmental functions, so it could also aid in the prosecution of terrorism. *Id.* at 117-24, 137-49.

However, nations must have jurisdiction to enforce such laws. RESTATEMENT, *supra*, § 401. Assuming valid prescriptive jurisdiction exists, enforcement jurisdiction refers to measures that a nation may take to induce or compel compliance with its laws. *Id.* § 431. Extraterritorial abduction is not an acceptable method of law enforcement. See *id.* § 432 cmt. b (stating that nation's law enforcement officers cannot judicially enforce one nation's laws in another nation's territory without other nation's consent, including arrest and abduction of individuals in other nation).

<sup>18</sup> See *infra* notes 178-82 and accompanying text (discussing *Alvarez-Machain*); *Hijacker*, *supra* note 1 ("The techniques used have been permitted by U.S. courts in previous cases, including several in which suspected drug traffickers [e.g., *Alvarez-Machain*] were put on planes by countries anxious to avoid formal extradition procedures.").

<sup>19</sup> The Office of Legal Counsel, within the U.S. Justice Department, advises the Attorney General, the President, and executive agencies on constitutional law issues. CONGRESSIONAL QUARTERLY'S WASHINGTON INFORMATION DIRECTORY 1993-1994, at 497 (1993).

<sup>20</sup> 13 Op. Off. Legal Counsel 195 (1989) [hereafter 1989 Opinion]. See *infra* notes 197-201 and accompanying text (criticizing 1989 Opinion).

vides historical background on extraterritorial abduction.<sup>21</sup> Part II discusses how international and U.S. law currently address the issue of extraterritorial abduction.<sup>22</sup> Part III explains, from the perspectives of law and policy, why nations, and specifically the United States, should not engage in extraterritorial abduction.<sup>23</sup> Finally, Part IV contains a proposal to eliminate extraterritorial abduction.<sup>24</sup>

Specifically, this proposal recommends an international and national prohibition of extraterritorial abduction.<sup>25</sup> It also renews the call, in light of recent developments, for the creation of an international criminal court to enable individuals, as well as nations, to enforce the proposed prohibition of extraterritorial abduction.<sup>26</sup> The proposal also encourages the development of the contract doctrine of duress in the international legal sphere in order to assist U.S. and international judicial organs in determining the legality of an extraterritorial abduction.<sup>27</sup> Additionally, this Comment advocates cooperation among local law enforcement agencies to reduce the need for extraterritorial abduction.<sup>28</sup> If implemented, this comprehensive proposal will help to maintain both national and international peace and security by eliminating extraterritorial abduction and its resulting damage to the global community.

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<sup>21</sup> See *infra* notes 29-55 and accompanying text (examining historical roots of extraterritorial abduction and role of extradition treaties).

<sup>22</sup> See *infra* notes 56-194 and accompanying text (analyzing international and U.S. conventions and case law).

<sup>23</sup> See *infra* notes 202-36 and accompanying text (presenting legal and policy arguments against extraterritorial abduction from international and national perspectives).

<sup>24</sup> See *infra* notes 237-79 and accompanying text (presenting proposal to eliminate extraterritorial abduction).

<sup>25</sup> See *infra* notes 237-79 and accompanying text (presenting Comment proposal).

<sup>26</sup> See *infra* notes 252-55 and accompanying text (supporting establishment of international criminal court).

<sup>27</sup> See *infra* notes 256-64 and accompanying text (recommending incorporation of contract-law doctrine of duress into international law).

<sup>28</sup> See *infra* notes 269-79 and accompanying text (recommending cooperation among local law enforcement agencies in criminal investigation and prosecution).

## I. HISTORICAL BACKGROUND OF EXTRATERRITORIAL ABDUCTION

### A. *The Roots of Extraterritorial Abduction*

Extraterritorial abduction evolved from the international law concept of "reprisal."<sup>29</sup> A reprisal occurs when an entity forcibly takes something from another entity in satisfaction for an injury that the latter has caused the former to suffer.<sup>30</sup> Historically, private reprisals<sup>31</sup> were the customary method of law enforcement.<sup>32</sup> As modern nations increased their power, both militarily and politically, they adopted the reprisal method for themselves.<sup>33</sup> Thus, governments incorporated reprisals, including extraterritorial abduction, into their law enforcement activities.<sup>34</sup> Nations with the requisite military, economic, and diplomatic power continue to utilize extraterritorial abduction today.<sup>35</sup>

In contrast to the traditional system of national sovereignty, the United Nations<sup>36</sup> is the modern system of international govern-

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<sup>29</sup> Reprisal is distinct from restitution or retorsion, the other two common countermeasures available to a nation. See ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 4-44 (1984) (defining and discussing types of countermeasures).

<sup>30</sup> BLACK'S LAW DICTIONARY 903 (6th ed. abr. 1991). Historically, the governing authorities of a nation would approve of reprisals as a private remedy among communities within that nation. EVELYN S. COLBERT, RETALIATION IN INTERNATIONAL LAW 9 (1948). The sovereign or the sovereign's agents usually retained the right to authorize reprisals. *Id.*

<sup>31</sup> Private reprisals were reprisals that occurred between private individuals. COLBERT, *supra* note 30, at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 4, 55.

<sup>34</sup> See ZOLLER, *supra* note 29, at xiii.

<sup>35</sup> For example, the United States, a recognized global superpower, has extraterritorially abducted several times. See, e.g., *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990); *supra* notes 1-13 and accompanying text (presenting U.S. extraterritorial abduction of Rezaq from Nigeria).

<sup>36</sup> The original members of the United Nations formed the organization when they signed the U.N. Charter at The United Nations Conference on International Organization in San Francisco in 1945. NORMAN D. BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS at xx (1969). Currently, there are 159 U.N. member nations. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 1 (1991). The United Nations' stated purposes are "[t]o maintain international peace and security, . . . [t]o develop friendly relations among nations . . . , [and t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character." U.N. CHARTER art. 1, ¶¶ 1-3.

ance.<sup>37</sup> Unlike individual nations, for which domestic security is the prime concern, the United Nations' mission is international peace and security.<sup>38</sup> However, the development of the modern international system has not eliminated extraterritorial abduction. Individual nations still retain the right to use force in certain circumstances,<sup>39</sup> and this severely limits the United Nations' ability to maintain collective security and international justice.<sup>40</sup> Conse-

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<sup>37</sup> See CARTER & TRIMBLE, *INTERNATIONAL LAW* 453-73 (1991) (discussing motivation behind United Nations' creation as desire after World War II for international institution to promote and protect global peace and security; also discussing organizational structure of United Nations); see also BENTWICH & MARTIN, *supra* note 36, at ix-xxviii (discussing evolution of U.N. Charter).

<sup>38</sup> See *supra* notes 36-37 (explaining United Nations' mandate).

<sup>39</sup> The U.N. Charter authorizes nations to utilize their armed forces in self-defense if another nation initiates an armed attack. U.N. CHARTER art. 51.

<sup>40</sup> The United Nations has not placed effective restrictions upon the use of force, as reflected in the United Nations' lack of permanent armed forces under its control. INDAR J. RIKHYE ET AL., *THE THIN BLUE LINE: INTERNATIONAL PEACEKEEPING AND ITS FUTURE* 24-25 (1974). The U.N. Charter requires member nations to make available to the United Nations their armed forces, assistance, and facilities upon the formation of "special agreements" between the United Nations and member nations. U.N. CHARTER art. 43. Some dispute exists concerning the ability of the United Nations to raise a permanent standing force under its exclusive control, as opposed to the forces contributed according to the special agreements. See BENTWICH & MARTIN, *supra* note 36, at 96 (expressing view that U.N. Charter does not prohibit international force United Nations might raise on its own behalf). *But see* LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 163 (1946) (expressing view that United Nations does not have power to raise own armed forces).

The United States, the largest financial contributor to the United Nations, has been reluctant to relinquish control over the armed forces it has made available to the United Nations. *United Nations: Bush Supports Stronger U.N. Peacekeeping Efforts*, Inter Press Serv., Sept. 21, 1992, available in LEXIS, NEXIS Library, Wires File. However, in September 1992, President Bush proposed several changes to the current system of supplying the United Nations with military and financial resources. *Id.* Bush suggested that member nations create special military units that would be available on short notice for U.N. activities. *Id.* Bush also proposed coordination among member nations in the command-and-control area. *Id.* The U.N. mission in Somalia is the first in which U.S. troops have operated under U.N. command. See *A Key Question: Whose General?*, N.Y. TIMES, May 3, 1993, at A11 (citing Clinton Administration decision to place U.S. troops in Somalia under Turkish general's command); Michael R. Gordon & John H. Cushman, Jr., *Mission in Somalia; After Supporting Hunt for Aidid, U.S. Is Blaming U.N. for Losses*, N.Y. TIMES, Oct. 18, 1993, at A1 (analyzing chronology of events in Somalia up until time this Comment went to press and citing difficulties of United States in formulating policy regarding



quently, nations continue to use extraterritorial abduction when no other method to obtain justice exists.<sup>41</sup>

### B. *The Role of Extradition Treaties*

Extradition treaties provide nations with a method to avoid disputes stemming from extraterritorial abduction.<sup>42</sup> Extradition is a formal process through which one nation surrenders an individual to another nation by operation of a treaty.<sup>43</sup> Currently, the United States is a party to over 102 extradition treaties.<sup>44</sup> Significantly, however, the United States does not have extradition treaties with 56 countries, including Iran, Libya, and Syria.<sup>45</sup> Without extradition treaties, the United States has been unable to prosecute acts of nation-sponsored terrorism in which these countries have allegedly engaged.<sup>46</sup>

Extradition treaties should provide adequate access to suspects abroad.<sup>47</sup> However, extraterritorial abduction can occur even when an extradition treaty is in force between two nations.<sup>48</sup> For exam-

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U.N.-U.S. cooperation in U.N. operations). *See also* Ricardo Chavira, *Who Will Keep the Peace? New Wars Pushing U.S. Toward U.N. Partnership*, DALLAS MORNING NEWS, Feb. 21, 1993, at 1J (citing President Clinton's pledge to increase U.S. cooperation in international efforts by United Nations to maintain international peace and security).

<sup>41</sup> *See* Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 30 (Antonio Cassese ed., 1986) (discussing "disintegration" of U.N. Charter due to lack of independent enforcement mechanism).

<sup>42</sup> For example, the United States complied with an extradition request from Israel for John Demjanjuk in 1986. *Demjanjuk Seeking Citizenship from Ukraine*, CHI. TRIB., Apr. 11, 1993, at C22.

<sup>43</sup> M. CHERIF BASSIOUNI, 1 INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 5-33 (1983) (defining extradition and presenting its history).

<sup>44</sup> Findlay, *supra* note 17, at 9 n.52 (citing TREATIES IN FORCE (1986)).

<sup>45</sup> *Id.*

<sup>46</sup> For example, Libya continues to shelter the Libyans suspected of bombing Pan Am flight 103 in 1988. *Morning Edition: News* (NPR radio broadcast, Apr. 15, 1992); *Libya Won't Surrender Pan Am 103 Suspects*, U.S.A. TODAY, Mar. 26, 1992, at 1A. Despite a U.S. air and arms embargo against Libya, it has refused to turn over the suspected individuals to any country. *Id.* In such situations, extradition is not a "viable option." Findlay, *supra* note 17, at 9.

<sup>47</sup> *See* CARTER & TRIMBLE, *supra* note 37, at 786 ("The more common alternative to direct law enforcement abroad is through extradition treaties.").

<sup>48</sup> For example, a U.S.-Mexico extradition treaty was in force at the time U.S. agents abducted Alvarez-Machain. *United States v. Alvarez-Machain*, 112

ple, most extradition treaties do not require the asylum nation<sup>49</sup> to turn the individual over to the requesting nation in all situations.<sup>50</sup> When an extradition treaty is not effective, the United States engages in extraterritorial abduction because no international convention or U.S. law explicitly prohibits such conduct.<sup>51</sup>

Some commentators believe that extradition treaties reflect an intent to abide by the customary international law precept of respect for international territorial boundaries.<sup>52</sup> One commentator has even suggested that international custom<sup>53</sup> creates a presumption in the absence of an extradition treaty between two nations. Professor Anthony D'Amato has suggested that the *failure* of two nations to sign an extradition treaty with each other creates "the constructive conclusion of a 'treaty' to grant reciprocal asylum."<sup>54</sup> In other words, the lack of an extradition treaty assumes the acceptance of the international custom of asylum, not the right to extraterritorially abduct.<sup>55</sup> In these respects, extradition treaties

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S. Ct. 2188, 2193 (1992). *See infra* notes 49-51 and accompanying text (presenting situations in which extradition treaties do not provide access to suspects).

<sup>49</sup> The asylum nation provides sanctuary, refuge, and protection for the suspected individual. *See* BLACK'S LAW DICTIONARY 83 (6th ed. abr. 1991) (defining "asylum").

<sup>50</sup> Most extradition treaties leave discretion to the asylum nation's executive branch, or limit rights under the treaty depending on the nature of the alleged crime. *See* CARTER & TRIMBLE, *supra* note 37, at 787-91 (discussing common exceptions that allow discretion, such as "political offenses" and "dual criminality," and role of U.S. Secretary of State in approving extradition requests).

<sup>51</sup> *See infra* notes 56-194 and accompanying text (discussing international and U.S. law).

<sup>52</sup> *See* Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 950 (1993) (citing Brief Amicus Curiae of Minnesota Lawyers International Human Rights Committee in Support of Respondent at 6, 11, 18, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712); Brief Amicus Curiae of Allard K. Lowenstein International Human Rights Clinic and the Center for Constitutional Rights in Support of Respondent at 9-15, 36-46, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712); Brief Amicus Curiae of the Lawyers Committee for Human Rights in Support of Affirmance, at 6-16, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712)).

<sup>53</sup> *See infra* notes 94-105 and accompanying text (discussing international custom and extraterritorial abduction).

<sup>54</sup> ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 143-44 (1971).

<sup>55</sup> *Id.* at 144.

support customary international law, and signatories to such treaties assent to the idea of territorial inviolability.

## II. CURRENT LAW

Extraterritorial abduction presents an issue under international law because it involves one nation's violation of another nation's territorial sovereignty.<sup>56</sup> The Statute of the International Court of Justice (I.C.J.)<sup>57</sup> sets forth the hierarchy of sources to apply in analyzing an international law problem.<sup>58</sup> Section A of this Part will examine each of these sources. Like international law, domestic law also applies to the problem of extraterritorial abduction.<sup>59</sup> Because the United States has adopted a policy of utilizing extraterritorial abduction,<sup>60</sup> this Comment examines U.S. law in Section B.<sup>61</sup>

### A. International Law<sup>62</sup>

#### 1. U.N. Charter and Resolution

The United Nations (U.N.) is an international entity that governs relations among its member nations.<sup>63</sup> However, the United Nations can only resolve international disputes if the U.N. Security

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<sup>56</sup> RESTATEMENT, *supra* note 17, § 101 (international law refers to rules and principles regarding "conduct of [nations] . . . and . . . their relations inter se"); *see supra* note 17 (defining extraterritorial abduction).

<sup>57</sup> When the I.C.J. came into being in 1945, all U.N. member nations automatically became parties to the Statute. U.N. CHARTER art. 93, ¶ 1. The Statute sets forth the rules and procedure the I.C.J. must follow. *Id.* at art. 92; *see generally* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179 [hereafter I.C.J. Statute].

<sup>58</sup> I.C.J. Statute, *supra* note 57, art. 38, ¶¶ 1-2.

<sup>59</sup> *See infra* notes 138-94 and accompanying text (discussing U.S. law regarding extraterritorial abduction).

<sup>60</sup> *See infra* notes 145-94 and accompanying text (discussing U.S. cases of extraterritorial abduction).

<sup>61</sup> *See infra* notes 145-94 and accompanying text (reviewing U.S. case law and extraterritorial abduction).

<sup>62</sup> Section A derives its organization from Article 38 of the I.C.J. Statute. *See* I.C.J. Statute, *supra* note 57, art. 38, ¶¶ 1-2 (requiring I.C.J. to apply international conventions, international custom, general principles of law recognized by civilized nations, judicial decisions and teachings of most highly qualified publicists of various nations, and equity in addressing issues before Court).

<sup>63</sup> *See* CARTER & TRIMBLE, *supra* note 37, at 455-56.

Council's<sup>64</sup> permanent members agree unanimously on a solution.<sup>65</sup> Achieving unanimity is time-consuming and difficult,<sup>66</sup> even when member nations agree that a problem calls for some form of action.<sup>67</sup> Therefore, it would be difficult for the United Nations to settle an extraterritorial abduction dispute directly.<sup>68</sup> Additionally, although the United Nations is authorized to initiate and pass international legislation, it lacks sufficient enforcement power to carry out that legislation.<sup>69</sup>

When applying international law to a dispute, both international and national courts first refer to international conventions,<sup>70</sup> such as those the United Nations produces.<sup>71</sup> The U.N. Charter<sup>72</sup> is one such international convention and is the primary document to examine when resolving international disputes.<sup>73</sup> Article 2(4) of the U.N. Charter declares that member nations shall refrain from

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<sup>64</sup> The U.N. Security Council consists of fifteen member nations. U.N. CHARTER art. 23, ¶ 1. The Security Council has "primary responsibility" for carrying out the United Nations' mandate to maintain international peace and security. *Id.* at art. 24.

<sup>65</sup> *Id.* at art. 27, ¶ 3.

<sup>66</sup> COLBERT, *supra* note 30, at 204.

<sup>67</sup> See Stanley Meisler, *Los Angeles Times Interview; Boutros Boutros-Ghali; Leading a Revived United Nations Toward Peace in a Changing World*, L.A. TIMES, Dec. 27, 1992, at M3 (discussing United Nations' "paralysis" during Cold War and present U.N. "inaction" in Bosnia and Somalia); Norman Kempster, *U.S. Won't Stop Serbs by Itself*, S.F. CHRON., Apr. 7, 1993, at A1 (noting inability of U.N. Security Council members to agree on course of action in Bosnia).

<sup>68</sup> *Cf.* Kempster, *supra* note 67 (noting inability of U.N. Security Council members to agree on course of action in Bosnia).

<sup>69</sup> HENRY H. HAN, INTERNATIONAL LEGISLATION BY THE UNITED NATIONS 117 (1971); see U.N. CHARTER art. 18, ¶ 2 (authorizing General Assembly to make "recommendations with respect to the maintenance of international peace and security").

<sup>70</sup> An international convention is a pact or agreement between states in the nature of a treaty. BLACK'S LAW DICTIONARY 230 (6th ed. abr. 1991).

<sup>71</sup> See I.C.J. Statute, *supra* note 57, at art. 38 (listing international conventions first in order of sources of international law).

<sup>72</sup> The U.N. Charter is the document that sets forth the United Nations' structure and activities. U.N. CHARTER pmbl. By becoming parties to it, member nations agree to follow the Charter's rules of international law. *Id.* at art. 2, ¶ 2.

<sup>73</sup> See *supra* note 62 and accompanying text (presenting hierarchy of sources to apply in resolving questions of international law). As for U.S. acceptance of the U.N. Charter as an authoritative source, William Barr, in an Opinion of the Office of Legal Counsel, contended that the Charter, as a non-self-executing treaty, is not binding. 1989 Opinion, *supra* note 20, at 215-16. However, the Restatement allows such treaties to serve as sources of customary

using force against any other nation.<sup>74</sup> Many commentators believe that Article 2(4) prohibits armed reprisals.<sup>75</sup> Because extraterritorial abduction is a type of armed reprisal,<sup>76</sup> these commentators believe Article 2(4) prohibits extraterritorial abduction.<sup>77</sup> Although Article 2(4) does not expressly prohibit extraterritorial abduction, it does prohibit violations of territorial sovereignty.<sup>78</sup> Through its violation of the asylum nation's territory, extraterrito-

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international law, which is a legal authority. RESTATEMENT, *supra* note 17, § 102 cmt. f.

<sup>74</sup> The Charter states that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any [nation], or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2, ¶ 4.

<sup>75</sup> Roberto Barsotti, *Armed Reprisals*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 79, 102 n.1 (Antonio Cassese ed., 1986).

<sup>76</sup> See *supra* notes 29-55 and accompanying text (exploring historical origins of extraterritorial abduction).

<sup>77</sup> Barsotti, *supra* note 75, at 79, 102 n.1.

<sup>78</sup> Extraterritorial abduction does not always involve a violation of the territorial integrity or political independence of the asylum nation. See U.N. CHARTER art. 2, ¶ 4 (violation of Article 2(4) occurs when nation violates territorial integrity or political independence of another nation). For example, if the asylum nation consents to the abduction, the abducting nation would not violate the territorial integrity or political independence of the asylum nation by virtue of that consent. See RESTATEMENT, *supra* note 17, § 432(2) (no violation of territorial integrity when nation consents); SC Res. 138, SC Res. & Dec., 15th Sess. at 4, UN Doc. S/INF/15/Rev.1 (1960) (declaring that extraterritorial abduction without consent of asylum nation violates Article 2(4)). Consequently, there would be no extraterritorial abduction as defined in this Comment. See *supra* note 17 (defining extraterritorial abduction). Likewise, no violation of national sovereignty could occur in the case of a suspect abducted from a territory with no effective sovereign government. Findlay, *supra* note 17, at 16-17. This is so because in the absence of a government, the asylum nation has no political independence or territorial sovereignty to violate. *Id.* For example, in 1988, the United States could have attempted to abduct individuals suspected of terrorism in Lebanon without violating international law. *Id.* At the time, Lebanon had no effective, sovereign government. *Id.* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949). In *Chandler*, U.S. authorities arrested the defendant, a U.S. citizen, for broadcasting from Germany during World War II. *Id.* at 924. U.S. agents abducted the defendant from Bavaria during the U.S. occupation. *Id.* at 927-28. The First Circuit Court of Appeals affirmed *Ker v. Illinois*, 119 U.S. 436 (1886), when it stated that U.S. agents did not violate Germany's territorial sovereignty because no effective government existed at the time of the abduction. *Id.* at 935; see also *infra* notes 156-66 and accompanying text (discussing *Ker*).

rial abduction violates territorial sovereignty.<sup>79</sup> Therefore, the U.N. Charter can be interpreted to prohibit extraterritorial abduction, although it is not dispositive because it does not mention extraterritorial abduction explicitly.

Absent an explicit prohibition of extraterritorial abduction in Article 2(4), some commentators look to Article 51 of the U.N. Charter for authority to engage in such operations.<sup>80</sup> Article 51, an exception to Article 2(4), allows a member nation to use individual or collective self-defense if another nation attacks it.<sup>81</sup> However, some commentators categorize extraterritorial abduction as “self-help”<sup>82</sup> rather than self-defense.<sup>83</sup> These commentators place extraterritorial abduction beyond the scope of Article 51.<sup>84</sup> In any case, an Article 51 self-defense measure can only occur if an armed attack<sup>85</sup> has already taken place.<sup>86</sup> Extraterritorial abduction is typically not a response to an armed attack as that term is used in Article 51.<sup>87</sup> Rather, it is the response of a nation’s law enforcement agents to an individual or group’s allegedly criminal action within

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<sup>79</sup> See *supra* note 17 (defining extraterritorial abduction).

<sup>80</sup> See Glennon, *supra* note 17, at 755 (suggesting that extraterritorial abduction of terrorists may fall under Article 51 exception to prohibition of use of force); Halberstam, *supra* note 17, at 736 n.5 (asserting that extraterritorial abduction of terrorists constitutes self-defense under Article 51).

<sup>81</sup> U.N. CHARTER art. 51.

<sup>82</sup> “Self-help” is a unilateral action a nation takes to remedy a wrong that does not justify the use of armed force. Findlay, *supra* note 17, at 24 n.165.

<sup>83</sup> *Id.* at 24.

<sup>84</sup> *Id.*

<sup>85</sup> The International Court of Justice analyzed what is meant by the phrase “armed attack” in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (Judgment). The court concluded that armed attack includes “not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’” *Id.* ¶ 195 (quoting Definition of Aggression, art. 3, ¶ g, annexed to G.A. Res. 3314, 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (1974)).

<sup>86</sup> BENTWICH & MARTIN, *supra* note 36, at 106-07.

<sup>87</sup> See *infra* notes 179, 184-86 and accompanying text (discussing circumstances that precipitated abductions in *Alvarez-Machain* and *Noriega*, respectively).

that nation.<sup>88</sup> Thus, Article 51 fails to make extraterritorial abduction lawful under the U.N. Charter.<sup>89</sup>

The United Nations' only explicit prohibition of extraterritorial abduction appeared in a nonbinding format;<sup>90</sup> nevertheless, it has come to be interpreted as "a definitive construction" of the U.N. Charter.<sup>91</sup> In 1961, after Israeli agents abducted Nazi war criminal Adolf Eichmann from Argentina for trial in Israel, the U.N. Security Council passed a resolution stating that Article 2 prohibits extraterritorial abduction without the consent of the asylum nation.<sup>92</sup> However, U.N. resolutions are traditionally nonbinding,<sup>93</sup> so this expression of U.N. sentiment does not constitute a sufficiently strong condemnation of extraterritorial abduction.

## 2. International Custom

International custom is the second source of authority in international law that must be analyzed in determining the legality of extraterritorial abduction.<sup>94</sup> Customary international law consists of principles that have evolved over time to obtain the status of law.<sup>95</sup> Custom is recognized as an authoritative source of international law.<sup>96</sup> Its authority stems from those principles' consistent repetition and nations' acceptance of the principles as legal obliga-

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<sup>88</sup> See *supra* note 17 (defining extraterritorial abduction).

<sup>89</sup> See *supra* notes 80-88 and accompanying text (discussing Article 51 and extraterritorial abduction).

<sup>90</sup> HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 293-95 (1966) (U.N. Security Council resolutions become binding only if Security Council takes specific action under Article 39 of U.N. Charter).

<sup>91</sup> 4B Op. Off. Legal Counsel 543, 548 (1980) (citing *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66-68 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51, 63 (1977); Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961)).

<sup>92</sup> SC Res. 138, SC Res. & Dec., 15th Sess. at 4, UN Doc. S/INF/15/Rev.1 (1960).

<sup>93</sup> KELSEN, *supra* note 90, at 293-95.

<sup>94</sup> D'AMATO, *supra* note 54, at 4, 41-44. See *infra* notes 208-10 and accompanying text (describing international custom's authority in international community); notes 226-30 and accompanying text (discussing international custom's authority in U.S. legal system).

<sup>95</sup> See STARKE, *supra* note 17, at 34-38 (discussing general definition of customary international law).

<sup>96</sup> D'AMATO, *supra* note 54, at 4, 41-44.

tions.<sup>97</sup> For example, nations demonstrate that they accept these customary international law doctrines when they sign extradition treaties<sup>98</sup> to prevent violations of nations' territorial integrity.<sup>99</sup>

The Restatement of the Foreign Relations Law of the United States (Restatement)<sup>100</sup> contains the customary international law principle regarding extraterritorial abduction.<sup>101</sup> The Restatement states that a nation's agents may not seize an individual from another nation without obtaining consent from the other nation's government.<sup>102</sup> In conjunction with this prohibition, customary international law requires that if the asylum nation objects to the extraterritorial abduction and demands the return of the individual, the abducting nation must comply.<sup>103</sup>

In addition to violating an express provision of customary international law, extraterritorial abduction also violates a broader, more general principle of international law: the prohibition against violating another nation's territorial integrity.<sup>104</sup> Extraterritorial abduction violates territorial integrity through the territorial infiltration of the asylum nation.<sup>105</sup> Thus, extraterritorial abduction violates two aspects of international custom.

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<sup>97</sup> *Id.* See also RESTATEMENT, *supra* note 17, § 102 cmts. b-c (defining scope of customary international law).

<sup>98</sup> See *supra* notes 42-55 and accompanying text (analyzing extradition treaties and extraterritorial abduction).

<sup>99</sup> BLAKESLEY, *supra* note 17, at 185-90.

<sup>100</sup> The American Law Institute produces the Restatement of the Foreign Relations Law of the United States. BLACK'S LAW DICTIONARY 910 (6th ed. abr. 1991). Highly qualified publicists author the Restatement. *Id.* It is an influential volume that courts use to determine existing international law and to divine future trends in the area. *Id.* Furthermore, the Restatement is considered a source of customary international law under the I.C.J. Statute. See I.C.J. Statute, *supra* note 57 (presenting hierarchy of sources to apply in analysis of international law, including "teachings of the most highly qualified publicists of the various nations").

<sup>101</sup> RESTATEMENT, *supra* note 17, § 432(2), cmt. c.

<sup>102</sup> *Id.* § 432(2). However, situations may arise in which it is impossible to obtain such consent. Findlay, *supra* note 17, at 16-18. For example, consent may be impossible to obtain during war or an internal breakdown in the asylum nation's governmental structure. *Id.* at 17.

<sup>103</sup> RESTATEMENT, *supra* note 17, § 432(2), cmt. c.

<sup>104</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 212, 251 (June 27) (Judgment).

<sup>105</sup> See *supra* note 17 (defining extraterritorial abduction).



### 3. Judicial Decisions

In the absence of a definitive international convention on the subject, and given courts' reluctance to utilize international custom, national courts have struggled with the legality of extraterritorial abduction.<sup>106</sup> For example, in *Attorney General v. Eichmann*,<sup>107</sup> the Israeli Supreme Court rejected German defendant Adolf Eichmann's jurisdictional challenge to his abduction from Argentine territory by Israeli agents.<sup>108</sup> Israel charged Eichmann with crimes against humanity and war crimes during World War II.<sup>109</sup> Without an extradition treaty with Argentina,<sup>110</sup> the Israeli government chose to abduct Eichmann extraterritorially rather than to allow him to escape justice.<sup>111</sup> To address Eichmann's jurisdictional challenge, the court did not rely on the U.N. Charter or international custom to determine whether the abduction was lawful.<sup>112</sup> Instead, the court referred to various British, Israeli, and American court decisions to reject the defendant's challenge.<sup>113</sup>

Given the complexities and inconsistencies of international law, the I.C.J. has often dealt with issues of territorial integrity.<sup>114</sup> Although the I.C.J. has never addressed a case of extraterritorial abduction, cases concerning territorial integrity are applicable because extraterritorial abduction also involves the international custom of territorial integrity.<sup>115</sup> In 1927, for example, the Permanent Court of International Justice (P.C.I.J.)<sup>116</sup> held in the *S.S. Lotus*<sup>117</sup> case that international law prohibits a nation from exercis-

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<sup>106</sup> See *Attorney General v. Eichmann*, 36 INT'L LAW REP. 5 (Isr., Dist. Ct. Jerusalem 1961), *aff'd*, 36 INT'L LAW REP. 277 (Isr. S. Ct. 1962).

<sup>107</sup> 36 INT'L LAW REP. at 5.

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *Id.* at 11.

<sup>110</sup> *Id.* at 16.

<sup>111</sup> *Id.* at 5-6.

<sup>112</sup> See *id.* at 12 (discussing sources court relied upon in *Eichmann*).

<sup>113</sup> For example, the court cited the American *Ker-Frisbie* doctrine to state that a defendant may not challenge the jurisdiction of the court based on the alleged illegality of his abduction. *Eichmann*, 36 INTL. L. REP. at 12. See *infra* notes 152-77 and accompanying text (presenting *Ker-Frisbie* doctrine).

<sup>114</sup> See CARTER & TRIMBLE, *supra* note 36, at 44-49 (giving synopses of major I.C.J. cases).

<sup>115</sup> See *supra* notes 70-89 and accompanying text (discussing U.N. Charter and extraterritorial abduction); notes 94-105 and accompanying text (analyzing customary international law and extraterritorial abduction).

<sup>116</sup> The Permanent Court of International Justice was the forerunner of the I.C.J. CARTER & TRIMBLE, *supra* note 37, at 269.

<sup>117</sup> (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10.

ing its power in another nation's territory.<sup>118</sup> The *Lotus*, a French mail steamer, negligently collided with a Turkish collier, killing eight Turkish citizens.<sup>119</sup> Turkish legislation enabled the adjudication of crimes occurring outside Turkish territory.<sup>120</sup> Under this legislative authority, a Turkish court tried and convicted the French officer who was on watch aboard the *Lotus* when the collision occurred.<sup>121</sup> The Turkish court sentenced the French officer to eighty days' imprisonment and a fine.<sup>122</sup>

The trial caused a flurry of French diplomatic efforts to obtain the officer's release or to transfer the proceedings to a French court.<sup>123</sup> The Turkish and French governments agreed to submit the case to the P.C.I.J.<sup>124</sup> The P.C.I.J. determined that international law prohibited the Turkish court's adjudication of a case regarding acts that occurred outside Turkish territory.<sup>125</sup> In its jurisdictional analysis, the court mentioned the fundamental restriction that a nation may not exercise its power in another nation's territory.<sup>126</sup>

In the post-World War II era, the I.C.J. examined another case in which a nation exercised its force upon another nation.<sup>127</sup> In the *Corfu Channel*<sup>128</sup> case, Britain sued Albania to recover damages for ships damaged by mines while passing through the Corfu Channel.<sup>129</sup> On three separate occasions, British warships passed through the Channel and Albania claimed their passage violated Albania's territorial sovereignty.<sup>130</sup> The Corfu Channel is an international waterway, but Albania placed the mines in its territorial waters within the Channel.<sup>131</sup> The I.C.J. held that a nation may not

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<sup>118</sup> 1927 P.C.I.J. at 18; see also RESTATEMENT, *supra* note 17, § 432(2) ("A state's law enforcement officers may exercise their functions in the territory of another [nation] only with the consent of the other [nation], given by duly authorized officials of that [nation].").

<sup>119</sup> *Lotus*, 1927 P.C.I.J. at 10.

<sup>120</sup> *Id.* at 14-15.

<sup>121</sup> *Id.* at 10-11.

<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 11-12.

<sup>125</sup> *Id.* at 19.

<sup>126</sup> *Id.* at 18.

<sup>127</sup> *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 1.

<sup>128</sup> 1949 I.C.J. 1.

<sup>129</sup> *Id.* at 10.

<sup>130</sup> *Id.* at 26. Albania claimed that Britain violated Albania's national sovereignty by not requesting permission to pass through Albanian territorial waters. *Id.* at 12.

<sup>131</sup> *Id.* at 14.

unilaterally use force<sup>132</sup> against another nation to remedy a violation of that nation's right of passage through an international waterway.<sup>133</sup> Subsequent commentators have broadened their interpretation of this holding to prohibit any unilateral use of force by a nation.<sup>134</sup> Extraterritorial abduction is such a use of force, and under this interpretation violates the territorial integrity of the asylum nation.

Despite these interpretations of cases prohibiting violations of territorial integrity, only customary international law explicitly prohibits extraterritorial abduction.<sup>135</sup> Moreover, although the U.N. Security Council has passed a resolution condemning extraterritorial abduction, it has never amended its Charter or passed a declaration to ban extraterritorial abduction expressly.<sup>136</sup> Therefore, it is not surprising that extraterritorial abduction continues in the international community, in spite of the damage to international peace and security that results from it.<sup>137</sup>

### B. U.S. Law<sup>138</sup>

#### 1. Constitutional, Executive, and Legislative Authority

The first source to examine under U.S. law to determine the legality of extraterritorial abduction is the U.S. Constitution.<sup>139</sup> However, nothing in the Constitution explicitly or implicitly prohibits extraterritorial abduction; therefore, other sources of law

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<sup>132</sup> Here, Albania used force by laying mines to halt the passage of British ships through its territorial waters. *Id.* at 28.

<sup>133</sup> *Id.* at 35. The Court found Albania liable for the damage the mines caused. *Id.* at 23. However, the Court also found that Britain violated Albania's national sovereignty by passing through the Channel in an aggressive and non-"innocent" manner. *Id.* at 35.

<sup>134</sup> J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 425 (Humphrey Waldock ed., 6th ed. 1963).

<sup>135</sup> See *supra* notes 94-105 and accompanying text (analyzing customary international law and extraterritorial abduction).

<sup>136</sup> See *supra* notes 90-93, 107-13 and accompanying text (discussing *Eichmann* and subsequent U.N. resolution).

<sup>137</sup> See *infra* notes 202-07, 211-24 and accompanying text (analyzing international and national consequences of extraterritorial abduction).

<sup>138</sup> The structure of this Section follows the framework for analyzing questions of U.S. constitutional law suggested in MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 52-70 (1990).

<sup>139</sup> *Id.* at 52-53.

must be consulted.<sup>140</sup> Unlike the Constitution, the executive and legislative branches have not been silent concerning extraterritorial abduction; in fact, they have chosen action inconsistent with international law. In 1986, for example, Congress gave the Federal Bureau of Investigation (FBI) authority to abduct extraterritorially through a "long-arm" statute designed to reach terrorists.<sup>141</sup> However, this statute allows the United States to extraterritorially abduct without the asylum nation's consent; thus, it violates customary international law.<sup>142</sup> In 1989, the executive branch, under the Bush Administration, adopted an advisory opinion that concluded that the FBI has authority to extraterritorially abduct in spite of the resulting violation of international law due to lack of asylum nation consent.<sup>143</sup> Thus, the U.S. executive and legislative branches have authorized extraterritorial abduction in spite of the violation of international law.<sup>144</sup>

## 2. Case Law

While the judiciary has the power to check executive and congressional action, the U.S. Supreme Court has chosen to condone the executive's use of extraterritorial abduction in spite of its violation of customary international law. Just as Congress has the power to regulate offenses against international law,<sup>145</sup> the Supreme Court also has the authority to interpret international law as it applies to federal law.<sup>146</sup> Extraterritorial abduction violates customary inter-

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<sup>140</sup> See U.S. CONST. art. I, § 8 (listing powers of Congress); art. II, §§ 2-3 (presenting powers of President).

<sup>141</sup> 18 U.S.C. § 2331 (1993). See *Hijacker*, *supra* note 1; *U.S. Won't Seek Death Penalty for Hijacking; Suspect Denied Bail*, 7 AIR SAFETY WK., Aug. 9, 1993; Engelberg, *supra* note 12 (all citing U.S. use of long-arm statute to abduct suspected terrorists); David S. Kris, Recent Development, *Interpreting 18 U.S.C. § 2331 Under U.S. and International Law*, 27 HARV. J. ON LEGIS. 579, 587-96 (1990) (analyzing § 2331 in context of international law); see generally Brandon S. Chabner, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas*, 37 U.C.L.A. L. REV. 985 (1990) (analyzing § 2331).

<sup>142</sup> Kris, *supra* note 141, at 595-96 (finding that "some members of Congress appear ready to violate international law if necessary to enforce section 2331").

<sup>143</sup> 1989 Opinion, *supra* note 20, at 197-98.

<sup>144</sup> See *infra* notes 145-94 and accompanying text (discussing U.S. case law regarding extraterritorial abduction).

<sup>145</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>146</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), cited in LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 219-22 (1972). The

national law,<sup>147</sup> which is a part of U.S. law.<sup>148</sup> Therefore, defendants in U.S. trials often raise the alleged illegality of the abduction as a jurisdictional challenge.<sup>149</sup>

Before a U.S. court can hear a case regarding a violation of international law, it must have personal jurisdiction over the defendant.<sup>150</sup> A court has personal jurisdiction over a defendant when the court may exert its power over the defendant.<sup>151</sup> In its reluctance to free suspected criminals, the Supreme Court developed the *Ker-Frisbie* doctrine<sup>152</sup> to deny jurisdictional challenges based on the invalidity of extraterritorial abduction.<sup>153</sup> Under the *Ker-Frisbie* doctrine, a defendant may not assert the illegality of her abduction to defeat a court's jurisdiction over her.<sup>154</sup> Moreover, by repeatedly utilizing this doctrine, the Court implicitly validates extraterritorial abduction under U.S. law even though it violates customary international law.<sup>155</sup>

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Supreme Court has incorporated international law into U.S. law. The *Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . .").

<sup>147</sup> See *supra* notes 94-105 and accompanying text (discussing customary international law regarding extraterritorial abduction).

<sup>148</sup> See *infra* notes 226-36 and accompanying text (explaining U.S. acceptance of customary international law as legal authority).

<sup>149</sup> See *infra* notes 152-77 and accompanying text (describing evolution of *Ker-Frisbie* doctrine in response to jurisdictional challenges); *infra* notes 180-81 (discussing jurisdictional challenge in *Alvarez-Machain*); *infra* notes 187-88 (analyzing jurisdictional challenge in *Noriega*).

<sup>150</sup> Personal jurisdiction refers to a court's power over a defendant. BLACK'S LAW DICTIONARY 792 (6th ed. abr. 1991); FED. R. CIV. P. 60(b)(4); Milton Roberts, *Lack of Jurisdiction, or Jurisdictional Error, as Rendering Federal District Court Judgment "Void" for Purposes of Relief Under Rule 60(b)(4) of Federal Rules of Civil Procedure*, 59 A.L.R. FED. 831 (1992).

<sup>151</sup> See BLACK'S LAW DICTIONARY 544 (6th ed. abr. 1991) (defining *in personam* jurisdiction).

<sup>152</sup> See *infra* notes 156-77 and accompanying text (explaining *Ker-Frisbie* doctrine).

<sup>153</sup> See *infra* notes 156-66 and accompanying text (discussing *Ker v. Illinois*); *infra* notes 167-71 and accompanying text (discussing *Frisbie v. Collins*). Some commentators have suggested that courts should explicitly overturn the *Ker-Frisbie* doctrine. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 191 (1991) (calling for "assault" on *Ker-Frisbie* doctrine based on due process constitutional guarantees and "international proscription against abduction").

<sup>154</sup> See *infra* notes 156-77 and accompanying text (explaining and defining *Ker-Frisbie* doctrine).

<sup>155</sup> See *supra* notes 94-105 and accompanying text (explaining customary international law's prohibition of extraterritorial abduction).

The Supreme Court first addressed the issue of extraterritorial abduction in *Ker v. Illinois*.<sup>156</sup> When Illinois authorities filed charges of larceny and embezzlement against Ker, a U.S. citizen, he fled to Peru.<sup>157</sup> The governor of Illinois requested an extradition warrant from the Secretary of State pursuant to the U.S. extradition treaty with Peru.<sup>158</sup> President Arthur then authorized a detective to present the warrant to the Peruvian government and bring the defendant back to the United States.<sup>159</sup> However, no Peruvian government existed at the time because Chilean forces occupied Peru.<sup>160</sup> With no government to receive the warrant, the agent, on his own initiative, seized Ker and forcibly returned him to Illinois to stand trial.<sup>161</sup> The U.S. Supreme Court affirmed the judgment of the Illinois Supreme Court<sup>162</sup> and disregarded Ker's jurisdictional challenge, which was based on his illegal abduction.<sup>163</sup> The Court found Ker's claim of illegal abduction to be a "mere irregularit[y]"<sup>164</sup> and insufficient to require a dismissal for lack of personal jurisdiction.<sup>165</sup> Therefore, under *Ker*, a defendant may not assert the illegality of her abduction to defeat the court's jurisdiction over her.<sup>166</sup>

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<sup>156</sup> 119 U.S. 436 (1886). See Findlay, *supra* note 17, at 47 (presenting *Ker-Frisbie* doctrine).

<sup>157</sup> *Ker*, 119 U.S. at 437-38.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* The detective, functioning as a U.S. agent, went to Peru "as messenger, to receive the defendant from the authorities of Peru . . . in compliance with the treaty between the United States and Peru on that subject." *Id.*; see also Abramovsky, *supra* note 153, at 157 & nn.21-22 (discussing *Ker's* facts).

<sup>160</sup> Abramovsky, *supra* note 153, at 157. See Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953) (discussing factual ambiguities of *Ker*); Findlay, *supra* note 17, at 17 (citing two commentators who suggest that Chile's occupation of Peru eliminated Peru's ability to contest violation of territorial sovereignty).

<sup>161</sup> *Ker*, 119 U.S. at 438.

<sup>162</sup> *Id.* at 437-38.

<sup>163</sup> *Id.* at 445; see also Abramovsky, *supra* note 153, at 157 (suggesting that Court rejected Ker's jurisdictional challenge simply because abduction had already occurred).

<sup>164</sup> *Ker*, 119 U.S. at 440.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* The growing authority of human rights law makes this holding questionable. Halberstam, *supra* note 17, at 745. Individuals are beginning to play a role in international law, and their claims will increase in force now that international conventions specifically concern them as well as the traditional rights of nations. See, e.g., International Covenant on Civil and Political Rights,

The Supreme Court reiterated the *Ker* holding in *Frisbie v. Collins*.<sup>167</sup> In *Frisbie*, Michigan officers abducted the defendant in Illinois and took him back to Michigan to stand trial.<sup>168</sup> The Court affirmed *Ker* by repeating that a defendant's illegal abduction will not eliminate a court's jurisdiction over him.<sup>169</sup> The *Ker-Frisbie* doctrine addresses jurisdictional challenges based on the alleged illegality of the defendant's abduction.<sup>170</sup> In rejecting the jurisdictional challenges in the cases, the Court implicitly approved of each abduction.<sup>171</sup>

However, the facts of *Ker* and *Frisbie* do not constitute true international extraterritorial abduction cases.<sup>172</sup> The United States did not violate Peru's territorial integrity because no sovereign government existed at the time of *Ker*'s abduction.<sup>173</sup> *Frisbie* was a case of interstate abduction, not international abduction.<sup>174</sup> However, these cases introduced the general proposition that the illegality of an abduction is an insufficient jurisdictional challenge.<sup>175</sup> Under the *Ker-Frisbie* doctrine, and in the absence of any congressional act to the contrary, U.S. authorities can engage in extraterritorial abduction without violating U.S. case law.<sup>176</sup> The *Ker-Frisbie* doctrine allows the U.S. government to engage in extraterritorial

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Dec. 16, 1966, 999 U.N.T.S. 171; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984), reprinted in 23 ILM 1027 (1984), modified, 24 ILM 535 (1985) (recognizing validity of individuals' claims under various offenses).

<sup>167</sup> 342 U.S. 519 (1952).

<sup>168</sup> *Id.* at 522.

<sup>169</sup> *Id.* at 522-23.

<sup>170</sup> See *id.* at 520 (defendant claims abduction in violation of Fourteenth Amendment Due Process Clause and Federal Kidnaping Act); *Ker*, 119 U.S. at 439 (defendant claims abduction in violation of U.S.-Peru extradition treaty).

<sup>171</sup> *Frisbie*, 342 U.S. at 522-23; *Ker*, 119 U.S. at 440.

<sup>172</sup> See Abramovsky, *supra* note 153, at 157-58 (discussing irregularities and ambiguities of *Ker* and *Frisbie*).

<sup>173</sup> See generally Fairman, *supra* note 160. The United States attempted extradition from a nation under foreign occupation. See *supra* note 159 and accompanying text (discussing Chilean occupation of Peru); *supra* notes 100-03 and accompanying text (explaining consent requirement for legal extraterritorial abduction).

<sup>174</sup> *Frisbie*, 342 U.S. at 520.

<sup>175</sup> *Id.* at 522.

<sup>176</sup> See *United States v. Toscanino*, 500 F.2d 267, 271 (2d Cir. 1974) ("For years these two cases [*Ker* and *Frisbie*] have been the mainstay of a doctrine to the effect that the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him."). See also Jonathan Gentin, *Government-Sponsored Abduction of Foreign*

abduction even though it is contrary to customary international law.<sup>177</sup>

The most recent manifestation of U.S. judicial policy regarding extraterritorial abduction appears in *United States v. Alvarez-Machain*.<sup>178</sup> In *Alvarez-Machain*, U.S. agents abducted a Mexican doctor suspected of participating in the murder of a U.S. Drug Enforcement Administration agent in Mexico.<sup>179</sup> Alvarez-Machain claimed that the Court lacked personal jurisdiction because the abduction violated customary international law.<sup>180</sup> Again, the Supreme Court invoked the *Ker-Frisbie* doctrine and rejected Alvarez-Machain's jurisdictional challenge based on the extraterritorial abduction.<sup>181</sup> The Court also rejected Alvarez-Machain's contention that the abduction violated the U.S.-Mexico extradition treaty.<sup>182</sup>

The evolution of U.S. policy regarding extraterritorial abduction is particularly evident in a U.S. district court's decision in *United States v. Noriega*.<sup>183</sup> In *Noriega*, a Florida grand jury indicted Panamanian General Noriega on drug-trafficking charges.<sup>184</sup> During

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*Criminals Abroad: Reflections on United States v. Caro-Quintero and the Inadequacy of the Ker-Frisbie Doctrine*, 40 EMORY L. J. 1227 (1991).

<sup>177</sup> See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992) (rejecting defendant's jurisdictional challenge under *Ker-Frisbie* doctrine despite acknowledgement that abduction violates customary international law).

<sup>178</sup> 112 S. Ct. 2188 (1992).

<sup>179</sup> *Id.* at 2190. Jim Newton, *Clinton Urged to Ban Foreigners' Abductions*, L.A. TIMES, Jan. 7, 1993, at B3. See Abramovsky, *supra* note 153, at 166 ("[In *Alvarez-Machain*,] all explanations point to a unilateral abduction by bounty hunters acting at the behest of the DEA, with the approval of the Justice Department.").

<sup>180</sup> *Alvarez-Machain*, 112 S. Ct. at 2195.

<sup>181</sup> *Id.* at 2192-93, 2197. A U.S. district court acquitted Alvarez-Machain in December 1992 and allowed him to return to Mexico. *World Briefs*, HOUSTON CHRON., Dec. 16, 1992, at A33.

<sup>182</sup> *Alvarez-Machain*, 112 S. Ct. at 2194-95. The Court needlessly held that the U.S.-Mexico extradition treaty did not prohibit extraterritorial abduction in the absence of an explicit prohibition. *Id.* at 2194-95. One commentator has noted that no extradition treaty to which the United States is a party contains terms proscribing extraterritorial abduction. Glennon, *supra* note 17, at 747. Furthermore, two other treaties express the customary international law concept that a nation's territory is inviolable. *Id.* at 748. Therefore, any reference to it in an extradition treaty would be superfluous. *Id.*

<sup>183</sup> 746 F. Supp. 1506 (1990).

<sup>184</sup> *Id.* at 1506.



the 1991 U.S. occupation of Panamanian territory,<sup>185</sup> U.S. armed forces took Noriega from Panama to the United States to stand trial.<sup>186</sup> Noriega contested the validity of the court's jurisdiction over him based on the extraterritorial abduction.<sup>187</sup> The district court rejected Noriega's contention without addressing the existence of a U.S.-Panama extradition treaty.<sup>188</sup>

Although it is unlikely that Noriega would have extradited himself if the United States had formally requested it,<sup>189</sup> the U.S. invasion of Panama made such a request impracticable.<sup>190</sup> When the abducting nation is responsible for the asylum nation's internal breakdown, it may not use that situation to justify its use of extraterritorial abduction.<sup>191</sup> Therefore, the United States' abduction of Noriega was contrary to established principles of customary interna-

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<sup>185</sup> See *id.* at 1511 (describing circumstances surrounding Noriega's abduction, including deterioration of U.S.-Panama relations and subsequent invasion).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1511-12.

<sup>188</sup> *Id.* at 1515.

<sup>189</sup> The treaty applicable to Noriega's case states that if the asylum nation refuses an extradition request, it must prosecute the individual itself. Single Convention on Narcotics Drugs, 18 U.S.T. 1409, 1451-52, Mar. 30, 1961, T.I.A.S. No. 6298. See M. CHERIF BASSIOUNI, *The Need for an International Criminal Tribunal in the New World Order*, OCCASIONAL PAPER NO. 1: AN INTERNATIONAL CRIMINAL COURT 20-21 (1992) (stating difficulty of prosecuting head of nation who personally benefits from drug trafficking); *U.S. Prosecution of Noriega Cleared*, WASH. POST, Jan. 5, 1989, at A18 (U.S. Attorney acknowledges difficulty of extraditing Noriega).

<sup>190</sup> See Michael Gelb, *Bush Urges Panama Military to Overthrow Noriega*, Reuters, May 14, 1989, available in LEXIS, NEXIS Library, Wires File; Maureen Dowd, *Bush Hardens Line on Noriega Ouster*, N.Y. TIMES, May 14, 1989, at 13 (both reporting on deterioration of U.S.-Panama relations).

<sup>191</sup> The Restatement requires that U.S. enforcement measures be "reasonably related" to the law to which they are directed. RESTATEMENT, *supra* note 17, § 431. By one account, the invasion of Panama resulted in an estimated 20,000 homeless, 7,000 detained by military authorities for "vague reasons," and 4,000 missing individuals. Peter Stack, *The Other Side of Panama "Liberation,"* S.F. CHRON., Sept. 11, 1992, at C8. A House Armed Services subcommittee reported that U.S. forces killed at least 230 civilians and 70 Panamanian soldiers. *U.S. Invasion Killed "300 to 400" Panamanians: Congress*, Agence France Presse, Aug. 4, 1992, available in LEXIS, NEXIS Library, Wires File. Are hundreds or thousands of deaths "reasonably related" to the acquisition of one man? See BASSIOUNI, *supra* note 189, at 21-22 (questioning reasonableness of Panama invasion).

tional law.<sup>192</sup> However, the district court nonetheless validated the abduction by rejecting the jurisdictional challenge.<sup>193</sup> The United States was thus able to enforce its laws beyond its territory by the use of extraterritorial abduction.<sup>194</sup>

### III. THE LEGAL AND POLICY ARGUMENTS AGAINST EXTRATERRITORIAL ABDUCTION

For those nations that possess sufficient military, economic, and diplomatic power, extraterritorial abduction may seem to be an effective way to bring a suspect to trial.<sup>195</sup> Various commentators have concluded that extraterritorial abduction is an appropriate law enforcement method in certain circumstances.<sup>196</sup> For example, the recently released 1989 Office of Legal Counsel advisory opinion ("1989 Opinion")<sup>197</sup> concluded that the United States

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<sup>192</sup> See *supra* notes 94-105 and accompanying text (presenting customary international law's prohibition of extraterritorial abduction).

<sup>193</sup> *Noriega*, 746 F. Supp. at 1515.

<sup>194</sup> See *supra* notes 145-93 and accompanying text (presenting U.S. extraterritorial abduction cases).

<sup>195</sup> See *supra* note 13 and accompanying text (presenting reaction of U.S. government official to abduction of Rezaq from Nigeria).

<sup>196</sup> Findlay, *supra* note 17, at 51-53; Bush, *supra* note 52, at 977-83; Chabner, *supra* note 141, at 1014-21.

<sup>197</sup> 1989 Opinion, *supra* note 20. This document, entitled "Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities," was written in 1989 but released to the public in the spring of 1993. The 1989 Opinion was released, in an "extraordinary" action, along with ten years' worth of opinions of the Office of Legal Counsel in a single day. Telephone interview with James Dempsey, Counsel, House Judiciary Committee, Subcommittee on Civil and Constitutional Rights (Sept. 13, 1993). The 1989 Opinion was a reconsideration of a 1980 advisory opinion that concluded that the FBI had no authority under its implementing legislation to extraterritorially abduct in violation of customary international law. 1989 Opinion at 195. The 1989 Opinion rejected the 1980 Opinion's conclusion and found that the FBI's implementing legislation gave it "broad statutory authority" to arrest individuals abroad in spite of an international law violation. *Id.* The 1989 Opinion determined that the FBI could legally violate both customary international law and U.N. Charter art. 2(4) in engaging in extraterritorial abduction. *Id.* at 195-96. See *supra* notes 70-89 and accompanying text (discussing how extraterritorial abduction violates provisions of U.N. Charter); notes 94-105 and accompanying text (analyzing violations of international customary law by extraterritorial abduction). The 1989 Opinion also reaffirmed the *Ker-Frisbie* doctrine, which allows a court to reject jurisdictional challenges based on the alleged illegality of an extraterritorial abduction. See

is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. While targeting the United States and United States citizens, these criminal organizations frequently operate from foreign sanctuaries. Unfortunately, some foreign governments have failed to take effective steps to protect the United States from these predations, and some foreign governments actually act in complicity with these groups. Accordingly, the extraterritorial enforcement of United States laws is becoming increasingly important to the nation's ability to protect its own vital national interests.<sup>198</sup>

The 1989 Opinion purports to base its analysis only on the legal authority for extraterritorial abduction.<sup>199</sup> However, the 1989 Opinion does advance one narrow policy perspective: it defines as the only relevant national interest the necessity of exacting justice on terrorists.<sup>200</sup> It ignores the full extent of the consequences of adopting extraterritorial abduction as a method of law enforcement. This Comment takes the position that policy considerations regarding extraterritorial abduction should receive much closer attention than they do now. Consequently, this Part will address those policy concerns, both from the international and national perspectives. This analysis will show that extraterritorial abduction significantly undermines both international peace and security and U.S. national interests, and should therefore be eliminated as a law enforcement method.<sup>201</sup>

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*supra* notes 152-77 and accompanying text (explaining and criticizing *Ker-Frisbie* doctrine).

<sup>198</sup> 1989 Opinion, *supra* note 20, at 198.

<sup>199</sup> *Id.* at 196-97.

<sup>200</sup> See *supra* note 197 and accompanying text (quoting 1989 Opinion).

<sup>201</sup> Initially, many general practical limitations to extraterritorial abduction exist. For example, extraterritorial abduction is limited to situations in which (1) the abducting nation can easily infiltrate the asylum nation's territory (e.g., U.S. agents entering Mexico to abduct Alvarez-Machain (*see supra* note 179 and accompanying text (presenting facts of Alvarez-Machain's abduction))); or (2) the abducting nation can successfully pressure the asylum nation militarily (e.g., U.S. invasion of Panama to abduct Noriega (*see supra* notes 183-94 and accompanying text)), economically, or diplomatically (e.g., U.S. agents abducting Rezaq in Nigeria (*see supra* notes 1-13 and accompanying text (reporting latest U.S. extraterritorial abduction))). Extraterritorial abduction has not been viewed as a viable option in other situations, such as acquiring the suspects in the Pan Am bombing currently residing in Libya, or those responsible for taking Americans hostage in Lebanon and killing Lt. Col. William Higgins. Rod Nordland et al., *Were the Deals Worth It*, NEWSWEEK, Dec. 16, 1991, at 38 (listing events leading up to freeing of hostages in Lebanon; extraterritorial abduction is not among them). Other limitations to extraterritorial abduction include its expense. See

### A. Extraterritorial Abduction and the International Sphere

The international community of nations is defined by international boundaries.<sup>202</sup> The United Nations governs the international community and is responsible for maintaining international peace and security within it.<sup>203</sup> However, extraterritorial abduction degrades those international boundaries by violating another nation's territorial integrity.<sup>204</sup> The United Nations has failed to act on its condemnation of extraterritorial abduction.<sup>205</sup> Consequently, extraterritorial abductions undermine the United Nations' legitimacy as the governing organization of international affairs.<sup>206</sup> The legitimacy of the United Nations is particularly critical at this time in history: the end of the Cold War has placed increased attention and pressure on the United Nations as the governing body in charge of maintaining international peace and security.<sup>207</sup>

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*supra* note 191 and accompanying text (discussing costs in terms of human life of Panama invasion). Finally, even if an extraterritorial abduction is successful, there is no guarantee that the suspect will be found guilty by a court of law of the crime for which the suspect was abducted, as in the case of Alvarez-Machain (*see supra* note 181 (reporting Alvarez-Machain's acquittal)). The United States recently engaged in extraterritorial abduction that resulted in two highly publicized court cases, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992), and *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990). *See supra* notes 179-82 and accompanying text (discussing *Alvarez-Machain*); notes 183-94 and accompanying text (analyzing *Noriega*). Nations' use of extraterritorial abduction persists (*see supra* notes 178-94 and accompanying text (examining cases where Bush Administration engaged in extraterritorial abduction)) because of the lack of international regulation of the practice. *See supra* notes 62-137 and accompanying text (explaining insufficient international prohibition against extraterritorial abduction).

<sup>202</sup> ANTHONY A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 16-17 (1987). Traditionally, a primary indication of the existence of a nation has been government control over a defined territory. L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS* 5-10 (1978).

<sup>203</sup> CARTER & TRIMBLE, *supra* note 37, at 455.

<sup>204</sup> *See supra* note 17 (defining extraterritorial abduction).

<sup>205</sup> *See supra* notes 90-93 and accompanying text (describing U.N. Security Council resolution following Eichmann abduction).

<sup>206</sup> *See* Bush, *supra* note 52, at 943 (discussing how U.S. abduction of Alvarez-Machain undermines international law enforcement efforts under U.N. auspices).

<sup>207</sup> *See* Chavira, *supra* note 40 (citing President Clinton's pledge to increase U.S. cooperation in international efforts by United Nations to maintain international peace and security); Thomas L. Friedman, *Clinton to Outline New U.S. Proposals for Limiting Arms*, N.Y. TIMES, Sept. 27, 1993, at A1 (reporting that President Clinton will assure U.N. General Assembly of United States' continuing support of United Nations); Ruth Marcus, *Clinton Tells U.N. It Can't*

Extraterritorial abduction threatens international peace and security by undermining the international community's basic structural component: territorial boundaries.

Beyond the practical reasons for the United Nations to prohibit extraterritorial abduction, a strong legal argument exists supporting such a prohibition. Customary international law prohibits extraterritorial abduction.<sup>208</sup> Customary international law consists of principles that have evolved over time to obtain the status of law in the international community.<sup>209</sup> International custom reflects the foundational principles of international relations, and it applies universally.<sup>210</sup> Therefore, all nations are bound by the customary

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*Be Everywhere*, S.F. CHRON., Sept. 28, 1993, at A1 (noting President Clinton's expression of U.S. support for U.N. peacekeeping efforts). See also *Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L L. 63 (1991) (analyzing presidential and congressional authority to commit to U.N. peacekeeping and peacemaking missions).

Violations of territorial integrity also had significant consequences during the Cold War. For example, the downing of the U.S. U-2 reconnaissance plane by the Soviets in 1960 resulted in a tense exchange between the United States and the Soviet Union. Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836 (1960). A Summit Conference between the two nations and President Eisenhower's scheduled visits to Russia and Japan were cancelled in the aftermath of the incident. *Id.* at 840. Soviet Foreign Minister Andrei Gromyko threatened with aerial bombardment the nations that had assisted the U.S. in the U-2 flights. *Id.* at 841. The U.N. Security Council debated the matter at length. *Id.* at 840-44. A resolution was passed, calling for nations "to refrain from uses or threats of force and to respect each other's sovereignty, territorial integrity and political independence." *Id.* at 844. One commentator found that the U.S. violation of the U.S.S.R.'s territorial integrity by the U-2 flights violated international law. *Id.* at 844 ("Is action in time of peace by one state in the territory of another without the latter's authorization forbidden by international law? . . . This question must be answered in the affirmative. International law and the United Nations Charter are based on the principle of respect by states for the territory and independence of other states."). Just as the incursion of the U-2 into Soviet territory violated international law and had powerful consequences for U.S. foreign policy and international peace and security, so extraterritorial abduction violates territorial integrity and has similarly significant global consequences. See generally Part III of this Comment for a description of how extraterritorial abduction violates international law and undermines national and international peace and security.

<sup>208</sup> See *supra* notes 94-105 and accompanying text (discussing customary international law relating to extraterritorial abduction).

<sup>209</sup> See STARKE, *supra* note 17, at 34-38 (discussing general definition of customary international law).

<sup>210</sup> D'AMATO, *supra* note 54, at 4.

norms that prohibit extraterritorial abduction and protect territorial integrity.

### B. *Extraterritorial Abduction and the National Sphere*

Beyond the international interests that warrant prohibition of extraterritorial abduction, the United States should cease the practice out of its own national interest. If the United States continues to engage in extraterritorial abduction, reciprocal abductions and terrorism<sup>211</sup> will erode U.S. security interests by violating U.S. international boundaries.<sup>212</sup> The United States, through its use of extraterritorial abduction, risks possible retaliation and other negative foreign affairs repercussions by aggrieved nations.<sup>213</sup> For example, in reaction to the recent U.S. extraterritorial abduction of a Mexican citizen from Mexico,<sup>214</sup> some foreign commentators called for the expulsion of U.S. ambassadors throughout Central and South

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<sup>211</sup> Although no complete or authoritative definition of terrorism exists, one authority defined it as an organization's use of systematic violence to achieve its objectives. WALTER LAQUEUR, *THE AGE OF TERRORISM* 151-52 (1987). These objectives usually are political in nature and aimed at impacting a nation's sovereignty. BLAKESLEY, *supra* note 17, at 97. Since World War II, terrorism has been a matter of concern to many nations, including the United States. LAQUEUR, *supra*, at 334. A U.N. commission recently defined a terrorist as

[a]n individual who as an agent or representative of a State commits or orders the commission of any of the following acts: — undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public

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*Draft Code of Crimes Against the Peace and Security of Mankind*, International Law Commission, U.N. Doc. A/46/405, art. 24 (1991).

<sup>212</sup> See *supra* notes 202-07 and accompanying text; *infra* notes 213-24 and accompanying text (both presenting negative consequences of extraterritorial abduction).

<sup>213</sup> Abramovsky, *supra* note 153, at 189 (U.S. policy of extraterritorial abduction could result in reciprocal actions by other nations on U.S. territory); see also *id.* at 201 n.246 (discussing Iranian adoption of extraterritorial abduction policy); Findlay, *supra* note 17, at 5 (explaining potential political fallout of U.S. adoption of policy advocating extraterritorial abduction).

<sup>214</sup> See *supra* notes 178-82 and accompanying text (discussing *Alvarez-Machain*).

America.<sup>215</sup> After the U.S. Supreme Court rejected the defendant's jurisdictional challenge to the abduction, Mexican authorities suspended the right of U.S. agents to work in Mexico.<sup>216</sup>

Moreover, if the United States persists in trying an abducted foreign national, reciprocal abductions might take place.<sup>217</sup> For example, in 1989, the Iranian Majlis (parliament) passed a law authorizing government agents to arrest Americans wherever they find them to stand trial in an Iranian court of law.<sup>218</sup> However, most nations have not endorsed a policy of reciprocal abductions of Americans for the purpose of bringing them to trial in foreign courts.<sup>219</sup> Rather than abducting and bringing Americans back for trial,<sup>220</sup> nations frustrated with American policy will more likely resort to committing terrorist acts against U.S. citizens both at home and abroad.<sup>221</sup>

Furthermore, the Reagan, Bush, and Clinton Administrations' policy of authorizing extraterritorial abduction has had a profound effect on the United States' position in international affairs.<sup>222</sup> Besides the immediate law enforcement consequences, the policy may impact other areas of foreign relations.<sup>223</sup> For example, Sena-

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<sup>215</sup> *Latin Americans React to U.S. Supreme Court Decision*, Notimex Mexican News Serv., June 17, 1992, available in LEXIS, NEXIS Library, Wires File.

<sup>216</sup> *Id.*

<sup>217</sup> See Abramovsky, *supra* note 153, at 151-52 (envisioning hypothetical case of Iraqi agents abducting American oil executive in Texas in response to U.S. precedent of extraterritorial abduction).

<sup>218</sup> 138 CONG. REC. S8535 (1992) (Senate Resolution 319—Sense of the Senate Concerning the Illegality of Kidnaping of American Citizens, submitted by Sen. Moynihan).

<sup>219</sup> Abramovsky, *supra* note 153, at 201-03.

<sup>220</sup> *Id.*

<sup>221</sup> See Findlay, *supra* note 17, at 8 n.45 (discussing statistics of American casualties of terrorism for years 1984 and 1985); Robert B. Oakley, Terrorism and Tourism, Address Before the Conference on the Future of Transatlantic Travel (July 23, 1986), in DEP'T ST. BULL., Oct. 1986, at 55 (presenting worldwide statistics of terrorist attacks, indicating "upward trend" for the 1984-1986 period); Manuel Perez-Rivas & Kevin McCoy, *Worry Over Terrorists: Airport Security Tightened*, NEWSDAY, Feb. 27, 1993, at 5A (reporting terrorist bombing of New York's World Trade Center).

<sup>222</sup> Abramovsky, *supra* note 153, at 206-08; *2 Place Mexican Officials at '85 Killing*, N.Y. TIMES, Dec. 10, 1992, at A20.

<sup>223</sup> On June 22, 1993, U.S. Secretary of State Warren Christopher announced that negotiations with Mexico will take place in an attempt to end the U.S. practice of abducting criminal suspects in Mexico for trial in the United States. Daniel Williams, *Mexico, U.S. to Negotiate Extradition Pact*, S.F. CHRON., June 22, 1993, at A11. Mexico has requested the talks. *Id.* In return,

tor Moynihan has suggested that the United States' failure to adhere to the U.S.-Mexico extradition treaty in its extraterritorial abduction of Alvarez-Machain may set a precedent for the violation of other international conventions to which the United States is a party.<sup>224</sup>

In addition to the practical negative consequences of U.S. use of extraterritorial abduction, strong legal arguments exist supporting the prohibition of extraterritorial abduction. Again, customary international law also has implications within the national context. The international customary norms regarding the illegality of extraterritorial abduction and the more general prohibition against violating territorial sovereignty have already been discussed in this Comment.<sup>225</sup> However, customary international law also plays a role in U.S. law.

The United States becomes bound by customary international law in a number of ways. In the United States, customary international law is a part of domestic federal law.<sup>226</sup> As such, it is superior

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Mexico is expected to end its traditional opposition to the extradition of Mexican citizens to the United States. *Id.* These talks are viewed as part of the attempt to ensure passage of the North American Free Trade Agreement. *See id.* ("The ability of drug traffickers to elude capture in Mexico is a sticking point in U.S.-Mexican relations and a factor being used against the proposed trade agreement."). Mexico wants a legally binding treaty in addition to the extradition treaty making plain the illegality of extraterritorial abduction. *Id.* These negotiations began in June 1993. *Id.*

<sup>224</sup> 138 CONG. REC. S8535, S8536 (1992) (statement of Sen. Moynihan). He notes that Canada also formally protested the *Alvarez-Machain* decision. *Id.*; *see also* Brief for the Government of Canada as Amicus Curiae in Support of Affirmance at 10, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712) (stating Canadian position concerning interpretation of extradition treaties); *infra* notes 265-68 and accompanying text (presenting proposal for congressional action).

<sup>225</sup> *See supra* notes 94-105 and accompanying text.

<sup>226</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). In an earlier case, the U.S. Supreme Court explained that in situations

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; and, as evidence of these, to the works of jurists and commentators, . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The *Paquete Habana*, 175 U.S. 677, 700 (1900). The executive, legislative, and judicial branches have all condoned extraterritorial abduction. *See supra* notes 197-200 and accompanying text (analyzing 1989 Office of Legal Counsel advisory opinion); note 141 and accompanying text (citing 1986 congressional



to state law.<sup>227</sup> In addition, the United States has indicated its acceptance of international custom by signing conventions, such as the U.N. Charter,<sup>228</sup> that codify such precepts.<sup>229</sup> Finally, it has long been recognized that international custom is binding upon the international community of nations, of which the United States is a member.<sup>230</sup>

In fact, the U.S. Supreme Court has recognized the international customary law prohibition of extraterritorial abduction.<sup>231</sup> In *United States v. Alvarez-Machain*,<sup>232</sup> the Court accepted the validity of the defendant's claim that his abduction from Mexico violated customary international law.<sup>233</sup> Thus, the Court implicitly agreed that extraterritorial abduction violates customary international law, even

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long-arm statute); notes 145-94 and accompanying text (discussing U.S. judicial decisions). However, given the increasing authority of customary international law and the negative impact of extraterritorial abduction on U.S. national interests, the U.S. practice of extraterritorial abduction should be re-evaluated and prohibited. See generally Part III of this Comment for a discussion of the legal and policy arguments against extraterritorial abduction.

<sup>227</sup> See U.S. CONST. art. VI (declaring that U.S. Constitution, "Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). This Comment calls for a change in the status of customary international law in light of the end of the Cold War and the increasing importance of the United Nations. Raising the authority of customary international law will result in the clear prohibition of extraterritorial abduction. *Contra* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 113 (1987) (noting that U.S. courts generally have not treated customary international law as "supreme law of the land" and that federal legislation overrides customary international law).

<sup>228</sup> The U.N. Charter is the document that sets forth the United Nations' structure and activities. U.N. CHARTER pmbl. By becoming parties to it, member nations agree to follow the Charter's rules of international law. *Id.* at art. 2, ¶ 2.

<sup>229</sup> Glennon, *supra* note 17, at 746 (noting that U.N. Charter and Charter of the Organization of American States codify international customary law regarding territorial inviolability).

<sup>230</sup> See Bush, *supra* note 52, at 952 (citing BRIERLY, *supra* note 134, at 162; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 280, 284 (2d ed. 1973)).

<sup>231</sup> See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992) ("Respondent's abduction . . . may be in violation of general international law principles."); *supra* notes 178-82 and accompanying text (analyzing *Alvarez-Machain*).

<sup>232</sup> 112 S. Ct. at 2188.

<sup>233</sup> *Id.* at 2196.

though it chose not to give that custom effect.<sup>234</sup> Although it has been suggested that international customary norms have fallen out of favor recently,<sup>235</sup> in an era of increasing international cooperation and mutual respect, their authority must be reiterated.<sup>236</sup>

In sum, extraterritorial abduction violates customary international law and undermines the most fundamental component of the international community: its territorial boundaries. Extraterritorial abduction thus endangers both international and national peace and security. It is therefore in the collective interest of all members of the international community to oppose extraterritorial abduction and to take measures to eliminate its practice.

#### IV. PROPOSAL

This Comment proposes a comprehensive framework to govern extraterritorial abduction.<sup>237</sup> The framework has three components: international, national, and local.<sup>238</sup> The Clinton Administration's apparent adoption of extraterritorial abduction<sup>239</sup> highlights the need for a comprehensive response to this policy.

First, the United Nations, as the supervisory body of international affairs, should prohibit extraterritorial abduction by requiring a nation that wishes to abduct to gain the consent of the asylum nation.<sup>240</sup> However, if the asylum nation does not consent to a suspect's return, this Comment proposes an additional measure for international justice: the international criminal court.<sup>241</sup> Next, to aid those contesting extraterritorial abduction, this Comment encourages the incorporation of the contract-law concept of duress

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<sup>234</sup> *Id.*

<sup>235</sup> Bush, *supra* note 52, at 955 (describing different perceptions of international customary law historically and modernly).

<sup>236</sup> Some U.S. courts have used customary international law as a source of authority. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

<sup>237</sup> See *supra* notes 56-194 and accompanying text (discussing insufficient prohibition of extraterritorial abduction).

<sup>238</sup> See *infra* notes 239-79 and accompanying text (presenting proposal on international, national, and local levels).

<sup>239</sup> See *supra* notes 1-13 and accompanying text (reporting FBI abduction of Rezaq from Nigeria).

<sup>240</sup> See *infra* notes 245-51 and accompanying text (describing proposed amendment to U.N. Charter).

<sup>241</sup> See *infra* notes 252-55 and accompanying text (recommending establishment of international criminal court).

as a way to evaluate the asylum nation's consent to an abduction.<sup>242</sup> Additionally, this Comment proposes that Congress prohibit U.S. agents from using extraterritorial abduction to reach those suspected of committing offenses against the United States or its nationals.<sup>243</sup> Finally, this Comment proposes that law enforcement agencies foster working relationships with their foreign counterparts to facilitate the prosecution of individuals who flee to asylum nations.<sup>244</sup>

On the international level, the United Nations should amend the U.N. Charter<sup>245</sup> to incorporate Article 16 of The Harvard Research in International Law's<sup>246</sup> international convention on extradition.<sup>247</sup> The Harvard Research in International Law proposed Article 16 to prohibit a nation from prosecuting an individual without obtaining the consent of the asylum nation.<sup>248</sup> If abducted without the consent of the asylum nation, a defendant could assert a successful jurisdictional challenge.<sup>249</sup> Without jurisdiction, the court would have to dismiss the case.<sup>250</sup> Therefore, the consent requirement would dissuade nations from resorting to extraterritorial abduction because prosecution would be impossible.<sup>251</sup>

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<sup>242</sup> See *infra* notes 256-64 and accompanying text (describing how contract-law concept of duress helps to determine validity of asylum nation's consent).

<sup>243</sup> See *infra* notes 265-68 and accompanying text (proposing congressional action to prohibit extraterritorial abduction).

<sup>244</sup> See *infra* notes 269-79 and accompanying text (suggesting use of transfer of proceedings).

<sup>245</sup> See EDWARD McWHINNEY, UNITED NATIONS LAW MAKING 133-35 (1984) (describing U.N. Charter amendment process).

<sup>246</sup> Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 623 (Supp. 1935). The Research in International Law was a group of Harvard Law School faculty. *Id.* They prepared the convention for the American Society of International Law. *Id.* The majority in *Alvarez-Machain* noted the convention and the international community's failure to accept it. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2194-95 & n.13 (1992).

<sup>247</sup> Harvard Research in International Law, *supra* note 246, at 623.

<sup>248</sup> *Id.* Such an amendment would codify existing customary international law. See *supra* notes 94-105 and accompanying text (presenting customary international law regarding extraterritorial abduction).

<sup>249</sup> Harvard Research in International Law, *supra* note 246, at 623.

<sup>250</sup> *Id.*

<sup>251</sup> See *supra* notes 245-50 and accompanying text (describing amendment's elimination of court's ability to adjudicate without jurisdiction). Recently, the United States and Mexican governments agreed on the necessity for a prohibition of extraterritorial abduction. *Janet Reno in Mexico City to Discuss Issues* (NPR radio broadcast, Oct. 12, 1993).

The United Nations should also establish an international criminal court with effective power to adjudicate the issues that compel nations to engage in extraterritorial abduction.<sup>252</sup> For example, if the asylum nation refuses to consent to an individual's return for prosecution, an international criminal court would provide a neutral forum in which member nations and individuals could adjudicate disputes.<sup>253</sup> The court would thus eliminate the need for nations to resort to extraterritorial abduction.<sup>254</sup> The United Nations could establish an international criminal tribunal by adopting a convention that would make the court an entity of the United Nations.<sup>255</sup>

A further solution would be to incorporate the contract-law concept of duress into international law. The asylum nation's consent to the abduction is one of the key issues to examine in order to

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<sup>252</sup> In 1991, the International Law Commission reported progress on drafting a convention establishing an international criminal court. Stephen C. McCaffrey, Current Development, *The Forty-third Session of the International Law Commission*, 85 AM J. INT'L L. 703, 706-07 (1991). Currently, investigations are underway in Bosnia that may lead to the prosecution of those accused of war crimes. M. Cherif Bassiouni, *War-Crime Tribunal: The Time Is Now*, CHI. TRIB., Feb. 11, 1993, at 29. John F. Burns, *Bosnia War Crime Trial Hears Serb's Confession*, N.Y. TIMES, Mar. 14, 1993, at 10. Such trials may form the foundation of a permanent international criminal court. *UN War Crimes Tribunal: Crucial First Step Outweighs Risk*, OTTAWA CITIZEN, Feb. 26, 1993, at A10. The idea of an international criminal court is not new, and it is beyond the scope of this Comment to venture into the mechanics of its structure. See BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980) (presenting historical analysis of concept of international criminal court). Calls for an international criminal court have resounded since World War I. 2 *Id.* at 23. Question of International Criminal Jurisdiction, International Law Commission, Doc. A/CN.4/15, ¶ 6-7 (Report by Ricardo J. Alfaro, Special Rapporteur), reprinted in 2 FERENCZ, *supra*, at 241. The Nuremberg trials of 1945 and the Tokyo trials of 1946 show that international tribunals are feasible and effective. *Id.*, ¶¶ 39-42. As recently as 1990, U.S. Secretary of State James Baker recommended the activation of such an institution. Crisis in the Persian Gulf: Hearings and Markup Before the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 26 (1990) (statement of James A. Baker III, Secretary of State). President Clinton has yet to state his administration's position on an international criminal court, but Senator Christopher Dodd is leading efforts to gain U.S. support for such an institution. Don Noel, *Dodd's Court Would Move World Closer to the Rule of Law*, HARTFORD COURANT, July 12, 1993, at C11.

<sup>253</sup> BASSIOUNI, *supra* note 189, at 9, 13-17.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 16.

determine the validity of an extraterritorial abduction.<sup>256</sup> If the asylum nation gives its consent to the extraterritorial abduction, no violation of international law occurs because the abducting nation has respected the territorial integrity of the asylum nation. The concept of duress<sup>257</sup> should be used to determine whether an asylum nation has truly consented to an extraterritorial abduction within its territory.<sup>258</sup> Duress is a ground for voiding an agreement in U.S. contract law,<sup>259</sup> and the Restatement reports that the concept of duress is developing "slowly" in international law.<sup>260</sup> Duress consists of "any wrongful act or threat which overcomes the free will of a party."<sup>261</sup> The "wrongful act" includes physical as well as economic pressure.<sup>262</sup> This could be extrapolated to the international legal sphere by encompassing wrongful military and economic pressure<sup>263</sup> on an asylum nation in order to obtain consent.<sup>264</sup> Incorporating duress into international law will give an asylum nation a way

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<sup>256</sup> See *supra* notes 100-03 and accompanying text (examining Restatement's presentation of customary international law prohibition of extraterritorial abductions performed without asylum nation consent).

<sup>257</sup> See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 336-51 (3d ed. 1987) (explaining contract-law concept of duress).

<sup>258</sup> The Restatement has noted that application of contract law to international law is to be performed "with caution." *RESTATEMENT, supra* note 17, at pt. III, p. 147.

<sup>259</sup> See CALAMARI & PERILLO, *supra* note 257, at 349 (contract voidable at election of party placed under duress); *id.* at 355 (contract voidable at election of party unduly influenced).

<sup>260</sup> *RESTATEMENT, supra* note 17, at pt. III introductory note at 147. Of course, the incorporation of the concept of duress in international law will be ineffective without a forum for relief. To that end, this Comment encourages the establishment of an international criminal court where such cases could be adjudicated. See *supra* notes 252-55 and accompanying text (presenting proposal for international criminal court to adjudicate extraterritorial abduction cases).

<sup>261</sup> CALAMARI & PERILLO, *supra* note 257, at 337.

<sup>262</sup> *Id.*

<sup>263</sup> Economic pressure may be more likely in situations of economic disparity between the parties to the agreement. *Id.* at 338. For example, in the case of the extraterritorial abduction reported in the Introduction to this Comment, Ghana's consent to facilitating Rezaq's abduction may be questioned due to the economic disparity between the United States and Ghana and the reported belief of the Ghanaian government that to improve its economy it must improve its relations with the United States. See *supra* notes 1-13 and accompanying text (describing Rezaq's abduction). Furthermore, the United States may have taken unfair advantage of the political situation in Nigeria in order to obtain custody over Rezaq; the Nigerian government's ability to validly consent to the abduction at a time

to contest an abduction that occurs without its meaningful consent. Congress could pass legislation mandating this incorporation in order to help U.S. courts adjudicate extraterritorial abduction cases. If an international criminal court is established, the incorporation could assist in that forum as well.

On the national level, Congress should actively support the establishment of an international criminal court and submit the United States to its jurisdiction.<sup>265</sup> In addition, even if the United Nations does not adopt Article 16, Congress should enact legislation explicitly pronouncing that extraterritorial abduction is illegal under U.S. law.<sup>266</sup> This would effectively overrule the *Ker-Frisbie* doctrine.<sup>267</sup> If this occurred, individuals could successfully contest their extraterritorial abduction on the grounds of international and U.S. law.<sup>268</sup>

Local measures can also be effective in eliminating extraterritorial abduction. Extradition is often impossible or impracticable in reaching an individual who has fled abroad.<sup>269</sup> Consequently, frustrated law enforcement agencies have occasionally resorted to

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when it was confronted with violent political unrest is doubtful. *See supra* notes 8-9 and accompanying text.

<sup>264</sup> Additionally, the contract-law maxim that silence cannot constitute acceptance of an agreement has already been codified in another area of international law, and this concept could also help determine the validity of an asylum nation's consent. *See* United Nations Convention on Contracts for the International Sale of Goods, art. 18, 19 I.L.M. 671, 675 (1980) (silence or inactivity does not constitute acceptance).

<sup>265</sup> *See supra* notes 252-55 and accompanying text (describing establishment of international criminal court).

<sup>266</sup> *See* U.S. CONST. art. I, § 8, cl. 10 (giving Congress authority to "define and punish . . . Offenses against the Law of Nations").

<sup>267</sup> Abramovsky, *supra* note 153, at 191 (calling for "assault" on *Ker-Frisbie* doctrine based on due process constitutional guarantees and "international proscription against abduction").

<sup>268</sup> Traditionally, courts did not allow individuals standing to contest matters of international law. *See* CARTER & TRIMBLE, *supra* note 37, at 826; *see generally* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982) (documenting increasing recognition of role of individual in international disputes). However, some international conventions now recognize individuals' claims to human rights. *See, e.g.*, The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>269</sup> *See supra* notes 48-51 and accompanying text (citing circumstances where extradition procedure is impossible); notes 145-94 and accompanying text (presenting U.S. extraterritorial abduction cases).

extraterritorial abduction to reach suspects abroad.<sup>270</sup> However, one local U.S. law enforcement agency has developed resources to render extraterritorial abduction, to a limited extent, unnecessary.<sup>271</sup> In 1984, the Los Angeles Police Department established a Foreign Prosecution Unit (F.P.U.) to pursue foreign suspects who flee to their home nations.<sup>272</sup> The F.P.U. consists of bilingual officers who translate and deliver a suspect's file to law enforcement officials in the asylum country.<sup>273</sup> With the case file, the asylum nation's authorities can apprehend and prosecute the suspect.<sup>274</sup> The F.P.U.'s work has resulted in successful prosecutions in Mexico, South America, and France.<sup>275</sup>

The F.P.U. only pursues individuals who have committed crimes within Los Angeles County.<sup>276</sup> Thus, this local remedy is by its nature limited in efficacy. Therefore, it is an imperfect solution to limiting extraterritorial abduction in the absence of any other international or domestic prohibitions. However, establishing such

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<sup>270</sup> See *supra* notes 145-94 (presenting cases in which U.S. law enforcement personnel have resorted to extraterritorial abduction).

<sup>271</sup> Alice Crane, *LAPD Extends Arm of the Law Across Borders*, L.A. TIMES, Dec. 14, 1986, pt. 2, at 2.

<sup>272</sup> *Id.* The F.P.U.'s method is known as "transfer of proceedings." BLAKESLEY, *supra* note 17, at 279-80. See 6 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (1990) (presenting complete examination of this method).

<sup>273</sup> BLAKESLEY, *supra* note 17, at 279-80.

<sup>274</sup> Crane, *supra* note 271 (reporting on Parisian police's apprehension of French national for murder occurring in California on basis of Los Angeles Police Department documents).

<sup>275</sup> Michael Connelly, *LAPD Foreign Prosecution Unit; South of the Border Is No Longer Safe For Criminals*, L.A. TIMES, Dec. 13, 1987, at 1. The F.P.U. also assists Mexican law enforcement agencies by utilizing the U.S. Immigration and Naturalization Service (INS) to deport from the United States Mexican citizens wanted for crimes committed in Mexico. *Id.* The INS uses a special expedited procedure to deport the suspects to Mexico. *Id.* Mexico then prosecutes the suspects in its own judicial proceedings. *Id.* Such action substitutes deportation proceedings for extradition proceedings and is an improper use of the INS. BLAKESLEY, *supra* note 17, at 278-79; 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, 82-89 (1964); Deportation, 4 HACKWORTH DIGEST § 311, at 30. Other nations consider this use of deportation an abuse of human rights and deny their courts jurisdiction over individuals seized in this manner. See BLAKESLEY, *supra* note 17, at 279 (discussing France's policy of forbidding deportation to reach criminal suspects).

<sup>276</sup> Connelly, *supra* note 275.

working relationships among individual nations' law enforcement agencies may expedite the prohibition of extraterritorial abduction on the national and international levels.<sup>277</sup> Therefore, local law enforcement agencies should establish working relationships with law enforcement agencies abroad.<sup>278</sup> Cooperation among law enforcement agencies would reduce the need to resort to extraterritorial abduction by providing an alternative method to prosecute suspected individuals.<sup>279</sup>

### CONCLUSION

Extraterritorial abduction erodes international and national peace and security and violates international law.<sup>280</sup> Despite these negative consequences, nations resort to extraterritorial abduction for a number of reasons, including ineffective extradition treaties.<sup>281</sup> Due to inconsistent interpretation and enforcement of

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<sup>277</sup> See *supra* note 275 and accompanying text (noting F.P.U.'s successful prosecutions in various countries).

<sup>278</sup> See *supra* notes 272-76 and accompanying text (giving example of LAPD's Foreign Prosecution Unit). Recently, U.S. Attorney General Janet Reno and her Mexican counterpart announced that Mexico and the United States are exploring increased cooperation regarding transfer of proceedings, including the creation of a "judicial attache" located in the U.S. Embassy to facilitate such cooperation. Laurence Iliff, *Reno, Carpizo Tout Crime-Fighting Plan*, HOUSTON CHRON., Oct. 12, 1993, at A11. For its part, the Mexican government also pledged support for its own "institute" to coordinate U.S.-Mexico law enforcement activities. *Janet Reno in Mexico City to Discuss Issues* (NPR radio broadcast, Oct. 12, 1993).

<sup>279</sup> See *supra* note 275 and accompanying text (describing number of successful prosecutions as result of F.P.U.). However, such a program requires safeguards to ensure that abuses of human rights do not occur. For example, the F.P.U.'s use of the Immigration and Naturalization Service (INS) to deport Mexicans suspected of committing crimes in Mexico is an inappropriate method of law enforcement. See *supra* note 275 (analyzing F.P.U.'s use of INS and illegality of substituting deportation for extradition). Transfer of proceedings is an acceptable mode of cooperation among law enforcement agencies; deportation is not. See *supra* notes 269-78 and accompanying text (discussing transfer of proceedings); note 275 and accompanying text (criticizing F.P.U. for utilizing deportation procedures to return suspects to Mexico).

<sup>280</sup> See *supra* notes 202-07, 211-24 and accompanying text (revealing negative consequences of extraterritorial abduction on foreign relations and international law).

<sup>281</sup> See *supra* notes 45-46, 196-98 and accompanying text (presenting reasons nations use extraterritorial abduction).



international law, the use of extraterritorial abduction continues.<sup>282</sup> The absence of domestic legislation and clear statements from the U.S. Supreme Court condemning extraterritorial abduction have compounded the problem.<sup>283</sup>

This Comment presents a proposal to eliminate extraterritorial abduction. The proposal addresses the problem of extraterritorial abduction on three levels of law prescription and enforcement: international, national, and local. At the international level, an amendment to the U.N. Charter requiring an abducting nation to obtain consent from an asylum nation will clarify and strengthen existing international law.<sup>284</sup> Also, the establishment of an international criminal court will provide an effective forum for nations and individuals to raise international law objections to extraterritorial abduction.<sup>285</sup> At the national level, congressional action will prohibit U.S. agents from engaging in extraterritorial abduction.<sup>286</sup> Finally, by working together, local law enforcement agencies in different nations will reduce instances of extraterritorial abduction.<sup>287</sup> By adopting this Comment's proposal, nations can create viable alternatives to extraterritorial abduction and eliminate its endangerment of international peace and security.

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<sup>282</sup> See *supra* notes 62-137 and accompanying text (discussing international law and extraterritorial abduction).

<sup>283</sup> See *supra* notes 138-94 and accompanying text (discussing U.S. executive and legislative sources, and case law on extraterritorial abduction).

<sup>284</sup> See *supra* notes 245-51 and accompanying text (presenting amendment to explicitly prohibit extraterritorial abduction).

<sup>285</sup> See *supra* notes 252-55 and accompanying text (recommending international criminal court as neutral forum in which nations can resolve extraterritorial abduction disputes; also discussing international criminal court as alternative to extraterritorial abduction).

<sup>286</sup> See *supra* note 265 and accompanying text (recommending that Congress endorse international criminal court and explicitly prohibit extraterritorial abduction).

<sup>287</sup> See *supra* notes 269-79 and accompanying text (advocating increased cooperation among local law enforcement agencies).

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