COMMENT

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EXTRATERRITORIAL ABDUCTION: AN AUSTRALIAN APPROACH ?

WHEN a resident of a particular State breaks the laws of that State, the offender can be prosecuted and punished through local law enforcement agencies. Problems arise when that person crosses national boundaries as the State wanting to prosecute must seek their return from the country of refuge. Jurisdiction over these fugitives is most commonly obtained through extradition but there are informal rendition procedures that may be applied. One such form of irregular extradition is the abduction of suspected international criminals by States for domestic trial.

This issue was prominent in Australia in 1995 after the Australian Government failed in its attempts to extradite Christopher Skase from Majorca, Spain,[1] to face 32 charges by the Australian Securities Commission relating to the management of the Qintex Group.[2] Outrage in Australia at the Spanish judicial decision to refuse the extradition request prompted a public appeal that raised more than A$275,000, the fee required to hire an American bounty hunter to bring Skase back to Australia for trial.[3] The then Australian Attorney General, Mr Michael Lavarch, said of the "Chase for Skase" that "there could be considerable problems in successfully prosecuting someone who was returned in such a

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1 *Re Skase,* Extradition Procedure No 1/94 (Audiencia Nacional, Criminal Division, Madrid, 8 September 1994), Motion for Review No 31/94 (Audiencia Nacional, Criminal Division, Full Court, Madrid, 19 December 1994).

2 *Financial Times* 1 February 1994 p1.

3 *The Advertiser* 12 April 1995 p1.

fashion".[4] This comment considers what approach may be taken by an Australian court when confronted with this situation. I will consider three different approaches adopted by courts when dealing with this issue: first, there is the adherence to the ancient Roman maxim *male captus bene detentus*;[5] second, the courts may exercise a discretion to refuse jurisdiction where there is an abuse of process; and finally, violations of international law may constitute a bar to the exercise of jurisdiction. Particular regard will be had to the influence of international law in the various decisions, as an abduction that takes place in the territory of another State constitutes a violation of that State's territorial integrity.[6] In conclusion, I will consider what approach an Australian court may adopt when faced with a case of extraterritorial abduction.

The maxim *male captus bene detentus* has generally been applied in the United States where the practice of acquiring jurisdiction over fugitives by irregular extradition has been most prevalent.[7] *Male captus bene detentus* is usually referred to as the *Ker-Frisbie* doctrine as it largely stems from two Supreme Court decisions: *Ker v Illinois*[8] and *Frisbie v Collins*.[9]

In *Ker*, the defendant was kidnapped from Peru and transported to the United States where he was wanted on larceny and embezzlement charges.[10] The Supreme Court rejected a challenge to its jurisdiction and held that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court ... and presents no valid objection to his trial in such a court".[11] It was also established in *Ker* that involvement of government agents in the abduction of international criminals in a country having an extradition treaty with the United States does not constitute a breach of that treaty. *Frisbie* involved an interstate abduction of an accused and reaffirmed the holding

4 As above.

5 An illegal apprehension does not preclude prosecution.

6 The notion of territorial sovereignty in international law means that a State has territorial control over persons and things within its territory and is a rule of customary international law: Findlay, "Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law" (1988) 23(1) *Tex Int LJ* 1 at 16. See also McCarthy, "*United States v Verdigo-Urquidez*: Extending the *Ker-Frisbie* Doctrine to Meet the Modern Challenges Posed by the International Drug Trade" (1993) 27(4) *NELR* 1084. The only exception to this is when the abduction occurs with the participation of the asylum State. This means that since the State itself was involved in the act of apprehension, it cannot complain of a violation of its sovereignty.

7 It is estimated that the United States abducts two individuals from Mexico alone every day: Ma, "Noriega's Abduction from Panama: Is Military Invasion an Appropriate Substitute for International Extradition ?" (1991) 13(4) *Loy LA Int & Comp LJ* 925 at 947.

8 (1886) 119 US 436.

9 (1952) 342 US 519.

10 *Ker* at 437-438.

11 At 444.

of *Ker*. With little exception, the United States' courts have consistently applied the *Ker-Frisbie* doctrine.[12]

There was a surprising deviation from the entrenched *Ker-Frisbie* rule by the United States Court of Appeals, Second Circuit, in *US v Toscanino*.[13] The accused in that case appealed a conviction of conspiracy to import and distribute narcotics on the alleged basis that American agents had kidnapped him in Uruguay, transported him to Brazil where they confined, interrogated and tortured him for three weeks and then brought him to the United States for trial. There was clearly a violation of the territorial integrity of Uruguay and there had been no recourse to the extradition treaty in force between Uruguay and the United States.

The reasoning in *Toscanino* is based on a finding that extraterritorial abduction by government agents is a violation of due process[14] and that "*Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty".[15] The court found that there had been a breach of international law so *Ker* was held to be inapplicable. This was so even though there was no reference in the judgments to a protest by Uruguay on the violation of its sovereignty. The Second Circuit held, however, that the United Nations Charter[16] and the Charter of the Organisation of American States,[17] which prohibit the United States from the use of force in any manner that would violate the territorial sovereignty of another State, had been breached by the alleged abduction.[18]

It is on this ground that the decision in *Toscanino* has been validly criticised as it has been said that "the pertinent extradition treaty was impliedly found to be inapposite and non-self-executing".[19] The court decided that the United Nations Charter and the Charter of the Organisation of American States conferred rights directly on individuals and were to be self-executing but the actual issue of self-execution was not dealt with by the court.[20] It would seem that the court neglected the decision of the Supreme Court of California in *Sei*

12 McCarthy, "*United States v Verdigo-Urquidez*: Extending the *Ker-Frisbie* Doctrine to Meet the Modern Challenges Posed by the International Drug Trade" (1993) 27(4) *NELR* 1067 at 1072.

13 (1974) 500 F 2d 267.

14 At 268-270.

15 At 278.

16 Art 2, para 4.

17 Art 17.

18 *Toscanino* at 277-278.

19 Note, "International Abduction of Criminal Defendants : Overreaching by the Long Arm of the Law" (1976) 47 *U Colo LR* 489 at 510. A self-executing treaty is one where the terms of the treaty themselves automatically provide for its execution and legislation is thus unnecessary to enforce it.

20 Feinrider, "Extraterritorial Abductions: A Newly Developing International Standard" (1980)14 *Akron LR* 27 at 34.

Fujii v State[21] where it was held that the United Nations Charter was not self-executing. Nevertheless, there is authority in international law that contradicts the American municipal law as the International Court of Justice stated unequivocally in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*[22] that the United Nations Charter imposes human rights obligations on the member States and that these obligations are self-executing. The *Toscanino* decision is thus justifiable and acceptable in terms of international law even though its reliance on local precedent is somewhat questionable. The Second Circuit relied on two Supreme Court decisions of *US v Rauscher*[23] and *Cook v US*[24] but neither of these cases "support the proposition that individuals have rights under extradition treaties, or that individuals may, on their own behalf, invoke the violation of international law that occurs in the injury to a State".[25]

Only six months later, the *Toscanino* decision was significantly modified and narrowed by the Second Circuit in *US ex rel Lujan v Gengler.*[26] The *Lujan* court held that "mere" kidnapping from Bolivia, without allegations of torture or custodial interrogation, was not a "complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process".[27] The court reverted to the traditional international law approach whereby violations of the Charters of the United Nations and of the Organisation of American States could not be invoked by Lujan as an individual particularly when "unlike Toscanino, Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction".[28] This requirement of an official protest is consistent with an established principle in international law that a State may voluntarily surrender a fugitive to another State without any violation of sovereignty or of any treaties of the surrendering State. However, this is inconsistent with the implied holding of *Toscanino* that the Charters of the United Nations and of the Organisation of American States are self-executing.[29] As a result of the decision in *Lujan*, courts dealing with cases of extraterritorial abductions strictly applied the *Ker-Frisbie* doctrine until 1992 and considered *Toscanino*, as it was reinterpreted in *Lujan*, to be an exception to the rule rather than a change in the rule.

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21 242 P 2d 17 (1952) 19 ILR 312 (1952); Supreme Court of California.

22 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971 p16.

23 (1886) 119 US 407.

24 (1933) 288 US 102.

25 Feinrider, "Extraterritorial Abductions: A Newly Developing International Standard" (1980) 14 *Akron LR* 27 at 34.

26 (1975) 510 F 2d 62.

27 At 66.

28 At 67. See also Feinrider, "Extraterritorial Abductions: A Newly Developing International Standard" (1980) 14 *Akron LR* 27 at 34-35.

29 Note, "International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law" (1976) 47 *U Colo LR* at 511-512.

The abduction of suspected international criminals has most recently been addressed in the United States in the cases of *US v Verdugo-Urquidez*[30] and *US v Alvarez-Machain*.[31] There is a common factual background leading up to these two cases as both defendants were abducted from Mexico to be tried for their involvement in the kidnapping, torture and murder of a Drug Enforcement Administration Special Agent, Enrique Camarena-Salazar. The *Ker-Frisbie* doctrine was not applied by the United States Court of Appeals in either case as it was reasoned that the kidnapping violated the United States - Mexico extradition treaty and was therefore a bar to jurisdiction.

The decision of *Alvarez* was reversed on appeal by the Supreme Court. The majority did not consider the treaty to be the exclusive method of extradition but instead took the view that the "Treaty says nothing about the obligations of the United States and Mexico to *refrain* from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs".[32] Since the treaty did not expressly prohibit the abduction of Alvarez, the rule in *Ker* was held to apply. The dissent rightly criticised this approach since it could logically follow that either country could execute or torture a person rather than attempt an extradition since they too are not expressly prohibited.[33] The dissenting judges' opinion is more in line with the reasoning used by the *Verdugo* court as they state that the treaty "on its face appears to have intended to set forth comprehensive and exclusive rules concerning the subject of extradition".[34] Despite the unsatisfactory reasoning in the *Alvarez* decision, it has reaffirmed the importance of the maxim *male captus bene detentus* in American jurisprudence.

Cases in Belgium and Germany have also held that domestic courts will not review the regularity of a foreign extradition.[35] The most notorious case of forcible abduction was the seizure of Adolf Eichmann on Argentine territory for trial in Israel on the charge of murdering six million Jews during World War II. The court in *AG(Israel) v Eichmann*[36] rejected any challenge to its jurisdiction. It approved the *Ker-Frisbie* doctrine and stated that it had also been accepted in Palestinian case law.[37] The violation of Argentina's territorial sovereignty was one of the controversies surrounding Eichmann's abduction and subsequent trial. Argentina lodged a complaint with the United Nations Security Council and a resolution was passed requesting the Israeli government to make "appropriate

30 (1991) 939 F 2d 1341.
31 (1992) 112 S Ct 2188.
32 At 2193 (emphasis added).
33 At 2199. But cf Guzman, "International Kidnapping or Justifiable Seizure?" (1993) 17 *Southern Illinois University Law Journal* 317 at 337.
34 As above.
35 See examples given in Note, "Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law" (1974) 72 *Mich LR* 1087 at 1107.
36 (1961) 36 ILR 5.
37 At 59-61. This decision was reaffirmed by the Supreme Court at 306.

reparation".[38] "The two Governments agreed to give effect to the resolution of the Security Council and resolved to regard the incident as closed."[39] This was interpreted by the court to mean that the kidnapping incident passed from the level of international law to the level of municipal law so the *Ker-Frisbie* rule could be applied.[40]

In the wake of the application of the *Ker-Frisbie* doctrine in the *Alvarez* decision by the United States Supreme Court, the twenty-one member States of the Ibero-American Conference suggested that it would be appropriate for the General Assembly to request under Article 96 of the United Nations Charter that the International Court of Justice render an advisory opinion on the legality of extraterritorial abductions and on the international legal consequences for the States involved.[41] These States agree that the use of this unilateral measure to obtain jurisdiction "undermines existing mechanisms for international cooperation in the apprehension and prosecution of criminal offenders, as well as treaty obligations to prosecute or extradite such offenders".[42]

The adherence of courts to the maxim *male captus bene detentus*, despite the violations of international law that have occurred, has clearly been driven by the court's desire to prosecute persons within their jurisdiction. This is in line with the transformation approach to international law whereby international law has no validity unless it is accepted and adopted by domestic law.[43] The most significant exception to the application of the *Ker-Frisbie* doctrine thus far has been the decision of *Toscanino* that took the rather progressive step of regarding the Charters of the United Nations and of the Organisation of American States as conferring rights directly on individuals that could be raised as a possible bar to jurisdiction on a municipal level. The alternative bar to jurisdiction in *Toscanino* was a violation of due process under the American Constitution and such a finding is based on the fundamental principles of the rule of law and the administration of justice rather than any breaches of international law. Concern about the administration of justice has led to the approach preferred by the courts of England and New Zealand. These jurisdictions have favoured a discretionary exercise of jurisdiction in the face of an abuse of process due to an extraterritorial abduction.

In *R v Horseferry Road Magistrates' Court; Ex parte Bennett*,[44] a majority of the House of Lords held that the court has a discretion to stay, as an abuse of process, criminal

38 At 58.
39 At 59.
40 At 70-71.
41 Morris & Bourloyannis-Vrailas, "The Work of the Sixth Committee at the Forty-Seventh Session of the UN General Assembly" (1993) 87 *AJIL* 306 at 322. By decision 49/425 of 9 December 1994 (adopted without a vote) the General Assembly decided to give further consideration to the request for an advisory opinion at a future session of the Assembly.
42 Morris & Bourloyannis-Vrailas, "The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly"(1994) 88 *AJIL* 343 at 357.
43 See for example *Chung Chi Cheung v R* [1939] AC 160.
44 [1994] 1 AC 42.

proceedings brought against an accused person who has been brought before the court by abduction in a foreign country where the abduction was participated in or encouraged by British authorities.[45] The accused was a New Zealand citizen who was wanted for criminal offences in relation to the purchase of a helicopter by a series of false pretences. The English police eventually located the accused in South Africa. No formal extradition procedures were in force between the United Kingdom and South Africa but special arrangements for extradition could have been employed. The accused argued that the English police elected not to use this process, but colluded with the South African police to have him arrested in South Africa and forcibly returned to the United Kingdom against his will.

The House of Lords was confronted with conflicting municipal authority as well as conflicting authority from other jurisdictions. The court examined earlier English cases[46] where it had been held that the courts did not have power to examine the circumstances in which a prisoner was brought within jurisdiction. These decisions were quite consistent with the *Ker-Frisbie* doctrine. This line of authority was departed from in the United Kingdom by a decision of the Divisional Court in *R v Bow Street Magistrates; Ex parte Mackeson*,[47] that relied upon a decision of Woodhouse J in *R v Hartley*,[48] a decision of the Court of Appeal of New Zealand. Woodhouse J held that "there can be no possible question here of the Court turning a blind eye to action of the New Zealand police"[49] who had telephoned the Australian police and asked them to arrest a man and put him on an aeroplane to New Zealand where he was wanted on a charge of murder. The Divisional Court then declined to follow *Ex parte Mackeson* in *R v Plymouth Justices; Ex parte Driver*[50] and reverted to the earlier English authorities. As a result, the House of Lords in *Ex parte Bennett* had to "decide as a matter of principle which of the two conflicting principles of law ought to prevail".[51]

The House of Lords did speak of kidnapping "if participated in or encouraged by British officialdom as a grave contravention of international law, the comity of nations, and the rule of law generally",[52] yet the majority's decision ultimately rested on an extension of the concept of abuse of process.[53] Prosecution could be prevented where the police had

45 At 73 per Lord Lowry; at 62 per Lord Griffith.
46 *Ex parte Susannah Scott* (1829) 9 B & C 446; 109 ER 166 (which was relied on by the United States Supreme Court in *Ker*); *Sinclair v HM Advocate* (1890) 17 R(J) 38; and *R v Officer Commanding Depot Battalion, RASC,Colchester; ex parte Elliott* [1949] 1 All ER 373.
47 (1981) 75 Cr App R 24.
48 [1978] 2 NZLR 199.
49 At 216-217.
50 [1986] QB 95.
51 *Ex parte Bennett* at 65, per Lord Bridge.
52 At 76, per Lord Lowry.
53 At 61-62 per Lord Griffiths; at 67-68, per Lord Bridge.

disregarded the available procedures as this constituted an abuse of power.[54] The court focused on the conduct of the police and the knowing involvement of the Executive rather than considering in any depth the violations of international law. Lord Griffith also distinguished the American cases on the grounds that they dealt with the due process provisions under the American Constitution as a defence to prosecution, rather than an exercise of discretion by the court to refuse to try the accused assuming the court has jurisdiction.

The abuse of process discretion adopted by the English and New Zealand courts is thus similar to the *Ker-Frisbie* doctrine in as much as both approaches are consistent with the transformation approach to international law. Consequently, the issue of extraterritorial abduction is dealt with on a municipal level using domestic principles of law. Any reference to the rules of international law serve to support the opinion that there has been an abuse of process rather than a breach of international law constituting a valid bar to jurisdiction in its own right. This position can be contrasted with French jurisprudence. The French courts have held in the cases of *In re Jolis*[55] and *Case of Nollet*[56] that there is no jurisdiction unless the return of the accused is voluntary or by regular extradition procedures.[57] This issue will be raised by the defence lawyers in the case against the international terrorist Illich Ramirez Sanchez ("Carlos the Jackal").[58] It is alleged that Carlos was drugged and kidnapped by Sudanese and French agents after an operation in Khartoum.[59] The Sudanese President has stated, however, that Carlos was legally extradited.[60] If the abduction can be proved as a matter of fact then there will be a bar to jurisdiction according to the French authorities.

A decision of the South African Court of Appeal also found that jurisdiction was barred after an accused had been abducted from Swaziland by government agents and returned to South Africa for trial.[61] The court stated that the sovereignty of States and the limits of territorial jurisdiction were "embodied [in] several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice".[62] The violation of international law was therefore central in the court's decision that it was barred from exercising jurisdiction.

From the foregoing discussion, it is clear that there are three possible approaches that may be followed by an Australian court, namely, the *Ker-Frisbie* doctrine, the abuse of process discretion or the violation of international law as a bar to jurisdiction. The best indication

54 At 62 per Lord Griffiths.
55 [1933] Ann Dig 191.
56 18 *Journal Du Droit International* 1188 (1891).
57 See Note, "Extraterritorial Jurisdiction" (1974) 72 *Mich LR* 1087 at1107-1108.
58 *The Advertiser* 19 August 1994 p16.
59 As above.
60 *The Guardian Weekly* 21 August 1994 p1; UN Doc A/49/528 annex.
61 *S v Ebrahim* 1991 (2) SA 553.
62 At 555.

of what the Australian High Court could do may be drawn from a decision of the New South Wales Court of Appeal, *Levinge v Director of Custodial Services*.[63] In that case, an accused person was arrested in Mexico and taken to the United States by illegal means and subsequently lawfully extradited by the United States to Australia to face criminal charges in New South Wales. Following *R v Hartley* and *Ex parte Mackeson*, the Court of Appeal held:

> Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has a discretion not to do so, where to exercise its discretion would involve an abuse of the court's process.[64]

This is entirely consistent with the later House of Lords decision of *Ex parte Bennett* and that case would be of considerable persuasive value in the High Court.

In *Levinge*, the court did not stay the prosecution as, unlike the police in *Ex parte Bennett*, the Australian prosecuting authorities were not involved in any irregularity or illegality in bringing the accused before the court as it was the American authorities who had carried out the initial abduction from Mexico. Therefore, if an accused person, like Christopher Skase, was abducted by a bounty hunter and returned to Australia unbeknownst to the Australian authorities or he was taken to another country and then legally extradited to Australia, it is unlikely that the accused would obtain relief from criminal proceedings. The police or the Executive must be knowingly involved for the abduction to constitute a "blot on the administration of justice".[65]

The High Court has considered the application of international law in their decisions.[66] For example, Brennan J in *Mabo v Queensland (No 2)* [67]stated that:

> [t]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights."[68]

There are a number of guarantees found in human rights law that prohibit practices that are both inevitably involved in an abduction and that affect the personal rights of the person

63 (1987) 9 NSWLR 546.
64 At 556, per Kirby P.
65 At 564, per McHugh JA.
66 See, most recently, *Minister for Immigration v Teoh* (1995) 183 CLR 273 at 286-288. See also *Commonwealth v Tasmania* (1983) 158 CLR 1 (Tasmanian Dam Case); *New South Wales v Commonwealth* (1975) 135 CLR 337 (Offshore Sovereignty Case); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
67 (1992) 175 CLR 1.
68 At 42 per Brennan J (with whom Mason CJ and McHugh J agreed).

abducted. Rights of personal liberty that prohibit arbitrary detention have been construed as forbidding: "(1) unlawful seizures such as abductions; (2) connivance between agents of two states to seize a person without lawful means; and (3) actions by private volunteers acting for or on behalf of the state".[69] Other human rights that may be violated by an extraterritorial abduction include rights of personal integrity (that is, rights that protect security of persons and prohibit cruel, inhuman or degrading treatment), the right to be brought promptly before a judge and a right to challenge the lawfulness of detention.[70]

The violation of these human rights should constitute a bar to jurisdiction that can be raised by the individual who has been abducted. The breach of the various rules of international law should also be accepted by Australian courts as sufficient reason to refuse to exercise jurisdiction. Following the *Alvarez-Machain* decision, the Australian Department of Foreign Affairs and Trade issued a Diplomatic Note stating, "Australia is of the view that the assertion of competence to abduct Australian nationals from foreign countries, or to abduct foreign nationals from Australia, is contrary to international law and unacceptable".[71] Nonetheless, the main hurdles to such an approach being followed in Australia are the general adherence to the transformation approach and the possible argument that violations of international law can only be raised by the State because an individual is not a subject of international law in traditional international jurisprudence. The violation of these rules is more likely to constitute factors that may be taken into consideration in the discretion as to whether to exercise jurisdiction. This would be in line with *Levinge*, as well as the English and New Zealand authorities. Whilst this approach by an Australian court is at least preferable to the application of the maxim *male captus bene detentus*, it would still be far from a progressive and global perspective to the development of the law.

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69 Bassiouni, *International Extradition and World Public Order* (AW Sijthoff International Publishing Company Netherlands 1974) at 157.

70 Quigley, "Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on *US v Alvarez-Machain*" (1993) 68 *NDLR* 723 at 740-742.

71 "Jurisdiction - Australian reaction to trial in United States of person abducted from another country" (1993) 14 *Australian Year Book of International Law* 420 at 421.