

XIX

Panel III

Discussion—Maritime and Coalition Operations

On the Abduction or Extradition of Terrorists

Ivan Shearer

Countries throughout the common law world draw a distinction between obtaining jurisdiction over individuals through some type of government collusion which violates international law and obtaining jurisdiction through happenstance over an individual. In the former case, such jurisdiction over a person constitutes an abuse of process for the court to continue trial and the case should be dismissed and the individual discharged. When jurisdiction is obtained through happenstance, however, trial may proceed. This approach stands in marked contrast to that taken by the US Supreme Court in *United States v. Alvarez-Machain* where the Court held that it effectively does not matter how jurisdiction over the body of the defendant is obtained.¹

1. **Editor's Note:** After being indicted in the United States for the kidnapping and murder of a DEA agent, Humberto Alvarez-Machain was kidnapped by the Mexican police and flown to the United States to be turned over to DEA agents. Defendant contested the jurisdiction of the federal district court and the Ninth Circuit Court of Appeals reversed the holding of the district court. Upon government appeal to the Supreme Court, that Court reversed and remanded the holding of the Circuit Court of Appeals holding that a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty does not acquire a defense to the jurisdiction of US courts simply by virtue of the abduction itself when the treaty does not exclude that a party might resort to self-help for achieving the presence of an individual. 504 U.S. 655 (1992) at 662 [hereinafter Machain].

Wolff von Heinegg

I do not agree that the practice of irregular rendition has a proper place in international law. The violation of a nation's sovereignty by resort to self-help is unconscionable. Using armed force to conduct such an irregular rendition is clearly a violation of international law.

Kenneth O'Rourke

United States courts have, on occasion, suggested that a defendant may not be prosecuted if his presence is obtained in violation of specific terms of an extradition treaty prohibiting abduction.² Where, however, an extradition treaty is not violated and a defendant's presence is obtained through forcible abduction, (commonly known as irregular rendition) the US Supreme Court has consistently recognized that jurisdiction may nonetheless be properly exercised.³ The propriety of irregular rendition is less clear, however, within the international community, prompting the United States, as a matter of policy not to resort to its use. Having said that, I believe irregular rendition continues to have its place, particularly in the war on terrorism.

As for international law, I do not agree that irregular rendition is absolutely prohibited and not a proper mechanism for addressing terrorism. For example, the proposition that Article 51 of the UN Charter would not permit the United States to enter a country to conduct a rendition, or renditions, as a matter of national self-defense is illogical. Certainly, if the United States could have snatched Osama bin Laden to remove the threat to its peace and security, instead of engaging in a full blown attack on al Qaeda and the Taliban, it would have done so and it would have been, if not more favorable as a means of self-defense, at least a less aggressive means authorized under Article 51. It seems incongruous to suggest that a state can resort to a full blown armed conflict, invade another state as a matter of self-defense, but could not use a lesser means of force, such as an irregular rendition, to remove the threat. Clearly, renditions to remedy criminal activity not amounting to a threat to the peace and security of a state raise issues of sovereignty that many believe are not supported by international law. However, renditions to remedy threats to the peace and security of an aggrieved state under Article 51 of the UN Charter would be much preferable to full blown military action. Unfortunately, in the case of addressing the terrorist network operating out of Afghanistan, the United States was unable to take this less severe course of action (snatch

2. See, e.g., *United States v. Rauscher*, 119 U.S. 407 (1986).

3. See, e.g., *Ker v. Illinois*, 119 U.S. 436 (1886); see also *Machain*, *supra* note 1, at 669.

Osama Bin Laden) and, as a result, needed to resort to armed hostilities against bin Laden and the Taliban who provided material support to al Qaeda.

Christopher Greenwood

Were the US government to be asked whether it were lawful for the British government to abduct Irish Republican Army suspects from America, the answer would be no. If this is true, then it must be equally true that it is not lawful for the United States to abduct offenders who are otherwise not extraditable to bring them to the United States. It is a clear violation of international law for a state to exercise its jurisdiction on the territory of another. The fact that domestic law supports the subsequent trial of such a person is entirely separate from the question of whether jurisdiction exists to seize that person from the territory of another state. There may perhaps be a self-defense exception to this in the case of someone such as bin Laden, but this is very much the exception.

The normal remedy it seems for such an irregular rendition would be the return of the person concerned as restoration of the status quo is the normal remedy required by law. History provides an example of this type of remedy where a group of British jailers from Gibraltar who were pursuing a suspect managed to arrest him on the wrong side of the border with Spain. The suspect was ultimately returned to Spain to rectify the violation of Spanish sovereignty.⁴

John Murphy

In *United States v. Alvarez-Machain*, the issue before the Supreme Court was the bilateral extradition treaty between the United States and Mexico.⁵ The majority conclusion in this case was that given that the defendant's abduction was not in violation of the extradition treaty between the United States and Mexico, the rule of *Ker v. Illinois* did not prohibit the trial of *Machain* in a US court for violations of the criminal laws of the United States.⁶ It is worth noting though, that if the majority had come to the conclusion that the extradition treaty barred this abduction, then the defendant would have been released and returned to Mexico. The *Machain* Court also parenthetically addressed the issue of customary international law, noting that such an abduction may well have been a violation of customary international law as a violation of the

4. See *In re Patrick Lawler* in 1 Lord McNair International Law Opinions (1956) at 77–78.

5. *Machain*, *supra* note 1 at 669–70.

6. *Id.* at 669–70; citing *Ker v. Illinois*, 119 U.S. 436 (1886).

sovereignty of Mexico but that such a violation must properly be considered by the executive branch and not the judicial branch.⁷

Two final points of interest merit mention about this case. First, the subsequent history of this case tells us that the government's case was ultimately dismissed pursuant to Machain's motion for summary judgment.⁸ Secondly, Dr. Machain currently has civil litigation pending against the United States for damages.⁹

Yoram Dinstein

There is a risk of confusing two completely unrelated issues. One is whether or not an act of abduction from abroad constitutes a violation of the sovereignty of a foreign state. Undoubtedly, that is the case, if the abduction is carried out without the consent of the local government. A separate issue is whether the state which acquired custody over an individual through such abduction (in breach of the sovereignty of another state and therefore in breach of international law) may nevertheless exercise jurisdiction over the abductee. The answer is clear: jurisdiction exists.

On the one hand, since the act of abduction is in violation of international law, the abducting state incurs responsibility vis-à-vis the other state whose sovereignty has been encroached upon. On the other hand, the jurisdiction of the abducting state vis-à-vis the person in the dock is not affected by the inter-state clash. The paradigmatic case is that of Adolph Eichmann.¹⁰ As is well known, Eichmann was abducted from Argentina, brought to Israel, tried there, convicted, and executed. The matter was brought by Argentina before the Security Council.¹¹ Interestingly enough, the Security Council,

7. *Id.* at 669–70.

8. See Machain, *supra* note 1, at 669–70, *rev'd and remanded to United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. Ct. App. 1992), *amended and remanded by sub nom.* United States v. Zuno-Acre, 44 F. 3d (9th Cir. Cal. 1995), *post conviction relief denied in part, dismissed in part* 25 F. Supp 2d 1087 (C.D. Cal. 1988), *aff'd by* 209 F. 3d 1095 (9th Cir. Cal. 2000).

9. See *Alvarez-Machain v. United States*, 96 F.3d 1246 (9th Cir. Cal. 1996) *amended by* 107 F.3d 696 (9th Cir. Cal. 1997), *cert denied sub nom.* Berellez v. Alvarez-Machain, 522 U.S. 814 (1997) *remanded by Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. Cal. 2001).

10. Adolph Eichmann, one of the key architects of the Holocaust, fled to Argentina after World War II. Abducted by Israeli Mossad agents in 1960 (after a prolonged worldwide search), he was put on trial for genocide and related crimes. See generally J. Fawcett, *The Eichmann Case*, 38 BRIT. Y.B. INT'L L. 181 (1962); L.C. Green, *The Eichmann Case*, 23 MODERN L. REV. 507 (1960); F. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABATI ROSENNE 407–422, 414 (Yoram Dinstein & Mala Tabory eds., 1989).

11. See S. C. Res. 138, U.N. SCOR, 15th Sess., U.N. Doc. S/138/(1960).

while acknowledging the breach of Argentinian sovereignty, did not demand that Israel return Eichmann to Argentina. Eichmann's case is in many respects unique. But the view of the US Supreme Court on the underlying issue was consolidated already in the 19th century in *Ker v. Illinois*.¹² The Court held that personal jurisdiction is not affected by the improper manner in which a defendant is brought before a court.

Christopher Greenwood

Eichmann is far from a paradigmatic case on the abduction of individuals from the territory of another state. First, Eichmann is an egregious case and there is no real counterpart to it today. Secondly, the case was decided under an almost entirely different world order. Today, the idea that the only violation in the posited case is that of the territorial sovereignty of the state where the abduction occurs, simply does not ring true. There is also a violation by the abducting state of the international human rights of the abducted individual.¹³ Indeed, the Human Rights Committee illustrated clearly this to be the case in 1981.¹⁴ This international human right against abduction, is contained in another form in the prohibition against arbitrary arrest and detention contained in Article Nine of the International Covenant on Civil and Political Rights to which the United States is a party.¹⁵

International law today would not permit a state to exercise jurisdiction over someone illegally seized for two reasons. In a case like *Machain*, where unlike Eichmann, the state from whose territory the man was abducted protested throughout, the normal principles of state responsibility require the abducting state to make good its violation of the other state's sovereignty by

12. See *Ker v. Illinois*, 119 U.S. 436, 444 (1886). *Accord* *Frisbie v. Collins*, 342 U.S. 519, 523 (1952) (no Constitutional prohibition on finding of guilt when criminal defendant is forcibly abducted)

13. See Beverly Izes, *Drawing Lines in the Sand: When State Sponsored Abduction of War Criminals Should be Permitted*, 31 COLUM. J. L. & SOC. PROBS. 1 (1997) 12–14. See also Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 270 (1952).

14. See Views of the Human Rights Committee on the Complaint of Lopez, 36 U.N. GAOR, Supp. No. 40, at 176–84, U.N. Doc. A/36/40 (1981); See also M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 59 (1979) (forcible abduction said to violate human right to liberty and freedom from arbitrary detention).

15. See International Covenant on Civil and Political Rights, ratified by the United States in 1992, 991 U.N.T.S. 171, 31 I.L.M. 645 (May 1992). Note that the United States does not consider Articles 1–27 of the covenant as self-executing. See 138 CONG. REC. S4784 (Apr. 2, 1992).

restoring the status quo. Secondly, under the international law in existence today, the abducted individual possesses rights under human rights treaties which, if taken seriously, operate to ensure that he is not abducted.

The events in *Eichmann*, are so peculiar to their own facts that to generalize from them is a great mistake. The *Machain* Court simply created bad law and happens to turn on a point of US law only. This case was argued and developed by the defense on the interpretation of a bilateral extradition treaty and not on the proper grounds of violations of customary international law. Accordingly, if someone is abducted from the United States by any other country, and put on trial in that other country the United States would demand his return. No remedy less than this under international law would be proper.

Yoram Dinstein

I disagree. I believe that it is very dangerous to apply to extradition law—which essentially governs the relations between states—concepts of human rights law. As far as the individual is concerned, assuming that the state has jurisdiction over him, he should appear before the court when summoned to do so. He has no human right to be a fugitive from justice. If bounty hunters were to capture and return him, the legality of the act would scarcely be challenged. Why should the position be different if the abduction was carried out by state agents? Evidently, all this is not relevant to the grievance to the state whose sovereignty has been disregarded by the abducting agents. The state carrying out the abduction may have to compensate or otherwise satisfy the aggrieved state. But let us not confuse the state with the individual.

Robert Turner

The Ninth Circuit Court of Appeals in the *Machain* case, quite simply was in error and it was proper for the Supreme Court to correct this error in the law and bring the decision into line with *Ker v. Illinois*.¹⁶ The issue here is not whether the state has remedies or not but instead, whether the defendant should be able to deprive the US courts of jurisdiction simply because of his abduction from another state. One reason this line of reasoning remains important today is that in the global war on terrorism, there are sometimes states that may be willing to assist the United States with intelligence on individuals operating within their borders and may be willing to surreptitiously permit a “cover abduction.” To avoid angering other terrorists, such states must retain their ability to protest

16. See *Machain*, *supra* note 1, at 946 F. 2d 1466 (1991).

publicly such alleged violations of their sovereignty. This is not to say, however, that such individuals should go free. Accordingly, international law continues to recognize that states may engage in the practice of irregular rendition.

Ivan Shearer

Our case study on irregular rendition would not be complete without a reference to the Second Circuit Court of Appeals case of *United States v. Toscanino*.¹⁷ In this 1974 case, the Second Circuit stated that if the abduction was accompanied by more than just an abduction, in other words some violation of due process such as torture or other human rights violation, then the Second Circuit would refuse to grant jurisdiction over the abducted person.¹⁸ Accordingly, whether the jurisdiction would stand in the event of some additional harm to the abducted individual, other than the abduction itself, in US courts is somewhat subject to debate.

On the Application of the Law of Armed Conflict

Neil Brown

Typically, the armed forces are taught that rules of engagement (ROE) are a combination of mission and threat. Clearly, the mission is defined by policy and law. Threat is based on intelligence indicators and often the state of the world order. Currently, the only mission in support of the global war on terror being conducted by the United Kingdom that does not explicitly rely upon Article 51 of the UN Charter as its basis for action is that of the UK troops participating in support of the International Security Assistance Force mission in Afghanistan pursuant to Security Council Resolution 1386.¹⁹ Of course, notwithstanding any policy constraints imposed on our forces by ROE, they always possess the right to self-defense.

Paul Cronan

From an Australian perspective, we are also relying on Article 51 as the legal basis for our involvement in Operation ENDURING FREEDOM. The question

17. See *United States v. Toscanino*, 500 F.2d 267, 275 (1972).

18. *Id.*

19. See S. C. Res. 1386, U.N. SCOR, 56th Sess., U.N. Doc. S/1386/(2001). This resolution provides for the establishment of the “International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment.”

that must be asked though, is at what point does the authorization to use force in self-defense under Article 51 begin to wane? In other words, what happens if our respective countries are not attacked or threatened with attack by terrorists for the next several years? When does the inherent right to continue to use force in self-defense end? How long, for example, can maritime enforcement operations based on self-defense continue to be legitimately argued? This is a difficult question and while there exists today a continuing threat, it is conceivable that this threat will ultimately wane. What then will be the basis for these operations?

Jean-Guy Perron

Canadian participation in Operation ENDURING FREEDOM is also based on the collective self-defense provisions contained in Article 51 of the UN Charter and in customary international law. Clearly, our forces' operations are bounded and constrained by the law of armed conflict and so our commanders and forces must understand how these laws affect their ability to accomplish the given mission.

Terrorism as a Criminal or International Law Problem

Charles Garraway

Up until the last few years, the international community recognized terrorism as a matter of criminal law to be dealt with by each state independently. This is not to say that there were not efforts to prohibit broad categories of terrorist acts but rather that these acts once prohibited were typically enforced through the courts of the states affected by them. During the last few years, and definitely since the events of September 11th, the international view on terrorism has changed from that of a criminal law matter to that of a law of armed conflict matter. In many respects, we are now operating in a new paradigm which calls for the legal application of deadly force against such terrorists and not their capture and subsequent trial. Perhaps as Commander Brown indicated in his comments, it would be wise to develop an interagency approach to this matter and revise the existing criminal law tools to increase the powers available to address the difficult problem of global terrorism.