

Fordham International Law Journal

Volume 13, Issue 4

1989

Article 10

The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law

Andrew M. Wolfenson*

*

Copyright ©1989 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law

Andrew M. Wolfenson

Abstract

The Note argues that U.S. courts should consider treatment of an apprehended individual in determining whether to retain jurisdiction. It examines U.S. and international law, and argues that the U.S., in order to comply with international law, must consider the treatment of an apprehended individual. It concludes that the U.S. courts must divest themselves of jurisdiction if U.S. agents have mistreated an apprehended individual in violation of international law.

THE U.S. COURTS AND THE TREATMENT OF SUSPECTS ABDUCTED ABROAD UNDER INTERNATIONAL LAW

INTRODUCTION

The continued development of successful international relations among states depends upon each state respecting fundamental human rights.¹ Countries, however, have pushed aside this ideal by engaging in extraordinary apprehensions that involve infringements upon individual rights.² Individuals often allege that they were mistreated or tortured when officials bring them to the prosecuting forum.³ The acceptance of such apprehensions on the judicial and executive levels, both in the United States and abroad, has weakened the foundation of human rights embodied in international law.⁴ U.S. courts

1. See U.N. CHARTER art. 1, ¶ 3. The U.N. Charter states that the United Nations' "purpose [is] to promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all." *Id.*; see W. OLSON, *THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS* 294 (7th ed. 1987); Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?* 57 OR. L. REV. 51 (1977). National sovereignty and territorial integrity are given paramount consideration under international law. *Id.* at 63.

2. M. BASSIOUNI, *INTERNATIONAL EXTRADITION* 239 (1987); see Abramovsky & Eagle, *supra* note 1, at 52. The two forms of extraordinary apprehensions are abductions and irregular renditions. *Id.* Abductions are done unilaterally, as officials in the asylum state are not alerted to the operation nor is their cooperation requested. *Id.* Irregular renditions, however, "may be defined as ad hoc agreements . . . whereby either through active cooperation or acquiescence by officials of the asylum state an individual is removed forcibly to the state of apprehension." *Id.*

3. See, e.g., *United States v. Yunis*, 681 F. Supp. 909 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989); see also *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981); *United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976); *United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 487 (1975); *United States v. Toscanino*, 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

4. See 6 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 727 (1968). The customary method for a state to obtain jurisdiction over a fugitive abroad is by extradition, a "process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment." *Id.* The act of one country surrendering a fugitive to another country is an institutional practice, created for the benefit of the prosecuting state with little or no regard for the individuals being transported. M. BASSIOUNI, *INTERNATIONAL LAW IN UNITED STATES LAW AND PRACTICE* 629 (1986). Extradition requests are not always granted by the requested state, however, because there is no absolute duty on nations to comply with such requests; compliance with extradition requests is recommended, but is not mandatory. See, e.g., *Convention for the Suppression of Unlawful*

are split as to whether a court should consider the treatment of an apprehended individual in determining whether to exercise jurisdiction.⁵

This Note argues that U.S. courts should consider treatment of an apprehended individual in determining whether to retain jurisdiction. Part I presents the international law applicable to the treatment of individuals apprehended abroad. Part II examines U.S. case law, setting forth the various courts' inquiries into the treatment of apprehended defendants. Part III argues that the U.S. courts, in order to comply with international law, must consider the treatment of an apprehended individual in determining whether to retain jurisdiction. This Note concludes that U.S. courts must divest themselves of jurisdiction if U.S. agents have mistreated an apprehended individual in violation of international law.

I. INTERNATIONAL LAW ON APPREHENSIONS AND HUMAN RIGHTS

Traditionally, the abduction of an individual abroad was considered a violation of international law.⁶ The maxim condemning abduction evolved from various sources, including

Seizure of Aircraft, *opened for signature* Dec. 16, 1970, art. 7, 22 U.S.T. 1641, 1646, T.I.A.S. No. 7192, at 6 (stating that "[t]he contracting state . . . if it does not extradite [the offender . . . shall] submit the case to its competent authorities for . . . prosecution"); Single Convention on Narcotic Drugs, *opened for signature* Mar. 30, 1961, art. 36(2)(b), 18 U.S.T. 1407, 1426, T.I.A.S. No. 6298, at 20, 520 U.N.T.S. 151, 252 (stating that "[i]t is desirable that the offenses . . . be included as extradition crimes"); *see also* Abramovsky & Eagle, *supra* note 1, at 58 n.27. Recent unsuccessful extradition attempts by the U.S. government include the request made to Italy for the hijackers of the cruise ship *Achille Lauro* and the request made to West Germany for suspected terrorist Mohammed Hamadei. *See* Engelberg, *U.S. Is Said to Weigh Abducting Terrorists Abroad for Trials Here*, N.Y. Times, Jan. 19, 1986, at 1, col. 4.

5. Compare *infra* notes 116-63 and accompanying text (discussing cases that consider treatment of detainees) with *infra* notes 164-202 and accompanying text (discussing cases that do not consider treatment of detainees).

6. *See* *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F.Supp. 916 (E.D.N.Y. 1975); *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5 (D. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Sup. Ct. Isr. 1962). The court in *Toscanino* stated that "[a] long standing principle of international law [holds] that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state." *Toscanino*, 500 F.2d at 278; *see* J. INTERNOSCIA, *NEW CODE OF INTERNATIONAL LAW* 15, § 84 (1910). This text states that "[e]very act of a government tending to diminish the territorial power of another State is illegal, unless it be ordered by the International Community." *Id.*

treaties⁷ and the customary rules under which sovereigns had conducted themselves when dealing with other states.⁸ This international maxim was also incorporated into the domestic laws of states.⁹

Customary international law, however, is dynamic and may be modified by continued practice within the international community.¹⁰ This has been the case with abductions.¹¹ Countries have come to regard abductions as acceptable under

7. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The preamble to the Vienna Convention on the Law of Treaties states that the signatories to the Vienna Convention recognize "the ever-increasing importance of treaties as a source of international law." *Id.* at 332; see P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 10 (1983). Sieghart states that international law derives from consent, and that states may express such consent through "an express contract or treaty, [which] . . . constitutes a large part of modern international law. Consent may however also be inferred from the established and consistent practice of States in conducting their relationships with each other." *Id.*

8. See T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 1 (1989). The Restatement (Third) of Foreign Relations Law of the United States (the "Restatement (Third)") declares that customary international law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation." *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(2) [hereinafter *RESTATEMENT (THIRD)*]; see P. SIEGHART, *supra* note 7, at 11, 81. Custom may be created by voluntary compliance, but when the process has been widely accepted it may "be said that the law imposes obligations." *Id.* at 7. Customary law, however, may be modified through "[r]eliance by a State on a novel right or an unprecedented exception to the principle . . . if shared in principle by other states." *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4, ¶ 207 (Judgment of June 27).

9. See G. EZEJIOFOR, *PROTECTION OF HUMAN RIGHTS UNDER THE LAW* 20 (1964). The doctrine of incorporation holds that "the rules of customary international law, at least, are part of the law of the land without any express act of transformation." *Id.* at 20; see *Eichmann*, 36 I.L.R. at 24. In the absence of state law to the contrary, customary international law is generally considered as "per se part of the law of the land." See *id.* at 24-25; *Abramovsky & Eagle*, *supra* note 1, at 64 (stating that "the United States has recognized explicitly that international law is our law"). Even countries not a party to a specific instrument may be bound to observe its maxims. T. MERON, *supra* note 8, at 1; see Vienna Convention, *supra* note 7, art. 38, 1155 U.N.T.S. at 341 (stating that "[n]othing . . . precludes a rule set forth in a treaty from becoming binding upon a [non-party] State as a customary rule of international law").

10. See T. MERON, *supra* note 8, at 58. In fact, violations of a standard may occur so often that it becomes difficult to ascertain whether the practices of states reflect the norm or violations of that norm. *Id.*

11. See, e.g., *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (all permitting the abductions of individuals overseas). Recent U.S. abductions abroad of Mexican nationals have again thrust this issue into the international spotlight. See Hedges & Witkin, *Kidnapping drug lords*, U.S. NEWS & WORLD REPORT, May 14, 1990, at 28.

international law.¹² This changed attitude has accordingly been reflected in domestic practice.¹³ If the host state does not formally protest the infringement of its borders, the abducted individual may not protest.¹⁴

This modification of international law is undermined by the use of torture and mistreatment by abducting agents.¹⁵ As stated, treaties constitute an integral part of what is considered to be international law.¹⁶ Various human rights documents and treaties have been promulgated that state such mistreatment contravenes international standards of conduct.¹⁷ In ef-

12. See *Attorney General of Israel v. Eichmann*, 36 I.L.R. 5, 59-62, 65-67 (D. Jerusalem 1961) (discussing cases from United Kingdom, Palestine, and United States upholding jurisdiction over fugitives captured in other countries), *aff'd*, 36 I.L.R. 277 (Sup. Ct. Isr. 1962). But see *Cutting's Case*, U.S. DEP'T OF STATE, 1887 FOREIGN RELATIONS 751, 760 (1888), 2 J. MOORE, INTERNATIONAL LAW DIGEST 228, 230-31 (1906) (U.S. protest leads to release of U.S. citizens abducted in Mexico).

13. See *infra* notes 95-202 and accompanying text (absent allegations of torture, mere abduction of individual does not require official response).

14. See *Abramovský & Eagle*, *supra* note 1, at 70. Standing "essentially requires that the individual possess a right which allegedly has been infringed . . . American courts consistently have denied the individual the right to contest the legality of an extraordinary apprehension abroad. Standing in these instances has been restricted to the asylum state." *Id.* This restriction "has been premised upon the rationale that provisions such as article 2:4 of the U.N. Charter and article 17 of the O.A.S. Charter were designed to protect the sovereignty and territorial integrity of states." *Id.* at 70 n.67; see J. INTERNOSCIA, *supra* note 6, at 191. According to section 1107 of this text: "International Law gives rise to perfect rights and duties only as regards States and not as regards individuals or associations subordinate to it." *Id.* § 1107. The court in *Toscanino* noted that "[b]y and large treaties are to be enforced by governments, rather than by their individual citizens, and [none of the countries involved] contemplated that . . . a defendant could personally seek to invoke these treaties." *Toscanino*, 500 F.2d at 282.

15. See *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33*, U.N. Doc. E/CN.4/1986/15 (1986) [hereinafter *Report by Special Rapporteur*]. According to the United Nations, "[t]orture is now absolutely and without any reservation prohibited under international law If ever a phenomenon was outlawed unreservedly and unequivocally it is torture There [is] no disagreement whatsoever on the fact that torture is absolutely forbidden." *Id.* at 1, ¶ 3.

16. See *Vienna Convention*, *supra* note 7, 1155 U.N.T.S. at 332.

17. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/708 (1984) [hereinafter *Convention on Torture*]; *Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) [hereinafter *Declaration on Torture*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Conven-*

fect, it may be possible under international law, through the enactment of these treaties, that mistreatment of a prisoner would render an abduction illegal.¹⁸

The protection of certain basic human rights is a universally accepted ideal, regardless of any existing historical or cultural differences between states.¹⁹ According to several scholars, the importance of human rights lies in the recognition that the state exists for the human being, and not that the human being exists for the state.²⁰ Awareness of the importance of protecting these rights reached its peak in response to violations committed by sovereign governments during World War II.²¹ After the war, the victorious states sought to introduce new concepts into international law that would preclude a reoccurrence of human rights violations, leading to the formation of such multinational organizations as the United Nations,²² the Organization of American States (the "OAS"),²³

tion]; Universal Declaration on Human Rights, G.A. Res. 217A, 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; *infra* notes 41-94 and accompanying text (discussing these and other international human rights instruments).

18. See *United States v. Toscanino*, 500 F.2d 267, 275-76 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

19. L. HENKIN, *THE INTERNATIONAL BILL OF RIGHTS* 1 (1981); see P. DROST, *HUMAN RIGHTS AS LEGAL RIGHTS* 43 (1965). One commentator notes that the "source of human rights in international law . . . consists of customary rules and . . . international agreements." P. DROST, *supra*, at 43; see G. EZEJIOFOR, *supra* note 9, at 3. Ezejiofor defined human rights as "moral rights which every human being, everywhere, at all times, ought to have simply because of the fact that, in contradistinction with other beings, he is rational and moral." *Id.*

20. J. BURGERS & H. DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 5 (1988); see A. BENNETT, *INTERNATIONAL ORGANIZATIONS* 232 (1977). Bennett described human rights as "those areas of individual or group freedom that are immune from governmental interference or that, because of their basic contribution to human dignity or welfare, are subject to governmental guarantee, protection, or promotion." *Id.*

21. J. BURGERS & H. DANIELIUS, *supra* note 20, at 5. The authors assert that there have been two major waves of human rights awareness—the eighteenth century and the 1930-1940s. *Id.* From the seventeenth to the eighteenth century, they claim, such documents as the U.S. Declaration of Independence of 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789 show the belief that the "human being was endowed by nature with inalienable fundamental rights which can be invoked against the government and which must be safeguarded by the government." *Id.* The second wave began in the 1930s and culminated when "the full scale of the horrors perpetrated by the Nazis came to light." *Id.*; see P. SIEGHART, *supra* note 7, at 14; G. EZEJIOFOR, *supra* note 9, at 53.

22. See generally, I M. KU, *A COMPREHENSIVE HANDBOOK OF THE UNITED NATIONS*

and the Council of Europe (the "Council").²⁴

A. *The United Nations*

For over forty years, the United Nations has been at the forefront of protecting human rights.²⁵ The actions of the United Nations in promoting human rights reflect the concerns of the international community²⁶ and have influenced

96 (1978). The Declaration of Teheran, signed on December 1, 1943, by Franklin Roosevelt, Joseph Stalin, and Winston Churchill, stated that "we look with confidence to the day when all peoples of the world may live free lives, untouched by tyranny, and according to their varying desires and their own consciences." 9 U.S. DEP'T OF STATE BULL. at 409 (Dec. 11, 1943). This reiterated the premise underlying the Declaration by United Nations, signed on January 1, 1942, which stated that the Allied Nations were

convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world.

6 U.S. DEP'T OF STATE BULL. at 3 (Jan. 3, 1942); *see generally* R. RIGGS & J. PLANO, *THE UNITED NATIONS INTERNATIONAL ORGANIZATION AND WORLD POLITICS* 14-19 (1988) (describing events surrounding formation of United Nations); N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 2 (1987); A. CASSESE, *UN LAW/FUNDAMENTAL RIGHTS* (1979) (compiling essays regarding U.N. action with respect to human rights and U.N.'s formation). Prior to the end of World War II,

human rights were seen as a matter to be left to the . . . domestic jurisdiction of states . . . [because] for most purposes governments could do what they wished with those under their jurisdiction and international law had no opinion on the matter, much less any means to act It became clear to the Allied Powers who founded the United Nations that no peace could be secure where governments were free to break and obliterate their own people.

N. RODLEY, *supra*, at 2; *see* P. SIEGHART, *supra* note 7, at 14.

23. *See* Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, *amended*, T.I.A.S. No. 6847, Feb. 27, 1967 [hereinafter OAS Charter]. The OAS was formed as a regional faction of the United Nations. *Id.* art. 1, 2 U.S.T. at 2417, T.I.A.S. No. 2361 at 26, 119 U.N.T.S. at 50. The preamble states that the member states are "[r]esolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm." *Id.* preamble, 2 U.S.T. at 2416, T.I.A.S. No. 2361 at 25, 119 U.N.T.S. at 50; *see* I F. GARCIA-AMADOR, *THE INTER-AMERICAN SYSTEM* 70-71 (1983).

24. *See infra* notes 83-84 and accompanying text (describing formation of Council of Europe)

25. *See infra* notes 30-69 and accompanying text (discussing U.N. action with respect to human rights).

26. UNITED NATIONS, *ACTION IN THE FIELD OF HUMAN RIGHTS (25TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS)* 5, U.N. Sales No. E.74.XIV.2 (1973) [hereinafter U.N. ACTION IN THE FIELD OF HUMAN RIGHTS].

both the constitutions and legislation in many states.²⁷ In its charter and in promulgating the following declarations and resolutions, the United Nations has established itself as the international body most devoted to protecting human rights and eradicating practices of torture and inhuman punishment.²⁸ These measures, however, were not intended to actually establish new codes of conduct, but rather to recognize those acts already prohibited under customary international law.²⁹

1. The United Nations Charter

The United Nations Charter (the "U.N. Charter" or the "Charter"), adopted in 1945 by the victors of World War II, expressed concern for both the dignity and worth of human beings.³⁰ Article 2 of the Charter evinces the universal nature of this document.³¹ Paragraph 6 of article 2 states that members of the United Nations should strive to ensure compliance from all states with the Charter's provisions, even from those states not parties to the Charter itself.³² Drafted in the wake of World War II, the preamble to the Charter proclaims that the

27. *Id.* at 17-19. Many states, including the African states of Cameroon, Chad, and Niger, have expressly referred to the Universal Declaration on Human Rights (the "Universal Declaration") in their national constitutions. *Id.* at 17. Many other states, while not specifically mentioning the Universal Declaration, incorporate its principles into their constitutions. *Id.* States that have human rights provisions in their constitutions include Austria, Belgium, France, the German Democratic Republic, the Federal Republic of Germany, Italy, the Netherlands, Spain, and Switzerland. See generally PEASLEE, CONSTITUTIONS OF NATIONS, vol. III, at 25-932. In addition, several municipal laws of members nations cite provisions of the Universal Declaration. U.N. ACTION IN THE FIELD OF HUMAN RIGHTS, *supra* note 26, at 17-18.

28. See N. RODLEY, *supra* note 22, at 18.

29. J. BURGERS & H. DANIELIUS, *supra* note 20, at 1. For example, the Convention on Torture was "based upon the recognition that the [included] practices [were] already outlawed under international law. The principal aim of the Convention [was] to strengthen the existing prohibition of such practices by a number of supportive measures." *Id.* (emphasis in original); see L. HENKIN, *supra* note 19, at 12.

30. See U.N. CHARTER preamble. The Charter states that the peoples of the United Nations are "determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small." *Id.* The U.N. Charter also states that one of the purposes of the United Nations is to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all." *Id.* art. 1, ¶ 3.

31. *Id.* art. 2, ¶ 6.

32. *Id.* Article 2, paragraph 6 provides that "[t]he [United Nations] shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." *Id.*

members of the United Nations were determined to prevent another occurrence of the atrocities committed during both World War I and World War II.³³

In addition to the preamble, several articles of the Charter directly address the protection of human rights. In article 1, the Charter calls upon all states to take appropriate measures to ensure universal peace by protecting and encouraging respect for human rights.³⁴ In addition, articles 55 and 56 promote universal respect for human rights and fundamental freedoms by encouraging the United Nations and its member states to comply with certain standards of human rights.³⁵

Scholars now consider these provisions of the Charter to be part of the foundation of international law.³⁶ The Charter creates legal obligations that a state violates if it abridges the

33. *Id.* preamble.

34. *Id.* art. 1, ¶¶ 2-3. Article 1 states:

The purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which may lead to a breach of the peace;

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

(3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction as to race, sex, language, or religion; and

(4) To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Id. art. 1.

35. *Id.* arts. 55-56. Article 55 of the Charter states that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* art. 55. Article 56 forces all members to pledge themselves to achieving the purposes set forth in article 55. *Id.* art. 56.

36. See T. MERON, *HUMAN RIGHTS LAWMAKING IN THE UNITED NATIONS* 7 (1986). The author states that the U.N. Charter is "by now accepted into the corpus of customary international law." *Id.*; see T. MERON, *supra* note 8, at 82. The human rights principles enumerated in the U.N. Charter have "become a basic component of international customary law, binding on all states, not only on members of the United Nations." *Id.*; see Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 17 (1982). But see P. DROST, *supra* note 19, at 29. Drost questions the legal validity of the U.N. Charter, stating that "it seems impossible to admit that these Articles [of the Charter] constitute legal norms, from

fundamental human rights of individuals.³⁷ One scholar has noted that the language of the Charter, however, is general as references to fundamental human rights lack clear definition.³⁸

Indeed, it appears that the framers of the Charter recognized this vagueness and, thus, included article 68 in the Charter, which provides for the formation of the Commission on Human Rights.³⁹ The framers instructed the Commission on Human Rights to codify in a detailed International Bill of Rights the generalizations set forth by the Charter.⁴⁰ Three years after the adoption of the Charter, the Commission on Human Rights promulgated the Universal Declaration of Human Rights (the "Universal Declaration" or the "Declaration").⁴¹

2. The Universal Declaration of Human Rights

On December 10, 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights, the first part of the International Bill of Rights, as a common standard of conduct for all nations and peoples.⁴² The preamble of the

which human rights under positive law can be derived. The text forbids such an interpretation." *Id.*

37. L. HENKIN, *supra* note 19, at 8; see H. CHIU, *THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES, AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED* 193 (1986) (discussing sources evidencing intention of United Nations to create legal obligations through its instruments).

38. See U.N. CHARTER preamble. The Charter's language uses such broad terms as "fundamental human rights," "equal rights," and "better standards of life." *Id.*; see L. HENKIN, *supra* note 19, at 8.

39. U.N. CHARTER art. 68.

40. *Id.*

41. Universal Declaration, *supra* note 17, G.A. Res. 217A, 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810 (1948). Like the U.N. Charter, the importance of the Universal Declaration cannot be ignored because "the standards laid down in the Universal Declaration, although perhaps devoid of legal obligation at the time of adoption, have become part of customary international law as a result of subsequent state practice." N. RODLEY, *supra* note 22, at 63.

42. G.A. Res. 217A, 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810 (1948); see B. RAMCHARAN, *HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 3 (1979). The Universal Declaration passed unanimously, with forty-eight member states approving and eight member states abstaining. U.N. ACTION IN THE FIELD OF HUMAN RIGHTS, *supra* note 26, at 8. It operated as the sole component of the International Bill of Rights for eighteen years, until the U.N. General Assembly enacted the International Convention on Civil and Political Rights and the International Convention on Economic, Social, and Cultural Rights in 1966. International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. The United

Universal Declaration notes the extreme importance of protecting human rights, stating that recognition of these rights constitutes the foundation of freedom, justice, and world peace.⁴³ The preamble also refers to the U.N. Charter, noting that the Charter had reaffirmed the international community's faith in the dignity and equal rights of all peoples.⁴⁴ In its thirty articles, the Universal Declaration defines and expands upon those human rights generally described in the Charter.⁴⁵ As such, it operates as a standard of international human rights by which states may measure their compliance.⁴⁶

The first three articles of the Universal Declaration essentially reiterate the Charter's assertion that human beings are all equal in dignity, have equal rights, and are free to pursue fulfillment of their rights to life, liberty, and personal security.⁴⁷ Article 5 of the Universal Declaration buttresses these basic ideals by condemning torture and cruel, inhuman, or degrading treatment.⁴⁸ Furthermore, article 11 of the Universal Dec-

States is a signatory to both of these documents but has yet to ratify either. UNITED NATIONS, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 3, 27, U.N. Sales No. E.87.XIV.2 (1987).

43. Universal Declaration, *supra* note 17, preamble, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 71, U.N. Doc. A/810.

44. *Id.*

45. See Universal Declaration, *supra* note 17, G.A. Res. 217A, 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810.

46. Van Boven, *The United Nations and Human Rights: A Critical Appraisal*, in B. RUBIN & E. SPIRO, HUMAN RIGHTS AND UNITED STATES FOREIGN POLICY 20 (1979).

47. Universal Declaration, *supra* note 17, arts. 1-3, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 72, U.N. Doc. A/810. Article 1 provides that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." *Id.* art. 1, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810. Article 2 states that

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id. art. 2, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810. Article 3 provides that "[e]veryone has the right to life, liberty, and the security of person." *Id.* art. 3, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810.

48. *Id.* art. 5, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810. This article states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

laration provides for the presumption of an individual's innocence until proven guilty and states that defendants have the right to all guarantees required for a criminal defense.⁴⁹

Like the U.N. Charter, the legal significance of the Universal Declaration should not be disregarded.⁵⁰ Almost every state in the world has accepted the Universal Declaration.⁵¹ In addition, despite the initial reluctance of some countries to view it as legally binding, subsequent reliance by states on the Universal Declaration has rendered it a binding instrument, imposing obligations for states to follow in their international relations.⁵² According to one scholar, the Universal Declaration has become an authentic interpretation of the U.N. Charter.⁵³ Its provisions, like those of the Charter, bind all states, not just those who are members of the United Nations.⁵⁴

3. Instruments Regarding Torture

As noted in the Universal Declaration, one of the most important facets of human rights is protection from torture and other ill-treatment.⁵⁵ The International Court of Justice (the "World Court")⁵⁶ has ruled that prohibitions against torture

49. *Id.* art. 11, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810. The guarantees set forth in this article are similar to the due process provisions of the U.S. Constitution, which state that the state must not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV.

50. See RESTATEMENT (THIRD), *supra* note 8, § 701. The Restatement (Third) recognizes that practices that comprise the framework of customary human rights law include

virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle . . . [and] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law.

Id.; see *supra* note 27 (discussing influence of Universal Declaration on States' constitutions and legislation).

51. See L. HENKIN, *supra* note 19, at 1.

52. See B. RAMCHARAN, *supra* note 42, at 33, 45.

53. *Id.* at 37.

54. *Id.*; see Proclamation of Teheran, 23 U.N. GAOR, U.N. Doc. A/Conf. 32/41 (1968). The 1968 International Conference on Human Rights in Teheran led to a proclamation (the "Proclamation of Teheran") that stated that the Universal Declaration created an obligation for members of the international community to preserve human rights. *Id.* art. 2.

55. Universal Declaration, *supra* note 17, art. 5, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810.

56. See U.N. CHARTER arts. 92-96. The International Court of Justice (the

are part of general international law, binding states regardless of whether they are parties to specific treaties containing the prohibition.⁵⁷ Although decisions of the World Court lack precedential value because they have no binding force beyond the parties and circumstances of each particular case,⁵⁸ one scholar noted that these decisions are respected in resolving disputes within the international community.⁵⁹

Toward achieving its goal of eliminating torture, the U.N. General Assembly passed the Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1975.⁶⁰ Almost ten years later, it passed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention on Torture").⁶¹ These instruments were created to prevent torturous conduct best typified by the conduct of various sovereigns during World War II.⁶²

"World Court") was established in 1945 in conjunction with the United Nations. *Id.*; see N. RODLEY, *supra* note 22, at 59 n.49. Article 92 of the U.N. Charter states that the World Court is the principal judicial organ of the United Nations. U.N. CHARTER art. 92. Article 93 provides that all U.N. member states are parties to the World Court Statute and also permits non-member states to apply to the U.N. General Assembly to become a party to the Statute. *Id.* art. 93. Article 94 mandates that U.N. member states must comply with judgments of the World Court in cases involving them as parties. *Id.* art. 94. Immediately following the U.N. Charter, the World Court Statute details the World Court's organization, its basis of jurisdiction, and its procedures. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, at 25 [hereinafter World Court Statute].

57. See N. RODLEY, *supra* note 22, at 70. One other major ruling of the World Court found Iran liable to the United States for the detention of the U.S. diplomatic staff from 1979-80, finding that depriving these individuals of their freedom was incompatible with the principles enumerated in both the U.N. Charter and the Universal Declaration. Case Concerning United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 91 (Judgment of May 24).

58. World Court Statute, art. 59, 59 Stat. at 1062, T.S. No. 993, at 32. Article 59 of the World Court Statute states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.*

59. See N. RODLEY, *supra* note 22, at 59, 65.

60. Declaration on Torture, *supra* note 17, G.A. Res. 3452, U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975).

61. Convention on Torture, *supra* note 17, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

62. See Report by Special Rapporteur, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 1. The Report of the U.N. Special Rapporteur on Torture (the "Special Rapporteur") stated that "[i]t was only after the Second World War that torture—just like human rights in general—became a matter of *international* concern and it is only during the last 20 years that torture has received special attention as a particularly

The Convention on Torture sets forth a comprehensive definition of activities that constitute torture.⁶³ This definition requires that the alleged conduct include the intentional infliction of mental or physical pain and be administered by a public official or a person acting in an official capacity.⁶⁴ One scholar described torture as the officially-sanctioned infliction of intense pain, aimed at coercing persons into doing or saying something against their will.⁶⁵

Many states ban torture under their domestic law.⁶⁶ In

heinous violation of human rights since that time." *Id.* (emphasis in original); see J. BURGERS & H. DANIELIUS, *supra* note 20, at 5; see also N. RODLEY, *supra* note 22, at 8. Torture, having been abolished as part of the legal process in the late eighteenth century, was virtually non-existent "until the rise of the Nazi party in Germany in the 1930s, which went so far as to legislate the permissibility of 'third-degree' interrogation." *Id.* This conduct was "perceived to be an aberration that must not be allowed to recur." *Id.*

63. Convention on Torture, *supra* note 17, art. 1(1), G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51.

64. *Id.* This definition states that

[f]or the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

65. See N. RODLEY, *supra* note 22, at 7.

66. See *id.* at 64. Rodley states that "many constitutions include a prohibition against torture—explicitly or implicitly." *Id.* According to the Special Rapporteur, twenty-four states "have incorporated in their constitutions the equivalent to the right not to be subjected to any cruel, inhuman or degrading treatment or punishment." These states include Canada, Japan, Mexico, Spain, the USSR, and the United States. *Report by Special Rapporteur, supra* note 15, U.N. Doc. E/CN.4/1986/15, at 18, ¶ 72. The Special Rapporteur also reported that nineteen states "consider torture as an offence under their penal or criminal codes." *Id.* at 20, ¶ 83. Additionally, the Restatement (Third) provides that a state violates international law if it practices, encourages, or condones torture or other ill-treatment as a matter of state policy. RESTATEMENT (THIRD), *supra* note 8, § 702.

In fact, torture is so reviled that the universality principle of jurisdiction is applied to it in dealing with offenders:

states are to consider it among those crimes that they treat as extraditable Unless a state extradites an alleged torturer to another country to stand trial, it is obliged to institute criminal proceedings against any such person within its jurisdiction, regardless of the latter's nationality, or of where the crime was committed.

1985, the U.N. Commission on Human Rights established a Special Rapporteur for the Convention on Torture,⁶⁷ however, and he received enough incriminating evidence from various sources detailing the permitted use of torture to send inquiries to thirty-three specific countries.⁶⁸ The U.N. Special Rapporteur further noted that although allegations of torture were frequently made, those countries confronted consistently denied having undertaken such policies.⁶⁹

B. *The Organization of American States*

Countries in South and Central America, in conjunction with the United States, signed the OAS Charter in 1948.⁷⁰ The member nations reaffirmed the importance of human rights in accordance with the Universal Declaration.⁷¹ Article 3 of the

N. RODLEY, *supra* note 22, at 47; see Convention on Torture, *supra* note 17, art. 8, ¶ 1, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 198, U.N. Doc. A/39/51. The universality theory of jurisdiction holds that certain crimes are of such a heinous nature that they should be considered *hostis humani generis* and that any state may apprehend and penalize an alleged offender upon conviction. Abramovsky & Eagle, *supra* note 1, at 82 n.100. *Hostis humani generis* is translated into English as "enemies of the human race." BLACK'S LAW DICTIONARY 664 (Special Deluxe 5th Ed. 1988).

67. See Report by Special Rapporteur, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 5, ¶ 22. The Special Rapporteur is to "promote the full implementation of the prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment." *Id.* The original draft resolution included references to "other cruel, inhuman or degrading treatment or punishment" that were later deleted in the Special Rapporteur's official mandate. *Id.*; see U.N. Doc. E/CN.4/1985/L.44. Thus, the Special Rapporteur is to restrict his inquiries to examples of torture, but he may also examine instances of cruel or inhuman punishment that may, "in a further analysis, constitute an act of torture." Report by Special Rapporteur, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 5; ¶ 23; see N. RODLEY, *supra* note 22, at 121-22.

68. Report by Special Rapporteur, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 15-16, ¶¶ 56-59 (1986). The Special Rapporteur received information from forty-seven countries in addition to materials from such organizations as Amnesty International, the International Commission of Jurists, the World Federation of Trade Unions, Quaker Peace and Service, and Friends Committee on National Legislation. *Id.*, ¶¶ 57-58. Of the thirty-three countries considered by the Special Rapporteur, eleven sent back replies. *Id.* at 16, ¶ 60. In his report, however, the Special Rapporteur declined to divulge the nations involved. *Id.*

69. *Id.* at 3, 16, ¶¶ 16, 63-67; see T. MERON, *supra* note 8, at 59.

70. OAS Charter, *supra* note 23, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3. Members of the OAS are as follows: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela. T.I.A.S. No. 6847, at 196-203.

71. See OAS Charter, *supra* note 23. The preamble of the OAS Charter sets forth that "the true significance of American solidarity and good neighborliness can only

OAS Charter sets forth a reaffirmance of obligations imposed by treaties and other sources of international law and the fundamental rights of the individual.⁷²

In 1985, the OAS promulgated the Inter-American Convention to Prevent and Punish Torture (the "Inter-American Convention").⁷³ The definition of torture contained in this document has a broader scope than that contained in the U.N. Convention on Torture, requiring only that the act be inflicted for purposes of a criminal investigation, as a means of intimidation, for personal penalty or punishment, or for any other purpose.⁷⁴ The preamble of the Inter-American Convention notes that acts of torture are an offense against human dignity in accordance with such instruments as the U.N. Charter, the OAS Charter, and the Universal Declaration.⁷⁵

Article 1 of the Inter-American Convention states that all state parties shall prevent and punish torture.⁷⁶ Article 5 renders the admonition against torture absolute by precluding any justifications for administering torture.⁷⁷ Under article 6, state

mean the consolidation on [South America] . . . of a system of individual liberty and social justice based on respect for the essential rights of man." *Id.* preamble, 2 U.S.T. at 2416, T.I.A.S. No. 2361, at 25, 119 U.N.T.S. at 50; see U.N. ACTION IN THE FIELD OF HUMAN RIGHTS, *supra* note 26, at 16.

72. OAS Charter, *supra* note 23, arts. 3(b), 3(j), 2 U.S.T. at 2418, T.I.A.S. No. 2361, at 27, 119 U.N.T.S. at 52; see *id.* art. 11, 2 U.S.T. at 2419, T.I.A.S. No. 2361, at 28, 119 U.N.T.S. at 56 (stating that observance of treaties constitutes standards for developing peaceful relations among states).

73. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, O.A.S. Doc. OEA/Ser.A/42 (SEPF), 25 I.L.M. 519 (1986) [hereinafter Inter-American Convention]; see N. RODLEY, *supra* note 22, at 5.

74. Compare Inter-American Convention, *supra* note 73, art. 2, O.A.S. Doc. OEA/Ser.A/42, at 13, 25 I.L.M. at 521 with Convention on Torture, *supra* note 17, art. 1(1), G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51.

75. Inter-American Convention, *supra* note 73, preamble, O.A.S. Doc. OEA/Ser.A/42, at 13, 25 I.L.M. at 520.

76. *Id.* art. 1, O.A.S. Doc. OEA/Ser.A/42, at 13, 25 I.L.M. at 521.

77. *Id.* art. 5, O.A.S. Doc. OEA/Ser.A/42, at 14, 25 I.L.M. at 521-22. This provision states that

[t]he existence of circumstances such as a state of war, threat of war, state of seige or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

Id.

parties must take affirmative measures to prevent and punish those who administer torture within their jurisdiction by making such actions offenses under their domestic criminal laws.⁷⁸ Finally, article 10 provides that any evidence obtained by torturous methods may not be used against the defendant at trial.⁷⁹

In 1982, the Inter-American Court of Human Rights issued an advisory opinion and stated that human rights treaties protected individuals' basic rights, irrespective of their nationality.⁸⁰ The advisory opinion also stated that parties to these instruments assume obligations toward the individuals within their jurisdiction, rather than only to other sovereigns.⁸¹ Because such obligations run to individuals, the opinion noted, the OAS conventions enabled states to make binding unilateral commitments not to violate the human rights of individuals.⁸²

C. *The Council of Europe*

The end of World War II saw not only the formation of the United Nations and the OAS, but also the creation of the Council of Europe.⁸³ The European states, wanting to create

78. *Id.* art. 6, O.A.S. Doc. OEA/Ser.A/42, at 14, 25 I.L.M. at 522. Article 6 also requires states to take similar measures to prevent the infliction of cruel, inhuman, or degrading treatment or punishment. *Id.*; *see id.* art. 9, O.A.S. Doc. OEA/Ser.A/42, at 15, 25 I.L.M. at 522 (mandating that states introduce legislation that guarantees suitable compensation for torture victims).

79. *Id.* art. 10, O.A.S. Doc. OEA/Ser.A/42, at 15, 25 I.L.M. at 523. In accordance with the Inter-American Convention, the OAS recently passed the American Convention on Human Rights. Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System 25, OEA/Ser.L.V/II.71 Doc. 6, rev. 1, 23 Sept. 1987 (1988).

80. Advisory Opinion OC-2/82, INTER-AM CT. H.R., JUDGEMENTS AND OPINIONS (ser. A), No. 2 (1982); *see* T. MERON, *supra* note 8, at 18.

81. Advisory Opinion OC-2/82, *supra* note 80, INTER-AM CT. H.R., JUDGEMENTS AND OPINIONS (ser. A), No. 2, at 16.

82. *Id.* at 17-18.

83. *See* Statute of the Council of Europe, May 5, 1949, Eur. T.S. No. 1, 87 U.N.T.S. 103. This document stated that European states were "[r]eaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy." *Id.* preamble, Eur. T.S. No. 1, at 2, 87 U.N.T.S. at 104; *see* G. EZEJIOFOR, *supra* note 9, at 98. A desire for European unity following World War II led to the Congress of Europe in 1948 at the Hague. *Id.* At this meeting it was decided that an organization would be created that would be "open to all democratically governed European nations which under[took] to respect a Charter of Human Rights." *Id.* at 99. The Council of Europe was officially created in May 1949. *Id.* at 100.

European unity following the end of World War II, sought to protect human rights in an effort to prevent the reappearance of oppressive European dictatorships.⁸⁴ Toward this end, in 1950, the Council passed the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention").⁸⁵

The preamble of the European Convention states the reason for its promulgation: to begin enforcement of the rights enumerated in the Universal Declaration.⁸⁶ The European Convention contains provisions that are very similar to those of the U.N. Charter and the Universal Declaration⁸⁷ because the framers of the European Convention utilized texts that had been prepared by the U.N. Commission on Human Rights.⁸⁸ State obligations under the European Convention are absolute.⁸⁹ Acceptance of its principles is a condition to Council

84. See European Convention, *supra* note 17, preamble, 213 U.N.T.S. at 222. The signatories re-affirmed "their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained . . . by an effective political democracy and . . . by a common understanding and observance of the Human Rights upon which they depend." *Id.*; see G. EZEJIOFOR, *supra* note 9, at 100.

85. European Convention, *supra* note 17, 213 U.N.T.S. 221. The European Convention entered into force on September 3, 1953. *Id.* at 222 n.1. The current members of the Council of Europe are as follows: Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. See Eur. T.S. No. 126, at 7-11 (1987).

86. European Convention, *supra* note 17, preamble, 213 U.N.T.S. at 222-24. See F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 4-5 (1974). The author states that "[o]ne of the purposes of the [European] Convention is to strengthen resistance to attempts in all member States to undermine free democracy and thus to secure greater 'democratic stability.'" *Id.*

87. Compare European Convention, *supra* note 17, art. 2(1), 213 U.N.T.S. at 224 with Universal Declaration, *supra* note 17, art. 3, G.A. Res. 39/46, 3(1) U.N. GAOR Res. at 72, U.N. Doc. A/810 and Universal Declaration, *supra* note 17, art. 5, G.A. Res. 39/46, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810 and Universal Declaration, *supra* note 17, art. 4, G.A. Res. 39/46, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810; and U.N. CHARTER art. 55, ¶ c, Universal Declaration, *supra* note 17, art. 2, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 72, U.N. Doc. A/810.

88. J. BURGERS & H. DANIELIUS, *supra* note 20, at 6.

89. See Statute of the Council of Europe, arts. 3, 8, Eur. T.S. No. 1, at 4, 6, 87 U.N.T.S. at 106, 108. Article 3 states that "[e]very Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council." *Id.* art. 3, Eur. T.S. No. 1, at 4, 87 U.N.T.S. at 106. Article 8 provides that "[a]ny Member of the

membership.⁹⁰

Article 3 of the European Convention mirrors the Universal Declaration's admonitions against torture and inhuman or degrading treatment.⁹¹ The European Court of Human Rights (the "Court") has specified that article 3 makes no room for exceptions, strengthening the concept that the prohibition against torture is absolute.⁹² In 1987, the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the "European Convention on Torture").⁹³ Recalling the provisions of the European Convention, the European Convention on Torture calls for the establishment of a European Committee for the Prevention of Torture for the purpose of protecting individuals from torture or other ill-treatment.⁹⁴

II. THE ACCEPTANCE AND REJECTION OF UNITED STATES *v.* TOSCANINO IN U.S. COURTS

In the 1886 case of *Ker v. Illinois*,⁹⁵ the U.S. Supreme Court established the long-standing rule that forcible abductions of individuals abroad would not affect a court's ability to try those brought within its jurisdiction. In *Ker*, a private inves-

Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw." *Id.* art. 8, Eur. T.S. No. 1, at 6, 87 U.N.T.S. at 108; G. EZEJIOFOR, *supra* note 9, at 100.

90. See Statute of the Council of Europe, arts. 3, 8, Eur. T.S. No. 1, at 4, 6, 87 U.N.T.S. at 106, 108.

91. Compare European Convention, *supra* note 17, art. 3, 213 U.N.T.S. at 224, with Universal Declaration, *supra* note 17, art. 5, G.A. Res. 217A, 3(1) U.N. GAOR Res. at 73, U.N. Doc. A/810. The Council of Europe also evinced its devotion to eradicating torture by establishing both the European Commission of Human Rights and the European Court of Human Rights. European Convention, *supra* note 17, art. 19, 213 U.N.T.S. at 234. Article 19 states that "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up: (1) A European Commission of Human Rights hereinafter referred to as 'the Commission'; (2) A European Court of Human Rights, hereinafter referred to as 'the Court'." *Id.*

92. *Ireland v. United Kingdom*, 23-I Eur. Ct. H.R. (ser. B) (1976). Scholars consider the European Convention to be an integral part of international law. See P. SIEGHART, *supra* note 7, at 27; R. LILlich & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 7-8 (1979); Higgins, *The European Convention on Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 495 (T. Meron ed. 1984).

93. European Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment, Eur. T.S. No. 126 (1987).

94. *Id.* at 2.

95. 119 U.S. 436 (1886).

tigator forcibly abducted and returned a fugitive to the United States in violation of an existing extradition treaty between the United States and Peru, the country in which the defendant had sought asylum.⁹⁶ The Court overruled the defendant's protests to his abduction, finding that forcible abductions were not a violation of the Due Process Clause and that indictments would not be dismissed solely on the basis of such abductions.⁹⁷

The Supreme Court re-affirmed this holding in the 1952 case of *Frisbie v. Collins*.⁹⁸ The defendant in *Frisbie* protested his abduction from Illinois to face trial in Michigan.⁹⁹ The Court ruled that the defendant's right to due process was not infringed because the defendant's due process rights were satisfied when his captors apprised him of the charges against him.¹⁰⁰ The holdings of these two cases have been joined under what is known as the *Ker-Frisbie* doctrine.¹⁰¹ Under this

96. *Id.* at 437-38. Frederick Ker was indicted in Illinois for embezzlement and larceny, and he escaped to Peru to avoid facing judgment. *Id.* at 437. U.S. officials sent the investigator to Peru to obtain the defendant's extradition, but the investigator could not gain access to the Peruvian government because Chilean forces were occupying the city. *See id.* at 438; Abramovsky & Eagle, *supra* note 1, at 54 n.10.

97. *Ker*, 119 U.S. at 440. The Court held that for mere irregularities in the manner in which he was brought into the custody of the law, "we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged." *Id.* The Court further stated that

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

Id. at 444.

98. 342 U.S. 519 (1952).

99. *Id.* at 520. The defendant claimed that he had been illegally apprehended in Illinois and sought to be released under the Federal Kidnapping Act. *Id.*; *see* Federal Kidnapping Act, 18 U.S.C. § 1202 (1988).

100. *Frisbie*, 342 U.S. at 522. The Court held that, under *Ker*, "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Id.*

101. *See* United States v. Toscanino, 500 F.2d 267, 275 (2d Cir., *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975). The Supreme Court re-affirmed the *Ker-Frisbie* doctrine in *Gerstein v. Pugh*, 420 U.S. 103 (1975). In *Gerstein*, law enforcement officials arrested respondent Pugh and an accomplice in Dade County, Florida. *Id.* at 105. Officials arrested the men solely on the basis of a prosecutor's information. *Id.* The respondents filed a class action suit, claiming a constitutional right to a judicial hearing. *Id.* at 107. The Court held that a judicial hearing was not a prerequisite to prosecution by information and also stated that "[n]or do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119 (citing United States v. Ker, 119

standard, the constitutional right to due process is limited to the guarantee of a constitutionally fair trial, with no consideration given to how jurisdiction was obtained over the defendant.¹⁰²

This maxim remained unchallenged until 1974, when the U.S. Court of Appeals for the Second Circuit decided *United States v. Toscanino*.¹⁰³ In *Toscanino*, Uruguayan police, under the direction of U.S. authorities, abducted the defendant from his home in Montevideo.¹⁰⁴ The police blindfolded him, knocked him unconscious, and drove him to Brazil.¹⁰⁵ For seventeen days, Brazilian authorities allegedly questioned the defendant continuously, denying him adequate sleep and nourishment.¹⁰⁶ Later, during his criminal prosecution in the United States, the defendant alleged that the Brazilian officials tortured him during this detention and that U.S. authorities were aware of this torture.¹⁰⁷

The Second Circuit held that where a defendant alleges

U.S. 436 (1886); *Frisbie*, 342 U.S. 519 (1952)); see *Immigration and Nationalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984); *United States v. Crews*, 445 U.S. 463, 474 (1980).

102. *Frisbie*, 342 U.S. at 522; *Toscanino*, 500 F.2d at 271. In 1972, the Court of Appeals for the Fifth Circuit twice reaffirmed jurisdiction over abducted defendants, basing these decisions on *Ker* and *Frisbie*. In *United States v. Vicars*, officials arrested two defendants in the Panama Canal Zone and brought them to Texas to face trial for narcotics violations based on activities undertaken while they were in Panama. *Vicars*, 467 F.2d 452, 456 (5th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973). One defendant protested his abduction, but the court cited *Frisbie* for the proposition that "the power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by means of 'forcible abduction.'" *Id.* at 455-56.

A similar result was reached in *United States v. Caramian*, 468 F.2d 1370 (5th Cir. 1972). The defendant, facing charges on narcotics violations, fled the United States on the last day of his trial and disappeared in Bolivia. *Id.* at 1371. Officials located Caramian and brought him back to the United States without first requesting his extradition. *Id.* The court refused to dismiss his claim based on the denial of a formal extradition hearing, citing to *Frisbie*. *Id.*

103. 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

104. *Id.* at 269.

105. *Id.*

106. *Id.* at 270.

107. *Id.* The defendant alleged that he

was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced into his anal passage. Incredibly, these agents of the United States Government attached electrodes to Toscanino's earlobes, toes, and genitals. Jar-

such acts of torture, a court may be forced to divest itself of jurisdiction if the alleged acts are outrageous enough to shock the conscience.¹⁰⁸ The court reasoned that the government should be unable to realize the product of its own deliberate and unnecessary misconduct, which in this case was the seizure of the defendant.¹⁰⁹ The court arrived at its decision by examining cases in which the Supreme Court had expanded the concept of due process to include protections prior to and during the defendant's arrest, not just during trial.¹¹⁰ The court stated that the underlying principle of these due process cases—that the government could not exploit its own illegal conduct—directly opposed the *Ker-Frisbie* doctrine.¹¹¹ Thus, when the government engaged in conduct that shocked the conscience in order to apprehend or detain the defendant, the court would not have jurisdiction and must divest itself accordingly.¹¹²

ring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

Id. The defendant also alleged that U.S. officials were aware of this torture, because they were admittedly in constant communication with Brazilian police throughout Toscanino's confinement. *Id.*

108. *Id.* at 275. The court also stated that forcible abductions violated article 2, paragraph 4 of the U.N. Charter and article 17 of the OAS Charter, both of which protect the territorial integrity of states. *Id.* at 277.

109. *Id.* at 272-75. The court stated that "when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct." *Id.* at 275.

110. *See id.* at 272-75. The court opined that due process no longer consisted of just a fair trial, but now included pre-trial conduct of law enforcement authorities as well. *Id.* at 274 (citing *Rochin v. California*, 342 U.S. 165 (1952); *United States v. Russell*, 411 U.S. 423 (1973); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966)).

111. *Id.* at 275; *see Ford v. United States*, 273 U.S. 593 (1927). The Court in *Ford* stated that *Ker* would be "inapplicable where a treaty of the United States is directly involved." *Id.* at 605-06.

112. *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975). This shocking the conscience standard was first put forth in *Rochin v. California*, where the Supreme Court ruled that evidence of narcotics obtained by pumping the defendant's stomach would not be allowed because such actions by the police "shocked the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). The *Toscanino* court believed that the *Rochin* decision, handed down two months prior to *Frisbie*, actually served as an anticipatory erosion of the *Ker-Frisbie* doctrine. *Toscanino*, 500 F.2d at 273. The court further stated that "[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *Id.* at 274; *see United States v. Archer*, 486 F.2d 670, 677 (2d Cir. 1973).

On remand, the district court did not divest itself of jurisdiction, finding that the defendant failed to adequately prove his allegations of torture.¹¹³ The method of inquiry into the circumstances of a defendant's arrest, however, is now referred to by courts as an exception to the *Ker-Frisbie* doctrine.¹¹⁴ The federal courts in the United States have treated the *Toscanino* method of inquiry differently, with some circuits analyzing the circumstances surrounding a defendant's apprehension and others ignoring the Second Circuit's pronouncement.¹¹⁵

A. Cases Applying *Toscanino*

One year after the *Toscanino* case, the U.S. Court of Appeals for the Second Circuit in *United States ex rel. Lujan v. Gengler*¹¹⁶ re-affirmed the requirement in *Toscanino* that a U.S. court must divest itself of jurisdiction if government agents engaged in conduct with respect to the detainee that shocks the conscience of mankind.¹¹⁷ In *Gengler*, the defendant, a native of Argentina, appealed his conviction based on his abduction from Bolivia.¹¹⁸ Because the defendant did not allege torture, the court distinguished this case from *Toscanino*.¹¹⁹ The court held that the defendant's mere abduction was not a sufficient reason to overturn his conviction.¹²⁰

The court considered the arresting agents' actions and stated that the *Toscanino* holding would not require a court to divest itself of jurisdiction in cases where there was mere irregularity in the arresting agents' actions, but only when outra-

113. *United States v. Toscanino*, 398 F. Supp. 916 (E.D.N.Y. 1975).

114. *See, e.g.*, *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *United States v. Lira*, 515 F.2d 68, 70 (2d Cir.), *cert. denied*, 423 U.S. 487 (1975); *United States v. Matta-Ballesteros*, 700 F. Supp. 528, 530-31 (N.D. Fla. 1988).

115. *See infra* notes 116-63 and accompanying text (setting forth discussion of cases applying *Toscanino* analysis); *infra* notes 164-202 and accompanying text (setting forth discussion of cases rejecting *Toscanino*).

116. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

117. *Id.* at 63.

118. *Id.*

119. *Id.* at 66.

120. *Id.* The court also pointed out that neither Argentina nor Bolivia had contested the defendant's apprehension. *Id.* at 67. Because the countries did not protest, he was unable to do so himself because of a lack of standing. *Id.*; *see supra* note 14 and accompanying text (discussing individuals' lack of standing to protest abduction).

geous conduct was alleged.¹²¹ While noting that it did not condone illegal government conduct, the court recognized that indictments could not be nullified by actions that were not sufficiently egregious.¹²² A concurring opinion explained that absent allegations of torture or inhuman treatment, the *Ker-Frisbie* doctrine would be followed.¹²³

The Second Circuit continued to adhere to the *Toscanino* rule in *United States v. Lira*.¹²⁴ In *Lira*, Chilean authorities arrested the defendant in Santiago and allegedly tortured him.¹²⁵ The defendant alleged that the local police were acting as agents of the United States and that U.S. Drug Enforcement Agency (the "DEA") agents were present during the alleged administration of torture.¹²⁶ The DEA agents who accompanied the defendant on his flight to the United States, however, denied ever meeting the defendant prior to boarding the plane.¹²⁷

The court distinguished this case from *Toscanino* and refused to release the defendant, finding no evidence that U.S. agents were aware of his mistreatment.¹²⁸ Arguments of vicarious U.S. liability also failed, as the court stated that it would be impossible for DEA agents to monitor the conduct of all foreign governments or agencies from which they request aid.¹²⁹

121. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975).

122. *Id.*

123. *Id.* at 69 (Anderson, J., concurring).

124. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 487 (1975).

125. *Id.* at 69. The defendant alleged that he was "blindfolded by the Chilean police, beaten, strapped nude to a box spring, tortured with electric shocks, and questioned about the whereabouts" of a co-conspirator in the matters leading to his conviction on narcotics violations. *Id.*

126. *Id.* The defendant testified that he heard English spoken during his incarceration but could not identify the source. *Id.* He also alleged that two DEA agents were present when he was taken before the Chilean Naval Prosecutor and photographed, presumably because "some Americans were waiting for his photograph." *Id.*

127. *Id.* at 70. DEA agents also testified that while they had been in contact with Chilean officials following the defendant's arrest, these conversations were restricted to the defendant's location and gave no reports of torture. *Id.*

128. *Id.* at 70-71. The court held that "the record fails to reveal any substantial evidence that Chilean police were acting as agents of the United States in arresting or mistreating [the defendant] or that United States representatives were aware of such misconduct." *Id.*

129. *Id.* at 71. Also, according to the court, extending the *Toscanino* doctrine to situations where the U.S. government has no control over foreign police "would serve no purpose." *Id.*

The court further noted that imposing such liability would not eliminate illegal government conduct, but would actually deter U.S. law enforcement officials from making lawful requests for aid from other governments.¹³⁰

The Second Circuit once again applied the *Toscanino* inquiry in *United States v. Reed*.¹³¹ The defendant in *Reed* fled the United States amid charges of securities fraud and failed to appear for his trial.¹³² Agents of the Central Intelligence Agency (the "CIA") allegedly enticed the defendant to leave Bimini two months after his disappearance by using a revolver and threatening language.¹³³ The agents also allegedly forced him to spend a thirty minute plane ride face down with a loaded gun pointed at his head.¹³⁴ The court, however, refused to dismiss his conviction on the securities charges after applying the analysis set forth in *Toscanino*.¹³⁵ The court found that the agents' conduct was not sufficiently egregious to warrant dismissal.¹³⁶

The court arrived at this conclusion by comparing the case to the results in *Toscanino* and in *Lujan*.¹³⁷ It found that the facts alleged in this case more closely resembled those of *Lujan*, and, thus, the *Toscanino* rule would not require the court to divest itself of jurisdiction.¹³⁸ It also stated in a footnote that because the defendant in *Reed* was a fugitive when the arrest and illegal conduct occurred, the case was different from the situation in *Toscanino*.¹³⁹ According to the court, consideration of whether a court should divest itself of jurisdiction will only be applied when jurisdiction is initially obtained by illegal means and not when the defendant is already a fugitive.¹⁴⁰

In 1984, the Fifth Circuit applied the *Toscanino* rule by examining the circumstances of the defendant's apprehension in

130. *Id.*

131. 639 F.2d 896 (2d Cir. 1981).

132. *Id.* at 900.

133. *Id.* at 901-02.

134. *Id.*

135. *Id.* at 902.

136. *Id.*

137. *Id.* at 901-02.

138. *Id.*

139. *Id.* at 902 n.2.

140. *Id.*

United States v. Wilson.¹⁴¹ This case marked a reversal for the Fifth Circuit, which had previously refused to acknowledge the *Toscanino* holding in four cases that were decided between 1974 and 1976.¹⁴²

141. 732 F.2d 404 (5th Cir.), *cert. denied*, 469 U.S. 1099 (1984).

142. See *United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976); *United States v. Lara*, 539 F.2d 495 (5th Cir. 1976); *United States v. Winter*, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974). In *Herrera*, the defendant, a native of Colombia, escaped from an Atlanta, Georgia prison where he was incarcerated for narcotics violations and returned to his home in Bogota, Colombia. *Herrera*, 504 F.2d at 860. Officials arrested the defendant in Peru fifteen months later and detained him for five days before transporting him to Miami, Florida. *Id.* Two agents, one from the United States and one from Peru, accompanied the defendant on this flight. *Id.* The defendant protested his return to the United States as violative of Peru's territorial sovereignty under both the U.N. Charter and the OAS Charter. *Id.* The court rejected his contention, stating that "[w]e are bound on the basic proposition by the *Ker* and *Frisbie* decisions of the Supreme Court." *Id.*

In *Winter*, the U.S. Coast Guard apprehended and arrested the passengers of a vessel on which one-half ton of marijuana was found. *Winter*, 509 F.2d at 977. Two of those arrested were Jamaican nationals. *Id.* The arrest took place approximately thirty-five miles off the coast of Florida. *Id.* The Coast Guard seized the ship, however, less than twelve miles off the coast of the Bahamas. *Id.* at 984. The Jamaican defendants claimed that their arrest was a violation of Bahamian territoriality, because the Coast Guard's maximum jurisdiction under article 24 of the Convention on the Territorial Sea and Contiguous Zone is only twelve miles. *Id.* at 984 n.31; see Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612-13, T.I.A.S. No. 5639, at 7, 516 U.N.T.S. 205, 220-21 (1958). The court upheld jurisdiction over the defendants, citing to its recent decision in *Herrera* as having rejected the *Toscanino* exception. *Winter*, 509 F.2d at 987-88.

The court also determined that the *Ker-Frisbie* doctrine could be applied to non-residents as well as to U.S. citizens, finding no reason to distinguish between the two groups. *Id.* at 989. The court realized that it would be inappropriate for aliens to enjoy more protections than U.S. citizens and, thus, concluded "that *Ker-Frisbie* applies to non-resident aliens as well" as to U.S. nationals. *Id.*

In *Lara*, the defendant fled the United States while awaiting a jury verdict on charges of conspiracy to transport automobiles in interstate commerce. *Lara*, 539 F.2d at 495. Officials arrested him three years later in Panama, and the defendant unsuccessfully claimed that he was tortured by his captors. *Id.*

In *Lopez*, the defendant was convicted on five counts of violating the National Firearms Registration and Transfer Records Act, 18 U.S.C. § 922 (1988). *Lopez*, 542 F.2d at 284. After his conviction, he posted bond and was released. *Id.* He failed to appear for his sentencing, however, and officials issued a bench warrant for his arrest. *Id.* Authorities in the Dominican Republic arrested the defendant when he attempted to enter the country with fraudulent immigration documents. *Id.* The Dominican police held the defendant for eight days before returning him to the United States, and the defendant alleged that he was tortured during this detention. *Id.* The defendant further attempted to show that U.S. authorities had instigated the actions of the Dominican police, but he could not substantiate this assertion with any facts. *Id.* The court stated that "the usual rule . . . is that a Court's jurisdiction over a defendant cannot be defeated because of the manner in which the defendant was brought

In *Wilson*, the defendant, a former CIA officer, was charged with illegally shipping twenty tons of explosives to Libya.¹⁴³ Agents of the U.S. government lured him to the Dominican Republic and subsequently brought him to the United States.¹⁴⁴ The court in *Wilson* noted that the Second Circuit had narrowed the scope of *Toscanino* in *Lujan* and now decided to consider the method of the defendant's abduction in determining whether to retain jurisdiction.¹⁴⁵ Because the defendant made no allegations of torture, though, the court refused to dismiss his indictment in the absence of such impropriety.¹⁴⁶

The U.S. Court of Appeals for the First Circuit applied a

before the Court." *Id.* at 284-85. The court also stated that "so far we have declined to apply [the *Toscanino* exception] in this circuit." *Id.* at 285.

143. *Wilson*, 732 F.2d at 406-07. Wilson met the shipment in Tripoli and then directed the explosives to the intended recipients. *Id.* at 407.

144. *Id.* at 410. These agents placed Wilson aboard a commercial aircraft bound for the United States, and federal agents took him into custody immediately after the plane landed. *Id.* at 411. He appealed, claiming that the court should dismiss the case because his presence before it was the result of fraudulent representations of the agents. *Id.*

145. *Id.* at 411. In light of the narrowing of *Toscanino*'s scope, the court stated that "our analysis of *Ker* and its progeny compels the conclusion that unless the government conduct in securing custody of the defendant is shocking and outrageous, the court should not dismiss the indictment on a due process basis." *Id.*

146. *Id.* The court refused to dismiss his indictment, finding that he was merely the "victim of a non-violent trick," and had not been subjected to any conduct that could be considered "shocking" or "outrageous." *Id.*

A federal court in Texas later noted the Fifth Circuit's acceptance of the *Toscanino* doctrine in *United States v. Degollado*, 696 F. Supp. 1136 (S.D. Tex. 1988). Mexican border officials arrested the defendant and several accomplices for transporting cocaine into the United States. *Id.* at 1137. Officials targeted the defendants' car for inspection after a surveillance camera at the border of the United States and Mexico took photographs of the defendants passing over the border several times in a short span. *Id.* at 1138. Border officials stopped the defendants' car in Texas and confiscated approximately 237 pounds of cocaine. *Id.* One of the defendants, Degollado, initially escaped, but the officials traced him to a Mexican hotel, where they apprehended and allegedly tortured him. *Id.* The defendant alleged that the Mexican policemen entered the hotel room first, followed by U.S. agents. *Id.* The court noted that

[e]ventually, the defendant was placed on the bed with his hands bound behind him. He was being held down by several Mexican officers. The Mexican officers began to interrogate the Defendant while periodically spraying seltzer water in his nose. Defendant claims that after about 45 minutes, he was blindfolded and then subjected to long periods of torture by electrical prod. He insists that at some point, the Mexican police switched to a more powerful electrical device and told him that this device had been furnished by the American agents.

Id. The defendant could not identify any U.S. agents as having witnessed the torture.

version of the *Toscanino* rule in *United States v. Cordero*.¹⁴⁷ In *Cordero*, Panamanian officials abducted and arrested the defendants, sent them to Venezuela, and then flew them to Puerto Rico to face narcotics charges.¹⁴⁸ The court found the treatment afforded to the defendants poor but refused to dismiss the defendants' indictments.¹⁴⁹ In so holding, the court noted that it was upholding jurisdiction because the conditions alleged were not egregious enough to warrant dismissal.¹⁵⁰

The U.S. District Court for the District of Columbia applied the *Toscanino* rule in *United States v. Yunis*.¹⁵¹ In *Yunis*, agents of the Federal Bureau of Investigation (the "FBI") lured the defendant from Lebanon into international waters and arrested him.¹⁵² The defendant was the leader of a group that had hijacked a Jordanian airliner in 1985.¹⁵³ Following

Id. at 1139. He claimed that he could hear the voice of one of the U.S. agents, but he could not see the agent after the first forty-five minutes of his detention. *Id.*

The court examined the facts under the *Toscanino* rule, and refused to dismiss the charges against the defendant because there was no evidence that U.S. agents had participated in the torture. *Id.* at 1140; see *Day v. State*, 763 S.W.2d 535 (Tex. App. El Paso 1988); *Quintero v. State*, 761 S.W.2d 438 (Tex. App. El Paso 1988), *petition for discretionary review refused, cert. denied*, 110 S.Ct. 90 (1989). In both *Day* and *Quintero*, the court refused to dismiss indictments against defendants captured in Mexico because they failed to prove shocking conduct by the arresting agents. See *Day*, 763 S.W.2d at 536; *Quintero*, 761 S.W.2d at 440-41. As was the case in *Lira*, U.S. agents were not held vicariously responsible for the actions of the Mexican police even though Mexican aid had been requested. *Degollado*, 696 F. Supp. at 1140.

147. 668 F.2d 32, 37 (1st Cir. 1981).

148. *Id.* at 35.

149. *Id.* at 37.

150. *Id.* According to one of the defendant's allegations, the defendants were forced to sleep on the floor of their cells and received little nourishment, barely enough to stay alive. *Id.* Despite these contentions, the court did not consider the treatment egregious enough to warrant divestment of jurisdiction. *Id.*

151. 681 F. Supp. 909 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

152. *Yunis*, 681 F. Supp. at 912-15.

153. *United States v. Yunis*, 681 F. Supp. 896, 899 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989). Three U.S. citizens were aboard the plane, and U.S. officials set out to prosecute the defendant under recently enacted anti-terrorism statutes. *Yunis*, 681 F. Supp. at 912. The two main anti-terrorism statutes enacted in the United States in the 1980s were the Hostage Taking Act and the Omnibus Diplomatic Security and Antiterrorism Act. See Hostage Taking Act, 18 U.S.C. § 1203 (1988); Omnibus Diplomatic Security and Antiterrorism Act, 18 U.S.C. § 2331 (1988). Both of these statutes allow for conviction of any perpetrator, regardless of nationality, as long as the victim is a U.S. citizen. See, e.g., 18 U.S.C. § 1203(b)(1)(A). Congress used the *Ker-Frisbie* doctrine (U.S. law enforcement officials may "seize suspected criminals and return them to the U.S. for trial without violating constitutional protections") as a justification for the abduction of terrorists

the arrest, the FBI transported the defendant to the United States.¹⁵⁴

The defendant moved to dismiss the indictments against him, alleging that the arresting agents used excessive force.¹⁵⁵ Specifically, the defendant alleged that the agents fractured both of his wrists while arresting him and that he suffered frequent pain and nausea while aboard the U.S.S. *Butte*, a U.S. naval vessel.¹⁵⁶ The court refused to grant the defendant's motion, finding that the conduct alleged did not meet the level of outrageousness required for dismissal under *Toscanino*.¹⁵⁷ The court noted that several circuits had accepted the *Tos-*

abroad and for the passage of the Antiterrorism Act. *Anti-Terrorism Act of 1986: Hearings on H.R. 4294 Before the House of Representatives*, 99th Cong., 2d Sess. 19 (1986) (statement of Congressman Ron Wyden); see M. BASSIOUNI, *supra* note 2, at 243 n.128.

These provisions invoke the passive personality doctrine. See *Harvard Research in International Law, Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 439 (Supp. 1935). The passive personality doctrine focuses on the nationality of the victim of a crime and holds that a state has the power to protect its nationals from criminal conduct, even if such conduct is undertaken overseas and/or by a foreign national. *Id.* at 578-80. Thus, this principle allows for jurisdiction if the victim is a national of the prosecuting state. *Id.*; see McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 711 (1985).

This form of jurisdiction was consistently rejected in the past. See *id.* at 712; see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2). The Restatement (Second) of the Foreign Relations Law of the United States states that "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." *Id.* § 30(2), comment e; see Blakesly, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895, 908 (1987). Views toward using this theory of jurisdiction, however, have recently shifted with respect to terrorism. See RESTATEMENT (THIRD), *supra* note 8, § 402, comment g. The Restatement (Third) acknowledges that the passive personality basis of jurisdiction has been "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." *Id.*; see Note, *U.S. Legislation to Prosecute Terrorists: Anti-terrorism or Legalized Kidnapping?*, 18 VAND. J. TRANSNAT'L L. 915, 931 n.65 (1985) (discussing views of both Restatement (Second) and Restatement (Third) with respect to passive personality doctrine).

154. *Yunis*, 681 F. Supp. at 915.

155. *Id.*

156. *Id.* at 913-14. Immediately after being arrested, the defendant complained of pain in his legs and wrists. *Id.* at 913. The defendant frequently suffered from nausea during the voyage and was kept in an eight foot by ten foot stateroom usually used to store mail. *Id.* at 914. The U.S.S. *Butte* travelled the Mediterranean for five days before reaching a ship equipped with a helicopter to fly Yunis to the United States. See *id.* at 915.

157. See *id.* The court also denied the motion for lack of standing, as "individuals, alone, are not empowered to enforce extradition treaties." *Id.*; see *supra* note 14

canino rule as valid, but that no circuit court had divested itself of jurisdiction under the *Toscanino* analysis.¹⁵⁸

The highest court in New York State, however, has dismissed a case based on the principle set forth in *Toscanino*.¹⁵⁹ The New York Court of Appeals decided *People v. Isaacson*¹⁶⁰ in 1978.¹⁶¹ In *Isaacson*, a police informant lured the defendant into participating in a narcotics transaction during which he was arrested by police.¹⁶² The court reversed the defendant's subsequent conviction and held, similarly to *Toscanino*, that police impropriety could lead to such a dismissal.¹⁶³

(discussing individual's lack of standing to contest both extraordinary apprehensions and methods used in such captures).

158. *United States v. Yunis*, 681 F. Supp. 909, 919 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989). The court stated that "[a]lthough most circuits have acknowledged the exception carved out by *Toscanino*, it is highly significant that no court has ever applied it to dismiss an indictment." 681 F. Supp. at 919 (emphasis in original). The court concluded that the "defendant has failed either to allege or to show any actions committed by these officers that meet the standard of outrageousness established by *Toscanino* and its progeny requiring this Court to divest itself of jurisdiction." *Id.* at 920 (emphasis in original).

The defendant's due process claims were not entirely dismissed, however, as the court granted a motion to suppress statements given to the agents while aboard the *Butte*. *Id.* at 921. The court found flaws in the rights afforded to Yunis during his detention, stating that his treatment fell far short of the standards set forth in *Miranda*. *Id.* at 922 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). On appeal, however, the confession was permitted to be used at trial. *United States v. Yunis*, 859 F.2d 953, 955 (D.D.C. 1989).

159. *People v. Isaacson*, 44 N.Y.2d 511, 521, 378 N.E.2d 78, 83, 406 N.Y.S.2d 714, 719 (1978).

160. 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978).

161. *Id.* at 511, 378 N.E.2d 78, 406 N.Y.S.2d 714.

162. *Id.* at 514-18, 378 N.E.2d at 79-81, 406 N.Y.S.2d at 715-17. The defendant was a student at Pennsylvania State University and had no previous arrest record. *Id.* at 514, 378 N.E.2d at 79, 406 N.Y.S.2d at 715. At the urging of police, an acquaintance of the defendant telephoned him and asked him to participate in a narcotics transaction. *Id.* at 516, 378 N.E.2d at 80, 406 N.Y.S. 2d at 716. The defendant claimed that the caller "cried and sobbed on the phone, relating that he was facing 15 years to life in Attica [prison], that his parents had turned him away as had his friends, and that he was looking for ways to make money to hire a decent lawyer." *Id.* at 516, 378 N.E.2d at 80, 406 N.Y.S.2d at 716. After seven such calls, the defendant agreed to supply the caller/informant with two ounces of cocaine. *Id.* at 516-17, 378 N.E.2d at 80, 406 N.Y.S.2d at 716. The transaction was to take place in New York State, just over the border from Pennsylvania. *Id.* at 517, 378 N.E.2d at 81, 406 N.Y.S.2d at 717. Police arrested the defendant during the course of the transaction. *Id.* at 518, 378 N.E.2d at 81, 406 N.Y.S.2d at 717.

163. *See id.* at 521, 378 N.E.2d at 83, 406 N.Y.S.2d at 719.

B. *Cases Rejecting Toscanino*

Several U.S. courts of appeal have rejected the *Toscanino* rule and have refused to consider the methods by which defendants have been apprehended.¹⁶⁴ The U.S. Court of Appeals for the Seventh Circuit appeared to reject the *Toscanino* rule in *United States v. Marzano*.¹⁶⁵ U.S. officials charged the defendants in *Marzano* with taking money from several federally insured banks and fleeing the United States.¹⁶⁶ Local authorities captured the defendants on Grand Cayman Island and turned them over to FBI agents.¹⁶⁷ The defendants made no allegations of torture but moved to be discharged from custody because of the method of their apprehension.¹⁶⁸

The court refused to grant the defendants' request, adhering to the *Ker-Frisbie* doctrine that the courts should not inquire into the circumstances by which a defendant is brought before the court.¹⁶⁹ The court also distinguished *Toscanino* because the U.S. agents had not participated in the apprehension.¹⁷⁰ Although the court did not expressly rule on the validity of the *Toscanino* doctrine within the Seventh Circuit, it did name several circuits that had rejected the *Toscanino* holding.¹⁷¹

The Ninth Circuit clearly rejected the *Toscanino* standard

164. See *infra* notes 165-202 and accompanying text (discussing cases rejecting *Toscanino*)

165. 537 F.2d 257, 272 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

166. *Id.* at 261.

167. *Id.* at 271.

168. *Id.* at 271-72. The defendants contested the method by which they were tricked into leaving Grand Cayman Island. *Id.* at 270-71.

169. *Id.*

170. *Id.* at 272.

171. *Id.* The court stated that "[w]e note that the Fifth Circuit appears to have rejected *Toscanino*, and the Ninth and Tenth Circuits have rejected similar arguments." *Id.* The court, however, cautioned that in two of these cases the actions taken by U.S. agents did not rise to the level of outrageousness alleged in *Toscanino*. *Id.*; see *Hobson v. Crouse*, 332 F.2d 561 (10th Cir. 1964); *United States v. Cotten*, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973). In *Hobson*, the defendant claimed that he had been unlawfully extradited from North Carolina to face charges in Kansas. *Hobson*, 332 F.2d at 561. The defendants in *Cotten* were convicted in the United States for conspiracy to defraud the United States and theft of government property based on actions undertaken in Japan and South Vietnam. *Cotten*, 471 F.2d at 745. South Vietnamese police, at the request of U.S. authorities, arrested the defendants and handed them over to U.S. officials for transport to Hawaii. *Id.* In these cases, as the court in *Marzano* noted, the defendants had not alleged outrageous conduct. *Marzano*, 537 F.2d at 272.

in the 1980 case of *United States v. Valot*.¹⁷² In *Valot*, the defendant had violated his parole conditions in Hawaii by flying to Asia, and officials in Hawaii issued a warrant for his arrest.¹⁷³ Two years later, he was arrested in Thailand on an unrelated charge of marijuana possession, and Thai officials incarcerated him for two years.¹⁷⁴ The Thai officials later delivered the defendant to two DEA agents at Bangkok Airport, who then accompanied the defendant on a flight back to Hawaii.¹⁷⁵ The defendant requested that the U.S. District Court for the District of Hawaii divest itself of jurisdiction, arguing only that his apprehension by DEA agents in Thailand was illegal.¹⁷⁶ The court, however, refused to divest itself in this manner.¹⁷⁷ It held that precedent within the Ninth Circuit rejected the *Toscanino* approach and that a forcible return to the United States would constitute no bar to the defendant's prosecution.¹⁷⁸

In 1981, however, in *United States v. Fielding*,¹⁷⁹ the Ninth Circuit appeared to apply an approach similar to that used in *Toscanino*.¹⁸⁰ In *Fielding*, the defendant alleged that he was tortured.¹⁸¹ The *Fielding* court cited to an earlier decision in *United States v. Lovato*¹⁸² as having upheld jurisdiction over a defendant while no showing of the egregious conduct required under *Toscanino* had been made.¹⁸³ The court in *Lovato*, however, held, as did the court in *Valot*, that circuit precedents stated that forcible return of the defendant would pose no bar-

172. 625 F.2d 308, 309-10 (9th Cir. 1980).

173. *Id.* at 309.

174. *Id.*

175. *Id.*

176. *Id.* The defendant contended that the arresting agents violated his constitutional due process rights by abducting him. *Id.*

177. *Id.*

178. *Id.* The court stated that "an unbroken line of cases in this circuit [holds] that forcible return to the jurisdiction of the United States constitutes no bar to prosecution once the defendant is found within the United States." *Id.* (quoting *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975)).

179. 645 F.2d 719 (9th Cir. 1981).

180. *Id.* at 723. The court explained that even though Peruvian officials had mistreated the defendant during his captivity, there was no evidence that U.S. agents had participated in any of the alleged conduct. *Id.* at 724.

181. *Id.* at 720.

182. 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975).

183. *Fielding*, 645 F.2d at 723. The court stated that "[i]n *United States v. Lovato*, we determined that no *Toscanino* showing had been made." *Id.*

rier to prosecution.¹⁸⁴ In addition, the Ninth Circuit's opposition to use of the *Toscanino* doctrine was later clarified in *United States v. Verdugo-Urquidez*.¹⁸⁵

The U.S. Court of Appeals for the Eleventh Circuit twice refused to apply the *Toscanino* standard.¹⁸⁶ In *United States v. Darby*,¹⁸⁷ a U.S. agent and Honduran officials arrested the defendant in Honduras.¹⁸⁸ The officials drove the defendant at gunpoint to an airport and flew him to Florida under the guise of deportation.¹⁸⁹ The defendant was later convicted of smuggling narcotics into the United States.¹⁹⁰ He appealed his conviction and alleged that he was illegally abducted from Hondu-

184. 520 F.2d at 1271. The court pointed out that "an unbroken line of cases in this circuit hold[s] that forcible return to the jurisdiction of the United States constitutes no bar to prosecution once the defendant is found within the United States." *Id.* Only in referring to the Second Circuit's use of the *Toscanino* standard does the court refer to any form of inquiry. *Id.* Thus, it appears that the *Fielding* court is misreading the *Lovato* court's discussion of such inquiries.

185. 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S.Ct. 1056 (1990). U.S. authorities contracted with Mexican officials to capture the defendant and turn him over to DEA agents. *Id.* at 1216. The majority only addressed whether a search of the defendant's home in Mexico, where agents lacked a valid search warrant, was reasonable under the Fourth Amendment. *Id.* at 1217-30.

The dissent, however, discussed the apprehension of the defendant, refusing to inquire into the circumstances involved in his capture and stating that it was rejecting the *Toscanino* rule. *Id.* at 1243-46 (Wallace, J., dissenting). This dissent based its rejection of *Toscanino* on two points—that "[t]he majority in *Toscanino* cited no authority, nor did it provide any sound reasoning, for its expansive holding" and that the *Toscanino* court's "rationale has been substantially undermined by subsequent Supreme Court decisions that have wholeheartedly and repeatedly reaffirmed the *Ker-Frisbie* rule." *Id.* at 1243, 1245. The dissenting judge did state, however, that "[a]nalyzed under the fifth amendment, *Toscanino* could be harmonized with other precedent." *Id.* at 1244. He clarified this position by stating that

[t]o the extent that *Toscanino* recognized that aliens may invoke the fifth amendment to challenge the admission of evidence that was obtained through means that 'shock the conscience,' [we] find the case unobjectionable. This rule is consistent with those cases suggesting that the fifth amendment applies to anyone, citizen and alien alike, subject to criminal prosecution in the United States.

Id. at 1245.

186. See *infra* notes 187-94 and accompanying text (discussing Eleventh Circuit's rejection of *Toscanino*).

187. 744 F.2d 1508 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

188. *Id.* at 1530.

189. *Id.* Before the plane proceeded to Miami, it had a stopover in Belize. *Id.* While the plane was grounded, the defendant attempted to assert his rights as a British citizen and deplane, but he was allegedly wrestled back into his seat and not permitted to move until the plane landed in Miami. *Id.*

190. *Id.* at 1514.

ras.¹⁹¹ The court refused to apply the *Toscanino* analysis, finding that Supreme Court and the former Fifth Circuit precedent did not accept this rule.¹⁹² Noting that the recent Supreme Court case of *Gerstein v. Pugh*¹⁹³ had reaffirmed the *Ker-Frisbie* doctrine, the *Darby* court questioned *Toscanino*'s validity.¹⁹⁴

The refusal of these federal courts of appeal to accept the *Toscanino* doctrine was noted by the U.S. District Court for the Southern District of Illinois in *Matta-Ballesteros ex rel. Stolar v. Henman*.¹⁹⁵ The defendant in *Matta-Ballesteros* escaped from a U.S. federal prison camp at Eglin Air Force Base in 1971.¹⁹⁶ Fifteen years later, he claimed Honduran citizenship and returned to that country.¹⁹⁷ In 1986, U.S. officials issued a warrant for the defendant's arrest that detailed his involvement in international drug smuggling.¹⁹⁸

The Honduran military captured the defendant at his home in 1988 by forcibly subduing him with a stun gun and driving him to an air base.¹⁹⁹ Members of the U.S. Marshal's

191. *Id.* at 1530.

192. *Id.* at 1531. The Eleventh Circuit, created in 1981 and comprised of states that used to be part of the Fifth Circuit, bases its decisions on precedent from the Fifth Circuit. See *Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

193. 420 U.S. 103 (1975); see *supra* note 101 (discussing facts of *Gerstein*).

194. *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). The *Darby* court gave several reasons for not applying the exception. *Id.* It stated that "the continuing validity of the *Toscanino* approach is questionable after the intervening decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the Supreme Court refused to 'retreat from the established rule that illegal arrest or detention does not void a subsequent conviction.'" *Id.* (quoting *Gerstein* at 119). It also held, however, that it would not apply *Toscanino* because the defendant "ha[d] not alleged the sort of 'cruel, inhuman and outrageous treatment allegedly suffered by *Toscanino*.'" *Id.* (quoting *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975)).

The same result was reached in *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). In *Rosenthal*, DEA agents and Colombian authorities arrested the defendant, a member of an alleged racketeering and cocaine smuggling conspiracy, at his home in Colombia. *Rosenthal*, 793 F.2d at 1225. The officials flew the defendant to Miami and incarcerated him there. *Id.* The defendant protested his capture, but the court upheld jurisdiction, stating that it "has declined to adopt the *Toscanino* approach." *Id.* at 1232.

195. 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990).

196. *United States v. Matta-Ballesteros*, 700 F. Supp. 528, 529 (N.D. Fla. 1988).

197. *Id.*

198. *Id.*

199. *Id.*

Service then accompanied him on a flight to New York.²⁰⁰ Officials arrested the defendant when the plane landed and transported him to a U.S. penitentiary in Illinois.²⁰¹ The court declined the defendant's motions for dismissal based on this method of apprehension, noting that several circuit courts had rejected the *Toscanino* rule and that no case had ever been dismissed based on this argument.²⁰²

III. COURTS SHOULD CONSIDER THE METHOD BY WHICH AN INDIVIDUAL IS APPREHENDED

The *Toscanino* standard of inquiry requires that a court examine the methods by which a defendant is brought within its jurisdiction.²⁰³ In light of the increased use of such an inquiry in the federal courts of appeal and the prohibitions of torture contained in several multinational instruments, U.S. courts should uniformly adopt the *Toscanino* inquiry and consider the circumstances involved in extraterritorial apprehensions.²⁰⁴ In order to promote human rights, U.S. courts should do more than merely engage in such inquiry; they should also divest themselves of jurisdiction when the conduct of arresting agents is egregious enough to shock the conscience.²⁰⁵ By divesting themselves in this manner, courts are likely to dissuade U.S. agents from torturing suspects both during and after apprehension.

The promulgation over the past forty years of multinational instruments prohibiting the use of torture evinces a

200. *Id.* The plane first landed in the Dominican Republic and then proceeded to New York. *Id.*

201. *Id.*

202. 697 F. Supp. at 1045. The court noted that "to date, the *Toscanino* argument, or one similar, has been rejected by the Fifth, Ninth, Tenth, and Eleventh Circuits . . . [a]nd no court applying *Toscanino* has dismissed an indictment." *Id.*

203. *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F.Supp. 916, 917 (E.D.N.Y. 1975).

204. See R. Shafer, *District Court Jurisdiction Over Criminal Suspect who was Abducted in Foreign Country and Returned to United States for Trial or Sentencing*, 64 A.L.R. FED 292 (1983, 1989 Supp.). The American Law Reports (Federal) states that "[c]ases decided in other circuits appear to give credence to the Second Circuit's views." *Id.* at 295; see notes 42-65 (discussing Universal Declaration and Convention on Torture); *supra* notes 116-63 (describing use of *Toscanino* standard in various federal judicial circuits).

205. *Toscanino*, 500 F.2d at 273.

worldwide commitment to eradicating the use of torturous methods and shows the dynamic nature of international law.²⁰⁶ The United States is currently a signatory to several multinational treaties that prohibit the use of torture.²⁰⁷ According to the U.S. Constitution, these treaties are to be treated as part of the supreme law of the land.²⁰⁸ Moreover, the Supreme Court has ruled that maxims of international law must be considered as a part of U.S. domestic law,²⁰⁹ thereby compelling U.S. courts to comply with these instruments.²¹⁰

Even if the United States was not a party to the international human rights instruments, U.S. courts would still be bound to observe the provisions of these documents.²¹¹ The binding authority of these instruments extends to U.S. courts because the use of torture is considered *hostes humani generis*,²¹² and it is reviled worldwide.²¹³ Cases involving torture invoke the universality theory of jurisdiction, meaning that any country has the power, if not the affirmative duty, to punish any persons who practice or utilize torturous methods in defiance

206. See Inter-American Convention, *supra* note 73; Convention on Torture, *supra* note 17, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51; Declaration on Torture, *supra* note 17, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 39) at 91, U.N. Doc. A/10034; European Convention, *supra* note 17, 213 U.N.T.S. 221; Universal Declaration, *supra* note 17, G.A. Res. 217A, 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810.

207. See *supra* notes 42-82 and accompanying text (discussing various U.N. and OAS instruments to which United States is a signatory).

208. U.S. CONST. art. VI. The U.S. Constitution also states that "[t]he judicial power shall extend to all cases, in law and equity, arising under . . . treaties made." *Id.* art. III, § 2, cl. 1; see *supra* note 9 (discussing doctrine of incorporation).

209. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). In this case, the Supreme Court stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *Id.*

210. *Id.*

211. See U.N. CHARTER art. 2, para. 6; see also T. MERON, *supra* note 8, at 81. Meron notes that

[s]tates parties to human rights instruments and supporters of declarations and resolutions promulgating human rights naturally seek to promote the universality of human rights by attempting to assure concordant behaviour by non-parties to the instruments concerned and by states which have not supported the adoption of the declarations and resolutions.

Id.; see *infra* notes 212-16 and accompanying text (discussing universal nature of instruments prohibiting torture).

212. See Abramovsky & Eagle, *supra* note 1, at 82 n.100.

213. See *Report by Special Rapporteur*, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 1, ¶ 3.

of the Convention on Torture and similar instruments.²¹⁴ In essence, documents such as the Universal Declaration, the Convention on Torture, and the European Convention are treated as universally binding, requiring compliance from states even if they have not signed nor ratified the specific instruments.²¹⁵ The Vienna Convention buttresses the concept of universal application of these multinational instruments.²¹⁶

The prohibition of torture is absolute; both the Convention on Torture and Declaration on Torture explicitly state that no justifications may be given for the use of torture.²¹⁷ The absolute prohibition of torture also appears in the Inter-American Convention and in at least one case decided by the European Court of Human Rights.²¹⁸ Yet, some U.S. courts continue to uphold jurisdiction over defendants apprehended by extreme methods without inquiring into the circumstances of arrest and detention.²¹⁹

One scholar noted that, if the United States ratifies the Convention on Torture, the U.S. courts would be forced to consider the methods used in capturing and detaining a defendant.²²⁰ Even without this ratification of the Convention on Torture and in the absence of other international human rights documents, U.S. domestic law requires that arresting agents not use torturous methods when arresting fugitives.²²¹ The

214. See *supra* note 66 (discussing universality theory of jurisdiction as applied to torture).

215. See, e.g., notes 52-54 and accompanying text (discussing universal applications of Universal Declaration and U.N. Charter).

216. See Vienna Convention, *supra* note 7, art. 38, 1155 U.N.T.S. at 341. The preamble to this convention regards multilateral treaties as universally binding in order to "promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations." *Id.* preamble, 1155 U.N.T.S. at 333.

217. Convention on Torture, *supra* note 17, art. 2(2), G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51; Declaration on Torture, *supra* note 17, art. 3, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034.

218. See Inter-American Convention, *supra* note 73, art. 5; Ireland v. United Kingdom, 23-I Eur. Ct. H.R. (ser. B) (1976); *supra* notes 77, 92 and accompanying text (defining ban against torture as being absolute).

219. See *supra* notes 164-202 and accompanying text (discussing circuits refusing to apply *Toscanino* inquiry).

220. See M. BASSIOUNI, *supra* note 2, at 206; see also *A Law to Light the Darkest Cell*, N.Y. Times, Feb. 16, 1990, at A34, col. 1. The U.S. Senate is currently debating whether or not the U.S. will ratify the Convention on Torture. *Id.*

221. See *infra* notes 222-24 and accompanying text.

U.S. Constitution forbids the use of cruel or inhuman punishment²²² and guarantees all defendants the due process of law, both before and during trial.²²³ Furthermore, the Restatement (Third) reflects the prohibition of any government-sanctioned torture.²²⁴

The long-accepted rule of *Ker* was that a court should not concern itself with the circumstances of a defendant's apprehension and detention and that irregularities in obtaining jurisdiction had no ramifications on the defendant's prosecution.²²⁵ Since *Ker* was decided in 1886, however, the Supreme Court has expanded the concept of due process under the Constitution to include procedural safeguards prior to trial, so that a defendant is now offered protection even before the inception of formal proceedings.²²⁶ The Second Circuit recognized that defendants were entitled to certain constitutional protections once they were apprehended by U.S. agents and devised a standard in *Toscanino* that prevents U.S. agents from benefitting from their own unlawful activities.²²⁷

Despite this expansion of due process and the existence of multinational treaties banning the use of torture, several U.S. circuit courts have declined to make the *Toscanino* inquiry.²²⁸ Those courts that do not undertake a *Toscanino* inquiry are violating the mandates of the various international instruments on human rights. The Convention on Torture provides that states must take measures to prosecute violators of anti-torture instruments and that a state must undertake an examination of any allegations and facts made available to it regarding the de-

222. U.S. CONST. amend. VIII.

223. U.S. CONST. amends. V, XIV; see *United States v. Russell*, 411 U.S. 423 (1973); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Rochin v. California*, 342 U.S. 165 (1952); *supra* note 110 and accompanying text (discussing judicial development of due process standards).

224. See *supra* note 66 (discussing section 702 of Restatement (Third)).

225. See *supra* notes 95-102 (discussing *Ker* and *Frisbie* cases).

226. See *supra* note 110 (discussing expansion of due process cases to include protections before trial).

227. See *United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

228. See *supra* notes 164-202 and accompanying text (discussing circuits that do not utilize *Toscanino* inquiry).

fendant's apprehension and detention.²²⁹ Thus, courts within the Seventh, Ninth, and Eleventh Circuits are failing to abide by obligations imposed by the international documents by not engaging in a *Toscanino* inquiry.

Even those circuits making a *Toscanino* inquiry are falling short of their duties under international law. No court has ever divested itself of jurisdiction over a defendant after engaging in a *Toscanino* inquiry.²³⁰ One rationale put forth in these decisions is that the conduct alleged did not rise to the level of torture that is outrageous or egregious enough to warrant dismissal.²³¹ Yet, the Special Rapporteur has defined as torture certain of the methods of apprehension and detention used by U.S. agents; and, accordingly, these acts require an of-

229. Convention on Torture, *supra* note 17, arts. 5-6, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 198, U.N. Doc. A/39/51. Article 5 provides:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over [acts of torture] referred to in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . . to any of the States mentioned in . . . this article.

3. This convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Id. art. 5. Article 6 provides, in pertinent part:

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offense referred to . . . is present shall take him into custody or take other legal measures to ensure his presence.

2. Such State shall immediately make a preliminary inquiry into the facts.

Id. art. 6.

230. *See supra* notes 158, 202 (indicating that no court has ever divested itself of jurisdiction in this manner).

231. *See* *United States v. Yunis*, 681 F. Supp. 909, 919 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989). The other main reason advanced for the failure of courts to divest themselves of jurisdiction is that U.S. officials did not participate in or instigate the torture administered. *Id.*; *see* *United States v. Lira*, 515 F.2d 68, 70-71 (2d Cir.), *cert. denied*, 423 U.S. 487 (1975); *United States v. Degollado*, 696 F. Supp. 1136, 1140 (S.D. Tex. 1988).

ficial response.²³²

For example, in *Toscanino* the arresting agents allegedly administered no less than five of the torture techniques detailed in the Special Rapporteur's report, which was issued twelve years after the *Toscanino* decision.²³³ The agents allegedly denied the defendant adequate sleep and nourishment, beat him, forced fluids into orifices of his body, and administered electrical shocks to various parts of the defendant's body.²³⁴ On remand, the district court failed to dismiss the charges against the defendant because the allegations of torture were not sufficiently proven.²³⁵ The guidelines set forth by the Special Rapporteur, however, would have required that the court should have divested itself of jurisdiction.²³⁶

Additionally, in *Reed*, the U.S. Court of Appeals for the Second Circuit declined to divest itself even though agents allegedly held a loaded gun to the defendant's head, threatened to kill him, and forced him to lie on the floor of the plane carrying him from Bimini to Florida.²³⁷ Moreover, in *Cordero*, the U.S. Court of Appeals for the First Circuit refused to dismiss the defendant's indictments, holding that the defendant's sleeping and eating conditions were not sufficiently egregious.²³⁸ In this case, the defendant was forced to sleep on the floor of his prison cell and provided limited amounts of food.²³⁹ Yet, the denial of both sufficient hygiene and nourishment are both included in the Special Rapporteur's list of torturous activities.²⁴⁰ Furthermore, in *Yunis*, arresting FBI agents fractured both of the defendant's wrists while arresting

232. See *Report by Special Rapporteur*, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 28-30, ¶ 119.

233. Compare *United States v. Toscanino*, 500 F.2d 267, 269-70 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975) (detailing alleged torture administered to defendant) with *Report by Special Rapporteur*, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 28-30, ¶ 119 (describing various methods of torture used by sovereigns).

234. *Toscanino*, 500 F.2d at 270.

235. *United States v. Toscanino*, 398 F. Supp. 916 (E.D.N.Y. 1975).

236. See *Report by Special Rapporteur*, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 28-30, ¶ 119 (describing torture techniques warranting official action).

237. *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981).

238. *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981).

239. *Id.*

240. See *Report by Special Rapporteur*, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 29-30, ¶ 119.

him and then failed to give his injuries proper treatment for five days.²⁴¹ The U.S. Court of Appeals for the District of Columbia refused to divest itself of jurisdiction,²⁴² despite the Special Rapporteur's characterization of denial of medical assistance as torture.²⁴³

The use of the *Toscanino* standard is important in two respects—it reflects the goals of the various human rights instruments and recognizes the importance that the U.S. system places on due process. One factor weighing against divestment under the *Toscanino* inquiry, however, is the courts' insistence on considering the interests of the individual only after those of the invaded country.²⁴⁴ Under this form of analysis, the U.S. courts have held that an individual does not have standing to protest his abduction and subsequent treatment if the invaded country has not undertaken a similar complaint.²⁴⁵ The 1982 advisory opinion of the Inter-American Court of Human Rights, however, provides that states undertake obligations toward individuals, not only to other sovereigns.²⁴⁶ Thus, it may be possible for a court to rule that an individual may bring an action even where his asylum or native country has not already done so.

The U.S. government has attempted to justify its use of extraordinary apprehensions by pointing to the failure of the extradition process.²⁴⁷ Worldwide tensions regarding narcot-

241. *United States v. Yunis*, 681 F. Supp. 896, 913-15 (D.C. Cir. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

242. *Id.* at 915.

243. See *Report by Special Rapporteur*, *supra* note 15, U.N. Doc. E/CN.4/1986/15, at 30, ¶ 119.

244. See *supra* note 14 and accompanying text (discussing individual's lack of standing in extraordinary apprehensions).

245. *Id.*; see *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (defendant had no ability to protest abduction as both country of citizenship and asylum country failed to formally protest).

246. Advisory Opinion OC-2/82, *supra* note 80, INTER-AM CT. H.R., JUDGEMENTS AND OPINIONS (ser. A), No. 2, at 16.

247. VAN DEN WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION* 154 (1980). The author wrote that "[g]enerally, most 'western countries' are willing to extradite terrorists among themselves, whereas many Afro-Asian countries are fundamentally opposed to extradition and accordingly, have become asylum havens for terrorists from all over the world." *Id.* In addition, some of the countries in which terrorists and narcotics traffickers seek asylum do not have extradition treaties with the United States. See Engleberg, *Terrorism Trial in U.S. Moves Minor Actor to Center Stage*, N.Y. Times, Feb. 14, 1989, at A10, col. 2; see also Engleberg, *U.S. Is Said to*

ics trafficking and terrorism are increasing, and countries that historically have complied with extradition requests have now refused to cooperate.²⁴⁸ The need for unilateral action, how-

Weigh Abducting Terrorists Abroad for Trials Here, N.Y. Times, Jan. 19, 1986, at 10, col. 4; *supra* note 4 (discussing extradition generally).

248. See, e.g., Tagliabue, *4 Hijackers Charged by Italy With Murder And Kidnapping; 2 P.L.O. Officers Taken To Rome*, N.Y. Times, Oct. 12, 1985, at 1, col. 6. Two recent cases that underscored the inability of the United States to gain cooperation from its traditional allies in extradition matters involved suspected terrorists Mohammed Abbas and Mohammed Hamadei. Abbas was the leader of a terrorist group that hijacked the *Achille Lauro*, an Italian cruise ship, and murdered Leon Klinghoffer, an elderly, wheelchair-bound U.S. citizen. Dionne, *Hostage's Death: 'A Shot to Forehead'*, N.Y. Times, Oct. 11, 1985, at A1, col. 6. The hijackers surrendered to Egyptian authorities, who were to fly the hijackers to safety in Tunisia. Weinraub, *'We Want Justice,' Reagan Declares*, N.Y. Times, Oct. 12, 1985, at 1, col. 5. Israeli intelligence learned of the plan and alerted the U.S. government, which then used U.S. Naval planes to intercept the hijackers' plane and force it to land in Sicily. Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy; Gunmen Face Trial In Slaying Of Hostage*, N.Y. Times, Oct. 11, 1985, at A1, col. 6. Despite an immediate U.S. request for the hijackers' extradition, Italian authorities refused to surrender the perpetrators and instead chose to try them in Italy. Emerson, *Taking on Terrorists*, U.S. NEWS & WORLD REP., Sept. 12, 1988, at 32. One of the hijackers was eventually convicted by the Italian court and sentenced to thirty years imprisonment, but Abbas was permitted to fly to safety. *Id.*

In January, 1987, West German authorities apprehended Mohammed Hamadei, suspected leader of the hijacking in 1987 of a Trans World Airlines jet that left U.S. Navy diver Robert Stethem dead. Markham, *Hijacking Suspect Arrested By Bonn*, N.Y. Times, Jan. 15, 1987, at A1, col. 3. Hijackers seized control of the plane and held its passengers hostage after the flight left Athens, Greece, on June 14, 1985, and forced the plane to remain on the runway in Beirut Airport for seventeen days. *Id.* at A8, col. 5. Forty U.S. citizens were aboard the plane, and the hijackers murdered Stethem and dumped his body onto the runway. Markham, *Bonn May Balk at Extraditing Terror Suspect*, N.Y. Times, Jan. 17, 1987, at 6, col. 2.

U.S. officials immediately requested Hamadei's extradition, but West German authorities refused—West German law did not permit the imposition of the death penalty, and authorities sought assurances from the U.S. that Hamadei would not be subjected to capital punishment. *Id.* U.S. officials agreed to this condition, but the West Germans still refused to surrender Hamadei after two West German citizens were abducted in Lebanon. Shenon, *U.S. Will Not Seek Death In Hijacking*, N.Y. Times, Jan. 19, 1987, at A5, col. 1. West German authorities feared that extraditing Hamadei to the United States would incur a "death sentence" for the hostages. Markham, *Bonn Hesitates On Extraditing Terror Suspect*, N.Y. Times, Jan. 22, 1987, at A1, col. 5.

Hamadei was later sentenced to life imprisonment in West Germany, but some U.S. leaders voiced contempt for the actions of the West German government. See Roberts, *'No Deal' For Accused Hijacker, Bonn Assures*, N.Y. Times, June 25, 1987, at A9, col. 1; *Justice for Flight 847*, TIME, May 29, 1989, at 63. It was later reported that the French government had an opportunity to arrest Hamadei several months before he was apprehended in West Germany. *The West reels in 'a big fish' at last*, U.S. NEWS & WORLD REP., Jan. 26, 1987, at 14. Despite having information that the hijacker was entering their country, however, the French authorities did not take any action nor

ever, should not permit the use of excessive or torturous methods in securing a suspect's capture and detention.

The defendant in *Reed* charged that the U.S. government was contradicting its stated concern for human rights by participating in extraordinary apprehensions.²⁴⁹ The U.S. Court of Appeals for the Second Circuit disagreed, noting that there was no pattern of repeated apprehensions in disregard of international law.²⁵⁰ Despite this assertion, recent events indicate otherwise, and, in fact, the United States has increasingly resorted to such abductions overseas.²⁵¹ The increasing number of defendants captured abroad and brought to trial in the United States might be a valid response to failed extradition requests but also should require that U.S. courts inquire into the methods used by apprehending agents in order to conform to frequently stated concerns for human rights.

CONCLUSION

The standards set forth in instruments barring the use of torture are merely a codification of customary standards with which all states should comply. The United States is a party to several of these instruments and, moreover, is recognized worldwide as a leader in the advancement of human rights. U.S. courts, however, permit the unlawful activities of agents to go unrecognized by refusing to divest themselves of jurisdiction where a defendant has been captured abroad through torture or ill-treatment. The *Toscanino* inquiry recognizes that U.S. agents should not be permitted to benefit from unlawful conduct. U.S. courts should apply this inquiry more stringently and in accordance with the guidelines set forth by the Special Rapporteur if the United States is to maintain its position as a leader of democracy and human rights.

*Andrew M. Wolfenson**

notify U.S. officials due to their fear of reprisals against French citizens being held hostage in Lebanon. *Id.*

249. See *United States v. Reed*, 639 F.2d 896, 903 (2d Cir. 1981).

250. *Id.*

251. See *supra* notes 116-202 and accompanying text (describing cases in which authorities abducted defendants abroad).

* J.D. Candidate, 1991, Fordham University.