Illegal Extra-Territorial Abductions and Reconceptualising *Mala Captus, Bene Detentus*[*]

Abstract

The abduction of British-Nigerian citizen, Mr Nnamdi Kanu from Nairobi, Kenya for trial in Abuja, Nigeria provides the context for this paper which interrogates the legality and propriety of municipal courts assuming and exercising trial jurisdiction over victims of illegal extraterritorial abduction. The previous part of this paper,[1] considered the principle of territorial inviolability in international law, and the proposition that every State, to the exclusion of every other state, exercises dominion over persons on its territory. It scrutinised the status of forceful extra-territorial abductions in international law, including abductions by state and non-state agents, and when abductions by non-state agents could be attributed to the state. It examined the traditional Anglo-American doctrine of *mala captus bene detentus*, which stands for the proposal that courts may assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured. This current paper considered the more nuanced view of the *mala captus* doctrine and examined the way and manner in which states are gradually moving away from the principle in its absolute sense. It established that while international tribunals accept the *mala captus* doctrine, however, if defendant's attendance was attained though violation of his human rights, international tribunals would stay the proceedings particularly, if their own staff were complicit in the violations. Within the context of whether an abducting country should exercise jurisdiction over the abductee, this paper dealt with the cardinal duty of the abducting country to terminate its breach of international law and make restitution by returning the abductee to the country from which he was taken. The paper iterated the principle that unless there is reason not to exercise jurisdiction, all municipal courts, including Nigerian courts are required to exercise jurisdiction to try and determine every case which comes before them initiated by due process of law. The paper considered legal developments within and outside the commonwealth in respect of courts assuming jurisdiction over victims of illegal extraterritorial abduction, and established that current jurisprudence allows courts to assume jurisdiction and stay the proceedings. The paper also established that despite the reticence of US courts in staying proceedings, if egregious or unconscionable violation of human rights are established, they would stay proceedings. In conclusion, the paper suggested the existence of sufficient precedent for the Nigerian court to stay proceedings in the current matter of Mr Kanu.

Keywords

Abduction, Extradition; Domestic courts; Extraordinary Rendition; Jurisdiction; International Law; Mala Captus Bene Detentus

1. Introduction and Factual Background

In June 2021, Mr. Kanu a Nigerian-British citizen was abducted in Kenya and exfiltrated to Nigeria in a private jet on June 27, 2021. On or about June 29, 2012, Mr. Kanu was produced in court in Abuja, Nigeria, in continuation of pending criminal proceedings against him. His legal counsel filed an objection to the jurisdiction of the court in general. The basis of objection to the jurisdiction of the court was that the consequence of the defendant's abduction from Kenya to Nigeria, without subjecting him to extradition proceedings in Kenya, was to deny the

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[1] Chike B. Okosa, 'Illegal Extra-Territorial Abductions and the Concept of *Mala Captus, Bene Detentus*', (2022) 4(3) *International Review of Law and Jurisprudence* [26-35]

Nigerian court of requisite jurisdiction to try him. On April 8, 2022, the High Court dismissed the objection, and held that since there was an extant bench warrant for Mr. Kanu's arrest, the law allowed his arrest anywhere he was found, so that his rendition has lawful.[2] On appeal, on October 13, 2022, the Court of Appeal held that the Federal Government brazenly violated the law, when it forcefully rendered Mr Kanu from Kenya to Nigeria for continuation of his trial. It held that such extra-ordinary rendition, without adherence to due process of the law, was a gross violation of all international conventions, protocols and guidelines that Nigeria is signatory to, and also a breach of Mr Kanu's fundamental human rights. The court held that the Government's action tainted the entire proceeding and amounted to '*an abuse of criminal prosecution in general*'.[3] The Federal Government's appeal at the Supreme Court against the decision of the Court of Appeal is pending. In international law, just like in municipal law, the principle of *ubi jus, ibi remedium* applies. Consequently, on proof of violation by a state of its international duty and obligation towards another state, the question of suitable recompense arises. Formal acceptance of the wrongfulness of the act accompanied by an apology, may constitute satisfaction and an acceptable relief for the violation. This however, is without prejudice to other existing remedies such as indemnity or restitution where appropriate. The state whose rights were violated is entitled to elect whether or not to overlook the violation, and is also entitled to election on the choice of remedy. Election to reparation as a remedy compels a return to the *status quo* previous to the violation. Within the framework of illegal extraterritorial abduction, where the wronged state does not waive the injury, but, demands and insists on return of the fugitive to the place of abduction, the abducting state has a duty to comply. The traditional Anglo-American rule is that a domestic court may exercise its jurisdiction over an individual who has been abducted from abroad and brought before it in violation of international law, is exemplified as *mala (*also *male) captus bene detentus*. This paper will examine the current more nuanced version of the *mala captus* doctrine, and consider the response of international tribunals to the *mala captus* doctrine, in a bid to show how much their practice conforms or differs from the response of domestic tribunals. This will lead to the duty of a country that has illegally abducted a fugitive from another country to restore the fugitive to the country of his abduction, and failing this, the duty of the domestic courts of the abducting country to decline exercise of its jurisdiction over such an illegally abducted fugitive. The paper will then conclude.

2. Rethinking the Male Captus, Bene Detentus Doctrine

Mala captus had at its best of times, been a doctrine of expediency. Its justification of wholesale violation of both domestic and international laws in pursuit of domestic law enforcement failed to attain the status of official orthodoxy. Even in the US where it seemed to have the widest adherence, its complete acceptance was not immediate. Before they eventually accepted it as an applicable principle of law, certain States, had initially rejected it on the grounds that permitting trial of an illegally abducted defendant would sanctify police misconduct and thus violate public policy.[4] Accordingly, development of the doctrine and development of opposition

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[2] 'Court strikes out 8 of 15 charges against Nnamdi Kanu', *BusinessDay*, April 8, 2022, <https://businessday.ng/news/article/court-strikes-out-8-of-15-charges-against-nnamdi-kanu/> Accessed 4 May 2023

[3] 'Breaking: Appeal Court acquits Nnamdi Kanu, strikes out FG's charge', *Vanguard,* October 13, 2022, <https://www.vanguardngr.com/category/top-stories/> Accessed 14 October 2022

[4] Austin W. Scott, Jr 'Criminal Jurisdiction of a State over a Defendant Based Upon Presence Secured by Force or Fraud' (1963) 37 *Minnesota Law Review* [91-107] 100, [In *State v. Simmons*, 39 Kan. 262, 18 Pac. 177 (1888) the court stated: '*It would not be proper for the courts of this state to favour, or even to tolerate, breaches of the peace*

to the doctrine were contemporaneous. This led to the suggestion or at least expectation of its modification in appropriate cases. In this regard, in *Sinclair v HM Advocate*[5], though in concurrence with the majority that police irregularities in apprehension and detention of the prisoner should not prejudice public interest in the punishment of crime, Lord McLaren nevertheless argued that if there had been '*substantial infringement of right*' the court would intervene to prevent exercise of criminal jurisdiction.[6] Yet again, in *R. v O./C. Depot Battalion, R.A.S.C. Colchester (Ex parte Elliott)*,[7] though conceding that the court's jurisdiction over an applicant could not be challenged in the event of an illegal arrest because inquiry into the circumstances by which the defendant was before it lay outside the court's power, Lord Goddard was of the opinion that '*it may influence the court if they think there was something irregular or improper in the arrest.*'[8] The suggestion that the doctrine should be rejected, and a rule prohibiting post-abduction trial developed, has received support, due to the fact that by allowing the trial of abductees, the doctrine violates individual's rights.[9] A well-known author, in explaining the doctrine's subversive effect suggests that that *'[t]o place states in a position where they can benefit from these practices encourages further violations and erodes voluntary observance of international law, whether by states or by individuals.'*[10] Part of the justification for revisiting and revising the concept is that if public respect for the law must be re-established, then law enforcement officials should not be guilty of breaching the law. Achieving this requires a procedural rule that prohibits courts from trying persons brought before it by lawless means.[11] Thus, it has been held that though certain law enforcement practices may not be patently illegal or unconstitutional, nonetheless, they may be *'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction*.'[12] By way of an analogy, previously, provided evidence was relevant and admissible, courts were indifferent about the way it was obtained. This position has now changed in some states and is changing in others, so that constraints now exist in admission of evidence from illegal search and seizures. Along this trajectory, it is was clear that eventually,

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committed by their own officers, in a sister state.... [Such jurisdiction] would not only be a special wrong against the individual .. .but it would also be a general wrong against society itself a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together.' (18 Pac. at 178-9). In *re Robinson*, 29 Neb. 135, 45 NW 267, 8 LRA 398 (1890), the court said '*We cannot sanction the method adopted to bring the petitioner into the jurisdiction of this state .. .the district court, therefore, did not acquire jurisdiction of the person of the petitioner.*' (45 NW at 268)]

[5] 17 R. (Ct. of Sess.) 38 (H.CJ. 1890)

[6] Ibid. 44

[7] [1949] 1 All ER 373 (KB)

[8] Ibid, 376-77

[9] Jonathan A. Bush, 'How did we get Here? Foreign Abduction after Alvarez-Machain' (1993) 45 *Stanford Law Review* 939 [Human rights law, contains an emerging norm against foreign forcible abduction. This new norm focuses on the wrongs (abduction and trial) suffered by the individual, and differs from *male captus* by treating the abduction as a wrong requiring an individual remedy. Although the new norm is definitely present in modern international law, it is still unclear whether it has supplanted *male captus*.]

[10] MC Bassiouni, *'International Extradition: United States Law and Practice'*, ch. 5, § 1, at 190

[11] Austin W. Scott, Jr (n. 4) 107; *US v. Toscanino*, 500 F.2d 267, 271 (1974) [Forcible abduction of individuals from a foreign country for the purpose of criminal prosecution in US is an unacceptable means of obtaining jurisdiction,] *See also* Jonathan E. Katz, 'Should Government Sponsored Forcible Abduction Render Jurisdiction Invalid? (1993) 23 *California Western International Law Journal*, [395-414] 395

[12] *US v. Russell*, 411 US 423, 93 S Ct 1637 (1973); see also *Virgin Islands v. Ortiz*, 427 F.2d 1043, 1045 (3d Cir. 1970) [We recognize that the validity of the Frisbie doctrine has been seriously questioned because it condones illegal police conduct.]

courts would consider as relevant, the method by which the presence of a defendant before them was procured.[13] Moreover, the now accepted systems and procedures of current international collaboration differs from the objective of aggressive domestic law enforcement with its projection of extraterritorial force and unilateral self-help.[14] Yet again, development of a supervisory jurisdiction over executive misconduct by courts and the proposition that domestic courts are beholden to follow certain international norms, have severely tested the *male captus* doctrine.[15] Even where the court is not moved by mere altruism to decline jurisdiction over an abducted defendant, in *US v Toscanino*, it was held that a '*complex of shocking governmental conduct might be sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process*,' and thus prompt the court to decline jurisdiction.[16] Although the

[13] Austin W. Scott, Jr (n. 4) 102 [In *Rochin v. California*, 342 US 165 (1952), three local police officers, suspecting that Rochin had possession of narcotics, saw him swallow two capsules. They seized him and attempted by force to extract the capsules from his mouth. This proving unavailing, Rochin was taken to a hospital, where a doctor forced a tube into his throat. An emetic solution was then poured into Rochin's stomach, and he vomited the two capsules. At Rochin's trial for illegal possession of narcotics, the capsules were admitted into evidence over his objections, and he was convicted. The US Supreme Court held unanimously that the conviction must be reversed as a means of deterring police from using methods so brutal and uncivilized and offensive to '*the community's sense of fair play and decency*.' The brutality involved in kidnapping is not far removed in degree from the brutality of the stomach pump.]

[14] Jonathan A. Bush, (n. 9) [Exempting government's extraterritorial acts from constitutional constraints and oversight, divorcing modern constitutional criminal procedure from extraterritorial policing permits government agents to behave in a dubious fashion, and to act in concert with those lacking rules or scruples.]

[15] Paul Michell, 'English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain', (1996), 29 *Cornell International Law Journal* [383-500] 392

[16] *US v. Toscanino*, (n. 11), Toscanino, an Italian citizen, claimed he was lured from his home in Montevideo, Uruguay, by a telephone call placed by or at the direction of a member of the Montevideon police, acting as a US agent; knocked unconscious by a blow to the head, thrown into the back of a car after being lured to a deserted area in the City of Montevideo and driven to the Uruguayan/Brazilian border. He alleged that at the border, a group of Brazilians, under US control, took custody of him and over the next three weeks denied him sleep and nourishment except intravenously carefully calculated to the exact amount needed to keep him alive; he was forced to walk up and down a hallway for several hours at a time and if he stopped, he was kicked and beaten. When he did not respond to a question, he claimed his fingers were pinched with pliers and alcohol was flushed into his eyes and nose as were other fluids forced up his anal cavity. US agents also allegedly attached electrodes to his earlobes, toes and genitals and sent jolts of electricity coursing through his body. After seventeen days of alleged torture, he was brought to US and arrested on a narcotics charge. The US government neither affirmed nor denied the allegations, but instead claimed they were immaterial to the court's power to proceed. Toscanino filed a motion to have the court vacate the verdict, dismiss the indictment, and order his return to Uruguay. He contended that because he was abducted by US agents, the court unlawfully acquired jurisdiction over him. Relying on the Ker-Frisbie doctrine, the district court denied his motion without a hearing, and he was subsequently convicted. On appeal, the US Court of Appeals for the Second Circuit remanded the case to the district court to determine whether Toscanino's allegation could be substantiated, and if so, to divest itself of jurisdiction over him. The court based its conclusion on the theory that since the time of the Frisbie decision, the Supreme Court had expanded the interpretation of due process. This new due process, according to the Second Circuit, not only guaranteed the accused a fair procedure at trial, but also the freedom from '*unreasonable invasion of [his] constitutional rights*.' The court concluded that when a defendant is kidnapped, forcibly brought within a court's jurisdiction, and treated as Toscanino had alleged, due process required a court to divest itself of jurisdiction over the person. *See* Halle Fine Terrion, '*US v. Alvarez-Machain*: Supreme Court Sanctions Governmentally Orchestrated Abductions as Means to Obtain Personal Jurisdiction', (1993) 43 *Case Western Reserve Law Review* [625-650] 644 [Although many readers may find abduction in and of itself to be an *'outrageous'* way for a government to conduct itself, the parameters of this exception are considerably narrower. '*Mere governmental kidnapping, without allegations of torture, [is] not considered shocking to the conscience;'* Therefore, it is not an exception to jurisdiction.]

Toscanino holding was narrowed by subsequent decisions,[17] in principle, even in the US which is its major bastion, the *male captus* doctrine is no longer inviolate. It admits of exceptions, and could be excepted to where the circumstances attendant to an abduction shock the conscience, or depict cruel and inhuman conduct. In *US ex rel. Lujan v Gengler*[18] while holding that irregularity in the manner of rendition was insufficient on its own to require a court to decline exercise of jurisdiction, the court concluded that, the conduct complained of did not '*shock the conscience*,' so that the exclusionary rule did not apply. The court thus left open the possibility that conduct which shocked the conscience may prompt divestiture of jurisdiction. In *US v Lira*,[19] in holding that the court need not automatically divest itself of jurisdiction when the defendant was abducted by state agents unless the defendant's presence is secured through the use of '*cruel and inhuman conduct*,' the court also left open the window of cruel and inhuman conduct as another reason to decline exercise of jurisdiction. The case of *R. v Bow Street Magistrates' Court (Ex parte Mackeson*), involved a major challenge to the traditional English position that a court is not required to decline jurisdiction to try an illegally arrested person. Lord Lane, CJ., held that the court had jurisdiction both to try the fugitive as well as the discretion to stay proceedings against him. In the particular case, the court enjoined further proceedings because the unlawful rendition of the applicant had been designed to circumvent regular extradition processes.[20] In analysing the two competing interests that the court must consider in order to reach a decision whether proceedings should continue, the House of Lords in *R v Latif*, reasoned that public confidence in the criminal justice system would be undermined, and a perception would arise that the court condones criminal conduct and malpractice by law enforcement agencies and bring it into disrepute, if consistently, the court refuses to stay such proceedings. Contrariwise, the court would be criticised for inability to protect the public from serious crime if the court were always to stay proceedings. [21] Reconciliation of both extreme positions requires principled solution. Despite the seeming tenacity of the doctrine, even in jurisdictions where it is still favourably considered, its application is not invariable. Its spotty and patchy application suggests that even at its strongest, it is not a particularly ideal doctrine.[22] In conclusion, under current jurisprudence, if the manner

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[17] Jacqueline A. Weisman, 'Extraordinary Rendition: A One-Way Ticket to the US.... Or Is It? (1992) 41 *Catholic University Law Review* [149-175] 157

[18] 510 F.2d 62 (2d Cir.) cert.

[19] 515 F.2d 68 (2d Cir.), cert. denied, 423 US 847 (1975)

[20] 75 Crim. App. 24 (Eng. QB Div. Ct. 1982) English authorities sought the return of the fugitive from Rhodesia on fraud charges, but made no formal request for his extradition. Rhodesia was in civil revolt, and the UK did not even recognize the Rhodesian government. English police informed local authorities that the fugitive was wanted in England. The local authorities arrested him and made out an order for his deportation. Rhodesia authorities sent the fugitive's passport to England, where it was revalidated for a single month and for a one-way trip back to UK. All of this took place without the fugitive's knowledge. The fugitive challenged the deportation order in the Rhodesia courts on the basis that it amounted to an unlawful disguised extradition. He succeeded on his initial application, but this was overturned on appeal. The fugitive was deported to England and arrested there upon his arrival. In England, the fugitive sought certiorari to quash the charges against him and an order of prohibition against further proceedings, alleging that his presence in England had been secured through an unlawful deportation from Zimbabwe/Rhodesia. In staying the proceedings, the court found that the abuse of process resulted from a mixture of the actions of the domestic and foreign authorities. *See* Paul Michell, (n. 15), 462-3

[21] *Regina v. Latif*; *Regina v. Shazad*, 18 January 1996, 1 WLR 104-117 (1996), at 112-113.

[22] See for example, in *re Patrick Lawler*, (1956) 1 '*Lord McNair International Law Opinions'* at 78-79, [Patrick Lawler, a fugitive escaped from prison in Gibraltar, and was recaptured by a British prison officer in Algeciras, Spain. The Law Officers of the Crown advised that an *...Order ought to be given for setting Lawler at liberty immediately .... If any doubt exists, as to what the circumstances really were, inquiry should of course be made; but, for the present, we assume that M. Isturitz has been correctly informed of the facts. If so, a violation of Spanish*

of bringing a fugitive before the court is so patently unlawful that continuation of the proceedings would amount to abuse of process, the court, notwithstanding that it has jurisdiction to try the matter, will in exercise of its discretion, divest itself of that jurisdiction. In this regard, control of the executive branch, restraint on violations of state sovereignty, avoidance of injustice to the accused, breeding of confidence and respect for the administration of justice, protection of the rule of law, are amongst the reasons why the court would decline jurisdiction to try a victim of illegal extraterritorial abduction.[23]

3. Response of International Tribunals to Male Captus, Bene Detentus Doctrine

Theoretically, international tribunals by taking into account, the pre-trial treatment of the accused, including the procedure and circumstances of the arrest, convey the impression that they are not bound by the *mala captus* doctrine.[24] In point of fact, their response to the *mala captus* doctrine discloses polarisation. Due to the particular structure of international law, international tribunals do not maintain police forces. They rely on the police forces of member nations to implement their processes and execute their warrants. Consequently, they are not under any responsibility to justify or excuse the misconduct of arresting officers. Furthermore, most offences for which abductees are renditioned for trial in domestic tribunals are either offences against a particular state or its citizens. This creates self-interest in the domestic tribunals of the concerned states to acquire jurisdiction by any means, however tenuous, over the abductee. In contrast, international tribunals, beyond the provisions of their constitutive instruments, do not have personal interests in either the defendant or the offence committed. These make it easy for an international tribunal to decline jurisdiction, where circumstances of bringing the accused person to court evince police or prosecutorial misconduct. The other side of this consideration is that even where misconduct on the part of law enforcement officials is established, provided the misconduct is not by the officials of the international tribunals, they tend to apply the *mala captus* rule and refuse to decline jurisdiction.[25] International tribunals proceed on the basis that, in order to strike an equitable balance between the interests of justice, the integrity of the proceedings and the rights of the accused, all violations are entitled to be remedied.[26] They adopt a jurisprudence that since fair trial is the only course to justice, the purpose of the judicial process is frustrated where fair trial is rendered impossible.

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territory was committed by the Warder Nicholls, in removing Lawler over and out of Spanish ground... for the purpose of restoring him to a penal custody at Gibraltar, from which he had escaped into Spain. For we regard the removal, if effected as alleged by means of drugging or intoxication, as being a removal clearly without consent, and as involving the same international consequences, as if it had been accomplished by force. A plain breach of international law having occurred, we deem it to be the duty of the state, into whose territory the individual thus wrongfully deported was conveyed, to restore the aggrieved state, upon its request to that effect, as far as possible to its original position.... [T]herefore, . . . we recommend that notice be given to the Spanish authorities that, at a given time and place (the place being a convenient spot on the Spanish confines) Lawler will be set at liberty, and allowed to choose his own course: and he should be disposed of accordingly."] *See generally*, Jianming Shen, 'Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension', (1994) 23 *Denver Journal of International Law & Policy* [43-85] 54-58

[23] Helen McDermott, *'Extraterritorial Abduction Under the Framework of International Law: Does Irregular Mean Unlawful?* (PhD thesis of School of Law, National University of Ireland, Galway, 2014) 207

[24] Ibid. 216

[25] ICC, Situation in DRC, *Prosecutor v Dyilo*, 14 December 2006 (Judgment on the Appeal of Mr. Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to art. 19(2)(a) of the Statute of 3 October 2006), para. 37, [The requirement to decline jurisdiction has been *'confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal.'*] Helen McDermott, (n. 23) 222

[26] Helen McDermott, (n. 23) 225

Consequently, they include the pre-trial treatment of the accused in their liberal interpretation of the concept of fair trial. They consider that putting the accused on trial would be contradictory to the concept of doing justice, if the fairness of the trial has become impossible due to violations of accused persons' fundamental rights.[27] In *ICTR Prosecutor v Barayagwiza*,[28] the Appeals Chamber observed that its supervisory powers function to afford relief for violation of accused's rights; prevention of future misconduct; and enhancement of the integrity of the judicial process; and that it was ready, where, '*to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity*' to utilise the abuse of process doctrine to decline jurisdiction. They recognise and accept an obligation to scrutinise the entire process inclusive of pre-trial procedures. This leads clearly to the conclusion that they have not accepted the *male captus bene detentus* rule as a working principle.[29] In this regard, as a general rule, though they are ready to decline jurisdiction if the accused has been subjected to '*serious and egregious violations ... [which]...would prove detrimental to the court's integrity,*' they nevertheless do not consider themselves liable for acts of states which are not implemented under their directions.[30] It is from this viewpoint that we must understand that the statement of the Tribunal in *Prosecutor v Dragan Nikolic*[31] that exercise of jurisdiction should not be declined in cases of abductions by private individuals whose actions, unless instigated by a state or an international organisation,

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[27] ICC, Situation in DRC, *Prosecutor v Dyilo*, (n. 25) [The Appeals Chamber of ICC considered the remedy of a permanent stay of proceedings in response to allegations that the accused had been illegally detained and ill-treated by Congolese authorities with the collusion of the Court. The Appeals Chamber held that: *'Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.'*] Helen McDermott, (n. 23) 222

[28] *ICTR Prosecutor v. Barayagwiza*, 'Decision', Case No. ICTR-97-19-AR72, 3 November 1999, para. 76; *ICTR Prosecutor v. Barayagwiza*, 'Decision (Prosecutor's Request for Review or Reconsideration)', Case No. ICTR-97-19-A, 31 March 2000; Barayagwiza was indicted for genocide, complicity in genocide, incitement to commit genocide, conspiracy to commit genocide and crimes against humanity. The Appeals Chamber found that the Prosecutor had failed in her duty to diligently prosecute the case and that accused's rights to be promptly informed of charges against him and to *habeas corpus* had been violated. In determining the appropriate remedy, the Chamber referred to the seriousness of the charges but found the *'conduct to be so egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and resultant denial of his rights is to release the Appellant and dismiss the charges against him'.* The decision was met with fierce criticism. Upon review, the judges concluded that '*the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on which the Decision is founded.'* Consequently, the remedy of release was changed. *See* Helen McDermott, (n. 23) 216-18

[29] Helen McDermott, (n. 23) 216; see *ICTY, Prosecutor v Dokmanović*, 'Decision on the Motion for Release by the Accused Slavako Dokmanović', Case No. IT-95-13a-PT, T.Ch. 11, 22 October 1997; *ICTY, Prosecutor v Todorovic'*, 'Sentencing Judgment', Case No. IT-95-9/1-S, 31 July 2001. See also Goran Sluiter, 'Decision on the Motion for Release by the Accused Slavko Dokmanović, *Prosecutor v Mrksic, Radic, Slijvancanin and Dokmanović*, Case No. IT-9513a-PT, T. Ch. II, 22 October 1997', Commentary', in: A. Klip and G. Sluiter (eds.) '*Annotated Leading Cases of International Criminal Tribunals: The Special Court for Sierra Leone 2003-2004',* at 155-156. [The Chamber, acknowledged the responsibility of ICTY for these procedures. This responsibility is based on the Trial Chamber's duty pursuant to art. 20 to ensure the accused receives a fair trial and on the vertical co-operation relationship between States, which enables the Tribunals to impose modalities of execution.]

[30] *See generally*, *Barayagwiza v. The Prosecutor* (Appeal Chamber Decision) TPIR-97-19-AR72 (3 November 1999) para. 74; *see also* Ölvir Karlsson, '*Mala Captus, Bene Detentus*, *from Domestic Courts to International Tribunals'*, (BA Degree in Law Thesis, University of Akureyri, Iceland 2012) 21

[31] *Prosecutor v Nikolic* (Appeal Chamber Decision on Interlocutory Appeal Concerning Legality of Arrest) IT-94-2-AR73 (5 June 2003) at para 26

or other entity, do not necessarily in themselves violate State sovereignty; does not assert a right to states to conduct illegal extraterritorial abductions. Contrariwise, the statement implies that states should decline jurisdiction over persons brought in front of their courts by state sponsored abductions.[32] This entails that, provided issues of violation of the human rights of the accused do not arise, abductions by private individuals which are not procured by states or other entities or international organisations, and which do not violate state sovereignty, should not be sufficient reason to decline jurisdiction.[33] Consequently, concerning abductions sponsored or carried out by non-state agents or independent third parties and persons unknown, the practice of international tribunals is congruent to that of domestic tribunals. In this regard, since no sovereignty or official body is chargeable for the illegal abduction, and since violation of the territorial sovereignty of the host state is not chargeable to another state, jurisdiction over the abductee would not be declined, and the trial would proceed.

Though international tribunals have not completely accepted the *mala captus* rule, they have not completely rejected it either. In their restricted and circumscribed application of the rule, under the abuse of process doctrine, they are willing to exercise their discretion to decline jurisdiction if pre-trial misconduct against the accused exceeds a certain threshold of gravity. Yet again, like most national tribunals, they proceed on the basis that they have jurisdiction over the accused irrespective of the method of compelling his appearance before the tribunal.[34] Consequently, the tribunal would assume jurisdiction where the accused stands charged with grave and universally contemned offences such as war crimes, crimes against humanity, or genocide. This is because, the singular nature and gravity of the crimes charged provides sufficient cause to assume jurisdiction.[35] In conclusion, where the accused is brought before the tribunal through a flawed pre-trial process, the tribunal would proceed on the basis that it possesses jurisdiction to try the accused. It would however, subject its exercise of jurisdiction to the abuse of process doctrine, which permits it to decline jurisdiction where an egregious violation of the rights of the accused are established. For the purpose of reaching a decision whether its processes have been abused, the tribunal adopts an expansive interpretation that evaluates both the conduct of the parties and the manner of bringing the accused before it.[36]

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[32] Ölvir Karlsson, (n. 30), 25

[33] (n 31)

[34] Helen McDermott, (n. 23) 223

[35] *ICTY, Prosecutor v Nikolić*, (n. 31) [The Appeals Chamber acknowledged that accused's human rights had been violated and that *'certain human rights violations are of such a serious nature that they require the exercise of jurisdiction to be declined.*'] Helen McDermott, (n. 23) 220. In ICTY, *Prosecutor v Tadic,* Appeal on the Jurisdiction, Case IT-94-1-AR72, 2 October 1995, para 55, the Appeals Chamber, stated: *'Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty.'*

[36] In *Prosecutor v Nikolić* 'Decision on the Defense Motion Challenging the Exercise of Jurisdiction by the Trial Chamber', Case No. IT-94-2-PT 85, 9 October 2002, the accused filed a motion alleging that he was kidnapped in Serbia before being transferred to custody of SFOR officers stationed in Bosnia and Herzegovina. It was proven that unknown persons with no connection to the Stabilization Forces undertook the kidnapping. The Trial Chamber rejected the argument that by receiving Nikolić the SFOR adopted the illegal conduct of the unknown persons, and held that regardless of the circumstances by which the accused came into the custody of SFOR, rule 59 of ICTY's Statute placed an obligation on SFOR to deliver him to the Tribunal. In considering the alleged human rights violations, it undertook a balancing exercise in order to '*assess all of the factors of relevance in the case at hand and in order to conclude whether, in light of these factors, the Chamber can exercise jurisdiction over the accused'*. It looked at the seriousness of the alleged mistreatment and whether SFOR or the OTP were involved. It found that based on the '*assumed facts, although they do raise some concerns, do not at all show that the treatment of*

4. Duty of Abducting Country to Return Abductee to Host Country

Restitution as a central relief in international law demands that a country responsible for a wrongful act has an obligation to make appropriate reparations to the injured country.[37] Where a state in illegally abducting a fugitive has violated the territory of another state, the abducting state has a primary obligation to reverse its violation of international law. This entails the return of the abductee to his host state.[38] The requirement of returning the abductee to his host country is not envisaged to enable the abductee evade criminal justice of the abductee country. The essence is that since the breach of international law involved in an illegal extraterritorial abduction is of equal or greater gravity than the fugitive's initial breach of the domestic laws of the abducting state, that breach of international law and violation of the sovereignty of another state by the abducting state should not be endorsed as the means of obtaining custody of the fugitive.[39] Consequently, the abducting country, has an obligation, to restore the abductee to his host country. It has been suggested that the abducting country's obligation to restore the abductee to his host country is contingent on a demand by the host country.[40] In this regard, if the sole consideration is justice to the unlawfully abducted individual, relief and remedy should be triggered by the fact and unlawfulness of the abduction alone. Thus, any prescription of a protest as a predicate for the obligation to return the abductee, subordinates the individual and the unlawfulness of his abduction to foreign policy issues.[41] Since an illegal territorial abduction, without more constitutes a violation of the clear international obligation of respect for the territorial sovereignty of the injured state,[42] a suggestion that upon an unlawful territorial abduction, a finding of violation of international law and national sovereignty, is dependent

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the Accused by the unknown individuals [...] was of such an egregious nature.'; *see* Helen McDermott, (n. 23) 218-20

[37] *Chorzow Factory* case (1927) PCIJ Series A, No 9 at 21; *Corfu Channel* case (1949) ICJ Rep 4; Lord Mcnair, *International Law Opinions*, vol. 1 (1956) 78. *['The remedy under international law for the abduction of an accused from a foreign country was the restitutio in integrum of the aggrieved State, whose territory had been violated, by releasing the person abducted'*] See also O'Higgins, P, 'Unlawful Seizures and Irregular Extraditions' (1960) 36 *BYIL* 279. In the *Case Concerning US Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Reports 3, the ICJ ordered Iran to immediately release every detained US national. [Examples of material restitution include the release of detained individuals or the handing over to the State of an individual arrested in its territory] See also *Restatement (Third) of Foreign Relations Law of the* US (1987) at § 432(2) cmt. B [A state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury.]

[38] Jianming Shen, (n. 22) 53-4 [Forcible and fraudulent abduction in violation of international law should not go unpunished. Remedies to the offended State include restoration, public apology, undertaking not to commit acts of the same nature again, extradition of the responsible individuals, and damages to the injured State. The most important remedies, however, are the repatriation of the abducted individual to the host country and punishment or extradition of officials or private citizens responsible for the abduction.]

[39] Jianming Shen, (n. 22) 58

[40] Manuel R. Angulo & James D. Reardon Jr., 'The Apparent Political and Administrative Expediency Exception Established by the US Supreme Court in *US v. Humberto Alvarez-Machain* to the Rule of Law as Reflected by Recognized Principles of International Law, (1993) 16 *Boston College International & Comparative Law Review* [245-284] 258

[41] Jonathan A. Bush, (n. 9); Paul Michell, (n. 15) 419, [The prevailing view is that if the host state objects to the abduction and demands the return of the fugitive, then the abducting state is required to effect restitution.] *Restatement (Third) of Foreign Relations Law of the US* (n. 37) at § 432 cmt. c [The state from which the person was abducted may demand return of the person and international law requires that he be returned. If the state does not demand his return, under the prevailing view the abduction state may proceed to prosecute him under its laws.] *see also* Michael G. McKinnon, '*US v. Alvarez-Machain*: Kidnapping in the 'War on Drugs' - A Matter of Executive Discretion or Lawlessness? (1993) 20 *Pepperdine Law Review*, [1503-1562] 1529

[42] Paul Michell, (n. 15), 410

upon the formal objection of the country from whose territory the fugitive was abducted,[43] is specious. Any proposition, that demanding the return of the abductee is relevant to the issue of violation of sovereignty or the question of the courts of the abducting country assuming jurisdiction over the defendant has no justification whatsoever.[44] Correction of wrongs and termination of additional international violations is the foremost reason for reparations. A suggestion that an offender should be relieved of the responsibility of making reparations due to the failure of the offended party to protest would further encourage international misconduct. It is thus proper that a formal protest or demand by the violated state in not a condition precedent for the violator's duty to make reparations to arise.[45] Respect for the law is supported by the basic moral principle that discourages expediency and ensures that illegality must remain unproductive. In this regard, the protests or demand of the injured state is irrelevant in treating the abduction of the fugitive from its territory as an unlawful act which should not bestow jurisdiction.[46] Thus, the question of the abducting country exercising jurisdiction over the abductee, whether or not a protest or demand is made and the form it takes is insignificant to nullification of the abduction.[47] A difference exists between the conduct of private citizens which does not violate the international law obligations of a state, and conduct expressly authorized by the Executive Branch of the Government, which constitutes a violation of international law.[48] Although abduction and transfer of a fugitive from one state to another by private individuals acting without the knowledge or approval of their home state might constitute violation of the domestic laws of the host state of the fugitive, there is however, no violation of customary international law.[49] Under applicable principles of state responsibility for internationally wrongful acts, while a state is answerable for its own deeds, it is not answerable for the conduct of its citizens. Although a state does not bear international responsibility for illegal abductions conducted by its citizens without state assistance or support, if the state subsequently proceeds to try the abductee, or fails to return or order the return of the abductee to his initial country of refuge, or refuses the extradition of the abductors pursuant to any applicable extradition treaty, the state would be deemed to have adopted or ratified the unlawful abduction. In that instance, it will become responsible for the international consequences of the abduction, and will come under an immediate duty to return the abductee or order his return to his host state.[50]

5. General Duty of Domestic Courts to Exercise Statutory Jurisdiction

Before submitting an individual for trial, a valid basis for jurisdiction must be established. In situations where the offence for which the individual is suspected was directed against the prosecuting state or its nationals, the question of jurisdiction is relatively straightforward. Under international law, the principle of territoriality confers upon states, the authority to prescribe

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[43] Jacqueline A. Weisman, (n. 17) 149
[44] FA Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* [407-422] 407 (Yoram Dinstein & Mala Tabory, eds. 1989) 411
[45] Jianming Shen, (n. 22) 78
[46] FA Mann, (n. 44) 419
[47] Jianming Shen, (n. 22) 79 [Since a state-sponsored or sanctioned abduction is a breach of international law, from the moment of the abduction, the international responsibility of the abducting state to return the abductee to his host state and make amends to the violated state arises.]
[48] *US v. Alvarez-Machain*, 112 S Ct 2188 (1992) 2203
[49] Paul Michell, (n, 15) 485
[50] Jianming Shen, (n. 22) 62-3; Abdul Ghafur Hamid*,* 'Jurisdiction over a Person Abducted from a Foreign Country: *Alvarez Machain* case Revisited', (2004) 4 *Journal of Malaysian and Comparative Law*

and enforce laws within its own borders.[51] It is the duty of a court to accept jurisdiction of those cases where jurisdiction is present and it is equally the duty of the court to decline those cases where jurisdiction is not present.[52] A court having jurisdiction of a case has not only the right and the authority, but also the duty to exercise that jurisdiction.[53] The court must not only assume and exercise jurisdiction, but must render a decision on the case properly submitted to it.[54] Thus, no court having proper jurisdiction and process to compel the satisfaction of its own judgments can be justified in turning its suitors over to another tribunal to obtain justice.[55] In this regard, jurisdiction, as power to consider and decide one way or the other, as the law may require is not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff.[56] However, the general principle that a court which has jurisdiction over a case is bound to exercise that jurisdiction is not without qualification,[57] and the existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the court.[58] Accordingly, the court may quite competently in certain types of cases, decline to assume or exercise jurisdiction,[59] and the court, though seized of jurisdiction, may from considerations of public policy, decline to exercise jurisdiction.[60]

6. Duty of Domestic Courts to Decline Jurisdiction over Unlawfully Abducted Persons

An important and fundamental issue to the justice delivery system is the way and means of bringing criminal defendants before the courts.[61] Abuse of process is a term generally applied to a proceeding which is wanting in *bona fides* and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of legal process.[62] In determining whether an abuse

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[51] *Case of the SS 'Lotus' (France v Turkey)* [1927] PCIJ Rep Series A No 10, para 46-47; Helen McDermott, (n. 23) 43

[52] *Bryson v. Northlake Hilton* 17 FPD 2d 180

[53] *England v. Louisiana Board of Medical Examiners*, 375 US 411, 84 S Ct 461

[54] *American Auto Insurance Co. v. Freundt*, 20 Am Jur 2d, 453; *Nixon v. Sirica* 17 FPD 2d 102 [Want of physical power to enforce its judgment does not prevent a court from deciding an otherwise justiciable case]

[55] *Knox County v. Aspinwall*, 20 Am Jur 2d, 453; *Igbokwe v. Udobi*, [1992] 3 NWLR Part 228, 214, [The mere fact that a suit may fail for the failure of the plaintiff to prove satisfactorily the intermediate facts necessary for the success of the suit is not a valid reason for denying the court the requisite jurisdiction derived from the provisions of the Constitution]

[56] *WMCA Inc. v. Simon*, 82 S Ct 1234, 370 US 190; *Adams v. Union Railway Co*., 20 Am Jur 2d, 454, [The motive or ulterior purpose of the plaintiff in invoking the jurisdiction of the court is not sufficient justification for the court to decline to exercise its jurisdiction]

[57] *Canada Malting Co. v. Paterson SS Ltd.*, 285 US 413, 52 S Ct 413

[58] *Sparrow v. Nerzig*, 228 S Ct 227

[59] *Ogunsola v. APP*, [2003] 9 NWLR Part 826, 462, examples are,:- (i) Where leave of the court is required for service of process outside jurisdiction; (ii) Where proceedings in respect of the same subject-matter are pending outside the court's jurisdiction; (iii) Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign court; (iv) Where the court is being asked to exercise its equitable jurisdiction *in personam* in cases involving foreign land. *Magit v. University of Agriculture, Makurdi,* [2005] 19 NWLR Part 959, 211, [The courts have consistently refused to usurp the function of the senate, the council and the visitor of the university in the selection of their fit and proper candidates for award of certificates, degrees and diplomas. If, however, in the process of performing their functions, civil rights of any of the students or candidates is breached, denied or abridged, it will grant remedies and reliefs for protection of those rights.]

[60] *Akintemi v. Onwumechili* [1985] 1 NWLR Part 1, 68; *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 350 US 903, 76 S Ct 182, [In certain cases, a court seized of jurisdiction over a case, may, in its discretion, decline to exercise the jurisdiction]

[61] Jonathan A. Bush, (n. 9)

[62] *7Up Bottling Co. Ltd. v. Abiola & Sons Bottling Co. Ltd*. [1996] 7 NWLR Part 463, 714; *see also CBN v. Ahmed, [2001] 11 NWLR Part 274, 369* [The concept of abuse of judicial process though imprecise, involves

of the process of court has occurred, it is not the exercise of the right *per se*, but its improper and irregular exercise which constitutes an abuse.[63] Inherent jurisdiction or power is a necessary adjunct of powers conferred by the rules and is invoked by a court to ensure that the machinery of justice is not abused. A court of law, being a court of justice, will always prevent the improper use of its machinery and will not allow it to be used as a means of vexatious and oppressive litigation.[64] The Nigerian Constitution grants all superior court of record, the inherent powers and sanctions of a court of law.[65] Embedded in the power is the right of the court to ensure that its process is not abused. Once a court is satisfied that a proceeding before it is an abuse of process, it has the power and duty to terminate it.[66] In this regard. the ordinary remedy in a case where there is abuse of process of court is to stay the proceedings, or to prevent further proceedings being taken without the leave of the court.[67] Generally, domestic courts consider it proper to decline assumption of jurisdiction over causes and matters brought before them by ways and means they consider abusive of their process. This position is not predicated on an absence of jurisdiction over the cause brought before them. Rather, while conceding that they possess jurisdiction over the cause, the courts consider certain aspects of the matter as an abuse of its process and based on that consideration, decline the exercise of jurisdiction to hear and consider the matter on its merits.[68] In exercise of its judicial powers, a court should adhere to constitutionality, and not condone the commission, even by the state, of constitutional wrong

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circumstances and situations of infinite variety and conditions, with a common feature of improper use of the judicial process by a party to interfere with the due administration of justice] *Saraki v. Kotoye* [1992] 9 NWLR Part 264, 156 [Abuse of process may lie in both a proper or improper use of the judicial process. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice]

[63] *CBN v. Ahmed*, (n. 62), *Attahiru v. Bagudu*, [1998] 3 NWLR Part 543, 656 [Abuse of process is a malicious perversion of a regularly issued process civil or criminal, for a purpose and to obtain a result not lawfully warranted or properly attainable thereby.] *Governor of Anambra State v. Anah*, [1995] 8 NWLR Part 412, 213, [Abuse of court or judicial process occurs when the judicial process or procedure is invoked in bad faith for the purpose of gaining an advantage or interest by a party against or to the detriment of his adversary] *FRN v. Abiola* [1997] 2 NWLR Part 488, 444, [It may involve some bias, malice or desire to misuse or pervert the course of justice or judicial process.]

[64] *Christain Outreach Ministries Inc. v. Cobham*, [2006] 15 NWLR Part 1002, 283

[65] s. 6(6)(a) of 1999 Constitution of Federal Republic of Nigeria

[66] *COP v. Fasehun*, [1997] 6 NWLR Part 507, 170; *Kotoye v. Saraki* [1991] 8 NWLR Part 211, 638, [A court of law has the jurisdiction to terminate *in limine* the proceedings when it is satisfied that they constitute an abuse of itself] *Eze v. Okolonji*, [1997] 7 NWLR Part 513, 515 [All courts of record have inherent power to stay their proceedings. A trial court has inherent power to stay its own proceedings; so too an appellate court.]

[67] *7Up Bottling Co. Ltd. v. Abiola & Sons Bottling Co. Ltd*. (n. 62), there is however another view that abuse of the process of court merits an order of dismissal and not merely an order of striking out. In *Christian Outreach Ministries Inc. v. Cobham*, (n. 64), the court held that once a court is satisfied that any proceedings before it is an abuse of process, the proper order is that of dismissal of the process.

[68] *Attahiru v. Bagudu* (n. 63); *see Ntuks v. NPA*, [2007] All FWLR Part 387, 809, [Abuse of Court process generally means that a party in litigation takes a most irregular, unusual and precipitous action in the judicial process. The process of the court is used *mala fide* to overreach the adversary. The court process is initiated with malice or in some premeditated or organized vendetta. The court process could also be said to be abused where the court process is premised or founded on recklessness.] *Nnonye v. Anyichie*, [1989] 2 NWLR Part 101, 110 [The court may exercise its inherent jurisdiction to stay proceedings in a pending action where it is demonstrated that such action is either oppressive or vexatious and ought not to go on, being an abuse of the process of the court] *Jadesimi v. Okotie-Eboh (No.2)* [1986] 1 NWLR Part 16, 264 [The judicial process is abused if a party employs improper and perverse procedure or means with an unlawful objective to obtain a relief or advantage undeservedly. Where an action is an abuse of the judicial process, the court has power to protect itself from abuse, and it can do so by ordering a stay of proceedings]

nor should it be accessory after the fact to the commission of unconstitutionality.[69] It is clear that illegal extraterritorial abduction of a fugitive from the territory of his host country is a violation of the territorial integrity of his host country and creates an international incident. Ordinarily, the domestic jurisdiction of courts of a forum state is coterminous with the jurisdiction of the forum state. Thus, though, a state is competent to assume jurisdiction over an offender, the means of procuring jurisdiction over the offender must not violate international law. Unlawful abduction of a fugitive from another state is a violation of international law, which the abducting state is required to recompense by returning the abductee to the place of abduction. It would amount to a further violation of international law for courts of the abducting country to assume jurisdiction to try the abductee, in the face of the abductor's refusal to make the necessary restitution.[70] The obligation of a court not to continue with proceedings against an illegally abducted fugitive is part of the responsibility of domestic courts under international law to ensure that the international obligations of their state are fulfilled.[71] Consequently, notwithstanding the necessity of arresting, trying and punishing a fugitive malefactor, domestic law must not violate international law. Accordingly, domestic jurisdiction when acquired or exercised in violation of international law is a nullity.[72]

Abductions by private individuals and those by state officials differ in the legal implications attaching to each.[73] In determining the international consequences of an abduction, whether the abduction was carried out by agents or officials of the prosecuting state, or by private persons is a threshold issue.[74] Due to the fact that international wrongfulness and state responsibility depend upon agency relationship, in order for a state to incur international responsibility for an abduction, it must have been carried out by state agents or private persons working under instruction of the state.[75] Any individual vested with the authority of his government is a state agent, and his acts are assimilated to his state. Abduction by agents of the prosecuting state incurs responsibility for the government of the prosecuting state.[76]

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[69] *Engineering Enterprise of Niger Contractor Co. of Nigeria v. the A-G, Kaduna State* [1987] 2 NWLR Part 57, 381; in *Onagoruwa v IGP* [1991] 5 NWLR Part 193, 593 Justice Tobi, JCA stated *'Under the Common Law, we, as judicial officers, are under a legal duty to do justice to all manner of people coming before us without let or hindrance, without fear or favour. By the nature of our duty we are bound only to look at the facts of the case before us, and apply the law in the way we understand it. Let us err on the side of the law alone"*

[70] Jianming Shen, (n. 22) 45

[71] Paul Michell, (n. 15), 392; in *re Bennett II*, [1994] 1 App. Cas. at 77 Lord Lowry stated that '*[t]he abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context*.'

[72] Jianming Shen, (n. 22) 58-9 [This is particularly so if the offended state formally protests and demands the return of the abducted individual, although the duty to return is not necessarily contingent upon such demands.]

[73] In *State v. Ebrahim*, 1991 (2) S. Afr. L. Rep. 553 (Apr.-June 1991); (1992) 31 ILM 888-899, a case involving the abduction of a South African citizen from Swaziland, the Supreme Court of South Africa stated: *'It is clear from the authorities in English and in American law that the distinction made [...] between an unlawful abduction made by a private citizen of a person abroad and an abduction made with the connivance of the South African State or its officials is sound and logical. The latter is objectionable because it affects the comity of nations and the international obligations of sovereign States, the former does not.'*

[74] Jacqueline A. Weisman, (n. 17) 163; Felice Morgenstern, 'Jurisdiction in Seizures Effected in Violation of International Law', (1952) 29 *BYBIL* 269; Michael H. Cardozo, 'When Extradition Fails, is Abduction the Solution? (1961) 55 *AJIL*, 127, 132; Candace R. Somers, 'US v. Alvarez-Machain: Extradition and the Right to Abduct', (1992) 18 *North Carolina Journal of International Law*, 233 [This does not however diminish the fact that kidnapping, whether for a ransom or for a vigilante sense of justice is illegal.]

[75] Paul Michell, (n. 15), 483

[76] Jacqueline A. Weisman, (n. 17) 163; Clyde Eagleton, *'The Responsibility of States in International Law'* (NY: NYUP, 1928) 44-45

Nevertheless, conduct that was not or may not have been attributable to a state at the time of commission, would nevertheless be considered an act of that State under international law if and to the extent that the State subsequently acknowledges and adopts the conduct in question as its own.[77] In this regard, where the prosecuting state receives, detains and subsequently prosecutes an illegally abducted person, this conduct is tantamount to ratification of the illegal abduction, even if the abduction was initially carried out by non-state agents and vigilantes.[78]

A general principle of law with application in both domestic and international law is that in order not to portray the law as an instrument of injustice, the law will not allow a person (person includes the state) to reap any benefit from his own wrongful act.[79] Articulated as - *ex injuria jus non oritur* - that an illegal act does not give rise to any right, this principle requires that general rules of international law prohibiting illegal seizure should be given effect to by municipal courts, and this they can do by refusing exercise of jurisdiction over property and persons apprehended and detained in contravention of international law.[80] This point of view finds support in the opinions of publicists and state practice. O'Connell posits that application of the maxim *ex injuria jus non oritur* provides solution to the problem created by obtaining territorial jurisdiction of a person by a violation of international law, or in violation of either an extradition treaty or the municipal law of another state.[81] When a state violates international law by forcibly abducting a fugitive, it is incumbent upon its courts as a matter of international law to ensure that the violation ceases. In this regard, the duty of a court to divest itself of jurisdiction and order the return of an abductee is the inevitable conclusion of the maxim *ex injuria jus non oritur* i.e., illegal abduction does not give rise to the right to exercise jurisdiction.[82] Absence of enforcement power translates to absence of adjudicative power, so that the courts of a delinquent state have a duty, by declining exercise of jurisdiction over the abductee, to bring the preceding violation of international law to an end.[83] The basis for this position is that irrespective of whether an individual or asset is the subject-matter of the unlawful seizure, the offending state, by reason of its breach of international law is disallowed from assertion and exercise of jurisdiction over the illegally seized person or property.[84] In the

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[77] Article 11 of ILC Articles on State Responsibility

[78] Helen McDermott, (n. 23) 233-4

[79] *AP Ltd. v. Owodunni*, [1991] 8 NWLR Part 210, 391; Jianming Shen, (n. 22) 64 [Even where under proper procedure, the rights of the forum country to try the fugitive might have been unassailable, the illegal abduction of the fugitive, as a violation of the territorial integrity of the host country, extinguishes that right, and renders legally impossible, the ensuing exercise of jurisdiction over the abductee]

[80] Felice Morgenstern, (n. 74) 279 [Municipal courts should decline to exercise jurisdiction over persons and things brought before them in violation of international law because in exercising jurisdiction in such circumstances the court fails to give effect to the rule of international law prohibiting the seizure; it not only condones but gives effect to the violation of international law.] Jianming Shen, (n. 22) 65-6 [State practice supports the view that jurisdiction does not follow illegal abductions. There are numerous cases in which courts declined jurisdiction following the abduction of persons or the seizure of things in violation of international law.]

[81] O' Connell, DP, *International Law* (London: Stevens, 2nd ed, 1970) 831-832; Fletcher N. Baldwin, 'Some Observations concerning External Power of Decentralized Units within the Context of the Treaty Making Powers of Article II and Corresponding Transnational Implications', (1986-1986) 2 *Florida International Law Journal*, 198-199, [In cases of illegal extraterritorial abductions, the general state practice is either to release the individual, or refuse to exercise jurisdiction where individuals were brought before the courts.]

[82] Jianming Shen, (n. 22) 85

[83] Edwin D. Dickinson, 'Jurisdiction Following Seizure or Arrest in Violation of International Law', (1934) 28 *AJIL*, 244; *see* Paul Michell, (n. 15), 435

[84] Jianming Shen, (n. 22) 72 [Releasing the subject of the illegal seizure or divesting its courts of jurisdiction over the subject matter are the only options before the state.] Felice Morgenstern, (n. 74) 274 [Rules and principles arising from seizure of vessels in foreign territorial waters are *'[e]ssentially the same as those arising from the*

light of the fact that customary international law as part of domestic common law, prohibits the non-consensual exercise of sovereign or police powers by one state within the territory of another state,[85] an illegal seizure as a violation of international law, is beyond the national powers of the abducting state. The corollary is that the abducting state lacks competence to assert its domestic jurisdiction over the seized person or thing.[86] This is because, since a state does not possess the competence or powers to acquire jurisdiction over a fugitive by means of an illegal extraterritorial abduction, its courts do not possess the competence or powers to assert and exercise personal jurisdiction over the illegally abducted person or thing.[87] The acceptance and exercise of *in personam* jurisdiction by the courts of the abducting country over an abductee is tantamount to denial of justice, and thus, commission of a further internationally wrongful act.[88] Thus, domestic courts of the abducting country should lessen the consequence of the breach of international law involved in the illegal abduction, and this they can do only by ordering a return of the fugitive to the country from where he was abducted.[89] In this regard, the obligation of the abducting state to return the fugitive to his host state corresponds to the duty of the domestic courts of the abducting state to decline jurisdiction over the abductee.[90]

The concept of *ex injuria jus non oritur*, taken to its logical conclusion asserts that the courts of the abducting state do not possess any jurisdiction at all to try the abductee. This position is however, not conclusive of opinion on the matter. An alternate position affirms the existence of domestic jurisdiction to try the abductee but suggests that municipal courts should decline to exercise it. Conforti is of the opinion that enforcement of international law depends more on the determination of municipal operators such as public and judicial officers to utilise the processes afforded by municipal law to guarantee compliance with international norms, rather than on available enforcement procedures at the international level.[91] This raises the issue

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seizure of individuals in foreign territory' - both kinds of seizure constitute a *'[v]iolation both of the sovereignty of the foreign state and of the rule of international law which prohibits the exercise of acts of authority within the territorial jurisdiction of other states.'* The courts of the seizing State should '[*d]ecline to give effect to such a seizure and thereby enforce the rule of international law prohibiting it.*']

[85] *JH Rayner Ltd. (Mincing Lane) v. Dep't of Trade and Industry*, [1990] 2 App. Cas. 418, 499; *Trendtex Trading Corp. Ltd. v. CBN*, [1977] QB 529; *In re Newfoundland Continental Shelf*, [1984] 1 SCR 86 (Can.) Paul Michell, (n 15) 435-6

[86] Edwin D. Dickinson, (n. 83); Jianming Shen, (n. 22) 72 [The jurisdiction of a State limits the jurisdiction of its municipal courts. If a state does not have authority under international law to exercise its national jurisdiction over a certain individual or thing, its courts do not have such jurisdiction either. The jurisdiction of municipal courts can never be broader than that of their State as a whole. If the State does not have authority to abduct individuals, then its municipal courts may not assume and exercise jurisdiction, because the courts' jurisdiction can never be more extensive than that of the State itself.]

[87] Jianming Shen, (n. 22) 79

[88] Fletcher N. Baldwin, (n. 81) 198-199

[89] Jianming Shen, (n. 22) 53-4

[90] Paul Michell, (n. 15), 426-7 [In *re Jolis*, [1933-1934] 7 Ann. Dig. 191 (1933) Jolis, a Belgian citizen, followed into his home country from France, was arrested by French police officers, returned to France, imprisoned, and charged with theft. When Belgium protested and demanded his return, the French court ordered his release, declaring that his arrest by the French police was '*of no legal effect*.' In *Nollet Case*, 18J. Du DR. ITr'L 1188 (1891) Nollet, a Belgian citizen was arrested in Belgium by French police and handed over to Belgian authorities, who mistakenly transferred him to French police at the border. The French court ordered his release because his presence in France resulted from illegal acts of the French police. In *Jabouille Case* (1905) R.D.I.P. 704, Jabouille, the victim of a disguised extradition from Spain to France demanded that his arrest in France be quashed. The court found the arrest to be illegal, ordered the defendant's release, and gave him a grace period to reach the frontier.]

[91] Benedetto Conforti, *'International Law and the Role of Domestic Legal Systems'* (Springer, 1993), 8-9; Paul Michell, (n. 15), 428

whether courts possess a duty to decline exercise of jurisdiction over a person unlawfully brought before a court, or whether they possess merely a discretion to do so. It is not denied that even in cases of illegal extraterritorial abductions, courts of the abducting state possess formal jurisdiction to try the abductee. However, recent Commonwealth decisions define the issue as not whether the court has jurisdiction over the defendant, but rather, taking the existence of this jurisdiction as given, whether the court should permit the trial to proceed.[92] The House of Lords in *R. v Horseferry Road Magistrates Court (Ex parte Bennett)*,[93] by a majority held that it would constitute an abuse of process to allow the criminal charges against the fugitive to proceed, given the manner in which he had been brought to trial. The Court did not dispute that English courts had jurisdiction over the fugitive, but held that the court could invoke its supervisory jurisdiction to inquire into how the fugitive had been brought before it. If the fugitive was brought into the jurisdiction through circumvention of relevant (extradition) procedures, the court could stay the proceedings and order his release. This reasoning was based partly on the though that a court should not allow an executive's abuse of process.[94] *R v*

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[92] Paul Michell, (n 15) 393

[93] (1993) All ER 138, a New Zealander was charged in England with criminal offenses arising from his purchase of a helicopter, having allegedly raised financing under false pretences and defaulting on repayment. The English police discovered that the fugitive had moved to South Africa. There was no extradition treaty between the UK and South Africa, and the police did not seek his extradition through the normal channels. The fugitive alleged that the English police colluded with the South African authorities to have him arrested and forcibly returned to UK to stand trial. South African detectives arrested the fugitive and placed him in police custody. After being told that he was to be deported to New Zealand, and flown as far east as Taiwan, he was returned to South Africa and put on an airplane to Heathrow airport, handcuffed to his seat. English police arrested him upon his arrival at Heathrow. He alleged that his rendition was in violation of an order of the Supreme Court of South Africa. The English police denied any collusion with South African police, although they acknowledged that the South Africans informed them that the fugitive was being sent through Heathrow *en route* to New Zealand. The trial court refused the fugitive an adjournment to prepare a challenge to the court's jurisdiction. On an application for judicial review, the divisional court held that fugitive's allegations of police misconduct did not provide adequate basis to challenge the court's criminal jurisdiction. The divisional court followed the traditional *male captus bene detentus* rule, holding that the manner in which a fugitive is brought before a court of competent jurisdiction does not affect its exercise of criminal jurisdiction. The majority in the House of Lords held that it would constitute an abuse of process to allow the criminal charges against the fugitive to proceed, given the manner in which he had been brought to trial. The case was remitted to the divisional court for resolution. The discretion to stay proceedings in a criminal trial was found to be latent in the inherent jurisdiction of the court to prevent an abuse of process. Lord Griffiths argued that proceedings should be stayed not only where the trial itself would be unfair, but also where it would be unfair to even put the accused on trial. He held that the Law Lords had a duty '*to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*' In the face of executive misconduct, it was '*unthinkable*' that a court '*should declare itself to be powerless and stand idly by.*' In *re Schmidt*, [1995] 1 App. Cas. 339, 362, the House of Lords clarified the position it had taken in the Bennett case by considering the neglected but important question of whether an individual can challenge extradition proceedings against him on the basis that he was brought illegally into the jurisdiction seeking to extradite him. *See generally*, Paul Michell, (n. 15), 383, 464-66,

[94] Per Lord Griffiths *'In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party. If extradition is not available very different considerations will arise on which I express no opinion'*] Helen McDermott, (n. 23) 204 [By extending the abuse of process doctrine to encompass pre-trial treatment and acknowledging the authority of the judiciary to examine the conduct of the executive, the decision stands as a welcome repudiation of the *male captus bene detentus* principle.]

Hartley[95] pertained to an extraterritorial abduction where the accused was arrested in Australia by Australian state officials and returned to New Zealand. The New Zealand Court of Appeal, holding that it had power '*to prevent anything which savours of abuse of process*' set aside the proceeding because of misuse of power by the authorities. In *Levinge v Director of Custodial Services*[96], the Australian court made it clear that it had authority to stay the proceeding in the case of state sponsored abductions, and stated that: *'Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has discretion not to do so, where to exercise its discretion would involve an abuse of the court's process .... [S]uch conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participation in unauthorized and unlawful removal of criminal suspects from one jurisdiction to another'.* In *State v Ebrahim,*[97] a member of the African National Congress

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[95] *R v Hartley* [1978] 2 NZLR 199 at 216-7 [The court stated that: '*Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society.*']

[96] *Levinge v. Director of Custodial Services* (1987) 9 NSWLR 546, here, the fugitive faced trial for numerous dishonesty offences in New South Wales. He claimed that he had been arrested by Mexican police at his home in Mexico, brought to the American border, and delivered into the custody of US FBI agents who then brought him into US and held him until he was extradited to Australia. He argued that this forcible abduction rendered his subsequent extradition to Australia unlawful and an abuse of process, such that proceedings against him in Australia should be stayed. Moreover, he alleged that the Australian authorities had been aware of and participated in his abduction from Mexico. The court held that there was no evidence to connect Australian authorities with the fugitive's transfer from Mexico to US. Kirby, P., conceded (and McHugh, JA, assumed *arguendo*) that the fugitive may have been illegally renditioned from Mexico to the US. However, the court held this to be a matter for the American and not Australian courts. McHugh, JA, rejected the argument that the fugitive's extradition from US to Australia was made unlawful by his alleged abduction from Mexico. In his view, Australia followed all proper procedures. Australia was the unwitting beneficiary of the FBI's conduct, itself lawful under US law. The FBI's conduct could not be imputed to Australian officials. Kirby, P., and McHugh, JA, approved of Hartley and Mackeson, and held that the court could stay proceedings in order to prevent an abuse of process in those cases where an individual was brought before it illegally. Kirby, P., suggested two conceptual bases for this power to stay proceedings. First, the executive should be estopped or deterred from relying upon its own misconduct in bringing a case to trial. Second, the court must exercise its power to protect the integrity of its own processes. While precedent tended to favour the first argument, Kirby, P., preferred that the court's power be grounded upon the second rationale. However, the court would only order a stay where it could be demonstrated that the executive had been '*either a party to the unlawful conduct or connived at it'*. McHugh, JA, noted that there is no unfairness in the trial of a forcible abduction case: so it is necessary to balance the public interest in having the charge or complaint determined. This is not to say that the end can justify the means and that the more serious the charge the greater is the scope for the prosecution to engage in unlawful conduct. But conduct which might be regarded as constituting an abuse of process in respect of a comparatively minor charge may not have the same character in respect of a serious matter. McHugh, JA, and Kirby, P., held that the court possessed an inherent jurisdiction to stay proceedings to prevent an abuse of process, but would not exercise this power on these facts. McLelland, A.-JA, applied the *male captus* rule to reject the fugitive's claim that the court did not have jurisdiction over him, although he did not doubt that the court possessed the power to prevent an abuse of process. In this case, however, Australian authorities were not involved in the abduction of the fugitive from Mexico to the US. *See* Paul Michell, (n. 15), 452-4

[97] (n. 73) here, two men identifying themselves as South African police officers seized a South African member of the military wing of the ANC from Swaziland; Swaziland did not protest this abduction. Ebrahim was bound, gagged, blindfolded, and brought to Pretoria and charged with treason. He applied for release, alleging that his abduction had been orchestrated by the South African police. South African authorities denied these allegations. Ebrahim argued that his abduction and rendition violated international law, and that the trial court was thus incompetent to try him because international law was a part of South African law. The court strongly approved of

(ANC) was abducted from Swaziland by agents of the South African government to face treason charges in South Africa. The court held, *inter alia*, that kidnapping by the government was a violation of international law. In such circumstances, the Court ruled, courts may conclude that they have no jurisdiction or simply decline to exercise their jurisdiction because of an inherent discretion to prevent abuse. According to the Court, to do otherwise '*would be to sanctify international delinquency by judicial condonation. There is an inherent objection to such a cause, both on grounds of public policy pertaining to international ethical norms and on the ground that it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations*'.[98] In *State v Beahan*[99] the Supreme Court of Zimbabwe found abduction to be a violation of state sovereignty and hence international law. Chief Justice Gubbay considered Anglo-American precedents including the US decision of Alvarez Machain and the South African decision of Ebrahim, and concluded that: '*In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. …… A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual*.'[100] Ebrahim's case establishes the fact that municipal courts are agents of the international legal system, and have an obligation to vindicate both domestic and international law principles.[101] Within the context of current jurisprudence from the Commonwealth countries, it may be surmised that the judicial branch of Government, is beholden to discharge the State's international law obligations, so that refusal of municipal courts to effectuate principles of international law locally would be equivalent to a further violation, cumulative to the executive branch's initial breach of international law.[102] Though the courts have no power of discipline over the police or

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Toscanino. It allowed the appeal, ordering that the conviction and sentence be set aside on the basis that the trial court did not have jurisdiction over the fugitive. *See* Paul Michell, (n. 15), 454-5. *See also* Phillip J. Cooper, '*US v. Alvarez-Machain*: Douglas was Right-The Bill of Rights is not Enough', (1994) 15 *Chicano-Latino Law Review*, [38-73] 66

[98] *State v. Ebrahim* (ibid.) 442 [Per Steyn, JA: *'The individual must be protected from unlawful arrest and abduction, jurisdictional boundaries must not be exceeded, international legal sovereignty must be respected, the legal process must be fair towards those affected by it and the misuse thereof must be avoided in order to protect and promote the dignity and integrity of the judicial system. This applies equally to the State. When the State is itself party to a dispute, as for example in criminal cases, it must come to court "with clean hands" as it were. When the State is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean.']*

[99] 1992 (1) SACR 307

[100] Ibid. 317; *see* Stephan Wilske & Teresa Schiller (1998) 'Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of *US v. Alvarez-Machain*,' (1998) 5 *University of Chicago Law School Roundtable,* [205-241] 221-222

[101] Paul Michell, (n. 15) 455

[102] Jianming Shen, (n. 22) 82 [Abductions are inherently objectionable both on grounds of public policy pertaining to international ethical norms and because it imperils peaceful co-existence and mutual respect of sovereign nations. The court recognized that abduction is an improper basis for exercising jurisdiction under international law. A contrary view would amount to the end justifying the means, thus encouraging states to break laws in order to secure conviction of private individuals. Even with the consent of the abductee's host state, in Behan, the Supreme Court permitted the trial court to decide whether to exercise jurisdiction. Behan represents vigorous condemnation of exercise of jurisdiction over a victim of illegal extraterritorial abduction.]

the prosecuting authorities, they can utilise the abuse of process theory to truncate a prosecution and prevent the police or prosecuting authorities from taking advantage of their abuse of power.[103] Consequently, municipal courts must perceive themselves as representatives of the international legal order and ensure congruence of domestic law procedures with norms of international law. Where therefore, a defendant is brought before the court in violation of international law, the court has a duty to decline jurisdiction.[104]

Disparate from the emerging jurisprudence of Commonwealth countries, willingness to divest themselves of jurisdiction is not readily indicated by US courts.[105] One of the reasons given for this reticence is that since every legal system contains wrongs without judicial remedy; though illegal abductions violate international and by incorporation, municipal law, nonetheless, there is no legal remedy for the individual, and the claims of an abductee - however meritorious, should be resolved through diplomatic avenues.[106] The unfortunate thing with this '*see no evil, do no evil'* stance is that by the domestic court turning a blind eye to violations of international law, it actually encourages such conduct.[107] In this regard, a system that utilises lack of remedies as a response to violations of law provokes scepticism.[108] Despite the clear resistance of the US courts to divestment of jurisdiction, writers and publicists have avidly sought a theoretical framework for such relinquishment of jurisdiction. It is thus suggested that beyond their unlawfulness and violation of the rights of other nations, assumption of trial jurisdiction over a victim of illegal extraterritorial abductions is equivalent to an endorsement lawlessness.[109] From the moral perspective, it is recognised that decency, security and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. If the Government becomes a lawbreaker, it invites anarchy. To declare that in the administration of criminal law, the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution.[110]

One of the concepts applied in overturning the doctrine that requires courts to exercise jurisdiction irrespective of the illegality of the defendant's abduction is the doctrine of the supervisory power. In issues involving political questions, the courts generally defer to the executive branch, while retaining supervisory powers to restrain executive conduct. This entails that the court may sanction improper government conduct. Thus, supervisory power as a judicially created rule permits the court in the name of judicial integrity, to exclude evidence or dismiss a case.[111] The doctrine of supervisory power allows the judiciary to monitor and restrain

[103] Bennett II, (n. 71) 62
[104] Paul Michell, (n. 15), 386-7 [Courts adjudicating extraterritorial abduction cases should consider customary international law and international human rights law when structuring and interpreting domestic constitutional, statutory and common law doctrines, so as to render decisions which vindicate both international and domestic norms. In particular, international legal norms provide useful guidelines by which the domestic abuse of process doctrine may be structured and exercised in forcible abduction cases. In this way, domestic courts act as agents of the international legal system by ensuring that international legal norms are, so far as possible, used to inform domestic common law doctrine.]
[105] Halle Fine Terrion, (n. 16) 639-40
[106] Jonathan A. Bush, (n. 9)
[107] Paul Michell, (n. 15), 429
[108] Jonathan A. Bush, (n. 9)
[109] Candace R. Somers, (n. 74) 232
[110] *Olmstead v. US,* 277 US 438 (1928), Justice Brandeis' dissenting
[111] Michael G. McKinnon, (n. 41) 1531; the Court first exercised the power in *McNabb v. US*, 318 US 332, 341 (1913), by holding that incriminating statements obtained during a prolonged detention were inadmissible, due to '*considerations of justice not limited to strict canons of evidentiary relevance.*' [Courts should not become

unconstitutional conduct of other branches of government. '*The purposes underlying use of supervisory powers are threefold: to implement a remedy for the violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct.*'[112] Judicial supervisory power is implicated where governmental conduct is unlawful, because the '*law must not make itself an accomplice in wilful disobedience of the law*.'[113] It is thus expected that in order to prevent the court becoming complicit with the government in violation of international law, the court's supervisory power should be invoked and exercised in cases of illegal extraterritorial abductions.[114] There is hope and expectation that in the process of time, in pursuit of the goal of creating and sustaining enlightened standards of procedure and evidence, jurisdiction would be prohibited over illegal abduction cases. Until that point is reached, exercise of supervisory power remains the means to preserve respect for the law.[115]

In contemporary society reverence for law, whether municipal or international, by both individuals and government, is imperative. Disrespect for the law is created by the abuse of power inherent in deployment of illegal means in enforcing the law.[116] Flowing from this, the rule prohibiting states from prosecuting or punishing a person brought into their territory by means violative of international law has been accepted as custom by states.[117] Contemplation of the requirements of rule of law is the first duty of a court confronted with the burden of trying a fugitive illegally abducted from another state.[118] Rules and principles of international law are given effect to where a municipal court declines to assume jurisdiction on the merits over a defendant brought before the court in breach of due process. Thus, the court as an arm of government, in discharge of its duty to acknowledge and effectuate the rules and principles of international law, would be properly reversing its nation's wrong by ordering a return of a defendant brought before it pursuant to an illegal abduction.[119] In any event, society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect

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'*accomplices in wilful disobedience of law.*'] *US v. Hastings*, 461 US 499, 505 (1983) [Generally, courts invoke their supervisory powers to dismiss indictments reached as a result of prosecutorial misconduct. The purposes underlying supervisory powers are . . . *'to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct.'*]

[112] *US v Hastings*, ibid.) The doctrine is sometimes referred to as the McNabb Rule, as it was formulated in *McNabb v. US* (ibid.). See also, *Elkins v US*, 364 US 206, 80 (1960), and *US v. Payner*, 447 US 727 (1980)

[113] *US v. Caro-Quintero*, 745 F. Supp. 599, 615 (C.D. Cal. 1990); *see also* H. Moss Crystle, 'When Rights Fall in a Forest... The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture,' (1991) 9 *Penn State International Law Review,* [387-409] 405

[114] Jonathan Gentin, 'Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on *US v. Caro-Quintero* and the Inadequacy of the Ker-Frisbie Doctrine', (1991) 40 *Emory Law Journal*, 1231; Stephanie A. Ré, 'The Treaty Doesn't Say We Can't Kidnap Anyone' - Government Sponsored Kidnapping as a Means of Circumventing Extradition Treaties', (1993) 44 *Washington University Journal of Urban & Contemporary Law* [265-280] 278-9

[115] *US v. Caro-Quintero*, (n. 113) (quoting *US v. Lira*, (n. 19); Michael G. McKinnon, (n. 41) 1532

[116] Jianming Shen, (n. 22) 82

[117] *See* Michael R. Pontoni, 'Authority of the US to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and other Fugitives,' (1990) 21 *California Western International Law Journal*, 234; Stephanie A. Ré, (n. 114) 271

[118] Paul Michell, (n. 15), 387 [A strand of the rule of law embodies a concern that the domestic authorities comply with international legal norms, and requires that domestic courts must take more seriously their role as agents of the international legal system.]

[119] Jianming Shen, (n. 22) 83

for the law.[120] As the Mr Kanu's matter progresses through the Nigerian court system, it is not clear that the court would accede to the defendant's request for it to divest itself of jurisdiction. Certainty, the need to avoid sustaining an impression that the end justifies the means with regards to law enforcement and administration of justice, taken on its own, is sufficient reason to stay the proceedings. Nigerian courts have consistently applied the clean hands principle in equity to deny compassionate consideration to litigants who approach the court with unclean hands. It is doubtful whether a more trenchant instance of unclean hands could be situated than the breach of municipal and international laws involved in the kidnaping of the defendant in Kenya and renditioning him to Nigeria outside any legal process. *Ex arguendo*, declining jurisdiction due to the manner of his rendition amounts to deploying unnecessary nicety to assist persons accused of serious crimes escape justice. Of course, since *'justice'* must not be had at all costs and by any means, several legal principles create legal niceties that assist persons accused of serious crimes escape justice. The rule against hearsay evidence is one of such legal principles. Others include rules precluding admission of confessions obtained under duress or admissions obtained fraudulently or under a mistake of facts. From the foregoing, it is clear that Nigeria's administration of justice is not founded on an expectation of trial in all instances or conviction by all means. It looks at the larger picture of administration of justice and creates rules that eliminate any perception that the end justifies the means. This very principle and resolve will be sorely tested in Mr Kanu's case. The proper thing for the court to do is that, in consideration of the subversion of both municipal and international law that enabled the court obtain personal jurisdiction over him, the court should stay the proceedings. However, whether the court would have the courage to do this, is not clear.

7. Conclusion

It is impossible to isolate the domestic and international systems. They function as a unit. This is brought out with greater clarity when considering the role of municipal courts as agents of international rule in limiting violations of international law by the municipal executive. Effective discharge of this role compels courts, so long as it lies within their powers, to terminate any violation of international law that is brought within their compass. An area of constant recrudescence is the arraignment of victims of illegal extraterritorial abductions for trial before the courts of the abducting country. This invariably puts the court in the dilemma of being complicit in the executive's violation of international law, or to bring any such violation to an end. By assuming jurisdiction over the abductee, the courts are drawn into the web of violation of international law, and instead of being an institution for allocation of justice, become the opposite - an institution for perpetuation and sustenance of illegality. Of course, the court could do just the opposite, - decline jurisdiction over a person brought before it where the method of apprehension of the defendant involved serial illegality and breach of international law. The *male captus* principle had its day. However, even during its heyday, because it was founded on moral relativity of justice, it suffered severe shortcomings. Taken to its ultimate conclusion, it was subversive of several principles of international law, extradition law, domestic law and human rights. It also subverted the principle of good neighbourliness amongst countries and mutual respect and friendly relations by members of the international system. The shift away from *male captus* rule produced two movements both aimed at ensuring that an illegal territorial abduction did not yield any fruits to the abductor. The first school took the position that since you cannot put something on nothing, absence of state competence and

[120] *US v. Alvarez-Machain*, (n. 48) 2196-97, (Stevens, J., dissenting) citing *US v. Toscanino*, (n. 11)

power by the abducting country in the illegal rendition of the abductee rendered the court also without jurisdiction to try him. The second school took the position that notwithstanding the method by which the defendant was brought before the court, the court had jurisdiction over him, but would decline to exercise this jurisdiction as to do so would bring it in complicity to the illegality committed by the executive. In respect of the current Mr Kanu's matter which is before the Nigerian court, it is the argument of this author that the current jurisprudence both within and without the Commonwealth is that proceedings in such cases should be stayed. Without even assaying to the Commonwealth, local provisions which preclude the 'an end justifies the means' or 'justice at all costs' principle require courts to apply exclusionary rules where such would meet the broader aims of the administration of justice. In this particular instance of Mr Kanu, in accordance with the practice of most members of the international community, the court staying the proceedings would meet the broader aims of the administration of justice.

Postscript: On December 15, 2023, while this paper was in press, the Nigerian Supreme Court held that although the Nigerian government unlawfully removed Mr. Kanu from Kenya to Nigeria, such an unlawful act has not divested Nigerian courts of the jurisdiction to proceed with his trial.