

**ILLEGAL EXTRA-TERRITORIAL ABDUCTIONS AND THE CONCEPT OF
MALA CAPTUS, BENE DETENTUS ***

Abstract

As a general principle, barring a willingness to conduct an in-absentia trial of a fled fugitive, physical presence of the fugitive is inevitable to assertion and exercise of personal jurisdiction over him for his trial. The abduction of British-Nigerian citizen, Mr Nnamdi Kanu from Nairobi, Kenya for trial in Abuja, Nigeria provides the context for this paper in which we have undertaken interrogation of municipal and international law to discover the practice of municipal courts assuming and exercising trial jurisdiction over victims of illegal extraterritorial abduction. In part 2, we 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 all persons on its territory. Part 3 examined the status of forceful extra-territorial abductions in international law, including abductions carried out by state agents and non-state agents respectively, and when abductions by non-state agents could be attributed to the state. Part 4 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. In conclusion, part 5 suggests that there is sufficient precedent for the Nigerian court to continue with the proceedings in the current matter of Mr Kanu which is before it.

Keywords: Abduction and Extradition, Domestic Courts, Extraordinary Rendition, Jurisdiction in International Law, *Mala Captus Bene Detentus*

1. Introduction

In June 2021, a certain Mr. Kanu was abducted in Kenya. The abductee, a dual Nigerian and British citizen was mostly resident in Britain from where he conducts a separatist campaign for creation of a Republic of Biafra out of the current Nigerian state. He was previously facing trial in Nigeria and had been granted bail. In September 2017, at the peak of a military operation alleged by Mr Kanu to be targeted at him, he disappeared, and reappeared a year later overseas to continue his separatist campaign. In reporting the successful abduction of Mr. Kanu, Nigeria's Justice Minister stated that it was accomplished with the collaboration of the security agencies of an un-named friendly country. Later, it became clear Mr Kanu was abducted from Kenya, and was exfiltrated to Nigeria in a private jet on June 27, 2021. Kenya's Government denied complicity in the operation.¹ On or about June 29, 2012, Mr. Kanu was brought to court in Abuja, Nigeria, in continuation of the erstwhile criminal proceedings against him. Subsequently he filed an action against the Nigerian government and certain persons alleged by him, who as agents of the Nigerian government, played direct or indirect roles in the events that led to his escape from Nigeria and subsequent abduction in Kenya and rendition to Nigeria.² Subsequent to the action filed by him, on October 21, 2021, he was arraigned in court on fresh charges.³ He pled not guilty to the charges. His legal counsel filed a preliminary objection to certain of the charges in particular and 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 Nigerian court of the requisite jurisdiction to try him.⁴ This paper examines current practice by municipal courts of most countries on if a country can lawfully obtain personal jurisdiction over a defendant by kidnapping him from another country.⁵

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¹ <<https://newsrescue.com/category/africa/>>; Accessed July 19, 2021

² Suit No. HIH/FR14/2021; Kanu v. FRN, AGF & others; see <<http://saharareporters.com/2021/09/18/exclusive-n5billion-suit-against-nigerian-government-nnamdi-kanu%E2%80%99s-family-expose-how-ipob>> Accessed on September 27, 2021; <<https://www.vanguardngr.com/2021/09/breaking-nnamdi-kanu-files-n5bn-lawsuit-against-fg-demands-return-to-britain/>> Accessed on September 27, 2021

³ See <<https://thewillnigeria.com/news/details-of-fresh-charges-against-ipob-leader-nnamdi-kanu/>> Accessed on October 25, 2021

⁴ See <<https://barristerng.com/full-details-of-nnamdi-kanus-preliminary-objection-to-terrorism-charges/>> Accessed on October 25, 2021

⁵ Jonathan A. Bush, 'How did we get Here? Foreign Abduction after Alvarez-Machain' (1993) 45 *Stanford Law Review* 939 [Even supporters of such abductions concede that they should be undertaken only in egregious cases, while opponents concede an exception for figures like Eichmann. The Eichmann seizure puts critics of abduction in a dilemma. One view holds that the abduction was a violation of international law, but concludes that the Security Council's resolution and Israel's 'no-fault apology' settled the matter. The implication is that though it enjoyed wide support, the Eichmann case supports the norm against abduction. Other critics of abduction, without defining who else should fit within the exception, simply term Eichmann a unique and morally compelling case for abduction.] See also Paul Michell, 'English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain', (1996), 29 *Cornell International Law Journal* [383-500] 423 [The Eichmann case concerned crimes of such a unique and grave nature that it would be imprudent to abstract general principles from it. At the Security Council, Israel argued that 'this isolated violation of Argentine law must be seen in the light of the exceptional and unique nature of the crimes attributed to Eichmann.']

There is the practice known as luring, in which by deception, the fugitive is enticed away from the state of refuge. This practice does not involve violation of the territorial integrity of the host state and is consequently more excusable, if not justifiable, than forcible abduction from the territory of the host state.⁶ This however, lies outside the scope of this paper. We concede that every state possesses jurisdiction to try persons who violate their laws. The focus of this paper is however the responses of different countries to whether such jurisdiction may or should be exercised over persons brought before domestic courts pursuant to a violation of international law. In other words, we consider, whether municipal courts of the abducting country are willing to sanctify the international illegality of violation of the territorial integrity of the fugitive's host state by exercising jurisdiction over the illegally rendered fugitive.⁷ In this paper, using the Mr Kanu case as a background, we intend to explore the response of the domestic courts of an abducting state in exercising its jurisdiction over an illegally abducted fugitive. In the section next, we will explain the idea of territorial inviolability in international law; and thereafter take a look at the status of forced abductions in international law. This will lead us to an examination of the traditional Anglo-American rule 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, otherwise exemplified as *mala (also male) captus bene detentus.*, with particular application to the case of Mr. Kanu which is currently before the Nigerian courts. We will then conclude.

2. Principle of Territorial Inviolability in International Law

The concept of territorial sovereignty as a basic principle is recognized by international law.⁸ It indicates the authority of a state over its own territory, and implies that under contemporary international law, states are prohibited from exercise of sovereign powers in the territory of another state without the latter state's consent.⁹ Thus, in international law a fundamental principle is that every nation's sovereignty is limited by its own territorial boundaries, so that it may not act within the territory of another sovereign without its consent.¹⁰ As a corollary to the principle prohibiting states from non-consensual exercise of sovereign powers in the territory of another state, every state is entitled, within its borders, to exercise jurisdiction, and take and implement decisions in respect of its internal and external affairs without interference by other states.¹¹ Article 2(4) of UN Charter requires all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. Thus, any use of inter-state force by member states for

⁶ Jonathan A. Bush, (n. 5) [An exception would be the individual brought out of foreign sanctuary not by force, but by trickery. In luring a defendant, the abducting state's officials neither directly violate the territorial sovereignty of the asylum state nor risk excessive violence to the abductee or third parties.]

⁷ See generally, Jianming Shen, 'Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension', (1994) 23 *Denver Journal of International Law & Policy* [43-85]

⁸ Jonathan A. Lonner, 'Official Government Abductions in the Presence of Extradition Treaties', (1992-93) 83 *Journal of Criminal Law & Criminology* [998-1023] 1017; see, e.g., UN Charter, art. 2(4) [All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.] See also Constitutive Act of African Union adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government, on 11 July, 2000, at Lome, Togo [The Union shall function in accordance with the following principles: (a) sovereign equality and interdependence among Member States of the Union; (f) prohibition of the use of force or threat to use force among Member States of the Union; (g) non-interference by any Member State in the internal affairs of another; (i) peaceful co-existence of Member States and their right to live in peace and security; (m) respect for democratic principles, human rights, the rule of law and good governance]

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits, judgment) [1984] ICJ Rep. 14 paras. 212; *Case of the SS 'Lotus' (France v Turkey)* [1927] PCIJ Rep Series A No 10, 18-19; Alberto Costi, 'Problems with Current International and National Practices Concerning Extraterritorial Abductions' *Yearbook of the New Zealand Association for Comparative Law*, (2002) 8 [57-99] 61; Andreas F. Lowenfeld, 'US. Law Enforcement Abroad: The Constitution and International Law' (1990) 84 *American Journal of International Law* [444, 472]; Gregory Townsend, 'State Responsibility for Acts of *de facto* Agents' (1997) 14 *Arizona Journal of International & Comparative Law*, [631-673] 635; Jonathan A. Bush, (n. 5) [Few question the norm of international law that using force without consent in the territory of another sovereign is *prima facie* wrong]; see Ólvir Karlsson, '*Mala Captus, Bene Detentus, from Domestic Courts to International Tribunals*', (BA Degree in Law Thesis, University of Akureyri, Iceland 2012) 3

¹⁰ Gary W. Schons, '*US v. Toscanino: An Assault on the Ker Frisbie Rule*', (1975) 12 *San Diego Law Review* 865, 873; Aimee Lee, '*US v. Alvarez-Machain: The Deleterious Ramifications of Illegal Abductions*', (1993) 17 *Fordham International Law Journal* [127-189] 130; in the *Schooner Exchange v. McFaddon* 11 US (7 Cranch) 116 (1812) at 136 Chief Justice John Marshall stated the principle thus '*The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction*'. Aaron Schwabach & SA Patchett, 'Doctrine or Dictum: The Ker-Frisbie Doctrine and Official Abductions Which Breach International Law', (1993) 25 *University of Miami Inter-American Law Review*, [19-56] 44, [A state may not carry out official acts in another state's territory without permission. Each state's sovereignty over its own territory is exclusive and absolute. This includes official law enforcement activities of one state in another.]

¹¹ NA Maryan Green, *International Law* (3d Ed. 1987) 191

whatever reason is banned, unless explicitly allowed by the Charter.¹² Consequently, the first and foremost restriction imposed by international law upon a state is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state.¹³ In this regard, exercise of territorial supremacy by a State over all persons on its territory, whether they are subjects or aliens, corresponds to exclusion of exercise of power by a foreign sovereign over its own nationals in the territory of another state.¹⁴ Generally, every state has powers to prescribe conduct for its citizens outside of its territory, and prescribe criminal sanctions for violation of the proscribed conduct. However, it is unlawful to exercise enforcement jurisdiction in the territory of another state.¹⁵ Accordingly, except under the terms of a treaty or other consent given, fugitives may not be arrested nor police or tax investigations be implemented on the territory of another state.¹⁶ It constitutes ridicule of state sovereignty and a violation of international law for states to send their agents into other states to abduct fugitives.¹⁷ From this particular perspective of abduction of fugitives, this implies that though a state may implement non-intrusive non-judicial enforcement against a person in another state, its law enforcement officers cannot arrest a suspect in another state without that state's permission.¹⁸ Thus, the territory of a foreign State constitutes a temporary asylum for the fugitive, until and unless he is extricated therefrom in accordance with applicable rules and protocols.¹⁹ On the particular issue of extraterritorial abductions of fugitives, it must be noted that most of these abductions find immediate condemnation due to the fact that they are illegal under the domestic kidnapping laws of the host state of the fugitive.²⁰ The abductions also, without more constitute a violation of the clear international obligation of respect for the territorial sovereignty of the injured state.²¹ Any incursion into the territory of another State constitutes violation of article 2(4) of UN Charter. This is so even if the purpose of the incursion is not intended to deprive that state of part of its territory. Furthermore, this is yet so even if the incursion terminates immediately upon completion of a temporary and limited operation.²² From the foregoing, it is clear that forcible abduction of fugitives from their host countries constitutes unlawful use of force within the meaning of the UN Charter, and a violation of international law.²³

3. Status of Forceful Abductions in International Law

Within the context of illegal extraterritorial abductions, an individual is kidnapped or abducted by the forceful or unauthorised physical apprehension of his person outside the territory of the abducting state.²⁴ While in the majority of cases, knowledge and consent of the host country of the abductee may be lacking, that is not inevitable. The opposite situation is also probable. The illegal abduction of the fugitive might be undertaken with the complicity of his host

¹² Yoram Dinstein, *War, Aggression and Self-Defense*, (2005) 87-88; see also Helen McDermott, 'Extraterritorial Abduction Under the Framework of International Law: Does Irregular Mean Unlawful?' (PhD thesis of the School of Law, National University of Ireland, Galway, 2014) 79 [In the context of use of force, the apprehending state will be in violation of international law unless, the state from which the individual is abducted consented, the Security Council authorized the operation or, it was a lawful exercise of self-defence.]

¹³ *The SS 'Lotus' (Turkey v. France)*, (n. 9) 18

¹⁴ Wade A. Buser, 'The Jaffe Case and the Use of International Kidnapping as an Alternative', (1984) 14 *Georgia Journal of International & Comparative Law*, 362-63; Aimee Lee, (n. 10) 130

¹⁵ Paul Michell, (n. 5), 411

¹⁶ Ian Brownlie, *Principles of Public International Law* (4th Ed. 1990) 307; see 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] 263

¹⁷ Paul Michell, (n. 5) 411

¹⁸ Joseph Miller, 'Extending Extraterritorial Abduction Beyond its Limit: *US v. Alvarez-Machain*', (1994) 6 *Pace International Law Review* [221-252] 247

¹⁹ 1 Lassa Oppenheim, *International Law* (8th ed. Lauterpacht 1955) 676-77, §144b [States must not perform acts of sovereignty within the territory of other States]; Aimee Lee, (n. 10) 130

²⁰ Jonathan A. Bush, (n. 5)

²¹ Paul Michell, (n. 5) 410

²² Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, (2005), at 29-30; Helen McDermott, (n. 12) 85-6 [The Eichmann capture is the only extraterritorial abduction that the Security Council has pronounced upon. The Resolution that followed condemned the act as violation of Argentina's sovereignty but it did not go so far as to classify the conduct as a violation of art. 2(4) of UN Charter. The resolution acknowledged the gravity of the crimes committed by the abductee and the interest of the international community in bringing him to justice, thus raising a question as to whether extraterritorial abductions can be reconciled with the Charter in situations in which the purpose of the operation is to serve the interests of the international community.]

²³ Helen McDermott, (n. 12) 94

²⁴ Please see Helen McDermott, (n. 12) 67 [Kidnapping or abduction by force is the physical apprehension of an individual outside of a state's territory.] 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] 211 [An abduction in violation of international law is a seizure of a person by force against the will of the territorial sovereign without justification under international law.] In *US v. Toscanino*, 500 F.2d 267, 271 (1974), it was held that an individual is forcibly abducted when they are illegally apprehended or kidnapped by government agents and brought to the US for the purpose of facing criminal charges in the US. See Jonathan E. Katz, 'Should Government Sponsored Forcible Abduction Render Jurisdiction Invalid?' (1993) 23 *California Western International Law Journal*, [395-414] 395

country.²⁵ There is argument that the rule of international law prohibiting the exercise of police powers by one state in the territory of another, is, within the context of illegal territorial abductions, suspended where the host state of the fugitive consents to, or is complicit in the violation of its territory by agents of the abducting state. In this instance, the host state gives its tacit consent or active collaboration to the abduction.²⁶ It is thus suggested that if the host government aids in or acquiesces to the action of the agents of the abducting state on its territory, the abduction does not violate its sovereignty.²⁷ The problem with this argument is that it fails to take into consideration the fact that it is not only the right of the host country that is violated, but also the rights of the fugitive not to be apprehended outside due legal process and any applicable extradition treaty. Complicity of the host state in the illegal abduction of the fugitive does not legitimate the extra-judicial rendition of the fugitive. While the host state could waive the violation of its territorial sovereignty, it is incompetent to waive the violation of the personal rights of the fugitive to be removed from the place of refuge only in accordance with due process. Consequently, from the context of the proposition of this paper, which is the duty of domestic courts to forbear from exercising their jurisdiction to try the victim of an illegal extraterritorial abduction, while there might be a lessening of the attendant illegality by the consent or complicity of the host state to the abduction, such consent or complicity by no means completely sanctifies or deodorises the operation.

Within the taxonomy of illegal extraterritorial abductions, from the perspective of state responsibility for internationally wrongful acts, a difference exists between abductions carried out by agents of the abducting state and abductions carried out by private persons. Where law enforcements personnel of a state, breach the territory of another state, in accordance with directions of their home state to abduct and repatriate a fugitive, their act is assumed to their home state and they are its agents for the purpose of violating the territorial integrity of the host state of the fugitive.²⁸ Extraterritorial abductions conducted by state agents without the consent of the fugitive's host country constitutes violation of the sovereignty of the host country.²⁹ In this regard, the inflexible rule of general application remains that abduction of a fugitive from his host country without consent of the host government, is a blatant violation of the territorial integrity of the host state and a gross violation of international law.³⁰ The difficulty in ignoring this uncompromising position of international law explains why in *US v. Alvarez-Machain*,³¹ a divided US Supreme Court, while upholding the competence of the local court to try a victim of illegal abduction, conceded to the possibility that its decision 'may be in violation of general international law principles'.³² Consequently, it is generally accepted that

²⁵ See Helen McDermott, (n. 12) 67

²⁶ Paul Michell, (n. 5) 421; *US v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991) at 1352 [A nation may consent to the removal of an individual from its territory outside the formal extradition process after the fact, by failing to protest a kidnapping.]

²⁷ Jacqueline A. Weisman, 'Extraordinary Rendition: A One-Way Ticket to the US.... Or Is It? (1992) 41 *Catholic University Law Review* [149-175] 149 [It lies within the discretion of the state to determine whether such violations have occurred and whether the alleged violations require redress. p. 163]

²⁸ Gregory Townsend, (n. 9) 636; Perry John Seaman, 'International Bounty Hunting: A Question of State Responsibility', (1985) 15 *California Western International Law Journal*, 397; Helen McDermott, (n. 12) 226

²⁹ 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; *US ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.) cert. denied, 421 US 1001 (1975), at 66-67 [An abduction from another country without that country's consent violates customary international law] *US v. Toscanino*, (n. 24) [holding that the abduction violated a UN Charter provision which incorporated the customary international law principle of territorial sovereignty] *US v. Verdugo-Urquidez*, (n. 26) [finding a breach of fundamental international law principles incorporated in both the UN and the OAS charters], vacated, 112 S. Ct. 2986 (1992) *Restatement (Third) of Foreign Relations Law of the US* (1987) at § 432(2) cmt. b [It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent.] Helen McDermott, (n. 12) 227 [Extraterritorial abductions undertaken by personnel of a state authority let it be the secret service, a law enforcement agency or the military, will be deemed an act of the state for the purposes of responsibility for international law breaches.]

³⁰ *US v. Alvarez-Machain*, 112 S Ct 2188 (1992) (Justice Stevens dissenting) at 2202, citing Louis Henkin, 'A Decent Respect to the Opinions of Mankind', (1992) 25 *John Marshall Law Review*, 231. See Michael Slattery, 'Government Sanctioned Abductions: *US v. Alvarez-Machain*,' (1996) 16 *NYLS Journal of International and Comparative Law*, 159-180; Jonathan A. Lonner, (n. 8) 1017 [Official abductions constitute violations of territorial sovereignty, and hence are infractions of international law] *US v. Verdugo-Urquidez*, (n. 26) [Territorial integrity of a sovereign nation may not be breached by force'] See also I.A Shearer, *Extradition in International Law* (1971), 72 [Where an abduction is effectively carried out, an infraction of the territorial sovereignty of the host State has been committed.] 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] 271, [When one country impinges on another country's sovereignty, the intruding country is violating customary international law]; Ölvir Karlsson, (n. 9), 4 [States are not allowed under international law to breach another state's sovereignty for the purpose of bringing a person in front of its own court of law, unless they can justify their conduct by some other principle of international law.]

³¹ (n. 30) at 2190

³² Ibid; Candace R. Somers, 'US v. Alvarez-Machain: Extradition and the Right to Abduct', (1992) 18 *North Carolina Journal of International Law*, 228 [Sponsoring an abduction of a nation's citizen from his homeland is a breach of the sovereignty of his nation] Alfred Paul LeBlanc Jr., '*US v. Alvarez-Machain* and the Status of International Law in American

where the agents of one country abduct a person from the territory of another country, in the absence of the consent of the host country to the abduction, the action constitutes a violation of customary international law.³³ From the foregoing, it is clear that a predicate to application of the rule prohibiting violation of territorial sovereignty of host countries is a premise that the illegal abduction was carried out by agents of the foreign state, acting under state authority. Thus, official authorisation or sponsorship of the operation by the foreign state is a prerequisite to state responsibility. However, where the act is carried out by private persons, non-state agents or volunteers, fault and responsibility could still be attributed to the state if it adopts or ratifies their actions.³⁴ While international law has undergone profound changes, with respect to the territorial sovereignty of nations, it still corresponds to a unitary typology. Only a state entity has a positive obligation under the law of nations, to respect the sovereignty of another state. Flowing from this, a private person, unlike a state entity is not bound by the rules of international law that require that the territorial sovereignty of nations be respected and not violated.³⁵ Where therefore, a person, not acting under the instruction of a state or any of its organs, in pursuit of his personal agenda, goes into the territory of a state, and thereat, abducts a fugitive and furtively exfiltrates him from the country of refuge, he falls into the category of a private abductor.³⁶ From the viewpoint of international law, abductions by state agents, and abductions by private individuals differ in consequences and implications. While abductions by private individuals in pursuit of private interests connote mere and simple criminality and breach of the municipal laws of the fugitive's host country, abductions by a state through its agents is a direct violation of customary international law and a breach of Charter provisions compelling respect for the territorial integrity of member states.³⁷ While a state is ordinarily not responsible for the acts of private persons acting independently of the state, those acts may under certain circumstances be assumed and attributed to the state. In this regard, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran, (US v. Iran)*, the International Court of Justice held that where a state or state authority adopts or approves the private acts of private individuals, those acts become subsumed into acts of that state.³⁸ Flowing from the above, the question is whether and when the illegal abduction of a fugitive by private persons may be attributed to the state to which he was delivered for prosecution or custody? In answer, the state would be deemed to have ratified the abduction and thus accepted responsibility for violation of the territorial sovereignty of the state of refuge if it retains custody of the abductee or commences his prosecution.³⁹ In any event, from the perspective of the duty of the domestic courts of the abducting country to renounce jurisdiction to try the victim of an illegal extraterritorial abduction, the inquiry into whether the abduction was originally an act of state or whether it was the act of private persons that was subsequently ratified by the state is of no moment. By whichever of these means the abductee is brought into custody, to the extent that it constitutes a breach of the territorial integrity of another state and a violation of international law, it should not provide a basis for exercise of jurisdiction.⁴⁰

The foregoing leads to a consideration of the effect of illegal territorial abductions on an extant extradition treaty between the fugitive's host country and the abducting country. An extradition treaty, as the name implies is a treaty by which two countries bind themselves to surrender fugitives to one another under certain circumstances.⁴¹ Generally, such treaties stipulate an official procedure for requesting the surrender of a fugitive. This accordingly limits the discretion of both countries in the extradition of fugitives to the conditions specified in the relevant extradition treaty. In this regard, typically, the process of extradition of fugitives is accomplished through diplomatic channels.⁴² Contextually, extradition treaties are analogous to contracts between nations. Consequently, the parties are entitled to

Courts', (1993) 53 *Louisiana Law Review*, [1411-1486] 1414-6 [The protest generated by failure of the US Supreme Court in *US v. Alvarez-Machain*, to condemn a blatant violation of another sovereign's territorial integrity is ample evidence of the potentially broad and de-stabilizing sweep of such a remiss and ill-conceived suggestion]

³³ Aaron Schwabach and SA Patchett, (n. 10) 44

³⁴ 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)

³⁵ Candace R. Somers, (n. 32) 228; Helen McDermott, (n. 12) 229 [Majority of extraterritorial abductions involve some degree of encouragement from state authorities. Absent promise of financial gain, there would be little incentive for an individual to enter another territory to apprehend an individual for the purpose of having him stand trial. In the case of bounty hunters, the abduction is undertaken without the direction or control of state authorities but on completion, the conduct may be attributed to the state. If the abductee is subsequently detained or tried, this exercise of jurisdiction could constitute adoption of the illegal act by the state for the purposes of allocating responsibility.]

³⁶ Gregory Townsend, (n. 9) 636; Perry John Seaman, (n. 28) 397; Helen McDermott, (n. 12) 226

³⁷ Jianming Shen, (n. 7) 53

³⁸ *Case Concerning US Diplomatic and Consular Staff in Tehran* (Judgment) (US/Iran) [1980] ICJ Reports 3, 34-35 para 73-74; FA Mann, 'Further Studies in International Law', (OUP: 1990) 339 [A state is guilty of a violation of public international law for abduction by private volunteers whose acts have been adopted or ratified by the State.]

³⁹ Alberto Costi, (n. 9) 63

⁴⁰ Jianming Shen, (n. 7) 53

⁴¹ *US v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), cert. denied, 479 US 1009 (1986)

⁴² Candace R. Somers, (n. 32) 219-220

waive the treaty's terms.⁴³ Accordingly, the discretion of the treaty parties to surrender fugitives for reasons of comity, prudence, or even as a whim is not trammelled by the existence of an extradition treaty.⁴⁴ This entails that the parties to an extradition treaty may permit extradition outside the procedure stipulated by the treaty. In this regard, consent of the parties to extradition outside the stipulated procedure [e.g. forceful rendition of the fugitive] is tantamount to a waiver of the resulting breach of the territorial sovereignty of the host country of the fugitive.⁴⁵ Although operation of the treaty parties outside the terms of the extradition treaty is a violation of the treaty, however, the consent of the treaty parties to the breach constitutes its waiver, or, comprises ratification.⁴⁶ Thus, consensual rendition outside the terms of the extradition treaty is subject to the consent of the treaty parties. The extradition treaty does not become subject to an 'overriding privilege of abduction'.⁴⁷ This is because, when an abduction is done in the territory of a treaty party without its consent, it is not only a violation of international law; it utterly eviscerates the extradition system.⁴⁸ In conclusion, permitting jurisdiction over abductees is in the long-term subversive of extradition treaties and protocols since it provides a shortcut to extradition.⁴⁹

4. *Male Captus* Doctrine and Domestic Jurisdiction over Unlawfully Abducted Persons

Whether criminal conduct is conducted within a state by a person who subsequently becomes a fugitive, or is committed from outside the state but its effect is felt within the state, public policy demands the prosecution and punishment of persons who indulge in conduct that is injurious to the state or its citizens.⁵⁰ The extradition process makes it possible for a person suspected of or convicted for an offence who has fled from jurisdiction to be repatriated from his state of asylum.⁵¹ Apart from providing a formal procedure for return of fugitives, extradition treaties also protect the sovereignty of contracting parties and safeguard rights of individuals whose transfer is sought.⁵² Occasional failure of the formal extradition process is however inevitable. This failure might be due to a vested interest in the host state of the fugitive not to yield him up to the requesting state. On the other hand, it might be due a too-ready willingness of the requesting state to obtain custody of the fugitive by any possible means.⁵³ These conditions, jointly, or singly, invariably lead the requesting state to resort to extraterritorial abduction as an easy and pragmatic way to obtain custody of the fugitive. This the-end-justifies-the-means method of obtaining custody of the fugitive however creates a moral dilemma of whether a domestic court may exercise its jurisdiction to try an individual who has been abducted and brought before it in violation of international law? Under the *mala captus, bene*

⁴³ *US v. Verdugo-Urquidez*, (n. 26) at 1352 [Just as a private party to a contract may waive a term in a contract that is for his benefit, so a signatory to an extradition treaty may waive the requirement that the other signatory follow the procedures set forth in the treaty]

⁴⁴ *US v. Najohn*, (n. 41)

⁴⁵ See Candace R. Somers, (n. 32) 220; see Manuel R. Angulo & James D. Reardon Jr., (n. 16) 274

⁴⁶ *US v. Verdugo-Urquidez*, (n. 26) 1352

⁴⁷ Daniel Patrick Moynihan, 'Supreme Court's Kidnapping Ruling is Manifestly Wrong', *Roll Call*, July 27, 1992, available in LexisNexis Library, International File; see also Candace R. Somers, (n. 32) 229. 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] 632 [Despite its plain conclusion, the majority's underlying rationale is not clear. It asserted that in the absence of extradition treaties, nations are under no obligation to surrender their residents; therefore, extradition treaties exist 'to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures.' From this, the majority then inferred that the Treaty merely established procedures to be followed when the Treaty is invoked. Thus, since US chose to abduct Dr. Alvarez, rather than invoking the Treaty, US was not bound by the Treaty obligations. In sum, it is permissible for US to abduct a foreign national for purposes of prosecution because the Treaty does not expressly prohibit abductions. Also, the Justices based their conclusion that the Treaty does not prohibit abductions on the fact that the Treaty does not impose obligations on the nations unless it is actually invoked. The circuitous logic underlying this phase of the opinion is so flawed that intelligent response is nearly impossible.]

⁴⁸ *US v. Alvarez-Machain*, (n. 30) 2202; Jonathan A. Lonner, (n. 8) 1008 [Official sanction of an abduction in a treaty partner's territory violates the intent of an extradition treaty.] 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] 408 [Ker-Frisbie doctrine is based on obsolete standards of state action analysis. In overlooking government sponsored abuses abroad, it holds human rights of foreign nationals and the sovereignty of other nations in contempt.]

⁴⁹ Stephanie A. Ré, (n. 30) 270 [Resulting from the Alvarez-Machain decision, the US, when it chooses to, can ignore extradition treaties with other countries, and apply the treaty only when it elects to invoke its procedures.]

⁵⁰ Helen McDermott, (n. 12) 35-36, 43; *SS 'Lotus' (France v. Turkey)*, (n. 9) para 46-47 [A valid basis for jurisdiction must be established before an individual is tried. If the offence for which he is suspected was directed against the requesting state or its nationals, the issue of jurisdiction is clear. Every state has an interest in maintenance of peace and order and suppression of crime committed on its soil. Under international law, the principle of territoriality confers upon states, authority to proscribe and enforce laws within their own borders]

⁵¹ Helen McDermott, (n. 12) 36

⁵² Ruth Wedgewood, 'The Argument Against the International Abduction of Criminal Defendants: Amicus Curiae Brief Filed by the Lawyers Committee for Human Rights in *US v Humberto Alvarez Machain*,' (1991) 6 *American University Journal of International Law*, 537-538; Helen McDermott, (n. 12) 41

⁵³ See Helen McDermott, (n. 12) 63-4

detentus doctrine, traditional Anglo-American practice permits courts to exercise their jurisdiction to try criminal defendants before them even if the mode of bringing the defendants before the court involved unlawful executive conduct.⁵⁴ Thus, the norm ‘*mala captus, bene detentus*’ (‘*improperly captured, properly detained*’) permits jurisdiction and trial even after an irregular arrest.⁵⁵ The predicate for this concept is the theory that the power of the court to detain a person is unaffected by irregularity in the method by which the person was brought before the court.⁵⁶

The *mala captus* doctrine entered English law through the case of *ex parte Scott*⁵⁷, where the court held that it was not the duty of the court to inquire into the circumstances how a person charged with a crime was brought before it. Subsequent cases, such as, *R. v Sattler*,⁵⁸ *Queen v Anderson*,⁵⁹ *Queen v Hughes*,⁶⁰ followed this principle, and it became an accepted part of English jurisprudence that the illegality of an arrest could not affect the court's jurisdiction over the accused. The English position became finally fixed and settled in *R. v O./C. Depot Battalion, R.A.S.C. Colchester (Ex parte Elliott)*,⁶¹ where, the court held that if a defendant is brought before a court which has jurisdiction to try him, it is no answer for him to plead that his arrest was in violation of the laws of the country of his refuge. Nigerian law followed English law in this regard. Under the principles regulating reception of English law into Nigeria, subject to the provisions of any written law, the common-law of England, the doctrines of equity and the statutes of general application which were in force in England on the 1st day of January, 1900, are applicable within the jurisdiction of Nigerian courts.⁶² Thus, the principle as established in the cases of *ex parte Scott*, *R. v Sattler*, *Queen v Anderson*, and *Queen v Hughes*, which are all pre-1900 decisions are applicable in Nigerian law. In any event, Nigerian courts hold tenaciously to the principle that the illegality of an arrest does not invalidate a later proceeding.⁶³ In *Sinclair v H.M. Advocate*,⁶⁴ Scotland adopted the English position and held that the fugitive's trial is not affected by the irregularities of foreign officials who arrested the him, and that the said irregularities were not cognisable by the court since domestic officials had not acted unlawfully. The Canadian position, paralleling the

⁵⁴ Paul Michell, (n. 5) 383, 392; [Public policy justification for this rule posits that first, forcible abduction does not affect the fairness of the trial itself. Second, the rule ensures that alleged offenders are brought to trial. F, and finally, courts are not the appropriate forum to adjudicate violations of public international law by the executive]

⁵⁵ Jonathan A. Bush, (n. 5)

⁵⁶ See generally Christophe Paulussen, *Male Captus Bene Detentus? Surrendering Suspects to the international Criminal Court*, (Intersentia: 2010); see also Helen McDermott, (n. 12) 197

⁵⁷ 9 B. & C. 446,447-48, 109 Eng. Rep. 166, 166-67 (KB 1829), the accused, indicted in England for perjury, was apprehended by an English police officer in Belgium and returned to England. It was held that though her arrest may have violated Belgian law, and might give her right of action against the police officer, it did not bar her prosecution in England, and was not sufficient cause for the court to divest itself of jurisdiction. Per Lord Tenterden, CJ: ‘*The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.*’ See also Paul Michell, (n. 5), 448

⁵⁸ 1 Dears. & Bell 539, 546-47, 169 Eng. Rep. 1111 (Cr. Cas. Res. 1858)

⁵⁹ [1868] 1 L.R. 161, 162 (Cr. Cas. Res.) [Blackburn, J. stating that ‘*Sattler's Case decides that even if wrongly brought here, it makes no difference.*’]

⁶⁰ [1879] 4 QBD 614, 629 (Cr. Cas. Res.).

⁶¹ [1949] 1 All ER 373 (KB) here, British army officers accompanied by Belgian policemen arrested a British army deserter in Belgium. He was brought to England and charged with desertion. On a writ of *habeas corpus*, he argued that the illegality of his arrest under Belgian law precluded the court from exercising jurisdiction over him. Lord Goddard, C.J., rejected this argument as ‘*entirely false.*’ Dismissing the application, he stated: ‘*If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested."*’

⁶² See for example s. 23 of High Court Act (Abuja)

⁶³ See *Mattaradona v. Ahu*, [1995] 8 NWLR Part 412, 225, it was held that by virtue of s. 382 of Criminal Procedure Code, no finding, sentence or order of a court of competent jurisdiction shall be reversed on account of any error, omission or irregularity on the warrant unless the appeal court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity.

⁶⁴ 17 R. (Ct. of Sess.) 38 (H.C.J. 1890), the fugitive, charged in Glasgow with theft, embezzlement, and breach of trust, was arrested and detained in Portugal by local authorities acting without a warrant. There was no extradition treaty between Portugal and UK. Portuguese police took the fugitive aboard a British ship in the presence of a Scottish detective, whence he was brought to and imprisoned in Scotland. The fugitive argued that his illegal arrest and imprisonment divested the court of jurisdiction over his person. The court held that any alleged irregularities on the part of foreign officials in his arrest were not cognisable by the court and could not affect the fugitive's trial; the domestic authorities had not acted unlawfully. Any impropriety in his transfer to the British vessel in Portugal was actionable in damages against the detective alone, or against Portuguese authorities in Portuguese courts; the court was not concerned with the manner in which the fugitive had come into its jurisdiction. His transfer onto the British ship was a matter of diplomatic rather than judicial concern, and the Portuguese authorities had not objected to the transfer.

English position is that the circumstances by which the fugitive had been brought to trial did not concern the court and did not affect its exercise of jurisdiction over him.⁶⁵

US courts unflinchingly support the competence of the court to exercise jurisdiction over a defendant, irrespective of the method by which the defendant was brought before the court. In *Ker v Illinois*⁶⁶ the Supreme Court noted that ‘forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such a court.’⁶⁷ Decades later, the Court in *Frisbie v Collins*⁶⁸ reaffirmed the decision of *Ker v Illinois*, and stated that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by a ‘forcible abduction,’⁶⁹ and that as a rule, the manner in which the individual is brought before the court does not negate the court's jurisdiction.⁷⁰ These two decisions provided the substance of what eventually came to be known as

⁶⁵ See Paul Michell, (n. 5), 459; in *R. v. Walton*, 10 C.C.C. 269 (Ont. (Can.) C.A. 1905). a US police officer arrested a Canadian in New York, on the basis of a telegram from the Toronto police. The fugitive was detained in New York until a detective from Toronto took custody of him and returned him to Toronto. The fugitive argued that his arrest and imprisonment were unlawful and a violation of the Canada-US Extradition Treaty. Osler, JA., following Ker and Scott, held that the circumstances by which the fugitive had been brought to trial did not concern the court and did not affect its exercise of jurisdiction over him. In *re Hartnett*, 1 O.R. 2d 206 (Ont. (Can.) High Ct. J. 1973) Canadian authorities lured the applicants into Canada under the guise of having them testify before the Ontario Securities Commission, and then arrested them and charged them with fraud. The applicants argued that the fraudulent misrepresentations by the Canadian authorities violated their right to natural justice and due process of law under the Canadian Bill of Rights. They contended that to allow their trial to proceed would constitute an abuse of process and a circumvention of the extradition process. Hughes, J., held that ‘an illegal arrest does not deprive a Judge of jurisdiction to entertain the prosecution of the victim,’ and denied the applications.

⁶⁶ 119 US 436, 444 (1886); Ker, a US citizen, fled from the US to Peru after being convicted for larceny in Illinois. US issued a warrant for Ker and sent a messenger to Peru to receive Ker from the Peruvian authorities, in accordance with an extradition treaty in force between US and Peru. When he arrived in Peru, instead of presenting the papers to the Peruvian government or making any request of them, the messenger ‘forcibly and with violence’ arrested Ker. Peru did not protest Ker's abduction. The Court held that the manner in which the defendant Ker was brought into jurisdiction did not violate due process and the indictments would not be dismissed solely because of the forcible abduction. Before reaching its holding, the Court also noted that ‘the facts show that it was a clear case of kidnapping within the domains of Peru, without any pretence [sic] of authority under the treaty or from the government of the United States’. However, see Paul Michell, (n. 5), 394, [While Ker is often cited in support of the assertion that the illegal arrest of a defendant is no bar to a court's ability to exercise criminal jurisdiction over him, there is little support for such an interpretation in the case itself. Ker's limitations should be noted. First, the kidnapping was not government-sponsored. As such, it was not attributable to US, no state responsibility arose, and the abduction did not violate customary international law.]

⁶⁷ *Ibid.* 444 [‘The question of how far (defendant's) forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the state court, for the offense now charged upon him, is one which we do not feel called upon to decide; for in that transaction, we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court’.]

⁶⁸ 342 US 519 (1952)

⁶⁹ This was a case involving interstate extradition. Defendant alleged that while he was living in Chicago, he was ‘forcibly seized, handcuffed, [and] blackjacked’ by Michigan police officers and taken to Michigan for trial. He sought his release from a Michigan prison, claiming that his trial and conviction violated Federal law and Due Process and was invalid. Applying the Ker decision, the Court denied Collins relief from his conviction. [‘This court has never departed from the rule announced in [Ker] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will’.] It may be noted that Collins’ case did not implicate national sovereignty or a state's ability to assert rights conferred by a bilateral treaty.

⁷⁰ Jonathan A. Lonner, (n. 8) 1007, [The holding of Frisbie, allowing for personal jurisdiction despite the defendant's having been brought before the court by an abduction, should have no precedential value in this case. The Frisbie abduction was an interstate rather than international abduction. There was no extradition treaty, nor principles of international law, as in Alvarez-Machain case. Thus, other Supreme Court cases involving interstate abductions similarly are not on point here.] See *Lascelles v. Georgia*, 148 US 537 (1893) at 545, [‘[t]o apply the rule of international or foreign extradition, as announced in [Rauscher], to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles.’] See Jianming Shen, (n. 7) 48 [Frisbie, was a domestic case without international significance. It did not involve any issue of international law. It concerned the abduction and removal of an individual from one internal territorial unit of a federal state and his subjection to the jurisdiction of another such internal territorial unit. It is difficult to see any reason why the Frisbie case has frequently been cited along with Ker in the discussion on the exercise of jurisdiction following seizures in violation of international law. Indeed, the so-called Ker-Frisbie doctrine would be better read simply as

the Ker/Frisbie doctrine, which limited due process to the guarantee of a constitutionally fair trial, without regard to the method by which jurisdiction over the defendant was obtained.⁷¹ Based on this doctrine, propriety of prosecution of abducted persons, notwithstanding the illegality of their abduction in international law, has been upheld by the US Supreme Court,⁷² and continually, the Supreme Court has held, regardless of the protests of foreign governments and demands for reparation, that violations of international law do not negate a court's jurisdiction.⁷³ Ironically, the Ker/Frisbie decisions, did not establish the legal principles attributed to them.⁷⁴ The dubious utility of using the Ker/Frisbie doctrine in the jurisprudence of state sanctioned international abductions was brought out by Justice Stevens in *US v Alvarez-Machain*, where he clearly explained that *Ker v Illinois* involved an ordinary abduction by a private kidnapper, or bounty hunter; *Frisbie v Collins*, involved the apprehension of an American fugitive who committed a crime in one state in the country and sought asylum in another state in the country. None of these two cases involved violation of the territorial sovereignty of one country by another country. None involved a state-sanctioned extraterritorial abduction. It is thus a colossal error in application of legal concepts to use either or both of them to create or define a doctrine of what the appropriate response of the court should be in respect of a state-sanctioned extraterritorial abduction.⁷⁵ A well-known case of extraterritorial abduction was the kidnapping of Adolf Eichmann in 1960. He was abducted from Argentina to Israel for trial for his role in the Holocaust. His abduction was without the knowledge or cooperation of officials of the Argentine state. The District Court of Israel acknowledged that Courts in England, US and Israel have constantly held that the circumstances of the arrest and the mode of bringing of an accused into the territory of the State have no relevance to his trial.⁷⁶ The Israeli Supreme Court having considered whether extraterritorial abduction deprived a court of jurisdiction, affirmed the finding of the District

the Ker doctrine, as Frisbie has no bearing on cases involving forcible or fraudulent abductions in violation of international law.]

⁷¹ Candace R. Somers, (n. 32) 217-8

⁷² *Frisbie v. Collins*, (n. 68); *Ker v. Illinois*, (n. 66); *US v. Alvarez-Machain*, (n. 30); R. Stark, 'The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and US Sponsored Kidnapping of Foreign Nationals Abroad', (1993) 9 *Connecticut Journal of International Law*, [113-163] 161

⁷³ Michael G. McKinnon, (n. 29) 1530; *US v. Alvarez-Machain*, (n. 30); *Cook v. US*, 288 US 102, 121 (1933) [Absent a treaty violation, seizures which violate general international law do not affect a court's jurisdiction] *The Richmond v. US*, 13 US (Cranch) 102 (1815) [Seizure of vessels within territorial waters of a foreign power violates territorial sovereignty, but does not void jurisdiction].

⁷⁴ See Aaron Schwabach and SA Patchett, (n. 10) 42-3, 56, [Since *Ker*, the Supreme Court has applied that case only to defeat due process claims of domestic defendants, claiming a lack of personal jurisdiction because of their illegal mode of arrival before a trial court. In short, whether an international law norm of *male captus, bene detentus* exists is yet to be proven. A significant part of state practice cited as evidence for this rule's existence is a distorted reading of *Ker v. Illinois*, which is completely unjustified by its holding or the actual *dicta* on forcible abductions itself. The Ker-Frisbie doctrine lacks international content. The doctrine also bears no relationship to existing international law norms that prohibit unilateral abductions. It is a long-standing principle that US courts should interpret domestic law, including Ker-Frisbie, in a way that it does not conflict with international law. All of these factors compel the conclusion that the Ker-Frisbie doctrine does not preserve courts' jurisdiction to try criminal defendants whose abductions abroad breach international law.]

⁷⁵ *US v. Alvarez-Machain*, (n. 30) 2197, [Justice Stevens' dissenting opinion was joined by Justices Blackmun and O'Connor]; see also Halle Fine Terrion, (n. 47) 645-6 [A legal rule is only as good as facts underlying it. The rule which *Ker* actually set forth was that abduction by a private citizen did not divest US courts of jurisdiction of a US citizen who allegedly committed a crime within US. In the case at bar, however, US government executed the abduction, the accused was a foreign citizen and the alleged crime was committed on foreign soil.]

⁷⁶ *A-G of Israel v. Eichmann*, (1968) 36 ILR 18-276; see also Helen McDermott, (n. 12) 197; see Abdul Ghafur Hamid, 'Jurisdiction over a Person Abducted from a Foreign Country: *Alvarez Machain* case Revisited', (2004) 4 *Journal of Malaysian and Comparative Law*, [The Security Council decided that abduction of Eichmann was a violation of Argentine territorial sovereignty and a violation of international law. Therefore, the rationale in respect of the issue of abduction, of the Israeli court on the basis of *male captus, bene detentus* is rather doubtful. As some writers suggest, the only reasonable argument for the Israeli court seems to be on the basis of universal jurisdiction because the crimes with which Eichmann was charged were, war crimes, genocide and crimes against humanity.] See Jianming Shen, (n. 7) 50 [The uniqueness of the Eichmann case exists in the following facts: First, Israeli authorities alleged that they were not involved in the initial kidnapping, and the abduction was planned for and carried out solely by its private citizens. Second, Israel's apology and Argentina's renouncement of its claim to Eichmann served to strengthen Israel's exercise of jurisdiction over him. Third, and most important, Eichmann's crimes were such that his capture and trial were welcomed at the time. There has been no comparable case worldwide. Neither *Ker* nor the *Alvarez-Machain* case bears any resemblance with, nor did the US Supreme Court in *Alvarez-Machain* seem to have relied on the Eichmann case.] See also FA Mann, (n. 34), 414 [While doubt remains, few have challenged the jurisdiction of the Israeli court to try Eichmann as a war criminal. The Eichmann case was so extreme and unique that a court before which Eichmann appeared could not possibly be expected not to exercise jurisdiction. The singular character of Eichmann's crime rendered exercise of jurisdiction a duty, but at the same time should not in any sense be allowed to supply the standard applicable in other, different cases.] See also Stephan Wilske & Teresa Schiller (n. 24) 225 [The UN Security Council, however, affirmed in the Eichmann case that non-consensual kidnapping by agents of another state violates international law, even when the victim of the kidnapping committed offenses subject to universal jurisdiction. Consequently, the Security Council ordered Israel to make reparations to Argentina.]

Court that jurisdiction could be sustained pursuant to the maxim *male captus bene detentus*.⁷⁷ The Federal High Court in Abuja, on April 8, 2022, validated Mr Kanu's illegal rendition from Kenya by the Nigerian government. The court recalled that it had previously, ordered Mr Kanu's arrest after adjudging him to have jumped bail and truncating his ongoing trial. The court held that there was a bench warrant for the arrest of Mr Kanu; he was a fugitive, and the bench warrant survived until he was brought to court. The court then decided that since Mr. Kanu's arrest in Kenya and repatriation to Nigeria were in compliance with the court's order for his arrest to face trial, his repatriation to Nigeria could not be said to be illegal when there was an existing bench warrant for his arrest.⁷⁸

5. Conclusion

As a general principle, it is the duty of a court to accept jurisdiction of those cases where jurisdiction is present. Thus, a court having jurisdiction of a case has not only the right and the power or authority, but also the duty to exercise that jurisdiction. However, the court, even though seized of jurisdiction, may from considerations of public policy, decline to exercise jurisdiction, especially where the law provides an alternative, cheaper, more convenient and more expeditious forum, better equipped to deal with the matter than the court. The court may in certain types of cases, decline to assume or exercise jurisdiction, such as where proceedings in respect of the same subject-matter are pending outside the court's jurisdiction; where a contract provides that disputes between the parties are to be referred to the exclusive jurisdiction of a foreign court; where the court is being asked to exercise its equitable jurisdiction *in personam* in cases involving foreign land. In these cases, jurisdiction exists, but the court may, due to the peculiar circumstances of the case, refuse to exercise its jurisdiction. In respect of Mr Kanu's case, to the extent that jurisdiction connotes the power of courts to inquire into facts, apply the law, make decisions and declare judgment, the Federal High Court has jurisdiction to continue with Mr Kanu's trial irrespective of the means of bringing him to court. In this regard, its application of the *mala captus, bene detentus* rule was lawful, and in accordance with settled precedents of several nations. Whether the court should from considerations of public policy, have declined jurisdiction over Mr Kanu, due to the mode of bringing him to court, is beyond the scope of the current paper.

⁷⁷ The Trial of Adolf Eichmann, Record of Proceedings in the District Court of Jerusalem, vol. 1, session 1, available at: <<http://www.nizkor.org/hweb/people/e/eichmannadolf/transcripts/Sessions/Session-00105.html>> [Israel's Attorney General stated that the circumstances of the accused's detention, his seizure and his transfer are not relevant for competence and they contain nothing which can affect this competence.] See also Helen McDermott, (n. 12) 71-3; David Cesarani, *Eichmann: His Life and Crimes*, (London: Vintage) 259

⁷⁸ <<https://www.premiumtimesng.com/regional/ssouth-east/522632-ipob-court-validates-repatriation-of-nnamdi-kanu-from-kenya.html>> Accessed 9 December, 2022