Wrongful Capture, Proper Detention? Challenging the Doctrine of *Male Captus, Bene Detentus* in International Law

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I. FACTUAL AND CONTEXTUAL BACKGROUND OF THE STUDY

On 6 January 1995, a fire broke out in the six-storey Doña Juana Apartments, foiling what would have been one of the most devastating terrorist bombings in history.[1] Upon investigation of the burning apartment, Philippine authorities found a massive collection of chemicals used to create explosives, electronic fusing systems, timers, switches, pipe bombs, and a manual written in Arabic on how to build a liquid bomb.[2] Alongside these were documents about the Pope's upcoming visit to Manila a mere six days

1. Doug Struck, et al., *Borderless Network of Terror, Bin Laden Followers Reach Across Globe*, WASH. POST, Sep. 23, 2001, at A01.

2. Matthew Brzezinski, *Operation Bojinka's Bombshell*, TORONTO STAR, Jan. 2, 2002.

after the planned bombing.[3] Shocked, the authorities deduced the nefarious plan at hand: whoever possessed these materials planned to kill the Pope.

Further investigation led to the warrantless arrest of "Saeed," whose real name was Abdul Hakim Murad, found to be one of the plotters to kill the Pope and bomb 11 flights between Asia and the United States (U.S.). The Philippine National Police subjected Murad to "tactical interrogation," hitting him with wooden planks, forcing water into his mouth, and crushing out lit cigarettes on his genitals — after which he confessed to being behind the plot.[4] The Philippines authorities, after the warrantless arrest and cruel treatment of Murad, rendered him to the U.S., where he and two other co-conspirators endured life imprisonment. This entire foiled operation became known as *Operation Bojinka.*[5]

While the world lauded Murad's arrest, it is difficult to ignore the iniquitous circumstances that attended his arrest. Whereas either a warrantless arrest not attended by given exceptions in law, or acts amounting to torture, would deprive Philippine courts of the power to detain and prosecute a suspected criminal,[6] a different rule pervades international law.

"*Male Captus, Bene Detentus*" (MCBD) roughly translated, means "wrongful capture, valid detention." Under this doctrine, a person being tried for an offense against the laws of a State may not oppose his trial by reason of the illegality of his arrest.[7] National courts, when dealing with suspects whose arrest outside of those courts' jurisdictions possess attendant irregularities, have instead considered these problems irrelevant and

3. The Smoking Gun, Transcript of an interview with Abdul Hakim Murad, *available at* http://www.thesmokinggun.com/fall/murad1.html (last accessed May 23, 2011).

4. *See* MARITES D. VITUG & GLENDA M. GLORIA, UNDER THE CRESCENT MOON: REBELLION IN MINDANAO (2000).

5. PETER LANCE, COVER UP: WHAT THE GOVERNMENT IS STILL HIDING ABOUT THE WAR ON TERROR 5 (2005).

6. PHIL. CONST. art. III, § 12.

7. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992) (U.S.); R. v. Plymouth Magistrates' Court: Ex parte Driver, 1986 Q.B. 95 (U.K.) (1986); United States *ex rel* Lujan v. Gengler, 510 F.2d 62 (1975) (U.S.); In Re Argoud (Ct. of Cass.), 45 I.L.R. 90 (1964) (Fr.); Attorney-General v. Eichmann, 36 I.L.R. 277 (1962) (Isr.); Frisbie v. Collins, 342 U.S. 519 (1952) (U.S.); O/C Depot Battalion, R.A.S.C., Colchester Ex parte Elliott, 1 All E.R. 138 (1949) (U.K.); Ker v. Illinois, 119 U.S. 436 (1886) (U.S.); Sinclair v. H.M. Advocate, 17 R.(J.) 38, 43 (1890) (Scot.); Ex parte Scott, 9 B&C 446 (1829) (U.K.).

proceeded with prosecution.[8] This doctrine has at times been regarded as customary by commentators.[9]

The purported customary status of MCBD stems from a canon of lauded, if controversial, cases — mostly domestic. Among these are *Attorney General v. Eichmann*,[10] where Israel kidnapped a former Nazi officer from Argentina and prosecuted him for his role in the Judean genocide.[11] Another is the more recent *U.S. v. Alvarez-Machain*,[12] where the U.S. kidnapped a Mexican citizen who killed Drug Enforcement Agency officials.[13]

The most important recent historical development was the global "war on terror." This movement, led by the U.S. and its allied nations, has resulted in glaringly abhorrent arrests and detentions, from Abu Ghraib prison in mainland Iraq and Guantanamo Bay off the coast of the U.S., and widespread reports of abductions and extra-territorial renditions.[14] These illegal arrests have given States the opportunity to invoke MCBD — not in courts of law, but to frame Executive policy.[15]

This applies even to the Philippine context. The Philippines has been one of the partners of the U.S. in the so-called "war on terror," especially considering the listing of the Abu Sayyaf Group (ASG), the Jemaah Islamiyah (JI), and other groups present in the Philippines in the list of terrorist groups. The Philippines may even play an unwitting role in the detention of wrongfully-arrested international criminals, as it has engaged the U.S. in talks about the possible transfer of Guantanamo Bay prisoners to its shores.[16] This, considered alongside *Operation Bojinka*, means that the legal status of MCBD has profound effects on Philippine foreign policy.

II. HISTORICAL AND CONCEPTUAL FOUNDATIONS

A. *Historical Development of Male Captus, Bene Detentus*

8. ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 218 (2007).
9. *Id.*
10. Attorney General v. Eichmann, 36 I.L.R. 277 (1962) (Isr.).
11. *Eichmann*, 36 I.L.R. at 30.
12. United States v. Alvarez-Machain, 504 U.S. 655 (1992) (U.S.).
13. *Alvarez-Machain*, 504 U.S. at 655.
14. Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1201 (2007).
15. *Id.*
16. Alcuin Papa, *Arroyo-Obama Meeting: Transfer of 'Gitmo' prisoners a talking point*, PHIL. DAILY INQ., July 25, 2009, at A1.

The League of Nations was established in 1919 to enforce collective security, and take steps to grant independence to dependent territories.[17] However, the League of Nations collapsed upon the advent of World War II, and was replaced by the United Nations (U.N.). There are two main reasons why the League of Nations collapsed, as related to the concept of extra-territorial abductions and subsequent prosecution.

First, States were not barred from attacking, conquering, and occupying each other's territories, in accordance with Intertemporal Law, a customary principle in international law which provides that the validity of State actions is adjudged by the existing law at the time.[18] Not until the 20th century has the proscription against aggressive action against State-borders been deemed a *jus cogens* norm,[19] or one that is considered an inviolable peremptory norm that could not be derogated from.[20]

Second, the principle of non-interference was only expressly codified in the U.N. Charter, and not in the League of Nations Charter.[21] The principle militates against State action within the borders of another State's territory, recognizing the violation of the latter's supreme and plenary authority within these borders. States then had less leeway to traverse another State's borders and attempt to exercise sovereign powers within these.

Notwithstanding the prohibition against aggressive action against another State,[22] and respect for sovereign equality of States,[23] more powerful States have continued to deploy force as a foreign policy mechanism. The inviolability of State borders has thus taken its second, important step. This development, however, reached a stumbling block post World War II. In light of crimes against humanity, war crimes, and genocide, States have attempted to put these international criminals to justice. In the absence of a permanent international criminal court at that time, States have resorted to trying these individuals in ad hoc tribunals. The problem that arose is how to obtain jurisdiction over the persons of these suspected international criminals. This problem was best exemplified by the *Eichmann* conundrum.

17. League of Nations Covenant, Preamble.

18. *See* Attorney-General v. Ngati Apa, 3 NZLR 643 (HC) (2003) (N.Z.) & T.O. Elias, *The Doctrine of Intertemporal Law*, 4 A.J.I.L. 285 (1980).

19. *See* U.N. Charter art. 2, ¶ 7.

20. Vienna Convention on the Laws of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331 [hereinafter VCLT].

21. U.N. Charter art. 2, ¶ 7.

22. *Id.* art. 2, ¶ 4.

23. *Id.* art. 2, ¶ 1.

Adolf Eichmann was a former Nazi commander who, after World War II, took up residence in Argentina.[24] Israeli Mossad (Institute for Intelligence and Special Operations) agents entered Argentina, abducted Eichmann, and forcibly transferred him to Israel.[25] This sparked an international issue where States discussed the ramifications of one State's agents entering another's territory to seize and obtain jurisdiction over the person of a suspected international criminal.[26] What arose, therefore, was a seeming mismatch between two ideals: States, on the one hand, sought to respect and protect territorial integrity; on the other hand, they also sought to bring international criminals to justice.

It is at this point that a seeming compromise was reached: the concept of MCBD was retroactively established to allow the striking of a balance between these two principles.[27] International law commentators, have therefore, proclaimed the customary status of MCBD to justify these incursions. MCBD thus served a peculiar purpose at these crossroads of international law. From the Cold War era onwards, some States have assumed this customary status of MCBD and perpetuated abductions.[28]

The next development, one that continues to this day, was the attack on the World Trade Center, at the heart of New York City, which spurred on an international terrorist man-hunt, often involving surreptitious practices.[29] As targets of apprehension are extra-territorially positioned, and are often located in worldwide cells, States — particularly the U.S. and their "coalition of the willing" — have resorted to irregular apprehensions, in light of the now-redeployed concept of MCBD.

The Philippines has not been exempt from participation in these legal developments. In *Operation Bojinka*, Philippine authorities foiled a suspected terrorist plot to kill Pope John Paul II in his 1995 Manila visit.[30] The arrest of the suspect Murad, however, saw several questionable acts. First, the Philippine police arrested him without warrant; second and more importantly, the Philippines, recognizing the infirmity attending Murad's

24. *Eichmann*, 36 I.L.R. at 30.

25. Haggai Hitron, *The Monster is in Handcuffs*, HAARETZ, Jan. 16, 2007.

26. *See* U.N.S.C. Res. 138, U.N. Doc. S/RES/4349 (June 23, 1960).

27. BANTEKAS & NASH, *supra* note 8, at 218.

28. *See Alvarez-Machain*, 504 U.S. at 655; *Ex parte Driver*, 1986 Q.B. at 95; *Lujan v. Gengler*, 510 F.2d at 62; *In Re Argoud*, 45 I.L.R. at 90.

29. *See* Extract from the Report of the Secretary-General on Measures to Eliminate International Terrorism, U.N. Doc. A/58/116 (Jul. 2, 2003).

30. LANCE, *supra* note 5.

arrest, transferred jurisdiction over his person to the U.S., which prosecuted and convicted Murad.[31]

More recently, the Philippines has also engaged the U.S. in talks about the possible transfer of Guantanamo Bay prisoners to Philippine shores.[32] Both of these circumstances highlight the key role the Philippines has played and can continue to play, which may be either of the two-fold infirmities: on the one hand, the international criminals could be captured in Philippine shores and then forcibly transferred to another State, curing any legal problem during arrest; and on the other hand, the criminals may be transferred to the Philippines to have them prosecuted here instead.

B. Review of Pertinent International Law Concepts

1. International Custom

Article 38 of the Statute of the International Court of Justice establishes the sources of international law.[33] The pertinent applicable provision is subparagraph (b), which establishes international custom, a general practice accepted as law, as a source of international law.

International custom admits of two elements: State practice or *usus*, the objective element; and *opinio juris sive necessitatis*, the subjective element. *Usus*, generally, has three elements: duration, generality, and uniformity.[34]

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31. *Id.*

32. *Id.*

33. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute]. This Article provides:

> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> (2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Id.

34. North Sea Continental Shelf (FRG v. Neth.), 1968 I.C.J. 3 (Apr. 26, 1968).

Generality means that the practice is widespread, and uniformity refers to the consistency of practice among States. *Opinio juris* demands that continuous conduct by States is not enough; there must be a clear indication that States, in performing this conduct, perceive a legal obligation to act in such manner.

Therefore, the lack of either *usus* or *opinio juris* militates against the presence of international custom, and challenges the customary status of MCBD. *Usus*, specifically, may be disestablished by attacking any one component of duration,[35] uniformity, or generality.

2. Sovereignty, Jurisdiction, and Enforcement

Jurisdiction refers to particular aspects of States' legal competence, whether territorial, judicial, legislative, or executive.[36] A State may exercise jurisdiction over a person when it can point to some title or basis for its exercise.[37]

Territorial jurisdiction is the most fundamental of all principles of jurisdiction in international law.[38] The territoriality principle holds that the State that has jurisdiction over an offense is that State where it was committed.[39] Provided that territorial jurisdiction takes precedence, as a general rule, international law still provides for alternative principles of establishing jurisdiction. The nationality principle recognizes State exercise of jurisdiction over its nationals, due to that person's allegiance to the State's body of laws. The protective principle allows State exercise of jurisdiction over aliens for acts done in another State when these adversely affect the former State's security.[40] Jurisdiction vests in this principle with reference to the national interest injured by the offense.[41] The universality principle allows States to exercise jurisdiction over non-nationals where the nature of

35. *See North Sea Continental Shelf*, 1968 I.C.J. 3. Duration, however, is not always an essential element of international custom. There are cases of "instant custom," where, notwithstanding short duration of practice, these acts immediately ripen into custom.

36. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser.A) No. 10 (Sept. 10, 1927) & MARTIN DIXON & ROBERT MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 272 (2003).

37. DIXON & MCCORQUODALE, *supra* note 36, at 272.

38. Arrest Warrant of Apr. 11, 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 14 (Feb. 14, 2002) (Guillaume, separate opinion).

39. Edwin Dickinson, *Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935*, 29 AJIL SUPP. 443 (1935) & D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 279 (2004).

40. *Eichmann*, 36 I.L.R. at 30 & LORI DAMROSCH, ET AL., INTERNATIONAL LAW 1134 (2001).

41. Dickinson, *supra* note 39, at 443.

the crime justify its universal suppression.[42] The crimes that trigger this right of universal jurisdiction are the four recognized international crimes within the competency of the International Criminal Court: genocide, crimes against humanity, grave breaches of the Geneva Conventions, and aggression.[43] The passive personality principle allows the home State of a victim of a crime perpetrated in another State to exercise jurisdiction over the non-national suspect.[44] This is the most challenged basis for jurisdiction.

Jurisdiction becomes pertinent by distinguishing between jurisdictional entitlement and enforcement jurisdiction. Where more than one State is entitled to exercise jurisdiction, priority vests on the State that can exercise enforcement jurisdiction.[45] As a general rule, the State that can apprehend a suspect and gain personal custody over him is the territorial sovereign, respecting inviolability of State borders.[46] Thus, jurisdictional entitlement does *not* automatically justify extraterritorial apprehension. The interplay of these concepts shall be relevant in the foregoing discussions.

III. RECONSIDERING THE STATUS OF *MALE CAPTUS, BENE DETENTUS*

Some authors have heralded MCBD as a customary principle of international law. The succeeding discussion still obtains relevance regardless of the status of MCBD in international law. Assuming arguendo that it is not customary, it still exists as a doctrine regularly complied with by certain States.

This Note can be divided into two parts. The First Part, which directly follows this prefatory statement, debunks the customary status of MCBD. The Second Part proposes a new legal framework for handling violations in the apprehension of international criminals, culling the different elements and problem areas uncovered in the discussion of MCBD.

A. Re-examining the Usus of MCBD

Challenging the customary status of MCBD in international law requires the rebuttal of the presence of *usus* or *opinio juris sive necessitates*. Without these, international custom could not arise.

Usus or State practice requires sufficient duration, uniformity, and generality to amount to international custom.[47] Since MCBD specifically deals with prosecution of suspected international criminals notwithstanding prior unlawful or extraterritorial arrest, then most State practice regarding

42. Restatement (Third) of Foreign Relations Law § 404 (1987).

43. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE ICC 21 (2001).

44. *Yunis*, 924 F.2d at 1091-92.

45. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. Ser. A No.10 (June 27, 1927).

46. M. CHERIF BASSIOUINI, INTERNATIONAL CRIMINAL LAW 298 (1986).

47. *North Sea Continent Shelf*, 1968 I.C.J. at 3.

MCBD may be gleaned from judicial decisions. While as a general rule, judicial decisions are mere subsidiary means to establish the rules of international law,[48] these can also amount to *usus*.

The difficulty with establishing or debunking international custom, is that most customs occur retroactively, through the lens of commentators, who cull international cases and *post facto* determine the existence of customary law through opinions in learned treatises. The danger to be avoided here is the possibility of a "spiral of silence." Selective compilation of cases may lead to systemic exclusion of certain decisions, developing an illusion of consistency or generality in State practice. MCBD has been the product of such jurisprudential pruning — whether deliberate or accidental — leading to its debatable customary status.

Three foundational points shall be made: first, there is no widespread State practice of MCBD, notwithstanding the panoply of cases upholding it; second, there are silenced contrary decisions denouncing MCBD; and third, even internal practice in States abiding by MCBD has been inconsistent.

B. Dearth of Widespread State Practice

The Author submits that there is no widespread State practice of MCBD. This is a foreign policy strategy exercised by only a few States, shedding doubt as to the widespread acceptance of this practice. There are two points to consider. First, this Note does not claim that in examining *usus*, all States must be taken into account at all times, as a general rule. As all States have the capacity to assume jurisdiction over an illegally or extraterritorially abducted individual, then State practice by *most*, if not all States must be considered. Second, while this Note shall go further in depth in discussing the *ratio* behind the cases applying MCBD, the discussion shall cursorily examine the actors involved. This serves to outline the extent of State practice, and whether it is sufficiently broad to warrant customary status.

The seminal case evincing MCBD is *Ker v. Illinois*.[49] Commonly discussed alongside *Ker* is *Frisbie v. Collins*.[50] Taken together, both cases compose the *Ker-Frisbie* doctrine, which has been cited as a customary doctrine allowing for the prosecution of a suspected criminal in spite of the illegal arrest, which, in both these cases, went against extradition laws.[51]

48. ICJ Statute, *supra* note 33, art. 38, ¶ 1 (d).

49. *Ker*, 119 U.S. at 436.

50. *Frisbie*, 342 U.S. at 519.

51. Michael Cardozo, *When Extradition Fails, Is Abduction the Solution?* 55 AJIL 127, 135 (1961).

Subsequent cases include a trio of U.S. cases where government authorities have been involved in proscribed practices, including, *inter alia*, illegal surveillance, torture, and extra-territorial rendition.

The first is *U.S. v. Toscanino*, which involved the kidnapping of an Italian national suspected of violating U.S. narcotic laws.[52] The second is *U.S. v. Verdugo-Urquidez*, which involved the kidnapping of a Mexican citizen suspected of dealing drugs.[53] The third is *Alvarez-Machain.*

Finally, a few more cases that bear emphasizing: *Ex Parte Driver* held that courts had no power to inquire as to the circumstances in which a person was brought into its jurisdiction, for the purpose of refusing to try him.[54] This case dealt with British authorities exercising jurisdiction over a suspect who was in Turkey. Without benefit of an extradition treaty or agreement, Turkish authorities placed the suspect on a plane bound for the United Kingdom. While this British case did not expressly recognize MCBD, its doctrinal ruling amounted to the same result. Also, as discussed, in *Eichmann*, Israeli agents entered Argentina and abducted Eichmann, a former Nazi commander, forcibly transferring him to Israel.[55]

Out of these seven cases, five were conducted by the U.S., and one by Israel, a key ally. The sole British case in this sampling did not even expressly recognize MCBD; it only provided a doctrine yielding the same result. While *usus* does not result merely from American State practice, the dearth of cases dealing with the same doctrine from other jurisdictions shows *usus* that falls short of widespread State practice. Admittedly, there is no quantitative measure needed to fully establish widespread State practice, but the practice of three States, or slightly more, still misses the mark.

C. Dissenting Cases

International commentators play a large part — intentionally or accidentally — in establishing a spiral of silence that attends the construction of international custom. Since there is no central body that determines when custom arises, most of it is evinced *post facto* with the assistance of learned treatises from commentators. The problem results when State practice contrary to the established custom are not discussed nor merely recognized.

This Note shall outline as best as it can the pertinent cases not often discussed by commentators to shed greater light on the actual status of MCBD as international custom.

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52. United States v. Toscanino, 500 F.2d 267, 267 (1974) (U.S.)

53. United States v. Verdugo-Urquidez, 939 F.2d 939, 1341 (1990) (U.S.).

54. *Ex parte Driver*, 1986 Q.B. at 95.

55. Hitron, *supra* note 25.

In *Bennett v. Horseferry*,[56] the Queen's Bench, in the United Kingdom, examined whether it can prosecute an individual illegally kidnapped from South Africa.[57] While recognizing *Alvarez-Machain* and the *Ker-Frisbie* doctrine, the Queen's Bench held the opposite. The Court said:

> There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take [cognizance] of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.[58]

In this Case, therefore, the British court expressly rejected MCBD and the *Ker-Frisbie* doctrine. It also recognized the relationship between the executive and the judiciary, where abuses of the former would divest the latter of jurisdiction. A possible explanation, however, for this contrary ruling is the British court's recognition that *Alvarez-Machain* and the other decisions considered involved constitutional violations, which divested courts of jurisdiction.[59] MCBD, therefore, may be deemed as a doctrine applicable when *there has been a constitutional violation*. Since Britain, has no constitution, the magistrate could have rejected MCBD's application solely on the ground that no parallel application can be evinced between the two different legal systems.[60]

Another case is *State v. Ebrahim*, [61] which was decided by the South African Courts.[62] This Case involved a South African suspected of being involved with the right-wing *Umkonto We Sizwe* faction of the African National Congress. He was abducted from Swaziland and brought before South African Courts for prosecution. Said Court refused to exercise jurisdiction over Ebrahim, citing protection of "decency, security, and liberty" as underlying reasons.[63] The Court also recognized the *Ker-Frisbie*

56. Bennett v. Horseferry, 1 A.C. 42, 67 (1994).

57. *Id.*

58. *Id.* at 67.

59. *Id.* at 59.

60. The magistrate simply said that due to the constitutional violation allegation, the *Alvarez-Machain* doctrine does not apply, without explaining why not.

61. State v. Ebrahim, 21 I.L.M. 888 (1991) (S.A.).

62. *Id.*

63. *Id.* at 898.

doctrine and the *Toscanino* decision; however, it refused to comply with their doctrine. In doing this, *Ebrahim* all but expressly rejected MCBD.

The presence of these cases, involving two different States brings confusion to the purportedly well-settled MCBD doctrine. Often, it can be understood that for the sake of consistency and simplicity, treatises on MCBD fail to acknowledge these cases' existence. However, it is now of greater imperative — considering the untrammeled deployment of MCBD — to rediscover these cases evincing contrary State practice. In doing so, then MCBD's status as international custom is placed in great jeopardy.

D. Inconsistent Practice

Toscanino, actually evinces some inconsistency in U.S. *usus* as regards MCBD.[64] In this case, Toscanino was abducted in Uruguay by U.S. authorities through illegal electronic surveillance, and then tortured and rendered to the U.S. for prosecution. The abduction was attended with several cruel, inhuman, and degrading acts, such as the dousing of the suspect's orifices with alcohol and the electrocution of his genitals. While the U.S. Court did not divest itself of jurisdiction *per se*, it remanded the case for determination of whether these acts "shocking to the conscience" were factual or not. Proving these was deemed to be sufficient ground to prevent further prosecution of the suspect.

This "shocking the conscience" test seems to run counter to MCBD, which does not regard the illegality of arrest as a reason to prevent a court from taking cognizance of the controversy. However, by adding an exception here, of acts that shock the conscience, the Court recognized that there are certain acts that are too egregious to ignore, and effectively deny the courts from attaining jurisdiction. This inconsistent practice shows lack of uniformity in the deployment of MCBD as a doctrine.

More importantly, the U.S. itself, which, as discussed above, is the strongest proponent of MCBD, is the same jurisdiction that provided the *Toscanino* exception. This shows lack of uniformity, even within a single jurisdiction. This same reservation as regards MCBD can be found in the aforementioned case of *Verdugo-Urquidez*.[65] Therefore, when there is much fluctuation, discrepancy, and contradiction, even within a single jurisdiction, there can be no strongly discernable international custom.

In sum, the discussion of MCBD in learned treatises by highly qualified publicists is often cursory and assumptive. However, considering three factors — that most *usus* stems from the same States, the silenced

64. *Toscanino*, 500 F.2d at 267.

65. *Verdugo-Urquidez*, 939 F.2d at 1341.

contradictory decisions, and internal dissents among leading proponent States — shows that MCBD's customary status is not easily proved, nor established.

E. Re-examining Opinio Juris Sive Necessitatis of MCBD

The present discussion now seeks to disestablish MCBD as international custom by debunking the second element of international custom. MCBD has not attained the status of international custom because there is no *opinio juris sive necessitates*, or simply, *opinio juris*.

First, States have acceded to MCBD, not because of any perceived legal obligation, but in due deference to the executive branch.[66] Thus, despite the "hands-off" approach by some tribunals, they have not accorded any legal imprimatur on MCBD. *Opinio juris*, in contrast, as discussed, arises when State practice is done not out of mere convenience, deference, or comity, but when States perceive a specific legal obligation arising from the performance of the act.[67] One could not establish a legal obligation arising from MCBD when it stems purely from deference to the executive branch.

Second, courts in the landmark cases supposedly evincing customary recognition of MCBD did not intend to make general pronouncements, beyond the exceptionally applicable facts on those cases. To prove this point, this Note shall examine four of the landmark MCBD cases, and peruse the *ratio* provided by their respective tribunals.

It must be again stated that MCBD first stemmed from the domestic U.S. *Ker-Frisbie* doctrine.[68] The first two cases to be examined, therefore, are those composing this primordial idea in international law.

F. Ker v. Illinois[69]

Ker was decided in 1886, prior to the denouncement of force as a legal foreign policy tool. In the Case, a detective of the Pinkerton Agency was hired by the U.S. government to apprehend a larcenist, Frederick Ker. Ker had fled to Peru, and the detective had all the necessary extradition papers to arrest him and transfer him to the U.S. However, since there was no Peruvian official to meet his request, due to the Chilean invasion of Peru,

66. *See* M. CHERIF BASSOUINI, INTERNATIONAL CRIMINAL LAW 298 (1986).

67. International Law Association (ILA), London Conference: Final Report of the Committee-Statement of Principles Applicable to the Formation of General Customary international law, *available at* http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376 (last accessed May 23, 2011).

68. Cardozo, *supra* note 51, at 135.

69. *Ker*, 119 U.S. at 436.

the detective captured Ker instead and placed him in a vessel headed for the U.S. He was then prosecuted.

Here, there was no official government involvement in the manner of arrest, which was solely decided by the agents who found themselves in war-torn Peru. The abduction of Ker, therefore, arose from exigent circumstances, and was not a legally-sanctioned official act of the State. *Opinio juris*, in contrast, must arise from State practice, and not from purely private acts, which apply here. This Note, however, is not oblivious to the possibility of State adoption of these acts, which would transform them from purely private to public,[70] although the Case is silent as regards this.

G. Frisbie v. Collins[71]

While *Frisbie* was decided post-World War II, this was a purely domestic affair — the suspect was arrested in Illinois and then transferred to Michigan. This involved two different jurisdictions within the U.S. The defense interposed to challenge the court's jurisdiction was lack of due process. A suspected criminal was kidnapped by U.S. authorities from Chicago, and then prosecuted in Michigan. Here, the Supreme Court upheld the validity of the prosecution notwithstanding allegations of kidnapping and lack of due process in the suspect's capture.

This exposes the actual legally-efficacious reason behind MCBD. The *Ker-Frisbie* doctrine recognized the guarantee of a constitutionally fair trial as a condition *sine qua non* to MCBD; thus, MCBD in itself is not the international law doctrine, but is just a possible due process exception cured by a constitutionally fair trial.

Inspecting *Ker* and *Frisbie* shows that commentators have derived a generally-applicable rule of international law from rationally-infirm cases. *Ker*, on the one hand, was a special exigent circumstance and a purely private abduction; *Frisbie*, on the other hand, touched upon issues of due process and constitutionality — not MCBD *per se* — and was an internal affair.

H. United States v. Alvarez-Machain[72]

Humberto Alvarez-Machain was a Mexican suspected of kidnapping, torturing, and murdering a drug enforcement agent Enrique Salazar. Relying on MCBD (as explicated in *Ker-Frisbie*), U.S. agents entered Mexico and kidnapped Alvarez-Machain, over the protests of Mexican officials. *Alvarez-Machain* specifically invoked the *Ker-Frisbie* doctrine to justify the forcible

70. *See* Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3. (May 24, 1980).

71. *Frisbie*, 342 U.S. at 519.

72. *Alvarez-Machain*, 504 U.S. at 655.

abduction, rendition, and prosecution of a Mexican citizen who killed Drug Enforcement Administration agents. This was one of the first such indications of *Ker* and *Frisbie* being cited together as establishing a general rule as to abductions and subsequent prosecution.

The central *ratio* behind this case was that there was *no* breach of an extradition treaty in cases where States resorted to forcible abduction instead. When there is extradition treaty, as in the case of the U.S. vis-à-vis Mexico, then there is no conventional obligation violated. Pertinently, there was no mention of MCBD as being international custom *per se*, as the issue was purely centered on conventional law.

1. Attorney-General v. Eichmann[73]

This case, meanwhile, was decided under Israel's jurisdiction, where the U.S. *domestic Ker-Frisbie* doctrine could not bind, and could merely persuade.

Notably, the case involved a former Nazi commander, whose acts constituted the nadir of international criminal law. The *nature* of Eichmann's acts, therefore, was exceptional. It is questionable whether whatever exigent measures taken to capture and prosecute Eichmann are generally applicable to perpetrators of less serious crimes. Therefore, the *Eichmann* conundrum is similar to the *Ker* situation: both these cases contemplated special circumstances that could have limitedly justified their rulings, but did not intend any doctrine to hold for general situations. The lack of the latter would defeat the very concept of *opinio juris*, States having acted in emergency measures here, and not a legal duty.

J. State Reactions

States' reactions to MCBD have been mixed. Some States continued to abide by this doctrine, as evinced in further extra-territorial kidnappings. This is best exemplified by the kidnapping of the Achille Lauro hijackers[74] and Israel's abduction of Lebanese Shiite cleric Sheik Obeid.[75] Several have expressly denounced extra-territorial rendition and the subsequent prosecution.[76]

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73. *Eichmann*, 36 I.L.R. at 277.

74. G.V. Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158 (1987).

75. Joel Brinkley, *Israeli Commandos Seize Leader of a Pro-Iran Group in Lebanon*, N.Y. TIMES, Jul. 29, 1989, at A1.

76. Steven M. Schneebaum, *The Supreme Court Sanctions Transborder Kidnapping in United States v. Alvarez-Machain: Does International law Still Matter?* 18 Brook. J. Int'l L. 303 (1992) & Gooding, *supra* note 74, at 158.

However, in spite of these mixed reactions, which evince inconsistent State practice, and in spite the exceptional application of cases holding to the contrary, commentators have still categorically established that MCBD exists as a concept in customary international law.

K. Some Final Considerations and Pursuing a New Framework

At this point, it becomes increasingly apparent that MCBD's status as international custom is questionable, at best. Apart from the aforementioned discussions on the lack of widespread State practice and the existence of dissenting cases, although silenced, a bigger problem surfaces: there is no single consistent iteration of the "principle" of MCBD. A quick survey of the cited cases show different versions of the principle sprouting up: it has been applied internationally in most cases, but domestically in *Frisbie*; only some versions consider exceptional circumstances, like *Toscanino*; only a few also touch upon the approach suggested by *Eichmann*, where court processes are deemed as curative of executive violations; even the crimes involved seem to differ (international crimes like genocide in *Eichmann*, vis-à-vis "mere" homicide in *Alvarez-Machain*).

The approach demanded right now, since MCBD is not customary — nor is there any MCBD *per se* to speak of — is to identify all these elements that would have to be considered if there should arise any new framework in assessing cases involving forcible abduction and other violations in the apprehension of criminals. These elements are:

(1) First element: What is the crime suspected of being committed, and where is the suspect currently found? This element, with two sub-elements, considers whether there is a question of international law in the first place.

(2) Second element: Is there an extradition agreement, and if there is, what are its terms? This element shall determine the available alternatives and processes available to the abducting State. This also determines the consequences of pursuing any infirm apprehension, in violation of such treaty.

(3) Third element: Who is the actor forwarding the protest — a State or the violated individual? This precedes an in-depth discussion of the present international framework for individuals as subjects in international law, and the States empowered to take up claims on behalf of wronged individuals.

(4) Fourth element: What is the act purportedly amounting to a violation? The two most common infringing acts, as seen in the above discussion, are extra-territorial abduction and torture or other cruel, inhumane, and degrading treatment

(CIDT). The act committed controls the attendant consequences, as well as the whether there are exigent circumstances that may excuse these acts in certain instances.

(5) Fifth element: What are the exigent circumstances behind the infringing act, and did the infringing act exceed what was called for by the surrounding circumstances? As will be further discussed, this is the most important part of the proposed framework, and will determine whether there was a violation in the first place. It must be noted, however, that since this paper has to this point challenged whether MCBD exists as a doctrine in the first place, that the burden of proving exigent circumstances is on the shoulders of the authorities committing the infringing act. There is no more customary doctrine that the clothe these authorities' acts with immediate validity.

(6) Sixth element: What was nature of the court procedure involved? This determines whether the procedure could be deemed to cure any infirmities in the apprehension, as posited by *Frisbie*.

IV. A NEW LEGAL APPROACH TO SITUATIONS ATTRACTING *MALE CAPTUS, BENE DETENTUS*

By concluding that MCBD could not be treated as customary international law, the necessary implication is that the current policy of tolerating infringing apprehensions of suspected international criminals wholesale due to existing law finds no ground. Thus, there is demand for a new legal framework, which would take into account the situations and circumstances accounted for in the cases where MCBD was either deployed or rejected, and help deduce the proper legal approach to solving problem areas.

A. The Proposed Framework

This Note shall first lay down the proposed framework, divided into six steps, and then discuss each step's components in depth. This structure shall therefore help provide an overarching guide first, which shall shape all further discussion of particular problem areas. Thus, all justification as to why particular questions are asked and how particular circumstances are resolved *shall be provided in the subsequent discussions following this Chapter*. This portion of the discussion, therefore, is a mere preface that provides the conclusion first, and from which inductive reasoning on the particular components shall surface.

First: Nature of crime and physical location of the suspect

The two main questions to be answered in the first place:

(1) Is there a person suspected of committing an *international crime*, found *anywhere in the world*?[77]

(2) Is there a person suspected of committing a *non-international crime*, found *in another jurisdiction*?

If both questions are answered by *no*, meaning, neither situation is applicable to the particular situation at hand, then the framework disengages. A negative response to both questions would mean that the crime committed was a mere domestic or non-international offense, and the suspected perpetrator is found within the territorial jurisdiction of the apprehending State. This takes the crime outside the ambit of international law, except in certain rare exceptions.[78] However, a positive response to either of the two questions means that the framework applies to such situation, should any infringing activity occur therein.

Second: Existence of an extradition agreement

The next questions to be asked are:

(1) If there was extraterritorial apprehension in the situation, was there an existing extradition agreement between the apprehending State and the State where the apprehension took place?

(2) If there was, does any provision in the extradition treaty excuse or tolerate extra-territorial situations in particular situations?

If there was an existing extradition treaty which does not allow for any exceptional extraterritorial rendition, then any apprehension in that tenor should entail the apprehending State *to divest itself of jurisdiction over the suspected criminal*. If the apprehending State refuses to do such, then the offended State should have recourse to demand the apprehended individual,

77. One issue that shall be resolved in the succeeding Chapter is whether terrorism is considered an international crime — a particularly controversial issue, since there is no universal definition of terrorism, or consensus as to which acts constitute such crime.

78. An example is a violation of the Convention Against Torture, where a State, apprehending a suspected perpetrator of a domestic crime within its own jurisdiction, subjects the person to water-boarding or cigarette burning. Another is a violation of the ICCPR's provisions on arbitrary deprivation of liberty. Nevertheless, oftentimes these violations by domestic authorities are punishable administratively or criminally through local legislation, and so resort to international instruments is rare in these situations. *See generally* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter CAT].

under its right to restitution in the international law Commission's Articles on State Responsibility.[79]

If there was no existing extradition treaty, an extradition treaty that allows for exceptional circumstances triggering extraterritorial apprehension, or no other proper recourse for the apprehending State to obtain jurisdiction over the person suspected of committing the crime, then one should move to the next step in the framework.

Third: Protesting subject

The third step is an expansion of which subjects may launch a protest. As previously discussed, the only State that may currently launch a protest is the State in which the infringing apprehension took place.[80] The proposed framework shall expand the subjects who may challenge an apprehension to three actors:

(1) The State in which the infringing apprehension took place,

(2) Any State that may exercise diplomatic protection over the individual whose rights were infringed,

(3) The individual him or herself.

The framework expands the list of subjects allowed to protest any infringing apprehension by including two other subjects. First is a State entitled to exercise diplomatic protection over the individual, consistent with the nationality of claims, under the Articles on State Responsibility.[81] Second is the individual him or herself, in concordance with the development in international law allowing the individual to have international personality in particular circumstances.

Fourth: Nature of the act involved

This Part is less stringent and less well-defined that the other sections in the framework, since the natures of acts constituting infringing apprehension are unpredictable and may come in multiple forms. No framework may adequately anticipate all forms of these acts. In as such, this research shall content itself in discussing the two broad categories in which acts that led to the cases discussed above fall under:

(1) Extraterritorial apprehensions;

79. International Law Commission, Articles on State Responsibility, art. 35, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Annex, Agenda Item 162, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

80. *Eichmann*, 36 I.L.R. ¶ 47.

81. Articles on State Responsibility, *supra* note 79, art. 44.

(2) Torture or other cruel, inhuman, and degrading treatment.

These two broad categories comprise majority of the cases discussed above. This categorization is helpful, since the nature of the act involved further influence possible exigent circumstances that may justify their commission, or whether these exigent circumstances exist at all. Broadly, extraterritorial apprehensions not attended by violence or cruelty constitutes a violation of a person's rights,[82] but is not *jus cogens*, while the international crime of torture is arguably *jus cogens*.[83] Thus, there is less leeway allowed if the apprehension involves torture, since *jus cogens* allows no derogation.[84]

Fifth: Determination of exigent circumstances

There are three relevant components of this Portion of the framework.

One — When it has been brought to the court's attention by the individual, or the State entitled to exercise diplomatic protection or protest the violation of its territorial integrity, then the court *must demand for an explanation of exigent circumstances calling for such infringing act* from the authorities involved. Thus, this procedure is preliminary question that calls for judgment by the tribunal, whether it can continue to exercise jurisdiction over the case.

Two — The burden of explaining exigent circumstances is incumbent upon the apprehending officers.

Three — The following scenarios may arise, along with their concomitant legal implications:

(1) If there are no exigent circumstances calling for the infringing act, then the court must divest itself of jurisdiction;

(2) If there are exigent circumstances, but the arresting authorities' infringing acts exceeded what was necessary, then the court may maintain jurisdiction, but the authorities are subjected to punitive measures, depending on available remedies; *Provided*, however, when the gravity of excess is clearly egregious, the court must divest itself of jurisdiction.

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82. International Covenant on Civil and Political Rights art. 9, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

83. Special Rapporteur to the Commission on Human Rights Resolution, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1986/15, ¶ 3 (Feb. 19, 1986) (by P. Koojimans) [hereinafter First Report of the UN Special Rapporteur on Torture].

84. Chapter VIII shall include a discussion on the "Ticking Time Bomb" scenario, and whether this may be a rare exception to such *jus cogens* norm.

(3) If there are exigent circumstances, and the arresting authorities' acts are proportionate to the situation, then the court shall maintain jurisdiction and continue exercising its power to hear the case.

It is only under the third circumstance where the classical "*male captus*" situation applies. The first two situations suggest different outcomes: for the first, the court completely divests itself of jurisdiction, similar to the local rule in Philippine law; for the second, the court may hear the case, but the authorities are without impunity.

Sixth: Examination of court procedure

The two relevant questions here are:

(1) Was there a protest launched by the State or individual, under part five of the framework?

(2) Did information about infringing acts attending the arrest surface during the trial itself?

This Section of the framework only applies when there is no protest launched by the State possessing such right or by the individual apprehended. Since there is no preliminary process in which the infringing acts and the exigent circumstances may be weighed, the facts attending the arrest would otherwise surface during the trial itself. Thus, the Sixth Part of the framework merely allows the court to determine whether the procedure in the trial itself "cured" whatever infirmities occurred in the arrest. This hinges on the doctrine laid down in *Frisbie*[85] that court processes may cure procedural infirmities.

B. Summary of the Proposed Framework

The simplified version of the framework is as follows:

(1) Determine the nature of the crime and physical location of the suspect, and either of two scenarios must exist:

(a) Is there a person suspected of committing an *international crime*, found *anywhere in the world*?

(b) Is there a person suspected of committing a *non-international crime*, found *in another jurisdiction*?

(2) Existence of an extradition agreement:

(a) If there was extraterritorial apprehension in the situation, was there an existing extradition agreement

85. *Frisbie*, 342 U.S. at 519.

between the apprehending State and the State where the apprehension took place?

(b) If there was, does any provision in the extradition treaty excuse or tolerate extra-territorial situations in particular situations?

(3) The following subjects may protest the infringing apprehension:

(a) The State in which the infringing apprehension took place,

(b) Any State that may exercise diplomatic protection over the individual whose rights were infringed,

(c) The individual him or herself;

(4) Examine the nature of the act involved, and whether derogations or other exceptional circumstances are allowed and/or recognized:

(a) Extraterritorial apprehension

(b) Torture or other Cruel, Inhuman, and Degrading Treatment

(c) Others

(5) Tribunal examination of apprehending officers' justification for the act, and deciding in the following manner:

(a) If there are no exigent circumstances calling for the infringing act, then the court must divest itself of jurisdiction;

(b) If there are exigent circumstances, but the arresting authorities' infringing acts exceeded what was necessary, then the court may maintain jurisdiction, but the authorities are subjected to punitive measures, depending on available remedies; Provided, however, when the gravity of excess is clearly egregious, the court must divest itself of jurisdiction.

(c) If there are exigent circumstances, and the arresting authorities' acts are proportionate to the situation, then the court shall maintain jurisdiction and continue exercising its power to hear the case.

(6) Examine the court procedure, in case no protest was forwarded by the individual or the State, and whether these can cure procedural infirmities brought about by the apprehension:

(a) Was there a protest launched by the State or individual, under part five of the framework?

(b) Did information about infringing acts attending the arrest surface during the trial itself?

V. NATURE OF THE CRIME AND PHYSICAL LOCATION OF THE SUSPECT

The first step in the new framework in approaching cases formerly attracting the application of MCBD is to establish two important facts affecting jurisdiction and States' approach to the problem.

As previously stated, the two main questions that must be answered are:

(1) Is there a person suspected of committing an *international crime*, found *anywhere in the world*?

(2) Is there a person suspected of committing a *non-international crime*, found *in another jurisdiction*?

If both questions elicit a negative response, meaning neither situation exists, then the rest of the framework does not apply to the situation at hand. Conversely, a positive response to either of the two questions means that the framework applies to such situation, should any infringing activity occur therein.

A. "International Crime"

In the framework, should the suspect commit an international crime, regardless of his or her present physical location in relation to the apprehending State, the rest of the framework applies.

The term "international crime," in recent years, has seen an increasingly crystallized definition. As per the International Criminal Court's statute, the four international crimes that fall within its jurisdiction are: (1) genocide, (2) grave breaches of the Geneva conventions, (3) crimes against humanity, and (4) aggression.[86] This is the same *exclusive* list of international crimes that the proposed framework shall apply to.

There are two relevant interlocking concepts proffered in this particular idea. First is the theory behind international crimes. The preamble of the Rome Statute provides the foundation of the International Criminal Court:

86. Rome Statute of the International Criminal Court, July 1, 2002, art. 5, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes, even those outside the very State itself.[87]

Second is the *exclusivity* of the list of crimes to which such universal jurisdiction applies. Admittedly, the Rome Statute does not indicate whether the four listed international crimes constitute an exclusive list. The Rome Statute only provides for which crimes the International Criminal Court may exercise jurisdiction over, but does not explicitly provide that these are the only international crimes.[88] However, the idea that universal jurisdiction only applies to the four international crimes of genocide, crimes against humanity, war crimes, and aggression, and not any other international crime like cross-border drug trafficking, finds ground in the *Arrest Warrant*.[89] In the case, the International Court of Justice discussed jurisdiction over international crimes by explicitly referring to "*crimes against humanity and war crimes*" only and not "international crimes" as a general category.[90] By inference, the International Court of Justice excluded other *international crimes* like drug trafficking or human trafficking, which although occurring in a cross-border scale, are distinct from the more specific list of "true" international crimes provided in the Rome Statute. It is unclear why the case did not mention genocide, although it may be argued that being a widespread and systemic crime, it falls under the broader definition of crimes against humanity.[91] The crime of aggression was not mentioned in the Case, because there is no existing definition for such crime in international law as of the moment.[92]

In light of the pronouncement made in *Arrest Warrant*, the proposed framework shall refrain from expanding the list provided in the Rome Statute and thereby limit the assessment of a tribunal's adjudicative jurisdiction over a crime *occurring anywhere in the world*, if it is one of the four international crimes provided.

The framework applies to these crimes even when they occur within the domestic borders of the very apprehending and adjudicating State itself. This idea stems from the very wording of the Rome Statute, where it establishes jurisdiction over the four international crimes, without reference to the

87. *Id.* Preamble. *See generally* SCHABAS, *supra* note 43 (However, as will be discussed later, there is a difference between enforcement jurisdiction and adjudicative jurisdiction.).

88. Rome Statute, *supra* note 86, art. 5.

89. *See Arrest Warrant*, 2002 I.C.J. at 121.

90. *Id.*

91. Rome Statute, *supra* note 86, art. 7.

92. William Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J. 907, 911 (2003).

physical location of the suspect.[93] Thus, international law applies to assess the validity and implications of the apprehending State's acts, without regard or reference to geographical location. The nature of the act involved already triggers the application of international law.

B. Excluding Piracy Jure Gentium from this Framework

Piracy *jure gentium* has always been regarded as the only "true" international crime, and at the very least, it is certainly the oldest.[94] The framework finds it proper to exclude piracy *jure gentium* by recovering the historical treatment of this crime. Traditionally and properly, piracy *jure gentium* has been deemed as a crime that is committed in the high seas.[95] Thus, not falling within any domestic jurisdiction, any State may exercise enforcement jurisdiction and thus apprehend the offending pirates. It is for this same reason that the framework finds no need to comprise piracy *jure gentium* — there is no question that any State may apprehend pirates and adjudicate the crime of piracy; thus, there is no controversy as regards enforcement and adjudicative jurisdiction.[96] Therefore, more than the nature of the act of piracy itself, it is the *geographical* location of the act that gives it international color, unlike the four crimes mentioned prior.

The other historically-pertinent development as regards piracy is the expansion of the phrase's application even to territorial seas. This gave rise to the suggestion that piracy is simultaneously an international and a domestic crime, especially since many States also have domestic laws that punish this act.[97]

C. Terrorism as "International Crime"?

Another controversial issue is whether terrorism may be considered an international crime. In the post-September 11 context, extra-territorial rendition and prosecution have often been applied to suspected international terrorists.[98] As previously discussed as well, justification of MCBD's application has been grounded on the egregious nature of the crimes which were prosecuted; as in genocide in *Eichmann*.

93. Rome Statute, *supra* note 86, art. 5.

94. Edwin Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 336 (1925).

95. LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW 277 (1921).

96. Dole v. New England Mutual Marine Insurance, 2 Cliff. 394, 417 & 418-19 (1st Circ. 1864) (U.S.).

97. Dickinson, *Is the Crime of Piracy Obsolete?*, *supra* note 94, at 335.

98. Sadat, *supra* note 14, at 1201.

Taking into account both factors leads us to discuss whether the proposed framework should include terrorism as an international crime that invokes the application of the framework, regardless of the suspect's physical location. Terrorism in itself has not yet been established as an international crime *per se*, much less one calling for universal jurisdiction.[99] While there have been several G.A. Resolutions regarding the suppression of terrorism, there is still no universally-established definition of terrorism.[100] General Assembly Resolutions touching on the matter have been circumlocutory and tautological, at best.[101] In fact, rather than define and prohibit terrorism *per se*, existing conventions resort to prohibiting particular acts recognized as "terrorism" without expressly defining a crime.[102] Terrorist acts generally fall into other established categories of crime, notwithstanding a politically-

99. Thomas M. Franck, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 A.J.I.L. 69 (1974).

100. Kalliopi K. Koufa, *Specific Human Rights Issues: New Priorities, In Particular Terrorism*, Additional Progress Report, ¶ 44, U.N. Doc.E/CN.4/Sub.2/2003/WP.18 (Aug. 8, 2003).

101. Declaration on Measures to Eliminate International Terrorism of 1994, G.A. Res. 57/27, ¶ 10, U.N. Doc. A/RES/57/27 (Jan. 15, 2003); G.A. Res. 56/88, U.N. Doc. A/RES/56/88 (Jan. 24, 2002); G.A. Res. 55/158, ¶ 9, U.N. Doc. A/RES/55/158 (Jan. 30, 2001); G.A. Res. 54/110, ¶ 7, U.N. Doc. A/RES/54/110 (Feb. 2, 2000); G.A. Res. 53/108, ¶ 8, U.N. Doc. A/RES/53/108 (Jan. 26, 1999); G.A. Res. 52/165, ¶ 7, U.N. Doc. A/RES/52/165 (Jan. 19, 1998); G.A. Res. 51/210, Annex, ¶¶ 7-8, U.N. Doc. A/RES/51/210 (Jan. 23, 1996); G.A. Res. 50/53, ¶ 2, U.N. Doc. A/RES/50/53 (Jan. 29, 1996); S.C. Res. 1566, U.N. SCOR, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004); Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, art. 5, U.N. GAOR, U.N. Doc. A/RES/52/164 (Jan. 12, 1998); SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW 215 (2006).

102. *See* International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, 37 I.L.M. 249; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

colored motive.[103] Absent any clear definition of a crime, there can be no prosecution for such.

As previously mentioned, apart from *piracy jure gentium*,[104] even the International Criminal Court only recognizes universal jurisdiction for four cases: war crimes, genocide, crimes against humanity, and aggression.[105] None of these provide that terrorism is considered an international crime as of the moment. Thus, the framework finds no application to suspected international terrorists.

As a suggestion, however, the framework may still accommodate the prosecution of these terrorist acts, and not let suspects leave unscathed. First, some terrorist acts may fall under the definition of crimes against humanity. Crimes against humanity have been defined as widespread or systemic attack directed against a civilian population.[106] International terrorist attacks, which often involve thoroughly planned attacks in several locations, or at the very least, a systemic attack concentrated on one location, may fall under this broad definition, especially considering the sheer number of casualties that these attacks may bring. Second and alternatively, the framework may still treat these acts as non-international crimes, although this would limit the framework's application to situations when the act committed was performed outside of the apprehending State's jurisdiction.

D. Non-international Crimes: Prescriptive Jurisdiction

Unlike for international crimes, the framework limits its application to non-international crimes committed within the jurisdiction of another State. This suggestion takes into account the fundamental concept of State sovereignty. As a product of sovereignty, States have territorial jurisdiction over geographical areas falling within its borders, in which it can exercise nearly-unfettered political authority.[107] As such, issues of violations in the apprehension of suspected criminals within a State's borders aptly fall within the scope of that State's domestic law, and not international law.

The framework more aptly pertains to non-international crimes occurring within another State's borders. In this regard, the prerequisite that must be established is whether the apprehending State, in the first place, can establish *prescriptive jurisdiction* over the act. Prescriptive jurisdiction is the application of a State's law to the activities, relations, or status of persons,

103. *Id.*

104. Geneva Convention on the High Seas art. 15, Apr. 29, 1958, 450 U.N.T.S. 11.

105. Rome Statute, *supra* note 86, art. 5.

106. *Id.* art. 7.

107. *See* Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 868 (Perm. Ct. Arb. 1928).

through any branch of the government.[108] Thus, even before there can be a question of enforcement or adjudicative jurisdiction — seen in the apprehension and subsequent prosecution of a suspected criminal — the apprehending State must first establish prescriptive jurisdiction. As previously discussed, the bases for prescriptive jurisdiction are the principles of territoriality, nationality, protection, passive personality, and universality.[109] Without any such bases, then a State would have no basis to take further action against the suspected criminal.

Notably, the question of prescriptive jurisdiction is easier to establish as regards the aforementioned international crimes of genocide, crimes against humanity, war crimes, and aggression. Since universal jurisdiction attaches to these particular crimes, then *any* State possesses prescriptive jurisdiction over these acts.[110] Again, however, this does not automatically establish the right for such State to physically apprehend and try the suspect.

Should the suspected crime be international, there are two conclusions that may be drawn: first, the assessment of subsequent apprehension and adjudication is governed by international law, regardless of where the act was committed — even within the apprehending State's own borders; second, any State has prescriptive jurisdiction over such international crime.

Should the suspected offense be non-international, the following conclusions may be drawn: first, if the act occurred within the borders of the apprehending State, then that State's domestic laws govern the apprehension and adjudication; second, if the act occurred outside the apprehending State's borders, then international law governs any subsequent controversy in enforcement and apprehension; and third, the apprehending State must establish prescriptive jurisdiction over the act, *without prejudice* to another State having greater enforcement or adjudicative rights.

VI. EXISTENCE OF AN EXTRADITION AGREEMENT

After establishing the nature of the crime, the geographical location of the suspected criminal, and in case of non-international crimes committed outside the apprehending State's territory, upon the establishment of prescriptive jurisdiction, the next questions to be asked are:

(1) If there was extraterritorial apprehension in the situation, was there an existing extradition agreement between the apprehending State and the State where the apprehension took place?

108. Restatement (Second) of Foreign Relations Law § 6 (1965).

109. *See* Discussion in Chapter III for a review of concepts of International law.

110. SCHABAS, *supra* note 43, at 21.

(2) If there was, does any provision in the extradition treaty excuse or tolerate extra-territorial situations in particular situations?

The question of fact that must be established prefatorily, therefore, is whether an extradition treaty exists.

A. Extradition Treaties

Should an extradition treaty exist, this framework establishes that no forcible apprehension in circumvention of this treaty is allowed.

Extradition treaties, in principle, strike a balance between two principles: the need to exercise jurisdiction over certain persons charged with a crime, and the need to respect the territoriality of States.[111] States use extradition treaties when one State seeking an individual (requesting State) requests the delivery of that individual from another country (asylum State).[112] The asylum State, then, under the principle of *aut dedere, aut judicare*, must either deliver the individual to the requesting State or prosecute him itself.[113] As such, an essential requirement for extradition treaties between States is *double criminality* — that the crime is chargeable and/or prosecutable in both States involved.[114]

The framework, in light of the underlying purpose and principles of extradition agreements, demands that an existing extradition agreement must be respected and given precedence. Since States entered into these extradition agreements on their own volition, the framework respects this. This is consistent with *pacta sunt servanda*, the obligation of States to comply with treaty provisions in good faith.[115] Thus, the proper way to obtain jurisdiction over a suspected criminal, if there is an existing extradition agreement, is to comply with the provisions stated in that treaty.

B. Violations of Extradition Treaties

The extradition treaty being a source of international obligations for the State signatories,[116] breaches thereof trigger the right of the wronged State to

111. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 8 (1987).

112. Wade A. Buser, *The Jaffe Case and the Use of International Kidnapping as an Alternative*, 14 GA. J. INT'L AND COMP. L. 357, 362-63 (1984).

113. BASSIOUNI, *supra* note 111, at 8.

114. *Id.* at 326 & A Primer on US Extradition Law, *available at* http://www.freeexistence.org/us_extradition.html (last accessed May 23, 2011).

115. VCLT, *supra* note 20, art. 26.

116. Articles on State Responsibility, *supra* note 79, art. 2 & VCLT, *supra* note 20, art. 26.

demand for restitution.[117] Similarly, a State party to an extradition agreement may demand restitution from the other State party which breached the treaty. The simplest and most straightforward means of doing this is to return the abducted individual to where he or she was apprehended, to restore *status quo ante*. This, furthermore, does not preclude demand for compensation, which is the other recourse available to a wronged State.[118]

Notably, even if the end product of this remedy of restitution available to the wronged State is the return of the individual to his or her location prior to apprehension, the State is not acting under its capacity to exercise diplomatic protection.[119] Exercise of diplomatic protection means that the State itself is not the injured party, and is simply acting on a claim on behalf of an injured individual, over whom the State has a claim of nationality. Instead, in this situation, the State itself is the directly injured party, the breached provisions of the extradition treaty being "an obligation breached [owed] to that State individually."[120] Therefore, any problem sought to be resolved regarding the breach of an extradition treaty need not comply with the requisites of diplomatic protection, nor it is an action that is deemed to be initiated by the person sought to be recovered from the apprehending State.

C. Overturning Alvarez-Machain

One of the seminal decisions cited as purportedly upholding MCBD, *in spite of the existence of an extradition treaty*, is *Alvarez-Machain*. *Alvarez-Machain* upheld the abduction of Humberto Alvarez Machain by the U.S. from Mexico, and his subsequent trial *not* because of a positive determination of the existence of a rule in international law allowing this act. Instead, the U.S. Supreme Court argued negatively: the existing extradition treaty between the U.S. and Mexico did not explicitly proscribe abduction; therefore, the abduction of Alvarez Machain did not violate the international obligations of the U.S. *Ergo*, according to the U.S. Supreme Court, the abduction was valid.

There are three problematic aspects of the *Alvarez-Machain* decision that this Study deems proper to challenge and to recommend overturning.

First: As aforementioned, the U.S. Supreme Court held that then US-Mexico extradition treaty's language does not explicitly prohibit abductions; therefore, these must be deemed valid.[121] This is problematic because no

117. *Id.* art. 35.

118. Articles on State Responsibility, *supra* note 79, art. 36.

119. *Id.* art. 3.

120. *Id.* art. 42.

121. *Alvarez-Machain*, 504 U.S. at 663–66.

extradition treaty may anticipate all acts geared towards acquiring jurisdiction over a person that it seeks to proscribe. Under *Alvarez-Machain*'s reasoning, any act other than those explicitly prohibited must be deemed valid.

This is illogical, since the very existence of the extradition treaty indicates that the States-party intended to formalize the procedure through which individuals may be transferred from one State-party to another. Even the U.S.-Mexico extradition treaty itself implies this underlying goal in its preamble.[122] Thus, the non-explicit prohibition of abduction by the extradition treaty does not mean such act is not *impliedly* proscribed. This argument, therefore, suggests the rejection of the prevailing idea that if an extradition treaty does not prohibit extra-territorial apprehensions, then this would automatically be deemed allowed.

Second: The decision refused to consider customary international law in assessing the validity of Alvarez-Machain's abduction, stating that there is no established practice to integrate rules of customary international law into treaty provisions.[123] As a prefatory consideration, this statement seems to imply that *had customary international law been applicable*, then proscriptions on abductions which shock the conscience and violate international law would have rendered the *Alvarez-Machain* abduction illegal. However, the court refused to apply this law to the extradition treaty, thereby avoiding this problem.

The U.S. Court's approach on this matter was unfortunately precipitate and dismissive. To consider customary international law in the *Alvarez-Machain* abduction need not entail an attempt to integrate it into the treaty, and thereby convolute the two sources of law. Instead, one may resort to the classic doctrine that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[124] Instead of attempting, in vain, to integrate customary international law to the U.S.-Mexico extradition treaty, the Court could have simply regarded the question of abduction's validity as a legal vacuum not governed by treaty; hence, it could have resorted to customary international law. The proposed framework advocates this approach.

Third: Finally, the Supreme Court posits that when an extradition treaty is inapplicable, the *Ker-Frisbie* doctrine governs.[125] The *Ker-Frisbie* doctrine,

122. United States-Mexico Extradition Treaty, Preamble, U.S.-Mex., Jan. 25, 1980, 31 U.S.T. 5059 ("Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition"). *Id.*

123. *Alvarez-Machain*, 504 U.S. at 666-70.

124. The Paquete Habana, 175 U.S. 677, 700 (1900) (U.S.).

125. *Alvarez-Machain*, 504 U.S. at 659-62.

as aforementioned, provides as a general rule that extra-territorial abductions and other violations in apprehension could not divest the adjudicating tribunal or court from exercising jurisdiction.[126] Thus, the two-pronged approach advocated by *Alvarez-Machain* is as such: if there is an extradition treaty that *explicitly* prohibits extra-territorial apprehension or whatever violation is the subject of questioning, then jurisdiction over the person was invalidly obtained. When there is no express prohibition by the treaty or if no treaty exists at all, then the *Ker-Frisbie* doctrine automatically validates the action and green-lights any subsequent trial.[127]

In lieu of this, the Note suggests that instead, if there is no extradition treaty that governs transfer of jurisdiction over a person, and there is no provision in the treaty that allows the questioned act as an exception, then *instead of making a blanket resort to the Ker-Frisbie doctrine*, the tribunal should simply move on to the next step of the framework. This will ensure that other factors like exigent circumstances and the nature of the act involved are taken into consideration. *Alvarez-Machain*, in contrast, ignores these.

To conclude this Section of the discussion, the proposed framework abandons the doctrine laid down in *Alvarez-Machain*.

D. Resolving Enforcement Jurisdiction Conflicts

Meanwhile, a common problem that arises in cases where no extradition treaty exists, is the resolution between or among two or more States with concurrent prescriptive jurisdiction over a criminal act as to who has priority to exercise enforcement jurisdiction. One usual situation that gives rise to problematic apprehensions is when two or more States have concurring prescriptive jurisdiction over a criminal act, and one State unilaterally apprehends that individual, even within the territory of that other State.[128]

The suggested — but often impractical — "escape mechanisms" from problems arising from apprehension and adjudication are the rules of reasonableness and comity.[129] On the one hand, the rule of reasonableness provides that a State must assess all relevant factors such as links to territory, character of activity, connections to the States, *inter alia*, and restrain itself

126. *Ker*, 119 U.S. at 436; *Frisbie*, 342 U.S. at 519; & Cardozo, *supra* note 51, at 135.

127. *Alvarez-Machain*, 504 U.S. at 659-62.

128. *See Eichmann*, 36 I.L.R. ¶ 30 (Where Israel abducted a German citizen who took up residence in Argentina, for crimes committed against the Israeli people).

129. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 952 (D.C. Cir. 1984) (U.S.). *See generally* Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW AND CONTEMP. PROBS. 1001 (1987) & Kathleen Hixson, *Extra Territorial Jurisdiction under the Third Restatement of Foreign Relations Law of the United States*, 12 FORDHAM INT'L L. J. 127, 134-38 (1988).

from exercising enforcement jurisdiction when the exercise of such is unreasonable.[130] When the prescriptions of both States are reasonable, one State must defer to the other possessing greater interest.[131] On the other hand, the rule of comity provides for a more stringent requirement on States: "a State has an obligation to evaluate, but 'should' defer if the other State's interest is 'clearly' greater."[132] Both rules of reasonableness and comity, therefore, in varying degrees, require that States exercise restraint and defer to another State that has greater right to exercise enforcement powers. In a situation where neo-realist States often look after their own self-interest,[133] and comity is often unreliable, problematic apprehensions arise.

While there is a possibility that conflicts over which the framework governs may be solved *ad hoc* through the rule of reasonableness or comity, it also accommodates the great possibility that these methods would fail. In the end, the approach is simple: should there be comity or an *ad hoc* agreement between States as to which actor has greater interest to enforce, then the framework disengages, and the problem is solved. However, if there is no agreement as to which State has greater right to enforce *and* one State takes unilateral action, the next step of the proposed framework applies.

VII. SUBJECTS WITH LEGAL CAPACITY AND STANDING TO PROTEST

The next step is to assess — in view of a problematic apprehension — which actors have the standing and capacity to protest the infringing act. It is understood that there must have been a failure of the rules on comity and reasonableness to govern the apprehension of a suspected international criminal.[134]

The *status quo* only allows one actor to protest: the State whose territory has been infringed.[135] The framework expands this list to three actors:

(1) The State in which the infringing apprehension took place,

(2) Any State that may exercise diplomatic protection over the individual whose rights were infringed,

(3) The individual him or herself.

A. The State in Which the Infringing Apprehension Took Place

130. Restatement (Third) of Foreign Relations Law § 403 (2) (1987).

131. Hixson, *supra* note 129, at 136.

132. *Id.*

133. KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 132-33 (1979).

134. *See generally* Meessen, *supra* note 129.

135. *Ker*, 119 U.S. at 436 & *Eichmann*, 36 I.L.R. ¶ 47.

There has been no doubt as to the capacity of the State in which another State entered and apprehended an individual to launch a protest against such act. Among others, that State may allege a violation of the infringing State's international obligations to respect the protesting State's borders and refrain from interfering with its internal affairs,[136] or should there be an extradition treaty, a violation of the procedure it espouses.[137]

The problematic matter that this study deals with is the implicit statement made in prior cases that it is *only* the wronged State that may launch a protest, and not any other actor.[138] In *Ker*, the U.S. Supreme Court inferred that where a person was arrested through illegal means, the ability to protest belongs not to that person, but to the State from whose territory he was unlawfully taken.[139] In this case, since Peru did not launch any protest, notwithstanding Mr. Ker's complaint as regards being abducted by U.S. officials from within Peru's borders, the U.S. Supreme Court found no need to divest itself of jurisdiction.[140] Therefore, regardless of any merit in Mr. Ker's allegations, since he did not possess the capacity to protest, the U.S. Supreme Court decided against him.

Meanwhile, *Eichmann*, which upheld Israel's kidnapping of former Nazi Adolf Eichmann from within Argentina's borders, was decided similarly.[141] The District Court of Jerusalem held that notwithstanding protests by Mr. Eichmann as to the manner of his arrest, since Argentina waived its claims of violations of its borders, then the court may continue exercising jurisdiction over the matter.[142] Therefore, similar to *Ker*, which was decided in 1886, and even spanning even the U.N. era, *Eichmann* gave complete priority to the wronged State, over and above any other actor intending to protest and regardless of the actual merit of such complaint.

The proposed framework suggests a departure from the *Ker* and *Eichmann* decisions, by empowering other actors to protest illegal arrests and apprehensions. It is only by abandoning the myopic perspective of *Ker* and *Eichmann* would the framework sufficiently accommodate the existing regime of international law.

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136. U.N. Charter, art. 2, ¶ 7.

137. *See* Articles on State Responsibility, *supra* note 79, art. 2 & VCLT, *supra* note 20, art. 26.

138. *Ker*, 119 U.S. at 436 & *Eichmann*, 36 I.L.R. ¶ 47.

139. *Ker*, 119 U.S. at 442–43.

140. *Id.*

141. *See Eichmann*, 36 I.L.R. at 277.

142. *Eichmann*, 36 I.L.R. ¶ 47.

B. A State with the Right to Exercise Diplomatic Protection over the Apprehended Individual

The *Eichmann* and *Ker* justifications for allowing protest by the wronged State hinged largely on the principle of territoriality and violations of the wronged State's sovereignty.[143] The list of actors with capacity to protest must be expanded to include States that intend to exercise diplomatic protection over an individual.

Diplomatic protection is the invocation by one State of the responsibility of another State for any internationally wrongful act committed by the latter against a national of the former State.[144] The two foundational principles of diplomatic protection are that injury to a State's national is an injury to the State itself,[145] and that by a State which takes up the claim of such individual is in reality asserting its own right.[146]

Thus, as opposed to the central focus on territoriality that governed the application of *Eichmann* and *Ker*, diplomatic protection instead focuses on linkages of nationality to the protesting State. There is no reason to limit the ability of a State to protest only to situations where there has been an infringement of territory alone, since the very basis of the *Eichmann* and *Ker* statements is not specifically hinged on territorial violations, but the more general concept of an internationally wrongful act against a State.[147]

This conclusion may be drawn, for instance, from *Ker*, where the protest issue similarly touched on Mr. Ker's *claim of asylum in Peru in the interim period prior to transfer*, since the U.S. and Peru had an extradition treaty and any transfer must be pursuant to that agreement.[148] Therefore, Mr. Ker claimed that the kidnapping was a violation of the right of asylum implicitly granted by the extradition treaty. Brushing aside for the meantime the question of whether Mr. Ker can invoke a treaty provision on behalf of Peru (which the tribunal rejected), the tribunal in this decision implied that Peru's protest does not only hinge on the violation of its territory *but also* pursuant to a possible violation by the U.S. of the extradition treaty. Thus, the right to protest stems not exclusively from issues of territoriality, but also other internationally wrongful acts.

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143. *Ker*, 119 U.S. at 442-43 & *Eichmann*, 36 I.L.R. ¶ 47.

144. Draft Articles on Diplomatic Protection, U.N. GAOR, 61st Sess., Supp. No. 10, art. 1 (2006) [hereinafter Articles on Diplomatic Protection].

145. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS 136 (1758).

146. *Mavrommatis*, PCIJ Series A, No. 2, at 12.

147. *Ker*, 119 U.S. at 442.

148. *Id.*

The most important concern is determining the State of nationality of a person, which is the "State whose nationality the person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner not inconsistent with international law."[149] The framework adopts this and posits that in order for a State to protest an illegal apprehension on behalf of a person, under this second category of States possessing the right to exercise diplomatic protection, the person must be a national by (a) birth, (b) descent, (c) naturalization, (d) State succession, or (e) any other manner not inconsistent with international law. This general approach is consistent with the doctrine that it is for each State to determine under and through its internal law who are its nationals.[150]

The next question is the application of the *genuine link* theory in assessing which State may exercise diplomatic protection over an individual, as provided in *Nottebohm*.[151] Genuine link treats nationality as a legal bond, which has as its basis "a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[152]

The Draft Articles of Diplomatic Protection notably *do not* require that a genuine link be present prior to the exercise of diplomatic protection.[153] The official commentaries to the Draft Articles even expressly acknowledge this deviation from the *Nottebohm* rule.[154] There are two reasons behind this rejection. First is the refusal to treat the genuine link theory as a general rule — only treating it as a relative rule, as in *Nottebohm*, where Liechtenstein's claim of diplomatic protection was weighed vis-à-vis Guatamala's.[155] Second is a more pragmatic reason: having to require a genuine link would exclude millions of people from the benefit of diplomatic protection, since waves of immigration have displaced people from States of nationality and placed them in States where there is neither acquisition of nationality nor a genuine connection.[156]

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149. Articles on Diplomatic Protection, *supra* note 144, art. 4.

150. European Convention on Nationality art. 3, Nov. 6, 1997, 2135 U.N.T.S. 213 & Hague Convention on Certain Questions Relation to the Conflict of Nationality Laws art. 1, Apr. 12, 1930, 179 L.N.T.S. 89.

151. Nottebohm Case (Liech. v. Guat.) (second phase), 1955 I.C.J. 4, 23 (Apr. 6, 1055).

152. *Id.*

153. Articles on Diplomatic Protection, *supra* note 144, art. 4.

154. *Id.* at 32, commentaries.

155. *Flegenheimer*, Italian-United States Conciliation Commission, 25 I.L.R. 148 (1958).

156. Articles on Diplomatic Protection, *supra* note 144, at 33, commentaries.

The framework gathers suggestions from the Draft Articles' perspective, but does not adopt such approach wholesale. In short, when there is no conflict between two or more States as to which is entitled to exercise diplomatic protection, there is no need to impose the genuine link theory. The Article 4 requirement imposed in the Draft Articles suffices. Nevertheless, when there is a conflict among two or more States as regards diplomatic protection, as the usual case would be in enforcement jurisdiction conflicts, then one must resort to the genuine link theory. The State that is entitled to exercise diplomatic protection, thus must have stronger and more genuine links to the individual sought to be protected, as opposed to the other State. This approach strikes a balance between the more straightforward approach advocated by the Draft Articles as to establishing the right of diplomatic protection, and the need for a mechanism to resolve enforcement disputes among States.

C. The Individual Him or Herself

Individuals under classical international law are treated as pure objects or beneficiaries; thus, they possessed no rights and duties, they could not invoke international law for their own protection, and whatever protections they receive are predicated upon State action on their behalf.[157] However, developments in modern international law have accorded individuals with both limited *locus standi* and limited legal capacity.[158] One major development is that individuals may now be placed at a position where they are individually criminally liable for acts such as war crimes, genocide, crimes against humanity, and aggression under the International Criminal Court.[159] Thus, individuals are not pure objects anymore; there are special instances when the individual is granted limited subjectivity.

The question that arises is when these individuals may be granted such limited *locus standi* or legal capacity. This Note posits that while there is no one general rule that may determine when individuals are granted limited standing or capacity, the less positivist, process-based perspective of international law lends some guidance.[160] This perspective views "individuals [as] participants, along with governments, international institutions and private groups."[161] Individuals, in this perspective, only participate in

157. *See* George Manner, *The Object Theory of the Individual in International law*, 46 AM. J. INT'L L. 428 (1952).

158. ANTONIO CASSESSE, INTERNATIONAL LAW 85 (2001).

159. Rome Statute, *supra* note 86, art. 25.

160. Christiana Ochoa, *The Individual and Customary international law Formation*, 48 VA. J. INT'L L. 119, 154 (2007).

161. Rosalyn Higgins, *Conceptual Thinking About the Individual in International law*, 24 N.Y. L. SCH. REV. 11, 16 (1978).

processes that are relevant to them, as contradistinguished from processes which primarily involve States.[162] This Note suggests taking this perspective to cover any lacunae in the protection of individual rights that a purely Statist perspective brings about.[163]

The proposed framework suggests that individuals may bring forth complaints to the tribunal. This has been accommodated by recent developments where, as an analogy in the macro-sphere of international law, individuals have been empowered to make claims based on human rights violations before regional bodies like the European Court of Human Rights and Inter-American Commission and Court,[164] as well as non-regional international bodies like the U.N. Human Rights Commission,[165] and pursuant to treaties like the Convention Against Torture (CAT).[166] Empowering individuals to forward protests to these bodies and, pursuant to treaties, notwithstanding the latter being entered into by States, highlights customary international law's move towards empowering individuals in regard to *human rights violations*.[167] Therefore, beyond subscribing to the process-theory of international law, the following circumstances make it possible for individuals to protest infringing apprehensions: (a) States being party to regional human rights bodies, non-regional international bodies, or human rights treaties; (b) States legislating domestic acts allowing such protests;[168] and (c) States like the Philippines that treat customary international law as part of the law of the land.[169] Among these three bases, there is little trouble that a situation where individuals protesting infringing apprehensions would have no legal basis under international law.

In conclusion, one must remember that even if both States *and* individuals are empowered to protest violations under the proposed framework, their bases of protest are different. States may protest violations committed against itself — such as transgressions into its territory sans

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162. *Id.*

163. Ochoa, *supra* note 160, at 151.

164. European Court of Human Rights, Applicants — Application form on-line, *available at* http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+form+online/ (last accessed May 23, 2011) & Organization of American States, American Convention on Human Rights art. 44, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

165. This may be accomplished through use of the First Optional Protocol to the ICCPR.

166. *See* CAT, *supra* note 78, art. 22.

167. Ochoa, *supra* note 160, at 155.

168. *See, e.g.*, The Alien Tort Claims Act, 28 U.S.C. § 1350 (1789) (U.S.). *See also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (U.S.).

169. PHIL. CONST. art. II, § 2.

consent — or against the individual, pursuant to diplomatic protest. The individual, on the other hand, as previously discussed, obtains limited legal capacity and *locus standi* based on customary international law's goal to protect individual human rights. Thus, an individual may not base his or her protest on the violation of State sovereignty or any other right solely possessed, and waived at times, by States alone.

VIII. NATURE OF THE ACT INVOLVED

This Note discusses the two usual acts involved in the cases oft-discussed: (a) extraterritorial apprehensions; (b) torture or other cruel, inhuman, and degrading treatment.

A. Extra-territorial Apprehensions

Violations in extra-territorial apprehensions engage two aspects: a violation of the rights of the State where the infringing apprehension took place, and a violation of the rights of persons. Extra-territorial apprehensions violate State sovereignty and territoriality; hence, State protest would center on these principles.[170] When the infringing State undertakes extra-territorial apprehensions without consent by the other State, then the latter would use these principles as bases for protest.

The question, therefore, is on which grounds individuals may base their protests on, should they be subjected to extra-territorial apprehensions. This issue is more difficult to address than at first glance. Cases involving extra-territorial apprehensions are commonly coupled with torturous acts, or at least, cruel, inhuman, and degrading treatment.[171] The question, however, still remains: under what basis may an individual lodge a protest, should there be an extra-territorial apprehension with no attendant torture, or cruel, inhuman, and degrading treatment?

The first concern is whether an individual may base his protest on the U.N. Charter. This discussion has already identified how the U.N. Charter may be used as bases for States to launch protests on the violation of their territorial integrity, and keep it free from use of force.[172] Ostensibly, the language of the Charter only pertains to States ("refrain from the treat or use of force against the territorial integrity of any state"), and has only been used

170. BASSIOUNI, *supra* note III, at 8 & U.N. Charter art. 2, ¶ 7.

171. *See, e.g.*, *Toscanino*, 500 F.2d at 267 (In this case, while there was extra-territorial apprehension by United States agents of a suspected criminal from Uruguay, questions on the validity of the arrest focused *not* on the extra-territorial apprehension *per se*, but on the acts shocking to the conscience that attended the arrest.).

172. U.N. Charter art. 2, ¶ 4. *See generally* S.C. Res. 138, U.N. Doc. S/RES/4349 (June 23, 1960).

to regulate interactions between States — leaving out individuals.[173] Nevertheless, efforts have been made to reframe this obligation as fundamentally protecting individuals' rights in the end; the prohibition of the use of force has, in its spirit, the desire to protect individuals.[174] This argument has been hinged on the Universal Declaration of Human Rights (UDHR),[175] which, while establishing unenforceable obligations upon States,[176] evinces customary international law.[177] Further, the International Court of Justice held that the UDHR provided fundamental rights to which all individuals are entitled.[178] In particular, the two rights under the UDHR violated by extra-territorial arrests are first, "the right to life, liberty, and security of person,"[179] and second, that "no one shall be subjected to arbitrary arrest, detention, or exile."[180] Thus, in conclusion, while the U.N. Charter does not, by itself, provide for any rights that individuals may base protests on, some commentators have attempted to translate the language of the Charter as including the protection of individual rights, based on the *ratio legis* of the Charter and the presence of the UDHR.[181] An individual may therefore, base a protest on the U.N. Charter, although it may best serve the individual to concomitantly base his protest on another treaty.

More straightforwardly, the International Covenant on Civil and Political Rights (ICCPR) provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."[182] The U.N. Human Rights Committee has consistently held that extra-territorial arrests fall within the scope of acts proscribed by this provision.[183]

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173. Gaetano Arangio-Ruiz, *The 'Federal Analogy' and U.N. Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT'L L. 1, 9 (1997).

174. Jeffrey Loan, *Sosa v. Alvarez-Machain: Extraterritorial Abduction and the Rights of Individuals under International law*, 12 ILSA J. INT'L & COMP. L. 253, 269 (2005).

175. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

176. *Alvarez-Machain v. Sosa*, 124 S. Ct. 2739, 2767 (2004) (U.S.).

177. Restatement (Third) of Foreign Relations Law § 701 (1987).

178. *Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. ¶ 91.

179. UDHR, *supra* note 175, art. 3.

180. *Id.* art. 7.

181. *Alvarez-Machain v. Sosa*, 124 S.Ct.

182. ICCPR, *supra* note 82, art. 9, ¶ 1.

183. U.N. Human Rights Committee, Lilian Celiberti de Casariego v. Uruguay, Commc'n No. 56/1979, U.N. Doc. CCPR/C/OP/1 (1984); U.N. Human Rights Committee, Delia Saldias de Lopez v. Uruguay, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); U.N. Human Rights

In applying this Provision of the ICCPR to extra-territorial abductions, the Committee also forwarded two important conclusions. One, the Committee held that even when States party to the ICCPR are not acting within their borders, the rights and obligations provided therein still apply — thus rebutting a common argument put forth by abduction apologists.[184] Two, the violated individual may still launch a protest *even when* the host State consented to the abduction.[185] This is a dramatic departure from the aforementioned rule where the host State's consent to extra-territorial abduction deems any subsequent protest nugatory.[186] Thus, compared to the U.N. Charter regime, the ICCPR regime to protect individual human rights of those subject to extra-territorial abductions is stronger.

Nevertheless, an important consideration to make as regards rights provided under the ICCPR is the ability of States to make reservations. The ICCPR allows States to derogate from their obligations under the Covenant in times of public emergency which threatens the life of the nation and the existence of which has been officially proclaimed.[187] On the one hand, being a conventional right, Articles 3 and 9 fall within the scope of Article 4 on reservations; thus, a State subjected to any of the proscribed acts discussed in Chapter V may declare a public emergency that threatens the life of the nation and subsequently resort to extra-territorial arrests, reserving Articles 3 and 9. On the other hand, the Human Rights Committee declared that the proscription against arbitrary arrest and detention is part of customary international law.[188] What is clear is that there has been no pronouncement yet that the prohibition against extra-territorial arrests by States has reached the level of a *jus cogens* norm.[189]

Committee, Almeida de Quinteros v. Uruguay, Commc'n No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981 (1983).

184. *Celiberti de Casariego*, U.N. Doc. CCPR/C/OP/1 at ¶ 10.1.

185. U.N. Human Rights Committee, Giry v. Dom. Rep., Commc'n No. 193/1985, U.N. Doc. CCPR/C/39/D/193/1985 (1990) & U.N. Human Rights Committee, Canon Garcia v. Ecuador, Commc'n No. 319/1988, U.N. Doc. CCPR/C/43/D/319/1988 (1991).

186. *Eichmann*, 36 I.L.R. ¶ 47.

187. ICCPR, *supra* note 82, art. 4.

188. Office of the High Commissioner of Human Rights, General Comment No. 24: *Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

189. United States v. Matta-Ballesteros, 71 F.3d 754, 764 (9th Cir. 1995) (U.S.) (Stating that the prohibition against official kidnapping is not *jus cogens*, unike torture, slavery, or genocide). *See also* Committee of U.S. Citizens Living Nicaragua v. Reagan, 859 F.2d 929, 934-40 (D.C. Cir. 1988) (U.S.).

B. Torture andCcruel, Inhuman, and Degrading Treatment

Torture[190] is prohibited in both conventional and customary international law.[191] The usual cases of infringing apprehensions, which formerly attracted the application of MCBD, fall under this definition. These infringing apprehensions are deployed against suspected international criminals, on suspicion that they have committed such crime, and are often attended by acts causing physical pain.[192] Moreover, these cases involve suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[193] The generally accepted test deployed to determine whether the attendant abuse or pain caused by these public officials may be seen in the seminal case *Ireland v. United Kingdom*,[194] where the European Court of Human Rights held that where the suffering merely resulted from lack of judgment rather than intention to hurt or degrade, the purposive element is negated and no torture is committed.[195]

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190. CAT, *supra* note 78, art. 1. This Article provides:

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

Id.

191. *See* CAT *supra* note 78; UDHR, *supra* note 175, Preamble; ICCPR, *supra* note 82, Preamble; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., U.N. Doc.A/10034 (Dec. 9, 1975); Convention Relative to the Treatment of Prisoners of War arts. 3, 17, 87, & 130, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 32, & 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV].

192. *See generally Toscanino*, 500 F.2d at 267 & *Verdugo-Urquidez*, 939 F.2d at 1341. These cases featured acts such as electrocution of genitalia, broken wrists, dousing of orifices with alcohol, *inter alia.*

193. Refer to the cases cited in the above discussion. A notable exception, however is Ker v. Illinois, 119 U.S. 436 (1886) (U.S.), which involved an agent of the Pinkerton National Detective Agency, a private U.S. security guard and detective agency.

194. Ireland v. United Kingdom, 2 E.H.R.R. 25 (1978).

195. *Id.* at ¶ 124.

Torture is markedly distinct from mere extraterritorial apprehensions, because torture has elevated to a *jus cogens* norm[196] and an *erga omnes* obligation.[197] As such, there can be no derogation from a State's obligation to refrain from performing any acts amounting to torture.[198] Thus, unlike the provisions governing extraterritorial apprehensions which may be excused by a public emergency threatening the life of a nation, under the ICCPR regime, torture under the CAT may not be justified by a state of war or public emergency.[199] Not even the purported commission of terrorist acts may justify torture.[200]

The status of torture as both *jus cogens* and *erga omnes*, under customary international law, even benefits an individual or State invoking a violation of the ICCPR. Article 7 of the ICCPR states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[201] Moreover, Article 10 provides that all persons deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person.[202] Article 10 has even been explicitly declared by the Human Rights Committee as a *jus cogens* norm.[203] The direct implication is that both Article 7 and Article 10, which individuals and States may invoke to protest infringing apprehensions, are *not* covered by the Article 4 provision on reservations in the ICCPR. Therefore, even an invocation of these rights from within the ICCPR regime still enjoys the same protections as invocations from within the CAT regime.

It must be noted, however, that in discussing *jus cogens* norms, it is only *torture* itself that is defined as such.[204] Since torture is often distinguished from cruel, inhuman, and degrading treatment (CIDT),[205] one must be careful with determining whether the act committed by the public official in question is torture or CIDT. In contrast to the definition of torture discussed

196. First Report of the UN Special Rapporteur on Torture, ¶ 3; *See* Prosecutor v. Furundžija, Case no. IT-95-17/1-T (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998).

197. REED BRODY & MICHAEL RATNER, THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 238 (2000).

198. VCLT, *supra* note 20, art. 53.

199. CAT, *supra* note 78, art. 2 & ICCPR, *supra* note 82, arts. 4 & 7.

200. Chahal v. United Kingdom, App.No. 22414/93, 23 E.H.R.R. 413, ¶ 79 (1996).

201. ICCPR, *supra* note 82, art. 7.

202. *Id.* art. 10, ¶ 1.

203. H.R. Comm., General Comment 29: States of Emergency (Article 4), ¶ 11, U.N. Doc.CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

204. First Report of the UN Special Rapporteur on Torture, ¶ 3.

205. CAT, *supra* note 78, art. 2.

above, along with its attendant elements, "cruel and inhuman treatment" is simply defined as that which deliberately causes severe and unjustifiable suffering, mental or physical,[206] which "degrading treatment" is that which grossly humiliates an individual before others or drives him to act against his conscience or will.[207] Thus, while there is no question that CIDT is similarly proscribed under conventional and customary international law, *jus cogens* and its tremendously weighty moral pull only applies to torture *per se*, and not CIDT.

C. Ticking Time Bombs: Post 9/11 Justification for Torture?

The framework shies away from granting the leeway demanded by the "ticking time bomb,"[208] a hypothetical situation where a hidden explosive device is set to detonate in the middle of a large urban area, causing massive death and destruction. The "ticking time bomb" only works in a perfect hypothetical situation, one that is uniformly filled with "known knowns" and absolutely no "unknown knowns" or "unknown unknowns," resulting from assumed perfect omniscience by the law enforcement bodies.[209] In simpler terms, the "ticking time bomb" justification only works when the law enforcers, as regards the ticking time bomb situation, know everything there is to be known, and know that there is nothing else to be known — hardly a feasible situation. Real-world situations often defy such perfect hypothetical scenario. For instance, five years since 9/11, 5,000 suspected terrorists were detained, only three of whom were formally charged with terrorism, and two of whom were acquitted.[210] A 2003 poll even suggests that public support for torture is *only* present when there is a high degree of certainty by the law enforcers that the detainee knows what must be known regarding the ticking time bomb.[211]

However, it is undeniable that there have been real-world situations that have dangerously straddled the "ticking time bomb" scenario, the best example of which is close to home: the intended Pope assassination and airplane-jacking plot concocted in the Philippines by Abdul Hakim Murad and company.[212] The best response commentators have mustered for this scenario is, for these extremely rare and potentially justified circumstances of

206. Greece v. United Kingdom, 1958-59 Y.B. Eur. Comm'n on H.R. at 174.

207. *Id.*

208. Craig Forcese, *Torture and the New Normal: Modern Legal Thinking on an Ancient Scourge*, 37 OTTAWA L. REV. 149, 152 (2005).

209. *Id.* at 154.

210. SANFORD LEVINSON, TORTURE: A COLLECTION 284 (2004 ed.).

211. Forcese, *supra* note 208, at 155.

212. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE NEW CHALLENGE 137 (2003).

torture, is to permit *ex post* ratification of the act by the public, in a criminal trial against the law enforcer, who must then justify the necessity of the action.[213] Therefore, assuming arguendo that torture may be justified by extremely rare cases of "ticking time bombs," there is still no justification for any *ex ante* legalization of the act.[214]

This framework adopts this precise approach: the "ticking time bomb" scenario *does not* justify torture, nor does it support its legalization *ex ante*. Instead, torture should remain proscribed and strictly policed against. In the rare instance that a "ticking time bomb" situation arises, then the best the framework could provide for is *ex post* ratification of the act by the judiciary.

To conclude, there are myriad acts that may be deemed as infringing apprehensions to which the *Male Captus* regime (formerly) applied. This discussion only focused on two of the most common infringing acts, as exhibited by the seminal cases: extraterritorial apprehensions and torturous acts, or those amounting to CIDT. Torture, in fact, has attained *jus cogens* and *erga omnes* status. Even assuming arguendo that the extremely rare "ticking time bomb" scenario may justify torture, it only calls for an *ex post* ratification, rather than *ex ante* legalization. Meanwhile, extraterritorial apprehensions, which are mainly proscribed by the ICCPR, are subject to derogation provisions under that convention, in situations where the life of a nation is threatened: a possible justification for cross-border kidnapping post-9/11.

IX. DETERMINING EXIGENT CIRCUMSTANCES AND THEIR EFFECTS ON JURISDICTION

Needless to say, there must be prior tribunal examination of the apprehending officers' justification for the act. The court, in sum, shall decide in the following manner:

(1) If there are no exigent circumstances calling for the infringing act, then the court must divest itself of jurisdiction;

(2) If there are exigent circumstances, but the arresting authorities' infringing acts exceeded what was necessary, then the court may maintain jurisdiction, but the authorities are subjected to punitive measures, depending on available remedies. *Provided*, however, when the gravity of excess is clearly egregious, the court must divest itself of jurisdiction;

(3) If there are exigent circumstances, and the arresting authorities' acts are proportionate to the situation, then the

213. LEVINSON, *supra* note 210, at 244.

214. *Id.* at 247.

court shall maintain jurisdiction and continue exercising its power to hear the case.

A. What situations constitute exigent circumstances

An essential preliminary question is whether exigent circumstances are present. The presence or absence of these will determine if the infringing acts would be justified or rebuffed. Notably, this is a departure from MCBD, where regardless of the surrounding circumstances, an infringing apprehension would have no effect on the subsequent exercise of judicial power by tribunals or courts.

Most importantly, the nature of the crime committed as being an international crime and the gravity of the acts committed, *do not* determine whether exigent circumstances exist. Returning to the first part of the discussion, one of the subcategories of crimes to which the framework applies to are those committed anywhere in the world.[215] Therefore, arguing that the apprehended individual committed international crimes, and therefore the law enforcers must be given more leeway to resort to extraordinary means in the apprehension is pure tautology. There must be the existence of exigent circumstances *beyond* the commission of international crimes, which is, anyway, one condition *sine qua non* for the framework's application.

In the Achille Lauro Incident, members of the Palestinean Liberation Front, led by notorious terrorist Mohammad Abbas,[216] hijacked an Italian cruise ship and demanded the release of prisoners held by Israel.[217] The vessel docked into Egypt, but Egyptian authorities, in spite of repeated demands by the U.S. to prosecute the offenders, refused to do so.[218] Egypt attempted to transfer the suspected hijackers to Tunisia through a plane, but the aircraft was intercepted by the U.S. authorities and was forced to land in a NATO base in Italy.[219] In this case, the breach into Egyptian airspace to apprehend the suspected terrorists was questioned.

Without passing judgment on the validity of the U.S. apprehension of the suspected terrorists, a confluence of exigent circumstances may be appreciated here. First, Egypt refused to cooperate with the U.S., practically

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215. Rome Statute, *supra* note 86, art. 5.

216. Douglas Kash, *Abductions of Terrorists in International Airspace and on the High Seas*, 8 FLA. J. INT'L L. 65, 89 (1993).

217. John Tagliabue, *Ship Carrying 400 Seized*, N.Y. TIMES, Oct. 9, 1985, at A1.

218. Judith Miller, *Egypt Says It Gave Gunmen to P.L.O.*, N.Y. TIMES, Oct. 11, 1985, at A11.

219. Robert J. Beck & Anthony C. Arend, *"Don't Tread on Us:" International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 176 (1994).

harboring the suspected terrorists. Egyptian authorities even deceived the U.S. authorities, by claiming that the suspects had already left Egyptian territory, when in fact, Egypt planned to transfer them to Tunisia.[220] The deceit of the host State made it difficult to apprehend the suspects. Second, the sudden aircraft transfer of the suspected terrorists to Tunisia left the U.S. authorities little time to consider available plans of action to obtain jurisdiction over Abbas and the other suspects. This short window of time and the danger of further losing sight of the suspects upon their transfer to another State was an exigent circumstance practically unique to the *Achille Lauro* incident.

In *Ker*, the U.S. forcibly abducted a grand larceny suspect residing in Peru.[221] The agents sent to apprehend Mr. Ker to enforce an arrest warrant, pursuant to a U.S.-Peru treaty. However, upon arriving in Peru, the agents could not enforce the warrant because Chilean forces had invaded Peru. This forced the agents to apprehend Mr. Ker without following proper procedure under the treaty. Ignoring for the meantime the fact that those who undertook the apprehension of Mr. Ker were agents of the Pinkerton Detective Agency, a private entity, there are two exigent circumstances that may be appreciated here.

First, Peru was in a state of war at the time the agents sought to apprehend Mr. Ker. With these circumstances taking hold of the Peruvian government's attention and resources, the feasibility of cooperative efforts between the two States to arrest Mr. Ker was harmed. Second, the agents bore an arrest warrant and sought to comply with the U.S.-Peru extradition treaty until they encountered the unfortunate occupation by Chilean forces of Peru. These facts exhibited efforts to comply in good faith with the agreed-upon criminal procedure, and indicated that the infringing apprehension was done as a last resort — or at least, with hesitation.

Meanwhile, there are cases where the question of exigency is less clear. While as stated above, the nature of the suspected crimes committed as international does not *per se* automatically establish exigency, what about extremely egregious situations that are historically unprecedented?

This is *Eichmann*, where the apprehended individual, Adolf Eichmann, was a former Nazi commander.[222] While in general, the acts of the Nazi party could be generally classified as acts of genocide, the unprecedented egregiousness and extent of the wave of terror caused by the Nazi party's acts could constitute exigent circumstances, as regards the sheer urgency to apprehend those responsible. Another unclear circumstance is the "ticking time bomb" theory, which is a hypothetical situation based on a weighing of

220. Miller, *supra* note 218, at A11.

221. *See Ker*, 119 U.S. at 436.

222. *See Eichmann*, 36 I.L.R. at 277.

consequences and deficiency of time and opportunity to diffuse an imminent threat.

Taking all these situations together, there is still some difficulty in painting a general picture as to when exigencies exist. Using the above examples, however, clear examples are the presence of fraud and deceit by host State, attempts to facilitate the flight of the suspects, war-time situations, and attempts by law enforcers to comply with legal procedures, in good faith. More questionable grounds are historically egregious acts and imminent threat. In any case, it would depend upon the tribunal to determine whether these exigent circumstances exist, consider the actions of the law enforcers, and declare whether it has jurisdiction based on the three possible situations discussed below.

B. No Exigent Circumstances

In a situation where no exigent circumstances exist, and the apprehending officers nonetheless committed infractions in the apprehension, then the court must divest itself of jurisdiction. The case is dismissed and must not proceed further.

Both *Bennett v. Horseferry*[223] and *State v. Ebrahim*[224] constitute the legal foundation for the loss of court jurisdiction over cases where no exigent or justifying circumstances exist. These decisions posit that courts could not simply turn a blind eye to acts by the executive in the process of obtaining jurisdiction over the individuals apprehended. By checking these abuses committed by the executive, the courts in these cases recognized that there was no need for these officials to commit acts that violate the fundamental liberties of these individuals. The lack of need and the concomitant abuses, where extraterritorial apprehensions led to arbitrary deprivation of liberty of these suspects, form the foundational argument why these courts refused to exercise jurisdiction over these cases.

The framework espouses the departure from the monolithic approach taken by *Male Captus, Bene Detentus*, recognizing the need not only to prosecute offenders, but also to respect the fundamental liberties of individuals which States are obligated to respect under conventional and customary international law.[225] The adoption of this frame is evident in the House of Lords' rejection of *Ker*, stating that the question of court jurisdiction is not a matter of determining in a vacuum whether a tribunal has jurisdiction to try individuals *per se*, but whether this jurisdiction can be

223. *Bennett*, 1 A.C. at 67.

224. *Ebrahim*, 21 I.L.M. at 888.

225. ICCPR, *supra* note 82, art. 9 ¶1. *See* CAT, *supra* note 78; UDHR, *supra* note 175, Preamble; ICCPR, *supra* note 82, Preamble; GC III, *supra* note 191, arts. 3, 17, 87, & 130; GC IV, *supra* note 191, arts. 3, 32, & 147.

exercised in light of violations of rights guaranteed in international law.[226] This is also a departure from the archaic perspective that courts need not concern themselves with the rights of an individual *prior* to trial, and is consistent with a global community's respect for human rights.[227] Thus, the framework adapts to, and is consistent with the espousal of fundamental human rights, which should not shrink in the face of State claims to security, protection, and justice.

C. Disproportionate State Action vis-à-vis Exigent Circumstances

In situations where exigent circumstances exist, there are two situations that lead to divergent outcomes: first, if the State action exceeded what was necessary vis-à-vis the exigent circumstances, then the court may still maintain jurisdiction, but the officials are subject to liability; and second, if the State action gravely exceeded what was necessary vis-à-vis the exigent circumstances, then the court must divest itself of jurisdiction, similar to situations where no exigent circumstances exist. To better justify and illustrate the distinction between these two State infringements, a comparison of two cases is in order.

The first case, *U.S. v. Toscanino*, involved an abduction attended by egregiously harsh treatment that "shocks the conscience." Toscanino was drugged by U.S. authorities in the air journey following his abduction from Uruguay to the U.S.[228] He was denied sleep and food, was forced to march back and forth across a hallway for seven hours, was subjected to alcohol-flushing in his eyes and nose, and was electrocuted through his ears, toes, and genitals.[229] Toscanino claimed that this shocking brutality, alongside his illegal arrest and detention, negated the court's jurisdiction. The Second Circuit agreed with the contention, and concluded that exercising jurisdiction over that case would reward police brutality and lawlessness, and thus, the existence of such was tantamount to a violation of due process.[230]

The second case, *U.S. v. Yunis*, the FBI arrested Fawaz Yunis, who suspected of hijacking an airliner in Beirut and taking hostage more than fifty passengers, two of whom were American.[231] Like *Toscanino*, the FBI agents conducted an extraterritorial arrest by entering Lebanon, posing as drug traffickers, and luring Yunis onto a yacht, which sailed and led to his arrest

226. BUTTERSWORTH LAW, THE ALL ENGLAND LAW REPORTS ANNUAL REVIEW 163 (1994)

227. *See* U.N. Charter Preamble.

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

229. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 157 (1991).

230. *Toscanino*, 500 F.2d at 272.

231. *Yunis*, 924 F.2d at 1089.

in international waters.[232] Yunis expressly invoked the *Toscanino* doctrine, claiming that he experienced discomfort and ill treatment during the apprehension.[233] However, the court merely found that his wrists were broken during the arrest, which while still not a justified, was not enough to "shock the conscience" under the *Toscanino* test.[234] Thus, the court proceeded with the trial.

A caveat: for both *Toscanino* and *Yunis*, there seem to be no clear exigent circumstances that would justify the extra-territorial apprehension coupled with acts amounting to either torture or CIDT in these cases, the confluence of which is required by the framework as condition *sine qua non* for the application of this second category (disproportionate State action). Nevertheless, the factual circumstances and the decisions in *Toscanino* and *Yunis* are still instructive to illustrate the contrasting effects of an apprehension that "shocks the conscience" and one that, while still excessive, does not.

For both cases, the acts of the law enforcers exceeded what the surrounding circumstances called for. The framework thus pins the difference on *how badly* these acts exceeded the call of necessity. The difference lies in the subsequent legal effect of these apprehensions — in the case of *Toscanino*, the court identified that such egregious acts amounted to a lack of due process, thus calling for the court to divest jurisdiction.[235] In *Yunis*, meanwhile, while the court acknowledged that the acts of the officers exceeded what was necessary, there was no acknowledgement of any failure of due process since no acts "shocked the conscience."[236]

Admittedly, the "shocks the conscience" test admits of ambiguity, and is subject to differing interpretations, depending on the judge or jury hearing the trial.[237] However, there are guidelines that could reasonably standardize the application of this test, notwithstanding the infeasibility of perfect uniformity. *United States v. Ross* laid down two guiding principles: first, torture is *prima facie* shocking to the conscience, and second, in order to be shocking to the conscience, "it must be a clear case on which there is unanimity, or something very close to it" as to the egregious nature of the acts committed.[238] In making such determination, moreover, there must be

232. *Id.*

233. *Id.* at 1093.

234. *Id.* at 1092-93.

235. *Toscanino*, 500 F.2d at 272.

236. *Yunis*, 924 F.2d at 1092-93.

237. Paul Mitchell, *Domestic Rights and International Responsibilities: Extradition under the Canadian Charter*, 23 YALE J. INT'L L. 141, 177 (1998).

238. United States v. Ross, 119 D.L.R.4th 333, 372 (B.C. C.A.) (1994) (Can.) .

some adaptation to the social milieu, as the conscience to be shocked belongs to the imagined collectivity of citizens in the tribunal's home State.[239] Another factor that must be considered is the so-called "baseline," which constitutes the core of elementary human rights, which could not be breached.[240] This baseline may be established in reference to international human rights law.[241] Taking together all these factors, there can be some uniformity as to when acts may be deemed to shock the conscience.

In summary, while the "shocks the conscience" test admits no objective standards, the tribunal may be guided by the following factors: (a) whether they constitute torture or other *jus cogens* acts, (b) unanimity of tribunal opinion, (c) social opinion or milieu, and (d) the minimum standards set by international law. The guidelines are thus instrumental in drawing the line between acts shocking to the conscience and those nearly exceeding what is necessary — which eventually determines whether the court may exercise jurisdiction or not.

The other element comprises the remedies available to victims of infringing acts that *do not* shock the conscience, but still exceed what is necessary. The officers would be subject to liability, whether criminal, civil, or administrative, depending on what is available in the territorial jurisdiction encapsulating the proceeding. It must be noted that one can pin individual liability on international instruments like the CAT, unless, of course, the previously-discussed *post facto* judicial approval for "ticking time bomb" situations exists.[242]

D. Proportionate Acts vis-à-vis Exigent Circumstances

After discussing the first two sub-categories, where there are either no exigent circumstances or the acts done by public officers exceeded the call of necessity, the residual sub-category thus covers acts proportionate to necessity brought about by exigent circumstances. In such a situation, the tribunal may continue exercising jurisdiction over the case at bench, notwithstanding infringing acts committed by the law enforcers, since these acts were justified and proportionate.

The reason behind this approach by the framework lies on the original *ratio* of *Male Captus, Bene Detentus*. States have a pressing need, especially in

239. *Id.* at 371.

240. FRANZ MATSCHER & HERBERT PETZOLD, PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 668 (1988).

241. *See* Chan v. Canada (M.E.I.) 3 S.C.R. 593, 635 (1995) (Can.) (La Forest, J., dissenting).

242. *See* Florian Jessbenger, *Bad Torture — Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany*, 3 J. INT'L CRIM. JUST. 1059, 1063 (2005).

the post-9/11 context, to prosecute international criminals.[243] When exigent circumstances such as those discussed above exist, States would have to resort to certain extra-legal means to protect the greater public welfare. When the extra-legal means taken are thus proportionate to what is necessary, then the court could continue to exercise jurisdiction, since there was no egregious violation of human rights amounting to lack of due process.[244]

The closest illustration to this sub-category is *Eichmann*.[245] Assuming, as discussed above, that exigent circumstances existed in that particular case — due to the historically unprecedented egregiousness of the crimes committed by Mr. Eichmann — then the infringing apprehension was proportionate to what the situation demanded. In that Case, there was minimal infringement on State sovereignty, due to a quick-strike "grab and catch" affair, and there was no harm done to Mr. Eichmann or any civilians.[246] As the Eichmann capture was, as termed by commentators, an "efficient breach" of Argentinean territory,[247] while there was an illegal extra-territorial apprehension, it did not exceed the exigencies of the situation.

In sum, the proposed framework abandons the singular approach of MCBD. Instead, the court determines whether there are exigent circumstances, which are illustrated by the cited cases. Should the court deem that there be no exigent circumstances, and law enforcers committed infringing acts, then the court must divest itself of jurisdiction. On the other hand, when there are exigent circumstances, should the infringing acts grossly exceed necessity and shock the conscience, then the court must divest itself as well of jurisdiction. If these acts exceed necessity but not enough to shock the conscience, then the court maintains jurisdiction, and the law enforcers may simply be subject to criminal, administrative, or civil liabilities. Finally, if the acts done by the law enforcers are proportionate to need, then the court may maintain jurisdiction.

X. COURT PROCEDURES AND THEIR CURATIVE EFFECT

A. An Issue of Timing

Two questions have to be asked preliminarily, which are:

243. BANTEKAS & NASH, *supra* note 8, at 218.

244. *See Toscanino*, 500 F.2d at 272 (Where egregious acts are deemed to deny an apprehended individual the needed due process.).

245. *See Eichmann*, 36 I.L.R. at 277.

246. LOUIS HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 885 (1986).

247. Jeffrey L. Dunoff & Joel P. Trachtmann, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 31 (1999).

(1) Was there a protest launched by the State or individual, under part five of the framework?

(2) Did information about infringing acts attending the arrest surface during the trial itself?

This will only apply when the host State or the individual did not protest against the apprehension at the beginning of the court proceedings. The rule is that when the host State did not protest the apprehension of the individual from within its borders, then the right to protest is deemed waived.[248] Not even the apprehended individual may raise any protest.[249]

Changes in the landscape of international law have called for a different approach. Lack of initial protest by the State or the individual does not mean that the violation of the individual's human rights can be ignored. Since the obligations for States to respect individuals' rights to liberty and freedom from arbitrary arrest belong in the sphere of both conventional and customary international law,[250] and respect for the territorial sovereignty of States is also both a conventional and customary obligation,[251] then mere failure to launch a protest should not eviscerate these international obligations.

Therefore, the framework proposes a slightly modified approach to the doctrine laid down in *Ker* and *Eichmann*. If there is failure to protest, but during the trial proper, information regarding infringing acts surfaced, then the tribunal hearing the case must not simply ignore these. The court may, *motu propio*, determine the *post facto* application of the framework notwithstanding initial failure to protest.

B. Can Due Process in Trial Cure Infringing Apprehensions?

In *Frisbie*, the Court held that notwithstanding infirmities in an apprehension, that there was a subsequent full and fair trial accorded to the apprehended individual *cured* the infirmities in the apprehension.[252] Some commentators have suggested that the assurance that there will be a subsequent full and fair trial justifies infringing apprehensions, and is thus a safeguard.[253] The "full and fair trial" standard involves the exclusion of

248. *Ker*, 119 U.S. at 442-43 & *Eichmann*, 36 I.L.R. ¶ 47.

249. *Id.*

250. ICCPR, *supra* note 82, art. 9, ¶ 1. *See* CAT, *supra* note 78; UDHR, *supra* note 175, Preamble; ICCPR, *supra* note 82, Preamble; GC III, *supra* note 191, arts. 3, 17, 87, & 130; GC IV, *supra* note 191, arts. 3, 32, & 147.

251. *See, e.g.*, U.N. Charter art. 2, ¶¶ 4 & 7.

252. *See Frisbie*, 342 U.S. at 519.

253. *See, e.g.*, Andrew Calica, *Self-help is the best kind: the efficient breach justification for forcible abduction of terrorists*, 37 CORNELL INT'L L. J. 389, 415 (2004).

evidence obtained through pre-trial misconduct.[254] While not as efficacious as the proposed framework, which deprives a court of jurisdiction to try a case where pre-trial infirmities occurred, this alternative has, to some extent, guaranteed fair trials. The question, however, is whether this particular safeguard is enough to cure the damage caused by the infringing apprehensions.

It is submitted that this perspective on curative due process is too myopic. For instance, under the second-subcategory of step five of the framework, when there are infringing acts that exceeded the call of necessity, then *at the very least*, the law enforcers would have to answer for the consequences of their actions. Depending on the degree by which the acts exceeded the exigency, then the court may pursue hearing the case or divest itself of jurisdiction. Even when there is a full and fair trial subsequent to the apprehension, when there are *no* exigent circumstances, then the fair trial could not cure the pre-trial infirmities.

C. Piecing Together the Framework

At this point, to better illustrate how the framework operates, it shall be applied to *Operation Bojinka*,[255] the facts of which, involving an attempted assassination of the Pope and hijacking of international aircraft carriers from within Philippine territory, as well as to *Alvarez-Machain*[256] and *Frisbie*.[257]

D. Applying the Framework to Operation Bojinka

Step one demands the examination of two elements: (a) what crime the arrested individual is suspected of committing, and (b) the geographical location of the individual vis-à-vis the arresting State. The framework will apply when there is an international crime committed *anywhere in the world* or non-international crimes committed *in another jurisdiction*. In *Operation Bojinka*, the arresting State was the Philippines and likewise, Abdul Hakim Murad was located within Philippine territory. Therefore, the crime suspected of being committed or planned must be of international character. There is no internationally-defined crime of terrorism yet, but these acts often fall within the definition of crimes against humanity, or conspiracy to commit such. Considering the scope of damage poised in the assassination of the Pope and bombing of multiple aircraft carriers, the crime suspected of being committed — along with the history of crimes committed by the

254. Paul Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain*, 29 CORNELL INT'L L. J. 383, 400 (1996).

255. Struck, *supra* note 1.

256. *See Alvarez-Machain*, 504 U.S. at 655.

257. *Frisbie*, 342 U.S. at 519.

suspect in pursuance of the same goal to sow terror — is either widespread or systematic. Thus, the framework applies.

Step two determines whether the apprehension has violated an extradition treaty between the apprehending State and the host State. This step does not apply to *Operation Bojinka*, because, the apprehending State and host State are one and the same: the Philippines. A State obviously cannot enter into a treaty with itself. Thus, no extradition treaty was violated.

Step three lays down the empowered subjects that may launch a protest for the infringing apprehension. In general, there are three: (a) the host State, (b) the individual him or herself, and (c) the State entitled to exercise diplomatic protection over the individual. In this case, the two empowered subjects are the individual himself, Abdul Hakim Murad, and the State entitled to exercise diplomatic protection over him, Pakistan. The host State, the Philippines, cannot protest its own actions.

Step four involves an examination of the acts of the law enforcers. In *Operation Bonjinka*, the Philippine authorities hit Mr. Murad with wooden planks, forced water into his mouth, and crushed lit cigarettes into his penis.[258] These acts are akin to the acts committed in *Toscanino*, where there was the dousing of orifices with alcohol and electrocution of Mr. Toscanino's genitals.[259] In *Toscanino*, the Court found that the acts committed by the officers amounted to torture. Likewise, under the proposed framework, the acts committed by Philippine officials must amount to torture. Under normal circumstances, since the prohibition of torture is a *jus cogens* norm,[260] this act of the Philippine officials allows no derogation.

Step five arrays the acts of the law enforcers against the exigent circumstances present in the case. This is where court balancing is crucial. One viewpoint is that since torture is non-excusable, the Philippine officials' acts exceeded what was necessary; thus, the court must divest itself of jurisdiction, faced with acts "shocking to the conscience."[261] The other viewpoint, however, is that the *Bonjinka* situation is a classic "ticking time bomb" case, where torture could be *ex post* ratified.[262] In the latter viewpoint, the means employed would be proportionate to the exigencies of the situation, and the court would retain jurisdiction.

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258. VITUG, *supra* note 4.

259. *Toscanino*, 500 F.2d at 272.

260. First Report of the UN Special Rapporteur on Torture; *See Prosecutor v. Furundžija*, IT-95-17/1-T.

261. *Yunis*, 924 F.2d at 1092-93.

262. DERSHOWITZ, *supra* note 212, at 137.

Applying step six, in case Murad or his home State failed to protest the infirm apprehension, then there can be subsequent *motu propio* application of the tribunal of the framework, once the infirm circumstances surface.

E. Applying the Framework to Alvarez-Machain

Under step one, the framework applies. While the murder of two Drug Enforcement Administation agents was a non-international crime, Mr. Alvarez-Machain was found in Mexico, which was a different jurisdiction from the apprehending State, the U.S.

Step two would apply differently, as compared to *Operation Bojinka*. The apprehension by the U.S. agents violated the U.S.-Mexico extradition treaty.[263] The lack of express prohibition against extra-territorial apprehensions in that treaty did automatically deem such apprehension legal. Stemming from that discussion, the U.S. breached the extradition treaty. Mexico's demand for the return of Alvarez-Machain must be given effect, as tantamount to a demand for restitution under the Articles on State Responsibility.[264] Since Mexico made such request, then there can be no further trial. Under the framework, *Alvarez-Machain* would have thus ended much differently.

F. Applying the Framework to Frisbie

Much like *Alvarez-Machain*, the framework's application would end early in *Frisbie*.[265]

Applying step one, the framework already disengages, since the framework only applies to international crimes committed anywhere or non-international crimes committed in another jurisdiction. In that case, since murder was a non-international crime, and Mr. Collins in the same territorial jurisdiction as the apprehending officers, and the authorities transferred the suspect from Illinois to Michigan. This was a purely domestic affair, where the framework does not apply. Therefore, assuming the framework had applied to *Frisbie*, then this case would not have even formed the second half of the supposedly doctrinal *Ker-Frisbie* rule.

In conclusion, applying the six-step framework to decided cases like *Alvarez-Machain* and controversial matters such as *Operation Bojinka* would yield drastically different results from the conclusions established by their respective tribunals. The framework demands for strict respect for human rights, international conventions, and even bilateral extradition treaties —

263. *See* United States-Mexico Extradition Treaty.

264. Articles on State Responsibility, *supra* note 79, art. 35.

265. *Frisbie*, 342 U.S. at 519.

the violation of which would either lead to adverse consequences for the apprehending State or a disengagement of the framework.

XI. CONCLUSION AND RECOMMENDATIONS

A. Summary and Conclusion

International law commentators have accorded MCBD customary status, but ignored the absence of *both* State practice and *opinio juris* in pronouncing the same status. First, there is no sufficient *usus*. There has been a "spiral of silence" as to practices contrary to MCBD — commentators have framed domestic decisions from various States to simply highlight those that upheld MCBD. Moreover, MCBD has been a foreign policy strategy mostly exercised by a few States: the U.S. and Israel in particular. Thus, there is questionable consistency in State practice. Even State practice in the U.S. has been woefully contradictory, through the *Toscanino* exception of "acts shocking to the conscience." Second, there is no *opinio juris sive necessitatis*. States have acceded to MCBD not because of any perceived legal obligation, but to defer to the Executive branch. Moreover, one must also consider the *special circumstances* attending the cases where courts have applied MCBD. The extraordinary circumstances belie any attempt to extrapolate a general rule that would apply to any situation.

Often, discussions of MCBD have solely focused on its effect on State sovereignty, and the power of States in whose territory other States have wrongfully arrested suspected international criminals. However, in considering both International Humanitarian Law and International Human Rights Law, MCBD expressly controverts recognized obligations such as respect for due process and proscription of arbitrary detention. Due to these, and the foregoing reasons, MCBD's international customary status may be sufficiently questioned through a six-step framework.

Step one: The framework will only apply for international crimes committed anywhere in the world, or non-international crimes committed in a different territorial jurisdiction from the apprehending State. The four international crimes recognized under the Rome Statute — genocide, crimes against humanity, grave breaches of the Geneva conventions, and aggression — are the only four international crimes considered by the framework. Piracy *jure gentium* and terrorism are both excluded: the former involving no jurisdictional conflicts, since it occurs in the high seas, and the latter possessing no standardized definition under international law. For non-international crimes, the apprehending State must possess prescriptive jurisdiction over the act suspected of being a crime.

Step two: Examine whether there is an extradition treaty between the apprehending State and the host State. If in spite of this agreement, the apprehending State violated the provisions of the treaty, the host State may

demand restitution, under the Articles on State Responsibility. The abducted or tortured individual must be returned to the host State. This Note expressly rejects the doctrine laid down in *Alvarez-Machain* that if there is no express prohibition in the extradition treaty against extra-territorial apprehensions, then there is no violation of the treaty, since the ruling in the case ignores customary international law and makes a dangerous quick-resort to the *Ker-Frisbie* doctrine — the primordial doctrine supporting MCBD. Step three: There are three actors empowered to protest an illegal apprehension: the host State, a State entitled to exercise diplomatic protection over the apprehended individual, and the apprehended individual him or herself. The expansion of empowerment as to include the latter two subjects is consistent with the Draft Articles on Diplomatic Protection and the seminal *Nottebohm* case, as well as developments in international law that consider the individual as a subject with limited legal capacity and standing. Basis for protest, however, would be different: for the host State, it is the violation of sovereignty and territory; for the State exercising diplomatic protection, it is the violation of the rights of its national; and for the individual, the violation of his or her rights under conventional or customary international law.

Step four: There are myriad acts that may be deemed as infringing apprehensions, although this study only focuses on two: extraterritorial apprehensions and torturous acts, or those amounting to CIDT. One must distinguish between these two acts, since although both are proscribed under international conventional law, particularly the ICCPR and CAT, torture has attained *jus cogens* and *erga omnes* status, as compared to extra-territorial apprehensions or mere CIDT. Even assuming *arguendo* that the "ticking time bomb" scenario justifies torture, it only calls for an *ex post* ratification, and not *ex ante* legalization. Extraterritorial apprehensions, meanwhile, are also subject to derogation provisions under the ICCPR, in situations where the life of a nation is threatened.

Step five: The court determines whether there are exigent circumstances. Exigent circumstances are illustrated by situations such as the *Achille Lauro* incident, *Ker*, and *Eichmann*. There are three categories that determine whether the court has jurisdiction. *First*, should the court deem that there are no exigent circumstances, and law enforcers committed infringing acts, it must divest itself of jurisdiction. *Second*, when there are exigent circumstances, should the infringing acts grossly exceed what was necessary and "shock the conscience," then the court must divest itself as well of jurisdiction. The test for acts that shock the conscience are provided in *U.S. v. Toscanino*, as compared to *U.S. v. Yunis*. If these acts exceed necessity, but not enough to shock the conscience, the court maintains jurisdiction. The law enforcers, in any case, may be subject to criminal, administrative, or civil liabilities. *Third*, if the acts done by the law enforcers are proportionate to need, then the court may maintain jurisdiction.

Step six: Finally, the framework abandons the doctrine that failure by the individual or State to protest the apprehension in the first place would waive such right, as well as the doctrine that a full and fair trial subsequently cures any infirmity in the apprehension. Instead, the framework allows the court to *motu propio* and *post facto* apply the framework during the trial itself, when facts evincing infirm acts by the law enforcers during the apprehension become apparent.

B. Recommendations

Admittedly, customary international law, due to its unwritten nature, cannot be explicitly changed, repealed, or modified. Moreover, most State practice stems from foreign policy, which is only belatedly justified by deploying principles of law — as seen in the frequent use of MCBD to justify abductions in exigent circumstances. Finally, another consideration is that in as much as it takes a long while to establish custom, it also similarly takes a long time to disestablish it.

The proposed framework only scratches the surface as far as a detailed step-by-step assessment is concerned of the entire process of apprehension of suspected criminals until their prosecution. The following are admitted weaknesses or deficiencies of the framework, which subsequent research may build on:

First, further study on other infringing acts committed by law enforcers. This Note only discusses in depth two of these acts: extra-territorial apprehensions and torture. Other typical acts include the luring of suspects into the high seas or international airspace to facilitate apprehension,[266] and CIDT, which this study only cursorily discussed.

Second, further study on the wording and structure of extradition treaties. This study examines the wording of the U.S.-Mexico extradition treaty and builds an argument to abandon *Alvarez-Machain*. To further supplement this suggested abandonment, a more in-depth examination of the typical wording of extradition treaties and the policy statements behind these may be in order.

Third, more comprehensive laying-down of cases invoking MCBD. As stated in the introductory chapters of this research, there is no attempt to provide a definitive treatise on cases involving MCBD. Unearthing a greater number of cases would further support the point this Note is making. This study is also open to the possibility that it has unfortunately potentially contributed to the "spiral of silence," should it have ignored any of the seminal cases that could have changed the result of this research.

266. *See* Kash, *supra* note 216, at 65.

Fourth, additional application of the framework's steps to decided cases and controversial matters. This Note has already commenced the test-application of the framework to three situations: *Operation Bojinka*, *Alvarez-Machain*, and *Frisbie*. Further application of the framework to other cases may serve to highlight the strengths and identify possible weaknesses of the proposed framework.

Fifth, appending additional steps to the framework. Admittedly, this framework, much like international law itself, is a work in progress. In a purely hypothetical medium such as the present research, there are certainly unanticipated situations or instances where the framework either has no answer or has inadequate solutions. Further studies may therefore augment the proposed framework by developing or expanding its steps.

Lastly, employing other epistemological methods. Suggested approaches are on-the-ground interviews or immersive studies on the actual experiences of individuals subject to infringing apprehensions, to further appreciate the nuances of their situation and identify other solutions to these problems from the international legal system. By going in-depth and focusing on individual experiences, the present Note is personalized and its top-down approach may be supplemented. It must not be forgotten that at the center of these cases and situations are individuals whose personal liberties have been infringed by powerful governments, and who have little to no recourse in the present international legal framework.