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## CASE COMMENT: *United States v. Toscanino* - The forcible abduction of a criminal defendant from a foreign state precludes a federal court's acceptance of jurisdiction

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**United States v. Toscanino**—The forcible abduction of a criminal defendant from a foreign state precludes a federal court's acceptance of jurisdiction.\*

The United States Court of Appeals for the Second Circuit was called upon, in *United States v. Toscanino*,<sup>1</sup> to decide "whether a federal court must assume jurisdiction over a defendant who is illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges."<sup>2</sup> Resting its decision on what it perceived to be violations of the United States Constitution and treaties in force between the United States and Uruguay, the court held that jurisdiction could not be assumed.

Francisco Toscanino, a citizen of Italy residing in Uruguay, was convicted of conspiring to import and distribute narcotics into the United States.<sup>3</sup> Appellant asserted prior to and during trial that the district court lacked jurisdiction because of the manner in which he was arrested. In an offered proof of facts, Toscanino alleged that he had been forcibly kidnapped from his home in Uruguay, taken to Brazil by agents in the employ of the United States, isolated and subjected to torture for seventeen days<sup>4</sup> and then enplaned for the United States where he was placed under arrest.<sup>5</sup>

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\*Eight months after its decision in *United States v. Toscanino*, the United States Court of Appeals for the Second Circuit was given the opportunity, in *United States ex rel. Lujan v. Gengler*, of reassessing its holding. The import and effect of *Lujan* are noted by the author in a discussion immediately following the original comment.

1. 500 F.2d 267 (2d Cir. 1974), *petition for rehearing en banc denied*, 43 U.S.L.W. 4175 (U.S. Oct. 8, 1974).

2. 500 F.2d at 271.

3. Toscanino was found guilty of violating former 21 U.S.C. §§ 173, 174 (1964) (repealed in 1970).

4. Appellant offered to prove that he was

denied . . . sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. . . . Toscanino was forced to walk . . . a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. . . . his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

500 F.2d at 270.

5. Toscanino also asserted on trial and on appeal that the district court improperly denied his motion to compel the United States Attorney to state, pursuant to 18 U.S.C. section 3504 (1970), whether electronic surveillance had taken place. Toscanino alleged

The United States Attorney neither affirmed nor denied these allegations, contending that the proceedings were independent of the allegations' validity. The district court, relying principally on *Ker v. Illinois*<sup>6</sup> and *Frisbie v. Collins*,<sup>7</sup> agreed. Ruling that the manner by which a party is brought before the court is immaterial to its power to proceed, the court refused to dismiss the indictment.

The United States Court of Appeals for the Second Circuit unanimously reversed. Holding that courts must divest themselves of jurisdiction in a criminal case when the defendant has been forcibly kidnapped from a foreign state, the court remanded *Toscanino* for an evidentiary hearing with respect to appellant's allegations.<sup>8</sup> The court concluded that because the abduction violated American treaty commitments and the United States Constitution, the acceptance of jurisdiction would be improper.<sup>9</sup>

The court, in determining that treaty violations had occurred, examined sections of the United Nations Charter and the Charter of the Organization of American States.<sup>10</sup> The court con-

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in his proof of facts that he had been the target of a telephone wiretap while residing in Uruguay. 18 U.S.C. § 3504 (1970) provides in relevant part:

(a) In any trial, hearing, or other proceeding in or before any court . . . of the United States

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the unlawful act;

. . . .

(b) As used in this section 'unlawful act' means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

6. 119 U.S. 436 (1886). *Ker*, while residing in Peru, was indicted in Illinois for larceny and embezzlement. The President, upon request by the Governor of Illinois, invoked the treaty of extradition between Peru and the United States, and issued a warrant authorizing an American agent to take custody of *Ker* from the Peruvian authorities. The warrant was never served however, instead *Ker* was forcibly abducted by the agent and brought to Illinois where he was tried and convicted.

7. 342 U.S. 519 (1952). In *Frisbee*, *Collins* sought release through a writ of habeas corpus from a Michigan state prison. He alleged that, "while he was living in Chicago, Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan." *Id.* at 520.

8. 500 F.2d at 281.

9. Additionally, the court held that appellant could properly assert a claim under 18 U.S.C. section 3504 (1970) even though the alleged surveillance took place in Uruguay. See note 49 *infra*.

10. The court relied upon U.N. Charter, art. 2, para. 4, which states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,

strued these charter provisions as an agreement by the United States "not to seize persons residing within the territorial limits of Uruguay . . ."<sup>11</sup> This construction was essential to the court's disposition of the case.

The court recognized that two lines of authority, embodied in *Cook v. United States*<sup>12</sup> and *Ker v. Illinois*,<sup>13</sup> had possible application to the instant case. The distinguishing factor in these decisions was the violation of a self-executing treaty by an extra-territorial seizure.<sup>14</sup> The Supreme Court in *Cook* held that the existence of a treaty and its subsequent violation precluded the acceptance of jurisdiction.<sup>15</sup> In *Ker*, however, the Court held that the absence of a treaty permitted the acceptance of jurisdiction and an adjudication on the merits.<sup>16</sup> The interpretation of the charters by the court in *Toscanino* established that a violation

or in any other manner inconsistent with the Purposes of the United Nations. The court also relied upon Article 17 of the Charter of the Organization of American States, which declares:

The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

11. 500 F.2d at 278.

12. 288 U.S. 102 (1933). *Accord*, *United States v. Ferris*, 19 F.2d 925 (N.D. Cal. 1927); *United States v. Schouweiler*, 19 F.2d 387 (S.D. Cal. 1927). *See also* *United States v. Cotton*, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973).

13. 119 U.S. at 436. *Accord*, *Arch v. United States, The Island Home*, 13 F.2d 382 (5th Cir. 1926); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934); *The Muriel E. Winters*, 6 F.2d 466 (S.D. Texas 1925); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924); *The Grace and Ruby*, 283 F. 475 (D. Mass. 1922). *See also* *United States v. Cotton*, 471 F.2d at 744; *United States v. Caramian*, 468 F.2d 1370 (5th Cir. 1972); *United States v. Vicars*, 467 F.2d 452 (5th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973); *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971); *Virgin Islands v. Ortiz*, 427 F.2d 1043 (3rd Cir. 1970); *Hobson v. Crouse*, 332 F.2d 561 (10th Cir. 1964); *United States v. Sobell*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957).

14. A self-executing treaty has been defined as one "which prescribes by its own terms a rule for the executive or for the courts or which creates obligations for individuals enforceable without legislation." Evans, *Self-Executing Treaties In The United States of America*, 30 Br. Ybk. INT'L L. 178, 185 (1953).

15. In *Cook* a British vessel suspected of smuggling was seized by the United States Coast Guard. This act violated a treaty in force between the United States and Great Britain which specifically established territorial limits, extending out to sea, beyond which seizures could not be undertaken by the United States. In affirming that the libel for forfeiture was properly dismissed, the Supreme Court recognized that the treaty compelled such a holding. As the Court concluded, the treaty was meant to deal completely with the subject of search and seizure and its violation deprived the court of jurisdiction to decide the issue. 283 U.S. at 112.

16. 119 U.S. at 443-44.

had occurred and that *Toscanino* was consequently governed by *Cook*.

Two issues, however, call into question the court's conclusions. It is by no means clear that the court's interpretation of the charters was correct and that a violation had occurred. Furthermore, had a breach of the compacts been determined it is similarly unclear whether *Toscanino*, as an individual, was in a legal position to gain advantage from it.

The charter provisions construed by the court deal with the duty of member states to refrain from the use or threat of force against the territorial inviolability of another state. The court interpreted these sections as forbidding the forcible kidnapping of an alleged criminal from within the territory of a member state. However, an analysis of the provisions indicates that they were intended to bear upon a different aspect of international relationships. Contrary to the interpretation of the court, the sections' purpose was to prohibit aggression and intervention in the classic and commonly understood sense.

The United Nations Charter provision

is to be compared with the corresponding provisions of the League of Nations Covenant, notably Article 10 by which members undertook "to respect and preserve as against *external aggression* the territorial integrity and existing political independence of all Members of the League" and Article 12, 13 and 15 by which members undertook not to "*resort to war*" under certain conditions.<sup>17</sup>

Similarly, this provision has been characterized as a restatement of the traditional non-intervention rule,<sup>18</sup> commonly understood as prohibiting "an act of dictation by one state to another with regard to its internal or external policy backed by the use or threat of force."<sup>19</sup>

The Dumbarton Oaks Proposals,<sup>20</sup> the foundation of the

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17. L. GOODRICH & E. HAMBRO, *CHARTER OF THE UNITED NATIONS* 103 (2d ed. 1949) (emphasis added).

18. J. HALDERMAN, *THE UNITED NATIONS AND THE RULE OF LAW* 50 (1966). See also F. DE LIMA, *INTERVENTION IN INTERNATIONAL LAW* 34 (1971); J. STONE, *AGGRESSION AND WORLD ORDER* 92 (1958); Frank, *Who Killed Article 2(4)? or: Changing Norms Governing the Use Of Force By States*, 64 *AM. J. INT'L L.* 809 (1970); Verosta, *The Maintenance of International Security As A Specific Purpose of the United Nations*, 1971 *U. TOLEDO L. REV.* 127.

19. Brierly speaking before the International Law Commission, International Law Commission, 1st Sess. 12th meeting, Apr. 28, 1949, A/CN.4/SR, 12, Apr. 29, 1949, p. 2, quoted in 5 *WHITEMAN, DIGEST OF INTERNATIONAL LAW* 329 (1965).

20. The Dumbarton Oaks Proposals, 9 October 1944, Chapter II Principles (4). See L. GOODRICH & E. HAMBRO, *supra* note 17, at 103.

United Nations Charter, omitted the concluding words of the present paragraph. The Proposals, which stated that "[a]ll members shall refrain from the threat or use of force in any manner inconsistent with the proper purposes of the organization" indicates that the section was designed simply to prohibit aggression.<sup>21</sup> The circumstances in which the provision has been invoked by the United Nations buttress this construction.<sup>22</sup>

The Second Circuit's citation of the Eichmann case as United Nations action supportive of its interpretation is incorrect.<sup>23</sup> The record indicates that no reliance was placed upon any specific Charter provision by Argentina, nor subsequently by the Security Council, in their condemnation of Israel's actions. It is questionable whether the parties even viewed the controversy as being a legal issue. In an Explanatory Memorandum which accompanied its request for a Security Council meeting, the Argentinian government stated that

[i]n these circumstances the only remaining recourse is to the Security Council. A *political question* is involved which . . . contributes a precedent dangerous for international peace and security, for the maintenance of which the Security Council bears primary responsibility.<sup>24</sup>

It seems, therefore, that the United Nations Charter section relied upon by the court does not yield to the interpretation given.

21. The section's concluding words are ". . . against the territory or political independence of another state." In their treatise, Goodrich and Hambro indicate that it was the insistence of certain smaller states that brought about the expanded provision. These states' purpose was to explicitly establish "that there should be included in the Charter some more specific guarantee that force could not be used by more powerful states." See L. GOODRICH & E. HAMBRO, *supra* note 17, at 103.

22. Thus, when Ambassador Stevenson addressed the Security Council during its debate on India's invasion of Goa, he stated that, "what is at stake . . . is a bold violation of the most basic principle in the United Nations Charter, stated in . . . Article 2, paragraph 4. . . ." SCOR XVI Mtg. 987 pp. 7-27. See also the statement of Ambassador Lodge concerning the dispatch of an observation group to Lebanon, Discussion in the Security Council, 15-18 July 1958, SCOR XIII Mtgs. 827, 832-3.

23. 500 F.2d at 277.

24. 5 WHITEMAN, *supra* note 19, at 211 (emphasis added). In bringing a case before the Security Council, it is arguably a recognition by the party that the issue is politically rather than legally based. Roslyn Higgins observed that

[m]any lawyers contend that law plays a minimal role in the work of the Council. That organ is, they point out, essentially a political body. It operates in a different way from a judicial body such as the International Court of Justice, and frequently ignores the law of nations.

Higgins, *The Place of International Law In The Settlement of Disputes By The Security Council*, 64 AM. J. INT'L L. 1 (1970).

Furthermore, an investigation of the non-intervention article of the Charter of the Organization of American States establishes a similar conclusion. Article 17 of the Charter was designed to combat the repeated United States military interventions into Latin America which occurred in the early part of the century.<sup>25</sup> President Theodore Roosevelt's proclamation of 1904, announcing the intention of the United States to exercise international police power, provided the impetus in the Latin American states' drive to establish the forbearer of the present treaty provision.<sup>26</sup>

The court's reliance upon treaty violations, as a basis for precluding the acceptance of jurisdiction, was misplaced for an additional reason. The Supreme Court has recognized that not every breach of a treaty confers individual rights adjudicable in court.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interests and the honor of the government which are the parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress. . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens . . . of one of the nations . . . which partake of the nature of the municipal law, and which are capable of enforcement as between private parties in the country. . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress. . . . A treaty, then is a law of the land . . . whenever its provisions prescribe a rule by which the rights of private citizens . . . may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.<sup>27</sup>

The Charter of the United Nations and the Charter of the Organization of American States were intended to be compacts among independent states.<sup>28</sup> The treaties confer no rights upon the citi-

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25. M. BALL, *THE O.A.S. IN TRANSITION* 48-57 (1969).

26. C. FENWICK, *THE ORGANIZATION OF AMERICAN STATES* 137-43 (1964).

27. *Head Money Cases*, 112 U.S. 580, 598 (1884). *See also* *United States v. Rauscher*, 119 U.S. 407 (1886); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

28. Several courts have reached this conclusion. *See Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir. 1960); *Sei Fujii v. State of California*, 38 Cal. 2d 718, 242 P.2d 617 (1952). *See also* *Hitai v. United States Immigration and Naturalization Serv.*, 343 F.2d 466 (2d Cir. 1965); *United States v. Vargas*, 370 F. Supp.

zens of the contracting states.<sup>29</sup> This conclusion is supported by both municipal<sup>30</sup> and international law.<sup>31</sup> Whether one concludes that the treaties were not violated, or if violated accorded no rights to Toscanino cognizable by our courts, *United States v. Toscanino* apparently should have been decided in accordance with those seizure cases, such as *Ker*, in which the courts' jurisdiction was unimpaired by treaty considerations.

The second principal basis for the denial of jurisdiction was rooted in the court's determination that the abduction violated the Due Process Clause of the fifth amendment.<sup>32</sup> In concluding that due process prohibited the acquisition of jurisdiction, the court re-examined the traditional rule, expressed in *Frisbie*, that

due process of law is satisfied when one present in court is convicted of the charges against him after a fair trial in accordance with constitutional procedural safeguards.<sup>33</sup>

The court, in so doing, broadly concluded that *Frisbie* was in conflict with the expanded and enlightened interpretation of due process expressed in more recent decisions of the Supreme Court and therefore would be forced to yield. The "Ker-Frisbie rule," stated the court of appeals, "cannot be reconciled with the . . .

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908 (D.P.R. 1974); *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961). Furthermore [i]n the cases of *Shelley v. Kraemer*, [334 U.S. 1 (1948),] *Sipes v. McGhee*, [316 Mich. 614, 25 N.W.2d 638 (1947),] and *Kempt v. Kempt* [sic] [188 Misc. 310, 69 N.Y.S.2d 680 (Sup. Ct. 1947),] counsel sought to show that restrictive land covenants based upon race or color violated the human rights provisions of the United Nations Charter. In each case, however, the court either refused to pass upon the question or expressly rejected the contention that such restrictive covenant clauses could be successfully attacked in a court of law by virtue of the legal effect of the United Nations Charter on the United States municipal law.

Note, *Constitutional Law—Treaties—Effect Of The United Nations Charter Upon Inconsistent State Law*, 5 VILL. L. REV. 100, 103-04 (1959) (footnotes omitted). *But see Oyama v. California*, 332 U.S. 633, 673 (1947) (Murphy, J., concurring).

29. See notes 30 & 31 *infra*.

30. See note 13 *infra*. See also *The Merino*, 22 U.S. (9 Wheat.) 391 (1824); *The Richmond*, 13 U.S. (9 Cranch) 102 (1815); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924).

31. See, e.g., *Mavrommatis Palestine Concessions (Jurisdiction)*, [1924] P.C.I.J., ser. A, No. 2; 1 D. O'CONNELL, *INTERNATIONAL LAW* 119 (1965); 1 L. OPPENHEIM, *INTERNATIONAL LAW* § 13, at 19 (8th ed. Lauterpacht 1958). American practice similarly appears to recognize that the state is the proper juridical personality to advance claims concerning international kidnappings. See *The Vincenti Affair*, 1 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 624 (1920); *The Cantu Case*, 2 *id.* at 310; *The Case of Blatt and Converse*, 2 *id.* at 309.

32. 500 F.2d at 275.

33. 342 U.S. at 522.

expansion of the concept of due process, which . . . protects . . . against pretrial illegality by denying the government the fruits . . . of any deliberate and unnecessary lawlessness. . . ."<sup>34</sup> This holding, extending the protections of the Constitution to an alien residing in a foreign country, has important ramifications in municipal and international law. Surprisingly, however, it was not until reaching Toscanino's allegations of a government sponsored wiretap, employed against him in Uruguay, that the court addressed itself to the issue.<sup>35</sup>

The court noted that over the past century the protections of the Constitution have been expanded to encompass citizens outside,<sup>36</sup> and aliens within<sup>37</sup> the territorial boundaries of the United States. Concluding that "[n]o sound basis is offered in support of a different rule with respect to aliens abroad," the court held that the Constitution shielded Toscanino from violations of the fifth amendment.<sup>38</sup>

The court's analysis both oversimplifies a recurring problem<sup>39</sup> and ignores several *sound bases* which militate against such an extension of constitutional protections. The court failed to consider that the jurisdictional foundations which were present in earlier decisions, in which the Constitution was extended, do not necessarily exist to permit application of constitutional safeguards to an alien outside the territorial bounds of the United

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34. 500 F.2d at 275. The decisions cited and discussed by the court as embodying the expanded protections of the Due Process Clause were, *United States v. Russel*, 411 U.S. 423 (1973); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverman v. United States*, 365 U.S. 505 (1961); *Rochin v. California*, 342 U.S. 165 (1952).

35. 500 F.2d at 280. The constitutional issue was reached by the court when it held that 18 U.S.C. section 3504 (1970) was intended to prohibit any act of surveillance determined to be in violation of the Constitution, and not simply those enumerated in the statute.

36. See *Reid v. Covert*, 354 U.S. 1 (1957); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951).

37. See *Galvan v. Press*, 347 U.S. 522 (1954); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *San Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972); *Au Yi Lau v. United States Immigration & Naturalization Serv.*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); *Cermeno-Cerna v. Farrell*, 291 F. Supp. 521 (C.D. Cal. 1968).

38. 500 F.2d at 280.

39. The issue was popularly expressed in the question, "does the Constitution follow the flag?" For a discussion of this problem, see Flynn, *The Constitution Abroad: The Operation of The Constitution Beyond The Continental Limits of The United States*, 32 TEXAS L. REV. 58 (1953); cf. Sutherland, *The Flag, The Constitution and International Agreements*, 68 HARV. L. REV. 1374 (1955), Fairman, *Some New Problems of The Constitution Following The Flag*, 1 STAN. L. REV. 587 (1949).

States.<sup>40</sup> In failing to recognize the absence of a jurisdictional base for its holding, the court acted contrary to the holdings of American decisional<sup>41</sup> and international law.

International law recognizes that a sovereign nation can exercise its jurisdiction when a proper foundation exists.<sup>42</sup> These underpinnings are territoriality, nationality, protection of certain state interests, and the protections of certain universal interests.<sup>43</sup> Our courts, traditionally, have adhered to the limitations imposed by international law.<sup>44</sup> *Toscanino* fails to meet the requisites for establishing jurisdiction.

Practical difficulties also exist in extending the Constitution's protections to an alien residing abroad. Judge Anderson in

40. Since citizenship is not a consideration, ascertaining whether a territorial basis existed for extending the Constitution should have been the goal of the court. Traditionally, our courts have interpreted territoriality as a dual concept. Not only must the individual be before the court, but the alleged injustice must have been committed within the territorial ambit of the United States. *See* cases cited note 37 *supra*. (An exception is recognized, apparently, when the non-resident alien owns property within the United States and seeks the protections of the fifth amendment's just compensation clause. *See, e.g.,* *United States v. Pink*, 315 U.S. 203 (1942); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966)).

Since appellant's complaint relies upon acts taking place in Uruguay, it would appear that the court should have denied him the protections of the Constitution. *See, e.g.,* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Reyes v. Secretary of Health, Education and Welfare*, 476 F.2d 910 (D.C. Cir. 1973); *Cermeno-Cerna v. Farrell*, 291 F. Supp. 521 (C.D. Cal. 1968); *Pauling v. McElroy*, 164 F. Supp. 390 (D. Cal. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir. 1960); *cf. Kakatash Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962).

The decisions denying the Constitution's protections to non-resident aliens do differ in one material respect from *Toscanino*. *Toscanino* is a criminal case, and the appellant's presence is not voluntary. The court was confronted with a different issue than the courts in the earlier cases. The court apparently recognized this distinction when it questioned whether the protections accorded an alien should not be commensurate with those of any other defendant "at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States." 500 F.2d at 280.

However, if the court did view this as the issue before it, it was incumbent upon it to so state the question in this narrower manner, and then fully explore its holding in the light of the several factors noted above. *See* text accompanying notes 39-48 *infra*.

41. *See* note 40 *supra*.

42. *See* *The S.S. Lotus*, [1927] P.C.I.J., ser. A No. 10 at 18. Rhyne noted that [t]he jurisdictional competence of a state is the legal authority it possesses consistent with the limitations of international law. . . . the jurisdiction of a state typically includes authority over its land area, over bodies of water within and adjoining its land area, over the airspace above it and over persons within its domain.

C. RHYNE, *INTERNATIONAL LAW* 102 (1971). *See also* 1 D. O'CONNELL *supra* note 31, at 655-60; *RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES*, §§ 10-36 (1965).

43. *See* note 42 *supra*.

44. *See* note 40 *supra*.

his concurring opinion touched on this problem. In disassociating himself from the majority's application of the fourth amendment to circumscribe illegal wiretapping abroad, Judge Anderson questioned the novel and unreasonable demands upon law enforcement and national security agents such a holding entailed.<sup>45</sup> Agents complying with the laws of the country in which they were located might concurrently find themselves in violation of the United States Constitution.

The court's very method of reaching its holding gives pause, especially the limited analysis given the issues. Extensions of the Constitution should be cautiously undertaken.<sup>46</sup> The Supreme Court's admonition in *In re Ross* that "[t]he Constitution can have no operation in another country" was a viable doctrine only a short time ago.<sup>47</sup> The Court, in circumstances more compelling than *Toscanino*, did not utilize territoriality as a jurisdictional foundation for extending constitutional rights to aliens. In the *Insular Cases*, the residents of areas under the complete sovereignty and control of the United States were found not to be entitled to full constitutional safeguards.<sup>48</sup>

The United States Court of Appeals for the Second Circuit failed in *United States v. Toscanino* to adequately explore the bases upon which it chose to establish its holdings. In concluding that the abduction of *Toscanino* violated American treaty obligations and the United States Constitution, the court relied upon surface investigations of the issues.<sup>49</sup>

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45. 500 F.2d at 281.

46. See, e.g., Flynn, *supra* note 43, at 62 (discussion of the difficulties the Supreme Court encountered with the famous *Insular Cases*).

47. 140 U.S. 453, 464 (1891). It was only with the Court's holding in *Reid v. Covert* that *Ross'* holding was vitiated. 354 U.S. 1 (1957). It is noteworthy that even today a citizen cannot always claim the Constitution's protection when outside the United States. As Henkin noted when commenting on the vitality of *Madsen v. Kinsella*, 343 U.S. 341 (1952):

When the United States exercises authority as an occupying power, the President, as Commander in Chief, may establish courts for the trial of crimes committed there, and even American citizens may be tried in such courts without jury trial or other safeguards provided in the Bill of Rights.

L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 267 (1972).

48. See *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); cf. *Downes v. Bidwell*, 182 U.S. 244 (1901).

49. After concluding its inquiry into *Toscanino's* allegations of forcible abduction, the court addressed itself to the wiretap issue. Under the provisions of 18 U.S.C. section 3504 (1970), the government can be called upon to either affirm or deny that "evidence is admissible because it was obtained by the exploitation of an unlawful act." An unlawful act is defined in the statute as, "any act the use of any electronic, mechanical, or other

In *United States ex rel. Lujan v. Gengler*,<sup>50</sup> the court of appeals was afforded the opportunity of reviewing *Toscanino*. The issue again before the court was the effect upon jurisdiction of a forcible abduction occurring in a foreign state.

Lujan argued that the district court's dismissal of his petition for a writ of habeas corpus was in error under the Second Circuit's holding in *Toscanino*. In support of his position, Lujan, as had *Toscanino*, recounted the manner in which he was arrested.<sup>51</sup> The court, in apparent retreat from its broad holding in *Toscanino*, affirmed the district court's ruling. The appellant's pleadings, when measured against *Toscanino*, were found insufficient to afford relief. Emphasizing differences in the pleadings, the court limited the sweep of *Toscanino*, determining that Lujan's kidnapping breached neither American treaty commitments nor the Due Process Clause of the fifth amendment.

In *Toscanino*, the court had interpreted sections of the United Nations Charter and the Charter of the Organization of American States as indicating an agreement by the United States

device (as defined in section 2510(5) of this title) in violation of the Constitution or law of the United States . . . ."

The government argued, and the Court of Appeals agreed, that 18 U.S.C. section 2510 (1970) had no application in the present situation. It was, noted the court, intended to apply only to "our Nation's communication network." 1968 U.S. CODE CONG. & ADMIN. NEWS, 90th Cong., 2d Sess. 2179. However, the court concluded that 18 U.S.C. section 3504 (1970) was not limited by the inapplicability of this statute, but was operative whenever "any act - in violation of the Constitution occurs." 500 F.2d at 280.

Apart from the impropriety of extending the Constitution to protect an alien residing in a foreign state, the court's application of this statute to the present situation appears improper. The court acted contrary to the "accepted canon of construction that the coverage of a federal statute will not extend beyond our national boundaries unless such a legislative intent clearly appears." *Air Line Stewards and Stewardesses Ass'n, Int'l v. Trans World Airlines, Inc.*, 273 F.2d 69, 70 (2d Cir. 1959). See also *Foley Bros. Inc. v. Filardo*, 336 U.S. 281 (1949); *Blackmer v. United States*, 284 U.S. 421 (1932). Clearly, section 3504 was intended to have application only in the United States. As the court itself noted, its companion statute, 18 U.S.C. section 2510 (1970), was designed to operate only in our nation's communication system. 500 F.2d at 279.

50. 510 F.2d 62 (2d Cir. 1975).

51. The pleadings, as the court noted, alleged that

Lujan, a licensed pilot, was hired in Argentina by one Duran to fly him to Bolivia. . . . Duran . . . had been hired by American agents to lure Lujan to Bolivia. When Lujan landed . . . on October 26, 1973, he was promptly taken into custody by Bolivian police who were not acting in the direction of their own superiors . . . but as paid agents of the United States. . . . Lujan . . . was held until November 1, 1973. On that date . . . Bolivian police, acting together with American agents, brought Lujan to the airport and placed him on a plane bound for New York. Upon his arrival . . . Lujan was formally arrested by federal agents.

510 F.2d at 63.

to refrain from abductions carried out within the sovereign territory of a member state.<sup>52</sup> The court, in *Lujan*, accepted this construction, choosing to distinguish and limit *Toscanino* on a different basis. *Toscanino* had alleged in the course of his offered proof of facts that

the Uruguayan government had no prior knowledge of the kidnapping nor did it consent thereto and had indeed condemned this kind of apprehension as alien to its laws.<sup>53</sup>

In *Lujan*, the court seized upon this assertion, otherwise ignored in *Toscanino*, and concluded that appellant's pleadings in failing to allege a similar protest were faulty.<sup>54</sup> Declaring that "[t]he provisions in question are designed to protect the sovereignty of states," the court held "it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress."<sup>55</sup>

This holding evidenced an awareness that *Toscanino* was in need of limitation. It is, however, unfortunate that the court distinguished its decision in this manner. In so doing, the court reaffirmed its questionable charter interpretations and again failed to recognize the basis upon which individual rights are accorded under international treaties.

In *Toscanino*, the Second Circuit concluded that the simple violation of a treaty enabled an individual to seek redress in the courts.<sup>56</sup> In *Lujan*, the court attempted to clarify its position by stating that a protest by the offended state was a prerequisite to relief.<sup>57</sup> Both decisions fail to realize that treaties afford individual rights only when it was the intent of the signatories that they do so.<sup>58</sup> The Charter of the United Nations and the Charter of the Organization of American States were designed to regulate the rights and duties of nations.<sup>59</sup> A state protest indicates that the state deems itself injured by the act committed within its borders or against its nationals.<sup>60</sup> The protest is in no sense a devolution

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52. See text accompanying note 11 *supra*.

53. 500 F.2d at 270.

54. 510 F.2d at 67.

55. *Id.*

56. See text accompanying note 27 *supra*.

57. 510 F.2d at 67.

58. See P. JESSUP, A MODERN LAW OF NATIONS 17-18 (1948); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27-29 (1950); W. FRIEDMAN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW 217-19 (1969)(citing JESSUP and LAUTERPACHT).

59. See text accompanying notes 26-31 *supra*.

60. See 1 LAUTERPACHT, *supra* note 31, at 874-75.

of rights to the individual whose claim the state may or may not choose to espouse.<sup>61</sup> The *Lujan* court's attempt to restrict *Toscanino* resulted in an equally erroneous interpretation of law.

The effort to limit *Toscanino* was similarly evident in the court's deliberations on Lujan's due process claim. The court again assessed Lujan's pleadings in the light of *Toscanino* and held that, despite the unqualified nature of its earlier decision, it was not the court's intent "to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court."<sup>62</sup> It was not necessarily true, the court noted, that the expansion of due process protections created irreconcilable conflicts with *Ker* and *Frisbie*. The court belatedly recognized that the Supreme Court had never disavowed its holdings in *Ker* and *Frisbie*, although the opportunity had presented itself, and that every other court of appeals that had passed on this question had concluded that the rule must stand.<sup>63</sup>

Its intent in *Toscanino*, stated the court in *Lujan*, had been to prohibit the acceptance of jurisdiction when the conduct amounted to "cruel, inhuman and outrageous treatment."<sup>64</sup> *Toscanino*'s allegations were "of a most shocking and outrageous character."<sup>65</sup> Such acts were comparable to those condemned by the Supreme Court in *Rochin v. California*<sup>66</sup> and *United States v. Russell*.<sup>67</sup> Decisions, the *Lujan* court asserted, which had been the basis of its holding in *Toscanino*.<sup>68</sup> The government conduct alleged by Lujan, observed the court, lacked the shocking quality which transformed an illegal abduction, sanctioned by *Ker* and *Frisbie*, into a violation of due process.

The court, having chosen to distinguish *Toscanino* by limiting the circumstances in which it could be invoked, failed to consider, once again, the underlying propriety of extending constitutional protections to an alien residing in a foreign state. It is regrettable that the court did not capitalize on the opportunity provided by *Lujan* to clarify or more fully explore its holding.

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61. *Mavrommatis Palestine Concessions (Jurisdiction)*, [1924] P.C.I.J., ser. A, No. 2 at 11-12.

62. 510 F.2d at 65.

63. *Id.* at 65 n.4.

64. *Id.* at 65.

65. *Id.*

66. 342 U.S. at 165.

67. 411 U.S. at 423.

68. 510 F.2d at 65.

Indeed, the court's failure to reconsider *Toscanino* in its entirety is unfortunate.

Decisions such as *Toscanino* and *Lujan* have dual importance. The holdings establish a rule of law which, theoretically, governs when similar circumstances arise. In this sense the decisions must be deemed to have only partially succeeded. The holdings of *Toscanino* were limited in *Lujan* to the extent that it might fairly be argued that the decision has application only to a unique set of facts. The *Lujan* decision emerged largely as a mere restatement of the law prior to *Toscanino*. Despite the opportunity the cases provided, the court contributed little but confusion and misinterpretation to international law.

Decisions, however, can have a value distinct from the practical accomplishment of providing guideposts for later courts. The reasoning engaged in by a court, particularly when confronted with international legal problems, may have a more significant effect than its holding. In *Banco Nacional De Cuba v. Sabbatino*,<sup>69</sup> the United States Court of Appeals for the Second Circuit, speaking through Judge Waterman, recognized that

[i]nternational law is derived . . . from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality. . . . Judges of municipal courts, the bulk of whose decisions involve questions under domestic law derived from a long established and increasingly elaborate national legal system, will often find themselves unfamiliar with the ratiocination necessary for decision in this area, where recognized precedent and accepted authority are scant. Anyone who undertakes a search for the principles of international law cannot help be aware of the nebulous nature of the substance we call international law. . . . But until the day of capable international adjudication among countries, the municipal courts must be the custodians of the concepts of international law, and they must expound, apply and develop that law whenever they are called upon to do so. . . .<sup>70</sup>

The court of appeals in *Toscanino* and *Lujan* failed to adhere to the precepts charted in *Sabbatino*. Scant attention was given basic concepts which municipal courts must appreciate in order to grapple with common issues in international law.

The court failed to adequately explore the purposes and in-

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69. 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1963).

70. *Id.* at 860.

tent of treaties before premising decisions upon them. This led to probable misconstructions of relevant provisions and in turn to the recognition of nonexistent rights. It is unlikely that the court would have approached a relevant municipal statute in the superficial manner employed to examine the charters in *Toscanino* and *Lujan*. Similarly, little attention was devoted to determining the validity of extending the reach of American law into a foreign country.

The court though grounding its holdings, in part, on violations of international law neglected to explore its single most developed source. The Second Circuit's examination of international law focused entirely on convention. No reliance was placed on the abductions' apparent violation of customary international law.<sup>71</sup> Clearly this was error, for as the Supreme Court held in *The Paquete Habana*,<sup>72</sup> international law is to be ascertained and applied as often as questions depending upon it are presented for adjudication.

The court failed in *Toscanino* and in *Lujan* to appreciate the significance of international law for its holdings. Consequently, the court failed to perform the necessary function every municipal court must undertake in order to advance international law as a system of effective jurisprudence.

*Barry Carl Ross*

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71. See O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L LAW 279, 280 (1960).

72. 175 U.S. 677 (1900).