file: JAFFE

DEC 15 1982

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DANIEL S. DEARING
L. RALPH SMITH, JR.

December 13, 1982

Honorable Richard A. Hauser
Deputy Counsel to the President
The White House
Washington, D.C. 20500

Dear Dick:

Enclosed please find papers filed by us in behalf of Sidney L. Jaffe in the habeas corpus pending before the United States District Court, Middle District of Florida.

The sole issue raised in our petition was lack of personal jurisdiction of the Florida Court resulting from the Extradition Treaty violation which occurred when Mr. Jaffe was kidnapped from his Toronto home and forcibly transported to Palatka, Florida to stand trial. The Florida Attorney General responded to the Order to Show Cause by filing a Motion to Dismiss for failure to exhaust State remedies, a threshold issue to which we have replied.

Meanwhile, the Toronto Chapter of the International Law Association filed an exhaustive review of international law affected by the kidnapping, copy enclosed.

Sincerely,

Daniel S. Dearing

DSD:lh

Enclosures

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY LEONARD JAFFE, Petitioner, vs. LOUIE WAINWRIGHT, Respondent, and HONORABLE JIM SMITH, Attorney General, Additional Respondent.	:	Habeas Corpus Case No. 82-1100-Civ-J-M

MEMORANDUM OF LAW IN
OPPOSITION TO MOTION TO DISMISS

Respondents were given 25 days to show cause why relief Petitioner seeks should not be granted. The cause shown on the 25th day was a motion to dismiss addressed to only one of three points raised in papers supporting the petition. (See, Memorandum of Law in Support of Petition for Habeas Corpus, p. 19). Presumably, then, the response, directed to the threshold issue of the need for 'exhaustion' in this case, is all the 'cause' that Respondents have to show, and if the Court denies their motion, the relief Petitioner seeks can be granted without further delay.

1. State Court Relief On The Issue Raised In This Petition Is "Unexhausted" Because It Is Unavailable.

The Attorney General says he and the Fifth District Court of Appeal are surprised that Petitioner asserts his claim to be one of exclusive Federal jurisdiction, since the point was raised and briefed in the pending state court appeal from Petitioner's conviction. The Attorney General is right about Mr. Jaffe having challenged (because of the treaty violation) personal jurisdiction of the trial court at sentencing and on appeal. But the implication of Respondent's comment, that by having offered the issue to state courts for their review Petitioner is somehow estopped from raising it as the ground for his habeas corpus application, is wrong. Petitioner

cannot endow state courts with the authority to interpret United States treaties, an authority beyond the power of state courts to assert, just as the treaties themselves are beyond power of the states to make, urgent arguments of the Attorney General notwithstanding. And interpretation of the Extradition Treaty, 27 U.S.T. 983, is most assuredly required for any fair-minded judicial treatment of whether its terms were violated.

Petitioner does not contest the Attorney General's citation of cases discussing the exhaustion requirement. All of the cases say what the brief says they say. Nor does Petitioner have any quarrel with the definition of "comity" set out in Younger v. Harris, 401 U.S. 37 (1971), quoted at length by Respondent. In fact, Petitioner relies upon it. For just as Younger invokes a "sensitivity to the legitimate interests of both State and National governments," Petitioner urges that same "sensitivity" in support of his business at Bar. For "comity" is a two-way street. A mutual deference is expressed in the term. While legitimate interests of a State Goverment should not be subject to injunctive power of the Supremacy Clause, legitimate interests of the National Government should not be ignored in the process. Such legitimate National Government interests are treaty making and international relations, areas "where states individually are incompetent to act . . . " Missouri v. Holland, 252 U.S. 416 (1920). Indeed, State laws give way before enforcement of international treaties, and State court proceedings are subject to Federal interference when appropriate to preserve the foreign relations of the United States from State court encroachment. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cf., Hauenstein v. Lynham, 100 U.S. 483 (1880); and Missouri v. Holland, supra.

> * * * Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. [Emphasis supplied.]

United States v. Belmont, 301 U.S. 324, 330 (1936).

If governmental power over external affairs is exclusively vested in the National Government, shall we say that the courts of a State have

authority to intervene in the conduct among national sovereigns, to interfere with specific aspects of such international conduct, and to nullify treaties which have been negotiated to control specific aspects of international conduct? Clearly not. Yet a State court could not hear and decide issues raised in this habeas corpus proceeding without being prepared to nullify the Extradition Treaty insofar as it was breached by action of State officials, a fact to be presumed in Petitioner's favor for purposes of deciding Respondent's motion to dismiss.

When the State Attorney, the bonding company, Putnam County and the circuit judge agreed to have the bond forfeiture order set aside to provide financial incentive for the bonding company to send the bounty-hunters to Toronto to kidnap Petitioner, and bring him to Palatka, Florida for trial, the Extradition Treaty was deliberately nullified. The State's duty to follow procedures set out in the Treaty was repudiated. Rights of Petitioner to contest extradition within the framework of procedural safeguards agreed to between Canada and the United States and carefully worded in the treaty, were ignored. These are not matters which the courts of the offending State--or of any other State--are empowered to deal with. (See, generally, discussion in the Brief of Amicus Curiae, Toronto Chapter of the International Law Association, attached hereto and made part hereof by reference, which Petitioner adopts for its thorough and detailed analysis of international law.)

The heart of the exhaustion doctrine is comity. Ex Parte Royall, 117 U.S. 241 (1886). The doctrine implies that there exist courts of concurrent jurisdiction to defer to. Cf., Darr v. Burford, 339 U.S. 200, 204 (1950). But with respect to treaty violations there is no concurrent jurisdiction. For State courts simply do not have power to exercise jurisdiction over the foreign relations of the United States.

The Attorney General notes in several places in his response that State courts are fully competent to decide Federal constitutional issues, and argues that, therefore, the exhaustion rule applies in this case. Petitioner does not anywhere suggest that State courts lack jurisdiction to decide constitutional issues. It is rather Petitioner's position that such jurisdiction

does not imply power to interpret treaties in place between the United States and foreign governments.

At page 5 of his brief, the Attorney General refers to Autry v. Wiley, 440 F.2d 799 (1st Cir. 1971), as a "seeming exception" to the exhaustion requirement "in this context", and notes that the case is distinguishable on its facts. Petitioner agrees. However, one aspect of the case is significant to consideration of the sole issue raised by Respondent's motion to dismiss for failure to exhaust State remedies. Autry, an AWOL American sailor, had been arrested in Canada by Canadian military police at the request of, and duly transferred to custody of, American authorities who escorted him to Boston to stand trial for desertion. Upon conviction, Autry sought habeas corpus relief on grounds that he had not been furnished legal counsel when taken into custody, and that his being brought back to the U.S. from Canada violated the NATO Status of Forces Agreement. Respondents, custodial officers in Boston, moved successfully to dismiss the petition for failure to exhaust remedies within the military system. Said the First Circuit:

> Respondents renew their argument, successful in the district court, that petitioner is not properly before us because he has not exhausted his remedies within the military judicial system. But one of petitioner's two claims asserted here is jurisdictional in the strict sense, namely, that the circumstances under which petitioner was brought back to this country from Canada violated the Status of Forces Agreement between the parties to the North Atlantic Treaty. If the Agreement--itself a treaty--was violated, Autry urges, then under the doctrine of United States v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), the respondents would have acted without jurisdiction over petitioner. This kind of claim is properly cognizable by a federal civil court without requiring exhaustion. [Emphasis supplied.]

For purposes of the motion to dismiss, this court must take notice of fact that the treaty at issue was entered into by the United States and Canada to insure the orderly return of fugitives. The treaty signifies a compact between these two independent nations with a view to enhancing the public policy and public welfare of both. United States v. Belmont, 301 U.S. 324, 330 (1936).

Treaty-making power of the United States is to be exercised without regard to state laws or policies. The supremacy of a treaty has been recognized since this nation was founded. Art. 6 cl. 2, United States Constitution; 3 Elliot Debates 515. And see, Ware v. Hylton, 3 Dall. 199 (1795).

Under Article I, Section 10, United States Constitution, states are expressly prohibited from entering into treaties, but the major limitation to state action relating to treaties is rooted in Article VI, the Supremacy Clause. Treaties are expressly declared to be the supreme law of the land, and must supersede inconsistent as well as consistent state action. Hines v. Davidowitz, 312 U.S. 51 (1941).

The Extradition Treaty in the present case, is binding within the State of Florida. Baldwin v. Franks, 120 U.S. 678, 682 (1887). This rule of constitutional origin cannot be rendered nugatory by any one of the several states. It operates of itself, without the aid of any legislation, State or Federal. Therefore, it must be given full force and effect in Federal courts.

An aggrieved private person has standing to allege treaty violations, where an actual injury has occurred. Stanton v. Georgia, 6 Wall. 50, 64 (U.S.) (1868). Further, where Federal courts fail to act, the United States will be held internationally responsible for State violations of a treaty. See Butler, The Treaty Power 142-169 (1902); Hale Memorandum, S. Doc. No. 56, 54th Cong., 2d Sess. 5 (1897).

The extradition theory at issue creates an exception to the settled doctrine that Federal courts will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority. The exception as stated by the United States Supreme Court is where a matter involves "special circumstances", Ex Parte Royall, supra; Whitten v. Tomlinson, 160 U.S. 231 (1895), or requires prompt disposition "such, for instance, as cases involving the authority and operations of the general government, or the obligation of this county to, or its relations with foreign nations." See Urquhart v. Brown, 205 U.S. 179, 180 (1906). The court has put it even

stronger in more recent years. In United States v. Belmont, supra, 301 U.S. at 331, the court stated in no uncertain terms that:

> In respect of all international negotiations and compacts and in respect of our foreign relations generally, state lines disappear.

See also, Ware v. Hylton, 3 Dall. 199; 1 L.Ed. 568 (1795); and United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936). As to such purposes, as the court noted in Belmont, the State of Florida does not exist. Id.

> And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operations of a federal constitutional power.

See Missouri v. Holland, 252 U.S. 416 (1920).

Thus, it is clear that complete power over international affairs, including the interpretations of international treaties, is in the National Government, and is not and cannot be subject to any curtailment or interferences on the part of the several states. If Florida courts are permitted to interpret treaties, even though Florida is forbidden to enter into such treaties, such action would in effect relegate national and international affairs to state jurisdiction, something the Constitution forbids.

In Due v. Braden, 16 How. 635 (1853), Chief Justice Taney summed up our response to the state's motion to dismiss when he noted that:

> * * * [I]t would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire into the treaty or it's impact. . . .

This petition for habeas corpus, then, is not meant as an assault upon the doctrine of comity expressed as 'exhaustion of state remedies'. It is, rather, an example of the rare case that falls squarely within a narrow exception of the "exhaustion" requirement first announced in Ex Parte Royall (117 U.S. at 251) ("cases of urgency, involving the authority and

operations of the General Government, or the obligations of this country to, or its relations with, foreign nations. . ."") and recognized 85 years later in Autry v. Wiley, supra (440 F.2d at 800) (where a treaty is alleged to have been violated "[t]his kind of claim is properly cognizable by a federal civil court without requiring exhaustion"). The motion to dismiss for failure to exhaust State remedies should be denied.

2. Allegations Of Fact Set Out In The Petition And Supporting Memorandum Clearly Sustain This Cause Against Respondent's Motion.

The Attorney General's insistence at pages 6 and 7 of his memorandum that the petition should be dismissed because of the lack of a factual record ignores:

1. While the Advisory Committee Notes to Rule 4, Rules Governing Proceedings in United States District Courts under § 2254, Title 28, U.S.C., provide that the magistrate may authorize a motion to dismiss the petition on grounds that petitioner has failed to exhaust state remedies, no such authorization appears in the Order to Show Cause issued November 10, 1982.

2. Assuming the motion to dismiss to have been properly filed, it must be further assumed that it was filed pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim for which relief can be granted (testing legal sufficiency of the petition for habeas corpus relief). As such, statements of fact material to the claim are taken as admitted. Walker Process Equipment v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Ward v. Hudnell, 366 F.2d 247 (5th Cir. 1966). To assert that it appears beyond doubt that Petitioner can prove no set of facts to support his claim that the Extradition Treaty was violated by agents of the State of Florida when they kidnapped him and brought him back for trial would be an assertion way below the Plimsoll line. Cook v. Nichol, Inc. v. Plimsoll Club, 451 F.2d 505 (5th Cir. 1971).

CONCLUSION

For reasons and upon authority set out above, the Motion to Dismiss filed by the Attorney General as response to the Order to Show Cause must be denied, and, in the absense of any assertion of fact to traverse allegations of the petition, the writ requested should be issued directing immediate release of Petitioner and his return forthwith to Toronto, Ontario, Canada.

Respectfully submitted,

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and

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Holland Law Center
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(905) 492-2211

Attorneys for Petitioner.

By: Daniel S. Dearing
Daniel S. Dearing

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by United States Mail this 13 day of December, 1982, upon the Honorable Richard B. Martell, Assistant Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida 32014; and also upon Professor Gerald L. Morris, Faculty of Law, University of Toronto, 84 Queen's Park, Toronto, Ontario, Canada M5S 1A1.

Daniel S. Dearing

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

SIDNEY LEONARD JAFFE,	:	
Petitioner	:	
vs.	:	HABEAS CORPUS
		CASE NO. 82-1100-CIV-J-M
LOUIS WAINWRIGHT,	:	
Respondent	:	
and	:	
HONORABLE JIM SMITH,	:	
Attorney General, Additional Respondent	:	

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

1. This motion is filed by Professor Gerald L. Morris (a member of the Ontario Bar) and by Jennie Hatfield, acting in their capacity as members of and pursuant to the authorization of the Executive of the Toronto Chapter of the Canadian Branch of the International Law Association.

2. By this motion, the Toronto Chapter of the International Law Association respectfully requests this Honorable Court to permit filing of the attached amicus curiae brief, prepared on behalf of the Toronto Chapter and approved by its Executive, as part of the documentary proceedings in the above habeas corpus action.

3. In the hope of assisting this Honorable Court in disposing of this motion, a statement is annexed, providing information concerning the Toronto Chapter and its interest in this case.

Jennie Hatfield

Jennie Hatfield

Gerald L. Morris

Gerald L. Morris
c/o Faculty of Law
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Canada
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this motion and its attachments was forwarded by courier service this 7th day of December, 1982, to Dearing and Smith, 322 Beard Street, Tallahassee, Fla., attorneys for the Petitioner, with a request that they effect service forthwith on the Respondent and Additional Respondent.

Gerald L. Morris

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

SIDNEY LEONARD JAFFE,	:	
Petitioner	:	
vs.	:	HABEAS CORPUS
LOUIS WAINWRIGHT,	:	CASE NO. 82-1100-CIV-J-M
Respondent	:	
and	:	
HONORABLE JIM SMITH,	:	
Attorney General, Additional Respondent	:	

STATEMENT OF INTEREST ANNEXED TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

1. This statement is filed by Professor Gerald L. Morris and Jennie Hatfield, who certify and attest to its accuracy to the best of their knowledge and belief, in support of the Motion for Leave to File an Amicus Curiae Brief submitted on behalf of the Toronto Chapter of the Canadian Branch of the International Law Association.

2. In late November, 1982, a member of the Toronto Chapter's Executive learned of the pending habeas corpus petition through a chance conversation. Discussions among executive members followed and a decision was taken to have a brief prepared and approved for submission to this Honorable Court.

3. This resulting brief amicus curiae is submitted to the Court by the executive of the Toronto Chapter in the hope that the Court and the parties to the proceedings might find its analysis of the complex international law issues pertinent to the petition to be helpful in some measure.

4. The submission of this brief is a most unusual step for the Toronto Chapter and appears to be its first amicus curiae presentation in the nearly twenty-five years since it was founded. It was felt, however, that the occurrence in Toronto of acts central to the issue now before this Honorable Court justified a submission on behalf of the organized international law community in Toronto.

5. It should be stressed that only the Toronto Chapter has endorsed this brief and that no attempt has been made to involve the International Law Association at either the Canadian national level or the global level through its world headquarters in London, England.

6. The executive members of the Toronto Chapter include law teachers, a provincial judge, the chief counsel to a major multinational corporation, provincial government lawyers and practising lawyers -- all with a particular interest in international law. The composition of the executive reflects the profile of the general membership of the Chapter.

7. Apart from their general concern for the progressive development and wider comprehension of international law and procedure, no member of the Toronto executive has any professional or personal interest in the proceedings before this Honorable Court. In particular, there is no attorney-client or other professional or personal relationship with the petitioner, his family, or his attorneys, nor is any remuneration being paid in connection with the preparation of this brief.

8. In case such information would assist this Honorable Court, basic data concerning the two individuals primarily responsible for drafting the attached brief are set out herewith:

Professor Gerald Morris has taught law at the

University of Toronto since 1966, with emphasis on international law. From 1958 to 1966 he was an officer of Canada's Department of External Affairs, serving in Ottawa, New Delhi and (as Canadian Consul) in New York. He is immediate past president of the Toronto Chapter and a vice-president of the Canadian Branch of the International Law Association. He is also immediate past president of the Canadian Council on International Law.

Ms. Jennie Hatfield is a recent LL.M. graduate in international law from Columbia University who is currently engaged in international law teaching and research in Toronto. Her previous experience includes working in Washington as a staff member of the U.S. House International Relations Sub-Committee on Development and in New York for the International League for Human Rights.

Jennie Hatfield

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IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

SIDNEY LEONARD JAFFE,

Petitioner

vs.

HABEAS CORPUS
CASE NO. 82-1100-Civ-J-M

LOUIE WAINWRIGHT,

Respondent

and

HONORABLE JIM SMITH,

Attorney General,
Additional Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Submitted by:

Jennie Hatfield and
Prof. Gerald L. Morris
for The Toronto Chapter
of the Canadian Branch
of the INTERNATIONAL
LAW ASSOCIATION.

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Bassiouni, M.C. "Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition" (1973), 7 Vanderbilt J. of Transnational L. 25

Chermside and Hebert," Jurisdiction of Federal Court to Try Criminal Defendant Who Alleges that He Was Brought Within United States Jurisdiction Illegally or as Result of Fraud or Mistake", 28 A.L.R. Fed. 685.

Cole, C.V., "Extradition Treaties Abound But Unlawful Seizures Continue" (1975), 2 Int'l Persp. 40; (1975), 9 Gazette 117

Collins, J.P., "Traffic in Traffickers: Extradition and Controlled Substances Import and Export Act of 1970" (1974) 83 Yale L.J. 706

Constitutional Law - "Criminal Law - A Federal Court Lacks Jurisdi ion Over a Criminal Defendent Brought Into The District By Forcible Abduction: The Fourth Amendment Protects An Alien Residing Abroad Against Unreasonable Searches and Seizures Conducted by American Agents" U.S. v. Toscanino 500 F. 2d 267 (2d Cir. 1974); (1975) 88 Harv. L. Rev. 813

Corcoran, P.J., "Criminal Law - Apprehension Abroad of Alien Criminal Defendant in Violation of Fourth Amendment Ousts Trial Court of Jurisdiction to Hear Charges - Second Circuit Restricts Ker-Frisbie Rule" (1975) 43 Fordham L. Rev. 634

Dickinson, E.D., "Jurisdiction Following Seizure or Arrest in Violation of International Law" (1934) 28 Am. J. Int. L. 231

De Schutter, B., "Competence of National Judicial Power In Case The Accused Has Been Unlawfully Brought Within the National Frontiers" (1965) 1 Revue Belge de Droit Int'l. 88-124

Di Sabatino, M.A., "Arrest Without Extradition" 45 A.L.R. Fed. 871

"Due Process: Criminal Jurisdiction By Kidnapping" (1975) Ann. Survey Am. L. 1974/75, 290

"Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law" (1974) 72 Mich. L. Rev. 1087

"Effect of Illegal Abductions by Law Enforcement Officials on Personal Jurisdiction" (1975) 35 Maryland L.R. 147

Evans, A.E., "Jurisdiction - Fugitive Offender - Forcible Abduction - Ker Frisbie Rule - Treaties Extradition" (1975), 69 Am. J. Int. L. 406

Finch, "Kidnapping of Fugitives from Justice on Foreign Territory" (1935) 29 A.J.I.L. 502

Garcia-Mora, M.R. "Criminal Jurisdiction of a State Over Fugitives Brought from Foreign Country by Force or Fraud: A Comparative Study" (1957) 32 Ind. L. J. 427

"Greening of a Poisonous Tree: The Exclusionary Rule and Federal Jurisdiction over Foreign Suspects Abducted by Government Agents" (1975) 50 N.Y.U.L. Rev. 681

Lawrence III, L.G., "Criminal Law - Jurisdiction - A Federal Court Should Decline to Exercise Jurisdiction Over A Criminal Defendent Whose Presence Before the Court is Obtained by Illegal Apprehension Abroad and Forcible Abduction Into The United States by or at the Direction of United States Government Officers" (1975) 15, Va. J. Int. L. 1016

Maki, L.J., "General Principles of Human Rights Law Recognized By All Nations: Freedom From Arbitrary Arrest and Detention" (1980) Calif. W'ern. Int. L. J. 10: 272

Morgenstern, F., "Jurisdiction in Seizures Effected in Violation of International Law" (1952) 29 Br. Yr. Bk. Int. L. 265

O'Higgins, P., "Unlawful Seizure and Irregular Extradition" (1960), 36 Br. Yr. Bk. Int. L. 279

Pedersen, F.C., "International Criminal Law - Due Process Rights of Foreign National Defendent Abducted from Native Country by Federal Agents" (1976). U. of Tol. L. Rev. 723;

Preuss, L., "Kidnapping of Fugitives from Justice of Foreign Territory" (1935) 29 Am. J. Int. L. 502

"Probable Cause and Provisional Arrest Under Certain Extradition Treaties", Caltagironi v. Grant (629 F 2nd 739) 7 N.C.J. Int'l L. & Com. Reg. 121-7 (1982)

Sarasody, R.L., "Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate", 54 Texas L. Rev. 1439; (1976)

Schons, G.W., United States v. Toscanino: "An Assault on the Ker-Frisbie Rule" (1975) 12 San Diego L. Rev. 865

Scott, A.W., "Criminal Jurisdiction of a State Over a Defendent Based Upon Presence Secured by Force or Fraud" (1953) 37 Minn. L. Rev. 91

Smith Jr., J.B., "International Law - Individual Alien Has no Standing to Complain of His Abduction in Violation of International Law Absent a Diplomatic Protest on His Behalf by His Government" (1976), 11 Texas Int. L.J. 137

Speziale, M.J., "International Law - Criminal Law - In the Absence of Protest by the Asylum Nation, A Federal Court has Jurisdiction over a Defendent Brought into the District by Forcible Abduction: United States v. Lira 515 F. 2nd 68 (2nd Cir. 1975)" (1976), 8 Conn. L. Rev. 141

Steptan III, P.B., "Constitutional Limits on International Rendition of Criminal Suspects" (1980) Va. J. Int. L. 20: 777-800

Tullio, P. etc., "Jurisdiction Obtained by Forcible Abduction: Reach Exceeds Due Process Grasp" (1976), 67 J. Crim. L. 181

"United States v. Toscanino (500 F. 2d 267): An Assault on Ker-Frisbie Rule" (1975), 12 San Diego L. Rev. 865

Webb, K.G., "Constitutional and International Law - International Kidnapping - Government Illegality as a Challenge to Jurisdiction" (1975) 50 Tul. L. Rev. 169

JURISDICTION

Article VI, Clause 2 of the United States Constitution states that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Despite the fact that under Article III (2) of the United States Constitution, the Judicial Power of the United States "shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority"; it is part of the basic constitutional scheme that state courts are not only competent but obligated to consider any federal issues raised in proceedings before them.[1] However, as the fifty States could have fifty different views on a particular issue of international law, the Supremacy Clause was thought vital to ensure the single, uniform interpretation of the international legal obligations owed by the United States to the world community.[2]

See Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941) where the Court held that particular state actions involving United States foreign affairs were preempted by federal action and therefore invalid under "the Supremacy Clause", Article VI, Clause 2 of the Constitution. Also see generally Henkin, Foreign Affairs and the Constitution, Chapter IX (1972).

In Sabbatino, the Court stated:

> However, we are constrained to make it clear that an issue concerned with a basic choice regarding our relationships with other members of the international community must be treated as an aspect

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1. Gunther, Constitutional Law: Cases and Materials, 10th Ed, 1980 at 373.

2. Henkin, International Law: Cases and Materials, 2nd Ed, 1980 at 136.

> of Federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie R. Co. v. Tompkins. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were Erie extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.

Banco Nacional de Cuba v. Sabbatino, 376 United States 398, 424-25, 84 Supreme Court 923, 938-39, 11 L.Ed. 2d 804, 821-22 (1964).

It is this possibility of state interference with federal action that prompted Congress to extend broad statutory authority to Federal Courts to grant habeas corpus where persons are in State custody. In particular 28 U.S.C.A. s2254(a) provides that:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State Court on the ground that he is in custody in violation of the Constitution or Laws or Treaties of the United States.

In the instant case, the Petitioner seeks habeas corpus relief from his confinement in violation of (1) Article IV, Section 2 of the United States Constitution, (2) federal law i.e., The Federal Kidnapping Act, 18 U.S.C. s. 1201 and various principles of customary international law (such as the sovereignty of States,

3. The Paquete Habana, 175 U.S. 677, 20 S. Ct. 290, 44 L.Ed. 320 (1900) held: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, 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, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well-acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. Hilton v. Guyot, 159 U.S. 113, 163, 164, 214, 215, 16 S. Ct. 139, 40 L.Ed. 108, 125, 126." Also see U.S. v. Smith 18 U.S. (5 Wheat.) 153, 160-161, 5 L.Ed. 57 (1820); Lopes v. Reederei Richard Schroder 225 F.Supp. 292, 295 (E.D. Pa. 1963); Respublica v. De Longchamps, 1 U.S. (1 Dall.) 113, 119, 1 L.Ed. 59 (1784); Ware v. Hylton, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796), which is cited in Filartiga v. Pena-Irala, 630 F. 2d 876 (1980) for the proposition that "it is clear that courts must interpret international law not as it was in 1798, but as it has evolved and exists among the nations of the world today". (at 881).

the independence and equality of States, and human rights), and (3) the Extradition Treaty in force between the United States and Canada, 27 U.S.T. 983; 1976, Can. T.S. No. 3.

It is submitted that the Petitioner has standing to assert the violation of his State's rights under customary and conventional law due to the fact that the Canadian Government has consistently protested the infringement of its sovereign rights under customary international law and the violation of its Extradition Treaty with the United States. At no point has Canada waived the above violations. Indeed, Canada to this date continues its discussions and negotiations with the United States Department of State and Department of Justice with a view to obtaining the return of the Petitioner to Canada.

Moreover, the Petitioner possesses individual rights under (1) the Extradition Act, R.S.C. 1970, C. E-21 which is the Canadian domestic legislation implementing its obligations under the United States-Canada Extradition Treaty; (2) the Canadian Charter of Rights and Freedoms;[4] and (3) international law relating to human rights, both customary and conventional, which were violated by the kidnapping and removal of the Petitioner to the State of Florida.

It is respectfully submitted that the above issues constitute special circumstances which negate the need for exhaustion of state remedies. While public policy and 28 U.S.C. S.2283 discourage federal court interference with state court proceedings on the basis of "comity" or a respect for State functions, the rule of comity does not limit the power of federal courts to dispense with the exhaustion requirement altogether where "special circumstances" exist, e.g. Braden v. Thirtieth Judicial Circuit Court, 410 U.S. 484, 489, 93 S.Ct. 1123, 1126-1127, 3 L.Ed. 21 443 (1973) (Speedy trial rights), or where expressly authorized by Act of Congress, 28 U.S.C. S.2283.

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4. In R. v. Rauca (Ontario, Nov. 1982), the guaranteed right under Article 6(1) of every Canadian citizen to remain in Canada was held to be subject to such reasonable limitations as extradition to face war crime charges in West Germany so long as all legal rights guaranteed under the Charter were complied with in the extradition hearings, and appeals therefrom.

First, it is submitted that comity between nations "trumps" the notion of Federal-State Comity. The kidnapping of the Petitioner has already adversely affected the relations between the United States and Canada. To have what appears to be the extra-territorial exercise of Florida state criminal jurisdication by Putnam County law officials acting within Canada, must be considered to be a serious and disproportionate irritant in the relations between Canada and the United States.

Second, it is submitted that 28 U.S.C.A. S.2254 (a) constitutes an express authorization to Federal Courts to intervene in State Court proceedings where a person is in the custody of a State in violation of the Constitution, laws or treaties of the United States. See Davis v. Muellar 643 F. 2d 521 (1981) which discusses the issue of "comity" and exhaustion of State remedies, although the Petitioner in this case had not yet been tried and convicted. In the present case, the Petitioner is in custody "pursuant to the judgement of a State Court"; therefore it would appear that the instant facts fit within the parameters contemplated by 28 U.S.C.A. S.2254 (a).[5]

It must therefore follow that the non-exhaustion of state remedies will not act as a bar to the consideration of this petition, and that the Court does indeed have jurisdication to resolve the present petition of habeas corpus.

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5. In Bowman v. Wilson, 672 F. 2d 1145 (C.A. PA. 1982) the Court held that the aspect of comity doctrine is a common-law principle and not a statutory or a constitutional rule, but that the basic inquiry remains the same, viz: whether the rule of law,protection under which Petitioner seeks to invoke, contemplates protecting the Petitioner.

STATEMENT OF FACTS

The Statement of Facts as filed before the Court by the Petitioner is hereby adopted as an accurate summary.

QUESTIONS PRESENTED

I

Whether the forcible abduction of a Canadian citizen from Canadian territory by two American citizens acting under colour of authority of the State of Florida, pursuant to a bench warrant issued by a court of that State; to a tripartite agreement between the Judge, the Prosecutor and the bonding agency involved in the case; and to an act of a Court of that State which could at the very least be considered a financial inducement, would constitute: (A) a violation of conventional international law, including the Extradition Treaty between Canada and the United States of America and the Charter of the United Nations, and/or (B) a violation of customary international law?

II

Whether the abduction of a Canadian citizen from Canadian territory involving official government action on the part of the State of Florida, if constituting a breach of conventional or customary international law, or both, creates a legal obligation on the Federal Government of the United States to undertake measures to ensure the release of the Canadian citizen so abducted, given the formal protest of that nation (Canada) whose rights under international law have been impugned?

SUMMARY OF ARGUMENTS

The kidnapping of the Petitioner, a Canadian citizen, from Canadian territory by two bail bondsmen of the State of Florida acting under colour of state authority pursuant to a bench warrant issued by a Court of that State; a tri-partite agreement between the judge, prosecutor and the bonding agency involved in the case; and an act of a Court of that State which could at the very least be considered a financial inducement, constitutes a serious violation of various principles of international law, both conventional and customary.

Among the most basic principles of customary international law is that of territorial integrity and sovereign equality which Canada enjoys as of right as a member of the international community of nations. These rights of nationhood were denied to Canada by the actions of the state officials complained of herein. These acts also constitute violations of the prohibitions contained in Article 2(4) of the Charter of the United Nations, and Article 1, 2, 3, and 4 of the Helsinki Accords to which both the United States and Canada are parties. Moreover, these acts reveal a serious violation of the Extradition Treaty in force between the United States and Canada.

The Petitioner has standing to assert these violations of its state's rights due to the active protests of the Canadian Government concerning the same to the United States Departments of State and Justice. Moreover, the Petitioner appears to have some individual rights under the Canada Extradition Act in conjunction with the Canadian Charter of Rights and Freedoms which can be asserted separate and apart from the violation of Canada's sovereign and treaty rights.

The development of customary international law with respect to the protection of human rights also benefits the status of the individual in asserting personal rights. No

longer is an individual merely an object under international law with only obligations owed to the community of nations. An individual has begun to acquire a quasi-legal personality under the international law of human rights protection which can be asserted. In particular, the human rights guarantees contained in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Helsinki Accords afford the Petitioner the right to be free from arbitrary arrest and detention.

There being certain obligations owed by the United States Government under customary international law to the world community in general, and under conventional international law to Canada in particular, the breach of these obligations involves the responsibility of the State for its internationally wrongful acts. To escape from this responsibility the United States cannot argue its federal form of government. Under international law, the United States Government is responsible for any and all acts of its constituent parts. The state practice in the area of extra-territorial assertion of criminal jurisdiction in the territory of another sovereign state indicates that the state so exercising its jurisdiction in violation of international law is under an obligation to surrender up the individual to the protesting state.

The United States judicial practice of assuming personal jurisdiction over an individual seized in violation of the United States Government's obligations under international law pursuant to the Ker-Frisbie doctrine involves a separate and distinct internationally wrongful act under the law of State responsibility - that of "denial of justice". The breach of an international obligation entails the responsibility to provide reparation. This responsibility and the responsibility to prevent a further breach of international responsibilities both require that this Court (a) refuse to recognize the competence of United States Courts to exercise personal jurisdiction, and (b) to grant the relief requested by Petitioner.

ARGUMENT AND AUTHORITIES

I. THE UNITED STATES BREACHED TREATY OBLIGATIONS AND RULES OF CUSTOMARY INTERNATIONAL LAW BY THE EXTRATERRITORIAL EXERCISE OF CRIMINAL JURISDICTION BY INDIVIDUALS ACTING UNDER COLOUR OF THE STATE OF FLORIDA WITHIN THE SOVEREIGN TERRITORY OF CANADA.

A. The kidnapping of the Petitioner within the territorial jurisdiction of Canada and his extra-legal removal from Canadian jurisdiction to the State of Florida is contrary to international law relating to territorial sovereignty.

1. It is a universally recognized principle of international law that a state's authority ends at its borders.

The territorial principle of State jurisdiction "remains the most basic organizing principle in a world order constituted primarily of, and by, territorially organized States". (McDougal & Reisman, International Law in Contemporary Perspective, 1980 at 1295). It is recognized that a state may also claim jurisdiction to proscribe criminal conduct which has an effect felt within United States territory but where all constituent elements of the conduct have occurred outside the territorial jurisdiction of the United States.[6] However, the jurisdiction to proscribe should not be confused with the jurisdiction to enforce which is at issue in the present case.

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6. See in general: Harvard Research in International Law, "Jurisdiction with Respect to Crime", 29 A.J.I.L. (Supp. 1935) at 445; American Restatement of the Law, Second, Foreign Relations Law of the United States, 1965. However, the Court in Timberlane Lumber G. v. Bank of America National Trust and Savings Association (1976) 549 F. 2d 597 held that international notions of comity and fairness must necessarily limit the scope of U.S. anti-trust legislation. Among the factors to be considered and balanced before the exercise of extraterritorial jurisdiction are the following: the degree of conflict with foreign laws, the nationality of the parties, the importance of the alleged violation, the availability of a remedy abroad, the existence of an intent to affect American commerce, the effect on foreign relations, and whether the Court can make effective its order. This balancing test has been adopted by the U.S. Court of Appeal for the 3rd Circuit in Mannington Mills Inc. v. Congoleum Corp., 595 F. 2d 1287 (1979).

It is submitted that if this approach were taken in the case of forcible abduction in order to obtain personal jurisdiction, the "notions of comity and fairness" might similarly work to limit the scope of U.S. criminal legislation.

As stated, one of the fundamental principles of international law is that the sovereignty of every nation is limited by its own territorial boundaries, and a nation is therefore incompetent to act within the territorial boundaries of another sovereign state without its consent. (The S.S. Lotus Case, (1927) P.C.I. J., Ser. A, No. 10, (1927-1928) Ann. Dig. 153 (No. 98), 22 A.J.I.L. 8 (1928)).[7] Hence, while a State may possess jurisdiction under one of the five theories of jurisdiction for the purpose of proscribing a particular form of conduct, it may still lack the jurisdiction to enforce the prohibition. The machinery of law enforcement, which is "designed to render effective within the territorial area of sovereignty the sanctions which the substantive law has imposed",[8] is thus territorially based.

2. The violation of this principle incurs a breach of obligations under customary international law and treaty provisions such as those contained in the Charter of the United Nations and the Helsinki Accords.

Enforcement authorities cannot execute the laws of their nation in the territory of another state without that state's consent without violating one of the peremptory norms of international law: the sovereignty and equality of nations. The Permanent Court of International Arbitration considered the concept of sovereignty in The Island of Palmas Case; 2. U.N. Rep. Int'l Arb. Awards 829 (1928):

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in

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7. In the Lotus Case, the Permanent Court of International Justice stated: "Now the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." (at 18)

8. U.K. Law Commission, Working Paper No. 29 (1970) at 3.

> regard to its own territory in such a way to make it the point of departure in settling most questions that concern international law" [Cat. 839] [9]

Sovereignty of a State, as understood in the context of 20th Century international relations, means "the residuum of power which it possesses within the confines laid down by international law". (Starke, Introduction to International Law, 8th Ed., 1977 at 113). By entering into the community of nations and participating in the United Nations, States have restricted their liberty. Being independent, a State possesses the right to have exclusive control over its territory, its population, and hence its domestic affairs; it also is subject to the necessary correlative duty not to intervene in the affairs of and not to infringe upon the territorial sovereignty of another State. (Akehurst, A Modern Introduction to International Law, 3rd Ed., 1977 at 22; Williams & DeMestral, Introduction to International Law, 1979 at 36-42).

This right is codified in Article 2 (4) and 2 (7) of the Charter of the United Nations. Canada and the United States are both founding members of the United Nations and are therefore both bound by the Charter provisions, which state in Article 2 (4):

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

and in Article 2 (7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters essentially within the domestic jurisdiction of any State.

The controversy over whether Article 2 (7) also forbids Member States from intervening in the domestic affairs of another State led to the inclusion in the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance

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9. Also see The Corfu Channel Case, (1949) I.C.J. 39 wherein the court states that "(b)y sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.

with the Charter of the United Nations[10] the following provisions in the Preamble:

> Convinced that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.

Article 1:

> Solemnly proclaims the following principles:
>
> The Principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political interdependence of any State, or in any manner inconsistent with the purposes of the United Nations.

Under this heading the Declaration emphasized that "(e)very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, frontiers of States". Rather States are under a duty to "strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States".

Moreover, Article 1(b) of the Declaration sets out the duty of States not to intervene in the domestic affairs of other States:

> The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.

Under this heading, it is categorically stated that: "No State .... has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State". Any armed intervention and all other forms of interference .... against the personality of the State or against its political, economic and cultural elements" are declared to be in violation of international law. Moreover, the Declaration expressly states that "(n)o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it

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10. G.A. Res. 2625, 25 GAOR, Supp. 28, U.N. Doc. A/8028, at 121 (1970).

the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".

The above principles are also set out in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki Accords). 11 Both the United States and Canada are Parties to the Helsinki Accords. Under Article I entitled "Sovereign Equality, Respect for the Rights Inherent in Sovereignty", the participating States agreed to "respect each other's sovereign equality and individuality as well as the rights inherent in and encompassed by its sovereignty". Included in this category are "the right of every State to juridical equality, to territorial integrity and to freedom and political independence". Under Article II entitled: "Refraining From the Threat of Use of Force", the Participating States agreed "to refrain in their mutual relations, as well as in their relations in general, from the threat or use of force against the territorial independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration". Moreover "they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights".

The participating States also agreed under Article III entitled: "inviolability of Frontiers" to "regard as inviolable all one another's frontiers .... and therefore they will refrain now and in the future from assaulting these frontiers". In Article IV entitled: "Territorial Integrity of States" the Parties agreed "to respect the territorial integrity of each

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11 Dept. of State Publication 8826, Gen. Foreign Policy Series 298 (August 1975). There appears to be some disagreement among international experts as to the exact status of the Helsinki Accords. The general rule is that an international "agreement" (as opposed to a treaty or convention) is not legally binding unless the parties intend it to be. [Schacter, "The Twilight Existance of Nonbinding International Agreements," in Henkin, International Law at 585.] The intention of the parties must be inferred from the language of the instrument and the attendant circumstances of its conclusion and adoption, when an agreement fails to state explicitly whether it is nonbinding or lacks legal force, as is the case of the Helsinki Accords.The declared views of various signatory States have revealed apparent differences, not only as among themselves but also in the language used by particular States in referring to the Accords over a period of time.

of the participating States". And finally under Article VI entitled: "Non-Intervention in Internal Affairs", the Parties agreed to "refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations". Pursuant to this guarantee, the Parties further agreed to "refrain from any other act of miiitary, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind".

In the present case, the determination of whether to grant or deny an extradition request is within the sovereign prerogative of the requested State. This rule of customary international law has been codified in Article 8 of the Extradition Treaty in force between the United States and Canada wherein it states that "(t)he determination that extradition should or should not be granted shall be made in accordance with the law of the requested State". In other words, it was a matter solely for domestic law to determine whether the terms and conditions of the Extradition Treaty had been met by the request. In this particular case, Florida at no point ever completed an official request for extradition of the Petitioner.

It is respectfully submitted that by resorting to the unlawful method of kidnapping to obtain personal jurisdiction over the Petitioner, Florida State authorities violated the territorial integrity of the sovereign nation of Canada. Also, by intervening in internal affairs which were within Canada's exclusive domestic jurisdiction, Florida State authorities deprived Canada of its independence as a sovereign nation. As a result of these violations, Florida has secured "advantages" (i.e. the personal jurisdiction over the Petitioner), which shall not be recognized under international law. (Declaration of Principles of International Law Concerning Friendly Relations, Article 1 (6)).

Another right of a sovereign nation is that of legal equality "No principle of general law is more universally

acknowledged than the perfect equality of nations", (The Antelope, 10 Wheat 66 (1825) per Chief Justice Marshall at 122). The notion of equality encompasses State competence, respect of one state by another, equal application of the law, reciprocity and juridical equality. (Holder, The International Legal System, 1972 at 213; Brierly, The Law of Nations, 1963 at 66). "States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of one do not depend upon the power which it possesses to assure its (their) exercise, but upon the simple fact of its existence as a person under international law". (Convention on the Rights and Duties of States, signed 26 December 1933, 49 Stat. 3097; T.S. 881; 165 L.N.T.S., Article 4).

The concept of sovereign equality was incorporated into the Charter of the United Nations and as such binding on all Members: "The Organization is based on the principle of the sovereign equality of all its Members" (Article 2(1)). The Declaration on Principles of International Law Concerning Friendly Relations declares that "(a)ll States enjoy sovereign equality ... They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature". (Article 1(f)). It defined sovereign equality as including the following elements:

(a) States are inviolably equal;
(b) Each State enjoys the rights inherent in full sovereignty;
(c) Each State has the duty to respect the personality of other States;
(d) The territorial integrity and political independence of the State are inviolable;
(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States. (Article 1(f)).

In the present case, Canada possessed the sovereign right of equality as defined above. The State of Florida in enforcing its criminal jurisdiction within Canadian territorial jurisdiction, deprived Canada of its equality

as a sovereign nation. (See The Antelope, 23 U.S. (10 Wheat.) 66, 122-123, (1825) wherein the U.S. Supreme Court stated that as a result of: "this equality no one can rightfully impose a rule on another. Each legislates for itself but its legislation can operate on itself alone." (at 122-123)) Canada's right to choose and develop its own separate legal system was subordinated to the desires of a few individual county law enforcement officials in the State of Florida. What the Federal Government of the United States is prohibited from doing under customary international law and by treaty is prohibited to the States. (See generally: Cowles, "International Law As Applied Between Subdivisions of Federations", (1949) 1 Rec. des Cours 655; Rice, Law Among States in Federacy, (1960).

3. The Security Council of the United Nations acting under Article 39 of the Charter has determined that a violation of this principle creates an atmosphere of insecurity and distrust incompatible with the preservation of peace.

Under Article 2 (3) all members of the United Nations are required to "settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered." The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations elaborates on this obligation in Article 1 (b). Under the Declaration States are required to "seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement....or other peaceful means of their choice". States are required to "refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations". Finally, such disputes are to be "settled on the basis of the sovereign equality of States".

The Helsinki Accords reiterate the above obligations and further require participating States to "endeavor in good faith and spirit of co-operation to reach a rapid and equitable solution on the basis of international law". Moreover, participating States agree "to refrain from any action which might aggrevate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult".

It is respectfully submitted that if the State of Florida had a dispute over the method by which alleged fugitives from State justice may be returned to its territorial jurisdiction, under international law, including the Extradition Treaty, there were peaceful methods of dispute resolution available to it. Its resort to extra-legal means to secure personal jurisdiction over the Petitioner in order to enforce its criminal prescriptions involved a violation of this duty to seek peaceful means of dispute resolution. It is an established precept of international law that extra-ordinary or extra-legal process will not be considered valid unless all ordinary procedures are first exhausted.[12] In the present case, the State of Florida never even completed the formal documents requesting extradition of the Petitioner.

The United Nations Security Council, in considering a complaint brought before it by Argentina concerning the Eichmann kidnapping, determined that the activities complained of in that case constituted a threat to international peace and security under Article 39 of the Charter. The Security Council in its Resolution on the Eichmann case stated that:

> (t)he violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations .... (t)he repetition of acts as that giving rise to this situation would involve a breach of the principles

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12. The Interhandel Case, (1959) I.C.J. 6

upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace.[13]

It is respectfully submitted that the present case presents an even stronger argument against the validity of international kidnapping due to the presence of official government involvement by the State of Florida in the illegal activity. The device of extradition was developed precisely to provide an orderly international mechanism to facilitate international assistance in criminal matters. A rule allowing the indiscriminate kidnapping of criminal suspects in foreign jurisdictions would introduce an unbearable tension into the relations between nations which threaten the very fabric of international order.[14].

4. The Petitioner possesses standing to assert the violation of his state's rights as Canada continues to officially protest the above violations.

Federal courts have, in the past, recognized that an individual may assert violations of customary and conventional international law as a bar to personal jurisdiction even though the violation involves a right owed to the individual's State and not to him personally. The one condition present is that the State whose rights have been violated must have expressly or by implication protested the violation. In U.S. v. Rauscher, 119 U.S. 407 (1886), which involved a violation of an extradition treaty, Federal Courts were held to have jurisdiction to make appropriate inquiry and grant relief even though there had been no suggestion of a formal protest by the British government.

Ker v. Illinois, 119 U.S. 436 (1886), which was decided the same day as Rauscher, held that the manner in which an

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13. 15 U.N. SCOR, 868th Mtg 1 (1960). Also see U.N. Doc. S/4349 (1960).

See A.G. of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 5 (Dist. Court of Jerusalem, 1961) and 36 I.L.R. 277 (Supreme Court of Israel, 1962). Also see: Fawcett, "The Eichmann Case", (1962) Brit. Yrbk. Int'l L. 181 and Silving, "In Re Eichmann - A Dilemma of Law and Morality" (1961) 55 A.J.I.L. 307.

14. See for instance Bassiouni, at 27-29, 46-47; and Sponsler, "International Kidnapping" (1971) 5, Int'l Lawyer 27 at 39 and 43.

individual is brought before a court will not act as a bar to personal jurisdiction. The Court rejected the Petitioner's argument that his irregular arrest, which did not comply with the extradition treaty between the United States and Peru, denied him his Constitutional right to due process and held that due process was satisfied when a party was regularly indicted and brought to trial "according to the forms and modes prescribed for such trials...." (119 U.S. at 440). In this case, there was no government authorization of the illegal conduct, nor was there reliance on a warrant authorizing the Pinkerton agent to take custody of Ker from Peruvian authorities. Also, there was no official protest by the Peruvian government with respect to the violation of its sovereign rights under customary international law or of the treaty. In Frisbie v. Collins, 342 U.S. 519, 522 (1952) the Petitioner was brought into the jurisdiction of the court in violation of the Federal Anti-Kidnapping Statute rather than an extradition treaty.

There have been instances where state courts have refused jurisdiction where the use of illegal measures was involved in the return of a fugitive to the State. See In re Robinson, 29 Neb. 135, 45 N.W. 267, 8 L.R.A. 398 (1890) (where jurisdiction was refused based on "reason" and a preferency for honesty and fair dealing); and State v. Simmons, 39 Kan. 262, 18 Pa. 177 (1888) where the state court refused jurisdiction for the following reasons:

> It would not be proper for the courts of this State to favor, or even to tolerate, breaches of the peace committed by their own officers in a sister state, by sustaining a service of judicial process procured only by such a breach of the peace. Indeed, it would not be proper for any court in any State to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself - a violation of those fundamental principles of mutual trust and confidence which lie at the very foundations of all organized society, and which are necessary in the very nature of things to hold society together (at 265-66).

Also see Tennessee v. Jackson, 36 F. 258 (D.C. E.D. Tenn.) (1888) where a criminal defendant argued successfully that habeas should issue where he was brought into the State by the use of fraudulent extradition papers. The Court in considering the rule of international law relating to the extradition principle of "speciality" (the issue in Rauscher) concluded that:

> Such a case is not altogether analogous to the one in hand, but it tends to show the good faith required between nations. Certainly the same character of faith should obtain between the executive authorities of the different states of this nation, which in many respects are foreign to each other. It seems to me that such authority should not be held to the seizure and removal which were procured by fraud, falsehood and imposition. (at 260).

While the Simmons case was overruled sub silento in Foster v. Hudspeth, 170 Kan. 338,224 P.2d 987 (1951) and the Robinson case was expressly overruled in Jackson v. Olson, 146 Neb. 885, 22 N.W. 2d 124, 165 A.L.R. 932 (1946), it is submitted that their reasoning may be vindicated with the further development of the exclusionary rule and the "fruits of the poisonous tree" doctrine. [See the development of the "shocks-the-conscience" due process standard established in Rochin v. California, 342 U.S. 165 (1952). Therein, due process was equated with fundamental fairness which would be offended by government conduct that "shocks the conscience" [at 172], violates "the community's sense of fair play and decency" and affords "brutality the cloak of law" [at 173].]

In United States v. Toscanino, 500 F.2d 267, 271 (2d Cir. 1974) the Court indicated that (1) the Constitutionally based exclusionary rule used to bar illegally obtained evidence; (2) the District Court's supervisory power first enunciated in McNabb v. United States, [318 U.S. 332 (1943)] used to exclude evidence which fell short of directly infringing a constitutional right but which "debased" the processes of justice; or (3) the Rochin "shock the conscience" due process standard could be used by a court in divesting "itself of jurisdiction over the person of a defendent where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's

constitutional rights" [500 F. 2d at 275]. Subsequent cases have distinguished Toscanino, however, either due to the absence of U.S. government involvement in the alleged kidnappings, or due to the absence of a protest by the State whose sovereign territorial rights have been violated. [Cases cited infra at P.19].

In the present case, it is submitted that both the above elements are present (1) government misconduct - agents acting under colour of authority or at the behest, encouragement or inducement of the State of Florida seized and removed the Petitioner in violation of Canada's territorial sovereignty; and (2) official State protest - Canada has protested the violation of its rights under international law both vigorously and continuously. For the above reasons, it is submitted that the Petitioner possesses standing to assert the violation of Canada's rights under international law.

B. The kidnapping of the Petitioner within the territorial jurisdiction of Canada and his extra-legal removal from Canadian jurisdiction to the State of Florida constitute serious violations of the Extradition Treaty in force between the United States and Canada.

1. It is a principle of international law that in the absence of treaty there is no duty to extradite.

Extradition is the international legal mechanism to be applied to effect "the surrender of an individual accused or convicted of a crime by the State within whose territory he is found to the State under whose laws he is alleged to have committed or to have been convicted of a crime". (Henkin, International Law, 474.) In theory, extradition can be accomplished either on the basis of reciprocity or under a treaty. However, there is no duty to extradite recognized under international law in the absence of treaty. See McDougal & Reisman, International Law: A Contemporary Perspective, 1489-1490; Bassiouni, A Treatise on International Criminal Law, Vol. II, 309; Williams, International Criminal Law Casebook, 1978 at 686. This is a principle which the U.S. Courts have long recognized. In Factor v. Laubenheimer, 290 U.S. 276, 287, 54 S. Ct. 191, 193, 78 L. Ed. 315 (1933) the

Court noted that:

> The principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled...the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.

Both the United States and Canada, as a general rule do not grant extradition in the absence of a treaty. The U.S. Courts have explicitly recognized this principle in Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959). In that case, the Court stated that: "(t)he right of a foreign power to demand the extradition of one accused of crime and the correlative duty to surrender him exists only when created by treaty; and in the absence of statutory or treaty provision therefor, no authority exists in any branch of the government to surrender a fugitive criminal to a foreign government".

2. Under Article 1 of the U.S.-Canada Extradition Treaty, both States Parties agreed to limit their sovereignty in this area by agreeing to extradite persons found in their territory who have been charged with any of the offenses covered by the Treaty.

"Extradition has generally been looked upon as a special favor conceded to the prosecuting state", (Bassiouni, A Treatise on International Criminal Law, Vol.II 309.) In general, treaties are a method by which States may agree to depart from general customary international law to the extent expressly stated in the treaty as between themselves. (Henkin, International Law, 70-71). This concept is expressly recognized by the U.S. government pursuant to its treaty-making capacity: "(t)reaties are designed to promote U.S. interests by securing action by foreign governments in a way deemed advantageous to the United States". (Department of State, Foreign Affairs Manual, Circular No. 175 (as revised 1966) s. 311. "Exercise of the Treaty-Making Power".)

The advantage which both the United States and Canada sought in concluding the Extradition Treaty (signed in Washington, 3 December 1971; Instruments of Ratification exchanged 27 March 1976; entered into force 22 March 1976 as Amended by an Exchange of Notes, 27 U.S.T. 983, 1976 Can. T.S. No. 3, Preamble) was the more effective co-operation between the two countries in the repression of crime. This was to be accomplished by making

explicit "provision for the reciprocal extradition of offenders" (preamble). In particular the two countries agreed:

> to extradite to the other, in the circumstances and subject to the conditions described in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty. (Article 1).

According to Article 2, the two States agreed that "(p)ersons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to th(e) Treaty". In the implementing legislation in Canada there is provision for extradition irrespective of treaty, including the case where an existing extradition treaty does not include all of the crimes listed in Schedule III, (The Extradition Act, R.S.C. 1970, C. E-21, Part II). Part II expressly states that "(t)he arrest, committal, detention, surrender and conveyance out of Canada of a fugitive offender" under this Section is governed by all the provisions of Part I ("Extradition Under Treaty".) Therefore all the steps and procedures applicable to extradition under treaty also apply "in the same manner and to the same extent as they would apply if the said crimes were included and specified in an extradition arranged between Her Majesty and the foreign state". (s. 37(2)).

Part II, however, is expressly not in force unless it has been declared by proclamation of the Governor General to be in force as regards such foreign state. (s. 35(1)). It is therefore, argued that Canada does not recognize as legitimate the surrender for any other crime or by any other method than that set out in the Treaty. This has certainly been the position of the Canadian Government throughout the negotiations between Canada and the United States in this case.

Canada's agreement to surrender up fugitives from justice which are found within its territory according to the provisions of the Treaty cannot be interpreted to imply a complete surrender of its sovereignty in the area of criminal jurisdiction to the State of Florida or any other foreign entity.

See: S.S. Wimbledon Case, P.C.I.J., Series A, No.1 (1923) wherein the Permanent Court of International Justice stated:

> The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. [at 25]

It is submitted that the partial surrendering of Canada's sovereignty by creating a duty to extradite those individuals who are caught within the treaty provisions can in no way be interpreted as creating any permissive rule authorizing the United States (or any State thereof) to enter, seize and remove individuals who are not caught within the provisions of the Treaty. See the S.S. Lotus Case, P.C.I.J., Ser. A., No. 10., 2 Hudson, World Ct. Rep. 20 which stated that "failing the existance of a permissive rule to the contrary, [a state] may not exercise its power in any form in the territory of another State." [at 19].

3. The kidnapping violated numerous provisions of the treaty, including Article 8 which requires that the request for extradition be made through diplomatic channels.

One of the most elementary and universally agreed principles of international law is that of pacta sunt servanda or the duty of states to fulfill in good faith the obligations assumed by them. [Henkin, International Law, 615; McDougal and Reisman, International Law in Contemporary Perspective, 119-120]. The United Nations Charter sets out that one of the principle purposes of the organization is " to establish conditions under which...respect for the obligations arising from treaties... can be maintained." [Preamble]. Moreover, " [a] Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." [Article 2 (2)].

The Declaration on Priniciples of International Law concerning Friendly Relations and Co-operation Among States in Accordance With the Charter, so as to secure their more effective application within the international community, would promote the realization

of the purposes of the United Nations." [Preamble]. In elaborating on this principle the Declaration, States not only have the duty to fulfill in good faith their obligations under the Charter itself, they also have the duty to fulfill in good faith, their obligations (1) Under the generally recognized principles and rules of international law; and (2) under international agreements valid under the generally recognized principles and rules of international law. [Article 1(g).]

The participating States under the Helsinki Accords agreed to the above principles. They further agreed that "[i]n exercising their sovereign rights, including the right to determine their laws and regulations, they will conform with their legal obligations under international law; they will furthermore pay due regard to and implement the provisions in the Final Act of the Conference on Security and Co-operation in Europe." [Article X: Fulfilment in Good Faith of Obligations Under International Law.]

The Vienna Convention on the Law of Treaties, [UN Doc.A/CONF. 39/27, (1969), 63 A.J.I.L. 875 (1969)] to which both Canada and the United States are parties provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." [Article 26."Pacta Sunt Servanda"]. Furthermore, Parties to the Convention are required to interpret "in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [Article 31, General Rule of Interpretation].

In the present case there is a valid Extradition Treaty in force between the United States and Canada. The obligation under the principle of pacta sunt servands requires that the United States adhere to the procedure set out in the provisions of the Treaty when it desires the delivery of an individual present in Canada charged with, or convicted of an offense in the United States. In the present case, The State of Florida totally circumvented the treaty, thereby violating every procedural requirement contained in the Treaty including the provisions of Article 9 which require that the request for extradition be made through the diplomatic channel.

The State of Florida never even managed to set into motion the initiating request for extradition through diplomatic channels as required under Article 8. Beyond the two abortive attempts by The State Attorney's Office in Putnam County to file an extradition request with the Attorney General's Office in Tallahassee, Florida [see Jaffe v. State of Florida, Case Nos. 82-204, 82-205, 82-242, Memorandum of Law of the Department of Justice of Canada (1982) 12-13, 36; and U.S.A. v. Johnson, Case No. 82-48-M-01 (U.S. District Court for the Middle District of Florida, Orlando Division.) (1982) at 354.], the State of Florida made no further attempt to fulfill in good faith the obligations under the Extradition Treaty as required by international law. Rather, it chose to disregard the Treaty as a whole when it set into motion the events which led to the kidnapping of the Petitioner.

4. The Petitioner has standing to assert the above treaty violations for the reason that Canada continues to protest these violations and also for the reason that the kidnapping deprived the Petitioner of his personal rights under Article 8 to use all remedies and recourses provided under the implementing legislation, the Canada Extradition Act.

The kidnapping of the Petitioner has been vigorously protested by Canada as a serious violation of the Extradition Treaty and has been the subject of a number of Diplomatic Notes [see Notes #613 and 691 from the Embassy of Canada to the State Department dated 5 November, 1981 and 12 December, 1981 respectively]. Conferences between the Canadian Ambassador to the United States and the U.S. Deputy Attorney General [in February 1982], The Canadian Minister of External Affairs and the U.S. Secretary of State [on 14 March, 1982], the Canadian Minister of Justice and the U.S. Attorney General [on 13 April, 1982]; the subject of a Memorandum of Law of the Department of Justice filed with the U.S. Department of Justice [in August, 1982]; and a conference between agents for the Canadian Department of Justice and the U.S. Department of Justice [in November, 1982]. Canada has also requested the extradition of Daniel Kear and Timm Johnson to face the charge of kidnapping in Canada. Both individuals have been ordered extraditable and have filed appeals therefrom [U.S.A. v. Kear, Case no. 82-106-M (1982) (U.S. District Court for the Eastern District of Virginia] and

U.S.A. v. Johnson, Case no. 82-48-M-01 (1982)(U.S. District Court for the Middle District of Florida, Orlando Division.]

As noted earlier, U.S. Courts have recognized the standing of a Petitioner who asserts violations of State rights under international law when that State has officially protested the violations of its rights under a treaty between it and the U.S.[U.S v. Rauscher, 119 U.S. 407 (1886); United States v. Postal, 589 F.2d 862,883 (5th Cir. 1979); Ford v. United States (1927) 273 U.S.593, 71 L. Ed. 793, 47 S. Ct. 531; and United States v. Ferris (1927, DC Cal) 19 F.2d 925 (where it was held that one illegally before the court in violation of a treaty cannot be subjected to trial, because there is an absence of jurisdiction).] Also see United States ex rel. Lujan v. Gengler, 510 F. 2d 62,67 (2d Cir. 1976); U.S. v. Lara, 539 F. 2d 495 (1976); United States v. Marzano (1975, DC Ill.) 388 F. Supp. 906, United States v. Fielding 645 F. 2d 719 (1981); United States v. Valot, 625 F. 2d 308 (1980); United States v. Cordero, 668 F. 2d 32(1981); United States v. Reed, 639 F.2d 896 (1981) (where the court specifically stated "[a]s we pointed out in Lujan, absent protest or objection by the offended sovereign, Reed has no standing to raise violation of international law as an issue, 510 F. 2d at 67-68; see Toscanino,500 F.2d at 279;" United States v. Orman, 417 F. Supp. 1126 (1976); Marschner v. United States, 470 F. Supp. 201 (1979); United States v. Sorren, 605 F.2d 1211 (1979); United States v. Orsini,424 F. Supp. 229 (1976); United States v. Keller, 451 F. Supp. 631 (1978); United States v. Lopez, 542 F. 2d 283 (1976); United States v. Lira (1975), 515 F. 2d 68. All the above can be distinguished from the present case due to the absence of an official protest on the part of the state whose Extradition Treaty with the United States had been violated.

In addition, the petitioner appears to possess individual standing by operation of domestic Canadian law. The Extradition Treaty provides that "the person whose extradition is sought shall nave the right to use all remedies and recourses provided by such law [the law of the requested State]. "[27 U.S.T. 983, Article8]. The Extradition Act [R.S.C. 1970, c.E.-21, s.3] implements the Extradition Treaty into domestic law. The Extradition Act, as

every other piece of Federal Canadian legislation, must be interpreted in light of the guarantees contained in the Canadian Charter of Rights and Freedoms, [The Constitution Act, 1981].

Among these guarantees are: The right of every citizen " to enter, remain in and leave Canada" [s.6(1)]; "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" [s.7]; "the right to be secure against unreasonable search or seizure" [s.8]; "the right not to be arbitrarily detained or imprisoned" [s.9]; "the right on arrest or detention (a) to be informed promptly of the reasons therefore, (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful" [s.10].

The above guarantees apply to the procedure established under the Extradition Act for the determination whether extradition should or should not be granted in a particular case. [Canadian Charter of Rights and Freedoms, s.32 (1) (a) states that it applies " to the Parliament and Government of Canada in respect of all matters within the authority of Parliament."] The Extradition Act itself requires a Canadian judge to issue a warrant for the apprehension of a fugitive on a foreign warrant of arrest on such evidence as would justify such warrant,[R.S.C. 1970,c.E-21, s.10(1)]. The judge so issuing a warrant must send a report regarding the same to the Federal Minister of Justice [s.10(2)]. The fugitive once apprehended pursuant to this procedure must then be brought before a judge who shall hear the case, together with the evidence of any witness tendered to show the truth of the charge, or that the crime is an offense for which extradition shall not be granted, [s.14 and 15 respectively]. The judge shall then determine if the evidence so produced would, according to the law of Canada, justify his committal for trial. [s. 18 (1)]. The individual then has a right to apply within fifteen days for a writ of habeas corpus if he is found to be extraditable [s.19(a)].

The Petitioner was deprived of these procedural safeguards under Canadian domestic law by unlawful seizure and removal from

Canadian territorial jurisdiction. Canada fully intended to make these procedural safeguards available to the petitioner and it does not lie within the power of the State of Florida to deprive a Canadian citizen of his rights under the Canadian Constitution and the Extradition Act by simply removing him from Canadian jurisdiction through a flagrant violation of international law.

C. The kidnapping of the Petitioner within Canadian territorial jurisdiction and his subsequent extra-legal removal from Canada to the State of Florida constitute serious violations of international human rights protection, both customary and conventional.

1. An individual is no longer merely an "object" of international law but has rights which can be asserted under international law.

" Historically, how a state treated persons within its territory was its own affair, implicit in its sovereignty over its territory and in the freedom to act there as it would unless specifically forbidden by international law." [Henkin, International Law at 805].

The rule that individuals could only be an object under international law with only obligations owed to the community of nations without any corresponding rights was the customary rule of international law at the time that Ker v. Illinois [119 U.S. 436(1886)] was decided. However, since that time the status of the individual has undergone a radical alteration under international law. [Starke, Introduction to International Law, 64; Henkin, International Law in Contemporary Perspective, 148-153 and 941-962]. The individual, through developments in international human rights law, has acquired a quasi-legal personality under international law. The state, against whom the protection is offered, cannot waive the human rights guarantees which are intended to benefit its nationals.

2. Among these rights is the right to be free from arbitrary arrest and detention guaranteed both by customary and conventional law.

(a) The Charter of the United Nations and the Universal Declaration of Human Rights provide a source for customary rules of international law in the area of human rights.

"The interests of individuals, their fundamental rights and freedoms..., have become a primary concern of international law "[Starke, Introduction to International Law,64]. Arising out of the unspeakable horrors, excesses and atrocities committed in the last World War was a conviction there was an ultimate and undeniable link between the behavior on the part of a government towards its own people and the peace and security of the international community. This conviction can be recognized in the wording of the preamble of the Charter of the United Nations itself:

> We The Peoples
> of the United Nations
> Determined
> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human purpose, in the equal rights of men and women and of nations large and small...
> [59 Stat. 1031, T.S. 993, 3 Bevans 1153

Moreover, one of the Purposes of the United Nations under the Charter is"[t]o achieve internation co-operation... in promoting and encouraging respect for all... "[Article 1(3).] Because the Charter did not contain a defination of human rights, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations as an "annex of definitions" to the Charter. [Sohn and Buergenthal, The International Protection of Human Rights, 519,where it is argued that, as an authoritative interpretation of rights and freedoms referred to in the Charter, Member States are bound by the human rights provisions of the Charter to the same extent as they are by the other provisions of the Charter.]

The Charter has been held by the U.S. Courts not to be self-executing [see: Sei Fujii v. California 217 P.2d 481, rehearing denied 218 P.2d 595 (Cal Dist. Ct. App. 1950); and Hitai v. Immigration and Naturalization Service,343 F. 2d 466,468 (2d Cir. 1965).], although, in Oyama v. California, 332 U.S. 633, 649-50,673, 68 S.Ct. 269, 276-77, 288, 92 L.Ed. 249, 59 (1948) in which the Court held a section of the Alien Land Law unconstitutional as violative of the Fourteenth Amendment, Justices Black, Douglas, Rutledge and Murphy in concurring opinions referred to the section's inconsistencies

with the United Nations Charter.

The International Court of Justice, on the other hand, in The Namibia Case, [Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16] was of the opinion that the United Nations Charter did impose human rights obligations on the Member States and that these obligations are self-executing.

This issue aside, U.S. Courts have been willing to recognize that the Charter's provisions on human rights and the Universal Declaration of Human Rights are evidence of principles of customary international law recognized as part of the law of the United States. [see: Filartiga v. Pena-Irala, 630 F.2d 876, 881-883 (2d Cir. 1980); Larean v. Manson, 507 F. Supp. 1177, 1186-1188 (1980); United States v. Toscanino, 500 F. 2d 267, 277 (2nd Cir. 1974); Restatement of the Foreign Relations Law of the United States (Revised) ss 102 (1) (b), 102 (3), 131 6 Comment h to s. 10z (Tent. Draft No. 1, 1980).]

The rights proclaimed "as a common standard of achievement for all peoples and all nations" which under customary international law were violated by the petitioner's abduction by individuals acting under colour of authority of the State of Florida and return to Florida were the following provisions of the Universal Declaration [G.A. Res. 217, 3 GAOR, U.N. Doc. 1/777 (1948)].

> Article 3. Everyone has the right to life, liberty and security of the person...
>
> Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...
>
> Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
>
> Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charges against him.

Article 11. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

As was argued above, human rights guarantees are worded so as to protect the individual even against violations by his own state. Consequently, the State can no longer waive violations of these guarantees without disregarding its international obligations. In the present case, Canada has in no manner waived the petitioner's rights under customary international law. Rather, it has argued that the State of Florida deprived it of the right to ensure that the petitioner's human right guarantees were complied with within its territorial jurisdiction.

(b) The United Nations has further clarified the rule regarding arbitrary arrest and detention in its Standard Minimum Rules for the Treatment of Prisoners, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, and the Draft Principles on Freedom from Arbitrary Arrest and Detention.

The Standard Minimum Rules, which were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and subsequently by the Economic and Social Council of the United Nations [ECOSOC Res.663C (XXIV), 31 July 1957 and ECOSOC Res.2076 (LXII), 13 May 1977], established "an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind. The standards embodied in this statement are relevant to the 'canons of justice' embodied in the Due Process Clause". [Larean v Manson, 507 F. Supp. 1177, 1187 (1980). Also see Rudolph v. Alabama, 375 U.S. 889, 890 & n.1, 84 S.Ct. 155, 11 L.Ed. 2d 119 (1963) wherein Goldberg J. in his dissenting opinion expressed the view that the

ECOSOC Resolution of 31 July 1957 was relevant to the question whether the Eighth Amendment had been violated; and Estelle v. Gamble, 429 U.S. 97, 103-104 & n.8, 97 S.Ct. 285, 290-291 & n.8 (1976) which cited the Standard Minimum Rules as evidence of "contemporary standards of decency" for the purposes of the Eighth Amendment.]

The United Nations Commission on Human Rights chose as its subject for study the right to be free from arbitrary arrest and detention [Study of the Right to be Free from Arbitrary Arrest, Detention and Exile, 34 U.N. ESCOR, Supp. (No. 8), U.N. Doc. E/CN.4/826/Rev.1 (1964).] The Commission stressed the crucial importance of this safeguard, because most of the remaining rights enumerated in the Declaration could not be enjoyed or exercised if a person is not "free". [Study, 208].

The Draft Principles on the Freedom from Arbitrary Arrest and Detention prepared by the Commission pursuant to its Study was intended to establish procedures to which all law and practice should conform in order to render the fullest protection of the right to liberty and security of the person in regard to arrest and detention. [Study, 218-9]. The most fundamental principle contained therein which was derived from a study of the procedures of 91 nations is the following principle:

> 1. No one shall be subjected to arbitrary arrest or detention. Arrest or detention is arbitrary if it is on grounds or in accordance with procedures other than those established by law. The terms "arrest" and "detention" shall be defined by law.

The Draft Principles also provide that: "Anyone who is arrested or detained shall be entitled to initiate proceedings before an authority in order to challenge the legality of his arrest or detention and obtain his release from that authority without delay if it is unlawful." [Draft Principles, Article 38]. Among these proceedings recognized as offering an indi-

vidual protection against arbitrary arrest and detention were habeas corpus, amparo and regular appeal.

It is submitted that the kidnapping of the Petitioner within Canadian territory by Florida State bail bondsmen pursuant to a warrant issued by a Flordia State Court constituted a violation of the prohibition against arbitrary arrest and detention on two separate grounds: (1) the bail bondsmen had no authority to enforce their contractual rights within Canadian territory, their authority to make arrest being territorially limited to the United States. [Reese vs. United States, 76 U.S. (9 Wall.) 13, 21-22 (1870), and State of Wisconsin v. Monje, Wisc. App., 312 N.W. 2d 827 (1981) in an analogous case where a Wisconsin police officer executed a Wisconsin arrest warrant in Illinois, the court held that the arrest was made without authority and was therefore illegal. The Court, moreover, held that the unlawful arrest deprived the court of personal jurisdiction.]; and (2) the established procedure of surrendering up individuals charged with an offense in the "requesting" State being that of extradition was circumvented, thereby depriving the Petitioner of various procedural and substantive guarantees.

C. The customary rule against arbitrary arrest has also been codified into conventional law binding upon States Parties and non-States Parties alike.

1. The international agreements which afford the petitioner protection include the International Covenant on Civil and Political Rights and the optional protocol thereto.

The International Covenant on Civil and Political Rights [Annex to G.A. Res. 2200, 21 GAOR, Supp.16, U.N. Doc. A/6316, at 52 (1966)] has codified the customary rules of international human rights law. Approximately 70 States have ratified or acceded to the Convention, including Canada. Among those States who signed the Covenant but who have not yet ratified is the United States. In accordance with the Vienna Convention on the Law of Treaties [U.S. Doc. A/CONF. 39/27, (1969), 63

A.J.I.L. 875 (1969), Article 18.] a State that has signed a treaty subject to its ratification and entry into force is under an obligation "to refrain from acts which would defeat the object and purpose of a treaty."

Canada, as a full party to the Covenant, undertook "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the...Covenant.." [Covenant, Article 2(1).] The detailed rights guaranteed under the Covenant relevant to the issue at hand include:

Article 9

1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release....

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful....

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail...of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing...
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses again him....

Canada not only ratified the Covenant, which guarantees to all individuals within its jurisdiction the human rights set out in the Covenant, it also ratified the Optional Protocol to the International Covenant on Civil and Political Rights [Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316 at 59 (1966)]. The separate ratification of the Optional Protocol grants to all individuals subject to its jurisdiction the right to personally petition the U.N. Committee on Human Rights alleging violation of any right contained in the Covenant.

It is submitted that Canada fully intended through its ratification of the above Conventions to ensure that the above human rights guarantees would be absolutely enforcible by any individual within its jurisdiction. The State of Florida by its involvement in the illegal seizure and removal of the Petitioner from Canadian jurisdiction prevented Canada from fulfilling its international obligations under the Covenant, and deprived the Petitioner of his individual rights under the Covenant.

Moreover, the United States having signed the Covenant in 1966, was bound under Article 18 of the Vienna Convention on the Law of Treaties to refrain from any acts which would defeat the purpose of a treaty. Not only was the State of Florida required

under the Covenant to comply with the rule of law in obtaining the presence of the Petitioner [in this case by fulfilling the obligations under the Extradition Treaty in force between the United States and Canada], it was also required to ensure that no "group or person...engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized...in the Covenant". [Covenant, Article 5; See: Landinelli-Silva, Final Views of the U.N. Committee on Human Rights (1981) where the Committee was of the view that Uruguay was in breach of its Article 2(1) undertaking to respect and ensure the rights recognized under the Covenant to all those "within its territory and subject to its jurisdiction" even though the acts constituting the violation of Articles 7, 9, 10 and 14 were committed by Uruguayan agents operating in the territory of Argentina.)]

II. THE UNITED STATES' VIOLATION OF ITS INTERNATIONAL OBLIGATIONS UNDER BOTH CUSTOMARY AND INTERNATIONAL LAW ENTAIL THE INTERNATIONAL RESPONSIBILITY OF THE UNITED STATES.

A. The United States cannot put forward its federal division of sovereign powers as an excuse for avoiding international responsibility for the international wrong committed by individuals acting under colour of State authority.

1. Customary international law as codified in the International Law Commission's Draft Articles on State Responsibility specifically reject as irrelevant the internal organization and division of powers in the domestic context to the determination of internation responsibility for the commission of internationally wrongful acts.

"Historically, states have been deemed liable for acts which violate international law." [McDougal and Reisman, International Law in Contemporary Perspective, 941-2]. The Don Sessarego Case (Italy v. Peru), [Decision of the Italian-Peruvian Arbitration, 15 R.Int'l. Arb. Awards 400, 401 (1901)] held that "it is a universally recognized principle of international law that a State is responsible for breaches of the

law of nations committed by its agents..." Under the International Law Commission's Draft Articles on State Responsibility [Report of the International Law Commission on the Work of its Thirty-First Session, 14 May - 3 August 1979, U.N. GAOR Supp. (No. 10) 239, U.N. Doc. A/34/10(1979), Article I]. "Every internationally wrongful act of a State entails the international responsibility of that State". An internationally wrongful act exists when "(a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation." [Draft Articles, Article 3.] The following Articles set out what conduct shall be considered an act of a State under the Draft Articles:

> Article 5....conduct of any State organ having that status under the internal law of that State....
>
> Article 6....conduct of an organ of the State... whether that organ belongs to the constituent, legislative, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of that State.
>
> Article 7.(1)...conduct of an organ of a territorial government entity within a State...
>
> (2)...conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority...
>
> Article 8....conduct of a person or group of persons ...if: (a) it is established that such person or group of persons was in fact acting on behalf of that State...
>
> Article 10...conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity...even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."

It is submitted that in the present case there is conduct present under several of the above headings. First, under Article 6 there is conduct of the executive, judicial or other power present, arising out of the "tri-party agreement" whereby the Final Judgement of the Trial Court estreating the surety was vacated, thereby creating at the very least, a financial inducement for the surety company to proceed to "return" the Petitioner to the Court's jurisdiction. See, Accredited Surety and Casualty Company, Inc. v. State of Florida and Putnam County, Florida, Case No. 81-1657 (Dist. C.A., 5th Dist. of Fla.) (1982) Brief of Appellees at 1:

> "the purpose of the order [to disburse] bond money wherein Accredited...was awarded $37,500. and the remaining $100,000. was [given over to]...the Board of County Commissioners [of Putnam County] was to carry out the intention of a tri-party agreement. The participants in the tri-party agreement were Accredited...the bonding company, the State Attorney's office and the Board of County Commissioners of Putnam County, Florida."

Ibid, Brief of the Appellant at 2:

> "the Circuit Court for Putnam County vacated the Final Judgement [estreating the Petitioner's bond]...on the following terms and conditions; (a) that Accredited pay...the sum of $137,500. in [to an escrow]...account; (b) that Accredited produce Jaffe before the court within 90 days..., and (c) that by this payment, Accredited waives all exceptions to and rights to appeal from the Order of Estreature."

Accredited had previously filed a motion to set aside the order estreating the Petitioners bond on the grounds that there was no pre- or post-forfeiture notice, there existed equitable matters (referring to the Petitioners physical infirmity preventing travel to appear at his trial, and an appeal that it be given some hope that, if it produced the Petitioner for trial, it would have some chance of remission. [Ibid.] Moreover, the "agreement" above-mentioned was expressly made:

> "in order that they [Accredited] would be safe in pursuing attempts to return the Defendant Jaffe, realizing that with a Judgement [the Estreature Order] their authority [to arrest the Defendant] would be voidable and their clandestine methods of returning the defendant would have placed them in jeopardy,

> whereupon the Court agreed to set aside the judgement in order to free up Accredited to pursue its hunt for Jaffe. Subsequently, Jaffe was returned and tried [Ibid, Brief of Appellees at 2].

Also: The facts are very clear that Accredited found itself in an untenable position [procedures had begun to proceed against Accredited's license] in that it had failed to properly remit the funds. Further, Accredited was desirous of having an order entered that would allow them, at least, to have the apparent authority to pursue the capture of Jaffe. With this underlying motive, Accredited approached the Court, together with Counsel for the other affected parties herein..." [Ibid at 5].

Further: "Having received the assurances of the circuit court that a subsequent petition for remission would be entertained, Accredited moved forward with the utmost good faith and diligence, and with incredible speed...paid over...the $137,500. on September 18, 1981 ... Thereafter, Jaffe was apprehended in Toronto, Canada by agents of Accredited on September 23, 1981,...and was returned to the Putnam County Jail in Palatka, Florida by Accredited's President on September 24, 1981." [Ibid, Brief of Appellant, at 3].

After Accredited filed for remission of forfeiture and received only $37,500 as a "reward" for having returned the Petitioner [Ibid, Brief of Appellees, at 1 and Brief of Appellant at 5], Accredited decided to revoke its agreement to waive appeal on the original Judgement estreating the bond. The Appellees argued in the trial that "[t]o overturn the order entered below would be tantamount to killing the goose that laid the golden egg. That is to say, the Appellant Accredited thrust a red herring into the wind in hopes that this Court would ignore the agreement of Counsel"...[Ibid, Brief of Appellees at 5], and that it was "incumbent upon Appellant to demonstrate to th[e] court that there was no agreement"...[Ibid, at 8]. The decision in the case is reported as Accredited Surety & Casualty Company, Inc. v. State of Florida, Sidney Leonard Jaffe and Putnam County, Florida (5th District, Case No. 81-1657, August 18, 1982), "District Courts of Appeal.", Florida Law Weekly 1767 (8/27/82).

There was further conduct under Article 10 of the Draft Articles on State Responsibility which is attributable to the State. Under Article 10, a surety company employing bail bondsmen

is "an entity empowered to exercise elements of governmental authority, such organ having acted in that capacity". The conduct of such entities "shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity". In Reese v. United States, 76 U.S. (9 Wall.) 13, 21-22 (1870) it was noted that with respect to a bondsman's right to arrest that "[t]his power of arrest can only be exercised within the territory of the United States".

In U.S.A. v. Timm Johnson [Case #82-48-M-01 31 March 1982 (U.S. District Ct for the Middle District of Fla., Orlando Div., Vol. II at 401-402 of the Transcript in the extradition hearing of one of the Petitioner's kidnappers] the N.Y. State Attorney for Niagara County testified that Mr. Johnson had admitted to him under questioning at the scene at the Niagara Falls International Airport that "they [the kidnappers, Johnson and Kear] had come from Canada and that they had...credentials as bondsmen ...and they had warrants...and he [Johnson] said he [the Petitioner] was wanted in the State of Florida and that they did have, in fact, warrants for him from the State of Florida." Furthermore, Mr. Trzeciak, an investigator with the Niagara County Sheriff's office, testified [Ibid, at 395-397] that the Petitioner was handcuffed and had indicated that "he did not wish to go to Florida". The same individuals testified to basically the same set of facts in U.S.A. v. Daniel John Kear, [Case No. 82-106-M, (8 April 1982) (U.S. District Ct. for the Eastern District of Va., Alexandria Div.) at 91-96.]

Both Johnson and Kear were determined to be extraditable under the U.S.-Canada Extradition Treaty by U.S. District Courts. However, by operation of Article 10 of the Draft Articles on State Responsibility the United States is still responsible for the actions of two bondsmen even though they exceeded their competence according to internal law.

According to Article 3(b) of the Draft Articles on State Responsibility, the final element required for the commission of an internationally wrongful act [after the establishment of conduct attributable to the State], is that the conduct must constitute a breach of international obligation of the State. [See Argument, Supra, Argument No. I as regards the breach of customary and conventional obligations involved in the Petitioner's unlawful seizure and removal to Florida.]

B. Where there is a breach of an international obligation requiring the adoption of a particular course of conduct, there is further State responsibility incurred when the conduct of that State fails to conform with that requirement.

1. Customary international law, as determined by the practice of States and opinio juris, indicates that there is an obligation to surrender a person seized and detained in violation of international law when the State whose sovereignty has been so impugned demands the return of the individual.

The I.C.J. is specifically authorized under Article 38 of the International Court of Justice [59 Stat. 1055, T.S. 993, 3 Bevans 1179] which defines the sources the Court may apply in settling a dispute before it, to consider international custom, as evidence of a general practice accepted as law."

"Historically customary norm of international law appears as a result of reiterated actions of States. The element of repetition constitutes the point of departure of its formation. In the majority of cases it is precisely the repetition of certain actions in analogous situations that leads to such practices becoming a rule of conduct". [Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law", in McDougal and Reisman, International Law in Contemporary Perspective, 86.]

From an international survey of State practice in the area, it is State practice for the State to surrender the individual

up to the State which protests the infringement of its sovereign rights. [See for example: Abrahams v. Minister of Justice [1963] 4. So. Afr. L.R. 542; The Göntsch Case (1909) see Burckhardt, Schweizerisches Bundesrecht, I (Frauenfeld, 1930); The Schaebele Case (1887), see Travers, Le droit penal international, III (Paris 1921) No. 1302; and the Jacob-Solomon Case, 30 A.J.I.L. 123 (1936)]. The courts of some States, such as France and Belgium, absolutely refuse to exercise jurisdiction in these cases [See In Re Jolis, (1933) For Tribunal Correctionel; In Re Nollet (1891), see (1935) 29 A.J.I.L. 502; and Argoud (1963) Cour de Surete de l'Etat, see (1965) I Revue Belge de droit Int'l 88-124.

Therefore it would seem that general State practice demands that an individual seized and detained in violation of international law at least be surrendered upon protest by the State whose sovereignty has been violated.

It is further submitted that the rapid development of the international law of human rights both under customary and conventional law further requires that States refuse to exercise personal jurisdiction over such cases.

It is respectfully submitted that U.S. courts' assumption of personal jurisdiction in cases where the individual has been brought into the territorial jurisdiction of the United States in violation of customary or conventional international law principles is not in conformity with State practice in the area of seizure in violation of international law.

Article 27 of the Vienna Convention on the Law of Treaties [U.N. Doc. A/CONF. 39/27, (1969), 63 A.J.I.L. 875 (1969) to which Canada and the U.S. are States Parties and are bound by the provisions thereof] prohibits a party from invoking the provisions of its internal law as justification for its failure to perform a Treaty obligation.

Moreover, Article 4 of the Draft Articles on State Responsibility states that an act of a State may only be characterized as internationally wrongful by international law. "Such characterization cannot be affected by the characterization of the same act as lawful by internal law." The United States cannot avoid international responsibility for the internationally wrongful acts committed by individuals acting under colour of State authorities which include the violation of (1) Canadian territorial sovereignty, (2) the U.S.-Canada Extradition Treaty, and (3) the personal rights of the Petitioner guaranteed to him under customary and conventional law and by operation of the domestic law of Canada.

2. The U.S. judicial practice of permitting a court to assume personal jurisdiction over a person so seized under the Ker-Frisbie doctrine constitutes a separate and distinct international wrongful act.

(a) Under the international law of State responsibility there is incurred a further international delict known as "denial of justice" when there is "an injustice antecedent to the denial, and then the denial after it."

According to the Restatement, Second, Foreign Relations Law of the United States (1965) [S.3 Effect of Violation of International Law.], "if a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law." Under Article 20 of the Draft Articles on State Responsibility [1978, 2 YRBK I.L.C. 78], there is a further breach, when an international obligation requires the adoption of a particular course of conduct, and the conduct of that State is not in conformity with that required of it by that obligation".

In cases involving the kidnapping of individuals across international boundaries, the general State practice is to either release the individual upon the protest of the nation

whose sovereign rights have been impugned, or to totally refuse to exercise jurisdiction where individuals are so brought before the Courts. The U.S. Courts in accepting jurisdiction in personam in such cases incur a further internationaly wrongful act: that of the denial of justice. In the British-American Claims Arbitration, Arbitrator Pound defined "denial of justice" to be "an injustice antecedent to the denial, and then the denial after it". [Nielsen's Report, 258 at 261].

C. The breach of an international obligation entails the responsibility to provide reparation.

1. Of the forms of reparation recognized under international law (restitution, indemnity or satisfaction), international law recognizes restitution as the normal form of reparation with indemnity taking place only if restitution in kind is not possible.

(a) Restitution in kind under international law requires the re-establishment of the situation which would have existed if the wrongful act or omission had not taken place.

The Permanent Court of Justice in The Chorzow Factory Case [(1928), P.C.I.J., Series A, No. 17, pp.47-48] established the basic principles governing reparation:

> reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

"Restitution in kind is designed to re-establish the situation which would have existed if the wrongful act or omission had not taken place, by performance of the obligation which the State failed to discharge." [Jimenez de Arechaga "Forms of Reparation for the Breach of An International Obligation", in Henkin, International Law at 568.] Among the forms of restitution

in kind which may be appropriate to place a party in its pre-breach situation are the following: revocation of the unlawful act, return of a property wrongfully removed; or abstention from further wrongful conduct. It must be stressed, however, that restitution-in-kind is the normal form of reparation and indemnity could only take its place if restitution in kind is not possible [See: Chorzow Factory Case, Ibid; Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v The Government of the Libyan Arab Republic, 17 Int'l Leg. Mat'ls 1 (1978) at 36; and The Barcelona Traction Case, [1970] I.C.J. 3].

2. It is respectfully submitted that the only possible way to achieve restitution in kind is for the United States' courts to decline to exercise personal jurisdiction over the individual seized and detained in violation of international law.

Whereas there is no more fundamental pre-requisite for the conduct of relations between States than the mutual respect for each other's independence, sovereign equality and territorial integrity inherent in their membership in the international community; and

Whereas the duty to fulfill in good faith the obligations undertaken by States is essential to the maintainance of the international legal order, and peace and security in the international community; and

Whereas the international law of human rights has become an integral part of the new international legal order established under the United Nations system; and

Whereas Canada in the present case has protested the violations of its rights under international law; and

Whereas the continuance of the situation which is the subject of this request exposes the individual concerned to privation,

hardship, anguish and even danger to life and health, and thus constitutes the possibility of irreparable harm: therefore,

It is respectfully submitted that the only possible way to achieve restitution in kind (or the re-establishment of the situation which would have existed if the wrongful act or omission had not taken place) is for the United States' courts to decline the exercise of personal jurisdiction over the individual seized and detained in violation of international law.

CONCLUSION

For the foregoing reasons and authority, it is respectfully requested that this honourable Court issue the writ of habeas corpus requested by the Petitioner, Sidney Leonard Jaffe, to secure his immediate release from his unlawful confinement by the State of Florida, and to ensure his immediate return to Canada.

Such action would return the Petitioner to a position as close as possible to that in which he was prior to his illegal seizure in contravention of Canada's territorial sovereignty and the Extradition Treaty between United States and Canada, and Mr. Jaffe's human rights. Furthermore, such relief would promote international amity and would reaffirm the commitment of the United States to abide by and promote the rule of law in international relations.

All of which is respectfully submitted by:

Jennie Hatfield

Jennie Hatfield

Gerald L. Morris

Prof. Gerald L. Morris
Faculty of Law
University of Toronto

for The Toronto Chapter
of the Canadian Branch
of the INTERNATIONAL
LAW ASSOCIATION.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief amicus curiae was served by HAND DELIVERY this day of , 198 , upon the Honorable Jim Smith, Attorney General, The Capitol Building, Tallahassee, Florida 32301; and upon the Honorable Louie Wainwright, Secretary, Department of Corrections, Winewood Center, Tallahassee, Florida 32301.

_____

AO 241
(2/77)

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

Sidney L. Jaffe
Name

#082007
Prison Number

Avon Park Correctional Institution

Avon Park, Florida
Place of Confinement

United States District Court Middle District of Florida

Case No. _____
(To be supplied by Clerk of U. S. District Court)

Sidney L. Jaffe, PETITIONER
(Full name) (Include name under which you were convicted)

v.

Louie Wainwright, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF Florida, Honorable Jim Smith

_____, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $ _____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Circuit Court, Seventh Judicial Circuit, Putnam County, Florida

2. Date of judgment of conviction February 11, 1982

3. Length of sentence 35 years Sentencing judge Robert R. Perry

4. Nature of offense or offenses for which you were convicted: 28 counts of violating the Florida Uniform Land Sales Practice Law, Chapter 498, Fla.Stat. (1979), one count of failure to appear for trial in violation of § 843.15(1)(b), Fla.Stat.

5. What was your plea? (Check one)
(a) Not guilty (X)
(b) Guilty ( )
(c) Nolo contendere ( )
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. Kind of trial: (Check one)
(a) Jury (X)
(b) Judge only ( )

7. Did you testify at the trial? Yes (X) No ( )

8. Did you appeal from the judgment of conviction? Yes (X) No ( )

9. If you did appeal, answer the following:
(a) Name of court Fifth District Court of Appeal
(b) Result Pending (briefed but not argued)
(c) Date of result N/A
If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: N/A

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ( ) No (X)

11. If your answer to 10 was "yes", give the following information:

(a)(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( ) N/A

(5) Result N/A

(6) Date of result N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( ) N/A

(5) Result N/A

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( ) N/A

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion: N/A

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did <u>not</u> appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State <u>concisely</u> every ground on which you claim that you are being held unlawfully. Summarize <u>briefly</u> the <u>facts</u> supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Confinement is unlawful in that Florida courts had no jurisdiction to try, convict, or incarcerate Petitioner

Supporting FACTS (tell your story briefly without citing cases or law): Petitioner, a Canadian citizen, was kidnapped from his home in Toronto by bounty-hunters acting at the request of, and with active assistance and support of Florida State Attorney's office, beaten, threatened with violence to himself and to his family, brought forcibly across the border and taken to Putnam County, Florida, where he was tried, convicted, and sentenced to 145 years, and $152,250 in fines and surcharges (with seven counts of the maximum five years to be served consecutively). The kidnapping of Petitioner was a deliberate violation of an existing extradition treaty between the U.S. and Canada. Canada has officially protested the violation.

B. Ground two: N/A

Supporting FACTS (tell your story briefly without citing cases or law): N/A

C. Ground three: N/A

Supporting FACTS (tell your story briefly without citing cases or law): N/A

D. Ground four: N/A

Supporting FACTS (tell your story briefly without citing cases or law): N/A

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:
The issue of whether a United States law or treaty was violated is a matter of exclusive jurisdiction of Federal courts. State courts lacking jurisdiction to try the issue, there are no state remedies to exhaust.
The jurisdiction of the state court was ~~raised~~ challenged at trial and on appeal. However, it is based upon violation of a United States-Canadian Treaty, and so the Federal court has exclusive jurisdiction to decide it.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes (X) No ( )

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing Larry G. Turner, P.O. Box 508, Gainesville, Florida 32602
(b) At arraignment and plea Larry G. Turner, P.O. Box 508, Gainesville, Florida 32602
(c) At trial John L. Briggs, Barnett Bank Bldg., 1000 N. Ashley Dr., Tampa, Florida 33602
(d) At sentencing James M. Russ, 18 W. Pine St., Orlando, Florida 32801
(e) On appeal James M. Russ (address above); Daniel S. Dearing, P.O. Box 10369, Tallahassee, FL 32302; Fletcher Baldwin (address below)
(f) In any post-conviction proceeding Daniel S. Dearing (address above); Fletcher N. Baldwin, University of Florida, Gainesville, FL
(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (X) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X)
(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) And give date and length of sentence to be served in future: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( ) N/A

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 1982.
(Date)

(Signature)

Signature of Attorney
(if any)

SWORN TO and subscribed before
me this 29th day of October, 1982.

NOTARY PUBLIC

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT 23 1984
BONDED THRU GENERAL INS. UNDERWRITERS

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY LEONARD JAFFE,	:	
	:	
Petitioner,	:	Habeas Corpus
	:	Case No. _____
vs.	:	
	:	
LOUIE WAINWRIGHT,	:	
	:	
Respondent,	:	
	:	
and	:	
	:	
HONORABLE JIM SMITH, Attorney General,	:	
	:	
Additional Respondent.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

This petition seeks release of Petitioner, SIDNEY LEONARD JAFFE, from his unlawful confinement by the State of Florida at a prison facility near Avon Park, Florida.

Prior to his imprisonment, Petitioner was a citizen and domiciliary of Toronto, Canada. He was also the principal shareholder and the chief executive officer of a corporation not incorporated in Florida which engaged primarily in real estate investment and development of certain land in Putnam County, Florida. Solely by virtue of Petitioner's status with this foreign corporation he was indicted on multiple counts charging violations of Florida's Land Sales Practices Act, Section 498.033, Florida Statutes.

Following Petitioner's involuntary failure to appear for trial in Florida on this indictment, he was charged with failure to appear, and agents acting on behalf of the State of Florida, forcibly abducted Petitioner from a street in front of his apartment in Toronto, drove him against his will across the border into the United States, and flew him to Palatka, Florida, where he was subsequently tried, convicted and sentenced to 145 years imprisonment with 35 years to be served consecutively, together with fines

and surcharges totalling $152,250 on the charges prosecuted against him in Florida.

Petitioner does not here challenge the merits of his conviction on grounds cognizable by appellate courts. He does however seek to obtain release from his imprisonment, asserting that his abduction was an unlawful act by the State of Florida which violated an extradition treaty between the United States and Canada. Violation of this treaty by the State of Florida, vigorously protested by the Canadian government, renders the Petitioner's confinement unlawful, and requires this court to issue with writ of habeas corpus to order his immediate release and return to Toronto, Ontario, Canada, for reason that the state was utterly without jurisdiction of Petitioner.

FACTS

1. Background

Continental Southeast Land Development Corp. bought a tract of land from Nortek, Inc., subject to a "wrap around" purchase money mortgage. The Nortek mortgage was subject in priority to a first mortgage in favor of Morris, the original grantor. Continental subdivided and platted lots on the property. The company then "registered" the subdivision with the Division of Florida Land Sales, and offered lots for sale under agreements for deed. These contracts provided for issuance by Continental of warranty deeds to lot buyers upon payment in full of the contract price.

To increase cash flow, Continental issued notes secured by mortgages. Unable to meet mounting difficulties, caused in significant part by inept management, Continental sold its stock to Ruby Mountain, a corporation operating primarily in Nevada. Ruby Mountain transferred assets to a new corporation, Atlantic Commercial Development Corp., a company organized by Petitioner primarily to manage and continue development of the Putnam County project, St. Johns Riverside Estates. Because of a series of disputes and questions arising from civil litigation against and among Continental, Ruby Mountain and Atlantic Commercial, and a class of second mortgage note holders, Nortek refused to make partial releases of lots as

payment schedules were completed, and Atlantic Commercial, successor to Continental as developer of the project, was thereby precluded from issuing warranty deeds to 27 lot buyers. Although the registration "prospectus" provided that warranty deeds were not required until October 1, 1980 (based upon the payment term set out in the contracts for deed and anticipated receipt of partial releases from encumbrance of the purchase money mortgages), complaints were made in January of that year to the Division of Florida Land Sales, thus exascerbating an existing dispute which had arisen from the class-action suit. In order to give the lot buyers some indicia of title until releases could be attained, Atlantic Commercial issued quitclaim deeds.

To alleviate growing pressure and gain time, Continental filed Chapter 11 proceedings in bankruptcy. A trustee was appointed. Seeking production of corporate books and records, discovery of company management was sought, and Petitioner (at that time in San Francisco, California) was ordered to appear at a hearing in bankruptcy court in Jacksonville, Florida. Leaving the courtroom after the hearing, Petitioner was arrested by deputies of the Florida Department of Law Enforcement, and taken to Palatka where he was subsequently charged by amended information alleging in 28 counts violations of the Florida Land Sales Act which makes it a third degree felony to materially alter an "offering" that has been registered with the state. Issuance by Atlantic Commercial of quitclaim deeds instead of warranty deeds was considered by the State Attorney's office (and later formed basis of an instruction to the jury) to be a material variation from the registration filing.

Petitioner was formally charged, fingerprinted, and arraigned. Petitioner obtained bail in the amount of $137,500 from Accredited Surety & Casualty Co., Inc., and was released. He returned to Toronto. Pretrial conference was set for May 6, 1981. Petitioner was advised by counsel (Larry Turner, Esq., of Gainesville, Florida) per Florida Rules of Criminal Procedure, that he need not appear. Hon. E. L. Eastmoore, circuit judge, ordered that a capias be issued for Petitioner's arrest for failure to appear

at pretrial conference in violation of a local rule of court. Trial was set for May 18, 1981.

During the interim, two changes occurred: Hon. Robert R. Perry was substituted for Judge Eastmoore, and John L. Briggs, Esq., was substituted as trial counsel. Meanwhile, Petitioner, while playing basketball in Toronto, was injured and suffered a concussion. Medical affidavits were forwarded to Briggs who moved for continuance on ground that Petitioner could not appear for medical reasons. (See, Composite Exhibit 1.) The motion was denied, the case was called for trial, and a second capias was ordered for Petitioner's failure to appear.

2. The Circuit Court's Order

In addition to ordering the capias, Judge Perry ordered that the $137,500 bond be estreated, and that the State Attorney immediately commence extradition procedures pursuant to treaty, 27 U.S.T. 983. (Exhibit 2).

3. Extradition

On June 29, 1981, the State Attorney, Hon. Stephen L. Boyles, submitted an application for extradition to the Governor. On July 2, 1981, the application was disapproved as to form by the Attorney General's office, and returned. On July 17, 1981, an amended application for extradition was submitted, and on July 23, 1981, the amended application was also disapproved as to form. Assistant State Attorney Clyde E. Shoemake was contacted by telephone and told to speak directly with the Attorney General's office to discuss ways to remedy the defective application. No further effort was made to extradite Petitioner from his home in Toronto, Ontario, Canada. (See, Composite Exhibit 3.)

4. Bond "Forefeiture"

Accredited Surety & Casualty Company, Inc. ("Accredited") had not been given notice of Judge Perry's forfeiture as required by § 903.26(2),

Fla.Stat., until June 29, 1981, when final judgment was entered against it in favor of the State of Florida for the use and benefit of Putnam County. On August 7, 1981, Accredited moved to set aside judgment, stating as grounds the lack of notice of forfeiture, and citing Petitioner's physical infirmity preventing travel. Accredited asked that it "be given some hope that if it produced [petitioner] for trial that Accredited would have some chance of remission of the forfeiture. . ." (Brief of Appellant, Accredited Surety & Casualty Company, Inc. v. State of Florida and Putnam County, Florida, Fifth DCA Case No. 81-1657, p. 2, attached hereto as Exhibit 4).

On September 18, 1981, following a hearing on Accredited's motion, Judge Perry vacated the final judgment of June 29, 1981, on conditions material hereto that Accredited escrow $137,500 and produce Petitioner before the court within 90 days. The State of Florida described the purpose of the order vacating judgment more succinctly in their brief filed in the Fifth DCA Appeal (attached hereto as Exhibit 5, pp. 1-2):

> How this all came about was not only unusual but unique because the purpose of the order was to carry out the intention of a tri-party agreement. The participants in the tri-party agreement were Accredited Surety & Casualty Company, Inc., the bonding company, the State Attorney's office and the Board of County Commissioners of Putnam County, Florida.
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> * * * *
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> Accredited agreed to deposit the money to cover the judgment if all parties would agree to setting aside of the judgment in order that they would be safe in pursuing attempts to return the Defendant Jaffe, realizing that with a judgment their authority would be voidable and their clandestine methods of returning the defendant would have placed them in jeopardy. Whereupon the court agreed to set aside the judgment in order to free up Accredited to pursue its hunt for Jaffe. [Emphasis supplied.]

At a March 30, 1982 hearing on Canda's request to extradite one of the bonding company's agents to Canada to stand trial for kidnapping (United States of America v. Timm Johnson, U.S.D.C. Middle District of Florida, Orlando Division, Case No. 82-48-M-01), Accredited's attorney, Joseph Miller, was offered as a witness for Johnson. (Transcript of Testimony, Vol III, pp. 470-472 attached hereto as Exhibit 6):

Q. And were you retained in the year 1981 to represent Accreditted Surety, I believe it's Accredited Surety and Casualty Company?

A. Yes, sir, I was.

Q. And was that for the purpose of obtaining a release of the Circuit Court after a judgment had been entered against it on a bond default?

A. Yes, sir, that's what I was retained for.

Q. And directing your attention to August or September of 1981, did you have a conversation with Mr. Stark, Mr. Shoemake and Mr. Glenn Norris, the first two being Assistant State Attorneys and the second being State Attorney's investigator?

A. Yes, sir, I did.

Q. Where did that conversation take place?

A. In the State Attorney's office, in the courthouse building, in Palatka, Florida, where I practice.

* * * *

Q. What did you state to the three gentlemen whose names I have just mentioned?

A. I asked them if they had extradition proceedings and were -- were they trying to return Sidney Leonard Jaffe to the courthouse or to the Justice in Putnam County and, in their proceedings, were meeting with any success.

Q. What did they say to you?

A. They told me they could not extradite him. They couldn't get him back.

Q. Did they indicate where Mr. Jaffe was located?

A. Yes, sir. They said they knew where they were and had informed my client, and they told me he was in Canada.

Q. And did they say anything further to you with respect to what efforts should be made, if any, to get Mr. Jaffe?

A. They asked me if my client was going to attempt to return him, and I said, "Yes," if we can get the Court to authorize it by vacating this judgment and we can get that done and they encouraged us to do so, and I said, "If you can't get him, and that's what you want us to do, why don't you tell the Judge that," which they did.

Q. And following that conversation, I believe you said there was a conversation with the Judge?

A. Yes, sir. Well, I wasn't there when that conversation went on but that was what the indication was, was that they did relate that to the Judge.

Q. And did you have any conversations yourself with the Judge in a hearing on that point?

A. Yes, sir. I told the Judge that if he vacated the judgment, that my client had been informed by the State Attorney's office and they knew where Mr. Jaffe was and that they would return him back for trial in Putnam County for the charges that were pending against him.

Once the "tri-party agreement" had been reached, or, in the words of the bonding company's brief: "Having received the assurances of the circuit court that a subsequent petition for remission would be entertained, Accredited moved forward with the utmost good faith and diligence, and with incredible speed. . . Accredited hired an investigator to locate and apprehend Jaffe, Accredited chartered a Lear Jet to expedite Jaffe's return from Canada to Florida, Accredited transported Jaffe from Orlando Airport to Palatka for surrendering him to the Putnam County jail--" (Accredited Brief, at p. 3).

5. The Kidnapping

Petitioner, who had just returned from jogging, was confronted in the lobby of his Toronto condominium by two men who showed badges and credentials and requested that he come down to Royal Canadian Mounted Police headquarters to answer some questions about the matter in Florida. Petitioner, believing them to be police officers, agreed to go with them. When, locked in the back seat of their case, he became aware of who they were and what they were about, Petitioner attempted to call out to passers-by for assistance. He was struck on the back of the head, knocked to the floor of the car, beaten, and threatened with further violence to himself and his family. He was driven across the border to an airport where the warrant issued by Judge Perry was shown to New York law enforcement officials who allowed the bounty-hunters to leave in the chartered plan with their "prisoner".

On September 24, 1981, Petitioner was incarcerated in the Putnam County jail. He was tried on one count of failure to appear, and was acquitted. He was tried on the second count, and found guilty. He was

tried on the land sales act violations, and convicted. At the latter trial, Defense Counsel Briggs, who had unsuccessfully moved to dismiss for lack of jurisdiction of the court due to the kidnapping and Petitioner's invalid custody, was not permitted to put on evidence going to prove that Petitioner had been forcibly abducted and brought to Putnam County for trial in violation of the treaty.

The Canadian government has vigorously protested violation of the extradition treaty in official notes lodged with the Department of State (see copies attached as Composite Exhibit 7), personal conferences with the Secretary of State, communications to the Department of Justice (see, Memorandum of Law of the Department of Justice of Canada, Exhibit 8), and appearance of the Canadian vice-consul before the Florida Parole and Probation Commission.

ARGUMENT

I.

Petitioner Has Standing To Challenge The State Of Florida's Violation Of The Treaty Of Extradition Between The United States And Canada In A Federal Habeas Corpus Proceeding

Petitioner seeks habeas corpus relief from his confinement in violation of an extradition treaty entered into between the United States and Canada. 27 U.S.T. 983. International law recognizes the right of Canada (as well as all other nations) to decline to surrender fugitives, and the purpose of extradition treaties is to create exceptions to this right. See United States ex rel Donnelly v. Mulligan, 74 F.2d 220, 222 (2d Cir. 1934). The United States may not engage in any act that would constitute a breach of international law. Valentine v. United States ex rel Neidecker, 299 U.S. 5 (1936); Fernandez v. Wilkinson, 505 F.Supp. 787, 798-799 (D. Kan. 1980).

Here, Petitioner was kidnapped in total disregard of the Canadian-United States Treaty of Extradition. The State of Florida acted in complete disregard of the absolute right of Canada to grant asylum to Petitioner (a Canadian citizen) or return him to Florida in response to proper request by

the United States Department of State. United States v. Rauscher, 119 U.S. 407 (1886).

Federal courts recognize that an individual may assert a treaty violation as a bar to jurisdiction if the asylum nation objects that its right to grant asylum has been violated, either by express protest or by implication. Thus, in Rauscher, it was noted that where an extradition treaty is violated, Federal courts have jurisdiction at the instance of one taken in violation of the treaty, to make appropriate inquiry and grant relief.

> The Treaty of 1842 being, therefore, the supreme law of the land, of which the courts are bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty.

In Rauscher, there was no suggestion that a formal protest was lodged by the British government, yet Rauscher's objection to the jurisdiction of the court was sustained. The international protest was presumed or implied. See, e.g., United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1976) (failure to allege such protests or objections held fatal to claim); United States v. Postal, 589 F.2d 862, 883 (5th Cir. 1979) ("It was absolutely clear, therefore, that the British position was that any interference not justified by the treaty would be unacceptable and subject to protest. Therefore, it was assumed that Great Britian would assert the rights of its vessels and their crews under international law not to be subjected to adjudication. Without such [i.e., implied] objection, the doctrine embodied in the Ker case would apparently have validated the jurisdiction of the court notwithstanding the violation of international law."); Autry v. Wiley, 440 F.2d 799, 801 (1st Cir. 1971).

In Ker v. Illinois, 119 U.S. 436 (1886), the court held that an individual abducted from Peru could not object to the jurisdiction of an Illinois court on the basis that he had been taken in violation of an extradition treaty. The abduction had not been authorized by the government of

the United States.[1] 119 U.S. at 443. The extradition treaty with Peru was not self-executing with respect to jurisdiction. 119 U.S. at 442. And, there is no suggestion in the opinion that Peru had lodged an express objection, or that there were any factors from which such an objection could be implied. Unlike the present case, in Ker Peru made no efforts to charge the abductor with kidnapping. Thus, Ker was asserting a naked personal right merely to complain that his asylum had been violated, a right not recognized by American courts and a matter which is not contemplated by extradition treaties.

The so-called Ker-Frisbie doctrine, that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'", must therefore be understood as being limited by the context in which is arose. Frisbie v. Collins, 342 U.S. 519, 522 (1952) (alleged violation of Federal Anti-Kidnapping Statute rather than extradition treaty). The Ker-Frisbie doctrine teaches that no fugitive has a personal right to asylum sufficient to defeat in personam jurisdiction derived from the defendant's actual presence in court. That is all the doctrine stands for. It has no relevance to the rights of Petitioner here, and does not preclude a challenge to jurisdiction of Florida's courts or the assertion of Canada's rights as a basis for obtaining Petitioner's return to Toronto.

Although the treaty is not self-executing, Canada has formally protested that Petitioner's abduction violated both its territorial sovereignty and the extradition treaty. Since there was in this case a governmental taking of Petitioner in disregard of the treaty, the Canadian protest gives Petitioner standing to assert the treaty violation as a bar to the Florida courts' jurisdiction. Since that which is at issue here is interpretation of a treaty,

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[1] Whether Illinois had authorized the abduction was not an issue in the case, since Illinois had obviously proceeded pursuant to the extradition treaty. 119 U.S. at 438. That Florida, acting through the State Attorney and the circuit court had authorized the abduction of Petitioner is clear. See discussion, infra. It is also abundantly clear that neither the State Attorney nor the circuit judge proceeded pursuant to the extradition treaty.

power to treat with this matter is beyond the purview of the Florida state courts. Therefore, exhaustion of state remedies is not a bar to consideration of this petition.

II.

FORCIBLE REMOVAL OF PETITIONER FROM CANADA WAS THE DIRECT RESULT OF STATE ACTION

1. Introduction

Petitioner acknowledges that "State action" is a fundamental element of the alleged denial of due process under the Fourteenth Amendment to the United States Constitution, Lugar v. Edmondson Oil Co., Inc., ___ U.S. ____, 102 Sup.Ct. (1982). It is also a necessary ingredient to showing a deprivation of rights "under color of state law" pursuant to 42 U.S.C. § 1983. The terms are equivalent and are used interchangeably. Lugar v. Edmondson Oil, supra. See also, Greco v. Orange Memorial Hospital Corp., 513 F.2d 873, 878 (5th Cir. 1975); Briley v. State of California, 564 F.2d 849, 855 (9th Cir. 1977); Harley v. Oliver, 539 F.2d 1143, 1145 (8th Cir. 1976); Ouzts v. Maryland National Insurance Co., 505 F.2d 547, 550 (9th Cir. 1974); Perez v. Sugarman, 499 F.2d 761, 764 (2d Cir. 1974); Watson v. Kinlick Coal Co., Inc., 498 F.2d 1183, 1185 (6th Cir. 1974); Shirley v. State National Bank of Connecticut, 493 F.2d 739, 741 (2d Cir. 1974). Decisions interpreting state action for purposes of showing a violation of 42 U.S.C. § 1983, therefore, apply for purposes of establishing a violation of constitutional due process in the case at Bar.

A determination of whether private conduct has such a state involvement, or nexus, as to constitute state action requires that the facts in each case be sifted and the circumstances weighed. Sims v. Jefferson Downs, Inc., 611 F.2d 609, 611 (5th Cir. 1980). See also, Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 501 (9th Cir. 1979); Broderick v. Associated Hospital Service of Philadelphia, 536 F.2d 1, 4 (3d Cir. 1976); Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 165 (6th Cir. 1973). Whether an activity constitutes state action is therefore a flexible

standard. Bach v. Mount Clemens General Hospital, Inc., 448 F.Supp. 686, 687 (E.D. Mich. 1978).

In Maynard v. Kear, 474 F.Supp. 794 (N.D. Or. 1979), the court noted that the proper inquiry for detecting state action focuses on the source of authority for the private conduct involved. If the state has clothed the activity with its apparent authority to act, then that private conduct constitutes state action.

Decisions which discuss state action have applied various formulas to fit the facts of individual cases. Those arising in context of private action taken pursuant to a state statute have alternatively suggested that the state is responsible only when it compels an act, see Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (1978); Waters v. St. Francis Hospital, Inc., 618 F.2d 1105, 1107 (5th Cir. 1980), or when it merely authorizes or encourages conduct which would otherwise be impermissible, see Tedeschi v. Blackwood, 410 F.Supp. 34, 42 (D. Conn. 1976); McDuffy v. Worthmore Furniture, Inc., 380 F.Supp. 257, 261 (E.D. Va. 1974). And the state has been held responsible for "prohibitory" legislation when such legislation is employed privately to deny a right on an impermissible basis, see Gresham Part Community Organization v. Howell, 652 F.2d 1227, 1240-41 (5th Cir. 1981).

Decisions arising in the context of private actions which involve the use of state court proceedings suggest that state judicial proceedings do not constitute state action when the state courts merely provide a forum for suits between persons, see Stevens v. Frick, 372 F.2d 378, 381 (2d Cir. 1967); Weisser v. Medical Care Systems, Inc., 432 F.Supp. 1292, 1925 (E.D. Pa. 1977); Fallis v. Dunbar, 386 F.Supp. 1117, 1120 (N.D. Ohio 1974); Mullarkey v. Borglum, 323 F.Supp. 1218, 1226 (S.D. N.Y. 1970), but that state judicial proceedings do constitute state action when the state courts are being utilized by an offending party to accomplish an unlawful purpose, see Hollis v. Itawamba County Loans, 657 F.2d 746, 749 (5th Cir. 1981); Dahl v. Akin, 630 F.2d 277, 281 (5th Cir. 1980); Watson v. Kenlick Coal Co., Inc., 498 F.2d 1183, 1193 (6th Cir. 1974); Brown v. Jones, 473

F.Supp. 439, 4__ (N.D. Tex. 1979); Girard v. 94th Street & 7 Fifth Avenue Corp., 396 F.Supp. 450, 453-54 (S.D. N.Y. 1975); Walton v. Darby Townhouses, Inc., 395 F.Supp. 553, 556 (D. Pa. 1975).

The underlying consistency behind these apparently diverse holdings is that, in each case, the inquiry focused on whether the state provided the means whereby a private party committed an act "generally associated with a power exercised by the sovereign." Northrip v. Federal National Management Association, 527 F.2d 23, 30-32 (6th Cir. 1976). The means through which a private party becomes associated with an exercise of sovereign authority, however, is not limited merely to statutory or judicial contacts with the state. Nor does the existence of any particular statutory or judicial contact in a given case guarantee that private action is entwined with state power sufficiently to justify charging the state with responsibility for another's private acts. Ultimately, every contact must be evaluated and some balance must be struck for or against association. In other words, "the facts in each case [must] be sifted and the circumstances weighed." Sims v. Jefferson Downs, Inc., supra.

Various considerations contribute toward finding state action in given cases. In Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975), the court held that private, individual conduct may be found to constitute state action: (1) where state courts enforce an agreement affecting private parties, (2) where the state significantly involves itself with the private party and, (3) where there is private performance of a government function. In Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), the court noted that each of the factors was considered material, and no one factor was conclusive.

In Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973), the court held in a slightly different context that there may be state action conduct when, among other things, a private agency in effect is acting on behalf of and furnishing a government service.

In yet other contexts, courts have found state action where the private party derived "some aid, comfort or incentive, either real or

apparent, for the state," see Jenkers v. White Castle Systems, Inc., 510 F.Supp. 981 (D. Ill. 1981), and where the state "had sufficiently insinuated itself in a position of independence" with the private party so that it became a joint participant in the activity, see Lyon v. Temple University, 507 F.Supp. 471 (D. Pa. 1981), or where the state exercised its power in aid of private conduct and thus provided means whereby private party commits an act associated with the power exercised by the state, see Fuzie v. Manor Care, Inc., 461 F.Supp. 689 (D. Ohio 1977).

Standards evidenced by each case require that all contacts between the state and private party be evaluated and weighed, and that state action be found when private action is so inextricably a part of the exercise of state power that the state should be held responsible.

Petitioner asserts that there was governmental action by the State of Florida in connection with his kidnapping which amounted to a treaty violation. The extradition treaty between Canada and the United States indicates that the federalist nature of American government was contemplated by the parties, and that the Treaty was intended to be binding not only on the federal government but on the states as well. Indeed, substantially all the offenses, which now are extraditable or which have in the past been extraditable pursuant to predecessor treaties between Canada and the United States of America, are "common law" offenses. There are, of course, no common law offenses against the American federal government, since there is no federal common law except for some limited areas which are not relevant here. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). It is clear, then, that the offenses contemplated to be grounds for extradition are offenses under state laws as well as federal.

The Supremacy Clause of the United States Constitution makes treaties binding on the states. Claflin v. Houseman, 93 U.S. 130 (1876); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). Hence, "governmental action" amounting to a treaty violation may not only be the action of the federal government but may be

an action by one of the several states as well. United States v. Rauscher, 119 U.S. 407, 430 (1886).

Despite a possible construction of the decision in Ker to suggest that an abduction undertaken for the benefit of a state government does not constitute a governmental action per se, and though the abduction here was undertaken by bailbondsmen, nevertheless, Petitioner asserts that the bailbondsmen's actions constituted action by the State of Florida.

Johnson and Kear, the bailbondsmen here involved, certainly cannot be said to have acted in reliance on their contractual rights vis-a-vis Petitioner. For authority of a bondsman to enforce his contractual rights is confined to the territory of the United States. In Reese v. United States, 76 U.S. (9 Wall.) 13, 21-22 (1870), it was noted with respect to a bondsman's right to arrest:

> This power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent.

The issue of governmental action vel non here resolves to a determination as to whether Johnson and Kear acted solely in a private capacity or whether they acted as agents for the State of Florida. If they acted as agents of the State, a treaty violation is patently involved since, even disregarding the territorial limitation on their authority under the bond, the State of Florida could only proceed by extradition against Petitioner.

Florida had no right to insist that the bondsmen obtain Petitioner's presence from Canada pursuant to their contractual authority; Florida's remedies were forfeiture of the bond and extradition, not abduction. Fitzpatrick v. Williams, 46 F.2d 40, 41 (5th Cir. 1931).

It is not suggested that action in accordance with the bond constitutes state action as a matter of American law, even though the action is taken in order to return a bail jumper to court. Curtis v. Peerless Insurance Co., 299 F.Supp. 429 (D. Minn. 1969); Thomas v. Miller, 282 F.Supp. 571 (E.D. Tenn. 1968); Easley v. Blossom, 394 F.Supp. 343 (S.D. Fla. 1975). But in

Petitioner's case the State of Florida promoted the kidnapping, and Johnson and Kear acted under color of state authority. Their abduction of Petitioner was, therefore, action by the State of Florida and, hence, a violation of the extradition treaty. Ouzts v. Maryland National Ins. Co., 505 F.2d 547, 553 (9th Cir. 1974) (direct or indirect promotion); Warren v. Cummings, 303 F.Supp. 803, 806 (D. Colo. 1969) (encouragement). Promoting, in the sense used here, means an action by State officials constituting either direct participation in the abduction, or direct causation of the abduction. Cf., Lustig v. United States, 338 U.S. 74 (1949) (Silver Platter doctrine); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) (search and seizure, "but for" test); Adickes v. Kress & Co., 398 U.S. 144, 152 (1970) (civil rights conspiracy of private persons with police officers).

In Maynard v. Kear, 474 F.Supp. 794 (N.D. Ohio 1979),[2] the question was whether there had been sufficient "state action" when bondsmen kidnapped the plaintiff. In the context of a civil rights action for damages, the court stated, at pp. 800-801:

> The fact that Kear and Mathusa possessed a State of Virginia bench warrant for Thomas Maynard and acted or purported to act pursuant to the authority of the bench warrant in seizing Maynard is sufficient to constitute the required state action. Griffin v. Maryland, 378 U.S. 130, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964); Smith v. Rosenbaum, 333 F.Supp. 35 (E.D. Pa. 1979), aff'd., 460 F.2d 1019 (3d Cir. 1972); United States v. Trunko, 189 F.Supp. 559 (E.D. Ark. 1969). Kear had in his possession the bench warrant issued by a Virginia state court. Though Kear never showed the warrant to Maynard, Kear did show the warrant to the police officers before the seizure of Maynard, during the police investigation at the apartment, and at the police station after seizure. Throughout the incident, the bondsmen acted or purported to be acting under the authority of the state bench warrant. That such conduct constitutes state action is made clear by the United States Supreme court:
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> > If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have

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[2] The defendant is apparently the same Daniel Kear who kidnapped Petitioner here. Both Kear and Johnson have been ordered extradited to Canada to stand trial for kidnapping Mr. Jaffe.

taken the same action had he acted in a purely private capacity or that the particular state action which he took was not authorized by state law. Griffin v. Maryland, supra at 135, 84 S.Ct. at 1773.

In Griffin, the Supreme Court found the Fourteenth Amendment to be violated by an employee of an amusement park, acting under the color of his authority as a deputy sheriff, who ordered a black man to leave the park because of his race. In Smith v. Rosenbaum, supra, state action was found when bondsmen acted pursuant to a bail piece obtained in a pro forma manner from a court clerk. In United States v. Trunko, supra, state action was found where a special deputy sheriff flashed his badge and a bench warrant upon seizing a person who had jumped bond. Other cases concerning recapture by bondsmen which have dismissed the Section 1980 claims for lack of state action are distinguishable by the fact that the bondsmen did not act or purport to act, under authority of a state bench warrant. Ouzts v. Maryland National Life Ins. Co., 505 F.2d 547 (9th Cir. 1975) (en banc), cert. denied, 421 U.S. 949, 95 S.Ct. 1681, 44 L.Ed.2d 103 (1975); Easley v. Blossom, 394 F.Supp. 343 (S.D. Fla. 1975); Thomas v. Miller, 282 F.Supp. 571 (E.D. Tenn. 1968); Curtis v. Peerless Ins. Co., 299 F.Supp. 429 (D. Minn. 1969).

Accord: Ker v. Illinois, 119 U.S. 436, 442-443 (1886) (agent carried extradition papers but never sought to utilize them, held no action by federal government).

2. But For Issuance Of The Warrant, Promotion, Encouragement, And Assistance Of The State Attorney's Office, And Agreement By The Circuit Judge To Vacate Bond Forfeiture, The Treaty Would Not Have Been Violated By Petitioner's Kidnapping

In the present case, the evidence will show that abduction of Petitioner by Johnson and Kear was "promoted" and "encouraged" by the State of Florida, that Johnson and Kear relied on the authority of Judge Perry's bench warrant in abducting Mr. Jaffe, and that if the judge had not vacated forfeiture, the bounty-hunters would not have been sent to Toronto. The evidence will show that members of the staff of the State Attorney's office asked the bonding company to "go get" Petitioner in spite of the fact that they were aware that extradition proceedings had been stalled by bureaucratic mistakes. It appears that these same staff members also persuaded Judge Perry to set aside the bond forfeiture when told that the bonding company had no financial incentive to pursue the matter. It is

apparent that Judge Perry set aside his final judgment of forfeiture because he knew that Accredited would make an effort to "get" Petitioner, without bothering with extradition proceedings, which, so far as he knew, had been denied by Canada. It was an agent for the State Attorney's office who told the bounty-hunters where Petitioner was. But for these actions, the bonding company--so said Accredited's attorney Joseph Miller--would have made no efforts to abduct Petitioner.

And, it is clear that Johnson and Kear overtly relied on the bench warrant issued by Judge Perry in accomplishing the abduction. This is apparent from reported episodes at the Lewistown bridge and at the Niagara Falls airport, and from Judge Perry's testimony to the effect that the Petitioner was arrested based upon the bench warrant, as indeed he was.

It is submitted that the State of Florida as a matter of law promoted the abduction, and that the abductors relied on the authority of the State in their undertaking. Thus, there was here a treaty violation in that governmental action by Florida infringed upon and violated Canada's right to decide whether to grant asylum to Petitioner.

3. Summary

In summary, all factors when sifted and weighed, lead to a finding of state action in the abduction of Petitioner. First Petitioner's kidnappers acted pursuant to an arrest power vested in "sureties" such as bail bondsmen under Fla.Stat. § 903.29, which authority they apparently perceived to have extranational effect, and which provides in relevant part:

> 903.29. Arrest of principal by surety after forfeiture. Within one year from the date of forfeiture of a bond that has been paid, the surety may arrest the principal for the purpose of surrendering him to the official in whose custody he was at the time bail was taken or in whose custody he would have been placed had he been committed.

Second, the incentive for the abduction was in vacating a bond forfeiture by a state circuit court judge. The judicial proceeding which discharged forfeiture lent aid, incentive, and judicial approval to the planned inter-

national abduction. Thirdly, the abduction itself was intended to effectuate the state's purpose of the return and trial of an accused before its criminal tribunals. The circuit court judge and state attorneys involved in vacating the bond forfeiture knew full well that the promised abduction of Jaffe violated a treaty having the force of the supreme law of the land. The legal consequence of these factors is that Jaffe's abductors were clothed in statutory, executive, and judicial authority of the State of Florida. Their misuse of the state power in violating an applicable treaty constitutes state action within the meaning of the due process clause of the United States Constitution, and deprived Florida courts of jurisdiction.

III.

A WRIT OF HABEAS CORPUS MAY ISSUE TO RELEASE A PETITIONER CONFINED IN VIOLATION OF A FEDERAL TREATY WITHOUT THE PETITIONER FIRST SEEKING TO EXHAUST STATE REMEDIES

Petitioner asserts that this court may issue its writ of habeas corpus ordering his immediate release even though he has not exhausted state remedies because of the exclusive interest of a federal court in dealing with violations of federal law, preserving international law, and interpreting obligations imposed by treaty. These considerations outweigh any interest of this court in preserving comity between state and federal judicial systems. Indeed, in the area of treaty interpretation or suits respecting violations of federal law, comity is not a relevant doctrine since there is no concurrent jurisdiction.

A writ of habeas corpus ordinarily will not issue before a petitioner has exhausted his state remedies. 28 U.S.C. § 2254(b). See also, e.g., White v. Regen, 324 U.S. 760 (1945). However, the requirement that available state court remedies be exhausted before federal habeas corpus relief is sought is a matter of comity and is not jurisdictional. Ballard v. Maggio, 544 F.2d 1247, 1249 (5th Cir. 1977); Weeks v. Estelle, 531 F.2d 780, 781 (5th Cir. 1976); Kennedy v. Fogg, 468 F.Supp. 671, 673 (S.D. N.Y. 1979). See also Ex Parte Royall, 112 U.S. 241 (1886).

The policy of comity is designed only to effect a balance between the roles of state and federal courts in protecting federal rights. It is not truly a requirement of jurisdictional exercise, but merely a measure of deference and consideration that the federal judiciary extends to parallel judicial systems of the several states. Ogle v. Estelle, 592 F.2d 1264, 1267-68 (5th Cir. 1979); United States ex rel. Trantino v. Hatrack, 563 F.2d 86, 93-98 (3d Cir. 1977).

Since the exhaustion requirement is a by-product of comity and is not jurisdictional, a federal court may in appropriate circumstances decline to dismiss a federal habeas action even though the petitioner has failed to exhaust his state court remedies. See, United States ex rel. Lockett v. Illinois Parole & Pardon Board, 600 F.2d 116, 117-118 (7th Cir. 1979).

Petitioner asserts that Florida's violation of an extradition treaty is a circumstance which should lead this court to issue a writ of habeas corpus, notwithstanding that the Petitioner has not exhausted his state court remedies, because the court has an overriding interest in enforcing the terms of a valid treaty and in carrying out the foreign policy of the United States.

In Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304 (1816), the United States Supreme Court early recognized that international treaties are a part of the supreme law of the land, which federal courts are obligated to enforce even though enforcement may require that inconsistent state laws be invalidated. And see Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). Although Martin did not directly hold that a federal habeas corpus action was proper to set aside state court actions interpreting treaties, it did effectively hold that the supremacy clause of the Constitution justifies vigorous federal intervention into such state court actions.

The duty of federal courts to enforce international treaties even though their provisions may contravene some state law or state public policy cannot now be disputed. Martin was reaffirmed by the Supreme Court in Hauenstein v. Lynham, 100 U.S. 483 (1880, and again in Missouri v.

Holland, 252 U.S. 416 (1920). In Hauenstein, Virginia courts decided against the decedent's heirs who were Swiss citizens, regardless of a treaty, and the Supreme Court reversed, saying:

> That the laws of the state, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. . . . If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution, which provides that 'all treaties made under the authority of the United States, shall be the supreme law of the land. . . .' A treaty cannot be the supreme law of the land, that is, of the United States, if any act of a state legislature can stand in its way. 100 U.S. at 488.

In Missouri v. Holland, the Supreme Court construed the federal treaty power in a slightly different context. The decision makes it clear that Congress may regulate in certain areas as a means of carrying into effect the provisions of a treaty when Congress could not regulate in those areas as an independent exercise of legislative power. The decision not only recognized that international treaties predominate over state law and state public policy, but also recognized that the federal treaty power necessarily predominates over reserved powers of the state as well. This is because the federal power to conduct foreign policy is incident to and inherent in the national sovereignty of the United States. Moreover, the decision recognizes that the federal power to conduct foreign policy is an exclusive power over which states may not interfere:

> It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. . . . Acts of Congress are the Supreme Law of the Land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is an open question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized

> government" is not to be found. Andrews v. Andrews, 188 U.S. 14, 33. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where states individually are incompetent to act. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld. 252 U.S. at 432-35.

The exclusive nature of the federal treaty power and the power to conduct foreign policy has been recognized by the United States Supreme Court in other contexts as well. The theory that the national government has only delegated powers is categorically true only in the realm of domestic affairs. In conducting its relations with foreign nations the United States is a sovereign nation which possesses all the powers that other sovereign nations enjoy, powers which are not limited to those delegated by the Constitution. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (federal plenary power over foreign affairs justified exception to the rule of nondelegability of legislative power, permitting a presidential embargo on the sales of arm to the Chaco); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (the theory of federal plenary power over foreign affairs forms the constitutional basis permitting Congress to draw immigration legislation); Jones v. United States, 137 U.S. 202 (1890) (federal statutes annexing any unoccupied guano islands which might be discovered by an American citizen, and extending United States criminal jurisdiction over same, were valid on theory that law of nations recognized that all states may acquire new territory by discovery and occupation, and that the federal government was therefore invested with this power as an incident of nationhood).

In the instant case, the federal plenary power over foreign affairs, which has been invested in the federal government as an incident to its national sovereignty, clearly confers jurisdiction in this court to inquire into the Petitioner's confinement alleged to violate an international treaty. Enforcing terms of a treaty, and implementing foreign policy of the United States, is a peculiarly federal--not a state--responsibility.

Refusal by the State of Florida to follow the terms of the treaty at issue (when the State Attorney gave up on extradition procedures required by the treaty, and, frustrated by his own ineptitude, sought the self-help remedy afforded by bounty-hunters) is a circumstance which permits this court to issue a writ of habeas corpus notwithstanding that Petitioner has not exhausted his state court remedies.

Because of the overriding federal interest in the enforcement of its treaties, an interest which arises from the exclusive federal plenary power to conduct foreign affairs, and because of the obvious danger which might flow from the violation of a foreign treaty by one of the states, or the confusion that would result from independent state-by-state interpretation of private rights under an extradition treaty, this court should disregard the policy of federal comity which usually requires a petitioner to exhaust his state court remedies, and accept jurisdiction of this habeas corpus action.

IV.
CONCLUSION

In the present case it is clear that: (1) state action was inextricably interwoven in the abduction of Petition from his home in Toronto, Ontario, in violation of an extradition treaty, and (2) sovereignty of Canada was affected adversely. The Canadian government registered, and continues to register official protests. Further, Canada did not cooperate in the unlawful act. From the beginning Canada has maintained that Petitioner's abduction violated its sovereignty. A state court in the United States interfered unlawfully with the domestic affairs of Canada, and thus imperiled the peaceful and harmonious coexistence of the two nations. See Art. VI, U.S. Const. Since Petitioner was lawfully present within the asylum state, he is entitled to rely upon the orderly process of rendition provided for in the United States-Canadian extradition treaty.

Since the extraordinary apprehension was illegal, the remedy is divestiture of jurisdiction over the alleged offender. United States v.

Toscanino, 500 F.2d 267 (2d Cir. 1974). Exhaustion considerations are overwhelmed by the treaty violation. Cf., Fernandex v. Wilkinson, 505 F.Supp. 787 (D. Kan. 1980).

In Baldwin v. Franks, 120 U.S. 678, 683 (1886), the Supreme Court of the United States pointed out that

> "treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." The above principle was applied again in Missouri v. Holland, 252 U.S. 416, 434 (1919), in which the court speaking through Mr. Justice Holmes stated that "the great body of private relations usually fall within the control of the state, but a treaty may override its power."

As recently as 1979, the United Supreme Court reaffirmed supremacy of treaties in regard to state statutes: "To the extent that any [Washington] State statute imposes any conflicting obligations, the statute is without effect [under the Sockeye Act] and must give way to federal treaties, regulations, and decrees." Washington v. Washington State, 443 U.S. 658, 692 (1979).

Strengthening Petitioner's assertion that Florida's noncompliance was a treaty violation and that this triggered exclusive federal jurisdiction to resolve the issue is 28 U.S.C. § 2254(a), which provides in pertinent part:

> The Supreme court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court on the ground that he is in custody in violation of the Constitution or Laws or Treaties of the United States. [Emphasis added.]

Implicit in the language of § 2254(a) is the notion that it is the state, through the vehicle of a state court, that perpetrates the treaty violation provided for in this section.

Therefore, based on the language of the jurisdictional statute, coupled with cases previously discussed, Petitioner asserts that Florida's violation of the treaty is a violation by the United States. Stated differently, a foreign

government could regard state noncompliance as a violation of the treaty and a violation of its sovereignty. The ultimate authority for this position--also the underlying authority for decisions in cases previously discussed--is the supremacy clause of the United States Constitution, Article VI, Section 2.

For the reasons and upon authority set out above, this Court should forthwith issue the writ of habeas corpus requested by the Petitioner, Sidney Leonard Jaffe, to cause his immediate release from his unlawful confinement by the State of Florida, and his immediate return to Toronto.

Respectfully submitted,

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and

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(905) 392-2211

Attorneys for Petitioner.

By: Daniel S. Dearing
Daniel S. Dearing

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Habeas Corpus and Memorandum of Law in Support of Petition for Writ of Habeas Corpus, was served by HAND DELIVERY this 29th day of October, 1982, upon the Honorable Jim Smith, Attorney General, The Capitol Building, Tallahassee, Florida 32301; and by certified mail upon the Honorable Louie Wainwright, Secretary, Department of Corrections, Winewood Center, Tallahassee, Florida 32301.

Daniel S. Dearing

The Washington Post

Jaffe

Parole of Convicted Canadian Becomes an International Issue

By Fred Barbash
Washington Post Staff Writer

The federal government, attempting to resolve a serious diplomatic controversy with Canada, yesterday took the unprecedented step of asking Florida to parole a Canadian businessman convicted of land fraud after American bounty hunters allegedly kidnaped him in Toronto.

Secretary of State George P. Shultz told the Florida Parole Commission that the alleged 1981 kidnaping of Sidney L. Jaffe has "outraged" Canadian officials and has placed a "severe strain" on U.S.-Canadian relations.

"Canadian authorities have raised this matter in virtually every recent high-level contact between our two nations," Shultz said in a statement accompanying the parole request, filed by Attorney General William French Smith.

The action follows an equally extraordinary petition for Jaffe's release filed by the Canadian government last month in a federal court in Jacksonville.

The controversy now pits the highest levels of the U.S. and Canadian governments against a local prosecutor, Stephen L. Boyles.

"I guess they got their job and I got mine," Boyles said in a telephone interview yesterday.

Boyles filed new land-fraud charges against Jaffe on July 8 that could make Jaffe ineligible for parole, rendering yesterday's request irrelevant. Boyles said that he had heard rumors of the pending government parole request when he filed the new charges, but he said that was not the reason he acted.

Jaffe, a well-known businessman and patron of the arts in Canada, was charged in 1980 by Boyles' office in Jacksonville with selling improper land deeds. Bail was set at $137,000.

After Jaffe failed to appear for trial, an international bounty hunter hired by a Jacksonville bail company allegedly seized Jaffe as he was returning from an afternoon run in Toronto. He was returned to Florida, convicted and sentenced to 145 years in prison under numerous counts.

Ordinarily, international bail jumpers are sought under extradition treaties between the United States and foreign governments. Florida officials, who did not seek formal extradition, deny involvement in the abduction.

"It is perfectly understandable that the government of Canada is outraged," Shultz said.

"I wish to emphasize," he said in his message to the parole commission, "that Canada is our most important extradition treaty partner, and that the maintenance of the excellent extradition relationship we have had with Canada is greatly in the law enforcement interest of Florida and the other states, as well as of the federal government . . . .

"The Jaffe case threatens to have a generally deleterious effect on our relations with Canada," Shultz continued.

Axel Kleiboemer, a Washington lawyer representing Canada in efforts to have Jaffe released, said yesterday that the case "has absolutely nothing to do with Mr. Jaffe's guilt or innocence or with his citizenship. Canada has filed this suit [a *habeas corpus* petition] in order to vindicate its rights under the extradition treaties. The issue is whether or not lawlessness in international relations is going to be tolerated."

Brian Dickson, first secretary of the Canadian Embassy here, said that his government welcomed yesterday's action by Smith and Schultz. Both governments "realize that this is a bilateral issue which needs to be resolved," he said.

2/16/83

THE WHITE HOUSE
WASHINGTON

TO: John Roberts

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: ✓

COMMENT: _____

ACTION: _____

file: JAFFB

DEARING & SMITH
ATTORNEYS AT LAW
322 BEARD STREET - P. O. BOX 10369
TALLAHASSEE, FLORIDA 32302
904 222-6000

DANIEL S. DEARING
L. RALPH SMITH, JR.

February 9, 1983

Honorable Jim Smith
Florida Attorney General
The Capitol Building
Tallahassee, Florida 32301

RE: Sidney L. Jaffe

Dear Jim:

Although my recent correspondence to you and my attempts to reach both you and Ken Tucker by telephone have been met with silence, I trust that you are aware of continuing developments in the Jaffe case. The enclosed editorial in the St. Petersburg Times illustrates at least part of our concern.

Jim, I urge you to please consider this matter from all aspects before it escalates any further. It is very important that I speak with you or Ken. I will attempt to call you on Friday.

Sincerely,

Daniel S. Dearing

DSD:lho

Enclosure

cc: Richard A. Hauser, Esq.
Roger M. Olsen, Esq.

"The policy of our paper is very simple – merely to tell the truth."
Paul Poynter, 1875-1950 Nelson Poynter, 1903-1978

editorials

A badly bungled case

Considering its reputation as a haven for swamp peddlers, it was high time for the State of Florida to throw the book at someone. But that first effort has backfired badly in the case of Sidney Jaffe, the Canadian land developer who's serving sentences totaling 145 years, 35 of them consecutive. Florida justice has managed to make Jaffe look like the victim in this bizarre affair.

The question of Jaffe's guilt or innocence on land sales charges has paled beside the fact that he was kidnapped outside his home in Toronto, in brazen violation of Canadian law, to be returned to Florida for trial. Canada has protested forcefully. U.S. Attorney General William French Smith has called it "tragic and inexcusable" and a "serious foreign policy matter." Yet Jaffe, 57, has been in Florida jails and prisons 17 months now, pulling a longer sentence than some murderers serve, while state and federal officials continue to disclaim responsibility for rectifying his abduction. Meanwhile, Florida continues to receive bad publicity in the Canadian press and U.S-Canadian relations suffer. CBS' *60 Minutes* reported on the controversy Sunday.

JAFFE WAS charged with 28 violations of the Florida land sales law for giving quitclaim deeds rather than warranty deeds to people who finished paying for their lots in a development in Putnam County near Palatka. The quitclaim deeds were no protection against mortgages that still encumbered the land, as irate purchasers found out. Jaffe's lawyers claim this should have been treated as a civil dispute rather than as a crime, especially since he did not own the company at the outset of the transactions.

Jaffe posted a $137,500 bond and returned to Canada, where he had lived since 1966 and which granted him citizenship after the Florida charges were filed. He failed to show up for his trial in May 1981, sending a doctor's statement that he had suffered a possible concussion and shouldn't travel. Circuit Judge Robert Perry refused a continuance and declared the bond forfeited. Prosecutors asked Gov. Bob Graham to seek Jaffe's extradition but the governor's office turned them down twice on the attorney general's advice that the applications were insufficient.

THERE WAS NO third application. Instead, two bounty hunters acting on behalf of the bonding company seized Jaffe outside his Toronto apartment, identified themselves as policemen, hustled him into a waiting car and sped him across the border. All this was in flagrant violation not only of the U.S.-Canada extradition treaty, but of Canadian law, which does not permit U.S.-style bounty hunting. Canada has demanded the extradition of the bounty hunters to stand trial for kidnapping; they are appealing U.S. court orders that would send them back.

Jaffe, meanwhile, was put on trial, convicted and given maximum sentences. The *cause celebre* languishes in Avon Park Correctional Institution while his lawyers argue in federal court — with no success, so far — that the state had no right to try him because of the way he was returned to its jurisdiction. To win their case, they may have to show that the state was responsible for what the bounty hunters did.

The state was at least an accomplice after the fact, in that it eventually gave back to the bonding company all but $5,500 of the forfeited $137,500. Much more serious is the question of whether prosecutors encouraged the company to have Jaffe abducted. Joseph Miller, a Palatka attorney, testifying last March at the extradition hearing of one of the bounty hunters, claimed that two assistant state attorneys and their investigator told him they could not extradite Jaffe and encouraged the company to "go get" him, holding out the promise that they would then help the company get its money back. Miller has since recanted that testimony, which he now calls "careless." State officials don't seem to care what the truth is in that regard.

U.S.-CANADIAN relations, already severely strained by trade disputes and acid rain, don't need this additional aggravation. The United States can't afford to be seen as condoning the shameless violation of a friendly nation's borders and the flouting of an extradition treaty. Those bounty hunters should be sent to Canada for trial as fast as possible. And Jaffe should be sent back, too, to be extradited the proper way if Florida officials think he hasn't been punished enough. By not intervening more forcefully, the U.S. government is lending its sanction to what it would call, under other circumstances, an act of terrorism.