

International kidnapping as an alternative for extradition?

by

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Law enforcement bodies are carrying out legal procedure against the suspects and accused in judicial proceedings, who may reside beyond the country borders, regardless of the where the alleged crime took place. It is crucial for the crime to be punishable in the country of residence of the wanted person.

Extradition is a procedure which serves to mutual surrender of the suspected or lawfully condemned between countries.

The extradition procedure lasts long and, as formalised, it does not guarantee the surrender of the wanted person.

On the one hand, the reason for the foregoing is the belief that the surrender is an act of sovereignty of a country. On the other hand, the foregoing may be explained by several rules and standards in this field.

Some countries absolutely require the ratification of an appropriate international treaty for extradition to be allowed. There are also countries which, considering the motion for surrender, apply the rule of *prima facie test*² derived from the *common law* system.

Among popular rules applied in the course of verification, whether a person will be surrendered, or not extradition provides for a requirement for double punishability and the specialty principle. The range of extradition obstacles is diversified, and the provisions of the treaty and the country regulate the future proceedings.

Therefore, there may be certain circumstances, in which a formal extradition does not present any real opportunities for the applying country to complete the surrender, since either not all

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² *Prima facie* (/ˈpraɪmə ˈfeɪʃɪ.i:/; from Latin: *prīmā faciē*) is a Latin expression meaning *on its first appearance*, or *at first sight*. The literal translation would be "at first face", from the feminine form of *primus* ("first") and *facies* ("face"), both in the ablative case. It is used in modern legal English to signify that on first examination, a matter appears to be self-evident from the facts. In common law jurisdictions, *prima facie* denotes evidence that – unless rebutted – would be sufficient to prove a particular proposition or fact

formal requirements and conditions may be met, or the costs and delays are not to be accepted. In general, depending on the extent of the involvement of political interest in the matter, such situations induce the organisations of the country to consider other, alternative methods and manners of “winning” a person in order to bring them to court. Apparently, kidnapping seems to be the only alternative to bring the wanted person to court.

This article explains the reason why the United States resort to kidnapping as the last resort in the battle against the impunity of serious criminals.

a) Extradition substituted with kidnapping as an alternative method of surrender

The practise of application of *Ker–Frisbie* doctrine in the United States of America (USA) in inter-state and international relations.

The USA constitution grants partial sovereignty to individual states. It is manifested by, in particular, the legally regulated procedure of the mutual inter-state surrender of criminals. Art. IV of the Constitution includes a regulation which stipulates as follows:

*“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”*³

Furthermore, in § 3182 chapter 209, part II title 18

§ 3182. Fugitives from State or Territory to State, District, or Territory⁴ includes a regulation on the international extradition⁵.

³ Article Four of the United States Constitution , Clause 2: Extradition of fugitives

⁴ Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

⁵The Extradition of Fugitives Clause in the Constitution requires States, upon demand of another State, to deliver a fugitive from justice who has committed a "treason, felony or other crime" to the State from which the fugitive has fled. 18 U.S.C. § 3182 sets the process by which an executive of a state, district or territory of the United States must arrest and turn over a fugitive from another state, district or territory.

In order for a person to be extradited interstate, 18 U.S.C. § 3182 requires:

- An executive authority demand of the jurisdiction to which a person that is a fugitive from justice has fled.

In accordance with the foregoing regulations concerning the rules of surrender in accordance with extradition, difficult situations take place, where instead of the surrender of criminals in the course of extradition procedure, their kidnapping takes place.

The foregoing practices are justified in doctrine *Ker v. Illinois*, 119 US 436 (1886), which was introduced as a rule, which allows situations of kidnapping the accused from another country/state and is brought to a court of proper subject matter jurisdiction, and they are sued without the extradition procedure. According to the Supreme Court, such behaviour does not thwart the possibility of a judgment and reliable trial.⁶

- b) ***Ker-Frisbie Doctrine*** is applied in the context of extradition and says that the accused may be tried in courts of the United States, regardless of whether they were brought to court due to the application of the current treaties on extradition.⁷

In case *Ker v. Illinois*, 119 US 436 (1886): agent Henry Julian was sent by the federal department to bring Frederick Ker accused of embezzlement to the United States. The Agent was sent to Peru with the necessary extradition documents of the accused, the governments of both countries negotiated extradition in this matter, however, due to the Chile armed forces occupation in Lima, the Agent decided to kidnap the accused from Peru forcibly and bring him back to the United States. At the moment of appearance in the United States territory, he was arrested against a court order. In this case, the United States Supreme Court adjudicated that the appearance of the unlawfully kidnapped accused does not weaken the jurisdiction of the court adjudicating in a given case. Moreover, the illegally kidnapped from abroad may not quote the breach of the Constitution, law or treaties of the United States. It was stressed that Peru did not object to the kidnapping. The Court added that the

-The requesting executive must produce a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, and

-Such document must charge the fugitive demanded with having committed treason, felony, or other crime, and

-Such document must be certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled.

-The executive receiving the request must then cause the fugitive to be arrested and secured, and notify the requesting executive authority or agent to receive the fugitive.

-An agent of the executive of the State demanding extradition must appear to receive the prisoner, which must occur within thirty days from time of arrest or the prisoner may be released. (Some states allow longer waiting periods of up to 90 days before release).

-Cases of kidnapping by a parent to another state would be automatic involvement by the US Marshals department.

⁶ Charles Fairman *The American Journal of International Law*, Vol. 47, No. 4 (Oct., 1953), pp. 678-686

⁷ *Ker v. Illinois*, 119 US 436 (1886), is a US Supreme Court case.

kidnapping and the kidnapping of the accused from a foreign country does not constitute the basis for which the person would not be held liable by an appropriate court of subject matter jurisdiction in the matter.

The State courts argue that the acknowledgement of the foregoing rule that the social costs of depriving the court of competence in such cases would be too high with regard to the possible benefits resulting from the perpetrator apprehension. Moreover, the Courts claim that the accused has been notified about the charges of the prosecution and has a reliable and just trial guaranteed. Therefore, if the course of trial is in accordance with legally regulated rules, the manner of the accused appearance to court does not exert a negative influence on the trial in progress.

The USA Constitution does not include a regulation which would provide the ground for a statement that the accused, who was sentenced as stipulated in his or her rights in accordance with the procedure, is to avoid justice only due to the fact that he was brought to court against his will. Moreover, the Constitution does not regulate or include a procedure that would be applied in order to surrender the accused. The foregoing is not regulated by mutuality principles between states. In case *MAHON V. JUSTICE*, 127 US 700 (1888) of a man accused of a murder in Kentucky, who escaped to Western Virginia to avoid being liable, the Court stated, that there are the United States law or Constitution does not provide any grounds for surrender of a person who was kidnapped from one state to another in order to be judged for the committed crime.

The scope of application of the foregoing rule was limited in some States. It was acknowledged that in certain circumstances the Court may be deprived of the competence to carry out proceedings against the accused due to the manner of its bringing to court. In case *UNITED STATES of America, Appellee, v. Francisco TOSCANINO, Appellant*. No. 746, Docket 73-2732. Argued Feb. 13, 1974., the Court acknowledged that the manner of the accused appearance and methods applied in the operation do not provide the ground for the conduct of the proceedings. Toscanino was accused of the importation of drugs to the USA. He was kidnapped at the beginning of January 1973 Francisco Toscanino was lured via the telephone from his house in Montevideo, Uruguay. This summons was prepared as ordered by Hugo Campos Hermedia. At that time Hermedia was a

member of Montevideo Police, Uruguay paid by the United States government. The plan to lure Toscanino succeeded in his and his wife coming to a secluded place. On arrival, Toscanino was kidnapped by Hermedio and his people who beat and kicked him in the presence of his wife, before loading him to a car. Then, he was brought to Brasil where he was tortured and interviewed by around three weeks. For the whole period the United States government and the prosecutor of the Eastern District of New York knew about the interview and received reports on the progress in the interview. The tortures and interview took place in the presence of a member of the United States Department of Justice, the Drugs and Medicines Office, who was also present during at least one part of the interviews. The Court position in this case was only an illusion that there will be any change of court adjudication in matters, in which the suspects were brought to court with the use of an unlawful kidnapping. The presented court position and approach to the manner of bringing the suspect to court which took place in the *UNITED STATES of America, Appellee, v. Francisco TOSCANINO, Appellant. No. 746, Docket 73-2732. Argued Feb. 13, 1974.* changed in the following cases. In Lovat case, the unambiguous approach of the Court of Appeal was that quoting Toscaninomo may only take place where the accused “will persuasively prove the glaringly cruel and unusual barbarism committed against him by contract agents”.

In case *United States ex rel. Lujan v. Gengler*. 510 F.2d 62. (1975), in which the court opinion expressed in the case of TOSCANINO was quoted the Court dismissed the petitions of the accused and the court of appeal maintained the decisions of the Court of First Instance in force.⁸ The position was justified by a statement that even though the sentence in Toscanino case means that Ker-Frisbie rule does not give a free hand to government agents with respect to the manner of surrender of the accused from foreign countries before the court, such appearance, inconsistent with the current rules and regulations, may not be considered to deprive the court of competence to judge such a person.⁹

⁸ Alona E. Evans ,The American Journal of International Law, Vol. 69, No. 4 (Oct., 1975), pp. 895-897

⁹ United States ex rel. Lujan v. Gengler. 510 F.2d 62(2nd Cir.1975)

The matter concerned the kidnapping of an Argentine citizen accused of drugs importation and sales from Bolivia to the US, which aimed at bringing them to courts of the US.¹⁰

Another case in which the Supreme Court referred to Ker doctrine was Frisbie v. Collins, 342 US 519 (1952), in which the accused was judged in Michigan, after he was unlawfully kidnapped from Chicago. The Supreme Court again accepted and retained the position represented and applied from the case of Ker and Mahon v. Justice (1888).

Also in 1992 the Supreme Court quoted Ker-Frisbee doctrine in case United States v. Alvarez-Machain, 504 US 655 (1992). The case concerned Álvarez Machaín, a Mexican citizen kidnapped and driven to Texas, the United States to be imprisoned for his participation in the kidnapping and murder of a Drug Enforcement Administration (DEA) agent and his pilot. The United States Supreme Court adjudicated, that despite the fact that the accused was kidnapped, his trial is not prohibited before a court in the United States, and does not constitute a breach of the criminal law. This position also confirms the use of Ker-Frisbie doctrine employed in cases Ker v. Illinois (1886) and Frisbie v. Collins (1952). Moreover, the Supreme Court adjudicated that the court of jurisdiction did not influence the manner of bringing the accused to court. In spite of objections from Mexican government, Álvarez was judged by the United States District Court in Los Angeles. American courts assume a position that the state *ius puniendi* (right to punish) is superior to the rights and interest of an individual, as well as to other countries. An unlawful detention of the accused by the secret service without carrying out the extradition proceedings within the area of another country does not constitute an obstacle in the trial of the suspect.¹¹

The form of such detention, being unlawful detentions within the area of other countries is a breach of international law and sovereignty of a given country, which, according to the court, is a political issue dealt with by executive power. *State v. Brewster*, 7 Vt.118

¹⁰ United States ex rel. Lujan v. Gengler. 510 F.2d 62. Alona E. Evans The American Journal of International Law, Vol. 69, No. 4 (Oct., 1975), pp. 895-897

¹¹ M. Płachta, „Kidnapping międzynarodowy w służbie prawa”, dom wydawniczy ABC, Warszawa 2000, s. 151

The foregoing shows the application of *male captus, bene detentus* doctrine, initiated by case *Ker v. Illinois*, 119 U.S. 436 (1836), by American courts.

It is worth marking that not only the USA resort to kidnapping from the territory of other countries, but similar practices are employed by other countries, such as Mexico, France and Israel.

In 1911 two American were kidnapped from the territory of the USA by a few Mexicans who brought them to Mexico. The Americans were arrested to await the trial. The response of the USA government to the kidnapping was very firm and was followed by sending a diplomatic note explaining that the USA citizens kidnapping from the USA territory “seriously violates the United States sovereignty”, and therefore the United States demand that their citizens be surrendered and the matter appropriately explained. If the US citizens were to commit crimes covered by the extradition treaty binding for both countries, the only permissible form would be the initiation by Mexican authorities of an extradition procedure aiming at the surrender of these persons. Mexican president intervened in that case which resulted in the surrender of the kidnapped to the US.¹² A case similar to the aforementioned concerned an American who was accused of spying, kidnapped from Mexico by the Security Police and transported to Laredo, Texas, where he was handed over to the US Immigration Inspector. In the case in question, the defence was raised that the manner of handing over the accused caused a breach of the extradition procedure and was inconsistent the treaty on extradition entered into by the parties. The court assumed the position that the treaty on extradition does not forbid any of its parties to kidnap criminals staying within the territory of the other party. Moreover, the Court rejected the charge of the accused, that the actions of Mexican agents were initiated and supported by appropriate American services and must be treated as the *US* actions. *UNITED STATES of America, Plaintiff-Appellee, v. Morton SOBELL 244 F.2d 520 (1957).*

An informal practice of surrender of the wanted developed in the relationships between America and Mexico. Frequently, such informal procedure involves agents or *bounty hunters*, who are conferred with the mission

¹² G.H.Hackworth, “Digrst International law” v. II and IV , Washington 1941

of searching and bringing the wanted to the law enforcement country. In general, such procedure is carried out upon the silent agreement and consent of the country, on the territory of which the incident is taking place. Another important matter mentioned by the Court was that the Treaty between the US and Mexico includes no ban which would refer to the unlawful kidnappings from the territory of another country. Such idea was also expressed in case *State v. Salcido*, Ramon Bojorquez Salcido, a Mexican citizen who legally lived in the US, in 1989 his wife and three daughters within the area of the US, then he escaped to Mexico. Within a short time after the crime was committed, he was traced by Mexican police and detained. After that he was handed over to American Agents in Mexico City, who brought him to prison in California. Note that as a Mexican citizen he was not subject to surrender in accordance with extradition principles (art. 9 of the treaty), and, secondly, in the USA he deserved death penalty, which itself was an extradition obstacle (art. 8 of the treaty). The foregoing was used by the defence as one of the arguments. In 2008 the Supreme Court maintained the sentence of the Court in San Mateo, which sentenced the accused to death.¹³ Another case is the kidnapping of Herrera, a Columbian citizen who escaped from American prison (sentenced for drug smuggling) and detained in Peru for half a year. Herrera claimed that on detention he was arrested, tortured and interviewed by Peruvian police, which was accompanied by American police officers. Then, he was transported by plane to Miami in order to be brought before court in America. The travel was assisted by a Peruvian police officer and DEA agent¹⁴. During the trial, Herrera accused the American government of the breach – a violation of Peru territorial sovereignty, contravened the Charter of the United Nations and the Organisation of American States (OPA), and, according to the plaintiff, the basis for the loss of jurisdiction is the fact that the extradition procedure was omitted, and the USA and Peru signed the treaty on extradition. Moreover, *United States v. Toscanino* case was quoted. On account of the presented position of the plaintiff,

¹³ People v. SALCIDO The PEOPLE, Plaintiff and Respondent, v. Ramon Bojorquez SALCIDO, Defendant and Appellant. No. S018814. June 30, 2008.

¹⁴ Drug Enforcement Administration – an American governmental agency dealing with the implementation of legal medicine turnover, e.g. the battle against drugs; founded in 1973. One of its functions is to enforce the law included in the Act on Controlled Substances Act as of 1970. I drug issues connected with the USA, which take place abroad.

the Court of Appeal dismissed the charges quoting *Ker-Frisbie* and different circumstances of the matter with reference to *Toscaninio* case¹⁵.

The case of *Rafael Lira*¹⁶, whose exact name was Rafael Mellafe (a Chile citizen), accused of drug trafficking was arrested in Chile by local police. During the trial he claimed to have been illegally kidnapped from Chile and tortured by the United States government agents. To prove that they were the US agents he testified that he had heard somebody speaking English, but was had not known the identity of the English-speaking persons, nor had been informed about that. In court proceedings, Cecil, the secret agent and DEA representative in Chile testified that Mellafe had been arrested following the request of DEA, and that the United States government had been informed about the incident, as well as about the place of his residence. According to Cecis's testimony, DEA carried on a limited investigation in Mellafe case before his being arrested, as well as received a report on Mellafe being arrested, and that Chile police informed DEA about the course of investigation. DEA filed an application of the USA government for the issue of an surrender order, which should have been addressed to Chile law enforcement bodies. However, Cecil denied having ever met Mellafe before he was placed on an airplane or in Santiago, as well as testified that DEA was not at all connected with the investigation conducted by Chile police. Moreover, the United States and Chile entered into an extradition agreement, and the state law of Chile, the citizen of which Mellafe used to be prohibits the surrender of its citizens. Therefore, he could not have been surrendered to the United States. Furthermore, the Accused quoted *State v. Toscaninio* case. The Court acknowledged that DEA and other institutions of that type must cooperate with numerous foreign departments in order to surrender people who break the law of the United States to the United States. DEA may not monitor the course of action selected by the representatives of each foreign government to ensure that the application for extradition or surrender is in conformity with the American constitutional standards. As the government did not supervise the foreign police

¹⁵ United States v. Herrera, 504 F. 2d 859 (5th Cir. 1974)

¹⁶ United States v. Lira Rafael 515 F 2d 68 No. 716, Docket 74-2567, Decided April 14, 1975.

from Chile, i.e. it did not influence the manner of operations or methods applied, the extension of *Toscanino* is pointless in this case.¹⁷

With reference to the foregoing, American law enforcement bodies and the judiciary may do anything, and, quoting *Ker* doctrine justify the unlawful kidnappings which do not provide any basis to judge those who committed serious offences. Some authors claim that the legal ban on the international kidnapping regards only countries and their organisations, as the addressees of these norms are countries, and not individuals acting for their own account. The opinion of American courts also confirms the aforementioned statement that *bounty hunters* are not officers of the authorities of the state. What is more, the Charter of the United Nations and the Organisation of American States (OPA)¹⁸ are not treated by the USA legal system as rights to a direct application with respect to the external legislation. Also the International Covenant of Civil and Political Rights is not able to provide protection from kidnapping acts committed by *bounty hunters*¹⁹, as during the ratification the US Senate will enclose a statement saying that the nature of art. 1-27 in the US is not *self-executing*, in other words, the kidnapped cannot quote the Covenant provisions.²⁰

¹⁷ United States v. Lira Rafael 515 F 2d 68 Nr 716, Docket 74-2567, Decided April 14, 1975.

¹⁸ The Organisation of American States – founded in 1948 during the Ninth International Conference of American States in Bogotá as the continuation of the Union of American Republics founded in 1910. The members of OAS are all Latin America countries (without Cuba since 1962), and the USA and Canada, the total of 35 countries, apart from Rio Pact and Bogotá pact, one of the three pillars of the system of American States.

¹⁹ Bounty hunters, As the Supreme Court noted in 1872, in *Taylor v. Taintor*, a bounty hunter in pursuit of a bail-jumper "may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose."

²⁰ M. Płachta, p. 163