

and brought back to another, the apprehended person may have a legal cause of action against the persons who took him into custody. The persons who arrested him may also be liable to charges of kidnapping. Charles Cheney Hyde, in his treatise entitled *International Law* (chiefly as interpreted and applied by the United States), notes that, where a fugitive is returned by means of abduction to the state where the offence has taken place, "the state whose territory has been invaded may demand the return of the individual, or the extradition of those who removed him from its domain".

Another interesting aspect is the attitude taken by domestic courts when claims of unlawful apprehension are raised before them. In the case of *King vs. Walton* at the turn of the century, the facts were that the accused was arrested in Buffalo, New York, by the Buffalo police on the basis of a telegram from Toronto. On the same day, custody of the accused was given to a detective of the Toronto police force, who brought him back to Toronto. Walton was not taken before any judicial body in the United States competent to order his return to Canada and no information was laid before any United States judicial body that he had committed an extraditable offence. The accused applied for a writ of habeas corpus in Canada. The Ontario Court of Appeal, per Mr. Justice Osler, observed: "We cannot enquire into the circumstances under which he was brought into this country . . . the remedy for the illegal arrest and the kidnapping of the prisoner is by proceedings at the instance of the government of the foreign country whose lands have been violated or at the suit of the party injured against the trespasser. If he is found in this country charged with a crime committed against its laws, it is the duty of our courts to take care that he is amenable to justice." A similar attitude has been adopted by the courts of other common-law countries, including Britain.

Courts of other countries, such as France, have adopted a different approach, holding the arrest null and void and annulling the subsequent proceedings. Moreover, a recent (1974) decision of the United States Court of Appeals for the Second Circuit in the case of *United States vs. Toscanino* may herald a rethinking of U.S. judicial attitudes to unlawful seizure cases. Toscanino was convicted on narcotics charges by a U.S. District Court and sentenced to 20 years in prison and fined \$20,000. On appeal, the Circuit Court remanded the case to the District Court and required the U.S. Government to respond

to his allegations that the Court acquired jurisdiction over him unlawfully through the conduct of American agents who kidnapped him in Uruguay, used illegal electronic surveillance, tortured him and abducted him to the United States. The Circuit Court specifically directed that its remand required an evidentiary hearing only if in response to the Government's denial. Toscanino offers some credible supporting evidence, including specifically evidence that the action was taken by or at the direction of United States officials. If he failed, it would be at the discretion of the District Court whether to hold an evidentiary hearing. This decision of the Circuit Court, which is technical and qualified, appears to have been influenced by a much wider approach to the conception of due process and the "sharp increase in kidnapping activities both here and abroad". The Court stated that "we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights". It will be interesting to see whether the U.S. Supreme Court eventually confirms this more liberal approach to the rights of an abducted person.

In January of this year, however, the U.S. Court of Appeals in New York turned down the petition for release of Julio Juventino Lujan, who alleged U.S. agents had lured him from Argentina to Bolivia, where arrangements had been made with Bolivian police to seize him and have him placed aboard a plane to New York, where he was arrested. The Court apparently distinguished the Toscanino case on the grounds that the "cruel, inhuman and outrageous treatment allegedly suffered" by Toscanino demanded his release if he could prove it at a subsequent hearing. "But the same cannot be said of Lujan."

In summary, it could be said that it is contrary to international law for agents of a foreign state to seize individuals in violation of the territorial sovereignty of another state and to return them to the state where they are wanted. Whatever may be the position under municipal law, however, it is not a violation of international law when agents of the state of refuge surrender a fugitive to the state where he is wanted without resort to extradition proceedings. As pointed out in an article by Morgenstern in the 1952 *British Year Book of International Law*: "The state which received the fugitive for prosecution has not exercised any force on the territory of the state of refuge and

Increase in kidnapping affects decision