

Wilske, Stephan. *Die völkerrechtswidrige Entführung und ihre Rechtsfolgen [Abduction contrary to international law and its legal consequences]*, Berlin: Duncker & Humblot, 2000. Pp 448. DM144, ISBN 3-428-09464-6.

State-ordered transboundary abductions have a long tradition. During his exile in Kolonos, Oedipus had to defend himself against the horse-riding agents of Thebes who tried to force him back to Theban territory. While the means of abductions may have grown more sophisticated, many of the questions raised by such abductions have, from Oedipus to Öcalan, remained the same: Under which conditions can the territorial state engage the responsibility of the acting state? Can kidnapping be justified by the fact that the abducted person is a public enemy or a dangerous criminal? And what are the consequences of such an abduction for subsequent penal proceedings carried out by the abducting state against the abducted person? Recently, these questions have received particular attention in prominent cases pending before the Tribunal for the former Yugoslavia²³ and the European Court of Human Rights.²⁴

Stephan Wilske engages in a comprehensive discussion of the major issues associated

with transboundary abductions in his monograph *Die völkerrechtswidrige Entführung und ihre Rechtsfolgen*. The book is structured in two parts.

Part I depicts the elements of the *delictum iuris gentium*: unilateral action on the territory of another state in the absence of the consent of that territorial state, attribution of this conduct to a state, use of force or use of fraud (if actually practised by state officials on the territory of another state), and fault. After establishing the elements of the *delictum*, Wilske focuses on the legally protected interests that are affected: the sovereignty of the territorial state on the one hand, and human rights, on the other hand. Subsequently, the author examines circumstances that may preclude the wrongfulness of the abduction, and thus does not fail to address such recent developments as the attempt to qualify drug-trafficking and international terrorism as 'armed attacks' against which self-defence is permitted.

Part II is dedicated entirely to discussing the consequences of the unlawful capture for subsequent criminal proceedings carried out by the abducting state. The author presents extensive evidence of state practice, which comprises political statements, declarations by international organizations, and domestic court rulings. He outlines the evolution of the *male captus bene detentus* doctrine, according to which courts may assert jurisdiction over defendants regardless of the circumstances of their arrest, and subsequently points to recent developments that suggest its decay. Wilske concludes that customary international law today bars a court from initiating criminal proceedings against an abducted individual.

Yet the attempt to anchor the rule that courts have no jurisdiction over individuals abducted by state agents in customary international law meets with some systematic concerns with respect to both practice and *opinio juris*.

Occasionally, the author is forced to bend state practice considerably to present evidence of the alleged new rule of customary law. Strictly speaking, only the judgments of the

²³ Cf. ICTY – *Todorovic (IT-95-9/1) 'Bosanski Samac'*, Transcript of the hearings of 4 March 99, 476–481, www.un.org/icty/transe9/990304MH.htm; moreover, Slodoban Milosevic is likely to make such a claim in order to deny the jurisdiction of the Tribunal. Legal counsel for Milosevic, Branimir Gugl, described his capture as 'tantamount to an abduction'. The vice speaker of the Russian government held that 'after the kidnapping of Milosevic a verdict of any court against him will be unlawful'. www.russianobserver.com/stories/2001/06/29/993802090/.

²⁴ Cf. ECHR, *Decision as to the Admissibility of Application no. 46221/99, Abdullah Öcalan v. Turkey*, http://hudoc.echr.coe.int/Hudoc2doc2/HEDEC/200012/46221dap.chb1_14122000e.doc.

British House of Lords *ex parte Bennett*²⁵ and the South African Supreme Court in *State v. Ebrahim*²⁶ can serve as precedents actually involving state-ordered kidnapping. The author predominantly relies on political declarations within or outside international institutions and academic writings in order to support his thesis. Therefore, some scepticism remains whether a departure from *male captus bene detentus* is really ‘in accordance with a constant and uniform usage practised by the States in question’.²⁷

Furthermore, neither *male captus bene detentus* nor the alleged new rule to the contrary was applied by courts with a belief that such conduct was required by international law. The major precedents relied on by the author to support his thesis, the judgments *ex parte Bennett* and *State v. Ebrahim*, were both based exclusively on the interpretation of domestic law.

International law should look at abductions from a double perspective that takes account of the inter-state violation of sovereignty as well as of the violation of human rights of the individual victim. As the Security Council pointed out in 1986, abductions have ‘severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States’.²⁸ The prohibition of unlawful arrest, reluctantly labelled by Elmar Bauer in his classical monograph,²⁹ as a ‘so-called human right’ is nowadays acknowledged as a genuine human right in the context of the International

Covenant on Civil and Political Rights,³⁰ as well as under the system of the European Convention on Human Rights³¹ and under customary human rights law.³² While Wilske discusses both the violation of sovereignty and human rights extensively, he unfortunately does not examine how the state rights and the human rights dimension are related to each other. Some questions of high practical relevance are, thus, excluded.

The territorial state’s consent to the capture of an individual by agents of another state undisputedly precludes or justifies the violation of that state’s sovereignty. But does such consent do away with the human rights violation as well? Wilske answers in the affirmative by virtue of the very structure of his argument. He regards the lack of consent of the territorial state as a necessary element of the *delictum* of an abduction and thereby invariably excludes all cases in which the territorial state consents from further consideration. Such an approach, however, triggers the danger of reducing the prohibition of abduction to a prohibition of exercise of governmental authority in the territory of another state, and implies that the consent of the territorial state transforms the agents of another state into lawful authorities, who can carry out a lawful arrest. The human right would be reduced to a mere derivative of the state’s territorial right. Is such implication, however, reconcilable with the modern concept – shared by Wilske – that the prohibition

²⁵ *R. v. Horseferry Road Magistrates’ Court, Ex Parte Bennett* [1994] 1 App. Cas. 42, [1993] 3 All E.R. 138, 3 W.L.R. 90, 98 Crim. App. 114. House of Lords, June 24, 1994.

²⁶ *Opinion in State v. Ebrahim*, 16 February 1991, 31 ILM (1992) 888, at 896.

²⁷ *Columbian-Peruvian Asylum Case*, Judgment of 20 November 1950, ICJ Reports (1950) 266, at 276–277.

²⁸ SC Res. 579, UN Doc. S/RES/579 (1985), 25 ILM (1986) 243.

²⁹ E. F. Bauer, *Die völkerrechtswidrige Entführung* (1968).

³⁰ *Celiberti di Casariego case*, Communication No. R. 13/56, 2 *Human Rights LJ* (1981) 145; *López Burgos case*, Communication No. R. 12/52, 2 *Human Rights LJ* (1981) 150; *Quinteros Almeida case*, Communication No. R.24/107, 4 *Human Rights LJ* (1984) 196.

³¹ *Opinion of the Commission (Stocké v. The Federal Republic of Germany)*, Publications of the European Court of Human Rights, Series A, Vol. 199, Annex, No. 167, at 24.

³² Articles 5 and 9 of the Universal Declaration of Human Rights may have acquired the status of customary law and protect the individual from arrest contrary to the laws of the territorial state. See T. Meron, *Human Rights and Humanitarian Norms as Customary International Law* (1989).

of unlawful arrest constitutes a genuine human right? The question is currently of relevance in the *Öcalan* case.³³

Some authors have suggested that the consent of the territorial state can only preclude the violation of territorial sovereignty, but that it leaves the human rights dimension of transboundary kidnapping unaffected. Harry A. Blackmun, dissenting justice on the U.S. Supreme Court in the *Alvarez-Machain* case, stated that 'even with the consent of the foreign sovereign, kidnapping a foreign national flagrantly violates peremptory human rights norms'.³⁴ Following Blackmun's view that the human right in question is of a *jus cogens* character, it would be difficult to maintain that states can still validly consent to kidnapping. In the language of Article 26 of the Draft Articles on State Responsibility adopted by the ILC '[n]othing . . . precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law'.³⁵

It may also be worthwhile to consider how far the question of jurisdiction over abducted persons, essentially a conflict of the *male captus bene detentus* doctrine and the Fruit of the Poisonous Tree doctrine, should be resolved in the light of these developments in human rights law. In the view of Jochen A. Frowein, national courts should 'enforce these [human rights] rules of international

law by reaching the only possible conclusion, namely to liberate the person'.³⁶

Furthermore, the concept of a human rights dimension that is independent of the state's territorial rights casts doubt on the sustainability of the common view that a court of the abducting state must only relinquish its jurisdiction if the territorial state protests subsequently. How would the lack of subsequent protest by the territorial state do away with the human rights violation, after the individual has been captured by authorities which were undisputedly unlawful at the time of capture?

There may be grounds for disagreeing with the view apparently prevailing among human rights lawyers that every arrest not carried out by the authorities of the territorial state is necessarily unlawful and constitutes a violation of the human rights of the arrested individual. Moreover, Blackmun's thesis of the peremptory character of these human rights need not remain uncontested. An analysis as comprehensive as Wilske's, however, should at least shed some light on these important questions stirred by recent developments in the field of human rights.

Wilske's monograph can provide valuable guidance to courts and foreign offices in assessing the questions commonly associated with transboundary abductions: such questions include problems of attribution if abductions are – *pro forma* – carried out by private individuals, problems of the validity of consent if such consent is given by lower police authorities, or the difficult distinction between use of force and use of fraud against the individual. Given the abundant references to cases from various jurisdictions, the reader will find a nicely digested and well-argued overview of the state of the law.

³³ The Turkish government asserted that Öcalan had been arrested in accordance with the procedures prescribed by law, because the Kenyan authorities had cooperated. By contrast, Öcalan's defence denies that such cooperation could turn his arrest into a lawful one. Cf. ECHR, *Decision as to the Admissibility of Application no. 46221/99, Abdullah Öcalan v. Turkey*, hudoc.echr.coe.int/Hudoc2doc2/HEDEC/200012/46221dap.chb1_14122000e.doc.

³⁴ Blackmun, 'The Supreme Court and the Law of Nations', 104 *YlJ* (1994) 39, at 42.

³⁵ A/CN.4/L.602/Rev.1, www.un.org/law/ilc/sessions/53/english/602rev1e.pdf.

³⁶ Frowein, quoted in L. L. Chmura, 'International Law in Domestic Legal Orders – A Comparative Perspective', *American Society of International Law Proceedings April 9–12* (1997).

To explore the rather new terrain of the a different, perhaps less case-oriented, systematic relation between state rights and book.
human rights remains, however, a task for *Ludwig-Maximilians-Universität, München* Dirk Pulkowski