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Abducting Foreign Nationals Abroad: United States v. Alvarez-Machain

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NOTES

ABDUCTING FOREIGN NATIONALS ABROAD: *UNITED STATES v. ALVAREZ-MACHAIN*

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[One] morning, four heavy-set men burst into Aramco's corporate headquarters in Houston, Texas, and point[ed] an AK-47 at the head of the Aramco's CEO. . . . The captive is informed that he is under indictment for [violating Iraqi law] . . . . [The captive is smuggled into Iraq and brought] before a court in Baghdad, where he is accorded all the due process rights to which he is entitled under Iraqi criminal law and promptly sentenced to prison. The U.S. State Department adamantly protests his apprehension and capture as a violation of U.S. sovereignty and territorial integrity, but the Iraqis respond with nothing less than unqualified scorn.[1]

I. INTRODUCTION

TO citizens of the United States, the above hypothetical scenario would seem outrageous and illegal. However, in 1989 the U.S. Attorney General's office authorized the Federal Bureau of Investigation to engage in such actions and abduct foreign nationals abroad who have outstanding arrest warrants in the United States.[2] This policy of resorting to extralegal methods[3] to bring fugitives to justice in the

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1. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991).

2. Richard Downing, *The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil*, 26 STAN. J. INT'L L. 573, 573 n.1 (1990) (citing *Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1989)). The Attorney General's Office authorized these actions after Assistant Attorney General William Barr issued an opinion entitled *Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities*. Michael R. Pontoni, *Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives*, 21 CAL. W. INT'L L.J. 215 (1990). Although the opinion is not available for public scrutiny, the title suggests that the

United States escalated as a result of both the Reagan and Bush administrations' war on drugs,[4] and their belief that extradition treaties are ineffective.[5]

The legality of the United States policy of bypassing extradition treaties and resorting to extralegal methods to acquire jurisdiction has been questioned.[6] Despite concerns regarding the legality of using extralegal methods, the U.S. government has adhered to its policy and, in fact, has abducted several fugitives living abroad. Some of these fugitives have attacked this aggressive policy on the ground that their abduction divests American courts of jurisdiction.[7] In one case involving an abducted fugitive, the United States Court of Appeals for the Ninth Circuit held that "the forcible abduction of a Mexican national from Mexico by agents of the United States without the consent or acquiescence of the Mexican government violates the 1980 Extradition Treaty between the United States and Mexico."[8] To determine the legality of the present United States policy, the United States Supreme Court granted certiorari of the Ninth Circuit's decision in *United States v. Alvarez-Machain*.[9]

U.S. government gave the FBI carte blanche to abduct and kidnap foreign nationals and bring them to trial. *Id.*

3. Two extralegal methods are generally recognized:

(a) abduction of a person by the agent of a state other than the one in which he is present without the knowledge or consent of the state of refuge; or

(b) the seizure of a person by the agents of one state and his informal surrender to the agents of another state without formal or legal process.

1 M CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE, Ch. 5, § 1, at 189 (2d ed. 1987). The extralegal method this Note discusses is in section (a).

4. Abramovsky, *supra* note 1, at 155.

5. *Id.*; Downing, *supra* note 2, at 575-576. Extradition treaties are considered ineffective when the following factors are present: when a foreign country is reluctant to comply, or refuses to comply, with requests from the U.S. government for extradition; or when the United States is concerned that corrupt officials will alert fugitives. *Id.* Another factor supporting present U.S. policy is that the extradition process is long, uncertain, and expensive. *Id.* The United States has entered into extradition treaties with over one hundred countries. *See* United States v. Verdugo, 939 F.2d 1341, 1362 (9th Cir. 1991). *See also* 18 U.S.C. § 3181 (1988).

6. Extraterritorial Apprehension by the Federal Bureau of Investigation, 4 Op. Off. Legal Counsel 543, 544 (1980). During the Carter administration, the Attorney General's office and the Justice Department considered abductions abroad as violations of the other country's sovereignty and of international law. 4B Op. Off. Legal Counsel 543 (1980). *See also* Abramovsky, *supra* note 1, at 199.

7. *See infra* note 9 and accompanying text.

8. United States v. Alvarez-Machain, 946 F.2d 1466, 1466 (9th Cir. 1991) (noting its prior holding in United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991)), *cert. granted*, 112 S. Ct. 857 (1992). *See* 31 U.S.T. 5059, T.I.A.S. No. 9656.

9. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). The Supreme Court's certiorari review of United States v. Alvarez-Machain could potentially affect the related cases of United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), and

The purpose of this Note is to review the legality of the United States policy of using extralegal methods to acquire personal jurisdiction. The Note will begin by reviewing the factual and procedural history of *Alvarez-Machain*. Next, the Note will review the main arguments advanced by the defendant, with particular emphasis on the allegations that the United States government's actions violated the extradition treaty between Mexico and the United States. Finally, based on an analysis of the leading case authority, and particularly the *Ker-Frisbee* doctrine,[10] this Note will suggest that customary international law dictates that the Supreme Court should affirm the Ninth Circuit's decision in *Alvarez-Machain* and declare that the *Ker-Frisbee* doctrine is not dispositive in cases where there is a formal protest, lodged by another country, that the U.S. government-sponsored abduction violated the extradition treaty between the countries.

II. ALVAREZ-MACHAIN

A. *Factual Background*

In 1985, an undercover agent of the Drug Enforcement Agency (DEA), Enrique Camarena-Salazar (Camarena), was found tortured and murdered near Guadalajara, Mexico.[11] This incident prompted the DEA to begin a massive investigation to bring Camarena's killers to justice.[12] In December of 1989, the Mexican Federal Judicial Police (MFJP), through a DEA informant named Garate-Bustamente (Garate),[13] arranged a meeting with the DEA to discuss the possibility of an exchange of fugitives wanted by each government.[14] At this meeting, DEA Agent Berrellez met with a MFJP commandante who claimed to be acting under the authority of the Attorney General of Mexico and working with the chief of the MFJP.[15] Agent Berrellez

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Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 209 (1990), because each of these cases involved extralegal methods of obtaining jurisdiction over the defendants.

10. *See infra* note 33 and accompanying text.

11. United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

12. This investigation was named "Operation Leyenda" and resulted in the indictment of twenty-two individuals. *Id.* at 601. However, as of 1990, only seven people had been brought to trial. *Id.* at 602.

13. By his own admission, informant Garate had been a corrupt officer in the Mexican military who covertly worked for the Guadalajara drug cartel during his military career. *See* Abramovsky, *supra* note 1, at 166.

14. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

15. *Id.*

and the MFJP commandante reached an agreement whereby the commandante agreed to deliver Dr. Humberto Alvarez-Machain (Machain), a Mexican national believed to be involved in the torture and murder of Camarena, to the United States. In return, the United States would initiate deportation proceedings against a Mexican national who was wanted in Mexico and living in the United States. The deal, however, fell through after the Mexican officials demanded $50,000 for transportation expenses.[16]

On January 25, 1990, the MFJP commandante requested a second meeting with DEA officials to further discuss the possibility of an exchange. This meeting, however, never took place because the DEA suspected it was being "set-up" by the Mexican authorities.[17] Instead, Agent Berrellez, acting under the DEA's authority,[18] offered $50,000 to informant Garate in exchange for the delivery of Dr. Machain to the United States.[19]

On April 2, 1990, Dr. Machain was abducted from his office by five individuals claiming to be federal police and taken to a house where, allegedly, he was beaten and tortured.[20] Later, a "fair-skinned" man joined the group and informed Dr. Machain that he was "with the DEA."[21] The next day Dr. Machain was delivered to DEA authorities in El Paso, Texas.[22]

The Mexican government was infuriated by Dr. Machain's abduction. On April 18, 1990, it delivered to the United States Department of State a diplomatic note announcing that an investigation into Dr. Machain's kidnapping was being conducted to determine whether the

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16. *Id.*

17. *Id.* at 602-03. There was apparently tension between the two governments because of the DEA's investigation and the NBC mini-series about the Camarena murder. *See Drug Wars: The Camarena Story* (NBC television broadcast, Jan. 7-9, 1990).

18. Agent Berrellez testified that he was not only authorized to make this "arrangement" by his superiors in Los Angeles, but also by high-ranking DEA officials in Washington D.C. United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

19. Informant Garate gathered some "associates" to assist him in Dr. Machain's abduction. These included former military police officers, current police officers, and civilians. *Id.*

20. *Id.* Dr. Machain testified that he was hit, forced to lie face-down on the floor for approximately three hours, shocked six or seven times on the soles of his feet, and injected twice with an unknown drug. *Id.* However, the court found that Dr. Machain's testimony was inconsistent with his statements to the doctors who examined him upon his arrival in the United States. *Id.* at 605-06.

21. *Id.* at 603. Agent Berrellez testified, however, that no DEA agents were involved in Dr. Machain's abduction. *Id.*

22. When Dr. Machain exited the airplane in El Paso, someone inside reportedly shouted to the DEA that, "[w]e are Mexican police, here is your fugitive." *Id.* Agent Berrellez testified that he was not sure if the Mexican government authorized Dr. Machain's delivery. *Id.* at n.8. Despite Agent Berrellez's testimony, it was uncontroverted that Mexico formally protested Dr. Machain's testimony. *Id.* at 614.

U.S. government was involved.[23] The Mexican government voiced its concern that any involvement in the abduction by the U.S. government would jeopardize future cooperation between the two countries in their war on drugs.[24] On May 16, 1990, the Mexican government delivered a second diplomatic note declaring that it had determined that the United States was involved in Dr. Machain's abduction, and that this involvement violated the extradition treaty between the two countries.[25] Mexico demanded the immediate return of Dr. Machain.[26]

B. Procedural Background

Following Dr. Machain's arrival in the United States, the Department of Justice brought several charges[27] against him related to the murder of Agent Camarena, and Dr. Machain was subsequently indicted. Prior to trial, Dr. Machain filed a Motion to Dismiss based on the United States government's misconduct and the district court's lack of personal jurisdiction.[28]

Upon review of Dr. Machain's motion, the district court identified four theories upon which Dr. Machain asserted his indictment should be dismissed: (1) his Fifth Amendment right to due process was violated; (2) the extradition treaty between the United States and Mexico was violated;[29] (3) the Charters of the United Nations and the Organization of American States were violated; and (4) his invocation of the court's supervisory powers.[30] After rejecting the due process claim, the district court dismissed Dr. Machain's indictment based on the United States violation of the extradition treaty.[31] On appeal, the Ninth Cir-

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23. United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

24. *Id.*

25. *Id.* Treaty on Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656. *See infra* notes 78-80.

26. United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). The Mexican government also delivered a third diplomatic note requesting that the United States arrest and extradite both informant Garate and Agent Bellerez for the kidnapping of Dr. Machain. *Id.*

27. *Id.* at 601 n.1. Dr. Machain was charged with violating 18 U.S.C. § 1959 (conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity), 18 U.S.C. § 1201(c) (conspiracy to kidnap a federal agent), 18 U.S.C. § 1201(a)(5) (kidnapping a federal agent), 18 U.S.C. §§ 1111(a), 1114 (felony-murder), and 18 U.S.C. § 3 (accessory after the fact). *Id.*

28. *Id.* at 601.

29. Treaty on Extradition, *supra* note 25.

30. United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). A fifth theory asserted by Dr. Machain, that the statutes he was charged under should not have extraterritorial application, was dismissed at a motion hearing on May 25, 1990. *Id.* at n.3.

31. *Id.* at 601. Because the district court dismissed the indictment against Dr. Machain on

cuit affirmed the district court's ruling relying on its prior decision in *United States v. Verdugo-Urquidez.*[32]

C. Dr. Machain's Claims

1. The Fifth Amendment Claim

In rejecting Dr. Machain's claim that his Fifth Amendment right to due process was violated by his illegal abduction, the district court relied solely on the *Ker-Frisbee* doctrine which stands for the proposition that a court has personal jurisdiction over a defendant regardless of the means by which he was brought before the court.[33] The district court noted that the only exception to this doctrine occurs when the defendant establishes that the government was involved in the abduction, and that the government's conduct in the abduction was "shocking to the conscience."[34]

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the ground that his abduction violated the extradition treaty, the court never had to reach Dr. Machain's final two claims. Nonetheless, the district court did note that Dr. Machain's abduction appeared to violate the Charters of the United Nations and the Organization of American States; but since these are non-self-executing instruments which have never been legislatively implemented, federal courts lack the authority to enforce them. *Id.* at 614. In addition, the district court warned the U.S. government, specifically the DEA, that further abductions could invite the court to exercise its "supervisory power in the interest of the greater good of preserving respect for the law." *Id.* at 615 (quoting United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring), *cert. denied*, 423 U.S. 847 (1975)).

32. 939 F.2d 1341 (9th Cir. 1991). In *Verdugo-Urquidez*, the court held that an abduction, similar to Dr. Machain's, would violate the extradition treaty if the rendering state objected, and that the appropriate remedy for such a violation was repatriation of the abducted national. *Id.* at 1358-59.

33. United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). The *Ker-Frisbee* doctrine was derived from the U.S. Supreme Court decisions in Frisbee v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436 (1886). Although the district court relied on the *Ker-Frisbee* doctrine, the validity of this doctrine has been questioned by numerous commentators. *See infra* notes 99-104 and accompanying text.

34. United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981) (Ninth Circuit's description of the conduct that was alleged to have taken place in United States v. Toscanino, 500 F.2d 267, 270 (2d Cir. 1974)). In United States v. Toscanino, the Second Circuit established an exception to the *Ker-Frisbee* doctrine. 500 F.2d 267, 275 (2d Cir. 1974). The Second Circuit stated that due process required a "court to divest itself of jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* In *Toscanino*, the defendant allegedly had been beaten, kept awake for long periods of time, deprived of nourishment, and shocked on his ears, toes, and genitals. *Id.* at 270. The Second Circuit stated that if the defendant's allegations were sustained on remand, then this would warrant the court's divestiture of personal jurisdiction. *Id.* at 275-76. On remand, however, Toscanino's allegations were not sustained, and the district court refused to divest itself of jurisdiction. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y. 1975). It has been noted that, in effect, the exception established by the Second Circuit has never been applied by any court. *See* Abramovsky, *supra* note 1, at 159-60. In addition, three circuits have shown a general hostility toward the exception and have rejected it. *See*

In reviewing the evidence, the district court found that the U.S. government was involved in Dr. Machain's abduction.[35] Therefore, the district court only needed to decide if the actions of the DEA's agents were "shocking to the conscience" so as to warrant dismissal of the case. The defense, however, was unable to establish this second requirement. Dr. Machain's own statements, according to the doctors who examined Dr. Machain shortly after his arrival in the United States, did not support his later allegation that he was tortured by the agents.[36] Thus, the district court concluded that the agents' actions did not satisfy the exception to the *Ker-Frisbee* doctrine, and, accordingly, it rejected Dr. Machain's due process claim.[37]

2. *The Extradition Treaty Claim*

Dr. Machain also claimed that the court lacked personal jurisdiction because his abduction violated the extradition treaty between Mexico and the United States.[38] In addressing this issue, the district court first noted that the *Ker-Frisbee* doctrine[39] was irrelevant in resolving this claim. The court stated that the *Ker-Frisbee* doctrine "is a constitutional doctrine which limits application of the due process clause of the fifth amendment for the purpose of dismissing an indictment. The doctrine has no application to violations of federal treaty law."[40]

The district court then divided Dr. Machain's argument that his abduction divested the court of personal jurisdiction, into two separate issues: first, whether Dr. Machain had standing to raise the extradition treaty violation; and second, whether the Treaty was even violated by Dr. Machain's abduction.[41]

a. *Whether Dr. Machain had standing*

The district court's analysis was rather cursory in determining whether Dr. Machain had standing to raise a violation of the extradi-

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Matta-Ballesteros *ex rel.* Stolar v. Henman, 896 F.2d 255, 263 (7th Cir. 1990), cert. denied, 111 S. Ct. 209 (1990); United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); United States v. Winter, 509 F.2d 975, 986-88 (5th Cir. 1975), *cert. denied sub. nom.* Parks v. United States, 423 U.S. 825 (1975).

35. United States v. Caro-Quintero, 745 F. Supp. 599, 605 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992). *See infra* text accompanying note 49.

36. *See supra* note 20.

37. United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

38. *Id. See* Treaty on Extradition, *supra* note 25.

39. *See supra* note 33 and accompanying text.

40. United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

41. *Id.* at 606-14.

tion treaty.[42] First, the court noted that there is a "line of authority" suggesting that only the offended country has standing to raise extradition treaty violations.[43] However, the court chose not to follow this precedent. Instead, the court relied on the "doctrine of specialty," which stands for the proposition that a defendant can only be tried for the crime for which he was extradited.[44] The court noted that when the doctrine of specialty applies and the rendering country protests,[45] individuals have been held to have derivative standing.[46] Thus, the district court concluded, apparently by analogy, that Dr. Machain had derivative standing if Mexico protested.[47]

b. *Whether the Treaty was violated*

Next, the district court addressed whether Dr. Machain's abduction violated the extradition treaty between Mexico and the United States. In opposition to Dr. Machain's claim that his abduction violated the treaty, the U.S. government advanced two arguments. First, the government asserted that no U.S. personnel were involved in the actual abduction.[48] The court, however, quickly disposed of this argument. The court found that the U.S. government was, without question, involved in the kidnapping because the DEA induced and paid informant Garate and his "associates" to abduct Dr. Machain.[49] Accordingly, the court determined that the government could be charged with the acts of the abductors.[50]

Second, the United States government argued that the extradition treaty was never violated because there was never a "formal extradition."[51] To support this argument, the government asserted that extradition treaties do not prescribe the exclusive procedural means for

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42. The district court also noted that "[e]xtradition treaties by their nature are deemed self-executing and thus are enforceable without the aid of implementing legislation." *Id.* at 607 (citing BASSIOUNI, *supra* note 3, at Ch. 2, §§ 4.1-4.2, at 71-72, 74).

43. *Id.*

44. *See infra* note 69.

45. On appeal, the Ninth Circuit stated that "there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation." United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

46. United States v. Caro-Quintero, 745 F. Supp. 599, 608 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

47. *Id.*

48. *Id.* at 609.

49. *Id. See supra* note 19 and accompanying text.

50. United States v. Caro-Quintero, 745 F. Supp. 599, 605 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

51. *Id.* at 609.

extraditing foreign nationals.[52] The court, however, found this argument unpersuasive because the abduction clearly violated the fundamental purpose of having an extradition treaty, which is "to protect the sovereignty and territorial integrity of states, and to restrict impermissible state conduct."[53]

Moreover, the court noted that under the established "rule of specialty," it is uncontroverted that an extradition treaty does limit the permissible means by which the United States can obtain jurisdiction over a fugitive located in Mexico.[54] Therefore, the court stated that the United States government's argument that a state violates an extradition treaty when it prosecutes for a crime other than that for which the individual was extradited (the doctrine of specialty), but not when a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crimes it chooses, is *absurd*.[55] Thus, the court found that the U.S. government's conduct in unilaterally abducting Dr. Machain, without the consent or participation of the Mexican government, violated the extradition treaty between the two countries.[56]

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52. *Id.* In support of its argument that an extradition treaty cannot be violated unless it is invoked, the U.S. government relied on United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986), despite the fact that this case involved an entirely different matter. In *Najohn*, Switzerland transported the defendant to the United States, and the district court subsequently found that the Swiss government had waived specific provisions within the extradition treaty between the two countries. *Id.* at 1421. Based on these findings, the Ninth Circuit in *Najohn* stated that a treaty "does not purport to limit the discretion of the two sovereigns to surrender fugitives . . . . Nor does it purport to describe the procedural requirements incumbent on the rendering country." *Id.* at 1422 (citing Ker v. Illinois, 119 U.S. 436 (1886), for the basis of this proposition). Thus, when the rendering country objects to a treaty violation, such as in United States v. Caro-Quintero, 745 F. Supp. 599, 605 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992), the reasoning used in *Najohn* is inapplicable.

53. United States v. Caro-Quintero, 745 F. Supp. 599, 609 (C.D. Cal. 1990) (citing BASSIOUNI, *supra* note 3, § 2, at 194), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

54. *Id.* at 610. *See* United States v. Rauscher, 119 U.S. 407 (1886); *infra* note 69.

55. United States v, Caro-Quintero, 745 F. Supp. 599, 610 (C.D. Cal. 1990), *aff'd*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992) (emphasis added).

56. *Id.* at 614. The district court also distinguished the cases relied on by the government to support its position by placing them in one of two categories: (1) the rendering country had assisted in the abduction, or (2) the rendering country acquiesced or consented to the abduction. *Id.* Therefore, the district court concluded that the U.S. government's argument was not supported by any prior cases. *Id. See e.g.*, Ker v. Illinois, 119 U.S. 436 (1886) (Peru never objected to the abduction nor did the U.S. government participate in the abduction); Matta-Ballesteros *ex rel.* Stolar v. Henman, 896 F.2d 255 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 209 (1990) (Honduran government did not protest abduction); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (Panamanian and Venezuelan officials actually deported the defendant); United States v. Valot, 625 F.2d 308 (9th Cir. 1980) (Thai authorities assisted in defendant's removal); United

C. On Appeal

The United States government appealed to the Ninth Circuit the district court's judgment dismissing Dr. Machain's indictment. In a prior case, *Verdugo-Urquidez*,[57] the Ninth Circuit had determined that an abduction, similar to Dr. Machain's abduction, sponsored by the United States would divest the court of personal jurisdiction.[58] Therefore, based on *Verdugo-Urquidez*, the Ninth Circuit affirmed the district court's judgment in *Alvarez-Machain*.[59]

In *Verdugo-Urquidez*, the Ninth Circuit addressed the sole issue of "whether the United States breaches its obligations under its extradition treaty with Mexico if it authorizes or sponsors the forcible taking of a Mexican national from that country without the consent of the Mexican government."[60] The Ninth Circuit determined that such actions by the United States would, in fact, violate the extradition treaty.[61] Moreover, the court held that "if the Mexican government formally objects to the treaty breach and [the] defendant timely raises that breach in a pending criminal proceeding, the courts of the United States may not exercise personal jurisdiction over that defendant, provided that the Mexican government is willing to accept repatriation."[62] In reaching this conclusion the Ninth Circuit examined prior case law, the rationale behind having extradition treaties, and the specific extradition treaty in question.[63]

In support of the U.S. government's contention that the court had personal jurisdiction over the defendant, the government in *Verdugo-Urquidez* argued that the *Ker-Frisbee* doctrine stood for the proposition that "the means by which a defendant is brought before [a] court are *never* relevant to the jurisdictional question . . . ."[64] The Ninth Circuit rejected this argument because it refused to accept such an expansive view of the *Ker-Frisbee* doctrine.[65] The court made this deter-

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States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975) (neither Argentina nor Bolivia objected to the abduction).

57. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).

58. *Id.* at 1343.

59. United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

60. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1342-43 (9th Cir. 1991).

61. *Id.* at 1343.

62. *Id.* (case remanded to determine whether the U.S. government sponsored or authorized defendant's abduction).

63. *Id.* at 1344.

64. *Id.* at 1345 (citing John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1449-55 (1988)).

65. *Id.*

mination because neither *Ker v. Illinois*,[66] nor *Frisbee v. Collins*,[67] involved an extradition treaty, and therefore they were distinguishable from the facts of *Verdugo-Urquidez*.[68] Moreover, the Ninth Circuit found that the U.S. Supreme Court corroborated this "limited view" of the *Ker-Frisbee* doctrine[69] in both *Ford v. United States*,[70] and *United States v. Raushcer*.[71] Thus, the Ninth Circuit in *Verdugo-Urquidez* concluded that the *Ker-Frisbee* doctrine was not dispositive in resolving the issue of whether the court had jurisdiction.[72]

Next, the Ninth Circuit in *Verdugo-Urquidez* examined "the purposes underlying extradition treaties."[73] One purpose the court noted for having extradition treaties is to impose legal obligations on each country to surrender persons sought by the other country under "appropriate conditions."[74] Another purpose is to "constitute a means of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals."[75] Based on these underlying

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66. 119 U.S. 519 (1886).

67. 342 U.S. 519 (1952).

68. *Verdugo-Urquidez*, 939 F.2d at 1346-47 (The Ninth Circuit noted that "*Ker* stands only for the proposition that a private kidnapping does not violate an extradition treaty." Moreover, *Frisbee* involved a domestic kidnapping, not an extradition treaty.).

69. *Id.* at 1348 (noting that the U.S. Supreme Court, in United States v. Rauscher, 119 U.S. 407 (1886), demonstrated that "it matters very much how a defendant happened to come before the court. . . . Thus, *Rauscher*, decided the same day as *Ker*, unequivocally rejects the broad formulation of the *Ker/Frisbee* doctrine."). In *Rauscher*, the Court created what has become known as the doctrine of specialty. *Id.* This doctrine is defined as:

> Under most international agreements, state laws, and state practice:
> (1) a person who has been extradited to another state will not, unless the requested state consents,
> (a) be tried by the requesting state for an offense other than one for which he was extradited; or
> (b) be given punishment more severe than was provide by the applicable law of the requesting state at the time of the request for extradition. (2) A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1987) [hereinafter RESTATEMENT].

70. 273 U.S. 593 (1927). In *Ford*, after the U.S. government seized their vessel, the defendants argued that this seizure violated a treaty between the United States and Great Britain. *Id.* at 605. In response, the government, relying on *Ker*, contended that "an illegal seizure would not have ousted the jurisdiction of the court to try the defendants." *Id.* The Supreme Court, however, rejected this contention noting that *Ker* did not involve a treaty violation. *Id.* at 606.

71. 119 U.S. 407 (1886).

72. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1348 (9th Cir. 1991).

73. *Id.* at 1349.

74. *Id.* (stating that "in the absence of an extradition treaty there is no general *obligation* of nations to surrender persons sought by another nation, although a nation may surrender such individuals as a matter of comity and discretion.")

75. *Id.* at 1350.

purposes, the Ninth Circuit concluded that the United States government's argument that "it is free to invoke or ignore extradition treaties at will . . . blatantly contravenes the purposes underlying extradition treaties."[76]

Finally, the Ninth Circuit in *Verdugo-Urquidez* reviewed specific articles of the extradition treaty between Mexico and the United States and stated that these articles "only make sense if they are understood as *requiring* each treaty signatory to comply" with them whenever it desires to extradite a national from the other country.[77] Under Article Five, neither country may extradite an individual for political offenses or military offenses.[78] Article Eight gives each country the discretion not to extradite an individual for an offense that would subject him to the death penalty if he could not be subjected to the death penalty for the offense in his own country.[79] Article Nine allows Mexico, after receiving an extradition request from the United States, to either extradite the Mexican national or to prosecute the case itself.[80] Therefore, if the United States is allowed to bypass the extradition treaty and simply abduct a Mexican national, these articles are futile. Moreover, the discretion given to Mexico under the treaty with respect to

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76. *Id.*

77. *Id.* at 1351.

78. Article Five states:

> Political and Military offenses 1.- Extradition shall not be granted when the offense for which it is requested is political or of a political character. If any question arises as to the application of the foregoing paragraph, the Executive authority of the requested Party shall decide.
>
> . . . .
>
> 3. Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

Treaty on Extradition, *supra* note 25.

79. Article Eight provides:

> Capital Punishment When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Id.

80. Article Nine states:

> Extradition of Nationals
>
> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

Id.

nationals would clearly be circumvented.[81] Based on these reasons, the Ninth Circuit in the *Verdugo-Urquidez* case concluded that, unless Mexico consents, an abduction authorized by the U.S. government would violate the extradition treaty between the two countries.[82]

After determining that an abduction by the United States without Mexico's consent would violate the treaty, the Ninth Circuit in *Verdugo-Urquidez* addressed whether the abducted individual had standing to raise the treaty violation.[83] The court analogized its case to one involving the doctrine of specialty. The court noted that it was an established rule that an individual, in a doctrine of specialty case, had standing to assert whatever objections the rendering country could assert.[84] Therefore, the court explained:

> [T]he case for affording standing to the individual defendant is even more compelling in a kidnapping case than in a specialty case. Although a violation of the principle of specialty constitutes a serious breach of the obligations of the United States, such a breach occurs only after the United States has initially complied with the procedures set forth in the treaty. By contrast, kidnapping is a flagrant treaty violation because it wholly circumvents the extradition process, and with it the commitment of the United States to follow the rule of law in its international relations. The injury in the case of a kidnapping is more egregious, not only to the offended nation but to the wronged individual as well.[85]

Accordingly, the Ninth Circuit in the *Verdugo-Urquidez* case concluded that the abducted individual would have standing to raise the extradition treaty violation if his country objected.[86]

III. ANALYSIS

In both *Alvarez-Machain*,[87] and *Verdugo-Urquidez*,[88] the U.S. government relied on two theories to argue that the abduction of the Mexican national did not violate the extradition treaty. First, the government argued that the extradition treaty with Mexico was never violated because the United States never invoked the treaty when it

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81. *Id.* Mexico has shown its willingness to prosecute the Mexican nationals wanted by the United States. *See* Abramovsky, *supra* note 1, at 206.

82. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355 (9th Cir. 1991).

83. *Id.*

84. *Id.*

85. *Id.* at 1356 (footnote omitted).

86. *Id.* at 1356-57.

87. 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

88. 939 F.2d 1341 (9th Cir. 1991).

obtained custody of Dr. Machain. Second, notwithstanding a treaty violation, the government argued that the courts had personal jurisdiction over the defendants under the *Ker-Frisbee* doctrine.[89] However, both the district court, in *Alvarez-Machain*, and the Ninth Circuit, in *Verdugo-Urquidez*, disagreed with the government's contentions.

A. The Abduction Violated the Treaty

One of the fundamental purposes underlying an extradition treaty is to impose obligations upon the countries that are parties to the agreement.[90] Prior to extradition treaties, countries were not obligated to extradite fugitives.[91] To discourage fugitives from fleeing a country to avoid prosecution, countries began enacting treaties which provided the means of returning these fugitives to the country from which they fled.[92] To date, the United States has over one hundred extradition treaties with other countries.[93] If the courts in *Verdugo-Urquidez* and *Alvarez-Machain* had ruled in favor of the government and found that the extradition treaty in question was not violated merely because it was never invoked, the obligations imposed in all of the United States extradition treaties would have become illusory. The Supreme Court has stated that "the obligations of treaties should be liberally construed so as to give effect to the apparent intentions of the parties."[94] It is obvious that Mexico never intended for the United States to ignore the extradition treaty and abduct Mexican nationals unilaterally.

Moreover, the Supreme Court has noted that in examining an extradition treaty, courts have the "duty to interpret it according to its terms. These [terms] must be fairly construed, but we cannot add to or detract from them."[95] The terms of the extradition treaty between Mexico and the United States are clear with respect to nationals—each country has the discretion to either extradite or prosecute the national.[96] The Treaty provides no other alternatives regarding nationals.

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89. *See supra* note 33 and accompanying text.

90. *See* United States v. Rauscher, 119 U.S. 407, 411, 414-15 (1886) (noting that extradition treaties govern the rights and conduct of the parties involved). *See also supra* text accompanying notes 74-75.

91. United States v. Rauscher, 119 U.S. 407, 411-12 (1886). *See supra* note 74 and accompanying text.

92. *Id.*

93. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1362 (9th Cir. 1991).

94. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 10 (1936) (case involved an American national and the extradition treaty between the United States and France).

95. *Id.* at 11.

96. *See supra* notes 80-81.

Allowing the United States to bypass the extradition treaty at its convenience clearly circumvents Mexico's discretion and is contrary to the express terms of the treaty.[97] A court cannot find that the U.S. government has this "alternative" without adding to or detracting from the treaty itself.

Furthermore, the United States is required to perform its obligations under treaties in good faith.[98] As the U.S. government never attempted to seek the extradition of Dr. Machain, it can hardly be argued that the United States performed its obligations under the treaty in good faith.

B. The Ker-Frisbee Doctrine is not Dispositive

The validity of the *Ker-Frisbee* doctrine has been seriously questioned by numerous commentators.[99] In discussing the doctrine's relevancy for resolving claims based on extradition treaty violations, one commentator made several negative observations about *Ker v. Illinois*. He noted that:

> *Ker*, first of all, is an antique 1886 case construing the fourteenth amendment, which had come into force a mere eighteen years before and had not been generously interpreted; the due process clause, in fact, had scarcely been interpreted at all.
>
> . . . .
>
> Even more important, *Ker* was not an extradition case. In fact, quite contrary to the proposition for which it is often miscited, *Ker* confirmed that if an extradition treaty is in force, it *does* matter how custody was obtained. . . .[100]

When an extradition treaty is in effect, *Ker* is inapplicable.[101]

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97. Many extradition treaties contain provisions exempting nationals of the rendering state from extradition. *See* RESTATEMENT, *supra* note 69, § 475 cmt. f.

98. The Restatement provides:

> Binding Force of Agreement
>
> Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.

RESTATEMENT, *supra* note 69, § 321. *See* Vienna Convention on the Law of Treaties, May 23, 1969, at 289, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969).

99. *E.g.*, Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 680 (1953) (explaining that Ker simply argued that he had a right to asylum under the extradition treaty, not that the United States breached its duty to Peru under the treaty). *See* Robert M. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 599-600 (1968). *See also supra* note 33 and accompanying text (describing *Ker-Frisbee* doctrine).

100. Kester, *supra* note 64, at 1450-52.

101. *Id.* (citation omitted).

Similarly, *Frisbee v. Collins*[102] is irrelevant in determining whether an extradition treaty has been violated. Because the fugitive in *Frisbee v. Collins* was abducted from Illinois and transported to Michigan, the case was purely a domestic abduction and never involved an extradition treaty.[103] The government's attempt to rely on the *Ker-Frisbee* doctrine to support its "catch and snatch" policy[104] is not supported by the facts of either *Ker v. Illinois* or *Frisbee v. Collins*.

Nonetheless, the United States Supreme Court implicitly demonstrated that it would continue to sustain the *Ker-Frisbee* doctrine. In *United States v. Verdugo-Urquidez*,[105] although the question presented before the Court dealt with an alien's Fourth Amendment rights, the Court also discussed an alien's right to rely on the Fifth Amendment.[106] The Court confirmed that it still did not support extending Fifth Amendment due process protection extraterritorially.[107] The Court distinguished between constitutional violations to aliens that occurred prior to trial and violations that occurred during trial, giving aliens more protection in the latter situation.[108] The Court also stated that the Constitution would not protect aliens who do not have "substantial connections with this country."[109]

By illustrating the limited protection available to aliens under the Fifth Amendment, the Supreme Court demonstrated that it will probably continue to sustain the *Ker-Frisbee* doctrine.[110] The Court did, however, note that restrictions could be placed on "searches and seizures" abroad if they are imposed through "diplomatic understanding, *treaty*, or legislation."[111] Thus, there is the possibility that the Court, in *Alvarez-Machain*, may find that there were treaty restrictions imposed on the United States because of the extradition treaty it had with Mexico.

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102. 342 U.S. 519 (1952).

103. Defendant, while living in Chicago, was forcibly abducted by Michigan authorities and taken to Michigan where he was subsequently tried and convicted for murder. *Id.* at 520.

104. This is how one commentator has labeled the Bush administration's policy of resorting to extralegal methods. Abramovsky, *supra* note 1, at 153.

105. 494 U.S. 259 (1990). For purposes of clarification, it should be noted that this case involved the same defendant as in United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), which was discussed in Section II(C).

106. United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 269 (1990).

107. *Id.* at 269.

108. *Id.* at 264 (emphasizing "trial right").

109. *Id.* at 271.

110. *See* Downing, *supra* note 2, at 581-82.

111. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (emphasis added).

C. *The Abduction Violated Customary International Law*

The abduction of Dr. Machain by the U.S. government was a clear violation of customary international law. The action violated Mexico's sovereignty and territorial integrity.[112]

The oldest source of international law is custom.[113] A custom of international law is created "when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right."[114] Despite numerous acts of aggression by countries throughout history, it is a settled principle of international law that countries shall not violate the sovereignty and territorial integrity of other countries.[115] This custom was exemplified by the international community's reaction to Iraq's invasion of Kuwait.[116] Even though the abduction of Dr. Machain was a minor infraction in comparison to the intrusion into Kuwait's sovereignty, it was still a direct violation of Mexico's sovereignty and territorial integrity.

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112. The Ninth Circuit noted that "[o]ne of the most fundamental principles of international relations is the principle that the territorial integrity of a sovereign nation may not be breached by force." United States v. Verdugo-Urquidez, 939 F.2d 1341, 1352 (9th Cir. 1991). *See* Abramovsky, *supra* note 1, at 194 (noting that "even in the absence of an extradition treaty, customary international law prohibits [a government-sponsored] abduction, because the abduction violates the sovereignty and territorial integrity of the asylum state"). *See also supra* note 6 (showing that the Carter administration considered abductions abroad illegal).

113. 1 L. OPPENHEIM, INTERNATIONAL LAW, Ch. 1, § 17 (H. Lauterpacht ed., 8th ed. 1967).

114. *Id.* at 26.

115. *Id.* § 128, at 295 n.1 (stating that it is "a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime."). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, Ch. 13, § 1 (4th ed. 1990). Professor Brownlie noted that:

> The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations . . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.

Id. (citations omitted); RESTATEMENT, *supra* note 69, § 432 cmt. b ("It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent"); Abramovsky, *supra* note 1, at 176 (declaring that an "extraterritorial abduction constitutes a violation of international law which offends the laws of the United States"); BASSIOUNI, *supra* note 3, at 194 (stating that "international law is designed to protect the sovereignty and territorial integrity of states, and restrict impermissible state conduct").

116. *World Powers Alarmed by Iraqi Invasion, Condemn Baghdad*, REUTERS, Aug. 2, 1990. *See also Total Rejection of Iraqi Stand*, KHALEEJ TIMES, Aug. 28, 1990 (The United Arab Emirates denounced the Iraqi invasion and noted that "a state's sovereignty and territorial integrity are inviolable under international law . . . .").

Since the beginning of the century, courts in the United States have been bound to enforce customary international law unless it violates the Constitution or is contradicted by actions of Congress.[117] The principle of sovereignty and territorial integrity is neither unconstitutional nor has it been repudiated by congressional actions.[118] Therefore, any government-sponsored intrusion into the sovereignty of another country is a violation of the laws of the United States. Thus, the courts in *Alvarez-Machain* and *Verdugo-Urquidez* could have invalidated the actions of the U.S. government solely on this basis. Because they choose not to, however, the future use of customary international law by the courts of the United States to punish blatant violations of the territory and sovereignty of another country by the U.S. government remains uncertain.

IV. CONCLUSION

If the United States Supreme Court affirms the Ninth Circuit decision in *Alvarez-Machain* regarding government-sponsored abductions abroad, U.S. policy will be consistent with the terms of the extradition

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117. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . . [W]here 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."). The Restatement also provides:

> International Law and Agreements as Law of the United States
> (1) International law and international agreements of the United States are law of the United States and supreme over the law of the several states. (2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts. (3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

RESTATEMENT, *supra* note 69, § 111.

118. It should be noted that the United States is a party to two multilateral agreements which codify the principle of sovereignty and territorial integrity. The United Nations Charter states:

> Article 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles.
>
> . . . .
>
> (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 . . . .

U.N. CHARTER art 2, ¶ 4. Likewise, the Charter of the Organization of American States provides:

> Article 17. The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means shall be recognized.

O.A.S. CHARTER art. 20.

treaty in question and with customary international law. The U.S. government's policy of invoking extradition treaties when it is convenient, and ignoring them in other instances, defeats the purpose of the treaties. The underlying purpose of extradition treaties will be undermined if agents of the United States can enter a country that has an extradition treaty with the United States and surreptitiously abduct one of that country's nationals. The U.S. government does not extend this same right to other countries.[119] Conduct such as this is certainly contrary to President Bush's call for a "new world order."[120] As noted by a leading authority on extradition:

> The most serious threat to world public order lies in the practice of unlawful seizure of a person in a foreign state and his abduction. . . . The abduction or kidnapping is a transgression against the sovereignty of the state wherein the fugitive was taken by agents of another state. . . . [It is] a threat to world public order.[121]

Moreover, a contrary decision by the Supreme Court, validating abductions, would undermine the judicial integrity of courts in the United States by illustrating that governmental misconduct will be overlooked and validated. The credibility of the U.S. government with respect to its international agreements will evaporate. In *Alvarez-Machain*, the Supreme Court has an opportunity to send a clear message to the Executive branch concerning its policy of violating duly negotiated treaties and clarify the role of international law within the legal framework of the United States.

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119. Downing, *supra* note 2, at 594.

120. Ann Devroy, *Deficits Called Key to Sustaining U.S. Role in New 'World Order,'* THE WASH. POST, Sept. 12, 1990, at A1 (describing President Bush's prime-time address to the American public on the gulf situation).

121. 2 M. Cherif Bassiouni, *International Extradition in American Practice and World Public Order, in* A TREATISE ON INTERNATIONAL CRIMINAL LAW—JURISDICTION AND COOPERATION 347, 357 (M. Cherif Bassiouni & V. Nanda eds., 1973) (footnote omitted).