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# NEIGHBORING COUNTRIES; UN-NEIGHBORLY ACTS: A LOOK AT THE EXTRADITION RELATIONSHIPS AMONG THE UNITED STATES, MEXICO, AND CANADA

DEA ABRAMSCHMITT\*

## INTRODUCTION

In the wake of the troubling Supreme Court decision in *United States v. Alvarez-Machain*,<sup>1</sup> where the Court approved jurisdiction although the defendant had been abducted from Mexico by U.S. Drug Enforcement Agents (DEA), both Mexico and Canada have expressed dismay at what they see as a blatant violation of international law.<sup>2</sup> The United States has reinforced its uncooperative position in the area of law enforcement across territorial boundaries.<sup>3</sup> According to Mexico and Canada, the U.S. has disregarded both the terms of their respective extradition treaties with them as well as the basic precepts of international law.<sup>4</sup>

They have valid cause for alarm as the United State's Supreme Court holding is a presumptuous and dangerous precedent in international law. This article first compares two similar instances where the United States abducted citizens of Mexico and Canada to stand trial in the United States. Part II explores the extradition laws of the United States, Mexico and Canada, as well as the extradition treaties between the United States and its two neighbors. Part III examines the jurisdiction questions at the root of the extradition issue. Finally, this paper analyzes the different approaches the three neighboring countries take in international law enforcement. The U.S. would benefit greatly by reexamining its dealings with Mexico, and looking to Canada in order to rediscover a sense of justice and fair play.

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\* B.A., Florida Atlantic University, 1975; J.D. Candidate, Florida State University Law School. This article is dedicated to Russ Abramschmitt.

1. 112 S. Ct. 2188 (1992).

2. *United States v. Verdugo-Urquidez*, 29 F. 3d 637 (9th Cir. 1993); Bradley Thrush, *United States' Sanctioned Kidnapping Abroad: Can The United States Restore International Confidence in its Extradition Treaties?*, 11 ARIZ. J. INT'L. & COMP. L. 181, 185-97 (1994).

3. Jeffrey J. Carlisle, *Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping*, 81 CALIF. L. REV. 1541 (1993); Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L. L. 151 (1991).

4. Thrush, *supra* note 2, at 185-97; Aimee Lee, *United States v. Alvarez-Machain: The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT'L. L. J. 126 (1993).

## I. ABDUCTION: DO-IT-YOURSELF EXTRADITION

Unfortunately, *Alvarez-Machain* is only one case in a long tradition of instances where the United States chose either irregular renditions<sup>5</sup> or outright abduction to obtain jurisdiction over fugitives.<sup>6</sup> In the Camarena investigation alone, of which *Alvarez-Machain* was a part, the U. S. was involved in no fewer than three quasi-legal or illegal abductions.<sup>7</sup> With drug trafficking continuing to flourish and it being relatively easy for suspects to flee the country, irregular renditions have become a method of choice in combating crime.<sup>8</sup> Local government often sees irregular renditions as necessary, particularly when one party to an extradition agreement continually refuses to comply with their treaty.<sup>9</sup> Thus, in its desire to win the war against crime, the United States has responded to this increase in extra-territorial fugitives by pursuing a course of vigilante justice.<sup>10</sup>

## A. Kidnapping in Mexico

Dr. Humberto Alvarez-Machain was abducted from his Guadalajara clinic by four bounty hunters paid by the DEA, flown to El Paso, Texas, and there turned over to U.S. agents.<sup>11</sup> This sequence of events was the culmination of an intensive manhunt following the kidnapping and murder of the DEA agent, Enrique Camarena. Agent Camarena had been in Mexico as an undercover agent whose task it was to infiltrate one of the largest drug cartels in Mexico. He was successful, and after a major raid on the kingpin of the cartel, Rafael Caro-Quintero apparently had Camarena abducted and taken to Caro-Quintero's nearby ranch. There Camarena was tortured, interrogated, and eventually killed.<sup>12</sup> Enraged DEA agents demanded the extradition of Caro-Quintero, but he escaped to Costa Rica. Through efforts of U.S. officials, he was deported back to Mexico, where he was tried and convicted for his part in the murder.<sup>13</sup>

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5. An irregular rendition describes "apprehensions that receive the tacit approval or acquiescence of the country from which the defendant is rendered." Abramovsky, *supra* note 2, at 155-6.

6. Lee, *supra* note 4, at 154-55; Hector H. Cardenas, Jr., *United States v. Alvarez-Machain: Result Oriented Jurisprudence*, 16 HOUS. J. INT'L. L. 101 (1993); *Alvarez-Machain*, 112 S. Ct. 2188.

7. Abramovsky, *supra* note 3, at 160-70; *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990); *Verdugo-Urquidez*, 29 F.3d 637.

8. Lee, *supra* note 4, at 140.

9. *Id.*

10. See Abramovsky, *supra* note 3, at 152, 155-6, 161, 206-8.

11. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2190 (1992); Abramovsky, *supra* note 3, at 168.

12. Abramovsky, *supra* note 3, at 160.

13. *Id.* at 161-62.

Several others who were suspects in the Camarena investigation were hunted down in Mexico. Deals were made with Mexican police to bring these men to the United States to stand trial.<sup>14</sup>

Dr. Alvarez-Machain's suspected role in the killing was that he used drugs to keep Camarena alive and conscious long enough for the others to get the information they wanted about various DEA operatives in Mexico.<sup>15</sup> There was never any more evidence other than the fact that Dr. Alvarez-Machain had been to the ranch at some point, which may or may not have been when Camarena was held prisoner there.<sup>16</sup> However, U.S. agents were zealously pursuing anyone who may have had anything to do with this brutal murder.<sup>17</sup>

A Mexican informant who worked for the DEA, Garate-Bustamante, initially contacted the Mexican police to try and negotiate an irregular rendition.<sup>18</sup> The Mexican officials wanted to exchange Alvarez-Machain for a Mexican fugitive in the U.S., plus they wanted \$50,000 for expenses. The money proved to be the obstacle that ultimately defeated the deal, as the DEA officials refused to pay.<sup>19</sup> Ironically, that same \$50,000 was later paid to Bustamante when he offered to deliver Alvarez-Machain to the DEA.<sup>20</sup> Bustamante and his cohorts proceeded to perform the kidnapping and split the \$50,000 among them. The DEA later evacuated several of the kidnappers and their families to the United States, where they paid another \$6,000 per week for their expenses.<sup>21</sup>

In federal district court, Dr. Alvarez-Machain protested that the United States did not have jurisdiction over him because he was forcibly kidnapped and brought into the United States<sup>22</sup> This, he stated, was both outrageous government conduct and a violation of the Mexican-U.S. Extradition Treaty.<sup>23</sup> Mexico had already registered strong protests against Dr. Alvarez-Machain's abduction. In fact, Mexico agreed with the doctor that this was a blatant violation of the extradition treaty. Mexico demanded that Alvarez-Machain be repatriated immediately.<sup>24</sup> Judge Rafeedie determined that the dis-

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14. Verdugo-Urquidez, 939 F.2d at 1343.

15. *Alvarez-Machain*, 112 S. Ct. at 2190; Lee, *supra* note 4, at 158.

16. Abramovsky, *supra* note 3, at 170 n.101.

17. *Id.* at 161.

18. *Id.* at 167-68.

19. *Id.*

20. *Caro-Quintero*, 745 F. Supp. at 603.

21. *Id.* at 603-4.

22. Brief for Respondent on writ of certiorari to the United States Court of Appeals for the Ninth Circuit, *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (No. 91-712), *rev'd*, 112 S. Ct. 2188 (1992).

23. *Id.*

24. Lee, *supra* note 4, at 161; Abramovsky, *supra* note 3, at 168.

strict court did not have jurisdiction when the method by which the defendant was brought before it was in violation of an international treaty. Judge Rafeedie dismissed the case and ordered the doctor's repatriation.<sup>25</sup>

The Government appealed. The ninth circuit ruled in accord with the lower court, dismissed the case for lack of jurisdiction and ordered Dr. Alvarez-Machain sent home.<sup>26</sup> Once again, the Government appealed. The Supreme Court granted certiorari, and the Government finally won.<sup>27</sup>

The majority opinion, in a fine example of Machiavellian reasoning, declared that Alvarez-Machain's kidnapping did not violate the Mexican-U.S. Treaty.<sup>28</sup> Once it reached this conclusion, the Court was free to apply the Ker-Frisbie doctrine, which holds that it is not a violation of due process to exercise jurisdiction when the defendant has been brought in front of the court by extra-legal or illegal means.<sup>29</sup> The Court reversed the district and circuit courts and sent the doctor back to stand trial.<sup>30</sup> Dismissing the case for a grievous lack of evidence, the trial court finally sent Doctor Alvarez-Machain home.<sup>31</sup>

The dissenting opinion of Justices Stevens, Blackmun, and O'Connor virtually set the pages afire. They strongly protested both the reasoning of and the results obtained by the majority opinion. The dissenting opinion held that it was wholly illogical that the majority could read the extradition treaty with Mexico as not forbidding kidnappings just because it did not expressly say. The entire point of an extradition treaty, they pointed out, was to provide a means of cooperation in returning fugitives to each other and prevent unilateral actions by one country that would offend the sovereignty of the other.<sup>32</sup> Reading the treaty as providing only one of many alternate ways of obtaining custody of defendants reduces much of the treaty to "little more than verbiage."<sup>33</sup> Stevens warned

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25. Abramovsky, *supra* note 3, at 171-75; *Caro-Quintero*, 745 F. Supp. at 161.

26. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991).

27. *Alvarez-Machain*, 112 S. Ct. at 2190.

28. *Id.* at 2197.

29. *Id.* at 2192. Here the Court is following the long established doctrine of *mala captus bene detentus* (Latin for 'a person improperly seized may nevertheless be property detained'); Lee, *supra* note 4, at 138-39 n.83.

30. *Alvarez-Machain*, 112 S. Ct. at 2197.

31. Carlisle, *supra* note 3, at 1551 n.63. After the court dismissed the government's case, the U.S. attorneys made one last desperate try. They sought a stay of the ruling arguing that Alvarez-Machain couldn't be set free because he was in the United States illegally!

32. *Alvarez-Machain*, 112 S. Ct. at 2198 n.4, 2198-99; Cardenas, *supra* note 4, at 129-31.

33. *Alvarez-Machain*, 112 S. Ct. at 2198. The dissent goes on to say, even more irately, that the majority might as well hold that "[i]f the United States . . . thought it more expedient to

that the United States was setting a dangerous precedent in justifying and rationalizing government kidnapping. He warned that the world was watching and that Americans might not like to be the recipients of this kind of extraterritorial law enforcement.<sup>34</sup> The dissenting opinion ended by quoting Thomas Paine, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."<sup>35</sup>

The reaction of Mexico was one of justifiable outrage.<sup>36</sup> Even though it was on the brink of realizing the economically significant North American Free Trade Agreement (NAFTA) with the United States, Mexico still threatened to deport the U.S. drug agents in Mexico and to halt its cooperation in fighting drug trafficking between their respective countries.<sup>37</sup> It demanded the extradition of Dr. Alvarez-Machain's abductors and told the United States it wanted to amend the extradition treaty to specifically prohibit unilateral actions such as abductions.<sup>38</sup> President Bush, and then President Clinton, tried to mollify Mexico with assurances that kidnapping would not be used again, but the changes to the treaty that Mexico wanted have not yet been made.<sup>39</sup>

Canada was also offended by the United States' actions in kidnapping the doctor and was further disturbed by the reiteration of U.S. policy to exercise jurisdiction regardless of how a defendant is brought into court.<sup>40</sup> Like Mexico, Canada abhorred the idea that the United States could and would breach a foreign state's borders with impunity which Canada considered an assault on its sovereignty.<sup>41</sup> Before *Alvarez-Machain*, Canadian-U.S. extradition policy had enjoyed a largely cooperative spirit. Although abductions have occurred on both sides of the border, the practice has been repatriation

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torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty." *Id.* at 2199.

34. *Id.* at 2206 n.33.

35. *Id.* at 2206.

36. Lee, *supra* note 4, at 184-87; Thrush, *supra* note 2, at 185-92.

37. Lee, *supra* note 4, at 184-87; Abramovsky, *supra* note 3, at 168; Thrush, *supra* note 2, at 182-83.

38. Lee, *supra* note 4, at 184-87; Abramovsky, *supra* note 3, at 168; Thrush, *supra* note 2, at 182-83.

39. Kristin Berdan Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 459, 461 (1994); Daniel Williams, *U.S. and Mexico Plan Talks on Extradition—And to Abduction of Criminal Suspects Sought*, THE WASHINGTON POST, June 22, 1993, at A15.

40. Thrush, *supra* note 2, at 194-95.

41. *Id.* at 193-94.

upon protest from the asylum country.<sup>42</sup> Now, however, because Canada's extradition treaty with the United States is similar to Mexico's in that it also does not expressly prohibit kidnapping, Canada fears that U.S. law enforcement officials will presume they have been given *carte blanche* to violate Canada's boundaries.<sup>43</sup> A typical example of the U.S. response (before *Alvarez-Machain*) where a Canadian has been kidnapped, is the *Jaffe* case.

### B. Canadian Kidnapping

Florida bounty hunters kidnapped Sidney Jaffe, a Canadian citizen, from outside his home in Toronto and brought him to Florida to stand trial. He had been charged with violations of the Uniform Land Sales Practices Law and had fled to Canada after posting bond. When he did not appear for his trial, warrants were issued for his arrest. Fearing they would forfeit their money, the company that had secured Jaffe's bond sent their agents to Canada to abduct Jaffe and bring him back to Florida to stand trial.<sup>44</sup> There were indications that a deal had been struck between the bonding company and the local Florida officials that initiated this action.<sup>45</sup>

Canada's reaction was immediate, sending official letters of protest to Washington protesting the bond company's behavior and demanding Jaffe's return.<sup>46</sup> Secretary of State George Schultz responded by sending a letter to the Florida Department of Corrections requesting Jaffe's release.<sup>47</sup> Jaffe was eventually released, pending additional charges, and he fled to Canada once again, where he remains to this day.<sup>48</sup> The United States also complied with Canada's directive to extradite the bounty hunters who had abducted Jaffe. They stood trial and were imprisoned in Canada for their part the kidnapping.<sup>49</sup> Shortly after the Jaffe incident, Canada and the United States amended their extradition treaty to expand extraditable offenses. Among other things, the countries agreed that those

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42. The "asylum" country is the country to which the fugitive fled. Thrush, *supra* note 2, at 195; Lee, *supra* note 4, at 182-83.

43. Thrush, *supra* note 2, at 193-97; Abramovsky, *supra* note 3, at 196.

44. *Jaffe v. Boyles*, 616 F. Supp. 1371, 1373 (W.D.N.Y. 1985).

45. *Jaffe*, 616 F. Supp. at 1373; Kristofer R. Schleicher, *Transborder Abductions By American Bounty Hunters - The Jaffe Case And A New Understanding Between The United States And Canada*, 20 GA. J. INT'L. & COMP. L. 489 (1990).

46. *Jaffe*, 616 F. Supp. at 1374; Lee, *supra* note 4, at 133.

47. *Jaffe*, 616 F. Supp. at 1374.

48. Schleicher, *supra* note 43, at 501-3.

49. *Id.* at 497.

who abducted extraterritorially would be extradited to the offended country to be prosecuted.<sup>50</sup>

Looking at the rather deferential way the United States handled Canada's protest of Jaffe's abduction, versus the indifference shown the Mexican government in the more recent *Alvarez-Machain* case, shows why Canada is concerned with the possible ramifications in their extradition relationship with the United States. Canada shares a vast border with the United States, resulting in a large number of extradition requests being made between these two countries.<sup>51</sup> Cooperation between them is vital for efficient law enforcement in their respective nations. If the extradition treaties themselves will not offer any protection and extraterritorial kidnapping will not keep a U.S. court from exercising jurisdiction over the defendant, where is the deterrent for either local governments or federal officials who would invade Canada's or Mexico's national sovereignty at will? What is the basis for the United States' unilateral actions disregarding customary international law, and does it make a difference which neighbor the United States is dealing with?

## II. COMPARISON OF EXTRADITION LAW AND TREATIES

Territorial inviolability is the established norm of all international law.<sup>52</sup> In the absence of a treaty, it is assumed that the country accepts the international custom of asylum, which must be respected by all others or be in violation of that country's sovereignty.<sup>53</sup> Extradition treaties between countries are the means by which states agree to cooperate with each other by surrendering fugitives who would otherwise be granted asylum. These international treaties represent a balancing of legal and political interests.<sup>54</sup> States enter into them for the very purpose of circumventing the need for unilateral abductions.<sup>55</sup>

The United States was originally leery of extradition treaties in light of its experience with oppressive monarchical governments. It

50. Marian Nash Leich, *United States-Canada Agreement: Protocol of Amendment, 1988*, 82 AM. J. INT'L L. 337, 339 (1988).

51. Thrush, *supra* note 2, at 193 n.64.

52. Carlisle, *supra* note 3, at 1541, 1555. Cross-border abductions are violations of international law because one state's exercise of authority in another state's territory is a violation of the sovereignty of the latter.

53. Weissman, *supra* note 39, at 468.

54. Roy Carleton Howell, *International Extradition: The Canadian Example of Justice and Fair Play*, 4 PACE Y.B. INT'L L. 147 (1992).

55. "Where such treaties exist it is clearly the intention of the parties to the treaty that the surrender and acquisition of the defendants be accomplished exclusively in a manner which does not violate the sovereignty of either state." Abramovsky, *supra* note 3, at 176.



strongly held to the principle of territorial inviolability and asylum to all who were in need of it.<sup>56</sup> This approach did not serve well as time passed, travel between nations became more common, and society grew more complex. It became apparent that a more cooperative attitude was in order, and so the United States began negotiating extradition treaties.<sup>57</sup>

The U.S. is now a party to more than 100 extradition treaties with various nations,<sup>58</sup> but its recent increase in extraterritorial abductions, together with the Court's stamp of approval, has these nations questioning the effectiveness of their treaties.<sup>59</sup> Especially in its dealings with South and Central America, the incidences of irregular apprehensions by the United States has increased dramatically over the past two decades.<sup>60</sup> The United States accounts for this change by pointing to increases in acts of terrorism and drug trafficking, the policy of many nations not extraditing their own citizens, the reluctance of many of these countries to extradite at all, the fear that extradition targets will be forewarned by corrupt government officials, and the perceived inefficiencies of the extradition system.<sup>61</sup>

#### A. Mexico

Mexico, with the basis of its law stemming mainly from the Spanish civil law, views the question of jurisdiction differently from either the United States or Canada. Like most of Europe, Mexican law provides for prosecution of crimes committed by its citizens no matter where they take place.<sup>62</sup> A Mexican court may also have competence to try offenders for crimes outside Mexico if the victim is Mexican. "Thus, a person accused of stealing a Mexican's wallet in New York City could be prosecuted in a Mexican court."<sup>63</sup> This fact is at the root of Mexico's prohibition of extraditing nationals. In most

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56. Abramovsky, *supra* note 3, at 154.

57. *Id.*

58. *Id.* at 154-55.

59. Cardenas, *supra* note 6, at 103; Weissman, *supra* note 37, at 467.

60. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991); Abramovsky, *supra* note 3, at 156; Lee, *supra* note 4, at 140 n.95.

61. Analisa W. Scrimger, *United States v. Alvarez-Machain: Forcible Abduction As An Acceptable Alternative Means of Gaining Jurisdiction*, 7 TEMPLE INT'L. & COMP. L. J. 369, 369-71 (1993); Leich, *supra* note 50, at 395 increased in 1960's to combat drug trafficking). U.S. fears that defendants will bribe their way out of Mexican jails and escape. Abramovsky, *supra* note 2, at 155. Various commentators conclude that extraterritorial abduction is appropriate in certain circumstances (e.g., in fighting serious threats to national security from terrorists or narcotics traffickers) and that international law enforcement is vital to U.S. interests. Weissman, *supra* note 39, at 484-85.

62. MODERN LEGAL SYSTEMS CYCLOPEDIA, *The Legal System of Mexico*, 1.30.52. (1988).

63. *Id.* at 1.30.53.

instances, Mexico will refuse extradition of its own nationals claiming that it can and will adjudicate the matter in its own courts.<sup>64</sup>

The restriction on extraditing its own nationals, barring "exceptional circumstances" is embodied in both the Mexican extradition law and in its extradition treaty.<sup>65</sup> The U.S.-Mexico Extradition Treaty was signed in Mexico City, by representatives from both nations, on May 4, 1978 and sets out in detail the circumstances and guidelines for extradition of persons between the two countries.<sup>66</sup> The restriction on extradition of nationals is found in Article 9 of the Mexican-U.S. Extradition Treaty which states:

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.<sup>67</sup>

Further, Article 10 of Mexico's own Extradition Law states, "No Mexican shall be surrendered to a foreign State, save in cases considered exceptional by the Executive, who may so determine."<sup>68</sup> Under Mexican law, the executive has the authority to use discretion in deciding whether to extradite an individual (whether a national or not). If a decision is made not to extradite, the defendant may be required to submit to Mexican authorities for prosecution, provided Mexico has jurisdiction over the offense.<sup>69</sup>

The United States, historically rejecting extraterritorial jurisdiction over its nationals, has found this to be an unsatisfactory limitation, and one of the results has been the use of both irregular renditions and outright abductions in Mexico.<sup>70</sup> In practice, Mexico

64. Lee, *supra* note 4, at 137 n.77; Abramovsky, note 3, at 206; 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 876-78 (1968).

65. WHITEMAN, *supra* note 64, at 866.

66. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter U.S.-Mexico Treaty].

67. U.S.-Mexico Treaty, *supra* note 66, 31 U.S.T. at 5065.

68. 6 WHITEMAN, *supra* note 64, at 866 (citing Article 10(II), Extradition Law of 1897 (Mexico)).

69. U.S.-Mexico Treaty, *supra* note 66, 31 U.S.T.

70. 6 WHITEMAN, *supra* note 64, at 876; SATYA DEVA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 97 (1928). One of the reasons given for the United States' aggressive pursuit of the defendants in the Camarena investigation was that the United States law enforcement officials knew that Mexico wouldn't extradite their own nationals and they feared defendants would not be prosecuted in Mexico "according to U.S. standards." Lee, *supra* note 4, at 147; see also Abramovsky, *supra* note 3, at 155-56, 206-7.

has shown a reluctance to extradite even U.S. citizens to the United States, and that, too, has led to the widespread practice of extra-legal means for obtaining wanted fugitives.<sup>71</sup>

Mexican law permits extradition both within and without a treaty. If extradition agreements are made with countries who do not have a formal treaty with Mexico, they are based on comity and reciprocity.<sup>72</sup> Inherent in any extradition agreement, treaty or not, is the fact that certain acts may be exempt from extradition.<sup>73</sup> As in most extradition treaties, the U.S.-Mexico Treaty enumerates the crimes that are extraditable, and includes the provision that an extraditable offense must be a crime in both the asylum country and the requesting country. Specifically, Article 2 states:

Extradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.<sup>74</sup>

Further articles of the extradition treaty elaborate on when a duty to extradite is created, what evidence is required, what documents must be used and the proper procedures each country must follow. For example, under Article 1, Obligation to Extradite, part 2 states:

For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

(a) its laws would provide for the punishment of such an offense committed in similar circumstances, or

(b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.<sup>75</sup>

Therefore, when the United States applies for extradition of a fugitive in Mexico wanted by the U.S. authorities and the crime took place outside of the U.S., Mexico is obligated to extradite only if it would have jurisdiction over the fugitive in similar circumstances, or if the fugitive was a U.S. citizen and the U.S. would have the jurisdiction to prosecute.<sup>76</sup> This second part makes sense only if one understands that the United States may not have jurisdiction over crimes committed by its citizens outside its territory.<sup>77</sup> Had the United

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71. Abramovsky, *supra* note 3, at 161 n.42.

72. WHITEMAN, *supra* note 62, at 736.

73. MEX. CONST. art. 15; U.S.-Mexico Treaty, *supra* note 66, 31 U.S.T.

74. U.S.-Mexico Treaty, *supra* note 66, 31 U.S.T. at 5062.

75. *Id.*

76. Andre M. Surena et. al., *Extraterritorial Application of Criminal Law*, 85 AM. SOC'Y. INT'L. L. PROC. 383, 384 (1991).

77. Abramovsky, *supra* note 3, at 177-80; *but see* Surena, *supra* note 76, at 388-90.

States requested extradition in the *Alvarez-Machain* case (and had he not been a Mexican national), Mexico would have been bound by this article to extradite because Mexico would have had jurisdiction in similar circumstances.

Any treaties entered into by the Mexican government automatically become the supreme law of the land, giving rights to both individuals and the government.<sup>78</sup> By treaty and by Mexican law, the decision to extradite is the executive's.<sup>79</sup> The executive will deny extradition if the fugitive has already been prosecuted, tried and convicted, or acquitted by the asylum country for the offense for which extradition is being requested.<sup>80</sup> Extradition may also be denied if the offense is punishable by death in the requesting country, especially if the same crime does not carry a capital punishment penalty in the requested state.<sup>81</sup>

All requests for extraditions are made through diplomatic channels, according to the Mexican extradition treaty, and must be accompanied by documents stating a description of the offense, a statement of facts, proof that it is a crime in the requesting country, the provision for punishment in the requesting state, and information identifying the fugitive. If the fugitive has not been convicted, the requesting state must include a copy of the warrant for arrest.<sup>82</sup>

The requested state will examine the documents and investigate the request to determine if the evidence suggests probable cause sufficient to extradite. This is embodied in Article 3, Evidence Required, which asserts:

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.<sup>83</sup>

In theory, the judge at an extradition hearing does not base her decision on the merits of the case<sup>84</sup>, yet this requirement of finding sufficient probable cause has justified several in-depth investigations resulting in subsequent denials of extradition on the part of the

78. Thrush, *supra* note 2, at 187-88.

79. U.S.-Mexico Treaty, *supra* note 66, 31 U.S.T. at 5061-63.

80. *Id.* at 5064.

81. *Id.* at 5065.

82. *Id.* at 5066.

83. *Id.* at 5062.

84. "The determination is one of probable cause, not 'an adjudication of guilt or innocence.'" The primary source of determining probable cause comes from evidence contained in the extradition request, which is presumed to be the truth. Extradition of Greer, 1991 WL 311924 (D. Vt. 1991).

United States.<sup>85</sup> When the U.S. believes Mexico's motives for requesting extradition are suspect, it independently decides to review the case as a trial court would and make its decision based on whether conviction would be likely under U.S. law, rather than simply determining if the evidence meets sufficient probable cause standards.<sup>86</sup> This paternalistic attitude has not been evinced in the reverse situation. While Mexico at times shows a general reluctance to extradite to the United States, it normally limits denials of extraditions to instances where the defendant is a Mexican national.<sup>87</sup>

Since Mexico severely limits extraditing its own citizens, and has shown a reluctance to extradite even non-nationals, an informal, quasi-legal structure for exchanging fugitives has emerged.<sup>88</sup> Cooperation for the exchange of offenders is usually accomplished by local governments and police on both sides of the border.<sup>89</sup> Occasionally, special agents and private citizens are engaged to apprehend fugitives and deliver them to the requesting state (with the asylum state's tacit approval or consent.)<sup>90</sup> Much of the international law enforcement in the border areas between the United States and Mexico is accomplished in this informal, cooperative manner rather than through official extradition requests.<sup>91</sup> Even when Mexico is likely to grant extradition, the process is cumbersome and U.S. local law enforcement officials will normally prefer to make an expedient deal with their Mexican counterparts rather than bear the lengthy wait of a formal extradition.<sup>92</sup> Where a deal cannot be negotiated, many times the U.S. agent will forego internationally recognized methods for obtaining custody of his targeted person rather than submit a request for extradition.<sup>93</sup>

Regardless of the de facto operating procedures of local law enforcement, this does not present a case for interpreting the U.S.-Mexico Extradition Treaty as merely "suggesting" methods of extradition. The treaty is extensive and fully provides for the formal, accepted method for the parties to handle extradition between them. While, in the interest of expediency, procedures for exchanging defendants might often be brought about through local officials of

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85. Extradition of Guillen, 1991 WL 149623 (N.D. Ill. 1991); Extradition of Contreras, 800 F. Supp. 1462 (S.D. Tex. 1992); *but see* Extradition of Garcia, 802 F. Supp. 773 (E.D.N.Y. 1992).

86. Guillen, 1991 WL 149623 at 4; Contreras, 800 F. Supp. 1462.

87. See Abramovsky, *supra* note 3, at 161 n.42.

88. Verdugo-Urquidez, 939 F.2d at 1343; Abramovsky, *supra* note 3, at 155-56, 206.

89. Verdugo-Urquidez, 939 F.2d at 1343; Abramovsky, *supra* note 3, at 155-56, 206.

90. Verdugo-Urquidez, 939 F.2d at 1341; Abramovsky, *supra* note 3, at 153-56.

91. Abramovsky, *supra* note 3, at 153-56, 206-7.

92. Surena, *supra* note 76, at 395.

93. Alvarez-Machain, 112 S. Ct. 2188.

the two nations, it is understood that these actions are quasi-legal and outside the established procedure for extradition. It was a gross misrepresentation of the actual provisions and intent of the treaty for the Supreme Court's majority to hold that the treaty was meant to be only one of many acceptable methods for obtaining wanted individuals in the other's country.

### B. Canada

The situation in Canada varies from the Mexican situation in many different ways, even though their actual extradition treaties with the United States are, in fact, quite similar.<sup>94</sup> The United States-Canada Extradition Treaty was signed by their respective officials on July 9, 1974.<sup>95</sup> Like Mexico's extradition treaty with the United States, Canada's also does not expressly prohibit abduction as a means of obtaining custody.<sup>96</sup> Canada's extradition treaty also mirrors Mexico's in the area of authorizing extradition both for specific, listed crimes in the appendix and for offenses "punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year."<sup>97</sup>

Part 3, Article 3 of the treaty, which provides that, "When the offense for which extradition has been requested has been committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances"<sup>98</sup> is very similar to Article 1, part 2 of the Mexican treaty.<sup>99</sup> Canada's treaty also prohibits extradition when the person being sought has already been prosecuted, tried and acquitted in the requested state.<sup>100</sup> It further bans extradition when the crime is punishable by death in the requesting state but not in Canada.<sup>101</sup> Generally, with a few exceptions, political crimes are also exempt from extradition.<sup>102</sup>

A major difference between the Mexican and Canadian extradition treaties with the United States is the absence of a Canadian

94. Thrush, *supra* note 2, at 193-94.

95. Extradition Treaty, July 9, 1974, U.S.-Can., 27 U.S.T. 983 [hereinafter U.S.-Canada Treaty].

96. *Id.*

97. *Id.*

98. U.S.-Canada Treaty, *supra* note 95, 27 U.S.T. at 986.

99. U.S.-Mexico Treaty, *supra* note 66, 31 U.S.T. at 5061.

100. U.S.-Canada Treaty, *supra* note 95, 27 U.S.T. at 988.

101. *Id.* at 989.

102. *Id.* at 988.

equivalent to Mexico's Article 9, prohibiting extradition of nationals. Canada, like the United States, makes no differentiation between extraditing Canadians versus any other national found within its borders.<sup>103</sup> This is probably a consequence of the fact that Canada is a common law country, with the resulting restriction on jurisdiction over crimes committed outside its territory.<sup>104</sup> Therefore, it has no power to prosecute its own nationals for crimes committed abroad and must extradite them to the state of the crime if the offender is to be punished at all. Mexico, on the other hand, is free to prosecute its own citizens for crimes committed abroad and generally prefers to do so.<sup>105</sup>

This single difference is a weighty consideration in the attitudes and cooperative spirit between the U.S. and Canada. Knowing that Canadians will not refuse extradition based on the nationality of the fugitive, U.S. law enforcement officials are less apt to attempt quasi-legal methods of obtaining custody.<sup>106</sup> Even though Mexico's refusal to extradite its own nationals is based on perfectly legitimate rules of civil law, it is different from Canada's and the U.S.' common law system and, therefore, problematic. This self-serving attitude on the part of the United States results in a tendency to view the Mexican rule as mere uncooperativeness and react accordingly.<sup>107</sup>

Canada's domestic extradition law permits extradition only under a treaty, and the provisions of a treaty have precedence over any provision in Canada's extradition statute.<sup>108</sup> Where one party to a Canadian extradition treaty provides that it is not bound to extradite their own nationals, Canada has discretion to surrender their own citizens or not.<sup>109</sup>

The procedure, in Article 9, for an extradition request and hearing is a replica of the one in the Mexican treaty. Canada also provides that a request be made through diplomatic channels, must be accompanied by a description of the person sought, facts of the case, a warrant for arrest if the fugitive has not yet been brought to trial, etc.<sup>110</sup> In Article 10, the Canadian treaty states:

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103. *Id.*; Bedi, *supra* note 70, at 97.

104. Bedi, *supra* note 70, at 97.

105. Abramovsky, *supra* note 3, at 206; 6 WHITEMAN, *supra* note 64, at 876.

106. Thrush, *supra* note 2, at 197 n.83.

107. Weissman, *supra* note 39, at 467-68; Surena, *supra* note 76, at 384.

108. Extradition Under Treaty, R.S.C. ch. E-21 (1970). Part II of Canada's extradition statute provides for extradition irrespective of a treaty upon proclamation by the Governor General, but Part II has never been proclaimed "in force."

109. 6 WHITEMAN, *supra* note 64, at 875.

110. U.S.-Canada Treaty, *supra* note 95, 27 U.S.T. at 990.

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.<sup>111</sup>

Although this matches the sufficient evidence clause in the Mexican treaty, a review of extradition hearings reveals that Canadian requests are not as prone to be denied based on insufficient evidence as are the Mexican petitions.<sup>112</sup> Though the sheer volume of extraditions between Canada and the United States may be a partial explanation for this, no doubt the U.S.' misperception of Mexico's civil law versus Canada's more familiar common law also plays a significant role.

Canada and the United States have an undefended border of over 3,000 miles.<sup>113</sup> The fact that approximately 50% of all American requests for extraditions are made to Canada can be accounted for by the length of their shared border and the relative ease with which it can be crossed.<sup>114</sup> Most transfers of international fugitives between Canada and the United States are made through formal extraditions, unlike extraditions between the United States and Mexico.<sup>115</sup>

Informal transfers do happen, however. Moreover, both countries have resorted to abducting from the other from time to time.<sup>116</sup> The major difference between U.S.-Canadian abductions and U.S.-Mexican (outside of the sheer number difference) is the result when the offended country objects. In Canadian-U.S. relations, once the asylum country complains, repatriation is usually certain.<sup>117</sup>

This reveals an unflattering bias on the part of the United States in its relationship with its northern versus southern neighbor.<sup>118</sup>

111. *Id.* at 991.

112. *Compare* Extradition of Alvarado, 1988 WL 59261 (W.D. Mich. 1988); Extradition of Greer, 1991 WL 311924, 5 (D. Vt. 1991) (discussing the standard of evidence at an extradition hearing); *and* Extradition of Stevenson, 1994 WL 164053 (S.D.N.Y. 1994) *with* Extradition of Guillen, 1991 WL 149623 (N.D. Ill. 1991) *and* Extradition of Contreras, 800 F. Supp. 1462 (S.D. Tex. 1992).

113. Thrush, *supra* note 2, at 193 n.64.

114. *Id.*

115. Lee, *supra* note 4, at 151; Thrush, *supra* note 2, at 193-95.

116. Thrush, *supra* note 2, at 195.

117. Lee, *supra* note 4, at 182-83; Thrush, *supra* note 2, at 195.

118. "The United States accommodates countries according to the diplomatic power of countries and U.S. necessity to maintain favorable international relations with certain countries. The United States in Jaffe, declined to withstand Canada's protests abandoning the opportunity to vindicate Mr. Jaffe's wrongs. The United States in this act demonstrated that it considered Canada to be an important diplomatic ally and desired to maintain favorable relations with this



Why should the U.S. be any less inclined to repatriate a defendant when the offended country is Mexico? Given the fact that the extradition treaties are virtually the same and each is a direct neighbor of the United States, there seems to be no rational or acceptable reason. While to a certain degree it may be human nature to be more comfortable with the familiar, the public policy of a supposed "melting pot" nation such as the United States should reflect a more non-discriminatory approach.

### C. *United States*

In the United States, international treaties are considered the "law of the land" and, thus, are equivalent to federal law.<sup>119</sup> However, many treaties are not considered "self-executing," which means that they cannot be given actual effect until Congress passes legislation pursuant to their execution.<sup>120</sup> Extradition treaties are self-executing and may be directly enforced in federal courts.<sup>121</sup> Thus, extradition treaties are considered "law" upon ratification, immediately giving each government certain rights.<sup>122</sup>

Under international law, there is no obligation to extradite absent a treaty. Like Canada, the United States only extradites pursuant to an extradition treaty.<sup>123</sup> In the United States, the treaty itself is what empowers the executive branch to actually surrender an individual to another country.<sup>124</sup> Extradition is deemed a purely national act, with no individual state within the U.S. having the power to effect an extradition.<sup>125</sup>

The United States makes no distinction between its own nationals or aliens in extradition proceedings. In fact, it is known for being almost zealous in its cooperation in extraditing U.S. fugitives.<sup>126</sup> However, because the U.S. extradites only according to the

country. In contrast, the situation in *Alvarez-Machain* indicated that the United States did not value Mexico as a strong and needed diplomatic force." *Lee, supra* note 4, at 184-85.

119. *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 10-11 (1936).

120. *U.S. v. Caro-Quintero*, 745 F. Supp. 599, 606 (C.D.Cal. 1990). Non-self-executing treaties are considered only contracts between the parties until Congress acts.

121. *Head Money Cases*, 112 U.S. 580, 598-9 (1884). While the executive branch actually forms the extradition treaty subject to the advice and consent of the Senate, the judiciary's role is to enforce and interpret the treaty based on the negotiating history, intent, and actual conduct of the parties under the treaty. *Lee, supra* note 4, at 134.

122. *Caro-Quintero*, 745 F. Supp. at 606-7.

123. 18 U.S.C. § 3181 (1990); *Extradition Under Treaty*, R.S.C. ch. E-21 (1970); *Ivancevic v. Artukovic*, 211 F.2d 565 (1954).

124. *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 8-9 (1936); 18 U.S.C. § 3184 (1985)

125. *Valentine*, 299 U.S. at 8.

126. *Id.* at 7-8.

provisions of a specific treaty, when the foreign party demands a clause exempting nationals from extradition, the United States has interpreted this as preventing it from delivering up its own nationals under that treaty also.<sup>127</sup> This potential problem is circumvented by the wording of Article 9, in the U.S.-Mexican treaty, which gives positive discretion to the respective executive branches as to whether or not to surrender their own nationals.<sup>128</sup>

### III. JURISDICTION

At the heart of the U.S. policy that sanctions abductions as a means of obtaining justice is the fact that a court has personal jurisdiction over anyone found within the state and that forcible abduction doesn't necessarily nullify this.<sup>129</sup> For over one hundred years, United States courts have followed the precepts now called the "Ker-Frisbie" doctrine even though it is in direct contradiction to customary international law, which is also a part of U.S. law.<sup>130</sup>

The Supreme Court first addressed extraterritorial abduction in the case of *Ker v. Illinois*.<sup>131</sup> Ker, a U.S. citizen, fled to Peru after being charged with larceny by the state of Illinois. After the governor requested extradition, an agent was sent down to Peru with the proper warrant to bring Ker back. When the agent arrived in Peru, however, he found that there was no Peruvian official to present the warrant to as the government had been overtaken by Chilean forces. So, acting on his own initiative, he seized Ker and brought him back to the United States.<sup>132</sup> Ker asserted that the Illinois court did not have personal jurisdiction over him because he had been forcibly kidnapped and brought before the court.<sup>133</sup> But the U.S. Supreme Court ultimately affirmed the Illinois court's decision that Ker's abduction constituted a "mere irregularity" and was insufficient to dismiss for lack of personal jurisdiction.<sup>134</sup> In a now famous (or infamous, depending on one's viewpoint) quote, Justice Miller stated that "[t]here are authorities of the highest respectability which hold

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127. *Id.*; 6 WHITEMAN, *supra* note 64, at 875; 18 U.S.C. § 3196 (1990).

128. U.S.-Mexico Treaty, *supra* note 64, art. 9 at 5065; 6 WHITEMAN, *supra* note 64, at 875; *Valentine*, 299 U.S. at 15 n.12.

129. *Ker v. Illinois*, 119 U.S. 436, 440 (1886). These quasi-legal and outright illegal methods take advantage of the principle of *mala captus bene detentus*. See *supra* note 29.

130. See *Lee*, *supra* note 4, at 140-41; *Carlisle*, *supra* note 3, at 1554-55. Only if the government's conduct is such that it "shocks the conscience" will the Supreme Court refuse to apply the Ker-Frisbie doctrine in cases where the defendant has been forcibly brought before the court.

131. *Ker v. Illinois*, 119 U.S. 436 (1886).

132. *Id.* at 438.

133. *Id.* at 439-40.

134. *Id.* at 440.

that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offense, and presents no valid objection to his trial in such court."<sup>135</sup>

This precedent was strengthened by the decision in *Frisbie v. Collins*, where Michigan officers kidnapped Frisbie after he had fled to Illinois to escape justice.<sup>136</sup> Frisbie, too, objected to the Michigan court's assertion of jurisdiction, claiming that kidnapping by Michigan state officials invalidated the court's power to hear his case.<sup>137</sup> Once again, however, the Supreme Court rejected the defendant's jurisdictional challenges. The status of the kidnapper, as a citizen or acting in official state capacity, did not matter.<sup>138</sup> Thus, the Supreme Court gave its stamp of approval to extraterritorial abductions.

The rationale of the United States for upholding the Ker-Frisbie doctrine is that how a person is brought before a court should not be a defense.<sup>139</sup> The Court has stated that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."<sup>140</sup> This viewpoint assumes, of course, that the defendant will not find "justice" anywhere but in a U.S. court. In fact, in many of the cases where the United States has taken unilateral action in obtaining foreign suspects, the asylum country was willing and able to prosecute the defendant themselves.<sup>141</sup> The U.S.' attitude of superiority is especially evident in its relationship with Mexico.<sup>142</sup>

In domestic criminal procedure, the exclusionary rule prevents illegally obtained evidence from being admissible in court.<sup>143</sup> This is to deter over-zealous police actions. Yet, in allowing the court to obtain jurisdiction over a defendant, no matter how she is brought within its boundaries, the Court allows this illegal action to "work."<sup>144</sup> This not only fails to deter extraterritorial abductions, it actually encourages them. Where is the deterrent to obtaining

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135. *Id.* at 444.

136. *Frisbie v. Collins*, 342 U.S. 519 (1952).

137. *Id.*

138. *Id.*

139. *Alvarez-Machain*, 112 S. Ct. at 2192.

140. *Id.*

141. *Abramovsky*, *supra* note 3, at 206.

142. Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y. INT'L. BUS. 391 (1993).

143. *Abramovsky*, *supra* note 3, at 192.

144. "As long as the United States is in a position to benefit from treaty violations, it will not be deterred from future illegal behavior. Thus, if kidnapping is a viable alternative to the extradition process despite the presence of a treaty, further violations will no doubt occur, rendering the force of extradition agreements meaningless." Scrimger, *supra* note 61, at 384.

custody of a fugitive by illegal means when the result is that it works to bring the person to "justice"?

Canadian courts, like the U.S., may assert personal jurisdiction over a defendant solely on the basis of her physical presence in the district.<sup>145</sup> However, Canada has never taken that critical next step of finding jurisdiction no matter how the defendant got before its court.<sup>146</sup> This is the crucial difference.

Jurisdiction works differently in Mexico, circumventing this whole issue of whether a court has jurisdiction over a kidnapped defendant. In Mexico, there must be some nexus between the person and the court that is trying her; mere physical presence is not enough to obtain personal jurisdiction.<sup>147</sup> Therefore, in a Mexican court the question would not be how the defendant was brought before it, but what was the relationship between the person and the court. If there was a relationship sufficient for that court to have jurisdiction, it would be there regardless of her physical presence. If there was not a relationship, the act of bringing her there would not give the court any more jurisdiction.

#### IV. ANALYSIS

Given the basic similarity of the extradition laws of the United States, Mexico, and Canada, and the fact that there are virtually identical treaties in place, there is little justification for these differences in actual transfer practices. Additionally, the United States has taken a position on extraterritorial abduction that has its neighbors looking on in horror. So, what is the cooperative ideal for the North American neighbors?

In upholding the Ker-Frisbie doctrine, as well as expanding its effect by holding that abductions do not violate extradition treaties, the United States is in conflict not only with other nation's concepts of international law, but with the very principles of law it holds for itself.<sup>148</sup> The Restatement of the Foreign Relations Law of the United States provides that, excluding wartime conditions, a nation's agents may not seize an individual from another nation without obtaining consent from the other nation's government.<sup>149</sup> In conjunction with this prohibition, customary international law demands that when an asylum country objects to the extraterritorial abduction, the

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145. Surena, *supra* note 76, at 395.

146. *Id.* at 397.

147. MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 62, at 1.30.52.

148. Abramovsky, *supra* note 3, at 204-5.

149. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432(2) (1987).

abducting country must return the abductee.<sup>150</sup> More importantly, it is difficult to imagine the U.S. being tolerant should other nations choose to employ kidnappings within U.S. borders.

In the *Alvarez-Machain* case, both Canada and Mexico made their disapproval of the kidnapping known by public outcry, amicus curiae briefs to the Court, and diplomatic protests.<sup>151</sup> Mexico went even further when it got little response from the American government by suspending cooperation with U.S. efforts to control drug trafficking and enjoining all DEA activities within Mexico.<sup>152</sup> As a result of the Court's holding that the treaty did not forbid kidnapping, Mexico has insisted on amending the U.S.-Mexico extradition treaty.<sup>153</sup> However, it is feared that the parties may have problems reaching an agreement, as the United States wants Mexico to agree to surrender its nationals in return for the U.S. promise not to use illegal means of gaining custody.<sup>154</sup> This may ultimately result in negotiations breaking down because this demand would be in conflict with Mexican constitutional law.

Mexico's position is that extraterritorial abduction, without the consent of the foreign government, is an outrageous violation of that country's national sovereignty. It stated that both the United Nations and the Organization of American States prohibited unilateral violations of a country's sovereignty and that, as a charter member of these organizations, the United States was bound by them. Mexico believes that relations between countries must be governed by the customs of international law.<sup>155</sup>

Canada agreed with Mexico's position that extraterritorial abductions could only harm relationships between sovereign countries.<sup>156</sup> Canada governs its own actions by the principles of international law, and whether or not kidnapping constitutes a breach of the actual extradition treaty, Canada considers kidnapping a violation of international law.<sup>157</sup> This in itself is enough to find that it would breach the intent of the treaty.

Even the Court found that the actions of the DEA agents in kidnapping *Alvarez-Machain* probably violated customary international law, but it just didn't find that this invalidated personal

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150. Carlisle, *supra* note 3, at 1557; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 901 (1992) (remedies for Violations of International Law).

151. Lee, *supra* note 4, at 136, 144-45; Thrush, *supra* note 2, at 182-96.

152. Thrush, *supra* note 2, at 182-83.

153. *Id.* at 210.

154. *Id.*

155. *Id.* at 185-92.

156. *Id.* at 193-97, 209-10; Abramovsky, *supra* 3, at 203-6.

157. Surena, *supra* note 76, at 397.

jurisdiction.<sup>158</sup> However, if the United States is concerned at all about its international reputation, it will have to rethink its position regarding self-help extradition.

The world being the interdependent community of individual nations that it is, unilateral actions by one country that offends the rest of the world cannot stand in the long run. The United States is revealing an unwarranted arrogance in its insistence upon the continued application of the Ker-Frisbie doctrine to legitimize its unilateral abductions. In its determination to have its way and "get its man," it is subjugating the rights of its neighbors.<sup>159</sup> Further, the U.S. evinces an inclination towards using these tactics against Mexico, which shows an unflattering prejudice and cultural intolerance.<sup>160</sup> The fact that the U.S. does not perceive Mexico as having the economic or diplomatic power that Canada does only makes its actions more abhorrent.<sup>161</sup> The U.S. shows a disappointing lack of regard for a people and system unlike its own, plus the attitude of the bully that "might makes right."

Canada only fares better in relation to how poorly the United States treats its southern neighbor. Canada has reason to fear that the unilateral actions of extraterritorial invasion the U.S. sanctions today might be used against them tomorrow.<sup>162</sup> The United States could well look to Canada for instruction on the proper way to handle inter-border disputes.<sup>163</sup> Canada's laws allow them to obtain jurisdiction by the same unilateral actions, but up until now it has largely refrained from using this method. However, America should worry whether it has invited Canadian retaliation.<sup>164</sup> With the large border that it shares, it could become quite an issue should Canada start snatching fugitives in the U.S. and prosecuting them in Canadian courts. Although, realistically, the United States probably does

158. Alvarez-Machain, 112 S. Ct. at 2196-97.

159. *United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1993); *Scrimger*, *supra* note 61, at 390; *Weissman*, *supra* note 39, at 487-89; *Surena*, *supra* note 76, at 396-97; *Abramovsky*, *supra* note 3, at 155-56.

160. *Abramovsky*, *supra* note 3, at 155-56, 208; *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

161. *See Lee*, *supra* note 4, at 184-85; *Abramovsky*, *supra* note 3, at 203-6.

162. *Thrush*, *supra* note 2, at 193-94.

163. *Howell*, *supra* note 52, at 151-52. When an American citizen robbed a Canadian bank and attempted to flee via the international tunnel connecting Windsor, Canada and Detroit, Michigan, both Canadian and United States police were involved his capture. The Canadian police actually made the arrest, but it was in the United States side of the tunnel. When the defendant protested that his arrest violated international law, the Canadian's released him with the condition that he leave Canada within two hours. He did, and was promptly arrested by the FBI. The Canadian government then sought extradition of the accused under the U.S.-Canada extradition treaty, which the United States granted.

164. *Weissman*, *supra* note 39, at 488-90; *Thrush*, *supra* note 2, at 197.

not have to worry about Canada in this regard, other countries that are not as friendly to the U.S. might well do this, and the United States would have little justification for complaint considering the example it has set. This illustrates the breakdown in communication, goodwill and cooperation that this kind of invasion of national sovereignty can bring about.

Relations among the three neighboring nations are particularly sensitive with the recent signing into law of NAFTA. This controversial treaty was hard fought, and goodwill is essential in its implementation and ultimate success.<sup>165</sup> The United States sits between two nations that it has gravely offended, yet shares borders with and needs their continuing support. Aside from the economic interests inherent in agreements like NAFTA, there is also the need for cooperative crime control, especially in the area of drug trafficking. Considering the vast borders it shares and the relative ease of crossing them, none of the neighboring states could pursue effective law enforcement without the cooperation of the other. A solution, other than the doctrine espoused by the U.S. Supreme Court's, is in order.

One answer might be to change the individual treaties to expressly prohibit kidnapping. But this is a limited solution and, as seen with the negotiations with Mexico, may stall in the process.<sup>166</sup> Additionally, is there really a need to change all the treaties to express what the parties intended in the first place? Most countries expect that, by entering into an extradition treaty, they are rejecting unilateral action. However, the United States' government shows a mistrust of other nation's legal systems, combined with a belief that only they can do the job correctly, that leads it to try and bend the rules to suit themselves.<sup>167</sup>

Probably the best solution would be to follow the example of Canada and not justify jurisdiction when the presence of the defendant has been obtained by illegal means. This would also be consistent with the U.S.' own ideals embodied in its criminal procedure. Congress should consider drafting legislation overruling the Ker-Frisbie precedent. Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, prepared by the Harvard Research in International Law proposes this rule:

In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its

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165. Thrush, *supra* note 2, at 209-10 n.154.

166. Thrush, *supra* note 2, at 210.

167. Various commentators have concluded that extraterritorial abduction is an appropriate law enforcement method in some cases. Thus extraterritorial law enforcement is important to protect U.S. interests. Weissman, *supra* note 39, at 484-85.

territory or place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.<sup>168</sup>

To do anything less will only encourage the escalation of extra-territorial violations.

#### CONCLUSION

Although the laws and treaties of Canada, Mexico and the United States are basically similar and designed to promote amicable transfers of persons across national boundaries, the practices of these nations differ in ways that are creating disharmony, suspicion and animosity among these neighbors. Each country could be benefited by an open-minded and respectful attitude towards the others' customs and laws. Nothing good can be ultimately gained by any one of the three taking unilateral actions which offend one or both of the others.

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168. Harvard Research in International Law, 29 AM. J. INT'L L. 442 (Supp. 1935).



