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Abstract

This Comment argues that the principles set forth in Alvarez-Machain highlight the weakness in U.S. policy regarding extraterritorial apprehensions. Part I sets forth the various methods utilized by nations to gain custody of an individual and how these practices have developed in the United States. Part II describes the factual background and the holding of the U.S. Supreme Court in Alvarez-Machain. Part III analyzes the Supreme Court's decision and argues that the Court's conclusion is misguided. Part III also examines the possible effects of this decision on other nations that hold extradition treaties with the United States. This Comment concludes that the United States should make every effort to refrain from abductions in order to avoid consequences ranging from international censure to retaliatory measures. Accepting such a policy ultimately benefits the United States and preserves U.S. relations with other countries.

COMMENTS

UNITED STATES v. ALVAREZ-MACHAIN: THE DELETERIOUS RAMIFICATIONS OF ILLEGAL ABDUCTIONS*

INTRODUCTION

Obtaining jurisdiction over a non-U.S. national for trial in the United States raises a multitude of complicated issues.[1] Historically, most nations, including the United States, considered extradition as the only legitimate method of obtaining jurisdiction.[2] This belief still prevails. Extradition, however, has not precluded the United States from employing other means to compel personal jurisdiction over a non-U.S. citizen.[3]

In April 1990, the United States chose to bypass extradition channels and abduct Dr. Alvarez-Machain, a Mexican national, without the consent of the Mexican government.[4] In response, the U.S. Court of Appeals for the Ninth Circuit, in *United States v. Alvarez-Machain*,[5] held that the United States agents'[6] conduct

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1. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 628-29 (1987).

2. Extradition, 4 Moore DIGEST § 580 at 245. The right to delivery of an individual has been described by Moore that

> [n]o State has an *absolute* and *perfect right* to *demand* of another the delivery of a fugitive criminal, though it has what is called an *imperfect right*. . . . The laws of nations embrace no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place.

Id. (emphasis in original).

3. *See, e.g.*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992); United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991). The rules of international law are conventional or customary. Conventional international law refers to law created or evidenced by or consolidated in an international treaty. SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 14 (1984). Customary international law does not depend on a treaty, and is the actual conduct of states in their international relations. *Id.* at 55-56. Customary international law is continually modified within the international community. Andrew M. Wolfenson, Note, *The U.S. Courts And The Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 707-08 (1990).

4. United States v. Caro-Quintero, 745 F. Supp. 599, 603-04 (C.D. Cal. 1990). Dr. Alvarez-Machain was a named co-defendant in this case. *Id.* at 601.

5. 946 F.2d 1466 (9th Cir. 1991).

violated the U.S.-Mexico Extradition Treaty[7] and determined the remedy[8] to be repatriation.[9] On appeal by the U.S. government, the U.S. Supreme Court reversed the Ninth Circuit.[10] The Court reasoned that because the U.S.-Mexico Extradition Treaty[11] did not specifically bar abduction,[12] the manner employed to bring the defendant before the U.S. court did not violate the express terms of the Treaty.[13]

In condoning the U.S. action, the Court applied and upheld the *Ker-Frisbie* doctrine.[14] This doctrine permits a U.S. court to exercise personal jurisdiction over an individual brought before it, regardless of the method utilized to acquire jurisdiction.[15] In *Alvarez-Machain*, the Supreme Court applied the *Ker-Frisbie* doctrine in its strictest sense, upholding abduction as a legitimate way of bringing a defendant before a U.S. court.[16]

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6. *Caro-Quintero*, 745 F. Supp. at 603. The agents who apprehended Dr. Alvarez-Machain were Mexican nationals and paid agents of the United States. *Id.*

7. *See* U.S.-Mexico Extradition Treaty, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656 (replacing earlier extradition treaties of 1899, 1902, 1925 and 1939) [hereinafter Treaty].

8. *Alvarez-Machain*, 946 F.2d at 1466-67.

9. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (1987). "[T]he state from which the person was abducted may demand return of the person and international law requires that he be returned." *Id.*

10. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992).

11. *See* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656.

12. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 156 (1991) [hereinafter Abramovsky, *Catch and Snatch Policy*]. "'[A]bduction,' is characterized by an absence of consultation with any responsible representatives of the asylum country's government." *Id.* Abductions are performed unilaterally, without the aid or knowledge of the asylum state. Abraham Abramovsky & Steven Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51, 71 (1977) [hereinafter Abramovsky & Eagle].

13. *Alvarez-Machain*, 112 S. Ct. at 2193-94.

14. Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952). The *Ker-Frisbie* doctrine evolved from the holdings of both cases. Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952). The Court in *Alvarez-Machain* applied the *Ker-Frisbie* doctrine and stated that:

> we conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of Ker v. Illinois is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

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

15. BASSIOUNI, *supra* note 1, at 201.

16. *Alvarez-Machain*, 112 S. Ct. at 2196 (quoting Supreme Court's decision justifying custody of Dr. Alvarez-Machain).

This Comment argues that the principles set forth in *Alvarez-Machain* highlight the weakness in U.S. policy regarding extraterritorial apprehensions. Part I sets forth the various methods utilized by nations to gain custody of an individual and how these practices have developed in the United States. Part II describes the factual background and the holding of the U.S. Supreme Court in *Alvarez-Machain*. Part III analyzes the Supreme Court's decision and argues that the Court's conclusion is misguided. Part III also examines the possible effects of this decision on other nations that hold extradition treaties with the United States. This Comment concludes that the United States should make every effort to refrain from abductions in order to avoid consequences ranging from international censure to retaliatory measures. Accepting such a policy ultimately benefits the United States and preserves U.S. relations with other countries.

I. *METHODS OF GAINING CUSTODY OF NON-NATIONALS*

Obtaining custody of a non-national defendant in a criminal proceeding is a common issue in international criminal law.[17] Traditionally, an extradition treaty provided the primary method to gain jurisdiction over an individual.[18] An extradition treaty is a bilateral[19] or multilateral[20] agreement that functions to foster cooperation and preserve the sovereignty of the signatories.[21]

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17. BARBARA YARNOLD, INTERNATIONAL FUGITIVES 1 (1991).

18. *See* Extradition, 6 Whiteman DIGEST § 1, at 727. Extradition is the customary method for a state to obtain jurisdiction over a fugitive abroad. *Id.*

19. Extradition, 4 Hackworth DIGEST § 312, at 33. "Treaties of extradition are usually bilateral in form and reciprocal in their undertakings." *Id.* Bilateral treaties recognize a nation's sovereignty, however the practice of bilateral treaties is a cumbersome process of entering into a separate and distinct agreement with each nation to preserve sovereignty. BASSIOUNI, *supra* note 1, at 31. The United States, England and most common law countries utilize extradition by signing a bilateral treaty. *Id.* at 31.

20. BASSIOUNI, *supra* note 1, at 25. The United States, however, can and does request extradition from a state with which the United States has no treaty or relies on a multilateral treaty. *Id.* at 40. Multilateral treaties are entered into by nations in a particular geographic region. *Id.* at 25. The treaty serves to harmonize the different national systems so as to maintain one unifying standard of practice regarding extradition. *Id.* Frequently the states involved are bound by political or economic ties. Whiteman, *supra* note 18, § 10, at 753. Multilateral extradition agreements are similar to bilateral agreements in form and content. *Id.*

21. BASSIOUNI, *supra* note 1, at 32. Sovereignty and territoriality are paramount considerations under international law. Abramovsky & Eagle, *supra* note 12, at 63.

Although extradition provides a formal mechanism, nations often employ other means to acquire custody of an individual.[22] As alternatives to extradition, states have utilized abduction and other quasi-legal methods to gain jurisdiction over an individual.[23] Nations resort to these alternate methods in order to subvert the operation of an extradition treaty, but still achieve the same result.[24] Generally, personal jurisdiction over an individual may be obtained by one of the following three manners: legally through either an extradition treaty or a civil law system;[25] quasi-legally through irregular renditions;[26] or illegally via an abduction.[27]

A. *General Principles of Extradition*

The history of extradition reflects the development of political relations between states.[28] Before extradition treaties became prevalent, countries exchanged individuals through courtesy and friendly cooperation, commonly referred to in international law as comity.[29] Extradition ultimately emerged to

22. *See* BASSIOUNI, *supra* note 1, at 189 (discussing alternative methods of rendition). Other methods include irregular rendition and abduction. *Id.*; Abramovsky & Eagle, *supra* note 12, at 52. Irregular renditions "may be defined as ad hoc agreements ordinarily entered into between law enforcement agents of the apprehending and asylum states whereby either through active cooperation or acquiescence by officials of the asylum state an individual is removed forcibly to the state of apprehension." Abramovsky & Eagle, *supra* note 12, at 52; *see supra* note 12 (defining abduction); *see also* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 1 (1991) (discussing extradition generally).

23. BASSIOUNI, *supra* note 1, at 189. Abduction and irregular rendition are the most common alternatives to extradition, however, "[h]ybrid renditions are possible." Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 156.

24. *See supra* note 22 (stating alternate methods to include abduction and illegal rendition).

25. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 51-52; *see supra* notes 19-20 and accompanying text (discussing bilateral and multilateral extradition treaties).

26. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 51-52.

27. *Id.* "Abduction is clearly an illegal act by the municipal law of the place where it occurs and by international law." I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 72 (1971).

28. BASSIOUNI, *supra* note 1, at 6.

29. *Id.* at 5. "States observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience, and goodwill. Such rules of international conduct are not rules of law, but of Comity." 1 LASSA OPPENHEIM, INTERNATIONAL LAW 33-34 (1955). The U.S. position as to extradition through an act of comity is that

> [g]enerally, this government does not request surrender as an act of comity, since in the few cases where it has done so, it has been necessary to point out to the government of the asylum country that this government would be un-

preserve internal order and to facilitate international cooperation in the suppression of criminality.[30] In present practice, most states enter bilateral or multilateral treaties that provide for the extradition of individuals from one state to another.[31] Other states, however, continue to render individuals through comity.[32] Extradition preserves the principle of territoriality by providing a legal channel for two nation-states to confer with one another in order to properly exercise jurisdiction over an individual charged with a crime.[33] By enabling countries to work effectively with one another, extradition treaties preserve the sovereignty[34] of the countries involved.[35]

Nations utilize extradition treaties when a country seeking an individual, referred to as the "requesting country," requests the delivery of that individual from another country, called the "asylum" or "requested country."[36] The requested or asylum country, pursuant to the terms of the extradition treaty, must

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able to comply with such a request if it should receive one. Such a statement usually has the effect of causing the requested government to decline surrender.

Whiteman, *supra* note 18, § 4, at 736-37; *see, e.g.* Hilton v. Guyot, 159 U.S. 113 (1895) (defining general principles of comity).

30. BASSIOUNI, *supra* note 1, at 7. Hugo Grotius in 1625 articulated this sentiment. *Id.* This idea grew between the 16th and 18th centuries at the time when piracy escalated. *Id.*

31. *See supra* notes 19-20 and accompanying text (discussing bilateral and multilateral extradition treaties).

32. *See supra* note 29 (discussing principles of comity).

33. BASSIOUNI, *supra* note 1, at 8. It should be noted that seldom was the requested individual a subject of the asylum country. *Id.*

34. Gary W. Schons, Comment, *United States v. Toscanino: An Assault on the Ker Frisbie Rule*, 12 SAN DIEGO L. REV. 865, 873 (1975). "A fundamental principle of international law is that the sovereignty of every nation is limited by its own territorial boundaries, and any nation is therefore incompetent to act within the territorial boundaries of another sovereign without its consent." *Id.*

35. *Id.*

36. Wade A. Buser, Comment, *The Jaffe Case and the Use of International Kidnapping As An Alternative*, 14 GA. J. INT'L & COMP. L. 357, 362-63 (1984). Requesting states means the state which seeks extradition while asylum state means the state from which extradition is sought. *Id.* Asylum and territorial supremacy are closely related. As Oppenheim expressed

> [t]he fact that every State exercises territorial supremacy over all persons on its territory, whether they are subjects or aliens, excludes the exercise of the power of foreign States over its nationals in the territory of another State. [The foreign State is] provisionally at least, an asylum for every individual who, being prosecuted at home, crosses its frontier.

OPPENHEIM, *supra* note 29, at 676-77.

deliver the individual to the requesting country or prosecute that individual under its own laws.[37] This principle is commonly referred to in international law as *aut dedere aut judicare.*[38]

In order to invoke an extradition treaty, certain criteria must be met. Double criminality must exist; the act of the individual must be a crime in the requesting country as well as in the requested country.[39] The crime must also be an extraditable offense listed in the treaty.[40] In the absence of such a provision, the asylum country determines whether the offense falls within the scope of the treaty and whether the offense satisfies the double criminality requirement.[41] If no treaty is in effect between the two nations, the crime must be mutually recognized as an offense that would warrant reciprocal rendition.[42] Some

37. BASSIOUNI, *supra* note 1, at 10. (citing Hugo Grotius, *DeJure Belli ac Pacis*, Book 2, Ch. XXI, §§ 3,4 (1624)). Hugo Grotius expressed preservation of sovereignty in the idea that a state had control over its own citizen, or *civitas maximas*, which was encompassed in his espousal of the maxim *aut dedere aut judicare*, the principle that the asylum state was obligated to either return the accused or punish the accused under its own laws. *Id.*

38. *Id. Aut dedere aut judicare* has widespread application and use in interstate, internal and transnational cases. *Id.* There is a contrasting view supported by Puffendorf, that the duty to extradite is an imperfect obligation which requires an explicit agreement. *Id.* Contemporary practice views extradition under a treaty as an imperfect right with regard to common criminality, but as an obligation with regard to international criminality. *Id.*

39. *See* Whiteman, *supra* note 18, § 13, at 773. This is a common requirement for extradition, and this requirement exists even when the request is made apart from a treaty or when there is a list of extraditable offenses. *Id.* Bassiouni gives three interpretations of double criminality: (1) acts which are chargeable in both states as offenses regardless of prosecutability; (2) acts which are chargeable and prosecutable in both states; and (3) acts which are chargeable, prosecutable and could result in a conviction in both states. BASSIOUNI, *supra* note 1, at 326. The majority of states adopt the first interpretation defining double criminality. *Id.* In the United States, "it suffices if the act charged is criminal by the law of the demanding country and by the laws of the particular State of the United States in which the person charged is found." Moore, *supra* note 2, § 589, at 268 (citing Wright v. Henkel, 190 U.S. 40 (1903)); *see also* Villareal v. Hammond, 74 F.2d 503, 505 (5th Cir. 1934) (stating that extradition requires offense denounced as crime by law of asylum state).

40. Hackworth *supra* note 19, § 304, at 2. "A state usually will decline to extradite pursuant to the provisions of a treaty containing a list of extraditable offenses unless the offense charged is enumerated in the list." *Id.* The U.S. views extraditable offenses as those specified in a particular treaty. *See* Whiteman, *supra* note 18, § 13, at 772. All the bilateral treaties to which the United States is a party contain a list of extraditable offenses. *Id.*

41. BASSIOUNI, *supra* note 1, at 329. "[T]he two requirements of extraditable offense and double criminality . . . are satisfied by a single test, i.e., the conduct is criminal in the jurisprudence of both states even though not defined identically." *Id.*

42. BASSIOUNI, *supra* note 1, at 328.

international crimes, regardless of what the extradition treaty provides, are governed by international conventions and mandate that the asylum country either extradite or prosecute the individual.[43]

1. Extradition Treaties in the United States

Extradition treaties are a fairly modern concept in the United States.[44] Prior to 1794, the United States declined to enter into extradition agreements.[45] This reluctance developed out of a distrust of monarchical regimes[46] and a concern that extradition would deter immigrants in need of asylum.[47]

In 1794, the United States entered into its first extradition treaty, the Treaty of Amity, Commerce and Navigation, also referred to as the Jay Treaty, with Great Britain.[48] The terms of the Jay Treaty were narrow, establishing murder and forgery as the only two extraditable offenses,[49] which reflected the cautious attitude of the United States.[50] National outcry evidenced the U.S.

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43. *Id.* at 13. Those crimes which require extradition or prosecution are set by multilateral conventions on international criminal law. *Id.*

44. *See* Santo F. Russo, Comment, *In re Extradition of Khaled Mohammed El Jassem*: The Demise of the Political Offense Provision in U.S.-Italian Relations, 16 FORDHAM INT'L L.J. 1253, 1261 (1993). "Extradition represents one of the oldest instruments of cooperation between states in criminal matters." *Id.* Extradition existed as far back as 1280 B.C. with the first extradition treaty entered into by Ramses II, Pharaoh of Egypt, and the Hittite King Hattusili III. SHEARER, *supra* note 27, at 5.

45. *See* Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 154.

46. *Id.* at 154. The United States was first settled by people who sought to escape a monarchical form of government. *Id.*

47. *Id.* at 154.

48. Treaty of Amity, Commerce and Navigation (Jay Treaty), Nov. 19, 1794, 8 Stat. 116, T.S. No. 105 [hereinafter Jay Treaty].

49. *See* Jay Treaty, *supra* note 48, art. 27, 8 Stat. at 129 T.S. No. 105. Article 27 provides:

> It is further agreed that His Majesty and the United States on mutual requisition, by them respectively, or by their respective Ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive.

Id. The Jay Treaty only incidentally provided for extradition. SHEARER, *supra* note 27, at 6. "Such provisions were just a gesture of friendship and cooperation." *Id.*

50. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 154.

public's opposition to extradition when Britain first invoked the Jay Treaty seeking custody of a U.S. citizen.[51]

Despite its initial reluctance to enter into extradition treaties, the United States began to recognize the necessity and practicality of extradition treaties in the mid-1800s.[52] First, concern for the administration of justice encouraged the United States to form extradition agreements with other nations.[53] Second, the need to combat transnational crime developed.[54] Finally, as transportation improved, it became imperative for nations to seek the return of individuals who fled the country in order to evade prosecution.[55] These factors prompted the United States to enter into extradition treaties with a number of countries.[56]

Extradition in the United States is governed primarily through bilateral treaties.[57] The United States forms a separate treaty with each country with which it desires to have an extradition agreement.[58] Through the use of bilateral treaties, the United States is now a party to over one hundred extradition treaties.[59] These treaties are amended or replaced periodically.[60]

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51. Honorable John Marshall, Address Before the House of Representatives, On the Resolutions of the Honorable Edward Livingston (1820), *in* 18 U.S. 201 (1820).

52. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 154.

53. Hackworth, *supra* note 19, § 304 at 2.

54. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 154. "A growing awareness of the need to combat transnational crime contributed to a more receptive attitude toward international agreements." *Id.*

55. OPPENHEIM, *supra* note 29, at 696-97. Fugitives were regularly surrendered by neighboring states to each other. *Id.* In the 19th century, as railways and transatlantic steamship transit developed immensely and criminals were able to flee to distant countries, States found that it was in their common interest to surrender criminals to each other. *Id.*; SHEARER, *supra* note 27, at 11.

56. BASSIOUNI, *supra* note 1, at 41. "Today, the United States is a party to no less than 104 extradition treaties as well as several other multilateral arrangements governing extradition for specific offenses." Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 154; *see also* EXTRADITION LAWS & TREATIES (I. Kavass & A. Sprudzs eds. 1979) (Supp. Apr. 1993) (documenting 104 treaties into which the United States has entered including those with Albania, Belize, Germany, Israel, Japan, Singapore).

57. *See supra* notes 19-20 (discussing bilateral and multilateral treaties).

58. BASSIOUNI, *supra* note 1, at 41.

59. *See supra* note 56 (referring to over 100 extradition treaties United States has entered into).

60. BASSIOUNI, *supra* note 1, at 41. Diplomacy between states plays an important part in treaty practice, because a change in foreign policy by one of the parties to the extradition treaty may affect treaty arrangements. *Id.* In addition, state succession, the effects of war, and the severance of diplomatic relations may require alteration of the existing treaty. *Id.* at 57.

The executive, judicial and legislative branches of the U.S. government play a role in U.S. extradition law and practice.[61] In the United States, the executive branch forms the extradition treaty subject to the advice and consent of the Senate.[62] The judiciary has the limited role of enforcing and interpreting the treaty.[63] The United States requires the judiciary to consider certain factors and principles in interpreting an extradition treaty, such as the negotiating history, the intent of the parties, and the conduct of the parties under the treaty.[64] The judiciary also applies customary international law[65] and federal legislation in the interpretation of treaties.[66] The judiciary considers these factors in ascertaining the plain meaning of the language and liberally construes the treaty to encompass all of the factors in-

61. BASSIOUNI, *supra* note 1, at 39. Power in the U.S. government is divided into three branches: the President holds executive power; the Congress holds all legislative power; and the Supreme Court has the judicial power. RICHARD M. PIOUS, AMERICAN POLITICS AND GOVERNMENT, 49-50 (1986). Article 1, section 8 paragraph 18, of the United States Constitution granted the Congress the power to "make all laws which shall be Necessary and Proper for carrying into Execution the powers [enumerated in article 1, section 8], and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. 1, § 8. Presidential power includes nominating important civil and military officials, seeing that the laws are faithfully executed by government officials, reporting and recommending measures to the Congress, acting as commander-in-chief of the armed forces and pardoning offenses against the Constitution. PIOUS, *supra* at 46; U.S. CONST. art. 2, §§ 2-3. The Judiciary possesses the power to "declare state laws or actions null and void on the grounds that they violated the national Constitution. They could also issue decrees and judgments directly affecting citizens, declaring that their action violated national laws, treaties, or the Constitution." PIOUS, *supra* at 46; *see also* U.S. CONST. art. 3 (setting forth power of judiciary).

62. U.S. CONST. art 2, § 2; *see, e.g.* BASSIOUNI, *supra* note 1, at 39; PIOUS, *supra* note 61, at 39. Article 2, section 2 provides, in part, that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art 2, § 2. "Thus only *one legislative chamber* approves treaties, but with a two-thirds majority [of the Senate]. Time, usage and necessity have demonstrated that the main role in foreign relations is played by the President." LUZIUS WILDHABER, TREATY-MAKING POWER AND CONSTITUTION 60 (1971) (emphasis in original).

63. BASSIOUNI, *supra* note 1, at 39 (explaining that judiciary cannot enjoin, prohibit or mandate executive negotiation or agreement of treaty, nor enjoin, or mandate executive's exercise of discretion to request relator's extradition or to refuse to grant extradition although terms of applicable treaty have been satisfied).

64. *Id.* at 77-80.

65. BASSIOUNI, *supra* note 1, at 77-79; *see supra* note 3 (explaining customary international law). The United States does not, however, apply customary international law to extradition outside of interpretation of treaties. *See* ROSENNE, *supra* note 3, at 56.

66. BASSIOUNI, *supra* note 1, at 77-79.

volved.[67]

2. The U.S.-Mexico Extradition Treaty

The U.S.-Mexico Extradition Treaty represents one of the many extradition treaties entered into by the United States.[68] The Treaty explicitly enumerates thirty-one extraditable offenses punishable by the federal laws of both countries.[69] Therefore, if

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67. *Id.* at 77-79; Hackworth *supra* note 19, § 313 at 39 (citing Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 10 (1936)).

68. *See* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656. The current enforceable U.S.-Mexico Extradition Treaty was signed in Mexico City on May 4, 1978, and became effective on January 25, 1980. *Id.*; *see supra* note 56 and accompanying text (setting forth examples of over one-hundred bilateral extradition treaties U.S. has entered into).

69. *See* Treaty, *supra* note 7, art. 2(3) & app., 31 U.S.T. at 5062, 5076-78, T.I.A.S. No. 9656 at 4, 18-20. The Appendix specifically sets forth these offenses:

1. Murder or manslaughter; abortion.
2. Malicious wounding or injury.
3. Abandonment of minors or other dependents when there is danger of injury or death.
4. Kidnapping; child stealing; abduction; false imprisonment.
5. Rape; statutory rape; indecent assault; corruption of minors, including unlawful sexual acts with or upon children under the age of consent.
6. Procuration; promoting or facilitating prostitution.
7. Robbery; burglary; larceny.
8. Fraud.
9. Embezzlement.
10. An offense against the laws relating to counterfeiting and forgery.
11. Extortion.
12. Receiving or transporting any money, valuable securities, or other property knowing the same to have been unlawfully obtained.
13. Arson; malicious injury to property.
14. Offenses against the laws relating to the traffic in, possession, production, manufacture, importation or exportation of dangerous drugs and chemicals, including narcotic drugs, cannabis, psychotropic drugs, opium, cocaine, or their derivatives.
15. Offenses against the laws relating to the control of poisonous chemicals or substances injurious to health.
16. Piracy.
17. Offenses against the safety of means of transportation including any act that would endanger a person in a means of transportation.
18. An offense relating to unlawful seizure or exercise of control of trains, aircraft, vessels, or other means of transportation.
19. Offenses against the laws relating to prohibited weapons, and the control of firearms, ammunition, explosives, incendiary devices or nuclear materials.
20. An offense against the laws relating to international trade and transfers of funds or valuable metals.
21. An offense against the laws relating to the importation, exportation, or

a citizen of either party to the Treaty commits one of the offenses listed, that individual may be extradited.[70]

Under Article 9 of the Treaty, however, neither party is required to extradite its own nationals.[71] In addition, the execu-

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international transit of goods, articles, or merchandise, including historical or archeological items.

22. Violations of the customs laws.
23. Offenses against the laws relating to the control of companies, banking institutions, or other corporations.
24. Offenses against the laws relating to the sale of securities, including stocks, bonds and instruments of credit.
25. Offenses against the laws relating to bankruptcy or rehabilitation of a corporation.
26. Offenses against the laws relating to prohibition of monopoly or unfair transactions.
27. Offenses against the laws relating to protection of industrial property or copyright.
28. Offenses against the laws relating to abuse of official authority.
29. Bribery, including soliciting, offering and accepting bribes.
30. Perjury; false statements to any governmental authority. Subornation of perjury or false statements.
31. Offenses against the laws relating to obstruction of justice, including harboring criminals and suppressing evidence.

Id., 31 U.S.T. at 5076-78, T.I.A.S. No. 9656 at 18-20.

70. *See* Treaty, *supra* note 7, art. 2(3) & app., 31 U.S.T. at 5062, 5076-78, T.I.A.S. No. 9656 at 4, 18-20 (setting forth parameters of extraditable offenses); *see supra* notes 39-43 and accompanying text (discussing double criminality and listed offenses).

71. *See* Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7 (setting forth option of denying extradition of state's own nationals and alternatively submitting case to state's own authorities). Article 9, paragraph 1 provides:

> 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.

Id. Most extradition treaties do not impose an obligation to surrender citizens of the asylum state. *See* Hackworth *supra* note 19, § 317, at 55 (noting states are not required to deliver its nationals). "Under the laws of many countries and under many extradition treaties, the extradition of nationals of the requested State is prohibited or is nonobligatory." Whiteman, *supra* note 18, § 18, at 865. "[G]enerally speaking, the policy of the United States is to surrender citizens." *See* Hackworth, *supra* note 19, at 55. The Mexican Law of International Extradition Chapter I, article 14, provides that no Mexican national may be extradited to a foreign country except in exceptional cases in the discretion of the Executive. Ley de Extradicion Internacinal, Capitulo I, Articulo 14, *in* Diario Oficial (Dec. 29, 1975) ("Ningún mexicano podrá ser entregado a un Estado extranjero sino en casos excepcionales a juicio del Ejecutivo.") The government of Mexico had not extradited a single Mexican national under the terms of the U.S.-Mexico Extradition Treaty at the time the Supreme Court was considering this case. Brief for the United States *on writ of certiorari* to the U.S. Court of Appeals for the Ninth Circuit at 21 n.17, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (No. 91-712), *rev'd*, 112 S. Ct. 2188 (1992) [hereinafter Government's Brief].

tive authority of the requested party may exercise discretion whether to extradite the individual.[72] This discretion may be premised on whether extradition is proper pursuant to a nation's domestic laws.[73] Conversely, the Treaty provides that if extradition is not granted, the requested party will submit the case to its own authorities for domestic prosecution, provided that the requesting party has jurisdiction over the offense.[74]

In the past, the United States and Mexico have exercised the option provided by Article 9 in contrasting ways.[75] Mexico has rarely extradited any of its citizens to the United States.[76] In cases when Mexico has refused to surrender an individual, Mexican authorities have, at times, prosecuted the individuals themselves.[77] This practice of domestic prosecution by the requested state can often be unsatisfactory to the requesting state.[78] In

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72. *See* Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7. The second paragraph of Article 9 provides:

> 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.

73. *See* Treaty, *supra* note 7, art. 9(1), 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7 (setting forth policy of extradition of nationals).

74. *See* Treaty, *supra* note 7, art. 9(2), 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7 (setting forth alternative to extradition is submission of case to requested state's own authorities); *supra* notes 37-38 (explaining general principle of *aut dedere aut judicare*).

75. *See supra* note 71 (explaining that United States generally renders its citizens while Mexico does not).

76. *See supra* note 71 (setting forth Mexico's law prohibiting extradition of Mexican nationals except in extreme cases). On grounds of nationality, Mexico denied extradition requests by the United States in 1943 of Francis Xavier Fernandez, who was charged with larceny, and in 1961 of Alejandro Ramirez Hinojosa, charged with violations of narcotics laws. *See* Whiteman, *supra* note 18, § 18, at 866-69.

77. *See, e.g.*, Michael Isikoff, *Arrest of Mexican Doctor Strains DEA's Reputation*, WASH. POST, May 2, 1990, at A1. Mexico has prosecuted Rafael Caro-Quintero and Miguel Angel Felix Gallaredo. *Id.* Domestic prosecution is not uncommon and "[g]enerally speaking, those countries which refuse to surrender their nationals have the power . . . to prosecute them for offenses committed abroad. Accordingly, treaties and laws which exempt nationals from extradition frequently require that they be tried by the country of which they are a national for the offense involved." Whiteman, *supra* note 18, § 18, at 876-77.

78. Heath v. Alabama, 474 U.S. 82, 93 (1985). "A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another state's enforcement of *its* own laws." *Id.* at 93 (emphasis in original). Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 207. "[T]he United States has often been disappointed by both the law of persecution of the relator and the slowness of the Mexican legal process." *Id.* "U.S. officials are exasperated at Mexican inefficiency and corruption." Juan M. Vasquez, *U.S. Bitterness Lingers in Drug Agent's Killing*,

fact, the United States has been disappointed with Mexico's legal response.[79] In contrast, the United States generally has delivered its citizens to Mexico.[80] In addition, recent allegations of corruption in Mexico's legal system have only exacerbated U.S. dissatisfaction with Mexican prosecution.[81]

B. *Irregular Renditions as a Method of Apprehension*

Alternative quasi-legal means to extradition have existed as long as the practice of extradition itself.[82] Quasi-legal methods derive from the principle *mala captus bene detentus*.[83] Under this

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L.A. TIMES, Mar. 17, 1985, at 1. DEA affidavits filed in connection with seizure by the DEA of cash and property of a Mexican lawyer, charged Mexican officials who participated in the drug syndicate headed by Rafael Caro-Quintero. Jim Schachter, *Widespread Camarena Case Bribery Alleged*, L.A. TIMES, May 28, 1987, at 1. Among those charged were the Mexican Federal Judicial Police, the Direccion Federal de Seguridad, an agency similar to the U.S. Secret Service and FBI, Governacion (an internal security agency), state police agencies, Mexican customs and the military. *Id.*

79. *See, e.g.*, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); Reply Brief for the United States *on writ of certiorari* to the U.S. Court of Appeals for the Ninth Circuit at 3, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (No. 91-712), *rev'd*, 112 S. Ct. 857 (1992) [hereinafter Government's Reply Brief]. The United States expressed in its reply brief that

> [i]f [Dr. Alvarez-Machain] is repatriated to Mexico, the United States will never have an opportunity to vindicate its sovereign interest in enforcing its criminal laws against him, despite the fact that he is charged with crimes that uniquely implicate this Nation's interests. In the case of the deliberate kidnapping, torture, and murder of a Special Agent of the United States Drug Enforcement Administration, killed because of his official actions . . . the United States' interest in enforcing its own criminal laws is manifest.

Government's Reply Brief at 5, *Alvarez-Machain* (No. 91-712).

80. *See supra* note 71 (discussing U.S. policy of extraditing its citizens).

81. *See* Jim Newton, *Camarena's Abduction and Torture Described*, L.A. TIMES, Dec. 10, 1992, at B1. One witness at the trial of Dr. Alvarez Machain testified that among those Mexican politicians present during the torture were Defense Minister Juan Arevalo Gardoqui, Interior Minister Manuel Bartlett Diaz, who is now the recently elected governor of the Mexican State of Purbla, Jalisco Governor Enrique Alvarez del Castillo, Mexican Federal Judicial Police Director Manuel Ibarra Herrera and Mexican Interpol Director Miguel Aldana Ibarra. *Id.*

82. *See, e.g.*, United States v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir. 1957), *cert. denied*, 355 U.S. 873 (1958) (involving abduction by Mexican officers who turned defendant over to U.S. authorities). Irregular renditions are difficult to document because they occur outside the legal process, presupposing the collusion of governmental agencies which would otherwise bring the matter to the attention of the judiciary. M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices As Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 34 (1973).

83. BASSIOUNI, *supra* note 1, at 190. *Mala captus bene detentus* translates to "a person improperly seized may nevertheless properly be detained." Courts applying *mala captus bene detentus* "will assert *in personam* jurisdiction without inquiring into the means by

principle, a court may recognize jurisdiction over an individual regardless of the method utilized for apprehension.[84] Countries continue to resort to irregular renditions[85] as nations persist in following the principle of *mala captus bene detentus*.[86]

An irregular rendition often results from a clandestine agreement between two countries to obtain the custody of an individual.[87] The agreement involves negotiations resulting in voluntary, mutual, tacit approval by agents of both countries.[88] Unlike extradition by treaty, irregular renditions occur most commonly through law enforcement personnel, without involving the executive powers of the states.[89] The rendition is characterized as irregular because a government or national agency chooses to bypass a formal treaty provision or executive office entrusted with handling extradition matters.[90]

An apprehension by irregular rendition carries minimal violations of international law.[91] Rendition occurs through the assent of the countries involved.[92] This voluntary assent by the government of the asylum country avoids the violation of the asylum state's sovereignty and territoriality.[93]

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which the presence of the defendant was secured." *Id.*; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 n.2 (1987) (discussing *mala captus bene detentus*).

84. Abramovsky & Eagle, *supra* note 12, at 81. "[I]rregular renditions have been used to obtain jurisdiction over United States citizens, resident aliens, and nonresident aliens. The class of persons most often subject to the irregular rendition process has been aliens." *Id.*

85. *See supra* note 22 (defining irregular rendition).

86. *See* Abramovsky & Eagle, *supra* note 12, at 82 (discussing utilization of apprehension through irregular rendition). As a general rule, irregular renditions have not been utilized in connection with misdemeanors and other minor offenses. *Id.*

87. BASSIOUNI, *supra* note 1, at 196.

88. *Id.* at 195. In the situation of an irregular rendition "the interest of the individual and the state of asylum ordinarily will differ . . . . Consequently, in the ordinary irregular rendition situation, the apprehension of the individual will not be subject to judicial scrutiny." Abramovsky & Eagle, *supra* note 12, at 72.

89. *See* BASSIOUNI, *supra* note 1, at 195 (distinguishing renditions between officials from abduction); *see supra* note 22 (defining irregular rendition).

90. *See* BASSIOUNI, *supra* note 1, at 196 (discussing unlawful seizure).

91. *Id.*

92. *See supra* note 22 (defining irregular rendition). "Irregular renditions involve the cooperation, or at least the acquiescence, of the asylum state in the effectuation of the apprehension." Abramovsky & Eagle, *supra* note 12, at 72.

93. Abramovsky & Eagle, *supra* note 12, at 72. States do not allege a violation because

> [b]y participating or at least acquiescing in the apprehension, the asylum state will not be interested in alleging a breach of its territorial sovereignty. The

Irregular rendition is not uncommon in contemporary practice.[94] In the 1960's, the number of irregular renditions increased as a method of apprehension to combat drug trafficking.[95] Irregular renditions are often necessary if formal extradition channels have not been established,[96] or if they do exist, one party to the extradition agreement continually refuses to comply with the treaty.[97]

C. *Abduction as a Method of Apprehension*

Abduction is the most drastic alternative to the formalized process of extradition.[98] Abduction is a unilateral method of gaining custody by which one state acts under the color of law[99] and seizes the individual within the jurisdiction of another state without that state's consent.[100] The abductors seeking the indi-

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only exceptions to this unwillingness may arise if the asylum state for political reasons decides to disclaim the irregular rendition as either the result of ultra vires activity by some of its officials, or the product of political or economic coercion by the requesting state.

Id.

94. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 155.

95. *Id.* In present practice "[c]ountries have come to regard abductions as acceptable . . . [t]his changed attitude has accordingly been reflected in [U.S.] domestic practice." Wolfenson, *supra* note 3, at 707-08. "Late in the 1960's and in the 1970's, partially in response to the growing problem of international drug trafficking, United States police agents increasingly resorted to extra-legal extraterritorial apprehension." Martin Feinrider, *Extraterritorial Abductions: A Newly Developing International Standard*, 14 AKRON L. REV. 27, 31 (1980).

96. CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 154 (1980). Irregular renditions are needed because although "[g]enerally, most 'western countries' are willing to extradite terrorists among themselves . . . many Afro-Asian countries are fundamentally opposed to extradition and accordingly, have become asylum havens for terrorists from all over the world." *Id.*

97. *See, e.g.*, Steven Emerson & Richard Rothschild, *Taking on Terrorists*, U.S. NEWS & WORLD REP., Sept. 12, 1988, at 26. Italy refused to extradite Mohammed Abbas and Mohammed Hamadei, who were suspected terrorists that hijacked the Achille Lauro and murdered Leon Klinghoffer, a United States citizen, to the United States. *Id.* A similar situation arose when the United States sought Mohammed Hamadei from Germany because he was a suspected leader in the 1987 hijacking of a Trans World Airlines jet on which U.S. Navy diver Robert Stethem, a passenger, was killed. Lori Santos, *U.S. Moves On Extradition of Hijacker*, WASH. NEWS, Jan. 19, 1987, at A5.

98. SHEARER, *supra* note 27, at 75. Shearer characterizes abduction as "such a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition in securing custody of fugitive offenders." *Id.*

99. BASSIOUNI, *supra* note 1, at 194 (explaining agents cannot act as complete volunteers).

100. *Id.* at 191; Abramovsky & Eagle, *supra* note 12, at 52 (defining abduction).

vidual at issue are usually government agents[101] and traditionally, nations have considered abduction illegal.[102]

States have territorial jurisdiction within their borders to make decisions without interference from other states regarding internal and external affairs.[103] The illegality of abduction stems from the violation of the asylum state's sovereignty and territoriality; the seizing state enters the asylum state and apprehends the individual without authorization.[104] The United States, however, has created a judicially sanctioned doctrine recognizing the legitimacy of abduction in obtaining personal jurisdiction.[105]

1. The *Ker-Frisbie* Doctrine

Two U.S. Supreme Court cases, *Ker v. Illinois*[106] and *Frisbie v. Collins*,[107] laid the foundation for the *Ker-Frisbie* doctrine. The *Ker-Frisbie* doctrine holds that a U.S. court will recognize jurisdiction over a defendant before that court, regardless of the means utilized to apprehend the individual.[108] The United States embraced this doctrine and U.S. courts continue to apply it.[109]

The *Ker-Frisbie* doctrine originated in 1886 when the U.S. Supreme Court, in *Ker v. Illinois*, addressed apprehension of a

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101. BASSIOUNI, *supra* note 1, at 194. The abductors cannot be complete volunteers because international law protects the sovereignty and territoriality of states and thus restricts states' conduct. *Id.* International law does not apply to persons who act in their private capacity. *Id.*

102. *Id.* at 194. In addition, the United Nations Security Council and General Assembly have denounced abduction as contrary to international law and the U.N. Charter. Abramovsky & Eagle, *supra* note 12, at 63-64.

103. OPPENHEIM, *supra* note 29, at 325. "As all persons and things within the territory of a State fall under its territorial supremacy, each State has jurisdiction over them." *Id.* "It follows from the principle of territorial supremacy that States must not perform acts of sovereignty within the territory of other States." *Id.* at 327-28; *see* ALAN JAMES, SOVEREIGN STATEHOOD 200 (1986).

104. BASSIOUNI, *supra* note 1, at 194.

105. Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952). The *Ker-Frisbie* doctrine arose from the holdings of both cases. Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952).

106. 119 U.S. 436 (1886).

107. 342 U.S. 519 (1952).

108. *Frisbie*, 342 U.S. at 522 (1952); *Ker*, 119 U.S. at 440 (1886). Abramovsky and Eagle state that "[t]he United States relied primarily upon the *Ker-Frisbie* doctrine in maintaining that power to prosecute would not be impaired by illegality in the acquisition of custody so long as the defendant is afforded a fair trial." Abramovsky & Eagle, *supra* note 12, at 56.

109. BASSIOUNI, *supra* note 1, at 193.

defendant outside the operation of an extradition treaty.[110] Mr. Ker, an American citizen, was indicted for embezzlement in Illinois and fled to Peru to avoid punishment.[111] The Governor of Illinois asked the U.S. Secretary of State to invoke the extradition treaty between the United States and Peru, to expedite Mr. Ker's return.[112] Accordingly, the United States issued a warrant, and dispatched a messenger[113] to obtain Mr. Ker's custody.[114] The messenger arrived in Peru with the necessary documents to receive Mr. Ker pursuant to the U.S.-Peru Extradition Treaty.[115] The messenger, however, could not invoke the extradition treaty because Peru had no operating government at the time.[116] Faced with no feasible way to enforce the treaty, the messenger abducted Mr. Ker in order that he could be returned to the United States to stand trial.[117]

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110. Ker v. Illinois, 119 U.S. 436, 438 (1886). "The United States Supreme Court first evaluated the legality of apprehension methods other than traditional extradition in the landmark case of *Ker v. Illinois*." Abramovsky & Eagle, *supra* note 12, at 54.

111. *Ker*, 119 U.S. at 437-38. Mr. Ker was indicted, tried and convicted in the Criminal Court of Cook County, Illinois for embezzlement and larceny. *Id.* at 437.

112. *Id.* at 438. In order to obtain Mr. Ker, the "governor Hamilton, of Illinois, made his requisition, in writing, to the Secretary of State of the United States, for a warrant requesting the extradition of the defendant, by the Executive of the Republic of Peru, from that country to Cook County. . . ." *Id.*

113. "The surrender was to be made to a Mr. Henry G. Julian, a Pinkerton agent. . . ." Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L. L. 444, 460 (1990). Pinkerton agents were the precursors to the U.S. marshals. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 157 n.21.

114. *Ker*, 119 U.S. at 438. In attempt to obtaining Mr. Ker, "on the first day of March, 1883, the President of the United States issued his warrant, in due form, directed to Henry G. Julian, as messenger, to receive the defendant from the authorities of Peru, upon a charge of larceny, in compliance with the treaty. . . ." *Id.* In accord with the existing bilateral treaty, the United States issued a warrant authorizing a private investigator to obtain custody of Mr. Ker. Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L. L. 678 (1953).

115. *Ker*, 119 U.S. at 438.

116. Fairman, *supra* note 114, at 684-85. The warrant for arrest could not be served because of a war between Chile and Peru. The messenger could not gain access to the Peruvian government because Chilean forces occupied the capital. *Id.*

117. *Ker*, 119 U.S. at 438-39. The messenger

> [f]orcibly and with violence arrested him, placed him on board the United States vessel Essex, in the harbor of Callao, kept him a close prisoner until the arrival of that vessel at Honolulu, where, after some detention, he was transferred in the same forcible manner on board another vessel, to wit, the City of Sydney, in which he was carried a prisoner to San Francisco, in the State of California. . . . The defendant arrived in the city of San Francisco on the 9th day of July thereafter, and was immediately placed in the custody of [Frank]

Mr. Ker contested the Court's jurisdiction because the United States failed to invoke the extradition treaty.[118] Mr. Ker claimed that through his physical presence in the country, he acquired a right of asylum in Peru.[119] The Court rejected Mr. Ker's argument, calling it absurd for a party fleeing the United States to be entitled to a right of asylum.[120]

Mr. Ker also alleged a constitutional due process violation.[121] Although the Court acknowledged that the U.S. messenger had kidnapped Mr. Ker, the Court failed to find any constitutional violation.[122] The Court held that due process rights attach only to post-indictment activities.[123] Despite the irregularities in the manner utilized to bring Mr. Ker to the United States, the Court concluded that Mr. Ker could stand trial.[124]

In 1952, the Supreme Court again addressed abduction in the case of *Frisbie v. Collins*.[125] In *Frisbie*, Mr. Collins brought a habeas corpus[126] petition alleging that his forcible seizure from Chicago to Michigan by state officials violated the due process

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> Warner, [appointed by the Governor of Illinois] under the order of the Governor of California, and, still a prisoner, was transferred by him to Cook County . . . .

Id.

118. *Id.* at 441.

119. *Id.*

120. *Id.* at 442.

121. *Id.* at 439-40.

122. *Id.* at 443.

123. *Id.* at 440. The Supreme Court upheld Mr. Ker's conviction and stated:

> 'due process of law'. . . is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.

Id.

124. *Id.* "[M]ere irregularities in the manner in which he may be brought [does not entitle him to] say that he should not be tried at all for the crime with which he is charged. . . ." *Id.* The *Ker* court further stated that

> [t]here are authorities of the highest respectability which hold 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 an offense, and presents no valid objection. . . .

Id. at 444.

125. 342 U.S. 519 (1952).

126. Luciano v. Murphy, 160 Misc. 573, 290 N.Y.S. 1011 (1936). "The sole function of a writ of habeas corpus is to release from unlawful imprisonment." *Id.* at 577. The function of a writ of habeas corpus is to test the legality of the detention or imprisonment of a prisoner. BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

clause of the U.S. Constitution[127] and the Federal Kidnaping Act.[128] The Court disagreed, and in a unanimous decision, overruled the U.S. Court of Appeals for the Sixth Circuit.[129] The Court, restating its ruling in *Ker*, held that a person may be tried within a court's jurisdiction even if brought by forcible abduction.[130] The Court did not distinguish this case from *Ker*, although *Frisbie* involved domestic interstate abduction, which did not involve an extradition treaty.[131] The *Ker* and *Frisbie* decisions formed the *Ker-Frisbie* doctrine.[132]

2. Application of the *Ker-Frisbie* Doctrine

Most cases concerning extraordinary apprehensions cite the judicially sanctioned *Ker-Frisbie* doctrine.[133] The doctrine remained unmodified and uncontested until a decision rendered in 1974 in *United States v. Toscanino*.[134] In *Toscanino*, the U.S. Court of Appeals for the Second Circuit created the *Toscanino* exception to *Ker-Frisbie* by refusing to apply the doctrine to specific situations.[135] The *Toscanino* exception requires a court to

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127. U.S. CONST., amend. XIV.

128. *Frisbie*, 342 U.S. at 520; *see* Federal Kidnapping Act, 18 U.S.C. § 1201 (1988 & Supp. III 1991).

129. *Frisbie*, 342 U.S. at 522.

130. *Id.* "[T]he power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'." *Id.*

131. *Id.* at 519.

132. BASSIOUNI, *supra* note 1, at 205. The *Ker-Frisbie* doctrine was created by the two cases and read to condone extraterritorial apprehension, including abduction. *Id.* at n. 49. The Supreme Court upheld the *Ker-Frisbie* doctrine in Gerstein v. Pugh, 420 U.S. 103 (1975), where officials arrested Mr. Pugh and an accomplice in Dade County, Florida. *Id.* at 105. The officials made the arrest based solely on a prosecutor's information. *Id.* The respondents claimed a constitutional right to a judicial hearing. *Id.* at 107. The court held that a judicial hearing was not a prerequisite to prosecution by information and furthermore stated "[n]or do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119.

133. *See, e.g.*, United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); United States v. Lovato, 520 F.2d 1290 (9th Cir. 1975); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States ex. rel. Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); United States v. Sherwood, 435 F.2d 867 (10th Cir. 1970); Ex parte Lamar, 274 F. 160 (2d Cir. 1921), *aff'd*, 260 U.S. 711 (1922). State courts almost unanimously follow *Ker-Frisbie*. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 205.

134. 500 F.2d 267 (2d Cir. 1974).

135. *Toscanino*, 500 F.2d at 275. The court stated that

> we are satisfied that the *Ker-Frisbie* rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the ac-

divest itself of jurisdiction over a person when the government acquires the person's presence by acts that are so deliberate, unnecessary and unreasonable[136] as to "shock the conscience."[137]

The United States charged and convicted Francisco Toscanino, an Italian citizen, with conspiracy to import and distribute narcotics in the United States.[138] Paid agents of the United States lured the defendant from his home in Montevideo, Uruguay and kidnapped him pursuant to a request received from the United States.[139] The abductors knocked Mr. Toscanino unconscious, blindfolded him, and drove the suspect to Brazil to release him to the Brazilian authorities.[140] The Brazilian authorities subjected Mr. Toscanino to a lengthy interrogation and detained him for seventeen days before placing him on

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> cused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. . . . . [W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees 'the right of the people to be secure in their persons . . . against unreasonable . . . seizures,' the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante.*

Id.

136. *Id.* The court held that "[a]ccordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.*

137. *Id.* The court stated that it was "compelled to conclude that the proceedings by which this conviction was obtained do[es] more than offend some fastidious squeamishness or private sentimentalism about combatting crime too categorically. This is conduct that *shocks the conscience.*" *Id.* (emphasis added). The Supreme Court in *Rochin v. California*, used the terms 'shocks the conscience' in describing the conduct of state officers who authorized use of an emetic to extract morphine capsules from stomach of defendant. Rochin v. California, 342 U.S. 165, 172 (1951). The Court in *Rochin* stated that

> [t]his is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.

Id.

138. *Toscanino*, 500 F.2d at 268; 21 U.S.C. § 963 (1988).

139. *Toscanino*, 500 F.2d at 269. On January 6, 1973, Mr. Toscanino was lured from his home in Montevideo, Uruguay to a deserted bowling alley in Montevideo by a telephone call. *Id.* The United States did not make any formal or informal request of the Uruguayan government for the extradition of Francisco Toscanino. *Id.* at 270.

140. *Id.* at 269.

a flight to the United States.[141] At trial, Mr. Toscanino claimed that the United States had knowledge that the Brazilian police tortured him.[142] The Second Circuit, relying on Supreme Court opinions subsequent to the *Frisbie* decision that expanded the due process guarantee to include pre-trial conduct,[143] created the *Toscanino* exception to the *Ker-Frisbie* doctrine as a result of the horrific treatment Mr. Toscanino received.[144]

The Second Circuit continues to recognize this excep-

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141. *Id.* at 270. The court detailed Mr. Toscanino's horror:

> For seventeen days Toscanino was incessantly tortured and interrogated [Toscanino's] captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

Id. These facts were alleged by Mr. Toscanino in the district court upon his motion to dismiss the proceedings which was denied by the lower court. *Id.* The Court of Appeals accepted Mr. Toscanino's allegations for purposes of the appeal. *Id.* at 269-71.

142. *Id.* at 270. Mr. Toscanino claimed that the U.S. Attorney for the Eastern District of New York was regularly informed of his interrogations. *Id.*

143. *Id.* at 272-75. The court stated that due process was no longer limited to a fair trial, but included pre-trial conduct of law enforcement. *Id.*; *see, e.g.*, United States v. Russell, 411 U.S. 423 (1973) (noting defense to criminal charge may be founded on intolerable degree of government participation); Miranda v. Arizona, 384 U.S. 436 (1966) (prohibiting use of defendant statements elicited without warning defendant of constitutional rights); Wong Sun v. United States, 371 U.S. 471 (1963) (finding arrests of defendants illegal when not within probable cause of Fourth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (holding evidence obtained without warrant constituted illegal search and seizure); Silverman v. United States, 365 U.S. 505 (1961) (eavesdropping by unauthorized persons violates Fourth Amendment rights); Rochin v. California, 342 U.S. 165 (1952) (expanding due process to include pre-trial lawlessness). The court also stated that forcible abductions violated article 2, paragraph 4 of the U.N. Charter and article 17 of the OAS Charter, which protect the territorial integrity of member states. *Toscanino*, 500 F.2d at 277.

144. *Toscanino*, 500 F.2d at 275. The court stated that "[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *Id.* at 274. On remand, the district court found that the defendant failed to prove such torturous conduct occurred and the district court therefore never divested itself of jurisdiction. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y. 1975).

tion.[145] Cases following *Toscanino*, however, have further refined the *Toscanino* exception. In *United States ex rel. Lujan v. Gengler*,[146] the defendant was charged with conspiracy to import and distribute heroin in the United States and petitioned for a writ of habeas corpus on the grounds that his abductors violated due process.[147] The U.S. Court of Appeals for the Second Circuit considered the *Toscanino* decision with the arresting agents' actions and concluded that mere irregularities in the agents' conduct would not divest jurisdiction.[148] Similar to the standard set forth in *Toscanino*, the court held that an agent's conduct must be outrageous for the *Toscanino* exception to apply.[149]

In *United States v. Lira*,[150] Chilean authorities arrested the

145. *See, e.g.*, United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

146. 510 F.2d 62, 63 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). Mr. Lujan, a licensed pilot, was hired by an undercover American agent to fly to Bolivia. *Id.* After arriving in Bolivia the Bolivian police acting on behalf of the U.S. apprehended Mr. Lujan and the following day placed Lujan on a plane to New York. Federal agents arrested Mr. Lujan in New York. *Id.*

147. *Lujan*, 510 F.2d at 63. The Court of Appeals for the Second Circuit was "to determine whether [the] recent decision in United States v. Toscanino precludes the court below from asserting jurisdiction over the protagonist, Julio Juventino Lujan, an Argentine citizen." *Id.* (citation omitted).

148. *Id.* at 65. The court stated

> [i]n recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court.

Id. (emphasis in original).

149. *Id.* at 65. The *Lujan* and *Toscanino* courts cited United States v. Rochin as an example of when the *Ker-Frisbie* rule would yield. *Id.* In *Rochin* an emetic solution was forced through a tube into a defendant's stomach to recover two morphine capsules which the defendant had swallowed. *Rochin v. California*, 342 U.S. 165 (1952). The defendant's conviction was reversed by the Supreme Court because government's conduct was found to "shock the conscience [and to] offend a sense of justice." *Id.* at 172-73. In *Lujan*, however, the court noted that there was a lack of complex shocking governmental conduct sufficient to violate due process. *Lujan*, 510 F.2d at 66. The court noted that

> Lujan does not allege that a gun blow knocked him unconscious when he was first taken into captivity, nor does he claim that drugs were administered to subdue him for the flight to the United States. Neither is there any assertion that the United States Attorney was aware of his abduction, or of any interrogation. Indeed, Lujan disclaims any acts of torture, terror, or custodial interrogation of any kind.

Id.

150. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

defendant and allegedly tortured him.[151] The defendant claimed that U.S. Drug Enforcement Agents ("DEA") witnessed his torture.[152] The Second Circuit, however, found insufficient evidence demonstrating that the DEA agents were aware of any unacceptable harm.[153] The court therefore, chose not to invoke the *Toscanino* exception.[154]

The Second Circuit further qualified the *Toscanino* exception in *United States v. Reed*,[155] which involved a defendant who had fled the United States in order to avoid charges of securities fraud.[156] Because the defendant was not severely mistreated, the Second Circuit distinguished this case from *Toscanino*.[157] Focusing on the defendant's flight, the court concluded that jurisdiction should not divest when the defendant is a fugitive, regardless of any illegal means used to apprehend the defendant.[158]

With these additional qualifications, the *Toscanino* exception has met with little success.[159] Although courts have referred to the exception, few have applied it to any set of specific cir-

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151. *Lira*, 515 F.2d at 70. The defendant was arrested in Santiago, Chile for a narcotics charge. *Id.* Mr. Lira claimed that he "was blindfolded by the Chilean police, beaten, strapped nude to a box spring, tortured with electric shocks, and questioned. . . ." *Id.* at 69. According to Mr. Lira, the torture lasted over a four week period before the defendant was put onto a plane for the United States. *Id.*

152. *Id.* at 69-70. The defendant alleged that Chilean officials were acting on behalf of the United States. *Id.* The court, however, found that the "only suggestion of possible involvement on the part of United States officials comes from Mellafe's [Lira's actual name] testimony that he heard English spoken during the time of his torture. . . ." *Id.* at 71.

153. *Id.*

154. *Id.* at 69.

155. 639 F.2d 896 (2d Cir. 1981).

156. *Id.* at 899-900.

157. *Id.* at 901-02. The court noted that in this case "there was none of the 'cruel, inhuman and outrageous treatment allegedly suffered by Toscanino.' . . . Accordingly, we hold that the alleged circumstances of Reed's arrest do not sink to the level of a violation of due process." *Id.* at 902.

158. *Id.* at 903. The court stated:

> we see no pattern of repeated abductions necessitating exercise of our supervisory power here in the interests of the greater good of preserving respect for law. Appellant, a fugitive from justice with no respect for the law whatsoever, is hardly in a position to urge otherwise.

Id.

159. *See e.g.*, United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). *See also supra* notes 146-58 and accompanying text (setting forth basis of non-application of *Toscanino* exception).

cumstances.[160] Courts recognizing the exception have not yet found a case where government conduct rises to the level that "shocks the conscience."[161] Furthermore, some courts have rejected the *Toscanino* exception in its entirety, thereby contributing to its ineffectiveness.[162]

3. *United States v. Rauscher*

United States v. Rauscher[163] represents a significant case establishing U.S. legal principles regarding a treaty violation.[164] In *Rauscher*, the United States charged Mr. Rauscher, a U.S. officer, with murdering a fellow national on an American merchant ship.[165] Mr. Rauscher subsequently fled to England to escape prosecution.[166] The United States invoked the Webster-Ashburton Treaty of 1842 to seek Mr. Rauscher's extradition.[167] The Webster-Ashburton Treaty provided for the extradition of crimes such as murder, piracy, arson, robbery, and forgery.[168] Britain complied with the request and extradited the defendant.[169]

At the time of the extradition request, the U.S. District Court for the Southern District of New York had instituted pro-

160. *See* United States v. Toscanino, 389 F. Supp. 916 (E.D.N.Y. 1975). Even in *Toscanino* the exception did not apply. The district court on remand found the defendant failed to prove his allegations of extreme torture. *Id.*

161. *See e.g.*, United States v. Cordero, 668 F.2d 32 (1st Cir. 1987); *see supra* notes 146-58 and accompanying text (citing Second circuit cases not reaching *Toscanino* standard).

162. BASSIOUNI, supra note 1, at 204-05 (discussing limited application of *Toscanino* exception); Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 159 & n.38 (discussing difficulty of invoking *Toscanino* exception). The Fifth and Eleventh circuits have not accepted the Toscanino exception. The exception was distinguished by the First, Third, Seventh, Eighth and Ninth circuits. *See* United States v. Sorren, 605 F.2d 1211 (1st Cir. 1979); United States v. Peltier, 585 F.2d 314 (8th Cir.), *cert. denied*, 440 U.S. 945 (1978); United States v. Marzano, 537 F.2d 257 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); United States v. Lovato, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975); Waits v. Mc Gowan, 516 F.2d 203 (3d Cir. 1975).

163. 119 U.S. 407 (1886).

164. *Id.* (establishing the doctrine of specialty).

165. *Id.* at 409; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 n.1 (1987).

166. *Rauscher*, 119 U.S. at 409.

167. *Id.* at 410; Convention as to Boundaries, Suppression of Slave Trade and Extradition (Webster-Ashburton Treaty) of 1842, 8 Stat. 572, T.S. No. 119 [hereinafter Webster-Ashburton Treaty].

168. *Rauscher*, 119 U.S. at 411; Webster-Ashburton Treaty, *supra* note 167, art. 10, 8 Stat at 576, T.S. No. 119.

169. *Rauscher*, 119 U.S. at 410.

ceedings against Mr. Rauscher for an offense not included in the treaty.[170] The U.S. Supreme Court considered the implications of enforcing the doctrine of specialty.[171] This doctrine provides that a defendant extradited for a specific crime cannot be prosecuted for another offense.[172] The Court held that a person obtained through the operation of an extradition treaty can only be tried for one of the offenses specified in the treaty.[173] In the event the person is charged with other crimes outside the scope of the treaty, that person should be afforded the time and opportunity to return to the asylum country.[174] The rationale behind the doctrine of specialty derives from the principle that the evidence necessary to extradite or prosecute the defendant for one crime may not be sufficient for another.[175] Once the suspect is returned to the asylum country, a requesting state may reformalize its extradition request in order that the suspect may be extradited for a separate offense.[176]

D. *Developments in Extraordinary Apprehension*

The United States continues to be involved in cases of extraordinary apprehension.[177] In *Jaffe v. Smith*,[178] the U.S. agents abducted a Canadian citizen to stand trial in the United States.[179] Similarly, in *United States v. Verdugo-Urquidez*,[180] the United States sought Mr. Rene Martin Verdugo-Urquidez, one of the leaders of the organization responsible for the murder of

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170. *Id.* at 409. The United States prosecuted Mr. Rauscher for the lesser offense of cruel and unusual punishment. *Id.*

171. *Id.*

172. *Id.* at 432. The doctrine of specialty guarantees a defendant extradited for a specific crime under an extradition treaty will be tried only for that crime. *Id.* Whiteman, *supra* note 18, § 46, at 1095. "Most extradition laws and treaties contain a provision prohibiting the requesting State from prosecuting or punishing the person extradited for any offense committed prior to the extradition, other than that for which extradition was granted. This is often referred to as the 'rule of specialty'." *Id.*

173. *Rauscher*, 119 U.S. at 430.

174. *Id. But see*, State v. Vanderpool, 39 Ohio St. 237 (1883) (requesting state may not prosecute even if offense is enumerated within treaty).

175. *See Rauscher*, 119 U.S. at 432.

176. *Id.* at 430.

177. *See, e.g.*, United States v. Alvarez-Machain, 112. S. Ct 2188 (1992); Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987).

178. 825 F.2d 304 (11th Cir. 1987).

179. *Id.* at 305.

180. 939 F.2d 1341 (9th Cir. 1991).

DEA Agent Enrique Camarena.[181] The U.S. intended to apprehend Mr. Verdugo via an irregular rendition.[182] An examination of the decisions in *Jaffe* and *Verdugo* aids in understanding U.S. policy regarding extraterritorial apprehension.

1. *Jaffe v. Smith*

The United States and Canada have historically enjoyed favorable relations in extradition practice.[183] The United States and Canada have had an extradition treaty in place since 1842.[184] For the most part, rendition of individuals has occurred through international cooperation and an extradition treaty without any problem or irregularity.[185] In *Jaffe v. Smith*,[186] however, rendition of the defendant Sydney Jaffe occurred outside the scope of the U.S.-Canada Extradition Treaty.[187]

On September 24, 1981, U.S. agents[188] abducted Mr. Jaffe, a Canadian citizen, from his home in Toronto to stand trial in Florida state court for land sale violations.[189] The Florida state court subsequently tried and convicted Mr. Jaffe,[190] who appealed his conviction, seeking habeas corpus relief from the U.S.

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181. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988).

182. United States v. Caro-Quintero, 745 F. Supp. 599, 602 n.5 (C.D. Cal. 1990).

183. Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987); Brief of the Government of Canada as Amicus Curiae in Support of Affirmance *on writ of certiorari* to the Court of Appeals for the Ninth Circuit at 2, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (No. 91-712), 112 S. Ct. 857 (1992) [hereinafter Brief of the Government of Canada].

184. U.S.-Canada Extradition Treaty, Dec. 3, 1971, 27 U.S.T. 983, T.I.A.S. No. 8237 [hereinafter U.S.-Canada Treaty].

185. Brief of the Government of Canada, *supra* note 183, at 2, *Alvarez-Machain* (No. 91-712).

186. 825 F.2d 304 (11th Cir. 1987).

187. *Jaffe*, 825 F.2d at 306.

188. Jaffe v. Boyles, 616 F. Supp. 1371, 1373 (W.D.N.Y. 1985). Agents of Accredited Surety & Casualty Co., Timm Johnsen and Daniel J. Kear seized Mr. Jaffe in Toronto, Canada as he returned home from a jog. *Id.* at 1373. Mr. Jaffe was taken through Ontario, across the Canadian-American border to the Niagara Falls International Airport and forced to board a plane to Orlando, Florida. *Id.*

189. *Id.* at 1373-74. Authorities previously arrested Mr. Jaffe in Florida on August 7, 1980. *Id.* at 1373. Mr. Jaffe was released when a Florida bonding company posted U.S.$137,500 in bail bonds. *Id.* Mr. Jaffe failed to appear before the Florida court allegedly due to health problems, which prompted the U.S. to abduct him from his home in Canada. *Id.*

190. *Id.* Mr. Jaffe was convicted and sentenced to consecutive jail terms totaling 145 years. *Id.* at 1374.

District Court for the Middle District of Florida.[191] On appeal to the U.S. Court of Appeals for the Eleventh Circuit, Mr. Jaffe maintained that the Florida State Court did not have jurisdiction over him because the United States acquired jurisdiction by abducting him from Canada violating the U.S.-Canada Extradition Treaty.[192] The Eleventh Circuit, citing *Ker*, stated that a defendant may not claim a treaty violation unless governmental action can be proved in the defendant's rendition.[193] The United States denied involvement in the abduction of Mr. Jaffe and the state trial court found no evidence of U.S. government participation.[194] Thus, the court held that jurisdiction over Mr. Jaffe was proper.[195]

Canada, enraged by the alleged abduction, attempted to halt proceedings against Mr. Jaffe.[196] Through diplomatic notes, Canada demanded Mr. Jaffe's return.[197] The U.S. Department of Justice and Department of State subsequently requested that Florida grant Mr. Jaffe an early release.[198] The former Secretary

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191. Jaffe v. Smith, 825 F.2d at 306 (11th Cir. 1987). This federal habeas corpus petition was originally dismissed for failure to exhaust state remedies. *Id.* On remand, the magistrate recommended that the district court decline to accept jurisdiction of Jaffe's case. *Id.* The district court accepted the magistrate's recommendation and because Mr. Jaffe may be considered an 'abuser' of the writ or because he may be considered a fugitive from justice. *Id.* An appeal to the Court of Appeals followed. *Id.*

192. *Id.* at 306; U.S.-Canada Treaty, *supra* note 184, 27 U.S.T. 983, T.I.A.S. No. 8237.

193. *Jaffe*, 825 F.2d at 307. "Unless a defendant can prove that she or he was removed from the asylum state by governmental action, and therefore establish a treaty violation, she or he may not object to trial in the United States." *Id.*

194. *Id.* at 307-08. The court stated that "[t]he present appeal presents a clear case of individual citizens acting outside the parameters of a treaty." *Id.* at 307. The state trial court determined that

> there is no evidence in this record thus far that this witness [one of the bondsmen] or any other person involved in the taking of the defendant received any instruction, directions, aid, comfort, succor or anything else from any authorized agency of the United States, the State of Florida, [or] the Seventh Judicial Circuit. . . .

Id. at 308. Canada later requested the extradition of the two bounty hunters, Daniel Kear and Timm Johnsen who were involved with the kidnapping. The United States granted Canada's request. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 200, 208 (1984).

195. *Jaffe*, 825 F.2d at 307-08.

196. Brief of the Government of Canada, *supra* note 183, at 11, *Alvarez-Machain* (No. 91-712).

197. *Id.*

198. Memorandum from Secretary of State George P. Shultz to State of Florida Probation and Parole Commission (July 22, 1983).

of State, George P. Shultz, in a letter to the Florida probation commission, strongly expressed his disapproval of the situation.[199] The former Secretary of State felt that the U.S.-Canada Extradition Treaty not only could have been utilized to obtain Mr. Jaffe's return, but should have been invoked.[200] Former Secretary Shultz acknowledged Canada's outrage at the alleged kidnapping, as the abduction violated the U.S.-Canada Extradition Treaty, international law, and Canada's sovereignty.[201] Mr. Shultz's letter emphasized that the strain on U.S.-Canada relations resulting from the matter needed to be alleviated.[202] The United States subsequently released Mr. Jaffe and returned him to Canada in 1983.[203]

2. The Camarena Investigation

Unlike Canada, Mexico has not enjoyed the same success with the United States in the area of extraterritorial apprehensions.[204] Extraterritorial apprehension between the United States and Mexico has received widespread attention recently in both *United States v. Verdugo-Urquidez*[205] and *United States v. Alvarez-Machain*.[206] Both cases involved extraterritorial apprehensions and evolved from the events surrounding the Camarena investigation.[207]

Drug Enforcement Agent Enrique Camarena had been as-

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199. *Id.*

200. *Id.* Former Secretary of State Shultz wrote that the U.S.—Canada Treaty could have been utilized to secure Mr. Jaffe's return . . . [a]s no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.

Id.

201. Memorandum from Secretary of State George P. Shultz to State of Florida Probation and Parole Commission (July 22, 1983).

202. *Id.*

203. *See* Brief of the Government of Canada, *supra* note 183, at 11, *Alvarez-Machain* (No. 91-712). The United States released Mr. Jaffe from prison on September 2, 1983. Jaffe v. Boyles, 616 F. Supp at 1374. After Mr. Jaffe's return to Canada, the Florida prosecutor sought extradition of Mr. Jaffe on other grounds. *Id.*

204. *See, e.g.*, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

205. 939 F.2d 1341 (9th Cir. 1991).

206. 112 S. Ct. 2188 (1992).

207. *Verdugo*, 939 F.2d at 1343 (acquiring custody of Mr. Verdugo through irregular rendition); *Alvarez-Machain*, 112 S. Ct. at 2190 (acquiring custody of Dr. Alvarez-Machain through abduction).

signed to Guadalajara, Mexico to combat drug trafficking.[208] In 1984, he infiltrated the Guadalajara drug cartel and reached its leader, Rafael Caro-Quintero.[209] On February 7, 1985, drug traffickers kidnapped Agent Camarena outside the American consulate in Guadalajara[210] and brought him to a ranch where they tortured him for information regarding DEA activities.[211] The kidnappers subsequently murdered both Agent Camarena and his pilot.[212] One month following the abduction, a passing farm worker found the two bodies outside Guadalajara.[213]

The Camarena investigation, resulting from the murder of U.S. Drug Enforcement Agent Enrique Camarena, prompted the United States to utilize extraterritorial apprehension to apprehend his killers.[214] The DEA immediately embarked on Operation Leyenda to investigate the murder of Agent Camarena.[215] The United States implicated twenty-two persons in connection with this murder.[216] Seven of the twenty-two indicted were found within the United States and charged.[217] Of the seven, three have been brought to the United States by extraordinary apprehension.[218]

3. *United States v. Verdugo-Urquidez*

The Camarena investigation led to the U.S. prosecution of

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208. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 160.

209. *Id.*

210. *Caro-Quintero*, 745 F. Supp. at 601-02; Ronald J. Ostrow & Marjorie Miller, *Mexico Sends Diplomatic Note to U.S. Asking Details on Suspect's Abduction*, L.A. TIMES, Apr. 19, 1990, at A6.

211. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 160.

212. Daniel Williams, *U.S. and Mexico Plan Talks on Extradition*, WASH. POST, June 22, 1993, at A15; *Caro-Quintero*, 745 F. Supp. at 602. The pilot, Alfredo Zavala-Avelar, had assisted Agent Camarena in locating marijuana fields. *Caro-Quintero*, 745 F. Supp. at 602.

213. *Id.* at 602; Juan M. Vasquez, *U.S. Bitterness Lingers in Drug Agent's Killing*, L.A. TIMES, Mar. 17, 1985, at 1.

214. *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1343 (9th Cir. 1991) (acquiring custody of Mr. Verdugo-Urquidez by irregular rendition); United States v. Matta-Ballesteros, 697 F. Supp. 1040 (S.D. Ill. 1988) (acquiring custody of Mr. Matta-Ballesteros by irregular rendition).

215. *Caro-Quintero*, 745 F. Supp. at 601; Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 161.

216. *Caro-Quintero*, 745 F. Supp. at 602.

217. *Id.*

218. *Id.* at n.5. The other two brought by extra-legal methods were Mr. Matta-Ballesteros and Mr. Verdugo-Urquidez. *Id.*

Mr. Rene Martin Verdugo-Urquidez.[219] Because of the similar issues regarding personal jurisdiction and international law principles, *United States v. Verdugo-Urquidez*[220] is considered the precursor to the *Alvarez-Machain* case.[221] Mr. Verdugo, a leader of the Caro-Quintero cartel, participated in the Camarena murder.[222] The United States issued a warrant for his arrest on August 3, 1985, based on the suspect's prior drug history.[223] After several unsuccessful attempts to apprehend Mr. Verdugo in the United States,[224] the U.S. Marshal Service asked the Mexican police for assistance in apprehending Mr. Verdugo.[225] On January 24, 1986, six Mexican Federal Judicial police officers ("MFJP"), acting under the authority of an arrest warrant, stopped Mr. Verdugo in San Felipe, Mexico.[226] The officers ordered Mr. Verdugo from his car and arrested him.[227] Mr. Verdugo was unaware of the reasons for his arrest or where the abductors intended to bring him.[228] The officers drove Mr. Verdugo to the U.S.-Mexican border and delivered him to the U.S. Marshals for arrest.[229] Neither the United States nor the Mexican authorities

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219. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991). A federal grand jury returned a five-count second superseding indictment on March 16, 1988, charging Mr. Verdugo with various offenses including the murder of DEA Agent Camarena. *Id.* Mr. Verdugo is a Mexican national whom the DEA believed to be a drug smuggler and one of the leaders of a large and violent organization based in Mexico. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

220. 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990). Mr. Verdugo also raised a Fourth Amendment violation when, after his arrest, Mexican police officials and U.S. agents searched his home in Mexico. The Supreme Court held the Fourth Amendment did not apply to a search by U.S. agents of Mr. Verdugo's home. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1059-60.

221. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 163. Mr. Verdugo raised jurisdictional issues based on the method of his acquisition. *Id.*

222. *Id.*

223. *Verdugo-Urquidez*, 856 F.2d at 1215-16.

224. Supreme Court Brief for Respondent Verdugo at n.3 United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990) (No. 88-1353) [hereinafter Verdugo Brief]. At the time the United States was seeking Verdugo's arrest, Verdugo was a legal resident of the United States with Alien Registration. *Id.*

225. *Verdugo*, 856 F.2d at 1216.

226. *Id.*

227. *Id.* Verdugo was then handcuffed and placed in the officer's unmarked car and forced to lie down on the backseat with his face covered by a jacket. *Id.*

228. *Id.* at 1216; Verdugo Brief, *supra* note 224, at 4, *Verdugo-Urquidez* (No. 88-1353).

229. *Verdugo*, 856 F.2d at 1216.

had previously approved the action.[230] Mr. Verdugo's apprehension amounted to an irregular rendition.[231]

A jury convicted Mr. Verdugo for various drug related offenses and the murder of Agent Camarena.[232] On appeal, Mr. Verdugo contested personal jurisdiction due to the method of his apprehension.[233] The U.S. Circuit Court of Appeals for the Ninth Circuit held that whenever the U.S. government abducts non-U.S. nationals, the *Ker-Frisbie* doctrine does not apply.[234] Although extradition treaties prohibit government authorized or sponsored kidnapping,[235] the court stated that an asylum nation may consent by failing to formally protest.[236] The court concluded that if a non-U.S. nation objects to the abduction, the defendant has derivative standing to claim a violation of the extradition treaty.[237] If such a violation exists, the proper remedy is repatriation.[238] The court remanded the case for evidentiary proceedings to determine whether Mexico voluntarily surrendered the defendant.[239]

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230. Verdugo Brief, *supra* note 224, at 5, *Verdugo-Urquidez* (No. 88-1353). Appropriate authority could have been obtained through the United States Justice Department and the Mexican Attorney General. Shortly after the kidnapping, the prosecutor of Baja California, Mexico charged the six Mexican Federal Police Officers with kidnapping. The United States subsequently placed these six men into the Federal Witness Protection Program. *Id.*

231. *Caro-Quintero*, 745 F. Supp. at 602 n.5; *see supra* notes 82-97 and accompanying text (discussing irregular rendition).

232. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988); Verdugo Brief, *supra* note 224, at 2, *Verdugo-Urquidez* (No. 88-1353). He was sentenced to four consecutive 60-year terms of incarceration. *Verdugo-Urquidez*, 939 F.2d at 1343.

233. *Verdugo-Urquidez*, 939 F.2d at 1344.

234. *Id.* at 1345-49. The court concluded that:

> a proper analysis of the cases does not support the contention that the broad view of *Ker* and its progeny has been adopted by the decision of any court. . . . [T]here is considerably more dictum to the effect that the broad view of *Ker* does not apply to cases in which the government of the nation from which a defendant has been kidnapped protests the kidnapping, and there are strong reasons why the sweeping interpretation of *Ker* should not be adopted.

Id. at 1348-49; *see supra* notes 106-32 and accompanying text (discussing *Ker-Frisbie* doctrine).

235. *Verdugo-Urquidez*, 939 F.2d at 1351-52.

236. *Id.* at 1352.

237. *Id.* at 1356-58.

238. *Id.* at 1359-60.

239. *Id.* at 1359. The Circuit Court refused to decide whether there was in fact government involvement in Verdugo's apprehension. *Id.* The Supreme Court denied certiorari on this matter. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1839 (1990).

II. UNITED STATES v. ALVAREZ-MACHAIN

The Camarena investigation directly led to U.S. involvement in the abduction of Dr. Alvarez-Machain.[240] The United States, familiar with Mexico's policy, knew Agent Camarena's assailants would neither be extradited nor prosecuted by Mexico according to U.S. standards.[241] Moreover the United States had a sovereign interest to enforce its own laws.[242] The government and Dr. Alvarez-Machain relied on differing propositions to justify their respective positions.[243] Dr. Alvarez-Machain asserted a violation of the U.S.-Mexico Extradition Treaty due to U.S. government involvement with his abduction.[244] The U.S. government, however, maintained that the U.S.-Mexico Extradition Treaty was not violated because the abduction occurred outside the operation of the Treaty and therefore the method used to acquire personal jurisdiction over a suspect is irrelevant.[245] The U.S. District Court and U.S. Court of Appeals for the Ninth Circuit agreed that the U.S. government unilaterally abducted Dr. Alvarez-Machain and violated the U.S.-Mexico Extradition Treaty.[246]

A. *Factual History of* United States v. Alvarez-Machain

The United States charged Dr. Humberto Alvarez-Machain, a Mexican national, in the sixth superseding indictment impli-

240. *Caro-Quintero*, 745 F. Supp. at 601 n.1. The sixth superseding indictment "charges [Dr. Alvarez-]Machain with conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity (18 U.S.C. § 1959), conspiracy to kidnap a federal agent (18 U.S.C. § 1201(c)), kidnap of a federal agent (18 U.S.C. § 1201(a)(5)), felony-murder (18 U.S.C. § 1111(a), 1114), and accessory after the fact (18 U.S.C. § 3)." *Id.*

241. *See supra* notes 71-77 and accompanying text (describing Mexico's policy on not extraditing Mexican nationals); Government's Reply Brief, *supra* note 79, at 5, *Alvarez-Machain* (No. 91-712). The United States believed Mexico would be lenient in the prosecution of Camarena's murders. *Id.*

242. Government's Reply Brief, *supra* note 79, at 4, *Alvarez-Machain* (No. 91-712).

243. *See generally* Government's Brief 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); 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) [hereinafter Respondent's Brief].

244. Respondent's Brief, *supra* note 243, at 4-5, *Alvarez-Machain* (No. 91-712).

245. Government's Brief, *supra* note 71, at 9, *Alvarez-Machain* (No. 91-712).

246. United States v. Caro-Quintero, 745 F. Supp. 601 (C.D. Cal. 1990), United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

cating him in the torture and murder of Agent Camarena.[247] Dr. Alvarez-Machain, a doctor with a specialty in obstetrics and gynecology,[248] allegedly prolonged Agent Camarena's life and revived him when unconscious in order to allow the drug traffickers to further torture him.[249] The United States sought to prosecute Dr. Alvarez-Machain for his involvement in the murder.[250]

Prior to abducting Dr. Alvarez-Machain, DEA agents attempted to obtain him through an irregular rendition.[251] MFJP commandante Jorge Castillo del Rey approached DEA informant Garate, who served as the liaison between the MFJP and the DEA.[252] Negotiations between the U.S. DEA and the MFJP followed regarding the possible exchange of Dr. Alvarez-Machain for Isaac Naredo Moreno,[253] a Mexican national residing in the United States and sought by Mexico's Attorney General for stealing money from Mexican politicians.[254] On December 13, 1989, DEA Agent Berrellez and DEA Special Agent Waters met in Los Angeles with MFJP commandante Jorge Castillo del Rey and an unidentified MFJP commandante.[255] The parties made arrangements that would lead to Dr. Alvarez-Machain's return to the United States.[256] In return for Dr. Alvarez-Machain, the United States would begin deportation proceedings against Mr. Moreno.[257] The parties scheduled this rendition to take place secretly after Christmas.[258] On January 7, 1990, however, complications arose when DEA informant Garate advised the DEA that

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247. *Caro-Quintero*, 745 F. Supp. at 601 n.1; *see supra* note 240 (setting forth charges in sixth superseding indictment).

248. *Caro-Quintero*, 745 F. Supp. at 602.

249. Government's Brief, *supra* note 71, at 2, *Alvarez-Machain* (No. 91-712). Dr. Machain was "to prolong Camarena's life so that others could continue interrogating and torturing him." *Id.* The drug allegedly used was lidocaine. *Judge Acquits Mexican Doctor in Murder of U.S. Drug Agent*, ST. PETERSBURG TIMES, Dec. 15, 1992, at 1A.

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

251. *Caro-Quintero*, 745 F. Supp. at 602.

252. *Id.* "Antonio Garate-Bustamante, a DEA informant who had served as an intermediary between the Mexican government and the DEA." Government's Brief, *supra* note 71, at 3, *Alvarez-Machain* (No. 91-712).

253. *Caro-Quintero*, 745 F. Supp. at 602.

254. *Id.*

255. *Id.*

256. *Id.* Receipt of Dr. Alvarez-Machain was to occur through irregular rendition. *Id.*

257. *Id.*

258. *Id.*

the Mexican officials demanded a U.S. $50,000 advance payment to transport Dr. Alvarez-Machain to the United States.[259] The DEA refused and the agreement was terminated.[260]

On January 25, 1990 Commandante Castillo contacted DEA informant Garate to schedule a second meeting.[261] Agent Berrellez initially agreed to the meeting, but later reconsidered.[262] No further negotiations occurred between the DEA and MJFP, thus terminating any possibility that the United States would gain custody of Dr. Alvarez-Machain through an irregular rendition.[263]

The failed negotiation left the DEA with limited possibilities.[264] The DEA disfavored utilizing the extradition treaty to seek Dr. Alvarez-Machain's return because Mexico proved ineffective in complying with previous U.S. requests[265] for individuals such as Mr. Caro-Quintero[266] and Mr. Matta-Ballesteros.[267] Both Mr. Caro-Quintero and Mr. Matta-Ballesteros had eluded custody by bribing Mexican officials.[268] In addition, Mexico's laws prohibited extradition of its nationals.[269] Agent Berrellez told DEA informant Garate that the DEA would pay for information leading to the arrest and capture of individuals involved in the murder of Agent Camarena.[270] In March of 1990, Mr. Garate informed Agent Berrellez that his contacts could apprehend Dr. Alvarez-Machain and deliver him to the United

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 602-03. Agent Berrellez's reconsideration was due to the tension between Mexico and the United States created by the airing of the NBC mini-series documenting the Camarena murder and investigation. "Drug Wars: The Camarena Story" aired on NBC on January 7, 8, and 9, 1990. Agent Berrellez also testified that he canceled because he believed the meeting was a 'set up'. *Id.* at 603.

263. *Id.* at 603.

264. Government's Reply Brief, *supra* note 79 at 5, *Alvarez-Machain* (No. 91-712). "[T]he United States' interest in enforcing its own criminal laws is manifest." *Id.*

265. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 161.

266. Ronald Ostrow, *U.S. Charges Mexico Let Suspect Flee*, L.A. TIMES, Feb. 25, 1985, at 1. Mr. Caro-Quintero was reputed to be part of a drug cartel and involved in the abduction and murder of Agent Camarena. *Id.*

267. Henry Weinstein, *Matta Convicted on Three of Four Counts in Camarena Case*, L.A. TIMES, July 27, 1990, at 1. Mr. Matta-Ballesteros was an Honduran businessman and a reputed drug kingpin involved in the kidnapping and murder of Agent Camarena. *Id.*

268. *See* Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 169 n.94.

269. *Id.* at 161 n.42.

270. *Caro-Quintero*, 745 F. Supp. at 602-03.

States.[271] After receiving this information, Agent Berrellez obtained authorization to offer a U.S.$50,000 reward if Mr. Garate's contacts could deliver Dr. Alvarez-Machain to the United States.[272] In March, Agent Berrellez and Mr. Garate made arrangements to apprehend Dr. Alvarez-Machain.[273] Agent Berrellez, who gained approval from the DEA in Washington and therefore assumed the U.S. Attorney General's Office was consulted before the abduction, began to execute the planned apprehension.[274]

On April 2, 1990, Dr. Alvarez-Machain was kidnapped from his office in Guadalajara, Mexico.[275] Five or six armed men entered Dr. Alvarez-Machain's office and showed him what appeared to be a badge of the Mexican Federal Police.[276] The men took Dr. Alvarez-Machain to a house in Guadalajara and forced him to lie face down for two to three hours.[277] Dr. Alvarez-Machain's abductors subjected him to electric shocks administered through the soles of his shoes and injected him with a sedative.[278] Following this treatment, the men placed Dr. Alvarez-Machain aboard a plane which flew to El Paso, Texas where several persons, including Agent Berrellez and Mr. Garate, met the doctor.[279] Dr. Alvarez-Machain was asked if his abductors had tortured or abused him.[280] He said he had not experienced any abusive treatment.[281] He later stated, however, that he suf-

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271. *Id.*; *see supra* notes 98-105 and accompanying text (discussing abduction as method of apprehension).

272. *Caro-Quintero*, 745 F. Supp. at 603. Agent Berrellez testified he received authorization to make this offer from the Los Angeles DEA Office, the Deputy Director of the DEA, Pete Gruden and other officials in Washington, D.C.. *Id.*

273. *Id.* "Garate testified that he did not make a move without first consulting with and obtaining authorization from agent Berrellez." *Id.* at n.7.

274. *Id.* at 603. "Berrellez testified that the abduction and the final terms of the abduction had been approved by the DEA in Washington, D.C., and agent Berrellez believed that the United States Attorney General's Office had also been consulted." *Id.*

275. *Id.* at 603.

276. *Id.*

277. *Id.*

278. *Id.* "He was injected twice with a substance that made him feel 'light-headed and dizzy.'" *Id.*

279. *Id.* Agent Berrellez testified he did not know if the abductors were acting under Mexican authority. *Id.* at n.8. The DEA made partial reward payment of U.S. $20,000 to the abductors and continued to give them U.S. $6,000 per week. *Id.* at 603-04. In addition, the United States arranged for the seven of the abductors and their families to come to the United States. *Id.*

280. *Id.* at 604.

281. *Id.* The court reported that Dr. Machain stated that

fered from chest pains.[282] He underwent a physical examination, and the examining doctor concluded that Dr. Alvarez-Machain exhibited no signs of mistreatment or abuse.[283]

On April 18, 1990, the Mexican Embassy requested a detailed report from the U.S. Department of State regarding the possibility of U.S. participation in the abduction of Dr. Alvarez-Machain.[284] The request included a warning that cooperation between the nations in the fight against drug trafficking would be endangered if the United States had participated in the abduction.[285] On May 16, 1990, the Mexican Embassy sent a second diplomatic note alleging U.S. participation in the abduction of Dr. Alvarez-Machain.[286] Mexico demanded Dr. Alvarez-Machain's repatriation and stressed that Dr. Alvarez-Machain's abduction violated the U.S.-Mexico Extradition Treaty.[287] On July 19, 1990, the Mexican Embassy presented a third diplomatic note requesting the arrest and extradition of Agent Berrellez and Mr. Garate for crimes relating to Dr. Alvarez-Machain's abduction.[288]

A. *The U.S. Government's Argument in Support of the Abduction of Dr. Alvarez-Machain*

In its brief to the U.S. Supreme Court, the United States maintained that jurisdiction was proper because the apprehension of Dr. Alvarez-Machain did not occur through the operation of the U.S.-Mexico Extradition Treaty and did not violate its pro-

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> he had not [been mistreated or abused], though he complained that he had injured his finger on the door of the aircraft. . . . Dr. Machain was subsequently treated by various . . . medical personnel during his incarceration. At no time did he indicate . . . that he had been mistreated by his kidnappers.

Id.

282. *Id.* Dr. Alvarez-Machain reported "a pain radiating from his chest and pressure in his chest." *Id.*

283. *Id.* Prompt medical treatment was provided at Thomason General Hospital by Dr. Mesa, who discovered no signs of abuse and prescribed a pain killer. *Id.*

284. *Id.* "The Mexican government indicated that it was making 'a scrupulous investigation [of] this case.'" *Id.*

285. *Id.* "'[I]f it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered. . . .'" *Id.*

286. *Id.* "The note stated that '[t]he Government of Mexico considers that the kidnapping of Dr. Alvarez-Machain . . . [was] carried out with the knowledge of persons working for the U.S. government. . . .'" *Id.*

287. *Id.*

288. *Id.*

visions.[289] Moreover, the government contended that the Mexican protests did not serve to invoke the U.S.-Mexico Extradition Treaty.[290] Having not invoked the extradition treaty in force between the two nations, the U.S. government viewed Mexico's protests, and the issue of whether the abduction was privately or government sponsored to be irrelevant.[291]

The U.S. government implicated the *Ker-Frisbie* doctrine to support its argument.[292] The government maintained that *Ker-Frisbie* applied in renditions operating outside of a treaty.[293] According to the U.S. government, an exception to the rule occurred if the applicable treaty or statute specifically barred abduction and provided for termination of the prosecution as a remedy.[294] The United States asserted that this case did not fall within the exception because the U.S.-Mexico Extradition Treaty did not set forth an express prohibition barring abduction as a method of obtaining custody.[295] Moreover, the United States cited *United States v. Rauscher*[296] to illustrate the exception to the *Ker-Frisbie* doctrine.[297]

The government emphasized that *Rauscher* involved formal extradition proceedings decided on the specific terms of the Webster-Ashburton Treaty.[298] The government maintained that *Rauscher* did not support the proposition that a court may rely

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289. Government's Brief, *supra* note 71, at 9, *Alvarez-Machain* (No. 91-712).

290. *Id.* at 15.

291. *Id.* According to the U.S. government "the *Ker*[*-Frisbie*] doctrine applies regardless of whether the abduction is attributable to government officials or private parties." *Id.*

292. *Id.* at 17. The U.S. government maintained that "[t]he *Ker-Frisbie* doctrine and its rationale are fully applicable in this case." *Id.*

293. *Id.* The U.S. government alleged that "the *Ker-Frisbie* rule applies to arrests that violate the Constitution; regardless of the unlawfulness of the defendant's apprehension. . . ." *Id.* at 16.

294. *Id.* at 17. Exceptions to the *Ker-Frisbie* doctrine were asserted as "*only* when the Court has found *both* a clear violation of a treaty or statute and a clear intention in the treaty or statute to provide for termination of the prosecution as a remedy." *Id.* (emphasis added).

295. *Id.* at 19 n.14. In examining the U.S.-Mexico Extradition Treaty, the U.S. government found that "[t]here is no language in our extradition treaty with Mexico that supports extension of the treaty's obligations to non-extradition settings." *Id.*

296. United States v. Rauscher, 119 U.S. 407 (1886). *See supra* notes 163-76 and accompanying text (discussing *Rauscher*).

297. *See supra* notes 163-76 and accompanying text (discussing *Rauscher*).

298. Government's Brief, *supra* note 71, at 17-18, *Alvarez-Machain* (No. 91-712). "Unlike *Ker*, *Rauscher* involved formal extradition proceedings." *Id.* *See supra* note 167-68 and accompanying text (discussing the Webster-Ashburton Treaty).

on the treaty to refuse jurisdiction when a nation obtained a defendant by methods other than extradition.[299] The government concluded that since the United States did not invoke the U.S.-Mexico Extradition Treaty to utilize the extradition process, Dr. Alvarez-Machain was not extradited under the treaty and was not entitled to any proceeding which the Treaty would have afforded him.[300]

The government asserted that not only did the United States not violate an express term of the extradition treaty, but it did not even violate an implied term of the U.S.-Mexico Extradition Treaty.[301] The government maintained that an extradition treaty addresses a narrow scope solely to impose obligations regarding the extradition process.[302] The United States and Mexico negotiated the treaty with this purpose in mind, without any intent to regulate forcible abductions.[303] In particular, the United States emphasized that the text and purpose of the U.S.-Mexico Extradition Treaty did not preclude forcible abductions.[304] The purpose of extradition treaties, according to the government, was to facilitate the rendition of fugitives.[305] Moreover, the government drew attention to other nations that bypassed treaty provisions and resorted to alternate means to

299. Government's Brief, *supra* note 71, at 18, *Alvarez-Machain* (No. 91-712). "Nothing in *Rauscher* supports the conclusion that if the defendant's presence was obtained by means other than extradition, a court may invoke the treaty to refuse to try the defendant at all." *Id.* at 18-19.

300. *Id.* at 19.

301. *Id.* at 21. "[T]he extradition treaty does not address the subject of apprehensions made outside the extradition context, and the treaty cannot be construed to impose an obligation to refrain from such apprehensions." *Id.*

302. *Id.*; *see supra* notes 28-43 and accompanying text (discussing extradition treaties in general).

303. Government's Brief, *supra* note 71, at 22, *Alvarez-Machain* (No. 91-712). The U.S. government cited the U.S.-Mexico Extradition Treaty and maintained that "[t]he treaty preamble states that the United States and Mexico entered the treaty out of a desire 'to mutually render better assistance *in matters of extradition*' . . . [t]hat stated purpose — to aid the extradition process — defines and limits the scope of the treaty." Government's Reply Brief, *supra* note 79, at 2, *Alvarez-Machain* (No. 91-712) (emphasis in original).

304. Government's Brief, *supra* note 71, at 23, *Alvarez-Machain* (No. 91-712). Citing the omission of certain terms from the U.S.-Mexico Extradition Treaty, the U.S. government stated that "[t]here is no provision in our extradition treaty with Mexico that forbids the signatory nations from making extraterritorial arrests outside the context of extradition proceedings." *Id.*

305. *Id.* at 24-25.

render individuals.[306] More specifically, both the United States and Mexico have operated outside the scope of an extradition treaty on various other occasions.[307] As early as 1906, the United States and Mexico indicated that the U.S.-Mexico Extradition Treaty did not bar abductions.[308] Furthermore, the government maintained that customary international law did not support the interpretation that the U.S.-Mexico Extradition Treaty precluded resort to extraterritorial abductions.[309]

The U.S. government asserted that even if the treaty contained an implied obligation that the United States violated, an individual would have no standing to raise an objection.[310] Extradition treaties, according to the government, could only be triggered by the nations that were a party to them.[311] Mexico's protests therefore could not create standing in an individual.[312] Such a right could not be implied.[313] Thus, Dr. Alvarez-Machain lacked the right to speak on behalf of Mexico or act as a surrogate.[314] Mexico could proceed only through diplomatic channels.[315]

The United States further argued that to recognize a treaty violation would interfere with executive branch authority over international matters.[316] The court's role is to apply and inter-

306. Government's Reply Brief, *supra* note 79, at 7, *Alvarez-Machain* (No. 91-712).

307. Government's Brief, *supra* note 71, at 27-28, *Alvarez-Machain* (No. 91-712). "The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty." *Alvarez-Machain*, 112 S. Ct. at 2194.

308. Government's Brief, *supra* note 71, at 28, *Alvarez-Machain* (No. 91-712). In 1906, the United States informed Mexico that forcible abduction was not grounds for the defendant to avoid criminal trial. *Id.*

309. *Id.* at 32. "Far from supporting the court's analysis, those sources of international law confirm that the extradition treaty between the United States and Mexico does not address the issue of extraterritorial arrests." *Id.*

310. *Id.* at 34. "This court holds that its [sic] is for the state, and not the individual, to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty." *Caro-Quintero*, 745 F. Supp. at 608.

311. Government's Brief, *supra* note 71, at 34, *Alvarez-Machain* (No. 91-712).

312. *Id.* at 35-36. The U.S. government felt that "Mexico's protest, however, [was] irrelevant to the issue of respondent's standing." *Id.*

313. *Id.* at 35.

314. *Id.* at 36. According to the United States, "[r]espondent is not empowered to speak on Mexico's behalf and is hardly a surrogate for that nation. Whatever rights Mexico has under the treaty cannot be delegated to a criminal defendant seeking to avoid trial in this country." *Id.*

315. *Id.*

316. *Id.* at 38. The U.S. government stated that "[t]he adjudication of claims chal-

pret the treaty, not create provisions or remedies.[317] The executive branch is to remedy treaty flaws and balance diplomatic relations.[318] Therefore, the government reasoned, the Court should not find a private right in the U.S.-Mexico Extradition Treaty and determine the remedy to be repatriation.[319] Allowing the courts to decide diplomatic issues would violate the treaty process.[320]

B. *Dr. Alvarez-Machain's Argument*

Dr. Alvarez-Machain asserted a violation of the U.S.-Mexico Extradition Treaty.[321] To support his argument, he relied on Article 9, paragraph 2, of the U.S.-Mexico Extradition Treaty which permits each party to prosecute its own nationals.[322] Dr. Alvarez-Machain asserted that this provision reflected an agreement to protect the rights of both countries and thus prohibit prosecution of each country's nationals in another nation.[323] Dr. Alvarez-Machain therefore maintained that the U.S.'s decision to ignore the U.S.-Mexico Extradition Treaty and abduct him undermined the intent of Article 9.[324] Dr. Alvarez-Machain further argued that the U.S.-Mexico Extradition Treaty should be viewed as a vehicle to enhance mutual cooperation and assure preservation of each nation's sovereignty.[325]

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lenging foreign arrests would frequently encroach on functions belonging exclusively to the political branches." *Id.*; *see supra* note 61 (discussing the three branches of power).

317. Government Brief, *supra* note 71, at 39, *Alvarez-Machain* (No. 91-712). The United States refuted the remedy of repatriation by arguing that "the remedy of repatriation devised by the court of appeals . . . is inconsistent with the generally limited function of the Article III branch in the realm of foreign relations." *Id.* (citing Haig v. Agee, 453 U.S. 280, 292 (1981)).

318. *Id.* at 39-40. The United States acknowledged that "the administration of extradition treaties is interwoven with the Executive's authority. . . ." *Id.*

319. *Id.* at 34.

320. *Id.* at 38.

321. Respondent's Brief, *supra* note 243, at 3, *Alvarez-Machain* (No. 91-712); Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656.

322. Respondent's Brief, *supra* note 243, at 9, *Alvarez-Machain* (No. 91-712); Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7.

323. Respondent's Brief, *supra* note 243, at 9, *Alvarez-Machain* (No. 91-712).

324. *Id.* at 11. "[T]he government completely undermines the basic purpose of the Treaty by unilaterally altering the terms of its agreement with Mexico." *Id.*; *see also* Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7.

325. Respondent's Brief, *supra* note 243, at 11, *Alvarez-Machain* (No. 91-712). Dr. Alvarez-Machain asserted that "it is precisely because abduction of criminal suspects from another country is so clearly prohibited in international law, and because there is

Dr. Alvarez-Machain relied on the history of relations between the United States and Mexico to bolster his argument.[326] Historically, neither the United States nor Mexico depended on abductions to obtain jurisdiction over a non-national.[327] Dr. Alvarez-Machain argued that in 1881 and 1887, the U.S. Secretary of State acknowledged that transborder abductions violated the extradition treaty.[328] Never before had the United States or Mexico taken the position that it had the right to abduct.[329]

Moreover, Dr. Alvarez-Machain noted that customary international law principles also supported the doctors' interpretation of the U.S.-Mexico Extradition Treaty.[330] Since it is a violation of international law for one state to exercise its police power in another state's territory, his capture violated the U.S.-Mexico Extradition Treaty.[331] Further, the executive branch of the U.S. in the past had always viewed abductions by government agents as violations of customary international law.[332]

Dr. Alvarez-Machain also distinguished the difference between the principles set forth in *Ker v. Illinois* and *United States v. Rauscher* and maintained that the U.S.-Mexico Extradition Treaty had to be interpreted within the *Rauscher* holding.[333] These cases, according to Dr. Alvarez-Machain, formed two distinct categories.[334] Pursuant to *Ker*, Peru did not protest the kidnapping and thus the abduction occurred without the pretense of authority.[335] In the absence of a protest by the sovereign, Mr. Ker's

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no international duty to extradite absent a treaty, that extradition treaties are necessary." *Id.*

326. *Id.* at 13. "The United States and Mexico have entered into a series of extradition treaties dating back to 1862." *Id.*

327. *Id.* at 14.

328. *Id.*

329. *Id.* at 15.

330. *Id.* at 16.

331. *Id.* Respondent writes that "it is a violation of international law for one government to exercise its police power in the territory of another state." *Id.*

332. *Id.* at 19. "The former Legal Advisor to the Department of State expressly testified that . . . 'the United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity.'" *Id.*

333. *Id.* at 28; *see supra* notes 163-76 and accompanying text (discussing *Rauscher*).

334. Respondent's Brief, *supra* note 243, at 29, *Alvarez-Machain* (No. 91-712). This is in contrast to the government's portrayal of *Rauscher* as merely an exception to *Ker*. *Id.* Dr. Alvarez-Machain asserted that "each one applies in a distinctive setting. . . ." *Id.* at 28.

335. *Id.* at 29. "Peru had the right to consent, explicitly or silently, to the kidnapping of Ker from its territory — a right Peru exercised by silence in that case." *Id.*

apprehension became a consensual informal rendition and did not violate any treaty.[336] In contrast, *Rauscher* involved a violation of a treaty's implied provisions because Mr. Rauscher was extradited to the United States for one crime within the scope of the treaty, but was prosecuted for another offense.[337]

Dr. Alvarez-Machain identified what he felt were the elements that amounted to a treaty violation.[338] Relying on prior case law,[339] the doctor argued that a court has no authority to exercise jurisdiction over an alleged offender if (1) one state abducts a national of another and (2) the latter protests.[340] The respondent also rejected the applicability of the *Ker-Frisbie* doctrine,[341] alleging that the cases relying on *Ker* contained one or more of the following elements: (1) no official protest by the government of the country from which the suspect was abducted; (2) direct involvement or consent of the non-U.S. government in the rendition of individuals to the United States; or (3) no involvement of the United States in the abduction.[342] Dr. Alvarez-Machain claimed that these elements did not exist in the present case.[343]

Dr. Alvarez-Machain alleged that the U.S.-Mexico Extradition Treaty was self-executing, thereby granting him standing to protest.[344] Historically, U.S. courts have recognized treaties to be self-executing.[345] According to Dr. Alvarez-Machain, not

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336. *Id.* at 28. "That the abduction did not violate the extradition treaty is evidenced first by the absence of any U.S. involvement in the kidnapping, and second by the absence of any protest by Peru." *Id.* at 28.

337. *Id.* at 23; *see supra* notes 170-76 and accompanying text (discussing the doctrine of specialty).

338. Respondent's Brief, *supra* note 243, at 29, *Alvarez-Machain* (No. 91-712).

339. Ford v. United States, 273 U.S. 593, 605-06 (1977) (finding *Ker* inapplicable to a claimed violation of the U.S.-Britain treaty to prevent smuggling of intoxicating liquors into United States).

340. Respondent's Brief, *supra* note 243, at 29, *Alvarez-Machain* (No. 91-712).

341. *Id.* "But the *Ker* case does not apply here . . . . Here a treaty of the United States is directly involved, and the question is quite different." *Id.*

342. *Id.* at 30.

343. *Id.*

344. *Id.* at 35. "If this [self-executing] standard has been met, an individual tried in violation of this particular provision by definition has standing to raise the issue." *Id.*

345. *Id.* at 37. "[T]he court has long recognized extradition treaties as prototypical examples of self-executing treaties. . . ." *Id.* Extradition treaties are considered self-executing, enforceable without implementing legislation, as opposed to executory treaties which are not enforceable until Congress enacts implementing legislation. Head Money Cases, 112 U.S. 580, 598-99 (1884).

only did an extradition treaty seek to promote law enforcement and preserve sovereignty, but Article 9 of the U.S.-Mexico Extradition Treaty also evidenced the intent to protect individual rights.[346] To support this proposition, Dr. Alvarez-Machain cited *Rauscher*,[347] where the Supreme Court held the treaty at issue to be self-executing and recognized the right of the accused.[348] Moreover, the Court in *Rauscher* implied an obligation to try an individual only for an extradited offense.[349] By analogy, the doctor argued, if a court would not allow Mr. Rauscher's prosecution, the Court would also forbid the prosecution of an abducted individual.[350] Dr. Alvarez-Machain felt this, coupled with Mexico's protest, granted him standing to assert a treaty violation.[351] According to international law and U.S. practice, Dr. Alvarez-Machain asserted repatriation to be the appropriate remedy.[352]

C. *The Decision of the United States District Court*

Dr. Alvarez-Machain filed a motion to dismiss his indictment due to outrageous government conduct and lack of personal jurisdiction.[353] Dr. Alvarez-Machain presented four theories to Judge Rafeedie, presiding judge of the U.S. District Court

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346. Respondent's Brief, *supra* note 243, at 39, *Alvarez-Machain* (No. 91-712). Dr. Alvarez-Machain argued that "[t]he prohibition against unconsented to abductions, expressed both in Article 9 and the whole structure of the Treaty, evidences a clear intent to confer benefits upon individuals. It is, therefore, self-executing." *Id.*

347. United States v. Rauscher, 119 U.S. 407 (1886); *see supra* notes 163-76 and accompanying text (discussing *Rauscher*).

348. *Id.*; Respondent's Brief, *supra* note 243, at 40, *Alvarez-Machain* (No. 91-712). Dr. Alvarez-Machain asserted that "*Rauscher* unequivocally established that an individual defendant *can* raise a violation of an extradition treaty in criminal proceedings, even when the particular term at issue is implicit." Respondent's Brief, *supra* note 243, at 40, *Alvarez-Machain* (No. 91-712) (emphasis in original).

349. *Rauscher*, 119 U.S. at 430.

350. Respondent's Brief, *supra* note 243, at 35, *Alvarez-Machain* (No. 91-712). According to the doctor, the situation in *Rauscher* and this case were analogous in that "[t]here is no valid reason for making a distinction between the implicit obligation not to try one who has been forcibly abducted by government agents in circumvention of a treaty and the implicit obligation not to try a person for unspecified offenses, held to be judicially enforceable in *Rauscher*." *Id.*

351. *Id.* at 41. "While Respondent has standing to raise the Treaty violation defensively because the prohibition against unilateral abduction is self-executing, the protest by Mexico serves an important evidentiary function in making it perfectly clear that Respondent has not been the subject of a consensual informal rendition." *Id.*

352. *Id* at 43.

353. *Caro-Quintero*, 745 F. Supp. at 601.

for the Central District of California.[354] First, Dr. Alvarez-Machain asserted that the United States deprived him of his Fifth Amendment due process rights.[355] Second, he claimed that the United States obtained his presence in violation of the U.S.-Mexico Extradition Treaty.[356] Third, Dr. Alvarez-Machain alleged that his presence was obtained in violation of both the Charters of the United Nations and the Organization of the American States.[357] Finally, Dr. Alvarez-Machain urged the court to use its supervisory power to dismiss the indictment.[358]

The District Court considered Dr. Alvarez-Machain's allegations and rejected his due process claim.[359] The court did, however, consider divestment based on the exception to the *Ker-Frisbie* doctrine set forth in *United States v. Toscanino*.[360] The court found that Dr. Alvarez-Machain's alleged mistreatment did not satisfy the *Toscanino* standard.[361] Dr. Alvarez-Machain's chest pains, experienced upon arrival to the United States, did not rise to the level of abuse.[362] Furthermore, Dr. Alvarez-Machain did not inform the examining physician of any mistreatment.[363] The court found it incredible that a doctor trained in trauma care, as was Dr. Alvarez-Machain, would not disclose acts of abuse to the treating physician.[364]

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354. *Id.* at 599-601.

355. *Id.* at 601.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* at 606.

360. *Id.*; United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); *see supra* notes 133-62 and accompanying text (discussing *Toscanino* exception).

361. *Caro-Quintero*, 745 F. Supp. at 606. "Dr. Machain's allegations of mistreatment, even if taken as true, do not constitute acts of such barbarism as to warrant dismissal of the indictment under the case law." *Id.* at 605. "Defendant has failed to demonstrate that his case fits within the narrow exception to the *Ker-Frisbie* doctrine." *Id.* at 606.

362. *Id.* at 605.

363. *Id.*; *supra* notes 280-81 and accompanying text (documenting Dr. Alvarez-Machain's denial of mistreatment).

364. *Caro-Quintero*, 745 F. Supp. at 605-06. The court stated that

> Dr. Machain's allegations of mistreatment are not worthy of belief. Dr. Machain, a medical doctor trained in trauma care, testified that shortly after his arrival in the United States he developed chest pains. Yet when he sought relief from various examining medical personnel, he failed to relate to them that he had been repeatedly shocked with an electrical apparatus the day before these pains developed. Surely Dr. Machain would have relayed this information to his treating physicians had he actually been repeatedly

The court also considered whether Dr. Alvarez-Machain's abduction violated the U.S.-Mexico Extradition Treaty.[365] As a preliminary matter, the court noted the inapplicability of the *Ker-Frisbie* doctrine in cases of treaty law and therefore did not consider it in this case.[366] The court then determined the U.S.-Mexico Extradition Treaty to be self-executing, thus subjecting the treaty to enforcement in federal court.[367]

In examining whether a treaty violation existed, the court turned its attention to the role of the United States in the abduction of Dr. Alvarez-Machain.[368] The court stated that the DEA, acting as agents of the United States, and with the apparent authority of the Attorney General's office, offered to pay a reward for the abduction of Dr. Alvarez-Machain and agreed to reimburse the abductors for their expenses.[369] The court thus found that the United States had engaged in a unilateral abduction, without the cooperation of the Mexican government.[370] This

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shocked. Under these circumstances, Dr. Machain's recent allegations of abuse are simply not credible.

Id.

365. *Id.* at 614.

366. *Id.* at 606. "The [*Ker-Frisbie*] doctrine has no application to violations of federal treaty law." *Id.*

367. *Id.* at 606. "A self-executing treaty is federal law which must be enforced in federal court unless superseded by other federal law." *Id.* Assured of its enforcement power, the court examined whether Dr. Alvarez-Machain had standing to claim a violation of the treaty. *Id.* The sovereign in a self-executing treaty has the right to raise a claim that the method of apprehension violates the procedure of an extradition treaty. The court, basing its judgment on the diplomatic notes that the Mexican government addressed to the State Department, found that Mexico had adequately protested Dr. Alvarez-Machain's abduction, thus creating derivative standing for Dr. Alvarez-Machain to raise such a claim. *Id.* at 606-07.

368. *Id.* at 609.

369. *Id.* The court determined that

> [t]he record reveal[ed] that the DEA and its informants were integrally involved in Dr. Machain's abduction. Prior to the kidnapping, the DEA induced the abuductors with the offer to pay a $50,000 reward for the successful abduction of Dr. Machain and promised to reimburse these individuals for their expenses. . . . Upon completion of the abduction, the DEA paid a $20,000 reward to the abductors and their families. In addition, many of the abductors and their families have been relocated to the United States. The United States pays approximately $6,000 per week in living expenses for the relocated abductors.

Id. Weekly payments to the abductors began on April 8, 1990, six days following Dr. Alvarez-Machain's abduction. Henry Weinstein, *Witness Tells of Kidnaping Payout*, L.A. TIMES, May 26, 1990, at 26. DEA spokesman, Frank Shults, characterized the U.S. $20,000 as payment for services to cover expenses and not a reward. *Id.*

370. *Caro-Quintero*, 745 F. Supp. at 612. The court noted that

conduct, according to the court, constituted a treaty violation.[371]

In order to remedy the treaty violation, the court deferred to international law principles.[372] Under international law, a state violating an international obligation must terminate the violation and make reparation to the offended state.[373] Accordingly, the court determined that Dr. Alvarez-Machain's repatriation was a proper remedy.[374]

D. *The Decision of the U.S. Circuit Court of Appeals*

The U.S. Circuit Court of Appeals for the Ninth Circuit affirmed the District Court's decision.[375] The Ninth Circuit, relying on its previous determinations in *United States v. Verdugo-Ur-*

> [i]n the present case, there has been no joint effort by the United States and Mexico. The record reveals no participation in the abduction by the Mexican government. Rather, the record reveals that earlier negotiations between the United States and known representatives of Mexico for an exchange of fugitives had broken down. When Mexico attempted to revive those negotiations, the United States refused. The United States then unilaterally proceeded with the abduction without the knowledge or participation of the Mexican government.

Id. Prior to this finding, the United States denied allegations of participation by U.S. agents. Ronald J. Ostrow and Marjorie Miller, *Mexico Sends Diplomatic Note to U.S. Asking Details on Suspect's Abduction*, L.A. TIMES, Apr. 19, 1990, at 6. Furthermore, according to Mexican officials, U.S. officials contended that the arrest was the result of a renegade operation from the L.A. DEA Office acting without authority from Washington. Marjorie Miller and Ronald J. Ostrow, *Mexico Threatens to Halt U.S. Anti-Drug Cooperation Over Abduction of Suspect*, L.A. TIMES, Apr. 19, 1990, at 6.

371. *Caro-Quintero*, 745 F. Supp. at 614. "[T]he United States has violated the extradition treaty between the United States and Mexico." *Id.*

372. *Id.*

373. *Id.* "'The reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'" *Id.* Ordinarily emphasis is placed on forms of redress that will "undo the effect of the violation, such as restoration of the *status quo ante*, restitution or specific performance of the undertaking." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 901 (1987); *see supra* note 9 (noting repatriation as remedy for abduction).

374. *Caro-Quintero*, 745 F. Supp. at 614. The court, citing *Toscanino* and *Rauscher*, recognized "a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped." *Id.* The court in *Caro-Quintero* determined "[t]he remedy in the present case is the immediate return of Dr. Machain to the territory of Mexico." *Caro-Quintero*, 745 F. Supp. at 614.

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

quidez,[376] stated that the forcible abduction of a Mexican national from Mexico by U.S. agents without the consent or acquiescence of the Mexican government violated the U.S.-Mexico Extradition Treaty.[377] According to the *Verdugo* court, a formal protest by the sovereign state would create standing for a national to allege a violation of the treaty.[378] When a treaty violation occurs, the remedy is repatriation.[379]

Relying on the findings of fact by the District Court, the Court of Appeals found a treaty violation.[380] The Court of Appeals therefore determined that a Treaty violation had occurred, and that Dr. Alvarez-Machain had standing to assert his rights under the treaty.[381] Consequently, the Ninth Circuit agreed with the District Court that the proper remedy was repatriation.[382]

E. *The Supreme Court's Holding*

In a six to three decision, the U.S. Supreme Court reversed the lower courts and sanctioned the abduction of Dr. Alvarez-Machain.[383] The majority opinion, delivered by Chief Justice William H. Rehnquist,[384] justified the U.S. government's actions and relied on both the *Ker-Frisbie* doctrine and the U.S.-Mexico Extradition Treaty.[385] Justice Stevens delivered the dissent and argued that *Rauscher* controlled and accordingly an implied term should be read into the treaty prohibiting abductions.[386]

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376. 939 F.2d 1341 (9th Cir. 1991); *see supra* notes 219-39 and accompanying text (discussing *Verdugo*).

377. *Alvarez-Machain*, 946 F.2d at 1467; *see* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656.

378. *Alvarez-Machain*, 946 F.2d at 1467; *Verdugo-Urquidez*, 939 F.2d at 1356.

379. *Alvarez-Machain*, 946 F.2d at 1466; *Verdugo-Urquidez*, 939 F.2d at 1359.

380. *Alvarez-Machain*, 946 F.2d at 1466. The District Court determined that the United States had abducted Dr. Alvarez-Machain through acts of the DEA and that Dr. Alvarez-Machain had derivative standing since the Mexican government had sent letters of protest to the U.S. government. *Caro-Quintero*, 745 F. Supp. at 608-09.

381. *Alvarez-Machain*, 946 F.2d at 1467.

382. *Id.*

383. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

384. *Id.* Justices White, Scalia, Kennedy, Souter, and Thomas joined the majority opinion. *Id.*

385. *Id.* at 2191-97; *supra* notes 106-62 (discussing the *Ker-Frisbie* doctrine and qualifications); *see* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656.

386. *Alvarez-Machain*, 112 S. Ct. at 2199. Justices Blackmun and O'Connor joined in dissent. *Id.* at 2197

1. The Majority Opinion

In the majority opinion, Chief Justice Rehnquist addressed the question of whether jurisdiction is proper when the United States abducts a criminal defendant from another country when an extradition treaty is in place.[387] In analyzing whether the abduction of Dr. Alvarez-Machain violated the U.S.-Mexico Extradition Treaty,[388] the Court identified and relied upon the propositions set forth in *Ker*,[389] *Rauscher*[390] and *Frisbie*.[391] The Court found that in the absence of the operation of an extradition treaty, *Ker* would support jurisdiction over Dr. Alvarez-Machain.[392] The Court also considered jurisdiction if rendition occurred pursuant to the U.S.-Mexico Extradition Treaty.[393]

In examining the U.S.-Mexico Extradition Treaty, the Court focused on Article 9,[394] which sets forth the procedure to be followed when a country requests extradition of a national of another country.[395] Under Article 9, the asylum country may either extradite the accused or submit the case to its own authorities for domestic prosecution.[396] The Supreme Court interpreted Article 9 as merely specifying one way in which a country may gain custody of an individual.[397] According to the Court, extradition treaties set forth procedures for narrowly defined situations that apply when countries invoke an extradition treaty.[398] Relying on the *Ker-Frisbie* doctrine, the U.S. courts have

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387. *Id.* at 2190.

388. *Id.* at 2192.

389. *See supra* notes 110-24 and accompanying text (discussing *Ker*).

390. *See supra* notes 163-76 and accompanying text (discussing *Rauscher*).

391. *Alvarez-Machain*, 112 S. Ct. at 2191-92; *supra* notes 125-32 and accompanying text (discussing *Frisbie*).

392. *Alvarez-Machain*, 112 S. Ct. at 2192-93.

393. *Id.*

394. *Id.* at 2194; Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7.

395. *See supra* notes 71-81 and accompanying text (discussing article 9 of U.S.-Mexico Extradition Treaty).

396. Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065, T.I.A.S. No. 9656 at 7; *see supra* notes 71-81 (discussing article 9 of the U.S.-Mexico Extradition Treaty); *see also Alvarez-Machain*, 112 S. Ct. at 2195 (discussing interpretation of U.S.-Mexico Extradition Treaty).

397. *Alvarez-Machain*, 112 S. Ct. at 2194. The Court found that "[a]rticle 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." *Id.*

398. *Id.* at 2194. "Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established

recognized jurisdiction even in cases of abduction.[399] Furthermore, the Supreme Court stated that Mexico had known of this practice since 1906.[400]

The Court considered and rejected Dr. Alvarez-Machain's contention that the U.S.-Mexico Extradition Treaty contained an implied term drawn from customary international law that prohibits abductions.[401] The Court rejected this assertion,[402] stating that international law did not apply to nations in the practice of extradition treaties.[403] Moreover, Dr. Alvarez-Machain relied on the general principle of customary international law that one government may not exercise its police power in the territory of another state.[404] The Court stated that this general proposition applied to situations of invasion of a nation and that one could not seriously contend that an invasion of the United States by Mexico would violate the terms of the extradition treaty.[405] In addition, the Court found the Ninth Circuit opinion to be an

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procedures." *Id.* The Court declined to find that a general prohibition of abductions existed as a result of the U.S.-Mexico Extradition Treaty. *Id.*

399. *Id.* at 2194. The Supreme Court asserts the treaty currently in effect between the U.S. and Mexico does not curtail the effect of *Ker*. *Id.*; *see supra* notes 106-62 (discussing the *Ker-Frisbie* doctrine).

400. *Alvarez-Machain*, 112 S. Ct. at 2194. The Court noted that

> [t]he history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the Solicitor General notes, the Mexican government was made aware, as early as 1906, of the *Ker* doctrine, and the United States' position that it applied to forcible abductions made outside of the terms of the United States-Mexico extradition treaty. Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of *Ker*.

Id.

401. *Id.* at 2195; *see supra* notes 321-52 and accompanying text (setting forth arguments of Dr. Alvarez-Machain).

402. *Alvarez-Machain*, 112 S. Ct. at 2195-2196.

403. *Id.* at 2195.

404. *Id.* at 2196; *see supra* notes 321-52 and accompanying text (setting forth argument of Dr. Alvarez-Machain).

405. *Alvarez-Machain*, 112 S. Ct. at 2196. The Court stated that

> Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not 'exercise its police power' in the territory of another state. There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations.

Id.

illogical interpretation that international abductions violate the purpose of the Treaty.[406]

The Supreme Court concluded that while the U.S.-Mexico Extradition Treaty did not expressly condone methods outside the extradition process, it also did not bar them.[407] The general principles cited by Dr. Alvarez-Machain failed to persuade the Court to enforce an implied term.[408] The Court did not find any language in the U.S.-Mexico Extradition Treaty that prohibited abductions.[409] The Court reversed the judgment of the Court of Appeals and remanded this case for further proceedings against Dr. Alvarez-Machain.[410]

2. The Dissenting Opinion

In his dissent, Justice John Paul Stevens contended that Dr. Machain's abduction violated the U.S.-Mexico Extradition Treaty.[411] He stated that although the U.S.-Mexico Extradition Treaty did not contain explicit terms banning abductions, the scope and object of the U.S.-Mexico Extradition Treaty imply an agreement to respect territorial integrity.[412] Justice Stevens acknowledged that the interpretation of a treaty must be consistent with the intent of the parties.[413] The United States and Mexico formed an extradition treaty so that the two countries could cooperate to fight crime and foster mutual assistance.[414] According to the dissent, the intent of the parties should be construed to prohibit abductions.[415] Furthermore, allowing abductions would render some of the provisions of the U.S.-Mexico Extradi-

406. *Id.* at n.14.

407. *Id.* at 2193-94. The Court observed that "[a]rticle 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." *Id.* at 2194.

408. *Id.*

409. *Id.* at 2195. "We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States." *Id.* at 2197.

410. *Id.* at 2197.

411. *Id.* at 2197. Justices Blackmun and O'Connor joined Justice Stevens in his dissent. *Id.*

412. *Id.* at 2199.

413. *Id.* at 2199.

414. Treaty, *supra* note 7, at pmbl., 31 U.S.T. at 5061, T.I.A.S. No. 9656 at 3; *Alvarez-Machain*, 112 S. Ct. at 2198.

415. *Alvarez-Machain*, 112 S. Ct. at 2198-2200.

tion Treaty meaningless.[416]

The dissent cited *Rauscher* to support its position that the Webster-Ashburton Treaty contained an implied term banning abductions.[417] The dissent noted that the Webster-Ashburton Treaty[418] between the United States and Great Britain was not as comprehensive as the U.S.-Mexico Extradition Treaty.[419] The Webster-Ashburton Treaty did not place any limit on jurisdiction once the requesting state gained custody of the individual.[420] Nevertheless, the Court in *Rauscher*, relying on the implied meaning of the Webster-Ashburton Treaty, would not allow an individual to stand trial for anything other than the extradited offense.[421] The dissent stated that *Rauscher* was correctly decided based on less clear legal standards than a violation of territorial integrity.[422] Therefore, a violation of territorial integrity, as was the case here, necessitated a comparable result.[423]

Furthermore, the dissent identified the majority's failure to differentiate between the conduct of private citizens and conduct authorized by the government as a critical flaw.[424] Conduct

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416. *Id.* at 2198. The dissent addressed the U.S. government's claim by stating

> [p]etitioner's claim that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform these, and other, provisions into little more than verbiage. For example, provisions requiring 'sufficient' evidence to grant extradition (Art. 3), withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitations for the crime has lapsed (Art. 7), and granting the requested State discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8), would serve little purpose if the requesting country could simply kidnap the person.

Id.; Treaty, *supra* note 7, at art. 2, art. 3, art. 5, art. 6, art. 7, art. 8, 31 U.S.T. at 5062-65, T.I.A.S. No. 9656 at 4-7.

417. *Alvarez-Machain*, 112 S. Ct at 2200.

418. Webster-Ashburton Treaty, *supra* note 167, art. 10, 8 Stat 572 at 576, T.S. No. 119; *see supra* notes 167-68 and accompanying text (discussing Webster-Ashburton Treaty).

419. *See* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656; *see* Webster-Ashburton Treaty, *supra* note 167, art. 10, 8 Stat at 576, T.S. No. 119; *Alvarez-Machain*, 112 S. Ct. at 2200.

420. *Alvarez-Machain*, 112 S. Ct. at 2200.

421. *Rauscher*, 119 U.S. at 432. Mr. Rauscher was extradited for the offense of murder, but he was charged with the offense of inflicting cruel and unusual punishment. *Id.* at 409. The Rauscher court held that he could not be tried for any offense other than murder. *Id.* at 432.

422. *Id.* at 2202-03.

423. *Id.* at 2202-03.

424. *Id.* at 2203.

authorized by government is a violation of international law, and in the dissent's view, a violation of an extradition treaty.[425] Comparing *Ker* to the case at bar, the dissent noted that the kidnapping of Mr. Ker occurred within Peru without any pretence of authority under the treaty or by the U.S. government.[426] Unlike *Ker*, the United States participated in the abduction of Dr. Alvarez-Machain.[427] The dissent therefore concluded that the majority's misplaced reliance on *Ker* contributed to the erroneous decision.[428]

F. *The District Court's Decision on Remand*

On remand the District Court for the Central District of California dismissed Dr. Alvarez-Machain's case, acquitting him of all charges on December 14, 1992.[429] At the close of the prosecution's case the court announced it would entertain the possibility of a dismissal for lack of evidence.[430] Judge Rafeedie found that the government's evidence amounted to wild speculation and subsequently dismissed the charges before the case reached a jury.[431]

The court based the acquittal on a lack of direct evidence.[432] Prosecutors failed to present sufficient evidence that Agent Camarena actually received any of the drugs that were allegedly administered by Dr. Alvarez-Machain.[433] The body of Agent Camarena contained no trace of drugs[434] and showed no puncture marks.[435] One government witness testified to having

425. *Id.*

426. *Id.* at 2204.

427. *Id.* at 2197. The case "does not involve an ordinary abduction by a private kidnapper, or bounty hunter, as in *Ker v. Illinois*. . . ." *Id.*

428. *Id.*

429. *Man Is Convicted In Drug Agent's Torture Death*, N.Y. TIMES, Dec. 22, 1992, at A18. Dr. Machain's co-defendant, Ruben Zuno Arce, was not acquitted. *Id.* Mr. Arce was convicted of all charges stemming from his association with the drug traffickers. Mr. Zuno acted as an intermediary between Guadalajara traffickers and corrupt Mexican officials with high positions in law enforcement and military. *Id.*

430. Jim Newton, *Prosecution Rests in Camarena Case*, L.A. TIMES, Dec. 11, 1992, at B1.

431. David Clark Scott, *Mexico Hails Acquittal in U.S. Murder Case*, CHRISTIAN SCI. MONITOR, Dec. 16, 1992, at 4.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Mexico Doctor Acquitted in DEA Agent's Murder*, HOUS. CHRON., Dec. 15, 1992, at A1 [hereinafter *Doctor Acquitted*].

seen Dr. Alvarez-Machain rinsing syringes at the ranch where Agent Camarena's torture took place.[436] Another witness alleged he saw Dr. Alvarez-Machain associate with the drug traffickers.[437] The government's only physical evidence linking Dr. Alvarez-Machain to the crime, however, were fingerprints found at the ranch.[438] Though witnesses testified to Dr. Alvarez-Machain's role in Agent Camarena's torture and implicated various Mexican political officials,[439] Judge Rafeedie found the prosecution's case lacked sufficient evidence to find Dr. Alvarez-Machain guilty of kidnapping, murder and torture.[440] The Judge accordingly dismissed the charges and allowed Dr. Alvarez-Machain to return to Mexico.[441]

III. *EFFECTS OF* UNITED STATES v. ALVAREZ-MACHAIN

In *United States v. Alvarez-Machain*, the Supreme Court condoned the abduction of a non-U.S. national.[442] The Court rendered its decision by relying on well established cases and principles in the area of extraterritorial apprehension.[443] Nevertheless, the authorities cited are not directly comparable to the situation in *Alvarez-Machain*.[444] As a result, a persisting question

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436. *Id.*

437. *Id.*

438. Scott, *supra* note 431, at 4. Fingerprints were found on a dry cleaning bag in a closet, but there was no indication when the prints were made. *Doctor Acquitted*, *supra* note 435, at A1.

439. *See supra* note 81 and accompanying text (referring to allegations of corruption in Mexico's Attorney General's Office and some executive leaders). Rene Lopez Romero, a former bodyguard of Raphael Caro-Quintero, testified he heard Mr. Caro-Quintero vehemently threaten Agent Camarena. Jim Newton, *Camarena's Abduction and Torture Described*, L.A. TIMES, Dec. 10, 1992, at B1. Another witness, Jorge Godoy, also a former bodyguard to Mr. Caro-Quintero, testified implicating political officials. Jim Newton and Marjorie Miller, *Testimony Links Mexican Officials to Agent's Death*, L.A. TIMES, Dec. 9, 1992, at A1.

440. *See Doctor Acquitted*, *supra* note 435, at A1.

441. *Id.* Judge Rafeedie told the prosecutors that "there has to be stronger evidence than you have offered to find that a man is guilty of kidnapping, murder and torture." *Id.* Dr. Alvarez-Machain subsequently filed a U.S. $20 million dollar administrative claim against the Justice Department for violation of his civil rights. Jerry Seper, *Justice Sued for $20 Million by Doctor in Camarena Case*, WASH. TIMES, July 10, 1993, at A5.

442. *Alvarez-Machain*, 112 S. Ct 2188.

443. *See supra* notes 383-410 and accompanying text (discussing Supreme Court's opinion in *Alvarez-Machain*); *see supra* notes 106-32 and accompanying text (discussing *Ker, Frisbie*); *see supra* notes 163-76 (discussing *Rauscher*).

444. *Alvarez-Machain*, 112 S. Ct. at 2191. The Supreme Court itself stated "we have never before addressed the precise issue raised in the present case. . . ." *Id.*

is whether the Court allowed the circumstances of the crime to dictate the outcome. *Alvarez-Machain* gives rise to the need for specific policy regarding abductions.

A. *Applicability of U.S. Case Law in the Supreme Court's Decision in* Alvarez-Machain

The distinction between the *Ker-Frisbie* line of cases and *United States v. Rauscher*'s progeny is central in analyzing *Alvarez-Machain*.[445] *Ker-Frisbie* applies when there is no invocation of a treaty,[446] while *Rauscher* applies in situations where a treaty controls and a treaty violation exists.[447] The Supreme Court in *Alvarez-Machain* correctly acknowledged the distinction between the case law principles and correctly identified them as established principles.[448] The controversy does not lie in what these cases stand for, but rather in the Supreme Court's interpretation and application of these case law principles to the circumstances in *Alvarez-Machain*.

Ker v. Illinois[449] applies in situations where an extradition treaty is not invoked.[450] *Ker* allowed jurisdiction over a defendant before the court regardless of the method used to apprehend the defendant. *Ker*, however, contains several elements that distinguish it from *Alvarez-Machain*. First, although the United States followed an existing extradition treaty, the extradition procedure could not be implemented.[451] Second, the United States sought Mr. Ker, a U.S. citizen, for a crime committed within the United States, which gave the United States territorial jurisdiction.[452] Third, *Ker* involved a private abduction by

445. 112 S. Ct. 2188 (1992).

446. *See supra* notes 106-62 and accompanying text (discussing *Ker-Frisbie* doctrine).

447. *See supra* notes 163-76 and accompanying text (discussing *Rauscher*).

448. *Alvarez-Machain*, 112 S. Ct. at 2191. The Court considered "proceedings in claimed violation of an extradition treaty, [in United States v. Rauscher] and proceedings against a defendant brought before a court by means of forcible abduction [in Ker v. Illinois]." *Id.* at 2191.

449. 119 U.S. 436 (1886).

450. *Id.* at 436; *see supra* notes 110-24 and accompanying text (discussing *Ker*).

451. *See supra* notes 113-17 and accompanying text (explaining lack of success of extradition procedure was due to civil unrest in Peru, which resulted in absence of formal, functioning government to enforce treaty).

452. *See supra* notes 110-24 and accompanying text (discussing *Ker*).

the United States of a U.S. citizen.[453] Finally, Peru had no objection to the action and thus consented to the rendition.[454] Because no conflict occurred, no issue arose as to the violation of the extradition treaty.[455] The *Ker* case presented an unusual situation. The Supreme Court decided this case in 1886 when the Peruvian government was unstable, international law principles were undeveloped and extradition treaties were not utilized as often as they are today.[456]

The case of *Alvarez-Machain* addressed a treaty violation. *Alvarez-Machain* involved a crime committed in Mexico by Mexican citizens.[457] The United States therefore had no territorial jurisdiction nor sovereign power over its own citizen.[458] In addition, although a fully enforceable extradition treaty was in place and operable, it was not invoked.[459] A crucial matter in the *Alvarez-Machain* case was that paid agents of the U.S. government, and not private persons, performed the abduction. As is evident, various differences exist between *Ker* and *Alvarez-Machain* that should have precluded *Ker*'s applicability.

The case of *Frisbie v. Collins*[460] upheld *Ker* and allowed jurisdiction regardless of how the government produced the defendant.[461] Specifically, it condoned domestic interstate abductions involving U.S. actions over U.S. citizens.[462] Because the action involved states within U.S. territory, violations of the principles

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453. *See supra* note 113 (explaining that Pinkerton agent was forerunner to U.S. Marshal Service).

454. *See supra* notes 110-24 and accompanying text (discussing *Ker*).

455. *Id.*

456. *Alvarez-Machain*, 112 S. Ct. at 2198. The dissent noted that "the extradition treaty with Mexico is a comprehensive document containing 23 articles and an appendix listing the extraditable offenses covered by the agreement." *Id.*

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

458. OPPENHEIM, *supra* note 29, at 331. Oppenheim notes that

> Many States claim jurisdiction with regard to certain acts committed by a foreigner in foreign countries. . . . These States cannot of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the commission of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment.

Id.

459. *See* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656. *See generally* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (utilizing extraterritorial abduction as alternative to extradition).

460. 342 U.S. 519 (1952).

461. *Id.* at 519.

462. *Id.*

of sovereignty and territoriality did not ensue.[463] Therefore, there is no international basis for the *Frisbie* decision and the principles of abduction found in *Frisbie* should not apply to *Alvarez-Machain.*

The Supreme Court mistakenly relied upon *United States v. Rauscher*[464] to support its decision in *Alvarez-Machain.*[465] Unlike *Ker*, *Rauscher* involved a legal extradition under a valid extradition treaty and did not address whether extraterritorial abductions violated extradition principles.[466] The issue before the Court in *Rauscher* was whether the treaty contained an implied term forbidding prosecution of a defendant for a crime other than the extradited crime.[467] *Alvarez-Machain* addresses the doctrine of specialty, because murder is one of the enumerated offenses encompassed in the U.S.-Mexico Extradition Treaty.[468] The Supreme Court, however, cited this case for the reasoning regarding the interpretation of a treaty when a treaty is invoked.[469] If the Supreme Court had found the U.S.-Mexico Extradition Treaty governed the *Alvarez-Machain* case, *Rauscher* would have been crucial in finding an implied term in the U.S.-Mexico Extradition Treaty that prohibited abductions.[470]

In addition to erroneously applying U.S. case law, the Supreme Court chose to overlook the U.S. government's involvement in the abduction of Dr. Alvarez-Machain.[471] According to customary international law, one government's presence in another nation violates the territoriality and sovereignty of that nation.[472] In addition, government participation in an unauthorized apprehension points to a violation of an extradition treaty. This indicates the importance of who effectuated the apprehension. Yet, the Supreme Court, in determining whether the U.S.-

463. *See supra* note 34 (discussing principle of sovereignty and territoriality).

464. 119 U.S. 407 (1886).

465. *Alvarez-Machain*, 112 S. Ct. at 2195; *see supra* notes 163-76 and accompanying text (discussing *Rauscher*).

466. *See supra* notes 163-76 and accompanying text (discussing *Rauscher*).

467. *Rauscher*, 119 U.S. at 407.

468. *See* Treaty, *supra* note 7, art. 17, 31 U.S.T. at 5071-72, T.I.A.S. No. 9656 at 13.

469. *Alvarez-Machain*, 112 S. Ct. at 2195. The Court stated "we have previously considered proceedings in claimed violation of an extradition treaty . . . in *Rauscher.*" *Id.* at 2191.

470. *Alvarez-Machain*, 112 S. Ct. at 2145.

471. *See supra* notes 387-410 and accompanying text (discussing majority opinion in *Alvarez-Machain*).

472. *See supra* note 3 (discussing customary international law).

Mexico Extradition Treaty controlled, did not consider the undisputed fact that the U.S. government paid agents to abduct Dr. Alvarez-Machain.[473] This factor, important in treaty interpretation and customary international law, was ignored by the Supreme Court.

B. *Implications of* Alvarez-Machain

The case of *Alvarez-Machain* is not an isolated case in the area of extraterritorial apprehension. The Court's rationale and decision in this case has created controversy in the international legal community, the United States, and in the area of diplomatic relations abroad. It is important to consider these ramifications in the context of U.S. international and domestic relations.

1. U.S.-Mexican Relations Compared With U.S.-Canadian Relations

The operation of the U.S.-Mexico Extradition Treaty in this case illustrates the duplicity of the United States in abiding by extradition treaties. The United States holds a separate bilateral extradition treaty with Mexico and with Canada.[474] Mexico and Canada are similarly situated in that each borders the United States, each holds an extradition treaty with the United States, and each country holds political influence.[475] In spite of the similarities, the United States, however, has not afforded Canada and Mexico comparable treatment in the area of extraterritorial apprehension.

a. U.S.-Canadian Relations

Canada and the United States have traditionally subscribed to the principle that an abduction, when protested, must result in repatriation.[476] Cases that involved abduction and protest have resulted in restoration of the status quo and repatriation of

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473. *Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990).

474. *See* Treaty, *supra* note 7, 31 U.S.T. 5059, T.I.A.S. No. 9656; U.S.-Canada Treaty, *supra* note 184, 27 U.S.T. 983, T.I.A.S. No. 8237.

475. *See supra* notes 240-441 and accompanying text (discussing *Alvarez-Machain*); *see supra* notes 183-203 and accompanying text (discussing *Jaffe*).

476. Brief of the Government of Canada, *supra* note 183, at 8, *Alvarez-Machain* (No. 91-712); *see supra* note 9 (discussing repatriation as remedy).

the abducted individual.[477] Such was the case in *Jaffe v. Smith*.[478]

Jaffe and *Alvarez-Machain* encompass similar jurisdictional issues.[479] In *Jaffe*, the United States obtained personal jurisdiction over the defendant through abduction, without utilizing the U.S.-Canada Extradition Treaty.[480] The United States admitted that the kidnapping of Mr. Jaffe, by bounty hunters, offended Canada's territoriality and sovereignty.[481] In response to the Canadian government's protest of the abduction, the United States repatriated Mr. Jaffe and acknowledged the need to alleviate tension in order to foster favorable relations.[482]

Following this incident the countries effected an amendment to the U.S.-Canada Extradition treaty.[483] The United States and Canada broadened the definition of extraditable offense to include crimes punishable by more than one year imprisonment.[484] In addition, bounty hunters seizing persons within Canada would be extradited from the United States and subject to kidnapping charges.[485]

The U.S. government dealt with Mexico and the issues surrounding *Alvarez-Machain* in an opposing manner. The United

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477. Brief of Government of Canada, *supra* note 183, at 11, *Alvarez-Machain* (No. 91-712).

478. 825 F.2d 304, 307 (11th Cir. 1987); *supra* notes 183-203 (discussing Jaffe v. Smith).

479. *Jaffe*, 825 F.2d at 307-08; *Alvarez-Machain*, 112 S. Ct. at 2193-97 (1992).

480. U.S.-Canada Extradition Treaty, *supra* note 184, 27 U.S.T. 983, T.I.A.S. No. 8237.

481. *See* Memorandum from Secretary of State George P. Schultz to State of Florida Probation and Parole Commission (July 22, 1983); *see supra* note 34 (discussing principles of sovereignty and territoriality).

482. *See* Memorandum from Secretary of State George P. Schultz to State of Florida Probation and Parole Commission (July 22, 1983).

483. David K. Shipler, *U.S. and Canada Close Extradition Gap*, N.Y. TIMES, Jan. 12, 1988, at A3. On January 11, 1988, Secretary of State George P. Schultz and Canadian Secretary of State for External Affairs, Joe Clark, signed a protocol, amending the U.S.-Canada Extradition Treaty. *Id.*; *see supra* notes 183-203 and accompanying text (discussing *Jaffe*).

484. Gabriel M. Wilner, *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). In addition, following the *Jaffe* incident, the United States and Canada amended their extradition treaty. *Id.* To discourage suspects from seeking refuge in either the United States or Canada, the protocol broadened the meaning of extraditable offense to include a crime in both countries punishable by more than one year of imprisonment. *Id.*

485. Wilner, *supra* note 484, at 489. In addition, bounty hunters seizing persons within Canada, would be extradited to face charges kidnapping charges. *Id.*

States paid agents to abduct Dr. Alvarez-Machain from Mexico without invoking the U.S.-Mexico Extradition Treaty.[486] Mexico protested the abduction by sending a series of diplomatic notes demanding Dr. Alvarez-Machain's return.[487] The United States, however, did not concede any violation of international law and did not respond by repatriating Dr. Alvarez-Machain.[488] Instead the United States claimed justification for its actions under the *Ker-Frisbie* doctrine.[489]

After the Supreme Court's decision in *Alvarez-Machain*, Mexico further expressed its outrage. Not only did Mexico threaten to desist in efforts with the United States to combat drug trafficking, but Mexico also demanded a renegotiation of its extradition treaty with the United States.[490] The United States responded by assuring Mexico that abductions would be used only in extreme circumstances and U.S. officials expressed that the United States held the preservation of Mexico's sovereignty and territoriality in highest regard.[491]

The United States accommodates countries according to the diplomatic power of countries and U.S. necessity to maintain favorable international relations with certain countries.[492] The

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486. *See supra* notes 368-71 and accompanying text (discussing United States involvement in abducting Dr. Alvarez-Machain).

487. *See supra* notes 284-88 and accompanying text (detailing notes sent by Mexico protesting abduction).

488. *See supra* notes 289-320 and accompanying text (setting forth argument of United States).

489. *Id.*

490. Neil A. Lewis, *U.S. Tries to Quiet Storm Abroad Over High Court's Right to Kidnap*, N.Y. TIMES, June 17, 1992, at A8. The Mexican government demanded "immediate renegotiation of the extradition treaty to bar the sort of kidnappings that have now won sanction by the Supreme Court." *Id.* Sharon LaFraniere, *Baker Offers Reassurances After Court Kidnap Ruling*, WASH. POST, June 17, 1992, at A2. "Mexico announced that it was essentially severing all cooperation between the two countries on drug investigations." *Id.* Marjorie Miller and Ronald J. Ostrow, *Mexico Threatens to Halt Anti-Drug Cooperation Over Abduction of Suspect*, L.A. TIMES, Apr. 19, 1990, at A6.

491. Sharon LaFraniere, *Baker Offers Reassurances After Court Kidnap Ruling*, WASH. POST, June 17, 1992, at A2. Attorney General William P. Barr said the United States "would use its 'snatch' authority 'only in the most compelling circumstances.'" *Id.* Secretary of State James A. Baker, III offered reassurances that "the United States respects the sovereignty of foreign governments, despite [the] Supreme Court ruling." *Id.*

492. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 205. Professor Abramovsky contends that "the ultimate lesson of the *Jaffe* case is that there are situations in which the executive branch does not sanction extraterritorial abductions, namely when the government of the asylum country is capable of applying substantial diplomatic pressure on the administration." *Id.*

United States in *Jaffe*, declined to withstand Canada's protests abandoning the opportunity to vindicate Mr. Jaffe's wrongs.[493] 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 country. In contrast, the situation in *Alvarez-Machain* indicated that the United States did not value Mexico as a strong and needed diplomatic force. At Mexico's protests, the U.S. government did not intervene in the judicial proceedings to alleviate tension between the countries, but rather allowed the U.S. courts to make their determinations.

Although reasons may exist to justify the actions of the United States, the fact remains that the United States deals with countries in contrasting and at times hypocritical ways. Specific factors involved in the *Alvarez-Machain* case are that the United States and Mexico have engaged in a joint effort to combat drug trafficking and annihilate drug rings.[494] While *Alvarez-Machain* involved drug enforcement and the kidnap and murder of a U.S. DEA agent, *Jaffe* involved land sale violations.[495] The murder of a U.S. law enforcement official combatting a dangerous drug trade was more than likely interpreted as an affront to the United States and played a large factor in U.S. discretion to abduct Dr. Alvarez-Machain.

Whatever the reason for the disparity of treatment, the United States cannot escape the unfavorable response to *Alvarez-Machain*. Such disparity in conduct between the *Alvarez-Machain* case and the *Jaffe* case, places the United States in a precarious position. The United States presents itself as ignoring international policy and selecting principles of international law according to the situation and the best interests of the United States. This inconsistent application can only be expected to cause repercussions with other nations where the United States has relations and seeks cooperation.

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493. Abramovsky, *Catch and Snatch Policy*, *supra* note 12, at 205. Professor Abramovsky maintains that "it is also clear that the administration did not deem the risk of not bringing Jaffe to justice before a court in the United States to be worth jeopardizing its foreign relations with Canada." *Id.*

494. Marjorie Miller & Ronald J. Ostrow, *Mexico Threatens to Halt U.S. Anti-Drug Cooperation*, L.A. TIMES, Apr. 19, 1990, at A6.

495. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190; Jaffe v. Smith, 825 F.2d 304, 305-06 (11th Cir. 1987).

b. U.S.-Mexico Relations

Mexico viewed the December 14, 1993 release of Dr. Alvarez-Machain as a victory.[496] Undeniably, the events surrounding the apprehension and prosecution of Dr. Alvarez-Machain caused tension in U.S.-Mexico relations.[497] The relations between the United States and Mexico deserve closer examination in dealing with this issue.

Mexico contended that the United States disrespectfully violated Mexico's territoriality and sovereignty.[498] In protesting the abduction, Mexico expected the United States to afford a remedy consistent with international law principles and respect previously given to other countries. Mexico, however, did not succeed in the repatriation of Dr. Alvarez-Machain and refused to go unnoticed.

Mexico made a vehement protest against the United States in spite of the benefits Mexico receives from the United States. Mexico gained advantages from the United States in drug enforcement, economic aid and currently in the North American Free Trade Agreement ("NAFTA"). Mexico seemingly risked jeopardizing its position with the United States by contesting Dr. Alvarez-Machain's jurisdiction and asserting international law violations.

Mexico strives to forsake its status as a developing country and become a strong national force.[499] In its protest to the ab-

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496. David Clark Scott, *Mexico Hails Acquittal in U.S. Murder Case*, CHRISTIAN SCI. MONITOR, Dec. 16, 1992, at 4.

497. *See* Henry Weinstein, *More Suspects to be Sought in Camarena Case*, L.A. TIMES, Aug. 10, 1990, at A3.

498. Brief for the United Mexican States as Amicus Curiae on *writ of certiorari* to the United States Court of Appeals for the Ninth Circuit at 11, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), 112 S. Ct 2188 (1992) (No. 91-712). Mexico President Carlos Salinas de Gortari made a speech stating that "the fight against drug trafficking cannot be used as a pretext for violating the law nor the territory of another country." Ronald Ostrow, *Mexican Leader Assails U.S. Drug War Conduct*, L.A. TIMES, Apr. 20, 1990, at A9. The Mexico President also stated that "international cooperation must be based on unrestricted respect for the sovereignty of each nation." *Id.*; *see, also* Juan M. Vasquez, *U.S. Bitterness Lingers in Drug Agent's Killing*, Mar. 17, 1985, L.A. TIMES, at 1 (describing U.S. disregard for Mexico's sovereign rights).

499. Anthony DePalma, *Reform in Mexico: Now You See It,. . .*, N.Y. TIMES, Sept. 12, 1993, at E4. "What makes Mexico so interesting now is that for the first time, a developed country like the United States is thinking of joining hands so firmly with a developing country like Mexico, and Mexico is determined to show that it is worthy of its new status. . . . Many economic and social reforms have come out of Los Pinos . . . and at least on the surface it appears that Mexico is truly re-inventing itself." *Id.*

duction of Dr. Alvarez-Machain, Mexico took the opportunity to express to the United States, its position as an equal. With principles of international law in its favor and other countries noticeably concerned with the outcome of this case and expressing an opinion consistent with Mexico, Mexico's protests served to establish recognition for its country while addressing the concerns of other countries.

2. Effects on Future Enforcement of Extradition Treaties and the United States' Move Towards a Specific Policy Regarding Extraterritorial Apprehensions

Nations have reacted to the Supreme Court's decision in *Alvarez-Machain* in several ways. On January 12, 1993, the Costa Rican Supreme Court invalidated the Costa Rica-U.S. Extradition Treaty following a U.S. citizen's habeas corpus appeal.[500] Costa Rica currently has several drug traffickers incarcerated awaiting extradition to the United States.[501] As a result of the Costa Rican Supreme Court's ruling, these individuals may not be extradited.[502]

Other organizations and countries have also expressed a reaction to the Supreme Court's reluctance to adhere to extradition law. Canada has expressed that an abduction from Canadian territory is a criminal act.[503] The Swiss Justice Ministry expressed disfavor with the ruling.[504] The Parliament of Uruguay interprets the decision as a lack of understanding for international law and extradition treaties.[505] Brazil has expressed its intent to invalidate its extradition treaty with the United States.[506] Some states, such as Mexico, have demanded the renegotiation

500. Maureen Walsh, *Costa Rican Court Invalidates Extradition Treaty*, 9 INT'L ENFORCEMENT L. REP. 57 (1993).

501. *Id.*

502. *Id.*

503. Sharon LaFraniere, *Baker Offers Reassurances After Court Kidnap Rule*, WASH. POST, June 17, 1992, at A2; *Canada: Government Asks for U.S. Promise Not to Abduct Suspects*, Inter Press Serv., July 20, 1992, *available in* LEXIS, Nexis Library, INPRES File.

504. Sharon LaFraniere, *Baker Offers Reassurances After Court Kidnap Ruling*, WASH. POST, June 17, 1992, at A2. The Swiss Justice Ministry, Juerg Kistler stated "imagine where it would lead if every country would do that. You would have anarchy." *Id.*

505. Andrew L. Wilder, Recent Development, *United States v. Alvarez-Machain*, 32 VA. J. INT'L L. 979, 993 (1992).

506. Maureen Walsh, *U.S. Customs Agents' "Sting" of Cypriot in the Bahamas and Costa Rican Supreme Court's Invalidation of U.S. Extradition Treaty Put Pressure on U.S. Extradition Policy*, 9 INT'L ENFORCEMENT L. REP. 58, 60 (1993).

of their extradition treaty.[507]

International organizations such as the Organization of American States ("OAS"), have expressed disfavor with the United States.[508] Argentina, Brazil, Paraguay, Uruguay, Chile and Bolivia requested the American Juridical Committee, a part of the OAS, to issue an advisory opinion regarding the outcome of *Alvarez-Machain*.[509] The Juridical Committee unanimously held that the United States violated Mexico's sovereignty and acted independently of established international principles.[510]

In response to the controversy prompted by the *Alvarez-Machain* decision, the U.S. Congress introduced legislation to address this issue. On July 7, 1992, the House of Representatives considered the International Kidnaping and Extradition Treaty Act (the "Act").[511] This legislation specifically bars prosecution of a person who is forcibly abducted from a non-U.S. nation by an agent of the United States where an extradition treaty is in place.[512] At the time of introduction of this legislation, the Act sought to restore respect for a nation's sovereignty and to express the view that extradition treaties serve to afford a nation a procedure for apprehension.[513] Recently, Senator Patrick Moynihan introduced a bill to amend the Foreign Assistance Act of 1961.[514] The amendment prohibits direct arrest and abduction

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507. *Id.* at 60.

508. *Id.*

509. Wilder, *supra* note 505, at 993.

510. Wilder, *supra* note 505, at 993. The Committee issued an opinion and determined that "the kidnapping in question is a grave violation of international rights and a transgression of the sovereignty of Mexican territory." *Id.*

511. 138 Cong. Rec. H6019, 102d Cong., 2d Sess. (1992).

512. *Id.* The International Kidnapping and Extradition Treaty Enforcement Act of 1992 provides in pertinent part:

> (a) In General. — A person who is forcibly abducted from a foreign place which has in effect an extradition treaty with the United States—
> (1) by the agents of a governmental authority in the United States for the purposes of a criminal prosecution; and
> (2) in violation of the norms of international law; shall not be subject to prosecution by any governmental authority in the United States.
> (b) Foreign Governmental Consent. — An abduction is not, for the purposes of this section, a violation of the norms of international law if the government of the foreign place consents to that abduction, but such consent may not be implied by the absence of a prohibition on such abductions in a treaty regarding extradition.

Id.

513. *Id.*

514. The Amendment to Section 481(c) of the Foreign Assistance Act provides:

by U.S. agents in any non-U.S. nation. Domestic concern in the area of extraterritorial apprehensions as well as concern expressed by non-U.S. nations indicates that the United States cannot continue operating without specific policy to address this situation.

CONCLUSION

United States v. Alvarez-Machain reveals the difficulties behind the lack of specific legislation directed towards extraterritorial apprehension. Despite the existence of extradition treaties, the United States in recent past has used extralegal means of apprehensions with increased frequency. With the decision of *Alvarez-Machain*, the United States' outdated interpretation of international law principles received renewed attention. In addition, to allow the U.S. Supreme Court to interpret existing U.S. policy and international law principles is unsatisfactory when relations between the United States and other nations are crucial. The need to update and clarify the way the United States deals with other countries has become crucial. Nations await the United States to redefine its extradition policy and alleviate the tension created by the events surrounding this decision.

*Aimee Lee**

(1) Prohibition on Direct Arrest and Abduction.

(A) Notwithstanding any other provision of law, no officer, agent or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action; and

(B) Notwithstanding any other provision of law, no officer, agent of employee of the United States Government may, directly or indirectly, authorize, carry out or assist in the abduction of any person within the territory of any foreign state exercising effective sovereignty over such territory without the express consent of such state.

S. 72, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Nexis Library, LEGIS File.

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