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THE ARGUMENT AGAINST INTERNATIONAL ABDUCTION OF CRIMINAL DEFENDANTS

AMICUS CURIAE BRIEF FILED BY THE LAWYERS COMMITTEE FOR
HUMAN RIGHTS IN *UNITED STATES V. HUMBERTO ALVAREZ-
MACHAIN*

Ruth Wedgwood*

SUMMARY OF ARGUMENT

All citizens of national states, including American, Mexican, and Kuwaiti alike, share a common interest in the fundamental human liberty to be free from abduction, disappearance and arbitrary arrest. Using illegal force and violence to remove any person from his homeland erodes the standards of international law on which all citizens of free states have relied. Humberto Alvarez-Machain is wanted in the United States for extremely serious crimes committed in Mexico in the course of a narcotics racketeering enterprise. But it is the glory of the United States and its system of justice that we proceed by principle rather than expedience. The short-run temptation to obtain and punish a particular defendant should not be allowed to endanger the liberty of all.

1. THE KIDNAPPING AND ABDUCTION OF HUMBERTO ALVAREZ-MACHAIN BY PERSONS ACTING AT THE REQUEST OF UNITED STATES AGENTS VIOLATED THE 1980 TREATY OF EXTRADITION BETWEEN THE UNITED STATES AND MEXICO, AND DEPRIVED THE TRIAL COURT OF JURISDICTION OVER THE DEFENDANT.

Extradition treaties serve the several purposes of promoting the enforcement of criminal law, protecting the sovereignty of each signatory nation over its own territory, and providing safeguards for the civil liberties of citizens and other individuals in inter-state surrenders. The United States-Mexico extradition treaty contains provisions guarding against double jeopardy, violations of statutes of limitations, and extradition for political offenses. The treaty preserves to both nations the

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right to decline extradition of their own national citizens. The treaty provides for each nation's scrutiny of the evidence supporting an extradition request, before extradition is granted. In both countries, this includes scrutiny by a reviewing judge. The treaty also allows each nation to terminate its participation in the treaty guarantees upon six months notice. It would make a mockery of these protections to suppose that nonetheless, without observing the treaty safeguards, the treaty permits either nation to kidnap citizens within the territory of the other and continue their detention once "safely" over the border. The forcible abduction of Alvarez-Machain from his workplace in Mexico and his continued detention for trial violate the 1980 United States-Mexico treaty.¹

The plain language and structure of the United States-Mexico treaty, its history, the public record assertions of prior Secretaries of State, and the authoritative Harvard Research in International Law support this view. The United States Attorney is simply mistaken in his assertion that this view of extradition treaties lacks authority. The plain language of the 1980 extradition treaty recognizes and protects the territorial sovereignty of the treaty parties. The careful procedures and standards of the treaty make sense only in light of this bar against transborder abductions. The Harvard Research in International Law, and the assertions of former Secretaries of State, concur that extradition treaties preclude extra-treaty abductions. That a treaty may limit the exercise of jurisdiction by the United States and its courts is established by the cases of *United States v. Rauscher*,² *Ford v. United States*,³ and *Cook v. United States*.⁴ The Harvard Research in International Law, and the assertions of former Secretaries of State also suggest that governmental abductions violating extradition treaties preclude the exercise of jurisdiction by the courts of the United States government as treaty signatory.

*Ker v. Illinois*⁵ is entirely distinct from this case. There are two crucial differences. In *Ker*, the extradition treaty between the United States and Peru was not in effect because of the occupation of Peru by Chilean troops. And in *Ker*, the government of Peru as treaty party did

1. Extradition Treaty Between the United States of America and United Mexican States (signed May 4, 1978; entered into force Jan. 25, 1980), 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on Dec. 9, 1980, pursuant to Article 102 of the Charter of the United Nations.

2. 119 U.S. 407 (1886).

3. 273 U.S. 593 (1927).

4. 288 U.S. 102 (1933).

5. 119 U.S. 436 (1886).

not raise any protest or objection to the detention and trial of the defendant, neither claiming that its right nor the derivative entitlement of the defendant was violated. These reasons wholly distinguish *Ker* from the present case. In addition, as the District Court noted, in *Ker* no official of the United States government, as treaty party, procured, induced, or otherwise authorized the extra-treaty abduction of the defendant on foreign soil. And in *Ker*, the defendant was a United States citizen, not a national of Peru, and thus Peru retained no general right under the treaty to refuse his surrender for trial in the United States. The limited reach of the *Ker* decision has been noted for almost forty years.

This case is also entirely distinct from the sui generis trial of General Manuel Noriega, and from the problem of inter-state surrenders in the United States. In the case of General Noriega, the government of Panama has interposed no objection to the arrest and trial of General Noriega, and the captures occurred in a military action directly ordered by the President of the United States. So, too, issues concerning domestic surrenders of defendants within the United States are distinct from international extradition. More stringent protections have been included in international extradition treaties, such as tests for the adequacy of evidence, statutes of limitations, double jeopardy, political offenses, and discretionary surrender of citizens, precisely because systems of justice may vary widely between treaty signatories. Hence, this case need not affect any of the rules concerning domestic surrenders and recovery of bail fugitives within the United States, including *Frisbie v. Collins*⁶ and *Gerstein v. Pugh*,⁷ for defendants in all states of the Union enjoy the safety of the basic guarantees of the United States Constitution.

Circumstances where a foreign nation has agreed to waive its treaty rights or has agreed to other means of surrender such as deportation, are distinct from this case. Here Mexico, acting on behalf of its own national citizen, has protested the unilateral violation of the treaty by United States agents and persons acting at their behest. To detain the defendant for trial following his illegal arrest and abduction from Mexican territory at the request of federal agents places Article III courts in the undesirable position of prolonging a detention that violates international law. This is not required by any conception of separation of powers. The issue of a court's own jurisdiction over the person of a

6. 342 U.S. 519 (1952).

7. 420 U.S. 103 (1975).

defendant lies at the heart of the judiciary's special province to say what the law is.

2. CUSTOMARY INTERNATIONAL LAW ALSO FORBIDS THE ABDUCTION OF A FOREIGN CITIZEN ON THE SOIL OF A FOREIGN SOVEREIGN, AND REQUIRES THAT AN ABDUCTED CITIZEN BE RESTORED TO HIS HOMELAND.

Article 9 of the Universal Declaration of Human Rights⁸ forbids the arbitrary arrest of any individual. An arrest without authority and jurisdiction is by its nature arbitrary. The United States approved the Universal Declaration of Human Rights at its adoption in 1948 by the General Assembly of the United Nations, and the Universal Declaration is now taken to be a restatement of customary international law. This guarantee of customary international law, which binds all nations, is fundamental to human dignity. Latin American countries, including Mexico, have suffered serious human rights abuses through the practice of illegal abductions and kidnappings by private factions, and by their own domestic police and military agencies. For the United States to indulge in the practice of illegal abduction on another country's soil will tarnish our example as a country dedicated to the rule of law.

It has been fundamental to American jurisprudence since Chief Justice John Marshall decided *Murray v. Schooner Charming Betsy*⁹ that federal law will be interpreted to uphold customary international law where federal law possibly admits of the interpretation. So, too, in *The Paquete Habana*¹⁰ the Supreme Court concluded that customary international law should be deemed part of United States law, unless modified by a controlling act of one of the political branches. For two separate and independent reasons, there was no controlling act of the political branches in the abduction of Alvarez-Machain and hence customary international law was not displaced. First, the abduction was not approved by the President. The abduction was known only to officials of the Drug Enforcement Administration and some unknown aide in the office of the Attorney General. The United States Attorney does not purport to suggest that the President of the United States was ever consulted in the decision to abduct Alvarez-Machain, or that he issued any policy directive for the violation of Mexico's sovereignty by the

8. G.A. Res. 217A (III), 3(1) U.N. GAOR Resolutions 71, U.N. Doc. A/810, (1948).

9. 6 U.S. (2 Cranch) 64 (1804).

10. 175 U.S. 677 (1900).

abduction of nationals from her territory.¹¹ Second, it has been traditional in our constitutional jurisprudence that only the legislature can seek to regulate the jurisdiction of the federal courts. Hence, though an Executive order might determine whether fishing boats on the high seas should be forfeit as prize vessels under the law of war, no one has ever supposed that a Presidential order could modify the jurisdiction of Article III courts or require Article III courts to assume jurisdiction of a cause in violation of international law. Though Judge Rafeedie did not have occasion to reach this ground, the District Court was entitled to decline personal jurisdiction over Humberto Alvarez-Machain on the ground of customary international law.

Humberto Alvarez-Machain, a Mexican physician, is charged with terrible crimes against an American law enforcement agent stationed in Mexico. Alvarez-Machain's charges involve kidnapping, torture and murder. In arguing for the rule of law, no one can minimize the seriousness of the offenses involved here. The issue only is whether, in the face of a treaty guarantee and the rules of customary international law, a government can indulge in one of the very techniques charged against the defendant—that of extra-legal kidnapping.

ARGUMENT

1. THE KIDNAPPING AND ABDUCTION OF HUMBERTO ALVAREZ-MACHAIN BY PERSONS ACTING AT THE REQUEST OF UNITED STATES AGENTS VIOLATED THE 1980 TREATY OF EXTRADITION BETWEEN THE UNITED STATES AND MEXICO, AND DEPRIVED THE TRIAL COURT OF JURISDICTION OVER THE DEFENDANT.

A. The extradition treaty of 1980 prohibits transborder abductions.

The United States Attorney contends that the 1980 extradition treaty between the United States and Mexico leaves each country free to abduct citizens from the territory of the other—that such an abduction is not a violation of the extradition treaty regime and treaty under-

11. At a speech in Los Angeles on April 23, 1990, President Carlos Salinas de Gortari called for greater respect for international law and an end to "unilateral actions outside the law and infringing the rights of other nations." President Bush, at a news conference on May 3, 1990, said "yes, there were some misunderstandings here and I've told our key people to eliminate the misunderstanding. We don't need misunderstanding with Mexico . . ." Lowenfeld, *Kidnapping by Government Order: A Follow-Up*, 84 AM. J. INT'L L. 712, 715 n.10 (1990).

takings.¹² The District Judge properly dismissed this contention as "absurd."¹³ The construction sought by the United States Attorney would allow Mexico to kidnap an American citizen from New York City for trial on a political offense, without any violation of the extradition treaty. By the United States Attorney's view, a Mexican police agent could spirit an American from Los Angeles to Guadalajara for a charge on which there is no evidence, without any violation of the extradition treaty. This mole's eye view would make a nullity of the treaty promises, and is blind to the careful procedures that protect Americans as much as Mexican citizens from unreviewed deliveries across the border. The United States Attorney's view is contradicted by the logic and history of the treaty, including the assertions of past Secretaries of State, by prior case law, and by the Harvard Research in International Law.

The present extradition treaty between the United States and Mexico was signed in Mexico City on May 4, 1978.¹⁴ Ratification was advised by the United States Senate on November 30, 1979. Ratifications were exchanged at Washington, D.C. on January 25, 1980, and on that date, the treaty entered into force. On February 6, 1980, the President of the United States issued the following proclamation:

Now, THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Treaty, to the end that it be observed and fulfilled with good faith on and after January 25, 1980, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.¹⁵

The treaty with Mexico has remained in force since that date.¹⁶ No President has suggested that the treaty is in any measure suspended, terminated, or repudiated. The treaty undertakings by the United States are promises 'willingly assumed. At any time since 1980, the

12. The issue is styled this way by the United States Attorney in the hope that American courts will disclaim any responsibility for the observance of the civil liberties protections of foreign law and customary international law. Even if this were an appropriate conclusion, the United States Attorney is forced to recognize that extradition treaties have traditionally been enforced by the United States courts in criminal proceedings affecting foreign individuals.

13. *United States v. Caro-Quintero, et al.*, 745 F. Supp. 599, 610 (C.D. Cal. 1990) (Rafeedie, J.). Though captioned by the name of the lead defendant in the pending indictment, this opinion deals solely with defendant Humberto Alvarez-Machain.

14. Extradition Treaty Between the United States of America and United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on Dec. 9, 1980, pursuant to Article 102 of the Charter of the United Nations.

15. *Id.*

16. DEPARTMENT OF STATE, TREATIES IN FORCE 160 (1990).

United States could have chosen to exercise its right under Article 23(4) of the treaty, which allows either party to "terminate this Treaty by giving notice to the other Party." Termination would have taken effect six months later. Instead, the United States has remained as Contracting Party to the treaty.

Extradition treaties serve the several purposes of promoting the enforcement of criminal law, protecting the sovereignty of each signatory nation over its own territory, and providing safeguards for the civil liberties of citizens and other individuals in inter-state surrenders. In the last two centuries, extradition has been an obligation that, in the American view, exists solely by virtue of treaty. The United States has strenuously defended the position that only where a treaty undertaking has been made, need a nation surrender a fugitive accused of even heinous crime. The United States has consistently asserted in international affairs that absent a treaty, there is no obligation by any unwritten law of nations to return an offender to a foreign state.¹⁷ The history of America explains this axiom: many of our ancestors were in flight from foreign oppression, and any general obligation to return persons accused of crime would have endangered emigrants from tyrannical lands.¹⁸ To protect our own national citizens, yet provide cooperation in enforcing criminal law, the United States has negotiated treaty undertakings for the return of fugitive criminals with countries whose system

17. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 7, subch. B, *Extradition*, Introductory Note, at 557 (1987) ("it is accepted that states are not required to extradite except as obligated to do so by treaty"); FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW § 941, at 597-98 (Philadelphia 1872) ("it has been maintained by high authority, both in Europe and the United States, that the duty of one sovereign to surrender to another fugitives from justice has no basis in international law, and only exists when created by treaty between the two sovereigns concerned. . . . This view[s] . . . chief support has been found in the United States."); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 111 (Philadelphia 1836) ("No sovereign state is bound, unless by special compact, to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign state or its officers of justice."). See also LORD MCNAIR, THE LAW OF TREATIES 333 (1961, reissued 1986) (British Government also "has, at any rate for a very long time, maintained that the surrender of an alleged criminal or an escaped convict cannot, as a matter of international law, be claimed in the absence of a treaty creating an obligation to do so").

18. See FRANCIS WHARTON, *supra* note 17, at 598 ("Cherishing as we have always done the right of free asylum for political and religious refugees, both as one of the happiest agents of our own colonization and as one of the proudest prerogatives of our institutions, it was natural that our statesmen and jurists should at an early period have declared that there was no duty either moral or juridical which made it incumbent on our government, unless under the sanction of a prior treaty, to surrender to foreign sovereigns fugitives who, even when under criminal prosecution, find refuge on our shores.").

of criminal justice meets our basic standards of fairness. Extradition treaties with Mexico have been in force since the middle nineteenth century,¹⁹ long before the multilateral treaties of this century, such as the United Nations Charter or Charter of the Organization of American States.

The present extradition treaty between the United States and Mexico contains numerous safeguards, designed to protect citizens of both countries. There would be no point to any of these protections if a foreign government could evade them by sending armed men to abduct suspects. Under the Mexico-United States treaty, an extradition request can be made only for a crime punishable by a year or more in prison and is limited to federal crimes and a specified schedule of state crimes. See Article 2. Adequate evidence must be submitted by the requesting state to support the extradition request: extradition shall be granted "only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party." See Article 3. The treaty prohibits extradition when the offense "is political or of a political character." See Article 5(1). The treaty prohibits any violation of double jeopardy rules, forbidding extradition where a person has already been prosecuted for the offense. See Article 6. Each state party can refuse extradition where the death penalty could be imposed on the defendant in the requesting country and the laws of the requested country would not provide for such punishment. See Article 8. The treaty provides that any request for extradition shall be processed "in accordance with the legislation" of the requested treaty party, see Article 13, and in Mexi-

19. The earlier United States-Mexico extradition treaties are the 1862 treaty, the 1899 treaty, and the Supplementary Conventions of 1903, 1926, and 1941. See Treaty Between the United States of America and the United Mexican States for the Extradition of Criminals (entered into force May 20, 1862; terminated January 24, 1899), 12 Stat. 1199, T.S. No. 209; Treaty of Extradition, United States of America-United States of Mexico (entered into force April 22, 1899; terminated Jan. 25, 1980), 31 Stat. 1818, T.S. No. 242; Supplementary Convention (entered into force April 13, 1903), T.S. No. 421 (adding bribery to list of extraditable offenses); Supplementary Convention (entered into force July 11, 1926), 44 Stat. 2409, T.S. No. 741 (adding narcotics offenses, hazardous substances, and smuggling); Supplementary Extradition Convention Between the United States of America and the United Mexican States (entered into force April 14, 1941), 55 Stat. 1133, T.S. No. 967 (extending extradition to accessories) (supplementary conventions terminated Jan. 25, 1980). The early history of negotiations between the United States and Mexico is discussed in JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 95-97 (1891).

can law, this requires a hearing for the defendant before a Mexican federal judge before extradition can proceed.²⁰

The treaty makes provision for so-called "provisional arrests" by the requested government, to hold a fugitive until the supporting evidence can be delivered. See Article 11. The treaty provides that either country may decline to extradite its own citizens, and instead may submit the criminal case to its domestic authorities for the purpose of prosecution.²¹ See Article 9. The treaty also limits extradition of extraterritorial offenses. For a crime committed in Mexico where the United States is the requesting Party, the treaty provides that extradition need be granted only if the laws of Mexico would provide for the punishment of an extraterritorial offense committed in similar circumstances, or if the fugitive is a national of the United States. See Article 1(2). The United States and Mexico agreed to each of these terms in the 1980 exchange of ratifications.

There would be no point to an extradition treaty's elaborate specification of the procedures and standards which the requested country may require of the requesting country, if those protections could be freely evaded by the requesting country's employment of armed men to abduct the defendant.

The suggestion of the United States Attorney,²² and of *amicus curiae* Criminal Justice Legal Foundation,²³ that the kidnapping of a defendant is permitted by the treaty is also manifestly inconsistent with the treaty's stated purpose of quashing criminal activity in the two countries. "Kidnapping" and "abduction" are high on the list of crimes

20. Ley De Extradición Internacional, arts. 24-27, El Diario Oficial de la Federación (December 29, 1975), also reprinted in CÓDIGOS DE PROCEDIMIENTOS PENALES (39th ed. 1988). See also *Hearings on the Extradition Reform Act of 1981, Before the Subcommittee on Crime, House Committee on the Judiciary, 97th Cong., 2d Sess.*, at 431, 463-64 (1982) (statement of Gisela Von-Muhlenbrock, Legal Specialist, Hispanic Law Division, Library of Congress) (discussing extradition law in Mexico).

21. Under the 1862 treaty, the United States routinely declined to extradite Americans to Mexico, because of a lack of authority under United States law. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 13-16 (1936); see also JOHN BASSETT MOORE, REPORT ON EXTRADITION WITH RETURNS OF ALL CASES 207-08 (1890). The 1899 treaty recast the provision for the surrender of nationals, creating power in the American Executive to surrender American nationals, but creating no obligation to do so.

22. See Opening Brief of Appellant United States, at 18-19, *United States v. Alvarez-Machain*, No. 90-50459 ("extradition treaties . . . limit government authority only with respect to individuals who are formally extradited pursuant to their terms.").

23. See Brief of *Amicus Curiae* Criminal Justice Legal Foundation, at 18, *United States v. Alvarez-Machain*, No. 90-50459 ("Any general protection of a nation's sovereignty or any prohibition against kidnapping is simply outside the scope of the treaty.").

subject to extradition under the treaty.²⁴ It is startling to suppose that the treaty allows a treaty party to use abduction, when abduction itself is announced as a crime subject to extradition and punishment under the self-same treaty.

This is not the first United States-Mexico extradition treaty. Secretary of State James Blaine, who administered relations under the first United States-Mexico extradition treaty in the nineteenth century, described the purpose served by the treaty in safeguarding residents from abrupt and unexplained removals from their own countries.

The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and *does not authorize* either party, for any cause, to deviate from those forms or *arbitrarily abduct from the territory, of one party, a person charged with crime, for trial within the jurisdiction of the other.*²⁵

Secretary of State Thomas Bayard spoke of abductions in the same light, as a clear violation of the extradition treaty. When Francisco Arresures was seized in Texas by three local deputy sheriffs and a Mexican police officer, and was forced across the border to Mexico without observing extradition treaty processes, Bayard complained that Arresures' return to Mexico was "obtained not in accordance with, but *in fraud of existing treaties.*"²⁶

24. 1980 Extradition Treaty, *supra* note 1, art. 2(1) ("Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix . . ."). See Appendix to 1980 Extradition Treaty, cl. 4 (including "Kidnapping; child stealing; abduction; false imprisonment" as extraditable crimes).

25. Letter of Secretary of State James Blaine to O.M. Roberts, Governor of Texas (May 3, 1881) (emphasis added), in DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, 1784-1906 (National Archives Microfilm Publication M40, Roll 93); also excerpted in 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 330 (1906).

26. Letter of Secretary of State T.F. Bayard to Thomas C. Manning (February 26, 1887) (emphasis added), in DIPLOMATIC INSTRUCTIONS OF THE DEPARTMENT OF STATE, 1801-1906, MEXICO (National Archives Microfilm Publication M77, Roll 117). Secretary of State Bayard denounced the "kidnapping" of Arresures and his "forcible transportation to Mexico." The hazard for all concerned in the disregard of appropriate legal process is also illustrated by the Arresures case: Arresures was killed during the incident in circumstances where his abductors alleged self-defense. Secretary of State Bayard was skeptical of the claimed self-defense.

See also Statement by Secretary of State George Shultz to the Florida Probation and Parole Commission, reprinted in Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 207, 208 (1984). Secretary of State Shultz urged Florida to give early parole to Canadian citizen Sidney L. Jaffe, following Jaffe's allegation that he was kidnapped by agents of the State of Florida while in Canadian territory. Observed Secretary Shultz:

The United States has an extradition treaty with Canada. That treaty could have been utilized to secure Mr. Jaffe's return

Secretary Blaine and Secretary Bayard's view is confirmed by common sense. It is the central premise of an extradition treaty that each country's exclusive jurisdiction over its own territory will be respected. Otherwise, there would be no need for formal extradition in the first place—bands of Mexican police could invade Texas to recapture Mexican or American fugitives, and vice versa. According to Samuel Spear:

The necessity for extradition grows out of the fact that, *except in cases specially provided for by treaty*, the penal laws of one country cannot operate within the jurisdiction of another. The sovereignty of a nation within its own territory is exclusive and absolute. . . . "In truth, the criminal, by his flight to another State, becomes (although but for a time) the subject of the supreme power of that State, and immediately enjoys the protection and guardianship of that State. *From that guardianship he cannot be forcibly taken, except under special agreement*, the terms of which, we presume, certainly do not extend further than to those very grounds on which the surrender was demanded and granted."²⁷

The language of the 1980 extradition treaty expressly recognizes the territorial jurisdiction of each contracting party in Article 4(1):

For the purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that Contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

Similarly, Article 20 of the 1980 extradition treaty expressly recognizes the right of each country to deny the other access to its own national territory except in accordance with the treaty. Article 20(1) notes that "The right to transport through the territory of one of the Contracting Parties a person who is not a national of that Contracting Party surrendered to the other Contracting Party by a third State *shall be granted* on presentation made through the diplomatic channel of a certified copy of the decision on extradition, provided that reasons of public order are not opposed to the transit."²⁸

As 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. (emphasis added).

27. See SAMUEL T. SPEAR, *THE LAW OF EXTRADITION* 70-74 (Albany 1884) (citing Dutch jurist Kluit).

28. 1980 Extradition Treaty, *supra* note 1, art. 20(1) (emphasis added). The first United States-Mexico extradition treaty followed lengthy negotiations between the United States and Mexico. Its preamble also clearly recognized the territorial sovereignty of each of the signatories:

The United States of America and the United Mexican States, having judged it expedient, with a view to the better administration of justice and to the preven-

The 1980 extradition treaty also explicitly recognizes that the decision of the territorial sovereign is final, and that no foreign seizure of a person may take place on Mexican territory without the consent of competent Mexican authorities. Article 14 provides that:

1.—The requested Party shall promptly communicate to the requesting Party *its decision* on the request for extradition.

2.—In the case of complete or partial rejection of a request for extradition, the requested Party shall give the reasons on which it was based.

3.—If the extradition is granted, the surrender of the person sought shall take place within such time as may be prescribed by the laws of the requested Party. The competent authorities of the Contracting Parties *shall agree on the date and place* of the surrender of the person sought.²⁹

The United States Attorney claims the absence of any article in the treaty stating *in haec verba* that the national territory of the treaty parties will be respected. But every article of the treaty takes this as its premise. According to the United States Attorney, the more fundamental an understanding is to the treaty regime, the less it may be enforced under the treaty's remedies. This is Alice-in-Wonderland logic.

An extradition treaty sets the conditions under which a foreign state may demand as of right the surrender of a fugitive criminal from the domestic territory of another state. Protection of the contracting states' sovereignty and territoriality lies at the treaty's very core. Where a state promises to surrender fugitives under certain specified conditions, the treaty parties have plainly agreed that fugitives need not be surrendered when those conditions are not met. As the Supreme Court noted in *Factor v. Laubenheimer*, "the principles of international law recognize no right to extradition apart from treaty."³⁰ In the mid-nineteenth century, international law scholar Theodore Woolsey similarly observed,

no nation is *bound* to administer the laws of another, or to aid in administering them . . . the definitions of crime vary so much in different nations, that a consent to deliver up all accused fugitives to the authorities at home for trial, would often violate the feeling of justice or of humanity. Some have contended for an absolute obligation to deliver up fugitives from justice; but (1.) The number of treaties of extradition, if nothing more, would show at least that no such obligation is generally recognized. Else what need of treaties giving consent to such

tion of crime *within their respective territories and jurisdictions*, that persons charged with the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a Treaty for this purpose

1862 Extradition Treaty, *supra* note 19, preamble (emphasis added); accord 1899 Extradition Treaty, *supra* note 19, preamble.

29. 1980 Extradition Treaty, *supra* note 1, art. 14 (emphasis added).

30. 290 U.S. 276, 287 (1933).

extradition, and specifying crimes for which the fugitive should be delivered up?³¹

The good faith with which extradition treaties are to be read was emphasized in *United States v. Rauscher*.³² There, a prisoner was surrendered from Great Britain to the United States on a charge of murder under the provisions of Article 10 of the Webster-Ashburton Treaty.³³ The prisoner, William Rauscher, was convicted in a United States circuit court on the lesser offense of cruelly punishing a crew member, a charge on which he had not been formally surrendered by Great Britain. The Solicitor General argued to the Court that the treaty contained no language expressly prohibiting the United States to try the defendant on the second charge once he was in custody and advanced that express language was prerequisite. The Court rejected the Government's claim on the ground that to allow trial on a second unscrutinized offense would undercut all the safeguards of the treaty concerning evidence, pre-extradition hearing before a judge or magistrate, and exclusion of political offenses. Said the Court:

this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined

31. THEODORE WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 179 (1860) (emphasis in original).

32. 119 U.S. 407 (1886).

33. Webster-Ashburton Treaty, United States-Great Britain (signed August 9, 1842, entered into force October 13, 1842), 8 Stat. 572, T.S. No. 119. The Webster-Ashburton Treaty was captioned a "Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave-Trade, and for the Giving Up of Criminals Fugitive from Justice, in Certain Cases." Article 10 states:

It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided, that this shall only be done upon 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 crime or offence had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges and other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretence of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally. *This proposition of the absence of express restriction in the treaty of the right to try him for other offences than that for which he was extradited, is met by the manifest scope and object of the treaty itself.*³⁴

The *Rauscher* Court concluded that the promise not to try an extradited defendant on unscrutinized offenses was inherent in the treaty itself—rejecting the Government's claim even in that case that express language should be required to preclude trial on a second offense.

The United States Attorney would have it that the rule of *Rauscher*—barring trial on charges that have not been subjected to the scrutiny of the extradition process, where the foreign government has objected—applies only where the defendant has been formally extradited on an initial charge: the foreign country's act of surrendering the defendant is said to consummate an implied "contract" not to try him on other charges.³⁵ But this flouts the fact that *the extradition treaty is also a contract*. *Rauscher's* logic applies with as full force where the treaty is being flouted altogether. In 1980 Mexico acceded to treaty obligations which it could have declined, and in consideration, gained a promise by the United States to observe the same treaty. An "implication of fraud" and "of bad faith" would accrue equally to the one disregard of the treaty as the other.

34. 119 U.S. at 422 (emphasis added).

35. See Opening Brief of Appellant United States, at 11, *United States v. Alvarez-Machain*, No. 90-50459 (9th Cir. 1990) ("When its terms are invoked, the Extradition Treaty (like any other contract) may limit the power of the requesting state to punish a fugitive surrendered *under* the Treaty. However, where no 'contract' of extradition is formed pursuant to the Extradition Treaty, the Treaty cannot create any duties on the part of either of the signatories, much less confer any rights on a criminal defendant.") (emphasis in original).

The same principle in interpreting treaties, to give force to the full understanding of the parties, was observed in *Cook v. United States*,³⁶ a case concerning American seizure of a foreign vessel for a smuggling offense, beyond one hour from shore. The Solicitor General suggested that the treaty with Great Britain did not contain any explicit language promising that the United States would refrain from seizing British vessels this far out from shore. The treaty, said the Solicitor General, only promised that Great Britain would “not protest” seizures *within* the one hour range. The American Coast Guard’s power to seize vessels up to twelve miles from shore had even been recognized in an earlier Congressional statute. The Supreme Court rejected this crabbed reading of the treaty:

First. It is suggested on behalf of the Government that the power to search and seize within the twelve-mile zone conferred upon officers of the Coast Guard by § 581 of the Tariff Act of 1922, was unaffected by the Treaty, save that the British Government agreed not to protest where the seizure was within an hour’s sailing distance of the coast. *The argument is that the Treaty settled the validity of the seizure only for those cases where it was made within the limits described in the Treaty; and that since this seizure was made beyond one hour’s sailing distance from the coast the Treaty did not apply.*³⁷ In construing the Treaty its history should be consulted. Compare *United States v. Texas*, 162 U.S. 1; *Oklahoma v. Texas*, 260 U.S. 606; *Nielsen v. Johnson*, 279 U.S. 47, 52. *Both its language and its history show that the high contracting parties did not intend so to limit its operation.* The preamble states that they entered into the Treaty “being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages.” The history reveals that serious differences had arisen between the two Governments in that connection; and that, for the purpose of resolving them, the parties determined to deal completely with the subject of search and seizure, beyond our territorial limits, of British vessels suspected of smuggling liquors.³⁸

36. 288 U.S. 102 (1933).

37. The *Cook* Court noted, in footnote, that the narrowing reading of the treaty “was advanced by the Solicitor General as representing the view not of the Department of Justice but of other lawyers for the Government.” 288 U.S. at 112 n.3.

38. *Cook v. United States*, 288 U.S. at 111-12 (emphasis added). The origin of the United States-Mexico extradition treaties in the need to settle affairs along the border is also apparent. Seeking an extradition treaty in 1850, President Millard Fillmore said to the Senate, “[t]he length of the boundary line between the two countries, extending as it does from the Pacific to the Gulf, renders such a convention indispensable to the maintenance of good order and the amicable relations now so happily subsisting between the sister republics.” Statement of Millard Fillmore, July 20, 1850, *quoted in* JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION, *supra* note 20, at 97. *See also* THEODORE WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW, *supra* note 31, at 180 (“We conclude that there is a qualified duty of nations to assist each other’s criminal justice, *which only special treaties, expressing the views of the parties at the time, can define.*”) (emphasis added).

Cf. Case of 1881, in JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION, *supra* note 19, at 287 (“Texas sheriff, accompanied by three

Under the United States Attorney's view, a foreign ship would have more treaty protection than a foreign citizen. The Supreme Court's regard for the full understanding of the treaty is even more striking, since in *Cook*, the Congress had previously authorized seizures beyond one-hour's sail. In the instant case, the seizure of a foreign citizen on his own soil has never been authorized by the Congress. The burden of a "clear statement" rule all the more strikingly falls upon the Government.

The history of United States-Mexico extradition treaties evidences at least two purposes:

(1) The state parties have sought increasing *national and judicial* safeguards in scrutinizing fugitive surrender.

(2) The state parties have relied upon *renegotiation* of the terms of the treaty when existing arrangements were inadequate.

The increasing concern for national and judicial scrutiny of fugitive surrenders may be seen in the gradual exclusion of local border authorities from the extradition process. In the 1862 treaty, surrender of fugitives could be made through diplomatic channels or, in the case of crimes committed in border states or territories of the two countries, through civil authorities of the border states and territories or even of local border districts and counties; when civil authority was suspended, the requisition could be made through the chief military officer in command of the border state or territory.³⁹ In the 1899 treaty, the compe-

men, had crossed from Tombstone, Arizona, into Mexico, and there captured a fugitive criminal, whom they had taken back into Arizona without any form of law." Secretary of State requested Secretary of Interior "to direct that proper measures be taken by the Territorial authorities for the punishment of any guilty parties, and *for the future maintenance of law and treaty obligations in such matters.*" Mexico did not request release of criminal.) (emphasis added); see also Note of Mexican Minister Zamacona to Secretary of State James Blaine (July 25, 1881), in NOTES FROM THE MEXICAN LEGATION TO UNITED STATES DEPARTMENT OF STATE 1821-1906 (National Archives Microfilm Publication M54, roll 19) (Tombstone sheriff and three men returned with fugitive from Mexico "without complying with the formalities prescribed by the extradition treaty."); Note from Secretary of State James Blaine to Mexican Minister Zamacona (August 2, 1881), in NOTES TO FOREIGN LEGATIONS IN THE UNITED STATES FROM DEPARTMENT OF STATE, 1834-1906, MEXICO (National Archives Microfilm Publication M99, roll 71) (Secretary of Interior will direct territorial authorities to punish any guilty parties and take measures "for the future maintenance of law and treaty obligations in such matters.").

39. 1862 Extradition Treaty, *supra* note 19, art. 2:

In the case of crimes committed in the frontier States or Territories of the two contracting parties, requisitions may be made through their respective diplomatic agents, or through the chief civil authority of said States or Territories, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or when from any cause the

tence of border authorities was reduced; according to Article 9, an initial demand for surrender could be presented to and initial apprehension of the fugitive could be made by border civil or military authorities, but, before surrender could proceed, a record of judicial examination of the fugitive

shall be forwarded to the proper executive authority of the United States of America or of the United Mexican States, as the case may be; when it is found by such respective executive authority that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases.⁴⁰

The 1980 Treaty *eliminated* any delegation of authority to border officials. Extradition demands must be presented through diplomatic channels, though either party may request a provisional arrest by the national authorities in cases of "urgency."⁴¹ Under Article 13, which incorporates the statutory law of each country, surrenders must be preceded by judicial scrutiny.

In the course of the treaty relationship, the scope of crimes subject to extradition also has been modified and expanded by supplementary agreements. In 1903, a supplementary convention added the crime of bribery to the crimes subject to extradition.⁴² In 1926, another supplementary convention added "[c]rimes and offenses against the laws for the suppression of the traffic in and use of narcotic drugs," smuggling, and crimes involving injurious or poisonous chemicals.⁴³ In 1941, a third supplementary convention added the criminal acts of "an accessory before or after the fact."⁴⁴

By its plain language, structure, and history, the 1980 Extradition Treaty clearly contemplates that the treaty parties will not seek to evade its terms by sponsoring abductions of the other's citizens. The

civil authority of such State or territory shall be suspended, through the chief military officer in command of such State or Territory.

Article 4 states that:

On the part of each country the surrender of fugitives from justice shall be made only by the authority of the Executive thereof, except in the case of crimes committed within the limits of the frontier States or Territories, in which latter case the surrender may be made by the chief civil authority thereof, or such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier States or Territories, or if from any cause the civil authority of such State or Territory shall be suspended, then such surrender may be made by the chief military officer in command of such State or Territory.

40. 1899 Extradition Treaty, *supra* note 19, art. 9.

41. 1980 Extradition Treaty, *supra* note 1, arts. 10 & 11.

42. 1903 Supplementary Convention, *supra* note 19.

43. 1926 Supplementary Extradition Convention, *supra* note 19, art. 1.

44. 1941 Supplementary Extradition Convention, *supra* note 19, art. 1.

United States Attorney has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion that any different understanding was reached with Mexico.⁴⁵

American drug enforcement agents need not breach United States treaty promises if present treaty terms are unsatisfactory,⁴⁶ for the treaty terms can be renegotiated. The *ex post facto* clause does not limit extradition treaties. A renegotiated treaty can be applied to crimes and offenses committed previously.⁴⁷ Mexican law also seems to allow the Mexican government to grant extradition beyond the scope of the treaty; the treaty serves to define what the United States may demand *as of right*; the statute further describes what the Mexican national government may allow as a matter of discretion.⁴⁸ In such cases, the Mexican statute provides procedural protections for the fugitive comparable to those in a treaty request, and requires that the requesting country be willing to surrender fugitives in like circumstances.⁴⁹ In American law, delivery of foreign fugitives outside the requirements of the treaty would require statutory authority from the Congress, except where a fugitive may be subject to deportation under American immi-

45. A letter drafted *after the event* by the newly appointed Legal Advisor to the State Department is no substitute for this missing evidence. See Addendum of the Appellant United States at 68, *United States v. Alvarez-Machain*, No. 90-50459 (9th Cir. 1990) (reproducing Letter from Edwin D. Williamson to Attorney General Richard Thornburgh (Sept. 26, 1990)).

46. It should not be overlooked that the United States never submitted any request to Mexico for the legal extradition of Alvarez-Machain under the treaty. Here, there is no basis to conclude that Mexico would not have cooperated with an extradition request made pursuant to the procedural safeguards of the treaty, including an emergency arrest under Article 11, if there appeared to be danger of flight before the evidence could be provided.

47. See, e.g., 1980 Extradition Treaty, *supra* note 1, art. 22(1) ("This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force."); see also Supplementary Extradition Treaty, United States-United Kingdom (signed June 25, 1985; entered into force Dec. 23, 1986), — UST —, TIAS No. —, 24 I.L.M. 1105-09 (1985) (excluding murder, aircraft hijacking, and abduction from the political offense exception; treaty applies to crimes committed before and after treaty entered into force, except where conduct was not an offense under the laws of the parties at the time of its commission); see also SENATE COMMITTEE ON FOREIGN RELATIONS, SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM, S. EXEC. REP. NO. 17, 99th Cong., 2d Sess. (1986); *In re De Giacomo*, 12 Blatch. 391, 7 F. Cas. 366 (C.C.S.D.N.Y. 1874) (No. 3,747), discussed in SAMUEL SPEAR, THE LAW OF EXTRADITION, *supra* note 27, at 35-36.

48. Ley De Extradición Internacional, arts. 1, 2, 14, 16 & 36, El Diario Oficial de la Federación (Dec. 29, 1975), also reprinted in CÓDIGOS DE PROCEDIMIENTOS PENALES, *supra* note 20, at 36.

49. *Id.*, art. 10.

gration laws.⁵⁰ The resort to kidnapping by agents of the Drug Enforcement Administration thus bypassed other available routes for seeking effective prosecution of foreign fugitives.⁵¹

B. Transborder abduction by a state party bars personal jurisdiction over the abducted individual.

The view that American extradition treaties forbid the exercise of criminal jurisdiction when state-sponsored abduction has been used by a state party to obtain the defendant and the foreign state has objected, is supported by the authoritative Harvard Research in International Law.⁵² This project—directed by Manley O. Hudson, professor of law at Harvard Law School, later judge of the Permanent Court of International Justice, and Chairman of the International Law Commission—examined three topics from 1932 to 1935: Extradition, Jurisdiction with Respect to Crime, and the Law of Treaties. The Advisory Committee to the project was chaired by George W. Wickersham, former Attorney General of the United States and President of the American Law Institute, and included other experienced figures in international and American law, including Frederic R. Coudert, Esq.; Green H. Hackworth, Legal Advisor of the Department of State; Judge Learned Hand of the United States Court of Appeals for the Second Circuit; former Secretary of State Elihu Root; and James Brown Scott, president of the American Society of International Law, director of the Division of International Law of the Carnegie Endowment for International Peace, and later Legal Advisor to the Department of State.

The Official Reporter for the Harvard study of Jurisdiction with Respect to Crime was Professor Edwin D. Dickinson, professor of international law at the University of California at Berkeley. The Reporter's standard for criminal jurisdiction read as follows:

50. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. . . . It must be found that statute or treaty confers the power.").

51. Upon the repatriation of defendant Alvarez-Machain to Mexico pursuant to Judge Rafeedie's order, the United States also could request the Government of Mexico to detain Alvarez-Machain under Articles 9 and 11 of the 1980 Extradition Treaty, while legally sufficient documentation for his lawful extradition is assembled and submitted to the Mexican government and courts by the United States. Judge Rafeedie did not grant the defendant's motion to dismiss the indictment, and hence the charges against Alvarez-Machain can be further prosecuted when custody of him is legally obtained.

52. *Harvard Research in International Law*, 29 AM. J. INT'L L. 1 (Supp. 1935).

Article 16. Apprehension in Violation of International Law

In exercising jurisdiction under this Convention, *no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.*⁵³

The Reporter's Comment noted as follows:

In the United States, for example, *the law is in accord with this article* in cases in which a person has been brought within the country by recourse to measures *in violation of an international convention.*⁵⁴

The Reporter cited *Cook v. United States*,⁵⁵ *Ford v. United States*,⁵⁶ and *United States v. Rauscher*,⁵⁷ and remarked the "noteworthy language" of *United States v. Ferris*⁵⁸ that described the "complete lack of jurisdiction" in cases where a person was seized by a state party in violation of an international convention.⁵⁹

In *United States v. Cook*, as we have seen, the Supreme Court declined the Solicitor General's suggestion that the United States was free to seize a British vessel for smuggling beyond a one-hour limit from shore merely for want of express language in the treaty with the British.⁶⁰ The Supreme Court went on to find that the federal courts shared responsibility to enforce the treaty's implicit jurisdictional limits. The illegal seizure in violation of the treaty deprived the District Court of jurisdiction over the vessel, even though the Court could have taken jurisdiction of an attempt to smuggle goods into the United States pursuant to a legal seizure. The Supreme Court rejected the Solicitor General's suggestion that one should distinguish between the initial illegal custody by the Coast Guard that effected the seizure and subsequent custody by the marshal of the District Court:

Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. *To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare United States v. Rauscher, 119 U.S. 407.*⁶¹

As Reporter Dickinson noted of this case:

53. *Harvard Research in International Law*, *supra* note 52, at 623 (emphasis added).

54. *Id.* at 624 (emphasis added).

55. 288 U.S. 102 (1933).

56. 273 U.S. 593 (1927).

57. 119 U.S. 407 (1886).

58. 19 F.2d 925 (N.D. Cal. 1927).

59. *Harvard Research in International Law*, *supra* note 52, at 624.

60. 288 U.S. at 121-22.

61. *Id.* (emphasis added).

Lacking the power to seize, in consequence of the treaty, the United States had no power to subject the vessel to its laws. The objection was not to the jurisdiction of the court alone, but to "the jurisdiction of the United States." The objection was not met by seeking to distinguish between the custody of the Coast Guard and the subsequent custody of the marshal of the court, nor was the defect of jurisdiction cured by an answer to the merits on the part of the individual claimant. The Supreme Court concluded that "to hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty. . . . The ordinary incidents of possession of the vessel and the cargo," said the court, "yield to the international agreement."⁶²

Similarly, *United States v. Ferris* involved the attempted prosecution of members of the crew of a Panamanian flag vessel for conspiracy to violate the United States Prohibition and Tariff Acts, where the ship and crew members had been seized 270 miles off the west coast of the United States.⁶³ In sustaining the individual defendants' objections to the jurisdiction of the District Court over their persons, Judge Bourquin said:

Hence, as the instant seizure was far outside the limit [of one hour's sail from shore], it is sheer aggression and trespass (like those which contributed to the War of 1812), contrary to the treaty, not to be sanctioned by any court, and *cannot be the basis of any proceeding adverse to defendants*. The prosecution contends, however, that courts will try those before it, regardless of the methods employed to bring them there. There are many cases generally so holding, but *none of authority wherein a treaty or other federal law was violated*, as in the case at bar. That presents a very different aspect and case. "A decent respect for the opinions of mankind," national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties

62. *Harvard Research in International Law*, *supra* note 52, at 625. Secretary of State Hamilton Fish took a similar view—that illegal abduction bars subsequent jurisdiction—in the case of Peter Martin, who was forcibly taken from American soil by Canadian law enforcement officers without fulfilling any of the safeguards of the extradition treaty. Said Fish, "the recapture and removal of the prisoner from the jurisdiction of the United States to British soil was an illegal, violent and forcible act, *which cannot justify the subsequent proceedings whereby he has been, is, or may be restrained of his liberty.*" See Note from Secretary of State Hamilton Fish to British Minister Edward Thornton (Jan. 10, 1877) (emphasis added), in NOTES TO FOREIGN LEGATIONS IN THE UNITED STATES FROM THE DEPARTMENT OF STATE 1834-1906, GREAT BRITAIN (National Archives Microfilm Publication M99, Roll 46). See also Notes from Secretary of State Hamilton Fish to British Minister Edward Thornton (Nov. 2, 1876, Dec. 6, 1876), in *id.*; *Case of Peter Martin*, in 1 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION, *supra* note 19, at 286; also in 1877 FOREIGN RELATIONS OF THE UNITED STATES 266-71 (naturalized American citizen Peter Martin convicted of assault in British Columbia, and conveyed by Canadian officials through American territory in Alaska en route to place of confinement in Victoria. While on American soil Martin attacked one of his Canadian custodians, was recaptured by other Canadian enforcement agents on American territory, and taken to Victoria, British Columbia, leading to Secretary Fish's complaint.).

63. 19 F.2d at 926 (N.D. Cal. 1927).

shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that treaties shall not be reduced to mere “scraps of paper.”⁶⁴

Judge Bourquin further explained:

It seems clear that, if one legally before the court cannot be tried because therein a treaty is violated [as in *Rauscher*], for greater reason *one illegally before the court, in violation of a treaty, likewise cannot be subjected to trial*. Equally in both cases is there absence of jurisdiction.⁶⁵

This reading of the extradition treaty is not only faithful to its text and intention. It also will aid the safety of American citizens, as much as Mexican nationals. As the history of our relations with Mexico and Canada make clear, abductions can occur in both directions across a border. Under Article 133 of the Mexican Constitution, as under Article VI of the United States Constitution, treaties are made the supreme law of the land.⁶⁶ Where a court declines to exercise personal jurisdiction over a defendant, because the defendant was forcibly brought

64. *Id.* (emphasis added).

65. *Id.* (emphasis added). Secretary of State Frederick Frelinghuysen also recognized that personal jurisdiction over a defendant is barred where an extradition treaty's protections are fundamentally breached and the other nation protests. Mexican citizen José Segura was indicted in Texas for homicide, then fled to Mexico. Agents hired by the state of Texas seized Segura in Mexico and brought him back to the United States “without observance of the *requisites* of the extradition treaties with Mexico,” complained the Secretary of State to the Governor of Texas.

I need hardly repeat to you . . . that such proceedings are entirely unwarranted, and afford to the Mexican Government just ground for complaint of violation of international laws and comity, and expectation of redress. *By the Constitution of the United States, the treaties executed by the general government are the Supreme law of the land, and to be respected as such by the several States as well as by the federal authorities*. This supremacy in the present case could be recognized and enforced *if the courts of Texas, whose duty it is to obey the supreme law, were to treat criminals brought before them under such circumstances as not properly within their jurisdiction, and refuse to take cognizance of the charge against them until it could be shown that the accused had come into the judicial power of the court after lawful process of arrest*.

I trust that your response will enable me to set the matter in a better light to the Mexican Minister than his note presents it in.

See Letter of Secretary of State Frederick Frelinghuysen to O.M. Roberts, Governor of Texas (February 5, 1883) (emphasis added), in DOMESTIC LETTERS OF THE DEPARTMENT OF STATE 1784-1906 (National Archives Microfilm Publication M40, Roll 97); also cited in 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, *supra* note 25, at 330.

66. See CONSTITUTION OF MEXICO, art. 133, *reprinted in* 10 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. 1988):

This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every State shall be bound to the said Constitution, the laws, and treaties, notwithstanding any contradictory provisions that may appear in the constitution or laws of the States.

before the court in violation of a treaty obligation, the court merely fulfills its obligation not to commit an international delict.⁶⁷

The United States Attorney and amicus Criminal Justice Legal Foundation err in characterizing the treaty's limits on personal jurisdiction as a question of "implying" a "remedy."⁶⁸ Rather, it is a matter of a court's traditional responsibility to ascertain its own jurisdiction, a task at the center of the judicial function. It is a question set by the treaty as law of the land, and the courts' duty to assure that they do not exercise jurisdiction in violation of the law.

The intimate involvement of the judiciary in the administration of extradition treaties has been set by the Congress itself, which delegates to federal judges the authority to refuse extradition if the required factual showing and legal requisites of the extradition treaty are not satisfied.⁶⁹ The involvement of the federal judiciary in the process of extradition became an axiom of our jurisprudence following the Adams administration's near debacle in the famous incident of Jonathan Robbins in 1799, in which, Jeffersonian Republicans suggested, a Cabinet officer sought to extradite an individual without full judicial review of the merits.⁷⁰ The statute passed by the Congress in 1848, now codified at 18 U.S.C. § 3184, established the centrality of the judiciary in guarding the process of extradition.⁷¹

67. Cf. PETER DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 3 (Philadelphia 1824) (emphasis omitted):

The law of nations, being the common law of the civilised world, may be said, indeed, to be a part of the law of every civilised nation. . . . It is binding on every people and on every government. It is to be carried into effect at all times under the penalty of being thrown out of the pale of civilisation, or involving the country into a war. Every branch of the national administration, each within its district and its particular jurisdiction is bound to administer it. . . . Whether there is or not a national common law in other respects, this universal common law can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state.

68. Opening Brief of Appellant United States, at 17-18, and Brief of *Amicus Curiae* Criminal Justice Legal Foundation, at 21, *United States v. Alvarez-Machain*, No. 90-50459 (9th Cir. 1990).

69. 18 U.S.C. § 3184 (1988).

70. See *In re Mackin*, 668 F.2d 122, 135 (2d Cir. 1981) (Friendly, J.) (Robbins incident led to "perception that extradition without judicial oversight was 'highly dangerous to liberty and ought never to be allowed in this country.'"); Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

71. The centrality of the courts in enforcing extradition treaties is also shown by the suggestions of Secretaries of State and Attorneys General that a defendant should seek a judicial remedy before resorting to diplomatic recourse. See *Case of Edward Underwood*, in 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, *supra* note 25, at 318 (prisoner extradited from Canada on murder charge, acquitted, then rearrested and convicted on two charges of robbery. British ambassador was advised by the United States that "as the question was of a judicial nature, there were no steps to

Only the President, not the Drug Enforcement Administration, may enjoy the power to terminate, suspend, or denounce a treaty obligation of the United States. Until then, the courts enjoy full competence and retain the responsibility to observe such treaty obligations in cases brought before them.⁷²

C. Ker v. Illinois is not to the contrary. United States v. Noriega is wholly distinct, for Panama did not object to the arrest of Noriega. Transfer of defendants among States of the Union enjoys lesser safeguards than international extradition.

Ker v. Illinois was decided the same day as *Rauscher*, and written by the same Justice, Samuel Miller. The eminent constitutional historian Professor Charles Fairman of Harvard University noted in his famous article *Ker v. Illinois Revisited*,⁷³ that *Ker* came before the Supreme Court upon the limited scope of review permitted by a writ of error.⁷⁴ The Court's construction of the treaty was limited to considering the precise claim made by counsel for United States citizen Ker that he had a right of asylum in Peru despite the apparent *willingness* of the government of Peru to have him be tried in the United States for financial crimes committed on American soil. A review of the diplomatic notes received from Peru between January 1, 1883 through January 1, 1887 shows *no objection* was made by Peru to the exercise of

be taken to fulfill the obligations of the treaty except through the appropriate judicial proceedings") (emphasis added); accord Opinion of Attorney General John W. Griggs (Mar. 27, 1901), 23 OP. ATT'Y GEN. 431, 434.

See also *Case of Henry Acosta*, in 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, *supra* note 25, at 318-19 n.; and in Opinion of Attorney General Philander Knox (Dec. 24, 1901), 23 OP. ATT'Y GEN. 604, 607 (defendant Acosta extradited from Mexico for offense, convicted, served sentence, and on day of release was rearrested for another offense committed prior to his extradition. Attorney General Knox said, "I do not mean to intimate that his only resort is to the courts, or that if they deny him any rights which he may possess, the Federal Government is powerless or free from obligation to interfere . . . My present opinion is only intended to intimate that his primary resort is to the courts.") (emphasis added).

72. See *The Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 598-99 (1884):

a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.

73. Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 682 (1953).

74. See Revised Statutes § 709 (1875).

criminal jurisdiction by the Illinois courts in *Ker*.⁷⁶ Equally important, at the time that Ker was seized in Lima, that city was occupied by the armed forces of Chile. Chile invaded Peru as part of the War of the Pacific, and the government of Peru had been displaced in Lima for over eighteen months by the foreign occupying forces. The Pinkerton agent who was seeking Ker applied to Admiral Lynch of the Chilean forces occupying Lima, and the Admiral agreed to release defendant Ker to the Pinkerton man for return to the United States.⁷⁶ As Professor Fairman noted:

On April 3, 1883, when Ker was seized in Lima, war existed between Peru and Chile—the War of the Pacific out of which grew the Tacna-Arica dispute. Chilean [sic] forces had occupied Lima. Admiral Patrick Lynch, soldier of fortune serving in the Chilean Navy, had been appointed military governor. On September 28, 1881, he had ousted the provisional government theretofore conducted by the Peruvian, Dr. Calderon. “The authority of the legitimate power having in fact passed into the hands of the occupant,” *the military governor was indeed the authority competent to surrender* a fugitive present in the occupied territory. . . . Accepting as accurate the factual recital of the [Illinois] Attorney General, there was no invasion of Peruvian sovereignty or other breach of international law.⁷⁷

Even after the surrender of defendant Ker by Chilean Admiral Lynch, the Peruvian government of Dr. Calderon filed no protest against the exercise of jurisdiction by United States courts.

Here, in contrast, the government of Mexico has consistently objected to the exercise of criminal jurisdiction by the United States, and has demanded the return of the defendant Alvarez-Machain. Unlike Ker, Alvarez-Machain was not surrendered by any foreign occupying power; the Mexican national government retains full sovereignty over the territory of Mexico under international law.

In addition, *Ker* involved a private Pinkerton agent who had been authorized by the federal government and the State of Illinois only to make a formal treaty demand on the government of Peru. The Pinker-

75. See NOTES FROM THE LEGATION OF PERU, 1827-1906 (National Archives Microfilm Publication T802); see also *Ker v. Illinois*, 110 Ill. 627, 640 (1884) (Scott, J.), *aff'd* 119 U.S. 436 (1886) (“*if the government of Peru does not complain* of the arrest of defendant within its jurisdiction, as an infraction of international law, it does not lie in the mouth of defendant to make complaint on its behalf.”) (emphasis added); *id.* at 643 (“Whether a nation will surrender a fugitive from justice that seeks with it an asylum, is a question of national comity resting in discretion. In no view that can be taken is defendant entitled to immunity . . .”).

76. See Statement of George Hunt, Attorney General of Illinois, in Brief for Defendant in Error, *Ker v. Illinois*, 119 U.S. 436 (1886), *reprinted in* Fairman, *supra* note 73, at 684-85.

77. Fairman, *supra* note 73, at 685-86 (footnotes omitted, emphasis added).

ton agent's action in obtaining custody of Ker, by treating with the occupying forces of the government of Chile, was undertaken without the knowledge or authority of prosecuting authorities of either Illinois or the United States government. Here, in contrast, the District Court found that the informant's actions in arranging to abduct Alvarez-Machain were undertaken with the prior knowledge, approval, and promised reward of Special Agents of the United States Drug Enforcement Administration.⁷⁸

Finally, in *Ker v. Illinois*, the extradition treaty reserved to Peru no discretion to refuse delivery, except for the required evidentiary showing. Ker was an American national charged for a larceny committed on American soil.⁷⁹ In the instant case, the United States agreed in 1980 that Mexico and the United States alike retained the right to decline to surrender their own nationals. In addition, the 1980 treaty permits extradition for the first time for extraterritorial offenses, similar to that charged by the United States against Mexican citizen Alvarez-Machain for a murder on Mexican soil—but only where it has been demonstrated that in a like circumstance, Mexican law would permit prosecution of a similar extraterritorial offense.⁸⁰

This case is also wholly distinct from the matter of General Manuel Noriega and Luis Del Cid who were brought to the United States following their capture in the United States invasion of Panama. First, and crucially, the Government of the Republic of Panama has *not objected* in any form to the seizure and arrest of these two defendants, nor has it suggested there was any violation of Panamanian sover-

78. See *United States v. Caro-Quintero, et al.*, 745 F. Supp. at 603 & n.7. Lower court decisions since *Ker* have concerned situations apparently distinct from the present case: either the foreign government made no protest under the extradition treaty, or a private individual acted on his own without prior authorization from United States officials. For example, in the 1905 incident of Antonio Martinez, see Opening Brief of Appellant United States at 43 n., *United States v. Alvarez-Machain*, No. 90-50459 (9th Cir. 1990), the fugitive was taken from Mexico by a private party. The abductor, Antonio Felix, was extradited by the United States to Mexico for full punishment—hardly imaginable if the abduction had been carried out at the request of United States officials. As Hackworth observes, the Martinez case fell into the distinct category of “breaches by private persons.” See 2 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 152, at 321 (1941).

79. See Brief for Defendant in Error, at 17-19, *Ker v. Illinois*, 119 U.S. 436 (1886):

The effect upon Ker of the acts complained of is identical with what would have happened to him if Peru had discharged her treaty obligation. . . . If every act, from the moment of his capture, is declared illegal, and Ker returned to the place whence he was taken, it will, at that instant, be the duty of Peru to surrender him to the United States for trial. Two more trips across the sea would be the outcome to Ker of this extraordinary venture.

80. See 1980 Extradition Treaty, *supra* note 2, art. 1(2) & 9.

eignty. The United States has placed this fact on the record in the Miami prosecution pending against Noriega and Del Cid.⁸¹ Secondly, the armed forces of the United States, acting pursuant to Presidential order, openly occupied the capital city and territory of Panama at the time Noriega and Del Cid were apprehended; ordinary treaty relations were thus arguably suspended.⁸²

The facts and law of the case of Alvarez-Machain arise under the bilateral United States-Mexico treaty, and are also distinct from American domestic removal of a defendant from, for example, the state of Texas to the state of California. The domestic transfer of defendants within the American union is governed by Article IV, Section 2 of the United States Constitution, by federal statute, 18 U.S.C. § 3182, and by state laws frequently patterned on the Uniform Criminal Extradition Act.⁸³ The American Law Institute's *Restatement (Third) of Foreign Relations Law of the United States* properly notes that the protections available in domestic transfers of fugitives are less rigorous than in international extradition: "some of the limitations on international extradition designed to guard against delivery of a person to a country with standards of justice lower than those of the forum are not applicable."⁸⁴ For example, the double criminality rule, requiring that the conduct be a crime under the laws of both countries, and the doctrine of specialty, requiring that the defendant be tried only for the crime for

81. "Noriega is not Panama's head of state. The Executive Branch recognizes another individual, Guillermo Endara, as Panama's President and head of state. . . . *The Endara Government is therefore the 'appropriate' entity to object to treaty violations against the Republic of Panama, and this it has not done.*" Government's Memorandum of Law in Response to Defendant Noriega's Motion to Dismiss Indictment, at 9-10 (emphasis added), *United States v. Manuel Antonio Noriega*, No. 88-0079 (S.D. Florida). "Panama has neither objected to Del Cid's seizure nor complained that its sovereignty was violated." Government's Memorandum of Law in Response to Defendant Del Cid's Request for an Evidentiary Hearing, at 8 n.4, *United States v. Manuel Antonio Noriega*, No. 88-0079 (S.D. Fla.).

82. See *Extradition Reform Act of 1981, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 97th Cong., 2d Sess., 390, 391 (1982) (memorandum on treaty termination or suspension under international law by Daniel Hill Zafren, Specialist in American Public Law, Library of Congress, Congressional Research Service) ("a treaty may effectively be terminated or suspended . . . through the outbreak of hostilities between parties to the agreement"); LORD MCNAIR, *THE LAW OF TREATIES*, *supra* note 17, at 716 ("in the absence of contrary provisions, express or implied, an extradition treaty between two States which find themselves at war with another is at least suspended for the duration of the war . . .").

83. 11 U.L.A. 51 (1974).

84. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 478 reporters' note 8 (1987).

which extradition is granted, do not apply between States of the Union.⁸⁵

Similarly, in domestic deliveries, "the arrest warrant is issued by the governor of the requested State, not by a magistrate; and, in general, judicial scrutiny of the extradition request is narrower than in international extradition."⁸⁶ Unlike international extradition, in domestic fugitive delivery there is no inquiry by the courts of the requested state into the criminal evidence supporting the claim of the requesting state;⁸⁷ the requested state may not inquire into the fairness of proceedings in the requesting state, or the adequacy of its jail facilities.⁸⁸ These lessened standards make sense in a domestic setting, since all court proceedings are governed by the basic protections of constitutional due process, and a person is not removed from his own nation.

In international extradition the problem is quite distinct, for the requested country may properly wish to assure itself of the evidence supporting another country's request, and there are often differences in the basic procedures of trial.⁸⁹ In this circumstance, the protections appropriate to regulate deliveries and bar the abduction of defendants between foreign jurisdictions, need not apply necessarily in domestic criminal process.⁹⁰

The Supreme Court recognized in the 1989 Term that, even where constitutional restrictions are inapplicable, the reciprocal understandings of treaty law are an appropriate means to protect citizens and aliens alike. As the Court noted in *United States v. Verdugo-Urquidez*, "[i]f there are to be restrictions on searches and seizures which occur

85. *Id.*

86. *Id.*

87. *Michigan v. Doran*, 439 U.S. 282 (1978); *accord California v. Superior Court*, 482 U.S. 400 (1987).

88. *Sweeney v. Woodall*, 344 U.S. 86 (1952); *Pacileo v. Walker*, 449 U.S. 86 (1980).

89. Secretary of State Thomas Jefferson warned of the special need for safeguards in international extraditions. In Jefferson's own view, foreign extradition should be allowed only where a grand jury returned a bill of approval. "Reformation of government with our neighbors, [is] as much wanting now as Reformation of religion is or ever was anywhere." "The exchange of criminals is so difficult between a free and an arbitrary government." Thomas Jefferson, Heads of consideration on the establishment of Conventions between the United States and their neighbors for the mutual delivery of Fugitives from Justice (Mar. 22, 1792) (emphasis omitted), in 23 *THE PAPERS OF THOMAS JEFFERSON* 328, 329 (C. Cullen ed. 1990); Letter from Thomas Jefferson to James Madison (Mar. 16, 1792), in 23 *id.* at 286. Jefferson counseled against seeking the informal return of fugitive criminals from Spanish Florida, for fear we would be required to reciprocate. See Letter from Thomas Jefferson to George Washington (Nov. 7, 1791), in 22 *id.* at 266.

90. See *Frisbie v. Collins*, 342 U.S. 519 (1952); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

incident to . . . American action, they must be imposed by the political branches through diplomatic understanding, *treaty*, or legislation."⁹¹

Here, the safeguards of the extradition treaty between Mexico and the United States were deliberately undertaken in 1980, with the advice and consent of the U.S. Senate and approval of the President, continuing a century-old treaty relationship. The District Court properly relied upon the standards of the 1980 treaty in concluding that the Court could not exercise personal jurisdiction over a defendant abducted from Mexico in violation of the treaty.

2. THE ABDUCTION OF DEFENDANT ALVAREZ-MACHAIN VIOLATES CUSTOMARY INTERNATIONAL LAW. CUSTOMARY INTERNATIONAL LAW BARS ARBITRARY ARRESTS, AND IS INCORPORATED IN UNITED STATES LAW.

The relation of customary international law to American national law is well settled. Chief Justice John Marshall held in *Murray v. Schooner Charming Betsy*⁹² that customary international law is to be deemed a part of federal law. Justice Horace Gray reiterated this lesson in *The Paquete Habana*.⁹³ It is presumed that the Congress, absent clear statement to the contrary, intends its statutes to be applied in a manner consistent with the requirements of international law. American courts have properly declined to choose any interpretation of federal statutory law that would place the United States in breach of an international obligation, so long as an alternative interpretation is consistent with statutory language and structure. As Chief Justice Marshall instructed, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."⁹⁴ This includes the exercise of jurisdictional statutes.

Article 9 of the Universal Declaration of Human Rights declares that "[n]o one shall be subjected to arbitrary arrest, detention or exile." The Universal Declaration of Human Rights was passed by the

91. ____ U.S. ____, 110 S.Ct. 1056, 1066 (1990) (emphasis added).

92. 6 U.S. (2 Cranch) 64, 118 (1804).

93. 175 U.S. 677, 700 (1900); see also Opinion of Attorney General Edmund Randolph (June 26, 1792), in 1 OP. ATT'Y GEN. 26, 27 ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference.").

94. *Murray v. Schooner Charming Betsy*, 6 U.S. at 118. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law . . ."); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

General Assembly of the United Nations,⁹⁵ with the strong support of the United States, and is considered by numerous international law authorities to be a statement of the standards of customary international law protecting human rights.

International abduction without lawful process is a violation of this standard of customary international law. Under the deepest norms of international law, the jurisdiction to apprehend offenders is limited to the political government that is sovereign in a particular country.⁹⁶ With democratic governments, this rule gives citizens the ability to monitor their government, and to assure that power exercised against them will be used only upon reasonable cause, and with appropriate process. The abduction of a Mexican citizen disregards this guarantee of customary international law, as much as the guarantees of the United States-Mexico extradition treaty, the standards of the Mexican Constitution and Mexican federal law.⁹⁷

Although Judge Rafeedie did not have occasion to reach this ground, the decision of the District Court finding a lack of personal jurisdiction over a foreign citizen abducted by government agents from foreign soil is thus sustained by this settled rule of statutory construction. The language and legislative history of the jurisdictional statutes of United States district courts over crimes under the United States Code and rules governing arrest reflect no indication that Congress intended to violate customary international law by permitting the court's warrant to be used as pretext for abducting foreign nationals on foreign soil.⁹⁸

95. See G.A. Res. 217A (III), 3(1) U.N. GAOR Resolutions 71, U.N. Doc. A/810 (1948).

96. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); *id.* § 432 comment b ("*Territoriality and law enforcement*. It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent."); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 125, at 179-80 (1912) ("The duty of every State itself to abstain and to prevent its agents and subjects from any act which contains a violation of another State's independence or territorial . . . supremacy is correlative to the respective right of the other State . . . a State is not allowed to send . . . its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission.") (footnotes omitted).

97. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 reporters' note 1 (1987) (in 1981 Human Rights Committee of United Nations under International Covenant on Civil and Political Rights decided that "abduction of a Uruguayan refugee from Argentina by Uruguayan security officers constituted arbitrary arrest and detention").

98. See F.R. CRIM. P. 4(d)(2) ("*Territorial Limits*. The warrant [of arrest] may be executed or the summons may be served at any place within the jurisdiction of the

The jurisdictional statutes reflect no indication that Congress intended to permit a court to detain a person kidnapped from his homeland; under customary international law the continued detention itself violates the rights of the state from which the individual was abducted.⁹⁹ Parallel to *United States v. Palestine Liberation Organization*,¹⁰⁰ the absence of any statement by Congress that it intended federal criminal jurisdiction to be exercised in violation of international law is sufficient to preclude its exercise.

Kidnapping is a continuing offense. The arbitrariness of abducting a foreign citizen from his homeland does not cease once he is over the border. If a North American were kidnapped by the agents of a Latin American country and put on trial in a Latin American courtroom, the abducting state's responsibility for his return and the continuing wrongful character of his detention under international law would not cease merely because he was forced over the frontier into the abductor's jurisdiction. Without a clear expression by Congress, Judge Rafeedie's order finding an absence of personal jurisdiction over the defendant was entirely consistent with this rule of American law.

Ker is again not to the contrary. *Ker* was a state, not federal prosecution, and in the late nineteenth century, issues of customary international law did not constitute a federal question which could be reviewed on writ of error to the Supreme Court.¹⁰¹ The *Ker* Court specifically noted that it could not seek to resolve, on writ of error, the questions

United States."); F.R. CRIM. P. 4(d)(1) ("The warrant shall be executed by a marshal or by some other officer authorized by law."); 18 U.S.C. § 3231 (criminal jurisdiction of United States district courts).

99. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 comment c (1987) ("If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. *If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned.*") (emphasis added).

100. 695 F. Supp. 1456 (S.D.N.Y. 1988).

101. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 3 (1987) ("State determinations of international law were originally not thought to be subject to review by the United States Supreme Court", citing *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1875); *Oliver American Trading Co. v. Mexico*, 264 U.S. 440 (1924); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 266 U.S. 580 (1924); *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948) (Learned Hand, J.). The landscape was changed by *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("rules of international law should not be left to divergent and perhaps parochial state interpretations"). Issues of customary international law now constitute federal questions for purposes of appeal.

raised under the unwritten or customary law of nations.¹⁰² In addition, as noted above, *Ker* was limited by its unusual facts.

The Paquete Habana raises the possibility that a "controlling act" by one of the political branches may displace the usual incorporation of customary international law into national law. But it is clear under *The Paquete Habana* that such an act must be made at the highest levels of responsibility. In *The Paquete Habana*, a case involving the seizure of prize vessels in time of war, the Court demanded that the controlling act be made by the President; even the act of a ranking Admiral, approving the seizure of Cuban fishing boats as prize vessels, was deemed insufficient.¹⁰³ The United States Attorney has not purported to suggest that the President of the United States has authorized or ordered the seizure of Mexican citizens in the territory of Mexico in displacement of Mexico's own government.¹⁰⁴ In addition it is at least arguable that any controlling act which concerns the jurisdiction of the federal courts

102. See *Ker v. Illinois*, 119 U.S. at 444:

The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court . . . is one which we do not feel called upon to decide . . .

. . . [T]he decision of that question is as much within the province of the State court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.

103. 175 U.S. at 677. There is no showing in this case that the Attorney General approved or authorized the abduction of defendant Alvarez-Machain. Even if there were, this case differs fundamentally from *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986), where the court was asked to enjoin the Attorney General from using his statutory authority to detain Cuban aliens ineligible for entry. A criminal defendant is detained by *the court's own authority*, whereas an alien applying for admission to the territorial United States is excluded by the authority of the Attorney General.

104. In this, one may again contrast the Noriega case, where the President issued an order to United States troops invading Panama, authorizing them to apprehend Noriega as part of their military operation:

In the course of carrying out the military operation in Panama which I have directed, I hereby direct and authorize the units and members of the Armed Forces of the United States to apprehend General Manuel Noriega and any other persons in Panama currently under indictment in the United States for drug-related offenses. I further direct that any persons apprehended pursuant to this directive are to be turned over to civil law enforcement officials of the United States as soon as practicable.

Memorandum for the Secretary of Defense from the President of the United States (Dec. 20, 1989), reproduced in Government's Memorandum of Law in Response to Defendant Del Cid's Motion to Dismiss, at 3, *United States v. Manuel Noriega*, No. 88-0079 (S.D. Fla.).

should have the concurrence of the Congress,¹⁰⁵ to which Article III assigns the special task of establishing the jurisdiction of the first and second tier federal courts. The prescription of rules of judicial jurisdiction and procedure is not a part of the duties of the Presidency under the principles of separation of powers and is inconsistent with the historic independence of the judiciary from Executive control. The Drug Enforcement Agency has never sought or obtained statutory authorization from the Congress to abduct individuals from foreign states in violation of the standards of customary international law.

CONCLUSION

The order of the District Court, finding that the Court could not exercise personal jurisdiction over a defendant abducted from Mexico by persons acting at the request of United States agents, should be affirmed.

105. See Henkin, *The Constitution and United States Sovereignty*, 100 HARV. L. REV. 853, 882-84 (1987) (narrow class of "controlling executive acts" intended by *The Paquete Habana*).