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The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction

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THE HYDRAULIC PRESSURE OF VENGEANCE:[1] *UNITED STATES v. ALVAREZ-MACHAIN* AND THE CASE FOR A JUSTIFIABLE ABDUCTION

INTRODUCTION

On April 2, 1990, five or six men burst into the office of a Mexican gynecologist, Dr. Humberto Alvarez-Machain.[2] The men, paid agents of the United States Drug Enforcement Agency ("DEA"),[3] seized the doctor, drove him to an airport in Northern Mexico, and placed him on a plane bound for El Paso, Texas, and the waiting arms of the DEA.[4] Dr. Alvarez-Machain was under indictment in the United States in connection with his alleged role in the brutal abduction, torture, and subsequent murder of Enrique "Kiki" Camarena-Salazar, a DEA agent working in Mexico.[5] Dr. Alvarez-Machain, the United States alleged, had been present during Camarena's torture, and had medically prolonged his life so that he would live long enough to answer the questions of his interrogators.[6]

In *United States v. Alvarez-Machain*,[7] the United States Supreme Court held that Dr. Alvarez-Machain, a Mexican citizen, could stand trial in the United States for violations of U.S. domestic law, even though agents of the United States had kidnapped the

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1. The title is taken from Justice Oliver Wendell Holmes's statement in Northern Securities Co. v. United States, 197 U.S. 193 (1908), *cited in* United States v. Alvarez-Machain, 112 S. Ct. 2188, 2205 (1992) (Stevens, J., dissenting). Justice Holmes wrote:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities, 197 U.S. at 400-01 (Holmes, J., dissenting).

2. United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *rev'd*, 112 S. Ct. 2188 (1992).

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

4. *Id.*

5. *Id.* at 602.

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

7. 112 S. Ct. 2188 (1992).

defendant in Mexico.[8] The Court further held that his abduction did not violate the extradition treaty between the United States and Mexico.[9]

This decision reaffirmed the long-standing judicial policy of non-inquiry into the means used to bring a criminal suspect to justice.[10] The decision also provoked strong criticism from the international community and from opponents of extraterritorial abduction.[11] In Congress, Representative Leon Panetta of California introduced legislation specifically aimed at reversing the effect of *Alvarez-Machain*.[12] In the Senate, the response took the form of an amend-

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8. *Id.* at 2197.

9. *Id.*; *see infra* notes 394-26 and accompanying text (discussing the majority opinion in *United States v. Alvarez-Machain*).

10. *See infra* notes 145-261 and accompanying text (discussing the different methods of obtaining custody).

11. *See, e.g.*, Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L. L. 746 (1992) (criticizing the *Alvarez-Machain* decision for applying an antiquated doctrine and ignoring the issue of Presidential authority to displace international law); Stephen Bindman, *Ottawa Lodges Protests of U.S. Kidnapping Fugitive*, GAZETTE (Montreal), Feb. 17, 1992, at E7 (noting the Canadian government's filing of an *amicus curiae* brief in *Alvarez-Machain*); *Foreign Minister Says* Machain *Ruling "Insulted" Mexican Sovereignty*, NOTIMEX MEXICAN NEWS SERVICE, June 29, 1992, *available in* LEXIS, Nexis Library, INTL file (quoting Mexican foreign minister Fernando Solana Morales and noting, however, that the Bush administration had been "flexible in its response to Mexico's concerns about the implications of the Machain ruling, and ha[d] shown 'a good spirit of reconciliation' "); Sen. Daniel P. Moynihan, *Supreme Court's Kidnapping Ruling is Manifestly Wrong*, ROLL CALL, UPI, July 27, 1992, *available in* LEXIS, Nexis Library, UPI file (criticizing the decision as contrary to international law and noting a pattern of U.S. disregard for international law); *OAS Opinion Asked In U.S. Abduction Decision*, UPI, June 27, 1992, *available in* LEXIS, Nexis Library, UPI file (noting that the presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay requested that the Organization of American States's Interamerican Judicial Committee issue an opinion on the U.S. decision); *Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S.*, NOTISUR, June 30, 1992, *available in* LEXIS, Nexis Library, INTL file (noting the negative reactions of Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Peru, Uruguay, and Venezuela); *U.S. "Right to Abduct" Rejected by Angry CARICOM Leaders*, LATIN AM. REGIONAL REP.: CARIBBEAN, July 23, 1992, at 8 (quoting St. Lucia Senator Mary Francis as saying "[the U.S.] is going crazy"); *Washington Reassures Columbia Over Kidnappings*, REUTERS NEWS SERVICE, June 17,1992, *available in* LEXIS, Nexis Library, INTL file (describing U.S. diplomatic efforts to reassure the Columbian government that the United States respects Columbian sovereignty). *But see* Malvina Halberstam, *In Defense of the Supreme Court Decision in* Alvarez-Machain, 86 AM. J. INT'L. L. 736 (1992) (arguing that the Court's decision was consistent with current international practice and an affirmation of the Executive's role in foreign affairs); Bruce Fein, *Victory for the Rule of Law*, WASH. TIMES, June 23, 1992, at F1 (arguing that if international law forbids kidnapping fugitives, then "something is wrong with international law, not the abductions").

12. International Kidnapping and Extradition Treaty Enforcement Act of 1992, H.R. 5565, 102d Cong., 2d Sess. (1992). This act provides:

> (a) A person who is forcibly abducted from a foreign place which has in effect an extradition treaty with the United States-

ment to the Foreign Assistance Act of 1961 that was sponsored by Senators Daniel Moynihan, Paul Simon, and Claiborne Pell.[13]

On December 14, 1992, United States District Court Judge Edward Rafeedie dismissed the charges against Dr. Alvarez-Machain for lack of sufficient evidence. Two days later, Dr. Alvarez-Machain returned to Mexico after nearly three years of incarceration in the United States.[14]

To prosecute a foreign criminal suspect in the United States, a court must first establish sufficient jurisdiction over both the offense and the offender.[15] This jurisdictional nexus, however, is meaningless in practical terms unless the court has physical custody of the criminal suspect.[16] In an international context, physical custody contemplates either a cooperative venture between nations or the unilateral act of one nation to bring the suspect before the appropriate judicial forum.[17]

This Note explores the traditional bases of jurisdiction over extraterritorial criminal acts in United States law as a starting point for a discussion of the propriety of prosecuting international criminal suspects.[18] The Note then discusses the limitations on a nation's power to exercise its jurisdiction abroad, including the requirements

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(1) by the agents of a governmental authority in the United States for the purposes of a criminal prosecution; and

(2) in violation of the norms of international law;

shall not be subject to prosecution by any governmental authority in the United States.

(b) An abduction is not, for the purposes of this section, a violation of the norms of international law if the government of the foreign place consents to that abduction, but such consent may not be implied by the absence of a prohibition on such abductions in a treaty regarding extradition.

Id. § 2(a), (b); *see also* 138 CONG. REC. 6019 (1992) (statement of Rep. Panetta) (explicitly criticizing the *Alvarez-Machain* decision as an "outrage").

13. Foreign Assistance Act of 1961 Amendment, S. 3250, 102d Cong., 2d Sess. (1992). This amendment specifically forbids the United States from participating, either directly or indirectly, in international abductions without the express consent of the state. *Id.* § 2(1)(B). Unlike the House version, the Senate bill does not limit the proscription to nations with which the United States has an extradition treaty. *Id.* Like the House version, the Senate action denied prosecutorial authority over abducted persons. *Id.* § 4.

14. George de Lama, *Abducted Mexican Cleared in Killing*, CHI. TRIB., Dec. 15, 1992, §1, at 1.

15. *See infra* notes 26-144 and accompanying text (discussing jurisdictional theories under international law).

16. *See infra* notes 145-261 and accompanying text (discussing the methods for and problems with obtaining custody of criminal suspects abroad).

17. *See infra* notes 145-261 and accompanying text (discussing methods for obtaining custody of foreign criminal suspects).

18. *See infra* notes 26-144 and accompanying text (discussing jurisdictional theories).

for extradition by treaty and the duty of nations to prosecute or extradite fugitives from other countries' judicial processes.[19]

The Note then analyzes the United States's methods of acquiring physical custody over fugitives whose presence the United States is either unwilling or unable to secure through extradition.[20] The United States's willingness to abduct foreign suspects without resort to extradition, often accomplished by entering into informal arrangements between law enforcement officers to accomplish the same goals of extradition, reflects the evolution of the U.S. policy during the 1980s. This policy made a 180-degree turn between 1980 and 1989, going from one in which law enforcement efforts overseas depended on the cooperation of the host nation to one embodied by the so-called "Barr memorandum," an official opinion concluding that the United States has the unilateral authority to enforce United States law extraterritorially.[21]

This shift in U.S. policy reflects law enforcement officers' intense frustration with the perceived inability or unwillingness of foreign countries to cooperate in bringing about effective resolutions to criminal investigations. Nowhere is that frustration, nor law enforcement's willingness to ride the edge of legality, more apparent than the intensive investigation that resulted from the abduction, torture, and murder of United States DEA agent Enrique Camarena-Salazar. That investigation led to the extraordinary apprehension of three foreign suspects, including Dr. Alvarez-Machain.[22]

The Note then addresses the *Alvarez-Machain*[23] decision and analyzes the majority and dissenting opinions. It concludes that while the Court was correct in deciding that it had jurisdiction to try Dr. Alvarez-Machain, it was incorrect in deciding that the abduction was consistent with the terms of the U.S.-Mexico extradition treaty. Further, the Court's opinion neither accurately reflects the purposes of general extradition practices nor the purposes specif-

19. *See infra* notes 173-88, 507-16 and accompanying text (discussing the state's duty to prosecute or extradite a fugitive).

20. *See infra* notes 189-261 and accompanying text (discussing alternate methods of acquiring custody of fugitives outside of the extradition process).

21. *See infra* notes 262-97 and accompanying text (discussing the evolution of U.S. policy in international abductions).

22. *See infra* notes 298-369 and accompanying text (discussing the Camarena investigation).

23. 112 S. Ct. 2188 (1992); *see infra* notes 394-462 and accompanying text (discussing the majority and dissenting opinions decision in this case).

ically expressed in the U.S.-Mexico extradition treaty.[24]

This Note then offers a framework for "justifiable" extraterritorial abductions based on objective criteria.[25] Applying this analysis, the Note concludes that while the United States clearly had valid jurisdictional premises under which to prosecute Dr. Alvarez-Machain, and that the Mexican government arguably failed in its duty to either prosecute him or deliver him to the United States under bilateral and multilateral agreements, the United States failed to exhaust all other means of obtaining jurisdiction over the defendant and was not justified in abducting him.

I. BACKGROUND

A. Traditional Bases of Jurisdiction in International Law

To prosecute a foreign criminal, a United States court is required to have valid jurisdiction over the offense and the offender. Jurisdiction in international law may be defined as a state's[26] authority to affect its legal interests.[27] Functionally, jurisdiction consists of a state's power: to prescribe — the ability to make its laws applicable to the person or entity; to adjudicate — the power to subject persons or things to its legal process; and to enforce — the authority to compel compliance or to punish disobedience to its laws.[28] Since a state may not enforce a law that it has no authority to make,[29] the power of a state to prescribe rules of law is logically dispositive in extraterritorial criminal prosecutions; the state must first establish jurisdiction over the criminal defendant based on a valid exercise of its power to make laws.

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24. *See infra* notes 463-543 and accompanying text (analyzing the *Alvarez-Machain* decision.).

25. *See infra* notes 490-527 and accompanying text (articulating and applying the "justifiable" abduction model).

26. *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT (THIRD)] ("[A] state is an entity that has a defined territory and a permanent population, under the control of its own government and that engages in, or has the capacity to engage in, formal relations with other such entities."); *Harvard Research in International Law, Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 466 art. 1(a) (Supp. 1935) [hereinafter *Harvard Research*] ("A 'state' is a member of the community of nations.").

27. Christopher L. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, *in* LEGAL RESPONSES TO INTERNATIONAL TERRORISM 131, 137 (M. Cherif Bassiouni ed., 1987).

28. 1 RESTATEMENT (THIRD), *supra* note 26, § 401.

29. *Id.* § 431 cmt. a ("[A] state may not exercise authority to enforce law that it has no jurisdiction to prescribe.").

International law recognizes five bases[30] for exercising prescriptive jurisdiction: territorial jurisdiction,[31] nationality jurisdiction,[32] protective jurisdiction,[33] passive personality jurisdiction,[34] and universal jurisdiction.[35]

1. *Territorial Jurisdiction*

Territorial jurisdiction[36] is the precept under which a state prescribes and enforces laws within its own physical boundaries.[37] Territorial jurisdiction is the primary basis for asserting jurisdiction in virtually all states.[38] All nations recognize that states have broad, though not unlimited,[39] authority to regulate the conduct of people and entities within their physical boundaries.[40] This state power to regulate conduct within its boundaries is inherent in a state's sovereignty.[41] As Chief Justice John Marshall noted:

> The jurisdiction of *courts* is a branch of that which is possessed by the na-

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30. A sixth principle, ubiquity, is recognized in European law. Christopher L. Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, The Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT'L L. 1, 15 (1991). Ubiquity, as a jurisdictional tenet, provides that a crime is deemed to have occurred in either the place that the perpetrator acted or in the place where the proscribed harm occurred. *Id.* While some European commentators assert that ubiquity has no parallel in U.S. law, Professors Blakesley and Lagodny argue that, while the parallel suffers from an *ad hoc* development, it nonetheless exists in a combination of the objective and subjective territoriality theories of jurisdictional competence. *Id.; see also infra* notes 36-57 and accompanying text (discussing territorial jurisdiction).

31. 1 RESTATEMENT (THIRD), *supra* note 26, § 402(c).

32. *Id.* para. (e).

33. *Id.* para. (f).

34. *Id.* para. (g).

35. *Id.* § 404.

36. While some treaties and scholars use "jurisdiction" and "territory" interchangeably, they represent two distinct concepts. Jurisdiction is a legal theory by which a state justifies its assertion of the right to prescribe and enforce rules of law; "territory" is the physical scope of the prescriptive and enforcement power. 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 255 (2d ed. rev. 1987) [hereinafter BASSIOUNI, INTERNATIONAL EXTRADITION].

37. *Id.* at 251.

38. Blakesley & Lagodny, *supra* note 30, at 9.

39. Limitations on a state's prescriptive authority within its territory include self-imposed limitations on governmental action, such as constitutional or legislative restrictions, as well as limitations imposed by international law. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 254.

40. A state's jurisdictional competence over crimes that begin in that state but are consummated elsewhere is referred to as the subjective application of territorial jurisdiction. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300-01 (4th ed. 1990).

41. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 252.

> tion as an independent sovereign power.
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> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[42]

Thus, when a crime or other offense is purely domestic in character, the authority of the state to prescribe and enforce its laws is not in question. That a state's sovereignty confers nearly absolute authority to prescribe and enforce laws within its own territory has a logical corollary: A state may not exercise its jurisdiction outside its territory without the acquiescence of the affected state.[43] When an offense involves one or more foreign components, the state's authority to punish rests, to a greater or lesser extent, on the relationships between legal systems and on international law.[44] Early American decisions in this regard were couched in absolute terms. For example, in *The Apollon,*[45] the court held that the United States could not exercise jurisdiction over a French ship in the interstitial zone between the U.S. (Georgia) and Spanish (Florida) territories. The ship had purposely docked at the Spanish port to avoid an excise on French ships in American ports, and American officials seized the ship and its contents.[46] The court held that "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction."[47]

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42. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

43. *See* The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 23, 25 (Sept. 7). The court stated:

> Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

Id. For an example of a convention or treaty permitting one state to exercise its jurisdiction within the territory of another state, see North Atlantic Treaty Organization Status of Forces, June 19, 1951, art. 7, 4 U.S.T. 1792, 1798, 199 U.N.T.S. 67, 76 (providing that members states sending and receiving military forces, civilian employees, and their dependents between signatory states would assist one another in the arrest of criminal suspects for rendition to the proper authorities, whether they be the host nation or sending nation).

44. Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 TEXAS L. REV. 785, 786 (1988).

45. 22 U.S. (9 Wheat.) 361 (1824).

46. *Id.* at 363.

47. *Id.* at 370.

Issues of territorial jurisdiction in international law often turn on whether a state possesses prescriptive and enforcement authority over a given territory at a given time.[48] For example, in *In re Lo Dolce*[49] the defendant admitted robbing and murdering his commanding officer while in combat behind enemy lines in Italy during World War II.[50] The United States could no longer prosecute the defendant for the murder under the Uniform Code of Military Justice because he had since left the military.[51] Similarly, the United States could not try the defendant in the United States for a crime committed overseas. The Italian government requested extradition, but the district court held that Italy did not have jurisdiction over the crime since Germany had been in control of the territory when the crime had occurred.[52]

Territorial jurisdiction, however, is not limited to crimes that take place wholly within the territory controlled by a given state.[53] United States courts have sustained jurisdiction over criminal acts that took place, in whole or in part, outside its physical boundaries but where the effect of the crimes occurred in the United States.[54] Scholars refer to this extension of the principle of territorial jurisdiction as "objective territoriality,"[55] or the "effects principle."[56]

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48. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 254.

49. 106 F. Supp. 455 (W.D.N.Y. 1952); *see also* United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956) (alleging that Icardi, LoDolce's superior officer, and LoDolce had flipped a coin to determine which of them would murder the commander); 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 256 (explaining that *Lo Dolce* is an example of this issue).

50. *In re Lo Dolce*, 106 F. Supp. at 456.

51. *Id.*

52. *Id.* at 460-61; *see* 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 256 (arguing that had the Germans attempted to extradite Lo Dolce, they would have also failed since Germany would not have had present jurisdiction to enforce laws that were in effect at the time the crime occurred).

53. 1 RESTATEMENT (THIRD), *supra* note 26, § 402.

54. *See, e.g.*, United States v. Cotten, 471 F.2d 744 (9th Cir. 1973) (upholding the jurisdictional scope of a statute prohibiting the theft of government property even though the crimes were committed against U.S. military sales facilities in Viet Nam and Japan); Rivard v. United States, 375 F.2d 882 (5th Cir. 1967) (upholding U.S. territorial jurisdiction over a conspiracy directed entirely from outside the United States).

55. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 261; BROWNLIE, *supra* note 40, at 301.

56. 1 RESTATEMENT (THIRD), *supra* note 26, § 402 cmt. d (referring to the "effects principle" as an aspect of territoriality implicated when a state exercises its power to prescribe or enforce laws respecting conduct that takes place outside its borders but affects in the state asserting jurisdiction); *see also Rivard*, 375 F.2d at 882-83. In *Rivard*, the defendant was convicted of both conspiracy to import heroin and actually importing heroin into the United States, even though he had never entered the country. *Id.* The court held that it had jurisdiction to try Rivard on both the conspiracy and the substantive counts, reasoning that a sovereign's jurisdiction "extends over all

Justice Holmes gave voice to this rule of objective territoriality when he said: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."[57]

2. *Nationality Jurisdiction*

A second principle of international jurisdiction — the nationality theory[58] — bases jurisdiction on the nationality or allegiance of the defendant, regardless of where the offense takes place.[59] The rationale for this assertion of state authority is that a sovereign's national enjoys the protection of its laws even while abroad, and thus has a corresponding duty to obey national laws that have an extraterritorial effect.[60] The dispositive factor is not necessarily citizenship; rather, allegiance, domicile, or residence may also implicate nationality jurisdiction.[61] Thus, in *Joyce v. Director of Public Prosecutions,*[62] an English court tried and hanged Joyce, an American national who had at some point obtained a false British passport, for making treasonous radio broadcasts from Germany during World War II.[63] The court reasoned that he had enjoyed the privileges of British citizenship and had therefore incurred its commensurate obligations under British law.[64]

States differ in their application of nationality-based jurisdiction. In U.S. practice, the types of offenses subject to nationality-based jurisdiction are limited.[65] Further, territorial jurisdiction and the

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acts which take effect within the sovereign even though the author is elsewhere." *Id.* at 886.

57. Strassheim v. Daily, 221 U.S. 280, 285 (1911).

58. 1 RESTATEMENT (THIRD), *supra* note 26, § 402(2). This principle is sometimes referred to as the "active personality" principle. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 288.

59. Blakesley, *supra* note 27, at 139.

60. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 288; *see, e.g.,* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (holding that the treason statute, 18 U.S.C. § 2381 (1946), applied extraterritorially to United States citizens).

61. 1 RESTATEMENT (THIRD), *supra* note 26, § 402 cmt. e; BROWNLIE, *supra* note 40, at 303.

62. [1946] 1 All E.R. 186 (H.L.).

63. *Id.* at 187.

64. *Id.* at 192-93.

65. *Compare* 1 RESTATEMENT (THIRD), *supra* note 26, § 402(3) cmt. f & reporter's note 1 ("Apart from its tax law . . . the United States has only sparingly applied law to individuals residing abroad on the basis of their United States nationality.") *with Harvard Research, supra* note 26, at 523 (analyzing United States legislative enactments that adhered to the nationality theory and categorizing them based on the types of conduct proscribed).

possibility of dual citizenship, coupled with nationality-based jurisdiction, may create parallel jurisdiction between states and the possibility of double jeopardy.[66]

The theories of jurisdiction discussed above depend on a nexus either between the criminal act and the prosecuting state's territory or between the actor and the prosecuting state. A third principle of international jurisdiction provides jurisdiction over acts that have no direct impact within the prosecuting state and are committed by a foreign actor. Protective jurisdiction is premised on a state's legitimate concern with protecting its vital interests worldwide.

3. *Protective Jurisdiction*

Protective jurisdiction[67] is, in effect, a "long-arm" jurisdictional theory that allows a state to apply its laws to non-national criminal defendants where the criminal act affects a vital state interest.[68] Most nations, for example, view counterfeiting currency[69] as falling within the aegis of protective jurisdiction. Other crimes that logically have an adverse impact on a state's national interest include espionage, falsification of official documents, and perjury before consular officials.[70]

Most states will assert jurisdiction over aliens for criminal acts committed abroad where those acts affect the security of the state.[71] Specifically, U.S. courts will assert protective jurisdiction when they view the criminal act as an affront to the sovereignty of the United States, or as having a detrimental impact on "valid governmental interests."[72]

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66. BROWNLIE, *supra* note 40, at 303; *see also* 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 288 (arguing that the potential for double jeopardy and for *ex post facto* application of the rule of law violates basic principles of legality).

67. 1 RESTATEMENT (THIRD), *supra* note 26, § 402(3) cmt f. The protective principle is sometimes referred to as the "security principle." BROWNLIE, *supra* note 40, at 304.

68. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 295.

69. *See* 1 RESTATEMENT (THIRD), *supra* note 26, § 402 cmt. f; *Harvard Research*, *supra* note 26, at arts. 7-8 (both acknowledging that counterfeiting lies within the ambit of the protective principle).

70. 1 RESTATEMENT (THIRD), *supra* note 26, § 402 cmt f; *see, e.g.*, United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960) (concerning the falsifying of statements to U.S. consular officials in order to obtain fraudulent entry into the United States); United States v. Archer, 51 F. Supp. 708, 711 (S.D. Cal. 1943) ("[A]ny person who takes a false oath before a consul commits an offense, *not against the country where the consul is, but against the sovereignty of the United States.*").

71. BROWNLIE, *supra* note 40, at 304.

72. Blakesley & Lagodny, *supra* note 30, at 23.

In *United States v. Layton*,[73] the Ninth Circuit used protective jurisdiction to hold that a defendant could be tried for conspiring to murder a United States Congressman, aiding and abetting the murder of a Congressman,[74] and aiding and abetting murder and attempted murder of an internationally protected person,[75] even though all of the relevant events took place abroad.[76] The murdered Congressman, Representative Leo Ryan, had been investigating the activities of an American expatriate religious cult in Guyana. The defendant Layton, a devotee of the cult, was eventually found to have participated in the Congressman's murder.[77]

The *Layton* court held that the charge of attempted murder of an internationally protected person[78] confers jurisdiction on a court "when the crime is committed against an internationally protected person . . . who enjoys his status as such by virtue of functions which he exercises on behalf of that State."[79] Ryan's status as an internationally protected person implicated a strong governmental interest of the United States. The court, therefore, was able to exercise jurisdiction over the defendant without regard to his nationality, based on the effect of the crime on the protected national interest.

United States courts have exercised jurisdiction over criminal suspects based on the location of the offense or its effects, the nationality of the perpetrator, and the perceived vital interest jeopardized by the crime. All of these jurisdictional tenets require some nexus between the offense or the offender and the United States. Yet another jurisdictional theory all but ignores the territorial connection and nationality of the perpetrator and focuses instead on the nationality of the victim.

4. *The Passive Personality Principle*

The "passive personality" principle[80] of jurisdiction purports to

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73. 855 F.2d 1388 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989).

74. *Id.* The Court relied on 18 U.S.C. § 351(d) (1988). *Layton*, 855 F.2d at 1394.

75. The Court also relied on 18 U.S.C. §§ 2, 1116(a), 1117 (1988). *Layton*, 855 F.2d at 1394.

76. In addition, the court applied variants of the nationality theory and the universal theory. *See infra* notes 131-144 and accompanying text (discussing overlapping jurisdictional theories).

77. *See Layton*, 855 F.2d at 1393-94 (discussing the so-called "Jonestown massacre").

78. 18 U.S.C § 1117 (1988).

79. *Layton*, 855 F.2d at 1396.

80. The passive personality principle is sometimes referred to as the "passive personal principle." *See* Adam W. Wegner, *Extraterritorial Jurisdiction Under International Law: The* Yunis *Decision As A Model For The Prosecution Of Terrorists In U.S. Courts*, 22 LAW & POL'Y INT'L BUS. 409, 417 n.45 (1991) (noting that the terms "passive personality" and "passive personal"

confer jurisdiction on a state based on the nationality of the victim.[81] Passive personality is thus a counterpart to the nationality principle in that, while the latter places obligations on a state's nationals no matter where they might be, the former places an obligation on other states to protect the interested state's nationals no matter where they might be.[82] In effect, the passive personality principle allows the punishment of aliens whose acts abroad are harmful to the forum state's nationals.[83] As a principle, it is the least justifiable of the jurisdictional bases,[84] and scholars have historically been uncomfortable with its application.[85] The source of scholarly discomfort with the passive personality principle is its potential for producing preposterous results. If the victim's nationality were the sole criterion for exercising extraterritorial jurisdiction, then presumably every purse-snatching or bar fight that befell a state's national abroad would confer jurisdiction on the victim's state.[86]

While many scholars have criticized the passive personality principle, and some have even expressly repudiated it, the principle is increasingly used to justify jurisdiction over alien criminal defendants.[87] Despite earlier rejection of the passive personality principle,[88]

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jurisdiction mean the same thing).

81. 1 RESTATEMENT (THIRD), *supra* note 26, § 402 cmt. g.

82. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 293.

83. BROWNLIE, *supra* note 40, at 303.

84. *Id.*; *see also Harvard Research*, *supra* note 26, at 579 ("Of all principles of jurisdiction having some substantial support in contemporary national legislation, [the passive personality theory] is the most difficult to justify in theory.").

85. *See Harvard Research*, *supra* note 26, at 445 (questioning the validity of the passive personality principle, and arguing that the passive personality principle, "asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles"). The passive personality principle is specifically excluded from the bases of jurisdiction listed in Articles 3 through 7. *Id.*

86. Wegner, *supra* note 80, at 427.

87. *Compare* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2)(1965) [hereinafter RESTATEMENT (SECOND)] ("A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.") *with* 1 RESTATEMENT (THIRD), *supra* note 26, § 402 cmt. g (noting that the passive personality principle is "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials").

88. *See, e.g.*, The Cutting Case (1888) (citation omitted), *reprinted in* 2 JAMES B. MOORE, A DIGEST OF INTERNATIONAL LAW 228-42 (1906) (rejecting Mexican assertion of jurisdiction over a United States citizen charged with libelling a Mexican national); In Re Fiedler (1940) (citation omitted), *reprinted in* 6 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 104 (1968). In *Fiedler*, the State Department noted:

> This Government continues to deny that, according to the principles of international

the United States has, in effect, written it into law with respect to terrorism.[89] Similarly, international instruments hint at broader applications of the passive personality principle in specific contexts.[90] Since these treaties are a part of United States law under the Constitution,[91] the United States government clearly accepts the passive personality principle, at least within specific contexts.

Despite its criticism, states have used the passive personality principle, often in tandem with one or more other bases, to justify jurisdiction over foreign criminal defendants.[92] In *United States v. Yunis,*[93] for example, the court upheld jurisdiction over a foreign defendant charged with both violating the 1984 Act for the Prevention and Punishment of the Crime of Hostage Taking[94] and "air piracy."[95] Yunis was convicted based on his participation in the hijacking and later demolition of an airliner. The only connection that these events had with the United States was that there were two U.S. nationals aboard the plane. The district court stated that "the Universal and Passive personality principles, together, provide am-

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> law, an American citizen can be justly held in Mexico to answer for an offense committed in the United States, simply because the object of that offense happens to be a Mexican citizen, and it maintains . . . [that] the penal laws of a State, except with regard to nationals thereof, have no extraterritorial force.

Id. (citation omitted).

89. *See* 1 RESTATEMENT (THIRD), *supra* note 26, § 402 note 3 (citing the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2331 (1988), which "makes it a crime to kill, or attempt or conspire to kill, or to cause serious bodily injury, to a national of the United States outside the territory of the United States").

90. *See, e.g., Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,* G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 197, 198 U.N. Doc. E/CN.4/1984/72 (1984) [hereinafter *Torture Convention*] ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to [in the convention]. . . . *[w]hen the victim is a national of that State* if that State considers it appropriate.") (emphasis added); *International Convention Against the Taking of Hostages,* G.A. Res. 34/146, U.N GAOR 6th Comm., 34th Sess., Supp. No. 46, at 245-46, U.N. Doc. A/C.6/34/L.23 (1979) [hereinafter *Hostage Taking Convention*] (allowing, at Article 5, § 1(d), each signatory state to assert jurisdiction when the hostage is a national of that state).

91. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States,* shall be the supreme Law of the Land . . . .") (emphasis added).

92. *See* 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 294 (asserting that the passive personality theory may not be relied upon as the exclusive basis for jurisdiction to prescribe or enforce criminal law, but that it may be used to reinforce the jurisdictional claim of a state where the state has another basis for jurisdiction).

93. 681 F. Supp. 896 (D.D.C. 1988), *aff'd,* 924 F.2d 1086 (D.C. Cir. 1991). The *Yunis* decision is discussed further with respect to the method used to acquire jurisdiction over the defendant, as being distinct from the jurisdiction itself. *See infra* note 274 and accompanying text.

94. 18 U.S.C. § 1203(a) (1988).

95. 49 U.S.C. § 1472(n) (1988).

ple grounds for [the] court to assert jurisdiction over Yunis."[96] The appellate court agreed, and held that the language of the Hostage Taking Act clearly conferred jurisdiction based on the nationality of the victims.[97] It found that "[u]nder the passive personality principle, a state may punish non-nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly strong interest in the crime."[98] Here, the court found that the Hostage Taking Act reflected an "unmistakable congressional intent" that it have extraterritorial effect.[99]

Under each of the above-described theories of jurisdiction, there must, at a minimum, exist some nexus between the state asserting jurisdiction and the offense over which the state claims jurisdiction.[100] That connection is either the location of the offense,[101] the effect that the offense has on a vital state interest,[102] the nationality of the offender,[103] or the nationality of the victim.[104] In each of these situations the state is involved, or declares itself to be involved, by virtue of the effect that a given behavior had on a particular state interest.[105] Universal jurisdiction, in contrast, rests on the premise that certain crimes or behaviors are inherently offensive to all nations, regardless of where they occur or who commits them.[106]

5. *Universal Jurisdiction*

Every state has an interest in exercising its jurisdiction over cer-

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96. *Yunis*, 681 F. Supp at 903.

97. *Yunis*, 924 F.2d at 1090-91. The language the court referred to is contained in 18 U.S.C. § 1203(b)(1)(A) (1988), which confers jurisdiction on U.S. courts when the hostage-taking is committed outside the United States where "the offender *or the person seized or detained* is a national of the United States . . . ." (emphasis added).

98. *Yunis*, 924 F.2d at 1091.

99. *Id.* The *Yunis* decision is also significant because, for the first time, an American court refused to be drawn into discussions of defining terrorism, and instead focused on the criminal act itself. *Compare* United States v. Yunis, 681 F. Supp. 891 (D. D.C. 1988) (refusing a military orders defense and refusing to define terrorism) *with* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823 (D.C. Cir. 1984) ("Federal courts are not in a position to determine the international status of terrorist acts."), *cert. denied*, 470 U.S. 1003 (1985) (Robb, J., concurring) .

100. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 298; Randall, *supra* note 44, at 788.

101. *See supra* notes 36-57 and accompanying text (discussing territorial jurisdiction).

102. *See supra* notes 67-79 and accompanying text (discussing protective jurisdiction).

103. *See supra* notes 58-66 and accompanying text (discussing nationality jurisdiction).

104. *See supra* notes 80-99 and accompanying text (discussing the passive personality principle).

105. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 298.

106. *Id.*; Randall, *supra* note 44, at 788-89.

tain universally condemned offenses.[107] Piracy and slave-trading are the prototypical offenses that any state may define and punish, since nations have historically viewed pirates and slave traders as *host humani generis* — enemies of all humanity.[108] In recent years, however, the number of crimes thought to fall within the realm of universal jurisdiction[109] has increased substantially.[110]

The largest expansion of universal jurisdiction began at the close of the Second World War with the International Military Tribunals at Nuremberg and Tokyo and the zonal tribunals in the occupied zones of Germany.[111] These tribunals, as well as domestic tribunals worldwide,[112] faced the unprecedented task of punishing criminal behavior on a massive scale, behavior that had occurred in various nations and on the high seas.[113] While some offenders were tried by the states in which they committed their crimes, others were tried by whatever state happened to catch them.[114]

At the heart of the Nuremburg tribunal's mandate for prosecuting war criminals was the idea of individual responsibility.[115] The transcript of the proceedings of the Military Tribunal at Nuremburg is clear on this point: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[116] Thus, the Nuremburg Tribunal and the tribunals created by the allied powers in the occupied zones rejected the defense of "obedience to superior orders" as an exculpa-

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107. Randall, *supra* note 44, at 788.

108. *Id.; see, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 158 (1820) (noting that piracy was an offense against the law of nations); United States v. LaJeune Eugenie, 26 F. Cas. 832, 843 (C.C.D. Mass. 1822) (No. 15,551) ("[V]essels and property in the possession of pirates may be lawfully seized on the high seas by any person, and brought in for adjudication."). For a discussion of piracy as an analogue to war crimes and to crimes against humanity, see Randall, *supra* note 44, at 789-91.

109. 1 RESTATEMENT (THIRD), *supra* note 26, § 404.

110. *Compare* RESTATEMENT (SECOND), *supra* note 87, § 34 (citing only piracy as an object of universal jurisdiction) *with* 1 RESTATEMENT (THIRD), *supra* note 26, § 403 (listing piracy, slave trading, attacks on or hijacking of aircraft, genocide, war crimes, and possibly certain acts of terrorism as falling within universal jurisdictional competence). *See also* Randall, *supra* note 44, at 839 (arguing that universal jurisdiction is created over grave breaches of the Geneva Conventions, hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture, genocide, and possibly other offenses).

111. Randall, *supra* note 44, at 800-01.

112. *Id.* at 801-02.

113. *Id.*

114. *Id.* at 802.

115. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 302-03.

116. *Id.* at 303.

tion for individual offenders.[117]

An example of the Allied application of the universal principle of jurisdiction is *In re List*.[118] In this case, a U.S. zonal tribunal tried German officers for executing hundreds of thousands of civilians in the Balkan region during the war.[119] The United States had no territorial connection with the crime; that is, the crime did not occur on territory subsequently occupied by American forces, nor were any of the other traditional nexuses present to assert extraterritorial jurisdiction.[120] The zonal tribunal noted that the defendants had committed an "international crime," which the tribunal defined as "an act *universally recognized* as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."[121] The court acknowledged that this criminal behavior was "universally recognized" and conferred jurisdiction on any state that captured the suspects.[122]

Trials of war criminals and those charged with crimes against humanity have continued to occur long after the close of World War II. Perhaps the most dramatic trial, and the most explicit acknowledgement of universal jurisdiction up to that time, was the trial of Adolf Eichmann,[123] a Gestapo official charged with masterminding Hitler's "final solution" to the "Jewish problem": the mass deporta-

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117. *Id.* Modern international instruments have explicitly rejected the notion that an individual offender may excuse his or her behavior by relying on the "superior orders" defense. *See, e.g., Torture Convention, supra* note 90, art. 2(3) ("An order from a superior officer or a public authority may not be invoked as a justification of torture.").

118. Randall, *supra* note 44, at 807 n.128.

119. *Id.* at 807. The extremely high numbers are based on a ratio of 25 to 100 civilians executed for every German soldier wounded or killed. *Id.*

120. The arguments in favor of an American court asserting jurisdiction over these crimes based on one of the traditional bases of jurisdiction would be weak. For example, there was obviously no assertion of territorial jurisdiction, since the crimes alleged neither occurred in nor had an impact on U.S.-controlled territory. Similarly, since neither the perpetrators nor the victims were U.S. nationals, no basis for either nationality or passive personality jurisdiction would exist. Consequently, an assertion of protective jurisdiction would have been tenuous at best, since no specific United States interest was implicated. Thus, the alternatives would be to allow the perpetrators to go free or to find another jurisdictional premise under which to prosecute the crime. The former result is obviously counter-intuitive; it is difficult to rationalize allowing a crime of this magnitude to go unpunished.

121. Randall, *supra* note 44, at 807.

122. *Id.* at 808.

123. Attorney General of Israel v. Eichmann, 36 I.L.R. 18 (Isr. Dist. Ct. Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962). An unofficial translation of the district court's opinion may be found at 56 AM. J. INT'L. L. 805 (1962).

tion and extermination of literally millions of European Jews.[124]

Israeli agents had abducted Eichmann from Argentina and brought him to Israel to stand trial.[125] The Israeli court held that it had jurisdiction over Eichmann based on both the universal character of the crimes at issue and on the particular nature of the attempt to exterminate the Jewish people.[126] The court went on to explain that Israeli jurisdiction was based on two sources: "[A] universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations," and the specific affront to the State of Israel, which gave the "victim nation" the right to try those who "assault[ed her] existence."[127]

Following World War II, the notion of universally condemned offenses has expanded so much that it now covers not only war crimes and crimes against humanity,[128] but also certain terrorist activities and human rights violations.[129] These crimes are more analogous to war crimes than to piracy, and thus continue to expand the scope of universal jurisdiction begun by the war crimes tribunals.[130]

6. *Overlapping Jurisdictional Premises*

The principles of international jurisdiction often substantially overlap, and it is sometimes difficult to justify a court's reliance on one principle over another. Often, jurisdiction in a given case might logically be premised on more than one principle.

For example, "objective territoriality" is often difficult to distinguish from other bases of jurisdiction, such as the nationality princi-

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124. For a powerfully written discussion of Eichmann and his crimes, see HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

125. *Eichmann*, 36 I.L.R. at 219-31. Israel initially disclaimed state responsibility for the kidnapping, asserting that the abductors were "volunteers." The Israeli government, however, later acknowledged its involvement. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 194.

126. *Eichmann*, 36 I.L.R. at 26.

127. *Id.* at 50. Note that jurisdiction was premised both on the passive personality and universal jurisdiction theories.

128. *See* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985) (employing universal jurisdiction to allow a naturalized American citizen to be extradited to Israel in order to stand trial for crimes against humanity), *cert. denied*, 475 U.S. 1016 (1986) .

129. Randall, *supra* note 44, at 815; *see, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (equating torturers with pirates as the enemies of mankind); United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (noting that terrorism is as much a threat to the international community as piracy), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981) .

130. Randall, *supra* note 44, at 815.

ple[131] or the protective principle,[132] and courts sometimes couch decisions in terms of objective territorial jurisdiction when another principle of jurisdiction might be equally, or even more, appropriate.[133] In *Chandler v. United States*,[134] for example, an American citizen who had made treasonous short wave radio broadcasts to the United States from Germany during World War II was successfully prosecuted in the United States based on an exercise of objective territorial jurisdiction.[135] While the objective territorial theory was adequate under the circumstances, the Court could easily have concluded that the United States had jurisdiction over Chandler under the nationality principle[136] since Chandler had remained a U.S. citizen throughout the war. Similarly, the Court could have claimed it had jurisdiction under the protective principle,[137] since propaganda broadcasts aimed at undermining the war effort might logically have been construed as a threat to the nation's vital interests. Finally, the "victims" of Chandler's treasonous broadcasts were American citizens, which could have brought the crime within the scope of the passive personality principle.[138]

Assertions of nationality jurisdiction are likewise often difficult to distinguish from protective jurisdiction[139] or from extensions of the principle of objective territoriality.[140] In *United States v. Layton*,[141] for example, the Ninth Circuit exercised its jurisdiction over the defendant based on his nationality as well as on the protective and universal principles of jurisdiction.[142] The court held that where a statute described an activity that did not logically depend on its lo-

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131. *See supra* notes 58-66 and accompanying text (discussing nationality jurisdiction).

132. *See supra* notes 67-79 and accompanying text (discussing the protective principle of jurisdiction).

133. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 261 ("Indeed, United States courts have freely extended the territorial principle in many cases to where it would have appeared that another theory would be appropriate.").

134. 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

135. *Id.* at 934.

136. *See supra* notes 58-66 and accompanying text (discussing nationality jurisdiction).

137. *See supra* notes 67-79 and accompanying text (discussing protective jurisdiction).

138. *See supra* notes 80-106 and accompanying text (discussing passive personality jurisdiction).

139. *See supra* notes 67-79 and accompanying text (discussing protective jurisdiction).

140. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 261 (noting that "extensions of the territorial principle have been such that it is often difficult to distinguish between cases relying on this theory or other theories, such as protective or nationality"); *see also supra* notes 53-57 and accompanying text (discussing objective territoriality).

141. 855 F.2d 1388 (9th Cir. 1988).

142. *Id.* at 1395-97.

cation but which injured the U.S. government no matter where it occurred, the statute could be applied to U.S. citizens who violated it abroad.[143] Logically, however, if the crime is sufficiently detrimental to U.S. government interests — no matter where it occurs — to warrant jurisdiction over a U.S. national, it is likely to be just as harmful to the government no matter who commits it. Thus, the objective territorial and protective theories of jurisdiction could apply to such a crime.[144]

B. Limitations on the Exercise of Jurisdiction Over Suspects Abroad

The question of whether a state may assert a valid jurisdictional claim over a particular act or a particular defendant is distinct from the questions of whether and how a state should exercise that jurisdiction.[145] Assuming a valid jurisdictional premise, states are limited to "reasonable" exercises of power with respect to extraterritorial jurisdiction.[146] Furthermore, for a state to adjudicate a criminal case successfully, whatever the jurisdictional theory, it must obtain

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143. *Id.* at 1395.

144. *See supra* notes 73-79 and accompanying text (discussing *United States v. Layton* in more detail).

145. If a suspect is accused of a petty offense against a private party, it may not be deemed serious enough to warrant the expense (in either dollars or time) of formal extradition proceedings. In the same instance, it is unlikely that the offended state would resort to an abduction. Further, the offended state may deem the domestic law of the asylum state sufficient to administer justice in the particular case.

146. 1 RESTATEMENT (THIRD), *supra* note 26, § 403 cmt. a. Having answered the threshold question of whether a state may exercise jurisdiction over an act or a defendant, a state may then exercise its jurisdiction to prescribe and enforce its laws if that exercise is not "unreasonable." A state's assertion of jurisdiction is "unreasonable" when there exists a conflict with another state's significant interest. The "reasonableness" rule is thus an attempt to determine the proper forum when more than one state has a basis for exercising its jurisdiction.

While the *Restatement (Third)* asserts that the "reasonableness" standard is widely accepted, at least by European courts, one author disagrees. Professor Blakesley contends that "reasonableness" is a term of art in Anglo-American jurisprudence, and that non-Anglo-American courts have no contextual history with which to understand or apply the term. Thus, Anglo-American decisions that purport to apply the "reasonableness" standard may appear arbitrary to nations unfamiliar with the term as used in United States law. Blakesley, *supra* note 27, at 142.

The *Restatement (Third)* lists factors relevant to a state's inquiry as to whether to exercise jurisdiction. Among these are: the extent to which the proscribed activity takes place within the asserting state, or whether the activity has a "substantial, foreseeable impact" within the asserting state; connections between the person responsible for the activity and the asserting state; the importance of the regulation to the international political or legal order; and the likelihood of conflict with another state's assertion of jurisdiction. 1 RESTATEMENT (THIRD), *supra* note 26, § 403 & cmts; *see* United States v. Noriega, 746 F. Supp. 1506, 1514-15 (S.D. Fla. 1990) (applying the *Restatement (Third)* reasonableness rule).

physical custody of the defendant.[147]

In practical terms, a valid jurisdictional premise is meaningless without a defendant to try. A court must therefore have custody over a criminal suspect's physical person in order to adjudicate a criminal act effectively. The methods that states use to gain custody over a criminal defendant range from extradition by treaty to outright abduction by the forum state.[148]

1. Extradition

While a comprehensive treatment of U.S. extradition practice and policy is beyond the scope of this Note,[149] the purposes of extradition and of extradition treaties provide a necessary context for a discussion of *United States v. Alvarez-Machain.*[150] Further, the question of a state's duty to extradite a fugitive from another state's justice system raises questions of international relations and sheds light on international cooperation in criminal matters.

Extradition is the surrender by one state to another of a person accused or convicted of a crime under the laws of the second state.[151] Extradition applies to those charged with crimes who have yet to be brought to trial, to those who have fled and been convicted *in absentia,*[152] and to those tried and convicted who subsequently escape to another country.[153] It does not apply to those accused of a crime against whom the state has not brought formal charges.[154] Extradition has, in one form or another, existed since antiquity.[155]

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147. Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?,* 57 OR. L. REV. 51, 53-54 (1977).

148. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 189-90 (discussing legal and extralegal alternatives to extradition).

149. For a comprehensive treatment of United States extradition policy and practice, see BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36 (both volumes).

150. 112 S. Ct. 2188 (1992).

151. WHITEMAN, *supra* note 88, at 727.

152. Professor Bassiouni disagrees with the contention that a conviction *in absentia* is valid grounds for granting extradition. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 381.

153. WHITEMAN, *supra* note 88, at 727.

154. *Id.*

155. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 1 (1987) [hereinafter BASSIOUNI, PUBLIC ORDER]. Professor Bassiouni divides extradition practice into four historical periods: (1) ancient practices, focusing almost entirely on religious and political offenders; (2) the eighteenth century to mid-nineteenth century, focusing on treaties providing for the return of military offenders and mirroring the historical character of Europe during the period; (3) the mid-eighteenth century to the present, characterized by a common concern among nations in suppressing criminality; and (4) the post-1948 period, emphasizing individual human

United States extradition practice is regulated, both in substance and procedure, by both statutes[156] and treaties.[157] Under U.S. law, a duty to extradite exists only under the provisions of a treaty.[158] Typically, extradition treaties consist of: a list of extraditable offenses;[159] a list of circumstances under which extradition is prohibited;[160] a general procedural framework, often including evidentiary,

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rights and evincing the need for international due process of law to protect individuals in international relations. *Id.* at 4-5.

156. 18 U.S.C. §§ 3181, 3184-86, 3188-93, 3195 (1988). The primary extradition provision is found in § 3184:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Id. § 3184.

157. The majority of international extradition agreements are bilateral, although some states have entered into multilateral agreements on extradition based on regional or political affinities. BASSIOUNI, PUBLIC ORDER, *supra* note 155, at 14.

158. *See* 18 U.S.C. § 3184 (1988) (providing that "[w]henever there is a treaty," a judge or magistrate may rule on an extradition request); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (noting that absent a treaty, there is no duty to extradite).

159. The list of extraditable offenses serves not only to reinforce the concept of double criminality, but also to safeguard the requested state's interests by restricting the requesting state's latitude with respect to prosecuting the surrendered fugitive. Under the doctrine of "specialty" a state may only prosecute a person for the crimes for which he or she was extradited. Thus, in United States v. Rauscher, 119 U.S. 407 (1886), the Supreme Court held that under an extradition treaty between the United States and Great Britain, a criminal defendant extradited to the United States for murder could not be subsequently tried on additional charges once he arrived within U.S. territory. *Id.* at 432.

160. A noteworthy example of a restriction on an otherwise valid extradition is the "political offense" exception, whereby the asylum state may refuse extradition on the grounds that the offense charged is of a political, rather than criminal, nature. Predictably, the political offense exception is the subject of much scholarly debate and discussion. *See, e.g.*, 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 383-453; M. Cherif Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition — A Proposed Juridical Standard for an Unruly Problem*, 19 DEPAUL L. REV. 217 (1969) [hereinafter Bassiouni, *Proposed Judicial Standard*]; Blakesley & Lagodny, *supra* note 30, at 46-48; Edward M. Wise, *Terrorism and the Problems of an International Criminal Law*, 19 CONN. L. REV. 799, 824-27 (1987) [hereinafter Wise, *Terrorism and Problems*].

documentary, and warrant requirements; and a clause allowing for "provisional" arrest of the accused if he or she is likely to flee before the requesting state has provided documentation.[161] These clauses serve as treaty-based limitations on the requesting state's ability to obtain physical custody of a fugitive.

a. Purposes of Extradition

Historically, extradition developed as a mechanism by which one state could obtain custody over fugitives from its laws from another state without resorting to force.[162] In this respect, extradition serves the international goal of promoting peaceful relations between countries. The purpose underlying extradition practice between nations is to ensure that the goals of criminal justice are not frustrated by the ability of criminal suspects to seek asylum in foreign countries.[163] As reflected in the preamble to the U.S.-Mexico Extradition Treaty,[164] the purpose of extradition is to allow the two countries "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."[165]

Extradition, as a phenomenon of international law, thus evolved primarily for the benefit of states with respect to apprehending fugitives. Individuals — to the extent that they have any rights in extradition practice — traditionally enjoy those rights only as derivative rights of the requested or requesting state.[166] These individual rights

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161. M. Cherif Bassiouni, *International Extradition: A Summary of the Contemporary American Practice and a Proposed Formula*, 15 WAYNE L. REV. 733, 739-750 (1969) [hereinafter Bassiouni, *Contemporary American Practice*]. For a concise comparison of American and European extradition practices, see Blakesley & Lagodny, *supra* note 30, at 44-48.

162. *See* BASSIOUNI, PUBLIC ORDER, *supra* note 155, at 6 (noting that before extradition treaties became common, nations often granted asylum to fugitives from other nations, with the result that the only way the first sovereign could assert jurisdiction was by force of arms). Professor Bassiouni notes that "[e]xtradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after World War I." *Id.*

163. Edward M. Wise, *Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare*, 62 REVUE INTERNATIONALE DE DROIT PÉNAL 109 (1990) [hereinafter Wise, *Civitas Maxima*]. Professor Wise further notes that, if there is an assumed common interest among nations in crime prevention and punishment, extradition "helps to ensure that criminals do not escape the punishment they deserve, that the preventive, educative, or expressive uses of the criminal law are not diluted by the recurrent spectacle of offenders managing to avoid trial by fleeing to a foreign sanctuary. It serves to close one kind of potential bolt hole." *Id.*

164. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061.

165. *Id.*

166. For a discussion of the interstate nature of extradition proceedings and the lack of individual protections, see 2 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 625-36. Profes-

have been considered ancillary and subordinate to a state's protection of its sovereign interests.[167] Among the restrictions states may impose within an extradition treaty are limitations on a contracting state's duty to extradite its own nationals. The U.S.-Mexico Treaty is fairly typical of United States bilateral extradition treaties with civil law countries in this respect.[168] Under Article Nine of the treaty, "Neither Contracting Party shall be bound to deliver up its own nationals."[169]

While the view of individual rights as subordinate to a state's sovereign interests in the context of extradition has been described as "moribund" in light of the increased emphasis on international human rights,[170] it nonetheless continues to dominate international practice.[171] At the heart of extradition practice is the assumption that states have a shared interest in preventing and punishing crime, and that this shared interest in combating crime represents a *civitas maxima:* an international duty to exchange fugitives between

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sor Bassiouni notes that under current practice, individual rights are derived from the treaty rights of the respective states, and that "there is no direct right conferred upon the individual by international extradition law which the individual can claim, let alone enforce, against either of the respective states involved if these states elect to disregard them." *Id.* at 630; *see also* Blakesley & Lagodny, *supra* note 30, at 44. They write:

> Historically, the traditional bars to extradition were created and functioned for the benefit of the states concerned. The individual sought for extradition benefitted, if at all, only incidentally to the state's protection of its sovereign interests. The fugitive in the requested state was not considered a subject of international law and therefore possessed no individual rights. The individual was considered an object transported from one state to the other as an exercise of the sovereign will of the two states involved.

Id.

167. *See* 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 194 (discussing abductions by public agents as a means of protecting sovereignty); Blakesley & Lagodny, *supra* note 30, at 44 (noting that historically, "The individual sought for extradition benefitted, if at all, only incidentally to the state's protection of its sovereign interests").

168. Typically, treaties between common law countries do not contain restrictions on extraditing nationals. *See, e.g.,* Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983; Extradition Treaty, June 8, 1972-Oct. 21, 1976, U.S.-U.K., 28 U.S.T. 227.

169. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061, 5065.

170. Blakesley & Lagodny, *supra* note 30, at 44-45; *see, e.g.,* International Convention on Civil and Political Rights, Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 175 (outlining the basic due process rights of criminal defendants).

171. *See* 2 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 630. Professor Bassiouni notes that even in the face of increased international attention to human rights, as evidenced by international conventions, individuals do not enjoy rights within the extradition process. Specifically, an individual has no right to challenge a state's failure to abide by the terms of an extradition treaty except as provided by the domestic law of the state involved. *Id; see also* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (holding that a surrendering state may waive treaty provisions that would have created rights for an individual fugitive).

states.[172]

b. The State's Duty to Prosecute or Extradite

As already noted, states do not have a rigid obligation under international law to extradite every fugitive to the requesting state.[173] Historically, a state had no duty whatever to extradite, and chose to do so only out of comity or out of its own sense of political expediency.[174]

Given that states lack enforcement authority within the territory of other states, they must rely on those other states for enforcement of their penal laws in what scholars refer to as the "indirect enforcement" model.[175] That is, states rely on the enforcement mechanisms built into bilateral and multilateral agreements to enforce their penal interests abroad.[176] As a result, provisions for criminal jurisdiction must be given a central role in these instruments if they are to have any effect.[177] Thus, international agreements typically levy a duty on states either to extradite an international offender or to prosecute the offender under their own domestic law.[178]

The Torture Convention provides an example of a multilateral agreement requiring effective domestic prosecution or extradition.[179] After specifically defining the criminal conduct proscribed,[180] the

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172. *See* 2 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 631 (noting that states have mutually complementary duties to combat crime and to promote world order); Wise, *Civitas Maxima*, *supra* note 163, at 116 (noting that humanity's common concern with "cruelty" justifies and requires the extradition of offenders).

173. *See supra* notes 145-61 and accompanying text (noting the self-imposed restrictions on and exceptions to extradition practice).

174. *See* 2 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 629-31 (noting the tendency of states to act within their narrow political self-interest with respect to extradition).

175. M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Penal Matters*, *in* PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 807, 811 (Albin Eser & Otto Lagodny eds., 1991) [hereinafter Bassiouni, *Inter-State Cooperation*].

176. *Id.*

177. *Id.* Professor Bassiouni points out, however, that despite the importance of jurisdictional provisions to effective international law enforcement, only 71 of the 315 international instruments currently in force contain provisions for criminal jurisdiction. *Id.*

178. The duty to extradite or prosecute is often rendered in Latin, *"aut dedere, aut punire"* or *"punire,"* which means to "either surrender or punish." The term traces its roots to fourteenth century legal scholarship. *See* Wise, *Terrorism and Problems*, *supra* note 160, at 110 n.3 (tracing the historical roots of the concept). From this, Professor Bassiouni has derived the principle, *"aut dedere, aut judicare,"* or "either surrender or prosecute." BASSIOUNI, PUBLIC ORDER, *supra* note 155, at 7.

179. *Torture Convention*, *supra* note 90, arts. 5-7.

180. *Id.* art. 1, which provides:

> For the purposes of this Convention, the term "torture" means any act by which

Convention levies a duty on all parties to outlaw the conduct domestically[181] and provides for criminal jurisdiction under the territorial,[182] nationality,[183] and passive personality principles.[184] The Convention then mandates that, "if [a state] does not extradite [the fugitive], [it must] submit the case to its competent authorities for the purpose of prosecution."[185]

Similarly, bilateral instruments often establish a duty to prosecute or extradite. Indeed, the extradition treaty between the United States and Mexico specifically mandates a duty to either extradite or prosecute.[186] In practical terms, this duty, as an incident to indirect enforcement, forces states to rely on the capabilities and limitations of each others' criminal justice systems.[187] Unfortunately, no international standards exist to regulate how states must carry out their respective duties to prosecute or extradite.[188]

> severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

181. *Id.* art. 4. ("[E]ach State Party shall ensure that all acts of torture are offences under its criminal law."). The domestic proscription must also extend to those who are charged with complicity in or participate in torture." *Id.*

182. *Id.* art. 5, § 1(a); *see also supra* notes 36-57 and accompanying text (discussing territorial jurisdiction).

183. *Torture Convention, supra* note 90, art. 5, § 1(b); *see also supra* notes 58-66 and accompanying text (discussing nationality jurisdiction).

184. *Torture Convention, supra note* 90, art. 5, § 1(c); *see also supra* notes 80-99 and accompanying text (discussing the passive personality theory).

185. *Torture Convention, supra note* 90, art. 7.

186. *See* Extradition Treaty, May 4, 1978, U.S.-Mexico, 31 U.S.T. 5061, 5065 art. 9, which provides: "If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense." *Id.* Ironically, this clause appears in the same article that excuses the parties from extraditing nationals, a perceived weakness in bilateral extradition treaties. Taken together, these provisions suggest that if the offender is a national, and is thus immune from extradition either by virtue of the treaty or by operation of domestic law, then the requesting state would at least expect that the offender would be prosecuted under the domestic law of the asylum state.

187. Bassiouni, *Inter-State Cooperation, supra* note 175, at 814.

188. *Id.* Professor Bassiouni argues both for recognition of the duty to prosecute or extradite and for the development of international standards of compliance. *Id.* at 821.

2. *Alternate Methods of Obtaining Custody*

While extradition is the legal means by which a state obtains custody over a foreign criminal defendant,[189] circumstances exist, for various reasons, where the forum state decides that extradition is impractical or undesirable. If, for example, no extradition treaty exists between the asylum state and the forum state, if an offense is not an extraditable offense within a given treaty,[190] if the crime alleged in the forum state is not criminal in the asylum state,[191] or if the forum state believes that the asylum state will protect the offender or allow him or her to escape,[192] then the forum state may choose an informal rendition to bring a suspect to justice. Similarly, states may have political considerations for preferring an informal rendition over extradition.[193] To a great extent, these forms of informal rendition rely on cooperation between the law enforcement agencies of the respective states,[194] cooperation that is virtually unregulated by international convention.[195] The obvious danger of judicially unsupervised, informal police coordination is the potential that it possesses for abuses of human rights and privacy and for

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189. *See* 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 189 ("The title of [the chapter on abduction and unlawful seizure as alternatives to extradition] does not suggest that alternatives to extradition means extradition other than by treaty.").

190. *Id.* at 329-35. Extraditable offenses are either specifically enumerated in the extradition treaty itself or derived from a formula which looks at the facts as charged and determines whether these would support a criminal charge under the laws of the asylum state. *Id.; see also* Abramovsky & Eagle, *supra* note 147, at 51 n.1 (further explaining the principle of "double criminality," which makes extradition available if an act is criminal in both nations). Some multilateral agreements, including the *Torture Convention*, specifically prescribe particular offenses that are "deemed to be included as extraditable offences in any extradition treaty existing between States Parties." *Torture Convention*, *supra* note 90, art. 8.

191. For a discussion of the requirement of "double criminality" under current extradition practice, see 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 324-58.

192. *See* Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 112 (Fall 1989) (noting possible state justifications for extraterritorial abductions in violation of international law as a matter of self-defense).

193. *See Transcript of Proceedings, A National Security Conference Strengthening the Rule of Law in the War Against Drugs and Narco Terrorism* (Washington, D.C., Oct. 11, 1990), *reprinted in* 15 NOVA L. REV. 795, 851 (1991) [hereinafter *Security Conference*] (statement of Mr. diGenova) (alluding to situations in which a country's internal political situation might cause it to prefer the irregular rendition of a criminal suspect over formal extradition).

194. *See id.* at 843 (statement of Judge Sofaer) (noting the extensive cooperation between U.S. law enforcement agencies and their foreign counterparts in the arena of narcotics enforcement).

195. Bassiouni, *Inter-State Cooperation*, *supra* note 175, at 812. Not even the International Criminal Police Organization ("ICPO-INTERPOL"), which has existed since 1923, is regulated by anything approaching treaty status. Instead, ICPO-INTERPOL relies on the voluntary cooperation of local police agencies within the host nation. *Id.*

breaches of national sovereignty.[196]

Alternatively, states may choose an informal method of rendition simply because the extradition process in most countries is procedurally burdensome and slow,[197] or because the asylum state's domestic law forbids the extradition of nationals to foreign countries.[198] In these cases, states find alternate means of obtaining custody of a suspect attractive.

The informal means that states use to obtain jurisdiction over foreign defendants generally fall within two broad categories: the "abduction of a person by agents of a state other than the asylum state without the knowledge or connivance of the asylum state; and . . . [the] seizure of a person by agents of one state and his or her subsequent surrender to the agents of another state without benefit of legal process."[199]

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196. *Id.* at 813. The conduct of the Camarena investigation demonstrated each of these shortcomings, including the breach of Mexican sovereignty. The Camarena investigation is discussed *infra* at notes 298-354 and accompanying text.

197. *See generally* 2 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 501-631 (providing a detailed discussion of extradition procedures under U.S. law). The process is long because it requires interaction of bureaucratic procedures, administrative tribunals, and, potentially, judicial *habeas corpus* proceedings in federal court and all attendant appeals of right and discretion. *Id.* An illustrative example is the case of Joseph Doherty, a member of the Provisional Irish Republican Army, who escaped in 1981 from Great Britain where he had been convicted for the 1980 ambush and murder of a British Army officer in Northern Ireland. He fled to the United States, entered the country illegally, and was eventually arrested by agents of the Immigration and Naturalization Service in 1983. Doherty's case took nine years and six court cases to resolve. He was extradited to Great Britain in 1991 and is currently serving a life sentence in a British prison. For an incisive analysis of the Doherty cases and the doctrine of nonrefoulment (the right of refugees not to be returned to a country where they may face persecution), see Wendy L. Fink, Note, *Joseph Doherty and the INS: A Long Way to International Justice,* 41 DEPAUL L. REV. 927 (1992). As Professor Bassiouni aptly points out, however, if the problem is that the extradition laws are inefficient, then the solution is to improve the laws, not to subvert them. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 190.

198. The Mexican Constitution, for example, limits the extradition of Mexican citizens to foreign countries. CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 15, *cited in* Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok,* 31 VA. J. INT'L L. 151, 161 n.42 (1991) [hereinafter Abramovsky, *Abductions*].

199. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 189. Professor O'Higgins developed a substantially more elaborate scheme for classifying alternatives to extradition:

> 1. Recovery of a fugitive in violation of international law:
> i. seizure in violation of customary international law;
> ii. seizure in violation of conventional international law.
> 2. Apprehension of a fugitive in one state's territory by nationals of another state, as private individuals, with the assistance or connivance of the asylum state's officials.
> 3. Apprehension of a fugitive in one state's territory by nationals of another state, as private individuals, without the assistance or connivance of the asylum state.
> 4. Irregular apprehension of a fugitive in one state by one of that state's officials prior to the subject's extradition to a second state.

These techniques of "extraordinary apprehension"[200] owe their existence to the Latin maxim *mala captus, bene detentus* (a bad capture is a good detention),[201] by which states will exercise *in personam* jurisdiction over a criminal defendant without regard for how he or she was apprehended. Thus, there is no real deterrent to extraordinary apprehension since the criminal proceeding is considered legally valid and its result is upheld by the courts.[202]

This is not to suggest that abductions are, therefore, legal under international law. On the contrary, abductions virtually always violate international law at least to the extent that they violate a nation's sovereignty.[203] Abductions by United States law enforcement agencies implicate three bodies of law: the domestic law of the asylum state, the domestic law of the United States, and customary

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5. Mistaken surrender of a fugitive by one state to another.

Paul O'Higgins, *Unlawful Seizure and Irregular Extradition,* 36 BRIT. Y.B. INT'L L. 279, 280 (1960).

200. Abramovsky & Eagle, *supra* note 147, at 52.

201. 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 190.

202. *Id.* There was one attempt to place limitations on the rights of states to prosecute criminal defendants abducted from another sovereign's territory. *Harvard Research, supra* note 26, at 623 art. 16. The Harvard researchers proposed adding the following language to temper the effect of *"mala captus bene detentus"*:

> In exercising jurisdiction under this [draft convention], no State shall prosecute or punish any person who has been brought within its territory . . . 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.

Id.

203. *See Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 102d Cong., 2d Sess. 6 (1992) [hereinafter *House Hearings*] (statement of Judge Sofaer) (noting that extraterritorial abductions "almost always violate international law because of the violation of territorial integrity that is involved," and carving out a very narrow exception for extreme cases of terror violence where all other international remedies have failed); 1 RESTATEMENT (THIRD), *supra* note 26, § 433(1)(a) (noting that U.S. law enforcement agents are authorized to "exercise their functions in the territory of another state only with the consent of the other state"); Abramovsky & Eagle, *supra* note 147, at 64 (arguing that the U.S. policy of extraterritorial abductions is illegal under international law); Sofaer, *supra* note 192, at 110 (noting the general illegality of international abduction); *see also House Hearings, supra,* at 33 (statement of Prof. Steinhardt) (stating that abductions are "obviously illegal" and frustrate the purposes of extradition); *id.* at 7-8 (statement of Prof. Lowenfeld) (noting that there is "virtual unanimity on the proposition that abduction . . . by agents of one state in the territory of another without that state's consent is a violation of international law"); *id.* at 62 (statement of Prof. Glennon) (stating that the prohibition against unilateral state-sponsored abductions is "about as fundamental a principle of international law as you can get"). Professor Glennon went on to acknowledge the possibility of a very narrow exception implicated by a nation's right to self-defense, but argued that the exception did not have the status of customary international law. *Id.*

international law.[204] The domestic laws of the asylum state will, of course, vary with each case; however, virtually every country has domestic laws against kidnapping.[205] As a matter of U.S. domestic law, the doctrine of *mala captus, bene detentus* has been, with very narrow exceptions, ensconced for more than one hundred years.

a. The *Ker-Frisbie* Doctrine

The U.S. Supreme Court first evaluated the legality of extraterritorial abductions in *Ker v. Illinois*.[206] In that case, the state of Illinois indicted the defendant for embezzlement and larceny while he was living in Peru.[207] The governor of Illinois made a written request to the U.S. State Department to issue a warrant for Ker's return under the terms of an extradition treaty between the United States and Peru.[208] The President issued the warrant and authorized an agent to retrieve the defendant from the Peruvian authorities.[209] The agent, however, did not serve the papers on the Peruvian government and instead forcibly abducted the defendant and placed him aboard a U.S. ship bound for Honolulu.[210] From there, the defendant was placed on another ship and taken to San Francisco, where authorities honored a request for his return to Illinois.[211] Illi-

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204. *Security Conference, supra* note 193, at 841 (statement of Judge Sofaer) (stating that where a seizure does not occur in international waters, three sets of laws are involved).

205. *See* Sofaer, *supra* note 192, at 110 (noting that U.S.-sponsored abductions would likely violate the asylum country's domestic laws and could subject U.S. agents to criminal prosecution in that country).

206. 119 U.S. 436 (1886). The Supreme Court's only previous opinion on a related topic was The Ship Richmond v. United States, 13 U.S. (9 Cranch) 102 (1815). In that case, a U.S. warship seized a U.S.-flagged ship in Spanish territorial waters off the coast of Florida for failure to pay a required bond prior to its original sailing. The Supreme Court rejected the appellant's argument that because the seizure was in violation of international law it should deprive the court of its jurisdiction. The Court noted that the seizure was an offense against the foreign sovereign, and therefore had no effect on the court's power over the ship. *Id.* at 104. Other U.S. courts had dealt with the issue of personal abduction prior to *Ker*. *See, e.g.*, State v. Brewster, 7 Vt. 118, 121 (1835) (holding that, in a case where a criminal defendant was abducted from his home in Canada to stand trial in Vermont, "it [wa]s not for [the court] to inquire by what means or in what precise manner, [the defendant had] been brought within the reach of justice").

207. *Ker*, 119 U.S. at 437.

208. *Id.* at 438; *see* 18 Stat. 719 (1874) (delineating the extradition treaty in force at that time).

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

210. *Id.*

211. *Id.* at 438-39. As it happened, Peru was at war with Chile when the agent arrived, and Chilean forces occupied virtually all of Peru. One could argue that, under the circumstances, there was no Peruvian government in control on whom the agent might have served the extradition request. *See* Charles Fairman, Comment, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678 (1953)

nois tried and convicted the defendant, and he appealed to the state supreme court, which affirmed the conviction.[212] He then appealed on a writ of error to the U.S. Supreme Court, arguing that his removal from Peru violated the mutual extradition treaty between the United States and Peru.[213] He also argued that Peruvian residence gave him a right of asylum, and thus he could only be removed under the provisions of the treaty.[214]

The Supreme Court rejected this argument and held that " 'due process of law' . . . is complied with when the party is regularly indicted by the proper grand jury in the State Court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled."[215] The Court further held that the defendant's "forcible abduction [wa]s no[t a] sufficient reason why the party should not answer when brought within the jurisdiction of the court which ha[d] the right to try him for such an offence."[216]

The Court reaffirmed its holding in *Ker,* that forcible abduction does not deprive a court of personal jurisdiction over a defendant, in *Frisbie v. Collins*[217] some sixty-six years later. In *Frisbie,* the defendant contended that his forcible abduction from Illinois to Michigan to stand trial violated his due process rights under the Fourteenth Amendment and the Federal Kidnapping Act.[218] The Supreme Court again rejected the defendant's arguments and held:

> This court has never departed from the rule announced in *Ker* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." . . . [D]ue process of law is satisfied when one present in court

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(detailing additional facts surrounding the *Ker* case).

212. *Ker,* 119 U.S. at 439.

213. *Id.*

214. *Id.* at 441.

215. *Id.* at 440.

216. *Id.* at 444. Professors Abramovsky and Eagle note the irony that the *Ker* decision, which is consistently relied upon to justify extralegal apprehension, began with a good faith attempt to exercise the provisions of an extradition treaty. Abramovsky & Eagle, *supra* note 147, at 55. For an analysis of extraterritorial application of the Due Process Clause of the Fifth Amendment, see Lea Brillmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process,* 105 HARV. L. REV. 1217 (1992) (concluding that courts should recognize Fifth Amendment limitations on choice of law in the context of extraterritorial applications of law in the same manner in which courts treat interstate choice of law models under the Fourteenth Amendment).

217. 342 U.S. 519 (1952).

218. *Id.* at 520 n.2.

> is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[219]

While one might interpret *Ker* as a reaction to a unique factual situation, its continued application tends to establish that non-inquiry into the means used to assert jurisdiction over a criminal defendant is a fixture of American law.[220] One might also argue that the *Ker-Frisbie* doctrine lends judicial support to a policy of extraordinary apprehension of criminal suspects.[221]

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219. *Id.* at 522.

220. Abramovsky & Eagle, *supra* note 147, at 55. The *Ker* holding has been followed consistently in virtually all of the federal courts. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that a defendant's person is never considered a "suppressible fruit" of an unlawful arrest); United States v. Crews, 445 U.S. 463 (1980) (explaining that a defendant may not object to his presence at trial as a result of an illegal arrest); Gerstein v. Pugh, 420 U.S. 103 (1975) (holding that an arrest based on probable cause is not invalidated due to other failures of police procedure); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (finding that the defendant's abduction by U.S. law enforcement officers in international waters did not deprive the court of jurisdiction); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (holding that a defendant's forced return to the U.S. from Panama did not require the court to divest itself of jurisdiction); United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (explaining that a forcible abduction does not require the district court to divest itself of jurisdiction); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975) (holding that the manner in which the defendant was brought to trial did not affect the court's jurisdictional competence to proceed), *cert. denied,* 421 U.S. 1001 (1975); United States v. Lira, 515 F.2d 68 (2d Cir. 1974) (finding that the abduction of the defendant in Chile did not affect the district court's ability to adjudicate the case), *cert. denied,* 423 U.S. 847 (1975); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974) (holding that an illegal arrest in Peru did not invalidate subsequent proceedings in the United States); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971) (finding that the return of a prisoner from Iowa to Illinois without an extradition hearing did not deprive Illinois courts of jurisdiction); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (holding that the involuntary presence of a material witness in a grand jury proceeding does not affect a court's jurisdiction); Autry v. Wiley, 440 F.2d 799 (1st Cir. 1971) (noting that the violation of Canadian law in securing the defendant's rendition did not impair the U.S. court's jurisdiction), *cert. denied,* 404 U.S. 886 (1971); Government of the Virgin Islands v. Ortiz, 427 F.2d 1043 (3d Cir. 1970) (finding that the defendant's involuntary removal from Puerto Rico to the Virgin Islands without a warrant did not violate any Constitutional guarantees); Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964) (explaining that an unlawful extradition between states did not invalidate the proceedings in the second state); United States *ex. rel.* Moore v. Martin, 273 F.2d 344 (2d Cir. 1959) (upholding jurisdiction despite the defendant's forcible abduction from Florida to Pennsylvania), *cert. denied,* 363 U.S. 821 (1960); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (upholding prosecution despite the forcible, involuntary return of the defendant from Europe to the United States), *cert. denied,* 336 U.S. 918 (1949); United States v. Noriega, 746 F.Supp. 1506 (S.D. Fla. 1990) (holding that the defendant's seizure in Panama did not affect the court's authority to try him). *But see* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (finding that the government's "outrageous" conduct in abducting the defendant deprived the court of jurisdiction). The *Toscanino* "exception" to the *Ker-Frisbie* rule is discussed *infra* at notes 239-61 and accompanying text.

221. Abramovsky & Eagle, *supra* note 147, at 55.

b. Exceptions to the *Ker-Frisbie* Doctrine

Despite the uniform application of the *Ker-Frisbie* doctrine,[222] courts have carved out narrow exceptions based on violations of U.S. treaty obligations and violations of the due process rights of individual defendants. Neither of these exceptions to the *Ker-Frisbie* doctrine have, however, enjoyed widespread application.

i. Treaty Violations

While violations of a law or treaty generally do not require a court to divest itself of jurisdiction,[223] courts have nonetheless held that where the United States has violated a specific treaty provision, a court may refuse jurisdiction.[224] Absent a specific treaty provision, however, the Supreme Court has been reluctant to imply a provision which would invalidate its jurisdiction.[225] One such case was *United States v. Rauscher.*[226]

In *Rauscher,* decided on the same day as *Ker,* the Supreme Court held that a criminal defendant, extradited under the terms of an extradition treaty for a particular crime, could not be subsequently prosecuted for a different crime.[227] The defendant in *Rauscher* was a British citizen extradited to the United States for a murder committed aboard a U.S. vessel on the high seas.[228] Upon arrival in the United States, Rauscher was tried for inflicting cruel and unusual punishment.[229] It did not make sense, the Court reasoned, to establish an enumerated list of extraditable offenses, with evidentiary requirements in the asylum state, only to surrender the fugitive to the requesting state "free from all the positive requirements and just implications of the treaty under which the transfer of his person

222. *See supra* note 220 and accompanying text (noting the consistent adherence of courts to *Ker-Frisbie* and subsequent cases).

223. *See supra* note 220 and accompanying text (discussing cases in which courts did not divest themselves of jurisdiction due to violations of either a law or treaty).

224. *See* Cook v. United States, 288 U.S. 102 (1933) (holding that a violation of a specific jurisdictional limitation within a treaty required the Court to divest itself of jurisdiction); Ford v. United States, 273 U.S. 593, 611 (1927) ("If [a defendant] committed an offense against the United States and [its laws], [the defendant] can not escape conviction, unless the treaty *affirmatively* confers on [him] immunity from prosecution.") (emphasis added).

225. United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied,* 479 U.S. 1009 (1986); United States v. F/V Taiyo Maru, 395 F. Supp. 413, 418-19 (D. Me. 1975).

226. 119 U.S. 407 (1886).

227. *Id.* at 423.

228. *Id.* at 409.

229. *Id.*

[took] place."[230] Thus, the Court was willing to imply a term to a treaty when the transfer took place under that treaty's terms.

Apart from violations of specific provisions within a treaty, another line of cases argues that extradition treaties provide the exclusive means by which a state may acquire jurisdiction over a defendant. In *United States v. Valot,*[231] the defendant was a U.S. citizen jailed in Thailand on narcotics charges.[232] Upon his release from jail, Thai authorities delivered him to American officials in Bangkok, who escorted him to the United States to face additional charges.[233] The defendant argued that his apprehension outside the terms of the U.S.-Thailand extradition treaty violated the treaty since it was meant to be the exclusive means of rendering fugitives between the two states.[234] The Ninth Circuit rejected this argument and held that the facts of the case put it squarely within the ambit of *Ker.*[235] The court further held that if the United States does not make an extradition request, and the defendant is merely deported by the asylum state, "no 'extradition' has occurred and failure to comply with the extradition treaty does not bar prosecution."[236]

Even assuming that a defendant's presence violates the express or implied terms of an extradition treaty, the courts have been reluctant to interfere with the foreign affairs power constitutionally reserved to the political branches of government.[237] This deference to

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230. *Id.* at 421.

231. 625 F.2d 308 (9th Cir. 1980).

232. *Id.* at 309.

233. *Id.*

234. *Id.* at 310.

235. *Id.*

236. *Id.*

237. *See, e.g.,* Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (holding that it was beyond the power of the judiciary to rule on the legitimacy of the executive's decision to disregard a treaty with a foreign sovereign); Mahon v. Justice, 127 U.S. 700 (1888) (noting that the question of whether to return a fugitive unlawfully brought to the forum state was beyond the competence of the judiciary); United States v. Sobell, 142 F. Supp. 515 (S.D. N.Y. 1956) (holding that extradition was not the exclusive means for exchanging fugitives between states, and that the decision by one state to bypass the treaty in favor of an alternate form of rendition was a question for the political branches), *aff'd,* 244 F.2d 520 (2d Cir. 1956), *cert. denied,* 355 U.S. 873 (1957); United States v. Insull, 8 F. Supp. 310 (N.D. Ill. 1934) (finding that the court had no power to examine a complaint from a foreign sovereign over a defendant's abduction, as that would have raised questions for the executive); *Ex Parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934) (finding that the Mexican government's protest over the abduction of one of its citizens was a matter for the executive branch); United States v. Unverzagt, 299 F. 1015 (W.D. Wash. 1924) (noting that a foreign sovereign's complaint about the defendant's abduction from British Columbia to the United States raised a political question for the executive branch), *aff'd sub nom.* Unverzagt v. Benn, 5 F.2d 492 (9th Cir. 1924), *cert. denied,* 269 U.S.

policy-makers demonstrates the need for consistency in foreign affairs pronouncements.[238]

ii. Due Process Challenges

In *United States v. Toscanino,*[239] the Second Circuit carved out what would seem like an exception to the *Ker-Frisbie* rule of non-inquiry. In *Toscanino,* a Uruguayan police officer alleged to be working for the U.S. government kidnapped the defendant, an Italian national, and took him to Brazil.[240] There, Brazilian police, with at least the tacit approval of U.S. agents, tortured the defendant for seventeen days.[241] The Brazilian authorities eventually sent the defendant to New York, where U.S. authorities arrested him.[242] The defendant was tried and convicted on narcotics-related charges in New York,[243] where the district court denied his motion to vacate the jury verdict and repatriate him to Uruguay.[244]

The Second Circuit framed the issue on appeal as "whether a federal court must assume jurisdiction over the person of a defendant who [wa]s illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges [in the United States]."[245] While it acknowledged judicial adherence to the *Ker-Frisbie* doctrine, the Second Circuit questioned the continued validity of the doctrine in light of the expanded scope of judicial inquiry into the due process aspects of pretrial procedures.[246] Relying on the Supreme Court's decisions in

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566 (1925).

238. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (holding that the conduct of foreign affairs requires a "unity of design").

239. 500 F.2d 267 (2d Cir. 1974).

240. *Id.* at 270.

241. *Id.* Toscanino alleged that he was beaten, deprived of sleep, held incommunicado, and subjected to various forms of beatings and torture for the entire period he spent in Brazil. He further claimed that U.S. agents of the Bureau of Narcotics and Dangerous Drugs participated in at least some of the brutality, and that the U.S. Attorney for the Eastern District of New York received regular progress reports on the defendant's interrogation. *Id.* Procedurally, the court considered Toscanino's claim on an appeal from a motion to dismiss, which the lower court had denied without a hearing. The Court of Appeals, therefore, viewed Toscanino's allegations as true for purposes of appeal. *Id.* at 269-71.

242. *Id.*

243. *Id.* at 269. Toscanino was convicted of conspiracy to import narcotics in violation of 21 U.S.C. §§ 173-74 (1956). *Toscanino,* 500 F.2d at 268-69.

244. *Id.* at 271.

245. *Id.*

246. *Id.* at 275.

Rochin v. California[247] and *Mapp v. Ohio,*[248] the court found that the *Frisbie* formulation[249] could no longer bar a court's inquiry into the method used to bring a defendant to justice.[250] The court expressed its expanded view of due process, stating, "[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[251] Allowing a defendant to stand trial in the face of such extreme governmental misconduct represents the "fruits of the government's exploitation of its own misconduct."[252] The government's abduction of the defendant in violation of his Fourth Amendment rights required the court, in the interest of "fundamental fairness,"[253] to return the defendant to the *status quo ante.*[254] Thus, the court held that if a defendant could prove deliberate, reprehensible government misconduct, due process would require the district court to divest itself of jurisdiction.[255]

This assault on the *Ker-Frisbie* doctrine did not last long. In *United States ex rel. Lujan v. Gengler,*[256] a case arising out of the same alleged conspiracy involved in *Toscanino,* the Second Circuit held that the defendant's extraordinary apprehension did not violate due process. There were, however, significant factual distinctions between *Lujan* and *Toscanino.* In *Lujan,* although the defendant had been extraordinarily apprehended in Bolivia by Bolivian police acting as agents of the U.S. government, the defendant made no allegations of torture or extreme misconduct by U.S. agents.[257] As in

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247. 342 U.S. 165 (1952) (holding that pumping a suspect's stomach for narcotics is an illegal search and seizure and violates the Due Process Clause).

248. 367 U.S. 643 (1961) (holding that all evidence obtained by illegal searches and seizures is inadmissible in a criminal trial).

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

250. *Toscanino,* 500 F.2d at 275.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* On remand, the district court held that the defendant could not prove his allegations of extreme government misconduct, and thus the court had proper jurisdiction. United States v. Toscanino, 398 F. Supp. 916 (E.D.N.Y. 1975). The inability of the defendant to prove his assertions demonstrated the factual problems inherent in proving an international abduction. It is exceedingly difficult to sort fact from fiction in both the government's and defendant's versions of events. The factual difficulties of abduction cases caused Professor Lowenfeld to comment, "I don't believe anybody in any of these cases . . . ." *Security Conference, supra* note 193, at 848.

256. 510 F.2d 62 (2d Cir. 1975), *cert. denied,* 421 U.S. 1001 (1975).

257. *Id.* at 66.

Toscanino, the defendant urged that his extraordinary apprehension had deprived him of due process, and therefore divested the federal courts of jurisdiction.[258] While the court recognized that the judicial system could not blind itself to the manner in which the defendant was brought to justice, it nonetheless refused to reject *Ker-Frisbie* entirely:

> Yet in recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. In holding that *Ker* and *Frisbie* must yield to the extent they were inconsistent with the Supreme Court's more recent pronouncements we scarcely could have meant to eviscerate the *Ker-Frisbie* rule, which the Supreme Court has never felt impelled to disavow.[259]

While *Toscanino* seemed to provide a valid exception to the *Ker-Frisbie* doctrine, in practice it has been rendered "virtually meaningless."[260] No court has subsequently applied the *Toscanino* test and concluded that the government's conduct was sufficiently "outrageous" so as to divest the court of jurisdiction.[261] *Toscanino* thus stands as an anomaly to the U.S. judiciary's otherwise uniform application of *Ker-Frisbie.*

A court's legal ability to prosecute a defendant abducted in a foreign country is distinct from the executive's willingness to abduct a defendant. As a matter of policy, the executive — through its law enforcement agencies — must determine the practical advisability and the political implications of an international abduction.

C. *Developments in U.S. Policy on Extraordinary Apprehensions*

As noted above, U.S. courts have consistently applied *Ker-Frisbie* to cases of "extraordinary apprehension" of criminal suspects de-

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258. *Id.*

259. *Id.* at 65.

260. Abramovsky, *Abductions, supra* note 198, at 160.

261. *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (referring to *Ker-Frisbie* and holding that an illegal arrest did not render a conviction void); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (finding that the defendant's allegations of poor treatment in a Panamanian jail failed to rise to the level necessary to invoke the *Toscanino* exception); United States v. Lopez, 542 F.2d 283 (5th Cir. 1976) (refusing to apply *Toscanino* in the 5th Circuit); United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (questioning whether *Toscanino* was good law in the circuit, and refusing in any event to apply it to the facts of the case); United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (finding no proof of DEA involvement in the defendant's mistreatment at the hands of Chilean authorities).

spite strong academic criticism.[262] United States policy in this regard has, over the past decade, become increasingly aggressive. The reasons for this increased willingness to abduct defendants abroad for prosecution in this country reflect a growing frustration with traditional means of exercising jurisdiction over foreign defendants in light of increasing drug trafficking and terrorism.[263] This frustration has led to a correspondingly permissive attitude with respect to law enforcement efforts to bring criminals to justice.[264] The relaxed attitude of U.S. policy-makers with respect to extraordinary apprehension is reflected both in the evolution of U.S. policy during the 1980s, and in the conduct of the Camarena murder investigation itself.[265]

1. Evolution of U.S. Policy on Extraterritorial Law Enforcement in the 1980s

On June 21, 1989, the United States Department of Justice ("DOJ") issued a legal opinion concluding that the President has the authority to order the Federal Bureau of Investigation ("FBI") (and, by extension, any executive law enforcement agency) to arrest individuals for violations of U.S. law in foreign countries without that country's consent.[266] This opinion reversed a previous DOJ

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262. *See, e.g.*, 1 BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 36, at 193 (noting that *Ker* is often applied to factual situations to which it does not apply); Abramovsky, *Abductions*, *supra* note 198, at 156 ("*Ker* was a judicial fluke and continued reliance upon it for our national policy is sheer folly."); Abramovsky & Eagle, *supra* note 147 (setting forth a generally critical view of the *Ker-Frisbie* rationale).

263. Abramovsky, *Abductions*, *supra* note 198, at 155-56.

264. *Id.* While a detailed discussion of the case is beyond the scope of this Note, a notable illustration of the lengths to which the United States is willing to go to bring criminal suspects to trial is the December 1989 invasion of Panamà aimed at securing the presence of General Manuel Antonio Noriega to stand trial in the United States. *See United States v. Noriega*, 746 F. Supp. 1506, 1511-13 (S.D. Fla. 1990) (setting forth the facts of the case and noting that at least one mission of the invading forces was to arrest Noriega). The case also provides an interesting discussion of the objective territorial theory of jurisdiction as applied to Noriega. *Id.* at 1512-13.

265. *See infra* notes 298-354 and accompanying text (discussing the Camarena investigation).

266. The Justice Department memorandum is unpublished. To glean a general explanation of the opinion see, *The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) (statement of William Barr, Ass't. Atty. Gen) and *The International Law and Foreign Policy Implications of Extraterritorial Law Enforcement Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) (statement of Abraham Sofaer). The record of their testimony is likewise not published, although it is available for inspection at room 806, House Annex Number One, Washington, D.C. The author of this Note has relied on secondary sources for his discussion of the testimony of these

opinion concerning the FBI's authority to conduct extraterritorial arrests, written in 1980 near the close of the Carter administration.[267]

This 1980 opinion had held that although "the question [wa]s not free from doubt, we conclude that the FBI only has lawful authority [to apprehend a suspect abroad for violating U.S. law] when the asylum state acquiesces to the proposed operation."[268] In reaching this conclusion, the Carter administration memorandum relied on Chief Justice John Marshall's formulation in *Schooner Exchange v. McFaddon*:[269] "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."[270] The Carter administration memorandum further relied on a rule of statutory construction that allows a government agency to use "all reasonable and necessary means" to accomplish its statutory duty. It was hardly "reasonable," the memorandum concluded, to assume that Congress had intended that the FBI violate international law under its authority to conduct arrests. The implication of this memorandum was that one nation does not have the authority under international law to violate the territorial integrity of another state.[271]

The Carter administration's opinion that extraterritorial law enforcement requires the asylum state's permission was eroded by two pieces of legislation in the 1980s,[272] both of which extended the FBI's authority to investigate crime abroad when a U.S. national

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gentlemen. *See* Major Richard Pregent, *Presidential Authority to Displace Customary International Law*, 129 MIL. L. REV. 77 (1990); Michael R. Pontoni, Comment, *Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives*, 21 CAL. W. INT'L L.J. 215 (1990); Richard Downing, Recent Development, *The Domestic and International Legal Implications of the Abduction of Criminals From Foreign Soil*, 26 STAN. J. INT'L L. 573 (1990); *see also* Monroe Leigh, Comment, *Editorial Comment: Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757 (1992) (noting that the Department of State has refused all requests, even one from Congress itself, for the "Barr Memorandum"). Requests for the memorandum under the Freedom of Information Act ("FOIA") have been similarly unsuccessful, and the State Department has refused such requests under various exceptions. Leigh's own FOIA request is the subject of a suit pending in federal district court. *Id.*

267. U.S. Dep't of Justice, Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Counsel 543 (1980).

268. *Id.* at 544.

269. 11 U.S. (7 Cranch) 116 (1812).

270. *Id.* at 136.

271. Pregent, *supra* note 266, at 78.

272. *Id.*

falls victim to a terrorist act.[273] This legislation resulted in more aggressive law enforcement efforts abroad, including the capture of Fawaz Yunis in 1987.[274]

The 1989 DOJ opinion, written by then-Assistant Attorney General William Barr, relied on two bases for reaching a conclusion diametrically opposed to the 1980 pronouncement: United States case law and the constitutional requirement that the President "shall take care that the laws be faithfully executed."[275] Ironically, the 1989 opinion relied first on *Schooner Exchange v. McFaddon*,[276] the very case relied on in 1980 to reach a contrary conclusion. Rather than standing for the proposition that the United States's authority to act outside its territory is necessarily a function of another state's acquiescence, Barr concluded that international law does not serve as a bar to the United States's sovereign capacity to act.[277] While *Schooner Exchange* established that customary international law is a part of U.S. law,[278] Barr argued that the United States has the authority to displace that law within its own boundaries.[279] Barr further relied on *Brown v. United States*,[280] another case arising out of the war of 1812, for the proposition that international law is a "guide which the sovereign follows or abandons at his will."[281] Both cases involved foreign vessels in U.S. waters, however, and thus did not resolve the question of the sovereign's ability to act

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273. Downing, *supra* note 266, at 574.

274. United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991). The jurisdictional premise of the *Yunis* decision is discussed *supra* at notes 93-99 and accompanying text. Yunis was suspected of being the leader of a group of terrorists who had hijacked and destroyed a Jordanian airliner in Lebanon in 1985. *Yunis*, 924 F.2d at 1089. After a two-year investigation, FBI agents lured Yunis with promises of a drug deal to a yacht in the Mediterranean Sea. *Id.* Once the yacht was in international waters, the FBI arrested Yunis and transported him via U.S. Navy ships and aircraft to the United States for trial. *Id.* Relying on United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), Yunis argued that the district court should have divested itself of jurisdiction based on the government's "outrageous" conduct in apprehending him. The D.C. Circuit, reading *Toscanino* as a narrow exception to *Ker-Frisbie*, examined the FBI's conduct in luring the defendant onto the yacht and the defendant's subsequent incarceration awaiting arraignment and found no "intentional, outrageous" conduct which would require the court to divest itself of jurisdiction. *Id.* at 1092-93; *see also supra* notes 239-61 and accompanying text (discussing the *Toscanino* case in light of *Ker-Frisbie*).

275. U.S. CONST. art. II, § 3.

276. 11 U.S. (7 Cranch) 116 (1812).

277. Pregent, *supra* note 266, at 79.

278. *Schooner Exchange*, 11 U.S. (7 Cranch) at 137.

279. *Id.* at 146 ("Without doubt, the sovereign of the place is capable of destroying this implication [of jurisdiction only under international law].").

280. 12 U.S. (8 Cranch) 110 (1814).

281. *Id.* at 128.

outside its territorial jurisdiction.

To establish the executive authority needed to displace customary international law, Barr cited *The Paquete Habana,*[282] a case that involved the seizure of fishing vessels by the U.S. Navy during the Spanish-American War.[283] There the Court had held that the seizure violated customary international law and ordered the return of the vessels.[284] Barr seized on the following language in *Paquete Habana* to establish a place for customary international law within the hierarchy of U.S. laws:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decisions, resort must be had to the customs and usages of civilized nations . . . .[285]

To further bolster his position, Barr relied on *Garcia-Mir v. Meese,*[286] a case involving a challenge by Mariel refugees to their "prolonged arbitrary detention" under customary international law. The Eleventh Circuit never reached the merits of the case, however, instead relying on the above dicta in *Paquete Habana* to hold that the Executive had authority to displace customary international law.[287] Thus, Barr concluded, the Executive has the authority to displace such law, at least domestically.[288] Assuming that *Garcia-Mir* stands for the proposition that the Executive may displace customary international law domestically, there is nevertheless no case law to support Barr's contention that the Executive's authority extends beyond U.S. territory.[289]

Barr next turned to the constitutional requirement that the President ensure that the "laws be faithfully executed"[290] to support his view that the President has unilateral authority to displace international law. This requirement alone, Barr argued, is enough to grant the Executive the power to authorize extraterritorial arrests by agents of the executive branch.[291] Barr concluded that even though

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282. 175 U.S. 677 (1899).
283. *Id.*
284. *Id.* at 714.
285. *Id.* at 700.
286. 788 F.2d 1446 (11th Cir. 1986), *cert. denied,* 479 U.S. 889 (1986).
287. *Id.* at 1455.
288. Pregent, *supra* note 266, at 82-83.
289. *Id.* at 84.
290. U.S. CONST. art. II, § 3.
291. Pregent, *supra* note 266, at 85.

seizure of a suspect in violation of the domestic law of the asylum state violates customary international law, both the legislative and executive branches nonetheless have the constitutional authority to depart from international law.[292]

The policy approach that the 1989 Barr memorandum attempted to justify has been roundly criticized as "illegal, incoherent, and likely to backfire upon its drafters,"[293] unnecessary,[294] and "politically risky."[295] Law enforcement officials preferred to view the Barr memorandum as a reinterpretation of the authority they already had rather than as a fundamental shift in policy.[296] Irrespective of how the opinion might be characterized, there can be but little doubt that the 1989 memorandum was a response to frustration with the increase in international crime and the perceived difficulties in prosecuting foreign criminals whose crimes affected U.S. national interests.[297]

Perhaps no set of incidents more clearly exposed the frustrations of United States law enforcement officials — and their consequent willingness to conduct extraordinary apprehensions — than the torture and murder of DEA agent Enrique "Kiki" Camarena-Salazar and the resulting investigation.

2. *The Camarena Investigation*

DEA Agent Enrique "Kiki" Camarena-Salazar ("Camarena") had been investigating a multi-million-dollar drug-smuggling syndicate in the state of Jalisco, Mexico. By late 1984, Camarena's investigation had reached Rafael Caro-Quintero, the leader of the Guadalajaro Cartel.[298] On February 7, 1985, members of the drug smuggling operation kidnapped Camarena from in front of the U.S. Consulate in Guadalajara, Mexico, as he left to meet his wife for lunch.[299] Two days later, Caro-Quintero, already suspected in the abduction, apparently bribed a Mexican Federal Judicial Police

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292. *Id.* at 78.

293. Abramovsky, *Abductions, supra* note 197, at 152.

294. *See* Pregent, *supra* note 266, at 79 (questioning whether domestic legal authority to violate international law is required to serve the extraterritorial law enforcement needs of the United States).

295. Sofaer, *supra* note 192, at 110.

296. Downing, *supra* note 266, at 575.

297. *See id.* at 575-76 (suggesting rationales for the new policy).

298. Abramovsky, *Abductions, supra* note 198, at 160.

299. ELAINE SHANNON, DESPERADOS: LATIN DRUG LORDS, U.S. LAWMEN, AND THE WAR AMERICA CAN'T WIN 9-10 (1988).

("MFJP") official and escaped via the Guadalajara airport.[300]

On March 5, 1985, Mexican officials discovered the bodies of Camarena and a Mexican pilot who had worked with him, with their hands and feet tightly bound, clad only in their underwear, on the side of a country road in Mexico.[301] An autopsy revealed that Camarena had been brutally beaten and had suffered multiple skull and jaw fractures.[302] Someone had driven a blunt instrument, such as a crow bar or tire iron, into agent Camarena's skull.[303] His rectum had also been violated by some foreign object, possibly a stick.[304]

Camarena's abduction, torture, interrogation, and murder led to an intensive[305] five-year investigation that implicated not only known drug smugglers, but also uncovered strong circumstantial evidence of official corruption and complicity within the Mexican government.[306] The DEA's frustration with the Mexican government's

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300. *See id.* at 15-16; Abramovsky, *Abductions, supra* note 198, at 161 n.42 (both citing the affidavit of Special Agent Salvador Leyva, filed October 22, 1987, in United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990)).

301. SHANNON, *supra* note 299, at 226.

302. *Id.* at 228.

303. *Id.*

304. *Id.* at 226.

305. DEA agent Jaime Kuykendall, Camarena's partner in the Guadalajara DEA office, noted that "[t]he war on drugs began on February 7, 1985. Nobody did anything until Kiki Camarena was gone, and a lot of people just wouldn't let him disappear into the mist." *Id.* at 453. Professor Abramovsky, citing the extensive media coverage and the eventual television movie made about Camarena's death, notes that Camarena's status has been raised to a level near martyrdom. Abramovsky, *Abductions, supra* note 198, at 160-61 n.41; *see also* Ronald J. Ostrow, *DEA Director Vows to Keep Investigating in Camarena Case*, L.A. TIMES, Aug. 29, 1990, at A3. Ostrow quoted newly-appointed DEA director William Bonner:

> I am committed to continuing the Camarena murder investigation for as long as it takes and for as long as there is any prospect . . . to bring justice to anyone involved in the kidnapping, torture and murder of agent Camarena. . . . The Mexican government essentially had closed their investigation. We have not closed our investigation. There is no statute of limitations on the murder of a federal agent, a DEA agent, under U.S. law.

Id.

306. *See generally* SHANNON, *supra* note 299, at 282-96. Shannon details the involvement of the Mexican Federal Judicial Police ("MFJP") in concealing the existence of audio tapes that Camarena's captors made of his interrogation, some of which indicated the involvement of Mexican authorities. *Id.* Shannon also notes that a telephone call was made from the Guadalajara airport to a "private line" in the office of MFJP Director Manuel Ibarra on the day that defendant Caro-Quintero bribed his way out of the airport. *Id.* at 298. Caro-Quintero's involvement and deportation from Costa Rica to Mexico is discussed *infra* at notes 308-17 and accompanying text; *see also* Ostrow, *supra* note 305, at A3 (quoting DEA Director Bonner as questioning the Mexican government's willingness to investigate Camarena's murder); Henry Weinstein, *U.S. Vows Pursuit of More Camarena Suspects in Mexico*, L.A. TIMES, Aug. 10, 1990, at A3 (noting that the DEA sought Ibarra-Herrera, former head of the MFJP, and Manuel Aldana-Ibarra, head of

inability — or lack of effort — to mount an effective investigation into the murder[307] led the agency to use extraordinary means of apprehension to bring three of the foreign suspects before U.S. courts. Each instance was progressively more blatant in its disregard for international law than its predecessors.

a. Caro-Quintero

In April 1985, the DEA located Caro-Quintero in Costa Rica and persuaded Costa Rican authorities to arrest him.[308] In an early morning raid, a Costa Rican antiterrorist squad arrested Caro-Quintero and six of his accomplices.[309] The U.S. DEA attaché in San Jose convinced the Costa Rican government to deport Caro-Quintero to Mexico, where a warrant for his arrest was outstanding.[310] Mexican authorities arrived the next day and took Caro-Quintero back to Mexico.[311]

Caro-Quintero's deportation to Mexico, while not done in strict

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Mexico's "equivalent to the DEA," and that the DEA was investigating Mexico City chief of police Javier Garcia Paniagua).

307. The agency's intense frustration with the Mexican government and its failure to mount an effective investigation is amply documented in SHANNON, *supra* note 299; *see also Mexico: A Sorry Tale of Drugs, Graft and Corruption*, 132 CONG. REC. 10,764 (1986) (statement of Sen. Hawkins) (decrying Mexican corruption and its lack of effective efforts to combat drug trafficking); *Storm Rises Over Camarena: U.S. Wants Harder Line Adopted*, WKLY. REP., Mar. 8, 1985, at 10 (reporting that then-DEA Chief Francis Mullen had charged the Mexican police with deliberately allowing a "key suspect" [Caro-Quintero] to slip away).

308. SHANNON, *supra* note 299, at 247-48.

309. *Id.* at 250-52. Shannon also notes that the DEA attaché himself followed closely on the heels of the Costa Rican antiterrorist squad and participated in the arrest of Caro-Quintero. *Id.* This was in violation of the Mansfield Amendment, 22 U.S.C. § 2291(c)(1) (1988), which provides that no U.S. law enforcement agent "may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law." *Id.* The Mansfield Amendment was amended in 1986 after Caro-Quintero's arrest to allow U.S. law enforcement officials to assist foreign officers who are effecting an arrest. *Id., amended by* Pub. L. No. 99-570, § 2009, 100 Stat. 3207-64 (1986).

The prohibition on participating in arrests overseas frustrated some law enforcement officers. As Travis Kuykendall, an agent in Mexico from 1972 to 1978, explained:

> If you're going to go into a country like Mexico, convince them to go out and eradicate drugs and make arrests, and that country doesn't even recognize the problem, how are you going to tell five Mexican policemen to go out there and arrest that big trafficker, he's got thirty armed guards, and I'm going to stay here in the office, and if you do it, I'll buy you a cup of coffee? It didn't work. The greatest motivator was that *we* were willing to go out and risk our own rear ends for our country. The Mexicans said, You guys are not serious about this. They lost faith in us. They didn't go. They started lying, and they started taking money.

SHANNON, *supra* note 299, at 459 n.6.

310. Abramovsky, *Abductions*, *supra* note 198, at 161.

311. SHANNON, *supra* note 299, at 254.

accordance with an extradition treaty, nonetheless received the approval of the highest levels of the Costa Rican government.[312] This high-level approval, however, did not completely legitimize the proceedings.[313] The Costa Rican government did not prosecute Caro-Quintero for any violation of its laws, nor did it afford him the benefit of an extradition proceeding.[314] Indeed, the Costa Ricans seemed to rely exclusively on the representations of the United States officials on the scene.[315] In any event, the cooperation between the DEA, the Costa Ricans, and the Mexicans loaned an " 'aura' of extradition" to Caro-Quintero's deportation.[316] At a minimum, his irregular rendition to Mexico did not offend the territorial sovereignty of Costa Rica.[317] The extralegal nature of his deportation to Mexico did, however, set the stage for the progressively less palatable apprehensions to come.

b. Verdugo-Urquidez

The DEA suspected Rene Martin Verdugo-Urquidez, a Mexican citizen,[318] of being a leader of the Mexican drug smuggling operation responsible for the abduction and murder of agent Camarena.[319] The DEA did not request Verdugo-Urquidez's extradition.[320] Instead, the DEA obtained a warrant for his arrest and contacted members of the MFJP to arrange for Verdugo-Urquidez's capture.[321] On January 24, 1986, the MFJP — apparently without authority from their federal government — obliged this request.[322] The MFJP arrested Verdugo-Urquidez, drove him to the U.S.-Mexican border at Calexico, California, and pushed him through a

312. Abramovsky, *Abductions, supra* note 198, at 161.

313. *Id.*

314. *Id.* at 161-62.

315. *See* SHANNON, *supra* note 299, at 247-54 (describing the DEA attaché's efforts to convince the Costa Rican Minister of Public Security that Caro-Quintero was dangerous, that he ought to be arrested, and that he ought to be deported to Mexico to avert an escape attempt).

316. Abramovsky, *Abductions, supra* note 198, at 162.

317. *Id.*

318. Verdugo-Urquidez had been, however, a resident alien in the United States. *Id.* at 162.

319. United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990) ["*Verdugo I*"].

320. While there is a mutual extradition treaty in place between the United States and Mexico, article 9(1) of the treaty relieves Mexico of any obligation to extradite its nationals; indeed, extradition of Mexican citizens is constitutionally prohibited. *See supra* notes 164-69 and accompanying text (describing the U.S.-Mexico extradition treaty).

321. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990) ["*Verdugo I*"].

322. *Id.*

hole in the fence into the hands of the United States Border Patrol.[323] While this rendition had the cooperation of the Mexican police, if not the Mexican government,[324] it nevertheless had no " 'aura' of extradition."[325]

Verdugo-Urquidez's extraordinary apprehension did not come up on his first appeal,[326] but he did challenge the personal jurisdiction of the U.S. district court in a pretrial motion based on the methods used to secure his presence.[327] In denying this motion, the court noted that:

> Though this circuit has yet to address the issue, there is a clear line of Second Circuit cases which hold that abduction from another country violates international law only when the offended state objects to the conduct. . . . The court is unaware of any formal objection by the government of Mexico and thus finds that the issue of the effect of violation of international law on Verdugo's criminal prosecution is not properly before the court at this time.[328]

On a separate appeal,[329] Verdugo-Urquidez argued that his abduction violated the U.S.-Mexico extradition treaty, and that therefore the district court was without personal jurisdiction to try

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323. *See* Abramovsky, *Abductions, supra* note 198, at 162 (explaining Verdugo-Urquidez's arrest).

324. The State Prosecutor for the state of Baja, Mexico, was substantially less sanguine about the irregular rendition, resulting in the formal indictment of Verdugo-Urquidez's Mexican abductors on kidnapping charges. *Verdugo I*, 856 F.2d at 1216 n.1; *see also supra* notes 189-205 and accompanying text (discussing the potential violation of domestic law inherent in abductions).

325. *See* Abramovsky, *Abductions, supra* note 198, at 162 (referring to Caro-Quintero's deportation from Costa Rica to Mexico).

326. Instead, Verdugo-Urquidez moved to suppress evidence that the DEA had obtained in a post-arrest search of his home in Mexico. The trial court granted the motion, and the Ninth Circuit affirmed, holding that Fourth Amendment protections apply to noncitizens and that its restrictions on governmental intrusions apply to the United States when it acts abroad. *Verdugo I*, 856 F.2d at 1215-18. On appeal, the Supreme Court reversed, holding that the search of the defendant's Mexican residence subsequent to his arrest in the United States did not violate the defendant's Fourth Amendment rights against unreasonable search and seizure since Verdugo-Urquidez, a noncitizen, was not one of "the people" that the Fourth Amendment contemplated protecting. *Verdugo I*, 494 U.S. at 259-60.

327. *See* Abramovsky, *Abductions, supra* note 198, at 163 n.55 (citing an unpublished order denying Verdugo-Urquidez's motion to dismiss pursuant to *Toscanino*).

328. *Id.* Professor Abramovsky notes that the Mexican government, which had yet to protest up to that time, did protest Verdugo-Urquidez's abduction once the motion to dismiss was denied. *Id.* The Mexican government did not make the same mistake again. When Dr. Alvarez-Machain was abducted, the Mexican government protested promptly and vociferously. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2191 (1992).

329. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated and remanded*, 112 S. Ct. 2986 (1992) ["*Verdugo II*"].

him.[330] In opposition, the U.S. argued that a forcible abduction does not normally divest a court of personal jurisdiction, even where there is an extradition treaty in place and the offended state registers a protest.[331] Further, the government argued that the treaty did not explicitly prohibit kidnapping, and that individuals did not have standing to raise treaty violations.[332]

The Ninth Circuit distinguished *Ker*,[333] noting that the kidnapping in *Ker* had not involved an officially-sanctioned kidnapping, nor had the government of Peru protested Ker's abduction.[334] Turning to the extradition treaty, the court found that extradition treaties imposed mutual obligations, and that the government's contention that it could disregard the treaty at will contravened the underlying purposes of extradition treaties.[335] The court noted that state-sponsored kidnapping represents a breach of the asylum state's sovereignty and thus violates international law.[336] The court held that, absent the asylum state's consent, either by expressly agreeing in advance or by failing to protest, a government-sponsored kidnapping is a breach of an extradition treaty.[337]

The court rejected the notion that the legality of the abduction was a political question, concluding that if the court were to hold that the United States could unilaterally "invade the sovereign territory of Mexico and kidnap an individual without violating this nation's treaty obligations, it would follow inexorably that no treaty bar exists to similar acts by foreign governments against citizens of the United States."[338] The court remanded the case, however, for a trial court determination as to whether the U.S. government was actually responsible for the abduction.[339]

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330. *Id.* at 1343.

331. *Id.* at 1351.

332. *Id.*

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

334. *Verdugo II*, 939 F.2d at 1345-46.

335. *Id.* at 1349-50.

336. *Id.* at 1352.

337. *Id.*

338. *Id.* at 1362. The Supreme Court granted *certiorari* and vacated the Ninth Circuit's decision, remanding the case to the appellate court for further proceedings consistent with United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). United States v. Verdugo-Urquidez, 112 S. Ct. 2986 (1992).

339. *Verdugo II*, 939 F.2d at 1359.

c. Matta-Ballesteros

Again using extralegal methods, United States agents arranged with the Honduran military for the deportation of Juan Ramon Matta-Ballesteros, a Honduran national, from Honduras to the Dominican Republic, and from there to the United States.[340] Matta-Ballesteros, an escapee from a U.S. prison camp at the Eglin Air Force Base in Florida,[341] was allegedly a chemist for the Guadalajara drug cartel,[342] and had been indicted along with Caro-Quintero and Alvarez-Machain.[343] On April 5, 1988, Honduran police, allegedly with the help of U.S. agents, arrested Matta-Ballesteros in front of his home in Tegucigalpa, Honduras, shocked him with an electronic "stun-gun," bundled him into a truck, and took him to an airfield for a flight out of the country.[344] He was first flown to the Dominican Republic, where he was placed on a plane bound for the United States.[345] On arrival in the United States, he was arrested and transferred to the federal penitentiary at Marion, Illinois.[346]

Matta-Ballesteros claimed that he had been beaten and shocked with an electrical device during the course of his rendition to the U.S., and offered his prison medical examination report in support of this contention.[347] On a writ of *habeas corpus,* the district court reached the issues of treaty law and due process.[348] The court held that absent a protest from the Honduran government, Matta-Ballesteros was without standing to assert a violation of the extradition treaty between the United States and Honduras.[349] Further, the court held that it was without jurisdiction to rule on violations of the Honduran constitution asserted by Matta-Ballesteros.[350]

The court refused to apply the *Toscanino* exception to the *Ker-*

340. United States v. Matta-Ballesteros, 700 F. Supp. 528, 529 (N.D. Fla. 1988).

341. *Id.*

342. SHANNON, *supra* note 299, at 269.

343. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 600 (C.D. Cal. 1990) (discussing the indictments of Caro-Quintero and Alvarez-Machain).

344. Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040, 1041-42 (S.D. Ill. 1988).

345. *Matta-Ballesteros,* 700 F. Supp. at 529.

346. *Id.*

347. *Matta-Ballesteros,* 697 F. Supp. at 1042. The medical evidence indicated that Matta-Ballesteros had abrasions of the neck, a depigmented and scaled area on his penis, linear abrasions on his forearms, a cut on his foot, and "[m]ultiple erythematous spots of about 3-5 mm" on his back. *Id.*

348. *Id.* at 1043.

349. *Id.* at 1044.

350. *Id.*

Frisbie doctrine[351] despite the uncontroverted evidence of torture.[352] In this respect, the court held that even if the Seventh Circuit were to apply the *Toscanino* exception, "the Court [found] that, as a matter of law, the allegations . . . d[id] not rise to the threshold standard of *Toscanino*. The allegations of torture d[id] not meet the required level of outrageousness."[353] This holding seems to bear out Professor Abraham Abramovsky's contention that the *Toscanino* exception is, indeed, meaningless.[354]

The extralegal nature of the Caro-Quintero, Verdugo-Urquidez, and Matta-Ballesteros cases set the tone for the official actions taken in the next case of extraordinary apprehension in the Camarena investigation: the abduction of Dr. Humberto Alvarez-Machain.

II. SUBJECT OPINION

A. Factual Background

On January 30, 1985, as a result of leads developed during the Camarena murder investigation,[355] the United States indicted Dr. Humberto Alvarez-Machain, a Guadalajara gynecologist, for his participation in the torture and murder of Agent Enrique Camarena.[356] Allegedly, Dr. Alvarez-Machain's role in the torture was to prolong Camarena's life so that he could be further interrogated and tortured.[357]

In December of 1989, DEA agents began negotiations through a paid informant with representatives of the MFJP for the informal surrender of Dr. Alvarez-Machain.[358] In return for Dr. Alvarez-

351. *See supra* notes 239-61 and accompanying text (discussing the *Toscanino* "exception" to the *Ker-Frisbie* rule).

352. *Matta-Ballesteros*, 697 F. Supp. at 1046-47.

353. *Id.* at 1046.

354. Abramovsky, *Abductions*, *supra* note 198, at 160; *see supra* notes 260-61 and accompanying text (noting that *Toscanino's* exception is meaningless in practice).

355. *See supra* notes 298-354 and accompanying text (discussing the Camarena investigation).

356. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *rev'd*, 112 S. Ct. 2188 (1992).

357. *Alvarez-Machain*, 112 S. Ct. at 2190. Alvarez-Machain was charged in a sixth superseding indictment with conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity under 18 U.S.C. § 1959 (1988), conspiracy to kidnap a federal agent under 18 U.S.C. § 1201(c), kidnapping of a federal agent under 18 U.S.C. § 1201(a)(5), felony-murder under 18 U.S.C. §§ 1111(a), 1114, and accessory after the fact under 18 U.S.C. § 3. *Caro-Quintero*, 745 F. Supp. at 601 n.1

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

Machain, the Mexicans wanted the reciprocal return of a Mexican fugitive then at large in the United States.[359] The MFJP representatives told the DEA that, while the informal rendition had the full support of the Mexican attorney general, they preferred to keep the arrangements secret to avoid public protest.[360]

In January of 1990, the informant, Antonio Garate-Bustamonte, informed the DEA that, in addition to the return of the Mexican fugitive, the MFJP wanted $50,000 for expenses.[361] The DEA balked at this request, and further negotiations proved fruitless.[362] Garate-Bustamonte approached the DEA agents again in March of 1990 and informed them that he and his associates could deliver Dr. Alvarez-Machain at that time; the DEA agents agreed to pay them $20,000 plus expenses for their services.[363]

On April 2, 1990, five or six armed men burst into Dr. Alvarez-Machain's Guadalajara medical office, abducted Dr. Alvarez-Machain, and took him by car to an airport in northern Mexico.[364] From there, Dr. Alvarez-Machain was flown to El Paso, Texas, where DEA agents were waiting to arrest him.[365] After a brief medical examination in El Paso, the DEA flew Dr. Alvarez-Machain to San Diego, California, to stand trial.[366] The DEA paid Garate-Bustamonte and his associates a reward of $20,000 for their services, as well as $6,000 per week to maintain the abductors and their families in the United States.[367]

The Mexican government quickly protested the abduction to the U.S. Department of State, demanding Dr. Alvarez-Machain's immediate return to Mexico.[368] The Mexicans further charged Dr. Alvarez-Machain's abductors, as well as the DEA agent in charge of the investigation, with kidnapping, and requested their return to Mexico to face charges.[369]

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359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.* at 603.
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.* at 603-04. There is no indication of the planned duration of this arrangement.
368. *Id.* at 604.
369. *Id.*

B. The District Court's Decision

Dr. Alvarez-Machain filed a motion in district court to dismiss the indictment, arguing that the court lacked *in personam* jurisdiction because U.S. agents had forcibly abducted him from Mexico in violation of his due process rights.[370] In addition, he argued that the abduction violated the extradition treaty between the United States and Mexico.[371]

Given the precedential weight of *Ker-Frisbie*,[372] Judge Edward Rafeedie rejected Alvarez-Machain's due process claim, reaffirming the *Ker* holding that forcible abduction does not deprive the court of the authority to try a defendant on criminal charges.[373] The court agreed, however, that the United States's unilateral abduction had violated the U.S.-Mexico extradition treaty.[374] Judge Rafeedie held that a party to a mutual extradition treaty violates the treaty when it abrogates to itself the right to abduct a fugitive from the territory of the second state when that state protests the abduction.[375]

In reaching that conclusion, the court held first that the diplomatic notes that the Mexican government had presented to the U.S. State Department constituted an official protest by the offended sovereign;[376] this protest was sufficient to grant Alvarez-Machain derivative standing to invoke Mexico's rights under the treaty.[377] Second, the court held that the United States was indeed responsible for the kidnapping, since the abductors were paid agents of the United States, and since the plan to abduct Dr. Alvarez-Machain had been induced by, and approved at, the highest levels of the DEA.[378] The determination of state responsibility for a unilateral abduction, coupled with an official protest from the offended sovereign, constituted a violation of the extradition treaty.[379]

The court rejected the government's argument that, since there had never been any formal extradition proceedings against Alvarez-

370. *Id.* at 601.
371. *Id.*
372. *See supra* notes 206-61 and accompanying text (discussing the *Ker-Frisbie* doctrine and its exceptions).
373. *Caro-Quintero*, 745 F. Supp. at 604-06.
374. *Id.* at 609.
375. *Id.*
376. *Id.* at 608.
377. *Id.* at 608-09.
378. *Id.* at 609.
379. *Id.*

Machain, there was no violation of the treaty.[380] The court held that while an extradition treaty does not represent the exclusive means by which one state might render criminal defendants to another, extradition treaties do limit the scope of permissible state conduct.[381] The court, analogizing to *United States v. Rauscher*,[382] reasoned that:

> The government's contention in the present case that a state violates an extradition treaty when it prosecutes for a crime other than that for which the individual was extradited (the doctrine of specialty), but not when a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crimes it chooses, is absurd.[383]

The district court, in distinguishing the case from *Ker*, focused on the issue of the United States's responsibility for the action.[384] In *Ker*, the court reasoned, the kidnapping agent had acted on his own, and the abduction therefore could not have been construed as a state action.[385] Having decided that the United States violated the extradition treaty based on the U.S.-sponsored abduction, and that Dr. Alvarez-Machain had standing to claim those rights derived from the Mexican government's protest, there remained only the question of remedy.

The court held that the proper remedy for a violation of international law is, to the extent possible, a return to the *status quo ante*.[386] Thus, the district court ordered Dr. Alvarez-Machain's immediate repatriation to Mexico.[387]

C. *The Ninth Circuit's Opinion*

The government appealed the district court's order and the Ninth Circuit, relying on its decision in *United States v. Verdugo-Urquidez*,[388] affirmed.[389] The Ninth Circuit held that the facts of the

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380. *Id.*

381. *Id.* at 609-10.

382. 119 U.S. 407 (1886); *see supra* notes 226-30 and accompanying text (discussing the decision in *Rauscher*).

383. *Caro-Quintero*, 745 F. Supp. at 610.

384. Ker v. Illinois, 119 U.S. 436 (1886); *see supra* notes 206-61 and accompanying text (discussing *Ker* and its progeny).

385. *Caro-Quintero*, 745 F. Supp. at 611.

386. *Id.* at 614 (citing 1 RESTATEMENT (THIRD), *supra* note 26, § 901 and notes).

387. *Id.*

388. 939 F.2d 1341 (9th Cir. 1991), *vacated and remanded*, 112 S. Ct. 2986 (1992).

389. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *rev'd*,

Alvarez-Machain case were directly on point with those of *Verdugo-Urquidez*, and thus required repatriation of Alvarez-Machain.[390] It found that the trial court had explicitly addressed the circuit's concerns of government responsibility and official Mexican protest.[391] The Ninth Circuit, therefore, ordered that the indictment be dismissed and that Dr. Alvarez-Machain be repatriated to Mexico.[392] The Supreme Court, however, granted *certiorari*.[393]

D. The Majority Opinion

As framed by the Supreme Court, the issue on appeal was whether a criminal defendant, abducted by the United States from a nation with which the United States has an extradition treaty, acquires a defense to the jurisdiction of U.S. courts.[394] The Court, in an opinion by Chief Justice William Rehnquist,[395] held that the extradition treaty did not explicitly forbid one state's unilateral abduction of a fugitive from the other's territory,[396] and that neither the language nor the history of the treaty supported an implied prohibition on acquiring jurisdiction outside its terms.[397]

Alvarez-Machain argued that his prosecution, like that in *Rauscher*, violated the implied terms of an extradition treaty.[398] The United States argued that *Rauscher* stood as an exception to the *Ker* line of cases, and therefore applied only when one state invoked the extradition treaty.[399] Thus, the central inquiry was whether Dr. Alvarez-Machain's kidnapping violated the terms of the extradition treaty. If the kidnapping did not, the Court found, then it could merely apply the *Ker* holding and "need not inquire as to how [Alvarez-Machain] came before it."[400]

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112 S. Ct. 2188 (1992).

390. *Id.* at 1467.

391. *Id.* at 1466.

392. *Id.* at 1467.

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

394. *Id.* at 2190.

395. The majority consisted of the Chief Justice and Justices Byron White, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas, while Justice John Paul Stevens dissented. *See infra* notes 427-62 and accompanying text (discussing Justice Stevens's dissent).

396. *Alvarez-Machain*, 112 S. Ct. at 2193.

397. *Id.* at 2195-96.

398. *Id.* at 2193.

399. *Id.*

400. *Id.*

1. Treaty Language and History

In interpreting the extradition treaty, the Court first looked to the terms of the document itself and found that it was devoid of express provisions outlining the parties' mutual obligation to refrain from abducting each other's nationals.[401] The Court rejected Alvarez-Machain's argument that Article 22 (1) of the treaty, which states that the extradition treaty "shall apply" to all of the enumerated offenses "committed before and after this Treaty enters into force,"[402] clearly implies that the treaty is the only way to prosecute or extradite fugitives between the two states.[403] The Court reasoned that in light of additional language in Article 22, which provides that extraditions already in process at the time of the signing would be handled according to the terms of the previous treaty, it was more "natural" to conclude that Article 22 simply provides assurance that the treaty will apply to extraditions requested after the treaty came into force.[404]

Similarly, the Court rejected Dr. Alvarez-Machain's argument that Article 9 of the treaty,[405] which allows either party to refuse to extradite its nationals and invokes a duty to prosecute or extradite, describes the terms of the agreement between the states. Alvarez-Machain argued that, since Mexico refused to extradite its nationals, if the United States wants a Mexican national it must first make an extradition request and then allow Mexico to prosecute the offender.[406] He then argued that this limitation on the respective

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401. *Id.*

402. *See* Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061, 5061 art. 2 (enumerating the list of extraditable offenses which includes kidnapping and murder, two of the offenses with which Dr. Alvarez-Machain was charged).

403. *Alvarez-Machain,* 112 S. Ct. at 2194.

404. *Id.* at 2193 n.10.

405. Extradition Treaty, 31 U.S.T at 5065. *See supra* note 186 and accompanying text (discussing the Article 9 proscriptions against extraditing nationals and the duty to prosecute or extradite).

406. *Alvarez-Machain,* 112 S. Ct. at 2193-94. The exchange between Justice Scalia and Mr. Hoffman, attorney for Dr. Alvarez-Machain, is illustrative of the Court's strict textualist bent:

> SCALIA: You repeatedly refer to "limitations" in the treaty and in Article 9. But the treaty simply does not contain any such limitations.
>
> HOFFMAN: Mexico had said all along that it would never extradite Mexican nationals to foreign countries. Article 9 supplied a means for action to be taken if Mexican nationals were wanted for a crime by the United States — the United States can make an extradition request, and Mexico may extradite or try the suspect herself.
>
> SCALIA: It seems to me that you're relying not on the treaty but on general principles of international law.
>
> HOFFMAN: I'm saying that the United States' conduct here violated the clear intent of

states' options preserved the states' rights with respect to where its citizens would be tried: in either foreign or domestic courts. Further, Dr. Alvarez-Machain argued that the treaty's processes and restrictions on the duty to extradite do not make sense if either party is free to eschew extradition altogether in favor of unilateral abduction.[407] The Court held that Article 9 contains no such implied restriction on the respective states to use the treaty as the sole means for acquiring custody over the other country's nationals.[408] Reasoning that since a state is not under an obligation to surrender its nationals absent a treaty, the treaty itself merely establishes procedures the states are obligated to follow when the treaty is invoked.[409] It does not imply that the treaty is the exclusive means of acquiring jurisdiction over the respective parties' nationals.[410]

To bolster its conclusion that the U.S.-Mexico extradition treaty does not require the state parties to refrain from abduction, the Court examined the history and practices of both the United States and Mexico under the treaty.[411] The Court noted that the Mexican government had been aware of the *Ker* doctrine as early as 1906, and had not added any language to the treaty to limit its effect.[412] Thus, the Court held that neither the language nor the history of the treaty evinced a prohibition against unilateral abduction in disregard of the treaty.[413]

2. *Treaty Interpretation*

Having concluded that the treaty itself does not expressly forbid actions outside its terms, the Court then asked whether such a proscription could be implied.[414] Dr. Alvarez-Machain contended that

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the treaty.

SCALIA: Intent, not language.

HOFFMAN: Yes.

Arguments Heard on Forcible Abduction of Foreign National for Criminal Prosecution; Remedy, U.S.L.W. (daily ed.), Apr. 14, 1992, *available in* LEXIS, Genfed Library, USLWD file [hereinafter *Arguments Heard*].

407. *Alvarez-Machain*, 112 S. Ct. at 2194.

408. *Id.*

409. *Id.*

410. *Id.* at 2195.

411. *Id.* at 2194-95.

412. *Id.* n.13 (citing *Harvard Research*, *supra* note 26, art. 16 as an example of delimiting language available to dampen the effect of *Ker*).

413. *Id.* at 2195.

414. *Id.* (quoting Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 17 (1936) ("Strictly, the question is not whether there had been a uniform practical construction denying the

international abductions are so clearly violative of customary international law as to obviate the need to include a clause restricting them in an extradition treaty.[415] Alvarez-Machain cited the U.N. Charter[416] and the Charter of the Organization of American States[417] as evidence of the widespread acceptance of the principle that states may not violate the territorial integrity of other states.[418]

The Court was puzzled by the requirement that the "offended" state must protest in order to trigger individual standing on the part of a defendant.[419] The Court found that if extradition treaties are self-executing then they are enforceable in federal courts irrespective of a foreign state's objections.[420] Thus, the Court determined that in *Rauscher,* Britain had argued in other cases that the doctrine of specialty was inherent in extradition treaties, but that Britain's protest of Rauscher's prosecution for crimes other than those for which he was extradited was irrelevant to the issue; the Court implied specialty from the current practice of nations with respect to extradition treaties.[421] The Court here found that Alvarez-Machain was attempting to imply a term into an extradition treaty from the practice of nations generally.[422] Thus, the Court held, with respect to the prohibition on the extraterritorial use of the police power: "There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended [that] an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations."[423] Concluding that the treaty forbids acquiring the presence of the defendant outside its terms required an "inferential leap, with only the most general of international law principles to

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power, but whether the power had been so clearly recognized that the grant should be implied.")).

415. *Alvarez-Machain,* 112 S. Ct. at 2195.

416. U.N. CHARTER art. 2.

417. CHARTER OF THE ORGANIZATION OF AMERICAN STATES (O.A.S.) art. 1.

418. *Alvarez-Machain,* 112 S. Ct. at 2195. While Alvarez-Machain did not rely on these instruments as a basis for his claim, the United States conceded that it had violated both the U.N. and O.A.S. Charters. *See Arguments Heard, supra* note 406 (noting that while the Solicitor General conceded that the U.S. action violated the U.N. and O.A.S. Charters in response to questioning from Justice Souter, the violation was indirect and a matter for the executive branches of the respective governments).

419. *Alvarez-Machain,* 112 S. Ct. at 2195.

420. *Id.*

421. *Id.* at 2196; *see also supra* notes 226-30 and accompanying text (discussing the *Rauscher* decision).

422. *Id.*

423. *Id.*

support it."[424]

Conceding that the abduction might indeed have been "shocking," and that it might have also been violative of international law, the Court held that it nonetheless did not violate the mutual extradition treaty between the United States and Mexico.[425] Having concluded that the United States had not violated the treaty, the Court held that *Ker* was "fully applicable" to Dr. Alvarez-Machain and that he could, therefore, be tried in the United States.[426]

E. The Dissent

Characterizing the decision as "monstrous,"[427] Justice John Paul Stevens[428] attacked the majority's holding both as a matter of treaty interpretation[429] and as a misreading of precedent.[430] Like the majority, the dissent found the central issue to be whether the United States's unilateral action violated the treaty;[431] but unlike the majority, the dissent viewed the issue of state responsibility as central to the inquiry.[432]

1. Treaty Interpretation

Justice Stevens began his analysis of the U.S.-Mexico extradition treaty by noting that its purpose is to assist the United States and Mexico "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."[433] Given that treaties are to be interpreted to give the words a meaning consistent with the parties' expectations, Justice Stevens found it "difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance — the

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424. *Id.*

425. *Id.* at 2196-97.

426. *Id.* at 2197.

427. *Id.* at 2206 (Stevens, J., dissenting); *see id.* at 2201-02, *quoting* The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824) ("It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, [to seize] vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.").

428. Justices Harry Blackmun and Sandra Day O'Connor joined Justice Stevens's dissent.

429. *Alvarez-Machain*, 112 S.Ct. at 2198-2200 (Stevens, J., dissenting).

430. *Id.* at 2200-03 (Stevens, J., dissenting).

431. *Id.* at 2197, (Stevens, J., dissenting).

432. *Id.*

433. *Id.* at 2198 (Stevens, J., dissenting), *quoting* Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. at 5061, 5061.

stated goals of the Treaty."[434] Further, the dissent reasoned, the document itself is comprehensive, addressing issues of concern to the criminal processes of both signatories and providing protections for their respective interests.[435]

An interpretation that the treaty is not exclusive, and that it allows both sides to conduct unilateral abductions from the other's territory would render the specific provisions of the treaty "little more than verbiage."[436] Thus, for example, either party could avoid the treaty's reservation against political offenses, or the states' prerogative to refuse extradition where the accused could face the death penalty in the requesting nation, merely by kidnapping the accused without resort to the treaty.[437]

The dissent reasoned that the parties' failure to explicitly promise not to kidnap each other's citizens hardly justified a conclusion that kidnapping was, therefore, permissible:

> Relying on that omission, the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self-help whenever they deem force more expeditious than legal process. If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty.[438]

Put more bluntly, the dissent argued that the majority had, in effect, written a new provision into Article 9 of the treaty: "Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other."[439] As there was nothing in the negotiating history, ratification process, or subsequent dealings between the states to suggest a contrary understanding,[440] the dissent reasoned that the "manifest scope and

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434. *Id.* at 2191 n.4.

435. *See id.* at 2198 (Stevens, J., dissenting) (noting treaty reservations against extradition for political or military offenses (Art. 5), where the accused has already been tried in one country (Art. 6), when the statute of limitations for the offense has expired (Art. 7), and discretionary extradition if the accused would face the death penalty in the requesting state (Art. 8)).

436. *Id.*

437. *Id.*

438. *Id.* at 2199 (Stevens, J., dissenting).

439. *Id.* n.11.

440. *Id.* n.15.

object of the treaty itself"[441] clearly implied a mutual undertaking between the parties to observe their respective territorial integrities.[442] The dissent reasoned that implying such a term into the extradition treaty was supported by the precedent the Court articulated in *Rauscher* as well as by the weight of international law.[443]

2. *Implying Terms to the Treaty*

Having concluded that the treaty represents a comprehensive treatment of the parties' intent with respect to cooperation in exchanging fugitives, Justice Stevens argued that the Court's own precedent supported an implication of exclusivity into the terms of the treaty. In *Rauscher,* the dissent argued, the Court was faced with a treaty substantially less comprehensive than the treaty at issue[444] and had implied a term requiring that a state prosecute a fugitive only for the crime for which he or she had been extradited, despite the lack of any express language in the treaty.[445] The *Rauscher* Court had concluded that the "fair purpose of the treaty" required implication of the term,[446] reasoning that it did not make sense for the treaty to supply specific crimes for which extradition could be had, only to allow the accused to be extradited to the other country "free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place."[447] Similarly, the *Rauscher* Court rejected the argument that the treaty represented merely a procedural device as contrary to "the manifest scope and object of the treaty itself."[448] Thus, the dissent concluded,

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441. *Id.* at 2199 (Stevens, J., dissenting) (quoting United States v. Rauscher, 119 U.S. 407, 422 (1886)).

442. *Id.*

443. *Id.* at 2200-03 (Stevens, J., dissenting) (citing *Rauscher,* 119 U.S. 407 (1886)).

444. The Treaty to Settle and Define 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, Fugitives from Justice, in Certain Cases, Aug. 9, 1842, U.S.-U.K., 8 Stat. 576 [hereinafter 1842 Treaty], delineated the border between the U.S. and Canada, provided for suppression of the African slave trade, and contained one paragraph respecting mutual extradition between the parties. The mutual extradition provision listed seven specific crimes for which a fugitive could be extradited, and provided for judicial review and evidentiary requirements. *See Alvarez-Machain,* 112 S. Ct. at 2200 n.16 (Stevens, J., dissenting) (setting out the extradition provisions of the 1842 Treaty in full).

445. *See Alvarez-Machain,* 112 S. Ct. at 2200-03 (Stevens, J., dissenting) (citing *Rauscher,* 119 U.S. 407 (1886)).

446. *Id.* at 2200 (Stevens, J., dissenting) (quoting *Rauscher,* 119 U.S. at 423).

447. *Id.* (quoting *Rauscher,* 119 U.S. at 421).

448. *Id.* at 2201 (Stevens, J., dissenting) (quoting *Rauscher,* 119 U.S. at 422).

an extradition treaty sufficed to protect a defendant from prosecution despite the absence of express limitations on the parties' power to do so.[449]

Furthermore, the dissent noted that the weight of precedent respecting specialty in the context of extradition proceedings was far less compelling than "the consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor."[450] That one party to an extradition treaty might believe itself vested with a secret right to violate the territorial integrity of the other party to abduct its citizens was, Justice Stevens observed, "shocking."[451]

3. *State Responsibility*

The dissent also argued that the majority, in failing to make a distinction between a private abduction and one explicitly authorized by the Executive Branch, had mischaracterized the issue presented by the case.[452] Though a private action could not violate a treaty between two sovereigns, a state-sponsored violation of another state's territorial integrity clearly did.[453] By framing the issue as "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts,"[454] the dissent argued that the majority merely rephrased the question already answered in *Ker*.[455] According to the dissent, the issue in *Kerr* was distinct from the question presented here.[456]

The dissent noted that the majority had made this distinction in prior cases to preclude U.S. adjudication in cases of wrongful seizure, and that the distinction was crucial to resolving the case. Indeed, the distinction between private and state action had been a factor in the *Ker* decision itself.

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449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at 2203 (Stevens, J., dissenting).

453. *Id.*

454. *Id.* at 2190.

455. *Id.* at 2203 (Stevens, J., dissenting).

456. *Id.*

4. *Consideration of the Decision's Impact*

Finally, Justice Stevens questioned the impact that the majority's holding would have on courts throughout the world.[457] Noting that although the United States's interest in prosecuting a person accused of the brutal murder of one of its agents was compelling, the facts of the case did not entitle the Court to "disregard[] the Rule of Law [it had] a duty to uphold."[458] The dissent observed that the desire for vengeance, to quote Justice Holmes, "exerts 'a kind of hydraulic pressure . . . before which even well settled principles of law will bend.' "[459] It is at moments such as these, the dissent argued, that the Court must be most mindful of its duty to "render judgment evenly and dispassionately according to law."[460] Noting that the way in which the Court performs that duty in a volatile case sets an example for other courts throughout the world,[461] the dissent concluded that foreign tribunals were apt to be "deeply disturbed" by the majority's decision.[462]

III. ANALYSIS

In *United States v. Alvarez-Machain,*[463] the Supreme Court held that, absent an express treaty provision to the contrary, abduction of a foreign citizen in a foreign country by agents of the United States does not deprive a U.S. court of jurisdiction over the defendant.[464] To arrive at this conclusion, the Court found that the U.S. action in abducting Dr. Alvarez-Machain did not violate the terms of the U.S.-Mexico extradition treaty.[465] While the Court was correct in holding that, under *Ker v. Illinois,*[466] abduction should not deprive a

457. *Id.* at 2205-06 (Stevens, J., dissenting).

458. *Id.* at 2205 (Stevens, J., dissenting).

459. *Id.* (quoting Northern Securities Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting)).

460. *Id.* (quoting United States v. Mine Workers, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting)).

461. *Id.* at 2205-06 (Stevens, J., dissenting). Justice Stevens cited *S. v. Ebrahim,* S. AFR. L. REP. (Apr.-June 1991), a case in which the South African Court of Appeal dismissed the prosecution of a defendant kidnapped from a foreign country by South African agents largely on the basis of that court's understanding of U.S. Supreme Court precedent, including the *Ker* decision. *Alvarez-Machain,* 112 S. Ct. at 2206 (Stevens, J., dissenting).

462. *Alvarez-Machain,* 112 S. Ct. at 2205-06 (Stevens, J., dissenting).

463. 112 S. Ct. 2188 (1992).

464. *Id.* at 2196-97.

465. *Id.* at 2197.

466. 119 U.S. 436 (1886); *see also supra* notes 206-61 (discussing *Ker* and its progeny).

court of jurisdiction, it was wrong to assert that the United States did not violate the treaty.

This decision did not address the issue of U.S. authority to conduct extraterritorial abductions, nor did it pass on the question of the wisdom of such actions. To the extent that the decision encourages a policy of international abduction of criminal suspects based on no discernibly objective criteria, this decision is unwise. Further, this decision — which ostensibly reflects a "victory" for law enforcement — may instead frustrate the cooperative efforts of police agencies by souring the diplomatic atmosphere in which these agencies must work.

A. Violation of the Extradition Treaty and Its Impact on Jurisdiction

1. The Treaty

Both the majority and the dissent viewed the question of whether the U.S.-Mexico extradition treaty was violated as dispositive of the question of whether U.S. courts had jurisdiction over Alvarez-Machain. The majority held that, absent a treaty violation, jurisdiction lay with the federal courts;[467] the dissent, in effect, agreed.[468] The critical substantive difference between the two positions was that the majority concluded that the United States did not violate the treaty,[469] while the dissent concluded that it did.[470]

2. Jurisdiction Over the Defendant

Logically, the U.S. courts had jurisdiction to try Dr. Alvarez-Machain regardless of whether the United States had breached the extradition treaty. The *Ker-Frisbie*[471] line of cases has consistently held that violations of a suspect's constitutional rights during arrest

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467. As framed by the Chief Justice:

> [O]ur first inquiry must be whether the abduction of [Alvarez-Machain] from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how the respondent came before it.

Alvarez-Machain, 112 S. Ct. at 2193.

468. Justice Stevens, in dissent, argued that "[i]t is clear that Mexico's demand [for Alvarez-Machain's return] must be honored if this official abduction violated the 1978 Extradition Treaty between the United States and Mexico." *Id.* at 2197 (Stevens, J., dissenting).

469. *Id.* at 2197.

470. *Id.* at 2197 (Stevens, J., dissenting).

471. *See supra* notes 206-21 and accompanying text (discussing the *Ker-Frisbie* line of cases).

do not deprive the court of jurisdiction over the defendant's person;[472] treaties — and all other sources of law — are subordinate to the Constitution.[473] It makes no sense to assert, as both the majority and dissent seemed to do, that a treaty violation might deprive the courts of jurisdiction while a constitutional violation will not.

The only exception to the *Ker* holding that constitutional violations do not deprive the courts of jurisdiction was first articulated by the Second Circuit in *United States v. Toscanino*.[474] Where a defendant can prove barbaric treatment at the hands of law enforcement, the district court must divest itself of jurisdiction.[475] Here, the district court had explicitly found that the *Toscanino* exception did not apply to the facts of this case.[476]

B. *Violation of the Treaty*

Given that the U.S.-Mexico Extradition Treaty does not contain a specific clause limiting the respective parties to extradition under its terms, it is obvious that there could be no violation of the express terms of the treaty. While it is not, as the Court asserts, central to the issue of jurisdiction, the majority's reading of the extradition treaty is flawed in light of the purposes of the treaty itself and of the extradition practices of states generally.[477] To hold that an extradition treaty allows one state to violate the territorial integrity of another state merely because it does not expressly forbid the practice is simply absurd.[478] As the dissent points out, drawing this conclu-

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472. *See supra* note 220 (citing cases which follow the holding in *Ker*).

473. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

474. 500 F.2d 267 (1974); *see supra* notes 239-61 and accompanying text (setting forth the *Toscanino* exception and the courts' subsequent retreat from it).

475. *Toscanino*, 500 F.2d at 275-76.

476. United States v. Caro-Quintero, 745 F. Supp. 599, 605 (C.D. Cal. 1990).

477. *See* Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061 pmbl. (noting that the purpose of the treaty is to improve cooperation between the states with respect to criminal law); *see also supra* notes 162-72 and accompanying text (discussing the rationale behind the practice of international extradition).

478. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992). As Professor Lowenfeld explains:

> I must stay [sic], I found [that the proposition that the treaty allowed what it did not expressly forbid] was the most remarkable statement in the majority's opinion. Imagine a buyer and a seller make a contract for the sale of merchandise, and the seller delivers stolen goods. When the buyer rejects the goods and demands his money back, the seller says "But the contract did not contain a clause expressly stating that stolen goods are not acceptable."

sion required the Court to rewrite the terms of the treaty.[479]

In holding that extradition is essentially a procedural device, intended to impose mutual obligations only in "certain defined sets of circumstances,"[480] the Court mischaracterized the purposes of extradition. Extradition is more than the mere exchange of criminals;[481] its larger purposes are to promote stability through peaceful and orderly cooperation among states[482] and to coordinate the fight against international crime.[483] These are, in fact, the express purposes of the U.S.-Mexico extradition treaty at issue in this case.[484]

It is unlikely that asserting a right to break international law by forcible abduction, an action that the majority conceded was in violation of international law,[485] will further the goal of international cooperation in law enforcement. To assert that states have the unilateral right to invade one another for the purpose of acquiring personal jurisdiction over criminal suspects calls into question the rationale for extradition in the first place.[486] If one views extradition treaties as merely procedural devices, conferring no substantive rights on the state parties (or derivatively on individual fugitives), then, as the dissent points out, such treaties are pointless.[487]

On the other hand, a primary goal of extradition generally, and of the U.S.-Mexico extradition treaty in particular, is the suppression

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House Hearings, supra note 203, at 52 (statement of Prof. Lowenfeld).

479. *Alvarez-Machain*, 112 S. Ct. at 2199 n.11 (Stevens, J., dissenting).

480. *Id.* at 2194 (citation omitted).

481. *See* Wise, *Civitas Maxima*, *supra* note 163, at 109. Wise writes:

> Extradition is not an end in itself. No one claims that it is somehow an intrinsic good to maintain a certain balance of trade in fugitives from justice. Thus, if we are not to regard extradition as an aimless activity, or a kind of sport, it must be found to serve some ulterior purpose related to legitimate political ends.

Id.

482. *See* BASSIOUNI, PUBLIC ORDER, *supra* note 155, at 5 (noting that extradition remains, to a large extent, "the most important instrument of cooperation between states").

483. *See supra* notes 162-72 and accompanying text (describing the rationale behind the practice of international extradition).

484. *See* Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061 pmbl. (noting the mutual desire of the United States and Mexico to cooperate closely in the fight against crime and to assist in matters of extradition).

485. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992).

486. *See House Hearings, supra* note 203, at 11 (statement of Assoc. Prof. Steinhardt) (stating that the Court's endorsement of government-sponsored abduction as an alternative to extradition renders the treaty meaningless).

487. *See Alvarez-Machain*, 112 S. Ct. at 2198 (Stevens, J., dissenting) (noting that a construction of the document as nonexclusive renders the specific provisions of the treaty "little more than verbiage").

of serious international crime.[488] To argue that states may never resort to abduction of a criminal suspect is to create *de facto* safe havens in those countries that refuse to view the duty to prosecute or extradite as a *civitas maxima*.[489] It is unrealistic to expect that any state would adopt a rule of law that completely circumscribed its freedom of action in the face of international crime emanating from an "extradition haven."

C. *Breaking International Law: The "Justifiable" Abduction*

Despite the virtually universal view that abductions violate international law,[490] it seems intuitive that some abductions are nonetheless justifiable. Few would argue, for example, that Adolf Eichmann[491] had some intrinsic "right" to live out his golden years in Argentina, free from any retributive reckoning with the law. Eichmann clearly deserved "justice," in the broad sense of the term; arguably, he deserved harsh justice.[492] The question, in the context of international public order, is under what circumstances might a state be justified in violating the territorial integrity of another state in pursuit of an individual fugitive.

To arrive at a conceptual framework for "justifiable" abductions as a matter of policy, one must first assume that the existing extradition regime has failed; it simply does not make sense to violate the territorial integrity of another state when there are viable alternatives. Second, one must assume that one objective of the state's conscious decision to disregard international law is prophylactic; that is, the purpose of the policy is to put would-be offenders, in particular states that refuse to cooperate in international extradition, on notice that there will be no safe haven for a defined group of individual offenders. Third, one must assume that the converse is also true: states that do cooperate in the international arena must be assured that their territorial sovereignty will not be violated. These assump-

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488. *See* Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061 pmbl. (noting the purpose of the treaty); *see also supra* notes 162-72 and accompanying text (discussing the purposes of extradition practice generally).

489. *See supra* notes 173-88 and accompanying text (discussing the duty of states to prosecute or extradite).

490. *See House Hearings, supra* note 203 (asserting unanimously that unilateral abductions violate customary international law as a violation of territorial integrity).

491. *See supra* notes 122-27 and accompanying text (discussing the *Eichmann* case).

492. This is not to suggest that Eichmann did not deserve due process; on the contrary, Eichmann deserved the full benefit of due process if for no other reason than to advance the demonstrative element of the criminal law.

tions imply two related assumptions: first, that the abducting state recognizes its departure from international law; and second, that the policy will be consistently applied.

Given these assumptions, a framework for nonconsensual international abduction might consist of the following elements: a valid jurisdictional premise,[493] a serious crime of an international character, a failure on the part of the asylum state to prosecute or extradite (taken in light of that state's historical tendencies in this respect),[494] and the failure of alternate means of obtaining custody over the offender.[495] Further, such a framework would have to take into account the basic human rights of the offender and strict adherence to due process in his or her prosecution. Finally, as a matter of policy, such a structure will fail unless there is compelling evidence of guilt on the part of the individual fugitive.

1. Jurisdiction

As a threshold matter, any state desiring to prosecute a criminal must have a valid jurisdictional premise.[496] Logically, the closer the jurisdictional nexus between the fugitive and the prosecuting state, the more justified a state is in asserting its power over an offender. This suggests a hierarchy of the jurisdictional theories that reflects the crime's connection to the forum state in descending order: territorial, nationality, passive personality, protective, and universal.[497]

In *Alvarez-Machain,* the United States clearly had valid jurisdictional premises under which to prosecute the defendant. Complicity in the abduction, torture, and murder of a U.S. law enforcement agent in the performance of his duties confers jurisdiction based on the objective territorial,[498] passive personality,[499] protective,[500] and

493. *See supra* notes 26-35 and accompanying text (outlining the traditional bases of jurisdiction under international law).

494. *See supra* notes 173-88 and accompanying text (discussing a state's duty to prosecute or extradite).

495. *See supra* notes 197-205 and accompanying text (discussing informal means of rendition between states).

496. *See supra* notes 26-35 and accompanying text (discussing international jurisdiction).

497. Bassiouni, *Inter-State Cooperation, supra* note 175, at 821. Professor Bassiouni also recommends developing rules for conflict resolution, including the establishment of an international criminal court. *Id.*

498. A conspiracy to torture and murder a U.S. law enforcement agent abroad is certainly a crime with objectively foreseeable consequences in the United States. *See supra* notes 36-57 and accompanying text (discussing the objective territorial theory of jurisdiction).

499. Camarena-Salazar was a U.S. citizen. *See supra* notes 80-106 and accompanying text (discussing the passive personality theory of jurisdiction).

possibly universal theories.[501]

2. *Serious International Crimes*

To justify a state's resort to abduction for an individual offender, it is logical that the crime in question must be a serious crime of an international character. A contrary conclusion might lead to preposterous results; it seems unlikely that a state would abduct a criminal from another state for a minor offense any more than it would attempt to extradite a petty criminal.[502] A "serious crime" of an international character, of course, raises definitional problems. As potential criterion, those crimes reflected in international instruments provide a starting point.[503] The category might be further limited to those crimes involving the loss of human life, but it is conceivable that an international crime where no one dies might still trigger an intense response in an offended state. Examples might include particularly egregious hostage-taking incidents, a torture incident in which the victim survived, or sabotage of a particularly vital or significant facility.

The United States charged Alvarez-Machain with complicity in the abduction, torture, and murder of a U.S. law enforcement officer in the performance of his duties.[504] That the torture and murder of a law enforcement officer are serious crimes of international character is self-evident. Camarena's murder was a despicable act of cal-

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500. The murder of a law enforcement officer in the performance of his or her duties clearly implicates protected interests of the United States. While the DEA agents in Mexico did not enjoy diplomatic status, they were nevertheless there on official U.S. government business and with the consent of the Mexican government. The United States has a legitimate and strong interest in protecting its law enforcement officers both at home and abroad. *See supra* notes 67-79 and accompanying text (discussing the protective theory of jurisdiction); *see also* SHANNON, *supra* note 299, at 177-203 (describing the arrangements under which DEA agents worked in Mexico).

501. Torture may be a universal offense. As a definitional matter, the *Torture Convention, supra* note 90, requires a state actor, a factor ostensibly not present in the actual torture of agent Camarena. Arguably, however, where high-ranking state officials are allegedly complicit in the crime, in aiding those directly responsible, and in obstructing the investigation, the inferential leap to state responsibility is not large. Camarena-Salazar's captors beat and interrogated him to obtain information on cooperative law enforcement operations undertaken by the United States and Mexico. *See supra* notes 107-30 and accompanying text (discussing the universal theory of jurisdiction).

502. *See supra* notes 149-61 and accompanying text (discussing extradition practice).

503. Professor Bassiouni has recommended the codification of international crimes, with the proviso that these crimes be added to the domestic law of all countries. Bassiouni, *Inter-State Cooperation, supra* note 175, at 821; *see e.g.*, TORTURE CONVENTION, *supra* note 90; *Hostage Taking Convention, supra* note 90 (both defining criminal behavior of international significance).

504. *See supra* note 357 (listing the charges against Alvarez-Machain).

culated violence directed purposefully at an American law enforcement officer.[505] That he was murdered while engaging in a bilateral law enforcement operation underscores the international character of the crime.[506] Clearly, Camarena's torture and murder rise to the level of a "serious international crime."

3. *The Duty to Prosecute or Extradite*

The practice of international extradition rests on the premise that states have a duty either to prosecute an offender or to extradite the offender to a requesting state.[507] If a policy that allows abduction in violation of international law has any validity at all, it can only have it when the duty to prosecute or extradite has failed.[508]

The duty to prosecute or extradite in international law suffers from an unfortunate lack of clear standards to apply.[509] Questions remain open as to what constitutes an effective prosecution and as to when the duty to prosecute or extradite ought to attach.[510] Further, in the context of abduction, a state's historical tendencies with respect to extradition are relevant in determining whether extradition requests will be futile, or whether the state will effectively prosecute those offenders it does not extradite.

While the United States clearly had jurisdiction to try Dr. Alvarez-Machain, and a serious crime for which to try him, it is much more difficult to conclude that the Mexican government failed in its duty either to prosecute or extradite Dr. Alvarez-Machain. Clearly, where a state refuses to extradite its nationals, or as here, where a state is forbidden by its domestic laws from doing so,[511] the extradition request seems superfluous. Obviously, the Mexican government was not going to extradite Alvarez-Machain — indeed it could not

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505. *See supra* notes 299-304 and accompanying text (describing the treatment Camarena suffered).

506. *See* SHANNON, supra note 299, at 226 (describing the cooperative arrangements between the Mexican government and the DEA).

507. *See supra* notes 173-88 and accompanying text (discussing the duty to prosecute or extradite).

508. *See* Bassiouni, *Inter-State Cooperation, supra* note 175, at 821 (arguing for the adoption of international minimum standards for application to the duty to prosecute or extradite).

509. *Id.* at 814.

510. *See generally id.* (noting the lack of international standards as to what constitutes a good faith prosecution).

511. *See supra* note 198 (noting the Mexican constitutional proscription on extraditing nationals).

do so legally under Mexican law.[512] Logically, it seems senseless to require an extradition request that both parties know will not result in an extradition. The duty to prosecute, therefore, ought to attach at the point at which the indictment is handed down in the requesting nation's courts and the asylum country is made aware of it. Accepting this logic, Mexico may have arguably failed in its duty to extradite or prosecute Dr. Alvarez-Machain.

Taken in the context of Mexico's historical willingness to cooperate in international law enforcement, however, this argument falls flat. While Mexico's record in extraditing criminals to the United States is not perfect,[513] it acted swiftly to obtain custody over Caro-Quintero,[514] and had at least initially cooperated in bringing Verdugo-Urquidez before the U.S. criminal justice system.[515] Beyond that, Mexico was (and is) actively cooperating with the United States in the fight against international drug trafficking. While the success of that effort has been mixed (the Mexican government clearly has internal problems with corruption and inefficiency),[516] it does not seem constructive to antagonize a nation that is basically committed to the same international law enforcement goals as the United States for the purpose of apprehending an individual suspect.

4. Failure of Other Methods

A fundamental presumption about a "justifiable" abduction is that it is a remedy of last resort. Thus, its validity rests on a showing that all other methods have failed or would be futile. If a duty is levied on the asylum state to prosecute or extradite, it is only rational that they be given that opportunity.

There is no evidence that the United States exhausted all available diplomatic and legal methods for acquiring Alvarez-Machain's

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512. *See supra* note 198 (noting Mexico's laws on extradition of its nationals).

513. *See House Hearings, supra* note 203, at 9 (statement of Judge Sofaer) (describing an incident in which the Mexican government allowed a fugitive wanted in the United States for terrorist activities to escape to Cuba).

514. Caro-Quintero is currently serving a forty-year sentence in a Mexican prison for his role in the Camarena killing. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 n.2 (1992) (Stevens, J., dissenting); *see supra* notes 308-17 and accompanying text (describing Caro-Quintero's apprehension and the role of the Mexican police).

515. *See supra* notes 318-39 and accompanying text (describing Verdugo-Urquidez's apprehension).

516. *See generally,* SHANNON, *supra* note 299 (providing a vivid account of Mexico's problems of corruption and official misconduct).

presence.[517] No source suggests that the United States sought Dr. Alvarez-Machain's prosecution through any legal or diplomatic channel. Apart from the abortive negotiations between the DEA and the MFJP, there is no public record to show that the United States discussed the issue with Mexican authorities. Rather, it seems that once informal negotiations fell apart,[518] the next step for the United States was the abduction.

5. *Protecting Human Rights and Due Process*

Some force, whether threatened or actual, is generally necessary to bring any criminal suspect into custody. Excessive force, however, serves no valid law enforcement purpose and violates internationally accepted norms of state behavior.[519] Given the international attention an abduction is likely to command, such an action heightens the importance of scrupulously fair treatment.[520] As a starting point, the International Covenant on Civil and Political Rights provides the minimal due process rights which should apply to a criminal suspect abducted from a foreign country. Specifically, the accused should have the right to be informed of the charges against him or her[521] and the right to be brought before a judicial officer without delay.[522] In addition, the credibility of an abduction depends on protecting the suspect from torture.[523]

There is no evidence to suggest that Dr. Alvarez-Machain's treatment within the U.S. criminal justice system violated any of the express provisions of the International Covenant on Civil and Political Rights. As explicitly noted by the district court, there was no credible evidence that U.S. agents used excessive force or brutality in bringing Dr. Alvarez-Machain into custody.[524] Certainly Dr. Alvarez-Machain did not suffer degradation to a degree sufficient enough

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517. No source indicates direct communications between responsible U.S. and Mexican agents concerning Dr. Alvarez-Machain.

518. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 602-03 (C.D. Cal. 1990) (describing the growing tension between the Mexican and U.S. governments over the Camarena incident and the resulting breakdown in informal negotiations).

519. *See* International Covenant on Civil and Political Rights, *supra* note 170, at arts. 9-10, 14-16 (outlining the basic due process requirements of any criminal prosecution).

520. *See supra* note 11 (noting the international reaction to *Alvarez-Machain*).

521. International Covenant on Civil and Political Rights, *supra* note 170, at art. 9.

522. *Id.*

523. *Id.* art. 7.

524. United States v. Caro-Quintero, 745 F. Supp. 599, 603-04 (C.D. Cal. 1990).

to trigger the *Toscanino* "exception."[525]

6. *Compelling Evidence*

As a practical matter, it is senseless for a state to violate another state's territorial integrity in pursuit of an individual suspect without compelling evidence of that person's guilt. The diplomatic rancor that abductions produce demands a strong showing that the suspect is indeed the perpetrator.[526] That the evidence presented to the district court on remand failed to withstand a motion to dismiss highlights the fact that the United States did not have compelling evidence of Dr. Alvarez-Machain's guilt.[527] Thus, under the proposed policy analysis, the United States was not justified in violating the territorial sovereignty of Mexico in pursuit of Dr. Alvarez-Machain. While the United States had a valid jurisdictional nexus with both the offender and the crime, and while the crime involved was of international significance, the record failed to establish that the Mexican government failed in its duty to prosecute or extradite Dr. Alvarez-Machain. Further, the United States failed to exhaust all other diplomatic and legal means of securing Dr. Alvarez-Machain's presence.

D. Advancing the Ends of Law Enforcement

With "startling nonchalance,"[528] the Court conceded that its decision might violate international law; it then responded, in effect, with a demurrer.[529] In fact, the violation of the territorial integrity of one state by another is virtually always a violation of international law. It is difficult to see how a precedent that is itself violative of internationally recognized legal norms represents an advancement of the rule of law. It is, in effect, a "stunning endorsement of lawlessness."[530] Ironically, the *Alvarez-Machain* decision, while superficially a victory for law enforcement, actually does little to advance

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525. *See supra* notes 239-61 and accompanying text (describing the *Toscanino* exception to the *Ker-Frisbie* doctrine).

526. In the Eichmann case, for example, there was ample documentary evidence, as well as eyewitnesses, to support the charges of murder levied against the defendant. *See* Randall, *supra* note 44, at 810-15 (discussing the *Eichmann* case).

527. *See* de Lama, *supra* note 14 (reporting that the case was dismissed for lack of sufficient evidence).

528. *See* Moynihan, *supra* note 11.

529. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992).

530. *House Hearings*, *supra* note 203, at 13 (statement of Assoc. Prof. Steinhardt).

the cause of effective law enforcement. Rather, international law enforcement became immediately more difficult and strained as a result of the *Alvarez-Machain* decision. By creating a diplomatic furor,[531] the Alvarez-Machain abduction temporarily halted DEA activities in Mexico, and resulted in a long term reevaluation of the relationship between the DEA and the MFJP.[532] Similarly, other nations quickly demanded reassurances that U.S. law enforcement activities in their countries would not exceed the bounds of international law.[533] The United States, to a greater or lesser extent, must rely on cooperation with other countries for enforcement of its domestic laws.[534] A precedent that sours the climate of mutual trust between nations respecting control of international law enforcement is likely to thwart efforts to streamline procedures and to codify methodologies for bringing international criminals to justice.[535]

In concluding that extradition treaties do not represent the exclusive means by which states may exchange fugitives,[536] the Court was, essentially, only half correct. While extradition is the only formal method for exchanging fugitives under international law, other, less invasive techniques, such as informal rendition, are available to states for bringing criminal suspects to trial.[537] These techniques, while skirting the fringes of international legality, have the distinct advantage of protecting the respective states' territorial integrity.[538] Consequently, they rarely result in the kind of diplomatic fallout that is bound to further frustrate law enforcement efforts.[539] Abductions, on the other hand, are violations of both domestic[540] and inter-

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531. *See generally supra* note 11 (describing the resulting diplomatic fallout, particularly in Central and South America).

532. *Foreign Minister Says Machain Ruling "Insulted" Mexican Sovereignty, supra* note 11.

533. *See supra* note 11 (citing responses from both the legal and international studies communities).

534. Bassiouni, INTER-STATE COOPERATION, *supra* note 175, at 812-13.

535. *See id.* (arguing for increased international cooperation in strengthening law enforcement modalities and greater, codified control over currently informal police practices).

536. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2194 (1992).

537. *See supra* notes 189-205 and accompanying text (discussing irregular rendition).

538. *See House Hearings, supra* note 203, at 6 (statement of Judge Sofaer) (commenting on the violation of a state's territorial integrity as a breach of international law).

539. By contrast, the Alvarez-Machain abduction resulted in a brief curtailment of all DEA activities in Mexico and a subsequent reassessment of the relationship between Mexican and U.S. law enforcement officers. *See Foreign Minister Says Machain Ruling "Insulted" Mexican Sovereignty, supra* note 11.

540. *See* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 n.1 (9th Cir. 1989) (noting that Mexican authorities charged the DEA agents involved in Verdugo-Urquidez's irregular rendition with kidnapping under Mexican law).

national law,[541] and as such tend to promote distrust in the international community.

This line of argument begs the question of why the DEA did not simply pay the $50,000 the MFJP wanted in the first place.[542] A rough calculation indicates that, by paying $20,000 as a reward, plus $6,000 per week in expenses, the DEA actually spent more than twice the originally requested amount (roughly $108,000) by the time Dr. Alvarez-Machain's hearing in the district court took place.[543]

IV. IMPACT

The impact of *United States v. Alvarez-Machain* is difficult to assess, particularly in view of the United States's subsequent failure to obtain a conviction in the case. Had it gone otherwise, and had Alvarez-Machain been convicted of complicity in the murder of Camarena-Salazar, one might expect the DEA and other law enforcement agencies to be emboldened by success. As it stands, one might expect that they are chastened by failure. Given this embarrassment, it is not likely that this decision will spark a rash of abductions by U.S. law enforcement agents.

While the Court did not explicitly assert a unilateral right to abduct foreign criminal suspects,[544] that is certainly the popular perception of the decision.[545] If the U.S. has the "right" to kidnap suspects from foreign soil to stand trial in the United States, then other states logically have a reciprocal right to abduct American citizens from American soil to stand trial abroad.[546] While this scenario depends on the relative abilities of those states to project power internationally, the impact on American citizens living abroad may be

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541. *See, e.g., House Hearings, supra* note 203, at 20 (statement of Assoc. Prof. Steinhardt) (discussing international abductions as violations of international law).

542. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990) (describing the aborted negotiations between the MFJP and the DEA).

543. *See id.* at 603 (describing the financial arrangements between the DEA and the kidnappers).

544. *See* United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992) (conceding that international abductions may violate international law).

545. *See, e.g., Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S., supra* note 11 (noting the reactions of Latin American leaders to the Court's endorsement of a right to kidnap); *U.S. Right to Abduct Rejected by Angry CARICOM Leaders, supra* note 11 (noting the reaction of Caribbean leaders and criticizing the Supreme Court's endorsement of a right to kidnap).

546. *See* Abramovsky, *Abductions, supra* note 198, at 151 (posing a hypothetical abduction of a U.S. citizen in the United States by Iraqi agents).

more immediate. If a foreign sovereign obtains custody of a U.S. national, it will have a ready propaganda tool in *United States v. Alvarez-Machain.*

It is likely that at least some of the 103 nations that have extradition treaties with the United States will attempt to renegotiate the terms of these instruments to include an explicit prohibition on abductions.[547] Even assuming these nations do not renegotiate the terms of their mutual extradition treaties with the United States, they will almost certainly require reassurances from the United States with respect to their expectations of territorial sovereignty.[548]

Finally, while the impact of *Alvarez-Machain* may only be surmised, the decision has sparked a high level of discussion on the subject of extraterritorial abduction.[549] Legislative attempts to curtail U.S. actions abroad are certain to engender controversy and debate on the topic.[550] While this author disagrees with the notion of circumscribing U.S. freedom of action entirely, the discussion that such legislation is bound to generate may cause a fundamental rethinking of U.S. policy on extraterritorial abductions and a move toward a model based on principles of international jurisdiction and international cooperation in penal matters.

V. CONCLUSION

The Supreme Court's opinion in *United States v. Alvarez-Machain* is consistent with its precedent in *Ker,* irrespective of whether the abduction violated the terms of the U.S.-Mexico extradition treaty. This opinion concededly violates customary international law, and does little to advance the purposes of international extradition practice. While the United States had valid subject matter jurisdiction over the crimes alleged in Dr. Alvarez-Machain's indictment, and while the Mexican government arguably failed in its duty to prosecute or extradite the defendant, these facts hardly justify the "self-help" remedy sanctioned by the Supreme Court. Rather, what is needed is a realistic policy approach that recognizes a specific and limited exception to the rule of customary interna-

547. *House Hearings, supra* note 203, at 39-41 (statement of Assoc. Prof. Steinhardt).

548. *See Washington Reassures Columbia Over Kidnappings, supra* note 11 (noting diplomatic efforts to reassure Columbia that the U.S. respects Columbia's territorial integrity).

549. *See supra* note 11 (citing responses from both the legal and international communities).

550. International Kidnapping and Extradition Treaty Enforcement Act of 1992, H.R. 5565, 102d Cong., 2d Sess. (1992).

tional law. This exception should be employed only in the most exigent of circumstances and even then must be applied consistently. While the United States need not completely circumscribe its ability to deal with dynamic international law enforcement problems,[551] the powerful weapon of international abduction is not, as a matter of policy, the most effective course for achieving those aims.

Alvarez-Machain reestablishes the court's jurisdiction over a criminal defendant present before the court, despite the method used to secure that presence. It does not establish the wisdom of abduction as a policy. As the *Alvarez-Machain* case points up, the current policy has, indeed, backfired on its drafters:[552] the United States went to the trouble and expense of litigating *Alvarez-Machain* all the way to the United States Supreme Court, subjecting itself to intense international criticism,[553] for a case that could not withstand a motion to dismiss for lack of evidence.[554]

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551. *See* Sofaer, *supra* note 192, at 112-13 (delineating several rationales which would justify international abduction in the context of terrorism, and arguing that the United States maintains its right to conduct international abductions as a prophylactic measure to undermine terrorists' beliefs in a safe haven).

552. *See* Abramovsky, *Abductions, supra* note 198, at 152 (noting that the U.S. policy of extraterritorial abduction is "likely to backfire on its drafters").

553. *See supra* note 11 (detailing criticisms of the U.S. handling of the *Alvarez-Machain* matter).

554. *See* de Lama, *supra* note 14 (discussing the dismissal of the charges against Dr. Alvarez-Machain).