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The Apparent Political and Administrative Expediency Exception Established by the Supreme Court in *United States v. Humberto Alvarez-Machain* to the Rule of Law as Reflected by Recognized Principles of International Law†

Manuel R. Angulo,*
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INTRODUCTION

It is not surprising that the United States Supreme Court decision in *United States v. Humberto Alvarez-Machain*¹ has caused considerable concern and shock among the international bar, not only in this country but abroad. This article attempts to make a detailed analysis of the decision itself, of Chief Justice Rehnquist's reasoning and his interpretation of various decisions cited and relied on in the opinion, and their application to the case. Chief Justice Rehnquist delivered the opinion of the Court in which Justices Scalia, Kennedy, Souter, Thomas, and White joined. Justice Stevens filed a strong dissenting opinion, joined by Justices Blackmun and O'Connor.

Part I of this article provides the facts of the *Alvarez-Machain* case. Part II gives an in-depth analysis of the decision and relevant case history. This part concludes that Chief Justice Rehnquist's decision was poorly reasoned, contrary to controlling precedent, and should

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¹ 112 S. Ct. 2188 (1992). There are three articles published on this subject of general interest in the October, 1992 issue of the American Journal of International Law: Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736 (1992); Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992); Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757 (1992); see also Note, *The Supreme Court Decision in United States v. Alvarez-Machain*, 32 VA. J. INT'L L. 979 (1992).

not stand. Part III contains various recommendations as to what the Mexican government might consider to rectify the legal precedent established by the Supreme Court. In addition, Part III considers proposals of legislation or executive action to prohibit abductions of the kind with which the decision deals. This article also proposes the use of a petition for rehearing and an advisory opinion from the International Court of Justice. These measures are necessary, it is believed, because legislative or executive action does not effectively eradicate a decision's establishment of legal precedent and the force of its inaccuracies and legal error. The article concludes with a Section entitled *Post Script*, which describes the various actions taken before the federal courts of the United States and the steps taken in international forums designed to correct the Rehnquist decision.

I. FACTS OF THE CASE

A citizen and resident of Mexico, Humberto Alvarez-Machain, was forcibly kidnapped from his home in Guadalajara, Jalisco, Mexico and flown by private plane against his will to Texas, where he was arrested by U.S. authorities for his alleged participation in the kidnapping and murder of a Drug Enforcement Administration (DEA) agent and the agent's pilot.² The District Court found that DEA agents were responsible for the abduction even though they had enlisted some Mexican nationals to assist them.³

Alvarez-Machain moved in the District Court to dismiss his indictment on the ground that the court lacked personal jurisdiction over him since his abduction by the DEA was protested by the Mexican government⁴ and thus was in violation of the Extradition Treaty between the United States and Mexico.⁵ The District Court dismissed the indictment and ordered the government to repatriate the defendant to Mexico on the ground that the United States had violated the Extradition Treaty by unilaterally abducting the defendant from Mexico.⁶

The United States appealed to the U.S. Court of Appeals, Ninth

² *United States v. Caro-Quintero*, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990); *aff'd*, 996 F.2d 1966 (9th Cir. 1991).

³ *Id.* at 609. "[I]t is clear that state responsibility attaches to acts committed by agents of a state or by private individuals acting for or on behalf of the state." *Id.* (quoting I M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 216 (2d ed. 1987)).

⁴ See *Caro-Quintero*, 745 F. Supp. at 604, 608.

⁵ Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty or Treaty].

⁶ *Caro-Quintero*, 745 F. Supp. at 614-15.

Circuit, which affirmed the District Court judgment holding that the forcible abduction of Alvarez-Machain, a Mexican national, by agents of the DEA violated the Extradition Treaty.⁷ Simultaneously, the Ninth Circuit heard *United States v. Verdugo-Urquidez*⁸ which presented identical issues. The court remanded the case for a hearing on whether Verdugo's abduction had been authorized by the DEA; and if so, ordered the District Court to release Verdugo and return him to Mexico because a violation of the Extradition Treaty had occurred, even though the treaty did not expressly prohibit such abduction.⁹ The Supreme Court considered the case on the narrow issue of whether the Fourth Amendment applied to an alien located in a foreign country and held that it did not.¹⁰

The Ninth Circuit upheld the District Court order releasing Alvarez-Machain and ordered his repatriation to Mexico.¹¹ The Ninth Circuit relied heavily on its decision in *Verdugo* in affirming the District Court order in *Alvarez-Machain*.¹² The Supreme Court granted *certiorari* of the *Alvarez-Machain* case and reversed and remanded.¹³ The Court held that the conduct of the agents of the United States government was not explicitly or impliedly forbidden by the Extradition Treaty. The abduction did not deprive the Court of jurisdiction to try the defendant on U.S. criminal charges, notwithstanding the fact that the government of Mexico protested the abduction on several occasions on the grounds of the Extradition Treaty violation.¹⁴ Thus, the Supreme Court held that Alvarez-Machain's forcible abduction did not prohibit his trial in the U.S. courts for a violation of this country's laws.¹⁵

II. ANALYSIS OF THE DECISION

A. *The "Ker-Frisbie Doctrine" and Due Process*

Chief Justice Rehnquist appears to have relied heavily upon the Court's decision in *Ker v. Illinois*,¹⁶ and the so-called rule that the power of a court to try a person for a crime is not impaired by the

⁷ *United States v. Alvarez-Machain*, 946 F.2d 1466-67 (9th Cir. 1991).

⁸ 939 F.2d 1341 (9th Cir. 1991).

⁹ *Id.* at 1362.

¹⁰ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

¹¹ *Alvarez-Machain*, 946 F.2d at 1467.

¹² *Id.*

¹³ *Alvarez-Machain*, 112 S. Ct. at 2197.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 119 U.S. 436 (1886).

fact that the person has been brought within the Court's jurisdiction by reason of a "forcible abduction."¹⁷ The Court quotes *Frisbie v. Collins*¹⁸ on the interpretation of the so-called "*Ker-Frisbie doctrine*," which is in effect the maxim *mala captus bene detentus* under which a national court will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured.¹⁹

The facts of *Ker* are as follows. The defendant Ker was charged with larceny in Illinois.²⁰ While in the city of Lima, Peru, he was kidnapped and brought to this country against his will.²¹ The President of the United States, at the request of the governor of Illinois, had previously issued a warrant requesting the extradition of Ker by the authorities of the Republic of Peru in compliance with the treaty of extradition between the United States and Peru.²² One Julian, a private investigator, was given the warrant to deliver to the Peruvian authorities.²³ Upon arrival in Lima, Julian presented no papers to the Peruvian authorities, but for reasons not reported he decided to apprehend the defendant himself.²⁴ Ker was forcibly placed aboard a U.S. vessel bound for the United States.²⁵ At no time did the Peruvian authorities object to this procedure. Ker asserted that the state court had no jurisdiction because his forcible abduction violated due process and that his abduction violated the extradition treaties between the United States and Peru which conferred on him a right of asylum in Peru.²⁶

The *Ker* case is clearly no authority for *Alvarez-Machain*. In the first place, while there was a treaty between the United States and Peru, the abduction of Ker was not made pursuant to the treaty of extradition but rather by an independent person *who was not acting* under the authority of the United States nor in fact any authority.²⁷ Because he was not acting as an agent of the state, his actions were not an act of state. The treaty was not invoked. Ker entered a plea

¹⁷ *Id.* at 444.

¹⁸ 342 U.S. 519, *reh'g denied*, 343 U.S. 937 (1952).

¹⁹ See *Alvarez-Machain*, 112 S. Ct. at 2192-93.

²⁰ *Ker*, 119 U.S. at 437.

²¹ *Id.* at 438.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 439-41.

²⁷ *Id.* at 442-43.

that the alleged method by which he was brought before the Illinois court denied him due process of law.²⁸ The Court points out that the defendant was indicted, tried and convicted in the state of Illinois for larceny.²⁹ There was no complaint that during this process he had not been guaranteed compliance with all the due processes of law for such trials.³⁰ The court in *Ker* did not establish or follow any rule of *mala captus bene detentus*.³¹ On the contrary, the court clearly stated:

We do not intend to say that there may not be proceedings *previous to trial* in regard to which the person could invoke in some manner the provisions of this clause of the Constitution, but, for *mere irregularities* in the manner in which he may be brought into the custody of the law, we do not think that he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment.³²

Apparently the Court considered a forceful kidnapping from one country to another as a "mere irregularity."³³ This holding had nothing to do with the violation of an extradition treaty.

In fact, that Treaty was not called into operation, was not relied upon, was not made a pretext of arrest and the facts show that it was a clear case of kidnapping within the dominions of Peru without any pretense of authority under the Treaty or from the government of the United States.³⁴

In other words, as pointed out by the District Court, *Ker* established a *constitutional doctrine* which limits the application of the Fifth and Fourteenth Amendments to trial procedures notwithstanding pre-trial problems of an illegal arrest and kidnapping.³⁵ The *Ker* court did not foreclose the possibility that the Fourteenth Amendment might be available to pre-trial procedures as well. In any event, the

²⁸ *Id.* at 439-40.

²⁹ *Id.* at 437.

³⁰ *Id.* at 440-41.

³¹ See United States v. Alvarez-Machain, 112 S. Ct. 2188, 2192 (1992).

³² *Ker*, 119 U.S. at 440 (emphasis added).

³³ See *id.*

³⁴ *Id.* at 443.

³⁵ See United States v. Caro-Quintero, 745 F. Supp. 599, 604-06 (C.D. Cal. 1990).

District Court stated that the *Ker* doctrine had no application to violations of federal treaty law.³⁶

Although *Frisbie v. Collins* did not involve an extradition treaty, the case raised due process concerns. The defendant was forcibly removed from Illinois to Michigan where he was tried, convicted, and imprisoned.³⁷ The defendant sought relief by a petition of habeas corpus for release from a Michigan prison on the ground that he was kidnapped from Illinois to be tried in Michigan. The defendant claimed, therefore, that he was being deprived of the due process protection of the Fourteenth Amendment and the Federal Kidnapping Act.³⁸ The Court held that the forcible abduction of a defendant from one state to be tried in another does not invalidate a trial conviction by the court of the abducting state as a violation of due process under the Fourteenth Amendment.³⁹

The scope of due process protection has been greatly expanded since *Ker* and *Frisbie*. For example, in *United States v. Toscanino*,⁴⁰ the Second Circuit held that a court was now required to divest itself of jurisdiction of a person the custody of whom had been acquired illegally, thus depriving the alleged offender of his constitutional rights.⁴¹ The Second Circuit questioned "the continuing viability of the [*Ker-Frisbie*] doctrine in the light of the expanded concept of due process which bars the government from directly realizing the fruits of its deliberate misconduct prior to bringing an accused to trial."⁴² The court cited a number of cases and law review articles which define and explain this due process evolution.⁴³ In *United*

³⁶ *Id.* at 606; *cf.* *Cook v. United States*, 288 U.S. 102 (1933) (holding the *Ker* doctrine inapplicable when basis for relief is a treaty violation). In *Cook*, the Court stated: "To hold that adjudication may follow a wrongful seizure [of a vessel] would go far to nullify the purpose and effect of the Treaty." 288 U.S. at 121-22. The treaty in question prescribed the limits within which the seizure of British vessels could occur.

³⁷ 342 U.S. 519, 520, *reh'g denied*, 343 U.S. 937 (1952).

³⁸ *Id.*

³⁹ *Id.* at 522-23.

⁴⁰ *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (1974).

⁴¹ *Id.* at 275.

⁴² Abraham Abramovsky & Steven J. Eagle, *United States Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?*, 57 OREGON L. REV. 51, 56 (1987). On remand, the district court held that the defendant had failed to prove his allegations and thus the court did not divest itself of jurisdiction. *United States v. Toscanino*, 398 F. Supp. 916, 916-17 (E.D.N.Y. 1975).

⁴³ See *Toscanino*, 500 F.2d at 271-79 (citing *United States v. Russell*, 411 U.S. 423, 430-431 (1973); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverman v. United States*, 365 U.S. 505 (1961)); see also Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Robert M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepherded, 56 CAL. L. REV. 579, 600 (1968).

States ex rel. Lujan v. Gengler, agents hired by the U.S. Customs Agency lured the alleged offender from Argentina to Bolivia, where he was arrested by Bolivian agents employed by the United States, and forcibly taken to New York.⁴⁴ While the defendant Lujan did not claim that he was severely beaten during his abduction, he did claim that his abduction violated international law, Article 2.4 of the United Nations (UN) Charter,⁴⁵ and Article 17 of the Organization of American States (OAS) Charter.⁴⁶ Both articles provide for the inviolability of the territory of a state.⁴⁷ In *Toscanino*, the Second Circuit observed that due to the U.S. ratification of these treaties, the United States was estopped from seizing persons from other nations.⁴⁸ In *Lujan*, however, unlike *Toscanino*, the court relied on the fact that neither Argentina nor Bolivia as beneficiary states of these declarations had objected to the abduction and thus declared that no violation of international law had occurred.⁴⁹ It will be recalled that in *Alvarez-Machain*, the Mexican government formally protested the abduction of Alvarez-Machain on at least two occasions.⁵⁰

As pointed out by the court in *Caro-Quintero*, the Second and Ninth Circuits recognize the *Toscanino* exception to the *Ker-Frisbie* doctrine.⁵¹ The Second Circuit requires a court to divest itself of jurisdiction over the defendant where the defendant establishes governmental conduct "of the most shocking and outrageous kind."⁵² The Ninth Circuit frames its test as requiring that a defendant make a "strong showing of grossly cruel and unusual barbarism inflicted on him by persons who can be characterized as paid agents of the United States."⁵³ The District Court found that the allegations

⁴⁴ 510 F.2d 62, 63 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975).

⁴⁵ *Id.* at 65-66. Article 2.4 of the U.N. Charter states in part that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . ." *Id.* at 67 n.6 (citing U.N. CHARTER art. 2, ¶ 4).

⁴⁶ *Id.* at 66. Article 17 of the Charter of the Organization of American States provides in part that: "[t]he territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. . . ." *Id.* at 66 n.7 (citing O.A.S. Charter art. 17).

⁴⁷ *Id.* at 66-67 (noting that treaties proscribed use of force directly or indirectly in violation of a state's territorial integrity).

⁴⁸ *See* *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (1974).

⁴⁹ *Gengler*, 510 F.2d at 67.

⁵⁰ *See supra* note 4.

⁵¹ *United States v. Caro-Quintero*, 745 F. Supp. 599, 605 (C.D. Cal. 1990).

⁵² *Id.* (citing *Gengler*, 510 F.2d at 65-66).

⁵³ *Id.* (citing *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985 (1975); *see also* *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980)).

of mistreatment made by Alvarez-Machain were not sufficient so as to be characterized as barbarism, nor were such allegations believable.⁵⁴ Nonetheless, although discussed by the District Court, these cases were not even mentioned in the Supreme Court's majority opinion regarding due process.

In this regard, the case of *Matta-Ballesteros v. Henman*⁵⁵ is relevant. The defendant alleged that he was illegally arrested in Honduras by U.S. Marshals. He presented a writ of habeas corpus to the U.S. District Court for the Southern District of Illinois further alleging that the United States violated the Honduran Constitution, international law, and the U.S. Constitution by bringing him to the United States for trial.⁵⁶ The defendant demanded his release to Honduras on the grounds of a due process violation.⁵⁷ The court denied the defendant's motion for discovery and an evidentiary hearing, and the defendant appealed to the Seventh Circuit.⁵⁸ In the judgment of the Seventh Circuit, the only issue on appeal was the denial of his motion for an evidentiary hearing, which it affirmed.⁵⁹ The Circuit Court did not comment on the violation of international law claim and held that since Honduras failed to protest the defendant's abduction, no violation of international law had occurred.⁶⁰ On the issue of due process, the court referred to *Toscanino* and *Rochin v. California*.⁶¹ In *Rochin*, the Supreme Court applied the due process laws to the whole course of the proceedings "in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of the English-speaking peoples even toward those charged with the most heinous offenses."⁶² The offending evidence was extracted from the defendant by forcibly pumping his stomach, which the Supreme Court regarded as a method which offended the due process clause and resulted in the reversal of his conviction.⁶³ In *Matta-Ballesteros*, the Seventh Circuit essentially rejected *Toscanino* and stated that if the defendant could prove he was

⁵⁴ *Id.*

⁵⁵ 896 F.2d 255 (7th Cir. 1990).

⁵⁶ *Id.* Honduras does not extradite its own nationals and the defendant was a Honduran citizen. *Id.*

⁵⁷ *Id.* at 257.

⁵⁸ *Id.* at 256.

⁵⁹ *Id.* at 257.

⁶⁰ *Id.* at 259-60.

⁶¹ *Id.* at 260-61 (citing *United States v. Toscanino*, 560 F.2d 267 (2d Cir. 1974) and *Rochin v. California*, 342 U.S. 165 (1952)).

⁶² *Rochin*, 342 U.S. at 169 (quoting *Malinski v. New York*, 342 U.S. 401, 416-17 (1952)).

⁶³ *Id.* at 166-67, 174.

punished as a pre-trial detainee, he would be entitled to some relief under due process laws.⁶⁴ The court pointed out that the defendant complained of being tortured only during his arrest.⁶⁵

In short, an analysis of *Ker, Frisbie*, and the cases interpreting these decisions demonstrates that they are clearly distinguishable from *Alvarez-Machain* and hardly authority for the *Alvarez-Machain* decision. Bassiouni's treatise, in discussing the *Ker-Frisbie* doctrine, states that "the federal courts have generally assumed jurisdiction over an abducted defendant."⁶⁶ Bassiouni cites twenty-five cases in illustration of this statement.⁶⁷ All of the cases cited, with the exception of five, involve constitutional issues of due process and have nothing to do with customary international law, extradition treaties, or other international treaties.⁶⁸

United States v. Cadena involved the Convention of the High Seas⁶⁹ (Convention). In that case, the court found that the arrest of the defendants on the high seas did not violate the Convention because of the nationality of the vessel. The defendants were Colombian and Canadian, and neither Canada nor Colombia had ratified the Convention.⁷⁰ The court recognized, however, that if the arrest had been made in violation of a treaty limiting the right of the United States to seize vessels of other sovereigns, the court would, for purposes of giving force to the treaty, dismiss the indictment, provided a timely plea contesting jurisdiction had been made.⁷¹ The court in *Cadena* also recognized and stated that the Convention was a codification of international law.⁷² The court stated, however, that a violation of international principles should not be remedied by an application of the exclusionary rule or by dismissal of the indictment, unless Fourth Amendment unlawful search and seizure interests were violated.⁷³

⁶⁴ See *Matta-Ballesteros*, 896 F.2d at 261.

⁶⁵ *Id.*

⁶⁶ BASSIOUNI, *supra* note 3, at 205 n.49.

⁶⁷ See *id.*

⁶⁸ The five cases dealing with international law are: *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978); *United States v. Quesada*, 512 F.2d 1043 (5th Cir. 1975); *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974); and *United States v. Sobell*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957), *reh'g denied*, 355 U.S. 920 (1958).

⁶⁹ 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200.

⁷⁰ 585 F.2d at 1260-61.

⁷¹ *Id.* at 1260.

⁷² *Id.*

⁷³ *Id.* at 1261.

The *Cadena* court added that the provision in the Convention relating to remedies for violations was limited to compensation for damages suffered as a consequence of a violation.⁷⁴ The court pointed out that if this remedy was only available to citizens or vessels of member nations, citizens of non-member nations should not enjoy the benefits of exclusion or dismissal of indictments because of their nations' failure to ratify.⁷⁵ The *Toscanino* case was not involved and was mentioned only in a footnote as an exception to *Ker*.⁷⁶

In *United States v. Winter*, the defendants, two American citizens, two Jamaican nationals, and one Bahamian national, were arrested on the high seas beyond U.S. territory. The defendants were not in the United States during the conspiracy where all the acts alleged in the indictment took place.⁷⁷ The District Court's jurisdiction over the U.S. persons was challenged on the ground that their arrest took place beyond the jurisdiction in which the Coast Guard was permitted to operate—that it was a violation of the applicable U.S. statute, the Convention on the Territorial Sea and Contiguous Zone, and customary international law.⁷⁸

The Fifth Circuit held that the District Court had jurisdiction over the crime because although the acts were performed outside the United States, they were intended to produce, and did produce, detrimental effects within the United States.⁷⁹ In other words, the Court applied the so-called "effects" rule as to the extraterritorial jurisdiction to the criminal acts involved.⁸⁰ The Court also held that the jurisdiction over the persons of the defendants was not impaired by the fact that the defendants were arrested within the territory of the Bahamas in violation of a U.S. Treaty of Extradition with the United Kingdom.⁸¹ The Fifth Circuit relied on the *Ker-Frisbie* rule and rejected the *Toscanino* exception.⁸² The case did not mention customary international law beyond references to the aforementioned Convention nor did it mention the due process issue.

In *United States v. Quesada*, the defendant Flores, a Venezuelan, asserted that his forcible abduction by U.S. government agents and

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1260 n.13.

⁷⁷ 509 F.2d 975, 977–80 (5th Cir. 1975).

⁷⁸ *Id.* at 984.

⁷⁹ *Id.* at 983.

⁸⁰ *See id.* at 981–83.

⁸¹ *Id.* at 984–89.

⁸² *Id.* at 985–87.

his removal to the United States for trial violated the federal Kidnapping Act, a treaty between the United States and Venezuela, and the Charter of the United Nations, thereby depriving him of *due process* and *Fourth Amendment guarantees*.⁸³ Notwithstanding these contentions, the Fifth Circuit affirmed his conviction citing *Ker*, *Frisbie*, and *Toscanino*, the latter without comment.⁸⁴ There was no specific discussion of the extradition treaty or of the due process issues, other than to confirm the application of the *Ker-Frisbie* doctrine.

In *United States v. Herrera*, the defendant had been convicted before the District Court for the Northern District of Georgia for escaping from a federal penitentiary.⁸⁵ The defendant appealed to the Fifth Circuit on the grounds that he had been illegally arrested in Peru and subsequently delivered to federal authorities in violation of the extradition process established under treaty between the United States and Peru.⁸⁶ The Fifth Circuit refused to divest the District Court of jurisdiction over the defendant on the authority of the *Ker-Frisbie* doctrine. The court rejected *Toscanino*, citing the "wide variance" between the facts of *Herrera* and those claims asserted in *Toscanino*.⁸⁷ While this is another example of the rejection of *Toscanino* by the Fifth Circuit, it is not a strong case.

In *United States v. Sobell*, the District Court denied the defendant's motions for a hearing and for an order setting aside his conviction for espionage conspiracy.⁸⁸ The defendant stated that Mexican security police had deported him from Mexico to the United States.⁸⁹ On appeal, the Second Circuit held that the fact that the defendant had been returned to the U.S. authorities by Mexican security police did not impair the power of the District Court to try the defendant for espionage conspiracy.⁹⁰ While the Second Circuit, speaking through Judge Medina, referred to the *Ker-Frisbie* doctrine as having continuing validity, it is noted that the *Sobell* decision predates *Toscanino* by approximately seventeen years.⁹¹ Furthermore, where a defendant is deported from one country for trial in another, and

⁸³ 512 F.2d 1043, 1045 (5th Cir. 1974).

⁸⁴ *Id.* at 1045-46.

⁸⁵ 504 F.2d 859, 859-60 (5th Cir. 1974).

⁸⁶ *Id.* at 860.

⁸⁷ *Id.*

⁸⁸ 244 F.2d 520, 520-21 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957), *reh'g denied*, 355 U.S. 920 (1958).

⁸⁹ *Id.* at 521.

⁹⁰ *Id.* at 524-25.

⁹¹ *Id.*

there is no connivance between the local authorities and agents of the abducting state, such rendition is not regarded as unlawful or as an unlawful abduction under international law.⁹² Deportation is not considered illegal rendition.⁹³

The reliance by the Court in *Alvarez-Machain* upon the *Ker-Frisbie* doctrine fails to consider two federal court cases involving the search and seizure of vessels on the high seas. *United States v. Ferris* involved the Court's refusal to uphold the government's prosecution of the violators of the Prohibition and Tariff Acts because in seizing the defendants, the government violated a treaty between the United States and Panama.⁹⁴ Under the terms of the treaty, the United States had the power to search and seize vessels of Panamanian registry within an hour's sailing time off the coast.⁹⁵ In *Ferris*, Ferris and others had been seized 270 miles off the west coast of the United States from a ship of Panamanian registry.⁹⁶ The Court held that the United States had violated the treaty by ignoring its limitation in seizing the ship outside of the jurisdiction conferred by the treaty.⁹⁷ Thus, the United States had imposed a limitation on its power in the treaty, and by ignoring this limitation, had thus violated the treaty. Similarly, in *Cook v. United States*, a British ship was seized by the U.S. Coast Guard on the high seas in violation of a treaty between Great Britain and the United States.⁹⁸ The Court found that because of the seizure, the courts had no jurisdiction for forfeiture proceedings over the seized property on the theory that the U.S. government itself lacked power to seize; therefore, the self-imposed territorial limitation upon the government's own authority precluded the court's jurisdiction in subsequent forfeiture proceedings.⁹⁹

Under the teachings of these two cases, the principle appears that if the government limits its power by a treaty and then acts beyond that power, it is a violation of that treaty. This principle appears applicable in the case of extradition treaties and to this case in a different manner, raising the question whether the treaty is violated when ignored. The Court does not explain why an extradition treaty

⁹² See BASSIOUNI, *supra* note 3, at 196.

⁹³ *Id.*

⁹⁴ 19 F.2d 925, 926 (N.D. Cal. 1929).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 927.

⁹⁸ 288 U.S. 102, 121-22 (1933).

⁹⁹ *Id.*

does not have the same effect as another type of treaty in limiting the government's power.

B. *Violation of International Law*

It is "black letter" law that in the absence of an extradition treaty, the forcible abduction of a person from within the territory of his state of citizenship without the consent of that state by the government agents of another state is a violation of the first state's sovereignty, territorial integrity, and legal processes, and is thus a violation of international law.¹⁰⁰ There are possible exceptions, however, one of which may be the kidnapping of terrorists.¹⁰¹ It seems that under Article 51, "self-defense" means an "armed attack" against a Member of the United Nations. This appears to exclude such things as the right of a State to take appropriate action to "protect its citizens." A

¹⁰⁰BASSIOUNI, *supra* note 3, at 191-92 (citing Argentina's protest against Israel for the kidnapping of Eichmann and the Security Council's action, U.N. SCOR, 15th Sess., Supp. for Apr-June 1960, at 35, U.N. Doc. S/4349). At Argentina's request, the Security Council passed a resolution condemning the abduction of Eichmann by Israeli agents. The United States agreed to the resolution. Bassiouni notes that another well-known case may also be characterized as violative of international law. *Regina v. Governor of Bixton Prison*, [1963] 2 Q.B. 243 *reprinted in* 8 BRIT. INT'L L. CASES 477 (1971) (deportation from Israel at U.S. request through England to the United States used as disguised extradition because one who commits espionage was not subject to extradition from Israel); *see also* *United States v. Toscanino*, 500 F.2d 267, 277-78 (2d Cir. 1974) (in discussing the Eichmann case, the Court stated, "The [Security Council's] resolution merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped."). Some mention should be made of the 1989 abduction of the President of Panama, General Manuel Noriega for trial in the United States on drug trafficking. The Court in sustaining *in personam* jurisdiction over Noriega relied on the *Ker-Frisbie* doctrine as an "international legal doctrine." This reasoning is incorrect because the *Ker* decision clearly identifies the doctrine as a "constitutional doctrine" and not as a principle of international law. Mention should also be made of the U.S. attempt to abduct the Palestinian hijackers of the Italian ship *Achille Lauro* in 1985. The hijackers were later tried in Italy after interception of their escape plane from Egypt by U.S. fighter planes.

¹⁰¹Halberstam, *supra* note 1, at 736 n.5 (kidnapping exception would be based on Article 51). Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs against a Member of the United Nations*, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51 (emphasis added).

loose interpretation, contrary to the express provisions of Article 51, might well include protection of citizens of the United States from the importation of drugs. This would be an expansion of the express intention of the Article, however. A more literal construction of this provision may well be supported by reference to the United Nations Convention against the Taking of Hostages,¹⁰² which requires that any suspected offender be delivered to the authorities of the country in which he is found "without exception whatsoever and whether or not the offense was committed" in that country. A forceful abduction of an individual, a native of state A from his residence in state A, violates international legal processes and the human rights of the individual involved.¹⁰³

It is an established rule of international law that the forcible abduction of an individual for trial by the abducting state, being *per se* a violation of customary international law, creates an obligation to restore the person so apprehended upon demand of the country from which he has been taken.¹⁰⁴ In addition, where the offended state protests the other state's action, the individual acquires derivative rights from the state and thus has standing to enforce the terms of any extradition treaty that may exist.¹⁰⁵ In analyzing the case, the majority in *Alvarez-Machain* stated:

Our first inquiry must be whether the abduction of respondent 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 respondent came before it.¹⁰⁶

¹⁰² U.N. Doc. A/34/819, art. 8 (1979).

¹⁰³ See BASSIOUNI, *supra* note 3, at 190; see also Glennon, *supra* note 1, at 746 n.1 (citing S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 10, at 18 (Sept. 7) (Permanent Court of International Justice stated that the foremost restriction imposed by international law upon a State is that it may not exercise its power in any form in the territory of another State.)).

¹⁰⁴ Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L LAW 279, 293 (1960); 1 OPPENHEIM, INTERNATIONAL LAW 205 (8th ed. 1955); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW, § 432 cmt. c (1987). *Harvard Research in International Law, Draft Convention of Jurisdiction with Respect to Crime, Comment to Article 16*, 29 AM. J. INT'L L. 439, 623 (Supp. 1935) [hereinafter *Draft Convention*]. In the Vincenti affair, Charles Vincenti was pursued and captured by an officer of the Department of Justice and two Internal Revenue agents in British territorial waters off the coast of Bimini. The United States government acknowledged that his arrest had been unlawful and revoked the charges against him. 1 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 624 (1940).

¹⁰⁵ See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2203 n.26 (1992) (Stevens, J., dissenting); cf. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981).

¹⁰⁶ *Alvarez-Machain*, 112 S. Ct. at 2193.

With these words the U.S. Supreme Court dismissed from its consideration almost 100 years of customary international law and in effect ignored the landmark case of *The Paquete Habana*.¹⁰⁷ There the Court said:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.¹⁰⁸

The *Paquete Habana* Court also stated that courts should take *judicial notice* and give effect to the law of nations.¹⁰⁹

The *Alvarez-Machain* Court should not have ignored Article 2.4 of the UN Charter and Article 17 of the OAS Charter which became the “supreme law of the land” by their ratification by the United States. The principles contained therein are thus part of federal law. The *Alvarez-Machain* Court should have taken judicial notice of these principles and applied them to the case.

In addition, from the Restatement (Third) of Foreign Relations Law, the Supreme Court might have considered the following:

None of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law. However, but Articles 3, 5, and 9 of the Universal Declaration of Human Rights as well as Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view. In 1981 the Human Rights Committee established pursuant to Article 28 of the Covenant decided that the abduction of a Uruguayan refu-

¹⁰⁷ 175 U.S. 677 (1900).

¹⁰⁸ *Id.* at 700.

¹⁰⁹ *Id.* at 711–12.

gee from Argentina by Uruguayan security officers constituted arbitrary arrest and detention in violation of Article 9(1).¹¹⁰

It has been stated that the customary international law question was not presented properly before the Supreme Court.¹¹¹ The Mexican government had protested Alvarez-Machain's abduction on that ground, as well as on the ground that the abduction violated the Extradition Treaty.¹¹² The issue of international law was briefly raised by Justice O'Connor at the oral argument.¹¹³

In this connection perhaps the most astounding remarks of the majority opinion are the following:

Respondent and his *amici* may be correct that respondent's abduction was "shocking" . . . and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes. . . , and the decision whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.¹¹⁴

It is a strange corruption of the separation of powers doctrine established by our Constitution for the Executive Branch to become a judicial organ to determine the rules of customary international law, particularly in light of the decision of *The Paquete Habana* requiring courts to apply principles of international law in the absence of a treaty or a controlling executive or legislative act.¹¹⁵ The Court made no attempt to produce evidence of such an act. *The Paquete Habana* was just ignored.

One other factor should be noted with respect to the requirements of jurisdiction to adjudicate.¹¹⁶ Comment (a) to Section 432 of Restatement (Third) of the Foreign Relations Law of the United States provides that:

¹¹⁰RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), § 432, Reporters' Notes 1

¹¹¹Jacques Semmelman, *International Decisions: United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 811, 815 n.22 (1992).

¹¹²See *United States v. Caro-Quintero*, 745 F. Supp. 599, 604, 608 (C.D. Cal. 1990).

¹¹³Semmelman, *supra* note 111, at 817 n.30.

¹¹⁴*Alvarez-Machain*, 112 S. Ct. at 2196.

¹¹⁵175 U.S. 677, 700 (1900).

¹¹⁶See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 110 § 432 cmt. a.

if a state would not have jurisdiction to adjudicate with respect to a particular claim, for instance because the act did not take place or cause harm within its territory, the state may not bring its criminal enforcement machinery to bear on the person accused of the act except to assist in the law enforcement efforts of a state with jurisdiction to adjudicate.¹¹⁷

In the *Alvarez-Machain* case, of course, the U.S. courts lacked subject matter jurisdiction inasmuch as the crime alleged was committed in Mexico, where Alvarez-Machain should be tried and where Article 9 of the Extradition Treaty so provides. It should be noted that the Ninth Circuit, in the case of *United States v. Felix-Gutierrez*, dealt with the issue of the extraterritorial jurisdiction of the United States over criminal activity taking place outside of the United States.¹¹⁸ In so doing, the court stated that generally speaking there is no constitutional bar to the extraterritorial application of the U.S. penal laws¹¹⁹ and that the court must examine the congressional intent, expressed or implied, to determine whether it is intended that a given statute have extraterritorial application.¹²⁰ The court also noted that it should insure that an extraterritorial application of U.S. law does not violate international law.¹²¹ The court also mentioned three international law principles which, if applicable, would permit such extraterritorial jurisdiction to be exercised.¹²² The three principles mentioned were: first, "territorial," which would permit jurisdiction over crimes occurring within or without the United States as long as they had effects within the United States;¹²³ the second such principle is denominated "protective," that is to say that the jurisdiction would be based on whether the national interest or national

¹¹⁷ *Id.*; see also *Draft Convention*, *supra* note 104, app. 3 (containing the treaty on international penal law signed in Montevideo Jan. 23, 1889, the first article of which provides: "Crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, of the victim, or of the injured party." Neither one of these instruments were ever signed or ratified by the United States.).

¹¹⁸ 940 F.2d 1200, 1203-06 (9th Cir. 1991).

¹¹⁹ *Id.* at 1204.

¹²⁰ *Id.* *United States v. Bowman* is authority for the proposition that criminal statutes dealing with effects that are directly injurious to the government and are capable of perpetration without regard to a particular locality ought to be construed as applicable to U.S. citizens upon the high seas or in foreign countries though there be no express declaration to that effect. 260 U.S. 94, 97-100 (1922).

¹²¹ *Felix-Gutierrez*, 940 F.2d at 1205.

¹²² *Id.*

¹²³ *Id.* at 1205-06.

security is threatened or injured by the extraterritorial conduct,¹²⁴ the third principle is “passive personality,” that is to say that the Court may assert extraterritorial jurisdiction on the basis of the nationality of the victim.¹²⁵ These principles are applied with those of “comity,” “fairness,” “justice,” “reasonableness,” or more directly, “the balancing of national interests.”¹²⁶ The *Felix-Gutierrez* Court found that in this case, which involved the same basic facts as *Alvarez-Machain*, all these principles were satisfied, after having found that Congress intended the statute with which the accused was charged with violating to have extraterritorial application.¹²⁷

In *Felix-Gutierrez*, the defendant entered the United States on his own,¹²⁸ whereas Alvarez-Machain was kidnapped, a difference which may be an important factor.¹²⁹ In addition, while the *Felix-Gutierrez* court mixed together the passive personality, territorial, and protective principles to assert jurisdiction, it is unclear whether passive personality, standing alone, would be enough of a basis to assert jurisdiction.¹³⁰ Alvarez-Machain is not a drug trafficker; therefore, it would be difficult to substantiate allegations that his actions had effects within the United States or were directed against the U.S. government.

Notwithstanding the foregoing, and the various attempts to classify extraterritorial jurisdiction of criminal conduct occurring outside of the United States under international law, the governing principle remains that a state cannot take measures on the territory of another state by way of enforcement of national laws, without consent of the latter as stated by the following:

Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1205.

¹²⁷ *Id.* at 1203–06.

¹²⁸ *Id.* at 1203.

¹²⁹ See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2190 (1992).

¹³⁰ Christopher J. Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreement Over Extraterritorial Jurisdiction, The Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT'L. L. 1, 24 (1991) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30(2) (1965) and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402 (1987)).

of a treaty or other consent given. In the field of economic regulation, and especially anti-trust legislation, controversy has arisen. It is probable that states will acquiesce in the exercise of enforcement jurisdiction in matters governed by the objective territorial principle of jurisdiction. Courts in the United States, for example, in the *Alcoa* and *Watchmakers of Switzerland* cases, have taken the view that whenever activity abroad has consequences or effects within the United States which are contrary to local legislation then the American courts may make orders requiring the disposition of patent rights and other property of foreign corporations, the reorganization of industry in another country, the production of documents, and so on. The American doctrine appears to be restricted to agreements abroad intended to have effects within the United States and actually having such effects. Such orders may be enforced by action within the United States against the individuals or property present within the territorial jurisdiction, and the policy adopted goes beyond the normal application of the objective territorial principle. More recently United States courts have adopted a principle of the balancing of the various national interests involved, which, though unhelpfully vague, could result in some mitigation of the cruder aspects of the "effects doctrine."¹³¹

In recent years, the United States has increasingly resorted to the apprehension of persons in circumvention of traditional extradition procedures in order to obtain custody of alleged offenders abroad.¹³² These abductions raise three legal issues: first, whether they violate U.S. law; second, whether they violate the law of the state of asylum; and finally, whether they violate international law.

C. *The Extradition Treaty*

The Supreme Court's interpretation in *Alvarez-Machain* of the Extradition Treaty is flawed. Although Chief Justice Rehnquist is correct when he states that "[e]xtradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures,"¹³³

¹³¹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 307-08 (4th ed. 1990).

¹³² See Abramovsky & Eagle, *supra* note 42, at 51-52.

¹³³ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2194 (1992).

he does not specify what the certain defined sets of circumstances are. According to at least one international law scholar, the reason U.S. extradition treaties exist are to recapture fugitives who have committed crimes in the “jurisdiction” of one of the Contracting Parties and who flees to the territory of the other Contracting Party.¹³⁴ Extradition was defined by Chief Justice Fuller as: “The surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him demands the surrender.”¹³⁵

The policy behind extradition treaties is to require the production of evidence of criminality sufficient to warrant the apprehension of the fugitive in the country where he seeks asylum.¹³⁶ This requires judicial review and a determination as to the adequacy and sufficiency of the evidence.¹³⁷ It may be inferred that extradition treaties require the imposition of the judiciary between the law enforcement authorities of one country and the deprivation of an individual’s liberty in another. Article 3 of the Extradition Treaty embodies these principles:

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.¹³⁸

The Extradition Treaty imposes the requested Party’s judiciary between the law enforcement authorities of the requesting Party and the fugitive.¹³⁹ One of the purposes of extradition treaties, therefore, is the establishment of international legal process, cooperation, and principles of comity.

Chief Justice Rehnquist seems to begin his analysis with the assumption that the Extradition Treaty is dormant until one state has requested the extradition of an accused residing in the other state.¹⁴⁰

¹³⁴2 CHARLES C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1043 (2d rev. ed. 1951)

¹³⁵ *Id.* at 1012 (quoting *Terlinden v. Ames*, 184 U.S. 270, 289 (1902)).

¹³⁶ *Id.* at 1016.

¹³⁷ *Id.* at 1018.

¹³⁸ Extradition Treaty, *supra* note 5, arts. 3, 31.

¹³⁹ *See id.*

¹⁴⁰ *See United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2194 (1992).

When the Extradition Treaty has accordingly been "invoked," its terms thereafter prohibit certain state conduct, such as prosecuting the defendant for crimes other than those enumerated in the Treaty.¹⁴¹

If an apprehension is achieved by means other than by formal treaty rendition, a court will not look into the state conduct employed in obtaining custody over a defendant.¹⁴² Chief Justice Rehnquist cannot maintain this legal fiction which he calls "abductions outside of the Treaty."¹⁴³ As the District Court found, Alvarez-Machain became entitled to raise his rights under the Extradition Treaty when the Mexican government protested his abduction because extradition treaties are self-executing.¹⁴⁴ Chief Justice Rehnquist decides, without directly stating so, that the defendant may only raise the terms of a treaty as a defense following his extradition according to treaty procedure.¹⁴⁵ Such a proposition, that only the prosecuting state may vest treaty rights in the defendant if it chooses to follow treaty procedure, while an injured state may not vest treaty rights in its abducted national through diplomatic protest, is not supported by the terms of the Extradition Treaty or any other authority. There is no provision in the Extradition Treaty giving a prosecuting state the only right to invoke its terms. The requested Party, according to a number of provisions, may refuse or delay extradition.¹⁴⁶ Thus, the notion that the Extradition Treaty lies dormant until a prosecuting state invokes its terms is absurd on its face.

When Chief Justice Rehnquist interprets Article 22(1) of the Extradition Treaty, he chooses one of two plausible meanings. The two, however, are not necessarily exclusive. Article 22(1) states that it "shall apply to offenses specified in Article 2 [including murder] committed before and after this Treaty enters into force."¹⁴⁷ While Alvarez-Machain argued that Article 22 makes application of the Treaty mandatory for those offenses, the Court construed that the Article's sole purpose was to make the Treaty applicable to crimes

¹⁴¹ *Id.* at 2191 (citing *United States v. Rauscher*, 119 U.S. 407 (1886)).

¹⁴² *See id.* at 2194.

¹⁴³ *See id.*

¹⁴⁴ *United States v. Caro-Quintero*, 745 F. Supp. 599, 607 (C.D. Cal. 1990).

¹⁴⁵ *See Alvarez-Machain*, 112 S. Ct. at 2195-97.

¹⁴⁶ *Id.* at 2198 (Stevens, J., dissenting) (discussing provisions conveying rights to requested state).

¹⁴⁷ Extradition Treaty, *supra* note 5, art. 22.

committed both before and after the Treaty came into effect.¹⁴⁸ The reader is tempted to pass over this interpretation without much thought. At second glance, however, Article 22 is entitled, "Scope of Application,"¹⁴⁹ and it is therefore quite obvious that the drafters wanted to make an imperative statement about more than the temporal application of the Treaty when they made reference to Article 2.¹⁵⁰ The drafters could have made no reference to Article 2 at all and achieved the same effect advocated by Chief Justice Rehnquist.

States are normally under no obligation to extradite their nationals. For many years, many countries excluded nationals from extradition obligations.

Under the laws of many countries and under many extradition treaties, the extradition of nationals of the requested State is prohibited or is nonobligatory. This exemption of nationals from extradition may result from specific prohibition of their extradition law or from a provision that the law or treaty providing for extradition applies only to aliens.¹⁵¹

The Court's interpretation of Article 9 of the Extradition Treaty lacks any semblance of a logical foundation. Article 9 of the Treaty provides:

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.¹⁵²

¹⁴⁸ *Alvarez-Machain*, 112 S. Ct. at 2193.

¹⁴⁹ Extradition Treaty, *supra* note 5, art. 22.

¹⁵⁰ *Id.* Article 2 states: "Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year." *Id.* art. 2.

¹⁵¹ 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 18 (1968).

¹⁵² Extradition Treaty, *supra* note 5, art. 9.

The Court, without first examining this Article in the context of the Treaty, leaps to the meaning of extradition treaties in general.¹⁵³ Chief Justice Rehnquist states: "Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures."¹⁵⁴ He fails to state, however, that Article 9 provides an exception to the general obligations established by these treaties. He also fails to state that this exception is applicable to Alvarez-Machain and that the Mexican government, from the beginning, and upon formal agreement with the United States, had no duty to extradite Alvarez-Machain to stand trial in the United States.¹⁵⁵

Essentially, these treaties reflect the intention of the Contracting Parties to affirm their respective territorial integrity. Chief Justice Rehnquist espouses the position that if the Contracting Parties had wanted to restrict their jurisdiction in respect to the other's nationals to prevent one nation from abducting nationals of the other nation for the purposes of prosecution without some form of the judicial process established in either Articles 3 or 9, they would have drafted language doing so, as reflected in the Draft Convention on Jurisdiction with Respect to Crime.¹⁵⁶ The Court fails to note that the same Draft Convention, in Appendix 3, contains the Treaty on International Penal Law, signed at Montevideo, January 23, 1889, the first article of which provides: "Crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, of the victim, or of the injured party."¹⁵⁷ This article reflects a rule of international

¹⁵³ See *Alvarez-Machain*, 112 S. Ct. at 2194.

¹⁵⁴ *Id.*

¹⁵⁵ In a prior extradition treaty, the United States made a reservation to a duty to extradite or prosecute its own nationals. See *The Convention on Extradition*, Dec. 26, 1933, 49 Stat. 3111, T.S. 882, reprinted in 3 CHARLES I. BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949* 152 (1969).

¹⁵⁶ *Alvarez-Machain*, 112 S. Ct. at 2194-95 n.13 (quoting *Draft Convention*, *supra* note 104, art. 16). The Draft Convention on Jurisdiction with Respect to Crime provides:

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

Draft Convention, *supra* note 104, art. 16.

¹⁵⁷ *Draft Convention*, *supra* note 104, app. 3.

law.¹⁵⁸ When it is applied to Alvarez-Machain's case, the international law of extradition treaties dictates that he be returned to Mexico, the situs of the crime, in order to stand trial.

D. *Supervisory Power*

Alvarez-Machain sought dismissal in the District Court of the indictment under the Court's supervisory power.¹⁵⁹ The Court stated that a court may exercise its supervisory power "as necessary to preserve judicial integrity and deter illegal conduct."¹⁶⁰ The Court must not allow itself to be made an "accomplice in willful disobedience of the law."¹⁶¹ The Court refers in this connection to *McNabb v. United States*.¹⁶² The District Court did not rest its decision upon its supervisory power, but said the following with respect to the conduct of the DEA in this and other cases:

However, the Court admonishes the DEA to heed Judge Oakes' [sic] warning made fifteen years ago, which this Court now adopts: "[W]e can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power. . . . To my mind the Government in its laudable interest of stopping the international drug traffic is by these repeated abduc-

¹⁵⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW, *supra* note 110, § 432.

¹⁵⁹ *United States v. Caro-Quintero*, 745 F. Supp. 599, 615 (C.D. Cal. 1990).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 318 U.S. 332 (1943); see also *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting).

tions inviting exercise of that supervisory power in the interest of the greater good of preserving respect for the law."¹⁶³

E. *Political Question Doctrine*

The suggestion made by the Court that the return of Alvarez-Machain to Mexico is a matter for the Executive Branch suggests that the Court wished to take refuge behind the "political question doctrine."¹⁶⁴ This doctrine is generally understood to mean that the courts will steer clear of decisions which might raise questions of political concerns and thus potentially embarrass the Executive Branch. It is not difficult to see that a court's challenge to an Executive law enforcement agency's action outside or in disregard of a treaty might be potentially embarrassing to the Executive and a threat to the Executive's foreign policy domain.

The applicability of this doctrine in cases of extraterritorial law enforcement action would seem to cause those very harms the doctrine is supposed to eliminate. Where a treaty is involved, presumably negotiated by the Executive, ratified by Congress, and by virtue of the Constitution, becoming the "supreme law of the land," any court judgment requiring the adherence to the terms of such treaty would confirm the intention of the Executive Branch's integrity in entering into the treaty on behalf of the United States.

In this regard, it should be noted that the Supreme Court in *United States v. Rauscher*¹⁶⁵ held that U.S. courts are barred from trying a fugitive surrendered by Great Britain for a crime other than that for which he had been extradited. In reaching this decision the court rejected the argument that "[t]he rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government and that they can only appeal to the executive branches of the treaty governments for redress." This court was the same court which decided *Ker* and the opinion was written by the same justice. *Rauscher* was also cited in the majority opinion of the Court in *Alvarez-Machain*, so the Court presumably was aware of its holding.¹⁶⁶ This position is consistent with the position taken by the Supreme

¹⁶³ *Caro-Quintero*, 745 F. Supp. at 615 (citing *United States v. Lira*, 515 F.2d 68, 73 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975) (Oakes, J., concurring)).

¹⁶⁴ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992).

¹⁶⁵ 119 U.S. 430, 432 (1886).

¹⁶⁶ *Alvarez-Machain*, 112 S. Ct. at 2191.

Court in *Cook v. United States*¹⁶⁷ to the effect that *Ker v. Illinois*¹⁶⁸ is inapplicable where a treaty of the United States is directly involved.¹⁶⁹ This is also consistent with the traditional doctrine that: “[t]he construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed.”¹⁷⁰

Additionally, in the *Alvarez-Machain* case, the Executive Branch never issued an official statement but apparently condoned the illegal apprehension of Alvarez-Machain and his removal by force from his country of domicile, notwithstanding the violation of the Extradition Treaty or of principles of customary international law. The application of the political question doctrine in this case seems inappropriate and illogical.

F. *International Effect of the Decision*

It is now generally known that the *Alvarez-Machain* decision has had a very frightening effect in other countries.¹⁷¹ For example, in Venezuela, Foreign Minister Ochoa Antich has asked Congress, now discussing constitutional amendments, to write into law a ban on extradition and prohibiting illegal abductions which the United States claims the right to do; Colombia and Bolivia have joined the protest against this decision.¹⁷² The president of the American Society of International Law has also criticized the decision.¹⁷³ The OAS has recently challenged and registered its disagreement with the *Alvarez-Machain* decision through its legal committee.

OPINION OF THE INTERAMERICAN JUDICIAL COMMITTEE¹⁷⁴

As requested, the present opinion analyzes the judgment of the United States Supreme Court from the standpoint of its compliance with International Public Law. The Com-

¹⁶⁷ 288 U.S. 102 (1933).

¹⁶⁸ 119 U.S. 436 (1886).

¹⁶⁹ See *Cook*, 288 U.S. at 121-22.

¹⁷⁰ See *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921).

¹⁷¹ See David O. Stewart, *The Price of Vengeance*, A.B.A. J., Nov. 1992, at 50; see also Valerie Epps, *Forcible Abduction, Jurisdiction And Treaty Interpretation*, INT'L PRAC. NOTEBOOK, Oct. 1992, at 6.

¹⁷² See *Washington Letter*, LATIN AM. REGIONAL REP., (Latin Am. News., London, England), July 30, 1992.

¹⁷³ *Will the U.S. Supreme Court Fail International Law*, AM. SOC'Y INT'L L. (Aug.-Sept., 1992).

¹⁷⁴ Source on file with the authors.

mittee does not opine on the compliance of said judgment with the United States internal law but points out that it is an indisputable norm of International Law that the dispositions of a state regarding its internal law cannot be invoked to elude fulfillment of international obligations.

[The First Seven Paragraphs Are Deleted. These paragraphs deal with the facts of the case and the international law issues thereby.]

8. The Committee had in mind that the State is responsible for the violation of its international obligations, not only by the Executive but also by any of its organs, including the Judiciary and that the acts or omissions of the same may constitute transgressions of International Law, whether by themselves or by confirming or leaving without remedy the violations of other state-organs.

9. As to the facts, the Committee has based itself exclusively on that which has been affirmed as indisputable in the judgment being studied. Thus, it considers it a fact that the Mexican citizen Humberto Alvarez Machain was kidnapped from Mexican territory and brought to United States territory and that the responsibility for that kidnapping lies with the Drug Enforcement Administration (DEA), a governmental organ of the United States of America which is in charge of the war against drug traffic.

The Committee, in the same way, considers beyond any argument or doubt that the kidnapping in question is a grave violation of Public International Law, since it constitutes a transgression of Mexico's territorial sovereignty. The responsibility of the United States of America for the DEA's conduct in this case is not argued either, since, having full knowledge of the same, it has abstained from correcting it.

10. In accordance with the norms that rule the state's responsibility in International Law, every State which violates an international obligation must redress the consequences of said violation. The intention is to return things to the state they were before the transgression occurred. Only to the extent that this becomes impossible, or that the injured party consents to it, would there be an alternative form of redress.

11. In virtue of the foregoing, it is clear that the United

States of America, as responsible for the violation of the sovereignty of Mexico caused by the kidnapping of the Mexican citizen Humberto Alvarez Machain, is obligated to repatriate him, without prejudice of other reparations its conduct may necessitate.

12. An analysis of the United States Supreme Court judgment brings the Committee to the conclusion that the judgment is contrary to the rules of International Law for the following reasons:

a) Because by affirming the United States of America's jurisdiction to try Mexican citizen Humberto Alvarez Machain, forcibly removed from his country of origin, the Court fails to recognize the obligation of the United States of America to return him to the country from whose jurisdiction he was abducted.

b) Because by maintaining that the United States of America is free to try persons abducted by action of its government in the territory of another state, unless it is expressly prohibited to do so in a current treaty between the United State and the country in question, it fails to recognize a fundamental principle of International Law, *i.e.* respect for the territorial sovereignty of States.

c) Because by interpreting the Extradition Treaty between the United States of America and Mexico in the sense that it does not impede the abduction of persons, it ignores the rule by which treaties must be interpreted in accordance with their objective and in relation to the applicable principles and regulations of International Law.

13. Finally, the Committee observes that if the principles invoked in the judgment being studied were to be carried to their ultimate consequences, international judicial order would be irreparably broken, when each State is given faculty to violate with impunity the territorial sovereignty of the other States. The Committee must also emphasize the incompatibility of the practice of abduction with due process belonging to every person, regardless of how grave may be the crime of which he is being accused, and which constitute one of the human rights honored by International Law.

This Opinion was approved by nine votes in favor and one abstention.

Rio de Janeiro, August 15, 1992

Manuel A. Vieira	Jose Luis Siqueiros
Seymour J. Rubin	Eduardo Vio Grossi
(U.S. abstained)	
Luis Herrera Mercano	Galo Leoro Franco
Juan Bautista Rivarola Paoli	Francisco Villagran Kramer
Ramiro Faraiva-Guerreiro	Jorge Reinaldo A. Vanossi

G. Conclusion

It would appear from the analysis of *Alvarez-Machain* set forth above, that the *Alvarez-Machain* decision is not representative of the current state of the law regarding the rights of state B to forcibly abduct an individual citizen and resident of state A to be tried in state B for criminal acts performed in state A in violation of an extradition treaty currently in effect between state A and state B, even though the treaty in question contains no express provisions prohibiting such abduction, and the abduction has been protested by state A. It is a rule of international law that a state must not perform acts of sovereignty in the territory of another state without the consent of such state. Hence the arrest of a fugitive criminal by the officers of a state in the territory of another is *prima facie*, a breach of international law.

Furthermore, the existence of an extradition treaty is regarded as requiring its strict observance to obtain the delivery of an alleged offender wanted by state B and found in state A.¹⁷⁵ Justice Stevens, who wrote the dissenting opinion in *Alvarez-Machain*, correctly states current law on this subject.¹⁷⁶

The Court relied heavily upon the *Ker* decision in the *Alvarez-Machain* and *Rauscher* cases.¹⁷⁷ In both *Ker* and *Rauscher*, the point was clearly made that an extradition treaty constituted the *means* by which the United States could obtain jurisdiction over the defendant within the territorial jurisdiction of another state, a party to such treaty.¹⁷⁸

The *Alvarez-Machain* case comes as a serious shock to the inter-

¹⁷⁵ See *United States v. Rauscher*, 119 U.S. 407, 429 (1886).

¹⁷⁶ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2197-206 (Stevens, J., dissenting).

¹⁷⁷ See *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (1974); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 63 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975) (representing a more current view of due process and other applicable law).

¹⁷⁸ *Alvarez-Machain*, 112 S. Ct. at 2200 (Stevens, J., dissenting) (citing *Rauscher*, 119 U.S. at 429).

national bar. The statement of Justice Stevens in his dissenting opinion says it all.

When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states).¹⁷⁹

This country, the cradle of liberty, justice, and "the rule of law" demonstrates by this decision a disregard for the rule of law apparently for reasons of political or administrative expediency, shaking the very basis of its image and the principles of fundamental human rights it proclaims to the world at large.¹⁸⁰

This decision cannot be permitted to stand.

III. RECOMMENDATIONS

The current status of the case is as follows. Alvarez-Machain filed a petition for rehearing *en banc* with the Ninth Circuit. His petition was denied,¹⁸¹ however, and the Ninth Circuit remanded his case to the District Court for trial.¹⁸² The District Court, hearing the defendant's Motion for acquittal based on the insufficiency of the evidence, granted the Motion and discharged Alvarez-Machain.¹⁸³ Although the District Court released the defendant, the Supreme

¹⁷⁹ *Id.* at 2202 (citing Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 231 (1992)).

¹⁸⁰ See William J. Brennan, Jr., *International Due Process and The Law*, 48 VA. L. REV. 1258, 1258 (1962).

¹⁸¹ *United States v. Alvarez-Machain*, 971 F.2d 310, 311 (9th Cir. 1992).

¹⁸² On November 3, 1992, the Ninth Circuit amended this order, denying a hearing of Alvarez-Machain's customary international law claims based on the Ninth Circuit's belief that the District Court's opinion precluded consideration of such claims, even if the Supreme Court's decision had not.

The District Court never ruled on the customary international law issue because Alvarez-Machain did not raise it in his motion to dismiss for lack of jurisdiction, and further, the District Court found the Extradition Treaty had been violated, making it unnecessary to consider customary international law principles. See *United States v. Caro-Quintero*, 745 F. Supp. 599, 614 (C.D. Cal. 1990).

Alvarez-Machain's attorneys subsequently filed a request for leave to amend his motion to dismiss based on principles of customary international law in the District Court. This motion was denied. At the same time, however, Alvarez-Machain's attorneys have presented a petition to the Ninth Circuit for a clarification of their order to the effect that the District Court is not precluded from considering the issue of customary international law.

¹⁸³ *United States v. Alvarez-Machain*, No. CR-87-422-(G)-ER (C.D. Cal. Dec. 14, 1992).

Court's opinion remains case law and should nevertheless be addressed.

There are several possible remedies which should be analyzed. The authors of this article are inclined toward further judicial action, whether at the Supreme Court level, or alternatively, at the international level.

A. *Petition for Rehearing*

A motion must be made immediately for leave to file an untimely petition for a rehearing of this case with the Supreme Court. This motion would be made on behalf of the Mexican Bar Association, the Mexican Government acting through its Foreign Office and the Ministry of Justice, the Canadian Bar Association and the American Bar Association, together with the support of the Inter-American Bar Association, the International Bar Association (American Branch) and the Association of the Bar of the City of New York (both the International and Inter-American Law Committees).

1. In General

Rule 51 of the Rules of Court¹⁸⁴ permits the filing of petitions for rehearing by unsuccessful litigants within twenty-five days of the entry of either (1) an adverse judgment or decision on the merits, or (2) an order denying certiorari. It is largely self-explanatory and reads as follows:

1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding *in forma pauperis* under Rule 46), accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition of rehearing is not subject to oral argument, and will not be granted except at the instance of a Justice who concurred in the judgment or decision

¹⁸⁴SUP. CT. R. 51.

and with the concurrence of a majority of the Court. See also Rule 52.2.

2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph 1, but its grounds must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel or of the party when not represented by counsel. A petition for rehearing without such certificate shall be rejected by the Clerk. Such petition is not subject to oral argument.

3. No response to a petition for rehearing will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received.¹⁸⁵

2. The Power to Grant Untimely Petitions

For many years the Supreme Court has recognized that, except in Tax Court cases, the Court has power during a Court term to modify any judgment rendered during that term, even upon an untimely petition for rehearing. This has been deemed a “general rule of the law” applicable to all courts.¹⁸⁶ All that is necessary, the untimely petition for rehearing being within the term, is that a motion for leave to file the petition should accompany it.¹⁸⁷

Under the Court’s previous practice, the “term rule” covered cases in which untimely petitions for rehearing were filed within the term in which the adverse decision was rendered, in addition to cases carried over from one term to another after the summer recess—

¹⁸⁵ *Id.*

¹⁸⁶ ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 619 (6th ed. 1986) (citing *Bronson v. Schulten*, 104 U.S. 410 (1881)).

¹⁸⁷ *Id.*

including subsequent untimely petitions filed in the following term.¹⁸⁸

The 1948 recodification of the Judicial Code, however, included a new provision, 28 U.S.C. Section 452. The second paragraph of this provision purported to eliminate the term rule for all federal courts:

All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding.¹⁸⁹

Facially, Section 452, as amended, can be interpreted as expanding indefinitely the Court's power to reopen a case, whether or not a term or session has expired.

In *United States v. Ohio Power Co.* and subsequent decisions, however, the Court has effectively abandoned the term rule *sub silentio*, referring neither to the rule nor to Section 452 in its original or amended form.¹⁹⁰ That same term, the Court denied certiorari as well as a timely petition for rehearing and a motion for leave to file a second and untimely petition for rehearing.¹⁹¹ Late that term, the Court vacated its prior order denying the timely petition for rehearing and "continued" that petition until the next term.¹⁹² During the following term, the Court granted the "continued" petition for rehearing, vacated the denial of certiorari, and granted the petition for certiorari. The Court also summarily reversed the lower decision based on the Court's new rulings in two other cases.¹⁹³ The four Justices of the majority discussed neither the term rule nor Section 452, stating merely:

We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (quoting 28 U.S.C. § 452 (1992)(as amended)).

¹⁹⁰ *Id.* (citing *United States v. Ohio Power Co.*, 353 U.S. 98 (1957)).

¹⁹¹ *Id.* (citing *Ohio Power*, 353 U.S. at 98).

¹⁹² *Id.* at 620.

¹⁹³ *Id.*

our power over our own judgments, both in civil and criminal cases.¹⁹⁴

This principle was later interpreted in *Gondeck v. Pan American World Airways*, in which a judgment was reversed in 1965 following the grant of a second and out-of-time petition for rehearing filed more than three years after the denial of certiorari in 1962 and the denial of a timely petition for rehearing.¹⁹⁵ In *Gondeck*, the Court stated “[w]e are now apprised, however, of ‘intervening circumstances of substantial . . . effect,’ justifying application of the established doctrine that ‘the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.’”¹⁹⁶ The intervening circumstances in *Gondeck* consisted of both factual and legal developments. The Supreme Court resolved inconsistent appellate court rulings on the one hand.¹⁹⁷ On the other hand, another plaintiff whose cause of action arose out of the same accident as Mrs. Gondeck’s, subsequently won her case, making the comparison of the two outcomes seem inequitable.¹⁹⁸

Another means of obtaining a rehearing is a split in the case law between the Second and Ninth Circuits. The District Court gave cursory attention to Alvarez-Machain’s third and fourth claims for relief. Under his third claim, Alvarez-Machain argued that the U.S. government violated the UN and OAS Charters when it authorized the DEA to forcibly abduct him from Mexican territory.¹⁹⁹ Under his fourth claim, Alvarez-Machain urged the Court to use its supervisory power to dismiss the indictment.²⁰⁰ Although the Court had already decided the case based on the Extradition Treaty, it noted an interesting split in the case law between the Ninth and Second Circuit Courts of Appeal.²⁰¹ The principle that the UN and OAS Charters are not self-executing absent implementing legislation is accepted throughout the federal court system.²⁰² The Second Circuit recognizes, however, that the principles contained in those Charters rep-

¹⁹⁴ *Id.* (citing *Ohio Power*, 353 U.S. at 99).

¹⁹⁵ *Id.* at 620–21 (citing *Gondeck v. Pan American World Airways*, 370 U.S. 918, *reh’g denied* 371 U.S. 856 (1962), *reh’g granted* 382 U.S. 25 (1965)).

¹⁹⁶ *Id.* (citing *Gondeck*, 382 U.S. at 26–27).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (citing *Pan American World Airways v. O’Hearne*, 335 F.2d 70 (4th Cir. 1964)).

¹⁹⁹ *United States v. Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 615 n.25.

²⁰² *Id.* at 614 n.24.

resent codified customary international law conveying individual rights to defendants.²⁰³ The Court noted that the Ninth Circuit does not recognize that these Charters convey individual rights to defendants.²⁰⁴

If Alvarez-Machain raised these two claims again at the district court level, and urged the District Court to use its supervisory powers to vindicate his international law rights, the Court would be obliged to rule consistently with Ninth Circuit decisions. He would then be free, however, to appeal the decision to the Supreme Court, which would have to resolve the dispute between the Ninth and Second Circuits of whether principles of international law convey substantive rights or affirmative defenses upon litigants in U.S. courts. Based on the holding in *The Paquete Habana*,²⁰⁵ the Court may have to resolve this issue in the affirmative—that aliens are entitled to the protection of their international law rights in the courts of the United States. Following this line of argument, the Supreme Court may thereafter be obliged to rule consistently with the principles of international law outlined previously in this article in favor of Alvarez-Machain's motion to be returned to Mexico to stand trial.

By far the most frequent reason for granting even a timely petition for rehearing after denial of certiorari is the intervention of the conflicting decision of another court of appeals or of the Supreme Court. This is also the situation in which out-of-time petitions for rehearing have been granted. Given the factual circumstances surrounding the *Alvarez-Machain* case, one would have to argue that the "interests of justice" have been miscarried because several of Alvarez-Machain's co-defendants, Rafael Caro-Quintero for example, were tried in Mexico. In order to obtain a rehearing, however, one Justice who participated in the majority must certify the motion

²⁰³ *Id.* at 615 n.25 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 n.9 (2d Cir. 1980)).

²⁰⁴ *Id.* (citing *United States v. Davis*, 905 F.2d 245, 248 n.1 (9th Cir. 1990)). "International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts." *Id.* This observation is dicta, as no violation of international law had occurred in *Davis*; therefore, it could not have been part of the ratio decidendi. See *Davis*, 905 F.2d at 245-51. In *Davis*, the Ninth Circuit cited *United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990), although the issue in that case regarded the extraterritorial application of a statute. *Davis*, 905 F.2d at 248 n.1. The *Thomas* court did consider whether such an application would violate principles of international law and found no violation. 843 F.2d at 1066, 1072. Thus, the leap from the Ninth Circuit's findings in *Thomas* to its statement in *Davis* is not well substantiated.

²⁰⁵ 175 U.S. 677 (1900).

and petition. As all five Justices in the majority were solidly behind the Rehnquist opinion, the chances of certification appear slight.

B. *Legislation*

If the petition is denied, legislative action should be sought from Congress confirming the proper application of customary international law to and status of all extradition treaties to which the United States is party, and not treaties merely confined to the express prohibition of "kidnapping."

Congress has passed legislation with respect to extradition.²⁰⁶ Although many extradition treaties are already in force without provisions proscribing the prosecution of abducted defendants, Congress may pass a law requiring the Executive Branch to repatriate foreign nationals to their homeland if they have been forcibly abducted therefrom without the consent of their government. This would, in effect, achieve the result sought by Alvarez-Machain. Such a law, supplementing 18 U.S.C.A. sections 3181 through 3195 could read as follows:

If any person is brought within the jurisdiction of the federal and state courts of the United States from a foreign country, by means of a United States federal or state sponsored, forcible abduction, to which such foreign country does not consent, then the Executive shall repatriate such person at his request or the request of the foreign country's government. The Executive shall not prosecute such person unless the foreign country from which the person was abducted subsequently consents to the prosecution. In the event of the existence of an extradition treaty, the provisions therein must be strictly observed with respect to rendition to the requesting country.

In the alternative, Congress could curtail the federal district courts' jurisdiction over these cases, as these courts are created by Congress.²⁰⁷ Congress could curtail either the subject matter jurisdiction conferred on these courts by statute, under 28 U.S.C.A. section 1331, or the in personam jurisdiction which these courts exercise over defendants pursuant to common law principles of jurisdiction. Such provisions could provide:

²⁰⁶ 18 U.S.C.A. §§ 3181-195 (West 1985),

²⁰⁷ U.S. CONST. art. III, § 2.

The federal district courts of the United States shall not have 1) in personam jurisdiction over a foreign national allegedly having committed a crime in a foreign country who was forcibly apprehended and brought before a United States court, or 2) federal subject-matter jurisdiction for crimes not committed within the territorial limits of the United States, provided however, that the foreign country does not render the person in accordance with an existing extradition treaty and the United States court would otherwise have federal subject-matter jurisdiction.

C. *Executive Action*

The Executive Branch may adopt the policy outlined by the Harvard Research Center in its Draft Convention on Jurisdiction with Respect to Crime by implementing it in all future treaties.²⁰⁸ Such a provision, as outlined, would read as follows:

In exercising jurisdiction under this extradition treaty, neither State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

As the renegotiation of extradition treaties does not occur frequently, the Executive Branch could put this in practice using its discretionary authority. The Executive may choose not to prosecute foreign nationals who have been forcibly abducted by government agents. The Executive may choose to repatriate these individuals. Countries in the process of renegotiating their extradition treaties with the United States could insist on this provision. The implementation of such a policy would fill the gap between the extradition treaties and the *Ker-Frisbie* doctrine.²⁰⁹

²⁰⁸ See *Draft Convention*, *supra* note 104.

²⁰⁹ Two months after the Extradition Treaty entered into force, the Justice Department's Office of Legal Counsel (OLC) issued an opinion entitled "Extraterritorial Apprehension by the Federal Bureau of Investigation." 4B Op. Off. Leg. Counsel 543 (March 31, 1980). That opinion concluded that the FBI only has lawful authority to engage in extraterritorial apprehension when the asylum state acquiesces to the proposed operation. In June, 1989, however, the OLC issued a secret opinion partially reversing the 1980 opinion. See *Statement of William Barr, Assistant Attorney General for the Office of Legal Counsel on the Legality As a Matter of*

D. *Advisory Opinion of the International Court of Justice*

All members of the United Nations are members of the Statute of the International Court of Justice (ICJ) at the Hague, pursuant to Article 93 of the Charter.²¹⁰ Both the United States and Mexico are members of the United Nations; therefore, Mexico could place its grievance before the ICJ for judicial resolution, pursuant to Article 35 of the Statute of the ICJ.²¹¹ Such cases are termed "contentious" because they involve an actual dispute pending between two states. In light of the diplomatic circumstances surrounding the Alvarez-Machain affair, the Mexican government may not wish to confront the United States in such a manner. There exist alternative means to place the issue before the ICJ.

Article 96 of the U.N. Charter²¹² also authorizes the ICJ to render advisory opinions with respect to any legal question.²¹³ The General

Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law, Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives at 8 (Nov. 8, 1989). Assistant Attorney General Barr contended that the President, or an Executive agency such as the FBI, could override customary international law. *Id.* Subsequent to Mr. Barr's statement, the Legal Adviser of the U.S. Department of State, Abraham D. Sofaer, testified before Congress, and assured that body that the policy of the United States with regard to extraterritorial apprehensions had not changed since the 1980 opinion which outlined the practice of international cooperation among law enforcement agencies:

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in United States policy concerning extraterritorial arrests. Our policy remains to cooperate with foreign States in achieving law enforcement objectives.

Statement of Abraham D. Sofaer, The Legal Adviser of the U.S. Department of State on The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives at 16-17 (Nov. 8, 1989).

When treaties are concerned, however, it is generally agreed that the President does not have the authority to reinterpret or rewrite the terms contained therein without the advice and consent of the Senate. *See Leigh, supra note 1, at 759.* Even if the President did have the constitutional authority to act contrary to international law, it may be argued that such action lies within his sole discretion and may not be delegated to an Executive agency such as the FBI or the DEA. *See Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds, 654 F.2d 1382 (10th Cir. 1981).* It is a power which only the President may exercise.

In the aftermath of the Alvarez-Machain affair, the policy of the U.S. government respecting international law needs to be reaffirmed.

²¹⁰ U.N. CHARTER art. 93, ¶ 1.

²¹¹ Statute of the International Court of Justice, 1978 I.C.J. Acts & Docs. No. 4, at 75

²¹² U.N. CHARTER art. 96, ¶ 1.

²¹³ Statute of the International Court of Justice, 1978 I.C.J. Acts & Docs. No. 4, at 85-87. Articles 65-68 of the Statute of the International Court of Justice govern advisory opinion procedure. *Id.*

Assembly or the Security Council must request these opinions. Article 102(2) of the Rules of the ICJ provide that the ICJ must first determine if the legal question is pending between two states.²¹⁴ This preliminary inquiry is procedural in nature. It is not necessary, however, that the two states involved give their consent to the advisory opinion.²¹⁵ If found to be the case, both states may be entitled to be heard before the Court, entitled to representation on the Court, or to appoint a judge ad hoc, pursuant to Article 102(3) of the Rules.²¹⁶

Although doubt exists as to whether the International Court of Justice is competent to render advisory opinions regarding disputes pending between two states when the dispute requires the resolution of questions of fact,²¹⁷ there would appear to be no such dispute in the *Alvarez-Machain* case. First, there are no contended facts. Second, neither the Supreme Court nor the Ninth Circuit heard the issue of customary international law. Third, the District Court decided the case on the grounds of the Extradition Treaty issue alone. Fourth, the United States has not responded to Mexico's diplomatic notes. No dispute which would deprive the ICJ of competence is present.

Despite its diplomatic overtures, Mexico may bring international pressure to bear on the United States without taking a confrontational position by sponsoring a resolution at the U.N. General Assembly calling for an advisory opinion by the ICJ. The issue to be submitted to the ICJ should read as follows:

Whether the forcible abduction of one State's national from that State's territory by the government agents of another State, without the consent or acquiescence of the first State, when an extradition treaty between the two States, 1) exists and is in force, or 2) does not exist, violates customary international law or international treaty law.

If the ICJ answers in the affirmative, its advisory opinion could motivate global opinion and bring international pressure to bear on the United States to recognize principles of customary international law or international treaty law and conform its conduct to such law.

²¹⁴ Rules of Court, 1978 I.C.J. Acts & Docs. No. 4, at 157.

²¹⁵ ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 716 (2d rev. ed. 1985).

²¹⁶ Rules of Court, 1978 I.C.J. Acts & Docs. No. 4, at 115, 158.

²¹⁷ *Id.* at 157.

POST SCRIPT

On November 17, 1992, nineteen Latin American countries, together with Spain and Portugal, requested that the General Assembly of the United Nations submit an issue to the International Court of Justice for an Advisory Opinion as to whether the forcible abduction of one State's national and resident from that State's territory by the government agents of another State without the consent or acquiescence of the first State, violates customary international law when under circumstances identical to the Alvarez-Machain case. The request has been forwarded to the Sixth Committee (Legal Questions) which will undertake discussion of the matter in the General Assembly's Forty-Eighth Session taking place in 1993.

On December 14, 1992 the District Court for the Central District of California, Judge Rafeedie presiding, issued an order acquitting Alvarez-Machain of all the charges against him and ordered his release, on the ground that the government had failed to make a *prima facie* case.²¹⁸ As a result of this order, Alvarez-Machain returned to Mexico. The Supreme Court's opinion, however, remains on the books as possible precedent for future cases. Steps must therefore be taken in order to prevent forcible abductions of this nature from taking place in the future.

²¹⁸United States v. Alvarez-Machain, No. CR-87-422-(G)-ER (C.D. Cal. Dec. 14, 1992).