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OFFICIAL GOVERNMENT ABDUCTIONS IN THE PRESENCE OF EXTRADITION TREATIES

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

I. INTRODUCTION

In *United States v. Alvarez-Machain*,¹ the United States Supreme Court held that a defendant who was abducted from Mexico in order to be tried for an alleged crime cannot prevent United States courts from exercising personal jurisdiction over him, even though the United States has an extradition treaty with Mexico *and* the abduction was conducted under the authority of United States government officials. This Note examines the opinions of *Alvarez-Machain* and concludes that the case was wrongly decided; the Court should have dismissed the case for lack of jurisdiction. This Note explains that the majority erred in failing to distinguish this case from *Ker v. Illinois*,² in which the Supreme Court held that jurisdiction could be exercised over a defendant who was abducted by an official acting only under his personal authority. This Note also argues that given the Extradition Treaty between the United States and Mexico³—including the Treaty's purposes, detailed provisions of the Treaty providing for exceptions to extradition requirements, the history of Mexico's understanding of the Treaty, and the background of international law in general—official abductions are implicitly prohibited. Given Supreme Court precedents preventing jurisdiction in the context of treaty violations, the United States government's violation of the Treaty should have prohibited personal jurisdiction. Finally, this Note suggests that the *Alvarez-Machain* opinion sends an ominous message to treaty partners that in the event that the United States carries out its treaties in bad faith, the nation's highest court may sanction such actions.

¹ 112 S. Ct. 2188 (1992).

² 119 U.S. 436 (1886).

³ Extradition Treaty, May 4, 1978, U.S.- Mex., 31 U.S.T. 5059.

II. FACTS AND PROCEDURAL HISTORY

Respondent Humberto Alvarez-Machain, a medical doctor by profession, is a citizen and resident of Mexico.⁴ Dr. Alvarez-Machain was indicted for his alleged involvement in the 1985 kidnapping and murder of Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar and Alfredo Zavala-Avelar, a Mexican pilot working for the agent.⁵ The United States government alleged that Dr. Alvarez-Machain prolonged Agent Camarena's life so that his kidnappers could continue their torture and interrogation.⁶

On April 2, 1990, five or six armed men forcibly abducted Dr. Alvarez-Machain from his medical office in Guadalajara, Mexico, and flew him to El Paso, Texas, where he was arrested by DEA agents.⁷ The abductors, Mexican citizens, presumably kidnapped Dr. Alvarez-Machain in order to obtain a \$50,000 reward offered by the DEA for the delivery of Dr. Alvarez-Machain to DEA custody in the United States.⁸ The District Court for the Central District of California found as a matter of fact that the DEA hired the abductors.⁹

Alvarez-Machain moved to dismiss his indictment on the grounds that the DEA abduction constituted outrageous government conduct, which violated due process.¹⁰ Moreover, Alvarez-Machain asserted that the district court lacked personal jurisdiction¹¹ over him because the abduction violated the Extradition Treaty¹² between the United States and Mexico.¹³ Under the precedent of *United States v. Rauscher*,¹⁴ Dr. Alvarez-Machain suggested,

⁴ *Alvarez-Machain*, 112 S. Ct. at 2190.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

⁹ *Id.* at 602-04.

¹⁰ *Id.* at 604. The claim of outrageous government conduct was an attempt by the attorneys of Dr. Alvarez-Machain to fit the facts of his case into a line of circuit court decisions creating an exception to *Ker*. According to this line of cases, abductions do not violate due process except in the event that torture was used in carrying out the abduction. See, e.g., *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974).

¹¹ Personal jurisdiction, or in personam jurisdiction, is defined as the "[p]ower which a court has over the defendant himself in contrast to the court's power over the defendant's interest in property . . . or power over the property itself. . . . A court which lacks personal jurisdiction is without power to issue an in personam judgment." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

¹² Extradition Treaty, *supra* note 3.

¹³ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2190 (1992).

¹⁴ 119 U.S. 407 (1886).

United States courts are precluded from asserting personal jurisdiction in the face of a treaty violation.¹⁵ The district court rejected the due process claim.¹⁶ However, it held that the abduction violated the Extradition Treaty, and that a diplomatic note from the Mexican Embassy to the United States Department of State constituted a formal protest giving the respondent standing to invoke the treaty violation.¹⁷ The court therefore concluded that it lacked personal jurisdiction over the respondent.¹⁸ On these grounds, the district court dismissed the indictment and ordered that Dr. Alvarez-Machain be repatriated to Mexico.¹⁹

The United States Court of Appeals for the Ninth Circuit upheld the dismissal of the indictment.²⁰ In doing so, the Ninth Circuit relied on *United States v. Verdugo-Urquidez*.²¹ In *Verdugo II*, the court similarly held that an abduction authorized by the United States violated the United States-Mexico Extradition Treaty, despite the Treaty's lack of an explicit prohibition on abductions, because the basic purpose of the Treaty was violated by a forcible abduction.²² This violation, combined with a formal protest by the Mexican government, gave the defendant standing to invoke the violation to prevent the court from obtaining personal jurisdiction.²³ Similarly, the official United States abduction of Dr. Alvarez-Machain, combined with a formal protest by the Mexican government, prevented the court from hearing the Alvarez-Machain case, according to the Ninth Circuit.²⁴

The United States Supreme Court granted certiorari.²⁵

¹⁵ See *United States v. Caro-Quintero*, 745 F. Supp. 599, 606 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

¹⁶ *Id.* at 605-06.

¹⁷ *Id.* at 608-09.

¹⁸ *Id.* at 614.

¹⁹ *Id.*

²⁰ *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

²¹ 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992) [hereinafter *Verdugo II*]. The holding of *Verdugo II* was vacated by the Supreme Court in light of its decision in *Alvarez-Machain*. *Verdugo II*, 112 S. Ct. 2986 (1992). Therefore, *Verdugo II* was still good law when the Supreme Court heard *Alvarez-Machain*. The Supreme Court had previously heard the *Verdugo-Urquidez* case on different grounds, in a case known as *Verdugo I*. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²² *Verdugo II*, 939 F.2d at 1350.

²³ *Id.* at 1352-53.

²⁴ *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

²⁵ *United States v. Alvarez-Machain*, 112 S. Ct. 857 (1992). It also may be of interest that subsequent to the holding of the Supreme Court, Judge Edward Rafeedie of the United States District Court for the Central District of California, on remand, dismissed

III. SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,²⁶ Chief Justice Rehnquist began by explaining the precedents of *Ker v. Illinois*²⁷ and *United States v. Rauscher*.²⁸ In *Ker*, the defendant Frederick Ker was brought to trial on larceny charges in Illinois after being abducted from Peru, a country with which the United States had an extradition treaty.²⁹ The abduction in *Ker* was carried out by a United States agent acting in his individual, rather than official, capacity.³⁰ The Court in *Ker* held that, since abductions were not specifically prohibited by the treaty, the treaty was not called into question by the abduction; the treaty thereby did not prevent the United States courts from obtaining personal jurisdiction over the defendant.³¹ In contrast, the Court in *Rauscher* held that even though the 1842 Webster-Ashburton Treaty between the United States and Great Britain did not explicitly prohibit it, the "manifest scope and object of the treaty"³² mandated that after a defendant was extradited for a specified offense, the United States courts could not try him for a different offense.³³ In essence, the Court in *Rauscher* held that trying a defendant in the face of a treaty violation, in and of itself, precluded United States court jurisdiction.

Chief Justice Rehnquist asserted that *Ker* and *Rauscher* address two separate types of incidents: *Ker* for forcible abductions from other countries, and *Rauscher* for claimed violations of treaties.³⁴ Thus, according to the majority, without a treaty violation, as in *Rauscher*, the holding of *Rauscher* was not applicable, and *Ker* was the

the charges against Dr. Alvarez-Machain, claiming the evidence against him was merely based on "hunches" and the "wildest speculation." Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

²⁶ Chief Justice Rehnquist was joined by Justices White, Scalia, Kennedy, Souter, and Thomas.

²⁷ 119 U.S. 436 (1886).

²⁸ 119 U.S. 407 (1886).

²⁹ *Ker*, 119 U.S. at 437-39.

³⁰ Specifically in *Ker*, Henry G. Julian, a messenger, was given a warrant by the President of the United States, and told to demand Ker's extradition by the Peruvian authorities in compliance with an extradition treaty with Peru. However, upon arriving in Peru, Julian, acting without any United States government authorization, forcibly abducted Ker and brought him to the United States. *Id.* at 438.

³¹ *Id.* at 443-44.

³² *Rauscher*, 119 U.S. at 422.

³³ *Id.* at 419-30. This principle is known as the doctrine of specialty. See, e.g., *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2191 (1992).

³⁴ *Alvarez-Machain*, 112 S. Ct. at 2191.

controlling case.³⁵ In trying to show that *Ker* was, in fact, the controlling case, Chief Justice Rehnquist de-emphasized the importance of the two main differences between the *Alvarez-Machain* case and *Ker*. First, unlike the abduction of *Alvarez-Machain*, the *Ker* abduction was not officially sponsored by the United States government. Second, the Peruvian government did not protest the abduction in *Ker*, as the Mexican government had done in *Alvarez-Machain*.³⁶

After establishing an analogy between the instant case and *Ker*, the Court then proceeded to interpret the 1978 Extradition Treaty between the United States and Mexico,³⁷ first looking at the plain terms of the Treaty.³⁸ The Court's purpose in interpreting the Treaty was to determine whether or not it prohibited abductions. If it did, then *Rauscher* would prohibit United States court jurisdiction in the face of a treaty violation. If it did not prohibit abductions, *Rauscher* would not be applicable, and jurisdiction could properly be asserted. The majority noted that the Treaty made no explicit mention of abductions,³⁹ and then proceeded to show that the Treaty also did not implicitly forbid abductions.⁴⁰ Chief Justice Rehnquist concluded that the specific provisions of the Treaty were not meant to be exclusive, but merely constituted one means by which both of the countries could gain custody of someone in the other country for the purpose of criminal prosecution.⁴¹

The Court continued its analysis of the Treaty by examining the history of negotiations and practices under the Treaty.⁴² As early as 1906, Chief Justice Rehnquist noted, the Mexican government was made aware that *Ker* allowed forcible abductions performed outside of extradition treaties, yet the 1978 Treaty demonstrated no attempt by the Mexican government to contract around *Ker*.⁴³ In addition, in 1935, a prominent group of scholars proposed language for inclusion in extradition treaties that would explicitly forbid abductions.⁴⁴ However, neither this language, nor a comparable clause, was included in the Treaty.⁴⁵

³⁵ *Id.* at 2193.

³⁶ *Id.*

³⁷ Extradition Treaty, *supra* note 3.

³⁸ *Alvarez-Machain*, 112 S. Ct. at 2193.

³⁹ *Id.*

⁴⁰ *Id.* at 2193-95.

⁴¹ *Id.* at 2194.

⁴² *Id.* at 2194-95.

⁴³ *Id.* at 2194.

⁴⁴ See *id.* (citing *Harvard Research in International Law, Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 623-32 (Supp. 1935)[hereinafter *Harvard Research*]).

⁴⁵ *Alvarez-Machain*, 112 S. Ct. at 2194.

The majority continued its analysis of the implied provisions of the Treaty with an analysis of the Treaty's background in light of customary international law.⁴⁶ Here, the majority claimed that the argument put forth by Dr. Alvarez-Machain was logically inconsistent in that it distinguished *Ker* by saying no formal protest was made there by the Peruvian government, while at the same time, the argument of Dr. Alvarez-Machain claimed that the Treaty was self-executing and had the force of law.⁴⁷ If the latter were in fact true, the majority claimed, then the courts could enforce the Treaty without any formal protest.⁴⁸

More importantly, the majority continued, the dissent sought to read general principles of international law into a specific treaty, while in *Rauscher*, the Court merely looked at international law specifically relating to extradition treaties.⁴⁹ Extrapolating on the dissent's reasoning, the majority concluded that, in light of the general principle of international law against asserting one nation's police power in the sovereign territory of another nation, extradition treaties would be held to prevent the waging of war in another country.⁵⁰ Because such a conclusion would be absurd, the majority held that, even if the Alvarez-Machain abduction was "shocking"⁵¹ and a violation of the general principles of international law, the decision of whether to repatriate the defendant was a matter outside of the Treaty and should be left to the Executive Branch.⁵² As the Treaty was not violated in this case, *Rauscher* should not apply. In accordance with *Ker*, the majority held that the United States courts have personal jurisdiction over the respondent.⁵³

B. THE DISSENTING OPINION

In the dissenting opinion, Justice Stevens⁵⁴ attempted to demonstrate how the Extradition Treaty was, in fact, violated by the abduction, and thus *Rauscher* applied to this case, rather than *Ker*.⁵⁵ He began by construing the Treaty itself which, in contrast to the majority, he said was meant to be all-inclusive on the subject of ex-

⁴⁶ *Id.* at 2195-96.

⁴⁷ *Id.* at 2195.

⁴⁸ *Id.*

⁴⁹ *Id.* at 2195-96.

⁵⁰ *Id.* at 2196.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2197.

⁵⁴ Justice Stevens was joined by Justices Blackmun and O'Connor.

⁵⁵ *Alvarez-Machain*, 112 S. Ct. at 2197-2206 (1992) (Stevens, J., dissenting).

tradition, given the totality of the Treaty's extradition provisions.⁵⁶

In looking to the parties' expectations when making the Treaty, Justice Stevens noted that the drafters of the Treaty would not have imagined that the Treaty allowed abductions, given its stated purpose of fostering cooperation and mutual assistance.⁵⁷ The extensive exceptions in the Treaty for when extradition is not appropriate "would serve little purpose if the requesting country could simply kidnap the person."⁵⁸ Taking the majority's reasoning to an extreme, the dissent said the majority would claim that it was permissible under the Treaty to simply torture or execute the suspect in the other country, in the name of expedience, given that such an act was not explicitly prohibited by the Treaty.⁵⁹ Clearly, the dissenting opinion argued, the basic scope and object of the Treaty "plainly imply a mutual understanding to respect the territorial integrity of the other contracting party."⁶⁰

Justice Stevens then attempted to demonstrate how the grounds for denying jurisdiction in this case were far more compelling than the grounds upon which jurisdiction in *Rauscher* was denied.⁶¹ Justice Stevens argued that the *Alvarez-Machain* case constituted an even clearer instance of a treaty violation than *Rauscher*. To begin with, the Webster-Ashburton Treaty in *Rauscher* was "far less comprehensive" than the Extradition Treaty in *Alvarez-Machain*.⁶² In addition, the cases cited by *Rauscher* in support of the doctrine of specialty⁶³ were not nearly as prevalent as those condemning violations of territorial integrity of friendly neighbors cited in the instant case.⁶⁴ Finally, the legal background cited by *Rauscher* for the doctrine of specialty was also "far less clear" than the authorities forbidding violations of the territorial integrity of a partner

⁵⁶ Specifically, Justice Stevens stated:

From the preamble, through the description of the parties' obligations with respect to offenses committed within as well as beyond the territory of a requesting party, the delineation of the procedures and evidentiary requirements for extradition, the special provisions for political offenses and capital punishment, and other details, the Treaty appears to have been designed to cover the entire subject of extradition.

Id. at 2198 (Stevens, J., dissenting).

⁵⁷ *Id.* at 2198 n.4 (Stevens, J., dissenting).

⁵⁸ *Id.* at 2198 (Stevens, J., dissenting).

⁵⁹ *Id.* at 2199 (Stevens, J., dissenting).

⁶⁰ *Id.* (Stevens, J., dissenting).

⁶¹ *Id.* at 2200-03 (Stevens, J., dissenting).

⁶² *Id.* at 2200 (Stevens, J., dissenting). Unlike the extensive Extradition Treaty with Mexico, the Webster-Ashburton Treaty merely contained "one paragraph authorizing the extradition of fugitives 'in certain cases.'" *Id.*

⁶³ This doctrine requires that after a person is extradited for a specified offense, the person may not be tried for a different offense. See *supra* note 33 and accompanying text.

⁶⁴ *Alvarez-Machain*, 112 S. Ct. at 2201 (Stevens, J., dissenting).

to an extradition treaty.⁶⁵

Justice Stevens then pointed out what he saw as a critical flaw in the majority opinion: in drawing analogies to *Ker*, the majority disregarded the distinction between a private abduction in *Ker* and a government-sponsored abduction in this case.⁶⁶ In support of his reliance on this distinction, Justice Stevens cited Justice Brandeis in *Cook v. United States*.⁶⁷ Justice Stevens claimed that *Cook* stands for the proposition that a crucial difference exists between the acts of private parties, or even state law enforcement officials, and those of federal officers acting beyond the authority conferred by a treaty.⁶⁸ Justice Stevens also noted that in *Ker*, Justice Miller explicitly distinguished *Rauscher* on the same grounds.⁶⁹ Unlike *Ker*, and just as in *Cook* and *Rauscher*, the acts here were committed by agents authorized by the federal government, and thus violated the Treaty.⁷⁰ Similarly, Justice Stevens pointed out that the proposal of scholars, cited by the majority,⁷¹ to include language in extradition treaties explicitly prohibiting abductions, dealt only with cases analogous to *Ker*, in which the abductions were performed by private persons.⁷²

Finally, the dissenting opinion concluded that despite the understandable desire of the Executive Branch to bring an alleged accomplice to the murder of a federal agent to justice, this "provides no justification for disregarding the Rule of Law that this Court has a duty to uphold."⁷³ Justice Stevens stated that when the public desire for revenge is strong, as it is here, it becomes increasingly important for the Court to provide its judgment dispassionately.⁷⁴ Ultimately, the decisions of the United States Supreme Court are read by courts around the world as a source of guidance. Justice Stevens believed that presumably "most courts throughout the civi-

⁶⁵ *Id.* at 2202-03 (Stevens, J., dissenting). Demonstrating the clarity of the legal background prohibiting violations of territorial integrity of extradition treaty partners, Justice Stevens quoted the Restatement of Foreign Relations, which illustrates this principle. *Id.* at 2202 n.25 (Stevens, J., dissenting)(quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 432(2) & cmt. c (1987), which states that international law demands the repatriation of a person abducted by a state's law enforcement officials from the territory of a second country without the second country's consent).

⁶⁶ *Id.* at 2203-04 (Stevens, J., dissenting).

⁶⁷ *Id.* (Stevens, J., dissenting)(citing *Cook v. United States*, 288 U.S. 102 (1933)).

⁶⁸ *Id.* (Stevens, J., dissenting).

⁶⁹ *Id.* at 2204 (Stevens, J., dissenting)(citing *Ker v. Illinois*, 119 U.S. 436, 443 (1886)).

⁷⁰ *Id.* (Stevens, J., dissenting).

⁷¹ *Id.* at 2194. See *supra* note 44 and accompanying text.

⁷² *Alvarez-Machain*, 112 S. Ct. at 2204 (Stevens, J., dissenting).

⁷³ *Id.* at 2205 (Stevens, J., dissenting).

⁷⁴ *Id.* (Stevens, J., dissenting).

lized world . . . will be deeply disturbed by th[is] 'monstrous' decision. . . ."75

IV. ANALYSIS

A. THE LEGACY OF *KER* AND *RAUSCHER*

The majority opinion began by taking the sensible step of reading *Ker v. Illinois*⁷⁶ in a limited fashion.⁷⁷ Ultimately, however, the Court's reasoning was flawed in not rejecting jurisdiction in this case, on the grounds that Alvarez-Machain was abducted by government officials in what should have been held to constitute a violation of the Extradition Treaty.

While some commentators⁷⁸ insist that *Ker* stands universally for the doctrine of *mala captus bene detentus*,⁷⁹ Chief Justice Rehnquist implicitly recognized otherwise. By viewing *United States v. Rauscher*⁸⁰ as a case in which the jurisdiction of a court was held to be limited by the requirements of a treaty,⁸¹ Chief Justice Rehnquist acknowledged that the mere presence of a criminal in a United States court does not automatically confer personal jurisdiction over him.

On previous occasions, the Supreme Court itself has indicated that *Ker* is to be read only in a limited fashion.⁸² In two cases involving government seizures in international waters of vessels engaged in transportation of alcohol allegedly in violation of the National Prohibition Act and the Tariff Act, the Court chose not to rely on *Ker* since, unlike in *Ker*, there were treaty violations. The Court in these two cases noted that the ability of the courts to adjudicate over seizures of property was directly affected if the seizures occurred in

⁷⁵ *Id.* at 2206 (Stevens, J., dissenting).

⁷⁶ 119 U.S. 436 (1886).

⁷⁷ See *Alvarez-Machain*, 112 S. Ct. at 2191-92.

⁷⁸ E.g., Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L. J. 907, 910 (1992) (suggesting *Ker* should be interpreted to stand for this broad proposition).

⁷⁹ This ancient doctrine stands for the proposition that the courts may "assert in *personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured." 1 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE*, ch. 5, § 1, at 190 (1987).

⁸⁰ 119 U.S. 407 (1886).

⁸¹ Specifically, the treaty was held to implicitly mandate the rule of specialty. See *supra* note 33 and accompanying text.

⁸² See, e.g., *Cook v. United States*, 288 U.S. 102 (1933); *Ford v. United States*, 273 U.S. 593 (1927). See generally *Harvard Research*, *supra* note 44, at 624-25 (citing *Ford* and *Cook* for the proposition that United States courts will not exercise jurisdiction when a person is brought to the country through methods violating treaties).

violation of United States treaties, here a treaty with Great Britain.⁸³ The Court in *Ford* distinguished the jurisdiction question from *Ker*, as in *Ford* "a treaty of the United States is directly involved and the question is [thus] quite different [from *Ker*]." ⁸⁴

In seeming contradiction of a limited reading of *Ker*, Chief Justice Rehnquist relied on the widely cited statement of *Frisbie v. Collins*,⁸⁵ which read *Ker* as standing for the proposition that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" ⁸⁶ However, because much of the remainder of the Court's opinion focused on whether or not the United States-Mexico Extradition Treaty was violated in this case, Chief Justice Rehnquist implicitly recognized that *Frisbie's* broad reading of *Ker* was, in fact, inaccurate. To read *Ker* this broadly would make it inconsistent with *Rauscher*,⁸⁷ a case in which the method by which a defendant was brought before a United States court *did* affect the court's jurisdiction over him. Particularly in light of the fact that *Ker* and *Rauscher* were handed down by the Supreme Court on the same day, it seems certain that the two cases were meant to be consistent with one another. Thus, a limited reading of *Ker* is in order.

Despite the Court's sensible reading of the limited scope of *Ker*, its reliance on *Ker* for the proposition that extradition treaties do not implicitly prohibit any abductions was flawed. The majority struggled to compare the facts of *Ker* to those of the instant case in an attempt to downplay the differences between the two cases.⁸⁸ The Court noted in passing that "[t]he only differences between *Ker*

⁸³ See *Ford*, 273 U.S. at 605-06; *Cook*, 288 U.S. at 120-22.

⁸⁴ *Ford*, 273 U.S. at 606.

⁸⁵ 342 U.S. 519 (1952).

⁸⁶ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2192 (1992)(quoting *Frisbie*, 342 U.S. at 522).

The holding of *Frisbie*, allowing for personal jurisdiction despite the defendant's having been brought before the court by an abduction, should have no precedential value in this case. The *Frisbie* abduction was merely an *interstate* rather than international abduction. Thus, there was no extradition treaty, nor principles of international law, for the Court to analyze, as in the *Alvarez-Machain* case. Thus, other Supreme Court cases involving interstate abductions similarly are not on point here. *E.g.*, *Pettibone v. Nichols*, 203 U.S. 192 (1906); *Lascelles v. Georgia*, 148 U.S. 537 (1893); *Mahon v. Justice*, 127 U.S. 700 (1888). As one of these interstate abduction cases stated, "[t]o apply the rule of international or foreign extradition, as announced in [*Rauscher*], to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles." *Lascelles*, 148 U.S. at 545.

⁸⁷ See, e.g., Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 679 (1953)(proposing that a broad reading of *Ker* would render it inconsistent with *Rauscher*).

⁸⁸ *Alvarez-Machain*, 112 S. Ct. at 2193.

and the present case are that *Ker* was decided on the premise that there was no governmental involvement in the abduction, and the country of Peru, from which *Ker* was abducted, did not object to his prosecution."⁸⁹ These "only differences," are crucial, however, and ultimately should have led to a contrary holding in this case.

The key distinction between this case and *Ker* is that the abduction in *Ker* was not, as here, authorized by the government. In holding that the extradition treaty between the United States and Peru was not violated by the abduction, the Court in *Ker* explicitly stated that "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."⁹⁰ The fact that the Court in *Ker* considered the absence of government involvement crucial to its holding that the extradition treaty was not violated, strongly suggests that its holding in *Ker* would have been otherwise if, as in *Alvarez-Machain*, there were government sponsorship.

An official sanction of an abduction in the territory of a treaty partner flagrantly violates the spirit of an extradition treaty. In the context of general international law,⁹¹ the fact that an abduction is officially sponsored is a crucial ingredient of its illegality.⁹² As one commentator articulated, "[t]he rule [of international law against abductions] presupposes that the abduction is carried out by agents instructed or authorized by the State, or by private volunteers whose acts have been adopted or ratified by the State."⁹³

Essentially, in an official abduction, the government exceeds the limits upon its own powers that were self-imposed by signing an extradition treaty. Once again, *Cook* and its discussion of government seizures of vessels during prohibition is enlightening. As Justice Brandeis declared in that case, "[t]he objection is that the government itself *lacked the power to seize*, since by the Treaty it had imposed a territorial limitation upon its own authority."⁹⁴ Similarly, in this case, the government, by the Extradition Treaty with Mexico, imposed limits on its own power. These limitations are evidenced by the many restrictions the Treaty places on extraditions, which

⁸⁹ *Id.* (citation omitted).

⁹⁰ *Ker v. Illinois*, 119 U.S. 436, 443 (1886)(emphasis added).

⁹¹ For a more detailed discussion of international law and its importance in American courts, and in the *Alvarez-Machain* case in particular, see *infra* notes 144-53 and accompanying text.

⁹² Frederick Alexander Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 407, 407 (Yoram Dinstein ed., 1989).

⁹³ *Id.*

⁹⁴ *Cook v. United States*, 288 U.S. 102, 121 (1933)(emphasis added).

make little sense unless the Treaty is construed as prohibiting the United States and Mexico from abducting criminal suspects from the other nation's territories.⁹⁵ The United States exceeded these limits by officially sponsoring the abduction of Dr. Alvarez-Machain. This official sponsorship is quite different from an abduction by a private party who has not agreed to comply with such limits. Thus, the fact that there was an officially sponsored abduction in this case but not in *Ker* is, contrary to the majority's contention, a crucial distinction.⁹⁶

Additionally, the fact that there was no protest by the Peruvian government in *Ker* distinguishes *Alvarez-Machain*, a point the majority chose to de-emphasize. As explained by the Ninth Circuit in *Verdugo II*,⁹⁷ a protest by the offended nation is necessary to constitute a treaty violation as "extradition treaties are principally designed to further the sovereign interests of nations, and therefore any rights they confer on individuals are derivative of the rights of nations."⁹⁸ As no violation of territorial sovereignty has occurred if a nation has consented to an action in its own territory,⁹⁹ a protest serves the necessary evidentiary function of showing that the offended nation did not consent to the abduction. Indeed, in the *Alvarez-Machain* case, Mexico repeatedly and formally protested the abduction of Dr. Alvarez-Machain.¹⁰⁰ Thus, based upon the formal

⁹⁵ For a more thorough discussion of how the Treaty placed limits on the power of the United States, see *infra* notes 111-14 and accompanying text.

⁹⁶ See also *Pettibone v. Nichols*, 203 U.S. 192, 218 (1906) (McKenna, J., dissenting) ("[b]ut how is it when the law becomes the kidnapper, when the officers of the law, using its forms and exerting its power, become abductors? This is not a distinction without a difference. . . .").

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

⁹⁸ *Id.* at 1346.

⁹⁹ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 432(2) & cmts. b & c & Reporters' Note 2 (1987). Section 432(2) reads in full: "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Comment c explains in part that:

If the unauthorized action [of a state's law enforcement officials in the territory of another state] includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws.

¹⁰⁰ *United States v. Caro-Quintero*, 745 F. Supp. 599, 604 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992) (discussing the three diplomatic notes of protest sent by the Embassy of Mexico to the United States Department of State). Similarly, the amicus briefs filed in this case by the government of Mexico, on behalf of Dr. Alvarez-Machain, clearly express the anger of the Mexican government over the abduction. Brief for the United Mexican States as Amicus Curiae in Support of Affirmance, *Alvarez-Machain*, 112 S. Ct. 2188

protest and official abduction in *Alvarez-Machain*, the case is distinguishable from *Ker* and numerous circuit court opinions in which the abductions were not officially carried out or formally protested.¹⁰¹ In short, *Alvarez-Machain* truly presented a "question of first impression."¹⁰² This question was whether an official abduction by the United States over the formal protests of an extradition treaty partner served to disqualify the United States courts from jurisdiction over the matter.

B. INTERPRETING THE EXTRADITION TREATY WITH MEXICO

The core of the majority opinion in *Alvarez-Machain* consisted of its interpretation of the United States-Mexico Extradition Treaty.¹⁰³ Given the holding in *United States v. Rauscher*,¹⁰⁴ if the abduction constituted a violation of the Treaty, jurisdiction would not be permitted. To reach its holding that the Treaty did *not* prohibit official abductions, the majority provided a strained reading of the Treaty and violated accepted norms of treaty interpretation by elevating the importance of the explicit terms of the Treaty, despite its ambiguity, above its purpose and history. The majority also read the Treaty largely outside the context of the norms of international law.

(1992) (No. 91-712); Brief for the United Mexican States as Amicus Curiae in Support of Granting Review, *Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712).

¹⁰¹ See, e.g., *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 209 (1990)(official abduction from Honduras, but no formal protest by Honduran government); *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987)(abduction from Canada, unofficially by bail bond recovery agents); *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980)(Thai government officials "initiated, aided and acquiesced" in a deportation); *United States v. Lovato*, 520 F.2d 1270 (9th Cir. 1975), *cert. denied*, 423 U.S. 985 (1975)(expulsion by Mexican army personnel); *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975)(abduction from Chile not officially conducted by the United States government, and no subsequent protest by the Chilean government); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975)(person lured from Argentina to Bolivia, and abducted in Bolivia, but neither nation protested); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974)(voluntary deportation by Peruvian police in cooperation with United States agents); *United States v. Cotten*, 471 F.2d 744 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1973)(Vietnamese officials voluntarily delivered person; no extradition treaty with Vietnam); *Stevenson v. United States*, 381 F.2d 142 (9th Cir. 1967)(deportation from Mexico at initiation of Mexican police); *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir. 1957), *cert. denied*, 355 U.S. 873 (1957)(abduction from Mexico, but no formal protest by the Mexican government).

¹⁰² *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2197 (1992)(Stevens, J., dissenting). See also *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1346 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992).

¹⁰³ See *Alvarez-Machain*, 112 S. Ct. at 2193-97.

¹⁰⁴ 119 U.S. 407 (1886).

1. *The Terms of the Treaty*

In terms of the explicit language used in the Treaty, the majority was technically correct that the "Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."¹⁰⁵ There are, in fact, no explicit references to abductions in the Treaty.

However, the majority overemphasized the significance of this omission. The majority went so far as to misrepresent the standard method of treaty interpretation spelled out by the Court's earlier case, *Air France v. Saks*.¹⁰⁶ Chief Justice Rehnquist cited *Air France* for the proposition that "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."¹⁰⁷ Actually, the *Air France* opinion said that treaty "analysis must begin . . . with the text of the treaty and the context in which the written words are used."¹⁰⁸ Thus, the absence of any explicit prohibition on abductions in the Treaty is less significant than the majority represented, if the context of the Treaty demonstrates otherwise.

The majority summarily dismissed the reasoning of the lower court that the Extradition Treaty provided the *mandatory* procedures through which the two countries had to act, in order to obtain jurisdiction over alleged criminals in the other country.¹⁰⁹ Given the strong case to be made for the lower court's reading of the Treaty, this interpretation of the Treaty warranted closer attention by the majority opinion.¹¹⁰

A significant number of the articles in the Treaty create exceptions as to when extradition is appropriate.¹¹¹ In particular, Article

¹⁰⁵ *Alvarez-Machain*, 112 S. Ct. at 2193.

¹⁰⁶ 470 U.S. 392 (1985).

¹⁰⁷ *Alvarez-Machain*, 112 S. Ct. at 2193.

¹⁰⁸ *Air France*, 470 U.S. at 397 (emphasis added).

¹⁰⁹ *Alvarez-Machain*, 112 S. Ct. at 2193-94.

¹¹⁰ This is not meant to suggest that the Supreme Court should have deferred to the holding below; the Treaty was and should be interpreted *de novo* by the Court. However, the Treaty could have been reviewed in accordance with an accepted canon of treaty interpretation that in the event of two possible interpretations, courts are to choose the more liberal construction. See *infra* notes 117-19 and accompanying text. Therefore, the Court should have at least considered in greater depth whether the interpretation of the Treaty provided by the court below was an interpretation which, if potentially valid, should have been preferred according to this canon of construction.

¹¹¹ E.g., Extradition Treaty, *supra* note 3, art. 2, 31 U.S.T. at 5062-63 (only certain types of offenses are extraditable); art. 3, 31 U.S.T. at 5063 (minimum amount of evidence required for extradition); art. 5, 31 U.S.T. at 5063-64 (no extradition for political or military offenses); art. 6, 31 U.S.T. at 5064 (no extradition when person sought was already prosecuted or tried and convicted or acquitted by requested party for the claimed offense); art. 7, 31 U.S.T. at 5064-65 (cannot extradite when barred by lapse of

9 of the Treaty affords the requested nation the option of whether or not to extradite its own citizens, but requires that the requested nation try them in its own courts if it refuses extradition.¹¹² Viewed in this context, the Treaty makes little sense unless it is understood as prohibiting abductions.¹¹³ If one party to the Treaty could simply abduct persons from the Treaty partner's territory, the exceptions would be superfluous. Thus, the Treaty should be read to affirmatively place limits on the powers of the contracting nations to abduct persons from the territory of the treaty partner.

This said, given the rule of specialty,¹¹⁴ governments would have an incentive to abduct rather than extradite if extradition treaties did not prohibit abductions.¹¹⁵ The abducting country would have substantially greater flexibility in trying a defendant if he were abducted, because the country would not be subject to the doctrine of specialty. Therefore, abductions would be more expedient than formal extradition. However, such encouragement of abduction over extradition is a far cry from the Extradition Treaty's stated purpose: "[T]o cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."¹¹⁶

time); art. 8, 31 U.S.T. at 5065 (restrictions on extradition when offense is punishable by death in requesting nation but not in requested nation); art. 9, 31 U.S.T. at 5065 (extradition of nationals of requested party is discretionary); art. 10, 31 U.S.T. at 5066-68 (required procedures for extradition); art. 17, 31 U.S.T. at 5071-72 (rule of specialty).

¹¹² Extradition Treaty, *supra* note 3, art. 9, 31 U.S.T. at 5065.

¹¹³ See, e.g., *Alvarez-Machain*, 112 S. Ct. at 2198 (Stevens, J., dissenting) ("Petitioner's claim that the Treaty is not exclusive, but permits forcible governmental kidnapping, would transform these, and other, provisions into little more than verbiage."); *Verdugo-Urquidez*, 939 F.2d at 1349 ("[A]s the government views extradition treaties in its brief, the requirements are pure formalities. . .").

See also *Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing Before the Subcommittee on Security and Terrorism of the Committee on the Judiciary*, 99th Cong., 1st Sess. 63 (1986) (statement of Abraham D. Sofaer, Legal Advisor of the Department of State) (Abductions "might also be viewed by foreign states as . . . incompatible with the bilateral extradition treaties that we have in force with those nations.") (emphasis added) [hereinafter *Prosecution of Terrorists*].

¹¹⁴ Extradition Treaty, *supra* note 3, art. 17, 31 U.S.T. at 5071-72 (explicit requirement of doctrine of specialty); *United States v. Rauscher*, 119 U.S. 407, 429-30 (1886) (holding that the doctrine of specialty is implicitly included in extradition treaties).

As discussed *supra* note 33 and accompanying text, the doctrine of specialty is the requirement that the country requesting extradition only try the extradited person for the offenses stated in the extradition request.

¹¹⁵ The author of a leading treatise on the laws of extradition noted the general incentive problem that occurs if nations are allowed to try defendants officially abducted from other nations, stating that "[t]o place states in a position where they can benefit from these practices encourages further violations and erodes voluntary observance of international law, whether by states or by individuals." BASSIOUNI, *supra* note 79, ch. 5, § 1, at 190.

¹¹⁶ Extradition Treaty, *supra* note 3, 31 U.S.T. at 5061.

Even assuming that the Treaty could be interpreted as not prohibiting abductions, such a reading would violate the accepted canon of treaty construction that treaties should be liberally construed.¹¹⁷ As the Court announced previously, "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements."¹¹⁸ In the case of the Extradition Treaty with Mexico, a narrow and restricted construction is advanced by the *Alvarez-Machain* majority: to permit official abductions because they are not explicitly prohibited. However, this reading blatantly thwarts the Treaty's purpose of fostering cooperation between the two nations in the rendition of criminals.¹¹⁹ As in other areas of treaty interpretation, such a narrow construction should be rejected in favor of a reading that is consistent with the purpose of the treaty.

2. *The History of Negotiation and Practice Under the Treaty*

In evaluating the history of negotiation and practice¹²⁰ under the Treaty, the majority once again neglected to make the crucial distinction between official government abductions and private ones.¹²¹ Thus, the Court erred. It provided two invalid examples for the proposition that Mexico was forewarned that abductions were not implicit violations of extradition treaties, yet Mexico refrained from demanding that the Treaty explicitly include a prohibition on abductions.¹²²

The majority first noted that Mexico was made aware of the *Ker* doctrine as early as 1906, yet Mexico failed to demand that a clause

¹¹⁷ See, e.g., *United States v. Stuart*, 489 U.S. 353, 368 (1989)(quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94, 303 (1933).

¹¹⁸ *Factor*, 290 U.S. at 293.

¹¹⁹ See *Extradition Treaty*, *supra* note 3, 31 U.S.T. at 5061.

¹²⁰ See, e.g., *Stuart*, 489 U.S. 366 ("Nontextual sources [often are used to help courts reach the intent of the treaty parties] such as a treaty's ratification history and its subsequent operation. . . .").

See also *BASSIOUNI*, *supra* note 79, ch. 2, § 4.3, at 82 ("Negotiations, preparatory works, and diplomatic correspondence are an integral part of th[e] surrounding circumstances, and [are] often relied on by courts in ascertaining the intentions of the parties.")(citation omitted).

¹²¹ See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2194-95 (1992).

For a discussion of the significance of the distinction between official and non-official abductions, see *supra* notes 89-96 and accompanying text.

¹²² See, e.g., *Alvarez-Machain*, 112 S. Ct. at 2204-05 (Stevens, J., dissenting)(noting that both examples advanced by the majority for the proposition that Mexico was forewarned involved private abductions rather than, as in this case, official abductions).

be inserted into the Treaty explicitly prohibiting abductions.¹²³ To support this proposition, footnote 11 of the *Alvarez-Machain* opinion discussed the 1905 Martinez incident, in which a Mexican national was abducted from Mexico and brought to the United States.¹²⁴ United States Secretary of State Blaine, however, informed Mexico that *Ker* allowed the United States to have jurisdiction over Martinez despite the Extradition Treaty.¹²⁵ Footnote 11, however, failed to mention that Martinez's abduction, unlike that of Dr. Alvarez-Machain, was not officially authorized by United States officials.¹²⁶ Thus, in reality, Mexico was never given notice that the Treaty did not prohibit *official* abductions.

Similarly, the proposal of legal scholars cited by the majority¹²⁷ to add an article to extradition treaties prohibiting jurisdiction over abducted defendants made no mention of officially sponsored abductions.¹²⁸ In the comment adjoining the proposed article, the scholars clearly stated that the article was meant as a rejection of *Ker*.¹²⁹ As *Ker* is not analogous to the official abduction that took place in this case, by implication the proposed article is also not directly on point, and therefore cannot be used to show that Mexico chose not to have the Treaty prohibit official abductions.

It would be truly ironic if the attempt by these scholars to broaden the respect for international law¹³⁰ were used, as the majority attempted, to support the breach of a basic tenet of international law—that official abductions violate the territorial sovereignty

¹²³ *Id.* at 2194.

¹²⁴ *Id.* at 2194 n.11 (citing LETTER OF ROBERT BACON TO MEXICAN CHARGE, JUNE 22, 1906, H.R. Doc. No. 1, 59th Cong., 2d Sess., pt. 2, at 1121-22 (1909)[hereinafter *Bacon Letter*]).

¹²⁵ *Id.*

¹²⁶ The Bacon letter spoke of *Ker* as holding that extradition treaties do not guarantee rights of asylum to fugitives. *Bacon Letter*, *supra* note 124, at 1122. In the case of official abductions, as in *Alvarez-Machain*, however, the objection raised by the respondent is not that he was denied a right to asylum guaranteed by the Treaty, but that the United States violated an affirmative limit it placed on its power by the Treaty.

¹²⁷ *Alvarez-Machain*, 112 S. Ct. at 2194.

¹²⁸ See *Harvard Research*, *supra* note 44, at 623. The proposed article reads in its entirety:

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.

Id.

¹²⁹ *Id.* at 631.

¹³⁰ See *id.* at 624.

of the other nation.¹³¹ Contrary to the examples raised by the majority, Mexico had significant reason to believe that the Treaty did, in fact, prohibit official abductions. This is due to authoritative statements made by senior United States government officials.

During the 1985 Senate hearings concerning a proposed law to extend United States jurisdiction over those who attack its citizens abroad, Judge Abraham D. Sofaer, legal advisor to the State Department,¹³² spoke decisively against official abductions from nations with whom the United States has extradition treaties.¹³³ In these hearings, Judge Sofaer demonstrated that he was not overly cautious with respect to most of the proposed extensions of jurisdiction; in fact, he strongly supported them.¹³⁴ However, he sharply criticized the section of the proposed law¹³⁵ that would allow United States courts to exercise jurisdiction over those officially seized from the territories of extradition treaty partners. He began his attack in general terms by stating that "seizure by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of a foreign state, and could violate local kidnapping laws. . . ."¹³⁶ He continued, specifically addressing the proposal's likely violation of extradition treaties, warning "[s]uch acts might also be viewed by foreign states as . . . incompatible with the bilateral extradition treaties that we have in force with those nations."¹³⁷

Similarly, Secretary of State George Shultz noted that official abductions are incompatible with extradition treaties.¹³⁸ Secretary

¹³¹ See *infra* notes 146-49 and accompanying text for a discussion of the fact that official abductions do violate basic tenets of international law.

¹³² Judge Sofaer previously served as a federal district court judge for the Southern District of New York.

¹³³ *Prosecution of Terrorists*, *supra* note 113, at 62-73. While the statements made in these hearings were not directly addressed to Mexico, they were not conducted in isolation. It is quite possible that Mexico, as a party with a definite interest in United States authorizations of abductions, would follow these discussions made in public hearings.

¹³⁴ *E.g.*, *id.* at 63.

¹³⁵ S. 1373, 99th Cong., 1st Sess. (1985).

¹³⁶ *Prosecution of Terrorists*, *supra* note 113, at 63.

¹³⁷ *Id.* Some may be concerned that a prohibition on official abductions from the territories of extradition treaty partners would severely frustrate efforts at bringing terrorists, in particular, to justice. However, it should be noted that many of the nations most notoriously known for their harboring of terrorists do not have extradition treaties with the United States. Thus, official abductions from these nations, including Libya, Syria, Lebanon, Tunisia, and Algeria, "present legal issues distinct from the issues presented in this case." Respondent's Brief at 13 n.7, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992)(No. 91-712).

¹³⁸ Statement of Secretary of State George Shultz to the Florida Probation and Parole Commission, July 22, 1983, *reprinted in*, Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 200, 207-09 (1984)[*hereinafter Shultz Statement*]. Just as discussed in the context of Senate hearings, *supra* note 113,

Shultz urged the Florida Probation and Parole Commission to grant parole to a Canadian citizen in a Florida prison, who was abducted from Canada (a country with which the United States has an extradition treaty),¹³⁹ possibly under the authority of Florida state officials.¹⁴⁰ The Secretary stated that "it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the [extradition] treaty and of international law, as well as an affront to its sovereignty."¹⁴¹ Significantly, the Extradition Treaty with Canada, just like the Treaty with Mexico, lacked an explicit prohibition on abductions.¹⁴² Thus, Secretary of State Shultz's comments regarding the Treaty with Canada should apply to the Treaty with Mexico as well.

In sum, the sources used by the majority in attempting to show that the Mexican government was on notice that abductions did not prevent United States courts from asserting personal jurisdiction over the kidnapped defendant are misplaced, as they are not applicable to officially sponsored abductions. On the contrary, the Mexican government relied on the statements of well-placed United States government officials to the effect that these abductions were, in fact, prohibited by the Treaty. Apparently, the Mexican government's belief that the Treaty prohibited official abductions was well-founded.¹⁴³

Mexico had an interest in these statements, and therefore may have learned of them as they were made public. To illustrate, Canada was sufficiently interested in the outcome of the *Alvarez-Machain* case to file an amicus brief on behalf of Dr. Alvarez-Machain, as a Supreme Court interpretation of the Treaty with Mexico would imply a similar interpretation of the Extradition Treaty with Canada, given the similarities between the two treaties. See Brief of the Government of Canada as Amicus Curiae in Support of Respondent, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992)(No. 91-712).

¹³⁹ Treaty of Extradition, Dec. 3, 1971, as amended by an exchange of notes, dated June 28 and July 9, 1974, U.S.-Can., 27 U.S.T. 983 [hereinafter *Canada Extradition Treaty*].

¹⁴⁰ *Shultz Statement*, *supra* note 138, at 207-08. Subsequent to Secretary of State Shultz's statement, however, Jaffe was found to have been privately abducted. Jaffe v. Smith, 825 F.2d 304, 307-08 (11th Cir. 1987).

¹⁴¹ *Shultz Statement*, *supra* note 138, at 208.

¹⁴² See *Canada Extradition Treaty*, *supra* note 139, 27 U.S.T. 983.

¹⁴³ In fact, the Canadian government construed its similar extradition treaty with the United States in an identical fashion, as seen through their amicus brief in support of Dr. Alvarez-Machain. See Brief of the Government of Canada as Amicus Curiae in Support of Respondent at 2-4, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992)(No. 91-712)(The United States-Canada Extradition Treaty "was negotiated with the understanding of Canada that the agreement would provide the *exclusive means* whereby Canada . . . and the United States . . . would seek to obtain custody of fugitives from each other.")(emphasis added).

3. *The Backdrop of Customary International Law*

The majority held that there is no implied prohibition on abductions in the Extradition Treaty based on an interpretation informed by principles of international law.¹⁴⁴ The majority's holding centered on a criticism of the sources used by the respondent, claiming that he cited only general principles of international law, rather than those regarding extradition treaties in particular.¹⁴⁵ Such criticism seems counterintuitive: if international law in general forbids abductions, it should forbid them, *a fortiori*, in the presence of extradition treaties. Otherwise, extradition treaties would paradoxically decrease the protections provided to nations by international law. Hence, this Note argues that these general principles of international law *should* be utilized in informing the reading of extradition treaties.

Territorial sovereignty is a basic principle recognized by international law.¹⁴⁶ Furthermore, official abductions constitute violations of territorial sovereignty, and hence are infractions of international law.¹⁴⁷ It has even been argued that jurisdiction in the

¹⁴⁴ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2195-96 (1992).

The Supreme Court has previously recognized, in a well-known and oft-cited case, the vital legal status of international law in American courts. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice. . . .").

The importance of interpreting treaties in light of international law principles is recognized by the Vienna Convention. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3), U.N. Doc. A/CONF. 39/27, *reprinted in* 63 AM. J. INT'L L. 875, 885 (1969) (In interpreting treaties, "[t]here shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.") [hereinafter Vienna Convention on Treaties].

¹⁴⁵ *Alvarez-Machain*, 112 S. Ct. at 2195-96.

¹⁴⁶ *See, e.g.*, U.N. CHARTER, art. 2(4) ("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, or in any other manner inconsistent with the Purposes of the United Nations."); Charter of the Organization of American States, Apr. 30, 1948, art. 17, 2 U.S.T. 2394, 2420, *as amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607 ("The territory of a State is inviolable; it may not be the object, even temporarily, of . . . measures of force taken by another State, directly or indirectly, on any grounds whatever. No . . . special advantages obtained either by force or by other means of coercion shall be recognized.").

See also *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

¹⁴⁷ *See, e.g.*, *Alvarez-Machain*, 112 S. Ct. at 2201-03 (Stevens, J., dissenting); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1352 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992) ("territorial integrity of a sovereign nation may not be breached by force"). *See also* I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 72 (1971) ("Where an abduction is effectively carried out, an infraction of the territorial sovereignty of the host State has been committed."); Mann, *supra* note 92, at 407 (citing U.N. CHARTER, art. 2).

Alvarez-Machain case should have been prohibited, and that Dr. Alvarez-Machain should have been returned to Mexico, based on international law alone, regardless of the Extradition Treaty.¹⁴⁸ Even the majority opinion conceded that “[r]espondent and his amici may be correct that respondent’s abduction was . . . in violation of general international law principles.”¹⁴⁹

Given the fact that Mexican government officials were likely familiar with this widely cited doctrine of international law, it was natural for these officials to assume that official abductions would violate the Extradition Treaty. This assumption holds true especially in light of the Treaty’s stated goal to have the two nations “cooperate more closely in the fight against crime”¹⁵⁰ and thus provide protections *beyond* the standard defaults of international law. The majority’s position that we should not look at international law principles that apply even in the absence of extradition treaties would seem to imply that extradition treaties actually *decrease* the protections otherwise given to nations by international law. Such an implication makes a mockery of extradition treaties.

The majority attempted to ridicule the territorial sovereignty argument with the *reductio* that even though waging war similarly violates territorial sovereignty, it stated that “it cannot be seriously contended [that] an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations.”¹⁵¹ This *reductio* misses the mark, however, since waging war has no serious connection with the stated purpose of the Treaty to cooperate in the fight against crime.¹⁵² Quite the contrary, abductions of criminals fall precisely under the sphere of issues that would logically be included in the purpose of cooperation in the rendition of criminals. Therefore, it is not a logical extension of the respondent’s argument to say that extradition treaties, by implication, prohibit wars.¹⁵³ Thus, the territorial sovereignty argument was wrongly rejected by the majority.

In sum, the Treaty’s purpose, when viewed in connection with the principles of international law, illustrates that the Treaty implic-

¹⁴⁸ See, e.g., Keith Highet & George Kahale III, *Decision: International Decisions*, 86 AM. J. INT’L L. 811, 815 (1992) (“Because Alvarez’s abduction and prosecution violated customary international law, he should have been ordered returned to Mexico for that reason alone, irrespective of the Treaty.”).

¹⁴⁹ *Alvarez-Machain*, 112 S. Ct. at 2196.

¹⁵⁰ Extradition Treaty, *supra* note 3, 31 U.S.T. at 5061.

¹⁵¹ *Alvarez-Machain*, 112 S. Ct. at 2196.

¹⁵² Extradition Treaty, *supra* note 3, 31 U.S.T. at 5061.

¹⁵³ A possible exception to this statement might exist if a war was actually waged for the purpose of carrying out an abduction.

itly prohibited abductions. The majority should not have ignored the relevance of these principles of international law.

C. IMPLICATIONS OF THE *ALVAREZ-MACHAIN* DECISION

The direct implications of the literal holding of the majority in *Alvarez-Machain* can be limited by the contractual specificity of treaty partners. For example, if extradition treaties do not implicitly prohibit official abductions, extradition partners of the United States can henceforth revise their treaties to add a clause explicitly prohibiting abductions.¹⁵⁴ Given the Court's reading of *Rauscher* as an exception to *Ker* in the event of treaty violations,¹⁵⁵ United States courts could not exercise personal jurisdiction over persons officially abducted from countries with which the United States signed an extradition treaty that *explicitly* prohibited such behavior.

However, the general implications of the decision are far more ominous. In President Jimmy Carter's proclamation of the Extradition Treaty, he declared that the Treaty "be observed and fulfilled with good faith. . . ."¹⁵⁶ Even assuming that a strained reading of the Extradition Treaty might not prohibit officially sponsored government abductions, it certainly was not a "good faith" reading of the Treaty to permit a "shocking" abduction¹⁵⁷ just because it was not explicitly prohibited.

Indeed, the majority opinion sanctioned the behavior of the Executive Branch¹⁵⁸ which was completely at odds with the spirit of the Treaty and indicative of a bad-faith interpretation of the Treaty.

¹⁵⁴ For example, one of the initial responses of the Mexican government of President Carlos Salinas de Gortari following the *Alvarez-Machain* decision was to demand that such a clause be added to its Extradition Treaty with the United States. Tim Golden, *Bush Gives Mexico Limited Pledge on Abductions*, N.Y. TIMES, July 2, 1992, at A5.

¹⁵⁵ See *supra* notes 78-87 and accompanying text.

¹⁵⁶ Extradition Treaty, *supra* note 3, 31 U.S.T. at 5059. See also Vienna Convention on Treaties, *supra* note 144, art. 26, 63 AM. J. INT'L L. at 884 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 325(1) (1987).

¹⁵⁷ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992).

¹⁵⁸ This is not to say that the majority opinion held that official abductions are actually *legal*. For example, the abductors may still have violated Mexican and, perhaps, United States criminal laws. The decision merely held that official abductions did not violate the Treaty. The false proposition that the decision held abductions to be legal was stated by many news articles reporting on the decision. For a discussion of these articles and their misconstruing of the *Alvarez-Machain* decision, see Malvina Halberstam, *Agora: International Kidnapping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736, 736 n.4 (1992).

However, in holding that the Extradition Treaty did not prohibit official abductions, and that the courts therefore had jurisdiction over Dr. Alvarez-Machain, the majority in *Alvarez-Machain* did, to a significant extent, sanction the abduction.

Current treaty partners of the United States, and those planning to execute treaties with the United States in the future, should now be on notice that the United States may not carry out its treaty obligations in a trustworthy fashion.¹⁵⁹ This is truly unfortunate because many nations hold the United States in high esteem.¹⁶⁰

Finally, the core precedent upon which the majority based its holding, *Ker v. Illinois*, has itself been widely condemned as anachronistic, with many commentators calling for its reversal.¹⁶¹ Rather than reversing *Ker* as has been widely suggested, or even limiting it,¹⁶² the majority actually extended *Ker* by applying it to the new fact situation of officially, as well as privately, sponsored abductions. Thus, *Ker* is highly unstable ground upon which to base such a controversial decision.

D. MISGUIDED POLITICAL MOTIVATIONS

In abducting and trying Dr. Alvarez-Machain, the Executive Branch, and perhaps even the Supreme Court majority, were likely

¹⁵⁹ Perhaps the recent United States presidential election will put an end to this type of conduct, at least temporarily. As then President-elect Clinton stated, "I believe that when another nation is willing to obey the law, and in the absence of information that the government itself has willfully refused to obey the law, that the United States should not be involved in kidnapping." John M. Broder & Paul Richter, *Clinton Vows to Seek Trade Pact Approval*, L.A. TIMES, Jan. 9, 1993, at A14. Note, however, the carefully guarded language Clinton used in condemning official kidnapping. In addition, then President-elect Clinton directly criticized the Supreme Court decision in *Alvarez-Machain*, saying that it "goes way too far." Clinton, *High Court Differ on Abduction*, L.A. TIMES, Dec. 16, 1992, at A32.

¹⁶⁰ See, e.g., *Alvarez-Machain*, 112 S. Ct. at 2205-06 (Stevens, J., dissenting) (noting that the Supreme Court sets an example to courts throughout the world that emulate it).

¹⁶¹ See, e.g., Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 231 (1992) ("Ker was decided during a period in United States history noted for both xenophobia and indifference to the opinions of mankind; other cases during that period have long ago been discredited.") (citation omitted); H. Moss Crystle, *When Rights Fall in a Forest . . . The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture*, 9 DICK. J. INT'L L. 387, 408 (1991) ("The Ker-Frisbie doctrine is based upon antiquated and disingenuous standards of state action analysis. The blind eye it turns to government sponsored abuses abroad is contemptuous for the human rights of foreign nationals and the sovereignty of other nations."); Jonathan Gentin, Comment, *Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on United States v. Caro-Quintero and the Inadequacy of the Ker-Frisbie Doctrine*, 40 EMORY L.J. 1227, 1230-31 (1991); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 463-64 (1990) (criticizing the *Ker* decision as "unconvincing" and anachronistic because today, in contrast to the time that *Ker* was decided, "both our concepts of due process and our understanding of individual rights under international law are much more developed."); John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1449-50 (1988).

¹⁶² See, e.g., *United States v. Lira*, 515 F.2d 68, 72-73 (2d Cir. 1975), cert. denied, 423 U.S. 847 (1975) (Oakes, J., concurring) (expressing a willingness to limit *Ker* by preventing its application to cases in which there are official protests).

motivated, at least in part, by the understandable desire to bring vicious criminals to justice and to curb the illegal drug trade. Indeed, this is not the first Supreme Court decision involving the Camarena murder that has been criticized as being politically motivated.¹⁶³

The Executive Branch freely admits that it was at least partially motivated by a vengeful spirit.¹⁶⁴ While the objectivity of an agency acting under such strong emotional forces is to be questioned, this spirit of vengeance is entirely out of place in the Judicial Branch. While it cannot be stated with certainty that disgust over the Camarena murder influenced the majority in *Alvarez-Machain*, this is clearly the implicit conclusion drawn by the Justices in the minority opinion. As Justice Stevens noted, the desire to seek revenge should not be used as a "justification for disregarding the Rule of Law that this Court has a duty to uphold."¹⁶⁵ It is precisely when this desire is strong, Justice Stevens continued, that the Court must be especially careful to render judgment dispassionately.¹⁶⁶

The wisdom of the revenge policy is also to be questioned as it may backfire on the United States.¹⁶⁷ Judge Sofaer warned that the precise justification given by the United States for seizing suspects abroad, namely that the countries in which they are located refuse to extradite them, could similarly be used by other nations against the United States.¹⁶⁸ Quite possibly, a single judicially approved abduction, as in this case, will lead to a recurring pattern of abductions on

¹⁶³ E.g., Leonard X Rosenberg, Note, *Fourth Amendment-Search and Seizure of Property Abroad: Erosion of the Rights of Aliens*, 81 J. CRIM. L. & CRIMINOLOGY 779, 797-98 (1991)(criticizing the Supreme Court's holding in *Verdugo I*, saying it "may well be caught up in the 'war on drugs'").

¹⁶⁴ See, e.g., David G. Savage, *U.S. Abductions Abroad Upheld*, L.A. TIMES, June 16, 1992, at A1 ("Outraged by [the Camarena murder], fellow DEA agents vowed to gain revenge.").

¹⁶⁵ *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2205 (1992)(Stevens, J., dissenting).

¹⁶⁶ *Id.*

¹⁶⁷ Significantly, the effort to bring drug dealers hiding in Mexico to justice was only hampered by the uproar following the *Alvarez-Machain* decision. See, e.g., Tim Golden, *Bush Gives Mexico Limited Pledge on Abductions*, N.Y. TIMES, July 2, 1992, at A5 (In the aftermath of the decision, "Mexican officials responded by saying they would tighten restrictions on agents of the Drug Enforcement Administration and other foreign law enforcement agencies with which they now cooperate.").

¹⁶⁸ *Prosecution of Terrorists*, *supra* note 113, at 63 ("I want to also add—and I think this is an important underlying comment I have to this bill and this committee—that we, the United States of America, are one of those nations who fail to extradite terrorists.").

See also Brief of the Lawyers Committee for Human Rights in Support of Affirmance at 5, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992)(No. 91-712)("The construction [of the Treaty] offered by the Department of Justice in this unprecedented case, defending the DEA abduction, would allow Mexico to kidnap an American busi-

the part of both parties to the treaties since the judicial opinion "amounts to an invitation to the injured State to commit similar illegalities in the wrongdoing State."¹⁶⁹

Finally, as well-illustrated by the unraveling events in this case,¹⁷⁰ a major danger of abductions is that the slipshod manner in which they are often conducted may subject an innocent person to barbaric injustices. With little or no pretrial due process rights afforded to these abductees, and the Supreme Court's permission to grant jurisdiction over them, the Executive Branch is given free reign over such abductions. As one commentator put it, the arguments in favor of abductions of violent criminals are "apt to overlook that among the persons so treated there may be an innocent one. This is a great danger, and . . . for this reason alone, neither society nor the law must allow a departure from the great principle that no illegality must ever bear fruit."¹⁷¹ Indeed, the subsequent history of *Alvarez-Machain* makes this admonition all too clear.¹⁷²

V. CONCLUSION

The majority in *Alvarez-Machain* wrongly decided that the Extradition Treaty with Mexico did not prohibit the abduction of Dr. Alvarez-Machain. Had the Court properly held that the Treaty prohibited his abduction, it then should have held that under *Rauscher*, United States courts could not exercise personal jurisdiction over Dr. Alvarez-Machain due to the Treaty violation. As the abduction of Dr. Alvarez-Machain was officially sponsored by the United States government, the Court should have distinguished it from *Ker*, which lacked such official government approval.

Reading the Treaty in light of its purposes, and the understanding of the two countries as to the Treaty's meaning, this Note argues

nessman from New York City for trial on a political offense, without any violation of the Extradition Treaty.").

Cf. *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 101st Cong, 1st Sess. 2 (1991)(statement of Representative Don Edwards, chairman of the Civil and Constitutional Rights Subcommittee) (Speaking in the context of official abductions in general, not merely in the presence of extradition treaties, Edwards stated that "the Iranian Parliament has cited this Justice Department opinion [supporting official abductions] and says that they have the same right to come into the United States and arrest Iranian fugitives without our knowledge and kidnap them.").

¹⁶⁹ Mann, *supra* note 92, at 420.

¹⁷⁰ See *supra* note 25 (noting that the United States District Court for the Central District of California, on remand, dismissed the charges against Dr. Alvarez-Machain, upon finding that the prosecution's evidence was wildly speculative).

¹⁷¹ Mann, *supra* note 92, at 419.

¹⁷² See *supra* note 25.

that the Treaty was intended to prohibit the type of official government abduction that occurred in this case. Similarly, a reading of the Treaty, informed by principles of international law, advocates the same result. While the Court was possibly motivated in part by an understandable desire to seek revenge on murderers, such a goal has no place in the courts of a civilized nation.

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