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Extending Extraterritorial Abduction Beyond Its Limit: United States v. Alvarez-Machain

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NOTE

EXTENDING EXTRATERRITORIAL ABDUCTION BEYOND ITS LIMIT: *UNITED STATES v. ALVAREZ-MACHAIN*†

I. INTRODUCTION

As the sun sets over the Getco Publishing Building, a gray haired man puts his coat on in anticipation of the long train ride home to his wife and four children. Suddenly, three men dressed in black carrying sub-machine guns burst into his office and tackle the man to the ground. As they hold a gun to the man's head they inform him that he is under arrest by the Iranian government for publishing books that criticize the Islamic religion.[1] The three Iranian nationals tie the bewildered man up and beat him with the shafts of their guns. Bloodied and semi-conscious, the man is told he will be brought back to Iran and tried for his "crimes." Sixteen hours later he is smuggled into Iran, taken into custody, tried for his "crimes" and sentenced to death. In response, the United States State Department protests the abduction as a violation of United States sovereignty. However, their protests are of no use. Iran cites United States law to justify the extraterritorial abduction. At 6:00 A.M., one day after his trial, the man is taken to a courtyard and shot by a firing squad. At home his wife and four children can only ask why.[2]

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† The author would like to dedicate this article to his parents Joseph and Mary Miller, for twenty-five years of constant support and inspiration.

[1] The Iranian government recently passed a law which authorizes the extraterritorial abduction of Americans. Richard A. Serrano, *Iranian Newspaper Wants Capt. Rogers Held, Tried*, L.A. TIMES, Nov. 2, 1989, at B2, Col. 1.

[2] This scenario is not unlike that posed by Abraham Abramovsky in *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991).

It is hard to imagine how such a scenario could occur on any sovereign's territory. Ironically, this scenario is reminiscent of the United States government's actions when it authorized Drug Enforcement Agency ("DEA") agents to enter Mexico, kidnap Doctor Humberto Alvarez-Machain ("Alvarez"), a Mexican national, and bring him to the United States to stand trial for murder. The United States Supreme Court subsequently upheld the government's actions in *United States v. Alvarez*.[3] In doing so, the Court set a dangerous precedent by providing a legal basis for extraterritorial abductions.[4]

This note examines the Court's reasoning in upholding the legality of Alvarez's abduction. The note submits that the Court's holding was based on a misapplication of judicial doctrines, a misreading of the United States-Mexico Extradition Treaty and a disregard for the principles of international law. While the time has not yet come when Iranian terrorists have invaded United States soil and kidnapped our nationals, the holding in *Alvarez*[5] establishes a justification for such action.

Part II of this note examines the domestic and international principles the Court relied upon in deciding *Alvarez*. These include: the Ker-Frisbie doctrine;[6] the Principle of Specialty;[7] customary international law;[8] basic principles of treaty interpretation;[9] and the United States-Mexico Extradition Treaty.[10] These principles provide a background for analyzing the Court's decision. Part III contains a detailed discussion of the Supreme Court's opinion. A critique of this decision follows in Part IV.[11] Part V concludes that while *Alvarez*[12] may be jus-

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[3] 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992).

[4] For the purposes of this article, extraterritorial abduction refers to the abduction of foreigners beyond the physical and juridical boundaries of a particular state. *See* BLACK'S LAW DICTIONARY 588 (6th ed. 1990); *see also* Mitchell J. Matorin, *Unchaining The Law: The Legality of Extraterritorial Abduction In Lieu of Extradition*, 41 DUKE L.J. 907 (1992).

[5] *See supra* note 3.

[6] For discussion *see infra* notes 13-49 and accompanying text.

[7] For discussion *see infra* notes 50-67 and accompanying text.

[8] For discussion *see infra* notes 68-73 and accompanying text.

[9] For discussion *see infra* notes 74-77 and accompanying text.

[10] For discussion *see infra* notes 78-89 and accompanying text.

[11] This article will not discuss the due process issues involved in this case. For a discussion of these principles *see generally*, Janet E. Mitchell, *The Selective Application Of The Fourth Amendment: United States v. Verdugo-Urquidez*, 41 CATH. U. L. REV. 289 (1991); *see also* United States v. Verdugo-Urquidez, 110 S. Ct.

tified under a narrow reading of United States domestic law, its validity under international law is questionable.

II. BACKGROUND

A. *The Ker-Frisbie Doctrine*

1. Ker v. Illinois[13]

In 1886, the Supreme Court addressed the issue of extraterritorial abduction for the first time in *Ker*. Ker, an American citizen, was convicted of larceny and embezzlement by an Illinois state court.[14] He subsequently fled to Lima, Peru and claimed asylum.[15] Governor Hamilton of Illinois petitioned the Secretary of State of the United States for a warrant, pursuant to an extradition treaty between the United States and Peru, requesting the extradition[16] of Ker by the Peruvian government.[17]

In accordance with existing practices, the United States government dispatched Henry G. Julian, a Pinkerton agent,[18] to retrieve Ker from Peru.[19] Julian arrived in Peru with the necessary papers but neither presented them to any officer of the Peruvian government, nor made a demand on the government for the surrender of Ker.[20] Instead, Julian "forcibly and with violence arrested Ker, placed him aboard the United States vessel Essex . . . and brought him home to stand trial in Illinois."[21]

1056 (1990) (Fourteenth Amendment does not apply to a search by American authorities of a Mexican citizen's residence in Mexico).

12 *See supra* note 3.

13 119 U.S. 436 (1886) [hereinafter Ker].

14 *Id.* at 437.

15 *Id.* at 438.

16 This note adopts M. Cherif Bassiouni's definition of extradition as a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused criminal or fugitive offender. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 1 (1974).

17 Ker, *supra* note 13, at 438.

18 A Pinkerton agent is similar to a present-day United States Marshall, however, he worked for a private agency often hired by the United States to retrieve prisoners from extraditing countries. *See generally* JAMES D. HORON, THE PINKERTONS: THE DETECTIVE DYNASTY THAT MADE HISTORY (1967).

19 Ker, *supra* note 13, at 438.

20 *Id.*

21 *Id.*

Ker objected to the court's jurisdiction contending that the arrest was not carried out in accordance with the provisions of the United States-Peruvian extradition treaty.[22] The Court rejected Ker's claims, stating:

> Julian . . . did not act nor profess to act under the treaty . . . . [I]t was not called into operation, was not relied upon, was not made the pretext of the arrest, and the facts show 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.[23]

Therefore, the Court held that Ker failed to establish the existence of any such rights conferred upon him by the treaty.[24] Furthermore, the Court rejected Ker's due process claim[25] on the grounds that the clause dealt exclusively with an individual's right to a fair trial.[26] The Court concluded that the actions of the arresting officers did not fall within the scope of the Due Process Clause.[27] Hence, *Ker* established the principle in United States law that an illegal arrest does not preclude the court from exercising jurisdiction.

2. Frisbie v. Collins[28]

Unlike *Ker*, *Frisbie* did not involve international law. Rather, it involved a purely domestic issue. In *Frisbie*, the defendant, Collins, sought release from a Michigan state prison

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[22] *Id.* at 439.

[23] *Id.* at 443.

[24] *Id.*

[25] The Due Process Clause of the Fourteenth Amendment states in relevant part: "[n]o state shall deprive any person of life, liberty or property without due process of the law." U.S. CONST. amend. XIV, § 1.

[26] Ker, *supra* note 14, at 440.

[27] The Court, in rejecting the due process claim, stated:

> The "due process of law" here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. . . . [F]or mere irregularities in the manner in which he may be brought into custody of the law, we do not think 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.

Ker, *supra* note 13, at 440.

[28] 342 U.S. 519 (1952) [hereinafter Frisbie].

where he was serving a life sentence for murder.[29] Collins filed a habeas corpus petition alleging that while living in Chicago, Michigan police officers "forcibly seized, handcuffed, blackjacked, and took him to Michigan."[30] Collins protested his conviction, arguing that the means by which he was apprehended violated the Due Process Clause of the Fourteenth Amendment.[31]

The United States Supreme Court rejected Collins' claim. Justice Hugo Black, speaking for the majority, reaffirmed the holding in *Ker*:

> This Court has never departed from the rule announced in *Ker v. Illinois*, 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." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.[32]

The principle established in *Ker*, and reaffirmed in *Frisbie* has become a judicially sanctioned doctrine.[33] It stands for the principle that a court's power to exercise personal jurisdiction over an individual is not impaired by the illegality of the means by which he is apprehended. The doctrine is used to support almost every case of illegal abduction, and is consistently upheld.[34]

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[29] *Id.* at 520.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 522.

[33] For a further discussion of the doctrine *see* Andrew B. Campbell, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385 (1990); 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 (1991); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law Continued*, 84 AM. J. INT'L L. 444 (1990).

[34] *See generally*, New York v. Harris, 495 U.S. 14 (1990) (defendant is not immune from prosecution because his person is not considered a fruit of a forbidden search); INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest); United States v. Crews, 445 U.S. 463 (1980) (respondent is not himself a suppressible fruit and the illegality of his detention

3. United States v. Toscanino:[35] *The Narrow Exception*

In *Toscanino*, the United States Court of Appeals for the Second Circuit established the "Shock-the-Conscience" exception to the Ker-Frisbie doctrine. In *Toscanino*, the defendant, an Italian citizen, was charged with conspiracy to import narcotics into the United States.[36] At trial, Toscanino protested the jurisdiction of the court on the grounds that he had been illegally abducted.[37] Toscanino alleged that he had been lured from his home in Montevideo, Uruguay by a telephone call from members of the Uruguayan police force, acting at the direction of the United States government.[38]

Toscanino and his wife were lured to a deserted area, where he was knocked unconscious, bound, blindfolded, and driven at gunpoint to the Uruguayan-Brazilian border.[39] Once in Brazil, Toscanino claimed, that under the United States' guidance[40] he was incessantly tortured and interrogated for seventeen days.[41] Toscanino specifically alleged that:

> . . . [His] captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by military men who returned home from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up

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cannot deprive the Government of the opportunity to prove his guilt); Gerstein v. Pugh, 420 U.S. 103 (1975) (illegal arrest or detention of an individual does not void a subsequent conviction).

[35] 500 F.2d 267 (2d Cir. 1974) [hereinafter Toscanino].

[36] *Id.* at 268.

[37] *Id.*

[38] *Id.* at 269.

[39] *Id.*

[40] Toscanino claimed that throughout the entire investigation, the United States government and the United States Attorney for the Eastern District of New York prosecuting the case were aware of the interrogation and did in fact receive reports as to its progress. Toscanino, 500 F.2d 267 at 270. Furthermore, he claimed that during the period of torture a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, was present one or more times and participated in the interrogation. *Id.*

[41] *Id.* at 270.

> his anal passage . . . . [A]gents of the United States government attached electrodes to Toscanino's earlobes, toes and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no scars.[42]

Following the interrogations, Toscanino was drugged and placed on an airplane bound for the United States.[43] Once inside the United States, he was arrested, convicted and sentenced to thirty years imprisonment.[44]

In light of these allegations, the Second Circuit refused to apply the Ker-Frisbie doctrine, and remanded the case to the district court with instructions that if the allegations proved true, the court should divest itself of jurisdiction.[45] Relying on the Supreme Court cases *Rochin v. People of California*[46] and *Mapp v. Ohio*,[47] the Second Circuit reasoned that "due process requires a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary, and unreasonable invasion of the accused's constitutional rights."[48] The court thereby established that when a government agent engages in conduct which "shocks the conscience," the court is divested of jurisdiction.

In theory, the Toscanino exception appears to be a viable option to the Ker-Frisbie doctrine. However, in reality, the majority of courts have construed the exception narrowly, leaving

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[42] *Id.*

[43] *Id.*

[44] *Id.* at 268, 270.

[45] *Id.* at 275.

[46] *Id.* at 273. In Rochin v. People of California, 342 U.S. 165 (1952), state police officers frustrated a defendant's efforts to swallow two morphine capsules in his possession by taking the defendant, handcuffed, to a hospital. *Id.* at 166. At the hospital, upon the police officers' orders, the doctor forced an emetic solution through a tube into the defendant's stomach against his will. *Id.* When the solution produced vomiting, the capsules were recovered. *Id.* The Supreme Court held that the policemen's conduct "shocked the conscience" and thereby overturned the conviction. *Id.* at 167.

[47] *Id.* at 273. In Mapp v. Ohio, 367 U.S. 643, 656 (1961), evidence obtained by searches and seizures in violation of the United States Constitution was held to be inadmissible in state court criminal proceedings.

[48] Toscanino, *supra* note 35.

it with virtually no force.[49] Hence, the Ker-Frisbie doctrine remains virtually unchanged even in the wake of the *Toscanino* decision.

B. *The Principle of Specialty*[50]

The Principle of Specialty provides that the requesting state, pursuant to a valid extradition treaty, can only prosecute a surrendered person for the offense for which he was surrendered by the requested state.[51] The requested state is thus precluded from prosecuting any crime not listed in the request.[52] The Principle of Specialty serves the dual function of protecting

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[49] *See* United States ex rel. Lujan, 510 F.2d 62 (2d Cir. 1975) (abduction and transportation of Argentinean defendant to the United States from Bolivia did not constitute a violation of due process which would require federal courts to divest themselves of jurisdiction where defendant makes no claim that he was subjected to torture or custodial interrogation); United States v. Lira, 515 F.2d 68 (2d Cir. 1975) (divesting a court of jurisdiction when plaintiff is unable to prove questionable activities of the government would serve no purpose because the exclusionary rule would not be effective in deterring unlawful conduct of a foreign government).

[50] The Doctrine of Specialty is codified in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1987). It states:

> Under most international agreements, state laws, and state practice:
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> (1) A person who has been extradited to another state will not, unless the requested state consents,
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> (a) be tried by the requesting state for an offense other than one for which he was extradited; or
>
> (b) be given punishment more severe than was provided by the applicable law of the requesting state at the time of the request for extradition.
>
> (2) A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from that state.

[51] *See* Bassiouni, *supra* note 16 at 360. Professor Bassiouni offers five factors as the rationale for the doctrine:

> 1. The requested state could have refused extradition if it knew that the relator (extradited person) would be prosecuted or punished for an offense other than the one for which extradition was granted.
>
> 2. The requesting state would not have *in personam* jurisdiction over the relator, if not for the requested state's surrender of that person.
>
> 3. The requesting state could not have prosecuted the offender, other than *in absentia*, nor could it punish him without securing that person's surrender from the requesting state.
>
> 4. The requesting state would be abusing a formal process to secure the surrender of the person it seeks by relying on the requested state, which will use its processes to effectuate the surrender.
>
> 5. The requested state would be using its processes in reliance upon the representations made by the requesting state.

(emphasis in original)

[52] *See* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 106 (1991).

fugitives' rights and protecting the extraditing nation from an abuse of its discretion.[53]

The Supreme Court first addressed the Principle of Specialty in *United States v. Rauscher*.[54] In *Rauscher*, William Rauscher, a second mate on an American vessel, murdered a crew member.[55] He subsequently fled to Great Britain and claimed asylum.[56] In response to United States' demands, Great Britain extradited Rauscher to the United States for the charge of murder.[57] Rauscher was tried and convicted for inflicting cruel and unusual punishment.[58]

Rauscher appealed on the ground that his conviction for cruel and unusual punishment violated the United States-Great Britain Extradition Treaty since he was extradited to stand trial for the charge of murder only.[59] The Supreme Court overturned the conviction, holding that Rauscher was exempt from trial for any offense other than those listed in the extradition papers, until he had the opportunity to return to the country from which he was taken.[60] The Court reasoned that "a

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[53] *Id.*

[54] 119 U.S. 407 (1986) [hereinafter Rauscher].

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 409.

[59] *See generally* Rauscher, *supra* note 55, at 409-410 (certifying questions on appeal).

[60] The Court set forth four parts to its holding:

> 1. That a treaty to which the United States is a party is a law of the land, of which all courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement.
>
> 2. That, on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and acts of Congress that subject, REV. STAT. §§ 5272, 5275, he cannot lawfully be tried for any other offence than murder.
>
> 3. The treaty, the acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offence, until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender. The national honor also requires that good faith shall be kept with the country which surrendered him.
>
> 4. The circumstances that the party was convicted of inflicting cruel and unusual punishment on the same evidence which was produced before the committing magistrate in England, in the extradition proceedings for murder, does not change the principle.

Rauscher, *supra* note 54.

treaty is primarily a compact between nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it."[61] In light of this, the Court reasoned that the Constitution places a treaty as the law of the land equal to an act of Congress.[62] Therefore, the Court concluded that when the rights of a citizen under a treaty are to be enforced, the court should look to the treaty for the answer.[63]

Building upon this analysis and the nature of extradition treaties, the Court stated that the Principle of Specialty was implicit in the extradition treaty:

> It is . . . very clear that this treaty did not intend to depart . . . from the recognized public law which has prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all other, but the entire face of the treaty, including the process by which it is carried into effect, confirms this view of the subject.[64]

Therefore, the Court held that prosecuting Rauscher in violation of the Principle of Specialty suggested an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition.[65] The Court resolved the issue by divesting the lower court of personal jurisdiction to try Rauscher for the charge of cruel and unusual punishment.[66]

The Principle of Specialty, like the Ker-Frisbie doctrine, has become judicially sanctioned. However, unlike the Ker-Frisbie doctrine the Principle of Specialty has not met widespread opposition. The doctrine is widely applied and consistently upheld.[67]

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[61] *Id.* at 417.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 420.
[65] *Id.* at 422.
[66] *Id.* at 433.
[67] *See* United States v. Levy, 905 F.2d 326 (10th Cir. 1990) (Hong Kong Courts decided defendant could be extradited on charge even though it was not clearly stated); United States v. Herbage, 850 F.2d 1463 (11th Cir. 1988) (Specialty

C. *Customary International Law*

"Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[68] To be accepted as a custom of international law a practice must generally satisfy five elements:

> [1] concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; [2] continuation or repetition of the practice over a considerable period of time; [3] conception that the practice is required by, or consistent with prevailing international law; [4] general acquiescence in the practice by other states; [5] the establishment of 'the presence of each of these elements . . . by a competent international authority.'[69]

Once it is established that a practice satisfies these elements, it must then be shown that a "state alleged to be bound has accepted or acquiesced in the custom as a matter of legal obligation, 'not merely for reasons of political expediency.'"[70]

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not violated by trying defendant on both fraud and misuse charges even though Britain analogized the latter to fraud); United States v. Jetter, 722 F.2d 371 (8th Cir. 1983) (Costa Rica intended to extradite accused for substantive offenses and conspiracy, even though conspiracy was omitted from the charges).

[68] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). *See also* J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 39-40 (1977). Starke describes the general approach of the International Court of Justice to the question of the judicial recognition of customary rules as exemplified in its manual of 1976 as follows:

> The Court's decisions show that a State which relies on an alleged international custom practiced by States must, generally speaking, demonstrate to the Court's satisfaction that this custom has become so established as to be binding on the other party. This attitude of judicial caution . . . is confirmed by the experience of the International Law Commission and of international legal conferences and is consistent with another trend in the Court's decisions viz., that the autonomy or sovereignty of a State should be respected unless the Court is duly satisfied that such autonomy or sovereignty is limited by rules that are binding on the State.

Id. at 47.

[69] ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 7 (1971).

[70] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. e (1987) (quoting Columbia v. Peru, I.C.J. Rep. 266, 267 (1950)).

Customary international law has long been accepted as a component of United States federal common law. In the precedent case, *The Paquete Habana,*[71] Justice Gray stated:

> 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 upon 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 . . . .[72]

The Paquete Habana has come to stand for the proposition that United States courts are obligated to enforce customary international law as "the law of the land."[73]

D. *Treaty Interpretation*[74]

There are few areas of international law as disputed as treaty interpretation. In 1969, The Vienna Convention on the Law of Treaties attempted to codify the rules of treaty interpretation.[75] The Convention described the rule of treaty interpretation, stating "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[76] Thus, under the Convention, interpretation begins by

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[71] 175 U.S. 677 (1900) (Supreme Court relied on international custom as a guide to understanding law of nations in order to determine the existence of a valid customary rule giving immunity to small fishing vessels from belligerent action in time of war).

[72] *Id.* at 700.

[73] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d (1987) (customary international law while not mentioned explicitly in the Supremacy Clause, is also federal law and as such is supreme over state law).

[74] The interpretation of international agreements is codified in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325. It states:

> 1. An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.
>
> 2. Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken in account in its interpretation.

[75] *See* T.O. ELIAS, THE MODERN LAW OF TREATIES 5 (1974).

[76] Vienna Convention on the Law of Treaties adopted, May 22, 1969, art. 31, U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969).

examining the meaning of the text, rather than inquiring into the intention of the parties.[77] The Convention principles and related modern case law set out the foundation for understanding treaty interpretation.[78]

E. *The United States-Mexico Treaty on Extradition*[79]

The United States-Mexico Extradition Treaty was concluded on May 4, 1978.[80] The purpose and object of the treaty was to provide the legal framework, whereby one of the parties could request from the other the extradition of persons from its

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[77] *Contra* LORD MCNAIR, THE LAW OF TREATIES 365 (1961) (goal of treaty interpretation is to give effect to the expressed intention of the parties as expressed in the words used by them in light of the surrounding circumstances).

[78] The general rules of treaty interpretation are:

1. Good Faith: The principle of good faith is the most fundamental principle of treaty interpretation. It requires that every treaty must be carried out in good faith by the parties. SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 119 (1973).

2. Plain Meaning: This principle interprets the words of the treaty so as to give effect to their ordinary or general meaning. LORD MCNAIR, THE LAW OF TREATIES 366 (1961). *See also* Air France v. Saks, 470 U.S. 392 (1985) [hereinafter Air France] (in construing a treaty a court should give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties).

3. Special Meaning: "A special meaning shall be given to a term if it is established that the parties intended so." SINCLAIR, at 126.

4. Context: Context means the treaty's preamble, other clauses, annexes, and other writings within the four corners of the treaty. *Id.* at 127. *See also* Air France *supra* ¶ 2 of this note (Starting point for analysis is the text of the treaty and the context in which the words are used); Choctaw Nations of Indians v. U.S., 318 U.S. 423 (1943) (treaty's history, the negotiations, and the practical construction adopted by the parties may also be relevant).

5. Liberal Construction: In choosing between conflicting interpretation of a treaty obligation, a narrow and restrictive interpretation is to be avoided as not consonant with the principles deemed controlling in the interpretation of the international agreement. [I]f a treaty fairly admits of two constructions, one restricting the right which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933).

6. International Law: Interpretation should take into account any relevant rules of international law applicable in the relations between the parties. SINCLAIR, at 138.

[79] Treaty on Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656 [hereinafter Treaty on Extradition].

[80] *Id.*

territory.[81] The treaty contains "twenty-three articles and an appendix listing the extraditable offenses."[82] Justice Stevens describes the treaty as:

> 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.[83]

Justice Stevens further describes the scope of the treaty's application[84] as reaching those offenses, specified in article 2,[85]

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[81] Brief for the United Mexican States as Amicus Curiae in Support of Affirmance at 6, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712). To support this contention Amicus refers to the record at 68-69.

[82] Alvarez, *supra* note 3, at 2198.

[83] *Id.*

[84] Article 22 entitled "Scope of Application" states:

1. This Treaty shall apply to offenses specified in Article 2 committed before and after this treaty enters into force.

2. Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899, and the Additional Conventions on Extradition of 25 June 1902, 23 December 1925, and 16 August 1939. Treaty on Extradition, *supra* note 79, at art. 22.

[85] Article 2 states:

1. 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.

2. If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3. Extradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4. Subject to the conditions established in paragraphs 1, 2 and 3, extradition shall also be granted:

a. For the attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

b. When, for the purpose of granting jurisdiction to the United States government, transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

Treaty on Extradition, *supra* note 79.

committed before and after the treaty became enforceable.[86]

At issue in *Alvarez* is Article 9 of the treaty,[87] which addresses the extradition of nationals.[88] It grants the executive of the requested party the discretion to surrender that party's own nationals. If extradition is not granted the requested party must submit the case to its own tribunals for resolution.[89]

III. Case History

A. *Alvarez's Abduction*

On April 2, 1990, Alvarez was abducted from his medical office in Guadalajara, Mexico.[90] He was flown in a rented twin-engine plane to Texas and arrested for the kidnapping and murder of DEA Agent Enrique Camarena Salazar ("Camarena"), and Alfredo Zavala-Avelar, a Mexican pilot who had assisted Camarena in his investigation of drug plantations.[91] The kid-

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[86] Alvarez, *supra* note 3, at 2198.

[87] 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 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.

Treaty on Extradition, *supra* note 79, at art. 9.

[88] Mexican domestic law prohibits the extradition of its nationals. Brief for the United Mexican States as Amicus Curiae in Support of Affirmance at 11, Alvarez, *supra* note 3, at 2188 (No. 91-712).

[89] *See* Treaty on Extradition, *supra* note 79.

[90] United States v. Caro-Quintero, 745 F.Supp. 599, 603 (C.D. Cal. 1990).

[91] On February 7, 1985, Drug Enforcement Agent Enrique Camarena Salazar "was kidnapped outside the American Consulate in Guadalajara, Jalisco, Mexico." *Id.* at 601-2. One month later, Agent Camarena's mutilated body was found at a ranch about sixty miles outside of Guadalajara, "along with Alfredo Zavala-Avelar, a Mexican pilot who had assisted Camarena" in his investigations. *Id.* at 602 (describing the events of the abduction of Alvarez-Machain); *see also DEA Payment Plan for Doctor Detailed; Camarena Case: Witness Says He Paid Friends $20,000 Plus $6,000 A Week to Deliver the Suspect to the U.S. The DEA Insists It Was Not A Reward or Bounty*, L.A. Times, (Southland Edition), May 26, 1990, at 26.

The abduction occurred as a result of the failure of negotiations between the United States and Mexico in which Mexico would trade Alvarez for Isaac Naredo Moreno, who was residing in the United States and wanted by Mexico in connection with the theft of large sums of money from politicians in Mexico. *See* Caro-Quintero, *supra* note 90, at 602.

napping was engineered by Antonio Garate Bustamante ("Garate"), a former Mexican police officer and DEA informant.[92] Garate, under the direction of Hector Berrellez, head of the Los Angeles DEA unit investigating Camarena's death,[93] organized and arranged for his associates in Mexico[94] to abduct Alvarez and bring him to the United States.[95] In return, the abductors were paid fifty thousand dollars plus expenses.[96]

At 7:45 p.m., on April 2, 1990, five or six armed men bearing Mexican federal police badges forcibly entered Alvarez's medical office.[97] The men placed a gun to Alvarez's head and warned him that if he did not cooperate he would be shot.[98]

Alvarez was then taken to a house in Guadalajara.[99] Once inside the house, Alvarez claimed he was punched, injected with a substance that made him feel "light-headed and dizzy", and shocked six or seven times through the soles of his shoes with "an electric shock apparatus."[100]

Shortly thereafter, Alvarez was transported to Leon, Mexico and put aboard a twin engine plane.[101] On April 3, 1990, he

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[92] Caro-Quintero, *supra* note 90, at 602 (describing the role Garate played in the abduction); *see also* Henry Weinstein, *Witness Tells of Kidnapping Payout; Camarena Trial: DEA Operative Says $60,000 Has Been Paid. No Ruling On Legality of Abduction of Mexican Doctor*, L.A. TIMES, (Home Edition), May 26, 1990, at 26.

[93] At trial, Berrellez stated that he received authorization for the plan from Peter Gruden, Deputy Director of the Drug Enforcement Agency. *See Drug Agency Paid $20,000 to Bring Doctor to U.S.*, CHI. TRIB., (Chicagoland North Edition), May 26, 1990, at 3 (describing the role Gruben played in the abduction).

[94] According to Garate at trial, his associates included former military police, Mexican Federal Judicial Police and various citizens. Caro-Quintero, *supra* note 90, at 602; *see also* Jay Mathews, *Agent: DEA Put Up $50,000 For Kidnapping of Doctor; Court Told Washington Authorized Operation*, WASH. POST, May 26, 1990, at A2 (describing Garate's friends hired to carry out the abduction).

[95] Caro-Quintero, *supra* note 90, at 602.

[96] *Id.* at 603. As of May 25, the DEA had made a partial payment of $20,000 to the abductors. *Id.* In addition, the DEA evacuated seven of the abductors and their families from Mexico to the United States. *Id.* The DEA continues to pay the expenses of the abductors in the estimated amount of $6,000. *Id.* at 604. There was testimony at trial that those families that were not evacuated were arrested by Mexican Federal Judicial Police. *Id.*

[97] *Id.* at 603.

[98] *Id.*

[99] *Id.*

[100] Although making these claims at trial, upon arrival in El Paso on April 3, 1990, Alvarez was asked whether he had been mistreated, tortured, or abused and he answered that he had not. *Id.* at 603.

[101] *Id.*

arrived in El Paso where he was met and arrested by DEA agents.[102] Shortly after arrival, Alvarez complained of pains in his chest.[103] He was taken to Thomason General Hospital in El Paso, where he was thoroughly examined.[104] The doctors found no signs of mistreatment.[105] In response to the abduction Mexico protested and demanded Alvarez's repatriation.[106]

B. *The District Court's Holding*[107]

Judge Rafeedie of the Central District Court of California, faced with a variety of contradictory facts,[108] multiple indictments,[109] and a case of state-sponsored abduction, held that the court lacked personal jurisdiction to try Alvarez.[110] Alvarez raised three arguments to support his claim that the court lacked personal jurisdiction over him. First, Alvarez argued that his abduction denied him due process of law as guaranteed by the Fourteenth Amendment.[111] The court, however, rejected the claim, reasoning that under the Ker-Frisbie doctrine the forcible abduction of a defendant from another jurisdiction does not deprive a court of personal jurisdiction to try the defendant.[112]

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102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* at 604. On May 16, 1990, the Embassy of Mexico presented a diplomatic note to the United States State Department. *Id.* The note stated that the government of Mexico considered that the kidnapping of Alvarez and his transfer to the United States were carried out by agents of the United States and in violation of the Extradition Treaty. *Id.* Mexico further demanded the return of Machain. *Id.*

107 The district court's opinion involving Alvarez-Machain is entitled United States v. Caro-Quintero. *Id.* at 599.

108 For example, at the pre-trial hearing the United States had denied that it participated in the abduction, but even if it did, the United States protested that the claim would be barred by the Ker-Frisbie doctrine. *Id.* at 601.

109 The sixth superseding indictment charged Alvarez with conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity (18 U.S.C. § 1959), conspiracy to kidnap a federal agent (18 U.S.C. § 1201 (c)), kidnap of a federal agent (18 U.S.C. § 1201(a)(5)), felony murder (18 U.S.C. §§ 1111(a), 1114), and accessory after the fact (18 U.S.C. § 3). Alvarez-Machain, *supra* note 1, at 2190, n. 1.

110 Caro-Quintero, *supra* note 90, at 599.

111 *Id.* at 604.

112 Caro-Quintero, *supra* note 90, at 604.

The court further rejected Alvarez's second argument that the circumstances surrounding his abduction fit within the "shock-the-conscience" exception to the Ker-Frisbie doctrine.[113] The court reasoned that when a defendant establishes that the government's conduct was "of the most shocking and outrageous kind," the court is divested of jurisdiction.[114] However, the court concluded, that even if Alvarez's allegations of mistreatment in the course of the abduction were true, they did not warrant dismissal under the Toscanino exception.[115]

The court, however, found merit in Alvarez's third argument that his abduction violated the United States-Mexico Extradition Treaty. The court determined the Ker-Frisbie doctrine had no application to violations of federal treaty law.[116] As such, the court held that the unilateral abduction of Alvarez, by paid agents of the United States, combined with the official protest of the Mexican government, constituted a violation of the Extradition Treaty between the two sovereigns.[117] The court found it axiomatic that a party to an extradition treaty violates its contracting partner's sovereignty when it unilaterally abducts a person from the territory of the contracting partner.[118] Accordingly, the case was dismissed.[119]

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's holding ordering the repatriation of Alvarez to Mexico.[120] The court based its decision on its ruling in *United States v. Verdugo-Urquidez*,[121]

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113 *Id.* at 605. For discussion of exception *see supra* note 35, and accompanying text.

114 *Id.*

115 *Id.*

116 *Id.* at 605.

117 *Id.* at 609.

118 *Id.* at 610.

119 *Id.* at 615.

120 United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991).

121 939 F.2d 1341 (9th Cir. 1991) [hereinafter Verdugo-Urquidez]. In *Verdugo-Urquidez*, Rene Verdugo-Urquidez, a citizen of Mexico, was suspected of being a leader of the drug cartel which murdered Drug Enforcement Agent Camarena. *Id.* at 1343. He was abducted by several individuals and brought to the United States to stand trial for the murder of Camarena. *Id.* The trial court found Verdugo-Urquidez guilty of the murder of Camarena. *Id.* On appeal, Verdugo-Urquidez's conviction was overturned on the grounds that the United States lacked jurisdiction to try the defendant because his abduction violated the United States-Mexico Extradition Treaty. *Id.* The court placed special emphasis on the formal objection

where it held that the forcible abduction of a Mexican national without the consent of Mexico violated the United States-Mexico Extradition Treaty.[122] The court, relying on *Verdugo-Urquidez*, placed emphasis on Mexico's objection to the abduction and the United States' failure to contradict the claim that the DEA sponsored the abduction.[123] Thus, the court determined it was not necessary to remand the case for further factual findings.[124] Therefore, the court concluded that the holding in *Verdugo-Urquidez* required the dismissal of the charges against Alvarez.[125] The United States appealed this decision to the United States Supreme Court and certiorari was granted.[126]

C. *The Supreme Court's Holding*

1. *Majority Opinion*

On appeal, the Supreme Court examined the issue of whether the district court had jurisdiction to try Alvarez.[127] Alvarez claimed that his forcible abduction violated the treaty and precluded the court from exercising jurisdiction over him.[128] Justice Rehnquist, speaking for the majority, rejected this argument and held that the district court had jurisdiction to try Alvarez for the murder of Camarena.[129]

The Court first examined whether the Ker-Frisbie doctrine[130] was applicable to the case.[131] Under the Principle of Specialty established in *Rauscher*,[132] the Court stated that a defendant may not be prosecuted in violation of the terms of an extradition treaty.[133] However, the Court reasoned when a treaty has not been invoked, a court may, under *Ker*, exercise jurisdiction even though the defendant's presence was procured

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of Mexico to the abduction and the United States' participation in the kidnapping. *Id.* at 1343, 1359.

122 *Id.* at 1341.

123 Alvarez, *supra* note 3 at 1466.

124 *Id.* at 1467.

125 *Id.*

126 United States v. Alvarez-Machain, 112 S.Ct. 857 (1992).

127 Alvarez, *supra* note 3, at 2190.

128 *Id.*

129 *Id.*

130 For discussion *see supra* note 14, and accompanying text.

131 Alvarez, *supra* note 3, at 2193.

132 For discussion *see supra* note 55, and accompanying text.

133 Alvarez, *supra* note 3, at 2191.

by force.[134] Thus, the Court concluded that if the treaty did not prohibit the abduction, the rule of *Ker* applied and jurisdiction was proper.[135] As such, the Court concentrated its analysis on whether the terms of the treaty prohibited the abduction.[136]

After examining the terms of the treaty, the Court determined that although detailed, the treaty did not contain any provisions which explicitly prohibited the abduction, nor did the treaty constitute the exclusive means of obtaining jurisdiction over the defendant.[137] Furthermore, the Court noted that the history of negotiations and practice under the treaty failed to show that abduction outside the treaty violated its terms.[138] Thus, the Court concluded that the language of the treaty, in the context of its history, did not prohibit the abduction.[139]

The Court then addressed Alvarez's argument that the treaty should be interpreted against general principles of international law, which he contended, prohibited the abduction.[140] The Court rejected Alvarez's argument.[141] It reasoned that general principles of international law did not provide a basis for interpreting the treaty to include an implied term prohibiting international abductions.[142] The Court explained that drawing such an inference from the treaty would go beyond established precedent and practice.[143] The Court contrasted Alvarez's case with *Rauscher*, explaining that in *Rauscher* it implied a term into the United States-Great Britain Extradition Treaty because of the practice of nations with regard to extradition treaties.[144] However, the Court concluded, to imply a term into the United States-Mexico Extradition Treaty, based on the practice of nations with regards to international law more gen-

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134 *Id.* at 2192.

135 *Id.* at 2193.

136 *Id.*

137 *Id.* at 2193-94.

138 *Id.* at 2194.

139 The Court noted that the Mexican Government knew of the existence of the Ker doctrine as early as 1906, and the United States' position that it applied to forcible abductions made outside the terms of the United States-Mexico Extradition Treaty. *Id.* at 2194-95.

140 *Id.* at 2195.

141 *Id.* at 2196.

142 *Id.*

143 *Id.*

144 *Id.* at 2195-96.

erally, would require a much larger inferential leap with only the most general international law principles to support it.[145] Therefore, the Court determined that while the abduction may have violated general principles of international law, the decision to return Alvarez to Mexico was a matter outside the treaty, for the Executive Branch to decide.[146]

In light of these findings, the Court determined that neither the explicit terms of the Extradition Treaty, nor general principles of international law, barred the abduction as a means of acquiring jurisdiction over the defendant.[147] Therefore, the Court concluded that the Ker-Frisbie doctrine applied to the case, and it would not examine the means by which Alvarez came before it.[148] Thus, the Court held Alvarez's forcible abduction did not prohibit his trial in the United States for the murder of Camarena.[149]

2. *Minority/Dissent*[150]

Justice Stevens, speaking for the minority, argued that the Court's holding transformed the provisions of the treaty "into little more than verbiage."[151] The minority reasoned that the document only made sense if understood as requiring each signatory to comply with the provisions whenever it wished to obtain jurisdiction over an individual located in the other signatory's country.[152] Stevens stated, under the majority's reasoning, the United States could execute someone instead of extraditing him since it was not expressly forbidden in the treaty.[153] In Steven's opinion the "manifest scope and object of the treaty plainly . . . [implied] a mutual undertaking to respect the territorial integrity of the other contracting party."[154]

Similarly, Stevens rejected the Court's holding that *Rauscher*[155] did not provide a basis for implying a term into the

145 *Id.* at 2196.
146 *Id.* at 2196-97.
147 *Id.* at 2197.
148 *Id.*
149 *Id.*
150 Justice Blackmun, Justice O'Connor, and Justice Stevens dissented.
151 Alvarez, *supra* note 3, at 2198.
152 *Id.* at 2199.
153 *Id.*
154 *Id.*
155 For discussion *see supra* notes 54-67 and accompanying text.

treaty forbidding abduction as a basis for obtaining jurisdiction.[156] Stevens argued that although the Court's decision in *Rauscher* was supported by a number of judicial holdings, those cases were not as uniformly accepted as the international principle prohibiting one nation from violating the sovereignty of another.[157] Therefore, Stevens found it shocking that a party to an extradition treaty could have secretly reserved the right to make seizures of citizens in the other's territory.[158] Thus, Stevens concluded that *Rauscher* dictated the existence of an implied term in the treaty prohibiting the forcible abduction of Alvarez.[159]

Furthermore, Stevens rejected the majority's claim that *Ker* was applicable to the case.[160] Steven's emphasized that, unlike *Alvarez*, *Ker* dealt with the actions of a private citizen acting on his own.[161] The majority's failure to reconcile this was a critical flaw in the decision.[162] Stevens concluded that the majority's misplaced reliance on *Ker*, combined with its failure to read into the treaty an implied term prohibiting abduction, led to the majority's blatant disregard for customary international law principles.[163]

IV. ANALYSIS

The Supreme Court's decision to uphold the district court's jurisdiction over Alvarez may be justified under a narrow reading of *Ker*. However, the majority's holding is in essence a result of a misapplication of the Ker-Frisbie doctrine, a misinterpretation of the United States-Mexico Extradition Treaty, and a disregard for international law principles.

The majority's decision fails to differentiate between private kidnapping and state-sponsored abduction and is based on a gross overstatement of the rule of *Ker*.[164] In support of its position, the majority offered the broad proposition that the

156 Alvarez, *supra* note 3, at 2201.
157 *Id.*
158 *Id.* at 2201.
159 *Id.* at 2202.
160 *Id.* at 2203.
161 *Id.*
162 *Id.*
163 *Id.* at 2205.
164 *Id.* at 2195.

power of a court to try a person for a crime is not impaired by the fact that jurisdiction has been obtained by a forcible abduction.[165] Although the majority correctly stated the rule of *Ker*, its reliance on that case to justify the exercise of jurisdiction over Alvarez is misplaced. There are two major reasons why the majority's reading of *Ker* should not govern this case.

First, Ker was abducted by a private individual without any authorization from the United States Government. The *Ker* Court held "that the extradition treaty was not called into effect . . . and the facts showed that it was a clear case of kidnapping without any authority from the United States."[166] Therefore, *Ker* stands for the limited proposition that a private kidnapping, without any pretense of authority under the treaty or from the government, does not violate the terms of an extradition treaty.[167] This however, lends no support for the majority's determination that the district court had jurisdiction over Alvarez. Here, the abduction of Alvarez was sponsored, financed and carried out by agents of the United States, a situation completely different from the factual setting of *Ker*. Thus, *Ker* does not address state-sponsored abduction in violation of a treaty. As such, it is inapplicable to *Alvarez*.

Second, even if it is conceded that *Ker* permits state- sponsored abduction, it would still not control this case. In *Ker*, the Peruvian Government at no time protested the abduction of Ker. In fact, it was in doubt whether the treaty between the United States and Peru was even in effect at the time of Ker's abduction. The failure of the majority to understand the significance of Peru's lack of objection to Ker's abduction has led to the majority's misguided attempt to apply the rule of *Ker* to *Alvarez*.[168] There have been no cases where *Ker* has been upheld when the violated country objected to the abduction.[169] The

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165 *Id.* at 2192.

166 Ker, *supra* note 13, at 443.

167 Verdugo-Urquidez, *supra* note 121, at 1345.

168 It is significant that Peru did not object because under international law, without the consent or acquiescence by the territorial state, another state may not send its agents into that state's territory to apprehend persons accused of crimes. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 cmt. c (1987) (if the unauthorized action involves abduction, the state from which the person was abducted may demand return of the person, and international law requires he be returned).

169 Verdugo-Urquidez, *supra* note 121, at 1347.

majority fails to acknowledge this and tries to apply a doctrine that is inapplicable when the aggrieved state protests. In fact, most cases that have dealt with similar issues take the position that if the country protests, the court may be divested of jurisdiction.[170] Therefore, *Ker* has no bearing on Alvarez's case.

Another failure of the Court's holding is its reliance upon *Frisbie* to justify its refusal to divest the district court of jurisdiction over Alvarez. *Frisbie* was a domestic case of interstate abduction, where neither a treaty nor international law was involved. *Frisbie* involved the abduction by Michigan police of a suspected criminal located in Illinois.[171] Furthermore, Frisbie's objection was based on the Due Process Clause of the Fourteenth Amendment, not on a violation of a treaty.[172] Clearly, *Frisbie* has no bearing on international abductions involving extradition treaties which spell out the procedures for gaining jurisdiction. Therefore, the majority's theory that jurisdiction can be grounded in the long established Ker-Frisbie doctrine is absurd.

The majority's reasoning is further weakened by its failure to interpret the treaty consistently with general principles of treaty interpretation.[173] It is true, as the majority points out, that no provision in the treaty specifically prohibits abduction as a means of acquiring jurisdiction over Alvarez.[174] However, when examined as a whole, the scope of the treaty and intentions of the parties in drafting the treaty show the fallacy of the majority's conclusion.[175] The majority ignores two basic rules of

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[170] *See, e.g.* Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S.Ct. 209 (1990) (without a protest from Honduras, Matta's claims that international law was violated, do not entitle him to relief); United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (Bahamian government made no protest); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (Panamanian and Venezuelan authorities did not object to the trial).

[171] Frisbie, *supra* note 28, at 520.

[172] *Id.*

[173] For discussion *see supra* notes 79-89 and accompanying text.

[174] Alvarez-Machain, *supra* note 3, at 2195.

[175] In the dissent, Justice Stevens stated: "[The] manifest scope and object of the treaty itself plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party." Alvarez, *supra* note 3, at 2199. Furthermore, the court in Verdugo-Urquidez stated that all these provisions "only make sense if they are understood as requiring each signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." Verdugo-Urquidez, *supra* note 121, at 1351.

interpretation: treaties are to be interpreted in the context in which the written words are used;[176] and treaties are to be construed as requiring the parties to carry out the provisions in good faith, in accordance with the ordinary meaning in light of the treaty's object and purpose.[177]

As stated above, in interpreting a treaty the starting point is "the text of the treaty and context in which the words are used."[178] The majority claims to have followed this procedure and has not found a specific provision prohibiting the abduction.[179] However, the majority's reading is narrow and fragmented. It fails to examine the provisions of the treaty in the setting of the whole treaty.

As Justice Stevens points out in his dissent, the Extradition Treaty is a comprehensive document which establishes the procedures by which one country gains custody of a criminal suspect from another country.[180] The document lists in considerable detail the extraditable offenses,[181] the process for extradition,[182] and the procedures for political offenses.[183] Furthermore, as both the majority and minority note, Article 9 expressly provides that neither contracting party is bound to deliver its own nationals, although it may do so at its own dis-

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176 *See* Air France v. Saks, *supra* note 78 at 397 (citing Maximov v. United States, 373 U.S. 49 (1963)).

177 Article 31(1)(c) of the Vienna Convention on the Law of Treaties states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose." Vienna Convention on the Law of Treaties, *supra* note 76.

178 Air France, *supra* note 78, at 397.

179 Alvarez, *supra* note 3, at 2193.

180 *Id.* at 2198.

181 Treaty of Extradition, *supra*, note 79, at art. 2. Article 2, which refers to the Appendix containing twenty-eight separate extraditable offenses and all willful acts punishable under the federal law of both states by a deprivation of liberty for more than one year.

182 Article 1(2) states:

> For an offense committed outside the territory of the requesting party, the requesting party shall grant extradition if:
>
> a. its laws would provide for the punishment of such an offense committed in similar circumstances, or
>
> b. the person sought is a national of the requesting party, and that party has jurisdiction under its own laws to try that person.

Id.

183 Article 5(1) states: Extradition shall not be granted when the offense for which it is requested is political. . . ." *Id.*

cretion.[184] It is difficult to believe that in light of the detailed provisions of the treaty, the United States and Mexico did not consider the treaty the exclusive means of jurisdiction. However, this is exactly what the majority concluded.

A further analysis of the context of the treaty shows the absurdity of the majority's conclusion. The majority failed to read the treaty as a whole, but instead, concentrated solely on each individual article. If it is true, as the majority stated, that the treaty is not the exclusive means of obtaining jurisdiction, then the provisions dealing with the limitation of nationals and the mandatory language, are worthless.

In order to gain a better perspective on the context of the treaty, the preamble states that the purpose of the treaty is to cooperate and foster mutual assistance.[185] In light of this stated goal, it is difficult to imagine that despite the more than eighty separate provisions of the treaty, the two countries viewed it as nothing more than an optional means of acquiring jurisdiction when it suited their needs. In effect the majority's failure to read the treaty as a whole has turned the provisions into "mere verbiage."[186]

Furthermore, the majority neglects to read into the treaty the duty of the parties to carry out the agreement in good faith, in accordance with the ordinary meaning of the terms, and in light of its object and purpose.[187] It is difficult to see how the majority's finding that the unilateral abduction was legal could facilitate the stated goals of the treaty which are "to cooperate more closely in the fight against crime, and to this end, to mutually render better assistance in the matters of extradition."[188] Furthermore, on a basic level of general international law, the majority's conclusion fails to further the goals of extradition treaties in general. A country's purpose in establishing an extradition treaty is to acquire a legal basis by which it can demand the return of a fugitive.[189] This furthers international

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184 Treaty on Extradition, *supra* note 87.

185 Treaty on Extradition, *supra* note 79, at preamble.

186 Alvarez, *supra* note 3, at 2198.

187 Vienna Convention on The Law of Treaties, *supra* note 76.

188 *Id.*

189 *See* GILBERT, *supra* note 53, at 33 (mutual legal assistance treaties . . . can be seen in broader forms of cooperation when meeting the problem of crimes or criminals that cross frontiers).

law by establishing a process, whereby the sovereignty and territorial integrity of States are protected and impermissible conduct is restricted.[190] The majority's interpretation of the treaty makes this process meaningless. It ignores the underlying goal of the treaty which is mutual respect for state sovereignty.

The majority's refusal to recognize Article 9 as the exclusive means of acquiring jurisdiction over a national further exhibits the majority's failure to read into the treaty the duty of the parties to carry out the treaty in good faith. Article 9 takes into account Mexican law which prohibits the extradition of nationals. However, the majority's decision makes light of Mexico's domestic legal order by allowing the United States to violate its agreement. In effect, the majority's holding means that regardless of the good faith effort of both countries to establish a system of extradition, either nation is free to violate the terms of the treaty. This interpretation clearly ignores the most basic notion that agreements are to be carried out in good faith.

However, even assuming that the majority correctly interpreted the treaty as not constituting the exclusive means of obtaining jurisdiction, the majority fails to interpret it consistently with principles of international law. Customary international law has long recognized that a state must not violate the territorial sovereignty of another state.[191] This theory is rooted in the principle that the jurisdiction of a state within its own territory is exclusive and absolute.[192] Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, its law enforcement officers cannot arrest a suspect in another state without that state's permission.[193]

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190 *See* BASSIOUNI, *supra* note 16, at 194 (international law is designed to protect the sovereignty and territorial integrity of States).

191 1 LASSA OPPENHEIM, INTERNATIONAL LAW 295 (H. Lauterpacht ed., 1955).

192 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). Justice Marshall went on to explain:

> [Sovereignty] is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

Id. at 136.

193 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987) (state's law enforcement officers may exercise their functions in the

Therefore "the first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state."[194]

The majority's decision refuses to acknowledge this principle. Instead the majority reasons that it would require too much of an inferential leap to imply a term prohibiting abduction from general principles of international law.[195] This holding directly contradicts the universal view of a state's sovereign right not to have its territorial integrity compromised by another state. This central principle is embodied in Chapter 17 of The Charter of the Organization of American States,[196] and Article 2 of the Charter of The United Nations.[197] It has also met wide acceptance in judicial decisions[198] and international conventions.[199] Yet, besides this universal view, the majority refuses to interpret the treaty as implicitly prohibiting abduction. This conclusion is illogical. To infer respect for state sovereignty is not a great leap; rather it merely requires the recogni-

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territory of another state only with the consent of the other state, given by duly authorized officials of that state). *Id.*

[194] The S.S. Lotus (Turkey v. France), 1927 P.C.I.J. (ser. A) No. 10, at 18 (1927).

[195] Alvarez, *supra* note 3, at 2196.

[196] Charter of the Organization of American States, April 30, 1948, 2 U.S.T. 2416, 2420, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. Article 17 provides that 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." *Id.*

[197] U.N. Charter art. 2, ¶ 4. Article 2, Paragraph 4 obligates "all members to refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . . ."

[198] *See supra* notes 200 and 202; *see also* The Savarkar Arbitration case, where the Permanent Court of Arbitration held that implicit in its judgment, if the return of a fugitive would have been by force, then France could have the demanded prisoner's return on the grounds that it violated France's sovereignty. Savarkar Case (Fr. v. Gr. Brit.), Hague Ct. Rep. (Scott) 275 (Perm. Ct. Arb. 1911).

[199] Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) (proposed). Article 16 stated:

> 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. at 623.

tion that the principle of sovereignty underlies all relations between states. As such the majority fails to recognize that treaties are interpreted against a backdrop of international law, and that international law delineates the circumstances under which one party will be permitted to rescind the treaty or take other steps.[200] This exhibits the Court's lack of understanding of international law and a tolerance for the violation of such.

Furthermore, the majority may have violated United States' domestic law by refusing to apply international law in reaching its decision. Under *The Paquete Habana*,[201] American courts are obligated to apply customary international law unless it is abrogated by a treaty, executive order, or legislative act.[202] None of these situations exist in this case. Whether or not the Court's interpretation of the Treaty is correct, the Treaty by no means expressly authorizes abduction. Likewise, neither the Senate nor President expressly authorized the abduction. Therefore, the majority's refusal to apply international law in its decision not only violates international law but also domestic law.

By failing to affirm the lower courts' holdings that the district court did not have jurisdiction over Alvarez, the majority has sanctioned the practice of extraterritorial abductions. One can interpret the majority's decision as sanctioning the United States' methods as a means of getting revenge for the violent murder of Camarena.[203] If the majority affirmed the lower courts' decisions it could have remedied the United States' egregious actions. Instead the majority chose to endorse the United States' actions even though they violated the Extradition Treaty as well as the international principle of State sovereignty.

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[200] Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992); James C. Wolf, Comment, *The Jurisprudence of Treaty Interpretation*, 21 U.C. DAVIS L. REV. 1023 (1988).

[201] *See supra*, note 71 and accompanying text.

[202] *Id.* at 700.

[203] Alvarez, *supra* note 3, at 2205. Justice Stevens, in his dissent warned against the Court allowing the executive to use the courts to gain revenge for the murder of Camarena. *Id.* He stated: "The desire for revenge exerts [a pressure] . . . but it is precisely at such moments that we should remember and be guided by our duty to 'render judgment evenly and dispassionately according to law'. . . ." (quoting United States v. Mine Workers, 330 U.S. 258, 342, 67 S.Ct. 677, 720, 91 L.Ed. 884 (1947) (Rutledge, J., dissenting)). *Id.*

V. CONCLUSION

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[204]

In deciding that the abduction of Alvarez was legal, the Supreme Court has sanctioned the use of extraterritorial abductions as a means of gaining jurisdiction over an individual. In doing so, the Court has established a dangerous precedent that someday may be used against the United States.

In recognizing the potential impact of its decision, Justice Stevens stated: "[t]he way we perform . . . in a case of this kind sets an example that other tribunals in other countries are sure to emulate."[205] Although it may not be the Court's role to stop the practice of extraterritorial abduction, it is critical that the Court does not contribute to the problem by issuing flawed and unsound decisions.

As a result of the *Alvarez* decision, the Court has made a mockery of Mexico's sovereignty, and nullified the object and purpose of the United States-Mexico Extradition Treaty. Further, it has extended the Ker-Frisbie doctrine to justify state-sponsored abductions. However, given the widespread opposition to this decision it is unlikely that it will be accepted or tolerated in the international community.[206] It is unfortunate that the Court did not feel compelled to respect Mexico's protests. In refusing to do so, it has sanctioned the violation of international law and has furthered the practice of

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[204] Alvarez, *supra* note 3, at 2206 (quoting THOMAS PAINE, THE COMPLETE WRITINGS OF THOMAS PAINE, 588).

[205] *Id.* at 2205-6.

[206] The international community expressed disdain for the decision. The heads of the government of the Caribbean Community (Caricom) issued a statement after their summit in Port of Spain denouncing the decision: "[we] emphatically reject the notion that any state may seek to enforce its domestic law by abduction of persons from the territory of another . . . so as to bring them within its jurisdiction in order to stand trial." *U.S. 'Right To Abduct' Rejected By Angry Caricom Leaders*, Latin America Regional Reports: Caribbean, July 23, 1992, at 8. On June 16, Bolivian Foreign Ministry official Armando Loaizo told reporters the decision represents the United States' imposing force over international law. *Reaction To U.S. Supreme Court Decision Endorsing Right To Kidnap Foreigners For Prosecution In U.S.*, Notisur, June 30, 1992, at § Multilateral issues. On June 18, Brazilian Foreign Minister Celso Lafer condemned the United States' decision as contrary to the Organization of American States Charter which prohibits intervention in the domestic affairs of foreign nations. *Id.*

extraterritorial abductions as a valid means of obtaining jurisdiction over an individual.

APPENDIX

On December 14, 1992, on remand from the Supreme Court, Judge Edward Rafeedie of the Central District Court of California acquitted Alvarez of all charges against him.[207] In dismissing the case, Judge Rafeedie said "the evidence against Dr. Humberto Alvarez-Machain, presented during the two weeks of testimony, had been based on 'hunches' and the 'wildest speculation' and had failed to support the charges that he had participated in the torture of the drug agent, Enrique Camarena Salazar."[208] Alvarez is now back in Guadalajara, Mexico.[209]

Joseph Miller

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[207] Seth Mydans, *Mexican Doctor Freed in Agent's Killing*, N.Y. Times, Dec. 15, 1992, at A20.

[208] *Id.*

[209] *Id.*