ARTICLE

Monstrous Decision: Kidnapping is Legal

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Introduction

Ethnocentrism leads to a blind and distorted vision of the world—that all countries are wrong except one's own. A superpower which believes that only its own constitutional guarantees should be respected exhibits disdain for international law and the world community.

Modern times should bring more international cooperation, more trade, and more communication. They should bring understanding among the nations of the world and mutual respect among legal systems. Universal cooperation is not simply important; it is opprobrious to show disrespect for international law. This Article focuses primarily on explaining the legal procedure of extradition and criticizing its lawless alternative—abducting people from other countries.

The United States Supreme Court's 1992 decision in *United States v. Alvarez-Machain*[1] reflects the Court's current disdain for international law and fails to interpret the bilateral extradition treaty between the United States and Mexico[2] in light of the Vienna Convention on the Law of Treaties[3] and the Charter of the United Nations. The Supreme Court's decision ominously fails to recognize the incorporation of international law into American law.

In *Alvarez-Machain*, the Court held that the United States government's abduction of a foreign citizen from his homeland would not prohibit his trial in a United States court for violations of this country's criminal laws.[4] The decision recognized that a defendant may not be prosecuted in violation of the terms of an extradition treaty,[5] but held that the United States-Mexico extradition treaty was not violated in this

1. 112 S. Ct. 2188 (1992).

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

3. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27 (1969) [hereinafter Vienna Convention].

4. *Alvarez-Machain*, 112 S. Ct. at 2197. Dr. Humberto Alvarez-Machain, a gynecologist accused of using his medical expertise to keep Enrique Camarena, an agent with the United States Drug Enforcement Agency (DEA), alive while Camarena was tortured and interrogated in Mexico in 1985, was abducted from his office in Guadalajara in 1990 and forced aboard an airplane to El Paso where he was then "arrested" by U.S. officials. The United States Supreme Court ruled that his detention did not violate the extradition treaty between the United States and Mexico. On December 14, 1992, after spending three years in jail, he was acquitted by District Judge Edward Rafeedie because of lack of evidence against him. He sued DEA officials and filed a separate $20 million damage claim against the Justice Department on July 9, 1993 for violations of his civil rights. *See Pandora's Box: Supreme Court ruling on kidnapping out of bounds*, HOUS. CHRON., Editorial, June 16, 1992, at A18; *Doctor Abducted in Camarena Case Sues U.S. Officials*, Reuter, July 9, 1993, available in LEXIS, Nexis Library, REUTER File.

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

case[6] because the treaty does not expressly prohibit abduction.[7] The Court concluded that general principles of international law provide no basis for interpreting the treaty to include an implied prohibition of international abductions. While conceding that Alvarez-Machain may have been correct in that his abduction was shocking and in violation of general international law principles, the decision whether he should be returned to Mexico was a matter for the executive branch.[8] Paradoxically, six months after this decision, United States District Judge Edward Rafeedie acquitted Dr. Humberto Alvarez-Machain for lack of evidence against him.[9] However, the damage to international law had already been done.

The *Alvarez-Machain* decision not only damages the constitutional guarantees protected by the Mexican Constitution[10] and the sovereignty of Mexico, but also opens the way for United States police departments to enforce laws by violating the national sovereignty of other countries[11] and the constitutional rights of those countries' citizens.

The world's reaction to the *Alvarez-Machain* decision suggests the seriousness of this deviation from international law,[12] a deviation that affects the whole community of nations. The President of the Nicara-

6. *Id.* at 2197.

7. *Id.* at 2193-95.

8. *Id.* at 2196.

9. Lou Cannon, *U.S. Judge Acquits Mexican in DEA Agent's '85 Killing—Physician was Abducted, Placed on Trial*, WASH. POST, Dec. 15, 1992, at A1.

10. CONSTITUCIÓN, arts. 14, 16 (Mex.).

11. Examples abound: In Texas, a Jefferson County District Attorney investigator and an officer for the Port Arthur Police Department face a warrant order issued against them by a Mexican Federal Judge in Piedras Negras, Coahuila, for the 1989 kidnapping of Mexican citizens Omar Ayala and Hector Morales Villa. *See* Proceso Penal: 98-989, Delito: Privación Ilegal de la Libertad y otros, Procesado: Federico Rivera Balderas y otros, Juzgado Tercero de Distrito en el Estado de Coahuila (copy on file with the *Hastings Constitutional Law Quarterly*).

Also in Texas, the court of appeals in El Paso held that the "isolated, spontaneous, illegal seizure[]" of Sylvia Day in Mexico by members of the FBI without resort to judicial process or international extradition treaty procedure would not support challenge to personal jurisdiction, absent abuse or treatment shocking to the conscience. Day v. Texas, 763 S.W.2d 535, 536 (Tex. Ct. App. 1988); *see* Quintero v. Texas, 761 S.W.2d 438, 441 (Tex. Ct. App. 1988).

A United States Border Patrol agent and a deputy from the sheriff's department in Cochise, Arizona have been implicated in the June, 1992 kidnapping of Mexican citizen Teodoro Romulo Lopez. The Mexican federal attorney's office is formulating criminal charges against the officers. Gregory Katz, *Mexico Demands Extradition of Two U.S. Law Officers*, HOUS. CHRON., June 19, 1992, at A23.

12. *See* Brief for the Government of Canada as *Amicus Curiae* in Support of Respondent in *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-712), *reprinted in* 31 I.L.M. 9119 (1992). Canada held similar views to those of Mexico and presented the results of a ten-country poll that reflected unanimous disapproval of international abduction practices. *Id.* at 6. This document was published by the Mexican Foreign Ministry. *See Secretaría de*

guan Permanent Commission for Human Rights (CPDH) said the ruling allows the United States government to "solve a crime with a crime."[13] Central American nations are now skeptical and distrustful of any possible future agreements with the United States.[14] Costa Rican deputies have said the ruling could present a dangerous "boomerang" to the United States since other countries may now allow kidnapping of United States nationals in the United States or abroad.[15] The President of the Salvadoran Supreme Court stated that the court would not tolerate abductions of fellow nationals under any circumstances, adding that the armed forces would protect Salvadorans threatened by such action.[16] Keith Knight, Jamaica's National Security Minister, stated that any North American caught in the act of kidnapping a Jamaican citizen would have to face the brunt of local legislation.[17] Barbados and St. Lucia have also spoken out against the decision. Senator Mary Francis of St. Lucia said, "America is going crazy, it is replacing a sense of justice with a sense of 'might is right.' "[18] Argentine Foreign Minister Guido di Tella said that his country would punish anyone attempting to kidnap a fellow national.[19] The Bolivian vice president called the decision a clear violation of international law and an "illogical and unilateral" measure.[20] The Brazilian Foreign Minister condemned the United States decision as contrary to the Organization of American States (OAS) Charter,[21] which prohibits intervention in the domestic affairs of foreign nations.[22] He added that the violation of Mexican territorial sovereignty "appears clear"

Relaciones Exteriores, Limits to National Jurisdiction: Documents and Judicial Resolutions on the Alvarez-Machain *Case*, Mexico, 1992.

For a specific case of abuse against the sovereignty of Canada, see *Jaffe v. Boyles*, 616 F. Supp. 1371 (C.D.N.Y. 1985). Sidney Jaffe was abducted from his Toronto home in 1981 and taken to Florida to stand trial for violating Florida law. *Id. See also* Jaffe v. Dearing, 1991 Ont. C. J. LEXIS 1602.

13. *Supreme Court Ruling Clouds U.S.-Central American Relations*, Notimex, Mexican News Service, June 18, 1992, available in LEXIS, Nexis Library, INTL File.

14. *Id.*

15. *Id.*

16. *Latin American Nations Fight U.S. Supreme Court Decision*, Notimex, Mexican News Service, June 18, 1992, available in LEXIS, Nexis Library, INTL File.

17. *Caribbean: Region Angry at U.S. Supreme Court Ruling*, Inter Press Service, June 18, 1992, available in LEXIS, Nexis Library, INPRES File.

18. *Id.*

19. *Latin American Nations Fight U.S. Supreme Court Decision, supra* note 16.

20. *Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S.*, NotiSur—S. Am. Pol. Affairs, June 30, 1992, available in LEXIS, Nexis Library, INTL File.

21. Charter of the Organization of American States, *opened for signature*, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter], *amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607.

22. *Id.* art. 20 (prohibiting the use of force by a foreign power).

in the *Alvarez-Machain* case.[23] The decision was also condemned by Chile, Colombia, Cuba, Uruguay, and Venezuela.[24]

Outside the hemisphere, the Arab countries also condemned the decision. An editorial from a mass circulation newspaper in Egypt said, "We doubt that those who issued this ruling are really men of the law or have even studied the alphabet of the law."[25] In Rabat, a newspaper called the Supreme Court ruling "an amalgamation of executive and judicial powers" that "justifies . . . the kidnapping of heads of state . . . in the Third World."[26] The criticisms ring true—it is logical for many outside the United States to view the Supreme Court's decision as an expression of superpower geopolitics.

The Court's decision has attracted domestic critics as well. An editorial from *The Houston Chronicle* called the Supreme Court decision a "Pandora's Box," and added that disregarding the law is no way to pursue justice.[27] Unfortunately, the term "Pandora's Box" is apt. The decision not only invites other countries to perform their own abductions, it appears to sanction federal, state, county, and city law officers' performance of abductions from any country in the world. Additionally, the decision suggests that the United States executive branch may disregard not only the United States' bilateral extradition treaties, but any kind of bilateral treaty. The *Los Angeles Times* called *Alvarez-Machain* "a pyrrhic victory" for the United States, a tool of extremely dubious value that could backfire.[28] "If we can snatch anyone we want, whenever we want, wherever we want, why bother with legal niceties at all?"[29]

An even more pessimistic argument is that the Supreme Court is just lifting the barriers that protect human rights and tilting the balance of law in favor of law enforcement officers. An unspoken policy differentiates on the basis of nationality, and the civil rights of foreigners are not weighed heavily when the unrestricted power of the American executive branch, including the law enforcement officer, is on the other side of the

23. *Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S.*, *supra* note 20.

24. *Id.*

25. *Egyptian Press Attacks U.S. Kidnap Ruling*, Reuter Library Report, June 18, 1992, available in LEXIS, Nexis Library, LBYRPT File.

26. *Id.*

27. *Pandora's Box*, *supra* note 4, at A18.

28. *Jeopardizing Relations with Mexico: High court ruling justifies dangerous 'snatch' technique in notorious Camarena case*, L.A. TIMES, Editorial, June 16, 1992, at B6.

29. *Id.* Compare this sentiment with Article 1 of the Mexican Constitution which protects the rights of foreigners and Mexican nationals equally. *See* CONSTITUCIÓN art. 1 (Mex.); *see also infra*, note 48.

legal equation.[30]

This Article explores a wide spectrum of issues which spring from the Supreme Court's decision in *United States v. Alvarez-Machain*. Part I addresses kidnapping within the context of human rights policy, international law, and national sovereignty.

Part II analyzes the law of treaties, focusing on bilateral extradition treaties and court decisions in this field, including those by the International Court of Justice, the judicial arm of the United Nations. An improper interpretation of a bilateral extradition treaty affects not only the treaty with Mexico, but any treaty with other countries. This part examines the United States' intentions in signing its treaties.

Part III discusses how international kidnapping affects the community of nations as a whole. The analysis focuses on customary and conventional international law as the "Supreme Law of the Land" under the United States Constitution.[31]

Part IV examines *Alvarez-Machain* in the context of the preceding analyses and critiques the Court's legal reasoning as well as its politically-motivated decision-making.

Part V considers an array of remedies, suggesting that solutions should be explored before the United Nations and the Organization of American States. This Article mentions that, in addition to exploring other viable remedies, Congress should expressly prohibit international kidnapping and similar violations of international law.

I. Kidnapping, Human Rights, and International Law

That no government may use force in the territory of another sovereign state is a well-established and revered principle. It is as old as the concept of sovereignty and finds its modern expression in the Charter of the United Nations.[32] Most modern governments have come to agree that states must conduct their foreign affairs according to international law. The contrary would lead to chaos and the domination of force over reason and justice.

Pursuant to international law, neither the United States nor Mexico can use force in the territory of another country. The United Nations Charter describes alternative paths for nations to resolve their interna-

30. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264-66 (1990). In *Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment's protection does not apply to foreigners who have not developed a sufficient connection with the United States so as to be considered part of the American community. *Id.*

31. U.S. CONST. art. VI, cl. 2.

32. U.N. CHARTER art. 2, paras. 2, 4.

tional conflicts.[33] The alternatives must be exhausted before a nation may resort to the use of force against another country.[34] An expression of this idea was recently drafted into the United Nations Convention Against Illicit Traffic in Narcotic Drugs, which came into force on November 11, 1990.[35] The Convention states that a party "shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law."[36] The language was introduced by delegates from Canada and Mexico[37] and reflects an enduring commitment to international law despite domestic pressures to expedite the war on drugs. The temptation to expedite social policy by side-stepping international law is not new. In 1968, Professor M. Cherif Bassiouni stated:

> The most serious threat to world public order lies in the practice of unlawful seizure of a person in a foreign state and his abduction. The *Eichmann* and *Tschombe* cases will remain landmarks of such abusive practice. The abduction or kidnapping is a transgression against the sovereignty of the state wherein the fugitive was taken by agents of another state. It is an affront of the asylum state and a challenge to the lawfulness of orderly world relations. Not to mention the individual's human rights.[38]

The costs to the integrity of international relations and human rights are too great to justify such means.

The Mexican Federal Constitution does not allow foreign police officers to arrest or punish offenders in Mexican territory.[39] Very specifically, it states, as an individual guarantee, that only the Mexican Public

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33. U.N. CHARTER art. 33.

34. *Id.*

35. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/15 (1988), *reprinted in* 28 I.L.M. 493 (1989) [hereinafter U.N. Convention].

36. *Id.* art. 2, § 3.

37. Ruth Wedgwood, *Cross-Border Kidnap Banned by U.N. Treaty*, WALL ST. J., July 23, 1992, at A13.

38. M. Cherif Bassiouni, *International Extradition in American Practice and World Public Order*, 36 TENN. L. REV. 1, 11-12 (1968) (citations omitted) [hereinafter Bassiouni, *International Extradition*].

39. CONSTITUCIÓN arts. 1-26 (Mex.) (individual guarantees). The Mexican Constitution, as well as other Mexican laws, are binding on everyone in Mexico. Foreigners, including officials from other countries, are not excluded from obeying Mexican laws. When American citizens step onto Mexican soil they are expected to respect Mexican law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 441(1)(a) (1987) [hereinafter RESTATEMENT]. Additionally, the extradition treaty between the United States and Mexico states that the procedure of extradition is subordinated to the laws of the requested state. *See* Extradition Treaty, *supra* note 2, art. 13, 31 U.S.T. at 5069 (recognizing the binding nature of the Mexican constitutional guarantees).

Ministry (an institution comprising lawyers of the General Attorney's office) with the help of the Judicial Police can prosecute crime in Mexico.[40]

Every country needs cooperation in the fight against crime. There must be a legal instrument to prevent suspects from escaping justice by crossing a border. At the same time, such an instrument must honor the rights of the individual by submitting to the country's due process where the suspect is found.

Under the Mexican Constitution, no one can be deprived of life, freedom, or property except by a judicial hearing which honors the essential requirements of judicial process.[41] This means that everyone who is arrested in Mexico has the right to a lawyer, to obtain a hearing before a judge, and to challenge the arrest or the legal procedure against him before a Mexican tribunal.

Extradition is a mechanism that allows the prosecution of a crime—even when the suspect escapes to another country—without jeopardizing the human rights of the citizens of that neighboring country. The extradition procedure protects the individual rights of the extraditable person because it always requires a hearing before a judge of the requested nation.

To initiate the application for extradition to the United States, the following procedure is observed: An application for extradition must be presented to the United States Secretary of State. If the alleged offense is within the jurisdiction of a state, the application passes from the governor of that state to the Secretary of State. If the offense is against the law of the United States, the request passes from the Attorney General of the United States to the Secretary of State.[42] Soon after that, the Secretary of State, who is in charge of foreign affairs, transmits the petition to the requested country through a diplomatic letter.

The Bilateral Extradition Treaty between the United States and Mexico states that a request for extradition shall be processed in accordance with the laws of the requested party.[43] When the United States Secretary of State then makes a request for extradition from Mexico, Mexican law specifies the procedures to be followed. According to the

40. "In the United Mexican States all individuals shall enjoy the guarantees granted by this Constitution, they can not be restricted or suspended but in the cases and according to the conditions described by this Constitution itself." CONSTITUCIÓN art. 21 (Mex.) (translation by author). *See* Extradition Treaty, *supra* note 2, art. 13, 31 U.S.T. at 5069.

41. CONSTITUCIÓN art. 14 (Mex.).

42. *See* Bassiouni, *International Extradition*, *supra* note 38, at 6.

43. Extradition Treaty, *supra* note 2, art. 13, 31 U.S.T. at 5069.

Mexican Extradition Act,[44] the petition for extradition must be presented to the Mexican Foreign Ministry, which will, in turn, ask the General Attorney's Office to request a warrant order from the District judge.[45] The bilateral extradition treaty instructs that the competent legal authorities of the requested party shall employ all legal means within their power to obtain from the judicial authorities the decisions necessary for the resolution of the request for extradition.[46] The Mexican Constitution states that no treaty can be enacted that "adversely affects the guarantees and rights granted by the Constitution for man and Citizen."[47] Indeed, the Mexican Constitution establishes that every individual, including foreigners, will enjoy the guarantees provided by its chapter on individual rights.[48]

The main objection to a "quick surrender," or transfer of an individual between governments without due process under the requested nation's constitution, is that such an "under-the-table" transaction reflects a lack of respect for human rights. Kidnapping[49] a suspect is even more repugnant than a "quick surrender." Professor Bassiouni refers to illegal seizures as "illegal acts . . . which cause damage to the person or property of the nationals of a foreign State."[50] He adds that this practice violates

44. Ley de Extradición International (D.O., Dec. 29, 1975) (Mex.) [hereinafter International Extradition Act].

45. *Id.* arts. 21, 24, 25.

46. *Id.*

47. CONSTITUCIÓN art. 15 (Mex.).

48. On this point the Mexican Constitution goes further than its United States counterpart in that the Mexican Constitution cannot be interpreted so that its constitutional rights are reserved for Mexican citizens and not foreigners. *See* CONSTITUCIÓN, art. 1 (Mex.).

49. For a definition of the crime of kidnapping in Mexico, see the chapter on deprivation of liberty and other guarantees in the Mexican Federal Penal Code. C.P.D.F. arts. 364-366 (Mex.). *See* Villareal v. Hammond, 74 F.2d 503, 505 (5th Cir. 1934). In *Villareal*, American bounty hunters pursued Lopez, an escaped bond defaulter, into Mexico where they effected his forcible seizure and delivered him to waiting authorities in Texas. The court stated:

> [T]he fact that the government of Mexico has no doubt that it [constituted a kidnapping], coupled with the further fact that what appellants did is generally and universally regarded under the laws of civilized nations as kidnapping, would cause the doubt to be resolved in favor of the demanding nation. But resort to construction is not necessary here, for it may not be doubted that the evidence was fully sufficient to sustain the charge under the treaty provision, under the statutes of Mexico and under those of Texas. Appellants did not do what they insist over and over again would not have been an offense, arrest Lopez in Mexico for delivery to the lawfully constituted Mexican authorities. They did not arrest him at all. In violation of the sovereignty of the state where he had sought asylum, they seized him unlawfully, and with force and arms took him unlawfully out of that state and into another to dispose of him at their will and pleasure to obtain a reward.

Id. at 505-06 (citations omitted).

50. M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 48 (1973) [hereinafter Bassiouni, *Unlawful Seizures*].

the protection of human rights referred to in the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.[51] As Bassiouni notes:

> The processes of extradition involve the requested and requesting states, but there are two additional participants whose interests must be considered: the individual and the world community. For the first participant, certain minimum human rights must be protected; for the second, minimum world order must be preserved.[52]

Additionally, under the Charter of the United Nations, members shall fulfill *in good faith* the obligations assumed by them in accordance with the Charter.[53] All U.N. members shall refrain 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.[54]

The United Nations Security Council, in reference to the abduction of Adolf Eichmann from Argentina to the territory of Israel, stated that "the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations."[55] The resolution noted that "the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded, creating an atmosphere of insecurity and distrust incompatible with the preservation of peace."[56] The resolution requested the government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.[57]

In *United States v. Toscanino*,[58] the Second Circuit stated that the United States had agreed in two international treaties to respect the sovereignty of the country where the abduction took place.[59] Those treaty provisions are article 2(4) of the United Nations Charter, and article 17

51. The United Nations Charter refers to respect for human rights in several articles. *See* U.N. CHARTER arts. 1, 13, 55, 56, 62, 76. *See also* Universal Declaration of Human Rights G.A. Res. 217A(III) U.N. GAOR, 3rd Sess., arts. 9, 10, 12, U.N. Doc. A/8810 (1948) (disapproving arbitrary arrest or detention and endorsing right to fair trial and public hearing); International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 9, 14, 17, 999 U.N.T.S. 171 (same).

52. Bassiouni, *Unlawful Seizures*, *supra* note 50, at 25.

53. U.N. CHARTER art. 2, para. 2.

54. *Id.* para. 4.

55. *See* S.C. Res. 138, U.N. SCOR, 15th Sess., 865th Mtg., U.N. Doc S/4349 (1960). The United States voted affirmatively on this resolution.

56. *Id.*

57. *Id.*

58. 500 F.2d 267 (2d Cir. 1974). Toscanino, an Italian citizen, claimed he was abducted from his home in Uruguay by United States agents, tortured, and brought to the United States to face narcotics charges. *Id.* at 268-271.

59. *Id.* at 277.

of the Charter of the Organization of American States.[60] The *Toscanino* court also noted that:

> [The courts] must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.[61]

The *Restatement of Foreign Relations Law* states that United States law enforcement officers may exercise their functions in the territory of another sovereign state *only* with the consent of that state and in compliance with the laws both of the United States and of that country.[62] The *Restatement* adds that the acts and omissions of United States officials are subject to the constraints of the United States Constitution whether they are committed in the United States or abroad.[63] The United States Constitution recognizes both customary and conventional international law as the Supreme Law of the Land.[64] Thus, an executive policy which does not recognize the rules of international law is an unconstitutional policy.

The *Restatement* describes a number of cases where offenders (kidnappers or other law-breakers) were punished by the state whose territory was violated.[65] In 1973, an Italian inspector was arrested in Switzerland for making inquiries about movement of contraband toward Italy.[66] Another Italian policeman was prosecuted in France when he drew his gun and wounded a suspect.[67] Two French customs officials were convicted of committing prohibited acts in favor of a foreign state when they traveled to Switzerland on several occasions in 1980 to interrogate a former official of a Swiss bank.[68] Finally, in the nineteenth cen-

60. *Id.*

61. *Id.* at 275.

62. RESTATEMENT, *supra* note 39, § 433(1). Even though § 433(2) of the *Restatement* mentions that a person apprehended in a foreign state may be prosecuted in the United States unless his detention was carried out in a manner shocking to the conscience of civilized society, this clause needs to be interpreted in light of § 433(1) and other dispositions of the *Restatement.*

63. *Id.*, § 433 cmt. a.

64. *See* discussion *infra* Part III; *see also* U.S. CONST. art. II, § 1, cl. 8, and § 3; *id.* art. III, § 2; *id.* art. VI, cl. 2; *id.* amend. IX; *Henfield's Case*, 11 F. Cas. 1099, 1101 (C.C.D.Pa. 1793); THE FEDERALIST No. 3 (John Jay); RESTATEMENT, *supra* note 39, § 111 cmt. e; Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 77-78, 84-87 (1990).

65. RESTATEMENT, *supra* note 39, § 432 n.1.

66. *Id.*

67. *Id.*

68. *Id.*

tury Koszta affair, the United States Secretary of State determined that Austrian functionaries had obtained possession of the person of Koszta, not in a legal manner, but by violating the civil laws of Turkey.[69]

As demonstrated by the above cases, no state is allowed to use force in foreign countries unless stringent requirements are fulfilled. Neither the United States nor Mexico can surrender suspects to foreign authorities unless that individual's constitutional rights are protected.[70] The defendant must have an opportunity to challenge the arrest in the country where it takes place, according to the constitutional guarantees that exist in that territory.[71] Moreover, no arrest or agreement may be made in violation of the arrested individual's fundamental human rights.[72] As a result of these requirements, no state is allowed to kidnap suspects from other countries.

Mexico can extradite suspects requested in accordance with its International Extradition Act or an extradition treaty. In both cases, the fundamental rights of the suspects are protected because the defendant is able to challenge the detention before a Mexican court.[73] International law, which is part of the legal systems of both Mexico and the United

69. *See* Letter from W.L. Marcy, Sec. of State, to Mr. Hülsemann (Sep. 26, 1853), *in* 2 FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 483-86 (1886). Koszta was a Turkish born man who later became a U.S. citizen. He was abducted by Austrian officers in Turkish waters without Turkish consent and, thus, in violation of international law. The U.S. sent a Diplomatic Letter to Austria complaining of that violation. *See id.*

70. The *Restatement* only authorizes law enforcement in other states when it is done in compliance with other state's laws. Obviously, constitutional guarantees need to be respected, including the right to a court hearing when threatened with a deprivation of liberty. *See* RESTATEMENT, *supra* note 39, § 433(1)(a)-(b).

71. *Id. See* CONSTITUCIÓN arts. 1-24 (Mex.) (individual guarantees).

72. In 1981, the U.N. Human Rights Committee decided that the abduction of an Uruguayan refugee from Argentina by Uruguayan security officers constituted arbitrary arrest and detention in violation of Article 9(1) of the International Covenant on Civil and Political Rights. *See* RESTATEMENT, *supra* note 39, § 432 n.1 (citing Report of the Human Rights Committee, 36 U.N. GAOR Supp. (No. 40) at 176-84, 185-89, U.N. Doc. A/36/40 (1981)).

73. *See* International Extradition Act arts. 24-26 (D.O., Dec. 29, 1975) (Mex.). The Act provides that the detainee shall appear before the District Court and be allowed to file objections to the detention on his own or by his lawyer. The detainee must be informed of the reason for the arrest, must have a state-appointed lawyer when unable to pay for his own defense, and, in some cases, be freed on bond. When the detention takes place under an extradition treaty, the instrument must provide for the respect of the constitutional guarantees, or the treaty is invalid. *Id.*; *see* CONSTITUCIÓN art. 15 (Mex.).

The Extradition Treaty between the United States and Mexico provides that the requests for extradition are processed in accordance with the laws of the requested country. The requested country makes arrangements necessary for internal procedures arising out of the request for extradition. Competent authorities are authorized to employ all legal means within their power to obtain from the judicial authorities decisions necessary for the resolution of the extradition request. Extradition Treaty, *supra* note 2, art. 13, 31 U.S.T. at 5069.

States, forbids violations of human rights and guarantees a court hearing in the country where the person is arrested.[74]

Respect for the constitutional rights of a detainee within its territory exists under the United States Constitution.[75] The United States Extradition Statute, however, confers the power to extradite only during the existence of an extradition treaty with a foreign government.[76] Indeed, the United States Supreme Court has said that the president's power, in the absence of a statute conferring an independent power, must be found in the terms of the treaty.[77] The United States has long recognized the need to operate through extradition treaties as the legal way of international cooperation against crime. As a result, there have been about 100 bilateral extradition treaties ratified by the United States.[78]

The United States Supreme Court has recognized the international law principle that a demand for extradition need not be granted unless it conforms to the formalities and conditions prescribed in the treaties, internal legislation, and constitutional guarantees of the asylum nation. In *Factor v. Laubenheimer*,[79] the Supreme Court stated,

> [T]he principles of international law recognize no right to extradition apart from treaty. While a government may, *if agreeable to its own Constitution and laws*, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.[80]

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74. *See* sources cited *supra* note 51.

75. Unfortunately, some authors seem to support the position that executive authority may violate international law, including international human rights. For an article concerning claims of executive immunity from law and trends in judicial decisions, see Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HAST. CONST. L.Q. 719 (1982) [hereinafter Paust, *Is the President Bound*].

76. 18 U.S.C. § 3181 (1988).

77. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 18 (1936).

78. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1992 (1992) [hereinafter TREATIES IN FORCE].

79. 290 U.S. 276 (1933).

80. *Id.* at 287 (citations omitted, emphasis added). After a petition of the British Consul, a U.S. Commissioner held Mr. Factor in custody for extradition to England. Mr. Factor, an English citizen, was charged with receiving money fraudulently obtained in London. However, those acts were not considered crimes in the state of Illinois where he was arrested. He filed for habeas corpus relief on the basis that one requirement of the extradition treaty was not met and therefore England did not have the right to demand his extradition. The Supreme Court admitted that the legal right to demand his extradition and the correlative duty to surrender him exists only when created by treaty. However, the Court decided that the treaty was applicable in this case. *Id.* at 304.

Based on this language and the overwhelming force of international law and tradition, it appears that the only valid means for moving a defendant from a foreign nation into the United States is under the authority of a mutual extradition treaty and after satisfying the constitutional rights of the requested nation as well as the human rights guaranteed by international law.

II. Bilateral Extradition Treaties and the Law of Treaties

The United States can extradite suspects from its territory only when there is an extradition treaty.[81] Mexico can extradite from its territory on the basis of an extradition treaty or in accordance with its International Extradition Act.[82] In all cases, however, the constitutional guarantees and other human rights, granted by the constitution of the asylum state and international instruments[83] should be respected.

In the bilateral relationship between the United States and Mexico, there is a single extradition treaty.[84] There is therefore no other way to obtain custody of a suspect who is physically in the other country without violating that individual's human rights, customary international law, and the law of the treaties.

To arrive at this conclusion, one must look at how treaties are interpreted. This Part first examines some general principles of the law of treaties and bilateral extradition treaties.

The federal judiciary "has the prerogative of interpreting and applying treaties and federal legislative enactments in accordance with the applicable provisions of the United States Constitution."[85] Professor Bassiouni, after considering several case precedents, summarizes the rules of treaty interpretation as follows:

1. The purpose of treaty interpretation is to ascertain the plain meaning of the language that comports with the parties' intentions.
2. Sources of evidence which indicate this are:
    a. Negotiating history
    b. Interpretation of the parties
    c. Subsequent conduct of the parties
3. These sources are then construed according to the following criteria:
    a. Consistent interpretation of the terms

81. *See Valentine*, 299 U.S. at 9.

82. International Extradition Act art. 1 (D.O., Dec. 29, 1975) (Mex.).

83. *See supra* notes 51, 73 and accompanying text. *See also* CONSTITUCIÓN arts. 14, 16 (Mex.).

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

85. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 39 (1987).

b. Liberal construction of terms
c. Rule of liberality
d. *Expressio unius est exclusio alterius*
e. *Ejus dem generis*
f. Retroactive application
g. International law principles regarding treaty interpretation.[86]

The *Restatement* describes the general rules of interpretation as follows:

> (1) An international agreement shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the agreement in their context and in the light of its object and purpose.
> (2) The context for the purpose of interpretation shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the international agreement which was made between all the parties in connection with the conclusion of the agreement;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the agreement and accepted by the other parties as an instrument related to the agreement.
> (3) There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the agreement or the application of its provisions;
> (b) any subsequent practice in the application of the agreement which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relation between the parties.[87]

The text of the *Restatement* is based on the rules of interpretation of the Vienna Convention on the Law of Treaties.[88] Both the *Extradition Treaty* and the United States-Canada Treaty on Extradition[89] need to be interpreted in light of the United Nations Convention Against Illicit Traffic in Narcotic Drugs, which states that "a Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law."[90] Obviously, arresting a suspect on Canadian or Mexican soil is a function reserved exclusively for the authorities of those countries according to their respective constitutions.

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86. *Id.* at 77.
87. RESTATEMENT, *supra* note 39, § 329.
88. *Id.* The United States considers these provisions to reflect customary international law. *See* ARTHUR W. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973 307, 482-83 (1974).
89. Treaty on Extradition, Dec. 26, 1971, U.S.-Can., 27 U.S.T. 983.
90. U.N. Convention, *supra* note 35, art. 2(3).

The need to interpret international treaties in light of international law was recognized in earlier times by United States Chief Justice John Jay:

> Whenever doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations applicable to the case. The peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their engagements . . . .[91]

The Vienna Convention reaffirms the customary maxims and principles of international law reflected also in the United Nations Charter: the sovereign equality of all states, the prohibition of the threat or use of force, and universal respect for, and observance of, human rights and fundamental freedoms.[92]

The Convention recognizes the "importance of treaties as a source of international law and as instruments for developing peaceful cooperation among nations, whatever their constitutional and social systems."[93] Essentially, the principles of free consent, good faith and the rule of *pacta sunt servanda*[94] are the main tools for interpreting international treaties.[95] As a United States scholar of international law affirms:

> Although not yet acted upon in the Senate of the United States . . . , the Vienna Convention is the best evidence of what present customary international law about treaties and other international agreements is, at least with respect to most of its provisions. The Department of State has stated since 1973 that it considers the convention as a codification of customary international law and thus as authoritative with respect to the executive's treatment of international agreements issues arising after May 22, 1969.[96]

The Vienna Convention codified preexisting principles of customary international law. Some of those principles had been expressed by the United States Supreme Court in *Ross v. McIntyre*.[97] Relating to treaties conflicting with *jus cogens*, the Vienna Convention states in Article 53:[98]

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91. Henfield's Case, 11 F.Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6360) (Chief Justice Jay giving charge to the grand jury). Jay's use of the expression "laws of nations" refers to customary international law. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 371 (1824).

92. *See* Vienna Convention, *supra* note 3, prologue.

93. *Id.*

94. *Id.* The term "*pacta sunt servanda*" means agreements and stipulations of the parties to a contract must be observed. BLACK'S LAW DICTIONARY 1109 (6th ed. 1990).

95. Vienna Convention, *supra* note 3, prologue.

96. JOSEPH M. SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 993-94 (3d ed. 1988).

97. Ross v. McIntyre, 140 U.S. 453, 475 (1891).

98. "*Jus cogens*" refers to peremptory norms of general international law. *See* RESTATEMENT, *supra* note 39, § 102 cmt. k.

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[99]

It adds, "every treaty is binding upon the parties to it and must be performed by them in good faith."[100] Thus, if there is a question about the extent of that binding relationship among the parties, they must look in good faith to the goals of their treaty. Indeed, in order to find the purposes of a treaty, the parties must analyze not only the whole instrument, but also consider it as a part of the totality of instruments and rules of international law related to the subject matter, pursuant to the principles of *jus cogens*.

There may be some questions about which international law rules should be considered by the community of nations as part of the *jus cogens*. There is no question, however, that the doctrines listed in the purposes of the Charter of the United Nations are significant. These include the principles of sovereign equality, the respect for human rights,[101] fulfillment in good faith of the obligations assumed, peaceful settlement of disputes, and refraining from the threat or use of force in any manner inconsistent with the United Nations Charter.[102] The United Nations Charter underscores the superiority of its rules in Article 52, which subordinates regional arrangements to settled principles of international law.[103]

Looking to the context of a treaty, not just relying on a literal interpretation of its words, is the best way to provide coherence to a treaty's provisions. The interpreter must consider its interrelation with other international instruments and with international law. In order to understand the purpose of a treaty, it is necessary to determine why the instrument was signed and what was expected to be obtained by it. Finally, an interpretation producing legal effects, in accordance with the

99. Vienna Convention, *supra* note 3, art. 53. Therefore, no bilateral treaty can derogate a *jus cogens* norm. A subsequent *jus cogens* rule, however, would derogate any bilateral treaty that is contrary to its content.

100. *See id.* art. 26.

101. *See* RESTATEMENT, *supra* note 39, § 702 cmt. n.

102. U.N. CHARTER arts. 1, 2.

103. *Id.* art. 52. Furthermore, treaties need to be interpreted in accordance with Article 103 of the United Nations Charter, which states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." *Id.* art. 103.

rules of *jus cogens*, must be preferred to one that could lead to results in conflict with those peremptory norm, or *in dubio pro jus cogens*.[104]

It is reasonable to expect that the United States, at the signing of its bilateral treaties and other international agreements on extradition, had a good faith interest in abiding by their provisions and carrying out their manifest purposes. There is no indication that the United States was secretly attempting to reserve authority to disregard those provisions.[105] Despite these initial intentions, several years after signing various extradition treaties, the United States Department of Justice disregarded international law and abducted suspects from other sovereign nations.[106] In so doing, the United States Department of Justice claimed authority to unilaterally disregard both the content and intent of extradition treaties as well as United Nations Charter prohibitions, human rights law, and other fundamental international norms.[107]

In *Wright v. Henkel*,[108] however, the United States Supreme Court stated that "[t]reaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose."[109] The purpose of an extradition treaty is to define a formal channel for requesting and delivering suspects from one country to another without transgressing either's domestic legislation or international law. If the treaty were interpreted to give one party the option to follow the treaty's procedure or to ignore it, the object and purpose of the instrument would be at serious risk.

As the Supreme Court explained in *Ross v. McIntyre*,[110] "the parties' intentions are clear only if the treaty's context and history are considered. Courts often look to the circumstances surrounding the treaty's culmination in interpreting the relevant provisions of the treaty."[111] In

104. "*In dubio pro jus cogens*" means that if there is a doubt about which interpretation is preferred, the one that is in accordance with the *jus cogens* should be selected. It applies when the terms of the treaties are not sufficiently clear and admit more than one interpretation.

105. For references to several incidents involving complaints made by the United States for abductions committed in violation of its sovereignty, see 4 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW § 603 (1906).

106. *See supra* notes 11-20, 23-28, 37.

107. *See* Michael Wines, *U.S. Cites Right to Seize Fugitives Abroad*, N.Y. TIMES, Oct. 14, 1989, at A6 (citing the Justice Department's confidential memorandum of June 21, 1989, which appeared in the *New York Times*). The 1989 memorandum cites the right to seize fugitives abroad. With this classified document, the Department of Justice reversed a 1980 President Carter policy which stated that overseas arrests were tantamount to kidnapping unless foreign governments gave their approval in advance.

108. 190 U.S. 40 (1903).

109. *Id.* at 57.

110. 140 U.S. 453 (1891).

111. *Id.* at 475.

the same line of thinking, the Supreme Court in *Sullivan v. Kidd*[112] wrote:

> Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole.[113]

In contracts, "pure potestative conditions," conditions that depend exclusively on the will of the debtor and destroy the efficacy of the juridical linkage,[114] will not be held valid. There would be no point to creating a bilateral extradition treaty in which the parties were allowed to obtain custody over a suspect in a foreign country either by following the treaty procedures or by kidnapping, because the treaty provisions would depend exclusively on the will of one of the parties. Indeed, in *Henfield's Case*,[115] Chief Justice Jay stated that "[t]reaties between independent nations, are contracts or bargains which derive all their force and obligation from mutual consent and agreement; and consequently, when once fairly made and properly concluded, cannot be altered or annulled by one of the parties, without the consent and concurrence of the other."[116] Lassa Oppenheim wrote on treaty interpretation in his book *International Law*:

> It is taken for granted that the contracting parties intend something reasonable and something not inconsistent with generally recognized principles of International Law, nor with previous treaty obligations towards third States. If, therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations toward third States.[117]

Parties presumably intend their treaties to accord with international law. Thus, there is no need in any international treaty to prohibit conduct against international or domestic law. Those acts are already proscribed by preexisting norms.

Extradition treaties need not include clauses prohibiting kidnapping, violations of other countries' sovereignty, or suppression of constitu-

112. 254 U.S. 433 (1920).

113. *Id.* at 439.

114. 2 MANUEL BORJA-SORIANO, TEORÍA GENERAL DE LAS OBLIGACIONES 27 (1974) (translation by author).

115. 11 F.Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

116. *Id.* at 1101.

117. 1 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 952-53 (Hersch Lauterpacht ed., 8th ed. 1955).

tional guarantees of legal due process. These actions are obvious violations of *jus cogens*, domestic criminal codes, domestic constitutional laws, domestic and international human rights principles, other rules of customary international law, and of the Charters of the United Nations and of the Organization of American States. Also, under Article 103 of the United Nations Charter, any treaty (and thus, treaty interpretation) inconsistent with the Charter does not prevail.[118]

There is no express prohibition of abduction in any of the more than one hundred extradition treaties between the United States[119] and other nations, including France,[120] Germany,[121] Italy,[122] Japan,[123] and the United Kingdom.[124] Only a bad faith interpretation, made contrary to several fundamental rules of international law, could argue that kidnapping a suspect is permitted because it is not expressly prohibited by a bilateral treaty. When a general rule is not expressly inserted in the treaty, the United States Supreme Court has stated that the rule may be implied from the "manifest scope and object of the treaty."[125]

The International Court of Justice regularly interprets obligations arising from international treaties. Though the United States has withdrawn from the Court's general compulsory jurisdiction, the decisions of the International Court are expressions of customary international law. In a case concerning military activities in and against Nicaragua,[126] the court made clear the need to approach the controversy in light of customary international law:

118. U.N. CHARTER art. 103. *See* S.C. Res. 138, U.N. SCOR, 15th Sess., 865th Mtg., U.N. Doc S/4349 (1960) (U.N. Security Council condemning resolution related to a case of international abduction). *See also supra* note 103.

119. *See supra* note 78.

120. Extradition Treaty, Jan. 6, 1909, U.S.-Fr., 37 Stat. 1526, T.I.A.S. No. 872, *amended by* Supplementary Extradition Convention, Feb. 12, 1970, U.S.-Fr., 22 U.S.T. 407, T.I.A.S. No. 7075.

121. Extradition Treaty, June 20, 1978, U.S.-Ger., Protocol, 32 U.S.T. 885.

122. Extradition Treaty, Oct. 13, 1983, U.S.-Italy, T.I.A.S. No. 10837.

123. Treaty on Extradition, March 8, 1954, U.S.-Japan, 31 U.S.T. 892.

124. Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227.

125. Johnson v. Browne, 205 U.S. 309, 317 (1907). *See* Jordan v. Tashiro, 278 U.S. 123, 127 (1928) ("where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred.").

126. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26). After Nicaragua filed an application instituting proceedings against the U.S. with respect to its military and paramilitary activities in Nicaragua, the United States withdrew from the jurisdiction of the International Court of Justice (ICJ). Originally, the United States had argued that the ICJ did not have jurisdiction over the case concerning the mining of Nicaraguan waters in the 1980s, however, after the ICJ decided it had jurisdiction over the controversy, the United States withdrew October 7, 1985. *See*, JOSEPH M. SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 57-65 (3d ed. 1988).

> Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.[127]

In many ways the extradition treaties give printed life to what already exists in customary international law.[128]

Several customary international law principles can be corroborated by reading the more than one hundred extradition treaties which are binding upon the United States. Some examples are the universal rules of extradition or prosecution, the political offense exception, double criminality, the specialty doctrine, requests by diplomatic channels, and respect for the legal procedure of the territorial state. All are included in any extradition treaty.[129] However, when those principles are not included in extradition treaties, they still exist as rules of international customary law. This explains how single clauses about extradition contained in the Hague Convention[130] and the Montreal Convention[131] can be used as replacements for extradition treaties. The same applies to the extradition clause contained in the Convention Against Illicit Traffic in Narcotic Drugs.[132]

In reference to American practice, Professor Bassiouni has prophetically warned that "the process of securing jurisdiction over the person of a fugitive can be by lawful means provided for in the law of extradition and the applicable treaties, or by means which subvert the spirit of the treaty, such as the frequent practice of disguised extradition, or abduction."[133]

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127. *Military and Paramilitary Activities*, 1984 I.C.J. at 73.

128. *See, e.g.*, Jordan J. Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235, 238-39 n.9 (1987) [hereinafter Paust, *Extradition*].

129. *See* RESTATEMENT, *supra* note 39, §§ 476-477.

130. Convention on Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 8, § 2, 22 U.S.T. 1641, 1646, T.I.A.S. No. 7192 (Hague Convention).

131. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 8, § 2, 24 U.S.T. 565, 571, 974 U.N.T.S. 177 (Montreal Convention).

132. U.N. Convention, *supra* note 35, 28 I.L.M. at 507-08.

133. Bassiouni, *International Extradition*, *supra* note 38, at 10. *See generally* Paul O'Higgins, *Disguised Extradition: The* Soblen *Case*, 27 MOD. L. REV. 521 (1964).

III. International Law as the Supreme Law of the Land

International law, whether conventional or customary, is the Supreme Law of the Land in the United States under the United States Constitution. Though not codified or written, customary international law, as incorporated by federal law, federal statutes, and international treaties, is part of United States law. This position is supported by historical practice, the *Restatement*, past Supreme Court decisions, and the intent of the Framers.

In Roman Law, custom was defined as *inveterate consuetudo, opinio juris* or *consensus omnium, opinio necessitatis*.[134] Translated, the expressions mean a repeated practice accepted by the community as mandatory. They refer to the expectations of any civilized community. In terms of the international community they mean that states, and in general all humankind, expect to address international concerns and relations in accordance with universally accepted rules. The practice among states, and their expectations of proceeding according to rules, have been shaping customary international law through the centuries. "Born more directly of real authority and strength, it [customary international law] is likely to be more directly authoritative in particular social contexts."[135]

Supreme Court cases have recognized customary international law as the supreme law established by the general consent of mankind,[136] to which the executive branch is subordinate,[137] and which controls in the absence of congressional act or executive order, or even when there is an earlier statute or executive act.[138]

Unfortunately, some supporters of wider flexibility in the executive branch object to the incorporation of customary international law into American law, and argue that the President is not bound by international

134. *See* JUAN IGLESIAS, DERECHO ROMANO: INSTITUCIONES DE DERECHO PRIVADO 49 (Editorial Ariel, S.A., Barcelona 1985) (1958).

135. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 62-63 (1990) (stating that international customary law rules are more authoritative than other rules, including domestic rules) [hereinafter Paust, *Customary International Law*].

136. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796) (Chase, J. opinion).

137. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 178-79 (1804) (Marshall, C.J., opinion).

138. *See* The Paquete Habana, 175 U.S. 677, 700 (1900). *Paquete Habana* has been wrongly interpreted to state that international law is controlling *only* when there is not a congressional act, executive order, or judicial expression. However, *Paquete Habana* contains no expression limiting its application to those situations. Considering the expressions used in *Paquete Habana* in light of earlier judicial decisions and the nature of customary international law, there is no doubt that customary international law is the Supreme Law of the Land. It has the nature of federal law since it involves the relations of the United States, foreign states, citizens or subjects.

law. Addressing the question of whether the President of the United States may violate customary international law, Professor Jordan J. Paust affirms that the President is bound by, and may not lawfully violate, international law. He writes:

> While a few academics (few indeed) and aspiring lawbreakers within the executive branch have had the audacity publicly to disagree, it is evident to a thorough reader that they either were unfamiliar with relevant language from several judicial opinions and opinions of the attorneys general or had misinterpreted some of that language. In view of the actual trends in legal decision and the legal policies at stake, there is simply no viable counterargument. . . . The President must obey and faithfully execute supreme federal law whether it is customary or treaty-based.[139]

The *Restatement* recognizes that:

> [s]ince international customary law and an international agreement have equal authority in international law, and both are law of the United States, arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement, just as a later international agreement of the United States is given effect in the face of an earlier law or agreement.[140]

As long ago as 1797 the United States Attorney General stated, "the common law has adopted the law of nations in its fullest extent, and made it a part of the Law of the Land."[141] Specifically on the point of violation of sovereign territorial rights, Attorney General Lee stated:

> It is an offence against the laws of nations for any persons, whether citizens or foreigners, inhabiting within the limits of the United States, to go into the territory of Spain with intent to recover their property by their own strength, or in any other manner than its laws authorize and permit.[142]

Professor Paust does not advocate restricting the strength of customary international law to a mere extension of common law. "[I]t is too simplistic to argue, that customary international law is incorporable

139. Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987) [hereinafter Paust, *The President Is Bound*].

140. RESTATEMENT, *supra* note 39, § 115 cmt. d. Although the *Restatement* suggests that acts of Congress, provisions of treaties, and rules of customary international law all have the same rank as the Supreme Law of the Land, it does not authoritatively state that customary international law has sufficient authority to derogate earlier and opposing congressional acts. This seems to be because the Supreme Court has not addressed this question.

There is no conclusive indication that the Supreme Court would make statutes or treaties prevail over customary international law. A different question would be how to prove the existence of a rule of customary international law. The difficulty, in some instances, of clearly evidencing the existence of a rule of customary international law does not affect its validity, but rather its formulation in domestic or international courts.

141. *See* 1 Op. Att'y Gen. 68, 69 (1797).

142. *Id.*

merely as some sort of 'common law'."[143] He suggests that customary international law is not merely "common" law or "general" law, but much more, and of a higher transnational status.

Either under the guise of federal common law or as customary international law itself, it is part of the Supreme Law of the Land in the United States. The terms used in the United States Constitution were not intended to restrict the meaning of the words "laws of the United States"[144] to federal statutes. Otherwise, the phrases "statutes of the United States" or "Congressional statutes" would have sufficed. Indeed, in *Henfield's Case*,[145] Justice Jay pointed out that "the Constitution, the statutes of Congress, *the laws of nations*, and treaties constitutionally made, compose the laws of the United States."[146]

The existence of the law of nations, which cannot have another meaning than customary international law, was recognized in 1824 in *The Apollon*:[147]

> It would be *monstrous* to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.[148]

The United States, through the Department of State and the executive branch, has expressly recognized customary international law, at least in matters concerning the law of treaties[149] and the law of the sea.[150] The official statements of the United States are not constitutional elements of customary international law; they are just evidence of its existence. There is no requirement of official recognition of other subjects of customary international law, such as the ban on kidnapping.

The United States Constitution was designed not only in accordance with the law of nations, but was also aimed at providing greater respect for it. As John Jay expressed in *The Federalist*:

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143. Paust, *Customary International Law*, *supra* note 135, at 78.

144. U.S. CONST. art. III, § 2; *id.* art. IV, cl. 2.

145. 11 F.Cas. 1099 (C.C.D. Pa. 1793).

146. *Id.* at 1101 (emphasis added).

147. 22 U.S. (9 Wheat.) 362 (1824).

148. *Id.* at 371 (emphasis added); *see* Paust, *The President Is Bound*, *supra* note 139, at 378.

149. The Department of State recognized the content of the Vienna Convention on the Law of Treaties as an expression of customary international law. *See* ROVINE, *supra* note 88, at 307, 482-83.

150. The presidency recognized the content of the Convention of the Law of the Sea as an expression of customary international law. *See* RESTATEMENT, *supra* note 39, Part V, Introductory Note.

> The *just* causes of war, for the most part, arise either from violations of treaties, or from direct violence. America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us. She has also extensive commerce with Portugal, Spain, and Britain, and, with respect to the two latter, has, in addition, the circumstance of neighborhood to attend to.[151]
>
> It is of high importance to the peace of America that she observe the laws of nations towards all these powers . . . .[152]

Precisely the need to honor customary international law motivated John Jay to support federalism.

> [U]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner; whereas, adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent . . . .[153]

In conclusion, Jay wrote that given that "either designed or accidental violations of treaties and the laws of nations afford *just* causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the *safety* of the people."[154]

When federal authorities disdain the rules of international law by committing international abductions, and swerve from proceeding on good faith and justice in the interpretation of bilateral extradition treaties, their actions are not only repugnant to the philosophy of the Constitution, but become an illegitimate example for local authorities. Actions that violate customary international law violate United States law, under the Constitution.

IV. The *Alvarez-Machain* Case

A. The Opinion of the Court

The facts of the case *United States v. Alvarez-Machain* were summarized by the Reporter of Decisions as follows:

> [Alvarez-Machain], a citizen and resident of Mexico, was forcibly kidnapped from his home and flown by private plane to Texas, where he was arrested for his participation in the kidnapping and murder of a Drug Enforcement Administration (DEA) agent and the agent's pilot. After concluding that DEA agents were respon-

151. Since its independence in 1821, Mexico has taken the place of Spain as a neighbor country of the United States.

152. THE FEDERALIST No. 3, at 21 (John Jay) (Tudor 1937).

153. *Id.*

154. *Id.*

> sible for the abduction, the District Court dismissed the indictment on the ground that it violated the Extradition Treaty . . . and ordered respondent's repatriation. The Court of Appeals affirmed. Based on one of its prior decisions, the court found that, since the United States had authorized the abduction and since the Mexican government had protested the Treaty violation, jurisdiction was improper.[155]

The Supreme Court reversed the judgment of the Court of Appeals,[156] and held that Alvarez-Machain's forcible abduction did not prohibit his trial in a United States court for violations of this country's criminal laws.[157]

The Supreme Court's analysis turned on three basic assertions. First, a defendant may not be prosecuted in violation of the terms of an extradition treaty. When a treaty has not been invoked, however, a court may properly exercise jurisdiction even when the defendant's presence is procured by means of a forcible abduction. Thus, if the Extradition Treaty does not prohibit the defendant's abduction, the rule of *Ker v. Illinois*[158] applies and jurisdiction will be proper.[159]

Second, neither the Extradition Treaty's language nor the history of negotiations and practice under it supports the proposition that it prohibits abductions outside of its terms. The treaty says nothing about forcible abduction or the consequences if an abduction occurs. Although the Mexican government was made aware of the *Ker* doctrine as early as 1906, and language to curtail *Ker* was drafted as early as 1935, the treaty's current version contains no such clause.[160]

Finally, general principles of international law provide no basis for interpreting the treaty to include an implied term prohibiting international abductions. While Alvarez-Machain may have been correct that his abduction was shocking and in violation of general international law principles, the decision whether he should be returned to Mexico, as a matter outside the treaty, is a matter for the executive branch.[161]

B. Objections to the Opinion of the Court

In its apparent desire to support the actions of the executive branch, the Supreme Court not only placed at risk the principle of separation of powers, but also failed to apply the "supreme law of the land."

155. 112 S. Ct. 2188, 2189 (1992) (syllabus).
156. *Id.* at 2197.
157. *Id.*
158. 119 U.S. 436 (1886). *Ker* is discussed *infra* notes 186-209 and accompanying text.
159. *Alvarez-Machain*, 112 S. Ct. at 2191-93.
160. *Id.* at 2191-95.
161. *Id.* at 2195-97.

1. States Must Comply with Their Treaties

A defendant should not be prosecuted in violation of an extradition treaty. A treaty does not apply solely *when it is invoked*. Under established doctrines of international law,[162] treaties apply whenever the facts contemplated in their hypotheses take place.[163] It does not matter whether or not it is formally invoked. The nature of bilateral extradition treaties is to regulate the legal surrender of suspects between jurisdictions. Any other kind of extraterritorial detention or transfer is contrary to the treaty, against the principles of international law, and damaging to individual human rights.[164]

Treaty obligations, once assumed, cannot be disregarded. Any action contrary to the intent of a treaty is illegal. The declarations in bilateral or multilateral treaties establish a series of bilateral engagements with other states, in which the clauses and the procedure of the treaty must be considered.[165] By signing bilateral extradition treaties,[166] the United States assumes several obligations and causes other nations to rely on the procedures described in those instruments.

In *Alvarez-Machain*, the United States officers acted without good faith *ab initio* because they sought a suspect who, according to the Extradition Treaty, could challenge the extradition on several grounds. Under the United States-Mexico treaty, extradition may not be granted, even if the Mexican government would agree to surrender the suspect, if it is requested for an offense committed outside the territory of the requesting party and the suspect is a national of the requested country.[167] Alvarez-Machain was wanted for an offense committed in Mexico and he was a Mexican national. In such a case, application of the treaty is to be determined by a Mexican federal court. His right to challenge his detention before that court is a fundamental civil right the treaty was designed to

162. *See supra* text accompanying notes 85-88, 92-96.

163. This principle was recognized by the United States in 1881 in a letter from then Secretary of State Blaine:

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

Letter from James G. Blaine, Secretary of State, to the Governor of Texas (May 3, 1881), *reprinted in* 4 MOORE, *supra* note 105, § 603.

164. *See supra* notes 70-74.

165. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, at 60-61 (Nov. 26).

166. There are more than 100 bilateral extradition treaties which are binding upon the United States. *See* TREATIES IN FORCE, *supra* note 78.

167. *See* Extradition Treaty, *supra* note 2, art. 1, § 2(b), 31 U.S.T. at 5062.

protect.[168]

The United States officers did more than just obtain an individual whom they knew they might not have the authority to request; they did something worse. Instead of directing their request for the suspect's extradition to the Mexican diplomatic authorities as required by the treaty,[169] they attempted to make extralegal arrangements with Mexican police officers for his illegal surrender.[170] Ultimately the United States officers resorted to kidnapping.[171] The Supreme Court of the United States subsequently condoned this practice,[172] setting a terrible example for other federal and local law enforcement agencies.

2. *Kidnapping Is a Violation of the Extradition Treaty*

Kidnapping is against the nature, purpose, and goals of the Extradition Treaty. Although fast and effective, kidnapping sidesteps the safeguards described in the Extradition Treaty to protect individual human rights and asylum country sovereignty.

The Extradition Treaty contains numerous limitations on a State's right to transfer an individual across borders. The logical implication is that if these requirements are not satisfied, the suspect may not be removed by the requesting country. For example, the principle of dual criminality, which means that the offense should be considered a crime in both countries in order to grant extradition,[173] would not make sense if the requesting state had the option of following the treaty or ignoring it and simply kidnapping suspects. The requirement that the punishment must involve imprisonment for more than one year, and be restricted to the list of crimes mentioned in the Appendix of the Treaty[174] would be meaningless if the requesting party had the alternative of simply not invoking the treaty and performing an abduction. Indeed, it does not make sense to impose the burden of proof on the requesting party to demonstrate a crime was committed or the person has been convicted[175] if the requesting country can alternatively kidnap the suspect and meet no burden of proof at all.

168. *See* CONSTITUCIÓN arts. 14, 16 (Mex.); *see also supra* notes at 51, 73.

169. Actions of foreign policy belong to diplomatic authorities, and negotiations on international extraditions must be conducted by the United States State Department and the Mexican Foreign Ministry (*Secretaría de Relaciones Exteriores*). *See* Extradition Treaty, *supra* note 2, art. 10, 31 U.S.T. at 5066-68.

170. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990).

171. *Id.*

172. Alvarez-Machain v. United States, 112 S. Ct. 2188, 2197 (1992).

173. *See* Extradition Treaty, *supra* note 2, art. 1, § 2(a), 31 U.S.T. at 5061.

174. *Id.* art. 2, 31 U.S.T. at 5062-63.

175. *Id.* art. 3, 31 U.S.T. at 5063.

Like reasoning applies to the treaty's prohibition against extraditing for political and military offenses.[176] This prohibition would be laughable if the requesting party had the authority to disregard the treaty and simply abduct any politically offensive person. The treaty also states that when prosecution has become barred by lapse of time according to the laws of the requesting or requested country, extradition shall not be granted.[177] Another important safeguard of human rights insures that an individual shall not be extradited when he has already been tried and convicted or acquitted by the requested state on the same offense.[178] If the individual is deprived of the opportunity to challenge petitions of extradition before the courts of the requested country, and if the treaty is not binding upon the requesting country, all procedural protections become illusory.

A more drastic consequence of an Extradition Treaty violation exists in the potential disregard for the clause that prevents extradition to impose capital punishment.[179] In 1989 in Texas, Jefferson County District Attorney investigators kidnapped two Mexican citizens to charge them with capital murder.[180] It is fairly obvious that the intent of those officers was to avoid the procedure established in the Extradition Treaty and to trample the civil rights of the Mexican citizens in violation of the treaty limitation on capital punishment, as Mexico does not provide for capital murder.[181]

According to the Extradition Treaty, the requested state has discretion to deliver its own nationals or to prosecute them itself.[182] This discretionary right of the requested State would be phony if abductions are not contrary to the Extradition Treaty. This substantially affects the civil rights of suspects as well. Mexican citizens accused of committing an offense in Mexican territory, like Alvarez-Machain, may be deprived of the opportunity to be judged by their peers.

The procedure for extradition described in the treaty[183] would be

176. *Id.* art. 5, §§ 1, 3, 31 U.S.T. at 5063-64.

177. *Id.* art. 7, 31 U.S.T. at 5064.

178. *Id.* art. 6, 31 U.S.T. at 5064.

179. *Id.* art. 8, 31 U.S.T. at 5065.

180. *See* Defendant's Motion for Judicial Notice, State v. Morales, No. 53100 (Jefferson County, TX 1989); Defendant's Motion to Hold Article 37.071 of the Texas Code of Criminal Procedure Unconstitutional and Void, State v. Ayalla, No. 53101 (Jefferson County, TX 1989) (copies on file with the *Hastings Constitutional Law Quarterly*).

181. *See* sources cited *supra* note 180.

182. *See* Extradition Treaty, *supra* note 2, art. 9, §§ 1, 2, 31 U.S.T. at 5065.

183. *Id.* arts. 10, 12, 13, 31 U.S.T. at 5066-69. These procedures include a request made through diplomatic channels, a description of the offense, a warrant of arrest or sentence, any additional evidence, and authentication made by diplomatic or consular authorities. *Id.*

seriously affected if kidnapping of suspects were not considered a proscribed criminal practice. Indeed, these procedural safeguards provide the individual the opportunity to challenge the deprivation of his or her liberty in the country where it occurs. Otherwise, the suspect would be unable to object to either the procedure of extradition or his arrest. The process of extradition must be conducted before a federal judge of the requested state in accordance with its legislation.[184]

Finally, another important right of the suspect—the "rule of specialty" (that an extradited person may not be tried for an offense other than that for which the extradition was granted)[185]—would be seriously impaired if kidnapping were accepted under the treaty. With kidnapping, the seizing government does not have to state any basis for removal, and is free to charge the suspect with any crime. It is impossible to understand any of the clauses of the Extradition Treaty if abduction of suspects is not considered a violation of the treaty. Kidnapping is not only contrary to the nature, goals, and purposes of the treaty, it is so destructive of its intent that it makes the treaty a meaningless instrument.

3. Ker *Is an Exception—Not the General Rule*

The Supreme Court is wrong in its assertion that when the Extradition Treaty does not apply, the so-called "*Ker* rule" then applies.[186] The rule of *Ker v. Illinois*[187] holds that kidnapping from a foreign country, without any pretense of authority under an extradited treaty or from the government of the United States, is not sufficient reason why the abducted party should not answer when brought within the jurisdiction of the court which has the right to try him for such offense.[188]

As concluded in the analysis above,[189] even if the treaty did not apply, the rules of international law (either conventional or customary) must apply because they are the Supreme Law of the Land. The "*Ker* rule" cannot be considered a general rule, let alone a rule with authority to derogate the principles of *jus cogens*, which are not only imperative, but higher in rank than rules of domestic law. Previous court decisions

184. *Id.* art. 13, 31 U.S.T. at 5069.

185. *Id.* art. 17, 31 U.S.T. at 5071-72.

186. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 (1992).

187. 119 U.S. 436 (1886).

188. *Id.* at 443-44.

189. *See supra* text accompanying notes 127-133, 92, 139, 141.

support the restrictive application of *Ker*.[190] *Ker*'s holdings should not be applied to *Alvarez-Machain* because the two cases have distinctly different fact patterns.

In *Ker v. Illinois*, the question of violation of international law by United States officers was not at stake.[191] Ker's kidnapping was performed without any authority from the United States Government.[192] The case did not involve the *a priori* and *a posteriori* sanction of a violation of international law. In contrast, the question in the *Alvarez-Machain* case concerned the content of the confidential memorandum of the Justice Department authorizing international kidnapping, and the validation of the abduction by United States law enforcement officers.[193] The *Ker* decision, based on significantly different facts, therefore does not authorize government officers to violate the Extradition Treaty.[194]

The *Ker* decision expressly recognizes the need to respect international law. The *Ker* Court stated that the controversy should be decided by the rules of "common law" or of the "law of nations."[195] In the abduction of Ker, carried out by private citizens, the Court did not find any positive violation of the laws of the United States,[196] including international law as the Supreme Law of the Land. In contrast, the *Alvarez-Machain* case involves a clear challenge to both customary and conventional international law.

The Supreme Court decision in *Ker* paid respect to both the customary and conventional international law that existed at that time. The decision was rendered prior to the enactment of the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Charter of the Organization of American States. These instruments have since been applied to protect other countries' sovereignty and the human rights of suspects. *Alvarez-Machain* was decided after these enactments. The Second Cir-

190. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 371 (1824); United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974); Villareal v. Hammond, 74 F.2d. 503, 505 (5th Cir. 1934); 1 Op. Att'y Gen. 68, 69 (1797). *See also* Paust, *The President is Bound*, supra note 139, at 378.

191. Regarding the abduction of Toscanino from Uruguay, the court stated: "If distinctions are necessary, *Ker* and *Frisbie* are clearly distinguishable on other legally significant grounds which render neither of them controlling here. Neither case, unlike that here, involved the abduction of a defendant in violation of international treaties of the United States." *Toscanino*, 500 F.2d at 277.

192. *Ker*, 119 U.S. at 443.

193. *See supra* note 107 (referring to Justice Department confidential memorandum of June 21, 1989).

194. *Ker*, 119 U.S. at 440.

195. *Id.* at 444.

196. *Id.* at 440.

cuit *Toscanino*[197] case was also decided after the enactment of these international instruments, and acknowledged the United States government's duty to comply with two international treaties and respect the territorial sovereignty of Uruguay.[198]

In *Ker*, the Court decided that the suspect, an American citizen who had fled to Peru, failed to prove the existence of a right conferred by the treaty.[199] The Court arrived at that conclusion because the government of Peru could have ordered Ker out of the country.[200] This reasoning does not apply to the *Alvarez-Machain* case because Alvarez-Machain was not an escapee in a foreign country, but a national of the state where the abduction took place. In *Ker*, Peru did not complain about the incursion into its territory,[201] while in *Alvarez-Machain*, Mexico formally protested the abduction and the violation of its sovereignty.[202]

Another substantial difference between the *Ker* and *Alvarez-Machain* cases is that in *Ker* the question was whether the suspect would be prosecuted in American courts or not at all.[203] In *Alvarez-Machain*, the question was *which* country should prosecute the suspect. Additionally, the *Ker* Court returned the controversy to the state court,[204] while the *Alvarez-Machain* Court sent the issue of repatriation to the executive branch.[205] The *Alvarez-Machain* case does not fit *Ker*, and the *Ker* Court, unlike the *Alvarez-Machain* Court, attempted to follow then-current international law.

Frisbie v. Collins,[206] mentioned in *Alvarez-Machain* to support using the *Ker* rule,[207] is a case of domestic, not international kidnapping. In *Frisbie*, officers from the State of Michigan kidnapped the suspect from the State of Illinois.[208] No international treaty was at stake. The issue in

197. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

198. *Id.* at 277. The *Toscanino* court added that since the United States had agreed not to seize persons residing within the territorial limits of Uruguay, *Ker* did not apply but *Cook v. United States* did. *Id.* at 278 (citing Cook v. United States, 288 U.S. 102 (1933)). *Cook* stated that the Government lacked the power to seize a vessel because, by treaty, it had imposed a territorial limitation upon its own authority. *See Cook*, 288 U.S. at 121-22.

199. *Ker*, 119 U.S. at 443.

200. *Id.* at 444.

201. *Id.* at 442.

202. 112 S. Ct. 2188, 2196 (1992).

203. *Ker*, 119 U.S. at 441-42.

204. *See id.* at 444. Additionally, the *Ker* Court recognized Ker's right to sue for trespass and false imprisonment. *Id.*

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

206. 342 U.S. 519 (1952).

207. *Alvarez-Machain*, 112 S. Ct. at 2192. The Court in *Alvarez-Machain* mentioned that in *Frisbie v. Collins*, the rule of *Ker* was applied to a case in which the defendant had been kidnapped in Chicago by Michigan officers and brought to trial in Michigan. *Id.*

208. *Frisbie*, 342 U.S. at 520.

Frisbie was the violation of the Federal Kidnapping Act in light of the Fourteenth Amendment.[209] In contrast, the international elements of *Alvarez-Machain* must be contemplated pursuant to international law as the Supreme Law of the Land in the United States. It does not make sense to see *Frisbie*, which is ruled by Fourteenth Amendment principles, as a limit on international law principles, and controlling in *Alvarez-Machain*.

4. Kidnapping Is Contrary to International Law

The Supreme Court holding that a bilateral extradition treaty prohibits kidnapping only when it contains an express clause to that effect is based on a double misunderstanding: Mexico was aware (a) of the *Ker* doctrine since 1906, and (b) of the 1935 Harvard proposal to include an express clause in extradition treaties to prohibit abductions.[210]

Mexico, when signing international treaties with the United States, is not obliged to rely upon the American domestic courts' interpretations of legal instruments. It would make more sense for Mexico to rely on its own courts' interpretations of rules of international law. It would be even more reasonable for any country to rely on the criteria of interpretation produced by the International Court of Justice, the United Nations, and the Organization of American States. In any case, it appears that the Supreme Court of the United States misapplied *Ker*, which expressly recognized the need to honor international law principles.[211]

Mexico is likewise not obliged to rely on the 1935 Harvard proposal. It is an academic instrument without the authority of any international organization. Even within the academic community in the United States, there is widespread support for the position that kidnapping is an unlawful measure and contrary to the purpose and goals of extradition treaties.[212] Thus, there is no need to add a clause expressly prohibiting

209. *Id.*

210. *See Alvarez-Machain*, 112 S. Ct. at 2194-95 nn.11, 13. In the Harvard Draft Convention, the advisory committee proposed the following language:

> 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.

Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 442 (Supp. 1935) (quoted in *Alvarez-Machain*, 112 S. Ct. at 2195 n.13).

211. Ker v. Illinois, 119 U.S. 436, 444 (1886).

212. *See* RESTATEMENT, *supra* note 39, §§ 431-433.

abductions.[213] Indeed, the *Restatement (Second) of Foreign Relations Law* plainly stated that a state's jurisdiction to take enforcement action within its territory is normally exclusive, and a state shall not violate the rights of another state under international law while exercising jurisdiction.[214]

The Harvard proposal for the Draft Convention on Jurisdiction with Respect to Crime aimed to provide printed life to what already existed in customary international law and later was incorporated in other multilateral treaties. Thus, even if the 1935 Harvard clause is not expressly incorporated in a bilateral extradition treaty, the content of that clause is still mandatory for any country and fairly implied in treaties because it is an expression of both conventional and customary international law.

The Supreme Court, when referring to the need for including in extradition treaties the clause of the Harvard Research in International Law that prohibits abductions, relied on the "Draft Convention on Jurisdiction With Respect To Crime," not on the "Draft Convention on Extraditions."[215] The latter, published simultaneously with, and by, the same institute as the former, does not contain any explicit clause prohibiting kidnapping, because kidnapping was and is already contrary to international law and to any extradition treaty. Indeed, even the United Nations Model Treaty on Extradition does not include an express clause prohibiting abductions.[216] It is simply assumed that they are impermissible.[217]

The Supreme Court failed to realize that treaties, customary international law, and federal statutes have the same rank as Supreme Law of the Land in accordance with Article VI, Clause 2 of the United States Constitution. Fortunately, the Supreme Court did not expressly deny that customary international law is the Supreme Law of the Land, nor

213. *See* Bassiouni, *International Extradition*, *supra* note 38, at 10. *See generally* Bassiouni, *Unlawful Seizures*, *supra* note 50.

214. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 cmts. b, c (1965). This document was the updated instrument during the signing of the Extradition Treaty. The *Restatement* makes clear statements toward the respect of other countries' sovereignty rights, and the law of international human rights. RESTATEMENT, *supra* note 39, §§ 431-433.

215. *See* Harvard Research in International Law, *Draft Convention on Extradition*, 29 AM. I.INT'L L. 21 (supp. 1935).

216. *See* G.A. Res. 45/116, U.N. GAOR 3d Comm., 45th Sess., U.N. Doc. A/45/756 (1991).

217. *See* United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974); S.C. Res. 138, U.N. SCOR 15th Sess., 868th mtg., at 4, U.N. Doc. S/4349 (1960); RESTATEMENT, *supra* note 39, §§ 432 n.1, 433; Letter from William L. Marcy, Secretary of State, to Mr. Hülsemann (Sept. 26, 1853), *reprinted in* 2 WHARTON, *supra* note 69, at 483-86.

state that the President is not bound. Only the issue of proper interpretation of the bilateral treaty was raised. Thus, it is still possible for an abducted person to introduce these issues in U.S. courts by filing for relief on the basis that an abduction transgresses both customary and conventional international law in violation of the United States Constitution.

Because states must comply with their treaties, kidnapping violates the Extradition Treaty, and the *Ker* exception does not apply, thus the *Alvarez-Machain* case was wrongly decided.

V. The Possible Solutions

A. The United States Constitution Article VI, Clause 2 and the Exclusionary Rule

The constitutionality of the police action in the kidnapping of Alvarez-Machain can be challenged on the basis of its violation of both customary and conventional international law.

The Executive Branch has interpreted the Extradition Treaty as not prohibiting kidnapping. This interpretation contradicts the Vienna Convention on the Law of Treaties, which mirrors customary international law. Several treaties were signed by the United States after Alvarez-Machain's abduction that support the objectives of the Bilateral Extradition Treaty.[218] These international instruments all codify preexisting rules of customary international law prohibiting police or other enforcement functions in the territory of another state.[219] There is a diversity of other instruments containing rules of customary international law that were all violated by the Alvarez-Machain kidnapping.[220]

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218. RESTATEMENT, *supra* note 39, § 329. *See* U.N. Convention, *supra* note 35, art. 2, § 3, 28 I.L.M. at 500. This instrument came into force for the United States on November 11, 1990. The Alvarez-Machain abduction occurred before that date. *See also* Treaty of Cooperation for Mutual Legal Assistance, Dec. 9, 1987, U.S.-Mex., art. 1, § 2, 27 I.L.M. 443, 447 (1988). This instrument entered into force for the United States on May 3, 1991. *See also* Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, U.S.-Mex., art. I, § 3, 29 I.L.M. 58, 59 (1990). This convention entered into force for the United States on November 11, 1990.

219. The states in whose territories international abductions and other sovereignty transgressions have occurred protested such actions as violations of international law. *See* RESTATEMENT, *supra* note 39, § 432 n.1. For example, in 1973 an Italian inspector was arrested in Switzerland for conducting investigations in Swiss soil. Another Italian officer was indicted in France for wounding a suspect while in the course of making an arrest. Two French officials were arrested and convicted in Switzerland for committing prohibited acts in favor of a foreign state. *Id. See also* Cook v. United States, 288 U.S. 102 (1933); The Apollon, 22 U.S. (9 Wheat.) 362 (1824); 1 Op. Att'y Gen. 68, 69 (1797). For incidents involving complaints made by the United States, see 4 MOORE, *supra* note 105, § 603.

220. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 51, arts. 3, 5, 9, 10. International Covenant on Civil and Political Rights, *supra* note 51, arts. 7, 9 (1)-(4), 10;

As stated in *Weeks v. United States*:[221]

> the efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[222]

The same rationale applies to the *Alvarez-Machain* case. A poisonous fruit (obtained in violation of the Constitution) cannot constitutionally be used by the prosecution at trial. This was pointed out in *United States v. Toscanino*:[223]

> [W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. . . . [W]e must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct.[224]

The act of kidnapping, the executive branch interpretation that kidnapping is not against the Supreme Law of the Land, and the Supreme Court's suggestion that the executive branch's actions are not bound by customary international law all violate the spirit of the United States Constitution. Since customary international law is the Supreme Law of the Land,[225] rights or duties acquired or contracted under it are secured by the Constitution. The Supreme Court stated in *Weeks*:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgements of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[226]

American Convention on Human Rights, Nov. 22, 1969, arts. 7(2)-(6), 8(1), 1144 U.N.T.S. 123 (Pact of San Jose, Costa Rica). In 1981, the United Nations Human Rights Committee decided that the abduction of a Uruguayan refugee from Argentina by Uruguayan officers constituted arbitrary arrest and detention in violation of article 9 (1). *See* U.N. GAOR Hum. Rts. Comm., 36th Sess., Supp. (No. 40), at 176-84 U.N. Doc. CCPR/C/R. 12/52 (1981). *See also* RESTATEMENT, *supra* note 39, § 432 n.1. In addition to violating the Extradition Treaty, the United States also transgressed the United Nations Charter and the OAS Charter.

221. 232 U.S. 383 (1914).

222. *Id.* at 393.

223. 500 F.2d 267 (2d. Cir. 1974).

224. *Id.* at 275 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

225. Paust, *Customary International Law*, *supra* note 135, at 78.

226. *Weeks*, 232 U.S. at 392.

In reference to violations of the Fourth,[227] Fifth,[228], Sixth[229] and Fourteenth[230] Amendments, the United States Supreme Court justified the exclusionary rule as the only effective deterrent to lawless police action.[231] As the Court noted in *Mapp v. Ohio*:[232] "[i]f the fruits of an unconstitutional search had been inadmissible [ab initio] in both State and federal courts, this inducement to evasion would have been sooner eliminated."[233]

In sum, three conclusions can be extracted from *Mapp*, *Weeks* and *Toscanino*: a) there is a need to protect the fundamental principles of the Constitution; b) human rights must be respected (especially those concerned with due process, arbitrary detention, and seizure); and c) the need to preserve constitutional principles and protect substantial human rights requires enforcement of the exclusionary rule to limit unlawful police actions.[234] Under these foundational cases, it is impossible to conclude that the human rights of an abducted person are not substantially transgressed by kidnapping.[235] Therefore, exclusion would be the most effective deterrent for the opprobrious practice of international kidnapping.

In addition to exclusion, reparation is an essential restorative remedy to help neutralize the human rights violations suffered by the kidnapped suspect. The concept of reparation or restitution was defined by the Permanent Court of International Justice in the *Chorzów Factory* case:[236]

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would,

227. *See* Linkletter v. Walker, 381 U.S. 618, 633-637 (1965); Mapp v. Ohio, 367 U.S. 643, 658 (1961).

228. *See* Miranda v. Arizona, 384 U.S. 436, 442 (1966).

229. *Id.*

230. *See Linkletter*, 381 U.S. at 633-637; *Mapp*, 367 U.S. at 658.

231. *See Linkletter*, 381 U.S. at 633-637; *Mapp*, 367 U.S. at 658.

232. 367 U.S. 643 (1961).

233. *Id.* at 658.

234. *Id.*

235. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment does not apply to foreigners who have not developed a sufficient connection with the United States to be considered part of the community. *Id.* at 264-66 However, the United States is obligated to respect foreigners' human rights by the United Nations Charter, the OAS Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights (Pact of San Jose, Costa Rica).

236. Factory at Chorzów (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17, at 4 (Sept. 13).

> in all probability, have existed if that act had not been committed.[237]

This international law concept of reparation is compatible with the application of the exclusionary rule. Applying both rules together would, in kidnapping cases, bar prosecution and guarantee return of the abducted person to the place of abduction.[238]

B. Other Solutions

Other solutions could prevent international abductions. While the object of this article is to explain how the practice of kidnapping is a violation of both conventional and customary international law, and thus a violation of the Supreme Law of the Land of the United States, the following solutions deserve mention.

1. Adding a Clause Prohibiting Kidnapping to Extradition Treaties

An obvious solution would be to add a clause prohibiting kidnapping to the United States-Mexico Extradition Treaty. There are some reasons to believe that adding such a clause is not a necessity. It has been demonstrated, theoretically kidnapping is against the nature and purpose of extradition treaties and the Charters of United Nations and the Organization of American States.

There should be no need to have such a clause because the prohibition of international kidnapping is necessarily implied from the text of any extradition treaty. However, such a clause is useful for Mexico and other countries in order to protect their territorial sovereignty and may be helpful to define sanctions against international kidnappers.[239]

There are about one hundred extradition treaties binding the United States. The practice of reforming one of them with such a clause should not lead police officers to believe they are allowed to perform abductions in countries which have not added that clause. The same applies for states which have signed extradition treaties but have not added the clause.

2. Prosecuting Police Officers as Kidnappers

The Mexican government could opt to arrest American police of-

237. *Id.* at 47.

238. *See* 4 MOORE, *supra* note 105, § 432 n.1.

239. At the present time, there are negotiations between the U.S. and Mexico toward a new extradition treaty, "one that plainly outlaws kidnapping as a means for moving suspects in criminal cases across a border." *'No Mas:' Legalized kidnapping a blot on Mexico relations,* HOUS. CHRON., editorial, June 23, 1993, at A14. *See Nuevo Tratado de Extradition con EU; Prohibirá Secuestros Transfronterizos: SRE,* EXCELSIOR, July 29, 1993, at A1.

ficers[240] who attempt to kidnap suspects in Mexican territory. Kidnapping is a crime described by the Mexican Penal Code and there are decisions from American courts which state that the kidnappers can be extradited to the country where they committed the crime.[241]

Although arresting, prosecuting, or extraditing American police officers who kidnap Mexican citizens would likely reduce this unlawful practice, other actions must be taken. For example, after the *Alvarez-Machain* decision, the Mexican Congress approved a reform to the Mexican Federal Penal Code adding to the crime of treason the action committed by any Mexican citizen who assists an international abduction.

3. *The Organization of American States*

The Permanent Council of the Organization of American States requested a legal opinion from the Inter-American Juridical Committee about the decision of the United States Supreme Court in the *Alvarez-Machain* case.[242] Not surprisingly, the Inter-American Juridical Committee condemned the United States Supreme Court decision.

The Inter-American Juridical Committee stated that the domestic rules of a state cannot be invoked to avoid compliance with international obligations—the state should answer for violations of international law committed by its executive branch, or any other branch, including the judiciary.[243] The Committee affirmed that kidnapping is a grave violation of international law and a transgression of the sovereignty of Mexican territory.[244] They also stated that the United States is responsible for this violation because, while knowing of the actions of the Drug Enforcement Agency (which committed the abduction), it did nothing to reverse the unlawful action. The Committee added that the United States has not honored the principle that treaties need to be interpreted in light of their purpose and ends, and in accordance with international law.[245] Finally, the Committee said the Court's decision could hopelessly damage

240. United States police officers have no status as law enforcement officers when on foreign soil.

241. For references to penalization of the crime of kidnapping in Mexico, see *supra* note 49. On January 11, 1988, Secretary of State George Schultz and the Canadian Secretary of State for Foreign Affairs signed a protocol amending the Treaty on Extradition between the United States and Canada. In an exchange of letters, the two secretaries recognized that the transborder abduction of persons to the United States by civilian agents of bailbonding companies was an extraditable offense under the treaty. Marian N. Leich, *Contemporary Practices of the United States Relating to International Law*, 82 AM. J. INT'L L. 337, 337 (1988).

242. O.A.S. CP/Res. 586 (909/92) (July 15, 1992).

243. *See* O.A.S. CJI/Res. II-15/92 (Aug. 15, 1992) at 5.

244. *Id.*

245. *Id.* at 7.

the international juridical order if every state is deemed to have the authority to violate the sovereignty of other states.[246] Indeed, kidnapping is incompatible with the right of every person to due process, one of the fundamental human rights protected by international law.

Even though the opinion of the Inter-American Juridical Committee has no authority to change the decision of the United States Supreme Court, that opinion is keeping with the rules of both customary and conventional international law. It is useful evidence of what international law says about kidnapping, and in the future it could be persuasive authority before United States federal courts or international courts or commissions.

4. The United Nations

One of the most important purposes of the United Nations is to promote international cooperation and respect for international law and human rights.[247] Both the General Assembly and the Security Council can request an Advisory Opinion from the International Court of Justice about the *Alvarez-Machain* case.[248] The decision of the United States Supreme Court caused much concern in the world community regarding the views of the United States on several areas of international law, including the principles of interpretation of treaties, incorporation of customary international law into domestic law, respect for international human rights, and respect for other countries' sovereignty.[249] It appears that Mexico would have strong international support to bring these issues to the General Assembly and eventually to the Security Council.[250]

There are good reasons to think that an Advisory Opinion requested from the International Court of Justice would be no different than the Opinion of the Inter-American Juridical Committee of the Organization of American States.[251] The facts and the legal principles at stake are the

246. *Id.*

247. *See* U.N. CHARTER art. 1.

248. U.N. CHARTER art. 96. The Sixth Commission has recommended that the General Assembly request a consultive opinion from the International Court of Justice about the issue involved in the *Alvarez-Machain* case. *Request for an Advisory Opinion from the International Court of Justice: Report of the Sixth Committee*, U.N. GAOR 6th Comm., 47th Sess., Agenda Item 151, U.N. Doc. A/47/713 (1992).

249. *See supra* notes 11-28.

250. The United States has veto power in the Security Council, as do the other four permanent members (China, France, Russia, and the United Kingdom). However, this does not mean that the United States would necessarily block an effort to obtain clarification from the International Court of Justice. The United States voted affirmatively on the resolution condemning Israel in the case of Adolf Eichmann. *See* S.C. Res. 138, U.N. SCOR, 15th Sess., 868th mtg., at 4, U.N. Doc. S/4349 (1960).

251. *See* O.A.S. CJI/Res. II-15/92 (Aug. 15, 1992) at 4-7.

same. The decision of the Organization of American States represents the vision of an international organization. Furthermore, the International Court of Justice would base its Advisory Opinion on bilateral and multilateral treaties and customary international law.[252]

After obtaining an Advisory Opinion from the International Court of Justice, the General Assembly could recommend measures for the peaceful arrangement of a solution[253] or to promote better development of international law and the realization of human rights.[254] If the International Court of Justice provided its advisory opinion to the Security Council, the Security Council then could submit the Report to the General Assembly for its consideration and action.[255]

5. Tort for Violation of International Law

According to Section 1350 of the United States Judicial Code, "district courts . . . have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[256] This statute authorizes aliens to sue for a tort committed in violation of customary international law[257] or international treaties.[258] The statute was designed as a remedy for "territorial injuries to aliens, whether committed by U.S. authorities or citizens or by foreigners; . . . extraterritorial injuries to aliens committed by U.S. citizens, officials or instrumentalities, and . . . injuries to aliens bearing such other direct nexus as to make the United States responsible for them . . . ."[259] Kidnapping victims may have some civil recourse through tort remedies. In *Jaffe v. Boyles*,[260] Jaffe (a Canadian citizen kidnapped by American citizens to be brought to justice in Florida) sued his kidnappers under the Alien Tort Act.[261] Alvarez-Machain also has standing to sue his abductors on the basis of the violations committed under both conventional and customary international law. Though the Torts Act would provide compensation for the damage caused to the human rights of Alvarez-

252. *See* Statute of the International Court of Justice art. 38, § 1(a)-(d).

253. U.N. CHARTER art. 14.

254. U.N. CHARTER art. 13 § 1(a)-(b).

255. U.N. CHARTER arts. 24, 25.

256. Aliens Tort Claims Act, 28 U.S.C. § 1350 (1988)

257. The original Alien Tort Statute was enacted in 1789. Although most contemporary international instruments prefer to use the expression "customary international law," the current version of the statute retains the expression "law of the nations." *See* 28 U.S.C. § 1350 (1988).

258. *See* TREATIES IN FORCE, *supra* note 78.

259. Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 COLUM. HUM. RTS. L. REV. 315, 327 (1992).

260. 616 F. Supp. 1371 (C.D.N.Y. 1985).

261. *Id.* at 1374.

Machain,[262] "the only effective deterrent to lawless police action is the exclusionary rule."[263]

6. *Statute Prohibiting International Kidnapping*

Finally, legislation from the United States Congress specifying that the President is bound by customary international law would help deter governmental kidnapping. A specific statement that actions by the executive branch contrary to international law are illegal could lead to a more appropriate expression of policy on the part of the executive. Before the United States Congress can make such a law, it must be more conscious of international law, other countries' sovereignty, and international human rights.

Even if kidnapping is already contrary to international law, a congressional act expressly prohibiting this opprobrious practice would deter lawless police action. "If the Supreme Court will not compel the Executive to 'take care that the law [and the Constitution] be faithfully executed' by closing the courts to the fruits of executive violations of international law, Congress can do so."[264]

Conclusion

The 1992 decision of the United States Supreme Court in *Alvarez-Machain* reflects the Court's current disdain for international law, and failed to interpret the bilateral Extradition Treaty in light of the Vienna Convention on the Law of Treaties, the Charter of the United Nations, and the Charter of the Organization of American States. This decision damaged the sovereignty of Mexico and the international law itself.

Fortunately, the Supreme Court did not expressly deny that customary international law, and the above mentioned charters, are Supreme Law of the Land. Only the issue of prior interpretation of the bilateral treaty was raised. Thus, it is still possible for an abducted person to introduce these issues in U.S. courts.

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262. While the President and other United States officials can argue that they are immune from the Alien Tort Act while acting within the scope of their functions, an argument can be made that when these officers violate the Supreme Law of the Land, their actions are no longer pursuant to their "official duties" at all. *See* Paust, *Is the President Bound*, *supra* note 75, at 766-72.

263. *See* Linkletter v. Walker, 381 U.S. 618, 633-637 (1965).

264. Louis Henkin, *Will the U.S. Supreme Court Fail International Law?*, NEWSLETTER, (Am. Soc'y of Int'l L., Washington, D.C.), Aug.-Sept. 1992, at 2. It is also suggested in this article that the Congress could, in exercising its power to define offenses against the law of nations, make international kidnapping a federal crime. *Id.*

On July 9, 1993, Alvarez-Machain filed law suit in Los Angeles, California, alleging civil rights violations. This suit will force U.S. courts to make a deeper reflection on the role of human rights, multilateral treaties, and customary international law in trans-boundary abductions. In the bilateral relationship between the United States and Mexico, there is an extradition treaty which describes the existing safeguards to protect individual human rights. Thus, extradition is the only way to obtain custody of a suspect who is physically in the other country without violating his or her civil rights, customary international law, and the law of treaties. Even the *Ker* court in 1886 expressly recognized Ker's right to sue for trespass and false imprisonment.

International law, whether conventional or customary, is the Supreme Law of the Land in the United States under its Constitution. Three conclusions can be extracted from *Mapp*, *Weeks* and *Toscanino*: (1) there is a need to protect the fundamental principles of the Constitution; (2) human rights must be respected (especially those concerned with due process, arbitrary detention and seizure); and (3) the need to preserve constitutional principles and protect substantial human rights requires enforcement of the exclusionary rule to limit unlawful police actions. The courts should close their doors to the fruits of what has been obtained in violation of the Constitution.

In 1992, the International Law Commission of the U.N. proposed to the General Assembly to request a Consultive Opinion from the International Court of Justice on the issue of international abductions. That opinion, still to come, would be helpful for defining what international law is on these matters and for the correct interpretation of international treaties.