To Abduct or To Extradite: Does a Treaty Beg the Question?

The *Alvarez-Machain* Decision in U.S. Domestic Law and International Law

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"With rare unanimity and undeniable justification the courts of the world have held that the manner in which an accused has been brought before the court does not and indeed, cannot deprive it of its jurisdiction, or of its right to hear the case against the person standing before it.

III.

In so deciding the courts of the world have, however, failed to face the decisive question. This is not whether jurisdiction exists, but whether jurisdiction should be exercised"[3].

Introduction

In a highly visible case involving drugs, torture, murder, forcible kidnapping, U.S. government payments to the abductors, protests from the Mexican government and, almost incidentally, an extradition treaty, the United States Supreme Court recently reaffirmed the rule of *male captus bene detentus*[4]. The rule is understood in the United States to mean that

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[3] F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in: Yoram Dinstein (ed.), International Law in a Time of Perplexity – Essays in Honour of Shabtai Rosenne (1989), at 414.

[4] Malvina Halberstam, In Defense of the Supreme Court Decision in Alvarez-Machain, in 86 Am. J. Int'l L. 736 (1992), reminds readers of Louis Henkin's translation

the way in which a defendant is brought to its courts does not affect or remove a court's jurisdiction, except in extremely rare, limited circumstances[5]. The Supreme Court decision was faithful to long-established rules of U.S. domestic law known collectively as the *Ker-Frisbie* doctrine. However, by largely ignoring the equally long-running and continued integration of international law into U.S. law, the court failed in precisely the manner indicated above by F.A. Mann by not "facing the decisive question" of whether U.S. courts should exercise the jurisdiction which it found to exist over Dr. Alvarez-Machain, the Mexican citizen who was forcibly kidnapped from Mexico to be brought to trial in the United States. The pertinence of this question is in no way diminished by the later dismissal of all charges against Alvarez-Machain[6] by the U.S. District Court in which his trial was to take place following the Supreme Court decision analyzed in this article, *United States* v. *Alvarez-Machain*[7].

The 1990 kidnapping of Alvarez-Machain followed his indictment in the United States for alleged participation[8] in the 1985 torture and mur-

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from the Latin: "a person improperly seized may nevertheless properly be detained (and brought to trial)". Louis Henkin, International Law: Politics, Values and Functions, 216 Recueil des Cours 9, 305 (1989 V). For counter-arguments to Halberstam, see Michael J. Glennon, State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain, 86 Am. J. Int'l L. 746ff. (1992). Other recent discussions of the decision include: Jacques Semmelman, Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined, 30 Columbia Journal of Transnational Law 513 (1992).

[5] Some would argue that even these narrow exceptions are open to question, given that the one case which established the exception for government kidnappings that are "shocking to the conscience" *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974), reh'g denied, 504 F.2d 1380 (1974), has been largely discredited. See, e.g., *United States* v. *ex re. Lujan* v. *Gengler*, 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d. 668 (1975). See also, H. Moss Crystle, When Rights Fall in a Forest. The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture, 9 Dick. J. Int'l L. 387 (1991), at 393–394.

[6] All charges against Alvarez-Machain were dismissed on 14 December 1992. U.S. District Judge Edward Rafeedie, Central District of California, told two assistant U.S. attorneys: "There is suspicion and there may be hunches, but there is no proof that [Alvarez-Machain] participated in the kidnapping of Camarena or that he even knew about it", ABA Journal, February 1993, at 22.

[7] *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188, 119 L.Ed.2d 441, 60 U.S.L.W. 4523 (1992).

[8] Alvarez-Machain allegedly assisted medically to keep Camarena alive for further torture and interrogation, *U.S.* v. *Caro-Quintero* (C.D. Cal. 1990) 745 F.Supp. at 602. As of 1990, 22 individuals had been indicted in connection with the torture-murders; including Alvarez-Machain, three have been kidnapped to the United States to stand trial there. *Id.*

der of a U.S. Drug Enforcement Administration (DEA) agent, Enrique Camarena-Salazar, in Mexico[9]. The Mexican government protested the abduction in a diplomatic note, claiming violation of its Extradition Treaty[10] with the United States and requesting repatriation of Alvarez-Machain[11].

Upon Alvarez-Machain's motion to dismiss his indictment, the U.S. federal district court agreed that because the kidnapping violated the Extradition Treaty, the court had no jurisdiction to try him. Its dismissal of the indictment and order for his repatriation to Mexico[12] was affirmed on appeal[13], but a majority of the Supreme Court reversed the appellate judgment and remanded the case for further proceedings, finding that the abduction did not violate the Extradition Treaty and "does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States"[14].

The Supreme Court's decision was attentively awaited by several groups, including proponents of the United States' ability to act as freely as possible across international borders in its "war on drugs[15]; those hoping to broaden the effect and acceptance of international law within the

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[9] Following the indictment, informal negotiations (not conducted under the color of the Extradition Treaty) between the DEA and the Mexican Federal Judicial Police (MJFP) for Alvarez-Machain's delivery to the DEA were unsuccessful. The abductors were apparently Mexicans, all acting in their private capacity on behalf of the DEA. *United States* v. *Caro-Quintero*, 745 F.Supp. 599 (C.D.Cal. 1990), at 603. The DEA paid at least $ 25,000 to the kidnappers and moved some to the United States with their families, paying substantial related living expenses. *Id.*

[10] Extradition Treaty, May 4, 1978 (1979) United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656, referred to below as the Treaty or the Extradition Treaty.

[11] *Caro-Quintero*, 745 F.Supp. at 608. See also Wilson G. Jones, The Ninth Circuit's Camarena Decisions: Exceptions or Aberrations of the *Ker-Frisbie* Doctrine, 27 Tx. Int'l L. J. 211 (1992) for discussion of Mexico's protests in this and other cases, notes 163–164 and accompanying text.

[12] *United States* v. *Caro-Quintero*, 745 F.Supp. 599 (Cal. 1990), at 614. The case was renamed on appeal to name Alvarez-Machain as defendant/appellee.

[13] *U.S.* v. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), at 1467.

[14] 112 S. Ct. 2188 at 2196.

[15] Attorney General William Barr called the decision "an important victory in our ongoing efforts against terrorists and narcotraffickers who operate against the United States from overseas". N.Y. Times, 16 June 1992, A1, col. 6, Supreme Court Roundup; High Court Backs Seizing Foreigner for Trial in U.S., Linda Greenhouse. See also Jones (note 11), at 213, who discusses the *Ker-Frisbie* doctrine from the perspective that the "United States is forced to use methods beyond formal extradition to obtain jurisdiction over foreign offenders when the harboring country fails to cooperate in the extradition process", claiming that Mexico's "refusal to extradite Mexican nationals" is official policy, 242 and note 181 and accompanying text.

United States legal system[16]; and a good number of the foreign affairs and justice ministries from the over 100 nations with which the United States has extradition treaties[17]. Indignant responses to the opinion, criticizing it as being contrary to international law and for encouraging violation of other states' sovereignty, were widespread and notable, especially from the latter group[18].

In hopes of approaching a better understanding of the *Alvarez-Machain* decision, Part I of this article outlines the development of the *Ker-Frisbie* doctrine and Part II analyzes the Supreme Court's majority and dissenting opinions. Part III examines rules of international law relevant to the decision and Part IV discusses how the decision will affect future responses to illegal abductions as well as international law and relations in the larger global community.

I. The Ker-Frisbie *Doctrine*

Above all else, the *Alvarez-Machain* court came down on the side of upholding the *Ker-Frisbie* doctrine, a pillar of U.S. jurisprudence that has stood solidly against various challenges[19] over the 107 years since the *Ker* case was decided in 1886. It expresses the United States version of *male captus bene detentus*, a doctrine that has parallels in other legal systems as

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[16] See, e.g., Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, 84 Am. J. Int'l L. 444 (1990) who argues that U.S. "concepts of due process and our understanding of individual rights under international law are much more developed" than when *Ker* was decided over 100 years ago, at 463.

[17] The number of active bilateral extradition treaties between the United States and other countries has been identified as 103, N.Y. Times (note 15).

[18] Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Jamaica, Mexico, Paraguay, Uruguay are among the governments listed in a State Department statement as having registered some form of complaint following the decision. U.S. Explains Position on Foreign Abductions, 24 July 1992, unpublished document containing the statement of Alan Kreczko, State Department deputy legal adviser, prepared for a hearing of a House Judiciary subcommittee. As an immediate response, Mexico suspended operations of DEA agents in Mexico and ordered its own agents to return from the United States, N.Y. Times (note 15). It also demanded renegotiation of the extradition treaty, to which the U.S. immediately agreed, opening talks on 16 June 1992. N.Y. Times 17 June 1992, A8, col. 1, U.S. Tries to Quiet Storm Abroad Over High Court's Right-to-Kidnap Ruling, Neil A. Lewis.

[19] Recent such challenges are identified in: Note, Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition, Mitchell J. Matorin, 41 Duke L. J. 907 (1992), at note 13.

well[20]. In examining the doctrine's development, it is helpful to keep the following questions in mind: What would happen if the *Ker-Frisbie* pillar were to shift, or even collapse? What is it holding up? And why does it die so hard? As will be seen, the notion of due process stands behind the answer to each of these questions, although due process receives little discussion in the *Alvarez-Machain* decision itself.

Any court shifting the *Ker-Frisbie* pillar would go against more than one hundred years of domestic judicial doctrine. On the longevity of the doctrine in the United States and its relation to due process, the *Alvarez-Machain* majority quoted extensively from the 1952 *Frisbie* opinion:

> "This court has never departed from the rule announced in [Ker] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'. No persuasive reasons are now presented for overruling this line of cases [Ker-Frisbie]. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards ... Frisbie, supra, at 522, 72 S.Ct., at 511–512 (citation and footnote omitted)"[21].

The *Ker* case was one of two cases decided by the Supreme Court on the same day in 1886 involving delivery of a defendant to the United States from abroad.

In *Ker* v. *Illinois*[22], an American was kidnapped from Peru and taken to the United States, where he was tried and convicted for larceny, without the extradition treaty between the two countries being applied. Accordingly he could claim no right under the treaty to be returned to Peru[23]. The *Ker* court did not address due process specifically; as the *Alvarez-Machain* court said in summarizing the *Ker* decision: "... Ker's due process argument [was rejected] more broadly, holding ... that 'such forcible abduction is no sufficient reason why the party should not an-

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[20] Regarding the acceptance of the "male captus, bene detentus" rule in other jurisdictions, see Mann (note 3), at 412–414, who references French, English, U.S., German and Israeli courts consideration of the doctrine, the Israeli example of course occurring in connection with the trial of Adolph Eichmann in 1961 and 1962.

[21] *Alvarez-Machain*, 112 S.Ct. at 2192. *Frisbie*, *supra*, at 522, 72 S.Ct. at 511–512 (citation and footnote omitted)

[22] *Ker* v. *Illinois*, 119 U.S. 436 (1886).

[23] His abductor, a private agent, had been given valid extradition papers by the State of Illinois, which had properly obtained them under the extradition treaty. However, he abducted Ker rather than deliver the papers to the Peruvian government, presumably unable to do the latter because of a government coup underway when he arrived in Peru.

swer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such a court', *Ker*, at 444"[24].

In *Rauscher*[25], on the other hand, where the treaty extradition procedures were actually invoked, due process was found to be lacking because the defendant had been tried for an offense other than that for which he was extradited, violating the rule of "specialty" then widely recognized in international law[26]. Notwithstanding that the specialty doctrine was not spelled out in the treaty, the court in effect read it into the language of the treaty and allowed the defendant to object to jurisdiction because the specialty rule had been violated. *Rauscher* can apparently be reconciled with *Ker* by taking the view that violation of an extradition treaty can only be claimed when the treaty is actually used to deliver the person to the United States[27]. Requiring actual invocation of the treaty also reconciles the Supreme Court's unwillingness in *Alvarez-Machain* to read prohibitions of abductions into the treaty with the rule in *Ker*, and is discussed further in Part II.

The *Frisbie* case[28] involved neither an international kidnapping nor an extradition treaty, but rather a kidnapping from Chicago to Michigan, within the United States. Nonetheless, the Supreme Court invoked the *Ker* rule in the language cited above[29] to support its argument that no due process rights had been denied the defendant. The resulting *Ker-Frisbie* doctrine has stood ever since to allow jurisdiction, in the view of the *Alvarez-Machain* majority, in cases involving trans-border abductions, even when those may violate international law.

The only exception to the *Ker-Frisbie* rule that has lasted, announced in 1974 in *United States* v. *Toscanino*[30], is very narrow and requires shocking governmental participation in the abduction for the defendant to be able to object to a criminal prosecution[31]. The largely discredited deci-

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[24] 112 S.Ct. 2188 at 2192. *Ker*, at 444.

[25] *United States* v. *Rauscher*, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886).

[26] For a detailed history of how specialty or "speciality" has developed in U.S. law, see Individual Rights and the Doctrine of Speciality: The Deterioration of *United States* v. *Rauscher*, 14 Ford. Int'l L. J. 987 (1990/91), Christopher J. Morvillo.

[27] Crystle (note 5), at 392.

[28] *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

[29] See text accompanying note 24, above.

[30] 500 F.2d 267 (2d Cir. 1974), reh'g denied, 504 F.2d 1380 (1974).

[31] The shocking conduct in *Toscanino* involved exceptionally long (17 days) and severe torture. For a discussion of cases in which abduction-related torture has not been found to be shocking, see Crystle (note 5), at 393 et seq. As to judicial limitations of and failures

sion is nonetheless of interest for its attempt to evaluate the *Ker-Frisbie* doctrine in light of modern U.S. due process jurisprudence. The *Toscanino* court attempted to extend to non-U.S. citizens certain constitutional due process protections against unreasonable search and seizure, a concept that the Supreme Court rejected in 1990 in *U.S.* v. *Verdugo-Urquidez*[32]. In discussing illegal search and seizures, and abductions as such a seizure, the *Toscanino* court tried to draw parallels between the exclusionary rule, by which government prosecutors cannot rely on illegally obtained evidence at trial, and the "illegal" obtaining of a person[33]. The *Alvarez-Machain* decision, without directly discussing the issue, also effectively precludes expanding U.S. due process rights to non-U.S. citizens and limits the influence of international law on domestic due process and other doctrine.

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to adopt the *Toscanino* decision, see D. Cameron Findlay, Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law, 23 Tex. Int'l L. J. 1 (1988), 48–49; and Terry Richard Kane, Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold, 12 Yale J. Int'l L. 294 (1987), 337–338, and Lowenfeld (note 16), 469–472.

[32] 939 F.2d 1341 (9th Cir. 1991).

[33] Or, as Lowenfeld has concisely posed the issue: "One might have thought that if the unlawful seizure of documents or weapons leads to annulment of the search, i.e., to suppression of the evidence seized, the unlawful seizure of a person would also lead to annulment of the seizure, i.e., release of the person arrested or reversal of the resulting conviction". His conclusion on the matter that this view "however, has not been the jurisprudence of the U.S. Supreme Court", is still valid and even indirectly reinforced by the *Alvarez-Machain* decision, Lowenfeld (note 16), at 460.

II. The Alvarez-Machain *Decision*

A. The Majority Opinion[34]

The rule from *Ker* to which the *Alvarez-Machain* court adheres so firmly is the rule stating that because the treaty was not used to deliver the defendant to the United States, he cannot rely on the treaty to void the court's jurisdiction. Accordingly, the majority framed the issue so as to render unnecessary much of the discussion which occurred in the two lower courts as to whether the conduct of the U.S. government was outrageous, or whether exceptions to the *Ker-Frisbie* doctrine were created or applicable. This framing of the question also precluded any lengthy discussion of due process issues because the court assumed that if the *Ker-Frisbie* doctrine were applicable, due process was not at issue. The court asked simply "whether the abduction of respondent from Mexico violated the extradition treaty between the United States and Mexico"[35], reasoning that if the treaty did not prohibit the abduction, "the rule in Ker applies, and the court need not inquire as to how the respondent came before it"[36].

The majority concludes that because the treaty does not expressly prohibit abductions, abductions do not violate the treaty[37]. The court's rule for construing the treaty is to "look to its terms to determine its meaning"[38]. This rule differs somewhat from the Vienna Convention on the Law of Treaties which requires that a treaty be interpreted "in light of its

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[34] Three of the nine Justices dissented from the majority decision, writing their own separate opinion. While this division does not affect the decision's force as law binding on all lower U.S. courts, the dissent articulates arguments which in the future courts and others who disagree with the outcome of *Alvarez-Machain* might appropriate in their efforts to change the law. Given the strength of the domestic and international reaction to the case, and the increasing number of abductions by U.S. actors abroad, these challenges are likely to persist if not increase. Regarding this increase in abductions, see Kristin T. Landis, The Seizure of Noriega: a Challenge to the *Ker-Frisbie* Doctrine, 6 Am. U. J. Int'l & Pol'y 571 (1991), at notes 7 and 53, citing Cherif M. Bassiouni, International Extradition and World Public Order (3rd ed. 1989), at 199, 212.

[35] 112 S. Ct. 2188 at 2192.

[36] *Id.* The court seems to be careful to refer only to the *Ker* case here, perhaps in recognition that the *Frisbie* leg of the *Ker-Frisbie* doctrine involved no treaty or international abduction and is therefore not applicable. However, the majority later cited extensively from *Frisbie*.

[37] 112 S.Ct. 2188 at 2195.

[38] *Id.* at 2192.

object and purpose"[39]. The Supreme Court specifically rejects the Court of Appeals reasoning that abductions are contrary to the treaty's purpose[40] noting that the purpose so ascribed by the appeals court (safeguarding the sovereignty of the signatories) is illogically broad. The treaty's meaning, as found by the majority, does "not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution"; it simply establishes "the procedures to be followed when the treaty is invoked"[41]. Having concluded that the Treaty's terms do not prohibit abductions, the majority views the remaining question as "whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty".

In short, the court finds no such implied prohibition[42]. The majority rejects the contention that general principles of international law (which, as argued by counsel for Alvarez-Machain, clearly prohibit international abductions) should form the interpretive backdrop to this question, and focuses on the question of protest by the Mexican government[43]. In the majority's view, if the treaty is self-executing, government protest or lack of it should have no effect, for the court is obligated to apply the treaty to protect every individual, regardless of whether the other country involved registers its protest. Human rights advocates may not like the specific results arising from application of such reasoning in the immediate case. However, the court's acknowledgment of this aspect of the treaty's function is important for its recognition of the need to protect the individual within the framework of relations between States[44].

The finding made over 100 years ago that Ker's abductor was acting "without any pretence of authority under the treaty or from the government of the United States"[45], still figures centrally in the opinion of the Supreme Court majority in *Alvarez-Machain*, which cites this very language. Thus it seems all the more curious that the majority

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[39] VCLT, Art. 31, *lit.* 1.

[40] 112 S.Ct. 2188.

[41] *Id.* at 2193, emphasis added.

[42] *Id.* at 2195. This conclusion is discussed within an international law context in Section III.B.1., below.

[43] *Id.* at 2195.

[44] See section III.B.3, below, for further discussion of human rights implications of the *Alvarez-Machain* decision.

[45] 112 S.Ct. 2188 at 2192.

sees no distinguishing significance in what it identifies as one of the "only [two] differences between Ker and the present case"[46], namely the fact that Mexico protested formally to the State Department, requesting repatriation of its national Alvarez-Machain (Peru did not protest the abduction of Ker, an American). The other difference mentioned by the *Alvarez-Machain* court is that *Ker* "was decided on the premise that there was no governmental involvement in the abduction"[47].

B. How *Alvarez-Machain* Reflects Domestic Perceptions of International Law and the Role of the Judiciary

Because foreign relations were so clearly implicated in the aftermath of this trans-border kidnapping, the court's majority declined to do what it viewed as overstepping its boundaries into the diplomatic terrain normally reserved for the Executive branch[48]. The majority stated:

"Mexico has protested the abduction of respondent through diplomatic notes ... and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch"[49].

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[46] The majority, 112 S. Ct. 2188 at 2192, acknowledged that the Court of Appeals found these differences dispositive in a Companion case, *Verdugo*, 939 F.2d. at 1346.

[47] 112 S. Ct. 2188 at 2192.

[48] The circuit court's *Caro-Quintero* opinion was criticized for depriving the Executive Branch of diplomatic opportunities, Jones (note 11), at note 204 and accompanying text. The Executive has no special constitutional grant of a foreign affairs competence, but the Supreme Court has "long interpreted the Constitution as ... requiring judicial deference to the Executive in matters involving foreign affairs", Halberstam (note 3), at 741. See also Richard Falk, Implementing International Law – The Role of Domestic courts: Some Reflections on the United States Experience, 3 Leiden J. of Int'l L. 67, 70 (1990): "The governmental argument for judicial deference and passivity has overwhelmingly prevailed in the setting of foreign policy and national security concerns ... International law is acknowledged to be applicable, but not necessarily in judicial settings".

Executive authorization for the FBI to abduct "fugitives from United States law" abroad and return them to the U.S. without the foreign countries consent is found, e.g., in a legal opinion issued by the Justice Department in June 1989, Jones (note 11), at note 6. The CIA received similar authorization regarding terrorists, Findlay (note 31), at 2. These policies may change under the Democratic president, in office since January 1993.

[49] 112 S.Ct. 2188 (1992), 2197, pleadings reference and footnote omitted. For discussions on the sincerity and motivations behind protests see Jones, ibid., at 247–251; and Extradition-International Law – The United States Ninth Circuit Court of Appeals Holds Government – Sponsored Abduction Abroad is not a Lawful Alternative to Extradition. *United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), 21 Ga. J. Int'l & Comp. L., 525 (1991), Thomas L. Horan. Horan finds the facts of *Verdugo* to "de-

The Supreme Court in *Alvarez-Machain* viewed any questions of whether Alvarez-Machain should be repatriated as belonging strictly to the Executive Branch. It did not discuss supervisory powers[50], since it had found jurisdiction to exist. The dissent, however, made it clear that "the Executive's intense interest in punishing respondent in our courts" did not justify what it regarded as the executive's disregard for the rule of law[51].

The dissent expressed that the rule of law in the United States should include consideration of general principles of international law. It relied specifically on "applicable principles of international law" to reach the "inexorable" conclusion[52] that the lower courts had acted properly in dismissing Alvarez-Machain's indictment and ordering his repatriation to Mexico. The majority, on the other hand, denied any significance to its acknowledgement that the abduction "may be in violation of general international law principles", other than to justify leaving it to the Executive Branch to respond to Mexico's protest and demand that Alvarez-Machain be repatriated[53]. The majority also specifically rejected the general principles of international law presented by respondent as a basis for interpreting the Extradition Treaty[54].

The *Alvarez-Machain* majority did not see determination of the ques-

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monstrate that despite a formal protest, a country may not necessarily desire to have an individual returned", at 536.

[50] Supervisory powers have developed in case law over the years to be exercised "as necessary to preserve judicial integrity and deter illegal conduct", 745 F.Supp. 599 (C.D.Cal. 1990), at 615. For example, at the district court level in *Alvarez-Machain*, the court hinted that it might decline jurisdiction if the U.S. government persists in supporting abductions abroad in order to bring suspects to trial in the United States. Landis (note 34), at note 74 and accompanying text et seq., sketches such discussions of the supervisory power.

[51] 112 S. Ct. 2188 at 2205.

[52] *Id.* at 2197.

[53] *Id.* at 2196. In comparing these two approaches it is important to remember the U.S. dualist tradition, which holds that international law is a separate system that enters into domestic law decisions only when called for. Even the early statement in *The Paquette Habana* that is so often relied on to support greater integration of international law into U.S court decisions contains traces of dualism: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination", 175 U.S. 677, 20 S. Ct. 290, 44 L.Ed. 320 (1900). On monism and dualism, see generally Robert Jennings/Arthur Watts (eds.), Oppenheim's International Law, vol. I, Peace (9th ed. 1992), at 52 et seq.; and Louis Henkin [et al.], International Law, Cases and Materials, (2nd ed. 1987), at 140 et seq.

[54] 112 S.Ct. 2188 at 2196.

tions facing the court as "depending upon" international law. It was seemingly reluctant to open too wide, if at all, any doors which might expand unnecessarily the role of international law in the court's jurisprudence. One example of this reluctance is the majority's failure, after finding that the abduction did not violate the extradition treaty and that the treaty did not prohibit such abductions, to then consider whether general international law principles prohibited such abductions[55]. Apparently the court's rejection of general principles of international law as having any bearing on interpreting the treaty precluded the need to discuss the relevance of those principles to the legality of the kidnapping itself.

The preceding discussion shows that the Supreme Court majority certainly had many reasons to reach the conclusions it did. They were consistent with years of United States legal precedent, kept the court out of what it perceived to be the Executive business of diplomacy and perpetuated the dualist view of international law's limited role in U.S. jurisprudence. Viewed from within the closed system of U.S. law, the decision makes considerable sense. Even in the international sphere, as far as the decision reflects the rule of *male captus bene detentus* it enjoys an "undeniable justification"[56] similar to that expressed by F.A. Mann with respect to the status of that rule elsewhere in the world. Such justifications, however, were developed over an era when international law dealt largely with the relations between states, and human rights had not yet played the major role it has since assumed in the formation of international legal standards and norms. Accordingly, today, the *Alvarez-Machain* decision as viewed from across the borders or across the oceans which separate the United States from its partners in international relations raises serious questions, addressed in the next section, as to the appropriateness of international abductions in modern international law at the close of the 21st century.

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[55] Glennon points out, however, the important distinction that just because the court construes the treaty "as not prohibiting abduction claims does not mean that it views other international law sources as permitting abduction. The Court in *Alvarez-Machain* is, if anything, careful to avoid implying that it considers state-sponsored kidnaping to be permissible under international law", Glennon (note 4), at 748. And Halberstam (note 3), at 736, reminds the reader that the court in fact acknowledged that the abduction might have violated international law.

[56] However, while Mann indicates that the concept enjoys justification in many different legal systems around the world, he still questions whether jurisdiction gained under the rule should be exercised (note 3 and accompanying text, above).

III. The Alvarez-Machain *Case and International Law*

The fact that the Supreme Court was not persuaded by the general principles of international law presented on behalf of Alvarez-Machain struck a sensitive chord among many international lawyers[57]. Indeed, specific rules of international law are relevant to this concrete case of abduction[58], notwithstanding its undeniable political implications[59]. These rules are analyzed below by concentrating primarily on the United States' actions, while acknowledging that other states abduct people as well[60].

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[57] For a partial listing of commentaries on the *Alvarez-Machain* case, including international law analyses, see note 4, above.

[58] Cf. the definition provided by Cherif Bassiouni, International Extradition and World Public Order (2nd ed. 1987), at 191, according to whom abduction occurs when "agents of one state acting under color of law unlawfully seize a person within the jurisdiction of another state without that state's consent".

[59] Other forcible abductions of criminal suspects abroad, and the consequences have sparked commentaries by international lawyers, see, e.g., Paul O'Higgins, Unlawful Seizure and Irregular Extradition, 37 British Y. Int'l L. 278–320 (1960); E. Bauer, Die völkerrechtswidrige Entführung (1968); Vincent Coussirat-Coustère/Pierre Michel Eisemann, L'enlèvement de personnes privées et le droit international, Revue Général de D. I. P. 346–400 (1972); Bartholomé de Schutter, 11 Revue Belge D. I. P. 88–124 (1965); François Rigaux, Droit public et droit privé dans les relations internationales (1977), at 315 et seq.; Karl Doehring, Restitutionsanspruch, Asylrecht und Auslieferungsrecht im Fall Argoud, 25 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), 209–222 (1965); F.A. Mann, Zum Strafverfahren gegen einen völkerrechtswidrig Entführten, 47 ZaöRV 469–488 (1987); *id.* (note 3), 339–354; Richard Downing, The Domestic and International Legal Implications of the Abduction of Criminals from Foreign Soil, 26 Stanford J. Int'l L. 573–599 (1990); Abraham Abramovsky, Extraterritorial Abductions: America's Catch and Snatch Policy Run Amok, 31 Va. J. Int'l L. 151–210 (1991); Landis (note 34); Joel R. Paul, The Argument Against International Abduction of Criminal Defendants, 6 Am. U. J. Int'l L. & Pol. 527–536 (1991).

[60] E.g. the abductions of: *Savakar* by Great Britain, 1911, see Jürgen Kohler, Der Savakar-Fall, 5 Zeitschrift für Völkerrecht 202–223 (1911); *Argoud* from Germany probably by France, 1963, Collection "Les chemins du réel" (1964), and comment by Jean Robert, 80 Revue du Droit Public et de la Science Publique en France et à l'Etranger 1255 (1964); *Eichmann* from Argentina probably by Israel, 1960/61, 36 ILR 306; *Nduli* from Swaziland by South Africa, 1978, 69 ILR 145; a person from the Netherlands by Germany, 1985, 1 Neue Zeitschrift für Strafrecht 464 (1985); *Hartley* from Australia by New Zealand, see Mann, ibid., 469, 481. Further cases involving Nazi Germany and Switzerland are reported by Jörg Paul Müller/Luzius Wildhaber, Praxis des Völkerrechts (1982), at 273–276. For comparable cases dealt with in modern German court practice see note 116 below.

In ancient times abductions were apparently more or less accepted conduct. The objectives of these pre-modern abductions, however, appear to be different than bringing crimi-

A. U.S. Jurisdiction to Try *Alvarez-Machain*

If asked whether a national court may try a person, the international lawyer thinks in terms of jurisdiction, expediently distinguishing between jurisdiction to prescribe and jurisdiction to enforce[61]. With regard to the U.S. jurisdiction to prescribe in *Alvarez-Machain*'s case, it has to be remembered that he was charged not with drug trafficking[62] as such, but with helping torture a U.S. citizen. Therefore the U.S. jurisdiction to prescribe may only rest on the so-called passive personality principle.

B. Jurisdiction – Evaluation *Prima Facie* and Second Thoughts Based on the Law of Interstate Relations

The main jurisdictional question raised by the case, however, is whether the United States has the necessary enforcement jurisdiction to carry out its jurisdiction to prescribe. *Prima facie* this should not be a particularly intriguing question, once Alvarez-Machain is on U.S. soil and brought before the competent court.

Second thoughts which may challenge the *prima facie* view, however, are spurred by the way in which the current U.S. jurisdiction was established, i.e. by Alvarez-Machain's forcible abduction. Are there legal grounds which allow U.S. courts to take account of the way the U.S. jurisdiction was established with regard to trying Alvarez-Machain? Are there, in the words of F.A. Mann, quoted at the outset of this article, legal reasons not to exercise jurisdiction which is nonetheless vested in the courts by international and national law? The following matters are to be considered as possible restraints on the exercise of U.S. jurisdiction over *Alvarez-Machain*[63].

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nal suspects to trial. The first Romans, e.g., abducted daughters of another people, the Sabinians, in order to found families; and Zeus, disguised as a steer, abducted Europa.

[61] See Institute of American Law (ed.), Restatement of the Foreign Relations Law of the United States (3rd ed. 1987). For criticism of this distinction see, e.g., Andrea Bianchi, Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony between European and U.S. Approaches, 35 Germ. Yrbk. Int'l L. 366 (1992).

[62] Drug trafficking is an international crime that, according to the Convention of 20 December 1988, confers jurisdiction on every state (*Weltrechtspflegeprinzip*), see Françoise Rouchreau, La Convention des Nations Unies contre le trafic illicite de stupéfiants et des substances psychtropes, 34 Annuaire Français de D. I. 601–617 (1988), at 602.

[63] Authority for identifying limitations on the exercise of states jurisdiction goes as far back as the famous judgment of the Permanent Court of International Justice in the *Lotus* case, judgment of 7 September 1927, PCIJ Series A No. 9 at 19: "It does not follow, however, that international law prohibits a state from exercising jurisdiction in its own

1. The Extradition Treaty

Art. 38 § 1 *lit.* a) of the Statute of the International Court of Justice[64] invites us to turn first to treaty law. In this case the extradition treaty concluded between the United States and Mexico is the most specific applicable treaty law. The extradition treaty does not explicitly prohibit a state party from obtaining the wanted person by means other than demanding his or her extradition. According to Art. 31 of the Vienna Treaty Convention[65], however, a treaty has to be interpreted in the light of the purposes pursued by it.

The treaty in question provides a comprehensive means for the contracting parties to extradite nationals of the other to the territory of the party requesting the extradition. Thus the treaty shows how a country can obtain a non-national who it may then try. It also restricts the discretion that a state normally enjoys as to the extradition of its own nationals. One might argue that forcible abductions circumvent the purpose of the treaty. Yet, for this to be so, forcible abductions would have to be within the scope of the treaty in the first place.

Ratione materiae this treaty is confined to regulating how to render the extradition of a criminal suspect possible in the case that both governments agree on a common approach to the case. The treaty does not deal with the opposite hypothetical situation of one state party acting unilaterally. If, however, the treaty does not cover this hypothetical, its purpose cannot be to prohibit unilateral measures[66].

Neither is the treaty concerned *ratione materiae* with the actual jurisdiction of the state party which has the person whom the other state wants to try. The treaty does not establish a title or claim to such jurisdiction for either party. Indeed there is no need to do so in an extradition treaty since jurisdictional questions are already covered by rules of general international law. These are the principles of territorially defined state sovereignty, on the one hand, and personally defined sovereignty, on the other. The Supreme Court's ruling not to let the extradition treaty

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territory, in respect of any case which relates to acts which have taken place abroad [...] Far from laying down a general prohibition [...] it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules [...]".

64 UNCIO 15, 355, hereinafter Statute of the ICJ.

65 Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, UNTS 1155, 331. The rules of interpretation spelled out in the Convention reflect customary international law, Alfred Verdross, Die Quellen des universellen Völkerrechts (1973), at 93.

66 The Court recognized this in *U.S.* v. *Alvarez-Machain*, 112 S. Ct. 2188 at 2189.

restrict U.S. jurisdiction to try Alvarez-Machain, therefore, cannot be challenged from the point of view of international treaty law[67].

2. *State Responsibility*

State responsibility is the second possible restraint on exercise of U.S. jurisdiction over Alvarez-Machain. The law of state responsibility, which is still not codified, is to be regarded as either customary international law or as a constitutional principle[68]. Applying the law of state responsibility to the *Alvarez-Machain* case is made somewhat easier if one relies on the *travaux* of the International Law Commission, which now comprise not only the grounds for responsibility but also the legal consequences thereof[69].

The ground for a state to be responsible is laid when it breaches, without justification, a binding international obligation that also confers a subjective right on another subject of international law. Did the United States breach its international obligations by forcibly abducting Alvarez-Machain from Mexico[70]? The United States may have violated Mexico's territorially and/or personally defined sovereignty. The principles of territorial and personal sovereignty are part of general international law[71] and laid down in Art. 2 (1) of the UN Charter. Although there is some

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[67] For a different view, see the Brief for the United Mexican States as Amicus Curiae in Support of Affirmance, *United States* v. *Alvarez-Machain*, 60 U. S. L. W. 4523 (U.S. June 15, 1992) (No. 91–712), at 10; see also Ruth Wedgwood, The Argument Against International Abduction of Criminal Defendants. Amicus Curiae Brief Filed by the Lawyers Committee for Human Rights in *United States* v. *Humberto Alvarez-Machain*, 6 Am. U. J. Int'l L. & Pol. 537–570 (1991).

[68] Cf. *Sentence arbitrale* by Max Huber, in Affaire des biens britanniques au Maroc espagnol, RIAA II, 641: "La responsabilité est le corollaire necessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale". Louis Henkin sees Art. 38 para. 1 *lit.* c) ICJ Statute as the *sedes materiae* of such constitutional principles, General Course on Public International Law, 216 R.d.C. 19–401 (1989 IV), at 51–52.

For a comprehensive recent study of state responsibility, see Eduardo Jiménez de Aréchaga/Attilla Tazi, International State Responsibility, in: Mohammed Bedjaoui (ed.), International Law: Achievements and Prospects (1991), at 346–380.

[69] Draft on the law of state responsibility, reports submitted by Special Rapporteur Arangio-Ruiz, Part I, reprinted in ILC Yearbook, Vol. II (1980), 1 at 30 et seq.

[70] It may be noted that the extradition treaty, which is not applicable to forcible abductions, can therefore not be construed to permit such action. Glennon (note 4), at 748, thinks the Supreme Court holds no other view.

[71] International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, at 110 para. 212.

uncertainty as to the precise content of the concept of territorial sovereignty, it is clear that any use of force committed by an authority or an officer of state A on the soil of state B is illegal[72]. Furthermore, a forcible abduction arguably violates the political independence of the territorial state within the meaning of Art. 2 (4) UN Charter if the latter's freedom of decision is at stake. In abducting Alvarez-Machain through its agents, the United States clearly aimed at forcing the presumably reluctant hand of Mexico with regard to the suspect. The United States thus violated Mexico's territorial sovereignty and possibly its political independence by acting through U.S. Drug Enforcement Agency officers or their agents on Mexican soil[73]. Yet, for an international wrong to be established there must be not only breach of an international obligation but also absence of a justification on the part of the acting state. The question is thus whether the United States acted under any justifying rule of international law in abducting Alvarez-Machain. The prohibition of the use of force in Art. 2 (4) of the UN Charter is unconditional and the only exception, self defense as described in Art. 51, does not merit further attention in this case[74]. But attempts to establish a right, albeit limited, to intervene on foreign soil for the purpose of combatting terrorism, and by extension, drug trafficking, have also been discussed[75]. However, there is no persuasive authority on which to base such a right to intervention.

The United States, by forcibly abducting Alvarez-Machain, thus committed an international wrong by violating Mexican territorial integrity. It is, therefore, appropriate to take a closer look at the consequences of this established international responsibility of the United States. The author state's international responsibility gives rise to two different sets of consequences: The first consequence is the obligation to make reparation for the breach, which is a purely secondary obligation, and the obligation to cease the breach, the exact dogmatic conceptualization of which remains doubtful. As a second consequence, the breach gives the victim state the right to take counter measures to respond to the breach. These may range from demanding the immediate cessation of the breach to reprisals[76]. As this case involves the U.S. courts it is appropriate to focus on obligations incumbent on the United States.

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[72] Mann (note 3), at 339; Restatement of the Law (note 61), at para. 433 (2).

[73] See also Glennon (note 4), at 746–747.

[74] *Id.* at 749.

[75] *Id.* at 755.

[76] On the varying terminology see Special Rapporteur Arangio-Ruiz, A/CN.4/440 of 10 June 1991 at para. 26/7; Arbitration Tribunal in Case concerning *the Air Services*

The United States, as a subject of international law, is the addressee of these obligations. Further, the obligations under the law of state responsibility are binding on all organs of the author state, including the judiciary[77]. Each and every state organ's action may engender its state's responsibility[78].

Did the obligation to cease the breach of the obligations binding on the United States *vis-à-vis* Mexico require the U.S. courts not to try Alvarez-Machain? Such obligation does not flow from the obligation to cease[79] the violation of Mexican territorial integrity since at the time there were no more U.S. drug enforcement officers operating on Mexican soil. In fact, if the violation of an obligation does not continue, the corresponding duty to desist from the violation is without object[80]. The legal evaluation might be different with regard to the prohibition not to use force against another state's political independence, since Mexico's free action in dealing with Alvarez-Machain's case was still being impinged by his retention in the United States.

Another obligation, that of making reparations for breach of international obligations, was also binding on the United States and its courts. There has been some argument as to whether this duty comprises a duty of *restitutio in integrum* or only the payment of a compensatory amount of money. The preeminent authority that *restitutio in integrum* is due is still the judgment of the Permanent Court of International Justice in the

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Agreement of 27 March, 54 ILR 320 at 337; International Court of Justice, Case concerning *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14 at 127.

[77] Within the context of the European Convention on Human Rights, this has been made explicit by both of the Convention's organs, i.e. the European Commission of Human Rights and the European Court, in the Case *Vermeire* v. *Belgium*. See Judgment of 29 November 1991, Series A No. 214-C at para. 25, and Opinion of the Commission of 5 April 1990 at paras. 37 et seq. referring to the obligation of the Belgian courts to comply with an earlier judgment by the European Court on the same issue.

[78] This has been made explicit specifically for human rights violation by European Human Rights Commission and Court in the Case of *Ireland* v. *United Kingdom*, Judgment of 18 January 1978, Series A No. 25 at para. 222, and Report of the Commission of 25 January 1976, reprinted in 19 Yearbook of the European Convention on Human Rights at 758–7599 (1976); see Jochen Abr. Frowein, Allgemeines Völkerrecht vor der Europäischen Kommission für Menschenrechte, in: Festschrift für Hans-Jürgen Schlochauer (1981), 289–300 at 297–298.

[79] On this consequence of an international wrong see Special Rapporteur Arangio-Ruiz, A/CN.4/416 at para. 31 et seq.

[80] Case of *Rainbow Warrior (New Zealand* v. *France)*, France-New Zealand Arbitration Tribunal, Award of 30 April 1990, reprinted in 82 I.L.R. 499 (1990) at para. 114; Special Rapporteur Arangio-Ruiz, A/CN.4/416 at para. 33.

Chorzów Factory case[81]. International state practice[82] has adopted the same approach and so have many writers[83]. *Restitutio in integrum* amounts at least to re-establishing the *status quo ante* of the breach[84], and probably extends to establishing the hypothetical situation that would exist had the breach not occurred. If the United States had not violated Mexican territory to obtain Alvarez-Machain he would have remained in Mexico subject to Mexican territorial sovereignty. Re-establishing the *status quo* consequently necessitated Alvarez-Machain's return to Mexico[85]. The obligation to hand him back was substantively of an immediate character. Practically, however, a prior judicial clarification was to be accepted, arguably allowing for a Supreme Court judgment. Any further detention, however, and even more so any trial, of Alvarez-Machain would have been contrary to the duty to make reparation incumbent on the United States and its courts. The immediate return of Alvarez-Machain to Mexico should have been ordered by the Supreme Court.

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[81] *Affaire de l'Usine de Chorzow*, Judgment of 26 July 1927, PCIJ Series A No. 9 at 47, which authority on this point is not harmed by the fact that it may be based on an *obiter dictum* since Germany as applicant had actually claimed damages, see F.A. Mann, Consequences of an International Wrong, in: Further Studies in International Law (1991), at 124–198; see also Central American Court of Justice, Judgment of 9 March 1917, Am. J. Int'l L., 696 (1917).

[82] Decision of the Franco-Italian Conciliation Commission in the Case *Mélanie Lachenal*, RIAA XIII, at 125.

[83] For a listing of these authors see Mann (note 81), at 126 with note 10.

[84] See, e.g., Special Rapporteur Arangio-Ruiz, A/CN. 440 at para. 67 et seq. Abduction may pose very specific problems as to the realization of the *status quo ante*. For example, when the Sabinians came to Rome to demand the rendition of their abducted women, these women would not let their fathers and brothers fight against their Roman husbands. The changes which had occurred on the human plane in the time elapsed between abduction and demand for rendition made any attempt to return to the *status quo ante* appear utterly inappropriate.

[85] It is macabre irony that most of the cases in which a state has demanded the rendition of a person forcibly abducted from its soil and then actually obtained this person concern abductions from Switzerland by agents of German Nazi regime.

The Israeli Supreme Court, sitting in the *Eichmann* case, is thought to have taken the return of the person forcibly abducted as a normal consequence of the violation of the victim state's sovereignty: "[...] Argentina has [by way of the joint Israeli-Argentina communiqué by which the incident was declared closed] condoned to the violation of her sovereignty and has waived her claims, including that for the return of Eichmann", Judgment of the Supreme Court, 36 ILR at 306 para. 13.

3. The Function of Jurisdiction

The restrictions on the exercise of the U.S. courts' jurisdiction discussed so far are based on legal principles that exist outside the concept of jurisdiction as such. This raises the question whether a restraint on the exercise of jurisdiction in this case has to be inferred from the inherent logic of the very concept of jurisdiction.

Functionally, jurisdiction has to be seen as the allocation of sovereign powers to deal with given factual situations, in which competing claims to address those situations arise. This allocation is based on the assumption that a state on whose territory the situation occurs is best poised adequately to deal with it.

By establishing its jurisdiction by way of force in another state's territory, a state presumably acts contrary to this rationale of jurisdiction and presumably acts contrary to the world community's public interest[86]. Can this assumption be rebutted? Could the United States argue that because Mexico did not take the appropriate steps in this case, the assumption was rebutted that Mexico was best poised to deal with Alvarez-Machain's case?

Such a rebuttal should in principle be permissible. Yet, since territorial jurisdiction flows directly from territorial sovereignty, the rebuttal ought to correspond to certain strict requirements. Substantively the United States has to show that trying Alvarez-Machain was in the international public interest. Torture is a grave violation of the rights of the human person, and therefore of the international public interest, as expressed in the International Bill of Rights[87], and more specifically in the Anti-torture Convention[88]. Although there was no state authority involved in Camarena's torture, such a violation also presumably occurred, since certain fundamental human rights engender on the part of each state a duty to protect the individual against other individuals. This violation is to be redressed, most preferably by prosecuting the torturer[89].

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[86] Cf. Bassiouni (note 58), at 191.

[87] Universal Declaration of Human Rights, 10 December 1948, GAOR 3rd Session, Resolutions, Part I, UN Doc. A/810; International Covenant on Civil and Political Rights, done at New York, 16 December 1966, 999 U.N.T.S 171, entered into force on 23 March 1976, reprinted at 6 I.L.M. 368 (1967).

[88] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, reprinted in 23 I.L.M. 027 (1984) entered into force on 26 June 1987.

[89] See Jon M. van Dyke/Gerald W. Berkley, Redressing Human Rights Abuses, 20 Denver J. of Int'l L. & Pol. 243–267 (1992).

Thus, had Mexico refused to prosecute Alvarez-Machain in spite of sufficient evidence of his involvement in the torture, Mexico would have failed to live up to its international obligations. Yet such a failure may not be easily assumed. To the contrary, among nations, procedural safeguards play a major role providing the indispensable legal security in the relations between powerful nations and less powerful ones[90]. It remains to be specified which procedure is to be followed in each case. The ways and means of peaceful settlement enunciated in Art. 33 *lit.* 1, UN Charter are always available[91]. First and foremost, however, one has to think of the remedies specific to the case. The most specific remedy here would have been for the United States to make use of the extradition treaty and to lodge a request for extradition of Alvarez-Machain with the Mexican government. Because it failed to invoke this procedure the United States may not rebut the assumption of Mexico being best situated to deal with Alvarez-Machain's prosecution.

This functional view of jurisdiction leads to the conclusion that the United States' exercise of jurisdiction to enforce would be contrary to the international public interest, which is defined as a rational allocation of sovereign powers. In French administrative law as well as in the Law of the European Communities such a case would be subsumed under the term *abus de pouvoir* or *détournement de pouvoir*. Presumably this is a principle common to most civil law national legal systems, pursuant to Art. 38 § 1 *lit.* c) of the Statute of the ICJ, with parallels in common law national legal systems[92]. Arguably it flows directly from the functional view of national sovereignty as outlined above and consequently bars the United States from exercising its jurisdiction with regard to Alvarez-Machain.

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[90] See, e.g., Art. 33 et seq. UN Charter, but also the obligation on the Security Council to state a threat to international security, Art. 39 UN Charter, before taking measures under Chapter VII (emphasis added).

[91] While listed in the context of disputes "likely to endanger the maintenance of international peace and security, many of the following methods have arguable applicability in this case as well: "Negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice", UN Charter, Art. 33 *lit.* 1.

[92] For a discussion as to whether the concept of abuse of rights is "a general principle of international law", see Alexandre C. Kiss, Abuse of Rights, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 7 (1984), 1–2.

4. Jurisdiction – Second Thoughts Based on Human Rights

This legal situation is unsatisfying in that it considers Alvarez-Machain only as an object of the rights and obligations of states *vis-à-vis* each other. But what of the rights that he derives as an individual from international law? At first glance his chances to successfully claim violation of his individual human rights look slim. At the time of the abducation, the United States was not (yet) party to any general human rights instruments[93] i.e. instruments which grant a broad scope of rights[94]. Accordingly customary international law determines the human rights obligations of the United States and the corresponding rights of Alvarez-Machain.

Of course, there is uncertainty and disagreement as to which human rights are customary international law. The Universal Declaration of Human Rights (UDHR), however, may serve as a starting point. The Declaration, in Arts. 2 and 9, recognizes each person's right to personal freedom, subject to limitations such as criminal convictions. Some authors think the entire Universal Declaration has become customary international law[95]. Others see only the most basic rights recognized in the Declaration (i.e. not to be tortured or discriminated against) as forming customary law[96]. The correct view appears to fall somewhere between these two positions. Those rights enshrined in the Declaration that are an imminent expression of the dignity of the human person are part of customary international law[97]. Indeed it is by no means accidental that these rights are enunciated in many modern national constitutions; this would

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[93] As to the Anti-torture Convention, the Senate gave its advice and consent to ratification on 27 October 1990, see 136 Cong. Rec. S17486-92. The United States, however, will not deposit its instrument of ratification until after the Congress has adopted necessary implementing legislation, see David P. Stewart, U.S. Ratification of the Covenants on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations, 14 Human Rights L.J. 78 with footnote 5 (1993).

[94] The situation has changed as of 8 September 1992, pursuant to the ratification by the United States of the International Covenant on Civil and Political Rights (CCPR). The United States signed the Covenant in 1977, the Senate gave its advice and consent to ratification on 2 April 1992, and the U.S. instrument of ratification was deposited with the United Nations on 8 June, see Stewart, ibid., 77–83.

[95] Dinh Nguyen Quoc/Patrick Daillier/Alain Pellet, Droit international public (3rd ed. 1987), at para. 253.

[96] Restatement (note 61), at § 701 with note 6.

[97] Support for this view and citations appear in Jennings/Watts (note 53), vol. I/2, § 437, 1001 et seq., with references in note 10.

indicate that they may be seen as general principles of law[98]. The right to personal freedom fulfills these requirements.

It is doubtful whether Alvarez-Machain can claim any violation of his personal freedom specifically arising from his being in the United States. Indeed, Art. 9 UDHR – and more explicitly Art. 9 (1) CCPR – subjects the right to personal freedom to legal proceedings brought against him or her according to the respective state's law. Alvarez-Machain was kept and tried in full conformity with U.S. law, unless one accords international law an enhanced role in the U.S. internal legal order. The United States acted unlawfully, however, with regard to Alvarez-Machain's personal freedom when its agents abducted him in Mexico because Mexican law was applicable at that moment[99]. U.S. agents were then bound by Alvarez-Machain's human rights *ratione loci* while acting in Mexico. In international law it is established through case law that human rights bind a state's organs wherever they act[100].

The question arises, therefore, whether the violation of Alvarez-Machain's human rights by the United States in Mexico confers a right on him which he might invoke before U.S. courts. Applying the law of state responsibility, the United States has breached one of its international obligations and is therefore exposed to the consequences that such a breach entails. The most notable consequence would be to make reparation, which meant that Alvarez-Machain should have been released[101]. Sepa-

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[98] That is, general principles in the meaning of Art. 38. 1. c) ICJ Statute; Mann (note 3), at 415.

[99] Regarding what constitutes "illegality", Art. 9 UDHR requires that any measure depriving a person of his or her liberty must be in accordance with the domestic law of the high contracting party where the deprivation of liberty takes place. This has been made explicit by the European Commission for Human Rights with regard to the comparable Art. 5 para. 1 of the European Convention on Human Rights, see Case of *Stocké* v. *Federal Republic of Germany*, Series A vol. 199, Opinion of the Commission as expressed in the Commission's report of 12 October 1989, at para. 167.

Further, Art. 9 UDHR provides that no one shall be subjected to arbitrary arrest, detention or exile. According to the *travaux préparatoires* (The Commission on Human Rights E/CN.4/SR.4-7, para. 43) is an illegal act also an arbitrary act.

[100] Position of the Human Rights Committee, Communication No. R.13:56, *Lilian Celiberti de Casariego* v. *Uruguay*, views adopted on 29 July 1981, GAOR 36th session, Supplement No. 40, 185, 188, para. 10.2; European Commission of Human Rights, *Cyprus* v. *Turkey*, 2 Decisions and Reports 125 (1975), at 136–137.

[101] The Human Rights Committee has concluded that a violation of the international *habeas corpus* obliged the author state had to release the plaintiff, Communication No. 107/1981, views adopted on 21 July 1983, *Elena Quinteros Almaida et al.* v. *Uruguay*, GAOR 38th Session, Supplement No. 40 at 216, 224, para. 16. in the *Hostages* case the ICJ declared that Iran should release the U.S. diplomatic personnel immediately, *United*

rate from the question of his release, Alvarez-Machain might claim damages for the financial losses suffered because of his abduction, albeit on different grounds. He would have to argue that *restitutio in integrum* encompasses establishing by the tort feasor of the hypothetical situation that would have existed without the breach, including the economic situation.

These conclusions, however, presuppose that the general law of state responsibility applies to human rights violations. The desire to enhance the efficiency of human rights protection would advocate this[102]. According to the ILC, every breach of an international obligation entails the author state's responsibility. No qualification is made as to the character of the obligation. Deciding otherwise would assume the existence of obligations of major and of minor significance. Especially with regard to human rights obligations such a distinction would be shocking. It would also inappropriately introduce a subjective element in determining the significance of a state's international obligations. Thus, the general law of state responsibility applies in principle to human rights violations[103].

States Diplomatic and Consular Staff in Tehran, Merits, Judgment of 24 May 1980, ICJ Reports 1980 at 45.

[102] See Louis Henkin, Human Rights and "Domestic Jurisdiction", in: Thomas Buergenthal (ed.), Human Rights, International Law and the Helsinki Accord (1977), at 31; Bruno Simma, Fragen der zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte, in: Festschrift für Hans-Jürgen Schlochauer (1981), 635–648 at 636.

[103] United Nations practice recognizes that human rights violations may engender the state responsibility of the author state, see Report of the Expert of the Fate of Missing and Disappeared Persons in Chile, transmitted in Accordance with Para. 6 (b) of Commission of Human Rights Resolution 11 (XXXV) of 6 March 1979, UN Doc. A/34/583/Add.1, 21 November 1979 and follow-up report, UN Doc. E/CN.4/1363, 2 February 1980. Cf. furthermore the report presented by Theodor van Boven to the UN Human Rights Sub-Commission in August 1991. Since 1989 he has been entrusted with studying the right to compensation and rehabilitation for victims of gross violations of human rights, see Frank C. Newman, Redress for Gulf War Violations, in 20 Denver J. of Int'l L. & Pol. 213–222 (1992), at 215.

Powerful authority for applying the general law on state responsibility without restriction to human rights violations is also to be found in the context of regional human rights instruments. The *travaux préparatoires* of the European Convention indicate that the consequences of a judgment by the Court concluding to a violation by a state of its obligations under the Convention are to be determined by the general law of state responsibility (Rapport du Comité d'Experts of 16 March 1950, Collected Edition of the "Travaux préparatoires", Vol. IV at 45); see Jörg Polakiewicz, Die innerstaatliche Durchsetzung der Urteile des Europäischen Gerichtshofes für Menschenrechte, in 52 ZaöRV 149–190 (1992), at 163 et seq. Also, the Inter-American Court of Human Rights, San José, in the *Velasquez-Rodruigez* case – submitted by the Inter-American Commission on Human Rights against the State of Honduras, Judgment of 21 July 1989, reprinted in 11 Human Rights L.

For state responsibility to arise the author state must have breached an obligation that corresponds to the claimant's subjective right. Did Alvarez-Machain hold a subjective right under customary international law not to be abducted, or was he a mere factual beneficiary of the United States' objective obligations[104]? We propose the following response: the individual is not only the primary beneficiary of a state's customary law obligations in the field of human rights, but is entitled to invoke these rights against any state including his or her own national state. The individual is thus a limited subject of international law[105]. He or she is the holder of the primary customary international human rights and of secondary rights which arise in case of the primary rights being violated by a state. This does not exclude the entitlement of states to demand compliance[106] or the consideration of the objective international legal order[107] as beneficiary of a state's compliance with customary human rights obligations.

Alvarez-Machain therefore was entitled under international law to demand to be brought back to Mexico as *restitutio in integrum* for his being illegally abducted[108]. His interest must then have been to have a remedy

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J. 127 (1990) at paras. 24 et seq. has ruled as follows: "(...) the Court must now define the scope and content of the just compensation to be paid by the Government to the family of Manfredo Velasquez. It is a principle of international law, which jurisprudence has considered 'even a general principle of law', that every violation of an international obligation which results in harm create a duty to make adequate reparation. Reparation of harm brought about by the violation of an international obligation consists in full restitution (...) Indemnification for human rights violations is supported by international instruments of a universal and regional character" (citations omitted).

[104] On this distinction see Permanent Court of International Justice, *Compétence des tribunaux de Dantzig*, Advisory Opinion of 3 March 1928, PCIJ Series A/B No. 61 at 231.

[105] See Jost Delbrück, Die Rassenfrage als Problem des Völkerrechts und nationaler Rechtsordnungen (1971); Henkin (note 4), at 226.

[106] See former Special Rapporteur Roberto Ago, ILC Yearbook, Vol. II (1973), 1 at 221, para. 65; cf. PCIJ, *Phosphates in Marocco*, Prelim. Objections, Judgment of 14 June 1938, PCIJ Series A/B No. 74 at 28.

[107] For human rights instruments as establishing an objective legal order see Decision of the European Commisssion of Human Rights, Case *Chrysostomos et al.* v. *Turkey*, Decision of 4 March 1991, reprinted in 51 ZaöRV 156 (1991), at 167: "Constitutional instrument of European public order in the field of human rights", with annotation by Jörg Polakiewicz, ibid. See Jochen Abr. Frowein, The European Convention on Human Rights as the Public Order of Europe, in: Collected Courses of the Academy of European Law, Vol. I/2 (1990), 267–358 at 280 et seq.

[108] The European Court has repeatedly urged states party to the Convention to adapt their internal legal order to its rulings (e.g. in the *Norris* case, Judgment of 26 October 1988, Series A No. 142 at para. 50), which would constitute a *restitutio in integrum* of the violation of the Convention beforehand, see Polakiewicz (note 103), at 165–166.

to enforce this right. Art. 9 UDHR recognizes the right of each person to due process, and particularly to a fair trial, which belongs to the customary core of human rights. A crucial question then is whether the right to due process means that one's substantive international rights be taken into consideration by the national judge. Here, the European Convention of Human Rights is illustrative. According to its Arts. 6 and 13 every person has a right to a remedy for enforcing his or her conventional rights before national courts. It is submitted that this position is sound and should also be valid on the universal plane.

5. Jurisdiction: What International Law Expects of National Courts

As we have seen, international law basically requires the national judge to examine how the jurisdiction of the court has been established in the first place. If something internationally illegal in the establishment of jurisdiction is found, the judge is required to act accordingly, probably by refraining from exercising the jurisdiction. The judge may do so by relying directly on the principles of international law discussed above, and on the binding force of the international legal order, which binds the state and all of its organs, including the judiciary.

Since Alvarez-Machain has in fact been released, discussion of his further trial can only be hypothetical. Yet if the evidence against him had been acceptable, the Supreme Court judgment would have rendered his further trial possible. Because international law requires the U.S. courts to refrain from exercising their jurisdiction with regard to Alvarez-Machain, further trial by the competent U.S. court would thus have constituted a breach of the court's obligation to help make reparation of the violation of Mexico's sovereignty. It would also have breached any individual human rights that Alvarez-Machain holds against the United States. Further trial would also have constituted a separate breach of an international obligation, bringing into play the law of state responsibility a second time[109]. A formal conviction at the end of any trial that is held in breach of an international obligation would be void. Voiding is in fact the specific sanction for international wrongs committed by juridical acts[110].

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[109] Cf. Mann (note 3), at 344.

[110] See Ian Brownlie, System of the Law of Nations. State Responsibility, Part 1 (1983), at 27; Willem Riphagen, State Responsibility: New Theories of Obligation in Inter-State Relations, in: Ronald St.J. MacDonald/Douglas M. Johnston, The Struc-

IV. International Law: Status & Development after Alvarez-Machain

According to classic scholarship, international law is a legal order concerned with the relations between sovereign entities[111]. Since 1945 this understanding has been broadened by the surge in importance of the international law of human rights. *Alvarez-Machain* shows that these two important components of contemporary international law, i.e. state sovereignty and the rights of the human person, are intertwined though they retain rationales of their own. The case further illustrates that both start from formal and powerful premises: The integrity of a state's sovereignty is not dependent on its physical or political might and the integrity of a human is to be respected independently of his or her proven or alleged behaviour.

The doctrine of *male captus bene detentus*, although seemingly standing on its own at the core of the case, has to be seen within the framework of modern international law. If understood correctly, the doctrine is still a valid description of a principle that exists in international law[112]. A state has territorial jurisdiction over every person that is on its soil and is not immune from foreign jurisdiction by virtue of a specific norm, regardless of how this person came to the state. Yet it is something different if this jurisdiction is exercised with regard to the person who was *male captus* in the first place. Under modern international law the function of state jurisdiction and the rights of the human person combined with the law of state responsibility require the national court not to exercise its jurisdiction in such a case.

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ture and Process of International Law (1983), 581–626 at 598–599, paras. 38–39. A recent example is the non-recognition by the Member States of the European Community of acts of the government of former Yugoslavia after this state launched its attack on Croatia. See further the International Court of Justice in the *Fisheries* case, Judgment of 18 December 1951, ICJ Reports 1951, 116 at 124 concluding at the invalidity of an internationally wrong legislative act.

The Spanish constitutional court in a judgment of 16 December 1991 in the case of *Barberà et al.* declared null and void the criminal convictions pronounced by a lower court, after the European Court, in the Case of *Barberà, Messegué and Jabardo*, Judgment of 6 December 1988, Series A No. 146, had found that the lower court proceedings violated Art. 6 para. 1 ECHR. See Jörg Polakiewicz, Die Aufhebung konventionswidriger Gerichtsentscheidungen nach einem Urteil des Europäischen Gerichtshofs für Menschenrechte, 52 ZaöRV 804–827 (1992).

[111] See Nguyen Quoc/Daillier/Pellet (note 95), at 27 *et seq.*

[112] Cf. Doehring (note 59), at 213; very outspokenly Mann (note 3), at 344–345, who thinks that arguments and state practice have been exhaustively treated by the Israeli courts in the *Eichmann* case.

It is worrisome that this distinction is not yet clearly reflected in the admittedly sparse jurisprudence on forcible abduction. The *Alvarez-Machain* decision only confirms this consternation. Of the few previous national court rulings on trying persons forcibly abducted abroad[113], the trial of Adolf Eichmann is probably the most well-known[114]. Eichmann was tried in Israel after his abduction from Argentina where he had fled. The District Court of Jerusalem and the Israeli Supreme Court entered into a specific discussion of the *male captus* doctrine under international law and came to the conclusion that Israeli courts had jurisdiction. Clearly, in this case the Israeli court ought not to have renounced exercising its jurisdiction on any of the grounds discussed above because the atrocities for which Eichmann was responsible were such that no ordinary standards of argumentation can be applied to this case.

It is of interest to look at how European courts have recently dealt with cases of forcible abductions of criminal suspects abroad undertaken by the executive branch of government[115].

Courts in the Federal Republic of Germany have ruled on this intricate issue on several occasions, exercising jurisdiction in all but the latest instance[116]. Their jurisprudence is also based on longstanding acceptance of the *male captus bene detentus* rule, as reflected in a 1986 judgment of the

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[113] The *Argoud* decision is discussed above. Abundant material on the cases prior to 1960 is to be found at O'Higgins (note 59), at 279 and note 1.

[114] See, e.g., Helen Silving, In Re Eichmann: a Dilemma of Law and Morality, in 55 Am. J. Int'l L. 307–358 (1961).

[115] Only a few cases can be presented here. For an overview of French and British court practice see Matthias Herdegen, Die völkerrechtswidrige Entführung eines Beschuldigten als Strafverfolgungshindernis, 13 EuGRZ 1–3 (1986), notes 6 and 10 and accompanying text.

[116] The case in which jurisdiction was not exercised is Bundesgerichtshof, Judgment of 19 December 1986, reported in Monatsschrift für deutsches Recht (MDR) 1987, at 427. Earlier cases, in which jurisdiction was exercised include: Bundesverfassungsgericht (Federal Constitutional Court), ruling of 17 July 1985, reported in Europäische Grundrechte-Zeitschrift (EuGRZ) 1986, at 18; Bundesverfassungsgericht, Judgment of 3 June 1986, reported in Neue Zeitschrift für Strafrecht (NStZ) 1986, at 468; Bundesgerichtshof (Federal Supreme Court), Judgment of 2 August 1984, NStZ 1984, at 563; Bundesgerichtshof, Judgment of 1 February 1985, NStZ 1985, at 361; Bundesgerichtshof, Judgment of 30 May 1985, reported in NStZ 1985, at 464; Oberlandesgericht (Higher Regional Court) Düsseldorf, Judgment of 31 May 1985, reported in Neue Juristische Wochenschrift (NJW) 1984, at 2050.

The cases reported concerned abductions of persons from neighbouring European countries with which there were extradition treaties. The deplacements of the suspect from the other country on to German territory were obtained by means either of force or of deception.

Federal Constitutional Court, the Bundesverfassungsgericht[117]. In this case the German suspect was forcibly abducted by German police officers from the Netherlands and tried before a German court. He appealed to the Bundesverfassungsgericht on grounds of an alleged violation of his fundamental rights as enshrined in the German Grundgesetz. In response, the Bundesverfassungsgericht first turned to international law, drawing a distinction between the existence of jurisdiction and its exercise. As grounds for limitation of the exercise of a court's jurisdiction in such a situation, it looked to "general international law", which according to the German Basic Law, is incorporated into the German legal order[118]. The Court said that there was no general rule which forbade courts to exercise jurisdiction over a suspect abducted abroad. It found, however, that such abductions may give rise to a claim to *restitutio* of the suspect on the part of the state on whose territory the abduction had taken place, on grounds of violation of that state's sovereignty[119]. The court did not consider this rule relevant in the case before it, however, pointing out that the Netherlands had made no request for rendition of the abducted person. The court also denied that subjective rights for the individual flow from international law, in particular from the extradition treaty[120]. The court did not discuss international human rights law binding on the Federal Republic. The court then turned to the question as to whether, in the domain of national law, an obstacle to further proceedings arose out of the violation of the human rights of the suspect as guaranteed by the constitution or the rule of law. It regrettably answered this question in the negative.

Only in its most recent decision, from 1987[121], did the Federal Supreme Court, the Bundesgerichtshof, take account of the way its jurisdiction was established. The plaintiff was induced by fraud to come from the Netherlands to Germany, where he was sentenced to a long prison term. The Court ruled on appeal that the Dutch request for rendition of the plaintiff called for staying the proceedings and could eventually preclude

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[117] See comment by Theo Vogler, Internationale Zusammenarbeit in Strafsachen, 105 Zeitschrift für die gesamte Strafrechtswissenschft (ZStW) 1–29 (1993), at 26.

[118] Art. 25 of the Grundgesetz provides: Die allgemeinen Regeln des Völkerrechts sind Bestandteil des Bundesrechts.

[119] For a comprehensive argumentation on this point see Theo Vogler, Strafprozessuale Wirkungen völkerrechtswidriger Entführungen von Straftätern aus dem Ausland, in: Festschrift für Dietrich Oehler (1985), 379–393.

[120] Critical: Herdegen (note 116), at 1–2, discussing a similar reasoning of the constitutional court in its 1985 decision and Martin Schubarth, Faustrecht statt Auslieferungsrecht, in 3 Strafverteidiger (StV) 1987, 173–175.

[121] See note 115 above.

the exercise of German jurisdiction. The German decision appears to be based more on the inter-state rationale than on any rights of the plaintiff. This decision is thus a step in the right direction but not entirely satisfactory.

In a case reported from the Swiss Supreme Court[122], the court refused to follow the demand by German authorities for the extradition of a Belgian citizen who had been deceived into coming from Belgium to Switzerland. The court argued that by this deceptive action, Belgian sovereignty had been violated and that any extradition would constitute assistance by Switzerland in this internationally wrongful act.

The European Human Rights organs at Strasbourg, in deciding the *Stocké* case[123], also had to deal with a case of forcible abduction. In France Stocké was induced to board a plane which, contrary to his expectations, then landed in Germany where he was arrested. It could not be established that the agent who induced Stocké to board the plane had actually acted in collusion with the German authorities[124]. Unfortunately the case did not require either the Commission or the Court to rule definitively on forcible abductions under the Convention. Both organs viewed Art. 5 para. 1, which guarantees personal freedom as against unlawful detention, as the relevant provision, but did not discuss it further because the case could be disposed of on the facts.

Thus, the European experience, with the possible exception of the 1987 decision of the Bundesgerichtshof, parallels the United States inclination to exercise jurisdiction in such abduction cases. Although the end results are the same, it should be pointed out that how the different legal systems view international law plays a role in their respective courts' willingness to give greater weight to such considerations as human rights[125]. While international law is more thoroughly integrated into the German system, for example, the decisions of the Budesgerichtshof still evidence some inconsistency in that the international rights rationale is not fully accepted as a grounds for refusing to exercise jurisdiction in abduction cases such as those discussed here.

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[122] Bundesgericht, Judgment of 15 July 1982, reported in EuGRZ 1983, at 435; see Hans Schultz, Male captus, bene detentus?, 40 Annuaire Suisse D.I. 93–123 (1984).

[123] *Stocké* v. *Federal Republic of Germany* (note 99). See Report of the Commission at paras. 170 et seq. and the Court ruling of 19 March 1991 at para. 53.

[124] There is no space here to discuss whether certain expulsions may amount to disguised abductions, see Stefan Trechsel, Grundrechtsschutz bei der internationalen Zusammenarbeit in Strafsachen, 14 EuGRZ 69–80 (1987), at 75 et seq.

[125] See note 53, above, and accompanying text.

Notwithstanding the tentative recognition (or, worse, dismissal) by the world's courts of the idea that human rights may play some role in determining whether jurisdiction should be exercised in such cases, the human rights rationale is experiencing a breakthrough in another arena; namely the expulsion of a criminal suspect under an extradition treaty to a country where he or she expects the death penalty[126]. Here, state jurisdiction is also set *vis-à-vis* the rights of the accused. This configuration is in a way a corrollary of the *Alvarez-Machain* case and is spurring profoundly similar questions. Thus, in the *Soering* case[127], The European Court of Human Rights ruled that Soering's rights and the corresponding obligations of Britain flowing from the the ECHR had priority over the terms of the British-U.S. extradition treaty according to which Britain would have had to hand over *Soering* to face the death penalty in Virginia.

V. Conclusion

The U.S. Supreme Court's ruling in *Alvarez-Machain*, while it prolongs a line of national case law, does not have to be read as announcing the advent of a more rigid judicial stance on the question of whether a forcibly abducted person can be tried in national (U.S.) courts. The ruling apparently encompasses both the existence of jurisdiction and its exercise with regard to the abduction of Alvarez-Machain, thus differing the narrow understanding of *male captus* favoured above. Yet although the Supreme Court refers to international law, it does not really deal with the question of whether the jurisdiction confirmed by the *male captus* maxim ought to be exercised as well. In this sense the Supreme Court fails to address the decisive international law question. This makes it difficult to ascertain the relevance of the Supreme Court's judgment for the development of international law. A national court's judgment can certainly constitute state practice within the meaning of Art. 38 para. 1 *lit.* b) ICJ Statute. Yet, to qualify as such, one would expect the national court to rule on the specific international legal question that is to be confirmed or contradicted by state practice.

The *Alvarez-Machain* case does not have an immediate impact on the international law of forcible abductions but rather provides illustration of

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[126] Cf. Otto Lagodny/Sigrun Reisner, Extradition Treaties, Human Rights and Emergency-Brake – Judgments – A Comparative European Survey, 3 Finnish Yb. Int'l. L. 236–297 (1992).

[127] Case of *Soering*, Judgment of 7 July 1989, Series A No. 161.

the answers that existing international law provides in such situations. The illustrative character of the case and the publicity it has attracted may be of the most importance in the longer run. This impotence of the case is ironically reflected in that Alvarez-Machain had to be released without further ado shortly after the Supreme Court judgment.

The multitude of negative reactions to the judgment[128], both from states directly concerned and from states which did not have an immediate interest in the case, shows that the underlying policy is perceived by many as dangerous. But this largely political reaction also has some legal implications. It means that the forcible abduction by one state of criminal suspects from another state does not meet with the acquiescence of the community of states. It also shows that the fight against drug trafficking, widely recognized as an important international public interest, nevertheless has to be conducted in respect of the basic rules that support the interdependent edifices of the world community and international law.

Even if the Supreme Court missed a prime opportunity to educate the public and to itself abide by international law, lower courts have lived up to the challenge. It is up to the courts to assure the rule of international law[129] and in particular that of international human rights law[130]. In fact, the lower courts' independence and relative distance from the immediate considerations of national interest make them best poised for integrating another legal order into their respective national legal systems[131]. Furthermore, the U.S. Supreme Court judgment brought about clarification of various positions on forcible abductions of criminal suspects abroad. Since international law, at its present state of evolution, has no institution with the mandate of compulsory interpretation of its rules, it is up to the states to auto-interpret the law. The faculty of auto-interpretation, however, should be matched by considering how other states interpret the situation: if other members of the international community of states overwhelmingly adopt a different point of view, every state has the right to abide by its decision, but should also have the generosity to admit the possible error of its interpretation.

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[128] See notes 7–10, above, and the accompanying text.

[129] Falk (note 48), 67–76.

[130] For recent examples see case of *Nelson* v. *Saudi-Arabia*, 30 I.L.M 1171 (1991) with commentaries by Anthony D'Amato [et al.], Am. Society of Int'l. L., Proceedings of the 86th Annual Meeting, 1992, at 324–365; *Vermeire* case (note 77).

[131] The experience of the European Community, which relies heavily on the national courts for Community law to become effective, may illustrate this.