EXTRADITION TREATIES-INTERNATIONAL LAW-THE UNITED STATES SUPREME COURT APPROVES EXTRATERRITORIAL ABDUCTION OF FOREIGN CRIMINALS—*UNITED STATES V. ALVAREZ-MACHAIN*, 112 S. CT. 2188 (1992)

I. FACTS

On April 2, 1990, bounty hunters posing as Mexican police authorities forcibly kidnapped Dr. Humberto Alvarez-Machain, a physician of Mexican citizenship, from his medical office in Guadalajara.[1] The bounty hunters took Dr. Machain by force to a private plane and flew him to an El Paso, Texas airfield.[2] Upon arrival in the United States, his abductors turned him over to agents of the United States Drug Enforcement Administration (DEA) who arrested him on charges relating to the 1985 kidnap, torture, and murder of DEA special agent Enrique Camarena.[3]

After the Mexican government learned of the abduction of Dr. Machain, the Mexican Embassy formally requested a detailed report of possible U.S.

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[1] United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D.Cal. 1990). At about 7:45 that evening, just after he had finished treating a patient, five or six armed men burst into Dr. Machain's office in Guadalajara. One of the men showed Dr. Machain a badge which appeared to be a badge of the Mexican federal police, and another placed a gun to Dr. Machain's head and told him to cooperate or be shot. *Id.* The men took him by car to a house in Guadalajara, where one of the men hit Dr. Machain in the stomach after he exited the car at his abductors request. Inside the house, Dr. Machain was forced to lie face down on the floor for two to three hours, and Dr. Machain testified that the men used an electric shock device to shock him several times through the soles of his shoes. Dr. Machain also testified that he was injected twice with a substance that made him feel "light headed and dizzy." *Id.*

[2] *Id.* at 603. The United States government allegedly paid the abductors $20,000 of an agreed sum of $50,000 and financed the relocation of a number of the abductors and their families to the United States. Linda Greenhouse, *High Court To Weigh Trial of Suspect Abducted to U.S.*, N.Y. TIMES, Jan. 11, 1992, §1, at 6. The district court found that the DEA had sponsored the abduction of Dr. Machain, although it did not conclude that the DEA had actually participated in the kidnapping itself. *Caro-Quintero*, 745 F. Supp. at 609.

[3] Greenhouse, *supra* note 2, at 6. Special Agent Camarena was on assignment in Mexico for the DEA at the time of his kidnapping. Dr. Machain allegedly administered drugs to Camarena in order to prolong his life during the more than thirty hours of torture and interrogation inflicted on Camarena by his kidnappers. *2 Court Rulings Prevent Release of Mexican Doctor Held By U.S.*, N.Y. TIMES, August 25, 1990, § 1, at 9.

involvement in the kidnapping of Dr. Machain.[4] The Mexican Embassy later demanded the return of Dr. Machain to Mexico, insisting that U.S. officials had authorized the abductions.[5] Following his indictment for his alleged role in the murder of special agent Camarena,[6] Dr. Machain moved to dismiss the charges on the grounds that the abduction violated the extradition treaty between the United States and Mexico[7] and that the court thus lacked proper jurisdiction.[8] The district court granted the motion to dismiss and ordered the repatriation of Dr. Machain to Mexico.[9]

On appeal, the Ninth Circuit affirmed the district court's dismissal of the indictment against Dr. Machain.[10] The Ninth Circuit accepted the district

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[4] The request was made by means of a diplomatic letter to the United States Department of State. *Caro-Quintero*, 745 F. Supp. at 604.

[5] Mexican officials also submitted a third note to the State Department requesting the provisional arrest and extradition of an informant and a DEA special agent to Mexico to face charges relating to their roles in securing the abduction of Dr. Machain. *Id.*

[6] Dr. Machain was indicted with five counts relating to the kidnapping and murder of special agent Camarena and his pilot, Alfredo Zavala-Avelar. The charges included conspiracy to commit violent acts in furtherance of racketeering activity, committing violent acts in furtherance of racketeering activity, conspiracy to kidnap a federal agent, kidnap of a federal agent, and felony murder of a federal agent. *Caro-Quintero*, 745 F. Supp. at 601. n.1. Dr. Machain denied the allegations and maintained his innocence of the charges. Brief for Respondent at 2, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712).

[7] Extradition Treaty, May 4, 1978, U.S.-Mex., art. 9, 31 U.S.T. 5059, 5065.

[8] *Caro-Quintero*, 745 F. Supp. at 605-06. Dr. Machain's motion to dismiss the indictment was based on two theories: first, that the abduction constituted outrageous government conduct amounting to a violation of Dr. Machain's due process rights; and second, that the district court lacked proper jurisdiction over him because the DEA had sponsored the abduction of Dr. Machain in violation of the extradition treaty between the United States and Mexico. The district court rejected the outrageous government conduct claim. *Id.* at 605.

The district court found that Dr. Machain's claims of repeated electric shock lacked credibility, and in any event did not amount to torture, and thus dismissed Dr. Machain's challenge to jurisdiction based on alleged due process violation. *Id.* at 606.

[9] *Id.* Dr. Machain was not repatriated but remained in custody in the United States to await the government's appeal. Christopher Marquis and Aaron Epstein, *U.S. Moves to Calm Outraged Mexican Officials*, HOUSTON CHRONICLE, June 17, 1992, §A, at 14.

[10] United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir.1991). The Ninth Circuit relied on its decision in United States v. Verdugo-Urquidez, 939 F.2d 1341, 1356-57 (9th Cir. 1991), *vacated as moot*, 112 S. Ct. 2986 (1992), and found *a fortiori* that the Mexican government had unequivocally stated in diplomatic correspondence, both to the U.S. government and to the court, that Dr. Machain's abduction violated the Extradition Treaty between the two nations and demanded that the United States immediately return Dr. Machain. *Alvarez-Machain*, 946 F.2d at 1467.

court findings that the U.S. government was involved in the abduction of Dr. Machain and that the "specific formal diplomatic protests" to the abduction, submitted by the Mexican government to United States authorities, adequately served as official protests to the treaty violation.[11]

The *Verdugo* defendant, Rene Martin Verdugo-Urquidez, was also allegedly involved in the drug cartel that abducted and tortured Special Agent Camarena. Mexican police officials kidnapped Verdugo, handcuffed and blindfolded him, and stuffed him into the back seat of an automobile. After a two-hour drive to the United States border, the Mexican police officers forced Verdugo through a hole in the fence separating Mexico from the United States, where U.S. marshals produced a warrant for his arrest. Henry Weinstein, *U.S.-Backed Kidnappings Ruled Illegal*, L.A. TIMES, July 23, 1991, §A, at 1. A federal grand jury returned a five-count indictment against Verdugo, charging him with various offenses including the murder of Special Agent Camarena. *Verdugo*, 939 F.2d at 1343. Following a two-month jury trial resulting in Verdugo's conviction on all the charges against him, the district court sentenced him to four consecutive 60-year terms of incarceration, to run concurrently with a life sentence for murder. *Id.* On appeal, the Ninth Circuit reversed the convictions, concluding that the government-sponsored abduction of a Mexican national from Mexican soil violated the purpose of the extradition treaty between the United States and Mexico, even if the treaty did not expressly prohibit such abductions. The court further held that such a treaty violation, when coupled with a formal protest by the offended nation, gave a defendant the right to invoke the treaty violation to defeat the district court's jurisdiction. The court then remanded the case for an evidentiary hearing to determine whether Verdugo's abduction had in fact been authorized by United States authorities. *Id.* The Supreme Court's decision in *Machain*, however, rendered the decision moot and the evidentiary hearing unnecessary. *See* United States v. Verdugo-Urquidez, 112 S. Ct. 2986 (1992).

The Ninth Circuit's ruling in *Verdugo* marked a departure from the long-standing *Ker-Frisbie* doctrine, which evolved from two Supreme Court decisions, Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952). The doctrine states that a court will not inquire into the means by which jurisdiction is obtained over a criminal defendant. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 189 (1991).

[11] *Verdugo*, 939 F.2d at 1360-61. In the trial of Dr. Machain, the district court accepted as an official protest two formal letters submitted by the Mexican government and filed with the U.S. State Department requesting an investigation into the abduction of Dr. Machain and demanding his return. *Machain*, 946 F.2d at 1467. For text of the diplomatic correspondence submitted by the Mexican government, *see* Reply Brief for Respondent at 4, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (91-712).

Generally, an individual claiming a breach of an extradition treaty must present proof that his sovereign is protesting the violation on his behalf. *See* Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990), *cert denied*, 111 S. Ct. 209 (1990) (individuals have no standing to challenge violations of international treaties unless the sovereign involved filed a protest). Although it is unclear what constitutes a protest, it is generally recognized that a defendant would have to prove that the offended nation had registered an official document with the United States Department of State objecting to the treaty breach. *Caro-Quintero*,

The United States Supreme Court reversed the Ninth Circuit's ruling and remanded the case back to the district court for the Defendant's trial for the murder of Enrique Camarena.[12] *Held*, the United States sponsored abduction of a fugitive criminal suspect from foreign soil does not prohibit his trial in a U.S. court, notwithstanding an official protest by the offended nation. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

II. LEGAL HISTORY

The abduction of foreign nationals from one country for prosecution in another is a recognized violation of general international law and custom.[13]

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745 F. Supp. at 608; *see also* Matta-Ballesteros, 896 F.2d at 259. The official protest requirement is not absolute; the doctrine of specialty serves as an illustration of a rule which allows an individual to invoke a treaty even if his sovereign elects not to do so. United States v. Rauscher, 119 U.S. 407, 421 (1886) (although Rauscher's sovereign, Great Britain, did not protest U.S. jurisdiction over him, Rauscher himself was permitted to invoke the treaty).

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

[13] *See, e.g.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 432 cmt. b (1987) (international law prohibits law enforcement officers of one nation from conducting criminal investigations or arresting an individual in another state without the consent of that state); *see also* RESTATEMENT § 432 cmt. c (1987) (international law requires that the state sponsoring the abduction of an individual must return him upon demand by the offended nation).

The territorial integrity of sovereign nations is recognized by such international agreements as the United Nations Charter art. 2, para. 4, and the Charter of the Organization of American States art. 20. Although these agreements do not explicitly prohibit official abductions from other countries, they do illustrate the customary standards within which the United States and Mexico negotiated the extradition treaty.

Additionally, courts outside the United States have recognized that the extraterritorial abduction of criminal suspects violates the sovereignty of independent nations. For example, in R. v. Bow Street Magistrates, Ex Parte Mackeson, 75 Crim. App. 24 (Great Britain 1981), the British Lord Chief Justice prohibited the prosecution of a British subject deported from Zimbabwe to the United Kingdom. British police officials had conducted covert maneuvers to effect his arrest in an attempt to evade the provisions of the Fugitive Offenders Act of 1881, which regulated extradition between members of the British Commonwealth. Although British courts follow the rule that physical presence of a defendant bestows jurisdiction, official evasion of statutory extradition procedures bars prosecution. Thus, because the officials failed to follow the 1881 Act, jurisdiction over the suspect was invalid. *See also* In re Jolis, [1933-34] Ann. Dig. 191 (Tribunal Correctionnel d'Avesnes) (arrest of Belgian national by French police in Belgium held to be a "nullity" because the Belgian government lodged an official protest with the French Government); the Casablanca case, (France v. Germany), Hague Ct. Rep. (Scott) 110 (Perm. Ct. Arb. 1916) (French military authorities improperly seized German deserters from the French Foreign Legion who had sought German

However, United States courts have not always honored this principle, instead adhering to the *Ker-Frisbie* rule, under which a court may decline to question the means by which a defendant has come before it.[14] Despite this historical aversion to questioning the means of rendition, some courts have increasingly noted that an illegal abduction might divest a court of jurisdiction over a defendant if the abduction violates an existing extradition treaty, and if the nation from which the defendant was abducted lodges a formal protest.[15] Notwithstanding this trend, grounded in important developments in due process, other courts largely continue to comply with the *Ker-Frisbie* doctrine.

A. Treaty Interpretation

In determining the propriety of measures used to obtain criminal fugitives for trial, the interpretation of extradition treaties is vital: treaty interpretation provides the court with an insight into the expectations of the contracting states regarding their rights and obligations in matters of international criminal law.[16] No recognized legal obligation exists among nations to extradite individuals sought by other nations.[17] The practice of governments acting in conjunction with one another to effect the transfer of

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Consulate protection in Casablanca); the Schnaebele case, *described in* III Travers, Le Droit Penal Internationale 151-54 (Paris 1924) (French police official lured into Germany and then arrested by German police officials promising safe transport, returned by German government after official French protest). *But cf. Re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964) (repatriation not required if offended state fails to submit official protest before trial).

[14] *See, e.g.*, United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975) (forcible return to the jurisdiction of a U.S. court constitutes no bar to prosecution once the defendant is within the United States).

[15] United States v. Verdugo, 939 F.2d at 1355 (9th Cir. 1991); *see also* Matta-Ballesteros v. Henman, 896 F.2d at 260 (7th Cir. 1990) (requiring an official protest by offended nation before it would consider defendant's claim that abduction violated international law); United States v. Yunis, 681 F. Supp 909, 916 (D.D.C. 1988) (defendant precluded from raising his objection to seizure because neither Lebanon nor Cyprus filed formal protests to the circumstances of arrest).

[16] *See* GILBERT, *supra* note 10, at 17.

[17] M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 10 (1987). Originally, nations entered into extradition treaties with the self-preservation of their leadership in mind. *See, e.g.*, Ker v. Illinois, 119 U.S. 436, 442 (1886) (extradition treaties viewed as a "restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom").

extraterritorial defendants occurs as a result of intergovernmental goodwill.[18] Treaties, on the other hand, confer the right on a signatory nation to request certain conduct of another in certain situations, in exchange for the obligation to do the same when requested.[19] The United States itself has negotiated numerous extradition treaties with other nations in order to establish procedures by which contracting parties may conduct the effective transfer of criminal fugitives.[20]

When a court faces a matter involving an extradition treaty, it must determine whether the treaty is of a self-executing or an executory nature.[21]

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[18] In the absence of an extradition treaty, there is no general obligation of nations to surrender individuals sought for trial in other nations, although the transfer may take place as a matter of comity among nations. *See* United States v. Rauscher, 119 U.S. 407, 412 (1886); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (a nation may, if its constitution and laws permit, voluntarily surrender a fugitive to the country seeking him); Stevenson v. United States, 381 F.2d 142, 143-44 (9th Cir. 1967) (voluntary surrender of fugitive by Mexico); United States v. Kaufman, 858 F.2d 994, 1006-09 (5th Cir. 1988) (same).

[19] *Rauscher*, 119 U.S. at 412; *see also* Factor v. Laubenheimer, 290 U.S. at 287 (international law principles recognize that the legal right to request extradition and the duty to surrender exist only when created by treaty); Allen v. United States, 713 F.2d 105, 108 (5th Cir. 1983) (same).

[20] The United States has extradition treaties currently in effect with the following nations: Albania, Antigua and Barbuda, Argentina, Australia, Bahamas, Barbados, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burma, Canada, Chile, Colombia, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Finland, Federal Republic of Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kiribati, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Malaysia, Malta, Mauritius, Mexico, Monaco, Nauru, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru Poland, Portugal, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkey, Tuvala, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zambia. The Republic of Korea has a prisoner transfer treaty with the United States, though the two nations do not have an extradition treaty. Additionally, several nations have concluded judicial assistance treaties of limited scope with the United States. UNITED STATES DEPERTMENT OF STATE, TREATIES IN FORCE (1991). None of these agreements contain language excluding government abduction of criminal suspects.

[21] The distinction serves an important function. Self-executing treaties have the force of law and are enforceable without legislation to implement them. *Caro-Quintero*, 745 F. Supp. 599, 606 (C.D.Cal. 1990). United States courts have long recognized the right of individuals to enforce rights set forth in self-executing treaties. *See, e.g.*, Cook v. United States, 288 U.S. 102 (1933) (invoking treaty with Great Britain permitting seizure of vessels smuggling liquor

After this determination, the court will next interpret the terms to determine the treaty's meaning and legal effect.[22] In doing so, it is necessary to assess whether the terms provide signatory nations with an exhaustive list of methods for obtaining valid jurisdiction over a defendant, or whether nations may employ means not specified in the treaty.[23] If the treaty provides an exhaustive list of the available means of securing jurisdiction, practices outside the scope of the provision would violate the treaty as well as the defendant's due process rights, thus divesting a U.S. court of jurisdiction over him.[24]

B. Ker and Frisbie: Approval of Government-Sanctioned Abductions

Analyzing a rendition conducted outside the scope of an extradition treaty,

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during the Prohibition era; for discussion *see infra* notes 43-46 and accompanying text); Clark v. Allen, 33 U.S. 503 (1947) (inheritance rights under treaty with Germany); Bacardi Corp. of America v. Domenech, 311 U.S. 150 (1940) (trademark rights under multilateral treaty); Ware v. Hylton, 3 U.S. (Dall.) 199 (1796) (right to collect private debts under treaty with Great Britain).

Additionally, a self-executing treaty purports to create obligations which are enforceable without implementing legislation, *see Caro-Quintero*, 745 F. Supp. at 606; *see also* Trans World Airlines Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (no domestic legislation necessary to give self-executing treaty the force of law in the United States), and are intended to benefit the individual asserting a legal interest under them. *See* Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884). Self-executing treaties must be enforced in a federal court unless superseded by federal law. *Caro-Quintero*, 745 F. Supp. at 606.

Executory treaties, on the other hand, are legally enforceable only upon the enactment of legislation giving them full effect. *Id.* Without implementing legislation, executory treaty matters become "the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress." *Caro-Quintero*, 745 F. Supp. at 606 (citing *Head Money Cases*, 112 U.S. at 598-99).

[22] *See* Air France v. Saks, 470 U.S. 392, 397 (1985) (analysis of "the text of the treaty and the context in which the words are used" crucial to treaty interpretation).

[23] *See* GILBERT, *supra* note 10, at 8. For example, Dr. Alvarez argued that the extradition treaty limited the United States to two alternatives: requesting the defendant's extradition or relying on Mexican authorities to prosecute him. The Supreme Court found that the list of alternatives was not exhaustive and did not preclude abduction. *United States v. Alvarez-Machain*, 112 S.Ct. 2188, 2194-95 (1992).

[24] United States v. Verdugo-Urquidez, 939 F.2d 1341, 1350 (9th Cir. 1991). For example, the *Verdugo* court held that the options available to the United States were limited to submitting a formal extradition request to Mexico or to requesting Mexican acquiescence to an abduction sponsored by U.S. authorities. The United States had done neither, and thus the Ninth Circuit held that proper jurisdiction to hear the case was not present. *Id.* at 1350.

the Supreme Court, in *Ker v. Illinois*,[25] established the rule that the unauthorized forcible abduction of an individual from a foreign nation does not violate the individual's right to due process of law and thus does not deprive a court of jurisdiction over a defendant so seized.[26] In *Ker*, the Court held the means by which the government obtained jurisdiction over a criminal defendant is immaterial, so long as the defendant faces the court on a valid charge.[27] In support of its holding, the Court found that the abduction, performed by a private individual employed by the United States but unauthorized to conduct a kidnapping, had taken place outside the parameters of the extradition treaty between the United States and Peru.[28] Further, because a signatory nation had not invoked the treaty, the defendant had no access to the rights conferred by the treaty.[29]

The notion that *Ker* sanctions the government-sponsored abduction of fugitives received further support from the Supreme Court's approval of the

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[25] 119 U.S. 436 (1886).

[26] *Id.* at 440. Ker was an American citizen living in Lima, Peru and wanted by authorities in Illinois for larceny and embezzlement. The governor of Illinois petitioned for a warrant of extradition from the Department of State. In response, the Secretary of State issued a warrant and dispatched a Pinkerton agent to Peru with the necessary papers to request Ker's extradition in compliance with the extradition treaty between the United States and Peru. Failing to follow the extradition process, the messenger abducted Ker and transported him by sea via Honolulu to San Francisco and eventually to Illinois where he stood trial and was convicted. *Id.* at 437-38. Ker argued on appeal to the United States Supreme Court that his abduction in Peru violated his guarantee of due process under the Fourteenth Amendment because the agent had not brought him before the Court by means of the extradition treaty. The Court concluded that the trial proceedings had satisfied Ker's due process rights. *Id.* at 438-39.

[27] *Id.* at 443-44. At the time of Ker's abduction a Chilean-backed revolution was taking place in Peru, which not only caused the court system to cease functioning but also forced the Peruvian government to seek refuge in a mountain village eighty-five miles away. The Court may have justified the *Ker* holding on the special circumstances surrounding the situation, although the majority did not state this in the opinion. John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1445 (1988).

[28] In concluding that the abduction took place outside the bounds of the extradition treaty between the United States and Peru, the Court stated:

> Ker's abductor did not act or profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.

Ker, 119 U.S. at 442-43.

[29] *Id.* at 438.

interstate kidnapping of a fugitive in *Frisbie v. Collins*.[30] The *Frisbie* Court found *Ker* applicable to wholly domestic situations and restated its position that forcible abduction does not violate an individual's guarantee to due process of law.[31]

Subsequent to the Supreme Courts' decision in *Ker*, the *Ker-Frisbie* doctrine has become a well-established principle of law. The proposition resulting from this doctrine asserts that a United States court need not divest itself of jurisdiction over a defendant solely because the defendant's presence was obtained through extralegal means. Some courts have taken the doctrine a step further, interpreting it as precluding any inquiry into the means of securing jurisdiction over criminal defendants.[32] Following the United States' lead, other nations have also used the rule to justify improper means of gaining the presence of defendants.[33]

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[30] 342 U.S. 519 (1952). *Frisbie* had no connection with issues of international extradition law; it concerned the government supported abduction of an individual in Illinois who was fleeing prosecution in Michigan. The defendant, Shirley Collins, was in Illinois when he was abducted by Michigan law enforcement officers and returned to Michigan to face murder charges. *Id.* at 520. The Supreme court rejected Collins' contentions that he should be released because the forcible manner in which he was arrested violated his guarantee of due process, stating that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Id.* at 522.

[31] *Id.* The Frisbie court overturned the Sixth Circuit's holding in favor of Collins, which found that his arrest took place under circumstances which constituted an impermissible seizure in violation of the fourth amendment. *See* Collins v. Frisbie, 189 F.2d 464, 468 (6th Cir. 1951).

[32] *See, e.g.*, United States v. Pelaez, 930 F.2d 1289 (3d Cir. 1991) (no inquiry into forcible abduction from Colombia); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) (alleged abduction of defendant from Honduras insufficient to divest district court of jurisdiction); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (forcible abduction of defendant from Panama irrelevant); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974) (abuction from Peru and failure to follow extradition process insufficient to destroy jurisdiction); United States v. Sobell, 244 F.2d 520 (1st Cir. 1957) (alleged abduction from Mexico held irrelevant).

[33] Probably the most notorious case in which a foreign state has invoked the *Ker-Frisbie* doctrine is Attorney General v. Eichmann, 36 INT'L L.REP. 5 (Dist. Ct. Jerusalem 1961), *aff'd*, 36 INT'L L.REP. 277 (S. Ct. Isr. 1962). Israeli agents kidnapped Eichmann from Argentina to stand trial in Israel for his role in Nazi atrocities which took place in Poland during World War II. Conducted without the knowledge or participation of the Argentine government, the abduction was a clear violation of Argentina's sovereignty. The Argentine government dropped its protest over the violation of its sovereignty upon the approval of the trial by the United Nations Security Council Resolution on 24th June 1960. 15 U.N. SCOR, 15th Sess.,

C. Toscanino and Rauscher: Limitations on the Ker-Frisbie Rule.

Notwithstanding the long-standing adherence to the *Ker-Frisbie* rule, a federal court may in certain instances lack jurisdiction to try a criminal defendant seized by means of forcible abduction.[34] In *United States v. Toscanino*,[35] the Second Circuit limited the *Ker-Frisbie* doctrine in light of the "due process revolution" which expanded the concept of constitutionally guaranteed individual rights.[36] The Second Circuit held that the Due

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Supp. for Jan.-Dec. 1960, U.N. Doc S/4349. In the resolution, the Security Council condemned the Israeli conduct as an encroachment on Argentina's sovereignty and a threat to world peace, and requested Israel "to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law." 15 U.N. SCOR 15th Sess., 868th mtg. at 1, U.N. Doc. S/PV.868 (1960). Eichmann argued at trial that the court lacked jurisdiction to try him because the abduction violated Argentina's sovereignty. The court relied on *Ker* and other Anglo-American precedent in ruling that the means of acquiring a defendant is irrelevant to the trial. *See* GILBERT, *supra* note 10; *see also* Michael H. Cardozo, *When Extradition Fails is Abduction the Solution?*, 55 AM. J. INT'L L. 127 (1961).

[34] United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). Toscanino, an Italian national living in Uruguay, alleged that Uruguayan officials, sponsored by U.S. authorities, abducted him from his home in Uruguay and handed him over at the Brazilian border to Brazilian authorities also paid by the United States. *Id.* at 269. Toscanino further alleged that his abductors held him for seventeen days in Brazil, and that during this period they severely and repeatedly tortured and interrogated him in the presence of a member of the U. S. Department of Justice Bureau of Narcotics and Dangerous Drugs before drugging him and bringing him to the United States to face federal conspiracy charges related to narcotics trafficking. *Id.* at 269-70.

After it had established that U.S. involvement in such activities would constitute a violation of an individual's right to due process, the U.S. Court of Appeals for the Second Circuit ordered a hearing to determine the extent of the United States' involvement in the case. *Id.* at 281. At this hearing, Toscanino failed to provide credible evidence of either the presence of U.S. officials at his abduction or U.S. involvement in his alleged mistreatment at the hands of the Uruguayan or Brazilian authorities. United States v. Toscanino, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

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

[36] The term "due process revolution" refers to the Court's emphasis on Constitutional rights which was marked by such landmark decisions as Wong Sun v. United States, 371 U.S. 471 (1963) (evidence obtained as the result of police behavior which violates the Fourth Amendment may not be used as evidence at trial), and Mapp v. Ohio, 367 U.S. 643 (1961) (extending the exclusionary rule in holding that evidence illegally obtained by state officers was inadmissible at a state criminal trial of the victim of the unlawful search). Jonathan Gentin, Comment, *Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on* United States v. Caro-Quintero *and the Inadequacy of the Ker-Frisbie Doctrine*, 40 EMORY L.J. 1227, 1238 (1991); *see also Toscanino*, 500 F.2d at 275 (due

Process Clause applies in cases of outrageous government conduct and divests a court of personal jurisdiction over a defendant in much the same way illegal governmental conduct might cause certain evidence to be excluded.[37] Despite its liberal interpretation of the Due Process Clause in *Toscanino*, however, the Second Circuit has declined to follow this rationale outside *Toscanino's* factual context.[38] Other courts have given a more expansive reading to *Toscanino*, preferring not to apply the exclusionary rule, even at the risk of infringing upon individual rights.[39]

On the same day it decided *Ker*, the Supreme Court handed down its

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process requires a court to divest itself of personal jurisdiction over a defendant "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights").

[37] *Toscanino*, 500 F.2d at 275. The *Toscanino* court attempted to balance *Ker* with the doctrine of Rochin v. California, 342 U.S. 165 (1952), to develop a due process argument based on outrageous physical treatment. In *Rochin*, an officer who had seen the defendant swallow what appeared to be drug capsules arrested him and directed a doctor to force a tube into the defendant's stomach. The doctor administered a solution to induce vomiting, which produced two morphine capsules used ultimately to convict the defendant. The court found the government conduct to "shock the conscience" and to "offend those canons of decency and fairness which express the notions of English-speaking peoples," and held that due process barred the government from deliberately acting lawlessly in bringing the accused to trial. Rochin, 342 U.S. at 169.

[38] See United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d. Cir 1975), *cert. denied*, 421 U.S. 1001 (1975) (limiting *Toscanino* to situations where offended state formally protests the invasion of sovereignty and where government conduct is "appropriately condemned as most inhuman"); United States v. Lira, 515 F.2d 68, 70 (2d Cir. 1975) (*Toscanino* inapplicable absent showing of mistreatment at hands of U.S. government representative); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (conduct involved was not "gross mistreatment" but resembled circumstances of ordinary arrest).

[39] The Supreme Court has held that the societal need to bring criminals to justice substantially outweighs the desire to correct an error made by law enforcement officers. Stone v. Powell, 428 U.S. 465, 490-91 (1976) (maintaining that the question of guilt or innocence "is the central concern in a criminal proceeding" and precludes application of the exclusionary rule in a jurisdictional context); *accord* United States v. Darby, 744 F.2d 1508 (11th Cir. 1984), *cert. denied* 471 U.S. 1100 (1985) (*Toscanino* inapplicable where appellant failed to prove claims of kidnapping and extended torture during abduction from Peru and delivery to federal authorities in Miami); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974) (defendant failed to allege the sort of "cruel, inhuman, and outrageous treatment allegedly suffered by Toscanino").

decision in *United States v. Rauscher*.[40] In *Rauscher*, the Court held that the internationally accepted doctrine of specialty, which provides that an individual may face trial only for the crime for which he was extradited, was an implied part of a treaty between the United States and Great Britain even though the doctrine was not specifically included in the text.[41] Because the United States had violated the treaty by employing an improper means of acquiring jurisdiction over Rauscher, the Court concluded that no United States court could exercise jurisdiction over him "until a reasonable time and opportunity have been given him . . . to return to the country from whose asylum he had been forcibly taken. . . ."[42] Thus, the Court concluded that under certain circumstances, it is well within a court's duties to inquire into the means by which a defendant is brought before it.

The Court continued to place importance on treaty obligations, including implied obligations, in *Cook v. United States*,[43] where the Court held that by signing a treaty, a nation restricts its own authority in certain instances.[44] In *Cook*, the Court held that a treaty violation defeated the jurisdiction of

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[40] 119 U.S. 407 (1886). Rauscher was second mate on an American vessel named the J.F. Chapman. While the ship was at sea, Rauscher allegedly murdered a crew member named Janssen. Rauscher fled to England, and U.S. officials sought his extradition on the murder charge. Upon request from the State Department, the British government surrendered him. *Id.* at 409.

Rauscher went to trial in federal district court in New York charged not with murder, but with infliction of cruel and unusual punishment. The infliction of cruel and unusual punishment was not one of the extraditable offenses enumerated in the 1842 Webster-Ashburton Treaty. *Id.* at 408-09. The defendant was charged, tried, and convicted in federal district court under charges of inflicting cruel and unusual punishment.

[41] *Id.* at 423.

[42] *Id.* at 430.

[43] 288 U.S. 102 (1933).

[44] *Id.* at 121. The defendant, a British subject, was assessed a fine after United States authorities seized his vessel for allegedly violating laws banning the importation of alcoholic beverages during the Prohibition era. However, the vessel was seized outside the permissible zone defined in a treaty permitting U.S. authorities to board, search, and seize British vessels suspected of smuggling liquor. The treaty required that the vessels to be searched be within the distance from the customary three-miles-from-shore limit "which could be traveled in one hour by the vessel suspected of endeavoring to commit the offense." *Id.* at 110 (citations omitted). The vessel in question, the Mazel Tov, could not be operated at a speed of more than ten miles per hour. United States authorities boarded, searched, and seized the vessel and its cargo off the Massachusetts coast, 11 1/2 miles from the edge of the three-mile limit. *Id.*

United States court.[45] Thus, the Court determined that by signing a treaty with Great Britain, the United States had accepted certain limitations on its own authority in exchange for concessions from Great Britain.[46]

The treaties invoked in *Rauscher* and *Cook* regulated the means by which a defendant could come under the jurisdiction of a United States court. Together the decisions support the basic principle that courts are not forced to accept jurisdiction over individuals brought to justice in violation of treaty obligations. Although these cases are many years old, they remain grounded in strong logic and continue to guide courts addressing issues relating to treaty violations.[47]

D. Verdugo: The Ninth Circuit Clarifies the Role of the Ker-Frisbie Doctrine

Applying its understanding of both the *Ker-Frisbie* doctrine and extradition law, the Ninth Circuit, in *United States v. Verdugo-Urquidez*, adopted an approach to the issue of illegal abductions which clarifies the relevance of the *Ker-Frisbie* doctrine to treaty violations.[48] The Ninth Circuit first

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[45] *Id.* at 121. The Court reasoned that "[t]he Treaty fixes the conditions by which a vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication" under United States laws. *Id.*

[46] The Court found that "the government itself lacked power to seize, since by the treaty it imposed a territorial limitation upon its own authority" in exchange for the right to board, search and seize private vessels of British registry outside U.S. territorial waters. *Id.*

[47] *See, e.g.*, United States v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974) (following *Cook* in concluding that courts have a duty to ensure that international agreements are faithfully kept and observed); United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979) (reading *Cook* as representing the proposition that self-executing treaties may be invoked to deprive U.S. courts of jurisdiction over individuals otherwise subject to jurisdiction); Fiocconi v. Attorney General of the United States, 462 F.2d 475, 479-80 (2d Cir. 1972) (applying the judicial remedy fashioned in *Rauscher* to a situation where extradition obtained was as an act of comity rather than treaty obligation).

[48] 939 F.2d 1341 (9th Cir. 1991), *vacated as moot*, 1212 S. Ct. 2986 (1992). Like Dr. Machain, Verdugo faced prosecution in the United States for his alleged involvement in the abduction and murder of DEA Special Agent Camarena, and Verdugo likewise challenged the court's jurisdiction over him on the grounds that he was forcibly abducted from Mexico and brought to the United States to stand trial. Verdugo's kidnappers abducted him in Mexico and then cuffed his hands, blindfolded him, and stuffed him in the back seat of an automobile. The abductors drove Verdugo to the U.S. border, and then pushed him through a hole in the border fence to awaiting U.S. marshals who took him into custody. Henry Weinstein, *U.S. Backed Kidnapings Ruled Illegal*, L.A. TIMES, July 23, 1991, § A, at 1.

rejected the U.S. government's argument that *Ker-Frisbie* controlled *Verdugo*, which involved a government-sponsored abduction from a nation which officially protested the intrusion onto its soil.[49] After concluding that extradition treaties provide a comprehensive method of regulating the rendition of an extraterritorial fugitive under its jurisdiction, the court stated that jurisdiction achieved by extralegal means was a redressable violation of law.[50] The Court further asserted that U.S. involvement in extraterritorial

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In rejecting the notion that the *Ker-Frisbie* doctrine completely precluded any inquiry into the means of a defendant's rendition, the Ninth Circuit concluded that the government-sponsored abduction of a Mexican national without Mexico's consent constituted a violation of the extradition treaty. *Verdugo*, 939 F.2d at 1358. Furthermore, the Ninth Circuit asserted that if the offended nation formally protested a treaty violation, the individual challenging the court's jurisdiction in a criminal proceeding could invoke the treaty terms.

[49] *Verdugo*, 939 F.2d at 1346. The Ninth Circuit Court of Appeals first stated that *Ker* involved kidnapping by a private citizen wholly unauthorized by any United States official and asserted that "*Ker* stands only for the proposition that a private kidnapping does not violate an extradition treaty. It does not address the question of a kidnapping authorized by the United States government." *Id.*

The court then noted that *Ker* was not dispositive of the case because in *Ker* the Peruvian government had not protested the extradition treaty violation. Noting that *Ker* involved a case of kidnapping neither authorized by the U.S. government nor challenged by the "offended" Peruvian government, the court emphasized the presence of a formal objection in the *Verdugo* case, stating that "numerous cases have suggested that were the government of the country from which an individual was kidnapped to lodge a formal protest with the United States, that protest might defeat jurisdiction." *Id.* The court suggested that the revolution occurring in Peru at the time of Ker's abduction may have made an official protest improbable. *See supra* note 28.

Finally, relying upon *Rauscher* to reject the broad reading of *Ker-Frisbie* and its progeny, the Court of Appeals determined that "it is manifestly untrue that a court may never inquire into how a criminal defendant came before it." *Verdugo*, 939 F.2d at 1348. The court extended the reasoning behind the *Rauscher* specialty argument to extradition treaty disputes, applying the principle that "violation of a treaty under appropriate circumstances prevents a court from exercising jurisdiction over a defendant." *Id.*

Additionally, the court rejected the application of *Frisbie* on two grounds: first, that *Frisbie* centered around a claimed violation of due process, whereas Verdugo's claim was grounded in the treaty violation; and second, that *Frisbie* properly involves interstate rendition, whereas the international kidnapping of defendants requires an entirely different analysis. *Id.* at 1347.

[50] *Id.* at 1351. The Verdugo Court presented two arguments to support its finding that extradition treaties proscribe government-sponsored kidnappings. The court first looked to the underlying purpose of extradition treaties, determining that "[n]ations enter into extradition treaties in order to impose . . . legal obligations on one another under appropriate conditions . . . to secure the benefits of international cooperation." *Id.* at 1349. The court further rejected the government's contention that extradition treaties are of consequence only when

abduction in violation of an extradition treaty conferred upon the individual standing to challenge the court's jurisdiction over him, if the nation from which the abduction occurred were to file a formal protest.[51] The Court then found that if the United States had violated the Extradition Treaty by participating in Verdugo's abduction, U.S. jurisdiction over him would be invalid.[52]

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formally invoked, stating that this view "blatantly contravenes the purposes underlying extradition treaties." *Id.* at 1350. The court examined the rule of specialty and found it to be embodied in all extradition treaties, either expressly or implicitly, and thus signatory nations are precluded from extraditing individuals for prosecution on charges other than those enumerated in the treaty. The court then stated that, *a fortiori*, an individual abducted by a treaty signatory nation could challenge a court's jurisdiction over him absent the consent of the nation from which he was taken. *Id.*

Second, the court drew upon general principles of international law to support its finding that extraterritorial abductions were precluded where extradition treaties existed. *Id.* at 1351-52. The court referred to such documents as Article 17 of the Charter of the Organization of American States, *supra* note 14, as well as the United Nations Charter, *supra* note 13, of which both the United States and Mexico are signatories, as representing the position that the territorial integrity of a sovereign nation may not be breached by force.

The court noted that party nations to an extradition treaty were not bound to comply with the provisions of the treaty, as long as the requested nation voluntarily acquiesced to relaxing the procedure, either by waiver, *citing* United States v. Valot, 625 F.2d 308 (9th Cir. 1980) (no treaty violation where Thai authorities surrendered defendant to U.S. authorities in Thailand), or by consent, *citing, inter alia,* United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (appellant lacked standing absent protest by Belize or Guatemala of appellant's arrest and removal), United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (absent protest by Bahamian government or demand for defendant's return, existence of extradition treaty between United States and Bahamas is irrelevant). Noting the official protests by the Mexican government, however, the Court found no evidence of official acquiescence in the present case. *Verdugo*, 939 F.2d at 1352.

[51] The court supported its approval of individual standing by presenting two arguments. First, the court drew again on *Rauscher* and found that at least in situations involving breaches of the specialty doctrine, the individual could raise whatever objection the rendering nation might have raised. The court further stated that were Verdugo challenging jurisdiction using a specialty defense, he would have standing. Second, the court recognized that standing was more compelling in a kidnapping case because the United States had deliberately circumvented the terms and purpose of the treaty. *Id.* at 1355-56.

The court found the existence of an official protest extremely relevant, noting that "in no reported case has a court held that an officially authorized or sponsored kidnapping did not violate an extradition treaty when the country from which the defendant was kidnapped objected to the abduction." *Id.* at 1346.

[52] *Id.* at 1350-51. The court then remanded the case to the district court to determine whether the United States had authorized or sponsored Verdugo's abduction. *Id.* at 1362.

The Ninth Circuit's decision in *Verdugo* was significant in holding that government-sponsored abductions would not pass muster if conducted outside the parameters of existing extradition treaties and without the consent of the other nation involved. The holding marked a departure from the customary lack of inquiry into the often questionable means of securing jurisdiction over individuals.

III. ANALYSIS

In *United States v. Alvarez-Machain*,[53] the Supreme Court ruled that the United States may authorize the forcible abduction of a criminal defendant from foreign soil without violating the extradition treaty existing between it and the nation from which the defendant was abducted.[54] The decision effectively expanded the *Ker-Frisbie* doctrine to include abductions sponsored by the United States even where the offended nation filed a formal protest. The decision also foreclosed judicial resolution to the dispute between the United States and Mexico which had arisen over the abduction by stating that the Executive Branch was the proper avenue through which the Mexican government could seek redress of its claimed breach of sovereignty.[55]

In reaching the conclusion that the defendant's forcible abduction from Mexican soil did not destroy the district court's jurisdiction over him, the Court relied upon three determinations. The Court first determined that when a signatory acts without invoking an extradition treaty, and if the treaty does not prohibit abduction, there is no treaty violation.[56] Second, the Court found no basis in international law to support an interpretation of the Treaty at issue as implying a prohibition of extraterritorial abductions.[57] Third, the Court held the *Ker-Frisbie* rule to be wholly applicable where there was no violation of the Extradition Treaty between the United States and Mexico.[58]

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[53] 112 S. Ct. 2188 (1992).
[54] *Id.* at 2197.
[55] *Id.* at 2196.
[56] *Id.* at 2191-93.
[57] *Id.* at 2194-96.
[58] *Id.* at 2192-93.

A. *Interpreting the Treaty*

The Court began its analysis by addressing whether the abduction of the defendant violated the Extradition Treaty between the United States and Mexico. Examining the Treaty to determine its express provisions, the Court rejected the defendant's arguments that the Treaty was violated. The Court next looked to the rights and obligations implied under the Extradition Treaty and found no basis for concluding that the United States had the duty to refrain from authorizing extraterritorial abductions.

1. Express Obligations Under the Treaty

Initially, the Court looked to the terms of the Treaty[59] to determine its meaning and found neither an explicit obligation on either nation to refrain from conducting forcible abductions from the soil of the other nation, nor any stated consequences under the Treaty should either party conduct such an abduction.[60] The Court reasoned that because "nations are under no obligation to surrender those in their country to foreign authorities for prosecution" where there is no extradition treaty, nations which have extradition agreements also face no such obligation to deliver until another party invokes the treaty.[61] In reaching this premise, the Court ignored the very reason nations enter into extradition treaties—to create reciprocal arrangements by which nations may turn over fugitives fleeing justice.[62] The procedures set forth in extradition treaties can be effective only if the signatories understand them as reciprocal obligations to comply with those procedures whenever either party seeks a fugitive located in the other state.

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[59] Article 9 of the Extradition Treaty states:

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

Extradition Treaty, May 4, 1978, U.S.-Mex., art.9, 31 U.S.T. 5059, 5065.

[60] *Machain*, 112 S. Ct. at 2193, *citing* Air France v. Saks, 470 U.S. 392, 397 (1985).

[61] *Id.* at 2194.

[62] See United States v. Verdugo, 939 F.2d 1341, 1349 (9th Cir. 1991).

Having found no express prohibition of abduction in the Treaty, the Court concluded that the language of Article 9[63] failed to foreclose supplemental methods of securing the custody of fugitives, including abduction.[64] The Court reasoned that in the absence of an extradition treaty, nations have methods by which they may nevertheless secure the presence of fugitives in flight, and that these methods include abduction.[65] Here, however, an extradition treaty was in effect between the United States and Mexico, and it did create legal obligations on both parties, including the obligation to refrain from acting beyond the scope of the agreement.[66]

Dissenting strongly from the majority opinion, Justice Stevens argued that

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[63] *See* Extradition Treaty, *supra* note 59.

[64] *Machain*, 112 S. Ct. at 2194. The Court stated that Article 9 "does not purport to specify the only way in which one country may gain custody of the national of another country for the purposes of prosecution." *Id.*

In addition to its position that Article 9 did not restrict the means of securing jurisdiction, the Court reasoned that "the history of negotiation and practice under the Treaty" did not support Dr. Machain's claim that his abduction violated the Extradition Treaty. The Court stated that Mexico had long been aware of the United States' view that the *Ker* doctrine governed forcible abductions if the Treaty was not invoked. *Id.* The court referred to the 1905 Martinez Incident, in which the United States applied the *Ker* holding to a situation in which a defendant was abducted from Mexico to stand trial in the United States. In diplomatic correspondence, Mexico was informed that its recourse consisted of extraditing the abductor to face trial in Mexico. *Id.* at 2194, n.11.

Contrary to the Court's interpretation, however, the Martinez Incident fails to support the Court's interpretation because there is no evidence that Government agents were involved in the Martinez abduction, and thus the rule in *Ker* was applicable there. Furthermore, the Martinez Incident occurred long before the current treaty came into force in 1980, and the Mexican government may have relied on the language of the existing Treaty as a guarantee that the United States would operate within the terms of the Treaty in securing the presence of future criminal suspects. *Id.*

[65] *Id.*

[66] The Court avoided this argument by first stating that Article 9 established procedures for the parties to follow only when a nation invokes the Treaty, and not necessarily at other times, and then finding that because the United States elected not to employ the Extradition Treaty, there was no obligation to abide by the provisions therein. *Id.* The Court's interpretation was contrary to the position advanced by the Mexican government, which submitted, in an *amicus curiae* brief to the Court, that Mexico intended for the Treaty to apply to all fugitive transfers, unless the parties agreed to waive the Treaty terms. Mexico offered to the Court its interpretation that the Extradition Treaty "governs comprehensively the delivery of all persons for trial in the requesting state for an offense committed outside the territory of the requesting Party." Brief for United Mexican States as *Amicus Curiae* at 6, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (citation omitted).

the majority's reading of Article 9 as merely a noncompulsory illustration of jurisdictioning methods reduced the bulk of the Treaty's provisions "to little more than verbiage," mainly referring to procedural requirements for ensuring effective and legal transfers of prisoners.[67] In addition, the *Machain* ruling has thoroughly undermined the fundamental purpose of the Treaty by unilaterally altering the terms of which it agreed with Mexico.[68]

2. *Implied Obligations Pursuant to the Treaty*

After the Court rejected Dr. Machain's argument that the Treaty expressly prohibited the abduction of foreign nationals, it addressed whether the Treaty implied a prohibition on securing jurisdiction beyond the scope of the Treaty.[69] Dr. Machain argued that customary international law "so clearly prohibited international abductions that there was no reason to state it in the Treaty."[70] The Court rejected his contention, refusing to infer that the Treaty prohibited all means of gaining jurisdiction which were not agreed

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[67] *Machain*, 112 S. Ct. at 2198. Provisions rendered meaningless by such a decision, according to Justice Stevens, include: Article 3 (requiring "sufficient" evidence to grant extradition); Article 5 (withholding extradition for political or military offenses); Article 6 (withholding extradition when the person sought has already been tried); Article 7 (withholding extradition when the statute of limitations for the crime has elapsed); and Article 8 (granting the requested State discretion to refuse an individual facing the death penalty in the requesting country).

Responding to the majority's conclusion that extraterritorial abductions are permissible unless expressly prohibited, Justice Stevens noted that the Treaty also fails to explicitly prohibit execution or torture as a more expedient means of administering justice than extradition; however, if the majority is correct, Justice Stevens suggests that such conduct would not violate the Treaty. *Id.* at 2199 (Stevens, J., dissenting). Although Justice Stevens concedes in his dissenting opinion that the dispatching of execution squads is a "highly improbable interpretation of a consensual agreement," it is a possible one given the court's reasoning. *See id.*

[68] Basic rules of treaty interpretation forbid this type of unilateral interpretation. *See, e.g.*, New York Indians v. United States, 170 U.S. 1, 23 (1898) (precluding United States from interpreting treaty with Indian tribes without informing the tribes).

[69] *Id.* at 2195, *citing* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 17 (1936) (stating that "the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied").

[70] *Machain*, 112 S. Ct. at 2195. The respondent argued that the Charters of the United Nations and the Organization of American States provided further evidence of the "international censure of international abductions." *Id.*

upon by both signatories and set forth in the Treaty.[71]

However, Justice Stevens disagreed, arguing that the "manifest scope and object of the Treaty itself . . . plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party."[72] As Justice Stevens suggests, by promulgating a treaty to promote international cooperation, contracting nations imply that each is willing to honor the sovereignty of the other, at least with respect to the subject matter of the treaty. A contrary finding minimizes the role of diplomacy and ignores the purpose of making international agreements. Although the Extradition Treaty grants to the requested party the option of denying the extradition request, the Treaty implies an obligation on each party that individuals sought will stand trial for their alleged offenses.[73] The refusal of the Supreme Court to recognize this implied obligation to follow the agreed extradition procedures nullifies the effect of an extradition treaty by sanctioning activity outside its parameters.[74]

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[71] The Court stated that "[t]he general principles cited by the respondent [including the United Nations Charter and the Charter of the Organization of American States, *see supra* note 13] simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions." *Id.* at 2196.

[72] *Id.* at 2199 (*quoting* United States v. Rauscher, 119 U.S. 407, 422 (1886).

[73] If the nation from which the extradition is being sought chooses not to grant the extradition, "the requested Party shall submit the case to its competent authorities for the purpose of prosecution." Extradition Treaty, *supra* note 7, art. 9, 31 U.S.T. at 5065.

[74] Dr. Machain conceded that nations may voluntarily deliver individuals for prosecution in other nations without invoking an extradition treaty but could not convince the Court that in the case of an abduction not approved by the offended nation, a formal protest would require the return of the kidnapped fugitive. *Machain*, 112 S.Ct. at 2195. The Court stated that "the Extradition Treaty only prohibits the defendant's presence by means other than set forth in the treaty when the nation from which the defendant was abducted objects . . . seems inconsistent with the remainder of respondent's argument. The Extradition Treaty has the force of law, and if as respondent asserts, it is self-executing, . . . a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." *Id.*

The Court noted that general international law supported this argument of Dr. Machain, but concluded that the specific area of extradition treaties failed to support his theory. *Id.* at 2196. The Court stated that Dr. Machain "would imply terms in the Extradition Treaty from the practice of nations with regards to international law more generally" than to extradition treaties themselves and attempted to argue that the abduction was in violation of the general international law principle that one government may not "exercise its police power in the territory of another state." *Id.* The Court rejected these assertions by suggesting that a military invasion of Mexico by the United States would be an exercise of police power which

B. Applying the Ker-Frisbie Rule

After concluding that no express or implied provision in the Treaty prohibited the government-sponsored abduction of the defendant from Mexico, the Court applied the *Ker-Frisbie* rule and determined that the defendant could not successfully use his illegal abduction to challenge U.S. jurisdiction over him.[75] Because *Ker* involved a defendant brought before the court by way of an illegal abduction, the Court found the *Ker-Frisbie* doctrine to be controlling.[76] As a result, the Court dismissed as immaterial any evidence of the respondent's forcible abduction in determining whether a court may exercise jurisdiction over him.[77]

Notwithstanding the presence of an illegal abduction in both *Ker* and the present case, the *Ker-Frisbie* rule is simply inapplicable to the situation presented here. Criticizing what he characterized as a "monstrous" decision,[78] Justice Stevens pointed out that the Court's "critical flaw"—the failure to distinguish between government-sponsored abductions and action by private citizens, removed this situation from those addressed by *Ker-Frisbie*.[79] The Court failed to address the issue of government sponsorship of illegal activity except to dismiss it as a superfluous element of the

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might violate international law but not the Extradition Treaty. *Id.*

The military invasion illustration fails to support the Court's rationale. The respondent never contended that international warfare had any relation to the Extradition Treaty; he argued that the United States engineered his abduction in order to gain his presence in a U.S. Court while skirting the provisions of the Extradition Treaty. The argument that the United States is engaged in a "war on drugs" and that the treaty does not apply seems unpersuasive.

[75] *Id.* The Supreme Court distinguished *Rauscher* on the grounds that the defendant there had come before the court by the operation of an extradition treaty and that the *Rauscher* holding should be limited to similar facts. *Id.* at 2192-93.

[76] The Court declared that it "has never departed from the rule announced in *Ker* that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'" (citation omitted). *Id.*

[77] *Machain*, 112 S. Ct. at 2193.

[78] *Id.* at 2206.

[79] In his dissenting opinion, Justice Stevens stated that the actions of private citizens cannot be held to violate any treaty obligation, but conduct which is expressly authorized by the Executive Branch of the government, such as the DEA authorization of the defendant's abduction, "constitutes a flagrant violation of international law," as well as "a breach of our treaty obligations." *Id.*

defendant's argument.[80] By dismissing the issue of government involvement in Machain's abduction, the Court ignored the precedent of *Cook v. United States*, where Justice Brandeis distinguished government-sponsored seizures from those conducted by private citizens and held that government-sanctioned seizures were subject to a challenge of jurisdiction.[81]

Much like the government action in *Cook*, the United States, in authorizing the abduction of Dr. Machain, acted in a manner that exceeded the scope of its powers, because the terms and purpose of the Treaty imposed a limit on its permissible conduct. The Extradition Treaty between the United States and Mexico clearly listed the limitations on the rights of the contracting nations to use self-help in securing the presence of fugitives in court, and the United States overstepped those limits. Remarkably, the Court, rather than censure the U.S. activities conducted in violation of both the Extradition Treaty and international goodwill, authorized the use of force in the land of an ally, and in truth placed no prohibition on future encroachments into foreign territory.

C. Redress Available to the Mexican Government

After concluding that the United States could authorize such abductions at the expense of Mexican sovereignty, the Court suggested possible avenues of recourse available to the Mexican government. Recognizing that the Mexican government had protested the kidnapping of the defendant through diplomatic correspondence to the State Department, the Court stated that the decision to repatriate the defendant, as a matter apart from the Treaty, was

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[80] *Id.* at 2193. The Court reasoned that "Ker was decided on the premise that there was no governmental involvement in the abduction . . . . Respondent finds these differences to be dispositive" (citations and footnote omitted). The Court then addressed the legality of abductions as a whole, without differentiating between sanctioned abductions and those undertaken by private citizens. *Id.*

[81] Cook v. United States, 288 U.S. 102 (1933). In *Cook*, another instance of illegal government seizure in violation of another nation's sovereignty, the United States lacked the power to seize a ship suspected of importing alcoholic beverages, during Prohibition, into the United States.

The treaty's issue in *Cook* prohibited the exercise of boarding rights onto a vessel at a distance from shore greater than the vessel could travel in one hour, and the seized vessel could not exceed a speed of more than ten miles per hour. The government lacked the power to seize the vessel, because it had exceeded the territorial limit imposed on it by the treaty with Great Britain. *See Machain*, 112 S. Ct. at 2203, n.28; for further discussion of the limits of U.S. power in *Cook*, see *supra* text accompanying notes 38-43.

a matter not for the judiciary, but for the executive branch.[82] Although President Bush issued a statement promising that his administration would not again authorize the abduction of individuals from Mexican soil, this assurance has little practical effect. For example, such a promise is effective only so long as the U.S. government chooses to follow it. Additionally, there is no legal obligation imposed on future administrations to honor this type of statement. And finally, this promise not to abduct applies only to executive branch conduct and does not guard against state agencies operating under other authority.[83] In foreclosing a judicial resolution to the dispute, however, the Court failed to notice that *Rauscher* recognized the validity of recourse by means of the judiciary as well as the executive branch.[84]

In holding that the United States is under no obligation to conduct itself within the parameters of its extradition treaties, the *Machain* ruling presents a potentially serious situation, in which a foreign nation might likewise circumvent its own extradition treaty and abduct an American citizen for trial overseas.[85] For example, the government of Iraq, seeking American citizens, including President Bush, to face trial in retaliation for what it might allege to be war crimes relating to the 1991 Persian Gulf War, might choose to abduct those it felt were responsible for the deaths of its citizenry. Although such a situation might never occur, this scenario is plausible, and it is quite unlikely that the United States would permit such an invasion on

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[82] *Id.* at 2196. Although the Bush Administration apologized for the invasion of Mexico's sovereignty and promised that it will not kidnap another suspect for trial in the United States, it refused to amend the language of the Treaty to proscribe such abductions. Damian Fraser, *Mexico and U.S. Settle Kidnapping Dispute*, FIN. TIMES, July 3, 1992, at 4. Instead, the two nations agreed to exchange diplomatic notes that will make extraterritorial kidnapping by private citizens an extraditable offense. This move would reinterpret the Treaty to shield those who abduct suspects under the auspices of government approval. The Administration further refused demands made by the Mexican government for the repatriation of Dr. Machain. *Id.*

[83] *Id.*

[84] See United States v. Rauscher, 119 U.S. 407, 430-31 (1886). The *Rauscher* court discounted the argument that parties seeking to challenge alleged violations of Treaty obligations may "only appeal to the executive branches of the treaty governments for redress" by noting that the Supreme Court may issue writs or error and habeas corpus. *Id.* at 431.

[85] Ruth Wedgwood, *A Dangerous Precedent*, NAT. L.J., July 6, 1992, at 15 (warning that the Machain decision may encourage a foreign country to circumvent an extradition treaty and kidnap an American executive from American soil to face a foreign trial).

American soil or an Iraqi attempt to hide behind the *Machain* precedent.[86]

In the wake of the decision issued in *United States v. Alvarez-Machain*, nations seeking to guard against the possibility of illegal abductions by U.S. invasions of their territorial sovereignty may be well advised to amend their extradition treaties with the United States to prescribe the apprehension of individuals outside the parameters of an extradition treaty. To preserve its own territorial integrity against possible United States intrusions as the one which occurred in *Machain*, a nation might negotiate an amendment to its extradition treaty divesting jurisdiction over defendants seized by methods which violate international law.[87]

IV. CONCLUSION

The Supreme Court decision in *Alvarez-Machain* expanded the *Ker* rule to uphold jurisdiction over individuals who are abducted from other nations to stand trial in the United States, regardless of whether the offended nation lodges a formal protest and demands the repatriation of the individual. Although the *Ker* decision has long been recognized as based on the absence of a sovereign protest and the lack of government participation in the abduction, the *Machain* court expanded the doctrine to include those abductions which occur under official United States sponsorship, even if the offended nation files a formal protest. The Supreme Court thus broadened an already controversial doctrine to sanction illegal kidnappings abroad by government operatives. Without some sort of limit placed on the actions of law enforcement agencies, this decision may signal a weakening in international cooperation in bringing fugitives to trial.

Because the paramount goal is rightly to pursue justice whenever a crime has occurred, the use of abductions and other extralegal methods to obtain jurisdiction over fugitives will continue. This pursuit of justice, however,

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[86] In fact, the United States showed signs of just such a hypocritical position as early as 1948. In response to an attempt by the Soviet Union to abduct a Soviet citizen fron U.S. soil, the State Department declared that the United States Government "cannot permit the exercise within the United States of the police power of any foreign government." 19 DEP'T STATE BULL. 251 (1948); *see also* the *Eichmann* incident, *supra* note 34.

[87] Of course, countries are free to effect the delivery of criminal suspects informally, so long as both nations agree to circumvent the treaty. For discussion of consent to irregular rendition and waiver of the procedures established in extradition treaties, *see supra* note 50. *See also* Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L. L. at 439, 442 (Supp. 1935).

does not take place in a vacuum, and therefore nations should undertake irregular methods of rendition only when no other alternative exists, and only then with a keen eye to respecting both individual rights and international sovereignty.

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