

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)

I. FACTS

In January of 1986, Rene Martin Verdugo-Urquidez ("Verdugo"), a citizen and resident of Mexico, was seized by Mexican police officers in his home country. He was handcuffed, blindfolded and placed face down in the back seat of an automobile for a two hour drive to the United States border.<sup>1</sup> At the border, the Mexican police officers pushed him through a hole in the fence separating the two countries and taken into custody by waiting United States marshals possessing a warrant for his arrest for various charges related to drug trafficking.<sup>2</sup> In response to Verdugo's apprehension, the Mexican government lodged a formal complaint<sup>3</sup> with the United States State Department.

In addition to denying all charges, Verdugo sought to have the case dismissed for lack of personal jurisdiction, claiming that the manner in which he was apprehended violated the extradition treaty between the United States and Mexico.<sup>4</sup> Following a two month jury trial, he was convicted in district court of five felonies related to the kidnapping and murder of United States Drug Enforcement ("DEA")

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<sup>1</sup> *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990)(Fourth Amendment does not apply to the search by United States authorities of the Mexican residence of a Mexican citizen who had no voluntary attachment to the United States).

<sup>2</sup> *U.S.-Backed Kidnappings Ruled Illegal*, L.A. TIMES, July 23, 1991, § A, at 1, col. 2 (home ed.).

<sup>3</sup> Mexico did not specifically ask for Verdugo's repatriation. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991).

<sup>4</sup> Article 10 of the extradition treaty in place at the time of Verdugo's abduction states that a party must be extradited through diplomatic channels. Extradition Treaty, Jan. 25, 1980, United States-Mexico, art. 10, 31 U.S.T. 5059, 5066 [hereinafter "Extradition Treaty"]. The United States District Court for the Central District of California, which initially heard Verdugo's case, determined that his claim of a violation of the extradition treaty was irrelevant to the court's jurisdiction, citing the Ker-Frisbie rule, *see infra* note 7, and did not make a determination as to whether the extradition treaty was breached. *Verdugo*, 939 F.2d at 1343. *See infra* note 8 and accompanying text.

Special Agent Enrique Camarena Salazar<sup>5</sup> and sentenced to four consecutive 60-year sentences.<sup>6</sup>

On appeal, the Ninth Circuit Court of Appeals, in a departure from the longstanding Ker-Frisbie rule,<sup>7</sup> remanded Verdugo's case back to the district court for an evidentiary hearing to determine if the United States authorized his removal without the consent of the Mexican government.<sup>8</sup> *Held*, where an extradition treaty exists and the United States fails to receive consent from the foreign government, a United States sponsored abduction of an individual from that foreign country in order to face charges in the United States violates the extradition treaty; in addition, if the abduction violates the extradition treaty, and the foreign government formally protests the abduction,<sup>9</sup> a United States court does not have jurisdiction over the individual and must grant an order of repatriation.<sup>10</sup> *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

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<sup>5</sup> In 1985, Camarena was abducted in Guadalajara, Mexico, while walking down a street to meet his wife for lunch. He was tortured for thirty hours before being killed. In response to the brutality of the murder, the DEA initiated "Operation Leyenda" which established a task force for the purpose of apprehending those persons responsible for Camarena's kidnapping, torture, and murder. The "Operation Leyenda" task force arranged for Verdugo's capture and later paid \$32,000 to the individuals who abducted Verdugo in Mexico. *Camarena Case Spotlight Shifts to L.A. Unit's Tactics*, L.A. Times, May 7, 1990, § A, at 1, col. 5 (home ed.).

<sup>6</sup> *Verdugo*, 939 F.2d at 1343.

<sup>7</sup> The Ker-Frisbie rule is derived from two Supreme Court cases, *Ker v. Illinois*, 119 U.S. 436 (1888), and *Frisbie v. Collins*, 342 U.S. 519 (1952). The rule states that a court has valid in personam jurisdiction over a defendant regardless of the fact that he has been brought before the court by a forcible abduction from another jurisdiction. M. BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE*, 201 (2d ed. 1987) [hereinafter "BASSIOUNI"]. See text accompanying notes 11-20 for further discussion of the rule.

<sup>8</sup> The letter of protest from the Mexican government after Verdugo's arrest contended that the Mexican officers who apprehended him were hired by the DEA. The State Department's response was that despite being paid by the DEA, the officers had worked in cooperation with U.S. authorities as agents of the Mexican government, and that the decision to pay the officers was not made until after Verdugo's capture. *Verdugo*, 939 F.2d at 1344.

<sup>9</sup> The defendant must raise the issue of a treaty breach in a timely manner before the trial begins, or objection to the court's jurisdiction is waived. Also, the protesting government must be willing to accept repatriation. *Id.* at 1343.

<sup>10</sup> The court considered the letters sent by the Mexican government to the U.S. State Department to be a formal protest. A partial dissent to the court's ruling contended that the case should be sent back to the district court to determine whether Mexico sought Verdugo's return. *Verdugo*, 939 F.2d at 1364 (Browning, J., dissenting).

## II. LAW

A. *Ker-Frisbie Rule*

The decision in *Ker v. Illinois*<sup>11</sup> establishes that a forcible abduction abroad is a viable alternative to extradition for bringing a defendant into the United States and obtaining personal jurisdiction over the defendant. In *Ker*, the Supreme Court ruled that a court had standing to try a defendant who was abducted from Peru instead of being extradited, stating that an extradition treaty must be invoked by a signatory in order for a defendant to have any rights conferred by the treaty.<sup>12</sup> A defendant abducted by an individual acting outside of the treaty would not be denied due process, due to loss of rights granted by the extradition treaty when the treaty was never invoked.<sup>13</sup> The second case in which the Ker-Frisbie rule is based, *Frisbie v. Collins*,<sup>14</sup> formed no new legal precedent, but instead reiterated the holding of *Ker* that a forcible abduction does not violate due process.<sup>15</sup>

The Ker-Frisbie rule gives a court broad latitude in maintaining personal jurisdiction over a defendant despite the means by which

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<sup>11</sup> 119 U.S. 436 (1886). In *Ker*, the governor of Illinois made a request to the United States Secretary of State for the extradition of Frederick Ker, an American citizen living in Lima, Peru. Ker was wanted in Illinois on a larceny charge. The State Department gave proper papers requesting extradition in compliance with the treaty with Peru to a messenger. Instead of contacting Peruvian authorities, the messenger forcibly abducted Ker and brought him back to the United States for trial. Ker was convicted in Illinois of embezzlement. *Id.* at 438-440.

<sup>12</sup> The question presented to the Court was whether the defendant was denied due process because he was not brought before the court through the provisions of the extradition treaty between the United States and Peru. *Id.* at 438.

<sup>13</sup> *See id.* at 443. However, the Court added that the kidnapper was liable for his actions, and he could be charged by Peruvian authorities for kidnapping. Moreover, the defendant could seek civil damages against his abductor for false imprisonment. The Court stressed that the messenger who abducted Ker was acting as an individual, not as an agent or under any authority from the United States government. The Court did not address the situation in which a government agent had abducted a defendant instead of following the procedures of an extradition treaty. *Id.* at 443-444.

<sup>14</sup> 342 U.S. 519 (1952).

<sup>15</sup> "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.' . . . [D]ue process of law is satisfied . . . after a fair trial in accordance with constitutional procedural safeguards." *Id.* at 522. The facts of *Frisbie* did not involve a kidnapping abroad, but a kidnapping of a man in Illinois by police officers from Michigan. The Court was not addressing a situation involving an extradition treaty when it reiterated the *Ker* rule. *Id.*

he or she was brought before the court<sup>16</sup>. Many politicians and government officials mistakenly believe the rule sanctions government abduction of individuals from abroad for trial in a United States court under all circumstances.<sup>17</sup> Other governments have also cited the rule in an attempt to validate abductions abroad.<sup>18</sup> The rule, however, only involves due process issues.<sup>19</sup> If the abduction is from a country with which the United States has an extradition treaty, a court must also determine whether any legal obligations are imposed by the treaty.<sup>20</sup>

### B. Extradition Treaty Interpretation

The Supreme Court has held the Ker-Frisbie rule inapplicable to a situation where the United States government violates a treaty in obtaining the defendant.<sup>21</sup> The Court's interpretation of the statement

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<sup>16</sup> The Supreme Court in *Rochin v. California*, 342 U.S. 165 (1952), stated that law enforcement conduct which "shocks the conscience" violates due process. The Second Circuit extended the *Rochin* standard to abductions abroad, holding that a court must divest itself of jurisdiction over a person who was acquired through a serious violation of constitutional rights, such as an overuse of force during the defendant's apprehension. *United States v. Toscanino*, 500 F.2d 267 at 275, (2d Cir. 1974), *reh'g denied*, 504 F.2d 1830 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

Jurisdictions are split on acceptance of the *Toscanino* exception to the Ker-Frisbie rule. See Andrew M. Wolfenson, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 *FORDHAM INT'L L.J.* 705, 722-38 (1990).

<sup>17</sup> During a floor debate of the United States Senate, Senator Arlen Specter of Pennsylvania cited the Ker-Frisbie rule as a means by which the United States could exercise extraterritorial jurisdiction. 135 CONG. REC. § 12672-73 (daily ed. Oct. 5, 1989). For a further disclosure of Senator Specter's advocacy of kidnapping abroad, see Specter, *How to Make Terrorists Think Twice*, N.Y. TIMES, Mar. 14, 1986, § A, at 31, col. 1.

<sup>18</sup> *Attorney General v. Eichmann*, 36 I.L.R. 5 (Dist. Ct., Isr. 1961), *aff'd*, 36 I.L.R. 277 (Isr. 1962). In *Eichmann*, the jurisdiction of an Israeli court over a war criminal kidnapped from Argentina and brought to Israel for trial was upheld based on United States precedent established by *Ker v. Illinois*. 36 I.L.R. at 64-66. See *infra* note 60.

<sup>19</sup> *Frisbie*, 342 U.S. at 522. The Ker-Frisbie rule continues to be cited by courts as a means of maintaining jurisdiction of defendants kidnapped from another country to face trial in the United States. See, e.g., *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987)(court cites *Ker* to deny petition for a writ of habeas corpus by a Canadian citizen kidnapped in Canada by bounty hunters and brought to Florida for trial, stressing that abductors were not acting as government agents). See also Wade A. Buser, *The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition*, 14 GA. J. INT'L & COMP. L. 357, 367-371 (1984).

<sup>20</sup> *Ford v. United States*, 273 U.S. 593 (1927). See *infra* note 21.

<sup>21</sup> *Ford*, 273 U.S. at 605. A treaty between the United States and Great Britain

in the United States Constitution that "treaties . . . made under the authority of the United States shall be the supreme law of the land"<sup>22</sup> requires a court to adhere to the rights conferred by a treaty<sup>23</sup> entered into by the United States.<sup>24</sup>

Additionally, a court has authority to interpret a treaty in order to settle any disputes involving that treaty.<sup>25</sup> When an individual's rights as granted by a treaty are restricted in the process of bringing that individual before a court, then that court will lack jurisdiction over that defendant.<sup>26</sup>

The rights granted to a defendant by an extradition treaty depend on the wording of the specific treaty.<sup>27</sup> For example, the treaty violated in *United States v. Rauscher*<sup>28</sup> gave the defendant the right to face trial only for the offense for which he was extradited.<sup>29</sup> However, a

gave the United States the right to seize British vessels beyond territorial waters to prevent alcohol from entering the United States. The defendants, who had been convicted for violating the National Prohibition Act, appealed, arguing they were apprehended in violation of the treaty. The Court rejected the Solicitor General's reliance on *Ker*, stating that a treaty violation affected the right of a court to hold the defendants for trial. *Id.* at 606. See also John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1449-55 (1988).

<sup>22</sup> U.S. CONST. art. VI, cl. 2.

<sup>23</sup> The Constitution gives the President the power to make treaties, U.S. CONST. art. II, § 2, subject to the consent of two-thirds of the Senate. U.S. CONST. art. I, § 10.

<sup>24</sup> *Head Money Cases*, 112 U.S. 580, 598-99 (1884) ("A treaty, then, is a law of the land as an act of Congress is" subject to the judicial cognizance of the courts of the country); See also BASSIUNI, *supra* note 7, at 201.

<sup>25</sup> *Head Money Cases*, 112 U.S. at 599.

<sup>26</sup> See *United States v. Rauscher*, 119 U.S. 407 (1886). The treaty broken in the *Rauscher* case was an extradition treaty between the United States and Great Britain. A provision of the treaty stated that a prisoner could only be tried for the charge indicated on the extradition indictment. Rauscher was extradited on a murder charge, but tried and convicted for cruel and unusual punishment. Because of the treaty violation, the Supreme Court disallowed the trial court's jurisdiction. *Rauscher*, 119 U.S. at 407.

Interestingly, *Ker v. Illinois*, 119 U.S. 436 (1886) was decided the same day as *Rauscher*. The *Ker* opinion referred to the *Rauscher* ruling, noting that had the defendant been brought to the United States under an extradition treaty, he probably would have been successful in his objection to the court's jurisdiction because he was abducted out of Peru to face larceny charges and was later convicted for embezzlement. *Ker*, 119 U.S. at 443.

<sup>27</sup> The list of extradition treaties the United States has entered into is given in 18 U.S.C. § 3181 (1985). The United States is a party to over 90 such treaties. *Id.*

<sup>28</sup> 119 U.S. 407 (1886). See *supra* note 26.

<sup>29</sup> *Id.* at 430. The principle that a defendant is free from prosecution for any offense other than that for which he was extradited is known as the "doctrine of specialty." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (Am. Law Inst. 1987).

defendant does not have the right that extradition serve as the exclusive means of bringing him from abroad into the United States and within a court's jurisdiction.<sup>30</sup> Thus, although an extradition treaty may exist between the United States and another country, there are situations in which a defendant can legally be abducted from abroad to face trial in the United States. For example, a defendant loses standing to claim rights granted in an extradition treaty if the other country consents to or helps with a United States violation of the treaty provisions.<sup>31</sup>

Because extradition treaties protect the sovereignty of a nation, courts distinguish between the rights of a sovereign and the rights of an abducted individual.<sup>32</sup> An individual is allowed only those rights conferred by a treaty if his or her government has invoked the treaty.<sup>33</sup> A court may consider a formal protest to constitute both an invocation of the treaty and a claim that the treaty was violated.<sup>34</sup> An exception to this rule is that a violation of the doctrine of specialty<sup>35</sup> gives either the government or the individual extradited standing to invoke rights granted by the treaty.<sup>36</sup>

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<sup>30</sup> *United States v. Cordero*, 688 F.2d 32, 38 (1st Cir. 1981) (defendants sent by the Panamanian government to the United States without invocation of existing extradition treaty did not deprive court of jurisdiction).

<sup>31</sup> *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (Thai agents delivering defendant to DEA agents at airport indicated government acquiescence to the defendant's abduction and was not a violation of the extradition treaty existing between the countries).

<sup>32</sup> BASSIOUNI, *supra* note 7, at 201.

<sup>33</sup> "It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) (no justification for a court to divest itself of jurisdiction without an allegation of a government protest); *See also* Martin. B. Sipple, *The Wild Western Hemisphere: Due Process and Treaty Limitations on the Power of United States Courts to Try Foreign Nationals Abducted Abroad by Government Agents*, 68 WASH U.L.Q. 1047, 1059-68 (1990) [hereinafter *The Wild Western Hemisphere*].

In *Matta*, a defendant challenged the court's jurisdiction over him after he was abducted out of Honduras. The court denied his challenge because the Honduran government made no official protest. 896 F.2d at 260. Although the government did not protest the abduction, individuals in Honduras did. Following the defendant's abduction, 2000 protestors stormed the American consulate in Honduras. Five people died in subsequent clashes with police. *Camarena Case Spotlight Shifts to L.A. Unit's Tactics*, L.A. TIMES, May 7, 1990, § A, at 1, col. 5 (home ed.).

<sup>34</sup> "Little authority exists as to what constitutes a protest by a sovereign for the purpose of raising a treaty violation in federal court." *United States v. Caro-Quintero*, 745 F. Supp. 599, 608 (C.D. Cal. 1990) (defendant abducted from Mexico ordered returned after Mexican government asked for defendant's repatriation).

<sup>35</sup> *See supra* note 29.

<sup>36</sup> *Rauscher*, 119 U.S. at 421 (Great Britain did not protest the treaty violation

An extradition treaty is an agreement which under certain circumstances creates rights recognized in domestic courts.<sup>37</sup> However, it is primarily an accord between nations entered into for a specific purpose.<sup>38</sup> Therefore, the rights granted domestically by the treaty should not exceed the purpose intended.<sup>39</sup>

### III. ANALYSIS

In *United States v. Verdugo-Urquidez*,<sup>40</sup> the Ninth Circuit Court of Appeals concluded that a unilateral government sponsored extra-territorial abduction executed in order to bring a defendant to trial in the United States is a clear violation of an existing extradition treaty and of principles of international law.<sup>41</sup> The court refused to give the abducted individual standing to protest the violation unless the other government involved made a formal protest.<sup>42</sup> The court, however, considered a formal protest to be tantamount to a request for repatriation.<sup>43</sup> As a result of the ruling, the United States government has few alternatives other than formal extradition proceedings in order to bring defendants abroad to trial in a United States court.<sup>44</sup>

#### A. Narrowing of the Ker-Frisbie Rule

The court correctly distinguished the *Verdugo* case from those cases in which a forcible abduction had been allowed under the Ker-Frisbie rule.<sup>45</sup> The facts surrounding the cases which developed the rule<sup>46</sup> are

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to the United States, but the doctrine of specialty allowed the defendant to claim rights under the treaty).

<sup>37</sup> *The Wild Western Hemisphere*, *supra* note 33, at 1063.

<sup>38</sup> *Head Money Cases*, 112 U.S. at 580.

<sup>39</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (Am. L. Inst. 1987).

<sup>40</sup> 939 F.2d 1341 (9th Cir. 1991).

<sup>41</sup> "One of the most fundamental principles of international relations is the principle that the territorial integrity of a sovereign nation may not be breached by force." *Id.* at 1352; *see infra* note 61.

<sup>42</sup> *Id.* at 1343.

<sup>43</sup> *Id.* at 1360.

<sup>44</sup> The United States may avoid formal extradition proceedings if the other government consents to or assists in abducting the individual, or does not file a protest after the abduction. However, in no situation can the United States abduct an individual from a country with which it has an existing extradition treaty without that government's approval. *Id.* at 1352.

<sup>45</sup> The Ker-Frisbie rule indicates 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'". *Frisbie v. Collins*, 342 U.S. 519, 522 (1952). *See supra* note 15.

<sup>46</sup> *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

significantly different from the facts of *Verdugo*. In *Ker*, the court stressed that the abduction which brought the defendant to trial was carried out by a private individual acting outside any treaty agreement the United States had entered.<sup>47</sup> Moreover, no government protest followed the abduction.<sup>48</sup> In *Verdugo*, the abductors were acting at the behest of the United States, an extradition treaty was in place, and the abduction was protested by the Mexican government.<sup>49</sup>

The *Frisbie* case concerned a domestic kidnapping from one state by agents of another state, together with alleged violations of the defendant's fourteenth amendment rights.<sup>50</sup> *Verdugo*, however, involved a kidnapping outside the United States. The defendant argued lack of jurisdiction due to rights conferred by an extradition treaty,<sup>51</sup> thus making a comparison to *Frisbie* irrelevant. Therefore, the court was correct in distinguishing *Verdugo* from *Ker* and its progeny.

The court in *Verdugo*, by clarifying the factual situation in which the *Ker-Frisbie* rule applies, indicates that the United States does not have unquestionable jurisdiction if a government-sponsored kidnapping results in a protest from the nation in which the kidnapping took place.<sup>52</sup>

### B. Clarifying Obligations of Extradition Treaties

The defendant's appeal in *Verdugo* was based on a claim of loss of rights which were guaranteed by the extradition treaty existing between the United States and Mexico at the time the defendant was abducted.<sup>53</sup> Although the treaty does not contain any specific provisions dealing with unilateral forcible abductions outside of the treaty, the court accurately considered this type of activity to be an implicit treaty violation.<sup>54</sup> This position is supported by the Supreme Court's ruling in *United States v. Rauscher*,<sup>55</sup> which states that extradition treaties impose legal obligations on the United States which

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<sup>47</sup> *Ker*, 119 U.S. at 443.

<sup>48</sup> *Id.*

<sup>49</sup> *Verdugo*, 939 F.2d at 1343.

<sup>50</sup> *Frisbie*, 342 U.S. at 520.

<sup>51</sup> *Verdugo*, 939 F.2d at 1344.

<sup>52</sup> *Id.* at 1348.

<sup>53</sup> Extradition Treaty, *supra* note 4.

<sup>54</sup> "A kidnapping is a flagrant treaty violation because it wholly circumvents the extradition process. . . ." *Verdugo*, 939 F.2d at 1356.

<sup>55</sup> *Rauscher*, 119 U.S. 407 (1886).

must be obeyed whether the obligations are expressed or implied.<sup>56</sup>

The United States government attempted to make the kidnapping of Verdugo legitimate by arguing that the extradition treaty could not grant the defendant rights because the United States chose not to invoke the treaty to obtain the defendant.<sup>57</sup> Such a position ignores the purpose<sup>58</sup>, pledges<sup>59</sup> and written language of the actual treaty.<sup>60</sup> Additionally, this position overlooks the fact that the United States violated Mexican sovereignty and international law by supporting the kidnapping.<sup>61</sup> A similar incident involving an Israeli abduction of a war criminal from Argentina<sup>62</sup> led to a United Nations Security Council resolution condemning Israel's action<sup>63</sup>. The government's position that an extradition treaty can be ignored begs the fundamental ques-

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<sup>56</sup> 119 U.S. at 412; see *supra* note 26. "Nations enter into extradition treaties in order to impose legal obligations on one another under appropriate conditions." *Id.* at 412.

<sup>57</sup> *Verdugo*, 939 F.2d at 1352.

<sup>58</sup> The treaty specifies that the United States and Mexico desire to "cooperate more closely against crime." Extradition Treaty, *supra* note 4, at 5061. However, due to a forcible abduction similar to the type occurring in *Verdugo*, Mexico threatened to cut off anti-drug cooperation with the United States for violating its sovereignty. *Extradition of DEA Agent, Informant Sought*, WASH. POST, July 21, 1990, § 1, at A4 (final ed.).

<sup>59</sup> In the treaty, the United States promised to observe and fulfill extradition procedures in good faith. Extradition Treaty, *supra* note 4, at 5059.

<sup>60</sup> Article Nine of the treaty preserves a government's right to have its citizens prosecuted by its own authorities instead of extraditing an individual. Extradition Treaty, *supra* note 4 at 5065. By abducting the defendant, the United States prevented the Mexican government from exercising this right. *Verdugo*, 939 F.2d at 1350.

In Colombia, the right of native-born Colombians not to be extradited was made a part of the new constitution enacted July 5, 1991. *Colombia's Rewritten Charter Opens Politics to New Forces*, N.Y. TIMES, July 5, 1991, at A2, col. 3.

<sup>61</sup> BASSIOUNI, *supra* note 7, at 191. See also Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 472-77 (1990) (state-sponsored abduction is a violation of international law for three reasons: 1) breach of the other nation's sovereignty, 2) loss of safeguards provided by extradition treaty to the treaty nations and the individual, and 3) violation of international human rights).

<sup>62</sup> In 1961, individuals acting on the behalf of the Israeli government kidnapped Adolf Eichmann from Argentina without the consent or knowledge of the Argentine government. He was taken to Israel to face trial under Israeli law for crimes against the Jewish people, war crimes, and crimes against humanity for his role in the Jewish holocaust during World War II. He was tried, convicted, and hanged. See P. PAPADATOS, *THE EICHMANN TRIAL* 1-32 (1964); see also *Attorney General v. Eichmann*, 36 I.L.R. 5 (Dist. Ct. Isr. 1961), *aff'd*, 36 I.L.R. 277 (Isr. 1962).

<sup>63</sup> 15 U.N. SCOR, 15th Sess., 868th mtg. at 1, U.N. Doc. S/PV.868 (1960) (resolution declaring the abduction an invasion of Argentina's sovereignty and an endangerment to world peace).

tion: what is the purpose of a nation entering into a treaty if it can be disregarded?<sup>64</sup>

The *Verdugo* court's position that forcible abductions are implicitly prohibited in extradition treaties is bolstered by statements in many international documents to which the United States is a signatory that prohibit a nation from violating the sovereignty of another nation with force.<sup>65</sup>

### C. Requirement of Formal Protest

Although the Ninth Circuit ruled that extradition treaties forbid government-sponsored kidnappings, it required a formal protest by the foreign government in order for the abducted individual to have standing to object to a loss of rights granted by the treaty.<sup>66</sup> The result of this holding is that the United States is not restricted to using the formal extradition procedures of a treaty as the exclusive means of obtaining individuals located in another country. However, the holding does protect a nation's sovereignty by prohibiting the United States from ignoring the extradition treaty without the other nation's consent. For example, a nation may choose to consent to an abduction by implicitly failing to protest it,<sup>67</sup> or may agree with the United States to cooperate outside of the treaty.<sup>68</sup>

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<sup>64</sup> The *Verdugo* court strongly disagreed with the government's position that the terms of an extradition treaty are operative only when it chooses to invoke the treaty, stating it made "no sense whatsoever." *Verdugo*, 939 F.2d at 1351.

<sup>65</sup> Article 6, paragraph 4 of the Charter of the United Nations provides:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

U.N. CHARTER art. 6, ¶ 4.

Article 17 of the Charter of the Organization of American States provides:

"The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever." Charter of the Organization of American States, Apr. 30, 1948, art. 17, 2 U.S.T. 2394, 2420, as amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607.

<sup>66</sup> *Verdugo*, 939 F.2d at 1352.

<sup>67</sup> See *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), cert denied, 421 U.S. 1001 (1975) (refusing defendant standing to invoke rights in extradition treaty because Argentina did not protest his abduction).

<sup>68</sup> See *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980) (defendant cannot invoke extradition treaty if both countries agreed to work outside of it).

The difficulty with the court's ruling that a formal protest gives an individual standing to invoke the rights granted by the extradition treaty is that the scope of each protest is over-interpreted to mean that the protesting government is seeking repatriation.<sup>69</sup> By protesting the abduction, a government may be sending a message other than that it wants the defendant returned. For instance, it may be seeking to avoid a political crisis among its constituents, or it may be merely attempting to receive an accounting from the United States for its actions and may not actually want to invoke sovereign rights or have the defendant returned. Moreover, it is not inconceivable that some departments in a government may not be aware of what others are doing, so that a situation could arise in which one department is protesting an abduction while another has assisted in it.<sup>70</sup> International law does not require repatriation for abductions which violate national sovereignty.<sup>71</sup> In an incident similar to *Verdugo* heard by the United Nations Security Council,<sup>72</sup> the offending nation was ordered to pay reparations but was not required to return the abducted individual.<sup>73</sup>

The *Verdugo* court stated that a government may withdraw a protest, causing the defendant to lose his rights under the extradition treaty.<sup>74</sup> The court, however, again failed to recognize that a formal protest may be made for political as well as judicial reasons. In such instances the protest cannot be withdrawn even though the government does not want the defendant returned. The dissenting opinion in *Verdugo* stated a more appropriate solution: a nation seeking repatriation should ask for it specifically.<sup>75</sup>

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<sup>69</sup> The *Verdugo* court considered a formal protest by a country tantamount to an invocation of the treaty, which allowed the defendant to claim individual rights granted by the treaty. *Verdugo*, 939 F.2d at 1351. Under Article 10 of the extradition treaty, in order to extradite an individual a government must submit a formal extradition request through diplomatic channels. Extradition Treaty, *supra* note 4, art. 10, 31 U.S.T 5066. Since the forcible abduction did not involve any formal proceedings, the defendant's rights had been violated once the Mexican government formally protested, requiring the court to decline jurisdiction based on the ruling in *United States v. Rauscher*, 119 U.S. 407 (1886) (where United States violation of treaty with Great Britain disallowed a court's jurisdiction). See *supra* note 26.

<sup>70</sup> The court in *Verdugo* remanded the case to the district court to determine if the Mexican individuals who abducted the defendant were acting as agents of the Mexican government or as individuals. *Verdugo*, 939 F.2d at 1366.

<sup>71</sup> I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 73 (1971).

<sup>72</sup> The abduction of war criminal Adolf Eichmann from Argentina by Israeli agents. See P. PAPADATOS, *THE EICHMANN TRIAL* 1-33 (1964); see *supra* note 62.

<sup>73</sup> U.N. SCOR 15th Sess., 868th mtg. at 1, U.N. Doc. S/PV.868 (1960). See also, Buser, *supra* note 19, at 367-371.

<sup>74</sup> *Verdugo*, 939 F.2d at 1361.

<sup>75</sup> *Verdugo*, 939 F.2d at 1369 (Browning, J., dissenting).

The facts of *Verdugo* demonstrate that despite a formal protest, a country may not necessarily desire to have an individual returned. Although the Mexican government sent two letters to the State Department protesting the abduction, neither letter asked for the defendant's return.<sup>76</sup> Also, Mexican authorities later assisted DEA agents in searching the defendant's home in Mexico for evidence supporting the charges which caused the defendant to be abducted originally.<sup>77</sup> Assisting the United States in establishing a stronger case against the defendant makes no sense if the Mexican government wanted the defendant returned instead of brought to trial.

The *Verdugo* court clarified the unlawfulness of action by the United States government in abducting an individual from a country with which it has an existing extradition treaty, without that government's approval. The court restricted the exceptions to formal extradition to a limited few. However, the court's position on the minimal requirements needed for an individual to acquire standing to protest the abduction overly restricts those exceptions.

#### IV. CONCLUSION

Much confusion has surrounded the Ker-Frisbie rule and the ability of the United States government to reach outside of its borders to apprehend those wanted for trial within the United States. The ruling in *United-States v. Verdugo-Urquidez* has eliminated the confusion.<sup>78</sup>

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<sup>76</sup> *Id.* at 1361.

<sup>77</sup> *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1057 (1990) (evidence obtained from abroad admissible at trial if the defendant's constitutional rights were not violated in obtaining it).

A clear demonstration of the Mexican government seeking repatriation is found in *United States v. Caro-Quintero*, 745 F. Supp. 599, 604 (C.D. Cal. 1990). After the United States abducted a defendant from Mexico, the Mexican government sent a letter of protest to the State Department explicitly stating it considered the kidnapping to be a violation of the existing extradition treaty and requested the defendant's return. *Id.* at 603.

Additionally, Mexico sought the extradition of a DEA agent to Mexico to a face a charge of kidnapping the defendant. *Arrest of Mexican Doctor Strains DEA Reputation*, WASH. POST, May 2, 1990, § 1, at A4 (final ed.). See also A. Lowenfeld, *Kidnapping By Government Order: A Follow-Up*, 84 AM. J. INT'L L. 712 (1990).

<sup>78</sup> On January 10, 1992, the Supreme Court granted certiorari in *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, (No. 91-712, Jan. 10, 1992), which was decided based on the authority of the *Verdugo* decision. The Court's decision on certiorari for the *Verdugo* case is on hold pending the ruling in *Alvarez-Machain*. *Court to Decide if U.S. Can Abduct Suspects in Foreign Countries*, UPI, Jan. 10, 1992, available in LEXIS, NEXIS Library, UPI File.

Specifically, the Ker-Frisbie rule only states that due process is not violated when a defendant is forcibly abducted from another jurisdiction. Further clarification is required if the United States government abducts an individual from another country with which it has an extradition treaty. The *Verdugo* decision clearly states that the United States cannot violate the sovereignty of a nation with which it has an extradition treaty. Violation of the treaty requires a court to divest itself of jurisdiction. While the Ninth Circuit required the United States to abide by its treaty obligations in reaching the *Verdugo* decision, the court failed to acknowledge that in certain circumstances, the other government involved would prefer that the United States did not comply.

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