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Forcible Transborder Abduction: Defensive Versus Offensive Remedies for Alvarez-Machain

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FORCIBLE TRANSBORDER ABDUCTION: DEFENSIVE VERSUS OFFENSIVE REMEDIES FOR *ALVAREZ-MACHAIN*

I. INTRODUCTION

Imagine the following scenario: You are sitting in your office steadfastly working when armed gunmen burst in, kidnap you, and place you on an airplane bound for Tijuana, Mexico, where they will hand you over to Mexican officials. Upon arrival in Mexico, the court refuses to dismiss the indictment even though the abduction violates the United States' territorial sovereignty, your personal rights, and international law. After the criminal case, nonetheless, you might be granted an offensive remedy in which you can sue your abductors and the Mexican government.[1] It sounds extraordinary, but the U.S. Supreme Court, along with the Ninth Circuit Court of Appeals, has effectively condoned this exact conduct—although in the reverse situation—throughout the various stages of *United States v. Alvarez-Machain*.[2] This

1. Several commentators have recognized the possibility of a reciprocal effect of the Supreme Court's decision in *Alvarez-Machain*, which condoned forcible transborder abductions. One observed that "[t]he Court may not have considered the possible reciprocity of its decision compelling. By subjecting foreign nationals to the vagaries of United States Government abduction, the Court has diminished the protections of United States citizens." David Ring, Note and Comment, United States v. Alvarez-Machain: *Literalism, Expediency and the "New World Order,"* 15 WHITTIER L. REV. 495, 532 (1994); *see also* Michael R. Wing, *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), 23 GA. J. INT'L & COMP. L. 435, 457-58 (1993). In a proposed Senate Resolution, Senator Moynihan also acknowledged the possibility of U.S. citizens being kidnapped:

> [T]here are terrorists the world over prepared to see Americans killed, and we have legitimated the proposition that a foreign government can send agents into this country or find agents in this country which will take Americans out of the jurisdiction, leave them defenseless in foreign lands, and they will say to us, "You did it, and we are doing it. What is the difference?"

S. Res. 319, 102d Cong. (1992).

2. 504 U.S. 655 (1992) (holding that the district court had jurisdiction to try a Mexican national who was forcibly abducted and brought to the United States); Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (en banc) (holding that Alvarez-Machain had offensive remedies available under the Alien Tort Claims Act and the Federal Tort Claims Act). Nevertheless, it remains to be seen if the Supreme Court will sustain the right to an offensive remedy. The Court accepted certiorari in December 2003 and will hear the cases in Spring 2004. United States. v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 821

disturbing situation has occurred because the courts first legitimized transborder abductions as a means to apprehend a suspect and then offered an after-the-fact monetary remedy to the victim.

Throughout history, the United States has used varying forms of irregular rendition to bring foreign criminal defendants into the United States to stand trial.[3] Such abductions occur outside the contours of any existing extradition treaty between the nation states. This has caused an outcry from the international community in certain circumstances. Although abduction might be a somewhat efficient way to bring criminals to justice, it violates a nation's territorial sovereignty, the victim's personal rights, and the integrity of the international legal process. In addition, transborder abductions affect the abducting state's reputation in the international community because such abductions transgress the formal extradition process. The practice of transborder abductions represents a great paradox in U.S. foreign policy because the United States makes all attempts to stop the abduction of its own citizens yet excuses the use of kidnapping to accomplish its own goals.[4]

Despite the negative implications, the United States Supreme Court has upheld *in personam* jurisdiction and the legality of transborder abductions through the *Ker-Frisbie* doctrine.[5] Through this controversial doctrine, courts

(Dec. 1, 2003) (No. 03-485); Sosa v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 807 (Dec. 1, 2003) (No. 03-339).

3. Professor Bassiouni explains that there are two categories of irregular rendition:

> (1) abduction of a person by the agents of a state other than the one in which he is present, with or without the knowledge or consent of the state of refuge; and
>
> (2) seizure of a person by the agents of the state where he is present and his surrender to the agents of another state outside of formal or legal process.

M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 249 (4th ed. 2002).

4. Even a Legal Advisor to the State Department acknowledged the paradoxical nature of the United States position regarding transborder abductions: "[H]ow would we feel if some foreign nation . . . came over here and seized some terrorist suspect in New York City . . . because we refused through the normal channels of international, legal communications, to extradite that individual?" *Alvarez-Machain*, 504 U.S. 655, 679 n.21 (1992). A Senate Resolution proposed by Senator Moynihan recognized this absurdity after the *Alvarez-Machain* decision:

> Whereas, as a result of certain actions taken by United States officials and the recent decision of the United States Supreme Court in the case of United States v. Alvarez-Machain other nations may believe that the United States accepts the international legality of kidnapping;
>
> . . .
>
> be it [r]esolved by the Senate, that: (1) Anyone who attempts to kidnap a person in the United States for the purpose of bringing that person to trial abroad should be deemed to have committed a crime in the United States and dealt with accordingly . . . .

S. Res. 310, 102d Cong. (1992).

5. The principle is embodied in two Supreme Court cases: Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952). *Frisbie* can be distinguished from *Alvarez-Machain* as it was a domestic kidnapping case in which a suspect was abducted by Michigan

have jurisdiction over a defendant regardless of how he was brought before the court.[6] In *United States v. Alvarez-Machain*, the Court applied the *Ker-Frisbie* doctrine in the strictest sense and condoned forcible transborder abductions as a means to gain custody of a suspect even when an extradition treaty exists between the countries.[7]

The decision caused outrage throughout much of the international community for a multitude of reasons.[8] Many nations feared that their nationals would be kidnapped by the United States and felt that such unilateral action violated their territorial sovereignty.[9] The *Alvarez-Machain* decision was also condemned because the Supreme Court simply dismissed the contention that international law might prohibit such unilateral state action. Nonetheless, most of the criticisms revolved around the fact that the United States domestic legal system should have provided a defensive remedy for Alvarez-Machain by dismissing the indictment. Rather than dismissing the indictment, however, the U.S. court system has provided him with an after-the-fact monetary remedy.

A defensive remedy, essentially dismissal of the indictment, maintains the highest level of judicial integrity, deters future government misconduct, and compensates the victim by restoring the victim's liberty and freedom. On the other hand, an offensive remedy, when not coupled with a defensive remedy, effectively condones government misconduct, as it allows the government to keep the fruits of its illegality, and cannot restore a victim's intangible rights. The purpose of this Note, therefore, is to show that a case against an abducted individual should be dismissed and the individual should be repatriated to his or her home State because dismissal is the only appropriate and adequate remedy to restore the victim to the *status quo ante*.

Part II of this Note reviews the history of the *Alvarez-Machain* case, which began in 1990. It discusses the background facts of the case, the criminal case, and the civil case up to this point in 2004. Part III considers the international community's response to forcible transborder abductions and the appropriate

officials in the state of Illinois. *Frisbie*, 342 U.S. at 520. *Ker*, on the other hand, involved the abduction of the suspect from Peru to the United States; the difference between *Ker* and *Alvarez-Machain* is that the kidnapper was acting "without any pretence of authority under the treaty or from the government of the United States." *Ker*, 119 U.S. at 443. As John Kester observed when describing the doctrine, "[b]ecause lawyers have found this canard so intriguing and memorable, it often slips into judicial decisions. That should not be allowed to continue." John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1449-50 (1988) (footnote omitted).

6. *Ker*, 119 U.S. at 440-44; *Frisbie*, 342 U.S. at 522.

7. *Alvarez-Machain*, 504 U.S. at 657-62.

8. For example, the United Nations and the Organization of American States both condemned the decision. *See infra* Part III.A.

9. Many governments expressly condemned the decision and stated that a kidnapping of their national would be viewed as a criminal act. *See infra* Part III.B.

remedy under international law. Part IV examines the possible defensive and offensive remedies available to an abducted individual. Specifically, it explores dismissal of the indictment, the exclusionary rule, the Alien Tort Claims Act, and the Federal Tort Claims Act. Part V evaluates policy objectives announced in various U.S. Supreme Court decisions, such as judicial integrity, deterrence of government misconduct, and victim compensation. It also rebuts the two main objections to providing a defensive remedy: (1) that it undermines effective law enforcement and (2) that the judiciary should not involve itself in matters concerning international relations and political questions.

II. HISTORY OF THE *ALVAREZ-MACHAIN* CASE

There are several background facts that must first be established before discussion of the *Alvarez-Machain* case. First, there was a significant increase within the United States' borders in drug trafficking operations by Mexican cartels in the 1980s.[10] This, in turn, caused the United States to launch its so-called War on Drugs.[11] As a result of the Mexican cartels and the War on Drugs, the United States began placing D.E.A. (Drug Enforcement Agency) agents in Mexico to help eradicate the cartels and their plantations. In addition to these factors, there has also been an increase in terrorism in the United States in the past decade, which has caused the government to take extraordinary measures, in some circumstances, to bring criminals to justice. As the Ninth Circuit Court of Appeals noted, "[i]n the midst of contemporary anxiety about the struggle against global terrorism, there is a natural concern about the reach and limitations of our political branches in bringing international criminals to justice."[12]

A. Background Facts

Enrique Camarena-Salazar was a D.E.A. agent who was assigned to Mexico to bring Mexican drug traffickers to justice and to identify political corruption within the Mexican drug program.[13] He played a role in the eradication of several marijuana plantations. As a result of his involvement in

10. William J. Aceves, *The Legality of Transborder Abductions: A Study of* United States v. Alvarez-Machain, 3 SW. J. L. & TRADE AM. 101, 104 (1996).

11. Melanie R. Hallums, Note, *Bolivia and Coca: Law, Policy, and Drug Control*, 30 VAND. J. OF TRANSNAT'L. L. 817, 835 (1997). In 1973, President Nixon proclaimed an "all-out, global war on the drug menace." Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 574 (1995) (quoting the President's Message to Congress Transmitting Reorganization Plan No. 2 of 1973, Establishing a Drug Enforcement Administration, H.R. Doc. No. 69 (1973)). Despite the professed War on Drugs, the market for illegal drugs has substantially increased in the United States and throughout the world. Hallums, *supra* at 819.

12. Alvarez-Machain v. United States, 331 F.3d 604, 608 (9th Cir. 2003) (en banc).

13. Aceves, *supra* note 10, at 104-05.

these efforts, Camarena was kidnapped by Mexican drug traffickers outside the American consulate in Guadalajara, Mexico on February 7, 1985.[14] Camarena was subsequently taken to a house where he was tortured, interrogated, and eventually murdered.[15] He was repeatedly revived throughout the torture so that the interrogation and torture could continue.[16] Camarena's body was found a month later with that of a Mexican pilot who had assisted him in aerial reconnaissance of marijuana fields in Mexico.[17]

Following the discovery of Camarena's body, the D.E.A. and the Mexican government separately initiated operations to investigate his murder and bring the people responsible for his death to justice.[18] Although twenty-eight Mexican nationals were convicted in Mexico for their involvement in Camarena's murder, not all suspects were detained. One of those released was Dr. Humberto Alvarez-Machain.[19] The United States had received information that Alvarez-Machain administered lidocaine to Camarena in order to revive him throughout his torture and interrogation.[20]

An indictment was issued on January 31, 1990 in the U.S. District Court for the Central District of California that charged Alvarez-Machain, along with other Mexican nationals, with federal crimes relating to the Camarena murder.[21] Nevertheless, the United States never made any attempt to formally extradite Alvarez-Machain. Rather, the D.E.A. initiated informal negotiations with several Mexican officials to abduct and bring him into the United States. Specifically, the D.E.A. offered a $50,000 reward and expenses to deliver Alvarez-Machain.[22]

Alvarez-Machain was kidnapped by "[f]ive or six armed men" from his office in Guadalajara by Mexican nationals on April 2, 1990.[23] He was held for approximately twenty hours in Mexico, where he was physically and verbally abused before being handed over to the D.E.A. in El Paso, Texas.[24]

14. United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *rev'd sub nom*. United States v. Alvarez-Machain, 504 U.S. 665 (1992).

15. *Alvarez-Machain*, 331 F.3d at 609.

16. *See* Jim Newton, *Camarena's Abduction and Torture Described; Courts: Former Bodyguard Says Ranking Mexican Officials were at the House Where U.S. Drug Agent was Killed*, L.A. TIMES, Dec. 10, 1992, at B1.

17. *Id*.

18. Aceves, *supra* note 10, at 105.

19. *Id*.

20. *Id*. at 105-06.

21. *Id*.

22. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *rev'd sub nom*. United States v. Alvarez-Machain, 504 U.S. 665 (1992).

23. *Id*. at 603.

24. Aceves, *supra* note 10, at 107.

Alvarez-Machain testified that he was "shocked six or seven times through the soles of his shoes with . . . 'an electric shock apparatus'. . . [and] injected twice with a substance that made him feel 'light-headed and dizzy.'"[25] After receiving medical treatment in El Paso for one week, he was transferred to Los Angeles for arraignment before the U.S. District Court for the Central District of California.[26]

B. Procedural History of Alvarez-Machain

1. The Criminal Case

Alvarez-Machain filed a motion to dismiss in the district court for lack of personal jurisdiction and outrageous government conduct.[27] Relying on the *Ker-Frisbie* doctrine, the court rejected his due process claim, stating that "the Supreme Court established the long standing rule of law that a forcible abduction does not offend due process and does not require that a court dismiss an indictment for the loss of jurisdiction on those grounds."[28] Nevertheless, the court found merit in Alvarez-Machain's argument that his forcible abduction violated the United States-Mexico Extradition Treaty.[29] The district

25. *Caro-Quintero*, 745 F. Supp. at 603.

26. Aceves, *supra* note 10, at 108.

27. *Caro-Quintero*, 745 F. Supp. at 601.

28. *Id*. at 604. The court did note that exceptions to the *Ker-Frisbie* doctrine had been allowed when the defendant could establish government conduct "of the most shocking and outrageous kind." *Id*. (quoting United States *ex rel*. Lujan v. Gengler, 510 F.2d 62, 65-66 (2d Cir. 1975). However, Alvarez-Machain failed to show this type of abuse because he never reported any type of mistreatment to the doctors that examined him upon arrival in El Paso. *Id.* at 605-06.

29. Treaty of Extradition Between United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty]. The Extradition provides that:

> 1. - The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.
>
> 2. - For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:
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> a) its laws would provide for the punishment of such an offense committed in similar circumstances, or
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> b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

Id. at art. 1. The extradition of nationals is governed by Article 9 of the Extradition Treaty, which provides:

> 1. - Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

court held that Mexico's express protest of the abduction vested Alvarez-Machain's rights under the extradition treaty.[30] The court went on to note that "[i]t is axiomatic that the United States or Mexico violates its contracting partner's sovereignty, and the extradition treaty, when it unilaterally abducts a person from the territory of its contracting partner without the participation of or authorization from the contracting partner where the offended state registers an official protest."[31] As a remedy for the violation, the court ordered the immediate return of Alvarez-Machain to Mexico.[32] The government subsequently appealed the district court's decision, and Alvarez-Machain was not repatriated to Mexico.

The Ninth Circuit Court of Appeals affirmed the district court's ruling, relying on its earlier decision in *United States v. Verdugo Urquidez*.[33] In *Verdugo*, the court held that the forcible abduction of a Mexican national from Mexico by United States government officials without Mexico's consent violated the Extradition Treaty between the two states.[34] The United States

> 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.

Id. at art. 9.

30. *Caro-Quintero*, 745 F. Supp. at 608.

31. *Id*. at 610. In addition to the two claims mentioned above, Alvarez-Machain sought dismissal based on violations of the Charters of the United Nations and the Organization of American States and under the court's supervisory powers. *Id.* at 601. Although the court did not reach these issues, it noted that although the United States' involvement in the abduction of Alvarez-Machain appeared to violate the Charter of the United Nations and Charter of the Organization of American States, "the weight of authority indicates that these international instruments are not self-executing and therefore are not enforceable in federal courts absent implementing legislation." *Id*. at 614. In addition, the court warned:

> [W]e can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power. . . . To my mind the Government in its laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interest of the greater good of preserving respect for the law.

Id. at 615 (quoting United States v. Lira, 515 F.2d 68, 73 (2d. Cir. 1975) (Oakes, J., concurring)).

32. *Id*. at 614.

33. 939 F.2d 1341 (9th Cir. 1991).

34. *Id*. at 1350-55. The court observed that forcible abductions violated the purpose of the Extradition Treaty even though they were not expressly prohibited by it. In particular, the Ninth Circuit held:

> [E]xtradition treaties provide a comprehensive means of regulating the methods by which one nation may remove an individual from another nation for the purpose of subjecting him to criminal prosecution, and that unless the nation from which an individual has been forcibly abducted consents to that action in advance, or subsequently by its silence or otherwise waives its right to object, a government authorized or sponsored abduction constitutes a breach of the treaty. To hold to the contrary would seriously undermine the

government again appealed this decision, and the Supreme Court granted the petition for certiorari.

The Supreme Court, in a 6-3 decision authored by Chief Justice Rehnquist, reversed the Ninth Circuit. The Court first reaffirmed the *Ker-Frisbie* doctrine because "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[35] The Court held that the district court had jurisdiction to try Alvarez-Machain even though he had been forcibly abducted from Mexico because the Extradition Treaty did not prohibit such action.[36]

The Court considered both the express language and the implications of the treaty. The Court first concluded that the "Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."[37] The Court next examined Alvarez-Machain's argument that the Treaty needed to be examined in the context of customary international law. The majority found that while Alvarez-Machain's abduction might have been "shocking" and in "violation of general international law principles," it did not violate the Extradition Treaty and, as such, did not prohibit his prosecution.[38]

Justice Stevens's dissent provided a stark contrast to the majority opinion. He seemed to be appalled by the government conduct and the majority's approval of it.[39] First, Justice Stevens noted that the Treaty "appears to have

> utility and vitality not only of our extradition treaty with Mexico but of all of our extradition treaties.

Id. at 1355. The court's holding and decision to repatriate the defendant were based on "general principles of international law." *Id*. at 1351-52.

35. United States v. Alvarez-Machain, 504 U.S. 655, 662 (1992).

36. *Id*. at 660-70.

37. *Id*. at 663. The Supreme Court further elaborated that the Mexican government was aware of the *Ker* doctrine as early as 1906 and the United States position as to forcible abductions and a court's jurisdiction. The Court found that despite Mexico's knowledge, "the current version of the Treaty . . . does not attempt to establish a rule that would in any way curtail the effect of *Ker*. *Id*. at 665. Nevertheless, Mexico is not obligated to rely on United States domestic courts' interpretations of legal doctrines, and it would be more reasonable for Mexico to rely on its own courts' interpretations of international law. However, it would make the most sense for the countries to rely on an interpretation by an international body like the International Court of Justice or the United Nations. Hernan De J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833, 865 (1993).

38. *Alvarez-Machain*, 504 U.S. at 669-70. However, "[k]idnapping is against the nature, purpose, and goals of the Extradition Treaty. Although fast and effective, kidnapping sidesteps the safeguards described in the Extradition Treaty to protect individual human rights and asylum country sovereignty." Ruiz-Bravo, *supra* note 37, at 860.

39. Justices Blackmun and O'Connor joined in the dissent. *Alvarez-Machain*, 504 U.S. at 670-88 (Stevens, J., dissenting).

been designed to cover the entire subject of extradition."[40] The dissent further elaborated that "[i]t is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory."[41] As support for his contentions, Justice Stevens stated various authorities of international law to show that international opinion condemns forcible abductions as violations of the territorial integrity of sovereign nations.[42]

Finally, Justice Stevens warned of the risks that follow from the majority's opinion, which it saw as revenge for the murder of an American law enforcement agent. He noted:

> Indeed, the desire for revenge exerts 'a kind of hydraulic pressure . . . before which even well settled principles of law will bend,' but it is precisely at such moments that we should remember and be guided by our duty 'to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it.'[43]

Thus Stevens felt that transborder forcible abductions violate both international law and the United States' treaty obligations.

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40. *Alvarez-Machain*, 504 U.S. at 673 (Stevens, J., dissenting). While considering the purpose of the Extradition Treaty with Mexico, Justice Stevens added that "[i]t is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance—the stated goals of the Treaty." *Id*. at 673, n.4. He went on to observe that provisions of the Treaty "would serve little purpose if the requesting country could simply kidnap the person. . . . '[E]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct.'" *Id*. at 673 (quoting United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349 (9th Cir. 1991), *rev'd sub nom*. United States v. Alvarez-Machain, 504 U.S. 665 (1992)).

41. *Id*. at 678-79.

42. *Id*. at 678-81. In particular, Justice Stevens considered the Charter of the Organization of American States, numerous provisions of the United Nations Charter, Oppenheim's International Law, and the American Law Institute's Restatement of Foreign Relations. The chief reporter for the Restatement of Foreign Relations states:

> [w]hen done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system. . . .

Id. at 681 (quoting Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 231 (1992) (footnote omitted).

43. *Id*. at 687 (quoting N. Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting) and United States v. Mine Workers, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting)) (citation omitted). Justice Stevens reminds us of Thomas Paine's warning:

> an "avidity to punish is always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws." "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."

Id. at 688 (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed. 1945)) (footnote omitted).

On remand from the Supreme Court, the Ninth Circuit Court of Appeals considered the issue of whether customary international law alone could justify the dismissal of the indictment and Alvarez-Machain's return to Mexico. The court held that an international customary law exception to the *Ker-Frisbie* doctrine has only been recognized "in a situation where the government's conduct was outrageous,"[44] therefore denying Alvarez-Machain's motion. Nevertheless, on remand, the court granted his motion for acquittal, holding that there was insufficient evidence to prosecute. District Court Judge Rafeedie explained that "the evidence presented against Alvarez had been based on 'hunches' and the 'wildest speculation' and had failed to support the government's allegations."[45]

2. The Civil Suit

Following the end of the criminal case, Alvarez-Machain filed a civil suit in U.S. federal district court requesting damages for his abduction and detention. Alleging civil rights violations and violations under the Federal Tort Claims Act (FTCA) and the Alien Tort Claims Act (ATCA),[46] he filed claims against the United States, the D.E.A. agents who abducted him, a former Mexican policeman, and Mexican civilians. Alvarez-Machain's claims first reached the Ninth Circuit Court of Appeals in 2001, and a three-judge panel rendered an opinion. The case was subsequently reheard by the Court of Appeals *en banc*, which submitted an opinion in June 2003.

The three-judge panel held that Alvarez-Machain's kidnapping was a violation of the law of nations, as required by the ATCA, because it violated customary international human rights law.[47] In particular, the panel found that "[a]lthough no international human rights instruments refers to transborder

44. United States v. Alvarez-Machain, 971 F.2d 310, 311 (9th Cir. 1992). For detailed information on this exception, see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (finding that a court should not have jurisdiction over a defendant when he has been forcibly abducted and subjected to torture and abuse at the behest of the U.S. government); United States v. Reed, 639 F.2d 896, 901-02 (2d Cir. 1981) (holding that the misconduct of the government agent must reach the level of "gross mistreatment" in order for a court to divest itself of jurisdiction following a transborder abduction).

45. Aceves, *supra* note 10, at 116.

46. *See* Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003); *see also* Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1997). Specifically, he alleged the following tort claims: (1) kidnapping; (2) torture; (3) cruel, inhuman, and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; and (10) negligent infliction of emotional distress. *Alvarez-Machain*, 331 F.3d at 610 n.1.

47. Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir. 2001), *rev'd en banc*, 331 F.3d 604 (2003). As background, the ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000).

abduction specifically," various international human rights norms encompass it, such as "the rights to freedom of movement, to remain in one's country, and to security in one's person."[48] It further held that the detention of Alvarez-Machain violated the international customary legal norm against arbitrary detention.[49] "[D]etention is arbitrary if 'it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'"[50] The three-judge panel noted that the arrest was only arbitrary while he was held in Mexico because the lawful arrest warrant and indictment issued in the United States "broke the chain of causation."[51]

The three-judge panel also held that neither the foreign activities exception, nor the intentional torts exception applied to Alvarez-Machain's FTCA claim.[52] The foreign activities exception did not apply because Alvarez-Machain asserted a valid "headquarters claim." Under the "headquarters doctrine," the FTCA requires courts to "look at the law of the place where the act took place, rather than the place where the act had its operative effect."[53] The three-judge panel found that all of the command decisions about the abduction occurred in the United States even though the actual kidnapping took place in Mexico.[54] In addition, the panel found that the intentional torts exception did not apply because investigative or law enforcement officers committed the torts.[55] After this decision was rendered in

48. *Alvarez-Machain*, 266 F.3d at 1051. The three-judge panel specifically considered the American Convention on Human Rights, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Declaration of the Rights and Duties of Man. *Id*. at 1051-52.

49. *Id*. at 1052.

50. *Id*. (quoting Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998)).

51. *Id.* at 1063.

52. *Alvarez-Machain*, 266 F.3d at 1054-57. The foreign activities exception to the FTCA means that the Act does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k) (2000). The intentional torts exception states that the FTCA does not apply to:

> [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h) (2000).

53. *Alvarez-Machain*, 266 F.3d at 1054.

54. *Id*.

55. *Id*. at 1056.

2001, however, a majority of nonrecused judges of the Ninth Circuit voted to rehear the case *en banc*.[56]

In considering Alvarez-Machain's claims, the court first held that Alvarez-Machain lacked standing to assert Mexico's interests in its territorial sovereignty because the ATCA does not allow an individual to defend the rights of a foreign country.[57] The court next reached the issue of transborder abduction and customary international law. It found that the "United States does not recognize a prohibition against transborder kidnapping, nor can it be said that there is international acceptance of such a norm."[58] The Court of Appeals, sitting *en banc*, did not find the previous three-judge panel's opinion that the restriction of an individual's right to freedom of movement and security of person translated into a right to be free from forcible transborder abductions. The court found that such general prohibitions are insufficient to support a claim under the ATCA because the ATCA requires a "specific, universal, and obligatory" violation of the laws of nations.[59]

Despite this setback for Alvarez-Machain, the Court of Appeals held that there was an international norm prohibiting arbitrary arrest and detention.[60] The court reiterated the three-judge panel's definition of arbitrary detention and stated that the norm is against arbitrary detention—not pursuant to the law—and does not have a temporal element to it.[61] Applying the standard to *Alvarez-Machain*, the court held that "there was, quite simply, no basis in law for the unilateral extraterritorial arrest and related detention of Alvarez in Mexico."[62] The court did not find the argument that the United States had an arrest warrant for Alvarez-Machain persuasive because a federal arrest warrant does not operate as a license to effectuate arrests throughout the world.[63]

Likewise, the court was not persuaded by the argument that it lacked jurisdiction over the defendants because the incident occurred outside the United States. Instead, the court stated that it was this same principle of extraterritoriality that caused the Supreme Court to conclude that Alvarez-Machain could be tried in the United States.[64] Along the same lines, the court importantly noted that "[e]xtraterritorial *application* . . . does not automatically

56. Alvarez-Machain v. United States, 284 F.3d 1039, 1040 (9th Cir. 2002).

57. Alvarez-Machain v. United States, 331 F.3d 604, 616 (9th Cir. 2003) (en banc).

58. *Id.* at 617.

59. *Id.* at 619.

60. *Id.* at 620. The court found that the prohibition against arbitrary arrest and detention is "codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions." *Id.*

61. *Id.* at 621.

62. *Alvarez-Machain*, 331 F.3d at 623.

63. *Id.*

64. *Id.* at 624.

give rise to extraterritorial *enforcement* authority."[65] In looking at the statutes relating to the D.E.A., it found that D.E.A. agents are granted felony arrest power, but that no language in the statute allows this power to go beyond the borders of the United States.[66] In conclusion, the court held that the arrest and detention of Alvarez-Machain were arbitrary because they were not pursuant to law. There was no basis in law for the D.E.A.'s actions, and a warrant issued by a United States court cannot authorize extraterritorial abductions of defendants.[67]

The court agreed with the three-judge panel's assessment of Alvarez-Machain's FTCA claim and held that neither the foreign activities exception nor the intentional tort exception applied.[68] In addition, the court agreed that the United States should be substituted for the individual D.E.A. agents under the FTCA.[69] Alvarez-Machain succeeded on his ATCA claim against Sosa, the Mexican policeman who kidnapped him, and on the FTCA claim against the United States at the Court of Appeals. However, the Supreme Court recently granted certiorari on petitions from the United States and Sosa.[70]

Four separate issues are raised between the two petitions. In the case regarding the United States, the Court is asked to decide whether federal law enforcement officers have the authority to arrest an indicted suspect in a foreign country.[71] In addition, the Court will decide whether a suspect arrested in another country can bring an action under the FTCA for false arrest, notwithstanding the FTCA's foreign activities exception.[72]

65. *Id*. at 625.

66. *Id*. at 626. In addition, "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." (quoting Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804)).

67. *Alvarez-Machain*, 331 F.3d at 623-26.

68. *Id*. at 638-40.

69. Alvarez-Machain's ATCA claim against the United States failed because of the Federal Employees Liability Reform and Tort Compensation Act, which provides that the exclusive remedy for the wrongful act of a federal employee acting within the scope of his duties and against the United States is through the FTCA. *Id.* at 631.

70. U.S. v. Alvarez-Machain, 124 S.Ct. 821 (Dec. 1, 2003) (No. 03-485); Sosa v. Alvarez-Machain, 124 S.Ct. 807 (Dec. 1, 2003) (No. 03-339).

71. Petition of United States, at I, United States v. Alvarez-Machain, 124 S.Ct. 821 (2003) (No. 03-485). Interestingly enough, the Bush administration has turned the case into one about the war on terrorism, rather than focusing on the smaller issue of the specific DEA agents involved in the case. In the petition for certiorari, the government claims that the Ninth Circuit's holding "threatens the government's ability to conduct necessary law enforcement operations abroad to combat terrorism, international crime, and the flow of illegal drugs into the United States." *Id*. at 15. However, as Respondent's brief points out, "[t]his case is not about . . . the war on terrorism," and the "United States is simply using the war on terrorism as a subterfuge to ask [the] Court to involve itself in an unrelated dispute." Brief in Opposition to Petition of United States, at 14, 16, United States v. Alvarez-Machain, 124 S.Ct. 821 (2003) (No. 03-485).

72. Petition of United States, at I, *Alvarez-Machain*, (No. 03-485).

The more anticipated questions are raised by Sosa's petition, which presents questions about the legitimacy and scope of the ATCA.[73] First, the Court must decide whether the ATCA creates a private cause of action or instead is merely a jurisdiction-granting statute that does not establish a private right of action.[74] If the Court finds that the ATCA does establish a private cause of action, it must then decide if the arrest of Alvarez-Machain in Mexico is actionable under the statute.[75]

III. INTERNATIONAL RELATIONS AND IMPLICATIONS FOLLOWING *ALVAREZ-MACHAIN*

There was international outrage following the Supreme Court's *Alvarez-Machain* decision. Governments and scholars alike expressed extreme disagreement and disgust with the Court's disrespect and disregard for principles of international law.[76] Despite the United States' adherence to the principle of "*mala captus bene detentus*,"[77] there is international precedent that

73. These questions are more anticipated as they relate to the hotly debated ATCA. With the increasing appearance of the ATCA in litigation, there is a split of opinions as to the efficacy and legitimacy of the statute. Robert Bork, a former Supreme Court nominee, complained that an unholy alliance of imperialistic judges and a leftish cadre of international law professors "[have] turned this same statute into a tool for 'judicial imperialism.'" Daphne Eviatar, *Judgment Day: Will an Obscure Law Bring Down the Global Economy?*, BOSTON GLOBE, Dec. 28, 2003, at D1. On the other hand, the executive director of Human Rights Watch considers opinions like Bork's to be "a craven attempt to protect human rights abusers at the expense of victims." *Id.*

74. Brief for the United States at I, Sosa v. Alvarez-Machain, 124 S.Ct. 807 (2003) (No. 03-339). The United States contends that the ATCA does not establish a private cause of action. Nevertheless, the U.S. government, in its official submission to the U.N. Committee Against Torture, described the ATCA as a statute that provides a right of action for civil damages for torture occurring in a foreign territory. Specifically, the government stated that the ATCA "represents an early effort to provide a judicial remedy to individuals whose rights have been violated under international law." Brief for Alvarez-Machain at 16, Sosa v. Alvarez-Machain, 124 S.Ct. 807 (2003) (No. 03-339). For more detail of how the United States has repeatedly contradicted their apparent opposition to the ATCA, see *id.*

75. Brief for the United States at I, *Sosa* (No. 03-339).

76. Indeed, the United States Senate proposed a resolution out of concern for the international implications of the Supreme Court's decision in *Alvarez-Machain*. *See* S. Res. 319, 102d Cong. (1992). The resolution first recognized that other nations might think that the U.S. accepts the legality of kidnapping. *Id*. It then stated that criminals should be pursued "through the existing international legal framework, including extradition treaties; and,[the] United States officials should refrain from committing the crime of kidnapping which weakens international cooperation against crime, encourages the abduction of American citizens and subverts respect for the rule of law." *Id*; *see* Mark S. Zaid, *Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 HOUS. J. INT'L L. 829 (1997).

77. Professor Bassiouni describes this maxim as the process whereby "national courts will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured." BASSIOUNI, *supra* note 3, at 250.

transborder abductions violate international law when the abducting country detains and tries the victim. This Section reviews this precedent and considers the international community's response when such an abduction occurs.

A. History of International Condemnation of Transborder Abductions

The international community condemned transborder abductions prior to the Supreme Court's decision in *Alvarez-Machain*. The United Nations Security Council has criticized state-sponsored abductions twice. The first occurred after Israel abducted a Nazi official, Adolf Eichmann, from Argentina on charges of crimes against humanity during World War II.[78] Argentina petitioned the Security Council requesting Eichmann's return and for the punishment of the abductors. The Council adopted a resolution stating that Israel violated Argentina's sovereignty and requested the "Government of Israel to make appropriate reparation."[79]

On a more general level, the Security Council has acknowledged that "abductions are offenses of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and cooperation among States," and has condemned "unequivocally all acts of . . . abduction."[80] Thus, it is apparent that the United Nations body charged with maintaining international peace and security condemns transborder abductions.

In a more recent case, the South African Supreme Court ordered the release of a defendant abducted from Swaziland after finding that the court lacked jurisdiction due to the forcible transborder abduction.[81] In that case, South African authorities forcibly abducted Ebrahim from Swaziland despite an extradition treaty between the two countries.[82] The South African Supreme Court held that a court lacks jurisdiction to try a person kidnapped from a foreign territory by state actors.[83]

Basing the decision on Roman-Dutch law, the South African Supreme Court reasoned that a person "must be protected against illegal detention and

78. Attorney-General of Israel v. Eichmann, 36 I.L.R. 5, 5 (Dist. Ct. Jerusalem 1961) (summary, A. Munkman), aff'd, 36 I.L.R. 277 (Supp. Ct. Isr. 1962).

79. S.C. Res. 138, U.N. SCOR, 15th Sess., 865th mtg., at 14, U.N. Doc. S/4349 (1960).

80. S.C. Res. 579, U.N. Doc. S/RES/579 (1985), *reprinted in* 25 I.L.M. 243 (1986).

81. *South Africa: Supreme Court (Appellate Division) Opinion in State v. Ebrahim (Jurisdiction Over Abducted Person) February 16, 1991*, 31 INT'L LEGAL MATERIALS JUD. & SIMILAR PROC. 888 (John Dugard ed. 1992) [hereinafter Dugard]. Justice Stevens referred to this decision in his dissenting opinion in *Alvarez-Machain*. U.S. v. Alvarez-Machain, 504 U.S. 655, 687 (1992). While considering *Ebrahim*, Stevens noted that "[t]he Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the 'monstrous' decision the Court announces today." *Id.*

82. Dugard, *supra* note 81, at 890-91.

83. *Id.* at 899.

abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice."[84] The *Ebrahim* court also referenced *United States v. Toscanino*[85] and agreed with the outcome of the case.[86] In addition to having the case dismissed, Ebrahim received compensation for the abduction in a civil case.[87] Although the *Ebrahim* decision is based more on municipal law than international law, it still represents an important precedent because it indicates a movement of customary international law toward prohibiting jurisdiction over an individual abducted from another nation.

The Human Rights Committee (HRC) has also held that transborder abductions violate Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).[88] In the case of Lilian Celiberti de Casariego, a Uruguayan/Italian citizen was forcibly abducted from an apartment in Brazil by Uruguayan agents on suspicion of "subversive association" and taken into

84. *Id*. at 896. The court also noted that "[w]hen the state is a party to a dispute, as for example in criminal cases, it must come to court with 'clean hands.' When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean." *Id*.

85. 500 F.2d 267 (2d Cir. 1974).

86. *Id*. at 896-97. In *Toscanino*, the Second Circuit Court of Appeals held that a court should "divest itself of jurisdiction" after a transborder abduction "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Toscanino*, 500 F.2d at 275; s*ee infra* notes 134-38 and accompanying text.

87. Ebrahim v. Minister of Law and Order, 1993 (2) SA 559 (C).

88. "Everyone has the right to liberty and security of person. . . . No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." International Covenant on Civil and Political Rights, art. 9(1), Dec. 19, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (entered into force Mar. 23, 1976). Because the United States did not adopt a reservation to Article 9(1), if a transborder abduction like that of Alvarez-Machain occurred in the future, the defendant could raise Article 9(1) as a defense to the jurisdiction of U.S. courts. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 196 (1999). However, the United States did not ratify the Optional Protocol of the ICCPR, which gives the HRC jurisdiction to hear cases. Therefore, the HRC cannot hear a case in which the U.S. is a party. BASSIOUNI, *supra* note 3, at 236. The HRC has also found countries in violation of the ICCPR for abductions even though they only assisted in the abduction. In one case, a Colombian citizen was abducted in Ecuador at the command of the United States DEA and deported to the United States. Although no action could be brought against the United States, the HRC found that Ecuador was in violation of ICCPR Article 9(1). *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Forty-third Session*, Cañón Garcia v. Ecuador, Human Rights Committee, 43d Sess., Annex, U.N. Doc. CCPR/C/43/D/319/1988 (1991).

Uruguay.[89] The HRC held that the abduction violated Article 9(1) of the ICCPR, as it constituted an arbitrary arrest and detention and ordered that Celiberti de Casariego be immediately released from custody, compensated for violations, and allowed to leave the country.[90]

Thus before the abduction of Alvarez-Machain, it was clear that transborder abductions violated international law.[91] Furthermore, international law has acknowledged that the correct remedy is to repatriate the victim and offer monetary compensation. Because this is the norm, the next section will detail how the international community reacted to the Supreme Court's decision to lend more credence to the conception that transborder abductions violate international law.

B. International Response to Alvarez-Machain

Not surprisingly, the Mexican government was highly critical of the Supreme Court's decision because its territorial sovereignty and the personal liberty of its citizen had been disregarded by the highest court of the United States.[92] The Mexican Foreign Ministry criticized the decision as "transgressing basic principles of international law."[93] The Mexican government felt that the extradition treaty was the only legitimate way to apprehend a suspect and temporarily suspended cooperation with D.E.A. agents in Mexico.[94] However, negotiations between the United States and Mexico led to the signing of the Transborder Abduction Treaty in 1994, which suggests an effort by both countries towards improvement in extradition

89. Celiberti de Casariego v. Uruguay, R.13/56, Human Rights Committee, U.N. Doc. A/36/40 (1981), at 185, *reprinted in* 68 I.L.R. 41 (1981).

90. *Id*; *see* Lopez v. Uruguay, R.12/52, Human Rights Committee, U.N. Doc. A/36/40 (1981), at 76, *reprinted in* 68 I.L.R. 29 (1981) (holding that the transborder of a Uruguayan national from Argentina by Uruguayan agents violated Article 9(1) and ordering his immediate release and compensation).

91. The State Department Legal Adviser noted that it is important for the judiciary to consider international law and implications:

> Specifically, we believe that both the administration of justice and the foreign relations of the United States are best served when the United States courts take into consideration the views of foreign governments on issues of concern to them. It is important that courts be made aware of the international implications of their decisions and that they give appropriate weight to these considerations in the process of making their decisions.

CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 318 (2003).

92. Following the Supreme Court's decision, the Mexican Foreign Minister held a press conference in which, among other things, it called the decision "invalid and illegal" and demanded the repatriation of Alvarez-Machain. Zaid, *supra* note 76, at 842.

93. David Clark Scott, *U.S. Court Ruling Provokes Heated Mexican Retort*, CHRISTIAN SCI. MONITOR, June 17, 1992, at 1.

94. *Id.*; Tim Golden, *Mexicans Mollified Over Drug Ruling*, N.Y. TIMES, June 18, 1992, at A3.

policies.[95] Most importantly, the remedy for a violation of the Treaty is repatriation of the abductee.[96]

In response to the *Alvarez-Machain* decision, the Inter-American Juridical Committee of the Organization of American States (OAS) found that the abduction violated Mexico's territorial sovereignty and that the United States' refusal to repatriate Alvarez-Machain was a further violation of Mexico's territorial sovereignty.[97] The Committee emphasized "the incompatibility of the practice of abduction with the right of due process to which every person is entitled, no matter how serious the crime they are accused of, a right protected by international law."[98] The Committee was of the opinion that Alvarez-Machain's personal rights were violated by the abduction and that this violated international law. In addition, the participants of the Ibero-American Summit Conference requested the U.N. General Assembly to present an issue to the International Court of Justice for an Advisory Opinion on the legality of transborder abductions.[99]

The U.N. General Assembly agreed that international law prohibits a State from exercising its jurisdiction beyond its borders because it violates the territorial integrity and sovereign equality of States.[100] It decided that

95. Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., 31 U.S.T. 5059, *reprinted in* MICHAEL ABBEL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CRIMINAL EXTRADITION A-676.3 (Vol. 5 1995 & Supp. 1995) [hereinafter Transborder Abduction Treaty]. The Treaty provides:

> [t]he purpose of this Treaty is to prohibit transborder abductions.
>
> . . .
>
> The Parties shall not conduct transborder abductions.
>
> . . .
>
> For the purposes of this Treaty, a "transborder abduction" occurs when a person is removed from the territory of one Party to the territory of the other Party:
>
> (a) By force or threat of force; and
>
> (b) By federal, state or local government officials of the Party to whose territory the person is taken, or by private individuals acting under the direction of such officials.
>
> . . .
>
> Individuals responsible for transborder abductions shall be subject to prosecution in accordance with the laws of the Requesting and Requested Parties.

Transborder Abduction Treaty, at art. 1, 2, 3(1), 6(1).

96. *Id*. at art. 5(1). However, "[t]he obligation to repatriate shall not apply if (a) the Requesting Party does not make an explicit request for repatriation, or (b) the abducted person opposes repatriation." *Id*. at art. 5(2). Neither the Treaty itself, nor a violation of it creates private rights for individuals. *Id*. at art. 7.

97. *Legal Opinion on the Decision of the US Supreme Court in the Alvarez-Machain Case*, CP/RES 586 (909/92), Inter-Am. Juridical Committee Doc. CJI/RES.II-15/92, *reprinted in* 13 HUM. RTS. L.J. 395, 396 (1992).

98. *Id*. at 5, *reprinted in* 13 HUM. RTS. L.J. at 397.

99. Aceves, *supra* note 10, at 121.

100. Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 AM. J. INT'L L. 343, 357-58 (1994).

transborder abductions undermine existing mechanisms for international cooperation in the apprehension of criminals and extradition treaties.[101] The U.N. Working Group on Arbitrary Detention also determined that transborder abductions violate international customary law.[102] In particular, the Working Group found that:

> [N]o legal basis whatsoever can be found to justify the deprivation of freedom from the date of the abduction - 2 April 1990 - until his release on 14 December 1992 since this deprivation of freedom took place without the orders of any authority whatsoever and, indeed, both the District Court and the Court of Appeals declared it unlawful.[103]

The Working Group, thus, declared that the United States' position with regard to transborder abductions is mistaken and violates customary international law.

In addition to the U.N. declaration, several nations issued statements expressly condemning the Supreme Court's decision.[104] The decision was referred to as "an historic regression in criminal law," and one government claimed "the ruling allows the United States government to 'solve a crime with a crime.'"[105] A few nations stated that an abduction within their territory would be regarded as a criminal act and as a violation of any extradition treaty in place.[106] The Costa Rican Supreme Court issued a statement regarding the decision stating:

> Legaliz(ing) abduction by other States' officials to bring the abducted before the courts of such country, is not only contrary to modern times, but is against the ideals it forged upon the principles of respect to freedom and human dignity, is against the ideals of independence of that nation, and infringes its highest principles and those of the rest of nations, that have the natural right to protect its inhabitants and to judge them according to due process. . . .[107]

101. *Id*.

102. *Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, U. N. Commission on Human Rights, 48/1993, at ¶¶ 5(n)-(p), U.N. Doc. E/CN.4/1994/27 (1993).

103. *Id*. at ¶ 5(r).

104. Zaid, *supra* note 76, at 840-58. *See* Stephan Wilske & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of* United States v. Alvarez-Machain, 5 U. CHI. L. SCH. ROUNDTABLE 205, 235-38 (1998).

105. Zaid, *supra* note 76, at 844, 852. In reference to the Supreme Court's ruling, the Swiss Justice Ministry spokesman commented, "[i]magine where it would lead if every country would do that. You would have anarchy." *Id*. at 852.

106. *See id*. at 844-53.

107. *Id*. at 848 (alteration in original). The Cuban government released a statement regarding *Alvarez-Machain*, which stated:

> [t]he decision of the highest North American court, now controlled by ultraconservatives and racists, defines its character as an instrument of the imperialist policy and proves evident the falsehood of the pretended independence of the Judicial Power in that country.

It is clear from these views that many countries consider any attempt at a forcible transborder abduction as a violation of their territorial sovereignty, the victim's personal rights, and principles of international law. As such, it is clear the United States' policy on carrying out transborder abductions stands in stark contrast to the views of the rest of the world.

C. Two Violations of International Law: Abduction and Failure to Provide a Defensive Remedy

The International Court of Justice (ICJ) held in the *LaGrand* case that not only did the United States violate international legal obligations under the Vienna Convention on Consular Relations by not ensuring the LaGrands' rights under the Convention, but it also violated international law by failing to provide a remedy for the violation of these rights.[108] Under the Vienna Convention on Consular Relations ("Vienna Convention"), a state is required to inform a foreigner of his right to contact his consulate.[109] The consulate has a right to visit the prisoner who is in custody, "to correspond with him and to arrange for his legal representation."[110]

In *LaGrand*, two German nationals were convicted and sentenced to death in the United States without receiving notification of their rights as required under the Vienna Convention.[111] The ICJ released a provisional measure requesting that the United States stay the execution of the LaGrand brothers pending its final decision.[112] Nevertheless, the United States executed the two brothers.[113]

The ICJ first recognized that the Convention "creates individual rights" and that the "laws and regulations [of the U.S.] . . . must enable full effect to be given to the purposes for which the rights . . . [of the foreign national] are intended."[114] The Court then found that the "procedural default rule" violated

> The Government of the Republic of Cuba reaffirms that national sovereignty is inviolable and that it can not be questioned, nor belittled by false decisions of foreign tribunals and that no state, powerful as it may be, has any authority whatsoever to ignore the rules of law and to act as if it owned the world.

Id. at 849.

108. LaGrand (F.R.G. v. U.S.), 2001 I.C.J. at ¶ 128 (June 27).

109. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77. The Convention was enacted to develop friendly relations among nation-states and to provide for more efficient consulate functioning.

110. *Id.* at art. 36(1)(c).

111. *See LaGrand*, 2001 I.C.J. at ¶¶ 10-29.

112. *Id.* at ¶ 29.

113. *Id.* at ¶¶ 30-34. Although the United States attempted to argue that the provisional measure was not an order, but a suggestion or request that was not binding on it, the ICJ did not find this argument persuasive. *Id*. at ¶¶ 92-109. The Court ultimately held that provisional measures have a binding effect. *Id*.

114. *Id*. at ¶¶ 77, 88.

the Convention by preventing LaGrand from challenging his conviction and sentence.[115] Finally, the ICJ held:

> [A]n apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.[116]

Thus, the ICJ held that the United States violated international law by breaching its obligations under the Vienna Convention and by not providing a defensive remedy to LaGrand.

The Supreme Court recently denied certiorari in *Torres v. Mullin*,[117] which is a case similar to *LaGrand*. The facts of the case are almost identical to *LaGrand*. A Mexican national was convicted and sentenced to death without being notified of his rights under the Vienna Convention.[118] He subsequently raised the Vienna Convention claim on habeas corpus and the district court found that he procedurally defaulted the claim under state law.[119]

Although certiorari was denied, Justices Breyer and Stevens wrote dissenting opinions from the denial of certiorari. Justice Breyer considered the ICJ's decision in *LaGrand* significant and reasoned that "[g]iven the international implications of the issues raised . . . further information, analysis, and consideration are necessary."[120] Justice Stevens noted that "[a]pplying the procedural default rule to Article 36 claims is not only in direct violation of the Vienna Convention, but it is also manifestly unfair."[121] Justice Stevens also

115. *Id.* at ¶¶ 90-91.

116. *LaGrand*, 2001 I.C.J.at ¶ 125.

117. Torres v. Mullin, 317 F.3d 1145 (10th Cir. 2003). Interestingly enough, since the *LaGrand* decision, most state and federal courts that have been confronted with an Article 36 claim have not mentioned the ICJ decision or departed from the precedent of denying relief. Sarah M. Ray, Comment, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 CAL. L. REV. 1729, 1753 (2003). One court, however, recognized that the ICJ's interpretation of the Vienna Convention in *LaGrand* is authoritative: "To disregard one of the I.C.J.'s most significant decisions interpreting the Vienna Convention would be a decidedly imprudent course. . . . After *LaGrand* . . . no court can credibly hold that the Vienna Convention does not create individually enforceable rights." U.S. ex rel. Madej v. Schomig, No. 98 C 1866, 2002 WL 31386480, at *1 (N.D. Ill. Oct. 22, 2002).

118. *See Torres*, 317 F.3d at 1150.

119. *Id.*

120. Torres v. Mullin, 124 S.Ct. 562, 565 (Breyer, J., dissenting).

121. Torres v. Mullin, No. 03-5781, 2003 U.S. LEXIS 8548, at *4 (Nov. 17, 2003) (Stevens, J., concurring) (respecting the denial of the petition for certiorari).

observed that the Court is "unfaithful" to the Supremacy Clause "when it permits state courts to disregard the Nation's treaty obligations."[122]

From *LaGrand*, it is clear that the United States violates its treaty obligations by not notifying a foreign national of his or her rights under the Vienna Convention. It is equally clear that it is a further violation of international law to not provide a defensive remedy for this violation. The dissents of Justices Breyer and Stevens are important in that they note the United States' treaty obligations and the importance of adhering to them without violating international law. In addition, they show the binding effect of the ICJ's decisions on the United States and recognize that by denying a defensive remedy to a victim of a Vienna Convention violation, the courts ignore the Supremacy Clause and the nation's treaty obligations.

IV. POSSIBLE REMEDIES UNDER UNITED STATES DOMESTIC LAW

As discussed above, the United States violated both international law and Alvarez-Machain's internationally protected individual rights when it kidnapped him. The U.S. judiciary furthered this violation by upholding jurisdiction. Consequently, the following question arises: What types of remedies are potentially available in the U.S. legal system for an individual, like Alvarez-Machain, whose personal rights have been violated? This Part will discuss the possible defensive and offensive remedies available to a person in a situation similar to that of Alvarez-Machain.

A. Defensive Remedies

The defensive remedies that are available in the United States domestic legal system are dismissal of the indictment or application of the exclusionary rule to illegally obtained evidence. As shown below, the *Ker-Frisbie* doctrine prevents dismissal of the indictment, and the exclusionary rule does not apply because there is no evidence to be excluded.[123]

1. Dismissal of the Indictment

The United States has generally upheld *in personam* jurisdiction over a defendant even when procured through irregular methods by applying the maxim "*mala captus bene detentus*."[124] The two landmark Supreme Court cases that courts continually rely on to uphold jurisdiction are *Ker v. Illinois*[125] and *Frisbie v. Collins*.[126] The rule from the cases combined has come to be known as the *Ker-Frisbie* doctrine. It stands for the proposition that "criminal

122. *Id*. at *5.
123. *See infra* notes 124-53 and accompanying text.
124. BASSIOUNI, *supra* note 3, at 250.
125. 119 U.S. 436 (1886).
126. 342 U.S. 519 (1952).

jurisdiction is not impaired by the illegality of the method by which the court acquires *in personam* jurisdiction over the relator."[127]

In *Ker*, the defendant was indicted in Illinois for larceny and embezzlement but was living in Peru at the time of indictment.[128] Although a warrant had been issued for Ker's arrest, a private citizen forcibly abducted Ker rather than using the formal extradition process.[129] Ker was subsequently tried and convicted in Illinois. The Supreme Court held that the abduction did not violate the Due Process Clause of the Fourteenth Amendment because due process only requires that the accused be regularly indicted by a grand jury and brought to "trial according to the forms and modes prescribed for such trials."[130] The Court upheld Ker's conviction by holding that Illinois validly tried him, regardless of the extralegal methods used to acquire control over him.[131]

In *Frisbie*, the defendant, who was living in Chicago, was forcibly seized by Michigan state officers and returned to stand trial in Michigan.[132] The defendant claimed his conviction violated due process, but the Supreme Court, relying on *Ker*, rejected this claim.[133] The Court held 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.'"[134]

There have been only two exceptions to the *Ker-Frisbie* doctrine, one of which was rendered by the Second Circuit in *United States v. Toscanino*.[135] In *Toscanino*, the defendant, an Italian citizen, was forcibly abducted from his

127. BASSIOUNI, *supra* note 3, at 262.

128. *Ker*, 119 U.S. at 437-38.

129. *Id*. at 438. Justice Stevens pointed out the following fatal flaw in the majority's reliance on *Ker* in his *Alvarez-Machain* dissent: There is a crucial difference between a court's jurisdiction over a defendant wrongfully seized by a private citizen, which does not violate any treaty obligation, and a defendant illegally abducted at the behest of a government whose authority to act had been limited by a treaty. U.S. v. Alvarez-Machain, 504 U.S. 655, 682-86 (1992) (Stevens, J., dissenting).

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

131. *Id*. The Court found that "but . . . for mere irregularities in the manner in which he may be brought into custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment." *Id.*

132. Frisbie v. Collins, 342 U.S. 519, 520 (1952).

133. *Id*. at 520-22. The Court explained, "[t]his Court has never departed from the rule announced in [*Ker*]. . . . There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id*. at 522.

134. *Id*. at 522.

135. 500 F.2d 267 (2d Cir. 1974). The other exception, which was at issue in *Alvarez-Machain*, is known as the "treaty exception." Under this exception, the treaty must affirmatively state that citizens of one country will not be forcibly abducted by the other signator country. *See* Brandy Sheely, United States v. Best*: International Violation Schmiolation—The* Ker-Frisbie *Doctrine Trumps All*, 11 TUL. J. INT'L & COMP. L. 429, 435-37 (2003).

home in Uruguay by agents working for the United States government.[136] He was driven to Brazil where he was brutally tortured for seventeen days until he was drugged and boarded onto a plane.[137] Upon arrival in the United States, he was convicted by the district court of conspiracy to import and distribute narcotics.[138] The Second Circuit Court of Appeals relied on the Supreme Court's expanding interpretation of due process to hold that a court should divest itself of jurisdiction "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[139]

Although *Toscanino* is still good law, it has consistently been distinguished and restricted since it was decided to the extent that not one case expressly affirms it. In 1975, the Second Circuit clarified the *Toscanino* holding in *United States ex rel. Lujan v. Gengler*.[140] The court held that in order for a court to divest itself of jurisdiction, the U.S. agent's actions must constitute "conduct of the most outrageous and reprehensible kind."[141] In *Lujan*, the defendant was lured from Argentina into Bolivia and taken into custody by Bolivian officials who were paid agents of the United States.[142] The court found that because the conduct did not reach the level of egregiousness described in *Toscanino*, the unconventional means used to acquire Lujan did not "convert [his] abduction which is simply illegal into one which sinks to a violation of due process."[143] Unfortunately, the various circuits throughout the United States have repeatedly limited the *Toscanino* decision to the point that the "United States position . . . remains linked to the *Ker-Frisbie* doctrine."[144]

Furthermore, the Supreme Court's decision in *Alvarez-Machain* reaffirmed the *Ker-Frisbie* doctrine by resting its holding on the doctrine and stating that the Court has never departed from the rule.[145] In a companion case of *Alvarez-Machain*, the Ninth Circuit noted that "[i]n the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino*, have been

136. *Toscanino*, 500 F.2d at 269.

137. *Id*. at 269-70. Toscanino's captors tortured him by denying sleep, food, and water for days at a time. Nourishment was provided intravenously only to the extent needed to keep him alive. In addition, he was kicked, beaten, and shocked with electrodes connected to his earlobes, toes, and genitals. *Id*. at 270.

138. *Id*. at 270.

139. *Id*. at 275.

140. 510 F.2d 62 (2d Cir. 1975).

141. *Id*. at 65.

142. *Id*. at 63.

143. *Id*. at 66.

144. BASSIOUNI, *supra* note 3, at 266-67.

145. United States v. Alvarez-Machain, 504 U.S. 655, 661 (1992).

cut short."[146] Therefore, the *mala captus bene detentus* principle of the *Ker-Frisbie* doctrine still applies today, and United States courts can validly exercise *in personam* jurisdiction over a defendant who has been forcibly abducted from another country. By foreclosing this defensive remedy, the judiciary perpetuates transborder abductions.

2. Exclusionary Rule

The exclusionary rule is the other option available to a criminal defendant as a defensive remedy. The exclusionary rule, as formulated by the Supreme Court, holds that evidence seized through unconstitutional police conduct is inadmissible in court.[147] The Supreme Court has stated different policy objectives for excluding evidence, including judicial integrity, deterrence of police misconduct, and compensation to victims.[148] The underlying rationale for exclusion, however, is that it is the only remedy that can adequately protect the victim's fundamental constitutional rights.[149]

Nevertheless, in *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment does not apply to the search and seizure of

146. United States v. Matta-Ballesteros, 71 F.3d 754, 763 (9th Cir. 1995) (citation omitted) (holding that a government-sponsored transborder abduction does not divest the court of jurisdiction). The Ninth Circuit was troubled by the outcome that they were compelled to reach but nevertheless had to rely on the precedent of *Alvarez-Machain* throughout the decision:

> While it may seem unconscionable to some that officials serving the interests of justice themselves become agents of criminal intimidation, like the DEA agents in *Alvarez-Machain*, their purported actions have violated no recognized constitutional or statutory rights. They have likewise engaged in no illegal conduct which this court could attempt to deter in the future . . . .

Id. at 763-64. "Matta-Ballestero's abduction, even if we labeled it a 'kidnapping,' does not violate recognized constitutional or statutory provisions in light of *Alvarez-Machain*." *Id.* at 764 n.5.

147. *See* Mapp v. Ohio, 367 U.S. 643, 650-53 (1961) (applying exclusionary rule to unreasonable searches and seizures under the Fourth Amendment); Miranda v. Arizona, 384 U.S. 436, 490 (1966) (applying exclusionary rule to the privilege against self-incrimination under the Fifth Amendment); Massiah v. United States, 377 U.S. 201, 207 (1964) (applying exclusionary rule to the right to counsel under the Sixth Amendment); Spano v. New York, 360 U.S. 315, 323-24 (1959) (applying exclusionary rule to the due process clause).

148. *See infra* notes 174-205 and accompanying text. Critics of the exclusionary rule proclaim it as "an all-or-nothing remedy," that it only offers a benefit to the guilty, and that it results in a huge loss in convictions. Barry F. Shanks, *Comparative Analysis of the Exclusionary Rule and its Alternatives*, 57 TUL. L. REV. 648, 657-58 (1983). However, as the *Mapp* Court reasoned when applying the exclusionary rule:

> Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

Mapp, 367 U.S. at 660.

149. *See Mapp*, 367 U.S. 643.

property owned by an alien and located in a foreign country.[150] The Court reasoned that the textual structure of the Amendment "suggests that 'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[151] Because Verdugo-Urquidez was a citizen of Mexico and the search took place in Mexico, the Fourth Amendment did not apply.[152]

Thus, the Fourth Amendment does not apply to a transborder abduction case like *Alvarez-Machain* because it does not protect aliens or evidence abroad. Even if *Verdugo-Urquidez* did not exist, the Supreme Court has held that suppression of a defendant's person is not an appropriate remedy for a violation of the Fourth Amendment.[153] As the issue in forcible transborder abductions is a jurisdictional matter and the only thing to suppress is the defendant's person, the exclusionary rule does not help a victim such as Alvarez-Machain.

B. Offensive Remedies

The offensive remedies available are for monetary compensation under the Alien Tort Claims Act[154] and the Federal Tort Claims Act.[155] Although both statutes are available, there is no significant difference between the two from the standpoint of individuals such as Alvarez-Machain because both provide an after-the-fact monetary remedy.

1. Alien Tort Claims Act

The Alien Tort Claims Act ("ATCA") is a federal jurisdictional statute that provides a private cause of action where a plaintiff can establish a municipal tort and a violation of the law of nations or a treaty.[156] Specifically, the statute currently provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

150. 494 U.S. 259, 274-75 (1990).

151. *Id*. at 265.

152. *Id*. at 274-75.

153. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (holding that the body of the defendant is not a suppressible fruit of an unlawful arrest); United States v. Crews, 445 U.S. 463, 474 (1980) (finding that the defendant is not a suppressible fruit).

154. 28 U.S.C. § 1350 (2000).

155. 28 U.S.C. §§ 1346(b), 2674 (2000).

156. 28 U.S.C. § 1350 (2000). The constitutional foundation for jurisdiction under the ATCA is that the cases "arise under" federal law. For a more detailed discussion of the ATCA, see generally Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473 (1986) [hereinafter *Further Inquiries*].

nations or a treaty of the United States."[157] The statute was originally a provision of the Judiciary Act of 1789, and prior to 1980, courts had only sustained jurisdiction under the statute twice.[158]

Filartiga v. Pena-Irala was the first case to successfully invoke the statute in the human rights context.[159] In that case, the Filartigas, who were Paraguayan citizens residing in the United States, brought an action against Pena-Irala, also a citizen of Paraguay, for causing the wrongful death of their son and brother, Joelito.[160] The Filartigas claimed that Joelito was kidnapped, tortured, and killed in retaliation for his father's political activism.[161] The *Filartiga* court found that torture violated the law of nations due to the universal condemnation of torture in international agreements and the renunciation of torture as an official policy by almost all nations of the world.[162] The court explained that it was not granting new rights to aliens but was "opening the federal courts for adjudication of the rights already recognized by international law."[163]

An important part of the *Filartiga* decision was based on how customary international law fits into U.S. domestic law. Quoting *The Paquete Habana*, the court recognized that "'[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate

157. 28 U.S.C. § 1350 (2000). Both state and non-state actors (including corporate actors, state officials, and individuals) can be sued for certain offenses under the ATCA. *Further Inquiries*, *supra* note 156, at 495-512. However, the Foreign Sovereign Immunities Act and the Federal Tort Claims Act make it more difficult to bring a claim against foreign states or the United States. *Id*. at 507-11.

158. Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961); Bolchos v. Darrell, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607).

159. 630 F.2d 876 (2d Cir. 1980). Opponents to the expansive view of the ATCA have criticized the *Filartiga* line of decisions for their "flawed reasoning and 'inappropriate leniency in allowing U.S. courts jurisdiction over international human rights cases.'" Kathleen M. Kedian, Note, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of* The Paquete Habana, 40 WM. & MARY L. REV. 1395, 1411-12 (1999). However:

> [R]etreating to an isolationist view that shelters courts from making decisions based on customary international law is an unsettling solution . . . . On the other hand, . . . reiterating the authority of federal courts to rule on claims based on customary international law would enable courts to carry out their responsibility for protecting the powerless, salvage the United States's reputation for fostering individual liberty, demonstrate an eagerness to participate in global accountability, and move the country confidently into the future.

Id. at 1425. For a more detailed discussion of the ATCA in the human rights realm, see Beth Stephens, *Human Rights Accountability: Congress, Federalism and International Law*, 6 ILSA J. INT'L & COMP. L 277 (2000).

160. *Filartiga*, 630 F.2d at 878.

161. *Id*.

162. *Id*. at 880.

163. *Id*. at 887.

jurisdiction, as often as questions of right depending upon it are duly presented for their determination.'"[164] As the *Filartiga* court noted, "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[165] In holding that torture was a violation of the law of nations, the court compared the torturer to the pirate and slave trader and noted that all were "an enemy of all mankind."[166]

Since *Filartiga* was decided, district courts have been increasingly willing to accept jurisdiction under the ATCA. In addition, the district courts have recognized summary execution, disappearance, arbitrary detention, and cruel, inhuman or degrading treatment as violations of the law of nations.[167] On the other hand, the *Alvarez-Machain* court found that there was not an international norm against transborder abductions, but that every abduction violates the prohibition against arbitrary arrest.[168] Therefore, a victim who has been forcibly abducted from another country can bring a claim under the ATCA for any of the aforementioned reasons; however, in order to get relief for the abduction, the victim must claim that the arrest and detention were arbitrary, rather than claiming that the abduction itself violates the law of nations.

2. Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") provides a limited waiver against the sovereign immunity of the United States when one of its employees commits certain torts.[169] The statute grants exclusive jurisdiction to the district courts on claims against the United States for money damages relating to tort

164. *Id.* (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)). Furthermore, the Supreme Court observed in *The Paquete Habana* that ascertaining customary international law involves "resort . . . to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. at 700.

165. *Filartiga*, 630 F.2d at 881.

166. *Id.* at 890.

167. *E.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 186 (D. Mass. 1995) (finding that summary execution, disappearance, torture, arbitrary detention, and cruel, inhuman and degrading treatment violated international law); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) (finding prolonged arbitrary detention and summary execution violated the law of nations).

168. Alvarez-Machain v. United States, 331 F.3d 604, 617 (9th Cir. 2003) (en banc). The Ninth Circuit essentially fit transborder abductions under the label of arbitrary arrest and detention so that any transborder abduction will violate the law of nations in that it constitutes an arbitrary arrest and detention.

169. 28 U.S.C. §§1346(b), 2674 (2000). The FTCA does not "create any new governmental liability" and only applies to "existing causes of action." Thomas A. Kantas, *Maximizing Your Client's Recovery Under the Federal Tort Claims Act*, 91 ILL. B.J. 76, 76 (2003).

claims.[170] However, there are several exceptions to the FTCA in which sovereign immunity is not waived.[171] The foreign activities exception prohibits recovery in claims "arising in a foreign country," and the intentional torts exception excludes certain intentional torts except when committed by "investigative or law enforcement officers."[172] Thus, a victim of a forcible transborder abduction will have a cause of action under the FTCA against the United States if the claim does not arise in a foreign country and the intentional tort is committed by an investigative or law enforcement officer.

V. DEFENSIVE AND/OR OFFENSIVE REMEDY IN LIGHT OF POLICY RATIONALES

There are two remedial mechanisms available to an individual like Alvarez-Machain: 1) a dismissal of the indictment with or without monetary compensation; or 2) a criminal trial followed by a civil suit for compensatory damages.[173] Although the exclusionary rule does not apply to forcible transborder abduction cases, the policy objectives mentioned by the Supreme Court in various opinions apply differently to defensive and offensive remedies. The foundation of these holdings is found in *Weeks v. United States*.[174] "[I]t is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right" that requires the courts to remedy the government's misconduct.[175]

This Part will analyze Supreme Court cases in light of policy goals and will apply those goals to both a defensive (dismissal of the indictment) and offensive (monetary compensation) remedy in *Alvarez-Machain*. Specifically, the policy goals of judicial integrity, deterrence of government misconduct, and victim compensation strongly favor dismissal of the indictment. The two main objections to dismissal are that it undermines law enforcement and exceeds judicial power. This Part will rebut these arguments by showing that effective law enforcement is not undermined by dismissal because extradition exists as an effective mechanism and that dismissal as a remedy does not exceed judicial power because it is within the judicial branch's powers to provide such a remedy.

170. 28 U.S.C. §§ 1346(b), 2674 (2000).

171. *See* 28 U.S.C. § 2680 (2000).

172. 28 U.S.C. § 2680(h), (k) (2000).

173. *See infra* notes 174-264 and accompanying text. The United States could offer both a defensive and offensive remedy for transborder abductions, as various international bodies have suggested. Nevertheless, a defensive remedy alone is sufficient in most cases. On the other hand, an offensive remedy should not be the exclusive remedy for reasons that will be shown.

174. 232 U.S. 383 (1914).

175. *Id.* at 391.

A. Upholds Judicial Integrity

In his dissenting opinion in *Olmstead v. United States*,[176] Justice Brandeis argued passionately for judicial integrity as a reason that evidence should be excluded. In *Olmstead*, the government wiretapped telephone lines in the defendant's home and office.[177] The information gathered through the taped conversations was admitted into evidence and ultimately led to a conviction against the defendant.[178] Although the majority of the Supreme Court held that the wiretapping did not violate the Fourth Amendment, the decision was later overruled by *Berger v. New York*.[179] Justice Brandeis wrote a compelling, oft-cited dissenting opinion in *Olmstead*, arguing that the evidence should be inadmissible for a violation of the Fourth Amendment.[180]

Justice Brandeis reasoned that if the Court allowed the government to punish the defendant through illegal means, the Court itself would be ratifying the illegal actions and the government would become a lawbreaker.[181] He declared that it was the duty of the courts not only to protect individuals from unreasonable government intrusions, but also to protect the government from itself:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[182]

176. 277 U.S. 438 (1928).

177. *Id*. at 456-57.

178. *Id*. at 457.

179. 388 U.S. 41, 62-64 (1967).

180. *Olmstead*, 277 U.S. at 471-85 (Brandeis, J., dissenting). The passage was cited by the dissenting opinion in *Alvarez-Machain*. Justice Stevens observed that even though Alvarez-Machain participated in a "brutal murder" of an American law enforcement agent, "[s]uch an explanation . . . provides no justification for disregarding the Rule of Law that this Court has a duty to uphold." United States v. Alvarez-Machain, 504 U.S. 655, 686 (1992) (Stevens, J., dissenting).

181. *Olmstead*, 277 U.S. at 483 (Brandeis, J., dissenting). The *Weeks* court used a similar line of reasoning in finding that government misconduct (unlawful searches) "should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." Weeks v. United States, 232 U.S. 383, 392 (1914).

182. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

Therefore, Justice Brandeis acknowledged that it is the responsibility of the courts to uphold the integrity of the judicial process by preventing the government from using illegal means to convict a criminal.

Furthermore, even though a transborder abduction is an international law violation, the judicial integrity of the courts is implicated as much by these violations as when a constitutional law violation occurs. This is so because a violation has occurred, regardless of whether it is an international or constitutional law violation, and a remedy should be provided.[183] As Chief Justice Marshall so wisely stated:

> It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[184]

Even though international law is implicated by transborder abductions, the principle remains the same—where there is a right, there is a remedy.[185] Thus, it is the duty of the courts to provide this remedy so that the right is protected.[186]

Dismissal of the indictment for transborder abductions would most certainly uphold judicial integrity. The judicial integrity of the Supreme Court and the courts of the United States was seriously questioned after the *Alvarez-Machain* decision came down in 1992. Legal scholars, international organizations, and other countries condemned the decision.[187] The Supreme Court's decision, in effect, sanctioned the violation of Mexico's territorial integrity and Alvarez-Machain's personal rights.

The dissent, however, recognized that the Court's integrity was at stake and quoted Justice Brandeis in *Olmstead v. United States*.[188] If the courts sanction lawless conduct, they become accomplices in the "'willful disobedience of a Constitution they are sworn to uphold.'"[189] As Justice

183. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147, 163 (1803).

184. *Id.*

185. This idea, also stated as the legal maxim *ubi jus ibi remedium*, "forms the bedrock of our system of justice." United States v. Pena-Gonzalez, 62 F. Supp. 2d 358, 365 (D.P.R. 1999).

186. In fact, the courts are "duty-bound to construct an effective remedy tailored to the injury. . . . [A] grave violation merits an equally weighty remedy." *Id.*

187. *See* Aceves, *supra* note 10; *see also supra* notes 78-106 and accompanying text.

188. United States v. Alvarez-Machain, 504 U.S. 655, 687 n.33 (1992) (Stevens, J., dissenting).

189. Elkins v. United States, 364 U.S. 206, 223 (1960) (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).

Stevens correctly noted, by sanctioning the government's conduct in *Alvarez-Machain*, the Court imperiled the perception of its judicial integrity throughout its own country and the world.[190] Accordingly, dismissal of the indictment and a denial of *in personam* jurisdiction uphold judicial integrity.

On the other hand, an offensive remedy does very little to uphold judicial integrity because the courts would still have *in personam* jurisdiction over the defendant. An offensive remedy, without more, effectively condones government misconduct because it allows the government to keep the fruits of its illegality. It might compensate the victim monetarily, but this fact alone does not uphold the judicial integrity of the courts. The courts would become a party to the wrongdoing by upholding a constitutional violation and allowing the government to simply pay off the victim. Therefore, dismissal of the indictment with or without monetary compensation is the best remedy to maintain the highest level of judicial integrity.

B. Deters Government Misconduct

Another important policy goal is deterrence of government and police misconduct. As Justice Stewart asserted in *Elkins v. United States*, "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[191] In *Elkins*, the state unlawfully seized evidence from the defendant's home.[192] After a state prosecution failed due to the illegality of the search, the state turned the evidence over to federal officials and a federal indictment followed.[193] The Supreme Court held that evidence obtained by state officers during a search, which if conducted by federal officers would violate the defendant's rights under the Fourth Amendment, is inadmissible.[194]

The Court reasoned that only the most flagrant police abuses come to the attention of the courts and that in order to protect the innocent against such invasions, evidence must be excluded against those who are guilty.[195] Indeed, as Judge Cardozo stated in *People v. Defore*, "[t]he criminal is to go free because the constable has blundered."[196] Thus, a legitimate policy goal of the

190. *Alvarez-Machain*, 504 U.S. at 687-88 (Stevens, J., dissenting).

191. *Elkins*, 364 U.S. at 217.

192. *Id*. at 206-07

193. *Id*. at 207 n.1.

194. *Id*. at 223.

195. *Id*. at 217-18.

196. 150 N.E. 585, 587 (N.Y. 1926). The *Elkins* majority opinion also quoted Professor Wigmore's adage:

> 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly,

Supreme Court is to deter police misconduct, and if a case is dismissed because of the exclusion of evidence, it is the government's misconduct that sets the criminal free, not the courts.

Dismissal of the indictment would deter government misconduct because if the agents knew that the court would lack jurisdiction once the defendant was brought into the country, they would use the formal extradition process rather than simply abducting the suspect. Justice Stevens also warned of the possible repercussions of the majority's opinion in *Alvarez-Machain*. "If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited . . . ."[197] As it stands now after *Alvarez-Machain* and subsequent cases, the DEA and other agencies have no disincentives to forcibly abduct a wanted criminal.[198] Nevertheless, if the Court would have followed Justice Stevens's line of argument, governmental misconduct and forcible abductions would have to stop because United States courts would not have jurisdiction over the defendant once in the United States. Thus, a defensive remedy for transborder abductions would deter government misconduct.

On the other hand, an offensive remedy, without more, would do very little to deter government misconduct. An offensive remedy by itself would allow the government to pay the victim after-the-fact for its illegal action. Thus, if the government valued the defendant's apprehension more than it valued international law, it could elect to act in violation of international law and pay damages. Where gain exceeds harm to the suspect, the government could violate international law, abduct the suspect and simply pay damages at a later date. As such, dismissal of the indictment for transborder abductions would be better at deterring government misconduct than an offensive remedy standing alone.

> but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.'

Elkins, 364 U.S. at 217.

197. United States v. Alvarez-Machain, 504 U.S. 655, 674 (1992).

198. *E.g.*, United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) (affirming conviction of Honduran citizen who was tried in federal court after being abducted by U.S. government agents from his home in Honduras); United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002), *cert. denied*, 537 U.S. 1038 (2002) (finding that dismissal of the indictment was not appropriate after DEA agents lured Duarte-Acero, a Colombian national, into Ecuador where Ecuadorian police arrested him and turned him over to the DEA).

C. Provides Compensation to Victims

In *Bivens*, agents of the Federal Bureau of Narcotics arrested the defendant in his apartment in front of his wife and children and threatened to arrest the entire family.[199] In addition, the agents searched the entire apartment and subjected the defendant to a visual strip search.[200] He sought damages because the arrest and search were effected without a warrant and unreasonable force was used during the arrest.[201] The Supreme Court held that Bivens could recover damages for violations of the Fourth Amendment upon proof of injuries sustained from federal agents' actions.[202]

The Court reasoned that the only protection available to an individual in that situation is afforded by the judiciary because the sole alternative is resistance to the officer's asserted authority, and this might amount to a crime.[203] The Court noted that damages were the historical remedy for violations of personal liberty and security and that it was the judiciary's responsibility to vindicate such rights.[204] Furthermore, "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'"[205] In a concurring opinion, Justice Harlan explained that compensatory relief is appropriate even where it will have little deterrent effect because it might be the only remedy to an innocent victim, to whom the exclusionary rule would not apply.[206] Thus, the *Bivens* Court held that an individual could recover money damages for violations of constitutional rights.

A defensive remedy for transborder abductions would not compensate the victim monetarily. However, it would compensate the victim in the sense that he gains his freedom and liberty through dismissal of the indictment. It is probable that any victim who was abducted would prefer the restoration of life and liberty, rather than monetary compensation. A defensive remedy helps restore the victim's intangible rights, which are impossible to value monetarily.[207]

199. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971).

200. *Id*.

201. *Id*. at 389-90.

202. *Id*. at 397.

203. *Id*. at 394-95.

204. *Bivens*, 403 U.S. at 395, 407.

205. *Id*. at 397 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

206. *Id*. at 408-10 (Harlan, J., concurring).

207. Although a defensive remedy can help restore intangible rights, it would be impossible to completely restore them as these lost rights include pain, suffering, humiliation and embarrassment, which can never be recovered. Thomas M. Antkowiak, Note, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977, 1008 (2002).

An offensive remedy obviously compensates the victim through damages. A victim can get damages in return for the violation of his rights. However, it is almost impossible to think that monetary compensation alone can completely compensate the victim for the violation of his personal rights, the pain and suffering, and the humiliation that the forcible abduction caused. Damages also present a separate problem with valuation. How can a court put a value on a victim's personal liberty and human rights? Even if an offensive remedy compensates a victim more than a defensive remedy in a monetary sense, it cannot restore a victim's intangible rights like dismissal of the indictment. Thus, dismissal of the indictment with or without monetary compensation adequately compensates the victim, whereas an offensive remedy, without more, does not.

D. Undermines Law Enforcement

The government argues that dismissal of the indictment undermines effective law enforcement because it allows the criminal to go free. However, "the criminal is to go free because the constable has blundered."[208] In addition, extradition treaties exist as an effective and legal mechanism for capturing criminals in another country.[209] The Attorney General's Annual Report states that:

> Working jointly with foreign counterparts is a realistic way to achieve the goals of dismantling international criminal organizations, locating fugitives, and establishing mutually recognized processes for ensuring criminals are brought to justice primarily through the extradition process . . . . [Extradition] treaties provide the means to bring fugitives to justice and supply evidence necessary to support criminal investigations and prosecutions.[210]

Because a legal means exists via extradition treaties, there is no reason to resort to extra-legal means such as abduction; as such, dismissal of the indictment does not undermine effective law enforcement.

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208. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

209. More specifically:

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

Ruiz-Bravo, *supra* note 37, at 840. In addition to protecting the individual's rights, extradition preserves the sovereignty and territoriality of the countries involved by "providing a legal channel for two nation-states to confer with one another in order to properly exercise jurisdiction over an individual charged with a crime." Aimee Lee, Comment, United States v. Alvarez-Machain: *The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT'L L.J. 126, 130 (1993).

210. U.S. DEP'T OF JUSTICE, FISCAL YEAR 2002 PERFORMANCE REPORT & FISCAL YEAR 2003 REVISED FINAL PERFORMANCE PLAN, FISCAL YEAR 2004 PERFORMANCE PLAN 33-34 (2003), http://www.usdoj.gov/ag/annualreports/pr2002/pdf/FullReport.pdf.

The Supreme Court has considered the fact that in many cases law enforcement would be undermined by the exclusionary rule and has become more reluctant to apply the exclusionary rule in certain instances due to this rationale.[211] However, the cases in which the Supreme Court has held that the exclusionary rule is inapplicable have involved minor invasions that were limited in scope and extent, like the *Terry* stop.[212] In these cases, the Court balances the intrusiveness of the police actions against the necessity of obtaining the evidence.[213] If this balancing test were applied to a transborder abduction case, the intrusiveness of the abduction would far outweigh the necessity of obtaining the suspect since a legal and less intrusive means exists through an extradition treaty.[214]

Moreover, the Supreme Court considered whether the exclusionary rule had rendered the administration of criminal justice ineffective in *Mapp v. Ohio* when it decided to extend the exclusionary rule of the Fourth Amendment to the states.[215] The Court found that the federal criminal justice system had not been rendered ineffective since it began operating under the exclusionary rule in *Weeks* almost fifty years earlier.[216] Furthermore, "'the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.'"[217] Thus, the Court recognized that effective law enforcement does not rest solely on obtaining convictions, but also on respecting the constitutional boundaries within which the government

211. *E.g.*, United States v. Leon, 468 U.S. 897, 913 (1984) (applying the good faith exception to the exclusionary rule); California v. Carney, 471 U.S. 386, 394 (1985) (holding that the exclusionary rule does not apply to warrantless search of motor home); Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that a law enforcement officer can stop and frisk a suspect on reasonable suspicion).

212. On the other hand, the Supreme Court has consistently held that "[i]n the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." Kyllo v. United States, 533 U.S. 27, 37 (2001). By analogy, because the home is such a sacred place, it would seem that the Court would be repulsed by the kidnapping of an individual, whose personal rights were completely ignored.

213. *Terry*, 392 U.S. at 21 (citing Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).

214. United States v. Place, 462 U.S. 696 (1983) (finding that less intrusive means existed in which the police officers could have carried out the search).

215. Mapp v. Ohio, 367 U.S. 643 (1961).

216. *Id.* at 659-60. The *Elkins* court made a similar finding only one year earlier concerning application of the exclusionary rule in the federal criminal justice system: "the Federal Bureau of Investigation has [not] thereby been rendered ineffective, [and] the administration of criminal justice in the federal courts has [not] thereby been disrupted." Elkins v. United States, 364 U.S. 206, 218 (1960).

217. *Mapp*, 367 U.S. at 658 (quoting Miller v. United States, 357 U.S. 301, 313 (1958)).

and its agents must operate.[218] Because extradition treaties are an effective and legal means of apprehending criminals abroad, there is no reason that the government or its agents should operate outside the boundaries of these treaties.

Nevertheless, the government has been hesitant to rely on extradition treaties under a mistaken belief that extradition treaties are ineffective. This causes states to resort to irregular forms of rendition to apprehend a criminal living abroad.[219] Professor Bassiouni has elaborated some of the policy considerations that go into a determination of whether to use an extradition treaty:

> [1.] The extraditable offenses listed in the treaty may not cover the specific offense.
>
> [2.] Political and practical considerations in given cases may require a political compromise among states concerning persons beyond the respective reach of each state or in the respective custody of each of the given states.
>
> [3.] Commencement of formal proceedings is likely to give notice to the fugitive and time to flee the jurisdiction of the state of refuge.
>
> [4.] The length of the formal process further delayed by appeals and collateral attack dilutes its certainty and swiftness.
>
> [5.] The cost of extradition for both states is often significant.
>
> [6.] The weaknesses of the requesting state's case at the time extradition is sought may be a bar to it.
>
> [7.] The requesting state may find it necessary to withhold some of the evidence against the fugitive for trial strategy or other reasons.
>
> [8.] Exceptions and exemptions such as the political offense exception may contribute to the dilution of the effectiveness of the process.[220]

Therefore, a country may sometimes resort to an illegitimate process because it thinks that abduction is the only efficient way to apprehend the suspect.[221]

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218. Respecting constitutional boundaries also means respecting treaty obligations because Article VI states that "all Treaties made . . . shall be the supreme Law of the Land." U.S. CONST. art. VI.

219. *See* BASSIOUNI, *supra* note 3, at 249-311.

220. *Id*. at 308-09 (renumbered from original).

221. It has been argued that irregular rendition should only be used in extreme cases where the crime is especially heinous and serious and when the asylum state has refused to punish or extradite. Jimmy Gurule, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457, 490-92 (1994). In addition, the abduction should be directly approved by the Attorney General to ensure that "proper consideration would be given to foreign policy concerns and would provide for a comprehensive risk-benefit assessment at the highest levels of government." *Id*. at 492.

However, the process of irregular rendition, especially in the case of a forcible abduction without state consent, is not necessarily more effective than the formal extradition process because the consequences of the abduction outweigh the efficiency of the apprehension. By kidnapping an alien from another country, the state disrupts world order, violates the infringed-upon state's territorial integrity, sovereignty, and legal processes and damages the integrity of the international process.[222] In addition, the kidnapping violates the abducted person's right to freedom from arbitrary arrest and detention, as well as international due process and fairness.[223] As Professor Bassiouni states, "[t]he practical considerations of justifying invalid means by a purportedly valid end must be rejected."[224] And, because an effective means for detaining suspects exists through extradition treaties, there is no reason to turn to the invalid means of kidnapping.

Abduction also is not an effective means of capturing a criminal because the abducting government's reputation is damaged in the international community, and future efforts at international cooperation are hindered. In fact, this has proven true in United States-Mexico relations after the Supreme Court decided *Alvarez-Machain* in 1992. Despite the two thousand mile common border that the states share, no major Mexican drug trafficker was ever extradited to stand trial in the United States before 2001, and the decision in *Alvarez-Machain* only strengthened the Mexican government's resentment and mistrust of the United States government.[225] Because this is true and because Mexico requested the repatriation of Alvarez-Machain immediately after his abduction, dismissal of the indictment would not undermine law

Nonetheless, in *Alvarez-Machain* the United States never requested Mexico to extradite the suspect, and Mexico did not refuse to punish him; the Attorney General did not authorize or approve the abduction; and although the crime was serious and heinous, there wasn't even sufficient evidence to convict Alvarez-Machain in court. Still yet, the best policy is to prohibit all transborder abductions in all circumstances, which would force more reliance on extradition treaties. Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746, 755 (1992).

222. BASSIOUNI, *supra* note 3, at 309-10.

223. *Id*. at 310.

224. *Id*. at 311. If an extradition request fails for whatever reason, the solution should not be to forcibly abduct an individual. As Professor Bassiouni explains:

> The solution, however, should be to make extradition more efficient, not to subvert it by resorting to unlawful or legally questionable means. . . . At this stage in the development of international law, it is no longer possible to rationalize violations of international law on grounds of expediency or to allow such violations to be perpetrated without an adequate deterrent-remedy.

Id. at 251.

225. Rishi Hingoraney, Note, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 GA. J. INT'L & COMP. L. 331, 331, 351 (2002).

enforcement, as it would strengthen the abducting government's reputation within the international community.[226]

In addition, a defensive remedy would further international cooperation in the apprehension of foreign criminals because nation states would have to work together through pre-existing extradition treaties. The Attorney General's Report recognizes that extradition treaties "forge strong law enforcement relationships between the U.S. and other countries, and they convey an obligation to assist in international extradition."[227] The Report further states that international cooperation is "critical to addressing the dramatic growth in the scope of transnational crime," thus recognizing the substantial benefits that extradition has over unilateral actions like abduction.[228]

Extradition treaties have been effective and useful in the past and continue to be so today. In fact, only two extradition requests were turned down by the State Department of the United States in a period of twenty-one years.[229] As John Kester noted, "[t]here is no reason to believe that the percentage is any different today."[230] These high statistics of cooperation through extradition treaties are likely the same throughout the world, especially when a country is dealing with a request from the United States because extradition candidates "can become unattractive pawns in global geopolitics."[231] Thus, extradition is

226. Analisa W. Scrimger, Comment, United States v. Alvarez-Machain*: Forcible Abduction as an Acceptable Alternative Means of Gaining Jurisdiction*, 7 TEMP. INT'L & COMP. L.J. 369, 388-90 (1993).

227. U.S. DEP'T OF JUSTICE, *supra* note 210, at 34.

228. *Id*. at 33. The number of extradition requests also demonstrates how important international cooperation is within the international community when it comes to capturing criminals. In Fiscal Year 1992, there were only 842 extradition requests, whereas there were 3,923 requests in Fiscal Year 2000. U.S. DEP'T OF JUSTICE, FISCAL YEAR 2000 PERFORMANCE REPORT AND FISCAL YEAR 2002 PERFORMANCE PLAN 17 (2001), http://www.usdoj.gov/ag/annualreports/pr2000/TableofContents.htm. Furthermore, the U.S. State Department sends out many more extradition requests every year than it receives. In Fiscal Year 2002, 269 fugitives were surrendered to the United States, while 102 fugitives were surrendered from the U.S. U.S. DEP'T OF JUSTICE, *supra* note 210, at 34.

229. Kester, *supra* note 5, at 1486.

230. *Id*.

231. *Id.* at 1487. Kester further argues:

> If a foreign country wants a United States resident badly, and that country can or does provide something else—say, a military base or a trade agreement—that the United States would like to have, one individual (who it is easy to assume is probably guilty, anyway) may be a cheap price to pay, in the minds of United States diplomats, to help secure a more important end.

Id. This applies with equal force when the United States is the requesting country because the U.S. can use humanitarian aid or military assistance as a bargaining tool. For an example of how the United States has recently used aid as a coercive bargaining tool in international relations, look no further than the bilateral immunity agreements that many countries reluctantly signed with the United States concerning the International Criminal Court's jurisdiction. *See, e.g.*,

an effective mechanism for capturing a suspect; consequently, dismissal of the indictment would not undermine law enforcement.

While an offensive remedy does not undermine effective law enforcement, it certainly does not strengthen law enforcement mechanisms. Although a court would maintain jurisdiction over a criminal and the government could succeed in prosecution, an offensive remedy, without more, effectively excuses lawless action. By doing this, it makes the United States appear to be above the law, as the courts have jurisdiction over a defendant regardless of whether the government forcibly abducted him or chose to rely on the formal extradition process. This, in turn, hampers cooperation between nations in apprehending suspects and ultimately leads to less effective law enforcement because other nations would not be willing to work with the United States in international criminal law issues.

Furthermore, an offensive remedy, without more, fails to secure compliance with constitutional and international law because it encourages illegal abductions by allowing a court to retain jurisdiction regardless of how the suspect was apprehended. As the *Elkins* court stated, "'[e]xperience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures.'"[232] Thus, dismissal of the indictment is the only remedy that will stop transborder abductions and it will not undermine law enforcement efforts because extradition is an efficient mechanism to apprehend foreign criminals.

E. Limits on Judicial Power

Judicial restraint is another concern of the courts because the judiciary does not sit to question political decisions.[233] Courts are skeptical of becoming involved in cases dealing with international relations and international law because they do not want to overstep their boundaries and question policy choices constitutionally committed to the Executive Branch or Congress.[234] As such, when a potential treaty violation has occurred, the Judicial Branch is cautious in its decision and often defers to the views of the Executive

Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19 (2003); Benjamin B. Ferencz, *Misguided Fears About the International Criminal Court*, 15 PACE INT'L L. REV. 223, 230-46 (2003); *Bungling Bully: Strong-Arm Diplomacy is Damaging US Interests Abroad*, FIN. TIMES (London), July 3, 2003, at 18.

232. Elkins v. United States, 364 U.S. 206, 220 (1960) (quoting People v. Cahan, 282 P.2d 905, 911-13 (Cal. 1955)).

233. The political question doctrine prohibits courts from examining government actions that are "mere political act[s]." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803).

234. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

Branch.[235] Nevertheless, courts have the "authority to construe treaties," which is a "recurring and accepted task for the federal courts."[236] The question of whether or not the courts should intervene and provide a remedy has been a recurring issue in many cases dealing with a foreigner's rights under the Vienna Convention on Consular Relations.[237]

In *Breard v. Greene*, the defendant, a citizen of Paraguay, was convicted of murder and attempted rape and sentenced to death.[238] In 1996, Breard filed a motion for habeas relief claiming that his convictions and sentence should be overturned because he had never been notified of his right to contact the Paraguayan Consulate, a violation of the Vienna Convention.[239] The Republic of Paraguay instituted proceedings in the International Court of Justice (ICJ) against the United States for violations of the Vienna Convention at the time of Breard's arrest.[240] The ICJ issued an order requesting the United States to "'take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.'"[241] Nevertheless, the Supreme Court denied relief and held that Breard procedurally defaulted his claim by failing to raise it in the state court.[242]

The Court reasoned that under principles of international law, the procedural rules of the forum state govern the implementation of a treaty and that under United States procedural law, Breard was required to assert his Vienna Convention claim in state court.[243] The Court, in dictum, stated that even if a Vienna Convention claim were properly raised in state court proceedings, it is "extremely doubtful" that the violation would result in reversing the conviction without a finding that the violation had an effect on the trial.[244]

235. *E.g.*, Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142 (9th Cir. 1999); Factor v. Laubenheimer, 290 U.S. 276 (1933); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *but see* Tachiona v. Mugabe, 186 F. Supp. 2d 383, 393 (S.D.N.Y. 2002) ("[T]he theory [of deference to the Executive Branch's interpretation] makes a mockery of constitutional separation of powers. Manifestly, its effectuation would spell doom for judicial independence.").

236. *Japan Whaling Ass'n*, 478 U.S. at 230.

237. Vienna Convention, *supra* note 109 and accompanying text.

238. 523 U.S. 371, 373 (1998).

239. *Id*.

240. *Id*. at 374.

241. *Id*.

242. *Id*. at 375.

243. *Breard*, 523 U.S. at 375-76.

244. *Id*. at 377.

Regrettably, the Supreme Court never even considered the ICJ's request to delay execution until the proceedings were complete.[245] The Court found that it was within the executive branch's power to stay the execution, and that the judiciary did not have the power to do so based on existing statutes or case law.[246] Thus, relying on judicial restraint, the Court would not consider the ICJ's request because it involved foreign relations and would violate the separation of powers.[247]

However, the Supreme Court did not impose similar judicial restraint on itself in the case of *Cook v. United States*.[248] In *Cook*, a treaty between the United States and Great Britain allowed the search of a vessel within a state's territorial waters, which was defined as one hour's traveling distance measured by the maximum speed of the seized vessel.[249] Although the treaty mentioned compensation, it did not expressly mention a defense to a fine. The United States Coast Guard boarded a British vessel, which was capable of traveling ten miles per hour, 11.5 miles from the United States coast and seized intoxicating liquor.[250] Even though the seizure took place outside the agreed upon distance, the ship's master was fined $14,286.18 for failure to include liquor in the ship's manifest.[251]

The Supreme Court allowed the ship's master to assert the treaty as a defense and held that the treaty violation deprived the court of jurisdiction:

> The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. . . . Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.[252]

Thus, the Supreme Court allowed Cook to defensively invoke the treaty and dismissed the case.

245. The Supreme Court's opinion was announced less than one hour before Breard's execution was scheduled. The execution was able to be carried out on time, thus giving absolutely no weight or deference to the ICJ's opinion or Breard's rights. Ray, *supra* note 117, at 1744.

246. *Breard*, 523 U.S. at 378.

247. For reasons why the Supreme Court should have considered the ICJ's request, see Justices Stevens' and Breyer's dissenting opinions in the denial of certiorari in *Torres v. Mullin*, 124 S.Ct. 562 (2003). *See also supra* notes 117-22 and accompanying text.

248. 288 U.S. 102 (1933).

249. *Id.* at 110-11.

250. *Id.* at 107.

251. *Id.* at 108.

252. *Id.* at 121-22.

It has been argued that this interpretation respects the purposes of the Supremacy Clause: "By making treaties the supreme law of the land and thereby giving individuals, including foreigners, the right to raise treaty rights in American courts, the Framers hoped to reduce potential conflict with the foreigners' home countries."[253] The *Cook* holding prevented the development of this conflict by construing the treaty liberally. Thus, although courts have used judicial restraint when foreign relations and politics are involved, *Cook* represents a case where the judiciary did not restrict itself.

The United States government argues that to allow courts to decide cases involving customary international law:

> threaten[s] the fundamental constitutional principles that reserve to the political branches the authority to make judgments about how to conduct the Nation's foreign affairs and that seek to ensure that the Nation speaks with one voice on such matters. . . . "Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts."[254]

In short, the government contends that the Judicial Branch should not supervise the Executive Branch's "conduct of foreign policy and law enforcement activities abroad,"[255] and that it is not appropriate for the courts to provide a remedy that has not been authorized by the political branches.[256]

Even if the President has the power to authorize violations of international law through his foreign affairs powers, lower-level executive officials do not have this authority.[257] There is nothing in the record of *Alvarez-Machain* to show that the decision to abduct was approved by the President, Attorney General, or any other cabinet officer.[258] Furthermore, 21 U.S.C. § 878(a) gives DEA agents the power to "make arrests without warrant . . . for any felony, cognizable under the laws of the United States" and to "perform such other law enforcement duties as the Attorney General may designate."[259] Thus, the express statutory language does not permit unauthorized extraterritorial arrests; rather, it refers to the Attorney General's authority to designate such activities.

253. Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401, 1445 (1996).

254. Brief for the United States at 10, 15, Sosa v. Alvarez-Machain, 124 S.Ct. 807 (2003) (No. 03-339) (quoting Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003)).

255. Petition of United States at 15, United States v. Alvarez-Machain, 124 S.Ct. 821 (2003) (No. 03-485).

256. *Id.*; Brief for the United States at 10, 15, *Sosa* (No. 03-339).

257. Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (observing that the President can "disregard international law in service of domestic needs" and "'act in ways that constitute violations of international law by the United States'").

258. Brief for Alvarez-Machain at 5, United States v. Alvarez-Machain, 124 S.Ct. 821 (2003) (No. 03-485).

259. 21 U.S.C. § 878(a)(3), (5) (2000).

Because there is no evidence that the President, Attorney General or other cabinet-level official authorized the abduction, and because the statute does not provide low-level DEA officials with the power to authorize such an abduction, the judiciary does not need to limit its power to adjudicate the case.

Furthermore, the political branches exercise more control over offensive remedies than defensive remedies. When a right has been established, it is normally the decision of Congress whether to attach individual liability for violations.[260] For example, when Congress enacted the Torture Victim Protection Act,[261] it chose to increase the use of the federal court system for violations of international law by extending the right to sue for torture to citizens and aliens.[262] Likewise, Congress could choose to preclude an ATCA or FTCA remedy for transborder abductions if they chose to do so, but it has not decided to do so.[263] Even so, it is typically a decision of Congress to grant an offensive remedy and private damages, rather than the judiciary.

If the established right does not contemplate private damages, "it would not be sound judicial policy to conjure a legal theory that would expose individual officers to liability for breaches of international treaties."[264] On the other hand, the Judicial Branch has historically played an active role in formulating defensive remedies, whereas the political branches have had little or no part in creating defensive remedies.[265] The Supreme Court created the exclusionary rule and the political branches did not authorize this decision and, in fact, vehemently opposed it.[266] The judiciary historically has not limited

260. United States v. Lombera-Camorlinga, 206 F.3d 882, 894-95 (9th Cir. 2000) (Thomas, J., dissenting). Recognizing that the exclusionary rule is the only adequate and appropriate remedy for Vienna Convention violations, Judge Thomas reasoned that "[i]n fact, the only [other] options readily apparent are private damage actions . . . . The decision on whether to attach individual liability for such violations should be left to Congress." *Id*. at 895.

261. 28 U.S.C. § 1350 note (2000) (Torture Victim Protection).

262. *Id*.

263. As Judge Walker commented, the ATCA:

> is simply an act of Congress. If it raises valid policy concerns and if adjudication under it leads to real-world problems for the executive or the legislature, it may be amended, or even repealed. The fact that Congress has not done so, and, indeed, appears to have endorsed the *Filartiga* approach in the legislative history of the Torture Victim Protection Act, indicates that the substantial concerns that have been voiced are, at least at this point, largely theoretical.

Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 560 (1997).

264. *Lombera-Camorlinga*, 206 F.3d at 895 (Thomas, J., dissenting).

265. *See supra* notes 123-53 and accompanying text.

266. Mapp v. Ohio, 367 U.S. 643, 650-53 (1961); Miranda v. Arizona, 384 U.S. 436, 490 (1966); Massiah v. United States, 377 U.S. 201, 207 (1964); Spano v. New York, 360 U.S. 315, 323-24 (1959). "The most elemental concepts of checks and balances and separation of powers explain why a branch of government that is found to act illegally should not have the ability to prevent a remedy for its own wrongful conduct." Brief for Alvarez-Machain at 46, United States

itself when considering defensive remedies, where the opposite has been true regarding offensive remedies. As such, the limits on judicial power support dismissal of the indictment over monetary damages because this is a remedy traditionally granted by the Judicial Branch and not by the other political branches.

VI. CONCLUSION

It is clear that transborder abductions violate a State's territorial integrity, the abducted individual's personal rights and liberty, and international law. The United States' choice of an offensive remedy in place of a defensive remedy for transborder abductions is mistaken, as it was previously shown that a defensive remedy with or without monetary compensation can better accomplish policy objectives set out by various Supreme Court decisions.[267] A defensive remedy, and more precisely dismissal of the indictment, upholds judicial integrity, deters government misconduct, and compensates the victim by re-establishing his liberty and personal rights. The dismissal of the indictment would not undermine law enforcement efforts because extradition treaties are an efficient mechanism to detain a suspect, and it is within the judiciary's powers to grant such a remedy. Conversely, an offensive remedy, when not coupled with a defensive remedy, only compensates the victim monetarily. Refusal to dismiss the indictment tends to promote lawless conduct and harms the integrity of the judicial system both within the United States and throughout the world.

As such, the courts should not adhere to the flawed policy of the *Ker-Frisbie* doctrine and should instead repatriate a victim of a transborder abduction. Repatriation and dismissal of the indictment uphold the integrity and process of international law and further international cooperation in the apprehension of criminal suspects. However, as the minority counsel of the

v. Alvarez-Machain, 112 S.Ct. 2188 (1992) (No. 91-712). In his dissent in *Lombera-Camorlinga*, Judge Thomas explained another reason why a court should not give deference to government positions when the government is a party to the case: "[government] positions developed in response to a lawsuit are not of the same character: they are specifically tailored to help obtain a favorable outcome in a pending controversy in which the agency is involved." *Lombera-Camorlinga*, 206 F.3d at 895 (Thomas, J., dissenting).

267. As Jorge Reinaldo A. Vanossi stated in the Inter-American Juridical Committee decision concerning *Alvarez-Machain*,

> [i]n the general order of life and, no less in the life of peoples, situations come up that are sometimes errors, sometimes misfortunes, and sometimes mysteries. This being the case, errors must be corrected, misfortunes require our resignation to them, and mysteries must be explained. The topic that concerns us today is neither a mystery nor a misfortune. It is simply an error . . . .

Legal Opinion on the Decision of the US Supreme Court in the Alvarez-Machain Case, CP Res. 586, Inter-Am. Juridical Comm. Doc. CJI/RES.II-15/92 (Aug. 15, 1992), *reprinted in* 13 HUM. RTS. L.J. 395, 397 (1992) (explanation of concurring vote of Dr. Jorge Reinaldo A. Vanossi).

Senate Foreign Relations Committee, Robert Friedlander, commented, "'it seems to be the practice of the United States to do what it wants to do; it has long been so and probably will continue to be so.'"[268] Thus, until the Supreme Court is willing to overrule the *Ker-Frisbie* line of cases dealing with transborder abductions, it seems that the United States can and probably will continue to apprehend suspects through forcible transborder abductions. International law has evolved to no longer accept transborder abductions as a legitimate way to apprehend a suspect and has shown that jurisdiction should not be upheld in such a case. Hopefully the United States' courts will soon follow suit and require the dismissal of the indictment when a suspect has been forcibly abducted from another country.

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268. Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 884-85 (1993) (quoting Robert Friedlander, Comments at the 84th Annual Meeting of the American Society of International Law (1990)).

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