

## NOTE

### SHOULD GOVERNMENT SPONSORED FORCIBLE ABDUCTION RENDER JURISDICTION INVALID? *UNITED STATES V. ALVAREZ-MACHAIN*

#### INTRODUCTION

International treaty law requires that parties to a treaty act in good faith in performing the various provisions of that treaty.<sup>1</sup> Good faith performance under extradition treaties requires that the forcible abduction of individuals from a foreign country for the purpose of criminal prosecution in the United States is an unacceptable means of obtaining jurisdiction. An individual is forcibly abducted when they are illegally apprehended or kidnapped by government agents and brought to the United States for the purpose of facing criminal charges in the United States.<sup>2</sup> The existence of an extradition treaty between two countries dictates the means for bringing individuals from one country to another for criminal prosecution.

Extradition is "the surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender."<sup>3</sup> The United States and Mexico are parties to an extradition treaty signed in Mexico City on May 4, 1978, and ratified by both countries in 1979.<sup>4</sup> The obligations to extradite under the extradition treaty between the United States and Mexico reads,

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: a) its [the requested Party's] laws would provide for the punishment of such an offense committed in similar circumstances, or b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.<sup>5</sup>

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1. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 15-23 (1988).

2. *United States v. Toscanino*, 500 F.2d 267, 271 (1974).

3. BLACK'S LAW DICTIONARY 585 (6th ed. 1990).

4. Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059.

5. *Id.* at 5061-62.

This preamble demonstrates a mutual agreement to abide by its terms in extraditing people sought for criminal prosecution in the requesting country, including the expressed requirement that those not extradited be prosecuted in the requested country.

The treaty's purpose, as stated in its preamble, is: "The Government of the United States of America and the Government of the United Mexican States; [d]esiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition; [h]ave agreed as follows. . ."<sup>6</sup> To meet this purpose the countries included murder and kidnapping among extraditable offenses in the treaty.<sup>7</sup>

Countries enter into extradition treaties to impose general legal obligations on one another to surrender persons sought for criminal prosecution.<sup>8</sup> For example, "[i]n exchange for its legal promise to surrender persons suspected or convicted of criminal activity to nation A in accordance with the terms of the treaty, nation B obtains a reciprocal promise from A."<sup>9</sup> A country is under no such obligation in the absence of an extradition treaty.<sup>10</sup> The consensual nature of the extradition agreement between the United States and Mexico demonstrates a mutual respect for each nation's territoriality, and sets forth the means for extraditing individuals from one country to another.<sup>11</sup>

The use of forcible abduction to obtain jurisdiction has been a repeated practice of the United States since 1886.<sup>12</sup> The use of forcible abduction was initially approved of in 1886 in the case of *Ker v. Illinois*, where it was held that if an extradition treaty has not been invoked a court may properly

6. *Id.* at 5061.

7. *Id.* at 5076. Other extraditable offenses include: malicious wounding of another; abandonment of minors or other dependents where there is danger of injury or death; child stealing; abduction; false imprisonment; rape; promoting or facilitating prostitution; robbery; burglary; larceny; fraud; embezzlement; counterfeiting; forgery; extortion; arson; malicious injury to property; offenses against the laws relating to the traffic in, possession, production, manufacture, importation or exportation of dangerous drugs and chemicals; offenses against the laws relating to the control of poisonous chemicals or substances injurious to health; piracy; offenses against the safety of means of transportation including any act that would endanger a person in a means of transportation; an offense relating to unlawful seizure or exercise of control of trains, aircraft, vessels, or other means of transportation; offenses against the laws relating to prohibited weapons, and the control of firearms, ammunition, explosives, incendiary devices, or nuclear materials; an offense against the laws relating to international trade and transfers of funds or valuable metals; an offense against the laws relating to the importation, exportation, or international transit of goods, articles, or merchandise, including historic or archeological items; violations of the customs laws; offenses against the laws relating to the control of companies, banking institutions or other corporations; offenses against the laws relating to prohibition of monopoly or unfair transactions; offenses against the laws relating to protection of industrial property or copyright; offenses against the laws relating to abuse of official authority. *Id.* at 5076-78.

8. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1349 (1991).

9. *Id.*

10. *Id.*

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

12. *Ker v. Illinois*, 119 U.S. 436 (1886).

exercise jurisdiction even though the defendant's presence is procured by forcible abduction.<sup>13</sup> This rule has been asserted by the United States in numerous cases justifying the abduction of individuals wanted for prosecution.<sup>14</sup>

This Note will analyze the practice of forcibly abducting individuals from foreign countries for the purpose of their criminal prosecution in the United States. This Note will focus on the reasoning behind the decisions advocating forcible abduction and will give an overview of the recent United States Supreme Court decision in *United States v. Alvarez-Machain*<sup>15</sup> which held that forcible abduction does not render jurisdiction improper so as to prevent the individual from facing trial in the United States court for violations of United States' criminal laws. Secondly, it will discuss possible Constitutional due process violations resulting from obtaining jurisdiction by forcible abduction. Finally, it considers international law and treaty law violations stemming from this practice and concludes that the forcible abduction of Alvarez-Machain violated both Constitutional due process rights and international law.

### I. BACKGROUND: *UNITED STATES V. ALVAREZ-MACHAIN*

Humberto Alvarez-Machain was a citizen and resident of Mexico.<sup>16</sup> He was indicted for his involvement in the kidnapping and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar (Camarena) and Alfredo Zavala-Avelar, Camarena's pilot.<sup>17</sup> The DEA believe that Alvarez-Machain, a medical doctor, participated in the murder of Camarena by prolonging his life so that others could torture and interrogate him.<sup>18</sup>

DEA officials tried to have Alvarez-Machain turned over to the United States via informal negotiations with Mexican officials but were not successful.<sup>19</sup> The DEA officials offered a \$50,000 reward and payment of expenses in return for the delivery of Alvarez-Machain to the United States.<sup>20</sup> In March, 1990, a DEA informant, Antonio Garate-Bustamante, told DEA Special Agent Hector Berrellez, the chief investigator of the Camarena murder, that his associates in Mexico could successfully apprehend

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13. *Id.*

14. *See* *Frisbie v. Collins*, 342 U.S. 519 (1952); *United States v. Marzano*, 388 F. Supp. 906 (N.D. Ill. 1975).

15. 112 S. Ct. 2188 (1992).

16. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2190 (1992).

17. *Id.*

18. *Id.*

19. *United States v. Caro-Quintero*, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990). This case is the trial court level where Dr. Alvarez-Machain was initially tried with other defendants in the Camarena murder case.

20. *Id.*

Alvarez-Machain.<sup>21</sup> On April 2, 1990, Alvarez-Machain was forcibly kidnapped from his medical office in Guadalajara, Mexico.<sup>22</sup> Five or six armed men burst into Alvarez-Machain's office, one of them held a gun to his head and told him to cooperate or he would be shot.<sup>23</sup> He was flown to El Paso, Texas where he was arrested by DEA officials for his alleged participation in the kidnapping and murder of Camarena.<sup>24</sup> The District Court, in *United States v. Caro-Quintero*, concluded that although the DEA agents did not personally, physically abduct Alvarez-Machain, they were "integrally involved" in the abduction. This involvement was demonstrated by the reward offered for successfully abducting Alvarez-Machain, the DEA approval of the abduction, the payment of \$20,000 to the abductors after its completion, and the relocation of many abductors and their families to the United States including the payment of \$6,000 per week for living expenses.<sup>25</sup>

Alvarez-Machain challenged his arrest, and moved to dismiss the indictment, claiming that the United States District Court lacked jurisdiction because the abduction violated the extradition treaty between the United States and Mexico.<sup>26</sup> Though the extradition treaty does not expressly prohibit the use of forcible abduction as a means of obtaining jurisdiction, the District Court agreed and dismissed the case holding that it lacked jurisdiction due to the treaty violation.<sup>27</sup> The District Court's decision was affirmed by the Ninth Circuit Court of Appeals<sup>28</sup> which relied on its recent decision in *United States v. Verdugo-Urquidez*.<sup>29</sup> The Ninth Circuit agreed that the remedy for the treaty violation would be the dismissal of the indictment and repatriation of Alvarez-Machain to Mexico.<sup>30</sup>

The United States government appealed the Ninth Circuit's decision to the Supreme Court and certiorari was granted.<sup>31</sup> The issue before the United States Supreme Court was whether a criminal defendant can challenge the

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21. *Id.*

22. *Alvarez-Machain*, 112 S. Ct. at 2190.

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

24. *Alvarez-Machain*, 112 S. Ct. at 2190.

25. *Caro-Quintero*, 745 F. Supp. at 609.

26. *Alvarez-Machain*, 112 S. Ct. at 2190.

27. *Caro-Quintero*, 745 F. Supp. at 613-14. The court held that because the United States acted unilaterally, without the participation or consent of the Mexican government, and the Mexican government has registered an official protest to these actions, the United States violated the extradition treaty by forcibly abducting Alvarez-Machain. The District Court distinguished other cases where forcible abduction was held to be a reasonable means for gaining jurisdiction by explaining that in those cases the acts of abduction were done without any authority from the United States Government. See *Ker*, 119 U.S. at 443.

28. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1467 (1991).

29. 939 F.2d 1341 (9th Cir. 1991) The court held that the forcible abduction of a Mexican national with the authorization or participation of the United States government violated the extradition treaty between the United States and Mexico.

30. *Alvarez-Machain*, 946 F.2d at 1467.

31. *Alvarez-Machain*, 112 S. Ct. at 2188.

jurisdiction of United States' courts on the grounds that he was forcibly abducted to the United States from a nation with which the United States has an extradition treaty.<sup>32</sup> This precise issue had never before been addressed by the United States Supreme Court.

The Court, in a 6-3 decision delivered by Chief Justice Rehnquist, held that the extradition treaty did not prohibit forcible abductions as a means of bringing Mexican nationals to the United States for criminal prosecution.<sup>33</sup> The Court determined that because the language of the treaty does not expressly prohibit forcible kidnapping or forbid the United States or Mexico from bringing an individual from one country to the other for prosecution outside of the express terms of the treaty, forcible abduction does not impair the power of the court to try a person for a crime.<sup>34</sup> According to the Court's interpretation of the treaty, extradition is not the only way that one country can gain custody over a citizen of the other.<sup>35</sup> The Court relied on the fact that Mexico was aware that the United States approved the practice of forcible abduction established in the *Ker* case,<sup>36</sup> and that Mexico did not negotiate a provision in the treaty prohibiting such conduct, and preventing jurisdiction from being validly asserted under those circumstances.<sup>37</sup>

In reaching its decision in *Alvarez-Machain* the Court largely relied on the decision in *Ker v. Illinois*, which held that when an extradition treaty has not been invoked, a court may properly exercise jurisdiction even if the defendant's presence was procured by forcible abduction.<sup>38</sup>

In *Ker*, the defendant, Frederick J. Ker, challenged the jurisdiction of the United States to prosecute him on the ground that his presence was obtained by forcible abduction from Peru.<sup>39</sup> Though a warrant was drafted to extradite Ker, it was not presented by the messenger sent by the United States, who instead abducted him without United States government approval.<sup>40</sup> Ker argued that both his due process rights and the extradition treaty between the United States and Peru had been violated.<sup>41</sup> The Court disagreed, concluding that Ker did not suffer due process violations and the extradition treaty was not violated.<sup>42</sup> The Court reasoned that despite the manner utilized to bring him within the jurisdiction of the state of Illinois,

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32. *Id.* at 2189.

33. *Id.* at 2196.

34. *Id.* at 2193-96.

35. *Id.* at 2194.

36. *Ker*, 119 U.S. 436 (1886).

37. *Alvarez-Machain*, 112 S. Ct. at 2194.

38. *Ker*, 119 U.S. 436 (1886).

39. *Id.* at 438.

40. *Id.* at 438-39.

41. *Id.* at 439-40.

42. *Id.* at 436.

Ker is liable to answer for a crime against the laws of the state so long as there is a proper grand jury indictment and trial.<sup>43</sup>

In a dissenting opinion, Justice Stevens, joined by Justices Blackmun and O'Connor, differentiated the *Alvarez-Machain* issue from that decided in *Ker*.<sup>44</sup> The dissenters distinguished the abduction of Alvarez-Machain authorized by the United States government from the abduction of Ker carried out by a private kidnapper or bounty hunter without government involvement.<sup>45</sup>

Justice Stevens stated that *Alvarez-Machain*, "involves this country's [the United States] abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty."<sup>46</sup> The dissenters conclude that the United States' involvement in the kidnapping constitutes a flagrant violation of international law and a breach of our treaty obligations.<sup>47</sup>

## II. FORCIBLE ABDUCTION AND DUE PROCESS

The Court in *Alvarez-Machain* seemingly ignored the issue of whether Alvarez-Machain was deprived of his due process rights as a result of his forcible abduction. This issue was addressed in *Ker* and expanded on by later decisions.<sup>48</sup> In *Ker*, the United States Supreme Court discussed whether the forcible kidnapping of the defendant, outside the procedures set out in an extradition treaty, deprived the defendant of due process rights guaranteed in the Constitution.<sup>49</sup>

After charges were brought against Ker for larceny and embezzlement in 1883, he was forcibly kidnapped from Peru to stand trial.<sup>50</sup> During the trial, Ker presented a plea in abatement,<sup>51</sup> that he was kidnapped from Peru after the offenses were charged, and brought to the United States against his will.<sup>52</sup> In 1886, Frederick M. Ker was convicted of larceny and embezzlement in a state court of Illinois, and appealed the conviction.<sup>53</sup>

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43. *Id.* at 440.

44. *Alvarez-Machain*, 112 S. Ct. at 2197.

45. *Id.* at 2203.

46. *Id.* at 2197.

47. *Id.* at 2203.

48. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); and *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975).

49. *Ker*, 119 U.S. at 439-40.

50. *Id.* at 438.

51. *Id.* A plea in abatement in common pleading, is a plea which, without disputing the merits of the [prosecution's] claim, objects to the place, mode, or time of asserting it . . . A plea in abatement sets forth facts extrinsic to the merits which affect only the manner under which the action is sought to be prosecuted, and does not destroy the right of action but merely suspends or postpones its prosecution. BLACK'S LAW DICTIONARY 1151-52 (6th ed. 1990).

52. *Ker*, 119 U.S. at 438.

53. *Id.* at 436.

The abduction came about after a request had been made by Governor Hamilton of Illinois to the Secretary of State for a warrant requesting the extradition of Ker from the Executive of Peru.<sup>54</sup> The President of the United States issued the warrant directed to Henry G. Julian, as messenger, to receive Ker from the authorities of Peru in compliance with the extradition treaty between the two countries.<sup>55</sup>

Julian went to Peru, and, without presenting the warrant to the Peruvian government, forcibly, with violence, arrested Ker.<sup>56</sup> Julian placed Ker on a U.S. ship and brought him to Honolulu where he was forced onto another ship and brought to California.<sup>57</sup> Governor Hamilton made a requisition to the Governor of California for the delivery of Ker to Illinois as a fugitive from justice.<sup>58</sup> Ker was transferred to Cook County, Illinois, where he was held for trial.<sup>59</sup>

Ker argued in his pleading that from the time of his forcible arrest in Peru until his delivery to authorities in Cook County, he was refused any opportunity to communicate with any person or seek any legal advice.<sup>60</sup> However, the Court found that Ker's due process rights had not been violated because due process required only that the party: 1) be properly indicted by a grand jury in the state court, 2) have a fair trial, and 3) not be deprived of any rights he is lawfully entitled to during the trial.<sup>61</sup> The Court stated that unless there was some positive provision of the Constitution or of the laws of the United States that was violated in bringing him into court, there could not have been a due process violation.<sup>62</sup>

The Fourteenth Amendment of the United States Constitution requires "that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."<sup>63</sup> In the *Ker* decision, the Court stated that "mere irregularities in the manner in which [an individual is] brought into the custody of the law" does not constitute a violation of Fourteenth Amendment due process so as to require the dismissal of charges.<sup>64</sup> This narrow reading of the Fourteenth

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54. *Id.*

55. *Id.*

56. *Id.* at 438-39.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 439.

61. *Id.* at 440.

62. *Id.*

63. U.S. CONST. amend. XIV, § 1.

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

Amendment has been greatly altered and expanded by later court decisions.<sup>65</sup>

### A. *Outrageous Conduct Exception*

In the 1974 case of *United States v. Toscanino*,<sup>66</sup> the United States Court of Appeals for the Second Circuit identified the issue by stating, "in an era marked by a sharp increase in kidnapping activities, both here and abroad, we face the question . . . of whether a federal court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges here."<sup>67</sup> The court stated that the requirement of due process to obtain a conviction extends to the pretrial conduct of law enforcement authorities.<sup>68</sup> The court concluded that due process requires a court to divest itself of jurisdiction over a defendant when that person's presence was acquired "as the result of the government's deliberate unnecessary and unreasonable invasion of the accused's constitutional rights."<sup>69</sup>

In February, 1973, a citizen of Italy, Francisco Toscanino, and four others were charged with conspiracy to import narcotics into the United States.<sup>70</sup> Toscanino alleged that in January, 1973 he was lured from his home in Montevideo, Uruguay by a telephone call from an Uruguayan police officer.<sup>71</sup> Toscanino and his wife went to a deserted bowling alley and he was attacked by seven men, knocked unconscious with a gun and thrown into the rear seat of a car.<sup>72</sup> Later, Toscanino was brought to Brasilia where he was tortured and interrogated for seventeen days.<sup>73</sup> The United States government was aware of the interrogation and arrested Toscanino when he was brought to New York at the end of January, 1973.<sup>74</sup> Toscanino was convicted at trial for conspiracy to import and distribute narcotics.<sup>75</sup> He appealed the decision and the Second Circuit Court of Appeals remanded the case for an evidentiary hearing because the defendant had not sufficiently established that he was abducted by or at the direction of United States

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65. See *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975).

66. 500 F.2d 267 (2d Cir. 1974).

67. *Id.* at 271.

68. *Id.* at 274.

69. *Id.* at 275.

70. *Id.* at 268.

71. *Id.* at 269.

72. *Id.*

73. *Id.* at 270.

74. *Id.*

75. *Id.* at 267.



officials.<sup>76</sup> The court further stated that if Toscanino could establish that United States officials were behind the kidnapping, the case should be dismissed for lack of due process because, "where suppression of evidence will not suffice [to meet due process requirements] . . . the government should be denied the right to exploit its own illegal conduct, . . . and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the government's exploitation of its own misconduct."<sup>77</sup> By this, the court is saying that the government cannot take advantage of its illegal method of bringing an individual to the United States. Therefore to prevent its exploitation of the illegally obtained individual, jurisdiction is deemed improper and the individual should be returned to his country.

In reaching its decision the Second Circuit analyzed the decisions in *Ker*, as well as the 1952 case of *Frisbie v. Collins*,<sup>78</sup> stating that under the "*Ker-Frisbie Rule*" (which says forcible abduction does not render jurisdiction invalid), due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant.<sup>79</sup> The court chose not to apply this narrow interpretation of due process because in the twenty-two years between *Frisbie* and *Toscanino* the Supreme Court had expanded its interpretation of due process so it is no longer limited to just the guarantee of a fair trial.<sup>80</sup> The term due process has been extended to "bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial."<sup>81</sup> The expanded interpretation of due process developed in an effort to deter illegal police conduct by barring the government from directly utilizing the fruits of its own lawlessness.<sup>82</sup>

On remand, Toscanino alleged that he was abducted from his home by Uruguarian police, and turned over to Brazilian police.<sup>83</sup> Toscanino alleges he was sedated and flown to the United States where DEA agents arrested

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76. *Toscanino*, 500 F.2d at 281.

77. *Id.* at 275.

78. 342 U.S. 519 (1952) in which the Supreme Court relied on the *Ker* ruling to find that a defendant's due process rights were not violated when he was forcibly abducted in Chicago, Illinois and brought to Michigan for criminal prosecution.

79. *Toscanino*, 500 F.2d at 272.

80. *Id.* See also *Silverman v. United States*, 365 U.S. 505 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Russell*, 411 U.S. 423 (1973).

81. *Id.* (citing *United States v. Russell*, 411 U.S. 423, 430-31 (1973); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Wong Sun v. United States*, 371 U.S. 643 (1963); and *Silverman v. United States*, 365 U.S. 505 (1961)).

82. *Toscanino*, 500 F.2d at 272; see also *United States v. Archer*, 486 F.2d 670, 674-75 (2d Cir. 1973) in which the court stated that, "the court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. The aid is denied despite the defendant's wrong . . . to maintain respect for law."

83. *United States v. Toscanino*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

him.<sup>84</sup> The court found that, assuming all allegations made by Toscanino were true, there was no claim of United States participation in the abduction or that it was carried out at the direction of United States officials.<sup>85</sup> The court denied Toscanino's motion to vacate the judgment of conviction and to dismiss the indictment on jurisdictional grounds.<sup>86</sup>

The exception to the Ker-Frisbie ruling raised in *Toscanino* was revisited shortly thereafter in *United States ex rel. Lujan v. Gengler*.<sup>87</sup> In July, 1973, defendant Lujan was indicted for conspiracy to import and distribute large quantities of heroin.<sup>88</sup> The warrant for Lujan's arrest called for any special agent of the DEA, United States Marshal or Deputy Marshal to bring him before the District Court for the Eastern District of New York.<sup>89</sup> This warrant was enforced when he was taken into custody in October, 1973, by Bolivian police acting as paid agents of the United States.<sup>90</sup> He was held for a week and was not permitted to contact his embassy (Argentina), a lawyer or his family.<sup>91</sup> Lujan was then brought from Bolivia to New York where he was formally arrested by federal agents.<sup>92</sup>

Following the *Toscanino* decision, Lujan challenged his being brought to the United States via forcible abduction on due process grounds.<sup>93</sup> The court reviewed its decision in *Toscanino* and explained that it did not eviscerate the *Ker-Frisbie* rule, but merely expanded due process to protect individuals brought to the United States from abroad by the use of torture, brutality and similar outrageous conduct.<sup>94</sup> The *Toscanino* ruling should not be interpreted to mean that entry into the United States by any irregular circumstances renders jurisdiction improper.<sup>95</sup> Therefore, the decision in *Lujan* limited the *Toscanino* rule to cases where the abduction by United States officials was accompanied by outrageous conduct.<sup>96</sup> The court explained that outrageous conduct is defined as, "that which offends those canons of decency and fairness which express the notions of justice of English-speaking people, to shock the conscience, and to offend a sense of justice."<sup>97</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. 510 F.2d 62 (1975).

88. *Id.* at 63.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 64.

95. *Id.*

96. *Id.*

97. *Id.* at 65. (citing *Rochin v. California*, 342 U.S. 165, 172-173 (1952)).

This outrageous conduct exception to the *Ker-Frisbie* rule was further explained as applying to situations where the conduct of United States law enforcement agents is so outrageous that due process principles would bar the government from invoking judicial processes to obtain a conviction.<sup>98</sup> This means that where the government uses outrageous conduct in apprehending an individual, jurisdiction over the individual is invalid and the government is prevented from gaining the benefit of their illegal conduct through judicial processes (grand jury indictments and fair trials) which the government could hide behind under the *Ker-Frisbie* rule. The *Lujan* court stated that the *Ker-Frisbie* doctrine did not prevent judicial scrutiny of government conduct which is outrageous and reprehensible.<sup>99</sup> The court explained, using language from the *Toscanino* decision, that “[a]ny other approach...would be inconsistent with cases refusing to permit the government to benefit from illegal police conduct in obtaining evidence.”<sup>100</sup>

The outrageous conduct exception to the *Ker-Frisbie* rule was again raised a year later in *United States v. Marzano*.<sup>101</sup> Pasquale Charles Marzano and his co-defendant Luigi Michael DiFonzo argue that their forcible abduction from the British West Indies in October, 1974 violated their due process rights.<sup>102</sup> The defendants were indicted for stealing approximately 4.3 million dollars from the headquarters of the Purolator Company in Chicago.<sup>103</sup> The F.B.I. located them on Grand Cayman Island in the British West Indies and contacted them.<sup>104</sup> The defendants met with agents of the F.B.I. and they boarded a plane for Miami when asked to do so by a local police officer.<sup>105</sup> The defendants did not resist boarding the flight and the agents did not actively involve themselves in the process of returning them to the United States.<sup>106</sup> F.B.I. agents arrested Marzano and DiFonzo when they arrived in Miami.<sup>107</sup>

The court in *Marzano* distinguished *Toscanino* with regard to the outrageous conduct used in the abduction of *Toscanino*.<sup>108</sup> Marzano was asked by Detective Superintendent Derrick Tricker, a Grand Cayman police officer, to board the plane going to Miami.<sup>109</sup> Marzano did not resist boarding the plane and the FBI was not actively involved in his return to the

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98. *Id.*

99. *Id.* at 64.

100. *Id.* (citing *Toscanino*, 500 F.2d at 272).

101. 388 F. Supp. 906 (N.D. Ill. 1975).

102. *Id.* at 907.

103. *Id.*

104. *Id.*

105. *Id.* at 907.

106. *Id.*

107. *Id.* at 906.

108. *Id.* at 909.

109. *Id.* at 907.

United States.<sup>110</sup> No force was used whatsoever.<sup>111</sup> By contrast, Toscanino was knocked unconscious with a gun, bound and blindfolded, and thrown into the rear seat of a car.<sup>112</sup> He was tortured, and denied sleep and nourishment for days before being flown to New York.<sup>113</sup> Further, Toscanino asserted that the United States government was aware of this conduct.<sup>114</sup>

The court in *Marzano* found no due process violations. The court held there was no outrageous conduct involved in Marzano's return to the United States.<sup>115</sup> The court, however, reiterated that whenever a foreign national is abducted or kidnapped from outside the United States and is forcibly brought into this country by United States agents using means of torture, brutality or similar physical abuse, the federal court acquires no jurisdiction over him because of a violation of due process.<sup>116</sup> The court further stated that the *Ker-Frisbie* rule is still applicable in the determination of a court's jurisdiction over defendants who have been returned to the United States against their will.<sup>117</sup> The *Toscanino* decision only applies in cases where, "an egregious factual situation involving torture, brutality, or some form of official protest to the violation of an extradition treaty by a foreign government."<sup>118</sup>

#### B. Applicability of Outrageous Conduct Exception to Alvarez-Machain

The question for the *Alvarez-Machain* Court, if they had adopted the *Toscanino-Lujan* rule, would be one of degree. If those who kidnapped Humberto Alvarez-Machain acted with outrageous conduct, the United States Court would not have proper jurisdiction over Alvarez-Machain because his due process rights would have been violated. The circumstances of the abduction of Alvarez-Machain are as follows: five or six armed men burst into Dr. Alvarez-Machain's office.<sup>119</sup> One placed a gun to his head telling him to cooperate or be shot.<sup>120</sup> He was taken from his office to a house in Guadalajara.<sup>121</sup> When he exited the car one of the men hit him in the stomach.<sup>122</sup> He was forced to lay face down on the floor in the house for

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110. *Id.* at 908.

111. *Id.*

112. *Id.* at 910.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 910.

117. *Id.*

118. *Id.*

119. *Caro-Quintero*, 745 F. Supp. at 605.

120. *Id.*

121. *Id.*

122. *Id.*

two to three hours.<sup>123</sup> Alvarez-Machain alleged that he also was shocked six or seven times and injected twice with a substance that made him feel dizzy.<sup>124</sup> Later he was forced on a plane and flown to El Paso, Texas.<sup>125</sup> In addressing these allegation, the District Court found that these acts, if true, "do not constitute acts of such barbarism as to warrant dismissal of the indictments."<sup>126</sup> However, this author believes that the nature and extent of the abuse inflicted on Alvarez-Machain was outrageous and comparable to that inflicted on Toscanino, and, as it was done with the knowledge and agreement of the United States government, it should have been found to be a due process violation.

Currently, only the Second Circuit adheres to the *Toscanino-Lujan* exception to the *Ker-Frisbie* rule.<sup>127</sup> The Second Circuit rule has followed the line of decisions expanding due process protection to keep states from exercising jurisdiction gained through an indisputably illegal act.<sup>128</sup> If the United States Supreme Court adopted the *Toscanino-Lujan* rule it would increase the protection of individuals from abusive or outrageous conduct by United States law enforcement individuals. The United States government would either have to follow procedural guidelines expressed in extradition treaties, or at least not act outrageously when forcibly bringing individuals to the United States for prosecution. The limitation is minor, only protecting those being taken into custody from outrageous conduct by the United States Government or its agent. This safeguard is both logical and necessary to protect both individuals being taken into custody from abuse, and the integrity of the United States in the international arena.

### III. INTERNATIONAL LAW AND THE LAW OF TREATIES

The law of treaties serves a similar function in international law as does the law of contracts in municipal or national law.<sup>129</sup> It sets forth rules regarding the making, effect, amendment, invalidity, and termination of agreements among countries.<sup>130</sup>

Article 77 of the Vienna Convention on the Law of Treaties states, "Every treaty in force is binding upon the parties to it and must be

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 605.

127. *Lujan*, 510 F.2d at 65 ("the courts of other circuits have continued to adhere to the *Ker-Frisbie* rule").

128. *Toscanino*, 500 F.2d at 272.

129. Janis, *supra* note 1, at 14.

130. *Id.* at 14-15.

performed by them in good faith."<sup>131</sup> The Vienna Convention is largely a codification of the existing international law of treaties.<sup>132</sup> Though the United States is not formally a party to the convention, the U.S. Department of State recognizes it as the authoritative guide to current treaty law and practice.<sup>133</sup> In addition to requiring Parties to perform their treaty obligations in good faith, the Vienna Convention states that a, "State is obliged to refrain from acts which would defeat [the treaty's] object and purpose."<sup>134</sup>

### A. Good Faith and Treaty Obligations

Good faith encompasses honesty of purpose, freedom from intention to defraud, and being faithful to one's duty or obligation.<sup>135</sup> This "duty or obligation" in the Extradition Treaty stems from the purpose of the treaty as stated in the preamble: "The Government of the United States and the Government of Mexico desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."<sup>136</sup>

The United States courts may not acquire jurisdiction over an individual wanted for prosecution in the United States by means of a treaty violation.<sup>137</sup> It follows then that the appropriate inquiry into the validity of a court's jurisdiction in cases such as *Alvarez-Machain* is whether there has been a violation of the extradition treaty.<sup>138</sup>

Extradition treaty provisions are included to protect a nation's sovereignty.<sup>139</sup> If a nation determines its sovereign interests have been violated and files an official protest, redress from the violating nation may be required.<sup>140</sup> Courts have repeatedly held that a violation of an extradition treaty and international law can be raised as a defense only if the nation

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131. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 AM. J. INTL. L. 875, 884 (1969) (drafted in 1966; signed and adopted at Vienna May 23, 1969; entered into force January 27, 1980, not in force for the United States. The Vienna Convention is the international law "Treaty on Treaties.")

132. Janis, *supra* note 1, at 15 explaining that the Vienna Convention is largely a codification of customary international law. Custom has developed as a source of law through the consideration of international state practices as implicit consent to the creation and application of international legal rules.

133. *Id.*

134. Vienna Convention, *supra* note 130.

135. BLACK'S LAW DICTIONARY 477 (6th ed. 1990).

136. Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, Mex.-U.S., 31 U.S.T. 5059, 5061.

137. *United States v. Sobell*, 244 F.2d 520, 524 (2d Cir. 1957), *cert denied*, 355 U.S. 873 (1957), *reh'g denied*, 355 U.S. 920 (1958).

138. *Id.*

139. *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988).

140. *Id.*

where the individual was taken from objected to the means of gaining the person's presence in the United States.<sup>141</sup>

In *United States v. Zabaneh*,<sup>142</sup> Angel John Zabaneh, a citizen of Belize, was forcibly abducted from Guatemala in November, 1985, and taken to the United States to be prosecuted under a drug trafficking indictment.<sup>143</sup> The Fifth Circuit held that because neither Belize nor Guatemala objected to the abduction, Zabaneh could not successfully claim the extradition treaty was violated.<sup>144</sup> In the *Alvarez-Machain* case, the Mexican government formally demanded on at least two separate occasions that Alvarez-Machain be returned to Mexico.<sup>145</sup> Under the *Zabaneh* decision, and the decisions in many other cases, Alvarez-Machain should be allowed to raise the treaty violation as a defense because, as the court in *Zabaneh* explained, "[t]reaties are contracts between or among independent nations . . . [with] provisions . . . designed to protect the sovereign interests of nations, . . . [so] it is up to the offended nations to determine whether a violation of sovereign interests occurred and require redress."<sup>146</sup> When Mexico protested Alvarez-Machain's removal to the United States, it asserted such a violation of sovereign interests and, thus, the issue is a viable one for redress.

The Court in *Alvarez-Machain* held that there was not a treaty violation because the treaty does not expressly forbid forcible abduction.<sup>147</sup> In reaching this decision, the Court ignored customary international law, and the decisions of cases which state that when the Nation/party requested to extradite formally protests the abduction of its citizen, the violation of international law and the treaty may be raised as a defense to jurisdiction.<sup>148</sup> By analogy, because Mexico objected to the abduction on at least two occasions, international law and treaty violations were validly raised. The Majority decision in *Alvarez-Machain* disregarded these objections and the violations which flowed from them when it followed the *Ker-Frisbie* rule to determine that jurisdiction is valid despite the nullifying effect the decision has on the Extradition Treaty's effectiveness, as either country now may disregard the treaty and kidnap individual sought for prosecution.<sup>149</sup>

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141. See *United States v. Reed*, 639 F.2d 896, 902 (1981); *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989), cert. denied, 492 U.S. 921 (1989); *United States v. Lehder-Rivas*, 955 F.2d 1510, 1520 (11th Cir. 1992), cert. denied, 113 S. Ct. 347 (1992).

142. 837 F.2d 1249 (5th Cir. 1988).

143. *Id.* at 1252.

144. *Id.* at 1261.

145. *Alvarez-Machain*, 112 S. Ct. at 2197.

146. *Zabaneh*, 837 F.2d at 1261. See also *United States v. Kaufman*, 858 F.2d 994 (5th Cir. 1988); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981).

147. *Alvarez-Machain*, 112 S. Ct. at 2193.

148. See *Reed*, 639 F.2d at 902; *Zabaneh*, 837 F.2d at 1261; *Diwan*, 864 F.2d at 721; *Lehder-Rivas*, 955 F.2d at 1520.

149. *Alvarez-Machain*, 112 S. Ct. at 2198.

The good faith obligations inherent in treaty performance would dictate that the United States follow the terms it consented to upon ratifying the treaty.<sup>150</sup> The majority of the Supreme Court concluded that the actions by the United States were outside of the treaty and therefore not a violation.<sup>151</sup> This ignores the requirement that the United States fulfill its treaty agreements in good faith.

The United States-Mexico extradition treaty appears to be designed to cover the entire subject of extradition from the preamble, through the other Articles previously discussed.<sup>152</sup> It does this by covering the entire extradition process: listing the crimes extraditable, procedures for extradition, and the remedy a party to the agreement refuses to extradite.<sup>153</sup> The United States ratified the extradition treaty on May 4, 1979.<sup>154</sup> Therefore, The United States Government had a good faith duty to obtain Alvarez-Machain under the terms of the treaty. "The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage, that might result from a literal and unintended interpretation of the agreement between them."<sup>155</sup>

The Mexican government, on at least two occasions, complained of treaty violations and demanded Alvarez-Machain's return to Mexico.<sup>156</sup> Mexico's good faith performance of the terms of the treaty is shown by the expressed intent to prosecute Alvarez-Machain pursuant to Article Nine of the extradition treaty.<sup>157</sup> Article 23 of the treaty includes a clause that either Party to the Treaty can terminate the agreement by giving the other party six months notice of termination.<sup>158</sup> Otherwise, the treaty is a consensual, binding agreement which should be respected, making non-consensual extradition outside of its terms a violation. The remedy would be the repatriation of Alvarez-Machain.<sup>159</sup>

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150. Janis, *supra* note 1, at 25.

151. *Alvarez-Machain*, 112 S. Ct. at 2195.

152. *Id.* at 2198.

153. *Id.*

154. *Id.* at 2190.

155. 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 107 (1984).

156. *Alvarez-Machain*, 112 S. Ct. at 2197.

157. *Id.*

158. *Extradition Treaty Between the United States of America and the United Mexican States*, May 4, 1978, Mex.-U.S., 31 U.S.T. 5059, 5074.

159. Janis, *supra* note 1, at 9.





United States for criminal prosecution.<sup>168</sup> In the *Verdugo-Urquidez* decision the Ninth Circuit held that unless Mexico had the opportunity to exercise both options of Article Nine other means of extradition would violate the treaty.<sup>169</sup> The government's argument would render Article Nine a pointless formality because either party to the treaty could disregard the express extradition procedures and simply abduct the individual they seek to prosecute.<sup>170</sup>

Justice Stevens, in his dissenting opinion in *Alvarez-Machain*, explains that the Majority's decision makes a nullity of many Articles of the Extradition Treaty, in addition to Article Nine.<sup>171</sup> The United States argued that the Treaty is not exclusive, and permits forcible abduction, as the "requesting" state can disregard these discretionary articles and simply kidnap the individual sought for prosecution, because it does not expressly disallow it.<sup>172</sup> This reading of the Treaty, as explained in Justice Stevens' dissenting opinion, makes the following provisions useless: 1. sufficient evidence to grant extradition (Art. 3); 2. withholding extradition for political or military offenses (Art. 5); 3. withholding extradition when the person sought has already been tried (Art. 6); 4. withholding extradition when the statute of limitations for the crime has lapsed (Art. 7); 5. and granting the requested State discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8).<sup>173</sup>

The DEA and Mexican officials had formally negotiated for the extradition of Alvarez-Machain.<sup>174</sup> The DEA agents on behalf of the United States government refused to front any money needed for the extradition after Mexican authorities requested \$50,000 to cover the expenses of transporting Alvarez-Machain, though later the DEA offered a \$50,000 reward plus expenses for Alvarez-Machain's return to the United States.<sup>175</sup> Mexican officials attempted to meet with DEA agents again to negotiate the extradition, but this meeting was canceled by the DEA agents.<sup>176</sup> Alvarez-Machain was forcibly abducted without any further meetings between agents of the two countries.<sup>177</sup>

Under the provisions of Article Nine, when the extradition negotiations failed, Mexico was required to prosecute Alvarez-Machain in its own

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168. *Alvarez-Machain*, 112 S. Ct. at 2191; *Verdugo-Urquidez*, 939 F.2d at 1350.

169. *Verdugo-Urquidez*, 939 F.2d at 1350.

170. *Id.*

171. *Alvarez-Machain*, 112 S. Ct. at 2198.

172. *Id.*

173. *Id.*

174. *Caro-Quintero*, 745 F. Supp. at 602.

175. *Id.* at 602-03.

176. *Id.*

177. *Id.* at 603.

courts.<sup>178</sup> The forcible abduction of Alvarez-Machain authorized by the United States government prevented Mexico from performing its requirements under the second option of Article Nine. Because Mexico was prevented from exercising one of its options under Article Nine, the United States involvement in the abduction constituted a violation of the treaty.<sup>179</sup>

### CONCLUSION

Due process concerns have been greatly expanded by the United States Supreme Court since *Ker*. Protection from outrageous conduct by government authorities has become the cornerstone of due process interpretation. The *Second Circuit's Toscanino-Lujan* exception to the *Ker-Frisbie* rule, made abduction accompanied by outrageous conduct a violation of due process. The outrageous conduct exception dictates the dismissal of charges,<sup>180</sup> and protects this expanded due process purpose by ensuring that the government cannot take advantage of its own illegal conduct. This exception should be applied by the Supreme Court in the case at hand because it enforces those protections developed via the Court's many due process holdings.<sup>181</sup>

The fact that the United States entered into a consensual extradition treaty with Mexico demonstrates that the treaty is the sole means by which individuals wanted for prosecution in one of the countries should be obtained. International law, expressed by the Vienna Convention, dictates that the express terms of a treaty be interpreted in good faith.<sup>182</sup>

The acceptance of forcible abduction as a means of gaining Alvarez-Machain's presence in United States' courts, without regard for the extradition treaty, demonstrates bad faith performance of treaty obligations because a good faith interpretation of its terms would dictate following the procedural guidelines for extradition set forth in the treaty. Such bad faith performance accompanied by an express complaint by the Mexican government requires the return of Alvarez-Machain to Mexico because it invokes the treaty's procedures.

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178. Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, Mex.-U.S., 31 U.S.T. 5059, 5065.

179. *Verdugo-Urquidez*, 939 F.2d at 1350.

180. *Toscanino*, 500 F.2d 267 at 275.

181. See *Silverman v. United States*, 365 U.S. 505 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Russell*, 411 U.S. 423 (1973).

182. Vienna Convention, *supra* note 130, art. 31(1).

POSTSCRIPT: THE TRIAL OF ALVAREZ-MACHAIN

On December 2, 1992 the trial of Dr. Alvarez-Machain for his alleged participation in the torture and killing of Enrique Camarena began.<sup>183</sup> The United States government accused Alvarez-Machain and a co-defendant, Ruben Zuno Arce, of participating in a conspiracy to kidnap, torture and kill Camarena.<sup>184</sup>

On December 14, 1992 Judge Edward Rafeedie of the United States District Court decided that the evidence presented against Alvarez-Machain "had been based on hunches and the wildest speculation and had failed to support the charge that he had participated in the torture of" Camarena.<sup>185</sup> Judge Rafeedie "threw out" the charges against Alvarez-Machain based on this lack of evidence.<sup>186</sup> Following the dismissal Dr. Alvarez-Machain returned home to Guadalajara, Mexico.<sup>187</sup>

The district court opinion found that the United States had no evidence linking Dr. Alvarez-Machain to the murder of Camarena. The Supreme Court holding that the forcible abduction of an individual, in lieu of following the express provisions of an extradition treaty is an acceptable means of obtaining jurisdiction over a person wanted for prosecution in the United States, remains the law in the United States in such cases.

*Jonathan E. Katz*

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183. *Mexican Doctor Goes on Trial in Agent's Slaying*, N.Y. TIMES, Dec. 3, 1992, at A17.

184. *Id.*

185. Seth Mydans, *Judge Clear's Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

186. *Id.*

187. *Id.*