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RECENT DEVELOPMENTS

THE SUPREME COURT SANCTIONS TRANSBORDER KIDNAPPING IN *UNITED STATES v. ALVAREZ-MACHAIN*: DOES INTERNATIONAL LAW STILL MATTER?

*Steven M. Schneebaum**

When Enrique Camarena Salazar, a special agent of the United States Drug Enforcement Administration (DEA) was brutally murdered, apparently by the Mexican narcotics ring he was investigating, United States law enforcement officials were faced with a unique set of problems in apprehending his assassins. That the killing was especially sadistic and grisly[1] at once increased their frustration and strengthened their resolve to bring the perpetrators to justice in the United States.

One of those alleged to have played a crucial rule in the murder of Camarena was Humberto Alvarez-Machain. Alvarez, a medical doctor in the tradition of Josef Mengele, is said to have kept Camarena alive over a period of three days, during which he was mercilessly tortured and interrogated until at last he died.

Unable to obtain Alvarez by other means, the DEA arranged to have him abducted from his office in Guadalajara on April 2, 1990. He was flown to El Paso, Texas, where he was arrested. A grand jury in Los Angeles indicted him for his role in

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1. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

the Camarena murder.

Despite the United States-Mexico Extradition Treaty, signed in 1978,[2] there is no question that the treaty provisions were not invoked in the case of Alvarez. No formal request was presented, nor was any opportunity given to the Mexican Government to determine, within its discretion, whether to render the fugitive to the United States.[3]

Alvarez moved to dismiss the indictment on the grounds that his abduction violated the Extradition Treaty. The district court agreed and ordered that he be repatriated to Mexico.[4] The court held that it was without jurisdiction to try a defendant brought before it by virtue of an act in violation of a treaty binding on the United States, "the supreme law of the land" under Article VI of the Constitution.

The United States Court of Appeals for the Ninth Circuit affirmed the lower court's decision.[5] Basing its conclusion upon its holding in another case arising out of the same incident,[6] the appellate court found that forcible abductions violate at least the "purpose" — even if not the letter — of the United States-Mexico Extradition Treaty.[7] The Supreme Court granted certiorari[8] and reversed the Ninth Circuit's determination.[9] The Court found that the Treaty is not violated if one of its High Contracting Parties takes the law into its own hands, since it is silent as to such self-help measures as kidnapping, even if, as in the case at bar, the other Party protests promptly and firmly.[10]

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2. Treaty of Extradition, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

3. In the United States as well, while the judiciary may make preliminary determinations and recommendations, the decision whether to return a fugitive pursuant to a valid extradition request is ultimately for the Executive. 18 U.S.C. § 3193 (1988).

4. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

5. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

6. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992) (remanded in light of United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)). *See infra* notes 22, 37 & 39 and accompanying text.

7. *Alvarez-Machain*, 946 F.2d at 1467 (citing *Verdugo-Urquidez*, 939 F.2d at 1350).

8. United States v. Alvarez-Machain, 112 S. Ct. 857 (1992).

9. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

10. The Supreme Court noted that the Court of Appeals (United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991)) did not alter the district court's finding (United States v. Caro-Quintero, 745 F. Supp. 599, 608-09 (C.D. Cal. 1990)) that letters from the Mexican Government constituted an official protest. *Alvarez-Machain*, 112 S. Ct. at 2191. Mexico participated at all stages of the *Alvarez* litigation as *amicus curiae*, arguing strongly for the repatriation of its citizen for trial or other disposition in Mexico pending a valid extradition. Mexico has in fact tried, convicted, and incarcerated other individuals involved in the Camarena affair. *See, e.g.*, Brief for the United Mexican

The *Alvarez* decision, authored by the Chief Justice with three Justices dissenting,[11] is inconsistent with existing law. It has also already, in its brief life, shown itself not only to be bad foreign policy, but dangerous precedent. Read broadly enough, the *Alvarez* opinion could even be taken to call into question the landmark Supreme Court decision in *The Paquete Habana*,[12] which for nearly a century has been understood as enshrining customary international law in the common law of the United States.[13]

I.

The reasoning of the High Court in *Alvarez* is deceptively simple. It has long been the law that United States courts will not inquire into how criminal defendants have been brought before them.[14] That a defendant may have been abducted will not defeat jurisdiction, so long as the government itself has not acted illegally. The legality of government conduct, the Court held, is assessed by strict construction of any relevant treaty: here the United States-Mexico Extradition Treaty that the United States chose *not* to invoke. "If we conclude that the Treaty does not prohibit [Alvarez's] abduction," wrote Chief Justice Rehnquist, "the rule in *Ker* applies, and the [trial] court need not inquire as to how respondent came before it."[15]

The United States-Mexico Extradition Treaty nowhere contains the word "abduction" or any of its synonyms. The Chief Justice was unable to find in the Treaty text or in its negotiating history any contemplation of self-help remedies, and hence, any necessarily implied condemnation of them. He held that the Treaty lays down *one* way of procuring the international rendi-

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States as Amicus Curiae in Support of Granting Review, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

11. Justice Stevens wrote the dissenting opinion in which Justices Blackmun and O'Connor joined. *Alvarez-Machain*, 112 S. Ct. at 2197.

12. 175 U.S. 677 (1900).

13. *Id.* at 700. *See also* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) in which Chief Justice Marshall stated that "the court is bound by the law of nations which is part of the law of the land."

14. The cases usually cited for this proposition are Ker v. Illinois, 7 U.S. 436 (1886), and Frisbee v. Collins, 139 F.2d 464 (6th Cir. 1951), *rev'd*, 342 U.S. 519 (1952). It is often called the "Ker/Frisbee rule." *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1345 (9th Cir. 1991).

15. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992).

tion of a fugitive, but not necessarily the *only* way.[16]

Chief Justice Rehnquist admitted that the abduction may be "shocking," and that "it may be in violation of general international law principles."[17] But it is for the Executive, not the courts, he said, to construe international law. The job of the Supreme Court in *Alvarez*, according to the Chief Justice of the United States, was to interpret the Treaty and the Treaty alone — and given the silence of the Treaty, all else was for the political branches.

II.

Never since *The Paquete Habana*[18] — indeed, probably never since *Respublica v. de Longchamps*[19] — has the Supreme Court categorically refused to settle a dispute over international law when a "question of right depending upon it [was] duly presented for [its] determination."[20] The error of the Chief Justice was to attempt the construction of a treaty text hermetically sealed against all outside influences, including that of customary international law.[21]

It is well-established that United States courts incorporate custom and usage into contractual interpretation. For instance, a sales contract provides that A will deliver widgets to B, and that B will make payment to A within a stated interval. If B is concerned that A may fail to make delivery, his armed burglary of A's premises cannot meaningfully be considered consistent with the contract. It is still less lawful in the broader sense. If proven guilty, B has committed a criminal act, and he may also be liable to A in a civil action for trespass or conversion. Nor can B sue on the contract: he has acted inconsistently with it. And none of these conclusions requires that the parties expressly incorporate in their contract an agreement not to commit armed burglary against one another.

Similarly, to assess the lawfulness of international conduct, it is necessary to analyze treaties in the context of customary

16. *Id.* at 2196.
17. *Id.*
18. 175 U.S. 677 (1900).
19. 1 U.S. (1 Dall.) 111 (1784).
20. *The Paquete Habana*, 175 U.S. at 700.
21. Customary international law has been held to inspire interpretation of even the United States Constitution in appropriate cases. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981).

international law. International law does forbid the abduction of individuals by agents of foreign governments, at least when they occur without consent of the "host" state.[22] There is no shortage of support for this proposition, which is not of recent vintage; it was accepted as virtually self-evident thirty years ago when Israeli agents abducted Adolf Eichmann from Argentina to stand trial as a principal architect of the Holocaust.[23]

The operative legal rule here is an instance of a broader prohibition: a State may not perform acts of sovereignty (such as carrying out an arrest) within the territory of another State, without its consent. This rule, articulated in the *S.S. Lotus* case,[24] and elsewhere, has always been accepted without objection by the United States.[25] It is not overstating the point to place it near the very heart of the international legal order, since the juridical hierarchy is without power to condemn even unilateral acts of aggression or violations of *jus cogens* without respect for sovereignty as a basis.[26]

Whether these considerations of customary law should be seen as inspiring a correct interpretation of the United States-Mexico Extradition Treaty in *Alvarez*, or whether they are held directly controlling irrespective of the Treaty, is a dilemma that need not be resolved, since the result is the same on the facts presented. But the Court's conclusion is unequivocal: had there been no United States-Mexico Extradition Treaty, the Court would surely have found the kidnapping to be lawful.

This result, like the abduction itself, is "shocking."[27] That

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22. If the "host" state has consented, then it could be said that the kidnappers are agents of that state, which clearly has jurisdiction to conduct an arrest on its own territory. *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1352-55 (9th Cir. 1991).

23. *See* the Security Council Resolution condemning the Israeli action, U.N. SCOR 15th Sess., 868th mtg. at 1, U.N. Doc. S/4349 (1960).

24. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) Nos. 10, 18, 19 (Sept. 7).

25. *See generally* 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 128 (H. Lauterpacht ed., 7th ed. 1948); 1 CHARLES C. HYDE, INTERNATIONAL LAW § 200 (1945). *See also* Villareal v. Hammond, 74 F.2d 503, 506 (5th Cir. 1934) (granting extradition to Mexico of bounty hunters who violated Mexican sovereignty by kidnapping accused bond defaulter); Vaccaro v. Collier, 51 F.2d 17, 19 (4th Cir. 1931) (United States Government informer accused of kidnapping alleged drug smuggler from Canada to United States).

26. *Jus cogens* means those norms of international law that are most fundamental, and from which derogation is never permissible. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. j & k (1987). *See also id.* § 331(2)(B) & cmt. e.

27. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2201 (1992) (Stevens, J., dissenting).

Alvarez may well be guilty of the most unspeakable of acts is not relevant either to the legality of his apprehension or to the broader question of the relevance of customary international law.[28]

III.

Already there has been a firestorm of criticism of the *Alvarez* decision. Much of it comes from nations friendly to the United States, which have habitually cooperated with the United States government in matters of law enforcement.[29]

Not only must United States extradition treaty partners feel unsafe at the prospect that the United States reserves the unilateral right to abduct their citizens, but Americans should feel some unease as well. If there is no law against United States-sponsored vigilantes raiding the territories of nations with which we are at peace to apprehend persons accused of crimes, there can be no such norm against foreign states hiring kidnappers to do the same on domestic soil. It is likely that such an infringement on United States sovereignty would be seen by the United States Government as an offense of the highest magnitude. But after *Alvarez*, the United States would have no right to rely on anything more than diplomatic means to redress such a perceived wrong.

Yet the specter of generalized lawlessness — however abhorrent to those who believe that international law still does matter — is not the principal reason why the *Alvarez* decision deserves round condemnation and prompt reversal. The reason is, rather, the Chief Justice's repudiation of centuries of decisions holding that customary international law is part of the law of the United States. Lest there be any doubt that this is exactly what happened in *Alvarez*, one need only consider subsequent developments in that very case.

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28. *See id.* at 2205 (Stevens, J., dissenting) ("Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold.") (Citations omitted).

29. At their meeting in Madrid in July 1992, the Presidents of Latin American countries passed a resolution urging the U.N. General Assembly to seek an advisory opinion from the International Court of Justice, condemning the *Alvarez-Machain* decision. *See Conclusiones de la II Cumbre Iberoamericana*, EL NACIONAL (Mex.), July 25, 1992, at 18.

IV.

The Supreme Court remanded *Alvarez*, "for further proceedings consistent with this opinion,"[30] on June 15, 1992. After the remand, counsel for Alvarez requested leave to file a brief on the issues of customary international law discussed in this Note. The Ninth Circuit, tersely and ominously, denied permission.[31]

On July 27, 1992, the Ninth Circuit found the customary law issues foreclosed by the Supreme Court decision.[32] The Ninth Circuit based this on its understanding that the High Court had held that, since there was no Treaty violation, "[t]he fact of respondent's forcible abduction does not *therefore* prohibit his trial in a court in the United States for violations of the criminal laws of the United States."[33] The Treaty is all: there is no room for custom. Although the issue of custom was not *addressed* in the Supreme Court, the Ninth Circuit found it to have been *decided* by omission. The other shoe has dropped. That hundreds of years of precedent are being ignored has attracted no attention from the Chief Justice or from the Circuit on remand.

It will not suffice to say that the line of cases featuring *The Paquete Habana* is not implicated because, by its own terms, that decision establishes reliance on customary international law only when there is no controlling executive or legislative act.[34] It has long been settled that the political branches may override international law:[35] they may, for example, cause the United States to violate a treaty.[36] However, in such a case, the treaty

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

31. United States v. Alvarez-Machain, No. 90-50459, 1992 WL 172994 (9th Cir. July 27, 1992).

32. *Id.*

33. *Id.* at *2 (emphasis added) (quoting United States v. Alvarez-Machain, 112 S. Ct. 2188 at 2196).

34. The Paquete Habana, 175 U.S. 677, 708 (1900). In that case, the issue was whether a presidential proclamation authorizing the seizure of vessels as prize during the Spanish-American War was interpreted and applied in a manner consistent with "the law of nations."

35. The Courts will not readily or easily find Congress to have acted outside international law, but they will do so when the intention of the legislature is clearly expressed. *See* Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

36. *See, e.g.*, Goldwater v. Carter, 444 U.S. 966 (1979). Holding that the issue was not ripe for judicial review, the Supreme Court dismissed the suit of several members of Congress who claimed that President Carter's unilateral termination of the 1954 mutual defense treaty with Taiwan (Mutual Defense Treaty, Dec. 2, 1954, U.S.-Taiwan, 6 U.S.T. 433) violated their legislative right to be consulted. That the U.S. was at least arguably in breach of that treaty was not sufficient to cause the Court to consider reversal of the

still binds the nation internationally, and the breach may entitle other parties to an international remedy, even though as a matter of United States domestic law, the later superseding act will govern.

But here, the very point is that there has been no executive or legislative enactment to displace the governing customary law. Transborder kidnapping by the agents of a state is prohibited by that law, and the Supreme Court itself held in *Alvarez* that the political branches have done nothing to neutralize the normative force of international custom. Thus, if *The Paquete Habana* lives — if the incorporation of customary international law into the domestic law of the United States has survived — then one would expect this to be the very case in which it would be invoked.

V.

The notion that this venerable line of cases and this tradition of respect for customary international law have been undone by the Chief Justice's silence in *Alvarez* will soon be tested in another case deriving from the same Camarena affair. This is the matter of Rene Martin Verdugo-Urquidez, also alleged to have had a hand in the murder of the DEA agent.

Unlike Alvarez, Verdugo was actually tried and convicted for Camarena's murder. His motion to dismiss the indictment was denied by the trial court,[37] which held that under *Ker-Frisbee*,[38] it did not matter whether Verdugo had been kidnapped by United States agents in Mexico: jurisdiction to try him derived from his physical presence in California however procured.

The Ninth Circuit vacated the conviction, and remanded the case for an evidentiary hearing on whether in fact the United States authorized or sponsored Verdugo's abduction.[39] If this were the case, then *Ker* would not apply. Yet the Ninth Circuit's *Verdugo* holding was finally grounded on construction of the United States-Mexico Extradition Treaty:

> Although the principle of *pacta sunt servanda* (agreements must be obeyed) has not always been scrupulously followed in the affairs of this and other nations, if we are to see

act.

37. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991).
38. *See supra* note 14 and accompanying text.
39. *Verdugo-Urquidez*, 939 F.2d at 1362.

> the emergence of a "new world order" in which the use of force is to be subject to the rule of law, we must begin by holding our own government to its fundamental legal commitments.[40]

This reasoning — powerful, correct, planted firmly in the mainstream of American jurisprudence, and implicitly recognizing customary international law as the rule of construction of the treaty — could not survive the radical blast of *Alvarez*. On June 22, 1992, the Supreme Court granted certiorari in *Verdugo*,[41] vacated the reported decision, and remanded it to the Ninth Circuit "for further consideration in light of" the decision in the *Alvarez* case.[42]

The Panel, consisting of Circuit Judges Browning, D.W. Nelson, and Reinhardt has set a briefing schedule, with oral argument to be held probably late in the autumn. It seems likely that another petition for certiorari will ensue, however the Appeals Court decides Verdugo's fate.

VI.

The development of human rights law as law applicable by courts in the United States, which has occurred since the landmark decision of the Second Circuit in *Filartiga v. Pena-Irala*,[43] depends upon a single proposition that no advocate or judge has ever appeared to doubt: that customary international law, like treaty law, is part of the law of this land, and that, while its contents may occasionally be difficult to ascertain, when it is clear and precise, it has the same normative force and juridical dignity as principles of the common law.

In *Alvarez*, the Supreme Court has brought the validity of this principle into question. Borrowing the term from Mr. Justice Story,[44] Justice Stevens in dissent called the decision "monstrous."[45] It is to be hoped that the Ninth Circuit and the Supreme Court will seize the opportunity presented by *Verdugo* to limit the jurisprudential damage that has been wrought, and incidentally to restore the image of the United States as a nation that takes international law seriously.

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40. *Id.*

41. United States v. Verdugo-Urquidez, 112 S. Ct. 2986 (1992).

42. *Id.*

43. 630 F.2d 876 (2d Cir. 1980).

44. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2201-02 (1992) (Stevens, J., dissenting) (quoting The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824)).

45. *Id.* at 2206.