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# Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad

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# Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad

By Jimmy Gurulé\*

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## I. INTRODUCTION

In *United States v. Alvarez-Machain*,<sup>1</sup> the United States Supreme Court in reversing the U.S. Court of Appeals for the Ninth Circuit<sup>2</sup> held that the non-consensual abduction of a Mexican citizen from Mexican territory by U.S. law enforcement officers did not violate the United States-Mexico extradition treaty.<sup>3</sup> In applying the *Ker-Frisbie* doctrine,<sup>4</sup> the Supreme Court reaffirmed the long-standing principle that jurisdiction over the defendant is not impaired when the defendant is forcibly abducted and brought before the court.<sup>5</sup>

The *Alvarez-Machain* decision has sparked a firestorm of international controversy. Foreign governments throughout Latin America, as well as the government of Canada, have denounced it.<sup>6</sup> The opinion has also been widely criticized by the media and the academic legal community as sanctioning government-sponsored international kidnapping.<sup>7</sup> Members of Congress have further expressed their disdain over the Supreme Court ruling, and legislation has been introduced that would effectively overturn the result.<sup>8</sup> The *Alvarez-*

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1. 112 S. Ct. 2188 (1992).

2. 946 F.2d 1466 (9th Cir. 1991).

3. 112 S. Ct. at 2190; see Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

4. See *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952), *reh'g denied*, 343 U.S. 937 (1952).

5. 112 S. Ct. at 2192-93.

6. The Presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay issued a declaration on June 26, 1992, expressing their concern with the decision and requesting that the Inter-American Juridical Committee of the Organization of American States issue an opinion on the international juridical validity of the *Alvarez-Machain* decision. In addition, on June 15, 1992, the government of Colombia issued a statement that the *Alvarez-Machain* decision imperils the legal stability of all treaties. The Canadian Minister of External Affairs in a statement before the Canadian Parliament stated that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act. See *Kidnapping Suspects Abroad: Hearings Before the Civil and Constitutional Rights Subcomm. of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 111-12, 114 (1992) (statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Dep't of State) [hereinafter *Kidnapping Suspects Abroad: Hearings*].

7. Tony Mauro, *Foreign Kidnapping Upheld: Ruling A Global "Hunting License,"* USA TODAY, June 16, 1992, at A1; Herman Schwartz, *The Supreme Court's Insult to Law-Abiding Countries*, L.A. TIMES, June 21, 1992, at M1; *Court: U.S. Can Kidnap Foreigners*, PHIL. INQUIRER, June 16, 1992, at A1; see also Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 150 (1991); Andreas F. Lowenfeld, *Still More on Kidnapping*, 85 AM. J. INT'L L. 655 (1991).

8. The House Judiciary Subcommittee on Civil and Constitutional Rights held hearings on the case one week after it was decided. Under a bill sponsored by former Congressman Leon Panetta, which was entitled the International Kidnapping and Extradition Treaty Enforcement Act of 1992, U.S. courts would be divested of jurisdiction over a defendant forcibly abducted from a foreign country that has in effect an extradition treaty

*Machain* decision, however, has been grossly distorted by its detractors. *Alvarez-Machain* does not, as its critics maintain, give federal law enforcement officers a "green light" or "license" to kidnap foreign fugitives anywhere in the world. Moreover, the Supreme Court did not hold that the United States may ignore and violate with impunity the express terms of an extradition treaty to which it is a party, nor did the Court sanction the violation of customary international law.

In *Alvarez-Machain*, the Supreme Court analyzed the extradition treaty between the United States and Mexico and held that the forcible apprehension of a foreign fugitive from the territory of Mexico was not prohibited by the express terms of the treaty.<sup>9</sup> The Court expressly rejected respondent *Alvarez-Machain's* argument that the treaty provides the exclusive means by which a defendant can be brought within the jurisdiction of the United States. Holding that the forcible abduction of *Alvarez-Machain* did not violate the extradition treaty, the Court stressed that the *Ker-Frisbie* doctrine is therefore controlling, and "the Court need not inquire as to how respondent came before it."<sup>10</sup>

The *Alvarez-Machain* case, however, raises more than simply an issue of treaty construction and interpretation. Rather, the forcible abduction of a foreign national from foreign soil by U.S. law enforcement agents raises several complex international legal issues and policy questions. First, to what extent may the United States resort to self-help to apprehend international drug kingpins, state-sponsored terrorists, and organized crime figures that threaten the sovereignty and domestic security of the United States? Second, to what extent is unilateral action limited or prohibited by customary international law? Moreover, what recourse, if any, is afforded the United States when the foreign government refuses to extradite or prosecute international criminals because it either fears terrorist reprisals<sup>11</sup> or has

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with the United States, absent the consent of the foreign sovereign. See H.R. 5565, 102d Cong., 2d Sess. 101-02 (1992).

The American Bar Association (ABA) House of Delegates adopted a recommendation that federal and state law enforcement authorities should "fully respect international law" when dealing with the rendition of fugitives from foreign countries by extradition or otherwise. The resolution was backed by the Criminal Justice and International Law and Practice Sections of the ABA in reaction to *Alvarez-Machain*. *Extradition*, 52 CRIM. L. REP. (BNA) 1431 (Feb. 17, 1993).

9. 112 S. Ct. at 2193-95.

10. *Id.* at 2193.

11. Pablo Escobar, the former head of the infamous Medellin Cartel, is believed to have been responsible for the assassination of Colombian Justice Minister Rodrigo Lara-Bonilla on April 30, 1984, in retaliation for stepped-up law enforcement efforts against the

determined that cooperation with the United States would not be in its best political interest?<sup>12</sup> Must the United States simply sit idly by and permit international criminals to go free? Finally, if the foreign state fails to prosecute or extradite and, in the more egregious case, aids and abets the international terrorists by providing a sanctuary from prosecution, is the asylum state in violation of the internationally imposed duty to prosecute and punish criminal offenders within its territory as well as the duty to protect a state's nationals within its border?

The facts surrounding the *Alvarez-Machain* case, including the kidnapping and sadistic torture-murder of Special Agent Enrique "Kiki" Camarena-Salazar of the U.S. Drug Enforcement Administration (DEA) abroad, the dismal lack of cooperation by the Mexican government to bring Camarena's assailants to justice, coupled with evidence of complicity by high-level Mexican government officials in Camarena's murder, make a compelling case for extraordinary rendition under narrowly defined circumstances. Part II of this Article will

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Medellin Cartel. See ELAINE SHANNON, *DESPERADOS-LATIN DRUG LORDS, U.S. LAWYERS, AND THE WAR AMERICA CAN'T WIN* 138-76 (1988). In August 1992, Escobar was indicted in the Eastern District of New York for the killing of 110 passengers, including two Americans, stemming from the 1989 bombing of an Avianca Airlines jetliner. *United States v. Pablo Escobar*, No. CR91-1285(s) (E.D.N.Y. Aug. 13, 1992). Robert C. Bonner, who served as the Administrator of the DEA from 1990 to 1993, stated that Escobar's motivation may have been to flex the drug cartel's muscle. "It may have been a retaliation against the Colombian government, an attempt to show them who's boss," he noted. Robert Davis & Bruce Frankel, *Terrorism Added To Escobar's List*, USA TODAY, Aug. 14, 1992, at 3A.

Escobar was indicted in 7 cities, including Miami, Los Angeles, and San Francisco. He was also indicted in Louisiana for the murder of DEA informant Barry Seal. See U.S. DEP'T OF JUSTICE, *DRUG ENFORCEMENT ADMINISTRATION, TOP COLOMBIAN COCAINE VIOLATORS* 14 (1991). Colombian officials refused all requests for Escobar's extradition or surrender to the United States. Escobar escaped from prison in Colombia after bribing a military officer and was recently killed in a firefight with Colombian military police. See Robert D. McFadden, *Head of Medellin Cocaine Cartel is Killed by Troops in Colombia*, N.Y. TIMES, Dec. 3, 1993, at A1.

12. The Camarena case has been a continuing source of embarrassment to the Mexican government. To date, 22 individuals have been indicted for their participation in the kidnapping and murder of DEA Special Agent Camarena, including the former Director of the Mexican Federal Police and the head of Mexican Interpol. *United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (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); *High-Level Mexican Ex-Officials Indicted in DEA Agent's Death*, WASH. POST, Feb. 1, 1990, at A5 [hereinafter *High-Level Mexican Ex-Officials*]. This author believes that the prosecution of high-level Mexican government officials for their participation in the Camarena murder and involvement in narcotics trafficking would be politically embarrassing to the Mexican government. Consequently, there is a strong disincentive for Mexico to agree to the extradition of any Mexican nationals to the United States for prosecution.

discuss the *Alvarez-Machain* decision. Part III will examine the general duty imposed on a state under international law to act with due diligence to prevent the commission of acts of terrorism as well as other acts of violence directed against foreign nationals within the jurisdiction of the asylum state. Part IV will analyze the restraints on the use of force extraterritorially and the exceptions to this general proscription recognized under customary international law and the United Nations Charter. Finally, Part V will set forth a legal framework for the exercise of extraordinary rendition within narrowly defined circumstances.

## II. THE ALVAREZ-MACHAIN DECISION

Humberto Alvarez-Machain, a citizen and resident of Mexico, was indicted for the kidnapping and murder of U.S. DEA Special Agent Camarena-Salazar.<sup>13</sup> The U.S. government alleged that Alva-

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13. 112 S. Ct. at 2190. Under Rule 29 of the Federal Rules of Criminal Procedure, a motion seldom granted by the court, the trial judge ruled after the close of the government's case against Dr. Machain that the evidence was insufficient to allow the case to go to the jury for deliberation. See David Schrieberg, *Trail in Agent's Death Bypasses Mexico's Elite*, SACRAMENTO BEE, Dec. 21, 1992, at A1; FED. R. CRIM. P. 29. While admittedly the government's case against Dr. Machain was circumstantial, the trial court erred in dismissing the criminal charges. At trial, a number of government witnesses testified that Dr. Machain was a member of the infamous Guadalajara narcotics cartel. An eyewitness testified that he saw Dr. Machain at the residence where Agent Camarena was being held. The witness stated that Dr. Machain was seen with a medical bag and was cleaning medical syringes in the kitchen of the residence. The witness's credibility was further buttressed by independent physical evidence introduced at trial, including a six cubic centimeter syringe with traces of lidocaine that was found by FBI agents in the guest house of the residence where Agent Camarena was tortured and interrogated. A medical doctor also testified at the *Alvarez-Machain* trial that lidocaine is used to correct cardiac arrhythmia and to ease pain. Fifteen latent fingerprints and six palm prints matching those of Dr. Machain were found at the residence. In Dr. Machain's post-arrest statements, he admitted to being at the residence and on two occasions entering the room when Agent Camarena was being interrogated. On the second occasion, Dr. Machain stated that Agent Camarena had been severely beaten and was near death. Finally, the torture-interrogation of Special Agent Camarena was tape-recorded by his assailants. It is clear from the tapes that Agent Camarena is moaning and shrieking in pain and at one point actually pleads with his captors to provide him with medical treatment for his wounds. See Government's Opposition to Motion of Defendant Alvarez-Machain for Judgment of Acquittal Under Rule 29 of the Federal Rules of Criminal Procedure: Memorandum of Points and Authorities at 12-22, *United States v. Caro-Quintero*, No. CR 87-422(G)-ER (C.D. Cal. 1992) [hereinafter Government's Opposition].

Judge Rafeedie's Rule 29 ruling further reflects his criticism of the DEA's actions in the Camarena investigation. In an earlier pre-trial ruling, Judge Rafeedie dismissed the criminal charges against Alvarez-Machain holding that his forcible apprehension in Mexico by the DEA violated the United States-Mexico extradition treaty. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991). In the court's written decision,

rez-Machain, a medical doctor, participated in the kidnapping and murder by administering medication to Special Agent Camarena to revive him and to keep him alive so that he could be further tortured<sup>14</sup> and interrogated. His assailants sought to elicit information regarding DEA narcotics investigations in Mexico, the names of confidential informants working for the DEA, and whether high-level officials in the Mexican government had been implicated by the DEA in narcotics trafficking.<sup>15</sup>

On April 2, 1990, Alvarez-Machain was forcibly abducted from his medical office in Guadalajara, Mexico. It is conceded that Alvarez-Machain was abducted by Mexican police officers who were acting at the request of the DEA and flown by private plane to El Paso, Texas, where he was turned over to special agents of the DEA.<sup>16</sup>

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Judge Rafeedie strongly admonished the DEA for bringing three of the Camarena defendants before the jurisdiction of the court by means of extraordinary rendition and, in the court's opinion, undermining respect for the rule of law. *Caro-Quintero*, 745 F. Supp. at 615; see also *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990) (discussing abduction of Juan Ramon Matta-Ballesteros); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990) (discussing abduction of defendant Rene-Verdugo Urquidez).

14. Agent Camarena's mutilated body was discovered approximately one month after the kidnapping in an open field 60 miles outside of Guadalajara. *Caro-Quintero*, 745 F. Supp. at 602. An autopsy on the body performed by U.S. Navy Captain, Dr. Gerald Spencer, revealed that Agent Camarena had been savagely beaten, eight ribs had been fractured (four on each side), both jaws had been fractured, and his skull had severe multiple fractures. A blunt instrument, the "*coup de grace*," had been driven through the top of Agent Camarena's skull. Trial Testimony of Dr. Gerald Spencer at 5-49 to 5-71, *Caro-Quintero*, No. Cr 87-422(B)-ER (C.D. Cal. 1992); see also *United States v. Lopez-Alvarez*, 970 F.2d 583, 593 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 504 (1992).

15. At the first Camarena trial, it was established that Camarena's captors tape-recorded the torture-interrogation. The tape-recordings and transcripts of the interrogation were introduced into evidence at trial. *Lopez-Alvarez*, 970 F.2d at 593. Evidence was additionally adduced at trial that the motive for the kidnapping was the seizure by DEA agents and Mexican police officials, three months earlier, of approximately 10,000 tons of marijuana in Bufalo, Chihuahua. See *United States v. Vasquez-Velasco*, No. 91-50342, 1994 U.S. App. LEXIS 1200, at \*16-17 (9th Cir. Jan. 25, 1994); Schrieberg, *supra* note 13, at A1; Philip Shenon, *U.S. Charges Nine in Mexico Death of a Drug Agent*, N.Y. TIMES, Jan. 7, 1988, at A1; George B. Lake, *Who Killed Kiki Camarena?*, NAT'L REV., Aug. 29, 1986, at 34. High-level Mexican government officials were implicated in the vast marijuana operation. Agent Camarena was kidnapped and interrogated to determine what the DEA knew about Mexican government corruption and involvement in narcotics trafficking. See *Be-lated Justice: Another Conviction in the Murder of a DEA Agent*, TIME, Aug. 13, 1990, at 36.

On the same day Agent Camarena was kidnapped, Alfredo Zavala-Avelar, a DEA informant who worked with Agent Camarena, was also abducted. Zavala-Avelar was also brutally beaten and tortured. Zavala-Avelar's battered corpse was found alongside that of Agent Camarena. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1203 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 2332 (1993).

16. 112 S. Ct. at 2190.

Alvarez-Machain moved to dismiss the indictment first on grounds that the forcible abduction by DEA agents constituted outrageous government conduct and, second, on grounds that his abduction violated the extradition treaty between the United States and Mexico and thereby divested the district court of jurisdiction to try him.<sup>17</sup> The district court denied the outrageous government action claim, but held that Alvarez-Machain's abduction violated the extradition treaty and the district court therefore lacked jurisdiction over him. The district court dismissed the indictment against Alvarez-Machain and ordered that he be repatriated to Mexico.<sup>18</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the indictment and the district court's order to repatriate Alvarez-Machain, relying on its earlier decision in *United States v. Verdugo-Urquidez*.<sup>19</sup>

In analyzing whether the abduction of Alvarez-Machain from Mexico divested the district court of jurisdiction over respondent, Chief Justice Rehnquist, writing for the majority, analyzed the continuing viability of the *Ker-Frisbie* doctrine. In *Ker v. Illinois*,<sup>20</sup> Ker was forcibly abducted from Peru and brought to the United States to stand trial for larceny. Ker challenged the court's jurisdiction over him and argued that he had a right under the extradition treaty between the United States and Peru to be returned to the United States only in accord with the terms of the treaty. The Supreme Court rejected Ker's argument and held that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."<sup>21</sup> In *Frisbie v. Collins*,<sup>22</sup> the Supreme Court applied the *Ker* rule. Defendant Collins had been kidnapped in Chicago by Michigan state police officers and forcibly transported interstate to Michigan to stand trial. The Supreme Court upheld the conviction over objections based on

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17. *Id.*

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

19. 939 F.2d at 1341. In January 1986, Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was apprehended in Mexico by Mexican police officers and transported to the United States, where he was surrendered to the custody of the U.S. Marshals. In January 1988, a federal grand jury returned a five count second superseding indictment charging Verdugo-Urquidez with multiple criminal violations, including the kidnapping and murder of Agent Camarena. Verdugo-Urquidez was eventually convicted for the Camarena murder. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990), *reh'g denied*, 494 U.S. 1092 (1990). See *infra* note 66 and accompanying text.

20. 119 U.S. 436 (1886).

21. *Id.* at 441, 444.

22. 342 U.S. 519 (1952).

the due process clause and the federal kidnapping statute. In holding that the jurisdiction of the court was not impaired by the forcible interstate abduction of the defendant, Justice Black, speaking for a unanimous Court, stated:

This Court has never departed from the rule announced in [*Ker*] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. 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.<sup>23</sup>

The *Alvarez-Machain* Court emphasized that if the abduction of respondent Alvarez-Machain is not prohibited under the extradition treaty between the United States and Mexico, then "the rule in *Ker* applies and the court need not inquire as to how respondent came before it."<sup>24</sup> The Court then proceeded to analyze the terms of the extradition treaty. The Court first noted that the treaty is silent on the obligation of the parties to refrain from forcible abductions from the territory of the other nation.<sup>25</sup> In addition, the Court emphasized that the treaty fails to set forth any sanctions or remedies in the event such an abduction occurs.<sup>26</sup>

Alvarez-Machain argued that article 9 of the treaty specifies the exclusive means by which the requesting nation may gain custody of a foreign national from the foreign country for the purposes of prosecu-

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23. *Id.* at 522.

24. 112 S. Ct. at 2193; see F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 407, 414 (Yoram Dinstein ed., 1989) ("With rare unanimity and undeniable justification the courts of the world have held that the manner in which an accused has been brought before the court does not and, indeed, cannot deprive it of its jurisdiction . . .").

25. 112 S. Ct. at 2193.

26. *Id.* While not addressed by the Supreme Court in *Alvarez-Machain*, at least one commentator has suggested that both the district court and the U.S. Court of Appeals for the Ninth Circuit erred in finding that repatriation of respondent Alvarez-Machain was the required remedy for a violation of the extradition treaty. Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736, 737 n.7, 737-38 (1992).

tion.<sup>27</sup> He contended that pursuant to article 9, neither country is bound to deliver up its own nationals.<sup>28</sup> Extradition, he maintained, is wholly discretionary under the treaty.<sup>29</sup> Under article 9, if extradition is not granted, the requested party shall submit the case for prosecution locally.<sup>30</sup> If Mexico refuses to extradite or prosecute locally, the United States is limited by the treaty and is without any further recourse.<sup>31</sup>

In rejecting the proposed "exclusive means" reading of the extradition treaty, the Court construed the treaty as simply providing specific procedures to be followed when, and if, extradition was requested by either party. The Court opined:

Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures. The treaty thus provides a mechanism which would not otherwise exist, requiring under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be followed when the treaty is invoked.<sup>32</sup>

The Supreme Court then turned to the history of negotiation and practice under the treaty. The Court found particularly instructive the fact that the Mexican government was made aware, as early as 1906, of the rule in *Ker*.<sup>33</sup> The treaty signed in 1978, however, does not in any way attempt to limit the *Ker* doctrine.<sup>34</sup> In addition, the Court

27. 112 S. Ct. at 2193. Article 9 of the treaty 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.

2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

Extradition Treaty, *supra* note 3, art. 9, 31 U.S.T. at 5036.

28. 112 S. Ct. at 2193-94.

29. *Id.* at 2194.

30. *Id.* at 2193.

31. *Id.* at 2194.

32. *Id.*

33. *Id.*

34. In 1905, a Mexican national was abducted from Mexico and brought to the United States to stand trial. The Mexican Chargé wrote the Secretary of State protesting the forcible abduction and arguing that the abduction was made outside of the procedures set forth in the extradition treaty. Letter from Balbino Devalos, Chargé of the Mexican Embassy, to Robert Bacon, Acting Secretary of State (June 11, 1906), reprinted in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, H.R. DOC. NO. 1, 59th Cong., 2d Sess., pt. 2, at 1121-22 (1906). In his reply, Bacon defended the forcible abduction, empha-

emphasized that language that would have divested the federal courts of jurisdiction in forcible abduction cases was drafted as early as 1935 by a group of legal scholars sponsored by the faculty of Harvard Law School, but was never included in the current treaty.<sup>35</sup>

Having concluded that neither the language of the treaty nor its history supports the proposition that the treaty prohibits abductions outside of its terms, the Supreme Court turned to the question of whether the treaty should be interpreted to include such a prohibition as an implied term.<sup>36</sup> Alvarez-Machain argued that international abductions are so clearly violative of customary international law that there was no reason to include such a prohibition in the treaty itself.<sup>37</sup> In support of this position, he cited *United States v. Rauscher*,<sup>38</sup> in which the Court implied as a term of the Webster-Ashburton Treaty of 1842,<sup>39</sup> which governed extraditions between the United Kingdom and the United States, the doctrine of specialty, which prohibits the prosecution of the defendant for a crime other than the crime for which he had been extradited. In rejecting Alvarez-Machain's argument and distinguishing *Rauscher*, the Court stated: "In *Rauscher*, we implied a term in the Webster-Ashburton Treaty because of the practice of nations with regards to extradition treaties. In the instant case, respondent would imply terms in the extradition treaty from the practice of nations with regards to international law more generally."<sup>40</sup>

The Court also found as unpersuasive the general international law principles cited by Alvarez-Machain and, without more, refused to read into the treaty as an implied term a general principle of interna-

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sizing that the issue had been decided by the Supreme Court in *Ker*. Letter from Robert Bacon, Acting Secretary of State, to Balbino Devalos, Chargé of the Mexican Embassy (June 22, 1906), reprinted in PAPERS RELATING TO FOREIGN RELATIONS OF THE UNITED STATES, H.R. DOC. NO. 1, 59th Cong., 2d Sess., pt. 2, at 1121-22 (1906).

35. In article 16 of the Draft Convention on Jurisdiction With Respect to Crime, an international convention on extradition, the Advisory Committee of the Harvard Research in International Law proposed the following language be adopted:

In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

Harvard Research in International Law, *Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 442 (Supp. 1935).

36. 112 S. Ct. at 2195.

37. *Id.* at 2196.

38. 119 U.S. 407, 417-23 (1886).

39. Webster-Ashburton Treaty of 1842, Aug. 9, 1842, 8 Stat. 572, 576.

40. 112 S. Ct. at 2195-96.

tional law that one government may not "exercise its police power in the territory of another state."<sup>41</sup> Finally, the Court left open the issue whether the forcible apprehension of Alvarez-Machain was a violation of international law.<sup>42</sup>

The dissent in a harshly worded opinion criticized the majority's narrow reading of the extradition treaty that absent an explicit prohibition in the treaty to the contrary, the parties are free to engage in forcible government kidnapping in the territory of the other nation.<sup>43</sup> Justice Stevens, writing for the dissent, stated that an analogous argument had been rejected by the Supreme Court in *Rauscher*. In that case, the Court implied as a term of the treaty between the United States and the United Kingdom the doctrine of specialty absent any express language in the treaty limiting the extraditing nation's authority to prosecute the defendant for only those crimes for which he had been extradited.<sup>44</sup>

The dissent was equally critical of the majority's reliance on *Ker v. Illinois*.<sup>45</sup> The dissent reasoned that *Ker* involved conduct by a private citizen, which does not violate any treaty obligation, while *Alvarez-Machain* involved a government-sponsored abduction, which Justice Stevens maintained constitutes a "flagrant violation of international law."<sup>46</sup> The dissent accused the government of showing disdain for the "Rule of Law" that the Court has a duty to uphold.<sup>47</sup> The

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41. *Id.* at 2196.

42. With no discussion or elaboration the Court stated, "Respondent and his amici may be correct that respondent's abduction was 'shocking,' . . . and that it may be in violation of general international law principles." *Id.*

43. *Id.* at 2198-99.

44. *Id.* at 2201 (citing *Rauscher*, 119 U.S. at 422).

45. *Id.* at 2197.

46. *Id.* at 2203; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS: LAW OF THE UNITED STATES § 432(2) (1987). The Restatement states in part: "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." *Id.*

It should be noted that the federal district court never ruled on the customary international law issue and, instead, based its decision on a violation of the Extradition Treaty. See *Caro-Quintero*, 745 F. Supp. at 614.

47. 112 S. Ct. 2205. One commentator has suggested just the contrary: "Proscribing terrorist acts and punishing terrorists helps to establish the rule of law and emphasizes the criminal nature of the terrorist act." D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEN. INT'L L.J. 1, 50 (1988); see also Jeffrey A. McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and Its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 467 (1986).

dissent characterized the DEA's conduct as motivated by "revenge"<sup>48</sup> and described the majority opinion (not the crime) as "monstrous."<sup>49</sup>

The dissent, although obviously concerned with respect for Mexico's territorial sovereignty and respect for the rule of law, fails to acknowledge or fully appreciate the legitimate and compelling federal interests at stake in the instant case. If a federal agent can be kidnapped and brutally murdered and the assailants evade apprehension and prosecution, this breeds lawlessness, invites continued violence, and thereby endangers the lives and safety of all federal agents abroad.<sup>50</sup> The threat of prosecution and incarceration in the United States serve as strong deterrents in preventing hostile attacks against federal law enforcement officers and other U.S. citizens overseas.<sup>51</sup> This deterrent value, however, is lost when the foreign state fails to prosecute locally, refuses to extradite and, instead, harbors the foreign fugitive to prevent prosecution in the United States.<sup>52</sup>

International law further imposes a duty on the state to protect the safety of foreign nationals within its borders—here, Special Agent Camarena.<sup>53</sup> A breach of this duty likewise constitutes a violation of

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It is difficult to comprehend how the "rule of law" and the interests of justice are served by standing idly by and permitting a fugitive to avoid apprehension and seek refuge from prosecution and punishment within the territorial borders of a foreign state.

48. 112 S. Ct. at 2205.

49. *Id.* at 2206.

50. DEA agents are currently stationed in 43 countries. In August 1986, in an incident frighteningly reminiscent of that involving Camarena, DEA Special Agent Victor Cortez was arrested in Guadalajara, Mexico by Mexican police officers, charged under a pretext with illegal possession of firearms, and taken to Jalisco state police headquarters where he was tortured for six hours with beatings and electric prods. Like Camarena, DEA Agent Cortez was interrogated on DEA operations in Mexico. See Harry Anderson, *Drugs and Torture in Mexico*, NEWSWEEK, Aug. 25, 1986, at 42; Pico Iyer, *The Hunters Become the Hunted: American Drug Agents Come Under Verbal and Physical Attack*, TIME, Sept. 8, 1986, at 40; see also *United States v. Benitez*, 741 F.2d 1312, 1312-13 (11th Cir. 1984) (defendant Armando Benitez was tried and convicted on one count of conspiracy to murder and two counts of assaulting with a deadly weapon two DEA agents in Colombia engaged in the performance of their official duties under 18 U.S.C. §§ 2, 112, 1114, and 1117).

51. See Findlay, *supra* note 47, at 29. "[T]he apprehension, prosecution, and punishment of terrorists would prevent future attacks by particular terrorists involved and deter other terrorists from targeting United States citizens. Indeed, to allow terrorists to continue harming United States citizens would invite further terrorist attacks." *Id.*

52. See McCredie, *supra* note 47, at 466 (noting that "[u]n-enforced prohibitions against violent acts present a danger to the world community by encouraging future terrorism").

53. Jordan J. Paust, *The Link Between Human Rights and Terrorism and Its Implications for the Law of State Responsibility*, 11 HASTINGS INT'L & COMP. L. REV. 41, 48-53 (1987); Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 276-307 (1977).

international law.<sup>54</sup> Under this general international duty, a state is required to act with "due diligence" to prevent the commission of acts of violence and terrorism within its jurisdiction.<sup>55</sup> A breach of this duty may result from either affirmative acts (government-sponsored terrorism) or acts of omission (failure to apprehend, prosecute, punish, or extradite) by the foreign state.<sup>56</sup> The critical question is what remedy or recourse is afforded the United States, or any nation, when a foreign country breaches its duty of due diligence under international law.

While the right of territorial sovereignty is viewed, and rightfully so, as paramount under international law, this right is not absolute.<sup>57</sup> Customary international law recognizes the right of a nation to intervene to protect the safety of its nationals abroad.<sup>58</sup> The law of nations further sanctions the extraterritorial application of a nation-state's criminal laws to protect and preserve vital national interests.<sup>59</sup> Moreover, Congress has frequently extended the reach of federal criminal statutes extraterritorially in order to prevent and punish terrorists attacks against American nationals abroad.<sup>60</sup>

The thesis of this Article is that where the safety of American nationals abroad is jeopardized by the failure of the foreign state to act with due diligence to prevent the commission of violent attacks against U.S. nationals by apprehending, prosecuting, punishing, or extraditing the international criminals, or where the foreign state harbors and thereby aids and abets international fugitives, the state's interests in protecting its nationals abroad are superior and must take precedence over foreign territorial sovereignty. This limited foreign intervention is not only justifiable, but consistent with international

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54. One commentator has suggested that "[a] State should be equally culpable as an accessory-after-the-fact if it permits free entry or safe passage when theoretically subject to international responsibility to punish or extradite terrorists." William Slemanson, *I.C.J. Damages: Tort Remedy for Failure to Punish or Extradite International Terrorists*, 5 CAL. W. INT'L L.J. 121, 125 (1974).

55. See McCredie, *supra* note 47, at 453.

56. See Lillich & Paxman, *supra* note 53, at 308-09.

57. See D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* §9-91 (1955).

58. See Findlay, *supra* note 47, at 25-29; McCredie, *supra* note 47, at 461-65.

59. See CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY* (1992).

60. The Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2331 (Supp. IV 1987), expressly provides for "Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals."

law.<sup>61</sup> International law does not require the United States to "submit supinely to terror."<sup>62</sup>

### III. STATE RESPONSIBILITY FOR HOSTILE ACTS DIRECTED AGAINST THE NATIONALS OF ANOTHER STATE

On January 7, 1988, at a press conference held in Los Angeles, U.S. Department of Justice officials announced the filing of a federal grand jury indictment charging nine Mexican nationals with complicity in the kidnapping and torture-murder of DEA Special Agent Camarena. DEA Administrator John C. Lawn stated that the cooperative trust between Mexican and U.S. law enforcement agents had been fatally compromised in the Camarena case. Lawn remarked, "In what we do for a living we depend on the integrity of our law enforcement counterparts. In the case of Kiki Camarena, that mutual trust failed."<sup>63</sup>

Lawn was referring to the fact that named in the federal indictment were three Mexican police officials. Defendant Sergio Espino-Verdin, a Comandante with the Mexican Federal Judicial Police, was alleged to have interrogated Special Agent Camarena while he was being tortured.<sup>64</sup> First Comandante Armando Pavon-Reyes, the federal police comandante in charge of the Mexican investigation, was charged in the federal indictment with accepting a \$261,000 bribe from drug kingpin Rafael Caro-Quintero, the chief suspect in the Camarena murder, and permitting Caro-Quintero to flee Guadalajara

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61. Article 55 of the United Nations Charter provides: "The United Nations shall promote . . . universal respect for and observance of human rights and fundamental values." U.N. CHARTER art. 55. The respect for "human rights" referred to in article 55 certainly includes the protection and safety of U.S. citizens abroad and the prevention of kidnapping, torture, and murder.

62. See McCredie, *supra* note 47, at 458 (quoting former U.N. Ambassador Jean Kirkpatrick).

63. William R. Doerner, *Latin America; Flames of Anger; Washington Heats Up Its War Against Drugs South of the Border*, TIME, Jan. 18, 1988, at 28; Shenon, *supra* note 15, at A1. As the federal prosecutor in charge of the Camarena prosecution at the time, the author participated in the Department of Justice press conference announcing the filing of the federal grand jury indictment.

64. At the first Camarena trial, tape-recordings of the interrogation of Agent Camarena were played to the jury and introduced into evidence. *Ex-Officer Guilty in Death of Agent*, N.Y. TIMES, Sept. 23, 1988, at A24. On the tapes, Special Agent Camarena refers to his interrogator as "Comandante" and pleads with the "Comandante" to spare his life. At trial, Comandante Espino-Verdin was identified on the interrogation tapes as one of Camarena's interrogators. See Doerner, *supra* note 63, at 28.

by private jet in full view of three DEA agents.<sup>65</sup> Finally, defendant Raul Lopez-Alvarez, one of the three defendants convicted in the first Camarena trial, was a Mexican state police officer at the time of the abduction who aided and abetted in the kidnapping.<sup>66</sup>

At the press conference, U.S. Attorney Robert C. Bonner set forth what has been, and continues to be, the single objective of the Department of Justice in the Camarena investigation: "Our first and foremost concern is that justice is done. If justice is done in Mexico, so be it."<sup>67</sup> Unfortunately, justice has not been done in Mexico. Since the date of that historic press conference in Los Angeles, twenty-two Mexican nationals have been indicted in the United States and charged with complicity in the kidnapping and murder of Camarena. Twelve of the Mexican defendants are fugitives believed to be residing (not hiding) in Mexico. Added to that infamous list are former high-level Mexican government officials, including the former Director of the Mexican Federal Judicial Police (MFJP), the former Commander of Operación Pacífico, the federales' anti-drug unit, and the brother-

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65. After the Mexican federal police detained Caro-Quintero at the Guadalajara Airport, DEA Agent Salvador Leyva, who testified at the Camarena trial, stated that he followed Comandante Pavon-Reyes into a hangar at the airport and overheard him place a telephone call to his supervisor. DEA officials suspect that Comandante Pavon-Reyes called Manuel Ibarra-Herrera, director of the Mexican Federal Police (which is equivalent to the Director of the Federal Bureau of Investigation), to obtain authorization to accept the bribe and permit Caro-Quintero to flee. *See Doerner, supra* note 63, at 28.

It is a cruel irony that the Mexican police official assigned the responsibility of supervising the Mexican criminal investigation and tracking down Agent Camarena's killers allegedly aided and abetted Camarena's assailants and assisted in securing their escape.

66. To date, there have been three trials in the Camarena case. At the first trial, a federal jury returned guilty verdicts on all counts against defendants Rene Verdugo-Urquidez, Raul Lopez-Alvarez, and Jesus Felix-Gutierrez. Defendant Verdugo-Urquidez was sentenced to 240 years plus life in prison; defendant Lopez-Alvarez received a sentence of 250 years plus life in prison; and defendant Felix-Gutierrez was sentenced to 10 years, the maximum sentence provided under federal law for an accessory-after-the-fact. *See United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992); *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 2332 (1993); *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 504 (1992) (charges for the kidnapping and murder of Agent Camarena were affirmed, but charges for the murder of confidential informant Alfredo Zavala-Avelar were reversed). At the second trial, defendants Ruben Zuno-Arce, Juan Ramon Matta-Ballesteros, and Juan Jose Bernabe-Ramirez were found guilty of the kidnapping and murder. *Ex-Guard Convicted for the Kidnapping of a Federal Agent*, N.Y. TIMES, July 31, 1990, at A14; *Central Figure is Convicted in '85 Killing of Drug Agent*, N.Y. TIMES, Aug. 1, 1990, at A10. At the third trial, the district court dismissed the criminal charges against Alvarez-Machain. *See supra* note 13 and accompanying text; *see also* Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20. Ruben Zuno-Arce, however, was convicted for the murder. *Et Cetera: The Other Verdict*, TIME, Jan. 4, 1993, at 11.

67. Doerner, *supra* note 63, at 28; Shenon, *supra* note 15, at A18.

in-law of the former President of Mexico, Luis Echeverria-Alvarez.<sup>68</sup> To date, no high-level Mexican government official has been prosecuted in Mexico for the murder of Agent Camarena,<sup>69</sup> and the former MFJP Director and the former head of the Mexican anti-drug unit reside openly in Mexico, apparently without fear or threat of prosecution by the Mexican government.<sup>70</sup> The Mexican government has been sharply criticized for its lack of diligence and cooperation in the criminal investigation.<sup>71</sup>

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68. In December 1992, defendant Ruben Zuno-Arce was convicted by a federal jury in Los Angeles for his role in planning Agent Camarena's kidnapping and being present when Camarena was tortured and interrogated. *Et Cetera; The Other Verdict*, *supra* note 66, at 11; see also *Busting the Brass: The U.S. Indicts Top Mexicans in the Camarena Case*, *TIME*, Feb. 12, 1990 [hereinafter *Busting the Brass*]; *High-Level Mexican Ex-Officials*, *supra* note 12, at A5.

69. Despite repeated promises and assurances by Mexican government officials that if released and repatriated to Mexico, Alvarez-Machain would be prosecuted locally, upon Alvarez-Machain's return to Mexico following Judge Edward Rafeedie's ruling that federal prosecutors had failed to prove their case against him, the Mexican Attorney General announced that Alvarez-Machain would not be prosecuted and that the matter was considered closed. See Schrieberg, *supra* note 13, at A1.

Although drug kingpins Rafael Caro-Quintero and Ernesto Fonseca-Carrillo have been prosecuted in Mexico for their participation in the Camarena murder, these convictions have been tainted by numerous reports that during his incarceration, Caro-Quintero was permitted private cooks, overnight conjugal visits, free-flow access to alcohol and narcotics in a carpeted cell equipped with elaborate video and stereo systems, private kitchen and bedrooms, luxurious furnishings, and a sauna. DEA agents also discovered the ultimate amenity, a private exit, still under construction, consisting of a 267-meter tunnel underneath Caro-Quintero's cell. See Linda Gomez, *Harvest of Death: The Violent World of Drug Trafficking Has Moved Right Next Door*, *LIFE*, Mar. 1988, at 80; Larry Rohter, *Mexican Drug Leaders Guilty in Killing of a U.S. Agent*, *N.Y. TIMES*, Dec. 13, 1989, at B10.

In 1989, Miguel Angel Felix-Gallardo, the leading cocaine trafficker in Mexico, was arrested by Mexican authorities on narcotics charges. Until just recently, Felix-Gallardo continued to manage his vast drug empire from a Mexican prison office equipped with a fax machine and cellular telephones. See Tim Golden, *The Enemy Within: Mexico's Drug Habit is Giving it Shivers*, *N.Y. TIMES*, June 20, 1993, at A6.

70. See *Busting the Brass*, *supra* note 68, at 25; *High-Level Mexican Ex-Officials*, *supra* note 12, at A5.

71. The battered corpses of DEA Agent Camarena and DEA informant Zavala-Avelar were not found until approximately one month after the abductions. Frustrated and angered by Mexico's lack of vigor in pursuing Camarena's killers, the United States took the extreme measure of directing the U.S. Customs Service to inspect all vehicles entering Mexico at many of the official crossing points along the 2,000 mile U.S.-Mexico border in an effort to locate Camarena's murderers. The directive to the U.S. Customs Service virtually closed the border. In addition, the Customs Service inspections hurt business in border towns in California and Texas. Ultimately, these actions had the desired effect of prompting the Mexican police to intensify their search efforts and forcing a response from the Mexican government. The bodies were later discovered, but not until the United States was forced to take this unprecedented course of action. See Jacob V. Lamar, Jr., *Deadly Traffic on the Border: A Drug Agent Is Found Murdered*, *TIME*, Mar. 18, 1985, at 23.

State responsibility to prosecute and punish criminal offenders within its territorial borders is neither a new nor novel proposition, but rather has long been recognized under customary international law. Justice Wilson in the *Henfield's Case* observed that "[w]hen the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him . . . . If the nation refuses to do either, it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury."<sup>72</sup>

The internationally imposed duty to use "due diligence" to prosecute and punish criminal offenders within the state's territorial boundaries has consistently been upheld in international arbitral decisions.<sup>73</sup> In the *Janes Case*,<sup>74</sup> one of the most widely cited cases acknowledging state responsibility to prosecute and punish the criminal offender, a U.S. citizen was murdered in Mexico. Although the Mexican authorities had eyewitnesses to the murder, they did nothing to apprehend or punish the assailant. A claim was brought by the United States alleging that Mexico had breached its duty under international law. Ruling in favor of the United States, the General Claims Commission based Mexico's liability on the idea that "the Government's negligence is the damage resulting from the non-punishment of the murderer."<sup>75</sup> The Commission concluded:

The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender.<sup>76</sup>

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72. 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6360); see also *United States v. Arjona*, 120 U.S. 479, 484 (1887), where the Supreme Court posited:

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction [violate the laws] . . . of another nation has been long recognized.

73. See Lillich & Paxman, *supra* note 53, at 278-88.

74. *Janes Case* (U.S. v. Mex.), 4 R.I.A.A. 82, 87 (1925).

75. *Janes Case*, 4 R.I.A.A. at 87.

76. *Janes Case*, 4 R.I.A.A. at 87. See also the *Texas Cattle Claims*, where the Commission stated that the international duty imposes a responsibility on Mexico because by "knowingly giving the criminals asylum in Mexico, [the Mexican government] encouraged them to continue their crimes." American-Mexican Claims Commission, Report to the Secretary of State, cited in *State Responsibility for Injuries to Aliens: Diplomatic Protection and International Claims*, in 8 *Whiteman Digest of International Law*, at 751 (1967).

In another international arbitral decision, a suspect was arrested in connection with the murder of a U.S. national in Mexico. The suspect confessed to Mexican authorities and implicated eight other persons in the murder. No one, however, was apprehended or prosecuted for the crime. The Commission found that "the conduct of the Mexican authorities in the investigation of these crimes and in the punishment of the persons implicated therein constitutes such an utter indifference to the performance of their duties as clearly to impose liability on the Mexican Government under well-recognized principles of international law."<sup>77</sup>

The duty to prosecute and punish criminal offenders under customary international law has also been codified in various multilateral conventions and treaties. The United Nations addressed, in part, the problem of state responsibility for acts of terrorism in the Hague<sup>78</sup> and Montreal<sup>79</sup> Conventions relating to aircraft hijacking and the International Convention Against the Taking of Hostages.<sup>80</sup> The Hague, Montreal, and Hostages Conventions impose on the contracting states the duty to prosecute or extradite the criminal offenders.<sup>81</sup> In addition, these three Conventions require the state to take the offender into custody to enable criminal or extradition proceedings to be insti-

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77. See Claim of Dexter, American-Mexican Claims Commission, Report to the Secretary of State 51, at 264, cited in Whiteman, *supra* note 76, at 755-56.

78. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 (1971) [hereinafter Hague Convention].

79. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 10 I.L.M. 1151 (1971) [hereinafter Montreal Convention].

80. International Convention Against the Taking of Hostages, adopted by U.N. G.A. Res. 146, 34 U.N. GAOR, Supp. (No. 46), U.N. Doc. A/34/46 (1980), reprinted in 18 I.L.M. 1456 (1979) [hereinafter Hostages Convention].

81. Hague Convention, *supra* note 78, art. 7, 22 U.S.T. at 1646, provides in relevant part:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.

The Preamble to the Hostages Convention further provides:

Considering that the taking of hostages is an offense of grave concern to the international community and that, in accordance with provisions of this Convention, any person committing an act of hostage-taking shall be either prosecuted or extradited.

Hostages Convention, *supra* note 80, art. 8, 18 I.L.M. at 1456; see Montreal Convention, *supra* note 79, art. 7, 24 U.S.T. at 571.

tuted.<sup>82</sup> Furthermore, in order to ensure successful prosecution, these multilateral conventions impose on the contracting states a duty to "afford one another with the greatest measure of assistance in [connection] with the criminal proceedings."<sup>83</sup>

The U.N. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents<sup>84</sup> imposes yet another affirmative obligation requiring the state to take all practicable measures to prevent terrorist acts against heads of state, officials, and diplomats.<sup>85</sup> Moreover, in 1985 the U.N. Security Council affirmed the "obligation of all states in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage taking and abduction in the future."<sup>86</sup> Finally, in the 1970 Declaration on Principles of International Law, the United Nations prescribed that "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts."<sup>87</sup>

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82. See Hague Convention, *supra* note 78, art. 6, 22 U.S.T. at 1645-46; Montreal Convention, *supra* note 79, art. 6, 24 U.S.T. at 570; Hostages Convention, *supra* note 80, art. 6, 18 I.L.M. at 1458.

See also European Convention on Suppression of Terrorism, signed in 1977 by member states under the auspices of the Council of Europe and affirming the obligation of nation-states to prosecute or extradite criminal offenders. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, 4 E.T.S. 41, *reprinted in* 15 I.L.M. 1272-76 (1976).

83. Hostages Convention, *supra* note 80, art. 11, 18 I.L.M. at 1461; *see also* Hague Convention, *supra* note 78, art. 11, 22 U.S.T. at 1647; Montreal Convention, *supra* note 79, art. 13, 24 U.S.T. at 572.

84. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York, Dec. 14, 1973, 28 U.S.T. 1975, G.A. Res. 3166, U.N. GAOR, 28th sess., Supp. No. 30, at 146, U.N. Doc. A/9030 (1973) [hereinafter 1973 U.N. Convention].

85. *Id.* art. 2.

86. S.C. Res. 579, U.N. Doc. S/RES/579 (1985), *reprinted in* 25 I.L.M. 243 (1986). It is particularly ironic that the U.N. Security Council passed this resolution in 1985, the same year Agent Camarena was abducted. The lack of diligence by Mexican police officials in pursuing Agent Camarena's assailants and in failing to locate Agent Camarena until one month after his abduction would support a breach of this international duty. *See supra* note 71 and accompanying text. *Cf. supra* note 50 (discussing the abduction and torture of DEA Agent Victor Cortez by Jalisco State police officers).

87. 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971),

In the case of Camarena, a compelling argument can be made that Mexico breached its international duty of due diligence. While the Department of Justice investigation has clearly established complicity by Mexican government officials in Camarena's kidnapping and murder, the Mexican government has limited its investigation to lower-level drug traffickers. Ruben Zuno-Arce, a former high-level Mexican government official, has been convicted in federal district court for his role in Camarena's kidnapping and murder.<sup>88</sup> The former Director of the MFJP and the former head of the federales' anti-drug unit have been indicted for this kidnapping and murder.<sup>89</sup> Moreover, the person hand-picked in Mexico City to direct the Mexican criminal investigation has been indicted for aiding and abetting the escape of drug kingpin Caro-Quintero, and other former high-level Mexican government officials have been implicated in the murder.<sup>90</sup>

Evidence was further adduced during the Camarena trial of complicity by Mexican police officials in narcotics trafficking.<sup>91</sup> Police corruption was so pervasive at the time, with Mexican municipal, state, and federal police officers serving as bodyguards for the drug traffickers, that it was difficult to distinguish Mexican police officers from the drug thugs.<sup>92</sup> The Mexican federal police were accused of providing the traffickers with official police credentials and installing radio

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reprinted in 9 I.L.M. 1292, 1294 (1970) [hereinafter Declaration on Principles of International Law].

88. See *supra* note 68 and accompanying text. (Zuno-Arce was convicted of participating in the planning of the kidnapping and being present when Agent Camarena was being tortured and interrogated).

89. See *supra* note 69 and accompanying text.

90. In the most recent Camarena prosecution, a former Mexican federal police officer on the payroll of the narcotics traffickers testified at trial for the government that the then-Mexican Defense Minister and former Interior Minister gave their blessings to the kidnap plot, and that the kidnapping of Agent Camarena was in retaliation for the Bufalo, Chihuahua marijuana seizure. At an alleged meeting between drug traffickers and high-level Mexican government officials, former Mexican Defense Minister Arevalo-Gardoqui stated that he wanted the bodies buried properly and to hide them where they could not be found. Testimony of Rene Lopez-Romero, Tr. 34, *United States v. Caro-Quintero*, No. CR-82-422(G)-FR (C.D. Cal. 1992); see also *Government's Opposition*, *supra* note 13; Schrieberg, *supra* note 13, at A1; *Busting the Brass*, *supra* note 68, at 25.

91. *Lopez-Alvarez*, 970 F.2d at 586; see also Iyer, *supra* note 50, at 40 (U.S. official observing that "[i]t is not unknown for DEA agents to give the name of someone [drug dealer] to Mexican cops and then learn the guy was tipped off and has gone underground").

92. *Lopez-Alvarez*, 970 F.2d at 586; see also *Government's Opposition*, *supra* note 13 (noting that in Alvarez-Machain's post-arrest statement to the DEA, he stated that when he approached the Lope de Vega address where Agent Camarena was being held, *Direccion Federal de Seguridad Comandante Rogelio Munoz-Rios* was guarding the door to the residence).

equipment for the drug traffickers to monitor DEA radio communications.<sup>93</sup> The Mexican military allegedly provided security for drug shipments destined to the United States and guarded the marijuana plantations in Bufalo, Chihuahua.<sup>94</sup>

Even when a state does not itself engage in acts of violence or terrorism, or sponsor such acts directly, state responsibility exists nevertheless under international law for "acquiescing in" such criminal activities.<sup>95</sup> Furthermore, a convincing case can be made that the Mexican government breached its duty under international law by "acquiescing in" hostile attacks against a U.S. citizen by providing a safe haven for drug traffickers, former police, and high-level Mexican government officials indicted in the United States for complicity in the kidnapping and murder.<sup>96</sup>

It is abundantly clear that under international law a state is obligated to prosecute and punish criminal offenders within its territorial boundaries;<sup>97</sup> extradite foreign fugitives if it is unwilling or unable to prosecute;<sup>98</sup> refrain from "organizing, instigating, assisting or participating" in hostile attacks against another state or the nationals of that state;<sup>99</sup> and take appropriate measures to prevent the commission of such hostile attacks.<sup>100</sup> The tortuous history in the Camarena case makes it abundantly clear that Mexico repeatedly breached its duty under international law.

While various multilateral conventions and treaties embody principles of customary international law regarding the responsibility of

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93. Trial Testimony of Government Witness Lawrence Harrison at 13-177, *Caro-Quintero*, No. CR 87-422(F)-ER (C.D. Cal. 1992).

94. *Caro-Quintero*, No. CR 87-422(F)-ER (C.D. Cal. 1992); Michael Isikoff, *Informer Ties Top Mexican To Drug Deals: Allegations Revealed in DEA Affidavit*, WASH. POST, June 4, 1988, at A3.

95. See Paust, *supra* note 53, at 46.

96. Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 720-21 (1986) ("It may be argued that a state also 'harbors' terrorists if it fails to fulfill an international obligation to prosecute or extradite those within its territory who are reasonably accused of having committed impermissible acts of terrorism . . . . Similarly, such form of 'harboring' may in a given case amount to impermissible 'toleration' . . . .").

97. *Janes Case*, 4 R.I.A.A. at 87.

98. Hague Convention, *supra* note 78, art. 7, 22 U.S.T. at 1646; Montreal Convention, *supra* note 79, art. 7, 24 U.S.T. at 571; Hostages Convention, *supra* note 80, art. 8, 18 I.L.M. at 1460.

99. Declaration on Principles of International Law, *supra* note 87.

100. 1973 U.N. Convention, *supra* note 84.

states for terrorist acts,<sup>101</sup> they remain ominously silent on the imposition of state sanctions for failure to carry out the treaties and for the resulting breach of international law.<sup>102</sup> Former State Department Legal Adviser Abraham D. Sofaer posits that "when a state fails to fulfill these duties, whether it is through unwillingness or inability, the moral and legal case for an adversely affected state to use the necessary and proportionate means to rectify the effects of violations of international law increases."<sup>103</sup> Therefore, the threshold and dispositive inquiry is whether the adversely affected state may bring to justice the criminal offender by means of extraordinary rendition when the asylum state has breached its duty of state responsibility or whether such action would violate the general prohibition under international law against the use of force extraterritorially. The next section will examine the international proscription regarding the use of force extraterritorially, the exceptions recognized under international law, and whether extraordinary rendition to preserve the domestic security interests of the United States, or any other adversely affected nation, can be reconciled with these principles of international law.

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101. One commentator has suggested that if the treaties embody principles of customary international law recognized by the international community, they are binding on signatories and non-signatories alike. See Jeffrey A. McCredie, *The Responsibility of States for Private Acts on International Terrorism*, 1 *TEMPLE INT'L & COMP. L.J.* 69, 76 (1985).

102. In the 1988 terrorist bombing of Pan Am Flight 103, an explosion of an American airliner over Lockerbie, Scotland caused the death of 270 passengers on board. The Libyan government is suspected of complicity in the terrorist bombing. On January 21, 1992, the U.N. Security Council passed Security Council Resolution 731, which urged Libya to cooperate in the Pan Am Flight 103 investigation and to relinquish its nationals to stand trial for the bombing. See Christopher C. Joyner & Wayne P. Rothman, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Law?*, 14 *MICH. J. INT'L L.* 222, 222-27 (1993); S.C. Res. 731, U.N. SCOR, 3033d mtg., U.N. Doc. S/23574 (1992), reprinted in 31 *I.L.M.* 731-33 (1992). Due to Libya's failure to respond to these requests, on March 31, 1992, the U.N. Security Council passed Security Resolution 748, ordering Libya to extradite the defendants charged with the bombing. See Joyner & Rothman, *supra*, at 228; S.C. Res. 748, U.N. SCOR, 47th Sess., 3063 mtg., U.N. Doc. S/RES/748 (1992), reprinted in 31 *I.L.M.* 749 (1992). The failure of the Libyan government to exercise due diligence to apprehend and prosecute the Libyan terrorists constitutes a clear violation of customary international law. See Montreal Convention, *supra* note 79, art. 7. The United Nations, however, is without any enforcement mechanism to enforce the resolutions and remedy the breach of state responsibility under customary international law. See Joyner & Rothman, *supra*, at 257. See generally Findlay, *supra* note 47, at 28. As of this writing, the economic sanctions imposed by the United Nations have proved ineffective in forcing the Libyan government to extradite the Libyan terrorists for prosecution.

103. See Abraham D. Sofaer, *Letters to the Editor: The Case For and Against Abducting Terrorists*, *N.Y. TIMES*, Jan. 28, 1986, at 24.

#### IV. RESTRAINTS ON THE USE OF FORCE EXTRATERRITORIALLY AND THE RIGHT UNDER CUSTOMARY INTERNATIONAL LAW TO PROTECT NATIONALS ABROAD

The critics of *Alvarez-Machain* maintain that the exercise of a state's police powers abroad constitutes an unlawful use of force against the territorial sovereignty of the foreign state.<sup>104</sup> International legal purists stress that a state is justified in exercising the use of force extraterritorially only in response to a foreign-armed attack.<sup>105</sup> Absent an armed offensive, if a state exercises force within the territory of another state to preserve and protect legitimate and vital national interests (e.g., to protect its nationals abroad, rescue its citizens being held hostage, or apprehend international terrorists granted sanctuary by a foreign sovereign), the actions of the state are in derogation of international law and the state becomes the lawbreaker.<sup>106</sup> This restrictive view of international law goes too far and "stress[es] black letter at the expense of far more fundamental values."<sup>107</sup>

##### A. *Prior to the U.N. Charter*

Prior to the adoption of the U.N. Charter in 1945, customary international law permitted intervention by a state to protect its nationals when the foreign state was unwilling or unable to do so. It is widely accepted that "[t]raditional international law has recognized the right of a state to [use force] for the protection of the lives and

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104. See Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 746-47 (1992); *Kidnapping Suspects Abroad: Hearings*, *supra* note 6; see generally Abramovsky, *supra* note 7.

105. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 432-34 (1963); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 140-41 (2d ed. 1979).

The U.N. Charter provides: "Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

106. See generally Abramovsky, *supra* note 7. Moreover, dissenting Judge Morozov opined in the International Court of Justice decision involving the failed U.S. mission to rescue Americans held hostage in Iran that absent an armed attack against the United States, the rescue attempt constituted a violation of Iran's territorial sovereignty, and as such, a violation of the U.N. Charter and principles of customary international law. *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 54, 57 (May 24) (Morozov, J., dissenting).

107. See Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 344 (1967).

property of its nationals abroad in situations where the state of their residence . . . is unable or unwilling to grant them the protection to which they are entitled."<sup>108</sup>

The right to protect nationals abroad has also been recognized in international arbitral decisions. In the *Spanish Moroccan Claims* case, which involved an international dispute between Great Britain and Spain, the arbitrator stated:

[I]t cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions. The right of intervention has been claimed by all states; only its limits are disputed.<sup>109</sup>

Under the customary international law right to protect a state's nationals abroad, it is reasoned that while the right of territorial sovereignty is viewed as paramount, this right is not entitled to absolute deference.<sup>110</sup> Under the principle of relativity of rights, the state's right of territorial integrity must be balanced against the competing right of the other state to protect its nationals abroad.<sup>111</sup> Moreover, the right of sovereignty carries with it certain reciprocal duties and obligations. One commentator has noted:

[I]n international law there are no perfect rights, no absolute rights. All rights must be exercised prudently with ordinary precautions without abusing them or exceeding their equitable limits. When a state abuses its rights by permitting within its territory the treatment of its own nationals or foreigners in a manner violative of all universal standards of humanity, any nation may step in and exercise the right of humanitarian intervention.<sup>112</sup>

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108. PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 169 (1949). Professor Bowett has commented that "[t]he right of the state to intervene by the use or threat of force for the protection of its nationals suffering injury within the territory of another state is generally admitted, both in the writings of jurists and in the practice of states." BOWETT, *supra* note 57, at 87; see Findlay, *supra* note 47, at 26; Paust, *supra* note 96, at 729; Lillich, *supra* note 107, at 329-30; 1 L. OPPENHEIM, *INTERNATIONAL LAW* §135, at 309 (H. Lauterpacht ed., 8th ed. 1955).

109. *Anglo-Spanish Arbitrations, Beni-Madan, Rzini Claim*, 2 R.I.A.A. 616, 641 (1925) (trans. by author); see also *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829 (1928).

110. See Halberstam, *supra* note 26, at 745. Professor Halberstam argues that "states should not infringe the territorial sovereignty of other states, but neither should those who commit horrendous crimes be guaranteed immunity because there exists a state that condones their conduct and refuses to extradite or prosecute." *Id.*

111. See BOWETT, *supra* note 57, at 93.

112. A.J. THOMAS, JR. & ANN V.W. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965* 19 (1967).

Professor Bowett has further commented that a state that abuses its right of sovereignty by failing to protect aliens within its territory in violation of international law should not be permitted to assert its right of territorial sovereignty when the state adversely affected intervenes to protect its nationals.<sup>113</sup>

## B. U.N. Charter

The primary legal restraint on the use of force extraterritorially is found in article 2(4) of the U.N. Charter, which states: "All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."

Article 2(4), however, does not provide a blanket prohibition on all threats or uses of force extraterritorially.<sup>114</sup> There remains strong disagreement among international scholars and a wide divergence of views on whether the customary international law right to intervene for the protection of nationals abroad survived the adoption of the U.N. Charter.<sup>115</sup> Three distinctive theories have emerged.

### 1. Restrictive Theory

Under the most restrictive view, article 2(4) is construed as a sweeping prohibition against the use of force regardless of the motive of the intervening state.<sup>116</sup> Article 51, which prescribes the right of self-defense, provides a narrowly defined exception to the article 2(4)

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113. See BOWETT, *supra* note 57, at 90-91.

114. Under article 51 of the U.N. Charter, a state is justified in using force to repel an armed attack. U.N. CHARTER art. 51. See *supra* note 105 and accompanying text.

115. International legal scholars have been engaged in a heated debate over this issue for decades. See Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (John N. Moore ed., 1974).

Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), is often cited by international law scholars in support of the proposition that self-help measures have been rendered unlawful under the Charter. Several noted international legal scholars disagree. See D. O'CONNELL, *INTERNATIONAL LAW* 303 (2d ed. 1970) (observing "[t]he statement of law in the Corfu Channel Case is not sufficiently comprehensive or precise to warrant the conclusion that protection of nationals . . . is in all circumstances illegal"); BOWETT, *supra* note 57, at 15; HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 84-85 n.75 (Robert W. Tucker ed., 2d ed. 1966); Jeffrey A. McCredie, *The Role of Law Enforcement In Extraterritorial Jurisdiction: Law and Policy Considerations for the Future*, 5 *EMORY INT'L L. REV.* 103, 136 (1991).

116. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1632 (1984).

prohibition.<sup>117</sup> Furthermore, an armed attack against a national abroad is not viewed as constituting an armed attack against the state for purposes of article 51.<sup>118</sup>

The jurists and legal scholars that espouse this restrictive construction of article 2(4) reason that the primary purpose of the United Nations is the maintenance of peace.<sup>119</sup> That end, it is argued, is best served by subjecting the use of force to the collective control of the United Nations.<sup>120</sup> The unilateral use of force by an individual state, whatever the reason, is inconsistent with and serves to jeopardize this fundamental goal of preserving international peace and stability.<sup>121</sup> Finally, in support of a non-interventionist policy regarding the use of force, restrictionists invoke U.N. General Assembly Resolutions that further condemn the unilateral use of force.<sup>122</sup>

## 2. *Realist Theory*

The proponents of the realist theory espouse a more literal reading of article 2(4) and maintain that it does not limit the right of a state to use force to protect its nationals abroad. Several arguments are advanced. First, article 2(4) expressly prohibits the use of force against the "territorial integrity" or "political independence" of a state. Realist scholars assert that the use of force to protect a state's nationals in a foreign territory is not directed at the "territorial integrity" or "political independence" of the foreign state.<sup>123</sup> Second, the

117. *Id.* at 1620.

118. See Maj. Ronald M. Riggs, *The Grenada Intervention: A Legal Analysis*, 109 *MIL. L. REV.* 1, 22 (1985); Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: It's Current Validity Under the U. N. Charter*, 4 *CAL. W. INT'L L.J.* 203, 251 n.208 (1974); BROWNLIE, *supra* note 105, at 278-79.

119. See McCredie, *supra* note 47, at 455-56; Lillich, *supra* note 115, at 236.

120. See BROWNLIE, *supra* note 105, at 431.

121. *Id.* at 431.

122. See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Sovereignty, G.A. Res. 2131, 20 U.N. GAOR, Agenda Item 107, at 9, U.N. Doc. A/6220 (1965); Declaration on Principles of International Law, *supra* note 87.

123. See Paust, *supra* note 96, at 726 (1986) ("the use of force to capture and abduct an international criminal located within foreign territory would certainly not be directed against the territorial integrity or political independence of such foreign state"); THOMAS & THOMAS, *supra* note 112, at 16 ("[s]uch emergency action does not impair the territorial integrity or political independence of a state; it merely rescues nationals from a danger which the territorial state cannot or will not prevent"); W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177 (Richard B. Lillich ed., 1973) ("[s]ince a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the United Nations but is

realists submit that there are two major purposes to which the U.N. Charter aspires.<sup>124</sup> In addition to the maintenance of peace, the United Nations is committed to the protection and preservation of human rights. Articles 1, 55, and 56 codify the international obligation of all member states to promote and protect human rights.<sup>125</sup> Under the realist theory, the protection of human rights is equally as important as maintaining international peace.<sup>126</sup> The use of force, for example, to rescue nationals held hostage in a foreign state is perceived as advancing a major purpose of the U.N. Charter—that of protecting human rights.<sup>127</sup> Therefore, unilateral use of force for such purpose does not run afoul of the second clause of article 2(4), which prohibits the use of force “in any manner inconsistent with the purposes of the United Nations.”<sup>128</sup>

The proponents of the realist theory also opine that to the extent states consciously relinquished the customary law right of forcible self-help, such action was premised on the ability of the United Nations to implement a collective enforcement mechanism to redress human rights deprivations and injuries to aliens abroad.<sup>129</sup> However, postwar expectations regarding centralizing authority within the United Nations have lamentably not materialized.<sup>130</sup> Professor McDougal has commented:

[A]t one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think this was a very grave mistake . . . . In the absence of collective machinery to protect against attack and deprivation, I would suggest that the principle of major purposes requires an interpretation which would honor self-help

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rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4)”; *see generally* Lillich, *supra* note 107, at 336; Lillich, *supra* note 115, at 236-37.

124. *See* Lillich, *supra* note 115, at 236.

125. Paragraph 3 of article 1 states: “The purposes of the United Nations are: . . . promoting and encouraging respect for human rights . . . .” Article 55 provides: “[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms . . . .” Article 56 provides: “All members pledge themselves to take joint and separate action in co-operation with the Organization for achievement of the purposes set forth in Article 55.” U.N. CHARTER arts. 1, 55, 56.

126. *See* Lillich, *supra* note 115, at 236-37.

127. *See* Reisman, *supra* note 123, at 177.

128. *Id.*

129. *See* Lillich, *supra* note 115, at 238-39; Findlay, *supra* note 47, at 28.

130. *See* Findlay, *supra* note 47, at 28 (“[i]n the absence of an international body to protect its citizens, a nation cannot be expected to stand idle and watch its nationals be killed or injured”); Riggs, *supra* note 118, at 30-31.

against prior unlawfulness . . . . Many states of the world have used force in situations short of the requirements of self-defense to protect their national interests.<sup>131</sup>

Consequently, absent any enforcement authority by the United Nations, realists argue that the customary law right revives and the state may lawfully intervene to protect the safety of its nationals.<sup>132</sup>

Finally, the realist theory advocates maintain that the use of force to protect nationals must be narrowly drawn and only that amount of force necessary to achieve the objective of protecting the state's national is justified.<sup>133</sup> The use of force must be consistent with the principles of necessity and proportionality.<sup>134</sup>

### 3. *Self-Defense Theory*

Under this theory, the use of force to protect nationals abroad is viewed as an extension of the lawful exercise of a state's right of self-defense. Professor Bowett posits:

that an injury to the nationals of a state constitutes an injury to the state itself, and that the protection of nationals is an essential function of the state. On this reasoning it is feasible to argue that the

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131. Myres S. McDougal, *Authority to Use Force on the High Seas*, 20 NAVAL WAR COLL. REV. 19, 28-29 (1967). See W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 280 (1985):

[T]he security system of the United Nations was premised on a consensus between permanent members of the Security Council. Lamentably, that consensus dissolved early in the history of the organization. Thereafter, for almost all cases but those in which there was a short-term interest in collaboration, the Security Council could not operate as originally planned. Part of the systemic justification for the theory of Article 2(4) disappeared.

See also Findlay, *supra* note 47, at 28 (“[t]o require states to refrain from using force in such circumstances [the absence of a collective enforcement mechanism] would mean that the Charter—notwithstanding its provisions guaranteeing human rights—affords a great deal less protection to individuals than did prior customary international law”).

132. See W. MICHAEL REISMAN, NULLITY AND REVISION 850 (1971). Reisman states: “A rational and contemporary interpretation of the Charter must conclude that Article 2(4) suppresses self-help insofar as the organization can assume the role of enforcer. When it cannot, self-help prerogatives revive.” *Id.*

133. See McCredie, *supra* note 47, at 463; Paust, *supra* note 96, at 727.

134. The doctrine of necessity (*i.e.*, “forcible self-help”) is implicated when the danger to the individuals concerned is imminent and the state whose duty it is to protect the alien is unable or unwilling. A state, however, need not wait for an actual violation to occur before taking preventive action. See Lillich, *supra* note 107, at 347-48. The doctrine of proportionality requires that the state use only that amount of force reasonably necessary to redress the violation of human rights. See BOWETT, *supra* note 57, at 93; Paust, *supra* note 96, at 728-29; McCredie, *supra* note 115, at 137.

defence of nationals, whether within or without the territorial jurisdiction of the state, is in effect the defence of the state itself.<sup>135</sup>

The international scholars that embrace the self-defense theory argue that the right of self-defense is an "inherent right" that predates the Charter.<sup>136</sup> Absent an express prohibition, they maintain that the customary law right survived the adoption of the Charter.<sup>137</sup> Moreover, the use of force for the limited purpose of defending a state's nationals "cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other state."<sup>138</sup> Former State Department Legal Adviser Sofaer has stated that the use of force in self-defense, even if constituting a breach of the asylum state's territorial sovereignty, does not necessarily render the action unlawful:

Every state retains the right of self-defense, recognized in article 51 of the U.N. Charter.

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Thus, a state may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign state where the state is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks on U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a state does not render it unlawful.<sup>139</sup>

### C. *Application to Alvarez-Machain*

Under the restrictive construction of article 2(4), since the forcible apprehension of Alvarez-Machain was not in response to an "armed attack" of U.S. territory, it does not fall within the narrowly construed article 51 exception to the general prohibition against the

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135. BOWETT, *supra* note 57, at 92.

136. *Id.* at 187.

137. *Id.* at 185-86. See also Schachter, *supra* note 116, at 1633-34.

138. BOWETT, *supra* note 57, at 185-86. See also Lillich, *supra* note 167, at 336-37.

139. See *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 24 (1989) (statement of Abraham D. Sofaer, Legal Adviser, U.S. Department of State) [hereinafter *FBI Authority to Seize Suspects Abroad: Hearing*]. See also Glennon, *supra* note 104, at 755 ("[i]n situations involving state-sponsored terrorism conducted on a large scale with ongoing dangers that cannot be circumscribed by economic or diplomatic measures, abduction may be permissible under Article 51 of the U.N. Charter").

unilateral use of force.<sup>140</sup> The restrictionists would therefore argue that the arrest of Alvarez-Machain was in violation of international law. Those that espouse such a restrictive reading of article 2(4), however, must concede that unilateral intervention to remedy a human rights violation (the kidnapping and murder of a federal agent) in response to a breach of state responsibility is at least morally condonable.<sup>141</sup> Any breach of international law by the intervening state should therefore be mitigated accordingly.<sup>142</sup>

In contrast, under the realist theory the unilateral use of force would be lawful. The use of force to apprehend Alvarez-Machain was not directed against the territorial integrity or political independence of the State of Mexico.<sup>143</sup> Thus, the use of force does not run counter to the article 2(4) prohibition. The extraterritorial apprehension of Alvarez-Machain was also consistent with a major purpose of the Charter—the promotion of human rights. According to one commentator:

[T]he seizure of terrorists abroad for trial in the United States is intimately related to the protection of U.S. nationals; the apprehension, prosecution, and punishment of terrorists would prevent future attacks by the particular terrorists involved and deter other terrorists from targeting U.S. citizens. . . . Thus, while the apprehension of terrorists may not be as directly related to the protection of threatened nationals as, for instance, a rescue mission, it might be a necessary measure to protect U.S. nationals throughout the world.<sup>144</sup>

The apprehension of Alvarez-Machain in Mexico was aimed at not only bringing one of DEA Agent Camarena's assailants to justice

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140. There is growing resistance on the part of the world community to read article 2(4) as an absolute ban on the use of force to protect nationals. Findlay has commented: [N]early all Western states and most publicists today believe that the use of armed force to protect nationals is consistent with international law, as long as the exercise of force is necessary to this end and proportionate to the threatened harm. State practice following the adoption of the U.N. Charter supports this conclusion.

Findlay, *supra* note 47, at 27-28; see also McCredie, *supra* note 47, at 464-65; Paust, *supra* note 96, at 728-29.

141. See John R. D'Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality under International Law*, 2 VA. J. INT'L L. 485, 510 (1981); *FBI Authority to Seize Suspects Abroad: Hearing*, *supra* note 139 and accompanying text.

142. See D'Angelo, *supra* note 141, at 510.

143. See Paust, *supra* note 96, at 726; McCredie, *supra* note 47, at 464-65; Findlay, *supra* note 47, at 25.

144. Findlay, *supra* note 47, at 29.

but also was specifically intended to deter future violent attacks against U.S. federal agents as well as American civilians overseas.<sup>145</sup> Narco-terrorists must understand that the murder of a U.S. federal agent anywhere in the world will not be tolerated.<sup>146</sup> Moreover, the perpetrators of such heinous crimes will be apprehended and aggres-

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145. McCredie has stated:

By encouraging nations to take enforcement actions against international terrorism, the United States has contributed to the reaffirmation of principles and purposes of international treaties and of the rule of law. If even one terrorist is deterred from causing destruction, the action of the United States should be considered valuable to the world community. By utilizing force to bring terrorists to justice, the United States has contributed to re-establishing world order and has set a valuable precedent for the future.

McCredie, *supra* note 47, at 467.

146. In a 1989 Department of Justice legal opinion, former Assistant Attorney General William P. Barr of the Office of Legal Counsel explained that at the direction of the President or the Attorney General, the FBI may use its statutory authority under 28 U.S.C. § 533(1) and 18 U.S.C. § 3052 to investigate and arrest international criminals abroad even if those actions conflict with customary international law or unexecuted treaties. Furthermore, the President, acting through the Attorney General, has inherent constitutional authority to order the FBI to investigate and arrest individuals in foreign territory and to override international law. *Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities*, 13 OP. OFF. LEGAL COUNSEL 195 (1989); Theodore C. Jonas, *International "Fugitive Snatchings" in U.S. Law: Two Views From Opposite Ends of the Eighties*, 24 CORNELL INT'L L.J. 521, 533-37 (1991).

The issue regarding whether the President may override customary international law has been heatedly debated in international legal circles. Three distinct legal theories have been advanced. Professor Paust, who espouses the most restrictive view, maintains that the President has no authority or constitutional power to violate a treaty or principle of customary international law and that such an act by the President would be *ultra vires*, or without authority. Professor Paust also rejects the argument that Congress can authorize the President to violate customary international law. See Jordan J. Paust, *The President is Bound by International Law*, 81 AM. J. INT'L L. 377, 387-89 (1987). Professor Glennon adopts a more moderate position. In his view, absent Congressional consent, the President does not have the constitutional power to breach a clearly defined norm of customary international law. However, when the President acts with the concurrence of Congress, "customary international law has no bearing on the constitutionality of that act." Michael J. Glennon, *Raising the Paquette Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 363 (1985); Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 930 (1986). Finally, Professor Henkin posits that even without Congressional approval, the President may act to supersede a treaty or principle of international law, if the act is within the President's constitutional authority as sole organ in the area of foreign affairs or as commander-in-chief. See Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936 (1986); Louis Henkin, *The Constitution and United State Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 885 (1987).

A detailed analysis of the Department of Justice legal opinion and relevant legal articles is beyond the scope of this Article.

sively prosecuted wherever they might be located.<sup>147</sup> Inaction would otherwise surely jeopardize American lives abroad as well as at home. Professor Halberstam, commenting on the arrest of Alvarez-Machain, observed:

[A] rule that would prohibit trial whenever the defendant is illegally seized, unless coupled with a rule requiring states to extradite, would put terrorists, drug dealers and others who have no regard for human life on notice that they can perpetrate the most monstrous crimes without fear of punishment as long as they can find a state that condones their conduct, or that will—for whatever reason—neither prosecute or extradite.<sup>148</sup>

The apprehension of Alvarez-Machain was also consistent with both the doctrine of proportionality and necessity. The force used to arrest Alvarez-Machain in Mexico was limited and reasonable. He was arrested by Mexican state police officers without incident. Only that amount of force necessary to effect Alvarez-Machain's arrest was utilized.<sup>149</sup> DEA agents did not participate in the actual arrest.<sup>150</sup>

The requirement of necessity, which demands an imminent threat of death or serious bodily harm, was likewise satisfied. In the case of apprehending fugitives for past terrorist activities, the fear is that future acts of terrorism will be committed if the perpetrators are not apprehended or otherwise deterred. "The imminency requirement should [therefore] be liberally construed to allow nations to utilize force to apprehend terrorists likely to go unpunished. Unenforced prohibitions against violent acts present a danger to the world com-

147. See 132 CONG. REC. S1384 (daily ed. Feb. 16, 1986) (statement of Senator Arlen Specter). Senator Specter stated:

[I]f the terrorist is hiding in a country . . . where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back for trial. We have the ability to do that right now, under existing law. Under current constitutional doctrine, both U.S. citizens and foreign nationals can be seized and brought to trial in the United States without violating due process of law.

148. Halberstam, *supra* note 26, at 745.

149. See *Caro-Quintero*, 745 F. Supp. at 603-04 (during questioning following his arrival, Dr. Machain stated that he had neither been tortured nor mistreated).

150. *Caro-Quintero*, 745 F. Supp. at 603. Cf. Paust, *supra* note 96, at 727. In the Achille Lauro incident, U.S. Navy F-14 fighter planes intercepted an Egyptian airliner and forced the plane to land in Sicily. Professor Paust noted that the use of force in response to the terrorist capture on international waters of the Achille Lauro vessel with 28 U.S. citizens aboard was proportionate and reasonable. See *id.* McCredie commented that the interception was "motivated by the rationale of deterrence and sought to protect United States citizens abroad." McCredie, *supra* note 47, at 465. "[T]he interception [like the arrest of Alvarez-Machain] was strictly confined to the purpose of bringing the offenders to justice." *Id.*

munity by encouraging future terrorism."<sup>151</sup> This point is further underscored by the kidnapping and torture of DEA Special Agent Victor Cortez in Guadalajara, Mexico, approximately one year after Agent Camarena was kidnapped and murdered.<sup>152</sup> This second kidnapping of a DEA agent in Mexico was preceded by inaction and foot-dragging by the Mexican police officials involved in the Camarena criminal investigation.<sup>153</sup>

Under the self-defense theory, the forcible apprehension of Alvarez-Machain would likewise be legally permissible. An armed attack against an American citizen is deemed an attack against the state.<sup>154</sup> The state may therefore justifiably respond by the use of force in self-defense.<sup>155</sup> Sofaer has posited that the threats posed by narco-terrorists to U.S. citizens could support the lawful use of force extraterritorially under article 51:

We are reaching the point . . . at which the activities of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. . . . But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures of self-defense.<sup>156</sup>

The Mexican narcotics cartel responsible for the kidnapping and murder of DEA Agent Camarena, of which Alvarez-Machain was alleged to be a member, poses a grave and serious threat to the domestic security of the United States. Through the perpetration of violent acts against its citizens and the distribution of massive quantities of narcotics that plague this country, the threat of harm is real and imminent.<sup>157</sup>

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151. McCredie, *supra* note 47, at 466.

152. *See supra* note 50 and accompanying text.

153. *See supra* note 71 and accompanying text.

154. *See* BOWETT, *supra* note 57, at 92.

155. *Id.*

156. *F.B.I. Authority To Seize Suspects Abroad: Hearing, supra* note 139.

157. In addition to the murder of DEA Agent Camarena, members of the Guadalajara narcotics cartel have been indicted for the murders of two Americans in Guadalajara, as well as the murder of DEA informant Zavala-Avelar, under 18 U.S.C. 1959(a)(1), Violent Crimes in Aid of Racketeering. *Vasquez-Velasco*, No. 91-50342, 1994 U.S. App. LEXIS 1200 (9th Cir. Jan. 25, 1994).

## V. A LEGAL FRAMEWORK FOR THE USE OF EXTRAORDINARY RENDITION

In addition to the legal challenges raised under customary international law and the U.N. Charter, the use of extraordinary rendition has been assailed on policy grounds. Three policy arguments are raised for prohibiting the non-consensual use of force abroad. First, it is maintained that the unilateral use of force extraterritorially to apprehend a foreign fugitive renders the United States a lawbreaker and diminishes respect for the United States in the international community.<sup>158</sup> The argument is advanced that the United States should set an example for other countries to emulate by upholding and preserving, rather than ignoring and violating, the rule of law.<sup>159</sup> Second, it is asserted that a policy permitting foreign abductions invites retaliatory abductions of American citizens within the territory of the United States and endangers American lives.<sup>160</sup> The opponents of extraordinary rendition further charge that forcible apprehensions abroad threaten diplomatic relations and decreased cooperation with foreign governments.<sup>161</sup> International stability should not be compromised, it is claimed, simply to bring a foreign fugitive before the jurisdiction of the court for prosecution in the United States.<sup>162</sup> Legitimate and compelling policy interests are thus implicated by the resort to extraordinary rendition.

Extraordinary rendition is an extreme measure and, as such, should only be pursued in extreme cases. Extraordinary rendition should not be pursued ad hoc, but should be narrowly restricted and confined. The following legal framework is offered to limit its use. First, a state should be permitted to use force extraterritorially only when the asylum state has abandoned its duty of state responsibility under international law to prosecute and punish or to extradite international criminals within its territorial borders. When the state

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158. Justice Stevens in his dissenting opinion in *Alvarez-Machain*, quoted Justice Brandeis' now famous passage: "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto itself; it invites anarchy." *Alvarez-Machain*, 112 S. Ct. at 2205; see also Glennon, *supra* note 104, at 756.

159. 112 S. Ct. at 2205-06. See generally Glennon, *supra* note 104, at 756.

160. See Abramovsky, *supra* note 7, at 201-203; Glennon, *supra* note 104, at 754.

161. Professor Ralph G. Steinhardt posits that the abduction of Alvarez-Machain jeopardized cooperation with Mexico in the international war on drugs and on a broad range of other issues, including the North American Free Trade Agreement. See *Kidnapping Suspects Abroad: Hearings*, *supra* note 6, at 40 (statement of Professor Ralph G. Steinhardt); Abramovsky, *supra* note 7, at 206-08.

162. *Id.*

breaches its duty of state responsibility, the foreign state violates customary international law.<sup>163</sup> Moreover, when the asylum state provides the criminal offender a safe-haven from prosecution or, in the more egregious case, provides financial support and training to foreign terrorists, the foreign state becomes an accomplice in crime.<sup>164</sup> The state may be in direct violation of international principles of law that prohibit a state from assisting or acquiescing in "acts of civil strife or terrorist acts" directed at the citizens of another state.<sup>165</sup> The failure to act as required under international law constitutes an abuse of the right of territorial sovereignty<sup>166</sup> and justifies the limited and temporary incursion on the breaching state's right of territorial sovereignty. When a state breaches its duty of state responsibility, the right of territorial sovereignty must give way to the affected state's right to protect its nationals. Conversely, when the foreign state has agreed to proceed against the defendant locally and is acting with "due diligence"<sup>167</sup> to apprehend and prosecute the criminal offender, the state's right of territorial sovereignty must be afforded great deference. The overriding principle is that justice be done, and if justice is done in the foreign state, so be it.<sup>168</sup> In this case, justification simply does not lie for violating the territorial integrity of the foreign state.

Extraordinary rendition should further be restricted to violations of the most serious and heinous crimes. While intended as illustrative rather than exclusive, such criminal offenses include: terrorist bombings, murder, hijacking, hostage-taking, kidnapping, and large-scale narcotics trafficking. When an individual is charged with any of these offenses, the foreign state's failure to act jeopardizes the safety of American nationals by encouraging future terrorist acts or other violent crimes.<sup>169</sup> If violent criminal offenders are permitted to go free, the domestic security of the United States is threatened.<sup>170</sup> In the case of a less serious, non-violent crime, however, the right of territorial integrity should prevail.

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163. See *Henfield's Case*, 11 F. Cas. at 1099; *Janes Case*, 4 R.I.A.A. at 87; Lillich & Paxman, *supra* note 53, at 276-307; Paust, *supra* note 53, at 48-53.

164. See *Henfield's Case*, 11 F. Cas. at 1108.

165. See Declaration on Principles of International Law, *supra* note 87; Hague Convention, *supra* note 78, art. 7, 22 U.S.T. at 1646; Montreal Convention, *supra* note 79, art. 7, 24 U.S.T. at 571; Hostages Convention, *supra* note 80, art. 6, 18 I.L.M. at 1458.

166. See THOMAS & THOMAS, *supra* note 112, at 19.

167. See Lillich & Paxman, *supra* note 53, at 278-88.

168. See *supra* note 67 and accompanying text.

169. See Findlay, *supra* note 47, at 29; McCredie, *supra* note 47, at 466.

170. See McCredie, *supra* note 47, at 466-67.

The doctrine of proportionality should serve as yet another restriction on the use of extraordinary rendition.<sup>171</sup> Only that amount of force necessary to apprehend the foreign fugitive should be sanctioned. Finally, the decision to proceed by way of extraordinary rendition should be approved by the U.S. Attorney General, after consultation with high-level Administration and State Department officials. This procedure would 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. For example, in the case of a terrorist attack directed against American citizens committed by Libyan nationals and sponsored by the Libyan government, diplomatic efforts by the United States to extradite the terrorist perpetrators from Libyan soil would be futile.<sup>172</sup> Furthermore, after assessing the international policy implications, the United States might reasonably conclude that in light of Libya's long history of terrorist aggression and its breach of international law in the instant case, the United States would not likely suffer public condemnation by the international community if it sought to bring the foreign fugitives before the jurisdiction of the court by means of extraordinary rendition.<sup>173</sup> To the contrary, the proposed U.S. action might even be applauded by some foreign governments.<sup>174</sup> Moreover, the foreign policy interests against jeopardizing diplomatic relations by exercising the use of force within the territory of the asylum state are of lesser

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171. See BOWETT, *supra* note 57, at 93; Paust, *supra* note 96, at 728-29.

172. While diplomatic resolution is always preferable and should be encouraged, the aggrieved state should not be required to exhaust all diplomatic avenues if it is clear that such efforts would be futile. See *supra* note 102 and accompanying text (terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland; Libyan government fails to comply with U.N. Security Council Resolutions to extradite Libyan defendants charged with bombing).

173. International reaction and public condemnation further serve as a check and balance on the unilateral use of force extraterritorially.

174. A United States military strike against Iraq in retaliation for an assassination plot allegedly sponsored by the Iraqi government targeting former U.S. President George Bush was strongly endorsed by European allies. Chancellor Helmut Kohl of Germany described the missile strike against Iraq as "a justified reaction" to a "deplorable attempted act of terrorism." British Prime Minister John Major called the missile attack "a justified act of self-defense." Craig R. Whitney, *Raid of Baghdad: Reaction, European Allies are Giving Strong Backing to U.S. Raid*, N.Y. TIMES, June 28, 1993, at A7. Russia's Foreign Ministry approved of the military raid and stated that such action was in accord with the U.N. Charter and "a state's right to individual and collective self-defense." William Drozdiak & Caryle Murphy, *Muslim Leaders Accuse U.S. of Using Double Standard*, WASH. POST, June 28, 1993, at A14. The unilateral military action, however, was denounced by Islamic nations. See *Arab Nations See A Double Standard; Reaction: They Charge that U.S. Ignores the Plight of Bosnian Muslims While Targeting Iraq, But Europeans Applaud Strike*, L.A. TIMES, June 28, 1993, at A8.

concern when dealing with a nation that sponsors and exports terrorism. Finally, if the United States were to tolerate and adopt a policy of inaction and permit the terrorists to evade apprehension and prosecution, the risk of possible retaliatory kidnappings by the Libyan government would have to be weighed against the risk of encouraging future terrorist attacks. After balancing all relevant foreign policy interests against the government's interest and duty to protect its citizenry, the United States might ultimately conclude that the greater risk and danger to its citizens lie in failing to act to bring the international terrorists to justice. A balancing of foreign policy and domestic interests by the U.S. Attorney General and high-level Administration and Department of State officials would serve to carefully limit and restrict the use of extraordinary rendition and ensure that important international policy interests are not inadvertently jeopardized.

## VI. CONCLUSION

Since the 1985 murder of DEA Agent Enrique Camarena by narco-terrorists, there has been a significant increase in terrorist attacks directed against American nationals. In 1988, approximately 200 Americans were victims of terrorist attacks abroad and 855 acts of international terrorism were recorded worldwide.<sup>175</sup> The December 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, caused the death of 270 passengers.<sup>176</sup> Now, tragically, terrorists have crossed onto U.S. soil. The recent bombing of the World Trade Center in New York City resulted in six deaths, injured more than 1,000 persons, and closed two of the world's largest office towers for a month.<sup>177</sup> Recently, two CIA employees were gunned down and three other employees were wounded outside the CIA headquarters

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175. See McCredie, *supra* note 115, at 107-08. This number of international terrorist attacks represents a 3% increase over 1987 and the highest yearly total ever recorded.

176. See *supra* note 102 and accompanying text. The 1989 bombing of an Avianca Airlines jetliner took the lives of 110 passengers, including two Americans. Pablo Escobar, the former head of the Medellin Cartel, has been indicted in the United States in connection with this terrorist act. While this act of terrorism was apparently intended to intimidate the Colombian government and chill criminal investigations against the members of the Cartel, American lives nevertheless fell victim. See *supra* note 11 and accompanying text.

177. Robert D. McFadden, *The Twin Towers: The Overview; Jersey City Man Is Charged in Bombing of World Trade Center After Rented Van is Traced*, N.Y. TIMES, Mar. 5, 1993, at A1; Mike Dorning, *Sixth World Trade Center Victim Found*, CHI. TRIB., Mar. 16, 1993, § 1, at 4.

in Langley, Virginia.<sup>178</sup> The chief suspect in the fatal shootings is a Pakistani national who is believed to have fled the United States to Pakistan.<sup>179</sup> While the motive for the slayings is unclear, one theory is that the two murders were the work of Islamic terrorists.<sup>180</sup> Finally, terrorism has threatened the life of a former President of the United States. Former President George Bush was the target of an attempted assassination by the Iraqi government.<sup>181</sup>

When fugitive terrorists flee and seek sanctuary in a foreign country, issues involving extraterritorial jurisdiction and whether the defendants should be prosecuted locally or extradited should be resolved diplomatically between the aggrieved state and foreign country. International cooperation is necessary to maintain world order and should always be encouraged. Moreover, a state's territorial sovereignty should be respected.

The international law right of territorial sovereignty, however, is not absolute and carries with it reciprocal duties and responsibilities under international law.<sup>182</sup> A state is obligated to protect foreign nationals within its territory, and this internationally imposed obligation includes the duty to prosecute or extradite international criminals within its borders.<sup>183</sup> When a state breaches its duty under international law by failing to prosecute or extradite, or by providing assistance or knowingly harboring international criminals, this poses a special circumstance for the enforcement of international law.<sup>184</sup> The asylum state is violating international law.<sup>185</sup>

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178. John Dillin, *Terrorist Incidents in the U.S. Raise Immigration Concerns*, CHRIST. SCI. MON., Mar. 19, 1993, at A1.

179. Robert O'Harrow, Jr., *Investigators in CIA Case Seek Bronco Driver: Other Witnesses to Shootings, Car Used by Gunman Also are Sought*, WASH. POST, Mar. 5, 1993, at D2.

180. Bill Gertz, *Motive as Elusive as CIA Shooter Conspiracy Theories Rampant*, WASH. TIMES, Feb. 13, 1993, at A1.

181. R. Jeffrey Smith, *U.S. Links Iraq to Bush Plot: Action May be Taken After Kuwait Trial*, WASH. POST, June 10, 1993, at A25; Bill Nichols, *Calls for Retaliation After Report of Iraqi Plot*, USA TODAY, May 10, 1993, at 4A (some officials favor extraditing suspects to U.S., while others want a direct military response); Douglas Jehl, *U.S. Cites Evidence in a Plot on Bush*, N.Y. TIMES, May 9, 1993, § 1, at 9.

182. See Lillich, *supra* note 107, at 344; BOWETT, *supra* note 57, at 93.

183. See *Henfield's Case*, 11 F. Cas. at 1108; *Janes Case*, 4 R.I.A.A. at 87; Lillich & Paxman, *supra* note 53, at 278-88; Hostages Convention, *supra* note 80, art. 8, 18 I.L.M. at 1460; Montreal Convention, *supra* note 79, art. 7, 24 U.S.T. at 571; Hague Convention, *supra* note 78, art. 7, 22 U.S.T. at 1646.

184. See Paust, *supra* note 96, at 726; Halberstam, *supra* note 26, at 744.

185. See Findlay, *supra* note 47, at 223; McCredie, *supra* note 115, at 144.

While the maintenance of peace and international security is a major purpose under the Charter,<sup>186</sup> the United Nations is also committed to the fundamental principle of protecting and promoting human rights.<sup>187</sup> The cause of human rights is not advanced if the perpetrators of heinous crimes are permitted to go free or seek refuge from prosecution in foreign territory.<sup>188</sup> Apprehension and prosecution of international criminals deters terrorist acts, and thereby saves innocent lives.<sup>189</sup> The forcible abduction of Dr. Alvarez-Machain served to promote the legitimate interests of justice and humanitarian rights in the world community.

The first duty of government is the protection of its citizens. This duty extends to the protection of its nationals abroad. This solemn obligation of government was cogently described by Supreme Court Justice Nelson, on circuit, who stated:

Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.<sup>190</sup>

This duty has not been surrendered under international law.

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186. See McCredie, *supra* note 47, at 455-56; Lillich, *supra* note 115, at 236.

187. See Lillich, *supra* note 115, at 236.

188. See McCredie, *supra* note 47, at 466.

189. See Findlay, *supra* note 47, at 50.

190. Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186).

