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COMMENTARY

Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain

John Quigley*

We have people who deliver people to us.... You might just find a fellow somewhere, all tied up.1

I. INTRODUCTION

Last year when the United States Supreme Court in United States v. Alvarez-Machain2 ruled on the legality of abducting a suspect abroad, a significant element was missing in its analysis. The Court analyzed the rights of the United States, as well as the rights of the state3 where the abduction occurred, which in that case was Mexico. However, neither the majority opinion nor the strong dissent addressed the issue of whether United States Drug Enforcement Agency ("DEA") agents violated Dr. Alvarez-Machain’s personal rights when they abducted him and shipped him involuntarily across an international border.

The Court’s omission is even more glaring in light of the United States’ ratification of the International Covenant on Civil and Political Rights in 1992.4 By ignoring the human rights issue

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3 "State" is used in this Article, unless otherwise indicated, to mean nation-state.
in *Alvarez-Machain*, the Supreme Court put the United States squarely in violation of its obligation to observe minimum standards for individual rights, regardless of nationality or location. Obvious human rights violations should have barred the Court’s conclusion that the abduction of an individual, in a country with whom the United States has an extradition treaty, does not bar jurisdiction of United States courts. The Court overlooked these violations, especially at a time when human rights considerations should be at the forefront of judicial thinking.

II. THE *ALVAREZ-MACHAIN* OPPINION

In 1990, DEA agents hired several Mexican nationals to abduct Dr. Humberto Alvarez-Machain, a Mexican national residing in that country, and deliver him to the United States. The DEA claimed to have information that Dr. Alvarez-Machain was involved in the abduction-torture-murder of Enrique Camarena, a DEA special agent, that occurred in Mexico in 1985. The DEA alleged that Dr. Alvarez-Machain gave Camarena injections to keep him alive while his abductors tortured and interrogated him. The men hired by the DEA seized Dr. Alvarez-Machain from his office in Guadalajara, forced him onto a private airplane, and flew him to El Paso, Texas, where DEA officials awaited him. DEA officials arrested Dr. Alvarez-Machain, and then a federal grand jury indicted him. Mexico protested the seizure and demanded both the return of Dr. Alvarez-Machain and the extradition of two persons it suspected as the DEA’s hired abductors.
Dr. Alvarez-Machain objected to being tried in the United States because of the irregularity of his rendition, arguing that the abduction violated an extradition treaty between Mexico and the United States.\textsuperscript{12} The United States district court decided that the abduction did violate the treaty and that the violation vitiated its jurisdiction to try Dr. Alvarez-Machain.\textsuperscript{13} The Ninth Circuit Court of Appeals affirmed on similar reasoning.\textsuperscript{14}

The United States Supreme Court, by a six to three vote, reversed, deciding that the abduction did not violate the extradition treaty.\textsuperscript{15} The Court framed the issue as relating only to the extradition treaty and discussed only that issue in its opinion.

The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States.\textsuperscript{16}

On remand, a trial was held in the district court. At the close of the prosecution's case, the judge dismissed the charges for lack of evidence.\textsuperscript{17} Dr. Alvarez-Machain was released and returned to Mexico.

\textsuperscript{13} Caro-Quintero, 745 F. Supp. at 614.
\textsuperscript{14} United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev'd, 112 S. Ct. 2188 (1992). The Ninth Circuit based its decision on a prior case, United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), vacated, 112 S. Ct. 2986 (1992), because Verdugo-Urquidez had a factual basis similar to Alvarez-Machain. In Verdugo-Urquidez, Verdugo-Urquidez was detained by six Mexican police officers. \textit{Id.} at 1216. At the instigation of DEA agents, the Mexican officers drove Verdugo-Urquidez to the United States-Mexican border and turned him over to United States Marshals. \textit{Id.} The Mexican police officers were indicted for kidnapping. \textit{Id.} at 1216 n.1. Verdugo-Urquidez raised the abduction as a bar to jurisdiction, but the district court overruled his motion. \textit{Id.} at 1215. Verdugo-Urquidez did not appeal that ruling.
\textsuperscript{15} Alvarez-Machain, 112 S. Ct. at 2197.
\textsuperscript{16} \textit{Id.} at 2190.
\textsuperscript{17} Jim Newton, \textit{Judge Orders Camarena Case Defendant Freed}, L.A. \textit{TIMES}, Dec. 15, 1992, at A1 (reporting that proof was insufficient to show that Dr. Alvarez-Machain had given injections to Camarena).
III. ABDUCTION AND SOVEREIGNTY RIGHTS

Alvarez-Machain was the first twentieth-century case in which the United States Supreme Court considered whether a suspect may be tried after being abducted abroad. The practical importance of the decision is that the United States and other states have used abduction abroad more frequently in recent decades. For example, to capture a mail and securities fraud suspect in Bimini, Central Intelligence Agency ("CIA") personnel duped the man into entering an airplane, held him at gunpoint, and forced him to fly to the United States where he was arrested by Federal Bureau of Investigation ("FBI") agents. In addition, along with Dr. Alvarez-Machain, another Mexican suspected in the same crime was abducted to the United States.

Other states also have abducted suspects in cases they considered particularly important. Uruguay abducted political dissidents who had taken refuge in neighboring states. Israel abducted Nazi official Adolf Eichmann in Argentina on World War II charges of crimes against humanity. It also abducted a man in Italy and tried him for treason and espionage.

18 In the nineteenth century, however, the Supreme Court addressed this issue. See, e.g., Ker v. Illinois, 119 U.S. 436 (1886).
19 United States v. Reed, 639 F.2d 896 (2d Cir. 1981).
21 On July 13, 1976, a Uruguayan man, who was a trade unionist, allegedly was abducted from Argentina by Uruguayan security and intelligence forces, who were aided by Argentinean paramilitary groups. Report of the Human Rights Committee: Case of Sergio Rubén López Burgos, Communication No. R.12/52, U.N. GAOR, 36th Sess., Supp. No. 40, at 176, U.N. Doc. A/36/40 (1981) [hereinafter López Burgos]. López Burgos was abducted on a charge of "subversive association" and allegedly was tortured and ill-treated during his detention. Id.

In another abduction case, Uruguayan agents abducted Lilian Celiberti de Casagiero, a Uruguayan woman, on November 12, 1978 from Brazil on a charge of "subversive association." Report of the Human Rights Committee: Case of Lilian Celiberti de Casariego, Communication No. R.13/56, supra at 185 [hereinafter Celiberti].
23 See Israel v. Mordechai Vanunu, reported in Around the World: Israel Nuclear Technician Charged with Spying, N.Y. TIMES, Nov. 29, 1986, at A7; Israel Opens Trial in Espionage Case, N.Y. TIMES, Aug. 31, 1987, at A8; Ex-Technician Appears in Court in Jerusalem, ST. LOUIS POST-DISPATCH, Dec. 1, 1986, at 8A; Vanunu: Israel Will Explain to Rome, JERUSALEM POST (int'l ed.), Jan. 3, 1987, at 4 (stating that charges related to information given to a newspaper by the abductee, a former technician at an Israeli nuclear power facility, that Israel had prepared one hundred nuclear bombs at the facility). After unsuccessfully pleading the abduction as a bar to prosecution, Vanunu was convicted and sentenced to
Efforts to combat terrorism and drug trafficking have led to renewed interest in abduction by the United States. United States military aircraft forced down an Egyptian aircraft that was flying in international waters over the Mediterranean Sea because the airliner contained suspected terrorists. Former President Ronald Reagan also reportedly issued a directive authorizing the abduction abroad of suspected terrorists. United States authorities have used abduction to combat drug trafficking. In the company of and at the apparent instigation of four United States Marshals, Honduran army officers detained a Honduran man in Honduras who was


24 On October 10, 1985, United States authorities intercepted the persons accused of hijacking the cruise ship Achille Lauro in the Mediterranean Sea, forcing their aircraft to land at a NATO base in Sicily. See Gooding, supra note 23. In addition, the U.S. State Department, commenting on Israel's interception of an aircraft it thought was carrying suspected terrorists, said that interceptions are justified in "very narrow counterterrorism cases" when there is "the strongest and clearest evidence that terrorists are on board." U.S. Declines Judgment on Plane Interception, N.Y. TIMES, Feb. 5, 1986, at A9. Vernon Walters, United States delegate to the United Nations Security Council, vetoed a draft resolution that would have condemned Israel's interception, arguing that interceptions in search of suspected terrorists are justified under some circumstances. U.S. Vetoes Anti-Israel Move, N.Y. TIMES, Feb. 7, 1986, at A6.

25 Walcott & Pasztor, supra note 1, at 1 (quoting administration sources that such a directive was adopted in January 1986 and that the CIA was to undertake such operations); see Stephen Engelberg, U.S. is Said to Weigh Abducting Terrorists for Trials Here, N.Y. TIMES, Jan. 19, 1986, at A1 (CIA preparing contingency plans for abduction of several persons in Middle East implicated by United States in terrorist acts); see also Foreign Assistance and Related Programs Appropriations for Fiscal Year 1987: Hearings Before a Senate Subcomm. on Appropriations on H.R. 5339/S. 2824, 99th Cong., 2d Sess. 113 (1987), reported in Bernard Gwertzman, Shultz Backs 'Moderate Force' Against Terrorists, N.Y. TIMES, Mar. 14, 1986, at A8 (Former Secretary of State George Shultz answered affirmatively when asked by Senator Arlen Specter, "Would you sanction use of moderate force to take terrorists into custody in remote parts of the world to bring them to the United States to stand trial?"); David L. Abney, Abducting Terrorists to Try in U.S.: A Sanctioned Way to Fight the Foe?, NAT'L L.J., June 30, 1986, at 41 (Judge advocate general officer stating, "It is time to institute a full-scale program to abduct known international terrorists by bounty or direct government action, and then bring them to trial in our federal courts.").
wanted on drug charges in the United States.26 The man was forced onto an airplane and then flown to the United States.27

One reason for abduction is the absence of an extradition treaty with the country where the suspect is located.28 Even where an extradition treaty is in force, the treaty may not cover the offense in question, particularly if the offense can be characterized as political.29 In Alvarez-Machain, the apparent reason for the abduction was that the United States-Mexico extradition treaty did not require, and Mexican law prohibited, the extradition of nationals.30

The desire of states to gain custody of a suspect is understandable. However, custody through abduction is problematic in two regards. First, the rights of the state where the abduction occurs are implicated. States do not like foreign agents operating in their territory to carry out what constitutes the crime of kidnapping. Each state enjoys sovereignty over its territory, and it is a violation of that sovereignty for other states to carry out criminal investigative functions without consent.31

27 Id. Matta-Ballesteros raised the abduction as a bar to his prosecution because it allegedly violated extradition treaties, which the United States and Honduras are signatories. Id. at 1048. The court did not entertain his motion because Honduras had not protested any violation of the extradition treaty. Id. As a result, Matta-Ballesteros was precluded “from personally asserting that a violation of any extradition treaty has occurred.” Id. at 1048-44.
29 Webb, supra note 28, at 177.
30 Extradition Treaty, supra note 12, art. 9, at 5065 (requiring a state that refuses to extradite on grounds that the person sought is a national to take criminal proceedings against that person itself).
31 See, e.g., United States v. Toscanino, 500 F.2d 267, 276-78 (2d Cir. 1974) (finding violation of United Nations Charter); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 (1987) [hereinafter RESTATEMENT] (“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.”); see also F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407 (Yoram Dinstein & Mala Tabory eds., 1989) (“A State which authorizes the abduction of a person from the territory of another sovereign State is guilty of a violation of public international law. This principle is supported by considerable State practice, numerous decisions of municipal courts and a large body of doctrinal opinion.”); id. at 408 (saying that a state that tries the abductee commits an international wrong against the state where the abduction occurred even if the abductors were not acting at the behest of the state that conducts the trial because the
In *Alvarez-Machain*, the United States Supreme Court did not address this question, limiting itself rather to the issue of whether the abduction violated Mexico's rights under the United States-Mexico extradition treaty. However, even absent an extradition treaty, the rights of a state where such an abduction occurs are violated. The United Nations Security Council twice has issued condemnations over abductions. Argentina protested to Israel over the abduction of Eichmann in Argentina and then complained to the Security Council, asking for Eichmann's return and for the punishment of the abductors. The Council said that Israel had violated Argentina's sovereignty, and it "request[ed] the Government of Israel to make appropriate reparation." Israel and Argentina then issued a joint communiqué reciting that the abduction had "infringed fundamental rights of the State of Argentina."

Lebanon also has complained to the Security Council about abductions. Israeli airplanes, while searching for a suspected terrorist, intercepted a Lebanese civil aircraft over Lebanon and forced the Lebanese plane to land in Israel. The Security Council adopted a resolution condemning Israel's action, calling it a violation of the United Nations Charter, of civil aviation treaties, and of "the principles of international law and morality." The Council did not have to address the question of returning any abductees because Israel released all passengers when it discovered that the suspected terrorist was not on board.

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state ratifies the abduction simply by putting the abductee on trial); IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 72-73 (1971) (noting that no international tribunal has had occasion to rule on the issue).

35 Attorney-General v. Eichmann, 36 I.L.R. 5, 59 (Dist. Ct. Jerusalem 1961), aff'd, 36 I.L.R. 277 (Sup. Ct. Isr. 1962). The communiqué further stated that the two states regarded the incident as "closed." Id. Eichmann was tried in Israel, convicted, and executed. Id. at 273-76 (conviction); Attorney-General v. Eichmann, 36 I.L.R. 277, 341-42 (Sup. Ct. Isr. 1962) (affirming death sentence).
38 Smith, supra note 36, at A1. States objected that the resolution merely con-
The state where the abduction occurs has a right to the abductee's return and indemnification for the abduction. For example, when Germany abducted a man from Switzerland and charged him with treason, Switzerland filed a diplomatic protest and initiated arbitration proceedings against Germany to gain the return of the man. Before the case was heard, Germany returned the man.

The traditional position of the United States and other states generally is that abduction of suspects abroad violates the sovereign rights of that territorial state. However, United States officials in the 1980s gave mixed opinions on the matter when commenting on proposals to abduct persons suspected of terrorism. For example, former Attorney General Edwin Meese thought such abduction was justified as self-defense against prior or anticipated terrorist attacks. Former Secretary of State George Shultz said, "A nation attacked by terrorists is permitted to use force . . . to seize terrorists . . . when no other means is available."

A Justice Department memorandum, whose contents were widely reported but which was not made public, asserted that the President was free to disregard international law if he felt it necessary to order the abduction abroad of terrorists. State Department Legal Adviser Abraham Sofaer, however, said that such abductions were unlawful under international law. Sofaer further
noted that states are entitled to the use of their territory, and that abductions violate their sovereignty.47

IV. JURISDICTION TO TRY AN ABDUCTEE

Despite the fact that abductions violate the sovereignty of the state where they occur, United States courts generally have held that an abduction does not bar prosecution once the suspect is before them.48 In Alvarez-Machain, the Supreme Court affirmed the propriety of trying a suspect who was abducted abroad.49 The Court only addressed the narrow issue of whether the abduction violated the United States-Mexico extradition treaty.50 Finding that it did not,51 the Court reversed the Ninth Circuit's ruling without addressing the broader issue of whether Mexican sovereignty was violated, and whether that might vitiate jurisdiction. Because abduction violates sovereignty, the practice of finding jurisdiction has been criticized on the ground that it involves taking advantage of an illegal act.52

In Alvarez-Machain, the Supreme Court relied on a nineteenth-century precedent, Ker v. Illinois,53 that involved an abduction in Peru. In that case, Peru had agreed to a United States request to

"[d]espite the importance of the principle of territorial integrity there are situations in which that principle is not entitled, under international law, to absolute deference." Id. at 24.

47 Id. at 31; see also Bill to Authorize Prosecution of Terrorists and Others Who Attack U.S. Govt. Employees and Citizens Abroad: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 68 (1985) (Abraham Sofaer stating that abductions violate sovereignty). But see Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Govt. Employees and Citizens Abroad: Hearing on S.1373, S. 1429, and S. 1508, before the Senate Comm. on the Judiciary, Subcomm. on Security and Terrorism, 99th Cong., 1st Sess. 69 (1986) (statement of Abraham Sofaer). Sofaer stated that abductions are unlawful but suggesting they may nonetheless be necessary and appropriate:

In general, seizure by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of the foreign State, could violate local kidnapping laws, and might well be viewed by the foreign State as a violation of international law and as incompatible with any bilateral extradition treaty in force. Yet, self help is sometimes necessary in various areas of public and private law, and this area is no exception.

Id.

50 Id. at 2188.
51 Id. at 2196-97.
52 Garcia-Mora, supra note 28, at 447 (citing the maxim ex injuriae jus non oritur in this connection); Mann, supra note 31, at 414-15.
53 119 U.S. 436 (1886).
extradite the suspect, but there was political disorder in Peru when the United States official arrived.\textsuperscript{54} Therefore, instead of going through the Peruvian government, he abducted the suspect.\textsuperscript{55} The United States Supreme Court upheld jurisdiction, saying that "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"\textsuperscript{56} because the abduction violated no law or treaty of the United States.\textsuperscript{57}

Courts in the United States generally have followed the \textit{Ker} approach.\textsuperscript{58} The only major deviation was a decision of the Second Circuit Court of Appeals, \textit{United States v. Toscanino},\textsuperscript{59} a case involving an abduction from Uruguay. The Second Circuit said that the abduction violated the United Nations Charter and the Charter of the Organization of American States, which mandate respect for territorial integrity.\textsuperscript{60} It found that a United States court has no jurisdiction to prosecute an abductee, so long as the state where the abduction occurred deemed its sovereignty infringed.\textsuperscript{61} The court said that "the government should be denied the right to exploit its own illegal conduct, ... and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."\textsuperscript{62} It further stated that "the government should as a matter of fundamental fairness be obligated to return [the accused] to his \textit{status quo ante}."\textsuperscript{63}

In a later case in which the state where the abduction occurred did not protest, the Second Circuit Court of Appeals allowed the prosecution on the basis that no violation of territorial integrity occurs absent a protest from that state.\textsuperscript{64}

\textsuperscript{54} \textit{Id.} at 498.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 444.
\textsuperscript{57} \textit{Id.} at 442 (The Court apparently viewed the abduction as not violating the United States-Peru extradition treaty because of the chaotic situation in Peru.).
\textsuperscript{59} 500 F.2d 267 (2d Cir. 1974).
\textsuperscript{61} Toscanino, 500 F.2d at 276-78.
\textsuperscript{62} \textit{Id.} at 275.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{United States ex rel. Lujan v. Gengler}, 510 F.2d 62, 67 (2d Cir.), \textit{cert. denied}, 421
Like the United States Supreme Court, courts elsewhere allow a trial to proceed following an abduction. In Britain, for example, the King's Bench allowed criminal proceedings to be brought against the accused, even though a British police officer had apprehended the accused in Belgium without the consent of Belgian authorities and forcibly brought the accused to England. The court stated that the fact that the abduction might have violated Belgian law was irrelevant to the issue of jurisdiction.

The Swiss Federal Tribunal, however, has ruled that abduction abroad is a bar to jurisdiction. In one case, German authorities sought a Belgian national who was temporarily in Italy. After duping the man into travelling from Italy to Switzerland, German authorities arrested him. Germany then requested extradition from Switzerland, with which it had an extradition treaty. Had Germany tried to extradite the man from Belgium, a German-Belgian extradition treaty would have given Germany no right to extradition because it did not compel extradition of nation-

U.S. 1001 (1975). Lujan, a pilot, was lured into flying an American agent to Bolivia from Argentina. Id. at 63. Upon Lujan's arrival in Bolivia, Bolivian police, acting as paid agents of the United States, took Lujan into custody and subsequently took him to New York where federal agents formally arrested him. Id.

Lujan alleged that his abduction violated the United Nations Charter, U.N. CHARTER art. 2, and the Charter of the Organization of American States, supra note 60. Gengler, 510 F.2d at 66. However, the Second Circuit noted that "[t]he provisions in question are designed to protect the sovereignty of the states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress." Id. (citation omitted). The court concluded that "the failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise occur." Id. at 67. But see Paul O'Higgins, Unlawful Seizure and Irregular Extradition, 36 BRIT. Y.B. INT'L L. 279, 293 ("The remedies open to a person who has been arrested in violation of international law would seem to be very tenuous. However, he may be able to prevail upon the State whose territorial sovereignty has been violated to enter a diplomatic protest."); see also Mann, supra note 31, at 410 (stating that silence on the part of the state where the abduction occurred should not be deemed a waiver of the wrong).

65 See cases discussed in Note, Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law, 72 MICH. L. REV. 1087, 1106-09 (1974) [hereinafter Extraterritorial Jurisdiction].
67 Id. at 167; see O'Higgins, supra note 64, at 280-91.
69 Id.
70 Id.
als. The German-Swiss extradition treaty did not contain a similar clause. The Swiss Federal Tribunal refused to extradite the man, on the grounds that Germany violated Belgium's rights under the German-Belgian extradition treaty by seeking extradition from Switzerland after deceiving the man into going there. If it allowed Switzerland to extradite the man, the tribunal stated that it would be an accessory to the international wrong committed by Germany against Belgium through its evasion of Belgium's rights under the treaty.

V. ABDUCTION AS A VIOLATION OF THE RIGHTS OF THE SUSPECT

Like courts in the United States, foreign courts faced with an abductee's challenge to their jurisdiction have analyzed abduction from the standpoint of the rights of the state where the abduction occurred, not of the rights of the abductee. Curiously, abductees objecting to jurisdiction have rarely raised the issue of personal rights that might bar jurisdiction. One of the few who did so was Eichmann, who challenged the jurisdiction of the district court in Jerusalem on the grounds that his abduction in Argentina violated the human rights law prohibition against arbitrary detention. Eichmann cited the European Convention for the Protection of Human Rights and Fundamental Freedoms as evidence that customary international law of human rights, a body of law based on state practice that binds states even in the absence of a treaty obligation, prohibits arbitrary detention. The Su-
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Premise Court of Israel, however, did not address the rights issue and simply decided that any possible illegality in his abduction was irrelevant once Eichmann was in Israel.\(^7\)

Nonetheless, the personal rights of a suspect are implicated in an abduction.\(^7\) This was the opinion of the legal arm of the Organization of American States ("OAS") regarding Dr. Alvarez-Machain. The OAS Permanent Council asked the Inter-American Juridical Committee of the OAS to render an opinion on the United States Supreme Court's decision in *Alvarez-Machain* because of the decision's "international repercussions, particularly in the member states of the Organization of American States."\(^8\) Evidently the Council was concerned that people in Latin American states would be targets of the United States' abduction policy. The Committee found that the abduction of Dr. Alvarez-Machain had violated Mexico's territorial sovereignty and that the United States Supreme Court decision, that Dr. Alvarez-Machain could be tried following the abduction, was an additional violation of Mexico's territorial sovereignty.\(^8\) In addition to considering the rights of Mexico and the United States, the Committee said that the abduction had violated personal rights of Dr. Alvarez-Machain. "The Committee should likewise underscore the incompatibility of the practice of abduction with the right of due process to which every person is entitled, no matter how serious the crime they are accused of, a right protected by international law."\(^8\)

\(^7\) *Eichmann*, 36 I.L.R. at 304-08. In United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), the human rights issue was not pressed by Dr. Alvarez-Machain or by the many *amicus curiae* who wrote briefs in his behalf. Counsel apparently anticipated prevailing by gaining an affirmance of the Ninth Circuit, which had ruled in Dr. Alvarez-Machain's favor on the treaty issue. United States v. Alvarez-Machain, 946 F.2d 1466, 1466-67 (9th Cir. 1991), rev'd, 112 S. Ct. 2188 (1992).


\(^8\) *Id.* at 5, reprinted in 13 HUM. RTS. L.J. at 397.
The Committee’s reference to the personal rights of Dr. Alvarez-Machain opened a line of analysis different from that pursued by the United States Supreme Court. Because the Court decided that the federal district court had jurisdiction, the personal rights of Dr. Alvarez-Machain were clearly at issue. Had the Court decided, like the Committee, that the abduction violated rights personal to Dr. Alvarez-Machain, it could not have found jurisdiction in the federal district court.

Abduction of suspects abroad is not mentioned in human rights treaties. However, a number of guarantees found in human rights law prohibit practices that are inevitably involved in an abduction.

VI. PERSONAL LIBERTY

Abduction violates the prohibition in human rights law against arbitrary detention. A detention can hardly be considered nonarbitrary when it is carried out by hired kidnappers, or by police acting outside their authority. Arbitrary detention also is prohibited by customary international law. In the Iran hostages case, the International Court of Justice found that arbitrary detention of embassy personnel violates “applicable rules of general international law,” meaning customary law. The court said,

Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.


85 United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 41 [hereinafter U.S. v. Iran]. It is not clear whether the court limits itself to detention of diplomatic and consular personnel or is applying this statement to any arbitrary detention. See NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 270 (1987) (suggesting that the court is referring to any arbitrary, prolonged detention).


The International Covenant on Civil and Political Rights, which the United States ratified in 1992, states, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." In the Celiberti case, the Human Rights Committee that monitors compliance with the International Covenant entertained a complaint from a woman abducted from Brazil to Uruguay. The Committee ruled that abduction constituted an "arbitrary arrest and detention" under the International Covenant. In another case, López Burgos, the Committee reached the same conclusion. A person abducted is not held "in accordance with such procedures as are established by law." On the contrary, when it occurs, an abduction is a criminal act.

Furthermore, under the International Covenant, anyone detained unlawfully "shall have an enforceable right to compensation." Thus, an abductee, like Dr. Alvarez-Machain, is entitled to

89 See European Convention, supra note 76, art. 5. In his case, Eichmann unsuccessfully cited to the European Convention for support. See supra note 77.
90 See White House Statement, supra note 4; see also Paust, supra note 4; Quigley, supra note 4.
91 International Covenant, supra note 4, art. 9(1), S. Exec. Doc. E at 26, 999 U.N.T.S. at 176.
92 Celiberti, supra note 21, at 185.
93 Id. at 188.
94 López Burgos, supra note 21, at 183.
monetary compensation from the United States for his detention.\(^7\)

One can seek to justify abduction of suspects abroad as an appropriate method to ensure that someone who has committed a serious crime will be brought to justice. Despite such considerations, the circumstances of detention are perforce arbitrary, because whether the abductors are private parties or police, the person is not held pursuant to law while in the state where the abduction occurs.

### VII. PERSONAL INTEGRITY

Abduction is an act of violence. An arrest, of course, is an act of violence, but is carried out under authority of law, while an abduction is not. Moreover, abductions have often been carried out with considerable force. Some victims have been held at gunpoint throughout their journey to the state that seeks to prosecute them,\(^9\) and others have been transported in closed containers\(^9\) or forcibly drugged.\(^10\) The abductee may not understand that the abductors plan to deliver him to trial, but may fear that they will kill him. An abductee presumably is justified in killing the abductors if an opportunity presents itself because of the illegality of the abduction.

The *Celiberti* case vividly illustrates the assault on personal integrity involved in an abduction. In that case, Uruguayan police abducted Lilian Celiberti, a Uruguayan national, from Brazil.\(^10\) The Uruguayan police entered Celiberti’s apartment in Brazil and forcibly took her children to another location.\(^10\) The police then held Celiberti captive for one week in her apartment while they made arrangements to transport her to Uruguay.\(^10\)

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97 Since the right is personal to the individual, it applies even if the state where the abduction occurred makes no representations over the incident.

98 United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (abductee held with gun to head during plane ride from Bimini to Florida).

99 *Italy Balks Air Abduction of Man in a Trunk*, N.Y. TIMES, Nov. 18, 1964, at A1; *Italy Expels 2 Egyptian Envoys Accused in Trunk Abduction Attempt*, N.Y. TIMES, Nov. 19, 1964, at A1; *Man in Trunk Returns to Israel*, N.Y. TIMES, Nov. 25, 1964, at A6. Egyptian officials kidnapped Mordecai Luk, apparently on charge of spying, in Italy. *Id.* The officials drugged Luk and then locked him in a trunk for transport to Egypt. *Id.* An airport employee discovered Luk at Rome airport when he heard Luk moan from inside the trunk. *Id.*

100 Toscanino was drugged for the air journey from Uruguay to the United States. United States v. Toscanino, 500 F.2d 267, 270 (2d Cir. 1974).

101 *Celiberti*, *supra* note 21, at 187.

102 *Id.* at 186.

103 *Id.*
Abductors are typically not in a position to treat the abductee well, even if they are disposed to do so. Since the abduction is carried out against the consent of the state where it occurs, the abductors must avoid detection which will be a greater priority for them than the welfare of the abductee. As a result, there is little assurance that they will treat the abductee humanely.

A guarantee against “cruel, inhuman or degrading treatment” has entered into customary law. The Universal Declaration of Human Rights protects “security of the person” and prohibits “cruel, inhuman or degrading treatment.” The International Covenant on Civil and Political Rights forbids “cruel, inhuman or degrading treatment or punishment,” and further provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Similar provisions are found in the regional human rights treaties.

In recognition that an abductee’s rights are at stake, the Second Circuit Court of Appeals, in United States ex rel. Lujan v. Gengler, decided that the abductee’s right to due process is violated when treatment is sufficiently cruel. When the treatment reaches this point, the court stated that it would not have jurisdiction over him. In United States v. Toscanino, the abductee alleged that Brazilian police, with the knowledge of a United

104 RESTATEMENT, supra note 31, § 702(d).
105 Universal Declaration, supra note 86, art. 3.
106 Id. art. 5.
109 See, e.g., American Convention, supra note 87, art. 5(1), (2) (“Every person has the right to have his physical, mental, and moral integrity respected” and is protected against “cruel, inhuman, or degrading punishment or treatment.”), reprinted in 9 I.L.M. at 676; European Convention, supra note 76, art. 3 (“No one shall be subjected to torture or inhuman or degrading treatment or punishment.”); African Charter, supra note 88, art. 4 (“Human beings are inviolable,” and “[e]very human being shall be entitled to respect for his life and the integrity of his person.”), reprinted in 21 I.L.M. at 60; African Charter, supra note 88, art. 5 (guaranteeing “respect of the dignity inherent in a human being” and prohibiting “inhuman or degrading punishment and treatment”), reprinted in 21 I.L.M. at 60.
111 Id. at 65-66. However, in this case, the Second Circuit determined that the circumstances surrounding Lujan’s abduction from Argentina did not meet this standard. Id. at 66.
112 Id.
113 500 F.2d 267 (2d Cir. 1974).
States attorney, had knocked him unconscious, drugged him, and interrogated him under torture. The court thus set a limit on how badly an abductee may be treated without a forfeiture of jurisdiction.

VIII. DETENTION UNDER LEGAL AUTHORITY

The abductee's status is insecure because no legal regime covers the detention, at least until the abductee is delivered to the state that sponsored the abduction. Customary law protects both a right to be brought promptly before a judge and a right to challenge the lawfulness of detention.

Consistent with the rule of law idea, a detainee is entitled to be held within a legal framework. Under international standards, "all measures affecting the human rights of a person under any form of detention . . . shall be ordered by or be under the effective control of a judicial or other authority under the law." The words "other authority" indicate a quasi-judicial officer "whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence." A police officer is not a "judicial or other authority," and a private abductor is even less so. With abduction, detention is not under the control of a "judicial or other authority."

At trial, the district court released Dr. Alvarez-Machain because the government lacked sufficient evidence that he committed the crime for which the DEA abducted him. Thus, the DEA did not have sufficient evidence to prosecute. An abductee, however, has no judicial recourse in the state of the seizure to complain that he is innocent. The possibility of mistake in abduction is illustrated by the previously mentioned Israeli acts of forc-

114 Id. at 269-70.
115 RODLEY, supra note 85, at 269.
117 Draft Body of Principles, supra note 116, art. 8.
118 See RODLEY, supra note 85, at 265 (concluding that practice in some states of security officers holding power of arrest and detention would violate right to be under judicial authority).
119 Newton, supra note 17, at A1.
ing down aircraft in search of suspected terrorists. In two of these instances, the persons sought were not on board.

An abductee has no possibility of vindicating any rights because he lacks judicial recourse. An abductee is not presented before a judge where he might complain either about the conditions of the detention or about the legality of the detention itself. In recognition of the importance of allowing such pleas, international standards give detainees a right to be taken before a judge soon after arrest. The Universal Declaration of Human Rights provides a “right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The International Covenant on Civil and Political Rights provides:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The American and European conventions contain similar guarantees.

A detainee has a right not to be held incommunicado and, specifically, a right to immediately inform his family of the detention. An abductee has no way of enforcing this right and is

120 See supra notes 23-24, 38.
121 Gooding, supra note 23, at 163, 175-76; Friedman, supra note 23, at A1; Smith, supra note 36, at A1.
122 RODLEY, supra note 85, at 261-63.
123 Universal Declaration, supra note 86, art. 8.
124 International Covenant, supra note 4, art. 9(3), (4), S. Exec. Doc. E at 26, 999 U.N.T.S. at 175; see also RODLEY, supra note 85, at 267.
125 See, e.g., American Convention, supra note 87, art. 7(5), (6) (“Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . . Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful . . . .”), reprinted in 9 I.L.M. at 677; European Convention, supra note 76, art. 5(4) (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”).
held in a kind of legal limbo, deprived of any recourse to competent authority. If the abductors have difficulty arranging clandestine transport to the other state, they may hold the person for a substantial period of time.127 An abductee has no opportunity to appeal to authority to complain about the fact of or conditions of detention. Such a right, however, is supposed to be provided by any state that detains a person. "A detained . . . person shall immediately be provided, by the authority responsible for his . . . detention . . . with . . . an explanation of his rights . . . relating to his . . . detention . . . and how to avail himself of his rights."128

Another aspect of being under no legal regime is that a detainee has no means to enforce his right to medical treatment129 which is a particular problem because of the force typically used to effectuate the detention. In addition, abductors likely will be reluctant to seek medical attention for the abductee, for fear of having the detention become known.

Beyond the personal welfare of the abductee, rights of others are potentially involved. The abductors may take the abductee away from an ill relative or a dependent child.130 Normally, police making an arrest would deal with such situations. Abductors are not likely to do so.


127 See, e.g., Celiberti, supra note 21, at 186 (held in captivity of one week prior to transportation out of Brazil).
128 Draft Body of Principles, supra note 116, art. 12.
129 The United Nations has recognized that prisoners are entitled to prompt medical treatment. See, e.g., Code of Conduct for Law Enforcement Officials, art. 6, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (stating that police have a duty to take immediate action to secure medical attention for persons in their custody whenever required); Standard Minimum Rules for the Treatment of Prisoners, supra note 126, art. 91 (right of untried prisoner to be treated by own doctor or dentist at own expense); Draft Body of Principles, supra note 116, art. 21 (medical officer at place of detention shall examine detainee promptly after admission); id. art. 22 (right to physician of choice); Parliamentary Assembly, Council of Europe, Declaration on the Police—Part A, Res. 690 (1979), art. 14 (obligation of police to secure necessary medical attention for detainees); see also Rodley, supra note 85, at 260.
130 See, e.g., Celiberti, supra note 21, at 186.
IX. STATUS OF THE SUSPECT IN THE STATE WHERE ABDUCTION OCCURS

Even apart from rights connected with criminal proceedings, abduction deprives an individual of the right to choose whether to leave or remain in the state where the abduction occurs. A person lawfully in a state has a right to remain there, and a national has a right of permanent residence. Therefore, Dr. Alvarez-Machain, as a national of Mexico, had a right to remain in Mexico. Even an alien has a right to reside in a state, at least until expelled by a decision taken under the law of that state. The International Covenant on Civil and Political Rights states, "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law" and has a right to representation by counsel to contest the grounds for expulsion. In abductions, the person is removed from the state by decision of executive officials of a different state.

In addition, individuals, under human rights law, enjoy the right to leave their state of residence. This right is guaranteed by the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the American Convention on Human Rights. If, as may be the case, the abductee formerly resided in the state carrying out the abduction,

132 Id. art. 12(4), S. Exec. Doc. E at 27, 999 U.N.T.S. at 176 ("No one shall be arbitrarily deprived of the right to enter his own country.").
133 Id.
134 Id. art. 13, S. Exec. Doc. E at 27, 999 U.N.T.S. at 176; see also American Convention, supra note 87, art. 22 ("An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.")., reprinted in 9 I.L.M. at 682; African Charter, supra note 88, art. 12 ("A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."), reprinted in 21 I.L.M. at 61.
136 Universal Declaration, supra note 85, art. 13(2) ("Everyone has the right to leave any country, including his own, and to return to his country.").
137 International Covenant, supra note 4, art. 12(4), S. Exec. Doc. E at 27, 999 U.N.T.S. at 176 ("Everyone shall be free to leave any country, including his own.").
138 American Convention, supra note 87, art. 22(2) ("Every person has the right to leave any country freely, including his own.")., reprinted in 9 I.L.M. at 681.
the right to leave that state is violated when the individual is abducted back there.

The abductee may have fled the state sponsoring the abduction because of persecution. All persons have a right to seek asylum in other states. If the abductee fled the state sponsoring the abduction, the right of asylum is violated.

X. ABDUCTION AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Most, if not all, the guarantees discussed here are provided by customary international law, even apart from any treaty binding on a particular state. However, the issue of violation of personal rights of the abductee assumed new meaning for the United States in 1992, when it ratified the International Covenant on Civil and Political Rights. The United States, in connection with ratification, entered a “declaration” that articles 1 to 27 are not self-executing. These articles are the provisions of the Covenant that impose obligations on states. “The intent,” explained the Foreign Relations Committee, “is to clarify that the Covenant will not create a private cause of action in U.S. courts . . . . Existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.

The International Covenant on Civil and Political Rights falls into the category of treaties that courts have called “self-executing.” The parties intend that the various rights guaranteed should inure to the benefit of individual persons. Even if the International Covenant does not “create a private cause of action,” an abductee would still be entitled to rely on it to object to jurisdic-

139 Universal Declaration, supra note 86, art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”); American Convention, supra note 87, art. 22(7) (“Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”), reprinted in 9 I.L.M. at 682.

140 Even if a court were to find that any one of the above-mentioned rights had not entered customary law, the violations taken together violate customary law. Tribunals have frequently cumulated violations. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 179 n.1 (1965).

141 See sources cited supra note 4.


144 International Covenant, supra note 4, S. EXEC. DOC. E at 23, 999 U.N.T.S. at 171.
tion. In so doing, the abductee would not be asserting a private cause of action.

Most courts, like the United States Supreme Court, have ignored the rights of the abductee. They have not been able to forego the opportunity to try a person who is standing before them. Nonetheless, courts have long recognized that there are situations in which persons who may be guilty of crime must be released to vindicate important societal policies. Where an accused was entrapped, or where critical evidence was seized unlawfully, potentially guilty persons go free.

The same should be true with abduction, and the Human Rights Committee and the Inter-American Juridical Committee have recognized this. The values served by the observance of the norms on lawful detention outweigh the importance of trying a particular suspect. Individuals should not have to live in fear that some foreign government, operating on real or fanciful suspicion, will send operatives or hire kidnappers to abduct him. Human rights law provides that such abduction is unlawful. Abduction, writes one analyst of extradition law, is "such a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition."

In neglecting personal rights, the Supreme Court in Alvarez-Machain ignored what should have been a critical issue in the case. Abduction violates freedoms protected under the conventional and customary law of human rights. Now, particularly with the United States ratification of the International Covenant on Civil and Political Rights in 1992, the Supreme Court should pay closer attention to the personal rights that are protected at the international level. A person abducted for prosecution is entitled

145 See supra notes 74, 78.
147 See U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961) (excluding evidence seized in violation of Constitution); Case of Gioev, 11 Biull. Verkh. Suda RSFSR 5 (1981) (incriminating ammunition excluded from evidence because when it was discovered during search in a dresser drawer, no member of the household was present in that room to observe the search).
148 See, e.g., Celiberti, supra note 21, at 187-88 (Committee ruling that Celiberti should be released immediately, be permitted to leave country, and receive compensation from Uruguay for the violations that Celiberti suffered); López Burgos, supra note 21, at 183 (Committee ruling that López Burgos should receive similar remedies as Celiberti).
149 See supra notes 80-82 and accompanying text.
150 SHEARER, supra note 31, at 75.
to be released and compensated for damages caused by that abduction.

Because it ignored the human rights issue in *Alvarez-Machain*, the Supreme Court has yet to rule on the matter. The *Alvarez-Machain* opinion cannot be taken as a rejection of arguments based on human rights. It is thus open to the lower courts, state or federal, to decline jurisdiction following an abduction without evading precedent. Given the obvious violation of human rights involved, it is incumbent on courts to reach that conclusion.

Like the United States Supreme Court, the highest courts of other states have not confronted squarely the question of whether a trial following abduction violates the personal rights of the accused. It is remarkable that the courts have avoided addressing an issue that so clearly implicates individual rights. Particularly in light of the increasing adherence by states to the International Covenant on Civil and Political Rights, courts should cease to address this issue solely from a statist perspective. Courts should decline jurisdiction as the only way of ensuring state compliance with international human rights standards.