JURISDICTION OVER PERSONS ABDUCTED IN VIOLATION OF INTERNATIONAL LAW IN THE AFTERMATH OF *UNITED STATES V. ÁLVAREZ-MACHAIN*

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There's a lot of law at the end of a nightstick.
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Summary: I. Introduction; II. State practice; III. Conclusion.

I. INTRODUCTION

On June 15, 1992, in *United States v. Álvarez-Machain* [1], the United States Supreme Court held that federal courts have jurisdiction over a defendant abducted from abroad by governmental authorization despite the existence of an extradition treaty with the state from which he was abducted. Álvarez-Machain, a Mexican physician, was alleged to have administered stimulants to an American drug enforcement agent to keep him awake while he was being tortured by drug dealers who had captured and who eventually murdered him [2]. When informal negotiations for the extradition of Álvarez-Machain failed, the Drug Enforcement Administration (DEA) offered a reward for his produc-

[1] 504 U.S. 655, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992).
[2] In December 1992, the district court dismissed the criminal charges against Álvarez-Machain, concluding that the government's evidence supporting the indictment was insufficient, Don J. DeBenedictis, *Scant Evidence Frees Abducted Doctor*, 79 ABA J. 22 (February 1993).

tion in the United States and finally had him kidnapped [3]. The decision caused an international outcry which has not yet died away. Most media commentary even in the United States condemned the decision as condoning a lawless policy [4]. Egyptian, Moroccan [5], and even Chinese media, eager to discuss a human rights issue other than the Tienanmen massacre, joined the chorus of critics [6].

The decision drew the attention of the international legal community. It was commented all over the world and heavily criticized [7].

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[3] United States v. Caro-Quintero, 745 F. Supp. 599, 602-03 (C.D. Cal. 1990), *aff'd sub nom*, United States v. Álvarez-Machain, 946 F.2d 1466 (9th Cir. 1990), *rev'd*, 504 U.S. 655 (1992).

[4] See the comprehensive compilation of national and international press coverage collected by Jonathan Bush, *How Did We Get Here? Foreign Abduction After Álvarez-Machain*, 45 Stan. L. Rev. 939, 941-2, notes 10-16.

[5] See Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping Is Legal*, 20 Hastings Const. L.Q. 833, 837 (1993).

[6] Beijing Radio Condemns U.S. Court Ruling on Foreign Suspects, BBC Summary of World Broadcasts, June 24, 1992, available in LEXIS, Nexis Library, BBCSWB File.

[7] Neville Botha, Extradition v. Kidnapping: One Giant Leap Backwards - United States v. Álvarez-Machain [1992] 31 ILM 900, 19 South African Yearbook of Int'l L. 219 (1994); Faizan Mustafa, United States v. Álvarez-Machain - A Critique, 29 Civil & Military L.J. 36 (1992) (New Delhi, India); S. Farinelli, Panorama: Trattati di estradizioni e norme generali in tema di forcible abduction secondo la Corte Suprema degli Stati Uniti, 75 Rivista di Diritto Internazionale 1037 (1992) (Italy); Betsy Baker/Volker Röben, To Abduct or To Extradite: Does a Treaty Beg the Question? 53 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 657 (1993) (Germany); Hartmut A. Grams, Jurisdiktion im Anschluß an die Ergreifung eigener Staatsangehöriger im Ausland. *Male captus bene iudicatus or ex iniuria ius non oritur?* [1994] Juristische Ausbildung 65 (1994) (Germany); Christopher B. Kuner, Zur völkerrechtswidrigen Entführung nach US-amerikanischem Recht, 20 Europäische Grundrechte-Zeitschrift 1 (1993) (Germany); Dirk Schlimm, Der Strafprozeß gegen eine im Ausland entführte Person-Anmerkung zur Entscheidung des United Sates Supreme Court im Fall United States v. Álvarez-Machain, 16 Zeitschrift für Rechtspolitik 262 (1993) (Germany); Brigitte Stern, L'extraterritorialité revisitée: Où il est question des affaires Álvarez-Machain, Pâte de bois et de quelques autres, 38 Annuaire Français de Droit International 239 (1992) (France); Rosemary Rayfuse, International Abduction and the United States Supreme Court: The Law of the Jungle Reigns, 42 Int'l & Comp. L.Q. 882 (1993) (United Kingdom); George Sullivan, Jack Kaikati, John Virgo & Kathy Virgo, US Supreme Court: An Inconsistent International Policy, 23 Anglo-Am. L. Rev. 311 (1994); Carlos D. Espósito, *Male captus, bene detentus*: A propósito de la sentencia del tribuno supremo de Estados Unidos en el caso Álvarez-Machain, 2 Estudios de Jurisprudencia 7 (Marzo/Abril 1993) (Spain); Francisco Villagran Kramer, *El caso Álvarez Machain a la luz de la jurisprudencia y la doctrina internacional*, 45 Revista Española de Derecho Internacional 541 (1993) (Spain), Alonso Gómez-Robledo Verduzco, *United States vs. Álvarez Machain*, 5 Cuadernos Constitucionales, México 1993; John Murphy Jon Michael Dumont, *The Rendition of International Criminals: Hard Cases Make Bad Law*, Festkrift till Jacob W.F. Sundberg at 171 (Juristförlaget, Stockholm 1993) (Sweden 1993); Otto Lagodny, *Legally Protected Interests of the Abducted Alleged Offender*, 27 Israel L. Rev. 339 (1993).

This interest was somehow astonishing because the holding of the majority of the Supreme Court was a quite narrow one. It did not allege a «right to kidnap» as some newspapers [8] and even commentators [9] erroneously reported. The majority simply held that Álvarez-Machain's abduction did not violate the Extradition Treaty between Mexico and the United States [10]. This question was deemed to be crucial to avoid application of the *Ker-Frisbie Doctrine*, which states that —as a matter of principle— a court's exercise of personal jurisdiction is not defeated by a defendant's unlawful importation into the court's jurisdiction [11]. The *Ker-Frisbie Doctrine* knows two exceptions. The Second Circuit requires a court to divest itself of jurisdiction over the defendant where the defendant establishes governmental conduct «of the most shocking and outrageous kind»[12]. As framed by the Ninth

[8] N.Y. Times, June 16, 1992, *Court Says U.S. May Kidnap Foreigners*; Neil A. Lewis, *U.S. Tries to Quiet Storm Abroad Over High Court's Right-to-Kidnap Ruling*, N.Y. Times, June 17, 1992, at A8. Cf. Wash. Post, July 2, 1992, *U.S. Promises Not to Abduct Mexicans*, at A34: «The court said Álvarez Machain's kidnapping was legal because it was not expressly forbidden by the bilateral extradition treaty».

[9] Candace R. Somers, Note, *Extradition and the Right to Kidnap*, 18 N.C.J. Int'l L. & Com. Reg. 213 (1992); Jana Logan, Note, *Kidnap? Sure, Says the Court*, 1 San Diego Justice J. 253 (1993); Heidi L. Goebel, Note, *The Supreme Court's Approval of the Abduction of Foreign Nationals*, 25 U. Tol. L. Rev. 297 (1994).

[10] Extradition Treaty, May 44, 1978, United States-United Mexican States, 1207 U.N.T.S. 189, 31 U.S.T. 5059, T.I.A.S. No. 9656 (entered into force on January 25, 1980).

[11] In Ker v. Illinois, 119 U.S. 436 (1883), the US Supreme Court addressed for the first time the issue of a defendant brought before the court by way of a forcible abduction from abroad. Frederick Ker had been tried and convicted in an Illinois court for larceny; he managed to escape to Peru. A Pinkerton agent, Henry Julian, was sent to Lima with the proper warrant to demand Ker by virtue of the extradition treaty between Peru and the United States. The Court put emphasis in the fact that Julian disdained reliance on the treaty processes, and instead forcibly kidnapped Ker and brought him to the United States. In fact, when the agent arrived in Peru, he found Lima under military occupation by Chilean forces. The remnants of Peru's government had fled to the mountains. Therefore, Julian secured the consent of the commander of the Chilean forces, see Charles Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l I. 678 (1953). The political situation in Peru was not mentioned in the Supreme Court's opinion. There is also some ambiguity as to whether the court deemed Ker's «abductor» a government agent or a private party. Frisbie v. Collins, 342 U.S. 519 (1952) is a domestic kidnapping case. It is therefore inappropriate to cite this case as precedent for international kidnapping cases.

[12] United States ex reli. Lujan v. Gengler, 510 F2d 62, 65-66 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975). This case limited United States v. Toscanino, 500 F2d 267 (2d Cir. 1974) by declaring that mere forcible kidnapping, «without evidence of torture or other such barbarous conduct, does not rise to the level of shocking the conscience».

Circuit, a defendant must make «a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States» [13]. Álvarez-Machain's allegations of mistreatment, however, even if taken as true, did not constitute acts of such barbarism to be covered by this exception [14].

The other exception is known as *Rauscher exception.* In light of the Supreme Court's decision in *United States v. Rauscher* [15] and *Cook v. United States* [16], lower courts and commentators alike have assumed that American courts could not exercise jurisdiction over a defendant abducted by the government in violation of a treaty obligation. Both the *Ker-Frisbie Doctrine* and its exceptions are creations of national law, not necessarily based upon international law.

The more interesting question —whether customary international law prohibited the exercise of jurisdiction over Álvarez-Machain— was not before the Court [17]. Even under US law the answer to this question could have been decisive. The Supreme Court has long held that customary international law is incorporated into the law of the

[13] United States v. Lovato, 520 F2d 1270, 1271 (9th. Cir. 1975) (*per curiam*), crt. denied, 423 U.S. 985 (1975); see also, United States v. Valot, 625 F2d 308 (9th. Cir. 1980) (dismissal of an indictment is warranted only where a defendant demonstrates governmental misconduct «of the most shocking and outrageous kind» (quoting Lujan v. Gengler, 510 F2d at 65-66).

[14] United States v. Caro-Quintero, 745 F. Supp. 599, 605 (C.D. Cal. 1990), *aff'd sub nom*., United States v. Álvarez-Machain, 946 F2d 1466 (9th. cir. 1991), rev'd, 504 U. S. 655 (1992).

[15] United States v. Rauscher, 119 U.S. 407 (1996). *Rauscher*, decided the same day as Ker, held that the doctrine of specialty, implied into the treaty in question, barred Rauschert's arrest or trial for other offenses «until a reasonable time and opportunity have been given to him... to return to the country from whose asylum he had been forcibly taken». A protest of this country, Great Britain, is not mentioned in the decision.

[16] Cook v. United States, 288 U.S. 102 (1933). In *Cook* the court held that American courts lacked jurisdiction over a boat seized beyond the territorial limits authorized by a treaty with Great Britain.

[17] During the oral argument, Justice O'Connor asked Álvarez-Machain's counsel the following question: «Well, if we were to conclude the treaty doesn't cover this, do you fall back on some violation of international law?». Mr. Hoffman: «Justice O'Connor, there were alternative grounds for affirmance that were presented to the Ninth Circuit and presumably those would be litigated if this Court finds that there is no provision in the treaty». Transcript of oral argument at 34-35, United States v. Álvarez-Machain (No. 91-712).

United States [18]. However, if a branch of the United States government abrogates a provision of customary international law, American courts will cease to give the custom, domestic effect [19]. In an oft-quoted passage from, *The Paquete Habana*, Justice Gray enunciated these principles as follows:

> «International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations» [20].

On remand, Álvarez-Machain raised an independent defense based on customary international law. The Ninth Circuit, however, explained that

> «To the extent that customary international law may arguably provide a basis for an exception to the *Ker-Frisbie Doctrine*, the exception has been recognized only in a situation in which the government's conduct was outrageous» [21].

This decision was disappointing, compared with the thoroughly drafted opinion on appeal [22]. No explanation was given for the equalization of the *Ker-Frishie Doctrine* and its exceptions with customary international law.

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[18] The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (Nothing that in the absence of a congressional act, «the court is bound by the law of nations, which is part of the law of the land»), The Paquete Habana, 175 U.S. 677, 700 (1900).

[19] Garcia-Mir v. Meese, 788 F2d 1446 (4th. Cir. 1986), cert. denied, 479 U.S. 889 (1986). See also Restatement (Third) of Foreign Relations Law § 115, note 3 (1987); Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U.L. Rev. 322 (1985).

[20] The Paquete Habana, 175 U.S. 677, 700 (1900).

[21] United States v. Álvarez-Machain, 971 F2d 310, 311 (1992); see also, United States v. Verdugo-Urquidez, 29 F3d 637 (1994).

[22] The Court of Appeals had affirmed the dismissal of the indictment and the repatriation of Álvarez-Machain in United States v. Álvarez-Machain, 946 F2d 1466 (1991), relying on its prior decision in United States v. Verdugo-Urquidez, 939 F2d 1341 (1991).

It is possible that the Ninth Circuit saw another ruling precluded by a dictum of the Supreme Court opinion in *United States v. Álvarez-Machain.* After conceding that the abduction «may be in violation of international law principles», the majority stated that, even if it were so,

> «The decision of whether respondent should be returned to Mexico, as a matter outside of the treaty, is a matter for the Executive Branch» [23].

This dictum does, however, not exonerate future courts from an examination of relevant customary international law. This examination will be even more important as the decision in *Álvarez-Machain* had repercussions in the international community which might already have changed the relevant rules of customary international law.

The following analysis of state practice in matters of international state sponsored kidnapping tries to update former studies [24]. Following an outline of sources and evidence of customary international law, a first part examines the scant practice of international organizations. A second part is concentrated on recent decisions by foreign courts. In a third part, reactions of government in the aftermath of *Álvarez-Machain* which might constitute *opinio iuris* are analyzed. In evaluating the state practice, an attempt is undertaken to prove an (emerging) rule of customary international law which precludes jurisdiction over persons abducted in violation of international law. This rule does not depend on an extradition treaty between the abducting state and the state whose territorial sovereignty is violated...

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[23] United States v. Álvarez-Machain, 504 U.S. 655, 669 (1992).

[24] See, e.g., Morganstern, Felice, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 British Yb. Int'l L. 265 (1952); García-Mora, Manuel R., *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 Ind. L.J. 427 (1957); Schutter, Bartholomé de, *Competence of the National Judiciary Power in Case the Accused Has Been Unlawfully Brought within the National Frontiers*, 1 Revue Belgue de Droit International 88 (1965); Bauer, Elmar F., *Die völkerrechtswidrige Entführung*, Berlin, 1968; Vincent Coussirat. Coustère & Pierre-Michel Eisemann, *L'Enlèvement des Personnes Privée et le Droit International*, 76 RGDIP 346 (1972).

II. STATE PRACTICE

1. Sources and evidence of customary international law

In the absence of international conventions governing a certain subject, customary law is the most important source of international law. Article 38 (1) of the Statute of the International Court of Justice, which enumerates the sources of international law, refers in subsection (b) to «international custom, as evidence of a general practice accepted as law». Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation [25]. Evidence that a custom in this sense exists can be found only by examining the practice of states. Such evidence will obviously be very diverse. There are multifarious occasions on which persons who act or speak in the name of the state do acts or make declarations which either express or imply some view on a matter of international law. Any such act or declaration may be some evidence that a custom, and therefore that a rule of international law does or does not exist; but, of course, its value as evidence will be altogether determined by the occasion and the circumstances [26]. Customary rules crystallize from usages or practices which have evolved in three sets of circumstances [27]:

1.1. Diplomatic relations between states

Acts or declarations by representatives of states, press releases or official statements by governments may all constitute evidence of usages followed by states.

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[25] North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands), 1969 IC.J. 3, 43 (February 20), Restatement of the Foreign Relations Law of the United States (Third) [hereinafter *Restatement (Third)*], (1986), §102 (2).

[26] Brierly, J.L., *The Law of Nations* at 61 (5th. ed. Oxford 1954).

[27] Shearer, I.A, *Starke's International Law* at 33 (11th. ed. Butterrworths 1994).

1.2. Practice of international organizations

The practice of international organizations, again whether by conduct or declarations, may lead to the development of customary rules of international law concerning their status, or their powers and responsibilities [28].

1.3. State laws, decisions of state courts, and state administrative practices

A concurrence, although not a parallelism, of state laws or of judicial decisions of state courts or state administrative practices may indicate so wide an adoption of similar rules as to suggest the general recognition of a broad principle of law [29].

The means of proving a rule of customary international law are described by the Restatement (Third) § 103 (2):

> «In determining whether a rule has become international law, substantial weight is accorded to:
>
> a) Judgments and opinions of international judicial and arbitral tribunals;
>
> b) judgments and opinions of national judicial tribunals;
>
> c) the writings of scholars;
>
> d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states».

[28] Compare Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174-75 (April 1949).
[29] The Scotia, 14 Wall. (81 U.S.) 170, 188 (1872).

2. Opinions of international bodies

There are no international judicial or arbitral tribunals which focus on the question of jurisdiction over kidnapped personas. Both the *Colunje* Case [30] and the *Savarkar* Case [31] concentrated on the question of restitution. In the *Stocké* Case, the European Court of Human Rights avoided a decision on the merits by stating that kidnapping was not proven [32]. The Álvarez-Machain decision, however, was subject of a juridical opinion of the Inter-American Juridical Committee [33]. This opinion was requested by a resolution of July 15, 1992 by the Permanent Council of the Organization of American States (OAS).

In its opinion of 15 August 1992 approved by nine votes in favor and one abstention (Seymour J. Rubin, USA), the Committee stated that the analysis of the decision of the US Supreme Court is contrary to the norms of international law, because, *inter alia*,

> «By affirming the jurisdiction of the United States of America to try Mexican citizen Humberto Álvarez-Machain, who was brought by force from his country of origin, the decision ignores the obligation of the United States to return Álvarez to the country from whose jurisdiction he was kidnapped» 34.

It might be questionable whether the Inter-American Juridical Committee really has the competence under articles 104 and 105 of the OAS Charter to issue an opinion directly as to the validity of a

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[30] Guillermo Colunje (Panamá) v. United States, 6 R.I.A.A. 342 (United States Panama General Claims Commission 1933). For a comment on the case see Bert L. Hunt, *The United States-Panama General Claims Commission*, 28 Am. J. Int'l L. 61, 73 (1934).

[31] The Savarkar Case (Great Britain v. France), 11 R.I.A.A. 243 (Arbitral Appointed to Decide the Case of Savarkar 1911). See also Karl Doehring, *Savarkar Case*, in Bernahrdt, Rudolph (ed.), *Encyclopedia of Public International Law*, Instalment 2 (1981), at 252-254.

[32] Affaire Stocké c. République Fédérale d'Allemangne, Decision of 19 March 1991, No. 28/1989/188/248, Publications de la Cour europénne des Droits de l'Homme, Série A, Vol. 199.

[33] Reprinted in *Kidnapping Suspects Abroad*, 1992: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102nd. Cong., 2nd. Sess. 267 (1992) [hereinafter *Kidnapping Suspects Abroad*]. The opinion is also published in 13 Human Rights L.J. 395 (1992) and 4 Crim. L.F. 119 (1993).

[34] *Kidnapping Suspects Abroad, supra* note 33, at 269.

decision of a court of a member state [35]. It is clear that the opinion has no binding character. The opinion merely claims its conclusions without referring to any particular sources which might support or justify them. It is nevertheless of some evidential weight due to the composition of the Inter-American Juridical Committee which consists of international law experts of various member states serving in their personal capacity.

3. Judgments and Opinions of National Judicial Tribunals

3.1. England

England, like the United States, followed for a long time the rule of *male captus, bene detentus* based on a precedent of the early 19th. century. In *Ex parte Susannah Scott* Chief Justice Lord Tenderden held:

> «The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought and still continue to think, that we cannot inquire into them» [36].

The circumstances in *Scott* were dubious: Susannah Scott was arrested by English police in Brussels. It is not clear whether consent was given by the territorial sovereign, the Netherlands in those times. At least a Dutch protest is not reported. The rule, however, was followed in *Ex parte Elliott* [37]. A British deserter was arrested by British police in Belgium and brought to England. Belgian policemen, however, assisted in the arrest. The extraterritorial arrest was therefore presumedly in accordance with international law. In *Ex parte Mackeson*

[35] See Explanation of vote by Dr. Seymour J. Rubin, *Kidnapping Suspects Abroad*, *supra* note 33, at 284-85.
[36] B. & C. 446 (K.B. 1829) = 3 British Internat'l Law Cases 1.
[37] 1 All E.R. 373 (K.B. 1949).

the non-inquiry rule was seriously questioned. Mackeson, a British citizen wanted on fraud charges, was sent from Zimbabwe back to England under a deportation order. Lord Chief Justice Lane stated:

> «... the mere fact that his arrival might have procured by illegality did not in any way oust the jurisdiction of the Court; nevertheless, since the applicant had been removed from Zimbabwe-Rhodesia by unlawful means, i.e. by a deportation order in the guise of extradition, he had in fact been brought to the United Kingdom by unlawful means. Thus, the Divisional Court would, in its discretion, grant the application for prohibition and discharge the applicant» [38].

The old maxim of *male captus, bene detentus* was, however, revived in *Ex parte Driver* [39], another case where the extradition procedure was circumvented by both states involved. The final turning-point came with the decision of the House of Lords in the *Bennett* case [40]. By a vote of four to one, the Law Lords found that English courts can stay the trial of a criminal defendant where English police disregard the protections of formal extradition and arrange to have a defendant seized abroad by illegal means. The defendant located in South Africa was wanted in England for fraud charges. There was no extradition treaty in force with South Africa at the time, but England's 1989 Extradition Act allowed special arrangements for extradition to be made by certificate of the Secretary of State, with protections against double jeopardy, political offenses and trial of other unreviewed offenses. The English police, however, took the short cut of an informal arrangement with South African police colleagues. The defendant claimed that he was arrested by South African police, forced onto a flight for New Zealand by way of Taipei, intercepted at Taipei by South African police packed back onto a flight to South Africa, and then —in disdain of an order of the

[38] 75 Cr. App R 25 (1981).
[39] 2 All. E.R. 373 (q. B. 1985).
[40] Bennett v. Horseferry Road Magistrates' Court, 3 All. E.R. 138 (1993).

South African Supreme Court— forcibly placed on a flight from Johannesborg to Heathrow. The Law Lords were disinterested in whether there was protest or acquiescence by New Zealand and South African authorities. Nor did the decision depend on any circumstances of physical brutality. Lord Bridge of Harwich, after discussing Justice Stevens' dissent in *Álvarez-Machain* concluded:

> «To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view» [41].

Lord Lowry who obviously had the scenario in *Álvarez-Machain* in mind gave a clear warning:

> «If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offense which the courts would not be dealing with if the rule of law had prevailed».

The Lords justified their decision as an exercise of supervisory power. According to *Bennett* a forcible abduction does not mandatorily bar jurisdiction. The trial court rather has discretion to decline jurisdiction. It seems, however, as if a forcible abduction would in almost every case lead to a stay of the trial [42].

[41] *Id*. at 1559.

[42] Cf. Andrew L.-T. Choo, *International Kidnapping, Disguised Extradition and Abuse of Process* 57 Modern L. Rev. 626, 632 (1994): «One might wonder how willing a court would be to stay a prosecution for mass murder on the basis that the English police circumvented the relevant extradition procedures in securing the return of the accused to England. Yet a stay is precisely what Lord Griffiths would seem to require even in this situation».

3.2. South Africa

The South African Supreme Court made an even more remarkable switch in its decision of February 16, 1991 in *State v. Ebrahim* [43]. For decades South African courts had followed the maxim of *male captus, bene detentus* [44]. Ebrahim was abducted by South African police from Swaziland. Although there is an extradition treaty between South Africa and Swaziland [45], no formal request for extradition was lodged. Swaziland also failed to file a complaint against the violation of its sovereignty after the seizure of Ebrahim from its territory. When Ebrahim complained that he had been abducted from Swaziland, one of the police officers who interrogated him remarked that his alleged kidnapping was «purely of academic interest» [46]. This view was apparently shared by the lower court which upheld jurisdiction [47]. The Supreme Court reversed, concluding that a South African court has no jurisdiction to try a person abducted from foreign territory by the state [48]. The court based its opinion on principles of Roman-Dutch common law, which contains the fundamental legal principles of the necessity to protect and promote human rights, and the importance of maintaining good international relations and a healthy administration of justice. The Court required that when the state is involved in a judicial process, it must approach the courts with clean hands, which is not the case when it has abducted a person from a foreign territory.

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[43] [1991] 2 S. Afr. L. Rep. 553 (alternate translation in 31 I.L.M. 888 (1992)). J. Stevens referred to this decision in his dissenting opinion, United States v. Álvarez-Machain, 504 U.S. 655, 687 (1992). Cf. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 42: «Ironically, in its construction of the treaty, the Supreme Court could have benefited from the example of the highest court of South Africa, which recently dismissed the prosecution of a person kidnapped from a neighboring country».

[44] Rex v. Robertson (Transvaal Provincial Division), [1912] S. Afr. L. Rep. 10; Abrahams v. Minister of Justice (Cape Provincial Division), [1963] 4 S. Afr. L. Rep. 542; Ndhlovu v. Minister of Justice, 68 I.L.R. 7 (Natal Provincial Division 1976); Nduli v. Minister of Justice, 69 I.L.R. 145 (S. Ct. App. Div. 1977).

[45] Published in GG 1026 No. 2179 1986. Quoted by Rika Pretorius, *Delictual Compensation for Abduction in Foreign Territory*, 18 S. Afr. Yb. Int'l L. 142, 145 (1992/93).

[46] State v. Ebrahim, 31 I.L.M. 891 (1992).

[47] Ex parte Ebrahim: In re State v. Maseko (Transvaal Provincial Division), [1988] 1 S. Afr. L. Rep. 991.

[48] State v. Ebrahim, 31 I.L.M. 895 (1992).

The approach adopted by the South African Supreme Court, was welcomed by South African scholars as adeparture from «bad old days» [49]. In *State v. Wellem* [50] and *State v. Mabena* [51] the new rule of *Ebrahim* was even applied to cases in which, by mutual agreement of law enforcement personnel, the regular extradition procedures were circumvented. In a follow-up civil proceeding, Ebrahim was awarded compensation for the kidnapping [52].

Ebrahim can be considered as a settled precedent. South African courts do not uphold jurisdiction over persons kidnapped from abroad by the state anymore. This rule is, however, based predominantly on municipal law. Although the court did mention respect for the sovereignty of another state in its evaluation of the rule, it was more like a factual consideration in evaluating the municipal law rule and cannot be equated with the proper application of international law as such [53]. It is nevertheless an important precedent, insofar as the court evaluates the international implications of its ruling.

3.3. Zimbabwe

Largely influenced by its counterpart in South Africa, the Supreme Court of Zimbabwe in 1991 overruled old precedents following the *male captus, bene detentus* rule. In *State v. Beaham* [54] Chief Justice Gubbay thoroughly considered Anglo-American precedents including

[49] John Dugard, *No Jurisdiction Over Abducted Persons in Roman-Dutch Law; Male Captus, Male Detentus*, 7 S. Afr. J. Human Rights 199, 200 (1991). See also M.G. Cowling, *Unmasking «Disguised» Extradition-Some Glimmer of Hope*, 109 S. Afr. L J. 241 (1992); Hercules Booysen, *Jurisdiction to Try Abducted Persons and the Application of International Law in South African Law*, 16 S. Afr. Yb. Int'l L. 133 (1990/91); Rika Pretorius, *Delictual Compensation for Abduction in Foreign Territory*, 18 S. Afr. Yb Int'l L. 142 (1992/93); Neville Botha, *Extradition v. Kidnapping: One Giant Leap Backwards- United States v. Álvarez Machain* [1992] 31 ILM 900, 19 S. Afr. Yb Int'l L. 219 (1993/94).

[50] [1993] 2 S. Afr. Crim. Rep. 18.

[51] [1993] 2 S. Afr. Crim. Rep. 295.

[52] Ebrahim v. Minister of Law and Order, [1993] 2 S. Afr. L. Rep. 559 (T). See also, Rika Pretorius, *supra* note 49.

[53] Cf. Hercules Booysen, *supra* note 49, at 137.

[54] [1992] 1 S. Afr. Crim. Rep. 307.

United States v. Álvarez-Machain and balanced them against *State v. Ebrahim*. He concluded:

> «In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State» [55].

This part of the opinion was dictum because the case dealt with consensual circumvention of the extradition procedure. But even under those circumstances, the Supreme Court allowed the trial court discretion in whether to exercise jurisdiction.

3.4. Australia

In *Levinge v. Director of Custodial Services* [56] the plaintiff alleged that his extradition to Australia was a consequence of his having been wrongfully arrested in Mexico and forcibly and wrongfully delivered across the border into the United States by Mexican police at the instigation of the FBI, at the request or with the connivance of the Australian Federal Police. Once arrived in the USA the plaintiff was lawfully extradited by the United States to Australia.

The Court considered the *Eichmann* case and all relevant Anglo-American precedents starting with *Kerr v. Illinois.* It was not convinced by the traditional line of cases and followed the approach of *Ex parte Driver.* The Court concluded:

> «Where a person, however unlawfully, is brought into the jurisdiction and is before a court in this State, that court has undoubted jurisdiction to deal with him or her. But it also has discretion not to do so, where to exercise its discretion would involve an abuse of the court's process....[S]uch conduct may exist, including wrongful and even unlawful involvement in bypassing the regular machinery for extradition and participation in unauthorized and unlawful removal of criminal suspects from one jurisdiction to another» [57].

[55] *Id*. at 317.
[56] [1987] 9 NSWLR 546 (Court of Appeal, New South Wales).
[57] *Id*. at 556G-557A.

In the present case no evidence could be established that the Australian police were involved in or connived at the expulsion of the plaintiff from Mexico. No violation of international law was pleaded in this case. A forcible unilateral abduction can therefore be assumed to be a strong case for a stay of criminal proceedings in order to prevent abuse of process.

3.5. New Zealand

A similar approach was followed by a New Zealand court in *Hartley* [58]. The Court allowed the trial court to exercise discretion to discharge a fugitive seized in Australia by informal agreement between the Melbourne and Wellington police, although there may have been no violation of international law.

The Court held:

> «Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this may never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society» 59.

The English decision *Ex parte Mackeson*, the first English challenge to the *male captus, bene detentus* rule relied largely on *Hartley*. It seems to be quite obvious that in case of forcible abduction, the arguments against the ends that justify the means and «short cuts» are even stronger. Taking in addition into account the strong traditional reliance on English precedents, it is fair to conclude that New Zealand courts do not uphold jurisdiction in a case of forcible abduction.

[58] R. v. Hartley, [1978] 2 NZLR 199 (Court of Appeal, Wellington).
[59] *Id*. at 317.

3.6. Germany

The Federal Constitutional Court was faced with the question of jurisdiction over abducted persons in two decisions of 1986 [60]. The Court examined the relevant state practice —mostly Anglo-American precedents, Swiss and French cases and the *Eichmann* case— and concluded that there was no rule of customary international law prohibiting jurisdiction over abducted persons in general. It ruled that the authorities of the abducting state will have to return the alleged offender only if the state of origin claims the right to have the individual back. This, in fact, happened in a case concerning an abduction by Germany from the Netherlands [61]. As a result, the abductee was returned, and a German proceeding was barred since criminal proceedings *in absentia* are, in general, not allowed under German law. Legal scholars heavily criticized the Federal Constitutional Court for its narrow holding, complaining that the Court lacked respect for international law [62]. The Court is, however, usually quite careful in determining rules of customary international law [63]. Confronted with another case of forcible abduction and doubts about the continued validity of its 1986 conclusion, it is therefore most likely that the Court would examine subsequent state practice.

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[60] 39 Neue Juristische Wochenschrift (NJW) 1427 and 3021 (1986).

[61] Federal Supreme Court, 40 NJW 3087 (1987) pointing out that there is no permanent bar to prosecution.

[62] F.A. Mann, *Zum Strafverfahren gegen einen völkerrechtswidrig Entführten.* 47 ZaoRV 469, 485 (1987) (=Reflections on the Prosecution of persons Abducted in Breach of International Law, in F.A. Mann, *Further Studies in International Law at 339 (Oxford 1990)); Bernd Schunemann, Materielle Tatverdachtsprüfung un völkerrechtswidrige Entführung als nationalstaatliche Sprengsätze im internationalen Auslieferungsverkehr*, in 140 Jahre Goltdammer's Archiv für Strafrecht 215, 230 (Jürgen Wolter ed. Heidelberg 1993).

[63] See, e.g., 16 BVerfGE 27, 33-61 (1964) (Customary international law does not prohibit exercise of jurisdiction over foreign state for claims arising out of commercial activity); 66 BVerfGE 39, 65-66 (1984) (storage of nuclear weapons for defensive purposes not prohibited by customary international law); 75 BVerfGE 1, 18-33 (1988) (The principle of *non bis in idem* is not yet a rule of customary international law). Recently, persons whom reunified Germany prosecuted for espionage for the former German Democratic Republic challenged their convictions. They claimed that customary international law exempts spies from punishment after unification of former enemy states. The court requested a legal opinion from the Max Planck Institute of Comparative Public Law and International Law before it dismissed this defense based on the opinion's conclusion, 92 BVerfGE 277 (1995). The legal opinion of the Max Planck Institute is meanwhile published, J.A. Frowein, R. Wolfrum, G. Schuster, *Volkerrechtliche Fragen der Strafbarkeit von Spionen aus der ehemaligen DDR*, SPRINGER-Verlag Berlin 1995.

3.7. Israel

Israel exercised jurisdiction against the Nazi war criminal Eichmann, who was kidnapped by Mossad agents from Argentina [64]. The case is often cited as a precedent for the rule that a defendant cannot dispute the jurisdiction of a court simply because of his forcible abduction. The *Eichmann* case was, however, already settled by diplomatic means when the criminal proceedings started. After Israel tendered an official apology, Argentina waived further action on the abduction [65].

The case is not a good precedent due to the extraordinary crimes of Eichmann. Even strong critics of jurisdiction over abducted persons justify an exception for crimes like the ones committed by Eichmann [66].

In 1972 Israel military forces captured the Turkish citizen Faik Balut during a raid into Lebanese territory. He was convicted by the Military Court of Lod on August 7, 1973. The defense of forcible abduction was rejected with reference to *Ker v. Illinois* and the *Eichmann* case [67]. The abduction of the Israeli nuclear technician

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[64] 36 I.L.R. (District Court of Jerusalem 1961); 36 I.L.R. 277 (Supreme Court 1962).

[65] See Louis Henkin, Richard Crawford Pugh, Oscar Schachter & Hans Smit, *International Law* at 1085 (3nd. ed. 1993).

[66] Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 Am. J. Int'l 444, 490 (1990) («cases that are bigger than law- Adolf Eichmann, for example»); F.A. Mann, *supra* note 62, at 478-79; Rosalyn Higgins, *Problems and Process. International Law And How We Use It* at 472 (Oxford 1994); Jianmeng Shen, Note, *Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension*, 23 Denv. J. Int'l L. & Pol'y 43, 58 (1994). Cf. ABA Report No. 110 (February 1993): «Abducting someone charged with international crimes against humanity might be asserted as an exception (the seizure of Eichmann from Argentina might have been such a case, if Israel had claimed responsibility»). Quoted by the Secretaría de Relaciones Exteriores, 2, *Limits to National Jurisdiction* at 112 (México 1993). The U.N. Security Council, however, affirmed in the *Eichmann* case that non-consensual kidnapping by agents of another state violates international law, even when the victim of the kidnapping committed offenses subject to universal jurisdiction. Consequently, the Security Counsel ordered Israel to make reparations to Argentina, S.C. Res. 138, U.N. SCOR, 45th Sess., 868th. mtg. at 4, U.N. Doc. S/4349 (1960) (noting that resolution in no way condoned «odious crimes» of which Eichmann was accused).

[67] Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent*, 72 Mich. L. Rev. 1087, 1087 (1974); M. Cherif Bassiouni, *2 International Extradition: United States Law and Practice* at 205 (2nd. ed. 1987).

Vanunu in September 1986 caused anger among European countries. Vanunu had revealed details of the Israeli nuclear weapons arsenal to the British *Sunday Times*. Before the report was published, Vanunu was kidnapped by Israeli secret service agent from Italy. In a closed criminal proceeding he was convicted of treason and espionage. Only the sentence of the judgment was made public [68]. His appeal was dismissed by the Supreme Court on May 27, 1990. The European Parliament protested, in a resolution of June 14, 1990, vehemently against the judgment [69]. Israel has used kidnapping, however, not just to subject alleged offenders to the jurisdiction of its courts. In July 1989 military commandos kidnapped Sheik Karim Obeid from Lebanon [70]. In May 1994 the Shiite leader Mustafa Dirani fell victim to a similar operation [71]. The abductees serve as pawns to achieve the release of Israeli soldiers. Other political opponents like the Hizbollah General Secretary Sheik Mussawi were simply killed without any attempt to subject them to court proceedings [72]. The unique circumstances of Israel's national security make it questionable whether these Israeli cases can serve as guidelines to determine rules of customary international law. At the very least, Israel has been at the extremes in these cases. It is thus hard to say that its acts represent an international consensus.

3.8. France

The French Tribunal Correctionnel d'Avesnes ordered the release of a fugitive abducted from Belgium by French agents in violation of international law in the 1933 case *In re Jolis* [73] thereby affirming the

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[68] John Kifner, *Israel Finds Nuclear Technician Guilty of Treason and Espionage*, N.Y. Times, March 25, 1988, at A1; Jerusalem Post International Edition, Israel Will Explain to Rome, January 3, 1987, at 4.

[69] 1990 O. J. (C 175) 168.

[70] Joel Brinkley, *Israeli Commandos Abduct a Chief of Pro-Iranian Group in Lebanon*, N.Y. Times July 29, 1989, at. 1.

[71] Clyde Haberman, *Israelis Abduct Guerilla Chief from Lebanon*, N.Y. Times, May 22, 1994, at 1.

[72] Clyde Haberman, *Israelis Kill Chief of Pro-Iranian Shiites in South Lebanon*, N.Y. Times, Feb, 17, 1992, at A1; Chris Hedges, *Killing of Sheik: Israel Waited for Months*, N.Y. Times, Feb. 22, 1992, at 1.

[73] 7 Ann. Dig. 191 (1933-34).

ruling of older cases which had required an inquiry into the circumstances of the defendant's apprehension [74]. These cases seemed to be overruled after the judgment of the Cour de Cassation *In re Argoud* [75]. Antonie Argoud, an ex-colonel in the French Army, was sentenced *in absentia* to death by a Military Court for conspiracy to assassinate President De Gaulle. Subsequently, he was abducted from Munich and taken to Paris, where he was found and arrested by the French police, as a result of information from an anonymous telephone call. Germany did not officially complain about the abduction prior to Argoud's trial, nor was there evidence that the French government participated in the abduction. The Court said:

> «[I]n international law, the State which is entitled to complain of damage suffered by one of its Nationals or protected persons exercises a right of its own when it seeks reparation. It follows that the individual who claims to be injured... is without any right or capacity to plead in judicial proceedings a violation of international law, *a fortiori* when the State in question makes no claim» [76].

French legal authorities cite the *Argoud* case nowadays as an example of an abduction undertaken by private parties and hold the rule pronounced in *Jolis* still for good law in France [77].

3.9. Switzerland

Switzerland also adheres to the rule of inquiry into the circumstances of apprehension. In 1967, a businessman living abroad was lured by private persons to Switzerland where he was arrested. The

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[74] Case *Nollet*, 18 Journal du Droit International Privé 1188 (Cour d'Appel de Douai 1891) (Fugitive released because French police violated Belgian territorial sovereignty to apprehend suspect) and case *Jabouille*, Revue de Droit International Privé et de Droit Pénal 1 (Cour d'Appel de Bordeaux 1905) (Fugitive released because the extradition procedure was not followed).

[75] 45 I.L.R. 90 (Cass. Crim 1964).

[76] *Id*. at 95.

[77] Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, *Droit International Public* at 448 (4th. ed. Paris 1992); Pierre Marie Dupuy, *Droit International Public* at 48 (2th. ed. Paris 1993).

Zurich Higher Court followed the conclusion of a legal opinion of Professor Hans Schultz [78] and declined jurisdiction over the defendant [79]. The action was deemed to violate national due process and principles of extradition law whereby apprehension of a person by means of force or ruse was prohibited. Knowledge of the prosecutor of the trick sufficed to turn the private operation into state action.

3.10. Costa Rica

In an unusual manner, the Justices of the Supreme Court of Costa Rica unanimously censured the *Álvarez-Machain* decision of the US Supreme Court, stating in the Court's plenary session of June 25, 1992:

> «Because of the profound harm to the rules of international law and to sovereignty of States that the resolution implies, this Court resolves to establish evidence so it be known in this way, of the inadmissibility of such pronouncement, and has no doubt that shortly, it will be amended by the same Court who has issued it, in support of the supremacy of law and the mutual respect that must rule between the United States and all other States with whom —under the principle of good faith— it subjected its relations, concerning to extradition treaties, which must be construed, not only according to its content, but to the practice of law, teachings, and jurisprudence that inform it» [80].

3.11. Evaluation

So far as practice in national tribunals is concerned the courts of states are increasingly holding that the seizure of a person in violation of international law, or custody without legal process, to which their own authorities are a knowing party, vitiates jurisdiction by reason of abuse of process [81]. These decisions are not explicitly based on

[78] Schultz, Hans, *Male Captus Bene Iudicatus?* 24 Schweizerisches Jahrbuch für Internationales Recht (1967).
[79] 65 Blätter für Zürcherische Rechtsprechung 248 (1967).
[80] Quoted by the Secretaría de Relaciones Exteriores, *2 Limits to National Jurisdiction* at 81-82 (México 1993).
[81] I.A. Shearer, *Starke's International Law* at 92 n.11 (11th. Ed. Butterworths 1994).

international law grounds. And therefore one might doubt whether they reflect *opinio iuris.* Most of these states, however, considered questions of international law by interpreting their local statutes. In the Swiss case, e.g., the Court did not reach the question of a violation of international law, because the local statute was already interpreted in a way to be in conformity with the supposed rule of international law. The distinction between cases upholding a prohibition against exercising jurisdiction and cases following a discretionary approach could be invoked as an argument against a uniform customary rule. The differences, however, seem to be based on the different legal techniques offered by the national judicial systems to apply a rule of international law in the context of national criminal proceedings. The very existence of different legal systems makes it unlikely that municipal courts reach a common result by exactly the same method. What is more important than the same method is that municipal courts reach the same result. The discretionary approach does not contradict a strict prohibition of jurisdiction insofar as even this prohibition would know exceptions. For instance, an abduction and prosecution of Saddam Hussein in 1991 would have been arguably covered by resolution 678 of the Security Council [82].

The concurrence of judicial decisions of state courts might further indicate the general recognition of a broad principle of law. This is well illustrated by a decision of the US Supreme Court in the case of The *Scotia* [83]. In 1863, the British government adopted a series of regulations for preventing collisions at sea. In 1864, the US Congress adopted practically the same regulations, as did the governments of nearly all the maritime countries within a short time after. Under these circumstances the *Scotia* (British) collided in mid-ocean with

[82] U.N. SCOR, 45th. Sess., 2963rd. mtg. at 27, U.N. Doc. S/INF/46 (1990) («The Security Council, ... acting under Chapter VII of the Charter, ... authorizes Member States... to use all necessary means to uphold and implement resolution 660 (1990) and all relevant resolutions and to restore international peace and security in the area»).

[83] 14 Wall. (81 U.S.) 170 (1871).

the *Berkshire* (USA), which was not carrying the lights required by the new regulations. As a result, the *Berkshire* sank. The question was whether the respective rights and duties of the two vessels where determined by the general maritime law before the regulations of 1863. It was held that these rights and duties must be determined by the new customary rules of international law that had evolved through the widespread adoption of the British regulations, and that therefore, the fault lay with the *Berkshire*. The court stated:

> «This is not giving to the Statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation» [84].

One might ask whether the non-existence of further judgments of national courts can be interpreted as support for the modern rule of inquiry into the circumstances of the apprehension as well. It seems to be quite convincing that in a legal system where law enforcement personnel are convinced that a transborder kidnapping would cause the national courts to decline jurisdiction, there is no incentive to kidnap persons and consequently no precedent. Professor Espósito, e.g., explains in his commentary on *Álvarez-Machain* that certain articles of the Spanish constitution were interpreted by Spanish courts in such a way that makes it highly unlikely that a court can exercise jurisdiction over an abductee [85]. Therefore, one has to keep in mind that not just these

[84] *Id.* at 188.

[85] Carlos D. Espósito, *Male captus, bene detentus: A propósito de la sentencia del Tribunal de Estados Unidos en el caso Álvarez-Machain*. 2 Estudios de Jurisprudencia 7 (Marzo-Abril 1993).

states whose courts already explicitly declined jurisdiction follow the new rule [86].

The old maxim of *male captus, bene detentus* seems still to be alive in Israel. It was further followed by the United States in *Álvarez-Machain*. But even in the United States the *opinio iuris* might have changed. The Federal District Court, Judge Rafeedie —a Reagan appointee— and a unanimous panel of the 9th. Circuit had already declined jurisdiction over Álvarez-Machain when a 6:3 majority of the Supreme Court turned back the wheel. Even though these decisions have no authoritative weight, they might indicate that the federal judiciary has doubts when confronted with the question of jurisdiction over abductees. Other courts in the United States had previously indicated warnings that law enforcement personnel should no longer rely on the old rule [87]. It is interesting to note that the US Supreme Court did not exclude the idea of the dismissal of an abductee's indictment under the Court's supervisory power. In *Mc Nabb*, the Court held that a federal court must not allow itself to be made an «accomplice [] in willful disobedience of law» [88]. Guided by considerations of justice, federal courts may exercise their supervisory power to implement a remedy for violation of recognized rights, to preserve judicial integrity, and finally, as a remedy designed to deter illegal conduct [89].

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[86] Cf. Malcom N. Shaw, *International Law* at 67 (Grotius Publications 1986): «Failures to act are in themselves just as much evidence of a state's attitude as are actions. They similarly reflect the way in which a nation approaches its environment». See, however, the *Case of the S.S. Lotus (France v. Turkey)* where France referred to the absence of criminal prosecutions by states in similar situations and from this deduced tacit consent in the practice which therefore became a legal custom. The Permanent Court of Justice rejected this and declared that even if such a practice of abstention from instituting criminal proceedings could be proved in fact, it would not amount to custom. It held that «only if such a duty to abstain were based on their [the states] being conscious of a duty to abstain would it be possible to speak of an international custom». 1927 P.C.I.J. (Ser. A) No. 10, at 28 (September 1927). Cf. Nottebohm Case (Liechtenstein v. Guatemala) (second phase, 1955 I.C.J. 4, 22 (April 6): «The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation».

[87] See, e.g. the explicit warning in *Day v. State*, 763 S.W. 2d 535, 536 (Tex. App. El Paso 1988).

[88] McNabb v. United States, 318 U.S. 332, 345 (1943).

[89] United States v. Hastings, 461 U.S. 499, 505 (1978).

Several courts have already threatened to possibly exercise the supervisory power to bar jurisdiction in an abduction case [90]. It is therefore possible for American Courts to deny jurisdiction over abductees without disregarding *United States v. Álvarez-Machain*. The authority of this precedent is weakened by the fierce dissent of J. Stevens calling the majority's opinion a «monstrous decision» [91]. The dissenting opinion which was joined by J. O'Connor and J. Blackmun seems to be more persuasive for courts in other countries than the majority's holding. For instance, the House of Lords explicitly relied on the dissent in *Bennett* [92]. In addition to this, the majority's approach was almost unanimously condemned by scholars and commentators nationwide [93].

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[90] United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974), *reh'g en banc denied*, 504 F.2d 859 (1975); United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J. concurring), cert. denied, 423 U.S. 847 (1975); United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom* United States v. Álvarez-Machain, 946 F.2d 1466 (9th. Cir. 1990), *rev'd*, 504 U.S. 655 (1992).

[91] United States v. Álvarez-Machain, 504 U.S. 655, 687 (1992) (Stevens, J., dissenting).

[92] [1993] 3 All E.R. 138, 148, 154. See also the preference which was given to J. Stevens opinion in *State v. Wellem*, [1993] 2 S. Afr. Crim. Rep. 18, 28 (Eastern Cape Division).

[93] The author is aware that the strength of an argument cannot solely be measured by the number of supporters. The compilation of defenders and critics of the decision shows, however, that the Supreme Court did not succeed in convincing even the national legal community.
Critics: David D. Almroth, Note, 23 SetonHall L. Rev. 1128 (1993); Manuel R. Angulo & James d. Reardon, 16 B.C. Int'l & Comp. L. Rev. 245 (1993); Charles Bibloweit, 9 N.Y. Int'l L. Rev. 105 (1996); Jonathan A. Bush, 45 Stan. L. Rev. 939 (1993); Héctor H. Cárdenas, Jr., 16 Hous. J. Int'l L. 101 (1993); Tom Cartmell, Note, 41 Kan. L. Rev. 635 (1993); Elizabeth Chien, Note, 15 U. Hawaii L. Rev. 179 (1993); Philipp J. Cooper, 15 Chicano-Latino L. Rev. 67 (1994); Lori Pate Daves, Note, 38 Loy. L. Rev. 1173 (1993); Donald A. Dripps, Trial, September 1992, at 81; Valerie Epps, International Practitioner's Notebook No. 55, at 6 (October 1992); Scott Evans, 137 Mil. L. Rev. 187 (1992); R. T. Francis, Note, 20 New Eng. J. on Crim. & Civ. Confinement 117 (1993) Michael J. Glennon 86 Am J. Int'l L. 746 (1992); Heidi L. Goebel, Note, 25 U. Tol. L. Rev. 2997 (199i); Michelle D. Gouin, Note, 26 Conn. L. Rev. 759 (1994); Loubna W. Haddad, Note, 5 St. Thomas L. Rev. 543 (1993); Patrick M. Haggan, 17 Suffolk Transnat'l L. J. 438 (1994), The Supreme Court, 1991 Term-Leading Cases, 106 Harv. L. Rev. 163 (1992); Philip B. Heymann & Ian Heath Gershengorn, 4 Crim. L.F. 155 (1993); John R. Hitt, Note, 1993 Det. C. L. Rev. 193; Mark D. Hobson, 1 Fla. St. U. J. Transnat'l L. & Pol'y 253 (1992); Brigitte B. Homrig, Note, 28 Wake Forest L. Rev. 671 (1993); Yvonne W. Jicka, Note, 14 Miss. C. L. Rev. 103 (1993); Jonathan E. Katz, Note, 23 Cal. W. Int'l L. J. 395 (1993); Leigh Ann Kennedy, Note, 27 Creighton L. Rev. 1105 (1994); Michael Kristofco, Note, 20 Ohio N.U. L. Rev. 191 (1993); Alfred Paul LeBlanc, Jr., Note, 53 La. L. Rev. 1411 (1993); Aimee Lee, Note, 17 Fordham Int'l L.J. 126 (1993); Jana Logan, Note, 1 San Diego Justice J. 253 (1993); Jonathan Looner, 83 J. Crim L. & Criminology 998 (1993); Edmund S. McAlister, Note, 43 DePaul L. Rev. 449 (1994); Michael G. McKinnon, Note, 20, Pepp. L. Rev. 1503 (1993); Carrie S. McLain, Note, 24 U. West L.A. L. Rev. 321 (1993); Carol R. Miller, Human Rights, Spring 1994, at 24; Note, 6 Pace Int'l 1. Rev. 221 (1994); Jordan J. Paust, 67 St. John's L. Rev. 551 (1993); Ian J. Platt, Note, 27 Suffolk U. L. Rev. 271 (1993); John Quigley, 10 Hum. Rts. Q. 193 (1988); Stephanie A. Re, 44 Wash. U.J. Urb. & Contemp. L. 265

United States v. Álvarez-Machain is not a precedent which enjoys high respect in the legal community. The strong reactions in the aftermath of the decision even prompted Congress to conduct a hearing on the subject [94]. Legislation was introduced to address this issue [95]. The US Supreme Court, however, seems to be more and more inclined to leave in place —even recent— important constitutional decisions with plainly inadequate rationale for the sole reason that they once attracted a narrow majority [96]. This raises hopes that the Court will have a second look at *Álvarez-Machain* in the near future.

(1993); Amy K. Rehm, Note, 18 U. Dayton L. Rev. 889 (1993); David D. Ring, Note, 15 Whittier L. Rev. 495. (1994); Hernán De J. Ruiz-Bravo, 20 Hastings Const. L.Q. 833 (1993); Steven M. Schneebaum, 18 Brook. J. Int'l L. 303 (1992); Aaron Schwabach & S.A. Patchett, 25 U. Miami Inter-Am. L. Rev. 19 (1993); Analisa W. Scrimger, Note, 7 Temp. Int'l & Comp. L.J. 369 (1993); Jacques Semmelman, 30 Colum. J. Transnat'l L. 513 (1992); Michael C. Snyder, Note, 31 Duq. L. Rev. 939 (1993); Candace R. Somers, Note, 18 N.C.J. Int'l L. & Com. Reg. 213 (1992); Royal C. Stark, 9 Conn. J. Int'l L. 113 (1993); Ralph G. Steinhardt, 4 Crim. L.F. 135 (1993); Andrew L. Strauss, 67 Temp. L. Rev. 1209 (1994); Bradley Trush, 11 Ariz. J. Int'l & Comp. L. 181 (1994); Michael Albert Tomasulo, Note, 67 S. Cal. L. Rev. 475 (1994); Terry L. Traveland, Note, 45 Baylor L. Rev. 185 (1993); Ruth Wedgwood, 6 Am. U.J. Int'l & Pol'y 537 (1991); Kristin Berdan Weissman, Note, 27 U.C. Davis L. Rev. 459 (1994); Stephen M. Welsh, Note, 44 Mercer L. Rev. 1023 (1992); Andrew L. Wilder, 32 Va. J. Int'l L. 979 (1992); Michael R. Wing, Note, 23 Ga. J. Int'l & Comp. L. 435 (1993); John J. Yered, 17 Suffolk Transnat'l L.J. 218 (1994).

In defense: Tarek N. Fahmi, Note, 20 W. St. U.L. Rev. 695 (1993); Matthew L. Guzman, 17 S. III. U. L.J. 317 (1993); Malvina Halbertam, 86 Am. J. Int'l L. 736 (1992); Charles L. Hobson, Nat'L L.J., July 6, 1992, at 15; Mitchell J. Matorin, 41 Duke L.J. 907 (1992); Michael J. Weiner, Note, 12 Wis. Int'l L.J. 125 (1993).

[94] *Kidnapping Suspects Abroad*, 1992: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102nd. Cong., 2d Sess. 267 (1992).

[95] On July 7, 1992, the House of Representatives considered the *International Kidnapping and Extradition Act*, 138 Cong. Rec. H6019, 102d Cong., 2d Sess. (1992).This legislation would have barred prosecution of a person who is forcibly abducted from abroad by an agent of the United States where an extradition treaty is in place. Senator Patrick Maynihan introduced a bill to amend the *Foreign Assistance Act of 1961*, S. 72, 103d Cong., 1st. Sess. (1993). The amendment prohibits direct arrest and abduction by U.S. agents abroad. Both pieces of legislation fault.

[96] Cf. Payne v. Tennessee. 501 U.S. 808, 834 (1991) (Scalia, J., concurring). This is a more general trend which reflects how the US Supreme Court is handling its caseload For a recent controversial discussion about the value of *stare decisis* see Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

4. Acts or Declarations of Representatives of States

4.1. Reactions of foreign states following *Álvarez-Machain*

Forcible abductions are still sufficiently rare as to compel states to pronounce their legal point of view. The aftermath of *Álvarez-Machain*, however, provoked a lot of reactions by foreign governments. Many Governments expressed outrage that the United States believes it has the right to decide unilaterally to abduct one of their Nationals. Some countries told the US State Department that they believe that such actions would violate their bilateral extradition treaties [97]. The reaction was strongest throughout Latin America and the Caribbean. Among these reactions are the following ones:

1. On June 15, the Colombian government stated that it «energetically rejects the judgment issued by the United States Supreme Court...». Although recognizing that the decision dealt only with a treaty between the U.S. and Mexico, the Government felt that «its substance threatens the legal stability of [all] public treaties» [98].

2. A resolution adopted by the lower house of the Parliament of Uruguay on June 30, 1992 asserted that the decision shows «a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties» [99].

3. Jamaica's Minister of Security and Justice criticized the decision as based on the principle that might makes right. «He said the ruling was an atrocity that would disturb the world», and called on the U.S. to come «back to its senses» [100].

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[97] Kidnapping Suspects Abroad, *supra* note 94 (Prepared Statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State), at 110.11.
[98] *Id*. at 112.
[99] *Id*. at 112.
[100] *Id*. at 112-13.

4. The Supreme Court's decision led to a rigorous debate in the Canadian Parliament. The Canadian Minister of External Affairs told the canadian parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of the U.S.-Canada extradition treaty [101].

5. Spain's President publicly criticized the decision as «erroneous» [102].

6. In a statement issued by the Heads of Government of the Caribbean Community on July 2, 1992 they:

> «Emphasized that the only acceptable method of effecting any involuntary transfer of persons from one sovereign state to another must be in conformity with the laws and procedures of the State from which persons are transferred or under and in conformity with the terms of any Extradition Treaty which may exist between the two states in question» [103].

7. The Bolivian Vice president called the decision a clear violation of international law and an «illogical and unilateral measure» [104].

8. The Brazilian Foreign Minister condemned the decision as contrary to the OAS Charter [105].

The decision was also condemned by Chile, Colombia, Cuba, Uruguay, and Venezuela [106].

[101] *Id*. at 114.
[102] *Id*. at 114.
[103] Secretaría de Relaciones Exteriores, *2 Limits to National Jurisdiction* at 13 (Mexico 1993).
[104] Ruiz-Bravo, Hernan de J., *Monstrous Decision: Kidnapping Is Legal*, 20 Hastings Const. L. Q. 833, 836 (1993).
[105] *Id*. at 836.
[106] *Id*. at 837.

It goes without saying that the reaction was strongest in Mexico [107]. México and Canada had both submitted *amicus curiae* briefs in support of Álvarez-Machain to the US courts [108].

As already discussed above, the Permanent Council of the OAS requested a legal opinion from the Inter-American Juridical Committee.

The Second Ibero-American Summit of heads of state and of government, gathered in Madrid, on July 23 and 24, 1992, agreed to ask the General Assembly of the United Nations, to solicit an advisory opinion from the International Court of Justice [109]. Introducing the item on behalf of the 21 member states of the Ibero-American Conference, Spain suggested to request that the questions should be addressed as follows:

> «1. Does the conduct of a State which, directly or indirectly, arrests or apprehends a person in the territory of another State without the latter's consent, and transfers him to its own territory to subject him to its criminal jurisdiction, constitute a breach of international law?
>
> »2. If the answer to the first question is in the affirmative, what would be the international legal consequences in that case for each of those States, and, possibly, for third States?» [110].

Due to the reputation of the International Court of Justice, there can be no doubt that such an advisory opinion would be of enormous substantial weight.

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[107] *Kidnapping Suspects Abroad*, *supra* note 94 (Prepared Statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State), at 117-20.

[108] Reprinted in 31 I.L.M. 919 [Canada] and 934 [México] (1992).

[109] *Kidnapping Suspects Abroad*, *supra* note 94, at 251-52.

[110] Virginia Morris & M. —Christiane Bourloyannis, *Current Developments—. The Work of the Sixth Committee at the Forty-Seventh Session of the General Assembly*, 87 Am. J. Int'l L. 306, 322 (1993).

The question whether to request an advisory opinion is still pending in the Sixth Committee of the General Assembly. However, at the forty-ninth session the committee, however, did not hold a debate on this item and decided to defer its consideration to a «future session» [111].

4.2. Evaluation

The state reactions are of different character. Some of them seem to aim at the question of jurisdiction over abductees, other ones seem to be caused by the equivocality of the Supreme Court's remark:

> «Respondent and his amici may correct that respondent's abduction was... in violation of general international law principles» [112].

There might be cases where transborder kidnappings are justified [113], but not even the US Government seriously contested that Álvarez-Machain's abduction was a violation of international law. The Court, therefore, would have been well advised to state clearly that it did not doubt the illegality of nonconsensual law enforcement abroad.

A closer reading of the decision, however, would have revealed that the Court did not proclaim a «right to kidnap». And states who protested against the judgment can be expected to have studied its holding carefully. The very narrow interpretation of the extradition treaty with its overemphasis of the words of the treaty was certainly

[111] Virginia Morris & M. —Christiane Bourloyannis, *Current Developments—. The Work of the Sixth Committee at the Forty-Ninth Session of the General Assembly*, 89 Am. J. Int'l L. 607, 620 (1995).

[112] United States v. Álvarez-Machain, 504 U.S. 655, 669 (1992).

[113] Cf. Jonathan Bush, *How Did We Get Here? Foreign Abductions after Álvarez-Machain*, 45 Stan. L. Rev. 939, 977-983 (1993); *FBI Authority to Seize Suspects Abroad*: Hearings before the Subcommittee on Civil and Constitutional Rights of the House of the Judiciary, 101st. Sess. 20-21 (1989) (Statement of William Barr, Assistant Attorney General).

questionable [114] but not monstrous. In fact, the question whether abduction constitutes a violation of the extradition treaty was only in the domestic context of the *Rauscher* exception of any significance. No state would have been outraged by a decision, holding that waging war did not violate extradition treaties as long as no doubt is left that waging war is forbidden by customary international law and numerous international treaties [115]. A spontaneous outcry about the decision could have been understood as traditional resistance against a perceived US predominance in Latin America [116]. Most states, however, were more interested in clarifying the legal issue instead of bashing the United States. The declarations and actions taken after the decision really seem to insist on the legal question: May another state enjoy the fruits of its breach of international law? Apparently, the states who protested and requested advisory opinions from the Inter-American Juridical Committee and the International Court of Justice answer this question in the negative. Their explicit rejection of the *Álvarez-Machain* decision even limited their own leeway for future action. For instance, México and Canada would see themselves confronted with a reproach of estoppel if they kidnapped persons from the United States and claimed that they had jurisdiction over them. The real point of the dispute in the aftermath of *Álvarez-Machain* is therefore the question of jurisdiction and not so much the narrower

[114] Cf. Steinhardt, in: Paul Hoffman, Ralph Steinhardt, Manuel A. Medrano, Charles Siegel & Laurie Evensong, *Kidnapping Foreign Criminal Suspects*, 15 Whittier L. Rev. 419, 421 (1994): «The Álvarez-Machain decision, in its insistence that outrageous conduct is permitted so long as it is not explicitly prohibited by the terms of a treaty, is a relatively modern version of a kind of cleverness that has plagued the law of nations and maybe the law in general since antiquity. The story goes that the Platens, of the ancient Greek city-state, promised the Thebans that their prisoners of war would be returned. The Plataeans, killed the prisoners before returning them, however, maintaining that they had never promised to return them alive. A comparable story is that of a Roman general who, having promised an opposing general that half of the latter's fleet would be restored, neatly sawed each of the ships in two and returned half of each vessel in the fleet».

[115] Cf. *United States v. Álvarez-Machain*, 504 U.S. 655, 668 (1992): «... it cannot seriously be contended that an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations».

[116] Cf. J.L. Brierly, *The Law of Nations* at 61 (5th. ed. Oxford 1955): «States, like individuals, often put forward contentions for the purpose of supporting a particular case which do not necessarily represent their settled or impartial opinion...».

question of a violation of the extradition treaty. The latter question solely seemed to be the means to reject jurisdiction.

The state reactions in the aftermath of *Álvarez-Machain* are evidence that at least at the regional level jurisdiction over abductees is in general prohibited by customary international law.

III. CONCLUSION

Professor von Glahn wrote in 1992:

> «This principle is supported by the laws of the overwhelming number of all states; once a prisoner is under the authority of a given court and has been properly charged in accordance with the local law, he may be tried and, if convicted, sentenced by that court regardless of the mode by which he was brought originally under the authority of that court» [117].

This statement is not true anymore. More and more national courts inquire into the circumstances of the apprehension of alleged offenders and decline jurisdiction in case of a forcible abduction from abroad. The strong reactions of states in the aftermath of *Álvarez-Machain* confirm this trend. States don't want other states to enjoy the fruits of illegal conduct. The practice necessary to create customary law may be of comparatively short duration, but it must be general and consistent [118]. The speed can increase to such an extent that binding law comes into being more quickly by way of custom than by way of a treaty [119]. A practice can be general even if it is not universally followed. It should, however, reflect wide acceptance

[117] Gerhard von Glahn, *Law Among Nations*, at 315 (6th. ed. Macmillan 1992). Cf. Malcom N. Shaw, *International Law*, at 361 n.76 (2nd. ed. Grotius 1986) «Unlawful apprehension is no defense to an exercise of jurisdiction».

[118] North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands), 1969 I.C.J. 3, 43 (February 20): «... the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law...»; Restatement (Third) of Foreign Relations Law, § 102 cut. b.

[119] H. Meijers, *How Is International Law Made? - The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 Netherlands Yb. Int'l Law 5, 25 (1978).

among the states particularly involved in the relevant activity [120]. This requirement is arguably accomplished in the kidnapping cases. Even though the precise contours of this new rule might still be questionable, the principle of lack of jurisdiction over persons abducted in violation of international law seems to have passed the threshold of a legally binding norm of customary international law. In 1934, the US Supreme Court had to determine the boundaries in Delaware Bay and river [121].

After an examination of historical titles, state practice, and the writings of international scholars the Court fount that international law divides river boundaries between states by the middle of the main channel, and not by geographical center, halfway between the banks. However, Justice Cardozo who delivered the opinion of the Court, admitted:

> «International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality» [122].

[120] North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. Netherlands), 1969 I.C.J. 3, 43 (February 20); Restatement (Third) of Foreign Relations Law, § 102 cmt. b.
[121] New Jersey, v. Delaware, 291 U.S. 361 (1934).
[122] *Id*. at 383.

As pressure increases on the United Nations to call to account major suspects of serious war crimes in the former Yugoslavia, the imprimatur for our new rule could possibly come from the Yugoslav War Crimes Tribunal [123].

[123] The Statute of the Tribunal contains no explicit provisions for obtaining custody of the accused, 32 I.L.M. 1192 (1993). Article 20 of the Statute provides in pertinent part:
«1. The Trial Chambers shall ensure that a trial is fair and expeditous and that proceedings are conducted in accordance with the rules of procedure and evidence, with fullrespect for the rights of the accused and due regard for the protection of victims and witnesses.
»2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
»3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shell then set the date for trial». The Secretary-General's report indicates that «it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused»,
Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. SCOR, 48th. Sess., at 9, U.N. Doc. S/25704 (1993), U.N. SCOR, 48th. Sess., revised by U.N. Doc. S/25704/Corr. 1 (1993), para. 106. The report possibly addresses concerns such as the possibility that United Nations personnel may abduct accused individuals and deliver them to the Tribunal; cf. Karl Arthur Hochkammer, Note, *The Yugoslav War Crimes Tribunal: The compatibility of Peace, Politics, and International Law*. 28 Vand. J. Transnat'l L.119, 153 (1995).