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Jurisdiction over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain

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I. Introduction

On June 15, 1992, the United States Supreme Court rendered a landmark decision that affected not only American jurisprudence, but international law as well. Besides resolving an immediate dispute about a defendant abducted
from abroad, *United States v Alvarez-Machain*¹ also initiated a worldwide change in international law. Although the decision was narrowly written, it has become the template courts use to analyze a range of similar events, which continue to surface.²

The international effects of *Alvarez-Machain* are important not only for understanding the issues and for predicting outcomes for subsequent cases, but also for studying the evolution of international law. *Alvarez-Machain* served as the impetus for the United States’ decision to sign an agreement with Mexico, the Treaty to Prohibit Transborder Abductions of November 23, 1994, that expressly provides for the prompt return of an abductee and strips domestic courts of jurisdiction to try such an abductee.³ In so doing, the agreement effectively overrules the outcome of the Supreme Court’s decision in *Alvarez-Machain*. Even more interesting is the influence of *Alvarez-Machain* on the evolution of a contrary rule of customary international law. This evolution was largely provoked by strong opposition from foreign states and international bodies to the U.S. Supreme Court’s reasoning. The rule of customary international law has been established even faster than the U.S.-Mexican treaty amendment, which has not yet entered into force.⁴ The boundaries of such a new rule of customary international law (the existence of which is established in this Article) will surely be tested as cases of international abductions continue to arise; the Yugoslav War Crimes Tribunal may well provide the forum for such a test.

In *Alvarez-Machain*, the Supreme Court held that federal courts have jurisdiction over a defendant abducted from abroad under the auspices of governmental authority, despite the existence of an extradition treaty with the state from which he was abducted.⁵ Dr. Humberto Alvarez-Machain, a Mexican physician, allegedly administered stimulants to an American drug enforcement agent to keep him awake while he was tortured by drug dealers who had captured and eventually murdered him.⁶ When informal negotiations

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3. Treaty to Prohibit Transborder Abductions, signed Nov 23, 1994, United States-Mexico, in Michael Abbell and Bruno A. Ristau, *5 International Judicial Assistance (Criminal) Extradition* A-676.3 (Supp 1995). For the necessity of such a provision, see *Easing Border Tensions*, Sacramento Bee A6 (Nov 30, 1994) (“In most bilateral relationships such a provision would hardly be necessary.”).
4. According to its Article 9, the treaty is subject to ratification. Treaty to Prohibit Transborder Abductions, Art 9 (cited in note 3). However, it has not yet been submitted to the U.S. Senate for ratification.
5. 504 US at 670.
for the extradition of Alvarez-Machain failed, the Drug Enforcement Administra-
tion (DEA) offered a reward for turning him over to officials in the United
States; eventually, the DEA had him kidnapped.7

Despite Alvarez-Machain’s ultimate acquittal for lack of evidence,8 the
Supreme Court’s decision caused an international outcry which has not yet
died away. Media commentary, even in the United States, condemned the
decision as condoning a lawless policy.9 Egyptian,10 Moroccan,11 and even
Chinese media,12 eager to discuss a human rights issue other than the
Tienanmen massacre, joined the chorus of critics. The decision also drew the
attention of the international legal community. It was heavily criticized all over
the world.13 This reaction has “signal[ed] a decline in tolerance for covert

Alvarez-Machain, 10 F 3d 696, 698 (9th Cir 1996).
7. United States v Caro-Quintero, 745 F Supp 599, 602-03 (C D Cal 1990), affd as
8. Partial Transcript, United States v Caro Quintero, et al, No CR-87-422-(G)-ER
(CD Cal Dec 14, 1992) reproduced in Secretaria De Relaciones Exteriores, 2 Limits to
National Jurisdiction 184 (Mexico 1993).
9. Jonathan A. Bush, How Did We Get Here? Foreign Abduction After Alvarez-
11. Thomas Michael McDonnell, Defensively Invoking Treaties in American Courts: Ju-
risdictional Challenges Under the U.N. Drug Trafficking Convention By Foreign Defen-
12. China Comments on US Affairs; Beijing Radio Condemns U.S. Court Ruling on
Foreign Suspects, BBC Summary of World Broadcasts (June 24, 1992).
States v. Alvarez-Machain, 19 S African Yrbk of Intl L 219 (1994); Faizan Mustafa,
India); S. Farinelli, Panorama: Trattati di estradizione 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 Anscbluss an die
Gereifung eigener Staatsangehöriger im Ausland. Male captus bene indicatus or ex iniuria
ius non oritur?, 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 States Supreme Court
(Germany); Brigitte Stern, L’extraterritorialité revisitée: Où il est question des affaires
Alvarez-Machain, Pâtre de bois et de quelques autres, 38 Annuaire Français de Droit In-
ternational 239 (1992) (France); Rosemary Rayfuse, International Abduction and the
United States Supreme Court: The Law of the Jungle Reigns, 42Intl & Comp L Q 882
(1993) (United Kingdom); George Sullivan, et al, US Supreme Court: An Inconsistent
International Policy, 23 Anglo-Am L Rev 311 (1994) (United Kingdom); Carlos D.
Espósito, Male captus, bene detentus: A prôposito de la sentencia del tribunal supremo de
Estados Unidos en el caso Alvarez-Machain, 2 Estudios de Jurisprudencia 7 (Mar-Apr
1993) (Spain); Francisco Villagran Kramer, El caso Alvarez Machain a la luz de la
jurisprudencia y la doctrina internacional, 45 Revista Española de Derecho Internacional
coercive activities across sovereign borders generally and not just a particular low point in U.S.-Mexico bilateral relations."\(^{14}\)

The interest generated by the *Alvarez-Machain* decision was remarkable given the narrow scope of the Supreme Court's holding. The Court did not find that there exists a "right to kidnap," as some newspapers\(^ {15} \) and even commentators\(^ {16} \) erroneously reported. The majority simply held that *Alvarez-Machain*'s abduction did not violate the Extradition Treaty between Mexico and the United States.\(^ {17} \) This holding was crucial to the Court's exercise of jurisdiction in the case. The question of jurisdiction hinges upon the 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.\(^ {18} \) However, two exceptions to the *Ker-Frisbie* Doctrine have developed. The first exception requires a court to divest itself of jurisdiction over the defendant where the defendant establishes governmental conduct "of a most shocking and outrageous character."\(^ {19} \)

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15. *High Court Backs Seizing Foreigner for Trial in U.S.*, *NY Times* Al (June 16, 1992). Compare *U.S. Promises Not to Abduct Mexicans*, Wash Post A34 (July 2, 1992) ("The court said Alvarez Machain's kidnapping was legal because it was not expressly prohibited by the bilateral extradition treaty.").


18. In *Ker v Illinois*, 119 US 436 (1886), the U.S. Supreme Court addressed for the first time the issue of a defendant brought before a 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 on 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 Intl L 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 US 519 (1952) is a domestic kidnapping case. Therefore, it is inappropriate to cite this case as precedent for international kidnapping cases.

19. *Lujan v Gengler*, 510 F2d 62, 65-66 (2d Cir 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
The Ninth Circuit further explained that before jurisdiction will be divested, 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." Alvarez-Machain's allegations of mistreatment, however, even if taken as true, did not constitute acts of such barbarism as to be covered by this exception.

The other exception which might have threatened the Court's exercise of jurisdiction is known as the Rauscher exception. In light of the Supreme Court's decision in United States v Rauscher and Cook v United States, lower courts and commentators have assumed that American courts cannot exercise jurisdiction over a defendant abducted by the government in violation of a treaty obligation. Thus, by finding that there was no violation of the Mexican-American extradition treaty in Alvarez-Machain, the Supreme Court level of "shocking the conscience."

20. United States v Lovato, 520 F2d 1270, 1271 (9th Cir 1975) (per curiam); see also United States v Valot, 625 F2d 308, 310 (9th Cir 1980) (quoting Lujan, 510 F2d at 65-66) (cited in note 19) (stating that dismissal of an indictment is warranted only where a defendant demonstrates governmental misconduct "of the most shocking and outrageous kind").


22. United States v Rauscher, 119 US 407, 430 (1886). Rauscher, decided the same day as Ker, held that the doctrine of specialty, read into the treaty in question, barred Rauscher's arrest or trial for other offenses "until a reasonable time and opportunity have been given him . . . to return to the country from whose asylum he had been forcibly taken." A protest registered by the relevant country in this case, Great Britain, was not mentioned in the decision.

23. Cook v United States, 288 US 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.

was able to ignore the *Rauscher* exception and exercise jurisdiction over the defendant. Both the *Ker-Frisbie* Doctrine and its exceptions are creations of national law that are not necessarily based upon international law.

The more interesting question, whether customary international law prohibited the exercise of jurisdiction over Alvarez-Machain, was not before the Court.\(^{25}\) Even under U.S. 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 United States.\(^{26}\) 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.\(^{27}\) In an oft-quoted passage from *The Paquete Habana*, a relevant case, Justice Gray enunciated these principles:

> 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.\(^{28}\)

On remand, Alvarez-Machain did, in fact, raise an independent defense based on customary international law. The Ninth Circuit, however, explained that “[t]o 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.”\(^{29}\) This decision was disappointing when compared with the thoroughly drafted opinion on appeal.\(^{30}\) The Ninth Circuit failed to explain why it did

\(^{25}\) During the oral argument, Justice O’Connor asked Alvarez-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 the courts below. Those have not been ruled upon either by the district court or the Ninth Circuit and presumably those would be litigated if this Court finds that there is no provision in the treaty.” *United States v Alvarez-Machain*, No 91-712, 1992 WL 687303 at *34-35 (April 1, 1992).

\(^{26}\) See *The Nereide*, 13 US 388, 423 (1815) (noting 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.”); see also *The Paquete Habana*, 175 US 677, 700 (1900).


\(^{28}\) 175 US at 700.

\(^{29}\) *United States v Alvarez-Machain*, 971 F2d 310, 311 (9th Cir 1992).

\(^{30}\) The Court of Appeals had affirmed the dismissal of the indictment and the repatriation of Alvarez-Machain in *United States v Alvarez-Machain*, 946 F2d 1466 (9th Cir 1991), relying on its prior decision in *United States v Verdugo-Urquidez*, 939 F2d 1341 (9th Cir 1991).
not even discuss the question of whether other exceptions to the Ker-Frisbie Doctrine had to be applied under customary international law, and thus, following Paquete Habana, under U.S. law as well.

It is possible that the Ninth Circuit saw a different ruling precluded by a dictum of the Supreme Court opinion in United States v Alvarez-Machain. After conceding that the abduction “may be in violation of international law principles,” the majority stated that, nonetheless, “the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.” However, this dictum suggesting that the executive branch is solely responsible for remedying violations of customary international law runs contrary to the language in Paquete Habana, and does not exonerate future courts from making an examination of relevant customary international law. Such an examination will become even more important in the future given that Alvarez-Machain has had repercussions in the international community that have changed the relevant rules of customary international law.

The following analysis of state practice in matters of international state-sponsored kidnapping updates former studies. The first section provides an outline of sources and evidence of customary international law, and examines the scant practice of international organizations. The second part concentrates on recent decisions by foreign courts. The third section analyzes reactions by individual governments in the aftermath of Alvarez-Machain which might constitute opinio juris. This general evaluation of state practice attempts to show that customary international law precludes a state from exercising jurisdiction over persons whom its agents have abducted in violation of international law. Furthermore, such a rule does not depend upon the existence of an extradition treaty between the abducting state and the state whose territorial sovereignty is violated.

For purposes of this Article, an abduction in violation of international law will be defined as a seizure of a person by force against the will of the territorial sovereign without justification under international law. The seizure
has to be performed by persons whose actions can be attributed to a state. Thus, seizures by private parties without participation of the state are not a subject of this article.

II. 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, therefore, results from a general and consistent practice which states follow out of a sense of legal obligation. Evidence that such a custom 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 perform acts or make declarations which either express or imply some view on a matter of international law. Any such act or declaration may constitute evidence that a custom, and hence, a rule of international law, does or does not exist, but of course, the evidentiary weight accorded to the act or declaration will be determined only after considering the relevant occasion and circumstances. Customary rules crystallize from usages or practices which have evolved under the following three sets of circumstances.

1. **Diplomatic relations between states**—Acts or declarations by representatives of states, press releases, or official statements by governments may all constitute evidence of practices followed by states.

2. **Practice of international organizations**—The practice of international organizations, whether by conduct or declaration, may lead to the

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34. *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)*, 1969 Intl Ct Justice 3, 43 (Feb 20); Restatement of Foreign Relations § 102(2) (1986).
development of customary rules of international law concerning their status, or their powers and responsibilities.\textsuperscript{37}

3. \textit{State laws, state courts decisions, and state administrative practices}—A concurrence, although not necessarily 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.\textsuperscript{38}

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

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.

This Section examines all of these sources of customary international law in an attempt to identify the prevailing concurrence of nations on the issue of law raised by \textit{Alvarez-Machain}.

A. \textbf{OPINIONS OF INTERNATIONAL BODIES}

There are no cases from international judicial or arbitral tribunals which directly focus on the question of jurisdiction over kidnapped persons. Both \textit{Colunje v United States}\textsuperscript{39} and \textit{The Savarkar Case}\textsuperscript{40} concentrated on the question of restitution to a person whose custody was obtained by irregular means, but not by forcible abduction. Although the \textit{Stocké} case involved allegations of a forcible abduction, the European Court of Human Rights avoided a decision on the merits by holding that a kidnapping had not been proven.\textsuperscript{41}


\textsuperscript{38} \textit{The Scotia}, 81 US 170, 188 (1871).

\textsuperscript{39} \textit{Guillermo Colunje (Panama) v United States}, 6 RIAA 342 (United States-Panama General Claims Commission 1933). For a comment on the case, see Bert L. Hunt, \textit{The United States-Panama General Claims Commission}, 28 Am J Intl L 61, 73 (1934).

\textsuperscript{40} \textit{The Savarkar Case (Great Britain v France)}, 11 RIAA 243 (Arbitral Appointed to Decide the Case of Savarkar 1911); see also Karl Doehring, \textit{Savarkar Case}, in Rudolph Bernhardt, ed, \textit{Encyclopedia of Public International Law} 252-54 (North Holland 1981).

1. Inter-American Juridical Committee

The Alvarez-Machain decision, however, was the subject of a juridical opinion of the Inter-American Juridical Committee. At the request of the presidents of the Cono Sur countries (Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay), the Permanent Council of the Organization of American States ("OAS") requested the opinion in a resolution of July 15, 1992. In a common statement made June 26, 1992, the Presidents expressed their concern about the consequences of the Alvarez-Machain decision and decided to petition the Permanent Council of the OAS to request the Inter-American Juridical Committee to issue an opinion about the legality of this ruling.

The Committee's opinion, issued on August 15, 1992, was approved by nine votes in favor and one abstention, Seymour J. Rubin of the United States. The Committee found that the reasoning of the U.S. Supreme Court decision was contrary to the norms of international law because, among other things,

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

One might dispute, as the Committee's one abstaining member did, whether the Inter-American Juridical Committee really has the authority under Articles 104 and 105 of the OAS Charter to issue an opinion directly addressing the validity of a Member State's high court. Regardless of the Committee's power to issue such an opinion, it is clear that the opinion has no binding effect. The opinion merely asserts its conclusions without referring to any specific sources which might support or justify them. Nevertheless, the opinion should be accorded some evidentiary weight in determining what is to be considered customary international law because the members of the Inter-American Juridical Committee are international law experts of various Member States.

44. Secretaria de Relaciones Exteriores, 2 Limits to National Jurisdiction: Documents and Judicial Resolutions on the Alvarez Machain Case 7 (1993) ("Limits II").
45. Kidnapping Suspects Abroad at 269 (cited in note 42).
46. See Explanation of Vote by Dr. Seymour J. Rubin, Kidnapping Suspects Abroad at 284-85 (cited in note 42).
2. Conference of Heads of Government of the Caribbean Community

The Conference of Heads of Government of the Caribbean Community ("CARICOM"), the Community's supreme authority, issued the following statement on July 2, 1992 in Port-of-Spain, Trinidad and Tobago:

The Heads of Government of the Caribbean Community take note of the recent decision of the US Supreme Court in the Alvarez-Machain Case and the circumstances leading up to that decision. The Heads of Government emphatically reject the notion that any State may seek to enforce its domestic law by means of abduction of persons from the territory of another sovereign state with the intention to bring them within its jurisdiction in order to stand trial on criminal charges.

Such actions constitute a violation of the most fundamental principles of international law and must be unequivocally condemned by the international community.

Even though the Conference of Heads of Government of CARICOM is a political and not a judicial body, the statement issued nevertheless reflects the opinio juris of the organization and the participating governments.

The opinions of these international bodies reflect at least some evidence that it is contrary to a rule of customary international law for a court to exercise jurisdiction over a person kidnapped from a foreign state.

B. JUDGMENTS AND OPINIONS OF NATIONAL JUDICIAL TRIBUNALS

Further evidence of customary international law regarding jurisdiction over persons kidnapped from abroad can be found by looking to judgments and opinions of national judicial tribunals. It must be kept in mind, however, that in determining the existence of and applying a rule of customary international law, not only is the court's nonexercise of jurisdiction over abductees important, but as important is the court's nonexercise of jurisdiction over the defendant out of a sense of legal obligation.

1. England

England, like the United States, has traditionally been perceived as following the rule of *male captus, bene detentus* (wrongfully caught, legally detained), based on precedent of the early 19th century. In *Ex parte Susannah Scott*, Chief Justice Lord Tenderden held:

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47. CARICOM was founded in 1973 by agreement of Commonwealth Caribbean Heads of Government, on the signing of the Treaty of Chaguaramas. It succeeded the Caribbean Free Trade Association ("Carifta"), established in 1968. Member countries of CARICOM are Antigua and Barbados, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. The British Virgin Islands and the Turks and Caicos Islands are associate members.

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.

The U.S. Supreme Court in *Ker v Illinois* considered *Scott* to be one of the "authorities of highest respectability." As in *Alvarez-Machain*, the court in *Scott* failed to consider customary international law in reaching its decision. Some critics are convinced that the *Scott* court's decision would have been different had it examined customary international law.

It is not obvious that *Scott* stands for the proposition that a court can exercise jurisdiction over a defendant abducted from a foreign state without the consent of that state. The circumstances were somewhat dubious: although Susannah Scott was arrested by English police in Brussels, it is not clear whether or not consent was ever given by the territorial sovereign, the Netherlands in those times. No Dutch protest to the arrest was reported in the case. If Dutch authorities had indeed consented to the arrest on Dutch soil by English police, then no violation of Dutch sovereignty would have occurred. An absence of protest could be interpreted as an indication of consent. If the English court indeed interpreted Dutch silence as consent to the arrest, *Scott* cannot be considered precedent for permissible jurisdiction over persons abducted in violation of international law.

There is some evidence that the court found the absence of protest by the territorial sovereign to be significant. The *Scott* opinion even contained a warning to English law enforcement agents who might be tempted to act without the sovereign's consent:

> [T]here is little danger that a foreign country would allow such an arrest, and if the party making it is guilty of misconduct, the verdict of a jury will teach him [the English officer] not to repeat it.

The court seems incredulous that consent was not given in *Scott*. In any event, its warning must have fallen on fertile ground, because there were no subsequent cases in which English agents kidnapped a person from abroad without the consent of the territorial sovereign. In all of the following cases, consent was sought and given.

49. *Ex parte Susannah Scott*, 109 Eng Rep 166 (KB 1829).
50. 119 US at 444.
52. 109 Eng Rep at 167.
In *Ex parte Elliott*, with the help of Belgian police officers, a British deserter was arrested by British police in Belgium and brought to England. The extraterritorial arrest was presumed to be in accordance with international law because of the participation of the Belgian officers. Nonetheless, the court affirmed the *male captus, bene detentus* rule, first pronounced in *Scott*, by not inquiring into the circumstances of the arrest.

In *Ex parte Mackeson*, however, the noninquiry rule was seriously questioned. Mackeson, a British citizen wanted on fraud charges, was returned from Zimbabwe to England under a deportation order. Lord Chief Justice Lane stated:

> [T]he mere fact that his arrival might have been 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.\(^5^4\)

No violation of international law was pleaded in *Mackeson*. Nonetheless, the court felt it necessary to put a stop to what it perceived to be overzealousness on the part of English police dealing with suspects abroad. In this case, an attempt to achieve extradition "by the back door" was enough to throw the non-inquiry rule into question.\(^5^5\)

The old maxim of *male captus, bene detentus* was revived, however, in *Ex parte Driver*, another case in which the extradition procedure was circumvented by both states involved. The court in *Driver* did not feel bound by *Mackeson* and *Healy* because both cases were considered to have been decided *per incuriam* (through inadvertence).\(^5^7\) Therefore, inconsistent precedents existed under

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53. Regina v Officer Commanding Depot Battalion (Ex parte Elliott), 1 All ER 373 (KB 1949).


55. Judge Davies in *Mackeson* even remarked, "[I]n my view the principles to be applied to a case of this nature are now well established." Id at 34. Shortly after *Mackeson*, this approach was followed by Regina v Guildford Magistrates’ Court (Ex parte Healy), 1 WLR 108, 113 (1983) ("As I say, if this question is to be raised in future cases the proper procedure is to use that in *Reg. v. Bow Street Magistrates, Ex Parte Mackeson.*").

56. Regina v Plymouth Magistrates’ Court and others (Ex parte Driver), 2 All ER 681 (QB 1985).

57. Id at 698 ("[I]t appears to me that, in the absence of fuller reference to the authorities which have been drawn to the attention of this court, Mackeson’s case, so far as the existence of a discretion is concerned, can be said to be a decision *per incuriam* [citations omitted]. It must also follow that *Ex p. Healy* . . . which followed Mackeson’s case, was also decided *per incuriam* in so far as the court accepted the existence of a discretion in the court."). However, this reasoning was strongly rejected by legal scholars. See Andrew L.-T. Choo, *The Consequences of Illegal Extradition*, [1992] Crim L R 492 ("This conclusion was reached by a questionable application of the doctrine of stare decisis and without any consideration of issues of principle."); G. Ossman, *The Doctrine*
English law with respect to the question of jurisdiction over defendants illegally brought into the country. It remained unclear how English courts should resolve the conflict between Mackeson and Driver.58

The House of Lords finally resolved the conflict in Ex Parte Bennett.59 By a vote of four to one, the Law Lords found that English courts have the discretion to stay the trial of a criminal defendant where English police have disregarded the protections of formal extradition and have had a defendant seized abroad by illegal means.60 The defendant Bennett, located in South Africa, was wanted in England on 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 a shortcut by making an informal arrangement with their 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 South African Supreme Court—forcibly placed on a flight from Johannesburg to Heathrow.61 In making their decision, the Law Lords did not consider whether there was protest or acquiescence by Taiwanese and South African authorities. Nor did they rely on evidence of any physical brutality. Lord Bridge of Harwich, after discussing Justice Stevens’s dissent in Alvarez-Machain, condemingly 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.62

Lord Lowry, who obviously had the scenario from Alvarez-Machain in mind, gave a clear warning:


58. Regina v Bateman and Cooper, 1989 Crim L Rev 590 (CA Feb 3, 1989); Regina v Gilmore, 1992 Crim L Rev 67 (CA Aug 19, 1991) (“It was an open question whether the court had power to enquire into the circumstances in which a person was found in the jurisdiction for the purpose of refusing to try him.”). The Court of Appeals twice had the opportunity to resolve the conflict between Mackeson and Driver but refused to do so. Bateman, 1989 Crim L Rev at 591 (“It was not necessary to resolve the conflict in the instant case because there was no evidence that the deportation was a disguised extradition.”).

59. Regina v Horseferry Road Magistrates’ Court (Ex Parte Bennett), 3 All ER 138 (HL 1993).

60. Id at 139c.

61. Id at 141j.

62. Id at 155g.
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 offence 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 necessarily bar jurisdiction. Rather, the trial court has the discretion to decline jurisdiction in such a case, meaning that the House of Lords does not consider a decline of jurisdiction to be required in all cases. Nonetheless, under the Law Lords’ articulation of the doctrine, it is likely that a forcible abduction would lead, in almost every case, to a stay of the trial.

Thus, English courts inquire into the circumstances of an arrest abroad. They do so under requirements of national law which are interpreted, however, so as to give special emphasis to international law. Therefore, the English approach, at least in part, reflects a sense of legal obligation.

2. South Africa

The South African Supreme Court made an even more remarkable switch in its February 26, 1991 decision in *State v Ebrahim*. For decades, South African courts had followed the maxim of *male captus, bene detentus*. Ebrahim was abducted by South African police from Swaziland. Although there was an extradition treaty between South Africa and Swaziland, no formal request for extradition was lodged. Swaziland also failed to file a complaint against the

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63. Id at 163c.
64. Compare Andrew L.-T. Choo, *International Kidnapping, Disguised Extradition and Abuse of Process*, 57 Mod L Rev 626, 632 (1994) (“One wonders 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.”).
65. See Vaughan Lowe, *Circumventing Extradition Procedures is an Abuse of Process*, 1993 Cambridge L J 371, 373 (“[Bennett] demonstrates a determination to make the processes of English law conform to principles of international law.”).
66. 1991 (2) SALR 553 (alternate translation in 31 Intl Legal Mat 888 (1992)). Justice Stevens referred to this decision in his dissenting opinion in *United States v Alvarez-Machain*, 504 US at 687. Compare Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L J 39, 42 (1994) (“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.”).
67. *Regina v Robertson*, 1912 SALR 10 (Transvaal); *Abrahams v Minister of Justice*, 1963 (4) SALR 542 (Cape); *Ndhlou v Minister of Justice*, 68 ILR 7 (Natal 1976); *Nduli v Minister of Justice*, 69 ILR 145 (S Ct App Div 1977).
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." This view was apparently shared by the lower court which upheld the South African courts' jurisdiction.

The Supreme Court reversed, however, concluding that a South African court has no jurisdiction to try a person abducted from foreign territory by the state. This means that courts must decline jurisdiction in these cases. The court did not reach the question of international law because it based its opinion on principles of Roman-Dutch common law which include the fundamental legal principles of (1) the necessity to protect and promote human rights, (2) the importance of maintaining good international relations, and (3) a healthy administration of justice. The court insisted 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 foreign territory. Ebrahim received a windfall from the South African Supreme Court's change in doctrine: not only did the Court reverse jurisdiction, but in a follow-up civil proceeding, Ebrahim was awarded compensation for the kidnapping.

The approach adopted by the South African Supreme Court in Ebrahim was welcomed by South African scholars as a departure from the "bad old days." Courts extended the doctrine beyond the facts of Ebrahim in subsequent cases. In State v Wellem and State v Mabena, the new rule of Ebrahim was applied to cases in which, by mutual agreement of law enforcement personnel, the regular extradition procedures were circumvented. Ebrahim can be considered a settled precedent: South African courts do not uphold jurisdiction over persons kidnapped from abroad by the state anymore. However, this rule is based predominantly on municipal law, rather than a consideration of international law. Although the court did briefly consider the importance of 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

69. Ebrahim, 31 Intl Legal Mat at 891.
70. Ex parte Ebrahim: In re State v Maseko, 1988 (1) SALR 991 (Transvaal).
71. Ebrahim, 31 Intl Legal Mat at 899.
72. Id at 896.
73. Id.
74. Ebrahim v Minister of Law and Order, 1993 (2) SALR 559 (C). See also Pretorius, 18 S African Yrbk Intl L at 146 (cited in note 68).
76. 1993 (2) SACR 18 (A).
77. 1993 (2) SACR 295 (A).
with the proper application of international law as such. Nevertheless, Ebrahim represents an important precedent insofar as the court evaluates the international implications of its ruling. Ebrahim provides at least an indication of a customary rule of international law which prohibits jurisdiction over a person abducted from abroad in violation of international law.

3. Zimbabwe

Largely influenced by its counterpart in South Africa, in 1992 the Supreme Court of Zimbabwe overruled old precedents which had followed the male captus, bene detentus rule. In State v Beahan, Chief Justice Gubbay thoroughly considered Anglo-American precedents including United States v Alvarez-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. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual.

Because the case dealt with a consensual circumvention of the extradition procedure rather than a kidnapping, this language amounts to dicta. However, it nonetheless expresses the court's strong condemnation of the exercise of jurisdiction on facts like those in Alvarez-Machain. The opinion also contains an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. The court recognizes that abduction is an improper basis for exercising jurisdiction under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual. Even with the consent of the state from which the defendant was taken, in Beahan, the Supreme Court allowed the trial court discretion over whether to exercise jurisdiction. Thus, Beahan stands for a strong condemnation of the exercise of

78. Compare Booysen, 16 S African Yrbk Intl L at 137 (cited in note 75).
80. Id at 317.
jurisdiction over a person abducted from abroad in violation of international law. This view is at least partly based on a consideration of international law.

4. Australia

In Levinge v Director of Custodial Services, the defendant challenged the court's jurisdiction on the grounds that he was improperly extradited to Australia. The defendant alleged that he was extradited only after being wrongfully arrested in Mexico and forcibly delivered by Mexican police across the border into the United States at the instigation of the FBI and at the request or with the connivance of the Australian Federal Police. Once in the United States, the defendant was lawfully extradited to Australia.

In making its decision about jurisdiction, the court considered the Eichmann case from Israel and all relevant Anglo-American precedents starting with Ker v Illinois. It was not persuaded by the male captus, bene detentus line of cases, however, and instead followed the approach of the English court in 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. . . . Such 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.

No evidence could be established in Levinge that the Australian police were involved in the expulsion of the plaintiff from Mexico. No violation of international law was argued in the case. The court implies, nonetheless, that a forcible unilateral abduction would be a strong case for staying criminal proceedings in order to prevent abuse of process. Therefore, an Australian court most probably would not exercise jurisdiction over a person abducted from abroad in violation of international law. This result might not even require a reference to international law as it can be achieved by application of national law.

5. New Zealand

A similar discretionary approach to jurisdiction was followed by a New Zealand court in Hartley. The appellate court allowed the trial court to exercise its discretion in deciding whether to discharge a fugitive seized in Aus-

81. 9 NSWR 546 (Ct App 1987).
82. Id at 549.
83. See subsection II.B.7.
84. Ker v Illinois, 119 US 436 (1886); see also text accompanying note 18.
85. Driver, 2 All ER 698.
86. Levinge, 9 NSWR at 556G-557A.
tralia under an informal agreement between the Melbourne and Wellington police. The court found that the trial court had discretion over the discharge even though there may have been no violation of international law. The court commented:

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 must 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.

Although *Hartley* was a case of informal extradition, rather than forcible abduction, the court’s language in *Hartley* condemning ends that do not justify the means applies even more strongly to a case involving forcible abduction. New Zealand courts have not specifically addressed the question of jurisdiction over an abducted defendant, but *Hartley* stands as a strong precedent for denying jurisdiction.

This decision was the basis for the English decision in *Ex parte Mackeson*, which was the first serious challenge to the *male captus, bene detentus* rule under English law. Furthermore, taking into account the fact that New Zealand courts traditionally rely heavily on English precedents such as those found in *Mackeson* and *Bennett*, it is fair to conclude that New Zealand courts would not uphold jurisdiction in a case of forcible abduction. *Hartley* provided no opportunity for the court to consider international law. Based on *Hartley*, one can assume, however, that New Zealand is in favor of a rule of international law prohibiting the exercise of jurisdiction over abducted persons where international law does not provide for an exception.

6. Germany

The Federal Constitutional Court of Germany faced the question of jurisdiction over abducted persons in two 1986 decisions. The Court examined relevant international practice—mostly Anglo-American precedents, Swiss and French cases, and the *Eichmann* case from Israel—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 have to return an alleged offender only if the state of origin claims the right to have the individual back. Consequently, in a subsequent case, the Federal Supreme
Court found that further proceedings were barred when the Netherlands demanded the return of an individual who was lured from the Netherlands to Germany by German officials. Legal scholars have heavily criticized the Federal Constitutional Court for its narrow holding that the state of origin must make a claim, complaining that the Court lacked respect for international law. These critics may have been overly harsh, given that the Court based its holding on a sufficiently broad analysis of state practice and scholarly writing. The cases analyzed did not clearly indicate that a contrary rule existed in 1986. Therefore, the judgment of the Federal Constitutional Court cannot be considered to misstate customary international law as of that time. The more interesting question, however, is whether the Court, if confronted with a new case, would re-evaluate its 1986 decisions in light of a change in state practice. The developments in England and South Africa, and particularly the fierce reaction of states after Alvarez-Machain, should cause the Federal Constitutional Court to question seriously whether the holdings in its 1986 decisions are still valid.

The Federal Constitutional Court generally has been very careful in determining rules of customary international law. Whenever a question of customary international law is at issue, the Court carefully examines relevant state practice and scholarly writing. Given the doubts about the continued validity

96. See F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in F.A. Mann, ed, Further Studies in International Law 339, 344 (Oxford 1989) (“There is . . . no justification for the suggestion which has sometimes been intimated, particularly in Germany and the United States of America, that it is relevant to the question of the court's jurisdiction whether a demand for the return has been made [citations omitted].”); Bernd Schünemann, Materielle Tatverdachtsprüfung und völkerrechtswidrige Entführung als nationalstaatliche Sprengsätze im internationalen Auslieferungsverkehr, in Jürgen Wolter, ed, 140 Jahre Golddammer's Archiv für Strafrecht 215 (R.V. Deckers Verlag 1993).
97. See, for example, 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, 63-66 (1984) (storage of nuclear weapons for defensive purposes is not prohibited by customary international law); 75 BVerfGE 1, 18-33 (1988) (principle of non bis in idem is not yet a rule of customary international law). In a 1994 decision, a three-judges panel of the Federal Constitutional Court, however, simply mentioned in an obiter dictum that different opinions exist with respect to a legal bar to jurisdiction over an abductee having its basis in international law; 48 NJW 651 (1995). In a case where the outcome of this question is decisive, the full court would have to take a closer look.
98. In some cases, the Court has sought outside opinions on the state of customary international law. Recently, persons prosecuted by reunified Germany for espionage for the former German Democratic Republic challenged their convictions under the theory 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 in Heidelberg and ultimately dismissed this defense based on the opinion's conclusion. 92 BVerfGE 277 (1995). See also the legal opinion of the Max Planck Institute which has since been published. Jochen Abr. Frowein, et al, Völkerrechtliche Fragen der Strafbarkeit von Spionen aus der ehemaligen DDR 1
of its 1986 decision, and the Court's general approach to cases based on customary international law, the German Federal Constitutional Court is likely to re-examine the issue when confronted with another case of forcible abduction.

7. Israel

In the Eichmann case, Israel exercised jurisdiction against the Nazi war criminal, Adolf Eichmann, who was kidnapped from Argentina by Mossad agents. 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. However, the issue of jurisdiction had already been settled by diplomatic means when the criminal proceedings started in the Eichmann case. After Israel tendered an official apology for violating sovereign authority, Argentina waived further action on the abduction. Therefore, the case cannot appropriately be cited as precedent for the exercise of jurisdiction over an abducted defendant where the state from which the defendant was abducted objects. Furthermore, the case is not a good example of customary law on jurisdiction because of the extraordinary crimes of Adolf Eichmann. Even strong critics of jurisdiction over abducted persons will allow for an exception for defendants who have committed heinous crimes like the ones of Adolf Eichmann.

It is probably more accurate to look to less extreme cases when determining customary Israeli practice regarding jurisdiction over abducted persons. In 1972, Israel military forces captured a Turkish citizen, Faik Balut, during a raid into Lebanese territory. He was convicted by the Military Court of Lod on August 7, 1973. The court rejected the defense of forcible abduction citing Ker v Illinois (Springer-Verlag 1995).

99. 36 ILR 18 (Dist Ct Jerusalem 1961); 36 ILR 277 (Sup Ct 1962).
101. See Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, 84 Am J Intl L 444, 490 (1990) (asserting that there are "[c]ases that are bigger than law—Adolf Eichmann, for example"); Mann, Reflections at 478-79 (cited in note 96); Rosalyn Higgins, Problems and Process: International Law And How We Use It 472 (Oxford 1994); Jianmeng Shen, Note, Responsibilities and Jurisdiction Subsequent to Extraterritorial Apprehension, 23 Denv J Intl L & Policy 43, 52 (1994). See also ABA Report No 110 (Feb 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 in Limits II at 112 (cited in note 44). The U.N. Security Council, however, affirmed in the Eichmann case that nonconsensual 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 Council ordered Israel to make reparations to Argentina, SC Res 138, UN SCOR, 15th Sess, 868th mtg at 4, UN Doc S/4349 (1960) (noting that resolution in no way condoned "odious crimes" of which Eichmann was accused).
Another case involving the abduction of Israeli nuclear technician Mordechai Vanunu in September 1986 caused widespread anger among European countries. The nuclear technician had revealed details of the Israeli nuclear weapon arsenal to the British Sunday Times. Before the report was published, however, he was kidnapped from Italy by Israeli secret service agents. He was convicted of treason and espionage in a closed criminal proceeding; only the guilty verdict and sentence were made public. Vanunu's appeal was dismissed by the Israeli Supreme Court on May 27, 1990. The European Parliament protested vehemently against the judgment in a June 14, 1990 resolution.

Israel has used kidnapping, however, for purposes other than simply to subject alleged offenders to the jurisdiction of its courts. In July 1989, for example, military commandos kidnapped Sheik Abdul Karim Obeid from Lebanon. In May 1994, the Shiite leader Mustafa Dirani fell victim to a similar operation. The abductees served as pawns to obtain the release of Israeli soldiers. Other political opponents, such as the Hizbollah General Secretary Sheik Mussawi, were abducted and killed without any attempt to subject them to court proceedings. The unique circumstances of Israel's national security, however, raise doubts about whether any of these Israeli cases should be factored into a determination 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 practice with regard to jurisdiction over abducted persons represents an international consensus.


103. Vanunu was sentenced to eighteen years in prison. As of May 1996, Vanunu was still in prison despite appeals from the international community. John Kifner, Israel Finds Nuclear Technician Guilty of Treason and Espionage, NY Times A1 (Mar 25, 1988); Israeli given 18 Years in Atomic Secrets Case, NY Times A11 (Mar 25, 1988); William J. Broad, Scientist at Work: Joseph Rotblat Still Battling Nuclear Weapons 50 Years After Manhattan Project, NY Times C1 (May 21, 1996) (quoting Dr. Rotblat) ("He has suffered enough.").

104. 1990 OJ (C 175) 168.

105. Id.


8. France

In 1933, the French Tribunal Correctionnel d'Avesnes affirmed the rule that there must be an inquiry into the circumstances of the defendant's apprehension before jurisdiction can be exercised. It ordered the release of a fugitive who had been abducted from Belgium by French agents in violation of international law. This holding followed a line of older cases in which the defendants were ordered released based on the means used to apprehend them. Thus, customary French state practice would seem to be clear.

However, there is some question about whether these older cases were effectively overruled by the judgment of the Cour de Cassation in *In re Argoud*. In that case, Antoine Argoud, an ex-colonel in the French Army, was sentenced to death *in absentia* 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 acting on information from an anonymous telephone call. Germany made no official complaint about the abduction prior to Argoud's trial, and there was no evidence that the French government participated in the abduction. The Court held:

[[In 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.]

While it might be argued that *Argoud* stands for the proposition that a defendant cannot point to the circumstances of his apprehension to defend against the exercise of jurisdiction unless the State from which he was abducted makes an objection, it has not been interpreted that way. French legal authorities cite *Argoud* primarily as an example of a case in which jurisdiction was exercised over a defendant who was abducted by *private parties* and hold that the rule pronounced in *Jolis* regarding abductions by agents of the state is good law in France. This would mean that no jurisdiction may be exercised over a person abducted from abroad.

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110. Id.
111. *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); *Case Jabouille*, Revue de Droit International Privé et de Droit Pénal 1 (Cour d'Appel de Bourdeaux 1905) (fugitive released because the extradition procedure was not followed).
112. 45 ILR 90 (Cass Crim 1964).
113. Id at 95.
9. Switzerland

Switzerland also adheres to the rule of inquiry into the circumstances of apprehension. In a 1967 case, a Swiss businessman living abroad was lured by private persons to Switzerland where he was arrested. In determining whether to exercise jurisdiction over the defendant, the Zurich Higher Court followed the conclusion of a legal opinion of Professor Hans Schultz and declined jurisdiction over the defendant. The Court found that the defendant’s apprehension violated national due process and principles of extradition law under which apprehension of a person by means of force or ruse was prohibited. Because the prosecutor knew of the circumstances surrounding the defendant’s abduction and arrest, the court found that the knowledge alone sufficed to turn the private operation into state action which violated extradition law. The question of a violation of international law and its consequences had been raised by the defendant, but the Court did not have to address the issue because a first obstacle to jurisdiction was found in national due process, which the Court interpreted in light of international law.

The Swiss Federal Court of Lausanne extended this holding in a 1982 case by finding that it would be unlawful to extradite a person from Switzerland to a third state when such person was tricked into entering the Switzerland by the state requesting extradition. In that case, Germany had lured a Belgian citizen from Belgium to Switzerland and subsequently requested his extradition from Switzerland. The Swiss Court held that Germany had violated the territorial sovereignty of Belgium, and therefore, Switzerland would be an accessory after the fact if it approved Germany’s extradition request. Thus, extradition was denied. Professor Hans Schultz is of the opinion that this decision implicitly follows the principle of ex iniuria ius non oritur (no right stems from a wrong) and rejects the male captus, bene detentus principle. In summary, it may be said that Switzerland strongly rejects the exercise of jurisdiction over abductees.

10. Costa Rica

The national judicial tribunal of Costa Rica has rejected outright the exercise of jurisdiction over persons abducted by state agents. Strikingly, the Justices of the Supreme Court of Costa Rica unanimously censured the Alvarez-Machain decision of the U.S. Supreme Court, stating in the Court’s plenary session of June 25, 1992:

118. Belgium does not extradite its own nationals. Thus, an extradition request to Belgium would have been useless.
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 supremacy of law and mutual respect that must rule between the United States and all other States with whom—under the principle of good faith—it subjected its relation, in what concerns, to extradition treaties, which must be construed, not only according to its content, but to practice of law, teachings, and jurisprudence that inform it.  

The resolution expressly refers to international law as a legal bar to the exercise of jurisdiction. The statement has a self-binding effect on the Court. The Court would be at variance with itself if it were to decide in a subsequent case that customary international law does not constitute a legal bar to the exercise of jurisdiction over an abductee.

11. Evaluation of State Practice

a. Interpretation of Local Laws in Accordance with International Law

The foregoing survey shows that national tribunals are increasingly holding that when a State's authorities are a knowing or participating party to the seizure of a person in violation of international law, or to the illegal handing over of a person outside of applicable extradition laws, such knowledge or participation either vitiates jurisdiction or constitutes a discretionary ground for the court to refuse to exercise jurisdiction by reason of abuse of process. Many of these high court decisions are not explicitly based on international law grounds, however, so one might doubt whether they reflect opinio juris. Nonetheless, most of these states did consider questions of international law in the process of interpreting their local statutes. In the Swiss case of 1967, for example, the Court did not reach the question of whether a violation of international law had occurred because it found that the local statute incorporated the rule of international law, and the local statute had been violated. Thus, although the decision was not reached explicitly on the basis of a violation of international law, international law is implicit in the local law as it has been construed.

It might be argued that the distinction between cases which prohibit courts from exercising jurisdiction and cases which give courts the discretion to exercise jurisdiction or not indicate that there is no uniform customary rule. This distinction, however, seems to be based on the different legal techniques offered by the national judicial systems and their respective rules of criminal procedure to apply a rule of international law in the context of national criminal proceedings. The

121. Quoted in Limits II at 81-82 (cited in note 44).
122. Shearer, Starke's International Law at 92 n 11 (cited in note 36).
123. 66 Blätter für Zürcherische Rspr 250-253 (1967).
very existence of different legal systems makes it unlikely that municipal courts reach a common result by exactly the same method. For the purpose of establishing a customary rule of international law, it is more important that municipal courts reach the same result than that they use the same method.

The discretionary approach does not contradict a strict prohibition of jurisdiction because even the strict prohibition knows exceptions. For instance, an abduction and prosecution of Saddam Hussein in 1991 would arguably have been covered by resolution 678 of the Security Council. It is also widely believed that the seizure of war criminals in former Yugoslavia is justified by the mandate of the United Nations. In such cases, states with a discretionary approach, such as England and New Zealand, as well as states with a strict prohibition to the exercise of jurisdiction over abductees, such as South Africa and Zimbabwe, would most probably come to the same results despite the slightly different legal rule. English and New Zealand courts most likely would not exercise their discretion to stay such a trial, and South African and Zimbabwean courts would allow jurisdiction because international law itself provides the basis for an exception in these cases.

b. Concurrence of Judicial Decisions as Indication of International Law

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 the decision of the U.S. Supreme Court in the case of *The Scotia*. In 1863, the British Government adopted a series of regulations for preventing collisions at sea. In 1864, the U.S. Congress adopted practically the same regulations, as did the governments of nearly all the maritime countries soon thereafter.

Under these legal conditions, the Scotia (British) collided in mid-ocean with the Berkshire (American), 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 were determined by the general maritime law before the regulations of 1863. It was held that these rights and

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124. UN SCOR, 45th Sess, 2963rd mtg at 27, UN 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.").

125. Steven Erlanger, *NATO Action Reflects Shift in Tactics*, NY Times A5 (July 11, 1997) ("Our mandate is to arrest people who have been accused of war crimes and turn them over for trial,' Mr. Clinton said."); Richard Holbrooke, *Bold Stroke in Bosnia*, NY Times A27 (July 11, 1997) ("[T]he Dayton agreements, which were signed by the leaders of the parties to the war in Bosnia, including the Bosnian Serbs themselves, contain sufficient authority to detain and arrest indicted war criminals."); Coalition for International Justice, *Mr. President: Order the Arrest of War Criminals in Bosnia Now!*, NY Times A8 (July 15, 1997). But see *Russland verurteilt Sfor-Einsatz (Russia condemns SFOR operation)*, Frankfurter Allgemeine Zeitung 1 (July 12, 1997); Barbara Crossette, *U.N. Chief Seems Unlikely to Make Abrupt Changes*, NY Times A8 (Dec 19, 1996).

126. 81 US 170 (1871).
duties must be determined by the *new* customary rules of international law that had evolved through the widespread adoption of the British regulations, and therefore, 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.\(^{127}\)

With respect to the question of whether jurisdiction over an abductee from abroad may be exercised, the same rationale applies. Taking into consideration the fact that most of the court decisions analyzed in the previous section realized the implications of international law for questions of national law, it is fair to conclude that the concurrence of national judicial decisions indicates a common consent with respect to a customary rule of international law.

In some instances the lack of additional judgments by other national courts also indicate support for the modern rule of inquiry into the circumstances of a defendant’s apprehension. 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 is developed. Professor Espósito, for example, explains in his commentary on *Alvarez-Machain* that certain articles of the Spanish Constitution have been interpreted by Spanish courts in such a way that makes it highly unlikely that a court can exercise jurisdiction over an abductee.\(^{128}\) Therefore, it is clear that, in addition to the states whose courts have explicitly declined jurisdiction over abducted persons, other states also follow the new rule of customary international law.\(^{129}\)

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127. Id at 188.
129. See Malcolm N. Shaw, *International Law* 67 (Grotius 2d ed 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 also *Nottebohm Case (Liechtenstein v Guatemala) (second phase)*, 1955 Intl Ct Justice 4, 22 (1955) (“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.”). Compare *Case of the S.S. Lotus (France v Turkey)* in which 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 PCIJ (Ser A) No 10 at 28 (Sept
c. Indication of the Weakening of the Alvarez-Machain Rule

The old maxim of *male captus, bene detentus* seems still to be alive in Israel. It was further followed by the United States in *Alvarez-Machain*. But even in the United States there is evidence that the *opinio juris* might have changed. A federal court, presided over by Judge Rafeedie and a unanimous panel of the 9th Circuit, had already declined jurisdiction over Alvarez-Machain when a six-to-three majority of the Supreme Court turned back the wheel. Even though these decisions have no authoritative weight after the Supreme Court's decision, they might indicate that the federal judiciary has doubts when confronted about the legality of exercising jurisdiction over abductees. Other courts in the United States had previously given warnings to law enforcement personnel that they should no longer rely on the old rule.130

It is interesting to note that the U.S. Supreme Court did not exclude the idea of the dismissal of an abductee's indictment under the Court's supervisory power. In *McNabb v United States*, the Court held that a federal court must not allow itself to be made an "accomplice in willful disobedience of law."131 Guided by considerations of justice, federal courts may exercise their supervisory power to remedy a violation of recognized rights, to preserve judicial integrity, and finally, to deter illegal conduct.132 Several courts have already threatened to exercise the supervisory power to bar jurisdiction in an abduction case.133 It is therefore possible for American courts to deny jurisdiction over abductees without disregarding *United States v Alvarez-Machain*. The authority of *Alvarez-Machain* as a precedent for international law is weakened by the fierce dissent of Justice Stevens, who called the majority's opinion a "monstrous decision."134 The dissenting opinion, which was joined by Justices O'Connor and Blackmun, has been more persuasive for courts in other countries than the majority's holding. For instance, the House of Lords explicitly relied on the dissent when making its decision in *Bennett*.135

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1927).
130. See, for example, the explicit warning in *Day v State*, 763 SW2d 535, 536 (Tex App 1988). After the decision, several courts openly criticized the Supreme Court's holding. *United States v Matta-Ballesteros*, 71 F3d 754, 774 (9th Cir 1995) (Noonan concurring) (strongly condemning government officials' participation in international kidnapping); *United States v Matos*, 1996 WL 104264 *4 (D Puerto Rico 1996) (declining to extend); *Sneed v Tennessee*, 872 SW2d 930, 935 (Tenn Crim App 1993).
133. United States v Toscanino, 500 F2d 267, 276 (2d Cir 1974), reh'g en banc denied, 504 F2d 859 (1975); United States v Lira, 515 F2d 68, 73 (2d Cir 1975) (Oakes concurring), cert denied 423 US 847 (1975).
134. 504 US at 687 (Stevens dissenting).
135. Regina v Horseferry Road Magistrates' Court (Ex parte Bennett), 3 All ER at 148, 154. See also the preference which was given to Justice Stevens's opinion in *State v Wellem*, 2 S African Crim Rep 18, 28 (E Cape Div 1993).
Furthermore, the majority’s approach was almost unanimously condemned by scholars and commentators nationwide. On the one hand, this almost

136. An international resolution, for example, was adopted by the XVth International Congress of Penal Law in 1994 prohibiting jurisdiction by an abducting state. The Congress found international abduction to be "contrary to public international law" and urged that it be "a bar to prosecution." The resolution specifically demands that the victim of an abduction be brought into the position which existed prior to the abduction. Resolutions of the XVth International Congress of Penal Law, Section IV, The Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperative Procedures in Criminal Matters, 66 Int'l Rev Penal L 67, 70 ¶ 19 (1995).

The authors are aware that the strength of an argument cannot solely be measured by the number of supporters. The compilation of critics and defenders of the decision shows, however, that the Supreme Court did not even succeed in convincing the national legal community with its decision, let alone the international legal community.

unanimous criticism of scholars might cause the Supreme Court to reconsider its ruling in the future. On the other hand, this criticism on the national level makes it even more unlikely that Alvarez-Machain serves as a persuasive model on the international level.

United States v Alvarez-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 and to introduce legislation to address the issue. Shortly after the decision, the U.S. Department of Justice issued a memorandum which stated, "the Alvarez-Machain decision does not constitute a 'green light' for unrestricted efforts to secure custody over persons abroad without regard to international extradition treaties, or the laws of foreign states, [or] international law." The spirit of the Alvarez-Machain decision has not disappeared, however. A presidential directive, signed by President Clinton in 1995, stated, "[i]f we do not receive cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation." This new policy seems to be much more restrictive than the policies under earlier administrations. It appears that under certain circumstances, the new presi-


137. On July 7, 1992, the House of Representatives considered the International Kidnapping and Extradition Act, 138 Cong Rec H6019-01, 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 when an extradition treaty is in place. In the Senate, Senator Daniel Patrick Moynihan introduced a bill to amend the Foreign Assistance Act of 1961, S 72, 103d Cong, 1st Sess (1993). The amendment would have prohibited direct arrest and abduction of persons by U.S. agents abroad. Both pieces of legislation failed.


139. In February 1997, the Associated Press wrote, "The United States is willing to snatch suspected terrorists by force from foreign countries that refuse to cooperate in their extradition, according to a newly declassified presidential directive." John Diamond, Associated Press, U.S. Will Take Terrorists By Force, 1997 WL 4854819 at *1 (Feb 4, 1997).

140. Id.

141. Compare George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, 783 Current Policy 3 (1986); FBI Authority to Seize Suspects Abroad, Hearing before the
dential directive might call for state-sponsored kidnapping that would otherwise be a clear violation of international law. However, it is more likely that in cases where the new presidential directive comes into play kidnapping might be justified under international law.

The Supreme Court may also be shifting to a more worldly view of national issues. In the past, according to constitutional law scholar Mark Tushnet, "[t]he Supreme Court has almost never treated constitutional experience elsewhere as relevant." However, Justice Stephen Breyer recently discussed the federal systems of other countries in a dissent over a recent case about local authority over gun control. He wrote, "Of course, we are interpreting our own Constitution, not those of other nations." Nonetheless, his opinion suggested the possibility of a global approach to U.S. jurisprudence in the future: "experience [of other countries] may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem." Using a more global approach in *Alvarez-Machain* might have resulted in more weight given to customary international law and a different outcome altogether.

Since the Court's decision in *Alvarez-Machain*, transborder abduction issues involving the United States have arisen and continue to arise. There is some evidence that the U.S. Supreme Court is willing to revisit important constitutional decisions, which are based on plainly inadequate rationales, but which have become controlling precedent for the sole reason that they once attracted a narrow majority. This raises hopes that the Court will have a second look at *Alvarez-Machain* in the near future.

C. ACTS OR DECLARATIONS OF REPRESENTATIVES OF STATES

1. Reactions of Foreign States Following *Alvarez-Machain*

Forcible abductions are still sufficiently rare that foreign states do not generally have the opportunity to declare their legal standpoint on such an issue. *Alvarez-Machain*, however, provoked many reactions by foreign governments which can be considered "pronouncements by states that undertake to state a rule of international law." 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 U.S. State Department that they believe that such actions would violate the bilateral extradition treaties.\textsuperscript{147} The reaction was strongest throughout Latin America and the Caribbean. Some of the reactions of foreign states to the Supreme Court's 1992 decision include the following:

- On June 15, 1992, 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 United States and Mexico, the Government felt that "its substance threatens the legal stability of [all] public treaties."\textsuperscript{148}

- On June 16, 1992, Argentina's Justice Minister called the decision "an historic regression in criminal law" while its President on June 18 declared it to be a "horror."\textsuperscript{149}

- Chile's Foreign Minister made a statement on June 16, 1992, in which he declared that the Chilean government "simply does not accept [the U.S. Supreme Court decision]."\textsuperscript{150}

- In Peru, on June 16, 1992, Lima's Superior Justice Court President, Lino Roncallo, called the move an "attack on the sovereignty of foreign countries."\textsuperscript{151}

- On June 16, 1992, the head of Venezuela's Foreign Relations Legislative Commission said that the Commission had requested that President Carlos Andres Perez revise its extradition treaty with the United States as a result of the decision. The president of the Venezuelan Judges Association called the Alvarez-Machain decision "a violation of human rights."\textsuperscript{152}

- Costa Rica's Justice Minister, Elizabeth Odio, declared that the decision was "inconceivable."\textsuperscript{153}

- On June 17, 1992, the Bolivian Justice Minister stated, "the U.S., with the title of owner of the world, is declaring that there are no borders, sovereign states or legal organizations in the world."\textsuperscript{154} The country's Vice President called the decision a clear violation of international law and an "illogical and unilateral measure."\textsuperscript{155}

- On June 18, 1992, Brazil's Foreign Minister condemned the decision as contrary to the OAS Charter.\textsuperscript{156} Justice Minister Celio Borja said that the

\begin{footnotes}
\footnotetext{147}{Kidnapping Suspects Abroad at 110-11 (prepared statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State) (cited in note 42).}
\footnotetext{148}{Id at 112.}
\footnotetext{149}{Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S., Notisur-South American & Caribbean Political Affairs, 1992 WL 2410586 at *1 (June 30, 1992).}
\footnotetext{150}{Id.}
\footnotetext{151}{Id.}
\footnotetext{152}{Id.}
\footnotetext{153}{Associated Press, Kidnap Ruling Met By Outrage Abroad, New Orleans Times-Picayune A14 (June 17, 1992).}
\footnotetext{154}{Reaction to U.S. Supreme Court Decision at *2 (cited in note 149).}
\footnotetext{155}{Ruiz-Bravo, 20 Hastings Const L Q at 836 (cited in note 10).}
\footnotetext{156}{Id.}
\end{footnotes}
decision violated the “fundamental principle of international society and of limiting the jurisdiction of nation-states to respective territories.”¹⁵⁷

- On June 30, 1992, the lower house of the parliament of Uruguay adopted a resolution which 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.”¹⁵⁸

- 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 United States to come “back to its senses.”¹⁵⁹

- 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.¹⁶⁰

- Spain’s President publicly criticized the decision as “erroneous.”¹⁶¹

- The Minister of Justice of Switzerland, Jürg Kistler, expressed his disapproval of the Alvarez-Machain decision with the following statement: “Imagine where it would lead if every country would do that. You would have anarchy.”¹⁶² The statement is all the more astonishing because Switzerland gives high value to its neutrality, and therefore, does not comment lightly on court decisions of foreign countries.

- It almost goes without saying that the negative reaction to the Alvarez-Machain decision was strongest in Mexico.¹⁶³ Mexico had filed a formal protest with the U.S. government and expressly sought the return of Dr. Alvarez-Machain.¹⁶⁴ In a press conference after the pronouncement of the decision, the Mexican Foreign Minister repudiated the decision as invalid and illegal.¹⁶⁵ Both the Mexican Chamber of Representatives and the Mexican Senate rejected the Alvarez-Machain ruling in statements made on June 16, 1992.¹⁶⁶ Mexico and Canada had both submitted amicus curiae briefs in support of Alvarez-Machain to the U.S. courts strongly objecting to the exercise of jurisdiction.¹⁶⁷

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¹⁵⁷. Reaction to U.S. Supreme Court Decision at *2 (cited in note 149).
¹⁵⁹. Id at 112-13.
¹⁶⁰. Id at 114.
¹⁶¹. Id.
¹⁶⁴. See Secretaria de Relaciones Exteriores, 1 Limits to National Jurisdiction 5-6 (1992) (“Limits I”).
¹⁶⁶. Limits I at 143, 147 (cited in note 164).
¹⁶⁷. Canada’s brief is reprinted in 31 Intl Legal Mat 919 (1992), and Mexico’s in 31 Intl Legal Mat 934 (1992).
The Permanent Council of the OAS expressed concern about the decision and requested a legal opinion on the issue from the Inter-American Juridical Committee.\textsuperscript{168}

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.\textsuperscript{169} Introducing the item on behalf of the twenty-one member states of the Ibero-American Conference, Spain suggested that the following questions should be addressed:

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?\textsuperscript{170}

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.

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 did not hold a debate on this item and decided to defer its consideration to a "future session."\textsuperscript{171}

2. Evaluation

The reactions of the various foreign states are of different character. Some of them aim at the question of jurisdiction over abductees; others are concerned about the equivocality of the Supreme Court's remark, "[r]espondent and his amici may be correct that respondent's abduction was ... in violation of general international law principles."\textsuperscript{172} There might be cases where transborder kidnappings are justified,\textsuperscript{173} but not even the U.S. government seriously contested that Alvarez-Machain's abduction was a violation of international law. The

\textsuperscript{168} See subsection II.A.I.
\textsuperscript{169} Kidnapping Suspects Abroad at 251-52 (cited in note 42).
\textsuperscript{172} Alvarez-Machain, 504 US at 669.
Court, therefore, would have been well advised to state clearly that it did not doubt the illegality of Alvarez-Machain's kidnapping.

A closer reading of the decision, however, would have revealed that the Court did not proclaim a "right to kidnap." 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 on the words of the treaty was certainly questionable, but not "monstrous." In fact, the question of whether abduction constitutes a violation of the extradition treaty was only in the domestic context of the Rauscher exception, and not of any significance. It is unlikely that foreign states would have been comparably 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. A spontaneous outcry about the decision might be understood as traditional resistance against a perceived U.S. predominance in the Americas. Most states, however, have been more interested in clarifying the legal issue than 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 have 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 Alvarez-Machain decision even limits their own leeway for future action. For instance, Mexico and Canada would be confronted with an estoppel argument if they kidnapped persons from the United States and claimed that they had jurisdiction over them. The real point of the dispute which has developed in the aftermath of Alvarez-Machain is, therefore, the question of jurisdiction and not so much the narrower question of a violation of the extradition treaty. The latter question solely seems to be the means to reject jurisdiction. Thus, the state

174. See Paul Hoffman, et al, Kidnapping Foreign Criminal Suspects, 15 Whittier L Rev 419, 421 (1994) ("The Alvarez-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 Plataeans, 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.").

175. Alvarez-Machain, 504 US at 687 (Stevens dissenting).

176. Id at 668 ("[I]t 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.").

177. Briarly, The Law of Nations at 61 (cited in note 35) ("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.").

reactions in the aftermath of Alvarez-Machain are clear evidence that 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.179

This statement is no longer true. Most national courts inquire into the circumstances of the apprehension of alleged offenders and decline jurisdiction in cases of forcible abduction from abroad. The strong reactions of states in the aftermath of Alvarez-Machain confirm this trend. States do not want other states to enjoy the fruits of illegal conduct. In order to become a rule of customary international law, the relevant practices, such as those reviewed in this article, may be of comparatively short duration, but they must be general and consistent.180 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.181 A practice can be general even if it is not universally followed. It should, however, reflect wide acceptance among the states particularly involved in the relevant activity.182 These requirements arguably have been met to create a customary rule of international law in the kidnapping cases. Even though the precise contours of this new rule might still be questionable, the principle that courts must look into the circumstances under which a defendant was apprehended before exercising jurisdiction over him seems to have passed the threshold of a legally binding norm of customary international law.

In 1934, the U.S. Supreme Court had to determine the boundary in the Delaware river and bay.183 Justice Cardozo who delivered the opinion of the Court, admitted:

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180. North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands), 1969 Intl Ct Justice 3, 43 (Feb 20) (“[T]he 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.”); See also Restatement of Foreign Relations § 102 cmt b (1987).


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.\textsuperscript{184}

After the U.S. Supreme Court's decision in \textit{Alvarez-Machain}, international organizations, foreign courts, and foreign governments responded by articulating rules of individual state practice that together have moved beyond an amorphous sense of "morality or justice," and closer to a well-established customary rule of international law which contradicts the exercise of jurisdiction in \textit{Alvarez-Machain}. It is likely that the question of jurisdiction over abductees will continue to arise and be further developed in international law. Eventually, an international tribunal is apt to articulate authoritatively the new rule of international law that has developed in the aftermath of \textit{Alvarez-Machain}. Indeed, as pressure increases on the United Nations to call to account major suspects of serious war crimes in the former Yugoslavia, we may find the Yugoslav War Crimes Tribunal called upon to establish our new rule.\textsuperscript{185}

\textsuperscript{184} Id at 383.

\textsuperscript{185} Even if the kidnapping of indicted war criminals were justified, the Court would probably have to spell out the general rule on the question of whether an abduction in violation of international law excludes a subsequent trial before defining exceptions to this rule.

The Statute of the Tribunal contains no explicit provisions for obtaining custody of the accused, 32 Intl Legal Mat 1145, 1192 (1993). Article 20 of the Statute provides in pertinent part:

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect 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 shall then set the date for trial.
