

SUPREME COURT OF THE UNITED STATES ¹

Syllabus

UNITED STATES V. ÁLVAREZ MACHAIN

**CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT**

No. 91-172 Argued April 1, 1992-Decided June 15, 1992

Responded, a citizen and resident of Mexico, was forcibly kidnapped from his home and flown by private plane to Texas, where he was arrested for his participation in the kidnapping and murder of a Drug Enforcement Administration (DEA) agent and the agent's pilot. After concluding that DEA agents were responsible for the abduction, the District Court dismissed the indictment on the ground that it violated the Extradition Treaty between the United States and Mexico (Extradition Treaty or Treaty) and ordered respondent's repatriation. The Court of Appeals affirmed. Based on one of its prior decisions, the court found that, since the United States had authorized the abduction and since the Mexican government had protested the Treaty violation, jurisdiction was improper.

Held: The fact of respondents forcible abduction does not prohibit his trial in a United States court for violations of this country's criminal laws. pp.3-15.

¹ Where it is feasible, a *syllabus* (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The *syllabus* constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See **United States v. Detroit Lumber Co.** 200 U.S. 321, 337.

a) A defendant may not be prosecuted in violation of the terms of an extradition treaty. *United States v. Rauscher*, 119 U.S. 407. However, when a treaty has not been invoked, a court may properly exercise jurisdiction even though the defendant's presence is procured by means of a forcible abduction. *Ker v. Illinois*, 119 U.S. 436. Thus, if the Extradition Treaty does not prohibit respondent's abduction, the rule of *Ker* applies and jurisdiction was proper. pp.3-7.

b) Neither the Treaty's language nor the history of negotiations and practice under it supports the propositions that it prohibits abductions outside of its terms. The Treaty says nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if an abduction occurs. In addition, although the Mexican government was made aware of the *Ker doctrine* as early as 1906, and language to curtail *Ker* was drafted as early as 1935; the Treaty's current version contains no such clause. pp.7-11.

c) General principles of international law provide no basis for interpreting the Treaty to include an implied term prohibiting international abductions. It would go beyond established precedent and practice to draw such an inference from the Treaty based on respondent's argument that abductions are so clearly prohibited in international law that there was no reason to include the prohibition in the Treaty itself. It was the practice of nations with regard to extradition treaties that formed the basis for this Court's decision in *Rauscher, supra*, to imply a term in extradition treaty between the United States and England. Respondent's argument however would require a much larger inferential leap with only the most general of international law principles to support it. While respondent may be correct that his abduction was «shocking» and in violation of general international law principles, the decision whether he should be returned to Mexico, as matter outside the Treaty, is a matter for the Executive Branch. pp.11-15.

946 F 2d 1466, reversed and remanded.

REHNQUIST, C. J. delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, SOUTER and THOMAS J.J. joined. STEVENS, J. filed a dissenting opinion in which BLACKMUN and O'CONNOR, J.J. joined.

SUPREME COURT OF THE UNITED STATES¹

No. 91-172

**UNITED STATES, PETITIONER v. HUMBERTO
ÁLVAREZ MACHAIN**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

June 15, 1992

THE CHIEF JUSTICE delivered the opinion of the Court.

The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States. Respondent, Humberto Álvarez Machain, is a citizen and resident of Mexico. He was indicted for participating in the kidnap and murder of the United States Drug Enforcement Administration (DEA) special agent Enrique Camarena Salazar and a Mexican pilot working with Camarena, Alfredo Zavala Avelar². The DEA believes that respondent,

¹ This opinion is subject to formal revision before publication in this preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 205-43, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

² Respondent is charged in a sixth superseding indictment with conspiracy to commit violent acts in furtherance of racketeering activity (in violation of 18 U.S.C. §§371, 1959); committing violent acts in furtherance of racketeering activity [in violation of 18 U.S.C. § 1959 (ax2)]; conspiracy to kidnap a federal agent (in violation of 18 U.S.C. §1201 (ax5), 1201 (c)); kidnap of a federal agent (in violation of 18 U.S.C. §1201 (ax5)); and felony murder of a federal agent (in violation of 18 U.S.C. §§ 1111 (a) 1114). App. 12-32.

a medical doctor, participated in the murder by prolonging agent Camarena's life so that others could further torture and interrogate him. On April 2, 1990, respondent was forcibly kidnapped from his medical office in Guadalajara, Mexico, to be flown by private plane to El Paso, Texas, where he was arrested by DEA officials. The District Court concluded that DEA agents were responsible for respondent's abduction, although they were not personally involved in it. *United States v. Caro Quintero*, 745 F. Supp. 559, 602-604, 609 (CD Cal 1990) ³.

Respondent moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the United States and Mexico. Extradition Treaty, May 4, 1978, (1979) United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No.9656 (Extradition Treaty or Treaty). The District Court rejected the outrageous governmental conduct claim, but held that it lacked jurisdiction to try respondent because his abduction violated the Extradition Treaty. The district court discharged respondent and ordered that he be repatriated to Mexico. *Caro-Quintero, supra*, at 614.

The Court of Appeals affirmed the dismissal of the indictment and the repatriation of respondent, relying on its decision in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (CAS 1991), cert. pending, No.91-670.946F.2d 1466 (1991). In *Verdugo*, the Court of Appeals held that the forcible abduction of a Mexican national with the authorization or participation of the United States violated the Extradition Treaty between the United States and Mexico ⁴.

³ Apparently, DEA officials had attempted to gain respondent's presence in the United States through informal negotiations with Mexican officials, but were unsuccessful. DEA officials then, through a contact in Mexico, offered to pay a reward and expenses in return for the delivery of respondent to the United States. *United States v. Caro Quintero*, 745 F. Supp. 599, 602-604 (CD Cal. 1990).

⁴ Rene Martin Verdugo-Urquidez was also indicted for the murder of agent Camarena. In an earlier decision, we held that the Fourth Amendment did not apply to a search by United States agents of Verdugo-Urquidez home in Mexico. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Although the Treaty does not expressly prohibit such abductions, the Court of Appeals held that the «purpose» of the Treaty was violated by a forcible abduction, 939 F.2d. at 1350, which, along with a formal protest by the offended nation, would give a defendant the right to invoke the Treaty violation to defeat jurisdiction of the district court to try him ⁵. The Court of Appeals further held that the proper remedy for such a violation would be dismissal of the indictment and repatriation of the defendant to Mexico.

In the instant case, the Court of Appeals affirmed the district court's finding that the United States had authorized the abduction of respondent, and that letters from the Mexican government to the United States government served as an official protest of the Treaty violation. Therefore, the Court of Appeals ordered that the indictment against respondent be dismissed and that respondent be repatriated to Mexico. 946 F 2d, at 1467. We guaranteed certiorari, 502 U.S.-1992, and now reverse.

Although we have never before addressed the precise issue raised in the present case, we have previously considered proceedings in claimed violation of an extradition treaty, and proceedings against a defendant brought before a court by means of a forcible abduction. We addressed the former issue in *United States v. Rauscher*, 119 U.S. 407 (1886) more precisely, the issue of whether the Webster-Ashburton Treaty of 1842, 8 Stat. 576, which governed extraditions between England and the United States, prohibited the prosecution of defendant Rauscher for a crime other than the crime for which he had been extradited. Whether this prohibition, known as the doctrine of specialty, was an intended part of the treaty had been disputed between the two nations for some time. *Rauscher*, 119 U.S., at 411. Justice Miller delivered the opinion of the Court, which carefully examined the terms and history of the treaty; the practice of nations in regards to extradition treaties; the case law from the states; and the writings of commentators, and reached the following conclusion:

⁵ The Court of Appeals remanded for an evidentiary hearing as to whether Verdugo's abduction had been authorized by authorities in the United States. *United States v. Verdugo Urquidez*, 939 F. 2d 1341, 1362 (CA9 1991).

«[A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings». *Id.*, at 430 [emphasis added].

In addition, Justice Miller's opinion noted that any doubt as to this interpretation was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party. *Id.*, at 423 ⁶. Unlike the case before us today, the defendant in *Rauscher* had been brought to the United States by way of an extradition treaty; there was no issue of a forcible abduction.

In *Ker v. Illinois*, 119 U.S. 436 (1886), also written by Justice Miller and decided the same day as *Rauscher*, we addressed the issue of a defendant brought before the court by way of a forcible abduction. Fredrick Ker has been tried and convicted in an Illinois court for larceny; his presence before the court was procured by means of forcible abduction from Peru. A messenger was sent to Lima with the proper warrant to demand Ker by virtue of the extradition treaty between Peru and the United States. The messenger, however, disdained reliance on the treaty processes, and instead forcibly kidnapped Ker and brought him to the United States ⁷. We distinguished Ker's case from *Rauscher*, on the basis that Ker was not brought into the United States by virtue of the extradition treaty between the United States and Peru, and rejected Ker's argument that he had a right under the extradition

⁶ Justice Gray, concurring, would have rested the decision on the basis of these acts of Congress alone. *Rauscher*, 119 U.S. at 433. Chief Justice Waite dissented, concluding that the treaty did not forbid trial on a charge other than that on which extradition was guaranteed, and that the acts of Congress did not change the «effect of the treaty». *Id.* at. 436.

⁷ Although the opinion does not explain why the messenger failed to present the warrant to the proper authorities, commentators have suggested that the seizure of *Ker* in the aftermath of a revolution in Peru provided the messenger no «proper authorities» to whom the warrant could be presented. See Kester, **Some Myths of United States Extradition Law**, 76 *Geo. L.J.* 1441, 1451 (1988).

treaty to be returned to this country only in accordance with its terms⁸. We rejected Ker's due process argument more broadly, holding in line with «the highest authorities» that «such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court». *Ker, supra*, at 444.

In *Frisbie v. Collins*, 342 U.S. 519, rehearing denied, 343 U.S. 937 (1952), we applied the rule in *Ker* to a case in which the defendant had been kidnapped in Chicago by Michigan officers and brought to trial in Michigan. We upheld the conviction over objections based on the due process clause and the Federal Kidnapping Act and stated:

«This Court has never departed from the rule announced in [*Ker*] that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction". No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will». *Frisbie, supra*, at 522 (citation and footnote omitted)⁹.

⁸ In the words of Justice Miller, the «treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States». *Ker v. Illinois*, 119 U.S. 430 at 443 (1886).

Two cases decided during the Prohibition Era in this country have dealt with seizures claimed to have been in violation of a treaty entered into between the United States and Great Britain to assist the United States in off-shore enforcement of its prohibition laws, and to allow British passenger ships to carry liquor while in the waters of the United States. 43 Stat. 1761 (1924). The history of the negotiations leading to the treaty is set forth in *Cook v. United States*, 288 U.S. 102, 11-118 (1933). In that case we held that the treaty provision for seizure of British vessels operating beyond the three-mile limit was intended to be exclusive, and that therefore liquor seized from a British vessel in violation of the treaty could not form the basis of a conviction.

In *Ford v. United States*, 273 U.S. 593 (1927), the argument as to personal jurisdiction was deemed to have been waived.

⁹ We have applied *Ker* to numerous cases where the presence of the defendant was obtained by an interstate abduction. See *Mahon v. Justice*, 127 U.S. 700 (1888); *Cook v. Hart*, 146 U.S. 183 (1892); *Pettibone v. Nichols*, 203 U.S. 192, 215-216 (1906).

The only differences between *Ker* and the present case are that *Ker* was decided on the promise that there was no governmental involvement in the abduction, 119 U.S. at 443; and Peru, from which *Ker* was abducted, did not object to his prosecution¹⁰. Respondent finds those differences to be dispositive, as did the Court of Appeals in *Verdugo*, 939 F.2d, at 1346, contending that they show that respondent's prosecution, like the prosecution of *Rauscher*, violates the implied terms of a valid extradition treaty. The Government, on the other hand, argues that *Rauscher* stands as an «exception» to the rule in *Ker* only when an extradition treaty is invoked, and the terms of the treaty provide that a breach will limit the jurisdiction of a court. Brief for the United States 17. Therefore, our first inquiry must be whether the abduction of respondent from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies and the court need not inquire as to how respondent came before it.

In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning. *Air France v. Saks*, 470 U.S. 392, 397 (1985); *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 11 (1936). The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs. Respondent submits that Article 22 (1) of the Treaty which states that it «shall apply to offenses specified in Article 2 (including murder) committed before and after this Treaty enters into force». 31 U.S.T., at 5073-5074, evidences intent to make application of the Treaty mandatory for those offenses. However, the more natural conclusion is that Article 22 was included to ensure that the Treaty was applied to extraditions requested after the Treaty went into force, regardless of when the crime of extradition occurred¹¹.

¹⁰ *Ker* also was not a national of Peru, whereas respondent is a national of the country from which he was abducted. Respondent finds this difference to be immaterial. Tr. of Oral Arg. 26.

¹¹ This interpretation is supported by the second clause of Article 22 which provides that «(r) requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899...». Extradition Treaty, May 4, 1978 (1979) United States-United Mexican States, 31 U.S.T. 5059, 5074, T.I.A.S. No. 9656.

More critical to respondent's argument is Article 9 of the Treaty which provides:

«1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

«2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense». *Id.*, at 5065.

According to respondent, Article 9 embodies the terms of the bargain which the United States struck: if the United States wishes to prosecute a Mexican national, it may request that individual's extradition. Upon a request from the United States, Mexico may either extradite the individual, or submit the case to the proper authorities for prosecution in Mexico. In this way, respondent reasons, each nation preserved its right to choose whether its nationals would be tried in its own courts or by the courts of the other nation. This preservation of rights would be frustrated if either nation were free to abduct nationals of the other nation for the purposes of prosecution. More broadly, respondent reasons, as did the Court of Appeals, that all the process and restrictions on the obligation to extradite established by the Treaty would make no sense if either nation were free to resort to forcible kidnapping to gain the presence of an individual for prosecution in a manner not contemplated by the Treaty. *Verdugo, supra*, at 1350.

We do not read the Treaty in such a fashion. Article 9 does not purport to specify the only way in which one country for the purposes of prosecution. In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution. *Rauscher*, 119 U.S., at 411-412; *Factor v. Laubenheimer*, 290 U. S. 276, 287 (1933); cf. *Valentine v. United States ex. rel. Neidecker, supra*, at 8-9 (United States may not extradite a citizen in the absence of a statute or treaty obligation). Extradition treaties exist so as to impose mutual obligations to sur-

render individuals in certain defined sets of circumstances, following established procedures. See 1 J. Moore, *A Treatise on Extradition and Interstate Rendition*, § 72 (1891). The Treaty thus provides a mechanism which would not otherwise exist, requiring under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be followed when the Treaty is invoked.

The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the Solicitor General notes, the Mexican government was made aware as early as 1906, of the *Ker* doctrine, and the United States position that it applied to forcible abductions made outside of the terms of the United States-Mexico extradition treaty¹². Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of *Ker*¹³. Moreover, although language which would grant individuals exactly the right sought by respondent had been considered and drafted as early as 1935 by a prominent group of legal

¹² In correspondence between the United States and Mexico growing out of the 1905 Martinez incident, in which a Mexican national was abducted from Mexico and brought to the United States for trial, the Mexican charge wrote to the Secretary of State protesting that as Martinez' arrest was made outside the procedures established in the extradition treaty, «the action pending against the man can not rest (on) any legal fundamentation». Letter of Balbino Davalos to Secretary of State reprinted in *Papers Relating to the Foreign Relations of the United States*, H.R. Doc. No. 1 59th Cong., 2d. Sess., pt 2, p.1121 (1906). The Secretary of State responded that the exact issue raised by the Martinez incident had been decided by *Ker*, and that the remedy open to the Mexican government, namely a request to the United States for extradition of Martinez' abductor had been granted by the United States. Letter of Robert Bacon to Mexican Charge, reprinted in *Papers Relating to the Foreign Relations of the United States*, H.R. Doc. No. 1, 59th Cong., 2d. Sess, pt. 2, at 1121-1122 (1906).

Respondent and the Court of Appeals stress a statement made in 1881 by Secretary of State James Blaine to the governor of Texas to the effect that the extradition treaty in its form at that time did not authorize unconsentend to abductions from Mexico, *Verdugo*, 939 F.2d, at 1354; *Brisf* for Respondent 14. This misses the mark, however, for the Government's argument is not that the Treaty authorizes the abduction of respondent; but that the Treaty does not prohibit the abduction.

¹³ The parties did expressly include the doctrine of specialty in Article 17 of the Treaty, notwithstanding the judicial recognition of it in *Rauscher*. 31 U.S.T., a 5071-5072.

scholars sponsored by the faculty of Harvard Law School, no such clause appears in the current treaty ¹⁴.

Thus, the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms. The remaining question, therefore, is whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty. See *Valentine*, 299 U.S., at 17 («Strictly the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied»).

Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are «so clearly prohibited in international law» that there was no reason to include such a clause in the Treaty itself. Brief for Respondent 11. The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States. *Id.*, at 17. Respondent does not argue that these sources of international law provides an independent basis for the right respondent asserts not to be tried in the United States, but rather than they should inform the interpretation of the Treaty terms.

¹⁴ In Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, the Advisory Committee of the Research in International Law proposed:
«In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the States or States whose rights have been violated by such measures». Harvard Research in International Law, 29 Am In'L. 442 (Supp 1935).

The Court of Appeals deemed it essential, in order for the individual defendant to assert a right under the Treaty, that the affected foreign government had registered a protest *Verdugo*, 939 F. 2d, at 1357 («in the kidnapping case there must be a formal protest from the offended government after the kidnapping»). Respondent agrees that the right exercised by the individual is derivative of the nation's right under the Treaty, since nations are authorized, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the Treaty. The formal protest, therefore, ensures that the «offended» action actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution. Thus the Extradition Treaty only prohibits gaining the defendant's presence by means other than those set forth in the Treaty when the nation from which the defendant was abducted objects.

This argument seems to us inconsistent with the remainder of respondent's argument. The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation. In *Rauscher*, the Court noted that the Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

More fundamentally, the difficulty with the support respondent garners from international law is that none of it relates to the practice of nations in relation to extradition treaties. In *Rauscher*, we implied a term in the Webster-Ashburton Treaty because of the practice of nations with regard to extradition treaties. In the instant case, respondent would imply terms in the extradition treaty from the

practice of nations with regards to international law more generally¹⁵. Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not «exercise its police power in the territory of another state». Brief for Respondent 16. There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations¹⁶.

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. In *Rauscher*, the implication of a doctrine of specialty into the terms of the Webster-Ashburton treaty which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small stop to take. By contrast, to imply from that terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited

¹⁵ Similarly, the Court of Appeals in *Verdugo* reasoned that international abductions violate the «purpose» of the Treaty, stating that «(t)he requirements extradition treaties impose constitute a means of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals» 939 F. 2d, at 1350. The ambitious purpose ascribed to the Treaty by the Court of Appeals, we believe, places a greater burden on its language and history than they can logically bear. In broad sense, most international agreements have the common purpose of safeguarding the sovereignty of signatory nations, in that they seek to further peaceful relations between nations. This, however, does not mean that the violation of any principles of international law constitutes a violation of this particular treaty.

¹⁶ In the same category are the examples cited by respondent in which after a forcible international abduction, the offended nation protested the abduction, and the abducting nation then returned the individual to the protesting nation. Brief for Respondent 18, citing *inter alia*, 1 Bassiouni, *International Extradition: United States Law and Practice*, § 5.4 pp. 235-237 (2d. rev. ed. 1987). These may show the practice of nations under customary international law, but they are of little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted. More to the point for our purposes are cases such as *The Ship Richmond*, 9 Cranch 102 (1815), and *The Merino*, 9 Wheat. 391 (1824), both of which hold that a seizure of a vessel in violation of international law does not affect the jurisdiction of a United States court to adjudicate rights in connection with the vessel. These cases are discussed, and distinguished, in *Cook v. United States*, 288 U.S., at 122.

by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.

Respondent and his *amici* may be correct that respondent's abduction was «shocking», Tr. of Oral Arg. 40, and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, App. 33-38, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch¹⁷. We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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¹⁷ The Mexican government has also requested from the United States the extradition of two individuals it suspects of having abducted respondent in Mexico, on charges of kidnapping. App. 39-66.

The advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation, is illustrated by the history of the negotiations leading to the treaty discussed in *Cook v. United States*, *supra*. The United States was interested in being able to search British vessels which hovered beyond the 3-mile limits and served as supply ships for motor launches which took intoxicating liquor from them into parts for further distribution in violation of prohibition laws. The United States initially proposed that both nations agree to searches of the other's vessels beyond the 3-mile limit; Great Britain rejected such an approach since it had no prohibition laws and therefore no problem with United States vessels hovering just beyond its territorial waters. The parties appeared to be at loggerheads; then this Court decided *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923), holding that our prohibition laws applied to foreign merchant vessels as well as domestic within the territorial waters of the United States, and that therefore the carrying of intoxicating liquors by foreign passenger ships violated those laws. A treaty was then successfully negotiated giving the United States the right to seizure beyond the 3-mile limit (which is desired), and giving British passenger ships the right to bring liquor into United States waters so long as the liquor supply was sealed while in those waters so long as the liquor supply was sealed while in those waters (which Great Britain desired). *Cook v. United States*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 91-712

**UNITED STATES, PETITIONER v. HUMBERTO
ÁLVAREZ MACHAIN**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

(June 15, 1992)

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

The court correctly observes that this case raises a question of first impression. See *ante*, at 3. The case is unique for several reasons. It does not involve an ordinary abduction by a private kidnaper, or bounty hunter, as in *Ker v. Illinois*, 119 U.S. 436 (1886); nor does it involve the apprehension of an American fugitive who committed a crime in one State and sought asylum in another, as in *Frisbie v. Collins*, 342 U.S. 519 (1952). Rather, it involves this country's abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty.

A Mexican citizen was kidnapped in Mexico and charged with a crime committed in Mexico; his offense allegedly violated both Mexican and American Law. Mexico has formally demanded on at

least two separate occasions¹ that he be returned to Mexico and has represented that he will be prosecuted and punished for his alleged offense². It is clear that Mexico's demand must be honored if this official abduction violated the 1978 Extradition Treaty between the United States and Mexico. In my opinion, a fair reading of the treaty in light of our decision in *United States v. Rauscher*, 119 U.S. 407 (1186), and applicable principles of international law, leads inexorably to the conclusion that the District Court, *United States v. Caro Quintero*, 745 F. Supp. 599 (CD Cal. 1990), and the Court of Appeals for the Ninth Circuit, 946 F 2d 1466 (1991) (*per curiam*), correctly construed that instrument.

¹ The abduction of respondent occurred on April 2, 1990. *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (CD Cal. 1990). Mexico responded quickly and unequivocally. Tr. of Oral Arg. 33; Brief for Respondent 3. On April 18, 1990, Mexico requested an official report on the role of the United States in the abduction, and on May 16, 1990 and July 19, 1990, it sent diplomatic notes of protest from the Embassy of Mexico to the United States Department of State. See Brief for United Mexican States as *Amicus Curiae* (Mexican *Amicus*) 5-6; App. to Mexican *Amicus* 1a-24a. In the May 16th note, Mexico said that it believed that the abduction was «carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries», App. to Mexican *Amicus* 5a, and in the July 19th note, it requested the provisional arrest and extradition of the law enforcement agents allegedly involved in the abduction. *Id.*, at 9a-15a.

² Mexico has already tried a number of members involved in the conspiracy that resulted in the murder of the DEA agent. For example, Rafael Caro-Quintero, a co-conspirator of Álvarez Machain in this case, has already been imprisoned in Mexico on a 40-year sentence. See Brief for Lawyers Committee for Human Rights as *Amicus Curiae* 4.

I

The Extradition Treaty with Mexico³ is a comprehensive document containing 23 articles and an appendix listing the extraditable offenses covered by the agreement. The parties announced their purpose in the preamble: the two Governments desire «to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition»⁴. From the preamble, through the description of the parties' obligations with respect to offenses committed within as well as beyond the territory of a requesting party⁵, the delineation of the procedures and evidentiary requirements for extradition⁶, the special provisions for political offenses and capital punishment⁷, and other details, the Treaty appears to have been designed to cover the entire subject of extradition. Thus, Article 22, entitled «Scope of Application» states that the «Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force», and Article 2 directs that «[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of the extraditable offenses listed

³ App. 72-87.

⁴ *Id.*, at 72. In construing treaty, the Court has the «responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties». *Air France v. Sarks*, 470 U.S. 392, 399 (1985). It is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance—the stated goals of the Treaty. See also Presidential Letter of Transmittal attached to Senate Advice and Consent 3 (Treaty would «make a significant contribution to international cooperation in law enforcement»). Extradition treaties prevent international conflict by providing agreed upon standards so that the parties may cooperate and avoid retaliatory invasions of territorial sovereignty. According to one writer, before extradition treaties became common European States often granted asylum to fugitives from other States, with the result that «a sovereign could enforce the return of fugitives only by force of arms... Extradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after the World War I». M. Bassiouni, *International Extradition and World Public Order* 6 (1974). This same writer explained that such treaties further the purpose of international law, which is «designed to protect the sovereignty and territorial integrity of states, and [to] restrict impermissible state conduct». 1 M. Bassiouni, *International Extradition: United States Law and Practice* Ch. 5, 2, p.194 (ed. 1987).

The object of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual delivery of fugitives, but why they do prohibit states sponsored abductions. See Restatement (Third) of Foreign Relations (Restatement) § 432, and Comments a.e. (1987).

⁵ App. 72-74 (Articles 2 and 4).

⁶ *Id.*, at 73, 75, 76-79 (Articles 3, 7, 1, 12 and 13).

⁷ *Id.*, at 74-75 (Articles 5 and 8).

in the clauses of the Appendix»⁸. Moreover, as noted by the Court, *ante*, at 8, Article 9 expressly provides that neither Contracting Party is bound to deliver up its own nationals, although it may do so in its discretion, but if it does not do so, it «shall submit the case to its competent authorities for purposes of prosecution»⁹.

Petitioner's claim that the Treaty is not exclusive, but permits forcible governmental kidnapping, would transform those, and other, provisions into little more than verbiage. For example, provisions requiring «sufficient» evidence to grant extradition (Art. 3) withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitations for the crime has lapsed (Art. 7), and granting the requested State discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8) would serve little purpose if the requesting country could simply kidnap the person. As the Court of Appeals for the Ninth Circuit recognized in a related case, «[e]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct». *United States v. Verdugo Urquidez*, 939 F. 2d 1341, 1349 (1991). In addition, all of these provisions «only make sense if they are understood as requiring each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation». *Id.*, at 1351.

It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other Nation. See *ante*, at 9. Relying on that omission¹⁰, the Court, in

⁸ *Id.*, at 83, 73.

⁹ *Id.*, at 76.

¹⁰ The court resorts to the same method of analysis as did the dissent in *United States v. Rauscher*, 119 U.S. 407 (1886). Chief Justice Waite would only recognize an explicit provision, and in the absence of one, he concluded that the Treaty did not require that a person be tried only for the offense for which he had been extradited: «The treaty requires a delivery up to justice, on demand, of those accused of certain crimes, but says nothing about what shall be done with them after the delivery has been made. It might have provided that they should not be tried for any other offenses than those for which they were surrendered, but it has not». *Id.*, at 434. That approach was rejected by the Court in *Rauscher*, and should also be rejected by the Court here.

effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process¹¹. If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, those options would be equally available because they, too, were not explicitly prohibited by the Treaty¹². That, however, is a highly improbable interpretation of a consensual agreement¹³, which on its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition¹⁴. In my opinion, «the manifest scope and object of the treaty itself», *Rauscher*, 119 U.S., at 422, plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party. That opinion is confirmed by a consideration of the «legal context» in which the Treaty was negotiated¹⁵. *Cannon. University of Chicago*, 441 U.S. 677, 699 (1979).

¹¹ To make the point more starkly, the Courts has, in effect, written into Article 9, a new provision which says: «Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other».

¹² It is ironic that the United States has attempted to justify its unilateral action based on the kidnapping, torture, and murder of a federal agent by authorizing the kidnapping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico. See App. to Mexican *Amicus* 5a. This goes to my earlier point, see n. 4, *supra*, that extradition treaties promote harmonious relations by providing for the orderly surrender of a person by one State to another, and without such treaties, resort to force often followed.

¹³ This court has previously described a treaty as generally «in its nature a contract between two nations», *Foster v. Nellson*, 2 Pct. 253, 314 (1829); see *Rauscher*, 119 U.S. at 418; it is also in this country the law of the land. 2 Pct., at 314; 119 U.S., at 418-419.

¹⁴ Mexico's understanding is that «[t]he extradition treaty governs comprehensively the delivery of all persons for trial in the requesting state "for an offense committed outside the territory of the requesting Party"». Brief for United Mexican States as *Amicus Curiae*, O.T. 1991, No.91-670, p.6, and Canada, with whom the United States also shares a large border and with whom the United States also has an extradition treaty, understands the treaty to be «the exclusive means for a requesting government to obtain... a removal» of a person from its territory, unless a Nation otherwise gives its consent. Brief for Government of Canada as *Amicus Curiae* 4.

¹⁵ The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion that a different understanding with Mexico was reached. See M. Bassouni, *International Extradition: United States Law and Practice* Ch. 2, § 4.3, at p.82 («Negotiations, preparatory works, and diplomatic correspondence are an integral part of the surrounding circumstances, and (are) often relied on by courts in ascertaining the intentions of the parties») (footnote-omitted).

II

In *Rauscher*, the Court construed an extradition treaty that was far less comprehensive than the 1978 Treaty with Mexico. The 1842 Treaty with Great Britain determined the boundary between the United States and Canada, provided for the suppression of the African slave trade, and also contained one paragraph authorizing the extradition of fugitives «in certain cases». 8 Stat. 576. In Article X, each Nation agreed to «deliver up to justice all persons» properly charged with any one of seven specific crimes, including murder. 119 U.S., at 421 ¹⁶. After Rauscher had been extradited for murder, he was charged with the lesser offense of inflicting cruel and unusual punishment on a member of the crew of a vessel on the high seas. Although the treaty did not purport to place any limit on the jurisdiction of the demanding State after acquiring custody of the fugitive this Court held that he could not be tried for any offense other than murder ¹⁷. Thus, the treaty constituted the exclusive means by which the United States could obtain jurisdiction over a defendant within the territorial jurisdiction of Great Britain.

¹⁶ Article X of the Treaty provided:

«It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdictions, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive». 8 Stat. 576.

¹⁷ The doctrine defined by the Court in *Rauscher* — that a person can be tried only for the crime for which he had been extradited — has come to be known as the «doctrine of specialty».

The Court noted that the Treaty included several specific provisions, such as the crimes for which one could be extradited, the process by which the extradition was to be carried out, and even the evidence that was to be produced, and concluded that «the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offence and for no other». *Id.*, at 423, The Court reasoned that it did not make sense for the Treaty to provide such specifics only to have the person «pas[s] into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place». *Id.*, at 421. To interpret the Treaty in a contrary way would mean that a country could request extradition of a person for one of the seven crimes covered by the Treaty, and then try the person for another crime, such as a political crime, which was clearly not covered by the Treaty; this result, the Court concluded, was clearly contrary to the intent of the parties and the purpose of the Treaty.

Rejecting an argument that the sole purpose of Article X was to provide a procedure for the transfer of an individual from the jurisdiction of one sovereign to another, the Court stated:

«No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

»The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance of fraud or by what pretence of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offences than that for which he was extradited, is met by the manifest scope and object of the treaty itself». *Id.*, at 422.

Thus, the Extradition Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant

from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction¹⁸.

Although the Court's conclusion in *Rauscher* was supported by a number of judicial precedents, the holdings in those cases were not nearly as uniform¹⁹ as the consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor²⁰. It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory²¹. Justice Story found it shocking enough that the United States would attempt to justify an American seizure of a foreign vessel in a Spanish port:

«But, even supposing, for a moment, that our laws had required an entry of the *Apollon*, in her transit, does it follow, that the power to arrest her was meant to be given, after she had passed into the exclusive territory of

¹⁸ In its opinion, the Court suggests that the result in *Rauscher* was dictated by the fact that two federal statutes had imposed the doctrine of specialty upon extradition treaties. *Ante* at 4. The two cited statutes, however, do not contain any language purporting to limit the jurisdiction of the Court: rather, they merely provide for protection of the accused pending trial.

¹⁹ In fact, both parties noted in their respective briefs several authorities that had held that a person could be tried for an offense other than the one for which he had been extradited. See Brief for United States in *United States v. Rauscher*, O.T., 1885, No.1249, pp. 6-10 (citing *United States v. Caldwell*, 8 Blatchford 131 (SDNY 1871); *United States v. Lawrence*, 13 Blatchford 295 (SDNY 1876); *Adriance v. Lagrave*, 59 N.Y.110 (1874)); Brief for Respondent in *United States v. Rauscher*, O.T. 1885, No.1249, pp. 8-16 (same).

²⁰ This principle is embodied in Article 17 of the Charter of the Organization of American States, Apr. 30,1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27,1967, 21 U.S.T. 607, T.I.A.S. No. 6847, as well as numerous provisions of the United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (to which both the United States and Mexico are signatories). See generally Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in *International Law at a Time of Perplexity* 407 (Y. Dinstein and M. Tabory eds. 1989).

²¹ When Abraham Sofaer, Legal Adviser of the State Department, was questioned at a congressional hearing, he resisted the notion that such seizures were acceptable: «Can you imagine us going into Paris and seizing some person we regard as a terrorist...? (H)ow would we feel if some foreign nation —let us take the United Kingdom— came over here and seized some terrorism suspect in New York City, or Boston, or Philadelphia... because we refused through the normal channels of international, legal communications, to extradite that individual?». Bill To Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 63 (1985).

a foreign nation? We think not. *It would be monstrous* to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations». *The Apollon*, 9 Wheat. 362, 370-371 (1824) (emphasis added) ²².

The law of Nations, as understood by Justice Story in 1824, has not changed. Thus, a leading treatise explains:

«A State must not perform acts of sovereignty in the territory of another State.

«It is... a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended». Oppenheim's International Law 295, and n., (H. Lauterpacht 8th ed. 1955) ²³.

Commenting on the precede issue raised by this case, the chief reporter for the American Law Institute's Restatement of Foreign Relations used language reminiscent of Justice Story's characterization of an official seizure in a foreign jurisdiction as «monstrous»:

²² Justice Story's opinion continued:

«The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said, that there is a revenue jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the range of a common shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond thus, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the American». *The Apollon*, 9 Wheat., at 371-373.

²³ See Restatement § 432, Comment c («If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned»).

«When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states)»²⁴.

In the *Rauscher* case, the legal background that supported the decision to imply a covenant not to prosecute for an offense different from that for which extradition had been granted was far less clear than the rule against invading the territorial integrity of a treaty partner that supports Mexico's position in this case²⁵. If *Rauscher* was correctly decided — and I am convinced that it was — its rationale clearly dictates a comparable result in this case²⁶.

III

A critical flaw pervades the Court's entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes

²⁴ Henkingk, A Decent Respect to the Opinions of Mankind, 25 John Marshall L.J. 215, 231 (1992) (footnote omitted).

²⁵ Thus, the Restatement of Foreign Relations states in part:

«(2) A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state. c. Consequences of violation of territorial limit of law enforcement. If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws». Restatement § 432, and Comment c.

²⁶ Just as *Rauscher* had standing to raise the treaty violation issue, respondent may raise a comparable issue in this case. Certainly, if an individual who is not a party to an agreement between the United States and another country is permitted to assert the rights of that country in our courts, as is true in the specialty cases, then the same rule must apply to the individual who has been a victim of this country's breach of an extradition treaty and who wishes to assert the rights of that country in our courts after that country has already registered its protest.

a flagrant violation of international law²⁷, and in my opinion, also constitutes a breach of our treaty obligations. Thus, at the outset of its opinion, the Court states the issue as «whether a criminal defendant, abducted to the United States from a national with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts». *Ante*, at 1. That, of course, is the question decided in *Ker v. Illinois*, 119 U.S. 436 (1886); it is not, however, the question presented for decision today.

The importance of the distinction between a court's exercise of jurisdiction over either a person or property that has been wrongfully seized by a private citizen, or even by a state law enforcement agent, on the one hand, and the attempted exercise of jurisdiction predicated on a seizure by federal officers acting beyond the authority conferred by treaty, on the other hand, is explained by Justice Brandeis in his opinion for the Court in *Cook v. United States*, 288 U.S. 102 (1933). That case involved a construction of a prohibition era treaty with Great Britain that authorized American agents to board certain British vessels to ascertain whether they were engaged in importing alcoholic beverages. A British vessel was boarded 11 1/2 miles off the coast of Massachusetts, found to be carrying unmanifested alcoholic beverages, and taken into port. The Collector of Customs assessed a penalty which he attempted to collect by means of libels against both the cargo and the seized vessel.

The Court held that the seizure was not authorized by the treaty because it occurred more than 10 miles off shore²⁸. The Government argued that the illegality of the seizure was immaterial because, as in

²⁷ «In the international legal order, treaties are concluded by states against a background of customary international law. Norms of customary international law specify the circumstances in which the failure of one party to fulfill its treaty obligations will permit the other to rescind the treaty, retaliate, or take other steps». Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 *Colum. L. Rev.* 301, 375 (1992)

²⁸ The treaty provided that the boarding rights could not be exercised at a greater distance from the coast than the vessel could transverse in one hour, and the seized vessel's speed did not exceed 10 miles an hour. *Cook v. United States*, 288 U.S. 102, 107, 110 (1933).

Ker, the Court's jurisdiction was supported by possession even if the seizure was wrongful. Justice Brandeis acknowledged that the argument would succeed if the seizure had been made by a private party without authority to act for the Government, but that a different rule prevails when the Government itself lacks the power to seize. Relying on *Rauscher*, and distinguishing *Ker*, he explained:

«*Fourth*. As the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed. The Government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.

»It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. *Dodge v. United States*, 272 U.S. 530, 532 [(1926)]. Compare *Ker v. Illinois*, 119 U.S. 436, 444. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize. *Gelston v. Hoyt*, 3 Wheat. 246, 310 [(1818)]; *Taylor v. United States*, 3 How. 197, 205 206 [(1845)]. The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare *United States v. Rauscher*, 119 U.S. 407». *Cook v. United States*, 288 U.S., AT 120-122.

The same reasoning was employed by Justice Miller to explain why the holding in *Rauscher* did not apply to the *Ker* case. The arresting officer in *Ker* did not pretend to be acting in official capacity when he kidnapped Ker. As Justice Miller noted, «the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States». *Ker v. Illinois*, 119 U.S., at 443 (emphasis added)²⁹. The exact opposite is true in this case, as it was in *Cook*³⁰.

The Court's failure to differentiate between private abductions and official invasions of another sovereign's territory also accounts for its misplaced reliance on the 1935 proposal made by the Advisory Committee on Research in International Law. See *ante*, at 10, and n. 13. As the text of that proposal plainly states, it would have rejected the rule of the *Ker* case³¹. The failure to adopt that recommendation does not speak to the issue the Court decides today. The Courts admittedly «shocking» disdain for customary and conventional international law principles see *ante*, at 14, is thus entirely unsupported by case law and commentary.

²⁹ As the Illinois Supreme Court described the action:

«The arrest and detention of (Ker) was not by any authority of the general government, and no obligation is implied on the part of the Federal or any State government... The invasion of the sovereignty of Peru, if any wrong was done, was by individuals, perhaps some of them owing no allegiance to the United States, and not by the Federal government». *Ker v. Illinois*, 110 Ill. 627, 643 (1884).

³⁰ The Martinez incident discussed by the Court, see *ante*, at 9-10, n. 11, also involved abduction by a private party; the reference to the *Ker* precedent was therefore appropriate in that case. On the other hand, the letter written by Secretary of State Blaine to the Governor of Texas in 1881 unequivocally disapproved of abductions by either party to an extradition treaty. In 1984, Secretary of State Schultz expressed the same opinion about an authorized kidnapping of a Canadian national. He remarked that, in view of the extradition treaty between the United States and Canada, it was understandable that Canada was «outraged» by the kidnapping and considered it to be «a violation of the treaty and of international law, as well as an affront to its sovereignty». See Leich, *Contemporary Practice of the United States Relating to International Law*, 78 Am. J. Int'l L. 200, 208 (1984).

³¹ Article 16 of the Draft provides:

«In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures». Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 435, 623 (Supp. 1935).

IV

As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts³². Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold³³. That the Executive may wish to reinterpret³⁴ the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation³⁵. Indeed, the desire for revenge exerts «a kind of hydraulic pressure... before which even well settled principles of law will bend», *Nothorn Securities Co. v. United States*, 193 U.S. 197, 401 (19C4) (Holmes, J., dissenting), but it is precisely at such moments that we should remember and be guided by our duty «to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it». *United States v. Mine Workers*, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting). The way

³² See *e.g.*, Storm Arises Over Camarena; U.S. Wants Harder Line Adopted, *Latin Am. Weekly Rep.*, Mar.8, 1985, p.10; U.S. Presses Mexico To Find Agent, *Chicago Tribune*, Feb.20,1985, p.10.

³³ As Justice Brandeis so wisely urged:

«In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto him; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means [to declares that the private criminal] would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face». *Olmstead v. United States*, 277 U.S. 438,485 (1928) (Brandeis, J., dissenting).

³⁴ Certainly, the Executives view has changed over time. At one point, the Office of Legal Counsel advised the Administration that such seizures were contrary to international law because they compromised the territorial integrity of the other Nation and were only to be undertaken with the consent of that Nation. 4B Op. Off. Legal Counsel 549, 556 (1980). More recently, that opinion was revised and the new opinion concluded that the President did have the authority to override customary international law. Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101sr. Cong., 1st. Sess., 4-5 (1989) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

³⁵ Cf. *Perkins v. Elg*, 307 U.S. 325 (1939) (construing treaty in accordance with historical construction and refusing to defer to change in Executive policy); *Johnson v. Browne*, 205 U.S. 309 (1907) (rejecting Executive's interpretation).

that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.

The significance of this Court's precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa. Based largely on its understanding of the import of this Courts cases—including our decision in *Ker v. Illinois*— that court held that the prosecution of a defendant kidnapped by agents of South Africa in another country must be dismissed. *S v. Ebrahim*, S. Afr. L. Rep. (Apr. June 1991) ³⁶. The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world— will be deeply disturbed by the «monstrous» decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character ³⁷. As Thomas Paine warned, an «avidity to punish is always dangerous to liberty» because it leads a Nation «to stretch, to misinterpret, and to misapply even the best of laws» ³⁸. To counter that tendency, he reminds us:

«He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself» ³⁹.

I respectfully dissent.

Ⓞ Índice General

Ⓞ Índice ARS 8

³⁶ The South African court agreed with appellant that an «abduction represents a violation of the applicable rules of international law, that these rules are part of (South African) law, and that this violation of the law deprives the Court... of its competence to hear (appellant's) case...». S. Afr. L. Rep., at 8-9.

³⁷ As Judge Mansfield presciently observed in a case not unlike the one before us today: «Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law». *United States v. Toscano*, 500 F. 2d. 267, 274 (CA2 1974).

³⁸ 2 The Complete Writings of Thomas Paine 588 (P. Foner ed. 1945).

³⁹ *Ibid.*

**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1991

No. 91-712

UNITED STATES OF AMERICA, (Petitioner)

Vs.

**HUMBERTO ÁLVAREZ MACHAIN,
(Respondent)**

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED MEXICAN STATES AS
AMICUS CURIAE IN SUPPORT OF
AFFIRMANCE**

Pursuant to Rule 37 of the Rules of this Court, the United Mexican States (Mexico) respectfully submits this brief as *amicus curiae* in support of affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit of October 18, 1991. By letters lodged with the Clerk of the Court, the petitioner and the respondent have consented to the filing of this brief.

Summary: I. Interest of the Amicus Curiae; II. Statement; III. Summary of argument; IV. Argument; V. Conclusion.

I. INTEREST OF THE *AMICUS CURIAE*

The respondent, Humberto Álvarez Machain, is a national of Mexico. Until his abduction from Mexican territory, arranged by United States law enforcement officers, he was a resident of Mexico. Respondent was forcibly brought to Los Angeles where he was charged in federal court with complicity in the kidnapping and murder of a DEA agent in Mexico.

On this writ of certiorari, the Court will necessarily consider whether respondent's forcible removal from Mexican territory was in contravention of the existing extradition treaty with Mexico and of general principles of international law, mandating respondent's return to Mexico.

Mexico regards respondent's abduction from Mexican territory as a deliberate disregard by the United States of its obligations under the extradition treaty. Respondent's abduction by agents of the United States is incompatible with established principles of international law and with express undertakings by the United States in recent bilateral and multilateral agreements on mutual legal assistance in penal matters and on cooperation in combating narcotics trafficking that were in force between Mexico and the United States at the time of respondent's abduction. Under general international law, and under those specific agreements, the United States is obligated to respect Mexico's sovereignty and territorial integrity and not to perform functions of authority in Mexican territory.

Mexico repeatedly protested to the United States government the treaty violations and the attendant infringement of its territorial integrity, and it requested respondent's return to Mexico. Its diplomatic protests and its request for respondent's repatriation have gone unanswered.

The United States' disregard of its commitments to Mexico undermines the rule of law in international relations to which both States are

strongly committed. Mexico has a manifest interest in ensuring that treaties to which it and the United States are parties are interpreted an applied by United States courts consistently with the treaty's text, history, object and purpose.

II. STATEMENT

a) The Mexican Government's Protest

The respondent challenged the district court's jurisdiction to try him on the ground that his forcible abduction from his homeland by officials of the United States violated the Mexico/United States extradition treaty ¹ (Pet. App. 4a).

Mexico repeatedly protested respondent's abduction through diplomatic channels. Mexico's first note to the United States Department of State of April 18, 1990 (J.A. 33), sought information on the participation of United States officials in the abduction of respondent. The note placed the Department of State on notice that «if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered» (*ibid*).

One month later, on May 16, 1990 (J.A. 35), Mexico informed the Department of State that «[t]he Government of Mexico considers the kidnapping of Dr. Álvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in

¹ Extradition Treaty between the United States of America and the United Mexican States with Appendix, done in Mexico May 4, 19789, entered into force January 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on December 9, 1980, pursuant to Article 102 of the Charter of the United Nations; reprinted in J.A. 72-87.

force between the two countries». The note informed the Department that criminal proceedings had been instituted in Mexico against the abductors for the offenses of kidnapping, false imprisonment and criminal association, and that the Mexican government would seek the abductor's extradition. The note requested that the Department of State «intervene before the corresponding authorities so that Dr. Humberto Álvarez Machain be returned back to Mexico in order to be investigated regarding his probable participation in the crimes whose investigation and prosecution correspond to [*sic*] the Mexican Government». The note concluded with a request for assistance «in order that... [The respondent] be tried and sentenced in Mexico with absolute respect to the Mexican laws in connection with the crimes in which... [The respondent] has participated» (J.A. 36).

Thereafter, on July 19, 1990 the Embassy of Mexico presented two notes to the Department of State (J.A. 39, 53), and transmitted two extradition requests from the Attorney General of Mexico for the provisional arrest and extradition of the two individuals who were principally responsible for respondent's abduction from Mexico — a DEA agent, and a Mexican national who had been granted refuge in the United States. The United States did not respond to those notes.

On appeal, following the dismissal of the indictment by the district court, the Mexican Consul General in Los Angeles was instructed by the Ministry of Foreign Affairs to present a letter to the court of appeals setting forth Mexico's position with respect to the treaty, its violation by the United States, and the manner in which the treaty regulates the extradition of Mexican nationals from Mexico (J.A. 67). The letter stated in relevant part:

8. The Treaty constitutes the exclusive and sole means by which the Government of the United States can seek to bring a Mexican national present in Mexico to justice. Mexican legislation in force and effect makes it illegal for Mexican government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special

arrangement, either with the United States or with any other country, to surrender its own nationals.

In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably and expressly reserved to the parties the right to refuse the requested extradition to [*sic*] one of their own respective nationals, agreeing instead to prosecute them in their own national courts, in the interest of justice.

9. The purpose and object of the Treaty, was from its inception, precisely to provide the legal framework, with which one of the parties could request of the other the extradition of persons from the territory of the former to the territory of the latter. The Treaty is binding on its parties, but serves no purpose if the parties are free to ignore its terms.

10. The only legal means by which the United States could have pursued the prosecution of DR. HUMBERTO ÁLVAREZ MACHAIN, a Mexican national, was through the specific provision of the Treaty, which was negotiated, agreed upon and ratified precisely to deal, with the extradition of nationals...

J.A. at 68-69.

b) The United States' Complicity in Respondent's Abduction

After respondent's arraignment, the district court held an evidentiary hearing to determine whether United States law enforcement officers were responsible for respondent's abduction (Pet. App. 6a). Although the United States denied its complicity in the abduction, the court found that in the evening of April 2, 1990, respondent was seized by five or six armed men in his office in Guadalajara, put by force on a private plane, and flown to El Paso, Texas. There he was met by agents of the DEA and arrested. He was flown to Los Angeles, where he was placed in detention awaiting trial (Pet. App. 10a-11a).

The district court further found that as of May 1991, the DEA had made partial reward payments of \$20,000 to the Mexican individuals who abducted the respondent; that the DEA had evacuated seven of the abductors and their families from Mexico to the United States;

that it paid for their weekly living expenses (*ibid.*); that respondent's abduction did not result from any cooperative effort by Mexico and the United States, or any participation in the abduction by the Mexican officials; and that the United States «unilaterally proceeded with the abduction without the knowledge or participation of the Mexican government» (Pet. App. 33a).

The district court determined as a matter of law that the United States violated the Mexico/United States extradition treaty, and that «[u]nder circumstances, the Court lacks jurisdiction to try this defendant. Accordingly, the defendant to Mexico is ordered discharged and the government is ordered to repatriate the defendant to Mexico forthwith» (pet. App. 4a-5a).

On appeal, the United States did not challenge the district court's findings regarding its instigation and complicity in respondent's abduction. The court of appeals affirmed *per curiam* (Pet. App. 1a), relying on its exhaustive treatment of the abduction issue in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), cert. pending, No. 91-670, decided three months earlier. The court below concluded:

The Government of Mexico has stated unequivocally that the abduction of Dr. Álvarez-Machain by United States agents violated the 1980 Extradition Treaty and general principles of international law and has at all times demanded his immediate repatriation to Mexico. Moreover, the Mexican government has stated its position on these issues unequivocally to the court in this case... Thus, there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation... The Verdugo case requires the dismissal of the indictment and the repatriation of the appellee (Pet. App. at 3a).

(Pet. App. at 3a). The United States seeks reversal in this Court. It maintains that respondent's abduction was in the nature of an «extra-territorial arrest», and is not inconsistent with the means provided for in the extradition treaty for obtaining custody of persons from Mexico for trial in United States Courts.

III. SUMMARY OF ARGUMENT

A. The United States' argument that the extradition treaty does not address abductions of Mexican nationals from Mexican territory, and that such «extraterritorial arrests» are conducted «outside the extradition context» (Pet. Br. 9) does not withstand analysis. The treaty, like all international accords, must be interpreted against the background of relevant rules of international law applicable to the relations between the parties. Of particular relevance to the forcible removal of a person by agents of a foreign state are the established international law principles of independence of states, non intervention in internal affairs, legal equality, and respect for territorial integrity. Those principles are the foundation upon which all extradition treaties are constructed. For a state to send its agents to another State to apprehend or abduct that State's nationals for trial elsewhere is incompatible with the established international legal order. There was, therefore, no reason for Mexico to insist that the extradition treaty contain express language that, absent permission from Mexico, the United States could exercise no police powers in the Mexican territory. At no time during the negotiation of the extradition treaty did the United States' negotiators state or suggest that the United States reserved to itself the right to secure the presence of Mexican nationals for trial in the United States «outside the extradition context», and there exists no such reservation to the treaty.

B. Article 9 of the extradition treaty leaves it to the discretion of each State whether to extradite its nationals. During the negotiation of Art. 9, the Mexican negotiators expressly informed the United States negotiators of the restraints that Mexican laws impose on the President of Mexico with respect to the extradition of Mexican nationals. Consequently, the parties included a second paragraph –similar to one contained in most modern U.S. extradition treaties with civil law countries– to assure that Mexicans whose extradition was denied solely on the basis of nationality would be prosecuted by Mexico.

In this case, the United States did not inquire whether Mexico was prepared to deliver the respondent for trial in the United States, nor did it afford Mexico the opportunity to try the respondent in its own courts. Instead, in disregard of the stipulations of the extradition treaty and its responsibilities under established principles of international law, the United States abducted the respondent from Mexico, brought him without the consent of the Mexican government to the United States for trial, and deprived him of the rights guaranteed to him by the Constitution and laws of Mexico.

C. Mexico and the United States are parties to two recent bilateral treaties on mutual legal assistance and on cooperation in combating narcotics trafficking, and both States have ratified a multilateral United Nations Convention on the latter subject. Both treaties and the Convention make it explicit that, in rendering assistance to each other and in combating crime and drug trafficking, the States must carry out their obligations in a manner consistent with the principles of sovereign equality and territorial integrity. The United States' action in abducting the respondent from the territory of Mexico was in total disregard of those solemn treaty commitments.

II

The *Ker Frisbie* rule, which holds that an illegal arrest or abduction does not void a subsequent conviction, is a rule of United States domestic law, not a principle of international law, and has been most often applied in the United States in the context of domestic kidnappings, abductions and wrongful arrest.

This Court has never sanctioned the prosecution in a United States court of a foreign national abducted from his home State by officials of the United States, where an extradition treaty was in force with that foreign State, where the offense was committed in the territory of the foreign State, and where the foreign state protested the abduction.

Ker is no authority for the issue in this case. The rule's namesake, *Frisbie*, and its progeny, deal with domestic interstate abductions and are not relevant to the statesponsored international abduction which lies at the heart of this case. International law, which this Court has traditionally applied, firmly establishes the principle that absent consent or acquiescence by the territorial State, another State may not send its agents into that State's territory to apprehend persons accused of a crime.

III

The appropriate remedy for the contravention of the treaty that occurred in this case, and the only remedy that will prevent the recurrence of the violation of Mexico's territorial integrity, is the return of respondent to Mexico. Repatriation of a national who was unlawfully abducted from his home State by agents of a foreign State will signify the courts' unwillingness to countenance lawlessness by its law enforcement agents on foreign soil. Unlike the result which frequently follows from the application of the exclusionary rule in the domestic context, ordering the respondent's repatriation will not immunize him from prosecution, as the United States claims. His return to Mexico will only change the place of trial and the applicable law since Mexico is committed under the extradition treaty to submit the case to its judicial authorities for investigation and prosecution.

IV. ARGUMENT

a) Absent consent by Mexico to a less formal rendition of offenders, the extradition treaty provides the sole means by which the United States may secure and offender from Mexico.

The Treaty Prohibits U.S. Government Authorized or Sponsored Abductions of Persons From Mexican Territory for Trial in the United States.

The thrust of the United States' argument is that the Extradition Treaty «is not a general compact for the protection of territorial rights» (Pet. Br. at 9). Elsewhere, the United States submits that the Extradition Treaty does not prohibit «extraterritorial arrests» by the United States «outside the context of extradition proceedings» (*Id.* at 23), and that «nothing in the treaty speaks to the consequences of an apprehension that is made without a request for extradition» (*Ibid.*). Mexico rejects in the strongest terms the view that the United States authorities may perform «extraterritorial arrests» in Mexico.

As a sovereign state, Mexico alone has the right to determine which authority exercises governmental powers in its territory, and no State may arrogate to itself the right to perform sovereign's acts within its borders without its consent. The principles of sovereign equality and territorial integrity of States, the foundation of an enlightened international legal order, are fundamental. The principle was forcefully and unequivocally set forth by this Court, speaking through Chief Justice Marshall, in *The Schooner Exchange v. Mc Faddon*, 7 Cranch (11 U.S.) 116, 136 (1812):

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.

...

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See also Art. 2, para. 4, of the Charter of the United Nations of June 26, 1945², the members of which include Mexico and the United States, which obligates «All Members» to «refrain... from the threat

² 59 Stat. 1031, T.S. No. 993.

or use of force against the territorial integrity or political independence of any State...». Additionally, the Charter of the Organization of American States of April 30, 1948³, whose members also include Mexico and the United States, provides in Art. 17 that the «territory of a State is inviolable; it may not be the object, even temporarily... of... measures of force taken by another state, directly or indirectly, on any grounds whatsoever». It is within this framework that the Mexico/United States Extradition Treaty must be interpreted⁴.

Extradition is one of the oldest forms of international judicial assistance. Extradition treaties are designed to promote the cooperation between States in criminal matters. They «Balance[] the demands of the international legal order that serious crime not go unpunished with concern that persons accused of crime not be subjected to unfair methods of adjudication or punishment». *Restatement (Third) Foreign Relations Law of the United States* § 476, comment a (1987). Since the beginning of extradition relations between Mexico and the United States one hundred thirty years ago, it has been clearly understood by both States that their extradition treaties were designed, among other things, to protect the sovereignty and territorial integrity of both States. United States Secretary of State Blaine acknowledged this principle well over a century ago when he advised the Governor of Texas that:

The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and *does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdiction of the other.*

³ 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, as amended by the Protocol of Buenos Aires of February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

⁴ See Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31, *reprinted* in 63 Am. J. Int'l L. 875, 885 (1969):

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2...

3. There shall be taken into account, together with the context: ... c. *any relevant rules of international law applicable in the relations between the parties* [Emphasis added.]

4 Moore, *Digest of International Law* § 603, at 330 (1906), emphasis added.

That the United States regarded the extradition treaty as the exclusive means by which Mexico could secure a person from the United States was also made clear by Secretary of State Bayard in 1887 when a Mexican national was seized in Texas by a Mexican police officer with the aid of local deputy sheriffs and forced across the border to Mexico. Mr. Bayard stated that the wanted person's return to Mexico was «obtained not in accordance with, but in fraud of existing treaties». 2 Moore, *supra* § 204, at 276. Nothing in the negotiating history of the three successive extradition treaties that Mexico entered into with the United States, beginning in 1862⁵, or in the diplomatic correspondence between them following the entry into force of these treaties, lends support to the view pressed by the United States that the police authorities of the signatory states may, consistently with the detailed stipulations of an extradition treaty, make «extraterritorial arrests» in the territory of the other «outside the extradition context» (Pet. Br. at 21). The acknowledgement of this extraterritorial right in either Party would have constituted such a radical departure from the very *raison d'être* of extradition treaties, that it would have excited contemporary comment. No consent to arrests in the territory of the other party is discernible from the text, history or purpose of the treaty. The United States does not, and cannot, point to any source that would support its thesis —a thesis that it announces here for the first time. Had the United States at any time insisted on such a reservation to the treaty, its extradition relations with Mexico would have ended.

Respondent's Abduction Has Deprived Him of the Special Safeguards Stipulated in the Treaty for Nationals of the Signatory States.

⁵ The precursors of the current extradition treaty between Mexico and the United States are the treaty of May 20, 1862, 12 Stat. 1199, T.S. No. 209 (terminated January 24, 1899), and the treaty of April, 22, 1899, 31 Stat. 1818, T.S. No. 242, with supplements of 1903, 1926 and 1941 (terminated January 25, 1980).

1. Article 9 of the 1978 extradition treaty provides (J.A. at 76):

Extradition of Nationals

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of persecution, provided that Party has jurisdiction over the offense.

This Article takes into account the provisions of the Mexican Law on International Extradition ⁶ which prohibit the extradition of its nationals. The United States fully understood this to be the law of Mexico and agreed in Art. 9 of the treaty that extradition of Mexican nationals was subject to a special regime.

In submitting the treaty to the Senate for its advice and consent, President Carter's message provided an article –by article analysis prepared by the Department of State ⁷, which described the import of Art. 9 thus:

Article 9 deals with the extradition of nationals. It is similar to provisions in some of our other recently signed extradition treaties. It grants the executive the discretionary power to extradite its own nationals. If extradition is denied on the basis of nationality, the requested Party undertakes to submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense. *This article thus takes into account the law of Mexico prohibiting the extradition of its nationals but allowing for their prosecution in Mexico for offenses committed abroad* [Emphasis added].

The United States' brief makes light of the Mexican government's discharge of its domestic legal order when it complains that «to date,

⁶ Art. 14 of the *Ley de Extradición Internacional* of December 22, 1975, provides: No Mexican shall be extradited to a foreign state except in exceptional cases in the discretion of the Executive (informal translation).

⁷ Exec. Rep. M, Extradition Treaty with the United Mexican States, 96th Cong., 1st Sess. VI (1979) (Letter of Submittal by Secretary of State Cyrus Vance).

the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States» (Pet. Br. at 21 n. 17). The accompanying sentence in the text is ominous: «[N]othing in our extradition treaty with Mexico affirmatively indicates that a defendant who has been forcibly abducted from that country is immune from prosecution in an American court» (Id. at 20). It then proceeds to justify the abduction by stating: «Yet if respondent is repatriated to Mexico, *he will acquire just such an immunity form prosecution*» (Id. at 20-21, emphasis added). The assertion is demonstrably false.

A Mexican national accused of having committed a crime on Mexican soil does not, by reason of being abducted to a foreign country, become «immune» form prosecution. Along with all citizens and residents, he enjoys the rights guaranteed to him by the Constitution, treaties and laws of Mexico⁸. One of these rights is to be tried by the courts of Mexico for an offense committed in Mexico. The United States' abduction seeks to deny to the respondent that right — a right also guaranteed by Article 9(2) of the extradition treaty⁹. There can,

⁸ The Mexican Political Constitution provides in relevant part:
«Article 14... No person shall be deprived of life, liberty, property, possessions, or rights without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect prior to the act.

In criminal cases no penalty shall be imposed by more analogy on convincing rationale but rather must be based on a law which is in precisely applicable to the crime in question...

Article 16. No one shall be disturbed in his person, family, domicile, documents or possessions except by virtue of a written order by the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, unless such arrest or detention is preceded by a charge, accusation, or complaint concerning a specific act punishable by physical punishment, made by a credible party, supported by a sworn affidavit or by other evidence indicating the probable guilt of the accused...».

⁹ Mexican municipal law makes no distinction between «self-executing» treaties and those that merely constitute a contract between States, as known in United States law.

Article 133 of the Mexican Political Constitution provides:

«This Constitution, the laws of the congress of the Union which emanate there from, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Laws throughout the Union. The judges of each State shall conform to the said Constitution, the law, and treaties, notwithstanding any contradictory provisions that may appear in the Constitution or laws of the States.

A treaty that has been approved by the Mexican Senate and proclaimed by the President forms part of the municipal law of Mexico and confers personal rights on individuals that are enforceable in Mexican courts».

of course, be no question that the courts of Mexico are competent and obligated to try the offenses with which the respondent is charged.

The United States-sponsored abduction plainly denied to the respondent the procedural rights guaranteed to him by Articles 14 and 16 of the Mexican Constitution, by Article 3 of the extradition treaty ¹⁰ and by Article 16 of the Mexican Extradition Law ¹¹, to have the inculpatory evidence against him reviewed by an impartial Mexican magistrate before he was deprived of his liberty.

The United States' answer to the deprivation of all of these rights is simply that since respondent was not extradited under the treaty, he has no rights (Pet. Br. at 13). Mexico disagrees. The extradition treaty governs comprehensively the delivery of all persons requested for extradition «for an offense committed within the territory of the requesting Party» (Article 1(1)), and, as in this case, for an offense committed inside the territory of the requested party (Article 1(2)). In consequence, the United States' failure to use the extradition treaty deprived Mexico of its sovereign right to prosecute the respondent in its domestic courts and denied to respondent the rights guaranteed him by the Mexican Constitution, treaties and laws. The frustration and denial of these rights constitute independent material breaches of the treaty.

¹⁰ Article 3 of the treaty provides in relevant part:
Evidence Required.

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party... to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place.

¹¹ Article 16 of the Mexican Extradition Law requires that the Mexican authorities be furnished: The formal extradition request and the documents on which it is based by the requesting State must include:

I. Specification of the crime for which the extradition is sought.

II. Proof that the crime has been committed and the probable involvement of the accused. If the accused has been convicted by the courts of the requesting state, it will suffice to submit an authenticated copy of the final judgment.

III...

IV. A copy of the legal provisions of the requesting State, with regard to the definition of the crime and the punishment, and the corresponding statute of limitations, as well as an authorized statement of the fact that said provisions and statute were in force at the time the crime was committed.

V. The original warrant of arrest which may have been issued against the accused.

*Respondent's Abduction Violated Three Other Recent Accords
between Mexico and the United States*

Three other accords presently in force between Mexico and the United States emphasize Mexico's willingness to provide the fullest cooperation in combating crime and narcotics trafficking, and in providing effective and timely, legal assistance to the United States. The United States' brief treats these accords with silence¹².

First, the 1987 Treaty of Cooperation for Mutual Legal Assistance¹³ expresses in its preamble the commitment of both States «to cooperate in the framework of their friendly relations, and to undertake mutual legal assistance *to provide the best administration of justice in criminal matters*» (Emphasis added). Thereafter, paragraph 2 of Article 1 of the Treaty sets forth the understanding of both States that:

This Treaty does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations [Emphasis is added].

¹² The treaties described in the text provide a «relevant rule of (conventional) international law» that governs the relations between Mexico and the United States within the purview of Art. 31 (3) of the Vienna Convention on the Law of Treaties, *supra*, n.4.

¹³ Treaty of Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, done in Mexico City December 9, 1987, entered into force for the United States, May 3, 1991, T.I.A.S. No. ---, *reprinted* in 27 I.L.M. 443 (1988). Article 1 provides as follows:

SCOPE OF THE TREATY

1. The Parties shall cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters, in accordance with the terms of this Treaty and subject to the limitations of their respective domestic legal provisions. Such assistance shall deal with the prevention, investigation and prosecution of crimes or any other criminal proceedings arising from acts which are within the competence or jurisdiction of the requesting Party at the time the assistance is requested, and in connection with ancillary proceedings of any other kind related to the criminal acts in question.

Second, the 1989 Agreement on Cooperation in Combating Narcotics Trafficking and Drug Dependency¹⁴ emphasizes in Article 1, that:

2. The Parties will fulfill their obligations under this Agreement *in accordance with the principles of self determination, non intervention in internal affairs, legal equality, and respect for the territorial integrity of States.*

3. *This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations. (Emphasis added).*

¹⁴ Agreement between the United States of America and the United Mexican State on Cooperation in Combating Narcotics Trafficking and Drug Dependency, done in Mexico City February 23, 1989, entered into force July 30, 1990, T.I.A.S. No. ---, *reprinted* in 29 I.L.M. 58 (1990).

The preambles and Article I state as follows:

The United States of America and the United Mexican States (the Parties), Aware of the need to protect the lives and health of their respective peoples from the serious effects of narcotics trafficking and drug dependency.

Agreeing that such conduct should be attacked comprehensively from four major areas: prevention and reduction of the illicit demand for narcotics and psychotropic substances; control of supply; suppression of illicit traffic; treatment and rehabilitation.

Acknowledging that the various aspect of narcotics trafficking and drug dependency threaten the security and the essential interests of each of the Parties;

Resolved to extend to each other the necessary cooperation to effectively combat narcotics trafficking and drug dependency, given the international scope and nature of these phenomena;

Encouraged by the spirit of the recommendations contained in the Comprehensive and Multidisciplinary Plan of Future Activities in the Control of the Improper Use of Drugs (the Plan) adopted at Vienna, Austria, on June 26, 1987, and

Inspired by the goal that cooperation under this Agreement complement the cooperation that both Parties provide in fulfillment of their international obligations under the United Nations Convention on Illicit Trafficking in Narcotics and Psychotropic Substances (the Convention), adopted at Vienna, on December 20, 1988,

Have agreed as follows:

ARTICLE I.

Scope of the Agreement.

1. The purpose of this Agreement is to promote cooperation between the Parties so that they can combat more efficiently narcotics trafficking and drug dependency, phenomena that transcend the boundaries of both countries.

The Parties shall adopt the necessary measures in fulfillment of the obligations they have entered into under this Agreement, including legislative and administrative measures, in conformity with the fundamental provisions of their respective internal legal systems.

2. The Parties will fulfill their obligations under this Agreement in accordance with the principles of self-determination, non-intervention in internal affairs, legal equality, and respect for the territorial integrity of States.

3. This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other party by its national laws or regulations.

Third, the multilateral 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs, which both Mexico and the United States have ratified ¹⁵, echoes the provisions of the two bilateral agreements between Mexico and the United States with respect to the observance of the principles of sovereign equality and territorial integrity by the High Contracting Parties.

These accords establish no new norms for the conduct of States. They codify the established rule of international law prohibiting the authorities of one State from performing police or other enforcement functions in the territory of another State without the express permission of the latter, and the principle that extradition treaties are designed, *inter alia*, to protect the territorial integrity and sovereignty of the Contracting States (See *supra*, pp.10-12). The United States conspicuously disregarded those principles, and the reciprocal pledges contained in those international accords when its agents arranged for respondent's forcible removal from Mexico.

b) The Rule Announced in Ker v. Illinois does not govern this Case

Ker v. Illinois ¹⁶, decided more than a century ago, concerned the prosecution in an Illinois court of an American citizen who was

¹⁵ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna, December 20, 1988, entered into force for the United States and for Mexico on November 11, 1990, T.I.A.S. No. ---, reprinted in 28, I.L.M. 493 (1989), defines the scope of the Conventions as follows:

ARTICLE 2.

Scope of the convention.

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. The parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law (Emphasis added).

¹⁶ 119 U.S. 436 (1886).

charged with larceny and embezzlement from a Chicago bank. Ker fled to Peru to escape prosecution and was forcibly returned by a private Pinkerton agent to Chicago to stand trial. Although the agent carried an extradition warrant for Ker's arrest which was to be presented to the local authorities, on his arrival in Lima, the agent found that the city was occupied by military forces of Chile. There apparently was no Peruvian government to which the extradition warrant could be presented¹⁷. The agent apprehended Ker and brought him forcibly to Chicago where he was tried and convicted. Peru at no time protested Ker's abduction.

The Illinois Supreme Court sustained the conviction and rejected Ker's defenses that the manner in which he had been brought before the court denied him due process of law and that as a result of his presence in Peru he had acquired a «positive right» that he could be removed from that country only under the extradition treaty. *Ker v. Illinois*. 110 Ill. 625 (1884). On writ of error to this Court, Ker again raised both defenses. Speaking for a unanimous Court, Justice Miller rejected the due process argument:

The «due process of law» here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.

119 U.S. at 440.

The court dismissed the asylum argument, stating:

There is no language in this treaty, or in any other treaty made by this country on the subject of extradition of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; ...

119 U.S. at 442.

¹⁷ The additional historical facts, not recorded in the Court's opinion, are taken from Fairman, *Ker v. Illinois Revisited*, 47 Am. J. Int'l L. 678 (1953).

As regards the extradition treaty with Peru, the Court observed:

Julian (The Pinkerton agent), in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, *and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.*

119. U.S. at 443, emphasis added.

Most relevantly to the present case, the Court declined to consider whether this private abduction constituted a violation of international law, leaving final determination of that question to the state courts as a matter of state law¹⁸:

The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection...

However, this may be, the decision of that question is as much within the province of the State court, as a question of common law, or of the law of the nations, of which that court is bound to take notice, as it is of the courts of the United States. *And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.*

119 U.S. at 444, emphasis added.

The distinctions between the factual and legal underpinnings of *Ker* and the instant case are palpable and striking:

¹⁸ It was less than three decades ago, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1984), that the Court squarely ruled that international law is *federal law*, and that state courts must follow the federal lead in ascertaining, interpreting and applying that body of law. «(R)ules of international law should not be left to divergent and perhaps parochial state interpretations». *Id.* at 425.

—In 1886, the legal protections afforded to individuals throughout the civilized world today and the emerging international law of human rights did not exist.

—Ker's abduction by a private agent was «without any pretense of authority... from the government of the United States». 119 U.S. at 443; here, the Court is faced with an abduction sponsored and financed by the United States and carried out by agents of the United States in the performance of their official functions.

—Ker, unlike the respondent, was a United States citizen who, under established doctrine, cannot invoke international law against his own sovereign, but must be satisfied with such protections as the Constitution and laws of the United States may afford to him; respondent is not so limited.

—Ker, unlike respondent, was charged with offenses which he committed solely in this country and he became a «fugitive from justice» in the dictionary sense of the term when he fled from the United States; respondent is charged with no offense committed in the United States and he did not flee to escape prosecution, nor did he seek asylum elsewhere ¹⁹.

—It is subject to doubt whether the extradition treaty between the United States and Peru was in force at the time of Ker's abduction, in light of the political instability in Peru when Ker was abducted; no such doubt exists here.

—*Ker* was a state prosecution in the 19th century, not a federal prosecution conducted in the last decade of this century.

¹⁹ Aside from the provisions of the extradition treaty, under international law Mexico has the primary right to place him on trial, both under principles of territoriality and nationality.

—Peru at no time protested Ker’s abduction through channels of diplomacy or by appearance in the United States courts, either at trial or on appeal.

It would be presumptuous for Mexico to comment whether the rule formulated by this Court in *Ker* should retain its vitality in the purely domestic context, as reaffirmed in *Frisbie v. Collins*, 3242 U.S. 519 (1952). Mexico submits that the court below was correct in its discriminating analysis and in declining to apply the *Ker rule* mechanically in an international abduction case, as the United States urges (Pet. Br. at 11-17). Blind adherence to doctrines formulated in another era, and disregard of international agreements to combat crime, will not further international efforts to bring criminals to justice.

It is true that numerous lower federal courts have struggled in recent years with various aspects of forcible seizure of suspects abroad in disregard of extradition treaties, and that they have felt bound by this Court’s pronouncement in *Ker*. Their decisions are, nevertheless, distinguishable from the facts here because of such factors as non involvement by agents of the United States in the forcible removal of the suspect from foreign territory²⁰; rendition of the suspects, or active assistance in their rendition to the United States, by the authorities of the territorial sovereign²¹; seizures of suspects in international waters²², or the tacit *condo nation* of the abduction by the sovereign in whose territory the abduction occurred²³.

The United States pleads with the Court to reaffirm the *Ker* rule in this case for the reason that «immunizing a defendant from *all* prosecution is too high a price to pay for an illegal arrest» (Br. at 17;

²⁰ E.g., *United States v. Lira*, 515 F.2d 68, 70-71 (2d Cir. 1975).

²¹ E.g., *United States v. Toro*, 840 F.2d 1221, 1229 (5th Cir. 1988); see also Verdugo-Urquidez, *supra*, 939 F.2d at 1353 n .2 (citing cases).

²² E.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

²³ E.g., *Matta-Ballesteros v. Henman*, 896 F.2d 225, 2560 (7th Cir.). Cert. denied, -- U.S. -- (1990); see also Verdugo-Urquidez, *supra*, 939 F.2d at 1349 n.9 and 1353 n. 12 (citing cases).

emphasis added). As Mexico pointed out earlier, the plea's premise is both false and disingenuous. Mexico does not appear in this Court in support of «immunizing» the respondent from prosecution²⁴; it respectfully asks the Court to recognize and enforce its right to try the respondent in its courts –a right which the United States acknowledged and agreed to in the extradition treaty, but which the United States seeks to deny to Mexico in this case.

c) International Law Mandates that Respondent be Returned to Mexico

This Court has uniformly recognized that prosecutions in American courts of violations of treaties and international law require the restoration of the *status quo ante*, and the release of persons or property prosecuted or seized in violation of the international commitments of the United States. See *e.g.*, ***United States v. Rauscher***, 119 U.S.407 (1886) (prosecution in violation of extradition treaty); ***Cook v. United State***, 288 U.S. 102 (1933) (seizure of property in violation of Convention to Prevent Smuggling); ***Ford v. United States***, 273 U.S. 593 (1927) (same); ***The Paquete Habana***, 175 U.S. 677 (1900) (condemnation of fishing vessels as prize of war in violation of international law);

²⁴ Mexican authorities commenced a criminal investigation in 1985 into the kidnapping and murder of DEA agent Enrique Camarena Salazar and Alfredo Zavala Avelar. Warrants of arrest were issued for Rafael Caro Quintero, Ernesto Fonseca Carrillo, and others in the state of Jalisco (Guadalajara) on charges of illegal deprivation of freedom in the form of abductions, homicides, and various narcotics offenses. They were charged with the offenses named on September 19, 1989, and were tried and convicted on December 12, 1989. The court imposed the maximum penalty on both defendant, viz., 40 years imprisonment, various fines and forfeiture of properties. The convictions were affirmed on appeal on August 10, 1980, by the Third District Criminal Court of the State of Jalisco. Nine of their principal associates were also convicted and sentenced for their complicity in the offenses.

In addition, Caro Quintero, Fonseca Carrillo and twenty-one of their associates were convicted and sentenced in the Federal District (Mexico City) for narcotics offenses, firearms offenses, criminal association and illegal deprivation of freedom offenses. In that case, Caro Quintero was sentenced to a separate 34-year prison term and Fonseca Carrillo was sentenced to a separate 11-1/2 year term. Their twenty-one associates received sentences ranging from 12-1/2 to 14-1/4 years, plus fines and forfeitures.

A third person, belied to be a principal in the Camarena case, Miguel Ángel Félix Gallardo, has also been arrested and is being tried, together with nine of his associates in the Federal District (Mexico City) on various narcotics trafficking, firearms and bribery charges.

They have been in custody since April 1989.

Cosgrove v. Winney, 174 U.S. 64 (1899) (prosecution for an offense committed prior to extradition). The court below was correct in relying on these decisions in formulating its order that the respondent be allowed to return to Mexico.

In its Judgment (indemnity phase) in the *Chorzów Factory* case (*Germany v. Poland*), 1928 P.C.I.J., ser. A, No.17, at 4, 47, the Permanent Court of International Justice ruled that restitution is the foremost remedy for international wrongful acts:

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals— is that *reparations must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed in that act had not been committed* (Emphasis added).

Among the ambitious studies in international law conducted under the auspices of Harvard University between the two world wars, the results of which were formulated in the form of «draft conventions», was a proposed convention on «Jurisdiction with Respect to Crime» 29. Am. J. Int'l L. Supp.435 (1935)²⁵. The scholars who participated in this project agreed that the following rule comprised a fair statement of customary international law with respect to transborder abductions that violate treaties:

²⁵ The Reporter and the Assistant Reporter of the project were Prof. Edwin D. Dickinson and Prof. William W. Bishop, Jr., respectively.

The advisory panel on the project consisted of a veritable Who's Who of American international law scholars and practitioners at the time: Judge Learned Hand; George W. Wickersham, former Attorney General of the United States; Elihu Root, former Secretary of State; Manley O. Hudson, former judge of the Permanent Court of International Justice and a member of the Permanent Court of Arbitration; Green H. Hackworth, Legal Advisor of the Department of State; Charles Chaney Hyde and James Brown Scott, former Solicitors of the Department of State; Philip C. Jessup, a future American judge on the International Court of Justice.

Article 16. *Apprehension in Violation of International Law*

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

29 Am. J. Int'l L. Supp. at 623.

In commenting on the rule, the project stated: «It is everywhere agreed of course, that «recourse to measures in violation of international law or international convention» in obtaining custody of a person charged with a crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise». *Id.* at 623-24. Writers and publicists on international law are near unanimous that the appropriate municipal law remedy for the United States' violation of the extradition treaty is respondent's discharge from the custody of the courts and his return to Mexico.

A former President of the Permanent Court of International Justice, and one of the most distinguished scholars on international law in the English speaking world, Hersch Lauterpacht, stated:

«The duty to respect the territorial supremacy of a foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. A State must not perform acts of sovereignty in the territory of another State».

1 *Oppenheim's International Law* 295 (Lauterpacht ed., 8th ed. 1955). To illustrate such an international delinquency, and the remedy therefore, Judge Lauterpacht refers to abductions from another State's territory:

It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of a crime. Apart from other satisfaction, *the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended* (Emphasis added).

Id. n. 1.

Contemporary American, English, Canadian and Latin American scholars and publicists support the view. See *e.g.*, Lowenfeld, U.S. *Law Enforcement Abroad: The Constitution in International Law*, Continued, 84 Am. J. Int'l L. 444, 474, 481 (1190); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 Minn. L. Rev. 91, 105 (1953); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 Brit. Yb. Int'l L. 265, 266 (1952); Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffe: A Case in Point*, 28 Crim. L. Q. 341, 348 (1986); Garcia Mora, *Criminal Jurisdiction of a State Over Fugitives Brought From a Foreign Country by Force or Fraud: A Comparative Study*, 32 Ind. L. J. 427, 430 (1957).

This Court's uniform holdings, beginning with *Rauscher, supra*, and the foregoing authorities support the view that if there was no jurisdiction in a State to make the original arrest or seizure, because it was in violation of a treaty or of international law, there is no jurisdiction in the courts to subject the person or property to its process²⁶. Restoration of the *status quo ante* is the only proper remedy for the violation of international law that occurred here.

²⁶ The United States reliance on *The Ship Richmond v. United States*, 9 Chanc (13 U.S.) 102 (1815) (Pet. Br. at 14 n.8) is misplaced. The holding of that case cannot be reconciled with this Court's decisions, *supra*, and *Richmond* must be regarded as having been overruled.

V. CONCLUSION

For the foregoing reasons, the Court of Appeals judgment ordering the respondent's repatriation should be affirmed.

Respectfully submitted,

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March 5, 1992.

Río de Janeiro, 18 de agosto de 1992

CJI/0/11

A Sua Excelencia el señor
Embajador Joao Clemente Baena Soares
Secretario General de la Organización de los Estados Americanos
Washington, D.C.
E.U.A.

Estimado señor Secretario General:

Como es del conocimiento de Vuestra Excelencia, el Consejo Permanente de la Organización de los Estados Americanos, en su sesión celebrada el 15 de julio de 1992, mediante resolución *CP/RES. 586 (909/92)*, acordó solicitar al Comité Jurídico Interamericano se sirva emitir una opinión en el presente período de sesiones, preferentemente, acerca de la juridicidad internacional de la sentencia de la Suprema Corte de Justicia de Estados Unidos en el caso *United States vs. Álvarez Machain*.

Al respecto, en su sesión realizada el 15 de agosto en curso, el Comité Jurídico Interamericano, por nueve votos a favor y una abstención, aprobó el documento *CJI/RES, II-15/92, titulado Opinión Jurídica sobre la Sentencia de la Suprema Corte de Justicia de los Estados Unidos de América*. Votaron afirmativamente los doctores José Luis Siqueiros, Eduardo Vío Grossi, Luis Herrera Marcano, Galo Leoro Franco, Juan Bautista Rivarola Paoli, Francisco Villagrán Kramer, Ramiro Saraiva Guerreiro, Jorge Reinaldo A. Vanossi y el suscrito. El voto de abstención correspondió al doctor Seymour J. Rubin.

De acuerdo a lo dispuesto en el artículo 37 del Reglamento del Comité y por haberlo anunciado en el momento de la votación, presentaron sus votos razonados concurrentes los doctores Eduardo Vío Grossi, Jorge Reinaldo A. Vanossi y el suscrito. El doctor Seymour J. Rubin presentó su voto razonado de abstención.

Tengo, pues, a honra de remitir al señor Secretario General y, por su digno conducto, al Consejo Permanente de la Organización de los Estados Americanos, el mencionado documento que contiene a continuación del mismo los referidos votos razonados.

Aprovecho la oportunidad para renovar a Vuestra Excelencia las seguridades de mi estima y más alta consideración.

Manuel A. Vieira (Rúbrica)
Presidente
Comité Jurídico Interamericano

CJI/RES.II-15/92

OPINIÓN JURÍDICA SOBRE LA SENTENCIA DE LA SUPREMA CORTE DE JUSTICIA DE LOS ESTADOS UNIDOS DE AMÉRICA

I. ANTECEDENTES

1. El Consejo Permanente de la Organización de los Estados Americanos, mediante Resolución *CP/RES.586 (909/92)*, de 15 de julio de 1992, solicitó a este Comité emitir una opinión, preferentemente en el período de sesiones que transcurre del 3 al 29 de agosto actual, acerca de la juridicidad internacional de la sentencia dictada por la Suprema Corte de los Estados Unidos de América, el 15 de junio de 1992, en el caso (recurso de *certiorari*) No.91-712, interpuesto por el Gobierno de los Estados Unidos de América, como peticionario *vs.* Humberto Álvarez Machain, acusado.

2. El texto de dicha resolución es el siguiente:

«EL CONSEJO PERMANENTE DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS

VISTOS:

Los artículos 104 y 105 de la Carta de la OEA, y

El artículo 12 del Estatuto del Comité Jurídico Interamericano, y

CONSIDERANDO:

La repercusión internacional, en particular en los Estados miembros de la Organización de los Estados Americanos, de la sentencia de la Corte Suprema de Justicia de los Estados Unidos de América de fecha 15 de junio de 1992, dictada en el caso número 91-712,

RESUELVE:

Solicitar al Comité Jurídico Interamericano se sirva emitir una opinión en su próximo período de sesiones, preferentemente, acerca de la jurisdicción internacional del referido fallo».

II. COMPETENCIA

3. El Comité Jurídico Interamericano estimó pertinente precisar, en primer término, los alcances de su competencia para emitir o rendir opiniones jurídicas solicitadas por otros órganos del Sistema Interamericano. El Comité consideró, para este caso, por siete votos contra dos, que los artículos 104 y 105 de la Carta establecen su competencia con suficiente claridad, máxime al tenerse presente que se trata de opiniones consultivas sin efectos obligatorios para el o los órganos que las solicitan.

III. LA SENTENCIA

4. Los términos de la cuestión planteada en la sentencia son textualmente los siguientes:

«El acusado, Humberto Álvarez Machain, es un ciudadano y residente de México. Fue acusado de participar en el secuestro y asesinato del agente especial de la *Drug Enforcement Administration* (DEA) de los Estados Unidos de América, Enrique Camarena Salazar y de un piloto mexicano que trabajaba con Camarena, Alfredo Zavala Avelar. La DEA cree que el acusado, que es médico, participó en el asesinato al prolongar la vida del agente Camarena a fin de que otros pudieran continuar torturándolo e interrogándolo.

»El 2 de abril de 1990, el acusado fue sustraído por la fuerza de su consultorio médico en Guadalajara, México, para ser trasladado en un avión privado a El Paso, Texas, donde fue arrestado por oficiales de la DEA. La Corte Federal del Noveno Distrito concluyó que los agentes de la DEA fueron responsables de la sustracción del acusado, aun cuando no estuvieron involucrados personalmente en la misma.

»El acusado promovió el desechamiento de la acusación, reclamando que su sustracción constituía una conducta gubernamental ultrajante y que la Corte de Distrito carecía de jurisdicción para enjuiciarlo, porque había sido sustraído

en violación al Tratado de Extradición vigente entre los Estados Unidos y México, suscrito el 4 de mayo de 1978. La Corte de Distrito rechazó la reclamación por conducta gubernamental ultrajante, pero sostuvo que carecía de jurisdicción para juzgar al acusado porque su sustracción violaba el Tratado de Extradición. La Corte de Distrito desechó los cargos y ordenó que el acusado fuera repatriado a México.

»La Corte de Apelaciones confirmó el desechamiento de la acusación y la orden de repatriación del acusado, apoyándose en su decisión en *United States vs. Verdugo Urquidez*. En Verdugo, la Corte de Apelaciones sostuvo que la sustracción forzosa de un nacional mexicano, con la autorización o participación de los Estados Unidos, violaba el Tratado de Extradición entre los Estados Unidos y México.

Aun cuando el Tratado no prohíbe expresamente tales sustracciones, la Corte de Apelaciones sostuvo que el propósito del tratado había sido violado por la sustracción forzosa, que junto con la protesta formal por parte del Estado ofendido, otorgaba al acusado el derecho de invocar la violación del tratado con el fin de impugnar la jurisdicción de la Corte de Distrito para juzgarlo. La Corte de Apelaciones estableció además que el remedio apropiado para tal violación sería el desechamiento de la acusación y la repatriación del acusado a México.

»En el presente caso, la Corte de Apelaciones confirmó la conclusión de la Corte de Distrito de que los Estados Unidos habían autorizado la sustracción del acusado, y de que las cartas [*Notas*] del Gobierno mexicano al de los Estados Unidos servían como una protesta oficial por la violación del tratado. En consecuencia, la Corte de Apelaciones ordenó que la acusación fuera desechada y que el acusado fuera repatriado a México».

5. Según se señala en el propio fallo:

«La controversia en este caso es si un acusado sustraído de un país con el cual los Estados Unidos tienen un tratado de extradición adquiere por esta razón una protección contra la jurisdicción de las cortes de los Estados Unidos. Nosotros sostenemos que no es así y que puede ser juzgado en una corte federal de distrito por violaciones al derecho penal de los Estados Unidos».

6. La Suprema Corte concedió el recurso de *certiorari* y revocó el fallo de la Corte de Apelaciones, expresando que:

«Podría ser cierto lo afirmado por el acusado y sus amici en el sentido de que el secuestro fue “escandaloso” y que el mismo constituye una violación

a los principios generales del Derecho Internacional. México ha protestado por la sustracción del acusado a través de notas diplomáticas y la decisión sobre si el acusado debería ser devuelto a México, como una materia al margen del Tratado es una decisión que corresponde al Poder Ejecutivo. No obstante concluimos que la sustracción del acusado no fue violatoria del Tratado de Extradición entre los Estados Unidos y México y por lo tanto, la resolución dictada en el caso Ker vs. Illinois es aplicable al presente caso. El hecho de que el acusado haya sido secuestrado en forma violenta no impide su enjuiciamiento en una Corte de los Estados Unidos por violaciones a las leyes penales de este país.

»Por lo tanto la resolución respectiva dictada por la Corte de Apelaciones queda sin efecto y el presente caso se sujetará en lo sucesivo a lo dispuesto en esta resolución.

Así se ordenó».

IV. OPINIÓN DEL COMITÉ JURÍDICO INTERAMERICANO

7. La presente opinión, conforme a lo solicitado, se limita a analizar la sentencia de la Corte Suprema de los Estados Unidos de América desde el punto de vista de su conformidad con el Derecho Internacional Público. No le corresponde al Comité opinar acerca de la conformidad de dicha sentencia con el derecho interno de los Estados Unidos, pero recuerda que es norma indiscutible del Derecho Internacional que las disposiciones del derecho interno de un Estado no pueden ser invocadas por éste para eludir el cumplimiento de sus obligaciones internacionales.

8. El Comité tuvo presente que el Estado es responsable por la violación de sus obligaciones internacionales, no sólo por el Poder Ejecutivo sino por cualquiera de sus órganos, incluido el Poder Judicial y que los actos u omisiones de éste pueden constituir transgresiones del Derecho Internacional, bien en sí mismos o bien por confirmar o dejar sin remedio violaciones de otros órganos estatales.

9. El Comité se ha basado, en cuanto a los hechos, exclusivamente en lo afirmado como indiscutido en la misma sentencia que estudia.

Así, da por cierto que el ciudadano mexicano Humberto Álvarez Machain fue secuestrado en territorio mexicano y llevado a territorio de los Estados Unidos y que la responsabilidad de ese secuestro corresponde a la *Drug Enforcement Administration (DEA)*, órgano del Gobierno de los Estados Unidos de América que tiene a su cargo la lucha contra el tráfico de estupefacientes.

Del mismo modo, el Comité considera que está fuera de toda discusión y duda que el secuestro en cuestión configure una grave violación del Derecho Internacional Público, pues constituye una trasgresión de la soberanía territorial de México. Tampoco se discute la responsabilidad de los Estados Unidos de América por la conducta de la DEA en este caso, pues, en pleno conocimiento de la misma, se ha abstenido de revertirla.

10. De conformidad con las normas que rigen la responsabilidad estatal en Derecho Internacional, todo Estado que viole una obligación internacional debe reparar las consecuencias de esa violación. La reparación tiene por objeto volver en todo lo posible las cosas al estado en que se encontraban antes de suceder la trasgresión. Sólo en la medida en que esto resultara imposible o que la parte agraviada consintiera en ello, habría lugar a una reparación sustitutiva.

11. En virtud de lo antes expuesto, es claro que los Estados Unidos de América, como responsable de la violación de la soberanía de México por el secuestro del ciudadano mexicano Humberto Álvarez Machain, está obligado a repatriarlo, sin perjuicio de otras reparaciones a que su conducta haya podido dar lugar.

12. El análisis de la sentencia de la Corte Suprema de los Estados Unidos lleva al Comité a la conclusión que la misma es contraria a las normas del Derecho Internacional por las razones siguientes:

a) Porque al afirmar la jurisdicción de los Estados Unidos de América para juzgar al ciudadano mexicano Humberto Álvarez Machain, sustraído por la fuerza en su país de origen, desconoce

la obligación de los Estados Unidos de restituirlo al país de cuya jurisdicción fue secuestrado.

b) Porque al sostener la tesis de que los Estados Unidos de América son libres de juzgar personas secuestradas a través de la acción de su gobierno en territorio de otros Estados, a menos que ello esté expresamente prohibido por un tratado vigente entre Estados Unidos y el país de que se trate, desconoce el principio fundamental de Derecho Internacional que es el respeto a la soberanía territorial de los Estados.

c) Porque al interpretar el Tratado de Extradición entre los Estados Unidos de América y México, en el sentido de que no es impedimento para el secuestro de personas, hace caso omiso del precepto según el cual los tratados deben interpretarse de conformidad con su objeto y fin en relación a las normas aplicables y principios del Derecho Internacional.

13. Finalmente, observa el Comité que si los principios invocados en la sentencia en estudio fueran llevados a sus últimas consecuencias, quedaría irremediablemente quebrantado el orden jurídico internacional, al atribuirse cada Estado la facultad de violar impunemente la soberanía territorial de los demás Estados. Debe igualmente subrayar el Comité la incompatibilidad de la práctica del secuestro con el debido proceso que corresponde a toda persona, por grave que sea el crimen del que se le acuse, y que constituye uno de los derechos humanos consagrados por el Derecho Internacional.

Esta Opinión fue aprobada por nueve votos a favor y una abstención.

Río de Janeiro, 15 de agosto de 1992.

Manuel A. Vieira
(Rúbrica)
Seymour J. Rubin
(Rúbrica)

Luis Herrera Marcano
(Rúbrica)
Juan Bautista Rivarola Paoli
(Rúbrica)
Ramiro Saraiva Guerreiro
(Rúbrica)
José Luis Siqueiros
(Rúbrica)
Eduardo Vío Grossi
(Rúbrica)
Galo Leoro Franco
(Rúbrica)
Francisco Villagrán Kramer
(Rúbrica)
Jorge Reinaldo A. Vanossi
(Rúbrica)

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**LEGAL OPINION OF THE INTER
AMERICAN JURIDICAL COMMITTEE ON
THE RESOLUTION CP/RES.586 (909/92)
OF THE PERMANENT COUNCIL OF THE
ORGANIZATION OF AMERICAN STATES
ABOUT THE DECISION ISSUED BY THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA IN THE CASE US VS. ALVAREZ
MACHAIN**

**EXPLANATION OF VOTE BY
DR. SEYMOUR J. RUBIN**

I have abstained from voting on approval or disapproval of the Report of the Committee on the above cited matter. My reasons are as follows:

1. I have expressed my strong views during the course of the extensive discussion of this matter in the Committee to the effect that,

a) The Committee does not have jurisdiction to issue an opinion on the basis of a resolution on the legality or not of a judgment issued by the Supreme Judicial Authority of one of the member States;

b) I am firmly of the opinion that the acts committed by agents of the United States Drug Enforcement Administration were a clear violation of International Law;

2. Clearly, whatever the language used in the resolution of the Permanent Council, the Committee is being asked to issue an opinion directly as to the validity of a decision of the Supreme Court of the United States. In doing so, the Committee would be assuming the role

of a judicial court or an arbitral tribunal. The Committee has no jurisdiction to act in this way. To make such a decision would require the Committee to provide a procedure for the hearing of arguments and the filing of briefs, in other words, to give the parties in interest the kind of opportunity which due process requires in a judicial or arbitral procedure. Therefore in this case and following the arguments which I have previously expressed to the Juridical Committee when it sought to make a decision as to the merits of the controverted case, I have consistently, in statements which are on record, made the point that the Inter American Juridical Committee cannot take action of this sort. However one reads articles 104 and 105 of the Charter, they make it clear that Juridical Committee is to take cognizance of juridical —not judicial— matters. My position on this point has been made clear over the years and I am equally convinced here —as I was in cases involving legal claims to the Panama Canal Zone, to the Falkland (Malvinas) Islands, and to the dispute of territory of Belize—, that the Committee should not take up this aspect of the resolution of the Permanent Council.

3. I am however equally convinced that the intrusion of agents of the United States of America into Mexico to kidnap and to bring back to the United States Dr. Álvarez Machain was an illegal act, illegal under all standards of International Law. I have also stated this on record.

4. Therefore in so far as the report under consideration by the Committee purports to decide —whether by binding opinion or not— that a specific decision of the Supreme Court of the United States is wrong or *internationally illegal*, I believe that the Committee has no competence or jurisdiction under its statute —that is, the OAS Charter. On the merits, as I have said, my own opinion is that an act violative of International Law has been committed.

5. Finally, the argument has been made in the Committee that the Committee as an organ of the OAS has a duty to respond to requests made to it by the Permanent Council. In a sense, I agree

that the Committee does have an obligation to reply. But the request of the Permanent Council cannot confer upon the Committee an authority which is not conferred on either the Permanent Council or the Committee by the Charter of the OAS. The proper reply to the Permanent Council should be an analysis of International Law considerations which are raised by the case at hand, but not an opinion, advisory or otherwise, with respect to the correctness of a ruling of the Supreme Tribunal of one of the member States.

It is my belief that for the Committee to do this would be itself an intrusion prohibited by the Charter of the OAS.

6. In summary, therefore, I believe that there has been a clear violation of International Law. But I do not believe that the Committee has a right to apply that conclusion to specifics of the case at hand. It is the nearly unanimous view of jurists the world over that a violation of International Law has taken place, I would hope that the matter will be corrected as soon as possible. I note that the United States has already indicated that it would take no further action of this sort. That should be stated. There are several possible ways of doing this. While the restitution of Álvarez Machain to Mexico is one such way, other cases, such as the Eichmann case in Argentina, indicate that there are other ways of handling a matter of this sort. I believe that this is a special case, and that its consequences for international law will be limited.

Seymour J. Rubin
(Rubric)

**DECRETO de promulgación del Tratado de
Extradición entre los Estados Unidos Mexicanos y
los Estados Unidos de América, firmado en México,
D.F., el 4 de mayo de 1978.**

(Publicado en *Diario Oficial* de
26 de febrero de 1980).

Secretaría de Relaciones Exteriores.

JOSÉ LÓPEZ PORTILLO, Presidente de los Estados Unidos Mexicanos, a sus habitantes, sabed:

Por Plenipotenciarios debidamente autorizados al efecto, se firmó en la Ciudad de México, Distrito Federal, el día cuatro del mes de mayo del año mil novecientos setenta y ocho, un Tratado de Extradición entre los Estados Unidos Mexicanos y los Estados Unidos de América, cuyo texto y forma en español constan en la copia certificada adjunta.

El anterior Tratado fue aprobado por la H. Cámara de Senadores del Congreso de la Unión, el día veinte del mes de diciembre del año mil novecientos setenta y ocho, según Decreto publicado en el Diario Oficial de la Federación del día veintitrés del mes de enero del año mil novecientos setenta y nueve.

El Canje de Instrumentos de Ratificación respectivo se efectuó en la ciudad de Washington, D.C., el día veinticuatro del mes de enero del año de mil novecientos ochenta.

Por lo tanto, para su debida observancia, en cumplimiento de lo dispuesto en la Fracción Primera del Artículo Ochenta y Nueve de la

Constitución Política de los Estados Unidos Mexicanos, promulgo el presente Decreto, en la residencia del Poder Ejecutivo Federal, en la Ciudad de México, Distrito Federal, a los doce días del mes de febrero del año mil novecientos ochenta.- *José López Portillo*. (Rúbrica). El Secretario de Relaciones Exteriores, *Jorge Castañeda*. (Rúbrica).

La C. Aída González Martínez, Oficial Mayor de la Secretaría de Relaciones Exteriores, certifica:

Que en los Archivos de esta Secretaría obra uno de los dos originales del Tratado de Extradición entre los Estados Unidos Mexicanos y los Estados Unidos de América, firmado en la Ciudad de México, Distrito Federal, el día cuatro del mes de mayo del año mil novecientos setenta y ocho, cuyo texto y forma en español son los siguientes:

TRATADO DE EXTRADICIÓN ENTRE LOS ESTADOS UNIDOS MEXICANOS Y LOS ESTADOS UNIDOS DE AMÉRICA

El Gobierno de los Estados Unidos Mexicanos y el Gobierno de los Estados Unidos de América.

Deseosos de cooperar más estrechamente en la lucha contra la delincuencia y de prestarse mutuamente, con ese fin, una mayor asistencia en materia de extradición,

Han acordado lo siguiente:

Artículo 1 Obligaciones de Extraditar

1. Las Partes Contratantes se comprometen a entregarse mutuamente, con sujeción a las disposiciones de este Tratado, a las personas respecto de las cuales las autoridades competentes de la Parte requirente hayan iniciado un procedimiento penal o que hayan sido

declaradas responsables de un delito o que sean reclamadas por dichas autoridades para el cumplimiento de una pena de privación de libertad impuesta judicialmente, por un delito cometido dentro del territorio de la Parte requirente.

2. Cuando el delito se haya cometido fuera del territorio de la Parte requirente, la Parte requerida concederá la extradición si:

a) Sus leyes disponen el castigo de dicho delito cometido en circunstancias similares, o

b) La persona reclamada es nacional de la Parte requirente, y ésta tiene jurisdicción de acuerdo con sus leyes para juzgar a dicha persona.

Artículo 2

Delitos que Darán Lugar a la Extradición

1. Darán lugar a la extradición conforme a este Tratado las conductas intencionales que, encajando dentro de cualquiera de los incisos del Apéndice, sean punibles conforme a las leyes de ambas Partes Contratantes con una pena de privación de la libertad cuyo máximo no sea menor de un año.

2. Si la extradición se solicita para la ejecución de una sentencia, se requerirá además que la parte de la sentencia que aún falte por cumplir no sea menor de seis meses.

3. Darán también lugar a la extradición las conductas intencionales que, sin estar incluidas en el Apéndice, sean punibles, conforme a las leyes federales de ambas Partes Contratantes, con una pena de privación de la libertad cuyo máximo no sea menor de un año.

4. Bajo las condiciones establecidas en los párrafos 1, 2 y 3, la extradición también será concedida:

a) Por la tentativa de cometer un delito; la asociación para prepararlo y ejecutarlo; o la participación en su ejecución; o

b) Cuando para los efectos de atribuir jurisdicción al Gobierno de los Estados Unidos, el transporte de personas o de bienes el uso de correos u otros medios de realizar actos de comercio interestatal o con el extranjero sea un elemento del delito.

Artículo 3 Pruebas Necesarias

Sólo se concederá la extradición si se determina que las pruebas son suficientes, conforme a las leyes de la Parte requerida, bien para justificar el enjuiciamiento del reclamado, si el delito del cual se le acusa hubiese sido cometido en ese lugar, bien para probar que es la persona condenada por los tribunales de la Parte requirente.

Artículo 4 Ámbito Territorial de Aplicación

1. A los efectos de este Tratado, el territorio de una de las Partes Contratantes comprende todo el territorio sometido a su jurisdicción, incluyendo el espacio aéreo y las aguas territoriales, así como los buques y aviones matriculados en ella, siempre que, tratándose de estos últimos, se hayan encontrado en vuelo en el momento de cometerse el delito.

2. Para los efectos de este Tratado, una aeronave será considerada en vuelo todo el tiempo que medie entre el momento en que todas las puertas que dan al exterior hayan sido cerradas, con posterioridad al embarque, hasta el momento en que cualquiera de esas puertas sea abierta para el desembarque.

Artículo 5
Delitos Políticos y Militares

1. No se concederá la extradición si el delito por el cual fue solicitada es político o de carácter político.

En caso de surgir cualquier cuestión respecto de la aplicación del párrafo anterior, corresponderá decidir al Poder Ejecutivo de la Parte requerida.

2. Para los efectos de este Tratado, los siguientes delitos no se consideran incluidos en el párrafo 1:

a) El homicidio u otro delito intencional contra la vida o la integridad física de un Jefe de Estado o de Gobierno o de un miembro de su familia, incluyendo la tentativa de cometer un delito de esa índole;

b) Un delito que las Partes Contratantes tenga la obligación de perseguir en virtud de un convenio internacional multilateral;

3. No se concederá la extradición cuando el delito por el cual fue solicitada sea un delito puramente militar.

Artículo 6
Nom bis in Ídem

No se concederá la extradición cuando el reclamado haya sido sometido a proceso o haya sido juzgado y condenado o absuelto por la Parte requerida por el mismo delito en que se apoya la solicitud de extradición.

Artículo 7
Prescripción

No se concederá la extradición cuando la acción penal o la pena por la cual se pide la extradición hayan prescrito conforme a las leyes de la Parte requirente o de la Parte requerida.

Artículo 8
Pena de Muerte

Cuando el delito por el cual se solicita la extradición sea punible con la pena de muerte conforme a las leyes de la Parte requirente y las leyes de la Parte requerida no permitan tal pena para ese delito, la extradición podrá ser rehusada, a menos que la Parte requirente dé las seguridades que la Parte requerida estime suficientes de que no se impondrá la pena de muerte o de que, si es impuesta, no será ejecutada.

Artículo 9
Extradición de Nacionales

1. Ninguna de las dos Partes Contratantes estará obligada a entregar a sus nacionales pero el Poder Ejecutivo de la Parte requerida tendrá la facultad, si no se lo impiden sus leyes, de entregarlos si, a su entera discreción, lo estiman procedente.

2. Si la extradición no es concedida en virtud de lo dispuesto en el párrafo 1 de este artículo, la Parte requerida turnará el expediente a sus autoridades competentes para el ejercicio de la acción penal, siempre y cuando dicha Parte tenga jurisdicción para perseguir el delito.

Artículo 10
Procedimientos para la Extradición y
Documentos que son Necesarios

1. La solicitud de extradición se presentará por vía diplomática.

2. La solicitud de extradición deberá contener la expresión del delito por el cual se impide la extradición y será acompañada de:

a) Una relación de los hechos imputados;

b) El texto de las disposiciones legales que fijen los elementos constituidos del delito;

c) El texto de las disposiciones legales que determinen la pena correspondiente al delito;

d) El texto de las disposiciones legales relativas a la prescripción de la acción penal o de la pena;

e) Los datos y antecedentes personales del reclamado que permitan su identificación y, siempre que sea posible, los conducentes a su localización.

3. Cuando la solicitud de extradición se refiera a una persona que aún no haya sido sentenciada se le anexarán además:

a) Una copia certificada de la orden de aprehensión librada por un juez u otro funcionario judicial de la Parte requirente;

b) Las pruebas que conforme a las leyes de la Parte requerida justificarían la aprehensión y enjuiciamiento del reclamado, en caso de que el delito se hubiere cometido allí.

4. Cuando la solicitud de extradición se refiera a una persona sentenciada, se le anexará una copia certificada de la sentencia condenatoria decretada por un tribunal de la Parte requirente.

Si la persona fue declarada culpable, pero no se fijó la pena, a la solicitud de extradición se agregará una certificación al respecto y una copia certificada de la orden de aprehensión.

Si a dicha persona ya se le impuso una pena, la solicitud de extradición deberá estar acompañada de una certificación de la pena impuesta y de una constancia que indique la parte de la pena que aún no haya sido cumplida.

5. Todos los documentos que deban ser presentados por la Parte requirente conforme a las disposiciones de este Tratado deberán estar acompañadas de una traducción al idioma de la Parte requerida.

6. Los documentos que, de acuerdo con este artículo, deban acompañar la solicitud de extradición, serán recibidos como prueba cuando:

a) En el caso de una solicitud que se origine en los Estados Unidos, estén autorizados con el sello oficial del Departamento de Estado y legalizados además en la forma que prescriba la ley mexicana;

b) En el caso de una solicitud que se origine en los Estados Unidos Mexicanos estén legalizados por el principal funcionario diplomático o consular de los Estados Unidos en México.

Artículo 11

Detención Provisional

1. En caso de urgencia, cualquiera de las Partes Contratantes podrá pedir, por la vía diplomática, la detención provisional de una persona acusada o sentenciada. El pedimento deberá contener la expresión del delito por el cual se pide la extradición, la descripción del reclamado y su paradero, la promesa de formalizar la solicitud de extradición y una declaración de la existencia de una orden de aprehensión librada por autoridad judicial competente o de una sentencia condenatoria en contra del reclamado.

2. Al recibo de un pedimento de esa naturaleza, la Parte requerida tomará las medidas necesarias para obtener la aprehensión del reclamado.

3. Se pondrá fin a la detención provisional si, dentro de un plazo de sesenta días después de la aprehensión del reclamado, el Poder Ejecutivo de la Parte requerida no ha recibido la solicitud formal de extradición con los documentos mencionados en el artículo 10.

4. El hecho de que no se ponga fin a la detención provisional en aplicación del párrafo 3 no impedirá la extradición del reclamado si la solicitud de extradición y los documentos necesarios para fundarla, enumerados en el artículo 10, son entregados posteriormente.

Artículo 12 **Pruebas Adicionales**

Si el Poder Ejecutivo de la Parte requerida estima que las pruebas presentadas en apoyo de la solicitud de extradición no son suficientes para satisfacer los requisitos de este Tratado, dicha Parte solicitará la presentación de las pruebas adicionales que sean necesarias.

Artículo 13 **Procedimiento**

1. La solicitud de extradición será tramitada de acuerdo con la legislación de la Parte requerida.

2. La Parte requerida dispondrá los procedimientos internos necesarios para dar curso a la solicitud de extradición.

3. Los funcionarios competentes de la Parte requerida quedarán autorizados para emplear todos los medios legales a su alcance con el fin de obtener de las autoridades judiciales las decisiones necesarias para la resolución de la solicitud de extradición.

Artículo 14 **Resolución y Entrega**

1. La Parte requerida comunicará sin demora a la Parte requirente su resolución respecto de la solicitud de extradición.

2. En caso de denegación total o parcial de una solicitud de extradición, la Parte requerida expondrá las razones en que se haya fundado.

3. Si se concede la extradición, la entrega del reclamado se hará dentro de un plazo que fijen las leyes de la Parte requerida. Las autoridades competentes de las Partes Contratantes convendrán en el día y lugar de entrega del reclamado.

4. Si la autoridad competente ha expedido el mandamiento u orden para la extradición del reclamado y éste no es llevado fuera del territorio de la Parte requerida dentro del plazo prescrito, será puesto en libertad y la Parte requerida podrá posteriormente negarse a extraditarlo por el mismo delito.

Artículo 15 **Entrega Diferida**

La parte requerida podrá, después de acceder a la extradición diferir la entrega del reclamado cuando existan procedimientos en curso en contra de él o cuando se encuentre cumpliendo una pena en el territorio de la Parte requerida por un delito distinto, hasta la conclusión del procedimiento o la plena ejecución de la sanción que le haya sido impuesta.

Artículo 16 **Solicitudes de Extradición de Terceros Estados**

La Parte requerida, en caso de recibir solicitudes de la otra Parte Contratante y de uno o varios terceros Estados para la extradición de la misma persona, ya sea por el mismo delito o por delitos distintos, decidirá a cuál de los Estados requirentes concederá la extradición de dicha persona.

Artículo 17
Regla de la Especialidad

1. Una persona extraditada conforme al presente Tratado no será detenida, enjuiciada o sancionada en el territorio de la Parte requirente por un delito distinto de aquél por el cual se concedió le extradición, ni será extraditada por dicha Parte a un tercer Estado a menos que;

a) Haya abandonado el territorio de la Parte requirente después de su extradición y haya regresado voluntariamente a él;

b) No haya abandonado el territorio de la Parte requirente dentro de los 60 días siguientes a la fecha en que haya estado en libertad de hacerlo; o

c) La Parte requerida haya dado su consentimiento para que sea detenida, enjuiciada, sancionada o extraditada a un tercer Estado por un delito distinto de aquél por el cual se concedió la extradición.

Estas disposiciones no se aplicarán a delitos cometidos después de la extradición.

2. Si, en el curso del procedimiento se cambia la calificación del delito por el cual el reclamado fue extraditado, será enjuiciado y sentenciado a condición de que el delito, en su nueva configuración legal;

a) Esté fundado en el mismo conjunto de hechos establecidos en la solicitud de extradición y en los documentos presentados en su apoyo; y

b) Sea punible con la misma pena máxima que el delito por el cual fue extraditado o con una pena cuyo máximo sea menor.

Artículo 18 **Extradición Sumaria**

Si el reclamado manifiesta a las autoridades competentes de la Parte requerida que consiente en ser extraditado, dicha Parte podrá conceder su extradición sin mayores trámites y tomará todas las medidas permitidas por sus leyes para expedir la extradición. No será aplicable en estos casos el artículo 17.

Artículo 19 **Entrega de Objetos**

1. En la medida en que lo permitan las leyes de la Parte requerida y sin perjuicio de los derechos de terceros, los cuales serán debidamente respetados, todos los Artículos, instrumentos objetos de valor o documentos relacionados con el delito, aun cuando no hayan sido utilizados para su ejecución, o que de cualquier manera puedan servir de prueba en el proceso, serán entregados al concederse la extradición, aun cuando la extradición no pueda consumarse por la muerte, desaparición o fuga del acusado.

2. La Parte requerida podrá condicionar la entrega de objetos a que la Parte requirente dé seguridades satisfactorias de que tales objetos sean devueltos a la Parte requerida a la brevedad posible.

Artículo 20 **Tránsito**

1. El tránsito por el territorio de una de las Partes Contratantes de una persona que no sea nacional de esa Parte Contratante, entregada a la otra Parte Contratante por un tercer Estado, será permitido mediante la presentación por la vía diplomática de una copia certificada de la resolución en la que se concedió la extradición, siempre que no se opongan razones de orden público.

2. Corresponderá a las autoridades del Estado de tránsito la custodia del extraditado mientras permanezca en su territorio.

3. La Parte requirente reembolsará al Estado de tránsito cualquier gasto en que éste incurra con tal motivo.

Artículo 21 **Gastos**

La Parte requerida se hará cargo de todos los gastos que ocasionen los procedimientos internos mencionados en el Artículo 13, con excepción de los gastos inherentes a la traducción de documentos y, en su caso, al transporte del reclamado, los cuales serán expensados por la Parte requirente.

Artículo 22 **Ámbito Temporal de Aplicación**

1. Este Tratado se aplicará a los delitos especificados en el artículo 2 que hayan sido cometidos, ya sea antes o después de su entrada en vigor.

2. Las solicitudes de extradición que se encuentren en trámite en la fecha en que entre en vigor este Tratado serán resueltas conforme a las disposiciones del Tratado de 22 de febrero de 1899 y de las Convenciones Adicionales sobre Extradición de 25 de junio de 1902, 23 de diciembre de 1925 y 16 de agosto de 1939.

Artículo 23
Ratificación, Entrada en Vigor, Denuncia

1. Este Tratado está sujeto a ratificación; el canje de los instrumentos de ratificación se hará en la ciudad de Washington a la brevedad posible.

2. Este Tratado entrará en vigor en la fecha del canje de los instrumentos de ratificación.

3. Al entrar en vigor este Tratado, el Tratado de Extradición de 22 de febrero de 1899 y las Convenciones Adicionales sobre Extradición de 25 de junio de 1902, 23 de diciembre de 1925 y 16 de agosto de 1939 entre los Estados Unidos Mexicanos y los Estados Unidos de América dejarán de surtir efectos sin perjuicio de lo dispuesto en el artículo 22.

4. Cualquiera de las Partes Contratantes podrá poner término a este Tratado mediante aviso que dé a la otra Parte. La terminación surtirá efectos seis meses después del recibo de dicho aviso.

Hecho en dos originales, en español y en inglés, ambos igualmente válidos, en la Ciudad de México, a los cuatro días del mes de mayo del año mil novecientos setenta y ocho. Por el Gobierno de los Estados Unidos Mexicanos: *Santiago Roel García*. (Rúbrica). Por el Gobierno de los Estados Unidos de América: *Cyrus Vance* (Rúbrica).

Apéndice

1. Homicidio; parricidio; infanticidio; aborto.
2. Lesiones graves intencionales.
3. Abandono de menores u otros dependientes cuando haya peligro de daño o muerte.

4. Secuestro; privación ilegal de libertad; robo de infante; rapto.
5. Violación; estupro; atentado al pudor; corrupción de menores, incluyendo actos sexuales ilícitos cometidos con menores de edad.
6. Lenocinio.
7. Robo; robo con violencia; allanamiento de morada.
8. Fraude.
9. Abuso de confianza: peculado; malversación de fondos.
10. Delitos relativos a la falsificación en todas sus formas.
11. Extorsión; exacción ilegal.
12. Recibir o transportar sumas de dinero, valores o cualquier cosa a sabiendas de que fueron obtenidas delictuosamente.
13. Incendio intencional y daño intencional en propiedad ajena.
14. Delitos relativos al tráfico, posesión producción, elaboración, importación o exportación de drogas y productos químicos peligrosos incluyendo drogas narcóticas, *cannabis*, drogas psicotrópicas, opio, cocaína o sus derivados.
15. Delitos en materia de control de productos químicos venenosos o de sustancias dañinas a la salud.
16. Piratería.
17. Delitos contra la seguridad de los medios de transporte incluyendo cualquier acto que ponga en peligro a una persona en un medio de transporte.

18. Secuestro o apoderamiento ilegal de trenes, aeronaves, barcos u otros medios de transporte.

19. Delitos en materia de armas prohibidas y control de armas de fuego, municiones, explosivos, aparatos incendiarios o materias nucleares.

20. Delitos contra el comercio internacional y en materia de transmisión internacional de fondos y metales preciosos.

21. Delitos previstos en las leyes relativas a la importación, exportación o tránsito internacional de bienes, artículos o mercancías incluyendo objetos históricos o arqueológicos.

22. Delitos en materia aduanal.

23. Delitos previstos en las leyes relativas al control de sociedades mercantiles, instituciones bancarias y otras personas morales.

24. Delitos previstos en las leyes relacionadas con el mercado de valores, incluyendo la venta de acciones, bonos y títulos de crédito.

25. Delitos previstos en las leyes relacionadas con la quiebra o suspensión de pagos de una sociedad mercantil.

26. Delitos en materia de monopolios y de competencia desleal.

27. Delitos previstos en las leyes relacionadas con la protección de la propiedad industrial y derechos de autor.

28. Delitos previstos en las leyes relacionadas con el abuso de autoridad.

29. Cohecho y concusión.

30. Falsedad en declaraciones judiciales o en informes dados a una autoridad pública distinta de la judicial. Sobornar a otro para que se produzca con falsedad.

31. Delitos relativos a la obstrucción de la justicia, incluyendo el encubrimiento y la supresión de pruebas.

La presente es copia fiel y completa en español del tratado de Extradición entre los Estados Unidos Mexicanos y los Estados Unidos de América, firmado en la Ciudad de México, Distrito Federal, el día cuatro del mes de mayo del año mil novecientos setenta y ocho.

Extiendo la presente, en veinte páginas útiles, en Tlatelolco, Distrito Federal, a los ocho días del mes de febrero del año mil novecientos ochenta, a fin de incorporarla al Decreto de Promulgación respectivo. La Oficial Mayor, *Aída González Martínez*. (Rúbrica).

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