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New, Emerging World Order: Reflections of Tradition and Progression through the Eyes of Two Courts, A

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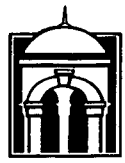

A NEW, EMERGING WORLD ORDER: REFLECTIONS OF TRADITION AND PROGRESSION THROUGH THE EYES OF TWO COURTS

I. INTRODUCTION

Our modern world is united. Since October 24, 1945, more than 170 nations of the world have united as members of an international Charter and its underlying organization, the United Nations. This Charter's primary objective, and that of the organization, is to save generations from the "scourge of war" by maintaining international peace and promoting a recognition of the fundamental rights of humankind.[1] In pursuit of this objective, the organization, through its Charter, has sought to change the perspective of the State from that of a self-serving and isolated entity to that of a smaller unit within a much larger world community. While this has "united" the nations of the world to some extent, it has gone further and altered the traditional perspective of State sovereignty by imposing international obligations and responsibilities upon the State, which make it answerable for its actions to the community-at-large.

The United Nations Charter serves as codification of fundamental law for the international community, and as such it embraces many functions. First among them, founding Member States intended that an organization of united nations strive to establish conditions under which justice and respect for obligations arising from treaties and other sources of international law could be maintained.[2] This particular charge has required Member States to place increased importance upon the harmonious observance and exercise of international law to ensure cooperation and respect between states are preserved. However, in the process of promoting international peace, requiring proper deference to international obligations, and furthering the purposes of the organization's goals, this charge has also altered the notion of sovereignty to

1. U.N. CHARTER pmbl. [hereinafter CHARTER].

2. *Id.* ¶ 3. *See also id.* art. 2(4) which calls upon States to refrain from the threat of force or use of force against the territorial integrity or political independence of any State. This article demonstrates the acknowledgment of international respect throughout the State system.

which States have always been accustomed and brought about increased international responsibility.

This comment identifies the growing recognition of international responsibility of the State throughout the world, focusing specifically on the reactions of two world leaders, the United States and the United Kingdom. It discusses a particular instance in which the highest courts of both States, relying upon their own domestic precedents and giving some credence to international persuasion from court and custom, ruled in an opposite manner on the issue of forced international extradition. It compares these decisions as exemplary of a struggle arising between the traditional concept of the "sovereign State" and the emerging idea of a "new world order" — a concept embodied in the Charter which sacrifices some State sovereignty for the greater good. The comment concludes with a discussion of the implications the two decisions may have upon the world community in light of its current advancement and evolution.

II. THE CONCEPT OF INTERNATIONAL LAW AND EXTRADITION

A. *The Sovereignty of States*

The notion of the sovereign State was conceived long ago. From the collapse of the Roman Empire to the present time, two distinct characteristics have stood out in a State's makeup: (1) States create geographic boundaries into which they gather populations; and (2) States select a form of government to serve those populations as needed.[3]

Sovereign States also maintain the prerogative and objective of being "free to order their own affairs, internally and externally, and they are not subordinate to any other political authority."[4] Accordingly, this notion yields the State wide latitude in its ability to both independently create and enforce laws which govern the relationships within its population.[5] To exercise this power, it is only logical that each State is therefore free to embrace the form of government of its choice and implement its chosen social, legal, and economic structure or philosophy.[6]

Another important interest to the sovereign State is the control and protection of its citizens. The State to which an individual belongs enjoys a certain degree of control over that person.[7] This control may take the form of certain public duties and obligations placed upon the citizen, but such duties and obligations do not cross national boundary lines. The individual is likewise afforded certain privileges and immunities which also do not cross boundaries and are not afforded to citizens of other States.[8] It is thus implicit in the

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3. *Cf.* the four "qualifications" afforded to States as noted in art. 1 of the Convention on Rights and Duties, Dec. 26, 1933, 49 Stat. 3097.

4. FREDERICK S. DUNN, THE PROTECTION OF NATIONALS - A STUDY IN THE APPLICATION OF INTERNATIONAL LAW 27 (1970).

5. *Id.*

6. *Id.*

7. *Id.* For related readings *see* GEOFFREY DE Q. WALKER, THE RULE OF LAW (1988).

8. DUNN, *supra* note 4, at 27-28.

makeup of a State that its government possess no power to control the citizens of another State, and that its populations do not reap benefits provided by another State without changing citizenship. In essence, States enjoy the right to be responsible for those populations existing within their geographic boundaries and to confer upon them privileges and rights not available to citizens of other States.

Sovereign States also possess the ability to create agreements between themselves and other States. Obviously, the fact that States must interact and, to some extent, need to act in harmony compels the use of international pacting. These agreements usually relate to commerce and industry, but they may extend to areas such as personal jurisdiction, e.g., one State's ability to assert control over certain citizens of the other. This concept has been recognized as a common tool facilitating State concerns throughout the world; it is known as extradition.[9]

Extradition treaties confer upon the contracting States a greater degree of control over certain citizens of the States with which they contract. They set forth particular guidelines by which a transfer of nationals may occur, thus putting into place a means by which a State may lawfully, and with respect for the sovereignty of the other, exercise jurisdiction over a particular national of the other State. It has been the unfortunate practice of States however, to act under preconceived notions of sovereignty to evade existing extradition treaties under which foreign nationals could have been properly extradited.

M. Cherif Bassiouni[10] recognized three basic techniques States employ which essentially serve to "dodge" the extradition process. They are:

> (1) abduction and kidnapping of a person by the agents of another state;
> (2) informal surrender of a person by the agents of one state to another without formal or legal process;
> (3) use of immigration laws as a device to directly or indirectly surrender a person or place a person in a position where he or she can be taken into custody by the agents of another state.[11]

It is the first technique which has tremendous international implications and, above the others, is considered violative of recognized principles of international law. It is also the first technique which is the subject of this Comment, and a proper question at this point would be: what is the status of international law regarding forced extradition?

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9. Extradition is the act of surrendering alleged criminals to another country. This concept is generally found within provisions of international treaties. States may act without following treaties and rely on their own laws, morals or principles, but extradition remains the basis for rendering an accused to the courts of another nation, and the basis for extradition is founded within treaties. SATYA DEVA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 15 (1968) (citing E. VATTEL., THE LAW OF NATIONS; OR PRINCIPLES OF NATURAL LAW 3, 19 (J.B. Scott trans., 1916)). In the absence of a treaty, a State must rely upon its own extradition laws and those of a requesting country.

10. Bassiouni, LL.B., J.D., LL.M., J.S.D., is a professor of law at DePaul University.

11. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 122-23 (1974).

B. The Concept of International Law and Extradition

Though hard to determine and not easily applied, "international law" in its broadest sense consists of "rules and principles of general application dealing with the conduct of States and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."[12] This includes law contained in widely accepted multilateral agreements as well as that observed in the practice of particular States.[13] A rule of international law is a principle accepted as "law" by the international community of States when evidenced by: (a) particular customs, (b) international agreements, or (c) extraction of certain "general principles" common to the major legal systems of the world.[14] In determining whether a rule has become international law, one must give deference to the judgments and opinions of national or international tribunals, writings of scholars, and pronouncements of States that undertake to formulate rules of international law, when such pronouncements are not seriously challenged.[15]

Forced extradition and kidnapping under color of law have been considered violations of State sovereignty and territorial integrity.[16] These actions allegedly permit a State to exercise judiciary power over a fugitive offender brought before it by any means, regardless of the legality of those means.[17] Absent governmental action which directly violates or circumvents a treaty, forced extradition and kidnapping also deny the kidnapped person any basis upon which to challenge jurisdiction of the prosecuting forum.[18] According to Bassiouni, these actions create very distinct violations of international principles, including: "(a) disruption of world public order, (b) infringement on the sovereignty and territorial integrity of another state, and (c) violation of the human rights of the individual unlawfully seized."[19] Therefore, this method by which one State receives a benefit through the invasion of another's sovereignty generally detracts from any concept of order the Charter or the United Nations sought to establish.

Forced extradition and kidnapping have been held to violate the Charters of the United Nations and the Organization of American States. According to the Second Circuit in *United States v. Toscanino*,[20] the abduction of a man from Uruguay for prosecution in the United States directly violated Article 2(4) of the Charter of the United Nations and Article 17 of that of the Organization of American States.[21] The Second Circuit came to its conclusion based upon a

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12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §101 (1986).

13. *Id.* at cmt. d.

14. *Id.* §102. *See also* art. 38(1) of the Stat. of the I.C.J., 59 Stat. 1031, T.S. No.993 (Oct. 24, 1945).

15. Restatement (Third) of Foreign Relations Law §103 (1986).

16. BASSIOUNI, *supra* note 11, at 124.

17. CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY 276-77 (1992).

18. *Id.* at 277.

19. BASSIOUNI, *supra* note 11, at 124.

20. United States v. Toscanino, 500 F.2d 267, 277 (2d Cir.), *reh'g denied en banc*, 504 F.2d 1380 (1974).

21. CHARTER, *supra* note 1, art. 2, ¶ 4; O.A.S. CHARTER art. 17. Both paragraphs require all members to refrain from threat or use of force against the "territorial integrity" or "political independence" of another

Security Council resolution addressed to the international kidnapping of Adolf Eichmann from Argentina by Israeli volunteers several years earlier.[22]

In the Eichmann situation, the State of Argentina complained to the Security Council of Israel's acts under Article 35 of the U.N. Charter.[23] The Security Council subsequently adopted a resolution[24] criticizing such abduction, though it was intended to bring Eichmann to Israel for prosecution of crimes he committed during the Second World War.[25] Specifically, the Security Council stated:

> Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations . . . [and n]oting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace . . . [the Security Council requests] the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.[26]

The Second Circuit interpreted this resolution to show the Security Council's recognition of a "long standing principle of international law" that one State's abduction of persons from within the territory of another violates the latter State's territorial sovereignty and calls for repatriation of the abducted person.[27] Since the resolution survived a United States or United Kingdom veto, the Second Circuit, as have other authorities,[28] viewed the resolution as a reflection of international law.

The *Toscanino* court found that the United States had voted against Israel in the resolution and held it to that concurring vote, which the court believed confirmed the United States' acceptance of the legal principle that transnational abduction violates international law. It then concluded that the United States' actions could not be tolerated. Though the case never reached the Supreme Court, the court's finding directly challenged the United States' long-standing law on the subject. It also served as a cornerstone for other cases, including *United States ex rel. Luján v. Gengler*,[29] which modified *Toscanino* to allow such a conclusion only where the conduct (abduction) was "of the most egregious and reprehensible kind,"[30] i.e., abduction coincident with serious infliction of injury.

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state. *See also* O.A.S. CHARTER arts. 18-20 regarding improper state intervention and territorial inviolability.

22. *Toscanino*, 500 F.2d at 277.

23. Article 35(1) allows Member States to bring disputes or situations falling under article 34 to the attention of the Security Council or the General Assembly. Article 34 provides the Security Council discretion to investigate disputes or situations that "might lead to international friction or give rise to a dispute," to determine whether they will likely endanger the maintenance of international peace and security.

24. U.N. Doc. S/4349 (1960).

25. *Toscanino*, 500 F.2d at 277.

26. Michael J. Glennon, *International Kidnapping: State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L. L. 746, 746-47 n.8 (1992) (citing U.N. SCOR, U.N. Doc. S/4349).

27. *Toscanino*, 500 F.2d at 278.

28. *See* Glennon, *supra* note 26 (discussing the United States' actions with Alvarez-Machain as compared to historically conflicting decisions and authority).

29. United States ex rel. Luján v. Gengler, 510 F.2d 62, 63 (2d Cir. 1975).

30. BLAKESLEY, *supra* note 17, at 277, n.483 (citing Luján, 510 F.2d at 62).

From the practice, writings and decisions of the international community, it is clear that forced extradition has not been traditionally favored. As stated above, the act has been considered violative of fundamental human rights and also of the territorial integrity of the country wherein the abduction occurred. Though these actions appear to be a convenient method by which a State may obtain *in personam* jurisdiction over a person outside its boundaries, they are clearly not accepted by the international community and even seen as proscribed under the U.N. and O.A.S. Charters. For many years however, States such as the United States and the United Kingdom have exercised this extension of their sovereignty without fail.

Nineteenth century law in the United States and the United Kingdom set forth the principle that a State need not inquire into the means by which a criminal defendant is brought before its court, provided international agreements are not breached. As early as 1829, in *Ex Parte Susannah Scott*,[31] the United Kingdom announced law that prevented the court from considering how a person was brought within its jurisdiction in criminal matters.[32] Likewise in 1886, in the cases of *Ker v. Illinois*[33] and *United States v. Rauscher*,[34] the United States Supreme Court took a similar stance, holding that when the language of a treaty does not prohibit abduction and is not referred to in the procurement of the act, the treaty is not violated and the accused must stand trial.[35]

These viewpoints are consistent with the traditional concept of the power of the sovereign State, wherein State action need only serve the State's direct interests regardless of any effects or counter-effects its action might have in the international community. Furthermore, this State action may be accomplished by whatever means necessary to achieve the State's ultimate purpose. Whether international law is violated in the meantime is not a relevant question. These viewpoints allow the State wide discretion to conduct its own affairs without deference to the interests of the international community.

The U.N. Charter and its parent organization are new creatures to the nations of the world because they place a heightened value upon international relationships, and they require all nations to give proper respect and consideration for each other in the carrying out of their own domestic policies. This concept reflects an underlying goal of the Charter which seeks to preserve inviolate the treaties invoked between nations, because they reflect such international respect and cooperation. Since these international instruments form the basis for interpreting relationships between nations, one must first consider, within the scope of this Comment, the treaties in question in order to reasonably assess an alleged treaty violation and that of international law.

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31. *Id.* at 126 (citing Ex Parte Susannah Scott 9 B & C 446 (1929)).

32. R. v. Horseferry Road Magistrates' Court, ex parte Bennett [1993] 3 All E.R. 138, 145 (citing *Ex Parte Susannah Scott*).

33. Ker v. Illinois, 119 U.S. 436 (1886).

34. United States v. Rauscher, 119 U.S. 407 (1886).

35. *Ker*, 119 U.S. at 442-44. Note also that the *Ker* court referred to the *Ex Parte Susannah Scott* (cited *supra* note 31) decision and another English decision, Lopez & Sattler's Case (1829) 1 D & B Cr. Cas. 525, it considered noteworthy.

C. *The U.S.-Mexico Extradition Treaty*

At the center of the suit in *United States v. Alvarez-Machain*[36] was the Extradition Treaty between the United States and Mexico.[37] This Treaty, entered into force January 25, 1980,[38] defines all extraditable offenses and procedures which govern extradition between the two nations. Under the Preamble of the Treaty, both the United States and the United Mexican States noted their ultimate reason for entering the pact: "[C]lose cooperation in the fight against crime and mutually rendered assistance in matters of extradition."[39] This Treaty was created to govern situations where nationals of one State commit criminal acts against those of the other; the language of the instrument evinces its importance to both governments of the United States and Mexico.

Article 2 and the Appendix of the Treaty list offenses which merit extradition. They include murder or manslaughter, malicious wounding or injury, kidnapping, abduction and assault among others.[40] All willful acts not included in the Treaty's Appendix also constitute extraditable offenses if they are punishable under the federal law of either State.[41] Additionally, extradition is a remedy under Article 2(4) of the Treaty, for any act committed in attempting, conspiring, or participating in the offense. Thus, an "extraditable offense" under the Treaty encompasses a broad range of activities from the planning stage to perpetration.

Article 10 of the Treaty enumerates the procedure by which one State may request extradition and explicitly requires that such requests be made through "diplomatic channels."[42] Word selection here is critical, because this provision not only specifies that upper level officials are required to request, consider and grant extraditions, but it also illuminates the importance of the process to both States.[43] Such procedural formality can only imply a certain respect for and consideration of the sovereignty of each State and that of each State's legal processes as well.

Whether the State from which extradition is requested is bound to deliver an alleged offender is a question of the State's executory power and discretion. Under the Article 9 of the Treaty, neither State is bound to deliver any national, and the ultimate decision is made by "executive" authority and discretion.[44] Article 9(2) also provides an escape mechanism for one State to refuse extradition by requiring submission of the case to competent authorities within

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36. United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992).

37. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

38. *Id.*

39. *Id.* at 5061.

40. *Id.* at 5076. For a complete listing of all other extraditable offenses, *see* the Appendix, 31 U.S.T. at 5076-77.

41. *Id.* at 5062.

42. *Id.* at 5066.

43. *See id.* art. 10, ¶ 2 for further formality in setting forth the procedural guidelines to request and consider extradition. For further requirements concerning the extradition process, *see id.* art. 10, ¶¶ 3, 4, 5 and 6; arts. 11-17.

44. *Id.* at 5065.

its territory for prosecution.[45] The formality of this procedure further demonstrates respect for the sovereign control each State maintains over its own nationals. To violate these principles or require automatic extraditions without governmental decision making would deprive the State of its sovereign discretion and create an erratic system in which two nations could seek "justice" at the expense of their nationals' rights and their territorial integrity.

The Treaty between Mexico and the United States seeks to maintain the integrity of the judicial and executive functions of both nations simultaneously. It also attempts to allow for proper prosecution without depriving the accused of certain fundamental rights. In sum, it attempts to maintain a certain balance between the apparent necessity of criminal prosecution presented by the requesting State and the sovereignty and self-governance of the State from which extradition is requested. This balance is vital to both States because international relations between the two depend in part upon the relationship established by this Treaty. If either State ignores its obligations under this document, harmonious relations established between them could be jeopardized.

The Court was faced with a complex issue directly involving the Extradition Treaty in Alvarez' case. He claimed the United States violated the Treaty by bringing him by force from Mexico to trial before a United States District Court. Alvarez claimed this action violated Article 22(1) of the Treaty[46] and was cause for dismissal of the action.

D. The U.K. Extradition Act of 1989

In the periphery of the suit in *R. v. Horseferry Road Magistrates' Court, ex parte Bennett,*[47] was the Extradition Act of 1989.[48] This Act consolidated all English enactments relating to extradition prior to September 27 of that same year.[49] It also set forth all extraditable offenses and procedures for extradition and generally regulated the judicially reasoned movement of persons into and out of the country. It governed all situations in which foreign nationals committed criminal acts against the United Kingdom and vice versa. Section 2 of the Act contains a list of extraditable offenses which includes any offense punishable in England by imprisonment for over one year.[50]

For purposes of prosecution, it was intended that an "extraditable offense" would encompass a wide range of activities. Sections 7 through 9 of the Act cover the procedures for requesting extradition and enumerate precise steps by which a nation or the United Kingdom may seek such action. Section 9 explicitly provides the court jurisdiction and describes the proper committal proceedings of those arrested under warrant. This procedure, like the U.S.-Mexico Treaty, depends heavily on formal processes, which reflects the United

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45. *Id.*

46. *Id.* at 5073-74. Art. 22, ¶ 1 deals primarily with the scope of the Treaty and essentially refers to those offenses listed in art. 2, which are discussed *supra* at 5062-63.

47. R. v. Horseferry Road Magistrates' Court, ex parte Bennett [1993] 2 All E.R. 474.

48. Extradition Act, 1989 (Eng.).

49. *Id.*

50. *Id.* § 2.

Kingdom's intent to maintain respect for the sovereignty of other States and allow due consideration for the ability and the correctness of foreign process.

The House of Lords did not directly examine the Extradition Act in *Ex parte Bennett*. Rather, it examined the court's power to look into the means by which a defendant is forcibly brought before it. Bennett had been charged with purchasing a helicopter under false pretenses and subsequently defaulting on the repayment.[51] As a criminal offense in the United Kingdom, this entitled the government to utilize the Extradition Act against him. Because it failed to do so, Bennett raised as a defense to the court's jurisdiction, that he was brought before the court improperly and not under the guise of Section 9 of the Act, which was cause for his dismissal. Though the Extradition Act was deemed important, it remained on the case's periphery as the Lords examined a novel issue of law.

III. UNITED STATES SUPREME COURT DECISION

A. *Statement of Facts*

Enrique Camarena-Salazar (Camarena) was a special agent of the United States Drug Enforcement Agency (DEA) in Guadalajara, Mexico. Camarena and his Mexican pilot, Alfredo Zavala-Avelar, were abducted outside the United States Consulate in Guadalajara, tortured and later found murdered. A Mexican national, René Martín Verdugo-Urquidez (Verdugo), suspected by the DEA to be a leader of a violent Mexican narco-smuggling group, was believed to be directly involved in the kidnapping and torture-murders. The DEA obtained a warrant for Verdugo's arrest in August 1985, and Mexican officials subsequently arrested him and extradited him to the United States for criminal prosecution before a federal court, where he was later convicted.[52]

Another Mexican national, Dr. Humberto Alvarez-Machain (Alvarez) was also believed to be a part of the crimes against Camarena and his pilot. The DEA believed Alvarez assisted Verdugo in the torture-murders by helping to prolong Camarena's life, which allowed him to be further tortured and interrogated. On April 2, 1990, Alvarez was abducted by United States' officials in Guadalajara and flown against his will to El Paso, Texas where he was arrested upon arrival.[53] He was later brought before a federal court for trial.

B. *Statement of the Case*

The United States charged Alvarez with certain indictments under Title 18 of the United States Code, including the kidnapping of a federal agent and felony

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51. *Ex parte Bennett* [1993] 3 All E.R. at 141.

52. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), for an opinion of the Court as to Verdugo's subsequent claims against United States agents for violation of Fourth Amendment rights.

53. It was later determined by the District Court that DEA agents were responsible for Alvarez's kidnapping, though the agents were not personally involved. For specific findings of the District Court in related proceedings *see* United States v. Caro-Quintero, 745 F. Supp. 599, 603-04 (C.D. Cal. 1990).

murder.[54] Alvarez moved to dismiss the indictments asserting two main points. First, he alleged the "outrageous governmental conduct" by the United States to bring about his prosecution was cause to dismiss. Secondly, he asserted that the District Court lacked jurisdiction to hear his case because the abduction violated the Extradition Treaty existing between the United States and Mexico.[55] The District Court overruled the outrageous conduct charge but sustained the motion to dismiss on the grounds it lacked jurisdiction to hear the case since the United States did violate the Extradition Treaty by abducting Alvarez. The District Court then ordered Alvarez to be repatriated to Mexico.[56]

On appeal, the Ninth Circuit, relying in large part on its recent decision in *Verdugo-Urquidez*,[57] affirmed the dismissal and held that "the forcible abduction of the Mexican national [Alvarez] with the authorization or participation of the United States violated the Extradition Treaty between the United States and Mexico."[58] The court further held that this violation, coupled with Mexico's official protest,[59] provided Alvarez with the "properly-intended" remedy of dismissal of the action and repatriation to Mexico.[60] The United States Supreme Court subsequently granted certiorari, reversed the judgment of the Ninth Circuit and remanded the action for further proceedings.[61]

C. *Issue Presented*

In the majority opinion, Chief Justice Rehnquist recognized the novel question of law raised by this case in his opening sentence. He, along with the majority, viewed the issue as whether the abduction of a criminal defendant to the United States from a nation with which the U.S. maintains an extradition treaty provides him a defense to the jurisdiction of United States' courts.[62] The Court noted that it had previously considered the issue of proceedings in alleged violation of an Extradition Treaty, as well as the issue of a defendant brought by forcible abduction to a court of law, but it had never before considered an issue which related definitively to both.

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54. The other indictments issued against Alvarez included: (a) conspiracy to commit violent acts in furtherance of racketeering activity, in violation of 18 U.S.C. §§ 371 and 1959; (b) committing violent acts in furtherance of racketeering activity, in violation of 18 U.S.C. § 1959(a)(2); and (c) conspiracy to kidnap a federal agent, in violation of 18 U.S.C. § 1201(a)(5). *Alvarez-Machain*, 112 S.Ct. at 2190 n.1.

55. Extradition Treaty, *supra* note 37.

56. *Alvarez-Machain*, 112 S.Ct. at 2190.

57. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) and subsequent history.

58. *Id.*

59. Apparently, the Mexican government directed certain letters to that of the United States which, in the District Court and the Ninth Circuit, served as an "official protest" of the United States' violation of the Extradition Treaty. *Alvarez-Machain*, 112 S.Ct. at 2191.

60. *See* Verdugo-Urquidez, 939 F.2d at 1350 (9th Cir. 1991). The *Verdugo* court, in this proceeding, held the forcible abduction from Mexico by U.S. agents without the consent or acquiescence of the Mexican government constitutes a violation of the Extradition Treaty. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd. on appeal*, 112 S.Ct. 2188 (1992) (citing *Verdugo*, 939 F.2d at 1351-52).

61. *Alvarez-Machain*, 112 S.Ct. at 2191.

62. *Id.* at 2190.

IV. UNITED KINGDOM'S HOUSE OF LORDS

A. *Statement of Facts*

Paul Bennett was a citizen of New Zealand who purchased a helicopter in Great Britain in 1989 under what the House of Lords termed "a series of false pretences."[63] Bennett had apparently financed his purchase through an English company and defaulted on his payments. The English police traced him to South Africa and sought to arrange for his presence in the United Kingdom for trial. Since no extradition treaty existed between the United Kingdom and South Africa, the English police considered utilizing Section 15 of the Extradition Act which dealt with the method and procedures for extradition.[64] However, the police sought South Africa's assistance in abducting Bennett in order to deport him to the English jurisdiction for trial.

Two South African detectives, acting under the coordinated efforts of the English and South African police, arrested Bennett on January 28, 1991 in Lanseria, South Africa to return him to the United Kingdom for prosecution. At that time, he was to be repatriated to New Zealand through Taipei by plane, and since an extradition treaty existed between England and New Zealand, Bennett's return would allow for a direct extradition to the United Kingdom. Once his plane reached Taipei however, he was forced to return to South Africa and held in custody until mid-February, whereupon he was flown into Heathrow airport and immediately taken into custody.[65]

B. *Statement of the Case*

Bennett was brought for committal proceedings before the Horseferry Road Magistrates' Court. He requested an "adjournment" to allow him to challenge the court's jurisdiction because of his abduction, however, the Magistrate refused and committed him for trial to the Southwark Crown Court on five counts of "dishonesty." Bennett appealed the Magistrate's decision to the Queen's Bench Divisional Court, and on July 22, 1992, that court accepted jurisdiction over the issue of whether, in applicable appellate standards, the court could inquire into the circumstances by which Bennett had been brought within the jurisdiction of the court.[66]

The Queen's Bench found that English and South African police had colluded to obtain Bennett's presence before the court, but also found that it had no power to inquire into the circumstances by which he was brought into the country to stand trial. It accordingly dismissed Bennett's appeal and subsequent

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63. *Ex parte Bennett* [1993] 3 All E.R. at 141. The facts of this case are derived from the recant of Lord Griffiths.

64. Extradition Act, *supra* note 48.

65. Apparently, the English officer involved, Sergeant Davies, had informed the South African police that if Bennett was returned through London he would be arrested on arrival. Davies then claimed he was informed by the South African police that Bennett was to be repatriated to New Zealand via Heathrow. Davies then consulted the Crown Prosecution Service and they decided that the English police would arrest Bennett upon arrival. Affidavit of Sgt. Davies, *Ex parte Bennett* [1993] 3 All E.R. 138, 142.

66. *Ex parte Bennett* [1993] 2 All E.R. at 476.

application for judicial review,[67] but certified the question of its power to the House of Lords seeking an official opinion. A majority of the House, in a lengthy discussion of five Lords, allowed Bennett's appeal to the Queen's Bench Crown Division for determination and adjudication of his abduction.

C. *Issue Presented*

In the disposition by the Queen's Bench, the court framed the issue for the House of Lords in compliance with Section 1(2) of Great Britain's Administration of Justice Act of 1960[68] as:

> Whether . . . [a] Court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction.[69]

This question dealt with the issue of whether the court should possess the ability to refuse to try an accused, if it believes the means by which he was brought before the court were illegal. This issue, at least according to Lord Griffiths, was analogous to but did not exactly mirror that of *Alvarez-Machain*.

V. COMPARISON OF THE CASES

A. *Issue and Rationale*

At issue in *Alvarez-Machain* was whether a person who is forcibly abducted from another country for prosecution in the United States can raise that abduction as a defense to the court's jurisdiction. Similarly, the issue before the House of Lords in *Ex parte Bennett* was whether a court, having jurisdiction over an abducted person, may look into the means by which he was brought before it and refuse to prosecute him because of those means. Both issues, though apparently similar in nature, were decided differently, perhaps this was due to a different interpretation of the issue presented. However, this difference in opinion itself poses a larger question of international law, seeking to determine the outward bounds of State power in a global community. By their apparent differences in opinion as to the common issue, the courts failed to reach a similar conclusion.

1. *United States v. Alvarez-Machain*

In considering the issue presented in *Alvarez-Machain*, the Court noted two quite similar cases, *United States v. Rauscher* and *Ker v. Illinois*. Incidentally, both opinions were decided on the same day and delivered by Justice Miller. Both cases also dealt with the specific issues presented in *Alvarez-Machain*, but

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67. The court, speaking through Woolf, L.J., stated, with particularity, "But the prosecution, being a proper one, there being no abuse of the procedures and process of that prosecution, it seems to me that the preliminary issue must be determined in the respondent's [State's] favour and, accordingly, as this preliminary issue is decisive of the application, the application has to be dismissed." *Ex parte Bennett*, 2 All E.R. at 480.

68. The Administration of Justice Act of 1960 § 1, para. 2 (Eng.).

69. *Ex parte Bennett*, 2 All E.R. at 480.

differed to such extent that neither could be binding without further consideration of the facts of the case and the law applicable to the action at hand.

The Court in *Rauscher* had considered an alleged international treaty violation. The United States and England executed the Webster-Ashburton Treaty[70] to govern extradition between the two nations. An Act of Congress imposed certain provisions onto the treaty by implication, requiring the extradited nationals be charged with only those crimes for which they were extradited.[71] Justice Miller recognized the fact that this restriction had been created by the legislature, implied into the treaty, and thus became a term within the treaty. As a result of implying the term upon the parties, the Court held that the treaty had been violated.[72] Though the facts of *Rauscher* are not necessary for an analysis in Alvarez's case, Rauscher had been extradited under the law of a treaty whereas no extradition was ever attempted with Alvarez. Thus, only the holding that terms such as congressional enactments can become a part of a treaty by implication was applicable to Alvarez's case.

The Court in *Ker* considered an alleged forcible abduction. Ker was abducted from Lima, Peru after being convicted in Illinois for larceny. Though the United States and Peru had established an extradition treaty, it was not employed in securing Ker's presence in the country for trial. The *Ker* Court held that its power to try a person for a crime was not impaired solely because the defendant had been brought into the jurisdiction by means of forcible abduction.[73] It further held that once a party is brought within the jurisdiction of the court which has the right to try him, he has no reason to fail to answer for his offense, even though he may have been brought into the jurisdiction by forcible means.[74]

However similar *Ker* and *Alvarez-Machain* may seem, the present Court distinguished the two by the private actions which occurred in *Ker* and the governmental involvement in *Alvarez-Machain*. Thus, the Court held this "*Ker* Doctrine" inapplicable until it determined the precise terms of the Extradition Treaty as under *Rauscher* to see if there had been a violation. More particularly, the Court stated, "the 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."[75] Taking the Treaty into consideration, the Court first analyzed its explicit meaning, looking at the terms therein.[76]

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70. Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-Eng., 8 Stat. 572, 576.

71. Specifically known as the Doctrine of Specialty, which Congress imposed upon all extradition treaties through § 5275 of the Revised Statutes, enacted Mar. 3, 1869.

72. *Rauscher*, 119 U.S. at 430. It is interesting to note the variance of opinion on this issue, as seen in the opinion of Waithe, C.J., dissenting and holding the Doctrine of Specialty did not apply to the treaty nor could any Act of Congress affect the treaty; and in the opinion of Gray, J., concurring but holding Acts of Congress formed the only basis for decision. 119 U.S. at 436.

73. *See* Frisbie v. Collins, 342 U.S. 519, *reh'g denied*, 343 U.S. 937 (1952) (A later application of the *Ker* rule).

74. *Alvarez-Machain*, 112 S.Ct. at 2192, (quoting Ker, 119 U.S. at 444).

75. *Id.* at 2193.

76. *Id.* (citing Air France v. Saks, 470 U.S. 392, 397 (1985)).

In the terms of the Extradition Treaty, the Court found no mention of "forcible abduction" or "forced extradition." Alvarez claimed Article 22(1) of the Treaty (scope of application) had been violated,[77] and he alleged that it provided for extradition as the *only* means by which one nation could bring to justice the other's nationals. The Court noted that an interpretation as alleged, however, would require that extradition be the exclusive remedy for the occurrence of all offenses listed by the Treaty. The "more natural conclusion" to the Court was that Article 22(1) was designed to merely ensure that the Treaty applied to requests after its date-in-force and regardless of the date of the crime.[78] After further review of the terms of the Treaty with no indication of an express proscription of forcible abduction, the Court then began to analyze it for any implicit terms generated through the nations' respective history and practice.

Examining historical practice under the Treaty, the Court concluded that forcible abduction had been held not to violate terms of the Extradition Treaty in the past. In fact, the Court noted that the Mexican government had been made aware of the United States' position on forcible abduction, as well as its practice as to such acts, as early as 1906. In support of its conclusion, the Court re-examined the 1905 Martínez incident where a Mexican national was similarly abducted from Mexico and brought to trial in the United States. There, as in the *Alvarez* case, the Mexican government strongly protested the abduction and wrote to the United States Secretary of State about what it considered to be a violation of the then existing Extradition Treaty.[79] The Court nevertheless interpreted *Ker* as allowing forcible abduction above the terms of the Treaty, finding that the Treaty failed to restrict *Ker*'s application, which then empowered the Court to rule accordingly.[80]

Having concluded that the language and the usage of the Extradition Treaty failed to prohibit forcible abduction, *per se*, the Court finally considered whether the Treaty should be interpreted as including "an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty."[81] Alvarez's main argument caused the majority to briefly consider international custom. The Court recognized that it had created a term by implication in the U.S.-England extradition treaty in

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77. Extradition Treaty, *supra* note 37. Art. 22(1) of the Extradition Treaty states that it applies to offenses specified in the previous Article 2. Article 2, which deals with extraditable offenses, refers in paragraph 1 to wilful acts which fall within clauses of the Treaty's Appendix. *Id.* at 5062. First on the list in the Appendix is murder. *Id.* at 5076.

78. *Alvarez-Machain*, 112 S.Ct. at 2193.

79. *See id.* at 2194, n.11 (citing PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, H.R. Doc. No. 1, 59th Cong., 2d Sess., pt. 2, 1121 (1906)).

80. Note also the Court's review of the Ninth Circuit's decision in *Verdugo-Urquidez*, 939 F.2d at 1354, where the Ninth Circuit stressed an 1881 statement of the U.S. Secretary of State to a Texas governor concluding the extradition treaty at that time did not authorize abductions from Mexico for which the U.S. received no consent. The Circuit Court uses this statement to show that practice under the Extradition Treaty does not authorize forcible abductions. The Supreme Court quickly notes the Circuit Court has "missed the mark" since it is not looking at whether abduction is authorized under the Treaty, but whether it is prohibited. This Court held it is not prohibited in general. *Alvarez-Machain*, 112 S.Ct. at 2194.

81. *Alvarez-Machain*, 112 S.Ct. at 2195.

Rauscher in 1886;[82] but it also noted the term had been created by implication because of the similar "practice by nations with regard to extradition treaties"[83] during that period.

In Rauscher's case, the implied term, the "Doctrine of Specialty," was a widely accepted part of custom and practice by most nations at that time. This factor, coupled with our legislature's enactment of law and the Court's ability to recognize such terms in treaties, persuaded that Court to take a small inferential step and interject the term by implication into the treaty. In Alvarez's situation however, the Court believed that such a small step would become more of an "inferential leap" since Alvarez had presented only the most general of international principles to support his argument that the Extradition Treaty, through international practice, implicitly prohibited forcible abduction.[84] Thus, the Court saw no reason to create the term by implication and concluded Alvarez's capture did not violate the Treaty and that the *Ker* Doctrine could be applied.

2. *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*

In examining the issue presented in *Ex parte Bennett*, the Queen's Bench Divisional Court first considered Bennett's basis for judicial review. In *R. v. Crown Court at Manchester, ex parte DPP*,[85] the Queen's Bench had held that one may bring an application for judicial review if moving to quash an indictment for lack of jurisdiction. Bennett was moving to quash such an indictment and thereby obtained such a right of appeal.

The Court next considered whether it could refuse to hear a case in which the defendant was brought into the jurisdiction by improper means. In doing so, the Court noted the decision in *R. v. Plymouth Magistrate's Court, Ex parte Driver*,[86] which held that for the purpose of refusing to try someone, "there is no power in a court to inquire into the circumstances in which a person is found in the jurisdiction .. . ."[87] Though in Bennett's case, Lord Justice Woolf[88] expressed his belief that a significant abuse of process might be grounds for such a refusal,[89] it is clear that the remainder of his decision stemmed from the *Ex parte Driver* rationale which precluded the Court from determining that issue. In its conclusion, the court found it had no authority to consider the issue of abusive process with Bennett, since no abusive process occurred at trial. Under the principle set forth by the *Ex parte Driver* court, the Queen's Bench dismissed Bennett's application for review and denied him leave to appeal to the House of

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82. Webster-Ashburton Treaty, *supra* note 70.

83. *Alvarez-Machain*, 112 S.Ct. at 2195-96.

84. *Id.* at 2196.

85. *Ex parte Bennett* [1993] 2 All E.R. at 477 (citing R. v. Crown Court at Manchester, ex parte DPP [1993] 1 All E.R. 801).

86. R. v. Plymouth Magistrates' Court, ex parte Driver [1985] 2 All E.R. 681, [1986] Q.B. 95, [1985] 3 W.L.R. 689.

87. *Ex parte Bennett* [1993] 2 All E.R. at 478, (quoting *Ex parte Driver*, 2 All E.R. at 697).

88. Both Woolf, L.J., and Pill, J., heard and decided the case at the Queen's Bench Divisional Court level.

89. *Ex Parte Bennett* [1993] 2 All E.R. at 479.

Lords. However, the court did frame a certified question for the consideration of the House itself.

On certification, Lord Griffiths[90] quickly identified the rationale of the Queen's Bench decision, citing the traditional English common law viewpoint demonstrated by *Ex parte Driver*. He noted this long-standing law which was considered and cited by the Queen's Bench in its decision — cases consistent with and cited by the *Ex parte Driver* court: *Ex Parte Susannah Scott, Sinclair v. HM Advocate*,[91] and *Rex v. Officer Commanding Depot Battalion, RASC, Colchester, ex parte Elliott*.[92] Each of these decisions concluded, as does *Ex parte Driver*, that the court possessed only a limited ability to investigate the means by which a person is brought within its jurisdiction in an "abuse of process" situation.[93] Each of these cases also examined the traditional common law rule that refuses the court such power to inquire. In Lord Griffiths' judgment, he not only represented a need to expand this judicial discretion, but he, along with Lords Bridge of Hartwick and Lowry, also shed some light on relevant English case law contrary to the *Ex parte Driver* decision, as well as that of the international community.

The first of these English cases is *R. v. Bow Street Magistrates, ex parte Mackeson*,[94] considered by the Queen's Bench in proceedings below but rejected nonetheless. Mackeson, a British citizen living outside of the country, was forcibly abducted from Zimbabwe-Rhodesia and arrested at Gatwick in 1980. He applied for an order to prohibit committal proceedings against him in the Magistrate's Court on his charges. The Queen's Bench issued that order after much deliberation and careful consideration of precedent from the New Zealand Court of Appeals.

Lord Lane, C.J., of the *Ex parte Mackeson* court first held the court had jurisdiction to try Mackeson, and in a bold statement demonstrative of the traditional power of the court over the person, he stated:

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90. Four other Lords joined Lord Griffiths in the opinion. The concurring members were Lord Bridge of Harwick, Lord Slynn of Hadley and Lord Lowry. Lord Oliver of Aylmerton was the sole dissenter.

91. Sinclair v. HM Advocate (1890) 17 R(J) 39.

92. R. v. Officer Commanding Depot Battalion, RASC, Colchester, ex parte Elliott [1949] 1 All E.R. 373.

93. Lords Griffiths and Lowry addressed the issue of defining the phrase "abuse of process." Lowry described it as the "abuse of the process of the court which is to try the accused," and also "a misuse or improper manipulation of the process of the court" (citation omitted). *Ex parte Bennett* [1993] 3 All E.R. at 160. He also describes a situation in which the court's process has been abused as allowing acts which provide morally unacceptable foundations for the exercise of jurisdiction over the suspect and taint the proposed trial. *Id.* at 162.

Griffiths quoted from Reg. v. Derby Crown Court, ex parte Brooks (1984) 80 Cr. App. R. 164, 168-69, to define circumstances in which the court may "stop a prosecution." *Ex parte Bennett* [1993] 3 All E.R. at 149-50. The Ex parte Brooks court defined an abuse of process as occurring either (a) when the prosecution manipulates or misuses the court's processes so as to deprive the defendant of protection provided by the law, or (b) when the defendant most probably has been or will be prejudiced in the preparation of conduct of his defense by the prosecution's unjustifiable delay. *Ex parte Bennett* [1993] 3 All E.R. at 149-50 (citing *Ex parte Brooks*). In a more recent decision, Griffiths noted the court in Reg. v. Croydon Justices, ex parte Dean (unreported) 19 February 1993, determined an abuse of process occurs when the executive takes some unlawful action with respect to the accused. *Ex parte Bennett* [1993] 3 All E.R. at 150 (citing *Ex parte Dean*).

94. R. v. Bow Street Magistrates, ex parte Mackeson (1981) 75 Cr. App. R. 24.

> Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently, the mere fact that his arrival there may have been procured by illegality did not in any way oust the *jurisdiction* of the court.[95] (emphasis added).

For a moment, this statement appears to mirror the reasoning behind the *Alvarez-Machain* Court. However, Lane's ultimate conclusions regarding Mackeson's abduction run somewhat contrary to this bold statement.

For the basis of his judgment, Lane turned to the judgment of Woodhouse, J. in *Reg v. Hartley*, from the New Zealand Court of Appeal, whose facts are similar to those of *Mackeson* and *Bennett*.[96] In Woodhouse's opinion, he recognized that extradition procedures stemming from treaties between nations are well-known and explicitly enumerated in statutes. He proclaimed that it is for the protection of the public that such statutes "demand the sanction of recognised court processes before any person . . . can properly be surrendered from one country to another."[97] This concept is basic to a free society, he continued, and the means by which Hartley's trial was made possible varied so greatly with the statutory requirements and conflicted so greatly with "one of the most important principles of the rule of law" that the court should refuse to hear the case and discharge Hartley.[98] Lane also held accordingly and ordered prohibition against the Magistrate's Court to discharge Mackeson.

Lords Griffiths, Bridge, Lowry and Slynn, sought to uphold the holdings of *Hartley* and *Ex parte Mackeson* in their separate opinions. Comparing case law and the Queen's Bench decision, Griffiths distinguished *Ex parte Mackeson* from *Ex parte Driver*. Noting first that *Mackeson* was decided in 1981 and followed by a subsequent 1983 Divisional Court ruling in *Reg. v. Guildford Magistrates' Court, ex parte Healy*,[99] Griffiths considered the *Ex parte Driver* court in 1985 to be of a different composition than the *Mackeson* court, a possible reason why the same issue was decided in an opposing manner. Though the latter court had in essence changed its position since deciding *Ex parte Driver*, Griffiths did not believe this would necessarily prevent it from deciding along the lines of the later *Ex parte Mackeson* decision. It was for this purpose that Griffiths and Bridge introduced more persuasive common law regarding abduction from courts of the international community.

The decision of the South African Court of Appeal in *S. v. Ebrahim*[100] was persuasively cited as authority by both Lords. Ebrahim, a former citizen of South Africa, was abducted from his home in Swaziland by persons under South African authority. He was returned to South Africa under charges of treason, then tried and sentenced to a 20-year prison term. His application for dismissal on grounds of his abduction in violation of international law was rejected by the trial court, but on appeal of the dismissal ruling, the Court of Appeal ruled that

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95. *Ex parte Bennett* [1993] 3 All E.R. at 143 (quoting *Ex parte Mackeson*, 75 Cr. App. R. 32).
96. Reg. v. Hartley, [1978] 2 N.Z.L.R. 199.
97. *Id.* at 216-17.
98. *Id.*
99. Reg. v. Guildford Magistrates' Court, ex parte Healy [1983] 1 W.L.R. 108.
100. S. v. Ebrahim, 1991 (2) S.A. 553.

his abduction was a "serious injustice." It also found that the court before which he had been brought lacked any jurisdiction to try him,[101] and in a striking statement, the court held that the rules regarding the injustice of forcible abduction embodied:

> several fundamental legal principles, *viz.* those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system.[102]

The international principle of law handed down by the Court of Appeal is but one basis upon which the Lords concluded their opinions. Insight from other nations in the international community regarding the problem of forcible abduction was also considered.

Lord Bridge considered the United States' decision in *Toscanino* and the dissenting opinion of *Alvarez-Machain*. In *Toscanino*, an Italian citizen, convicted in a New York District Court for drug conspiracy, was subsequently kidnapped in Uruguay and brought to the United States for prosecution. Though he alleged the court had acquired jurisdiction unlawfully, the District Court applied the *Ker* Doctrine and stated that allegations of "unlawful means" were immaterial to its exercise of jurisdiction since Toscanino was physically present at the time of trial.[103]

On appeal, the Second Circuit made a stand against the rationale of both *Ker* and *Frisbie* and held that in a forced abduction situation, the government should be denied the right to exploit its own illegal conduct. Lord Bridge noted that the decision more forcefully established that any power the court acquired from this unlawful conduct was equivalent to "the fruits of the government's exploitation of its own misconduct."[104] This opinion, coupled with *Ebrahim* and the strong dissent in *Alvarez-Machain*[105] created the general framework of the Lords' opinion, holding that in all fairness, a court must have power to inquire into the means by which a defendant is subjected to process within its jurisdiction. He noted this was important, both for the protection of nationals and their fundamental human rights but also for the advancement and promotion of international relations and international law.

The second consideration made by the Lords was that of broadening the court's discretion. To achieve this goal, Lords Griffiths, Bridge and Lowry all suggested empowering the court with the ability to investigate the means by which an accused is brought before it. From such evidence, a court could then refuse to hear the case because of such improper acts. Griffiths agreed, noting that the High Court should ensure executive action be exercised responsibly and

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101. *Ex parte Bennett* [1993] 3 All E.R. at 153.

102. *Id.* (citing *Ebrahim*, 1991 (2) S.A. 553).

103. *Ex parte Bennett* [1993] 3 All E.R. at 154 (citing *Toscanino*, 500 F.2d at 268).

104. *Id.*

105. *Id.* For a discussion of the dissenting opinion of Stevens, J., joined by Blackmun, J.J., and O'Connor, J.J., in *Alvarez-Machain*, 112 S.Ct. at 2197, *see infra* part V.B.1.

as intended by the parliament, and if the High Court finds a serious abuse of power, it should express disapproval by refusing to act upon it.[106]

Lowry also agreed with this addition of power and, referring to the authority cited by Lord Bridge, reasoned that the court had a duty to protect its own process from degradation and misuse. He believed that the court must therefore be able to stay proceedings made possible only by acts which "offend the court's conscience as . . . contrary to the rule of law."[107] Bridge offered his personal opinions on the certified question and prosecution at hand:

> There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. . . . To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, in my mind, an insular and unacceptable view.. . . [I]f the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. . . . To hold that in these circumstances the court may decline to exercise its jurisdiction . . . is, in my view, a wholly proper and necessary one.[108]

Because a majority of Lords believed the judiciary should be responsible for maintaining and overseeing executive action, they held it should have the power to refuse to condone executive behavior that threatens fundamental human rights or the rule of law.[109] They further held that since the court should not declare itself powerless and stand idly by as the executive manipulates its processes as with Bennett. Rather, the court should act to display its disapproval for such action by refusing to hear the case.[110] The majority thus chose to extend the court's power, noting strong disapproval for Bennett's abduction.

B. Dissenting Opinions

1. *United States v. Alvarez-Machain*

The *Alvarez-Machain* Court produced a vigorous dissent. The majority opinion led by the Chief Justice and joined by Justices White, Scalia, Kennedy, Souter and Thomas was strongly opposed by Justices Stevens, Blackmun, and O'Connor. The central theme of their dissent invoked internationally accepted principles of law, and though they agreed with the majority that the case raised a question of first impression, they quickly concluded that the United States' acts violated Mexico's territorial integrity.[111]

The dissenting opinion found that the actions taken by the United States government to forcibly abduct Alvarez violated the Extradition Treaty established between the United States and Mexico. Reaching this conclusion, the minority

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106. *Ex parte Bennett* [1993] 3 All E.R. at 152.

107. *Id.* at 162.

108. *Id.* at 155-56.

109. *Id.* at 150.

110. *Id.* Consequently, once Bennett was back before the Queen's Bench Division, that court quashed both the committal charges against him as well as the order of the Magistrate's Court committing him for trial because of the unlawful means by which he was brought into the United Kingdom. *See* Propriety of Procedure if Paramount; Law Report, TIMES OF LONDON, Apr. 1, 1994. *See also* the application of *Ex parte Bennett* in *In re Schmidt* in Extradition jurisdiction limited by Act; Law Report, TIMES OF LONDON, July 1, 1994.

111. *Alvarez-Machain*, 112 S.Ct. at 2197.

discussed the goal of the Treaty and the fact that it was an 'all-inclusive' document for which strict application was required. They also discussed the fact that if such acts were permissible, the Treaty would serve no purpose and have no reason for existence. Taking Alvarez's position, the dissenters concluded that the Treaty was intended to require extradition as the only means to obtain a perpetrator for prosecution when any act listed therein occurred.[112] This, they reasoned, not only would preserve respect for territorial integrity, but would also end the impermissible practice of self-help that sovereign States employ and which violates territorial integrity.

The dissent also found the United States' acts went against internationally accepted principles of law. Reciting Oppenheim, they quoted the following principle: "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."[113] They continued by quoting the opinion of Justice Story in *The Appollon*,[114] a case factually similar to *Alvarez-Machain*, in which he held that such abductions performed without the consent of the foreign government constitute a gross violation of international law. Finally, using the *Restatement of Foreign Relations*, the dissent noted that section 432 prohibits law enforcement officers of one State from exercising their functions within the territory of another, without the latter's consent.[115] From these principles, the dissent concluded that the government's acts in Alvarez' case violated such principles of international law.

The basis of the dissent was the majority's alleged failure to differentiate private conduct from acts of the government. This, the dissenters noted that this was the "critical flaw" of the majority opinion.[116] Justice Stevens began the argument by comparing private conduct to official conduct. According to Stevens, the conduct of private citizens did not violate treaty obligations, as exemplified by *Ker*. However, he noted that when the conduct is authorized by the government, an unquestionable violation of international law then arises.[117] Thus, the government's actions in abducting Alvarez constituted a direct breach of the underlying obligations of the Extradition Treaty.

The dissenters then turned to *Cook v. United States*,[118] for which Justice Brandeis wrote the opinion. The Court in *Cook* held that an act performed by federal officers which exceeds the authority conferred by a treaty is unlawful because treaties are intended to "fix the conditions under which . . . [a government may take action to bring about] adjudication in accordance with the [United States'] applicable laws."[119] The dissenters agreed with Alvarez that

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112. *Id.* at 2198.

113. *Id.* at 2202 (quoting 1 OPPENHEIM'S INTERNATIONAL LAW § 295 & n.1).

114. The Appollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824).

115. *Alvarez-Machain*, 112 S.Ct. at 2202 n.23 (quoting RESTATEMENT OF FOREIGN RELATIONS LAW § 432 & cmt. c).

116. *Id.* at 2203.

117. *Id.*

118. Cook v. United States, 288 U.S. 102 (1933).

119. *Id.* at 120-22.

the Extradition Treaty between the United States and Mexico fixed the conditions by which the United States could have obtained Alvarez's presence in court. They attributed the majority's erroneous decision to the Justices' failure to understand the difference between governmental and private action.

2. *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*

Of the five Lords whose judgments were announced in *Ex parte Bennett*, only one dissented from the majority. Lord Oliver of Aylmerton stood alone in his opinion of the change the Lords were committing to the courts of the United Kingdom.

In his dissent, Lord Oliver restated the issue presented to the House as whether the court "should assume the duty of overseeing, controlling and punishing an abuse of executive power leading up to properly instituted criminal proceedings . . . by restraining the further prosecution of those proceedings."[120] He declared that the addition of this power would greatly affect public policy in a number of ways. First, properly charged persons (if guilty) would be allowed to go unpunished. Second, enforceable remedies would still be available to those persons charged. Third, public interest in prosecution and punishment of crime, in general, would be defeated by a mere showing of judicial disapproval.[121] To Lord Oliver, these reasons were sufficient to restrain the courts' assumption of such power.

The basis of Oliver's dissent was directed to a careful differentiation of the precedent cited by the majority. He claimed that a distinction had to be made between the civil and criminal case law cited by the others, since the English courts in civil cases had always possessed the power to ensure that their processes were not abused by their ability to release those unlawfully obtained. This power in a civil matter had never been doubted, but Oliver also noted that the United Kingdom had traditionally treated criminal cases in a different manner.

To support his conclusion, Oliver noted that until *Ex parte Mackeson* in 1981, an unbroken line of authority existed in the United Kingdom; in criminal cases, once a person was in lawful custody in the country, the court was powerless to inquire into the means by which he may have been brought before it.[122] This principle, Oliver claims, was followed by the *Ex parte Driver* court in 1986, which rejected a decision to the contrary in *Ex parte Mackeson*, and followed the more traditional approach. This, in turn, was followed by the lower court in Bennett's case.

The case at hand raised a novel question of law to the court. It invited the House of Lords to expand the court's power in criminal matters to embrace a much wider jurisdiction, extending even to the "administration of justice."[123] Lord Oliver insisted however, that this expansion was unwarranted and would only yield inconvenience and uncertainty. In support, he posed two questions.

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120. *Ex parte Bennett* [1993] 3 All E.R. at 156.
121. *Id.*
122. *Id.* at 157.
123. *Id.*

First, he asked whether the court should have this duty or any power to investigate and oversee executive abuses made prior to criminal proceedings. Second, if no such power is found, he questioned whether a court should have that power if a person is brought before the court as a result of unlawful activity within the jurisdiction where he was obtained.

To answer his initial question, Oliver pointed out that no precedent existed allowing for such a broadening of the power of the court. Though he agreed that the court must have some power to investigate *bona fide* charges of "bad faith" actions, he reasoned that where the party does not suggest bad faith or unfairness during the trial process, the court can maintain no grounds upon which to inquire and claim discretion.[124] Oliver then offered an observation by Lord Scarman in *Reg. v. Sang*[125] to support this principle. Scarman had stated, "Judges are not responsible for the bringing or abandonment of prosecutions; nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury."[126] Thus, Oliver believed the majority was exerting excessive power.

To answer his second question, Lord Oliver posed two possibilities by which the court could acquire this power. First, he believed one could argue that in consideration of international comity, English courts should use some discretion to disapprove invasion of sovereign territorial rights of foreign States in the context of abduction. However, he also noted that criminal courts should not be concerned with determining what exactly constitutes a violation of foreign law occurring on foreign soil, and that this power should be left solely to diplomatic discussions between governments.[127] Secondly, Oliver noted that the court might believe a "right" exists under the Extradition Act if a person is wrongfully detained and deported to the United Kingdom. However, he also noted that the Extradition Act was never used in Bennett's case, and the arrest and detention were not a part of the trial process. Therefore, Oliver believed any actions used to secure Bennett's presence before the Magistrates' Court went beyond the scope of the court's inquiry, and he saw no reason why the court should have this power conferred upon it, whatever outrage the questionable acts may cause.

VI. A NEW, EMERGING WORLD ORDER

The views of these two courts differ in reasoning and interpretation of the basic situation at hand. The *Alvarez-Machain* Court viewed international forced extradition as raising a question of domestic law regarding the outward limits of State sovereignty and the restrictions questionably placed upon that sovereignty by the Extradition Treaty and other international considerations. The Court there chose to ignore the means by which the abducted person was brought before the court. However, in *Ex parte Bennett*, the Lords viewed international forced extradition as raising only a question of whether traditional English law should

124. *Id.* at 158.
125. Reg. v. Sang [1980] AC 402.
126. *Ex parte Bennett* [1993] 3 All E.R. at 158 (quoting *Sang* A.C. at 454).
127. *Id.* at 159.

give way to more contemporary considerations of international relations and transnational consequences. There, the House of Lords chose not to ignore the means by which the abducted person was brought before the court. Both opinions form one example of a struggle the nations of the world now face between maintaining traditional views of State sovereignty and acknowledging that since the Cold War's conclusion, a newer and more encompassing world order is slowly coming to life.

The *Alvarez-Machain* decision embodies the view that traditional concepts of State sovereignty must be maintained. It reaffirms the concept of States as powerful, autonomous sovereigns which dictate law according to their own desires and principles, but also according to self-granted authority, regardless of the international consequences which may ensue. This view clearly established the foundation for the nineteenth century decisions relied upon by the Court and also those handed down by the courts of Germany and the United Kingdom until now.[128] It is a view that has been held in great esteem by nations institutionally, since the conception of national boundaries, but one being gradually superseded by a more progressive recognition of the State as a smaller unit of an international community.

On the other hand, the *Ex parte Bennett* decision is diametrically opposed to *Alvarez-Machain*. It represents a progressive view of the State as sovereign but enmeshed with other States to form a more cohesive and restrictive international union. Under this model, State law remains important because the State itself remains sovereign and self-governing. However, recognition by the State of the existence of a higher law created through the international community has now become equally as important. This latter principle has brought about the recognition of a "new world order" which seeks to limit the traditional concept of States as exclusive entities and promote this concept of States acting in a collective unit within the community. Such a principle certainly calls for diminution of State sovereignty, but the concept of sovereignty as a whole cannot be lost.

At this time, the holding in *Alvarez-Machain* is not necessarily incorrect, nor is the decision in *Ex parte Bennett* universally accepted. The conflicting opinions demonstrated in and by these two cases are a product of the current dispute regarding the extent to which State sovereignty trumps the law among nations, and at what point it intrudes into the realm of the international community. In his Report to the Security Council, *An Agenda for Peace*,[129] U.N. Secretary-General Boutros Boutros-Ghali identified the fact that States are becoming more internationally involved; governments are responding to the outcry for democratic change; and the Cold War, a barrier once halting international growth, has ended.[130] As a result, the United Nations, as a collective unit of international strength, has been allowed to grow and act in

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128. *The Alvarez-Machain Decision Before the Subcomm. on Civil and Const. Rights of the House Judiciary Comm.* (July 24, 1992), *in* DEP'T ST. BULL., Aug. 1992, at 615 (statement of Alan Kreczko).

129. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE, PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACEKEEPING, Report of the Secretary-General pursuant to the Statement Adopted by the Summit Meeting of the Security Council on Jan. 1992, 46, U.N. Doc. S/24111 (1992), 31 I.L.M. 956, 17 (1992).

130. *Id.* at 957.

ways which were previously impossible due to the superpower rivalry within the Security Council.[131] Thus, the United Nations has been catapulted into a more prominent role in addressing the world's post Cold War problems.

This tremendous growth in power and ability has expanded the State's role as a community member and simultaneously restricted, to some extent, traditional views of unincumbered State sovereignty. This, in turn, has brought about a greater recognition of State responsibility in the relationships between the smaller units, which has been readily accepted in countries like the United Kingdom and its House of Lords. However, it has not been received so graciously by others, including the United States Supreme Court, and this may pose a problem for the future growth of the international community. However large this world order may grow, the State remains important. It still continues to be the foundation for such a community, and "the respect for its fundamental sovereignty and integrity are [sic] crucial to any common international progress."[132] The distinction however, between State sovereignty and international responsibility has been left unresolved by these decisions, and the opposing viewpoints they set forth frustrate the progress of the international community even further.

It is only by mere speculation that one could possibly predict the effect these decisions may have upon the growth and progress of the international community. What the United States may view as a mere affirmation of jurisdictional principles may appear to other States as a newly established executive authority to conduct international abductions.[133] Surely our Supreme Court did not intend to grant such authority, but this viewpoint is not unreasonable, especially for those nations who officially denounced the decision or issued declarations after it was rendered.[134] For a decision that sought to merely reaffirm a key principle of law, it appeared to the rest of the world as a "green light" to violate principles of international law. It also wrongfully created the appearance of an accepted governmental practice which not only compelled President Bush to assure Mexican President Salinas that similar actions would not be conducted, encouraged or condoned,[135] but also brought into the forefront the proposition of amending the Extradition Treaty expressly to exclude such activity.[136]

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131. *Id.* at 958.

132. *Id.* at 959.

133. Kreczko, *supra* note 128, at 614.

134. *See id.* at 615-17. Among the Caribbean nations officially protesting the Supreme Court's decision were: Argentina, Bolivia, Brazil, Chile, Colombia, Jamaica, Mexico, Paraguay, and Uruguay. The Court's decision was also closely followed by the European and Mexican press, including *Agence France Press* and *Le Monde* (Fr.), *La Opinión* and *El Pregonero* (Mex.), *La Stampa* (It.), *Der Standard* (Ger.), *NRC Handelsblad* and *Trouw* (Hol.).

135. *Id.* at 618. In fact, the controversy survived the Bush presidency and confronted the Clinton administration when Mexican officials urged Mr. Clinton to issue an executive order to prohibit transborder kidnapping. *See* Gail Diane Cox, *Drug War's Big Showcase Falls Apart*, NAT'L. L.J., Feb. 1, 1993, at 8. *See also* Jim Newton, *Clinton Urged to Ban Foreigners' Abductions*, L.A. TIMES, Jan. 7, 1993, at Metro 3 (Mr. Clinton's denouncement of the Alvarez-Machain kidnapping).

136. Strong consideration has been given to a proposed amendment to the existing Extradition Treaty between the United States and Mexico which would expressly proscribe "transborder applications of law." *Relations Between the U.S. and Mexico*, SAN DIEGO UNION-TRIB., Feb. 27, 1994, at G-5. This amendment, of course, has been urged by Mexico. *Id.*

Alternatively, the potential outcomes that may ensue decisions like *Ex parte Bennett* are largely predictable and more accepted within the international community of States. Yielding some State power for the promotion of international principles and objectives benefits the international community of States, and the reluctance of States to promote international wrongdoing, i.e. international forced extradition, helps reinforce the transnational respect which the United Nations and its Charter seek to accomplish. Clearly, decisions which follow the *Ex parte Bennett* rationale would receive little criticism from the international community.[137]

When the Charter was signed, almost fifty years ago, the nations which consented to its terms and conditions never expected a Cold War to dampen the effectiveness of its underlying organization as a whole. Perhaps they never expected to see such an empowerment of the organization as well, but the founding States did recognize a *need* to be fulfilled by a world order of united nations. This organization would serve as a means by which the countries of the world could unite their strength in the maintenance of peace, the promotion of economic and social advancement, and the preservation and protection of the fundamental rights of humankind. The extent of the organization's actual powers could not have been anticipated in 1945, but each Member State, upon accession thereto, recognized that it was exchanging a portion of its sovereignty for the greater good. The problem the nations of the world now face is whether they will yield that portion for the enhancement of a collective, international world order.

VII. CONCLUSION

From the concept of separate States with independent autonomy and prerogatives to that of a community of inter dependent States, the peoples of the world have changed — regrouped — modified. They are no longer just a part of States but now a part of the international community. Because of the growth of power and recognition this new, collective world unity has accumulated, States are now faced with adaptation and modification toward a newly-recognized concept of international responsibility, inherently differing from the fundamental principles upon which those nations were founded. This change is all a part of a larger goal, which involves a new world order — one in which States are not independent of each other, but *inter*dependent and reliant upon each other for the good of humankind and the preservation of peace.

The problem the international community now faces is the reluctance of some States to submit fully to the concept of an international society. Of course this is an expected and justifiable position for any State to take, for if it submits, it must yield a portion of the sovereignty inherent in its history and forming the foundation from which it evolved. Likewise, if the State resists, it may further delay the fruits that such concession may yield. There exists a distinct and fine line between the choices.

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137. Consider Andrew L.-T. Choo, *Ex Parte Bennett: The Demise of the Male Captus, Bene Detentus Doctrine in England*, 5 CRIM. L.F. 165 (1994) (book review).

Mr. Bennett and Dr. Alvarez are but two players in a large arena; a community of world nations are participants as well and are charged with the responsibility to make decisions which may reshape and reorder that arena. Ironically, both Bennett and Alvarez are the bearers of the problem we now face and have brought it to the forefront of international attention. This has shown the nations of the world the paths now becoming clear. Either path determines and shapes what exactly will constitute this world order in generations to come, and it is now up to those nations to choose.

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