A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court’s Abduction Decision in Alvarez-Machain

Andrew L. Strauss

University of Dayton, astrauss1@udayton.edu

Follow this and additional works at: https://ecommons.udayton.edu/law_fac_pub

Part of the International Law Commons

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of eCommons. For more information, please contact frice1@udayton.edu, mschlangen1@udayton.edu.
A GLOBAL PARADIGM SHATTERED: THE JURISDICTIONAL NIHILISM OF THE SUPREME COURT’S ABDUCTION DECISION IN ALVAREZ-MACHAIN

Andrew L. Strauss*

INTRODUCTION

We have entered into a new historical era with the end of the Cold War and the rise of the global economy. No longer locked into a mortal struggle in the furtherance of what were perceived to be life’s most fundamental values and even societal survival, there is now an unprecedented opportunity to build a global system of government founded on the same civilizing precepts of legal authority upon which we in the United States have based our domestic order. The potential, if the political will can be summoned, is the creation of a world structure where conflict over principles, as well as competition for power, can be resolved peaceably through the media of negotiation, compromise, and adjudication based on legal norms, rather than through violence and destruction.

The current globalization of the world economy provides new, compelling reasons for strengthening the international legal order in general, and it particularly gives us new incentive to protect and even enhance the specific body of international law that defines the boundaries of state jurisdictional authority. The historic international trade in goods and services is being eclipsed by the internationalization of the production process itself.¹ This creates a new imperative that such globalized activity be effectively regulated. To meet this need, national regulatory authority must be defined as clearly as possible by a framework that delineates the boundaries of state jurisdiction. Not to meet this challenge is to invite regulatory confusion, political conflict, and economic inefficiency.

The tragedy of United States v. Alvarez-Machain,² the United States Supreme Court’s first post-Cold War international decision, is that the Court

* Associate Professor, Widener University School of Law; B.A., Woodrow Wilson School, Princeton University; J.D., New York University School of Law. I would like to express my warm appreciation for the great dedication given to this project by my research assistants, Heather Satterfield and Bob Lohr. I would also like to thank Alan Garfield, Mary Kate Kearney, Patrick Kelly, Marty Kotler, Mary Brigid McManamon, Laura Ray, and Anne-Marie Slaughter for their very helpful comments and criticisms.


squandered this great historic moment by refusing, for the first time, to up-
hold the international law which provides for the coherent allocation of inter-
national jurisdictional authority over criminal defendants. The Court’s
decision dramatically undermined the advancement of international law gen-
erally, and the preservation of a coherent allocation of state regulatory au-
thority in the increasingly globalized area of enforcing laws that prohibit
criminal conduct. This article reveals the unfortunate truth that the Supreme
Court in *Alvarez-Machain* shattered the existing international jurisdictional
paradigm, and in its place offered not a coherent regulatory alternative, but
jurisdictional nihilism. If adopted by other countries, the Court’s approach
can only lead to global regulatory confusion.

Writing for the majority, Chief Justice William Rehnquist overturned the
United States Court of Appeals for the Ninth Circuit by ruling that the
United States could assert personal jurisdiction over Humberto Alvarez-
Machain. Alvarez-Machain was a Mexican doctor who was abducted from

3. As used in this article, the word “paradigm” refers to a generally accepted model that
describes a social institution. Thomas Kuhn very much affected our contemporary understand-
ing of the word. He employed it to denote a generally accepted conceptual framework that
explains natural phenomena. The word has been increasingly used, however, by social scientists
to explain human institutions. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS
43-51 (1962).

4. Dr. Alvarez-Machain was indicted and brought before the United States District Court
for the Central District of California. He moved to dismiss for lack of personal jurisdiction
because he had been abducted by the United States government in violation of the Mexican-
1990), aff’d sub nom. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev’d, 112
S. Ct. 2188 (1992). The district court granted the motion and ordered the doctor’s repatriation to
Mexico based upon the finding that the treaty impliedly prohibited one nation from violating the
territorial integrity of another. *Id.* at 610, 614.

The United States Court of Appeals for the Ninth Circuit affirmed the district court’s deci-
sion based upon its prior holding that an abduction conducted in Mexican territory, sponsored
by the United States and without Mexico’s consent, was a violation of the treaty. United States
v. Alvarez-Machain, 946 F.2d 1466, 1466-67 (9th Cir. 1991) (citing United States v. Verdugo-
Urguizua, 939 F.2d 1341 (9th Cir. 1991), cert. granted and judgment vacated, 112 S. Ct. 2986
(1992)). The circuit court agreed that the proper remedy for the treaty violation was dismissal of
the indictment and repatriation of Dr. Alvarez-Machain to Mexico.

The United States Supreme Court granted certiorari and reversed. United States v. Alva-
rez-Machain, 112 S. Ct. 2188 (1992). On remand, the district court judge dismissed the charges
at the close of the prosecution’s case for lack of evidence. See Jim Newton, *Judge Orders
offered to show that Dr. Alvarez-Machain had given injections to agent Camarena); Seth

5. Dr. Alvarez-Machain was allegedly involved in the 1985 abduction and murder of DEA
Camarena had been investigating suspected drug lord Rafael Caro-Quintero who, together with
Ernesto Fornesca, was alleged to have ordered the agent’s death. Dr. Alvarez-Machain alleg-
edly injected Camarena with lidocaine to keep him alive for prolonged torture by drug kingpins.
*Long Arm of the Law; A Decision To Uphold an International Kidnapping Alarms Latin
America*, TIME, June 29, 1992, at 30. The doctor was one of 22 persons indicted for involvement
in the agent’s abduction and murder. *Caro-Quintero*, 745 F. Supp. at 602. The doctor was
his office in Guadalajara, Mexico, transported to the United States by bounty hunters whom the Drug Enforcement Agency (DEA) had hired, and held in the United States despite Mexico's protest and demands for his return. The Court did not dispute Dr. Alvarez-Machain's argument that general international jurisdictional law, in the cause of protecting Mexico's territorial sovereignty, prohibited the United States from asserting personal jurisdiction over him. In fact, the Court admitted that the kidnapping "may be in violation of general international law principles."

In disregarding the international law of jurisdiction, the Court for the first time explicitly distinguished between abductions that violate general principles of international law and those that violate extradition treaty obligations. The Court determined that only those abductions that violate treaty obligations are cause for denying jurisdiction. The understanding of the general principles of international law that allows the Court to draw this distinction is the crux of the decision. It not only results in the Court's failure to apply general international jurisdictional law, but it correspondingly wrongly causes the Court to focus its analysis on the United States-Mexican bilateral extradition treaty and, ultimately, to conclude that the absence of an anti-abduction provision in that treaty provided a legally sufficient basis for the United States to kidnap Dr. Alvarez-Machain.

Although the Court concluded that it need not apply the international law of jurisdiction, the Court failed to articulate the basic understanding of
jurisdiction upon which its analysis was built, the provisions of the interna-
tional law of jurisdiction governing abductions, or the relationship between
international law and domestic law which would lead the Court to an under-
standing of which authority to apply. In order, therefore, to determine
whether the Court should have applied the international law of jurisdiction, I
first describe how the Court should have approached the type of jurisdic-
tional concerns found in the Alvarez-Machain case. Specifically, I explain
why the Court should have ascertained and applied the legal authority which
actually granted the relevant jurisdictional authority to the United States. I
then demonstrate why the international law of jurisdiction, which prohibits
abductions, is that legal authority. Finally, I explain why the doctrine of dual-
ism, which allows states to disregard substantive international law, cannot be
applied to international jurisdictional law. This article does not attempt to
establish a normative basis for a new international jurisdictional system.
Rather, operating within the positivist tradition, this article is limited to
assessing whether the Alvarez-Machain Court applied the existing jurisdic-
tional paradigm in holding that the United States had personal jurisdiction
over Dr. Alvarez-Machain.

To develop the above issues, this article is specifically structured as fol-
lows: Part I identifies the nature of the jurisdictional issues suggested by the
abduction of Dr. Alvarez-Machain. I differentiate between the utilization of
jurisdictional limits as a mechanism to allocate authority between governing
entities and the utilization of jurisdictional limits as a means to protect the
rights of defendants. I then explain why the body of this article focuses on
the jurisdictional law which is concerned with allocating authority between
governing entities. In Part II, I present the relevant allocational jurisdictional
framework. This framework provides that whenever faced with a choice be-
tween competing jurisdictional laws, emanating from more than one author-
ity, which could possibly be applied to limit the jurisdictional power of a
governing entity, courts should apply the law from the authority that actually
grants jurisdiction to that governing entity. In Part III, I describe the para-
digm underlying the nation-state system. I explore the inherent implications
of the concept of territorial sovereignty as they relate to the international
jurisdictional law specifically prescribing abductions. In Part IV, I explain
why another implication of this concept of territorial sovereignty is that inter-
national law is the source of jurisdictional law that should be applied in our
domestic courts. After demonstrating that the Alvarez-Machain Court as-
sumed that the United States Constitution was the source of applicable jurisdic-
tional law, I explain that the Court erred in failing to apply the
international law of jurisdiction as the correct authority. In Part V, I review
the specifics of the Court's interpretation of the United States-Mexican bilat-
eral extradition treaty and demonstrate that the Court employed the treaty as

13. A positivist legal analysis attempts to discern the law as it has actually developed. In
contrast, a normative analysis offers rationale to justify a given legal standard. Legal positivism
in international law is generally associated with the idea that legitimate international legal au-
thority flows primarily from the consent of nation-states.
a decoy to displace the international law of jurisdiction that prohibits abductions. I show how the Court interpreted the treaty in such a way so as effectively to create an international law of its own invention that permitted Dr. Alvarez-Machain's abduction. In Part VI, I explain that the dualist theory of the relationship between the domestic and international legal systems, which provides a theoretical basis for judicial deference to state violations of substantive international law, cannot be extended to permit state violations of international jurisdictional law. In Part VII, I review past judicial precedent and conclude that until the Alvarez-Machain decision, abduction cases in the United States had been consistent with the paradigm underlying the state system described in this article. Finally, this article concludes with an assessment of the detrimental implications of the Alvarez-Machain opinion.

I. Narrowing the Issue: A Focus on the Jurisdictional Concern with Allocating Governmental Authority Rather than Protecting the Rights of the Defendant

In order to analyze the Alvarez-Machain decision properly, one must understand the nature of the jurisdictional issue presented in the case. This understanding will make it possible to derive a basic framework which can be used to assess the decision. The DEA's commissioned abduction of Dr. Alvarez-Machain from Mexico14 raises jurisdictional concerns about both the allocation of governmental authority and the protection of the defendants' rights. Jurisdictional concerns surrounding the allocation of governmental authority raise the question of whether the United States, acting without Mexico's permission, can legally exercise law enforcement activities within Mexican territory. Jurisdictional concerns about protecting the rights of defendants raise the question of whether fugitives themselves enjoy a basic right not to be abducted by a foreign government, and if so, whether the United States has the power to assert jurisdiction over a defendant abducted in such a manner.

The jurisdictional analysis presented in this article, however, only attempts to understand and critique the basis for the Supreme Court's determination that the United States courts need not apply the international law which concerns the allocation of authority between nation-states. (I will call this "allocational jurisdiction.") While there are substantial indications that international law has progressed both to recognize the right of defendants to be free from arbitrary arrests and to view derogations of such rights as having jurisdictional implications, a detailed discussion of the implications of this development for the Alvarez-Machain decision is outside the parameters of this article.15 Having so narrowed the issue, I begin my analysis by construct-

14. See supra notes 5-7 and accompanying text.
15. The Alvarez-Machain opinion was likely premised on the assumption that this law does not exist. The Court failed to discuss the possibility that international law recognizes the rights of a defendant not to be abducted, much less whether that right should be applied in the United States. Accordingly, this article will also be limited to assessing the implication for domestic
ing a framework that demonstrates the need for courts to identify the proper legal authority that determines the jurisdictional competence of the governmental entity whose jurisdictional power is in question.

judicial application which flows from the clearly existing jurisdictional paradigm allocating authority between nation-states. See infra notes 16-40 and accompanying text. By so limiting my task, I do not wish to imply, however, either that international law does not protect the right of defendants or that this law should not be applied by American courts. Assuming two progressive changes within international law have transpired, the basis for a doctrine that would bar the exercise of personal jurisdiction gained in violation of a defendant's rights would exist.

First, of course, it would have to be established that there is an international right not to be subject to state-sponsored abductions. While this right is not specifically guaranteed in any of the international human rights instruments, several commentators have convincingly argued that it is within the penumbra of rights protecting individuals against arbitrary governmental actions which are not, to use the American terminology, in accord with due process of law. John Quigley, Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists, 10 HUM. RTS. Q. 193, 204-05 (1988) (“In any case of abduction, there is violation of personal liberty, of the right to be detained under legal authority, of the right of emigration, of the right to remain in a state until expelled, and of the right to seek asylum.”); see also Martin Feinrider, Extraterritorial Abductions: A Newly Developing International Standard, 14 AKRON L. REV. 27, 37 (1980) (“There has been a major development in international law which justifies a further search for international protection for the victims of extraterritorial abductions: the development, over the past several decades, of international human rights law and the concomitant [sic] change in status of the individual into a subject of international law.”).

In addition to establishing the international right not to be subject to state sponsored abductions, for jurisdiction to be defeated, it would also have to be established that a state does not have legal authority to exercise jurisdiction over a defendant whose presence was secured by a violation of that international right. Currently, as this article will explain, governing entities do not have the authority to exercise jurisdiction that encroaches on the exclusive jurisdiction of other states. Nonetheless, personal jurisdiction in criminal cases has not been so explicitly tied to international human rights concerns. American courts have, however, begun to create a domestic doctrine connecting the two concepts. The United States Court of Appeals for the Second Circuit introduced the doctrine when it ruled that due process required the court to divest itself of jurisdiction over a criminal defendant who was tortured while being abducted from overseas. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). The court based its decision upon the “shock the conscience” test associated with the constitutional concept of fundamental fairness as first enunciated in Rochin v. California, 342 U.S. 165 (1952). Toscanino, 500 F.2d at 275. The Second Circuit later narrowly interpreted its holding in Toscanino to make clear that only outrageous physical brutality would defeat jurisdiction in United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), cert. denied, 421 U.S. 1001 (1975), and United States v. Lira, 515 F.2d 68 (2d Cir.), cert. denied, 423 U.S. 847 (1975). Circuit courts are split in their application of what has been termed the “shocking and outrageous government conduct” exception to the Ker-Frisbie doctrine. See generally Andrew B. Campbell, The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs, 23 VAND. J. TRANSNAT'L L. 385, 419 nn.226-27 (1990) (questioning vitality of Toscanino exception); Jonathan Gentin, Comment, Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on United States v. Caro-Quintero and the Inadequacy of the Ker-Frisbie Doctrine, 40 EMORY L.J. 1227, 1241-43 (1991) (Supreme Court's recent decision in United States v. Crews, 445 U.S. 463 (1980), may foreclose courts from relying on objective constitutional threshold to analyze government misconduct); Andrew Wolfenson, Note, The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law, 13 FORDHAM INT'L L.J. 705, 724-38 (1989-1990) (tracing appellate court application of Toscanino case as exception to Ker-Frisbie doctrine).
II. The Allocational Jurisdictional Framework: The Need for a Jurisdictional Authority

The framework which prescribes the way in which courts should approach jurisdictional problems concerning the allocation of governmental authority can be derived from the allocational jurisdictional concept itself. Jurisdiction employed in this way acts as a mechanism for channeling government authority into discrete and politically justifiable organizational units. Without it, there would be no way to accomplish effectively the intricate and myriad tasks necessary for governing a modern complex society.16 There would be no way to determine which government entity could legally exercise its power in what area and there would be no way to attach responsibility for an entity's failure to carry out government functions.

To make a simple illustration, the Bureau of Motor Vehicles in my home state of Pennsylvania could, instead of issuing driver's licenses, attempt to determine who had to register for military conscription, promulgate United States income tax regulations, mimic the role of the United Nations Security Council by passing decrees purporting to mandate international sanctions on a foreign nation, or even claim the ability to capture and try a capital offender. Other government units could do likewise. This would obviously make it impossible to organize global social life. By drawing upon a coherent organizational scheme to delineate the relative spheres of authority of the various government entities, and then legally mandating institutional compliance with these limits, jurisdictional law functions to channel governmental regulatory authority coherently.

This concept of allocational jurisdiction would be meaningless if there was not a clear system that defined the distribution of power between the various government entities. Therefore, inherent in this jurisdictional model is the idea that this law and order must flow from an identifiable authority.17

16. Lawyer and social theorist Max Weber explored the concept of bureaucracy in *Economy and Society*, a work which, although unfinished when he died in 1920, identified and described the importance in modern bureaucratic society of, what I am calling, allocational jurisdiction. 3 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 954 (Guenther Roth & Claus Wittich eds. & Ephraim Fischoff et al. trans., 1st ed. 1968). Weber determined that there were certain principles common to all modern governing structures. Among these, the most basic was that of jurisdiction. According to Weber, "[r]ationally regulated association within a structure of domination finds its typical expression in bureaucracy... [which] is fully developed in political... communities only in the modern state." *Id.* at 956. Of the characteristics essential to a rationally regulated modern bureaucratic structure, the requirement of jurisdictional delineation of authority held the highest priority. *Id.*

17. *Id.* at 956-57. Weber further states that "[t]he principles of office hierarchy... stipulate a clearly established system... , and that the principle of hierarchical office authority is found in all bureaucratic structures." *Id.* at 957. See infra note 64 for further reference to this material. See also H.L.A. HART, THE CONCEPT OF LAW 24-25 (1961) (identifying need for single source of jurisdictional law). See generally SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 137-47, 168-83 (1979) (discussing hierarchical dispute resolution in state organizations).
legal authority could reasonably be applied to a jurisdictional issue, the authority which actually grants jurisdiction to the government entity must be determined and the rule of law promulgated by that authority must be applied.

To address whether the Supreme Court in *Alvarez-Machain* should have applied the international law of jurisdiction as the legal authority, one must determine whether the international legal system is the proper source of the jurisdictional law that governs whether the United States has personal jurisdiction over a fugitive abducted from another country without that country's consent. Usually, within any given domestic system there is no question about the jurisdictional law to be applied. For example, within the American federal bureaucracy the source of jurisdiction among the various government agencies is well-settled. It is clear, for instance, that the Food and Drug Administration (FDA) was granted authority pursuant to an act of Congress, the Federal Food, Drug, and Cosmetic Act, to promulgate rules regulating the food and drug industries in the United States. Congress itself, it has been established, was granted the authority to legislate in this area by the so-called Interstate Commerce Clause found in Article I, Section 8 of the United States Constitution.

Unlike the jurisdictional law which operates solely within our domestic system, where the sources of jurisdictional law and the various governing bodies unto which they grant jurisdiction have been explicitly delineated, the sources of authority governing the international distribution of jurisdiction have not been explicitly delineated. The source of the international jurisdictional power, however, can be inferred from the paradigm upon which the nation-state system is based. This paradigm, as will become evident, provides the foundation upon which jurisdictional authority is distributed between countries. Therefore, an international jurisdictional decision, such as *Alvarez-Machain*, which is inconsistent with this paradigm, necessarily conflicts with the underlying institutional reality upon which the international order is based. In Part IV, I demonstrate why, under this paradigm, the international law of jurisdiction is the source of the relevant jurisdictional grant of power to the United States and should, therefore, be applied to prohibit the assertion of personal jurisdiction over defendants abducted by the United

19. United States v. Walsh, 331 U.S. 432, 434 (1947); see also United States v. Sixty-Two Packages, 48 F. Supp. 878, 884 (W.D. Wis. 1943) (recognizing that Congress has power under Commerce Clause to condemn interstate transportation of misbranded drugs), aff'd, 142 F.2d 107 (7th Cir.), cert. denied, 323 U.S. 731 (1944).
States without the consent of the abductee’s state. First, however, I must describe the content of this jurisdictional law and explain its fundamental relationship to the paradigm underlying the state system.

III. The International Law of Jurisdiction and the Restrictions on Foreign Abductions

The international prohibition on asserting personal jurisdiction over defendants whom a foreign state has abducted without permission of the state where the abduction took place flows from the territorial jurisdictional limits on state authority inherent in the existing international system, which is based on territorial sovereignty. Under the classic territorial sovereignty formulation, states possess the full and complete power to exercise exclusive jurisdiction over persons or things within their own territory. This understanding is inherent in the recognized definition of the “state” under international law: “[A]n entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”

The notion that a “defined territory and a permanent population” must be “under the control of its own government” is in reality nothing more than a designation that statehood is the manifestation of a state’s exercise of jurisdiction over its territorially defined populace. Chief Justice John Mar-

---

22. Restatement (Third), supra note 9, § 201. The Restatement states that “the definition in this section is well-established in international law; it is nearly identical to that in Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.” Id. § 201 cmt. a.

23. Id. § 201 (emphasis in original). The equation of statehood with coordinated control over a population within a defined territory is well-accepted. See, e.g., Hart, supra note 17, at 216-17 (“‘A state’ is not the name of some person or thing inherently or ‘by nature’ outside the law; it is a way of referring to two facts: first, that a population inhabiting a territory lives under that form of ordered government provided by a legal system with its characteristic structure of legislature, courts, and primary rules; and, secondly, that the government enjoys a vaguely defined degree of independence.”); J.D. van der Vyver, Statehood in International Law, 5 Emory Int’l L. Rev. 9, 99 n.406 (1991) (citing H. Dooyeweerd, De Strijd om Het Souvereiniteitsbegrip in de Moderne Rechts-en Staatsleer 54 (1950)) (defining the state as “the institutional community of a government and subjects, regulated by public law on the historical foundation of a monopolistic organization of the power of the sword (political authority) within a defined territory.”); cf. Henry Wheaton, Elements of International Law with a Sketch of the History of the Science 51, 98-129 (Philadelphia, Carey, Lea & Blanchard 1836) (“A sovereign state is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers.”).

24. This closely accords with the common understanding of the necessary link between governmental control and jurisdiction. See Clyde Eagleton, International Government 87 (3d ed. 1957) (“The most important right—and duty—of a state is jurisdiction. It is solidly established in jurisprudence. . . . From the viewpoint of sovereignty, jurisdiction means internal sovereignty, exclusive control over all persons and things within its territory.”). Georg Schwarzenberger stated the principle with authoritative support:

State sovereignty and State jurisdiction are complementary terms. Territorial sovereignty cannot limit itself to its negative side, i.e., the exclusion of the activities of other States, but equally fulfills a positive function: “It serves to divide between nations the
shall, writing in *The Schooner Exchange v. M'Faddon*, provided what became the classic American description of this grant of jurisdictional power:

> 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, and an investment of that sovereignty to the same extent in that power which could impose such 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.26

> space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. Further, in principle, State sovereignty and State jurisdiction are co-extensive. As the Permanent Court of Arbitration held in the case of the *North Atlantic Coast Fisheries* (1910), "the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided... [.]. One of the essential elements of sovereignty is that it is to be exercised within the territorial limits, and that, failing proof to the contrary, the territory is conterminous with the sovereignty."


International tribunals have articulated the correlation between sovereignty and territoriality. The International Court of Justice stated, "By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States." Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 39 (Apr. 9). In Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928), Max Huber wrote, "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe [territory] is the right to exercise therein, to the exclusion of any other State, the functions of a State." Id. at 838.

25. 11 U.S. (7 Cranch) 116 (1812).

26. Id. at 136. Marshall's statement is perhaps the best known American articulation of the territorial principle of jurisdiction. The doctrine of territoriality had, however, been previously described in the famous maxims formulated by Ulricus Huber (Huberus), a Dutch jurist of the 17th century. See ULRICUS HUBER, DE CONFLICTU LEGUM, translated and reprinted in Davies, THE INFLUENCE OF HUBER'S DE CONFLICTU LEGUM ON ENGLISH PRIVATE INTERNATIONAL LAW 49 (1937). These maxims were later identified by Joseph Story as the laws which prescribed the territorial jurisdictional limits on governmental power. See Geoffrey C. Hazard, Jr., A General Theory of State-Court Jurisdiction, 1965 SUP. CT. REV. 241, 259-62 (1965) (explaining Story's role in shaping the jurisdictional rules); Ernest G. Lorenzen, Story's Commentaries on the Conflict of Laws—One-Hundred Years After, 48 HARV. L. REV. 15, 16 & n.9, 17 (1934) (explaining that Huber's announcement of doctrine of territoriality preceded Story's commentaries); see also Ernest G. Lorenzen, The Theory of Qualifications and the Conflict of Laws, 20 COLUM. L. REV. 247, 271 n.110 (1920). The doctrine of territorial jurisdiction has not changed significantly over time and remains the basis of international jurisdictional law. See, e.g., RESTATEMENT (THIRD), supra note 9, § 206(a) & cmt. b (describing state sovereignty and jurisdiction over its territory); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287-91 (4th ed. 1990) (same);
Despite the inherently territorial character of the state, many assertions of state authority do not lend themselves to being neatly circumscribed by territorial restraints. Thus, Marshall's statement merits some qualification.\textsuperscript{27} Richard Falk has explained:

\[\text{[A]s Marshall was ready to acknowledge and to apply in Schooner Exchange, the fundamental spatial allocation must be modified to accommodate many situations of interaction between states. Not all events can be meaningfully located in space, and reference to the place where most of the constituent acts are performed often is not the state with the best claim of legal competence.}\textsuperscript{28}\]

Falk elaborates on the ways in which international law has accommodated this problem:

This has induced an expansion of the territorial allocation of legal competence to authorize the assertion of control over events with only a remote spatial contact with the claimant state. It has also

\begin{flushright}
\text{Charles C. Hyde, International Law §§ 220, 244 (2d rev. ed. 1945) (describing state's sovereignty and jurisdictional boundaries); Schwarzenberger, Law and Order, supra note 24, ch. 5 (describing function of sovereignty in current international law); Luzius Wildhaber, Sovereignty and International Law, in The Structure and Process of International Law 425, 441 (R. MacDonald & Douglas Johnston eds., 1983) (describing concept of territorial jurisdiction).}
\end{flushright}

Territorial jurisdiction principles are codified as major constitutional principles of the United Nations organization. \textit{See, e.g., I Lassa Oppenheim, Oppenheim's International Law § 169 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (observing that "[t]he exclusive dominion of a state within its territory is basic to the international system and Article 2.4 of the United Nations Charter accordingly requires all members to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'.")}. The constituent documents of regional organizations also include language guaranteeing territorial jurisdiction. American states, for example, provide in Articles 9 and 12 of the Charter of the Organization of American States that

\[\text{[T]he State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law. . . . Jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.}
\]

Charter of the Organization of American States, Apr. 30, 1948, arts. 9, 12, 2 U.S.T. 2394, 2419, 119 U.N.T.S. 3, 54, 56. Nation-states' underlying concern in maintaining international law principles that guarantee them exclusive control over their respective territories is the desire to maintain political authority. Encroachment on this exclusive authority is a direct threat to the "territorial integrity" of a state, similar to the unleashing of invading armies. This is because a regime that allows another government to assert political authority within its territory will find its own political authority jeopardized.

\textsuperscript{27} This article addresses only the allocation of horizontal authority between states. Increasingly, interventions by the United Nations and other international organizations supported by changing notions of what should be exclusively reserved for the domestic realm are vertically challenging the notion that states have exclusive jurisdiction over what transpires inside their territories.

\textsuperscript{28} Richard Falk, The Role of Domestic Courts in the International Legal Order 30 (1964).
induced the formulation of supplementary principles of legal com-
petence each of which in special contexts appears to provide a more
persuasive defense of a jurisdictional claim than . . . could be given
by resort to the territorial principle.29

Falk lists the supplemental principles of jurisdiction which have gained ac-
ceptance in varying degrees:

[T]he nationality principle (the actor was a national of the claimant
state) . . . the protective principle (the act threatened some vital
national interest such as the security or the credit of the claimant
state, e.g., counterfeiting its currency) . . . the passive personality
principle (the victim of the act was a national of the claimant state),
or . . . the universality principle (the act is so contrary to interna-
tional order that its mere commission is enough to give legal compe-
tence to any state that can obtain custody of the actor, e.g.,
piracy).30

However, as Falk makes clear, Marshall's notion of exclusive territorial juris-
diction "remains an accurate account of the major allocation of competence
[and, most important for our purposes], especially in regard to enforcement
aspects of legal control."31

29. Id. at 31-32.
30. Id. at 32.
31. Id. at 29. Today, the concept of jurisdiction in international law has been separated for
purposes of analytical clarity into three categories: prescriptive jurisdiction, referring to the
power of a state to legislate or prescribe its substantive laws extraterritorially; enforcement ju-
risdiction, referring to the power of a state to enforce its laws or perform executive acts outside
of its territory; and adjudicative jurisdiction, referring to the power of a state to assert personal
jurisdiction usually by way of a court exercising control over a foreign or offshore defendant so
as to render a judgment having legal effect. See Restatement (Third), supra note 9, pt. IV,
chs. 1-3 (discussion of international jurisdiction law organized according to these distinctions);
see also I Oppenheim, supra note 26, § 136 (describing concepts of jurisdiction in international
law); Michael Akehurst, Jurisdiction in International Law, 46 Brit. Y.B. Int'l L. 145, 145-212
(1973) (same, using slightly different terminology); David J. Gerber, Beyond Balancing: Interna-
(describing prescriptive jurisdiction); Bruce Zaganis & Jay Rosenthal, United States Jurisdictional
Considerations in International Criminal Law, 15 Cal. W. Int'l L.J. 303, 316-31 (1985) (describ-
ing international jurisdiction with respect to United States' criminal jurisdiction).

This article only addresses adjudicative and enforcement jurisdiction. See infra note 40 and
accompanying text. Because the ability to achieve legislative policy goals within national bound-
aries is often affected by activities which occur outside of national boundaries, national legisla-
tive schemes often prescribe activity outside national boundaries. In addition, international law
accepts that states can generally prescribe the activities of their citizens even when in foreign
territories. Therefore, Falk's "expansion of the territorial allocation of legal competence" and
"supplementary principles" are most relevant to jurisdiction to prescribe laws. Falk, supra note 28,
at 31-32. Mann distinguishes between enforcement jurisdiction, which continues to be strictly
limited by territorial principles, and prescriptive jurisdiction, which does not, as follows:

Indeed, the fact that a State has legislative jurisdiction in respect of a crime committed
abroad does not authorize it to send police officers into a foreign State to arrest the
criminal and carry him across the frontier, or to send its judges into the foreign State to
sit there as a court and try the case. There can be no question of the two jurisdictions
coinciding. That a State which has legislative jurisdiction may apply and enforce it in its
own territory is undoubted and involves no problem. Enforcement jurisdiction, how-
Because police operations and, in particular, the capture of criminal suspects naturally occur within a clearly defined territory, such operations serve as classic examples of state activities over which the allocation of jurisdictional control continues to be governed exclusively by territorial principles. For this reason, the international jurisdictional law addressing the allocation of authority between states as it relates to state jurisdiction over criminal defendants is well-defined. Stemming from states' exclusive territorial sovereignty, they may, under the general principles of international law, at their discretion, extradite, grant asylum, or exercise authority in some other country. As a matter of firm principle this cannot be done without the consent of the State in which the act of enforcement takes place. The rights of the territorial sovereign prevail. The international order would be gravely prejudiced if it were otherwise.

Therefore, a conviction obtained in such circumstances would, it is submitted, itself be unlawful.


32. See infra note 36 and accompanying text.
33. See infra note 40 and accompanying text.
34. "Extradition" is defined as the process by which a person charged with or convicted of a crime under the law of one state is arrested in another state and returned for trial or punishment. Re Statement (Third), supra note 9, pt. IV, ch. 7, introductory note, at 556-57. Extradition, which often occurs pursuant to the obligatory provisions of a bilateral extradition treaty, is a legal procedure that tends to be more procedurally cumbersome than either deportation or exclusion of an international fugitive. See infra note 39.

International law does not require states to surrender fugitives in the absence of a treaty creating the obligation. Judge Bedjaoui recently reaffirmed the principle specifically as it applies to a state's own citizenry in his opinion in Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, which arose from the bombing of the PanAmerican airliner over Lockerbie, Scotland and was recently argued before the International Court of Justice: "Without entering into the merits of the case, I would point out that, as is well known, there does not exist in international law any rule that prohibits, or, on the contrary, imposes the extradition of nationals." Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114, ¶ 12 (Apr. 14) (Bedjaoui, J., dissenting). The doctrine is authoritatively established. See, e.g., I Oppenheim, supra note 26, § 415; 6 Marjorie Whiteman, Digest of International Law ch. XVI, § 3 (1968); IV John B. Moore, A Digest of International Law § 580 (1906). There was a contrasting historical minority rule, but that is no longer applicable today. See II Hugo Grotius, De Jure Belli Ac Pacis ¶¶ 527-28 (1625), translated in Classics of International Law (Scott ed. 1913) (understanding extradition to be a duty imposed by international law under some circumstances).

In addition to fulfilling the allocational jurisdictional function of allowing states to secure the return of wanted fugitives, which is consistent with the principles of territorial sovereignty, see supra note 26 and accompanying text, some states have chosen to build into extradition treaties and corresponding domestic legislation protections for the rights of defendants. "The law of extradition as reflected in treaties and statutes ... balances 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), supra note 9, § 476 cmt. a (citations omitted). See generally id. at pt. IV, ch. 7, subchapter B (describing United States law on extradition); M. Cherif Bassiouni, International Extradition and World Public Order 560-75 (1974) (discussing traditional law of extradition).
manner over fugitives who are present within their territory and wanted by foreign states.

As a logical extension of this law, states may not ascertain jurisdiction over foreign defendants by abducting them. The obvious complement to the full and complete sovereignty that each state has within its own territory is that these same states cannot exercise administrative powers in foreign states and, specifically, cannot arrest fugitives within those foreign states without the states' permission. Such prohibitions may frustrate the ability for states


35. "Asylum" refers to a state granting safe-haven to individuals who are wanted by foreign authorities by admitting them to and later allowing their continued presence within state borders. States' competence to grant asylum is authoritatively established as derivative of territorial sovereignty.

The fact that every state exercises territorial supremacy over all persons on its territory, whether they are its nationals or aliens, excludes the exercise of the power of foreign states over [their own] nationals in the territory of another state. Thus, a foreign state is, provisionally at least, an asylum for every individual who, being prosecuted at home, crosses its frontier. . . . [S]tates have always upheld their competence to grant asylum, if they choose to do so.

I OPPENHEIM, supra note 26, § 402. The weight of scholarly opinion has traditionally supported this principle. See HYDE, supra note 26, § 310 (describing right of state to grant asylum to those in its territory); I JOHN B. MOORE, EXTRADITION AND INTERSTATE RENDITION § 9 (1891) (same); I OPPENHEIM, supra note 26, § 402 n.2 (listing informative sources on the right of asylum generally); WHEATON, supra note 23, at 211 (describing right of state to grant asylum generally).

36. The uncontroverted rule is:

It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state . . . , its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent.

RESTATEMENT (THIRD), supra note 9, § 432 cmt. b. In addition, international principles defining the limits of judicial assistance likewise provide that "[t]he underlying principle of international law . . . is that a state may not conduct official activities in the territory of another state without that state's consent, express or implied." Id. ch. 7, subchapter A, introductory note, at 526. This rule of international law is a logical extension of the principle of territorial sovereignty: "When done without consent of the foreign government, abducting a person from a foreign country is a . . . blatant violation of the territorial integrity of another state . . . ." Louis Henkin, A Decent Respect to the Opinions of Mankind, 25 J. MARSHALL L. REV. 215, 231 (1992), cited in United States v. Alvarez-Machain, 112 S. Ct. 2188, 2202 n.24 (1992) (Stevens, J., dissenting). Writings of other commentators similarly reflect the understanding that the international rule banning kidnapping flows directly from the concept of territorial sovereignty: The territorial principle "reflects one aspect of the sovereignty exercisable by a state in its territorial home, and is the indispensable foundation for the application of the series of legal rights that a state possesses." MALCOLM N. SHAW, INTERNATIONAL LAW 400 (3d ed. 1991); accord HYDE, supra note 26, § 321, at 1031-32; F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABATI ROSENNE 407 (Yoram Dinstein & Mala Tobory eds., 1989); M. Cherif Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 VAND. J. TRANS-
to prosecute defendants because, contrary to civil cases, in criminal cases in
the United States and many other countries, defendants must be physically
brought before the court. This is thought necessary to secure the defendants' right to notice of the proceedings against them, the right to defend themselves, and the right to confront their accusers.

If a defendant can be arrested within the territorial jurisdiction of the
prosecuting state, there is, of course, no violation of the international law of
territorial jurisdiction. However, if the defendant is residing in a foreign

37. Courts can assert jurisdiction over civil defendants even if they never appear before the court by providing proper notice of the proceedings against them. Without the need for a physical incursion by United States law enforcement agents into the foreign state where the defendant is resident to capture illegally the defendant, the assertion of civil jurisdiction over an offshore defendant does not violate the exclusive jurisdiction of foreign states to exercise law enforcement activities within its own territory. Restatement (Third), supra note 9, § 478 cmt. e; Lea Brilmayer, An Introduction to Jurisdiction in the American Federal System 330 (1986) (explaining possible reasons for different requirements for civil and criminal jurisdiction).

I argue elsewhere that, in civil cases involving foreign (as opposed to offshore) plaintiffs or defendants, international rather than domestic jurisdictional law should be applied by domestic courts. Andrew L. Strauss, Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts, Harv. Int'l L.J. (forthcoming 1995). Because territorial sovereignty, which I demonstrate in this article to be internationally prescribed, is not violated in civil cases, that article more comprehensively explores the nature of the existing allocation of prescriptive authority between the domestic and international orders. Based on this exploration, the article concludes that the state cannot self-prescribe its own law of civil jurisdiction. Id.

38. In the United States, for example, the presence of the criminal defendant is constitutionally required pursuant to the Sixth Amendment right of confrontation which states, in pertinent part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.” U.S. Const. amend. VI. More specifically, the accused’s physical presence is constitutionally required to initiate prosecution, although a trial in progress may in limited circumstances proceed without the presence of the criminal defendant. E.g., Lewis v. United States, 146 U.S. 370, 372-73 (1892) (common law secures criminal defendant’s right to be present for duration of trial); accord Coy v. Iowa, 487 U.S. 1012, 1015-20 (1988) (reaffirming importance of confrontation right constitutionally provided to criminal defendant); United States v. Gagnon, 470 U.S. 522, 526 (1985) (“The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment . . . .”) (citing Illinois v. Allen, 397 U.S. 337 (1970) (addressing effect of defendant’s disruptive conduct during trial proceedings on confrontation right)); Diaz v. United States, 223 U.S. 442, 455 (1912) (asserting that Sixth Amendment constitutional right to be heard requires criminal defendant’s presence at trial); see also Taylor v. United States, 414 U.S. 17, 20 (1973) (recognizing valid waiver of defendant’s right to confrontation pursuant to accused’s voluntary absence after commencement of proceeding in non-capital case); Snyder v. Massachusetts, 291 U.S. 97, 105-08 (1934) (holding Fourteenth Amendment guarantee of due process requires defendant’s presence only to extent necessary to ensure fair trial), overruled on other grounds, Malloy v. Hogan, 378 U.S. 1 (1964).
state, “informal rendition,” extradition, or physical abduction are the only means of securing the defendant's physical presence in the prosecuting state.

When a state secures the requisite physical presence of a defendant by disregarding the jurisdictional requirements of international law, the state does not have personal jurisdiction to try the defendant despite the defendant's presence. Comment c to section 432 of the Restatement (Third) of the Foreign Relations Law of the United States states the generally accepted rule relating the prohibition on illegal abductions to the prohibition on assertions of jurisdiction:

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.40

39. “Informal” renditions may allow nation-states to secure the return of fugitives without involving the formal procedures of extradition. See generally Restatement (Third), supra note 9, § 475 reporters' note 6, § 478 reporters' note 6 (discussing deportation as alternative to extradition). See also Charron v. United States, 412 F.2d 657 (9th Cir. 1969); Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967); R. v. Governor of Brixton Prison, ex parte Soblen [1963] 1 Q.B. 829, [1963] 2 Q.B. 243. Exclusion and deportation comprise the two most common methods of informal rendition, both of which require a unilateral act by the asylum state that may result in the return of the alien fugitive to the state wanting him for prosecution. “Exclusion” refers to the asylum state's practice of denying admission to its territory based on grounds of, for example, lack of proper documentation, suspicious behavior, or physical or mental affliction. See Alona E. Evans, Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice, 40 Brit. Y.B. Int'l L. 77, 82-83 (1964) (defining what exclusion entails under United States law). Once the fugitive has entered the asylum state's territory, the asylum government must issue an administrative order directing the foreigner to leave the country through deportation processes. Under deportation or expulsion (the terms are used interchangeably), the fugitive is generally provided the means to leave the country voluntarily, a choice of destination states from limited options, and may be permitted to plead threat of physical persecution if returned to the state of his departure. Id. at 84-85.

A state's unilateral ability to deport or exclude aliens has been historically established in accordance with the territoriality principle of state power. For example, the Supreme Court held, in Nishimura Ekiu v. United States, 142 U.S. 651 (1892), that the powers of exclusion and expulsion are inherent in sovereignty as “an accepted maxim of international law.” Nishimura, 142 U.S. at 659.

40. Restatement (Third), supra note 9, § 432 cmt. c. The overwhelming weight of distinguished commentary confirms the existence of a rule of international law denying states personal jurisdiction over defendants abducted from foreign states without the consent of such states. For example, Lassa Oppenheim states:

It is . . . a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime. Where this has happened, the offending state should—and often does—hand over the person in question to the state in whose territory he was apprehended.
JURISDICTIONAL NIHILISM

I Oppenheim, supra note 26, § 119, at 388 (footnotes omitted); accord T. Walker, A Manual of Public International Law 50 (1895) (no state may exercise jurisdiction over persons or property in territory of another state); Edwin D. Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 Am. J. Int'l L. 231, passim (1934) (national court not competent to subject person to local law if seizure or arrest made in violation of international law); Felice Morgenstern, Jurisdiction in Seizures Effected in Violation of International Law, 29 Brit. Y.B. Int'l L. 265, 266 (1952) (discussing whether local jurisdiction can be founded on violation of international law); Paul O'Higgins, Unlawful Seizure and Irregular Extradition, 36 Brit. Y.B. Int'l L. 279, 280 (1960) (one state may not perform acts of sovereignty over another state); Jacques Semmelman, Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined, 30 Colum. J. Transnat'L L. 513, 576 (1992) (when nation in which abduction occurred protests, subsequent prosecution violates international law); Catherine Fisher, U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?, 18 Vand. J. Transnat'L L. 915, 933-36 (1985) (discussing limitations on state's authority to apply its laws in conflict with other state's interests); Gentin, supra note 15, at 1263 (violation of extradition treaty extinguishes U.S. court jurisdiction).

State practice is consistent with the rule prohibiting the assertion of personal jurisdiction following an unpermitted, state-sponsored abduction. See I Moore, supra note 35, ch. VII, §§ 188-99, at 281-93 (cavassing early United States cases involving state-sponsored abductions); 4 Moore, supra note 34, § 603, at 328-32 (same). While individual instances of state practice demonstrating the principle are too numerous to mention, some of the more well-known cases include: Ex parte Mackeson, 75 Crim. App. R. 24, 33 (1981) (international jurisdictional rule of law precluded jurisdiction); Regina v. Hartley, 2 N.Z.L.R. 199, 217 (C.A. 1978) (adherence to international jurisdictional rule of law precluded jurisdiction); Affaire Mantovani, Italie et Suisse, cited in Charles Rousseau, Chronique des Faits Internationaux, 69 Revue Generale de Droit International Public 761, 834-35 (1965) (Italian police apologized for violation of Switzerland's territorial sovereignty after Italian police officials failed attempt to arrest and return to Italy an Italian national in Switzerland); The Schnaebele Case, described in III Travers, Le Droit Penal International No. 1302 (Paris 1924) (German government returned French police official to France after French government protested acts of German officials luring defendant into Germany); Casablanca Case (Fr. v. Germ.), Hague Ct. Rep. (Scott) 110 (Perm. Ct. Arb. 1916) (referring to deserters from French Foreign Legion seized by France in Germany); Case of Nollet, as digested in 18 Journal du Droit International 1188, 1189 (Cour d'appel de Douai 1891) (integrity of sovereignty asylum state precluded jurisdiction); see also Lawrence Preuss, Kidnapping of Fugitives from Justice on Foreign Territory, 29 Am. J. Int'l L. 502, 502-04 (1935) (describing The Jacob-Salomon Case in which Germany ultimately conceded to return Swiss citizen kidnapped in Switzerland after Swiss government diplomatically protested); Lawrence Preuss, Settlement of the Jacob Kidnapping Case (Switzerland-Germany), 30 Am. J. Int'l L. 123, 124 n.6 (1936) (describing The Blair Case (1876), in which English government returned English citizen to United States after United States government protested); Selleck, supra note 36, at 260 (discussing In re Jolis, [1933-1934] Ann. Dig. 191 (Tribunal Correctional d'Avesnes), in which court held arrest of Belgian by French was "a nullity" because Belgian government officially protested to French government).

Consistent with the concept of sovereignty, states can assert jurisdiction if the foreign state does not object. The international rule on abductions referred to as the doctrine of "male captus, bene detentus" incorporates this exception which allows for jurisdiction. "Nearly all states have followed the rule that, absent protest from other states, they will try persons brought before their courts through irregular means, even through an abduction from another state in violation of international law." Restatement (Third), supra note 9, § 432 reporters' note 2 (emphasis added). Influential commentary has, however, called for strengthening the international rule by requiring explicit consent to the assertion of personal jurisdiction by the abducting country. See Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L.
Having described the concept of state sovereignty and its relationship to international jurisdictional law as prohibiting the assertion of state jurisdiction over defendants abducted from foreign states without the consent of those states, I can now explain why this law is the source of the jurisdictional grant that should be applied in American courts.

IV. THE LEGAL SOURCE THAT GRANTS JURISDICTION TO THE UNITED STATES

A. The Alvarez-Machain Court's Mistaken Belief that the United States Constitution Is the Source of Jurisdictional Law To Be Applied to Foreign Abductees by Domestic Courts

The framework prescribing the proper method of applying jurisdictional law makes clear the tautology that once any component within an organizational structure identifies the source of its jurisdictional authority to act, the jurisdictional rules promulgated by that source must be followed. I will demonstrate in Section B which follows that the just discussed international law of jurisdiction is the proper source granting the United States the authority to assert personal jurisdiction over defendants when questions arise concerning the international allocation of jurisdictional authority. The Alvarez-Machain Court, however, believes to the contrary that the United States Constitution is that source. The fact that the Court believes the Constitution to be this source of jurisdictional authority is evidenced by the Court's reliance upon Frisbie v. Collins, one of the two major pre-Alvarez-Machain abduction decisions. Frisbie implicitly held that United States constitutional law allows for jurisdiction in abduction cases. Frisbie, unlike the other case which the Court discussed, Ker v. Illinois, was not an international case. Rather, the defendant in Frisbie was kidnapped in Illinois by Michigan officials and brought before a Michigan state court. The Supreme Court, as it had in Ker, looked to the United States Constitution to ascertain whether the Constitution protected the defendant

435, 442 (Supp. 1935) [hereinafter Research in International Law] (Article 16). Article 16 provided:

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.


42. 342 U.S. 519 (1952).
43. 119 U.S. 436 (1886). See infra notes 116-26 and accompanying text for a detailed discussion of Ker.
44. Frisbie, 342 U.S. at 520.
from the kidnapping.\(^{45}\) Concluding that the Constitution did not protect the defendant,\(^{46}\) the Court neglected to consider the possibility that the protection of the territorial sovereignty of Illinois may be a basis for restricting the Michigan court's assertion of jurisdiction over the defendant. The \textit{Frisbie} Court may have incorrectly and quite illogically concluded that although the international law of jurisdiction did distribute authority within the United States, that law should nonetheless be ignored. This would have been rather unlikely, however, given international law's unambiguous prohibition on extraterritorial assertions of personal jurisdiction.\(^{47}\) More likely, the \textit{Frisbie} Court correctly assumed that the allocation of authority between states within the United States should be distributed in accordance with the United States Constitution and not international law.\(^{48}\) If so, the Court effectively held that the United States, at the time of the decision in 1952, was integrated to a sufficient extent that, unlike the international law protecting the territorial sovereignty of nation-states, the constitutional protections of the sovereignty of the fifty United States no longer meant that one state's unauthorized arrest of a defendant in another state precluded the first state's jurisdiction. By relying on \textit{Frisbie} as precedent, and subsequently failing to distinguish the constitutional basis for its intra-United States territorial or lack of territorial divisions, the \textit{Alvarez-Machain} Court is indicating that it does not see a distinction between abductions among the fifty states of the Union and abductions among the nation-states of the international order. Thus, the Court likely assumes that the United States Constitution applies to international abduction cases.\(^{49}\)

\(^{45}\) \textit{Id.} at 522.

\(^{46}\) The \textit{Frisbie} Court proclaimed:

This Court has never departed from the rule announced in [\textit{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 '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 [sic] 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.


\(^{47}\) \textit{See supra} note 40 and accompanying text.

\(^{48}\) International law is not intended to allocate jurisdiction between states within the United States. "International law addresses the exercise of jurisdiction by a state; it does not concern itself with the allocation of jurisdiction among domestic courts within a state for example, between national and local courts in a federal system." \textit{Restatement (Third), supra} note 9, § 421 cmt. f; \textit{cf. infra} notes 62-95 and accompanying text (discussing international law's role as allocating jurisdiction between nation-states).

\(^{49}\) \textit{Alvarez-Machain}, 112 S. Ct. at 2192-93. For an example of a lower court case that failed to distinguish properly between the constitutional issues in \textit{Ker} and the international issues in \textit{Frisbie}, see United States v. Lira, 515 F.2d 68, 73 (2d Cir.), \textit{cert. denied}, 423 U.S. 847 (1975); \textit{see also id.} at 72-73 (Oakes, J., concurring) (referring to "abstract doctrine \textit{Ker} and \textit{Frisbie} are said to stand for" as a matter of United States constitutional law) (citations omitted).
In addition, a belief that the Constitution is the ultimate source of the grant of personal jurisdiction to the United States would provide an explanation for the Court's distinction that the bilateral extradition treaty, if found to ban kidnapping, should have been applied to deny jurisdiction while the prohibition under international jurisdictional law should not have been applied.50 The United States-Mexico extradition treaty51 is a self-executing treaty that was ratified by the United States Senate and is therefore regarded within the American legal scheme as applicable but subordinate in authority to the Constitution.52 Under this hierarchy of authority the treaty could be considered the functional equivalent of a long-arm statute.53 As long as the United States Constitution grants jurisdiction, and the legislative intent manifest in the treaty does not prohibit the ability of the United States to exercise the Constitution's grant of jurisdiction, then the assertion of jurisdiction should be allowed. However, because the international law of jurisdiction is not thought to be the basic source granting jurisdiction, and it clearly does not perform the role of a long arm statute, which states prescribe themselves to limit their own jurisdiction, it has no role in this domestic scheme.54

Further evidence that the Alvarez-Machain Court believed the Constitution to be the definitive source that grants personal jurisdiction to the United

52. "By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." Whitney v. Robertson, 124 U.S. 190, 194 (1888); accord Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598-99 (1884) (stating the proposition that when treaty is self-executing, court may look "to the treaty for a rule of decision for the case before it as it would to a statute"); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("[O]ur constitution declares a treaty to be the law of the land. It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.").
53. "Long arm statute" refers to legislation fashioned by a forum's government to limit the jurisdictional reach of its own forum courts. For example, although the United States Constitution prescribes mandatory constraints on jurisdiction, the federal and state legislatures can create long arm statutes that function to further limit the jurisdictional reach of their respective forums beyond those constitutional requirements. For further definition, see BLACK'S LAW DICTIONARY 942 (6th ed. 1990).
54. Otherwise, it is difficult to ascertain from the decision the theoretical rationale behind the Court's distinction between general principles of international law as inapplicable and treaty law as applicable. Based on the traditional doctrine under which the rules of international law are applied in American courts, this is an unusual distinction. This doctrine establishes that international law is a part of the law of the United States and should be applied by American courts when appropriate. The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."). As such, there is no basis for distinguishing between self-executing treaties and other general international legal rules. See supra note 52 and accompanying text. This is qualified by some commentators who believe that if the two are in conflict, the treaty should take precedence over general international legal rules. RESTATEMENT (THIRD), supra note 9, § 115 cmt. d, reporters' note 4.
States is that, when the Court analogously attempts to assert jurisdiction in civil cases, it appears to believe that the jurisdiction of the United States as a whole emanates from the Constitution rather than international law. For example, the Court has looked to the United States Constitution when defining the personal jurisdictional reach of the federal courts which, as opposed to state courts, are agents of the whole of the American sovereign.

Recognizing the national character of federal courts, some commentators have argued for a "national contacts" test, and in certain circumstances

---


I explore elsewhere the question of whether the Supreme Court, other courts, and commentators are correct in assuming that the Constitution is the source which grants jurisdiction to the United States in civil cases involving foreign parties. This question suggests related, though different, problems from those which are explored in this article. See Strauss, supra note 37. On the one hand, the attempt to assert jurisdiction over criminal defendants can lead, for reasons unique to criminal jurisdiction, to a potential conflict with the allocation of territorial jurisdiction between sovereign states. See supra note 36 and accompanying text. On the other hand, jurisdiction over civil defendants may be defeated, for reasons unique to civil jurisdiction, if a sufficient nexus between the defendant and the forum, based on factors other than strict territoriality, is not established. See supra note 37 and accompanying text. Despite these differences, the fact that the Supreme Court is accustomed to looking to the Constitution as the proper source of the law of jurisdiction in civil cases indicates it is probably doing likewise in Alvarez-Machain.

56. See, e.g., Ireland, 456 U.S. at 701-05 (assuming United States Constitution prescribes scope of adjudicatory jurisdictional law to be applied when federal courts attempt to assert jurisdiction over foreign defendants).

57. E.g., Gary B. Born, Reflections on Judicial Jurisdiction in International Cases, 17 GA. J. INT'L & COMP. L. 1, 37, 43 (1987) (proposing heightened constitutional scrutiny of jurisdictional claims in international cases and stating that national contacts test would be closer to practice of other nations than current due process analysis); Graham C. Lilly, Jurisdiction over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 151 (1983) (analyzing limitations on personal jurisdiction in suits involving aliens and examining utility of national contacts doctrine in both federal and state court assertions of personal jurisdiction); Irene D. Sann, Personal Jurisdiction in Federal Question Suits: Toward a Unified and Rational Theory for Personal Jurisdiction over Non-Domiciliary and Alien Defendants, 16 Pac. L. J. 1, 232-33 (1984) (arguing that national contacts standard in federal questions cases would be rationally related directly to United States as "the sovereign that is seeking to assert jurisdiction," and that such a standard would promote uniformity of analysis among federal courts); Pamela J. Stephens, The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction, 18 U. Rich L. Rev. 697 (1984) (exploring history of personal jurisdiction doctrine and arguing for congressional adoption of a national contacts test based on reasonableness standard); Yvonne L. Blauvelt, Comment, Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California, 49 Ohio St. L.J. 853, 874 (1988) (noting that Supreme Court in Asahi ignored opportunity to provide federal standard of personal jurisdiction in international cases and arguing that a "foreign defendant's contacts should be with the United States as a whole rather than with a particular, individual state"); Brian B. Frasch, Comment, National Contacts as a Basis for In...
when deciding whether to allow federal assertions of personal jurisdiction in civil cases, such a test has been applied.\textsuperscript{58} Though operating under the assumption that the United States is the relevant jurisdictional entity, courts do not apply international law to determine the civil defendant's contacts with the United States when applying the national contacts test. They instead apply the minimum contacts analysis derived from the United States Constitution.\textsuperscript{59}

Finally, in civil procedure, the argument that assertions of personal jurisdiction by the United States emanate from the Constitution and not interna-


\textsuperscript{58} In federal question cases, the courts look to the service-of-process provisions, if they exist within the applicable substantive federal legislation to be applied, for an indication of how widely to construe the extent to which they should assert personal jurisdiction. \textit{Fed. R. Civ. P. 4(e)}. Provisions have been interpreted to provide that contacts with the United States as a whole (national contacts), rather than with any of the fifty states, are sufficient to establish the personal jurisdiction of the federal forum. See, e.g., Sherman Act, 15 U.S.C. § 5 (1994); Clayton Act, 15 U.S.C. § 22 (1976) (same); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976) (same). If such provisions do not exist, or in diversity cases, courts have read various provisions of Rule 4 of the \textit{Federal Rules of Civil Procedure} to require that their jurisdiction is determined by the long arm statute of the state in which they sit. \textit{Fed. R. Civ. P. 4(f)}. The rule was recently amended, however, to provide that in federal question cases, for which there is no applicable long arm statute, if a foreign defendant does not have contacts with any individual state sufficient for the exercise of jurisdiction under the state's own long arm statute, but does have contacts with the United States as a whole sufficient to establish the requisite “national contacts” under the Due Process Clause of the Fifth Amendment, any federal court can assert personal jurisdiction. \textit{Fed. R. Civ. P. 4(k)(2)}.

\textsuperscript{59} \textit{See, e.g., FTC v. Jim Walter Corp.}, 651 F.2d 251, 256 (5th Cir. 1981) (standing for proposition that, subject only to regulation of Congress, each federal court exercises judicial power of United States, which is not constitutionally limited by boundaries of particular district, and “due process requires only that a defendant in a federal suit have minimum contact with the United States, ‘the sovereign that has created the court’”) (citing \textit{Stafford v. Briggs}, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting)); \textit{accord Askhanase v. Fatjo}, Civ.A.No. H-91-3140, 1993 WL 208682, at *3 (S.D. Tex. Apr. 22, 1993) (concluding that bankruptcy laws provide personal jurisdiction anywhere in United States as sovereign authority on federal questions).

The Supreme Court has not determined the constitutionality of the national contacts test. In \textit{Asahi Metal Industry Co. v. Superior Court}, 480 U.S. 102 (1987), the Court did mention the issue:

\begin{quote}
We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits. \textit{Asahi}, 480 U.S. at 113 n.* (emphasis in original).
\end{quote}
tional law tends to explain why the Supreme Court, when applying the conventional minimum contacts test to restrict the assertion of jurisdiction over alien defendants by states within the United States, is only concerned with whether the individual states have jurisdiction and not with whether the United States as a whole has jurisdiction.\footnote{See, e.g., Asahi, 480 U.S. at 116 (denying California jurisdiction over Japanese parts supplier); Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408, 418 (1984) (denying Texas jurisdiction over Columbian corporation); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 439 (1952) (permitting Ohio jurisdiction over Philippine mining corporation). In none of these cases did the Court question whether the United States as a whole had jurisdiction.} If under the Constitution one of the fifty states within the United States may assert personal jurisdiction over a defendant, then that same document would not logically circumscribe the jurisdiction of the more encompassing national entity more narrowly. The Court's failure to consider the jurisdictional relevance of the United States as a whole, therefore, indicates its implicit understanding that the Constitution provides the jurisdictional grant of power to the United States.

While implicit rather than explicit, the evidence is persuasive that the \textit{Alvarez-Machain} Court based its decision on the belief that the Constitution, rather than international law, is the source that grants jurisdiction to the United States.\footnote{There is, however, a possible alternative basis for the Court's disregard of international law. The Court may believe that the grant of territorial jurisdiction to countries comes from international law, but that the jurisdictional law relevant to the Court's own ability to assert personal jurisdiction comes from the Constitution. The Court could have arrived at this conclusion, that the jurisdiction of courts as distinct from the state is governed by the Constitution by assuming that, in accordance with the territorial approach to jurisdiction, the Constitution should prescribe assertions of jurisdiction by American courts located within American territory. If the Court has made the assumption, it has invented a false distinction between the personal jurisdiction of the state and the personal jurisdiction of the courts. Because personal jurisdiction is concerned not with courts, but with the allocation of authority between states of the union within our federal system, or nation-state within the international system, it concerns the forum state's authority to exercise regulatory control over the defendant. While the discourse surrounding personal jurisdiction has developed to sometimes interchangeably refer to "the jurisdiction of the court" and "the jurisdiction of the forum," the jurisdiction of the court is only at issue to the extent that the court is the particular institution of the forum state called upon to act on the state's behalf. If a state has personal jurisdiction over a criminal defendant, it can dispose of the case in any manner it desires. It could send the case to any of its courts or even subject the defendant to extra-judicial process. See \textit{Restatement of Judgments} § 7 cmt. a, at 41 (1942). ("Although a state has jurisdiction over the person of the defendant, it may not have given to a particular court or it may not have given to any of its courts power to entertain the action. In such a case the court has no 'competency' to render a valid judgment.").}

While other issues of international human rights might be impacted, the authority of the forum to exercise personal jurisdiction based on the territorial concern with the allocation of authority between states would remain unaffected. Because the distinction between the personal jurisdiction of the state and that of the court is a false one, what is really at issue is not the question of whether the court has jurisdiction or the state has jurisdiction, but whether the courts are to apply the applicable jurisdictional law if it is the international law of jurisdiction.

If the Court has in fact confused the jurisdiction of the state with the jurisdiction of the Court, it would not be the first to do so. Although \textit{Ex parte Lopez}, 6 F. Supp. 342 (S.D. Tex. 1934), is distinguishable from \textit{Alvarez-Machain}, see infra note 112, as jurisdiction in Lopez is
B. International Jurisdictional Law as the Source of the States’ Jurisdictional Law To Be Applied in United States Courts

The central premise of this article is that international jurisdictional law, and not the United States Constitution, is the proper source that grants jurisdiction to the United States. When concerned with the allocation of territorial jurisdiction between sovereigns, international law and the Constitution are both coherently fashioned from the common paradigm underlying the state system. Implicit in this paradigm is the idea that the distribution of power between nations emanates from international law and the distribution of power between entities within nations emanates from domestic law. Only when seen in this light does each type of jurisdictional law, within the global system of jurisdiction, perform a coherent symmetrical function. International law allocates authority between nation-states. The United States Constitution, as an internal document of the United States, allocates authority among the fifty states. Contrary to this premise, Alvarez-Machain implies that the domestic laws of the various nations redundantly attempt to allocate the international distribution of authority unilaterally, while leaving the clearly existing international law of jurisdiction no role to play. To accept that this paradigm applies internationally is only to presume that the basic organizational theory axiom—that institutional coherence demands that structures and rules necessary for allocating authority between units of coe-


62. See supra notes 22-40 and accompanying text for a discussion of this paradigm.

63. In addition, the Constitution could act as a supplemental long-arm-like self-limit on the jurisdiction of the United States beyond that called for by international law. See supra note 53 for a definition of “long arm statute.”
qual status be developed at a level which transcends that of any individual unit—applies to the international order. 64

Specific evidence that international law is the source of a state's jurisdiction is found in the formulation of the international jurisdictional law regarding abductions in particular. The explicit requirement that an illegally abducted defendant be returned to the state of capture 65 implies that it is not only illegal for a foreign state to abduct a defendant from another state (which could be remedied by any one of a variety of international sanctions 66), but also that the abducting state does not have jurisdiction to exercise authority over the defendant.

Written by drafters who implicitly assumed the paradigm, the United States Constitution implies a similar understanding. 67 As a document designed to provide a framework for the internal governance of the United States and not the global community, the Constitution does not purport to allocate power among the nation-states of the global community, but only among the fifty states of the Union and between those fifty states and the

64. Max Weber gives one of the classic descriptions of this axiom:

The principles of office hierarchy and of channels of appeal... stipulate a clearly established system of super- and subordination in which there is a supervision of the lower offices by the higher ones. Such a system offers the governed the possibility of appealing, in a precisely regulated manner, the decision of a lower office to the corresponding superior authority. With the full development of the bureaucratic type, the office hierarchy is monocratically organized. The principle of hierarchical office authority is found in all bureaucratic structures: in state and ecclesiastical structures as well as in large party organizations and private enterprises. It does not matter for the character of bureaucracy whether its authority is called "private" or "public."

When the principle of jurisdictional "competency" is fully carried through, hierarchical subordination—at least in public office—does not mean that the "higher" authority is authorized simply to take over the business of the "lower." Indeed, the opposite is the rule; once an office has been set up, a new incumbent will always be appointed if a vacancy occurs.

65. See supra note 40 and accompanying text.

66. For example, possibilities could include formal censure through resolutions of international organizations or limited economic sanctions.

67. One legal scholar, emphasizing that the framers of the Constitution were extremely well-schooled in international law, has described the Constitution as a charter of authority, allocating jurisdiction between the different branches of the distinct national and state authorities in order to achieve, in part, the essential constitutional objective of paving a "way to nationhood—'one nation firmly hooped together' with respect to everything external." Edwin D. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. PA. L. REV. 26, 45 (1952) (citation omitted).
federal government. The Preamble to the Constitution makes clear that it is "[w]e the People of the United States," who are attempting to form (obviously between the states within the United States) "a more perfect Union," and that "this Constitution for the United States of America" was "ordain[ed] and establish[ed]" to "establish Justice [presumably within the American system], insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."68 The specific articles of the Constitution, true to the document's intention, provide for the internal allocation of authority within the United States and not within the international community. For example, it is clear, from the context of Article III's identification of the limited subject matter jurisdiction of the Supreme Court and other federal courts to be established, that Article III provides an alternative to state court jurisdiction, and is not intended to allocate authority between the United States and foreign courts.69 Likewise, the Full Faith and Credit Clause of Article IV requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."70 Thus, the Constitution establishes once again the deference that the fifty states within the Union owe to each other. Nowhere does the Constitution impose similar obligations upon the nation-states of the world.71 These obligations, it is

68. U.S. Const. pmbl. (emphasis added). Without the benefit of my editing, the original reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id.

69. According to Article III, the judicial power of the national authority was to "be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Article III, Section 2 enumerates specific areas of subject matter jurisdiction for the exercise of the national, as opposed to state, judicial power. U.S. Const. art. III, § 2. Alexander Hamilton specifically addressed the way in which judicial authority to resolve disputes with foreign implications should be allocated between American courts:

"The union will undoubtedly be answerable to foreign powers for the conduct of its members. . . . So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals."


70. U.S. Const. art. IV, § 1.

71. It is well-established that the Full Faith and Credit Clause of the Constitution applies only between states of the United States. The satisfaction of judgments between courts of different nation-states is determined in accordance with international principles of comity. See Arthur von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1607 (1968) (discussing inherent differences between American and international practice); cf. Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1 (1991) (exploring meanings and origins of comity in international law).
well-established, are within the province of international law and not the United States Constitution.\textsuperscript{72}

\textsuperscript{72} Canons of American legal construction provide additional support for not reading the Constitution to prescribe the grant of personal jurisdiction to the United States. Such canons hold that, unless indicating to the contrary, United States law should be interpreted as consistent with international law. In an often-cited opinion, Chief Justice Marshall wrote that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .” Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Additional support is found in the Restatement (Third), supra note 9, § 114. (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). See also id. § 401 cmt. b (observing that domestic law generally construed to avoid conflict with international law). While this rule generally applies to statutes, logically the Constitution should likewise be construed as consistent with international law, unless it similarly indicates to the contrary.

One application of these interpretive rules is that American law should not be construed as attempting to legislate within the prescriptive domain rendered by international law to other nation-states. International law under the paradigm legitimately circumscribes the allocation of personal jurisdiction to nation-states, while the Constitution does not indicate an intention to prescribe the allocation of personal jurisdiction to the United States. (The Constitution makes no explicit reference to personal jurisdiction and in fact only makes reference to the relationship of the judicial arms of the various states to each other directly in the Full Faith and Credit Clause, U.S. Const. art. IV.) In accordance with these canons of construction, therefore, the Constitution should not be interpreted as intending to prescribe the allocation of personal jurisdiction between the United States and Mexico.

Another application is that the Constitution would be usurping international law’s substantive limitation on the proper means of ascertaining jurisdiction over offshore defendants to the extent that the Court’s acceptance of jurisdiction implied that the constitutional grant of personal jurisdiction to the United States was broader than that allowed by international law. The Charming Betsy case is commonly cited to invoke international norms of comity or abstention in controversies regarding the extraterritorial reach of domestic statutes. See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (holding that jurisdictional provisions of National Labor Relations Act must be interpreted consistent with “well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship”). For a discussion of the Charming Betsy principle as providing, in part, a “jurisdictional imperative” by requiring a specialized rationale for the rebuttable presumption that all legislation is territorial, see Ralph G. Steinhardt, The Role of International Law as a Canon of Domestic Statutory Construction, 43 Vand. L. Rev. 1103, 1144, 1197 (1990) (maintaining that Charming Betsy principle should take on “heightened practical and theoretical significance”; for example, offering “an affirmative warrant for applying the substantive international standards in the construction of domestic statutes” in light of contemporary international legal developments and rise of statutes in domestic law).

While canons of construction can be helpful in reinforcing our interpretation of the Constitution as consistent with this paradigm, courts should not attempt to ascertain this law by conducting an exercise in constitutional interpretation. Because the understanding of personal jurisdiction informing both the Constitution and international law similarly conforms to a paradigm which sees international law as the source of the grant of jurisdiction to the United States, courts might correctly conclude that the same international doctrine would result by either looking directly to international law or by interpreting the intention of the Constitution. However, a clear implication of the paradigm is that since the United States cannot generate its own jurisdiction, it follows that it would be ultra vires for United States law, even constitutional law, to attempt to prescribe the international parameters of its jurisdiction to adjudicate. It would, therefore, be improper under the paradigm for courts to attempt to ascertain this law by conducting an exercise in constitutional interpretation.
This understanding of the respective functions of domestic and international law can also be seen in the pre-minimum contacts American judicial doctrine of civil jurisdiction which, like the aspect of the modern law of criminal jurisdiction that I am addressing, was designed to allocate territorial authority between sovereigns and not to protect the rights of defendants. Justice Field wrote the Supreme Court's classic decision in *Pennoyer v. Neff* at a time when personal jurisdiction in civil cases was primarily viewed as allocating such territorial authority to sovereigns. The *Pennoyer* decision clearly implies an acceptance of the paradigm that the jurisdiction of the United States emanates from international law. Justice Field's approach to articulating the American requirements for exercising personal jurisdiction over a defendant was to analogize the "well-established principles of public law respecting the jurisdiction of an independent State over persons and property" to the American internal system created under our Constitution. The Justice wrote:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instru-

---


74. 95 U.S. 714 (1877).

75. Id. at 732-36. This concern with the allocation of sovereign authority was a legacy of medieval legal concepts drawn from English common law. In order for the courts to assert jurisdiction over civil defendants in the early days of the common law, such defendants, like criminal defendants today, had to be present before the court. See supra note 38 and accompanying text. The presence of the defendant was required to ensure that the Court could enforce a potential judgment against him as well as to ensure the proper functioning of what were called "trials by ordeal." Robert C. Casad, *Jurisdiction in Civil Actions* § 2.02(2)(a), at 2-12-13 (1991) (posting bond in amount that would cover any anticipated judgment would release defendant). To gain the defendant's presence, many civil lawsuits began with the actual arrest of the defendant under what was called, "a writ of *capias ad respondendum*." Id. The need for such arrests had the same potential for conflicts with other sovereigns that exist today in criminal jurisdiction. See supra note 36 and accompanying text. While the presence of the defendant was no longer required by the time of *Pennoyer*, and arrest had, therefore, given way to service of process, courts had not yet changed their method of analysis. See generally 3 W.S. Holdsworth, *A History of English Law* ch. VI (1923) (discussing evolution of procedure and pleading, including process, in English criminal and civil law); Hazard, supra 26, at 252-58 (documenting effect of early English common law on American law of jurisdiction).

ment, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.\footnote{77}

By analogizing the United States' internal constitutional scheme to the international system, the Pennoyer Court acknowledged the existence of separate preexisting international "public law" rules of jurisdiction between nation-states, and further, that the federal scheme under the Constitution is modeled on principles of interstate relations. Not only did Justice Field assume the continued validity of the international rules under our American system, but it would be illogical to reason that the philosophical underpinnings of this system conflicted with the very international order from which it drew its inspiration.\footnote{78}

\footnote{77. Id. The passage goes on to say: As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. Id. (citations omitted).}

\footnote{78. Pennoyer, 95 U.S. at 732-36. Pennoyer is the most famous of the many cases of the time which, through such analogous reasoning, implied the validity of the international law of jurisdiction within our system. In D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850), the Supreme Court refused to enforce a sister state judgment under the Full Faith and Credit Clause by analogizing the domestic law of jurisdiction to the international law of jurisdiction. D'Arcy, 52 U.S. at 175-76. The Court proclaimed: "We deem it to be free from controversy that these adjudications are in conformity to the well-established rules of international law, regulating governments foreign to each other . . . ." Id. at 174; see also Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (analogizing American states to nations for jurisdictional purposes); Peckham v. North Parish, 33 Mass. (16 Pick.) 274, 286 (1834); Picquet v. Swan, 19 F. Cas. 609, 611-13 (C.C. Mass. 1828) (No. 11,134); M'Queen v. Middletown Mfg. Co., 16 Johns. 4, 7 (N.Y. 1819); Mali v. Keeper of the Common Jail (Waldenhus's Case), 120 U.S. 1 (1887); Kibbe v. Kibbe, 1 Kirby 119 (Conn. Super. Ct. 1876); Phelps v. Holker, 1 Dall. 281, 284 (Pa. 1788); Campbell v. Wilson, 6 Tex. 379, 391 (1851); see also Max Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775, 782-84 nn.23 & 28-31 (1955) (discussing cases addressing territorial limits on judicial power in reference to judgments, on state power to grant divorces, on state power to tax, and on state power to legislate).}

Patrick Borchers recently canvassed the early personal jurisdiction cases in support of the argument that "the Court did not intend to transform the substance of personal jurisdiction into a matter of constitutional law," and concluded that courts prior to Pennoyer consistently applied the international territorial principles of personal jurisdiction. Patrick J. Borchers, The Death of
Having now seen that the international order is the source which grants jurisdiction to the United States and that this order does not permit abductions, we must logically conclude that the United States does not have jurisdiction over defendants brought to the United States by way of an abduction.

V. The Court's "Interpretation of the Treaty": Its Attempt To Replace the International Law of Jurisdiction with a Law of Its Own Invention

As the starting point for its analysis, the *Alvarez-Machain* Court asserted that if "the [United States-Mexican bilateral extradition] Treaty does not prohibit respondent's abduction . . . the court need not inquire as to how respondent came before it."79 Having framed the issue as such, the *Alvarez-Machain* decision is ostensibly committed to arguing that the extradition treaty, which it regards as the equivalent of a long arm statute,80 does not ban abductions. If the Court correctly assumed that the United States' grant of jurisdiction stems from the Constitution, which I have shown has been interpreted to allow jurisdiction in abduction cases between states of the union,81 then it would have been logical for the Court to demonstrate that the extradition treaty did not "legislatively" restrict jurisdiction and ban abductions. If, however, as I have demonstrated above, the source of the United States' grant of jurisdiction stems from international law, a body of law which clearly does not provide states with the original authority to assert such jurisdiction, then merely demonstrating that the extradition treaty does not explicitly prohibit jurisdiction based on abductions would not be sufficient to permit such an assertion of jurisdiction.

The Court, starting from the erroneous premise that international law is not the proper source of the relevant jurisdictional law, could have attempted to prove that jurisdiction based on abductions is permissible by openly acknowledging that it applied the United States Constitution as the relevant source of legal authority for the United States' assertion of jurisdiction over Dr. Alvarez-Machain, thereby ignoring the international legal context altogether. The Court then would have needed only to demonstrate that the extradition treaty, acting as the equivalent of a long arm statute, did not explicitly ban abductions. The Court implicitly realized, however, that such a

---

80. *See supra* text accompanying note 54.
81. *See supra* text accompanying notes 41-49.

---
demonstration would have been a meaningless interpretation of the extradition treaty because the treaty was not negotiated within the context of the American constitutional system of jurisdiction. The parties rather negotiated it with the understanding that it was an international instrument whose terms were to be interpreted within the context of the international system. The Court could, therefore, only reach its conclusion that the United States had jurisdiction over Dr. Alvarez-Machain by creating and applying its own international jurisdictional legal order which conforms to the permissive constitutional one. The Court accomplished this convoluted reasoning by using the extradition treaty both as a vehicle to marginalize the international law of jurisdiction, and then as a means of replacing that law with its own international jurisdictional order that permits abductions.

In reality, the United States-Mexico bilateral extradition treaty, although operating within the context of the international jurisdictional system, has nothing to do with abductions. Implicit in the territorial grant of jurisdiction to states is the legal right to exercise unilateral discretion in deciding whether to honor a foreign nation's request to turn over resident fugitives. While the Alvarez-Machain Court is heir to a long line of confusion surrounding the role of extradition treaties in abduction cases, extradition treaties only provide a mechanism by which states may mutually agree to

---

82. While the Supreme Court had never before held that international jurisdictional law should be disregarded, see infra notes 107-38 and accompanying text, the prevailing belief among commentators and courts, including those who have refused to assert jurisdiction over abducted defendants, see infra note 112, has been that extradition treaties are relevant to determining the legality of abductions. The seeds of this confusion were planted by the method of analysis employed by the Supreme Court in its first American overseas abduction decision, Ker v. Illinois, 119 U.S. 436 (1886). In Ker, the Court did not directly apply international jurisdictional law but, because of factors unique to the time and manner in which that case was argued, felt itself forced to derive the controlling jurisdictional law from an extradition treaty. See infra notes 116-26 and accompanying text for an explanation of the Ker Court's analysis. Following Ker, courts have attempted to derive jurisdictional law from extradition treaties.

When Ker was decided in 1886, customary international law was thought to be incorporated into state common law. Consequently, the Supreme Court considered a determination of international law by a state court to be a question of state law, not subject to review or independent determination by the Supreme Court. Customary international law operating as domestic law of the United States only came to be regarded as exclusively incorporated in federal law in the middle of this century. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (Supreme Court implying for the first time that customary international law is federal law and its determination by federal courts is binding on state courts); Restatement (Third), supra note 9, § 111 (1)-(2) cmts. d-f, reporters' note 3; see also Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1559 (1984) (observing that, prior to Sabbatino, state determinations of customary international law were not reviewed by Supreme Court). The Court considered the international law of jurisdiction to be customary international law and, since international jurisdictional law had not been argued in state court, the Ker Court believed it could not independently apply this law. It stated:

[T]he decision of [whether international jurisdictional law prohibits jurisdiction] is as much within the province of the State court, as a question of common law, or of the law of 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 of that subject, it is one in which we have no right to review their decision.
waive a part of that discretion and obligate themselves to turn over certain classes of defendants in the event of requests for extradition. Extradition

\[ Ker, 119 U.S. at 444; see Charles Fairman, Ker v. Illinois Revisited, 47 AM. J. INT'L L. 678, 683 (Supp. 1953) (pointing out that Ker Court limited to reviewing original treaty claim made in state court). \]

83. Because in theory it is in furtherance of the rights of states that international law provides for exclusive territorial jurisdiction, as Justice Marshall in The Schooner Exchange specifies, international law allows for exceptions to this exclusivity, "traced up to the consent of the nation itself." The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812). This principle of state consent not only allows for states to prospectively waive, to the extent specified in an extradition treaty, their sovereign right not to extradite defendants, but also is currently presumed to allow for states to assert jurisdiction over defendants abducted from foreign states, provided the foreign state does not retroactively object. See supra note 40 and accompanying text.

84. See Factor v. Laubenheimer, 290 U.S. 276 (1933), which states:

> [T]he principles of international law recognize no right to extradition apart from treaty. . . . [T]he legal right to demand [a fugitive's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. To determine the nature and extent of the right we must look to the treaty which created it. Factor, 290 U.S. at 287 (citations omitted); see also Jaffe v. Smith, 825 F.2d 304, 306 (11th Cir. 1987) ("Under international law, as recognized in the United States, any nation has the right not to surrender fugitives, but instead to grant asylum. The function of extradition treaties is to create exceptions to this right of other nations."); accord United States v. Verdugo-Urquidez, 939 F.2d 1341, 1356 (9th Cir. 1991), cert. granted and judgment vacated, 112 S. Ct. 2986 (1992) (Court stated, in case arising out of the same events as Alvarez-Machain, where defendant was also abducted from Mexico, that "a kidnapping is a flagrant treaty violation because it wholly circumvents the extradition process, and with it the commitment of the United States to follow the rule of law in its international relations.") (case was vacated as a result of the Alvarez-Machain decision); Valentine v. United States ex rel Neidecker, 299 U.S. 5, 14 n.12 (1936) ("The treaty between the United States and Mexico creates an obligation on the part of the respective governments, and does no more, and where the obligation ceases the power fails. . . . It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify a usurpation of power.").

That general international jurisdictional law and extradition treaties function together in this way is supported by extensive expert commentary. As one prominent author explained:

> In the case of extradition, the refugee is outside the territory of the State where the offence has been committed. The State which decides on the grant of territorial asylum, that is to say, non-extradition, exercises its own territorial jurisdiction. In the absence of an extradition treaty, its discretion is unlimited. Even when an extradition treaty with an exception clause regarding political crimes exists, such a clause is merely a reservation of the freedom which, in the absence of a treaty, the territorial sovereign would in any case be able to exercise.

1 Georg Schwarzenberger, International Law 257 (3d ed. 1957); see also Ian Brownlie, Principles of Public International Law ch. XV (1966) (discussing in this chapter, titled "Reservations From Territorial Sovereignty," treaties as a "privilege and license granted by territorial sovereigns . . . [and as] waivers of jurisdiction . . . [and explaining that] the basis for such competence can only be by the invitation and consent of the territorial sovereign."); I Oppenheim, supra note 26, § 169, at 564 ("No other state may exercise its power within the boundaries of the home territory; however, international law does, and international treaties may, restrict the territorial sovereign in the exercise of its sovereignty . . ."); Georg Schwarzenberger & E.D. Brown, A Manual of International Law 91 (6th ed. 1976) ("International law may lead to a limitation of territorial jurisdiction . . . as practiced on the basis of treaties . . . Extrad-
treaties neither ban nor permit abductions since they do not play a role in determining the preexisting obligation of states to respect the territorial sovereignty of foreign states. Therefore, as one would expect and as the Court acknowledges, the United States-Mexico bilateral extradition 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.” The Court, however, in concluding that abductions are allowed, draws the wrong conclusion from the treaty’s silence.

The Court, under the pretense of interpreting the extradition treaty, merely used it to imply a general jurisdictional framework which permits the United States to maintain jurisdiction over an abductee. The Court bolstered its conclusion by claiming to have looked to the treaty’s “history of negotiation and practice.” The Court’s first step was to portray the international law of jurisdiction as irrelevant to the issue at hand. While the Court vaguely admitted that the abduction may have been in “violation of general international law principles,” it failed not only to explain the ultimate relevance of this law but also to mention its specific ban on abductions. Under the pretense that the only relevant issue the Court needed to address was whether the extradition treaty bans abductions, the Court illogically used the fact that the extradition treaty does not explicitly ban abductions to establish that in-
ternational jurisdiction law, which does ban abductions, is irrelevant. The Court stated:

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." 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 nations.89

Having disregarded the significance of the international law of jurisdiction, the Court, by misinterpreting the meaning of two independent legal developments, created a new international jurisdictional order that permits jurisdiction over abducted defendants. The Court accomplished this by interpreting one of these developments as creating and the other as implying an overall international jurisdictional order consistent with allowing for abductions. The Court then argued that abductions must be allowed because the extradition treaty operating within this order does not explicitly ban them.

The Court first pointed to its 1886 decision, Ker v. Illinois,90 which it interpreted as creating a rule that American courts will always accept jurisdiction over abducted defendants.91 The Court inferred from this an international jurisdictional framework that permits jurisdiction over abductees between the United States and Mexico. The Court argued that because the Mexican government did not negotiate a ban on abductions in a subsequent version of the extradition treaty, the treaty permits jurisdiction. The Court further implied the existence of a jurisdictional framework that permits the assertion of jurisdiction over abductees by arguing that the treaty's drafters ultimately rejected language proposed by a Harvard research team which would have prohibited the assertion of jurisdiction over abductees.92 Because "no such clause appears in the current treaty," the Court argued that the treaty must permit jurisdiction over abducted defendants.93

89. Id. (citations omitted). The Court also claimed that "[r]espondent does not argue that [international jurisdictional law or the U.N. or O.A.S. charters] provide an independent basis for the right... not to be tried in the United States." Id. at 2195. It is unclear, however, whether the Court believed that the defendant's failure to make the argument relieved the court of the burden of considering the applicability of international law. Regardless of who should make the argument, the fact that international law independently prohibits jurisdiction in this case cannot be denied.

90. 119 U.S. 436 (1886).

91. Alvarez-Machain, 112 S. Ct. at 2194. The Ker decision did not actually hold that American courts may accept jurisdiction over defendants abducted in violation of international law. See infra notes 116-26 and accompanying text for a discussion of Ker.

92. Alvarez-Machain, 112 S. Ct. at 2194 (referring to that "prominent group of legal scholars sponsored by the faculty of Harvard Law School"); see Research in International Law, supra note 40, at 623. For text of clause, see supra note 40 and infra note 93.

93. Alvarez-Machain, 112 S. Ct. at 2194-95. In article 16 of the Draft Convention on Jurisdiction with Respect to Crime, the Harvard Research in International Law proposed:
The Court misinterpreted the meaning of both the *Ker* decision and the language prohibiting jurisdictions over abductees. First, as will be demonstrated in Part VII, the *Ker* decision did not hold that American courts could assert jurisdiction over defendants abducted in violation of international jurisdictional law. Second, the language that prohibits jurisdiction over abductees cannot reasonably be interpreted to imply that international law permits abductions. The Harvard research proposal did not attempt to suggest language for inclusion in extradition treaties so that they might reverse a generally permissive international rule. Instead, the proposal attempted to suggest language for use in a proposed multilateral convention codifying the existing international prohibition on abductions.94

Even if the Court did not misinterpret the *Ker* decision and the Harvard proposal, these two isolated legal sources could not reasonably supplant the international law of jurisdiction. As I have demonstrated, the international law of jurisdiction is inherent in the very international paradigm upon which the international state system is based.95

VI. THE DUALIST MODEL DOES NOT PERMIT DOMESTIC COURTS TO GIVE DEFERENCE TO AMERICAN VIOLATIONS OF THE INTERNATIONAL LAW OF JURISDICTION

Even having assumed that the United States Constitution is the proper legal source that grants jurisdiction to the United States, the Court must contend with the fact that the international law of jurisdiction, which clearly prohibits abductions without foreign consent, still exists. To justify disregarding the international law of jurisdiction, the Court's decision, therefore, implies reliance on what is called the "dualist" understanding of the relationship between international law and domestic law. The dualist model of this relationship, which the American judiciary has adopted, posits that domestic and

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.


94. Research in International Law, *supra* note 40, at 445 (Comment).

95. Even if the Court was correct in its interpretation of these developments, and even if international jurisdictional law was not so fundamental to the international system, these developments would have, on their own terms, provided scant support for the existence of a positive rule of international law allowing abductions. The Harvard research would have at best been only implicit evidence of a generally permissive rule regarding abductions. It would not have created a law of its own.

In regard to *Ker*, even assuming that the *Alvarez-Machain* Court was correct in its analysis, and that *Ker* held that if the United States chose to engage in abductions, United States courts would accept jurisdiction over defendants abducted in violation of international law, one domestic decision would not constitute state practice sufficient to create a customary or special customary rule preempting the general prohibition on abductions. See *infra* note 97 and accompanying text for an explanation of the law-making implications of state practice.
international legal systems are completely separate and distinct. As distinct systems, they each have their own sources of law and their own separate law-applying institutions. Emanating from the international system, international law is mostly created by nation-states through procedures which manifest their consent to be legally bound either explicitly through treaties or implicitly through customary practice. Domestic law, on the other hand, emanates from an individual nation-state's domestic system. Legislatures, administrative agencies, and tribunals, for example, serve as law-making bodies in the American domestic system. International legal disputes are largely resolved through international dispute resolution mechanisms such as diplomacy, international arbitration, or the International Court of Justice. Domestic legal disputes are resolved within the legal bodies of the particular nation-states, most notably domestic courts.

The seamless nature of law, however, often necessitates that domestic courts interpret and apply international law despite this theoretically strict separation between the domestic and international legal systems. In the United States, for example, this is accomplished consistently with the dualist model by incorporating international law into federal law.98 This convoluted approach permits the United States to break international law by employing

96. The doctrine of dualism is one of two accepted analytical approaches that have evolved in an attempt to explain the interaction between international law and the domestic legal order coherently. Unlike the doctrine of monism, which contemplates a single legal order based on a hierarchy of legal norms comprised of both international and domestic law, dualism is premised on the fact that the international and domestic legal orders are distinct. The monist-dualist distinction impacts upon when a domestic court is required, as opposed to merely permitted, to give legal effect to international obligations. See generally Louis Henkin et al., International Law Cases and Materials 153-54 (3d ed. 1993) (discussing the monist-dualist debate); Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 Harv. L. Rev. 853, 864-66 (1987) (explaining monist and dualist doctrines). See also J.G. Starke, Monism and Dualism in the Theory of International Law, 17 Brit. Y.B. Int’l L. 66, 68 (theoretical treatment of the relationship between international and municipal law).

97. Positivist doctrine classically holds that the international legal order is based primarily on the principle of the consent of states. "It followed logically from . . . sovereignty that, if the states were to be subject to law, that law must emanate from the states themselves. Since states were sovereign and independent they could be bound only with their consent." John P. Humphrey, On the Foundations of International Law, 39 Am. J. Int’l L. 231, 233 (1945). The primary way in which states manifest their consent is through treaties. Id. at 234.

States are also thought to manifest their consent through state practice. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third), supra note 9, § 102(2); see also id. § 102 cmts. b, c & reporters’ notes 2 (explaining opinio juris and further defining way in which state practice becomes customary international law); P.E. Corbett, Fundamentals of a New Law of Nations, 1 U. Toronto L.J. 3, 15 (1935-1936) (suggesting more modern view of international law that recognizes norms of global law as imposing duties). Customary practice as so conceived refers to "law that is 'legislated' through the political actions of the governments of the world's States." Henkin, supra note 82, at 1562.

98. But not all international law is incorporated into United States law. Only customary international law, as well as treaties and other international legal instruments that are specifically appropriate for application by domestic courts, are deemed to be incorporated. All other international law is limited to application by state parties in international fora.
JURISDICTIONAL NIHILISM

the "later-in-time rule." Since the most recent enactments of federal law take precedence, the courts are required to recognize the most recent federal law as authoritative even if such federal law is preceded by an international legal obligation.99

International agreements and international law are incorporated into United States law in the following manner:

Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation. . . . The proposition that international law and agreements are law in the United States is addressed largely to the courts. In appropriate cases they apply international law or agreements without the need of enactment by Congress or proclamation by the President. Much customary law and many international agreements, however, do not have the quality of law for the courts in that they do not regulate activities, relations, or interests in the United States. . . .

. . . .[T]he intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.

Restatement (Third), supra note 9, § 111 (3) & cmt. c.

99. The "later-in-time" rule is established by the weight of authority. "An act of Congress and a self-executing treaty of the United States are of equal status in United States law, and in case of inconsistency the later in time prevails." Restatement (Third), supra note 9, § 115 cmt. a. The Supremacy Clause of the United States Constitution has been read to support the equal status of treaties and statutes and the later-in-time rule. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other. . . .") The Supremacy Clause of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. This Clause does not establish the relationship between treaties, international customary law, and statutes. It only addresses the relationship between treaties and state law. It is accepted, however, that customary law is, like treaty law, international law and, therefore, both are indistinguishable in status from self-executing treaties. In The Paquete Habana, 175 U.S. 677 (1900), the Court decided that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. at 700. Consequently, customary international law is part of the law of the United States. Accord Restatement (Third), supra note 9, § 111 & cmts. c-e & reporters' notes 4 (stating that issues of customary law "arise under the laws of the United States" for purposes of jurisdiction of federal courts); cf. Henkin, supra note 82, at 1562-64 (customary international law should be given authority equal to United States federal law); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071, 1100-14 (1985) (explaining that subsequent federal statute could supersede custom).
This understanding has at times been extended in American doctrine to allow the President, acting on his own authority, to violate international law. Noted commentators, such as Louis Henkin, have extensively and persuasively criticized this executive power. They feel this executive power contradicts the theory that international law is the law of the United States since the President is obligated under Article II, Section 3 of the Constitution to "take Care that the Laws be faithfully executed." Such commentators argue that since we are a nation of laws, the executive branch should not be able to act in violation of international law, when it functions as the law of the United States, anymore than the executive branch can act in violation of purely domestic law.

The argument that judicial deference to executive violations of international law under the dualist theory violates American constitutional principles is persuasive. Such deference is, however, consistent with the more fundamental dualist notion that domestic courts can be directed to follow domestic sources of law rather than international sources of law.

---

100. This authority has been read into the Supreme Court's dictum that courts will give effect to international law "where there is no treaty and no controlling executive or legislative act or judicial decision." *The Paquete Habana*, 175 U.S. at 700 (emphasis added). See infra note 103 for a more detailed discussion of this case. *See also Restatement (Third), supra note 9, § 115 reporters' note 3 (discussing presidential authority to supersede international law or agreement).


102. *See Henkin, supra note 96, at 881-82 ("Only new international law or a new treaty will repeal, or modify, a principle of customary law or terminate its status as law of the United States and relieve the President of his duty to take care that it be faithfully executed."); see also Lobel, supra note 99, at 1115 (proposing that a government of separated powers requires explicit congressional assent for deviations from international law)."

103. Even under the constitutionally questionable dualist rule, that the President acting on his own authority can break international law, there is a serious question as to whether this authority extends to the Administrator of the Drug Enforcement Agency. The major precedent cited for the proposition that courts should give deference to executive violations of international law is *The Paquete Habana*, 175 U.S. 677 (1900). In this case, a United States naval commander ordered the arrest and capture, during the Spanish-American War, of two private fishing boats located off the coast of Cuba and owned by a Spanish subject. The boats and their cargo were sold, and the claimant sued for the proceeds of the sale. *The Paquete Habana*, 175 U.S. at 679. The customary international law of war allowed for nations to capture the ships of belligerents during times of war, but prohibited the capture of small private coastal fishing boats. In holding for the claimant that the capture of the fishing boat was illegal under our law, the Supreme Court announced, "International law is part of our law, and must be ascertained and
administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." \textit{Id}. at 700. However, the Court concluded that "[f]or this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . ." \textit{Id}.\footnote{Id. \textit{at} 1453-54. As to the second group, the court concluded that there was no affirmative legislative grant to detain, but found it legal, nonetheless, under the precedent established in \textit{The Paquete Habana}. \textit{Id}. \textit{at} 1454. The court concluded that the delegation of executive power to break international law could be construed as delegated to the Attorney General. \textit{Id}.}

Courts have interpreted this language as supportive of the dualist proposition that deference should be given to a controlling executive act over international law. But what would qualify as a "controlling executive act"? Obviously, in \textit{The Paquete Habana}, the decision of a naval commander was not a "controlling executive act." However, in 1986, United States Attorney General Edwin Meese ordered the detention of two groups of Cuban refugees that came to the United States as part of the 1980 Mariel boat lift. The first group consisted of Cuban criminals and mental incompetents. Garcia-Mir v. Meese, 788 F.2d 1446, 1448 (11th Cir.), cert. denied, 479 U.S. 889 (1986). The second group consisted of those for whom there was no evidence of criminal or mental defect. \textit{Id}. The detention of both of these groups was challenged in Garcia-Mir v. Meese. The court did not dispute the appellees' contention that general principles of international law forbade prolonged, arbitrary detentions. Rather, the decision rested on the authority of the Attorney General to violate this law. As to the first group, in accordance with the dualist understanding that later-in-time legislation takes precedence over international law, the court found that there had been "an affirmative legislative grant" of authority to detain. \textit{Id}. \textit{at} 1453-54. As to the second group, the court concluded that there was no affirmative legislative grant to detain, but found it legal, nonetheless, under the precedent established in \textit{The Paquete Habana}. \textit{Id}. \textit{at} 1454. The court concluded that the delegation of executive power to break international law could be construed as delegated to the Attorney General. \textit{Id}.\footnote{Since such authority could be construed as delegated to the Attorney General, could it also be construed as delegated to the Administrator of the Drug Enforcement Agency? For a discussion of "when and how . . . the United States [may] violate international law," see Michael J. Glennon, \textit{State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain}, 86 \textit{Am. J. Int'l L.} 746, 750, 753 (1992) (concluding that "[t]here is in fact sound reason to believe that the President cannot, without congressional approval, place the United States in violation of a widely accepted and clearly defined norm of customary international law of the sort that prohibits abduction").}

Since such authority could be construed as delegated to the Attorney General, could it also be construed as delegated to the Administrator of the Drug Enforcement Agency? For a discussion of "when and how . . . the United States [may] violate international law," see Michael J. Glennon, \textit{State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain}, 86 \textit{Am. J. Int'l L.} 746, 750, 753 (1992) (concluding that "[t]here is in fact sound reason to believe that the President cannot, without congressional approval, place the United States in violation of a widely accepted and clearly defined norm of customary international law of the sort that prohibits abduction").

Complicating this legal problem is that it is not factually clear whether the abduction was authorized at a level higher or even lower than the Administrator of the DEA. Former legal advisor to the Department of State, Abraham D. Sofaer, testified before the House Judiciary Subcommittee on Civil and Constitutional rights concerning the kidnapping issue. In his testimony, given days after the \textit{Alvarez-Machain} decision, Sofaer stated that those in "the State Department were never consulted" about the capturing of Alvarez-Machain, and added that they were "not even presented" with the idea. With regard to the usual chain of decision-making in these kidnapping cases, Professor Andreas F. Lowenfeld stated at the same hearing:

\textit{Kidnapping Subjects Abroad: Hearing Before the House Judiciary Subcomm. on Civil and Constitutional Rights, 102d Cong., 2d Sess. 92-93 (1992) (Professor Andreas F. Lowenfeld); see also Abraham Abramovsky, \textit{Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok}, 31 \textit{Va. J. Int'l L.} 151, 165-66 (1991) (discussing fact that despite "strikingly different versions of the facts . . . all explanations point to a unilateral abduction by bounty hunters acting at the behest of the DEA, with the approval of the Justice Department").
The Alvarez-Machain Court implicitly relied upon the dualist model to support its position that it could disregard the general principles of international law. The Court stated that "the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch."\footnote{104} The Court elaborated in an explanatory footnote that in the absence of a treaty violation, a "diplomatic approach," rather than a "unilateral action by the courts of one nation," is the better method for redress of such violations.\footnote{105} The position that the Court should give deference to the "later-in-time" executive action, and that this deference should allow the executive to resolve matters within the international system as the foreign relations agent of the American state, is undoubtedly borrowed from the jurisprudential doctrine which has established the dualist model in the United States.

Based on the Court's tacit assumption that the Constitution is the source of law which determines whether the United States can exercise jurisdiction over a defendant abducted from a foreign nation, the Court's disregard of the international law prohibiting abductions appears to be consistent with the dualist model. However, once we correctly acknowledge international law as the sole source of jurisdictional authority to nation-states, disregarding the international law is no longer consistent with the dualist model.

The fact that the dualist model provides for two distinct systems of substantive law does not imply that it provides for two distinct jurisdictional systems. Rather, the model is based upon a unified global jurisdictional system. The source of the state's basic grant of jurisdictional authority to create its

\footnote{105.} Id. at 2196 n.16. In this footnote, the Court relied on an historical example drawn from the litigation in Cook v. United States, 288 U.S. 102 (1933), a case which was otherwise relevant to the decision, see infra note 112. The facts leading up to this case evidenced a diplomatically negotiated solution to a conflict between the United States and Britain, which transpired in the context of the Supreme Court having interpreted American legislation in a way the British thought violative of their sovereign rights under international law. During prohibition, British ships entered American territorial waters to supply alcohol to American distributors in violation of prohibition laws. Having failed to negotiate a diplomatic solution with the British, in Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1922), the United States argued that American prohibition laws applied to, and could be enforced against, British ships operating within American territorial waters. Cunard, 262 U.S. at 124. The British argued that under international law American prohibition laws should not apply on board these ships because under international law they should be considered a part of British territory and beyond the jurisdictional reach of American legislation. Id. at 106-07. The Supreme Court held that international law allowed states to prescribe activities on board ships within their territorial waters and that it was Congress's intent that American prohibition laws should apply to, and be enforced against, foreign ships operating in American territorial waters. Id. at 128-29. Presumably, the relevance of this case is that, as in Alvarez-Machain, the Supreme Court allowed the government to act against the interests of a foreign country. The lesson evidently drawn from Cunard by the Alvarez-Machain Court is that, freed to act without judicial impediment, the executive was able to successfully negotiate a mutually satisfactory treaty with Britain. The two cases differ, however, in that the decision in Cunard, allowing the United States to apply and enforce its laws against foreign ships within its territorial waters, was most likely legal under international law, while the acceptance of jurisdiction in Alvarez-Machain was clearly illegal under international law.
own substantive law-making system is, therefore, international law. While the dualist model allows a nation-state to characterize substantive international law as domestic law for the purposes of applying the law domestically, it does not allow a nation-state to characterize international jurisdictional law in the same manner.106

VII. The Consistency of American Case Law with the Paradigm Underlying the Nation-State System

Prior to the Alvarez-Machain decision, American abduction cases were almost universally consistent with the nation-state paradigm. While the existence of the paradigm and its implications for jurisdictional law have been independently demonstrated,107 such consistency of application is corroborative of the paradigm and its jurisdictional implications.

This is not to claim that the courts have been consciously aware that they were applying the paradigm. In fact, there was a tremendous amount of confusion prior to the Alvarez-Machain decision. As I explained, courts and commentators in civil cases have pervasively viewed the Constitution as the source of the American state's grant of jurisdictional power.108 Some criminal courts have likewise failed to distinguish between the international abduction found in Ker v. Illinois and the domestic abduction found in Frisbie v. Collins.109 Finally, following the Ker decision, courts and commentators have in their confusion universally attempted to determine the legality of abductions by way of interpreting extradition treaties.110 Indeed, one of the contributions I hope to make in this article is to articulate the relevance of this nation-state paradigm to personal jurisdiction in criminal cases. Nevertheless, because the paradigm forms the basis for our primary understanding of the relationship of nation-states to the international order, it provides either consciously or unconsciously the intellectual foundation upon which such decisions are based. It is significant, therefore, that despite all this con-

106. Even if the state could create its own jurisdiction, the "executive" order authorizing the kidnapping would have to be construed as not only authorizing a political action, but also as intending to create new jurisdictional law. If international law is the source of the state's jurisdiction, the only remedy for a violation of such law is a denial of jurisdiction. The Court could not, consistent with the nature of jurisdiction, find that an abduction which violated the international law of jurisdiction could be remedied other than by refusing to assert personal jurisdiction. For example, simply punishing the officials involved in the abduction or suggesting that the country whose sovereignty was offended punish such officials would not remedy the jurisdictional infraction. See, e.g., Villareal v. Hammond, 74 F.2d 503, 504-06 (5th Cir. 1934); Collier v. Vaccaro, 51 F.2d 17, 18-21 (4th Cir. 1931). In other words, the concern of a jurisdictional analysis, unlike the Fourth Amendment's exclusionary rule, cannot be reduced to deterring unlawful official conduct. U.S. CONST. amend. IV (establishing right of people to be secure in their persons against unreasonable seizures); see United States v. Leon, 468 U.S. 897, 919-21 (1984) (establishing good-faith exception to exclusionary rule and holding that the rule's purpose is to deter unlawful official conduct).

107. See supra notes 16-40 and accompanying text.
108. See supra notes 55-61 and accompanying text.
110. See supra notes 50-54, 82, and accompanying text.
fusion jurisdictional decisions are largely consistent with the nation-state paradigm. The *Alvarez-Machain* decision is destructive specifically because it broke with paradigm-consistent precedent, by distinguishing violations of extradition treaty obligations (a legitimate reason for domestic courts to deny personal jurisdiction) from violations of customary international jurisdiction law (not providing a legally sufficient basis for such a denial).

Although United States courts have often upheld jurisdiction over defendants who have been kidnapped from foreign countries, they have done so in accordance with accepted notions of international law. Most commonly, they have done so when foreign states have not objected to the

111. See generally Richard P. Shafer, Annotation, *District Court Jurisdiction over Criminal Suspect Who Was Abducted in Foreign Country and Returned to United States for Trial or Sentencing*, 64 A.L.R. FED. 292 (1983 & Supp. 1994) (collecting and analyzing federal cases ruling on federal courts' personal jurisdiction over defendants abducted from foreign countries); Herbert B. Chermside, Jr., Annotation, *Jurisdiction of Federal Court To Try Criminal Defendant Who Alleges that He Was Brought Within United States Jurisdiction Illegally or as Result of Fraud or Mistake*, 28 A.L.R. FED. 685 (1976 & Supp. 1994) (collecting and analyzing cases involving federal jurisdiction over criminal defendants brought into territorial jurisdiction by illegal or irregular means).

112. Prior to *Alvarez-Machain*, an important Department of Justice opinion concluded that of all the reported decisions of United States courts addressing an alleged violation of territorial sovereignty by international abduction, there was apparently no reported case in which a court found jurisdiction when the abduction was the subject of a formal diplomatic protest by the asylum state. United States Department of Justice, Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Counsel 543 (1980). Only two cases could be found by this author in which the United States courts accepted jurisdiction over an abducted defendant despite a state protest. However, in these cases, acceptance of jurisdiction was arguably consistent with international law, see infra note 115, because the United States itself had not encroached on the foreign State's territorial sovereignty. In *Ex parte Lopez*, 6 F. Supp. 342 (S.D. Tex. 1934), while the court is less than clear about why it accepted jurisdiction “under such circumstances,” despite a state protest, the court made no mention of United States involvement in the abduction and in fact specified that a Mexican Army captain had so been involved. *Lopez*, 6 F. Supp. at 344. In *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987), employees of a private Florida bonding company had on their own initiative abducted the defendant and, in fact, following Canada's protest the executive branch made great efforts to seek Jaffe's repatriation to Canada. *Jaffe*, 825 F.2d at 307.

Reported decisions of United States courts addressing international abductions are otherwise overwhelmingly decided consistently with the international law of jurisdiction. See, e.g., *Dominguez v. State*, 234 S.W. 79, 82 (Tex. Crim. App. 1921) (precluding jurisdiction based on reasoning that entry into Mexico by United States soldiers for purpose of apprehending criminal offenders was “a violation of Mexican territory contrary to the law of nations in the absence of consent of the Mexican government”); cf. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.) (holding that individuals have no standing to challenge violations of international treaties in absence of protest by sovereign involved), *cert. denied*, 498 U.S. 878 (1990); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (holding that defendant had no standing to raise violation of international law as issue absent foreign sovereign nation's objection); United States *ex rel. Lujan v. Gengler*, 510 F.2d 62, 66-68 (2d Cir.) (upholding district court’s jurisdiction where defendant failed to allege that foreign nations objected to abduction), *cert. denied*, 421 U.S. 1001 (1975); United States v. Yunis, 681 F. Supp. 896 (D.D.C.) (holding that only sovereign nations and not individuals have authority to complain about violations of extradition treaties.), *rev’d on other grounds*, 859 F.2d 953 (D.C. Cir. 1988); United States v. Insull, 8 F. Supp. 310, 311-13 (N.D. Ill. 1934) (finding jurisdiction over defendant where foreign country had not objected).
Cases involving the seizure of vessels in foreign territorial waters involve some of the same issues of violation of the territorial sovereignty of the foreign state. Although the jurisdictional implications of the maritime cases are compounded by the complexities of vessel ownership, the extent of territorial waters, and the laws of war, the cases generally support an analogous rule that international law is not violated unless the foreign state objects to the seizure. See, e.g., The Purissima Conception, 165 Eng. Rep. 844, 845 (1805) (Sir William Scott) (“The privilege of territory will not itself enure to the protection of property, unless the state from which that protection is due, steps forward to assert the right.”); Cook v. United States, 288 U.S. 102, 121-22 (1932); Hudson v. Guester, 10 U.S. (6 Cranch) 281, 284-85 (1810); see also Edwin D. Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 AM. J. INT’L L. 231 (1934) (summarizing additional maritime cases in support of doctrine); Felice Morgenstern, Jurisdiction in Seizures Effected in Violation of International Law, 29 BRIT Y.B. INT’L L. 265 (1952) (same).

113. See supra note 40 and accompanying text for discussion of requirement that, under international jurisdictional law, when a state protests an abduction from its territory, the abducting state is required to return the defendant.

114. See supra note 40 and accompanying text. While the doctrine of male captus bene detentus is often used as authority to support the legality of assertions of jurisdiction by courts over kidnapped defendants, the exception which disallows jurisdiction if the offended state objects is what is most important. It is important to point out that some commentators have cited this doctrine for the erroneous proposition that courts have jurisdiction over defendants under international law regardless of the circumstances surrounding their capture. E.g., Halberstam, supra note 61, at 737-38 (noting that “person improperly seized may nevertheless properly be brought to trial”); Bifani, supra note 61, at 676 (noting that notwithstanding illegal apprehension, state can retain jurisdiction); Campbell, supra note 61, at 410 (noting that “illegal apprehension does not preclude jurisdiction”); McCarthy, supra note 61, at 1071-72 (noting that forcible abduction, standing alone, will not defeat jurisdiction).

The exception which disallows jurisdiction if the offended state objects is central to this doctrine and should not be read out of it. Based on the theory that the territorial interest being compromised is that of the state, not the defendant, only an objection by the state should invalidate jurisdiction. Reported decisions indicate that often the foreign state does not object. Therefore, jurisdiction is allowed since the state of asylum participated, acknowledged, or acquiesced in the arrest. E.g., Ker v. Illinois, 119 U.S. 436, 442-44 (1886) (Peru did not object to proceeding; private detective did not conform to extradition treaty requirements); The Merino, 22 U.S. (9 Wheat.) 391, 402-03 (1824) (American-owned vessels seized in Spanish territory of Pensacola while Pensacola was in possession of the American army; Spain did not object); The Ship Richmond, 13 U.S. (9 Cranch) 102, 104 (1815) (finding seizure of American vessel within territorial jurisdiction of foreign power offence against that power; no objection made by Spain); Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.) (no violation because Honduran government did not protest abduction), cert. denied, 498 U.S. 878 (1990); United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988) (no violation despite defendant’s removal from Panama by DEA agents acting without compliance to extradition procedures because no State objection); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (no protest by Guatemala or Belize to defendant’s removal); United States v. Romano, 706 F.2d 370, 375 (2d Cir. 1983) (no United States officer or agent ever entered Italian territory; Italy never asserted any violation of its rights of sovereignty); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (no violation where Bahamian government did not protest defendant’s abduction); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976) (despite FBI’s involvement, including meetings with foreign police officers and paying defendant’s airfare, court found foreign official action “totally volun-
tion when the kidnapping was not authorized by the United States government based on the traditional understanding in international law that only a nation-state can violate international law.  

Ironically, despite its fundamental departure from precedent, the *Alvarez-Machain* Court implicitly justified its reliance on the United States-Mexican bilateral extradition treaty, and not on international jurisdictional law, by deferring to the precedent established in *Ker v. Illinois*, the classic 1886

---

115. In some instances, no violation of international law occurred because individuals were kidnapped in other countries by private persons or otherwise brought within the jurisdiction without the connivance of state authorities. See supra note 112 (discussing jurisdiction in *Lopez* and *Jaffe* as arguably legal under international law because, despite foreign protest, there was no state participation in abduction). See also Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967) (removal of defendants from Mexico not initiated by United States as defendants had been deported by Mexican immigration authorities as undesirable aliens); United States v. Sobell, 244 F.2d 520, 524-25 (2d Cir.), (international jurisdictional law not violated where Mexican Security Police brought United States citizen charged with espionage to United States, and Mexico did not protest), cert. denied, 355 U.S. 873 (1957). For cases applying an analogous rule for abductions between states within the United States, see Mahon v. Justice, 127 U.S. 700, 706 (1888) (jurisdiction not precluded because "process emanating from the Governor of Kentucky furnished no ground for charging any complicity on the part of that State in the wrong done to the State of West Virginia"); State v. Ross, 21 Iowa 467, 471 (1866) (parties acting without authority in Missouri, brought to Iowa and re-arrested; court held "the State is guilty of no wrong.... The officers of the law take the requisite process, find the persons charged within the jurisdiction, and this, too, without force, wrong, fraud or violence on the part of any agent of the State or officer thereof.").

116. 119 U.S. 436 (1886).
overseas abduction case. The *Alvarez-Machain* Court asserted that "[i]f we conclude that the [extradition] 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."\(^{117}\) In other words, as long as the abduction violates only general international jurisdictional law, and not an extradition treaty, the domestic “rule in *Ker*” departs from international law and provides that the United States may exercise jurisdiction over an abducted defendant. *Ker*, however, never held that the United States could assert jurisdiction over a defendant where the United States violated international jurisdictional law.

While the Supreme Court in *Ker* found that the United States had jurisdiction over a defendant who was kidnapped from Peru and forcibly brought to the United States, in that case the United States did not violate international law. As the *Alvarez-Machain* Court explained, “*Ker* was decided on the premise that there was no governmental involvement in the abduction . . . and Peru . . . did not object to [Ker’s] prosecution.”\(^{118}\) In *Ker*, the Court held that the extradition treaty “was not called into operation” because the United States sent the defendant’s abductor to Peru in order to seek the defendant’s legal extradition and the abductor himself made the decision to disregard the treaty processes and abduct the defendant forcibly to the United States.\(^{119}\) The United States was, therefore, not itself involved in the illegality of the abduction.\(^{120}\) In addition, as the *Alvarez-Machain* Court’s second reference implies and the *Ker* Court addressed indirectly,\(^{121}\) the fact that Peru never protested the defendant’s abduction or demanded his return\(^{122}\) is understood by international law to signify Peru’s consent to the abduction and, therefore, renders the abduction legal under international law.\(^{123}\)

While the *Ker* decision, based on the prevailing view at the time that state interpretations of customary international law should not be reviewed by the Supreme Court,\(^{124}\) only specifically addressed the fact that the extradition treaty had not been called into operation, it did not find that it was upholding jurisdiction in spite of a violation of international jurisdictional law. In fact, for the same reasons that the court found that the extradition treaty was not called into operation, general principles of international law were also not violated. Thus, the Court’s decision to recognize jurisdiction did not indicate the Court’s willingness to disregard the general principles of international jurisdictional law. Based upon the theory that only a nation-


\(^{118}\) *Id.* (citations omitted).

\(^{119}\) *Ker*, 119 U.S. at 443.

\(^{120}\) *Id.*

\(^{121}\) *Id.* at 444.

\(^{122}\) *Id.*


\(^{124}\) See *supra* note 82.
state can violate international law, the failure of the United States to authorize the abduction not only meant that the illegality of the abduction as outside the "operation" of the treaty could not be imputed to the United States, but it also, under the same theory, meant that the abductor's violation of general principles of international jurisdictional law could not be imputed to the United States. In addition, Peru's failure to protest the abduction constructively authorized American jurisdiction because international law inferred Peru's retroactive consent to waive the territorial rights granted by the general principles of international law, and not by the extradition treaty. Consequently, the \textit{Ker} Court's decision to allow for jurisdiction in the absence of Peru's protest cannot be construed to imply that, even though the extradition treaty between the United States and Peru did not ban abductions, the Court would have recognized the United States's jurisdiction in the event that Peru protested.

It is possible that the \textit{Alvarez-Machain} Court's interpretation of \textit{Frisbie v. Collins}—the other major abduction case relied on by the Court—helped to form the Court's incorrect interpretation of the "rule in \textit{Ker}." Lower courts and commentators had read \textit{Frisbie} previously, in conjunction with \textit{Ker}, to create the \textit{Ker-Frisbie} doctrine. This doctrine states that an American court will have valid jurisdiction over a criminal defendant regardless of how the defendant came before the court. The \textit{Ker-Frisbie} doctrine

\begin{itemize}
  \item \textbf{125.} See \textit{supra} note 40 and accompanying text.
  \item \textbf{126.} Despite the fact that \textit{Ker} never actually made this distinction between general principles of international law and extradition treaties, the entire argument justifying the holding in \textit{Alvarez-Machain} depends on the assumption that it did. The Court concludes that "the only differences" between \textit{Ker} and \textit{Alvarez-Machain} was that \textit{Ker} was decided on the premises, discussed in the body of this article, that first there was a lack of involvement by the United States in the abduction, and second that Peru did not protest the abduction. \textit{Alvarez-Machain}, 112 S. Ct. at 2193. Specifically, while Ker's abductor acted on his own initiative, the district court in \textit{Alvarez-Machain} found that the DEA had hired bounty hunters specifically to abduct Dr. Alvarez-Machain. United States v. Caro-Quintero, 745 F. Supp. 599, 605 (C.D. Cal. 1990), \textit{aff'd sub nom. United States v. Alvarez-Machain}, 946 F.2d 1466 (9th Cir. 1991), \textit{rev'd}, 112 S. Ct. 2188 (1992). In addition, while Peru remained silent, Mexico vociferously protested Dr. Alvarez-Machain's abduction and demanded his return. \textit{Id.} at 608. Without the benefit of a similar factual record, the Court attempted to fit the facts in \textit{Alvarez-Machain} within the \textit{Ker} holding by showing that the extradition treaty with Mexico was similarly not violated. To do this, the Court extended its analysis beyond the circumstances surrounding the specific abduction to an examination of whether the provisions of the extradition treaty at issue banned kidnapping in general. The acceptance of jurisdiction over a defendant who is present in the forum as a result of a state-sponsored abduction despite the protests of the offended state, regardless of whether the extradition treaty specifically bans kidnapping, is clearly contrary to international jurisdictional law. Therefore, the effort at treaty interpretation would be in vain if the Court was otherwise to apply international jurisdictional law. The result in \textit{Alvarez-Machain} is consequently dependent upon the proposition that violations of extradition treaties defeat jurisdiction while violations of general principles of international law do not.
  \item \textbf{127.} 342 U.S. 519 (1952).
  \item \textbf{128.} \textit{Alvarez-Machain}, 112 S. Ct. at 2193.
  \item \textbf{129.} See \textit{supra} notes 42-49 and accompanying text for a discussion of \textit{Frisbie}.
  \item \textbf{130.} See generally \textit{Scott}, \textit{supra} note 36, at 95-99 (examining \textit{Ker-Frisbie} doctrine and critiquing \textit{Frisbie} decision).
\end{itemize}
has primarily been used to allow jurisdiction despite illegal arrests or kidnappings between states within the United States. This doctrine cannot be extended to hold that jurisdiction over a defendant illegally abducted from abroad will be recognized despite the objection of a foreign state. In addition, the doctrine certainly does not distinguish between a treaty violation and a violation of general principles of international law as a reason for denying jurisdiction. Because Frisbie involved the abduction of a defendant from one state within the United States to another, the most that reasonably can be extrapolated from the case is that jurisdictional rules based on the fifty states' sovereignty, which are analogous to international jurisdictional rules, are no longer applicable within the relatively integrated domestic fifty states of the Union. Therefore, neither Ker, read alone nor in conjunction with Frisbie, can reasonably be understood to mean that American courts have jurisdiction over a defendant illegally abducted from a foreign country despite its protest.

The Alvarez-Machain Court also heavily relied on United States v. Rauscher, decided the same day as Ker, for the proposition that it could not recognize jurisdiction if the extradition treaty had been violated. In Rauscher, the Court held that the American forum does not have jurisdiction to try a defendant on charges other than those for which he had been extradited under a bilateral extradition treaty. The Alvarez-Machain Court interpreted this rule, known as the doctrine of "specialty," as supporting the proposition that when a bilateral extradition treaty exists, the terms of the treaty limit the extent of criminal jurisdiction over offshore defendants. The Rauscher decision buttressed the Alvarez-Machain Court's interpretation of Ker, that extradition treaty violations can prohibit the acceptance of jurisdiction by courts over abductees while general international jurisdictional law


133. See supra note 48 and accompanying text.

134. 119 U.S. 407 (1886).


137. Alvarez-Machain, 112 S. Ct. at 2191.
cannot. In *Rauscher*, however, where no abduction had taken place and there was no violation of international jurisdictional law, the Court, like the *Ker* Court, never held that courts could assert jurisdiction despite a violation of international jurisdictional law.

**Conclusion**

In this article, I have pointed out why the paradigm underlying the nation-state system requires that each individual nation-state apply the international law of jurisdiction in adjudicating issues of jurisdiction over foreign abductees. I have refrained from making any significant normative assertions. Now, however, I will make a few conclusory normative observations.

The nation-state paradigm I have described, interconnected as it is with the notion of territorial sovereignty, has been less than an ideal way to organize international social life. The system has led to recurrent and increasingly deadly wars, has been used to justify horrendous violations of human rights, and has encouraged states to sacrifice socially beneficial regulatory standards in their competition to attract scarce capital resources. Indeed, we have entered into a very hopeful historical period where the international community is reassessing many of the basic tenets of territorial sovereignty.

The paradigm does, however, provide a coherent approach to allocating, on an international level, the authority to enforce criminal laws. With criminal enterprises, such as those trafficking in illegal drugs, being driven by the same globalizing forces as legitimate commerce, the maintenance of such an approach is increasingly important.

I do not assert that the present allocation of jurisdictional responsibility could not be improved. Various schemes could provide for nation-states to share with international or foreign authorities their right to enforce laws within their own territories. For example, partially in response to the inability of certain nations to effectively enforce drug laws, the International Law Commission has recently completed preparation of a proposed statute to establish an international court. This court, in addition to deciding cases involving violations of fundamental human rights, would be charged with hearing drug cases. Many, including some within the DEA, would be supportive of such schemes based on their belief that certain countries, such as Mexico, are not adequately deterring criminal activities that affect countries beyond their own borders. Indeed, in a different context, while they do not provide for direct enforcement of laws by foreign parties, the environmental and labor "Side Agreements" to the recently enacted North American Free Trade Agreement (NAFTA) are devices to internationalize the enforcement of labor and environmental laws among the United States, Canada, and Mexico.

While a discussion of the relative merits of these kinds of proposals is beyond the scope of this article, it is noteworthy for our purposes that these

138. *Id.* at 2195-96.
proposals all emanate from a similar attempt to create a constructive and coherent alternative to the current international allocation of jurisdictional responsibilities. All are consistent with the paradigm supporting the international law of jurisdiction in that they only allow for the exercise of police powers in a particular country with the consent of that country.

Unfortunately, the same cannot be said for the Supreme Court’s decision in *United States v. Alvarez-Machain*. The Court, in its disregard for the international law of jurisdiction, confused the recognized international jurisdictional paradigm. In so doing, the Court failed to provide any semblance of a normative alternative. The Supreme Court’s decision suggests jurisdictional nihilism. If used by other nation-states to legitimize engagement in overseas abductions and then applied by other judiciaries to permit jurisdiction over abductees, the decision can only lead to global regulatory confusion.