CHAPTER 16

INTERNATIONAL CRIMINAL LAW

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International law contains a distinct branch generally referred to as international criminal law, which is focused on addressing the criminal responsibility of individuals. One component of this field concerns transnational cooperation in harmonizing *national* criminal laws and procedures for the investigation, extradition, and prosecution of persons who offend those laws. Important cooperation in this area arises with respect to national crimes that often have a transnational component, such as trafficking in controlled substances, corruption, bribery, money laundering, tax evasion, or fraud (Section 1).

Another component concerns national prosecution of individuals for conduct regarded as criminal under *international law*. Some crimes, such as piracy and slave trading, have long been recognized under customary international law. Many more now have been defined in multilateral treaties relating to state-sponsored torture, genocide, attacks on civil aircraft, and other egregious acts. Despite the emergence of international criminal courts, national courts continue to play the dominant role in enforcing such international crimes (Section 2).

A third component concerns international criminal tribunals or hybrid (mixed international and national) tribunals, charged with investigating and prosecuting persons for certain categories of international crimes, within the confines of their particular jurisdiction. Such tribunals include *ad hoc* international criminal tribunals, which are temporary in nature and limited in their temporal and geographic jurisdiction (Section 3). Since entry into force of the Rome Statute in 2002, there is also a *permanent* International Criminal Court which, as of late 2018, has 123 states parties (Section 4).

International criminal law often intersects with the field of human rights (see Chapter 13). First, crimes under international law for which an individual may be held responsible will often constitute a violation of internationally-protected human rights. In this sense, international human rights are the normative foundation for an important part of international criminal law. Second, in investigating, arresting, detaining and prosecuting offenders, national and international law officials and tribunals must respect the human rights of the accused, including rights to due process, a public trial, the presumption of innocence, and appeal.

For general reading on this branch of international law, see International Criminal Law (Bassiouni ed. 3d ed. 2008) (3 vols.); Cryer et al., An Introduction to International Criminal Law and Procedure (2d ed. 2010); The Diversification and Fragmentation of International Criminal Law (van den Herik & Stahn eds. 2012); Cassese & Gaeta, Cassese's International Criminal Law (3d ed. 2013); Werle, Principles of International Criminal Law (3d ed. 2014).

1. TRANSNATIONAL COOPERATION IN HARMONIZING AND PROSECUTING NATIONAL CRIMES

A conceptually distinct component of international criminal law focuses on harmonization of *national* criminal laws, and on transnational cooperation by states in the investigation and prosecution of those crimes. Most national prosecutors, to the extent that they encounter a criminal matter with transnational dimensions, are faced with conduct that violates only national criminal law, and yet involves evidence or a prospective defendant in another country.

A. HARMONIZING NATIONAL CRIMES

A variety of treaties seek to harmonize national criminal laws in particular areas. Often the impetus for such treaties is that states realize that the area in question cannot adequately be addressed by each state acting individually; rather, cooperation is necessary to combat transnational criminal networks.

For example, the 1961 Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204, seeks to harmonize national criminal laws relating to the use of narcotics with cannabis, coca, and opium-like effects. Generally speaking, such use has been banned, except for scientific and medical purposes. To that end, the convention obligates parties to restrict to licensed persons the cultivation, manufacture, and distribution of such narcotics. Further, the convention created an International Narcotics Control Board (INCB), to which the parties must report the amount of narcotics produced, consumed, or seized in their territory. One consideration with respect to the legalization of marijuana in the United States for recreational use, as has occurred in at least nine U.S. states as of 2018, is whether doing so places the United States in violation of its obligations under the 1961 Single Convention. See, e.g., U.N. Doc. UNIS/NAR/1164, INCB President Calls on the United States Government to Address Initiatives Aimed at Permitting Recreational Drug Use (Mar. 14, 2013) (reporting that the INCB President regards allowing the recreational use of cannabis as "a violation of international law, namely

the United Nations Single Convention on Narcotic Drugs of 1961, to which the United States is party").

The 1971 Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, was developed in response to the diversification and expansion of the spectrum of drugs beyond those addressed in the 1961 Single Convention. It introduced controls over mind-altering and synthetic drugs, including import and export restrictions, based on the risk of abuse and therapeutic value of the drug. The 1988 U.N. Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, S. Treaty Doc. No. 101–4, 1582 U.N.T.S. 95, regulates the precursor chemicals to drugs controlled by the Single Convention and the Convention on Psychotropic Substances. It also contains important provisions related to money laundering and other drug-related crimes.

Similar regimes exist in other areas, such as corruption, organized crime, money laundering, tax evasion, and even cyber-crime. See, e.g., U.N. Convention against Corruption, Oct. 31, 2003, GA Res. 58/4, annex (Oct. 31, 2003); U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, G.A. Res. 55/25, annexes I (main convention), II (protocol on trafficking in persons), & III (protocol on smuggling migrants) (Nov. 15, 2000); Convention on Cybercrime, Nov. 23, 2001, E. T.S. No. 185.

B. MUTUAL LEGAL ASSISTANCE

Elaborate bilateral and multilateral arrangements have been adopted by states to enable and promote mutual assistance in national criminal investigations and prosecutions. Mutual legal assistance treaties (MLATs) require a "requested state" to assist a "requesting state's" law enforcement efforts by sharing useful information in the requested state's possession, searching for and seizing evidence located in the requested state, serving summons on and tracing suspects or witnesses located in the requested state, and taking written testimony from such persons. For example, in 1959, the Council of Europe adopted a Convention on Mutual Legal Assistance in Criminal Matters, Apr. 20, 1959, E.T.S. No. 30, as amended by protocol, which has had a significant influence on the development of MLATs by European states. Since many countries (particularly in the developing world) do not have MLATs with one another, the United Nations in 1990 adopted a model MLAT. See G.A. Res. 45/117, annex (Dec. 14, 1990), *reprinted in* 30 I.L.M. 1419 (1991).

The United States has concluded more than 50 bilateral MLATs, and is also party to an agreement with the European Union which provides for cooperation between the United States and all E.U. member states (twenty-eight as of 2018), as well as an Inter-American Convention on Mutual Legal Assistance. See Agreement on Mutual Legal Assistance in

Criminal Matters, U.S.-E.U., June 25, 2003, 2003 O.J. (L 181) 34, 43 I.L.M. 758. On U.S. practice for mutual legal assistance in criminal matters, see Restatement (Fourth) § 429.

C. EXTRADITION

Once an alleged offender is located abroad whom a state wishes to apprehend, various bilateral and multilateral treaties provide a basis for pursuing extradition. "Extradition" is generally defined as the surrender of an individual by the state within whose territory he is found to the state under whose laws he is alleged to have committed (or already to have been convicted of) a crime.

Until the 19th century, the extradition of fugitives was rare and was a matter of sovereign discretion rather than of obligation. With the dramatic improvements in transportation in the 19th century, the number of criminals fleeing to foreign states increased and states began to conclude bilateral and multilateral treaties providing for their extradition. See U.N. Secretariat, Survey of Multilateral Conventions Which May Be of Relevance for the Work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)," U.N. Doc. A/CN.4/630 (June 18, 2010); see also U.N. International Law Commission, Final Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), U.N. Doc. A/CN.4/L.844 (June 5, 2014); Jones & Davidson, Extradition and Mutual Legal Assistance Handbook (2d ed. 2014).

Do states have an obligation under customary international law to extradite someone accused by another state of committing a crime? In *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933), the U.S. Supreme Court noted that:

> [t]he principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled * * * the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.

National laws of many states prevent the arrest and extradition of a fugitive except pursuant to a treaty or statute providing for extradition. See O'Connell, 2 International Law 793–94 (2d ed. 1970); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

1. Extradition by the United States

In the United States, international extradition is governed by federal law, leaving the several states with no power to extradite persons to foreign

countries. See 18 U.S.C.A. §§ 3181–3196 (2018). The key provision is § 3184, which states:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, * * * may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, * * * issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. * * * If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, * * * he shall certify the same * * * to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Thus, federal law requires a judicial hearing of the evidence against the fugitive to ensure that the proceedings comply with the applicable treaty. If the judge regards the evidence sufficient to sustain the charge under the relevant treaty, the judge so certifies to the U.S. Secretary of State. The Secretary of State then may grant or refuse extradition. The fugitive may petition for a writ of habeas corpus to challenge the legality of his detention and may urge upon the Secretary of State that his extradition not be granted. See Bassiouni, International Extradition: United States Law and Practice, ch. XI (6th ed. 2014); Restatement (Fourth) § 428.

The reference in the statute to 18 U.S.C.A § 3181(b) was added in 1996 as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 120 Stat. 1280 (1996). That section indicates that it is possible to surrender

> persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries *without regard to the existence of any treaty of extradition with such foreign government* if the Attorney General certifies, in writing, that—
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> > (1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence * * *; and

(2) the offenses charged are not of a political nature.

18 U.S.C.A § 3181(b) (2018) (emphasis added).

NOTES

1. *Surrender to Ad Hoc International Criminal Tribunals.* In 1995, U.S. President Clinton entered into executive agreements with the International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.) and the International Criminal Tribunal for Rwanda (I.C.T.R.) "to surrender to the Tribunal * * * persons * * * found in its territory whom the Tribunal has charged with or found guilty of a violation or violations within the competence of the Tribunal." In 1996, Congress enacted legislation to implement the agreements, by providing that federal extradition statutes are to apply to surrender of persons to the I.C.T.Y. and I.C.T.R. See Pub. L. 104–106, § 1342, 110 Stat. 486 (1996).

2. *Ntakirutimana Surrender.* A Rwandan (Hutu) clergyman, Elizaphan Ntakirutimana, was alleged to have urged hundreds of Rwandan men, women and children to take refuge in a church and hospital to escape the ethnic slaughter in progress in 1994, yet he then brought Rwandan soldiers to murder them. In 1996, Ntakirutimana was indicted by the I.C.T.R for genocide. Later that year, Ntakirutimana was arrested in Texas by U.S. federal marshals. In U.S. court, he sought to challenge his surrender by writ of habeas corpus, on the grounds that: (1) the U.S. Constitution requires an Article II treaty for any surrender tantamount to extradition; (2) the I.C.T.R. request for surrender did not establish probable cause; (3) the U.N. Charter did not authorize the U.N. Security Council to establish the I.C.T.R.; and (4) the I.C.T.R. did not protect fundamental rights guaranteed by the U.S. Constitution and international law. The Fifth Circuit Court of Appeals rejected all four bases for challenge. *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999). The Secretary of State approved his surrender in March 2000, marking the first instance of transfer of an indicted criminal by the United States to an international criminal tribunal. At the I.C.T.R., Ntakirutimana was convicted and sentenced to ten years' imprisonment. For more information on the I.C.T.R., see *infra* Section 3(C).

2. Extradition Within Europe

The European Arrest Warrant (EAW) Act—adopted by the European Union as a framework decision in June 2002—was part of a package of measures designed to harmonize E.U. state responses to threats of terrorism and cross-border crime. The EAW Act, which was amended in 2009, abolishes the system of extradition among EU members and replaces it with an obligation to mutually recognize arrest warrants issued by judicial authorities of the members. The Act aims to eliminate obstacles to the transfer of criminals between jurisdictions by providing that the arrest warrant is simply transmitted from one judicial authority to another, outside diplomatic channels. The basic principle underpinning the Act was that a judicial request constitutes a public act by one state which must be

recognized and honored as such by another. The Act only applies, however, in situations where: (1) a final sentence of imprisonment already has been imposed on the fugitive for a period of at least four months; or (2) the fugitive is sought to be prosecuted for offences punishable by imprisonment for at least one year.

Since enactment of the EAW Act, the use of such warrants has steadily risen, with their annual use now exceeding 16,000, but various challenges have been made in the course of implementation. For example, in September 2004, the Central Court of Investigation in Criminal Matters in Madrid issued an arrest warrant against Mamoun Darkazanli, who was alleged to be a key Al-Qaeda operative in Europe. German authorities placed Darkazanli under arrest pending extradition and Hamburg's Higher Regional Court declared his extradition permissible. Before his extradition could be carried out, however, Germany's Constitutional Court declared the EAW Act to be unconstitutional for violating Article 16.2 and 19.4 of Germany's Basic Law. Article 16.2 guarantees German citizens freedom from extradition. The Court also held that the Act infringed the right of judicial review provided in Article 19.4 of the Basic Law since it did not establish effective avenues for the challenge of the grant of extradition. Similar decisions of unconstitutionality were handed down in Poland and Cyprus. By contrast, a contrary decision was reached in the Czech Republic. Following these national developments, the European Court of Justice ruled on May 3, 2007, that the European Arrest Warrant Act was valid. For criticism of that decision, see Sarmiento, European Union: The European Arrest Warrant and the Quest for Constitutional Coherence, 6 Int'l J. Const. L. 171 (2008); see also The Oxford Companion to International Criminal Justice 313 (Antonio Cassese ed. 2009); Barbolla, The European Arrest Warrant in Law and Practice, in Liberty and Security in Europe 47 (Ruggeri ed. 2012).

As was the case with MLATs, the European Union and United States signed an extradition treaty in June 2003, which entered into force February 1, 2010. *See* Agreement on Extradition, U.S.-E.U., June 25, 2003, 2003 O.J. (L 181) 27, 43 I.L.M. 749. The treaty does not eliminate bilateral extradition agreements between the United States and European Union member states; rather, it supplements and selectively amends them. So as to conform to that treaty, for example, the United States and the United Kingdom negotiated a new Extradition Treaty in 2003. See Extradition Treaty, U.S.-U.K., Mar. 31, 2003, S. Treaty Doc. No. 108–23, at 1, 4 (2003) (entered into force Apr. 26, 2007).

3. Principles of Specialty and Double Criminality

According to the "principle of specialty," the requesting state may not, without the permission of the requested state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which

he was extradited. The permission of the requested state is also required for the requesting state to re-extradite the fugitive to a third state. See *United States v. Rauscher*, 119 U.S. 407 (1886); Restatement (Fourth) § 428, Comment *d* and Reporters' Note 7.

Difficult problems can arise under some treaties when the act committed by the fugitive is punishable in the requesting state and listed in the treaty, but not punishable in the requested state because the law of the latter defines the crime differently. In such a situation, if the requested state applies its own law to define the crime, it may violate its treaty obligations since it cannot extradite. See Hackworth, 4 Digest of International Law 117–18 (1940). If the requested state applies the law of the requesting state, however, it would be extraditing the fugitive for an act that was not an offense under its own law, thereby likely violating its national law.

To avoid such problems, many treaties contain a requirement of "double criminality," whereby extradition is available only when the act is punishable under the law of both states. The name of the offense and the elements that make it criminal need not be precisely the same, provided that the fugitive could be punished for the act in both states. In *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996), for example, the court held that an Italian crime concerning an "association of mafia type" was substantially similar to U.S. crimes under the conspiracy statute and the Racketeer Influenced and Corrupt Organizations Act.

The principle of "double criminality" may also require that the act be punishable in both states at the time when it was committed. Treaties frequently provide that extradition shall not take place if the prosecution of the fugitive is barred by a statute of limitations in either the requesting state or requested state, but that rule can also be set aside. See Extradition Treaty, art. 6, U.S.-U.K., Mar. 31, 2003, S. Treaty Doc. No. 108–23 ("The decision by the Requested State whether to grant the request for extradition shall be made without regard to any statute of limitations in either State"). See Restatement (Fourth) § 428, Reporters' Note 2.

NOTES

1. *Standing of Individual to Raise Treaty Claim.* In *United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995), the court took note of a split among the federal circuit courts as to whether a defendant has standing to raise a claim of violation of the principle of specialty (i.e., that he was prosecuted for a crime other than the one for which he had been extradited under a treaty), in the absence of affirmative protest from the state party to the treaty. The Eleventh Circuit concluded that the defendant had standing to raise the claim of a treaty violation, but he would lose that right if the state party waived its objection. By contrast, in *United States v. Burke*, 425 F.3d 400, 408 (7th Cir. 2005), and

United States v. Suarez, 791 F.3d 363 (2d Cir. 2015), the court found that the defendant had no such standing. As of late 2018, this split in the circuits has not been resolved. See Restatement (Fourth) § 428, Reporters' Note 7.

2. *Pinochet Case.* The principle of double criminality was involved in the *Pinochet* extradition proceedings in the United Kingdom. Both the requesting state (Spain) and the requested state (United Kingdom) had ratified the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which had become effective as national law in the United Kingdom by enactment of § 134 of the U.K. Criminal Justice Act in 1988. Prior to 1988, however, there was no basis in U.K. law for extraterritorial jurisdiction over the crime of state-sponsored torture and thus no dual criminality in relation to Spain's prosecution. Lord Browne-Wilkinson's opinion stated on this point:

> [T]he principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed. If, on the other hand, the double criminality rule only requires the conduct to be criminal under U.K. law at the date of extradition the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988.

Regina v. Bartle & Commissioner of Police, Ex Parte Pinochet, 2 W.L.R. 827, 38 I.L.M. 581 (1999). A majority of the House of Lords concluded that Pinochet could be extradited to Spain for crimes committed *after* the United Kingdom had implemented the Torture Convention, but not for earlier crimes. For other extracts from the case, see Chapter 11, Section 3(E); Chapter 12, Section 4(B).

4. Extradition of a State's Own Nationals

Many extradition treaties contain provisions exempting nationals of the requested state from extradition. A typical provision is that neither party shall be obligated to surrender its nationals, thus leaving the matter to the discretion of the requested state. The policy, which is most commonly reflected in civil law jurisdictions, apparently stems from a belief that individuals should not be withdrawn from the jurisdiction of their own courts. Consequently, constitutional restrictions on extradition of nationals have regularly featured in the decisions of national courts so as to preclude such extradition. However, the courts in many civil law countries have broad jurisdiction to try and punish their nationals for crimes committed in other countries, consistent with the nationality principle (Chapter 11, Section 3(A)).

Some states, however, take a different view and allow their nationals to be extradited to other states. The United States surrenders its own nationals (unless exempted by treaty), even in the absence of reciprocity.

See 18 U.S.C.A. § 3196 (2018) ("If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met."); see also *Charlton v. Kelly*, 229 U.S. 447 (1913). The United Kingdom generally surrenders its nationals. See Extradition Act, 1870, 33 & 34 Vict. c. 52 § 26; 1 Oppenheim's International Law (Lauterpacht ed. 8th ed. 1955) at 699–700. Treaties that recognize the principle of non-extradition of nationals sometimes provide that if the sending state refuses to extradite a national it shall itself submit the matter to its own prosecutorial authorities. See Restatement (Fourth) § 428, Reporters' Note 6.

5. "Political" Offenses

In the 18th century, extradition was frequently sought and granted for acts by an individual that were, in essence, political activism seeking political change, but were declared by the individual's government to be "treason" or a "crime against the state." By the 19th century, public opinion in Western Europe turned against the extradition of fugitives accused of such "political offenses," since it could entail returning an individual advocating democratic change to a situation where he or she might be subjected to an unfair trial and punishment.

Today, most treaties exempt fugitives accused of "political offenses" from extradition. Yet, while the principle has been widely accepted, "political offenses" have never been precisely defined. Indeed, efforts at definition tend to explain what types of offenses are *not* "political offenses." For example, some treaties provide that "[c]riminal acts which constitute clear manifestations of anarchism or envisage the overthrow of the bases of all political organizations" shall not be considered political offenses. Treaty of Extradition between the United States and Brazil, art. V(6), Jan. 13, 1961, 15 U.S.T. 2093, 532 U.N.T.S. 177. As such, the contours of the doctrine have often been developed through case law. Thus, U.K. and U.S. courts have held that for an offense to be political it must be committed in furtherance of a political movement or in the course of a struggle to control the government of a state. *In re Castioni*, [1891] I Q.B. 149, 156, 166; *In re Ezeta*, 62 F. 972, 999 (D.C. Cal. 1894); *Cheng v. Governor of Pentonville Prison*, [1973] A.C. 931, 945 (H.L.). However, this strict rule has been relaxed in some circumstances to provide refuge for private individuals fleeing totalitarian states. See, e.g., *Regina v. Governor of Brixton Prison, Ex parte Kolczynski*, [1955] I Q.B. 540 (1954).

The current U.S.-U.K. Extradition Treaty provides that the following offenses shall not be considered political offenses:

(a) an offense for which both Parties have the obligation pursuant to a multilateral international agreement to

extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;

(b) a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family;

(c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm;

(d) an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage;

(e) placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;

(f) possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage;

(g) an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any of the foregoing offenses.

Extradition Treaty, U.S.-U.K., art. 4(2), Mar. 31, 2003, entered into force Apr. 26, 2007, S. Treaty Doc. No. 108–23 (2003). On this and other aspects of practice on "political offenses," see Restatement (Fourth) § 428, Reporters' Note 3.

In 2013, Edward Snowden, a former National Security Agency (NSA) contractor, disclosed to several media outlets classified NSA documents that revealed operational details of NSA global surveillance. Snowden fled to Russia, where he remains as of late 2018. The U.S. government filed criminal charges in U.S. court against Snowden for theft of government property and espionage, and called upon Russia to return him to the United States. Supporters of Snowden, however, view him as an important whistleblower who is simply standing up to secretive malfeasance of his government in the hopes of changing government policy. The United States has no extradition treaty with Russia; if such a treaty existed, might Russia decline to extradite Snowden on the basis of the political offense exception?

6. Rule of Judicial Non-Inquiry; Human Rights Challenges

Most courts have rejected defendants' efforts to resist extradition on the ground that in the requesting state they would be subjected to standards of procedural due process falling short of those in the requested state, or would otherwise suffer unjust treatment following extradition. Courts have typically considered that the treaty obligation to extradite

precludes such an inquiry, and that it is the responsibility of the executive branch in negotiating and implementing an extradition treaty (or the legislative branch in approving the treaty) to ensure adequate safeguards for the treatment of extradited persons. Thus a "rule of judicial non-inquiry" has been applied under which the court considering an extradition request concerns itself only with whether the treaty standard for extradition is satisfied and not with evidence about the quality of the justice system in the requesting state. (For the United States, the Secretary of State may consider such evidence in making the final discretionary decision whether to go forward with the extradition.)

Recently, however, human rights tribunals and a variety of national courts have considered and upheld human rights challenges to extradition. Some denials of extradition arise in the context of differing positions in the requesting and requested state with respect to the death penalty and related practices. Other cases involve concerns about the practice of torture or other forms of cruel, inhuman or degrading treatment or punishment in the requesting state. See Quigley, The Rule of Non-Inquiry and Human Rights Treaties, 45 Cath. U.L. Rev. 1213 (1996); Parry, International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty, 90 Boston U.L. Rev. 1973 (2010).

NOTES

1. *Rule of Judicial Non-Inquiry in U.S. Courts.* In *Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir. 1990), the district court had held a hearing on the defendant's habeas corpus petition, in which it took extensive testimony on whether a Palestinian defendant would receive a fair trial in Israel on allegations of a terrorist attack on a bus. After the hearing, the court denied the defendant's habeas corpus petition. The Second Circuit affirmed the ruling that defendant was extraditable and confirmed the rationale underlying the "rule of judicial non-inquiry":

> We have no problem with the district court's rejection of Ahmad's remaining argument to the effect that, if he is returned to Israel, he probably will be mistreated, denied a fair trial, and deprived of his constitutional and human rights. We do, however, question the district court's decision to explore the merits of this contention in the manner that it did. * * * A consideration of the procedures that will or may occur in the requesting country is not within the purview of a habeas corpus judge. * * * Indeed, there is substantial authority for the proposition that this is not a proper matter for consideration by the certifying judicial officer. * * * In *Jhirad v. Ferrandina, supra*, 536 F.2d at 484–85, we said that "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." * * *

> Notwithstanding the above described judicial roadblocks, the district court proceeded to take testimony from both expert and fact witnesses and received extensive reports, affidavits, and other documentation concerning Israel's law enforcement procedures and its treatment of prisoners. This, we think, was improper. The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced. * * *

Id. at 1066–67.

The U.S. Supreme Court reaffirmed the rule of non-inquiry in *Munaf v. Geren*, 553 U.S. 674 (2008). Although *Munaf* involved transfer outside the framework of an extradition treaty (from the U.S. component of a multinational force to Iraq as the territorial sovereign), the Court relied on cases and practice in the extradition context in concluding that challenges to the quality of the justice system of a foreign state are not proper considerations on a habeas petition. See Chapter 11, Section 3(A)(1). See also Restatement (Fourth) § 428, Reporters' Note 11.

2. *Non-Refoulement.* The principle of *non-refoulement* is incorporated in many treaties relating to refugees or human rights, so as to preclude the return of a victim of persecution to the persecuting state. For example, the Convention against Torture provides:

> 1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3, 1465 U.N.T.S. 85 (1984).

U.S. courts have divided on whether they can review on a habeas petition a claim that a person is likely to be tortured in the requesting state. See Restatement (Fourth) § 428, Reporters' Notes 10–11. By analogy, in *Munaf v. Geren*, 553 U.S. 674 (2008), the Supreme Court considered that the determination as to whether a detained person is likely to face torture upon transfer to another state should be made by the political branches rather than the judiciary. There, the U.S. Solicitor-General had informed the Court of the Executive Branch's judgment that Iraq's justice and prison systems generally satisfied international standards. The Court did not think it should second-guess this conclusion. See Chapter 11, Section 3(A)(1).

3. *Extradition to Death Penalty Jurisdictions.* In *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) (1989), the European Court of Human

Rights held that the United Kingdom would violate the human rights of a young man by extraditing him to face capital murder charges in the state of Virginia. The court acknowledged that international law does not prohibit the death penalty as such, but it found a serious risk that Soering would be subjected to inhuman or degrading treatment by virtue of what it termed the "death row phenomenon" of prolonged incarceration prior to execution of a death sentence. Soering was later extradited after receipt of assurances that the death penalty would not be applied.

In *Ng v. Canada*, U.N. Doc. CCPR/C/49/D/469/1991 (1993), 98 I.L.R.479, the U.N. Human Rights Committee found that extradition by Canada to the United States, where the petitioner was to be subjected to the death penalty by means of asphyxiation in a gas chamber, was violative of Article 7 of the International Covenant on Civil and Political Rights prohibiting cruel, inhuman or degrading treatment or punishment. Cf. *Kindler v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991 (1993), 98 I.L.R. 426 (since international law does not prohibit the death penalty, there was no obligation on the part of Canada to seek assurances from the United States that the death penalty would not be applied).

In *United States v. Burns*, 2001 S.C.C. 7 (Can.), the Supreme Court of Canada revisited its holdings in *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779, and *Reference re Ng Extradition*, [1991] 2 S.C.R. 858, in which it had held that there was no requirement of constitutional or international law to request assurances from the United States against application of the death penalty. In view of international trends toward abolition of the death penalty, and Canada's leadership role in initiatives toward that objective, the Court reinterpreted the Canadian Constitution's provisions on fundamental justice to require the Minister of Justice to obtain such assurances as a condition of extradition.

Meanwhile, an Italian court found that extradition could not be granted to a death penalty jurisdiction even if the executive branch of the requesting state gave assurances that the death penalty would not be sought. The court was concerned that such assurances might not bind an independent branch of government, and interpreted its own fundamental law to preclude any involvement with surrendering the accused to a state where the death penalty was even a possibility. *Venezia v. Ministero di Grazia e Giustizia*, 79 Rivista di Diritto Internazionale 815 (Ital. Const. Ct. 1996); see Bianchi, Case Note, 91 A.J.I.L. 727 (1997); Dugard & Van den Wyngaert, Reconciling Extradition with Human Rights, 92 A.J.I.L. 197, 206 n. 143 (1998).

In May 2018, four U.N. special rapporteurs issued a joint statement expressing concern over Spain's recent decision to allow extradition to China of several Chinese and Taiwanese political dissidents, in view of a risk of exposure to torture or the death penalty. See U.N. Office of the High Commissioner for Human Rights, "UN Human Rights Experts Urge Spain to Halt Extraditions to China Fearing Risk of Torture or Death Penalty," May 18, 2018, available at https://www.ohchr.org/SP/NewsEvents.

4. *Human Rights Scrutiny of Hong Kong/China.* Several cases have involved challenges to extradition to Hong Kong shortly before or after its incorporation into the People's Republic of China. Although a few courts were sympathetic to defendants' claims that extradition should not go forward in light of the changeover, appellate courts have found defendants extraditable. See *Lui Kin-Hong v. United States*, 957 F. Supp. 1280 (D. Mass.), reversed, 110 F.3d 103 (1st Cir. 1997), stay denied, 520 U.S. 1206 (1997); *Regina v. Secretary of State for the Home Department, Ex parte Launder*, Nos. C.O. 2480/95, 0018/96 (Q.B. Div'l Ct. 1996), reversed by the House of Lords, [1997] 1 W.L.R. 839. See also Bloom, A Comparative Analysis of the United States' Response to Extradition Requests from China, 33 Yale J. Int'l L. 177 (2008).

7. Alternatives to Treaty-Based Extradition

Where extradition is not possible because of the lack of a treaty or for some other reason, or where extradition is not feasible because of the time and expense involved, the requested state sometimes has resorted to other methods of surrendering the offender. If the fugitive is not a national of the requested state, it may deport him as an undesirable alien or exclude him (i.e., deny him permission to enter the country). In either case, the offender may be turned over directly to the state that desires to prosecute him, or may be sent to a third state from which his extradition is possible. The United States and Mexico, and the United States and Canada, have frequently resorted to exclusion or deportation in order to deliver fugitives to each other without going through the process of extradition. See Divine & Chisam, Immigration Practice (2011–12 ed.).

"Extraordinary rendition" is a term used to describe the transfer of a person without any involvement of judicial authorities from one state to another state, often to take advantage of the second state's ability to interrogate the person. In recent times, the United States has been accused of transferring suspected terrorists and other aliens from U.S. custody to states in which they could be interrogated in a manner that would not be lawful in the United States.

For example, in *El-Masri v. United States*, Khaled El-Masri was apparently mistaken for an Al Qaeda operative with a similar name. He was abducted at a border crossing in Macedonia in 2003, held incommunicado for twenty-three days, and then transferred into CIA custody, after which he was flown to Afghanistan where he was held, tortured and abused for four months. At the end of his detention, he was dropped on a roadside in Albania, having never been charged with a crime. After he brought a claim for redress in U.S. court, the Fourth Circuit dismissed the case due to the "state secrets" doctrine. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); see also *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). By contrast, the European Court of Human Rights ruled that El-Masri's treatment by U.S. agents in cooperation with Macedonian

officials "amounted to torture." *El-Masri v. The former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. (2012). The European Court reached similar conclusions in 2018 in cases against Lithuania and Romania; see Chapter 8, Section 3(D). Aside from mistreatment while in detention, are such transfers permissible under national and international law, including obligations flowing from extradition treaties? For reports and documents assessing the practice, see Terrorism: Commentary on Security Documents-Volume 108, Extraordinary Rendition (Boon, Huq, & Lovelace eds. 2010).

If an extradition treaty exists but its procedures are not followed, can a court nonetheless exercise criminal jurisdiction?

UNITED STATES v. ALVAREZ-MACHAIN

Supreme Court of the United States, 1992
504 U.S. 655 (some citations and footnotes omitted)

THE CHIEF JUSTICE delivered the opinion of the Court.

The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States.

Respondent, Humberto Alvarez-Machain, is a citizen and resident of Mexico. He was indicted for participating in the kidnap and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar and a Mexican pilot working with Camarena, Alfredo Zavala-Avelar. The DEA believes that respondent, a medical doctor, participated in the murder by prolonging agent Camarena's life so that others could further torture and interrogate him. On April 2, 1990, respondent was forcibly kidnapped from his medical office in Guadalajara, Mexico, to be flown by private plane to El Paso, Texas, where he was arrested by DEA officials. The District Court concluded that DEA agents were responsible for respondent's abduction, although they were not personally involved in it. *United States v. Caro-Quintero*, 745 F. Supp. 599, 602–604, 609 (CD Cal. 1990).

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

and ordered that he be repatriated to Mexico. [*Caro-Quintero*,] 745 F. Supp. at 614.

The Court of Appeals affirmed the dismissal of the indictment and the repatriation of respondent * * *.

* * * We granted certiorari, * * * and now reverse.

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

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

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

In *Ker v. Illinois*, 119 U.S. 436 (1886), also written by Justice Miller and decided the same day as *Rauscher*, we addressed the issue of a defendant brought before the court by way of a forcible abduction. Frederick Ker had been tried and convicted in an Illinois court for larceny; his presence before the court was procured by means of forcible abduction from Peru. A messenger was sent to Lima with the proper warrant to demand Ker by virtue of the extradition treaty between Peru and the United States. The messenger, however, disdained reliance on the treaty processes, and instead forcibly kidnapped Ker and brought him to the

United States. We distinguished Ker's case from *Rauscher*, on the basis that Ker was not brought into the United States by virtue of the extradition treaty between the United States and Peru, and rejected Ker's argument that he had a right under the extradition treaty to be returned to this country only in accordance with its terms. We rejected Ker's due process argument more broadly, holding in line with "the highest authorities" that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court." * * *

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

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

* * *

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

Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are "so clearly prohibited in international law" that there was

no reason to include such a clause in the Treaty itself. * * * The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States. * * * Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms.

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

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

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

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. * * * The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.

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

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

So ordered.

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

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

A Mexican citizen was kidnaped in Mexico and charged with a crime committed in Mexico; his offense allegedly violated both Mexican and American law. Mexico has formally demanded on at least two separate occasions that he be returned to Mexico and has represented that he will be prosecuted and punished for his alleged offense. It is clear that Mexico's demand must be honored if this official abduction violated the 1978 Extradition Treaty between the United States and Mexico. In my opinion, a fair reading of the treaty in light of our decision in *United States v. Rauscher*, 119 U.S. 407 (1886), and applicable principles of international

law, leads inexorably to the conclusion that the District Court, *United States v. Caro-Quintero*, 745 F. Supp. 599 (CD Cal. 1990), and the Court of Appeals for the Ninth Circuit, 946 F.2d 1466 (1991) (*per curiam*), correctly construed that instrument.

* * *

* * * [T]he Extradition Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction.

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

> "But, even supposing, for a moment, that our laws had required an entry of The Apollon, in her transit, does it follow, that the power to arrest her was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. *It would be monstrous* to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations." *The Apollon*, 22 U.S. 362, 9 Wheat. 362, 370–371 (1824) (emphasis added).

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

> "A State must not perform acts of sovereignty in the territory of another State . . . . . It is . . . a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended." 1 Oppenheim's International Law 295, and n. 1 (H. Lauterpacht 8th ed. 1955).

Commenting on the precise issue raised by this case, the chief reporter for the American Law Institute's Restatement of Foreign Relations used

language reminiscent of Justice Story's characterization of an official seizure in a foreign jurisdiction as "monstrous":

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

In the *Rauscher* case, the legal background that supported the decision to imply a covenant not to prosecute for an offense different from that for which extradition had been granted was far less clear than the rule against invading the territorial integrity of a treaty partner that supports Mexico's position in this case.[25] If *Rauscher* was correctly decided—and I am convinced that it was—its rationale clearly dictates a comparable result in this case.

* * *

* * * I suspect most courts throughout the civilized world will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character. As Thomas Paine warned, an "avidity to punish is always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws." To counter that tendency, he reminds us:

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

I respectfully dissent.

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[25] Thus, the Restatement [(Third)] states in part:

"(2) A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state. [Ed.: Cf. Restatement (Fourth) § 401, Comment *b* and Reporters' Note 3; § 432(b) and Reporters' Note 3.]

. . . .

"*c. Consequences of violation of territorial limits of law enforcement.* If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws."

[Restatement (Third)] § 432, and Comment *c*. [Ed.: Cf. Restatement (Fourth) § 432, Reporters' Note 5.]

NOTES

1. *Male Captus, Bene Detentus?* If a state improperly seizes a person accused of a crime outside of its borders, may it nevertheless properly exercise judicial jurisdiction over this person in the United States? The traditional rule of international law is that of "*male captus, bene detentus*," i.e., that a person who has been improperly seized may nevertheless properly be tried. This rule has been said to follow from the principle that, under traditional international law, only states and not individuals could complain of improper exercise of enforcement jurisdiction, invoking whatever state-to-state remedies might be available (typically in diplomatic or political channels, as in the Eichmann incident addressed in Chapter 11, Section 5). As the majority decision in *United States v. Alvarez-Machain* demonstrates, U.S. courts have exercised judicial jurisdiction over persons improperly seized even if the state in the territory of which they were seized objected.

However, courts in a growing number of other countries, including Australia, Germany, New Zealand, South Africa, the United Kingdom, and Zimbabwe, have taken a different approach, sometimes referring to international law rules and human rights norms. See Restatement (Fourth) § 427, Reporters' Notes 6–7.

2. *Good Faith Interpretation of Extradition Treaty.* Are you persuaded by the majority's analysis of the meaning of the U.S.-Mexico extradition treaty? Recall from Chapter 3 that it is a well-settled rule of international law that international agreements must be construed in accordance with good faith. Is there any doubt that, if, at the time of the negotiation and conclusion of the Treaty, the parties had considered the possibility that either party would engage in abduction in violation of international law, they would have included in the treaty a provision prohibiting this? Does the Court give any consideration to the possible implication of this prohibition on the basis of objective good faith?

3. *Acquittal on Remand.* Upon remand, the district court granted an acquittal on the ground that the prosecution had failed to produce adequate proof of its charges. Thereafter, Alvarez-Machain brought a civil suit against the United States government and individuals involved in the abduction, including claims for "violation of the law of nations" within the meaning of the Alien Tort Statute, 28 U.S.C.A. § 1350. For the Supreme Court's eventual ruling that the claim could not be maintained, see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), excerpted in Chapter 10, Section 2(B).

4. *International Reactions.* The decision in *United States v. Alvarez-Machain* generated widespread international criticism. On November 23, 1994, the United States and Mexico signed a Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* Abbell, Extradition to and From the United States, at A-303 (2002). While that agreement would require the prompt return of abducted persons and prohibit the exercise of jurisdiction over them, the treaty is not yet in force because the President has not submitted it to the Senate for its advice and consent.

5. *Luring the Target Away from Foreign Territory.* Can a state exercise enforcement jurisdiction in situations where a targeted person was lured away from foreign territory, either to the United States or to a common space, such as the high seas? For example, FBI agents wanted to arrest a person accused of hijacking a Jordanian airplane in Beirut with U.S. passengers aboard. The agents lured the target onto a yacht in the Mediterranean with the promise of a drug deal and then arrested him when the vessel entered international waters. U.S. jurisdiction was upheld in *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) and Yunis served sixteen years in a U.S. prison before being deported. On the Yunis arrest and related matters, see the series of articles by Lowenfeld, U.S. Law Enforcement Abroad, 83 A.J.I.L 880 (1989), 84 A.J.I.L. 444 (1990), and 84 A.J.I.L. 712 (1990).

2. PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL COURTS

It has been accepted for hundreds of years that some acts constitute crimes under international law and, in the absence of international tribunals with broad jurisdiction over such crimes, it is left to national courts to try offenders. There is ample authority in international law for the proposition that a national court may try an individual who has committed a crime under customary international law or a treaty, as long as there is a jurisdictional basis under international law for doing so (see Chapter 11). Within the national legal system, the conduct is considered criminal if the international criminal law is automatically incorporated as part of national law or, as is required in the case of the United States, legislation has been enacted which identifies the conduct as a crime under national law.

Because of the existence of international crimes, there are many references in national constitutions, statutes, and judicial decisions worldwide, as well as in treatises by scholars, to individuals committing "an offense against the law of nations." See, e.g., U.S. Const. art. 1, § 8, cl. 10. A prominent historical example is individual responsibility for acts of piracy, which, although crimes under customary international law, have been prosecuted in national courts in the absence of an international court with jurisdiction. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), the Supreme Court held that Smith had properly been convicted under an act of Congress that criminalized "piracy, as defined by the law of nations;" according to the Court, Congress had adequately defined the crime by incorporating by reference the definition of piracy under customary international law. 18 U.S. at 158. U.S. cases in the 21st century follow this same view. See Chapter 10, Section 2(B).

Another example of crimes arising under customary international law is war crimes under the laws of war. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court held that Congress had, by enacting a statute referred

to as the Articles of War, explicitly provided that U.S. military tribunals have jurisdiction to try individuals for offenses against the laws of war. The case involved the trial and conviction of a group of spies (one, a U.S. national, and the others, German nationals) who were put ashore with explosives in the United States by German submarines during World War II. The Court stated:

> * * * Similarly by the reference in the 15th Article of War to "offenders or offenses that * * * by the law of war may be triable by such military commissions", Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war * * * and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.
>
> * * * The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. * * *
>
> Such was the practice of our own military authorities before the adopting of the Constitution, and during the Mexican and Civil Wars.

317 U.S. at 30–31.

Former Peruvian President Alberto Fujimori was convicted by a Peruvian court in April of 2009 for the commission of crimes against humanity, for his role in the killings and kidnappings by Peruvian security forces in operations against leftist guerrillas (the Shining Path) in the 1990s. Fujimori was sentenced to twenty-five years in prison. The case was unusual in that Fujimori, an elected head of state, fled his country after leaving office to live in another country (Japan), traveled to a third country (Chile) where he was arrested, and then was extradited back to his home country for trial. In December 2017 the incumbent Peruvian president granted him a humanitarian pardon, but the pardon was overturned by Peru's Supreme Court in October 2018. In January 2019 Fujimori was returned to prison for completion of his sentence (concurrent with sentences on other crimes).

While customary international law is regarded as identifying certain acts as crimes under international law, many such crimes are now identified in multilateral treaties, along with obligations upon the states parties to prosecute offenders who turn up in their territory. For example, the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, provides that persons committing genocide and related enumerated offenses "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals" (Article IV). Moreover, the contracting parties undertake to enact the necessary legislation to provide effective penalties for guilty persons (Articles V). Further, the Convention provides that "[p]ersons charged with genocide * * * shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction * * * " (Article VI). The United States ratified the Convention in 1988 and has enacted legislation rendering genocide a crime for which individuals may be tried and punished in U.S. courts. Genocide Convention Implementation Act of 1988, Pub. L. No. 100-606, 102 Stat. 3045, as amended; Genocide Accountability Act of 2007, Pub. L. No. 110–151, 121 Stat. 1821, as amended; 18 U.S.C.A. § 1091–1093 (2018).

Similarly, the four Geneva Conventions of 1949 on the laws of war require any state party (including a belligerent state) to try individuals (including members of enemy forces) who are alleged to have committed grave breaches specified in the conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Individuals who commit such offenses might be tried in a regular national court, but also might fall within the jurisdiction of a national military commission or tribunal. Yet while such rules may provide the basis for a prosecution, they will also impose limitations on the manner in which the prosecution may be pursued. For example, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court struck down the President's creation of certain military commissions to prosecute "unlawful combatants" being held at Guantánamo Bay Naval Base in the "war on terrorism," because those commissions deviated from the protections afforded by Common Article 3 of the 1949 Geneva Conventions and, in so doing, so were inconsistent with Congress' incorporation of those rules by statute. See Chapter 10, Section 3(E).

Provisions in several anti-terrorism conventions, such as the conventions relating to the suppression of aircraft hijacking and sabotage, frequently require any state party to make the offense punishable by severe penalties and either to investigate and prosecute, if appropriate, an alleged offender in its custody or to extradite the individual to another party having jurisdiction under the convention. See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft, art. 2, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for Suppression of Unlawful Acts Against the Safety of Civilian Aviation, arts. 3 & 7, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, annex (Dec. 15, 1997); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106–49 (2000), G.A. Res. 54/109, annex (Dec. 9, 1999). Other crimes that have been established under multinational treaties include the crime of apartheid and crimes against internationally protected persons, such as diplomats and officials of international organizations.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85, requires all parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," where torture is defined as state-sponsored torture (Articles 1 & 2(1)). Moreover, the Convention provides that if a party obtains custody of an alleged perpetrator (no matter where the act occurred), it must either (1) investigate, and, if the facts warrant, prosecute the suspect; or (2) extradite the suspect to another state that has a basis for exercising jurisdiction and that has requested extradition (Articles 6 & 7). This type of requirement is referred to as the principle of *aut dedere aut judicare* (Latin for extradite or prosecute). Such a requirement is considered to embody an application of the universality principle as among the state parties, because custody of the suspect is the only necessary nexus; there is no requirement that the offence be committed within the state's territory, by its national or against its national.

In 2014, a working group of the International Law Commission completed a study of *aut dedere aut judicare*. See U.N. International Law Commission, Final Report of the Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), U.N. Doc. A/CN.4/L.844 (June 5, 2014). Among other things, the report analyzed the I.C.J.'s decision in *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), 2012 I.C.J. 422, in which the Court identified several important procedural aspects of the *aut dedere aut judicare* provisions of the Convention Against Torture, aspects that likely have significance beyond that treaty. The I.C.J.'s decision has now been implemented: in 2017, a Senegalese court acting under authority of the African Union tried