Loyola of Los Angeles International and Comparative Law Review

Volume 13 | Number 4 Article 1

6-1-1991

Individual Rights under Self-Executing Extradition Treaties—Dr. Alvarez-Machain's Case

Charles D. Siegal

LOYOLA OF LOS ANGELES
INTERNATIONAL AND COMPARATIVE
LAW JOURNAL

VOLUME 13 1991 NUMBER 4

Individual Rights Under Self-Executing Extradition Treaties—Dr. Alvarez-Machain's Case

CHARLES D. SIEGAL*

I. INTRODUCTION

On December 6, 1886, the United States Supreme Court handed down two opinions, both written by the same justice and both dealing with related issues of extradition. However, despite their common origin and subject matter, the opinions point in philosophically opposite directions. One opinion, *United States v. Rauscher*,[1] points toward the increased protection of individual rights by incorporating conventional international law constraints into the fabric of domestic law to protect an extradited person. The second opinion, *Ker v. Illinois*,[2] points toward a diminished set of individual rights. It condones a state's usage of whatever means it has, legal or illegal, to bring to trial a person abducted from a foreign state. Perhaps not surprisingly, most courts have followed *Ker*'s path. *Rauscher* is, by contrast, largely forgotten.

In spite of its rare use, *Rauscher*'s analysis cannot easily be dismissed. This Article will discuss one recent case which relies on *Rauscher*. It will argue that judicial limitations on *Rauscher*'s thrust are generally inappropriate and particularly troublesome where an extra-

* J.D., Stanford Law School, 1975; Ph.D., Carnegie-Mellon University, 1972; Member of the California State Bar. I want to thank Helen Kim and Cornell Winston, librarians at Munger, Tolles & Olson, for locating books all over Los Angeles. I also want to thank Doreen Guillen for typing pages of hieroglyphics into readable form.

1. 119 U.S. 407 (1886).
2. 119 U.S. 436 (1886).

dition treaty expressly protects nationals of one of the contracting parties.

In the United States, as in most other countries,[3] extradition is, and has been throughout the nation's entire history, a creature of treaty.[4] The United States has entered into more than ninety bilateral extradition treaties.[5] Despite the intricate and long-standing web of bilateral extradition treaties,[6] United States law enforcement officers have increasingly relied on "informal" means of removing suspects from other nations.[7] In many of those cases, the defendant made a colorable argument that the removal violated the terms of an extradition treaty between the United States and the asylum country. However, with only a few exceptions, courts have held that such extraditions did not violate the treaty. Often, the court's rationale focused on the fact that the asylum state either affirmatively assisted in the removal, through the participation of its police or military personnel,[8] or acquiesced in the removal by failing to protest the action.[9] In cases where the asylum state does not protest, courts posit that the violation of an extradition treaty violates a duty owed to the other state treaty party and that, at most, the defendant can raise that state party's rights derivatively.[10]

---

3. I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 22 (1971). A vast literature exists on extradition. *See, e.g.*, M.C. BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE 189 n.1 (2d rev. ed. 1987); O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279 & n.1 (1961); Harvard Research on International Law, *Draft Convention on Extradition, with Comments*, 29 AM. J. INT'L L. SUPP. 15 (1935).

4. *See, e.g.*, Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 8 (1936). *See generally Ex parte* McCabe, 46 F. 363, 369-81 (W.D. Tex. 1891); Garner, *Non-Extradition of American Citizens—The Neidecker Case*, 30 AM. J. INT'L L. 480 (1936) (criticizing both *Valentine* and *McCabe* on a separate point); 18 U.S.C. §§ 3181-95 (1988). Other countries permit extradition as a matter of reciprocity or comity. M.C. BASSIOUNI, *supra* note 3, at 625-36.

5. *See* 18 U.S.C. § 3181 (1988).

6. The United States is also a party to one multilateral extradition treaty. Multilateral Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, T.S. No. 882.

7. *See* Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990). The appellate reports are full of examples of the practice of employing informal methods of extraditing individuals from other countries. *See, e.g.*, United States v. Cordero, 668 F.2d 32 (1st Cir. 1981); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Toro, 840 F.2d 1221 (5th Cir. 1988); Leighnor v. Turner, 884 F.2d 385 (8th Cir. 1989); United States v. Najohn, 785 F.2d 1420 (9th Cir. 1986).

8. *See, e.g.*, United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980).

9. *See, e.g.*, Matta-Ballesteros v. Henman, 896 F.2d 255, 259-60 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

10. *Gengler*, 510 F.2d at 67.

Recently, a case arose in the United States District Court for the Central District of California where the state from which the defendant was kidnapped did in fact protest.[11] In that case, United States officials charged a Mexican doctor, Humberto Alvarez-Machain, with participating in the torture and murder of a Drug Enforcement Administration ("DEA") agent, Enrique Camarena.[12] An official of the Mexican Federal Judicial Police ("MFJP") approached a DEA agent investigating the Camarena murder about exchanging Alvarez-Machain for a Mexican fugitive in the United States.[13] After the transfer deal collapsed, the DEA abducted Alvarez-Machain, using a DEA informant and various Mexican citizens, including former military police officers, civilians, and at least two current police officers.[14] Alvarez-Machain's abductors transported him to El Paso, Texas, where he was taken into custody. After Alvarez-Machain's kidnapping, the Mexican government presented a diplomatic note to the United States Department of State as a means of protest. This note claimed that Alvarez-Machain's abduction and transfer from Mexico violated the extradition procedure in the United States-Mexico Extradition Treaty[15] and demanded his return to Mexico.[16]

Alvarez-Machain moved to dismiss the indictment based on outrageous government conduct, the treaty violation, and lack of personal jurisdiction. Applying the maxim of *mala captus, bene detentus*[17] adopted by the United States Supreme Court in *Ker*, and

11. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). This is not the first case in which defendants asserted a violation of the United States-Mexico Extradition Treaty. *See, e.g., Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934) (citing *Ker*, and not *Rauscher*, court refused to discharge prisoner allegedly abducted by United States marshalls acting in conjunction with Mexican police); *Ex parte* Campbell, 1 F. Supp. 899 (S.D. Tex. 1932); Dominquez v. State, 90 Tex. Crim. 92, 97-100 (1921) (assuming existence of treaty, Texas Court of Criminal Appeals ordered release of defendant seized by United States expeditionary force in Mexico); *see also* Dickinson, *Jurisdiction Following Seizure on Arrest in Violation of International Law*, 29 AM. J. INT'L L. 231, 233-34 (1954) (discussion of *Dominquez*).

12. *Caro-Quintero*, 745 F. Supp. at 601.

13. *Id.*

14. *Id.* at 602.

15. Extradition Treaty between the United States of America and the United Mexican States, January 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656 [hereinafter United States-Mexico Extradition Treaty].

16. The case immediately caught academic attention. *See* Lowenfeld, *Kidnapping by Government Order: A Follow Up*, 84 AM. J. INT'L L. 712 (1990).

17. Under this maxim, national courts will assert *in personam* jurisdiction without inquiring into the means by which the presence of the defendant was secured. M.C. BASSIOUNI, *supra* note 3, at 190.

later in *Frisbie v. Collins*,[18] the court rejected the defendant's outrageous conduct claim.[19] However, the court accepted Alvarez-Machain's treaty-violation argument. The court's analysis hinged on the fact that the Mexican government had protested Alvarez-Machain's kidnapping.[20] The court held that there could not be a violation of an extradition treaty without protest by the asylum country; since Alvarez-Machain caught the attention of his own government, he won.[21]

The court's requirement that the other state protest the extradition, a requirement followed by most circuits and many foreign juris-

18. 342 U.S. 519, *reh'g denied*, 343 U.S. 937 (1952); Ker v. Illinois, 19 U.S. 436 (1886). In *Ker*, the Supreme Court held that the fact that a private detective from Peru kidnapped the defendant did not deprive the Illinois courts of jurisdiction. The Court made this ruling in the face of a valid extradition treaty between Peru and the United States. In *Ker*, no governmental action occurred, thus arguably creating no treaty violation. *Id.* at 443. The Supreme Court expressly declined to decide "how far [Ker's] forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the state court. . . ." *Id.* That question was within the jurisdiction of the Illinois courts. *Frisbie* applied *Ker* to interstate abduction. The approach taken by the Court is known as the *Ker-Frisbie* doctrine.

Ker appears to concur with the law in many common-law jurisdictions. *See* State v. Brewster, 7 Vt. 118, 121-22 (1835); *Ex parte* Scott, 9 B. & C. 446, 109 Eng. Rep. 166 (K.B. 1829); Abrahams v. Minister of Justice, [1963] 4 S. Afr. L.R. 542; Afouneh v. Attorney-General, 10 ANN. DIG. & REP. OF INT'L L. CASES 327 (No. 97) (Palestine, Supreme Court 1942); Attorney General of Israel v. Eichmann, 36 I.L.R. 18, 58-76 (Israel, Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277, 304-08 (Israel, Supreme Court 1962). It is also the law in France, Belgium, and Germany. *See, e.g.*, *Re* Argoud, 45 I.L.R. 90, 96-97 (France, Cour de Cassation, Crim. Cham. 1964); Geldof v. Meulemeester and Steffen, 41 I.L.R. 385 (Belgium, Cour de Cassation 1961); Extradition (Jurisdiction) Case, 8 ANN. DIG. & REP. OF PUB. INT'L L. CASES 348 (No. 165) (Germany, Supreme Court 1936). *See also* Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1037, 1106-09 (1974). Scholars, however, have pointed out that the basic English cases, like *Ker*, which relied on *Scott*, do not involve violations of international law. O'Higgins, *supra* note 3, at 280-87. *But see* Comte, *Note*, 45 I.L.R. 98 (1972). In 1935, Professor Dickinson, as editor, proposed an article in the Draft Convention on Jurisdiction with Respect to Crimes that would have forbidden prosecution or punishment of a person "brought within [a state's] territory or a place subject to its authority by recourse to measures in violation of international law or international convention *without first obtaining the consent of the State or States whose rights have been violated by such measures.*" Harvard Research on International Law, *Draft Convention on Jurisdiction with Respect to Crimes*, 29 AM. J. INT'L L. SUPP. 439, 623 (1935) (emphasis added). Professor Dickinson recognized that the italicized language was not "everywhere agreed" and that the article would be "in part in the nature of legislation." *Id.* at 624.

19. This Article will not discuss that element of the case, because, while the legal principle may be abhorrent, the analysis under that principle is straightforward and consistent with precedent. "This maxim . . . is certainly not from Virgil [and] gives out a rather cynical and unpleasing odour . . . ." Comte, *supra* note 18, at 104.

20. *Caro-Quintero*, 745 F. Supp. at 608-09.

21. *Id.*

dictions, raises troubling questions about the effect of extradition treaties in domestic United States law and the status of individuals in international law. In particular, the district court did not explain why a concededly self-executing treaty does not bestow rights on individuals in the absence of a protest by the individual's nation. Nor did the decision satisfactorily justify a narrow standing doctrine to enforce extradition treaties, in which rights are conferred on governments, but not on their citizens.[22] This Article briefly considers these issues.

II. SETTING THE STAGE FOR *CARO-QUINTERO*: THE CAMARENA MURDER AND THE ALVAREZ-MACHAIN ABDUCTION

In February 1985, DEA Agent Camarena was kidnapped, tortured, and murdered in Guadalajara, Mexico.[23] In *United States v. Caro-Quintero*,[24] the government returned a sixth superseding indictment charging twenty-two people, including Alvarez-Machain, with various crimes in connection with the Camarena torture-murder. By August 4, 1990, seven of the twenty-two people had been brought to the United States to stand trial. Significantly, of the seven, three appeared before the court "by means of covert forcible abduction from their homelands."[25]

Locating the various suspects resulted from a major effort by DEA officers. The DEA organized "Operation Leyenda" to capture Camarena's murderers. As part of the operation, they used an informant, Antonio Garate-Bustamante, a former employee of a major Mexican drug trafficker, Ernesto Fonseca-Coreo. Eventually, the National Broadcasting Company ("NBC") aired a "mini-series" based

22. While this Article was in press, the United States Court of Appeals for the Ninth Circuit decided another case arising out of the Camarena incident, United States v. Verdugo-Urguidez, 939 F.2d 1341 (9th Cir. 1991). The court found that a person in United States custody, who allegedly had been kidnapped from Mexico with the assistance of United States officials, could assert a treaty violation where Mexico protested the kidnapping. However, in dictum, the court wrote that "[i]f the Mexican government were to withdraw its formal protest, [the kidnapped individual] would no longer be entitled to object to the court's exercise of personal jurisdiction over him." *Verudgo-Urguidez*, 939 F.2d at 1361-62. The conclusion is contrary to the conclusion of this Article, unless it is assumed that the withdrawal of the protest is equivalent to acquiescence in the kidnapping.

23. *Caro-Quintero*, 745 F. Supp. at 601-02.

24. *Id.* at 602.

25. *Id.* The other two abductions were not in connection with this case. *See* Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990); United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

upon the murder and the DEA's subsequent investigation.[26]

Law enforcement authorities suspected Alvarez-Machain of assisting Camarena's murderers by keeping Camarena alive during the torture in an effort to extract additional information. The DEA initially attempted to obtain Alvarez-Machain's presence in the United States with the "informal" assistance of Mexican officials.[27] In December 1989, an MFJP Commandante, Jorge Castillo del Rey, arranged a meeting with Garate-Bustamante to discuss an exchange of "a Mexican national suspected of involvement in the Camarena killing"[28] for a Mexican citizen residing in the United States. On December 13, 1989, two DEA agents, including Hector Berrellez, the agent in charge of Operation Leyenda, met in Los Angeles with Castillo and another MFJP commandante.

At this meeting, Castillo informed the agents that he was working under Javier Orosco-Orosco, the chief of the MFJP fugitive detail in Mexico City.[29] Castillo further told the agents that he came to the meeting with the full knowledge and authority of the Attorney General of Mexico.[30] At the meeting, the parties struck an accord regarding the delivery of Alvarez-Machain to the United States. Castillo and the agents also discussed the possible initiation of deportation proceedings against a Mexican citizen in the United States whom the Mexican Attorney General wished to try for the theft of large sums of money from Mexican politicians.[31] However, the deal fell through when the DEA refused to advance the Mexican officials $50,000 to cover the expense of transporting Alvarez-Machain to the United States.[32]

Meanwhile, Agent Berrellez instructed Garate-Bustamante to inform his contacts in Mexico that the DEA would pay for information leading to the arrest and capture of individuals responsible for Camarena's death.[33] Garate-Bustamante in turn informed Berrellez that his "associates" in Mexico could deliver Alvarez-Machain to cus-

26. *Drug Wars: The Camarena Story* (NBC television broadcast, Jan. 7-9, 1990). The series itself exacerbated already tense relations between the Mexican government and the government of the United States.

27. *Caro-Quintero*, 745 F. Supp. at 602.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Caro-Quintero*, 745 F. Supp. at 603.

33. *Id.*

tody in the United States.[34] Berrellez told Garate-Bustamante that the DEA would pay those "associates" a $50,000 reward plus expenses for Alvarez-Machain's delivery; Berrellez testified that his authorization came not only from his superiors in the Los Angeles division of the DEA, but also from the Deputy Director of the DEA, in Washington, D.C. The parties worked out the details of the abduction during March 1990. Berrellez testified that the DEA approved the abduction in Washington, D.C. Further, he stated that he believed that the United States Attorney General's office had been consulted in the matter.[35]

On April 2, 1990, five or six armed men abducted Alvarez-Machain from his office in Guadalajara.[36] During and after the abduction, his kidnappers hit him in the stomach, forced him to lie on the floor face-down for two hours and, he testified, "shocked [him] six or seven times through the soles of his shoes with an 'electric shock apparatus.' "[37] Alvarez-Machain claimed that he was injected twice with a substance that made him feel "light-headed and dizzy."[38]

The abductors then transported Alvarez-Machain by car to Leon, Mexico. Once in Leon, they boarded a twin-engine airplane and were joined by a man who stated that he was affiliated with the DEA. The plane flew to El Paso and dropped Alvarez-Machain off at the airport, where Berrellez, Garate-Bustamante, and others were waiting on the runway. As Alvarez-Machain left the plane, he allegedly heard one of the abductors say, "[w]e are Mexican police, here is your fugitive."[39] The DEA had paid the abductors a partial reward of $20,000 as of May 25, 1990. The DEA also evacuated seven of the abductors and their families from Mexico to the United States. The DEA continues to pay the expenses of these persons in the amount of approximately $6,000 per week.[40]

On April 18, 1990, Mexico's embassy presented a diplomatic note to the United States Department of State, seeking "a detailed report on possible U.S. participation in the abduction" of Alvarez-

34. *Id.*

35. *Id.*

36. *Id.* At the time of the abduction, one of the armed men showed Alvarez-Machain what appeared to be a badge of the federal police. The abductors instructed Alvarez-Machain to cooperate, or else they would shoot him.

37. *Caro-Quintero*, 745 F. Supp. at 603.

38. *Id.*

39. *Id.*

40. *Id.* at 604.

Machain.[41] On May 16, 1990, the Mexican embassy presented a second diplomatic note to the Department of State. The second note stated that

> the Government of Mexico considers that the kidnapping of Dr. Alvarez-Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries.

The government of Mexico also demanded Alvarez-Machain's return to Mexico.[42] On July 19, 1990, the Mexican embassy presented another diplomatic note to the State Department, this time seeking the arrest and extradition of Garate-Bustamante and Berrellez to stand trial in Mexico for crimes related to Alvarez-Machain's abduction.[43]

III. *CARO-QUINTERO*: HOW THE DISTRICT COURT RESOLVED ALVAREZ-MACHAIN'S CHALLENGES TO EXTRADITION

On Alvarez-Machain's motion, the district court dismissed the indictment against him on the ground that the United States had violated the United States-Mexico Extradition Treaty.[44] The court first found that the *Ker-Frisbie* doctrine does not apply when there is a violation of "federal treaty law."[45] The court relied heavily on *United*

41. *Id.*

42. *Caro-Quintero*, 745 F. Supp. at 603.

43. *Id.*

44. The district court rejected Alvarez-Machain's argument that it lacked jurisdiction over him because he had been denied due process of law under the fifth amendment. *Id.* at 605. The court wrote: "There is nothing in the Constitution that requires a court to permit a guilty person to escape justice because he was brought to trial against his will." *Id.* (quoting Frisbie v. Collins, 342 U.S. 519 (1952)); *cf.* United States v. Crews, 445 U.S. 463, 474 (1980); INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984); Gerstein v. Pugh, 420 U.S. 103, 119 (1975). The court also held that the "*Toscanino* exception" to the *Ker-Frisbie* doctrine did not apply. In United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), the Second Circuit held that if a defendant shows that the United States engaged in torture in the process of the extradition, the defendant's due process rights are violated. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 145 (1952).

Courts in other nations have adopted similar approaches. *See, e.g.*, R. v. Hartley, [1978] 2 N.Z.L.R. 199 (New Zealand, Ct. App. 1977) (in dictum, the court stated that an arrest by New Zealand police, after Australian police put prisoner on plane for New Zealand at informal request of New Zealand police, constituted abuse of process); *Ex parte* Mackeson, 75 Crim. App. R. 74 (1981) (England, Ct. App. 1981) (court ordered discharge of defendant fraudulently induced to leave Zimbabwe). *But see* United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981) (*Toscanino* requires conduct that is "shocking to the conscience").

45. *Caro-Quintero*, 745 F. Supp. at 606.

States v. Rauscher in reaching that conclusion.[46] As discussed below, *Rauscher* dealt with a variation of the treaty-violation theme. In *Rauscher*, the defendant was legally extradited from Great Britain pursuant to an extradition treaty, but was prosecuted for an offense not listed in the treaty. Because the prosecution involved a non-listed offense, it violated the "doctrine of specialty."[47] Consequently, the United States Supreme Court ordered that Rauscher be returned to Great Britain.[48]

The district court in *Caro-Quintero* held that the United States-Mexico Extradition Treaty was "self-executing."[49] According to the court, "[a] self-executing treaty is federal law which must be enforced in federal court unless superseded by other federal law. A self-executing treaty is enforceable without resort to implementing legislation by Congress."[50] The court contrasted self-executing treaties with executory treaties, which are not enforceable in court and are "the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress . . . ."[51] Significantly, the court stated, without discussion, that "[e]xtradition treaties by their nature are deemed self-executing and thus are enforceable without the aid of implementing legislation."[52]

The court's analysis in reaching this holding is somewhat unclear. First, the question whether a treaty is self-executing generally warrants some discussion of the actual terms of the treaty.[53] Yet the court did not discuss the treaty's language at all. Second, the court apparently believed self-executing extradition treaties are enforceable in court, but only by the states who are treaty parties, not by

46. *Id.*; *cf.* Cook v. United States, 288 U.S. 102, 121 (1933); Ford v. United States, 273 U.S. 593 (1927); *Toscanino*, 500 F.2d at 278; United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927).

47. This doctrine stands for the proposition that the requesting state, which secures the surrender of a person, can prosecute that person only for the offense for which he or she was surrendered by the requested state or else allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 353 (1974).

48. 119 U.S. at 433.

49. *Caro-Quintero*, 745 F. Supp. at 606.

50. *Id.*

51. *Id.* (quoting Head Money Cases, 112 U.S. 580, 598-99 (1884)).

52. *Id.* at 607 (citing M.C. BASSIOUNI, *supra* note 3, at 71-72, 74).

53. Indeed, two of the earliest Supreme Court cases involving self-executing treaties turned on whether the documents involved were translated into English or kept in their original Spanish. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833); Foster & Elam v. Nielson, 27 U.S. (2 Pet.) 253, 314 (1829).

individuals.[54]

After deciding that the treaty was self-executing, the court held that Alvarez-Machain had no standing by himself to raise the issue of the treaty violation. Beginning its analysis with the notion that international obligations exist solely between states, the court followed a long line of cases holding that individuals have no standing to raise violations of international law.[55] The court recognized that the circuits have split as to whether an individual, as opposed to a state, can raise a violation of the doctrine of specialty. However, it held that Alvarez-Machain's case did not involve a specialty issue. Accordingly, the court found that "it is for the State, and not the individual, to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty. The individual's standing to raise this claim is purely derivative of that of the State."[56]

The court's reasoning on this issue is somewhat opaque. First, the court did not explain the basis of the holdings in the cases upon which it relied. Second, the court relied upon a misreading of *Rauscher*, stating that in that case, the sovereign had protested under the treaty, when in fact, Rauscher himself made the protest.[57]

After deciding that Alvarez-Machain individually did not possess standing, the court dealt with two arguments raised by the government. First, the court rejected the government's argument that it was not chargeable with the actions of the abductors. The court held that the abductors were, in fact, United States agents after noting that: (1) the DEA had induced the abductors to act with its offer of a reward and reimbursement of expenses; (2) the DEA had given approval to the abduction; (3) United States officials of the highest levels were involved; and (4) the DEA had in fact paid a $20,000 reward and had relocated some of the abductors and their families to the United States.[58]

The court then discussed at length the government's contention that it had not violated the extradition treaty because no formal extradition proceedings had taken place. The government based its argument on cases holding that extradition treaties do not "purport to describe procedural requirements for extradition incumbent upon the

54. *Caro-Quintero*, 745 F. Supp. at 607.
55. *Id.*
56. *Id.* at 608.
57. *See infra* text accompanying notes 86-100.
58. *Caro-Quintero*, 745 F. Supp. at 609.

rendering state."[59] The court, however, relied upon the principle that extradition treaties do limit the receiving state's behavior.[60] Citing *Rauscher*, which held that the doctrine of specialty restricts the receiving state, the court wrote emphatically:

> [t]he government's contention in the present case that a state violates an extradition treaty when it prosecutes for a crime other than that for which the individual was extradited (the doctrine of specialty), but not when a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crimes it chooses, is absurd.[61]

The government relied upon *Ker* and a line of cases in which the rendering state had consented or acquiesced in the defendant's removal. *Ker*, according to the court, did not apply because the abductor in that case was a private citizen not acting under any United States authority. Thus, in *Ker*, the United States had not violated the treaty.[62] The court distinguished the other line of cases because Mexico had not only abstained from participating in the abduction, but had protested it. The court rejected the government's argument that it did not violate the treaty because certain of the abductors had been Mexican police officers on active duty, finding that they acted outside the scope of their authority.[63] The court also rejected the applicability of another related line of cases in which the rendering state did not participate in the abduction, did not register a protest, and thus was held to acquiesce in the abduction.[64]

Finally, the court stated that the United States had acted unilaterally and, given the Mexican government's official protest, had violated the treaty.[65] Concluding its opinion, the court held that the proper remedy under international law was reparation and that, in this case, reparation constituted the return of Alvarez-Machain to Mexico.[66]

---

59. *Najhon*, 785 F.2d at 1422; *Cordero*, 668 F.2d at 38.

60. *Caro-Quintero*, 745 F. Supp. at 610.

61. *Id.* The court further stated that it is "axiomatic" that the United States or Mexico violates the sovereignty of the receiving state when it unilaterally kidnaps a person from the asylum state and the asylum state protests. *Id.*

62. *Id.* at 611.

63. *Id.* at 612.

64. *Id.* at 613. *See, e.g.*, United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

65. *Caro-Quintero*, 745 F. Supp. at 614.

66. *Id.* The court also rejected Alvarez-Machain's attempt to rely upon various multilat-

IV. *CARO-QUINTERO*'S PARADIGM: AN INDIVIDUAL LACKS THE RIGHT TO PROTEST HER OWN ABDUCTION

The Alvarez-Machain matter presents the following paradigm: The United States abducts a Mexican citizen from Mexico, a state that has an extradition treaty with the United States. People acting as agents of the United States government, without following any procedures set forth in the extradition treaty, perpetrate this abduction. The extradition treaty precludes the extradition of nationals without the specific consent of Mexico.[67] Yet, the person extradited cannot raise the potential treaty violation unless Mexico first raises the issue.

While treaties, including extradition treaties, generally create rights and duties only between states,[68] if there existed any situation in which one might expect an extradition treaty to give rights to an individual, Alvarez-Machain's would seem to be the case. Presumably, one of a state's duties is to protect its citizens. Therefore, a presumptive treaty violation should take place when one state violates a treaty that expressly protects identified individuals.

To understand why this seemingly obvious point is not self-evident requires an understanding of the role of extradition treaties. Historically, substantial theoretical questions existed as to whether a duty to extradite existed in customary international law. State practice uniformly supported the view that there was no such duty.[69] Thus, states were forced to grant asylum or to refuse to extradite. Removal of a person, either a national or a foreigner, from one state by agents of a foreign state would seem to violate international law.[70] The viola-

---

eral treaties as sources of his rights and rejected his *Toscanino* argument that the court should use its supervisory powers to dismiss the indictment. *Id.* at 614-15.

67. United States-Mexico Extradition Treaty, *supra* note 15, art. IX.

68. *See Argoud*, 45 I.L.R. at 96 (individual could not argue violation of international law); Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 427, 436 & n.54 (1957); *cf. In re* Jolis, 7 ANN. DIG. & REP. OF PUB. INT'L L. CASES 91 (France, Tribunal Correctional d'Avenes 1933) (Belgian government protested abduction by French police on Belgian territory). *But see* Fiscal v. Samper, 9 ANN. DIG. & REP. OF PUB. INT'L CASES 402, 405 (Spain, Supreme Court 1934) (right belongs to individual).

69. *See* M.C. BASSIOUNI, *supra* note 3, at 5-12; I. SHEARER, *supra* note 3, at 23-24.

70. *See generally* L. OPPENHEIM, INTERNATIONAL LAW 295-96 (Lauterpacht 8th ed. 1955); Borchard, *The Kasenkina Case*, 42 AM. J. INT'L L. 858 (1948); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265 (1952); Note, *Jurisdiction After International Kidnapping: A Comparative Study*, 8 B.C. INT'L & COMP. L. REV. 237 (1985); Villareal v. Hammond, 74 F.2d 503, 505-06 (5th Cir. 1934) (dictum); Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931) (dictum). In *Villareal* and *Collier*, the defendants were returned to Mexico and Canada respectively, pursuant to extradition treaties,

tion of international law would occur when those acting on behalf of one state exercise sovereign power—which an arrest clearly constitutes—in the territory of a second state. The offended state could, therefore, request the abducting state to return the captive if there was a customary norm proscribing abductions.[71]

For over 3000 years, states have entered into extradition treaties in order to obtain the return of fugitives,[72] although the practice has

---

for kidnappings within Mexico and Canada. In the absence of a treaty, the kidnapper would not be extraditable. *See* 4 G. HACKWORTH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 226-27 (1940) (at request of United States government, Canadian government returned United States citizen taken to Canada by Canadian police).

71. *E.g.*, O'Higgins, *supra* note 3, at 305-06 (discussing the *Blair* case); *see* Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 AM. J. INT'L L. 502, 505-06 (1935); Preuss, *Settlement of Jacob Kidnapping Case*, 30 AM. J. INT'L L. 123 (1936) (German nationals kidnapped Swiss citizen from Basel, Switzerland, driven across borders to Germany and arrested; Swiss government lodged protest with German government and, after arbitration proceeding initiated, Germany returned Swiss citizen to Switzerland); *id.* at 124 n.6. (British citizen kidnapped from United States by British detectives; United States government protested and English government returned British citizen to United States); *Affaire Mantovani*, Italia et Suisse, Rousseau, *Chronique des Faits Internationaux*, 69 Revue Generale De Droit International Public 761, 834-35 (1965) (Italian policeman captured Italian national on Swiss territory and took him to Italy; Swiss police took him back to Switzerland; after protest by Swiss Attorney General, high Italian police official apologized and assured Swiss that everything was being done to prevent a repetition); Cole, *Extradition Treaties Abound But Unlawful Seizures Continue*, INT'L PERSPECTIVES 40 (discussing the *Anderson* case) (Mar.-Apr. 1975) (United States army deserter sighted crossing from Canada into the United States; customs officials pursued him back across border, captured him and turned him over to FBI; Canadian government formally requested his return and United States government agreed.); Case of Nollet, 18 JOURNAL DU DROIT INTERNATIONAL PRIVE 1188 (France, Cour d'Appel de Douai 1891) (court ordered release of French fugitive wrongly arrested in Belgium by Belgian authorities); *In re* Jolis, 7 ANN. DIG. & REP. OF PUB. INT'L L. CASES 191 (No. 77) (France, Tribunal Correctional d'Avesnes 1933) (French fugitive arrested in Belgium by French authorities ordered released). United States practice in this area is "contradictory and confused." Garcia-Mora, *supra* note 68, at 438. *See generally* Sponsler, *International Kidnapping*, 5 INT'L LAW. 27, 37 (1971).

There is, however, a question whether a violation exists. In one case, an arbitral panel held that the prosecuting state had no obligation to return the defendant. SCOTT, HAGUE CT. REVS. 276 (1911) (*Savakar Case: France v. Great Britain*, Paris Ct. of Arb.). For a discussion and related citations, see 1 L. OPPENHEIM, *supra* note 70, at 703 n.1. If the cases in which states returned abducted individuals are examples of comity, rather than a belief that an obligation exists to return the person, there would be no customary norm. The existence of a customary norm requires both longstanding international practice and *opinio juris sive necessitatis*, a belief that the practice is obligatory. Stat. I.C.J., art. 38(1)(b) (International Court of Justice shall use "international custom, as evidence of a general practice accepted as law"); Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974-75); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986); Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), [1986] I.C.J. 14, 97-98.

72. I. SHEARER, *supra* note 3, at 5.

really only developed in the past 200 years.[73] Extradition treaties, by which states agree to extradite people for certain crimes under a proper request, diminish a state's customary international law right to grant asylum or to decline to extradite.

One may argue that an extradition treaty gives the state no more right to protest an abduction than it already possesses under customary law. However, the issue is two-fold: first, is there an international norm against abductions, and second, will domestic courts enforce that norm? With regard to the first question, as this Article has already discussed, questions exist as to the presence of an international norm.[74] With regard to the second question, a more difficult issue arises. United States courts have assumed an ambivalent relationship with customary international law. On one hand, they have long assimilated parts of it into domestic law.[75] Thus, under this analysis, an official abduction would lead to state responsibility for the act. On the other hand, courts have subordinated customary international law, not only to domestic statutory law,[76] but also to "controlling executive acts."[77] Thus, according to this school of thought, even if a customary norm required the release of an abducted person at the request of the offended state, if the executive branch opposed the release, some doubt would exist as to whether courts would enforce the norm.

The presence of a treaty might yield a different result.[78] Treaties

---

73. *Id.*

74. *See supra* note 71 and accompanying text.

75. The Paquete Habana, 175 U.S. 677, 700 (1900); Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980).

76. *E.g.*, Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960) (subsequent act of Congress supersedes customary international law); *see* Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statute and Customary International Law*, 25 VA. J. INT'L L. 143, 149, 151 (1984); *see also* Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986). *But see* Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 875-77 (1987).

77. *E.g.*, Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir.), *cert. denied*, 479 U.S. 899 (1986). This follows Justice Gray's dictum in *The Paquete-Habana*, 175 U.S. at 700.

78. Commentators have criticized the distinction. *E.g.*, Dickinson, *supra* note 11, at 239-40; Sponsler, *supra* note 71, at 45-46. However, Professor Sponsler's argument, which notes the difference between *Ker* and *Rauscher*, may be slightly off-point. In *Ker*, a violation of custom may not have taken place. On the other hand, even if the abductor in *Ker* was not an agent of the government, the government arguably violated customary law by proceeding against Ker. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (finding state action when there is judicial enforcement of private agreements); *see* Note, *supra* note 70, at 248 n.104 (continued incarceration is state action).

rank with federal statutes as sources of law.[79] United States courts apply the rule of *lex posteriori*[80] to give effect to treaties that conflict with prior statutes and, *a fortiori*, executive branch positions.[81] Thus, an official abduction in violation of a treaty would be illegal, both as a matter of international and domestic law. If customary international law recognizes such a violation, the essential violation of a state's rights would have already occurred, but the treaty would give a state additional grounds to request the return of the fugitive. The *Caro-Quintero* court apparently believed that the extradition treaty had this effect. The court noted that the treaty was self-executing. In the court's view, this allowed Mexico to seek judicial redress in United States courts and, because the court construed Alvarez-Machain's rights as derivative of Mexico's, he could seek judicial redress as an individual.[82]

Under the almost universally-shared view expressed in *Caro-Quintero*, extradition treaties protect states' rights, not individuals' rights. Therefore, the *Caro-Quintero* court wrote that no *violation* of the treaty would occur in the absence of a protest by the aggrieved state, no matter what the abducted person did.[83] This is not a necessary conclusion. The purpose of the protest is to announce that a violation has occurred and to take measures to obtain the return of the abducted individual. States may choose to ignore violations of their international rights or respond to them in a number of ways.[84] By protesting that it did not acquiesce in the abduction, Mexico showed that its rights were violated, and only incidentally empowered Alvarez-Machain to proceed.

However, the more pertinent question from the defendant's per-

---

79. U.S. CONST., art. VI, cl. 2.

80. A latter statute reduces the effect of a prior statute. BLACK'S LAW DICTIONARY 822 (5th ed. 1979).

81. Cook v. United States, 288 U.S. 102 (1933); Whitney v. Robertson, 124 U.S. 190, 194 (1888).

82. United States courts have sometimes held that, even when a treaty exists, the matter is for diplomats to settle. *See, e.g., Ex parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934); United States v. Unverzagt, 299 F. 1015, 1018 (W.D. Wash. 1924).

83. *Caro-Quintero*, 745 F. Supp. at 606-07. The existence of a violation in the absence of a protest may receive different treatment than the situation in which the extradition was proper, but the extraditee was tried for an offense other than that for which he was extradited. The latter situation is a violation of the rule of specialty. *See* L. OPPENHEIM, *supra* note 70, at 702 & n.4.

84. In a well-known case, Israel had abducted Adolph Eichmann from Argentina. Rather than protest, Argentina simply agreed with Israel that the matter was closed. Sponsler, *supra* note 71.

spective remains whether she can seek a remedy if her asylum state does not protest. In other words, the issue is whether she can exercise these rights on her own.

The fact that a country violates customary international law by abducting a person from another country does not assist the captive once she is within the jurisdiction of the abducting country. With limited exceptions, such as the protections accorded to diplomats and aliens,[85] customary international law historically focused on governing states' actions among themselves and did not concentrate on regulating their behavior toward individuals within their jurisdiction.[86] Customary international law has rarely been thought to give individuals private rights of action.

One should note that this formulation hardly describes contemporary customary international law. Generally, customary norms protect against certain kinds of human rights violations.[87] Currently, United States courts view customary international law as binding principally between and among states.[88] The general reluctance to find that customary rules apply to transgressions committed against individuals extends to an individual's inability to protest illegal "extraditions." There is no customary norm giving abducted individuals a private right of action.[89]

Likewise, as a "general rule," treaties do not create individual

85. *E.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 50 U.N.T.S. 95 (generally considered to codify principles of customary international law); Chattin Claim (United States v. United Mexican States), 4 U.N. Rep. Int'l Arb. Awards 282 (United States-Mexico General Claims Commission 1927) (arrest, trial, and sentence of United States citizen in Mexico found illegal; Mexico ordered to pay monetary damages to the United States).

86. *E.g.*, H. KELSEN, PURE THEORY OF LAW 215 (Knight trans. 1967).

87. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); *see also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (customary international norm forbids murder by agents of a state and gives individual tort cause of action); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981) (customary international law prohibits prolonged arbitrary detention). *But see* Tel-Oran v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (no customary international norm prohibits murder by nonstate actors).

88. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, R.N. 4 (1987).

89. At least one United States decision rejected an argument based on customary international law. *See* United States v. Insull, 8 F. Supp. 310, 311-12 (N.D. Ill. 1934); *see also* Afouneh v. Attorney General, 10 ANN. DIG. & REP. OF PUB. INT'L L. CASES 327 (No. 97) (Palestine, Supreme Court 1942); *cf. In re* Jolis, 7 ANN. DIG. & REP. OF PUB. INT'L L. CASES 91 (France, Tribunal Correctional d'Avenes (1933)) (Belgian government protested). The *Nollet* and *Fiscal* cases indicate that other states do not take a similarly constrained view. *See supra* notes 68 and 71 and accompanying text.

rights.[90] However, treaties may create judicially enforceable rights for individuals. In United States law, treaties are the "supreme law of the land."[91] Upon ratification, only self-executing treaties create rights enforceable in domestic courts.[92] Beyond that, certain self-executing treaties give enforceable rights to individuals within a contracting state.[93] Whether a treaty creates private rights depends upon the intent of the parties to the treaty.[94] A common viewpoint is that the

90. *See, e.g.*, Sei Fujii v. State, 38 Cal. 2d 718, 722-25, 242 P.2d 617 (1952) (United Nations Charter does not create "justiciable rights in private persons" in the absence of implementing legislation); Hitai v. I.N.S., 343 F.2d 466, 468 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979). On the enforcement of conventional human rights obligations by United States courts, see Lillich, *Invoking International Human Rights in Domestic Courts*, 54 U. CIN. L. REV. 367, 371-93 (1985). In Extradition (Jurisdiction) Case, 8 ANN. DIG. & REP. OF PUB. INT'L L. CASES 348 (No. 165) (Germany, Supreme Court 1936), the German Court held that the individual had no right to raise the treaty-violation issue, unless the treaty specifically gave the right. *See also In re* Colman, 14 ANN. DIG. & REP. OF PUB. INT'L L. CASES 139 (France, Cour d'appel de Paris (Cham. de Mises en Accusation) 1947) (individual cannot rely on silence in treaty, which was not made for his benefit).

91. U.S. CONST. art. VI, cl. 2.

92. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 156-61 (1972). Executory treaties are enforceable internationally, *i.e.*, by international arbitral tribunals and by diplomatic means. *See generally* Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178 (1951). Obligations not to act are usually treated as self-executing. Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878), *cited in Rauscher*, 119 U.S. at 427-28. The notion of self-executing treaties is somewhat peculiar to the United States legal system. J. SWEENEY, C. OLIVER & N. LEECH, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1068-69 (1988). *But see* Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal: *Win at Any Price*, 74 AM. J. INT'L L. 892, 896 (1980); Evans, *Self Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178, 194-206 (1951). In Great Britain, treaties do not create domestic law in the absence of implementing legislation. *Rauscher*, 119 U.S. at 418; O'Higgins, *supra* note 3, at 301. On the other hand, in certain countries, treaties are automatically incorporated into domestic law and have an authority superior to that of domestic legislation. *See* Sasse, *The Common Market: Between International and Municipal Law*, 75 YALE L.J. 695, 712-13 (1966); J. SWEENEY, C. OLIVER & N. LEECH, *supra*, at 34-35; *e.g.*, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

93. Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

94. Professor Paust argues persuasively that the self-executing/executory dichotomy has no support in constitutional history and has been used only episodically. *See* Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988). Additionally, he argues that the only executory treaties are those which expressly provide that legislation is required. *See id.* at 781. The history Professor Paust cites also indicates that the framers assumed that treaties would create individual rights. *See id.* at 763 & n.21, *citing* Charles Pinckney of South Carolina, *quoted in* 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 277-79 (J. Elliot ed. 1941). Even if one accepted Paust's argument—and I do not suggest it is wrong—in view of the many cases that adopt the standard view, and the fact that even if extradition treaties are self-executing, there exists a long tradition of viewing them as not creating individual rights, discussion of that latter point is useful.

parties' intent determines whether a treaty is self-executing.[95] However, as Professor Riesenfeld points out, the intent of the parties goes only to the "international aspect . . . whether the treaty aims at immediate creation of rights and duties of private individuals which are enforceable and to be enforced by domestic tribunals."[96] The "domestic constitutional aspect," whether a treaty requires implementing legislation, depends only on the domestic constitutional law of that party.[97]

Determining whether a treaty provision creates individual judicially-enforceable rights requires an examination of the provision's "language, context, purpose, negotiating history, and general background."[98] One must examine these factors to determine whether the United States-Mexico Extradition Treaty creates private rights.

V. *RAUSCHER*'s BESTOWAL OF INDIVIDUAL RIGHTS UNDER EXTRADITION TREATIES IN THE CONTEXT OF INTERNATIONAL EXTRADITION

When Professor Riesenfeld suggests examining "general background" to discover judicially-enforceable rights for individuals in treaties, he probably refers to an examination of the specific treaty in question. However, an inquiry into the "global" general background must first begin with an examination of *Rauscher*.[99] In that case, the United States Supreme Court recognized that extradition treaties give rights to individuals. *Rauscher* constitutes the leading United States Supreme Court case on the remedies of a defendant tried in violation of the rule of specialty in an extradition treaty.[100] The *Rauscher* Court, in arriving at its holding, determined that the defendant himself had rights "growing out of [the] treaty."[101] Thus, *Rauscher* deserves detailed analysis.

The United States requested the extradition of Rauscher, a naval

95. *E.g., International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess., 314, 315 (1979) (letter from Robert B. Owen, Legal Adviser, Dep't of State, to Senator Jacob K. Javits).

96. Riesenfeld, *supra* note 92, at 896.

97. *Id.* at 897, 898.

98. *Id.* at 899. Numerous variations on that test have been proposed. *See, e.g.*, People of Saipan *ex rel.* Guerrero v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); Lillich, *supra* note 90, at 381 n.67.

99. 119 U.S. 407 (1886).

100. *See also* Johnson v. Browne, 205 U.S. 309 (1907); Cosgrove v. Winney, 174 U.S. 64 (1899).

101. *Rauscher*, 119 U.S. at 419.

officer, from Great Britain for the murder of a crewman on his ship. Great Britain transported Rauscher to the United States pursuant to the Ashburton Treaty.[102] However the Circuit Court for the Southern District of New York tried him not for murder, but for cruel and unusual punishment. This trial took place under a different criminal statute, but for the identical acts alleged in the extradition proceeding.[103]

In defending against the charge, Rauscher raised the doctrine of specialty.[104] Justice Miller, writing for the Court, began by pointing out that the surrendering of a fugitive by one country to another "has never been recognized as among those obligations of one government toward another which rests upon established principles of international law."[105] The Court discussed the need for a treaty and the fact that a dispute between the United States and Great Britain had arisen with regard to whether a defendant extradited from Great Britain could be tried for a crime not mentioned in the extradition demand.[106] The Court then considered what Professor Riesenfeld calls the domestic self-executing aspect of the United States-Great Britain Extradition Treaty.[107]

The Court noted that in England, duties arising from treaties are "matters confided wholly for their execution and enforcement to the executive branch of the government."[108] However, the Court wrote

---

102. Ashburton Treaty, Aug. 9, 1842, art. X, 8 Stat. 576.

103. *Rauscher*, 119 U.S. at 409.

104. In Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972), the Second Circuit, in an opinion by Judge Friendly, noted that *Rauscher* was decided against a background of disputes at the diplomatic level between Great Britain and the United States. The disputes centered on whether the United States could try an extradited defendant for an offense other than that named in the extradition demand. *Id.* at 480. In effect, subsequent courts have interpreted the discussion in *Fiocconi* as equivalent to finding that there was a protest by Great Britain in *Rauscher*. *See, e.g.*, United States v. Kaufman, 858 F.2d 994, 1009 (5th Cir. 1988). However, the *Rauscher* Court nowhere indicated that a protest was required. The *Fiocconi* court relied on *Rauscher* in holding that extraditions pursuant to international comity must adhere to specialty restrictions just as those extraditions accomplished pursuant to a treaty. The court stated that

> Rauscher's conviction of an offense for which he was not and could not have been extradited did not violate the treaty, which was silent as to the rights of a person extradited thereunder; it violated a rule of what we would now call United States foreign relations law devised by courts to implement the treaty.

Fiocconi, 462 F.2d at 479. This last sentence is dictum in *Fiocconi* and, as discussed in the text, contrary to *Rauscher*.

105. *Rauscher*, 119 U.S. at 412.

106. *Id.*

107. *Id.* at 417-18.

108. *Id.* at 417.

that

> [i]n the United States a different principle is established. Our 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; but when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.[109]

The *Rauscher* Court next referred to the discussion of self-executing treaties in the *Head-Money Cases*.[110] Quoting from those cases, the Court wrote that:

> a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the county.[111]

Without further discussion, the Court noted that the Ashburton Treaty was the supreme law of the land, that courts were bound to take judicial notice of it, and that courts were bound "to enforce in any appropriate proceeding the rights of persons growing out of that treaty."[112] Therefore, it seems apparent that the *Rauscher* Court believed that the extradition treaty created rights in Rauscher and not simply that Rauscher could enforce rights derivatively gained from Great Britain.

After discussing the Ashburton Treaty, the Court analyzed whether the treaty departed from recognized rules of public international law, which did not permit extradition but allowed a state to extradite a person at the request of another state.[113] Again, the Court assumed that the individual possessed rights, stating:

---

109. *Id.* at 418 (citing Foster v. Nielson, 27 U.S. (2 Pet.) 253, 314 (1829)).

110. 112 U.S. 580 (1884). The *Rauscher* Court stated:

> A treaty, then, is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And, when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Rauscher, 119 U.S. at 419.

111. *Rauscher*, 119 U.S. at 418.

112. *Id.* at 419.

113. *Id.* at 420.

> Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the state which makes the surrender of the fugitive, and that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and all the rights which the law governing that proceeding was intended to secure.[114]

The Court concluded that a person brought into the jurisdiction under an extradition treaty can only stand trial for an offense described in the treaty and for which he was extradited if "a reasonable time and opportunity had 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."[115]

Having arrived at its holding, the Court made another observation that reinforced its view that Rauscher possessed his own rights. It pointed out that "the operation of this principle of the recognition of the rights of prisoners," in circumstances such as the one before it, relieved a troublesome element from the relationship between the executive branch of the federal government and state courts.[116] If the only way of enforcing treaty obligations is "through the action of the respective national governments, it would seem that the government appealed to ought to have the right to see that the treaty is faithfully observed, and the rights of the parties under it [are] protected."[117] Thus, if an extraditee were tried in the state court and that court "fail[ed] to give due effect to the rights of the party under the treaty,"[118] the party could seek a writ of error from the Supreme Court of the United States to the state court. Once the writ is secured, the state court would determine the treaty's effect upon the rights asserted by the prisoner.[119] However, if the party is under arrest and desires a more speedy remedy in order to secure his release,

114. *Id.* at 421.
115. *Id.* at 430.
116. *Rauscher*, 119 U.S. at 430.
117. *Id.*
118. *Id.*
119. *Id.* at 431.

he could petition for a writ of habeas corpus from a federal court. The federal court could issue the writ on the ground that the extraditee's liberty has been unconstitutionally restrained. Alternatively, he may make the same argument under a law or treaty of the United States in federal court.[120] If the individual successfully pleads his case, he will be discharged.[121] State courts could also issue such a writ.[122] Although this analysis indicates that the offended government could protest the trial, it also appears to assume that the prisoner has certain rights flowing from the treaty, independent of any rights of his government.

In cases subsequent to *Rauscher*, the Supreme Court has found that United States courts lack jurisdiction when a defendant appears before them in violation of a treaty.[123] For example, in *Johnson v. Browne*, the Supreme Court applied the doctrine of specialty without any protest from Canada, the offended government.[124] In *Cosgrove v. Winney*,[125] again without protest, the Court released a prisoner held in violation of the doctrine of specialty contained in the 1890 treaty between the United States and Great Britain.[126] The cases are not wholly limited to violations of the doctrine of specialty. In *Cook v. United States*,[127] the Supreme Court held that the cargo of a ship, seized outside the United States territorial waters in violation of the treaty between the United States and Great Britain of May 22, 1924,[128] could not be retained.[129] Again, in *Cook*, the offended state did not lodge a protest.

According to *Rauscher* and its progeny, extradition treaties confer rights on individuals. In other words, an individual has standing to assert a violation of an extradition treaty in the absence of diplo-

120. *Id.*

121. *Rauscher*, 119 U.S. at 431.

122. *Id.*

123. *See* Dickinson, *supra* note 11; Morgenstern, *supra* note 70, at 279.

124. 205 U.S. 309 (1907). In *Johnson*, however, the Court did assume that the Canadian government would have refused to extradite. *Id.* at 316-17.

125. 174 U.S. 64 (1899).

126. Promulgated Mar. 25, 1890, 26 Stat. 1508. The government violated article 3, which forbids trying a person for a crime other than that for which he was extradited, until the extraditee can return to the country from which he was surrendered. Here Cosgrove, on trial for an offense for which he was properly extradited, returned to Canada, but voluntarily came back to the United States, where he was indicted for another crime. *Cosgrove*, 174 U.S. at 65.

127. 288 U.S. 102 (1933).

128. Convention Between the United States and Great Britain for Prevention of Smuggling of Intoxicating Liquors, 43 Stat. 1761 (1924).

129. *Cook*, 288 U.S. at 121-22.

matic protest. Nonetheless, federal courts have split on this issue, even as applied to violations of the doctrine of specialty.[130] The cases on both sides of the issue are characterized by a remarkable paucity of analysis. These cases generally rest on the theory that treaties protect the rights of sovereigns, rather than individuals. They tend not to discuss what exactly those sovereign rights are, or why extradition treaties, which since *Rauscher* have been understood to be capable of creating individual rights, do not confer rights on individuals. They do not even reference the detailed analysis employed by courts in dealing with whether treaties create individual rights.[131] The *Restatement (Third) of Foreign Relations Law of the United States* recognizes the inconsistency of the cases, but is additionally inconsistent itself. On the one hand, it states that "[b]oth the person extradited and the extraditing state are beneficiaries of the doctrine [of specialty]."[132] On the other hand, it states that "the obligation embodied in the doctrine of specialty runs to the requested state."[133]

Despite the split in authority at the circuit court level, the Supreme Court has allowed individuals to assert rights arising under extradition treaties. This concurs with the minority view that individuals may challenge the illegality of their removal from another jurisdiction.[134] After *Rauscher*, one could argue that a presumption exists

130. *Compare* United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988), *petition for reh'g denied*, 874 F.2d 242, 243 (5th Cir. 1989) (per curiam) (only a nation that is party to a treaty may complain of a breach of the treaty); Demjanjuk v. Petrovsky, 776 F.2d 571, 583-84 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) ("right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested"; extradition from United States) (citing Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.D.C. 1979)); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973) (principle of specialty is privilege of asylum state, rather than right of accused; extradition from United States); United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) ("under international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a violation") *with* United States v. Diwan, 864 F.2d 715, 720-21 (11th Cir.), *cert. denied*, 109 S. Ct. 3249 (1989) ("[t]he extradited individual . . . can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty"); United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir.), *cert. denied*, 489 U.S. 1012 (1989) ("person extradited may raise whatever objections the extraditing country would have been entitled to raise"); Leighnor v. Turner, 884 F.2d 385, 388 (8th Cir. 1989), *following* United States v. Thirion, 813 F.2d 146, 151 n.5 (8th Cir. 1987).

131. *See, e.g.*, cases cited *supra* note 130; *see also* Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).

132. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 comment b (1987).

133. *Id.*

134. *Fiscal*, 9 ANN. DIG. & REP. OF PUB. INT'L CASES at 402.

that extradition treaties create rights in individuals and that the government must rebut that presumption.

VI. APPLYING *RAUSCHER* TO ALVAREZ-MACHAIN'S PREDICAMENT: FINDING INDIVIDUAL RIGHTS UNDER THE UNITED STATES-MEXICO TREATY

Rauscher dealt with the doctrine of specialty. The treaty language in *Rauscher* imparted no explicit rights to individuals. Rather, it simply stated that the parties "shall . . . deliver up" persons charged with specified crimes and only implicitly precluded trial for other crimes. However, the Court recognized this implied limitation and allowed *Rauscher* to assert the limitation. The issue in Alvarez-Machain's case is different. Accordingly, one should carefully examine the United States-Mexico Extradition Treaty in order to determine if the language and context indicate the parties' intent to impart rights to individuals.

The treaty language indicates that, at least in part, it creates enforceable individual rights. Most important, the treaty negates an obligation on the part of either party to extradite its own nationals: "Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so."[135] Although this provision grants the executive of the requested party discretion to extradite its own nationals, it also appears to give those nationals an opportunity to challenge an extradition either as a violation of the laws of the requested party or, under a lower standard, as an abuse of discretion.[136]

Provisions forbidding extradition of nationals are not logically necessary. Extradition treaties facilitate the apprehension and punishment of criminals; if a national of a requested state is properly subject to extradition, excluding her from the ambit of the treaty impedes the criminal process, unless the national state prosecutes her. Nonetheless, "national clauses" began appearing in French extradition treaties of the mid-nineteenth century.[137] European countries and, to

135. United States-Mexico Extradition Treaty, *supra* note 15, art. IX(1).

136. *But see* I. SHEARER, *supra* note 3, at 115 (Mexican municipal law vests discretion in executive). Mexican practice contrasts with that of other states, where the decision is judicial. *Id.* at 117. This history of article IX(1) is discussed in Valentine v. United States, 299 U.S. 5, 13-16 (1936).

137. I. SHEARER, *supra* note 3, at 17.

a lesser degree, Latin American countries use such clauses. However, the United States and British Commonwealth countries generally try to exclude these clauses from their treaties.[138] The different approaches flow, in part, from the fact that many civil-law jurisdictions have extraterritorial criminal laws, which permit them to exercise jurisdiction on the basis of nationality. This allows those countries to punish their nationals for crimes committed abroad. Conversely, common-law states tend to use extraterritorial laws more sparingly.[139] Thus, if a person commits a crime abroad and returns home, civil-law states are more likely to have the power to prosecute criminals than are common-law states.[140]

Reasons usually given for excluding nationals focus on protecting individuals, while largely ignoring the protection of sovereign interests, except to the extent that a sovereign has an interest in protecting its citizens.[141] These reasons are: (1) a person should be tried by her "natural judges" (i.e., her peers); (2) a state owes a duty of protection to its citizens; (3) a citizen has a right to stay undisturbed in her homeland; and (4) a person may not receive a fair trial by a foreign jury. Moreover, where the crime was committed on asylum state territory and is punishable under that state's law, and where the abducting state is prosecuting the extraterritorial offense, it is particularly apparent that the rationales for nonextradition apply. Regardless of the validity of these rationales, a threatened individual or her state may equally advance these justifications. The issue is not simply that another state has violated the territory of the other treaty party, but that an individual is deprived of protected rights.

Treaty clauses precluding extradition of nationals fall into two categories, absolute and discretionary.[142] The corresponding provision in the United States-Mexico Extradition Treaty is a typical discretionary clause. The clause, in article IX, requires Mexico to try its nationals if it does not grant extradition.[143] Dean Shearer points out that even discretionary clauses tend to be absolute in practice.[144] Thus, while it is difficult to argue from the language of article IX that the treaty explicitly gives rights to individuals, it does appear to ne-

138. *Id.* at 97-118.
139. Alvarez-Machain was, however, indicted for an extraterritorial offense.
140. Garner, *supra* note 4, at 484.
141. I. SHEARER, *supra* note 3, at 98, 118-21.
142. *Id.* at 94.
143. United States-Mexico Extradition Treaty, *supra* note 15, art. IX(2).
144. I. SHEARER, *supra* note 3, at 126.

gate the argument that governmental silence amounts to acquiescence.

Moreover, the next paragraph in article IX states that, "if extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall admit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense."[145] Again, it appears that the requested party must take some affirmative action in order to permit the national's extradition.

Similarly, the requested party may expressly waive the "rule of specialty."[146] A person extradited under the present treaty shall not be detained, tried, or punished in the United States for an offense other than that for which extradition has been granted. Nor may the person undergo extradition by that party to a third state unless the requested party has given its consent to his detention, trial, punishment, or extradition to the third state for an offense other than that for which the extradition was granted.[147]

Moreover, the treaty sets out detailed requirements in article X for extradition procedures and documents required to initiate the extradition process. These provisions permit an individual to challenge the basis for the extradition.[148]

Provisions in the treaty which permit one of the parties to limit explicit rules governing extradition (either the rule against extraditing nationals or the rule of specialty) only when the requested party takes an affirmative act, make it dubious that the absence of such affirmative action should automatically constitute acquiescence in an abduction. Express language in the United States-Mexico Extradition Treaty undermines the United States courts' understanding that a lack of protest in the face of a treaty violation constitutes consent to the abduction.

Obviously, the nonacquiescence argument has more force with respect to a state's right to waive the rule of specialty. Under article XVII(1)(c), the requested party must consent to a derogation from the rule of specialty. One could interpret consent as including tacit consent. However, in view of the fact that more precise words would

145. United States-Mexico Extradition Treaty, *supra* note 15, art. IX(2).

146. *Id.*

147. *Id.* art. XVII(1)(c).

148. Although early on, the executive branches of governments had rather complete competence to make extradition decisions, the modern trend, going back to 1833, especially in common-law countries, is to assign the decision to the judicial branch. *See* I. SHEARER, *supra* note 3, at 197-200.

encompass that notion, such as the "acquiescence" often assumed by United States courts to constitute consent,[149] that reading is questionable. On the other hand, the provision relating to nonextradition of nationals does not by its terms demand an expression of consent. Nonetheless, because Mexico must "grant" such an extradition, and because the extradition is subject to the other procedural safeguards, it appears fair to interpret the treaty as requiring more than mere silence to validate an extradition.

One may argue, however, that the two provisions discussed above simply give a Mexican citizen the right to complain to her own government, and not the right to assert a violation against the United States. However, the treaty language need not be so explicit. The treaty by its operation has clothed nationals with certain protections. Typically, a protected person should be permitted to assert her own rights. In addition, these protections are not linguistically different in any material way from the protections that the specialty clauses offer. Thus, there is no reason to limit the right of one asserting those rights more than one would limit the rights of an individual asserting a violation of specialty. Finally, looking to the global context, under *Rauscher*, the treaty is self-executing. Thus, at a minimum, Mexico may enforce the treaty in United States courts. If a violation has occurred, the most natural party to assert the violation is the abducted individual. Requiring the state to argue the violation may needlessly complicate diplomatic relations. Moreover, the *Rauscher* Court indicates that an extradition treaty permits individuals to assert violations of the specialty doctrine without any intermediate steps. The absence of a distinction between Mexico's functions under the specialty clause and the national clauses indicates that individuals should have the right to assert rights under the latter.

In view of both the procedural requirements that must precede an extradition and the express prohibitions on extradition of nationals and derogation of the rule of specialty, it seems somewhat odd to say that a violation of the treaty cannot occur in the absence of a protest.[150] The treaty provisions in the United States-Mexico Extradition Treaty are more detailed than those at issue in *Rauscher*. Yet, the *Rauscher* Court had no problem with Rauscher's assertion of his

149. *E.g., Fiocconi*, 462 F.2d at 481.

150. The court implicitly found that Alvarez-Machain was extradited, since the court rejected as "absurd" the government's argument that in the instant case a violation of the rule of specialty might violate the treaty, but the removal of Alvarez-Machain did not. *Caro-Quintero*, 745 F. Supp. at 610.

rights.[151] It would seem to follow that the United States-Mexico Extradition Treaty implicitly creates judicially-enforceable rights in nationals.

The history of the national clause in the United States-Mexico Extradition Treaty does not throw additional light on the question of the creation of individual rights. The 1861 version of the treaty contained an article which stated that neither party was bound to deliver its own citizens. In 1891, the present language permitting discretionary rendition was added "to clarify the meaning of the original formula and to remove doubt as to its meaning which has been cast upon it by an erroneous interpretation by the Department of State and a decision of an inferior federal court."[152] The fact that parties were not required to extradite nationals has been read to mean that they could not extradite nationals. The change is thus unrelated to the question of individual rights.

Beyond the language that it contains, the treaty lacks certain language that would fortify the argument that an individual lacks standing to assert his rights when a treaty violation takes place. In 1973, prior to the United States-Mexico Extradition Treaty's 1979 signing, the United States and Switzerland signed their Treaty on Mutual Assistance in Criminal Matters.[153] That treaty expressly provides that, with certain enumerated exceptions, the treaty "shall not give rise on the part of any person of the right to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests" under the treaty.[154] In view of *Rauscher*, if the United States had wished to achieve a similar end in its extradition treaty with Mexico, it could have inserted similar language.

Other criteria for determining whether a treaty creates individual rights include the availability of alternative remedies and the consequences of failing to find enforceable rights.[155] If no other remedies exist, a stronger argument arises that individual rights exist. Other-

151. Typically, the argument that multilateral treaties do not create judicially enforceable rights in individuals relies on the imprecise and hortatory language of the treaty. *See, e.g.*, Sei Fujii v. State, 38 Cal. 2d 718, 722, 242 P.2d 617, 620 (1952).

152. Garner, *supra* note 4, at 483 (referring to *Ex Parte* McCabe, 46 F. 363 (W.D. Tex. 1891)).

153. May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302.

154. *Id.* at 37; *see* United States v. Davis, 767 F.2d 1025, 1029-30 (2d Cir. 1985).

155. People of Saipan *ex rel.* Guerrero v. United States Dep't of Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

wise, an abducted person possesses no recourse or remedy. It is highly unlikely that a defendant would sue his abductors. While the abducted person's own state can pursue its remedies, the possibilities that it may not do so, for a variety of reasons, make those remedies too uncertain. Likewise, the consequences of failing to enforce the treaty in court will mean that the abducted person has no effective remedy.

The notion that an individual found in one state, who is the citizen of another state, has rights under a treaty is hardly novel. For example, in *Asakura v. Seattle*,[156] a Japanese citizen invoked a treaty of friendship, commerce, and navigation to overcome a local ordinance which conflicted with the treaty. While a state can assert a claim of responsibility under international law by virtue of a protest or diplomatic approaches, the right the state asserts is different from the right of an individual under a self-executing treaty. Accordingly, whether or not a state asserts a violation of a treaty, an individual may still assert the violation of the treaty as to her own person.[157]

Taken together, these facts indicate that individuals have, and can enforce, rights under the treaty. Of course, these considerations are not dispositive. In the absence of express language creating private rights, it is difficult to gather the parties' intent. While *Rauscher* allows individuals to invoke extradition treaties, numerous cases do not. These cases sit against a background of international law doctrine that treaties do not create such rights. Likewise, the counter to the argument that additional treaty language was available to withhold private rights is that the parties could have inserted language confirming such rights. Nonetheless, where a treaty imposes limits on

156. 265 U.S. 332 (1924).

157. Even if a treaty creates individual rights, it is often said that those rights belong to residents of the state in which the rights are asserted. Here, one might argue that the United States did not intend to create rights in a Mexican national, despite whatever intention the government of Mexico may have had. In a recent case, the United States Supreme Court held that the fourth amendment did not apply extraterritorially. United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990). However, in that case, the Court's holding turned upon the definition of "the people" in the fourth amendment, which gives to the people the "right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." The Court found that "people" was a term of art applying to "the people of the United States" and not to "aliens outside of the United States territory." *Id.* at 1061. The context of a foreign subject protected by an extradition treaty is not so parochial. The question does not simply involve the intention of the United States, but also involves the intention of the other contracting party, in this case Mexico. If, as argued, Mexico intended to bestow individual rights on its citizens, as the government of Japan apparently did in the *Asakura* case, it is not for the United States unilaterally to deny the existence of those rights.

one government's power, which obviously protect a discrete class of people, it seems reasonable that those people have standing to enforce the treaty.[158]

This does not mean that a response of some sort by the requested state has no role in the process if someone is abducted from its territory.[159] Cases may exist in which a state wants a person extradited, despite the illegality of the removal. One imagines that Argentina did not wish to argue too strenuously that it wanted Eichmann back, although it probably did not like Israeli agents snatching people from its territory.[160] In an even more timely scenario, it is conceivable that if the United States abducted a member of the Medellín drug cartel from Colombia, the government of Colombia might not want him returned, but might not want to face the consequences of saying so. Tacit acquiescence and hiding behind the "rule" of *mala captus, bene detentus*[161] could solve the problem. However, where a state has entered a treaty requiring it to take affirmative steps to extradite its citizens, the state should, as a matter of principle, speak out if the treaty permits their abduction.

In the event that a state makes a conscious decision to acquiesce in an abduction, in effect ratifying the "extradition," it could, as a matter of international law, apparently choose to do so. Many cases involve situations in which states have expressly acquiesced in a violation of the rule of specialty[162] or have knowingly participated in what amounts to a deportation of the individual.[163] In cases where foreign agents abduct a national from her own territory in apparent violation of an extradition treaty, it would not seem too stringent a requirement

158. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

159. In proposing a restriction on a state's ability to prosecute abducted people, Professor Dickinson would have permitted offended states to consent. *See* Dickinson, *supra* note 11.

160. *Eichmann*, 36 I.L.R. at 5-6.

161. *See supra* note 17 and accompanying text.

162. *E.g.*, *Diwan*, 864 F.2d at 720-21 (British Home Office note confirmed "that the United Kingdom has no objection to the indictment of Ms. Diwan as proposed"); *Najohn*, 785 F.2d at 1422-23 (record included "a letter from the Swiss Embassy to the United States asking for prosecution and agreeing that the principle of specialty was suspended"); *cf. Leighnor*, 884 F.2d at 390 (sentence enhancement based upon pre-extradition conduct not included within an offense for which extradition was granted was permitted by Eighth Circuit Court in view of Federal Republic of Germany court statements acknowledging prisoner's prior escape and use of false passport).

163. *E.g.*, *Valot*, 625 F.2d at 310; *Gengler*, 510 F.2d at 63; *Cordero*, 668 F.2d at 37-38; United States v. Lovato, 520 F.2d 1270, 1272 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975).

on the prosecution to seek a confirmation from the state of nationality that it had not objected to the extradition.

In short, the better rule would be that where a treaty appears to confer individual rights, the presumption should be that such individual rights exist. In the absence of any express statements of acquiescence, the individual could then assert those rights.

VII. THE ROLE OF STATE SOVEREIGNTY IN INTERNATIONAL EXTRADITION

The foregoing thoughts force one to consider the nature of state sovereignty. As noted above, the "requirement" that the requested state lodge a protest flows from the theory that extradition treaties confer rights only on states. This requirement theoretically protects a state's sovereignty. Courts adopting this rule assume a view of international law in which treaties do not confer rights on individuals. Other courts apparently adopt a similar view which allows individuals to raise violations of extradition treaties, but holds that an individual's right to raise a violation is derivative of the right of the requested state.[164]

"State sovereignty" is a concept deriving originally from jurisprudence and later from political theory.[165] Brierly points out that after 400 years of metamorphosis, sovereignty "is merely a term which designates an aggregate of particular and very extensive claims that states make for themselves in their relations with other states."[166] The concept has little explanatory power for the relations between a state and its people. In practice and in theory, the spectrum of domestic political systems is too diverse for a generic term like "sovereignty" to be of any real aid in answering specific questions, such as whether individuals have rights under treaties. Yet that question involves an overlap of external and internal issues. By entering into a

164. *E.g.*, United States v. Thirion, 813 F.2d 146, 151 n.5 (8th Cir. 1987). Although the issue is stated in terms of standing, it is interrelated with, and perhaps indistinguishable from, the question whether the offended state must protest. If a protest is an element of the treaty violation, an individual cannot raise the violation in the absence of assistance from the offended state, so that at least standing is derivative. On the other hand, if an individual can, in the absence of a protest, raise the issue of a treaty violation, it would appear that the treaty confers at least some rights on the individual. Therefore, although the courts seem to adhere to a hierarchical view of international law, under which customary and treaty obligations exist only between states, permitting individuals themselves to raise treaty violations, even if only in a "derivative" capacity, seems to some extent a relaxation of the hierarchical hypothesis.

165. J. BRIERLY, THE LAW OF NATIONS 7-16 (Waldock 6th ed. 1963).

166. *Id.* at 47.

treaty that confers certain discretionary power on the state, vis-à-vis its nationals and the other treaty party, may the state simultaneously give rights to its nationals?

A state "is an 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."[167] One of a state's functions is the protection of its citizens.[168] Thus, the abduction of a citizen of one state by agents of another state affronts the sovereignty of the state of nationality in several ways. The affront is not only that one state exercises its power within the territory of the other, an insult to some highly abstract ideas of sovereignty, but the more palpable affront is that the latter state fails to fulfill its primary obligation of protection. Still, it does not automatically follow that, by entering into an extradition treaty with explicit limitations on extradition of nationals and on extradition procedures generally, a state protects its citizens by giving them the ability to attack allegedly improper extradition in the courts of the abducting state. With or without a treaty, diplomatic means exist for the state to vindicate the affront to its sovereignty. On the other hand, the question is whether such a treaty gives rights to the national of one state to enforce the treaty. The answer cannot be that it does not, simply because "sovereign rights" are at issue.

State sovereignty is not *a priori* incompatible with individual rights. Professor Reisman has written recently, "International law still protects sovereignty, but—not surprisingly—it is the peoples' sovereignty rather than the sovereign's sovereignty."[169] While Professor Reisman was considering the right of states to intervene to depose illegitimate "caudillos," his broader point has force here as well. A state may actualize the protective aspect of its sovereignty by empowering its citizens to litigate their rights in foreign courts. It does not follow that because treaties give rights to states, they deny them to individuals. Rather, giving rights to individuals expresses one of the principal reasons states exist and is a tactic for protecting those rights.

Clearly, this argument can prove too much. Treaties do not necessarily give rights to individuals, but the prevailing presumption that because extradition treaties are between states, only states have rights

167. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

168. *E.g.*, J. SWEENEY, C. OLIVER & N. LEECH, *supra* note 92, at 488.

169. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990).

under them, seems to be wrong. It would appear better to reverse the presumption. In the absence of evidence to the contrary, individuals should have rights under such treaties. Because states may legitimately have broader interests than those of an individual, in a given case it may be necessary to balance a state's interests with the interests of its citizens. Professor D'Amato has characterized the perception of states as "opaque," "transparent," or "translucent," depending on whether an individual's international human rights are nonexistent, whether people claim the whole set of those rights, or whether the people and the state each claim some of the available "rights."[170] The approach advocated here is "translucency": both the state and the individual have rights. A conflict between rights that reside in an individual and those that are derivative of the state would arise if an abducted individual alleged a treaty violation and the state demurred. The state's right as sovereign would clash with the state's duty to protect one of its citizens. This situation stands out most clearly in cases where the abducted individual is a national of the state in which the abduction occurred. If the state expressly acquiesces in the abduction, presumably it does so out of broader policy concerns. It is quite legitimate for the state to assert those broader interests. In those cases, presumably United States courts would abstain, and the individual's argument that the extradition was unlawful would be addressed to the individual's national courts. Under the act of state doctrine,[171] United States courts would almost certainly refuse to decide the legality of the "deportation" or ratified abduction. But where an extradition treaty appears to require some affirmative statement, silence should not suffice.

VIII. CONCLUSION

By entering into the extradition treaty with Mexico, the United States gained an advantage—the ability to extradite fugitives from the United States who have fled to Mexico and those who have allegedly committed crimes elsewhere and are found in Mexico, including Mexican nationals, at the discretion of the Mexican government. In exchange, the United States agreed to abide by certain procedures. In the absence of an extradition treaty, the United States would be forced to rely upon much more discretion-laden decisions by the government

170. D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 TEX. INT'L L.J. 1, 7 (1989).

171. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-22 (1964).

of Mexico (or, of course, abduction plain and simple). By entering into the treaty, the United States gave up a certain measure of its own freedom of action. If, as argued here, by giving up that freedom of action, the United States gave certain rights to Mexican nationals, it seems a relatively small price to pay for the ability to extradite fugitives in a systematic way.

The fact that the suspect is accused not only of a crime that is terrible under any circumstances, but one that has a high political profile, does not justify United States agents either acting illegally as a general matter[172] or violating the treaty. It seems contrary to the progressive development of international human rights law to argue that Alvarez-Machain's only hope of release following his kidnapping rests on the vagaries of the politics of United States-Mexican relations. The fact that Alvarez-Machain's own government might not have seen fit to protest should not limit his ability to contend that the United States must release him.

172. This Article has not considered the correctness of the court's decision to reject Alvarez-Machain's arguments based on the United Nations Charter or other norms of international law. At a minimum, the DEA agents' actions raise serious questions under these bodies of law.