After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims

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As expressed in the Preamble to the United States Constitution, one of the fundamental purposes of the Constitution and, thus, the creation of constitutional powers was "to . . . establish Justice." What is or is not serving of justice in particular contexts can be open to debate, but it is evident from the Preamble that it is always appropriate to ask whether particular exercises of governmental power (legislative, executive or judicial) are conforming (i.e., whether they are serving or thwarting justice). Stated differently, it is evident that the express need to "establish Justice" should condition the exercise of any constitutional power, especially the practices of our executive officials and the federal judiciary. As James Madison remarked more generally with respect to constitutionally delegated powers, "[t]he exercise of the power [delegated by the people] must be consistent with the object of the delegation."2

It is evident also from our history that the concept and claim of a "denial of justice," a phrase of some significance under customary international law,3 was of great concern to the Founders...
and played an important role in the creation of federal judicial power.\textsuperscript{4} As Alexander Hamilton wrote in \textit{The Federalist Papers}: 

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquility.\textsuperscript{5}

Writing more recently, Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia recognized:

There is evidence... that the intent of [the drafters of the Judiciary Act of 1789] was to assure aliens access to federal courts to vindicate any incident which, if mishandled..., might blossom into an international crisis.

... If [there is] a denial of justice..., under the law of nations the United States would become responsible for the failure of its courts and...[such] might thereby escalate into an international confrontation.\textsuperscript{6}

Interestingly, the phrase "denial of justice" has also had a close association with human rights precepts, at least since the nineteenth century, and with the right of aliens to an effective remedy in domestic tribunals.\textsuperscript{7} It is also significant that, as Chief Justice Marshall recognized early in our history, our judicial tribunals "are established...to decide on human rights."\textsuperscript{8} Human rights law now provides the interrelated right of all persons, not merely aliens, to an effective remedy in national tribu-

\textsuperscript{4} See, e.g., infra notes 5-6 and accompanying text.
\textsuperscript{5} \textit{The Federalist} No. 80, at 536 (Alexander Hamilton) (J. Cooke ed., 1961).
\textsuperscript{8} \textit{Fletcher} v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.).
nals, and quite clearly, it would constitute a denial or perversion of justice to ignore such rights to an effective remedy. In view of the above, such a denial would also be inconsistent with the object of power recognized in the Preamble to the U.S. Constitution, and thus, the constitutional exercise of judicial power.

These very basic and understandable points seem lost in recent judicial and textwriter treatments of the question: does an individual who has been abducted unlawfully from a foreign state by or at the behest of U.S. federal agents have standing to complain and a right to a remedy in U.S. courts? Under customary international law concerning the rights of aliens and prohibitions of a "denial of justice," when such a denial exists or is threatened the answer must be yes. Under customary human rights law, based also in the United Nations Charter, if there is a violation or threatened violation of the abductee's human rights, the answer must also be yes. And more generally under U.S. constitutional standards, when one "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the [Government]," and the injury fairly can be traced to the


10 See, e.g., Paust, supra note 7, at 613-14 n.476, 615-16, passim; supra note 3.

11 See Paust, supra note 7, at 613-16.

12 See supra note 3.

13 See U.N. CHARTER arts. 55(c), 56; see also Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (noting Charter guarantees of freedom from torture).

14 See, e.g., supra notes 7-10 and accompanying text.
challenged action' and 'is likely to be redressed by a favorable decision,'” such a person should have standing to complain of a deprivation of right.15 Under the latter standard, clearly if one has, for example, a human right to be free from illegal abductions, it is the abducted person who has the closest nexus to the harm, an actual injury directly related to the illegal action, and a right to a remedy that, legally, must be addressed and can be “redressed by a favorable decision.” The same is true with respect to an alien abducted illegally and who is raising a general claim of “denial of justice” in our tribunals.

These points were generally lost, no doubt, because the recent and now infamous decision of the Supreme Court in United States v. Alvarez-Machain,16 and other recent lower federal court opinions17 addressing the general question, did not actually examine alien claims of “denial of justice” under customary international law or claims of human rights violations under customary or treaty-based international law. Instead, they confronted a very narrow question whether individual standing in the case of an illegal abduction would be proper under a bilateral extradition treaty.18 Even with such a narrow focus, however, the Supreme

After Alvarez-Machain, the Court's majority opinion provided an appropriate recognition, one in contradistinction to those of the district court and the Ninth Circuit and to those of certain other lower federal courts.

At both the district and circuit levels, it was thought that an abducted person did not have standing under a bilateral extradition treaty otherwise silent as to individual standing. Under such a view, the individual's rights and standing would only be "derivative" of another state's rights under the extradition treaty and would therefore require a foreign state to protest the abduction. In contrast, the Supreme Court in Alvarez-Machain noted that the treaty "has the force of law, and if . . . it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." In a previous Supreme Court decision, the Court noted, "[N]o importance was attached to whether or not . . . [the foreign state] had protested . . . ." Of course, more generally, if an individual has a treaty-based right it remains that of the individual even if the foreign state signatory has a related right and may pursue or even control or "waive" remedies or sanctions at

(although political branches may terminate treaty, power "delegated by Congress to the Executive Branch" must not be "exercised in a manner inconsistent with . . . international law"); United States v. The Schooner Amistad, 40 U.S.(15 Pet.) 518, 553 (1841) (successful argument of counsel for individual claimants that "federal executive" does not have "power of making our nation accessories to . . . atrocious violations of human right"); see also id. at 595-96 (Story, J., opinion); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927) (executive seizure in violation of "international law" and treaty obviates jurisdiction and is "not to be sanctioned by any court"); cf. Louis Henkin, Correspondence, 87 Am. J. Int'l L. 100, 101-02 (1993).

[The executive branch is no more free under the Constitution to violate customary law than it is to violate a treaty.

. . . In general, it is the President's duty to take care that the law be faithfully executed, and that includes treaties of the United States as well as customary international law as law of the United States. . . .

The President may have some independent constitutional authority to take some actions in foreign affairs in which he has independent constitutional autonomy . . . even if his action is inconsistent with international law.


19 See supra note 18.
20 Alvarez-Machain, 112 S. Ct. at 2195.
21 Id. (citing United States v. Rauscher, 119 U.S. 407 (1886)).
the international level. It is simply not the case that the only rights or remedies protected under treaties are those of states or that individual rights are merely derivative. These points are especially evident when individual claims are based in human rights law, but there is no apparent reason why individual rights under a bilateral extradition treaty should be treated differently. The main question would seem to be whether, with respect to a particular treaty and practice, such rights can be identified.

Confusion and splits in lower federal court approaches to the question of standing seem to rest on differing views as to whether an individual has more than a “derivative” right under an extradition treaty as such. In some cases, claims concerning abductions or alleged improprieties were thought to be merely “derivative.”

22 See generally La Abra Silver Mining Co. v. United States, 175 U.S. 423, 458, 461 (1899) (even though claims before international commission were those of governments, private company had claim of right under “treaty and the award of the commission,” and such right is undoubtedly “susceptible of judicial determination”); Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, 84 Am. J. Int'l L. 444, 451, 473-74, 489 (1990); Paust, supra note 7, at 632 n.539; see also infra note 57; infra notes 97-98 and accompanying text.


24 See, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988); Jaffe v. Smith, 825 F.2d 304, 307 (11th Cir. 1987); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), cert. denied, 476 U.S. 1009 (1986); United States v. Cordero, 666 F.2d 32, 37 (1st Cir. 1981); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975); supra note 18; see also United States v. Yunis, 681 F. Supp. 896, 916 (D.D.C. 1988) (no abduction, but no foreign state complaint of any sort), aff'd, 924 F.2d 1086 (D.C. Cir. 1991). The Yunis court, in a simultaneous opinion pertaining to the defendant-hijacker's other pretrial motions, observed that a decision to permit the government to bring charges . . . should not be regarded as giving the government carte blanche to act as a global police force seizing and abducting terrorists anywhere in the world. The government cannot act beyond the jurisdictional parameters set forth by principles of international law and domestic statute.

Id. at 906; see also id. at n.22 (authority to secure arrest established by Universal Passive Personality principle and Hijack Taking statute); Id. at 907 (arrest “within the constraints imposed by international and domestic law”). But cf. Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (finding Mexican government’s protest insufficient regarding abduction by private perpetrators).
In others, either such claims25 or other claims26 under an extradition treaty were found to be ones which an individual has standing to raise. And the new Restatement of Foreign Relations Law provides room enough for more confusion when rightly recognizing individual standing to raise more general claims concerning the lack of a state’s jurisdictional competence under international law,27 and standing to complain of “brutal treatment in the course of an abduction from abroad,”28 but stating otherwise in connection with a violation of a foreign state’s “territorial” rights that “under the prevailing view the abducting state may proceed to prosecute” an abducted person absent foreign state objection.29 The Restatement adds, however, that this latter and inconsistent view was “based in part on the principle that only states, and not individuals, may raise objections to violations of international law,” that this general “principle” has been largely abandoned, and that many textwriters have criticized the antiquated but “prevailing” viewpoint concerning abductions and violations of “territorial” rights.30 Indeed, the general principle referred to has been in error for a much longer period of time than is sometimes real-

25 See, e.g., United States v. Thirion, 813 F.2d 146, 151 n. 5 (8th Cir. 1987) (where extradition treaty did not permit prosecution of offenses “other than the offense for which his surrender was accorded,” defendant had standing to challenge such additional prosecution); United States v. Vreeken, 603 F. Supp. 715, 717 (D. Utah 1984) (“The lone exception to the general rule is that the defendant can successfully challenge the court’s jurisdiction over his person if he is before the court in violation of an international treaty.”), aff’d, 803 F.2d 1085 (10th Cir. 1986), cert. denied, 479 U.S. 1067 (1987).

26 See, e.g., United States v. Rauscher, 119 U.S. 407, 418-19 (1886) (“rights of persons growing out of” extradition treaty); Leighnor v. Turner, 884 F.2d 385, 388 & n.4 (8th Cir. 1989) (citing cases supporting proposition that standing conferred directly on individual); Quinn v. Robinson, 783 F.2d 776, 786 n.3 (9th Cir. 1984) (habeas review only mechanism by which to challenge extradition), cert. denied, 479 U.S. 882 (1986); see also United States v. Herbage, 850 F.2d 1463, 1466 n.7 (11th Cir. 1988) (recognizing debate whether standing to challenge extradition is conferred upon state or individual), cert. denied, 489 U.S. 1027 (1989). Cf. In re Metzger, 17 F. Cas. 232, 233-35 (S.D.N.Y. 1847) (No. 9511) (discussing judicial authority to adjudicate extradition cases).

27 See Restatement, supra note 3, § 431 cmt. a; see also infra note 65.

28 Restatement, supra note 3, § 433 cmt. c and reporters’ note 3; see also id. § 432 reporters’ note 1. But see id. § 432 cmt. c and reporters’ note 2.

29 Id. § 432 cmt. c. But see id. reporters’ note 1 and § 433 cmt. c and reporters’ note 3; infra notes 43-44, 46-54, 65.

30 Restatement, supra note 3, § 432 reporters’ note 2; cf. M. Cherif Bassiouni, International Extradition in United States Law and Practice § 2-9 (1983) (“International legal doctrine as expressed in the majority of scholarly writings remains . . . opposed to these practices and to the application of the maxim mala captus bene detentus.”); see also id. § 4-8, § 5-1 ff.
ized, and its abandonment should compel continued questioning of the validity of the “territorial” rights focus and the related viewpoint concerning standing in the case of unlawful abductions. In fact, the territorial rights focus is misdirected. It fails to consider other individual interests and legal policies at stake and even ignores the question raised in Alvarez-Machain whether a bilateral extradition treaty can impliedly confer individual rights to be free from abduction, thereby establishing standing to complain.

Artful argument and articulation of implied terms in extradition treaties may resolve the controversy whether in general or in a particular instance a nonderivative individual right to be free from transnational abduction can be implied in a bilateral extradition treaty. Yet, this need not be the only focus. Quite clearly, most abductions engaged in merely for purposes of domestic prosecution would result in a “denial of justice” (in the case of an alien abductee) and a violation of human rights law. Quite clearly also, the individual victim of such violations of international law must have standing to complain and a right to an adequate remedy regardless of solutions to issues with respect to bilateral extradition treaties as such or the unlawful use of force in foreign state territory without foreign state consent.

The whole thrust of the customary prohibition of denials of justice is to assure that an alien has protection from impermissible harm by the government or those that the government can control, and that the victim of such harm has access to domestic judicial tribunals for adequate relief. When an abduction is unlawful under international law and perpetrated by the government or those it can control, a denial of the protections reflected in the prohibition of a denial of justice is reached. Additionally, if the alien victim of an illegal abduction is denied access to domestic courts and thereby adequate relief and justice, the classic circumstance of a denial of justice has been reached. Since customary international law is part of the laws of the United States and con-

31 See, e.g., supra note 23; infra note 65.
32 See generally infra notes 65-88 and accompanying text.
33 See supra notes 3, 7, 9-10, 13; see also Bassiony, supra note 30, at § 4-11 & n.32 (person illegally abducted is entitled, at least, to money damages).
34 See, e.g., Paust, supra note 3, at 52-53.
35 See, e.g., id. at 50-51, 53; Restatement, supra note 3, § 711 cmts. b, c, e, and reporters’ note 2.
36 See Restatement, supra note 3, § 711 reporters’ note 2; infra notes 40, 42 and accompanying text.
stitutionally-based, and our federal courts have the power and responsibility to apply customary international law, it is evident that an individual with a claim under customary international law to be free from a denial of justice by our government must have standing to raise such a claim whether or not the interests of a foreign state, several foreign states, or the entire international community are also at stake. The same is necessarily true with respect to claims under customary human rights law.

More generally, the United Nations Security Council has recognized that “abductions are offenses of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States,” has condemned “unequivocally all acts of . . . abduction,” and has recognized the “obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission of acts of hostage-taking and abduction in the future.” Clearly, this obligation goes beyond concern for “territorial” rights of or consent by some foreign state


38 Id. at 84-86, 89-90 (citing references); Abraham Abramovsky, Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok, 31 Va. J. Int'l L. 151, 176, 194 (1991). With such a constitutional, historical base, customary international law (at least with respect to civil sanctions) has been directly incorporable by the judiciary (i.e., without the need for implementing legislation). See, e.g., Paust, supra note 37, at 84-91 (citing references).

39 S.C. Res. 579, U.N. Doc. S/RES/579 (1985), reprinted in 25 I.L.M. 243 (1986). Of course, a more famous Security Council resolution in 1960 condemned the Israeli abduction of Adolf Eichmann from Argentina. See United States v. Toscanino, 500 F.2d 267, 277-78 (2d Cir. 1974) (quoting S.C. Res. 138, 15 U.N. SCOR, U.N. Doc. S/4349 (1960)). Unless expectations have changed, such Security Council condemnations of abductions can set limits even with respect to claimed exceptions noted in the text at notes 55-58. But the exceptions implicate other legal policies at stake that may not have been adequately considered. Additionally, Article 35 of the 1989 Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 (1989), reprinted in 28 I.L.M. 1457 (1989), requires signatories to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of . . . children for any purpose or in any form.” Id. Article 1 of that treaty defines “child” as any human being “below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” Id. at 1459. As the language of Article 35 declares, there are no exceptions to the prohibition of abductions of children, and thus, among such treaty signatories such a prohibition would appear to be controlling unless some right to use force in conformity with the U.N. Charter (e.g., the right to self-defense under Article 51) is implicated, since under Article 103 of the Charter, the Charter should prevail. See infra note 88.
and is expressly related to "rights of the victims." Further, such an obligation includes, but is also clearly beyond, prohibitions of state sponsorship or tolerance of hostage-taking and abduction. Even an innocent state not initially involved in the illegality can become responsible for its failure to act to secure the release of such persons or to prevent illegal conduct in the future. It does not matter how widespread or rare the illegal acts are once the state is on notice of such improprieties.

The obligation identified by the Security Council is not unlike the customary prohibition of a "denial of justice" by states in whose territory an offender is found or an offense is about to occur;\textsuperscript{40} nor is it unlike the more general obligation under the United Nations Charter of all states to take action in order to ensure a universal respect for and observance of human rights.\textsuperscript{41} In any event, when a government merely knows, or should know, that an offense of hostage-taking or abduction of an alien is about to occur and such government takes no reasonably available preventive action, liability for "denial of justice" can be appropriate.\textsuperscript{42}

It is worth stressing that this condemnation of abduction by the United Nations Security Council is important in setting limits to what otherwise is a fairly open standard. The very concept of "denial of justice" contains within it two broad criteria that should be tested with reference to the context and other legal policies at


\textsuperscript{41} See U.N. Charter arts. 1(3), 55(c), 56; Paust, supra note 3, at 42-43.

\textsuperscript{42} See supra note 40; see also Janes Case (U.S. v. Mex.), 4 R.I.A.A. 82, 95 (1925) ("prevalence of lawlessness and the inertness or powerlessness of the authorities near the scene"). In Quintanilla Case (Mex. v. U.S.), 4 R.I.A.A. 101 (1926), it was recognized that if prisoners or hostages are taken into governmental custody, the government must "account for them" and "can not exculpate itself" because "thereafter they have disappeared" or have been found killed. Id. at 103; see also Forti v. Suarez-Mason, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988) (human rights violation); Restatement, supra note 3, § 702(c).
stake. In some contexts, the serving of justice might justify certain means that are not otherwise prohibited. Logically, not all transnational detentions ultimately deny justice, but one can recognize that denial of an opportunity for those detained to even make the claim, at least in the country of destination, would constitute an unnecessary denial of justice. Similarly, the treatment of persons in a given circumstance can reach the level of unnecessary denial, and some forms of treatment are prohibited per se under other international laws. Ultimate justice, then, does not justify any sort of means, or restated, some means so taint the process, that justice, when fully considered, is recognizably thwarted. Additionally, because of demands and patterns of widespread expectation, in time the fairly open prohibition can become associated with certain absolutes even if there is no logical explanation for the relation of such absolutes to an open-ended concept of justice. The concept can take on a particular meaning precisely because, through time, we prefer that meaning. Moreover, one of those preferred interrelations now involves human rights.

Are most transnational abductions for purposes of domestic prosecution also violative of human rights law? As noted, the answer is yes. Early in our history, while justifying the use of force against Austrian naval power, Secretary of State Marcy proclaimed that an earlier use of force by Austria in Turkish waters had led to the capture of one Koszta, "not in a fair or allowable way, but by violating the civil laws of Turkey and the rights of humanity." The "rights of humanity," as proclaimed, undoubtedly included the right to be free from forcible abduction in foreign territory, and today such rights of humanity arguably exist as "human rights."

Whether this is so, it is evident that abductions can violate modern human rights law reflected in express prohibitions of "arbitrary" arrest or detention of individuals. For example, in 1981 the Human Rights Committee established under the Covenant on

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44 See, e.g., Paust, supra note 7, passim; see also Henfield's Case, 11 F. Cas. 1099, 1107 ("duties of humanity"); 1120 ("rights of man") (C.C.D. Pa. 1793) (No. 6360) (Wilson, J.) (charge to grand jury).
Civil and Political Rights decided that an abduction by Uruguayan officers of a Uruguayan refugee in Argentina violated the abductee's human right to be free from arbitrary arrest and detention. The same point has been noted in the Restatement and, more recently in connection with Alvarez-Machain, by Professor Lou Henkin. More generally, the Restatement has also recog-


48 See Louis Henkin, “Professor Henkin Replies,” ASIL Newsletter, Jan.-Feb. 1993, at 6 [hereinafter Henkin, Replies]; see also Henkin, supra note 18, at 101. Others agree that human rights are at stake. See, e.g., Bassiouni, supra note 30, §§ 1-2 to -3, §§ 4-9 (torture), §§ 5-13 to -34; M. Cherif Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 Vand. J. Transnat'l L. 25, 48 (1973); H. Moss Crystle, Comment, When Rights Fall in a Forest ... The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture, 9 Dick. J. Int'l L. 387, 402-03 (1991); Martin Feinrider, Extraterritorial Abductions: A Newly Developing International Standard, 14 Akron L. Rev. 27, 37, 38 n.85, 40-43 nn.98, 102-03 & 111, 44-46 (1980); Lowenfeld, supra note 22, at 474-75, 477, 489; John Quigley, Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists, 10 Hum. Rts. Q. 193, 205, passim (1988); Herman J. Ruiz-Bravo, Monstrous Decision: Kidnapping Is Legal, 24 Hastings Const. L.Q. 833, passim (1993); Ruth Wedgwood, Remarks, 84 Proc., Am. Soc'y Int'l L. 241 (1990). But see Jacques Semmelman, Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined, 30 Colum. J. Transnat'l L. 513, 517 n.23 (1992) (arguing that abduction should be expressly prohibited to be covered—which, of course, is not normal approach regarding this matter). In addition to the problem posed under human rights standards by the term “arbitrary” (i.e., which arrests or detentions are “arbitrary” will have to be determined with reference to context), the prohibition happens to be one which can be derogated from under the necessity within democratic limits test found in most human rights instruments. See, e.g., Symposium, 9 Yale J. World Pub. Ord. 113 (1982); Universal Declaration of Human Rights, art. 29(2). But see Covenant on Civil and Political Rights, supra note 45, art. 4 (allowing derogation “[i]n time of public emergency which threatens the life of the nation” etc.).

It should also be stressed that although the word “arrest” implies action by state officials, officers, or agents, arbitrary “detention” of individuals in violation of relevant human rights norms could be perpetrated by private actors. More generally, nearly all of the human rights instruments provided express or implied recognition of private duties. See Jordan J. Paust, The Other Side of Right: Private Duties Under Human Rights Law, 5 Harv. Hum. Rts. J. 51 (1992). By analogy, the “detention” of aircraft passengers by private perpetrators has resulted in claims of human right deprivations. See, e.g., Digest of United States Practice in International Law 171
nized that detention is arbitrary and violative of human rights "if it is unlawful or unjust," adding that our executive officials have similarly declared that such detention is "arbitrary also if 'it is incompatible with the principles of justice or with the dignity of the human person.'" Professor Henkin also stated that "retaining the abducted person, even for trial, . . . is plausibly 'prolonged arbitrary detention,' in violation of accepted customary international law," and that "[a]bduction would also appear to be 'cruel, inhuman or degrading treatment' in violation of' human rights law. "Prolonged arbitrary detention" is the curious phrase found in the Restatement, but, as recognized in federal court opinions, both customary and treaty-based human rights law prohibit "arbitrary detention" as such.

The problem for those who prefer a simple rule or flat prohibition of all abductions, however, is that the human rights standard contains within it its own exceptions. What is "arbitrary," otherwise "unlawful," or "unjust" will have to be considered in context and with reference to other legal policies at stake. The mere fact

(Eleanor C. McDowell ed., 1975) (United States memorandum regarding aircraft hijacking as "offense against . . . human rights"). Private kidnappings can also implicate human rights. But see Trajano v. Marcos, 978 F.2d 493, 501-02 (erroneously concluding that only actors "under official authority or under color of such authority may violate international law"). On the responsibility of private actors under international law more generally, see Paust, supra note 7, passim (citing numerous references).

49 RESTATEMENT, supra note 3, § 702 reporters' note 6; see also Wedgwood, supra note 48 at 241 ("Surely one can argue strongly that the right to know the identity of your arresting agent, the right to know the authority under which he acts, and the right for it to be a legal, lawful authority is a human right."); supra note 46.


51 Henkin, Replies, supra note 48, at 6.

52 Henkin, Replies, supra note 48, at 6.

53 See RESTATEMENT, supra note 3, § 702(e); see also id. cmt. n (noting that such prohibition reaches beyond custom as such and constitutes one of recognizable "peremptory norms (jus cogens)" which preempts any inconsistent law). On peremptory norms under customary international law, compare Anthony D'Amato, It's a Bird, It's a Plane, It's Jus Cogens, 6 CONN. J. Int'l L. 1 (1990) with Jordan J. Paust, The Reality of Jus Cogens, 7 CONN. J. Int'l L. 81 (1991).

of detention or even transnational detention does not make detention “arbitrary.” There must be something more. One factor might involve lack of consent of the foreign state, but such a factor is not determinative of what is or is not “arbitrary.”

I agree that in most cases each of the human rights prohibitions noted above can be implicated. I do not agree, however, that every abduction or capture of a person in foreign state territory without foreign state consent is violative of international law more generally or is necessarily “arbitrary,” “cruel,” “inhuman,” or “degrading” within the meaning of relevant human rights standards. For example, it may not be incompatible with principles of justice, “unjust,” “unlawful” or otherwise “arbitrary” to abduct or capture an international criminal in a context when action is reasonably necessary to assure adequate sanctions against egregious international criminal activity. It may not be “arbitrary” or “un-


just" to capture a dictator of a country who seeks to retain power illegally and through acts of violence in violation of the U.N. Charter, customary precepts of self-determination, and human rights of the citizens of such a country, especially at the request or with the approval of the lawfully elected officials of such a country.\footnote{See United States v. Noriega, 746 F. Supp. 1506, 1534 (S.D. Fla. 1990). See generally 84 Proc., Am. Soc'y Int'l L. 182-203, 236-56 (1990). Indeed, "consent" of the lawfully elected government would take the matter outside the general prohibition based on "territorial" rights. See Restatement, supra note 3, §§ 432(2), 433(1)(a); see also Malvina Halberstam, The Copenhagen Document: Intervention in Support of De-}


Senators Daniel Patrick Moynihan and Paul Simon have offered draft legislation partly supportive of such an exception. See S.72, A Bill to amend section 481(c) of the Foreign Assistance Act of 1961, 103d Cong., 1st Sess. (1993) ("Sec. 3. Violation of the Laws of War . . . . (7) This subsection does not prohibit the capture of any official, agent or employee of a state during armed hostilities for purposes of bringing such person to trial for violations of the internationally recognized laws of war."). It would be useful to amend such a draft to allow capture of "any person" (instead of merely state officials, agents, or employees) who violates the laws of war, and any person at any time (not merely during "armed hostilities") when otherwise reasonably necessary for international criminal law enforcement. S.72 also contains an exception to its prohibition of abductions if the foreign state is not "exercising effective sovereignty over such territory" (i.e., its own territory). \textit{Id.} Sec. 2 (proposed amendment as Section 481(c)(1)(B)). With respect to such an exception, it would be useful to add qualifying language reflecting the necessity and proportionality principles under customary international law, which nevertheless should be utilized as background for interpretation of the statute. A third exception in S.72 (designed to reflect developments under international law) might read: "(8) This subsection does not prohibit the capture of any person in accordance with international law." \textit{See infra} text accompanying notes 94-96. In a letter to members of the American Branch of the International Law Association's Human Rights Committee, Professor Michael Reisman declared:

\[\text{[L]awfulness . . . must be assessed by reference to international policies, the context that obtains at the moment and the aggregate consequences of the various options available. . . . There may be circumstances in which the abduction of a national of one state from its territory by officials of another government . . . may be lawful in international law. I read the Eichmann incident as one in which the international legal system effectively approved . . . [abduction], adding that the matter is more complicated with respect to "the way . . . apprehension of people with regard to whom there is no reasonable cause to suspect that they are criminals fits into an evolving system of international criminal law." Letter from Michael Reisman, to members of the American branch of the International Law Association's Human Rights Committee (May 14, 1993) (copy on file with St. John's Law Review).}\]
And it may not be “arbitrary” or “unjust” to capture an individual whose present activity forms part of a process of armed attack on a state in violation of the United Nations Charter and triggers a right of self-defense in response. Indeed, in the latter circumstance, abduction may provide a less violent and injurious option than general military strikes or targeting that is otherwise reasonably necessary and proportionate. Further, if a capture, arrest, and transfer is conducted as part of an armed activity authorized by the United Nations Security Council under its competence to address threats to the peace, breaches of the peace, or acts of aggression, such a capture may not be “arbitrary” or “unjust” and, in a given circumstance, may be permissible. The same conclusions may obtain when capture is part of a lawful exercise of regional power in accordance with Chapter VIII of the United Nations Charter.

Additionally, the thresholds of cruelty, degradation, or indignity might not be reached in all cases and might well depend upon democracy, 34 HARV. INT'L L.J. 168, 167-75 (1993); Jordan J. Paust, International Legal Standards Concerning the Legitimacy of Governmental Power, 5 AM. U. INT'L L. & Pol'y 1063, 1065, passim (1990); Panel, Democracy and Legitimacy—Is There an Emerging Duty to Ensure a Democratic Government in General and Regional Customary International Law?, in CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING EUROPEAN AND AMERICAN PERSPECTIVES 126-41 (Proceedings of Joint Conference held in The Hague, 1992). For this reason, the label “abduction” as opposed to arrest or detention may not be appropriate. Such facts would actually distinguish Noriega from Alvarez-Machain, not merely the absence of formal protest from Panama after Noriega's arrest. Moreover, our courts will defer to the Executive in matters concerning recognition of foreign governments. See, e.g., United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). Yet, the mere fact that the two governments agree (which solves the “territorial” rights of the state question) does not resolve the human rights issue, and the question whether an abduction or detention was “arbitrary” or “unjust” would have to be examined in context. See supra notes 22-23 and accompanying text; infra notes 97-98 and accompanying text. Additionally, human rights derogations may be permissible where reasonably necessary to stave off attacks against legitimate self-determination, see supra note 48, which may reach the level of self-defense, also implicating the next exception. Since international crimes are committed, the first exception can also apply.

See, e.g., Michael J. Glennon, State Sponsored Abduction: A Comment on United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746, 749, 755 (1992); Halberstam, In Defense, supra note 18, at 736 n.5 (“Not all abductions are violations of international law. Abduction of terrorists may be justified self-defense under Article 51 of the United Nations Charter and may thus not be in violation of international law.”); Paust, supra note 56, at 716, 720, 725-26; Pregent, supra note 18, at 104-06. In this instance, a community's right of self-defense under article 51 of the U.N. Charter would prevail over human rights claims as long as the responsive action was reasonably necessary and proportionate. See also supra note 48 (legitimate derogations); supra note 56 (S.72).
actual treatment of the captured person as opposed to capture per se. Nonetheless, when human rights of the abductee have been violated, the rights at stake are clearly those of the individual and that person must be accorded the right to an adequate or effective remedy.

Is the remedy of return of the abducted individual always necessary? In some instances, it may not be. When the foreign state objects to an abduction from its territory, the Restatement recognizes that “international law requires that [the abductee] be returned.”\(^{59}\) Similarly, the practice of states has often been in accord,\(^{60}\) but even in the case of a foreign state demand for return there may be exceptions in extraordinary cases\(^{61}\) and some textwriters disagree whether the Restatement’s proposition is complete.\(^{62}\) Indeed, the Restatement suggests that absent

\(^{59}\) Restatement, supra note 3, § 432 cmt. c; see also id. at reporters’ note 3; Richard Bilder, Remarks, 86 Proc., Am. Soc’y Int’l L. 451, 454 (1992) (adding “a court should not take jurisdiction”); Joan Fitzpatrick, Remarks, 86 Proc., Am. Soc’y Int’l L. 452 (1992); Feinrider, supra note 48, at 37, 47; Cook v. United States, 288 U.S. 102, 121-22 (1933) (“To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.”). But see Halberstam, Correspondence, supra note 56, at 256-57. The draft legislation S.72, supra note 56, contains the following “sanctions”:

(8) A person brought to the United States in violation of subsection (1)(b) hereof shall not be prosecuted by the United States Government if the state in which such abduction occurred objects and in the event of such an objection such person shall be promptly returned to the state in which the abduction occurred.

It is unclear from the draft whether mere objection is the test or whether a foreign state objection can be second-guessed in terms of the legislative scheme and its exceptions. Presumably, the language “brought to the United States in violation” and “such” abduction conditions the circumstance in which a foreign state protest operates, since one exception is contained within subsection (1)(B) and the other (the war crimes exception) is contained within subsection (7) of the overall amendment. See supra note 56. Yet, clarity would help.


\(^{61}\) See, e.g., supra notes 55-58 and accompanying text.

\(^{62}\) See, e.g., Glennon, supra note 58, at 750; Halberstam, In Defense, supra note 18, at 737 & n.7, 738-40, 744-45; Halberstam, Remarks, supra note 56, at 453-54; Halberstam, Correspondence, supra note 56, at 256-57; Alan Kreczko, Remarks, 86 Proc., Am. Soc’y Int’l L. 454 (1992). Of course, new circumstances might arise where the individual actually seeks asylum or refugee status and freedom from forced return under other international laws.
protest from the foreign state the remedy of return may not be required.\textsuperscript{63}

In my opinion, adequacy of remedies must be considered in context with reference to all relevant legal policies at stake. It might be that with respect to more ordinary abductions the remedy of return will be appropriate whether or not a foreign state protests the abduction. In fact, given the conclusion that a particular abduction violates the human rights of an abductee and such rights are those of the individual, it seems nearly irrelevant whether a foreign state also objects. Yet, in a given case, the lack of a demand for return may point, however indirectly, to some underlying rationale, based on an extraordinary set of circumstances, for denial of the remedy of return. In the complexities of circumstance, such a refusal to object might reflect at least one state's notions of justice (at least with respect to such a remedy), but I would stress that in no way should foreign state refusals simplistically constitute the "waiver" of individual claims.\textsuperscript{64} No single litmus test should preclude judicial inquiry into the appropriateness, the justness, of particular remedies. Here, reasonable people might disagree about appropriate remedies, but that precisely is the point.

Having demonstrated that most transnational abductions for purposes of domestic prosecution will result in a "denial of justice" (in the case of an alien abductee) and a violation of human rights law (both involving a violation of customary international law), it is worth revisiting the question whether these customary prohibitions could also be read into the meaning or constitute implied terms of an extradition treaty. Importantly, the Supreme Court in \textit{Alvarez-Machain} did not address individual claims of "denial of justice" or human rights deprivations. A more general prohibition under customary international law (mirrored in the U.N. Charter) was argued with respect to the background of the extradition treaty and allegedly implied terms, one prohibiting the exercise of governmental or "police" powers in a foreign state without foreign state consent.\textsuperscript{65}

\textsuperscript{63} See \textit{Restatement}, supra note 3, § 432 cmt. c and reporters' notes 2-3; see also Henkin, \textit{Replies}, supra note 48, at 6.

\textsuperscript{64} See supra notes 20-23 and accompanying text.

\textsuperscript{65} See \textit{Alvarez-Machain}, 112 S. Ct. at 2195-96; \textit{id}. at 2197, 2201-02, 2206 (Stevens, J., dissenting). On the general prohibition, see, e.g., The Apollo, 22 U.S. (9 Wheat.) 362, 370-71, 376-79 (1824); United States \textit{ex rel}. Lujan v. Gengler, 510 F.2d 62, 66-68 (2d Cir.), \textit{cert. denied}, 421 U.S. 1001 (1975); United States v. Toscanino, 500
Abroad, (11th Cir. 1992) (Hatehett, J., dissenting).

In this sense, the Supreme Court "missed the boat." The point has been made in a lower federal court opinion. In United States v. Chen, No. 92-50210 (9th Cir. 1993), apparently did not involve federal activity on foreign flag vessels as such, but there was consent from the Haitian government by international agreement for U.S. in-terdiction activities. See id. at 4685. Curiously, what the Supreme Court also did not address was whether federal acts on U.S. flag vessels were acts within the equivalent of United States territory for purposes of application of relevant treaty obligations. In this sense, the Supreme Court "missed the boat." The point has been made in a lower federal court opinion.

It should be noted that, under international law, a foreign flag vessel is the equivalent of foreign state territory. See, e.g., United States v. Flores, 289 U.S. 137, 155-59 (1933); United States v. Crews, 605 F. Supp. 730, 736 (S.D. Fla. 1985); S.S. Lotus (Fr. v. Turk.), P.C.I.J. (ser. A) No. 10 (1927); cf. Restatement, supra note 3, § 402 reporters' note 4. Thus, the exercise of police powers on a foreign state vessel without foreign state consent (i.e., consent in advance by treaty, tacit consent under relevant customary international law, or ad hoc consent) raises similar legal problems.

However, despite concerns of counsel, see Gail D. Cox, Court OKs Reach of INS Abroad, Nat'l L.J., Sept. 6, 1993, at 3, 29, the recent Ninth Circuit case, United States v. Chen, No. 92-50210 (9th Cir. 1993), apparently did not involve federal activity on a foreign flag vessel, but merely activity on a U.S. vessel otherwise on the high seas. The Supreme Court's decision in Sale v. Haitian Ctrs. Council, Inc., 61 U.S.L.W. 4684 (1993) did not address federal activity on foreign flag vessels as such, but there was consent from the Haitian government by international agreement for U.S. interdiction activities. See id. at 4685. Curiously, what the Supreme Court also did not address was whether federal acts on U.S. flag vessels were acts within the equivalent of United States territory for purposes of application of relevant treaty obligations. In this sense, the Supreme Court "missed the boat." The point has been made in a lower federal court opinion. See Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1515 (11th Cir. 1992) (Hatchett, J., dissenting).
In the majority's view, such a precept does not "relate[ ] to the practice of nations in relation to extradition treaties," and to infer its inclusion "goes beyond established precedent and practice." The majority reasoned that a violation of such a principle of customary international law is "of little aid in construing the terms of an extradition treaty" and would not necessarily constitute "a violation of this particular treaty." Moreover, the Court stated that "to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the treaty establishes requires a much larger inferential leap"—one larger than the less-than-nimble majority would recognize—and such principles "simply fail to persuade us that we should imply . . . a term prohibiting international abductions." The Court's inability to imply a well-understood prohibition under customary international law is, to say the least, quite bothersome in view of the holdings and rationale of the courts below in this and a related case and, indeed, in view of the well-reasoned dissenting opinion by Justice Stevens. The existence of such a prohibition as a logical and well-understood background to the extradition treaty, coupled with the overall purpose of extradition treaties, compels a more logical and common sense approach to interpretation. But "[t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions," the majority argued, and the purpose alleged was, for the majority, not sufficient to contain an implication to the contrary.

66 See Alvarez-Machain, 112 S. Ct. at 2195. But see Dominguez, 90 Tex. Crim. at 98-99 (customary prohibition of U.S. abduction of bandits in Mexico is one of "the implied limitations upon it under its treaty [of extradition] with Mexico" (emphasis added)); infra note 83.
67 Alvarez-Machain, 112 S. Ct. at 2196. But see infra note 83.
68 Alvarez-Machain, 112 S. Ct. at 2196 n.15. But see supra note 66; infra notes 72-74.
70 Id. 112 S. Ct. at 2196.
71 Id. But see supra note 66.
72 See the lower court opinions in Alvarez-Machain at 946 F.2d 1465, 1465-67 (9th Cir. 1991), and 745 F. Supp. 599, 609-10, 614 (C.D. Cal. 1990).
74 See Alvarez-Machain, 112 S. Ct. at 2197-2203, 2206 (Stevens, J., dissenting).
75 Id. at 2193.
76 Id. at 2196 n.14.
Commentators disagree whether such a prohibition should have been implied, but the majority opinion seems conclusory, result-oriented, illogical, and ultimately bizarre. The purpose of extradition treaties is relevant. The customary prohibition of abductions is also relevant and "of aid" in interpreting an extradition treaty addressing the means of acquiring custody of an individual. In addition, the absence of a clear "practice" specifically tied to extradition treaties as such would not be surprising in view of the well-known prohibition of abductions under customary international law and the lack of a previously known claim by any government that such prohibitions should not be implied—the sort of claim that the district court below found to be "absurd," the Ninth Circuit in a related case found to be "simply mak[ing] no sense whatsoever," and Justice Stevens in dissent found to be

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77 Compare Halberstam, In Defense, supra note 18, at 737, 744-46; Halberstam, Correspondence, supra note 56, at 256-57; Jacques Semmelman, International Decisions, 86 Am. J. Int'l L. 811, 816-17 (1992) with Abramovsky, supra note 38, at 176; Bilder, supra note 59; Valerie Epps, Forcible Abduction, Jurisdiction And Treaty Interpretation, International Practitioner's Notebook, No. 55, at 6-7 (Am. Branch, I.L.A. Oct. 1992); Glennon, supra note 58, at 748; Henkin, supra note 65, at 1-2; Leigh, supra note 54, at 762-63; Paust, Correspondence, supra note 18, at 255; Ruiz-Bra...
“shocking” and ultimately “monstrous.” Moreover, in this case there was a relevant “practice” between the United States and Mexico confirming beyond reasonable doubt the shared expectations of both countries that abductions would constitute clear violations of prior extradition treaties between the two, and there is simply no logical reason why such a shared view was not retained.

More generally, customary international law and relevant multilateral treaties are appropriate aids for interpreting bilateral treaties. Although the use of international law as background for interpretation has found acceptance in a long line of United States cases, such an approach to interpretation seems

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82 See Alvarez-Machain, 112 S. Ct. at 2201-02, 2205-06 (Stevens, J., dissenting) (quoting The Apollon, 22 U.S.(9 Wheat.) 362, 370-71 (1824)); see also Ruiz-Bravo, supra note 48, passim.

83 See Alvarez-Machain, 112 S. Ct. at 2191, 2197 & n.1, 2199 & nn.14-15 (present interpretation and protests by Mexican government); Letter from T.F. Bayard, Secretary of State to T.C. Manning (Feb. 26, 1887), in DIPLOMATIC INSTRUCTIONS OF THE DEPARTMENT OF STATE, 1801-1906; 4 Moore, supra note 43, § 204, at 276; Letter from J. Blaine, Secretary of State to Governor O.R. Roberts of Texas (May 3, 1881), in 4 Moore, supra note 43, § 603, at 330 and in DOMESTIC LETTERS OF THE DEPARTMENT OF STATE, 1784-1906, quoted in Verdugo-Urquidez, 939 F.2d at 1354; Letter from Chargé B. Davalos to Secretary R. Bacon, in Papers Relating to the Foreign Relations of the United States, H.R. Doc. No. 1, 59th Cong., 2d Sess., pt. 2, at 1121 (1906), quoted in part in Alvarez-Machain, 112 S. Ct. at 2194 n.11; Fitzpatrick, supra note 59, at 452; Ruiz-Bravo, supra note 48, at 859 n.163; see also Dominguez, 90 Tex. Crim. at 98-99 (quoted supra note 66); cf. Alvarez-Machain, 112 S. Ct. at 2194 & n.11 (noting that United States did not disagree and would extradite abductors, but U.S. unilateral view and/or executive action with respect to jurisdiction and remedy were controlled by Supreme Court decision in Ker v. Illinois, 119 U.S. 436 (1886)); id. at 2204 n.30 (Stevens, J., dissenting) (same).

84 See, e.g., Vienna Convention on the Law of Treaties, supra note 78, art. 31(3)(c) (“any relevant rules of international law applicable in the relations between the parties”); Alvarez-Machain, 112 S. Ct. at 2197, 2201-02, 2203 n.27 (Stevens, J., dissenting); Lung-chu Chen, An Introduction to Contemporary International Law 278-80 (1989); Myres S. McDougal et al., The Interpretation of Agreements and World Public Order 29-30, 44, 62, 105-06, 260-61 (1967); 1 Oppenheim, supra note 65, at 952-53; Joseph G. Starke, An Introduction to International Law 478-81 (10th ed. 1989); supra note 79; infra note 85.

simply to have been ignored by the majority opinion. Also, it is logical to consider a bilateral extradition treaty in view of the United Nations Charter’s prohibition of abductions not merely because the Charter is a relevant multilateral treaty, but also because, under Article 103 of the Charter, Charter obligations must prevail in the event of an unavoidable clash with any other treaty, and thus must logically be considered as background and opposed to bizarre interpretations favoring illegality. Indeed, “silence” in a bilateral extradition treaty concerning matters covered and guaranteed by the United Nations Charter is not merely understandable, but also cannot logically be used to even set up the sort of clash between a bilateral treaty and the U.N. Charter in which the Charter ultimately must prevail.

In view of the above, a general prohibition of transnational abductions should have been implied by the Court in *Alvarez-Machain* with respect to the U.S.-Mexico extradition treaty. The remaining question concerning whether an individual has stand-

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86 Compare *Alvarez-Machain*, 112 S. Ct at 2195-96 (Rehnquist, C.J.) with id. at 2197, 2201-03 (Stevens, J., dissenting).

87 See, e.g., id. at 2201 & n.20 (Stevens, J., dissenting); *Verdugo-Urquidez*, 939 F.2d at 1352; Glennon, *supra* note 58, at 747-48; Ruiz-Bravo, *supra* note 48, *passim*; Wilder, *supra* note 81, at 989; *supra* note 55. Charter prohibitions of two sorts are relevant: (1) concerning the use of “force,” see *supra* notes 55, 65, and (2) concerning human rights. See *supra* notes 13, 41, 45-54; see also *supra* text accompanying note 39.

88 U.N. CHARTER art. 103. Article 103 reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *Id.*

89 See *Alvarez-Machain*, 112 S. Ct. at 2201 & n.20 (Stevens, J., dissenting); Glennon, *supra* note 58, at 748; Paust, *Correspondence, supra* note 18, at 255; Ruiz-Bravo, *supra* note 48, 852.

90 See, e.g., *Alvarez-Machain*, 112 S. Ct. at 2201 & n.20 (Stevens, J., dissenting) (“It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory.”); *Verdugo-Urquidez*, 939 F.2d at 1354.
ing under the bilateral treaty could have then been addressed, and it is certainly possible that an individual’s separate claims of “denial of justice” or human rights violations could have formed the basis for an implied right to be free from abduction, even under the extradition treaty.\(^9\) In any event, such reasoning is not necessary given the fact of individual standing and the right to a remedy for denials of justice and violations of the victim’s human rights. Additionally, in the actual case, the complaint by Mexico concerning a violation of the extradition treaty was sufficient to allow standing even under a “derivative” rights theory.

Also, in the actual case, no exception would have existed with respect to: (1) persons reasonably accused of having committed international crimes (especially since Mexico was willing and able to prosecute, had breached or denied no relevant international obligation, and posed no threat relevant to the necessity for abduction), (2) persons similarly accused of crimes against self-determination (and in this case the Government of Mexico did not approve of the arrest by U.S. agents), (3) persons involved in armed attacks against the United States implicating in any way a right of self-defense under the United Nations Charter, or (4) action authorized by the U.N. Security Council or a regional organization. This was merely an ordinary circumstance\(^2\) posing no extraordinary exception, but resulting in an extraordinarily poor reading of a bilateral extradition treaty.

With respect to congressional response, legislation in this area is not actually necessary since the President has a constitutional duty to faithfully execute the law, including international law,\(^3\) but new legislation could be useful to reinforce the general prohibition of abductions under international law, to send a message to those within the executive branch who still dare to assert that the President is above the law, and to assure adequate

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\(^9\) If there had been enough evidence to pursue prosecution (there was not—see Don J. DeBenedictis, *Scant Evidence Frees Abducted Doctor*, 79 A.B.A. J. 22 (1993)), this abduction might have been more unlawful than arbitrary, more arbitrary than unjust, yet still more ordinary than extraordinary in the sense identified above.

\(^2\) More generally, rights certainly can be implied from treaties under well-recognized tests. See, e.g., Edye v. Robertson, 112 U.S. 580, 598-99 (1884) (“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 . . . .” (emphasis added)); Owings v. Norwood’s Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) (“Whenever a right grows out of, or is protected by, a treaty, it is . . . to be protected.” (emphasis added)).

\(^3\) See supra note 18.
civil and criminal sanctions against those who order or participate in abductions violative of international law. Such legislation need not be complicated. 94 Like several other statutory approaches incorporating international law, new legislation could incorporate such law by reference. 95 A new statute might simply begin: “Any person who orders or participates in an abduction of any person in violation of international law, when the accused knew or should have known that the abduction would be violative of international law, shall be liable to . . .” [list criminal and/or civil sanctions]. The language in such legislation would necessarily include any exceptions under international law and could thereby avoid complicated drafting schemes attempting to articulate every possible exception under international law now and in the future. Thus also, it provides a useful flexibility in case of changes in international standards, much like legislation incorporating the laws of war. 96

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94 Cf. Glennon, supra note 58, at 753, 755 (discussing possible congressional response to Alvarez-Machain). Portions of a current draft (S.72) are quoted supra note 56.


96 See 10 U.S.C. §§ 818, 821 (1993); supra note 95. On June 8, 1993, the Human Rights Committee of the American Branch of the International Law Association adopted the following resolution:

The Human Rights Committee of the American Branch of the International Law Association,

Alarmed at prior tolerance by the Department of Justice of transnational abductions in violation of international law;

Noting that under our Constitution the President and all executive officers and agents are bound faithfully to execute the law, including international law;

Applauds the efforts of those in the United States Congress to assure that the Executive branch engages in lawful law enforcement abroad; and

Hereby recommends:

1. That any future legislation in this regard incorporate international law by reference (as in 10 U.S.C. §§ 818, 821; 18 U.S.C. § 1651; 28 U.S.C. § 1350), and thus allow flexibility in case of changes or exceptions under international standards; and

2. That Congress consider adopting one or both of the following as legislation:
A different form of legislation might merely seek to assure that executive compliance is forthcoming. Such legislation could read: “No federal or state official, officer, or agent shall knowingly order or participate in an abduction of any person in violation of international law.” Additionally, Congress may wish to emphasize such a prohibition in legislation authorizing U.S. participation in an important and growing area of concern, that involving transnational international criminal law enforcement. Congress might wish to condition such participation through legislation as opposed to leaving developments in this area to ad hoc executive practice. A statute of this sort might begin as follows:

22 U.S.C. § 1733

*International Criminal Law Enforcement Act*

(a) The President of the United States is hereby authorized to engage or participate in or direct extraterritorial law enforcement efforts in foreign state territory:

(1) when the foreign state has consented to such enforcement efforts; or

(a) “No federal or state official, officer, or agent shall knowingly order or participate in an abduction of any person in violation of international law.”

(b) “Any person who orders or participates in an abduction of any person in violation of international law, when the accused knew or should have known that the abduction would be in violation of international law, shall be liable to . . . [specify criminal and/or civil sanctions, which may distinguish between federal officials, officers or agents, on the one hand, and all other persons, on the other hand].

3. Alternatively, that Congress should consider adopting the following as an amendment to current drafts:

“This subsection does not prohibit the capture of any person in accordance with international law.”

4. Additionally, that Congress should consider adopting in relevant legislation:

“The United States recognizes the human rights of all persons not to be removed from their country against their will except as international law permits.”

Members of the Committee were: Charles D. Siegel, Chair, Robert Bard, Thomas Bergerenthal, Lung-chu Chen, Anthony D'Amato, Joan M. Fitzpatrick, Thomas M. Franck, Claudio Grossman, Sofia Gruskin, Hurst Hannum, Louis Henkin, Paul L. Hoffman, Farrokh Jhabvala, Nina Lahoud, Sidney Liskofsky, Bert B. Lockwood, Steven Marks, David A. Martin, James A.R. Nafziger, Ved P. Nanda, Jordan J. Paust, Mark A. Roy, Prakash S. Sinha, W. Michael Reisman (who agreed that “persons may be captured by government agents acting under color of national authority when such capture is in accord with international law”), and Malvina Halberstam (dissented).
(2) when such efforts are reasonably necessary and proportionate to assure enforcement of international criminal law and such action is otherwise permissible under international law.

(b) As used herein, the phrase "international criminal law" is meant to include, at a minimum, coverage of the following crimes recognized under customary or treaty-based international law (and incorporated herein by reference):

(1) genocide;
(2) war crimes;
(3) crimes against self-determination, aggression against authority, or politicide;
(4) crimes against human rights;
(5) hostage-taking;
(6) attacks on or hijacking of aircraft, spacecraft, or merchant vessels;
(7) piracy; and
(8) slave trade.

(c) As used herein, the phrase "consented to" is meant to include consent in advance by international agreement or by implication under customary law and ad hoc consent of a foreign state.

CONCLUSION

When abductions occur in violation of international law, customary prohibitions of "denials of justice" and human rights violations, as well as more general principles of justice, demand recognition of individual standing and the right to an adequate remedy. Clearly, "territorial" and "derivative" rights are not the only rights at stake. Yet, because of the various interests of the individual, the state, and the international community, as well as the various legal policies at stake, not all transnational abductions should result in violations of international law. Certain extraordinary circumstances involving reasonably necessary international criminal-napping, acts of self-defense under the United Nations Charter, or permissible actions under Chapters VII and VIII of the U.N. Charter pose reasonable exceptions to a flat prohibition of the use of force to arrest persons in foreign territory without foreign state consent. Nonetheless, absent such extraordinary circumstances, transnational abductions recognizably constitute vio-
lations of several international norms, including those providing relevant rights of the individual victim of an abduction, and such rights remain those of the individual. They are neither "derivative" of nor ultimately waivable by the state. Indeed, they are rights *erga omnes*, owing by and to all humankind.

With respect to the claimed exceptions in extraordinary circumstances, all of this assumes an executive branch willing to abide by customary and treaty-based international law, and thus the mandate of Article II, Section 3 of the United States Constitution, and an executive branch capable of making fine point distinctions with respect to the context and relevant legal policies at stake. When it becomes evident that this is not the case, when the executive claims to be above the law and able to act in lawless disregard of its duty under the Constitution, the need for judicial review, indeed judicial supervisory power, becomes all the more necessary in a free society. Claims concerning standing, denials of justice, and human rights take on far greater import in the face of executive claims that its illegalities should be controlling. Ultimately, this quest for unbounded power threatens much more than law and justice or our own rights and liberties. Ultimately, this quest for power uncontrolled by law is subversive of constitutional democracy.

I fear not this evil, for despite momentary setbacks and flirtations with a postulated presidential power to violate the law of the land, I am confident that our generally shared commitment to law is preferable and I am optimistic that it will prevail.

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97 *See supra* notes 22-23, 57 and accompanying text.


99 *See supra* note 18.


102 *See* Alvarez-Machain, 112 S. Ct. at 2201-03, 2206 (Stevens, J., dissenting); Paust, *supra* note 100; *supra* note 18.
Draft

Declaration on Principles of International Law Concerning State Sponsored Abductions

THE GENERAL ASSEMBLY,

Considering the principles of international law concerning the use of force and impermissible intervention in foreign state territory reflected in the United Nations Charter and in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,

Alarmed at the use of transnational abductions to obtain custody of those accused of domestic crimes,

Affirming that customary human rights law guaranteed also by or thru the United Nations Charter prohibits the arbitrary arrest or detention of persons,

Recognizing that the Convention on the Rights of the Child prohibits the abduction of children,

Considering Security Council Resolution 138 of 23 June 1960 (concerning the abduction of Adolf Eichmann) and Security Council Resolution 579 of 18 December 1985 (condemning all acts of abduction),

Hereby Proclaims the following principles:

1. No State has the right to use, participate in, or authorize the use of force or police power in any other State in connection with transnational abduction without the consent of such other State or unless it is otherwise permissible under international law.

2. Abductions which are arbitrary under the circumstances constitute violations of the human rights of the abducted persons, are impermissible, and require appropriate domestic or international remedies.

3. Whether or not abduction or capture is permissible under international law must be considered in light of relevant legal policies at stake and all the circumstances of each particular case, including:
(a) whether such action is part of a lawful exercise of the right of self-defense,

(b) whether such action is part of a lawful exercise of power authorized by the Security Council under Chapter VII of the Charter,

(c) whether such action is part of a lawful exercise of regional power in accordance with Chapter VIII of the Charter,

(d) whether such action is part of a lawful exercise of self-determination assistance at the request or with the consent of a given people and in accordance with the principles and purposes of the Charter, and

(e) whether such action is part of a lawful and necessary effort to arrest those reasonably accused of international crime over which there is universal jurisdiction.

4. Nothing in this Declaration shall be construed as prejudicing the provisions of the Charter or the rights and duties of Member States or of peoples or individuals under the Charter taking into account the elaboration of rights, duties, and powers addressed in this Declaration.

5. In particular, it is emphasized that the territorial interests of States and the human rights of individuals are of a different nature and that mere consent to capture by relevant States does not bar inquiry into the human rights of an arrested or captured person. Nonetheless, the circumstances addressed in subparagraphs (a)-(e) of paragraph 3 provide, at least, a presumption that capture is not arbitrary.