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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

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I. EXTRADITION/FORCIBLE ABDUCTION

FORCIBLE INTERNATIONAL ABDUCTION OF MEXICAN NATIONAL BY UNITED STATES DRUG ENFORCEMENT ADMINISTRATION AGENTS HELD NOT TO VIOLATE EXTRADITION TREATY BETWEEN UNITED STATES AND MEXICO. *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

Humberto Alvarez-Machain (Alvarez), a citizen and resident of Mexico, was indicted for allegedly participating in the kidnap and murder of a United States Drug Enforcement Administration (DEA) agent and Mexican pilot. On April 2, 1990, Alvarez, in connection with the indictment and under the authority of the DEA, was kidnapped from his home and flown by private plane to Texas to stand trial. The district court dismissed the indictment on the ground that it violated the extradition treaty existing between the United States and Mexico and thus ordered Alvarez's expatriation. The court of appeals affirmed. On Appeal to the United States Supreme Court, the Court *Held: Reversed and remanded*. Where an extradition treaty is silent, a court properly may

exercise jurisdiction over a defendant even though that defendant's presence is procured by means of a forcible abduction.

Writing for the Court, Chief Justice Rehnquist followed the early case of *Ker v. Illinois*, 119 U.S. 436 (1886). *Ker* held that a court's power to try a person for a crime is not affected by the fact that jurisdiction had been obtained by a forcible abduction. See *Frisbie v. Collins*, 342 U.S. 519 (1952). The Court noted that *Ker* was applicable to the present case since the extradition treaty between Mexico and the United States did not explicitly prohibit abductions by its terms. Moreover, the Court rejected Alvarez's contention that "international abductions are 'so clearly prohibited in international law' that there was no reason to include such a clause in the Treaty itself." Instead, the Court maintained that to imply such a prohibition would necessitate "a much larger inferential leap, with only the most general of international law principles to support it." Recognizing that Mexico had protested the abduction of Alvarez, the Court left the decision whether he should be returned, which is not within the terms of the Extradition Treaty, to the executive branch. *Significance*: The United States may enter the territory of another nation to kidnap a foreign national for trial within the United States.

II. IMMUNITY FROM ARREST

A DISTRICT COURT ORDER TO PROHIBIT THE ARREST OF A FUGITIVE IN A FOREIGN STATE IN ORDER TO ELICIT EXCULPATORY TESTIMONY IS REJECTED THROUGH COURT OF APPEALS' ISSUING OF WRIT OF PROHIBITION. *United States v. Santtini*, 963 F.2d 585 (3d Cir. 1992).

In September 1991 Boris Conde was discovered by special agents of the Drug Enforcement Administration driving a truck containing materials used in the cocaine conversion process. Cooperating with officials, Conde inculpated three alleged co-conspirators. Before Conde's plea agreement was sent, however, he fled the United States to Colombia.

On December 6, 1991, after several attempts to locate Conde, a United States Magistrate found probable cause to believe Conde had committed the crimes charged and issued a warrant for his arrest. On December 20, Conde issued a written statement that he alone was responsible for the criminal acts and that he had implicated the others only to ensure his own release. Absent an agreement, the United States was barred from conducting discovery on Colombian soil. Conde offered to have his deposition taken in Costa Rica, however, provided that he would not be arrested. On February 11, the district court sanctioned the agreement and ordered the government not to arrest Conde while he was

in Costa Rica for the deposition.

The government responded with a motion for reconsideration of the district court's order, arguing that the lower court had no authority to interfere with a valid arrest warrant. The district court denied the motion, concluding that "the interests of a full and complete availability of evidence which the defense requires which is material to their case, outweighs the interests of the government which is immaterial in affecting his arrest in Costa Rica." The government filed a notice of appeal and petition for a writ of prohibition.

On appeal, the United States Court of Appeals for the Third Circuit *Held: Writ of prohibition granted.* The court held that the district court had exceeded its authority in ordering the government not to arrest a foreign fugitive to ensure that fugitive's participation in a criminal deposition. The court based its holding on a recognition that the district court order would interfere with the separation of powers within the federal government. The court noted that a federal district court cannot refuse to issue an arrest warrant once probable cause is established. Significantly, if carried out, the district court order would be effectively unreviewable. Once Conde had testified in Costa Rica, he presumably would return to Colombia, whereupon he would be irretrievable due to the fact that no extradition agreement exists between Colombia and the United States. *Significance:* The Third Circuit has addressed a question of first impression in the federal judicial system, holding that a federal district court does not have the authority to prohibit federal law enforcement agents from arresting a foreign fugitive in order to ensure that fugitive's testimony.

III. FOREIGN SOVEREIGN IMMUNITY

EXPROPRIATION CLAIM AGAINST ARGENTINA HELD TO FALL WITHIN "COMMERCIAL ACTIVITY" AND "INTERNATIONAL TAKINGS" EXCEPTIONS TO FSIA'S GRANT OF SOVEREIGN IMMUNITY—DELIBERATE AVAILMENT OF U.S. COURTS HELD TO SERVE AS IMPLIED WAIVER OF SOVEREIGN IMMUNITY TO TORTURE CLAIM. *De Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

On March 24, 1976, ten masked gunmen associated with the military junta that had overthrown the government of Argentina President Peron forcibly entered the home of Jose and Lea Siderman in Tucumun Province, Argentina. The gunmen took Mr. Siderman to a remote building and subjected him to verbal anti-Semitic harassment and torture for seven days. He left Argentina in response to the threats that he and his family would otherwise be killed. The persecution did not end in Argen-

tina, however. While Mr. Siderman resided in both Italy and the United States, he was the subject of fabricated criminal actions and extradition attempts initiated by Argentina. Argentina also succeeded in seizing the Siderman family business, Inmobiliaria del Nor-Oeste, S.A. (INOSA), in a judicial intervention proceeding in Argentina.

In 1982, after becoming permanent residents of the United States, the Sidermans filed a complaint against Argentina alleging torture, harassment, and the expropriation of property in Argentina. The district court dismissed the Sidermans' expropriation claim. The dismissal was based upon an unwillingness to interfere with United States foreign policy under the act of state doctrine. The torture claims were dismissed on the ground that Argentina was immune from suit under the Foreign Sovereign Immunities Act. The Sidermans appealed their case to the Ninth Circuit.

The Ninth Circuit Court of Appeals *Held: Reversed and remanded*. The court held that Argentina is not immune from the expropriation claim because the company had been taken in violation of international law and had "substantial contact" with the United States. Argentina was not immune from the torture claim since it chose to avail itself of United States courts in its efforts to maliciously prosecute Jose Siderman.

The court noted that the law had changed since *The Schooner Exchange v. M'Faddon* ruling and the era of unlimited sovereign immunity that followed it. Since Congress enacted the FSIA in 1976, a "regime of deference" was replaced with a type of qualified immunity, outlined in the exceptions to FSIA. Because Argentina was motivated by profit, advertised INOSA in the United States, accepted major United States credit cards, and solicited United States customers through Argentina's national airline, the court found a material connection between Argentina's actions in the United States and the Siderman's expropriation claim. Moreover, INOSA was found to be taken for personal profit, rather than for public purpose. *Significance*—The Ninth Circuit has denied absolute immunity under FSIA to a country that had significant commercial and judicial contacts in the United States.

IV. DISCOVERY/INTERNATIONAL RULES OF JUDICIAL PROCEDURE

FOREIGN LITIGANT IS ENTITLED TO DISCOVERY IN U.S. WITHOUT FIRST HAVING TO SEEK DISCOVERY IN ITS OWN COURTS. *Malev Hungarian Airlines v. United Technologies*, 964 F.2d 97 (2d Cir. 1992).

Pratt & Whitney, an airplane engine manufacturer, filed a complaint in Hungary against Malev, the Hungarian national airline, seeking spe-

cific performance on a contract to purchase several planes. Four days later, Malev requested discovery in the United States District Court for the District of Connecticut. It sought to depose several employees of Pratt & Whitney and to obtain documents relevant to the litigation in Hungary.

The district court denied Malev's request for discovery because Malev failed first to request discovery before a Hungarian court.

The Court of Appeals of the Second Circuit *Held: Reversed and remanded*. The court held that in order to effectuate judicial cooperation between the United States and foreign countries, a court may not impose quasi-exhaustion requirements upon the filing of discovery requests. Specifically, the court found that the requirement to seek discovery first from the foreign tribunal is contradictory to the goals of the Commission on International Rules of Judicial Procedure, 28 U.S.C. § 1782 (1988). *Significance*—As the dissent points out, this opinion appears to be the sole reported case in which a United States court is required to supervise discovery in the United States with respect to evidence that is under the jurisdiction of a foreign court.

