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From Noiega to Pinochet: Is There an International Moral and Legal Right to Kidnap Individuals Accused of Gross Human Rights Violations

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Human Rights Law, International Law: History, Criminal Law, Dictatorship, Globalization, International Criminal Law, Politics

FROM NORIEGA TO PINOCHET:

Is there an International Moral and Legal Right to Kidnap Individuals Accused of Gross Human Rights Violations?

SHERRI L. BURR*

I. INTRODUCTION

Throughout human history, people have committed atrocities against each other. Numerous instances of genocide, slavery, and wholesale annihilation have been committed on several continents. The recent incidents in East Timor, Kosovo, Rwanda, and Sierra Leone are, unfortunately, continuations of the theme of abomination. Many scholars have addressed the moral and legal ramifications of military intervention on humanitarian grounds in these and similar cases.¹

This article concerns the moral conceptions of justice and whether there should be an international legal right to kidnap individuals accused of gross human rights violations, and whether they should be brought before national and international judicial forums. My interest in this topic grew initially from teaching the case of Dr. Humberto Alvarez Machain. Dr. Alvarez Machain, a Mexican citizen, was kidnapped from his medical office in Guadalajara, Mexico, at the behest of United States Drug Enforcement Agents (DEA) in 1990.² For a promised reward of \$50,000, Mexican kidnapers flew him to the U.S.-

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1. See Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AMER. J. INT'L L. 279 (2000); and Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

2. Linda Greenhouse, *Justices Hear Case on Right of U.S. to Kidnap Foreigners*, N.Y. TIMES, Apr. 2, 1992, at D22.

Mexico border where the DEA took him into custody.³ The United States never submitted a request to the Mexican government to extradite Dr. Alvarez Machain.⁴ To extradite him would have required an official transfer from the Mexican to the U.S. government. Instead, the U.S. Government opted to kidnap him.

Dr. Alvarez Machain appealed his capture to the United States Supreme Court on grounds that he had been brought to this country in violation of the US-Mexico Extradition Treaty,⁵ and thus the District Court lacked jurisdiction over his person. Kenneth Starr, the Bush Administration's Solicitor General at the time, argued before the Supreme Court that the federal government had the right to kidnap foreigners and prosecute them in the United States for crimes committed abroad.⁶ Mr. Starr contended that the extradition treaty between the United States and Mexico is a "tool" that does not limit the Government's freedom to use other means to pursue "narco-trafficking."⁷

The Supreme Court, in a decision written by Chief Justice Rehnquist, held that Alvarez Machain's capture did not deprive the U.S. courts of jurisdiction because the US-Mexico extradition treaty was silent on the issue of kidnapping.⁸ Since the treaty did not forbid kidnapping, it was permitted, Rehnquist maintained.

The outcome seemed shocking at the time,⁹ yet the theory that international law permits what it does not forbid was also postulated in the SS Lotus case.¹⁰ In the SS Lotus case, France sued Turkey before the Permanent Court of International Justice after Turkey established jurisdiction over Lieutenant Demons, a French citizen, and captain of a boat that collided with a Turkish Steamer on the high seas, resulting in the death of several Turkish citizens.¹¹ France contended that in order for Turkish courts to have jurisdiction over Demons, they must present a jurisdictional principal recognized by international law in favor of

3. Linda Greenhouse, *Justices Hear Case on Right of U.S. to Kidnap Foreigners*, N.Y. TIMES, Apr. 2, 1992, at D22.

4. *Id.*

5. Extradition Treaty, May 4, 1978, U.S.-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656.

6. Greenhouse, *supra* note 3.

7. *Id.*

8. *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992).

9. Professor Tom Franck of New York University argues that there is something called the laughter test in International Law. If a nation puts forth a justification for an action before the world community, and the response is laughter, then the action is illegal. When I discuss the Alvarez Machain case in International Law, students routinely laugh at Rehnquist's reasoning, as did Professor Deborah Post of DePaul University when I told her about the case as part of my topic.

10. *The Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J.

11. *Id.*

Turkey. The court rejected this theory and affirmed the conviction of Lt. Demons of manslaughter.¹²

II. THE STRUGGLE OVER PINOCHET

Another example of the use of kidnapping individuals accused of evil acts is the case involving General Augusto Pinochet. Pinochet was under house arrest in London for 16 months awaiting extradition to Spain on charges of genocide, torture, kidnapping and murder in connection with the disappearance of 3,197 people in the years after he seized power in a 1973 coup.¹³ Spain's initial warrant for Pinochet's arrest was declared defective because: no alleged offense was committed in Spain, Pinochet was not a Spanish citizen, and the UK had no jurisdiction over Pinochet.¹⁴ Spain amended its complaint to allege that Pinochet murdered Spanish citizens in Chile, and committed torture and hostage-taking, both universal crimes triable in Britain, specifically under the Criminal Justice Act of 1988 and the Hostage Taking Act of 1982.¹⁵ Officers arrested Pinochet the day following the issuance of the second warrant. After several proceedings and decisions by the House of Lords, the British Government declared on November 25, 1998 that General Pinochet lacked immunity from arrest as a former head of state. It was poised to extradite Pinochet to Spain¹⁶ before an outcry erupted among certain conservative leaders including Baroness Margaret Thatcher, who forcibly argued against extradition. They argued that Britain should be appreciative for the support Pinochet gave Britain in 1982 during the Falklands Islands War with Argentina.¹⁷ Britain eventually released Pinochet on humanitarian grounds, stating he was too ill to stand trial.¹⁸ Upon his return to Santiago, Chile however, he walked off the plane on his own accord to a 21-gun salute and soon thereafter left for his beach house retreat.¹⁹

What would be the world's response if Spain followed the United States example, backed by the Rehnquist court, and simply absconded with Pinochet to bring him to justice? After all, the UK-Spain Extradition Treaty does not forbid kidnapping²⁰ and Pinochet is accused of con-

12. *The Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J.

13. See William Hoge, *After 16 Months of House Arrest, Pinochet Quits England*, N.Y. TIMES, Mar. 3, 2000, at A6.

14. THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS 3 (Diana Woodhouse ed. 2000).

15. *Id.*

16. William Hoge, *Britain Won't Free Pinochet, Ruling the Case Can Proceed*, N.Y. TIMES, Dec. 10, 1998, at A3.

17. Hoge, *supra* note 14.

18. *Id.*

19. *Id.*

20. Both Spain and England are signatories to the European Convention on Extradition.

tributing to the death of over 3,000 Chilean and Spanish individuals in addition to the torture and/or disappearance of more than 10,000 others. Moreover, he created an atmosphere of fear and intimidation, still palpable in Chile in 1991, about a year after he had relinquished power to his successor Patricio Aylwin.²¹ The idea that Pinochet could completely escape punishment must seem untenable to his victims.

In August, 2000, the Supreme Court of Chile divested the 84-year-old General of his lifetime senatorial immunity from prosecution.²² The court's ruling opens the door for the prosecution of retired military and police officers for the disappearance of citizens. The court also held that any person who disappeared during the dictatorship and has not been located was the victim of a continuing kidnapping offense. Pinochet subsequently appeared in court and was indicted. His family says they will fight to have him exempted from trial because he suffers from diabetes, circulatory problems, and the effects of three strokes.

Similarly, when I saw the pictures of the horrors in Kosovo and the leader Slobodan Milosevic walking around and talking as if he had few cares, despite his campaign of terror that has already killed hundreds of Kosovo Albanians and driven more than 200,000 from their homes,²³ I wondered what would it take to bring him to justice. After all, as long as he is the head of Kosovo, there is little likelihood that he would acknowledge his crimes against humanity, and surrender himself for trial by an international tribunal. Indeed, many such leaders attempt to justify their activities in the name of God.²⁴

tion, with Spain acceding to the convention on July 24, 1979 and the United Kingdom on December 21, 1990. See European Convention on Extradition, Paris, 13.XII. 1957. ETS No. 24.

21. I visited both Chile and Argentina in 1991. Chile had recovered its democratic tradition a year earlier, yet the energy of Pinochet remained. Although the curfew was lifted, Chileans were in their homes by 10:00 p.m. This contrasted quite distinctly with Argentina, whose generals had relinquished power a decade earlier after their defeat in the Falklands War. In Buenos Aires, the second and last stop on my South American tour, my host met me at the airport at 11:30 p.m. and announced we were going out to dinner. When we left the restaurant at 2:00 a.m., people were still streaming in to dine. In Santiago, most of the social life was confined to private parties with a limited circle of friends and family, either an indication of the tense environment or a very introverted society.

22. John R. Schmertz & Mike Meier, "Highest Court deprives Pinochet of Immunity." Vol 6, No. 8 Transnational Law Associates, August, 2000.

23. Madeleine K. Albright, *Our Stake in Kosovo*, N.Y. TIMES, Mar. 28, 2000 at A23.

24. Consider, for example, the concept of "The Just War." Just wars were preordained by the Catholic Church as necessary for the fight against evil in the world. See, e.g. HENKIN, PUGH, SCHACHTER, & SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 873-75, 941-44 (3d 1993).

III. WHEN LAW AND MORALITY CLASH

Does international law exist if there is no punishment for Milosevic, Pinochet and other violators of human rights and no justice for their victims? If law is synonymous with justice and justice means that violators are punished, then what kind of law is international law? Many argue that there is no such thing as international law. They say this because in so many instances, be it Chile, Kosovo, Sierra Leone, or Rwanda, might seems to make right. They see leaders perpetrating gross horrors on their populations, with no external force to temper their abusive exercise of power.

The lay man's perceptions of justice date from many sources; one of the oldest being the Bible. The King James version of the Bible speaks of justice in two representative passages. In the Old Testament, Leviticus 24 contains the following references to retributive justice: "And if a man cause a blemish in his neighbor, as he hath done, so shall it be done unto him: breach for breach, eye for eye, tooth for tooth."²⁵ This passage implies that those who take lives shall lose theirs. This conception of justice suggests that killers should be subject to the death penalty, unless they demonstrate mitigating circumstances.

The concept of mitigating circumstances likely flows from the New Testament. In Matthew, we find the following recommendation: "[r]esist not him that is evil: but who soever smiteth thee on thy right cheek, turn to him the other also."²⁶ Does this passage imply rather than return a breach for a breach, an eye for an eye, society should be willing to subject itself to further breaches?

There are times when principles and values clash, as in these two Biblical examples. International law, as with all systems of law, values human life. "Eye for an eye" justice may be considered the cornerstone of the deterrence theory, which would require that those who take lives should forfeit theirs as a means of discouraging similar behavior. If human beings experienced severe consequences for their inhumane actions, they may choose another path.

Another fundamental precept of international law requires states to respect the territorial boundaries of all other states. This principle is codified in Article 2(4) of the UN Charter, which requires nations to "refrain in their international relations from the threat or use of force

25. *Leviticus* 24:17-22. In a conversation with Professor Jon Van Dyke of the University of Hawaii William S. Richardson School of Law, on Friday, March 24, 2000, after I addressed this topic at the Denver Conference on Humanitarian Intervention, he postulated that an "eye for eye" was considered humanitarian. Before then, the response to a life taking was to wipe out the entire village. An "eye for eye" justice requires that the response be proportional to the violation.

26. *Matthew* 5:38-42.

against the territorial integrity or political independence of any state."²⁷ The policy behind Article 2(4) is that if all nations remained within their own boundaries, the world would never again suffer the large scale hostilities of another world war.

A third fundamental principle of international law accords immunity to sovereigns. This principle was codified in the Vienna Convention on Diplomatic Relations²⁸ and is founded on the concept of reciprocity. Nations that grant immunity to sovereigns of other nations expect the same be accorded to its sovereigns. Thus, all nations can proceed in their relations without fear of arrest or other disruption.²⁹

These three principles—respect for human life, territorial boundaries, and sovereign immunity—can collide in instances when sovereign leaders commit genocide against their own people and another state seeks to bring them to justice by means other than an extradition treaty. Upholding the value of territorial boundaries may mean sacrificing the value of human life. To kidnap the sovereign with the intent to bring him to justice before an international tribunal would uphold life, but sacrifice the values of respect for territorial boundaries and sovereign immunity.

IV. FROM EICHMAN TO NORIEGA: WERE THEIR ABDUCTIONS LEGAL?

The clashing of these basic international law values confirms that there is no international legal right to kidnap leaders and other state figures accused of gross human rights violations. The cases of Eichmann and Noriega lend support to my supposition. The Israeli kidnapping of Eichmann and the United States acquisition of Noriega were viewed as successful kidnappings in many circles. Both men were tried, convicted and punished for their crimes against humanity and their own people. Isn't the world better off that these men have been brought to justice?

In both instances we have the advantage of hindsight to assess the consequences. Argentina protested Eichmann's kidnapping as a violation of its territorial sovereignty and political independence to the United Nations Security Council.³⁰ The Security Council decided that Israel's actions endangered international peace and security, and re-

27. U.N. CHARTER, art. 2(4).

28. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 5000 U.N.T.S. 95 (entered into force on April 24, 1964).

29. When this principle was challenged, the International Court of Justice affirmed it by finding that the seizure of U.S. consular staff in Iran was illegal. See Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order of Provisional Measures, 1979 I.C.J. 7 (Dec. 15).

30. Letter of 15 June 1960 From the Representative of Argentina to the President of the Security Council, UN Doc. S/4336, reprinted in HENKIN, *supra* note 24, at 1083-1084.

quested that Israel make appropriate reparations in accordance with the U.N. Charter and the rules of international law.³¹ Approximately six weeks later, the two countries agreed to settle the matter. Israel agreed to pay reparations to Argentina, and acknowledge that it had infringed fundamental rights of the state of Argentina.³²

This outcome affirms that the world community does not support kidnapping as a means of bringing an alleged offender to justice. Israel committed a violation of international law, obviously not equal to Eichmann's crimes, but a violation nevertheless. In response, Argentina maintained that it did not take the violation of its territorial sovereignty lightly. The settlement recognized that there was a violation for which reparations were required to remedy the harm.

As for Noriega, the newly installed Panamanian government of Guillermo Endara did not protest his abduction, and the Bush Administration never submitted an official extradition request.³³ Nevertheless, numerous international legal scholars indicated they thought the abduction was "reminiscent of feudal times or earlier when wars were more personal."³⁴ Others stated that in the search for a precedent, one would have to go back more than two millennia "when ancient Romans brought back in chains leaders of conquered lands."³⁵ When Noriega insisted that he be treated as a prisoner of war, the judge consented, and honored his request to wear his military uniform to all court proceedings.³⁶ He was tried, convicted and has languished in a Florida prison since 1992, serving a 40-year prison sentence. Is this a successful kidnapping if the state of abduction does not protest. I think not.

In the process of apprehending Noriega, the United States military reportedly killed thousands of innocent Panamanian citizens.³⁷ Was procuring Noriega worth the sacrifice of these lives? To the people who perished, their relatives, and friends, the answer is most likely, "no." Many even sought compensation from the U.S. government.³⁸ Some

31. HENKIN, *supra* note 24, at 1084-85.

32. *Id.* at 1085.

33. Neil A. Lewis, *Scholars Say Arrest of Noriega has Little Justification in Law*, N.Y. TIMES, Jan. 10, 1990, at A12.

34. *Id.*

35. *Id.*

36. See *Manuel Noriega, Prisoner of War*, N.Y. TIMES, Dec. 12, 1990, at 22; see also Richard L. Berke, *Calling Himself a War Prisoner, Noriega Says US Can't Try Him*, N.Y. TIMES, Jan. 27, 1990, at 9.

37. By one estimate, between 2000 and 3000 Panamanian civilians were killed during the invasion. See Bernard Olderman, *One Law for the U.S., Another for Others*, World Sources, Online, Feb. 5, 1998. However, the U.S. military officially acknowledged the death of 314 Panamanian soldiers and 202 Panamanian civilians. See David Hoffman, *New Diplomatic Efforts Planned to Pressure Iraq; U.S. Delays Decision on Military Offensive*, WASH. POST, Oct. 14, 1990, at A1.

38. See Lee Hockstader, *In Panama, Civilian Deaths Remain an Issue; Months After*

might even ask the question, is Panama better off today than it was in 1990? After all, Panama has a new leader, Mireya Moscoso, and the United States returned to it the Panama Canal at the end of 1999.³⁹ Aren't these both signs that Panama is better off? However, the Panama Canal was returned on schedule based on a 1977 treaty negotiated by the Carter Administration. During the creation of the treaty, Californian Senator S.I. Hawakaya argued against the return of the Canal on the grounds that "We stole it fair and square."⁴⁰

Wasn't that, in effect, the Bush Administration's claim for the jurisdictional basis for trying Noriega? Did the United States steal him fair and square? I submit that no individual can be stolen fair and square. The acknowledgment of theft is to admit that the act is indeed illegal.

V. CAN KIDNAPPING OF LEADERS BE JUSTIFIED?

Are there any circumstances that would grant moral and international legal rights to kidnap individuals accused of gross violations of human rights, particularly when the individual is the leader of the country? Once the individual has been kidnapped, may the tribunal exercise jurisdiction over him?

In the fifth century, Roman courts questioned of the legality of kidnapping and declined to exercise jurisdiction over kidnapped suspects brought before its courts.⁴¹ Even at the height of Apartheid, South Africa's highest court declined to exercise jurisdiction over an African National Congress member who was kidnapped out of Swaziland and brought to South Africa.⁴²

When Rehnquist issued the Supreme Court decision that kidnapping was permissible and did not divest the U.S. courts of jurisdiction over Dr. Alvarez Machain, he declined to follow these historical precedents or the dictates of international law. Given the outcome of the Alvarez Machain case, the district court judge dismissed the charges due to "wildest speculation" after the U.S. government could not even prove that Enrique Camerena had been tortured let alone by Dr. Alvarez

Invasion, Some Seek Compensation for Loved Ones Lost to U.S. Fire, WASH. POST, Oct. 6, 1990, at A23.

39. See Serge Kovaleski, *Panamanians Receive Canal With Rejoicing, Patriotic Ceremony Marks End of U.S. Control of Waterway*, WASH. POST, Jan. 1, 2000, at A28.

40. See W. Michael Reisman, *The Struggle for the Falklands*, 93 YALE L.J. 287, 304 (1983); see also Graham Hovey, *Doubt Cast on 2 Republicans' Support of Canal Pacts*, N.Y. TIMES, Aug. 22, 1977, at A5.

41. According to Roman Law, "One who administers justice beyond the limits of his territory may be disobeyed with impunity." THEODOR MOMMSEN, I THE DIGEST OF JUSTINIAN 18:3 (Theodore Mommsen ed. 1985).

42. *State v. Ebrahim (Jurisdiction over Abducted Person)*, 31 I.L.M. 888 (1992).

Machain⁴³—perhaps the Rehnquist court should have paid heed to the prior international precedent. The court said that the most that Dr. Alvarez Machain was guilty of was socializing with known drug traffickers.⁴⁴ Had the U.S. followed the traditional extradition process, this information would have been vetted. Mexico would have had to try Dr. Alvarez Machain if it had denied a U.S. request to extradite him.

Ultimately, to permit kidnapping of sovereigns and others accused of gross human rights violations may do even greater damage to the fragile international legal system. After all, an eye for an eye leaves the entire village blind.

May kidnapping be justified even on moral grounds? Immanuel Kant, one of the world's most renowned philosophers, intimated that a person should be punished, if, and only if, he or she deserves to be punished, irrespective of whether or not the punishment produces any good consequences to the offender, the victim(s), or society at large.⁴⁵ For the international community, this is an untenable proposition. Punishment must produce good consequences to the community as a whole. We must not inadvertently increase the level of violence in the world community.⁴⁶ The goal of international law should be to decrease violence against humanity and increase peace, harmony and community justice.

VI. WHAT'S WRONG WITH KIDNAPPING?

"What's wrong with kidnapping?" Professor Fernando Teson of Arizona State University asked me in jest following my speech at the Denver Conference on Humanitarian Intervention.⁴⁷ There are many answers. One answer is that it demeans the kidnapper. To kidnap is to become a criminal.

By analogy, Lord Elgin of Britain, was accused of stealing the marbles of the Parthenon from Athens, Greece. The loss is still felt deeply by the Greek population, even 200 years after the incident.⁴⁸ For Greece

43. See Joshua S. Spector, *Extraditing Mexican Nationals in the Fight Against International Narcotics Crimes*, 31 U. MICH. J. L. REF. 1007, 1026-27 (1998); see also Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

44. See Mydans, *supra* note 43.

45. See Woodhouse, *supra* note 14, at 85.

46. Professor Van Dyke also disagreed with me on this proposition. He contends that people should be punished because they deserve to be punished. "Punishment," he said, "in and of itself, bestows good consequences upon the international community." For more information, see Professor Van Dyke's paper, "The Fundamental Human Right to Prosecution and Compensation," to be published in the Denver Journal of International Law and Policy.

47. This conversation took place on Friday, March 24, 2000, following my lecture to the Denver Conference on Humanitarian Intervention, Denver, Colorado.

48. When I lectured to a group of Greek law students at the University of Thrace in May, 1997, I asked them how Greece would have been different had the marbles of the

to send in a special forces team to the British Museum and swipe the marbles in the dead of night would reduce Greece to the level of a thief. There would now be two state thieves. And in the process of degrading its own reputation, Greece would violate Britain's territorial boundaries and political independence, as well as commit a crime against Britain that would be actionable in the International Court of Justice. The same applies for Spain were it to have contemplated the acquisition of Pinochet by means other than the extradition process. Spain would be guilty of one of the same crimes with which it has accused Pinochet, hostage-taking. It is for this reason that equitable rules of reason require that "he who seeks equity must do equity."⁴⁹

A second argument against kidnapping is that the kidnapper cannot always predict the consequences of the action. It may seem easy to contemplate and execute the kidnapping of Pinochet, but such an action could produce unintended consequences. Consider, for example, Elizabeth Brotons, the mother of Elian Gonzalez, who took her son without the permission of his father, who had joint custody, on a journey to the United States.⁵⁰ She did not foresee that the boat, with no life preservers on board, would leak, collapse, and take her life and that of ten others.⁵¹ Nor could she have foreseen that her son would be forced to cling to a raft for fifty hours in shark-infested waters with only dolphins for protection.⁵² And how would her actions have been different if she could have foreseen that her son would watch her and several others drown? While this mother has been heralded as a hero in some circles, is she not in reality guilty of child abuse for placing her son at risk?⁵³ Her abuse was not intentional, but nevertheless the consequences are available for all to see.

For Elian's great uncle Lazaro Gonzalez,⁵⁴ and other Miami rela-

Parthenon never been removed. Their response, "we would be a great country, so much more advanced." To steal the marbles was, in the words of Professor Adrien Wing, to wound the spirit of the nation. See Adrien Wing, *Rape Ethnicity and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 7 (1993).

49. Statute of the International Court of Justice, Art. 38, para. 2.

50. See Gabriel Garcia Marquez, *Shipwrecked on Dry Land*, N.Y. TIMES, Mar. 29, 2000, at A25. Marquez reports that Elian lived with his father and spent every other day at his mother's house. When Juan Miguel Gonzalez went to pick Elian up from School on Friday afternoon, November 19, 1999, he was told that his ex-wife had taken Elian at midday and had not returned. It wasn't until Monday, November 22nd that Gonzalez realized that his ex-wife had taken Elian on a voyage to the United States.

51. *Id.*

52. ABC News: 20/20: *What's Best For Elian?*, (ABC television broadcast, Mar. 29, 2000).

53. This risk is astonishing given the reports of her efforts to conceive Elian. Elizabeth Brotons and Juan Miguel Gonzalez experienced seven miscarriages before conceiving Elian, who they named after themselves, taking the first three letters of her name and the last two of his name. See Marquez, *supra* note 50.

54. Lazaro Gonzalez was described by the Miami Herald as a "body shop worker,

tives and politicians, to delay the return of Elian to his father was to confound the child's pain,⁵⁵ yet they argued that they were saving him from a worse harm—return to Castro's Cuba. Had Elian and his mother been nationals of a different country, say France or Haiti,⁵⁶ would these same individuals in Miami have created this political maelstrom? Would there be such an uproar that even U.S. presidential candidates feel obliged to weigh in on the fate of Elian?⁵⁷ Is this ultimately a situation where politics interferes with the dictates of right reason,⁵⁸ and a country doing what is right, moral, just and legal? Or is Miami degenerating into a Hobbesian state of nature?⁵⁹ Ironically, the U.S. government returned Elian to his father.⁶⁰ It is unlikely that this issue would have even become public had Elian not arrived from Cuba. If Elian had arrived from Mexico, he would have been sent back the same day before the public even had a chance to comment.

As it turned out, the federal government was forced to remove Elian from the home of his relatives early Saturday morning, April 22, 2000, in a raid that produced enormous protest from the Miami community and left the Justice Department scrambling to justify its actions.⁶¹

A third argument against kidnapping is that governments that

Marlboro smoker, family man, convicted drunk driver, die-hard anti-communist." See Manny Garcia, *Lazaro v. U.S.*, MIAMI HERALD, Apr. 16, 2000, at A1.

55. These relatives have made statements that indicate that they perceive Elian as more of a political tool than as a loved and cherished relative. For example, on Thursday, April 13, Lazaro Gonzalez said that he would never voluntarily return Elian to his father and that the federal government would have to use force to remove him. Is this not the Salamonian equivalent of the false mother, who agreed to cut the baby in half? It is the true mother that would rather see her child alive and with another than dead. One can sense that Lazaro believes Elian is better off dead than in Cuba. A true loving parent would never invite the government to use force to remove the child. See 1 Kings 3:16-28 (King James).

56. See Eric Pianin, *In Elian Case, Blacks See Double Standard on Elian*, MIAMI HERALD, Apr. 16, 2000, at A1 (stating that Rep. Alcee Hastings of Miami "complained that Haitian refugees are routinely deported, while those from Cuba get special consideration). See also Lance Morrow, *What if Elian Were Pug-ugly? Or Black?*, (posted Apr. 5, 2000) http://www.cnn.com/2000/US/04/05/morrow4_5.a.tm/.

57. See Thomas L. Friedman, *Elian and the Panderers*, N.Y. TIMES, Apr. 7, 2000, at A23.

58. See HUGO GROTIUS, DE JURE BELLI AC PACIS (1625), in THE CLASSICS OF INTERNATIONAL LAW, No. 3 Vol. 2 (James Brown Scott, ed., Frances W. Kelsey, trans. 1926).

59. See THOMAS HOBBS, LEVIATHAN 185 (C.B. MacPherson, ed. 1939) (1651).

60. *Reno Cites Law in Decision on Elian Case*, N.Y. TIMES, Apr. 8, 2000 at A9. The US government was reportedly concerned that failure to send Elian home would affect the 1100 cases abroad in which it is seeking the return of US children who have been abducted by a foreign national parent. CNN Headline News (CNN television broadcast, Apr. 14, 2000).

61. Lizette Alvarez, *Raid in Miami Opens New Front in Struggle Over the Cuban Boy*, N.Y. TIMES, Apr. 24, 2000, at A1.

kidnap abroad may ultimately kidnap at home. This recalls the Biblical warning that "ye shall reap what ye sow."⁶² Citizens should always be concerned about the activities of their governments abroad.⁶³ When governments conduct a host of illegal activities in other territories, they may merely be perfecting those activities for use against their own citizens.

In the Alvarez Machain case, the Canadian government expressed its concerns that the U.S. may be given authority to kidnap Canadians. Canada submitted a brief forcibly arguing against maintaining jurisdiction over abducted foreign nationals⁶⁴ and maintained that most of the U.S. extradition requests were to Canada.⁶⁵ Canada also noted that although the U.S.-Canada extradition treaty is also silent on the issue of kidnapping, the extradition process establishes the only means by which to obtain the return of foreign offenders.⁶⁶

A fourth argument against kidnapping is that it violates human rights notions that people are entitled to the security of their personhood.⁶⁷ A recent New York Times article quoted research about post traumatic stress disorder in adults who had suffered particular types of harm in childhood and indicated the stress from kidnapping exceeded the stress from rape.⁶⁸ The article listed the types of harm that leave behind severe degrees of stress. Kidnapping, being held captive or tortured can cause the most stress.⁶⁹

If an individual may be taken from his home, family, and friends at any time, it creates an insecure environment for all. Mexico argued firmly against the abduction of Alvarez Machain in its brief and in its policy statements,⁷⁰ perhaps because the Mexican people were clearly upset by the abduction. Mexicans have the following saying, "Pobre

62. *Galatians* 6:7 (King James) ("... for whatsoever a man soweth, that he shall also reap.")

63. See the Insular Cases (*Downs v. Bidwell*, 182 U.S. 244 (1901) and *De Lima v. Bidwell*, 182 U.S. 1 (1901)) where the Supreme Court held that the U.S. government is not restrained by the Constitution by what it does in its territories, such as Puerto Rico and the Virgin Islands.

64. Brief of the Government of Canada, *U.S. v. Alvarez-Machain*, 1991 U.S. Briefs 712 (1992).

65. *Id.*

66. Brief of the Government of Canada, *U.S. v. Alvarez-Machain*, 1991 U.S. Briefs 712 (1992).

67. Universal Declaration of Human Rights, G.A. Res. 217 A (III) of 10, U.N. GAOR, art. 3 (1948) ("Everyone has the right to life, liberty and the security of person.")

68. Jane Brody, *When Post-Traumatic Stress Grips Youth*, N.Y. TIMES, Mar. 21, 2000, at F8; see Naomi Breslau *et al.*, *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results From Area Survey of Trauma*, 156 AM. J. OF PSYCHIATRY 902, 902-907 (1999).

69. *Id.*

70. Brief of the United Mexican States as Amicus Curiae In Support of Affirmance, *U.S. v. Alvarez-Machain*, 502 U.S. 1024 (1992)(No. 91-712).

Mexico. *Tan Lejos de Dios y Tan Cerca de Los Estados Unidos.*"⁷¹ A holistic approach to international relations cognizant of systemic harm to the entire population. The kidnapping Dr. Alvarez Machain could make his fellow citizens feel less secure.

A fifth argument against kidnapping is that the kidnapping state signals to other states that it views kidnapping as an acceptable means of acquiring alleged offenders. Governments that kidnap subject their own citizens to being kidnapped. Many may oppose such an argument. Although the U.S. arranged for the kidnapping of Dr. Alvarez Machain from Mexico, this does not mean Mexico will kidnap U.S. citizens. Only powerful states have the means to kidnap. Professor Alvin Rubin says that in the 19th Century, Britain invoked the Law of Paramount Power, "meaning they were stronger than local governments in several countries where they sought to depose local leaders."⁷² What would be the consequence if Mexico kidnapped a US citizen that it believed guilty of a crime against a Mexican citizen? Would the US bomb Mexico? Would it impose sanctions? Would it protest the kidnapping as a violation of its territorial boundaries and political independence?

If an eye for an eye leaves the whole world blind, would kidnapping for kidnapping's sake depopulate territories? States should always look at the long term consequences of their actions. They should be mindful of the potential for a reciprocal claim and return action. How would the state feel about the action if it were done unto it?

International relations could benefit from an infusion of moral principles. The universal law of cause and effect⁷³ should cause states, particularly the powerful ones, to refrain from engaging in certain behavior if the actions may be reciprocated.

Nations with the most power have a duty to act responsibly, to behave in a moral, legal manner. They must set the example for other states and be cognizant of the consequences of their actions.

VII. CONCLUSION

Is there an international moral and legal right to kidnap individuals accused of gross human rights violations and international crimes? The answer is "no." Neither morally, nor legally do states have the right to kidnap individuals to bring them to trial within their jurisdiction. Kidnapping demeans the kidnapper, violates the territorial boundaries of the other states, and ultimately causes the citizens of both states to feel less secure. Further, the kidnapping state has no control over the

71. Poor Mexico, *So far from God and so close to the United States.*

72. Neil Lewis, *Scholars Say Arrest of Noriega has Little Justification in Law*, N.Y. TIMES, Jan. 10, 1990, at A12.

73. See DEEPOK CHOPRA, *THE SEVEN SPIRITUAL LAWS OF SUCCESS* 37 (1994).

consequences of the action. In the case of Panama, thousands of citizens lost their lives during the US intervention to retrieve Noriega. Elian Gonzalez's mother perished when the leaky boat collapsed. The kidnapping government may also eventually turn on its own citizens. It signals to other states that it believes that kidnapping is an acceptable means of acquiring individuals and instigates the possibility of a reciprocal claim and action.

So what's wrong with kidnapping? All of the above. Is there a scenario in which it would be moral and legal to kidnap an international leader accused of gross human rights violations? To paraphrase a Supreme Court Justice, "I'll know it when I see it." However, I hope I never see it. For if states do not protect the rights of the most hideous among us, they establish a slippery slope for the kidnapping of the least powerful in far less dire circumstances.