processes that maintain minimum order and approximate popular aspirations to the extent possible.

The end of the Cold War has once again moved constitutional law to the forefront, not simply in domestic contexts but on a planetary scale as well.[45] The United Nations Charter is only a part of this ongoing world constitutive process, but a full understanding of what the Charter has been able to achieve and what it is capable of achieving in the future requires clarification of critical international policies and the invention and appraisal of alternatives.

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The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE EDITOR IN CHIEF:

In her argument generally supporting the Supreme Court's decision in *Alvarez-Machain* (*Agora,* 86 AJIL 736 (1992)), Professor Malvina Halberstam quotes and cites prominently both me and the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). She has quoted and cited correctly, but incompletely.

First. Professor Halberstam quotes me as saying:

> To date, however, international law is wedded to the principle *male captus bene detentus:* a person arrested in violation of international law, for example by kidnapping from the territory of another State without that State's consent, . . . may nonetheless be brought to trial and the arresting State does not thereby commit an additional violation. (86 AJIL at 738)

She might have quoted also the sentences that follow: "That principle, antedating the age of human rights, encourages invasions of foreign territory and gross violation of human rights. It cries for re-examination and rejection."

In fact, the law relevant to *Alvarez-Machain* is not today what Professor Halberstam suggests. In my opinion, *male captus, bene detentus* is not the law when the state whose territory is violated protests the abduction and demands the victim's return.

That was the lesson in international law taught by the *Eichmann* case. It was generally accepted that if Argentina had insisted on Eichmann's return, Israel would have compounded its violation of Argentine territory by failing to return him. Fortunately, Argentina was persuaded to accept an apology from the Government of Israel and not to request Eichmann's return.

Professor Halberstam might have quoted also section 432, comment *c* of the *Restatement.* It states:

[45] Myres S. McDougal, Harold Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision,* 19 J. LEGAL EDUC. 253 (1967), *reprinted in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, ESSAYS IN INTERNATIONAL LAW 191 (1981).

* Of the Board of Editors. The author benefited from comments on earlier drafts by Mahnoush Arsanjani, Myres S. McDougal, Andrew Willard, Philip Bobbitt and Andrew Cappel.

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

To my recollection, reinforced by a search of the available record, that comment met no objection whatsoever among the reporters, the advisers, the council or the membership of the American Law Institute. It met no objection from either of the two Legal Advisers of the Department of State who commented extensively on many provisions of the various drafts of the *Restatement,* or from the Department of Justice, which also had (and used) the opportunity to comment. In the discussion of section 432 by the membership of the institute, Professor Halberstam herself raised questions about related matters but none about the comment quoted above. (*See* 1982 *Proceedings of the American Law Institute,* 59th Annual Meeting, at 174.)

As I suggested in the unquoted sentences, the traditional law of *male captus* also has to be reexamined in the light of intervening law of human rights. In restating the customary international law of human rights, the *Restatement* declares: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (e) prolonged arbitrary detention" (sec. 702). Is not abducting a person "arbitrary detention"? Might not detaining him or her for extended trial, when the country from which he (she) was abducted demands his (her) return, be "prolonged arbitrary detention"?

Kidnaping a person and retaining him (her) for trial also appears to be a violation of the International Covenant on Civil and Political Rights. Article 7 provides that "[n]o one shall be subjected to . . . cruel, inhuman, or degrading treatment." Article 9(1) provides that "[n]o one shall be subjected to arbitrary arrest or detention." And "[n]o one shall be deprived of his liberty except . . . in accordance with such procedures as are established by law." The United States ratified the Covenant in June 1992, though not without reservations.

Second. Professor Halberstam also quotes me, and the *Restatement,* in ways that may suggest support for her view that the courts do not, and should not, sit in judgment on violations of international law by the executive branch in the exercise of the President's "foreign affairs power." If there were such a principle, it is not obvious that it would include the abduction of an individual from a foreign country. That is hardly an exercise of "foreign affairs power." It implicates foreign affairs only if the foreign government learns of the abduction and decides to protest it.

In any event, in my view what Professor Halberstam asserts is not the law; surely, I did not say that it was. The President has no general, supreme, unreviewable foreign affairs power that the courts must bow to. Courts have enjoined actions by the executive branch in the conduct of foreign affairs. They have enjoined the executive branch from violating treaties. Indeed, the basis of the Supreme Court's decision in *Alvarez-Machain* is that the kidnaping in question did not violate the Extradition Treaty with Mexico; the clear implication is that if the Treaty had been violated, the courts would have enjoined the executive branch from pursuing the prosecution. In my view, the executive branch is no more free under the Constitution to violate customary law than it is to violate a treaty.

What I have said as to presidential and executive power, what the *Restatement* said, what I believe to be the law, is much more limited. 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. (Alexander Hamilton, a principal supporter of executive prerogative, expressed that understanding of the Constitution two hundred years ago in his Pacificus letter.)

The President may also have *some* independent constitutional authority to take *some* actions in foreign affairs in which he has independent constitutional autonomy—say, to denounce or terminate a treaty, recognize a foreign state or government, claim territory for the United States—even if his action is inconsistent with international law. And if such presidential actions have "quasi-legislative" character, the courts will give effect to those acts as they do to an act of Congress, even in the face of a treaty or a principle of international law. But except when the President has acted within that limited independent constitutional authority, executive officials must take care that international law be faithfully executed and the courts have the usual judicial duty to assure that executive officials do so.

In *Alvarez-Machain,* there was no relevant act by the President within his independent constitutional authority to support the kidnaping. The needs of law enforcement do not give the President—surely not some lower official or even the Attorney General—authority to disregard the laws of the United States, including treaties to which the United States is party and relevant principles of customary international law. An appropriate remedy in the circumstances would have been for the Supreme Court to assert the supervisory power of the courts to discipline the police and to refuse to lend themselves to such acts in violation of international law. (*See* McNabb v. United States, 318 U.S. 332 (1943).) The Court seemed prepared to do so if it had found the abduction to be contrary to U.S. obligations under the Extradition Treaty with Mexico. No one has suggested any good reason why the courts should do otherwise when the abduction is in violation of an indisputable principle of the law of nations, especially if the state from which the person was abducted continues to object. (*See also, e.g.,* Oakes, J., concurring, in United States v. Lira, 515 F.2d 68, 72–73 (2d Cir.), *cert. denied,* 423 U.S. 847 (1975).)

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Of the Board of Editors