

DUALITY OF NATIONALITY: CONFLICTING RIGHTS IN  
THE US-MEXICO EXTRADITION TREATY

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**INTRODUCTION**

Coparenting with a person who you are not in a relationship with can be difficult, especially when it comes to discipline and addressing behavioral issues. Different parents can have different ideas about punishment. One parent may think that it is more important to instill a sense of fear in the child. Another parent may approach the situation by trying to help the child understand why their behavior was wrong. So, when a child gets in trouble at school, which parent should make the disciplinary decision when they both have a right to make disciplinary decisions? The obvious answer is, if there is equal parenting, then the parent who is picking them up from school and bringing them home that day should make the decision. It is no different for countries who share nationals when it comes to punishment for crimes.

This comment addresses two conflicting provisions of the US-Mexico Extradition Treaty (the treaty). Article 1 of the treaty establishes by implication the requesting country's right to have its nationals extradited back within its borders.<sup>1</sup> Article 9 of the treaty establishes the requested country's right not to extradite its nationals.<sup>2</sup> However, these two rights come into conflict when an accused is a dual national of both countries and the requesting country wants them extradited, but the requested country does not want to extradite them. This comment argues that, under the treaty, the requested country's right to not extradite its own nationals should be prioritized over the requesting country's right to have its nationals extradited back to it.

Under the Fourteenth Amendment to the United States Constitution, people born or naturalized in the United States are citizens and US nationals.<sup>3</sup> Under the Mexican Constitution, one can become a Mexican national through either birth or naturalization.<sup>4</sup> Mexican nationality through birth is either acquired by being born in Mexico or being born to a parent who is a Mexican national.<sup>5</sup> The Mexican Constitution also expressly states that Mexicans by birth can never lose their nationality.<sup>6</sup> It is possible, and common, for people to have both Mexican and US nationality. The rights of both countries conflict in cases when the person sought to be extradited is a dual national and both countries want to assert their rights.

Part II of this comment will discuss the rights both countries have regarding extradition of their nationals. The US-Mexico Extradition Treaty expressly establishes that each country has the right to refuse to extradite its own nationals.<sup>7</sup> The treaty also implies the right of each country to have its own nationals extradited back to it. According to Article 1 of the treaty, the requested country is obligated to extradite a national of the requesting country that commits an offense outside of the territory of the requesting country and the requesting country has

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<sup>1</sup> Extradition Treaty, Mex.-U.S., art. 1, ¶ 2(b), May 4, 1978, 31 U.S.T. 5059. The requesting country is the country seeking or asking for extradition.

<sup>2</sup> *Id.* art. 9. The requested country is the country from whom extradition is being sought.

<sup>3</sup> U.S. CONST. amend. XIV, § 1.

<sup>4</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, cap. II, art. 30, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* cap. IV, art. 37.

<sup>7</sup> Extradition Treaty, *supra* note 1, art. 9, ¶ 1.

“jurisdiction under its own laws to try that person.”<sup>8</sup> Since the requested country has this obligation, it follows that the requesting country has a right to have its nationals extradited back to it when they commit a crime outside of the territory of the requesting country under the treaty, if the requesting country has jurisdiction under its laws. If this right exists when the crime is committed outside of the territory of the requesting country, then it must also exist when the crime is committed within the territory of the requesting country. Consequently, the requesting country will always have jurisdiction under its laws to try its national when this happens.

Part III of this comment will establish that the requested country’s right should be prioritized over the requesting country’s right because it is unreasonably difficult to prioritize the requesting country’s right. A way for the requesting country to enforce its right against the requested country is to conduct a transborder abduction. Although the treaty does not expressly prohibit transborder abductions,<sup>9</sup> there are consequences that each country needs to worry about when conducting them, especially since transborder abductions are prohibited by customary international law.<sup>10</sup> Among these consequences are the deterioration of the trust and relationship between the two countries.<sup>11</sup> Another consequence is offending the international community and retaliation from other countries.<sup>12</sup> Normalizing and legitimizing transborder abductions would also defeat the purpose of several provisions of the treaty.<sup>13</sup> Finally, transborder abductions do not truly enforce Article 1 rights since they are not extradition. Another way the requesting country could enforce its Article 1 right is to impose sanctions on the requested country when they refuse to extradite a shared

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<sup>8</sup> *Id.* art. 1, ¶ 2(b).

<sup>9</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).

<sup>10</sup> *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L OF THE U.S. § 432(1)(b) (AM. L. INST. 1987).

<sup>11</sup> Rishi Hingoraney, Comment, *International Extradition of Mexican Narcotics Traffickers: Prospects and Pitfalls for the New Millennium*, 30 GA J. INT’L & COMPAR. L. 331, 352 (2002); Emily Edmonds-Poli & David A. Shirk, *Extradition as a Tool for International Cooperation: Lessons from the U.S.-Mexico Relationship*, 33 MD. J. INT’L L. 215, 227 (2018).

<sup>12</sup> Hingoraney, *supra* note 11, at 352.

<sup>13</sup> *Alvarez-Machain*, 504 U.S. at 673 (Stevens, J., dissenting).

national.<sup>14</sup> However, sanctions tend to cause collateral damage and harm innocent people who are not involved in extradition decisions.

Part IV of this comment will argue that to prioritize the requesting country's right to have its own nationals extradited to it, and force the requested country to extradite, would be a violation of the requested country's sovereignty. Countries should not be expected to surrender their own national in their own territory at the command of a foreign power.<sup>15</sup> Doing so would be contrary to the territorial nature of criminal jurisdiction. It would also obligate Mexico to violate its own Constitution.<sup>16</sup>

Although the requesting country and the requested country each have a right, the requested country's right to not extradite its own nationals should be prioritized under the treaty. In cases of dual nationality, giving priority to the requesting country's right to have its nationals extradited back is unreasonably difficult and a violation of the requested country's sovereignty to prioritize the requesting country's right to have its nationals extradited back to it, in cases of dual nationality. Giving priority to the requested country's right is much easier to execute and does not violate the requested country's sovereignty.

## I. BACKGROUND

### A. PROVISIONS OF THE US-MEXICO EXTRADITION TREATY

The US-Mexico Extradition Treaty is an international agreement between the US and Mexico to extradite people present in the territory of one country to the territory of the other if they have been charged with, found guilty of, or are wanted to complete a sentence for an offense committed within the territory of the other country.<sup>17</sup> The treaty states, “[f]or an offense committed outside the territory of the requesting Party,

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<sup>14</sup> See International Extradition Enforcement Act of 2001, H.R. 2574, 107th Cong. § 3 (2001); see Özgür Özdamar & Evgeniia Shahin, *Consequences of Economic Sanctions: The State of the Art and Paths Forward*, 23 INT'L STUD. REV. 1646, 1648 (2021).

<sup>15</sup> See Hingoraney, *supra* note 11, at 342.

<sup>16</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, tit. Quinto, art. 119, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021; Ley de Extradición Internacional [LEI], art. 14, Diario Oficial de la Federación [DOF] 29-12-1975, últimas reformas DOF 20-05-2021 (Mex.).

<sup>17</sup> Extradition Treaty, *supra* note 1, art. 1, ¶ 1.

the requested Party shall grant extradition if: . . . the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.”<sup>18</sup> In other words, the treaty requires that the requested country extradite the nationals of the requesting country that commit offenses outside the territory of the requesting country if the requesting country has jurisdiction under its laws to try the accused. The treaty states, “Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.”<sup>19</sup> The treaty limits the requirement of extradition to willful offenses which are punishable in both countries with a maximum penalty that exceeds a year.<sup>20</sup> The evidence to justify committal for trial or to prove that the person has been convicted by the requesting party must be sufficient per the laws of the requesting party as a condition for extradition.<sup>21</sup> If time has barred the prosecution of an offense according to the laws of either country, extradition for that offense is prohibited.<sup>22</sup> Extradition for political offenses or offenses which may result in the requesting country imposing the death penalty is prohibited.<sup>23</sup> If a person has already been prosecuted, tried and convicted, or acquitted by the requested country for an offense, that person cannot be extradited to the requesting country for that offense.<sup>24</sup>

## B. NATIONALS OR CITIZENS

A national is a person who is under the protection of a country and owes permanent allegiance to that country.<sup>25</sup> A citizen is a person who is a member of a political community, owes allegiance that community, and is entitled to enjoy all the civil rights and protections of

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<sup>18</sup> *Id.* art. 1, ¶ 2(b).

<sup>19</sup> *Id.* art. 9, ¶ 1.

<sup>20</sup> *Id.* art. 2, ¶ 1.

<sup>21</sup> *Id.* art. 3.

<sup>22</sup> *Id.* art. 7.

<sup>23</sup> *Id.* art. 5, ¶ 1, art. 8.

<sup>24</sup> *Id.* art. 6.

<sup>25</sup> *National*, BLACK’S LAW DICTIONARY (11th ed. 2019).

that community.<sup>26</sup> In general, the main difference between a national and a citizen is that a citizen is entitled to more civil rights than a national.<sup>27</sup>

A person is a US national if they are either a US citizen or a noncitizen owing permanent allegiance to the United States.<sup>28</sup> The Fourteenth Amendment to the US Constitution establishes that all people who are born or naturalized in the United States and are under the jurisdiction of the United States are citizens of the United States.<sup>29</sup>

Mexican nationality can be acquired through birth by being born in Mexico, being born outside of Mexico but to at least one parent who is a Mexican national, or by being born on a Mexican ship or aircraft.<sup>30</sup> Mexican nationals by birth can never be deprived of their nationality.<sup>31</sup> Mexican nationality can also be acquired through naturalization by obtaining a certificate of naturalization from the Secretary of Relations, or by marrying a Mexican national, living in Mexico, and complying with any other conditions required by the law.<sup>32</sup> To be a Mexican citizen, one must be a Mexican national who is at least eighteen years of age and live an honest life.<sup>33</sup>

All citizens are nationals, but not all nationals are citizens. This comment will focus on the broader concept of nationality in analyzing the US-Mexico Extradition Treaty. Although this comment will discuss some law that only applies to citizens, the discussion will be in the context of nationals since all citizens are nationals.

It is easy to see how a person can be a dual national of both the United States and Mexico. A common way that people become dual nationals is to be born in Mexico and later immigrate to the United States and eventually become citizens of the United States through naturalization. Since they, as Mexican nationals by birth, cannot be deprived of their Mexican nationality, they do not lose their Mexican nationality when they become US citizens. Rather, they just gain their US nationality in addition to their Mexican nationality. Similarly, when a

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<sup>26</sup> *Citizen*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>27</sup> *Compare National*, BLACK'S LAW DICTIONARY (11th ed. 2019), with *Citizen*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>28</sup> 8 U.S.C. § 1101(a)(22).

<sup>29</sup> U.S. CONST. amend. XIV, § 1.

<sup>30</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, cap. II, art. 30, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021.

<sup>31</sup> *Id.* cap. IV, art. 37.

<sup>32</sup> *Id.* cap. II, art. 30.

<sup>33</sup> *Id.* cap. IV, art. 34.

Mexican national who has immigrated to the United States has a child in the United States, that child is born a national of both countries.

### C. DUAL NATIONALITY

Historically, dual nationality was almost nonexistent, but in the past three decades this dynamic has shifted. Today, tens of millions of people have multiple nationalities.<sup>34</sup> The 1990s marked a period of dramatic shift in how countries viewed nationality, with several countries moving to allow their nationals to be nationals of other countries too.<sup>35</sup>

On March 20, 1997, Article 37 of the Mexican Constitution was amended, asserting that Mexicans by birth cannot ever lose their nationality, which went into effect on March 20, 1998.<sup>36</sup> For the first time, adults were able to simultaneously hold US and Mexican nationality.<sup>37</sup> Former Mexican nationals who had lost their nationality by naturalizing in the United States or elsewhere and their children who had been born abroad were able to claim their Mexican nationality again.<sup>38</sup> Mexico made this shift permitting dual nationality so that Mexicans did not abstain from naturalizing abroad out of fear of losing their Mexican nationality.<sup>39</sup>

The United States was an early adopter of dual nationality, allowing its own nationals to also be nationals of another country even before 1990.<sup>40</sup> The US Supreme Court issued multiple rulings limiting the government's authority to expatriate US citizens without their consent.<sup>41</sup> The United States still imposes restrictions on Mexican

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<sup>34</sup> YOSHI HARPAZ, CITIZENSHIP 2.0: DUAL NATIONALITY AS A GLOBAL ASSET 1 (Andreas Wimmer ed., 2019).

<sup>35</sup> See *id.* at 8–9.

<sup>36</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, cap. II, art. 37, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021; Chris Dangaran, Notes and Comments, *The Duel Over Dual Nationality Amendments*, 7 SW. J.L. & TRADE AM. 447, 450 (2000).

<sup>37</sup> Immigr. & Refugee Bd. of Can., *Mexico/United States of America: Whether Dual Citizenship is Available Between the United States and Mexico*, REFWORLD (Oct. 18, 2002), <https://www.refworld.org/docid/3f7d4e437.html> [<https://perma.cc/T39J-K3MX>] (noting that before 1998, people born dual nationals of Mexico and United States had to choose one nationality when they turned eighteen); see also Dangaran, *supra* note 36, at 450.

<sup>38</sup> HARPAZ, *supra* note 34, at 67.

<sup>39</sup> *Id.* at 10.

<sup>40</sup> *Id.* at 8.

<sup>41</sup> *Id.* at 10.



American dual nationals, however, including barring them from sensitive government positions.<sup>42</sup>

#### D. HISTORY OF EXTRADITION BETWEEN MEXICO AND THE US

The relationship between Mexico and the United States did not begin well. In 1846, only a few decades after Mexico gained its independence from Spain in 1821, the United States and Mexico went to war against each other.<sup>43</sup> At the conclusion of the war in 1848, Mexico was forced to sign the Treaty of Guadalupe Hidalgo, in which Mexico ceded a vast amount of its territory to the United States.<sup>44</sup> After the war, the Mexican people became and have remained distrusting and resentful towards the United States and its power.<sup>45</sup>

The first extradition treaty between Mexico and the United States was signed in 1861,<sup>46</sup> the same year that both the American Civil War began, and France invaded Mexico.<sup>47</sup> This first treaty prohibited the return of fugitive slaves that had escaped to Mexico.<sup>48</sup> This was especially significant considering that in the decades leading up to 1861, tensions had grown between Mexico and the southern states over the issue of returning fugitive slaves that had escaped to Mexico, as Mexico had abolished slavery in 1829.<sup>49</sup> The first treaty had a clause asserting that neither country was obligated to extradite its own citizens.<sup>50</sup>

Following the American Civil War and the Second French Intervention in Mexico, both countries were unhappy with the lack of cooperation from the other in bringing criminals who crossed the border

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<sup>42</sup> *Id.* at 70.

<sup>43</sup> Edmonds-Poli & Shirk, *supra* note 11, at 223.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Extradition Treaty, Mex.-U.S., Dec. 11, 1861, 12 Stat. 1199; Bruce Zagaris & Julia Padierna Peralta, Article, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers – 150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U. J. INT'L L. & POL'Y 519, 524 (1997); Edmonds-Poli & Shirk, *supra* note 11, at 224.

<sup>47</sup> *Civil War Begins*, U.S. Senate: Historical Highlights, [https://www.senate.gov/artandhistory/history/minute/Civil\\_War\\_Begins.htm](https://www.senate.gov/artandhistory/history/minute/Civil_War_Begins.htm) [<https://perma.cc/W6VY-K3LJ>]; *Why Did the French Invade Mexico in 1861?*, HIST. HIT (May 5, 2019), <https://www.historyhit.com/1863-french-troops-capture-mexico-city/#:~:text=In%20one%20of%20the%20stranger,on%20for%20another%20six%20years> [<https://perma.cc/5KKW-QT9D>].

<sup>48</sup> Edmonds-Poli & Shirk, *supra* note 11, at 224.

<sup>49</sup> Zagaris & Padierna Peralta, *supra* note 46, at 523–24.

<sup>50</sup> Extradition Treaty, *supra* note 46, art. VI; Zagaris & Padierna Peralta, *supra* note 46, at 525.

to justice.<sup>51</sup> The prohibition of extradition of nationals greatly contributed to the lack of cooperation.<sup>52</sup> Frustrated, the United States resorted to approving military border incursions to apprehend criminals that crossed the border into Mexico.<sup>53</sup> The Mexican public was outraged by this decision.<sup>54</sup> In 1882, Both countries reached an agreement which authorized troops from either country to cross the border in unpopulated areas for limited purposes.<sup>55</sup>

In 1890, a woman by the name of Maria Inez McCabe was charged with a murder that was allegedly committed in Tamaulipas, one of the Mexican states.<sup>56</sup> Afterward she fled to Texas.<sup>57</sup> Judge Flores of Tamaulipas petitioned Judge Forto of Texas for the extradition of McCabe.<sup>58</sup> McCabe had been a US citizen since birth.<sup>59</sup> The Western District of Texas held that the extradition treaty between Mexico and the United States was “supreme law.”<sup>60</sup> The court was then bound to protect any individual rights that extended from the treaty.<sup>61</sup> The court concluded that Article VI of the first extradition treaty prohibited the extradition of US citizens to Mexico.<sup>62</sup> The court’s reasoning was that since Article VI of the treaty expressed that neither country was obligated to extradite its own citizens and the treaty did not expressly give any official the discretion to decide to extradite a citizen, the government did not have the authority to extradite its own citizen.<sup>63</sup> Although McCabe had likely committed a heinous crime, the court decided that judicial usurpation of power defied the law and was “repugnant to the genius of our institutions.”<sup>64</sup> *Ex parte McCabe* thus exposed a major flaw in the first extradition treaty, in that it provided no mechanism for either country to

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<sup>51</sup> Zagaris & Padierna Peralta, *supra* note 46, at 525.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 525–26.

<sup>55</sup> *Id.* at 526.

<sup>56</sup> *Ex parte McCabe*, 46 F. 363, 364 (W.D. Tex. 1891).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 365.

<sup>60</sup> *Id.* at 373–74.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 381.

<sup>63</sup> *Id.* at 374–75; see Extradition Treaty, *supra* note 46, art. VI.

<sup>64</sup> *McCabe*, 46 F. at 381.

extradite its own nationals to the other. This led to the negotiation of another treaty.<sup>65</sup>

On February 22, 1899, the United States and Mexico signed another extradition treaty.<sup>66</sup> The 1899 treaty still contained the provision that neither country was required to give up its own citizens but added that the executive had the discretion to extradite a citizen of their own country if they thought that it was proper.<sup>67</sup>

Although after the 1899 treaty went into effect the executive of either country had the discretion to extradite its own citizen to the other, Mexico consistently declined to extradite its own citizens.<sup>68</sup> This caused the government of the United States to reciprocate by declining to extradite US citizens to Mexico.<sup>69</sup> However, in 1939, the US Department of State granted Mexico's extradition request for Juan Delgado Ortiz, a US national.<sup>70</sup> This was a significant break in the usual practice between the two countries.

The current extradition treaty was signed in 1978.<sup>71</sup> It is the first treaty between the United States and Mexico to state that neither country is obligated to extradite its own nationals,<sup>72</sup> as opposed to citizens, which was the wording that was used in the first two treaties.<sup>73</sup> During the years following the signing of the current treaty, Mexico continued to refuse to extradite its own nationals claiming that it was able to bring them to justice in its own courts.<sup>74</sup> The United States was not satisfied with Mexico's efforts to bring its nationals to justice in its own courts and sought other ways of bringing Mexican nationals to face justice in the United States.<sup>75</sup>

The controversial Supreme Court decision in *United States v. Alvarez-Machain* highlights a controversial example of the United States using measures outside the US-Mexico Extradition Treaty to bring

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<sup>65</sup> Zagaris & Padierna Peralta, *supra* note 46, at 529–30.

<sup>66</sup> Extradition Treaty, Mex.-U.S., Feb. 22, 1899, 31 Stat. 1818; Zagaris & Padierna Peralta, *supra* note 46, at 526.

<sup>67</sup> Extradition Treaty, *supra* note 66, art. IV; Zagaris & Padierna Peralta, *supra* note 46, at 526.

<sup>68</sup> Extradition Treaty, *supra* note 66, art. IV; Zagaris & Padierna Peralta, *supra* note 46, at 530.

<sup>69</sup> See Extradition Treaty, *supra* note 66, art. IV; Zagaris & Padierna Peralta, *supra* note 46, at 530–31.

<sup>70</sup> See Extradition Treaty, *supra* note 66, art. IV; Zagaris & Padierna Peralta, *supra* note 46, at 531.

<sup>71</sup> Extradition Treaty, *supra* note 1, at 5059; Edmonds-Poli & Shirk, *supra* note 11, at 225.

<sup>72</sup> See Extradition Treaty, *supra* note 1, art. 9, ¶ 1.

<sup>73</sup> See Extradition Treaty, *supra* note 66, art. IV; see also Extradition Treaty, *supra* note 46, art. IV.

<sup>74</sup> See Extradition Treaty, *supra* note 1; Edmonds-Poli & Shirk, *supra* note 11, at 226.

<sup>75</sup> See Extradition Treaty, *supra* note 1; Edmonds-Poli & Shirk, *supra* note 11, at 226.

Mexican nationals to face justice in the United States.<sup>76</sup> In 1985, a US DEA agent and a Mexican pilot were working undercover on a narco-trafficking investigation when they were kidnapped.<sup>77</sup> They were then tortured and murdered.<sup>78</sup> It is believed that corrupt Mexican officials colluded with the drug cartel responsible which led to the heinous crime.<sup>79</sup> The United States was outraged that Mexican officials were likely at fault and that Mexico was not adequately investigating the crime.<sup>80</sup> Humberto Álvarez Machaín, a Mexican doctor, was suspected to have been involved in the murder and torture.<sup>81</sup> In 1990, American bounty hunters abducted Álvarez Machaín in Mexico and brought him to the United States where he was arrested by DEA agents.<sup>82</sup> The District Court held that the DEA agents were responsible for his abduction.<sup>83</sup> The Supreme Court ruled that since there is no provision in the treaty that explicitly prohibits transborder abduction as a way to bring people in Mexico to the United States to face justice, that transborder abduction was a legitimate way to bring people in Mexico to the United States to face justice.<sup>84</sup> This decision enraged Mexico and damaged the relationship between the two republics.<sup>85</sup>

In response to the *Alvarez-Machain* events and decision, in 1994, the United States and Mexico signed the Treaty to Prohibit Transborder Abductions.<sup>86</sup> Within it are various provisions to prevent transborder abductions and to rectify them when they occur.<sup>87</sup> However, this treaty does not bind either country as it was never ratified.<sup>88</sup>

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<sup>76</sup> See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>77</sup> *Id.* at 657; Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>78</sup> *Alvarez-Machain*, 504 U.S. at 657; Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>79</sup> Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>80</sup> *Id.*

<sup>81</sup> *Alvarez-Machain*, 504 U.S. at 657; Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>82</sup> *Alvarez-Machain*, 504 U.S. at 657; Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>83</sup> *Alvarez-Machain*, 504 U.S. at 657 (citing *United States v. Caro-Quintero*, 745 F. Supp. 599, 602–04, 609 (C.D. Cal. 1990)).

<sup>84</sup> *Id.* at 668–70.

<sup>85</sup> Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>86</sup> Treaty to Prohibit Transborder Abductions, Mex.-U.S., Nov. 23, 1994 in MICHEAL ABBELL & BRUNO A RISTAU, 5 INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL: EXTRADITION A-676.3 (Supp. 1995); Argiro Kosmetatos, Comment, *U.S.-Mexican Extradition Policy: Were the Predictions Right about Alvarez?*, 22 FORDHAM INT'L L.J. 1064, 1097 (1999).

<sup>87</sup> Kosmetatos, *supra* note 86, at 1097–98.

<sup>88</sup> Treaty to Prohibit Transborder Abductions, *supra* note 86; Kosmetatos, *supra* note 86, at 1098.

Starting around 1995, Mexico and the United States began to extradite more suspects between each other.<sup>89</sup> Mexico also began extraditing its own nationals to the United States.<sup>90</sup> Among the Mexican nationals that Mexico has recently extradited to the United States is the notorious drug lord, Joaquin “El Chapo” Guzman.<sup>91</sup> El Chapo had previously escaped a maximum security prison in Guadalajara with the help of corrupt prison personnel.<sup>92</sup> In 2017, after El Chapo had been caught and arrested again, Mexico extradited him to the United States for him to face justice in New York.<sup>93</sup> This was likely the most high profile extradition from Mexico to the United States.

#### E. THE MEXICAN LEGAL SYSTEM

The structure of Mexico’s government is very similar to that of the United States. Mexico has a federal system with power divided up between the federal government and the states.<sup>94</sup> The federal government consists of three branches: Congress, the President, and the judicial branch—whose highest authority is the Supreme Court of Justice.<sup>95</sup> There are thirty-one states in Mexico, all of which are required by the Mexican Constitution to have executive, legislative, and judicial branches.<sup>96</sup> The federal congress is bicameral and made up of the Senate and Chamber of Deputies.<sup>97</sup> The federal judicial branch has three levels, the highest of these being the Supreme Court of Justice.<sup>98</sup> The Supreme Court of Justice consists of the Chief Justice and ten associate justices.<sup>99</sup> At the intermediate level there are the circuit courts.<sup>100</sup> Mexico has twenty-three

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<sup>89</sup> Edmonds-Poli & Shirk, *supra* note 11, at 227.

<sup>90</sup> *Id.* at 227–28.

<sup>91</sup> *Id.* at 241.

<sup>92</sup> Hingoraney, *supra* note 11, at 354.

<sup>93</sup> Edmonds-Poli & Shirk, *supra* note 11, at 241.

<sup>94</sup> DAVID LOPEZ, THE LEGAL SYSTEM OF MEXICO § 1.4 (2000).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 1.4(F).

<sup>97</sup> *Id.* § 1.4(A).

<sup>98</sup> *Id.* § 1.4(C).

<sup>99</sup> *Id.* § 1.4(C)(1).

<sup>100</sup> *Id.* § 1.4(C).

circuits.<sup>101</sup> The lowest level of federal courts are the District Courts<sup>102</sup> which are the courts of first instance.<sup>103</sup>

Mexico is a civil law country, so legislation is the main source of law.<sup>104</sup> As a result, Mexican legislation is very clear and comprehensive to avoid the need to seek out other sources of law.<sup>105</sup> The Court can only create binding precedent if it issues multiple rulings on the same point in multiple cases without being interrupted by a contrary ruling.<sup>106</sup> This doctrine is called *jurisprudence constante*.<sup>107</sup> Jurisprudence constante is not a source of law, but it must be followed by all federal, state, and military courts.<sup>108</sup> The Supreme Court of Justice cannot read in any rights or powers into the Mexican Constitution<sup>109</sup> like courts can in common law countries such as the United States. As a result, the Mexican Constitution is very long compared to the US Constitution as it expressly contains all the powers of government officials and rights of Mexican citizens.<sup>110</sup>

#### F. ATTITUDES TOWARDS EXTRADITING NATIONALS

Generally, civil law countries are much more reluctant to extradite their nationals than common law countries.<sup>111</sup> This is because civil law countries tend to prioritize giving their nationals the protection of their laws,<sup>112</sup> whereas common law countries tend to prioritize punishing those who commit crimes.<sup>113</sup>

In the United States, the Secretary of State is given discretion to extradite a US citizen to face justice in a different country when the extradition treaty does not obligate the United States to extradite its own

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<sup>101</sup> *Id.* § 1.4(C)(2).

<sup>102</sup> *Id.* § 1.4(C).

<sup>103</sup> *Id.* § 1.4(C)(3).

<sup>104</sup> *Id.* § 1.7(B)(2).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* § 1.7(B)(3); *Jurisprudence Constante*, BLACK'S LAW DICTIONARY (11th ed. 2019); GUSTAVO E. GUERRA, UNITED STATES – MEXICO EXTRADITION TREATY 2 (Law Library of Congress eds. 2003).

<sup>107</sup> GUERRA, *supra* note 106, at 2.

<sup>108</sup> GUERRA, *supra* note 106, at 2–3.

<sup>109</sup> Lopez, *supra* note 94, § 1.3(A).

<sup>110</sup> *Id.*

<sup>111</sup> See Hingoraney, *supra* note 11, at 340.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

citizen.<sup>114</sup> However, the United States draws a hard line in having its citizens face justice in an international criminal court.<sup>115</sup> The United States currently has a prohibition on extradition of US citizens to international criminal courts or to foreign countries who may deliver US citizens to international criminal courts.<sup>116</sup>

The Mexican Penal Code gives domestic court's jurisdiction over crimes committed by Mexican nationals both at home and abroad if that national is within Mexican territory.<sup>117</sup> The Extradition Law of Mexico does not permit extradition of Mexican nationals except for in cases when the executive deems the circumstances to be so exceptional as to allow it.<sup>118</sup>

## II. THE US-MEXICO EXTRADITION TREATY ESTABLISHES CONFLICTING RIGHTS.

The US-Mexico Extradition Treaty contains two rights that contradict each other in cases where the person to be extradited is a national of both the requesting country and the requested country. These two rights are the implied right of the requesting country to have its nationals extradited to it and the right of the requested country not to extradite its own nationals.

### A. THE US-MEXICO EXTRADITION TREATY ESTABLISHES THE REQUESTING COUNTRY'S RIGHT NOT TO EXTRADITE ITS OWN NATIONALS.

As this comment has already explored, the treaty expressly establishes that neither country is under an obligation to extradite its own nationals.<sup>119</sup> This absence of obligation may be understood as a right not to extradite its own nationals, which the treaty allows each country to retain. This is of course a right not to extradite, not an obligation to refrain from extraditing one's own nationals, since the executive may

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<sup>114</sup> 18 U.S.C. § 3196.

<sup>115</sup> *See, e.g.*, 22 U.S.C. § 7402.

<sup>116</sup> 22 U.S.C. § 7402(a), (b).

<sup>117</sup> Código Penal Federal [CPF], art. 4, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 12-11-2021.

<sup>118</sup> Ley de Extradición Internacional [LEI], art. 14, Diario Oficial de la Federación [DOF] 29-12-1975, últimas reformas DOF 20-05-2021.

<sup>119</sup> Extradition Treaty, *supra* note 1, art. 9, ¶ 1.

still decide to extradite if they think it is proper, like Mexico did with “El Chapo” Guzman.<sup>120</sup>

B. THE US-MEXICO EXTRADITION TREATY ESTABLISHES THE  
REQUESTING COUNTRY’S RIGHT TO HAVE ITS NATIONALS EXTRADITED  
TO IT.

The US-Mexico Extradition Treaty obligates both countries to extradite people who are present in one to the other when they have been charged with, found guilty of, or need to complete punishment for a crime committed within the territory of the other.<sup>121</sup> This provision of the treaty does not distinguish between nationals and non-nationals of the requesting country.<sup>122</sup> The obligation to extradite for crimes committed within the territory of the requesting country extends to both the extradition of nationals and non-nationals of the requesting country.

The treaty extends this obligation to extradite to crimes committed outside the territory of the requesting country when the person sought to be extradited is a national of the requesting country and the requesting country has jurisdiction under its laws to bring that person to justice.<sup>123</sup> Since “outside the territory of the requesting” country includes the territory of the requested country, the requested country is obligated to extradite nationals of the requesting country, even when the crime is committed within the territory of the requested country. This provision also extends to crimes committed in a third country by a national of the requesting country. So, if a Mexican National commits a crime in the United States or any other country, the United States is obligated to extradite them to Mexico if they are found within US territory. This is assuming that an extradition request is made in the first place,<sup>124</sup> and that the requesting party has jurisdiction under its laws. If either of the two previous conditions is not met, then the requested party has no obligation to extradite.

The obligation to extradite both nationals and non-nationals who commit crimes within the territory of the requesting country and nationals that commit crimes outside the territory of the requesting

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<sup>120</sup> *Id.*; Edmonds-Poli, *supra* note 11, at 241.

<sup>121</sup> Extradition Treaty, *supra* note 1, art. 1, ¶ 1.

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* art. 1, ¶ 2(b).

<sup>124</sup> OPPENHEIM’S INTERNATIONAL LAW § 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).



country implicates a right of the requesting country to have its nationals extradited back to it under the US-Mexico Extradition Treaty. When a national commits a crime within the territory of the requesting country and flees to the requested country, the requested country is obligated by the treaty to extradite them back upon request. When a national commits a crime outside the territory of the requesting country, the requested country is obligated by the treaty to extradite them upon request. Whenever a national of one of the countries commits a crime, no matter where, if their country has jurisdiction under its laws to bring them to justice, the requested country will be obligated to extradite them to the requesting country. These two obligations of the requested country together may be understood as a right of the requesting country to have its nationals extradited back to it when it has jurisdiction to bring them to justice.

#### C. THE RIGHTS OF THE REQUESTING AND REQUESTED COUNTRY'S CONFLICT IN CASES OF DUAL NATIONALS.

Each country determines who its nationals are, so one person can legitimately have two nationalities.<sup>125</sup> As a result, through their respective Constitutions, Mexico and the United States have made it not only possible, but common for people to have both nationalities. Earlier this comment discussed multiple ways for a person to acquire both nationalities, including by birth.

The requesting country's right to have its nationals extradited to it and the requested country's right not to extradite its own nationals come into conflict when the individual in question is a national of both countries. Supposing that the requesting country has jurisdiction to bring its national to justice, but the requested country refuses to extradite on the grounds that the individual is its national, it is not clear whose right should prevail. This is the question that the remaining sections will seek to answer.

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<sup>125</sup> Convention on Certain Questions Relating to the Conflict of Nationality Laws ch. 1 art. 2-3, Apr. 12, 1930, 179 L.N.T.S 89 (this convention should be understood as customary international law according to OPPENHEIM'S INTERNATIONAL LAW § 151 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed., 1992)).

D. THE TREATY DOES NOT ADDRESS WHICH COUNTRY'S RIGHT  
SHOULD BE PRIORITIZED.

The US-Mexico Extradition Treaty's obligations to extradite in Article 1 are subject to the provisions established in the subsequent articles.<sup>126</sup> One of these provisions that Article 1 is subject to is Article 9, that neither state is bound to extradite their own nationals.<sup>127</sup> Although it may seem clear from the language of "subject to the provisions of this Treaty" that the Article 9 Right is superior, the issue is not actually as clear as it seems.

The US-Mexico Extradition Treaty does not consider the possibility of adult dual Mexican American nationals. Article 37 of the Mexican Constitution<sup>128</sup> was only amended to read that Mexicans by birth never lose their nationality on March 20, 1997.<sup>129</sup> This allowed people to have both Mexican nationality and US nationality for the first time.<sup>130</sup> The current US-Mexico Extradition Treaty was signed on May 4, 1978.<sup>131</sup> The US-Mexico Extradition Treaty was negotiated and signed almost two decades before it was possible for an adult to have both Mexican and US nationalities.<sup>132</sup> Dual nationality would likely not have been considered at the time the treaty was negotiated and signed.

Article 1 of the US-Mexico Extradition Treaty is subject to the other provisions of the treaty, most of which deal with punishments the countries may extradite for and establishing the procedure for extradition.<sup>133</sup> The only two articles that create rules based on nationality are Articles 1 and 9.<sup>134</sup> The provisions after Article 1 are there to put limitations on Article 1, not to conflict with it.<sup>135</sup> When the treaty was first signed, Article 9 was not in conflict with Article 1 since there were no adult dual nationals of both countries at the time.<sup>136</sup> At the time of

<sup>126</sup> Extradition Treaty, *supra* note 1, art. 1, ¶ 1.

<sup>127</sup> *Id.* art. 9, ¶ 1.

<sup>128</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, Capítulo II Artículo 37, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021.

<sup>129</sup> Dangaran, *supra* note 36, at 450.

<sup>130</sup> *See id.*

<sup>131</sup> Extradition Treaty, *supra* note 1; Edmonds-Poli, *supra* note 11, at 225.

<sup>132</sup> *See* Extradition Treaty, *supra* note 1; *See* Immigration and Refugee Board of Canada, *supra* note 37.

<sup>133</sup> *E.g.*, Extradition Treaty, *supra* note 1, art. 2, art. 5.

<sup>134</sup> *See* Extradition Treaty, *supra* note 1, art. 1, ¶ 2(b), art. 9, ¶ 1.

<sup>135</sup> *See id.* art. 1, ¶ 1.

<sup>136</sup> *See id.*; Immigration and Refugee Board of Canada, *supra* note 37.

signing, Article 9 would likely have only been understood as imposing an exception on the obligation to extradite a national when they commit a crime in the requesting country and run back to their home country.<sup>137</sup> It was not in conflict with the obligation to extradite a national of the requesting country back to it.

When the Treaty was negotiated and signed in 1978, it contained no conflicting provisions.<sup>138</sup> However, now there exist adult dual nationals of both Mexico and the United States, because of the Amendment to Article 37 of the Mexican Constitution in 1997.<sup>139</sup> Dual nationality causes the requesting country's right to have its nationals extradited to it from Article 1 and the requested country's right to refuse to extradite its nationals from Article 9 to contradict in those cases.

### III. IT IS UNREASONABLY DIFFICULT TO PRIORITIZE THE REQUESTING COUNTRY'S ARTICLE 1 RIGHT.

It would be unreasonably difficult to prioritize the requesting country's Article 1 right to have its nationals extradited to it over the requested country's Article 9 right to refuse to extradite its nationals. For the right of the requesting country to be prioritized, the requesting country needs to be able to enforce it in some way. Extradition treaties are generally enforced through reciprocity.<sup>140</sup> There is no way to enforce the requesting country's right without hardship or in a way that does not offend the requested country and potentially the international community. However, if the Treaty is interpreted in favor of the requested country's Article 9 right, there is no need for enforcement since the shared national is already in the territory of the requested country. To go through the difficulties that come with enforcing the requesting country's Article 1 right is an unreasonable endeavor when the Treaty can be interpreted in an alternative way that relieves both countries from that task.

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<sup>137</sup> See Extradition Treaty, *supra* note 1, art. 9, ¶ 1; See Immigration and Refugee Board of Canada, *supra* note 37.

<sup>138</sup> See Extradition Treaty, *supra* note 1; See Immigration and Refugee Board of Canada, *supra* note 37.

<sup>139</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, Capítulo II Artículo 37, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021; Dangaran, *supra* note 36, at 450; Immigration and Refugee Board of Canada, *supra* note 37.

<sup>140</sup> See Edmonds-Poli, *supra* note 11, at 217.

The following scenario will illustrate how difficult and impractical it would be for each country to assert its Article 1 right over the other's Article 9 right. Suppose that a person, who is a dual national of both the United States and Mexico, commits a crime that both countries have jurisdiction to try. They reside in the United States, and Mexico wants them to face justice under its laws and it requests extradition, asserting its Article 1 right to the United States. The United States asserts its Article 9 right and refuses because the person is their national. Mexico's power to enforce its criminal laws against that person depends on whether the person returns to Mexico's territory.<sup>141</sup> Mexico then has some options: it may wait for the person to enter its territory again so that the authorities may arrest them,<sup>142</sup> conduct a transborder abduction, or impose sanctions on the United States. It is unlikely that the person would return to Mexico because the person likely wants to do whatever they can to avoid being arrested. If the fugitive voluntarily returns to Mexico, Mexico would not be asserting its Article 1 right, since Mexico did not actively return the fugitive to its territory. Conducting a transborder abduction would entail going into the territory of the United States and abducting the person to bring them back into Mexican territory to face justice. Imposing sanctions would entail ending relationships, partnerships, or privileges with the other country.

A. TRANSBORDER ABDUCTIONS TO ENFORCE THE REQUESTING COUNTRY'S ARTICLE 1 RIGHT.

In its controversial decision *United States v. Alvarez-Machain*, the Supreme Court of the United States ruled the US-Mexico Extradition Treaty does not prohibit transborder abductions as a way for a country to get a person to face justice when extradition is not granted.<sup>143</sup> The defendant had been a Mexican national residing in Mexico when he was kidnapped in Guadalajara and taken to El Paso where he was arrested by US Drug Enforcement Administration (DEA) agents.<sup>144</sup> The defendant was indicted for being a party to the kidnapping and murder of a DEA agent and a Mexican pilot.<sup>145</sup> Although the DEA agents did not

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<sup>141</sup> See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 124, § 138.

<sup>142</sup> See *id.*

<sup>143</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992).

<sup>144</sup> *Id.* at 657.

<sup>145</sup> *Id.*

personally go into Mexico to abduct the defendant, they were nevertheless responsible for the transborder abduction.<sup>146</sup> The Central District of California held that it lacked jurisdiction to try the defendant because his abduction from Mexico, that the DEA was responsible for, violated the US-Mexico Extradition Treaty.<sup>147</sup> The Ninth Circuit agreed with the District Court, relying on its own decision in *United States v. Verdugo-Urquidez*.<sup>148</sup> In *Verdugo*, the Ninth Circuit reasoned that, although the treaty did not expressly prohibit transborder abductions, transborder abductions were still contrary to the purpose of the treaty, therefore, transborder abductions violated the US-Mexico Extradition Treaty.<sup>149</sup>

In support of its conclusion, the Supreme Court in *Alvarez-Machain* reasoned that its conclusion was consistent with its conclusion in *Ker v. Illinois*.<sup>150</sup> The majority's main reason was that since the treaty was silent on forcible transborder abduction, there was no *prima facie* obligation to refrain from carrying them out.<sup>151</sup> The majority did not interpret the treaty as making extradition the only way for each country to gain custody of persons for purposes of bringing them to justice, but rather as creating an additional way for each country to gain custody.<sup>152</sup> It is a principle of international law that a state cannot exercise its power in any way in the territory of another state.<sup>153</sup> The defendant argued that since his abduction violated this principle, the United States could not assert jurisdiction over him.<sup>154</sup> The majority rejected this argument, reasoning that many actions would violate the principle that could not be said to violate the US-Mexico Extradition Treaty, for example Mexico invading the United States.<sup>155</sup>

Justice Stevens, joined by Justices Blackmun and O'Connor, dissented, concluding that under the US-Mexico Extradition Treaty, the

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<sup>146</sup> *Id.* (citing *United States v. Caro Quintero*, 745 F. Supp. 599, 602–04 (C.D. Cal. 1990)).

<sup>147</sup> *Id.* at 658 (citing *United States v. Caro Quintero*, 745 F. Supp. 599, 614 (C.D. Cal. 1990)).

<sup>148</sup> *Id.*; *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

<sup>149</sup> *Alvarez-Machain*, 504 U.S. at 658 (citing *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1350 (9th Cir. 1991)).

<sup>150</sup> *Id.* at 660–62 (citing *Ker v. Illinois*, 119 U.S. 436 (1886) (holding that forcible abduction does not present a valid objection to being tried for a crime when the defendant is brought within the jurisdiction of the court he is being indicted in)).

<sup>151</sup> *Id.* at 663.

<sup>152</sup> *Id.* at 664–65.

<sup>153</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 124, § 139.

<sup>154</sup> *Alvarez-Machain*, 504 U.S. at 667–68.

<sup>155</sup> *Id.*

United States was obligated to return the defendant to Mexico, as his abduction was in violation of the treaty.<sup>156</sup> The dissent argued that the treaty should be interpreted to be the only way in which a country may forcibly take a defendant found in another country into custody, because if each country could simply conduct a transborder abduction, it would defeat the purpose of many provisions of the treaty.<sup>157</sup> An example given by the dissent is the Article 5 obligation not to extradite for political offenses.<sup>158</sup> The dissent goes on to argue that the rest of the world looks at US jurisprudence, giving an example of how a South African court, relying on case law from the US Supreme Court, had recently held that prosecution of a defendant that had been abducted from another country by South African agents had to be dismissed.<sup>159</sup> Justice Stevens warned that the majority's decision would be ill received by the international community,<sup>160</sup> which it was.<sup>161</sup>

*1. Transborder abductions come with several difficulties in executing them.*

For the requesting country to conduct a transborder abduction, it must send people into the territory of the requested country. These abductions would require acts that are likely to break the laws of the requested country. For example, those people would have to find the person they are looking for and overpower them while being discrete to not alert any bystanders, who may likely be their family. They would then likely have to transport their captive for miles without being discovered by the authorities, likely across multiple states.<sup>162</sup> Then, they would need to get them across an international border. If they are traveling by air, they would need to get their captive onto their plane discretely. Similar illicit actions are required if they are traveling by sea. The bottom line is that it is a dangerous, risky, difficult, and expensive process.

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<sup>156</sup> *Id.* at 671 (Stevens, J., dissenting).

<sup>157</sup> *Id.* at 673 (Stevens, J., dissenting).

<sup>158</sup> *Id.*; Extradition Treaty, *supra* note 1, art. 5.

<sup>159</sup> Alvarez-Machain, 504 U.S. at 687 (Stevens, J., dissenting) (citing *S. v. Ebrahim* 1991 (2) SA 553 (AD) at 69 (S. Afr.)).

<sup>160</sup> Alvarez-Machain, 504 U.S. at 687 (Stevens, J., dissenting).

<sup>161</sup> See Hingoraney, *supra* note 11, at 332.

<sup>162</sup> Both the United States and Mexico have a federal system of government and are divided up into different states.

2. *Transborder abductions violate customary international law.*

Since treaties are enforced by reciprocity, it is safe to assume that the requested country would reciprocate the requesting country's action in the future. So, when that country wants one of its nationals extradited to it to face justice, but the other refuses because the person is also their national, that country would also simply go across the border in secret and abduct the person. If the requesting country used transborder abductions as the method by which it would enforce its Article 1 right when the requested country refused to extradite their shared national, then it is likely that transborder abductions would become routine, breaking away from current international custom.

International custom is the original source of international law.<sup>163</sup> According to Oppenheim's International Law, "a custom is a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right."<sup>164</sup> Black's Law Dictionary defines customary international law as "international law that derives from the practice of states and is accepted by them as legally binding. This is one of the principle sources or building blocks of the international legal system."<sup>165</sup> International custom is then very important to understanding international law. International custom may then be understood as the habitual and mutual conduct by which sovereign countries interact with each other because they feel obligated to do so in that way.

It is not the habitual conduct of sovereign countries for agents of a country to go into another country in secret and abduct that country's nationals without the consent of that country.<sup>166</sup> Countries need the consent of the foreign country before its law enforcement officers may act in their official capacity within the territory of the foreign country.<sup>167</sup> This is a universally recognized principle that derives from the sovereignty of nations.<sup>168</sup> This principle applies to law enforcement

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<sup>163</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 124, § 10.

<sup>164</sup> *Id.*

<sup>165</sup> *Customary international law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>166</sup> *See, e.g.,* Sean Yau Shun Ming, *Transborder Abduction of Hong Kong Booksellers: Implications Under International Law*, LSE HUMAN RIGHTS (Apr. 25, 2016) [<https://perma.cc/BLS7-X8XC>] (China's kidnapping of booksellers in Thailand for selling scandalous books about the Chinese government is contrary to international law and controversial).

<sup>167</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 432(2) (AM. L. INST. 1987).

<sup>168</sup> *Id.* § 432 cmt. b.

officers of one country arresting a person in the territory of another country.<sup>169</sup> In *United States v. Alvarez-Machain*, the United States broke this principle of international law, and thus, broke away from this rule of customary international law.<sup>170</sup> Breaking from international custom in this way has negative consequences for the country who broke the customary rule, the country the customary rule was broken against, and the whole international community.

3. *Transborder abductions harm the two countries involved.*

The United States abducted Humberto Álvarez Machaín, a Mexican citizen, in Mexico to bring him to justice in the United States. The US Supreme Court's subsequent opinion condoning this behavior enraged Mexico.<sup>171</sup> This further damaged the already untrusting relationship between Mexico and the United States and made cooperation between the two countries more difficult.<sup>172</sup>

Now suppose that transborder abductions become the norm between the two countries for enforcing their Article 1 rights. They cease to have autonomy over what happens to their nationals, who are entitled to their protection.<sup>173</sup> They cease to have autonomy over which country's agents may act in their official conduct within their territory. They would need to be on constant guard against law enforcement officers from the other country trying to kidnap their nationals in secret. This system does not benefit either country.

Transborder abductions harm the country from whom the national is being abducted from because that country is robbed of its ability to exercise the sovereign autonomy over its nationals within its territory that it is entitled to according to international custom. It is not able to exercise its autonomy over what happened with its own national within its territory. However, transborder abductions also harm the country who conducts the abduction because the other country is less inclined to cooperate with them as a result. Cooperation between Mexico and the United States in the extradition of nationals is paramount in the

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<sup>169</sup> *See id.*

<sup>170</sup> *See id.* § 432 rep. notes 3 (listing examples of the prevailing practice of states objecting to abduction and criminal prosecution of individuals); *United States v. Alvarez-Machain*, 504 U.S. 655, 669–70 (1992).

<sup>171</sup> Hingoraney, *supra* note 11, at 331–32; Edmonds-Poli, *supra* note 11, at 227.

<sup>172</sup> Hingoraney, *supra* note 11, at 332; *See* Edmonds-Poli, *supra* note 11, at 227.

<sup>173</sup> *National*, BLACK'S LAW DICTIONARY (11th ed. 2019).



fight against the drug cartels that plague both countries.<sup>174</sup> Using transborder abductions to get a few criminals but destroying the trust between the two countries is like winning the battle but losing the war because it impairs both countries' ability to fight powerful and dangerous criminal organizations.

#### 4. *Transborder abductions harm the international community*

Transborder abductions not only harm the two countries involved, but the whole international community. The international community was outraged by the abduction of Humberto Álvarez Machaín by US DEA agents.<sup>175</sup> They were further outraged when the US Supreme Court held that the abduction was legal under international law.<sup>176</sup> Some countries threatened to prosecute people who conducted transborder abductions within their territory.<sup>177</sup> The *Alvarez-Machain* events and decision caused the international community to distrust the United States.<sup>178</sup> Transborder abductions hurt the international community because they diminish the trust between countries.<sup>179</sup> Luckily, transborder abductions did not become a normalized way to acquire jurisdiction over foreign fugitives.<sup>180</sup>

#### 5. *Normalization of transborder abductions would defeat the purpose of many provisions of the treaty.*

Many provisions of the US-Mexico Extradition Treaty would lose their purpose if it became normalized for the requesting country to abduct a person after extradition was denied.<sup>181</sup> In his dissent in *Alvarez-Machain*, Justice Stevens gave examples of various treaty provisions that would not have a purpose if transborder abductions were legal under the treaty:<sup>182</sup> the requirement of sufficient evidence,<sup>183</sup> prohibition of

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<sup>174</sup> Hingoraney, *supra* note 11, at 331.

<sup>175</sup> *Id.* at 331–32.

<sup>176</sup> *Id.* at 352.

<sup>177</sup> Kosmetatos, *supra* note 86, at 1085.

<sup>178</sup> *See* Hingoraney, *supra* note 11, at 352.

<sup>179</sup> *See id.*

<sup>180</sup> *See generally* Kosmetatos, *supra* note 86 (describing the events following the *Alvarez-Machain* decision, including the signing of the Transborder Abduction Treaty).

<sup>181</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 673 (1992) (Stevens, J. dissenting).

<sup>182</sup> *Id.*

<sup>183</sup> Extradition Treaty, *supra* note 1, art. 3.

extraditing people who have already been tried,<sup>184</sup> prohibition of extradition for political or military offenses,<sup>185</sup> prohibition of extradition for offenses whose statute of limitations has ran,<sup>186</sup> and prohibition of extraditing a person who potentially faces capital punishment.<sup>187</sup> These provisions are important and were derived from the values of the signatories to the treaty. If transborder abductions were a normal and legal way to obtain fugitives abroad, these provisions of the treaty would be bypassed by the practice of transborder abductions causing these provisions to lose purpose. Enforcement of the requesting country's Article 1 Right through transborder abduction puts these provisions of the treaty in jeopardy.

6. *The US and Mexico have reaffirmed that they will continue to abide by the customary rule regarding transborder abductions.*

The United States and Mexico have reaffirmed their dedication to customary international law on transborder abductions, despite the *Alvarez-Machain* decision.<sup>188</sup> This section has been concerned with transborder abductions becoming a recognized, legal way for the requesting country to enforce its Article 1 Right. It is true that after *Alvarez-Machain*, relations and cooperation between Mexico and the United States improved.<sup>189</sup> In response to *Alvarez-Machain*, the United States and Mexico signed the Treaty to Prohibit Transborder Abductions.<sup>190</sup> This treaty first prohibits both parties from conducting transborder abductions.<sup>191</sup> It obligates each country to notify the other when a transborder abduction has been conducted.<sup>192</sup> It obligates both

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<sup>184</sup> *Id.* art. 6.

<sup>185</sup> *Id.* art. 5.

<sup>186</sup> *Id.* art. 7.

<sup>187</sup> *Id.* art. 8.

<sup>188</sup> See Treaty to Prohibit Transborder Abductions, Mex.-U.S., Nov. 23, 1994, *reprinted in* 5 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL: EXTRADITION A-676.1 (Supp. 1995); Hingoraney, *supra* note 11, at 358.

<sup>189</sup> Kosmetatos, *supra* note 86, at 1107.

<sup>190</sup> Treaty to Prohibit Transborder Abductions, Mex.-U.S., Nov. 23, 1994, *reprinted in* 5 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL: EXTRADITION A-676.1 (Supp. 1995); Kosmetatos, *supra* note 86, at 1097.

<sup>191</sup> Treaty to Prohibit Transborder Abductions, Mex.-U.S., Nov. 23, 1994, *reprinted in* 5 MICHAEL ABBELL & BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL: EXTRADITION A-676.1 (Supp. 1995).

<sup>192</sup> *Id.* art. 4, ¶ 1.

countries to return the abducted person upon request.<sup>193</sup> It also subjects individuals who conduct transborder abductions to both criminal and civil sanctions under the laws of both countries.<sup>194</sup> Although the Treaty to Prohibit Transborder Abductions was never ratified,<sup>195</sup> its signing was still an assertion of both countries' intention that transborder abductions should be considered illegal going forward.<sup>196</sup> Therefore, the relationship between the United States and Mexico improved after Alvarez-Machin because both countries agreed that transborder abductions are not favorable and should remain to be contrary to international custom.<sup>197</sup> Had transborder abductions been normalized instead, the consequences described in this part (Part III) would manifest. Additionally, for the requesting country to utilize transborder abductions as a way to enforce its Article 1 right would be a violation of the Treaty to Prohibit Transborder Abductions that both countries signed. By signing the Treaty to Prohibit Transborder Abductions both countries have decided that transborder abductions are still illegitimate and recognize that they violate customary international law. Using transborder abductions to enforce Article 1 rights would violate this customary rule.

7. *Transborder abductions do not satisfy the requesting country's Article 1 right to have its nationals extradited to its territory.*

Conducting transborder abductions does not really assert the requested country's Article 1 right. Article 1 logically establishes the requesting country's right to have its nationals extradited to it.<sup>198</sup> Abduction is not extradition, however. By abducting a foreign fugitive, the requesting country is not asserting its right to extradition but is acquiring jurisdiction by bypassing extradition. Therefore, abductions are not a true enforcement of the requesting country's Article 1 right, rather a forceful other method utilized when an extradition request is denied.

Transborder abductions pose many risks and harm to the countries involved and to the international community. Fortunately, transborder abductions did not become routine between the United States

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<sup>193</sup> *Id.* art. 5, ¶ 1.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* art. 5 ¶ 1.

<sup>196</sup> *Id.* art. 6.

<sup>197</sup> *Id.*; Kosmetatos, *supra* note 84, at 1098.

<sup>198</sup> See Extradition Treaty, U.S.-Mex., art. 1, ¶ 2b, May 4, 1978, 31 U.S.T. 5059.

and Mexico following *Alvarez-Machain*, and US-Mexico relations improved afterward.<sup>199</sup> If the treaty were interpreted to favor the Article 1 right and the requesting country resorted to transborder abductions when the requested country refused to extradite a shared national, this progress would be in jeopardy. The relationship between the United States and Mexico would likely become fragile, like it was in the immediate aftermath of *Alvarez-Machain*.

#### B. SANCTIONS AS A WAY TO ENFORCE THE REQUESTING COUNTRY'S ARTICLE 1 RIGHT.

A different way that the requesting country can enforce its Article 1 right is by imposing sanctions on the requested country who refuses to extradite their shared national. Sanctions are a way that one country can coerce another country into a behavior.<sup>200</sup> Legislation has been introduced in the United States Congress in the past that would impose sanctions on countries that do not cooperate with US extradition efforts.<sup>201</sup>

Even though the requesting country could utilize sanctions to enforce its Article 1 right, sanctions often come with collateral damage. For example, economic sanctions can harm the country imposing the sanctions, third countries who do business with or neighbor the countries involved, as well as private parties who reside or operate in these countries.<sup>202</sup> These kinds of sanctions also tend to threaten women's rights and increase ethnic discrimination.<sup>203</sup> "An analysis of the US's sanctions imposed since 2000 shows that they reduced the human development index of targeted countries and increased corruption. . . ."<sup>204</sup> Sanctions are not an ideal way to enforce the requesting country's Article 1 right because of the amount of collateral damage that they cause.

Interpreting the treaty in favor of the requested country's Article 9 right is easier to execute and brings about better consequences. Although there are ways for the requesting country to enforce its Article 1 right, these methods are flawed and their consequences less than ideal. Transborder abductions violate customary international law and harm

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<sup>199</sup> Kosmetatos, *supra* note 84, at 1097.

<sup>200</sup> Özdamar, *supra* note 14, at 1648.

<sup>201</sup> E.g., International Extradition Enforcement Act of 2001, H.R. 2574, 107th Cong. § 3 (2001).

<sup>202</sup> Özdamar, *supra* note 14, at 1650–52.

<sup>203</sup> *Id.* at 1654.

<sup>204</sup> *Id.* at 1657.

international relationships. Sanctions cause collateral damage to many actors who do not contribute to the decision of whether to extradite. In contrast, since the shared national is already within the territory of the requested country, the requested country does not need a method to enforce its Article 9 right, it only needs to refrain from extraditing the shared national. Interpreting the treaty in favor of the requested country's Article 9 right saves both countries from the pain and agony that comes with having to enforce the Article 1 right. For the sake of ease and to yield better consequences and cooperation, the US-Mexico Extradition Treaty should be interpreted in a way that prioritizes the requested country's Article 9 right to refuse to extradite its own nationals.

#### **IV. ANYTHING SHORT OF PRIORITIZING THE REQUESTED COUNTRY'S ARTICLE 9 RIGHT IS A VIOLATION OF THE REQUESTED COUNTRY'S SOVEREIGNTY.**

Sovereignty is supreme authority.<sup>205</sup> When an entity has sovereignty over something, the entity has supreme authority over it. It is fundamental in international law that the sovereignty of countries be respected by their peers.<sup>206</sup> However, sometimes two entities have sovereignty over the same person. For example, the US federal and state governments share sovereignty over their common citizens. Since sovereign countries have the right to decide who their nationals are<sup>207</sup> and countries sometimes claim sovereign jurisdiction over their nationals abroad or at home,<sup>208</sup> then two countries will sometimes both claim sovereign jurisdiction over people who are nationals of both.

A country's jurisdiction depends on its sovereignty.<sup>209</sup> However, just because a country has sovereignty over a person, does not mean that it has jurisdiction over them.<sup>210</sup> Sometimes one country's exercise of jurisdiction on a person it is sovereign over infringes on another country's sovereignty.<sup>211</sup>

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<sup>205</sup> *Sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>206</sup> Kosmetatos, *supra* note 86, at 1069–70.

<sup>207</sup> Convention on Certain Questions Relating to the Conflict of Nationality Laws, ch. 1 art. 2, Apr. 13, 1930, 179 L.N.T.S. 89; Dangaran, *supra* note 36, at 449.

<sup>208</sup> *E.g.*, Zagaris, *supra* note 46, at 554 (citing *Steel v. Bulova Watch Co.*, 344 US 280 (1952)) (applying US antitrust laws extraterritorially to activities of US nationals).

<sup>209</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 125, § 136.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

A. TERRITORY IS THE MOST IMPORTANT BASIS TO CONSIDER IN  
DETERMINING SOVEREIGN JURISDICTION.

It is a principle of international law that countries may not assert their sovereignty in the territory of another country,<sup>212</sup> especially criminal jurisdiction.<sup>213</sup> Criminal jurisdiction, in general, is, and has historically been, very territorial.<sup>214</sup> “[Territory] is the primary basis for jurisdiction. . . .”<sup>215</sup> When two countries have jurisdiction over the same person, the country whose jurisdiction is based on territory wins over the other country’s jurisdiction.<sup>216</sup> This means that when a country has jurisdiction over its own nationals abroad, its ability to assert its jurisdiction is limited by the need to get assent from the country whose territory the person is physically present.<sup>217</sup>

Forcing the requested country to extradite its nationals breaks customary international law pertaining to sovereignty and territoriality. Remember, ambiguities in treaties must be interpreted in a way consistent with international law if possible.<sup>218</sup> The US-Mexico Extradition Treaty is not an exception to this principle. Customary international law has a principle that jurisdiction by territory trumps jurisdiction by all other bases. Under our explored scenario, the requested country has jurisdiction based on territory where the person is present and the nationality of the person. The territory basis alone is the end-all basis in the absence of a treaty, however, the nationality basis further drives that the requested country has the primary jurisdiction, even in the context of the treaty.

The US-Mexico Extradition Treaty does not explicitly break with customary international law by stating that the countries are obligated to extradite their own nationals, present within its own territory, when those nationals are also nationals of the requesting country. In fact, it states that neither country is obligated to extradite its own nationals.<sup>219</sup> Since the treaty has not explicitly broken with

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<sup>212</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 671 (1992) (Stevens, J., dissenting); OPPENHEIM’S INTERNATIONAL LAW, *supra* note 125, § 138; RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 432 cmt. b (AM. L. INST. 1987).

<sup>213</sup> *See* OPPENHEIM’S INTERNATIONAL LAW, *supra* note 125, § 138.

<sup>214</sup> *See id.* § 139.

<sup>215</sup> *Id.* § 137.

<sup>216</sup> *Id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See id.* § 11; *see* Kosmetatos, *supra* note 86, at 1090.

<sup>219</sup> Extradition Treaty, *supra* note 1, art. 9, ¶ 1.

customary international law, it should still be interpreted as being in accordance with international custom. A treaty's explicit break with international custom is important because it gives each country the chance to consent to the break. When the break is not explicit, countries do not have the genuine opportunity to consent. The United States and Mexico did not have a genuine opportunity to break from the customary principles we are currently discussing, especially since adult dual nationals of both countries did not exist at the time the treaty was signed.

It is a principle of customary international law that countries must not exercise sovereignty in the territory of another country and that territory is the primary basis of criminal jurisdiction. There is nothing in the US-Mexico Extradition Treaty that breaks from these customary principles. The treaty should be interpreted so as not to force the requested country to extradite its own nationals present within its territory. If the treaty is interpreted to force the requested country to extradite its own nationals for the sake of the requesting country's Article 1 right, there would be a violation of customary international law and of the requested country's sovereignty.

B. OBLIGATING MEXICO TO VIOLATE ITS OWN DOMESTIC LAW IS A  
VIOLATION OF MEXICO'S SOVEREIGNTY.

Paramount to being a sovereign country is having the ability to choose your values and writing them into your Constitution and other laws. Common law countries are generally more willing to extradite their own nationals to foreign countries.<sup>220</sup> This is because common law countries view their nationals who have been accused of a crime as criminals first; their status as a compatriot comes second to their criminal status.<sup>221</sup> In contrast, civil law countries are generally wary about extraditing their own nationals to foreign countries.<sup>222</sup> This is because civil law countries generally view their nationals who commit crimes as compatriots first; their status as criminals comes second.<sup>223</sup> Civil law countries then generally hold the view that it is their duty to afford their nationals the protection of their laws,<sup>224</sup> and their laws reflect this view.<sup>225</sup>

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<sup>220</sup> Hingoraney, *supra* note 11, at 340.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

The Mexican Constitution states that international extraditions are to be processed by the executive branch in accordance with domestic regulatory laws.<sup>226</sup> Mexico's Extradition Code establishes that Mexican nationals cannot be delivered to a foreign country except in exceptional cases as determined by the executive.<sup>227</sup> This is a common regulatory law among civil law Latin American countries.<sup>228</sup> Mexico has exercised its sovereignty by asserting to value the status of its nationals as compatriots over their status as criminals. Mexico has written this value into its Constitution and Extradition Code.

To force Mexico to extradite its nationals, when they are also nationals of the United States, would force Mexico to violate its own Extradition Code, and as a result, its Constitution. Since Mexico's Extradition Code only allows for extradition of nationals if the executive finds that there is an exceptional reason to,<sup>229</sup> interpreting the treaty in a way that forces Mexico to extradite its dual nationals violates this statute because it takes the discretion away from the executive. Since the Extradition Code is violated, the Mexican Constitution is also violated because Article 119 requires that extradition be done in accordance with Mexican regulatory laws,<sup>230</sup> which include the Extradition Code.

A United States equivalent would be to force the United States to extradite its national to the International Criminal Court or a country who would extradite them there. The United States prohibits extradition of its nationals to the International Criminal Court<sup>231</sup> or any country that would extradite them to the International Criminal Court.<sup>232</sup> The United States has decided that the International Criminal Court is flawed, has too broad of jurisdiction, and has no checks to prevent politically motivated

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<sup>225</sup> *E.g.*, Ley de Extradición Internacional [LEI], Diario Oficial de la Federación [DOF], 29-12-1975, últimas reformas DOF 20-05-2021 (Mex.).

<sup>226</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, tit. 5 art. 119, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021.

<sup>227</sup> Ley de Extradición Internacional [LEI], art. 14, Diario Oficial de la Federación [DOF], 29-12-1975, últimas reformas DOF 20-05-2021 (Mex.).

<sup>228</sup> Hingoraney, *supra* note 11, at 338.

<sup>229</sup> Ley de Extradición Internacional [LEI], art. 14, Diario Oficial de la Federación [DOF], 29-12-1975, últimas reformas DOF 20-05-2021 (Mex.).

<sup>230</sup> Constitución Política de los Estados Unidos Mexicanos, CPEUM, tit. 5 art. 119, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021.

<sup>231</sup> *See* 22 U.S.C. § 262-1(b)(2).

<sup>232</sup> 22 U.S.C. § 7402(a).



prosecutions.<sup>233</sup> In other words, the United States has decided that the International Criminal Court does not conform to its values as a country and has written this into its law. It would be a violation of the sovereignty of the United States to interpret existing extradition treaties as obligating it to extradite its nationals to the International Criminal Court or to a country that would extradite them to the International Criminal Court. This is because it would force the United States to violate its own laws that it has made based on its own values as a country. If the United States must not be obligated to extradite its own nationals in violation of its laws, Mexico should not be either.

Although Mexico's justice system is flawed and there is widespread corruption in the country that is a cause for concern to the United States, the United States should still respect what the Mexican people have decided are their values. The Mexican people have chosen their Constitution and have spoken. A flawed justice system is not an excuse for the United States to cast that aside and decide that its way is better.

Obligating Mexico to extradite its own nationals to the US when they are also nationals of the United States, forces Mexico to violate its Extradition Code and Constitution. Mexico's Constitution and Extradition Code reflect its values as a country and its right to do so derives from its sovereignty. Therefore, to obligate Mexico to extradite its own nationals to the United States, even if they are nationals of the United States too, is a violation of Mexico's sovereignty.

To prioritize the requesting country's Article 1 over the requested country's Article 9 right would be to violate the requested country's sovereignty. Customary international law asserts that territory is the primary basis of jurisdiction and countries may not assert criminal jurisdiction within the territory of another without its consent. Prioritizing the requesting country's Article 1 right would be to allow the requesting country to assert criminal jurisdiction within the territory of the requested country without the requested country's true consent. Prioritizing the requesting country's Article 1 right would violate Mexico's sovereignty by obligating Mexico to violate its Extradition Code and Constitution. It is a right of sovereignty to have a country's values reflected in its law, to obligate a country to violate its laws

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<sup>233</sup> Sasha Marcovic, *The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 CLEV. STATE L. REV. 263, 264 (2004).

violates that country's sovereignty. Therefore, to respect the sovereignty of both countries, the requested country's Article 9 right must be prioritized.

## **V. CONCLUSION**

The US-Mexico Extradition Treaty establishes rights that both the requesting and requested country have to their nationals. A conflict between these two rights has arisen with the advent of US-Mexico dual nationality. In cases where the person sought to be extradited is a dual national of both countries, the US-Mexico Extradition Treaty should be read in a way where the requested country's Article 9 right not to extradite its own nationals is prioritized over the requesting country's Article 1 right to have its national extradited back to it. The Article 9 right should be prioritized for ease of enforcement, to keep the treaty in harmony with principles of international law, and to keep the treaty in harmony with Mexican law.