

1-1-1999

An Examination of the Rights of American Bounty Hunters to Engage in Extraterritorial Abductions in Mexico

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Andrew Berenson, *An Examination of the Rights of American Bounty Hunters to Engage in Extraterritorial Abductions in Mexico*, 30 U. Miami Inter-Am. L. Rev. 461 (1999)
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COMMENT

AN EXAMINATION OF THE RIGHTS OF AMERICAN BOUNTY HUNTERS TO ENGAGE IN EXTRATERRITORIAL ABDUCTIONS IN MEXICO

I.	INTRODUCTION	462
II.	BOUNTY HUNTERS IN CONTEMPORARY SOCIETY	465
	A. <i>The Presence of Bounty Hunters on the Internet</i>	465
	B. <i>The Reliance on Bounty Hunters in the Modern Judicial System</i>	465
III.	THE LEGAL AUTHORITY ENABLING BOUNTY HUNTERS TO SEIZE FUGITIVES	467
	A. <i>Nineteenth-Century Cases</i>	467
	1. <i>Taylor v. Taintor</i>	467
	2. <i>Bounty Hunters Are Not State Actors</i>	469
	B. <i>Fourth Amendment Does Not Apply to Private Citizens</i>	469
IV.	AUTHORITY FOR BOUNTY HUNTERS' APPARENT UNLIMITED POWER TO ACT INTERNATIONALLY	470
	A. <i>United States v. Verdugo-Urquidez I.</i>	471
	B. <i>The Ker-Frisbie Doctrine</i>	474
	1. <i>Ker v. Illinois</i>	474
	2. <i>Frisbie v. Collins</i>	475

C.	<i>United States v. Alvarez-Machain</i>	476
V.	UNITED STATES' ACCEPTANCE OF EXTRATERRITORIAL ABDUCTIONS APPEARS TO CONFLICT WITH INTERNATIONAL LAW	478
A.	<i>Customary International Law</i>	479
B.	<i>International Treaty Law</i>	481
1.	The United Nations Charter	481
2.	Organization of American States Charter	481
3.	Civil and Political Covenant	482
C.	<i>Why International Law May Not Apply to Bounty Hunters</i>	483
VI.	ACTUAL LIMITS ON BOUNTY HUNTERS' ABILITY TO ENTER MEXICO AND ABDUCT MEXICAN NATIONALS	484
A.	<i>Reese v. United States</i>	484
B.	<i>Treaty to Prohibit Transborder Abductions</i>	485
VII.	CONCLUSION	487

I. INTRODUCTION

The Supreme Court in *United States v. Alvarez-Machain* held that a criminal defendant, abducted from Mexico, may be tried in American courts for violations of U.S. law.¹ The Court determined that the extradition treaty between the United States and Mexico² did not prohibit forcible abductions³ by the U.S. government, either explicitly or implicitly.⁴

1. *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992).

2. Treaty of Extradition Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter 1978 Extradition Treaty].

3. See, e.g., M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 121-43 (1974). "Abduction" refers to an individual's seizure and removal to another nation without the knowledge or consent of the nation in which the seizure occurs. *Id.* at 124. "Irregular rendition," on the other hand, refers to the informal surrender of an individual by agents of one nation to agents of another without formal or legal process. *Id.* at 128-29.

4. *Alvarez-Machain*, 504 U.S. at 663, 668-69.

The Supreme Court's decision in *Alvarez-Machain* was sharply criticized both domestically and internationally.⁵ Domestically, the Supreme Court's ruling spawned a myriad of law review articles and commentaries.⁶ Internationally, the United States received formal protests from many countries.⁷ The *Alvarez-Machain* decision raises serious questions. One such question concerns the rights of American bounty hunters⁸ to abduct individuals in foreign countries.

In recent years, the approximately seven thousand American bounty hunters have come to play an indispensable role in the criminal justice system.⁹ Bounty hunters enter the scene after the judicial process has commenced.¹⁰ An accused, who has had a judge-set bail, typically hires a commercial bondsman to file a bond directly with the court.¹¹ The accused and the bondsman sign a contract where the accused pays the bondsman a percentage of the total bail.¹² In return, the bondsman assumes the responsibility of paying the remainder of the bail if the accused fails to appear at trial.¹³ When an accused fails to show up in court, the bondsman usually hires professional bounty hunters to bring back the accused.¹⁴

The powers conferred upon bounty hunters to search for and apprehend an accused that has jumped bail are equivalent to

5. William J. Aceves, *The Legality of Transborder Abductions: A Study of United States v. Alvarez-Machain*, 3 SW. J.L. & TRADE AM. 101 (1996).

6. See, e.g., *Id.* at 101; Bradley Thrush, *United States' Sanctioned Kidnappings Abroad: Can the United States Restore International Confidence in Its Extradition Treaties?*, 11 ARIZ. J. INT'L & COMP. L. 181 (1994); Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939 (1992).

7. Some of the countries included: Mexico (June 1992); Canada (June 1992); China (Dec. 1992); Denmark (June 1992); Guatemala (Sept. 1992); Malaysia (Oct. 1992); and Venezuela (June 1992). See Aceves, *supra* note 5, at 117-20.

8. See John Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 732 n.2 (1996) (citing PAUL B. WICE, *FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE* 59 (1974) (stating that the rights and restrictions associated with bounty hunters are "equally germane" to those of bail bondsmen, despite the fact that the bondsman has the ultimate legal authority over the defendant; bounty hunters exercise such rights far more frequently than bondsmen themselves)); See also *Commonwealth v. Brickett*, 25 Mass. (1 Pick.) 137, 141 (1829) (recognizing that bounty hunters have the same rights as bondsmen).

9. See Drimmer, *supra* note 8, at 735, 787.

10. See *id.* at 743.

11. See *id.* at 741-42.

12. See *id.*

13. See *id.* at 742.

14. See *id.* at 743.

those of a police officer pursuing an escaped prisoner,¹⁵ but without similar training or restrictions.¹⁶ In addition, many bounty hunters are ex-convicts,¹⁷ and only are paid by the bondsman when they present either the accused or his death certificate to the court before the bond is lost.¹⁸ Thus, unfortunately, incidents of abuse can and do frequently arise.¹⁹ The conditions are ripe for another incident involving bounty hunters; but as a result of the *Alvarez-Machain* decision, the abuse will have international implications.

This Comment examines what rights and restrictions, if any, bounty hunters have to cross the border into Mexico, abduct an individual, and bring him or her back to be tried in front of an American court. This Comment argues that currently under both American and international law bounty hunters have such a right, although it is a limited right. Furthermore, the United States has the power to completely prevent American bounty hunters from abducting individuals inside Mexico, if the United States chooses to exercise such power.

Part II of this Comment briefly describes the presence of bounty hunters in American society and the reliance on bounty hunters in the current judicial system. Part III analyzes the sources of authority that permit bounty hunters to seize fugitives and return them to the court. Part IV analyzes the effects of Supreme Court cases that appear to provide bounty hunters with unlimited power to enter into Mexico and abduct individuals. Part V examines whether the holdings in the cases discussed in Part IV conflict with current international law. Part VI discusses limits, both actual and potential, on bounty hunters' rights to enter Mexico and abduct individuals. The Comment concludes that currently bounty hunters have limited rights to enter Mexico and abduct individuals. In addition, the Comment also concludes that a possibility exists that would completely

15. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371-72 (1872); see also *infra* notes 40-51 and accompanying text.

16. See *Drimmer*, *supra* note 8, at 737.

17. See *id.* at 732 n.2 (stating that bounty hunters usually carry weapons and quite often have prior records).

18. See *id.* at 743.

19. See *id.* at 735 n.12 (recounting several incidences of abuse, including one bounty hunter who broke into the home of an innocent man, whom he mistook for a bail jumper, and shot him to death).

eliminate American bounty hunters' ability to enter Mexico and abduct individuals.

II. BOUNTY HUNTERS IN CONTEMPORARY SOCIETY

A. *The Presence of Bounty Hunters on the Internet*

One of the best illustrations of the strong presence of bounty hunters in American society is the Internet. A search conducted on one of the many Internet "search engines" reveals the existence of close to 73,000 sites.²⁰ The sites range from home pages of bounty hunters²¹ to national bail bond agencies.²²

However, these bail bond agencies offer more services than providing accused individuals with bail. For example, Hunters Locators International, a national bail bond agency, offers the following services in addition to financing bail bonds: 1) Missing Persons/Background services; 2) Security Consulting services; and 3) Asset Recovery services.²³ In addition to the Internet, the bounty hunting industry has also resulted in the publication of many books on the subject.²⁴

B. *The Reliance on Bounty Hunters in the Modern Judicial System*

The budget reductions and limitations on spending that state and local governments have had to endure over the past several years²⁵ has forced government officials to seek alternatives. One such alternative is the privatization of certain law enforcement

20. *Yahoo!* (visited June 17, 1998) <<http://av.yahoo.com/bin/query?p=bail&bondsman&hc=0+hs=0>>. A search on Yahoo! for the term "bail bondsman" came up with 72,860 sites.

21. *See, e.g.*, the home page of David A. Mollison, *Professional Bail Bond Recovery Agent* (visited June 17, 1998) <<http://www.pimall.com/mollison/Home.dam.html>>.

22. *See, e.g.*, the home page of *Hunters Locators International* (visited June 17, 1998) <<http://www.hunterlocatorsintl.com/>>.

23. *See id.*

24. *See, e.g.*, LANCE ALLEN WILKINSON, BEA & RICHARD VERROCHI, CBA, BAIL, BOUNTY HUNTING AND THE LAW (1997); CHRIS HARPER, BAIL ENFORCEMENT PROFESSIONAL'S FIELD MANUAL (1997); DAVID MOLLISON, MODERN DAY BOUNTY HUNTING (1997).

25. *See* Peter Dreier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1371 (1993) (discussing the near bankruptcy of municipal governments and the subsequent closure of hospitals, police stations, and schools).

activities.²⁶ According to Drimmer, states spend approximately \$20,000 a year on the prisoners in the nation's overcrowded jails.²⁷ In addition, America spends \$60,000 per year for every police officer on the street.²⁸ This problem has led the judicial system to rely more heavily on the bail process as a means to decrease state pretrial costs and relieve the burden on prisons.²⁹

However, cuts in police budgets, which have resulted in manpower shortages, have made it impractical and inefficient for law enforcement officers to chase those accused individuals who jump bail.³⁰ Bounty hunters' participation in the criminal justice system saves the State the expenses of searching for, arresting, and transporting the accused to court.³¹ Drimmer also notes that "bounty hunters are significantly more effective at retrieving fugitives than the police, returning 99.2% of suspects committed to the custody of bondsmen."³² The police, on the other hand, return only 92% of the fugitives who jump bail while under public bail.³³ Thus, States have come to depend on bondsmen and bounty hunters to help relieve prison costs and ease prison overcrowding.

Police also rely on the assistance of bounty hunters in areas of law enforcement that are beyond the scope of the bail process.³⁴ Police and other government officials work symbiotically with bounty hunters.³⁵ Frequently, bounty hunters will trade information with police and law enforcement officials.³⁶

26. See Drimmer, *supra* note 8, at 758.

27. *Id.* at 759-60.

28. *Id.* at 760.

29. *Id.* at 762.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 762 n.181 (citing Charles Oliver, *National Issues*, INVESTOR'S BUS. DAILY, May 12, 1994, at 1).

34. See generally Drimmer, *supra* note 8; Emily Michael Stout, Comment, *Bounty Hunters As Evidence Gatherers: Should They Be Considered State Actors Under the Fourth Amendment When Working With the Police?* 65 U. CIN. L. REV. 665 (1997).

35. See Drimmer, *supra* note 8, at 787 & nn.312 & 317.

36. For example, in *United States v. Rose*, a bounty hunter arrested an individual charged with failure to appear at a court hearing. 731 F.2d 1337 (8th Cir. 1984), *cert. denied*, 469 U.S. 931 (1984). Upon the arrest, the bounty hunter obtained from the accused the weapon used in the commission of the crime. *Id.* at 1344-45. In addition, the accused confessed his involvement in the crime to the bounty hunter. *Id.* The bounty hunter handed over the weapon to the police and informed them about the accused's confession. *Id.* The court found that the bounty hunter was acting in a private capacity and, therefore, denied the defense's motion to suppress the weapon and the statements

Occasionally, bounty hunters will even help to capture elusive suspects before these suspects' initial arrest.³⁷

III. THE LEGAL AUTHORITY ENABLING BOUNTY HUNTERS TO SEIZE FUGITIVES

Two major categories of legal authority exist that provide bounty hunters with the power to apprehend fugitives: nineteenth-century cases upholding bounty hunters' common law power³⁸ and the Supreme Court's holding that the Fourth Amendment protections do not apply to private citizens.³⁹ Each of these legal categories is discussed below.

A. Nineteenth-Century Cases

1. *Taylor v. Taintor*

*Taylor v. Taintor*⁴⁰ is the cornerstone of bounty hunters' rights.⁴¹ *Taylor* involved an action by a bondsman, Taylor, to recover a forfeited bond.⁴² After his arrest in Connecticut, McGuire entered into a bail agreement with Taylor and one other surety.⁴³ After McGuire's sureties posted his bail, McGuire returned to his home in New York.⁴⁴ However, unbeknownst to his sureties, McGuire was wanted for a crime he committed while he was in Maine.⁴⁵ The governor of New York, upon a request from Maine's governor, seized McGuire, immediately extraditing McGuire to Maine, where he was imprisoned.⁴⁶ Since McGuire was in a prison cell in Maine, he obviously could not appear in

made to the bounty hunter. *Id.* at 1345.

37. See e.g., *United States v. Rhodes*, 713 F.2d 463, 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 1012 (1983), 465 U.S. 1038 (1984) (reporting a bounty hunter's help in the arrest of the defendants did not make the bounty hunter a government agent).

38. See discussion *infra* notes 40-54 and accompanying text.

39. See discussion *infra* notes 55-59 and accompanying text.

40. 83 U.S. (16 Wall.) 366 (1872).

41. See Gregory Takacs, Note, *Tyranny on the Street: Connecticut's Need for the Regulation of Bounty Hunters*, 14 QUINNIPIAC L. REV. 479, 489 (1994) (stating that the *Taylor* decision is still the foundation of bounty hunters' rights).

42. *Taylor*, 83 U.S. at 368.

43. *Id.*

44. *Id.*

45. *Id.* at 369.

46. *Id.* at 368.

front of the Connecticut court as required; therefore, Taylor and the other surety forfeited the bail amount.⁴⁷

In deciding whether the sureties could recover the amount of the forfeiture, the Court articulated the general common-law rights⁴⁸ afforded to bounty hunters:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. . . . "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge."⁴⁹

Thus, in *Taylor*, the Court held that the State gave custody of the accused to a bondsman as means of continuing the accused's imprisonment, and a bounty hunter's power of arrest was an extension of the State's initial capture.⁵⁰ Therefore, a bounty hunter enjoyed the same rights as a sheriff over an escaping prisoner, including the use of deadly force in obtaining custody over a fugitive.⁵¹

47. *Id.*

48. Under the common law in England, the state treated bail as a form of continued incarceration, and viewed an arrest by the bondsman as an extension of the state's initial capture. See Drimmer, *supra* note 8, at 744-51. Before *Taylor*, American courts adopted this same view, treating the defendant in a state of endless flight. *Id.* Therefore, bondsmen in early America enjoyed the same rights of capture as a jailer over an escaped prisoner, irrespective of whether the defendant had failed to appear in court. *Id.* See also *Nicolls v. Ingersoll*, 7 Johns. 145, 155-56 (N.Y. 1810) (stating the broad powers that are available to the bounty hunter).

49. *Taylor*, 83 U.S. at 371-72.

50. See Drimmer, *supra* note 8, at 752.

51. *Id.* at 752-53. But a few states have passed laws that supercede the Supreme Court's holding in *Taylor*. *E.g.*, IDAHO CODE § 19-2927 (1997); TEX. PEN. CODE § 8.03 (1997). For example, courts in Idaho and Texas refused to follow the holding of *Taylor* because these states' legislatures enacted laws that abrogated the common law holding of *Taylor*. *State v. Fry*, 910 P.2d 164 (Idaho Ct. App. 1994); *Green v. State*, 829 S.W.2d 222 (Tex. Crim. App. 1992); *Linder v. State of Texas*, 779 S.W.2d 520 (Tex. Crim. App. 1989). In addition, see footnote 2 in *Kear v. Hilton* where the court acknowledged that it proceeded:

2. Bounty Hunters Are Not State Actors

The same nineteenth-century courts that held the rights of bounty hunters were an extension of those rights granted to law enforcement officials also determined that bounty hunters were not State actors.⁵² These courts held that the bounty hunters' rights to recapture a fugitive derived not through their participation as a participant in the judicial process, but rather, from the private contract between the accused and the bondsman.⁵³ The result of the nineteenth-century courts' rational was that, "the comprehensive rights of bondsmen and bounty hunters, and their assumption of custody over a defendant, emanated from terms implicit in the private bail contract. Thus, although bounty hunters and bondsmen functioned as State proxies for the pretrial criminal process, bounty hunters were not considered State actors."⁵⁴

B. Fourth Amendment Does Not Apply to Private Citizens

The second legal authority for the power of bounty hunters is found in the non-application of the Fourth Amendment to private citizens. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁵

[P]roceed[s] on the assumption that the *Taylor* decision, which has never been overruled, remains the law. . . . [I]t has been a long time since 1872. In the meantime, the Supreme Court has imposed requirements of recourse to the judicial process to reclaim property interests. . . . It seems reasonable to suppose that liberty interests may be entitled to similar protection.

699 F.2d 181, 182 (4th Cir. 1983).

52. See Drimmer, *supra* note 8, at 752, 754.

53. See *In re Von Der Ahe*, 85 F. 959, 960 (C.C.W.D. Pa. 1898) (determining that powers of bounty hunters and bondsmen arise solely from private contract); *Nicolls*, 7 Johns. at 154 (recognizing the power of a bounty hunter and a bondsman to capture a fugitive results from a contract signed between the bondsman and the principal).

54. Drimmer, *supra* note 8, at 754-55.

55. U.S. CONST. amend. IV.

However, the Supreme Court has declared that the Fourth Amendment does not extend to searches and seizures, whether reasonable or unreasonable, conducted by private citizens who are acting upon their own initiative, without any governmental influence.⁵⁶ Federal courts have concluded that bounty hunters are private actors; therefore, the Fourth Amendment does not apply to arrests made by bounty hunters.⁵⁷ Bounty hunters have the powers of police officers, but without any of the constitutional restraints imposed upon police officers.⁵⁸ "Thus, bounty hunters have the authority to break into defendants' homes and take them into custody, and can seize or elicit incriminating evidence and statements that, whether voluntary or coerced, will be admissible against the defendant in court."⁵⁹

IV. AUTHORITY FOR BOUNTY HUNTERS' APPARENT UNLIMITED POWER TO ACT INTERNATIONALLY

Recent Supreme Court decisions have at first glance effected the rights of bounty hunters to abduct individuals in Mexico. The Supreme Court's decisions in *United States v. Verdugo-Urquidez I*⁶⁰ and *United States v. Alvarez-Machain*,⁶¹ coupled with its reaffirmation of the *Ker-Frisbie* doctrine,⁶² have provided bounty hunters with the legal power to abduct individuals in Mexico. The following is a discussion of each of these cases and their apparent contributions to the legal powers of bounty hunters.

56. See *Burdeau v. McDowell*, 256 U.S. 465 (1921) (declaring that the Fourth Amendment's protection against unlawful searches and seizure applies only to governmental action); see e.g. *Skinner v. Railway Labor Executive's Association*, 489 U.S. 602, 614 (1989) (noting that the Fourth Amendment does not apply to searches and seizures undertaken by a private party upon his own initiative).

57. See *United States v. Rose*, 731 F.2d 1337, 1345 (8th Cir. 1984), *cert. denied*, 469 U.S. 931 (1984); *United States v. Rhodes*, 713 F.2d 463, 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 1012 (1983), 465 U.S. 1038 (1984).

58. See *Drimmer*, *supra* note 8, at 769-73.

59. *Id.* at 770-71 & nn.222 & 223.

60. 494 U.S. 259 (1990).

61. 504 U.S. 655 (1992).

62. The *Ker-Frisbie* doctrine is derived from two Supreme Court decisions: *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952). See also discussion *supra* notes 88-103 and accompanying text.

A. *United States v. Verdugo-Urquidez I*

The Supreme Court's decision in *United States v. Verdugo-Urquidez I* apparently provides bounty hunters with an unchecked power to act internationally. The facts of the case began when the United States obtained a warrant for Verdugo-Urquidez and Mexican law enforcement agents, who after conferring with United States law enforcement officials, forcibly abducted Verdugo-Urquidez, a Mexican citizen, and delivered him to United States Marshals in California.⁶³ The marshals arrested Verdugo-Urquidez for both his participation in the murder of Drug Enforcement Agency (DEA) Special Agent Enrique Camarena-Salazar and his alleged narcotics trafficking.⁶⁴ After Verdugo-Urquidez's arrest, DEA agents sought and obtained permission from the Director General of the Mexican Federal Judicial Police (MFJP) to search Verdugo-Urquidez's residences in Mexico for evidence of the alleged crimes.⁶⁵ DEA and MFJP agents searched the residences and seized a tally sheet, which the government believed implicated Verdugo-Urquidez in narcotics smuggling into the United States.⁶⁶

The District Court granted Verdugo-Urquidez's motion to suppress the tally sheet, concluding that the Fourth Amendment applied to the searches and the DEA agents failed to justify searching Verdugo-Urquidez's residences without a warrant.⁶⁷ The Ninth Circuit Court of Appeals affirmed, citing the principle established by a plurality of the Justices in *Reid v. Covert*⁶⁸ that constitutional restrictions limit exercises of United States government power, whether at home or abroad.⁶⁹ Further, the

63. *Id.* at 262.

64. *Id.*

65. *Id.*

66. *Id.* at 262-63.

67. *Id.* at 263.

68. *Reid v. Covert*, 354 U.S. 1 (1957).

69. *Verdugo-Urquidez I*, 494 U.S. at 263. In *Reid*, Justice Black wrote:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Reid, 354 U.S. at 5-6.

Ninth Circuit, relying on a prior Supreme Court opinion that implied that illegal aliens in the United States have Fourth Amendment rights,⁷⁰ concluded that the Fourth Amendment also protects non-citizens abroad, such as Verdugo-Urquidez.⁷¹ Having determined that the Fourth Amendment applied to the searches of Verdugo-Urquidez's residences, the Ninth Circuit held that the searches violated the Constitution because the DEA agents failed to obtain a search warrant.⁷²

Chief Justice Rehnquist, writing for the majority, overruled the Ninth Circuit, holding that the Fourth Amendment does not apply to the search and seizure by United States law enforcement agents of property owned by a foreign national and located in another country.⁷³ The majority concluded Verdugo-Urquidez lacked the "voluntary connection" with the United States necessary to receive the protections of the Fourth Amendment.⁷⁴

In explaining why Verdugo-Urquidez lacked a sufficient connection to the United States so as to fall within the protections of the Fourth Amendment, the majority first contrasted the text of the Fourth Amendment with those of other Amendments.⁷⁵ The Court noted that the Fifth and Sixth Amendments use the words "person" and "accused," whereas the First, Second, Fourth, Ninth, and Tenth Amendments use the word "people."⁷⁶ The majority found that:

"[T]he people" protected by the Fourth Amendment, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. . . . The

70. *Verdugo-Urquidez I*, 494 U.S. at 272 (noting that the Ninth Circuit should not be faulted for interpreting *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) to stand for the proposition that fourth amendment rights do not apply to deportation hearings without directly deciding fourth amendment rights of illegal aliens).

71. *Verdugo-Urquidez I*, 494 U.S. at 263.

72. *Id.* Although the Ninth Circuit recognized that an American search warrant would have no legal validity in Mexico, the Ninth Circuit deemed it sufficient that a warrant would have great constitutional value in the United States. *Id.* at 263-64. The Ninth Circuit believed the search warrant would reflect a neutral magistrate's determination that probable cause existed to conduct the search, and the warrant would define the scope of such a search. *Id.*

73. *Id.* at 274-75.

74. *Id.* at 273.

75. *Id.* at 265.

76. *Id.*

language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.⁷⁷

The Court found the Ninth Circuit's expansive extraterritorial application of the Constitution contrary to the Court's decision in the Insular Cases,⁷⁸ which held that "not every constitutional provision applies to governmental activity even where the United States has sovereign power."⁷⁹ The Court concluded that the Fourth Amendment was one such "constitutional provision."⁸⁰

Finally, the Court found the Ninth Circuit's reliance on *Lopez-Mendoza* unpersuasive.⁸¹ The question presented to the *Lopez-Mendoza* Court did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in the United States; thus, the *Lopez-Mendoza's* statements on that subject are not dispositive.⁸² But even assuming illegal aliens would be entitled to Fourth Amendment protections, their situation differs from *Verdugo-Urquidez's*.⁸³ The illegal aliens in *Lopez-Mendoza* were in the United States voluntarily;⁸⁴ *Verdugo-Urquidez*, however, "had no voluntary connection with this country that might place him among 'the people' of the United States."⁸⁵

The ramifications of *Verdugo-Urquidez I* on bounty hunters ability to abduct individuals in Mexico seem to be great. Mexican nationals who are in Mexico have no connections so as to be considered one of "the people" whom the Fourth Amendment protects.⁸⁶ The Supreme Court's decision in *Verdugo-Urquidez*, combined with the Supreme Court's conclusion that the Fourth

77. *Id.* at 265-66.

78. *Id.* at 268. The Insular Cases consist of the following cases: *Downes v. Bidwell*, 182 U.S. 244 (1900); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

79. *Verdugo-Urquidez I*, 494 U.S. 276 (Kennedy, J. concurring).

80. *Id.* at 267.

81. *Id.* at 272.

82. *Id.*

83. *Id.* at 272-73.

84. *Id.* at 273.

85. *Id.* Justice Stevens in his concurrence argued that *Verdugo-Urquidez* should be included as one of "the people" since he was lawfully present in this country even though he was brought and held in America against his will. *Id.* at 279 (Stevens, J. concurring).

86. Randall Miller, *The Limits of U.S. International Law Enforcement After Verdugo-Urquidez: Resurrecting Rochin*, 58 U. PITT. L. REV. 867, 884-85 (1997).

Amendment does not apply to private citizens,⁸⁷ provides an open invitation to bounty hunters to abduct individuals in Mexico. The reason for this is the Fourth Amendment does not protect Mexican nationals who have no connections to the United States and does not limit bounty hunters in their conduct.

B. *The Ker-Frisbie Doctrine*

The second of the Supreme Court's recent pronouncements that apparently broaden bounty hunters' rights is the Court's reaffirmation of the *Ker-Frisbie* doctrine. The *Ker-Frisbie* doctrine permits courts to exercise personal jurisdiction over a defendant regardless of the illegal manner in which the defendant was brought before the court.⁸⁸ The *Ker-Frisbie* doctrine is the modern equivalent of the Roman maxim *male captus, bene detenus*—improperly captured, properly detained.⁸⁹

1. *Ker v. Illinois*

The first part of the doctrine is *Ker v. Illinois*.⁹⁰ This case involved the forcible abduction and repatriation to the United States of Ker, an American citizen who had fled to Peru after embezzling from a Chicago bank.⁹¹ Julian, a Pinkerton agent, was dispatched with formal extradition papers to present to the Peruvian Government.⁹² Instead of presenting the necessary papers to the Peruvian government, Julian forcibly abducted Ker from Peru and brought him back to the United States where he was convicted.⁹³ The Court viewed Ker's abduction as a clear

87. *Supra* notes 55-59 and accompanying text.

88. See *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (determining that the power of courts is not impaired when faced with a criminal defendant seized by "forcible abduction"); accord *Frisbie v. Collins*, 342 U.S. 519, 523 (1952) (declaring that the Constitution does not prohibit finding of guilt when criminal defendant is forcibly abducted).

89. Jacques Semmelman, *Due Process, International Law, and Jurisdiction Over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 514 & n.8 (1992).

90. *Ker*, 119 U.S. at 436.

91. *Id.* at 438.

92. *Id.*

93. *Id.* The opinion stated that Julian arrived in Peru with extradition papers, "but, without presenting them to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him." *Id.* However, in his article, Charles Faiman states that when Julian arrived in

case of kidnapping within Peru, without any pretext of authority under the treaty or by the government of the United States.⁹⁴

The Supreme Court upheld the conviction finding that the abduction did not violate Ker's due process rights since his criminal trial met the Constitution's necessary due process requirements.⁹⁵ The *Ker* Court also determined that the abduction did not violate the extradition treaty because, since his abduction was carried out beyond its scope, the treaty was not applicable and could not invoke its protection.⁹⁶ According to the Court, a private abduction, performed without the consent of the United States, lay completely outside the reach of the treaty.⁹⁷

2. *Frisbie v. Collins*

The second case that constitutes the *Ker-Frisbie* doctrine is *Frisbie v. Collins*.⁹⁸ In this case, Collins had been convicted of murder in a Michigan court.⁹⁹ In his *habeas corpus* petition, Collins argued that his conviction should be overturned because the police officers forcibly seized and beat Collins up when they brought him from Chicago, where he had been living, to Michigan for trial.¹⁰⁰ The Court rejected Collins' argument that he should be released as a result of the forcible manner in which he came before the court.¹⁰¹ The Court made the following statement:

[The Supreme Court] has never departed from the rule announced in [*Ker*] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. No persuasive reasons are now presented to justify overruling the line of cases. . . . There is nothing in the Constitution that requires a court to permit a guilty person

Peru, Lima was under Chilean military occupation and that Chilean authorities aided Julian in arresting Ker. Charles Faiman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 685 (1953). The opinion, however, makes no notice of the political turmoil in Peru. *Ker*, 119 U.S. 436.

94. *Ker*, 119 U.S. at 438.

95. *Id.* at 440.

96. *Id.* at 442.

97. *Id.*

98. *Frisbie v. Collins*, 342 U.S. 519 (1952).

99. *Id.* at 520.

100. *Id.*

101. *Id.* at 523.

rightfully convicted to escape justice because he was brought to trial against his will.¹⁰²

For over 100 years, American courts routinely have invoked the *Ker-Frisbie* doctrine, with very little judicial opposition.¹⁰³ The continued adherence of the *Ker-Frisbie* doctrine will seemingly enable American bounty hunters to enter Mexico, abduct Mexican nationals, and present the abductees in front of American courts without the courts losing their jurisdiction to try the abductees.

C. *United States v. Alvarez-Machain*

The third recent Supreme Court case that appears to increase the legal rights of bounty hunters is *United States v. Alvarez-Machain*.¹⁰⁴ The issue in the case was whether Alvarez-Machain's abduction from Mexico violated the 1978 Extradition Treaty.¹⁰⁵ Dr. Humberto Alvarez-Machain, a Mexican national, was one of the individuals indicted in connection with the murder of DEA Special Agent Camarena-Salazar.¹⁰⁶ The United States accused Alvarez-Machain of administering life-sustaining drugs to Camarena-Salazar during his torture by Mexican drug lords.¹⁰⁷ The DEA first unsuccessfully tried to secure Alvarez-Machain's

102. *Id.* at 522.

103. Timothy D. Rudy, *Did We Treaty Away Ker-Frisbie?* 26 ST. MARY'S L.J. 791, 802 (1995). Only one case has limited the Ker-Frisbie to any serious extent. *Id.* at 808. In *United States v. Toscanino*, the Second Circuit declared where a defendant, such as Toscanino, was subjected to grotesque treatment and incessant torture, it should result in the dismissal of charges against the defendant. 500 F.2d 267 (2d Cir. 1974). The Court stated that where it meets an intersection of the restrictive view of the Ker-Frisbie doctrine and the more expanded and enlightened interpretation of due process, the court is required to dispose itself of jurisdiction over a defendant where such jurisdiction was acquired as "a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. However, Toscanino became toothless. See *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975) (holding that an irregularity in the capture does not by itself violate due process; the government conduct complained of must rise to the level of shocking the conscience as did the conduct in *Toscanino*); *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975) (confining the *Toscanino* exception to situations in which agents of the United States play a direct role). Further, the Seventh and Eleventh Circuits have expressly rejected the *Toscanino* exception, and the Fifth Circuit has been unreceptive to it. See Semmelman, *supra* note 89, at 537.

104. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

105. *Id.* at 662.

106. *Id.* at 657.

107. *Id.*

presence in the United States through informal discussions with representatives of the MFJP.¹⁰⁸ DEA officials then, through a contact in Mexico, offered to pay a reward and expenses in return for the delivery of Alvarez-Machain to the United States.¹⁰⁹ In April of 1990, Alvarez-Machain was forcibly abducted from his medical office in Mexico, flown to Texas, and immediately arrested by DEA Agents.¹¹⁰

The District Court upheld Alvarez-Machain's motion to dismiss, holding that it lacked jurisdiction to try Alvarez-Machain.¹¹¹ The Ninth Circuit in a *per curiam* decision affirmed the dismissal of the indictment, relying on its decision in *United States v. Verdugo-Urquidez II*.¹¹² The Ninth Circuit affirmed the District Court's finding that the United States authorized Alvarez-Machain's abduction and that Mexico officially protested the abduction.¹¹³ Therefore, the Ninth Circuit ordered the indictment dismissed and that Alvarez-Machain be repatriated to Mexico.¹¹⁴

The Supreme Court stated that before it could determine whether the abduction of Alvarez-Machain violated the 1978 Extradition Treaty, it first had to determine whether the treaty in fact prohibited abductions.¹¹⁵ The Court reasoned that if the treaty did not prohibit abductions, then the *Ker-Frisbie* doctrine would apply, and it would not have to concern itself over how the defendant came before the Court.¹¹⁶ However, if the treaty did prohibit forcible abductions, then the rule in *United States v.*

108. *Id.* at 657 n.2.

109. *Id.*

110. *Id.* at 657.

111. *United States v. Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990).

112. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir. 1991), *vacated*, 504 U.S. 655 (1992). In *United States v. Verdugo-Urquidez*, the Ninth Circuit held that although the 1978 Extradition Treaty did not expressly prohibit forcible abductions, the purpose of the Treaty was violated by a forcible abduction, which, along with a formal protest by the offended nation, would give a defendant the right to invoke the violation of the Treaty to defeat a District Court's jurisdiction. 939 F.2d 1341 (9th Cir. 1991).

113. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1467 (9th Cir. 1991). On at least two occasions, Mexico formally protested Alvarez-Machain's abduction through diplomatic notes to the United States government. *Alvarez-Machain* 504 U.S. at 671, n.1 (Stevens, J. dissenting).

114. *Id.* at 659.

115. *Id.* at 662.

116. *Id.*

*Rauscher*¹¹⁷ would control, and therefore, Alvarez-Machain could not be prosecuted.¹¹⁸

The Court first noted that the language of the treaty said nothing about either the United States or Mexico refraining from, or the consequences for, forcibly abducting citizens from the territory of the other country.¹¹⁹ The Court also determined that a prohibition on forcible abductions could not implicitly be read into the treaty because "to infer from this treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice."¹²⁰ Thus, the Court, reversing the Ninth Circuit, held that the 1978 Extradition Treaty does not specifically disallow extraterritorial abductions, and that an implied term prohibiting international abductions cannot be read into the treaty.¹²¹

The majority's decision in *Alvarez-Machain* has great significance for bounty hunters. Unless the United States and Mexico enact legislation specifically prohibiting international abductions, then bounty hunters apparently will be able to enter Mexican territory and abduct Mexican nationals. American courts will still have jurisdiction over the abductees and the bounty hunters will still be paid.

V. UNITED STATES' ACCEPTANCE OF EXTRATERRITORIAL ABDUCTIONS APPEARS TO CONFLICT WITH INTERNATIONAL LAW

The United States' continued acceptance of extraterritorial abductions, in the form of the judicial decisions discussed above,¹²² is apparently in direct conflict with international law. This position seems to violate both customary international law and international treaty law.

117. 119 U.S. 407, 411 (1886) (holding that a defendant cannot be prosecuted in violation of the terms of an extradition treaty).

118. *Alvarez-Machain*, 504 U.S. at 659-60.

119. *Id.* at 663.

120. *Id.* at 668-69. In his dissent Justice Stevens conceded that the 1978 Extradition Treaty lacks express language preventing either country from forcibly abducting citizens from the territory of the country; however, he argues that the language and spirit of the 1978 Extradition Treaty prohibits such forcible abductions. *Id.* at 671-75.

121. *Id.* at 669-70.

122. See discussion *supra* notes 60-121.

A. Customary International Law

Customary international law consists of duties and privileges that States continue to follow from a sense of legal obligation.¹²³ However, a State is not bound by the duty if it has consistently acted as a persistent objector to the application of that particular customary international law.¹²⁴

According to the landmark International Court of Justice's *Corfu Channel* case, "the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State."¹²⁵ A State, therefore, has an absolute right to exercise its authority within the borders of its own territory.¹²⁶ As the Fourth Circuit said in *Collier v. Vaccaro*: "An unlawful arrest is merely an offense against the peace and dignity of the State; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another State is a violation of the sovereignty of the former."¹²⁷

The United States cannot claim that it is a persistent objector to the prohibition against extraterritorial abductions, and thus, not bound by customary international law. While American courts have generally upheld the *Ker-Frisbie* doctrine, some American diplomats and officials have recognized abductions as violations of customary international law.¹²⁸ Moreover, "the United States did not exercise a veto in the United Nations' Security Council. . . when the Security Council condemned Israel's abduction of Adolph Eichmann from

123. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS*, 54-55 (3d ed. 1993). See also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 (1986) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.")

124. See *Asylum (Columbia v. Peru)*, 1950 I.C.J. 266, 277-78 (Nov. 20).

125. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9) ("Between independent States, respect for territorial sovereignty is an essential foundation of international relations.")

126. See 1 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 252 (2d rev. ed. 1987).

127. *Collier v. Vaccaro*, 51 F.2d 17, 19 (4th Cir. 1931).

128. See *Rudy*, *supra* note 103, at 801. For example, during a congressional subcommittee hearing, Abraham D. Sofaer, the former State Department Legal Advisor, stated that "[t]he United States had repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity." *Id.* at 801 n.57.

Argentina.¹²⁹ Therefore, the United States appears to violate customary international law when it permits bounty hunters to cross the border and seize Mexican nationals.

The territoriality principle is not the only basis for a State to claim jurisdiction over an individual.¹³⁰ One such principle is the effects doctrine.¹³¹ The effects doctrine is the principle by which a State extends its jurisdiction to cover the conduct of foreign nationals committed abroad, but which has effects within the State's territory.¹³² Another principle is the protective principle, by which a State has jurisdiction over a foreign national when the foreign national commits a serious crime against the State's own safety.¹³³ Such crimes include "threaten[ing] the political or military security of the [S]tate", or "counterfeiting its currency."¹³⁴

However, these jurisdictional principles do not justify American bounty hunters crossing the Mexican border and seizing individuals within Mexico. The assertion of such jurisdictional bases has the real potential:

[O]f infringing [upon] the sovereign rights of that state to regulate matters taking place in its territory. . . . There comes a point. . . [at which] the application of a state's criminal law to the activities of foreigners in a foreign state involves an infringement of the territorial sovereignty and jurisdiction of the foreign state to which it may properly object.¹³⁵

Therefore, America cannot rely on these alternative jurisdictional bases to conclude that American bounty hunters have the legal authority under customary international law to enter Mexican territory and capture individuals within Mexico.

129. *Id.* at 801-802.

130. 1 OPPENHEIM'S INTERNATIONAL LAW § 139, 466-78 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

131. *Id.* at 472.

132. *Id.*

133. *Id.* at 470.

134. *Id.* at 470-71.

135. *Id.* at 476.

B. *International Treaty Law*

1. The United Nations Charter

The first international treaty that appears to prohibit American bounty hunters from capturing individuals in Mexico is the United Nations Charter. Both the United States and Mexico are parties to the United Nations Charter.¹³⁶ The goals of the United Nations include the maintenance of international peace and security in order to promote friendly relations and international cooperation among nations in solving international problems.¹³⁷ To this end the Charter provides that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”¹³⁸

It is reasonable to regard American bounty hunters entering Mexico’s territory and abducting Mexican nationals as a force that threatens and violates the territorial integrity of Mexico. Thus, the United Nations treaty would appear to prohibit American bounty hunters from entering Mexico and kidnapping Mexican nationals.

2. Organization of American States Charter

The second international treaty that seems to prevent American bounty hunters from engaging in activities in Mexico is the Organization of American States (O.A.S.) Charter. Both the United States and Mexico are also parties to the O.A.S. Charter.¹³⁹ Article 5 of the O.A.S. Charter provides: “International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other

136. U.N. Charter, opened for signature June 26, 1945, 59 STAT. 1031 (entered into force Oct. 31, 1945).

137. See U.N. Charter, art. 1.

138. *Id.* art. 2, para. 4.

139. Charter of the Organization of American States, Apr. 30 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, T.I.A.S. No. 2361.

sources of international law."¹⁴⁰ Article 17 states that a State's territory is inviolable, and that the State may not object on any grounds to measures of force taken by another State, either directly or indirectly, against the first State.¹⁴¹

The Inter-American Juridical Committee, an advisory body on legal matters for the O.A.S., declared in an opinion that extraterritorial abductions "are a serious violation of public international law since they violate the principle of territorial sovereignty."¹⁴² Thus, the O.A.S. Charter appears to prohibit extraterritorial abductions.

3. Civil and Political Covenant

The third treaty to apparently prohibit international bounty hunting is the Civil and Political Covenant. The Civil and Political Covenant,¹⁴³ to which the United States is a party, appears to prohibit extraterritorial abductions in several provisions. First, Article 9(1) states that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure established by law."¹⁴⁴ Second, Article 9(4) states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."¹⁴⁵ Because the United States is now a party to the Civil and Political Covenant, it would appear that it can no longer legally allow extraterritorial abductions.

140. *Id.* art. 3(b).

141. *Id.* art. 20.

142. See Aceves, *supra* note 5, at 151 (discussing Legal opinion of the Inter-American Juridical Committee on the Decision of the U.S. Supreme Court in the Alvarez-Machain Case, Inter-American Juridical Committee, Doc. No. CJI/RES.II-15/92, reprinted in 13 HUM. RTS. L.J. 395 (1992)).

143. International Covenant on Civil and Political Rights, adopted Dec. 19, 1996, 999 U.N.T.S. 171.

144. *Id.* art. 9(1).

145. *Id.* art. 9(4).

C. *Why International Law May Not Apply to Bounty Hunters*

Three reasons exist why international law may not apply to American bounty hunters who cross into Mexico and abduct individuals. First, international law concerns the relationship between States; it generally does not govern the conduct of individuals who act strictly in a private capacity.¹⁴⁶ Thus, even if customary international law prohibits extraterritorial abductions, it would have no effect on bounty hunters who enter Mexico and seize Mexican nationals. The reason for this is that American courts still hold that bounty hunters are not State agents,¹⁴⁷ and therefore, as private individuals, international law does not apply to them.

The second reason that international law may not apply to bounty hunters is that the U.N. and O.A.S. Charters' apparent prohibition on extraterritorial abductions will not act as an impediment against the American bounty hunters who cross the border into Mexico and abduct individuals. Federal courts have traditionally held that the U.N. and O.A.S. Charters are non-self-executing.¹⁴⁸ A treaty, or a treaty provision, is self-executing when a court can directly apply the treaty or provision without further legislation.¹⁴⁹ A treaty, or treaty provision, is non-self-executing if further implementing legislation is needed to effect the treaty or provision.¹⁵⁰

The final reason why international law may not apply to American bounty hunters is that the Civil and Political Covenant may not prevent American bounty hunters from conducting extraterritorial abductions in Mexico. Upon ratification of the Civil and Political Covenant, the Senate approved a declaration

146. M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L. L. 25, 32 (1973). However, an increasing trend in international law is to treat individuals, on a limited basis, as subjects of international law. See OPPENHEIM'S INTERNATIONAL LAW, *supra* note 130, at 849. For example, "[s]tates . . . occasionally . . . confer upon individuals, both their own subjects and aliens, international rights . . . which they can enforce in their own name before international tribunals." See *id.* at 847.

147. See Drimmer, *supra* note 8, at 764.

148. See *e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (citing *Hitai v. INS*, 343 F.2d 466, 468 (2d Cir. 1965). *But cf.* *United States v. Toscanino*, 500 F.2d 267, 276-77 (2d Cir. 1974) (hinting that the U.N. Charter was self-executing).

149. See Rudy, *supra* note 103, at 819.

150. *Id.*

stating that Articles 1 through 27 of the treaty are non-self-executing.¹⁵¹ Thus, if the federal courts hold that the treaty is in fact non-self-executing, the extraterritorial abductees will not be able to rely on the Civil and Political Covenant to claim that their abduction violated international law, and therefore, that they should be released.

VI. ACTUAL LIMITS ON BOUNTY HUNTERS' ABILITY TO ENTER MEXICO AND ABDUCT MEXICAN NATIONALS

While current international law does not appear to represent an impediment for American bounty hunters to enter Mexico's territory and abduct its citizens, two limitations potentially exist that provide a limitation on the ability of American bounty hunters to exercise their rights in Mexico. The first limitation is a United States Supreme Court decision. The second limitation is a proposed new treaty between the United States and Mexico, accompanied by a partial change in the manner that American courts view bounty hunters.

A. *Reese v. United States*

The first limitation on American bounty hunters legal rights to abduct Mexican nationals on Mexican soil is *Reese v. United States*.¹⁵² In *Reese*, Limantour was indicted on criminal charges in a federal district court in San Francisco.¹⁵³ Limantour hired two commercial bondsmen, Reese and Castro, to post his bond, which required Limantour to appear at the next regular term of the court and at any subsequent term.¹⁵⁴ The government and Limantour, with the court's approval, but without the knowledge of the sureties, agreed to postpone the prosecution of the criminal charges until the resolution of two land grant cases pending against Limantour.¹⁵⁵ In addition, the parties agreed that Limantour could return to Mexico, his native country, in the

151. *See id.* at 820. It is worthwhile to note, however, that the Senate approved a declaration, rather than a reservation. *See id.* A declaration, unlike a reservation, "has no conclusive international legal effect." *See id.* For a comprehensive discussion on whether American courts should and will find the Civil and Political Covenant self-executing, see Rudy, *supra* note 103, at 791.

152. *See Reese v. U.S.*, 76 U.S. (9 Wall.) 13 (1869).

153. *Id.* at 18.

154. *Id.*

155. *Id.* at 19.

interim.¹⁵⁶ However, Limantour never returned from Mexico, and an order was entered forfeiting the bail.¹⁵⁷

The United States brought an action against Reese and Castro in their capacity as the sureties.¹⁵⁸ The Supreme Court reversed the district court's finding against the sureties.¹⁵⁹ In its decision, the Supreme Court noted that under the law of recognizance, once the defendant is placed in the custody of the sureties, the defendant:

[I]s so far placed in [the sureties'] power that they may at any time arrest him [the defendant] upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty. *This power of arrest can only be exercised within the territory of the United States. . . .*¹⁶⁰

The importance of *Reese* as a limitation cannot be overstated. The common law, the same authority that provides American bounty hunters with their expansive powers within the United States,¹⁶¹ also sets a clear limitation on their power. Whenever a bounty hunter participates in activities that derive their legal authority from the common law, as articulated in *Taylor*,¹⁶² he must also simultaneously observe the limitations imposed by the common law, as articulated in *Reese*.¹⁶³ Therefore, an American bounty hunter cannot enter Mexico to abduct a Mexican national, or any other citizen, who has jumped bail.

B. Treaty to Prohibit Transborder Abductions

The second potential limitation on the ability of American bounty hunters to enter Mexico and seize individuals is the United States-Mexico Treaty to Prohibit Transborder Abductions.¹⁶⁴ To correct the Supreme Court's interpretation in

156. *Id.*

157. *Id.* at 19-20.

158. *Id.* at 18.

159. *Id.* at 22.

160. *Id.* at 21 (emphasis added).

161. See discussion *supra* notes 38-59 and accompanying text.

162. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366 (1872).

163. See *Reese*, 76 U.S. at 13.

164. Treaty Between the Government of the United States of America and the Government of the United Mexican States to Prohibit Transborder Abductions, Nov. 23,

Alvarez-Machain that the 1978 Extradition Treaty did not prohibit transborder abductions, the United States and Mexico entered into negotiations designed to address this issue.¹⁶⁵ The purpose of the treaty is to prohibit transborder abductions, and it recognizes that abductions are an extraditable offense under the 1978 Extradition Treaty between the United States and Mexico.¹⁶⁶

The treaty states that a transborder abduction occurs when a person is removed from the territory of one party to the territory of the other party either: (a) by force or threat of force; or (b) by federal, state or local government officials of the party to whose territory the person is taken, or by private individuals acting under the direction of such officials.¹⁶⁷ The treaty provides two remedies for any transborder abduction that is found to have occurred: repatriation of the abductee and the prosecution of any individual responsible for the abduction.¹⁶⁸

Before the Transborder Abductions Treaty can serve as the second limitation on American bounty hunters' legal rights to enter Mexico and seize abductees, however, the treaty must overcome two obstacles. First, the treaty must be ratified before it enters into force.¹⁶⁹ As of January 1999, the proposed treaty has not yet been submitted to the Senate for advice and consent.¹⁷⁰

The second obstacle is the American courts' consistent interpretation that bounty hunters are not State agents.¹⁷¹ Under the Transborder Abductions Treaty, abductions by purely private individuals with no government authorization are not

1994, U.S.-Mex., reprinted in 5 MICHAEL ABBELL AND BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL EXTRADITION (1995) [hereinafter 1994 Transborder Abductions Treaty]. "The provisions of the agreement may only be invoked by the parties and are not intended to benefit third parties. The agreement does not give rise to a right on the part of any private person." Aceves, *supra* note 5, at 156, n.259.

165. See Aceves, *supra* note 5, at 156.

166. *Id.*

167. See 1994 Transborder Abductions Treaty, *supra* note 164, art. 3(2). The treaty recognizes that the following actions do not establish a transborder abduction: (a) transfers of persons pursuant to a treaty; (b) deportations, voluntary departures, expulsions, or other actions taken pursuant to immigration laws; and, (c) other actions jointly agreed by the heads of the United States' Department of Justice and Mexico's Office of the Attorney General or their respective designees. *Id.*

168. *Id.* arts. 5-6.

169. See Aceves, *supra* note 5, at 158.

170. U.S. DEP'T OF STATE, TREATIES IN FORCE 177-86 (1997).

171. See discussion *supra* notes 52-54 and accompanying text.

covered under the treaty.¹⁷² Thus, because American courts view bounty hunters as private individuals acting with no government authorization, bounty hunters can still abduct an individual inside Mexico as long as that individual was not a principal.

However, American courts could overcome this obstacle if they adopted the philosophy taken by several legal commentators: bounty hunters are agents of the State.¹⁷³ The Supreme Court has found that whenever a private individual becomes "clothed" with the State's authority and acts pursuant to that authority, the individual has transformed into a State actor whose conduct is limited by constitutional principles.¹⁷⁴ State action exists when the State coerced or encouraged an individual to act on behalf of the State so that the individual's conduct is attributable to the State.¹⁷⁵ In addition, State action exists if a private actor willfully participates together with the State or its agents.¹⁷⁶

The close relationship that bounty hunters have with law enforcement agents¹⁷⁷ actually causes bounty hunters to become State agents. As State agents, bounty hunters would then fall under the Transborder Abductions Treaty since they are private individuals acting under the direction of government officials.¹⁷⁸ The classification of bounty hunters as government agents, would, under the terms of the Transborder Abductions Treaty, prohibit bounty hunters from seizing individuals inside Mexico where such seizure is done beyond the scope of the bail process.

VII. CONCLUSION

Bounty hunters provide an important service to the American criminal justice system. They provide the facilitation of a defendant's release from prison, thereby saving the State

172. See Aceves, *supra* note 5, at 156-57.

173. See generally Drimmer, *supra* note 8, at 731; Stout, *supra* note 34, at 665; Perry John Seaman, Comment, *International Bounty hunting: A Question of State Responsibility*, 15 CAL. W. INT'L L.J. 397 (1985).

174. See *Williams v. United States*, 341 U.S. 97, 99-100 (1951).

175. See *Skinner v. Ry. Labor Executive Ass'n.*, 489 U.S. 602, 614 (1989) (holding that a railroad becomes a state actor when it tests employees for drugs in compliance with federal regulations).

176. See *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

177. See *supra* notes 25-37 and accompanying text.

178. 1994 Transborder Abductions Treaty, *supra* note 164, art. 3.

significant expenses.¹⁷⁹ Due to the importance of this service, and their overall effectiveness at providing such a service, bounty hunters have been granted a great deal of authority to accomplish this service. Over time, bounty hunters have provided more and more services, while still retaining the same amount of power. The nature of the business combined with the type of individuals whom bounty hunters pursue, congers up images of the gunslingers of the Old West who were sheriffs of frontier towns. But just as with those sheriffs, it's quite often difficult to tell the good guys from the outlaws where bounty hunters are concerned. The simple fact is that excessive conduct by bounty hunters when seizing an individual, although always unfortunate and often tragic, happens more often than not. Because of the globalization of the world and the shrinking of national borders, the next incident involving a bounty hunter is likely to have international implications. And due to its proximity to the United States, Mexico and its citizens are likely to be the recipient of such excessive conduct.

This Comment has examined the rights of American bounty hunters to enter Mexico and abduct individuals inside Mexico's borders. The Supreme Court has granted bounty hunters sweeping powers to engage in their activities within the United States. The Comment concludes that while current international law is powerless from preventing bounty hunters from conducting their operations inside Mexico, the Supreme Court has largely restricted bounty hunters' legal rights to cross into Mexico and arrest principals. The United States can completely prohibit bounty hunters from entering Mexico and abducting anybody with the ratification of the Transborder Abduction Treaty, and the classification of bounty hunters as agents of the State.

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179. See Drimmer, *supra* note 8, at 739.

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