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Peter J. Vassalo

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# THE NEW IVAN THE TERRIBLE: PROBLEMS IN INTERNATIONAL CRIMINAL ENFORCEMENT AND THE SPECTER OF THE RUSSIAN MAFIA

## INTRODUCTION

THE SCENE IS A WOOD paneled study, New York, circa 1946. Outside, a traditional Sicilian wedding celebration is in full swing. An undertaker stands before Don Vito Corleone, requesting justice for the rape of his daughter, justice which the legitimate world could not provide. Don Corleone looks at the man and because no Sicilian can refuse a request on the day of his daughter's wedding, grants his wish. The request is granted, however, on the condition that the undertaker is now indebted to the Corleone family, and may be needed someday to perform a service in return.

Images such as this from the opening scene of "The Godfather" dominate the popular perception of organized crime.<sup>1</sup> When one thinks of the "Mafia," many times it is from this "Godfather" point-of-view, with Sicilians like the Corleones speaking of "honor" and "business" as a justification for their illicit activities. While the Mafia immortalized by Vito Corleone is still a threat, a much larger problem is on the rise—the Russian Mafia, known to Russians as "The Organizasiya."<sup>2</sup>

Unlike the Mafia of "The Godfather," which was organized in New York as five distinct families, "Russian Mafia" does not refer to a single group. Instead, it is a blanket term describing the nearly 6,000 Russian organized criminal groups operating world-wide.<sup>3</sup> The groups are divided according to three main classifications: ethnicity, region, and trade.<sup>4</sup> The Moscow area exemplifies this breakdown.<sup>5</sup> The Dolgoprudnaya and Solntsevo derive their names from their Moscow neighborhoods. Their operational specialties include protection rackets and slot machines.<sup>6</sup> Ethnic groups also specialize, such as the Azerbaijanis, who control the

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<sup>1</sup> THE GODFATHER (Paramount, 1972).

<sup>2</sup> See James Langton, *Godfathers of the East: From Russia With Blood*, SUNDAY TELEGRAPH, Mar. 7, 1993, at 23.

<sup>3</sup> See *Russia's Mafia: More Crime Than Punishment*, THE ECONOMIST, July 9, 1994.

<sup>4</sup> Claire Sterling, *Redfellas, The Growing Power of Russia's Mafia*, NEW REPUBLIC, April 11, 1994, at 19, 20.

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

<sup>6</sup> See *id.*

drug trade.<sup>7</sup> Other ethnic groups, such as the Chechen, are more diversified. Chechens are particularly notorious in their breadth of activity with involvement in several areas of criminal conduct from contract killings to drug trafficking.<sup>8</sup>

The Moscow example is only a small slice of Russian organized crime's worldwide activities. Russian Mafia groups have established themselves throughout Europe and the United States in activities including drug trafficking, money laundering, prostitution, and, most importantly, trafficking in nuclear weapons materials.<sup>9</sup> One commentator has stated:

The Russian Mafia is a union of racketeers without equal. Unlike the Mafia in Sicily, which it admires and copies as a standard of excellence, it has no home seat or central command. There are no ancestral enemies or common bloodlines. Nevertheless, its proliferating clans are invading every sphere of life, usurping political power, taking over state enterprises and fleecing natural resources. They are engaged in extortion, theft, forgery, armed assault, contract killing, swindling, drug running, arms smuggling, prostitution, gambling, loan sharking, embezzling, money laundering and black marketing—all on a monumental and increasingly international scale.<sup>10</sup>

James Woolsey, former Director of the CIA, recently testified before Congress on the Russian Mafia's threat to U.S. security.<sup>11</sup> Woolsey gave three reasons why the Russian Mafia is such a critical concern. First, Russia is a country of enormous strategic interest due to its stockpile of nuclear weapons materials. Second, the United States has an extreme interest in the outcome of Russia's transition to a market economy and democracy. Finally, Russian organized crime has become a menace threatening the United States not only from abroad, but internally as well.<sup>12</sup>

Due to the international nature of the Russian Mafia's activities and its lack of a central organization, it follows that international cooperation in combating it is essential. However, due to procedural barriers in

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

<sup>8</sup> *See id.*

<sup>9</sup> *See* Pyotr Yudin, *Ministry, FBI Sign Deal on Cooperation*, MOSCOW TIMES, July 6, 1994; *Hearing on International Organized Crime and Nuclear Security, former CIA Director, Before House Foreign Affairs Comm.*, 103rd Cong., 2d Sess. 83 (1994) [hereinafter *Woolsey Testimony*] (statement by James Woolsey, former CIA Director) available in LEXIS, World Library, News File.

<sup>10</sup> Sterling, *supra* note 4, at 19.

<sup>11</sup> *See* Woolsey Testimony, *supra* note 9.

<sup>12</sup> *Id.*

international criminal law, a uniform system of transnational criminal enforcement does not exist. Traditionally, criminal law has been the responsibility of domestic legal systems.<sup>13</sup> Although there have been instances of international cooperation, most enforcement efforts have been through bilateral treaties. National sovereignty and the reluctance of national courts to adjudicate foreign law have created barriers to effective transnational criminal enforcement. As a result, the system fails to recognize the international nature of modern organized crime, creating difficulties in implicating international groups such as the Russian Mafia.<sup>14</sup>

This failure is exemplified by a demonstration of how "domestic" crime has developed on an international scale. Normally a local crime, Russian organized crime has taken prostitution and the sex trade to an international level. The consequences can be deadly and disruptive. Russian groups lure young women into prostitution inside Russia, and then export them to countries where the earning potential for hard currency is greater.<sup>15</sup> When Russian organized crime is denied a cut of profits, situations such as the recent Frankfurt brothel murders arise.<sup>16</sup> Although the prostitution and murders occurred in Germany, only German authorities were able to prosecute.<sup>17</sup> The extent of Russian involvement will not be eliminated by single arrests.<sup>18</sup> In cases like the Frankfurt murders, successful prosecution will not stop the problem, making related violence probable.

On a more sophisticated scale, Russian organized crime is also causing serious disruption of world financial institutions. Because Russian organized crime controls at least half of Russia's banks, it is easily able

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<sup>13</sup> HENRY J. STEINER & DETLEV F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 787-88 (3rd. ed. 1986).

<sup>14</sup> *Id.* at 788.

<sup>15</sup> *But cf.* Jonathon Manthorpe, *Vladivostok Murders Shed Light in Vice Ring; Hong Kong Prosecutor, Prostitute Slain*, *THE GAZETTE* (Montreal), July 4, 1994, at E7. Although not directly related to the problems seen in Europe, the article is an example of the international consequences of circumventing the will of Russian organized crime.

<sup>16</sup> *See Life and Death In a Frankfurt Brothel*, Press Association Limited, Aug. 17, 1994, available in LEXIS, World Library, Curnws File. In August 1994, four prostitutes and two owners of a Frankfurt brothel were found murdered. The murders were apparently in retaliation for the owner's independent procurement of prostitutes, thereby cutting Russian organized crime out of its percentage of revenue.

<sup>17</sup> David Crossland, *Brothel Victims Include Four From Ex-Soviet Union*, Reuters World Service, Aug. 16, 1994, available in LEXIS, News Library, Curnws File. Evidence of threats against the prostitutes' families in Eastern Europe and Russia suggest international control.

<sup>18</sup> *Id.*

to tap into a major money supply, enabling it to take control of legitimate businesses both foreign and domestic.<sup>19</sup> It is through these legitimate businesses that organized crime expands its operations, using them as cover for new operations.<sup>20</sup> These tens of millions of dollars stolen from Russian banks contribute to the nearly fifteen billion dollars in cash already removed from Russia by organized crime.<sup>21</sup> Since the money to finance criminal activities originates from currency shuttled out of Russia, effective international cooperation could keep some of this currency within the country.<sup>22</sup> If not, Russia's economic situation will not improve, further destabilizing the country.

Nuclear smuggling poses the greatest threat to world security. The recent arrests of smugglers carrying nuclear material to Germany underscores the problem.<sup>23</sup> While Germany or another third country can arrest smugglers caught with the actual material, better coordination of enforcement could stop smuggling at the source while simultaneously destroying foreign distribution networks.

Considering the grave threat the Russian Mafia poses to world security, international criminal law must begin to develop the procedural mechanisms to combat the problem on a global scale. The development of international criminal procedural mechanisms will enable effective prosecution of internally committed crimes while assisting other countries in fighting related activity.

This Note will not attempt to create a new model of international criminal procedure. Because of national sovereignty and jurisdictional issues, it would be impractical to devise a new system of international evidence gathering and prosecution. Instead, this Note works within the current system to find a way for nations to effectively cooperate in combating organized crime while still preserving national sovereignty. The first section identifies the problems and scope of Russian organized criminal activity in its three main arenas: Russia, the United States, and Germany. Section Two explores the traditional notions of international criminal law, specifically the recognized principles and problems of transnational enforcement procedures. The Note then turns to an analysis

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<sup>19</sup> Paul Klebnikov, *Joe Stalin's Heirs*, FORBES, Sep. 27, 1993, at 124.

<sup>20</sup> Claire Sterling, *Containing the New Criminal Nomenklatura*, in GLOBAL ORGANIZED CRIME, THE NEW EMPIRE OF EVIL 106, 120 (Linnea P. Raine & Frank J. Cilluffo eds., 1994).

<sup>21</sup> See Klebnikov, *supra* note 19, at 124.

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

<sup>23</sup> Rensselaer Lee, *The International Black Market: Coping With Drugs, Thugs, and Fissile Materials*, in GLOBAL ORGANIZED CRIME, THE NEW EMPIRE OF EVIL 80, 81 (Linnea P. Raine & Frank J. Cilluffo eds., 1994).

of a system of bilateral cooperation that has proven effective in the past: mutual legal assistance treaties, (MLATs). While this arrangement is effective bilaterally, it could be expanded to a multilateral arrangement, something not previously attempted on a large scale. The Note concludes with an analysis and demonstration of the MLAT's practicability and ultimately argues for a new, hybrid system of the MLAT, a trilateral legal assistance treaty (TLAT), between the United States, Russia, and Germany.

## I. CURRENT MAFIA ACTIVITY

### A. *Internal Activity in Russia*

In February 1993, Russian President Boris Yeltsin declared organized crime a direct threat to Russia's strategic interests and national security.<sup>24</sup> According to the CIA, President Yeltsin's concerns are well-founded.<sup>25</sup> Of the 2,000 banks operating in Russia today, a majority are controlled by organized crime.<sup>26</sup> Control is exerted as follows. An organized criminal group will deposit massive amounts of money in a particular bank, causing the institution to adjust its lending and operational habits by involving itself in broad-scale ventures.<sup>27</sup> The groups will then demand payments or kickbacks with the threat of withdrawing what has become a large share of the bank's reserves.<sup>28</sup> Such control disrupts the activities of lending institutions that might otherwise lend money to private industry and business. This clamping of resources is particularly troublesome in Russia's economy where private industry is experiencing difficulty establishing itself.

Banks are not the only targets of Mafia activity. The state treasury has also fallen victim to organized crime. Cooperation between politicians and the Mafia enables enormous amounts of state funds to be channeled to the Mafia, including Western aid.<sup>29</sup> According to President Yeltsin, emergency international aid in the Winter of 1992 was almost completely deflected into the hands of organized crime.<sup>30</sup> The reasons for this were

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<sup>24</sup> *Russia's Mafia: More Crime Than Punishment*, *supra* note 3; *Russia: Conference on Combating Crime; Yeltsin Outlines Ways of Combating Crime*. BBC Summary of World Broadcasts, Feb. 15, 1993, available in LEXIS, News Library, Arcnws File.

<sup>25</sup> *Id.*

<sup>26</sup> See Woolsey Testimony, *supra* note 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Criminal Muscle Moves in on the Open Markets of Eastern Europe*, THE RECORDER (San Francisco), April 22, 1993, at 8, available in LEXIS, News Library, Curmws File.

<sup>30</sup> *Id.*

twofold. First, the Mafia was interested in the private sale of the food aid packages. More important was the effect that control of this food supply had on black market prices. The control of scarce items translated into an enormous source of revenue for the Mafia, since it charged whatever price it wished for the food.<sup>31</sup>

This activity has seriously eroded confidence in the ability of the Russian government to reform. The widespread view among average Russians is that Yeltsin's reforms have only benefitted criminals.<sup>32</sup> In the international community, Western business is reluctant to invest in Russia. Almost all ventures require a "profit tax" which must be paid to the appropriate group to insure smooth operations.<sup>33</sup> Failure to pay has resulted in the murder of several Western businessmen. Although many may be involved in organized crime, the Moscow Police Department suggests that many have simply paid off organized crime and are now trying to renege.<sup>34</sup> Other dangers also exist. Credit Lyonnais, a Paris-based bank, must post its own guards armed with heavy automatic weapons outside of its St. Petersburg branch to discourage attacks and robberies.<sup>35</sup> These examples demonstrate how organized crime is seriously undermining the transition to a free market and impeding the investment and development so desperately needed by Russia.

#### *B. Russian Mafia Activity in Germany*

In a society commonly associated with law and order, the presence of the Russian Mafia is seen as a threat to Germany's security. The main activities of Russian organized crime are drug trafficking, weapons and nuclear materials smuggling, prostitution, money laundering, and gambling.<sup>36</sup> Berlin is considered by most law enforcement officials to be the center of Russian mob activity in Europe, due to the presence of 300,000 ex-Soviet citizens.<sup>37</sup> Many of the same activities that occur in Russia

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<sup>31</sup> *Id.*

<sup>32</sup> *See generally* Langton, *supra* note 2.

<sup>33</sup> *Id.*

<sup>34</sup> *See* Klebnikov *supra* note 19, at 124. Peter Derby, an American who runs the Russian-based Dialog Bank, states that "[i]t's getting more and more difficult for Western businesses to avoid transactions that involve the Mafia." *Id.*

<sup>35</sup> Steve Liesman, *With Caution, Foreign Banks Step Into a Russian Maze*, N.Y. TIMES, Nov. 21, 1993, § 3, at 8.

<sup>36</sup> Timot Szent-Ivanyi, *Mafia Gangs Spread Into Germany, Say Crimebusters*, Reuters World Service, June 23, 1994, available in LEXIS, World Library, Curnws File.

<sup>37</sup> Barbara Demick, *Russian Mafia Hits Germany: Members of "The Organization" Blamed for Violent Crime*, HOUSTON CHRONICLE, Oct. 21, 1993, at A28.

occur in Germany as well, with prostitution and forced protection payments among the most common.<sup>38</sup> Recently, Russian Mafia networks have begun to penetrate financial markets with the goal of laundering illegally obtained cash.<sup>39</sup> Prostitution is another large revenue generator, especially in larger cities.<sup>40</sup> Events such as the murder of six people in a Frankfurt brothel the week of August 20, 1994 highlight the violence associated with Russian organized crime.<sup>41</sup>

This activity is trivial compared with nuclear materials smuggling. On May 10, 1994, German authorities confiscated a small amount of weapons-grade plutonium. Although the sample was not enough to build a bomb, it was proof that Russian organized crime had the capability to move dangerous nuclear material out of Russia. In August, similar arrests were made in Munich as a Colombian and two Spaniards were caught carrying 350 grams of plutonium off a flight from Moscow. Although not directly linked to the Russian Mafia, this followed a pattern that Hans-Ludwig Zachert, head of the German Bundeskriminalamts, Germany's version of the FBI, stated was generally attributed to Russian organized crime.<sup>42</sup>

### C. Russian Mafia Activity in the United States

While Russian organized crime does not operate in the United States on the same scale as it does in Germany or Russia, it is firmly established in this country. The principal focus of its activity is in the Brighton Beach section of Brooklyn, New York. The rapid growth of Russian organized crime prompted the U.S. Department of Justice in January 1994 to elevate the Russian Mafia to its highest investigative

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<sup>38</sup> *Id.*

<sup>39</sup> Jimmy Burns, *Survey of Fraud-Prevention and Detection*, FIN. TIMES (London), October 18, 1994, at 34.

<sup>40</sup> Monika Hillemacher, *Authorities Fear Russian Mafia Linked to Frankfurt Brothel Murders*, Deutsche Presse-Agentur, Aug. 16, 1994, available in LEXIS, World Library, News File (reporting that German police suspect that the Russian Mafia was responsible because of the degree of cruelty and ferocity involved which is indicative of murders committed by the Russian Mafia). Frankfurt and Berlin are the primary German centers of Russian vice rings.

<sup>41</sup> Mark Almond, *This New Arms Race That The Whole World Must Fear, As Russia Falls Into the Hands of Racketeers Pursuing A Disturbing Kind of Power*, DAILY MAIL (London), Aug. 20, 1994, at 8-9.

<sup>42</sup> *Organized Crime in the Former Soviet Union: Hearing Before the Subcomm. on Investigations of Crime in the Former Soviet Union*, 103d Cong., 2d Sess. 67 (1994) [hereinafter Zachert Testimony] (statement of Hans-Ludwig Zachert, President of the German Federal Criminal Police) available in LEXIS, World Library, Curnws File.



priority.<sup>43</sup> This level of investigative priority is the same as that used for most other major organized crime groups, such as the Italian La Cosa Nostra, Asian groups, and Colombian cocaine cartels.<sup>44</sup> As part of this action, the FBI also created a squad in its New York office to deal exclusively with Russian organized crime.<sup>45</sup> The Russian Mafia is known to be involved in drug smuggling, credit card fraud, and, most prominently, a nationwide gasoline tax scam.<sup>46</sup>

Although Russian organized crime is involved in many operations, the prime concern of the U.S. government is its international activity, particularly in the area of nuclear smuggling. In James Woolsey's testimony before Congress, he stated that the United States needs to understand the Russian Mafia, its strengths, and capacity to influence the development of Russia's new political institutions.<sup>47</sup> The nuclear threat prompted Louis Freeh, Director of the FBI, to open a field office in Moscow to aid in the collection of information about Russian organized crime.<sup>48</sup>

## II. CURRENT COORDINATION DIFFICULTIES BETWEEN THE UNITED STATES, GERMANY, AND RUSSIA

While the United States, Russia, and Germany are cooperating in combating organized crime, none of the activity is occurring in concert between the three nations and there is no specific framework governing information exchanges. The problem lies not in current police structures, but in the inability of politicians to create a legal framework for coordination in international criminal enforcement.<sup>49</sup> This problem is particularly acute with the Germans.<sup>50</sup> Even the members of the European Union are unable to agree on basic issues such as the structure and headquarters of an all-European Union police force.<sup>51</sup> Issues of sovereignty also arise,

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<sup>43</sup> Selwyn Raab, *Influx of Russian Gangsters Troubles F.B.I in Brooklyn*, N.Y. TIMES, Aug. 23, 1994, A1, B2.

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

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

<sup>46</sup> *Id.*

<sup>47</sup> See Woolsey Testimony, *supra* note 9.

<sup>48</sup> Robert Green, *F.B.I. Fears Russian Gang a Nuclear Threat*, Reuters, May 25, 1994, available in LEXIS, World Library, Curmws File.

<sup>49</sup> Official Kremlin International News Broadcast, Press Conference by Russian Federation Interior Ministry, U.S. Federal Bureau of Investigation and German Police Representatives on Prevention of Organized Crime (Aug. 12, 1993) (transcript available in LEXIS, World Library, Arcnws File).

<sup>50</sup> See *Criminal Muscle*, *supra* note 29 (discussing the difficulties that the enforcement agencies of several countries have experienced in dealing with organized crime within their current procedural frameworks).

<sup>51</sup> *Id.*

absent agreements, on the authority of foreign agents to act upon the soil of another EU Member.<sup>52</sup>

These problems are more serious in dealings with Russia. The majority of information exchanges have occurred at face-to-face meetings between German and Russian criminal enforcement authorities.<sup>53</sup> Despite these efforts, no unified system exists to coordinate investigatory approaches and activity.<sup>54</sup> This makes it even more difficult to trace and confirm the material's origin.<sup>55</sup> Finally, in testimony before Congress, the head of the German Criminal Police stated that Germany will not sign any legal assistance treaties with Eastern European states, wishing instead to incorporate them into the existing EU conventions.<sup>56</sup> Such a situation would require assent by the entire European Union, further slowing the process of creating mechanisms of mutual cooperation.

The situation between the United States and Russia is only slightly better. One example is the opening of an FBI office in Moscow.<sup>57</sup> While this will lead to better exchanges of information, without a comprehensive treaty arrangement defining the office's purpose, it will be impossible to determine the scope of information that will be available.<sup>58</sup> This problem was demonstrated by President Yeltsin's national security chief, Yuri Baturin, who emphasized that important transfers of nuclear information, crucial to the control of the trafficking of weapons-grade materials, would be impossible without the conclusion of a formal, comprehensive treaty effectively covering security concerns.<sup>59</sup>

### III. INTERNATIONAL LIMITATIONS OF CRIMINAL ENFORCEMENT

The Russian Mafia is an international problem; therefore, an international solution is appropriate. As demonstrated by Germany's reluctance to enter into treaties of cooperation, states have typically recognized criminal enforcement to be of a primarily domestic character. The tradi-

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

<sup>53</sup> Official Kremlin International News Broadcast, Press Conference with Russian Federation Federal Counterintelligence Service Officials (Sept. 22, 1994), *transcript available in LEXIS*, World Library, Allnws File.

<sup>54</sup> *Id.*

<sup>55</sup> William Boston, *Russian Mafia Has Nuclear Technology*, Reuters World Service, Aug. 27, 1994, *available in LEXIS*, World Library, Curnws File.

<sup>56</sup> See Zachert testimony, *supra* note 42.

<sup>57</sup> *FBI Chief Meets Russian Leaders; Reportedly Fails to Open FBI Mission*. BBC Summary of World Broadcasts, July 6, 1994, *available in LEXIS*, World Library, Curnws File.

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

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

tional justifications have centered around jurisdiction and sovereignty. Customary international law dictates that failing the existence of a permissive rule derived from international custom or a convention to the contrary, a state may not exercise its power in any form in the territory of another state.<sup>60</sup> This bar on the ability to prescribe the domestic law of one country on another, or *prescriptive jurisdiction*, severely limits the ability of states to conduct investigations or arrests in a foreign territory.

The prescriptive jurisdiction limitation can be demonstrated in the following hypothetical. Person X, intending to murder Person Y, intentionally shoots and kills Person Y in Country A. Country A's legal system recognizes homicide to be a legal act. Person Y's successor, however, is outraged by Person X's actions and wishes Person X to be prosecuted. Country B, on Country A's northern border, considers homicide illegal. Recognizing the differing laws of homicide between Countries A and B, Person Y's successor files charges with Country B's police.

Because the killing occurred in Country A, a sovereign and independent state, the prescriptive jurisdiction limitation bars Country B from prosecuting Person X because Country B may not prescribe its interpretation of homicide into Country A.<sup>61</sup> The prescriptive jurisdiction rule, however, does allow for exceptions in the case of a convention or customary international practice.<sup>62</sup>

The customary international practice exception was invoked in *United States v. Noriega*.<sup>63</sup> Manuel Noriega was indicted by a federal grand jury for numerous violations of U.S. drug trafficking laws.<sup>64</sup> Although none of these criminal violations occurred within the actual territory of the United States, the Court justified the prescription of U.S. law because Noriega's offense, drug trafficking, was considered by customary international law to be a universally condemned offense.<sup>65</sup>

Since Noriega's conduct fell under the exception for universally condemned offenses, the Court was able to claim jurisdiction over the

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<sup>60</sup> S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 9 (Sept. 7).

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

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

<sup>63</sup> *United States v. Noriega*, 746 F.Supp 1506, 1514-15 (S.D. Fla. 1990).

<sup>64</sup> Noriega was prosecuted under a variety of statutes. *See generally* 18 U.S.C. §§ 1962 (1995) (racketeering and conspiracy); 21 U.S.C. § 963 (1995) (conspiracy); 21 U.S.C. § 959 (1995) (distribution of narcotics); 18 U.S.C. § 2 (1995) (commission of an offense against the United States); and 18 U.S.C. § 1952(a)(3) (1995) (promoting, establishing, or carrying on an unlawful activity in interstate or foreign commerce).

<sup>65</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, Reporter's Note 8 (1986), *cited with approval in Noriega*, 746 F.Supp at 1514.

offense. Despite the successful prosecution, the narrow scope of the Restatement exception does not encompass a wide variety of foreign criminal acts. If an act is not "universally condemned" by the international community, *Noriega* holds that a state would then be unable to prescribe its laws onto another territory.

*United States v. Alvarez-Machain* demonstrates the consequences of violating the prescriptive jurisdiction limitation. *Alvarez-Machain* involved the forced abduction and removal of a Mexican national to the United States.<sup>66</sup> Unlike *Noriega*, who was wanted for drug trafficking violations, a crime falling into the "universally condemned" exception, *Alvarez-Machain* involved the arrest of a non-U.S. national for kidnapping and murder. The murder and kidnapping occurred solely in Mexico and was between Mexican citizens.<sup>67</sup> If the conduct does not fall under the universal condemnation exception, international law permits arrests and abductions only with the permission of local authorities.<sup>68</sup> If permission is granted, international law allows for removal and trial in the United States if the delivery was not carried out in a manner that "shocks the conscience of civilized society."<sup>69</sup> Because the Mexican government did not grant U.S. authorities permission to arrest *Alvarez-Machain*, it filed a formal protest against the action and demanded *Alvarez-Machain's* return.<sup>70</sup> Although the Supreme Court held that *Alvarez-Machain's* abduction did not violate international law, *Alvarez-Machain* has been internationally condemned.<sup>71</sup> Other countries have found the activity to be illegal, as in the South African case described in Justice Stevens' dissent, where a South African court ruled in an analogous case that the forcible abduction of a foreigner by South African authorities violated international law.<sup>72</sup> If *Alvarez-Machain* is consistently followed, the prescriptive jurisdiction limitation would be unilaterally circumvented because state police forces would be free to operate without limitation in foreign countries. This could lead to diplomatic tensions as witnessed between the United States and Mexico.<sup>73</sup>

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<sup>66</sup> *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

<sup>67</sup> *Id.*

<sup>68</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 432(1)(c)(2) (1986).

<sup>69</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 433(1)(b)(2) (1986); see also 28 U.S.C.S. § 2255, note 222 (Law. Co-op. 1990).

<sup>70</sup> *Alvarez-Machain*, 112 S.Ct. at 2188.

<sup>71</sup> Harold H. Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L. J. 2391, 2405 (1994).

<sup>72</sup> *Alvarez-Machain*, 112 S.Ct. at 2200. (Stevens, J., dissenting).

<sup>73</sup> Patrick M. Hagan, *Government Sponsored Extraterritorial Abductions in the New*

General principles of international law allow for some instances of extraterritorial prescription of law.<sup>74</sup> The first occurs when conduct outside a territory has or is intended to have substantial effect within the territory.<sup>75</sup> This provision, better known as the *effects principle*, has been generally held to include situations where the effects of a given criminal act are intended to cause or will cause substantial harm in the prosecuting state.<sup>76</sup>

The hypothetical homicide demonstrating the prescriptive jurisdiction limitation can be modified to demonstrate the narrow scope of the effects principle.<sup>77</sup> Again, Person X has intentionally shot and killed Person Y in Country A. Country B, where homicide is illegal, wishes to prosecute Person X for murder. Although Country B concedes that under international law it cannot prescribe its laws on a foreign territory,<sup>78</sup> it argues that the murder has affected its security through the knowledge of wanton violence occurring across its borders.

*United States v. Evans* demonstrates why Country B cannot apply the effects principle.<sup>79</sup> *Evans* involves extraterritorial violations of the Arms Control Export Act.<sup>80</sup> Because arms sales to a terrorist group would threaten or "affect" U.S. security, the court held Evans' arrest valid even though the illegal conduct occurred in Bermuda.<sup>81</sup> International law, however, limits the effects principle to a standard of reasonableness.<sup>82</sup> More specifically, the court notes the effects principle to be limited to

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*World Order: The Unclear Role of International Law in United States Courts and Foreign Policy*, 17 SUFFOLK TRANSNAT'L L. REV. 438, 461-62, nn.110-13. Hagan argues that extradition treaties, the normal procedure for obtaining custody over a foreign actor, would be completely circumvented by this ruling. By operating outside of binding treaties, police would violate international agreements and customary international legal principles of sovereignty.

<sup>74</sup> The Research in International Law of the Harvard Law School, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L., Supp. 1, 435, 445 (1935).

<sup>75</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1986).

<sup>76</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. c (1986).

<sup>77</sup> *Id.*

<sup>78</sup> *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (Ser. A) No. 9 (Sept. 7).

<sup>79</sup> *United States v. Evans*, 667 F.Supp 974, 980-81 (S.D.N.Y. 1987).

<sup>80</sup> 22 U.S.C. § 2778 (1995). The Arms Control Export Act was designed to control illegal American weapons sales to third countries. *See, e.g., Evans*, 667 F. Supp. at 980-81.

<sup>81</sup> *Evans*, 667 F.Supp at 980-81.

<sup>82</sup> *Id.* at 980, *citing* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 402(1)(c) cmt. d (Tent. Draft No. 6, 1985).

domestic statutes that contemplate threats to international activity, such as arms sales, as opposed to activities with only local effects, such as Person X's murder of Person Y.<sup>83</sup>

Closely related to the effects principle is the *protective* or *universal principle*, which recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons not its nationals.<sup>84</sup> *United States v. Yunis* defines this class of offenses as crimes recognized by the world community to be of universal concern, such as piracy, slave trading, hijackings, genocide, and war crimes.<sup>85</sup> *Yunis* involved a Lebanese national who hijacked a Royal Jordanian Airlines flight from Beirut.<sup>86</sup> Because hijacking falls under this exception, the court was successfully able to exercise jurisdiction.<sup>87</sup>

Despite the proper extension of jurisdiction, *Yunis* cautions that courts should be reluctant to invoke the protective principle absent a clear indication of legislative intent and recognition of international law.<sup>88</sup> While in *Yunis* the act of hijacking clearly fit under both domestic and international applications of the protective principle, less internationally focused crimes, such as Person X's murder of Person Y, are more difficult to justify.

#### IV. PRACTICAL DIFFICULTIES OF LARGE SCALE MULTILATERAL COOPERATION: INTERPOL

Interpol, the international police force, is an organization of 146 member states whose primary mission is to collect and disseminate information regarding the status and whereabouts of particular international criminals.<sup>89</sup> This sharing of information, however, is not standardized throughout the member states due to the varying national substantive criminal law definitions and procedures.<sup>90</sup>

In the popular press, Interpol is tagged with the image of an organi-

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<sup>83</sup> *Id.* at 981.

<sup>84</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (1986).

<sup>85</sup> *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

<sup>86</sup> *Id.* at 1086.

<sup>87</sup> *Id.* at 1089-90. The court cites the International Convention Against the Taking of Hostages, June 3, 1983, T.I.A.S. 11081, 1316 U.N.T.S. 204, and the domestic Hostage Taking Act 18 U.S.C. § 1203 (1995) as justification both internationally and domestically for the extension of jurisdiction under the protective or universal principle.

<sup>88</sup> *Yunis*, 924 F.2d at 1091.

<sup>89</sup> MALCOLM ANDERSON, *POLICING THE WORLD: INTERPOL AND THE POLITICS OF INTERNATIONAL POLICE CO-OPERATION* 3 (1989).

<sup>90</sup> *Id.* at 30

zation having the power to investigate and arrest criminals.<sup>91</sup> This, however, is not the case. Various misperceptions surrounding Interpol's purpose and existence illustrate how international criminal law limitations affect procedures to investigate, arrest, and prosecute. Interpol does not have the power to investigate or arrest suspects. Although the Interpol "red notice" is usually treated as a request for the arrest of a suspect with the assurance that extradition will follow, sovereign states are not bound to respond.<sup>92</sup> The principles surrounding the red notice are at odds with international legal norms. While a state may voluntarily agree to apprehend a suspect upon issuance of a red notice, issues of jurisdiction and sovereignty do not oblige cooperation. The prescriptive jurisdiction limitations dictate that although a suspect may be sought internationally, if the crime does not fall into the category of "universally condemned," foreign law may not be internationally prescribed.<sup>93</sup> If the crime does fall into the classification of "universally condemned," all foreign police forces are barred from making arrests without consent from the affected state.<sup>94</sup> If Interpol does receive consent to arrest, it does not have the power to extradite.<sup>95</sup> To conform with international law, extradition of suspects would then be dependent on the existence of a treaty between the requesting and arresting states.<sup>96</sup>

Interpol is unable to coordinate the gathering of evidence for similar reasons. Such activity would circumvent a state's sovereignty by allowing a foreign government to operate in its territory.<sup>97</sup> *Alvarez-Machain* again exemplifies the consequences of such activity, as demonstrated by adverse international feelings towards the decision.<sup>98</sup> If the United States was condemned for such activity, it follows that similar activity by Interpol would be unwelcome as well.

One area where Interpol has proven effective is in its capacity to relay information regarding a potential suspect's whereabouts. Such a system of communication is helpful because it alerts the participating

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<sup>91</sup> *Id.* at 53

<sup>92</sup> *Id.* at 30. "Red notices" are issued by Interpol at the request of national authorities to alert other Interpol participants of a suspect's location. The practice of arresting suspects upon posting of a red notice was followed by the United States until only recently.

<sup>93</sup> See *supra* notes 60-65 and related discussion.

<sup>94</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(1)(c)(2) (1986).

<sup>95</sup> See ANDERSON, *supra* note 89, at 3.

<sup>96</sup> See Hagan, *supra* note 73, at 461-62.

<sup>97</sup> *Id.* at 462-63; U.S. CONST. amend. V; STEINER & VAGTS, *supra* note 13, at 831.

<sup>98</sup> See Hagan, *supra* note 73, at 457.

countries to the location and activities of a certain criminal suspect. However, there are problems with Interpol's ability to effectively disseminate information. The National Association of Police Chiefs warned that Interpol's communication network gives terrorist-supporting states and drug traffickers easy access to sensitive law enforcement information.<sup>99</sup> In addition, many of the local coordinators of Interpol are corrupt themselves, and use information to thwart law enforcement and procedure.<sup>100</sup> A glaring recent example was Interpol President Ivan Barbot's assistance in aiding a known Palestinian terrorist to obtain secret medical treatment in France.<sup>101</sup> In Europe, confidence in Interpol's ability to effectively reduce crime has dwindled to the degree that European countries are beginning to withdraw from the organization and are coordinating their national police activities through a European Union-based organization, Europol.<sup>102</sup>

For countries outside this network, effective cooperation is difficult because access to information is limited to only the participating states. Europol, for example, concentrates only on EU affairs.<sup>103</sup> For this reason, any Russian organized crime activities would only be covered in the European sphere of operations.

As an actual functioning international police entity, the failure of Interpol to move beyond information sharing to address problems involved in transnational arrests and evidence gathering demonstrates the need for a more closely coordinated treaty arrangement. Recently, 138 nations sent delegations to a conference sponsored by the United Nations to discuss the possibility of drafting a new international convention that would enable the parties to more easily prosecute leaders of organized crime.<sup>104</sup> However, law enforcement and UN leaders expressed skepti-

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<sup>99</sup> *U.S. Police Group Pursues Restrictions on Interpol*, PR Newswire, May 5, 1993, available in LEXIS, News Library, Arcnws File.

<sup>100</sup> *Id.* Police, under the influence of the drug cartels, will use information supplied by Interpol to alert producers of potential actions against them, such as the uncovering of hideouts. This allows them to stay ahead of the reach of the authorities. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *U.S. Police Chiefs Applaud Action on Europol*, PR Newswire, Nov. 3, 1993, available in LEXIS, News Library, Cumws File.

<sup>103</sup> ANDERSON, *supra* note 89, at 90, 170. In response to problems of Inter-European cooperation, a Pan-European police organization under the authority of the E.C. (now EU) has been suggested and now is ultimately effective. It is easily functional, however, due to provisions of the E.U. treaty, which allows the central authorities of the E.U. to issue directives and regulations forcing the member states to harmonize such procedural rules as evidence gathering. This allows for smooth and easy implementation. *Id.*

<sup>104</sup> Alan Cowell, *138 Nations Confer in Italy on Rise in Global Crime*, N.Y. TIMES,



cism about such a convention ever being negotiated, due to the classic reasons of international sovereignty and the inherent problems of creating a coordinated international enforcement procedure.<sup>105</sup> Such attitudes and the impracticability of a broad-based treaty are even more persuasive evidence for acting on a smaller, more controlled, and case-specific scale.

#### V. MUTUAL LEGAL ASSISTANCE TREATIES AND THEIR APPLICATION

Due to questions of sovereignty and the lack of coordinated activity among Germany, Russia, and the United States in fighting Russian organized crime, there must be an understanding negotiated which a) resolves questions of sovereignty, and b) identifies and creates legal mechanisms to aid in the flow of information and ideas.<sup>106</sup> One such method that has proven to be effective are bilateral mutual legal assistance treaties, or MLATs.<sup>107</sup>

MLATs are unique in that they coordinate enforcement and cooperation in criminal matters by first identifying specific areas where there will be cooperation and then creating legal mechanisms to facilitate the transfer of such information.<sup>108</sup> Most importantly, the treaties force the signatory parties to surrender certain trappings of sovereignty through the allowance of foreign intrusion into traditionally domestic areas.<sup>109</sup> For example, in Article 38, Section 2 of the MLAT between the United States and Switzerland (Swiss MLAT), the parties specifically contract that provisions of the Treaty shall take precedence over any inconsistent provisions of the municipal laws in the contracting States.<sup>110</sup>

MLATs offer significant advantages over the current informal cooperation schemes produced among the United States, Russia, and Germany. Requests for evidence are facilitated more quickly, since all that is necessary is to contact the treaty-specified representative of the

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Nov. 22, 1994, at A6.

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

<sup>106</sup> See C. Todd Jones, *Compulsion Over Comity, the United States' Assault on Foreign Bank Secrecy*, 12 J. INT'L BUS. L., Winter 1992, at 454, 473.

<sup>107</sup> *Id.* at 475.

<sup>108</sup> STEINER & VAGTS, *supra* note 13, at 832.

<sup>109</sup> See, e.g., Treaty of Mutual Legal Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., art. 9, 27 U.S.T. 2019, 2035 [hereinafter Swiss MLAT]. Article 9 discusses the General Provisions for executing requests. Although the actual procedure for conducting investigations follows that of the requested state, the Treaty requires consent to intrusion and investigation if the evidence presented to the designated Central Authority is credible.

<sup>110</sup> *Id.* art 38, § 3, 27 U.S.T. at 2058.

contracting state.<sup>111</sup> These representatives, or “central authorities” will then process the request.<sup>112</sup> Efficiency is therefore greatly increased over the old system of letters rogatory, which involved requests issued by a court and sent through diplomatic channels.<sup>113</sup> Unlike MLATs, this system involved several layers of communication.<sup>114</sup> Most importantly, specific acts or crimes are identified as eligible for cooperation, doing away with the procedural barriers limiting information transfers.<sup>115</sup>

The first major MLAT involving the United States was the 1973 Treaty on Mutual Assistance in Criminal Matters<sup>116</sup> between the United States and Switzerland. Entered into force officially in 1977, the Swiss MLAT was unique in that it created a legal obligation on one state to mutually assist the other in investigating transnational crime.<sup>117</sup> Long known for its policies of bank secrecy, Switzerland was a haven for the hiding of illicit criminal funds. The principle objective of the Swiss MLAT was to allow the United States to penetrate bank secrecy laws and access evidence that would normally be protected.<sup>118</sup>

Because U.S. and Swiss law traditionally did not allow this type of foreign access, the parties were forced to enact legislation to facilitate information exchanges.<sup>119</sup> Under the traditional method of information transfer, letters rogatory, domestic courts were forced to abide by domes-

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<sup>111</sup> Jones, *supra* note 106, at 476.

<sup>112</sup> In the United States, the Central Authority is the Attorney General or his designee. In Switzerland, the Central Authority is the Division of Police of the Federal Department of Justice and Police in Bern. Swiss MLAT, *supra* note 109, art. 28, § 1, 27 U.S.T. at 2050. By vesting such power in centralized federal authorities, requests under the Treaty are processed through efficient, recognized methods unlike letters rogatory, which by their nature must be adapted to the specific situation at hand. *Id.*

<sup>113</sup> Tiedemann v. The Signe, 37 F.Supp 819, 820 (E.D. La. 1941). “Letters rogatory are the medium . . . whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter’s control, to assist the administration of justice in the former country . . . ” *Id.*

<sup>114</sup> *Id.* Even when the letter can be sent directly from the domestic court to the foreign court, the procedure still takes time. The procedure can also be extremely costly due to the arduous process of precise drafting necessary for a foreign judge to consider a request. Finally, letters rogatory are limited by the laws of specific jurisdictions, therefore limiting the amount of information that can be transferred.

<sup>115</sup> See *infra* notes 138-40 and accompanying text for an example of the procedural difficulties resulting from the refusal of Italy to extradite in civil disputes.

<sup>116</sup> See Swiss MLAT, *supra* note 109.

<sup>117</sup> Jones, *supra* note 106, at 473.

<sup>118</sup> *Id.*

<sup>119</sup> Swiss MLAT, *supra* note 109, art. 38, § 3, 27 U.S.T. at 2058.

tic laws limiting the amount or type of information to be transferred.<sup>120</sup> Comparatively, the MLAT procedure is less cumbersome because it involves cooperation between police and prosecutors as opposed to diplomatic channels. The Swiss MLAT's need for implementation legislation also forced the removal of domestic legal bars and provided for transfers under the auspices of designated central authorities.

The Swiss MLAT provides access and use of information not only for assistance in criminal proceedings, but also by administrative bodies in Switzerland and the United States such as the Securities and Exchange Commission (SEC).<sup>121</sup> This administrative component is important due to the increased use of securities exchanges and other financial markets for the laundering of illegal funds by groups such as the Russian Mafia.<sup>122</sup> Included are the mutual powers of the signatory countries' courts to issue an administrative order declaring a violation, or to command a person to comply with applicable laws.<sup>123</sup> Such provisions allow the courts of the signatory country to stop illegal conduct without the intrusion of foreign control. Secondly, the signatory countries have the power, upon request, to deny licensing to a party involved in a specific trade or business, thereby disallowing an individual from using a legitimate trade, such as that of the stock broker, as a front for illicit activity.<sup>124</sup> The parties may also use evidence obtained through the Swiss MLAT to impose penalties under administrative law, while courts have the power to freeze and confiscate assets.<sup>125</sup>

Several cases have been successfully prosecuted in the United States through evidence gathered under the Swiss MLAT. An example is *United States v. Sturman*, where Reuben and David Sturman were on trial for attempted tax evasion, filing false income tax returns, and endeavoring to obstruct justice in relation to their business in the production, sale, and distribution of pornography. After submitting evidence to the Swiss government of the defendants' involvement in organized crime, U.S. attorneys were easily able to obtain the men's Swiss bank records.<sup>126</sup> *Sturman* illustrates the ease with which the evidence was transferred and

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<sup>120</sup> *The Signe*, 37 F.Supp at 820.

<sup>121</sup> Switzerland-United States: Exchange of Letters Concerning the Treaty on Mutual Assistance in Criminal Matters, Nov. 3, 1993, 33 I.L.M. 168, 169-71 (1994) [hereinafter Swiss-U.S. Letters].

<sup>122</sup> See Peter Millspaugh, *Global Securities Trading: The Question of a Watchdog*, 26 GEO. WASH. J. INT'L L. & ECON. 355, 358 (1992).

<sup>123</sup> Swiss-U.S. Letters, *supra* note 121, at 169-71.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 171.

<sup>126</sup> *United States v. Sturman*, 951 F.2d 1466, 1482 (6 Cir. 1991).

also how the problems of jurisdiction and sovereignty were easily overcome through the advance MLAT arrangement. Without this treaty, obtaining the evidence would have been far more complicated due to the involvement of diplomatic channels.<sup>127</sup> The greater levels of bureaucracy would have slowed the process and allowed more room for snags in the evidence transfer.<sup>128</sup>

The Swiss MLAT also prompted the Swiss banking industry to cooperate in organized crime investigations. Due to the time needed to produce legislation in Switzerland to facilitate the collection of evidence barred by bank secrecy practices, the Swiss government agreed to provide information regarding securities transactions when requested by the U.S. Department of Justice and SEC through the Swiss Federal Office for Police Matters.<sup>129</sup> Such cooperation provided for information exchanges even before the essential legislation was passed.

The 1985 MLAT between Italy and the United States (Italian MLAT) contains many of the Swiss MLAT's provisions.<sup>130</sup> The key difference is the treaty's focus — organized crime as opposed to bank secrecy.<sup>131</sup> Like the Swiss MLAT, the Italian MLAT requires all agencies with criminal investigative functions, such as the SEC and the IRS, to request assistance through the U.S. Attorney General.<sup>132</sup>

MLATs have been a great success in the fight against organized crime. The Italian MLAT was crucial in the cracking of an international narcotics conspiracy known as "the Pizza Convention."<sup>133</sup> The Italian MLAT's provisions allowed for the live testimony of two Italian nationals, Tommaso Buscetta and Salvatore Contorno.<sup>134</sup> The Treaty's ability to facilitate the transfer of foreign witnesses was directly related to the

<sup>127</sup> See *supra* notes 111-15 and related discussion.

<sup>128</sup> By enabling the U.S. attorneys to directly contact their Swiss counterparts, the evidence transfer was more easily obtained. If the treaty had not been in place, the old procedural mechanisms would have been in effect and Switzerland would not have been legally obligated to divulge this information.

<sup>129</sup> Swiss-U.S. Letters, *supra* note 121, at 169-72.

<sup>130</sup> See Treaty of Mutual Legal Assistance in Criminal Matters, Nov. 9, 1982, U.S.-Italy, 24 I.L.M. 1536 [hereinafter Italian MLAT].

<sup>131</sup> Types of assistance and cooperation include the locating of persons, service of documents, document production, execution of search and seizure requests, taking of testimony, transfer of persons for testimony, and the immobilization and forfeiture of assets. *Id.* art. 1, § 2(a-g), 24 I.L.M. at 1539.

<sup>132</sup> *Id.* art. 2, §§ 1, 2, 24 I.L.M. at 1539.

<sup>133</sup> Richard A. Martin, *Problems in International Law Enforcement*, 14 FORDHAM INT'L L. J. 519, 522 (1991).

<sup>134</sup> *Id.* See, e.g., *United States v. Badalamenti*, 626 F.Supp. 658, 660 (S.D.N.Y. 1986) (discussing Contorno's testimony).

appearance of Contorno and Buscetta in the United States.<sup>135</sup> Without such a procedure, Italy would have been under no international obligation to produce these witnesses.<sup>136</sup>

The inadequacies of Interpol also demonstrate the usefulness of the MLAT arrangement. For example, Interpol could be used to tip off American authorities about activity in Russia or Germany, but an MLAT would be more effective in acting upon such information. An example where an MLAT could have provided further procedural clarification occurred in *Sami v. United States*.<sup>137</sup> If an MLAT would have been in force in *Sami* (at this time the Italian MLAT had not been negotiated) perhaps Interpol could have been more effective in helping to stop Sami from further running with the children. The questionable grounds for extradition between the United States and both Italy and Germany illustrate Interpol's tenuous ability to combat international crime.<sup>138</sup> If Interpol informs the United States of the presence of a Russian Mafia member in Germany, but there is not an extraditable offense on either side, the process is frustrated. However, with an MLAT designed to settle such procedural difficulties seen in *Sami*, investigations to produce evidence would be aided by Interpol's information-gathering mechanisms.<sup>139</sup>

Although Interpol could be effective in transferring information, its

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<sup>135</sup> See Italian MLAT, *supra* note 130, art. 16, 24 I.L.M. at 1541. This article discusses the mechanisms for transferring persons in custody in the requested state to the requesting state for testimony. It in effect allows the requesting state to "borrow" the witness for testimony, while preserving the custody of the witness for his or her return to the requested state for trial.

<sup>136</sup> See discussion and hypotheticals regarding prescriptive jurisdiction, *supra* part III.

<sup>137</sup> See *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979). The *Sami* case involved the kidnapping of children in a custody dispute. Mr. Sami, an Afghan national, escaped to Italy and then Germany with his American children in defiance of a Florida custody order in an attempt to remove his children to Afghanistan. Although Interpol notified the United States of Mr. Sami's presence in Italy, extradition was not undertaken immediately due to diplomatic difficulties in arranging the arrest and extradition. Many of the procedural issues that arose in this dispute were resolved in the Italian MLAT. See generally Italian MLAT, *supra* note 130, 24 I.L.M. at 1536 (facilitating the extradition of nationals fleeing the jurisdiction of a signatory).

<sup>138</sup> *Sami*, 617 F.2d at 757. Due to the absence of a treaty, Italy would not extradite because the kidnapping grew out of a civil action—the child custody dispute.

<sup>139</sup> See, e.g., Italian MLAT, *supra* note 130, art. 1, 24 I.L.M. at 1537. Article I limits cooperation to criminal matters, however the parties may, if desired, include civil matters as well. No known international law would limit these treaties to simply criminal matters.

ability to stop Russian organized crime by itself is not sufficient.<sup>140</sup> Other arrangements are needed to supplement Interpol's activities. Interpol itself would only be useful in locating and gathering information in third countries outside of an MLAT arrangement, since any MLAT could allow such information-gathering functions to be coordinated between the contracting states.<sup>141</sup> This would increase security and render any evidence gathered admissible. Such is not the case with Interpol, which is unable to provide for these types of procedural safeguards.<sup>142</sup>

#### VI. A NEW VERSION OF COOPERATION UNDER MLATS — A TRILATERAL MLAT BETWEEN RUSSIA, THE UNITED STATES, AND GERMANY

As examined, the three principal areas of difficulty in the coordination of fighting the Russian Mafia are sovereignty, jurisdiction, and the inadequate coordination of activity springing from international legal limitations.<sup>143</sup> Because MLATs have proven effective in circumventing these problems on a bilateral basis, a hybrid agreement, the trilateral legal assistance treaty (TLAT), would be effective among the United States, Germany, and Russia in fighting Russian organized crime.

The effectiveness of the TLAT arrangement can be demonstrated through application to a web of hypothetical international business arrangements carried on by a Russian organized crime group. The following situation involves several common activities of Russian organized crime.<sup>144</sup> The various crimes are committed in Russia, Germany, and the United States. In Russia, the group has gained control of a St. Petersburg bank. Using funds deposited from laundering operations abroad, the group is able to finance and pay military personnel to smuggle nuclear materials to a transfer and distribution group in Germany.<sup>145</sup> Shipment and labor funds are distributed through bank accounts arranged in the military personnel's names. From Germany, the materials are sold and the proceeds transferred to real estate holdings in the United States, from which the money is ultimately laundered and sent back to the St. Petersburg bank to pay the original smugglers and finance the organization.<sup>146</sup>

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<sup>140</sup> See Interpol discussion, *supra* notes 89-105.

<sup>141</sup> *Id.*

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

<sup>143</sup> See *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (Ser. A) No. 9 (Sept. 7).

<sup>144</sup> See discussion of current activity in Russia, Germany, and the United States, *supra* notes 24-48.

<sup>145</sup> See Zachert testimony, *supra* note 42.

<sup>146</sup> For a similar example, see Adam Tanner, *Russian Mafia Expands into New Areas, Using the U.S. to Launder Dirty Money*, CHRISTIAN SCI. MONITOR, Jan. 11,

### A. *Overcoming the Prescriptive Jurisdiction Limitation*

Without a TLAT arrangement, foreign investigations by the affected states would be barred under the prescriptive jurisdiction limitation.<sup>147</sup> As demonstrated in the homicide hypothetical, none of the three countries would be able to conduct investigations, gather evidence, or arrest suspects without the permission of the sovereign government.<sup>148</sup> The TLAT, however, would overcome the prescriptive jurisdiction limitation through one of its exceptions, a convention.<sup>149</sup>

In the hypothetical situation, a TLAT would be effective for Russian law enforcement in conducting its investigation of the illegal exportation of Russian nuclear material. While Russian authorities would be able to investigate and prosecute the individuals performing the act of stealing, they would be unable to prove the link between the theft and subsequent smuggling because the evidence of the transfer is in Germany and the United States. Using information provided by the smugglers, a TLAT would be used to obtain testimony from individuals in Germany.<sup>150</sup> Because the treaty is also in force with the United States, Russian authorities could also obtain records of money transactions to and from the United States.<sup>151</sup>

Although it can be argued that nuclear smuggling falls under either the effects or protective principle exceptions, a TLAT would still be more effective because it settles procedural difficulties. As demonstrated in the discussion of Interpol, a country has no obligation, absent an agreement, to surrender suspects or information.<sup>152</sup> While a state could argue that this Russian group's smuggling activity affects its security under the effects or protective principle, a successful prosecution depends upon relevant evidence.<sup>153</sup> Furthermore, only the nuclear smuggling portion of this transaction is covered by the effects or protective principles.<sup>154</sup> This would exclude the money laundering and bank fraud activity that links

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1995, at 1.

<sup>147</sup> S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 9 (Sept. 7).

<sup>148</sup> See Hagan, *supra* note 73, at 462-63, nn.114-19.

<sup>149</sup> See S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 9 (Sept. 7) (discussing the convention exception).

<sup>150</sup> See *Badalamenti*, 626 F. Supp. at 600; Italian MLAT, *supra* note 130, art. 16, 24 I.L.M. at 1539.

<sup>151</sup> See *supra* note 127 and accompanying text for an example of the function of a bilateral treaty allowing for the transfer of records to be used in criminal prosecutions.

<sup>152</sup> See Interpol discussion *supra* notes 89-105.

<sup>153</sup> See discussion of effects and protective principles *supra* notes 75-88.

<sup>154</sup> *Id.*

the operation together.<sup>155</sup> The protective and effects principles would apply to only one element of the operation, leaving the rest of the activity intact. All that the Russian organized crime group would need to re-establish the operation would be the recruitment of new smugglers. Use of the TLAT would place the money laundering and bank fraud under the prescriptive jurisdiction limitation exceptions, allowing for information exchanges and prosecution.<sup>156</sup>

### B. Simplified Legal Coordination

The TLAT would also remedy the coordination problems seen with Interpol. In our hypothetical situation, if Russia entered into separate bilateral agreements with the United States and Germany, a limiting clause would forbid Russia from disclosing to Germany bank records obtained from the United States.<sup>157</sup> Germany would then have no way of tracing the money from the transaction to the United States. This would allow the Russian organized crime group to protect its German distributors by removing the direct evidence of the transfer—the profits—from the reach of German law enforcement. A trilateral arrangement would circumvent this problem by allowing for information obtained by one party to be used by all.

Although oversimplified, this hypothetical demonstrates the potential of such an arrangement. Instead of prosecuting only specific actors, such as the couriers, the entire network could be implicated through a coordination of evidence relating to the group as a whole. This would have the impact of wiping out a much broader range of individuals. If the focus was simply domestic, only the low-level operatives would be prosecuted since there would be no way of effectively linking them to a greater organization.

### CONCLUSION

Because of the threat the Russian Mafia poses to world security, an effective method of criminal enforcement must be created to better coordinate enforcement. Because the Russian Mafia's principal bases of

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

<sup>156</sup> S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 9 (Sept. 7). The convention element would be invoked, creating the exception.

<sup>157</sup> See Italian MLAT, *supra* note 130, art. 8, 24 I.L.M. at 1540; Swiss MLAT, *supra* note 109, art. 5, § 1, 27 U.S.T. at 2029. Both treaties contain a limiting clause restricting information obtained to the proceedings for which they are requesting. If there is no three-way arrangement between the United States, Germany, and Russia, some information may not end up with the proper authorities.



activity are in the United States, Russia, and Germany, it makes sense for the three countries to coordinate their activities. However, issues of state sovereignty and problems of jurisdiction have proven to be barriers to effective cooperation. MLATs in a bilateral form, however, have proven effective in overcoming traditional problems of sovereignty and jurisdiction in criminal matters. Although a trilateral MLAT has never been attempted by any of the three countries, the evidence of its success in a bilateral form suggests that it could be highly effective in overcoming traditional problems of sovereignty while simultaneously creating solid, legally binding mechanisms with which the three countries can work together to stop the Russian Mafia's spread. Although this is only one possible solution to the problem, it would be an effective beginning and a vast improvement over current uncoordinated, sporadic activity.

*Peter J. Vassalo\**

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\* A.B., University of Michigan 1993; J.D. Candidate, Case Western Reserve University School of Law 1996. The author wishes to thank Professor Kevin McMunigal, Case Western Reserve University School of Law, for his helpful comments and guidance.