NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 19 | Number 2 Article 4

1999

THE NEED FOR INTERNATIONAL COOPERATION TO SUPPRESS TERRORISM: THE UNITED STATES AND GERMANY AS AN EXAMPLE

Sabrina R. Der Bagdasarian

THE NEED FOR INTERNATIONAL COOPERATION TO SUPPRESS TERRORISM: THE UNITED STATES AND GERMANY AS AN EXAMPLE

I. INTRODUCTION

Acts of international terrorism are steadily increasing throughout the world.[1] Certain procedural obstacles are currently hindering the international community's efforts to suppress terrorism.[2] The greatest obstacles include the failure to reach a working definition of terrorism,[3] the failure to gain international cooperation to achieve universally recognized crimes of terrorism, and the failure to achieve compatibility with divergent interests between nations.[4]

This Note will address these issues and propose improvements by first examining the development of international anti-terrorism laws and terrorist extradition legislation between the United States ("U.S.") and the Federal Republic of Germany ("Germany"). Next, this Note will examine Germany's efforts to combat terrorism through its own domestic laws. Third, this Note will direct special attention to the extradition treaty between the U.S. and Germany and the extradition of Mohammed Hamadei. By examining the Hamadei case, this part of the Note will critique the application and effectiveness of the U.S.-Germany Extradition Treaty. Finally, this Note will conclude that in achieving a collective policy against terrorism, the international community should pursue similar policies to those contained in the U.S.-Germany Extradition Treaty. The international

---

1. *See* Jürgen Meyer, *German Criminal Law Relating To International Terrorism*, 60 U. COLO. L. REV. 571, 571 (1989).

2. *See id.*

3. *See generally* M. Cherif Bassiouni, *A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism," in* LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS (1988).

4. *See* Thomas E. Carbonneau, Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 VA. J. INT'L L. 495, 513 (1977).

community should adopt approaches that parallel domestic German anti-terrorism laws to alleviate many of the procedural obstacles that hinder worldwide cooperation in suppressing terrorism. While the U.S.-Germany Extradition Treaty evidences progress, a more stringent and far-reaching consensus is needed to put an end to terrorism.

II. DEVELOPMENT OF INTERNATIONAL ANTI-TERRORISM LAWS AND THEIR LATENT DEFECTS

A. The Lack of an International Definition of Terrorism

International cooperation in defeating terrorism is obtainable only if uniform agreement can be reached on a definition of criminal terrorism.[5] Currently, there is no universally accepted definition of "terrorist act" or "terrorism."[6] The only international agreement defining terrorism is found in the 1937 Convention for the Prevention and Punishment of Terrorism.[7] The Convention defined acts of terrorism as "criminal acts directed against a state and intended or calculated to create a state of terror in minds of particular persons, or a group of persons or the general public."[8] This Convention never became legally enforceable due to World War II and the dissolution of the League of Nations.[9] More recently, M. Cherif Bassiouni[10] attempted to create a universal definition of terrorism as:

> an ideologically-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for or on behalf of themselves or on behalf of a state.[11]

---

5. *See* Meyer, *supra* note 1, at 573.

6. *See* Miriam Sapiro, Note, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 10 N.Y.U. L. REV. 654, 655 n.1 (1986).

7. *See* League of Nations 1937 Convention for the Prevention and Punishment of Terrorism, *opened for signature* Nov. 16, 1937, art. 1(2), 19 LEAGUE OF NATIONS O.J. 23 (1938).

8. *Id.* art. 1(2).

9. *See* Sapiro, *supra* note 6, at 654 n.1.

10. Professor of Law at DePaul University and Secretary-General of the International Association of Penal Law

11. Bassiouni, *supra* note 3, at xxiii.

The lack of international consensus on the definition of terrorism has created difficulties in identifying what terrorist crimes are and how they can be prevented and controlled.[12] The effect is that one country may categorize an act as criminal terrorism, while other nations may classify it as a liberation movement deserving support rather than punishment.[13] Without a definition for terrorist acts, the international community cannot work together to adopt universally recognized crimes of terrorism. An international consensus was lacking until the United Nations addressed this defect.

B. International Developments to Combat Terrorism

1. United Nations Conventions

The United Nations sponsored several multilateral conventions to define and develop an international consensus on methods to combat terrorism.[14] These conventions adopted a "piecemeal approach to defining terrorist acts concerning hijacking, kidnapping of diplomats, and the taking of civilian hostages."[15] The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, also known as the Tokyo Convention of 1963, addresses the concern over aircraft hijacking.[16] The Tokyo Convention requires its signatories to extend their national jurisdictions to include the crimes defined therein.[17] Therefore, each signatory state must establish its own jurisdiction over extraterritorial terrorist acts aboard aircraft with domestic registrations.[18] The Tokyo Convention fails to define the meaning of an international criminal offense, leaving it open to inconsistencies among the signatory states because the Convention relies upon domestic law definitions of criminal acts.[19] Furthermore, the Tokyo

---

12. *See* Meyer, *supra* note 1, at 573.

13. *See id.* at 571.

14. *See id.* at 575.

15. *Id.*

16. *See* Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

17. *See id.* art. 3.3.

18. *See id.* art. 3.1.

19. *See* Terry R. Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold,* 12 YALE J. INT'L L. 294, 301 (1987).

Convention does not require signatory states to either extradite or prosecute offenders.[20]

In response to the shortcomings of the Tokyo Convention, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention") established and defined the international crime of hijacking aboard civil aircraft to ensure consistency among signatory states.[21] Furthermore, the Convention adopted the principle of *aut dedere aut judicare*.[22] This principle allows the participating state to choose either extradition or prosecution of the offender within its own jurisdiction.[23] Under Article 4 of the Hague Convention,

> a contracting state is required to extend its extraterritorial criminal jurisdiction over offenses of hijacking if it is: (1) the state where the aircraft is registered; or (2) the state where the aircraft lands with the hijacker still aboard; or (3) the state in which the aircraft lessee's principal place of business is located or its permanent residence; or (4) the state in which an alleged offender is present, but from which he is not extradited.[24]

Furthermore, the Hague Convention provides that any alleged offender identified within the territory of a signatory state must be seized, and all potentially interested states must be notified of the apprehension.[25] Therefore, in addition to establishing the necessary definitions, the Hague Convention improved upon the Tokyo Convention by establishing a "near-universal jurisdiction" over the offense of hijacking rather than merely establishing jurisdiction by one state over the offender.[26]

Another major step toward combating terrorism was the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) ("Montreal Convention").[27] This Convention

---

20. *See id.*

21. *See* Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 [hereinafter Hague Convention].

22. *See* D. Costello, *International Terrorism and the Development of the Principle of Aut Dedere Aut Judicare,* 10 J. INT'L L. & ECON. 483, 483 (1975). *Aut dedere aut judicare* translates to "extradite or prosecute." *Id.*

23. *See id.*

24. Kane, *supra* note 19, at 302 (citing Hague Convention, *supra* note 21, art. 4).

25. *See id.* (citing Hague Convention, *supra* note 21, art. 6.4).

26. *See id.* (citing Hague Convention, *supra* note 21, art. 6.1).

27. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil

requires its signatory states to legislate "severe penalties" on a broader scope of activities that interfere with civil aviation.[28] The Montreal Convention explicitly defines the international criminal acts that endanger the safety of an aircraft in flight or render it incapable of flight.[29] These criminal acts include:

> acts of violence against persons on board an aircraft in flight; destruction of or damage to, an aircraft in service; sabotage of an aircraft in service; destruction of, or damage to, air navigation facilities, or interference with their operation; and communication of false information that, by its communication, endangers an aircraft in flight.[30]

Furthermore, any attempt to commit these offenses or aid anyone who commits them also constitutes a punishable offense.[31] This important advance in international cooperation sets forth the principle that a signatory state must "endeavor to take all practicable measures" to prevent the enumerated offenses outlined in the Montreal Convention[32] and must make offenders subject to extradition.[33] Therefore, in addition to a state's obligation to exercise subject-matter jurisdiction over an offender, as set forth under the Hague Convention, the Montreal Convention also adds the right "to establish territorial criminal jurisdiction in the state where the offense was committed."[34] Thus far, the United Nations conventions only addressed threats to civil aviation. Other classes of offenses were in need of definition and prevention as well.

The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents ("New York Convention"), adopted in 1973, takes a different approach from the former conventions.[35] The New York Convention was developed to prevent

---

Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. no. 7570, 10 I.L.M. 1150 [hereinafter Montreal Convention].

28. *See* Kane, *supra* note 19, at 303.

29. *See* Montreal Convention, *supra* note 27, art. 1.1.

30. Kane, *supra* note 19, at 303 (citing Montreal Convention, *supra* note 27, art. 1.1).

31. *See* Montreal Convention, *supra* note 27, art. 1.2.

32. *See id.* art. 10.1.

33. *See* Kane, *supra* note 19, at 303.

34. Kane, *supra* note 19, at 303 (citing Montreal Convention, *supra* note 27, art. 5).

35. *See* Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S.

violence against "internationally protected persons."[36] Under this Convention, the protected class of persons are defined as "heads of state, heads of government, foreign ministers and their families when in foreign countries, and officials of states or of international organizations and their families when other international law grants them special protection."[37] A signatory state "must protect such persons from murder, kidnapping, and other attacks upon their person or liberty; violent attacks upon their means of transport, private accommodations, or official premises likely to endanger their persons or liberty; and threats and attempts."[38] However, by not criminalizing these offenses under international standards, the issue of inconsistency arises once again.[39] Under the New York Convention, the offenses are merely "made to be the subject of national prohibitions by the various contracting states."[40] Thus, the New York Convention established internationally imposed domestic anti-terrorism laws.

In the aforementioned conventions, the international community did not universally acknowledge "international criminal offenses" and the need for specific international anti-terrorism legislation.[41] Not until the rapid passage of the International Convention Against the Taking of Hostages ("Hostages Convention") proposed by Germany in 1976, and approved by the United Nations General Assembly three years later, were international criminal offenses defined.[42] This Convention defined the international offense of hostage-taking as "[a]ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage. . . ."[43] Furthermore, "any attempts to commit or to abet the offense are also crimes."[44] This Convention is similar to the Hague, Montreal, and New York Conventions regarding

---

No. 8532, 1035 U.N.T.S. 167 [hereinafter New York Convention].

36. *Id.* art. 1.

37. *Id.*

38. Kane, *supra* note 19, at 304 (citing New York Convention, *supra* note 35, art. 2.1).

39. *See id.*

40. *Id.*

41. *See generally* Kane, *supra* note 19.

42. *See id.* at 306 (citing International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/34/819 (1979) [hereinafter Hostages Convention]).

43. *Id.* (citing Hostages Convention, *supra* note 42, art. 1).

44. *Id.* (citing Hostages Convention, *supra* note 42, art. 1).

custody of the offender,[45] notification of states,[46] and the choice of extradition,[47] or submission for prosecution.[48] However, the Hostages Convention surpasses the previously mentioned conventions by recognizing the need to acknowledge and define international criminal offenses.

Although the United Nations conventions concerned with single crimes advance international goals to eradicate and control terrorism, various problems persist. Because an international organ with the power to prescribe "international criminal offenses" does not yet exist, jurisdiction can only be attained through making the specified act a punishable offense in every member state.[49] As a result, certain regional level efforts were aimed at combating the problems of prescribing international criminal offenses.[50]

2. European Convention on the Suppression of Terrorism

European states have attempted to resolve one such problem of prescribing international criminal offenses through the European Convention on the Suppression of Terrorism ("ECST").[51] The ECST attempts to prescribe the internationally conceded exception to extradition: the political offense exception.[52] The ECST provides for extradition of terrorists and presupposes that certain acts are already punishable under a member state's national law.[53] The ECST is not an extradition treaty itself. Rather, it modifies existing treaties among the European member states, such as the European Convention on Extradition ("ECE").[54] Although a convention

---

45. *See id.* (citing Hostages Convention, *supra* note 42, art. 6.1).

46. *See id.* (citing Hostages Convention, *supra* note 42, art. 6.2).

47. *See id.* (citing Hostages Convention, *supra* note 42, art. 10).

48. *See id.* (citing Hostages Convention, *supra* note 42, art. 8).

49. *See* Otto Lagodny, *The European Convention on the Suppression of Terrorism: A Substantial Step to Combat Terrorism?* 60 U. COLO. L. REV. 583, 590 (1989).

50. *See* Meyer, *supra* note 1, at 575.

51. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, Europ. T.S. No. 90, 15 I.L.M. 1272 [hereinafter ECST].

52. *See id.* art. 1. The political offense exception provides for the refusal of extradition by a requested state for offenses of a political nature or for offenses committed in the context of a political incident. Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism,* 67 IND. L.J. 767, 772 (1992).

53. *See generally* ECST, *supra* note 51. *See also* Lagodny, *supra* note 49, at 590.

54. European Convention on Extradition, *opened for signature* Dec. 13, 1957, 359 U.N.T.S. 273, Europ. T.S. 24; with two additional protocols to the European Convention on Extradition, Oct., 1975, Europ. T.S. No. 86; Mar. 17, 1978, Europ. T.S. No. 98

like the ECE combats terrorism by extraditing the offender to the member state that seeks his or her prosecution, it also contains the well known political offense exception.[55] Article 3 of the ECE provides that extradition shall not be granted if "the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence."[56] However, the ECE never defines "political offense."[57] To prevent this exception from hindering the suppression of terrorism, the ECST narrows the scope of the political offense exception to expedite the prosecution of terrorist offenders.[58] In this context, the ECST provides for a "negative definition" of the political offense by stating what does not constitute a political offense.[59]

In contrast to the Hague Convention,[60] Montreal Convention,[61] and New York Convention,[62] none of which address the political offense exception, articles one through four of the ECST provide that certain offenses shall not "be regarded as a political offense or as an offense connected with a political offense or as an offense inspired by political motives."[63] These non-political offenses are:

> (1) offenses within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention), and the Convention for the Suppression of the Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention); (2) serious offenses against internationally protected persons; (3) taking hostages; and (4) offenses against persons involving the use of dangerous weapons (e.g. bombs, automatic firearms).[64]

The ECST furthered the international goal of suppressing terrorism by narrowing the scope of the political offense exception. Nevertheless, it is

---

[hereinafter ECE]. *See also* Lagodny, *supra* note 49, at 583.

55. ECE, *supra* note 54, art. 3.

56. *Id.*

57. *See generally* ECE, *supra* note 54.

58. *See* Lagodny, *supra* note 49, at 583 (citing ECST, *supra* note 51, arts. 1–4).

59. *See* ECST, *supra* note 51, arts. 1–4.

60. Hague Convention, *supra* note 21, art. 4.

61. Montreal Convention, *supra* note 27, art. 5.

62. New York Convention, *supra* note 34, art. 3.

63. ECST, *supra* note 50, arts. 1–4.

64. Lagodny, *supra* note 49, at 584–85.

still necessary to actually define what a "political offense" is and not merely enumerate what it is not.[65]

Second, the ECST approaches the jurisdictional issue with respect to regional terrorist offenses differently from the single-crime-oriented conventions of the United Nations.[66] Rather than create jurisdiction for a certain act in many states in order to avoid extradition, the ECST establishes the "representation principle."[67] This principle allows a requested state to extend in personam jurisdiction to a fugitive terrorist who is within its territory simply because that terrorist is not within the requesting state's territory.[68] Thus, the requested state becomes the "representative" of the requesting state in the fugitive's prosecution.[69] This cures the requesting state's jurisdictional deficiency over an absent offender. This concept of jurisdiction is much broader in scope than jurisdiction based on territoriality.[70] Thus the ECST, although it does not expand the number of crimes which are punishable by its member states, advances the quest for universal anti-terrorist legislation and focuses on the need for international member-state cooperation.

III. ANTI-TERRORISM LAWS IN GERMANY

Over the past twenty years, the German Federal Legislature has continuously enacted laws to combat terrorism.[71] The overall policy is to suppress terrorism at its source through stringent domestic laws.[72] This guiding policy was reflected in major reforms that led to the enactment of six anti-terrorism laws.[73] The legislation was contemporaneous with the aforementioned international conventions and yet was more specific in nature. This Note will address these German laws individually.

The first enactment was the 1974 *Gesetz zur Ergänzung des Ersten Gesetzes zur Reform des Stafverfahrensrechts* (Law Supplementary to the First Law on the Reform of the Criminal Procedure Statute).[74] This law

---

65. *See id.* at 591.
66. *See id.* at 590.
67. *See id.* at 587.
68. *See id.*
69. *See id.*
70. *See id.*
71. *See* Meyer, *supra* note 1, at 576.
72. *See id.*
73. *See id.*
74. *Id.* (citing StPO §§ 137.1, 138a, 146, 231a (1975)).

limits the number of defense attorneys allowed to represent a terrorist suspect to three.[75] Furthermore, the law rules out the chance of an attorney defending more than one client in the same action by proscribing the practice of joint representation[76] and "regularize[s] the procedure of completely excluding defense attorneys where there is reason to believe that the attorney and his client are collaborating with criminal intent."[77] This new law also allows for trial of a "defendant in absentia if, on account of his disturbances during the proceedings, his presence would make it impossible to hold the trial, or if he is unable to attend the trial on account of a self-induced injury."[78] Although this law was an effort to restrict terrorists' actions once in custody, additional reforms were needed to combat their actions prior to custody.

Consequently, the second step taken was the 1976 enactment of the *Antiterrorismus-Gesetz* (Anti-terrorism Law).[79] This law introduced a new provision in the Federal Criminal Code, which punishes organized terrorist groups with up to ten years imprisonment.[80] Furthermore, this law relaxed due process requirements by making it easier to commit a defendant for trial.[81] For example, an alleged offender can be detained on pending appeal or rehearing simply because of suspicion even if no risk of attempt to escape or danger of collusion is likely.[82] Due process was also relaxed by allowing for the monitoring of all correspondence between defendant and his counsel under surveillance, if an alleged offender is being detained on suspicion of having committed an offense pursuant to this provision.[83] Together, these reforms evidenced Germany's stringent domestic policy against suppressing terrorism.

A series of minor reforms followed specific instances of terrorist acts.[84] One example is the third reform taken by Germany in 1977, known as the *Kontaktsperre-Gesetz* (Law on the Banning of Contacts).[85] This reform,

---

75. *See id.* (citing StPO § 137.1(2)).
76. *See id.* (citing StPO § 146).
77. *Id.* (citing StPO § 138a).
78. *Id.* (citing StPO § 231a).
79. *Id.* (citing StGB § 129a (1976); StPO §§ 1, 148.2 (1976)).
80. *See id.* at 576–77 (citing StGB § 129a).
81. *See id.*
82. *See id.* (citing StPO § 112 (1976)).
83. *See id.* (citing StPO § 148.2).
84. *See id.*
85. *Id.* (citing EGGVG §§ 31–48 (1977), § 34a (1985) (German judicial code)).

which banned all contacts with other terrorist Red Army Faction ("RAF")[86] members once a fellow RAF member was captured, was in direct response to the kidnapping of Hans-Martin Schleyer.[87] This was the legal basis for curtailing contact with other RAF members, because it was believed that the captured RAF members would further direct the kidnapping.[88] Another minor reform was the enactment of the 1978 *Gesetz zur Änderung der Strafprozessordnung* (Law on the Reform of the Code of Criminal Procedure).[89] This law set up road checkpoints and required identification of individuals passing through them.[90] In addition, it provided that communication between a terrorist suspect and defense counsel be conducted through a glass reception cell to prevent them from exchanging objects.[91] Furthermore, the 1986 enactment of the *Gesetz zur Änderung der Strafprozessordnung* (Amendment to the Code of Criminal Procedure)[92] allowed for "the storage on short-term data files up to a maximum of three months of all personal data collected in the course of a search, regardless of whether the alleged offender had a prior police record."[93] The final reform was the 1986 *Gesetz zur Bekämpfung des Terrorismus* (Law on the Suppression of Terrorism).[94] This reform revived the earlier repealed crime of "incitement to an act of terrorism."[95] In addition, it strengthened and "tightened the previously mentioned anti-terrorism provisions."[96] When evaluated in sum, these reforms reflect Germany's successful efforts to pinpoint the necessity for specific anti-terrorism legislation as opposed to the "piecemeal approach" taken by the United Nations' international conventions.

Other principles merit discussion at this point because they also demonstrate Germany's commitment to the suppression of terrorism. In

---

86. The Red Army Faction is a German terrorist organization which has contact bases not only in Germany, but in neighboring states as well, such as Belgium, Denmark, France, Italy, the Netherlands, and Switzerland. *See generally* Meyer, *supra* note 1.

87. *See id.* at 577. Schleyer, the Arbeitgeberpräsident (President of the Federal Association of Employers), was assassinated in October 1977. *See id.*

88. *See id.*

89. *Id.* (citing StPO §§ 111, 148.2 (1978)).

90. *See id.* (citing StPO § 111).

91. *See id.* (citing StPO § 148.2(3)).

92. *Id.* at 578 (citing StPO § 163(d) (1986)).

93. *Id.*

94. *Id.* (citing StGB §§ 129a, 130a (1986)).

95. *Id.*

96. *Id.* (citing StGB § 129a (stating that the maximum sentence for group leaders of terrorist organizations was increased from ten to fifteen years)).

1986, Germany incorporated the "principle of universality" into its Criminal Code.[97] Under this principle, which is similar to the "representation principle" within the ECST, a terrorist act is punishable in Germany even if the act was committed beyond its borders, regardless of the law of the place of commission.[98] Thus, extraterritorial terrorist acts can be punished in Germany despite the absence of anti-terrorist enforcement elsewhere.[99] In addition, all criminal offenses punishable pursuant to international treaties binding on Germany are subject to the principle of universality.[100] Thus, a case of international terrorism prosecuted in Germany under the principle of universality deserves comment at this point.

IV. THE CASE OF MOHAMMED ALI HAMADEI AND THE UNITED STATES-GERMANY EXTRADITION TREATY

A. The Extradition of Mohammed Ali Hamadei

1. Facts

In 1985, terrorists boarded a TWA flight from Athens to Rome and hijacked the plane to Beirut.[101] Once in Lebanon, the terrorists executed U.S. Navy diver Robert Stethem and held thirty-nine of the mostly American passengers and crew hostage for seventeen days.[102] Based on this act, the alleged terrorists were indicted for the hijacking in the U.S. District Court for the District of Columbia in November 1985.[103] On January 13, 1987, one of the accused hijackers, Mohammed Ali Hamadei, a twenty-two year old Lebanese, flew into Frankfurt, Germany on a false passport with a suitcase full of liquid explosives.[104] The West German police captured and arrested Hamadei.[105] American officials immediately sought his

---

97. *See id.* at 580 (citing StGB § 6 (including that this law explicitly applies to offenses such as hijacking of an aircraft)).

98. *See id.* (citing StGB § 6).

99. *See id.*

100. *See id.*

101. *See* David M. Kennedy et al., *The Extradition of Mohammed Hamadei*, 31 HARV. INT'L L.J. 5, 5 (1990).

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

extradition.[106] However, within days of Hamadei's arrest and before Germany could even act on the U.S. request, two Germans were kidnapped in Beirut.[107] This complicated the extradition because if Hamadei were extradited to the U.S., the two German hostages would be executed.[108] Thus, the issue for Germany became whether the lives of the hostages could be preserved without capitulating to the demands of the hostage takers.[109] The U.S. wanted Germany to extradite Hamadei.[110] The Germans, on the other hand, believed they had a legal right to refuse extradition based upon the principle of *aut dedere aut judicare* (extradite or prosecute) within the U.S.-Germany Extradition Treaty ("Extradition Treaty").[111] Germany had a right to refuse extradition based on the German charges for the passport and the explosive materials for which Hamadei was arrested in Frankfurt.[112] Furthermore, Germany asserted its right to prosecute Hamadei based on the universality principle, which allowed Germany to claim jurisdiction over certain serious crimes, including hijacking, regardless of who committed the crimes or where they occurred.[113] Therefore, because of the universality principle of jurisdiction, Germany could also try Hamadei for the TWA offenses.[114] Ultimately, Germany refused to extradite Hamadei to the U.S. and prosecuted Hamadei for the hijacking in the German courts.[115]

2. The U.S.-Germany Extradition Treaty with Respect to the Hamadei Case

The Extradition Treaty between the U.S. and Germany was in force [116] at the time of the Hamadei case and played an important role in Germany's decision not to extradite Hamadei to the U.S. and to prosecute him in

---

106. *See id.*

107. *See id.* at 6.

108. *See id.*

109. *See id.* at 10.

110. *See id.*

111. *See id. See also* Treaty Concerning Extradition Between the United States and West Germany, June 20, 1978, U.S.-West Germany, 32 U.S.T. 1485, T.I.A.S. No. 9785 [hereinafter Extradition Treaty].

112. *See* Kennedy, *supra* note 101, at 10.

113. *See id.* (citing StGB § 6 (1986)).

114. *See id.*

115. *See id.* at 11.

116. The Extradition Treaty has been in force since 1978. *See generally* Extradition Treaty, *supra* note 111.

Germany.[117] Under the Extradition Treaty, the decision to extradite or try the terrorist is left to the unfettered discretion of the requested states.[118] Germany's decision to prosecute rather than to extradite Hamadei was influenced mainly by the kidnapping of two German nationals in Lebanon immediately after Hamadei's arrest.[119] Although Germany chose not to take affirmative steps to extradite Hamadei to the U.S., it acted in full compliance with the treaty when it invoked the treaty's provision of the principle of *aut dedere aut judicare*.[120]

Had Germany agreed to extradite Hamadei to the U.S., additional problems would have arisen, mainly with respect to the political offense exception to extradition.[121] Because the Extradition Treaty fails to define the term "political offense," the requested state has the discretion to apply its own definition of political offense.[122] Therefore, since the Extradition Treaty does not define political offense, the decision is left to German law.[123] Hamadei clearly would have raised the treaty's political offense exception, claiming that his acts were part of a "war of liberation" against Israel and its ally, the U.S.[124] Consequently, the decision to prosecute Hamadei within Germany avoided the potential difficulty with the political offense exception had Hamadei been extradited to the U.S.[125]

On the contrary, under German law, the difficulty of defining a political offense would never have been an issue and Hamadei could never have raised the exception as a defense.[126] Under Germany's Constitution or

---

117. *See generally* Kennedy, *supra* note 101.

118. *See id.* at 21. *See also* Meyer, *supra* note 1, at 580.

119. *See* Kennedy, *supra* note 101, at 21.

120. *See* Extradition Treaty, *supra* note 111, art. 10(1) (stating that extradition may be refused if the requested state seeks proceedings against the person for whom extradition is sought).

121. *See id.* art. 4(1) (stating that extradition shall not be granted if the offense is regarded by the requested state as a political offense or an offense of a political character).

122. *See* Kennedy, *supra* note 101, at 22 (citing Extradition Treaty, *supra* note 111, art. 4(3)). This article only specifies that certain offenses shall not be considered political, namely: "[a] murder or other willful crime against the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties or of a member of his family . . . [including an] offense which the Contracting Parties or the Requesting State have the obligation to prosecute by reason of a multi-lateral international agreement." Extradition Treaty, *supra* note 111, art. 4(3)(a)-(b).

123. *See* Kennedy, *supra* note 101, at 22.

124. *See* Meyer, *supra* note 1, at 581.

125. *See generally* Kennedy, *supra* note 101.

126. *See id.*

Grundgesetz of 1949 (Basic Law), certain circumstances involving extradition would be contrary to the Constitution.[127] Extradition of an offender would be contrary to German basic rights set forth in Germany's Constitution if:

> (1) the death penalty would be carried out; (2) the person was condemned in absentia; (3) the person would be tortured; (4) the prison conditions in the requesting state would cause severe damage to health or to life; or (5) the penal provisions on which the requesting states grounds its charges are contrary to the rights provided by the Basic Law.[128]

Therefore, a defendant's or, in this case, offender's interests and rights are met under the German Constitution and the necessity to have a political offense exception becomes redundant. Had such a provision been available within the Extradition Treaty, Germany would have been able to extradite Hamadei to the U.S. without the controversy of the political offense exception defense to acquit Hamadei of any wrongdoing.

3. The Supplemental Treaty to the U.S.-Germany Extradition Treaty

The Supplemental Treaty between the U.S. and Germany provides yet another solution to improve extradition laws with respect to terrorism.[129] However, this Treaty was not yet entered into force at the time of the Hamadei case.[130] Due to the improvements made to extradition law by the enactment of the Supplemental Treaty, former problems arising out of the Extradition Treaty cease to exist, such as the problematic political offense exception.[131]

One advantage to the new Supplemental Treaty is the manner in which extraditable offenses are defined.[132] Rather than define extraditable offenses in a lengthy appendix,[133] as does the Extradition Treaty, the Supplemental

---

127. *See* Lagodny, *supra* note 49, at 595.

128. *Id.*

129. *See* Supplemental Treaty of October 21, 1986, United States-West Germany, S. TREATY DOC. No. 6 100th Cong., 1st Sess. (1987), 1988 BGB1 II 1086 [hereinafter Supplemental Treaty].

130. *See* Kennedy, *supra* note 101, at 16.

131. *See id.*

132. *See id.*

133. *See* Extradition Treaty, *supra* note 111, Appendix. The Appendix lists such

Treaty broadens its definitions of the offenses.[134] The Supplemental Treaty has amended the Extradition Treaty as follows:

> Extraditable offenses under the Treaty are offenses which are punishable under the laws of both Contracting Parties. In determining what is an extraditable offense it shall not matter whether or not the laws of the Contracting Parties place the offense within the same category of offense or denominate an offense by the same terminology, or whether dual criminality follows from Federal, State or Länder laws. In particular, dual criminality may include offenses based upon participation in an association whose aims and activities include the commission of extraditable offenses, such as a criminal society under the laws of the Federal Republic of Germany or an association involved in racketeering or criminal enterprise under the laws of the United States.[135]

Another major improvement to the Extradition Treaty provided by the Supplemental Treaty is the emergence of the depoliticization of certain offenses.[136] In other words, the Supplemental Treaty addresses the problem of defining "political offense" by reformulating the exceptions.[137] By preserving the principle of protected political activity but narrowing grounds for which extradition may be denied, the Supplemental Treaty closes the gap through which many terrorists have escaped prosecution.[138]

---

extraditable offenses as murder, assault, rape, libel, and fraud. *See id.*

134. *See* Kennedy, *supra* note 101, at 16. *See also* Supplemental Treaty, *supra* note 129, art. 1.

135. Supplemental Treaty, *supra* note 129, art. 2.

136. *See* Petersen, *supra* note 52, at 781.

137. *See id.*

138. *See id.* The Supplemental Treaty amended those offenses that were not extraditable. *See* Supplemental Treaty, *supra* note 129, art. 2. For the purposes of the Treaty the following offenses shall not be deemed to be offenses within the meaning of paragraph (1):

> a. an offense for which both Contracting Parties have the obligation to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;
> b. murder, manslaughter, maliciously wounding, or inflicting grievous bodily harm;
> c. kidnapping, abduction, or any form of unlawful detention, including taking a hostage;
> d. placing or using explosive, incendiary or destructive device capable of endangering life, or causing grievous bodily harm, or of causing

Thus, this improvement by the Supplemental Treaty represents a major step forward in enforcement cooperation and joint efforts to suppress terrorism between the U.S. and Germany.

Nonetheless, the current Extradition Treaty between the U.S. and Germany still contains problems unsolved by the Supplemental Treaty.[139] First, the Supplemental Treaty leaves open the question "of what documents are required to make the prima facie case necessary to support an extradition request."[140]

Second, if only for academic interest since it has not posed a problem, is that while the U.S. extradites its nationals, Germany is forbidden to do so under its Constitution.[141] The U.S. law allows "any person within [its] jurisdiction to be extradited from the United States."[142] The German Constitution, on the other hand, states "[n]o German may be extradited to a foreign country."[143] Most countries do deny extradition of their own nationals to another state, either by constitution or by statute.[144] Thus, the principle of "reciprocity" of extradition is prohibited from coming into play because common law countries would be prevented from extraditing their own nationals to civil law countries because the civil law countries are unable to extradite their own nationals.[145] The U.S. and Germany have successfully established a de facto reciprocity which means German prosecutors are required under the "legality principle"[146] to commit to trial any German national who has committed an offense abroad which, as stated

---

substantial property damage;

e. an attempt or conspiracy to commit, or participation in, any of the foregoing offenses.

Id.

139. *See* Kennedy, *supra* note 101, at 17.

140. *Id.*

141. *See id.* at 18.

142. *Id.* at 18 n.71 (citing 18 U.S.C § 3184 (1982)).

143. *Id.* (citing GRUNDGESETZ [Constitution] [GG] art. 16, para. 2 (F.R.G.)).

144. *See id.* at 18.

145. *See id.* "Reciprocity" is the assurance that the requesting state will itself extradite in an equivalent future case. The requirement comes from the sovereignty of the requested state, not from the rights of the individual. *Id.* at 18 n.73 (citing Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland*, BEITRAGE UND MATERIALEN AUS DEM MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT 48, 351 (1987)).

146. Kennedy, *supra* note 101, at 19 (citing StPO § 2(2) (obliging police, prosecutors, and judges to prosecute so long as a reasonable suspicion exists)).

earlier, is automatically subject to German criminal jurisdiction.[147] In return, the U.S. can maintain its position of extraditing its own nationals.[148] Therefore, any potential conflicts are mitigated through the establishment of this de facto reciprocity.

A third problem between the U.S. and Germany with respect to extraditing terrorists concerns the death penalty.[149] Under the German Constitution, the death penalty has been abolished.[150] However, the Extradition Treaty has accommodated for this difference between the two countries by providing as follows:

> When the offense for which extradition is requested is punishable by death under the laws of the Requesting State and the laws of the Requested State do not permit such punishment for that offense, extradition may be refused unless the Requesting State furnishes such assurances as the Requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.[151]

Thus, the Extradition Treaty takes into account the basic rights inherent in the German Constitution and imposes no provision which would be contrary to the domestic law of Germany.[152] In conclusion, although the Extradition Treaty still contains a few minor problems, its overall impact toward achieving a worldwide policy against terrorism has proven to be quite effective.

V. PROPOSALS

A closer adherence to the laws of Germany combating terrorism would benefit the international community. For example, an approach similar to the domestic laws of Germany would eliminate the need for the controversial political offense exception within extradition treaties. Under German constitutional law, any provision contrary to its basic rights would be considered disproportional.[153] With a broad scope of defenses under its

---

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* (citing GRUNDGESETZ [Constitution] [GG] art. 102 (F.R.G.)).

151. Extradition Treaty, *supra* note 111, art. 12.

152. *See* Kennedy, *supra* note 101, at 19-20.

153. *See id.*

own Constitution, there is no need for the controversial and problematic political offense exception to allow terrorists to escape punishment because their act of violence was achieved based on political reasons. Stricter conformity to German laws regarding defenses and laws against terrorism would allow the international community to abolish the political offense exception.

Another proposal towards the achievement of a universal policy against terrorism would be to establish a permanent International Criminal Court and to create universally recognized acts of international criminal law. Professor Bassiouni has defined twenty-two categories of international criminal law.[154] In the summer 1998, 120 of the 148 participating states supported a statute for the creation of permanent International Criminal Court that would act as a tribunal to hear cases where such universally recognized acts were committed.[155] For example, this International Criminal Court would act as an incremental or additional tool for the effective prosecution of those cases when states elect the International Criminal Court to adjudicate the matters.[156]

The international community needs to move forward and redevelop its provisions and standards toward dealing with the suppression of terrorism. The aforementioned German laws, as well as the mutual assistance demonstrated by the Extradition Treaty between the U.S. and Germany, should help to provide workable new standards in promoting cooperation of an international policy to combat terrorist acts and provide mutual assistance in criminal matters. These laws help to establish stringent anti-terrorism policy and alleviate many of the procedural obstacles hindering international cooperation in suppressing terrorism.

---

154. These twenty-two crimes are: aggression, war crimes, unlawful use of weapons, crimes against humanity, genocide, racial discrimination and apartheid, slavery, torture, unlawful human experimentation, piracy, aircraft hijacking, threat and use of force against internationally protected persons, taking of civilian hostages, drug offenses, international traffic of obscene publications, destruction and/or theft of national treasures, environmental protection, theft of nuclear materials, unlawful use of mails, interference with submarine cables, counterfeiting, bribery of foreign public officials. *See* M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 163 (1992).

155. *See* Rome Statute of the International Criminal Court, adopted 17 July 1998, U.N. Doc. A/CONF.183/9 (1998).

156. *See* Bassiouni, *supra* note 154, at 164.

VI. CONCLUSION

Without international cooperation, the problem of terrorism will never be solved.[157] As demonstrated, a universally recognized definition of terrorism is necessary for its suppression.[158] Without a concrete definition, the international community cannot begin to reach a consensus on how to combat terrorism.[159] What one country categorizes as a violent act of terrorism may be considered a freedom movement by another state less willing to accept the concept of terrorism.[160] However, Germany's domestic anti-terrorism laws demonstrate a sound effort to combat terrorism at its source because they pinpoint the necessity for specific and stringent anti-terrorism legislation. Moreover, the relationship between the U.S. and Germany with respect to the Extradition Treaty should be used as an example of mutual cooperation to suppress violent acts of terrorists and punish the offenders. Through the extradition case of Mohammed Hamadei, the practical effects of this Treaty demonstrated the best outcome for both countries in attaining the mutual goal of punishing the offender. Although some problems may still exist, the Supplemental Treaty is an effort to further improve upon the work accomplished by the U.S. and Germany. The international community should take note of the joint effort taken by these two countries in suppressing terrorism and contribute to an international scheme for the prosecution of all acts of terrorism.

Sabrina R. Der Bagdasarian

---

157. *See id.*

158. *See* Meyer, *supra* note 1, at 573.

159. *See id.*

160. *See id.* at 571.