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Problems In International Law Enforcement

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Problems In International Law Enforcement

Richard A. Martin

Abstract

I would like to discuss the efforts that the United States has made to develop an effective system of international law enforcement, and the difficulties which it has encountered in that process. I will begin with a brief description of the tools which are available and can be employed in international criminal procedure. I will then discuss how these tools have been applied to different types of criminal activity. As I will explain, they have proved highly successful in the areas of narcotics trafficking, organized crime, and money laundering, but have encountered significant problems in the area of terrorism. These problems and the frustrations they have generated have prompted the United States to attempt methods of self-help, such as seizures and military operations to apprehend terrorists abroad. I will conclude with some observations on the wisdom of such remedies and the prospects for improved cooperation.

ADDRESS

PROBLEMS IN INTERNATIONAL LAW ENFORCEMENT†

*Richard A. Martin**

International cooperation in law enforcement has assumed an increasingly important role during the last decade. The reason for this is simple. Just as developments in communications, transportation, and finance have increased international commerce and tourism, they have also increased illicit commerce and criminal exploitation of national boundaries. Incidence of international crime, on an increasingly sophisticated and organized level, has grown rapidly during the last fifteen years and poses substantial problems for law enforcement worldwide.

One lesson the United States has learned is that international crime cannot be effectively fought from inside our borders. We have learned, for example, that we cannot effectively combat narcotics trafficking without the cooperation and assistance of all of those nations which are involved in the traffic of narcotics, and the movement of cash proceeds derived from their sale. The lesson of narcotics trafficking applies with equal force to all other areas of international crime. Thus, it has become commonplace to observe that cooperation in law enforcement among nations is essential, particularly with those types of crime which are international by nature, such as narcotics trafficking, organized crime, money laundering, and terrorism.

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I would like to discuss the efforts that the United States has made to develop an effective system of international law enforcement, and the difficulties which it has encountered in that process. I will begin with a brief description of the tools which are available and can be employed in international criminal procedure. I will then discuss how these tools have been applied to different types of criminal activity. As I will explain, they have proved highly successful in the areas of narcotics trafficking, organized crime, and money laundering, but have encountered significant problems in the area of terrorism. These problems and the frustrations they have generated have prompted the United States to attempt methods of self-help, such as seizures and military operations to apprehend terrorists abroad. I will conclude with some observations on the wisdom of such remedies and the prospects for improved cooperation.

Let me first describe the various legal and informal means used in international cooperation in investigations and prosecutions. These tools include the use of extradition treaties and conventions; the exchange of information, witnesses and evidence, through mutual assistance treaties; the adoption of laws with extra-territorial application; and perhaps most importantly, the establishment of channels for day-to-day information exchanges and personal contacts.

Narcotics and Organized Crime

When applied to international criminal activity, these mechanisms have obtained very different results, as I previously mentioned. Let's start with the good news. In the last ten years, U.S. efforts at combatting narcotics trafficking, organized crime activities, and related money laundering have been significantly strengthened by joining forces with many other countries which have common experience with these problems. Today we share information on a daily basis with law enforcement officers in many countries, and we have conducted and are conducting joint investigations and prosecutions leading to the interdiction and dismantling of numerous international criminal cartels. Yet this is a very recent phenomenon. Just ten years ago, it was extremely difficult to conduct investigations that reached outside the United States.

The problems included: a lack of trust on both sides as to what use would be made of information provided; extremely slow mechanisms permitting the exchange of information between countries; and substantial limitations on the use of any information which ultimately arrived.

In the late 1970s and early 1980s, the United States negotiated new treaties with a number of countries and worked toward a U.N. convention on narcotics trafficking.[1] The objective of entering into these new treaties was to streamline the process of information exchange and extradition, and to reduce technical barriers to the exchange of witnesses and data that were needed for joint investigations and prosecutions. While that process was in progress, the United States also established and encouraged programs which permitted U.S. law enforcement agencies to meet with their counterparts and discuss common problems in the area of narcotics and organized crime.

One such example is the United States-Italian Working Group on Organized Crime and Narcotics, which later was expanded to include terrorism as well.[2] Chaired by the U.S. Attorney General and the Italian Minister of the Interior (Chief of Law Enforcement), this Group began to provide a forum for discussion of law enforcement problems common to both countries. Canada has recently been included in this Group, which serves as a model for our relations with other countries. The combination of these informal discussions and treaty negotiations formed the basis of a new willingness on the part of the United States and its allies to work together.

Because of the new instruments—particularly mutual assistance treaties—legal barriers to the exchange of investigative material, including grand jury information and information collected by foreign authorities otherwise covered by the secrecy of the investigating magistrate, were eliminated, and it became possible to work together in ongoing cases. These mutual assistance treaties are agreements that permit the justice departments of each nation to engage in direct exchanges,

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1. On December 29, 1988, the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was opened for signature in Vienna.

2. This Group was formed in 1984 and added terrorism to its list of concerns in 1986. *See U.S., Italy Sign Post to Jointly Fight Terrorism*, L.A. Times, June 25, 1986, at A8, col. 6.

unlike the previous process of using Letters Rogatory,[3] which were sent to the court of another nation through diplomatic channels, and then assigned by the court to a local prosecutor. Letters Rogatory provided no chain of responsibility and took at least six months to a year to obtain any response. Mutual assistance requests go directly to the Justice Department, which is responsible for their completion, and they can produce evidence in days. This new possibility of information exchange, in turn, led interested prosecutors and investigators on both sides of the Atlantic to the quite logical conclusion that two nations possessed more information collectively than either had individually.

Thus, for example, in the case of the United States and Italy, it became evident during the early 1980s that, through exchanging information about certain organized crime and narcotics groups, they could jointly develop proof of an international narcotics conspiracy which had been established and operated for many years by U.S. and Sicilian mafia families. That exchange of information led to cases such as the "Pizza Connection," in which law enforcement officers in the United States, Italy, Spain, Brazil, Switzerland, Canada, and Germany all worked in concert for nearly a year, executed arrests of more than a hundred individuals, and conducted an equal number of searches on a single day.[4] In that same case, two Sicilian mafia members, Tommaso Buscetta and Salvatore Contorno, cooperated with both U.S. and Italian authorities and provided testimony in trials in both countries.[5] That joint testimony tested the limits of each system, which have very different rules regarding immunity agreements, pre-trial disclosure and cross-examination. Because of the new treaties and a desire to work together, those differences were successfully bridged, and a huge chain of organized crime-controlled narcotics traffic was exposed and destroyed.

This new cooperation also made it possible for U.S. authorities working with their allies to exchange information

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3. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2755, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

4. United States v. Badalamenti, No. 84 Cr. 236 (PNL) (S.D.N.Y.).

5. *See* United States v. Badalamenti, 626 F. Supp. 658, 660 (S.D.N.Y. 1986) (discussing Contorno's testimony); United States v. Badalamenti, 626 F. Supp. 655, 658 (S.D.N.Y. 1986) (discussing Buscetta's testimony).

obtained through electronic surveillance in their own countries, and to follow targets as they traveled throughout the world with the active cooperation of other law enforcement authorities. Similarly, it became possible to follow the flow of monies outside the United States through other countries, such as Switzerland, on to their ultimate recipients. That information had never been available before and, obviously, has provided extremely important proof linking significant organized crime members and narcotics traffickers to criminal events in other countries with which they otherwise would never be associated. Cases like the "Pizza Connection," which were important in their time, have been dwarfed by subsequent investigations where the United States has exchanged information on a scale far greater and broader than could be imagined just a few years ago. Plainly, the success of such cases has increased the willingness of all those involved to continue their cooperation and to enhance it.

In the area of money laundering, for example, the United States has been successful in seizing narcotics and organized crime profits in many countries, and has obtained cooperation not only from Switzerland but many countries in Latin and South America and others in Europe. Recently, the Trevi Group has pressed for uniform money laundering laws to be adopted by all the EEC nations.[6] If this is done, as I believe it will be, it will be possible to exchange information on a daily basis with those countries, which will enable each nation to trace illegal money flows throughout the world. Such legislation would substantially impede the ability of narcotics traffickers and organized crime members to launder proceeds and invest them in international commerce—an ability which they have until recently exercised without restraint.

While the successes I have described have been important, it is clear that they have by no means eliminated narcotics trafficking, organized crime, or the profits derived from those crimes. In fact, it is possible to argue that the advances in law enforcement have just kept pace with those of the criminal element in the use of international commerce. Having said that,

6. The Trevi Group brings together the equivalent of the Justice Department in all the nations of the European Community ("EC"). The Trevi Group is comprised of the justice and interior ministers of the EC Member States.

however, it is obvious that the need for such cooperation and its continued growth is essential. The prospects for that growth are good.

Terrorism

Let me now contrast the success of cooperative efforts in those fields with the results achieved in the area of terrorism.

An initial problem affecting cooperation in terrorism cases is that, although many nations have experienced terrorist incidents, until the recent advent of state-sponsored terrorism such crimes were routinely viewed as domestic or local problems, arising out of local political unrest, or religious, or racial divisions. Most often, therefore, such terrorism problems were dealt with through local political and police channels, and most countries have been quite resistant to outside interest or participation in these matters, which are often regarded as interference. That nationalist point of view has continued to prevail, even against new and quite different external threats such as state-sponsored terrorist groups and evolved mercenary organizations like the Japanese Red Army. Despite the presence of such terrorist organizations which often carry out their actions in third countries, the response to calls for unified international action has been slow and quite limited. When the United States launched its program against terrorism in 1981 and sought agreement that certain acts, such as hijacking, bombing, hostage taking, and murder should be viewed as criminal regardless of their alleged motivation or justification, the effort was viewed with considerable suspicion, and concern that the proposed program would result in an intrusion into domestic affairs.

While in the past several years, and in the face of ever more "international" terrorism, some of the suspicion about U.S. motives has abated, and a general consensus about particular criminal acts, such as murder and kidnapping, is emerging, there remains a strong interest on the part of each nation to set its own foreign policy which often stands in the way of greater cooperation. Plainly, each nation wants to preserve its independence in its bilateral relations with other nations, and no nation wants to be limited in its international dealings by another state. Similarly, many nations, or more precisely, their

governments, do not wish to be viewed as instruments of the foreign policy of a more powerful country, like the United States. Nor do they wish to take actions which may affect their economy, or which make it more likely that their citizens will be victims of terrorist acts.[7] These are simple realities which must be understood in any effort to encourage support for international cooperation against terrorism. What distinguishes terrorism in this regard from organized crime and narcotics trafficking, of course, is that, for the most part, those latter offenses have no political supporters and no recognized political movement behind them. Also, except for the recent example of Colombia, most narcotics and organized crime groups pose no direct challenge to governments. There is ordinarily no profit in such tactics, and therefore, no motivation for such behavior for those criminal groups. Thus, at the outset, international cooperation in the field of terrorism automatically raises complex political questions which are generally absent from efforts to combat organized crime and narcotics trafficking.

While this may well be stating the obvious, several additional considerations—which may be less apparent—emanate from these points. The first such observation is that those who speak on questions of terrorism represent different sections of their government from those who speak about organized crime and narcotics. Usually, foreign ministry representatives, sometimes together with intelligence officers and military personnel, dominate in delegations discussing terrorism or negotiating agreements in this area. Their counterparts from law enforcement, who *lead* similar discussions in the field of organized crime and narcotics, are in the minority, if present at all. More significantly, the decision making in terrorist cases is almost always left to political, rather than law enforcement officers. The problem which inevitably results from such a division of responsibility is that those most familiar with the day-to-day realities of terrorist actions have little or no role in setting governmental policy. Moreover, such knowledgeable officials are effectively deprived of a forum in which to meet and exchange information and opinions with their colleagues from other countries. The absence of such common meeting points works a serious hardship on the process of cooperation, which

7. *See supra* notes 30-38 and accompanying text (discussing *Hamadei* case).

requires precisely that common base of experience which the police often have and foreign affairs officers lack, particularly when they are assigned to cover terrorism only briefly, rather than as a profession.

Because practical information is not exchanged, investigations suffer. Patterns of activity and common goals are simply not generated and pursued when professional investigators are not brought together and do not enjoy full access to data. Greece, for example, has routinely refused to allow access to most foreign representatives interested in gathering information and evidence about terrorist bombings and shootings which have occurred there. When that bar was lifted slightly, those who were permitted access were not professional law enforcement agents, but intelligence agents, who have quite a different expertise and very different chain of command.

As a related matter, it is quite common for responsibility for terrorism matters to be relegated to intelligence services, rather than "judicial" authorities—by that term I mean professional law enforcement agents and prosecutors who are trained to obtain evidence which can be presented in court. Intelligence officers are not trained to accumulate or store evidence, and, instead of reporting their findings to a prosecutor or court, most intelligence services report to defense or political officers. Typically, the information they gather is not used to pursue criminal violations, but to advise the executive on how to act. Also typically, the information gathered by intelligence services is not shared or even available to other nations, should they request it. Rather, it is routinely classified as secret and shielded from disclosure.

The question of which governmental agency or division is responsible for conducting investigations in terrorism cases is not merely a bureaucratic or technical issue. Instead, the responsibility for such activities is essential to the development and preservation of evidence. In several recent cases, for example, U.S. law enforcement authorities have been frustrated by their inability to obtain physical evidence such as bombing devices or debris, or hotel or car registration records, on which fingerprints might appear. This information is obviously vital in identifying those persons involved in terrorist acts. That information is not only useful in prosecution but in all other efforts to combat terrorism. The problem often faced is that in-

telligence or military agencies who arrive at the scene are not trained in evidence collection or preservation, and, if not carefully handled or preserved, such evidence is easily destroyed. Even when properly developed and retained, however, such information is not often shared when it is gathered by intelligence rather than law enforcement authorities, whose objectives are frequently quite different.

I must point out that the United States does not have a perfect record in this regard either. While all terrorist events occurring in the United States are the province of the Federal Bureau of Investigation (the "FBI"), which reports them to local prosecutors for legal action with the exception of the new extraterritorial statutes, incidents occurring outside the United States are handled by the Central Intelligence Agency (the "C.I.A."), the Regional Security Office of the U.S. Department of State, or U.S. military investigators. Even in those cases where the FBI has presumptive jurisdiction, as in the recent killing of President Zia and the U.S. Ambassador in Pakistan,[8] it has not easily been afforded the access it needs to conduct its investigations. Resistance to FBI participation in the investigation of that case, and particularly in inspecting the "crime scene," was a combined result of foreign and U.S. opposition. This example illustrates how international cooperation remains stymied even in a case where the U.S. is involved.

In the end, the ingrained political control over the subject of terrorism permeates through all aspects of state responses, and impedes the process of cooperation. The effects of that process are equally evident in the different legal modes of international cooperation.

MECHANISMS OF INTERNATIONAL COOPERATION

The same treaties and conventions on extraditions and mutual assistance which are highly effective in narcotics and organized crime cases have not been productive in terrorism cases. While to some extent these problems are the result of the previously described difficulties in political perspective and personnel, these mechanisms unmistakably constitute the key

8. *See* Hazarika, *Indians Send Regrets, While Wondering What It All Means*, N.Y. Times, Aug. 18, 1988, at A10, col. 1 (discussing reactions to President Zia's death).

point in international law enforcement, and weakness at this level leads to a systemic breakdown of enforcement.

The foremost problem is that affecting extradition. Obviously, when one nation has pursued criminal charges against a terrorist who has committed an offense from, or fled to, another nation, there is an expectation that its criminal process will be honored. Just as clearly, when the extradition request is not granted, both countries emerge from the process frustrated, and the level of cooperation between them diminishes. Yet this is a likely result in terrorist cases, for several reasons.

First, there is no universally accepted formula for charging terrorists. Indeed, there are so many different charges which nations have adopted in their penal codes for prosecuting terrorist acts that very often it is impossible to find the basis of dual criminality.[9] One of the clearest examples of this problem arises in Italy, where terrorist conspiracies are charged as "associazione," a legal concept which makes it a crime to participate in a group seeking to destabilize the government, or which commits acts against the state. This type of criminal statute finds no parallel in the jurisprudence of most countries, which are unable to match it with a similar national offense and therefore decline to grant extradition. Over the past decade, for example, France has denied the extradition of many terrorists charged in Italy for precisely this reason. Since France has (until quite recently) indicated no willingness to alter its view in such cases, Italy's extradition requests were denied, and France became a haven for Italian terrorists, particularly Red Brigades members. Although there has been some recent progress in the return of Italian terrorists from France, this general problem remains.[10]

9. Dual criminality is the requirement that both nations involved in the extradition treat the offense charged as a crime. This requirement is a feature of all extradition treaties and is necessary to initiate an extradition. *See* Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981) (discussing requirement of dual criminality).

10. Italy and other nations with particular anti-terrorist statutes cannot reasonably attempt to draft the charges against a particular individual in such a way as to satisfy the internal laws of another state. In most cases, prosecution for all offenses committed is mandatory, and, even in those nations where there is some discretion, there is no way to be certain where the terrorist will be when he is apprehended. Moreover, if a terrorist is apprehended, the requesting state surely wants to be in the position to use its best evidence and most effective sanctions to prosecute the individual. To relinquish these powers at the outset would be counter-productive, and

Plainly, there is urgent need for harmonizing language or legislation which would permit treaty partners and convention participants to look to the underlying conduct charged. A requested nation could then determine whether that conduct constitutes a criminal offense under its law, and thereafter decide whether the manner in which the requesting nation has charged the offense, such as through "associazione," otherwise violates its constitution. While such a view of dual criminality would plainly assist in resolving that legal problem, there still remains the political question.

The Political Offense Exception

In extradition cases, the political offense exception problem comes to the fore when all other aspects of the extradition are met, but the defendant claims that he is being prosecuted for a political offense. The political offense exception to extradition is designed to protect individuals from abuse by barring their return to countries where either the legal system is inherently unfair, where they would be subject to racial or religious discrimination, or where their act was merely one of political expression or opposition.[11] This exception, however, has been applied by courts and governments in many situations outside its intended range. In these cases it is difficult candidly to say that the treaty is being applied, since the exception is so clearly being used merely to insulate the requested state from having to deny the extradition outright. Such actions diminish the respect for treaties, and discourage international extradition.

Although it is unfortunately true that there are many examples of such applications of the political offense exception, one recent case illustrates the issue clearly. In December 1988, Greece declined to extradite the Palestinian terrorist Al Zumar to Italy.[12] The Greek courts had ruled favorably on Italy's request to extradite Al Zumar, who had participated in the bombing of a synagogue in Rome where dozens of people

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could even result in the acquittal of the returned defendant, which creates future problems with the requested country.

11. *See* Abramovsky, *The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the U.S. Judiciary*, 13 HASTINGS INT'L & COMP. L. REV. 1 (Fall 1989).

12. *See* Parmelee, *Italy, U.S. Denounce Release of Suspect: Arab Wanted for Terrorism Freed by Greece*, Wash. Post, Dec. 10, 1988, at A17.

were injured and a child killed. Greece had notified Italy by diplomatic note[13] that it was going to hold Al Zumar until the sentence for the minor offense (passport violation) for which he had been arrested in Greece was concluded. At that time, Italy expected to receive Al Zumar. Instead, on the day his sentence expired, the Greek Minister of Justice denied the extradition, stating that Al Zumar's action constituted legitimate political expression, and the extradition was thus precluded by the political offense exception to the Treaty. Al Zumar was released to Algeria. The decision was badly taken and also badly timed since, two days later, Greece and the Justice Minister hosted a meeting of the Trevi Group.[14] Understandably, Greece came under heavy criticism at that meeting for its decision.

Obviously, no amount of language tightening can prevent such highhanded conduct. It should be equally obvious that the level of trust between Italy and Greece in the area of terrorism was badly damaged. While Greece may not have wished to be viewed as a refuge for terrorists, in Italy it was then believed that no extradition of a Middle Eastern terrorist would prevail there, and it was felt that the terrorist states had more diplomatic influence with Greece than Italy did.

In the area of mutual assistance in criminal matters, the major problem which again arises is that the treaties and conventions are designed to exchange information between national law enforcement organisms, when in fact, much of the most valuable evidence is maintained by intelligence services. Thus, the judicial and police officials of a particular country may not have access to the information which they need in order to pursue an investigation, let alone to turn it over to a requesting country. Compliance with mutual assistance requests may also be impeded by the requested nations' desire to know the motivation for the request, and significant time is often lost in an evaluation of whether release of the information is in the requested nations' best interests. Similarly, normal police-to-police exchanges, which occur informally and

13. Diplomatic note is notification through an official government communication.

14. *See Anti-Terror Unit to Talk Strategy*, N.Y. Times, Dec. 9, 1988, at A14, col. 1; *supra* note 6 (discussing Trevi Group).

with great frequency and success in the areas of narcotics and organized crime, are largely absent in the area of terrorism. Here, even if the "judicial" police have the information and want to exchange it, they find that its dissemination is restricted, or that they do not have foreign colleagues or contacts whom they know well enough to share it.

Similar problems exist at Interpol. Interpol, which should be a leading proponent of international cooperation against terrorism, is instead another victim of the lowest common denominator syndrome of international organizations. Until quite recently, Interpol did not accept requests for provisional arrest in most terrorist cases, because the international membership had agreed that these were generally political matters. As a result, nations seeking to apprehend terrorists proceeded by sending diplomatic notes requesting provisional arrests. Those notes, however, often stated that they were being transmitted by diplomatic means because the charge was considered (by Interpol) to be political in nature. Upon receipt of such a message, most nations found it difficult not to deny the request on the basis of the note itself. Although Interpol has now agreed to transmit requests for arrest in terrorist offenses, they still refuse "political" cases. Since many nations do not know of Interpol's recent decision, and those which do often can not tell which cases will be considered "political," they still do not use Interpol. Finally, the Interpol channel is not secret: any member (including Syria, Libya, Iraq and others) could learn of arrest requests for particular fugitives. Consequently, Interpol is rarely used, and another important avenue of cooperation has been largely foreclosed.

Self-Help

The *Achille Lauro* Affair

Given the difficulties inherent in the use of extradition and mutual assistance process in terrorism, it is not surprising that the United States has, in the last several years, resorted to means of "self-help" to secure jurisdiction of terrorists directly. In one well-known example which occurred in October 1985 and involved an Italian cruise ship, the *Achille Lauro*, the United States conducted a flawless military operation in which U.S. fighters intercepted and forced down an Egyptian plane

on which Abu Abbas and several terrorists who had hijacked the *Achille Lauro* and killed one American passenger were leaving Egypt.[15] The United States had for the previous several days monitored conversations from the office of Egyptian President Mubarak, and learned that, contrary to his assurances, the terrorists were still in Egypt and were about to depart on an Egypt Air flight.[16] U.S. fighter planes were waiting in the air off the coast of Egypt.[17] Acting on intelligence information, they were looking for a particular identifying number on the tail of the plane.[18] They flew up to and checked dozens of outbound Egypt Air flights until they located the one on which the hijackers were boarded.[19] The fighters then intercepted the plane and forced it to land at the Sigonella NATO base in Sicily.[20]

The United States was delighted with the success of this operation, through which they were able to get their hands on the terrorists and force them to a third country which they believed would be more receptive than Egypt to its request for extradition. The operation, I might note, was directed by Oliver North and John Poindexter, whose subsequent involvement in other international affairs was less favorably received. After having attained this tactical success, however, the United States was confronted with serious political and legal problems. Having forced the plane down in Italy, the country with primary jurisdiction over the incident since its citizens and its ship, the *Achille Lauro*, were involved,[21] Italian authorities

15. Jenkins, *The* Achille Lauro *Hijacking (A)*, Case Program C16-88-863.0, Kennedy School of Government, Harvard University [hereinafter *Achille Lauro* Case Program (A)]; *see* Miller, *Hijackers Yield Ship in Egypt; Passenger Slain; 400 Are Safe; U.S. Assails Deal With Captors*, N.Y. Times, Oct. 10, 1985, at A1, col. 6.

16. *Achille Lauro* Case Program (A), *supra* note 15, at 18.

17. *Id.* at 19.

18. *Id.* at 20.

19. *Id.*

20. Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy; Gunmen Face Trial In Slaying of Hostage*, N.Y. Times, Oct. 11, 1985, at A1, col. 6; Briefing by National Security Advisor Robert McFarlane on the Apprehension of the *Achille Lauro* Hijackers, Oct. 11, 1985, 24 I.L.M. 1516 (1985); *Achille Lauro* Case Program (A), *supra* note 15, at 20.

21. *See Achille Lauro* Case Program (A), *supra* note 15, at 21 (quoting Oliver Revell, FBI Executive Assistant Director for Investigations). Italy had primary jurisdiction over the offenses that were committed on the *Achille Lauro* under the law of the flag. The United States sought jurisdiction based on the passive personality principle, a lesser basis of jurisdiction. *See* Note, *The Passive Personality Principle and Its Use*

were compelled by their constitution to bring criminal action against the perpetrators of the incident.[22] That meant that the fugitives other than Abu Abbas would remain in Italy to face trial there.[23]

At that time, however, Italy did not have charges against Abu Abbas and, unless otherwise restrained, he would be freed. The United States made an immediate request under the new United States-Italy treaty on extradition for Abbas' provisional arrest and restraint.[24] Although that request satisfied all of the elements of the treaty and contained what the United States believed was ample evidence to support the request, including an arrest warrant issued in the United States, the Italian Justice Minister denied the request within six hours of its presentation (on this occasion the United States had no complaint about the promptness of Italy's reply).[25] Although the denial of that request is difficult to square with the terms of the treaty, it is not difficult to understand why Italy acted as it did.

Italy was advised that the United States had secured custody of the plane which the *Achille Lauro* defendants and Abu Abbas were aboard only moments before the aircraft was forced down on its territory.[26] Italy felt that the United States had forced it into a position of direct conflict with the PLO, with whom Italy had traditionally maintained good relations and with whom it had negotiated together with Egypt to secure the release of the *Achille Lauro*.[27] Ultimately, the Craxi government decided to permit Abbas to leave Italy, and held the

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in Combatting International Terrorism, 13 FORDHAM INT'L L.J. 298 (1989-1990) (discussing issues of jurisdiction in international law).

22. *See* Jenkins, *The* Achille Lauro *Hijacking (B)*, Case Program C16-88-864.0, Kennedy School of Government, Harvard University, at 1 [hereinafter *Achille Lauro* Case Program (B)].

23. *See id.* at 4-13.

24. *Id.* at 9-11.

25. *Id.* at 11. Italian Prime Minister Bettino Craxi later stated:

> The request for the provisional arrest, though formally correct, did not, in the Justice Minister's opinion, satisfy the factual and substantive requirements laid down by Italian law. This being so, there was no longer any legal basis for detaining Abbas, since at the time he was on board an aircraft which enjoyed extra-territorial status.

Id.

26. *Achille Lauro* Case Program (A), *supra* note 15, at 21-23.

27. *Achille Lauro* Case Program (B), *supra* note 22, at 12.

other defendants.[28] That decision was severely criticized both in the United States and within Italy's coalition government, which thereafter fell.[29]

The Hamadei Case

On January 13, 1987, another terrorist, Mohammed Hamadei, was arrested when he got off a plane in Frankfurt, West Germany, with a suitcase full of high explosives.[30] The United States had tracked Hamadei, learned of his trip, and notified the West German police, who were waiting for him on his arrival. Hamadei had participated in the hijacking of a TWA flight bound from Athens to Rome and the execution of a Navy seaman aboard that flight.[31] The United States had already indicted Hamadei for his participation in the hijacking and murder aboard the TWA flight, and immediately pursued his extradition from Germany.[32] The United States presented its complete extradition request one week after Hamadei's arrest. The request, which was translated into German, was 105 pages long and contained detailed evidence.[33] As one German Justice Ministry official later observed, "[the application] was perfect under the formal requirements. There was no legal reason not to have a quick decision."[34]

There was no quick decision, however, because during that same week following Hamadei's arrest, two German citizens were kidnapped in Beirut and their captors sent a

28. *Id.* at 11-13.

29. *See The U.S.-Italian Quarrel*, N.Y. Times, Oct. 18, 1985, at A8, col. 5; *see also Achille Lauro* Case Program (B), *supra* note 22, at 15-17. It should be noted that Abu Abbas was subsequently prosecuted by Italian authorities *in absentia*. He was convicted and sentenced to life imprisonment, though he still remains at large. *Id.* at 18-19. Despite Italy's subsequent recognition of Abbas' guilt in the *Achille Lauro* incident, the United States' unilateral action in bringing the Egyptian plane onto Italian territory and Italy's release of Abbas have remained sore points between the nations.

30. Kennedy, *The Extradition of Mohammed Hamadei*, Case Program C15-88-835.0, Kennedy School of Government, Harvard University, at 1 [hereinafter Hamadei Case Program].

31. *Id.*

32. *Id.*

33. *Id.* at 6. An official in the German Ministry's criminal law division stated that

> [o]n the 20th of January, that means one week after arresting Hamadei, the complete extradition request arrived . . . . That's quite exceptional . . . . The request is enormous, it's 105 pages.

Id. (statement of Peter Wilkitzki).

34. *Id.*

message stating that if Hamadei were extradited to the United States, the hostages would be killed.[35] The kidnapping of the two German citizens in Beirut slowed the extradition process to a standstill.

Ultimately, after six months, Germany rejected the U.S. application for Hamadei's extradition and instead determined to prosecute him in Germany on the U.S. charges.[36] While that alternative of prosecution rather than extradition was provided for by the treaty, the United States took the view that the extradition request took precedence over local prosecution under the treaty and should have been granted. The United States was concerned that Germany would not have the same interest in the matter that it did, since none of its citizens were aboard the flight and none were killed. In principle, the extradite or prosecute provision in treaties is not favored by the United States since the country in which the terrorist is found often has a significantly lesser interest in prosecuting the case, and may have legal restrictions which would not apply in a prosecution in the United States.

In *Hamadei*, the United States was also concerned that fear for the welfare of its hostages could affect Germany's willingness to prosecute the case fully. The United States therefore made substantial efforts to ensure that its evidence was fully presented and available to the German authorities, even though this meant an extensive and expensive effort to present witnesses and technical proof in Germany. The result of the prosecution was that Hamadei was convicted and sentenced as an adult for his crimes.[37] While there is no capital punishment in Germany, which Hamadei would have faced in the United States, he received a sentence of life imprisonment.[38] Although this result was somewhat satisfying to U.S. authorities, it fell far short of their goal to use the extradition treaty for its primary purpose—the return of the criminal to the

35. *Id.* at 1.

36. *Id.* at 19-20. The Germany-United States extradition treaty followed the principle "aut dedere aut iudicare"—either extradite or try. German law provided for jurisdiction over Hamadei's offense based on the universality principle of jurisdiction. The universality principle provides for jurisdiction over certain serious crimes, including hijacking. *See* Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785 (1988).

37. Hamadei Case Program, *supra* note 30, at 20.

38. *Id.*

United States for prosecution. The United States felt that, once again, despite excellent success at apprehending a terrorist in a friendly nation, political considerations had prevailed over treaty requirements.

The *Yunis* Case

Later that same year, in September 1987, special agents of the FBI arrested a Lebanese terrorist named Fawaz Yunis.[39] This arrest, however, was planned and executed in *international waters* in the Mediterranean. Yunis was sought for his involvement in the 1985 hijacking and destruction of a Jordanian airliner at Beirut International Airport on which three U.S. citizens had been passengers.[40] His arrest marked the first time that the United States exercised its authority to try a defendant under two anti-terrorist statutes enacted in 1984.[41]

Yunis had been persuaded to leave Beirut and go aboard a yacht in the Mediterranean on the promise of a narcotics deal.[42] Following his arrest, Yunis was put aboard a U.S. Navy vessel which sailed six days before reaching an aircraft carrier, from which Yunis was flown to the United States.[43] In this instance, Yunis' arrest presented no possibility that another nation would reject his return to the United States. That, in the view of many law enforcement officials, was the clear advantage of this type of remedy.

Yunis' arrest, however, raised other problems, this time of a legal nature. Thus, Yunis claimed that his arrest and transport to the United States violated his constitutional rights.[44] Although the arresting authorities had a warrant, Yunis claimed that he was effectively kidnapped and held hostage throughout the seven-day return to the United States, during which he made statements which were used against him at

39. *See* Jenkins, *Bringing Terror to Justice: The Extra-Territorial Arrest of Fawaz Yunis*, Case Program C96-90-960.0, Kennedy School of Government, Harvard University [hereinafter Yunis Case Program]; United States v. Yunis, 681 F. Supp. 909, 912-15 (D.D.C.), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988).

40. Yunis Case Program, *supra* note 39, at 1; United States v. Yunis, 681 F. Supp. 896, 899 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

41. Hostage Taking Act of 1984, 18 U.S.C. § 1203 (1988); Aircraft Sabotage Act, 18 U.S.C. §§ 31-32 (1988).

42. Yunis Case Program, *supra* note 39, at 14; *Yunis*, 681 F. Supp. at 912-15.

43. Yunis Case Program, *supra* note 39, at 14-16; *Yunis*, 681 F. Supp. at 913-15.

44. *Yunis*, 681 F. Supp. at 911.

trial.[45] Yunis' claim was ultimately rejected under the *Ker-Frisbie* doctrine.[46] *Ker-Frisbie*, which refers to two U.S. Supreme Court cases,[47] essentially holds that U.S. courts will not question the jurisdiction over an individual brought before it even if his presence is obtained through illegal means, including kidnapping. Although that doctrine has been modified somewhat by the U.S. Court of Appeals for the Second Circuit in *United States v. Toscanino*[48] and *United States ex rel. Lujan v. Gengler*,[49] those cases merely hold that due process would be violated if the conduct of U.S. officials in bringing the individual to its courts was so outrageous as to shock the conscience of the court.[50] Yunis' treatment at the time of his arrest and afterwards did not approach that standard, and his applications to dismiss the indictment were denied.[51]

Yunis also raised an objection that his appearance before the U.S. court was not proper because his extradition had not been requested.[52] Although that claim was also denied by the court, in reality it was not well founded, since no treaty exists between the United States and Lebanon, and even if it did, there was no governmental authority in that state to whom an extradition proceeding could have been advanced. Nevertheless, this issue is a significant one which might be more effectively presented in other circumstances in the future.

Post-*Yunis* Developments

Relying on *Yunis* and on an analysis of the *Ker-Frisbie* doctrine, the United States subsequently reconsidered the question of whether it was legal to effect the arrest of individuals, not solely terrorists, who were outside the United States, with-

45. *Id.*
46. United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988).
47. *See* Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952).
48. 500 F.2d 267, *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).
49. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1000 (1975).
50. For a discussion of the abduction issue in U.S. courts, see Note, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705 (1989-1990).
51. *See Yunis*, 681 F. Supp. at 918-21. *But see* Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 YALE J. INT'L L. 121 (Winter 1990).
52. *Yunis*, 681 F. Supp. at 915-16.

out resort to formal extradition.[53] The opinion concluded that U.S. courts would not be deprived of jurisdiction in such cases. Although that opinion is not, and was not intended to act as, a license for U.S. authorities to effect arrests overseas, in two recent cases involving narcotics fugitives, U.S. law enforcement agents, operating together with their foreign counterparts, have arrested narcotics fugitives and returned them to the United States without seeking their extradition. In these cases, *United States v. Matta-Ballesteros*[54] and *United States v. Verdugo-Urquidez*,[55] the local authorities did not protest U.S. actions. Rather, they tacitly agreed with, and supported the apprehension of, those individuals and their return to the United States.

However, the extension of self-help remedies of arrest inside the borders of other countries with whom the United States has extradition treaties raises serious policy issues, if not serious legal issues. I say this because in both *Matta-Ballesteros* and *Verdugo-Urquidez*, the prosecutions of the individuals were successful, and in *Verdugo-Urquidez*, the U.S. Supreme Court also permitted the use of evidence obtained in a search of his residence conducted in Mexico by U.S. agents.[56] However, the policy issue which is raised by these cases remains troublesome. While it is easy to understand why our authorities would be frustrated with efforts to use extradition treaties in the case of terrorists and high level narcotics fugitives, the circumvention of those treaties is unlikely to provide any better mechanism, and could create significant problems.

CONCLUSION

The efforts at developing methods and means of effective international cooperation in combatting terrorism are still in a formative stage. There is much to be learned and applied from the successes which have been obtained in the fields of narcotics trafficking and organized crime. Still, the problems which

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53. *See* Lewis, *U.S. Officials Clash at Hearing on Power to Seize Fugitives*, N.Y. Times, Nov. 9, 1989, at A10, col. 3.

54. No. 86-00511-RV (N.D. Fla.).

55. No. 86-0107 (Crim.) (S.D. Cal.).

56. *See* United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990); *see also* Comment, United States v. Verdugo-Urquidez: *Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267 (1990-1991) (analyzing Supreme Court's decision in *Verdugo-Urquidez*).

confront those seeking to enhance cooperation in the field of terrorism are more difficult and complex. The frustrations which follow from failed efforts at extradition following successful apprehensions are understandable. However, even though U.S. law permits the overseas arrest, indeed kidnapping, of fugitives, I think the United States should be wary of using this method even in frustrating circumstances. Circumvention of our treaties reduces trust on the part of our allies and fosters the belief that the treaties themselves lack significance. I believe that the best interests of the United States lie in developing its relations with its allies and strengthening its use of legal means, including extradition and mutual assistance. The development of those relations and the enhancement of those tools should be our primary interest, if we are to forge cooperative channels which will grow and endure in the future.