EXTRATERRITORIAL APPREHENSION AS A PRO-ACTIVE COUNTERTERRORISM MEASURE

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EXECUTIVE SUMMARY

1. Subject. Study evaluates a pro-active counterterrorism strategy option under which the United States would forcibly apprehend international terrorists in certain defined foreign areas without the consent of the sovereign authority for the area in which they are found. Apprehended terrorists would be transferred to the United States or an allied nation for prosecution under applicable criminal law.

2. Purpose. U.S. and Western allied counterterrorism strategies lack an effective means of reaching international terrorists operating out of: (1) areas where there is no effective, responsible sovereign authority, "stateless areas," and, (2) states which actively sponsor or support terrorism, "sanctuary states." International cooperation designed to promote aggressive prosecution and interstate extradition is of little use in reaching terrorists who operate from stateless areas and sanctuary states. Political, diplomatic, economic, and military sanctions may apply some pressure to sanctuary state regimes. However, these measures are ineffective against the mobile and highly sophisticated terrorist leadership and operational elites themselves. The proposed strategy option offers a means of reaching these key terrorist elements.

3. Scope. Study examines legal, policy, and operational considerations related to the planning and execution of "extraterritorial apprehension" as a pro-active counterterrorism measure. It examines the permissibility of this measure under both domestic and international law, identifying applicable legal doctrines and principles. In addition, it reviews an extensive range of policy, organizational, and operational factors arising before and after the apprehension which could impact on planning, execution, and criminal prosecution. Finally, it proposes a decision-making and planning system along with criteria which might be used to implement the counterterrorism measure.

4. Findings

a. Legal

- Extraterritorial apprehension is permissible under established U.S. case law doctrine which provides courts will not inquire into how the defendant is brought before them except where brutality can be imputed to the Government actions. Violations of international law are executive branch matters.

- U.S. domestic criminal law has selective extraterritorial application and could be used to prosecute international terrorists. Pending legislation which would make it crime to murder U.S. nationals anywhere is needed.

- Extraterritorial apprehension is consistent with international law of human rights.

- Intervention into stateless areas and sanctuary states can be justified under inherent right of individual and collective self-defense recognized under customary international law and by Article 51 of U.N. Charter.

- Other legal issues can be resolved.

b. Considerations Before Apprehension

- Legal and political considerations militate in favor of developing working partnership between executive and legislative branches in developing counterterrorism policy and strategy. Such partnership would resolve possible problems which could arise in immediate case arising out of requirements of War Powers Resolution and intelligence oversight legislation requiring Executive consultation with the Congress.

- Existing procedures used by Department of Justice, if enhanced by greater support from intelligence community, could be used to construct cases for criminal prosecution of apprehended international terrorists.

- Limits on military and CIA involvement in law enforcement would have to be addressed by planners, but can be overcome.

- Close allies should be consulted in advance and measure thoroughly explained after first use to nonaligned and Socialist bloc states.

c. Considerations After Apprehension

- Use and protection of intelligence information, sources, and methods is key concern but can be resolved under provisions of Classified Information Procedures Act and other authority available to trial court.

- No defense available to defendant terrorist at trial is likely to succeed if apprehension properly planned and executed.

- Countervailing action by terrorists and sanctuary states probable in aftermath of apprehension but represents no worse threat than that experienced in response to other pro-active counterterrorism measures. With thorough planning, effects can be minimized.

- Criminal and civil liability of apprehending government and its agents is unlikely to be significant detracting factor.

5. Conclusion. Extraterritorial apprehension is effective means of directly attacking two principal elements of international terrorism's center of gravity: (1) sanctuary states and stateless areas which provide support and safe-haven and, (2) network of leadership and operational elites responsible for organization, recruitment, funding, and execution of

international terrorism. Proposed measure is legally permissible, politically consistent with U.S. values and policy, and operationally feasible. It offers relatively cost effective use of resources which offers maximum benefit when compared to other pro-active counterterrorism strategy alternatives. There is strong Congressional support for such an approach.

6. Recommendation. That the National Security Council Interdepartmental Group on Terrorism strongly recommend that the President adopt extraterritorial apprehension as a U.S. pro-active counterterrorism measure.

Abstract of

EXTRATERRITORIAL APPREHENSION
AS A PRO-ACTIVE COUNTERTERRORISM MEASURE

This study evaluates a counterterrorism measure under which the United States would forcibly apprehend international terrorists in stateless areas or certain sanctuary states without the consent of the sovereign authority for the area in which they are located. "Extraterritorial apprehension" as it is developed in this study, offers a pro-active counterterrorism measure which expands the reach of U.S. domestic criminal law so that it can be more effectively used to prosecute international terrorists who direct their attacks against the United States, its nationals, institutions, and allies. As in the case of other counterterrorism measures involving coercion, this option has significant costs and benefits. A major objective of the study is to analyze these costs and benefits in the context of U.S. domestic and international interests. The study discusses the underlying legal, political, and operational considerations which must be understood in conjunction with performing a cost/benefit analysis of this counterterrorism measure. It examines the permissibility of extraterritorial apprehension under both U.S. domestic and international law. In addition, it reviews an extensive range of policy, organizational, and operational factors arising before and after the apprehension which could impact on the planning and decision-making process. While identifying limitations applicable to extraterritorial apprehension as a counterterrorism measure, the study finds that under specified circumstances, this option is legally permissible, politically acceptable, and operationally feasible. It concludes that as a pro-active

counterterrorism measure, extraterritorial apprehension presents the United States with an effective option offering significant benefits at an acceptable cost. The study recommends that the U. S. National Security Council Interdepartmental Group on Terrorism recommend adoption of extraterritorial apprehension as a pro-active counterterrorism measure available to the President.

PREFACE

This study was undertaken with no preconceived notions as to the desirability, permissibility, or feasibility of extraterritorial apprehension as a pro-active counterterrorism measure. While the author's professional experience in international law clearly influenced the focus of the study, an important fundamental assumption helped to ensure the analysis remained open and inclusive as opposed to narrow and exclusive in its approach. The underlying assumption was that extraterritorial apprehension had to be evaluated from the multiple perspectives of policy, law, and operational feasibility. Very simply, the assumption was made that any worthwhile counterterrorism measure had to satisfy major concerns in each of these three areas as a precondition to receiving serious consideration by U.S. national decision-makers.

Source material for this study consisted of both applicable literature and a series of interviews with U.S. Government officers having various responsibilities in developing and executing counterterrorism policy. The vast majority of legal literature with any bearing on the subject addresses the issue in terms of the "abduction" of criminals and the permissibility of such action under domestic and international law. With few exceptions, this literature concludes that such abductions are impermissible and counterproductive to the interests of the prosecuting state. This study does not directly challenge the majority of these findings, but suggests that in the context of international terrorism, it is essential to consider the interests of the world community, individual states, and the persons who are increasingly the victims of senseless acts of violence. To conclude that states may not reach beyond their borders in the absence of

formal extradition processes to protect their vital interests and to arrive at that conclusion by focusing primarily on the interests of the apprehended terrorist as a defendant, is to misunderstand the nature of the minimum world public order system. International law in the evolving minimum world public order system is reflective of both the exclusive values of nation states in protecting their own vital interests as well as the inclusive interests of the whole community of nations in maintaining global peace and security.

The findings, conclusions, and recommendations which result from this study are solely those of the author. They in no way reflect the views of individuals interviewed or their departments, agencies, or the members of Congress they may serve. Nevertheless, the dedicated government officers in both the executive and legislative branches who participated and gave so freely of their time, greatly influenced the direction and outcome of what follows. In light of the sensitivities related to U.S. counterterrorism policy and strategy, it has not been possible in all instances to specifically identify the source of interview-based information contained in this study. However, let there be no doubt that those government officers working in this area are committed to the U.S. counterterrorism mission and have unambiguous perceptions of what needs to be done and how to do it.

In presenting this study, the author wishes to express his particular appreciation to faculty members Professor George Bunn, Lieutenant Colonel William R. Farrell, U.S. Air Force, and Captain James D. Brush II, JAGC, U.S. Navy of the Naval War College at Newport, Rhode Island. The advice and expertise rendered by each of these gentlemen was invaluable throughout

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CHAPTER I

DEVELOPING A COUNTERTERRORISM STRATEGY

> [T]he United States needs an active strategy for dealing with ambiguous warfare. We must be better prepared intellectually and psychologically as a nation; we must be better prepared organizationally as a government. Many important steps have been taken, but more needs to be done. [1]
>
> Secretary of State George P. Shultz
> January 15, 1986

The Challenge

In February of 1986, in response to an unrelenting onslaught of savage terrorist attacks against the citizens and institutions of both the United States and its Western allies, a Vice Presidential task force published an important report on combatting terrorism. The task force of senior government officials reported that Americans view terrorism as one of the most serious problems facing the United States Government today. The report cited the growing threat from increased terrorist activities against U.S. citizens and interests abroad, noting that in 1985 alone, there were 812 international terrorist incidents, with a loss of 926 lives, including 23 Americans, a decidedly upward trend from the preceding year.[2]

Among the many specific recommendations developed to improve U.S. counterterrorism policy was one calling for the more effective application of law as an instrument in the war against terrorism:

Study the Relationship between Terrorism and the Domestic and International Legal System

> International and domestic legal systems are adequate to deal with conventional war and crime. However, on occasion, questions of jurisdiction and authority arise when it comes to terrorism. For example, there are ambiguities concerning the circumstances under which military force is appropriate in dealing with terrorism. The lack of clarity about international law enforcement relationships and legal systems could limit government's power to act quickly and forcefully. The Departments of State and Justice should encourage private and academic study to determine how international law might be used to hasten--rather than hamper--efforts to respond to an act of terrorism. [3]

What the Vice Presidential Task Force did not address, is how to better apply domestic and international law to win the war against terrorism. The fact is, to date, one of the most fundamental of American institutions, the legal system, has been little used as a counterterrorism measure. Instead, the United States and its Western allies have relied heavily on political, diplomatic, economic, and as of April 1986, military sanctions. Unfortunately, even the increased commitment to the cooperative application of such sanctions is unlikely to turn the tide in favor of those combatting terrorism.

The historical case in support of winning a war through the use of such sanctions is not a particularly persuasive one. Karl von Clausewitz teaches in his incomparable treatise on the policy and strategic implications of armed conflict, On War, that victory can be achieved only through decisive and offensive measures directed at what he refers to as the enemy's "center of gravity."[4] If von Clausewitz is correct and indeed the United States and the allied Western democracies are engaged in a true war against terrorism, then victory will only be achieved by undertaking

clear decisive and offensive measures against the center of gravity of this international menace.

The first step is to identify that center of gravity that was so important to von Clausewitz in building a strategy of warfare. In the case of international terrorism in the 1980's, there are two critical elements to that center of gravity. The first is the mutually supportive network of states which covertly sponsor, and in some cases even direct, international terrorism in its war against the democratic states. The second critical element is the leadership and operational elites within the terrorist organizations which mastermind the attacks, recruit the disaffected, and maintain the discipline of individual units. These two elements form the center of gravity which the United States and its allies must destroy if the war against terrorism is to be decisively won.

The sanctions now being applied in the war against terrorism are largely directed against the state sponsorship element of the enemy's center of gravity. Even if the sanctions can be effectively applied, there is little reason to believe that they will have a direct or lasting impact on the committed, radicalized terrorist networks themselves. Counterterrorism measures must be found which effectively address both elements of the center of gravity. It is necessary to reach the leadership and operational elites responsible for the lethal functioning of the terrorist networks themselves. One of the instruments available which has the potential for attacking both elements of the enemy's center of gravity is domestic and international law enforcement.

To the extent it has been used, law enforcement has proven effective as a counterterrorism measure. When terrorists have been located within

the jurisdictiion of the United States or a nation committed to holding terrorists accountable for their acts, criminal prosecution has been used to punish the offenders. However, the application of the criminal justice system has been frustrated by both voids in the law which is used to prosecute the terrorists and the inability of responsible states to gain physical custody over the terrorist offenders. The application of that domestic criminal law which has been developed to address terrorism has often been prevented by the fact that terrorists tend to operate and stage their attacks from areas well beyond the effective reach of those states committed to criminal prosecution. The essential challenge is to develop domestic criminal law to the fullest extent so that it applies to terrorists operating beyond state borders and then to find a permissible means of securing jurisdiction over such terrorists so that they can be effectively prosecuted under that law.

Jurisdictional Base for Building an Effective Criminal Law

Internal law has historically favored two bases of jurisdiction for nation states seeking to apply their domestic or so-called "municipal" criminal law. The most traditional jurisdictional principle is that of territoriality. Under this principle, a state is authorized to regulate and proscribe conduct within its territorial borders applicable to all persons found therein. A slight modification of this principle is the principle of quasi-territorial jurisdiction under which a state may selectively proscribe or regulate criminal conduct beyond its territorial borders but only under circumstances which are arguably extensions of its territory as in the case of vessels and aircraft registered to the state

and which bear its national character. Also widely accepted is the jurisdictional principle of nationality. Under this principle, a nation state is entitled to regulate and proscribe the conduct of its nationals without regard to the situs of such conduct.

In the case of many acts of international terrorism, these accepted jurisdictioinal principles have often been of little use. Terrorist acts committed beyond territorial borders by foreign nationals cannot be prosecuted through criminal law based on either the territoriality or nationality principle of state jurisdiction. To cope with this circumstance, states victimized by international terrorism have sought to extend the reach of their criminal justice systems through the application of alternative bases of jurisdiction recognized in varying degrees by international law. One of three major alternative bases of providing for extraterritorial jurisdiction is the passive personality principle. Under this principle, a nation applies its criminal law beyond its borders in circumstances where its nationals, their property, or institutions having a national character have been the subject or victim of the offense, particularly one of a violent nature. This basis of extraterritorial jurisdiction has not been greatly favored in the international legal and political community which fears the potential for state interference with the legitimate and perhaps greater interests of other states. Nevertheless, the principle has been gaining favor as a means of justifying the enactment of criminal laws which can be used to prosecute acts committed beyond state borders by foreign nationals. Israeli criminal law made an assertion of extraterritorial criminal jurisdiction based upon this principle in 1972.[5] The French adopted a similar provision in 1975, but

found it did not apply retroactively against the notorious Palestinian terrorist Abu Daoud who had to be subsequently released from custody notwithstanding his violation of a law founded on the principle of passive personality.[6]

The United States has generally not favored the passive personality principle as a basis for justifying the extraterritorial application of its criminal law. However, section 402 of the authoritative American Law Institute, Restatement of the Law Second, may signal a reversal in this traditional U.S. perspective. A Restatement provision recognizes a state's right to prescribe law with respect to "conduct outside its territory which has or is intended to have substantial effect within its territory."[7] Moreover, as will be discussed, recent U.S. Congressional legislation seems to have relied, at least to some extent, on the passive personality basis of extraterritorial jurisdiction.

A second alternative jurisdictional principle which recognizes a state's right to extend its municipal law to foreign nationals found beyond its borders is based on the necessity to defend or protect key national interests. Referred to as the "protective principle," this basis allows a state to extend its municipal criminal law to offenders who commit acts which undermine the integrity of the state itself, its vital institutions, and in particular, its national security interests. To be credibly applied, this principle requires a reasonable nexus between the criminal conduct and fundamental national interests, particularly those related to national security or the very existence of the nation state. The United States Congress has favored this principle as a basis for extending U.S. criminal jurisdiction to proscribe the conduct of foreign nationals in

overseas areas. The protective principle appears to be the primary jurisdictional basis for the Comprehensive Crime Control Act of 1984 which implements several international conventions designed to suppress a range of terrorist acts.[8]

The principle of "universal jurisdiction" constitutes the third major basis recognized in international law for states extending their municipal law beyond territorial boundaries to foreign nationals. Universal jurisdiction is predicated on the theory that certain types of conduct are so reprehensible and destructive of the civilized world order, that they are proscribed without regard to where committed or the nationality of the offender. This jurisdictional principle is most typically associated with piracy on or over the high seas and war crimes. Some legal theorists have recently made persuasive arguments that international terrorism, international narcotics trafficking, and certain other kinds of conduct should be brought within the penumbra of universal criminal jurisdiction. If their argument prevails, terrorism may one day be subject to prosecution by any nation having personal jurisdiction over the offender without regard to his nationality, the location of the offense, or the nationality of the victim.

The recent development of several major antiterrorism conventions demonstrates a growing commitment by responsible nations to apply municipal criminal law to counteract international terrorism. Typical of these conventions are the International Convention Against the Taking of Hostages[9] adopted December of 1979, and the Convention on Offenses and Certain Other Acts Committed on Board Aircraft,[10] adopted in September of 1963. Despite the mutual commitments made in these conventions to

prosecute or extradite international terrorists, most recognized authorities on international law still maintain that no customary or conventional law standard has as yet arisen which would justify the application municipal law based on the principle of universal jurisdiction. Unfortunately, there still appears an inadequate international consensus as to when particular acts constitute prosecutable acts of terrorism. As will be noted subsequently in this study, recent actions within the United Nations coupled with the increased interest of states in the multilateral antiterrorism conventions may very soon provide the basis for asserting that at least the more violent acts of terrorism are crimes against humanity and subject to the application of universal extraterritorial jurisdiction.

Although they must be applied with discretion, these principles of extraterritorial jurisdiction are providing a foundation upon which the United States and its allies are extending the reach of their substantive criminal law. By invoking one or more of these extraterritorial bases of jurisdiction, national legislators are broadening the municipal criminal law so as to make it applicable to foreign national terrorists who commit their acts beyond the territorial limits of the state. The problem which remains is how to secure physical custody over the terrorist offender. The preferred method of securing such custody has been by means of either regional or bilateral extradition treaties. Alternatively, less formal methods can be employed to transfer criminal offenders from the state in which they are found to the prosecuting jurisdiction. The transfers may be done with the express or tacit consent of the state in which the criminal offender is found, often referred to as the "asylum" or "sanctuary state."

In some instances, the transfers have been accomplished covertly and in the absence of even tacit consent from the asylum state.

Villanova University Law Professor John F. Murphy in Punishing International Terrorists provides a comprehensive legal analysis of the various methods of "rendition" which he defines as the "generic term" for the return of alleged offenders to the "requesting country" or prosecuting state.[11] Professor Murphy concludes in his analysis of rendition, prosecution, and punishment of terrorists, that the application of criminal law is ultimately dependent upon at least some form of consent by the state in which the terrorist is found. In Professor Murphy's view, forcible removal of an alleged terrorist offender in the absence of some form of consent or acquiescence from the asylum state would be unlawful as a matter of international, if not domestic, law. The term he applies to forcible seizures conducted in the absence of asylum state consent is "irregular rendition." In referring to forcible seizures accomplished without asylum state consent, this study will also employ the term "irregular rendition."

Professor Murphy and others who share his perspective, conclude that the principle of the inviolability of state territorial integrity, coupled with the important individual rights guaranteed in the expanding international law of human rights, legally preclude most, if not all, irregular renditions. As an alternative, these publicists advocate the increased development and use of bilateral and multilateral extradition treaties under which states commit themselves to either prosecute or formally transfer terrorists to other states with an interest in doing so. Extradition is accomplished with the consent of states parties to the

treaties and typically involves no question of excessive or unreasonable force being applied to the offender being transferred.

Current U.S. counterterrorism policy supports the concept of increased use of this formal mechanism for extending the application of municipal criminal law. The U.S. Government has actively participated in developing the multilateral antiterrorism conventions which require states to prosecute or extradite terrorists. It strongly encourages nonsignatory states to accede to these conventions. Moreover, the Reagan Administration has repeatedly expressed its commitment to developing extradition treaties which substantially curb the availability of the troublesome "political offense exception." Under this exception, some terrorists have been successful in preventing their extradition from the asylum state based on claims that their activities were not criminal but "political" in nature. Courts in the United States and elsewhere have all too frequently honored these claims and allowed the political offense exception as an effective bar to extradition. Some of the most notorious of these cases have occurred within the United States itself where courts have honored the claims of members of the Irish Republican Army opposing their extradition to the United Kingdom on serious criminal charges.

The United States, its Western allies, and other responsible states have made substantial progress in improving the level of international cooperation for the purpose of extending criminal sanctions to acts of terrorism committed beyond state borders. There is cause for much optimism that the trend toward greater cooperation will continue and that more and more states will see it in their interest to join the antiterrorism conventions. However, even with the favorable prospects for better

international cooperation, serious barriers to achieving effective, comprehensive international law enforcement will persist. One of the most serious of these barriers is the all too common problem of the terrorist group which operates out of an area where there is little or no effective government control, what this study will refer to as a "stateless area." Perhaps even more troublesome is the terrorist organization which enjoys the overt or covert protection and support of a sanctuary state regime. In either case, increased international cooperation offers little prospect of reaching terrorist offenders with municipal criminal law in these areas.

Secretary of State George P. Shultz in a major policy address in New York City in October of 1984 referred to the problem in these terms:

> The heart of the challenge lies in those cases where international rules and traditional practices do not apply. Terrorists will strike from areas where no governmental authority exists, or they will base themselves behind what they expect will be the sanctuary of an international border. And they will design their attacks to take place in precisely those "gray areas" where the full facts cannot be known, where the challenge will not bring with it an obvious or clear-cut choice or response. 12

All the efforts to extend the coverage and jurisdictional reach of U.S. and allied criminal law, all the diplomatic initiatives to improve the level of international cooperation through the development of better extradition vehicles, and all the political, economic, and even military sanctions, offer little prospect of coping with the problem Secretary Shultz identified in his address. If the problem of sanctuary states and "gray areas" is to be resolved, it will be necessary to find a means by which terrorists can be reached in these sanctuaries. These areas and the terrorist leadership and operational elites operating freely within them must be reached by effective counterterrorism measures if the West is to truly destroy the enemy's center of gravity.

Fortunately, the very national and international political and legal systems which are under unrelenting attack possess the means to respond. Although various "pro-active" counterterrorism measures including the use of preemptive military force are now being applied, as noted, not all appear to have the potential to effectively destroy the enemy's true center of gravity. This study proposes serious consideration be given to a measure which has been largely ignored in the rapid development of alternative counterterrorism strategy options. Misunderstandings and even false assumptions as to both law and policy have precluded a close examination of a measure which offers genuine potential for undermining the sanctuary states and stateless areas while simultaneously striking at the leadership and operational elites of international terrorism staging from within the borders of such states and areas.

What is proposed and will be examined in this study is the forcible apprehension of international terrorists in those stateless or so-called "gray areas" and sanctuary states from which they now operate. Such seizures would be directed by the United States or another responsible state wishing to acquire criminal jurisdiction over the alleged terrorist offender and would be conducted without the consent or acquiescence of the asylum or sanctuary state regime if one exists. In describing this proposed pro-active counterterrorism measure, this study employs the term "extraterritorial apprehension" as a means of distinguishing it from the broader range of seizures which Professor Murphy calls "irregular renditions." What will be examined is a highly selective type of rendition action designed for use against international terrorists who project their violence from a limited number of stateless areas and sanctuary states.

The pro-active counterterrorism measure proposed must be reviewed in terms of both its domestic or municipal law as well as international law implications. Since no worthwhile political or military strategy can be sensibly developed outside its factual and operational context, close attention must also be given to the practical aspects of such an approach to combatting the terrorist threat. A counterterrorism measure which appears politically acceptable and legally defensible, may be of little value when examined in the context of the real world in which it must achieve a stated objective. The study will consider this measure in terms of its costs and benefits as well as its advantages and disadvantages when compared with alternative counterterrorism measures.

This study proposes a counterterrorism measure which would identify, locate, apprehend, and criminally prosecute members of the international terrorist leadership and operational elites previously protected by stateless "gray areas" and sanctuary states. As a point of departure for considering such an option, it is necessary to discover whether an adequate legal foundation exists upon which such a counterterrorism measure can be built.

CHAPTER II

PERMISSIBILITY AND APPLICATION OF EXTRATERRITORIAL APPREHENSION UNDER MUNICIPAL LAW

> ...[F]or mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. [1]
>
> Mr. Justice Miller for the
> Supreme Court of the United States
> Ker v. Illinois (1886)

The permissibility of extraterritorial apprehension under municipal law will generally be determined in the context of the court considering the issue of jurisdiction. If the court determines that an accused terrorist brought before it by means of a government authorized extraterritorial apprehension is not subject to the law which the prosecution is attempting to apply, or that the government's action violated fundamental rights of the defendant, it may well act to divest itself of jurisdiction. The matter of establishing and maintaining proper jurisdiction is the very foundation upon which extraterritorial apprehension as a counterterrorism measure will rest. For this reason, it is important at the outset to critically examine both the issue of subject matter jurisdiction over the offense and the propriety of the trial court's personal or in personam jurisdiction over the accused terrorist brought before it by means of extraterritorial apprehension.

Establishing Subject Matter Jurisdiction Over the Offense

Antiterrorist Offenses in the U.S. Code

With the increased public alarm in recent years over the rise of terrorism, the United States and its allies have acted to extend the reach of their substantive criminal law. It is beyond the scope of this study to provide a comprehensive analysis of the substantive criminal law which might be used by the United States and its allies as the basis for prosecuting terrorists secured through extraterritorial apprehension. Nevertheless, several of the more recent Congressional enactments as well as legislative initiatives which are currently under consideration provide a good indication of what terrorist actions are most apt to give rise to the actual application of extraterritorial apprehension as a pro-active measure.

The 1984 Act for the Prevention and Punishment of the Crime of Hostage-Taking, specifically implemented the International Convention Against the Taking of Hostages adopted by the United Nations in December of 1979.[2] The Act amended the Federal kidnapping statute to provide for federal jurisdiction over any kidnapping in which a threat is made to kill, injure, or continue to detain a victim in order to compel a third person or governmental organization to take some action. The United States has jurisdiction over the taking of hostages outside the country under this legislation: (a) if the perpetrator or a hostage is a U.S. national; (b) if the perpetrator is found in the United States, regardless of nationality; or (c) if the United States is the government coerced by the hostage-taker.

This legislation implements the Hostage Taking Convention's recognition that a state party may assert jurisdiction over hostage takers (including accomplices) on the basis of its national being taken hostage. The 1984 implementing legislation appears to be a clear assertion of extraterritorial criminal jurisdiction based upon the passive-personality principle.[3] Had the United States been able to acquire in personam jurisdiction over Abul Abbas Zaiden and five Palestinian accomplices involved in the October 1985 Achille Lauro hijacking, it is clear the U.S. Attorney responsible for prosecuting would have based the Government's case in large part upon a violation of this 1984 statutory provision.[4]

The Congress also adopted a series of amendments to 18 U.S.C. 32 during 1984 designed to expand U.S. jurisdiction over aircraft sabotage. This legislation provides for implementation of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation adopted at Montreal in September of 1971, the so-called "Montreal Convention."[5] Under the Montreal Convention, nation states are required to establish jurisdiction over certain offenses affecting the safety of civil aviation. Under the newly adopted statutory implementation of the Montreal Convention, it is a Federal offense to destroy any aircraft in the special aircraft jurisdiction of the United States, whether it is military, state-owned, or civilian. The statute also makes it an offense to commit an act of violence against any person on the aircraft, not simply its crew members, if the act is likely to endanger the safety of the aircraft. The statute and convention also provide the basis, and indeed obligation, for the United States to prosecute any person who destroys a foreign civil

aircraft outside the United States if the offender is later found in the United States.

The Congress further acted in 1984 to authorize the prosecution of the murder, kidnapping, or assault of an immediate family member of certain federal officials where such crimes are committed with the intent to interfere with those officials in the performance of their duties or where the offenses are committed to retaliate against them for the performance of their duties. Under 18 U.S.C. 1114, enacted prior to 1984, the Congress had declared it a felony to kill certain federal officials, not including U.S. military personnel, acting in the performance of their duties. The 1984 enactment contained in 18 U.S.C. 115 now extends protection to immediate family members of the President, Vice President, Members of Congress, all federal judges, the heads of executive agencies, the Director of the CIA, and federal law enforcement officials.

In addition to these extensions in the U.S. substantive criminal law, the Congress acted to broaden the already existing special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. 7. This well established provision in the U.S. Code recognizes a limited Federal extraterritorial jurisdiction for certain serious crimes committed in areas specified to be within the "special maritime and territorial jurisdiction." The 1984 amendment served to greatly expand the definition of that jurisdiction so that it now encompasses any place outside the jurisdiction of any nation where the offense is committed against a national of the United States. This legislative action again appears to be a Congressional expression of the passive-personality principle of extraterritorial jurisdiction as recognized in international law.

Among the offenses which may be prosecuted when committed within the special maritime and territorial jurisdiction of the United States and which often characterize terroristic conduct are arson, maiming, murder, manslaughter, attempts to commit murder and manslaughter, and malicious mischief.[6] Under 18 U.S.C. 3231, U.S. federal district courts have jurisdiction over all offenses against the United States. Pursuant to 18 U.S.C. 3238, the trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is arrested or first brought. (emphasis added) Neither this section nor any other within the U.S. Code limits the manner or means by which the offender is brought before the court to stand trial for a charged violation of Federal criminal law.

One further 1984 enactment now makes murder for hire a Federal crime. Under 18 U.S.C. 1952A, the United States may prosecute anyone, without regard to nationality, who travels or uses facilities in foreign commerce with the intent to murder for pecuniary compensation. Although the elements of this offense may be difficult for a prosecutor to establish in the case of an international terrorist, it may nevertheless be useful in some cases.

These and other provisions of the U.S. Federal criminal law offer prosecutors a range of offenses which may be applied against international terrorists without regard to their nationality. However, unless the statute expressly provides for its application in foreign states, U.S. courts will presume jurisdictional application is limited to no more than the special maritime and territorial jurisdiction of the United States. Except for

those laws where the Congress specified extraterritorial application to include offenses committed within a foreign state, U.S. prosecutors have no substantive law with which to prosecute acts of terrorism or other crimes actually committed in a foreign country against a U.S. National.

Legislative Remedies

In general, the Congress has been cautious in extending U.S. criminal jurisdiction on an extraterritorial basis. It has preferred to extend U.S. criminal jurisdiction only where there is a discernible and direct U.S. interest.[7] To date, probably the furtherest extension of U.S. substantive criminal law with regard to terrorism has been the hostage-taking provisions in the 1984 Comprehensive Crime Control Act. The Congress has not enacted legislation to proscribe the murder, attempted murder, or the perpetration of a serious assault upon a non-official U.S. national outside U.S. borders except to the extent such offense can be tried under the newly expanded special maritime and territorial jurisdiction of the United States. State Department Legal Adviser Abraham D. Sofaer revealed that this void in the U.S. Federal criminal law frustrated efforts to bring indictments against those thought to have been responsible for the slaying of two American businessmen in El Salvador in 1985.[8]

One of the most significant legislative proposals currently under consideration in the Congress is the "Terrorist Prosecution Act." The Act is designed to amend Title 18 of the U.S. Code to authorize prosecution of terrorists who attack U.S. nationals abroad without regard to where the offense occurs or the nationality of the offender. The legislation received consideration as Senate Bill 1429 during July 1985 in hearings

conducted by the Senate Judiciary Committee's Subcommittee on Security and Terrorism. The clear purpose of the legislation is to provide relatively comprehensive subject matter jurisdiction to federal prosecutors for use against international terrorists who perpetrate the most serious acts of violence against U.S. nationals abroad.

Unlike the extraterritorial jurisdictional provisions in the 1984 Comprehensive Crime Control Act which are primarily based upon the passive personality principle, the Terrorist Prosecution Act would be based upon the more widely accepted protective principle. Section 2331 of the bill contains a statement of findings and purpose for the proposed legislation:

. . . .

> (b) it is an accepted principle of international law that a country may prosecute crimes committed outside its boundaries that are directed against its own security or the operation of its governmental functions;
> (c) terrorist attacks on Americans abroad threaten a fundamental function of our Government: that of protecting its citizens;
> (d) such attacks also threaten the ability of the United States to implement and maintain an effective foreign policy;
> (e) terrorist attacks further interfere with interstate and foreign commerce, threatening business travel and tourism as well as trade relations. [9]

It is particularly interesting that the legislative histories for Senate Bill 1429, as well as a number of other recent bills receiving active consideration in the Congress as means of dealing with the threat of terrorism, contain numerous approving references to "abduction" or "forcible seizure" as a way of gaining jurisdiction over offenders.[10] In the final floor debate on Senate Bill 1429, Senator Arlen Spector, the bill's chief sponsor and a former prosecutor himself, argues:

> In many cases, the terrorist murderer will be extradicted or seized with the cooperation of the government in whose jurisdiction he or she is found. Yet, if the terrorist is hiding

> in a country like Lebanon, where the government, such as it is is powerless to aid in his removal, or in Libya, where the government is unwilling, we must be willing to apprehend these criminals ourselves and bring them back to trial.
>
> . . . .
>
> Forcible seizure and arrest is a strong step, but the threat of terrorism requires strong measures, and this is clearly preferable to the alternatives of sending in combat troops or bombing a few neighborhoods. 11

Senator Spector's views concerning how the Terrorist Prosecution Act might be implemented are by no means unique. During the same floor debate, Senator Leahy remarked:

> The United States needs a comprehensive counterterrorist strategy. Part of the strategy must be to improve our intelligence so that discriminate use of force against terrorists who have committed or are about to commit violent acts becomes feasible and legitimate.
>
> Our strategy must also include laws which provide for the criminal prosecution in the United States of terrorists over whom we can obtain jurisdiction through extradition and other means. 12 (emphasis added)

After considerable floor debate replete with similar endorsements of "forcible seizure" and "abduction" or what this study refers to as "extraterritorial apprehension," the Senate unanimously adopted Senate Bill 1429 on February 19, 1986 and transmitted it to the House of Representatives where it awaits consideration.

Senate Bill 1429 and other legislation addressing international terrorism is currently under consideration in the Judiciary Committee of the U.S. House of Representatives. With public concern about international terrorism running high during the 1986 election year, it is likely the Congress will enact some form of the Terrorist Prosecution Act and, by so doing, provide a powerful new law which federal prosecutors may use in the war against terrorism. 13

A review of recent Congressional enactments and pending legislation confirms that some basis for subject matter jurisdiction already exists and the prospects for this basis being expanded in the near-term are excellent. Of even greater significance for purposes of the present study, there appears to be a significant political constituency prepared to support extending U.S. criminal jurisdiction to the maximum extent possible for purposes of reaching international terrorists located in stateless areas and sanctuary states. If the legislative history for Senate Bill 1429 and related bills as it has developed to date is any indication, this constituency is also prepared to enthusiastically support efforts by the United States and its allies to secure in personam jurisdiction over terrorist offenders by means of extraterritorial apprehension. In sum, there is a positive mood in the Congress in support of such a pro-active counterterrorism measure.

Securing In Personam Jurisdiction by Irregular Rendition

The Ker-Frisbie Doctrine

Once it has been established that the terrorist's conduct has violated municipal criminal law and there exists an appropriate nexus between the United States or some other prosecuting forum state and the crime based upon one of the jurisdictional principles recognized in international law, it is necessary to consider the legality of the means of securing jurisdiction over the person of the alleged offender. Extradition agreements and other forms of rendition using informal or "irregular" means often serve as the vehicles for physically acquiring jurisdiction over the the defendant. In the United States and other Western judicial systems, the accused has

the right to challenge the jurisdictional authority of the court based on the means used to acquire custody over his or her person. A considerable amount of case law has been developed interpreting the legality under municipal law of various means of rendition, irregular or otherwise. For purposes of this study, the central objective will be to understand what this case law, particularly that of the United States, holds with regard to irregular renditions.[14]

The foundation for the existing U.S. doctrine on irregular rendition was established by the United States Supreme Court in 1886 landmark decision in Ker v. Illinois.[15] Defendant Ker, then residing in Peru, was indicted in Illinois for larceny and embezzlement. Pursuant to a bilateral extradition treaty, the President of the United States issued a warrant authorizing a private investigator to secure custody of Ker from Peruvian authorities. However, the warrant could not be served due to a state of hostilities between Chile and Peru. At the time, Chilean forces had occupied the Peruvian capital of Lima. Despite these conditions, the investigator forcibly apprehended Ker and delivered him to U.S. authorities.

Ker contended that his Peruvian residence afforded him a right to asylum and that the fact an extradition treaty remained in force between the United States and Peru precluded his return other than under the terms of the agreement. He further argued that the seizure violated his due process rights under the U.S. Constitution. The Supreme Court rejected Ker's contention, holding that the existence of the bilateral extradition treaty did not necessitate the conclusion that obtaining physical custody over the offender, by means other than through the agreement, violated

its provisions. In affirming Ker's conviction in the lower court, the High Court held:

> "due process of law"...is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings he is deprived of no rights to which he is lawfully entitled. [16]

As is the case with most of the decisions rendered by the courts over the past century bearing on the legal propriety of irregular renditions, the Ker holding is subject to more than one interpretation. Legal analysts displeased with the apparent willingness of U.S. courts to condone most forms of irregular rendition argue that in Ker, government authorities intended to comply with the extradition process but were precluded from doing so by reason of the exigent hostilities. Such analysts read the Ker decision narrowly, concluding that, at most, Ker stands for the proposition that U.S. courts are prepared to ratify forcible seizures by private agents under extraordinary circumstances and where the prosecuting state has no direct role.

An alternative interpretation of Ker and one which better conforms to subsequent judicial reading of the case, is that it establishes a rule under which U.S. courts may ratify irregular renditions where extradition is unavailable or precluded by exigencies in the asylum state. What is incontestable about the Ker holding is that it establishes a rule that due process of law is not jeopardized by "mere irregularities in the manner in which [a defendant] may be brought into the custody of the law".[17]

In 1952, the U.S. Supreme Court specifically upheld its ruling in Ker in a companion landmark decision involving irregular rendition within the United States. In Frisbie v. Collins,[18] the Court ruled that due process

was not violated when defendant Collins was forcibly apprehended in Chicago by Michigan police, handcuffed, blackjacked, and returned to Michigan to stand trial for murder. Writing for a unanimous Supreme Court, Justice Black overturned a Sixth Circuit holding that the Federal Kidnapping Act had invalidated the Ker rule. Justice Black also rejected the defendant's contention that his due process rights had been violated:

> This Court has never departed from the rule announced in Ker v. Illinois...that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." [Footnote omitted.] No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. 19

The Frisbie decision articulated by Justice Hugo Black, often considered one of the Court's staunchest defenders of civil liberties, made clear that the Court's emphasis remained on issues of fair trial and Constitutional safeguards which it did not consider contravened by "forcible abduction," even when undertaken by government agents acting in the absence of asylum state consent.

Together, these two historic Supreme Court decisions formulate what has come to be known as the "Ker-Frisbie doctrine." With one notable exception, U.S. courts have consistently relied upon the Ker-Frisbie doctrine to retain jurisdiction over defendants apprehended by various irregular means. The facts and circumstances surrounding a series of recent cases involving forcible seizure of criminal defendants found in foreign countries vary considerably. None precisely describes the unique circumstances under which members of the leadership and operational elite of terrorist organizations would be seized under a counterterrorism measure

of extraterritorial apprehension. However, several of these cases do offer important principles upon which such a pro-active counterterrorism measure can be built to ensure compliance with U.S. Constitutional and municipal law requirements.

The Toscanino Caveat

The sole exception to the continuing line of cases reaffirming the Ker-Frisbie doctrine arises from the Second Circuit Court of Appeals 1974 decison in United States v. Toscanino.[20] Toscanino, an Italian national charged with conspiracy to import narcotics into the United States, alleged in an affidavit that he and his pregnant wife were lured from their Montevideo home on January 6, 1973 by a telephone call from a Uruguayan police officer acting as a paid agent of the United States Government. He claimed he was then knocked unconscious with a gun, bound, blindfolded, and driven without the knowledge or consent of the Uruguayan Government to the Brazilian border where he was surrendered to Brazilian authorities. Toscanino further alleged that Brazilian authorities held him incommunicado and interrogated him over several days denying him food, water, and sleep. He claimed that during this period, he was subjected to acts of torture including being kicked, beaten, having electrodes attached to his extremities, and the flushing of alcohol and other fluids into his eyes, nose, and anal passage. Of particular note, he alleged that on at least one occasion, he believed a U.S. Government agent was physically present in the vicinity of the violent interrogation being performed by the Brazilian authorities. At the conclusion of the interrogation, Toscanino claimed he was taken to Rio de Janeiro, drugged by Brazilian and U.S. Government

agents, and placed on a Pan American flight destined for the United States and the arms of arresting Federal agents.

The Second Circuit used Toscanino's allegations of outrageous government conduct to fashion an exception to the Ker-Frisbie doctrine. The court appeared to limit the Ker-Frisbie doctrine by applying the expanded interpretation of due process protections recognized in Rochin v. California[21] and Mapp v. Ohio.[22] to cases where in personam jurisdiction is acquired by irregular rendition. The Toscanino court recalled that in Rochin v. California, the Supreme Court relied upon the due process clause of the Fourteenth Amendment to invalidate a state court conviction won through evidence obtained by police brutality.[23] The Second Circuit reasoned that Rochin established the rule that convictions obtained by "conduct that shocks the conscience" violates the defendant's due process rights. The Toscanino court then chose to apply the exclusionary rule fashioned in Mapp v. Ohio[24] as "a judicially-created device designed to deter disregard for constitutional prohibitions...".[25] The court concluded that Rochin and Mapp represented an expansion of the due process clause which could not be reconciled with the Ker-Frisbie doctrine.[26]

At least in the Second Circuit, it now appeared that courts were required to divest themselves of in personam jurisdiction over the accused where such jurisdiction was acquired by deliberate, unnecessary, and unreasonable invasion of the defendant's Constitutional rights. Noting the gravity of the defendant's allegations and that if true they would constitute a violation of his due process rights, the court ordered an evidentiary hearing in which Toscanino was to be given an opportunity to prove those statements made in his affidavit.[27]

An important foundation for the Toscanino decision was the court's recognition that to require the Ker-Frisbie doctrine to yield to due process considerations, it would be necessary to extend the U.S. Constitutional protections to foreign nationals not within the United States at the time of the alleged violation. The court held foreign nationals are entitled to invoke Fourth Amendment protection against the U.S. Government's conduct abroad.[28] Judge Mulligan reasoned that this extension of U.S. Constitutional rights to aliens not even present in the United States was justified on the notion that the Fourth Amendment protects "people" rather than "areas" or "citizens."[29] The Judge further reasoned that the Constitution is in force whenever the sovereign power of the Government is exercised.[30]

This part of the Toscanino decision is relevant to the development and planning of extraterritorial apprehension as a counterterrorism measure. The court's broad interpretation of the scope of protection afforded by the U.S. Constitution is consistent with the trend in rulings of the U.S. Supreme Court and other federal circuit courts which uniformly hold that basic human rights protections should be accorded to all individuals, whether citizens or not, and without regard to whether or not a person is present within the United States.[31] The significant point is that the apprehended international terrorist is entitled to the full force and protection of the U.S. Constitution from the point he or she is subjected to effective U.S. Government control. The actions of U.S. Government personnel, possibly even including surrogate agents, engaged in an act of extraterritorial apprehension would have to be in substantial compliance

with due process and other Constitutional guarantees afforded citizens within the United States.

In addition to basing its decision on Toscanino's constitutional rights, the Second Circuit took note of an apparent violation of the territorial sovereignty of Uruguay as guaranteed under two international agreements to which the United States was a party. While the issue of state sovereignty and whether another state has a right to breach the territorial integrity of the asylum state will be addressed in Chapter III, it is important to note this issue seems to have been raised as a basis for the court's action in Toscanino. In terms of analysis of the municipal law implications of Toscanino, it is significant that at least the Second Circuit was prepared to examine the issue of irregular rendition or what it referred to simply as "abduction," in terms of U.S. obligations to the asylum state under international law. As will be seen, the Toscanino decision has undergone substantial refinement and, at best, represents that law in only one federal circuit. Nevertheless, the court did focus on what it perceived as relevant international obligations of the United States and considered their apparent violation a basis for ruling against the Government.

Ker-Frisbie -- Reaffirmed But Refined

While Toscanino appeared to strike a blow, at least in one federal circuit, to the Ker-Frisbie doctrine, a significant body of subsequent case law has done much to ameliorate its effects. Within six months of the Toscanino decision, the Second Circuit published its opinion in United States ex rel. Lujan v. Gengler[32] in which the court's prior holdings were substantially narrowed, reinterpreted and "clarified."

Lujan, a resident of Argentina, was the subject of an outstanding U.S. Federal warrant related to his role in a conspiracy to import and distribute a large quantity of heroin in the United States. U.S. Drug Enforcement Administration (DEA) agents employed a foreign national agent who engaged defendant Lujan, a pilot, to fly to Bolivia. Once lured out of Argentina to Bolivia on the promise of attractive employment, Lujan was taken into custody by Bolivian police acting not on behalf of their own government, but as agents for the DEA. Lujan was held in Bolivia and subsequently placed on a plane bound for New York where he was arrested by waiting Federal agents.

Chief Judge Kaufman, speaking for the Second Circuit, noted that the court's prior decision in Toscanino could scarcely "have meant to eviscerate the Ker-Frisbie rule." Judge Kaufman observed that in the Toscanino decision, the court "did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court."[33] Lujan clearly narrowed the holding in Toscanino. The rule under Lujan, which still applies in the Second Circuit, is that absent outrageous or shocking government conduct, irregular rendition is not in and of itself a violation of due process rights.[34]

As in Toscanino, the Second Circuit in Lujan v. Gengler addressed alleged violations of international law predicated on an apparent absence of consent or acquiescence to the seizure from the asylum state. On this issue, the Lujan court appeared to further narrow the holding in Toscanino, noting that the defendant did not have a private right to raise the issue

of sovereignty. Specifically distinguishing Lujan from Toscanino on this issue, Judge Kaufman wrote:

> But unlike Toscanino, Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction. This omission is fatal to his reliance upon the [United Nations and Organization of American States] [C]harters. The provisions in question are designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress. [35]

The court in this statement seemed to imply that "abduction" may violate international law but the asylum state may cure any real or apparent violation by its acquiescence. Moreover, the court seemed to be saying that if there is no protest from the asylum state, the court may imply consent or acquiescence. In any case, the defendant may not raise the issue of sovereignty under traditional international law since it is a questiion for the sovereigns themselves to resolve.

The Second Circuit further retreated from the Toscanino holding in its 1975 decision in United States v. Lira.[36] In Lira, the defendant, a Chilean national, was arrested by Chilean police at the request of the U.S. DEA. He alleged that thereafter he was brutally tortured at a Chilean naval base over a period of several weeks. Lira claimed that following a period of interrogation, he was taken to the airport, drugged, and put on a plane for the United States escorted by both Chilean police officers and agents of the DEA. Judge Mansfield, author of the Toscanino decision, ruled that because the defendant could not prove overt U.S. Government participation in his alleged ordeal, the district court was not required to divest itself of jurisdiction over the accused.[37] The court recalled its holding in Lujan and determined that Lira could not allege a violation of Chilean law if Chile as the asylum state was itself aware of an apparent

violation of its sovereignty, yet failed to protest to the Government of the United States.[38] Based on the allegations of police brutality in this case and some suggestion of DEA involvement, it is very difficult to distinguish this set of facts from those in Toscanino. The only mildly distinguishing factor seems to be the court's position that there is no evidence to support the defendant's allegations of possible U.S. DEA involvement in the abduction and torture.

Unfortunately, none of the Ker-Frisbie doctrine line of cases specifically fits all the operative circumstances likely to arise during a U.S. Government or allied nation apprehension of a terrorist in a stateless area or sanctuary state. It is virtually certain that such extraordinary apprehensions would be conducted without the consent or acquiescence of any regime in the stateless area or sanctuary state. Sanctuary states providing overt or covert support for international terrorists operating within their borders can be expected to voice outrage and alarm at an extraterritorial apprehension being conducted within their territory.

Another circumstance which might be expected in the apprehension of international terrorists in stateless areas or sanctuary states would be the direct and substantial use of U.S. Government forces or agents. Depending upon the security threat posed by the terrorists themselves or the security forces of the local area, it may prove necessary and prudent to use military, paramilitary, or specialized intelligence agency operatives. None of the Ker-Frisbie line of cases deal with facts even remotely resembling this sort of scenario in which there could be substantial involvement of U.S. Government personnel during the extra-territorial apprehension operation itself.

Two decisions in the Ker-Frisbie line of decisions do provide at least some indication of how U.S. courts might view a case of extraterritorial apprehension with regard to the almost certain protest which can be expected from the sanctuary state. In Ex parte Lopez,[39] the petitioner was seized while in Mexico and forcibly returned to the United States for trial upon narcotics charges. The Government of Mexico intervened at trial asking that the court surrender custody of the petitioner. In support of its request, the Mexican Government cited existing treaties between the United States and Mexico which it alleged had been violated by the seizure in its territory. Notwithstanding, the Texas court stated that the Mexican Government's claim would not affect its jurisdiction. The court speculated that the Mexican Government may wish to present the matter to the executive department of the U.S. Government. As in the Lira case, the Texas court viewed the matter of sovereignty as essentially a political question to be resolved by the executive branches of the governments involved.

A more recent case involves two American bounty hunters who kidnapped Sidney Jaffe, a U.S. national, from Toronto in May of 1981. Jaffe had fled the United States to avoid prosecution by Florida state authorities for fraudulent land sales. Florida authorities instituted extradition proceedings which were ineffective due to the state's failure to follow proper procedures.[40] The bounty hunters were engaged by the bail bondsman who, in turn, was "encouraged" by Florida prosecutors to return the defendant to allow continuation of the criminal trial. The Government of Canada vigorously protested Jaffe's seizure as a violation of its sovereignty and cited the existing U.S. - Canadian extradition treaty as a basis for its objections.[41]

The Florida state court rebuffed the Canadian protest, refused to release Jaffe and convicted him of land sale violations. The court simply cited a Florida state rule permitting bounty hunters to pursue and return bail jumpers to the jurisdiction of the court. The Florida court virtually ignored the Canadian protest. The Canadian Government sought the intervention of the U.S. Department of State and demanded that the two bounty hunters be extradited to Canada to stand trial for a violation of the Canadian kidnapping statute. The two bounty hunters were subsequently extradited to stand trial in Canada.[42] In this instance, the U.S. Federal authorities appeared genuinely concerned about the apparent violation of Canadian sovereignty and the State of Florida's failure to exercise the extradition treaty to the fullest extent.

Ex parte Lopez, Jaffe, and other cases where there have been affirmative protests from the asylum state have invariably resulted in the courts retaining jurisdiction. In Lopez, the court viewed the issue as a political matter to be resolved between the executive branches of the respective national governments. In Jaffe, the state court largely ignored the issue, perhaps based on the assumption that the bounty hunters were acting independently of any state action. What these and other cases involving a state protest seem to indicate is that courts have been very reluctant to divest themselves of in personam jurisdiction once acquired. Courts have even retained jurisdiction when foreign asylum states have protested the "irregular rendition" as a violation of their sovereignty. Such in personam jurisdiction has been retained even in cases involving asylum states which have cordial relations with the United States and which

are closely linked to it by treaties pledging mutual respect for sovereignty or committing the countries to the use of extradition.

United States v. Reed[43] provides still further indication as to how U.S. courts might view extraterritorial apprehension. Reed and two accomplices had been charged with mail fraud and conspiracy to commit securities and mail fraud. Prior to the selection of a federal jury in the Eastern District of New York, Reed jumped bail. Reed was tried in absentia while a fugitive. He was subsequently located in the Bimini Islands in the Bahamas where covert CIA agents lured him on board a small private plane they claimed was bound for Nassau. Once on board the aircraft, Reed alleged that one of the agents pulled a gun and made him lie on the floor. He alleged the agent held a cocked revolver to his head and threatened to "blow [his] brains out." Upon arriving in Fort Lauderdale, Reed alleged that one of the CIA agents twisted his arm badly while he was deplaning and in the process of being surrendered to waiting FBI agents. Although an extradition treaty existed between the United States and the Bahamas, there is no indication that any attempt was made to invoke it to gain Reed's return.

The court held that luring Reed onto the plane under false pretenses, the use of a revolver pointed to his head, and the threatening language was not conduct which involved "gross mistreatment" in contravention of Toscanino's[44] due process standard. The court further held that the fact the United States has an extradition treaty with the Bahamas, from which the defendant has been "abducted by CIA agents," had no bearing on the legality of the arrest where the Bahamian Government had not sought the defendant's return or made any protest. The court concluded that in the

absence of any such protest, the defendant had no standing to raise a violation of international law as a justiciable issue.

Reed also asserted that his fundamental Constitutional rights were violated on the theory that any "abduction" from another country with which the United States has an extradition treaty under the coerced circumstances alleged, constituted an unreasonable seizure within the meaning of the Fourth Amendment.[45] The court found Reed's seizure pursuant to an arrest warrant issued with probable cause was "reasonable" for purposes of the Fourth Amendment. The court specifically held:

> [T]he existence of an extradition treaty provides an individual with certain procedural protections only when he is extradited. And abduction is no more or less objectionable simply because of the existence of an extradition treaty. As for the manner of the seizure, custody obtained by executing an arrest warrant is not invalidated because of the use of excessive force, even though the defendant might have a suit for damages against the government agents involved.[46]

The Second Circuit might have chosen to limit the application of the Ker-Frisbie doctrine in a manner similar to its interpretation in Toscanino but basing its analysis on Reed's argument that his Fourth Amendment rights had been violated by a forcible seizure in a country with which the United States had an extradition treaty. Not only did this 1981 decision reject this analysis, but it once again made clear that an extradition treaty does not preclude the use of forcible seizure, at least in the absence of a protest from the asylum state.

In yet another argument made to the court, Reed maintained that divestiture of jurisdiction was required under its judicial supervisory powers to curb abuses by government agents. The defendant argued that his "abduction" at the hands of government agents "breeds contempt for the law,

mocks our stated concern for human rights, and jeopardizes our standing in the international community."[47] The Second Circuit responded to this argument noting,

> ...we see no pattern of repeated abductions necessitating exercise of our supervisory power here in the interests of the great good of preserving respect for the law. Appellant, (Reed) a fugitive from justice with no respect for the law whatsoever, is hardly in a position to urge otherwise.[48]

In this statement, the court does seem to imply that it would have reservations if it saw a "pattern of repeated abductions." However, it nevertheless approved the Government's actions and refused to divest itself of jurisdiction over the defendant. Of even greater interest, the court was quick to note the defendant's apparent lack of respect for the judicial system and seemed to balance this against the extraordinary law enforcement actions of the Government. This may signal that future courts, sitting in judgment of international terrorists who assert violations of their Constitutional and human rights, may view such claims in the context of the defendants' contempt for the rights and civil liberties of their victims.

Application of the Ker-Frisbie Doctrine to Extraterritorial Apprehension

The Ker-Frisbie doctrine remains a dynamic area of the law. It will continue to evolve and be refined in the years ahead. The line of cases interpreting and clarifying the doctrine fundamentally support irregular rendition, albeit with important qualifications bearing on the Constitutional rights of the apprehended person and the impact such actions may have on the sovereign rights of the asylum states. What is important for purposes of the present analysis is that the doctrine provides a basis

in U.S. municipal law for developing extraterritorial apprehension as a counterterrorism measure. The evolving doctrine offers important standards and criteria which must be folded into any detailed operational plan designed to carry out a pro-active counterterrorism measure involving extraterritorial apprehension.

The Toscanino decision and its successors establish attainable standards of conduct for those U.S. Government or allied nation personnel and surrogate agents who may be directly involved in the apprehension operation. These decisions establish that brutality, torture, or grossly excessive and unreasonable force under given circumstances may cause a U.S. court to divest itself of jurisdiction. It is equally clear that the use of ruse, trickery, paid foreign agents, and perhaps even the administration of tranquilizing drugs to facilitate transfer of the apprehended person will not offend the sensibilities of most courts. Nor will courts necessarily examine the precise amount of force applied to effect the apprehension, so long as there is some reasonable justification for the manner and extent to which it is applied under the circumstances.

The line of Ker-Frisbie decisions include cases where the apprehension was accomplished directly by U.S. Government personnel, others where foreign agents appeared in charge, and still others where there was some vague combination of foreign and U.S. agents operating in concert. If there is any lesson to be discerned from the courts' consideration of the governmental identification or agency relationships in these various cases, it is simply that the more directly the apprehending persons are associated with the U.S. Government, the higher the standard of conduct to which they will be held. There is no question that when U.S. Government personnel are

directly involved in an extraterritorial apprehension, they must conduct themselves so as not to disregard the Constitutional rights of the person being apprehended. It is also likely that foreign or private surrogate agents operating pursuant to a detailed U.S. Government plan or under the close direction of the U.S. Government will be held to an equally high standard of conduct.

The Ker-Frisbie line of decisions, starting with Ker itself, makes clear that extradition is not an exclusive remedy. The existence of an extradition treaty will not bar the court from proceeding in the case of a defendant brought before it by irregular rendition. However, the courts have recognized that irregular renditions carried out in lieu of such extradition treaties may give rise to a diplomatic protest from the asylum state at the national executive level of the government. Although the authority in this area is not well developed, there is no reason to believe that such a protest will necessarily cause the court to divest itself of in personam jurisdiction over the apprehended defendant. Divestiture seems a particularly unlikely possibility if the protest is made by a regime of questionable authority purporting to be the government in a stateless area or, alternatively, when the objections originate from a sanctuary state widely recognized as engaged in the state sponsorship of international terrorism.

Two issues among those considered in the Ker-Frisbie decisions remain significant points of contention. The first is the question of whether irregular rendition is permissible when the violation of the asylum state's sovereignty is accomplished through the fully authorized and intentional efforts of the apprehending state. The second issue which remains largely

open is whether under the expanding international law of human rights, the apprehended defendant now has a personal right to directly protest his seizure notwithstanding the acquiescence, consent, or silence of the asylum state. Answers to these remaining issues must be derived from international law. Nevertheless, their resolution will be developed in the context of, and incorporated within, the evolving Ker-Frisbie doctrine. The answers to these issues are fundamental to the overall question of the permissibility of extraterritorial apprehension as a counterterrorism measure.

CHAPTER III

THE RIGHT OF EXTRATERRITORIAL APPREHENSION UNDER INTERNATIONAL LAW

> We must use the law to preserve civilized order, not to shield those who would wage war against it. [1]
>
> Secretary of State George P. Shultz
> January 15, 1986

The Import of International Law on Strategy Development

The foundation of contemporary international law is the concept of a minimum world public order system designed to maintain peace and security through the development of friendly relations and cooperation among nations. Implicit in the maintenance of international peace and security is the concept of equality, justice, and respect for fundamental human rights of nations and their citizenry--without regard to political, economic, and social system or level of development.[2] Sophisticated terrorist leadership elites do not subscribe to this minimum world public order system under international law. In fact, a principal objective of international terrorism is to undermine this fundamental system by whatever means possible.

Despite their contempt for the minimum world public order system, international terrorist elites and their sanctuary state sponsors have learned to cynically exploit the rights and protections afforded under international law. Ironically, these rights were established to preclude war, violence, and suffering, and are now used by international criminal elements to prevent responsible states from holding them accountable for their acts against innocent persons and peaceful institutions. Any

reasonable analysis and application of international law must have as its point of departure, this fundamental understanding of the minimum world public order system and its underlying interest in the maintenance of peace and security among nations along with a guarantee of human rights for all people.

The principle of state sovereignty and concepts of human rights are two facets of international law which thus far have precluded a more intense and effective pro-active counterterrorism response. At issue is whether a state's right to territorial integrity or political independence as guaranteed under Article 2(4) of the United Nations Charter[3] applies without qualification. Does a state which enjoys Article 2(4) protection have corresponding obligations of its own and, if so, what are those obligations and to whom are they owed? Also at issue is whether the human rights guarantees which have been recognized by the United Nations itself and many regional groups of nations speaking through multilateral conventions shield the international terrorist from effective law enforcement or other counterterrorism measures. Whether or not terrorists enjoy a "state status" or "international personality," can they assert pro-active counterterrorism measures violate their fundamental human rights?

Toscanino and some of the other Ker-Frisbie decisions have raised these types of questions without satisfactorily resolving them. The resolution will be required if the United States adopts extraterritorial apprehension as a counterterrorism measure. Both the United States Constitution and Supreme Court decisions make clear that the U.S. courts are absolutely bound by international law. In its historic decision in Paquete Habana,[4] the U.S. Supreme Court stated:

> International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations... [5]

Paquete Habana confirmed the incorporation of international law within U.S. municipal law. It also established that unless provided to the contrary by federal statute, customary international law governs.[6]

The courts are mandated under U.S. common law to presume conformity between international law and U.S. Congressional enactments, unless it is unmistakably apparent that an act was intended to be in disregard of a principle of international comity.[7] Since there is no U.S. statute which either explicitly authorizes or prohibits extraterritorial apprehension, it is clear that American courts will be obligated to closely examine international law as well as their own Constitutional and municipal law-based decisions in determining the permissibility of extraterritorial apprehension as a counterterrorism measure. If extraterritorial apprehension does not comport with international law with regard to fundamental nation state rights or those human rights now being guaranteed to all persons, a U.S. municipal law court may divest itself of jurisdiction.

The Right of Extraterritorial Apprehension

Sanctuary State Sovereignty

The predominant claim by the critics of irregular rendition is that forcible seizures by one state in the territory of another violate the latter's sovereignty unless it has given its consent, explicit or implied, to the action. As a general principle of international law, it is

understood that sovereignty involves the supreme, absolute, and uncontrolled power of a nation state to control that which occurs within its territorial boundaries.[8] All persons found within the state's boundaries are subject to the exclusive power of the state. Absent such state's consent, no other state is entitled to exert jurisdiction over matters arising within its territory.[9] Under traditional international law, only the asylum state could exercise in personam jurisdiction regarding the status of the person within that state.[10] The forcible removal of a person without the consent of the asylum state violated this principle of international law.

The sovereign rights of states create corresponding obligations for other states to limit the extension and application of their municipal law beyond national boundaries. In effect, the various principles of extraterritorial jurisdiction recognized in international law and discussed at the outset of this study reflect the mutual obligations of nations to respect one another's sovereignty in the application of municipal law. Most interpretations of the principle of sovereignty provide that under customary international law, states are forbidden to send agents into the territory of another state to capture criminals.[11] Even the right to hot pursuit of criminals is limited by customary law interpretations of state sovereignty so that pursuing police are typically precluded from crossing territorial boundaries of foreign states in the absence of at least implied consent.[12] Many international law authorities also maintain that the principle of sovereignty protects states against violations of their territorial integrity caused by other states "allowing" their nationals to

engage in bounty hunting and other private actions intent on apprehending fugitives within the asylum state.[13]

National rights to sovereignty and territorial integrity as historically developed in the customary international law are now incorporated in Article 2, paragraph 4 of the United Nations Charter which provides:

> 4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[14]

The court in United States v. Toscanino[15] specifically referred to this paragraph as well as a similar provision contained in Article 17 of the Charter of the Organization of American States (OAS)[16] in its determination that the abduction of the defendant from Uruguay constituted a violation by the United States of its treaty obligations. Publicists have frequently cited Article 2(4) of the U.N. Charter and other treaty obligations as well as customary international law guaranteeing state sovereignty as an absolute bar to irregular rendition.

In the much celebrated 1960 seizure of World War II SS Officer and Nazi Adolf Eichmann, the United Nations Security Council specifically addressed an act of state sponsored irregular rendition in terms of the rights afforded under Article 2(4) of the organization's charter. Eichmann had been hiding in Argentina under the name Richard Klementz and was discovered by Israeli agents following a relentless hunt which began almost immediately after the surrender of Nazi Germany.[17] On May 11, 1960, Israeli agents kidnapped Eichmann in Buenos Aires, interrogated him for a period of time, and caused him to sign a statement that he was "voluntarily" leaving Argentina. Without the knowledge or consent of the Argentine

Government, Eichmann was removed to Israel aboard an El Al airliner. Once in Israel, authorities charged Eichmann under an Israeli law which retroactively outlawed Nazi war crimes and acts of collaboration.

Following Prime Minister Ben Gurion's May 23, 1960 announcement that Eichmann had been apprehended, Israel and Argentina engaged in an intensive exchange of diplomatic notes. The Ben Gurion Government apologized for what it admitted was a violation of Argentine sovereignty, but noted "the special significance" of bringing to trial the man responsible for the murder of millions of Jewish people.[18] As the dialogue continued, the Frondizi Government in Buenos Aires insisted that Israel make reparations in the form of the return of Eichmann and the extradition of those responsible for the kidnapping. When Israel refused to make the requested "reparations," the Argentines requested an "urgent meeting" of the U.N. Security Council to consider "the violation of the sovereign rights of the Argentine Republic resulting from the illicit and clandestine transfer of Adolf Eichmann from Argentine territory to the territory of the State of Israel."[19]

During the course of the Security Council debate, Argentina argued that all states had an interest in condemning the Israeli action "because of the dangers which this act and its possible repetition engender for the maintenance of peace and international security."[20] The Argentines raised the possibility that the Eichmann seizure, if not condemned by the Security Council, might be used as a precedent to justify future "violations of the sovereignty of other states."[21] Mrs. Golda Meir answered for Israel, arguing that the true threat to international peace and security lay, not in Eichmann's seizure, but in allowing Eichmann the war criminal to remain at

large. Articulating the Israeli case, Mrs. Meir asked rhetorically of the Council, "Is this a threat to peace -- Eichmann brought to trial by the very people to whose total physical annihilation he dedicated all his energies..?"[22]

After considerable diplomatic effort by several of the permanent members of the Council to reach a consensus, a resolution was adopted declaring that Eichmann's seizure had violated Argentine sovereignty and was incompatible with the United Nations Charter. With the Soviet Union and Poland abstaining, the Council requested the "Government of Israel to make appropriate reparation" in accordance with the U.N. Charter and rules of international law.[23] Following the adoption of the Security Council resolution, Argentina and Israel negotiated a compromise under which the two governments agreed to an exchange of new ambassadors. The governments issued a joint communique in which they announced their decision "to regard as closed the incident that arose out of the action taken by Israeli nationals which infringed upon fundamental rights of the State of Argentina."[24]

The Israeli seizure of Eichmann is a case bearing many similarities to the proposed countererrorism measure of extraterritorial apprehension. Eichmann was forcibly seized by state agents and without the consent or acquiescence of the asylum state. It is less certain whether Eichmann represented a genuine threat to international peace and security or to the Israeli state. In all probability, Eichmann's seizure and trial were more acts of retribution for his outrages against the Jewish people and less acts in the interest of crime prevention or deterrence. Noting the Security Council condemnation of the Israeli action as a violation of

Argentine sovereignty and as incompatible with the U.N. Charter, it may seem there is little possibility that extraterritorial apprehension would be viewed otherwise.

While the Security Council action in the Eichmann case represents an authoritative interpretation of Article 2(4) of the Charter, it is not in and of itself international law. Even more important, the Security Council debate did not in any significant way address the existence of possible exceptions to the sovereign rights and protections recognized under Article 2(4). Although Mrs. Meir implied Eichmann could be viewed as a general threat to world peace, there was no specific demonstration that he posed a continuing, imminent and serious threat to international peace and security or, alternatively, to the national security of the state of Israel. Finally, it may be significant that the Security Council resolution, although unanimous, was declaratory in nature and made no attempt to impose sanctions upon Israel. The ultimate facts are that Eichmann was tried by the apprehending state, found guilty under its municipal law, and executed for his universal criminal conduct, notwithstanding any diplomatic apologies or U.N. Security Council resolution.

One other aspect of the Eichmann case must be carefully weighed when considering its impact on the permissibility of extraterritorial apprehension. At the root of a violation of state sovereignty brought about by irregular rendition is the deep embarrassment caused to the asylum state. The seizure constitutes an exposure of the asylum state's inability to maintain credible control of actions occurring within its borders. In the Eichmann case as well as in the case of the vast majority of irregular renditions, the state performing the seizure has no desire or intent to

embarrass the asylum state. In most instances, the state benefitting from seizure would prefer to distance itself from the act of apprehension and to deny any state support for it. In the Eichmann case, the official Israeli position was that the abduction was not state supported. Israeli relations with the Argentines had been cordial. In fact, the two governments were in the process of entering into a bilateral extradition treaty when the seizure occurred.

The circumstances which will tend to surround the application of extra-terrritorial apprehension are quite different. As a counterterrorism measure, it is designed and intended to embarrass the sanctuary state or stateless area. One of the desired outcomes of such an apprehension would be to undermine the credibility of the regime through the limited and temporary violation of its territorial integrity. Rather than denying the action was state supported, the apprehending state would publicly acknowledge the seizure and explain the reasons for it.

Rights of Other States and the Minimum World Public Order System

Many of the analyses of irregular rendition under international law have tended to focus on the rights and interests of the sanctuary state or even the individual subjected to the seizure. As noted, the interest of the sanctuary state in the maintenance of its sovereignty and territorial integrity is of such gravity that extraordinary protection is provided under international law. It is to be expected that international law is extremely protective of the nation state unit which continues to form the basic component in the minimum world public order system.

While sovereign state rights to territorial integrity and political independence are important, international law encompasses other vital interests in the minimum world public order system. Unfortunately, many analyses of irregular rendition have tended to ignore these other interests, instead, excluding them from the formation of applicable international law. Viable and enforcible international law is not founded upon the interests or rights of any single state, group of states, or isolated juridically recognized entity. Instead it is based upon a comprehensive analysis and balance of the interests and rights of all participants in the minimum world public order system.

A reliable international law analysis of extraterritorial apprehension must consider the interests and rights of other key participants: the apprehending state, other states affected by the terrorists to be seized, and the minimum world public order system as a whole. At issue is whether there are interests protected by the conventional or customary international law so substantial that, on balance, the right of the sovereign state to territorial integrity and political independence may be forced to yield. The case law interpreting the Ker-Frisbie doctrine has not as yet produced a careful analysis of interests beyond those of the sanctuary state or "abducted defendant." Accordingly, it is necessary to look beyond these decisions to identify these other key interests and any law which may serve to protect them.

While the sanctuary states are entitled to the protection of Article 2(4) of the U.N. Charter, such protection is also available to the apprehending state and other members of the world community of nations. In the case of international terrorists who may be supported by the

sanctuary state, their attacks perpetrated on the nationals and institutions, public or private, of other members of the international community are clearly in contravention of their obligation to "refrain...from the threat or use of force against the territorial integrity or political independence of any state, in any other manner inconsistent with the Purposes of the United Nations."[25] Moreover, the "Purposes of the United Nations" as articulated in Article 1 of the Charter[26] are certainly not consistent with the state sponsorship of, or even acquiescence in, international terrorism directed at other members of the world community from within a state's borders.

Sanctuary State Responsibility for Terrorism Emanating From Within Its Territory

Categories of State Liability

Sovereign states are held responsible or liable to other states for their actions or omissions which violate the legitimate rights of other states in the minimum world public order system. The principle of external responsibility derived from the fundamental concepts of the rights and obligations of sovereign states, provides that one state's violation of another's external political or territorial sovereignty is a delinquency which imposes liability on the offending state.[27] This same principle extends to state agents as well as nationals of a state acting independent of any state direction.

Under international law, the sovereign state bears direct liability for acts of organs of its government. The United States Government clearly hoped to mount sufficient evidence against the Khadafy regime in Libya to establish

a credible case based on this theory of direct liability in undertaking the April 14, 1986 military air strikes against the terrorist infrastructure in Tripoli and Benghazi.[28] In support of its actions, U.S. Government spokesmen repeatedly claimed they had "incontrovertible proof" that the Libyan Government had been directly implicated in the April 5, 1986 bombing of the La Belle Club in West Berlin which resulted in the deaths of a U.S. serviceman and a Turkish woman and the injuring of some 230 other persons.[29]

Alternatively, a sovereign state may be held to be vicariously liable where it knowingly allows private persons to perpetrate activities from within its territory which injure other states. The theory of vicarious liability under international law provides that a state has a recognized duty to exercise reasonable care to prevent "illegal acts" which may originate in its territory. In the event such acts occur, the sanctuary state has a responsibility to the injured state to either punish the wrongdoers or to compel them to make reparation.[30]

The principle of vicarious liability was made applicable to states sponsoring or acquiescing in terrorist activity within their borders through the 1970 Declaration of Principles of International Law adopted by the U.N. General Assembly.[31] Among its other provisions, the Declaration prohibits state acquiescence to activity within its territory that aims at fomenting civil war or committing terrorists acts in another state. The Declaration may not as yet constitute a firm codification of customary international law. However, it does represent an authoritative interpretation of the obligations undertaken by soverign states under the U.N. Charter as understood by a sizable majority of the General Assembly.

Theories of Vicarious State Liability

Under international law, vicarious liability may be imputed to the state for its failure to control terrorists operating within its territory under one of three theories: fault liability, acts on behalf of a state, or absolute liability.[32] Under the theory of fault liability, a sanctuary state incurs responsibility for hostile acts emanating from its territory unless it was unaware of such activity, or knew but was unable to prevent it.[33] The fault liability theory is the most widely recognized of the three theories of liability by the international community. The International Court of Justice appeared to invoke the fault theory in its adjudication of the historic 1949 Corfu Cannel case in which it noted that a state is liable if it knowingly permits its territory "to be used for acts contrary to the rights of other States."[34] While this theory allows an injured party to hold states liable when they are aware of the terrorist activity within their borders, it does not serve as a basis for establishing state responsibility in cases where the state is unaware of such activity. Nor can it be used to established liability in the stateless "gray areas" where there may be awareness of the terrorist activity, but no responsible and capable sovereign authority in existence to take remedial action.

A state may also be held vicariously liable under international law for the conduct of persons who act on its behalf. Under this theory, if a state accepts the benefits derived from the actions of an individual or group, it is deemed to have consented to and ratified the actions.[35] In the case of international terrorism, unless it can be firmly established that the acts are committed at the direction of, or in direct support of a

state, e.g., the West Berlin La Belle disco bombing, it may be difficult to evidence a sanctuary state's acceptance or ratification of the "benefits" of the terrorists' acts.

The third basis for imputing liability to states holds them strictly accountable for terrorist acts which originate from within their territory.[36] Under this theory, a state is strictly liable if it tolerates the use of its territory for staging an intervention into a foreign territory. Sanctuary states and stateless areas remain accountable for all acts of terrorism staged from within their borders regardless of whether or not they were aware of such acts or were able to prevent them.[37]

Of the three theories of vicarious liability applicable to states, strict liability is clearly the broadest. It would even provide a basis for imputing liability in stateless areas to the extent there is any vestige of a sovereign regime in existence. However, since an imprudent application of the absolute liability theory may work even as against a nonaccomplice or "innocent" state, the principle has not received wide acceptance in the international community. For this reason, it would have to be applied selectively, if at all, as a basis for justifying pro-active counterterrorism measures against a sanctuary state which sponsors or condones a terrorist presence within its borders.

International law recognizes that sovereign states are entitled to substantial protection against the infringement of their rights to political independence and territorial integrity as recognized in Article 2(4) of the U.N. Charter. However, international law also recognizes that implicit in the universal respect for such rights is the corresponding obligation of states to refrain from interfering with the political

independence and territorial integrity of other states. The contemporary world public order system is substantially one in which nation states form the paramount authority over politically designated geographic areas. These states are charged under the principle of state responsibility and its supporting liability doctrine with maintaining control over activities within their borders which could interfere with the sovereignty of other states. A state's intentional or negligent failure to meet its obligations undermines its own sovereign status under international law and gives rise to self-help remedies by other states which have been injured as a result.

Remedies Under International Law

The Doctrine of Self-Defense

Both customary and conventional international law have long recognized that even the rights to political independence and territorial integrity inherent in the fundamental principle of national sovereignty must yield in the interest of maintaining international peace and security. A right to individual national, or more recently, collective, self-defense arises in a state or states faced with the imminent threat of armed attack.

The violent acts of international terrorists tend to be directed against targeted state institutions, public or private, and the nationals of such states. When individuals become the targets of terrorist attacks, those individuals are placed in that position because of their relationship with the actual target of the terrorist, an identified state or political system. In other words, terrorist acts may be perpetated against an immediate and often very innocent victim with the real intent of causing some response from, or injury to, the actual target, a sovereign state or

political system. When such violent acts emanate from a sanctuary state and liability for them can be imputed to that state, an act of aggression has been committed. The state or states which the terrorists sought to influence by their actions acquire under international law a right to engage in self-help against the responsible sanctuary state aggressor. In the case of a stateless area, the very existence of sovereign rights themselves may be in question. However, to the extent such rights do exist and have any application to an area, the same principle applies.

A right of individual or collective self-defense arises authorizing the victims of the aggression to respond with necessary and proportional measures to preclude an imminent attack or to stop an attack which is already underway. It is this fundamental right of the nation state and groups of nations to engage in self-help, usually as a matter of last resort when other remedies prove ineffective or unavailable, which provides the basis for lawful intervention into the sanctuary state or stateless area implicit in the right of extraterritorial apprehension.

Customary International Law of Self-Defense

The customary international law right of self-defense not only authorizes a state to respond to an actual attack, but also to engage in preemptive actions in anticipation of an imminent attack.[38] A state may undertake such preemptive action, referred to as "anticipatory self-defense," whether the aggression directed against it is conventional or unconventional in nature.[39] International law authorizes the use of force in individual national self-defense where a state reasonably apprehends that it will be the object of an attack by some external force or entity.

Customary international law recognizes four prerequisites to exercising the right of self-defense: (1) the existence of an imminent threat; (2) a compelling necessity to act in response to an imminent or ongoing threat; (3) the exhaustion of all practical peaceful procedures to avoid the use of force; and (4) that the force employed to counter the threat is proportionate to the threat and does not exceed that which is necessary to repel the aggression.

The principal international law authority cited for the doctrine of self-defense and, in particular, the right to anticipatory self-defense, is the celebrated Caroline case.[40] When viewed in a contemporary counterterrorism context, the circumstances in the Caroline case seem particularly timely and relevant. In that case the steamer Caroline was employed in 1837 to transport personnel and equipment from U.S. territory across the Niagara River to Canadian rebels on "Navy Island" and from there to the mainland of Canada. The U.S. Government had not prevented this assistance to the Canadian rebels who were presumably engaged in various dissident and violent acts directed against the British administration in Canada.

In the contemporary context, it would not be difficult to understand how British authorities might come to view the crew of the Caroline as engaging in "terrorist activity" with the acquiescence, if not support, of the United States. Not only was the United States the flag state for the Caroline, but it was also providing sanctuary for the crew and a source of supply for the rebels. There is no indication that the Canadian rebels were engaged in the sort of violence which typifies contemporary terrorism and to this extent there is no exact analogy to current events.

Neveretheless, the case dealt with the issue of state responsibility for the private acts of those under its control in an instance when those acts were directed against another state.

Canadian Government troops crossed the Niagara River and entered the territory of the Unites States. After killing two U.S. nationals, the troops set the Caroline adrift which resulted in its wreck on the Falls. In the ensuing diplomatic exchange, Great Britain maintained it acted as a matter of justifiable self-defense. The United States did not deny that circumstances might exist which would authorize force in self-defense. However, the United States denied the facts in this situation justified the resort to force. The diplomatic exchange terminated with the British issuing an apology but without any assumption of legal responsibility for the death of the two U.S. nationals. The absence of any reclama from the United States Government is broadly interpreted as its tacit acceptance of the permissibility of the British action in self-defense.[41]

Examined in the contemporary counterterrorism context, the British undertook action against private interests freely operating from the United States as sanctuary state. British action violated U.S. territorial integrity to the extent the Canadian forces entered the state of New York, actively engaged U.S. nationals, and destroyed a U.S. flag vessel. The British action was directed against the privately owned and crewed Caroline and not the United States Government. However, the United States Government had done nothing to restrain the Caroline crew from actions which derogated the British rights to the territorial integrity and political independence of its Canadian colony. International law provided that under these circumstances, the United States had compromised its right

to sovereignty which temporarily yielded to the British right of self-help in the form of individual self-defense.

Self-Defense Under the United Nations Charter

The concept that national sovereignty is not absolute in international law and is qualified by an individual, and more recently, a collective, right if self-defense is specifically recognized in the U.N. Charter. Article 51 of the Charter provides inter alia:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. 42

The doctrine of self-defense as recognized in Article 51 qualifies the sovereign rights of nation states guaranteed in Article 2 of the Charter. Article 51 authorizes a nation or group of nations to use force against an aggressor state or states in accordance with the customary international law of self-defense. Implicit in Article 51 is that the use of force in individual or collective self-defense may well impact on the aggressor nation's territorial integrity or political independence.

Unfortunately, Article 51 does not eliminate all the ambiguities which surround the exercise of individual or collective self-defense. It is not clear from this provision whether anticipatory measures are authorized or what may constitute an "armed attack" justifying a response. A number of publicists and, at times, the Security Council itself, have preferred a restrictive reading of Article 51. Advocates of the restrictive view, argue that Article 51 is clear and unambiguous on its face and that it does

not apply to any form of aggression other than an "armed attack."[43] One such proponent, Professor Kunz, has argued:

> ...this term means something that has taken place. Art. 51 prohibits "preventive war." The "threat of aggression" does not justify self-defense under Art. 51. Now in municipal law self-defense is justified against an actual danger, but it is sufficient that the danger is imminent. The "imminent" armed attack does not suffice under Art. 51.[44]

Advocates of the restrictive view also argue that a single isolated incident may not be sufficient to justify a self-defense response and that it is necessary to look to the totality of a series of armed attacks to confirm that a systematic campaign of aggression exists.[45] Under this restrictive view, sanctuary states engaged in the support of terrorist activities may be able to argue that selective acts originating from their borders do not constitute "armed attacks" within the meaning of Article 51. These sanctuary states may maintain that they have not committed the requisite "armed attack" against other states justifying a defensive response against them.

The advocates of a restrictive interpretation of the right of self-defense might have a persuasive argument but for the repeated failure of the United Nations as an organization to maintain international peace and security through the institutional mechanisms provided for in the Charter. With few exceptions, the Security Council as the organ responsible for maintaining peace and security has failed to meet its institutional responsibilities. During the course of Security Council meetings designed to address cases of rising tension or even open warfare betwee U.N. members, more often than not, the body is paralyzed by political disagreement among the five permanent members. If these permanent members

fail to reach a consensus, the Council is unable to order sanctions or other peacekeeping measures against the aggressor state.

The more persuasive interpretation of self-defense under Article 51 and the one which is supported by contemporary custom and usage, retains the concept of reasonable anticipatory measures and permits action without meeting specific institutional preconditions of the United Nations itself. International law authorities, McDougal, Feliciano, and Mallison, in examining the preparatory work or legislative history of the United Nations Charter, the "travaux preparatoires," indicate that the general purposes and demands projected by the parties drafting the agreement strongly favor a broad interpretation of Article 51.[46] As Professor Mallison notes:

> The formulation of Article 51 cannot be rationally construed as both preserving the "inherent" right of self-defense and simultaneously eliminating those central elements of it involving anticipatory self-defense. Since the basic community policy in maintaining at least minimum world public order is made possible by including reasonable anticipatory defense within the "inherent" right, this seems the better interpretation on policy grounds as well as consistency with the preparatory work.[47]

Consistent with this analysis, it is axiomatic in international law that treaties and other international agreements only limit the rights of parties to the extent that the parties have explicitly agreed. Since the United Nations Charter no where expressly prohibits anticipatory self-defense but instead provides in Article 51 that it shall not impair the inherent right of self-defense, a broad interpretation of the language is by far, the more persuasive.

Under this broad interpretation of Article 51, a state is fully entitled to undertake counterterrorism measures against a state which bears responsibility for the acts of terrorism staged within or from its borders. The state subject to the armed terrorist attacks is not obligated to first

seek peaceful resolution if it reasonably apprehends that preemptive measures are necessary.[48] However, consistent with the customary law of self-defense, if alternative means are reasonably available to address the threat and circumstances permit pursuing such means, the threatened state is required to invoke the less coercive measures. Whether or not preemptive measures are authorized is a question of necessity, the imminent nature of the threat, and the means available and required to address it.

Self-Defense as a Basis for Intervention

In the actual application of extraterritorial apprehension, prosecutors would first obtain a sealed indictment from a federal grand jury, or, alternatively, a warrant of arrest from a U.S. magistrate. Prosecutors would introduce sufficient evidence to establish probable cause that a crime had been committed and that the identified defendant terrorist or terrorists had committed the crime. Having met these threshold requirements, actual in personam jurisdiction over the indicted terrorist would have to be achieved through some lawful means of intervening in the stateless area or sanctuary state.

As noted, the sanctuary state would have to be shown to be directly or vicariously liable for the past actions of the terrorist or the terrorist's organization. In the case of a stateless area, where the existence of sovereign rights may be in question, the entire issue of establishing a right to intervene may be less important. Having established the direct or vicarious liability for terrorist activities of the sanctuary state, and possibly that of whatever regime may purport to be the constituted legal government for the stateless area, the right of self-defense may be

exercised as against the sanctuary state or stateless area itself. The threatening terrorist activities within the sanctuary state or stateless area give rise to the right of self-help and right to intervene through the exercise of self-defense under international law.

Extraterritorial apprehension founded upon a right of individual or collective self-defense should satisfy the four customary international law requirements for application of the doctrine. Evidence of past terrorist conduct and present capability to strike will normally satisfy the first two requirements to demonstrate that the apprehending state has a compelling need to act and in response to an imminent or ongoing threat. However, an apprehending state may not be able to satisfy these requirements if the indicted terrorist has clearly ceased his or her activities for a sustained period of time or redirected actions against other states.

In fulfilling the third customary law requirement that the endangered state exhaust all practical peaceful procedures, the apprehending state will have to be able to demonstrate that extradition or other less formal means of rendition are either unavailable or useless under the circumstances. Actively meeting this requirement will serve as a useful check against misapplication of extraterritorial apprehension to states which are actively cooperating in either bilateral or multilateral extradition treaties or conventions.

The fourth and all important requirement of self-defense is that the endangered state demonstrate that its response is proportional to the threat. Just as legal scholars have debated the scope of Article 51 with regard to anticipatory self-defense, they disagree over whether proportionality should be based upon only the immediate threat facing the

endangered state or, alternatively, whether such state may consider an "aggregation" of past illegal acts or events.[49] As noted by Gregory F. Intoccia in his evaluation of U.S. counterterrorism strategy, "...disagreement exists over whether the legality of a response is to be determined by reference to the prior illegal act which brought it about, or whether the legality of the response is to be determined by reference to the whole context of the relationship between involved parties."[50] Intoccia notes that the Security Council has formally condemned as an illegal reprisal any attempt to justify the totality of violence based upon an "accumulation of events."[51]

Experience and recent statements by senior U.S. Government officials indicates that individual self-defense as recognized in Article 51 of the Charter will generally serve as the basis for U.S. counterterrorism measures involving the use of force.[52] The requirement that such force meets the criterion of proportionality is particularly important if the United States is to avoid strident criticism from the international community. What makes extraterritorial apprehension a particularly attractive option when compared with other pro-active measures, is the relative ease with which the proportionality criterion is met.

Extraterritorial apprehension generally need not turn on an "aggregation" of past illegal acts or events. Instead, it will often result from and be based upon one or more specific acts of terrorism. These acts will form the basis for the indictment or warrant of arrest. Whether preemptive self-defense is justified will of course be related to the continuing proclivities and capabilities of the terrorist or terrorist elite element to be apprehended.

Recent United States pro-active counterterrorism measures have been based upon the right of self-defense. In his April 14, 1986 address to the nation announcing "...air and naval forces of the United States launched a series of strikes against the headquarters, terrorist facilities and military assets that support Moammar Khadafy's subversive activities...",[53] President Reagan explicitly cited the right of self-defense in justifying U.S. actions. Said the President:

> When our citizens are abused or attacked anywhere in the world on the direct orders of a hostile regime, we will respond so long as I'm in this Oval Office. Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter. We believe that this preemptive action against his terrorist installations will not only diminish Col. Khadafy's capacity to export terror, it will provide him incentives and reasons to alter his criminal behavior.[54]

In the aftermath of the air strikes, the Khadafy regime and its supportors charged that the U.S. military action was indiscriminate, resulted in unnecessary loss of civilian lives and property, and was itself an "act of state terrorism." The U.S. case in support of its action was generally considered persuasive by Western allied leaders who were made privy to classified intelligence reports linking the Khadafy regime to the La Belle Club bombing as well as planned future attacks. Nevertheless, following the relatively precise air strikes in Libya, adversaries of the United States argued that various preconditions for the exercise of the right of self-defense had not been met and that therefore the action violated international law.

Extraterritorial apprehension would certainly have far more focused objectives than direct military strikes of the type conducted in April of 1986. Its application would invariably be more selective. Presumably,

there would be little debate as to whether the apprehension was proportional to the threat, assuming the use of minimum military force in conjunction with the apprehension. The self-defense doctrinal requirement of proportionality would permit the use of sufficient force in conjunction with the apprehension to suppress terrorist and sanctuary state or stateless area forces which interfere with the operation.

Depending upon the location of the targeted terrorist leadership or operational elite and prevailing circumstances in the sanctuary state or stateless area, occasions may arise which require overt military action to suppress such resistance using naval, air, or ground forces. However, in the majority of cases, the initial phases of the extraordinary apprehension will be best achieved by the covert insertion by specially trained forces which conduct the seizure without the knowledge of either the sanctuary state or local terrorist elements. In any case, a well planned extraterritorial apprehension mission should be able to easily meet the proportionality requirement of the customary international law of self-defense. Moreover, although not a part of the proportionality requirement of self-defense, extraterritorial apprehension is far more likely than other pro-active coercive measures to be selective, minimizing collateral injury and damages sustained by innocent persons.

Application of the International Law of Human Rights

Expanding International Law of Human Rights

United States v. Reed[55] touched on the issue of human rights with the defendant arguing that his "abduction" by CIA agents breached the United

States commitment to this expanding body of international law. The court deflected the argument by noting it saw no repeated pattern of abuse by the Government. The Reed decision leaves open the issue of whether irregular renditions of any sort might be impermissible under this branch of international law and, by its incorporation into U.S. municipal law, a basis for divestiture of criminal court jurisdiction.

A number of commentators have argued that notwithstanding the Ker-Frisbie doctrine's perspective that Constitutional due process is not violated by such seizures and that only states have standing to complain of violations of their sovereignty, the defendant's fundamental human rights as now recognized by international law are violated. Since international law is incorporated into the U.S. municipal law, these commentators maintain any violation of the apprehended defendant's human rights resulting from irregular rendition is an absolute grounds for a U.S. municipal court divesting itself of jurisdiction.[56]

The expanding international law of human rights has received the full public support of the U.S. Government and its principal Western allies. Although this body of law has historical antecedents predating the nineteenth century, its nucleus emerged with the adoption of the United Nations Charter in 1945[57] and the Universal Declaration of Human Rights adopted in 1948.[58] The Charter declares that one of its purposes is to promote and encourage respect for human rights and the funndamental freedoms for all.[59] Article 55(c) states that "[t]he United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 56 mandates "all Members [to] pledge themselves to

take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[60]

Over more than 40 years these provisions have been enshrined, reinforced, and expanded upon in a variety of international human rights conventions, (e.g., the International Covenant on Civil and Political Rights[61] and the American Declaration on the Rights and Duties of Man[62]), as well as General Assembly resolutions. These conventions and resolutions have increasingly given juridical content to the Charter and the 1948 Declaration commitment to the more fundamental of these rights.[63] The International Court of Justice expressly established the existence of human rights as universally recognized legal obligations in its 1971 Advisory Opinion on Namibia (Southwest Africa).[64] Judge Fuad Ammoun of the International Court of Justice in his separate opinion on the case observed that:

> [a]lthough the affirmations of the Declaration (Universal Declaration of Human Rights) are not binding qua international convention...they can bind States on the basis of custom..., whether because they constituted a codification of customary law..., or because they have acquired the force of custom through a general practice accepted as law....[65]

Under President Carter's Administration, international human rights became a centerpiece of U.S. foreign policy.[66] One of many Congressional declarations in support of this increasingly more important element in U.S. foreign policy was adopted in Section 502B as a 1976 amendment to the Foreign Assistance Act of 1961 and provides inter alia:

> (a) (1) It is the policy of the United States, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To this end, a principal goal of the foreign policy of the United

States is to promote the increased observance of internationally recognized human rights by all countries. [67]

While the Reagan Administration redirected the focus of U.S. foreign policy to the problem of international terrorism, it did so without disavowing the U.S. commitment to human rights. In fact, many early Reagan Administration statements concerning the redirected focus of U.S. foreign policy in the 1980s addressed international terrorism as fundamentally inconsistent with the expanding commitment to universally recognized human rights.

Application of Human Rights to Extraterritorial Apprehension

Unlike the more traditional international law, the new international law of human rights creates enforceable rights in the individual and not the sovereign. Whether these rights are derived from customary international law or through multilateral convention, advocates argue with increasing authority that the rights apply to all persons, irrespective of their nationality.[68] Under the developing doctrine, the state can no longer waive fundamental human rights without in most instances disregarding its international obligations. Some states have been slow to sign or ratify the conventions. Other states may refuse the concept of human rights altogether as provided for in the conventions and even refuse to acknowledge the existence of a growing customary international law of human rights as essentially codified in the U.N. Charter and 1948 Declaration of Human Rights. Nevertheless, the relatively aggressive United States affirmation of human rights in its legislation and through its executive branch declarations over the past ten years virtually precludes it from seriously denying their application within U.S. municipal law.

Publicists maintaining that the new human rights doctrine is a challenge to irregular rendition note that Ker and a number of subsequent decisions denied the defendant the right to raise violations of sovereign treaty obligations. As noted in the Chapter II analysis of municipal law, several of the Ker-Frisbie line of decisions reasoned that only states may object to apparent violations of their sovereignty brought about by unauthorized foreign state seizures within their borders. In the absence of a protest from the asylum state, the courts have been prepared to assume acquiescence or implied consent to the seizure. But today, under the new international law of human rights, this line of reasoning may no longer be available to the well informed court.[69]

U.S. courts considering cases of extraterritorial apprehension will be asked whether the government action comports with human rights guarantees under both the U.S. Constitution and international law. Judicial review of the international human rights issue in irregular rendition cases is probably overdue. However, just as it will be absolutely necessary for courts hearing a terrorist prosecution case brought by extraterritorial apprehension to balance the rights of all interested state participants in interpreting the international law as it applies to sovereign rights and issues of self-help, so also will it be crucial to balance the human rights of all interested persons. The application of international human rights to the issue of extraterritorial apprehension will result in an excessively narrow and erroneous interpretation of international law if it examines the rights of only the international terrorist defendant without also considering the rights of the nations, institutions, and, in particular, the persons victimized by the acts of terror.

The apprehended international terrorist will see it in his or her interest to assert various human rights which appear to have received essentially universal recognition under international law. Using the Universal Declaration of Human Rights[70] as persuasive authority for, if not an actual codification of, customary international law, the apprehended terrorist may allege the seizure constitutes a violation of several provisions. The terrorist may assert that the seizure violates Article 3 which provides "Everyone has the right to life, liberty and the security of person."[71] There may be a claim that the irregular rendition violates the Article 9 guarantee -- "No one shall be subjected to arbitrary arrest, detention or exile."[72] He or she might maintain a derogation of rights under Article 12 which states:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.[73]

In taking note of the availability of these rights for the benefit of apprehended terrorists, it is important to understand that by definition, human rights have a "universal" application. They are not limited to any one class or category of individual. Whether based upon the Universal Declaration of Human Rights as a codification or authoritative statement of customary international law or some specific multilateral convention, these rights apply to all persons, regardless of nationality and status. Moreover, in applying these rights, it must be understood that they do not exist in the absence of corresponding obligations imposed on states and other persons. The rights and obligations of the state and the persons within society must be balanced through judicial and administrative

processes. Human rights cannot exist in a lawless, violence ridden environment of the type promoted by international terrorism.

As important as the doctrine of human rights may be to the political-legal system and society as a whole, it provides particularly important guarantees to the direct victims of terrorist violence. Article 3 of the Universal Declaration of Human Rights specifically states "[e]veryone has the right to life, liberty and the security of person."[74] (emphasis added) Article 8 of the Declaration provides "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[75] (emphasis added) Article 5 further provides "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[76] Any professionally competent and reasonable court of law addressing issues of fundamental human rights during the prosecution of an apprehended terrorist would be constrained to balance the defendant's rights against those of the community at large and the individual victims in particular.

Extraterritorial apprehension initiated by a probable cause finding by either a U.S. grand jury or federal magistrate and justified upon reliable facts as an appropriate self-help measure of self-defense is not ipso facto "illegal" or "arbitrary." Conducted pursuant to reasonable guidelines with the objective of providing the terrorist defendant a fair trial before a court of competent jurisdiction, extraterritorial apprehension may do much to serve the international community's interest in the advancement of human rights. A counterterrorism measure of this type affirmatively addresses the continuing derogation of human rights perpetrated by the terrorists on their innocent victims. Moreover, it does so at less human cost than might

otherwise result from the application of more coercive pro-active enforcement measures.

CHAPTER IV

CONSIDERATIONS PRIOR TO APPREHENSION

> We will act to indict, apprehend and prosecute those who commit the kind of atrocities the world has witnessed in recent weeks. 1
>
> President Ronald Reagan
> July 1985

The decision as to whether or not to adopt extraterritorial apprehension as a counterterrorism measure will also depend on an understanding of a number of key issues arising both before and after the actual apprehension occurs. In this and the following chapter, a set of political, operational, and ancillary legal issues will be examined for their possible impact on this counterterrorism measure and its implementation. This chapter examines those issues which would have their principal impact prior to the actual apprehension of the terrorist. Accordingly, these are considerations that would have to be taken into account early in the process of deciding whether to adopt such a counterterrorism measure. If the measure is to be adopted, these considerations would also have to be weighed closely throughout the planning process.

Case Formulation

Should the President adopt extraterritorial apprehension as a pro-active counterterrorism measure, it will be absolutely essential that planning and development proceed on a broad inter-agency basis. Whereas counterterrorism strategies and measures developed to date may have involved more than one department or agency of the U.S. Government, few

have encompassed the range of functions, expertise, and support that will be required to successfully achieve a program of aggressive criminal prosecution through the exercise of the right of extraterritorial apprehension.

Early planning and implementation of extraterritorial apprehension will require the cooperative efforts of the Department of Justice and various agencies within the U.S. intelligence community. While the Department of Justice has criminal and counter-intelligence collection capabilities in direct support of its normal law enforcement mission, information on international terrorist elites is more apt to originate from sources and methods not under the direction of the Department and the Federal Bureau of Investigation. Criminal prosecutors working directly for the Department of Justice or the various U.S. Attorneys Offices throughout the country are charged with the immediate responsibility of applying available intelligence and investigatory evidence to construct criminal cases against terrorists suspected of having violated federal criminal law.[2]

The Department of Justice has had considerable experience in prosecuting cases of so-called "domestic terrorism" occurring within the United States. With the adoption of the 1984 Comprehensive Crime Control Act[3] and the increased interest in applying other federal criminal law with extraterritorial reach to terrorists located beyond U.S. borders, the Department of Justice has begun to aggressively use its law enforcement capability against international terrorism. A number of the Department's U.S. Attorneys are now engaged in a concerted effort to reach and prosecute international terrorists located beyond U.S. borders, particularly where the acts of terrorism have been directed against the United States and its

nationals. The procedures applied in criminal cases recently developed against international terrorists could well be employed in connection with extraterritorial apprehension. The appropriate U.S. Attorney's Office in conjunction with the Department of Justice reviews available intelligence and investigatory evidence to ascertain whether sufficient admissible, relevant, and credible evidence exists on each and every element of one or more criminal counts. If prosecutors determine that the evidence is sufficient to support a minimally sufficient legal case, i.e., the prima facie case, the U.S. Attorney or his designated assistant seeks a criminal indictment or arrest warrant against the suspect international terrorist.

The Fifth Amendment to the U.S. Constitution provides that "no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury."[4] The actual exercise of this right is accomplished in the federal criminal justice system by an assistant U. S. attorney presenting evidence regarding one or more crimes to a grand jury of from twelve to twenty-three persons. Grand juries are empaneled, supervised, and instructed by a U.S. district court judge. Grand juries can, and frequently do, operate in secret and may be instructed by the supervising district court to maintain strict confidence regarding all proceedings, witnesses, and actions taken. If twelve or more members find that the evidence presented by the federal prosecutor constitutes probable cause to believe that a crime has been committed and that the named suspect committed the crime, they vote to indict. Alternatively, if the grand jury believes the evidence does not support a single count, they vote a "no true bill."

If the offense to be charged is a misdemeanor, the federal prosecutor may seek to have a U.S. magistrate issue an "information." U.S. magistrates are also authorized to issue "warrants of arrest" for misdemeanors and felonies. In either case, the U.S. magistrate, like the grand jury, is required to find "probable cause" as a basis for his or her actions. Some or all of these procedural actions may be held in confidence by the district court or its magistrates ordering proceedings and documents "sealed" under court order.

These standard preliminary procedures have been applied in various combinations in several efforts to prosecute international terrorists under U.S. federal law. In most, if not all, of these cases, U.S. prosecutors have sought sealed indictments or arrest warrants to avoid alerting terrorist suspects in advance and to preclude release of sensitive information. In response to the October 1985 hijacking of the Italian flag cruise ship Achille Lauro and murder of U.S. national passenger Leon Klinghoffer, the U.S. Attorney for the District of Columbia acted with extraordinary speed to formulate a case sufficient to support a request to Italian authorities for the provisional arrest of alleged mastermind Mohammed Abul Abbas Zaiden (Abul Abbas) and his Palestine Liberation Front (P.L.F.) accomplices.[5]

On Friday, October 11, 1985, an assistant U.S. attorney for the District of Columbia presented a U.S. magistrate with sufficient evidence to establish probable cause that a warrant should be issued for the arrest of Abbas and charging him with a violation of 18 U.S.C. 1203, hostage-taking, as well as piracy and conspiracy to commit both offenses.[6] Unfortunately, the Italian Government took the position that the U.S.

evidence concerning Abul Abbas and a second P.L.F. "representative" was insufficient to support a request for provisional arrest pending their extradition under the International Convention Against the Taking of Hostages.[7]

Most significant about the Achille Lauro case is the manner in which the terrorists were actually apprehended and the extraordinarily effective inter-agency coordination achieved within the U.S. Government in a matter of just hours. Overall coordination and direction of the U.S. reaction was the responsibility of the National Security Council staff. However, individual departments not accustomed to routinely working with one another were suddenly thrust into executing a complex counterterrorism law enforcement action. The Department of Justice and the U.S. Attorney for the District of Columbia formulated at least a preliminary theory of prosecution and marshaled sufficient evidence to make a showing of probable cause to a U.S. magistrate. Political and diplomatic considerations, particularly those involving the Italian Government, were addressed by the Department of State. Necessary intelligence collection and the actions to intercept, divert, and escort the Egypt-Air Boeing 737 with the six P.L.F. terrorists embarked to Sigonella Naval Base in Sicily using U.S. Navy F-14s were clearly the responsibility of the Department of Defense, the Joint Chiefs of Staff, and subordinate operational commanders.[8]

As the opportunity arose to apprehend the hijackers, cognizant officials from each of these principal departments coordinated personally with members of the NSC staff and one another to ensure that all necessary technical experience and expertise were brought to bear on the problem. Although it was Italian authorities who ultimately secured in personam

jurisdiction over the four hijackers, the U.S. Government demonstrated an impressive capacity to plan and execute a complex counterterrorism law enforcement operation with little or no prior warning. It is particularly worth noting that notwithstanding the coerced diversion of the Egypt-Air 737 over international waters, the Italian court has shown no inclination to divest itself of jurisdiction due to concerns with "irregular rendition."[9]

The Department of Justice has also sought and obtained arrest warrants for three men believed to have originally hijacked the T.W.A. Flight 847 in June 1985.[10] These hijackers tortured and murdered U.S. Navy Petty Officer Robert Dean Stethem. The hijackers also committed numerous other acts of brutality and theft against the remaining passengers and crew. Other cases reportedly under investigation and development by the Department of Justice relate to the abduction of six Americans missing in Beirut, the infamous Abu Nidal terrorists allegedly responsible for the December 1985 Rome and Vienna airport massacres, and terrorists suspected of perpetrating the bombings in 1983 of the U.S. Embassies in Beirut and Kuwait as well as of the Marine garrison at Beirut International Airport.[11] The details of Department of Justice efforts on these and other cases remain classified. Any indictments or warrants are sealed. But it appears that the process of case formulation, investigation, location of the criminal defendants, and an evaluation of extradition opportunities is well underway. What remains, is to find a means of securing jurisdiction over a named defendant in those instances where extradition is not available.

The Congressional Role

The separation of powers provided for in the U.S. Constitution encourages competition and even conflict among the branches of government. The potential for competition and conflict is often the greatest in "twilight zones" where the Constitution is vague or even silent as to which branch has primary responsibility for a particular function. The problems associated with developing an effective counterterrorism policy and strategy often arise within such twilight zones. What must be remembered in analyzing counterterrorism policy and strategy in general, and perhaps extraterritorial apprehension as a measure in particular, is that substantial interests as well as authority exist in all branches of government. The better the interests, responsibilities, and authority of the branches are understood, the better will be the policy and strategy produced and administered by them.

Congressional interests, responsibilities, and authority as related to counterterrorism are largely a function of the powers provided in section 8, Article 1 of the Constitution. Among the other enumerated powers, the Congress is charged:

. . . .

> 10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.
> 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
> 12. To raise and support armies...
> 13. To provide and maintain a navy.
> 14. To make rules for the government and regulation of the land and naval forces.
>
> . . . .
>
> 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers

vested by this constitution in the Government of the United States, or any department or officer thereof. 12

These and other powers of the Congress provide it an important role in the development, if not planning and execution, of extraterritorial apprehension as a counterterrorism measure. It is the Congress which possesses the power to declare crimes under its clause 10 mandate to define the specified offenses. The enumerated provisions related to the raising and regulation of the U.S. Armed Forces also require a level of Congressional oversight. Its power to declare war and "make rules concerning captures on land and water" may be a curiously relevant, if obtuse, reference to concepts such as extraterritorial apprehension. Powers such as these coupled with the exclusive Congressional powers of authorization and appropriation of revenue make it a key participant in counterterrorism policy and strategy development.

To understand the precise role of the Congress in the immmediate case, it is necessary to inquire as to the means the legislative branch has used to regulate and monitor the actions of the executive branch. Strategy planners must ask whether it is necessary to seek Congressional authorization to engage in extraterritorial apprehension. Does a requirement exist to consult with or notify the Congress if military forces are to be used in an extraterritorial apprehension? Even if military forces are not employed, are there other requirements imposing a duty to consult or notify the Congress either before or after the apprehension? If so, with whom and when should the notification or consultation occur? What are the political and operational costs and benefits to various methods of communication or other relationships between the branches? These and other issues must be

addressed in developing any counterterrorism strategy option and may be particularly important in the case of extraterritorial apprehension.

The War Powers Resolution

In the event that an extraterritorial apprehension is conducted using U.S. military forces, whether in a direct or major supporting role, the operation may be subject to the War Powers Resolution.[13] The War Powers Resolution (WPR), adopted over the vigorous opposition and veto of President Nixon, became law in 1973 with the expressed purpose "...to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities..."[14] Key provisions of the WPR which may apply to extraterritorial apprehension are contained in sections 2 through 4 of the Resolution.

Section 2 ("Purpose and Policy") provides that the President can "introduce the Unites States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances:"[15] (1) following a declaration of war; (2) pursuant to specific statutory authorization; or (3) in a national emergency caused by an attack on American territory or armed forces. While this section provides a congressional definition of the limits of executive war powers effectively advising the President of the political risks of ignoring the Resolution, it is probably little more than what Senator Eagleton once described as a "pious pronouncement of nothing."[16]

Section 3 ("Consultation") and section 4 ("Reporting") establish the procedures which the President must follow whenever U.S. Armed Forces engage in "non-routine" activities, ranging from involvement in hostilities to a significant build-up of forces in a foreign country. Section 3 provides that the President "in every possible instance consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."[17] Section 4 requires the President to report to Congress whenever the Armed Forces are introduced into hostilities, introduced into the territory of a foreign nation while equipped for combat, or significantly built up in a foreign nation.[18] Under this provision, the President is to report on the circumstances that require the action, the estimated scope and duration of the action, and his authority for ordering the action, e.g., statute, resolution, the President's inherent authority as Commander-in-Chief under the Constitution, or some other authority.

Legal interpretations of each of these sections vary widely. Proponents of limiting the President's war-making powers argue that the Executive may only introduce U.S. Armed Forces pursuant to Congressional action or a "national emergency" narrowly defined as a direct attack upon the United States, its territories, possessions, or armed forces. These proponents further tend to emphasize the President's obligation to consult in every possible instance before the introduction of U.S. Armed Forces.

Advocates of broad executive power in foreign and military affairs maintain that the President retains substantial Constitutional authority as Commander-in-Chief. These advocates disagree with the proponents of limited executive power on the issue of the constitutionality of the

Resolution and precisely what sorts of military actions should give rise to its being invoked. There is also disagreement over what constitutes "consultation"--merely informing or something more akin to seeking consent. Still further controversy arises over the issue of when, in the military planning and execution process, consultation should occur. Moreover, since the Resolution is silent on the details of the consultation, no one is certain as to precisely who in the Congress is to be consulted.

At first glance, sections 2 through 4 might appear to have automatic application to any introduction of U.S. Armed Forces into situations where imminent involvement in hostilities is indicated. This might often be the case if military forces were to be used in conducting an extraterritorial apprehension in a sanctuary state or even a stateless area like Lebanon where heavily armed militias are present. However, proponents of broad executive discretion argue that the phrase in section 3, "in every possible instance." (emphasis added) implies that there may be instances in which it is not possible to consult before ordering the introduction of forces.[19]

Section 4 requiring the President to report whenever he introduces U.S. forces "into hostilities" or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; into the territory, airspace or waters of a foreign nation, while equipped for combat..." was not drafted with counterterrorism operations in mind. The legislative history of this and other provisions of the WPR indicate the Resolution was intended to address the problem of conventional or even substantial nonconventional intervention which has characterized the post World War II and Vietnam experiences. The concept of a precise use of

military forces to facilitate a counterterrorism law enforcement objective was not contemplated by Congress when it adopted the WPR.

Since the legislative history does not contemplate pro-active counterterrorist actions, a strong argument exists that the WPR has little, if any, application in instances where military forces may be used to conduct or support an extraterritorial apprehension of international terrorists. It may be argued that the major objective of extraterritorial apprehension would be to avoid broader scale hostilities between the United States and the sanctuary state which could result if the targeted leadership or operational elites of the terrorist organizations were not apprehended. In other words, such preemptive action by the Executive would actually work toward the reduction of tensions and serve to reduce the possibility of having to introduce U.S. Armed Forces in a conventional or major unconventional warfare role. As for the requirement that the President consult before forces are introduced, the Executive could maintain, as has occurred in other military operations, that the constraints of time and secrecy coupled with difficulties in arranging extensive consultations with enough key members of Congress, militates against anything but the most limited dialogue.[20]

In practice, the Resolution has been invoked and applied in a number of different manners depending upon the circumstances and prevailing attitude within the particular Administration toward the Congress. President Ford reported that he had ordered U.S. military forces to rescue the crew and retake the Mayaguez after it had been seized in the Gulf of Thailand by Cambodians in 1975. His report cited section 4(a)(1) of the Resolution covering the introduction of forces into hostilities, but gave

as authority for his actions, the power of the Excutive and the authority of the President as Commander-in-Chief.[21] President Carter reported on the Iranian hostage rescue operation on April 26, 1980, two days after the unsuccessful attempt had been mounted. Carter's action could clearly be construed as a counterterrorism measure aimed at Iranian state supported terror. The President stated in his report to the Congress that the operation was ordered and conducted under the President's Constitutional powers as Chief Executive and Commander-in-Chief of the U.S. Armed Forces, expressly recognized in section 8(d)(1) of the War Powers Resolution.[22]

More recently, at about 4 p.m. on the afternoon of April 14, 1986, within approximately three hours of U.S. warplanes reaching their targets, President Reagan consulted with key Congressional leaders regarding his planned preemptive action against terrorist infrastructure and supporting military installations in Libya.[23] On this occasion, the White House indicated that while there was little time between the consultation and the initiation of the strikes, the warplanes could have been called back if strenuous opposition had been voiced by those members consulted.[24] The pattern which seems to have evolved since 1973 suggests an executive branch policy of avoiding confrontation with the Congress but which at the same time makes no specific concession as to the applicability or even the overall Constitutionality of the Resolution.[25] It seems likely that this general policy will continue and may very well have an impact on whether and how there is to be WPR consultation in the case of an extraterritorial apprehension which employs U.S. Armed Forces.

In the event U.S. Armed Forces are used to conduct or otherwise support extraterritorial apprehension, there may be strong Congressional

pressure to apply the Resolution. Although the Resolution is silent on who is to be consulted within the Congress and when, past practice seems to suggest that the Executive is not required to consult well in advance or with more than a limited number of members. If the Iranian hostage rescue mission is an appropriate precedent for highly sensitive pro-active counterterrorism measures, it may be acceptable to consult after-the-fact. But to completely avoid consultation altogether where U.S. Armed Forces are engaged in even a limited armed intervention of a sanctuary state or stateless area where resistance may be expected, will raise serious political, if not legal, challenges to the Executive's action.

It may very well be that the Executive could prevail in a legal challenge as to the Constitutionality or intentional nonapplication of the WPR. Nothing in the legislative history or on the face of the Resolution itself requires consultation when deploying the U.S. Armed Forces in support of a pro-active counterterrorism measure, particularly one in which enforcement is the principal objective. However, the broader issue at stake is developing and maintaining an essential spirit of mutual support and cooperation between the legislative and executive branches of government.

Despite the difficulties related to its application, the experience since 1973 demonstrates that the Executive benefits from widespread Congressional support which usually results from legislative involvement either before or concurrent with the commitment of the U.S. Armed Forces. Even though the argument may be made that the Resolution need not apply to the use of U.S. Armed Forces in the case of limited counterterrorism measures, the Executive should carefully weigh the overall constitutional

if not political interests, responsibilities, and authority of the Congress before choosing to ignore it. Overall, it would seem the political benefits which would stem from a partnership between the branches in this area, strongly militates in favor of a dialogue of some type, whether by means of the WPR or some other vehicle.

Intelligence Oversight

With respect to covert actions by the U.S. Government, the Congress has sought to legislate its relationship with the Executive through the adoption of the Intelligence Oversight Act of 1980[26] and various related provisions in the intelligence authorization acts adopted for particular fiscal years.[27] The Intelligence Oversight Act of 1980 was adopted as part of the Intelligence Authorization Act for Fiscal Year 1981 and was codified as Title V of the National Security Act of 1947.[28] The 1980 Act requires that the Director of Central Intelligence (DCI) as well as heads of departments, agencies, and other entities in the U.S. Government involved in intelligence activities keep the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives "fully and currently informed of all intelligence activities" including "any significant anticipated intelligence activity." The latter term is specifically defined by way of an amendment to the Hughes-Ryan Amendment[29] to include all CIA covert action operations. Prior to 1980, the law required that eight separate committees of the Congress be notified of such operations.[30]

Section 413(a)(1) of the Act specifically provides that the provision to fully inform of all intelligence activities shall not require the

President to seek approval of the committees prior to initiation of any anticipated intelligence activity, if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States. When such a Presidential determination is made, notice of the significant anticipated intelligence activity is to be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and the minority leader of the House of Representatives, and the majority and minority leaders of the Senate.[31]

The 1980 Act also contains provisions which protect the Executive's discretion with regard to intelligence operations. The initial proviso to section 413(a) provides that the reporting obligations in this subsection exist only

> ...to the extent consistent with all aplicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information related to intelligence sources and methods...[32]

Under this provision, the Executive has some basis for withholding information from the Congress entirely, when to do so is within his constitutional powers or disclosure to the Congress would unacceptably increase the risks of unauthorized disclosure. But there are definite limits on the Executive's discretion to withhold information. Section 413(e) of the Act contains a clear limitation in its proviso on legislative construction:

> Nothing in this chapter shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods.[33]

Notwithstanding this limitation on Executive discretion, the preambular language of section 413(a) is still regarded as a solid basis for the Executive to withhold prior notice of a covert action from the Congress. This interpretation is supported by section 413(b) of the Act which expressly authorizes the President to inform the intelligence committees in a timely fashion of covert actions for which prior notice was not given. In such instance, section 413(b) requires the President to provide a statement of the reasons for not providing such notice.[34]

Even with the Intelligence Oversight Act and other provisions of the law contained in the annual intelligence authorization acts, various ambiguities continue to exist regarding the relative responsibilities of the legislative and executive branches in the area of covert operations. The President's substantial national security and foreign affairs powers arise from his Article II Constitutional grant of authority as national "Commander-in-Chief" and as the executive officer charged with making of treaties and providing for the appointment of ambassadors. The Supreme Court in United States v. Nixon[35] and United States v. Reynolds[36] specifically recognized that the President's substantial Constitutional authority was broad enough to permit withholding certain limited categories of sensitive information from the Congress.

The Congress can just as legitimately cite its various Article I powers as a basis for its maintaining a reasonable level of oversight over the covert activities of the intelligence agencies. While the Executive may resist or attempt to constrain Congressional efforts to force consultation or some form of notification of significant covert actions, the realities of shared government power and legislative control over

appropriations argues strongly for the development of a partnership between the branches if policy and strategy are to be effectively developed and carried out.

A number of potential issues arise in attempting to apply the Intelligence Oversight Act of 1980 to extraterritorial apprehension. If the CIA is designated to actively participate in an extraterritorial apprehension, the Hughes-Ryan Amendment[37] will require that the President find that such an operation is important to the national security of the United States.[38] Once the President so determines and authorizes CIA involvement beyond a mere intelligence gathering role, he is mandated under Hughes-Ryan to treat the involvement as a "significant anticipated intelligence activity" for purposes of section 413 or Title 50. The activity must then be reported under the Intelligence Oversight Act, unless the Executive maintains his constitutional prerogative to withhold notice from the Congress. In the event the Executive elects to withhold notice he will have to provide the required statement describing the authority under which he does so or be prepared to face political and legal challenges if the activity is discovered by the Congress. It is very likely that CIA involvement in an extraterritorial apprehension would eventually become public.

It is doubtful the Congressional intelligence committees would long accept an Executive plan in which they receive notice of extraterritorial apprehension after-the-fact. If troublesome political controversy arises over the extraterritorial apprehension as a result of Congressional irritation with ex post facto reporting, an unnecessary constraint would be placed on the future application of the measure by executive branch decision-makers wishing to avoid unnecessary conflict with the Congress.[39]

Considerable disagreement may also arise regarding what constitutes reportable "intelligence activities" or "intelligence operations in foreign countries" under the Act. Is an extraterritorial apprehension in a stateless area or a sanctuary state an "intelligence activity?" Is it an "intelligence activity in a foreign country when the apprehension is conducted in a stateless area? Could the Executive argue that if no intelligence operatives are involved and if the mission is clearly in support of the law enforcement functions of the Government, it does not fall under the Intelligence Oversight Act reporting requirements? There is no indication in the legislative history that the Congress contemplated pro-active counterterrorism measures in establishing the intelligence oversight system. Certainly extraterritorial apprehension was not considered when Congress established the oversight procedures for the intelligence agencies. Neither the Act itself nor its legislative history provide clear answers to the many questions surrounding application of the Intelligence Oversight Act to counterterrorism measures like extraterritorial apprehension.

There is also the issue of whether, and under what circumstances, special warfare or other unique unconventional military operations become reportable under the Intelligence Oversight Act. Although Hughes-Ryan appears to automatically require notification of most operations in which the CIA has an active role, no such requirement is legislatively imposed on other departments or agencies. An important consideration in developing and planning a counterterrorism measure which could be construed as an "intelligence activity" or "intelligence operation" and which may be carried out by a department or agency other than the CIA, is whether the

Congress may elect to explicitly expand its oversight authority to activities not previously subject to its review.[40] Congressional action to legislate oversight over departments and activities not previously subject to legislative monitoring could represent a significant political cost for the executive branch. The mere possibility of incurring such a cost militates in favor of the Executive developing at least an informal understanding with the Congress with regard to the areas of ambiguity in intelligence oversight reporting of extraterritorial apprehension missions.

Reconciling Executive and Legislative Roles

As is clear from even a cursory review of the War Powers Resolution and the Intelligence Oversight Act of 1980, there remains substantial ambiguity regarding the authority and responsibilities of the two branches in the area of pro-active counterterrorism measures. This ambiguity has the clear potential for giving rise to divisive political and legal disputes between the two branches. Such disputes, should they occur, will only serve to undermine the chances of developing an effective, broad-based counterterrorism policy and strategy.

Citing the danger inherent in the Congress and Executive not working cooperatively with regard to war powers and intelligence oversight, Senator Durenberger recently made these remarks to the John Hopkins School of Advanced International Studies:

> My problem with the War Powers and Intelligence Oversight frameworks is that they will more often operate to inhibit rather than encourage...consultation, because of the intricate legal [gamemanship] that inevitably results.
>
> The executive branch spends its time figuring out whether and how a particular activity fits into either framework, when we might be conducting a more <u>meaningful</u> exchange of ideas on the

> wisdom of underlying basic policy, or even the advisability of a particular operation as a whole.
>
> This is not a theoretical problem. It exists today. In the view of the Administration, notification of Congress is tantamount to public disclosure. Therefore, in shaping the options available to counter a terrorist threat, planners in the executive department limit their consideration to actions which do not fall under the War Powers Act. What may be the most effective course of action from the military or political point of view may be rejected because of the current requirements for notification.
>
> In short, the Administration may prefer to do the wrong thing in secret, rather than doing the right thing with congressional knowledge.
>
> The system has truly been stood on its head -- and the effect could be disastrous. 41

In developing a counterterrorism option of extraterritorial apprehension, the benefits to be derived from a meaningful partnership with the Congress far outweigh the costs. The implementation of the partnership may be based on the nonspecific War Powers Resolution system in which the Executive typically elects to consult with key membes of the congressional leadership. Alternatively, such a partnership could be based upon the existing intelligence oversight system. The latter system offers the substantial advantages of being permanently in place, tested, and able to maintain operational security. The recipients of the information for the Congress are limited in number and may be granted appropriate security clearances.

In April of 1986, Senate Majority Leader Robert Dole joined other Senators in introducing legislation which would grant the President expanded powers to respond to terrorist acts. The legislative proposal exempts counterterrorist actions conducted by military forces from the constraints of the War Powers Resolution.[42] Extraterritorial apprehension

as a "counterterrorism action" would fall squarely within the purview of this proposed legislation. The bill eliminates any requirement for advance consultation with the Congress and authorizes both preemptive and punitive strikes in response to terrorist threats from abroad. Other provisions in the proposed legislation require the President to report the results of actions taken under this Congressional "authorization."[43] If this legislative proposal is adopted in one form or another, it will serve as the foundation for the Executive's partnership with the Congress in implementing a counterterrorism measure of extraterritorial apprehension.

Specific Limitations on Planning and Execution

Apart from the constraints imposed by the War Powers reporting and intelligence oversight requirements, a number of specific organizational and functional limitations could impact upon the development of extraterritorial apprehension as a counterterrorism measure. No exhaustive list of such limitations can be provided in the absence of highly specific apprehension scenarios. Nevertheless, a number of limitations can be identified which are likely to have a general impact on a range of possible scenarios. Since such limitations may influence the preparation of operational plans and organizational structures, it is useful to include them among the considerations to be reviewed.

Executive Order 12333

Executive Order 12333 of December 4, 1981 establishes an executive branch intelligence oversight and accountability structure. The Order specifies the jurisdictional responsibilities of the intelligence agencies

as well as certain substantive rules and limitations governing the conduct of their activities. The substantive rules are of general applicability with detailed implementation left to regulations ("procedures") promulgated by the head of each intelligence agency. Such regulations are subject to review by the U.S. Attorney General.

The involvement of the Department of Justice in the elaboration of these rules was so extensive during the Ford and Carter Administrations, that under the latter, it was necessary to create a separate office within the Justice Department known as the Office of Intelligence Policy and Review.[44] This office reviews agency regulations and procedures and approves applications submitted by the agencies made to the Foreign Intelligence Surveillance Court established under the Foreign Intelligence Surveillance Act.[45]

Executive branch oversight is further developed under E.O. 12334 signed December 4, 1981.[46] This order reestablishes the President's Intelligence Oversight Board (PIOB). The PIOB consists of three members who are charged to safeguard the lawfulness of activities of the various intelligence agencies. Board members are to be distinguished citizens from outside the Government. They are required to inform the President of intelligence activities which any member believes are in violation of the Constitution or laws of the United States. The PIOB is also required to perform a variety of oversight functions including reviewing practices and procedures of the inspectors general and general counsels of the intelligence community to ensure that the intelligence system maintains a check on its own actions. It may be appropriate for the PIOB to review the

legality of extraterritorial apprehension in support of any NSC study of this counterterrorism strategy option.

Additional executive branch oversight results from review procedures within the departments and agencies themselves. One of the principal purposes of these internal agency procedures is to ensure sensitive activities are reviewed and approved by senior agency officials. The general counsel for each of the agencies, or, in the case of the military departments, their respective Judge Advocates General, are given substantial responsibilities along with senior deputies to ensure oversight and proper implementation of E.O. 12333.[47] Depending upon which departments and agencies may be charged with conducting an extraterritorial apprehension, these internal procedures will be brought to bear to review not only the lawfulness of the proposed operational plan, but also its overall value from a policy and operational perspective.

Under Executive Order 12333, covert actions are euphemistically designated as "special activities" and are defined as:

> Activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.[48]

If a proposed "special activity" fits within this definition, it is subjected to the E.O. 12333 executive review procedures by the proposing agency which forwards it to the NSC staff for presentation to the NSC principals themselves. It is not at all clear that extraterritorial apprehension would constitute a "special activity" as defined in the Order. Although planning for a specific extraterritorial apprehension would be

highly classified to ensure the success of the operation and safety of the apprehending force, it would not be actively "planned and executed so that the role of the United States Government is not apparent or acknowledged publicly." Moreover, the very operation itself could be viewed as intended, at least in part, "...to influence the political processes, public opinion, policies, and media..." within the United States.

Once again, it is not completely clear whether an existing management and oversight system applies to the proposed counterterrorism measure of extraterritorial apprehension. In any case, operations mounted in support of a publicly acknowledged apprehension may have to remain covert and unacknowledged. At minimum, such supporting operations would be subject to the E.O. 12333 and internal agency review and determination processes.

Best known of the substantive rules contained in E.O. 12333 is the prohibition on engaging in "assassination" or participating in or requesting others to do so. This provision could be publicly or secretly canceled or selectively suspended as has been openly proposed in the media and even in pending legislation.[49] However, most extraterritorial apprehension scenarios would not include such "direct action" as an objective. Measures to apply on-scene force during the apprehension phase would be mounted for the express purpose of providing for the self-defense of those conducting the seizure and would appear to fall well outside the purview of the Order's prohibition on assassination.

Limitations on Performing Law Enforcement Functions

The CIA is precluded by the National Security Act of 1947 from exercising any "police, subpoena, [or] law enforcement powers."[50] However,

E.O. 12333 does authorize intelligence agencies to provide assistance to law enforcement authorities:

> Para. 2.6. Assistance to Law Enforcement Authorities. Agencies within the Intelligence Community are authorized to:
>
> . . . .
>
> (b) Unless otherwise precluded by law or this Order, participate in law enforcement activities to investigate or prevent intelligence activities by foreign powers, or international terrorists or narcotics;
>
> . . . .
>
> (d) Render any other assistance and cooperation to law enforcement authorities not precluded by applicable law. [51]

This paragraph appears to authorize the CIA to assist the Department of Justice in the apprehension of suspected terrorists on foreign soil. There may be some question as to whether CIA involvement in an extraterritorial apprehension would constitute a direct exercise of law enforcement powers prohibited under the National Security Act of 1947 itself. There may also be a question as to whether the Agency would be acting pursuant to a valid request for assistance and delegation of authority from the Department of Justice. A defense counsel representing an apprehended terrorist will almost certainly argue that any role the CIA plays in the apprehension represents more than mere "assistance" and is instead a direct assertion of law enforcement authority prohibited under the 1947 Act.

In United States v. Reed [52] discussed in Chapter II of this study, CIA agents operated in the Bahamas in apparent support of the FBI. The issue of the Agency's authority to provide such support was not seriously challenged or litigated on appeal. It appears likely that if planners ensure that the apprehension is documented as pursuant to the express request of the U.S. Attorney General and at the direction of the President,

any defense challenge asserting a bar to the CIA's authority is bound to fail. It is likely that U.S. courts would view the 1947 National Security Act prohibition as one designed to preclude the CIA from acting on its own initiative and as an independent law enforcement arm of the Government. They are unlikely to rule that CIA involvement is a violation of the Act when it is performed on a case specific basis, at the express request of the chief U.S. law enforcement officer, and subject to the close direction of the President.

The Posse Comitatus Act prohibits military departments from participating in law enforcement activities, except as specifically authorized by the Constitution and the laws of the United States.[53] The Act does not have general application outside the United States and moreover, exceptions can be granted by the U.S. Attorney General. Amendments adopted by the Congress in 1981 were designed to authorize the use of the military in support of the U.S. Coast Guard and other civilian law enforcement agencies engaged in the interdiction of both international and domestic drug smuggling.[54] The Posse Comitatus Act does not preclude the use of the U.S. Armed Forces in extraterritorial apprehension. There is no indication that the Act in any way inhibited U.S. Navy participation in the interception and diversion of the Egypt-Air 737 in the Achille Lauro case, a clear instance of direct support for a law enforcement function.

In United States v. Cotten,[55] the defendants were seized and forcibly removed from South Vietnam to Hawaii at the direction of U.S. Government personnel. In addition to charging their Constitutional rights were violated, the defendants objected to the use of U.S. Air Force aircraft and personnel to forcibly return them to the United States, asserting a

violation of 18 U.S.C. 1385. This code provision provides that whoever willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws violates Federal law. The court dismissed the defendants' claim noting that the remedy for the conduct complained of, if any remedy even existed, was not divestiture of jurisdiction by the court.

To ensure the Posse Comitatus Act is not an issue either overseas or upon return to U.S. territory, planners should ensure that military units act at the express request of and under the authorization of the U.S. Attorney General. Legal challenges which have resulted from the U.S. Navy's support of the Coast Guard in its drug interdiction operations, demonstrate the extreme importance of having such requests and authorizations well documented in advance. Operational orders should reflect any waivers to the Act so that on-scene commanders understand they are acting with proper authority and in support of a law enforcement function. Applicable Department of Defense and military department instructions which regulate the provision of assistance to civilian law enforcement agencies should be carefully followed to assist U.S. federal prosecutors in easily defeating defense objections based on alleged violation of the Posse Comitatus Act.

International Reaction to Extraterritorial Apprehension

Presenting the U.S. Position

A major consideration for the U.S. Government in evaluating extraterritorial apprehension as a counterterrorism strategy is the reaction of the international community at large and the Western allies in particular.

U.S. economic and military actions taken against Libya in 1985 and 1986 clearly demonstrate a willingness to undertake unilateral action and, when necessary, to take the lead in combatting terrorism. Nevertheless, there is a clear recognition of the need for international cooperation in addressing the problem. While the Western Summit Conference in Tokyo in May of 1986 recognized the right of nations to take unilateral actions, the meeting as a whole emphasized the need for greater international cooperation.[56]

Western leaders at the Tokyo summit meeting reportedly discussed a range of counterterrorism options including improved international law enforcement through greater use of extradition.[57] There was no indication that extraterritorial apprehension or any form of irregular rendition were discussed. Consistent with the U.S. commitment to improved cooperation with the allies in combatting terrorism, it would seem advisable to quietly but firmly inform them of any U.S. intention to exercise extraterritorial apprehension as a counterterrorism measure. During the course of consulting with the allies on this subject, the legal and policy reasoning in support of extraterritorial apprehension should be thoroughly explained. U.S. representatives should note that the municipal courts in many nations including the United Kingdom, Belgium, Canada, France, and Israel among others, have ruled to retain jurisdiction of offenders notwithstanding their irregular rendition.[58]

The United States should emphasize that it is exercising jurisdiction on a very selective basis in an application of the protective principle of jurisdiction and basing its limited intervention on what it considers to be a serious, continuing, and imminent threat to its vital or major national

interests. During these consultations, the point should be made that extraterritorial apprehension will be directed against the international terrorist leadership and operational elites operating in stateless areas and sanctuary states where there appears to be little or no hope of gaining good faith prosecution or extradition. The purpose of these allied consultations would be to gain multilateral support in the aftermath of an actual extraterritorial apprehension, or, at minimum, quiet acquiescence to unilateral U.S. action.

U.S. spokesmen should be prepard to make substantially the same legal and policy case to the world community following the first actual apprehension. While the official reaction from nonaligned states and the Socialist bloc countries will probably be negative, the United States must nevertheless make its case with clarity and conviction. The following should be emphasized: that the United States acts as a matter of self-help out of its right to individual self-defense, that its action is directed against only those states and stateless areas which harbor or support terrorists and frustrate accepted procedures for prosecuting or extraditing those who threaten international peace and security, and that the action is undertaken with the objective of avoiding more forceful measures which would also have been justified under the circumstances. The latter point may prove the most persuasive when making the political and legal case to both the nonaligned and Socialist bloc states. In general, these states might be expected to prefer the least coercive counterterrorism response and may see it in their interest to reluctantly accept this option as the "lesser of the evils" under the circumstances.

U.N. Resolutions as Source of Support

Recent United Nations resolutions in both the Security Council and General Assembly provide added impetus to the political, if not legal, case in support of pro-active counterterrorism measures. While these resolutions do not constitute international law *per se*, they provide evidence of a growing political consensus among the 159 U.N. members that state sponsored terrorism is contrary to the principles and objectives of the world organization. On December 19, 1983, the General Assembly denounced terrorism and called on all states

> to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organized activities within their territory directly toward the commission of such acts. 59

On December 9, 1985, the General Assembly approved an even stronger condemnation of terrorism in resolution 40/61 which declares *inter alia* that it:

. . . .

> 8. *Further urges* all States to co-operate with one another more closely, especially through the exchange of relevant information concerning the prevention and combatting of terrorism, apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists. 60

Just nine days later, on December 18, the Security Council adopted a resolution sponsored by the United States, Britain, France, Australia, Denmark, Egypt, and Peru which focused on incidents of hostage-taking and terrorist abduction. In addition to "condemning all acts of terrorism, including hostage-taking" and recalling the General Assembly Resolution 40/61

adopted earlier in the month, Resolution 579 provides that the Security Council:

> 4. Appeals to all States that have not yet done so to consider the possibility of becoming parties to the International Convention against the Taking of Hostages adopted on 17 December 1979, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents adopted on 14 December 1973, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation adopted on 23 September 1971, the Convention for the Suppression of Unlawful Seizure of Aircraft adopted on 16 December 1970, and other relevant conventions;
>
> 5. Urges the further development of international co-operation among states in devising and adopting effective measures which are in accordance with the rules of internatiional law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism. 61

Resolution 579 with these provisions was adopted by all fifteen members of the Security Council without debate. Although the "effective measures" called for by this Resolution are certainly not intended to include extraterritorial apprehension, the Resolution on its face can be read to encourage devising measures apart from those contained in the antiterrorist conventions. The case may be made that extraterritorial apprehension is justifiable as a measure of self-help in international law and is an "effective measure" within the scope of this resolution.

These recent declarations of both the General Assembly and Security Council are strong condemnations of international terrorism. The unanimous Security Council action represents a major political setback for international terrorists and their state sponsors. While nothing in these Resolutions can be read as specifically authorizing extraterritorial apprehension, the U.S. political case must take note that its actions are fully consistent with the political emphasis the United Nations has placed

upon the prosecution of terrorists and the encouragement of nations to actively cooperate in extradition measures.[62]

Advanced Coordination of Allied Support

Apart from the United States engaging in advanced consultation with its Western allies and making the general case to the world community in support of extraterritorial apprehension, direct negotiations may be necessary with one or more allied or friendly nations for the purpose of securing specific logistical or intelligence support. There may be instances where the apprehension involves units or agents of an allied or friendly foreign country. In other instances it may be useful to agree in advance as to which of several countries will apply its municipal criminal law and assume in personam jurisdiction over the apprehended terrorist offender(s). In any case, these and other matters should be the subject of advanced international coordination and agreement with interested states. In the Achille Lauro case, there was insufficient time to negotiate the details of the apprehension in advance. However, if extraterritorial apprehension is adopted as a counterterrorism measure, most operational plans could be designed to facilitate the necessary advanced coordination with those countries which would be asked to participate or provide support.

One matter which should not be overlooked in planning advanced coordination with allied or friendly nations is the possibility of inadvertently exposing an apprehended terrorist to third country foreign criminal jurisdiction. Once the apprehension is completed, it will be necessary to transport the terrorist or group of terrorists to the United States or some

other pre-selected forum state for arraignment and prosecution. The transportation can best be facilitated through the use of either a naval vessel or military aircraft. Depending upon the proximity of U.S. Naval vessels to the apprehension site, the apprehending units or force may be able to simply transfer the terrorist part or all the way back to the United States aboard a fleet unit. Alternatively, the terrorist may be put aboard a U.S. Air Force C-130, C-141, or C-5 equipped for inflight refueling.

In the event neither of these techniques can be used, it may be necessary to make intransit stops in allied friendly foreign countries. Once an apprehended terrorist is landed in a foreign country, he or she will become subject to its civil and criminal law unless that country has affirmatively waived jurisdiction. For this reason, unless the United States is prepared to allow a foreign country to assume jurisdiction over the apprehended terrorist, he or she should be either transferred directly back to the United States or a waiver of foreign criminal and civil jurisdiction arranged in advance for any non-U.S. area where an intransit stop is contemplated.

As an alternative, the United States may be able to assert sovereign immunity over the vehicle transporting the terrorist. In the case of warships, the doctrine of sovereign immunity is widely recognized under international law. So long as the terrorist remains on board the warship and in the absence of consent by the commanding officer, no foreign authority would be permitted to come aboard even in a foreign port for the purpose of assuming jurisdiction or custody over the apprehended terrorist.

A number of countries including some U.S. allies have not been prepared to acknowledge the application of the principle of sovereign

immunity to military or other state-owned aircraft. If the principle is applied, a military or state-owned aircraft may land in an intransit status and not be subject to search or inspection. Cargo and passengers remaining onboard would also be free of any assertion of jurisdiction by the host nation. However, should an apprehended terrorist be landed in a state which does not recognize this principle as applicable to military or state-owned aircaft, serious difficulties could arise. Again, the best solution for this problem is advanced coordination with those states in which it may be necessary to make intransit stops or to avoid such stops altogether through a nonstop transfer to the United States or other prosecuting forum state.

CHAPTER V

CONSIDERATIONS FOLLOWING APPREHENSION

> I think it would be a great day for international justice if those terrorists were brought to the United States, to Washington, D.C. and were tried in a U.S. court...were convicted...and...imprisoned here, because we have the primary concern....We are not fighting fire with fire; we are fighting fire with justice...on established principles. 1
>
> Senator Arlen Spector
> July 30, 1985

Being able to properly plan, execute, and justify a strategy of extraterritorial apprehension would be of no consequence if prosecutors are unable to secure a conviction. The very purpose of extraterritorial apprehension is to subject international terrorist elites to a fair trial under the constitutional guarantees afforded to defendants under the American or some other Western system of justice. In trying international terrorists dedicated to the destruction of the very system which seeks to hold them accountable, the government will be forced to respond to an array of political and legal tactics designed to undermine its prosecutorial efforts. These tactics may be ethical by legal standards, or they may be quite unethical. Prosecutors, the courts, and the public at large will have to be prepared to cope with an onslaught of such tactics. This chapter seeks to explore some of the tactics and the more critical problems which they present to the prosecuting nation, its government and its people.

Use and Protection of Intelligence Information, Sources, and Methods

Fair Trial Rights vs. Protection of National Security Interests

If there is one thing upon which the intelligence community and criminal prosecutors agree, it is that the protection of sensitive intelligence information, sources, and methods in a criminal proceeding can be a challenging task. Of the issues to be considered in evaluating a strategy option of extraterritorial apprehension, none is more troublesome, or important, than ensuring effective prosecution, protection of sensitive intelligence information, and a fair trial for the defendant, all in the same proceeding. Although each case will have its own unique set of national security issues, it is important to recognize the legitimate interests of both the defendant and the Government along with available measures which may serve to reconcile these interests where they are in conflict with one another.

It is difficult to imagine a trial of an international terrorist brought before the court by means of extraterritorial apprehension where classified information, sources, and methods would not become an issue. It is likely that as the Department of Justice constructs its criminal case against such terrorists, it will do so on the basis of highly classified information. This information may relate to the identification of particular terrorists, their location at various points in time, the acts which they are alleged to have committed, their future plans, their associations with other terrorists or sponsoring governments, their source of financial or arms support, and the methods they employ. Such

information will be essential in the planning and execution of the extra-territorial apprehension of the terrorist or terrorists.

At least some of this information will also be important in establishing the proof that a terrorist committed an offense under the laws of the prosecuting state. Not all such intelligence derived information will be relevant or admissible during the course of the criminal trial. However, constitutionally based fair trial rights require that the accused know the evidence to be introduced against him and be able to examine and, if appropriate, rebut it. In terms of the procedures used in his arrest, the securing of evidence, and other investigative matters, he also has substantial rights to know how the Government developed its case. Such information assists in confirming that the evidence presented at the trial has been obtained consistent with Constitutional limitations and is not subject to exclusion under the so-called "exclusionary rule." In other words, even the terrorist defendant has a right to confirm that the evidence against him is not "tainted" or improperly secured in violation of those Constitutional rights afforded to him, even as a foreign national apprehended beyond U.S. borders. At issue is whether sufficient evidence can be presented to adequately and fairly try the case for both prosecution and defense, and at the same time protect sensitive classified information, the disclosure of which would be damaging to national security.

The Classified Information Procedures Act

Prior to 1980, the conflict between introducing sufficient evidence into a criminal proceeding and protection of sensitive national security interests might well have precluded serious consideration of

extraterritorial apprehension as a counterterrorism strategy. However, during the 1970s, U.S. prosecutors confronted several serious cases in which classified national security information played a critical role in trial proceedings. Known as the "graymail cases," these trials involved former intelligence agents and others who had had accesses to classified information and who threatened to expose or demand the Government expose such information during criminal proceedings. The defendants in these trials attempted to force the Government to dismiss the cases by claiming that they could not receive a fair trial unless the Government disclosed, or they were allowed to disclose, highly classified information. The Government faced the dilemma of trying the case and exposing the classified information or, alternatively, dismissing the charges against the defendants as the price for protecting highly classified information.

Congress responded by adopting the Classified Information Procedures Act of 1980 (CIPA).[2] In adopting CIPA, it was the purpose of Congress to put an end to the "graymail" dilemma. The Congress wished to find a procedural means by which to afford the criminal defendant his fair trial rights but at the same time preclude the defense from using classified information to maneuver the Government into a forced dismissal of the proceedings.[3]

Section 1 of CIPA provides a definition of terms including "classified information" and "national security." Under subsection (a), "classified information" is defined as:

> [A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 [42 U.S.C. Sec. 2014(y)] [4]

Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States." The courts have consistently ruled that both of these key terms are sufficiently clear to inform the accused of the nature of classified information and national security.

Under section 2 of the Act, at any time after the filing of a criminal indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. The federal district court must then conduct a pretrial conference to establish the timing of requests for discovery. This conference also serves to initiate a procedure established by section 6 of CIPA to determine the use, relevance, or admissibility of classified information. Section 2 further provides that during the course of this conference "the court may consider any matter which may promote a fair and expeditious trial." However, substantive issues concerning the use of classified information are to be decided at a separate hearing required under section 6.

Section 3 provides for court protective orders which may direct the defendant not disclose classified information already known to him or which is made available by the Government during the course of the prosecution. This provision may have little application in the prosecution of an apprehended terrorist. Unlike many of the "graymail cases" where defendants had had prior legitimate access to classified information as former agents or government employees, any classified information disclosed to terrorists during an extraterritorial apprehension operation will be considered effectively "compromised" and presumably no longer subject to protection. Section 3 of CIPA has been interpreted to provide the Government the right

to request the issuance of protective orders ex parte and in camera, that is, before the court in the absence of other parties (e.g., the defendant) and in confidence or secret. A part of section 3 which may prove useful in terrorist prosecutions are provisions allowing the court to establish controlled handling of classified information throughout the course of proceedings including on appeal. Violation of court orders issued pursuant to section 3 are punishable by contempt of court.

Section 4 of CIPA provides that upon its request, the Government may be authorized to avoid disclosure of classified information through the use of alternative forms of evidence. Specifically, in responding to the defendant's discovery requests and upon a sufficient showing by the Government, the court may authorize the prosecutor to delete certain items of classified information. In lieu of the information being deleted, the Government may be permitted to substitute a summary of the information, or to substitute a statement admitting the relevant facts that the classified information would tend to prove. Closely resembling procedures contained in Rule 16(d)(1) of the Federal Rules of Criminal Procedure,[6] this provision authorizes prosecutors to demonstrate in an ex parte, in camera submission to the court, that the use of such alternative forms of evidence is warranted.

The legislative history of section 4 establishes that the court may take national security interests into account when considering the prosecution's request to allow deletions, substitutions, or summarizations of classified information.[7] The importance of national security interests in these judicial evaluations has been recently underscored by the First Circuit Court of Appeals decision in United States v. Pringle.[8] In

Pringle, the defendants sought discovery of classified materials relating to the surveillance, boarding, and seizure of a ship which they had used to smuggle narcotics. The federal district court, applying principles enunciated by the Supreme Court in Roviaro v. United States[9] and determining that the classified information sought was not properly a matter for discovery under Rule 16 of the Federal Rules of Criminal Procedure and Brady v. Maryland,[10] held that the defendant's interest in gaining the information was outweighed by the concomitant prejudice to the national security. In affirming the lower court decision, the Circuit Court held:

> We also reject defendants' contention that the protective orders issued by the district court violated their due process rights. We have reviewed the classified information and agree with the district court that "it was not relevant to the determination of the guilt or innocence of the defendants, was not helpful to the defense and was not essential to a fair determination of the case.[11]

The First Circuit holding interpreted the Supreme Court ruling in Roviaro to require the district court to "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense."[12] Section 4 of CIPA establishes the mechanism for the court to perform this crucial task of balancing this critical public interest against the defendant's fundamental fair trial rights.

The actual procedures for trying cases involving classified information are contained in section 6 of CIPA. Under this section, adversarial hearings may be conducted in camera to determine the use, relevence, and admissibility of the classified information concerned.[13] Prosecutors may notify the defendant at a hearing provided for under section 6 of classified information which will be at issue during the

trial. However, with the court's approval, it may provide a "generic description" of the classified material in lieu of disclosing the actual information itself, particularly parts which may tend to disclose sources and methods.[14]

If the court determines that the classified information at issue is not relevant or admissible, the trial proceeds without the information. However, if it determines that it is relevant and admissible, then the Government is afforded the right under section 6(c)(1) to request the court order the defendant to accept as a substitute, a statement "admitting relevant facts that the specific classified information would tend to prove" (i.e., a stipulation of facts), or "a summary of the specific classified information." Section 6(c)(1) further requires the court to grant such motion if it finds that the statement of the summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.

The court may allow a summary or stipulation in lieu of disclosure only if "the defendant's right to a fair trial will not be prejudiced."[15] The concept of the legislation is that the defendant should not stand in a worse position as a result of the alternative forms of evidence. The statutory standard is "substantially equivalent disclosure" by which the Congress did not intend precise, concrete equivalence.[16] Section 6(c)(2) of CIPA allows the Government to submit to the court an affidavit of the U.S. Attorney General "certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such

information." If requested by the Government, section 6(c)(2) requires the court to examine the affidavit ex parte, in camera.

Other provisions in section 6 authorize the court to impose a sliding scale of sanctions against the Government as a means of compensation for the defendant's inability to present proof regarding specific items of classified information. Sanctions may include dismissal of the indictment, dismissal of specific criminal counts of an indictment, finding against the Government on issues to which classified material relates, or striking or precluding all or part of the testimony of witnesses.[17]

Section 7 of the Act provides for an interlocutory appeal by the Government from any decision or order of the trial judge "authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosures of classified information."[18] This provision, which also provides for expedited consideration at the appellate court level, is intended to alleviate the "graymail" dilemma of "disclose or dismiss" which previously had to be addressed by prosecutors during the course of district court proceedings.

Section 8(a) specifically recognizes the classification of writings, recordings, and photographs containing classified information remains an executive, not judicial function. Concomitant section 8(b) clarifies the so-called "rule of completeness" found in Rule 106 of the Federal Rules of Evidence. The "rule of completeness" provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at the time to introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.[19]

To preclude "unnecessary disclosure" of classified information, section 8(b) of CIPA permits the court to order admission into evidence of only a part of a writing, recording, or photograph. Alternatively, the court may order into evidence the whole writing, recording, or photograph with excision of all or part of the classified information contained therein. The provision does not provide grounds for excluding or excising part of a writing or recorded statement "which ought in fairness to be considered contemporaneously with it." Accordingly, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.[20]

Finally, section 8(c) affords the prosecutor a means of precluding a witness from disclosing classified information in response to defense counsel's questions posed at either pretrial or trial proceedings. Under CIPA, if the defendant's counsel knew that a question or line of questions would result in disclosure of classified information, notice should have been provided the Government under separate section 5 of the Act and the matter resolved during a section 6 hearing. Section 8(c) is designed to supplement these procedures by allowing prosecutors to object to any question or line of inquiry requiring a witness to disclose classified information. The court then requires the Government and defense to proffer information in support of their respective positions.

Application of CIPA During Prosecution

The mechanism afforded by CIPA must be understood in the context of Congressional purpose and the judiciary's constitutional mandate to afford the criminal defendant a fair trial. The screening mechanisms provided by

the Act are largely designed to protect the Government against defense threats to disclose information already in the defendant's possession, i.e., to address the graymail "disclose or dismiss" dilemma. It does, however, also protect information not known to the defendant but potentially involved in developing the Government's case. The principal function of CIPA, as crafted by the Congress, is to provide uniform procedures under which the Government is made aware, prior to or even during trial, of whether classified information will have to be disclosed in open proceedings. Should that appear necessary, the Act affords prosecutors the opportunity to make an informed and reasoned decision on whether the interests in prosecuting outweigh the damage to national security which may occur as a result of disclosure.

CIPA does not change existing standards for determining the use, relevance, and admissibility of evidence in a criminal trial. United States v. Smith[21] decided by the Fourth Circuit in 1984, held that a district court conducting a section 6(a) hearing is not empowered to exclude classified evidence that is relevant to the accused's defense on the grounds that the prevention of harm to the national security outweighs the defendant's need. United States v. Collins[22] ruled that CIPA does not undertake to create new substantive law governing admissibility. In the final analysis, the Act does not reduce the Government's burden to produce sufficient evidence at trial to prove the defendant guilty beyond a reasonable doubt of each and every element of each count in its indictment. Nor is the Act a vehicle to prevent a defendant from marshalling sufficient relevant evidence to present a reasonable defense and to be able to challenge that evidence presented against him.

Appreciating that CIPA affords no panacea for difficult cases involving classified evidence, it nevertheless arms the prosecution with an important instrument with which to approach a very thorny problem. Where classified information available only to the Government in a terrorist prosecution is critical to the defendant's fair trial rights, it may be possible to apply the Act's mechanism for ex parte, in camera review of proposed substitutes or alternatives to the actual evidence itself. It may be possible to develop summaries or admissions which the court would review to ascertain whether the defendant is left in a position of having substantially the same ability to make his or her defense as if the classified information itself were disclosed at trial.

Ultimately, the success or failure of prosecution of an apprehended terrorist will depend upon three factors. The first of these is the absolute necessity of a high level of cooperation between members of the intelligence community and the prosecution team. Such cooperation must occur at the very earliest stages of prosecution case formulation and apprehension planning. A prosecution team with appropriate security clearances must ascertain as specifically as possible what evidence it will need at pretrial proceedings as well as at the trial itself. It will be necessary for prosecutors to have an understanding of what information, sources, and methods require absolute protection even at the risk of having a case dismissed or sanctions applied for failure to disclose. The prosecutors will have to fully appreciate that the overriding objective of the intelligence community is the preservation of reliable sources and methods. Without these sources and methods, there would simply be no intelligence. Equally important, the intelligence community will need to understand that

intelligence information which is never applied in the interest of overriding national policy and strategy, serves no useful purpose.[23]

The second factor which will prove crucial to the effective prosecution of a terrorist case is the existence of an energetic, dedicated, and innovative prosecution team. Prosecutors will have to aggressively use the provisions of CIPA, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, and existing federal case law to preclude unnecessary defense discovery and to protect classified information against disclosure. But they must do so while still allowing sufficient evidence to be introduced in support of the prosecution and the defense cases.

Early coordination between the intelligence community and the prosecution will greatly facilitate the development of independent lines of evidence which in no way rely upon classified sources or methods. When it is determined that a particular evidentiary showing is essential on the merits or for procedural reasons, but the available evidence cannot be disclosed, innovative prosecutors and intelligence officers may be able to identify other ways and means of obtaining essentially the same information through wholly independent and unclassified sources and methods.[24] The key in every case will be advanced planning, aggressive interdepartmental or inter-agency communication, close coordination, and innovative thinking.

Finally, successful prosecution will depend upon courts, both trial and appellate, which are prepared to actively exercise their judicial discretion in the interest of trying cases in which very substantial interests of the adversarial parties must be carefully balanced. Thomas Kennelly, an attorney experienced in both the prosecution and defense of

cases involving national security issues, described this factor in connection with United States v. Felt-Miller

> I think our case demonstrates that where there is a will, there is a way. If the government and the court want to try a case, they'll find a way to do it. At least at the trial level. They'll find a way to do it whether or not you've got the Classified Information Procedures Act. What I would suggest, however...is that the legislation does not solve all the problems, any more than passing a constitutional amendment to balance the budget balances the budget.
>
> I think you've got to exercise a great deal of judicial discretion, and I would hope that in the future there might be a greater amount of executive discretion exercised before a case of this type is brought. [25]

The willingness of the court in Felt-Miller to exercise this discretion, in conjunction with the prosecution's innovative use of various protective mechanisms under the Federal Rules and CIPA, facilitated the presentation of Government's case using summaries and other alternatives to the actual disclosure of highly classified information. While the case was protracted, costly, and entailed the laborious handling and review of tens of thousands of classified documents, it was tried.[26]

The court's willingness to exercise its inherent judicial powers will play a critical role in addressing issues which are not resolved in either the CIPA or the Federal Rules. For example, the introduction and management of classified information in grand jury or magistrate's proceedings will have to be goverened by the district court's judicial powers. These powers may also be required in instances where the defense counsel requires access to classified information but will not or cannot qualify for a security clearance. Court options include arranging for alternative counsel who can qualify for a clearance or imposing extraordinary protective orders on the use of the evidence.[27]

Ultimately, it will be the court which balances the Governmental interest in protecting classified information against the defendant's constitutionally guaranteed rights to a fair trial. Recent experience in Felt-Miller and other cases seems to suggest that the courts are prepared to take on this heavy responsibility at least where the Government selects its prosecution cases carefully. But as Mr. Kennelly noted in his remarks, "...where there is a will, there is a way." If it is the national will to prosecute terrorists in municipal courts, concerns for the protection of classified information, sources, and methods, should not stand in the way. With innovation, patience, and hard work, the problem can be resolved.

Defense Issues at Trial

An active, and very possibly dissident, defense team can be expected to challenge the Government's intended prosecution prior to and throughout the criminal proceedings. In addition to using "graymail" tactics and challenging the jurisdiction of the court, it seems likely the defense will raise a number of other defenses in an effort to defeat prosecution.

Act of State Doctrine

The act of state doctrine under international law provides that the court of one state will not judge the legality of an act committed by a government official of another state. During the Eichmann trial, Dr. Servatius, the defense counsel, argued on behalf of his client:

> one sovereign state does not dominate or sit in judgment on another sovereign state...[A] person who operates on behalf of a state, who carries out, in other words, an 'act of state,' cannot be tried for such an act, if it be criminal, by another state without the concurrence of the former...[N]ot the individual but

> the state on whose behalf he acts is responsible for any violation of international law.[28]

An international terrorist may argue that he is acting as a government agent of either a sanctuary state or even an organization which claims an internationally recognized status like the Palestinian Liberation Organization (P.L.O.).

The act of state doctrine is not likely to prove an effective defense for an international terrorist in U.S. and most Western allied courts, no matter how strong the connection with the sanctuary state or parent organization. In the Eichmann trial, the district court rejected the defense, noting that a state that plans and implements a "Final Solution" cannot be treated as par in parem[29], but only as a "gang of criminals." The court noted that the doctrine had been repudiated with respect to international crimes in the judgment of the Nuremberg Tribunal and that this position had been adopted by the United Nations and by the Convention for the Prevention and Punishment of Genocide.[30] The Israeli Supreme Court held that acts contrary to the law of nations are "completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them...."[31]

It is very likely any U.S. or other responsible criminal court will respond in a like manner to any act of state defense which a terrorist defendant puts forward. There seems virtually no way in which terrorism can be justified as "legitimate" when it has been so widely condemned by responsible nations and now by the United Nations itself in the recent series of General Assembly and Security Council resolutions.

Superior Orders

A second possible terrorist defense, also employed in the Eichmann trial, is that the accused acted pursuant to superior orders. Arguing for Eichmann, defense counsel Servatius asserted:

> Everything he did was inspired by the highest authorities, who enforced obedience by holding him to his oath. Had Eichmann refused to obey, at great personal cost, others would have carried out the task in any case, and his sacrifice would have been in vain. [32]

The Jerusalem District Court ruled that "all civilized countries" had rejected the superior orders defense as an exemption from criminal responsibility.[33] The court further noted that its position was acknowledged by the United Nations and that even jurists of the Third Reich "did not dare set down on paper that obedience to orders is above all else."[34] Finally, the court noted there is "no principle recognizing such a defense crystallized in international law."[35] The Nuremberg Tribunal considered an accused's acting pursuant to superior orders to be a matter of mitigation of punishment, not as an absolute defense.

It is unlikely Western courts will grant any more favorable recognition to this generally discredited defense. Since extraterritorial apprehension as a counterterrorism measure is most likely to be reserved for leadership and operational elites, it may prove difficult for defendants to establish that they were acting under orders other than of their own design. Even if defendants are acting under the orders of others, they would be required to establish duress. U.S. law would impose a heavy burden upon the defendant to show that he or she had no opportunity to escape from the control of superiors prior to the commission of the criminal conduct. In the unlikely event such duress could be established,

like the Israeli court, U.S. courts will treat such fact as a matter of extenuation and mitigation in assessing punishment and not as an absolute criminal defense, particularly in cases where deadly force or serious bodily injury is the object of the offense.

Inability to Receive a Fair Trial

The most difficult defense for the Government to overcome will be claims that the accused terrorist cannot receive a fair and impartial trial in the prosecuting forum state. The defense will point to pretrial publicity, suggestions that the true gravamen of the indictment is an offense against the prosecuting nation state itself, and the fact an alien defendant is being judged not by a tribunal or jury of his peers, but instead by persons of a totally different national and cultural background. If the defendant is not fluent in English or the language employed by the prosecuting forum state's courts, objections will be raised as to his capacity to even understand the nature of the proceedings themselves, much less the concept of the judicial system. Finally, the defense can be expected to allege that the defendant, as an alien, could not have been on notice as to his obligations under the forum state's laws.

Each of these arguments is of sufficient import to merit a careful and detailed prosecution response. However, examining the line of cases in support of the Ker-Frisbie doctrine, several of which involved the prosecution of foreign nationals in U.S. courts, there is no reason to believe that a fair and impartial trial cannot be afforded alien defendants. United States ex rel. Lujan v. Gengler,[36] United States v. Quesada,[37] and United States v. Herrera,[38] all involved acts of irregular

rendition to bring foreign nationals before U.S. courts. Each of the cases resulted in a conviction which was affirmed on appeal. No case in the Ker-Frisbie line of decisions has overturned a conviction of an alien by reason of the defendant's inability to receive a fair trial in a U.S. court.

To be sure, extraordinary measures will have to be undertaken to ensure fair trial rights for an apprehended international terrorist. Media coverage of the trial should remain under strict judicial scrutiny. In the event the victims of the alleged terrorist's acts reside in the district to which the terrorist is first brought, a change of venue may be appropriate. Prosecutors and the court will have to ensure that defendants not fluent in the national language are provided a competent interpreter at all points prior to and during investigatory and trial proceedings. The court may wish to permit foreign national legal counsel to join the defense team. Jury selection through the voir dire process will have to be expertly handled by the prosecution which will be under a particularly heavy burden in the face of an uncooperative defense, to ensure the selection of impartial fact finders. Publicity surrounding the trial itself may very well require the jury be sequestered during the course of proceedings.

These and other extraordinary measures will have to be considered to ensure accused terrorists are afforded, and are perceived by the world community to be receiving, a fair and impartial trial. But assuming U.S. or other forum state authorities are prepared to carefully prepare and bear the considerable expense of such proceeding, there is every reason to believe the trial can comport with constitutional and court established fair trial guarantees.

Countervailing Actions by Terrorists and Sanctuary States

Once the fact of an extraterritorial apprehension becomes public knowledge, the United States or other prosecuting forum state, including any state known to have provided direct support to the mission, will be under a substantially increased threat of countervailing action. Such action may be perpetrated by sympathetic terrorists or by the sanctuary state in which the defendant was apprehended. Experience demonstrates that terrorists are apt to respond to pro-active counterterrorist actions with escalated violence and "reprisal." In the aftermath of the April 14, 1986 U.S. air strikes in Tripoli and Benghazi, "reprisals" were conducted against targets associated with both the United States and Great Britain.[39]

Countervailing action may come in the form of random acts of violence against prosecuting state installations or nationals located in vulnerable overseas areas. One particularly likely scenario would be the kidnapping of prosecuting forum state nationals in "retaliation" for the extraterritorial apprehension. Kidnap victims would undoubtedly be held ransom for the unconditional release of the apprehended terrorist. Since it is stated U.S. national policy not to negotiate with or make concessions to terrorists, the U.S. Government would have to be prepaed to hold firm, even in the face of a significant number of American nationals being held ransom for a limited number of terrorist defendants in a proposed "prisoner exchange." Alternatively, allied nationals could be kidnapped in the hopes of bringing political and diplomatic pressure to bear or for the purpose of driving a wedge between the prosecuting forum state and its allies. Either countervailing action would be designed to bring political pressure to bear

while simultaneously demonstrating the impotence of the prosecuting forum state to respond under the circumstances.

Another potential countervailing action would be a direct attack upon the court proceedings themselves. One federal prosecutor involved in counterterrorist investigations indicated that the trial of an apprehended terrorist will all but result in "drawing concentric circles around the U.S. courthouse where the proceedings will be conducted."[40] Extraordinary physical security measures will be required to protect Government facilities, e.g., the courthouse, prosecutor's offices, lockup, etc. Even more important, measures will have to be in place to provide credible protection for all personnel involved in any way with the proceedings, e.g., the judge and his staff, jury, prosecutors, witnesses, and very possibly members of their families. Moreover, the personal inconvenience of such security measures to those being protected and the substantial expense to the government are two additional "costs" to be considered in evaluating the merits of bringing an international terrorist to the United States or any friendly forum state for prosecution.

Another factor to be considered is the possibility of other states asserting <u>their</u> right of extraterritorial apprehension against the United States and its allies. Under the principle of reciprocity recognized in international law, if the United States or another state asserts its right to extraterritorial apprehension, there must be a willingness to acknowledge such right is available to other states as well. How would the United States respond, for example, if the Soviet Union or Nicaragua engaged in the "extraterritorial apprehension" of a Contra guerrilla leader present in the United States? In light of the principle of reciprocity, it

is essential the United States define extraterritorial apprehension narrowly and make clear its application is limited to stateless areas and sanctuary states which support or actively condone international terrorism and which refuse to either prosecute or extradite those responsible. The threat posed by the international terrorists to U.S. or allied interests must also be demonstrated in unmistakable terms in explaining the action.

These and other countervailing responses are significant costs which may be experienced following an extraterritorial apprehension. Since they are significant, the threat they represent to the United States and its allies must be weighed carefully in deciding whether or not to adopt such a counterterrorism measure. In the event the proposed measure is adopted, these costs would generally militate in favor of applying this option only when the terrorists to be apprehended represent significant elements in the structure of international terrorism. In considering countervailing costs, decision-makers and planners must compare the costs of this measure with other counterterrorism options including the option to do nothing at all. On balance, extraterritorial apprehension may well prove less costly as compared with options entailing greater force or the decision to do nothing and endure the terrorist violence.

Liability of the Apprehending State and its Agents

Foreign Criminal Liability of Apprehending Agents

Certain forms of legal liability may arise in the aftermath of an extraterritorial apprehension and must be weighed along with other considerations. In the event the apprehending personnel experience resistance in the sanctuary state or stateless area and any of their number

are captured, they could be subjected to local criminal prosecution. Assuming such captured personnel are not summarily killed by local forces, they may be charged by the sanctuary state or "authorities" in the stateless area with violations of municipal criminal law. Such charges might be expected to include kidnapping, spying, criminal trespass, criminal assault, and attempted murder. In light of the circumstances, it is clear the United States or any other apprehending state would have neither political nor legal leverage to effect the release of these personnel. The captured personnel would in all probability be exploited in a propaganda campaign not unlike some of the displays endured by the United States when its pilots were captured by the North Vietnamese during the Vietnam War.

Little can be done about this contingency other than to recognize that steps must be taken during the planning process to minimize the possibility of capture. Ways and means of ensuring that such personnel can be fully supported by necessary force and "exfiltrated" under all foreseeable circumstances must be incorporated into any apprehension plan.

Claims and Civil Action Against the Apprehending State

Another possible area of legal liability which must be considered is civil liability in the form of an administrative claim or suit for damages brought against the apprehending state. Any administrative claim or civil action brought against the U.S. Government will have to overcome the doctrine of sovereign immunity which generally bars civil actions against the Government except where it has expressly granted its consent to be sued.[41] The Congress has adopted a number of claims acts which waive U.S. sovereign immunity under specified circumstances. Claims acts which may

have some potential for use by apprehended terrorists against the U.S. Government include the Federal Tort Claims Act (FTCA),[42] the Foreign Claims Act (FCA),[43] and the Military Claims Act (MCA),[44] While the chances for a terrorist prevailing under any of these acts is remote, the potential for such action against the U.S. Government must still be evaluated.

Adopted in 1946, the FTCA provides a broad waiver of sovereign immunity that makes the United States liable for injuries caused by

> The negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[45]

At the outset, the apprehended terrorist seeking to file a claim or bring a civil action upon denial of a claim will have to meet the burden of establishing that he was injured, his property damaged, or his Constitutional rights were in some manner violated by the actions of the U.S. Government personnel. To do this, the terrorist "claimant" would have to establish both the Government's "duty" to him and a causal connection between the Government's failure to perform that duty and his injuries. In the case of an alleged violation of his Constitutional rights, the terrorist would have to clearly establish that due process rights or some other Constitutionally protected interest was violated by the acts or omissions of the apprehending personnel. As noted, the Ker-Frisbie line of decisions suggests this burden may be almost impossible for the apprehended defendant to meet.

The FTCA enumerates a series of claims which are not within the scope of liability under the Act, one or more of which will probably always apply in cases of extraterritorial apprehension.[46] First, the Act precludes

payment for any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation whether or not such statute or regulation is valid. Under a reasonable application of this provision, even if a court determined extraterritorial apprehension improper as a matter of law, if the employee exercised due care in carrying out his or her assigned duties, no liability would arise.

The Act also precludes any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, and various other intentional torts, except where such wrongs arise from the acts or omissions of investigative or law enforcement officers.[47] For the purpose of this provision, "investigative or law enforcement officer," means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. In the event military or even CIA personnel are used in the actual apprehension, they may or may not fall within this definition of "investigative or law enforcement officers." If they are not so defined, their actions, even if otherwise tortious, come under this enumerated category of claims not payable under the FTCA.

The FTCA also excludes "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." There is at least some potential that a court could construe the circumstances surrounding an armed intervention into a sanctuary state or stateless area as tantamount to an "act of war" and therefore subject to this exception. Notwithstanding all else, the FTCA provision which precludes payment of any claim arising in a foreign country will normally serve to protect the Government. Since it is likely that the basis of the

terrorists' allegations will be acts or omissions arising in a foreign sanctuary state or stateless area, this provision will almost invariably preclude recovery under the FTCA even if the tort can be established.

The Foreign Claims Act (FCA)[48] constitutes an alternative mechanism under which the apprehended terrorist may attempt to gain recovery against the U.S. Government for alleged "wrongs" arising out of his seizure. The FCA allows claims for personal injury to, or death of, any inhabitant of a foreign country or damage to, or loss of, real or personal property of a foreign country occurring outside the United States and caused by its (U.S.) military forces or individual members or otherwise incident to non-combat activities of such forces. The purpose of the FCA would seem to exclude the terrorist or even those sustaining collateral injury or damage in the sanctuary state of stateless area from the category of eligible claimants. The stated purpose of the Act is "to promote and maintain friendly relations" in foreign countries "through the prompt settlement of meritorious claims."[49] Certainly a Presidentially authorized extraterritorial apprehension in a stateless area or sanctuary state identified with supporting or actively condoning international terrorism is well beyond this waiver of immunity intended by the Congress in enacting the FCA.

Nevertheless, the FCA provides some specific provisions which may well serve to absolutely preclude recovery. Claims for damage to, or loss or destruction of property, or for personal injury or death resulting from action by the enemy, or resulting directly or indirectly from any act by armed forces engaged in combat are not payable under the FCA. In general, claims which are payable are those related to noncombat activities. If

U.S. Armed Forces are involved in an extraterritorial apprehension in a stateless area or sanctuary state, it would be most difficult to categorize the operation as "noncombatant" and the terrorists or sanctuary state forces as anything but "the enemy."[50]

The Military Claims Act (MCA)[51] provides statutory authorization to pay claims against the U.S. Armed Forces for damage to or loss or destruction of real or personal property, or for personal injury or death, either caused by military personnel or civilian employees while acting within the scope of their employment or otherwise incident to noncombat activities. Unlike the FTCA, there are no geographical limits on claims under this Act. However, the Act provides no right to sue and claimants are limited to filing administrative claims for adjudication.

The MCA does not authorize the payment of claims resulting from action by the enemy, or resulting directly or indirectly from any act by armed forces engaged in combat. It also excludes claims from any inhabitant of a foreign country who is a national of a country at war with the United States or of any ally of such an enemy country, unless it is determined that the claimant is friendly to the United States. The first of these bars to recovery, if not the second, would appear to preclude any international terrorist from gaining successful adjudication on any claim against the U.S. Armed Forces involved in an extraterritorial apprehension.

Civil Action Against Individual Government Personnel

In most cases, Government personnel whose conduct gives rise to a civil action against the United States are immune from suit brought against them personally. In the case of the FTCA, immunity arises from case law

and the immunity must be pleaded and proved.[52] But in instances where the doctrine of sovereign immunity effectively bars action against the Government, the apprehended terrorist may attempt to bring a personal action against one or more Government personnel who directed, planned, or executed the seizure. As in the case of a claim or action against the Government, an action against an individual employee of the Government will have to allege an appropriate legal cause of action, most likely one based on an intentional tort theory or a violation of the terrorist defendant's Constitutional rights.

Assuming that the extraterritorial apprehension is executed with particular attention to the standards established in Toscanino and subsequent cases under the evolving Ker-Frisbie doctrine, it is highly unlikely that an apprehended terrorist would prevail in such harassing litigation against U.S. Government agents or personnel in their own individual capacity. Nevertheless, civil action against those directing, planning, and executing the apprehension remains a possibility and must be considered in assessing the overall merits of this counterterrorism measure.

The court in United States v. Reed[53] in determining that the defendant's seizure pursuant to an arrest issued with probable cause was "reasonable" for purposes of the Fourth Amendment, commented:

> As for the manner of the seizure, custody obtained by executing an arrest warrant is not invalidated because of the use of excessive force, even though the defendant might have a suit for damages against the government agents involved. (emphasis added)[54]

In DiLorenzo v. United States,[55] a DEA agent arranged for the arrest of the defandant in Panama. Panamanian authorities subsequently were

alleged to have tortured the defendant, although their actions were never imputed to the DEA. The court noted in its opinion that the DEA's direct role in the "abduction" from Panama to the United States could subject the individual agents to suit.

Actions brought against government personnel in their own individual capacity for alleged violations of the defendant's Constitutional rights are likely to be based upon the "Bivens Doctrine" which resulted from the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.[56] Bivens held that a federal agent who had violated the command of the Fourth Amendment could be held liable in damages despite the absence of a federal statute authorizing such a remedy.[57] The Bivens decision represented a bold judicial initiative to fabricate a remedy based on the Constitution. The Court in Bivens effectively sidestepped the doctrine of sovereign immunity in crafting a remedy for the plaintiff. The Bivens doctrine stands for the proposition that Constitutional rights have a self-executing force that not only permits, but requires, the courts to recognize remedies appropriate for their vindication.[58]

The doctrine has now been extended in Carlson v. Green[59] and Davis v. Passman[60] to violations of the Fifth and Eighth Amendments. In Carlson, the U.S. Supreme Court found a cause of action in damages against federal prison officials under the Eighth Amendment even though the plaintiff could have recovered damages under the FTCA directly from the Federal Government.[61] In Davis, the Court held that a woman discharged from her job as a congressional aide because of her gender could sue the congressman for damages under the Fifth Amendment.

In the event U.S. Government personnel are sued in their individual capacity, there is no automatic right of indemnification in the absence of a statute. Congress has chosen to provide for indemnification of federal employees in only a narrow category of cases, none of which cover the types of activities apt to be related to extraterritorial apprehensions.[62] While paying judgments for federal officials in such actions has been ruled by the Department of Justice to be an unauthorized expenditure of funds, legal representation is generally provided in litigation which challenges the propriety of the employee's authorized conduct.[63]

In practice, the Bivens doctrine has only been applied successfully against U.S. Government employees in a very limited number of cases. A study completed in early 1982 indicated that out of over 2,200 Bivens actions filed in district courts against federal officers, only 12 suits had resulted inactual damage awards.[64] While the doctrine has been expanded to cover additional amendments, the Supreme Court in two 1982 decisions imposed a greater evidentiary burden upon plaintiffs bringing actions against high Government officials.[65] In Nixon v. Fitzgerald, the Supreme Court held that the President, because of his unique position in the Constitutional scheme, is entitled to absolute immunity for official acts.[66] In Harlow v. Fitzgerald, the Court lowered a presidential aide's burden of establishing a good faith defense to liability for discretionary functions. The Court ruled that an official no longer has to establish both "subjective" and "objective" good faith as had been previously required. Government officials need only show "the objective reasonableness" of their conduct under the new Harlow rule.[67]

While there is little to prevent an apprehended terrorist from bringing civil action against the Government or its agents, the prospects for recovery are remote unless the seizure involves brutality or force far in excess of what is reasonably required under the circumstances. As long as the apprehension is carried out using such force as may be necessary to establish and maintain positive control over the defendant and the immediate area in which he or she is located, it is likely the apprehended terrorist will be without a valid claim or cause of action. Detailed planning, the development of appropriate rules of engagement based upon individual self-defense, and sufficient training in advance of execution should effectively preclude any real chance of civil recovery against either the Government or its agents arising out of an extraterritorial apprehension of international terrorists.

CHAPTER VI

DECISION-MAKING, PLANNING, AND EXECUTION

> I believe we have to structure some new international remedies to be built on existing precedents, and if we articulate these remedies properly...if we carry them out properly...we can establish a rule of law which will be recognized and sanctioned and upheld by world public opinion. [1]
>
> Senator Arlen Spector
> July 30, 1985

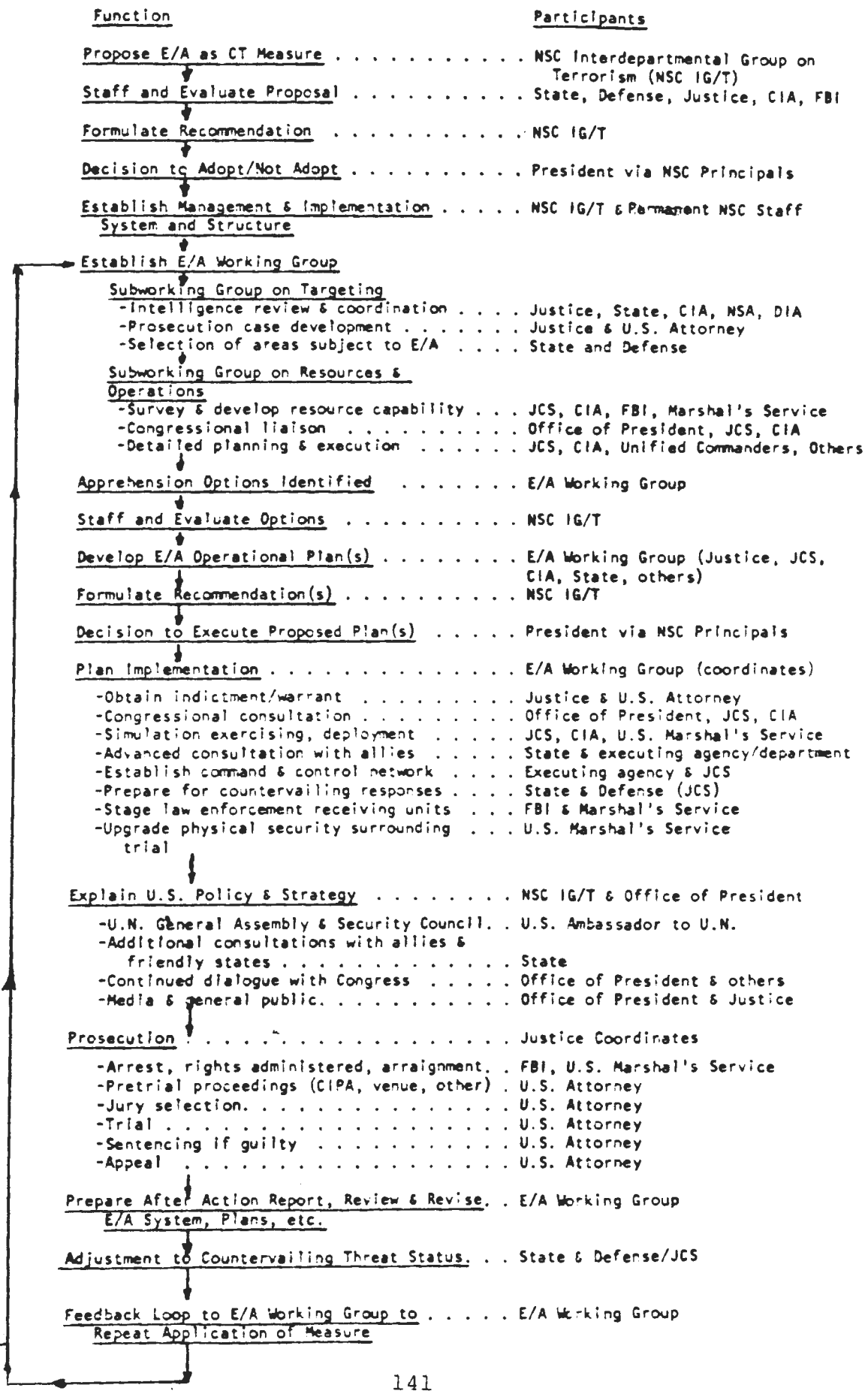
If extraterritorial apprehension is adopted as a counterterrorism measure, its success will greatly depend upon the development of an effective system of decision-making, planning, and execution. With an understanding of the principal legal, policy, and operational considerations which will play a role in this pro-active counterterrorism measure, it remains to identify the key participants and describe the functions they must perform in this system.

A System for Decision-Making, Planning, and Execution

Implementation of extraterritorial apprehension can be best understood in terms of the chronological steps which will have to be undertaken by decision-makers, planners, and operational personnel. Figure 1 provides a diagram of a chronologically based decision-making, planning, and execution system applicable to extraterritorial apprehension as a U.S. Government counterterrorism measure. The diagram depicts the principal steps in decision-making and planning in terms of the sequence of tasks to be performed. The diagram also identifies those government departments or agencies most likely to have cognizance or serve as active participants in the various phases of the system. The system proposed in this diagram

FIGURE 1

EXTRATERRITORIAL APPREHENSION DECISION-MAKING AND PLANNING DIAGRAM



generally conforms to the existing U.S. Government counterterrorism decisional and planning structures. Although changes could result from Congressional action; e.g., creation of a "czar" or cabinet level official whose sole responsibility it would be to manage U.S. Government counterterrorism policy; the proposed system incorporates both the principal participants and functions required to develop, plan, and execute this counterterrorism measure.

The initial steps to be undertaken would be the principal responsibility of elements of the President's National Security Council (NSC) staff. As a result of recommendations made by the Vice President's Task Force on Combatting Terrorism in December of 1985, permanent staff elements have been established within the NSC to manage and coordinate counterterrorism policy and strategy on a full-time basis. Previously, this function was accomplished through NSC general staff elements supporting three organizational units subordinate to the Council itself: the Senior Interdepartmental Group, the Interdepartmental Group on Terrorism (IG/T), and the Advisory Group on Terrorism.[2]

While counterterrorism and antiterrorism policy and strategy have been the principal responsibility of the NSC IG/T, this coordinating group comprised of relatively senior representatives of cognizant government departments has not operated on a full-time or continuous basis. The permanent NSC staff organization now provides the needed continuity. In all probability, this element would be an important point of coordination for decision-making, planning, and execution of the extraterritorial apprehension measure. The NSC counterterrorism staff element would presumably report to, and receive coordinating instructions from, the NSC IG/T, the

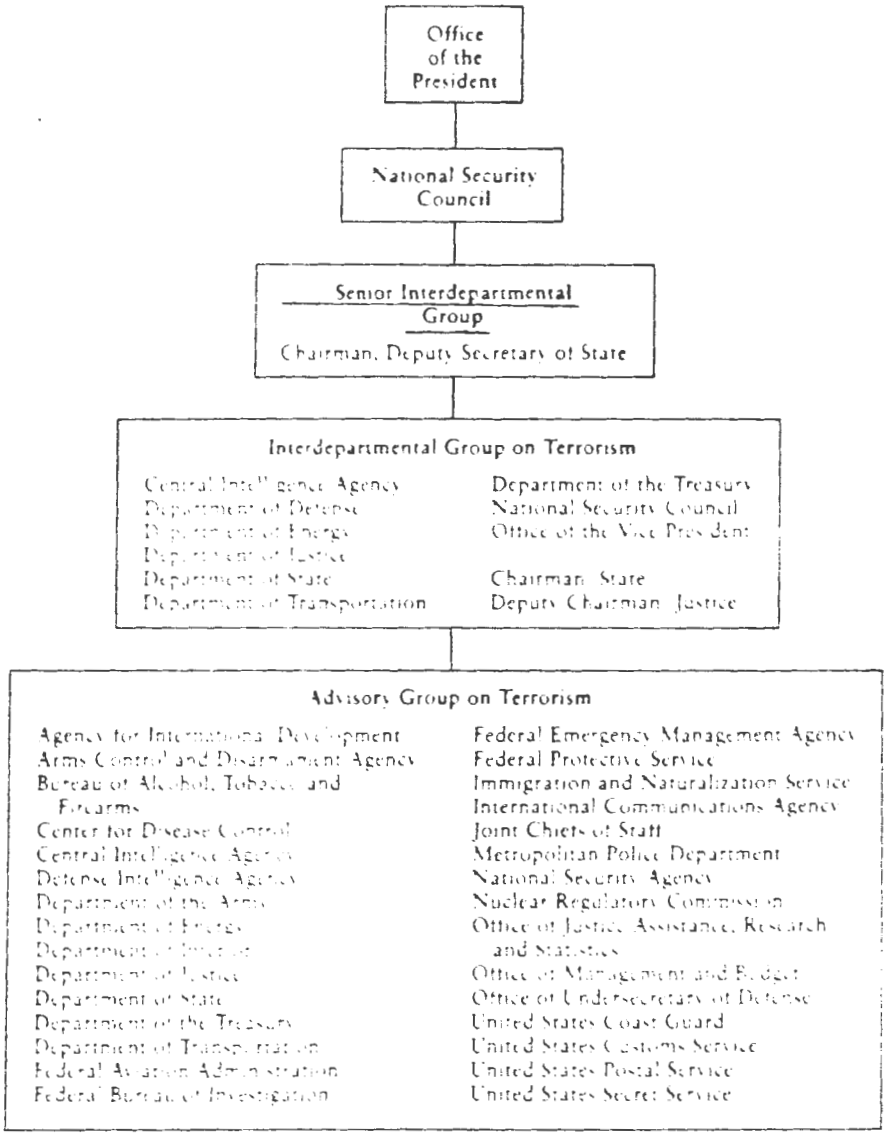
President's Special Assistant for National Security Affairs, and the Vice President, who, within the Reagan Administration, has substantial responsibility for overseeing Executive Branch policy on counterterrorism. Figure 2 provides a diagramatic depiction of the overall U.S. Government structure for antiterrorism, planning, coordination, and policy formation.

A proposal to adopt extraterritorial apprehension as a pro-active counterterrorism measure would be staffed through the NSC IG/T to at least those departments and agencies most apt to have an organizational role or interest. Although the total composition of the IG/T is somewhat larger, it is likely that staffing would entail review by, and clearance from, the Office of the Vice President, the NSC staff itself, the CIA, and the Departments of Defense, Justice, and State. Within the Department of State, particularly close examination of the proposal would be required by the Office of the Legal Adviser, the Office of the Ambassador-at-Large for Counterterrorism, the Bureau of Diplomatic Security, and the Bureau of Intelligence and Research. Within the Department of Defense (DOD), the proposal should be considered by the Office of General Counsel for the Secretary of Defense, the Joint Chiefs of Staff (JCS), the Deputy Assistant Secretary of Defense for Counterterrorism, the Defense Intelligence Agency (DIA), and the National Security Agency (NSA). At minimum, key operational personnel and legal counsel providing support to these organizations and officials should review and comment on the proposal.

Department of Justice (DOJ) staffing would most likely include the Assistant Attorney General for the Criminal Division, the Director of the Federal Bureau of Investigation (FBI), and possibly the Director of the U.S. Marshal's Service. Staffing within the CIA should include both the

FIGURE 2

U.S. Government Organization for Antiterrorism, Planning, Coordination, and Policy Formulation



"Combatting Terrorism: American Policy and Organization," *Department of State Bulletin*, Washington, D.C.: U.S. Department of State, August, 1982, p. 6.

Office of General Counsel and appropriate planning, research, and operational divisions having responsibility for counterterrorism matters. During this staffing of the concept throughout the agencies and departments, it may be appropriate to apply the E.O. 12333 executive branch intelligence oversight review process to confirm the legal, policy, and operational reliability of the concept.

With comments and recommendations received from cognizant IG/T representatives, the NSC staff may find it necessary to revise the proposal and present it through the Senior Interdepartmental Group to the NSC principals for presentation to the Office of the President. The proposal might go forward as a Presidential Decision Memorandum accompanied by a draft Presidential Directive. If the President elects to adopt this option as a pro-active measure available to the United States, the directive would presumably provide broad guidelines to the NSC IG/T to commence formal planning, coordination, and preparation for execution of extraterritorial apprehensions. The strategy option as envisioned, would require the President or a very senior executive branch official with a specific delegation of authority from the President to review and approve individual proposals for extraterritorial apprehension of international terrorists.

The Presidential directive should authorize the creation of a unit which might be entitled the "Extraterritorial Apprehensioin Working Group (EAWG) to be added to those working groups already functioning in support of the NSC IG/T. The EAWG would consist of experienced personnel from the NSC staff, CIA, and the Departments of Defense, Justice and State. As noted in Figure 1, at minimum, cognizant agencies and departments should include working-level representatives from key offices and divisions who

would directly participate in the development, planning, decision-making, and coordination of this measure. To be effective, the working group should be comprised of representatives who have the needed professional and technical expertise to actively contribute in this intense inter-agency process.

The EAWG would function to establish an effective mechanism for comprehensive intelligence review to assist in targeting terrorists to be apprehended. This specific function might be best accomplished by a sub-working group on targeting which would serve to bring prosecutors and the representatives of the intelligence community together on a routine basis to evaluate intelligence information, necessary case formulation requirements, and related matters. A principal objective of developing such a sub-working group would be to develop mutual understanding and trust between the law enforcement and intelligence communities.

The EAWG would also be tasked with coordinating and developing the required operational personnel and resource capability needed to eventually execute an apprehension plan. To address this and other issues, a second sub-working group on operations and resources should be established. This sub-working group would be composed of representatives from those departments and agencies which could play a principal role in the apprehension itself, e.g., the Departments of Defense, State, and Justice, and the CIA. This sub-working level group should review available personnel and equipment resources, analyze what may be needed in various probable apprehension scenarios, and direct materiel acquisition and force or unit training as needed. This same group would have substantial responsibility for assisting in the eventual selection of the agency or

department to be charged with executing a particular apprehension recommended by the targeting sub-working group.

The overall functions of the EAWG would be to manage and coordinate the entire governmental process related to extraterritorial apprehension. Once one or more terrorist leadership or operational elites had been identified by the targeting sub-working group and the operations and resources sub-working group determined the necessary capability was in place, the EAWG would prioritize target options and submit a proposal to the NSC IG/T for review. The proposal would provide a broad outline of the means by which the apprehension would be accomplished. If the IG/T considered that department or agency staffing would be appropriate at this point, its members would refer the proposal on an expedited basis to their respective organizations for comment and recommendations. As soon as feasible, the IG/T would reach a decision regarding whether to recommend adoption of any of the proposed options.

For any options approved by the IG/T, the working group could proceed to develop a detailed operational plan. Planners would engage in an iterative process with one another and their constituent departments or agencies to ensure that necessary interests and considerations regarding policy, law, operational, and political concerns are taken into account. At this juncture, it may be advisable for the State Department to consult in confidence with its country team if one exists for the sanctuary state or stateless area while the JCS enters into a dialogue with the unified commander for the geographical area where the apprehension is to occur. The completed and fully staffed plan would be provided to each of the principal departments or agencies for approval and comment before being

forwarded to the NSC IG/T for final consideration. Obviously, this staffing can be more centrally accomplished in the interest of increasing operational securty, although by so doing, there is some risk that important interests and concerns will not be exposed and addressed.

NSC IG/T approved plans would go forward to the NSC itself and ultimately to the President for a decision to approve or disapprove one or more apprehension options. The Presidential decision would be implemented by the NSC staff organization authorizing appropriate offices, agencies, and departments to proceed with the execution phase on a coordinated basis. The functions identified in Figure 1 are not intended to represent an exhaustive listing of tasks that would have to be accomplished immediately prior to and during the execution of the apprehension. However, during this phase, it would be necessary for the Department of Justice to perfect its case to the extent possible and to have obtained the necessary indictments or arrest warants if prosecutors had not already done so.

The department or agency selected to execute the actual apprehension would perform scenario specific exercising attempting to simulate the apprehension and expected conditions at the apprehension site to the extent possible. When the apprehension unit or force was determined to be operationally ready, it would be deployed in preparation for entry into the sanctuary state or stateless area. The NSC would undertake to complete the necessary Congressional liaison, pursuant to the War Powers Resloution, the Intelligence Oversight Act of 1980, or some alternative mechanism, depending upon the particulars of the apprehension scenario and the forces involved. The Department of State would be tasked with accomplishing limited consultations with principal Western allies. In the event specific

foreign support was needed to assist in the apprehension operation, the responsible agency or department and the Department of State would negotiate the detailed arrangements. Press guidance should be coordinated between the Office of the President, the Department of State, and the Department of Justice. Since the operational details of the extraterritorial apprehension should remain classified, the agency or department charged with execution should not have the responsibility for discussing its actions with the media.

The actual execution of the apprehension would in most cases be managed by existing command and control structures for the departments or agencies involved. During at least the actual execution phase, there should be active participation by the appropriate JCS unified military commander for the geographical region as well as the cognizant country team if one exists. As the apprehension occurs and is publicly reported, U.S. Government departments, particularly Defense and State, with major overseas interests should direct their personnel and facilities to increase physical security readiness in anticipation of possible countervailing action from sympathetic terrorists and sanctuary states or their allies. Under some circumstances, it may be necessary to provide travel advisories or discuss the increased threat with private U.S. and allied interests operating in high risk areas. The nature and scope of the threat would continue to be monitored up to and after the terrorist trial if appropriate.

Finally, the Department of State and the U.S. Ambassador to the United Nations would have the substantial responsibility of explaining U.S. actions to the world community at large. These actions should be explained not only in terms of the justification for proceeding under international

law, but in terms of overall U.S. counterterrorism policy. Particular emphasis should be placed on the narrow application of the extraterritorial apprehension option, the fact it was used in the absence of any evidence that the sanctuary state or stateless area would either prosecute or extradite, and that the apprehended terrorist leadership or operational elites were considered a serious, continuing and imminent threat to the vital interests of the United States, its institutions both public and private, and its nationals. The world community, and in particular the terrorist sanctuary states, should be made to clearly understand that the United States or some other apprehending state is prepared to repeat the use of this pro-active measure in other appropriate cases. The message should be to extradite, prosecute in good faith, or be prepared to have nations threatened do it for you.

Decision-Making Criteria

Adoption as a Pro-Active Measure

The many and often conflicting interests involved in developing counterterrorism policy make governmental decision-making in this area extraordinarily difficult. As in any other area of governmental decision-making, counterterrorist actions must be closely examined for not only their benefits, but also their costs. A cost-benefit analysis, if it is to be meaningful, must be compared against similar analyses for other potential counterterrorist measures, as well as the decision to take no action and simply endure some level of terrorist violence. The decision to undertake pro-active measures as part of U.S. counterterrorism policy was adopted April 3, 1984 as part of National Security Decision Directive

(NSDD) 138.[3] NSDD 138 is reported to have directed 26 government agencies and offices to provide the President with options on how to implement a new policy of pro-active measures designed to build "an active defense against terrorism."[4]

The fact that overt military action was not taken against state-supported terrorism until nearly two years after adoption of NSDD 138 is perhaps the best evidence of how difficult decision-making is with regard to pro-active counterterrorism measures. Notwithstanding the reportedly tough stance of NSDD 138, the U.S. Government has proceeded with care in developing counterterrorism policy and strategy, carefully weighing the costs as well as the benefits of particular options. Unfortunately, the result of this deliberative process is a high level of public and even Congressional frustration that too little is being done, too late.[5]

The difficulties inherent in the counterterrorism decision-making process were addressed in the Vice President's Task Force on Combatting Terrorism.[6] Recommendation Number 5 of the final report included sample criteria for developing response options:

> Adequacy of information
> Reliability of intelligence
> Status of forces for preemption
> Ability to identify the target
> Host country cooperation or opposition
> International cooperation
> Legality in both domestic and international terms
> Risk analysis: What is acceptable risk?
> Probability of success (including definition of "success")
> Proportionality of forces and damage to the terrorist act
> Political reaction of allies
> U.S. public attitude
> Probable media reaction
> Potential for collateral injury to those other than the terrorists
> Conformance with national standards of morality and ethics
> Timeliness of the response[7]

These criteria, while not necessarily exhaustive, should prove useful in examining and comparing extraterritorial apprehension as a counterterrorism measure. This study provides an analysis of many of these very considerations. Recommendation 5 of the Task Force Report charges the NSC IG/T to prepare a "realistic set of criteria within which the key decisions on the use of force in preemption, reaction, and retaliation can be formulated." Until final criteria are adopted, these sample criteria should prove useful in evaluating the costs and benefits of extraterritorial apprehension as a pro-active counterterrorism measure.

Site Selection and Targeting

The Task Force's sample criteria should also be rigorously applied in the decision-making related to the selection of those countries or areas which are to be made subject to the measure. For purposes of these specific decisions, decision-makers should take a number of additional factors into account. Countries and stateless areas subject to extraterritorial apprehension should be those which clearly demonstrate an inclination to harbor those terrorists who particularly threaten the vital or major interests of the apprehending state. Such countries and areas should be those which show little or no prospect of increasing the level of their cooperation in international counterterrorist initiatives. Prime candidates at the present would be Libya, Iran, Syria, and Lebanon. There may be cases in which the United States has been unable to secure the extradition of defendants it considers international terrorists because the asylum state has honored the political offense exception. However, the erection of this bar to extradition in the absence of a showing that the

asylum state is itself supporting or actively condoning the protected terrorist would not justify intervention under the right of extraterritorial apprehension as envisioned in this study. The measure should be reserved for only those countries and areas which have exhibited protracted and continued bad faith in their support for international terrorism.

Since the political as well as resource costs necessary to plan and execute extraterritorial apprehensions may be significant, the selection of those to be apprehended must be done with great care. Some factors which decision-makers and planners may wish to consider in the targeting process include:

Threat to U.S. national security and other U.S. interests
Gravity of the crime(s) committed
Number and nationality of persons victimized
Strength of prosecution case (admissibility, relevance, credibility, utility, and probative value of evidence)
Difficulties in providing terrorists a fair trial while protecting sensitive classified information
Probability of countervailing action
Impact apprehension will have on accused terrorist's organization (i.e., greater cohesion or cause for disorientation within the ranks)
Impact apprehension will have on other terrorist organizations
Impact apprehension will have on sanctuary state or stateless area (stabilizing or destabilizing effect)

These factors when considered with the sample criteria suggested in the Vice President's Task Force Report will generally limit targeting to key leadership and operational elites within international terrorist organizations. The cost attendant to using this measure is sufficiently high that decision-makers and planners will generally wish to apply it for the purpose of striking a meaningful blow designed to eliminate key figures, e.g., Abul Abbas, Abu Nidal, or Carlos. Assuming a prosecution case can be made, extraterritorial apprehension may even prove a means of holding key

government leaders in states sponsoring terrorism accountable under the law for their criminal conduct. Obviously, the political reaction to employing extraterritorial apprehension in this manner would have to be evaluated carefully, but such an approach should not be automatically ruled out, particularly when pro-active measures are considered which necessitate the greater use of force or the increased chance of collateral injury or damage to innocent persons.

Principal Operational Concerns

Selection of Apprehension Unit

Legal and policy considereations will play some role in the selection of a department or agency to conduct the actual extraterritorial apprehension. However, the key consideration in selection should be the type of capability required to successfully accomplish the mission at an acceptable cost. As suggested in the discussion of limitations to be considered prior to apprehension in Chapter IV, statutory limitations on CIA and military involvement in law enforcement activities militates strongly in favor of these organizations operating at the express request of the U.S. Attorney General. However, once the target for apprehension and his or her location are clearly identified, the selection of the organization or unit to conduct the apprehension should be driven by the anticipated threat which the terrorist and sanctuary state or stateless area local forces may pose and those means considered most effective in addressing this threat.

One possibility remains the use of either U.S. or foreign national "surrogate" agents to conduct the apprehension. A review of the recent Ker-Frisbie line of cases demonstrates both the advantages and the disadvantages of conducting the apprehension with the use of surrogate agents. While surrogate apprehensions under the auspices of an apprehending state agency may be successful, some of the Ker-Frisbie cases demonstrate the difficulty in ensuring that apprehended persons are properly treated. Toscanino[8] serves as an example of a surrogate apprehension in which proper control was not maintained over foreign agents acting at the behest of the U.S. Government and where the result was the alleged mistreatment of the apprehended person. In Toscanino, the absence of sufficient control over the surrogates directly interfered with the Government's ability to prosecute its case.

In the event surrogate forces or agents are employed, they must be of proven reliability and be thoroughly briefed on the absolute necessity of affording the apprehended defendant reasonable treatment under the circumstances. An apprehended terrorist who is able to persuasively claim that he was brutalized in connection with his apprehension and before being formally placed in the hands of U.S. law enforcement authorities, will embarrass the U.S. Government. Of far greater import, such terrorist defendant may be able to persuade the trial court that it must divest itself of in personam jurisdiction over the case under an application of the Toscanino ruling. Such an occurrence would clearly have an adverse long-term effect on extraterritorial apprehension as a counterterrorism measure.

One of the principal reasons for using surrogates in a covert operation is to ensure that the principal may plausibly deny involvement. In the case of extraterritorial apprehension, plausible denial will generally be irrelevant, at least when the mission is successful. However, if planners consider the use of surrogates is advisable under particular circumstances, the U.S. Government agency best able to train and manage such a unit or force would be the CIA.

In most instances, the preferable plan will be to employ forces or agents of the apprehending state itself. Four organizations within the U.S. Government appear suited to provide this capability: the Department of Defense, the CIA, the FBI, and the U.S. Marshal's Service. The central problem with the FBI being tasked to conduct the actual in-country apprehension is the necessity for it to maintain its relatively unblemished reputation as a law enforcement organization which operates within overt, formal channels.[9] The Bureau's jurisdiction has expanded with the extension of U.S. extraterritorial jurisdiction. However, the FBI's overseas activities are principally investigatory and are carried out with the consent of the host nation. To facilitate investigatory access to foreign nations, it is essential that the FBI foster and maintain a high level of credibility with a substantial number of foreign states. Its active involvement in extraterritorial apprehension may jeopardize the credible image it has developed among foreign law enforcement and judicial authorities.

The CIA and the U.S. Marshal's Service do not operate under the same practical constraints and may be suitable alternatives, particularly if the apprehension is to be accomplished through covert operations or by means of

ruse, lure, or trickery. The U.S. Marshal's Service provided direct and effective support in the apprehension of former CIA agent Edwin Wilson who was lured out of Libya in 1981 under false pretenses. Once Wilson crossed U.S. borders and before he was landed, he was apprehended by U.S. Marshals.[10] No matter which of these two organizations might be used, specialized training and support capability would be required. In more complicated and high threat scenarios, it is doubtful if either organization could perform an apprehension without the support of the U.S. Armed Forces.

The Department of Defense has the greatest potential for the near-term development of a working extraterritorial apprehension capability. The threat from the targeted terrorists and the sanctuary state or stateless area forces is likely to prove significant. Since the primary concern during the extraterritorial apprehension itself is the military threat and not the correct application of law enforcement procedures, the direct employment of U.S. military forces will generally prove the desired option. The command and control structure, number of forces, type, deployment, and support should remain a matter within the purview of the Joint Chiefs of Staff, the appropriate unified commanders and the on-scene military commander.

In the event extraterritorial apprehension is approved as a counterterrorism measure for general application and it is anticipated that U.S. military forces would be directly used in conducting the apprehensions, training should be provided to one or more identified DOD units. Included in such training would be the special concerns of the Department of Justice prosecutors that apprehended terrorists be afforded

reasonable treatment under the circumstances and that particular attention be directed toward avoiding direct or collateral injury which might give rise to due process objections in a Toscanino defense. Such training might also focus on basic legal requirements related to search and seizure or other investigative functions a military force may be asked to support.

In selecting particular military units to conduct extraterritorial apprehensions, it may be important to realize the unique characteristics of this counterterrorism measure. In extraterritorial apprehension, unlike in other counterterrorism missions, the priority will be placed on apprehension force or unit safety followed by securing effective custody over targeted terrorists. If at all possible, such custody must be secured with minimum force and minimum injury. Securing custody under these circumstances will not always be easy as an operational matter and units or forces would have to be specially trained to perform the mission.

Maintaining Mission Integrity

While an extraterritorial apprehension operational plan would have to reflect law enforcement considerations, mission execution must remain the subject of the tested doctrine and practices of the agency or department tasked. The mission objective will be to conduct the apprehension with no injury to the apprehending agents or force and with minimum collateral injury or damage to the targeted terrorist and surroundings. No legal requirements exist for the apprehending force to concern itself with the details of advising the apprehended terrorist of his or her rights under U.S. or some other apprehending state's law. Once the apprehended terrorist is transferred to a platform or area clearly subject to the

apprehending state's exclusive control, qualified law enforcement personnel, supported if necessary by interpreters, may advise him of the circumstances of his apprehension, the general nature of the charges, and that he is under the custody of the apprehending state for law enforcement purposes.

Intelligence interviews of the apprehended terrorist should be avoided until law enforcement agents can be present. The advantage of this procedure is that once the terrorist provides a statement, that which is taken by law enforcement officers would be available and sufficient for defense examination at trial. Under this arrangement, there would be no cause for the defense to later demand a Jencks' Act production of the statement taken by intelligence officers which could be protected from disclosure.[11]

Once the apprehended terrorist is transferred to a secure location, he can be formally arrested by on-scene U.S. Marshals or FBI agents who would then assume custody with such continuing military support as may be required. The apprehended and now arrested terrorist should be expeditiously returned to the United States for immediate arraignment before a U.S. magistrate. Alternatively, if such expeditious transfer is not feasible, a specially designated U.S. military Judge Advocate may be granted temporary magisterial authority and conduct an on-scene arraignment (e.g., if the terrorist is taken to a U.S. Naval vessel and is awaiting onward air transportation to the United States).

Mission planning should also include contingency planning to account for an unforseen emergency or failure. In light of the threat posed to the apprehending unit or force in case of attack or capture by local forces or terrorists, effective contingency planning should provide alternative means

of exfiltrating personnel from the area in which the apprehension is staged in the event major complications occur. This facet of the operation more than any other will dictate that strict operational security surround all extraterritorial apprehension missions.

CHAPTER VII

CONCLUSION

> The fight against terrorism through law will take ingenuity, endurance, and money. We must harness the outrage we feel over these acts to give us the strength to carry on the struggle. When you start to tire, I suggest you think about the innocent victims of terror, including Robert Stethem. A passenger on the plane described Stethem's screams as the kind that went on until the very breath went out of his lungs. The thought of those screams will keep me in this fight for as long as it takes to prevail. [1]
>
> Abraham D. Sofaer
> Legal Adviser
> U. S. Department of State
> July 15, 1985

If Karl von Clausewitz was right, then the Western democracies will only win the war against international terrorism by finding effective means of eliminating those elements which compromise its center of gravity. The challenge for these nations is to devise counterterrorism policies and strategies which destroy this center of gravity in a manner consistent with their fundamental democratic values. One need only recall the unfortunate French experience in Algeria to be reminded of the ill effects of a democratic state which attempts to attain a desired end by means which violate its fundamental political and social values.

This study makes the case that extraterritorial apprehension can be an effective option among those pro-active counterterrorism measures available to the United States and Western allied governments. It is designed to directly attack and undermine the leadership and operational elites as well as the state sponsorship elements of international terrorism -- the very components which together form the enemy's Clausewitzian "center of gravity." By identifying the elites, removing them from their followers

and protected sanctuaries, and undermining the sovereignty of their state sponsors, extraterritorial apprehension has the potential for striking a decisive blow at the heart of one of the West's most dangerous enemies.

To be certain, this measure must be applied only when national or collective self-defense is at stake and when less coercive measures to gain prosecution or extradition prove ineffective. Its use must be weighed against the threat posed to the apprehending force, the possibility of collateral injury to innocent persons, and the impact of countervailing actions mounted by sympathetic terrorists and the sanctuary state. Nor will extraterritorial apprehension be effective in every case. Once instituted, terrorist elites can be expected to be even more secretive as to their location, more concerned for their physical security, more unpredictable in their movements, all in an effort to frustrate apprehension operations.

But even with these limitations, extraterritorial apprehension offers an option which, perhaps more than any other pro-active counterterrorism measure, is consistent with democracy's genuine commitment to the preservation of civil liberties and human rights. Unlike most other pro-active measures, overt or covert, the objective of this option is a nonviolent end product.

By openly trying apprehended terrorists in a legal system which functions subject to well established constitutional and common law constraints on state action, the strength of the democratic form of government is reinforced for the world to see. The trial of the apprehended terrorist may be seen as a reaffirmation by the United States and the Western democracies as confidence in, and dedication to, their systems of government. Moreover, extraterritorial apprehension can be

applied in a manner which actually serves to advance the cause of nationally and internationally recognized human rights.

Extraterritorial apprehension and the subsequent application of the criminal law in judicial proceedings is a strategy option which is wholly consistent with open democratic processes and human rights values fundamental to the United States and its allies. It is precisely this which makes extraterritorial apprehension an attractive counterterrorism measure for the United States. As a pro-active measure, it does not subvert and undermine the fundamental values of our society. Rather, it tends to reinforce those values in direct opposition to the objectives of international terrorism.

A close examination of this option also demonstrates that far from undermining efforts to expand international cooperation in law enforcement, it compliments United States and Western allied policy. The proposed measure imposes a meaningful sanction on those few states which consistently resist both the antiterrorist conventions and efforts to improve cooperation through bilateral or multilateral extradition agreements. Moreover, it underscores that the sovereign's rights are counterbalanced by its obligation to other states and to the minimum world public order system itself. The message delivered is very simply -- act responsibly to support the minimum world public order system or have your rights as a sovereign challenged by those threatened through your inaction.

If extraterritorial apprehension is to strike a decisive blow against international terrorism as suggested by this study, it must be applied aggressively over a period of time. If so applied, it will clearly offer the United States and its allies some element of retribution for the

heinous crimes perpetrated against their institutions and nationals. Far more important, the aggressive application of extraterritorial apprehension and concomitant criminal prosecution stands a good chance of detering state sponsorship of terrorism while at the same time directly interdicting the activities of the terrorists' networks. If this measure does nothing more than cause concern to the sponsors of terrorism and undermine the self-confidence of the terrorist movement, it will have been of significant value. In all probability, it will accomplish far more.

While undertaking such a strategy will not be an easy task, its potential benefits may be well worth the investment of time and resources. The extraordinarily difficult job given to the intelligence community in dealing with international terrorism will only become more difficult if the end product is criminal prosecution. Government agencies and departments with varied missions and conflicting doctrines will be required to rise above bureaucratic interests for a common goal. Doubtful allies will have to be persuaded or lead. But the strength of the American people and their government is the ability to seize the initiative and stay the course. The American people and their Congress have signaled their strong support for pro-active counterterrorism measures. This study proposes that the National Security Council give serious consideration to recommending the President adopt extraterritorial apprehension as one of those measures.

NOTES

Chapter I

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61. United Nations, Security Council, Resolution 579 (1985)," U.S. Mission to United Nations advanced copy, adopted at 2637th Mtg., 18 December 1985, S/RES/579(1985).

62. Ibid. See Resolutions supra notes 59 and 60.

63. Ibid.

Chapter V

1. Senator Arlen Spector, U.S. Congress, Senate, Subcommittee of Security and Terrorism, Committee on the Judiciary, Hearing on Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad, Ser. No. J-99-45, (Washington: U.S. Govt. Print. Off., 30 July 1985), p. 92.

2. U.S. Laws, Statutes, etc., "Classified Information Procedure Act of 1980," U.S. Code, Title 18., app. (Supp. V 1981); Public Law No. 96-456, 94 Stat. 2025 (1980), (hereinafter referred to as "CIPA").

3. Standing Committee on Law and National Security, American Bar Association, Litigating National Security Issues, proceedings of workshop held 9 August 1982, (Washington: American Bar Association 1983), p. 1.

4. CIPA, sec. 1.

5. Ibid., sec. 2.

6. Federal Rules of Criminal Procedure 16(d)(1) reprint U.S. Code Service - Court Rules, (Rochester, NY: Lawyers Co-operative Publishing, 1978) provides:

> (1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

7. U.S. Congress, Senate, Senate Report no. 96-823, 96th Congress, 2d Sess. 3 (1980), reprinted in U.S. Code Congressional & Administrative News (St. Paul, MN: West Publishing, 1980), 4294, pp. 4299-4300. (hereinafter "Senate Report no. 96-823").

8. United States v. Pringle, 751 F.2d 419 (1st Cir. 1984).

9. Roviaro v. United States, 353 U.S. 53 (1957).

10. Brady v. Maryland, 373 U.S. 83 (1963).

11. United States v. Pringle 427-28. See United States v. Porter, 701 F.2d 1158, 1162-63 (6th Cir. 1983) (upholding denial of discovery by defendant under section 4 of CIPA).

12. Roviaro v. United States, 353 U.S. at 62.

13. Senate Report No. 96-823, p. 4300. See CIPA, sec. 6.

14. Ibid., p. 4301.

15. Ibid.

16. U.S. Congress, House of Representatives, House Conference Report No. 96-1436, 96th Congress, 2d Session 12-13 reprinted in U.S. Code Congressional and Administrative News, (St. Paul, MN: West Publishing, 1980), pp. 4310-11.

17. United States v. Porter, 701 F.2d 1158 (6th Cir. 1983), pp. 1162-63 where court held even if the defendants may have been hampered to some degree by inability to inspect the surveillance equipment in their defense against narcotics charges, section 6(e)(2) of CIPA did not require dismissal of the indictment.

18. CIPA, sec. 7(a).

19. U.S. Laws, Statutes, etc., "The Federal, Rules of Evidence," U.S. Statutes at Large, Public Law 93-595, 93rd Congress, Washington: U.S. Govt. Print. Off., 1975. Rule 106. See U.S. Code Service, Title 28 -- Appendix Rules of Evidence. Also see American Jurisprudence 2d, v. 32B, (New York: Lawyers Co-operative Publishers, 1982), p. 371.

20. Senate Report No. 96-823, p. 4304. See CIPA, sec. 8(b).

21. United States v. Smith, 750 F.2d 1215 (4th Cir. 1984) 1220, reh'g en banc granted (argued 6 June 1985).

22. United States v. Collins, 720 F.2d 1195 (11th Cir. 1983) 1199.

23. Interview with Mr. E. Lawrence Barcella, Assistant U.S. Attorney for the District of Columbia, Washington, D.C.: 9 April 1986. Also interview with Ms. Karen Morrissette, Chief, Litigation Section, Criminal Division, & Mr. Steve Weglian, U.S. Department of Justice, Washington, D.C.: 10 April 1986.

24. United States v. Felt-Miller discussed without citation ABA, Litigating National Security Issues, pp. 10-20.

25. Ibid., p. 13.

26. Telephone conversation with Mr. John Nields, former Special Prosecutor (United States v. Felt-Miller), U.S. Department of Justice, Miami, FL: 18 April 1986.

27. United States v. Felt-Miller discussed without citation ABA, Litigating National Security Issues, pp. 16-19.

28. M. Pearlman, The Capture and Trial of Adolf Eichmann, (1963), pp. 567-68. See Matthew Lippman, "The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law," Houston Journal of International Law, v. 5, no. 1, Autumn 1982, 1, p. 25.

29. Lippman, n. 143, p. 25.

30. Ibid., n. 144, p. 26.

31. Ibid., n. 145, p. 26.

32. Ibid., n. 148, p. 26.

33. Ibid., n. 151, p. 27.

34. Ibid., n. 153, p. 27.

35. Ibid., n. 159, p. 28.

36. United States ex rel. Lugan v. Gengler, 510 F.2d 62 (2d Cir. 1975).

37. United States v. Quesada, 512 F.2d 1043 (5th Cir. 1975).

38. United States v. Herrera, 504 F.2d 859 (5th Cir. 1974).

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40. Interview with Mr. Barcella.

41. See, e.g., United States v. Testan, 424 U.S. 392, (1976) 399. For the Supreme Court's rationale for the doctrine, see Kawananakoa v. Polybank, 205 U.S. 349, (1907) 353.

42. U.S. Laws, Statutes, etc., "Federal Tort Claims Act," U.S. Code, Title 28, sec. 1346(b), 2671-2680, (hereinafter "FTCA").

43. U.S. Laws, Statutes, etc., "Foreign Claims Act," U.S. Code, Title 10, sec. 2734, (hereinafter "FCA").

44. U.S. Laws, Statutes, etc., "Military Claims Act," U.S. Code, Title 10, -- Armed Forces, sec. 2733, (hereinafter "MCA").

45. FTCA sec. 1346(b) (1976).

46. Ibid., sec. 2680.

47. Ibid., sec. 2680(h), 1974 amendment, Public Law 93-253, sec. 2, 88 Stat. 50, adopted 16 March 1974.

48. FCA, sec. 2734.

49. Ibid.

50. Ibid.

51. MCA, sec. 2733.

52. Barr v. Matteo, 360 U.S. 564 (1959); Bates v. Carlow, 430 F.2d 1331 (10th Cir. 1970); Willingham v. Morgan, 424 F.2d 200 (10th Cir. 1970).

53. United States v. Reed, 639 F.2d 896 (1981) 902.

54. Ibid.

55. DiLorenzo v. United States, 496 F. Supp. 79 (S.D.N.Y. 1980).

56. Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). (hereinafter "Bivens").

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58. "Rethinking Sovereign Immunity After Bivens," New York University Law Review, v. 57, no. 3, (June 1982), pp. 597-668.

59. Carlson v. Green, 446 U.S. 14 (1980).

60. Davis v. Passman, 442 U.S. 228 (1979).

61. FTCA, sec. 2680(h) (1976).

62. For examples of indemnification statutes, see U.S. Code, Title 10, sec. 1089(f) (1976) (optional indemnification for damages paid by certain government medical personnel); U.S. Code, Title 38, sec. 4116(e) (1976) (optional indemnification of Veterans' Administration personnel). See

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63. Berman, "Integrating Governmental and Officer Tort Liability," pp. 1191-94.

64. "The Suits that U.S. Aides Fear," National Law Journal, 18 January 1982, pp. 1:4, 28:1.

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66. Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982).

67. Harlow v. Fitzgerald, p. 2739.

Chapter VI

1. Senator Arlen Spector, U.S. Congress, Senate, Subcommittee of Security and Terrorism, Committee on the Judiciary, Hearing on Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad, Ser. No. J-99-45, (Washington: U.S. Govt. Print. Off., 30 July 1986), p. 44.

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Chapter VII

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