

Fordham International Law Journal

Volume 23, Issue 5

1999

Article 7

Extradition, Evidence Gathering, and Their Relatives in the Twenty-First Century: A U.S. Defense Counsel Perspective

Bruce Zagaris*

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Abstract

The United States is serving as a laboratory to resolve the tension between globalization, rising transnational criminality, and the demand for enhanced human rights. This Essay reviews selected areas of evidence gathering and extradition in transnational crime and closely related areas. The perspective will focus particularly on the rights of defendants.

EXTRADITION, EVIDENCE GATHERING, AND THEIR RELATIVES IN THE TWENTY- FIRST CENTURY: A U.S. DEFENSE COUNSEL PERSPECTIVE

*Bruce Zagaris**

INTRODUCTION

Contemporary transnational crime takes advantage of globalization, trade liberalization, and exploding new technologies to perpetrate diverse crimes and to move money, goods, services, and people instantaneously. Diverse transnational groups, especially organized crimes groups, live and operate in a world without borders. Increasingly, transnational criminal groups are diversifying their crimes, markets, and networks. The intelligence networks of the transnational criminal groups and the coincidence of economic and political power enables them to transfer parts of their operations and enterprises quickly to the territories that they can dominate.¹ While the U.S. government has determined that transnational organized crime is a national security threat and has taken various initiatives to combat it,² the U.S. government is continuously and actively seeking more significant policy and legal initiatives to conceptualize and establish effective regimes. Some policymakers believe that many more transformations in the U.S. legal system are required to combat transnational organized crime.³

The U.S. government has enacted a substantial amount of new legislation and developed initiatives to combat transnational organized crime.⁴ In particular, the United States has taken sig-

* Partner, Berliner, Corcoran, and Rowe.

1. See, e.g., Peter A. Lupsha, *Transnational Organized Crime Versus the Nation-State*, 2 *TRANSNAT'L ORG. CRIME* 21-48 (1996).

2. See *Interview with the Hon. Richard A. Clarke, Special Assistant to the President and Senior Director, Global Issues and Multinational Affairs, National Security Council, Nov. 30, 1995*, 1 *TRENDS IN ORG. CRIME* 5-9 (1996).

3. See, e.g., SENATOR JOHN KERRY, *THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY* 31 (1997).

4. On October 22, 1995, President Clinton used the occasion of his 14 minute speech before the 50th anniversary of the United Nations to announce a number of new initiatives against transnational organized crime, including the extension of economic sanctions against certain Colombian narcotics trafficking organizations. See *Remarks of President Clinton to the United Nations on the Occasion of the 50th Anniversary of the*

nificant measures against drug trafficking, anti-money laundering, transnational corruption, trafficking in human beings, international terrorism, intellectual property, and fiscal offenses.⁵ The United States has also been in the forefront of asset forfeiture, especially civil and administrative forfeiture. At times, the United States has prioritized confiscating the proceeds of crime and disrupting organized criminal groups rather than bringing persons to justice.

The United States has been an international pioneer at posting liaison enforcement officers overseas, helping transform legal regimes, and developing bilateral law enforcement working groups on transnational organized crime (*e.g.*, with Italy and Mexico). The United States has provided a substantial amount of technical and financial assistance to create training centers (*e.g.*, the International Law Enforcement Academy in Budapest). Additionally, the United States has provided administration of justice directly against transnational organized crime (*e.g.*, in Central and Eastern Europe).⁶

At times, some law enforcement officials have cut legal corners in order to achieve their objectives. In some cases, the U.S. judiciary has afforded leeway to those officials. Clearly, this diverse and large nation is serving as a laboratory to resolve the tension between globalization, rising transnational criminality, and the demand for enhanced human rights.

This Essay will review selected areas of evidence gathering and extradition in transnational crime and closely related areas. The perspective will focus particularly on the rights of defendants.

I. EVIDENCE GATHERING

In an era of globalization, free trade, and exploding trans-

Creation of the United Nations, FED. NEWS SERVICE, Oct. 22, 1995, available in LEXIS, Nexis Library, Curnws File. For the economic sanctions, see Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (1995); for the text of President Directive 42 on transnational crime, see White House, *Presidential Directive on International Organized Crime, Summary Sheet*, Oct. 22, 1995.

5. For activities of the U.S. Executive, see Bruce Zagaris, *Clinton Administration Prepares International Organized Crime Initiative*, 12 INT'L ENFORCEMENT L. REP. 196-97 (1996); for activities of Congress, see *U.S. Congress Considers Suggestions on Combatting International Organized Crime*, 12 INT'L ENFORCEMENT L. REP. 116 (1996).

6. Frank Gregory, *Transnational Crime and Law Enforcement Cooperation: Problems and Processes Between East and West in Europe*, 4 TRANSNAT'L ORG. CRIME 105-33 (1995).

national crime, law enforcement agencies have become more proactive and eclectic in their evidence gathering. While law enforcement agencies investigating transnational crime assume their targets are organized crime groups and well-heeled crooks, frequently indigent persons are caught in the net. Increasingly, these indigent persons find it impossible to obtain due process in complex litigation spanning several countries, cultures, international conventions, and a mix of criminal, administrative, and civil cases.

A. *Informal Police Cooperation*

A phenomenon of globalization is that police cooperation has assumed various new forms, which could evolve into supranational police forces. One of these new forms of cooperation is the use of new communication channels, such as liaison officers, mixed investigation teams, and institutions like Europol and the European Fraud Prosecutor ("OLAF"). New investigative activities include multiple forms of proactive policing, such as undercover sting operations, controlled deliveries, and flipping defendants. New technological devices are used to engage in cross-border observations by satellite and tapping electronic or telephonic conversations. As police cooperation more becomes the norm, it becomes increasingly important to formalize such cooperation through international conventions and restrict informal police cooperation that violates constitutions, international human rights law, and fundamental rights of persons.⁷

On September 11, 1999, during its sixteenth Congress, the International Penal Law Association ("Association") called attention to these issues. The Association passed a resolution recommending that international proactive police should abide by the principles of legality, proportionality, and subsidiarity. The Association recommended that these principles be incorporated in the proposed U.N. Convention against Transnational Organized Crime on the international use of special investigative techniques.⁸ The Association also recommended appropriate moni-

7. *International Penal Law Association Adopts Resolutions on Transnational Organized Crime*, 15 INT'L ENFORCEMENT L. REP. 502 (1999).

8. See Revised draft United Nations Convention against Transnational Organized Crime, U.N. GAOR, Ad Hoc Committee on the Elaboration against Transnational Organized Crime, 55th Sess., art. 15, at 25, U.N. Doc. A/AC.254/4/Rev. 1 (1999), also available in United Nations Crime and Justice Information Network (visited Apr. 19,

toring of such policing activities by the authorities in charge of criminal investigations at the national level. In the case of coercive or intrusive methods, the Association recommended the provision of judicial order or review. These same principles should apply to other international conventions and to national laws and policies on transnational policing.

Another issue arises from the establishment of new structural forms of cooperation such as joint investigation by multiple agencies and undercover agents in multiple countries and common automated systems (*e.g.*, Schengen information systems). These new forms of cooperation are required in an era of globalization, but they should be accomplished in accordance with the law and with proper procedures, safeguards, and monitoring.⁹ An alternative way to gather evidence for defendants can be to resort to the Freedom of Information Act.¹⁰ On occasion, the media, U.S. Congress, and international human rights groups can assist in helping resolve cases.

In an interconnected world, U.S. citizens increasingly find themselves detained abroad and charged with crimes. While remarking on the case of Joseph Stanley Faulder, a Canadian who faced execution last year on death row in Texas, Secretary of State Madeleine Albright pointed out that there are 12,500 U.S. citizens in foreign jails, including some 300 Texans.

By focusing on recent cases of U.S. citizens detained for crimes in the Americas, I will highlight recurring themes in terms of the problems that befall U.S. citizens, the legal and non-legal means available to try to extricate them from their predicament, and consider some urgent policy trends and needs for the future architecture of the inter-American system. The four cases upon which I will focus involved six U.S. citizens: two tourists, one U.S. government employee, two businessmen, and one missionary.

1. Jim and Penny Fletcher, Sailing Enthusiasts from West Virginia

The first case concerns Jim and Penny Fletcher, who hail

2000) <<http://www.ifs.univie.ac.at/uncjin/mosaic/dcatoc/2session/4r1e.pdf>> (on file with the *Fordham International Law Journal*).

9. *Id.*

10. 5 U.S.C. § 552 (1994).

from Huntington, West Virginia. In October 1996, they were detained in Bequia, in the Grenadines, St. Vincent, and charged with the murder of Jerome Joseph, a water taxi driver. Eventually, their case went to trial. The court dismissed all charges and finally released them in August 1997.¹¹

When the Fletcher family first retained me, almost seven weeks after their detention, they already had an attorney from Puerto Rico, his associate, who had criminal defense experience, and two very seasoned St. Vincentian defense counsels, one of whom was also the opposition leader. There had been quiet negotiations regarding the payment of a bribe, in an amount of up to US\$100,000, to obtain their freedom. I was not a party to these negotiations, and in fact immediately relayed my concerns quietly to the St. Vincent Ambassador to the United States, whom I knew, and to the U.S. Embassy. To my dismay, no one registered surprise or even concern.

An important event in late November 1996 was the widespread reporting in the St. Vincent and South African papers about the detention of a South African yachtsman Alan Heath, whose yacht was clandestinely boarded while it was anchored in St. Vincent. After his wife was brutally murdered during the boarding, the St. Vincent police threatened to charge Mr. Heath with the crime. After the South African government furnished evidence about Mr. Heath, the St. Vincent government assured the South African government that it would release him due to lack of evidence. The St. Vincent government, however, continued to detain Mr. Heath until his family paid US\$25,000, which happened to be the amount of a life insurance policy on his deceased wife and which the St. Vincent government learned about from the South African government.

Since I was delivering a speech at the beginning of January in the Cayman Islands, I arranged to visit St. Vincent. Shortly after my arrival, attorneys in the St. Vincent Attorney General's office confided that the case was an embarrassment: no tangible evidence existed showing the Fetters were responsible and they held out hope for quick dismissal of the case. However, when I discussed the case with the Attorney General, whom I

11. For a more detailed discussion of the Fletcher case, see Bruce Zagaris, *Lost in Paradise: Lobbying Strategies for Public International Law Issues*, 4 ILSA J. OF INT'L & COM. PAR. L. 427-54 (1998).

knew and had taught in anti-money laundering programs in the region, I learned that the case was not likely to end any time soon.

From the beginning, I contacted both the U.S. Department of State's American Overseas Citizens Services Office and the U.S. Embassy consular officials who were working the case. As the case continued, my investigation showed that, notwithstanding the U.S. Department of State's denials, their own documents confirmed my suspicions that the consular officials shared my same concerns.

My discussions with the Fletchers revealed that: (1) serious improprieties had occurred during their initial detention and questioning, including failure to notify the U.S. government under a Consular Convention, failure to allow the Fletchers any calls, limited food and drink, and subjection to mental and physical abuse; and (2) the conditions of their detention were horrible, even though they were only in pre-trial detention.

On February 25, 1997, approximately three months after their arrest, a preliminary hearing was held and completed on March 10, 1997. The magistrate found that, although only extremely limited circumstantial evidence existed, probable cause existed to bind them over for trials. On May 2, 1997, ABC News aired a Nightline program about the case. Two days later, Inside Edition, a national program, aired an exposé. Shortly thereafter, Extra, a daily tabloid program, regularly aired developments in the case, including information on the deteriorating medical conditions of the Fletchers. On a May 5, 1997 radio interview in St. Vincent, the St. Vincent Prime Minister personally castigated ABC News, and defended his government's handling of both the South African's case and the Fletcher case. On May 10, 1997 while meeting Caribbean leaders in Barbados, President Clinton discussed the Fletcher's case with the St. Vincent Prime Minister, expressed his concern, and requested the Prime Minister's assurances that the Fletchers be accorded due process. Incidentally, the main concern at the meeting from the perspective of the Caribbean was the U.S. action at the World Trade Organization to end preferential treatment of bananas and the consequential enormous dislocation for farmers in the Eastern Caribbean.

On May 27, 1997, on the only government-owned radio station, the St. Vincent Prime Minister stated that "this couple has

an unsavory reputation and their behavior . . . was bizarre and offensive." The Prime Minister further asserted that "[t]here certainly appears to be very strong circumstantial evidence that [the Fletchers] were involved in this tragedy, and many of us believe they are guilty." On June 6, 1997, Senator Rockefeller sent a letter to U.S. Secretary of State Albright expressing outrage at the Prime Minister's remarks and seeking strident action. Six members of Congress wrote a similar letter. The media became increasingly interested in the diplomatic ramifications of the case. Further, the U.S. Congress and the media were also interested in Penny Fletcher's health. In the spring of 1997, the pre-cancerous condition of Penny Fletcher deteriorated. Mrs. Fletcher experienced increasing fainting spells due to her inability for months to obtain any adequate treatment.

In July 1997, the trial finally started. The St. Vincentian government hired a prominent regional Queen's Counsel from Trinidad to prosecute the case. He asked the judge to delay the trial until October and issue a worldwide gag order on coverage of the trial. When the Fletcher's Puerto Rican attorney went to St. Vincent for the trial, he was detained at the airport and questioned about a letter he sent to the U.S. Embassy discussing the bribe solicitation. As a result of threats of his arrest, he did not return for trial even though by then he was the attorney who was directing the litigation strategy. Almost simultaneously, on the night before the start of trial, R. Gonsalves, the lead local attorney, received a criminal complaint against him that charged him with contempt for his statements to ABC News three months before.

On July 14 and 16, 1997, the court held hearings on the request for a delay of the trial and a gag order. The St. Vincent Police Commissioner sued the reporter from West Virginia whose coverage of the case had been featured in the Gannett papers for writing about the allegation of the extortion attempt and Senator Rockefeller had to intervene for him to be able to leave St. Vincent.

After CNN started reporting on the case, the St. Vincent Prime Minister appeared on the "Burden of Proof" show and the media became even more interested. When the U.S. Ambassador visited the highest-ranking official in St. Vincent along with the family of the defendant, the trial resumed. The judge dismissed the case, after the prosecution presented its case, finding

no evidence to connect the two U.S. nationals. This case brought up several important issues.

a. Role of the Executive Branch

The role of the Executive Branch in these cases is critical. Title 22 U.S.C. § 1732 requires the U.S. President, if it comes to his attention that an U.S. citizen has been unjustly deprived of his or her liberty by or under the authority of any foreign government, to demand the reasons of such imprisonment and if it appears to be wrongful, to forthwith demand the release of such citizens. If the release so demanded is unreasonably delayed or refused, then the President must use such means, which do not amount to acts of war and are not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release.

The Foreign Affairs Manual requires U.S. consular officials to use their "best efforts in protecting the citizens' legal and human rights." They must use their own creative approach in achieving these goals. Heroic efforts by Sandra Ingram, a Foreign Service officer in Barbados, were critical in the case. She covered the preliminary hearing and reported in detail on procedural irregularities. We were not able to obtain copies of the report, however, until after we brought and exhausted our administrative appeals under the Freedom of Information Act and after a Congressional staff member viewed and leaked parts of the report. The U.S. Department of State took the position that, despite evidence of irregularities in the handling of this and other cases, it was not able to do anything. In the end the Executive Branch, from the consular officials to President Clinton himself, played an important positive role in ensuring that the Fletchers received a trial and decent treatment during their pre-trial detention.

b. Legislative Branch

A key factor in the eventual resolution of the case was the involvement of the U.S. Congress. At critical stages, key members of Congress, such as Jay Rockefeller and Congressman Lee Hamilton played important roles. They helped galvanize the Executive Branch, the St. Vincent Government, the international human rights community, and the media. However, until we ob-

tained the consular report of the pre-trial hearing, we could not convince the legislators to pay attention.

c. The Media

Perhaps the role of the media was most critical. The media was partly interested because the murder victim was a “hunk” who was likeable and was known as a “Romeo” with visiting tourists. The Fletchers were prominent for their wealth and their wild ways, which included the wife’s flaunting her six-shooter, getting thrown out of a restaurant owned by the Prime Minister’s former wife, and having an ugly fight with the Prime Minister’s cousin and one of his best friends, in which the latter was bitten in the neck.

A key event occurred in May 1997, when Julia Fletcher, the couple’s fourteen-year-old daughter, along with her step-sisters, called a news conference and warned the St. Vincent Government that “The Whole World Is Watching,” a refrain that I was able to repeat again and again. A Huntington, West Virginia, newspaper ran a series entitled *Prisoners in Paradise*, which the Gannett News Service and AP wires ran. The paper started a website on the case. Eventually, every network, in addition to CNN and the tabloids, covered the case. Their coverage and the importance of tourism for St. Vincent caused the St. Vincent government to hire a media firm and made it difficult for the court to act wrongly without consequences.

d. Investigation

A key element in the case was investigation. A person detained must be able to obtain and utilize facts about his or her case and the surrounding circumstances. Sources of information can include U.S. and local investigators, newspapers and reporters, and U.S. government reports. Much of the information gathering can be directed from the United States.

e. International Human Rights Provisions and Fora

An important component of the Fletchers’ case was raising violations of international human rights treaties. I immediately determined that the St. Vincent Government had ratified the International Covenant on Civil & Political Rights and the U.N.

Universal Declaration of Human Rights.¹² I brought each violation to the attention of the Executive and Legislative Branches and the media. Eventually, I was able to persuade the Lawyers Committee on Human Rights to issue an urgent Lawyer-to-Lawyer plea after the Puerto Rican lawyer was detained and the St. Vincentian lawyer was charged.

International human rights groups have excellent material. I found the newsletters of the St. Vincent International Human Rights chapter valuable, although the only place they were carried in the United States was in the Harvard Law Library.

f. Potential Roles of Other Governments

In some cases other governments can play important roles. In the Fletchers' case, the South African government was extremely sympathetic and helpful in providing access to key documents and information about the similarities in the handling of the South African case.

2. David M. Duchow, State Department Counter-drug Employee from Louisiana

A second case involves David M. Duchow, a Louisiana citizen who was decorated for his service in Vietnam where he lost his spleen. He worked for several years as a U.S. Department of State contract employee in Bolivia. In May 1995, he was accused of embezzling over US\$200,000 of fuel supply.

When the Inspector General came to interrogate him, Duchow requested counsel and information on any charges that would be filed. As a result, the Inspector General employees became agitated and told him they did not come to "this hellhole" to have him insist on his rights. They told him he would receive "Bolivian Justice." Thereafter, he was detained. Eventually he was released and has been under house arrest. He claims that, even to file motions, requires payment of money.

A large New Orleans law firm retained me when it filed a civil action, requesting declaratory relief and mandamus to order the U.S. government to try Duchow in the United States. The action was over successfully. Eventually, I made an affidavit

12. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3d. Sess, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

for the Bolivian court on the issue of the breach of Duchow's diplomatic immunity, which the trial court, indeed, used as a basis to dismiss the case on lack of jurisdiction. While the United States waived his immunity, it failed to do so until two weeks after his arrest. The appellate court has affirmed and the case is now before the Bolivian Supreme Court.

Meanwhile, I have been engaged in a lengthy effort under the Freedom of Information Act to obtain documents showing the factual predicate of the case against Mr. Duchow, which he could obtain in the Bolivian criminal justice process. The day that the U.S. Department of State had to submit its summary judgment, I received eighty percent of the documents requested—nearly two years after Mr. Duchow's arrest.

The Duchow case raises many important policy issues. First, what, if any, standards should exist for waiving diplomatic immunity of U.S. citizens working abroad? Second, should the United States waive immunity only for serious crimes? Third, should the United States waive immunity only when the countries that will prosecute meet minimum due process and international human rights conditions, which the U.S. Department of State's International Narcotics Control Strategy Report and annual human rights report claim are not met in Bolivia? Similarly, when should the United States exercise jurisdiction over criminal cases, especially when its nationals prefer trial and adjudication? In the United States, should the U.S. Government have standards to take into account the rights of the defendant or only its own goals? Some of these issues are raised in a front-page story by Warren Richey, *U.S. Diplomat Faces Foreign Brand of Justice*.¹³

The big difference between the two cases in terms of strategy has been money. The impecunious nature of the Duchows does not allow for elaborate strategy and has required a very selective use of the various mechanisms.

3. Jim Williams, Fish Importer from Jacksonville Beach, Florida¹⁴

Jim and Robin Williams worked hard in their fish import business. They both worked exceedingly long hours. Jim was in

13. Warren Richey, *U.S. Diplomat Faces Foreign Brand of Justice*, CHRISTIAN SCI. MON., Oct. 7, 1998.

14. For background on the case, see Free Jim—American Prisoner in Ecuador

charge of developing fish suppliers and production while Robin, a former bank employee, handled all the books, received and made all payments.

In April 1996, U.S. Federal Bureau of Investigation ("FBI") agents contacted them because one of their twenty-three fish suppliers, José Castrillon, was an alleged drug trafficker. Jim Williams gave two interviews to FBI and U.S. Drug Enforcement Agency ("DEA") agents and turned over more than five boxes of business records in connection with a Tampa grand jury investigation. By July 1996, Williams had not heard from the FBI and wanted to finish a pending project in Ecuador. His lawyer, a respected lawyer who was a Harvard graduate and law clerk to Judge William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, checked with the FBI and relayed the message that the FBI had no objection to Williams's traveling to Ecuador.

On August 14, 1996, a DEA agent based in Ecuador wrote a letter to Ecuadorian narcotics officials, identifying Jim Williams and five other men as members of a "narco-trafficking organization." The letter concludes with a request that Williams and the others be investigated "and steps be taken, as the case may require for the purposes of disarming this international drug-trafficking organization." In September 1996, Williams arrived in Ecuador, assuming the FBI had investigated him and believing that he was in the clear. On his arrival in the hotel, he encountered dozens of Ecuadorian narcotics policeman and was detained.

Like the Fletchers, he was held incommunicado for some days and not allowed to make any calls. He was charged with money laundering conspiracy in connection with his business dealings with José Castrillon. Shortly after his arrest, Williams's lawyer received a call from the same agents, asking if his client now wanted to cooperate more, since Mr. Williams had told them that he did not believe Mr. Castrillon had any narcotics dealings. Much of the evidence used against him consisted of business records turned over to the FBI and DEA for the Tampa investigation.

Simultaneously, Jim Williams was prosecuted for the same

offense in Panama, although the court has dismissed the charges. In May 1998, the Panama Government suddenly deported Mr. Castrillon to the United States and the Tampa prosecutor unsealed an indictment against Mr. Castrillon and Mr. Williams.

The U.S. Congress has held hearings on the case. Fourteen members of Congress have supported a resolution calling for his release. Although John Shattuck, the former Assistant Secretary of State for International Human Rights, promised treatment in accordance with international human rights standards, the fundamental violations of Mr. Williams's rights make a mockery out of justice. For instance, some of the evidence against Mr. Williams comes from the Ecuador police. Hence, Mr. Williams asked that they testify in person and be subject to cross-examination. They did not come and the judge refused to compel their presence, but continues to admit and rely on their evidence.

In addition, Mr. Williams's right to "a fair and public hearing by a competent, independent and impartial tribunal" has been breached. From the beginning, members of Congress have complained about the apparent influence of the U.S. government in this case and representatives of the U.S. government regularly visit the judge. After Mr. Williams's arrest, the U.S. Ambassador publicly praised the law enforcement action and the U.S. government issued press releases. In Ecuador, one cannot be convicted of money laundering unless the court has convicted one of a predicate offense. Finally, after approximately two years, Jim Williams was convicted in a trial, which fell short of fundamental justice, according to the human rights monitors who covered the trial.

At first, the U.S. government denied that the United States had anything to do with Mr. Williams's arrest. Still, the United States denies any responsibility. The responses to my requests under the Freedom of Information Act by the U.S. Department of State show otherwise. The FBI and DEA have found reasons to refuse to produce any documents and now produce a few copies of Congressional Inquiries.

Jimmy Carter himself and the Carter Center have intervened in the case. The International Human Rights Law Clinic at the Washington College of Law is involved. CBS Sixty Minutes, Extra, and other local media have aired reports. The

Miami Herald has published a strong editorial, demanding fairness in the Williams case. The New York Times, Christian Science Monitor, and other media have also reported on the case.

The case exhibits many of the same issues in the Duchow case about the considerations for determining the proper court when concurrent jurisdiction arises. It raises the propriety of U.S. law enforcement compelling the production of evidence for a grand jury investigation and then sending the same information to foreign government authorities, especially ones whose criminal justice system has fundamental problems, according to the U.S. Department of State's own reports. It also raises the question of fair treatment and candor by law enforcement authorities.

B. *Equality of Arms in the Use of U.S. Evidence Gathering*

From a U.S. perspective, one of the difficulties in defending allegations of transnational crime is gathering the evidence in admissible form. Proactive policing *vis-a-vis* transnational crime has produced transformations in international criminal cooperation law in the United States. Globalization ensures that the number of transnational criminal investigations and prosecutions involving the United States will increase. Undoubtedly, an increasing number of cases will bring into play the potential applicability of the various rights guaranteed by the U.S. Bill of Rights and the applicable provisions of international human rights conventions, such as the International Civil and Political Covenant.¹⁵ The tension between the need for the United States to cooperate more with national governments and international tribunals and the concern for the fulfillment of constitutional and international human rights standards is likely to continue to build.

1. U.S. Mutual Legal Assistance Treaties

Recent U.S. mutual legal assistance treaties (or "MLAT") in criminal matters that grant the government compulsory process rights, as delimited by the respective treaties, expressly state that the treaties do not create a right for a "private person" to obtain

15. For background, see Michael Abbell & Mark Andrew Sherman, *The Bill of Rights in Transnational Criminal Litigation*, CHAMPION 22-29 (1992).

evidence. The purpose is to prevent the MLAT from being used to suppress or exclude evidence or to impede investigations. Hence, if an adversely affected person wants to prevent the execution of a request, which he or she believes was made in violation of the MLAT, then his or her only recourse under the MLAT is to the executive authority of the requested country, not to its courts. Similarly, if an accused wishes to contest that the requested country violated the terms of the MLAT in executing a request, then he or she may do so only to the executive authorities of the respective countries.

The MLAT provisions do not prevent a person adversely affected by a request or its execution from asserting whatever rights he or she has under the laws of the appropriate country in its courts. For instance, a person whose home or place of business was searched and whose property was seized under a search warrant issued pursuant to an MLAT request may assert whatever rights he or she has under the laws of the requested country to prevent that property from being turned over to the requesting country. Similarly, a person whose records have been subpoenaed pursuant to an MLAT request may assert whatever rights he or she has, under the laws of the requested country, to prevent the production of those records or their transmittal to the requesting country. An affected person would also presumably be able to seek to enjoin the requested country from taking an action not authorized by the MLAT or its laws.¹⁶ In at least one case in which a defendant sought to use a U.S. MLAT in criminal matters to obtain evidence from a U.S. treaty partner pursuant to a treaty which was silent with respect to a defendant's right to seek evidence under it, the trial court directed the U.S. Department of Justice to make a treaty request on behalf of the defendant.¹⁷

In a recent case in which I was involved, the defendants were able to persuade the U.S. court to order the U.S. government to allow the defendants to make use of a U.S. MLAT. In particular, the court ordered that the defense counsel and U.S. government agree on a procedure to allow defense counsel to

16. See 3 MICHAEL ABBELL & RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 12-4-7.

17. The request was made by the U.S. Department of Justice to Switzerland at the direction of the U.S. District Court for the Eastern District of New York in *In re Sidona*, 584 F. Supp. 1437 (E.D.N.Y. 1984). See 3 MICHAEL ABBELL & RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 12-2-1.

utilize the applicable MLAT for a series of witnesses whose depositions abroad were required and for other evidence gathering. If the defense counsel and the U.S. government could not reach agreement, then the court indicated it would set a hearing and make rulings. The court expressed sympathy to the need for defense counsel to employ proactively the MLAT. Defense counsel and the U.S. government did reach accommodation on the procedure. However, when it came to implementation, defense counsel was able to obtain a much more favorable plea offer and, eventually, achieved a plea agreement.¹⁸

The U.S. government has agreed to provisions in its MLATs that accommodate concerns of its treaty partners about safeguarding provisions on international human rights. For instance, in the MLAT between the United States and Australia, signed on April 30, 1997, the term "essential interests" that may be invoked to deny assistance to a requesting state includes a discretionary limitation on providing assistance in death penalty cases.¹⁹

2. Equality of Arms in Tax Information Exchanges

One area in which the target of government international investigations can be disadvantaged is the area of administrative penal law. The United States and other governments have concluded mini-mutual assistance agreements in a broad range of enforcement cooperation areas, such as antitrust, customs, tax, recovery and return of stolen airplanes and vehicles, recovery and return of stolen cultural property, asset forfeiture, drug enforcement, and so forth.

An example of this problem concerns tax information exchanges. To understand the application of the new tax information exchange agreements (or "TIEA"), requires a detailed consideration of the different examination procedures, including the circumstances under which the types of information exchanges are started, continued, terminated, or expanded. In addition, an understanding of the new TIEA program requires a detailed consideration of mutual assistance procedures, assist-

18. *U.S. v. Nanne Hogendoorn et al*, U.S. District Court for the District of Alaska, Case No. A98-0087-CR (JKS), Transcript of Proceedings, Status Conference, July 15, 1999.

19. Treaty with Australia on Mutual Assistance in Criminal Matters, S. Treaty Doc. No. 105-27, at pmbl. (1997).

ance in collection, and how the new information exchange procedures fit into these elements. One consideration that this Essay does not discuss in detail, for instance, is whether the Internal Revenue Service ("IRS") or its tax treaty partner may find an alternative procedure, either statutory or through another treaty more effective and expeditious than utilizing a TIEA. Although that discussion is beyond the scope of this Essay, a review of the salient points of U.S. procedure on obtaining and exchanging information follows.

Internal Revenue Code ("I.R.C.") Section 6103(k)(4) authorizes disclosure of information with foreign countries. In particular, it states:

A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention or other convention relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention.²⁰

The Caribbean Basin Initiative tax information exchange agreements are treated as income tax conventions for purposes of Section 6103(k)(4), under IRS Section 274(h)(6)(C). The U.S. "Competent Authority" is the Associate Commissioner (Operations). The authority to act as U.S. Competent Authority was re-delegated for administering most of the international exchange and examination programs to the Associate Commissioner (Operations).²¹

In connection with the submission of the Council of Europe/Organization of Economic Cooperation and Development ("COE/OECD") Convention on Mutual Administrative Assistance in Tax Matters²² ("Convention on Mutual Assistance"), the U.S. Department of the Treasury reported over five years ago that it would prepare regulations providing U.S. taxpayers more comprehensive opportunity to be informed of and participate in U.S. requests to provide information to foreign treaty partners. Initially the regulations are designed just for the Convention on

20. IRC § 103(K)(4) (1988).

21. For a status report on the work of the Caribbean Law Institute on the Caribbean Basin Initiative, see a report prepared by Prof. Ralph Carnegie, Commercial Law Survey Seminar (Jan. 15, 1990) (unpublished) (on file with the author).

22. Convention on Mutual Administrative Assistance in Tax Matters, opened for signature Jan. 25, 1988, 27 I.L.M. 1160 (1988).

Mutual Assistance, the Office of International Tax Counsel has stated that these regulations would probably apply to requests received by the United States on other TIEAs generally. This area of taxpayer notification and participation is important as the TIEAs become more intensely utilized. Effective procedures will provide safeguards against abuse. The lack of promulgation of the regulations, after the United States has ratified the Convention on Mutual Assistance, jeopardizes the ability of U.S. citizens to receive notice and have an opportunity to participate in requests by foreign tax authorities.

a. Disclosure of Information to Foreign Tax Authorities
(United States as Requested State)

When the United States receives a request by a foreign country with which it has a tax treaty, the request is transmitted to the U.S. Competent Authority.²³ The Assistant Commissioner (International) or the Associate Commissioner (Operations), in sensitive cases, authorizes the exchanges. The Philadelphia Service Center handles certain automatic or "routine" exchanges (*i.e.*, reports of taxes withheld from income paid to nonresident aliens).

The Assistant Commissioner (International) usually forwards requests for information to the appropriate IRS offices. When the Assistant Commissioner receives the requested information, he or she prepares a response for the signature of the Assistant Commissioner (International), transmitting the information to the foreign Competent Authority. The Assistant Commissioner (International) will authorize any disclosure for requests pertaining to the Simultaneous Criminal Investigation Program.

For treaty partner requests under the Simultaneous Examination Program or Industry-wide Exchange of Information, the Assistant Commissioner (International) or the Associate Commissioner (Operations), in sensitive cases, will forward the request to the District Director for action and, when the information is received, transmit it to the treaty partner's competent authority. In the case of Spontaneous Exchanges of Information, the Assistant Commissioner (International) or the Associate Commissioner (Operations), in sensitive cases, will forward a

23. For a discussion of these provisions, see I.R.C. § 6103(e)(7) (1999).

U.S.-initiated exchange to the treaty partner's competent authority.

Normally, the United States does not furnish returns to foreign tax authorities pursuant to tax treaties. If the U.S. Competent Authority needs to issue a summons in order to obtain the requested information, then it will prepare and forward the summons to Branch One, Associate Chief Counsel (International) for review prior to issuance. The U.S. Competent Authority excludes from the exchange of information the provisions of the treaties and, hence, from their transmission pursuant to requests, information that would reveal business or trade secrets. The U.S. Competent Authority must account²⁴ pursuant to I.R.C. Section 6103(p)(3) and the Privacy Act of 1974 for disclosures to foreign tax authorities made pursuant to tax treaties.

When the United States needs to obtain third party information, such as from a bank or trust company, the IRS will issue a summons and the taxpayer will learn of the request. In such cases, the U.S. taxpayer can intervene and raise any applicable defenses. If the United States does not need to issue a summons, then the U.S. taxpayer may not learn of the request and cannot object (*e.g.*, because of the potential for injury to its trade or business or show that the request is for a political reason or a reason unrelated to a tax examination).

b. Non-treaty Disclosure to Foreign Countries

In addition to the authority for disclosure of return information to foreign tax authorities in I.R.C. Section 6103(k)(4), other provisions of Section 6103 allow limited disclosures to foreign countries or individuals of foreign countries in certain situations.²⁵ Such disclosures can be made regardless of whether the United States has a tax treaty with the country. The United States, however, exchanges information under a tax treaty, when one is in effect, to the extent possible. Return information may be disclosed by IRS employees to individuals of foreign countries pursuant to I.R.C. Section 6103(k)(6). Returns and return information may also be disclosed to individuals of foreign countries

24. For further background on this section, see I.R.M. (25)(30), Disclosure of Information to Foreign Tax Authorities, MT 1272-66 from which this account draws heavily.

25. Privacy Act, 5 U.S.C. § 522a (1994).

designated in writing by a U.S. taxpayer to receive such information in accordance with I.R.C. Section 6103(c) and (e). For instance, if a taxpayer has made a written request and signed a consent for disclosure, the IRS can certify to a tax treaty country that taxes were paid in the United States to enable the taxpayer to receive a credit for the taxes on a foreign return.

3. Equality of Arms in Antitrust Enforcement

An area of potential inequality of arms between the defense and prosecution that concerns another aspect of mini-mutual assistance agreements is the area of antitrust enforcement cooperation. For example, on April 27, 1999, the United States and Australia signed an antitrust mutual assistance agreement that will allow the two countries to exchange evidence and assist each other's antitrust investigative efforts. One of the highlights of this agreement is that the signatories agree to assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust evidence, through a variety of means, pursuant to their respective mutual assistance legislation, and regardless of whether the conduct underlying a request would violate the antitrust laws of the requested party.²⁶ The agreement provides for assistance in both civil and criminal antitrust matters.

The potential jeopardy to the person under investigation in multiple countries is exemplified by the recent decision in *In Re: Impounded*.²⁷ On May 13, 1999, the U.S. Court of Appeals for the Third Circuit upheld the recent prohibition disallowing defendants from asserting the right against self-incrimination due to fear of foreign prosecutions. The interesting twist was that the case concerned joint prosecution involving Canada, France, Germany, Mexico, Spain, the United Kingdom, the United States, and other countries to obtain documents for the grand jury investigation.²⁸

In particular, the case involved the issue of when a fear of foreign prosecution implicates the Fifth Amendment privilege after the U.S. Supreme Court's decision in *United States v. Bal-*

26. Agreement Between the Government of the United States and the Government of Australia on Mutual Antitrust Enforcement Assistance, art. II.F, *also available in* U.S. Department of Justice: Antitrust Division (visited Apr. 19, 2000) <<http://www.usdoj.gov/atr>> (on file with the *Fordham International Law Journal*).

27. *In re: Impounded*, 178 F.3d 150 (3rd Cir. 1999).

28. *Id.*

sys.²⁹ The appellants were immunized witnesses who refused to testify before a grand jury, claiming that their case fell within a test articulated in *Balsys* requiring Fifth Amendment protection. On October 29, 1997, a special grand jury was impaneled in the District of New Jersey to investigate possible price-fixing or other anticompetitive agreements among manufacturers and distributors in the artificial sausage casings industry that may have violated Section 1 of the Sherman Act.³⁰ The appellants were employees of a corporation targeted in the investigation. Each of them appeared before the grand jury pursuant to a subpoena and an immunity order of the district court compelling their testimony. While the employees were willing to answer questions relating to certain business dealings within the United States, they refused to answer questions about activities that occurred outside the United States, claiming that the court's compulsion order and grant of immunity gave inadequate protection against foreign prosecution. After the U.S. prosecutors moved to hold employees in contempt, they asked the court to order a hearing at which they could question the U.S. government concerning contacts with foreign governments relating to the investigation.

The employees argued before the U.S. district court and on appeal that language in the Supreme Court's opinion in *Balsys* established a test for when a foreign prosecution triggers a defendant's Fifth Amendment rights. This prosecution, they claimed, comes within the *Balsys* test because it is part of a cooperative international antitrust enforcement. They showed evidence of a "standing policy" that included selections from speeches by Antitrust Division officials that discussed increasing "internationalization" of antitrust enforcement, "positive comity" initiatives with other countries for information and evidence sharing, and two prior criminal antitrust investigations with the Canadian government. They also cited substantive criminal penalties in other countries for antitrust violations and also cited twelve countries as additional evidence of increasing internationalization of antitrust law. They contend that the policy of internationalization also includes the use of MLATs in criminal matters in obtaining information and also the use of the grand jury in aiding foreign prosecutions, through the International Anti-

29. *United States v. Balsys*, 524 U.S. 666, 118 S. Ct. 2218, 141 L. Ed. 2d 575 (1998).

30. Sherman Act, 15 U.S.C. § 1 (1990).

trust Enforcement Assistance Act.³¹

Appellants contended in the district court that a joint international prosecution had occurred in their cases. They cited as evidence of that joint prosecution: (1) questioning of grand jury witnesses about Canadian and German contacts; (2) efforts by the Antitrust Division in Canada, France, Germany, Mexico, Spain, the United Kingdom, and other countries, to obtain documents for the grand jury investigation; and (3) efforts by the Antitrust Division to question Mexican and German nationals. Additionally, appellants also contended that Canadian authorities contacted one of their counsel and that this event also represented evidence of a joint prosecution. Hence, appellants contended they were facing a "whipsaw" in which they could be compelled to produce information in this country, and yet be prosecuted in other nations. They claimed that the Antitrust Division wanted to use the witnesses' testimony about foreign effects of their conduct to instigate a foreign prosecution based on the grand jury's investigation.

Employees also claimed that they required a hearing to question government witnesses since they could not otherwise develop their proof regarding foreign contacts. In response to employees' arguments, the governments disclosed a set of affidavits and submitted separate ones *in camera*, stating that the compelled testimony was sought by the United States "[t]o advance the grand jury's inquiry and not for another purpose" and that testimony was not wanted for the purpose of delivering that testimony to a foreign nation. The employees argued that this government proffer was inadequate since it could be inferred from their evidence that the Antitrust Division had already been sharing information with foreign authorities for the purpose of foreign prosecutions. They argued that these facts showed that due process required that the nature and extent of the relationships between the United States and other countries in this case be explained, and that the evidence they produced mandated an evidentiary hearing.

The court held hearings on the legal issues and accepted the government's pronouncements to the effect that the information to be obtained was only to be used for a U.S. prosecution, that the employees had not raised a genuine issue of mate-

31. Pub. L. No. 103-438, 108 Stat. 4597, codified at 15 U.S.C. §§ 6201-6212 (1994).

rial fact requiring an evidentiary hearing, and denied the employee's motion to compel witnesses and their motion for an evidentiary hearing on their claims that the evidence would be used in foreign investigations. Finally, the district court found that *Balsys* did not provide a basis for the employees' claims of Fifth Amendment privilege and held them in contempt.

The employees filed an appeal from the contempt order, contending that the district court erred in not accepting their assertions of privilege and by determining that an evidentiary hearing was not required to determine the merit of their Fifth Amendment claims and their due process rights. The appellate court noted that the *Balsys* court concluded that fear of foreign prosecution, without more, was not an adequate basis for the invocation of a Fifth Amendment privilege against compelled self-incrimination.

The employees focused on the language in the *Balsys* opinion that provides for a test for an exception to the general rule, whereby the Fifth Amendment privilege may be recognized and connected with fear of foreign prosecution. Justice David Souter in *Balsys* said that it is conceivable that cooperative conduct between the United States and other countries could develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the self-incrimination Clause. In particular, it is possible that the United States and its counterparts had enacted substantially similar codes aimed at prosecuting offenses of international character. It could be demonstrated that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other countries as prosecutors of a crime common to both countries, then a defendant or witness could argue that the Fifth Amendment should apply based on fear of foreign prosecution because that prosecution was not fairly characterized as uniquely "foreign." Justice Souter distinguished the situation of Mr. Balsys because the United States, while assisting Lithuania and Israel in their interest in prosecuting Mr. Balsys for the alleged crimes committed during World War II, did not do enough to rise to the "level of cooperative prosecution." Hence, there was no "system of complementary substantive offenses at issue."³²

The employees claimed that the Souter language in *Balsys*

32. *Balsys*, 118 S. Ct. at 2235-36.

provides a test for determining whether an individual may claim a Fifth Amendment privilege against self-incrimination based on fear of foreign prosecution. The test considers whether: (1) the witness's fear of foreign prosecution is reasonable; (2) the fear is based on a foreign criminal statute substantively similar to U.S. law; and (3) the testimony is taken with a purpose that it will be shared with a foreign government.

The appellate court rejected the employees' arguments that *Balsys* "necessarily establishes a 'test,' let alone the test they urge." Interestingly, the appellate court also concluded that the employees' characterization of the "joint internationalization" of antitrust enforcement in the context of the case was not enough to demonstrate "joint prosecution" as contemplated by *Balsys*. The appellate court also focused on Justice Souter's effort to distinguish between "cooperative prosecution" and "[m]ere support of one nation for the prosecutorial efforts of another."³³ The appellate court interpreted the district court's findings as showing that employees had no "reasonable" fear of prosecution under their perspective of *Balsys*. Finally, the appellate court ruled that the employees did not show that the denial by the district court of their motion for an evidentiary hearing did not deny them due process because they had shown enough to merit an evidentiary hearing and override the discretion of the court in denying such a hearing.

The decision in *In re: Impounded*³⁴ shows the sloppy distinctions made by the Supreme Court in *Balsys*, apparently due in part to its lack of understanding about international criminal and enforcement cooperation. U.S. law enforcement authorities can easily characterize their efforts as merely in support of foreign governments and not a joint effort that rises to the "level of cooperative prosecution" or a "system of complementary substantive offenses." The reality is that in many investigations the multiple agencies involved from each country may have multiple goals and such goals may evolve and meander over months so that even the effort to try to characterize their purposes will be a meaningless and foolhardy exercise. Similarly, trying to gauge whether any international enforcement assistance, especially in a complex transnational case, rises to the "level of cooperative

33. *Id.*

34. *In re Impounded*, 178 F.3d 150 (3rd Cir. 1999).

prosecution" or to a "system of complementary substantive offenses," will be an ephemeral, elusive gesture.

Unlike *Balsys*, now more than a mere alien individual is involved. *In re: Impounded* involves U.S. multinationals and the potential subjection of their key employees to criminal investigation and prosecution. Apparently, there are thirty antitrust grand jury investigations pending. Hence, the economic and justice stakes are high. The lack of balance in *Balsys* and *In re: Impounded* show the need for a legislative remedy. Indeed, the exposure of U.S. multinationals and their key employees to the potential of criminal investigations and the loss of the right against self-incrimination may be the catalyst for legislative action.

4. Equality of Arms in Asset Forfeiture

Much of U.S. law on enforcement of penal sanctions is at the state level.³⁵ The United States has no problem in forfeiting funds that are derived from or are the instrumentality for the commission of crimes covered by forfeiture laws.³⁶

The United States has comparatively few criminal cooperation treaties and statutory provisions that concern enforcement of penal judgments, although this area has critical importance, especially when dealing with individuals and entities with convictions abroad and applications for banking, casinos, the arms business, alcohol beverages, piloting planes and boats, and so forth. While the United States has ratified the U.N. Vienna Drug Convention of 1988 ("1988 Vienna Drug Convention"), it participated in the preparation of, but did not sign or ratify, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 ("Euro-

35. For background on U.S. recognition and execution of foreign and international penal sanctions, see INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 597-626 (J. Paust et al., 1996).

36. One recent case involving the forfeiture of funds used in transnational organized crime was *United States v. Nine Million Forty One Thousand, Five Hundred Ninety Eight Dollars and Sixty Eight Cents*, U.S. District Court, Houston, Docket No. H-95-3182. See *Federal Court Ruling Goes Against Ex-Mexico Official Ruiz Massieu; Judgment Puts Lock on \$9 Million Deposited at Houston Bank*, HOUSTON CHRON., Apr. 29, 1997, at 12; Bruce Zagaris & Julia Padierna Peralta, *Mexico-U.S. Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers-150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U.J. OF INT'L L. & POL'Y 521, 598-603 (1997).

pean Laundering Convention").³⁷ The European Laundering Convention has several advantages over the 1988 Vienna Drug Convention. The obligation to criminalize money laundering is not restricted to drug trafficking offenses. Instead, it extends to any "predicate offense." An important purpose of the European Laundering Convention is to facilitate international cooperation concerning investigative assistance, search, seizure, and confiscation of the proceeds from all types of criminality, especially serious crimes, and particularly drug offenses, arms dealing, terrorist offenses, trafficking in children and young women, as well as other offenses that generate large profits.³⁸ Article 2 of the European Laundering Convention imposes "a positive obligation for states to enact legislation which would enable them to confiscate instrumentalities and proceeds" on an all crimes while holding out the possibility of taking a reservation as to the categories of offenses covered. The European Laundering Convention requires signatories to consider the domestic adoption of a number of special investigative techniques "which are common practice in some states but which are not yet implemented in other states."³⁹ In particular, Article 4(2) mentions monitoring orders, observation, interception of telecommunications, access to computer systems, and orders to produce specific documents. The permissive wording, however, is designed to provide flexibility to encompass other investigative tools that commend themselves to the law enforcement community because of their utility in handling complex crimes.⁴⁰

U.S. forfeiture law provides for jurisdiction either *in rem* (venue based on the presence of the thing),⁴¹ or *in personam*

37. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, 30 I.L.M. 148; Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature Dec. 20, 1988, 1992 Gr. Brit. T.S. No. 26 (Cmnd. 1927), 28 I.L.M. 493. For background on the international aspects of international asset forfeiture law and international and foreign law from a U.S. policy perspective, see Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT'L L. REV. 446-513 (1991).

38. *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, reproduced in INTERNATIONAL EFFORTS TO COMBAT MONEY LAUNDERING 193 (W. Gilmore, ed., 1992).

39. *Id.* at 205.

40. WILLIAM C. GILMORE, DIRTY MONEY: THE EVOLUTION OF MONEY LAUNDERING COUNTER-MEASURES 142-43 (1995).

41. 28 U.S.C. § 1395 (1999).

(venue based on a criminal case against the owner).⁴² The latter is based on minimum contacts with the forum states. *In personam* permits a prosecutor to consolidate actions against property seized in several counties, states, or even countries.⁴³ Hence, jurisdiction exists for all interests in property if the property for which forfeiture is sought is within this state at the time the action is filed. In addition, jurisdiction exists if there is an interest of an owner or the interest holder is subject to personal jurisdiction of the forum. As a result, proceeds of drug dealing in State X may be forfeited in State Y, into which they have been brought, and an *in personam* defendant may be ordered to surrender title to a load-vehicle van, airplane, or bank account titled or located in State A to a court in State B, into which his drug enterprise spread, but in which state the van, airplane, or bank account itself had not been used.

The permissive jurisdiction for *in personam* cases permits expeditious adjudication of forfeitures even though items of property or defendants are located in different countries.⁴⁴ However, practical considerations of resources, investigative support, attorney expertise, and location of evidence often have major impact on venue selection. Flexibility tends to encourage consolidating cases efficiently. A consolidated case is less expensive for claimants than a set or series of fragmented cases spread over several countries.⁴⁵

U.S. courts can order the forfeiture of any other property of a person, including a claimant in a forfeiture case, up to the value of the property found by the court to be subject to forfeiture if any of the forfeitable property cannot be located, has been transferred, conveyed, or sold to a third party, is beyond the jurisdiction of the court, has been substantially diminished in value, has been commingled, or is subject to an exempt interest.⁴⁶ For instance, if ABC Exchange House ("ABC") is indicted

42. 21 U.S.C. § 881(j) (1996).

43. For additional background on the operation of U.S. asset forfeiture law, see Peter J. Henning, *Individual Liability for Conduct by Criminal Organizations in the United States*, Report Submitted by the American National Section, AIDP, § IV.(B).

44. See, e.g., 18 U.S.C. § 881(j) (1990).

45. For additional background on jurisdiction in asset forfeiture cases in the U.S., see *The House, President's Commission on Model State Drug Laws, Economic Remedies*, at A 35 (Dec. 1993).

46. Food and Drug Act, 21 U.S.C. § 853(p) (1996); President's Commission, *supra* note 37, *Economic Remedies*, at A 58.

for participating in money laundering and its assets were transferred overseas, immediately before or after the indictment and before a freeze order, then a court can order the forfeiture of substitute assets or other property of ABC equal in value to the leased equipment.

With respect to confiscation of the proceeds of crime and pursuant to the provisions of the 1988 U.S. law, the Departments of Justice, State, and Treasury have aggressively tried to encourage foreign governments to cooperate in joint investigations of drug trafficking and money laundering, by offering the inducement of sharing in forfeited assets. The United States has encouraged spending these assets to improve narcotics law enforcement. The long-term goal has been to encourage governments to improve asset forfeiture laws and procedures, and undertake independent investigations.

At times, U.S. agencies simultaneously will employ multiple mechanisms and conventions to freeze and seize assets. The *Colello, et al v. United States Securities and Exchange Commission, et al.*⁴⁷ case is interesting for the adjudication by a U.S. court of an MLAT in the context of a transnational securities investigation in a pre-judgment situation. In a decision that has potentially important implications for international criminal cooperation, a California court has held that a freeze of a target's bank account in a U.S. securities enforcement investigation is unconstitutional, because it violates the target bank's Fifth Amendment right to due process and Fourth Amendment right to be protected from unreasonable seizures.⁴⁸

The case started as a derivative action of a U.S. Securities and Exchange Commission ("SEC") enforcement action. The SEC sued one of the plaintiffs, Michael Colello, for his role in a pyramid scheme. Colello asserted his Fifth Amendment right against self-incrimination during the investigative stage and has maintained his silence consistently. The day before the SEC filed the enforcement action against Colello and the other defendants, the SEC sought to freeze Colello's bank accounts in Switzerland. The U.S. Department of Justice transmitted a re-

47. *Colello, et al. v. United States Securities and Exchange Commission, et al.*, 908 F. Supp. 738 (C.D. Cal. 1995).

48. *Id.*

quest under the U.S.-Swiss MLAT in Criminal Matters⁴⁹ and the Swiss complied.

Simultaneously with the SEC enforcement action, the court issued a temporary restraining order in the enforcement action, freezing all the defendants' assets in the United States, including Colello's assets. District Court Judge Richard Paez refused to grant the SEC's motion for a preliminary injunction against Colello and the domestic asset freeze dissolved along with the temporary restraining order. Colello and plaintiff Robert Romano, who is not a defendant in the enforcement action, filed a separate case on September 2, 1994, to challenge the constitutionality of the Swiss asset freeze. They named as defendants the SEC, its lawyers, and the Director of the Office of International Affairs, Criminal Division, U.S. Department of Justice.

The SEC commenced the investigation in October 1993 against Cross Financial Services, Inc. ("CFS"), after discovering through a newspaper article that CFS promised very high rates of return to investors in a "government receivables" investment program. On December 3, 1993, the SEC issued a formal order of investigation. In April 1994, the SEC subpoenaed records and testimony from Michael Colello in connection with the investigation of CFS. When the SEC lawyers asked Colello during his investigative testimony about CFS, Carroll Siemens, letters of credit, European and U.S. banks, and his bank accounts, he asserted his right against self-incrimination and refused to answer.⁵⁰

On June 13, 1994, the U.S. Department of Justice sent a request for assistance from the Swiss Government under the MLAT. The U.S. Department of Justice sought documents and testimony from banks in Switzerland to establish whether CFS made false statements about its investment scheme to induce people to invest and, thereafter, misappropriated investors' funds in violation of U.S. federal securities laws. In addition, the SEC requested that any funds traceable to the subject matter of the request be frozen so that the funds later may be returned to the United States to compensate the victims of the fraud.

On June 15, 1995, the Swiss Federal Supreme Court re-

49. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977).

50. *Colello*, 908 F. Supp. at 741.

jected plaintiffs' contention that the asset freeze was improper. It explained that in matters of judicial assistance, the Swiss Federal Supreme Court examines an administrative court complaint only to determine whether the preconditions for the provisions of judicial assistance have been fulfilled. If the judicial assistance is requested by the United States, it then cannot be denied just on the basis of deficiencies in the U.S. proceedings, because the MLAT does not contain any corresponding provision.

In ruling that the freeze was an unconstitutional seizure in violation of the Fourth Amendment of the Constitution, the court rejected the government's contention that plaintiffs "assumed the risk" of depositing their money in a foreign country. The court, citing *Reid v. Covert*,⁵¹ instead, stated that U.S. citizens are protected by the Bill of Rights from incursions from the U.S. government on his or his property regardless of its location. Similarly the court found no authority for the government's notion that it can circumscribe or limit the entitlement of citizens to constitutional rights via a treaty.⁵² The court was troubled by the fact that freezing is permitted under the treaty based on "reasonable suspicion," whereas the Fourth Amendment requires showing "probable cause."

The court appeared troubled by the absence of implementing legislation and regulations, although legislation was initially contemplated. The court also noted that, while the U.S. Department of Justice Manual ("Manual") governs the conduct of the SEC and the Department of Justice, it does not require them to notify the subject of a treaty request or to provide a hearing before or after making the request. In addition, the court noted that the Manual contains no standards, and contains a disclaimer that the Manual provides only internal Department of Justice guidance and is not intended to be relied on to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. In addition, it states that no limitations are placed on otherwise lawful prerogatives of the Department of Justice.⁵³

The absence of statutory and regulatory provisions in the

51. *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957); *Colello*, 908 F. Supp. at 748.

52. *Colello*, 908 F. Supp. at 748.

53. *Id.* at 751-52.

United States contrasts with Switzerland's approach.⁵⁴ Switzerland has enacted law and guidelines under the MLAT. Switzerland's Federal Law on the MLAT in Criminal Matters with the United States of October 3, 1975, provides for certain "precautionary measures" to guarantee due process through requiring notice to the affected parties. In addition, the Federal Office for Police Matters ("FOPM") has also issued guidelines to inform interested authorities and citizens on what is meant and encompassed by international mutual assistance in criminal matters.⁵⁵

The decision may presage trouble on other criminal cooperation agreements when the U.S. government tries to enforce them in courts. Indeed, although the American Bar Association and other interested bar groups testified previously against excluding from such treaties the due process rights of defendants and third parties, the U.S. government vehemently opposed.⁵⁶ The decision seems to indicate that at least the court believes that a better balance is constitutionally required.

A problem in foreign countries with confiscation has been ineffective custodianship over the assets seized. In a case in Guyana the defendant eventually was acquitted in a criminal case. When he went to reclaim his Mercedes Benz, he found it stripped. The incident triggered additional litigation. The operation of asset forfeiture and its perceived unfairness to owners of the assets has generated substantial litigation as well as efforts in the U.S. Congress to try to remedy the situation through legislation, but Congress has been divided. The fairness issue is derived partly from the fact that the law enforcement official who decides key issues about whether to forfeit will benefit from the successful forfeiture since law enforcement agencies are able to keep the assets or the proceeds from their sale.

54. For the Swiss approach to confiscation of assets, see Nathalie Kohler, *The Confiscation of Criminal Assets in the United States and Switzerland*, 13 Hous. J. INT'L L. 1-28 (1990).

55. *Colello*, 908 F. Supp. at 752.

56. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Hearing, Senate Foreign Relations Committee, Sen. Exec. Rept. 100-26, 100th Congr., 2d Sess., resolution of the American Bar Association, at 186-90; Statement of Bruce Zagaris, 166-68, 205-12; Teresita Ferrera, *Second MLAT Hearings Spark Debate on Policy Issues*, 4 INT'L ENFORCEMENT L. REP. 917 (1988); Bruce Zagaris, *Sen. Helms' Inquiries over Individual Rights in MLATs Delay Mark-up*, 4 INT'L ENFORCEMENT L. REP. 160 (1988).

II. *EXTRADITION*

The new U.S. extradition treaties have expanded the ability of "relators" to waive their rights to extradition hearings. They no longer require the intervention of a court to determine that the waiver was made only after the fugitive is informed of the rights that he or she would surrender and that such waiver is genuinely voluntary.⁵⁷ These treaties can be improved if they had more detailed requirements about the need to waive before a court abroad and for the "relator" to receive at the hearing a full panoply of his or rights that will be waived. This would be similar to a hearing that a defendant in a U.S. criminal case has prior to the acceptance of his plea. The court, orally and on the record, reviews in detail each and every right the defendant foregoes when he or she agrees to a plea.

A major development has been the ability of the United States to have Colombia and the Dominican Republic resume extradition of nationals, although some observers believe the long-term viability of criminal justice objectives, such as counter-drug efforts resulting from extraditing nationals from these countries, is in question.⁵⁸

Efforts by foreign governments to extradite individuals from the United States have encountered difficulty in a number of cases because U.S. courts, in examining the requests, have discounted the evidence in support of the requests because of the apparent due process violations and questionable evidence gathering procedures that have occurred in the requesting state.⁵⁹ Behind requests based on evidence, creative and proactive attacks on evidence from countries with questionable criminal procedures, along with evidence of apparent violations in the gathering of evidence in support of the extradition request, can reap dividends.

57. See Bruce Zagaris & Danielle Barranca, *U.S. Senate Considers Ratification of 38 U.S. Criminal Cooperation Treaties*, 14 INT'L ENFORCEMENT L. REP. 404 (1998).

58. Joshua H. Warmund, Comment, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 *FORDHAM INT'L L.J.* 2373, 2378 (1999) (concluding that domestic political motivations that shaped new extradition reforms will adversely impact laws' effectiveness to combat drug trafficking).

59. Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers—150 Years and Beyond the Rio Grande's Winding Courses*, 12 *AM. U.J. OF INT'L L. & POL'Y* 521, 597-603 (1997) (discussing *In the Matter of the Extradition of Contreras*, 800 F. Supp. 1462 (S.D. Tex. 1992)) and Ruiz-Masieu cases, e.g., *Masseiu v. Reno*, 915 F. Supp. 681 (D.N.J. 1996)).

A controversial aspect of U.S. extradition jurisprudence and practice has been its periodic use of abductions by force and fraud as an alternative to extradition. In 1992, the U.S. Supreme Court held that the U.S. government's arranged abduction of a Mexican national from Mexican territory, despite the existence of an extradition treaty, did not divest the court of jurisdiction.⁶⁰ The U.S. government partly justified its use of abduction because it was prosecuting an individual who allegedly participated with a drug trafficking group in the abduction, torture, and murder of a U.S. drug liaison official in Mexico. After the United States abducted and detained the Mexican for close to two years, the court dismissed the case for lack of evidence. The U.S. jurisprudential practice, known as the *Ker-Frisbie* doctrine, stands for the proposition that the illegality of the arrest and seizure of the defendant by private or state actors does not preclude personal jurisdiction over the defendants, absent cruel or outrageous treatment.⁶¹ Despite protests by governments, international organizations,⁶² and resolutions adopted by non-governmental organizations⁶³ that international law requires courts to refuse jurisdiction when a fugitive's custody results from abductions, the U.S. practice has not changed although it appears mostly under wraps.⁶⁴

While U.S. citizens usually assume that abductions only happen to foreigners, U.S. citizens are also victims of this practice. An example of how U.S. businesspersons can encounter the ever-penetrating force of extraterritorial jurisdiction is displayed in the case of Gilbert Andrews, an El Paso businessman who was

60. *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992).

61. See *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

62. On August 15, 1992, the Inter-American Juridical Committee unanimously recognized that the *Alvarez-Machain* decision violated general principles of international law.

63. At its September 1994 Congress, the International Penal Law Association determined that the U.S. abductions were "contrary to public international law . . . and should be recognized as a bar to prosecution." For background, see *XVth Congress of International Penal Law Association Adopts Resolutions*, 10 INT'L ENFORCEMENT L. REP. 838, 886-87 (1994).

64. See *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 101st Cong., 1st Sess. (1989). For a related discussion on the position of the Executive Branch, see Marc Zaid, *Classified 1989 Justice Memorandum Opining President Has Authority To Disregard International Law in Favor of U.S. Extraterritorial Law Enforcement Activities Is Released to the Public*, 9 INT'L ENFORCEMENT L. REP. 60 (1993).

a victim of abduction by fraud and spent eight months in a jail in Mazatlan.⁶⁵ In 1995, Mr. Andrews sold about forty-five used items to the new Mazatlan Red Cross hospital. The medical equipment ranged from operating tables to heart catheters, wheel chairs, lamps, blood storage units, and industrial strength washing machines. Andrews received payment of US\$130,000 for the items. Mazatlan Red Cross officials inspected, approved, and collected the items at his warehouses in El Paso and Anthony, Texas, loaded them on an 18-wheeler, and took them directly to Mazatlan.

Oses Cole-Isunza, chairman of the board of the Mazatlan Red Cross, gave pre-trial testimony that the equipment was so damaged on its arrival in Mazatlan that it was useless. In addition, many of the items were supposed to have been donated, when in fact none of it was donated.⁶⁶ Steve Dominguez, a former employee of Border to Border Medical Equipment, Andrews's company who filed an affidavit in the case, stated that the Mazatlan Red Cross officials were so anxious to have the equipment that they did not take the precautions Andrews's company recommended—namely properly packing it in crates and taking a slightly longer route via Mexico Route 15, which extends through Arizona down the west coast of Mexico because the roads are in better condition and would better safeguard the condition of the equipment. Instead, the Mazatlan Red Cross representatives took the more difficult route, from Juárez to Durango and across a steep grade. It is a winding curved road called "Espinazo del Diablo" (the devil's spine) to Mazatlan. Those roads are "bumpy and bad, full of potholes."⁶⁷

According to Andrews, the American Red Cross in El Paso presented a letter to the Mexican customs in Juárez, stating the equipment would be donated to the Red Cross in Mazatlan. Andrews's list of the equipment with prices was attached. Andrews explained that the letter was only a formality so that the Red Cross in Mazatlan, as a non-profit organization, would not have to pay US\$40,000 in import tariffs for the equipment. The re-

65. Ken Flynn, *Mexico Frees El Pasoan Jailed in Mazatlan*, EL PASO TIMES, Dec. 12, 1998, at A1.

66. Ken Flynn, *El Pasoan Tries To Start His Life Over*, EL PASO TIMES, Jan. 4, 1999, at 1B.

67. Ken Flynn, *Family Man Claims He's Wrongly Accused*, EL PASO TIMES, Sept. 1999, at 1B.

quest for such a letter, to circumvent paying customs fees, came from the Mazatlan Red Cross, written in English to Donald Fredell and dated February 2, 1995. On February 10, 1995, the El Paso Red Cross responded with a letter in Spanish signed by Carmen Ruiz, which included Andrews's inventory of items being shipped to Mazatlan.

Andrews rejected an offer from Mazatlan officials to free him if he pleaded guilty to a lesser charge and paid a fine. Meanwhile, a press report stated that officials of the U.S. Consulate in Hermosillo visited Andrews at the prison. Requesting anonymity, a consulate spokesman said that by international treaty U.S. diplomats cannot help U.S. citizens jailed in Mexico, or anywhere else in the world. The United States cannot intervene in a foreign country's judicial system. The spokesman continued that "[a]bout the only thing we can do is visit the U.S. citizens in jail and make sure they're being treated fairly."⁶⁸

Although Andrews's counsel and family approached the American Red Cross for help, on September 24, 1998, it rejected the request by the national office to win Andrew's release. Ann Stingle, spokeswoman for the Red Cross national office in Washington, D.C., said she sympathized with Andrews's plight, but it was a matter between Mr. Andrews and the Mazatlan Red Cross. The American Red Cross does not have the authority to extricate him. Mitchell Moss, counsel for Andrews, underscored the role the El Paso Red Cross played in the case when it wrote a letter stating the hospital equipment the Mazatlan Red Cross obtained from Andrews had been donated when in fact it had been bought.⁶⁹ Despite the refusal by the U.S. national Red Cross office to his request for help, the El Paso office of the American Red Cross actively assisted Andrews in his case. Among other things, the El Paso Red Cross apparently wrote a letter to Mexican Judge Jacobo Ahumada Angulo, stating that the equipment picked up in El Paso by Mazatlan officials in 1995 was not donated, but purchased by the Mazatlan Red Cross from Andrews for US\$130,000.

On September 23, 1998, Jose Luis Posada, president of the Mazatlan Bar Association, filed petitions, accusing the judge in

68. *Id.*

69. Ken Flynn, *National Red Cross Won't Help Free Businessman from Mexican Jail*, EL PASO TIMES, Sept. 26, 1998, at 1B.

the case of violating Andrews's civil and procedural rights. U.S. Representative Silvestre Reyes (D-Tx.), whose wife, Carolina, is a member of the board of the El Paso Red Cross chapter, also cooperated with Mr. Moss, Andrews's counsel, and the El Paso Red Cross.⁷⁰ It appears that the Mazatlan and Juárez Red Cross offices played an active role in the abduction by fraud or "luring" of Andrews across the border. Andrews stated that the Juárez Red Cross inquired about a piece of used equipment. Andrews was arrested in the Red Cross office in Juárez and taken immediately to Mazatlan, where he was detained ever since without bond.⁷¹ In a letter Moss's counsel pointed out that the Mazatlan officials in charge have asserted criminal charges of fraud against Mr. Andrews, despite corresponding serial numbers between the goods bought and the goods delivered.⁷² Although Andrews was eventually found innocent of all charges, the Mazatlan Red Cross appealed the decision. On December 12, a panel of Mexican federal judges cleared Andrews of all fraud charges and ordered his release.⁷³

At the end of 1998, in addition to Mr. Andrews, three other El Pasoans were reportedly held in Mexican jails on the border and released after lengthy stays for lack of evidence. Gerardo Urenda, 34, returned to El Paso in January 1998 after he spent a year in a Guanajuato jail, along with a cousin and friend who were misidentified as bank robber suspects. In 1997, business-couple Larry and Patricia Haggard were released from a prison in Puebla after fighting for two years to secure their freedom on fraud charges.⁷⁴

While U.S. counsel in such cases can try to appeal beforehand to the Office of International Affairs ("OIA"), Criminal Division, U.S. Department of Justice, to scrutinize such requests and not execute them, such a plea is often not possible. In some cases the OIA staff attorney may determine that he or she does not have the time or the inclination to listen even to such a proposed intervention, especially since its normal client is the foreign government with which the OIA staff attorney is often trying to persuade to act on one of the U.S. requests. In many

70. *Id.*

71. *Id.*

72. *Id.*

73. Flynn, *supra* note 65, at 1B.

74. *Id.*

cases, U.S. counsel will not learn of such a pending request until after receipt of a criminal summons.

One way to try to counter foreign criminal processes is to hire foreign local counsel at an early time. It takes time just to find the most appropriate counsel. If counsel is needed in a rural province or an urban area outside of the capital, then it may take many hours, and weeks, of due diligence to find the appropriate counsel. In a business dispute in Latin America the appropriate counsel is often one of the best commercial law firms, which then hires criminal counsel. Unlike U.S. law firms, many Mexican lawyers practice solo and it is unusual for commercial law firms to have an in-house criminal counsel. Hence, the U.S. counsel must actually hire two lawyers. In addition, to develop sufficient leverage with the Chamber of Commerce or political officials, additional counsel may eventually be required.

III. *PROACTIVE ASSISTANCE BY A FOREIGN DEFENDANT'S GOVERNMENT*

An important role can be, and sometimes is, played by the government of the defendant's nationality. In this regard, it is important for the arresting state to adhere strictly and promptly to the requirement to give consular notification, whereby it notifies the consul of the arrestee's nationality. Some governments can be very helpful in immediately visiting the defendant, notifying relatives, helping tend to urgent needs, overseeing adherence to international human rights, and filing and following up breaches.

In some cases, governments do not effectively protect the rights of their nationals. A story in the U.S. media in 1997 raised issues about potential violations of international human rights of David Carmos, a U.S. national convicted in Mexico of possessing the illegal drug, methamphetamine. Just as importantly, the case raised issues of the potential lack of fulfillment by the U.S. government with its statutory and regulatory responsibilities to help U.S. citizens detained abroad.⁷⁵

In October 1992, Carmos traveled to Brazil for a week of missionary work as a bishop-at-large for the San Diego branch of The Essenes, a Christian group. When he returned, Mexican

⁷⁵ Molly Moore, *An American's Nightmare in a Mexican Jail*, WASH. POST, Aug. 13, 1997, at A1.

customs officials detained him with plastic bags containing a suspicious powder secreted inside a container of DuraCarb—a carbohydrate drink mix in powder form—and three other cans. Although Carmos admits carrying the drink mix, he says he had never seen the three other cans until Mexican customs agents showed them to him several hours after his arrest. Mexican authorities accused Carmos of carrying seven pounds of a substance than can be used to make a chemical precursor of the drugs amphetamine or methamphetamine.

After his arrest, the U.S. Embassy in Mexico City gave Carmos a list of attorneys. Each of them refused to handle a drug case. Eventually the Mexican Government assigned Carmos a series of court-appointed attorneys, whom Carmos described as inept. In fact, Carmos did not even learn about his trial until nearly one month after it ended in January 1993. During his trial, Mexican officials changed the charges against him, alleging that Carmos was not carrying a chemical component of an illegal drug, but was carrying the drug methamphetamine itself. According to Mexican prosecutors, the new charges were based on new and better laboratory tests on the substance he was accused of carrying.

A. Attention to Irregularities

Carmos's ability to obtain attention for his case came from his unique services rendered in prison that came to the attention of human rights organizations and local Mexican journalists. For years Carmos had developed acupuncture and chiropractic techniques and had written health books. In the 1960s, he spent four years teaching yoga and "health dynamics" at Boston University's Sargent College. In the years prior to his trip to Brazil, Carmos researched and wrote two health books in San Diego. In the Reclusorio Norte Prison, on the northern edge of Mexico City, his work in treating aches, pains, migraines, impotence, and other ailments resulted in a Mexican university asking him to conduct training courses at the prison for its doctors. Eventually, human rights organizations and Mexican journalists started examining his case.

Carmos began investigating the results of the tests Mexican authorities performed on the substance he was accused of carrying. Four experts in the United States and Mexico concluded

that the tests either had been fabricated or were based on analyses of a substance other than the one he was charged with possessing. According to the experts, eight documents submitted as separate laboratory analyses were photocopies of one test result. According to an internal U.S. Embassy memorandum dated April 9, 1994, a chemist for the U.S. DEA found other irregularities:

Upon review of the sentencing documents, it does seem extremely odd that Carmos, who was detained and charged on the basis of a suspicious powder, would have been charged with possession of a substance [the chemical precursor] that only exists in liquid form.

Although Carmos learned that the U.S. Embassy file contained documents that could help him, Embassy officials required that he request the documents under the Freedom of Information Act. The U.S. Department of State took two years and four months to respond to his request, releasing the documents in late June 1997, and then only several days after the Washington Post questioned the delay.

When reporters contacted embassy officials about Carmos's case as late as 1996, the consul general and public affairs officers warned them that Carmos had an association with an alleged drug trafficker. Subsequently, however, they conceded they had no evidence to support such an allegation.

B. *Role of the U.S. Government*

Under interrogation by the media, a U.S. Embassy official said that Mr. Carmos was not treated worse than a Mexican national would have been treated for the same crime. Even though U.S. government documents cited serious irregularities in Carmos's case, U.S. officials made only one complaint to the Mexican government on Carmos's behalf in the last five years—that he did not obtain adequate interpreting help during the appeals process.

The response of the U.S. government raises questions of the role of the U.S. government to protect its nationals when they are arrested abroad. Under 22 U.S.C. § 1732, the U.S. President must act when it is brought to his attention that a U.S. national is improperly detained. The State Department, however, takes a narrow approach to this 1868 statute, even though it only codi-

fies the right of a state to protect its nationals under public international law and, even though, administrative regulations require U.S. consular officers to use their "best efforts in protecting the citizen's legal and human rights" and use a post's "own creative approach to arrestee and prisoner services."⁷⁶

Carmos has stated that Mexican authorities apparently pursued his case, even after prosecutors detected irregularities, due to pressure from the United States to toughen its prosecution of drug offenders. Representative Moakley (D-Mass.) believes the U.S. Embassy failed to help Carmos because it did not want to embarrass Mexico or jeopardize drug enforcement diplomacy, especially since the United States is always trying to press Mexico to strengthen law enforcement of international drug trafficking.

CONCLUSION

Many of the same issues apply to other U.S. citizens and to foreign nationals detained in the United States. These cases display the urgent need for a new architecture in the hemisphere and the world for investigating, prosecuting, and adjudicating criminal cases. Globalization enables criminals to operate in a borderless world and challenges governments to develop mechanisms and institutions that are both effective in combating borderless crime and yet fair to all the persons involved, including defendants.

In countries such as Bolivia, Ecuador, and St. Vincent the criminal justice systems were already underfunded and unable to cope with their workload. The demands that they aggressively prosecute, convict, and give long sentences to drug traffickers, predictably led to many unfortunate prosecutions, persons who spent years in pre-trial detention, and many unfair results.

The inter-American and global systems do not have adequate and effective mechanisms to protect international human rights. Unfortunately, the United States has not ratified the American Convention and, while it speaks about human rights, its leadership in terms of ratifying and implementing the Convention and adhering to its requirements is wanting.

As the region facilitates free trade and goods in which capital, ideas, and services move instantaneously, a need exists for

76. U.S. Dep't of State, Foreign Affairs Manual § 441 (1987).

better mechanisms to create a permanent group, the Americas Committee on Crime Problems, which should be based at the Organization of American States. This committee should be staffed with lawyers, criminal justice professionals, and diplomats who spend all of their time every day on treaties, harmonization of law, and common approaches to specific crimes. The region is starting to develop such mechanisms and informal cooperation through annual meetings of the ministers of justice and the establishment of an inter-American justice study center.

In the meantime, transnational organized crime will continue to exploit the gaps. Cooperation will continue to be ad hoc and driven by policies on certain crimes such as narcotics trafficking. Creative advocacy and diplomacy will be needed. In this connection, bar associations and lawyers can and should continue to be proactive in identifying problems and proposing solutions. Just as important, the media and legislators will need to play active roles.

Meanwhile, because U.S. attorneys and legal professionals are quite advanced in due diligence and preventing crime and misconduct, they have advantages and opportunities to help export their services and mechanisms abroad. Hence, similar approaches to minimizing risks, mentioned in this Essay with respect to traveling and working abroad, can be applied to international money movement, transnational corruption, international environmental law, common carriers involved in international transportation, and so forth. As companies develop minimum standards for doing business internationally, the role of lawyers and legal professionals will be important in identifying and helping solve issues.⁷⁷

77. Bruce Zagaris, *International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration: A Post-NAFTA Transition Period Analysis with Special Attention to Investing in Mexico*, 3 SW. J. OF L. & TRADE IN THE AMERICAS 1, 82-84 (1996).