

# Recent International Legal Developments

## CJ341 – Cyberlaw & Cybercrime Lecture #27

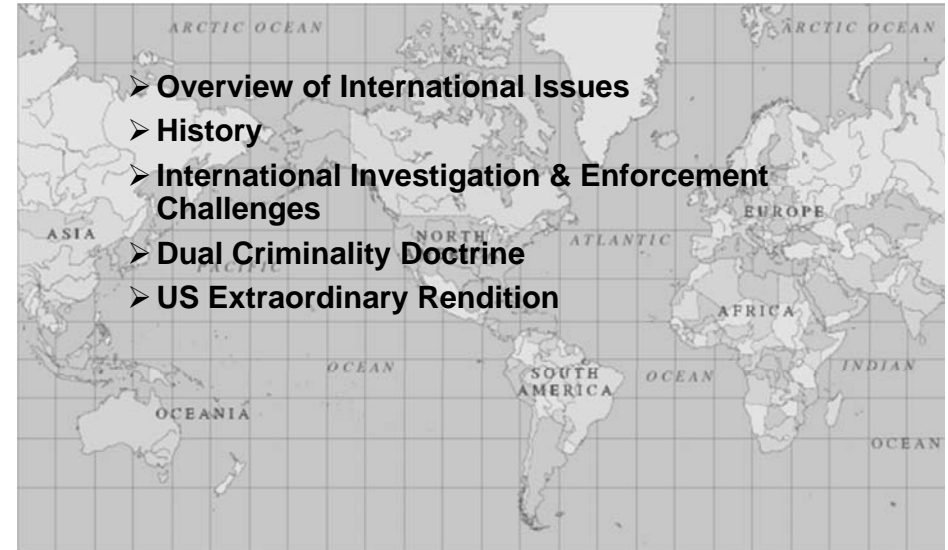
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## Topics



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## International Issues

### ➤ Jurisdictional Problems

☐ Commission of offenses across territorial borders

☐ Investigation

☐ Enforcement

✓ What laws apply?

✓ Who enforces them?



### ➤ Defining computer crime

☐ No international consensus on definition

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## UN Study: Categories of Cybercrime

- Fraud by computer manipulation
- Computer-based forgery
- Damage to or modifications of computer data or programs
- Unauthorized access to computer systems and service
- Unauthorized reproduction of legally protected computer programs
- Child pornography (creation, trafficking. . .)
- Use of computers by organized crime
- Terrorist groups committing computer-related crimes or other crimes



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## Historical Overview

- 1977: US Senator introduced first cybercrime legislation
  - ❑ Didn't become law
  - ❑ Credited as the catalyst for international policy
- 1983: Organisation for Economic Co-operation and Development (OECD)
  - ❑ Study of international legislation
  - ❑ Explored possibility of unified response



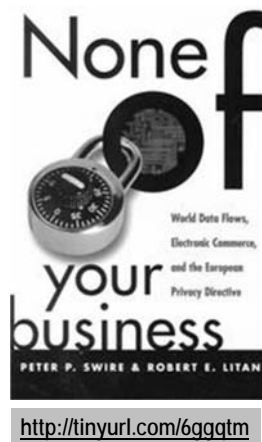
## History (cont'd)

- 1986: OECD published *Computer-Related Crime Report*
  - ❑ Recommended a list of offenses
  - ❑ Envisioned list to be addressed by each UN member country
- 1986-1989: Council of Europe (CoE) launched its own study
  - ❑ To determine categories of proposed offense conduct
  - ❑ To determine guidelines for enacting criminal legislation
  - ❑ Issued recommendations which expanded OECD list



## History (cont'd)

- 1995: CoE adopted recommendation R(95)13
  - ❑ Identifies substantive offense categories
  - ❑ Considers procedural issues related to investigation & evidence
    - ✓ E.g., search and seizure, co-operation obligations
  - ❑ Concern for civil rights (e.g., individual privacy)
    - ✓ European Privacy Directives require strict protections on privacy
    - ✓ More severe than US laws



<http://tinyurl.com/6ggqtm>

## History (cont'd)

- 1997: *Committee of Experts on Cyberspace* appointed by CoE
  - ❑ Charged with identifying new crimes, jurisdictional rights, and criminal liability related to Internet
  - ❑ Canada, Japan, South Africa, and US invited to participate
- 2001: Committee issued final report
  - ❑ *Draft Convention on Cyber-Crime* and Memo
  - ❑ Intended as blueprint for first international treaty
  - ❑ <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>

## History (cont'd)

- 2001: *Council of Europe, Convention on Cybercrime*
  - ❑ International Treaty adopted by Ministers of Foreign Affairs
  - ❑ Signed by 26 member countries, including US
  - ❑ US President signed *Convention* on Nov. 23, 2001
- 2004: July 1<sup>st</sup> treaty took effect
- 2006: Up to 38 signatories
- 2006: Sept – US became party
- 2007: Jan 1: treaty took effect



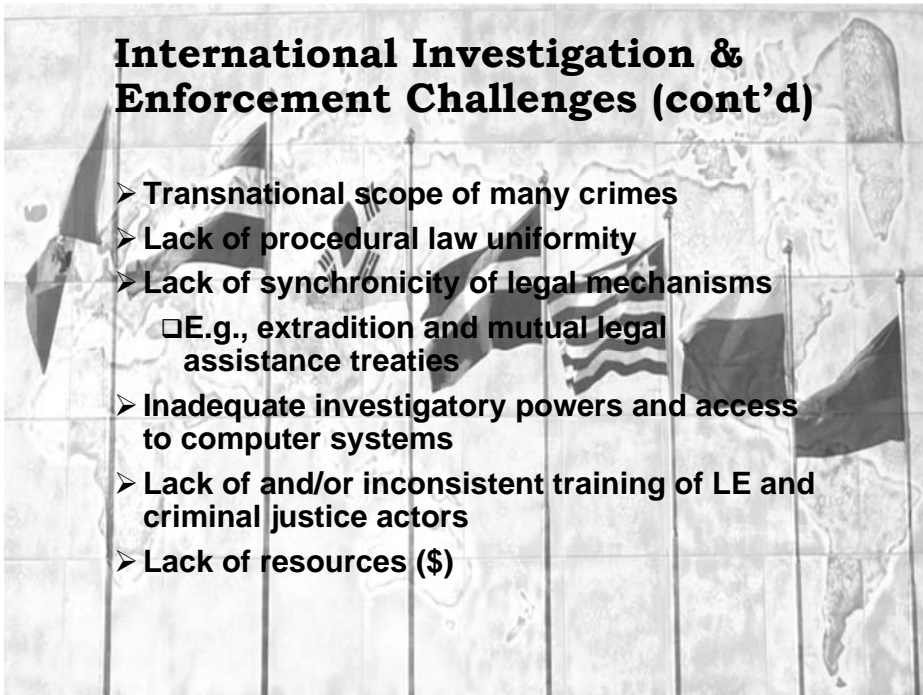
## International Investigation & Enforcement Challenges

- Responsiveness (speed) of International Community
  - ❑ “Heel dragging” (Clifford) by governments
  - ❑ Technology-Law lag: laws can’t keep pace
- Complexity of international legal landscape
  - ❑ Jurisdiction and venue (where to try) issues
  - ❑ Need for domestic legislation
- Lack of global consensus on
  - ❑ Definition of cybercrime
  - ❑ Types of conduct that make up cybercrimes
  - ❑ Definition of criminal conduct (i.e., what conduct should be criminalized)



## International Investigation & Enforcement Challenges (cont'd)

- Transnational scope of many crimes
- Lack of procedural law uniformity
- Lack of synchronicity of legal mechanisms
  - ❑ E.g., extradition and mutual legal assistance treaties
- Inadequate investigatory powers and access to computer systems
- Lack of and/or inconsistent training of LE and criminal justice actors
- Lack of resources (\$)



## Resolution of Challenges

- Resolution of investigation & enforcement challenges critical
- International cooperation is limited to countries with domestic laws and/or to treaty signatories
- EC began discussions in 2000 on special international school for LE
  - ❑ Focus on cybercrime
  - ❑ Involve Interpol



## Interpol

- International Criminal Police Organization
- History
  - ❑ Founded Vienna 1923; reconstituted 1946
  - ❑ Nonpolitical
  - ❑ Funded by member contributions
- General assembly: annual meeting
  - ❑ Decide policy
  - ❑ Elect officials
- HQ in Lyon, France
- Functions
  - ❑ Coordinate international police work
  - ❑ Organize regular information exchange



<http://www.interpol.int/public/icpo/default.asp>

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## Interpol (cont'd)



- Priority crime areas
  - ❑ Public safety and terrorism
  - ❑ Drugs and criminal organizations
  - ❑ Trafficking in human beings
  - ❑ Financial and high-tech crime
  - ❑ Fugitives
- Other crime areas
  - ❑ Counterfeit currency and payment cards
  - ❑ Environmental crime
  - ❑ Genocide, war crimes, crimes against humanity
  - ❑ Criminal analysis service

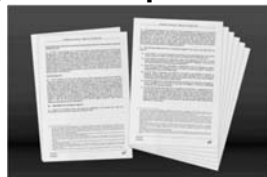
*Interpol Annual Report for 2005:*

<http://www.interpol.int/Public/ICPO/InterpolAtWork/iaw2005.pdf>

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## Council of Europe Convention on Cybercrime Treaty

- Only multilateral treaty dealing with computer-related crime and evidence
- Took effect July 1, 2004
  - ❑ 38 Countries have signed
  - ❑ Few have ratified it
  - ❑ US became party in late September 2006
- Obligations imposed on participating nations:
  - ❑ Enact legislation criminalizing certain computer-related conduct
  - ❑ Create investigative procedures
  - ❑ Create a regime of broad international cooperation (e.g., co-operation in extradition)



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## Key Treaty Provisions

- Consists of 48 articles, divided into 4 chapters
- Chapter II, Section 1
  - ❑ Substantive law issues
  - ❑ Defines 9 offenses grouped into 4 categories
    - ✓ Illegal access
    - ✓ Illegal interception
    - ✓ Data interference
    - ✓ System interference
    - ✓ Misuse of devices
    - ✓ Computer-related forgery
    - ✓ Computer-related fraud
    - ✓ Child pornography related offenses
    - ✓ Copyright related offenses

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## Key Treaty Provisions Cont.



- Chapter II, Section 2.
  - ❑ Addresses procedural law issues
    - ✓ Preservation of stored data
    - ✓ Interception of content data
    - ✓ Disclosure of traffic data
    - ✓ Search & Seizure
- Chapter II, Section 3.
  - ❑ Jurisdictional Provisions
- Chapter III.
  - ❑ Mutual assistance obligations
    - ✓ E.g., extradition rules

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## Key Treaty Definitions



- Treaty defines 4 principle terms
  - ❑ Computer systems
  - ❑ Computer data
  - ❑ Service provider
  - ❑ Traffic Data
- Members not required to incorporate definitions into domestic laws

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## Treaty Evidence Collection



- Provides four methods for securing evidence
  - ❑ Article 18: Production Order
    - ✓ Legal authority must exist to order production of data (e.g., authority to order an ISP to produce subscriber info)
  - ❑ Article 19: Search & Seizure of Stored Data
    - ✓ Applies to stored computer data
    - ✓ Limitation
      - Doesn't address trans-border search and seizure (searching without first going through mutual assistance channels)
  - ❑ Article 20: Real time collection of traffic data
  - ❑ Article 21: Interception of Collection Data

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## Crimes



- Section 1, Articles 2-13 establish minimum standards of offenses
- Requires all offenses be committed *intentionally* (mens rea)
- Offenses include
  - ❑ Title 1, Articles 2-6: Offenses against confidentiality, integrity, and availability of data and systems
  - ❑ Title 2, Articles 7-8: Offenses related to forgery and fraud
  - ❑ Title 3, Article 9: Offenses related to Child Pornography
  - ❑ Title 4, Article 10: Offenses related to copyright infringements
  - ❑ Title 5, Articles 10-13: Aiding, Abetting, Corporate Liability provisions

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## Jurisdiction

- Article 22: attempts to resolve jurisdiction question
  - ❑ Territoriality principle
    - ✓ Prosecute where committed
  - ❑ Ubiquity doctrine
    - ✓ Crime committed in its entirety within a country's jurisdiction if one of the elements of the offense or result occurred in that country's borders
    - ✓ Jurisdiction also applies to co-defendants & accomplices
  - ❑ Principle of nationality
    - ✓ Provides nationals are required to abide by a party's domestic laws even when they are outside the country

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## Mutual Legal Assistance Treaties & Other Agreements

- Mutual Legal Assistance Treaties (MLATs)
  - ❑ Aimed to improve judicial assistance and facilitate procedures with foreign nations
  - ❑ Usually spell out agreed upon procedures
  - ❑ Only for prosecutors
    - ✓ E.g., Office of International Affairs, Criminal Division of DOJ
- Dual Criminality
  - ❑ Meaning conduct is equivalent offense in both countries involved in extradition negotiations
  - ❑ Many MLATs require dual criminality
  - ❑ Investigation can't proceed if target nation hasn't criminalized conduct

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## Dual Criminality Doctrine

- Extradition requires
  - ❑ Collaboration of LE agencies across borders
  - ❑ Consistent classification of crimes
- Both must define the crime
  - ❑ E.g., Philippines did not define Love Bug distribution as a crime despite massive worldwide damage
- If a crime, must match in severity across borders
  - ❑ Thus cannot extradite if extraditing country treats crime as more serious (e.g., felony) than complying country (e.g., misdemeanor)
  - ❑ E.g., US in a minority in North America, South America and Europe in maintaining death penalty
    - ✓ Blocks extradition of some suspects

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## US *Extraordinary Rendition*

- Controversial process
- CIA capturing suspects outside boundaries of United States
  - ❑ Without legal processes for extradition
- Sending them for interrogation to countries with looser or no restrictions on torture
  - ❑ Egypt
  - ❑ Jordan
  - ❑ Morocco
  - ❑ Syria
  - ❑ Uzbekistan



<http://www.pbs.org/frontlineworld/stories/rendition701/>

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## US Extraordinary Rendition [2]

- Defenders
  - ❑ E.g., CIA Director GEN Michael V. Hayden
  - ❑ Speaking at Council on Foreign Relations
  - ❑ 2007-09-07
- Carefully controlled and lawfully conducted
- Nothing new
- Total numbers in dozens
- Used to combat terrorists around world
- Intelligence produced irreplaceable and has worked to deter attacks
- Constitutional limitations inadequate for current situation



<https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html> or <http://tinyurl.com/5rubaw>

## US Extraordinary Rendition [3]

- Attackers
  - ❑ E.g., ACLU
  - ❑ *Foreign Policy in Focus* of Institute for Policy Studies
- Process inherently subject to error
  - ❑ Arbitrary arrest, kidnapping
  - ❑ No challenge to allegations
  - ❑ Documented cases of abuse (see following)
- Violation of international conventions & US law against torture
- Ineffective in extracting usable intelligence
  - ❑ Documented failure of torture to extract truth
  - ❑ Victim will agree to anything to reduce pain
- Reduces protection of US personnel against torture around world
  - ❑ Cannot claim US gov't compliance with UN Convention

<http://www.aclu.org/safefree/torture/rendition.html>  
<http://www.fpif.org/fpiftxt/5502>

## US Extraordinary Rendition [4]

- Khaled El-Masri
  - ❑ Innocent German citizen from Ulm on vacation in Skopje in 2003
  - ❑ Detained by Macedonian border guard
    - ✓ *Mistaken identity*: thought he was Khalid Al-Masri of Al Qaeda in Hamburg
  - ❑ Turned over to CIA
  - ❑ Beaten, stripped, drugged, given enema, dressed in diaper & jumpsuit, flown to Baghdad
  - ❑ Flown to Afghanistan and imprisoned in secret CIO interrogation center
  - ❑ Tortured repeatedly, beaten, raped, force-fed
  - ❑ March 2004: captors admitted he was innocent
  - ❑ Released May 2004 without money on deserted road in Albania



## US Extraordinary Rendition [5]

- Maher Arar
  - ❑ Canadian/Syrian dual citizen
  - ❑ Sep 2002: Detained at JFK Airport on way home to Canada from holiday in Tunis
  - ❑ Solitary confinement in US under interrogation without lawyer
  - ❑ Deported to Syria & tortured for year
  - ❑ Syrian gov't found no links to terrorism
  - ❑ Canadian gov't commission of enquiry cleared Arar of all accusations
  - ❑ Gave him \$10.5M compensation
  - ❑ Lawsuit in progress (*Arar v. Ashcroft*)
    - ✓ US gov't keeps Arar and family on watchlist
    - ✓ Allowed gov't to use claim of national security to refuse evidence to court – case dismissed 2009



<http://jurist.law.pitt.edu/forumy/2006/09/arar-report-us-should-follow-canadas.php>  
<http://www.maheerarar.ca/>  
<http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft>

## **Maher Arar case on *Democracy Now***



### ➤ **Democracy Now October 19, 2006**

- ❑ <http://video.google.com/videoplay?docid=-7174998579366061294#> (streaming video)
- ❑ [http://www.mekabay.com/courses/academic/norwich/cj341/lectures/27\\_ghost\\_plane.mp3](http://www.mekabay.com/courses/academic/norwich/cj341/lectures/27_ghost_plane.mp3) (audio download)

### ➤ **Democracy Now November 3, 2009** – starting 14'56" to 25'25"

- ❑ <http://i2.democracynow.org/shows/2009/11/3> (streaming video)
- ❑ [http://www.mekabay.com/courses/academic/norwich/cj341/lectures/27\\_maher\\_2009.mp3](http://www.mekabay.com/courses/academic/norwich/cj341/lectures/27_maher_2009.mp3) (audio download)



# **DISCUSSION**