

Recent International Legal Developments

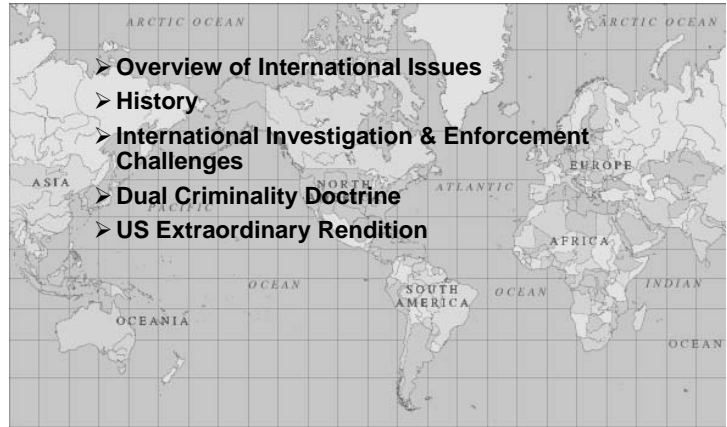
CJ341 – Cyberlaw & Cybercrime Lecture #27

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Topics



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

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



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



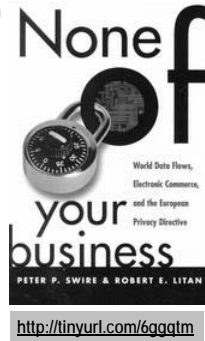
History (cont'd)

- 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



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 1st treaty took effect
- 2006: Up to 38 signatories
- 2006: Sept – US became party
- 2007: Jan 1: treaty took effect



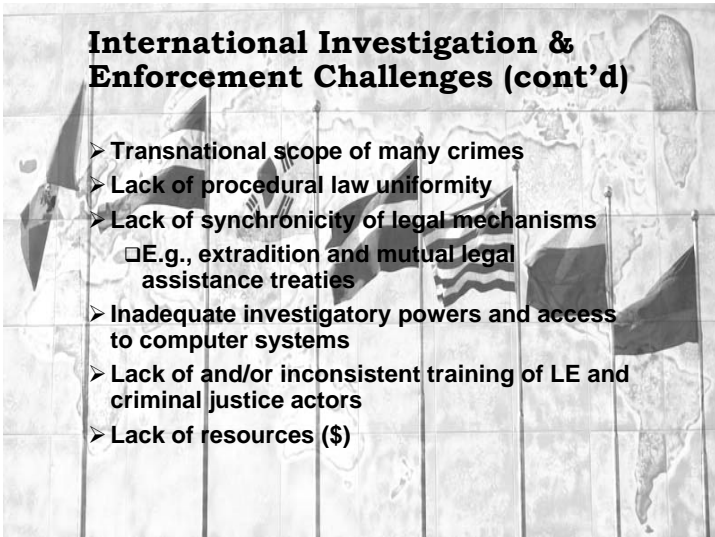
International Investigation & Enforcement Challenges

- 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/5rubav>

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<http://www.guardian.co.uk/world/2005/jan/14/usa.germany>

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.fpiif.org/fpiftxt/5502>

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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 CIA 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



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<http://www.guardian.co.uk/world/2005/jan/14/usa.germany>

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.maherarar.ca/>

<http://ccrjustice.org/ourcases/current-cases/arar-v.-ashcroft>

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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 (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 (audio download)

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DISCUSSION

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