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I. GAMING AND MONEY LAUNDERING

A. Operation Hurricane: Brazil's War on Illegal Gambling, Corruption and Money Laundering

by Sergio Sardenberg and Francisco A. Fabiano Mendes[1]

In a well-coordinated series of raids – appropriately code-named Operation Hurricane – launched in late April and encompassing three states and the Federal District, Brazil's Federal Police [Polícia Federal - PF] rounded up 25 persons suspected of involvement in illegal gambling and carried out 70 search and seizure warrants. The detainees, who were promptly whisked off by plane to the PF headquarters in Brasília, were a diverse group of individuals, ranging from a number of kingpins of what is known as the mafia of illegal gambling, to a high profile group of court of appeals judges, prominent lawyers, and a federal attorney.

In addition to the above-mentioned detainees, the unfolding gambling scandal ensnared a prominent figure, Justice Paulo Medina of Brazil's highest court for non-constitutional matters, the Superior Justice Court ["Superior Tribunal de Justiça" - STJ].[2] Justice Medina's brother, Virgílio Medina, a well-known attorney, was caught red-handed by the PF in a 2006 telephone intercept as he haggled with a lawyer for the bingo parlors, Sergio Luzio Marques de Araújo, about the payment of a fee in return for a favorable order for the release of 900 slot machines which had been seized in a police raid. On the following day, Justice Medina granted a request for injunctive relief for the release of the seized machines. It is believed that this incident was the trigger for a thorough investigation ordered by STJ Justice Cesar Peluso and carried out by the PF, which in turn, led to Operation Hurricane.

Justice Medina was called before a special panel of the STF, the companion court to the STJ. If the special panel finds evidence that Medina received payment in exchange for handing down a decision that favored the "gambling mafia", it will be required to recommend to the court's plenum that disciplinary proceedings be instituted against him by the STJ. Moreover, depending on the Court's findings he could be tried for criminal violations.

Other high-profile detainees included the former vice-president of the TRF [Federal Regional Court of Appeals] for the 2nd Region, Judge Eduardo Carreira Alvim, Judge José Ricardo de Siqueira Regueira also of the TRF and Judge Ernesto da Luz Pinto Dória of the Regional Labor Court ["Tribunal Regional do Trabalho - TRT"] for the 15th Region.

The wide scope of Operation Hurricane and the prominence of several detainees reflects the painstaking investigations and planning that made it possible for the PF to preserve the element of surprise. The meticulous planning is noticeable in a number of aspects of the raid, such as the PF's precaution of having all detainees

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[2] The Brazilian Constitution (enacted in October 5, 1988) dealt with the chronic case overload in the country's highest court, the Federal Supreme Court (STF) by creating another high court, the Federal Superior Justice Court (STJ). The STF has continued to be the paramount court for matters pertaining to constitutional issues. The STJ basically took on the role of the court of last resort for matters not involving constitutional issues.

submitted to a battery of medical tests at a Rio cardiology clinic prior to flying them to Brasília, thereby precluding claims of heart problems that might have otherwise been made by some of them to avoid or delay their transfer to the Capital.

In the aftermath of Operation Hurricane, a special panel of the Superior Justice Court (STJ) voted to accept the charges brought by the Federal Prosecution Office [Ministério Público Federal] and formally indicted Court of Appeals Judge Dirceu de Almeida Soares, removing him from active participation as a judge in the Federal Regional Court for the Fourth Region [TFR]. Judge Almeida Soares was charged with criminal conspiracy, larceny by default, and misconduct in office. According to the terms of the criminal charges, he habitually pressured other TFR judges to issue decisions benefitting the interests of a number of his lawyer friends. Four of those attorneys were also indicted, one of them for the same felonies and the others for criminal conspiracy and larceny by default. STJ Reporter Justice César Asfor Rocha found that the charges filed by the Federal Public Prosecution Office had provided true facts and solid evidence. Soares is also being the object of investigation proceedings instituted by the National Justice Council.[3]

Meanwhile, on June 19, 2007, the PF launched the second phase of Operation Hurricane, targeting corrupt Rio de Janeiro State and PF officers involved in illegal gambling activities. At least 30 arrest warrants were issued and served. The detainees were held at the PF's regional headquarters in Rio. This action answered the questions of those who had been wondering whether the PF would continue to apply pressure or whether the "hurricane" would abate and die out.

The history of what is known in Brazil as "jogos de azar" [games of chance] is full of twists and turns. In the twenties and throughout most of the forties casinos flourished throughout the country. The Urca casino in Rio de Janeiro was particularly famous for bringing to Rio the best entertainers from all over the world. In 1947 however, a federal decree banned all gambling activity – except for the national lottery, which has been a monopoly of the government owned CEF [Caixa Econômica Federal] since 1961. Several state savings banks continue to run state lotteries.

An illegal form of gambling, however, continued to operate with only token enforcement: the traditional numbers game, known as the "animals' game" ["jogo do bicho"] – "bicho" meaning animal in general. Its operators are known as "bicheiros." The "jogo do bicho" dates back to the closing years of the 19th century, in the early days of the new republican regime that succeeded the long-lasting Brazilian Empire (1822 to 1889). It was the creation of a wealthy nobleman, the Baron of Drummond, who sought to raise money for the upkeep of one of his business ventures, the Rio de Janeiro Zoological Gardens, as the republican government had abolished the subsidy that had enabled the park to operate. Borrowing an idea from a Mexican businessman who later became his associate, the Baron invited the leading members of Rio's society and members of the press to a special event at his zoo and instituted a kind of lottery involving numbered admission cards each one of which featured a picture of an animal. The novelty was particularly attractive since the lucky bearers of the winning tickets were paid 20 times the price paid by them. Soon thereafter the Baron's company had to establish several betting places, in order to accommodate the growing number of players. An instant success with all classes of people, but particularly with the poor, due to its colorfulness, simplicity and low cost bets, it became a widespread activity, entrenched in Brazilian life, folklore, literature and popular music. Although the object of sporadic raids, the "jogo do bicho" was largely tolerated by the

[3] The National Justice Council ["Conselho Nacional de Justiça"-CNJ] is an independent governmental agency that acts as a watchdog of the Judiciary. It is said that, since its inception, in 2005, it has already punished some 140 judges.

authorities, in spite of the opposition of the federal and state lotteries. Over the years it expanded and prospered, particularly in periods of increased tolerance by the law enforcement apparatus, and it came to be dominated by a group of entrepreneurs (known as "bicheiros") who operated outside the law. In 1993 the high command of the "jogo do bicho" in Rio de Janeiro was arrested and convicted by Judge Denise Frossard. Sometime thereafter, however, they were set free on appeal.

In more recent times "bicheiros" have poured money into the neighborhood associations known as samba schools ["Escolas de Samba"], which compete annually in Rio's"Carnaval." A similar pattern is found in other states. Each year the "escolas de samba" try to outdo one another with thousands of dancers, singers, floats, and catchy sambas. This world famous festival is a financial windfall for city and state administrations. As the "bicheiros" ingratiate themselves with the population and officials, the question comes up in many quarters as to whether or not it would be preferable to legalize the activity and tax its proceeds. It is a thorny issue that, raises a number of related problems and requires a careful analysis.

As to the more recent arrivals, the bingo parlors (whose managers are known as "bingueiros"), there is a bit of controversy as to whether or not they are actually illegal. (In a recent, detailed legal opinion on the matter, the renowned jurist Miguel Reale Jr. argued that a succession of laws designed to revoke an earlier statute that allowed their operation have actually failed to do so and consequently the permissive statutes are still in effect). Hence the flood of applications for injunctive relief filed with the courts by attorneys for the "bingueiros", which in turn, brought about the above-mentioned bribe scandals.

A new crop of "bicheiros" has, little by little, regained power. Evidence obtained by the PF showing that the "bicheiros" have seized control of all illegal gambling operations by way of a partnership with the "bingueiros" has further complicated matters, particularly since the "bicheiros", no doubt due to their financial clout and longstanding experience, have reportedly taken the upper hand in this "syndicate."

Beyond the immediate question of determining whether or not the current statutes allow the operation of bingo parlors, slot machines and electronic games of chance – which is a matter that can be easily disposed of by enacting appropriate legislation – there is a more serious problem, the pervasive source of corruption represented by such groups and their actions that threaten to erode the country's basic institutions including some sectors of the judiciary.

In a groundbreaking ruling, the STF held that the use of video-bingo and video-poker equipment and slot-machines is prohibited by the Penal Code (Art. 354, first paragraph) and, as such, a decision of the Vice-President of the TRF [Federal Regional Court] for the Second Region revoking an order by the lower court (the 4th Federal Court in Niterói, Rio de Janeiro State) for the seizure of such machines was contrary to the law. The high court agreed with the assertions of the Federal Prosecution Office, ruling that law enforcement would be stymied in its efforts to uphold the law if the decision were allowed to stand, which would be tantamount to placing the business interests of the illegal gaming equipment companies above the interests of society at large.

The STF cited other rulings by the court, noting that the states may not legislate on issues pertaining to the operation of lotteries and gambling activities in general as that would violate a specific provision in the Federal Constitution (Art.22-I) (decision n˚ 3048-Reporter:the Chief Justice of the STF).

In another significant development related to gaming activities, the STF recently issued a decision known as a "súmula vinculante" (binding uniform ruling) denying the right of the states to legislate on issues pertaining to

bingos. The STF ruled that only the Federal Government has jurisdiction over such matters. The "súmula vinculante" represents a rather interesting development in Brazilian law.

"Súmulas" are issued by courts of appeal and principally by the two highest ones, the STF and the STJ, whenever the court rules uniformly on a given issue over a period of time, thereby forewarning the parties and eliminating the need for the court to examine the matter anew. As such, the "súmulas" constitute an uncharacteristic development for a civil law country like Brazil where precedent is not binding. The "súmula vinculante" goes a step further in that the STF specifically makes law, as such rulings become binding on the other levels of the Judiciary and on government agencies. Thus, the "súmula vinculante" may be said to represent an interesting convergence between the civil and the common law systems.

Money laundering of the proceeds of illegal gambling operations has been one of the most significant illegal actions uncovered by the PF. Several irregular remittances have been reportedly made to the U.S., but no details have been made available. Apparently, two U.S. corporations were utilized for such purposes, the J.P. Morgan Chase Bank and a company named Beacon Hill Services Corp.

In another recent development, the 1st Special Panel of the Federal Regional Court (TRF) for the 2nd Region denied the pleas for habeas corpus filed on behalf of 20 defendants involved with the "slot-machine mafia", who had been arrested in the wake of Operation Hurricane. The decision upheld the preventive detention order issued by the lower court, (the 6th Federal Criminal Court of Rio de Janeiro). Several detainees have been indicted for their alleged involvement in a scheme involving the payment of bribes to government officials, including attorneys, federal agents (including PF commissioners), bingo parlor owners, and members of bingo associations.

The above-reported developments show that the swift, decisive actions taken by the two highest Brazilian courts, the STF and the STJ, in coordination with the PF and the Federal Prosecution Office, and constitute unequivocal and heartening evidence of the fact that the Brazilian state apparatus is gaining on its campaign against the deleterious effects of illegal gambling operations.

B. Brazilian Court Accuses Berezovsky of Money Laundering, Orders His Arrest

by Bruce Zagaris

On July 12, 2007, Brazilian Judge Fausta Martin de Sanctis, of the Sixth Federal Court in São Paul, ordered the arrest of Russian tycoon Boris Berezvosky and several of his associates for money laundering in connection with the Corinthian Paulista Sport Club, the latest legal setback for the increasingly embattled Berezovsky.[1] The court also issued an order freezing the Corinthian club's accounts by virtue of its agreement with the investment fund of Media Soccer Investments (MSI).[2]

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[1] Ministerio Publico Federal, *Denúncia Control Dirigentes do Corinthians é Aceita Pela Justiça Federal (Charge against Directors of Corinthians and Approves the Federal Justice Order*, Press Release, (http://noticias.pgr.mpf.gov.br/noticias-do-site/criminal/mpf-sp-2013-denuncia-contra-dirigentes-do-corinthians-e-aceita-pela-justica-federal).

[2] *Justiça Bloqueia Contas do Corinthians ordena prisão de Kia (Justice Blocks Accounts of Corinthians and Orders Detention of Kia*, ESTADO DO SÃO PAULO, July 17, 2007.

Brazilian police charged the directors of the Corinthians, Albert Dualib, Nesi Curi, Renato Duprat Filho, Paulo Sérgio Scudiere Angioni, as well as attorney Alexandre Verri, with money laundering and criminal association. The judge also ordered the detention of Berezovsky, Kia Joorabchian, and Nojan Bedroud, and the Brazilian government has requested Interpol red notices for all three. Brazilian authorities believe that detaining the accused foreigners, who have no contact with Brazil, will prevent them from continuing their criminal activities. The Brazilian Ministry of Justice will transmit copies of the charges and detention orders to accompany the extradition requests.[3]

Joorabchian, an Iranian-born business partner of Berezovsky, allegedly oversaw the transfer of Carlos Tevez, an Argentinian football star, from the Corinthians to West Ham Unit. In 2006, the Premier League conducted an inconclusive investigation.[4]

Berezovsky has said that the charges are connected to Russia's politicized campaign against him, and denied being involved in money laundering or any dealings connected to Carlos Tevez.[5] Criticizing the Brazilian prosecution, he claimed that Brazilian authorities were acting based on documents sent by Russian prosecutors.[6] Berezovsky had planned to move to Brazil in the face of the pressure against him in Europe.

The Corinthian club is known for the loyalty of the lower class. In 1941, Brazilian President Getúlio Vargas, seeking to use soccer as a way of unifying the country, established a National Council of Sports as a part of the Ministry of Education and Culture. For decades many clubs assumed that their close links to politicians protected them from scrutiny. In 2001, however, President Fernando Enrique Cardoso changed the clubs' status from social organizations to "commercial enterprises," thereby subjecting them to fiscal and legal accountability and oversight. Shortly thereafter, the Brazilian government and sports federation began uncovering widespread incidences of money laundering, tax evasion, fraud, and other financial improprieties in the soccer clubs.[7]

The current investigation of the Corinthian club and Berezovsky seems to follow the Brazilian government's efforts to clean up the soccer industry.

C. European Court of Justice Rules Against Attorney Professional Secrecy

by Bruce Zagaris

On June 26, 2007, the European Court of Justice upheld the European Council Directive 91/308/EEC on

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[3] *Id.*

[4] Adrian Bloomfield, *Brazilian Judge Orders the Arrest of Berezovsky*, THE TELEGRAPH, July 15, 2007.

[5] *Id.*

[6] *Berezovsky Acusa Brasil de Cair em Chantagem de Moscou (Berezovsky Accuses Brazil of Succumbing to Moscow Blackmail*), ESTADO DO SÃO PAULO, July 13, 2007.

[7] Teresa A. Meade, A BRIEF HISTORY OF BRAZIL 210-12 (Checkmark Books 2004). *See also* Jorge Nemr, *Soccer Entrepreneurs and Players are Arrested in Rio de Janeiro*, 19 INT'L ENFROCEMENT L. REP.312 (Aug. 2003).

anti-money laundering,[1] as amended by Directive 2001/97/EC of the European Parliament, ruling against bar associations contesting the directive.[2] The bar associations have challenged the portion of EC Directive, as implemented by Belgium, requiring attorneys to make suspicious activities reports (SARs) to regulatory and law enforcement authorities. The bar associations argued that the SAR requirements unjustifiably impinge on professional secrecy and the independence of lawyers. In particular, the bar associations contended that the SAR requirement infringe Articles 10 and 11 of the Belgian Constitution, read in conjunction with Article 6 of the ECHR, the general principles of law relating to the rights of the defense, Article 6(2) EU, and also Articles 47 and 48 of the Charger of Fundamental Rights of the EU on December 7, 2000.[3]

The bar associations emphasized that the obligations of reporting on and incriminating clients exceed mere infringement of professional secrecy, to the extent that they wholly destroy the relationship of trust between a lawyer and a client. The Council of the Bars and Law Societies of the European Union (CCBE) argued that the Belgian Law of January 11, 1993, as amended by the Law of January 12, 2004, makes it impossible to maintain the traditional role of the lawyer. The CCBE said that the specific features of the legal profession – namely independence and professional secrecy – contribute to the trust which the public has in the profession, and must apply to all aspects of an attorney's work.

The bar associations also asserted that the Article 1(2) of Directive 2001/97 infringed the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights and, as a result, Article 6(2) EU insofar as the new Article 2a(5) in Directive 91/308/EEC incorporates independent legal professionals.

The ECJ ruled that the SAR requirements do not infringe the right to a fair trial guaranteed by Article 6 of ECHR and Fundamental Freedoms and Article 6(2) EU. According to the ECJ, EU members need not impose SAR requirements on lawyers regarding information they receive from clients in the context of litigation and judicial proceedings. Instead, the ECJ explained, the SAR obligations apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions – essentially financial and real estate transactions. Such activities occur in a context with no link to judicial proceedings and hence fall outside the scope of the right to a fair trial.[4]

In a press release the CCBE said it has never accepted that lawyers, who are members of a regulated profession, should have been included in the reporting obligation. The CCBE has consistently requested that the Commission and Financial Action Task Force on Money Laundering (FATF) provide evidence that lawyers are unwittingly used to facilitate money laundering activities justifying reporting obligations. According to the CCBE, neither the Commission nor the FATF has provided such evidence. The CCBE said already professional ethical rules

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[1] OJ 1991 L 166, p. 77.

[2] *Order des barreaux francophones et germanophone v. Conseil des Ministres*, European Court of Justice (Grand Chamber), Case C-305/05, June 26, 2007.

[3] OJ 2000 C 364, p. 1.

[4] *Order des barreaux francophones et germanophone v. Conseil des Ministres*, *supra*.

and disciplinary sanctions, in addition to criminal sanctions, regulate lawyers who participate in criminal activity.[5]

The ECJ decision will likely make it more difficult for other EU bar associations to challenge SAR obligations, and may harm international efforts to fight similar requirements. Nevertheless, similar challenges have already succeeded in other countries, including in Canada, and may continue to succeed on a case-by-case basis.

The bar associations' decision to base their challenge on the right to a fair trial also potentially undermines the argument that SAR requirements violate fundamental protections since the right to a fair trial is only one small part of the attorney-client relationship, and is an aspect that the gatekeeper initiative arguably exempts.

II. EXTRADITION

A. Chilean Supreme Court Denies Peruvian Request for Fujimori Extradition

by Bruce Zagaris

On July 11, 2007, Chilean Supreme Court justice Orlando Alvarez ruled that Chile should deny a Peruvian government request for the extradition of former Peruvian president Alberto Fujimori. Peru promptly announced plans to appeal the decision to the Criminal Chamber of the Supreme Court.[1]

Fujimori, 68, remains under house arrest in Chile. Although banned from holding office in Peru until 2011, he recently announced plans to run for a position in the Japanese Senate later this month.[2] Fujimori will run as a candidate of the New People's Party, a small conservative party. Critics contend that he is running for office to avoid potential extradition by achieving parliamentary immunity in Japan.

Peru accuses Fujimori of embezzlement, kidnapping, and various human rights violations during his government's fight against the Senderos Luminosos. The extradition request alleges that Fujimori oversaw military death squads that killed 25 people in two mass murders. Fujimori has denied the charges.[3]

Fujimori's case, which involves neighboring countries whose relations are often tense and fractious, is very controversial. In addition, the effort to extradite and try a former head of state for atrocities has received close scrutiny from the legal community, especially since the U.K. deemed former Chilean head of state Augusto Pinochet extraditable for torture and crimes against humanity.

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[5] CCBE, *CCBE is disappointed by the decision of the Court of Justice on lawyers' reporting obligations*, Press Release, June 26, 2007.

[1] Lucien Chauvin and Monte Reel, *Fujimori Wins Legal Round in Extradition Fight*, WASH. POST, July 12, 2007..

[2] *Id.*

[3] *Id.*

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B. Russia Denies U.K. Request for Lugovoi Extradition

by Bruce Zagaris

On July 5, 2007, the Russian prosecutor general formally notified British prosecutors that Russia would not extradite Andrei K. Lugovoi, the former K.G.B. officer sought by the U.K. in connection with the murder of former K.G.B. officer Alexander V. Litvinenko.[1] The Russian prosecutor general explained that the Russian Constitution precludes the extradition of Russian citizens. In accordance with the requirements of international law, however, Russia offered to consider prosecuting Lugovoi domestically.[2]

The British government would need to furnish detailed evidence and work closely with Russia on the prosecution since most of the physical evidence and witnesses are in Britain. Because of the animosity between Russia and Britain over this and related extradition cases, the prospects of British cooperation with Russia on a Lugovoi prosecution are extremely low. For instance, Russian oligarch Boris Berezovsky, who lives in England, employed both Lugovoi and Litvinenko at various times.

On June 15, 2007, the Russian Federal Security Service opened a criminal investigation into accusations that Berezovsky and Litvinenko were British spies. The investigation may strengthen Russia's efforts to extradite Berezovsky, or at least persuade the British government to lift his political asylum status.[3] Berezovsky recently publicly criticized the Russian government, leading to charges that he had advocated its violent overthrow. Although Britain's Foreign Office said on June 15 its policy was not to comment on intelligence matters, U.K. officials have privately characterized the Russian claims as disinformation to divert attention from evidence in support of the Lugovoi extradition request.[4]

On July 16, 2007, Britian expelled four Russian diplomats, all middle-ranking officials unconnected to the Litvinenko case, in protest at Russia's failure to extradite Lugovoi.[5] In addition, Britian said it will close the door, for now, on talks aimed at streamlining visa applications for Russian citizens.[6]

On July 19, 2007, Russia expelled four British diplomats in response to Britain's expulsion of four Russian diplomats. Russia will also tighten visa requirements on British government officials' travel to Russia, in response to a similar move by Britain, and will suspend counterterrorism cooperation.[7]

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1 C. J. Chivers, *Russia: No Extradition for Poison Suspect*, N.Y. TIMES, July 6, 2007, at A5, col. 2.

2 *Id.*

3 Neil Buckley, *Russia launches UK spying inquiry after Lugovoi's M16 claim*, FIN. TIMES, June 16, 2007.

4 Buckley, *supra*.

5 James Blitz and Neil Buckley, *UK Expels Russians in Lugovoi Protest*, FIN. TIMES, July 16, 2007.

6 Karla Adam, *Britain to Expel 4 Russians Over Poisoning Case*, WASH. POST, July 17, 2007, at A15, col. 1.

7 Andrew E. Kramer, *Russia Orders 4 British Diplomats Home in Poisoning Case*, N.Y. TIMES, July 20,2007, at A10, col. 1.

On July 23, 2007, Russian Deputy Prosecutor General Alexander Zvyagintsev said the British extradition request was based on a flawed, politicized investigation and that its expulsion of the Russian diplomats was "plainly groundless, inappropriate, unjustified and lies exclusively in a political framework."[8]

Russia's denial of the British request for Lugovoi's extradition, coupled with new criminal charges against Berezovsky, show the important political bases for extradition. The fact that Russia The escalating dispute and tensions between the two countries indicate how disputes over extradition can spread to other areas of bilateral relations.

C. Freedom of Information Act Request Illuminates Use of Deportation as Alternative to Extradition

by Bruce Zagaris

On March 5, 2007, a magistrate in the U.S. District Court for the Eastern District of California granted summary judgment to the U.S. government in a Freedom of Information Act (FOIA) case brought by an individual deported by Romania to the U.S. in October 2000.[1] The case, *Michael Garvey v. U.S. Department of Justice*, provides insight into the use of deportation as an alternative to extradition by the U.S. and foreign governments.

Plaintiff Michael Dean Garvey brought an action seeking records concerning his alleged extradition from Romania in October 2000. Garvey had fled California after three counties in California filed criminal sexual assault charges against him. As of 1999, according to the U.S., Garvey was a fugitive on these charges. After his deportation from Romania, Garvey returned to the U.S. and was subsequently convicted on some charges.

After his incarceration, on January 9, 2003 Garvey filed a *pro se* FOIA request, alleging that he had been kidnaped. Garvey argued that the documents he requested would show that his extradition was accomplished unlawfully, nullifying his U.S. criminal convictions. He requested all communications between the U.S. Department of Justice (DOJ), Office of International Affairs (OIA), Criminal Division and any domestic or foreign government pertaining to the request.

The DOJ responded that Garvey was never formally extradited. Instead, after the local agency learned that extradition would be difficult because of the nature of the alleged offenses and the pertinent extradition treaty, the local agency obtained the assistance of the FBI in acquiring an Unauthorized Flight to Avoid Prosecution (UFAP)[2] warrant from the Central District of California. The UFAP warrant caused the U.S. Department of State to revoke Garvey's passport, allowing Romanian authorities to deport him.

Rather than claiming that it was exempt from Garvey's request, the DOJ Criminal Division searched its centralized records index for any documents referencing plaintiff and reported that none were found. The Office of

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[8] Peter Finn, *Russia Calls Evidence in Poison Case Inadequate*, WASH. POST, July 24, 2007, at A11, col. 3.

[1] *Michael Garvey v. U.S. Department of Justice*, U.S. E.D.Ca. (Mar. 5, 2007), 2007 U.S. Dist. LEXIS 15245 (Mar. 5, 2007).

[2] 18 U.S.C. § 1073.

International Affairs also searched the computerized case tracking and management index, but did not find records pertinent to the request. As a result, the court granted summary judgment in favor of the DOJ.

As Garvey's case shows, when the U.S. realizes that it may be difficult to win extradition under a treaty (the U.S.-Romania treaty is one of the oldest), it will consider alternatives such as the use of a UFAP warrant and passport revocation to obtain custody. Garvey's case also illuminates some interesting aspects of the FOIA. The DOJ's willingness to search for and turnover information about Garvey's surrender was perhaps without potential legal cost, since U.S. jurisprudence holds *mala captus bene detentus* (even if the capture is wrongful detention is lawful). As a result, Garvey's use of the FOIA to ascertain how he was captured was for all practical purposes meaningless in terms of his ability to use the information to overturn his surrender.

D. U.S. Magistrate Finds Lack of Probable Cause, Declines to Extradite Accused Murderer to Poland

by Bruce Zagaris

On July 20, 2007, U.S. Magistrate Judge Arlander Keys found that a Polish government submission of five volumes of evidence did not meet the probable cause requirement to show that Edward Mazur incited the murder of top Polish law enforcement official Marek Papala in June 1998.[3]

On October 19, 2006, the U.S. Attorney's Office filed a complaint seeking the provisional arrest and extradition of Edward Mazur, a dual citizen of the U.S. and Poland. On February 1, 2005, the Regional Court for Warsaw Śródmieście issued a provisional arrest warrant for Mr. Mazur for the crime of enticing Artur Zirajewski in April 1998, jointly and in conspiracy with another person, to perpetrate the crime of the murder of Chief Superintendent Marek Papala, offering him in return a sum of $40,000.

Magistrate Keys agreed that the offense for which Mazur's extradition was requested corresponds with the offense contained in article two of the U.S.-Polish extradition treaty. However, Keys deemed the written testimony of the government's star witness, Artur Zirajewski, unreliable and unpersuasive,[4] and found Zirajewski's identification of Mazur in a February 2002 lineup highly suspect.[5] The opinion also questioned the credibility of Andrzej Zielinski, the second key government witness.[6]

The opinion explains that the court must grant Poland's extradition request only if the evidence gives rise to "a soundly-based belief that the suspect may have committed [the] crime." *Gramenos v. Jewel Cos., Inc*., 797 F.2d 424, 440 (7th Cir. 1986). Instead, the opinion characterizes the evidence as giving rise to, at most, a soundly-based

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[3] *In the Matter of the Extradition of Edward Mazur*, U.S. Dist. Court for the N.D. Ill., E.D., No. 06 M 295, Memorandum Opinion and Order, July 20, 2007.

[4] *Id.* at 50-60.

[5] *Id*. at 60-61.

[6] *Id.* at 61-64.

belief that Mazur associated with a number of suspicious characters.[7]

Keys notes that the court is not allowed to hand over a U.S. citizen "on the word of a prosecutor, coupled with conclusory allegations and unsubstantiated, unreliable evidence."[8] While acknowledging the deference to which the decisions of a foreign government are entitled in extradition matters, the opinion characterized the extradition request as based on "selected statements given by Artur Zirajewski – a known scoundrel and unmitigated liar – implicating Mr. Mazur, without addressing all of the other statements given by this witness that, not only do not implicate Mr. Mazur, but contradict what Mr. Zirajewski said in the statements emphasized by the government."[9]

The court's ruling illustrates the import of probable cause requirement in common law countries. Some governments, such as the U.K., have abolished the requirement for selected countries such as the U.S. As the *Mazur* case demonstrates, even when the quantity of evidence is significant, a U.S. magistrate or judge can find such evidence does not meet the requirement of probable cause. In addition, Magistrate Keys repeatedly notes that the relator was a U.S. citizen even though the same legal standard theoretically applies to a relator regardless of citizenship.[10]

On July 21, 2007, a Polish Justice spokeswoman said the government plans to appeal the ruling. In the interim, Magistrate Keys released Mazur from detention.[11]

III. TRANSNATIONAL CORRUPTION

A. U.S. Launches BAE-Saudi Arabia Corruption Investigation

by Bruce Zagaris

On June 26, 2007, BAE announced that the U.S. Department of Justice had launched a formal investigation into BAE Systems' compliance with anti-corruption law, focusing on the company's business dealings with the Kingdom of Saudi Arabia.[1] BAE shares dropped more than 10 percent in London trading following the announcement.[2]

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7 *Id.* at 66.

8 *Id*., at 67, citing *U.S. v. Fernandez-Morris*, 99 F.Supp.2d 1358, 1366 (S.D. Fla. 1999).

9 *Id.* at 69.

10 For an earlier discussion of the case *see* Bruce Zagaris, *DelaysPlague U.S. Extradition in Polish Contract Murder Case*, 23 INT'L ENFORCEMENT L. REP. 263 (July 2007).

11 *Poland plans to pursue Mazur extradition case*, REUTERS, July 21, 2007.

1 Roger Blitz, *US launches corruption probe into BAE*, FIN. TIMES, June 26, 2007.

2 *Id.*

Despite concerns about the company, earlier this month the U.S. government approved BAE's $4.1 billion acquisition of Armor Holders, following a 30-day review by the Committee on Foreign Investment in the U.S. Executive Branch. BAE is one of the largest defense contractors with which the U.S. government cooperates.[3]

BAE has retained Lord Woolf, a leading member of the U.K. judiciary, to conduct an independent review of the company's arms deals. Oddly, however, Woolf's review will not include BAE dealings with Saudi Arabia. The media has reported allegations of multi-million pound payments to Prince Bandar, a leading member of the Saudi royal family and formerly the Saudi ambassador to the U.S. Prince Bandar has denied receiving improper payments, while BAE has said it acted within the law.[4]

In December 2006, following the U.K. government's decision to halt a fraud inquiry into BAE's 1980 Al Yamamah deal to furnish jets and other military hardware to Saudi Arabia, international organizations and foreign governments took note. At that time and again in June during the G-8 meeting, then British prime minister Tony Blair justified the decision to stop the fraud investigation based on national security and the potential loss of jobs. The U.S. government and the Organization of Economic Cooperation and Development immediately criticized the decision, arguing that it violated British obligations under the OECD Convention on Corrupt Payments to Foreign Officials.[5]

IV. ECONOMIC INTEGRATION AND ENFORCEMENT COOPERATION

A. CARICOM Agrees to Arrest Warrant, Maritime and Airspace Agreement

by Bruce Zagaris

On July 6, 2007, participants of the annual Meeting of the Conference of Heads of Government of the Caribbean Community agreed to conclude two treaties concerning international criminal and enforcement cooperation – the CARICOM Arrest Warrant Treaty and the CARICOM Maritime and Airspace Agreement, which are set for signing in September 2007.[1] The heads of government are focused on using CARICOM to augment the limited security and intelligence-gathering capabilities of individual member states.

According to the Communiqué published at the end of the meeting, "the CARICOM Arrest Warrant will put in place a legal mechanism to effect surrender of suspected persons and fugitives across borders." The arrangement will apparently emulate the European Arrest Warrant and provide the surrender of fugitives across border in lieu of

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[3] *Id.*

[4] *Id.*

[5] For additional discussion of recent developments in the case *see* Bruce Zagaris, *U.K. Media REVELATIONS OF BAE PAYMENTS PUT PRESSURE ON U.S. LAW ENFORCEMENT,* 23 INT'L Enforcement L. Rep. 298 (Aug. 2007).

[1] Communiqué Issued at the Conclusion of the Twenty-Eighth Meeting of the Conference of Heads of Government of the Caribbean Community (CARICOM), July 1-4, 2007, Needham's Point, Barbados, CARICOM Press Release 167/2007 (July 5, 2007).

the current extradition arrangements, as are now required.[2]

The Maritime and Airspace Agreement will encourage pooling of resources for more effective maritime surveillance. The Communiqué said the focus will initially "be on providing coverage for the maritime environment shared by Trinidad and Tobago, Barbados, Grenada, St. Vincent and the Grenadines and St. Lucia." Trinidad and Tobago Prime Minister Patrick Manning, CARICOM's spokesperson on security matters, added that Trinidad and Tobago will buy offshore patrol vessels to support this goal.[3]

The Cricket World Cup, which was held in the West Indies in April, was an important catalyst for international cooperation on security arrangements and procedures. Manning pointed in particular to The Joint Regional Command Centre (JRCC), which manages the Advance Passenger Information System and to the Fusion Centre in Trinidad, which collects regional information for the JRCC.[4] The heads are currently deciding how those measures can best be made permanent.

One important crime and security measure the Communiqué touts is "the creation of a Virtual Single Domestic Space facilitated through a voluntary regime of a CARICOM Travel Card with facial and finger print biometrics." Barbados government official Mia Mottley explained that both citizens and permanent legal residents of the CARICOM member states will be eligible for the card. Those on the CARICOM watch list would not be eligible.[5] The revenue from the travel card fees would be spent on strengthening the "CARICOM security architecture."[6]

The CARICOM heads of government made a Declaration of Functional Cooperation during the meeting as follows:

> Aware that the security of our people is our highest responsibility and deeply committed to reducing vulnerability to crime and other threats to security within national borders and in our shared economic space, as well as to those emanating from beyond,
>
> We:
>
> Agree to build on the security arrangements successfully implemented for Cricket World Cup 2007 in order to enhance the well being of the region's citizens and preserve the safety and security of our countries;
>
> Further agree to accelerate the process of intelligence-sharing and human resource development and to develop other relevant bilateral and multilateral security arrangements to supplement limited national resources;

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2 *Id.*

3 Candia Dames, *Bahamas Considers Signing Arrest Warrant Treaty*, THE BAHAMA JOURNAL, July 6, 2007.

4 Wendy Burke, *Manning: Use CWC Security as Model for Region*, BARBADOS NATION, July 5, 2007.

5 *CARICOM Arrest Warrant Treaty Coming*, July 6, 2007, http://www.caribbean360.com

6 Dames, *supra.*

Resolve to develop regional law enforcement instruments which will facilitate a coordinated approach to the scourge of organized crime, international terrorism and financial crimes.[7]

According to Manning, crime and security are major issues in the Caribbean and CARICOM states must cooperate to effect change in that area.[8] The initiatives taken at the CARICOM heads of government meeting will lead to just such enhanced criminal, enforcement, and intelligence cooperation among CARICOM members, particularly as they implement the Caribbean Single Market and Economy.[9]

V. COUNTER-TERRORISM AND INTERNATIONAL HUMAN RIGHTS

A. EU Court Annuls Council of Ministers Rulings Freezing Funds Linked to Terrorism

by Bruce Zagaris

On July 11, 2007, the European Court of First Instance issued two rulings overturning EU Council of Ministers actions freezing the assets of two groups allegedly linked to terrorism.

1. Stichting Al-Aqsa v. Council of the EU

Stichting Al Aqsa, a Netherlands-based NGO, successfully persuaded the European Court of First Instance to annul a July 24, 2007 EU Council ruling blocking the group and freezing its funds.[1]

Al-Aqsa, founded in 1993, works to improve the social welfare and living conditions of Palestinians in the Netherlands and the Palestinian territories. One of its main goals as a charitable institution is to help alleviate humanitarian emergencies in the Gaza Strip. To this end, it gives financial support to humanitarian projects and provides emergency cash assistance, food, medical care, and educational and psychological services.

On April 3, 2004, the Minister for Foreign Affairs of the Netherlands, acting on the basis of Security Council Resolution 1373 (2001) and the Netherlands Law on Sanctions of 1977, as amended by a law of May 16, 2002, adopted the Sanctieregeling Terrorisme 2003 (Regulation on sanctions for the suppression of terrorism, 2003). The Sanctieregeling ordered the freezing of all Al-Aqsa funds and financial assets, based on evidence that the group had transferred funds to organizations supporting terrorism in the Middle East. Following the Dutch regulation, the EU Council added Al-Aqsa to its own list of blocked entities.

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[7] A Community for All: Declaration on Functional Cooperation, Issued by the Heads of Government of the Caribbean Community on the Occasion of the Twenty-Eighth Meeting of the Conference, July 1-4, 2007, Needham's Point, Barbados.

[8] Dames, *supra.*

[9] *CARICOM Arrest Warrant Treaty Coming*, supra

[1] *Stichting Al-Aqsa v. Council of the EU*, EU Court of First Instance (Second Chamber), Case T-327/03, Judgment, July 11, 2007.

Following an Al-Aqsa legal challenge, the EU Court of First Instance annulled the ruling. The Court explained that the EU Council did not meet the Article 253 EC requirement that it disclose in a clear and unequivocal fashion its reasoning for adding Al-Aqsa to its prohibited list in such a way as to enable Al-Aqsa to review the EU decision. The judgment noted that when Al-Aqsa tried to obtain the documents behind the designation, it was told the documents were classified.[2]

2. Jose Maria Sison, et al v. Council of the EU

In a second case the National Democratic Front of the Philippines (NDFP) and three persons challenged Council Decision 2002/974/EC of December 12, 2002, which added the NDFP and Jose Maria Sison to the prohibited terrorist list. The EU Court of First Instance annulled the Council Decision for failing to explain the rationale for adding the NDFP and Sison and for violating the designees' due process rights.[3] In the NDFP proceeding, the EU Council again took the position that the documents showing why NDFP and Sison were designated were confidential.

An official from the EU Council of Ministers said it would review both decisions before commenting on whether it would appeal.[4]

The two EU Court of First Instance judgments offer additional jurisprudence with respect to the due process rights of persons challenging terrorism designations. The judgments also show the need for a proper procedure to decide when a person listed on a terrorism blacklist can petition for removal. Because of the interaction of intelligence with administrative, international, counter-terrorism, constitutional and international human rights law, there is a significant tension between counter-terrorism enforcement and due process.

B. U.S. Court of Appeals Dismisses Warrantless Wiretapping Case

by Bruce Zagaris

On July 6, 2007, a divided U.S. Court of Appeals for the Sixth Circuit overruled a decision of the U.S. District Court for the Eastern District of Michigan and dismissed a suit brought by several non-governmental organizations challenging warrantless wiretaps. The panel based the dismissal on the plaintiffs' lack of standing.[1]

The plaintiffs included journalists, academics, and lawyers who regularly communicate with individuals located overseas, who they believe are the types of people the NSA suspects of being al Qaeda terrorists, affiliates, or supporters, and are likely to be subject to monitoring under the Terrorist Surveillance Program (TSP). In their

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[2] *Id.*, paragraph 62.

[3] *Jose Maria Sison, et al v. Council of the EU*, EU Court of First Instance (Second Chamber), Case T-47/03, Judgment, July 11, 2007, paragraph 226.

[4] Joe Kirwin, *EU Court Rejects Council of Ministers Rulings to Free Funds Said to Aid Terrorist Groups*, Daily Rep. For Exec., July 12, 2007, at A-10.

[1] *American Civil Liberties Union, et al. v. National Security Agency*, et al., U.S. Court of Appeals for the 6th Cir., Nos. 06-2095/2140, July 6, 2007.

suit, the plaintiffs sought a permanent injunction against the NSA's continuation of the TSP and a declaration that two specific aspects of the SP – warrantless wiretapping and data mining – violate the First and Fourth Amendments, the Separation of Powers Doctrine, the Administrative Procedures Act (APA), Tittle III of the Omnibus Crime Control and Safe Streets Act (Title III), and the Foreign Intelligence Surveillance Act (FISA). The district court dismissed the data mining aspect of the plaintiffs' claim, but granted judgment to the plaintiffs concerning the warrantless wiretapping.[2]

The NSA had invoked the State Secrets Doctrine to bar the discovery or admission of evidence that would "expose [confidential] matters which, in the interest of national security, should not be divulged."[3] The NSA contended that, without the privileged information, the named plaintiffs could not establish standing. The district court rejected the NSA's argument, holding instead that three publicly acknowledged facts about the TSP – (1) it eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one fo the parties is a suspected al Qaeda affiliate – were adequate to establish standing. The district court found these three facts adequate to grant summary judgment to the plaintiffs on the merits.

The district court concluded that the wiretaps had violated the Fourth and First Amendment Rights of the plaintiffs and that the TSP violates the Separation of Powers doctrine, the Administrative Procedures Act, the FISA and Title III. The NSA appealed on lack of standing and that the State Secrets Doctrine prevented adjudication on the merits. The appellate court stayed the injunction pending the outcome of the appeal.[4]

The majority opinion, written by Judge Alice M. Batchelder, found that none of the plaintiffs have standing for any of their claims and hence vacated the district court's order and remanded for dismissal of the entire action. The majority opinion explained that plaintiffs did not allege as injury that they personally, either as individuals or associations, anticipated or feared any form of direct reprisal by the government, such as criminal prosecution, deportation, administrative inquiry, civil litigation, or even public exposure. The plaintiffs' alleged injuries are not direct, but rather more amorphous. Hence, the majority opinion found that plaintiffs have tried unsuccessfully to navigate the obstacles to state a justiciable claim. The injury that would support a declaratory judgment action (i.e., the anticipated interception of communications resulting in harm to the contacts) is too speculative, and the injury that is imminent and concrete does not support a declaratory judgment action.

The majority opinion explains that the plaintiffs failed to show a sufficient causal connection between the complained-of-conduct – the absence of a warrant or FISA protection – and the alleged harm – the inability to communicate.

The majority opinion also based its dismissal on the fact that the district court's declaration against warrantless wiretaps is not adequate to redress the plaintiffs' alleged injruy because the plaintiffs' self-imposed burden on communications would survive the issuance of FISA warrants. The only manner to redress the injury would be to enjoin all wiretaps, even those for which warrants are issued and for which full prior notice is given to the parties being tapped. Only then would the plaintiffs have relief of their fear that their contacts are likely under surveillance, the contacts be relieved of their fear of surveillance, and the parties be able to "freely engage in

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2 *See ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

3 *See United States v. Reynolds*, 345 U.S. 1, 10 (1953).

4 *See ACLU v. NSA*, 467 F.3d 590, 591 (6th Cir. 2006).

conversations and correspond via email without concern." Such a broad remedy is not available. Hence, the plaintiffs' requested relief, which is much narrower, would not redress their alleged injury.

Hence, the majority opinion concludes that the plaintiffs have no standing to pursue their First Amendment claim. Even if they could show injury, they cannot establish causation and their alleged injury is not redressable by the remedy they seek.

Judge Julia Smith Gibbons concurred in the judgment, but did not join in the extensive and technical discussion of whether the plaintiffs had standing to sue. She did agree that the plaintiffs have failed to provide evidence that they are personally subject to the program and that the state secrets privilege would prevent them from establishing standing. In dissenting, Judge Ronald Lee Gilman said that at least the plaintiffs who were lawyers did have standing because the TSP puts them in a position of abrogating their duties under the applicable professional-responsibility rules if they communicate with clients and contacts via telephone and email.[5]

The reaction to the decision by foreign governments with which the U.S. interacts in counter-terrorism and international criminal cooperation may be important. In the past the U.S. has been a leader in designing proactive law enforcement techniques with respect to transnational crime. For instance, many international agreements have included such techniques, such as undercover stings, electronic surveillance, and controlled deliveries. Some U.S. allies, namely members of the European Union, must conduct their operations under privacy directives and pursuant to the European Convention on Human Rights that may preclude many aggressive U.S.-style enforcement techniques.

VI. INTERNATIONAL NARCOTICS ENFORCEMENT AND EXTRADITION

A. U.S. Arrests Mexican Fugitive on Drug Charges

by Bruce Zagaris

On July 23, 2007, U.S. law enforcement officials arrested Zhenli Ye Gon, a Mexico City businessman sought by the Mexican government in connection with one of the Western Hemisphere's largest trafficking rings for psuedoephedrine, the main chemical ingredient in methamphetamine.[1] According to an ASSOCIATED PRESS report, Mexican prosecutors have charged Ye Gon with drug trafficking, money laundering, and weapons possession for his alleged role in illegally importing 19 tons of a pseudoephedrine compound used to make methamphetamine. Ye Gon denies the charges.[2]

Ye Gon, 44, is a Mexican citizen of Chinese descent. Mexican newspapers reported that in March 2007 Mexican law enforcement officials found and seized more than $205 million in U.S. currency and $22 million in

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[5] For additional background *see* Adam Liptak, *Panel Dismisses Suit Challenging Secret Wiretaps*, N.Y. TIMES, July 7, 2007, at A1, col. 6.

[1] *Authorities Nab Alleged Mexico Drug Kingpin Zhenli Ye Gon in Maryland*, FOX NEWS, July 24, 2007.

[2] Mark Stevenson and Michael Rubinkam, Associated Press Writers, *Drug Suspect Accuses Mexican Official*, July 2, 2007.

other currencies and travelers checks hidden in his mansion in Mexico City. According to U.S. officials the confiscation of that money is the largest single seizure of drug cash in history.[3] During the raid Mexican law enforcement officials also seized eight luxury cars and seven high-powered firearms.[4]

Ye Gon accused Javier Lozano Alarcon, Mexico's labor secretary, of forcing him to stash millions in illicit "secretive PAN Presidential Campaign funds" in the walls and closets of his Mexico City mansion. However, a media report states that "key details in his version of events seem contradictory, unclear or unverifiable."[5] Ning Ye, a U.S. attorney for Ye Gon, make the accusations in a letter sent to the Mexican Embassy in Washington. The letter requested the intervention of President Calderon.[6] Alarcon denied the accusations and said he was considering a defamation lawsuit against Ye Gon. He also maintained that he had never met Ye Gon and did not handle campaign funds.[7]

In 1990, Ye Gon emigrated to Mexico, where he obtained citizenship in 2002. He imported textiles, clothes, and shoes, and made his fortune as a buyer of goods forfeited by Mexican customs. In 1997, he founded his pharmaceutical company.[8] Today, Ye Gon is the legal representative of Unimed Pharm Chem Mexico, which has approximately 300 employees. The Mexican government suspects him of illegally bringing at least 100 Chinese nationals to work on the construction and development of an industrial complex in Toluca.[9]

According to Mexican intelligence officials, Ye Gon uses a network of organizations in China, India, and Germany to bring chemicals used in narcotics manufacturing between Mexican ports and Long Beach, California.[10] U.S. authorities allege that beginning in December 2005 Unimed Pharm Chem de Mexico illegally imported approximately 86 metric tons of restricted chemicals into Mexico "for the express purpose of manufacturing pseudoephedrine/ephedrine."[11]

On July 18, 2007, Ye Gon's attorneys held a news conference at the National Press Club, while Ye Gon

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[3] Martin Weil, *Suspect, Wanted in Mexico, Arrest on Drug Charges*, WASH. POST, July 24, 2007, at B6, col. 1. James C. McKinley Jr., *Businessman in Mexico Says Top Officials Hid Millions*, N.Y. TIMES, July 4, 2007, at A3, col. 4.

[4] McKinley, *supra*.

[5] *Id.* The AP reports that Ye Gon gave it a "very different version of the events laid out in the indictment against him." *Id.* Ana Francisca Vega, Zhenli *Ye Gon le pide a Calderón intervenir (Zhenli Ye Gon Asks Calderón to Intervene*), EXCELSIOR, July 4, 2007.

[6] Vega, *supra.*

[7] Stevenson and Rubinkam, *supra*.

[8] *Zhenli Ye Gon Acusa al Secretario del Trabajo de Obligarlo a Ocultar 205 mdd (Zhenli Ye Gon Accuses the Minister of Labor of Forcing Him to Hide $205 million*), EL UNIVERSAL, July 3, 2007.

[9] Gustavo Castillo Garcia, *La Operación Dragón pone al descubierto red de nracos y traficantes de personas (Operation Dragon Discovers a Network of Narcos and Trafficking of Persons*), Mar. 23, 2007, www.jornada.uam.mx.

[10] *Id*.

[11] Paul Duggan and Ernesto Londoño, *Not Your Average Drug Bust*, WASH. POST, July 25, 2007, at A1, col. 1.

fielded questions by phone from an undisclosed location. According to his attorneys, Ye Gon intends to apply for political asylum in the U.S. He visited the Washington, D.C. area to consult with counsel after his girlfriend was arrested in Las Vegas on criminal charges.[12]

On July 24, 2007, Ye Gon appeared in U.S. District Court and was ordered held without bond. During the hearings U.S. authorities did not mention extradition, although Mexican Attorney General Eduardo Medina Mora said Mexican officials would file legal papers to obtain Ye Gon.[13]

For practitioners, Ye Gon's arrest brings to mind the case of Mexico's former Deputy Attorney General, Mario Ruiz Massieu, who fled to the U.S. in 1999 after being implicated in drug-related corruption and money laundering. Mexico unsuccessfully tried to have Massieu extradited or deported. Eventually the U.S. prosecuted Massieu, who committed suicide during the proceedings. In 2003, the U.S. Customs Service presented the Mexican government with a check for over $800,000.00, the fruits of a joint money laundering investigation into Massieu's assets.[14] Because of the political corruption allegations, Mexico will want to obtain custody of Ye Gon as expeditiously as possible. The case will be well worth watching for its legal and diplomatic implications.

B. France, Panama Ask U.S. to Extradite Noriega

by Bruce Zagaris

The U.S. currently faces the dilemma of competing requests from Panama and France for the extradition of former Panamanian head of state Manuel Noriega. On July 17, 2007, the U.S. Department of Justice filed an extradition complaint in U.S. District Court, advocating that Noriega be sent to France following his release from U.S. prison to confront money laundering charges for which he was convicted in absentia in 1999.[1] According to the U.S. complaint, filed on behalf of the French government, Noriega would obtain a new trial if extradited.

In 1989, the U.S. invaded Panama, arrested Noriega, and then tried and convicted him for drug trafficking, money laundering, and racketeering. Noriega was sentenced to 30 years in prison, but after reductions for good behavior, he is due to be released on September 9, 2007.[2]

The Panamanian government is also seeking Noriega's extradition. In Panama, he was convicted in absentia for ordering the brutal murder of Hugo Spadafora, a political opponent.[3] Samuel Lewis, Panama's Exterior Relations Minister, said Panama will intervene in U.S. courts and insist that Noriega be extradited to Panama. In

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[12] *Id.*

[13] *Id.*

[14] U.S. Customs and Border Patrol, *U.S. Ambassador Presents $843,388 Forfeiture Check to Mexico as a Result of Joint Probe Into Former Mexican Deputy Attorney General*, Feb. 28, 2003.

[1] *Noriega to France? DOJ Files Extradition Papers*, ABC NEWS, July 17, 2007.

[2] *Id.*

[3] *Panama 'Wants Noreiga Extradited*," BBC, July 20, 2007.

1991, Panama filed its own extradition request, which it renewed during the past three years.[4]

Anthony Rubino, Noriega's attorney, has said that under the Geneva Conventions Noriega's status as a prisoner of war (POW) requires that he be immediately repatriated upon completion of his sentence. On his return to Panama, Noriega, 69, will appeal his conviction and sentence. He will at least have access to his children and grandchildren during his appeal.[5]

On July 26, 2007, Rubino argued before a U.S. District Court in Miami. While the U.S. has conceded Noriega's POW status, it did not return him to Panama after the conclusion of hostilities as the Geneva Convention requires. The conflicting extradition requests pose tricky questions for the U.S., particularly in light of Noriega's status as a former head of state and the U.S.'s role in the military hostilities that led to his arrest.

VII. INTERNATIONAL TAX ENFORCEMENT

A. Norway Launches International Tax and Corruption Enforcement Initiatives to Help LDCs

by Marieke Bjørgung[1] and Bruce Zagaris

On July 12th, 2006, the Norwegian Minister of International Development, Erik Solheim, along with the Minister of Finance, Kristen Halvorsen, launched an initiative to combat capital flight and the abuse of tax havens. The Norwegian initiative includes three elements: working with the United Nations to reduce corruption that has become an impediment to third world development assistance; taking a leadership role in establishing an International Task Force for Combating Tax Haven Abuse and Capital Flight; and commissioning and financing a World Bank investigation into illicit financial outflows from developing countries.

Traditionally, highly developed states such as Norway crack down on tax havens to ensure greater domestic tax revenue. Norway has the highest gross domestic product and millionaires (one in 86) per capita in the world.[2] Given the exceedingly high income tax rates, the revenue service would expect to gross equally high returns. However, due to Norwegian citizens' use of tax havens such as Sweden and Monaco, billions of Norwegian Kroner are lost each year.[3]

Ironically, the incentive behind the initiative is not to bolster domestic revenue but rather to reduce

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[4] *Panama Will Fight for Noriega's Extradition: Minister*, AFP, July 18, 2007.

[5] *Id.*

[1] Intern, the INTERNATIONAL ENFORCEMENT LAW REPORTER and Berliner, Corcoran & Rowe LLP, Washington, D.C. Rising senior at the University of Southern California.

[2] Nina Berglund, *Norway Can Claim the Most Millionaires in the World,* AFTENPOSTEN, July 11, 2007. The mention of Sweden as a tax haven may surprise many people since until recently Sweden had one of the highest tax rates in the world.

[3] Jørn Rattsø, Economic General Report for the 2004 Nordic Tax Research Council, May 24, 2005.

international corruption on tax matters and increase the government's ability to aid developing countries in beneficial ways. The Norwegian government has linked corruption to "funds that are illegally diverted from developing countries being hidden in tax havens or being laundered through investments in rich parts of the world."[4] Thus, the tax havens being targeted are those in developing countries to which Norway is giving aid that is being misused. [5]

The anti-corruption project mandate, released in May 2006, incorporates four goals: "to prevent corruption in connection with the administration of funds from the Ministy's [Foreign Affairs] budget, to ensure that funds from the Ministry's budget are used effectively, so that they strengthen the international anti-corruption effort, to undertake foreign policy initiatives that strengthen the international anti-corruption framework, and to give Norwegian and international anti-corruption efforts a higher profile."[6]

On June 29, 2006, Norway was one of the first developed countries to ratify the U.N. Convention against Corruption.[7] This Convention[8] has served as a jumping off point for other initiatives involving the Norwegian Agency for Development Cooperation, the Norwegian Investment Fund for Developing Countries, the Norwegian Volunteer Service and Norwegian foreign service missions.

Norway is considering taking the lead in establishing an International Task Force on Combating Tax Haven Abuse and Capital Flight.[9] This task force would be part of the work of the Leading Group on Innovative Financing for Development. Norway will also ask the World Bank to study illicit financial outflows from developing countries. Theoretically, this study, in coordination with the work of the task force, would demonstrate the severity of the corruption problem in specific tax havens. Norway is preparing to finance the study, pending agreement on its scope and budget with the Bank.

The Norwegian-lead Task Force would compliment Norway's involvement in the World Bank's Stolen Assets Recovery Program, which facilitates recovery of assets illicitly diverted to tax havens. The Task Force will also draft recommendations for the international community on ways to reduce these illicit capital outflows. Norwegian government officials hope that these recommendations can influence the 2008 Financing for

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[4] Norwegian Ministry of Foreign Affairs, press release December 5, 2006. Available at http://www.regjeringen.no/en/dep/ud/Press-Contacts/News/2006/Government-steps-up-fight-against-corruption.html?id=437778 (last viewed on July 18, 2007).

[5] One media source has reported concern over the formation of a Ghanaian offshore center, which critics say will be used to "siphon oil money out of West Africa." Analysts have suggested that firms may engage in flagrant underpricing of exports from developing countries to circumvent customs. Nick Mathiason, *Tax evasion taskforce to probe UK*, THE OBSERVER, July 1, 2007.

[6] Norwegian Ministry of Foreign Affairs, Mandate for Anti-Corruption Project. Available at http://www.regjeringen.no/upload/kilde/ud/prm/2006/0399/ddd/pdfv/301178-anti-korrupsjonmandat_eng.pdf (last viewed on July 17, 2007).

[7] *Id.*

[8] G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (2003), reprinted in 43 I.L.M. 37 (2004). The Web site for the latest information relative to signatories, accession, ratification, and reservations to the UN Convention are at http://www.unodc.org/unodc/encrime_signatures_corruption.html.

[9] For additional information on the UN effort to support sustainable revenue for developing countries, *see* United Nations, *Report of High-Level Panel on Financing for Development*, http://www.un.org/reports/financing; Bruce Zagaris, *U.N. Report Calls for New Spirituality: The Creation of Two Organizations to Aid International Tax Enforcement*, TAX NOTES INT'L, July 23, 2001, at 508.

Development conference in Doha.

Norway's initiatives are ground-breaking and ambitious. Because tax havens are designed as a legal framework for investment competition, with varying tax incentives, Norway has taken the official position that it does not intend to target legally operating jurisdictions. According to Norwegian officials, the country will focus on corrupt tax havens that impede development efforts, in cooperation with the U.N.[10]

While the initiatives are not explicitly designed to bolster Norwegian tax revenue, they will likely help prevent Norwegian high net earners from evading taxes. By working with the IMF and the World Bank, Norway can potentially use its funds to choke off developing countries' efforts to build financial sectors.[11] The U.S., the largest tax haven in the world, and the U.K., the second largest one, control the agenda of the IMF and World Bank and much of their funding. As a result, critics contend that international efforts to study "offshore financial centers" typically focus on small offshore jurisdictions while ignoring developed countries.[12]

B. South Korea Steps Up Scrutiny of Foreign Investment

by Jed Borod[1]

As part of a continued crackdown on perceived tax evasion by foreign investors, South Korean authorities announced investigations into General Electric (GE) and Mercedes Benz, while a South Korean tax court ruled against U.S.-based Lone Star Funds in the latest chapter of a long-running dispute. The two new investigations, both of which involve alleged underpayment of South Korean taxes, come amidst increasing popular pressure to reign in abusive foreign investment – and amidst increasing international concern that South Korea has become a hostile jurisdiction for such investors.

South Korean authorities are probing GE's use of a local affiliate, GE Real Estate, to execute $326 million worth of real estate transactions.[2] South Korean officials claim that the affiliate was used solely to avoid registration requirements, and argue that GE owes $18.5 million in back taxes.[3] Joh Byung-ryul, a company spokesman, countered that GE had "consulted lawyers, accounts, and the Ministry of Government Administration and Home

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[10] The U.N. has taken initiatives against improper use of international financial centers. *See, e.g.*, Jack A. Blum et al, *Financial Havens, Banking Secrecy and Money-Laundering*, 34 and 35 CRIME PREVENTION AND CRIMINAL JUSTICE NEWSLETTER, United Nations Office for Drug Control and Crime Prevention (1998).

[11] For a discussion of the role of international organizations, including the IMF and World Bank in combating international tax crime, *see* Bruce Zagaris, *The Role of Internatioanl Organizations in Fighting Tax Crime*, TAX NOTES INT'L 1073 (Mar. 27, 2006).

[12] For a discussion of efforts to regulate international financial centers, *see* J.C. Sharman, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION (Cornell U. Prss 2006); BEYOND THE LEVEL PLAYING FIELD? (Soc. of Trust and Estate Practitioners) (2006); Stikeman Elliott, TOWARD A LEVEL PLAYING FIELD: REGULATING COPRORATE VEHICLES IN CROSS-BORDER TRANSACTIONS (STEP). However, recently the IMF has classified Britain as an an offshore financial center. Mathiason, supra.

[1] Jed Borod is the assistant editor of the INTERNATIONAL ENFORCEMENT LAW REPORTER.

[2] Shu-Ching Jean Chen, *Market Scan: GE and Mercedez-Benz Tussle With S. Korean Tax Man*, FORBES, July 12, 2007.

[3] *Id*.

Affairs" prior to the disputed transactions.[4] He also said that the company was "a long term-investor in Korea, not a private equity fund," an apparent reference to the controversial role of Lone Star Funds and the Carlyle Group in the South Korean economy.[5]

Meanwhile, private equity firm Lone Star Funds' prolonged conflict with South Korean tax authorities ended with another defeat, as the country's National Tax Tribunal ruled against Lone Star's appeal and ordered the company to pay $110 million in back taxes.[6] In denying the company's March 2006 appeal, the court said that Lone Star's use of a Belgian affiliate in an effort to take advantage of a favorable tax treaty was merely "treaty shopping."[7] Rejecting Lone Star's arguments, the opinion ruled that Belgium-based Star Holdings was solely "a conduit company established for tax purposes."[8] Lone Star Funds plans to appeal the latest decision, but will have to pay the disputed tax bill in the interim.[9]

Lone Star's protracted spat with South Korean authorities, including criminal charges filed against denounced company officials, has hurt South Korea's image in the international business community. In a recent article noting the latest appellate decision, THE ECONOMIST suggested that "the ruling refocused attention on what, for both Lone Star and South Korea, has been a public-relations disaster," while the FINANCIAL TIMES referred to South Korea's "fervent economic nationalism."[10] The dispute has also hampered Lone Star's efforts to unload its remaining positions in Korea Exchange Bank, which would allow it definitively exit another controversial transaction.[11]

C. U.K. Court Denies U.S. Extradition Request for Former Hotel Owner, Citing Prosecutors' Delays

by Bruce Zagaris

On June 28, 2007, a U.K. court denied a U.S. extradition request for 77-year-old Stanley Tollman, a wealthy hotelier accused of bank fraud and tax evasion. Tim Workman, Senior District Judge of the City of Westminster Magistrates' Court, ruled that while the alleged revenue offenses were extraditable, the excessive delays

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[4] Song Jung-a, *GE faces S Korea back-tax claim*, FINANCIAL TIMES, July 12, 2007.

[5] *Id.*

[6] Jean Chen, *supra*.

[7] Jeongjin Lim, *Lone Star Tax Bill Upheld*, WALL STREET JOURNAL, July 6, 2007.

[8] James Lim, *South Korea Finance Ministry Increases Tax Pressure on U.S. Investment Fund*, DAILY REP. FOR EXEC., July 10, 2007.

[9] Jeongjin Lim, *supra*.

[10] *South Korea's financial markets: Do as I say, no as I do*, THE ECONOMIST, July 12, 2007; Jung-a, *supra*.

[11] *Lone Star says it's not in serious talks on selling Korean bank*, ASSOCIATED PRESS, July 18, 2007.

in seeking Tollman's extradition made it "unjust and oppressive" for him stand trial.[1]

Judge Workman applied section 82 of the Extradition Act 2003, which reads "a person's extradition to a category two territory is barred by reason of passage of time if (and only if) it appears that it would be unjust or oppressive to extradite the defendant by reason of the passage of time since he is alleged to have committed the extradition offence."[2] Judge Workman calculated the passage of time in this case as a range of 11 to 16 years for the fraud offenses and a range of 8 to 13 years for the tax evasion charges.

In response to the U.S. government's contentions that the delay in prosecuting Tollman should have redounded against Tollman and was caused by his fugitive status, Workman observed that Tollman left the U.S. unimpeded and before he was indicted by the grand jury. Although conceding that the U.S. considers Tollman a fugitive, Judge Workman did not consider that "evidence that the accused fled the country or that he is therefore responsible for the delay," and ruled that Tollman was allowed to apply for a dismissal of the extradition charges due to the passage of time.

Evidence given in support of the Tollman's application showed that a number of witnesses have died since the case was initiated, and that others have trouble remembering important details. A key witness, Arnold Tollman, Stanley Tollman's brother, died in 2004. Another witness, Derek Evans, died in 2002. Judge Workman also noted that Stanley Tollman's wife, Beatrice Tollman, whose case was already discharged by the court on the basis of her physical and mental health, could not give "cogent evidence of the facts that would have been within her knowledge" for the same health reasons.

Judge Workman also harshly criticized the behavior of Assistant United States Attorney Stanley Okula. Judge Workman found that Okula "displayed personal animosity towards Stanley Tollman and his family [by declaring] that he intends to make Tollman's 'life as miserable as possible' … and was looking forward to having a 'perp walk' with Beatrice Tollman." In addition, a Canadian court found in 2006 that an "unequivocal abuse of process of the court" occurred when Okula tried to bring Gavin Tollman to the U.S. from Canada outside of any formal extradition proceedings. However, Judge Workman concluded that Okula's actions did not by themselves "constitute sufficient evidence to make a finding of 'oppression' which would bar extradition."

Judge Workman ruled for Tollman largely based on his wife's failing health. Doctors testified that Tollman's extradition to the U.S. would have "an inevitable and disastrous effect upon her health" and also that "her health has already shown a considerable deterioration in recent months." As a result, Judge Workman decided that "extradition would inevitably cause oppression to Mrs. Tollman and through her to Mr. Tollman who is caring for her at the present time" and therefore ruled that "by virtue of the passage of time, it would now be unjust and oppressive for the defendant to be extradited."[3]

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[1] *United States of America v. Stanley Tollman*, In the City of Westminister Magistrates' Court, June 28, 2007 (available at http://services/services.taxanalysts.com).

[2] Available at http://www.opsi.gov.uk/acts/acts2003/20030041.htm

[3] *U.K. Will Not Extradite U.S. Man Wanted on Days Inn Tax Charges,* DAILY REP. FOR EXEC., July 6, 2007, at K-1.

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D. Belgium Designates 13 Types of Tax Fraud as Money Laundering

by Bruce Zagaris

On June 3, 2007, the Belgian government issued a Royal Decree, classifying 13 types of tax fraud as money laundering. As a result, banks, financial institutions, and gatekeepers, including lawyers and accountants, may be required to make suspicious activity reports (SARs) to financial authorities in Belgium when they become aware of such transactions.[1] Belgium's Law of January 11, 1993 criminalizes money laundering and establishes a number of anti-money laundering regulations. One of the requirements, part of standard international money laundering law under the EU Money Laundering Directive and the Financial Action Task Force recommendations, is that covered persons must identify and make SARs.

The Royal Decree of June 3, 2007, published in the Belgian State Gazette of June 13, 2007, lists thirteen suspicious events that must be referred to the CFI, the Belgian financial intelligence unit. However, an attorney making a SAR makes it first to the Dean of the Bar of which the attorney belongs. The Dean of the Bar will then assess whether or not the event is within the Law of January 11, 1993. If it is, the Dean must refer the SAR to the CFI. Persons who make a SAR must follow the prohibition against "tipping off" – informing client of such a referral. An attorney is exempt from the SAR requirement if he encounters such suspicious transactions when advising a client seeking advice or engaged in legal proceedings or litigation.

The list of potentially suspicious transactions includes the following:

1. the use of base companies situated in a tax haven or offshore center or at the home address of a nominee, or engaged in abnormal transactions given the corporate purpose, or with an unclear or incoherent corporate purpose;

2. the use of companies, the articles of which were amended shortly before the execution of suspicious financial transactions (i.e., new directors, a new corporate name, extension or change of corporate purpose, transfer of the registered office);

3. the intervention of nominees;

4. the execution of financial transactions that are suspicious or abnormal in light of the ordinary conduct of business of an enterprise in markets that are highly competitive or very sensitive to so-called "VAT-carrousel fraud;"

5. a very substantial and sudden increase of amounts or transactions on recently opened bank accounts;

6. irregularities of invoices produced to substantiate financial transactions;

7. the use of "pass-through accounts" and a chain of transactions for a substantial aggregate amount where there exists almost no positive balance in the accounts for most of the time;

8. the use of intermediary accounts or accounts owned by non-financial professionals as pass-through

[1] Werner Heyvaert, Annick Visschers and Direk Libotte, *Certain Types of Tax Fraud Earmaked as Money Laundering*, STIBBE TAX E-BULLETIN, Issue No. 2007/03 (June 2007).

accounts; the use of complex corporate structures and legal and financial constructions that blur or blunt the transparency of management systems;

9. the absence of economic or financial substance for an international transaction;

10. the refusal by, or inability of, a client to show the origin of money;

11. organized default, such as failure to pay debts, invoices received, etc., through associated individuals or legal entities;

12. the use of back-to-back loans; and

13. the payment of fees to or by foreign companies that lack any commercial activity.[2]

The Royal Decree takes effect on September 1, 2007. Thereafter, financial institutions gatekeepers, and other covered persons must report any of the listed events to the CFI or the Dean of the Bar.[3] The Decree was issued shortly before a European Court of Justice (ECJ) decision denying arguments made by the Belgian bar association that the law violates the attorney-client privilege. As a result of the decree and the ECJ decision, Belgian attorneys will undoubtedly pay closer attention to financial transactions, particularly those involving tax and corporate planning.

Because Brussels is the EU headquarters of a number of large companies and because Belgium has enacted a number of financial and tax incentives to attract headquarters companies, it will be interesting to watch the implementation of the Decree, especially in the context of the ECJ decision. As many foreign lawyers outside of Brussels participate in corporate and tax planning of headquarters companies, they must also pay attention to the requirements or risk running afoul of the law.

VIII. INTERNATIONAL COUNTERFEITING AND PIRACY

A. EU Seizures of Counterfeiting and Pirate Goods Rise Dramatically in 2006[1]

by Bruce Zagaris

On May 31, 2007, the European Commission published statistics showing a dramatic increase in the seizure of counterfeit and pirated articles at the EU's external borders in 2006. Customs officials seized more than 250 million of such articles in 2006 compared with 75 million in 2005 and 100 million in 2004. The statistics reveal that counterfeit medicines, cigarettes, and other goods continue to be faked in large quantities. Changes in the routes used by criminals to trade in fake goods, the use of the Internet, and the transport of small quantities by air or postal

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[2] *Id.*

[3] *Id.*

[1] We are grateful to Ursula Scott-Larsen, a paralegal in the Brussels office of the law firm Steptoe & Johnson LLP, for her help in researching and bringing this matter to our attention.

traffic make customs enforcement a continuing challenge. However, in 2006 the 36,000 seizures represented an increase of approximately 40% compared with 2005.[2]

Close cooperation between customs has been integral in the increase in seizures made during 2006. For instance, in September 2006's Operation DAN, customs officials seized 92 containers containing a wide range of products, including fake toys, sunglasses, shoes, and car parts. The joint operation, coordinated by the European Commission, involved 13 ports in EU member states and focused on counterfeit goods from China.[3]

The 2006 statistics reveal an overall 300% increase in 2006 in the number of counterfeit and pirated goods seized by Customs at the external borders of the EU – 250 million compared to 75 million in 2005. Customs activity towards customs seizures increased almost 40% – almost 37,000 compared to 26,000 in 2005 – in the number of seizures. Customs officials have also noted an increase in the number of cases involving relatively small quantities of counterfeited goods, a possible result of booming online sales. China was the main source for counterfeit goods, with over 80% of all articles seized coming from China. More than 60% of the articles seized in 2006 were cigarettes.

Although cigarettes represent such a large proportion all seizures, seizures of other products also increased dramatically. The amount of goods seized in 2006, other than cigarettes, more than doubled the equivalent amount in 2005. This reflected the trend towards diversification in the products that are subject to counterfeiting and piracy. In particular, medicines have shown a dramatic increase in seizures – 2.5 million items compared to 500,000 items in 2005. India is the number one source, followed by the united Arab Emirates and China. Together these three sources are responsible for more than 80% of all counterfeited medicines.[4]

New international enforcement cooperation efforts are exemplified by the four day seminar hosted by Romania in April 2007. 70 Police and Customs Officers from 17 countries participated in debates during a Training Seminar on Intellectual Property Rights (IPR) Infringement. The event was organized under the auspices of the EU Commission (DG Enlargement/Technical Assistance Information Exchange Instrument) with the cooperation of France, Greece and Europol and support from Romania and the SECI Center. In March 2005, another training session was held in Athens.[5]

A number of factors help determine the success of IPR enforcement, including cooperation, training, and expertise, as well as technical and operational responses. The Commission is developing a close cooperative relationship with the U.S. The conclusions of the recent EU-US Summit on April 30, 2007 included a re-affirmation of the joint commitment to combat IPR infringement. The Commission will try to implement those conclusions in the coming months.

The EU is strengthening its cooperation with Chinese Counterparts through various activities. EU Customs'

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[2] EU, *Customs: Commission Publishes 2006 Customs Seizures of Counterfeit Goods*, IP/07/735, May 31, 2007.

[3] EU, *2006 Customs Seizures of Counterfeit Goods - Frequently Asked Questions*, MEMO/07/214, May 31, 2007.

[4] *Id.* For more information on the 2006 Customs seizures of counterfeited goods *see* http://ec.europea.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/index_en.htm.

[5] Europol, *Combating Counterfeiting and Piracy*, May 22, 2007 (http://www.europol.eu.int).

experts have visited China and worked with Chinese Customs in several Chinese ports and airports and have exchanged experience on Risk Analysis techniques. They are also working on a specific Supply Chain Security Pilot Project with the aim of tightening and securing "end to end" supply chains between Asia and Europe. Particular emphasis will be place on having "secure lanes" for sea containers moving from China to Main European Maritime ports.[6]

The effort of the EU to combat counterfeited and pirated goods illustrates the efforts of international customs enforcement cooperation, including the use of proactive investigative techniques, as well as efforts to educate and involve private sector stakeholders in the efforts to prevent and combat the criminal phenomena.

IX. TRANSNATIONAL ORGANIZED CRIME

A. European Parliament Adopts Recommendation to Combat Organized Crime[1]

by Bruce Zagaris

On May 24, 2007, the European Parliament (EP) adopted a recommendation to the European Council on developing a strategic concept on combating organized crime.[2]

The EP called on the European Council to ask all EU Members to ratify the United Nations Convention against Transnational Organized Crime (the Palermo Convention) and the protocols thereto on trafficking in persons and migrants and to enforce these legal instruments. The EP asked the Council to encourage EU Members to remain steadfast in their support for training and exchange programs between agencies and authorities concerned in combating organized crime. The EP also asked EU Members to allocate sufficient resources to these programs for them to be genuinely effective, and to make their best practices available to the other EU Members.

The EP reminded the Council that strengthening police and judicial cooperation instruments requires adapting internal structures in line with the need for procedure modeling, fluidity of information transmission channels and improved knowledge of the phenomenon of organized crime. The EP suggested that the Council should ask the EU Members to extend, as soon as possible, the use of special investigation techniques and promote the creation of joint investigation teams, established by the Council Framework Decision of June 13, 2002.

The recommendation underscored to the Council the need for information channels between actors in the fight against crime to be more fluid, which will require significant legislative progress both in specific areas, such as the obtaining of evidence and its admissibility, or financial information for the purpose of identifying and then neutralizing the proceeds of crime, and on outstanding issues of principle, such as the principle of availability, which

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[6] EU, *2006 Customs Seizures of Counterfeit Goods - Frequently Asked Questions*, *supra.*

[1] We are grateful to Ursula Scott-Larsen, a paralegal with the Brussels office of the law firm of Steptoe & Johnson LLP, for her help in researching and bringing this matter to our attention.

[2] European Union, *European Parliament Recommendation to the Council of 24 May 2007 on Developing a Strategic Concept on Tackling Organized Crime* (2006.2094 (INI) (P6_TA-PROV(2007)0213 A6-0152/2007.

needs to be clearly defined and include safeguards, particularly in regard to the protection of personal data. To this end, the EP urged the Council to adopt as a matter of urgency the proposal for a Council framework decision (COM(2005)0475), to support the EU Members' efforts in seeking to improve understanding of these criminal phenomena by focusing and networking statistical tools developed within a dynamic framework and on the basis of common indicators, in such a manner that the intelligence disseminated not only provides an accurate assessment of organized crime, but is comparable and proposes intelligible strategies and recommendations for action which the agencies active on the ground can apply.

Under the recommendation the council was asked to draw EU Members' attention to the need to strengthen investigatory strategies and take effective action to combat organized crime by systematically targeting illegally acquired economic and financial resources.

The EP observed that both EU Members and EU institutions can call on the expertise of the newly formed Fundamental Rights Agency to protect the rights laid down in the Charter of Fundamental Rights and to investigate cases that have arisen in the field of cooperation in home affairs and justice. It called on the Council, if necessary, to also take advantage of this opportunity, and to promote it in the case of EU Member States also.

Because of the importance of public support to achieve success in combating organized crime, the Council was directed to ask EU Members to inform the general public of the successes achieved through cooperation between the various law enforcement agencies and legal bodies, and especially of the contribution by EU instruments and actors, with a view to raising awareness of the value added by EU initiatives in this area.

The EP asked the Council, on the basis of the White Paper on a European Communication policy, to help develop a genuine strategy for organizing these messages and disseminating them to the general public, a strategy with which the EU Crime Prevention Network could be closely involved if its responsibilities are expanded.

The Council was advised to ask EU Members to promote programs, especially at local level, for raising the public awareness regarding human trafficking for the sexual or labor exploitation of women and children.

The Council was urged to apply a proactive approach in EU policy on combating organized crime to EU cooperation agreements with non EU-countries, while simultaneously adopting a strict framework, including binding guarantees in regard to fundamental rights.

The Council was requested, in view of the criminal activity which is still too prevalent in the State apparatus of certain EU border countries, to adopt a specific approach built around a new transparency and anti-corruption initiative aimed at structuring relations with non-EU countries, especially those in the EU's neighborhood.

The EP advised the Council to urge EU Members to maintain the utmost vigilance concerning possible links between terrorist organizations and organized criminal groups, especially in connection with money laundering and funding of terrorism. EU Members should intercept movements of capital generated by money-laundering operations and confiscate assets generated by criminal and mafia-style activities.

The EP called on the Council to urge all EU Members that have not yet done so to ratify the UN Convention against Corruption. The Council was asked to monitor the administrative and governmental activities of elected institutions at national, regional and local levels whose members include political figures against whom criminal charges have been brought for links with organized or mafia-style crime.

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The EP called on the Council to take due account of the fundamental role played by the EU Counter-Terrorism Coordinator, who is responsible for oversight of counter-terrorism instruments and intelligence and the coordination and collation of information coming from police forces and security services of the EU Members.[3]

B. Mexico Arrests Former Governor on U.S. Extradition Warrant

by Bruce Zagaris

On June 21, 2007, Mexican federal agents arrested Mario Villanueva Madrid, the former governor of the Mexican state of Quintana Roo, on a U.S. extradition warrant based on an indictment in U.S. District Court for the Southern District of New York for drug trafficking, money laundering and racketeering.[1] Villanueva Madrid was arrested soon after he was released from Mexican prison after serving six years for money laundering.[2]

If he is successfully extradited, Villanueva Madrid would be the highest-ranking former elected official from Mexico to be prosecuted in the U.S. on drug trafficking charges.[3] Mexican President Felipe Calderón has made fighting the cartels a priority of his administration and has been more willing to extradite those involved in the drug trade to the U.S. In his first six months as president he has sent 21 drug dealers, including four high-level cartel leaders, to the U.S.[4]

Villanueva Madrid was arrested in Cancun in 2001 after spending two years as a fugitive. Although he acknowledged ties to the drug cartels, he claimed that the Mexican government was persecuting him due to political questions. A Mexican court withdrew the charge of organized crime and ratified only the crimes of money laundering and tax fraud. On June 21, 2007, a Mexican court upheld Villanueva Madrid's conviction of money laundering under Article 115 of the Mexican Criminal Code. The court said he had already served more than six years, the maximum sentence for the crime and thus ordered him to be released from prison.[5] Villanueva Madrid was acquitted of participating in organized crime, narcotics trafficking, criminal association and intimidation.[6]

In January 2002, the U.S. requested Villanueva Madrid's extradition with three others for narcotics

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[3] *Id.*

[1] James C. McKinley, Jr., *Mexico Moves to Send Ex-Governor to U.S. on Drug Charges*, N.Y. TIMES, June 22, 2007, at A6, col. 1.

[2] Ricardo Ravelo, *Buscará Mario Villanueva ampararse contra la extradición (Mario Villanueva Will Petition for Habeas Corpus Against Extradition*), PROCESO.COM.MX, June 25, 2007.

[3] *Id.*

[4] McKinley, *supra.*

[5] Mauel Roig-Franzia, *Former Mexican Governor Could Face U.S. Drug Trial*, WASH. POST, June 22, 2007, at A14, col. 1.

[6] Francisco Gómez, Teresa Montaño y Miguel Ángel Serrano, *Recaptura SIEDO a Mario Villanueva (SIEDO Recaptures Mario Villanueva)*, EL UNIVERSAL, June 21, 2007.

trafficking and money laundering.[7] Two indictments in the U.S. District Court in New York City alleged that Villanueva Madrid received millions of dollars from members of the Juárez cartel, including Alcides Ramón Magaña, from 1994 to 1999. According to the indictments, the cartel paid Villanueva Madrid about $500,000 for each shipment and he laundered at least $11 million total.[8]

In exchange for the payoffs, Villanueva Madrid allegedly allowed the cartel to bring at least 200 tons of cocaine from Colombia into Cancún by boat, then store it until it could be sent north to the border town of Reynosa where the cartel smuggled it into the U.S. and brought to New York and other cities.[9] U.S. law enforcement officials believe that, if they obtain custody of Villanueva Madrid, he may cooperate in return for a reduced sentence. They believe he has extensive knowledge of the cartel and his cooperation could be important.[10]

Villanueva Madrid's defense counsel, Jesús Horacio García Vallejo, said he would defend the extradition request by raising the double jeopardy or *ne bis in idem* argument.[11]

X. INTERNATIONAL TRIBUNALS

A. New Defense Counsel Appointed for Charles Taylor

by Jason McClurg

Despite a tumultuous start to the war crimes trial of former Liberian President Charles Taylor, things appear to have normalized as Taylor's replacement counsel has been appointed, and trial is set to resume as scheduled on August 20, 2007.

Taylor's trial before the Special Court for Sierra Leone began on June 4, 2007. However, before the Prosecution commenced its opening statements, Taylor's previous counsel, Karim Khan, read a letter to the Court written by Taylor claiming that Taylor had been denied proper resources and time to prepare an adequate defense.[1] The letter complained that his single defense attorney was heavily outgunned by the nine-member prosecution team, and that he had not been given the proper office space and support staff. Taylor concluded that he "cannot participate in a charade that does injustice to the people of Sierra Leone."[2] After Khan finished reading the letter, he

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7 *Cronología: Caso Mario Villanueva (Chronology: The Mario Villanueva Case)*, EL UNIVERSAL, June 21, 2007.

8 McKinley, *supra*; *Espera Justicia Neoyorquina a Mario Villanueva en Medio de Mutismo, New York Justice Awaits Mario Villanueva in the Middle of Silence*, LA JORNADA, June 21, 2007.

9 Ravelo, *supra.*

10 McKinley, *supra.*

11 Ravelo, *supra.*

1 Mike Corder, *Taylor Boycotts His War Crimes Trial,* ABC News, June 6, 2007.

2 *Id.*

informed the Court that Taylor had fired him, and that Taylor intended to represent himself in the future.[3]

Despite orders from Presiding Judge Julia Sebutinde to remain, Khan packed up his papers and left the courtroom. Judge Sebutinde then assigned duty counsel Charles Jalloh, a representative of the Special Court's Principal Defender's Office, to represent Taylor for the remainder of the day.[4] Chief Prosecutor Stephen Rapp presented the Prosecution's opening statements, outlining atrocities committed by rebels that will supposedly be directly linked to Taylor through Prosecution witnesses.[5]

After opening statements concluded, Judge Sebutinde indicated that she was concerned about whether Taylor's rights to a fair trial were being violated. Judge Sebitunde then delivered Orders granting Taylor's request to meet with the Principal Defender, and ordering the Registry to ensure that Taylor had adequate facilities and resources in accordance with Article 7 of the Special Court Statute without further delay. The trial was then adjourned until June 25, 2007, when the Prosecution was supposed to present its first witness.

However, Taylor refused to attend the proceedings on June 25, 2007, and rather than proceeding as previously planned, the Court was forced to address whether Taylor could represent himself in light of his refusal to appear. The Court ultimately decided that Taylor's failure to appear was tantamount to a boycott of the proceedings and that Taylor, therefore, could not be permitted to represent himself.[6]

On July 3, 2007, the Court postponed the trial until August 20, 2007, and ordered Principal Defender, Vincent O. Nmehielle, to immediately appoint new counsel to assume control of Taylor's defense while the Registry worked to ensure that a new defense team acceptable to the Court was put into place. The Order required that the new defense team to be composed of one lead counsel, two co-counsel, and one senior investigator.[7]

On July 6, 2007, Acting Registrar, Herman von Hebel, announced at a press briefing that the Registry would provide one additional legal assistant for the Taylor defense team for the duration of the trial, as well as two additional legal assistants for the first three months of the trial in order to allow new legal counsel to familiarize themselves as quickly as possible with the case.[8]

In addition, von Hebel announced that the budget for Taylor's defense team would be expanded to approximately $70,000 USD per month; roughly three times the budget for most defense teams before the Special Court, and two times the budget for most defense teams of the International Criminal Tribunal for the Former

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[3] Marlise Simons and Graham Bowley, *Charles Taylor Dismisses Lawyer at War Crimes Trial,* INTERNATIONAL HERALD TRIBUNE, June 4, 2007.

[4] *Dramatic Start to First Day of Taylor Trial* (June 4, 2007) <http://charlestaylortrial.org/>.

[5] Stephen Rapp and Mohamed Bangura, *Prosecution v. Charles Gankay Taylor: Prosecution Opening Statement* (June 3, 2007) <http://charlestaylortrial.org/>.

[6] *Taylor's Adequacy of Representation Issues Delay Trial Until August 20* (June 28, 2007) <http://charlestaylortrial.org/ >.

[7] *Taylor Appears in Court, Trial Formally Postponed Until August 20* (July 3, 2007) <http://charlestaylortrial.org/>.

[8] *Acting Registrar Agrees to Increase Funding for Taylor Trial* (July 6, 2007) <http://charlestaylortrial.org/>.

Yugoslavia ("ICTY").[9] According to Von Hebel, the increased budget does not include additional funds allocated for the senior investigator or office space that will be provided by the Registry. With those allocations included, the budget for Taylor's defense team amounts to approximately $100,000 per month.[10] Chief Prosecutor Stephen Rapp supported the Registrar's increased budget for the Taylor defense team and stated, "it is important that justice be done and be seen to be done."[11]

In a submission to the Court dated July 17, 2007, Principal Defender Vincent Nmehielle informed the Court that new counsel had been assigned to Taylor. Taylor's newly appointed team includes lead counsel Courtney Griffiths, as well as co-counsel Andrew Cayley and Terry Nunyard.[12] According to Griffith's biography, "his criminal practice ranges from fraud to terrorism, murder and serious public order to drugs."[13] Griffiths is a Jamaican-born attorney, educated and trained in England, and has achieved the rank of Queen's Counsel. Cayley served as Senior Prosecuting Counsel to the Office of the Prosecutor at the International Criminal Court ("ICC") and the ICTY. Munyard practices civil and criminal law, concentrating on public order and political activist cases.[14]

Taylor's trial is scheduled to proceed as planned on August 20, 2007, but it remains to be seen whether the new defense team will seek additional time.

XI. CYBERCRIME

A. NETeller Founder Pleads Guilty, Company Enters into Deferred Prosecution Agreement

by Bruce Zagaris

On July 10, 2007, John D. Lefebvre, a founder and former president of the NETeller Group, pleaded guilty to conspiracy to promote illegal gambling.[1] Separately, on July 18, 2007 Neteller Inc. agreed to forfeit $136 million as part of a deferred prosecution agreement with the U.S. government, which has recently led an aggressive crack down on Internet gambling.[2]

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Principal Defender Assigns Taylor New Counsel* (July 18, 2007) <http://charlestaylortrial.org/>.

[13] *Taylor's New Defense Team Includes Prominent QC* (July 23, 2007) <http://charlestaylortrial.org/>.

[14] *Id.*

[1] United States Attorney Southern District of New York, *Neteller Founder Pleads Guilty to Conspiring to Promote Illegal Intrnet Gambling Businesses, Press Release*, July 10, 2007.

[2] Chad Bray, *Neteller to Forfeit $136 Million in Deal with U.S. Prosecutors*, WALL ST. J., July 18, 2007.

In 1999, Lefebvre, together with Stephen E. Lawrence, founded the NETeller Group, offering online payment services to Internet gambling companies. In July 2000, Lefebvre and Lawrence began providing payment services through NETeller Inc., a Canadian company based in Calgary, Alberta. In 2004, Lefebvre and Lawrence started providing payment services through NETeller PLC, a public company based in the Isle of Man. While the services were provided to Internet gambling businesses located outside the U.S., they allegedly allowed gaming businesses to take bets from gamers in the U.S., where such wagering is illegal. In April 2004, NETeller PLC went public on the Alternative Investment Market (AIM) of the London Stock Exchange.[3]

After founding the NETeller Group, Lefebvre woked in senior management positions at NETeller, including as president of NETeller, Inc. from 2000 to 2002 and as a Non-executive Director of Neteller PLC upon its admission to the AIM.

Lefebevre pleaded guilty to one count of conspiracy to use the wires to transmit in interstate and foreign commerce bets and wagering information; to conduct illegal gambling business; to engage in international financial transactions for the purpose of promoting illegal gambling; and to operate an unlicensed money transmitting business. Lefebvre, 55, faces a maximum sentence of five years' imprisonment and a fine of $250,000 or twice the gross gain or loss from the offense, when he is sentenced before U.S. District Judge P. Kevin Castel on October 29, 2007. Lawrence also admitted to forfeiture allegations requiring him to forfeit $100 million.

In a related case, on June 29, 2007, Stephen Eric Lawrence pleaded guilty to participating in the same conspiracy. Lawrence also agreed to forfeit $100 million, for which he is jointly responsible with Lefebvre.[4] Lawrence is scheduled to be sentenced October 29, 2007, while Lefebvre is scheduled for November 1, 2007. Both defendants are cooperating with the government's investigation. Neither are now affiliated with NETeller, which has stopped handling gaming transactions from U.S. customers.[5]

At a hearing on July 18, 2007, NETeller agreed to return an additional $94 million it had held for U.S. customers, and to operate under a monitoring program for an 18-month period that started in June 2007.

In October 2007, President Bush sign into law legislation that criminalizes financial institution processing of payments from U.S. customers to Internet gaming sites. In March 2007, Electronic Clearing House (ECH), an Internet payment processing company, entered into a non-prosecution agreement with the government and agreed to disgorge $2.3 million. NETeller was one of ECH's customers.[6]

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[3] United States Attorney Southern District of New York, *Neteller Founder Pleads Guilty to Conspiring to Promote Illegal Intrnet Gambling Businesses, supra*.

[4] *Id.*

[5] Bray, *supra*.

[6] *Id.*

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B. EU Announces Cybercrime Initiatives[1]

by Bruce Zagaris

On May 22, 2007, the Commission of the European Communities communicated a general policy against cybercrime.[2] The report sets forth specific actions to improve coordination and cooperation between law enforcement authorities and between law enforcement and private sector operations at the national, European, and international levels.[3]

The report observes that the development of the internet has led to rapid new flows of information, products and services across the internal and external borders of the EU. Unfortunately, the development has also opened new possibilities for criminals. Traditional forms of crime such as fraud or forgery, as well as new crimes such as the publication of illegal content over electronic media (i.e., child pornography or incitement to racial hatred) and crimes unique to electronic networks (attacks against information systems, denial of service, and hacking) constantly evolve. Legislation and operational law enforcement have difficulties keeping pace. The international character of this new type of criminal further illustrates the need for strengthened international cooperation and coordination. A general agreement exists in Europe on the need to take action at the EU level.[4]

The Commission identified eight problem areas: a growing vulnerability to cyber crime for society, businesses, and citizens; an increased frequency and sophistication of cyber crime offenses; the lack of coherent EU-level policy and legislation; specific difficulties in operational law enforcement cooperation concerning cyber crime, due to its cross-border character; a need to develop competence and technical tools (training and research); the lack of a functional structure for cooperation between important stakeholders in the public and the private sector; unclear system of responsibilities and liabilities for the security of applications as well as for computer soft- and hardware; and the lack of awareness among consumers and others of the risks emanating from cybercrime.[5]

For instance, large scale attacks against information systems or organizations and individuals (often through so called botnets)[6] seem to have become increasingly prevalent. This has been compounded by the merging technologies and accelerated interlinking of information systems, which made those systems more vulnerable. Attacks are often well organized and used for purposes of extortion.

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[1] We are grateful to Ursula Scott-Larsen, a paralegal in the Brussels office of the law firm Steptoe & Johnson LLP, for her help in researching and bringing this matter to our attention.

[2] Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council and the European Committee of Regions Towards a General Policy on the Fight against Cybercrime*, COM(2007) 267 final, May 22, 2007.

[3] EU, *Defining the Commission's Global Policy on the Fight against Cyber Crime*, IP/07/689, May 22, 2007

[4] *Id.*

[5] EU, *The Commission Communication "Towards a General Policy on the Fight against Cyber Crim*e, MEMO/07/199, May 22, 2007.

[6] Botnet refers to a collection of compromised machines running programs under a common command.

The communication presents a coherent EU strategy for the fight against cybercrime. The strategy will give the European Commission a central coordinating role in Europe. The Commission will closely coordinate all actions with EU members and other competent bodies.

The present communication consolidates and develops the 2001 Communication on Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime. The 1001 Communication proposed appropriate substantive and procedural legislative provisions to deal with both domestic and transnational criminal activities.

To address security challenges for the information society, the EC has developed a three-pronged approach for network and information security: specific network and information security measures, the regulatory framework for electronic communications, and the fight against cyber crime.[7] The Communication calls for all EU members to ratify and implement the predominant European and international instrument in this field, namely the Council of Europe's 2001 Convention on cyber crime.

The communication highlights the lack or underutilization of immediate structures for cross-border operation cooperation, which remains a major weakness in the area of Justice, Freedom and Security. Traditional mutual assistance, when confronted with urgent cyber crime cases, is slow and ineffective. New cooperation structures have not yet been properly developed.

The Commission will soon emphasize training needs. The technological developments produce a need for continuous training on cyber crime issues for law enforcement and judicial authorities. A reinforced and better coordinated financial support from the EU to multinational training programs is envisaged. The Commission will seek to achieve an EU level coordination and interlinking of all relevant training programs.

The Commission will organize a meeting of law enforcement experts from EU members, as well as from Europol, the European Police College (CEPOL) and the European Judicial Training Network (EJTN), to discuss how to improve strategic and operational cooperation as well as cyber crime training in Europe in 2007. The Commission will consider the establishment of both a permanent EU contact point for information exchange and an EU cyber crime training platform.[8]

The communication addresses in detail the need to strengthen the dialogue with industry. To achieve broader public-private cooperation, the Commission will in 2007 organize a conference for law enforcement experts and private sector representatives, especially Internet Service Providers, to discuss how to improve public-private operation cooperation in Europe.[9]

The effort of the EU to develop policies and mechanisms to effectively combat cybercrime illustrates the important role of economic integration in combating transnational crime insofar as technology plays a major role in transnational crime.

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[7] EU, *The Commission Communication "Towards a General Policy on the Fight against Cyber Crim*e, *supra*.

[8] *Id.*

[9] *Id.*

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