CAN THE UNITED STATES POLICE THE WORLD?

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A Lebanese terrorist was recently convicted in a US court for hijacking a Jordanian airliner. Although the Americans on board the plane were unharmed, the FBI orchestrated an elaborate maneuver and captured the terrorist on board a Cypriot vessel in international waters. Alfred P. Rubin argues that such an extraterritorial application of US criminal law was a serious mistake, violating international law. He maintains that the international political implications of such legal maneuverings are more important than the arrest or conviction of a single terrorist.

In mid-March a "terrorist," Fawaz Younis, was convicted by a Federal District Court in Washington, D.C., of violating the United States Criminal Code by participating in the 1985 hijacking of a Jordanian airliner with two or four (accounts differ) Americans on board. The hijacking had occurred in Beirut as part of an Amal Shiite action aimed at Jordan, the Palestine Liberation Organization (PLO), and Lebanon. The Americans were released unharmed. To apply American criminal law to the incident was a serious mistake.

The issue is not whether hostage-taking or aerial hijacking is vile and deserving criminal punishment. The issue is *whose* laws should govern.

Our government appears to have been aware of the delicacy of the situation. Younis was arrested in an elaborate maneuver involving the chartering of a Cypriot vessel by FBI agents who have no authority to make arrests abroad, an assault on Younis within the vessel, his transfer to an American warship, and a formal arrest in that warship. Our government has argued that the assault was performed on the high seas, therfore no foreign state's jurisdiction was violated. The Federal District Court in a preliminary decision agreed. But Younis was not captured while swimming; he was assaulted in a vessel registered in a foreign country whose law governed relationships in it, including the interpretation of the charter under which an American agent could act as ship's master. As a matter of international law, the flag state, and not a state chosen by the charterer, has exclusive "enforcement jurisdiction" in a vessel on the high seas, contrary to the implied American position that nobody has such jurisdiction. The American judge might have been deceived as to the international law, or believed it irrelevant to his decision on jurisdiction under American law, but a display of ignorance or arrogance about the law does not determine the law. That Cyprus has not complained does not mean it has agreed, or that it and every other sophisticated observer in the Medi-

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terranean is not fully aware of the violations of international law we committed when apprehending Younis.

Nor is the issue minor. As a matter of American law, a bad arrest is severable from the arraignment and trial. The legal remedy for the bad arrest, if there is any in American law, lies elsewhere; the trial proceeds. But internationally, the insertion of an American arrest into a quarrel between Cyprus and Jordan involving internal Lebanese politics insults both governments and weakens the claim of the government of each to represent the sovereignty of the state. That is why they both prefer that no mention be made of the Cypriot nationality of the vessel or of the Jordanian and Lebanese (also, actually, Italian and Tunisian; the airplane was forced by the hijackers to make the rounds of the area) jurisdiction over the offense. It is hard to imagine that the political oppostion in any of these countries is deceived or that national pride in each is happy with American intervention in the affair. Is it really in American interest to be the opponent of nationalism in the intensely emotional Arab world? Is it really in American interest to operate under a theory of enforcement jurisdiction in foreign vessels that would be useful to Libyan or Iranian hit squads enforcing Islamic law in the United States?

There is another issue of jurisdiction perhaps even more significant. Apprehending and arresting Younis was an exercise of American "enforcement jurisdiction," police authority. But there is also an issue of "prescriptive jurisdiction," the use of American statutes to measure the legality of a foreigner's actions directed against other foreigners in a place outside the United States. "Crimes" are acts committed against some governing authority's public policy. On what basis does US public policy extend to acts by Lebanese against Jordanian aircraft in the Middle East?

No doubt aerial hijacking violates international public policy and states are bound to exercise national jurisdiction to apprehend and punish the hijackers. But the treaties do not extend national prescriptive jurisdiction this far; no state is made policeman for the world and the general requirement of "standing" is not abolished.

The American position on the extent of prescriptive jurisdiction was fixed by 1818. In *United States v. Palmer et al.* the Supreme Court under Chief Justice Marshall contemplated the open-ended legislation of 1790 relating to "piracy" on the high seas: "No general words of a statute ought to be construed to embrace [offenses] when committed by foreigners against a foreign government." In 1825 a unanimous Supreme Court reached the same result with regard to the slave trade, commenting in *The Antelope* that "the obligations of [a] statute cannot transcend the legislative power of the state which may enact it." It was confirmed in diplomatic correspondence in 1886-88, when we strongly protested Mexico's attempt to apply its criminal law to a Texas newspaper publisher for uttering a libel against a Mexican national, a criminal offense under Mexican law. There are many other cases and the use of "passive personality," the nationality of a victim alone, as the basis for extending

national criminal law to the acts of foreigners abroad, until now has not been suffered or asserted by the United States.

The reasons are obvious. We want our free press to continue without subjecting American publishers to foreign criminal sanctions. We should never have established a precedent under any logic that could appear to justify the Ayatollah in Iran demanding that Islamic criminal law penalties be applied to blasphemers in the United States, like Salman Rushdie, whose "crimes" by Iranian notions were more serious than aerial hijacking and had as victims all the Muslims in Iran; indeed, by Islamic logic, all the people of the entire world. Civil suits, like that of Ariel Sharon against *Time* magazine, are, of course based on other theories under which courts can apply foreign law to aspects of the suit that they believe should be governed by that law. Often these applications have been permitted. But the Younis prosecution was not a civil case; Younis was convicted of violating American public policy directly although his only contact with the United States was the incidental presence of four Americans in the aircraft who, in fact, were not injured and are not suing for any damages. Nor did the court use the civil law technique of applying the substantive rules of foreign law appropriate to the aspect of the case at issue. In the Younis case we did not purport to apply any foreign penal law to the incident as probably would have happened had the American victims sued Younis civilly. International law describes offenses which states should make criminal under their own laws, but, for various good constitutional reasons related to legislative and judicial authority in the United States, the American court did not purport to apply international law directly to the case.

If our extending American prescriptions to the acts of people like Fawaz Younis were applied as a precedent against us for the extension of other states' muncipal laws to the acts of Americans in the United States, we would certainly be outraged. Quite apart from the blasphemy and free press issues, most Americans would find it monstrous to discover that injuring a foreigner in Boston would subject an American to criminal trials before either foreign or American tribunals applying foreign laws and fixing fines in foreign currencies or terms in foreign jails.

This is all very unfortunate if we are serious about using the law to stop terrorists. There are sound grounds for the exercise of American "prescriptive jurisdiction" to the kinds of cases in which our national interest is involved. The governing legal theory protects international commerce because it is international. It is so-called "universal jurisdiction" and applies to a list of offenses agreed internationally to be serious enough to justify it. Hijacking commercial aircraft already fits that description as a result of widely ratified treaties concluded in 1963, 1970, and 1971.

Under this rationale, Younis would still have been beyond the reach of our criminal law because his hijacking did not involve American honor or lives, except incidentally. But every hijacking of an American-registered aircraft, or holding of any Americans hostage because they are Americans, or seeking

concessions from the United States through threats against international commerce, would give the United States "adjudicatory jursidiction," "standing" to apply its criminal law to the universal crime.

Another approach, neglected by Americans while we complain of the inaction of others, is legislation to carry out our obligations and implement our authority under the 1949 Geneva Conventions relative to the Protection of the Victims of War. Under those conventions, persons "ordering" the taking of hostages or the killing of captives like Leon Klinghoffer in the *Achille Lauro* incident commit a "grave breach" triggering obligations of all parties to seek them out and try them or extradite them. The failure of the United States to enact the legislation necessary to set up a military commission to try the likes of Abu Abas is nobody's fault but ours. The refusal for political reasons to apply the laws appropriate to armed conflict against "terrorists" is unconvincing; indeed, during our own civil war of 1861-65 we applied that law as a "concession" while denying the legal personality of the Confederacy. Nothing but our own confusion prevents us from doing the same to members of the Irish Republican Army, the PLO, or any other group whose political status we want to denigrate.

Our actions would be more effective if aimed at achieving international cooperation in ways consistent with the international legal order instead of simply asserting wider American prescriptive, adjudicatory, and enforcement jurisdiction. The assertions we make meet resistance because we could not accept them if made reciprocally by others. Placing ourselves in the position of world policeman for our version of international law creates a defensive reaction in even our allies, who deny that we have that authority. It creates a precedent and sense of righteousness in others who would apply their laws and their versions of international law to Americans whose actions they do not like. Worst of all, it presents an excuse and a national enemy — the United States — to those governments that ignore the legal obligations of their states to use their criminal laws to deprive aerial hijackers and hostage-takers of havens. It is very hard to understand the logic of our Justice Department in all this, the apparent inability of the State Department to perceive the international political implications of these legal maneuvers or, if perceived, to convince those making policy that those political implications are more important than a single conviction of a single "terrorist" whose victims only incidentally included some Americans who were in fact unharmed.

In sum, if we operate within the legal system instead of trying to extend our authority beyond the bounds the system imposes on us, we could do much more, even if with less excitement and fewer headlines.