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Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards

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I. INTRODUCTION

On October 7, 1985, members of a Palestinian group hijacked the passenger ship *Achille Lauro*. Not only did the hijackers hold more than one hundred passengers and crew members hostage for several days, but they murdered one of the passengers, Leon Klinghoffer, a United States national.[1] On October 9 the hijackers released the vessel and remaining hostages. On October 10 the hijackers and an alleged mastermind of the operation, Mr. Abbas, were on board an Egyptian aircraft flying over the high seas in the Mediterranean when United States military aircraft

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1. *See generally* N.Y. Times, Oct. 17, 1985, at A12, col. 5; *id.*, Oct. 14, 1985, at A12, col. 3.

intercepted the Egyptian aircraft and forced it to land in Italy.[2]

Italy took the hostage-takers into custody and eventually prosecuted and convicted them.[3] Nevertheless, Italy allowed the alleged mastermind of the hijacking to escape to Yugoslavia on October 12 despite a United States request to arrest Mr. Abbas provisionally pending a formal extradition request. According to certain Italian officials, Italy did not have sufficient evidence to detain Mr. Abbas further and, in any case, his diplomatic passport in an assumed name entitled him to immunity.[4] While Mr. Abbas was in Yugoslavia, the United States requested the Yugoslavian government to arrest him provisionally until the United States could extradite him under a United States-Yugoslavia extradition treaty, but Yugoslavian officials refused, apparently on the basis that Mr. Abbas was entitled to diplomatic immunity.[5] Later in 1986, however, Italy formally indicted and convicted Mr. Abbas *in absentia*.[6] Today he remains at large.

The *Achille Lauro* incident and subsequent Egyptian, United States, Italian and Yugoslavian actions, among others, raise several international legal issues, including those concerning nation-state involvement in international terrorism either before or after an incident and the obligations of nation-states with respect to effective implementation, invocation and application of international criminal law. General questions involving jurisdictional competence and the process of extradition are perhaps the most important of these issues. More specifically, were Egypt, Italy

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2. *See generally* Documents Concerning the Achille Lauro Affair and Cooperation in Combatting International Terrorism, 24 I.L.M. 1509, 1512-24, 1554-57 (1985); N.Y. Times, Oct. 18, 1985, at A1, col. 6; *id.*, Oct. 12, 1985, at A9, cols. 1-2; *id.*, Oct. 11, 1985, at A1, cols. 5-6, A10-12; *id.* Oct. 10, 1985, at A1, col. 6.

3. *See* N.Y. Times, July 11, 1986, at A1, col. 4, A6, col. 1. (Eleven were convicted by Italy: six of "Kidnapping for terrorist ends" or "terrorist kidnapping," five others of lesser crimes, four others were acquitted); *id.*, Mar. 23, 1986, at A15, col. 1 (thirteen indicted); L.A. Times, Nov. 7, 1986, § 1, at 2, col. 1 (Italian juvenile court later sentenced a seventeen year old). The United States announced in July that it reserved the right to seek extradition "once all Italian legal proceedings, including appeals, are ended." *See* N.Y. Times, July 11, 1986, at A6, col. 4. The U.S. District Court in Washington D.C. issued an arrest warrant for Mr. Abbas on October 16, 1986. *See* N.Y. Times, Oct. 16, 1985, at A1, col. 6.

4. *See generally* N.Y. Times, Oct. 20, 1985, at A10, col. 1; *Italy Frees "Notorious" Palestinian Leader*, Hous. Post., Oct. 13, 1985, at 1, col. 1.

5. *See generally U.S. Demands Arrest of Palestinian*, Hous. Post, Oct. 14, 1985, at 1, col. 1.

6. *See generally* N.Y. Times, July 11, 1986, at A1, col. 4 (conviction); *id.*, Mar. 23, 1986, at A15, col. 1 (indictment); *see also id.*, Oct. 31, 1985, at A1, col. 1 (arrest warrant).

or Yugoslavia obliged to prosecute or to extradite all of the alleged hostage-takers and their co-conspirators or accomplices? Did Italy or Yugoslavia or both countries have a valid excuse for failing to arrest Mr. Abbas or to extradite him to the United States? Can Italy still extradite to the United States those whom it has convicted?

In view of the fact that the *Achille Lauro* was a vessel with Italian registry and that those accused of hostage-taking or of complicitous involvement in such activity were within Italian territory, Italy clearly had jurisdiction both to prescribe and to enforce not only its criminal law but that of the international community.[7] Assuming that such jurisdictional competence existed, was Italy obligated to exercise its authority in connection with alleged international crimes?

II. PROSECUTION OR EXTRADITION

As a general matter, Italy's obligation would have been either to initiate prosecution or to extradite those individuals whom the international community might reasonably accuse of having committed violations of customary international law or crimes of hostage-taking in violation of the 1979 Hostages Convention [Hostages Convention].[8] Article 8 of the Hostages Convention expressly recognizes the duty of a signatory in whose territory an alleged offender is found "to submit the case to its competent authorities for the purpose of prosecution" if the country does

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7. The bases for jurisdiction under international law would be territorial and universal. *See generally* Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 201, 203, 211-14 (1983) [hereinafter Paust, *Federal Jurisdiction*]. Acts of Mr. Abbas would also fit within the objective territorial circumstance. *See id.* at 204-09.

8. *See generally id.* at 195, 227-29. *See also* Yates, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era,* in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213, 231-35 (R. Lillich ed. 1983) ("denial of justice" and state responsibility under customary international law occur if the nation-state "fails to take appropriate action to pursue and punish those responsible" for criminal conduct engaged in within such a state's jurisdiction against aliens), *also quoting* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 183 (1965); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) 506 (reporters' note 2 to § 711) (Tent. Draft No. 6, 1985) (failure to act vigorously and diligently to punish crimes against aliens can constitute a "denial of justice") [hereinafter DRAFT RESTATEMENT]; *In re* Janes (United States v. Mexico), 4 R. Int'l Arb. Awards 82, 86-87, 89-91, 94-97 (1925) (failure to apprehend and punish wrongdoer). A pardon or grant of amnesty would have only tightened liability for "denial of justice." *See, e.g., In re* Janes, 4 R. Int'l Arb. Awards at 87, 90, 96.

not extradite the alleged offender.[9] In the *Achille Lauro* incident Italy

9. *See* International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 8, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979), *reprinted in* 18 I.L.M. 1456, 1460 (1979) [hereinafter 1979 Hostages Convention]. Before the incident, Egypt, the United States and Yugoslavia were all signatories to the Convention. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE ON JANUARY 1, 1986, at 309; 24 I.L.M. 1500 (1985) (Yugoslavia on April 19, 1985). Italy ratified the Convention on March 20, 1986, after the incident, but before any extradition to the United States. *See* 25 I.L.M. 1016 (1986). No obvious reason exists why article 8 of the Convention should not apply retrospectively when a new signatory such as Italy has within its territory a person reasonably accused of having committed an offense over which other signatories had jurisdiction at the time of the commission of such offense. This seems especially so in view of the propriety of the Israeli prosecution of Eichmann in a forum that did not exist at the time of his criminal activity. Not only did a competence to prosecute in the new forum exist, but a duty to prosecute or extradite with respect to crimes already committed existed as well. *See generally* Attorney General of Israel v. Eichmann, [Jerusalem D. Ct. 1961], 36 Int'l L. Rep. 18 (1968), *aff'd,* [Israel Sup. Ct. 1962] 36 Int'l L. Rep. 277 (1968). *See also* Lubet & Reed, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law,* 22 STAN. J. INT'L L. 1, 52-54 (1986).

Additionally, the language of the 1979 Hostages Convention expresses no exception to article 8 obligations in the case of acts committed before ratification, and one should not imply such an exception so as to thwart the general purpose of the treaty to assure effective sanctions against those who commit the crime of hostage-taking. *See also* Lubet & Reed, *supra.* Further, one should not imply such an exception when it would be inconsistent with more general obligations not to tolerate impermissible acts of terrorism and to respect and observe fundamental human rights. Moreover, extradition under an extradition treaty ratified after the commission of an alleged crime is permissible and the right to extradition includes extradition for prior crimes unless the treaty expressly excludes them. *See, e.g., In re* De Giacomo, 7 F. Cas. 366, 369-70 (C.C.S.D.N.Y. 1874) (No. 3,747) (treaty between United States and Italy).

In any event, Italy had signed the 1979 Hostages Convention on April 18, 1980, and under customary international law, ratification generally relates back to the date of signature. *See, e.g.,* Davis v. Concordia, 50 U.S. (9 How.) 280, 289 (1850); *In re* Metzger, 17 F. Cas. 232, 240 (D.C.S.D.N.Y. 1847) (No. 9,511); *cf.,* Haver v. Yaker, 76 U.S. (9 Wall.) 32, 34-35 (1869) (treaty binds United States when signed but does not relate back from date of ratification to date of signature so as to divest title already vested); United States v. Arredondo, 31 U.S. (6 Pet.) 691, 748-49 (1832) (stands for same proposition as *Haver, supra*). Additionally, a state that has signed a treaty awaiting ratification can take no action inconsistent with the major purposes of the treaty. *See, e.g.,* Vienna Convention on the Law of Treaties, May 22, 1969, art. 18, U.N. Doc. A/CONF. 39/27, at 289 (1969), *reprinted in* 8 I.L.M. 679 (1969); *cf. id.* at 690, art. 28 (unless "otherwise established," a treaty as such does not apply retroactively to events "before the date of the entry into force"). The United States accepts the view that the Vienna Convention is presumptively to be customary. *See, e.g.,* DRAFT RESTATEMENT, *supra* note 8, at Vol. 2, Pt. III, introductory notes 1-2; J. SWEENEY, C. OLIVER, N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 951 (2d ed. 1981). In particular, article 18 is among the provisions that the international community considers to be customary. *See, e.g.,* DRAFT RE-

has generally done even more. The competent Italian authorities have prosecuted most of the alleged hostage-takers found in Italian territory, and although the Hostages Convention or customary law does not necessarily require convictions, Italy has now convicted most of the *Achille Lauro* hostage-takers and complicitors. Thus, Italy would not have to extradite such persons to the United States, although it may choose to do so in the future.

Yet Italy did not bring one of the more infamous alleged offenders, Mr. Abbas, into custody as article 6 of the Hostages Convention requires. Italy was certainly unwilling and is now unable to extradite Mr. Abbas to the United States, but has it fulfilled its obligation under the Hostages Convention by trying and convicting him *in absentia*? Perhaps it has, but Italy may have violated a more general obligation under customary international law and the United Nations Charter: an obligation not to tolerate, encourage or assist transnational acts of terrorism when it refused to arrest Mr. Abbas. Nonetheless, did the subsequent trial *in absentia* obviate any such impropriety?

As a general matter, one can argue that a refusal or failure to prosecute or extradite an alleged international terrorist involves an impermissible toleration of, encouragement of or assistance to unlawful terrorism in violation of obligations of nation-states under the United Nations Charter, if not also under customary international law.[10] In the history

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STATEMENT, *supra* note 8, at Vol. 2, § 312(3) and reporters' note 6, *quoting* Report of the International Law Commission ([1966] 2 YB. INT'L L. COMM'N 172, 202) (appears to be generally accepted), *citing* Certain German Interests in Polish Upper Silesia (Merits), P.C.I.J. Ser. A, No. 7, p. 30 (1926); Dalton, *Remarks*, 78 PROC., AM. SOC. INT'L L. 278 (1984) (quoting Secretary of State Rogers who "in his report to the President in 1971 characterized the rule in article 18 as 'widely recognized in customary international law' "), *also citing* 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 692-93.

10. *See, e.g.*, Paust, *Federal Jurisdiction, supra* note 7, at 227-29; Paust, *The Link Between Human Rights and Terrorism And Its Implications Concerning the Law of State Responsibility*, 11 HASTINGS INT'L & COMP. L. REV. (1987) (forthcoming) [hereinafter Paust, *The Link*]. The United Nations General Assembly has also affirmed "that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law." G.A. Res. 2840, 26 U.N. GAOR, Supp. (No. 29) at 2, U.N. Doc. A/8429 (1971). Certain acts of terrorism in time of armed conflict or in the context of crimes against peace may implicate such a form of state responsibility. For relevant purposes, principles and obligations, see, *e.g.*, U.N. CHARTER preamble, arts. 1 (2)-(3), 55(c), 56. Early in our history it was also recognized more generally with respect to "crimes against mankind," "the State in which the guilty person lives ought not to obstruct" the right of an injured State to punish the perpetrator. *See* 1 Op. Att'y Gen. 509, 513 (1821),

of the United States, the legal community has recognized a customary obligation either to provide civil redress for the victims of international crime or to punish the perpetrators found within a nation-state's territory.[11] "If the nation refuse [sic] to do either, it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury," echoed Justice Wilson in *Henfield's Case*.[12] The "duty of every government," an Attorney General recognized in 1797, is "to punish with becoming severity all the individuals of the State," at least, who commit infractions of the law of nations.[13]

Clearly Italy could not punish all of the alleged perpetrators once it had let some of them leave its territory. Did the subsequent trial *in absentia* mean that Italy had not impermissibly become "in some measure an accomplice in the guilt" or that it had tolerated illegality? The question still remains. It seems clear, however, that by mere technical compliance with an obligation under article 8 of the Hostages Convention, a nation-state may not necessarily fulfill more general obligations under the United Nations Charter and customary international law. Importantly also, a state need not actively *sponsor* international terrorism in order to implicate such forms of state responsibility with respect to terrorism.

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citing H. GROTIUS, DE JURE BELLI AC PACIS, [THE LAW OF WAR AND PEACE] lib. 2, cap. 21, sec. 3 (1625) (*De Poenarum Communicatione*). *See also supra* note 8 (denial of justice and state responsibility).

11. *See generally* Henfield's Case, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (Wilson, J., on circuit, charge to grand jury); 1 Op. Att'y Gen. 68, 69 (1797); 1 Op. Att'y Gen. 30, 32 (1793); *cf.* 1 Op. Att'y Gen. 106, 107 (1802); *see also* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) ("failure of justice"); THE FEDERALIST No. 80 (A. Hamilton) (denial or perversion of justice by judicial denial of standing or a remedy can subject the United States to liability); 1 Op. Att'y Gen. 57, 59 (1795) (foreign plaintiffs have a forum and a remedy by civil suit under 28 U.S.C. § 1350); 1781 Res. of Continental Congress, 21 J. CONT. CONG. 1137 (states should allow the United States to sue individuals who make the United States liable to foreign governments or to avoid such liability); Report of the Committee on Human Rights, Am. Branch of the International Law Association, PROCEEDINGS AND COMMITTEE REPORTS 56, 57-58, 65 (1983-1984); M. MCDOUGAL, H. LASSWELL, L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 739-40 (1980); Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81, 84-88, 90-92, 94, 99 & n.123 (1981) [hereinafter Paust, *Litigating Human Rights*]; *supra* note 8.

12. 11 F. Cas. at 1108. *See also* Paust, *Federal Jurisdiction, supra* note 7, at 226 & n.146.

13. 1 Op. Att'y Gen. 68, 69 (1797) (Lee, Att'y Gen.).

III. THE CLAIM OF DIPLOMATIC OR OTHER IMMUNITY

The Abbas affair raises another question that involves claimed diplomatic immunity from arrest and subsequent prosecution or extradition. The claim is unacceptable, however, when an individual has committed criminally sanctionable violations of international law. Not only does a general precept of non-immunity for violations of international law exist,[14] but courts have applied such a precept with respect to diplomats who engaged in international criminal behavior.[15] Clearly Italy and Yu-

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14. *See* Paust, *Federal Jurisdiction, supra* note 7, at 225-32. *See also Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA,* 8 HOUS. J. INT'L L. 49 (1985) [hereinafter *Draft Brief*]; M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 700-03 (1961); Dinstein, *International Criminal Law,* 5 ISRAEL Y.B. HUM. RTS. 55, 56-58, 62-64, 69-70, 83, 85-86 (1975); *infra* note 64; 9 Op. Att'y Gen. 356, 362-63 (1859) ("sovereign who tramples upon the public law of the world cannot excuse himself. . . .").

15. *See, e.g.,* the case of *Abetz* (France, Cour de Cassation, 1950), *reprinted in* 46 AM. J. INT'L L. 161, 162 (1952); *see also* Paust, *Federal Jurisdiction, supra* note 7, at 229-32; *In re* Weizsaecker, (The Ministries Case), 16 I.L.R. 344, 361 (1949) (diplomatic immunity applies only to legitimate acts of state and not to violations of international law — on the point, see also M. MCDOUGAL & F. FELICIANO, *supra* note 14, at 702 n.537); 2 Op. Att'y Gen. 725, 726 (1835), *quoting* I J. KENT, COMMENTARIES ON AMERICAN LAW 44 (1826), *quoting* E. DE VATTEL, II THE LAW OF NATIONS, ch. 2, § 34 (1758) (Vattel thinks that a foreign consul should receive immunity from criminal prosecution "unless he violates the law of nations by some enormous crime").

As the International Military Tribunal at Nuremberg recognized in a clear and trenchant manner generally determinative of such claims to immunity:

> The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment. . . .

Judgment of the International Military Tribunal (Nuremberg 1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947). *See also* U.S. DEP'T OF ARMY FM 27-10, THE LAW OF LAND WARFARE 181 (para. 506(b)), 183 (para. 510) (1956). For other relevant cases, see, e.g., M. MCDOUGAL & F. FELICIANO, *supra* note 14, at 702-03. The predominant expectation among textwriters is also that diplomatic immunity does not entitle diplomats to any right, privilege or immunity with respect to violations of international law, the law upon which such claims ultimately rest. *See, e.g.,* Paust, *Federal Jurisdiction, supra* note 7, at 231-32 & n.163. Such immunity protects them merely from violations of ordinary domestic law (and even such protection is not absolute). Indeed, no treaty of any sort expresses an immunity of any kind for violations of international law. The international criminal, even if a diplomat, is and remains *hostis humani generis.* The fact that Italy, at the insistence of the United States, finally recognized the nonimmunity of Mr. Abbas for violations of international law despite his diplomatic passport and status and tried and convicted him in absentia (see *supra* notes 4-6) adds to such precedent and patterns of expectation.

goslavia would have no excuse for any violation of their own obligations even if Mr. Abbas had generally been entitled to diplomatic immunity from prosecution for mere domestic crimes.

Can other countries try convicted individuals who have served their sentences? Countries can do so because under customary law, no principle of double jeopardy concerning international crime exists.[16] Thus, other nation-states can also prosecute the international criminal. Moreover, a domestic statute of limitation or other attempted application or grant of immunity cannot rightly obviate such a competence.[17] The international criminal remains *hostis humani generis* and subject to the universal jurisdiction of all nation-states.

Whether Italy has an obligation to extradite to the United States those persons whom it has already prosecuted and convicted, however, remains an entirely different question. With respect to such persons, at least, Italy has complied with any relevant obligation under the Hostages Convention[18] and with any other extradition commitments under treaty law with the United States.[19] In that sense, Italy has a general discretion whether or not to extradite such persons to the United States. Moreover, other aspects involving so-called "defenses" or justifications for the denial of a request for extradition may condition the exercise of such discretion.

A. *The Double Jeopardy Claim*

The first such defense involves a specific clause in the general extradition treaty between Italy and the United States that one might refer to as the double jeopardy clause. Under article 6 of the Treaty, extradition "shall not be granted when the person sought has been convicted, acquitted or pardoned, or has served the sentence imposed, by the Requested Party for the same acts for which extradition is requested."[20] According to the section-by-section analysis of the treaty contained in a report by the United States Senate Committee on Foreign Relations, the article follows "standard United States extradition treaty practice of barring ex-

16. *See, e.g.*, Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 285 & n.14 (1986) [hereinafter Paust, *Aggression Against Authority*].

17. *See, e.g., id.* at 284 & n.12.

18. *See supra* text accompanying notes 8-9.

19. *See* Extradition Treaty, United States-Italy, Oct. 13, 1983, arts. VI, VII, *reprinted in* 24 I.L.M. 1527, 1528 (1985). The 1979 Hostages Convention can also operate as an extradition treaty. *See* 1979 Hostages Convention, *supra* note 9, at art. 10, paras. 2 and 3.

20. *See* 24 I.L.M. at 1528.

tradition . . . when . . . [the person] has been in prior jeopardy in the requested country with respect to the same acts."[21]

One might question whether the drafters of the treaty intended the double jeopardy clause to change customary international law, under which no prohibition of double jeopardy for international crime exists,[22] or whether the phrase double or prior jeopardy should even apply in the case of prosecutions by separate sovereign entities,[23] but the treaty clause is specific enough to demonstrate an intent to impose a new prohibition. In fact, both the language of the treaty and its history have involved references to violations of international law,[24] so one would have difficulty arguing that article 6, unlike other portions of the treaty relates merely to domestic or ordinary offenses.

Nevertheless, the clause could play havoc with a general obligation of either Italy or the United States to not deny justice and to prosecute or extradite persons that other countries have reasonably accused of having committed an international crime, much less the general obligations of all nation-states not to tolerate, encourage or provide assistance to international terrorism and to take action in order to ensure universal respect for and observance of fundamental human rights. As such, the clause seems inconsistent with customary obligations of nation-states and those that several multilateral treaties proscribing various forms of individual conduct (e.g., war crimes, acts of genocide, aircraft sabotage and hijacking) describe,[25] especially the general prohibition of attempted grants of immunity or pardons[26] and general obligations under the United Nations Charter. If so, it would be policy-serving to interpret this and other double jeopardy clauses in such a manner that they would not apply to

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21. S. EXEC. REP. NO. 33, 98th Cong., 2d Sess. (1984), *reprinted in* 24 I.L.M. 1531, 1533 (1986).

22. *See supra* text accompanying note 16.

23. It should not. *See generally* Heath v. Alabama, 106 S. Ct. 433, 437-38 (1985) (state and state); United States v. Wheeler, 435 U.S. 313, 320 (1978) (Indian tribe and federal goverment); Bartkus v. Illinois, 359 U.S. 121, 122-24 (1959) (state and federal government); Jerome v. United States, 318 U.S. 101 (1943); United States v. Lanza, 260 U.S. 377, 382 (1922) (state and federal government); Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852) (state and federal); E. CORWIN & J. PELTASON, UNDERSTANDING THE CONSTITUTION 120 (4th ed. 1967); McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683, 706-07 (1950).

24. *See* Extradition Treaty, *supra* note 19, at art. V(2), *reprinted in* 24 I.L.M. at 1528 ("an offense . . . pursuant to a multilateral agreement"); S. EXEC. REP. NO. 33, *supra* note 21, *reprinted in* 24 I.L.M. at 1533 (analysis of art. V(2): "acts of terrorism, particularly those covered by multilateral treaties").

25. *See, e.g.*, Paust, *Federal Jurisdiction, supra* note 7, at 195 & n.15, 227-32.

26. *See supra* text accompanying note 17. *See also infra* note 32.

alleged violations of international law and to affirm this point in subsequent extradition treaties. Moreover, to the extent that bilateral double jeopardy clauses are inconsistent with such customary or multilateral obligations, countries should hold the latter to prevail. In any event, interrelated obligations under the United Nations Charter and those obligations that the United Nations Charter mirrors must prevail in view of the supremacy that article 103 of the Charter expressly recognizes. For these reasons, extradition to the United States for international crime should still be permissible.

B. *The Political Offense Exception*

Another potential problem involves the so-called political offense exception to extradition.[27] The Hostages Convention, for example, does not

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27. For general background, see, e.g., M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 370-429 (1974); Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 398 (M. Bassiouni ed. 1975). *See also infra* note 32; Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. (1987) (forthcoming) [hereinafter Paust, *Introduction*]; Goldie, *The "Political Offense" Exception and Extradition Between Democratic States*, 13 OHIO N.U.L. REV. 53, 59-86 (1986).

Early in its history the United States recognized that "[t]o surrender political offenders . . . is not a duty, but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind." Letter from Secretary of State Marcy to Mr. Hulsemann of Austria, Sept. 26, 1853, in F. WHARTON, II A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 483 (1887). *See also* J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 303-04 (1891); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 99-100 (1860) ("According to these usages, . . . persons who fled on account of political offences were almost always excepted, and the nation . . . exercises a discretion. . . . And the English Government . . . has always refused to deliver up political offenders"); *In re* Metzger, 46 U.S. (5 How.) 175, 188 n.1 (1847) (" 'it is generally admitted that extradition should not be granted in the case of political offenders, but only in the case of individuals who have committed crimes against the Laws of Nature, the laws which all nations regard as the foundation of public and private security' "), *quoting* W. PHILLIMORE, 1 INTERNATIONAL LAW 413 (1854) *and citing* LAWRENCE'S WHEATON 232 (1863); *In re* Ezeta, 62 F. 972, 997-1003 (N.D. Cal. 1894); United States v. Watts, 14 F. 130, 135 (D. Cal. 1882) ("It has been urged that the right of asylum for political offenders is so universally recognized as sacred and inviolable that an infringement of it was . . . not . . . possible. But jurists . . . are not always agreed as to what constitutes a political offense"); *In re* Sheazle, 21 F. Cas. 1214, 1215 (C.C.D. Mass. 1845) (No. 12,734) ("in case of mere political offences, it is seldom done," i.e., extradition); Oliver v. Kauffman, 18 F. Cas. 657, 659 (C.C.E.D. Pa. 1850) (No. 10,497) ("the common law and law of nations . . . refuse to deliver up persons guilty of mere political offences."); Blandford v. State, 10 Tex. App. 627, 639 (1881); Commonwealth v. Hawes, 76 Ky.

preclude a refusal to extradite under the political offense exception. Although there exists a general obligation to submit a case for prosecution if a signatory does not extradite, article 10(2) recognizes that choice concerning extradition "shall be subject to the other conditions provided by the law of the requested State." Not only does Italian law recognize the propriety of the political offense exception,[28] but the United States-Italy extradition treaty, which is a part of Italian law, also recognizes the possible use of such an exception.[29] The general extradition treaty does recognize, however, that it "will be presumed" that "an offense with respect to which both Contracting Parties have the obligation to submit for prosecution or to grant extradition pursuant to a multilateral international agreement," such as the Hostages Convention, is an ordinary or nonpolitical offense.[30] This is, nevertheless, merely a presumption.

In the actual circumstance Italy may find it nearly impossible to argue that relevant crimes were political in view of the fact that Italy has arrested, prosecuted and convicted the individuals involved. The scintilla of such a possibility, however, compels further comments about the exception. One should note that Italy apparently has an otherwise broad or tolerant attitude about labeling politically motivated crimes as political offenses. In the *Zind* case, for example, the Italian Court of Cassation declared that in Italian law, "the expression 'political offence' includes an ordinary offence committed wholly or in part for political motives," yet the motive "must go beyond the personal interests of the offender and be concerned wholly or in part with wider interests connected with the carrying into effect of different political ideals or theories" [or to impose political or socio-economic solutions].[31] Quite clearly, the acts of the Palestinian hostage-takers might fit within such a broad test.

Nevertheless, a growing number of commentators accept the point that

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697, 706-07, 713 (1878). The first political offense exception that a United States treaty recognized was in an 1843 treaty with France. *See* 8 Stat. 580, *reprinted in* 95 Parry's T.S. 393; I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 15-16, 167-68 n.5 (1971).

28. *See, e.g.,* Public Prosecutor v. Zind, 40 I.L.R. 214 (1961) (Italy, Cour de Cassation 1961).

29. *See* Extradition Treaty, *supra* note 19, at art. V(1), *reprinted in* 24 I.L.M. at 1528.

30. *See id.,* art. V(2), *reprinted in* 24 I.L.M. at 1528.

31. *See supra* note 28. In the recent case of the *Achille Lauro* hostage-takers, the lower court judge told reporters that Mr. Abbas and others had engaged in "a selfish political act" designed "to weaken the leadership of Yasir Arafat." *See* N.Y. Times, July 11, 1986, at A6, col. 2. Commentators also reported, however, that the jury appeared to accept defense arguments that some of the accused were "soldiers fighting for their ideals." *Id.,* at A1, col. 4, A6, col. 1.

courts must not treat violations of international law, especially international crimes, as mere political offenses even if the perpetrators of such illegalities had political motives for their actions.[32] A violation of fundamental human rights, for example, which are *obligatio erga omnes* (owing by and to all humankind), cannot rightly be immunized through this or any other form of state labeling or action.[33] Further, article VII of the

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32. *See, e.g.,* C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION 27 (1980); Bassiouni, *An International Control Scheme for the Prosecution of International Terrorism,* in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 485, 487 (A. Evans & J. Murphy eds. 1978) [hereinafter LEGAL ASPECTS]; Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983,* 17 AKRON L. REV. 495, 550 (1984); Dinstein, *supra* note 14, at 70; Garcia-Mora, *The Present Status of Political Offenses in the Law of Extradition and Asylum,* 14 U. PITT. L. REV. 371, 390, 394 (1953); Goldie, *supra* note 27, at 71; Kittrie, *Patriots and Terrorists: Reconciling Human Rights With World Order,* 13 CASE W. RES. J. INT'L L. 291, 298-302 (1981); Solf, *Remarks,* 79 PROC., AM. SOC. INT'L L. 301 (1985). *See also* Eain v. Wilkes, 641 F.2d 504, 520-21 (7th Cir. 1981) (random, indiscriminate bombing is "not . . . a protected political act even when . . . larger 'political' objective" exists), *cert. denied,* 454 U.S. 894 (1981) ; *In re* Doherty, 599 F. Supp. 270, 275 (S.D.N.Y. 1984) ("not . . . to protect . . . acts that transcend the limits of international law"); Universal Declaration of Human Rights, art. 14(2), G.A. Res. 217A, U.N. Doc. A/810 (1948) (no asylum allowed with regard to acts of persons engaged in "contrary to the purposes and principles of the United Nations," e.g., human rights violations); *In re* Bohne, V Jurisprudencia Argentina 339 (Sup. Ct. 1966), *digested in* 62 AM. J. INT'L L. 784 (1968) (war crimes are not political offenses); *In re* Meunier, 2 Q.B. 415, 419 (U.K. 1894) (terrorist acts of anarchists directed at private citizens are not acts directed against a particular government but against all governments and persons generally, and thus are not political offenses); *In re* Vogt, [1923-1924] Ann. Dig. 285 (No. 165) (Switzerland, Fed. Ct., 1924) ("To seize as hostages private persons who have no part in the quarrel . . . cannot . . . be regarded as a means justified by its political end"); COMMITTEE ON INTERNATIONAL TERRORISM, AM. BRANCH OF THE INT'L LAW ASSOCIATION, PROCEEDINGS AND COMMITTEE REPORTS 126, 145-46, 148 (1985-86); Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders,* 62 MICH. L. REV. 927, 942-53 (1964); J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 45-56 (1985); *but see* Quinn v. Robinson, 783 F.2d 776, 799-801 (9th Cir. 1986) (wrongly limiting violation of international law exception regarding "crimes against humanity" to crimes by government officials or those acting "with the toleration of" such officials), *cert. denied,* 107 S. Ct. 271 (1987). *Cf. id.* at 806 (terrorism).

33. *See, e.g.,* Paust, *Federal Jurisdiction, supra* note 7, at 221-32; Paust, *Aggression Against Authority, supra* note 16, at 284-85. Commentators have also recognized that no state can lawfully enter into a treaty "contemplating the performance of any . . . act criminal under international law" or "conniving at the commission of [such] acts." *See* International Law Commission, Draft Articles on the Law of Treaties, 61 AM. J. INT'L L. 263, 409 (1967) [hereinafter Draft Articles] (Commentary No. 3 to draft art. 50 and draft art. 50 concerning *jus cogens*). Such a treaty is void because "it conflicts with a peremptory norm of general international law from which no derogation is permitted." Draft Articles, *supra,* at 409. *See also* Draft Articles, *supra* (example of "treaties violat-

Genocide Convention, which a given case may arguably involve, expressly affirms that genocide and related conduct "shall not be considered as political crimes for the purpose of extradition."[34] Such trends apparently have conditioned Italian and United States perspectives at least to the point where they recognize a general presumption of non-immunity for international crime under the political offense clause.[35] More generally, one should recognize that international crimes are inherently nonpolitical because they are not merely crimes against a particular state or political institution but are crimes against humankind over which universal jurisdiction exists.

Certainly no perpetrator of this type of crime could reasonably expect that acts taken in violation of international law, over which there exists universal jurisdiction and no general immunity from prosecution, constitute political offenses affording an immunity from extradition. A request for such immunity is actually a request that the judiciary act contrary to public policy and several general obligations of the state under international law. Such a claim functions as a request that the court sanctify violations of international law by the individual and propagate new violations of international law by the state. A court of law must not do this. Thus, an individual's violation of international law poses the one necessary exception to the political offense exception.

C. *No Political Prosecutions*

A related political offense concern is probably not involved. Under both the Hostages Convention and the general extradition treaty Italy could refuse extradition to the United States if the United States Executive was intent on prosecuting the individuals involved "for a political offense,"[36] or, as the Hostages Convention notes, "on account of [their] race, religion, nationality, ethnic origin or political opinion" or if one could show that their "position may be prejudiced" for any such reason.[37] Indeed, if Italy could foresee that the United States would violate the fundamental human rights of such persons to freedom from discrimi-

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ing human rights").

34. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VII, 78 U.N.T.S. 277. I share the viewpoint of most that the prohibition of genocide now at least is customary. See Paust, *Aggression Against Authority, supra* note 16, at 293 n.64.

35. *See supra* note 30.

36. *See* Extradition Treaty, *supra* note 19, at art. V(1), *reprinted in* 24 I.L.M. at 1528.

37. *See* 1979 Hostages Convention, *supra* note 9, at art. 9(1).

nation on the basis of "race, religion, nationality, ethnic origin or political opinion,"[38] then Italy would have an obligation under more general international law to refuse extradition and, thus, to refuse to become a complicitor in the deprivation of fundamental human rights.[39]

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38. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 32, at art. 2; M. MCDOUGAL, H. LASSWELL, L. CHEN, *supra* note 11, at 272-74, 302, 325-27 (legal status of the Declaration), 564-68, 909, 916-18 (norm of nondiscrimination).

39. *See generally* Paust, *Federal Jurisdiction, supra* note 7, at 218-19, 226-27. *See also supra* note 11; *infra* note 54; DRAFT RESTATEMENT, *supra* note 8, at § 702 (nonexclusive listing of state violations of customary international law if, "as a matter of state policy, it . . . encourages or condones" certain human right prohibitions), § 711 (denial of justice and state responsibility) and reporters' notes 1-2 thereto; Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law,* 48 VA. L. REV. 1226, 1226, 1228-29, 1238-39 (1962); Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 VAND. J. TRANSNAT'L L. 57, 75-79 (1986) (addressing "humanitarian exception" to extradition); Letter from Thomas Jefferson to French Minister, 1793 ("until a reformation of the criminal codes of most nations, to deliver fugitives from them would be to become their accomplices"), *quoted in Ex parte* Kaine, 14 F. Cas. 78, 81 (C.C.S.D.N.Y. 1853) (No. 7,597); Paust, *Introduction, supra* note 27. On individual responsibility for complicitous involvement in international crime, see also Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility,* 57 MIL. L. REV. 99, 166-69 (1972); 1979 Hostages Convention, *supra* note 9, at art. 2(b).

One should also note that a country must not expel or return a person that the Refugee Convention covers (i.e., a person outside one's country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion") "in any manner whatsoever . . . where his life or freedom would be threatened on account of" such categories of discrimination. *See* Convention Relating to the Status of Refugees, July 28, 1951, arts. 1(A)(2), 33(1), 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol] (United States is a signatory to the Protocol and thus indirectly to the Convention). There are some exceptions regarding explusion. *See, e.g., id.* at arts. 1(F) ("serious non-political crime," "war crime," "crime against humanity"), 32, 33(2). But no such exceptions exist with respect to nonreturn (nonrefoulement). *See also* Goldman & Martin, *International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law*, 5 HUM. RTS. Q. 302, 312-13 (1983). Additionally, an express right of access to courts exists. *See* Protocol, *supra*, at arts. 16, 32(2); see also Universal Declaration of Human Rights, *supra* note 32, at arts. 8, 14(1). As a treaty, this is supreme federal law. In the United States, it should also prevail in the case of an unavoidable clash with a mere bilateral extradition treaty, and as human rights law through the United Nations Charter obligations (*e.g.*, arts. 55(c), 56) such law of nonrefoulement should prevail through article 103 of the Charter in the face of any other inconsistent treaty obligation. More generally, of course, Italy and the United States must not become complicitors with respect to foreign state human rights deprivations. *See supra.*

The Universal Declaration also allows the United States to grant "asylum from persecution," see Universal Declaration of Human Rights, *supra* note 32, at art. 141), but

This, of course, provides an answer to Professor Franck's intriguing question concerning extradition of German nationals of Jewish faith to Nazi Germany. If the United States extradited such persons, at least today, to a foreseeable deprivation of fundamental human rights, the United States officials involved would themselves become complicitors in the deprivation of such rights. Further, the United States, contrary to its obligations under the United Nations Charter, would become a complicitor as well (unless the official acts were classified as ultra vires) and the United States would engage in conduct constituting a denial of justice under customary international law. Surely no nation-state should do this and, because international law is part of supreme federal law, no United States official, executive or judicial, should allow this to occur.

D. *Claimed Lack of Jurisdiction in the United States*

Italy should also refuse extradition to the United States if it can show that the United States lacks jurisdiction under relevant principles of international law. It is well-recognized that a nation-state does not have jurisdiction to enforce if, under international law, it has no jurisdiction to prescribe.[40] Fortunately, however, the United States has jurisdiction under the universality theory with respect to any customary international crimes involving hostage-taking, such as acts of genocide or violations of customary human rights.[41]

Yet violations of the Hostages Convention pose a problem. The Hostages Convention, one might argue, creates a new crime[42] that operates

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this is largely discretionary (the right is to "seek and to enjoy" if granted). The power to grant asylum, as a broad customary power tied also to human rights law (the "right to seek"), should also prevail in case of an unavoidable clash with a bilateral extradition treaty, except of course in the case of international crime. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 32, at art. 14(2); Refugee Convention, *supra*, at arts. 1(F)(a), (c); Paust, *Aggression Against Authority, supra* note 16, at 284-85.

40. *See, e.g.*, Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 292 (1982); Paust, *Federal Jurisdiction, supra* note 7, at 199-201; DRAFT RESTATEMENT, *supra* note 8, at § 431(1) and comment a thereto (lack of competence under international law "may be objected to both by the affected person directly and by the state concerned").

41. *See, e.g.*, Paust, *Federal Jurisdiction, supra* note 7, at 211-15, 223-25; Paust, *Aggression Against Authority, supra* note 16, at 290-93.

42. *But see* Universal Declaration of Human Rights, *supra* note 32, arts. 3, 5, 9; International Covenant on Civil and Political Rights, arts. 7, 9, 10, approved by U.N. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967); Decision of the Human Rights Committee on Abduction, 36 U.N. GAOR Supp. (No. 40), at 176-89 (1981); DRAFT RESTATEMENT, *supra* note 8, at 305 (reporters' note 1 to § 432); Paust, *Federal Jurisdiction, supra* note 7, at

on so-called universal jurisdiction by treaty, a jurisdictional competence that the treaty signatories recognized and which is limited to themselves.[43] Since Palestinian defendants may not be nationals of any signatory to the Convention, if the treaty creates a new crime, it would seem to follow that signatories could not rightly prosecute such non-national defendants under the Convention and domestic implementing laws. The prosecuting state would have to demonstrate that customary international law already recognizably proscribed the relevant criminal activity and subjected perpetrators to criminal sanctions. To do so would not be difficult if one could classify the acts of the defendants as conduct violating fundamental human rights based in customary international law. If so, it would not seem to matter that the Hostages Convention supplements a customary prohibition and a jurisdictional competence already extant under the universality principle.

In my view, hostage-taking implicates such customary human rights law.[44] Indeed, strategies of impermissible terrorism necessarily involve violations of human rights laws that are as civilly and criminally sanctionable as any deprivation of fundamental human rights.[45] In this respect, Judge Bork's citation of my writings in his *Tel-Oren* opinion is misleading.[46] The point my writings actually made was that despite disagreement concerning a definition of terrorism, one can recognize an adequate and neutral definition,[47] and it is important to note that human rights law already proscribes strategies of impermissible terrorism regardless of name.[48] Indeed, soon after *Tel-Oren* the United Nations recognizably condemned "all acts of terrorism . . . in all its forms, wher-

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194 & n.14, 213, 231.

43. *See generally*, Paust, *Federal Jurisdiction, supra* note 7, at 214 & n.89; Paust, *Introduction, supra* note 27; Gooding, *Fighting Terrorism in the 1980's: The Interception of the* Achille Lauro *Hijackers*, 12 YALE J. INT'L L. 158, 160 (1987).

44. *See supra* note 42.

45. *See supra* notes 41-42. On human rights sanctions generally, see also Report of the Committee on Human Rights, *supra* note 11; Paust, *Litigating Human Rights, supra* note 11; *infra* notes 54, 57.

46. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 807 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 811 (1985), *citing* Paust, *"Nonprotected" Persons or Things* (hereinafter Paust, *"Nonprotected" Persons*), in LEGAL ASPECTS, *supra* note 32, at 341, 355-56.

47. *See* Paust, *"Nonprotected" Persons*, in LEGAL ASPECTS, *supra* note 32, at 345-52, 370-76, 393; Bassiouni, *An International Control Scheme for the Prosecution of International Terrosim*, in LEGAL ASPECTS, *supra* note 32, at 576-77, 613-14; Paust, *Federal Jurisdiction, supra* note 7, at 192-94; *Terrorism and "Terrorism-Specific" Statutes*, 7 TERRORISM: AN INT'L J. 233 (1984). *See also infra* note 73.

48. *See, e.g., supra* notes 41-42.

ever and by whomever committed"[49] as did the United States Congress.[50]

E. *The* Toscanino *Problem*

An additional difficulty for the United States might involve a claim that whatever jurisdictional competence the United States might have would be obviated if the United States has acquired control of the defendants, directly or through Italy, by its own violation of international law. One might argue, for example, that the United States violated international law when it coerced the Egyptian aircraft by the threat or use of armed force to land in Italian territory. One might argue that the international community cannot tolerate lawless enforcement of the law.

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49. *See, e.g.*, Note by the President of the Security Council, Oct. 9, 1985, U.N. Doc. S/17554 (on behalf of the members of the Council, also endorsing the Secretary General's statement of Oct. 8, 1985), *reprinted in* 24 I.L.M. 1565 (1985); S.C. Res. 579, U.N. Doc. S/RES/579 (1985), *reprinted in* 25 I.L.M. 243 (1986); U.N. G.A. Res. 40/61, 40 U.N. GAOR, U.N. Doc. A/RES/40/61 (1985), *reprinted in* 25 I.L.M. 239 (1986); Paust, *Terrorism and the International Law of War,* 64 MIL. L. REV. 1, 21 (1974), *reprinted in* 14 REV. DE DROIT PENAL MIL. ET DE DROIT DE LA GUERRE 13 (1975). *See also* United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), at 121, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1294 (1970) ("Every State has the duty to refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts . . ." and "no State shall organize, assist, foment, finance, incite or tolerate . . . terrorist . . . activities directed towards the violent overthrow of the regime of another State. . ."); Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, paras. 191, 192, 202, 205 ("support for subversive or terrorist armed activities within another State"), 209, 292(9), *reprinted in* 25 I.L.M. 1023 (1986).

A question remains, however, whether the United Nations actually meant to cover a gap in the customary law of armed conflict and Geneva law that allowed certain forms of terroristic tactics against combatants during an armed conflict. *See* Paust, *Terrorism and the International Law of War, supra*, at 27-31. That the context of armed conflict was fully considered is not evident. Nevertheless, the phrase "wherever and by whomever committed" is quite broad, and the preambular portion of the resolution did refer at least to "relevant instruments on international humanitarian law applicable in armed conflicts." In any event, those who targeted the *Achille Lauro* were certainly not directing their terroristic tactics of hostage-taking against combatants, and such acts remain impermissible under customary laws of armed conflict and Geneva law. *See, e.g.*, Paust, *Terrorism and the International Law of War, supra*, at 14-19, 31-32.

50. *See* H.R. Con. Res. 228, 99th Cong., 1st Sess. (1985), §§ 1(1), 4(b), *reprinted in* 24 I.L.M. 1562, 1563-64 (1985); International Security and Development Cooperation Act of 1985, §§ 503, 505, 507-508, 558 (4), Pub. L. No. 99-83 (Aug. 8, 1985), *reprinted in* 24 I.L.M. 1558, 1558-59, 1562 (1985).

Such a claim by Italy, as a ground for refusing extradition to the United States, would hardly make sense at this late date because Italy has itself taken advantage of any claimed impropriety and has prosecuted the hostage-takers. Nevertheless, one should not dismiss lightly the importance of the claim, based in part on the United Nations Charter. According to United States cases, including *United States v. Toscanino*,[51] the kidnapping of foreign nationals abroad by United States agents without foreign state consent violates the United Nations Charter and, if egregious enough, will lead to a nullification of jurisdiction to prosecute.[52] Some lower federal courts have recognized that the foreign state can later waive an infraction of its territorial integrity,[53] but early Supreme Court opinions may deny waiver of an independent right of the private defendant to remedial relief.[54] Moreover, if the incident also involved a governmental violation of human rights, no foreign state could waive the private right any more than a foreign state could recognize or grant some form of immunity for a deprivation of human rights *erga omnes*.[55]

If the United States violated international law, then even if Italy chose to extradite the accused to the United States, the individual defendants should have standing to raise the *Toscanino* defense to jurisdiction in a United States federal court. If the court did not find the alleged violation to be egregious enough to obviate prosecution, the defendants should still have standing, a cause of action and the right to a civil remedy in United

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51. 500 F.2d 267 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

52. *See, e.g.*, United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66-67 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975); United States v. Toscanino, 500 F.2d at 274, 277-79; *see also* Cook v. United States, 288 U.S. 102, 120-21 (1933) (illegal seizure voided); The Paquete Habana, 175 U.S. 677 (1900) (illegal seizure voided); Rose v. Himely, 8 U.S. (4 Cranch) 241, 276-77 (1808) (courts will disregard foreign judicial decrees if foreign jurisdiction is inconsistent with the law of nations). *Cf.* DRAFT RESTATEMENT, *supra* note 8, § 433, reporters' note 3. For additional recognition of the duty of United States officials "to observe with good faith and scrupulous care" the U.N. Charter and relevant U.N. Security Council resolutions during the process of extradition, see United States v. Steinberg, 478 F. Supp. 29, 31, 33 (N.D. Ill. 1979). *Toscanino* also applied a relevant Security Council resolution. *See* 500 F.2d at 277-78.

53. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d at 67-68.

54. *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 369-79 (1824). *See also* DRAFT RESTATEMENT, *supra* note 8, at 293 (comment a to § 431), 305 (reporters' note 1 to § 432), 485 (comment a to § 711), 500 (comment e thereto), 506 (reporters' note 2 thereto) (denial of access to domestic courts, judicial denial of human rights and denial of remedies for injury inflicted by the state or a private person constitute "denial of justice" for which the state is responsible); *supra* note 11.

55. *See, e.g., supra* notes 14-15, 17; Paust, *Aggression Against Authority, supra* note 16, at 284-85.

States courts,[56] especially for a violation of their human rights.[57] I have argued elsewhere, however, that under the circumstances, the United States diversion of the Egyptian airliner did not involve a violation of international law but, on the contrary, was a permissible use of force "in the common interest" reasonably necessary and proportionate to ensure the enforcement of international criminal law.[58] The United States did not direct the act against Egyptian territorial integrity or political independence as such, and, on balance, the act was arguably consistent with the purposes of the United Nations Charter. As such, the action did not violate article 2(4) of the Charter or article 14 of the Hostages Convention,[59] and the court should deny the defendants' claims to nullify prosecution efforts.

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56. *See, e.g., supra* notes 52, 54. *See also* Paust, *Litigating Human Rights, supra* note 11; *supra* note 11.

57. *See also* Paust, *Aggression Against Authority, supra* note 16, at 302; Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in U.S. Courts* (forthcoming) [hereinafter *On Human Rights*].

58. *See, e.g.,* Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad,* 8 WHITTIER L. REV. 711, 726-28 (1986); Paust, *Aggression Against Authority, supra* note 16, at 300 n.97. For partly supportive views, see Bazyler, *Capturing Terrorists in the 'Wild Blue Yonder': International Law and the Achille Lauro and Libyan Aircraft Incidents,* 8 WHITTIER L. REV. 685, 698-99, 701-03, 705, 707-09 (1986) (rightly noting that several international instruments did not apply to the Egyptian aircraft's flight, that article 51 of the Charter was not applicable for the United States and that the United States had a claim under the doctrines of state responsibility, "hot pursuit" and self-help with respect to Egypt's failure to arrest the suspects); Gooding, *supra* note 43, at 171-72, 175-77 (*but see* Gooding, *supra* note 43, at 163, 168, 170 n.91, 172-73); McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to* Achille Lauro*—Questions of Jurisdiction and Its Exercise,* 16 GA. J. INT'L & COMP. L. 435, 459-60, 464-66 (1986) (wrongly using self-defense rationale; arguing self-help rationale); Note, *The Achille Lauro Incident and the Permissible Use of Force,* 9 LOY. L.A. INT'L & COMP. L.J. 481 (1987); Note, *An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice,* 9 FORDHAM INT'L L. J. 328, 347, 359-62, 367 (1985-1986); *but see id.*, at 330-32, 362-65, 367; McGinley, *The Achille Lauro Affair—Implications for International Law,* 52 TENN. L. REV. 691, 718-21 (1985); Note, *Use of Force: Interception of Aircraft,* 27 HARV. INT'L L.J. 761 (1986). *Cf. id.*, at 770.

59. *See supra* note 58. Additionally, such a use of force was not an "arbitrary" interference with liberty interests protected by human rights law but a reasonably necessary and proportionate effort to assure enforcement of international criminal law. *Cf. supra* note 42.

IV. PROSECUTION IN THE UNITED STATES

As I noted, the United States arguably has jurisdiction under the universality principle if the defendants ever arrive in the United States. Universal jurisdiction by treaty under the Hostages Convention, or jurisdiction under article 5(d) thereof, which adopts the victim or passive personality theory,[60] is highly suspect with regard to defendants who are not nationals of a signatory to the Hostages Convention. A basis under international law (i.e., the universality principle) can exist, however, which permits the United States to use whatever statutory basis for prosecution it finds convenient. Such domestic legislation exists, at least, in the form of the 1984 Act for the Prevention and Punishment of the Crime of Hostage-taking and Aircraft Sabotage.[61]

Moreover, since its founding the United States has exercised universal enforcement jurisdiction against individuals found within its territory.[62] In view of that history and rediscovered views concerning the self-executing nature of United States treaties, one can even argue that a statute is not necessary to impose domestic criminal sanctions for violations of international law.[63] Additionally, one may note that any claims of the defendants to sovereign immunity or related claims to immunity from prosecution are unavailable under international and United States domestic law in the case of infractions of international law.[64]

Nonetheless, the United States indictments of Mr. Abbas and the four hostage-takers in 1985 raise other concerns. Although one of the offenses

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60. *See generally* Paust, *Federal Jurisdiction, supra* note 7, at 201-02.

61. 18 U.S.C. § 1203 (Supp. 1985). Under § 1203(b)(1)(C), if the acts occur abroad and neither the perpetrator nor the hostage victim is a United States national, see § 1203(b)(1)(A), and the offender is not "found in the United States," see § 1203(b)(1)(B), "the governmental organization sought to be compelled" must be "the Government of the United States." One can argue, however, that if several governments are sought to be coerced, the fact that the United States government is one such government is sufficient if the acts occur abroad and none of the other exceptions, *e.g.*, (b)(1)(A) or (b)(1)(B), apply. Thus, the statute is ambiguous with respect to attempts to coerce several governments, a circumstance which arose in the case of the *Achille Lauro* hostage-taking. Nevertheless, the statute applies because United States nationals were victims. *See* 18 U.S.C. § 1203(b)(1)(A).

62. *See, e.g.*, Paust, *Federal Jurisdiction, supra* note 7, at 211-13.

63. *See* Paust, *Rediscovering the Relationship Between Congressional Power and International Law: The Exceptions to the Last in Time Rule Concerning Clashes Between Treaties, Custom and Federal Statutes (with a Restatement of the Draft Restatement)* (forthcoming in 28 VA. J. INT'L L. No. 2).

64. *See, e.g.*, Paust, *Federal Jurisdiction, supra* note 7, at 221-47; *see also* Draft Brief, *supra* note 14; Amerada Hess Shipping Corp. v. Argentine Republic, _____ F.2d _____ (2d Cir. Sept. 11, 1987).

that the indictments specified was hostage-taking, and such is proper, the Executive claimed that the accused also engaged in acts of "piracy as defined by the law of nations."[65] As most individuals who have addressed the matter recognize, however, the claim is almost per se invalid.[66] Contrary to the Executive's claim that seizure and control of the vessel *Achille Lauro* was "for private ends,"[67] which is a necessary element of the crime of piracy under the law of nations, the motives and ends were obviously political in nature regardless of the nationality or other status of the perpetrators or of Palestinians more generally. That the Palestinian faction involved had insurgent status, lacking as it does any viable control of territory, may or may not be the case.[68] Yet such a status is not necessary in order to conclude that the parties engaged in relevant conduct for non-private (i.e., political) ends.[69]

An additional problem with the indictment for piratical acts is the fact that United States cases have recognized that piracy under the law of nations does not occur when the seizure of control and other acts origi-

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65. See 24 I.L.M. 1554, 1556-57 (1985); *see also id.* at 1515 (Remarks of President Reagan, Oct. 11, 1985), 1517 (Briefing by Robert McFarlane, Oct. 11, 1985).

66. *See, e.g.*, Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 910-11 (1986); Note, *Towards a New Definition of Piracy: The* Achille Lauro *Incident*, 26 VA. J. INT'L L. 723, 724, 737-43, 747-48 (1986). *Cf.* McGinley, *supra* note 58, at 697-99; *but see* Gooding, *supra* note 43, at 159.

67. *See* 24 I.L.M. at 1557. Even the Legal Adviser to the United States Department of State recognized that the acts were primarily for political ends and outside coverage of the 1958 Geneva and 1982 United Nations law of the sea conventions. *See* Sofaer, *supra* note 66, at 910-11. He added, however, that the perpetrators "stole money and jewelry." *Id.* at 910.

68. For relevant criteria, see, e.g., Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 11-15 (1978). In my opinion, the Palestine Liberation Organization does not meet the test even for insurgent status (lacking as it obviously does the effective control of territory). It does not follow that Palestinians as such are not members of a nation. For evidence of a different sort of "status" for the Palestine Liberation Organization, see McGinley, *supra* note 58, at 700.

69. *See* Note, *supra* note 66, at 730, 733, 735-43, 749; Dinstein, *supra* note 14, at 56; Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y.B. INT'L L. 496, 497-98 (1961); McCredie, *supra* note 58, at 447; Sofaer, *supra* note 66, at 910-11; Vali, *The Santa Maria Case*, 56 NW. U.L. REV. 168, 174 (1961); *see also* J. SWEENEY, C. OLIVER, N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 203 (2d ed. 1981); Paust, *The Seizure and Recovery of the* Mayaguez, 85 YALE L.J. 774, 778, 804-05 (1976); *cf.* McGinley, *supra* note 58, at 697; *but see id.* at 698-700; The Ambrose Light, 25 F. 408, 411-12 (S.D.N.Y. 1885) (if no belligerent status). A United States case rejecting the piratical label in the context of a belligerency was Dole v. New England Mutual Marine Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966). For other labels of the acts involved, see also *supra* note 31.

nate from the same vessel.[70] That modern treaty law has retained the same limitation found in prior customary law is highly probable.[71] For these reasons, the indictment for piracy is per se invalid and, moreover, cannot support a request for extradition. The charge of hostage-taking remains, however.

Finally, although the United States has useful new legislation for prosecuting certain acts of terrorism in the 1984 hostage-taking legislation, significant gaps in federal legislation still remain. If Congress is serious about assuring effective sanctions against all forms of impermissible terrorism, and one must assume that Congress is serious,[72] then legislative efforts realistically designed to reach all forms of terrorism should result in the adoption of either a new statute proscribing acts of international terrorism as such[73] or the draft legislation offered previously on Offenses Against Human Rights.[74]

Additionally, it is worth checking to assure that any new forms of legislation in related areas are not detrimental to efforts to better effectuate both civil and criminal sanctions against strategies of terrorism violative of fundamental human rights.[75] At several levels an inescapable link

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70. *See, e.g.*, United States v. Palmer, 16 U.S. (3 Wheat.) 610, 635, 642-43 (1818). *See also* Note, *supra* note 66, at 742 (the Santa Maria incident), *citing* M. MCDOUGAL W. BURKE, THE PUBLIC ORDER OF THE OCEANS 821-22 (1962); Dinstein, *supra* note 14, at 56-57; McCredie, *supra* note 58, at 444-45.

71. *See* Geneva Convention on the High Seas, April 29, 1958, art. 15(1)(a) ("directed . . . against *another* ship or aircraft, or against persons or property on board *such* ship or aircraft"), 13 U.S.T. 2312, 2137 T.I.A.S. No. 5200, 450 U.N.T.S. 82, 90 (emphasis added); 1982 United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 101, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982); Note, *supra* note 66, at 725, 727-28, 731-37, 742-43, 748-49 & n.127; McCredie, *supra* note 58, at 445-46, 448; McGinley, *supra* note 58, at 696. *But see* McGinley, *supra* note 58, at 696-97 (also misconstruing a United States case, United States v. The Brig Malek Adhel, 43 U.S. (2 How.) 210, 229, 232-33 (1844)). Article 15(1)(b) of the 1958 Convention does not apply because acts on an Italian flag vessel are within the jurisdiction of Italy (i.e., not "outside the jurisdiction of any State").

72. *See supra* note 50.

73. *See* Paust, *Federal Jurisdiction, supra* note 7, at 215-16, 250-51. *See also* H.R. Con. Res. 228, *supra* note 50, at § 4(b), *reprinted in* 24 I.L.M. at 1564; International Security and Development Cooperation Act, *supra* note 50, at § 507 (the United States should negotiate an international treaty that includes "an operative definition of terrorism"); *supra* note 47.

74. *See* Paust, *Federal Jurisdiction, supra* note 7, at 216, 250.

75. For a draft resolution of Congress to better effectuate human rights, see 81 PROC., AM. SOC. INT'L L. (1987) (forthcoming). *See also supra* note 54 (state responsibility to provide access to courts and allow private remedy for violation of human rights); Paust, *On Human Rights, supra* note 57.

between impermissible acts of terrorism and violations of human rights exists. When human rights are furthered, terrorism is necessarily set back.[76] For several reasons, an effective assurance of human rights and effective use of civil and criminal sanctions against the deprivation of human rights by governments and private perpetrators will bring an end to terrorism.

76. *See also* Paust, *The Link, supra* note 10.