THE ENTEBBE HOSTAGE CRISIS

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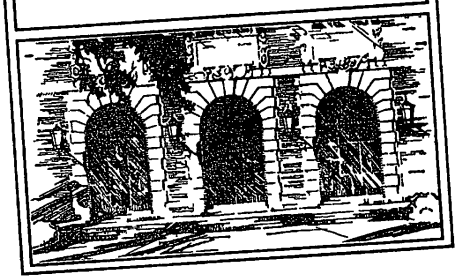

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by Francis A Boyle**

States create the rules of international law for the express purpose of serving and advancing their respective national interests States do not adopt useless impracti cal or dangerous rules to regulate their relations in the first place The requirements of international law are substantially albeit imperfectly congruent with the dic tates of vital national interests and vice versa Any system of law even an imperfect one usually proves to be more beneficial and therefore preferable to each partici pant than the existence of no legal rules at all Therefore in times of international crisis adherence to the rules of international law oftentimes proves to be in a state s best interest anyway The reason why two cars approaching each other on a narrow mountain road obey the rules of the road by each driving on the right hand side supplies an excellent analogy to why states will follow international law in time of crisis

During an international crisis states do not sacrifice considerations of interna tional law for the promotion of their vital national interests In situations of appar ent conflict between the two governmental decisionmakers commence to define or redefine their vital national interests to include considerations of international law conversely they define or redefine international law to take account of their vital national interests Invariably decisionmakers engage in both processes simulta neously In this fashion vital national interests are tailored to the demands of international law and vice versa An initially perceived gap between the two is narrowed from both sides to a point of at least plausible argument concerning its nonexistence

This process of dialectical interaction between vital national interests and international law during and following a crisis creates a strong force towards recon ciliatory modification upon each If a similar crisis occurs again in the future the experience of the first crisis will have already altered the contours of the interna tional system so as to render the second dispute more manageable Or a similar crisis might not even erupt again because a body of national and international law procedures or institutions developed in the aftermath of the first crisis specifically for the purpose of preventing such problems in the future Likewise vital national

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interests will have become altered in the wake of a crisis in order to make recur rence of such a crisis less likely In such instances international law international organizations and vital national interests work hand in hand to prevent the recur rence of crises and thereby maintain the stability of the international system for all its members

The purpose of this article is to develop a theoretical framework for analysis of the various functions performed by international law and international organiza tions during international crises It examines the Entebbe hostages crisis in order to elaborate a common schema applicable to the phenomenon of international crisis in general In chronological order I shall delineate five functions performed by inter national law and international organizations during the Entebbe crisis (1) defini tion (2) decision (3) adjudication (4) resolution and (5) redefinition [1] This functional approach will permit Entebbe to be understood as one paradigmatic manifestation of the dialectical interaction between international law and interna tional politics in time of crisis During an international crisis law and politics are so highly interdependent as to be virtually indistinguishable International politics is and becomes international law while international law is and becomes international politics A functional analysis of international law will reveal these dynamic proces ses by which the entire international system proceeds to cope with a crisis in order to survive

1 On June 24 1976 Air France flight 139 from Tel Aviv to Paris was hijacked by three men and a woman who identified themselves as members of the Popular Front for the Libera tion of Palestine (a splinter group within the Palestine Liberation Organization) approximately eight minutes after a scheduled stop in Athens where they had boarded the plane See Smith & Shuster Drama in Hijacking of Jet to Uganda A Long Week of Terror and Tensions *N Y Times* (July 11 1976) § 1 at p 1 col 4 (hereinafter cited as Smith & Shuster) The jet was then flown to Benghazi Libya for refueling See id at p 16 col 1 The Rescue We do the Impossible *Time* (July 12 1976) at p 21 p 22 (hereinafter cited as The Rescue) After the release of a pregnant woman at Benghazi the Airbus continued on to the Entebbe air port in Uganda where it landed at 3 00 a m on June 28 Smith & Shuster at p 16 col 2 Nine hours later the passengers disembarked and were transferred to a seldom used airport terminal Id The Rescue at p 22

The hijackers demanded the release of 53 imprisoned freedom fighters" (40 held in Israel with the rest scattered among France Switzerland Kenya and West Germany) by the after noon of July 1 in exchange for the safe return of the 241 passengers and 12 crew members of the hijacked plane The Rescue at p 22 Otherwise they threatened to kill all the hosta es Id at p 23 On June 30 the hijackers released 47 non Israeli women and children Smith & Shuster at p 16 col 4 Shortly before the expiration of the July 1 deadline Israel agreed to negotiate The Rescue at p 23 The hijackers subsequently released another 101 captives keeping only Israelis those believed to be Jewish and the Airbus crew Id The deadline was ex tended to July 4 Id

At 11 30 p.m on Saturday July 3 the Israeli Defense Forces conducted a military raid which rescued the hostages Smith & Shuster at p 16 cols 5 8 During the ensuing battle three captives one Israeli soldier at least twenty Ugandan soldiers and all of the hijackers were killed Id One other hostage Dora Bloch who held dual British and Israeli nationalities died in Uganda though not in the raid She had been hospitalized in Kampala prior to the time of the raid after she began to choke on a piece of meat that had lodged in her throat while she was eat ing She was left behind and later killed on Idi Amin s orders H Kyemba *A State of Blood* (1977) pp 166-78 (hereinafter cited as Kyemba) See also Y Ben Porat E Haber & Z Schiff Entebbe Rescue (1977) (hereinafter cited as Entebbe Rescue) Y Rabin *The Rabin Memoirs* (1979) pp 282 89 W Stevenson *90 Minutes at Entebbe* (1976) (hereinafter cited as Steven son)

I DEFINITION

The first function that international law performed in the Entebbe crisis was the definition of the situation for the actors involved Even before the hijacking of the Air France plane that led to the Entebbe raid international law had already established standards of behavior that were continually relevant to the facts of the crisis during its various stages of development These rules of law provided a fountain head for the generation of conceptions of legality or illegality right or wrong just or unjust through which the actors perceived the unfolding of events The rules shaped the perceptions that conditioned the responses by governmental decision makers to the crisis There was a dynamic interaction between initial conduct its evaluation in accordance with perceived standards of behavior and responsive conduct at all times

A functional analysis of international law de-emphasizes the traditional positivist concern with whether a particular set of rules was legally binding in a formal sense upon parties to a crisis What becomes critically important instead are the perceptions about rules held by decisionmakers themselves Due to the force of circumstances crisis management decisionmakers demonstrate a marked tendency to blur obscure or ignore the precise distinctions intrinsic to formal legal technicalities In their minds principles *de lege ferenda* can readily be treated as *lex lata*. From that point these perceptions are quickly translated into political action

1 1 Definitional context of the Entebbe hijacking and hostage-taking

1 1 1 Hijacking

Thus the provisions of the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft of September 14 1963 [2] were relevant to the Entebbe hijacking by way of analogy although not technically binding upon Israel and Uganda in relation to each other at the time since the former was a signatory while the latter was not Article 11 of the Tokyo Convention obligates the state of landing to take all appropriate measures to restore control of an unlawfully seized aircraft to its commander to permit the passengers and crew to continue their journey as soon as practicable and to return the aircraft and cargo to those entitled to possession It has been argued that irrespective of the Tokyo Convention these provisions are declaratory of principles of customary international law binding upon signatories and non signatories alike [3] Article 13 of the Tokyo Convention requires the state of landing to take into custody an alleged hijacker but the state of landing is not required to choose between prosecution or extradition of the alleged hijacker

2 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft done September 14 1963 0 UST 2941 TIAS No 6768

3 See Lissitzyn Hijacking International Law and Human Rights in E McWhinney ed *Aerial Piracy and International Law* (1971) p 116 at pp 117 18

At the time of the Entebbe crisis both Israel and Uganda were parties to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of December 16 1970 [4] Article 4 thereof required Uganda to take such measures as were necessary to establish its jurisdiction over the hijackers Under Article 6 Uganda was required to take the hijackers and their accomplices into custody Article 7 obligated Uganda either to extradite the offenders or to submit their case to its competent authorities for purpose of prosecution Though the Hague Convention does not specifically require that the hijackers actually be prosecuted Article 7 required Ugandan authorities to make the decision whether to prosecute as they would for an ordinary offense of a serious nature under domestic law By the terms of Article 9 Uganda had to take all appropriate measures to restore control of the aircraft to its lawful commander to facilitate the continuation of the journey of the passengers and crew as soon as practicable and to return without delay the aircraft and cargo to its rightful owners These were positive norms of international law directly binding upon Uganda which created undisputed obligations in its relations with Israel

The act of unlawful seizure of aircraft would usually include within itself the act of unlawful interference with an aircraft as defined by Article 1 of the Montreal Convention to Discourage Acts of Violence Against Civil Aviation of September 23 1971 [5] So the obligations of that convent on were brought into play as well Article 5 requires a contracting state to establish its jurisdiction over the offense Article 6 to take an offender into custody Article 7 to extradite the offender or else to submit the case to the state s own competent authorities for prosecution Article 10 to facilitate the continuation of the journey of the passengers and crew as soon as practicable and without delay to return the aircraft and cargo to those lawfully entitled to possession Although Israel was a signatory to the Montreal Convention at the time of the crisis Uganda was not Nevertheless its provisions were relevant to Entebbe by way of analogy Arguably these principles were generally declaratory of customary international law on this subject [6]

1 1 2 Piracy

The Entebbe situation also presented an analogy to the international crime of piracy as defined by article 15 of the 1958 Geneva Convention on the High Seas [7] To be sure this hijacking did not fit within the formal definition of the term

4 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) done December 16 1970 22 UST 1641 TIAS No 7192

5 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) done September 23 1971 24 UST 565 TIAS No 7570 See Ambramovsky Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II The Montreal Convention 14 Col J Transn L (1975) p 268 at pp 286-87

6 See Ambramovsky Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part III The Legality and Political Feasibility of a Multilateral Air Security Enforcement Convention 14 Col J Transn L (1975) p 451 at pp 466-70

7 Geneva Convention on the High Seas opened for signature April 29 1958 Art 15 13 UST 2317 2317 TIAS No 5200

piracy as set out in the convention since it was neither (1) undertaken for private ends nor (2) directed by one plane against another and (3) occurred over Greece and therefor was within the territorial jurisdiction of a state Yet in analogy was there to be seized upon and used to define the context of the crisis [8]

1 1 3 Hostage taking

Finally the Entebbe crisis also invoked an analogy to the principle of international law forbidding the taking of civilian hostages during time of armed conflict Article 34 of the Fourth Geneva Convention of August 12 1949 explicitly prohibits the taking of civilians as hostages during times of international armed conflict [9] Article 147 defines this offense to be a grave breach of the convention warranting severe penal sanctions [10] Moreover Article 146 of the Fourth Geneva Convention requires a signatory to search for persons who have committed grave breaches and either bring them before its own courts or else hand such persons over for trial to another concerned party [11] Common Article 3 to all four of the 1949 Geneva Conventions prohibits the taking of hostages with respect to persons having no active part in hostilities in cases of armed conflict not of an international character [12] Of course none of the four Geneva Conventions was directly applicable to the Entebbe hostage situation because it did not occur during an international armed conflict But if the taking of civilian hostages is prohibited in times of both international and civil war then *a fortiori* it is or should be forbidden during peace time as well This principle should hold true even during so-called wars of national liberation Nevertheless these latter two points had not been codified into positive treaty law by the time of the Entebbe crisis Entebbe would generate the momentum for closure of the last loophole in the web of international law against the taking of hostages

1 1 4 State responsibility

Taken together these authorities established a basic framework of standards for state behavior and responsibility for incidents of international civil aviation hijacking and transnational hostage taking A state's failure to live up to the spirit of these authorities and to follow at least in a general fashion the shared pronouncements contained in them could only sharpen the perceived incongruity between its action and the fundamental requisites of international deportment Uganda's outright violation of the terms of the Hague Convention could only have contributed to the creation of a strong impression among Israeli governmental decision makers that Uganda's behavior was inexcusable under even minimum standards of international law and politics As will be demonstrated these perceptions exerted a profound influence upon the Israeli decisionmakers who launched the raid at Entebbe

8 See e g the comment made by Israeli Ambassador Herzog in the Security Council Entebbe debates "The act of hijacking can well be regarded as one of piracy 31 UN SCOR (1939th mtg) 53 55 UN Doc S/p v 1939 (prov ed 1976)

9 Fourth Geneva Convention of August 12 1949 Art 34 6 UST 3516 3540 TIAS No 3365

10 Id Art 147 6 UST 3516 3618 TIAS No 3365

11 Id Art 146 6 UST 3516 3616 TIAS No 3365

12 First Geneva Convention of August 12 1949 Art 3 6 UST 3114 3118 TIAS No 3362 Second Geneva Convention of August 12 1949 Art 3 6 UST 3217 3222 TIAS No 3363 Third Geneva Convention of August 12 1949 Art 3 6 UST 3316 3320 TIAS No 3364 Fourth Geneva Convention of August 12 1949 Art 3 6 UST 3516 3520 TIAS No 3365

1 2 Definitional context of the Entebbe raid

An entire catalogue of well known principles strictures and doctrines of public international law are directly applicable to the military operation at Entebbe itself or indeed to any contemporary use or threat of force in international relations Relevant treaty law includes the UN Charter's Article 2(3) [13] and Article 33(1) [14] obligations for the peaceful settlement of disputes the Article 2(4) [15] prohibition on the threat or use of force and the Article 51 [16] right of individual or collective self defence Related to the right of self -defense are its two fundamental requirements for the necessity [17] and the proportionality [18] of the forceful response to the threat

In addition to treaty provisions principles of customary international law also operate in this area They include the doctrines of intervention protection and self help [19] These three doctrines however were rejected by the International Court of

13 UN Charter Art 2 para 3 provides All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered"

14 UN Charter Art 33 para 1 provides The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security shall first of all seek a solution by negotiation enquiry mediation conciliation arbitration judicial settlement resort to regional agencies or arrangements, or other peaceful means of their own choice "

15 UN Charter Art 2 para 4 provides All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations

16 UN Charter Art 51 states Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security Measures taken by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security

17 As definitively stated by Secretary of State Webster in the case of *The Caroline* self defence is justified when the necessity of that self-defence is instant overwhelming and leaving no choice of means and no moment for deliberation See *The Caroline* 2 J Moore *Digest of International Law* (1906) p 409 at p 412 W Bishop *International Law* (3d ed 1962) pp 916 17

18 See e g D Bowett *Self Defence in International Law* (1958) p 13

19 See Letter of July 9 19 6 from Myres S McDougal and Michael Reisman to the Editor *N Y Times* (July 16 1976) at p A20 col 3 (hereinafter cited as McDougal & Reisman Letter)

Justice in th *Corfu Channel Case* [20] as incompatible with the conduct of interna tional relations in the post-Charter world [21] Nevertheless the facts of that case unlike Entebbe did not involve an imminent threat to human life A dissenting opinion by Judge Azavedo [22] and an individual opinion by Judge Alvarez [23] recog nized the right of a state to intervene and use force in another state in the event of an emergency or exceptional circumstances respectively The Entebbe hos tage taking crisis might very well have fit within these putative exceptions to a universal prohibition against the use of force across state lines

Finally three seminal General Assembly resolutions have a distinct bearing on this issue The Declaration on the Inadmissibility of Intervention [24] The Declara tion on Principles of International Law concerning Friendly Relations and Co operation among States in accordance with the Charter of the United Nations [25] and The Definition of Aggression [26] Considered together these three resolutions can be interpreted to stand for the general proposition that in the opinion of the UN General Assembly nonconsensual military intervention by one state into the territorial domain of another state is prohibited for any reason whatsoever

2 DECISION [27]

After defining the situation for the actors involved the next function performed by international law during the Entebbe crisis was to serve as an element in the concerned national and international decisionmaking procedures This section of the article will describe how the aforementioned definitional framework of positive legal rules entered into the decisionmaking process of the Israeli government during the Entebbe crisis and once there how international law thereby determined the course of decisions actually taken and thus the outcome of events One crucial reason for the Israeli government s affirmative decision to launch the Entebbe raid was its bona fide belief that the operation was consistent with the requirements of international law Therefore the hypothetical conjecture that Israel would have launched the raid even if the government had believed it was illegal becomes imma terial

2 1 Crisis management team

According to its formal practice the Israeli Labor government dealt with inter national crises by the formation of a crisis management team consisting of a small number of key cabinet ministers and their chief assistants [28] The ultimate decisions were discussed and made under the guiding influence of the Prime Minister and transmitted to the full cabinet for debate and approval Immediately upon receipt of the information that the Air France plane had been hijacked with a large number of Israeli nationals aboard Prime Minister Rabin directed his head of bureau to convene a special meeting of five Ministers of the Government [29] Peres (Defense) Allon (Foreign Affairs) Yaakobi (Transportation) Zadok (Justice) and Galili (Minister without Portfolio) [30] The team was formed on a functional basis and worked on the principle of a highly compartmentalized division of labor [31] Peres was in charge of the design and execution of the military operation Allon handled the foreign affairs aspects of the crisis Yaakobi was designated to supervise bringing the situation to the attention of the International Civil Aviation Organization (ICAO) and the International Federation of Airline Pilots Associations (IFALPA) as well as to explain the decisions of the government to the public especially its initial stance of non negotiation with the hijackers [32] Galili participated as confi dant to the Prime Minister

Even at this formative stage of the decisionmaking process it is significant that the Minister of Justice was included in the team Yaakobi later said that the Minis ter of Justice was routinely included in crisis management teams dealing with interna tional problems in order to present the legal aspects of the crisis to the other mem bers for their consideration For example the Minister of Justice would give the members of the team opinions on the progress of the negotiations and any advise ments under relevant international law Yaakobi stated that Zadok was supposed to and did provide his opinion on the legality of the military operation In Yaakobi s view it was necessary for the Minister of Justice to be in the group because consid erations of legality are important to Israeli public opinion and to public opinion abroad particularly Israel s friends among the Western democracies

The routine inclusion of the Minister of Justice in Israeli international crisis management teams is especially significant when compared with American practice In the United States this would be equivalent to formally including the Attorney General in crisis management decisionmaking teams for the express purpose of ren

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Yet fifteen years earlier the doctrine of humanitarian intervention was branded amorphous in M McDougal & F Feliciano *Law and Minimum World Public Order* (1961) p 536 (hereinaf ter cited as M McDougal & F Feliciano)

20 Judgment in the Corfu Channel Case ICJ Rep (1949) p 4

21 Id at pp 34 35

22 Id at p 108

23 Id at p 47

24 G A Res 2131 20 UN GAOR Supp (No 14) 11 UN Doc A/6014 (1965) Art 1 states unequi ocally No State has the right to intervene directly or indirectly for any reason whate er in the internal or external affairs of any other State Consequently armed interven tion and all other forms of interference or attempted threats against the personality of the State or against its political economic and cultural elements are condemned

25 G A R s 2625 25 UN GAOR Supp (No 28) 121 UN Doc A/8028 (1970)

26 G A R s 3314 29 UN GAOR Supp (No 31) 142 UN Doc A/9631 (1974)

27 This section is based in substantial part upon an interview with Mr Gad Yaakobi Israeli Minister of Transportation durin the Entebbe crisis in Boston on October 19 1977 (hereinaf ter cited as Yaakobi Interview) I would like to thank Mr Yaakobi for his time and co-opera tion

28 Id

29 Entebbe Rescue *supra* n 1 at p 30

30 Id at viii ix at p 38

31 Yaakobi Interview *supra* n 27

32 Id

dering legal opinions throughout the process of decision Instead that task is dele gated to the Secretary of State with the assistance of the Legal Adviser and his Of fice [33] In effect the Secr tary of State must consider and balance both the politi cal and the legal aspects of the situation This practice risks subordination or at least diminution of legal considerations to the foreign policy dimension of the crisis Worse yet legal arguments might be manufactured as *ad hoc* or *ex post facto* justifications for decisions taken on the grounds of national interest and political power irrespective of international legal considerations [34] Because current United States practice does not routinely provide for independent institutional representa tion of international legal considerations at the highest echelon of crisis decision making these risks are real ones indeed

By including the Israeli Minister of Justice in the crisis management team it be came possible to interject legal considerations directly into the entire course of the decisionmaking process Justice had a voice and a vote equal to that of Defense and Foreign Affairs Unlike American practice this allowed for direct equal and inde pendent institutional access to the highest echelon of the crisis management deci sionmaking The legal aspects of the crisis did not risk dilution by the foreign policy dimension in a stage penultimate to their presentation before the determinative body Of course once the legal aspects were presented they had to compete in the marketplace of ideas drawn from other perspectives But it is significant that those legal ideas were presented and on an independent basis in the first place During the Entebbe crisis international law had its own personal advocate Zadok could use his considerable influence to ensure that Israel protected its vital national inter ests at stake in Uganda in a manner compatible with his perception of the require ments of public international law [35]

2 2 Early decisions

The conclusion that Zadok s influence was considerable is supported by exami nation of the first set of decisions taken at the initial meeting of the ministerial crisis management team [36] several of which were legal in nature The first decision was to contact the French government to express the official Israeli position that France as owner of Air France had ultimate legal responsibility for the safety of all passengers and was obliged to do everything in its power to secure the release of all passengers without discrimination particularly against Israeli nationals or dual nationals Second the team decided that the Minister of Transportation should ur gently approach the president of ICAO to demand vigorous action for the release of all passengers Third it was decided that the managing director of the Israeli air line El Al should pressure the president of IFALPA for the same purpose

Other decisions in the early stages of the crisis also had a legal character Profes sor Shlomo Avineri the Director General of the Foreign Ministry [37] suggested to Foreign Minister Allon that Haim Herzog Israel s Ambassador to the United Na tions be utilized [38] Allon accordingly instructed Herzog to talk to Secretary Gene al Waldheim and secure his personal intervention in an effort to obtain the safe release of all hostages [39] According to Yaakobi the crisis management team did not take this UN approach seriously because of the constant attacks upon Israel in the UN throughout the preceding several years But if it could help in some way why not? [40]

From their intelligence sources the crisis team knew that Amin was co-operating with the hijackers [41] The Israeli government had dealt with Amin before so the de cision team felt they knew his nature well enough Yaakobi characterized Amin as crazy but talented wild with good intuitions and clever but totally unpredictable After a period of close co-operation between the two governments Amin broke diplomatic relations in 1972 because Israel had refused to provide him with bom bers to hit Tanzania [42] installed the PLO in the private residence of the Israeli am bassador in Kampala [43] and thoroughly associated himself with the hardline anti Israel policy of that organization [44] These experiences with Amin led the decision team to expect the worst from him and consequently to explore the possibility of a military solution from the immediate outset of the crisis [45]

These shared perceptions on the need for military intervention were strengthen ed by the behavior of France Yaakobi was highly critical of the role the French government played throughout the entire affair In his opinion the French were re luctant to help Israel because of France s desire to minimize its involvement in a dispute concerning the Palestinian cause Presumably this reluctance was the product of a reorientation of French foreign policy towards a more favorable pro

33 See Bilder "The Office of the Legal Adviser The State Department Lawyer and Foreign Affairs 56 AJIL (1962) p 633

34 See e g Berger The President s Unilateral Termination of the Taiwan Treaty 75 Nw UL Rev (1980) p 577

35 Zadok had been Minister of Justice since 1974 and before that Minister of Commerce and Industry from 1965 to 1966 A graduate from Jerusalem Law School he joined the Hagana and Jewish Settlement Police and fought with the Israeli Defense Forces in the War of Indepen dence He was Deputy Attorney General from 1949 to 1952 Lecturer in Law at T l Aviv Law School from 1953 to 1961 and among other positions had been Chairman of the key Kne set Foreign Affairs and Defense Committee and member of the Knesset Constitutional Legal and Judicial Committee See generally I B n (Benditer) and M Grunberg eds *Who s Who in Israel* (18th ed 1978) p 401

36 See Entebbe Rescue *supra* n 1 at pp 39-40

37 Preface to id at viii

38 Entebbe Rescue *supra* n 1 at p 175

39 Stevenson *supra* n 1 at pp 28 29

40 Yaakobi Interview *supra* n 27 UN Secretary-General Kurt Waldheim originally called the Entebbe raid a serious violation of the sovereignty of a State Member of the United Nat tions 31 UN SCOR (1939th mtg) 7 8 UN Doc S/p v 1939 (prov ed 1976) UN Press Release SG/SM/2343 (July 8 1976) at 2 para 9

41 Stevenson *supra* n 1 at p 11 Yaakobi Interview *supra* n 27 Despite Israeli allega tions to the contrary before the Security Council Amin did not have prior knowledge of the hijacking plan Yaakobi Inter iew *supra* n 27

42 31 UN SCOR (1939th mtg) 59 60 UN Doc S/p v 1939 (prov ed 1976) Entebbe Rescue *supra* n 1 at pp 99 100

43 Entebbe Rescue *supra* n 1 at p 89

44 Stevenson *supra* n 1 at pp 66 69

45 Yaakobi Interview *supra* n 27

Arab stance after the 1967 Six Day War [46] France needed to guarantee its oil supplies by not unduly offending Arab pro Palestinian sentiments Therefore according to Yaakobi the French government informed Israel that any effort on its part that was more than just an appeal to Amin would be counterproductive Yet France did appeal to the Ugandan government for the safe release of all hostages [47]

Yaakobi stated that Zadok told the crisis management team that under international law France as the owner of the plane had complete responsibility to secure the release of all passengers This legal conclusion had a definite impact upon the decisionmakers s perception of French reluctance to act and further narrowed their perception of available options [48] If France was shirking its international duties if the UN was paralyzed and largely ineffective if Uganda was actively assisting the hijackers Israel would have to take the matter into its own hands to save the lives of its nationals This conclusion became crystal clear when all of the non Israeli hostages were voluntarily released by the hijackers and flown to safety [49]

2 3 Narrowing the options

At a meeting of the Security and Foreign Affairs Committee of the Knesset Prime Minister Rabin and Director General Avineri stated that Israel was not asking for formal Security Council intervention pursuant to Article 35 of the Charter [50] because Israel did not want to appear willing to relieve France of ultimate responsibility for the fate of the hostages [51] But a perceived French reluctance to fulfill its duties under international law was not the only reason Israel decided not to go to the Security Council which was in session at this time on another matter [52] For the decision had been essentially made to go ahead with the raid and as Israeli Foreign Minister Allon explained when he specifically requested French Foreign Minister Sauvagnargues not to bring the matter to the attention of the Security Council on his own accord this approach would only complicate matters" [53] Yaakobi said that the judgment of the crisis management team was that if the matter went to the Security Council a resolution would be passed calling upon the hijackers to release the hostages and in addition calling upon all states not to take any type of military action or use force in any way The crisis management team feared that Israeli disobedience of a Security Council resolution would have had an adverse impact upon Israeli domestic public opinion and upon international public opinion especially among those sectors in the West upon which Israel traditionally relied for support whereas the hijackers would not obey a UN Security Council resolution in any event Thus an Israeli or French approach to the Security Council offered Israel no benefits and would at least add significantly to the political costs of a rescue operation and would likely limit Israel s freedom to pursue a unilateral military solution to the problem Since the decision to intervene unilaterally if possible had already been made a request for UN intervention would have been counterproductive

Even in its regrettable failure to go to the Security Council however Israel pursued a course of conduct which minimized the force of any allegations that it had violated international law The Israeli crisis management team had three basic alternatives before it (1) not to launch the raid at all (2) to launch the raid without any prior referral to the Security Council (3) to bring the matter to the attention of the Security Council and risk having to launch the raid while the debate was in progress or after passage of an anticipated Security Council resolution prohibiting the use of force Of these three alternatives the second was the least objectionable whether viewed from a legal moral or political perspective

Concerning the first option intelligence sources indicated that the hijackers were planning to execute one or more hostages on Sunday July 4 to demonstrate their determination to secure release of their imprisoned comrades [54] Permitting the risk of imminent death for the hostages when a raid was possible was viewed as a completely unacceptable alternative to the decisionmakers Yaakobi stated that the most important shared common denominator within the operative assumptions of the members of the crisis management team was survival The physical survival of approximately 100 Israeli nationals or dual nationals was perceived to be at stake and with them the very ability of the State of Israel to ensure its own existence The spirit of the State of Israel was not to surrender its survival or jeopardize its existence in any way So option one was discarded once a viable military plan was formulated

The third option would have opened Israel to charges of bad faith and illegality If Israel or France (with Israel s approval) had brought the matter to the attention of the Security Council and Israel had then gone ahead and launched the raid while the debate was in progress Israel would have found it difficult to avoid the charge that it was obligated by such reference to await the outcome of the debate in the Security Council before acting that its precipitate unilateral action had prevented the Security Council from attempting to achieve a peaceful settlement of the dispute and thus had violated UN Charter Articles 2(3) and 33 Of course to launch the raid in the face of a Security Council prohibition against the use of force would have amounted to a more serious violation of Israel s obligation under Article 25 of the Charter to carry out the decisions of the Security Council [55] Option three would also have undercut the Article 51 self-defense argument that Israel needed to

46 W Laqueur *Confrontation The Middle East and World Politics* (1974) pp 162-63 Allon Israel The Case for Defensible Borders 55 Foreign Aff (1976) p 38 at pp 52 53

47 31 UN SCOR (1939th mtg) 16 UN Doc S/p v 1939 (prov ed 1976) Council Fails to Adopt Draft Resolution after Considering Uganda Hijacking Issue *UN Chronicle* (August September 1976) at pp 15 16

48 Yaakobi Interview *supra* n 7

49 Stevenson *supra* n 1 at p 31

50 UN Charter Art 35 para. 1 states Any Member of the United Nations may bring any dispute or any situation [which might lead to international friction or give rise to a dispute] to the attention of the Security Council or of the General Assembly

51 Stevenson *supra* n 1 at p 29

52 See nn 89 94 and accompanying text *infra*

53 Entebbe Rescue *supra* n 1 at p 265

54 Stevenson *supra* n 1 at p 56

55 UN Charter Art 25 provides The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter

overcome any alleged violation of Article 2(4) This option entailed the risk that the Security Council either would have been in the process of acting or would already have acted when Israel launched the raid making difficult any Israeli claim to a unilateral right of individual self-defense

The second option was the most appealing of the three To be sure Israel could be left open to the charge that it had violated its Charter obligation to seek a peaceful settlement of its dispute with Uganda before the Security Council But Israel was pursuing a peaceful settlement of this dispute on all other fronts including negotiations with the hijackers A gesture to the Security Council would in all probability have been futile and perhaps have occasioned delay in the rescue operation at the expense of the hostages s lives Option two would also allow Israel to make a solid claim that the raid was a legitimate exercise of its right of self defense pursuant to Article 51 of the Charter and the legitimacy of this claim could then be tested at the Security Council but at a time when 100 human lives were no longer in jeopardy

In effect the Israeli governmental decisionmaking team found itself engaged in the classic dilemma of choosing the least of several evils [56] If successful option two would preserve human life in a manner that was arguably consistent with the standards of international law It would certainly not have been the expression of disdain and contempt for the Security Council nor the flagrant breach of international law risked by option three And it did not like option one surrender the lives of the hostages to the good will of the hijackers and Idi Amin By choosing option two Israel operated in accordance with the standards of international law to the best of its ability under these unique historical circumstances

2 4 Decision to intervene

By the time of the final meeting of the ministerial crisis management team which would decide whether to launch a raid Defense Minister Peres believed that three out of the six members of the team – Yaakobi Allon and himself – would support intervention at any cost or risk Peres needed one more vote to gain a majority and for that he tried to convince Minister of Justice Zadok to agree to a raid Zadok had already resolved any questions about the legality of such an operation in its favor Upon the approach of Peres before the meeting Zadok was reported to have said The question isn t what Zionism and our sovereignty can expect if we don t rescue the hostages The question is whether there is a plan for a military rescue – one with a high probability of success? [57] Peres responded affirmatively and Zadok nodded

According to Yaakobi at that fateful team meeting when Zadok s turn to speak on the proposed raid came he got up and stated that in his opinion there were no international legal obstacles to a military operation Apparently Zadok had checked this matter with the Attorney General of Israel and his legal advisers [58] Yaakobi stated that Zadok s opinion was sufficient as far as he and his colleagues were concerned In Yaakobi s view this was Zadok s job and the members of the crisis management team had enough confidence in his ability to trust him completely The team then voted to approve the raid Next Zadok suggested that the Ministerial Defense Committee be convened to formally authorize the launching of the raid There eighteen ministers including Zadok voted unanimously in favor of the military operation [59]

2.5 The raid

The execution of the raid itself was handled exclusively by the military with little if any input from other sources According to Yaakobi the sentiment on the team was that until the military was able to devise a fully detailed plan that looked as if it could work there was no point in launching the raid and further imperiling the lives of the hostages An enormous amount of intelligence work was performed by El Al the Mossad and the Ministry of Foreign Affairs and unless all these details could be collected and a viable plan formulated out of them the team would not give its approval to a raid

Yaakobi said that the raid was to be executed so as to minimize the risk for the hostages Therefore the team decided to employ only the amount of force necessary to effect the rescue Israel had no reason or desire to fight or punish the Ugandan army even though its members were assisting the hijackers in detaining the hostages Orders were given to the Israeli soldiers to scare Ugandan soldiers away if possible and to keep Ugandan casualties to the minimum extent consistent with accomplishing the mission [60] On the other hand orders were given to kill all hijackers

56 Compare American Law Institute s Model Penal Code § 3 02 (1962) Justification Generally Choice of Evils

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable provided that (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence as the case may be suffices to establish culpability See also N Machiavelli *The Prince* (M Musa trans & ed 1964) p 191 (prince must choose the least bad as good)

57 Entebbe Rescue *supra* n 1 at pp 253 54

58 Yaakobi Interview *supra* n 27 Compare Embassy of Israel Washington D C *Information Background Legal Aspects of Israel s Rescue Action in Uganda* (n d) with Department of State Briefing Memorandum from Legal Adviser Monroe Leigh to the Secretary of State *Legal Aspects of Entebbe Hijacking Incident July 8 1976* (released in 1978 pursuant to a Freedom of Information Act request) excerpts reprinted in 73 AJIL (1979) pp 122 24

59 Entebbe Rescue *supra* n 1 at pp 290 92 *N Y Times* July 4 1976 § 1 at p 1 cols 7 8

60 Entebbe Rescue *supra* n 1 at p 269

on sight [61] According to Yaakobi all the hijackers were killed and Israeli forces took none back to Israel for interrogation [62]

Concerning the destruction of the Ugandan MIG planes at Entebbe hangers [63] Yaakobi stated that although the reason given in public for this action was to prevent the pursuit of the rescue planes by the MIGs the primary reason for their destruction was to serve as a penalty upon the Ugandan government for involving itself with the hijackers to the degree it had The members of the crisis management team felt that Uganda had to pay some price for what it had done So the MIGs were destroyed and with them the bulwark of the Ugandan air force obliterated Thus the destruction of the MIGs was not necessary to the success of the Entebbe rescue mission

2 6 Easy case

At this juncture a skeptic might interject that the *Decision* stage of the analytical framework proves little of any consequence since Israel is the easy case because it is a Western liberal democracy which by definition can be expected to conform with the requirements of the Western view of international law in its conduct of foreign affairs The validity of that objection however depends upon one s perspective Today there exist a substantial number of Arab African Asian and Communist states which definitively repudiate the notion that Israel possesses even a rudimentary commitment to upholding the fundamental principles of international law To these nations Israel is a militaristic aggressive and expansionist state that has consistently violated the most sacred principles of international law and international politics in pursuit of a comprehensive policy of conquest subjugation and intimidation throughout the Middle East On many of these complaints Third World and Second World states have been joined in their condemnation of Israel by the latter s erstwhile friends among the so-called Western liberal democracies of the First World and even occasionally by Israel s nominal ally the United States of America On some of these issues Israel has stood alone in a seemingly willful refusal to adhere to even the most basic requirements of international law in its relations with other states and peoples The list of abuses is so extensive and universally held that Israel has gradually become a pariah state within the international community a status it shares with the apartheid regime of South Africa

From an Arab perspective Israel would definitely not be the easy case for proving the proposition that considerations of international law do in fact play a crucial role in governmental decisionmaking processes during times of international crisis Instead Israel would constitute the worst case possible under the circumstances and therefore establishing the validity of this proposition for Israeli crisis management decisionmaking should be the acid test for its general applicability If *even* Israel pays heed to international law during a crisis then *any* state must do so since *no* other state appears to be so essentially lawless in its conduct of foreign affairs

61 Yaakobi Interview *supra* n 27
62 Contra Stevenson *supra* n 1 at p 121
63 See Entebbe Rescue *supra* n 1 at p 324

3 ADJUDICATION

The third function of international law in the Entebbe crisis was adjudication of the outstanding dispute between Israel and Uganda The immediate crisis was over The mode of its termination however had transformed the dispute between Israel and Uganda from a single issue problem concerning state responsibility for hijacked hostages into a more complicated problem concerning the legitimacy of a noncon sensual foreign military intervention launched to rectify an alleged failure to discharge that initial state responsibility The Israeli government believed that its behavior had comported with the conditions required for a legitimate exercise of its right to self-defense under international law It expected the reasonability of this belief to be tested in debate – in essence adjudicated under international law – but nevertheless Israel was certain that its actions were defensible Meanwhile international law had progressively narrowed the contours of this dispute to manageable proportions thus facilitating ultimate resolution of the crisis

3 1 By the OAU

The first institutional adjudication of the Entebbe dispute was by the Organization of African Unity (OAU) of which Uganda was a member On July 2 five days after the crisis began Amin travelled to Mauritius to open the thirteenth session of the OAU's Assembly of Heads of State and Government and to hand over the chairmanship of the Organization to the Prime Minister of that country [64] For this reason the hijackers extended the original deadline for compliance with their demands from Thursday July 1 to Sunday July 4 It was the extension of that deadline which gave Israel the necessary time to prepare and launch a raid with a reasonable chance of success [65] Ironically a consideration of international law (i e respect for the OAU) thus entered into the decisionmaking process of even the hijackers themselves and exercised a decisive impact upon the outcome of events This respect for the OAU by the PLO/PFLP hijackers/hostages takers is explainable by the fact that in 1974 the OAU had adopted a resolution in which it declared its full support for the PLO as the sole legitimate representative of the Palestinian people [66]

Later in a unanimous resolution adopted by the Assembly of the Heads of State and Government the OAU condemned the Israeli raid at Entebbe as a violation of

64 31 UN SCOR (1939th mtg) 16 UN Doc S/p v 1939 (prov ed 1976) Kyemba *supra* n 1 at p 169
65 *N Y Times* July 6 1976 at p 4 col. 1
66 See *Mogadishu Notebook* West Africa June 24 1974 at pp 750 751

Uganda s sovereignty [67] It charged it new chairman together with Guinea and Egypt to support Uganda in submission of its case to the UN Security Council This action was undertaken in accordance with Article VIII of the OAU Charter which gives the Assembly the power to discuss matters of common concern to Africa with a view to co-ordinating and harmonizing the general policy of the Organization" [68]

3 2 By the Security Council

The resolution of condemnation by the OAU set the stage for consideration of the Entebbe crisis by the UN Security Council Unlike the OAU however the Security Council has the primary responsibility for the maintenance of international peace and security [69] Any adjudication of the merits of the dispute between Israel and Uganda by the Security Council would not be subject to the criticism leveled at the OAU – that it proceeded *ex parte* and merely manifested regional prejudice in favor of a member against a non member The Chairman of the OAU registered the Organization s complaint in a letter [70] to the President of the Security Council in accordance with the right of UN members to bring any dispute or any situation which might lead to international friction or give rise to a dispute to the attention of the Security Council under Article 35 of the Charter No state questioned the right of the OAU to bring the Entebbe crisis to the attention of the Security Council pursuant to Article 35 of the Charter Once the matter had been submitted to the Security Council all interested parties (except the PLO/PFLP) [71] appeared and presented their claims and counterclaims during the course of the debate The parties expected the dispute to be brought to the Security Council and they wanted the opportunity to present their respective cases before that body in its capacity as the so-called court of world public opinion

The OAU Chairman s letter charged that the unprecedented aggression by Israel against Uganda constituted a danger not only to Uganda and Africa but to international peace and security as well The matter was inscribed on the Security Council agenda as Complaint by the Prime Minister of Mauritius current Chairman of the OAU of the act of aggression by Israel against the Republic of Uganda [72] The United States and Israel s other sympathizers on the Council did their collective best to broaden the terms of the debate to also include consideration of the issue of international hijacking and terrorism [73] This was part of an effort to place the question of Israeli legal responsibility for the raid within the overall context of a campaign of repeated military attacks against Israel by the PLO and its splinter organizations

This effort to broaden the scope of the debate was strenuously resisted during the Security Council Entebbe debates by those countries lining up for the condemnation of Israel [74] Eventually two draft resolutions reflecting these opposed positions were introduced [75] A three power draft resolution sponsored by Benin Libya and Tanzania would have had the Security Council condemn Israel s flagrant violation of Uganda s sovereignty and territorial integrity and demand that Israel meet the just claims of Uganda for full compensation for the destruction inflicted [76] A two power draft resolution introduced by the United States and the United Kingdom would have had the Security Council condemn hijacking and all other acts which threaten the lives of passengers and crews and the safety of international civil aviation and call upon all states to take every necessary measure to prevent and punish all such terrorist acts [77] Under the US–UK draft resolution the Council would have also deplored the tragic loss of human life which had resulted from the hijacking of the French aircraft reaffirmed the need to respect the sovereignty and territorial integrity of all states in accordance with the UN Charter and international law and enjoined the international community to give the highest priority to consideration of further means of assuring the safety and reliability of international civil aviation

The African draft resolution would have placed guilt squarely upon the shoulders of Israel while the US–UK draft resolution would have avoided an explicit adjudication of either Israeli or Ugandan guilt or innocence By implication however the adoption of the US–UK resolution would have absolved Israel from any alleged violations of international law committed by the raid The Security Council met five times on Entebbe between July 9 and July 14 [78] The three power African draft resolution was not pressed to a vote [79] because it seemed obvious that even if it obtained the nine votes necessary for adoption at least the United States would veto it The US–UK draft resolution was actually brought to a vote but failed to be adopted because it lacked the requisite majority The final vote was 6 in favor (France Italy Japan Sweden United Kingdom United States) to none against with 2 abstentions (Panama and Romania) [80] Seven delegations (Benin China Guyana Libya Pakistan USSR and Tanzania) did not participate in the vote on

67 AHG/Res 83/XIII (1976)
68 Charter of the Organization of African Unity (OAU) Art 8
69 UN Charter Art 24 para 1
70 See 31 UN SCOR Supp (July September 1976) 6 UN Doc S/12126 (1976)
71 Their exclusion from the proceedings was purposeful See nn 89 94 and accompanying text *infra*
72 31 UN SCOR (1939th mtg) 4 5 UN Doc S/p v 1939 (prov ed 1976)
73 See e g 31 UN SCOR (1939th mtg) 88 UN Doc S/p v 1939 (prov ed 1976) (French delegate)
74 See e g 31 UN SCOR (1940th mtg) 6 UN Doc S/p v 1940 (prov ed 1976) (Libyan delegate)
75 See Council Fails to Adopt Draft Resolution after Considering Uganda Hijacking Issue *UN Chronicle* (August September 1976) at p 15
76 31 UN SCOR Supp (July September 1976) 15 UN Doc S/12139
77 Id UN Doc S/12138
78 See 31 UN SCOR (1939th mtg) 1 UN Doc S/p v 1939 (prov ed 1976) 31 UN SCOR (1940th mtg) 1 UN Doc S/p v 1940 (prov ed 1976) 31 UN SCOR (1941st mtg) 1 UN Doc S/p v 1941 (prov ed 1976) 31 UN SCOR (1942d mtg) 1 UN Doc S/p v 1942 (prov ed 1976) 31 UN SCOR (1943d mtg) 1 UN Doc S/p v 1943 (prov ed 1976)
79 Council Fails to Adopt Draft Resolution After Considering Uganda Hijacking Issue *UN Chronicle* (August September 1976) at p 15
80 See 31 UN SCOR (1943d mtg) 81 UN Doc S/p v 1943 (prov ed 1976)

the two power draft resolution ostensibly because it was not representative of the it m which was inscribed on he agenda as an ct of aggr s on by I ra l against Uganda [81] During the d bates however both the vote s abstainers and non partici pators had argued against the legality of the Israeli raid under the UN Charter and general principles of public international law [82]

3 3 The Security Council debates

Can this seemingly inconclusive result be deemed to constitute an adjudica tion of the Entebbe crisis by the Security Council under international law? A functional analysis of international law looks behind and beyond the non adoption of a Security Council resolution on Entebbe in order to determine the true meaning and significance of this outcome Mere failure to adopt a formal resolution on the Entebbe incident does not mean that the Security Council vote lacked substantive significance and was therefore essentially irrelevant to this international crisis In Security Council practice what is not said in the form of an adopted resolution is oftentimes at least as important as what is expressed in this manner A careful analysis of the content of its Entebbe debates reveals the nature and extent of an underlying consensus among Security Council members on fundamental principles deemed so basic as to require no formal enunciation or imprimatur Delineation of the elements of this consensus sheds light upon the true meaning of the seemingly indeterminate outcome of the Security Council Entebbe vote In order to accom plish this it is necessary to examine both the arguments that were made and the arguments that were not made by each side in the debates Such line of analysis will allow derivation from the Security Council proceedings of the real lessons of Entebbe for future instances of international crisis akin to it

3 3 1 Consensus on Israel s right to exist

It is striking to observe the high degree of underlying consensus that existed among the participants in the Security Council Entebbe debates to the effect that this was not the time nor were these the appropriate circumstances to raise the general question of the right of Israel to exist as a state Consequently no argu ments were presented in the debates directly focusing on that issue To be sure Israel s Ambassador Herzog chose to view the Entebbe incident as part of a con tinued attack upon Israel s existence [83] and Libya castigated Israel for its alleged violation of Palestinian national rights [84] yet there was no outright attack upon Israel s right to exist That there were only a few oblique and tangential references

81 See e g 31 UN SCOR (1943d mtg) 78 80 UN Doc S/p v 1943 (prov ed 1976) (Guyana delegate)

82 See e g 31 UN SCOR (1942d mt) 13 UN Doc S/p v 1942 (prov ed 1976) (Panama nian delegate)

83 See 31 UN SCOR (1939th mtg) 32 UN Doc S/p 1939 (prov ed 1976)

84 See 31 UN SCOR (1939th mt) 106 UN Doc S/p v 1939 (prov ed 1976)

indicating that this might even be a contested issue of international relations today was somewhat remarkable [85]

A variant on the same theme would have begun with an argument that Uganda was entitled to assist the PFLP hijakcers at Entebbe because this operation was part of their legitimate war of national liberation against Israel This position could have been premised upon the assertion that such assistance was permitted by the seek and receive support language of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations [86] which was incorporated into Article 7 of the Definition of Aggression [87] and therefore was consistent with and not in violation of the requirements of international law Yet not one participant in the Entebbe debates made that argument for it would have opened up the question of Israel s existence from another direction Quite apparently no one wanted to do that

It is also significant that a representative of the PLO was not invited to partici pate in the Security Council Entebbe debates The very presence of a PLO represen tative in front of Ambassador Herzog would have dramatically raised the question of Israel s existence [88] Conversely his absence tends to indicate that the members of the Council deemed such a confrontation to be neither necessary nor desirable under the circumstances

This purposeful failure to question the right of Israel to exist as a state is even more remarkable since during the outset of the Entebbe crisis the Security Council was in session on the question of the exercise by the Palestinian people if its inalien

85 See e g UN Doc S/12136 (1976) (telegram from Siad Barre to Amin circulated as a Security Council document)

86 G A Res 2625 25 UN GAOR Supp (No 28) 121 123 24 UN Doc A/8028 (1971) states in relevant part *The principle of equal rights and self-determination of peoples* By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations all peoples have the right freely to determine without external interference their political status and to pursue their economic social and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self determination and free dom and independence In their action against and resistance to such forcible action in pursuit of the exercise of their right to self-determination such peoples are ent tled to seek and to re ceive support in accordance with the purposes and principles of the Charter

87 G A Res 3314 29 UN GAOR Supp (No 31) 142 144 UN Doc A/9631 (1974) Art 7 provides Nothing in this Definition could in any way prejudice the right to self-deter mination freedom and independence as derived from the Charter of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co operation among States in accordance with the Charter of the United Nations particularly peoples under colonial and racist regimes or other forms of alien domination nor the right of these peoples to struggle to that end and to seek and receive sup port in accordance with the principles of the Charter and in conformity with the above men tioned declaration See Stone Hopes and Loopholes in the 1974 Defintion of Aggression 1 AJIL (1977) p 224 at pp 231 239

88 See Palestinian National Charter Arts 2 8 15 22 reprinted in 3 *The Arab-Israeli Con flict* (J Moore ed 1974) p 706 Compare Deuteronomy 20 16-18

able rights [89] On June 29 1976 the United States vetoed a draft resolution which would have had the Council affirm the inalienable rights of the Palestinians to self determination including the right of return and the right to national independence and sovereignty in Palestine in accordance with the United Nations Charter [90] Both the United States and the four abstainers from the vote (France Italy Sweden and the United Kingdom) refused to support the draft resolution because it did not recognize the right of Israel to live within secure and recognized boundaries [91] A representative of the PLO was invited to participate in the debate [92] with the same rights of participation as those conferred upon a UN member under Rule 37 of the Council s Provisional Rules of Procedure [93] In this context the right of Israel to exist was called into question directly Yet there was no spill-over effect on this issue from the Palestinian debates to the Entebbe debates which commenced immediately afterward on July 9 [94]

3.3.2 Consensus on the illegality of aerial hijacking hostage taking and on state responsibility in such crises

All debate participants were in basic agreement that the appropriate source for derivation of relevant rules was the United Nations Charter and the extant body of public international law Here too there existed a remarkable degree of underlying consensus on what constituted acts that were inconsistent with the requirements of international law (1) Engagement in a war of national liberation was not a sufficient justification for specific instances of hijacking in international civil aviation by so-called freedom fighters (2) likewise fighting a war of national liberation would not justify the detention of hijacked hostages (3) consequently *a fortiori* a state could not provide assistance to alleged freedom fighters in such enterprises

89 The Security Council met eight times between June 9 29 1976 to consider the Palestinian issue See 31 UN SCOR (1924th mtg) 1 UN Doc S/p v 1924 (prov ed 1976) 31 UN SCOR (1928th mtg) 1 UN Doc S/p v 1928 (prov ed 1976) 31 UN SCOR (1933d mtg.) 1 UN Doc S/p v 1933 (prov ed 1976) 31 UN SCOR (1934th mtg) 1 UN Doc S/p v 1934 (prov ed 1976) 31 UN SCOR (1935th mtg) 1 UN Doc S/p v 1935 (prov ed 1976) 31 UN SCOR (1936th mtg) 1 UN Doc S/p v 1936 (prov ed 1976) 31 UN SCOR (1937th mtg) 1 UN Doc S/p v 1937 (prov ed 1976) 31 UN SCOR (1938th mtg) 1 UN Doc S/p v 1938 (prov ed 1976)

90 31 UN SCOR (1938th mtg) 62 UN Doc S/p v 1938 (prov ed 1976) The text of the draft resolution can be found in 31 UN SCOR Supp Capr June 1976) 73 UN Doc S/12119 (1976)

91 See e g 31 UN SCOR (1938th mtg) 63 UN Doc S/p v 1938 (prov ed. 1976)

92 31 UN SCOR (1924th mtg) 6 7 UN Doc S/p v 1924 (prov ed 1976)

93 Rule 37 Provisional Rules of Procedure of the Security Council UN Doc S/96/Re 6 (1974) provides Any Member of the United Nations which is not a member of the Security Council may be invited as the result of a decision of the Security Council, to participate without vote in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected or when a Member brings a matter to the attention of the Security Council in accordance with Article 35(1) of the Charter

94 See Proposal for Israeli Withdrawal from Occupied Territories by June 1977 Fails *UN Chronicle* (July 1976) at p 22

To the contrary when considered collectively the participants in the Entebbe debates (1) condemned acts by anyone that would disrupt international civil aviation (2) opposed the detention of hijacked hostages and (3) asserted that states are under an obligation to refrain from participation in such activities and should take effective measures to prevent their occurrence or else to secure the release of hostages in the event that a hijacked plane lands within their territorial jurisdiction

On these points Uganda merely argued and Israel emphatically denied that it had indeed lived up to these recognized standards of international behavior at Entebbe [95] By entering negotiations with the hijackers Amin had successfully obtained the release of the non Israeli nationals and by implication given more time could have secured the release of the remainder of the hostages [96] Naturally Israel had good cause to disbelieve these factual assertions The important point however is that the disagreement between Israel and Uganda in this regard was confined to a comparatively simple issue of fact whereas the principles of law involved were not at all contested By arguing that it had done everything in its power to secure the release of the Israeli hostages Uganda implicitly admitted the existence of its obligation to do so in the first place Contention over these purely factual matters became the essence of the dispute between Uganda and Israel

Moreover the members of the Security Council evidently perceived that Uganda was not telling the truth on the facts and this must have affected the Africans s decision to withdraw their draft resolution condemning Israel The shocking disappearance and then suspected death of Dora Bloch [97] must have had a similarly chastening effect upon even the most virulently anti Israeli participants in the debate Probably for these reasons the Israeli antagonists sought to limit the Security Council debate to the legality of the Israeli raid at Entebbe without reference to Ugandan conduct Since Uganda could only lose on the facts of the case it was essential to concentrate exclusively upon the assertion of an absolute prohibition under international law against nonconsensual military intervention by a state into the territory of another Israel s opponents thus had to argue that the Israeli raid at Entebbe could not be justified even if Amin had been an accomplice to the hijackers and hostage takers

3.3.3 Consensus on the illegality of foreign military intervention

No participant in the Security Council Entebbe debates argued that standards of behavior did not exist concerning nonconsensual foreign military intervention in

95 For Uganda s argument see 31 UN SCOR (1939th mtg) 11 25 UN Doc S/p v 1939 (prov ed 1976) For Israel s argument that Uganda had co-operated with the terrorists see id. at pp 32 50

96 Id at pp 13 15 16

97 On Friday July 2 Dora Bloch a hostage who held dual British Israeli nationality was taken from Entebbe to Mulago Hospital when she began to choke on a piece of meat she had been eating In the evening of Sunday July 4 after the Entebbe raid had been completed four men from Amin s State Research Bureau (the secret police) dragged her out of the hospital in plain view to all who were present and subsequently killed her See Kyemba *supra* n 1 at pp 170-78

international relations [98] All parties essentially agreed that military intervention by one state within the territorial domain of another ordinarily is illegal conduct By founding i de ense in the Security Council quarely upon ne righ of individual self-defense in international law Israel implicitly admitted that it was not free to do whatever it wanted to Uganda Once again a primary issue in the Security Council debates was not presented in a posture that would have turned upon the issue of existence or non-existence of any rules at all

3 3 4 Dissensus concerning exceptions to the rule

When it came to the general prohibition on nonconsensual forei_n military intervention in international law Israel merely argued and Uganda emphatically denied (1) that there were exceptions to this rule and (2) that these exceptions en compassed the facts of the Entebbe incident Uganda and its protagonists argued that nonconsensual foreign military intervention by one state within the territorial domain of another is forbidden for any reason whatsoever [99] – in other words that the Article 2(4) prohibition of the UN Charter is absolute A *prima facie* breach could not therefore be justified on the ground that it was not directed against the territorial integrity or political independence of the target state or for the reason that it was consistent with the Purposes of the United Nations (e g humanitarian intervention) [100] Under this interpretation Article 2(4) precludes military interven tion by a state to protect its nationals abroad from even a gross deprivation of their fundamental human rights by another state

Implicit in the Ugandan position were a number of subsidiary arguments that the principles of intervention protection and self help are not included within the body of public international law that these principles do not survive under the re gime of the Charter as elements of the Article 51 right to self-defense and therefore cannot take precedence over the Article 2(4) prohibition that there must be an ac tual armed attack by one state against another for the Article 51 ri_ht of self defense to come into play that it was Israel which had perpetrated an Article 51 armed attack a_ainst Uganda and not vice versa that the Israeli raid at Entebbe was neither necessary nor proportional under the circumstances and finally that Israel had violated its Charter obligation to attempt a peaceful settlement of its dispute with Uganda Of course Israel took a diametrically opposed position on all these points Yet these arguments as well as the dispute over the actual facts them selves did not dilute the hi_h degree of underlying consensus among the partici pants in the debates over the following points (1) that hijacking in international civil aviation is illegal (2) that the detention of hijacked hostages is illegal (3) that states have a responsibility to refrain from participation in such activities and where possible to prevent or thwart their occurrence and continuation finally (4) that the general prohibition on nonconsensual foreign military intervention is a fundamental principle of international law and international politics The elements of dissensus among the participants in the Security Council Entebbe debates proved to be both legally and politically insignificant when compared to these ele ments of consensus

If the Entebbe debates had entered upon the right of Israel to exist as a state the participants might never have achieved any consensus on the fundamental prin ciples of international law set out above Such lack of consensus might very well have rendered stillborn the momentous suggestion made by the delegate from the Federal Republic of Germany during the course of the Entebbe debates that con sideration be given by the next session of the UN General Assembly to preparation of a convention against the taking of hostages [101] Conversely the existence of a Se curity Council consensus upon these essential points paved the way for the appoint ment of an ad hoc committee on the drafting of a hostages convention by the Gen eral Assembly in December of 1976 [102] and for the eventual adoption by the Gen eral Assembly of the committee s draft hostages convention in December of 1979 [103] These matters will be analyzed in the fifth and final section of this article under the concept of *Redefinition.*

3 4 Result

From a functional perspective the seemingly indeterminate outcome of the voting in the Security Council can indeed be viewed as constituting an adjudication of the dispute between Israel and Uganda Israeli governmental spokesmen argued that given the bias of the United Nations Organization against Israel the Security Council s failure to adopt a resolution condemning or even critical of the Entebbe raid must be interpreted as tacit recognition that the rescue operation at least did not violate public international law [104] Moreover in statements made directly after the vote on the US–UK draft resolution Mr Bennet speaking on behalf of the United States Government took considerable satisfaction in that not one mem ber of the Security Council could bring itself to vote a_ainst such a balanced draft resolution [105] The implication of his statement was quite clear in Mr Bennett s opinion the Security Council had fully vindicated the Israeli position on Entebbe

98 Compare with a *New Yo k Times* editorial of July 6 1976 at p 24 ol 1 which blith ely asserted that in such situations the ordinary rules of international law simply cannot ap ply In a press conference of July 9 1976 President Ford drew a parallel between the Entebbe raid and the American inter ention into Cambodia to r scue the crew of the *Mayaguez* See 75 Dep t State Bull (August 2 1976) at p 161 Perhaps some hat inadvisably he implied that both actions stood or fell on the same l al grounds See Paust The Seizure and Re overy of the Mayaguez 85 Yale LJ (1976) p 774

99 See e g 31 UN SCOR (1941st mt) 41 53 UN Doc S/p 1941 (pro ed 1976)

100 Support for this absolute interpr tation of Art 2(4) can be found in its *travaux prepa atoi es* See J Stone *Aggressio t and World Order* (1958) pp 97 103

101 31 UN SCOR (1941st mtg) 23 25 UN Doc S/p v 1941 (prov ed 1976)

102 G A Res 31/103 31 UN GAOR Supp (No 39) 186 UN Doc A/31/39 (1976) 35 Member Group Established to Draft Convention Against Taking Hostages *UN Chronicle* (January 1977) at p 81

103 See Convention Against Hostage-Taking Approved Call for Appropriate Penalties *UN Chronicle* (January 1980) at p 85

104 *N Y Times* July 15 1976 at p 1 col 1

105 31 UN SCOR (1943d mtg) 87 UN Doc S/p v 1943 (prov ed 1976)

This argument draws additional credence from the African failure to press the three power draft resolution to a vote If the African countries really intended to express their strong disapproval of the raid at Entebbe and to avoid an expected Israeli claim that the Council's failure to condemn was tantamount to implicit approval they could have brought the resolution to a vote and forced the United States (if not Great Britain and France also) to veto the resolution According to the Tanzanian ambassador who announced the decision not to press the African resolution to a vote this action was taken because of the confrontations which had been exhibited in the Security Council and in light of the Council's seeming determination to ignore Africa's legitimate complaint [106]

But these considerations do not appear sufficient to account for the retreat For example African countries have not been deterred by the threat of a United States veto in matters concerning South Africa In that context they have persisted to the point of eliciting the veto precisely in order to embarrass South Africa and the vetoers as well as to put themselves firmly on record as virulently opposed to that regime [107] A forced US veto of a resolution condemning Israel for the Entebbe raid could have caused significant embarrassment to both countries in the eyes of a substantial number of Third World states Veto of the resolution by the United States would have added to Uganda's credibility and could have been denounced as part of the continuing zionist imperialist racist conspiratorial plot fomented by Israel the United States and for good measure South Africa A fairly large number of propaganda points could have been scored by the African countries by pressing the matter to a vote and a veto Simultaneously the Israeli claim to victory because of the Security Council's non adoption of a formal resolution on Entebbe would have been undercut

It is likely that the African draft resolution was not brought to a formal vote as a result of an honest disbelief of the Ugandan factual position on Entebbe the negative if not deprecatory attitude that many African leaders held toward Amin and a feeling that Amin had received a well-deserved comeuppance from Israel After an initial period of euphoria with Amin throughout Africa over his humiliating expulsion of the United Kingdom from Uganda Amin's buffoonery on the international scene and his systematic repression and massacre of opponents at home led African leaders to consider him a serious embarrassment to their collective stature [108] Even the Soviet Union thought he had gone too far when he suggested the erection of a monument in tribute to Adolph Hitler for his policy of extermination of the Jews [109] More serious at least from an African perspective were his bellicose pronouncements directed toward his immediate neighbors the Sudan Kenya and Tanzania [110] It was Israel's refusal to provide Amin with bombers capable of striking Dar-es Salaam that led him to break diplomatic relations with Israel in 1972 [111] and Amin's precipitate invasion of Tanzania ultimately led to his overthrow by President Julius Nyerere's armed forces and Ugandan rebels in April of 1979 [112]

Moreover there was a strong collective sentiment that Amin had simply gone too far in formally associating an African government with the activities of the hijackers/hostage takers Granted Arab African states such as Libya and Algeria provided assistance to the PLO But no state let alone a Black African state had ever gone so far as to actively aid and identify itself with a specific hijacking/hostage taking incident to the extent Amin had at Entebbe [113] All states in the region had a stake in the preservation of the safety and freedom of international civil aviation and none could afford to have Africa become known as a haven for hijackers and hostage takers

The Third World generally believed that PLO hijackings and hostage takings had lost their utility and were probably even counterproductive to securing the recognition of formal legitimacy for the organization especially by those countries in the West which alone could bring real pressure to bear on Israel The PLO had more to gain at the conference table than in the cockpit The period after Entebbe was to witness a marked decline in the number of such spectacular hijacking and hostage taking operations by the PLO and its splinter groups To be sure the PLO still launched military raids into Israel proper and the West Bank But with the encouragement of Arab states the PLO seemed to enter a new evolutionary phase in which the military war against Israel took second place to a diplomatic offensive [114] Subsequent history was testified to the wisdom of that decision

4 RESOLUTION

Public international law's third function of *Adjudication* merges imperceptibly into the fourth function here denominated as *Resolution* of the outstanding dispute among the parties to a crisis Amin had threatened to initiate retaliatory action against Israel for the Entebbe rescue operation [115] raising the specter of continuing

106 31 UN SCOR (1943d mtg) 76 UN Doc S/pv 1943 (prov ed 1976)

107 See e Security Council Fails to Adopt Resolution Recommending Expulsion of South Africa *UN Chronicle* (No ember 1974) at p 9 (triple veto by US UK and France of proposed Security Council resolution to recommend the expulsion of South Africa from the United Nations)

108 See generally Kyemba *supra* n 1 at pp 238-48 Deming Sullivan & MacPherson Idi Amin's Rule of Blood *Newsweek* (March 7 1977) at p 28 Kaufman Amin Cuts a Broad but Erratic Swath and People Love Him or Hate Him *N Y Times* (July 10 1976) at p 3 col 1

109 Stevenson *supra* n 1 at p 199

110 See e g Kyemba *supra* n 1 at p 256 (1976 threat to invade Kenya) *N Y Times* (July 9 1971) at p 3 col 4 id (December 26 1971) at p 19 col 1 (threat to attack Tanzania and subsequent border skirmishes) id (January 31 1971) at p 2 col 3 id (February 1 1971) at p 6 col 1 (threat to counterattack Sudanese forces alleging that Sudan was the original aggressor)

111 See nn 42-44 and accompanying text *supra*

112 An Idiotic Invasion *Time* (November 13 1978) at p 51 *N Y Times* (April 12 1979) at p A1 col 1

113 See Introduction to Stevenson *supra* n 1 at xi

114 See e g Middleton 1979 Terrorist Toll Put at a Record 587 *N Y Times* (May 11 1980) at p 14 col 1 Wieseltier 'The Sabbath Ambush *The New Republic* (May 24 1980) at p 18 See also Through the Barrel of a Gun *The Middle East* (July 1980) at pp 8 10 11

115 In a letter addressed to the president of the Security Council Amin declared that Uganda reserves her right to retaliate in whatever way she can to redress the aggression against

the crisis in their relations into the indefinite future at considerable cost to themselves and to the peace and stability of this highly volatile region surrounding the Horn of Africa Yet the institutions and procedures of international law played a critical role in forestalling Amin's threat to retaliate for Entebbe International law resolved the Entebbe crisis not necessarily to the complete satisfaction of either Uganda or Israel but in the sense that it provided the means for the interruption and termination of the cycle of force and counterforce that had developed between Uganda and Israel The rules of international law and the vital national interests of all concerned states coincided and reinforced each other in an urgent effort to find a peaceful resolution of the Entebbe crisis at the UN Security Council

4 1 Submission to the Security Council

Despite the threat of retaliation it was in Amin's interest to achieve a peaceful resolution of the Entebbe crisis by submission of the dispute to the Security Council Amin was trapped by his threat of retaliation He had to make it but it was too dangerous to carry out Assured Israeli counter retaliation would have destabilized his domestic political situation even further perhaps to the point of Amin's violent deposition which had already been attempted several times before [116] Amin had to terminate the crisis immediately and not retaliate but in a manner that would salvage whatever prestige his regime possessed after the raid Debates in the Security Council would satisfy this criterion They would shift the focus of public attention from the manifest military disaster at Entebbe airport to abstract arguments over legal principles in New York And even if Uganda could not win the war of words in the Security Council a seemingly inconclusive result would permit Amin to claim vindication and victory by virtue of pure majoritarian rhetoric alone Without the Security Council as an outlet to express rage and receive some degree of legitimizing support however Amin might have felt impelled by circumstances to make good on the threat to retaliate simply in order to shore up his internal power position Submission of the dispute to the Security Council provided Amin with a face saving and peaceful alternative response to the humiliation he had suffered at Entebbe

Certainly retaliation is not a legitimate exercise of the right to self defense [117] Yet by its voluntary participation in the submission of the dispute to the Security Council Uganda substantially undercut both its putative right and whatever limited ability it possessed to retaliate against Israel for Entebbe Non submission would have preserved intact at least an alleged right to act unilaterally against Israel In going to the Security Council however Uganda effectively committed itself both legally and politically to abide by the Council decision whatever that might be To use force without even a plausible claim for legal authority to do so adds significantly to the political and military costs already involved These additional costs

her 31 UN SCOR Supp (July September 1976) 4 5 UN Doc S/121 4 (1976)

116 Kyemba *supra* n 1 at p 250 Kaufman Amin Cuts a Broad but Erratic Swath and People Love Him or Hate Him *N Y Times* (July 10 1976) at p 3 col 1 at p 3 col 5

117 D Bowett *Self Defence in International La* (1958) p 13 Resort to War and Armed Force Reprisals 73 AJIL (1979) pp 489 97

can serve to increase the number and strength of other factors deterring a contemplated course of violent conduct After voluntarily submitting the dispute to the Security Council it would have been extremely costly for Uganda to have countermanded the Council's collective decision not to disturb the status quo existing after the Entebbe raid

The non adoption of a resolution by the Security Council automatically established the political and military situation existing after the raid as the legal status quo and the prohibition of Charter Article 2(4) immediately operated to protect this status quo Uganda could not plausibly retaliate pursuant to any alleged right of individual self defense under Article 51 without a new separate and independent breach of Article 2(4) by Israel through the threat or use of force Yet Israel neither threatened nor undertook further retaliatory measures against Uganda for what the latter had done at Entebbe The Security Council's non action thus effectively ensured that the cycle of violence would cease at the Entebbe airport

Moreover the status quo approved by the Security Council's non adoption of a resolution was not out of line with the merits of the dispute between Israel and Uganda as adjudicated by the Council Since the members generally agreed that Israel should not be held at fault for the Entebbe raid it was both proper and convenient to do nothing further and allow the post raid status quo to become permanent The equities of the situation had been fairly well adjusted by the design execution and success of the raid itself

4 2 Lessons of Entebbe Mogadishu and Larnaca

In the aftermath of the West German raid at the Mogadishu airport in Somalia it was publicly revealed that a large number of states had created special commando groups for the express purpose of undertaking Entebbe like rescue operations [118] Unlike the Entebbe raid however the raid at the Mogadishu airport was undertaken with the consent of the Somali government [119] fortunately it too was successful [120] But like the Entebbe raid the Egyptian raid at the Larnaca airport in Cyprus did not have the permission of the territorial government [121] and the consequences there were tragic [122] Larnaca clearly demonstrated that Entebbe could have easily become a human disaster of the first magnitude

Thus rapid succession of similar crises demonstrated to the entire international community the urgent need to suppress the incidence of transnational hostage taking and thus to attenuate the conditions conducive to non permissive hostage

118 Nations known to maintain anti terrorist commando units include the US Great Britain France West Germany and Italy Willenson & Nater 'Getting Tough *Newsweek* (October 1977) at p 51

119 *N Y Times* (October 18 1977) at p A1 col 6 at p 12 col 1

120 Two German Soldiers were wounded but no hostages were harmed in the raid Id at p A1 col 6

121 Willenson Jenkins Schmidt & Clifton Debacle in Cyprus *Newsweek* (March 6 1978) at p 33

122 Fifteen Egyptian soldiers died though the hostages were released unharmed The hostage takers had agreed to surrender prior to the action Id

rescue interventions From a functionalist perspective however they collectively il lustrate a fundamental axiom of the dialectical interaction between international law and international politics By its very nature international law represents an at tempt to legitimate pre existing or proposed power relationships an attempt that either succeeds or fails Consequently determinations of legality or illegality are es sentially dependent upon the political success or political failure respectively of the course of state conduct at issue A pattern of successful political action creates new legal rules through legitimization of that state behavior by lack of effective political opposition to it An accumulation of political failures also creates law by generating political pressures to establish legal rules prohibiting the unsuccessful political conduct The success pehonomenon is responsible for the development of customary international law The failure syndrome oftentimes leads to the conclu sion of a treaty on the subject Conversely successful international legal rules create the political environment necessary and conducive to the passage of more of the same Unsucessful international legal rules are either formally terminated by agree ment or informally abandoned by a pattern of successful contrary political practice that evolves into the formation of a new customary legal regime Once again international law is and becomes international politics and vice versa

In regard to Entebbe Mogadishu and Larnaca universal fear of permitting the development of a failure syndrome for hostage rescue operations proved to be the motivating force behind the negotiation and adoption of a hostages convention Here the analysis enters upon the fifth and final function of international law in time of crisis This consists of an examination of the political processes by which the legal standards of acceptable political behavior are redefined for all actors in the international system in light of the successes and failures of this dialectical interac tion between existing legal rules and political practice that are produced and illus trated by an international crisis

5 REDEFINITION

This last function of international law concentrates upon analysis of the process of redefinition in standards for state behavior by the international community in order to improve those international legal standards existing before the outbreak of a crisis Entebbe revealed an entire complex of unresolved problems concerning hos tage taking state responsibility in such crises and foreign military intervention to rescue hostages During the Security Council Entebbe debates a general consensus emerged that the taking of hostages for any reason violates a fundamental principle of international law and international politics The Entebbe crisis generated the momentum necessary to propel this consensus into the concrete form of a UN com mittee for the drafting of a convention against the taking of hostages A draft hos tages convention codified the elements of the Entebbe debate consensus thereby attempting to remedy those problems of international law and international politics exposed by Entebbe In the form of a draft hostages convention this redefined international law was designed to deter the outbreak of similar crises in the future or at least to allow for their more effective management if they should occur

5 1 German initiative

The first major initiative undertaken by the Federal Republic of Germany (FRG) in the United Nations after becoming a member in 1973 was its request made during the Security Council Entebbe debates for the preparation of an inter national convention on measures against the taking of hostages [123] The German delegate suggested that the next session of the General Assembly take this matter up Pursuant to that suggestion the FRG Vice-Chancellor and Minister for Foreign Affairs Hans Dietrich Genscher addressed a letter of September 28 1976 to the UN Secretary General requesting the inclusion in the agenda of the 31st session of the General Assembly of a separate item entitled Drafting of an international con vention against the taking of hostages [124] An attached explanatory memorandum stated that the taking of hostages not only threatened the lives of those directly in volved but the security of many other people as well and frequently also endan gered international peace and transnational relations [125] Undoubtedly this was an allusion to the Israeli raid at Entebbe Because of its legal importance the pro posed item was referred to the Sixth Committee of the General Assembly

In the Sixth Committee the FRG proposed a draft resolution for consideration by the General Assembly calling for the drafting of an international convention against the taking of hostages with a key requirement that state parties either prose cute or extradite hostage takers [126] In response thereto Libya introduced an amendment that would have added the word innocent before the word hos tages throughout the text of the proposed draft resolution [127] The effect of the Libyan amendment would have been to differentiate between innocent and non innocent hostages and thus to have raised the issue of whether citizens or leaders of a state against which a war of national liberation has been declared (e g Israel) are innocent and therefore entitled to the protection of a hostage conven tion In an apparent compromise the sponsors of the FRG resolution agreed to drop the provision calling for mandatory prosecution or extradition of hostage takers and the Libyan delegate agreed not to press his amendment

The final resolution adopted by the General Assembly upon recommendation of the Sixth Committee simply decided to establish an *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages (Hostages Committee) with instructions to draft at the earliest possible date an international convention against the taking of hostages [128] The Hostages Committee was request

123 See n 101 *supra*
124 See UN Doc A/31/242 (1976)
125 Id at annex p 1
126 See UN Doc A/C 6/31/L 10 (1976) reprinted in UN Doc A/31/430 (1976) at 2
127 See UN Doc A/C 6/32/L.11 (1976) UN Doc A/C 6/31/L 10 Rev 1 (1976) UN Doc A/31/430 (1976) at 3 See also *N Y Times* (December 16 1976) at p 3 col 3 Grose UN Assembly s Achievement A Quiet Session id (December 24 1976) at p A6 col 1
128 G A Res 31/103 31 UN GAOR Supp (No 39) 186 UN Doc A/31/39 (1976) UN Doc A/RES/31/103 (1976)

ed to submit a draft convention to the General Assembly for consideration at its 32nd session and such an item was included in its provisional agenda [129]

5 2 Circumvention of the Terrorism Committee

On that same day December 15 1976 and in reference to the immmediately prior agenda item the General Assembly had adopted resolution 31/102 on measures to prevent international terrorism etc [130] In it the General Assembly invited the *Ad Hoc* Committee on International Terrorism (Terrorism Committee) to continue its work The Terrorism Committee had been established by General Assembly resolution 3034 (XXVII) of December 18 1972 [131] but its work had been suspended since 1973 [132] The proceedings of the Terrorism Committee had broken down over several interrelated problems (1) the definition of international terrorism (2) the right of national liberation movements to commit putative terrorist acts as part of their struggle (3) the matter of so called state terrorism which allegedly gives rise to and legitimates national liberation movements and (4) whether a thorough study of the causes of terrorism should precede any recommendation of measures to deal with it or vice versa [133] Third World members of the Terrorism Committee feared that a campaign against international terrorism would be turned into a tool against national liberation movements such as the PLO in the Middle East and those operating in southern Africa [134] Hence the deadlock

The Entebbe incident generated enough enthusiasm among UN members to reinvigorate the Terrorism Committee Yet the thrust of the enthusiasm remained over hostage taking and so the General Assembly created the Hostages Committee

129 Pursuant to para 2 of resolution 31/103 the president of the UN General Assembly appointed thirty four states as members of the Hostages Committee Of the fifteen members of the Security Council at the time of the Entebbe debates all six of those which had voted in favor of the US–UK draft resolution (France Italy Japan Sweden US UK) and three which had not participated in the vote on the US–UK draft resolution (Libya USSR Tanzania) were appointed to the Hostages Committee In addition five non members of the Security Council which had participated in the Entebbe debates were also appointed to the Hostages Committee (Federal Republic of Germany Guinea Kenya Somalia Yugoslavia) There was thus a carry over of fourteen states from the Security Council Entebbe debates to membership on the Hostage Committee

130 The official name of this resolution is Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery frustration grievance and despair and which cause some people to sacrifice human lives including their own in an attempt to effect radical changes G A Res 31/102 UN GAOR Supp (No 39) 185 UN Doc A/31/39 (1976) UN Doc A/RES/31/102 (1976)

131 GA Res 3034 7 UN GAOR Supp (No 30) 119 UN Doc A/8730 (1972)

132 See 28 UN GAOR Supp (No 28) UN Doc A/9028 (1973)

133 Id at 6 paras 14 17 at 7 paras 22 24 at 8 para 24 at 11 12 paras 35 38 at 13 14 paras 41-44 at 15 paras 48-49 at 17 para 54 at 18 para 62

134 See e g Draft proposal submitted by the Non Aligned Group in the Ad Hoc Committee (Algeria Congo Democratic Yemen Guinea India Mauritania Nigeria Syrian Arab Republic Tunisia United Republic of Tanzania Yemen Yugoslavia Zaire and Zambia) id at 21 para 3 UN Doc A/90 8 (1973)

to circumvent the deadlock that had developed in the Terrorism Committee [135] Suggestions had previously been made in the Terrorism Committee for the adoption of a piecemeal approach to the regulation of international terrorism by drafting several conventions each of which would prohibit a specific type of reprehensible terrorist activity [136] A convention against the taking of hostages was among the earlier suggestions but did not succeed [137]

5 3 Vital national interests concerning hostage rescue operations

An abstract commitment to principles of international peace and security by UN members does not alone account for the breakthrough on a hostages convention On the level of pure national self interest the Israeli raid at Entebbe demonstrated quite dramatically the marked vulnerability in future hostage taking crises of most Third World states to similar self help measures by militarily advanced countries Failure to control transnational hostage taking might simply prompt stronger countries to intervene militarily into weaker countries for the purpose of rescuing hostages or worse yet encourage the use of hostage rescue operations as pretexts for accomplishing additional non humanitarian objectives such as for example a coup d etat Self help generally works in only one direction As a remedy it cannot be relied upon by a weak state against a strong state or even by the weak against the weak Conversely the adoption of a hostages convention could undermine a militarily advanced state s purported right to undertake self help measures and thereby deter or at least terminate an intervention In this regard a convention would be especially valuable to prevent nonconsensual intervention in cases where the state of landing was genuinely attempting to secure the safe release of all hostages

Even foreign military intervention genuinely limited to the humanitarian purpose of securing the release of hostages represents a distinct threat to the internal political security of the established government of the target state The domestic political question will inevitably arise what good is *this* government if it can not protect the country from outside attack? For example in the aftermath of the Entebbe raid there were severe disturbances within the Ugandan army and among

135 During the Sixth Committee debates over the establishment of the Hostages Committee the Soviet delegate suggested that it might be preferable to refer the matter of drafting a hostages convention to the Terrorism Committee See Nanda Progress Report on the United Nations Attempt to Draft an International Convention Against the Taking of Hostages 6 Ohio NUL Rev (1979) p 89 at p 97 Moreover a desire by the several Third World countries to have the Hostages Committee first study the causes of international terrorism also bore no fruit Id

136 See 28 UN GAOR Supp (No 28) at 9 para 29 at 14 para 44 at 17 para 56 UN Doc A/9028 (1973) The United States submitted a comprehensive draft convention against international terrorism but it has not been adopted Id at 28 33 UN Doc A/9028 (1973) See Franck & Lockwood Preliminary Thoughts Towards an International Convention on Terrorism 68 AJIL (1974) p 69

137 See e g 28 UN GAOR Supp (No 8) at 9 para 29 at 14 para 44 at 17 para 56 UN Doc A/9028 (1973) Draft proposal submitted by Uruguay id at 33 34 para 1 UN Doc A/9028 (1973)

the students at Maker re Univers tv dir cted a_ainst the Amin re_ime [138] Rumors of a oup d tat were followed by brutal governmental repression against both the army and students with a further destabilization of what was already a volatile situation [139]

Militarily weak states had everything to gain from a hostages convention and little to lose – except for a few propaganda points that might possibly be gained from insisting upon the principle that national liberation movements had a right to take hostages as part of their struggle But why should Third World governments jeopardize their own internal stability for such a tenuous principle? Weighted with in the utilitarian calculus of international politics UN non regulation of hostage taking came out short in comparison to the dangers that foreign military interven tion presented to the domestic security of governments that already were fairly un stable to begin with Entebbe had demonstrated that the negotiation of a hostages convention would promote the vital national interests of almost all Third World states

5 4 First session of the Hostages Committee

The first session of the Hosta_es Committee convened at United Nations Head quarters from Au_ust 1 to 19 1977 [140] The main working paper before it was a draft convention a_ainst the taking of hostages submitted by the Federal Republic of Germany [141] Its key provision was Article 7 which required a contracting state to extradite or prosecute an alleged offender found within its territory Unfortu nately the first session of the Hostages Committee deadlocked over the same general issue that had led to the breakdown of the Terrorism Committee How should a hostages convention deal with recognized national liberation movements? The Arab and African states wanted a _uarantee that a hostages convention would not be used as a legal political tool against legitimate national liberation movements [142]

138 *N Y Times* (August 2 1976) at p 4 col 1 id (August 8 1976) § 1 at p 4 col 1 id (February 23 1977) at p A2 col 3 But see Kyemba *supra* n 1 at pp 126 27

139 *N Y Times* (February 25 1977) at p A8 col 3 id (February 27 1977) § 4 at p 4 col 5

140 Hostages Committee Recommends That Work Be Continued during 1978 *UN Chronicle* (Au ust September 1977) at p 45

141 UN Doc A/AC 188/L 3 (1977) reprinted in 32 UN GAOR Supp (No 39) 106 10 UN Doc A/32/39 (1977) For a critique of the German Draft Convention see Kaye The United Nations Effort to Draft a Convention on the Taking of Hostages 27 Am UL Rev (1978) p 433

142 See e Report of the Ad Hoc Committee on the Drafting of an International Conven tion a ainst the Taking of Hostages (8th mtg) 3 para 6 UN Doc A/AC 188/SR 8 (prov ed 1977) (hereinafter cited as First Hostages Report) reprinted in 32 UN GAOR Supp (No 39) 30 at 31 para 6 UN Doc A/32/39 (1977) I irst Hosta es Report (14th mtg) 3 para 9 UN Doc A/AC 188/SR 14 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 74 at 75 para 9 UN Doc A/32/39 (1977) First Hostages Report (15th mt) 2 para 5 UN Doc A/ AC 188/SR 15 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 83 at 83 84 para 5 UN Doc A/32/39 (1977) UN Do A/AC 188/L 5 (197) reprinted in 32 UN GAOR Supp (No 39) 111 UN Doc A/32/39 (1977)

The earlier disputes over inclusion of a requirement for prosecution or extradi tion of hostage takers and the protection of only innocent hostages were re vived [143] To this confusion was added a request for the preservation in any hos tages convention of a state s right to grant political asylum [144] Finally underlying these problems was the seminal issue raised by the Entebbe crisis itself Whether under any circumstances a state could use force to rescue hostages held within the territory of another state? The Israeli raid at Entebbe haunted the proceedings of the first session of the Hostages Committee and numerous allusions to Entebbe were made throughout its debates [145]

Despite these matters of disagreement at the first session of the Hostages Com mittee however there were strong elements of consensus within the debates as well In effect they patterned the elements of consensus contained within the Secur ity Council Entebbe debates Since the laws of war severely condemned the taking of hostages this practice should not be tolerated by the laws of peace either [146] As for the treatment accorded to national liberation movements by a hostages conven tion the United States delegate observed [147] that those government members of the Hostages Committee expressing strong support for national liberation struggles had already endorsed the principle that liberation movements should not take hostages at the Diplomatic Conference on the Reaffirmation and Development of Interna

143 First Hostages Report *supra* n 142 (7th mtg) 3 para 5 UN Doc A/AC 188/SR 7 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 26 at 27 para 5 UN Doc A/32/ 39 (1977)

144 First Hostages Report *supra* n 142 (8th mtg) 5 para 15 UN Doc A/AC 188/SR 8 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 32 at 32 33 para 15 UN Doc A/32/39 (1977)

145 See e g First Hostages Report *supra* n 142 (7th mtg) 4 5 para 12 UN Doc A/AC 188/SR 7 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 26 at 28 para 12 UN Doc A/32/39 (1977) First Hostages Report *supra* n 142 (9th mtg) 3 para 11 UN Doc A/AC 188/SR 9 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 38 at 39 para 11 UN Doc A/32/39 (1977) First Hostages Report *supra* n 142 (11th mtg) 10 para 43 UN Doc A/AC 188/SR 11 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 51 at 58 para 43 UN Doc A/32/39 (1977) First Hostages Report *supra* n 142 (15th mtg) 3 para 6 UN Doc A/AC 188/SR 15 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 83 at 84 para 6 UN Doc A/32/39 (1977) First Hostages Report *supra* n 142 (8th mtg) 2 para 2 UN Doc A/AC 188/SR 8 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 30 at 30 para 2 UN Doc A/32/39 (1977)

146 First Hostages Report *supra* n 142 (1st mtg) 2 para 3 UN Doc A/AC 188/SR 1 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 10 at 10 para 3 UN Doc A/32/ 39 (1977) First Hostages Report *supra* n 142 (5th mtg) 3 para 5 UN Doc A/AC 188/SR 5 (1977) reprinted with additions in 32 UN GAOR Supp (No 39) 19 at 20 para 5 UN Doc A/32/39 (1977) First Hostages Report *supra* n 142 (5th mtg) 5 para 12 UN Doc A/AC 188/SR 5 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 19 at 22 para 12 UN Doc A/32/39 (1977) First Hostages Report *supra* n 142 (8th mtg) 5 6 para 19 UN Doc A/AC 188/SR 8 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 30 at 33 para 19 UN Doc A/32/39 (1977)

147 First Hostages Report *supra* n 142 (12th mtg) 4 para 11 UN Doc A/AC 188/ SR 12 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 60 at 62 para 11 UN Doc A/32/39 (1977) See also First Hostages Report *supra* n 142 (5th mtg) 3 para 5 UN Doc A/AC 188/SR 3 (prov ed 1977) reprinted with additions in 32 UN GAOR Supp (No 39) 19 at 20 para 5 UN Doc A/32/39 (1977)

tional Humanitarian Law Applicable in Armed Conflicts [148] Therefore the German delegate argued it was unnecessary for the FRG draft hostages convention to deal with hostage taking by national liberation movements [149] When the Additional Protocols to the Geneva Conventions entered into force liberation struggles would be regarded as international conflicts to which the prohibition on hostage taking applied [150] In the meantime a national liberation struggle would be treated as an armed conflict not of an international character within the meaning of Article 3 of the Fourth Geneva Convention [151] Article 147 of the Fourth Convention regards the taking of hostages as a grave breach and thus Article 146 of the Fourth Convention would require the prosecution or extradition of hostage takers [152] Therefore the taking of hostages in violation of Article 3 would obligate a contracting state to prosecute or extradite the hostage taker in accordance with Articles 146 and 147 of the Fourth Geneva Convention

As far as state terrorism was concerned the German delegate explained that Article 1 of the FRG draft hostages convention covered the case of a person who acting on behalf of a public institution or a state committed an offense of hostage taking within the terms of the convention [153] The Mexican delegate subsequently observed that the granting of political asylum to a hostage taker would not prevent prosecution under the terms of the convention [154] Finally no member of the Hostages Committee was prepared to argue for the inclusion in a draft hostages convention of a provision explicitly granting a state the right to use force to rescue hostages within the territorial domain of another state when the latter violated the convention Nevertheless the delegates were similarly unwilling to adopt proposals specifically denying the right to use force to rescue hostages [155] It appeared that

148 In June of 1977 that Conference had adopted two protocols additional to the Geneva Conventions of 1949 Art 1(4) of the First Protocol applied the entirety of the four Geneva Conventions of 1949 to wars of national liberation This would include the prohibitions against the taking of hostages contained in Art 3 common to all four conventions and in Art 34 of the Fourth Geneva Convention Art 75(2)(c) of the First Protocol specifically affirmed the prohibition against the taking of hostages during national liberation struggles And Art. 4(2)(c) of the Second Additional Protocol reiterated this prohibition for armed conflicts not of an international character See Protocol Additional to the Geneva Conventions of August 12 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) reprinted in 16 ILM (1977) p 1391 (hereinafter cited as Protocol I) Protocol Additional to the Geneva Conventions of August 12 1949 and Relating to the Protection of Victims of Non International Armed conflicts (Protocol II) reprinted in 16 ILM (1977) p 1442 (hereinafter cited as Protocol II)

149 First Hostages Report *supra* n 141 (10th mtg) 3 para 8 UN Doc A/AC 188/SR 10 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 46 at 47 para 8 UN Doc A/32/39 (1977)

150 Id

151 Id

152 See nn 9 12 and accompanying text *supra*

153 First Hostages Report *supra* n 142 (12th mtg) 7 para 21 UN Doc A/AC 188/SR 12 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 60 at 64 para 21 UN Doc A/32/39 (1977)

154 First Hostages Report *supra* n 142 (16th mtg) 4 para 16 UN Doc A/AC 188/SR 16 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 88 at 90 para 16 UN Doc A/32/39 (1977)

155 UN Doc A/AC 188/L 7 (1977) reprinted in 32 UN GAOR Supp (No 39) 111 UN

the members of the Hostages Committee were willing to settle for the inclusion in the text of the hostages convention of a general reaffirmation of the principles of the United Nations Charter This outcome hinted at a general prohibition against the use of transnational force but essentially left the seminal question of the Entebbe raid unanswered

To be sure such a compromise would avoid a neat positivist resolution of the issue by failing to determine the legality or illegality of hostage rescue operations under international law Yet insistence upon a clearcut solution to this abstract problem by either side in the Hostages Committee would have killed the hostages convention insofar as it would have been interpreted by both the opponents and the partisans of the Israeli raid at Entebbe as a *sub silentio* adjudication of the merits of that dispute All members of the Hostages Committee abstained from a revival of the Security Council debates on the legality of the Entebbe raid precisely in order to avert a breakdown of the Committee proceedings Instead they operated on the foundation of the least common denominator among them and drafted a hostages convention on that compromise basis Under the regime of a hostages convention an Entebbe like crisis would not recur and even if one did it could be dealt with at that time and on its own terms It would be foolish to defeat an apparent present gain for international law and international politics on account of a possible future loss or of a past concluded tragedy

5 5 Larnaca and the second session of the Hostages Committee [156]

The second session of the Hostages Committee was held from February 6 to 24 1978 in Geneva There the realization arose that the deadlock over the treatment to be accorded national liberation movements could be broken by the establishment of a link between the hostages convention and other international legal instruments [157] The concept of a link between a hostages convention and the Geneva Convention Protocols had been suggested by Syria during the first session of the Hostages Committee [158] Two distinctive approaches emerged as to how this link should be established A proposal submitted by Mexico at the first session of the Hostages Committee [159] would have provided that the hostages convention did not apply to any act or acts covered by the rules of international law applicable to armed conflicts [160] which would include legitimate national liberation struggles First World states suggested on the other hand that the scope of the hos-

Doc A/32/39 (1977) UN Doc A/AC 188/L 11 (1977) reprinted in 32 UN GAOR Supp (No 39) 112 UN Doc. A/32/39 (1977)

156 The Mogadishu hostages crisis had also exerted a profound influence upon progress in the negotiation of a hostages convention throughout the Fall of 1977

157 33 UN GAOR Supp (No 39) 5 para 17 UN Doc A/33/39 (1978)

158 First Hostages Report *supra* n 142 (8th mtg) 9 para 31 UN Doc A/AC 188/SR 8 (prov ed 1977) reprinted in 32 UN GAOR Supp (No 39) 30 at 36 37 para 31 UN Doc A/32/39 (1977)

159 UN Doc A/AC 188/L 6 (1977) reprinted in 32 UN GAOR Supp (No 39) 111 UN Doc A/32/39 (1977)

160 33 UN GAOR Supp (No 39) 5-6 para 19 UN Doc A/33/39 (1978)

tages convention should be broad enough to encompass all cases of hostage taking and therefore that the provisions of the hostages convention should supplement the Geneva Conventions of 1949 and its 1977 Additional Protocols [161]

The problem of state terrorism was disposed of by recognizing that under the proposed convention individual responsibility would arise if a government official of any state committed an act of hostage taking [162] On the other hand the questions of the right of asylum and of respect for the sovereignty and territorial integrity of states with regard to the release of hostages were deemed to constitute minor problems [163] Related to the problem of asylum however was a suggestion that the proposed convention contain a provision similar to Article 13 of the Strasbourg Convention allowing refusal of extradition if there were grounds to believe that the request was made for reasons of political ethnic or religious persecution [164] On these issues too it seemed a compromise was possible

The prospects were bright near the end of the second session of the Hostages Committee for the conclusion of a draft hostages convention And at this point fate itself intervened to invigorate the mandate of the Hostages Committee and give its work a renewed sense of urgency For on February 18 19 just prior to the final two meetings of the second session of the Hostages Committee on February 24 1978 [165] the hostage taking at Larnaca airport in Cyprus and the deadly Egyptian rescue operation unfolded towards their tragic denouement [166] The major concessions discussed above were readily accepted by the members of the Committee at these final meetings in a remarkable spirit of harmonious compromise [167] and then artfully woven into the textual fabric of the Committee s second report to the General Assembly

5 6 Third session of the Hostages Committee

The Hostages Committee held its third session in Geneva from January 29 to February 16 1979 [168] Of the two alternative concepts for the scope of the convention the Committee decided to accept textual language that would preclude the application of the draft hostages convention wherever the Geneva Conventions of 1949 or the Additional Protocols of 1977 were applicable to a particular act of hostage taking committed in the course of armed conflicts as defined in the Conven

161 UN Doc A/AC 188/L 20 (1978) reprinted in 33 UN GAOR Supp (No 39) 6 para 20 UN Doc A/33/39 (1978) See also 33 UN GAOR Supp (No 39) 63 para 2 UN Doc A/33/39 (1978) (French proposal)

162 Id at 58 para 5 UN Doc A/33/39 (1978)

163 Id at 58 para 6 UN Doc A/33/39 (1978)

164 Id at 57 para. 2 UN Doc A/33/39 (1978) See European Convention on the Suppression of Terrorism opened for signature January 27 1977 Art 13 reprinted in 15 ILM (1976) p 1272 at p 1275

165 33 UN GAOR Supp (No 39) 66 74 UN Doc A/33/39 (1978)

166 *N Y Times* (February 19 1978) at p 1 col 6 id (February 20 1978) at p A1 col 6

167 See e 33 UN GAOR Supp (No 39) at 82 paras 78 79 UN Doc A/33/39 (1978)

168 34 UN GAOR Supp (No 39) 2 para 3 UN Doc A/34/39 (1979)

tions and Protocols [169] In effect the Third World countries prevailed on this point The draft hostages convention would not as suggested by First World states supplement the Geneva Conventions and Additional Protocols by rendering an act of hostage taking subject to the provisions of both regimes Nevertheless the draft convention would serve the purpose of closing the final loophole in international law on hostage taking [170] The hostages convention would apply to all instances of transnational hostage taking not covered by the Geneva Accords

Language was also adopted to the effect that nothing in the hostages convention shall be construed to justify the violation of the territorial integrity or political independence of a state in contravention of the UN Charter [171] Finally there was general agreement that the provisions of the hostages convention should not be interpreted to impair the right of asylum [172] Yet a grant of asylum by a state party to a hostage taker would not relieve it of the obligation to submit the case to its competent authorities for the purpose of prosecution [173]

5 7 Teheran and the Hostage Convention

The 34th General Assembly referred the draft hostages convention to the Sixth Committee which substantially upheld the compromises contained therein Then once again fate added momentum to the hostages convention propelling it success fully through the final stages of the adoption procedure in both the Sixth Committee and the General Assembly On November 4 1979 Iranian student militants entered the embassy of the United States in Teheran and seized and detained the US diplomatic staff on the premises [174] On December 7 1979 the Sixth Committee adopted without vote a recommendation to the General Assembly that it adopt a

169 Id at 78 Art 12 para 1 UN Doc A/34/39 (1979) (emphasis added) In so far as the Geneva Convention of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage taking and in so far as States Parties to this Convention are bound under those *Conventions* to prosecute or hand over the hostage taker the present Convention shall not apply to an act of hostage taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto including armed conflicts mentioned in Article 1 paragraph 4 of Additional Protocol I of 1977 in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

In the final version of Art 12 adopted by the General Assembly the word emphasized above is spelled with a lower case c so that the phrase now refers to both the Geneva Conventions and the Geneva Protocols See Letter from Anthony C E Quainton Director of the State Department s Office for Combatting Terrorism to Israel Singer (December 11 1979) reprinted in 74 AJIL (1980) p 420 at p 421

170 See id American Branch International Law Association Report of the Committee on Armed Conflict *Proceedings and Committee Reports* p 38 at p 44

171 34 UN GAOR Supp (No 39) 7 8 para 2 UN Doc A/34/39 (1978)

172 Id at 15 16 paras 59-61 UN Doc A/34/39 (1978)

173 Id UN Doc A/34/39 (1978)

174 *N Y Times* (November 5 1979) at p A1 col 6 See Boyle Iran Afghanistan Cuba and SALT II The lessons of international law 1982 Yale J World Pub Order (forthcoming)