

1987

Jurisdiction Over Terrorists Who Take Hostages: Efforts to Stop Terror-Violence Against United States Citizens

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NOTES AND COMMENTS

JURISDICTION OVER TERRORISTS WHO TAKE HOSTAGES: EFFORTS TO STOP TERROR-VIOLENCE AGAINST UNITED STATES CITIZENS

Elizabeth R. P. Bowen*

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INTRODUCTION

International terror-violence of frightening dimensions threatens world order and strains international relations. Modern terrorism,¹ endangering human lives and jeopardizing fundamental freedoms, is frequently confused with "legitimate" means of self-determination and liberation.² Terrorism is a means of ideological warfare,³ in which innocent citizens of warring and non-warring states suffer the consequences.⁴ In the past, terrorists limited attacks to persons and locations having a direct relationship to an enemy government—through employment, ownership, or occupation.⁵ The modern trend in terrorism is to

1. Calvert, *Terrorism in the Theory of Revolution*, in *TERRORISM, IDEOLOGY & REVOLUTION* 27 (N. O'Sullivan ed. 1986) [hereinafter Calvert]. Modern terrorism is similar to the revolutionary activity occurring during the French Revolution of 1789. Revolutionaries used physical violence to create a basis for a new social order, executing members of the aristocracy for no reason other than their social status. *Id.* at 28.

2. Sofaer, *Terrorism and the Law*, 64 *FOREIGN AFF.* 906 (1986) [hereinafter Sofaer, *Terrorism and Law*]. United Nations resolutions do not establish a basis for differentiating between legitimate and illegitimate struggles. *Id.* As a result most groups apprehended while employing terrorist tactics justify their actions as legitimate fights against oppression and avail themselves of the political offense exceptions to extradition; see *infra* notes 229-53 and accompanying text (discussing the political offense exception to extradition and its abuse by terrorists).

3. See Alexander, *Conference Report—Terrorism: The Threat and Possible Countermeasures*, 8 *TERRORISM: AN INT'L J.* 272 (1986). Terrorists primarily use violent tactics to achieve ideological, political, and economic goals. *Id.* at 273; see also N. LIVINGSTONE & T. ARNOLD, *FIGHTING BACK* 23 (1985) [hereinafter *FIGHTING BACK*] (concluding that terrorism is an actual form of warfare and that Western nations must acknowledge an undeclared war between terrorism-sponsoring nations and the West to justify a defensive war against terrorism).

4. Lynch, *International Terrorism: The Search for a Policy*, 9 *TERRORISM: AN INT'L J.* 1 (1987) [hereinafter Lynch]. Because of the inaccessibility of the true targets of the terrorists, they attack the more accessible innocent civilians. *Id.* at 9-10.

5. See Bell, *Comment: The Origins of Modern Terrorism*, 9 *TERRORISM: AN INT'L J.* 307-08 (1987) (noting that in the past, the victims of terrorist attacks were targeted

attack innocent civilians sharing the nationality of the enemy government⁶ and to hold that government hostage in the eyes of the public.⁷

The international community has not effectively deterred acts of international terrorism.⁸ Despite numerous declarations denouncing terrorist activity, practical and effective sanctions are elusive.⁹ In an effort to reinforce the international battle against terrorism, the United Nations unequivocally condemned terrorist activity, particularly the killing of innocent hostages.¹⁰ Nations' inability to combat this international threat is partially due to the nature of terrorist warfare.¹¹ Characterized by surprise attacks, violent strikes against innocent citizens,¹² and the unpredictable bombing of airports, airplanes, and embassies, the perpetrators of terror-violence are difficult to apprehend.¹³ Even when a

because of their influence on events and regimes). Modern terrorism is not directed at individuals with influence, but at individuals with certain characteristics such as religion and nationality. Populations are the targets, not individuals. *Id.* at 309.

6. *Id.* But cf. Wilkinson, *Fighting the Hydra: International Terrorism and the Rule of Law*, in Calvert, *supra* note 1, at 205 (noting that United States citizens have always been major targets of terrorists).

7. Burtchael, *Moral Response to Terrorism*, in *FIGHTING BACK*, *supra* note 3, at 191, 194.

8. See A. MILLER, *TERRORISM AND HOSTAGE NEGOTIATION* 8 (1980) [hereinafter A. MILLER] (discussing ineffective attempts by the United Nations to combat international terrorism). The author criticizes the United Nations for its inability to afford innocent civilians the same protection as diplomats. *Id.* at 9.

9. Lynch, *supra* note 4, at 64-69 (describing the "murkiness" of international law on issues of terrorism).

10. See Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and the Study of 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. 40/61, 40 U.N. GAOR Supp. (No. 53) (108th mtg.), U.N. Doc. A/40/53 (1985), reprinted in Press Release GA/7272 (Jan. 13, 1986) (calling for international cooperation to eliminate acts of international terrorism and their underlying causes); see also L. HIPPCHEN & Y. YIM, *TERRORISM, INTERNATIONAL CRIME AND ARMS CONTROL* 71 (providing an analysis of the nature and background of international terrorism).

11. See M. CRENSHAW, *TERRORISM, LEGITIMACY, AND POWER: THE CONSEQUENCES OF POLITICAL VIOLENCE* 143 (1982) (noting that, in the confusion surrounding terrorist attacks, the criminal nature is subdued and the activity is interpreted as "a mode of doing politics"). The nature of terrorist warfare is so complex that establishing a consistent and comprehensive policy is very difficult. *Id.*

12. See Netanyahu, *Terrorism: How the West Can Win*, *TIME*, Apr. 14, 1986, at 48 (discussing certain characteristics and tactics of terrorists, such as attacking the weak and defenseless and deliberately violating laws of war); see also A. SCHMID, *POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES, AND LITERATURE* 79-83 (1982) [hereinafter A. SCHMID] (describing the difference between innocent victims of terrorism, civilian victims of terrorism, noncombatant victims of terrorism, and symbolic victims of terrorism).

13. Lutz, Streiker & Johnson-Champ, *International Terrorism: A Legal Bibliography of Selected Issues and Sources*, 20 *INT'L LAW* 1083 (1986) (stating that, for a

state captures terrorists, national laws against international terrorism generally fail to provide sanctions that satisfy the offended states' authorities.¹⁴ Thus, modern terrorism¹⁵ menaces states that are reluctant and unsuccessful in their efforts to combat the increasing threat.¹⁶

Part I of this Comment discusses the response of the United States and the international community to the recent surge in terror-violence, specifically examining hostage-taking as an effective terror-tactic. This Comment then considers the international community's inability to agree on the definition of terrorism, making legal sanctions ineffective. Part II provides a prospective of the terrorism crisis, highlighting the underlying agitators further complicating measures to combat terrorism—such as state-sponsored terrorism, the nature of terrorist warfare, media coverage of terrorist attacks, and the difficulty of extraditing terrorists. Part III addresses the response of the United States to international terrorism through an examination of domestic and international legal measures and changes in United States foreign policy. Part IV analyzes the possible jurisdictional responses to the problem of prosecuting terrorists who abduct and murder United States citizens and offers a conclusion on the most effective jurisdictional approach. Part V discusses the international measures on terrorism, specifically on hostage-taking, and suggests an international jurisdictional approach after an analysis of United Nation's initiatives to solve the terrorism problem. This Comment concludes that the United States and the international community should pursue a legal response to the international terrorist threat, giving states broader jurisdictional license to prosecute and extradite terrorists.

variety of reasons, most terrorists are beyond the reach of states' laws); see J. MURPHY, PUNISHING INTERNATIONAL TERRORISM 107 (1985) (noting that the apprehension and prosecution of terrorists is a rare phenomena).

14. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Part IV, Introductory Note, at 179 (Tent. Draft No. 6, 1985) [hereinafter RESTATEMENT DRAFT]. The Restatement Draft acknowledges the limitations on the authority of states to apply laws extraterritorially when the action conflicts with other states' interests. Section 401 of the Restatement Draft describes the limitations on state authority to prescribe, adjudicate, and enforce. *Id.*

15. See Kupperman, *Terrorism and National Security*, in *Conference Report—State-Sponsored Terrorism: The Threat and Possible Countermeasures*, reprinted in 8 TERRORISM: AN INT'L J. 255, 257 (1986) [hereinafter *Conference Report*] (discussing the new breed of modern terrorism characterized by groups that hide behind the protective veil of states illicitly sponsoring the terrorist activity).

16. *Id.* at 255.

I. INTERNATIONAL TERRORISM: A GLOBAL CONCERN

A. HOSTAGE-TAKING: A TERROR TACTIC

Hostage-taking became a popular terrorist tactic during the late 1960s because of its destabilizing force.¹⁷ Although the taking and killing of hostages is a recognized component of armed conflict,¹⁸ the recent increase in terrorist hostage-taking, calling attention to political causes, securing the release of criminals, and humiliating governments, has inspired the United States to strengthen its commitment to fight international terrorism.¹⁹

17. Cooper, *Hostage Rights: Law and Practice in Throes of Evolution*, 15 CASE W. RES. J. INT'L L. 61, 61 n.3 (1983) [hereinafter Cooper]. Before 1972, aircraft hijacking was the primary provocation of international response. *Id.* at 79. Taking innocent citizens hostage as a means of intimidating and coercing states reached unprecedented notoriety during the 1972 Olympic Games in Munich. *Id.* at 80. The availability of mass communications increases the effectiveness of this method of terrorism, allowing terrorists to capture the attention of the world community. Wurth-Hough, *Network News Coverage of Terrorism: The Early Years*, 6 TERRORISM: AN INT'L J. 403, 404 (1983) [hereinafter Wurth-Hough]. The more offensive the crime, the more media coverage it attracts. *See generally* VIOLENCE AS COMMUNICATION 9 (A. Schmid & J. de Graaf eds. 1982) [hereinafter A. Schmid & J. de Graaf] (discussing the different ways terrorists manipulate news media).

18. Cooper, *supra* note 17, at 62 (1983). Historically, hostage-taking is recognized under the law of war as a disagreeable, but inevitable characteristic of armed conflict. *Id.* States allied with the alleged offenders claim terrorist attacks are a means of legitimate struggle and thus individuals and groups engaged in violent actions possess soldiers' privileges to kill and receive prisoner of war treatment. International Law Association Committee on International Terrorism, *International Terrorism: Fourth Interim Report of the Committee*, reprinted in 7 TERRORISM: AN INT'L J. 123 (1984) [hereinafter *Fourth Report*].

19. Note, *The Taking and Killing of Hostages: Coercion and Reprisal in International Law*, 54 NOTRE DAME L. REV. 131, 131 (1978). The practice of taking hostages is ancient. *See* Alexander, *The Terrorism Problem*, in *Conference Report, supra* note 15, at 272 (presenting a historical perspective of terrorism). The international attitude toward hostage-taking and killing is evolving and increasingly categorizing the crime as barbaric. The attitude of Congress condemning terrorism is evident in legislation proposed in 1985. *See Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearings on S. 1373, S. 1429 and S. 1508, Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 10 (1985) [hereinafter *Prosecution Bills*] (proposing legislation to prosecute those who attack United States citizens and personnel abroad). S. 1508 requires a determination of whether the imposition of the death penalty is justified. Considerations include: 1) mitigating factors such as age, mental capacity (although this is not a defense), duress, level of participation, and 2) aggravating factors such as previous convictions and *mens rea*. *Id.*; *see also* S. 1508, 99th Cong., 1st Sess., 131 CONG. REC. 88 (1985) (introducing S. 1508 with the intent to "close the statutory gap by amending the existing hostage-taking statute to permit application of the death penalty . . . for first degree murder"). Senator Specter justifies the "abduction" of terrorists for the purpose of prosecution in the United States by analogizing the situation to *Ker v. Illinois*, 119 U.S. 436 (1886). In *Ker*, the defendant was kidnapped in Peru by Illinois authorities and later tried and convicted in the United States. *Ker v. Illinois*, 119 U.S. 436, 438 (1886). The Supreme Court upheld his con-

The increase in terrorist incidents has prompted states in the international community to study subversive activities and seek international cooperation to stop terror-violence and hostage-taking.²⁰ No international consensus exists, however, regarding the best means of achieving the desired results—the freedom of hostages in captivity, the punishment of hostage-takers, and the prevention of future hostage-taking.²¹

B. DEFINITIONAL DILEMMA: TERRORISTS V. FREEDOM FIGHTERS

Defining terrorism in an internationally recognized form causes controversy among states with divergent interests.²² Parties with different

viction, disclaiming any constitutional ground for objecting to this mode of arrest or trial. *Id.* at 444. With the *Ker* case as support, Senator Specter called for "arrest with reasonable force in whatever way is doable." Such action would authorize extraterritorial jurisdiction in an incident involving a United States citizen even if jurisdiction can only be based upon nationality of the victim. *Prosecution Bills, supra* note 19, at 44. Although Senator Specter does not use the phrase "passive personality principle," he is effectively suggesting its application if no other means of jurisdiction will allow prosecution. *Id.*; see also Sofaer, *Terrorism and Law, supra* note 2, at 919 (noting that the international community has only accepted the use of extraterritorial force in very limited circumstances and that the United States has historically rejected the passive personality principle). The author indicates, however, that the strict adherence to this principle "would serve to insulate the perpetrators of international violence from any control or punishment for their crimes." *Id.*

20. 40 U.N. SCOR (2637th mtg.) at 1, U.N. Doc. S/RES/579 (1985) (calling for increased international cooperation to devise effective measures to prosecute and punish all acts of hostage-taking as manifestations of international terrorism).

21. See *Conference Report: Terrorism, Future Threats and Responses*, 7 TERRORISM: AN INT'L J. 367, 372 (1985) (commenting on the lack of any consensus on the lawlessness of international crimes, i.e., terrorism).

22. *International Terrorism, Insurgency, and Drug Trafficking Present Trends in Terrorist Activity: Joint Hearings Before the Subcomm. on Foreign Relations and the Comm. on the Judiciary*, 99th Cong., 1st Sess. 183 (1985). In the Senate hearings, testimony suggested that the barrier to effective legal controls is "the definitional and moral confusion over what constitutes terrorism." *Id.* The definition offered at the hearings proclaimed terrorism as:

The deliberate employment of violence or threat of use of violence by sovereign states or sub-national groups encouraged or assisted by sovereign states to attain strategic and political objectives by acts in violation of law intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened.

Id. at 183-84. See *Ad Hoc Committee on International Terrorism, Analytical Study Prepared by the Secretariat in Accordance with G.A. Res. 32/147*, U.N. Doc. A/AC.160/4 (1979) (discussing the need for an international definition of terrorism, the difficulty of reaching an international consensus, and providing a variety of governments' perspectives on the terrorism issue). The confusion about the definition of terrorism is evidenced by the multitude of definitions and the lack of consensus on the components of the acts. See A. SCHMID, *supra* note 12, at 119-58 (providing a collection of eighty-nine definitions of terrorism by various authors and authorities). Schmid cites the definition adopted by the United States government as "the threat or use of violence for political purposes when such action is intended to influence the attitude or behavior of a target group wider than its immediate victims and its ramifications tran-

motives manipulate the confusion surrounding terrorism and self-determination to legitimize their actions.²³ What one state considers terrorism, another state may consider a valid exercise of resistance.²⁴ This difference in interpretation prevents the development of effective legal principles to deter terrorism.²⁵

The statement that "one man's terrorist is another man's freedom-fighter"²⁶ illustrates the definitional dilemma. Allowing certain parties

scend national boundaries." *Id.* at 147.

Other proposed definitions of terrorism by international scholars include:

Terrorism means any international use of violence or a threat of violence by the accused against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target through intense fear or anxiety in connection with a demanded political outcome.

Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 251 (Annex B) (1983) [hereinafter Paust]; see also Friedlander, *Terrorism and Self-Determination: The Fatal Nexus*, 7 SYRACUSE J. INT'L L. & COM. 263, 265 (1979-80) (defining terrorism as "the use of force, or threat of force, directed against innocent third parties for primarily ideological, financial or psychological purposes"). The failure of the international community to agree on an acceptable definition of international terrorism has been one of the major obstacles in adopting effective international sanctions and agreements. *Id.*

23. See McWhinney, *International Terrorism: United Nations Projects for Legal Controls*, 7 TERRORISM: AN INT'L J. 175, 181-82 (1984) (discussing the subjectivity of definitions of terrorism).

24. I R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 125-31 (1979) [hereinafter I R. FRIEDLANDER]. See generally NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, A SELECTED BIBLIOGRAPHY (1976) (providing a bibliography of works written on different aspects of terrorist warfare); A. LAKOS, *INTERNATIONAL TERRORISM: A BIBLIOGRAPHY* (1986) (providing a comprehensive bibliography of works on terrorism).

25. See Almond, *Using Law to Combat Terrorism*, in *FIGHTING BACK*, *supra* note 3, at 157, 160 (discussing the many faces of terrorism and the effect of the uncertainty about the definition upon the development of effective legal principles); *Ad Hoc Committee on International Terrorism, Analytical Study Prepared by the Secretariat in Accordance with G.A. Res. 32/147*, 1979 U.N.Y.B. 1146, 1147-49, U.N. Doc. A/AC.160/4 (discussing the need for an international definition of terrorism and the difficulty of reaching a consensus on the elements of terrorist warfare). The study provides the perspectives of various nations on the definitional dilemma. *Id.*; see also Shultz, *Terrorism: The Challenge to the Democracies*, 34 DEP'T ST. BULL. 2 (1984) [hereinafter Schultz] (finding a unifying thread in terrorism—"the attempt to impose their will by force . . . designed to create an atmosphere of fear").

26. *But cf.* Begin, *Freedom Fighters and Terrorists*, in *INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE* 39-46 (B. Netanyahu ed. 1979) [hereinafter B. Netanyahu] (suggesting that the difference between terrorists and freedom fighters is that terrorists kill innocent civilians, while freedom fighters save lives and fight at the risk of their own lives "until liberty wins the day"); A. MILLER, *supra* note 8, at 8-9 (criticizing the United Nation's inability to distinguish between freedom fighters and terrorists for the purpose of protecting innocent civilians when the United Nations has made this distinction for the protection of diplomats); Elkins, *Caging the Beasts*, in B. Netanyahu, *supra*, at 230-31 (opining that terrorists are defined by what they do, not by their political purposes).

to commit acts of violence under the guise of "freedom fighter" makes sanctioning the same activity committed by other parties nearly impossible. Countries cannot implement laws effectively when the process involves a determination of the legitimacy of each actor.²⁷ The definitional dilemma is the result of inconsistent interpretations of terrorist attacks made by the international legal community on terrorist issues as a whole.²⁸ If the international community can focus on the acts committed and not the various groups claiming the right to commit the acts, then the community can adopt a definition that distinguishes permissible and impermissible activity.²⁹ Such definitions would enable the international community to provide legal sanctions for acts, regardless of the identity of actors.³⁰

The evolution of terrorist tactics such as hostage-taking and ruthless murder of innocent civilians demands a distinction between legitimate and illegitimate means of insurgency. United States government officials make that distinction, charging that those who kill or abduct innocent civilians are not freedom-fighters under any circumstances—they are terrorists.³¹ Although the United States position on terrorism is

27. R. FRIEDLANDER, *TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL* 48 (1983) [hereinafter R. FRIEDLANDER, *TERROR-VIOLENCE*] (stating that although distinguishing between legitimate and illegitimate is as difficult as separating rebellion from conflict—violence can not be legitimate against innocent parties).

28. *Conference Report*, *supra* note 15, at 275 (noting that some states find terrorism justified when the actors fight for a valid cause, such as the right to self-determination or resistance to a totalitarian regime).

29. See R. FRIEDLANDER, *TERROR-VIOLENCE*, *supra* note 27, at 198 (encouraging the prosecution of terrorists regardless of motive and claiming that terrorism is impermissible in a law-ordered society).

30. See International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979), *reprinted in* 18 I.L.M. 1456 (1979) [hereinafter Hostage Convention] (signed by the United States on January 6, 1985) (defining the act of hostage-taking in article 1 with no mention of the actor's motivation). Although it is easy to label incidents as terrorist attacks, and in many instances easy for the West to label the perpetrators as terrorists, there is no consensus on this classification. When countries identify with the particular group's struggle—for example countries in the Middle East and the Palestine Liberation Organization (PLO)—they classify the terrorist attacks as legitimate means to achieve the legitimate goal of reestablishing the holy land. See generally *The Availability of Civil and Criminal Actions Against Yassir Arrafat's Palestine Liberation Organization [PLO]: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 84 (statement of Mary V. Mochary, Deputy Legal Advisor, United States Department of State) (stating that few terrorists are ever apprehended after the incident and asking for the enactment of more laws to combat the terrorist threat). Mochary advocates the abolition of the political offense exception, finding that the exception has "no place" in extradition treaties between stable democracies that have political systems to redress legitimate grievances and judicial process to provide fair treatment. *Id.* at 88.

31. See Schultz, *supra* note 25, at 2 (quoting Senator Henry Jackson as saying that the idea that one man's terrorist is another's freedom-fighter cannot be sanctioned and

clear, effective measures to combat the problem are difficult to implement.³² Most attacks against its citizens occur abroad, leaving the United States unable to either prosecute or ensure prosecution due to the number of states sympathetic to the plight of the freedom fighter and consequently offering the fugitives sanctuary. Without the assistance of the international community in reaching a consensus on the definition of international terrorism, United States efforts to deter terrorism with legal sanctions are futile.

Defining impermissible acts by terrorists is difficult because terrorist attacks share many components of acts of war.³³ Therefore, groups claiming they are at war with imperialist governments justify their attacks as acts of war.³⁴ Because most terrorist groups are not directly associated with a government,³⁵ the war-like activity does not fall within the international legal grasp. Terrorist are consequently allowed to continue attacking and killing innocent civilians without much consequence.³⁶

An additional factor complicating the problem of defining terrorism is the subsequent identification of the actual terrorists. Many small, splintered terrorist organizations are supported by governments sympathetic to their causes, because of similar ideologies and common ene-

that associating the word "freedom" with terror-violence would be a disgrace to democratic societies). A simple distinction between terrorism and self-determination is that "legally speaking, terrorism focuses upon the effect, while self-determination deals with causal relationships . . . terrorism is a human wrong, self-determination is, arguably, a human right." Friedlander, *Terrorism and Self-Determination: The Fatal Nexus*, 7 SYRACUSE J. INT'L L. & COM. 263, 266 (1979-80).

32. Alexander, *The Terrorism Problem*, in *Conference Report*, *supra* note 15, at 273. Although United States foreign policy on terrorism is clear, the United States failure to specifically define terrorism and accompanying criminal acts has contributed to the confusion over what acts constitute terrorism. *Id.*

33. See W. FARRELL, U.S. GOVERNMENT RESPONSE TO TERRORISM: IN SEARCH OF AN EFFECTIVE STRATEGY 6 (1982) [hereinafter W. FARRELL] (noting that terrorism is not easily separable from wars, disasters, and accidents). Farrell provides a lengthy list of definitions and analyzes the problems with applying them to international terrorism. *Id.* at 7-13.

34. See McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 702 (1984-85) [hereinafter McGinley] (stating that customary international law recognizes certain circumstances during armed conflicts when hostage-taking is permissible).

35. *Conference Report*, *supra* note 15, at 257-58 (discussing the new breed of terrorism characterized by nation-states that use proxies that are easily disowned).

36. *But see* Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 612, 632 (1986) [hereinafter Leich] (discussing the United States strike against Libya after a clear link between the terrorist activity and the Libyan government was established). Once a sufficient relationship between the terrorists and a government is established, the country of the attacked party may invoke self-defense measures under article 51 of the United Nations Charter. U.N. CHARTER art. 51.

mies.³⁷ Identifying the faction of the terrorist organization committing the immediate acts is, therefore, useless in preventing the continuation of similar attacks when the sponsoring state escapes undetected.³⁸ In an effort to stop the increasing number of attacks, the United States is identifying governments supporting the terrorists.³⁹ When the United States discovers a positive link between a government and a terrorist act, it has shown a willingness to fight back.⁴⁰ This low-level form of warfare is the result of United States frustration with ineffective means of prosecuting and deterring terrorists who kill United States citizens abroad.⁴¹

II. UNDERLYING AGITATORS

A. STATE-SPONSORED TERRORISM

The United States reaction is also an indication of the government's unwillingness to tolerate state-sponsored terrorism by hostile governments. The most dramatic problem of modern terrorism is the increase in international state-sponsored terrorism.⁴² A characteristic of this increase is the focus on attacking innocent civilians and non-toletarian societies.⁴³ Two basic problems arise in attempting to stop state-sponsored terrorism. First, the breakdown, or lack of a nation-state claiming responsibility for the terrorist activity leaves victims unable to bring formal actions through the United Nations legal channels. Second, the sponsoring state rarely acknowledges covert support for guerilla opera-

37. Livingstone & Arnold, *The Rise of State-Sponsored Terrorism*, in FIGHTING BACK, *supra* note 3, at 12-13 [hereinafter Livingstone & Arnold] (discussing the growing cooperation between fraternal revolutionary organizations and Soviet and Mideastern countries).

38. N. LIVINGSTONE, *THE WAR AGAINST TERRORISM* 163 (1983) [hereinafter N. LIVINGSTONE] (explaining that even when states identify and apprehend terrorists, they often release the terrorists because of fear of further violence and blackmail).

39. See *infra* note 45 and accompanying text (listing governments that the United States has identified as supporting terrorist activity).

40. Leich, *supra* note 36, at 632. The United States invoked the right of self-defense under article 51 of the United Nations Charter. In a statement to the Security Council, a United States representative explained the scope of the attack on Libya and justified the attack as a response to Libya's violation of article 2(4) of the United Nations Charter. *Id.* The specific violation was Libya's policy of threats and use of force against the United States and its citizens. *Id.* at 633.

41. See Kupperman, *Terrorism and National Security*, in *Conference Report*, *supra* note 15, at 255, 257 (noting that terrorist organizations are often indirectly or secretly related to sympathetic governments that provide safe havens from prosecution).

42. Livingstone & Arnold, *supra* note 37, at 11-12.

43. *The President Proposes Legislation to Counter Terrorism*, 84 DEP'T ST. BULL. 65 (June 1984).

tions promoting that state's interests and ideologies.⁴⁴

The United States has isolated five countries that, over the past five years, have increasingly supported terrorist activity.⁴⁵ According to the United States Department of State, incidents of terrorism increased thirty percent in 1984, with a high percentage of that increase occurring in the Middle East.⁴⁶ The response of the United States to suspected state-sponsored terrorism includes imposing various sanctions and, in some cases, severing diplomatic relations.⁴⁷

The United States is implementing preventative measures against the rise of state-sponsored terrorism.⁴⁸ These measures include using intelligence sources to intercept or detect terrorist activity before the acts occur, as well as the employment of active defense sources to make the acts more costly to terrorists.⁴⁹ Some states, the United Kingdom for example, have filed declarations against state-sponsored terrorism.⁵⁰ Other states, plagued with an increasing number of terrorist attacks instigated by covert actions of governments, will inevitably follow suit. The detection and elimination of individual acts through the employment of intelligence forces may act as the most effective sanction in the fight against state-sponsored terrorism.⁵¹ This approach avoids actual confrontation with the supporting government when the link between the sponsoring government and the terrorists is not positively established. In instances in which the connecting link is clearly established, the United States will not rule out measures available through the United Nations doctrines of self-defense.⁵²

44. Livingstone & Arnold, *supra* note 37, at 11, 14 (explaining that by the mid-seventies terrorism was highly cooperative, but that patron states preferred to stay in the background and control indirectly).

45. Oakley, *Terrorism: Overview and Developments*, 85 DEP'T ST. BULL. 61 (Nov. 1985) (listing Cuba, Libya, Nicaragua, Iran, and Syria as the states sponsoring terrorism); *see also* Reagan, *The New Network of Terrorist States*, 9 TERRORISM: AN INT'L J. 101-09 (1987) (adding North Korea to the list of states that sponsor terrorism and discussing the close Soviet relationship with the terrorist network).

46. Oakley, *Combating International Terrorism*, 85 DEP'T ST. BULL. 73-78 (June 1985) [hereinafter Oakley].

47. *Id.* Such sanctions rarely solve the problem and, in the case of severing diplomatic relations, may prolong the conflict. *Id.*; *see also* Leich, *supra* note 36, at 629 (imposing economic sanctions on Libya for material support to terrorist groups).

48. *See* W. FARRELL, *supra* note 33, 32-46 (discussing the different departments in the United States government and their roles in combatting the international terrorist threat).

49. Oakley, *supra* note 46, at 73-78.

50. Sayre, *International Terrorism: A Long Twilight Struggle*, 84 DEP'T ST. BULL. 48 (Oct. 1984).

51. Oakley, *supra* note 46, at 73-78.

52. Livingstone, *Proactive Responses to Terrorism: Reprisals, Preemption, and Retribution*, in FIGHTING BACK, *supra* note 3, at 109, 119. The possible responses to

B. THE NATURE OF TERRORIST WARFARE:
INVISIBLE BLOCKADES

The nature of terror-violence makes the activity difficult to control in the international community. Terrorist attacks are predominantly violent, characterized by suicide missions, car bombs, and aircraft hijackings. The insurgents risk their lives to advance "the cause"—whether political, religious, or fanatical—and are later immortalized as martyrs and heroes.⁵³ Laws prohibiting terrorist activity are ineffective because terrorists commit the acts considering goals, not sanctions.⁵⁴ This motivation for the attacks frustrates the traditional philosophy underlying the imposition of criminal sanctions—the deterrence of undesirable acts through the imposition of punishment.

Terrorists do not account for their actions to international courts or authorities.⁵⁵ Injured parties are, therefore, helpless in their quest for redress unless states who have custody of terrorists are willing to extradite or prosecute the terrorists. Because of the violent reprisals by terrorist organizations, most states do not dare sanction the members of terrorist organizations.⁵⁶ The conflicting interests of states, resulting in the refusal of many states to prosecute or extradite terrorists, undermine international efforts to stop modern terror-violence.⁵⁷ The impotence of individual states in the fight against international terror has prompted the United Nations to seek effective measures to curb the increasing number of terrorist attacks. By enacting an international convention with a broad jurisdictional base,⁵⁸ the United Nations hopes to stop the current increase in terrorist activity. A contributing factor in the increase of terrorist attacks is the publicity and attention that the attacks receive in the international community. Scholars have stud-

terrorism that can be justified under article 51 of the United Nations Charter are reprisal, preemption, and retribution. On April 15, 1986, the United States exercised the inherent right to self-defense under article 51 when it struck terrorist-related targets in Libya after discovering the positive link between the Libyan government and terrorists attacking United States citizens abroad. Leich, *supra* note 36, at 632-33.

53. Lynch, *supra* note 4, at 13 (discussing the difficulty of deterring attacks when the actor does not consider the legal sanctions for the crimes).

54. *Id.* at 13-14.

55. *See id.* at 64 (noting that terrorism escapes coverage under strategic, international, and domestic legal structures).

56. *See supra* note 38 (discussing states' hesitancy to sanction terrorists because of fear of reprisal).

57. *See infra* note 184 and accompanying text (discussing the Egyptian government's refusal to prosecute the terrorists after the Achille Lauro incident because prosecution of members of the PLO would be against Egypt's national interest).

58. *See* Hostage Convention, *supra* note 30, at art. 5 (granting jurisdiction on the basis of the victim's nationality).

ied the role of the media in reporting terrorist incidents, recognizing the correlation between publicity and terrorist goals. With the increase in violent terrorist attacks, the relationship between the media and terrorism has become increasingly important.

C. TELEVISION: THE ROLE OF THE MEDIA IN THE GROWTH OF INTERNATIONAL TERRORISM

The increase in the impact of terror-violence on governments and private parties is intricately related to the growth of the communication industry that transmits the terrorist threats.⁵⁹ The extensive coverage of the most inhumane acts creates a sympathetic atmosphere for terrorists, forcing states to control the lives of innocents by either meeting demands or causing the deaths of innocents as a consequence.⁶⁰ Through this manipulation of crisis, terrorists achieve fear and confusion in viewers, disguising their means of obtaining publicity as legitimate means of struggle.⁶¹ As a result, terrorist attacks, endangering human lives and jeopardizing fundamental freedoms, are frequently confused with "legitimate" means of self-determination and liberation.⁶²

The media faces the same problems plaguing the international community in reaching a consensus on an accurate definition of terrorism. As a primary source of public opinion, the media's presentation of terrorist activity is crucial to the education of its audience.⁶³ The media tends to distort reality and exaggerate the capabilities of terrorists in the extensive coverage of violent attacks.⁶⁴ Terrorists depend on this access to the media for conveying their ideological messages to the international public.⁶⁵ In the many dramatic and tragic incidents, the ter-

59. Wurth-Hough, *supra* note 17, at 404. Wurth-Hough presents a study on the reporting of terrorist incidents by the three major United States networks. The study discusses how technology facilitates the spreading of terrorism and attempts to distinguish between terrorist and mere criminal acts. *Id.* at 405.

60. See B. Netanyahu, *supra* note 26, at 250-52 (discussing terrorists' ability to psychologically manipulate the public through the media).

61. See N. LIVINGSTONE, *supra* note 38, at 57 (noting that the strategy of terrorists is to communicate fear and to achieve political goals through the threat of violence).

62. See *supra* note 2 and accompanying text (discussing problems in distinguishing legitimate and illegitimate activity by revolutionaries).

63. See Wurth-Hough, *supra* note 17, at 405 (discussing a study of the impact of terrorism as portrayed by the three major networks).

64. *Id.* at 418; see also Decter, *The Need for Clarity*, in B. Netanyahu, *supra* note 26, at 243-44 (discussing the inability of the media to distinguish questionable and horrific acts—resulting in inconsistent and confusing portrayals of terrorist incidents).

65. See N. LIVINGSTONE, *supra* note 38, at 57 (quoting opinions that support contentions that terrorists depend heavily on the media).

rorists capture more than just innocent citizens and public attention, they practically hijack the media itself.⁶⁶ Such criticism of the media does not emanate from the stories that are reported, but from the method of reporting.⁶⁷ The rewards to journalists often appear to outweigh the concerns for the lives of the victims.

1. First Amendment Balance

The media argues its right to report terrorist incidents is based on the first amendment guarantee of freedom of the press.⁶⁸ Additionally, the media asserts that the first amendment grants the right to gather news on the situs of the activity.⁶⁹ Although first amendment freedom is clearly stated in the United States Constitution,⁷⁰ United States courts have designated areas and times when it is permissible to abridge or suppress this freedom.⁷¹ Two examples of these restrictions are the prohibitions on obscenity and restrictions on the media when "clear and present danger" is imminent.⁷² When "specific harm of a grave nature would surely result from media dissemination of certain information," the United States may restrict first amendment freedoms.⁷³ If the media fails to adopt responsible guidelines on reporting terrorist incidents, the government may regulate the media's access to news and information.⁷⁴

Regulation of media access to crisis terrorist situations is justifiable

66. A. MILLER, *supra* note 8, at 85. See also N. LIVINGSTONE, *supra* note 38, at 65 (noting that the media is often symbolically held hostage by terrorists requiring the media to participate in the hostage negotiations).

67. A. MILLER, *supra* note 8, at 86.

68. U.S. CONST. amend. I (stating that "Congress shall make no laws . . . abridging freedom of speech, or of the press"). *But cf.* N. LIVINGSTONE, *supra* note 38, at 73 (noting that most news organizations have adopted voluntary guidelines regardless of any infringement on first amendment rights).

69. Miller, *Terrorism and the Media: Observations from the American and British Experiences*, in *MANAGING TERRORISM: STRATEGIES FOR THE CORPORATE EXECUTIVE* 91, 93 (P. Montana & G. Roukis eds. 1983) [hereinafter P. Montana & G. Roukis].

70. See *supra* note 68 and accompanying text (discussing freedom of speech according to the United States Constitution).

71. See Livingstone, *Terrorism and the Media Revolution*, in *FIGHTING BACK*, *supra* note 3, at 222 (quoting Justice Holmes on the limitations of free speech when words are used that "create a clear and present danger that they will bring about . . . substantive evils").

72. *Id.* at 222. The clear and present danger test is the guide for determining when free speech may be abridged. *Id.*

73. *Id.* at 221. In the past, there was speculation that the government would impose regulations and guidelines on the media. *Id.* This fear was the result of severe criticism of the media after the 1977 Hanafi Muslim hostage incident in Washington, D.C. *Id.*

74. See *id.* (discussing certain situations that would justify imposition of prior restraint by the government).

when the media's actions may endanger the lives of hostages. Numerous incidents have been reported where the media's release of information endangered the lives of hostages or jeopardized negotiation attempts.⁷⁵ In many of these incidents, the media's concern for getting the story,⁷⁶ not for the lives endangered, has earned severe criticism from both law enforcement officials and the general public.

By refusing to adopt comprehensive policy guidelines on airing terrorist incidents and videotapes produced by terrorists, the media is manipulated and utilized for terrorist purposes. Terrorists see television as the most effective access to the press that is otherwise controlled by the economically wealthy and powerful.⁷⁷ From this perspective, the real problem causing terrorist attacks is a malfunction in the Western information order.⁷⁸ Without access to communication, it is inevitable that the less powerful will use whatever methods available to access the largest audience possible.⁷⁹ Even accepting the imbalance in access to the media, the terrorist method of killing innocent civilians to publicize their causes is not tolerable in an international community seeking world peace and order.

2. Law Enforcement and Media

During terrorist attacks, the inapposite goals of law enforcement and the media produce tension.⁸⁰ Law enforcement's concerns are with the safety of victims and journalist's concerns are with getting "the story."⁸¹ At times, the media interferes with police operations, jeopardizing the lives of hostages.⁸² Instead of working against each other, law enforcement and media should work together to end the crisis.⁸³

75. P. Montana & G. Roukis, *supra* note 69, at 92. The goals of the media—gathering the news as it occurs—often interferes with police operations during a terrorist siege. These goals are not easily reconciled when the lives of innocent victims are at stake. *Id.* at 91-92.

76. *Id.* at 97, 98.

77. See A. Schmid & J. de Graaf, *supra* note 17, at 180 (explaining that groups lacking access to the media use terror-violence to gain publicity and recognition).

78. *Id.* at 193-200.

79. *Id.* at 218. Democratization of the press, which is a technical impossibility, would remedy this situation. *Id.* at 222. To avoid the seizure of media power, the media could adopt new reporting values and focus on stories having social utility, while realistically portraying the proportionate influences of the events. *Id.* This would help prevent the use of violence and murder as a justification for access to the press. *Id.*

80. P. Montana & G. Roukis, *supra* note 69, at 91.

81. *Id.* at 97.

82. See *id.* at 95 (describing a number of incidents when the media's broadcasting of police action or position caused the failure of a law enforcement maneuver in process or the death of a hostage).

83. See *id.* at 93 (urging civil authorities to work with the media rather than inter-

D. EXTRADITION: THE KEY TO PROSECUTION

Another serious concern of law enforcement is the inability to obtain custody of terrorists through extradition treaties. Without effective extradition agreements, hostage-taking and aircraft hijacking will continue to plague the international community. In absence of bilateral treaty provisions, states are not obligated to extradite persons accused of violent terrorist activity. If bilateral extradition treaties exist, states using the treaties to obtain custody of terrorists experience the same definitional problem as the international community. The problem is further complicated by the lack of consensus on the definition of terrorism and the legitimacy of certain methods to achieve the goals of self-determination, insurgency, and terrorism.

Many states regard violent acts committed by insurgents in foreign countries during times of peace as political in nature and warranting asylum.⁸⁴ In response to the increase in terror-violence and in the transnational character of terrorist attacks, some states have enacted provisions restricting the political offense exception to extradition. The European Convention on the Suppression of Terrorism,⁸⁵ for example, limits the availability of the political offense exception for specific crimes characteristic of terror-violence—such as the use of explosives and machine guns—but does not define the components of a political offense or terrorism.⁸⁶

United States extradition practice is limited by statute to bilateral treaties.⁸⁷ Although the treaties recognize the political offense exception, courts in the United States have construed this exception nar-

tere with the transmission of news). Although law enforcement often resents the portrayal of terrorists as ideological heroes, efforts to understand media and use media access in rescue operations would reduce tension between reporters and policemen. *Id.*

84. Dinstein, *Comments on the Fourth Interim Report of the ILA Committee on International Terrorism*, 7 *TERRORISM: AN INT'L J.* 163, 166 (1982) (noting the only solution to this problem is to prohibit terrorists from receiving exemptions from extradition regardless of political motives).

85. European Convention on the Suppression of Terrorism, *entered into force* Oct. 25, 1978, 1978 Gr. Brit. T.S. No. 93 (Cmd. 7390), Europ. T.S. No. 90, *reprinted in* 19 *I.L.M.* 325 (1980).

86. *Id.* The Organization of American States also enacted an Inter-American Convention on Extradition that recognizes a broad political offense exception but declines to define the exact limitations of the exception. Inter-American Convention on Extradition, *opened for signature* Feb. 25, 1981, O.A.S. Off. Doc. OEA/Ser. A/36, *reprinted in* 20 *I.L.M.* 723, 772 (1982) [hereinafter OAS Extradition Convention]; *see also* UNITED STATES DEP'T JUSTICE, OFFICE OF INTERNATIONAL AFFAIRS, *PROCEDURE FOR INTERNATIONAL EXTRADITION* (undated) (providing general guidelines for international extradition requests).

87. 18 U.S.C. §§ 3181, 3184, 3186-93 (1976) (outlining the scope and limitations on the extradition practices in the United States).

rowly.⁸⁸ In some treaties, such as the United States-United Kingdom Extradition Treaty,⁸⁹ Congress included additional provisions to deny terrorists the use of the political exception. Limiting the availability of political asylum and "safe havens" for terrorists is evidence that the courts support the executive branch's mandate on fighting international terrorism.⁹⁰ Court decisions, however, have reached confusing conclusions as to the applicability of the political offense doctrine.⁹¹

In a recent extradition case involving an American citizen accused of illegally using explosives and murdering an English constable, the court attempted to clarify the political exception confusion, holding that transnational terrorist activity is not protected under the political exception to extradition.⁹² In *Quinn v. United States*,⁹³ the United States Court of Appeals for the Ninth Circuit held that Quinn failed to meet the "incidence test." The test's requirements are: 1) that the crime is related to a struggle to abolish a country's existing government; and 2) that a crime is consequent to the uprising activity.⁹⁴ Although Quinn's actions met the first part of the test, he committed the attack in question in London, not Ireland, the country of the uprising. The court, therefore, held that Quinn did not meet the second part of the test and characterized his acts as international terrorism, depriving him the privilege of the political offense exception.⁹⁵ The court espoused the ju-

88. See *infra* notes 94-96 and accompanying text (citing cases interpreting the political offense exception to extradition very narrowly).

89. Extradition Treaty of June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (granting extradition for certain specified offenses, including murder, attempted murder, and malicious wounding).

90. See *infra* note 92 and 94 (discussing the limitation of the political offense exception, denying terrorists "safe haven" unless their activity is limited to certain circumstances).

91. See *infra* note 97 (discussing inconsistent court decisions on the applicability of the political offense exception).

92. *Quinn v. Robinson*, 783 F.2d 776, 817 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986) (stating that acts of international terrorism do not meet the incidence test and are not protected by the political offense exception).

93. *Id.*

94. *Id.* at 796-97; *cf. In re Castioni*, [1891] 1 Q.B. 149, 159 (1890) (requiring that the overt act concern the government and that the act is incidental to a political matter, uprising, or dispute between parties in the state). This test is presently used by the United States for the determination of the political incidence characteristics of crimes. *Quinn v. Robinson*, 783 F.2d 776, 797 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986) (noting that American courts continue to apply the incidence test set forth in *In re Castioni* and *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894)). The test requires (1) the occurrence of an uprising or violent political disturbance at the time of the charged offense and (2) that the charged offense is incidental to, in the course of, or in furtherance of the uprising. *Quinn v. Robinson*, 783 F.2d at 797.

95. *Quinn v. Robinson*, 783 F.2d 776, 813 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986) (holding that the uprising component was not met because (1) the level of violence outside of Northern Ireland was not sufficient to constitute an uprising and (2)

diciary's commitment to combatting international terrorism and refuted the government's argument that granting Quinn's request for political exception would recognize political terrorism and conflict with executive policy.⁹⁶

The court's opinion in *Quinn* noted the inconsistencies in prior court decisions on the extradition of individuals accused of violent political acts committed outside organized military conflict.⁹⁷ The court noted the difficulty in reaching a consensus on the components of the political offense exception but explained that the basic standards are refined on a case-by-case basis.⁹⁸ Regardless of the inconsistent court decisions on the political exception question, the United States unequivocally condemns all acts of international terror-violence and urges international cooperation in the battle against terrorist activity.⁹⁹ The court in *Quinn*

the violence was not generated by citizens or residents of England).

96. See *Quinn v. Robinson*, 783 F.2d 776, 786-87 (9th Cir. 1986), cert. denied, 107 S. Ct. 271 (1986) (determining that the judiciary could properly decide upon the application of the political offense exception). The court contrasted the political pressure on the executive branch concerning controversial international issues with the courts' ideological neutrality. *Id.* The executive branch retains the ultimate authority to decide upon extradition—subject to treaty obligations—after the judiciary has made a determination on the offender's extraditability. *Id.* The court in *Quinn*, however, decided the political exception issue, finding that judicial action did not infringe or limit the scope of the executive branch's discretion. *Id.*

97. *Id.* at 803; see *In re McMullen*, No. 3-78-1099MG, slip op. at 4 (N.D. Cal. May 11, 1979) (denying an extradition request by the United Kingdom after concluding that an IRA bombing of military barracks in England was connected to a political uprising and incidental to that uprising). But see *Quinn v. Robinson*, 783 F.2d 776, 803-06 (9th Cir. 1986), cert. denied, 107 S. Ct. 271 (1986) (rejecting *McMullen* and finding activity that constitutes international terrorism is not protected under the political incidence test); *Eain v. Wilkes*, 641 F.2d 504, 520 (7th Cir.), cert. denied, 454 U.S. 894 (1981) (holding that the political conflict requirement of the test was met, but that the random act of terrorism against indiscriminate targets was not incidental to the conflict and thus not protected under the political offense exception); *In re Mackin*, 668 F.2d 122 (2d Cir. 1981) (recognizing the existence of a political conflict in Northern Ireland when an IRA member murdered a British soldier in Belfast and finding the offense incidental to the struggle).

The only real distinction between *In re Mackin* and *In re McMullen* was the situs of the crime. On the basis of the "transcending of national borders" distinction, the *Quinn* court would deny *McMullen* political exception from extradition because his acts would constitute international terrorism. *Quinn v. Robinson*, 783 F.2d 776, 814 n.36 (9th Cir. 1986), cert. denied, 107 S. Ct. 271 (1986). *Mackin*, however, would still benefit from the political offense exception because his acts targeted the government within Northern Ireland's national boundaries. *Id.* at 801-02. The court in *Quinn*, cooperating with the executive branch in the fight against international terrorism, defined legitimate insurgent activity as activity that takes place within the national borders of the country under attack. *Id.* at 817.

98. *Quinn v. Robinson*, 783 F.2d 776, 790 (9th Cir. 1986), cert. denied, 107 S. Ct. 271 (1986).

99. *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J. concurring), cert. denied, 470 U.S. 1003 (1985); see also 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706, § 201(a) (to be codi-

calls for the limitation of the political uprising prong of the incidence test to its historic purpose—when those engaged in the violence are seeking to accomplish a particular objective.¹⁰⁰ The exception does not apply to political acts that involve “less fundamental efforts” to accomplish change or efforts that do not involve a significant amount of turmoil.¹⁰¹ The decision in *Quinn* firmly denies any judicial role in making judgments on the nature of foreign struggles because of the political nature of such judgments.¹⁰² In certain incidents involving international terrorism—not directly related to the struggle and occurring within the national boundaries of the opposing government—courts will refuse the political exception rather than define the political nature.

III. UNITED STATES RESPONSE TO TERRORISM

United States efforts to slow the rising tide of terrorism and the taking of hostages in the international community are exemplified by support for multilateral, bilateral, and regional treaties and conventions calling for an end to international terror-violence and hostage-taking.¹⁰³ Although these treaties and conventions purport to afford a more solid jurisdictional basis, significant deficiencies still exist in the ability of the United States government to prosecute international terrorists. One such problem is the inability of states to acquire jurisdiction over terrorists who victimize innocent civilians purely on the basis of nationality. Numerous illustrations of attacking innocents occurred in 1985-86.¹⁰⁴ Americans were abducted from ships, airplanes, and overseas

find in scattered sections of 18 U.S.C., 22 U.S.C., 41 U.S.C.) (condemning international terrorism).

100. *Quinn v. Robinson*, 783 F.2d 776, 807 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986) (finding that an uprising can only exist when “the turmoil that warrants characterization is created by nationals of the land in which the disturbances are occurring”).

101. *Quinn v. Robinson*, 783 F.2d 776, 798 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986); *see also Escobedo v. United States*, 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980) (denying the applicability of the political offense exception when the petitioner committed a politically motivated kidnapping). Unless the act was “committed in the course of and incidental to a violent political disturbance,” the court refused to apply the political offense exception. *Id.* at 1104.

102. *Quinn v. Robinson*, 783 F.2d 776, 817 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986).

103. *See infra* note 127-28 (listing international conventions against aircraft hijacking and crimes against internationally protected persons); *supra* note 30 (discussing the Hostage Convention and additional measures to apprehend and prosecute terrorists).

104. *See Sofaer, Fighting Terrorism Through Law*, 85 DEP'T ST. BULL. 38-42 (Oct. 1985) (describing incidents occurring in 1985, including the hijacking of TWA Flight 847, the murder of United States Embassy guards and civilians in San Salvador, the bombing of the Air India flight, the bombing at the Frankfurt airport, and the

posts. A number of citizens were murdered, some remain in captivity, and the fate of others is still unknown.

A. DOMESTIC LEGISLATION

Responding to terrorist activity directed at Americans, the United States enacted the Hostage Taking Act.¹⁰⁶ Although the Act does not impose sanctions against terrorism *per se*,¹⁰⁶ it was drafted to remedy specific problems of terrorism that pose the greatest threats to American citizens.¹⁰⁷ The United States also enacted anti-terrorist legislation, imposing economic sanctions and authorizing surveillance activities,¹⁰⁸

Achille Lauro incident); *see also Hostage Incidents: Examples in Modern History*, 81 DEP'T ST. BULL. 23 (Mar. 1981) (listing international incidents of hostage-taking and terror-violence occurring over the past century).

105. Hostage Taking Act, Pub. L. No. 98-473, 98 Stat. 2186 (1984) (codified as amended at 18 U.S.C. § 1203) [hereinafter Hostage Taking Act] (upholding jurisdiction over terrorists who seize or detain a national of the United States). Other federal legislation enacted to combat terrorist related activity includes the Anti-hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1976) (codified in scattered sections of 49 U.S.C.) (imposing criminal sanctions for persons convicted of hijacking or attempting to hijack); The 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706 (1984) (codified at 18 U.S.C. §§ 3071-76 (1984)) (authorizing rewards for information concerning terrorist acts); Antiterrorism Assistance Program Pub. L. No. 99-83, 99 Stat. 219 (codified at 22 U.S.C. § 501 (1985)) (authorizing appropriations for the Anti-Terrorism Assistance Program); *Prosecution Bills*, *supra* note 19 (considering three proposed bills that authorize prosecution for terrorists who attack or kill United States personnel and citizens abroad). The three bills would amend title 18 of the United States Code and apply harsher sanctions to diffuse terrorist activities. S. 1373 would authorize prosecution of persons who attack United States government employees abroad. S. 1373, 99th Cong., 1st Sess. (1985). The second bill, S. 1429, would authorize the prosecution of terrorists who attack United States nationals abroad. S. 1429, 99th Cong., 1st Sess. (1985). Finally, S. 1508 proposes the death penalty for first degree terrorist murder. S. 1508, 99th Cong., 1st Sess. (1985).

106. Ludington, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R. 4TH 949, 954-88 (1986) (noting that Arkansas, Delaware, Georgia, Hawaii, Kentucky, Kansas, Minnesota, Nebraska, Pennsylvania, and Texas have enacted legislation against terrorist threats, but that such statutes have little effect on the government's foreign policy toward terrorism); *see Legal Controls and Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L. J. 465, 466 (1982) (finding that most terrorist acts are prosecuted under federal or state criminal codes covering homicide, kidnapping, bombing, assault, battery, or other common crimes rather than a federal statute establishing a crime of terrorism).

107. *See supra* note 86 and accompanying text (discussing an approach to terrorism that sanctions specific acts as crimes, avoiding definitional problems by considering the activity instead of the motivation).

108. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729, 753 (codified at 22 U.S.C. § 2371 (1976)) (providing for withdrawal of United States assistance to countries that support terrorism); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1986) (codified at 50 U.S.C. §§ 1801-1811) (authorizing increased surveillance of suspected terrorist groups). The Surveillance Act allows for surveillance of activities that "involve violent acts or acts dangerous to human life that are a violation of the criminal law of

and proposed legislation on collecting information to prohibit the support of terrorist groups.¹⁰⁹

Most federal legislation addressing terrorist activity is designed to allow the United States to perform its obligations under international treaties.¹¹⁰ The Hostage Taking Act, enabling the United States to act under the Hostage Convention, provides for passive personality jurisdiction. The use of passive personality jurisdiction is inconsistent with traditional United States foreign policy, repudiating the principle as a valid base of international jurisdiction.¹¹¹ The effectiveness of the Hostage Taking Act will depend on the ability of the United States to assert jurisdiction over the accused terrorists¹¹²—a problem that weakens the Act's impact due to the United States' inability to overcome the protective veil of asylum and political refuge.

The frustration of the United States with the inability to prosecute terrorists has provoked a number of legislative responses.¹¹³ The most

the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state." *Id.* at § 1801. The Act specifically requires that the conflict occur totally outside the United States to ensure the international dimension. *Id.* at § 1801(c)(3).

109. See *United States Offers Rewards for Terrorists*, 85 DEP'T ST. BULL. 77 (Dec. 1985) (mentioning the 1984 Act to Combat Terrorism provisions to reward persons that provide information on terrorists). The Articles for Rewards for Information Concerning Terrorist Acts, appropriating rewards for information concerning unauthorized activities, and the Prohibition Against the Training or Support of Terrorist Organizations Act of 1984, both seek to prevent support of terrorist activity. *Id.*

110. See Note, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?* 18 VAND. J. TRANSNAT'L L. 915, 921 (1985) [hereinafter Note, *U.S. Legislation*] (discussing the limitations on the extraterritorial effect of domestic law).

111. See *infra* notes 148-51 and accompanying text (questioning the use of the passive personality principle as a valid, independent basis of jurisdiction under United States law).

112. Note, *U.S. Legislation*, *supra* note 110, at 950 (noting that personal jurisdiction must be obtained before terrorism can be tried in a United States court).

113. See H.R. 4737, 99th Cong., 2d Sess. (1986) (introducing legislation to increase international cooperation in the fight against international terrorism); H.R. 4611, 99th Cong., 2d Sess. (1986) (introducing legislation to protect United States citizens from terrorism); H.R. 4418, 99th Cong., 2d Sess. (1986) (introducing legislation to enhance diplomatic security and combat international terrorism); H.R. 4307, 99th Cong., 2d Sess. (1986) (introducing legislation to protect against international nuclear terrorism); H.R. 4294, 99th Cong., 2d Sess. (1986) (introducing legislation to amend Title 18 of the United States Code to provide additional means of combatting terrorism); H.R. 4044, 99th Cong., 2d Sess. (1986) (introducing legislation to amend Title 18 of the United States Code and the State Department Basic Authority Act of 1956 to increase the amount of awards for information on terrorist activity and to create a most wanted terrorist list); S. 2335, 99th Cong., 2d Sess. (1986) (introducing legislation to protect United States citizens against terrorism); S. 1940, 99th Cong., 1st Sess. (1985) (introducing legislation to protect the security of the United States by creating the offense of international terrorism); S. 1915, 99th Cong., 1st Sess. (1985) (introducing legislation to amend the Foreign Assistance Act of 1961 to provide special assistance to Central American countries fighting terrorism); H.R. 3704, 99th Cong.,

promising bill, the Terrorist Prosecution Act,¹¹⁴ passed in the Senate on February 19, 1986 by a ninety-two-to-zero vote.¹¹⁵ The bill "provide[s] for the prosecution and punishment of persons who, in furtherance of terrorist activities or because of the nationality of the victims, commit violent attacks upon Americans outside the United States or conspire outside of the United States to murder Americans within the United States."¹¹⁶ The bill does not define terrorism, avoiding problems associated with reaching a consensus on an acceptable definition of international terrorism.¹¹⁷ The bill also extends jurisdiction to crimes conspired outside the United States but committed within its territory.¹¹⁸ The Act is based on the protective principle of jurisdiction,¹¹⁹ allowing extraterritorial extension of laws when conduct threatens state security or government functions.¹²⁰ The main problem with this approach is that many attacks will not meet the jurisdictional requirements of the protective principle, especially random attacks against Americans that are not specifically targeted, but are among a group that is attacked.¹²¹

1st Sess. (1985) (introducing legislation to protect United States citizens and property from state-sponsored terrorism); H.R. 3463, 99th Cong., 1st Sess. (1985) (introducing legislation authorizing assistance to Central American countries fighting terrorism); H.R. 3330, 99th Cong., 1st Sess. (1985) (introducing legislation on nuclear power plant security and anti-terrorism); S. 1757, 99th Cong., 1st Sess. (1985) (introducing legislation to combat terrorism in Central America); S. 275, 99th Cong., 1st Sess. (1985) (introducing legislation to protect the internal security of the United States by creating the offense of terrorism).

114. S. 1429, 99th Cong., 2d Sess., 132 CONG. REC. S1382-88 (1986) [hereinafter Terrorist Prosecution Act]. The bill is a modified version of the Terrorist Prosecution Act considered by the Senate in 1985. S. 1429, 99th Cong., 1st Sess., 131 CONG. REC. S9430-32 (1985). The new bill is much narrower in scope than the 1985 bill, granting jurisdiction to the United States to try anyone assaulting or murdering a United States citizen abroad if the attack was the result of international terrorism. *Id.* at S9430.

115. *Id.*

116. *Id.* at § 2331(f).

117. Note, *U.S. Legislation*, *supra* note 110, at 954.

118. *Id.*

119. Terrorist Prosecution Act, *supra* note 114, at S1383. The act states that:

(b) it is an accepted principle of international law that a country may prosecute crimes committed outside its boundaries that are directed against its own security or the operation of its governmental functions.

Id.

120. *Id.*

121. See Note, *U.S. Legislation*, *supra* note 110, at 955 (discussing problems with exercising protective jurisdiction under the Terrorist Prosecution Act when the nexus between the attack and the threat to United States national security or government functions is tenuous). When the attack clearly targets Americans, in a hostage-taking incident for example, the Hostage Taking Act will cover the activity, making coverage under the Terrorist Prosecution Act superfluous. *Id.*; see also *Terrorism Legislation, Hearing Before the Senate Comm. on Foreign Relations*, 99th Cong., 2d Sess. 40-50 (1986) (statement of Stephen S. Trott, Assistant Attorney General of the Criminal Division, United States Department of Justice). Trott urges the House of Representa-

The progress of the United States in enacting domestic legislation to combat terrorism will not stop the increase in terrorist activity unless effective international measures are also adopted.

B. INTERNATIONAL EFFORTS OF THE UNITED STATES

Although an international consensus on the definition of terrorism is unlikely, if a majority of states could agree on which terrorist activities are intolerable, then effective sanctions could prohibit such activities.¹²² A multilateral treaty signed by many nations agreeing on the components of the illegal offense would offer the most effective international barrier to recurring terrorist strikes.¹²³ Although the Committee on International Terrorism of the International Law Association attempted to draft a single convention against international terrorism, the many problems that arose forced the Committee to abandon the goal of a single convention.¹²⁴ Even if signatory states compose a majority of world nations, when certain states plagued by a large percentage of terrorist attacks do not sign the treaty, sanctions are useless. Regardless, reaching an international consensus on sanctions for terrorist activity will increase the chances of intercepting terrorists operating outside of their protective spheres.

On January 6, 1985, the United States signed the United Nations Convention Against the Taking of Hostages¹²⁵ in an effort to combat the increasing number of terrorist incidents in which the perpetrators are not extraditable to a state with jurisdiction to prosecute. The hesitation of some states to sign the Convention, the narrow interpretation of its scope, and the continuing successful escape of terrorists from prosecution, have reduced the role of the Convention in the interna-

tives to pass S. 1429 to provide for the prosecution of terrorists who kill United States citizens abroad. *Id.* He notes that federal law already protects federal officials, but neglects citizens and civil personnel not attached to an embassy. *Id.* at 49-50.

122. See generally OAS Terrorism Convention, *infra* note 128 and the Hostage Convention, *supra* note 30 (inviting strict measures to prevent certain acts of international terrorism); European Convention on the Suppression of Terrorism, *entered into force* Oct. 25, 1978, art. IV, 1978 Gr. Brit. T.S. No. 93 (Cmd. 7390), Europ. T.S. No. 90, *reprinted in* 15 I.L.M. 1272 (1976) (proclaiming that there are limitations to what the international community will tolerate from terrorists).

123. Evans, *American Policy Response to International Terrorism: Problems of Deterrence*, in *INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD* 376, 382 (M. Livingston, L. Kress & M. Wanek eds. 1978) (discussing the possibility of multilateral action against international terrorism and stating that effective action will require political concessions from states).

124. *Fourth Report*, *supra* note 18, at 123. Specific problems the Committee encountered include the definition of international terrorism, *id.* at 133, and the comparison of acts of terrorism with acts forbidden during armed conflict. *Id.* at 135.

125. Hostage Convention, *supra* note 30.

tional fight against terrorism.¹²⁶ To combat the increasing terrorist dilemma, the United States has enacted legislation and signed international treaties that impose sanctions against people who hijack aircraft,¹²⁷ threaten the lives of internationally protected persons,¹²⁸ and most recently, against persons who take hostages.¹²⁹ Additional evidence of the emerging commitment of the United States to end terrorism is exemplified by developments in foreign policy.

126. Sofaer, *Fighting Terrorism Through Law*, 85 DEP'T ST. BULL. 38 (Oct. 1985). Sofaer notes the American government's frustration with several nations' refusal to comply with anti-hijacking conventions and with nations who are unable to carry out their obligations under anti-terrorism conventions. *Id.* Although the United States signed the Hostage Convention in 1985, it had previously voted against enactment of the proposed Convention because it did not consider the language strong enough. Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 DEN. J. INT'L L. & POL'Y 169, 170 n.26 (1980) [hereinafter Rosenstock]; see Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1141 (1982) [hereinafter Blakesley] (noting the United States refusal to support the United Nations Draft Resolution Regarding Terrorism, 14 U.N. GAOR at 355, U.N. Doc. A/RES/3034 (1972), because of its weak position on prosecuting terrorists); see also 68 DEP'T ST. BULL. 81 (1973) (reporting United States representatives' remarks during the United Nations General Assembly consideration of a resolution calling for the study of terrorism).

127. See, e.g., Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 10 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (prohibiting certain offenses and other acts on board aircraft); Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7570, *reprinted in* 10 I.L.M. 133 (1971) (prohibiting unlawful seizure of aircraft and imposing severe penalties upon persons convicted of aircraft piracy); The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *opened for signature* Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, *reprinted in* 10 I.L.M. 1151 (1971) (prohibiting acts of violence which endanger the safety of aircraft and imposing severe penalties upon persons convicted of those crimes); Anti-hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (codified in scattered sections of 49 U.S.C.) (levying severe criminal sanctions upon persons convicted of hijacking or attempting to hijack aircraft).

128. See Convention on the Protection and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/9030 (1973) [hereinafter Convention on Protected Persons] (imposing severe sanctions for crimes against internationally protected persons); Convention to Prevent and Punish the Acts of International Terrorism Taking Forms of Crimes Against Persons and Relating Extortion That Are of International Significance, *opened for signature* Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, O.A.S.T.S. No. 37, at 6, O.A.S. Off. Doc. OEA/Ser. A/17 [hereinafter OAS Terrorism Convention]; Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. No. 94-467, 90 Stat. 2000 (codified at 18 U.S.C. § 878 (1976)) (providing severe sanctions for persons convicted of crimes against internationally protected persons).

129. Hostage Convention, *supra* note 30.

C. UNITED STATES FOREIGN POLICY: ADAPTING TO INTERNATIONAL TERRORISM

The recent surge in terror-violence against American citizens has caused a reevaluation of the United States foreign policy responses to international terrorism.¹³⁰ The United States traditionally approached terrorist threats against its citizens by using one of its three methods—international legal principles, domestic legislation, or international agreements. Official statements noting frustration with the spreading threat of terrorist activity and calling for stricter measures of extradition and prosecution support a change in foreign policy.¹³¹ The United States is reinforcing its tough position on terrorism, enacting domestic laws that encompass most forms of terrorist activity.¹³²

No international consensus exists on what constitutes “justifiable activity” for groups struggling for self-determination. According to United States foreign policy, however, kidnapping and killing innocent civilians is clearly unacceptable activity.¹³³ The strengthening of United States foreign policy, illustrated by a lack of tolerance for violent terrorist activity, is in reaction to the development of violent means employed by terrorists to call attention to their respective causes.¹³⁴

Although United States foreign policy clearly condemns certain ac-

130. *A This World Symposium—Terrorism: What Should We Do?*, THIS WORLD 31, 31 (1985) [hereinafter *This World*] (noting that thirty to thirty-five percent of international terrorist attacks are against United States citizens and interests and that the attacks will probably become increasingly violent).

131. *See Terrorists Seize Cruise Ship in Mediterranean*, 85 DEP'T ST. BULL. 74 (Oct. 1985) (reporting statements by President Reagan, Secretary Shultz, William Webster, and Abraham Sofaer condemning terrorism and calling for the extradition and prosecution of all hostage-takers in the Achille Lauro incident).

132. *See Hostage Taking Act*, Pub. L. No. 98-473, 98 Stat. 2186 (1984) (amended at 18 U.S.C. § 1203) (providing that whoever takes United States citizens hostage, inside or outside the United States, shall be punished by imprisonment for any term of years to life); *The 1984 Act to Combat International Terrorism*, Pub. L. No. 98-533, 98 Stat. 2706 (codified at 18 U.S.C. §§ 3071-76 (1984)) (authorizing rewards for information concerning terrorist acts); *International Security and Development Cooperation Act of 1985*, tit. V, *International Terrorism and Foreign Airport Security, Antiterrorism Assistance Program* § 501, Pub. L. No. 99-83, 99 Stat. 219 (1985) (codified at 22 U.S.C. § 2349aa) (authorizing appropriations for the Anti-Terrorism Assistance Program); *see also* H.R. Con. Res. 228, 99th Cong., 1st Sess. (1985) (condemning all acts of terrorism and calling for the creation of an international coordination committee on terrorism); *supra* note 113 (citing additional proposed legislation to combat terrorism).

133. *See Terrorists Seize Cruise Ship in the Mediterranean*, 85 DEP'T ST. BULL. 74, 81 (Oct. 1985) (condemning the kidnapping of American passengers and the murder of Leon Klinghoffer by Palestinian terrorists in the Achille Lauro incident).

134. Willenz, *U.S. Policy on Terrorism: In Search of an Answer*, 9 TERRORISM: AN INT'L JOURNAL 225, 225-26 (1987).

tivity by terrorists,¹³⁵ the lack of definite guidelines on acceptable reactions to attacks invites terrorists to continue targeting American citizens and interests around the world.¹³⁶ The inconsistency of United States foreign policy on interaction with terrorists is illustrated by the arms-for-hostages swap with Iran.¹³⁷ One of the foundations of United States foreign policy was the government's refusal to make concessions to terrorists.¹³⁸ By trading arms for hostages, the Reagan administration undermined its policy of no concessions to terrorists.¹³⁹ The United States government must go beyond advocating a strict policy in combatting terrorism and adopt guidelines on legal measures, reprisal and retribution, and the risks of war that the United States is willing to assume when confronting state-sponsored terrorism.¹⁴⁰ Until United States policy-makers establish these guidelines, foreign policy initiatives will continue to portray strong ideas with weak results.¹⁴¹ Complementing the United States vehement condemnation of terrorism, United States courts have considered a broad jurisdictional approach to the problem of prosecuting terrorists.

IV. A JURISDICTIONAL RESPONSE TO TERRORISM

There are five generally recognized theories of criminal jurisdiction in international law:¹⁴² the territorial, protective, nationality, universal,

135. See Lynch, *supra* note 4, at 74 (quoting Robert B. Oakley, Director of the Office for Counter-Terrorism and Energy Planning, Department of State). Oakley states that United States policy is direct, that the United States will not pay ransom, abridge United States policy, or endanger democratic principles. *Id.* But see *Reagan Acknowledges Arms-for-Hostages Swap*, Wash. Post, Mar. 5, 1987, at A12 [hereinafter *Arms-for-Hostages*] (discussing the violation of established foreign policy when the United States sold arms to Iran to secure the release of hostages).

136. Lynch, *supra* note 4, at 1.

137. See *Arms-for-Hostages supra* note 135, at 1, col. 1 (reporting President Reagan's acknowledgment that the trading of arms-for-hostages with Iran conflicted with United States policy of not bargaining with terrorists for the freedom of hostages).

138. Lynch, *supra* note 4, at 74.

139. *Arms-for-Hostages, supra* note 135, at A12. In his March 4th address to the nation, President Reagan stated that:

[W]hat began as a strategic opening to Iran deteriorated in its implementation into trading arms for hostages. This runs counter to my own beliefs, to administration policy, and to the original strategy we had in mind. There are reasons why it happened, but no excuses. It was a mistake.

Id.

140. Lynch, *supra* note 4, at 75.

141. See *id.* at 83-85 (noting that the development of a coherent foreign policy would have a positive effect domestically and internationally). The development of such a policy may also educate the American public and elicit increased support for measures to combat terrorist activity. *Id.*

142. *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435 (1935) [hereinafter *Harvard Research*]; RESTATEMENT

and passive personality principles. The territorial principle grants jurisdiction when the crime occurs within the territory of a state.¹⁴³ A derivative theory of territorial jurisdiction, the "floating territorial principle," affords jurisdiction over offenses occurring on a state's ship or aircraft.¹⁴⁴ The protective principle provides for jurisdiction where the effect of the crime threatens the national interests of a state.¹⁴⁵ The

(SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 10 (1965) [hereinafter RESTATEMENT]. United States federal and state law and many treaties in international law have adopted the Harvard Research designation. See, e.g., *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), cert. denied, 389 U.S. 884 (1967) (discussing the five principles of jurisdiction according to the law of nations); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960), aff'd sub nom. *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir. 1960), cert. denied, 366 U.S. 948 (1961) (discussing the nature of criminal jurisdiction under international law); RESTATEMENT, supra, at §§ 10-19 (mentioning the territorial, nationality, protective, and universal principles, but not the passive personality principle of international jurisdiction); RESTATEMENT DRAFT, supra note 14, at § 402 and comments c-h (discussing the five principles of jurisdiction under international law, and acknowledging that the validity of the passive personality is still in dispute); Feller, *Jurisdiction Over Offenses With a Foreign Element*, in 2 INT'L CRIM. LAW. 5 (M. Bassioni & V. Nada eds. 1973) (describing the territorial, protective, universal, active personality and passive personality principles of jurisdiction); B. WESTON, T. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 564 (1983) (describing the five general principles of international jurisdiction).

143. See *Harvard Research*, supra note 142, at 495 (stating that territorial jurisdiction exists whenever a crime is committed "in whole and in part" within a territory). There are two types of territorial jurisdiction, the subjective and the objective. Paust, supra note 22, at 203. Subjective territorial jurisdiction extends to acts committed outside of the United States when a constituent element occurs within the territory. *Id.* Objective territorial jurisdiction extends to extraterritorial conduct having harmful effects occurring within national boundaries. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (allowing the State of Michigan to prosecute although the defendant entered the State only after the crimes transpired).

Traditionally, the United States perceived territorial jurisdiction as granting exclusive sovereignty within a state's territory, unless that state consented to another state's actions within its national boundaries. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

144. See *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953) (holding that the floating territorial principle will only apply where the ship is a flagship of a state and/or the ship is within a state's territorial waters); Empson, *The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM. L. Q. 32, 38 (1967) (noting that the United States has applied the "law of the flag" principle); Note, *Jurisdiction*, 15 TEX. INT'L L. J. 403, 404 n.3 (1980) (noting that the protective principle is recognized by most states and that United States courts have long held that jurisdiction must either be supported by the protective or objective territorial principle where the act is committed by an alien on foreign soil); George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 613 (1966) (discussing the floating territorial principle, the necessary existence of a nation's law on board a vessel, and the inadequacy of that law depending upon the location of the vessel).

145. RESTATEMENT DRAFT, supra note 14, at § 402(3) (providing jurisdiction over extraterritorial conduct directed against the security or interest of persons other than nationals). See *Harvard Research*, supra note 142, at 440 (stating that a state has jurisdiction with respect to any crime committed outside of its territory which is directed against the security of the state); *United States v. Pizzarusso*, 388 F.2d 8, 10

nationality theory affords a state jurisdiction if the person committing the crime is a national of that state, wherever the crime takes place.¹⁴⁶ The universal principle allows jurisdiction in any forum that has personal jurisdiction over the perpetrator for universally recognized heinous crimes.¹⁴⁷ The passive personality theory grants jurisdiction on the basis of the victim's nationality.¹⁴⁸

(2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968) (applying the protective principle to the crime of making a false oath in a visa application although committed abroad); *Rocha v. United States*, 288 F.2d 545, 549 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961) (upholding jurisdiction under the protective principle over immigrants who made unlawful entry, claiming preferred status as husbands of United States brides through sham marriages); *United States v. Layton*, 509 F. Supp. 212, 215-16 (N.D. Cal. 1981) (noting that the United States has extraterritorial jurisdiction under the protective principle over those involved in a conspiracy in Guyana to murder Congressman Ryan); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978) (upholding jurisdiction under the protective principle when the national interest of the United States is injured by a conspiracy to import illegal drugs); *United States v. Archer*, 51 F. Supp. 708, 711 (S.D. Cal. 1943) (upholding the protective principle for harm against the sovereignty of the United States when an immigrant signed a false oath for immigration purposes); *see also* Blakesley, *supra* note 126, at 1132-39 (describing the offenses that give rise to protective principle jurisdiction as potentially harming specific national interests). Unlike the objective or subjective territorial principles, the protective principle provides jurisdiction over offenses committed entirely outside the territory of the forum state, even without any effect within the territory, if the offenses might adversely affect the state's security, integrity, sovereignty, or governmental function. *Id.* at 1136.

146. *See, e.g.*, *Skiriotes v. Florida*, 313 U.S. 69, 73, 77 (1941) (holding that the United States may control the conduct of citizens on the high seas in matters in which the state has a legitimate interest); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (upholding nationality jurisdiction over a citizen convicted of contemptuous disobedience of two subpoenas in a criminal case and requiring the return of the United States citizen living abroad); *Cook v. Tait*, 265 U.S. 47, 54, 56 (1924) (allowing Congress to tax income received by a United States citizen from property situated outside the United States); *United States v. Bowman*, 260 U.S. 94, 102 (1922) (holding that United States citizens on the high seas are subject to criminal prosecution for fraud under the nationality principle); *United States v. Layton*, 509 F. Supp. 212, 215-16 (N.D. Cal. 1981) (affording the United States jurisdiction over a citizen accused of committing crimes abroad).

147. *See infra* notes 187-93 and accompanying text (discussing the universal principle of jurisdiction).

148. *Harvard Research, supra* note 142, at 445. Historically the United States has rejected the passive personality principle as a valid base of international jurisdiction. *See* RESTATEMENT, *supra* note 142, at § 30(2) comment e (stating that jurisdiction should not be granted over an alien of the state seeking prosecution solely on the basis of the victim's nationality); *see also* *The Cutting Case*, 1887 FOR. REL. 751 (1888), *reported in* 2 J. MOORE, INT'L L. DIG. 228 (1906) [hereinafter J. MOORE]. In *Cutting*, Mexican police arrested and jailed an American for crimes allegedly committed against a Mexican national in Texas. *Id.* The United States Secretary of State filed a protest that:

[T]here is no principle better settled than that the penal laws of one country have no extraterritorial force To say that the penal laws of a country can bind foreigners and regulate their conduct, either in their own or any other foreign country, is to assert jurisdiction over such countries and to impair their

In response to the international controversy regarding the most effective means of dealing with the threat of terrorism, the United States has taken the initiative and is broadly interpreting the jurisdictional provisions of both the Hostage Convention and the Hostage Taking Act in an effort to obtain jurisdiction when terrorist acts are committed against American nationals abroad. United States courts have never sanctioned the exercise of international jurisdiction based solely on the nationality of the victims.¹⁴⁹ As a response to the increase in international terrorism, however, the United States is sanctioning the use of the passive personality principle of criminal jurisdiction¹⁵⁰ that it has historically condemned on an international level because of its potential to violate sovereign rights.¹⁵¹

This shifting policy involves the possible assertion of jurisdiction over hostage-takers under either the universal¹⁵² or passive personality principle¹⁵³ of jurisdiction when no previously recognized means of jurisdiction will provide for prosecution of the perpetrators. Recent official statements and developments in foreign relations law suggest that the United States is prepared to employ either principle of jurisdiction to eliminate the proliferation of terrorist violence in the international community.¹⁵⁴

independence.

J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 95, 97 (2d ed. 1981) (reporting the *Cutting* case as a landmark holding rejecting the passive personality principle). The holding in *Cutting* repudiated the passive personality principle as a valid base of jurisdiction in international law. J. MOORE, *supra*, at 236.

149. *See* *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979) (rejecting the passive personality principle as a valid base of jurisdiction). *But see* *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984) (convicting a non-United States citizen in the United States for conspiracy to murder, assault, and rob United States Drug Enforcement Agents in Colombia). The court relied on *Rivard* and *Layton* to support the existence of the protective and passive personality principles. *Id.* at 1316; *see also* *United States v. Marino-Garcia*, 679 F.2d 1373, 1381 (11th Cir. 1972) (finding that the passive personality may be employed to gain jurisdiction over persons or vessels that injure citizens of a foreign country).

150. *But cf.* *United States v. Layton*, 509 F. Supp. 212, 216 n.5 (N.D. Cal. 1981) (stating that the court has the power to rely on the passive personality principle, but avoiding the question of whether this principle alone is sufficient to grant jurisdiction).

151. *RESTATEMENT, supra* note 142, at § 30(2) (stating that the United States does not have jurisdiction to prescribe rules of law attaching legal consequences to the conduct of aliens outside of its territory on the basis that the victim is a United States national).

152. *See infra* note 193 (providing cases that employ the universal principle to exercise jurisdiction over persons committing crimes that have an independent basis in international law).

153. *See infra* note 156 and accompanying text (discussing the limited acceptance of the passive personality principle in the Restatement Draft of Foreign Relations Law of the United States).

154. Sofaer, *Fighting Terrorism Through Law*, 85 DEP'T ST. BULL. 38, 41-42

A. RESTATEMENT OF FOREIGN RELATIONS LAW: AN
INDICATION OF LIMITED ACCEPTANCE

The 1985 Draft of the Restatement of Foreign Relations Law restates the traditional bases of jurisdiction over extraterritorial crime.¹⁵⁵ The Restatement Draft mentions both the passive personality principle¹⁵⁶ and the universal principle¹⁵⁷ as potential sources of jurisdiction over terrorist activity and hostage-taking in particular.¹⁵⁸ The recognition of these bases of international jurisdiction indicate a change in United States foreign policy. United States foreign policy traditionally rejected the use of the passive personality principle¹⁵⁹ as a basis of international jurisdiction and limited the universal principle to certain crimes.¹⁶⁰

The 1985 Restatement Draft of Foreign Relations Law delineates both the passive personality and the universal theories of jurisdiction as potential means of dealing with the problems of terrorism.¹⁶¹ United States foreign policy on the actual use of the passive personality princi-

(Oct. 1985) (calling for "meaningful" enforcement mechanisms, sanctions, amendment of extradition treaties to exclude international terrorism from the political exception to extradition, enforcement of international law, technological advances, and endurance in the struggle against terrorism).

155. RESTATEMENT DRAFT, *supra* note 14, at § 403. The Restatement Draft notes that a state has jurisdiction to prescribe law with respect to: 1) conduct which takes place within the territory (or a substantial part of which takes place within the territory); 2) the status of persons, or interests in things, present within its territory; 3) conduct outside its territory which has or is intended to have a substantial effect within the territory; and 4) the activities, status, interests or relations of its nationals outside as well as within its territory and certain conduct outside the territory by non-nationals which is directed against state security or a limited class of other state interests. *Id.*

156. *See id.* at § 402 comment g (mentioning the passive personality principle of jurisdiction as an increasingly acceptable basis of jurisdiction if a terrorist act is committed against "a State national by reason of their nationality" or against civil servants of the state). The comment, however, does not state that the drafters considered the passive personality principle a valid basis of jurisdiction. *Id.*

157. *Id.* at § 404 (discussing the possible use of the universal principle to obtain jurisdiction over terrorists).

158. *Id.* (stating that "perhaps" terrorism will be recognized under universal jurisdiction "even where none of the bases of jurisdiction indicated in § 402 is present"). Commentary to § 404 notes that the disagreement on the definition of terrorism is a substantial factor preventing the enactment of any internationally acceptable and effective sanctions. *Id.* at § 404 comment a. The United States is shifting its policy toward classifying certain aspects of terrorist activity under the universal principle instead of increasingly broadening its acceptance of the passive personality principle.

159. *See supra* note 148-49 and accompanying text (discussing the traditional rejection of the passive personality principle in United States and international law).

160. *See infra* note 189-92 and accompanying text (listing crimes that the international community considers of universal dimension).

161. *See* RESTATEMENT DRAFT, *supra* note 14, at § 402 comment g (noting the possible use of the passive personality principle against hostage-taking); *see also id.* at § 404 (discussing the universal principle's potential to reach certain acts of terrorism).

ple will remain unclear until the government has the opportunity to assert such jurisdiction without violating another state's sovereign rights. In most cases, this will require the consent of the state in question. Where one of the parties involved does not recognize the validity of the passive personality principle or consent to its use, there is potential for conflict.

B. THE PASSIVE PERSONALITY PRINCIPLE

The passive personality principle is not internationally accepted as a valid principle of jurisdiction because of its potential to violate sovereign rights.¹⁶² Few states have relied on the passive personality principle as an acceptable means of gaining jurisdiction.¹⁶³ Only a few states recognize this theory of jurisdiction as a valid principle of international law.¹⁶⁴ Nonetheless, recent attacks against government officials and civil servants travelling and working abroad have modified the United States historical rejection of the passive personality principle as a valid base of international jurisdiction. In *United States v. Layton*,¹⁶⁵ the

162. Note, *U.S. Legislation*, *supra* note 110, at 935. Even when the jurisdictional basis is sound, the exercise of criminal jurisdiction in a foreign state's territory may violate international law and state sovereignty. *Id.*; see also Paust, *supra* note 22, at 202 (stating that the United States, along with most other states, has rejected the passive personality principle as a valid principle of international law); Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime*, 4 UTAH L. REV. 685, 715 (1984) (discussing the rejection of the passive personality principle by United States authorities as a matter of foreign policy).

American courts have also rejected the passive personality principle because of its potential to violate the right of state sovereignty. *Id.* But see Sofaer, *Terrorism and Law*, *supra* note 2, at 919 (stating that nations should not only consider the principle of territorial sovereignty but also states' duties to cooperate, extradite, and prosecute terrorists).

163. Paust, *supra* note 22, at 191, 202; see also *United States v. Columba-Colella*, 604 F.2d 356, 360 (5th Cir. 1979) (reversing the conviction of a foreigner for receiving a stolen vehicle in foreign commerce). The court held that Congress did not intend to assert foreign jurisdiction under the statute and that "Congress would not be competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country, . . ." *Id.* at 360. The court rejects the use of the passive personality principle, finding the defendants acts beyond its competence to proscribe. *Id.*; see also Note, *An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice*, 9 FORDHAM INT'L L. J. 328, 342 (1986) [hereinafter Note, *Achille Lauro Affair*] (stating that the United States does not recognize the passive personality theory as a valid base of international jurisdiction).

164. Paust, *supra* note 22, at 202 n.43 (noting that only Germany, Israel, Italy, Japan, Mexico and Turkey recognize the passive personality as a valid principle of international law).

165. *United States v. Layton*, 509 F. Supp. 212, 216 (N.D. Cal. 1981). In *Layton*, the United States sought jurisdiction over Laurence Layton for the murder of Congressman Leo Ryan in the Republic of Guyana. *Id.* at 217. The court specifically stated that the protective, territorial, passive personality, and nationality principles give

court accepted the passive personality principle for the limited purpose of obtaining jurisdiction over terrorists who killed a member of Congress and were not covered by any other jurisdictional principle. The United States jurisdictional response to terrorist activity has been retarded by problems associated with asserting jurisdiction over terrorists and difficulties in reaching a consensus in the international community on the definition of terrorism.¹⁶⁶

The hesitancy of the United States to enact domestic legislation and ratify international treaties adopting the passive personality principle is understandable, as the government has traditionally found exercise of this theory repugnant to the principle of sovereignty.¹⁶⁷ If the United States did recognize the passive personality principle as a valid base of international jurisdiction, then the principle may be used to prosecute citizens committing crimes on the basis of the nationality of the victim.

The historical rejection of this principle is established in the *Cutting Case*.¹⁶⁸ Unlike the accusation of criminal libel in the *Cutting Case*, however, the taking of hostages is more amenable to the application of the passive personality principle because many of the attacks are com-

Congress the power to authorize extra-territorial jurisdiction. *Id.* at 216. The court relied on *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967) and *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd sub nom. Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961), requiring no actual effect to take place within national boundaries and noting that a potential effect will suffice. The court declined, however, to rule on the issue of whether the passive personality principle, standing alone, would be a sufficient basis of jurisdiction. *United States v. Layton*, 509 F. Supp. at 214. The opinion does note that United States courts have repeatedly upheld the power of Congress to attach extraterritorial effect to its penal statutes. *Id.* at 215; *see also* *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (holding that the territorial principle is neither exclusive nor a completely accurate description of a state's power to exercise extraterritorial jurisdiction); *United States v. Pizzarusso*, 388 F.2d 10, 10 n.5 (2d Cir. 1967), *cert. denied*, 392 U.S. 936 (1968) (upholding extraterritorial jurisdiction necessary to carry out Congressional power over the conduct of foreign relations). The courts in both *King* and *Pizzarusso* noted the passive personality principle of jurisdiction but chose to decide the cases on more recognized jurisdictional grounds. *See also* Comment, *Extraterritorial Jurisdiction of Federal Criminal Law: The Assassination of Congressman Ryan*, 14 LAW. AM. 61, 62-67 (1982) (discussing extraterritorial jurisdiction under United States and international law and noting that the passive personality principle has little support in United States case law).

166. W. FARRELL, *supra* note 33, at 6-18. The author recognizes the problem of defining terrorism and notes that the definition depends upon the point of view of the state or person. The definition of "[t]errorism, like beauty, remains in the eye of the beholder." *Id.* at 11.

167. *See supra* note 162 (describing the use of the passive personality principle as repugnant to the principle of sovereignty).

168. *See supra* note 148 (describing the *Cutting Case* as rejecting the passive personality principle).

mitted purely on the basis of the victim's nationality.¹⁶⁹ A crime committed against a citizen solely on the basis of nationality warrants jurisdiction on the basis of the passive personality principle, especially where no other basis for jurisdiction exists.¹⁷⁰ If the United States government applies this theory to hostage-taking, it should act as the exception to the general rejection of the passive personality principle, rather than an extension of the principle to other types of criminal activity.¹⁷¹

United States courts mention the passive personality principle in several opinions but do not recognize its international validity as an independent basis of jurisdiction.¹⁷² Although courts have hesitated to adopt the principle as an independent basis of jurisdiction,¹⁷³ the United States has signed the United Nations Convention Against the Taking of Hostages¹⁷⁴ and enacted the Hostage Taking Act¹⁷⁵ that both explicitly recognize the passive personality principle.¹⁷⁶ The enactment of the Hostage Taking Act and the ratification of the Hostage Convention indicate that the United States accepts the passive personality principle for the limited purpose of obtaining jurisdiction over terrorists who take United States citizens hostage. To date, however, the United States has not explicitly asserted this principle to gain jurisdiction over terrorists due to problems of concurrent jurisdiction.¹⁷⁷ The

169. RESTATEMENT DRAFT, *supra* note 14, at § 402 comment g (finding the passive personality principle increasingly acceptable when applied to terrorist attacks on states' nationals by reason of their nationality).

170. *Id.*

171. *Cf. Fourth Report, supra* note 18, at 126 (discussing the difficulties of defining offenses that would warrant a state to act against political fugitives committing violent acts abroad solely against foreigners for a cause which that state supports). *Contra Dissenting Statement by Professor L.C. Green and Dr. J. Lador-Lederer, id.* at 132 (finding that the passive personality principle is not a "doubtful legal basis" and that terrorism is not the first crime in which criminal jurisdiction is based on the nationality of the victim).

172. *See supra* note 149-50 (listing cases in which the United States has considered the use of the passive personality principle).

173. *See id.* (discussing the rejection of the passive personality principle as an independent basis of jurisdiction).

174. Hostage Convention, *supra* note 30, at art. 5(1)(d).

175. Hostage Taking Act, *supra* note 105.

176. *See* 18 U.S.C. § 1203(b)(1)(A) (providing an exception to the position that § 1203 offenses do not apply extraterritorially against a person seized or detained who is a national of the United States); Hostage Convention, *supra* note 30, at art. 5(1)(d) (stating that jurisdiction may be established "if that state considers it appropriate").

177. *See* The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., Ser. A, No. 10, at 70 (Judgment of Jan. 4, 1927) (holding that Turkey had jurisdiction over a French national on a French ship that collided with a Turkish ship on the high seas). The court was reluctant to rule on the passive personality principle, and instead based its holding on the territorial principle. *Id.* at 74, 79. RESTATEMENT, *supra* note 142, at § 40 (listing certain factors modifying the exercise of extraterritorial jurisdiction when two states have

existence of concurrent jurisdiction creates the potential for conflict between states, especially if one state does not accept the validity of the second state's jurisdictional claim.¹⁷⁸ The assertion of the passive personality principle may offend certain states especially if those states seek to exercise an alternative, internationally recognized basis of jurisdiction. If the terrorist is within the territory of a sovereign state, the sovereign could easily construe the use of the principle as a violation of that sovereign state's rights.¹⁷⁹

In the Achille Lauro incident,¹⁸⁰ the passive personality principle was

concurrent jurisdiction); Note, *U.S. Legislation*, *supra* note 110, at 933 (discussing the difficulty of determining which state has the greater jurisdictional claim when states assert concurrent jurisdiction).

178. See Note, *U.S. Legislation*, *supra* note 110, at 933-36 (describing the potential conflict when states assert concurrent jurisdiction). In the Achille Lauro incident, the Italian government recognized the passive personality principle but was not willing to forfeit its jurisdictional right to prosecute the terrorists. McGinley, *supra* note 34, at 693. When two states have concurrent jurisdiction, the state with the overriding interest has the right to prosecute, unless there is a treaty obligation that defines the states' respective responsibilities. *Id.* Where two or more states are legally present at the location of the criminals and each state wishes to prosecute, it basically creates a "free-for-all" situation in relation to capturing the criminals. Note, *U.S. Legislation*, *supra* note 110, at 958.

179. Blakesley, *supra* note 126, at 1109, 1114-17 (discussing the potential violation of sovereign territory when one state exercises police powers within another state's national boundaries).

180. McGinley, *supra* note 34, at 691-94 (reporting the details of the Achille Lauro incident). On October 7, 1985, members of a splinter group of the Palestine Liberation Organization (PLO) seized the Italian ship, the Achille Lauro, while the ship was in Egyptian waters near Port Said. *N.Y. Times* Oct. 8, 1985, at A1, col. 6. The terrorists separated and threatened to kill the American and Jewish passengers from the group of tourists on the cruise ship docked at Cairo. *N.Y. Times*, Oct. 9, 1985, at A1, col. 6. Leon Klinghoffer, an elderly, crippled, Jewish-American citizen was taken to the deck of the ship, shot in the head, and thrown overboard in his wheelchair. *Id.* In an effort to end the crisis, the Egyptian government negotiated with the terrorists, who were given an Egyptian airplane to leave Egypt. The United States, through intelligence sources, located the plane and forced it down at an air-base in Signoella, Italy. *N.Y. Times*, Oct. 11, 1985, at A1, col. 6. Both American and Italian troops were on the scene, prepared to receive the terrorists. Note, *Achille Lauro Affair*, *supra* note 163, at 337. After a dispute between Italy and the United States over which state should exercise criminal jurisdiction, the Italian government took the terrorists into custody. *Id.* Italy later allowed a leader of the Palestinians suspected of involvement in the hijacking to leave the country and seek asylum in Yugoslavia. The Italian government charged the remaining four terrorists with piracy. *N.Y. Times*, Oct. 13, 1985, at A1, col. 6. The United States filed an extradition request under the Treaty on Extradition between the United States and Italy requesting the extradition of all of the accused terrorists for the crime of hostage-taking. United States of America and the Republic of Italy, Oct. 13, 1983, United States-Italy, 28 U.S.T. 227, T.I.A.S. No. 8468, entered into force Jan. 21, 1977; see *Documents Concerning the Achille Lauro Affair and Cooperation in Combatting International Terrorism*, 24 I.L.M. 1509-85 (1985) (providing the extradition requests and diplomatic letters sent by the United States in an attempt to have all perpetrators extradited). According to article 6 of the Hostage Convention and the Hostage Taking Act, if the American forces had taken

the only basis of jurisdiction available to the United States.¹⁸¹ The offense occurred on an Italian ship in Egyptian waters.¹⁸² The Italians had jurisdiction under the floating territorial principle¹⁸³ and the Egyptians had both territorial and personal jurisdiction over the offenders.¹⁸⁴ The only jurisdictional claim available to the United States arose under the Hostage Convention when the terrorists took eighteen United States citizens hostage and murdered Leon Klinghoffer.¹⁸⁵ To exercise passive personality jurisdiction would have violated Italy's concurrent and, in this case, overriding jurisdictional claim to the terrorists. The presence of United States forces at the air-base in Sigonella, however, indicates that the United States was prepared to take custody of the accused terrorists if the Italians did not act immediately.¹⁸⁶

custody of the accused terrorists, they would have jurisdiction to prosecute; *see also* N.Y. Times, Oct. 10, 1985, at A11, col. 5 (discussing barriers to extradition for murder that limit the ability of American courts to prosecute the lesser crime of hostage-taking).

181. *See* McGinley, *supra* note 34, at 710 (stating that the United States has jurisdiction "with respect to a hostage that is a national of that State," according to article 5(1)(d) of the Hostage Convention). Because both the United States and Egypt had jurisdiction over the Achille Lauro terrorists under the Hostage Convention, either state could prosecute for the ship's hijacking, but only Egypt could prosecute for murder. Note, *Achille Lauro Affair*, *supra* note 163, at 346.

182. Note, *Achille Lauro Affair*, *supra* note 163, at 334. Although the United States does not recognize the passive personality principle, the Hostage Convention authorizes states to assert jurisdiction based on the nationality of the hostage. Hostage Convention, *supra* note 30, at art. 5(1)(d).

183. *See supra* note 144 and accompanying text (discussing the floating territorial principle). *But cf.* Sofaer, *Terrorism and Law*, *supra* note 2, at 902 (discussing the jurisdiction problems in the Achille Lauro case). The Achille Lauro case also presented a question as to whether the terrorist acts constituted piracy. *Id.* at 910. The political motives of the terrorists prevented the classification of pirates in this incident. *Id.* at 911. Consequently, United States law enforcement officials' desire to prosecute the Achille Lauro terrorists faced jurisdictional difficulties. *See also U.S. Jurisdiction Limited*, N.Y. Times, Oct. 10, 1985, at A11, col. 5 (noting that United States courts did not even have domestic legislation which would enable the courts to try the Achille Lauro criminals for murder, but only for hostage-taking).

In the aftermath of the Achille Lauro incident, the Senate proposed and passed legislation that would allow the United States to prosecute terrorist murder and impose the death penalty on convicted terrorists. *See Prosecution Bills*, *supra* note 19 (discussing proposals to prosecute terrorists for attacks against United States citizens abroad, particularly S. 1508, the Terrorist Death Penalty Act of 1985).

184. *See* Note, *Achille Lauro Affair*, *supra* note 163, at 344 (noting that Egypt had jurisdiction over the terrorists but failed to prosecute them because of Egypt's national interests). As a leader of the Arab world, to prosecute the terrorists would have conflicted with Egypt's state interests. *Id.* at 345 n.94.

185. *Id.* at 345.

186. Note, *U.S. Legislation*, *supra* note 110, at 958.

C. THE UNIVERSAL PRINCIPLE

The universal principle could provide a more acceptable basis of jurisdiction over terrorists who take hostages.¹⁸⁷ Traditionally, the universal principle is reserved for certain crimes that states deem so heinous that any state able to obtain custody of the violator may prosecute the violator.¹⁸⁸ The universal principle provides jurisdiction to enforce sanctions for crimes that have an independent basis in international law. Examples of crimes that are currently considered of universal significance are piracy,¹⁸⁹ war crimes,¹⁹⁰ genocide,¹⁹¹ and the hijacking of aircraft.¹⁹²

The United States has successfully prosecuted individuals under this principle for violations of international law.¹⁹³ The use of the universal

187. See Paust, *supra* note 22, at 205 (Annexes A and B) (suggesting two legislative alternatives to solve the problem of obtaining jurisdiction over terrorists). The first draft bases jurisdiction on the universal principle and calls for sanctions for the violation of human rights. *Id.* The second draft calls for the enactment of a federal statute which would impose sanctions for the crime of "international terrorism" and defines terrorism as "any intentional use of violence or threat of violence by the accused against an instrumental target in order to communicate to a primary target a threat of future violence so as to coerce the primary target through intense fear or anxiety in connection with a demanded political outcome." *Id.* This second suggestion may be more difficult to implement because, although it contains a useful definition of terrorism, it would inevitably be interpreted by some states as infringing upon the rights of self-determination. See also Blakesley, *supra* note 126, at 1141 n.81 (1982) (suggesting that terrorism is a crime of universal, or nearly universal, interest).

188. Blakesley, *supra* note 126, at 1111.

189. See 1958 Geneva Convention on the High Seas, April 29, 1958, arts. 14-22, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (outlawing international piracy).

190. See 10 U.S.C. §§ 818, 821 (1983) (granting military courts jurisdiction over any person subject to trial by military tribunal under the law of war); Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (Sup. Ct. Israel 1962) (holding that Israel may rely on universal jurisdiction to prosecute Adolf Eichmann for Nazi war crimes).

191. Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, G.A. Res. 260, U.N. Doc A/181, at 174 (1948), 78 U.N.T.S. 277. The United States Senate ratified this Convention in August 1986.

192. See *supra* note 127 (listing international treaties on the various crimes associated with aircraft hijacking).

193. See, e.g., *Ex Parte Quirin*, 317 U.S. 1, 27-36 (1942) (prosecuting German war criminals for war offenses, punishable under law of nations); *United States v. Arjona*, 120 U.S. 479, 479 (1887) (upholding constitutional power of Congress to provide for punishment of counterfeiting foreign bank notes as offense against law of nations); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 153 (1820) (upholding constitutional power of Congress to prosecute piracy under law of nations); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-61 (1795) (Iredell, J., concurring) (granting jurisdiction over a French privateer to determine the legitimacy of his ship's activities on the high seas); *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298-99 (1793) (granting concurrent jurisdiction over an alien sending letters threatening extortion to Pennsylvania citizen); *Republica v. DeLongchamps*, 1 U.S. (1 Dall.) 111, 116-17 (1784) (upholding the use of the universal principle of jurisdiction to prosecute a person threatening and assaulting French diplomats in United States); *United States v. Layton*, 509 F. Supp. 212,

principle to prosecute terrorists who takes hostages may succeed if states categorize terrorist offenses as heinous and internationally condemnable, allowing any state with custody to prosecute.¹⁹⁴ Classifying the offense of hostage-taking under this theory is the most effective means of asserting jurisdiction over those who victimize innocent civilians.¹⁹⁵

Applying the universal principle to terrorists who attack and murder will not resolve the problem of concurrent jurisdiction when more than one state claims the right to prosecute the offenders. Until an international consensus exists on the validity of applying universal jurisdiction for hostage-taking and certain terrorist acts, justified by the heinous nature of the crimes, the potential conflict caused by states exercising concurrent jurisdiction will not subside. Effective measures to combat terrorism in the international community will require both consensus and international sanctions ensuring prosecution. An effort to achieve this goal is illustrated by the United Nations Convention Against the Taking of Hostages.

216-21 (N.D. Cal. 1981) (applying the passive personality principle according to the United Nations Convention on the Protection and Punishment of Crimes Against Internationally Protected Persons where extraterritorial acts resulted in the death of Congressman Ryan); *United States v. White*, 27 F. Cas. 200, 201-03 (C.C.E.D. Mo. 1886) (granting jurisdiction for acts of piracy); *United States v. Baker*, 24 F. Cas. 962, 965 (C.C.S.D. N.Y. 1861) (No. 14501) (upholding jurisdiction over acts of piracy); *United States v. Jones*, 26 F. Cas. 653 (C.C.D. Pa. 1813) (No. 15494) (upholding jurisdiction over acts of piracy); *Henfield's Case*, 11 F. Cas. 1099, 1107-08 (C.C.D. Pa. 1793) (No. 6360) (finding that the federal judiciary has jurisdiction over offense against the law of nations and upholding conviction of citizens of neutral state who participated in attack by one belligerent power upon another); see also RESTATEMENT DRAFT, *supra* note 14, at § 404 (discussing the possible use of the universal principle to obtain jurisdiction over terrorists).

194. Blakesley, *supra* note 126, at 1111.

195. RESTATEMENT DRAFT, *supra* note 14, at § 404 comment a (noting that although terrorism is internationally condemned, problems with defining terrorism have prevented any internationally effective agreements from sanctioning the crime). If hostage-taking is incorporated as one of the offenses under universal jurisdiction, the focus would shift from the definition of terrorism as a whole to the single act of hostage-taking. The United States is already a member of one treaty that categorizes certain aspects of terrorism as crimes with universal dimensions. OAS Terrorism Convention, *supra* note 128, at art. II (adopting the universal principle of jurisdiction for certain acts of terrorism, regardless of motive).

V. AN INTERNATIONAL RESPONSE TO TERRORISM

A. THE UNITED NATIONS CONVENTION AGAINST THE TAKING OF HOSTAGES

1. *A Historical Perspective*

In past years, the League of Nations and the United Nations attempted but failed to address the problem of terrorism generally.¹⁹⁶ For example, the United States proposed a Draft Convention on Terrorism¹⁹⁷ to the United Nations in 1972, but the United Nations rejected the proposal because of its broad provisions creating jurisdiction over anyone who attempts to kill, or actually kills, causes serious bodily harm, or kidnaps another person.¹⁹⁸ The proposed Convention on Terrorism would have given broad classes of terrorist crimes international significance and classified them as crimes of universal interest.¹⁹⁹

This broad proposal to outlaw terror-violence failed to solve the primary problem of distinguishing between self-determination, a "legitimate" form of resistance or struggle, and terrorism, an unacceptable form of seeking radical change. Because of their divergent political and ideological interests, states are unwilling to compromise on a definition of terrorism that would restrict their ability to promote, and in some cases defend, their interests.²⁰⁰

196. See generally Report of the *Ad Hoc* Committee on International Terrorism, 34 U.N. GAOR Supp. (No. 37) at 6, U.N. Doc. A/34/37 (1979) (discussing the perspectives of nations on the use of the political offense exception by hostage-takers); Report of the *Ad Hoc* Committee on Terrorism, 32 U.N. GAOR Supp. (No. 37) at 4, U.N. Doc. A/32/37 (1977) (discussing the problems preventing the participating nations from reaching a consensus on the crime of hostage-taking); 28 U.N. GAOR Supp. (No. 28) at 5, U.N. Doc. A/9028 (1973) (noting the need for an international consensus on the components of terrorism); Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 LEAGUE OF NATIONS O.J., PART I, at 21 (suggesting the general sanctioning of the crime of terrorism); see also C. DOBSON & R. PAYNE, COUNTERATTACK: THE WEST'S BATTLE AGAINST THE TERRORISTS 3 (1982) (stating that the Council of the League of Nations found the rules of international law insufficient to address international terrorism).

197. Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism: United States Working Paper, art. I, U.N. Doc. A/C.6/L.850 (Agenda Item 92) (Sept. 25, 1972) [hereinafter Draft Convention], reprinted in 1 R. FRIEDLANDER, *supra* note 24, at 487 (1979).

198. Draft Convention, *supra* note 197, at art. 1.

199. *Id.*

200. See *supra* notes 22-23 and accompanying text (noting the inherent difficulties of nations attempting to agree upon a single definition of terrorism). *But cf. infra* notes 218-25 and accompanying text (describing the achievement of a compromise on the definition of terrorism in the Hostage Convention).

2. *Lack of Consensus on an International Definition of Terrorism*

Realizing that no broad definition could satisfy all states, the United Nations addressed specific types of terrorist acts that, according to an international consensus, are condemnable.²⁰¹ The United Nations decided to consider hostage-taking in the same manner. The United Nations approached the problem by attacking the most internationally condemned terrorist activities.²⁰² Acting on limited, less controversial subjects, United Nations conventions have generally succeeded in preventing aircraft hijacking²⁰³ and protecting diplomats.²⁰⁴

The United Nations Security Council recently adopted a resolution indicating that the United Nations is ready to declare the taking of hostages a heinous offense under any circumstances.²⁰⁵ The United Nations General Assembly also adopted a resolution calling for measures to prevent international terrorism and acts of violence that sacrifice innocent lives in attempts to affect radical changes.²⁰⁶ The willingness of the United Nations to impose sanctions or take measures against hostage-takers will determine the actual deterrent strength of recent declarations against hostage-taking.

The Hostage Convention represents a strong international consensus that hostage-taking is an unacceptable method of terror-violence. The United Nations *Ad Hoc* Committee on International Terrorism (*Ad Hoc* Committee) drafted the Hostage Convention and presented the fi-

201. See *supra* notes 189-92 and accompanying text (listing crimes that the international community sanctions as violations of the law of nations).

202. See Nanda, *Progress Report on the United Nations' Attempt To Draft "An International Convention Against the Taking of Hostages,"* 6 OHIO N.U.L. REV. 89, 89 (1979) [hereinafter Nanda] (discussing the shift from a comprehensive to a piecemeal approach to restraining terrorism); see also Verwey, *The International Hostage Convention and National Liberation Movements*, 75 AM. J. INT'L L. 69, 69 (1981) [hereinafter Verwey] (quoting the United States interpretation of article 12 of the Hostage Convention). Article 12 creates an exception to the Hostage Convention extradition clause if the offender's position would be substantially prejudiced by extradition to a certain state. Hostage Convention, *supra* note 30, art. 12. The United States interpreted this article as creating a limited protection from extradition to a *certain* state, not as a general exception from the obligation to prosecute or extradite. Verwey, *supra*, at 111. The question of national liberation movements and their rights under the Hostage Convention was one of the major controversies the *Ad Hoc* Committee faced. *Id.*

203. See *supra* note 127 (listing conventions adopted to curtail aircraft hijacking).

204. See *supra* note 128 and accompanying text (discussing the success of the international community in protecting diplomats).

205. 40 U.N. SCOR (2637th mtg.) at 2, U.N. Doc. S/RES/579 (1985) (labelling the taking of hostages as offenses "of grave concern to the international community, having severe adverse consequences for the rights of the victims" and for the relations among states).

206. See *supra* note 10 (discussing the General Assembly's resolution to prevent and eliminate acts of international terrorism).

nal document for signature in December 1979.²⁰⁷ The Convention follows the format and spirit of the Protection of Diplomats Convention,²⁰⁸ which is highly regarded as an effective deterrent to terrorist acts against diplomats and internationally protected persons.²⁰⁹

The primary principle underlying the Hostage Convention dictates that those who take, or attempt to take hostages are subject to prosecution or extradition by any signatory state if apprehended within that state's jurisdiction.²¹⁰ The signatory states also have a duty to undertake preventive measures to combat terrorist activity within their borders.²¹¹ In drafting the Hostage Convention, the *Ad Hoc* Committee sought to exclude any provisions with ambiguous interpretations. The fact that signatory states follow different domestic laws, however, resulted in various expectations among different states. Even the Hostage Convention's guarantee of prosecution or extradition will not always adequately satisfy an injured state's expectations concerning proper punishment.²¹²

207. Rosenstock, *supra* note 126, at 169. The signatory states to the Hostage Convention include: The Bahamas, Barbados, Bhutan, Canada, Chile, Egypt, El Salvador, Federal Republic of Germany, Finland, Guatemala, Honduras, Iceland, Kenya, Korea, Lesotho, Mauritius, New Zealand, Norway, Panama, Philippines, Portugal, Spain, Surinam, Sweden, Switzerland, Trinidad & Tobago, United Kingdom, United States, and Yugoslavia. U.S. STATE DEPT., A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1986. Twenty-eight states have ratified the Hostage Convention, including the United States which ratified on December 7, 1984. *Multilateral Treaties Deposited with the Secretary General: Status as of 31 December 1985*, at XVIII-5, U.N. Doc. St/Leg/Ser. E/4, U.N. Sales No. E.86.U.3 (1986).

208. Convention on Protected Persons, *supra* note 128.

209. Rosenstock, *supra* note 126, at 172 (noting the success of the Protection of Diplomats Convention in arresting the numerous attacks against diplomatic personnel); see also Convention on Protected Persons, *supra* note 128 (making attacks against diplomatic personnel a crime of universal significance).

210. Rosenstock, *supra* note 126, at 169. The obligation of a party to the Hostage Convention is to extradite or prosecute a suspected terrorist to a competent authority. Hostage Convention, *supra* note 30, at art. 6, 8. Therefore, there is assurance of the prosecution of the suspected terrorist, preventing the terrorist from seeking asylum or "safe haven" under the political offense exception. If, for the purpose of extradition, the suspect falls under the "substantial probability of prejudice" exception to article 12, the state's obligation is to either prosecute or extradite the suspect to another country that can prosecute. Hostage Convention art. 10. Although this provision was designed to destroy any loopholes, situations still exist in which a criminal could escape prosecution under this article. For example, if a state with personal jurisdiction has not enacted national laws that impose sanctions for the particular crime committed and another state requesting extradition has the jurisdictional grounds to prosecute, but meets the "substantial prejudice" test, then neither state may prosecute and the accused criminal may go free.

211. Rosenstock, *supra* note 126, at 170 (discussing measures that states are required to take to prevent terrorist activity within national borders).

212. See *supra* notes 180-82 and accompanying text (describing the Achille Lauro

Two controversial issues posing problems during the drafting of the Hostage Convention were the definition of terrorism and the situations involving asylum under the political offense exception to extradition. Defining terrorism will remain a problem as long as the perpetrators of terrorism continue to legitimize their activity as self-determination.²¹³ National liberation movements and Eastern European countries expressed particular concern with the distinction between terrorist activity and legitimate liberation struggles because of the distinction's potential to undermine their activities.²¹⁴

These nations did not want the Hostage Convention to define terrorism in a way that would undermine struggles of national liberation movements and make their activities unacceptable under international law.²¹⁵ Without specific language regarding the legitimacy of self-determination, these nations feared that more powerful states would use the Hostage Convention to deny their right of self-determination because of the low-level warfare characteristics of such struggles.²¹⁶ Western delegations fought against the inclusion of allowances for self-determination struggles, arguing that the distinction would create ex-

incident). Yugoslavia afforded the alleged masterminds of the plot refuge and refused the extradition requests of the United States on the ground that the persons were not the actual perpetrators of the crime. *Terrorists Seize Cruise Ship in Mediterranean*, 85 DEP'T ST. BULL. 74, 74-81 (Oct. 1985). The United States unsuccessfully asserted the agency theory to have the alleged planners extradited regardless of the United States extradition treaty with Yugoslavia and Yugoslavia's membership to the Hostage Convention. *Id.*

213. See Paust, *A Survey of the Possible Legal Responses to Terrorism: Prevention, Punishment, & Cooperative Action*, 5 GA. J. INT'L & COMP. L. 431, 437-41 (1975) (discussing various justifications for violent actions committed by terrorists and insurgents).

214. Verwey, *supra* note 202, at 72; see also Report of the *Ad Hoc* Committee on Terrorism, 32 U.N. GAOR Supp. (No. 39), U.N. Doc. A/32/39 at 28, 32, 34-36, 56, and 76 (1977) (reflecting various countries' concerns that the Convention distinguish liberation movements' activities from acts perpetrated by criminals under ordinary law).

215. Verwey, *supra* note 202, at 72.

216. Cf. Rosenstock, *supra* note 126, at 175-76 (addressing four rationales for including language on equal rights and self-determination in the preamble to the Hostage Convention). The rationales are: 1) to prevent the abuse of the Convention by states seeking to repress rather than protect human rights; 2) to satisfy Third World desire to reiterate the legitimacy of self-determination; 3) to support the legitimacy of the use of force in struggles of self-determination; and 4) to foreshadow the operative portions of the Convention. *Id.* There is an increasing trend to classify violent terrorist activity as warfare where supporting states can be identified. See *Kaddafi's Crusade*, NEWSWEEK, Apr. 7, 1986, at 20 (describing the United States attack on Libya after numerous provocations announced by Kaddafi and detected by intelligence); *A New Kind of War*, NEWSWEEK, Apr. 7, 1986, at 16 (discussing President Reagan's "Rambo diplomacy" and justifications by his administration).

ceptions to the prohibition against hostage-taking.²¹⁷

Disagreeing nations compromised, establishing article 12 of the Hostage Convention.²¹⁸ The compromise excluded acts committed during armed conflicts (including struggles of self-determination) that were covered under the Geneva Conventions of 1949 and the Additional Protocols from consideration under the Hostage Convention.²¹⁹ Some nations interpreted article 12 as a protective clause, ensuring that the Hostage Convention would not be used against national liberation movements who took hostages "in the course of struggle" against oppressive regimes.²²⁰ This interpretation caused a considerable amount of controversy. Certain states felt that article 12 gave national liberation movements a license to take hostages, excluding them from coverage when engaged in "armed conflict."²²¹ Nonaligned countries²²² responded that article 12 did not give national liberation movements full license to commit terrorist acts,²²³ rather it prevented the use of the Convention against national liberation movements taking hostages in the course of a legitimate struggle.²²⁴

Satisfied with the passage of article 12, the supporters of a separate clause for self-determination no longer feared that the Convention would bar their struggles. The Western delegations were also satisfied concluding that the Convention did not give nations a limitless right to active self-determination.²²⁵ Those favoring the inclusion of an exception for national liberation movements in the Hostage Convention interpreted article 12 as a guarantee that the Hostage Convention would not be used against self-determination struggles.²²⁶ The drafters of the Convention, however, viewed article 12 as a mere reassurance of the

217. Rosenstock, *supra* note 126, at 73.

218. *Id.* at 87-88 (discussing proposals offered by aligned and nonaligned countries to balance the interests of states concerned with the inclusion of exceptional rights for national liberation movements).

219. Hostage Convention, *supra* note 30, at art. 12.

220. Verwey, *supra* note 202, at 85-89 (discussing the compromises and negotiations in drafting article 12).

221. Rosenstock, *supra* note 126, at 184.

222. Verwey, *supra* note 202, at 77.

223. *Id.* at 77.

224. *Id.* at 72-73.

225. Rosenstock, *supra* note 126, at 183-85. Many developing, Eastern European, and some African countries feared that article 12 would be used to outlaw their legitimate struggles for self-determination. *Id.* Western countries feared that terrorists and perpetrators of violent insurgency would use article 12 to escape obligatory extradition and prosecution under the Hostage Convention. *Id.*

226. See Verwey, *supra* note 202, at 86 (emphasizing that the inclusion of language on self-determination was interpreted not as an exception for these groups, but as a distinction between their activities and the activities of ordinary criminals, including terrorists).

legitimacy of national liberation struggles in international law, not as an exception from prosecution.²²⁷ Such an exception, if allowed, would significantly undermine the Hostage Convention's scope, limiting a nation's ability to prosecute "whosoever" takes hostages.²²⁸

3. *The Political Offense Exception to Extradition: A Scapegoat for Terrorists*

Distinguishing terrorist movements from national liberation movements creates an exception to the Convention's hostage-taking provisions, establishing circumstances that legitimize hostage-taking.²²⁹ In addition, a dispute exists concerning when national liberation movements are considered in "armed conflict" and accordingly protected by the Geneva Convention.²³⁰ The resistance of national liberation struggles is not classified as traditional "armed conflict," but low-level warfare characterized by sudden attacks and sabotage, with the key element being surprise. To allow national liberation movements to legitimize hostage-taking, claiming that they are in "armed conflict," permits liberation movements to escape the Hostage Convention's scope. Therefore, to ensure the Convention's effectiveness, the Convention should prohibit *all* hostage-taking.²³¹

Western delegations supported the prohibition of hostage-taking without exception.²³² As a compromise, the *Ad Hoc* Committee included a list of conventions not affected by the Hostage Convention and adopted additional language stating that the Convention did not bar principles enshrined in the United Nations Charter.²³³ The Committee included this language to avoid complications in determining which convention would govern in an "armed conflict."²³⁴ The national libera-

227. Cf. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 420 (1980) [hereinafter Nash] (expressing that article 12(1) does not create an exception to the Convention unless the activities involved are already covered under the Geneva Conventions and Additional Protocols and that states are obligated under those conventions to prosecute or extradite the terrorists).

228. *Id.* at 420-21.

229. See Hostage Convention, *supra* note 30, at art. 12 (providing distinction between terrorism and struggles of national liberation).

230. See *infra* note 251 (listing the Geneva Conventions and Additional Protocols).

231. Nash, *supra* note 227, at 420 (discussing the United States denial that the Hostage Convention creates *any* exception for national liberation movements or anyone else).

232. *Id.*

233. Hostage Convention, *supra* note 30, at art. 12.

234. McDonald, *The United Nations Convention against the Taking of Hostages: The Inside Story*, 6 TERRORISM: AN INT'L J. 545, 552 (1983) (discussing the United States proposal to clarify the question of what international legal instrument would govern during periods of armed conflict between states); see also Friedlander, *Com-*

tion movements insisted on this inclusion because the Geneva Conventions and Additional Protocols recognize self-determination movements as involved in legitimate struggles.²³⁵

National liberation movements and developing countries feared that the Hostage Convention would deny the legitimacy of their struggles with oppressive regimes, defining their low-level warfare methods as prohibited terrorist activity.²³⁶ The Hostage Convention's goal is not to deny the legitimacy of certain struggles, but to legitimize a viable tool against the victimization of innocent citizens and to assure that those who practice this form of terrorism do not escape prosecution.²³⁷ The drafters sought to establish that there is no "safe haven" for anyone who takes hostages and that signatory states have an obligation to assert jurisdiction, if the opportunity arises.²³⁸

The controversy surrounding the extradition requirement posed another problem for the *Ad Hoc* Committee. Articles 8 and 9, which are central to the Convention's implementation, mandate that governments either extradite persons who take hostages, or submit their case to a competent authority for prosecution "without exception whatsoever."²³⁹ The operational phrase "without exception whatsoever" requires signatory states to act even if the crimes are not committed within their territories. Articles 8 and 9 guarantee the prosecution of terrorists who take hostages, regardless of extradition or other treaty obligations, because signatory states must assert jurisdiction upon a suspected offender's apprehension.²⁴⁰ Accordingly, the provision is the Convention's crucial enforcement mechanism. Without articles 8 and 9, a state claiming that no treaty exists could deny extradition. Additionally,

ment: Unmuzzling the Dogs of War, 7 TERRORISM: AN INT'L J. 169, 169 (1984) (discussing the confusion about the point at which political terrorists become legitimate freedom fighters).

235. See Rosenstock, *supra* note 126, at 183-85 (discussing the difficult negotiations between nations supporting an absolute prohibition of all hostage-taking and nations fearing the potential repressive powers of an all-inclusive prohibition on hostage-taking upon states in struggles of self-determination); see also Yoder, *The Effectiveness of United Nations Action against International Terrorism: Conclusions and Comments*, 6 TERRORISM: AN INT'L J. 587 (1983) (noting that the fear that a broad Convention may be used to suppress national liberation movements prevents the United Nations from concluding a terrorism convention that absolutely prevents terrorist activity).

236. See Verwey, *supra* note 202, at 71 (discussing the demands of developing countries to distinguish self-determination from terrorist warfare).

237. *Id.* at 83.

238. Hostage Convention, *supra* note 30, at art. 8.

239. *Id.* at arts. 8, 9.

240. See Hostage Convention, *supra* note 30, at art. 8 (requiring prosecution or extradition) and art. 9 (providing protection for offenders where extradition to a certain state may result in prejudicial treatment or insufficient due process).

without these articles, a state claiming insufficient jurisdictional grounds under international laws could refuse to prosecute terrorists. Article 8 confirms that signatory states are under an affirmative obligation to prosecute or extradite all apprehended terrorists.²⁴¹

Article 9 describes states' obligations to extradite terrorists who take hostages when the state with personal jurisdiction cannot prosecute the offender.²⁴² Article 9 also provides limited exceptions to the extradition requirements,²⁴³ denying extradition when there is suspicion that the state seeking extradition has an ulterior motive for prosecuting the offenders.²⁴⁴ The extradition requirements serve two specific objectives. First, obligations of signatory states under all extradition treaties are modified to the extent that they are inconsistent with the Hostage Convention.²⁴⁵ This provision guarantees that when a state does not wish to prosecute, or has any contrary obligations with respect to extradition, the state has one of two options—extradition or prosecution.²⁴⁶ Second, the extradition requirements protect individuals against persecution when a state believes that extradition is sought for the purpose of prosecuting or punishing a person on account of race, religion, nationality, ethnic origin, or political opinion.²⁴⁷ The political exception to the extradition causes two problems. In some cases, foreign states will not agree with the United States on the "political status" of the offenders.²⁴⁸ In these cases, offenders can seek political asylum and therefore escape the jurisdiction of nations seeking extradition.

The nature of most international terrorist attacks is political, whether the terrorists seek ransom, the release of prisoners, or just the public humiliation of a foreign government.²⁴⁹ The controversial dis-

241. *Id.* at art. 8 (providing that without exception whatsoever, states must prosecute or extradite).

242. *Id.* at art. 9.

243. *Id.* at art. 9, para. 1.

244. *Id.*

245. *Id.* at art. 9, para. 2; *see also* Verwey, *supra* note 202, at 92 (discussing compromises achieved in negotiating article 9).

246. Hostage Convention, *supra* note 30, at art. 9.

247. *See id.* at art. 9, para. 1(a) (providing states with the option of extraditing or prosecuting); *see also* Rosenstock, *supra* note 126, at 182 (discussing the rationale for including the option to extradite or prosecute). If a state refuses to extradite, it must nonetheless submit the case to a competent authority for adjudication. *Id.* at 183. The "substantial belief" standard will allow states to prove their good faith in requesting extradition by assuring recognized types of protection (including security methods to protect the accused from harm and visits from the Red Cross). *Id.*

248. *See* Nanda, *supra* note 202, at 100-03 (discussing the fear of the *Ad Hoc* Committee that lack of agreement on the acceptable limits of the political offense exception would undermine the scope of the Hostage Convention).

249. *This World*, *supra* note 130, at 31, 32.

inction between legitimate and illegitimate political struggles for the purpose of prosecuting violent terrorist acts has hindered the development of an international consensus on the most effective sanctions for eliminating the threat of international terror.²⁵⁰ By outlawing the taking of hostages for any purpose not covered by the Geneva Conventions and the Additional Protocols,²⁵¹ the *Ad Hoc* Committee sought to eliminate the use of the political exception in circumstances involving the taking of hostages by violent international terrorists. Although states with custody of terrorists are obligated to either prosecute or extradite, the evidentiary laws and sanctions are often considerably less stringent than comparable laws in the United States.²⁵²

4. *The Optional Clause: Adoption of the Passive Personality Principle*

The Hostage Convention contains an optional clause that grants jurisdiction on the basis of the passive personality principle.²⁵³ For example, the Convention specifically grants jurisdiction for crimes committed against American citizens on the basis of their nationality.²⁵⁴

250. Friedlander, *Commentary—Definitional Factors*, in 3 R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL—FROM THE TERROR DECADE OF THE 1970'S TO THE DANGEROUS DECADE OF THE 1980'S* 5-6 (1981). Problems surrounding the issue of self-determination resulted from the insistence of some states on the inclusion of language distinguishing terrorist hostage-taking from legitimate actions of struggle for self-determination. Verwey, *supra* note 202, at 72.

251. Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field (Convention I), Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea (Convention II), Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Convention III), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3364, 5 U.N.T.S. 287; and Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Two protocols additional to the Geneva Conventions were adopted on August 12, 1949, Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *reprinted in Official Documents: Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 72 AM. J. INT'L L. 457, 502 (1978).

252. See generally Sofaer, *The Political Offense Exception and Terrorism*, 85 DEP'T ST. BULL. 58 (Dec. 1985) (discussing the interplay of the political offense exception and the inability to bring criminals to justice). Additional problems are raised when varying domestic laws of signatory states allow terrorists to escape prosecution. Verwey, *supra* note 202, at 87-88 (stating that if a signatory state with custody of a suspected terrorist does not have the appropriate domestic legislation to prosecute, and the accused is not extraditable for political reasons, the accused may either escape jurisdiction or face prosecution for a less severe crime).

253. Hostage Convention, *supra* note 30, at art. 5(1)(d).

254. *Id.* The provision includes an optional clause for states unwilling to recognize

Originally, the United States objected to the inclusion of this provision in the Convention, claiming that the passive personality principle is reasonable for diplomatic personnel²⁵⁵ but should not extend to ordinary citizens. United States representatives asserted that the protection of the passive personality principle should not extend beyond diplomats and internationally protected persons.²⁵⁶ Civil law states insisted that the Convention include the passive personality principle. This insistence resulted in a compromise, granting jurisdiction on the basis of nationality when state finds it appropriate.²⁵⁷ The extraterritorial jurisdiction extension represents a departure in United States foreign policy. United States domestic legislation, granting jurisdiction on the basis of the victim's nationality, has expanded the application of the passive personality principle to obtain jurisdiction over terrorists who take hostages.

The willingness of Congress to include the passive personality principle of jurisdiction indicates the increasing acceptability of the principle's application to international terrorist attacks on civilians because of their nationality. This departure from the traditionally applied jurisdictional theories of international law is consistent with the Hostage Convention, but inconsistent with the jurisdictional principles of the majority of states.

The Hostage Convention could prove as effective as the complementary conventions²⁵⁸ in addressing international terrorism.²⁵⁹ Terrorists will inevitably succeed in a number of efforts to infiltrate security systems and state protective measures. Instances when perpetrators escape to "freedom" states that offer them sanctuary may render the broad provisions of the Hostage Convention useless, especially in geographic areas of common terrorist violence and little political control.

CONCLUSION

As technology advances, the defensive race against terrorism be-

this principle as a valid basis of international jurisdiction. *Id.*

255. Rosenstock, *supra* note 126, at 180; *see supra* note 128 (listing Conventions providing for protection of diplomatic personnel).

256. Rosenstock, *supra* note 126, at 180. During the negotiations on the Hostage Convention, the United States objected to the use of the passive personality principle as a basis for jurisdiction over terrorists. *Id.*

257. *Id.*

258. *See supra* notes 85, 86, 108, 127, and 128 (citing international conventions against various forms of terrorism).

259. *See* Nanda, *supra* note 202, at 108 (noting that the Hostage Convention, modeled after the successful aircraft hijacking conventions and Diplomats Convention, is a necessary and desirable step forward in combatting international terrorism).

comes more difficult—especially when states with substantial resources and access to technology support terrorist activity. Divergent interests and ideologies handicap the international community's struggle to reach a consensus on the legitimacy of certain aspects of terrorism. Attacking the manifestations of terrorism systematically through multilateral conventions may pose the best method of reaching a consensus on the nature of the problems. This is a slow process, however, that does not offer much promise to terrorist victims. To halt the taking and killing of innocent citizens, the United Nations should find that this crime is of universal dimension, and allow any state apprehending terrorists to prosecute or extradite. Declaring hostage-taking a crime of universal significance would essentially condemn *all* acts of hostage-taking in the interest of mankind. Such a determination would equate jurisdiction over hostage-taking crimes with hijacking. Proclaiming hostage-taking a universal crime would eliminate problems inherent in the assertion of the passive personality principle, expanding a nation's jurisdictional reach and increasing the potential for prosecution or extradition.

Absent the adoption of a universal designation for the crime of hostage-taking, the United States demonstrated its willingness to assert the passive personality principle of jurisdiction in the Achille Lauro incident. No matter how strong the traditional repudiation of the passive personality principle, the United States has accepted the theory for the purpose of prosecuting terrorists who take American hostages, whether they are diplomats or innocent persons. Adopting this questionable principle of international jurisdiction may prove effective because it is tailored to the nature of the crime—directed at innocent citizens purely on the basis of their nationality.

Expressly adopting either the passive personality or the universal principle to gain jurisdiction over international terrorists substantially deviates from the traditional approach to the terrorist problem. The United States has never employed the passive personality principle to assert jurisdiction over extraterritorial crime²⁶⁰ and has not adopted the

260. See *supra* notes 148-50 and accompanying text (noting that United States courts recognize the existence of this principle, but generally reject its validity as an acceptable independent basis of jurisdiction); see also *Rivard v. United States*, 375 F.2d 882, 885-86 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967) (acknowledging the passive personality principle under the law of nations but granting jurisdiction under the objective territorial principle over a heroin smuggler's acts having an effect within sovereign state); *United States v. Layton*, 509 F. Supp. 212, 215-16 (N.D. Cal. 1981) (noting that Congress has the power to employ the passive personality principle under the law of nations but declining to apply the passive personality principle where other grounds of jurisdiction exist); *United States v. Rodriguez*, 182 F. Supp. 479, 487 (S.D. Cal. 1960), *aff'd sub nom. Rocha v. United States*, 288 F.2d 545, 546-47 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961) (discussing United States jurisdiction over

universal principle with respect to hostage-taking.²⁰¹ One of the reasons the United States hesitated to adopt either the universal or passive personality principle is the lack of international guidelines defining terrorism and outlining acceptable jurisdictional principles to address the problem. The 1985 Restatement Draft suggests that the United States may consider terrorism a crime of universal significance.²⁰² Asserting jurisdiction under this theory is difficult, however, because there is no international consensus on the definition of terrorism.²⁰³

Adoption of the universal principle does not guarantee prosecution or extradition of offenders, but it increases the potential for states to assert jurisdiction where no other basis of jurisdiction exists. Even universal jurisdiction is inadequate to ensure prosecution if states continue to offer sanctuary and support to terrorists. Although the Reagan Administration has called on the international community for a "tougher" policy on the apprehension and prosecution of terrorists,²⁰⁴ before rec-

aliens for crimes committed abroad and finding extraterritorial jurisdiction through interpretation of congressional intent). *But see* RESTATEMENT DRAFT, *supra* note 14, at § 402 comment g (mentioning the passive personality principle as a potential means of obtaining jurisdiction over terrorist who victimize citizens on the basis of their nationality).

261. OAS Terrorism Convention, *supra* note 128 (adopting the universal principle of jurisdiction for terrorist crimes). Article II states that:

[F]or the purposes of this convention, kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive.

Id.

262. RESTATEMENT DRAFT, *supra* note 14, at § 404 (stating that "a state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, . . . and perhaps terrorism").

263. *See* R. FRIEDLANDER, TERROR-VIOLENCE, *supra* note 27, 153 (citing the failure of the international community to define and offer effective sanctions against terrorism as stifling any effective international deterrent of terror violence). Approaching the problem broadly, Friedlander defines terrorism as an "attack upon the prevailing legal order." *Id.* at 154; *see also* A. SCHMID, *supra* note 12, at 5-9 (1983) (analyzing various definitions of terrorism and concluding that one must consider the framework of the definition and the components of the crime).

Finding an internationally acceptable definition of terrorism is one of the major stumbling blocks in United Nations attempts to enact conventions prohibiting the more offensive aspects of terrorist activity. Because of the difficulties of reaching a consensus, the United Nations has approached the problems of terrorism by singling out the activities that are the most offensive to nations. *See supra* notes 22-31 and accompanying text (discussing various definitions of international terrorism and the problem of the lack of a universal definition). The international stagnation on defining terrorism frustrates the United States government in its quest of finding a solution to the problem of hostage-taking and to barriers of prosecution.

264. Oakley, *supra* note 46, at 73 (reiterating the Reagan Administration's commitment to the fight against international terrorism and calling for support for the fiscal year 1986 security assistance program).

ommending the sanctions for international terror-violence, the international community will have to reach a consensus that designates which activities and actors are condemnable. The inability to distinguish between terrorism and self-determination, terrorists and freedom-fighters, has retarded the progress of the United Nations in issuing effective measures to stop terror-violence. Once nations overcome the definitional threshold, the universal principle could provide a broad base of jurisdiction to ensure apprehension and prosecution of the offenders.