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The Achille Lauro Incident and the Permissible Use of Force

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I. INTRODUCTION

On October 7, 1985, the Italian cruise ship Achille Lauro was commandeered by four individuals identifying themselves as members of the Palestine Liberation Front (PLF), a breakaway faction of the Palestinian Liberation Organization (PLO).[1] The hijacking occurred as the Achille Lauro drew close to Port Said, Egypt, on a short excursion from Alexandria[2] carrying approximately four hundred crew members and guests.[3] Among the passengers were fourteen citizens of the United States who were singled out by the hijackers as those who would be the first to die if the hijackers' conditions were not met.[4] As their principal demand, the four gunmen sought the release of fifty Palestinians from Israeli prisons, among them convicted terrorists.[5]

After the hijackers had diverted the ship's course away from Egypt and towards Tartus, Syria, a radio message was received inferring that a person on board the ship had been killed.[6] After the hijackers had surrendered to a representative of the PLO at Port Said,

1. N.Y. Times, Oct. 8, 1985, at A1, col. 6. The PLF has been identified as one of the eight factions originally constituting the Palestinian Liberation Organization. *See* N.Y. Times, Oct. 9, 1985, at A9, col. 2. However, the PLF has distinguished itself as a particularly brutal band of terrorists, with a reputation gained in large measure by the Nahiariga incident, during which members of the PLF killed a five-year old Israeli girl by dashing her head against a rock. *See id.*, at A4, col. 5.

2. N.Y. Times, Oct. 9, 1985, at A1, col. 6; *see also* NEWSWEEK, Oct. 21, 1985, at 34.

3. N.Y. Times, Oct. 9, 1985, at A1, col. 6; *see also* NEWSWEEK, Oct. 21, 1985, at 35.

4. N.Y. Times, Oct. 8, 1985, at A1, col. 6. Accounts later given to the press by the passengers asserted that fourteen American, six British and two Austrian passengers were segregated from the remainder of those on board the ship. Apparently, the two Austrian passengers were held with the Americans because the hijackers mistakenly believed them to be Jewish. *See* NEWSWEEK, Oct. 21, 1985, at 35.

5. N.Y. Times, Oct. 8, 1985, at A1, col. 6; *see also* NEWSWEEK, Oct. 21, 1985, at 35, TIME, Oct. 21, 1985, at 32; N.Y. Times, Oct. 9, 1985, at A4, col. 4.

6. N.Y. Times, Oct. 9, 1985, at A1, col. 6. The transcript of radio communications between the hijackers and the Syrian port of Tartus was as follows: "We will start killing at 1500. We cannot wait any longer. We will start killing. What are the developments, Tartus? We will kill the second. We are losing patience." N.Y. Times, Oct. 9, 1985, at A1, col. 5.

Egypt,[7] the murder of Leon Klinghoffer, a wheelchair-bound United States citizen, was confirmed by Bettino Craxi, Prime Minister of Italy, during a news conference in Rome.[8] Pursuant to a settlement, the hijackers returned the ship to Egypt in response to a promise to provide them safe passage out of Egypt to an undisclosed location. However, according to Egyptian officials, the gunmen were not to be released until it was determined whether anyone on board the ship had been killed.[9] Meanwhile, the United States had requested that Egypt extradite the hijackers to the United States.[10]

On October 10, 1985, after ignoring American pleas to prosecute or extradite the gunmen, the Egyptian government placed the hijackers on a commercial airliner out of Cairo bound for the Palestinian Liberation Organization base in Tunis, Tunisia.[11] The EgyptAir airliner was intercepted by fighter jets from the United States aircraft carrier Saratoga over international waters north of Egypt[12] and diverted to Sicily, Italy, where the hijackers were arrested by Italian authorities.[13] Later, it was learned that the Tunisian government had refused landing rights to the Egyptian plane carrying the hijackers.[14]

Soon thereafter, Egyptian President Hosni Mubarek charged that the use of force by the United States constituted a breach of international law.[15] This Comment will address whether the use of force by the United States was justified as a legitimate act of self-defense or reprisal — an act that would have been unnecessary had Egypt com-

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7. N.Y. Times, Oct. 10, 1985, at A1, col. 6.

8. N.Y. Times, Oct. 10, 1985, at A1, col. 6; *see also* TIME, Oct. 21, 1985, at 33, establishing that on Oct. 10, 1985, the ambassador from the United States to Egypt confirmed that Leon Klinghoffer had been killed on board the ship. *See also* NEWSWEEK, Oct. 21, 1985, at 34.

9. N.Y. Times, Oct. 10, 1985, at A1, col. 6. However, there was speculation in the press regarding actual knowledge held by Egyptian officials concerning Mr. Klinghoffer's death, despite Egyptian claims to the contrary. *See* N.Y. Times, Oct. 11, 1985, at A34, col. 1. On October 9, 1985, Giulio Andreotti, Foreign Minister of Italy, stated that Italy had agreed to the settlement on the sole condition that no one on board the ship had been killed. *See* N.Y. Times, Oct. 10, 1985, at A10, col. 1.

10. N.Y. Times, Oct. 10, 1985, at A1, col. 3; *see also* NEWSWEEK, Oct. 21, 1985, at 25.

11. N.Y. Times, Oct. 11, 1985, at A1, col. 6.

12. *Id.*; *see also* NEWSWEEK, Oct. 21, 1985, at 25.

13. N.Y. Times, Oct. 11, 1985, at A1, col. 6.

14. NEWSWEEK, Oct. 21, 1985, at 25. Additionally, the EgyptAir airliner was also denied landing rights at Athens, Greece. *Id.*

15. President Mubarek was quoted as accusing the United States of "an act of air piracy . . . unheard of under any international law or code." N.Y. Times, Oct. 13, 1985, at A1, col. 5. President Mubarek also requested an apology of President Reagan, to which Mr. Reagan responded, "Never". TIME, Oct. 21, 1985, at 26.

plied with principles of international law to which Egypt had voluntarily bound itself. The thesis of this Comment is that the use of force against Egypt constituted a legitimate reprisal in that the action complied with standards of reasonableness — a reasonableness that may be quantified by the following three elements:

(1) Egypt was guilty of a prior international delinquency against the United States;
(2) An attempt by the United States to obtain redress or protection by other means was known to have been made, or was inappropriate or impossible under the circumstances, leaving the United States without a remedy against Egypt;
(3) The use of force by the United States was limited to the necessities of the case and proportional to the wrong perpetrated by Egypt.[16]

II. THE GENERAL PROHIBITION AGAINST THE USE OF FORCE

Article 2(4) of the United Nations Charter contains the "basic rule against the threat or use of force."[17] This provision states that "[a]ll Members shall refrain in their . . . use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[18] It is this basic principle that underlies Egypt's complaint against the United States.

The nationality of the airliner carrying the Achille Lauro hijackers is a basis for finding that the United States' actions constituted the use of force against Egypt's territorial integrity.[19] The Convention on International Civil Aviation,[20] to which Egypt and the United States are parties,[21] provides that "[a]ircraft used in military, customs and

16. Professor D. W. Bowett suggests this three part test in Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972). *See also* Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 430-31 (1969).

17. Schachter, *Self-Help in the International Law: U.S. Action in the Iranian Hostages Crisis*, 37 J. INT'L AFF. 231, 241 n.10 (1984).

18. U.N. CHARTER art. 2, para. 4. The U.N. Charter also requires that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3.

19. The assertion that the United States' action constituted a violation of Egypt's sovereignty is supported by the fact that EgyptAir is the Egyptian national airline. NEWSWEEK, Oct. 21, 1985, at 22.

20. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

21. *Id.*

police services shall be deemed to be state aircraft."[22]Furthermore, under the Convention on Civil Aviation, the airliner constituted the territory of Egypt because aircraft hold the nationality of the state where they are registered.[23]

Besides the nationality of the aircraft, the threat or use of force against Egyptian personnel operating the plane[24] and Egyptian policemen on board the flight[25] violated Egyptian sovereignty.[26] Thus, whether analyzing the interception of the airliner as an attack upon Egyptian property or Egyptian lives, the United States' actions constituted a threat or use of force against the territorial integrity of Egypt.

III. INAPPLICABILITY OF THE DOCTRINE OF SELF-DEFENSE

A. Traditional Self-Defense

Article 51 of the United Nations Charter establishes that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs."[27] Self-defense is so basic to the existence of nations that it warrants the label of an "inherent right."[28] The Charter does not create the "inherent right" to self-defense, but rather recognizes it.[29]

Justifying the actions of the United States in the Achille Lauro incident as legitimate instances of self-defense not only demands finding that an attack upon the United States occurred, but also that the measures taken in self-defense were necessary and proportional to the provoking injury.[30] The taking of United States citizens as hostages and the subsequent murder of Mr. Klinghoffer is an attack upon the United States itself, particularly if "the nationals are attacked because

22. *Id.* art. 3(b).

23. *Id.* art. 17; *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 29 comment a (1965). It is assumed herein that the EgyptAir airliner is registered in Egypt.

24. N.Y. Times, Oct. 11, 1985, at A1, col. 6; *see also* TIME, Oct. 28, 1985, at 23.

25. N.Y. Times, Oct. 11, 1985, at A1, col. 6.

26. *See* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 92 (1958). "It has been contended that an injury to the nationals of a state constitutes an injury to the state itself." *Id.* at 92.

27. U.N. CHARTER art. 51, para. 1.

28. L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 344 (3d ed. 1969). Former United States Secretary of State Dean Acheson has noted that the right of self-defense is inherent "in the very existence of nationhood." *Id.* at 344 n.188.

29. L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 28, at 344.

30. Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635, 1637 (1984).

of political antagonism to their government."[31] Indeed,

> [i]t has been contended that an injury to the nationals of a state constitutes an injury to the state itself, and that the protection of nationals is an essential function of the state. On this reasoning, it is feasible to argue that the defense of nationals, whether within or without the territorial jurisdiction of the state, is in effect the defense of the state itself.[32]

However, to properly invoke the doctrine of self-defense, either the lives of citizens must be in imminent danger or an attack upon territorial sovereignty must be underway.[33] Reflection upon the rescue action of the Israeli government at Entebbe, Uganda serves as a useful comparative device in concluding that the actions of the United States in the Achille Lauro incident were not in self-defense, precisely because an imminent threat of loss of life was missing. In the Entebbe rescue mission, Israel intruded upon the territorial sovereignty of Uganda in response to the threat of imminent loss of life of Israeli nationals.[34] The use of force was justified in that case by the United States' representative to the United Nations as follows:

> [T]here is a well-established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located either is unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.[35]

In the Achille Lauro case, the doctrine of self-defense cannot adequately justify the actions of the United States. When the EgyptAir airliner was intercepted by United States warplanes, the hostages, and

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31. *Id.* at 1632. "The right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writings of jurists and in the practice of states." D. BOWETT, *supra* note 26, at 87. The facts of the Achille Lauro hijacking establish beyond doubt that Mr. Klinghoffer and other American citizens were segregated from the other passengers and crew because of their nationality. *See* NEWSWEEK, Oct. 21, 1985, at 34.

32. D. BOWETT, *supra* note 26, at 92.

33. Schachter, *supra* note 17, at 243; *see also* Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1, 15-17 (1982).

34. Schachter, *supra* note 30, at 1630; *see also* Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, 2 THE FLETCHER F. 135 (1977).

35. Schachter, *supra* note 30, at 1630 (quoting DIG. OF U.S. PRAC. IN INT'L L. 150-51 (1976)).

Mr. Klinghoffer in particular, were well beyond protection and no longer in need of defense from the hijackers.[36] The right of self-defense, when used to justify an incursion upon the territorial integrity or sovereignty of a State is limited to cases of "immediate threat of irreparable injury to . . . life or property."[37] In the Achille Lauro case, the United States' actions were not self-defensive in character because the elements of immediate threat and irreparable injury were absent. Certainly, United States citizens were not immediately in need of rescue or protection when the United States acted. Accordingly, the armed intervention was not "justified by the sheer necessity of instant actions to save the lives of innocent nationals, whom the local government is unable or unwilling to protect."[38]

B. Anticipatory Self-defense

The right of self-defense has been read narrowly to apply only when an armed attack is actually in progress.[39] The United Nations has refused to recognize a right of preventative or anticipatory self-defense "for fear that it may be too fraught with danger for the basic policy of peace and stability."[40]

However, particularly in the nuclear age, "[s]tates faced with a perceived danger of immediate attack, . . . cannot be expected to await the attack like sitting ducks."[41] Within the context of terrorism, particularly as applied in the Middle East:

> When a government treats an isolated incident of armed attack as a ground for retaliation with force, the action can only be justified as self-defense when it can be reasonably regarded as a defense against a new attack. Thus, "defensive retaliation" may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action.[42]

The right of anticipatory self-defense may be applicable to the

36. By the time the United States planes intercepted the EgyptAir airliner, Mr. Klinghoffer was already dead. *See* N.Y. Times, Oct. 11, 1985, at A1, col. 6. Additionally, all of the hostages had already been released. *See* N.Y. Times, Oct. 10, 1985, at A1, col. 6.

37. D. BOWETT, *supra* note 26, at 89.

38. Schachter, *supra* note 30, at 1630 (quoting Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 240 (1962)).

39. Levenfeld, *supra* note 33, at 15.

40. *Id.* at 16 (quoting R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 203 (1963)).

41. Schachter, *supra* note 30, at 1634.

42. *Id.* at 1638.

Achille Lauro incident only if the threat of danger posed by the hijackers, assisted by Egypt, was imminent. In what "is often cited as authoritative customary law"[43] United States Secretary of State Daniel Webster refuted a British claim of anticipatory self-defense, asserting that anticipatory self-defense is limited to cases in which "the necessity of that self-defense is instant, overwhelming and . . . leaves no choice of means, and no moment for deliberation."[44]

In the Achille Lauro incident, anticipatory self-defense as a justification for the United States' actions must fail because the dangers posed by the hijackers were not imminent. A comparison to Israel's bombing of an Iraqi nuclear reactor in 1981, which Israel attempted to justify as anticipatory self-defense, is helpful to an analysis of the Achille Lauro case. In the former case, Israel's claim of anticipatory self-defense was rejected by the United Nations because the anticipated Iraqi attack was not imminent.[45] Similarly, in the Achille Lauro incident, while it may have been reasonable for the government of the United States to presume the same four hijackers would return to terrorism, the reaction of the United States was not in response to an imminent danger. Thus, the doctrine of anticipatory self-defense does not justify the American actions.

IV. REPRISAL AS A LEGITIMATE USE OF FORCE

The primary distinction between acts of self-defense and acts of reprisal is that "[s]elf-defense is future-oriented. It seeks to secure the state against threats to its territory or sovereignty. Reprisals are past-oriented. They seek to punish past behavior with the aim of preventing its recurrence."[46] There is a further distinction between reprisals which are simply punitive in character, and thus illegitimate, and reprisals holding characteristics of reasonableness, which serve to legitimize the action taken.[47] The following three elements provide an

43. *Id.* at 1635.

44. Levenfeld, *supra* note 33, at 28 (quoting 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 412-14 (1906)). The *Caroline* case involved the use of British armed forces against a vessel carrying armed men to Canada. The men were on their way to support an armed insurrection in Canada against the British. The primary justification by the British for their actions was the right of anticipatory self-defense. *Id.* at 28 n.92.

45. *See* Schachter, *supra* note 30, at 1635.

46. Levenfeld, *supra* note 33, at 37.

47. Bowett, *supra* note 16, at 11. Professor Bowett's contention, that reasonable conduct amounting to a reprisal is not illegal, is based upon his observation that reprisals conforming to the three factors set forth in the text at page 3 have not been condemned by the U.N. Security Council. *Id.*

analytical basis for examining and judging reprisals. These standards of evaluation are set forth below, within the context of the Achille Lauro incident.

A. "The target state must be guilty of a prior international delinquency against the claimant state."[48]

"The first prerequisite, *sine qua non* for the right to exercise reprisals is an occasion furnished by a previous act contrary to international law."[49] In the Achille Lauro case, for the United States to justify its actions as legitimate reprisals, the force utilized must have been in response to a breach of international law by Egypt.

The breach at issue here was Egypt's failure to comply with the International Convention Against the Taking of Hostages ("Hostages Convention"), to which both Egypt and the United States are parties.[50] "The basic thrust of the Hostages Convention is that those who take hostages will be subject to prosecution or extradition if they are apprehended within the jurisdiction of a state party to the Convention. Safe haven is to be denied by the application of the principle *aut dedere aut judicare* [to extradite or prosecute], which obligates states to prosecute or extradite an alleged offender."[51] As initially proposed by the Federal Republic of Germany, the offense of hostage-taking is best defined as "the holding of A to obtain concessions from

48. *Id.* at 3; *see also* Falk, *supra* note 16, at 431.

49. *Naulilaa Incident Arbitration* (Port. v. Ger.), 2 U.N. INT'L ARB. AWARDS 1012 (1928), *quoted in* W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 562 (1953). The Naulilaa incident arose when German soldiers who entered Portugal during World War I attempted to discuss the importation of food supplies. The parties to the conversation were incapable of effective communication due to language difficulties. The encounter culminated in the death of three Germans and the imprisonment of two others. Germany retaliated by a widespread attack of Portugese ports on six separate occasions, which the Germans attempted to justify as an act in response to an international delinquency. W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 561-63 (1953).

50. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979). As of January 1, 1985, the following states had signed the Hostages Convention: The Bahamas, Barbados, Bhutan, Chile, Egypt, El Salvador, Finland, The Federal Republic of Germany, Guatemala, Honduras, Iceland, Kenya, Korea, Lesotho, Mauritius, Norway, Panama, Phillipines, Portugal, Spain, Suriname, Sweden, Trinidad & Tobago, United Kingdom and the United States. *See* OFFICE OF THE LEGAL ADVISER, DEP'T OF STATE, TREATIES IN FORCE 1840 (1985).

51. Rosenstock, *International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism*, 9 DEN. J. INT'L L. & POL'Y 169 (1980). The initial proposals for the Hostages Convention were presented by the Federal Republic of Germany in September of 1976, "presumably stimulated by the Munich atrocity of 1972 and subsequent kidnappings of German businessmen within and outside the Federal Republic of Germany." *Id.* at 173.

B."[52] Threats, attempts to take hostages, and acting as an accomplice are also established as contrary to international law.[53]

The most critical provision of the Hostages Convention applicable to the Achille Lauro incident is as follows:

> The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.[54]

1. Egypt's Obligations under the Hostages Convention

In the Achille Lauro incident, the perpetrators of the crime of hostage-taking were present within Egypt's territory, a State Party to the Hostages Convention, immediately after the surrender of the ship.[55] Under the Hostages Convention, Egypt's obligation to prosecute or extradite the alleged offenders was triggered.[56]

Egypt's obligation was not conditioned upon the arguable status of the hijackers as freedom fighters engaged in a struggle for self-determination. This is clear from the outcome of proposals made during the Hostages Convention negotiations by several countries, including Egypt, that would have exculpated offenders if the motive for the offense was grounded in a struggle for self-determination.[57] The response of Western delegates to such proposals was that the Hostages

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52. *Id.* at 176. The offense has also been defined as [1] "the seizure or detention of another person"; [2] "the threat to kill or harm that person in order to compel a third party to perform, or refrain from performing, a specific act." Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT'L L. 69, 70 n.6 (1981).

53. Rosenstock, *supra* note 51, at 177. The taking of hostages offers to the terrorist a "natural means of attracting and maintaining widespread attention. The greatest challenge to the terrorist's ingenuity has been to achieve this objective without precipitating results so offensive as to sacrifice the sympathy for their cause which it is hoped will be evoked in the public." Wilder, *International Terrorism and Hostage Taking: An Overview*, 11 MANITOBA L.J. 367, 373-74 (1981).

54. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 46) art. 8, U.N. Doc. A/34/46 (1979).

55. *See supra* notes 7-11 and accompanying text.

56. *See supra* notes 51-53 and accompanying text.

57. One such proposal read, "[f]or purposes of this Convention, the term 'taking of hostages' shall not include any act or acts carried out in the process of national liberation against colonial rule, racist and foreign regimes, by liberation movements recognized by the United Nations or regional organizations." U.N. Doc. A/Ac. 188/L.5 (1977). The proposal was offered by Algeria, Egypt, Guinea, Lesotho, the Libyan Arab Jamahiriya, Nigeria and the United Republic of Tanzania. *See* Verwey, *supra* note 52, at 73.

Convention had nothing to do with a struggle for self-determination. The taking of hostages was to be outlawed by the Convention as an impermissible use of force, regardless of the justification.[58] The eventual outcome of such proposals was that "the principle *aut dedere aut judicare* [remained] unconditional, without any exception."[59]

However, Article 8 of the Hostages Convention materially dilutes the obligation of Party States to prosecute or extradite an alleged offender by allowing states to discharge their duty by referring and deferring any decision to their own prosecuting authorities.[60] In the Achille Lauro case, there is no evidence of any act by Egypt that would constitute presentment of the alleged offenders to Egypt's own prosecutors, as required by Article 8.

The head of the PLO reportedly requested that Egypt hand over the hijackers for trial.[61] However, the PLO trial could not have taken place because the location of the trial, Tunisia, was inaccessible. Tunisia refused to allow the hijackers to land there.[62] Additionally, any judicial action undertaken by the PLO would have been highly suspect. Although the PLO has a legal code that is fifteen years old, the only actions ever undertaken under their code have concerned the internal discipline of the PLO.[63] Given the inaccessibility of Tunisia

58. Verwey, *supra* note 52, at 74-75. The ban on the taking of hostages is analogized by Mr. Verwey to similar bans against the use of poisonous gas or germ warfare which are contrary to international law, regardless of any proffered justification. *Id.*

59. *Id.* at 76. According to Professor Verwey, the unconditional obligation to prosecute or extradite was agreed to by the nonaligned countries only after Western delegations agreed to include in the Preamble "a clear reference to the legitimacy of the struggle for self-determination." Verwey, *supra* note 52, at 87.

60. Rosenstock, *supra* note 51, at 181. As in the case of The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, T.I.A.S. No. 7192 and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, T.I.A.S. No. 7570, a careful reading of the Hostages Convention discloses that the Hostages Convention "does not mandate that the offender actually be prosecuted but merely that the case be presented to the competent prosecuting authorities." Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft: The Hague Convention*, 13 COLUM. J. TRANSNAT'L L. 381, 398 (1974); *see also* Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft: The Montreal Convention*, 14 COLUM. J. TRANSNAT'L L. 268 (1975).

61. N.Y. Times, Oct. 10, 1985, at A1, col. 6. A senior PLO representative, Hanni el-Hassan, stated that Yassir Arafat wanted Egypt to turn over the hijackers so that the PLO could not only place them on trial, but also punish them according to the PLO's judicial process. *See* N.Y. Times, Oct. 11, 1985, at A11, col. 1.

62. *See supra* note 14 and accompanying text; *see also* N.Y. Times, Oct. 11, 1985, at A10, col. 1. In addition, the PLO is not a party to the Hostages Convention and thus is not even nominally bound by its requirements. *See supra* note 50.

63. N.Y. Times, Oct. 14, 1985, at A11, col. 4.

and the paucity of PLO judicial process and precedent, it is highly unlikely that Egypt discharged its obligation to prosecute or extradite the hijackers by trying to hand them over to the PLO.

Unfortunately, the Hostages Convention fails to define the term "alleged offender" for the purpose of determining the degree of certainty that must exist before a government may detain a person for the crime of hostage-taking. A comparison to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents ("Protected Persons Convention") adopted by the United Nations is instructive.[64] Article 1(2) of the Protected Persons Convention defines "alleged offender" for purposes of that convention as "a person as to whom there is sufficient evidence to determine *prima facie* that he has committed or participated in one or more of the crimes set forth in Article 2."[65] Given the facts of the Achille Lauro hijacking and Egypt's own admission that the persons in custody were "alleged offenders" within the meaning of that term,[66] Egypt's obligation was to proceed under the Hostages Convention.

2. Obligations of the United States under the Hostages Convention

As a party to the Hostages Convention, the United States is subject to the requirement that "[e]ach State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of these offences."[67] The United States complied by enacting 18 U.S.C. § 1203 which outlaws the taking of hostages.[68] The power of Congress to assert extraterritorial ju-

64. Convention on the Protection and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 [hereinafter Protected Persons Convention].

> The [Protected Persons Convention] was the model most closely followed in the elaboration of the Hostages Convention essentially because: (a) it was adopted by the same body, *i.e.*, the United Nations General Assembly, and a number of the negotiators were the same; and (b) it was the most recent model and in many ways covered the most analagous conduct.

Rosenstock, *supra* note 51, at 170 n.6.

65. Protected Persons Convention, *supra* note 64, art. 1(2).

66. *Id.*

67. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 46) art. 2, U.N. Doc. A/34/46 (1979).

68. 18 U.S.C. § 1203 (West 1984) provides:

> (a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmen-

risdiction over the offense of hostage-taking is derived from article 5 of the Hostages Convention, which provides:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:
>
> . . .
>
> (d) with respect to a hostage who is a national of the State, if that State considers it appropriate.[69]

The assertion of jurisdiction under 18 U.S.C. § 1203 "utilizes the well-accepted territorial, personal, and passive personality basis for the exercise of legislative jurisdiction under international law."[70] Under the passive personality theory, "a State has prescriptive jurisdiction over anyone anywhere who injures one of its nationals."[71]

The protective principle of extraterritorial jurisdiction, which is more widely accepted than the personality theory,[72] also supports legislative jurisdiction over the Achille Lauro incident. It provides that "[e]ven though all relevant acts occur outside the ordinary territorial jurisdiction of the United States, jurisdiction is possible . . . if a significant national interest is at stake and it is not otherwise impermissible under international law to exercise such jurisdiction."[73] Under 18 U.S.C. § 1203, extraterritorial jurisdiction under the protective principle is appropriate because a significant national interest in the form of the health, well-being and freedom of movement of United States citizens was adversely impacted. The assertion of such jurisdiction is ex-

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tal organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for life.

(b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless —

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, unless the governmental organization sought to be compelled is the Government of the United States.

69. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 46) art. 5, U.N. Doc. A/34/46 (1979); *see also* Leich, *Current Developments - Four Bills Proposed by President Reagan to Counter Terrorism*, 78 AM. J. INT'L L. 915, 919 (1984).

70. Leich, *supra* note 69, at 919.

71. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under FSIA and The Act of State Doctrine*, 21 VA. J. INT'L L. 191, 201 (1983).

72. *Id.* at 207.

73. *Id.* at 209.

pressly encouraged by the Hostages Convention itself.[74]

As discussed previously with reference to Egypt's breach of its obligation to prosecute or extradite the hijackers,[75] the offense of hostage-taking was committed in the Achille Lauro incident. The Hostages Convention establishes that such an act is contrary to international law, and expressly provides jurisdiction for Congress to establish the acts of the hijackers as contrary to the law of the United States.[76]

The request of the United States for extradition of the hijackers under the Hostages Convention as implemented by 18 U.S.C. § 1203, was ignored by Egypt.[77] Accordingly, since Egypt neither prosecuted the hijackers nor extradited them to the United States for prosecution under section 1203, Egypt's acts constituted a breach of international law and the perpetration by Egypt of an international delinquency against the United States.

B. "An attempt by the claimant state to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances."[78]

In the Achille Lauro incident, the United States suffered two distinct harms perpetrated by two sets of wrongdoers. The first, and most obvious, was the taking of United States citizens as hostages and the murder of Mr. Klinghoffer. The second harm suffered by the United States was the failure of Egypt to either prosecute or extradite the alleged offenders.[79] However, it is questionable whether the request for extradition or prosecution could, after failure, justify the acts of the United States against Egypt, as distinguished from acts of force against the hijackers themselves. Any hostile act by the United States against Egypt cannot be based solely upon the crimes of the hijackers or failed attempts to gain redress for those crimes. This is because Egypt did not commit the crime of hostage-taking. Instead, Egypt breached an independent duty owed under the Hostages Con-

74. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 46) art. 5, U.N. Doc. A/34/46 (1979).

75. *See supra* note 56 and accompanying text.

76. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 46) arts. 2, 5, U.N. Doc. A/34/46 (1979).

77. *See supra* note 11 and accompanying text.

78. Bowett, *supra* note 16, at 3; *see also* Falk, *supra* note 16, at 431.

79. *See supra* notes 1-11 and accompanying text.

vention[80] thereby giving rise to a claim for redress by the United States against Egypt for that breach and that breach alone.

Such an attempt for redress was not made to the United Nations or any other international body prior to the acts of force undertaken by the United States. Therefore, because the United States did not seek redress for Egypt's breach of the Hostages Convention prior to its acts against Egypt, the actions of the United States appear to fail prong two of the analysis.

However, an independent attempt by the United States to seek redress against Egypt for ignoring the Hostages Convention is not necessary if it is "inappropriate or impossible in the circumstances."[81] The rationale for this exception is that "[t]he legal rules expressed in the (U.N.) Charter and in the customary law of self-defense are . . . considered as irrelevant or more precisely as conditional rules that are not operative when a state gravely wronged by an illegal act of another state has no effective remedy."[82] Although the United States could have sought sanctions against Egypt for its breach, the penalty imposed against Egypt would not have accomplished the prosecution or extradition of the hijackers. In effect, the United States would have been left without a remedy. Moreover, although sanctions may have been ordered by the United Nations, such sanctions would have only highlighted the dubious policy of defining international crimes without providing an effective mechanism for obtaining an adequate remedy.

An attempt by the United States to gain redress for Egypt's breach of the Hostages Convention would have been futile and inadequate considering the egregious nature of Egypt's breach and its disasterous consequences upon a previously agreed upon course of conduct. Thus, it appears that the United States can meet prong two of the test for determining whether a reprisal is legitimate in that a claim for redress would have been "inappropriate or impossible in the circumstances."[83]

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80. *See supra* notes 49-77 and accompanying text.

81. Bowett, *supra* note 16, at 3.

82. Schachter, *supra* note 17, at 244. In the view of Barry Levenfeld, attempts by Israel to gain pacific redress against Lebanon for the attacks of Palestinian forces also are inappropriate or impossible. Under Mr. Levenfeld's analysis, Israel is thus justified in violating the sovereignty of Lebanon in order to protect itself provided, of course, that an international delinquency has occurred and Israeli response is in proportion to that delinquency.

83. Bowett, *supra* note 16, at 3.

C. "The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state."[84]

Inquiry into the issue of proportionality must ask whether the immediate preceding wrong determines the degree of acceptable harm created by the reprisal, or whether proportionality is also to be determined by assessing future action intended to be deterred.[85] The danger of basing notions of proportionality upon projected events is that it produces permissive results.[86] In contrast, proportionality analyzed with reference to actions that have already taken place produces a benchmark of acceptable conduct in order to predictably assess the reprisal.

In the Achille Lauro incident, the United States' use of force went only so far as to threaten actual force. No shots were fired.[87] From the perspective of a past event creating a need for proportional conduct, the acts undertaken by the United States only attempted to accomplish the result that would have taken place had Egypt complied with its treaty obligations. The acts of the United States were proportional to the preceeding wrong because the reprisal brought the hijackers to a country that was willing to prosecute or extradite[88]—exactly that which Egypt refused to do.

It is questionable whether the acts of the United States would have been proportional to Egypt's breach of the Hostages Convention had the United States actually fired upon the airliner. Had the United States fired, the use of force would have been disproportionate to the wrong committed by Egypt. The result would no doubt have been a loss of Egyptian lives and property. Such a result would have been more serious than Egypt's decision to act in contravention of the Hos-

84. Bowett, *supra* note 16, at 3; *see also* Falk, *supra* note 16, at 431. The third prong of this three part test was also developed in the arbitration following the Naulilaa incident. The issue of proportionality there arose within the context of three Germans killed and two captured by Portuguese forces. The German response constituted six separate attacks upon Portuguese ports and facilities. This lack of proportionality culminated in the arbitrator's award of damages against Germany. *See* W. BISHOP, *supra* note 49, at 562-63.

85. Levenfeld, *supra* note 33, at 39-40.

86. *Id.* "Unless constraints are imposed (upon relying on future oriented analyses of proportionality), a massive attack in alleged self-defense may be justified as proportionate to some future, nebulous threat." *Id.* at 41.

87. N.Y. Times, Oct. 11, 1985, at A12, col. 1 (opening statement of news conference given by Larry Speakes, White House Spokesman).

88. N.Y. Times, Oct. 14, 1985, at A1 col. 6; *see also* NEWSWEEK, Oct. 21, 1985, at 25, 32.

tages Convention, a decision that in and of itself did not result in the loss of American lives or property.

In examining the issue of proportionality from the perspective of future events (hopefully) deterred, one must consider the ongoing nature of terrorism, "[i]ts need to create spectacular drama and influence the media; its use of violence to intimidate society beyond the impact on individual victims; and the policy-oriented response of . . . [governments] to the spectre of violence created by political terrorists." [89] Although Egypt was not engaged directly in the terrorism perpetrated upon the passengers and crew of the Achille Lauro, Egypt did act as an accessory after the fact. Standing alone, that act projects comfort and support to terrorists seeking state support for their activities. To some extent, future state support of terrorism was deterred by the United States' actions, thus lessening such support and reducing the impact of terrorism upon all of society. Considering that bodily harm was not incurred as a result of the actions taken by the United States and that the impact of those actions may reduce terrorism yet to occur, the acts of the United States were also proportional to the future deterred events.

V. CONCLUSION

The United States' actions in the Achille Lauro incident were undoubtedly an incursion upon the sovereignty of Egypt. However, while not justifiable as an act of self-defense, the use of force in this instance constituted a lawful act of reprisal. As discussed above, the general prohibition against the use of force can be flexible when a state has been injured, assuming the response is (1) to an international delinquency; (2) made after attempts at pacific redress, unless impossible or inappropriate; and (3) in proportion to the initial injury.

Some argue that allowing for exceptions to the prohibition against the use of force encourages unprincipled action. Others respond to the effect that an injured state should have a remedy of consequence because:

> The rules against force in the (U.N.) Charter are premised on an effective system of collective security and eventual enforcement by international organs. The contention is that where these conditions no longer hold, it is no longer appropriate to seek to maintain the rules against the use of force, since to do so would deprive the

89. Wilder, *International Terrorism and Hostage Taking: An Overview*, 11 MANITOBA L.J. 367, 369 (citing A. MILLES, TERRORISM AND HOSTAGE NEGOTIATIONS 10-11 (1980)).

injured state of an effective remedy.[90]

Although this exception to the general rule against the use of force can be used to manipulate the doctrine of reprisal in an unprincipled manner, international law should not leave injured states without any remedy whatsoever. Accordingly, given a prior delinquency by Egypt, redress impossible to obtain under the circumstances, and a reaction in proportion to the initial wrong, the actions of the United States in the Achille Lauro incident were not contrary to international law.

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90. Schachter, *supra* note 17, at 245.