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An Analysis of the United States' Response to the Achille Lauro Hijacking

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AN ANALYSIS OF THE UNITED STATES' RESPONSE TO THE ACHILLE LAURO HIJACKING

I. INTRODUCTION

On the morning of October 7, 1985 in waters off of the coast of Port Said, Egypt, four armed Palestinians seized the Achille Lauro, an Italian registered ship.[1] The hijackers, who were members of the Palestine Liberation Front, a splinter group of the Palestine Liberation Organization, ordered the ship to sail for Syrian waters.[2] In return for the safe release of the ninety-seven passengers on board the ship, the hijackers demanded that fifty Palestinians held in Israeli jails be released.[3] When Syria refused to grant the Achille Lauro permission to land at the port of Tartus, the hijackers threatened to kill passengers if their demands were not met.[4] The hijackers did, in fact, kill Leon Klinghoffer, an elderly, partially disabled American passenger, on October 8, 1985.[5] The ship sailed back to Port Said, Egypt after being denied entry to Cyprus.[6]

Throughout the hijacking, the Palestinians issued and received transmissions to and from a shore contact.[7] It was alleged that this person was Mohammed Abbas Zaidan (Abul Abbas), and that he had actually planned an aborted raid by the hijackers on the

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[1] *See* N.Y. Times, Oct. 8, 1985, § 1, at 1, col. 6 (Placing the seizure thirty miles off-shore, outside of Egyptian waters). *But see* N.Y. Times, Oct. 10, 1985, § 1, at 7, col. 2. (Displaying a map which indicated the seizure as having occurred much closer to the Egyptian coast, perhaps within Egypt's territorial waters).

[2] *Id.*, Oct. 9, 1985, § 1, at 11, col. 6.

[3] *Id.*, Oct. 10, 1985, at A11, col. 1.

[4] *Id.*

[5] *Id.*, Oct. 11, 1985, § 1, at 1, col. 6.

[6] TIME, Oct. 21, 1985, at 33.

[7] N.Y. Times, Oct. 18, 1985, § 1, at 1, col. 6.

Israeli port of Ashdod, rather than the hijacking of the Achille Lauro.[8] The shore contact apparently negotiated the release of the ship's passengers in exchange for Egypt's guarantee of safe passage by plane for the hijackers out of Egypt.[9]

Because the Egyptians refused to detain, prosecute, or extradite the Palestinians, President Reagan ordered four United States Navy planes to intercept the Egyptian aircraft that carried the hijackers and Abbas from Egypt.[10] On October 10, 1985, the United States Navy forced the aircraft to land at the joint US-NATO Sigonella Airbase in Sicily.[11] The United States requested extradition of the hijackers and Abbas.[12] Despite this request, Italy allowed Abbas to leave the country because he had diplomatic immunity, while Italy retained the four hijackers to prosecute them.[13]

This Note will analyze the actions of the United States during the Achille Lauro incident with respect to the role of law in international conflicts. The United States' action to gain physical custody of the hijackers was a flagrant violation of international law, despite the mission's success in capturing the hijackers and bringing them to trial. These actions appear even less legally justifiable in light of the fact that even if the United States had succeeded in gaining custody of the hijackers, an attempt by the United States to prosecute and convict them may have proven futile because of inadequacies in United States domestic law.

II. The Domestic Claim by the United States Against the Hijackers

A. *Principles of Jurisdiction*

In order to assert a claim against an individual who allegedly violated its domestic law, the United States must be able to prove that it has jurisdiction over the individual. There are five principles of jurisdiction recognized in the international community.[14] They are the territorial, the nationality, the passive personality, the protective and the universality principles.

The principle most commonly used to attain jurisdiction is the territorial principle. It provides a state with jurisdiction over all acts occurring within its territorial confines or on a vessel or aircraft subject to its "flag" jurisdiction.[15] The nationality principle gives a state competence to prescribe rules regulating the conduct of its nationals wherever

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[8] *Id.*

[9] *Id.*, Oct. 13, 1985, § 1, at 11, col. 2.

[10] *Id.*, Oct. 12, 1985, at A9, col. 1.

[11] *Id.*

[12] *Id.*, Oct. 12, 1985, § 1, at 4, col. 3.

[13] *Id.*, Oct. 20, 1985, § 1, at 10, col. 1.

[14] *See, e.g.*, Rivard v. United States, 375 F.2d 882, 885 (5th Cir. 1967), *cert. denied sub nom.*, Groleau v. United States, 389 U.S. 884 (1967); United States v. Layton, 509 F. Supp. 212, 215-16 (N.D. Cal. 1981); 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 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961).

[15] *See* cases cited *supra* note 14. For a discussion of territorial jurisdiction, *see* Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism*, 23 Va. J. Int'l L. 191, 201 (1983); W. Bishop, International Law 535, 551 (3d ed. 1971); Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, arts. 3 & 4, in International Criminal Law 41, 42 (G. Mueller & E. Wise eds. 1965) [hereinafter Harvard Draft]; Sarkar, *The Proper Law of Crime in International Law*, 11 Int'l & Comp. L.Q. 446, 461 (1962), *reprinted in* International Criminal Law 50, 66 (G. Mueller & E. Wise eds. 1965).

they are located.[16] Based on the passive personality doctrine, a state may assert extraterritorial jurisdiction over anyone, regardless of his or her nationality, who injures one of the state's nationals.[17] Unless otherwise impermissible under international law, a state may also assert extraterritorial jurisdiction under the protective principle if a significant state interest is at stake.[18] A significant state interest is one relating to security, territorial integrity, political independence, self-defense,[19] and violations of Article 2(4) of the United Nations Charter, which includes acts of state terrorism and the toleration, aiding and abetting of international terrorism.[20] Finally, the universality principle gives a state jurisdiction over crimes that affect the international community and are against international law.[21]

States use these five jurisdictional principles as a basis for determining the type of human conduct which their laws may regulate. However, the authority of a state to enforce such laws comes from a more limited use of jurisdiction known as enforcement or criminal jurisdiction. The use of criminal jurisdiction by a state to enforce its domestic laws is most often limited to the territorial principle.[22] In other words, most countries, including the United States, will only assert criminal jurisdiction over acts which have occurred within their territorial confines or on a vessel or aircraft registered in their country.

Some civil law countries have, however, extended criminal jurisdiction over extraterritorial acts by using one of the other principles of jurisdiction.[23] In addition, states have extended their jurisdictional claims beyond their territory based on treaty provisions with other states.[24] Single states also use the universality principle to enforce laws on behalf of the international community for extraterritorial crimes so heinous as to be considered against all of mankind,[25] such as acts of international terrorism.

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[16] *See* Paust, *supra* note 15, at 203; W. BISHOP, *supra* note 15, at 531-35, 559; Harvard Draft, *supra* note 15, at 41, 42 (art. 5); Sarkar, *supra* note 15, at 61-67.

[17] *See* cases cited *supra* note 14. For a discussion of the passive personality doctrine, *see* W. BISHOP, *supra* note 15, at 536-50, 554-55, 559; Sarkar, *supra* note 15, at 66.

[18] *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968); Rivard v. United States, 375 F.2d at 885-887; United States v. Layton, 509 F. Supp. at 215-216; Rocha v. United States, 288 F.2d at 549; W. BISHOP, *supra* note 15, at 551, 553, 557-61, 563; Harvard Draft, *supra* note 15, at 42-43 (art. 7); Sarkar, *supra* note 15, at 67-72.

[19] Harvard Draft, *supra* note 15, art. 7; *see* United States v. Layton, 509 F. Supp. 212 (threat to national security); United States v. Keller, 451 F. Supp. 631 (D.P.R. 1978)(invasion of territory).

[20] *See* Paust, *supra* note 15, at 210. U.N. CHARTER art. 2, para. 4 provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[21] *See,e.g.*, Paust, *supra* note 15, at 211; M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE-THE PUBLIC ORDER OF THE WORLD COMMUNITY 1419 (1981); Feller, *Jurisdiction Over Offenses With à Foreign Element*, in 2 A TREATISE OF INTERNATIONAL CRIMINAL LAW 5, 32-33, 41 (M. Bassiouni & V. Nanda eds. 1973).

[22] *See* Paust, *supra* note 15, at 210 n. 39.

[23] *See* Dickinson, *Introductory Comment to Harvard Research Draft Convention of Jurisdiction with Respect to Crimes*, 29 AM. J. INT'L L. SUPP. 443 (1935).

[24] *Id.*

[25] 1 Op. Att'y Gen. 509, 513 (1821) (Wirt, Att'y Gen.)(citing Grotius). *See also* Republica v. DeLongchamps, 1 U.S. (1 Dall.) 109, 116 (1784)("[C]rimes against the world"); E. DEVATTEL, LAW OF NATIONS 464-65 (J. Chitty ed.. 1883)(Recognizing violence against foreign ambassador as a "crime against mankind").

B. *The United States' Claim*

The United States charged the hijackers involved in the Achille Lauro incident and Abul Abbas with piracy on the high seas, hostage taking, and conspiracy.[26] Since the Italian government retained and prosecuted the four hijackers that were on board the ship and released Abbas for reasons of diplomatic immunity, the United States was unable to assert its claims. Even if Italy had extradited the hijackers to the United States, it is doubtful that the United States would have succeeded in asserting two of its claims against the hijackers. The United States' piracy statute may have proven to be insufficient to cover the Achille Lauro events, and the United States would probably not have had adequate criminal jurisdiction over the hijackers to enforce its hostage taking claim.

C. *The Piracy Charge*

The arrest warrant cited 18 U.S.C. § 1651 as a basis for the piracy charge against the hijackers. It reads as follows:

> Whoever, on the high seas, commits the crime of piracy as described by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.[27]

Thus, the law of nations defines the acts of piracy which are punishable in the United States. The Geneva Convention on the High Seas first defined piracy in 1958.[28] The 1982 Law of the Sea Convention reiterated the definition as follows:

> (1) Any illegal acts of violence, detention or any acts of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:
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> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
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> (b) Against a ship, aircraft, person or property in a place outside the jurisdiction of any State;
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> . . . .
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> (2) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[29]

1. Jurisdictional Basis of the Charge

The United States piracy statute grants jurisdiction to the United States over "who[m]ever" commits piracy on the high seas.[30] United States criminal or enforcement jurisdiction over acts of piracy is thus based on the universality principle. The piracy statute does not specify that either the pirates or the victims have to be United States nationals, or that the ship has to be of United States "flag" jurisdiction. The United States, therefore, may assert extraterritorial criminal jurisdiction over a non-national

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[26] 24 I.L.M. 1509, 1554-57 (1985).

[27] 18 U.S.C. § 1651 (1982).

[28] Geneva Convention on the High Seas 1958, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter 1958 Geneva Convention].

[29] 1982 Law of the Sea Convention, December 10, 1982, UN Doc. A/CONF. 62/122, art. 101, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter 1982 Law of the Sea Convention].

[30] 18 U.S.C. § 1651 (1982).

pirate who commits acts of piracy against non-nationals while on board a ship registered in a state other than the United States.

This universality principle embodied in the United States' piracy statute is reflective of the position taken in international law regarding jurisdiction over acts of piracy on the high seas. The 1958 Geneva Convention on the High Seas (the "Geneva Convention"), defining piracy according to the law of nations, gave the right to seize and try pirates found on the high seas to any state.[31] Prior to the codification of a piracy definition in the Geneva Convention of 1958, Justice Moore of the Permanent Court of International Justice had declared the universality principle of jurisdiction as applicable to cases of piracy.[32] In his dissenting opinion in the *Lotus* case, Justice Moore stated that "in the interest of all," any state could "capture and punish" pirates.[33] The problem with the United States' piracy claim, therefore, lies not with its jurisdictional basis, but rather with the difficulty in fitting both the Achille Lauro hijackers and Abbas within the somewhat restrictive definition of piracy articulated in the 1982 Law of the Sea Convention.

2. Substantive Requirements of the Charge

a. *Private Ends Requirement*

The first issue in determining whether the acts of the Achille Lauro hijackers fell into the 1982 Law of the Sea Convention piracy definition involves deciding whether or not the hijacking was "committed for private ends" as required by subparagraph (1) of the Convention. The Harvard Research Draft of 1932, which became the basis for the 1958 Geneva Convention on the High Seas, first articulated this limitation.[34] In the discussion of the "private ends" requirement in the Harvard Research Draft, the definition of piracy excluded acts committed for public ends "made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands."[35] There is a theory that the drafters, by including this private ends limitation in the piracy definition, intended to "prevent states from meddling with insurgents acting for public ends on the high seas, and to avoid their involvement in the freedom and anticolonial movements of the period."[36]

In their judicial interpretation of the "private ends" requirement courts examine the status of the group committing the act, the status of the group against whom the act was committed, and the character of the act itself.[37] The group allegedly committing an act of piracy is known as an insurgent group. An insurgency's status in the international community defines its legal rights and obligations. If a third state neutral to the conflict at hand recognizes the insurgent group as "belligerent," then the belligerent group may

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[31] 1958 Geneva Convention, art. 19.

[32] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 70 (Judgement of Jan. 4)(Moore, J., dissenting).

[33] *Id.*

[34] Harvard Research Draft, art. 39, in 26 AM. J. INT'L L. (Supp. IV 1932).

[35] *Id.*

[36] Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723, 737 (1986).

[37] *See, e.g.*, 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 665 (1965)(Status of the insurgents who seized the Santa Maria); Magellan Pirates, 164 Eng. Rep. 47, 48 (Ecc. & Ad. 1853)(Status of the victims of an insurgency); Eain v. Wilkes, 641 F.2d 504, 520-21 (7th Cir. 1981)(Status of the acts of insurgents).

achieve a qualified legal status in the international community.[38] This recognition of belligerency may make the laws of war applicable to the conflict, thereby preventing the acts of the belligerent group from being characterized as piracy.[39] Therefore, at the very least, insurgents must have belligerency status for their acts to qualify under the public ends exception to a United States piracy charge.

The seizure of the Santa Maria, a Portuguese passenger liner, in 1961 by Captain Galvao and seventy men posing as passengers involved the issue of a group's belligerency status with respect to its alleged acts of piracy.[40] The insurgents were members of the "National Independence Movement" which opposed the Salazar regime ruling in Portugal.[41] Of the 500 to 600 passengers on board, 40 were Americans.[42] The insurgents killed one member of the crew and injured others.[43] Before realizing that the incident involved only one ship, and thus the hijacking failed to fulfill the two ships requirement of piracy acts under the Geneva Convention, the United States Department of State declared the hijacking to be an act of piracy.[44]

In labeling the seizure of the Santa Maria as an act of piracy, the United States must have considered it to have been committed for private rather than for public ends. One scholar, in agreeing with this private ends characterization of the seizure, argued that the National Independence Movement did not have belligerency status because it was not in control of any territory, it did not have a base of operations in the territory it was seeking to liberate, and it did not have an organized force of insurgents with its own flag.[45]

In determining whether insurgents have committed acts for private ends, courts have also examined the status of those against whom the acts are committed and the character of such acts.[46] In examining the status of the group against whom insurgents have committed their acts, a court actually makes a determination of whether or not the insurgents acted as belligerents. The English Admiralty Court held in *The Magellan Pirates* case[47] that a group of insurgents could be considered as belligerents when acting against the legitimate government of the state with which they were in conflict, and as pirates when acting against neutral third states.

In addition, even if insurgents commit acts against members of the state with which they are in conflict, the character of the acts themselves may nevertheless cause them to be labeled as having been done for private ends, and thus potentially piratical. This may occur when the acts committed are not in "furtherance of their rebellion."[48] The Seventh Circuit Court of Appeals in *Eain v. Wilkes* defined a "political disturbance," like a public

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[38] *See* Note, *supra* note 36, at 738.

[39] *Id.*

[40] *See* WHITEMAN, *supra* note 37.

[41] *Id.*

[42] *Id.* at 666.

[43] *Id.*

[44] N. JOYNER, AERIAL HIJACKING AS INTERNATIONAL CRIME 111 (1974).

[45] Fenwick, *Piracy in the Caribbean*, 55 AM. J. INT'L L. 426, 428 (1961).

[46] *See,e.g.*, Magellan Pirates, 164 Eng. Rep. at 48; The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885).

[47] Magellan Pirates, 164 Eng. Rep. at 48. (Officer of Chilean convict settlement and followers involved in insurrection against government murdered provincial governor, seized British and American vessels, murdering master and passenger of British ship and owner of American ship).

[48] McGinley, *The Achille Lauro Affair- Implications for International Law*, 52 TENN. L. REV. 691, 699 (1985).

act, as one "that disrupts the political structure of a State, and not the social structure that established the government."[49]

In analyzing whether the hijacking of the Achille Lauro amounted to piracy, one must determine whether it was done for public or for private ends. The United States must have recognized the hijackers as belligerents or their acts would automatically be considered as having been committed for "private ends," thereby fulfilling one of the requirements of acts of piracy.[50] If the Achille Lauro hijackers were representing only the Palestine Liberation Front and the Palestine Liberation Organization neither supported nor endorsed their actions, as was its claim[51], then the hijackers' actions could automatically be characterized as having been committed for "private ends." This is so because the Palestine Liberation Front on its own has no status in the international community as a belligerent group.

Alternatively, however, if the hijackers were representing the Palestine Liberation Organization, then their actions may not be automatically characterized as fulfilling the "private ends" requirement of piracy. Because 115 countries recognize the Palestine Liberation Organization and it participates in the United Nations,[52] it is arguable that it has belligerency status in the international community. However, the United States, in proceeding against the hijackers, may itself have had to recognize the belligerency status of the Palestine Liberation Organization.

Even if the United States had recognized the hijackers as belligerents they still may have been liable as pirates. In order to escape such liability, they must have committed their acts against the legitimate government with whom they were in conflict rather than against a neutral group.[53] The Palestine Liberation Organization is in conflict with Israel regarding the acquisition of a homeland, not with Italy- the flag state of the Achille Lauro- or with the various countries, including the United States, of which the passengers on board the ship were nationals.

In addition, even if recognized belligerents committed the act against the government with which they are in conflict, such act must disrupt the political and not the social structure of that government in order to be considered in "furtherance of their rebellion" and not an act of piracy.[54] The hijacking of an Italian cruise ship (and the killing of an American passenger), however, disrupts the social, not the political, structure of all the countries involved and, therefore, was not an act in "furtherance of the [Palestine Liberation Organization's] rebellion." The acts of the hijackers during the Achille Lauro affair seem, then, to fulfill the requirement in the definition of piracy as having been done for private ends.

b. *High Seas Requirement*

The second requirement in the 1982 Law of the Sea Convention definition of piracy is that the act occur on the high seas or outside the jurisdiction of any state.[55] There is

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[49] Eain v. Wilkes, 641 F.2d at 520-21. (Court found defendants' bombing in Israel which killed two boys, injured 30 others as not incidental to the conflict with Israel).

[50] *See* Note, *supra* note 36, at 738.

[51] N.Y. Times, Oct. 11, 1985, § 1, at 1, col. 3.

[52] O'Brien, *The PLO in International Law*, 2 B.U. INT'L L. J. 349, 360, 379-81 (1983).

[53] Magellan Pirates, 164 Eng. Rep. at 48.

[54] Eain v. Wilkes, 641 F.2d at 520-21.

[55] 1982 Law of the Sea Convention, *supra* note 29.

some dispute as to where the hijacking of the Achille Lauro actually began.[56] After seizing the ship, the hijackers directed its captain to leave Egyptian waters, thereby implying that the seizure had taken place within Egyptian waters and not on the high seas.[57] Egyptian authorities, however, allegedly placed the initial seizure about 30 miles off of the Egyptian coast[58], outside of Egypt's territorial limits.

While the initial seizure may or may not have occurred within Egypt's territorial waters, the hijacking continued while the ship traveled into the high seas. This continued act of hijacking may bring the act within the 1982 Law of the Sea Convention definition of piracy regardless of where the initial seizure occurred. In *The Magellan Pirates* case, rebels seized two vessels in port, where they murdered several persons before sailing the ships into the high seas.[59] The English Admiralty Court considered the eventual possession of the vessels by the rebels on the high seas to be piracy regardless of the fact that the seizure had begun in port.[60]

c. *Two Ships Requirement*

A third requirement of the definition of piracy in the 1982 Law of the Sea Convention is that two ships be involved.[61] This presents a problem in characterizing the Achille Lauro incident as piracy because the hijackers did not board the ship from another private ship as the Convention requires.[62] The original purpose behind the two ships requirement was to protect international trade on the high seas by preventing pirates from seizing commercial vessels. There is support for eliminating the two ships requirement as "in an age when luxury liners and cruise ships carry passengers from many nations, threats of attack are as likely to come from within a ship as they are from without it."[63] Another argument, to minimize the effect of the two ships requirement, is that while the definition of piracy as originally articulated in the 1958 Geneva Convention on the High Seas may represent "the extent to which a general agreement could be reached," it should not replace reasoning as a final statement on the matter.[64]

Therefore, in order to put piracy in the context of present realities, the United States may not feel bound by the traditional and historical two ships requirement if new situations have arisen which the drafters of the Geneva Convention did not contemplate or address in 1958. The new reality of ship passengers taking them over seems to render the treaty's language inadequate and obsolete. However, the two ships requirement still stands within the Convention's definition of piracy. Consequently, this requirement remains in the United States piracy statute with its reference to the law of the nations definition of piracy. Therefore, this lingering two ships requirement in the definition of piracy makes it doubtful that the United States could have successfully asserted its piracy charge against the Achille Lauro hijackers.

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[56] *See* McGinley, *supra* note 48, at 695.
[57] N.Y. Times, Oct. 8, 1985, § 1, at 1, col.6.
[58] *Id.*
[59] Magellan Pirates, 164 Eng. Rep. at 47.
[60] *Id.* at 50.
[61] 1982 Law of the Sea Convention, *supra* note 29.
[62] *Id.*
[63] *See* Note, *supra* note 36, at 749.
[64] *See* McGinley, *supra* note 48, at 696-97; D. GREIG, INTERNATIONAL LAW 531-32 (1976).

D. *The Hostage Taking Charge*

1. Substantive Requirements of the Charge

The United States and Egypt are both parties to the 1979 United Nations International Convention Against the Taking of Hostages (hereinafter the "Hostages Convention") which imposes an obligation on parties to the treaty to prosecute or extradite offenders.[65] An "offender" is defined as follows under Article 1 of the Convention:

> (1) Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostages ("hostage taking") within the meaning of this Convention.
> (2) Any person who:
> (a) attempts to commit an act of hostage taking, or
> (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage taking likewise commits an offense for the purposes of this Convention.[66]

2. Jurisdictional Basis of the Charge

It appears that the United States, as a member to this Hostages Convention, had a substantive cause of action against the Achille Lauro hijackers based on the Convention language. However, there are problems with its assertion of jurisdiction over the hijackers for such a hostage taking claim. To begin with, the hijackers involved in the Achille Lauro affair apparently were Lebanese nationals, and Lebanon was not a party to the Hostages Convention.[67] The Hostages Convention gives signing members the right to try each others' nationals for treaty offenses.[68] However, as Lebanon did not sign the Hostages Convention, the United States could not claim jurisdiction over the hijackers based on the provisions of the Convention.

In addition, there is some question as to whether, under domestic law, the United States can claim criminal jurisdiction based on treaty provisions alone. Some scholars assert that United States federally prosecutable crimes cannot be created by treaty language alone without having an additional basis of Congressional legislation.[69] This assumption is based on an analogy to the decision in *United States v. Hudson & Goodwin* in which the United States Supreme Court objected to criminal prosecutions based on federal common law alone.[70]

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[65] 1979 International Convention for the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) at 245, U.N. DOC A/CONF. 6/34/L.23 (1979) [hereinafter Hostages Convention].

[66] *Id.*, art. 1.

[67] *See* UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE ON JANUARY 1, 1985 304.

[68] *See* 1979 Hostages Convention, *supra* note 65.

[69] *See,e.g.*, Paust, *supra* note 15, at 219; H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 584 (1968); Wright, *The Law of the Nuremberg Trial*, in INTERNATIONAL CRIMINAL LAW 239, 259 (G. Mueller & E. Wise eds. 1965).

[70] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 31 (1812).

It remains at least uncertain whether violations of international treaty law, like violations of federal common law, must have an additional domestic legislative basis for criminal prosecutions in the United States.[71] Despite these restraints, the United States may still be free to exercise criminal jurisdiction over hostage taking offenders, as the hostage taking offense has been legislatively incorporated into the United States Code by the Crime Control Act.[72]

When the Crime Control Act was introduced, the President expressed that the passive personality doctrine was to be the basis for jurisdiction over a hostage taking offender.[73] This doctrine would allow the United States to assert criminal jurisdiction over anyone who took a national of the United States hostage. Article 5(1)(d) of the Hostages Convention also designates the passive personality doctrine as giving a state jurisdiction over an offender who takes "a hostage who is a national of that state."[74] There are inconsistencies in the designation of the passive personality doctrine as the jurisdictional basis over the Achille Lauro hijackers by the United States for a hostage taking claim, however, as the doctrine is not well accepted as international law[75], and the United States has explicitly rejected it.[76]

In *United States v. Columba-Colella* the Fifth Circuit Court of Appeals rejected the use of the passive personality doctrine by the United States as a jurisdictional basis over an Italian national who kidnapped a United States general in Italy.[77] The six dissenting judges in the Permanent Court of International Justice's (the "PCIJ") opinion in the *Lotus* case took a similar position of rejecting the passive personality doctrine.[78] The majority of the PCIJ refused to decide on the validity of the doctrine, instead finding jurisdiction in the case based on the territorial principle.[79]

A principal objection to the passive personality principle is that jurisdiction should not depend on "the fortuity of the victim's nationality."[80] In addition, although never articulated, it is possible that the United States may object to the doctrine because of due process concerns. The United States may be fearful of subjecting its own nationals to the extraterritorial jurisdiction of some other country, which may have potentially less adequate due process standards than those guaranteed in the United States.

Despite these objections, due to changes in circumstances over the past two decades, passive personality may now be a logical and fair basis of jurisdiction in international and domestic law.[81] Recent acts of terrorism in which governments have been "held ransom by threats of violence against their nationals," the constant movement throughout the world of the terrorists perpetrating such offenses, and the fact that victims are often singled out because of their nationality are among these new circumstances.[82] It is now often impossible for a state to gain the most well accepted territorial based criminal

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[71] *See* Paust, *supra* note 15, at 220.

[72] H.R. Doc. No. 211, 98th Cong., 2d Sess. 1-4 (1984)(amending 18 U.S.C. 1201(e)(1982)).

[73] *Id.*

[74] 1979 Hostages Convention, *supra* note 65, art. 5(1)(d).

[75] *See* Paust, *supra* note 15, at 202 n.43.

[76] *Id.* at 202 n.41; United States v. Columba-Colella, 604 F.2d 356, 360 (5th Cir. 1979).

[77] United States v. Columba-Colella, 604 F.2d at 360.

[78] *See* the Lotus case (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 70.

[79] *Id.*

[80] *See* McGinley, *supra* note 48, at 712; GREIG, *supra* note 64, at 390-91.

[81] *See* McGinley, *supra* note 48, at 712-13.

[82] *Id.*

jurisdiction over an offender, because offenders often leave a state immediately after committing their illegal acts. In light of these changed circumstances, there no longer seems to be support for the principal objection to passive personality that jurisdiction should not depend on the "fortuity of the victim's nationality." This objection is particularly undermined by the fact that terrorists often intentionally, not fortuitously, victimize individuals and their countries because of their nationalities.[83]

While the passive personality doctrine is still emerging as an accepted principle of international law, in applying the doctrine to the Achille Lauro affair, the United States would have been using it as domestic law in its domestic court system. Therefore, the position that the international community has taken on the validity of passive personality would not have been controlling. However, the United States, having previously rejected the doctrine in the *Columba-Colella* case[84], would have to have changed its position and accepted its validity in order to have been able to exercise criminal jurisdiction over the alleged hostage takers.

A United States acceptance of the passive personality doctrine would have been particularly essential in the context of the Achille Lauro incident. This is true because the United States could not have claimed jurisdiction over the hijackers for the hostage taking claim on the strength of its signing of the 1979 Hostages Convention to which Lebanon, from which the hijackers claimed their nationality, was not a party.[85]

III. An Analysis of the United States' Actions Under International Law

The United States' military actions in trying to gain physical custody of the hijackers violated international law. It was not legal for the United States to force the Egyptian aircraft carrying the hijackers to land in Sicily. There is a right of a subjacent state to interfere with the flight of another state's aircraft in certain circumstances as recognized by the 1963 Tokyo Convention of Offenses Committed on Board Aircraft.[86] However, in 1973 the United Nations Security Council unanimously disapproved of the interception of a Lebanese aircraft in Lebanese airspace by Israeli military jets seeking to gain custody of a Palestinian on board who had allegedly killed crew members and passengers of a hijacked aircraft.[87] The Security Council members, including the United States, stated that Israel's action had violated the United Nations Charter.[88] Thus, it appears that a right of a state to interfere with an aircraft's flight does not exist if the aircraft is not over the territory of that state. In support of this proposition, Article 14 of the Hostages Convention disallows use of the Convention to justify violating "the territorial integrity or political independence of a state in contravention of the Charter of the United Nations."[89]

By allowing the hijackers to escape from its territory on board the Egyptian aircraft, Egypt allegedly failed to comply with its obligation under the Hostages Convention to prosecute or extradite the hijackers. However, even under the terms of the Hostages

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[83] *Id.* at 713.

[84] United States v. Columba-Colella, 604 F.2d at 360.

[85] *See* Treaties in Force, *supra* note 67.

[86] Article 4, The Tokyo Convention on Crimes Aboard Aircraft 1963, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. 6768, 704 U.N.T.S. 219; see McGinley, *supra* note 48, at 719-721.

[87] *See* 28 U.N.SCOR (1740th mtg.), Res. & Dec. at 10, U.N. Doc. S/Res/337 (1973).

[88] *Id.*

[89] *See* 1979 Hostages Convention, *supra* note 65, art. 14.

Convention, Egypt was not obligated to extradite the hijackers to the United States as no valid extradition treaty existed between the two countries.[90] Thus, the United States could not point to Egypt's alleged breach of its obligation in order to justify its illegal interception of the Egyptian aircraft carrying the hijackers.

Even if such an extradition treaty had existed between the two countries, the United States would still not have been justified in its actions. Article 2(4) of the United Nations Charter[91], as well as the International Court of Justice's opinion in the *Corfu Channel* case[92], makes it illegal to use self-help to restore violated rights.

It seems quite clear that the United States' grounding of the Egyptian aircraft was in violation of international law. Therefore, it is understandable that the United States has never claimed that its actions were valid or legal under international law.[93]

In addition, the United States' illegal efforts to gain custody of the hijackers may well have caused it to lose any jurisdiction it might have originally had over them.[94] The Executive branch, as well as the other two branches, is bound in its powers both by the Constitution and by "general norms of international law."[95] Therefore, in violating international law by intercepting the Egyptian aircraft, the United States in essence violated international due process standards and could have lost its jurisdiction over the hijackers.[96]

IV. CONCLUSION

While one can argue that the United States' show of force in dealing with the terrorists in the Achille Lauro affair was a necessary deterrent against future acts of terrorism, this argument involves an intrusion of political issues into the question of the legality of the United States' actions. In order to further the role of law and enable the United States, as well as other countries, to successfully punish and thereby deter acts of terrorism, an analysis of the law as it exists today is necessary. This becomes especially clear when analyzing the United States' involvement in the Achille Lauro affair. Even once United States navy planes had forced the grounding of the Egyptian aircraft carrying the Achille Lauro hijackers, existing laws may have proven inadequate for the assertion of United States' claims against the hijackers. Rather than continuing to ignore these existing laws, the United States should update them or change its interpretation and application of them so that heinous acts of terrorism will fall within the scope of these laws as well as within United States criminal jurisdiction.

For example, to begin with, the United States could and should revise its piracy statute to remove reference to the outdated and obsolete two ships requirement in the law of nations piracy definition. Then, hijackers such as those on the Achille Lauro, who pose as passengers and take over a ship, would fall within the statute. Two ships could

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[90] *See* McGinley, *supra* note 48, at 717.

[91] U.N. CHARTER, art. 2, para. 4.

[92] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4.

[93] *See* McGinley, *supra* note 48, at 721.

[94] *See,e.g.*, Paust, *supra* note 15, at 217; Cook v. United States, 288 U.S. 102, 120-21 (1933)(Jurisdiction voided where government seized vessel in violation of treaty).

[95] *See* Paust, *supra* note 15, at 217; Paust, *Is The President Bound by the Supreme Law of the Land-Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719 (1982); United States v. Toscanino, 500 F.2d 267, 276-78, 280 (2d Cir. 1974).

[96] *See* Paust, *supra* note 15, at 217-18; Cook v. United States, 288 U.S. at 120-21.

still be involved in acts of piracy, but such would not be an absolute requirement for the offense. Similarly, the law of nations definition of piracy in the 1982 Law of the Sea Convention should be revised to eliminate the two ships requirement.

In order to be able to assert claims against terrorists who commit hostage taking offenses against United States victims outside of its territory, the United States would have to change its position and recognize the passive personality doctrine as a valid basis of criminal jurisdiction. To further strengthen United States criminal jurisdiction over alleged hostage taking offenders, the United States could attempt to secure extradition treaties with as many other parties to the Hostages Convention as possible, including Lebanon and Egypt.

Finally, all countries may want to advance the universality principle as a basis for criminal jurisdiction over crimes of terrorism, as such crimes are so heinous that any state should be able to prosecute the offenders on behalf of the whole international community.

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