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Maritime Terrorism and Legal Responses

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I. INTRODUCTION

The specter of terrorism, known since antiquity, continues to threaten the stability and fabric of modern society in the 1990's.[1] The often cited term "terrorism" has yet to find a universally accepted definition.[2] This article will define terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience."[3] Recent events such as the horrific murder of Leon Klinghoffer

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1. For a synopsis of international terrorism incidents, see Foreign Broadcast Information Service, JPRS Report, Terrorism, Nov. 5, 1990, (JPRS-TOT-90-038-L); Loeb, *2 U.S. Airmen Killed Near Air Base in Philippines*, Philadelphia Inquirer, May 14, 1990, at A1; *IRA Takes Blame For Bomb That Injures 6 in London*, Wash. Times, May 15, 1990, at A10.

For a history of terrorism, see Bell, *Comment: The Origins of Modern Terrorism*, 9 TERRORISM: AN INT'L J. 309 (1987) (focusing on terrorism in late 1800's and early 1900's); THE TERRORISM READER (W. Laquer and Y. Alexander eds. 1987).

For an excellent theoretical and practical analysis of terrorism, see INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES (Y. Alexander ed. 1976).

2. An ad hoc United Nations Committee on International Terrorism "was unable to agree either on the definition of terrorism, its causes, or methods to prevent it." Levitt, *The International Legal Response to Terrorism: A Reevaluation*, 50 COLO. L. REV. 533, 537 (1989). *See* Bennett, *United States Initiatives in the United Nations to Combat International Terrorism*, 7 INT'L LAW. 752 (1973) (discussing U.S. attempts to formulate definition of terrorism in U.N.). *See also* Levitt, *Is Terrorism Worth Defining?* 13 OHIO N.U. L. REV. 97 (1986). In contrast, in 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, passed a Resolution on Criminal Acts of a Terrorist Character. U.N. Doc. A/CONF 121/L.12/Rev.1 (1985).

3. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM: 1986 at inside front cover (Jan. 1988). For a definition of international terrorism, see Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801(c) (1982).

Various U.S. state statutes discuss terrorist acts. *See* LEGISLATIVE RESPONSES TO TERRORISM, 308-19 (Y. Alexander & A. Nanes, eds. 1986); Ludington, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R. 4th 949, 954-88 (1986); *Legal Controls and Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465 (1982).

State-sponsored terrorism is defined as: "The deliberate employment of violence or the 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. These criminal acts are intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened." R. CLINE & Y. ALEXANDER,

during the seizure of the Italian cruise ship Achille Lauro underline the need for practical legal measures to reduce the harmful aspects of this virus.[4]

The purpose of this article is manifold. Part II describes the role of civil suits brought by states and other victims of terrorism. Part III reviews early international legal responses to maritime terrorism. Part IV explains the factual background to the Achille Lauro incident and Part V summarizes the civil suits which followed that incident. Part VI discusses the rationale and analysis of the Southern District of New York's June 1990 order in the *Klinghoffer v. Palestine Liberation Organization (PLO)* suit, in which the court determined, *inter alia*, that the federal court had jurisdiction over the PLO. Part VII assesses the *Klinghoffer v. PLO* order. Part VIII discusses U.S. legislative proposals to provide U.S. victims of international terrorism (and their families) a civil cause of action in U.S. federal district court. Part IX addresses the recent international response to maritime terrorism, such as the 1988 I.M.O. Convention, and Part X concludes that unilateral, bilateral, and multinational legislative responses are essential to furthering the vital, though slow struggle, against terrorism.

II. THE ROLE OF CIVIL SUITS BROUGHT BY VICTIMS OF TERRORISM

A. *Overview*

Professor Harold Koh differentiates between the criminal and civil responses to terrorism.[5] Prof. Koh notes that criminal sanctions generally revolve around "the apprehension, prosecution, and punishment of terrorists."[6] Furthermore, the criminal paradigm is additionally sub-divided into four tiers; global conventions, regional agreements, bilateral pacts, and national legislation.[7] In contrast, civil responses are subsumed under "all nonforcible, noncriminal means of sanctioning terrorists and states who support terrorism."[8] Prof. Koh notes that civil remedies are primarily questions of legal rather than political theory, and decried at the lack

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TERRORISM AS STATE-SPONSORED COVERT WARFARE 32 (1986).

4. *See infra* notes 104-122 and accompanying text.

5. Koh, *Civil Remedies For Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 171 (1987).

6. *Id.*

7. *Id.*

8. *Id.* at 173. "The array of possible 'civil' antiterrorist responses run the gamut from those remedies directed primarily against terrorist individuals and groups to those intended primarily to sanction their state supporters. Immigration measures and curtailment of travel rights are prime examples of nonforcible, noncriminal actions targeted against individual terrorists. A listing of the available nonforcible, noncriminal sanctions against state supporters of terrorism, by contrast, encompasses nearly every tool of economic warfare currently available to nations: denial of import benefits, export controls, financial embargoes and economic boycotts, withholding of foreign aid, termination of arms sales, and suspension of air flights by both official and nongovernmental institutions, to name but a few" (footnotes ommitted). *Id.* at 175-77.

of international framework to compensate victims.[9] Also, Prof. Koh proffers that while criminal prosecution corresponds to deterrence and punishment, civil sanctions afford monetary and economic benefits to victims of terrorism.[10]

Civil remedies to terrorism will ultimately, according to Prof. Koh, be determined by the following considerations: "[w]hat objectives do the recognition and enforcement of civil remedies against terrorism serve and what institutions within the national government are best situated to create and enforce the remedies — the courts, Congress, or the Executive Branch?"[11] Prof. Koh concludes that it is up to the Congress to craft extensive civil statutory schemes against terrorism.[12] Only in this manner, can the development of public international litigation be sustained.[13]

Other authors have also suggested that private sanctions are vital to the war against terrorism.[14] As Prof. Jordan Paust noted, "a realistic approach to law and choice should not focus on questions of whether there should be private involvement in decisions about and sanctions against terrorism, but rather how to make private participation more useful."[15] Prof. Paust advocates the use of the legislative and court systems to deter terrorism.[16] McDougal and Feliciano point to military, diplomatic, economic, and ideological solutions to terrorism.[17] Additionally, Prof. Paust discusses a possible cause of action for terrorist victims against common carriers.[18] More specifically, he states that tort law can be utilized by airline passengers to recover damages from airlines for acts committed by terrorist groups on their planes.[19]

Imposing civil liability against airlines could be perceived as an equitable distribution of the risk and a promotion of anti-terrorism efforts.[20] Thus, the idea of civil suits by the Klinghoffers against the owners of the Achille Lauro does not seem novel, nor far-fetched.[21] In fact, Prof. Paust supports civil liability whenever individuals or institutions are intentionally or negligently involved in an act of terrorism.[22] For instance, Prof. Paust cites as an example a gun shop owner supplying illicit dum-dum

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9. *Id.* at 175-77.
10. *Id.* at 173.
11. *Id.* at 174.
12. *Id.*
13. *Id.*
14. *See infra* notes 15-37 and accompanying text.
15. Paust, *Private Measures of Sanction*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 578 (Evans and Murphy eds. 1978).
16. *Id.* at 587, 593-5, 597-9, 607-11.
17. M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 56-57, 62-63, 102-103, 148-58 (1961).
18. Paust, *supra* note 15, at 597.
19. *Id.* at 597-98.
20. *Id.* at 598.
21. *See infra* notes 123-250 and accompanying text.
22. Paust, *supra* note 15, at 598.

bullets to terrorists who commit violent acts. He argues that such a vendor should be held strictly liable for the damages resulting from the sale of such an inherently dangerous product.[23] Such civil sanctions would greatly expand the scope of weapons which could be used to combat terrorism.[24]

While private causes of action involve non-state actors, strengthened governmental rules regarding international civil procedure would also assist private suits.[25] Additionally, more government rules are necessary to coordinate resolutions of such suits in light of already existing bilateral and multilateral conventions regarding jurisdiction and choice of law over the offender.[26] Such integration and use of established international law precepts will ultimately enable a victim of terrorism to receive compensation.[27]

Several authors suggest that civil causes of actions may already be brought under existing conventions, such as the European Convention on the Compensation of Victims of Violent Crimes (European Convention).[28] Professor Otto Lagodny points out that the European Convention expedites prosecution of terrorist offenders.[29] More specifically, it denies terrorists the designation of their violent activities as "political offenses," which are excepted from extradition under the European Convention.[30] As Article I provides in pertinent part:

> For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives: . . .
>
> c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
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> d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

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23. *Id.*

24. *Id.*

25. *See generally* Leanza & Sico, *Compensation for Victims of Maritime Terrorism*, in MARITIME TERRORISM AND INTERNATIONAL LAW 97-105 (Ronilli ed. 1990); Trotter, *Compensating Victims of Terrorism: The Current Framework in the United States*, 22 TEX. INT'L L.J. 383 (1987); Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 235 (1982).

26. *Id.*

27. *Id.*

28. Leanza & Sico, *supra* note 25, at 103; Lagodny, *The European Convention on the Suppression of Terrorism: A Substantial Step to Combat Terrorism*, 60 COLO. L. REV. 583 (1989). European Convention on the Suppression of Terrorism, opened for signature Jan. 27, 1977, Europ. T.S. No. 90, *reprinted in* 15 I.L.M. 1272 [hereinafter ECST]. *See also* Explanatory Report on the European Convention on the Suppression of Terrorism (Council of Europe 1977).

29. Lagodny, *supra* note 28, at 584.

30. *Id.*

> e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
>
> f. an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offence."[31]

Second, Professors Umberto Leanza and Luigi Sico argue that the European Convention assists civil remedies in the fight against terrorism.[32] More particularly, the Convention permits victims to be compensated by the nation where the crime occurred.[33] While acknowledging some immunities, Leanza and Sico note that the Convention provides, "set maximum levels of compensation; specif[ies] damages that may be claimed; outline[s] procedures for placing claims; and guard[s] against double compensation."[34]

Other authors argue that civil remedies against terrorists can be framed using existing U.S. legislation, namely, the Racketeer Influenced and Corrupt Organization statute ("RICO").[35] While the RICO statute was not designed to curb terrorism, civil RICO permits private treble damage suits by persons harmed in their property or business against RICO "enterprises" involved in a "pattern of racketeering."[36] RICO stipulates that a "pattern of racketeering" involves the carrying out of several acts including "any act or threat involving murder, kidnapping, arson, or extortion" within a ten-year period.[37]

There has been some use of the civil RICO statute by U.S. Attorneys' Offices against terrorist groups.[38] More particularly, the U.S. Attorney Office for the Southern District of New York utilized civil RICO provisions to obtain injunctions, curb the actions, and gain the forfeiture of assets of institutions who support terrorist groups.[39] In contrast, *United States v. Ivic*[40] attempted unsuccessfully to use criminal RICO against alleged arson and murder by Croation terrorists.[41] In *Ivic*, the Second Circuit concluded that criminal RICO was inapplicable because the alleged offenses

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31. ECST, *supra* note 28, art. 1.

32. Leanza & Sico, *supra* note 25, at 103.

33. ECST, *supra* at 28.

34. Leanza & Sico, *supra* note 25, at 103.

35. Nathan & Juster, *Law Enforcement Against International Terrorists: Use of the RICO Statute*, 60 COLO. L. REV. 553 (1989). RICO can be found at 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986).

36. 18 U.S.C. § 1962 (1982).

37. 18 U.S.C. § 1961(4) (1982).

38. Koh, *supra* note 5, at 175, n. 24.

39. *Id. See* Summary of Panel on Civil Remedies Against Terrorists and Nations Supporting Terrorists, American Bar Association National Conference on the Law in Relationship to Terrorism (June 6, 1986) (remarks of Carl T. Solberg, Chief of Civil Division, Office of United States Attorney for the Southern District of New York).

40. 700 F.2d 51 (2d Cir. 1983).

41. *Id.*

were "neither claimed nor shown to have any mercenary motive."[42] Furthermore, in *Ivic*, the court stated that "RICO's origins, most particularly of the mischief it was meant to remedy, indicate that political terrorism, at least when unaccompanied by any financial motive . . . is beyond its contemplated reach."[43]

In a subsequent case, *United States v. Bagaric*,[44] which involved allegations that a Croatian terrorist group was perpetrating an international extradition scheme, the Second Circuit concluded that RICO required that the criminal activities be motivated by only *some* economic or financial objectives.[45] Nevertheless, the *Bagaric* court concluded that terrorist acts are beyond the reach of RICO.[46]

Given the apparent limitations of RICO to combat terrorism in the U.S., Irvin Nathan and Kenneth Juster suggest amending RICO in order to enlarge the predicate offenses list of the statute.[47] This modification would allow for sanctioning "(1) hostage taking, (2) assault on foreign or federal offenses, and (3) assassination of foreign or federal officials."[48] Furthermore, Nathan and Juster articulate that RICO should be amended to eliminate the economic/financial motive to the predicate list.[49] If such changes are made to existing law, the authors conclude, the U.S. will have another tool to fight terrorism.[50]

The issue of who in the terrorist organization should be sued must also be addressed.[51] Although for evidentiary and length of procedure interests it would seem logical to file a civil action against the actual perpetrators, such defendants are unlikely to have the financial resources to adequately compensate the victims.[52] Instead, it is more beneficial to name the actual terrorist organization and its leaders in the suit;[53] however, impediments arise in such a scenario as well.[54] For example, since terrorist organizations are illicit, secret cadres, it is often difficult, if not impossible, to locate and attach their assets.[55]

Consideration should also be given to the defenses which can be claimed by terrorist organizations.[56] As has long been the case, terrorist

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42. *Id.* at 59.
43. *Id.* at 63.
44. 706 F.2d 42 (2d Cir. 1983).
45. *Id.* at 58.
46. *Id.*
47. Nathan & Juster, *supra* note 35, at 570.
48. *Id.*
49. *Id.*
50. *Id.*
51. Leanza & Sico, *supra* note 25, at 99.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 100.
56. *Id. See generally* Roberts, *The Legal Implications of Treating Terrorists as Soldiers*, 9 CONFLICT 375 (1989).

groups view themselves as freedom fighters and, in cases such as the PLO, as sovereign states.[57] If the latter is recognized as such an entity, then the "terrorist" group (and its leaders) could proffer the defense of sovereign immunity.[58] As will be discussed below, most terrorist groups which claim to be states, do not possess the attributes which define a state under international law.[59] Terrorists groups could, however, be ascribed the signification of insurgents under international law.[60] Viewing a terrorist group as an insurgent would similarly provide this extra-legal organization with the defenses of a sovereign state.[61]

B. *Civil Suits Against Common Carriers*

A plaintiff injured in a terrorist incident aboard a common carrier is more likely to obtain a judgement against the charterer of the carrier or against the common carrier itself than against a terrorist group.[62] National laws often require that the safety of passengers (and their luggage) be guaranteed by the common carrier.[63] Moreover, international agreements, such as article 3 of the 1974 Athens Convention, state that: "[t]he carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier, of his servants or agents acting within the scope of their employment."[64] While the Athens Convention is not yet in force, its basic principles shed light on both contractual liability and tort culpability of a common carrier.[65] For instance, Italian law requires that, to obtain damages, a passenger (in our analysis, a terrorist victim) need only show that the harm occurred during the course of the voyage.[66] In contrast, in a tort-based suit, the carrier's negligence must be demonstrated.[67] If the negligence standard must be satisfied in order to recover against the carrier, it would obviously be more difficult to prevail since it would be hard to show a direct relationship between the harm caused by the terrorist and the negligence of the carrier.[68]

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57. Leanza & Sico, *supra* note 25, at 100.

58. *See infra* notes 183-190 and accompanying text.

59. *Id.*

60. Roberts, *supra* note 56, at 375-88.

61. Leanza & Sico, *supra* note 25, at 100.

62. *Id.* at 100.

63. *Id.* at 101. *See* arts. 409 and 412 (1), Codice della Navigazione (Italy) *cited in* Leanza & Sico, *supra* note 25, at 104.

64. Athens Convention of December 13, 1974, art. 3 [hereinafter Athens Convention].

65. *Id.*; Sico, *supra* note 25, at 101.

66. Sico, *supra* note 25 at 101, n.13, citing Italian legal provisions.

67. *Id.*

68. *Id.*

C. *Civil Suits Against Nations and Their Agents*

Since it is a state's responsibility to check immigration and security matters during pre-boarding of maritime vessels, it would appear, at first glance, that state liability attaches if this duty is not met.[69] More specifically, a state could likely be responsible "if the terrorist group was on board the carrier from the time of embarking, or [at] a port of call where terrorists boarded the carrier."[70] Damages accruing from this state responsibility can be based on either direct or vicarious liability.[71] Yet, using tort principles, a nation's liability for harms to passengers resulting from a terrorist attack can accrue solely if the extra-legal attack was reasonably foreseeable.[72] Furthermore, sovereign immunity laws and the act of state doctrine may indeed be a grave impediment to suits against states by victims of terrorism.[73]

III. INTERNATIONAL LEGAL RESPONSES TO TERRORISM

The Achille Lauro incident brings into clear focus several international agreements that could have a useful role in fighting terrorism: The 1958 Convention on the High Seas, the 1982 United Nations Convention on the Law of the Sea, and the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("I.M.O. Convention").[74] Before these international documents can be applied, however, it is necessary to define the term "piracy," and then to assess whether the Achille Lauro incident constituted piracy.[75]

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69. *Id.* at 101.
70. *Id.* at 102.
71. *Id.*
72. *Id.*
73. *Id.*
74. Geneva Convention on the High Seas 1958, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter 1958 Geneva Convention]. 1982 Law of the Sea Convention, Dec. 10, 1982, U.N. DOC. A/CONF. 62/122, art. 101, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter cited as 1982 Law of the Sea Convention]. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located On the Continental Shelf, International Maritime Organization Doc. SUA/CONF/16/Rev.2, *reprinted in* 27 I.L.M. 668 (1988).
75. *Compare* McGinley, *The Achille Lauro Affair-Implications for International Law*, 52 TENN. L. REV. 691, 700 (1985) ("Thus it is evident that the seizure of the Achille Lauro was piracy *jure gentium*"); Halberstam, *Terrorism On the High Seas: The Achille Lauro Piracy and the I.M.O. Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 282 (1988) ("While the Achille Lauro incident may bring the hijackers within the definition of piracy, it might not apply to terrorist acts in different circumstances"); Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158, 159 (1987) ("While it may be contended that the taking of the Achille Lauro is not included within [the 1958 Convention on the High Seas] definition [of piracy] because there was no second vessel involved or because the hijackers did not act for private ends, customary international law and the history of the enforcement of the norm against piracy indicate that such a position is unfounded"). *See also* Ronzitti, *The Law of the Sea and the Use of Force Against Terrorist Activities*, in MARITIME TERRORISM, *supra* at 25 ("[T]he Achille Lauro hijacking cannot be considered as piracy, for two reasons: first, because the two-vessel re-

Although an ancient crime, an authoritative definition of piracy is lacking.[76] Part of this deficiency is due to arguments over the components of the crime which include: "[1] whether . . . an intent to rob, was a necessary element, [2] whether acts by insurgents seeking to overthrow their government should be exempt, as were acts by state vessels and recognized belligerents, and [3] whether the act had to be by one ship against another or could be on the same ship."[77] Nevertheless, customary international law views piracy as a crime.[78] More specifically, it encompasses "every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel."[79] In contrast, modern maritime terrorism often involves acts committed on one ship, and involves political rather than monetary goals.[80]

Under article I, section 8 of the U.S. Constitution, Congress is empowered to define and punish acts of piracy.[81] While early federal court decisions characterized piracy as "robbery and murder on the high seas" and "depredation on the seas,"[82] later courts have focused on the utility of sanctioning piracy in order to permit all countries "to navigate [freely] on the high seas."[83] Current legislation requires stringent punishment of a convicted pirate.[84] Yet because federal legislation defers its definition of piracy to international law, international clarification of the elements of piracy is vital.[85]

In order to establish a uniform definition of piracy in the law of nations, the 1958 Geneva Convention sculptured a straight-forward description of the crime.[86] The Convention provides that piracy includes any of

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quirement is lacking; secondly, because piracy is a crime committed for private ends, whereas terrorist organizations act for political aims." Note, *Towards A New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L. L. 723, 748 (1986) ("The Palestinians' actions, however, do not qualify as piracy under international law").

76. Halberstam, *supra* note 75, at 272-73. *See* J. BRIERLY, THE LAW OF NATIONS 154 (1928) ("There is no authoritative definition of international piracy").

77. Halberstam, *supra* note 75, at 272-73.

78. "[P]iracy by the law of nations, in its jurisdictional aspects, is *sui generis*." S.S. Lotus, 1927 PCIJ (ser. A) No. 10 (Sept. 7), *reprinted in* 2 M. HUDSON, WORLD COURT REPORTS 20, 70 (Moore, J., dissenting).

79. 1 L. OPPENHEIM, INTERNATIONAL LAW 608-09 (Lauterpacht 8th ed. 1955).

80. Halberstam, *supra* note 75, at 277-281.

81. Congress is empowered to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." U.S. CONST. art. I, § 8.

82. United States v. Smith, 18 U.S. (5 Wheat) 153, 155, 158 (1820).

83. United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982), *reh'g denied*, 685 F.2d 1389 (11th Cir. 1982), *cert. denied* 459 U.S. 1114 (1983).

84. "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." 18 U.S.C. § 1651 (1982). *See also* 33 U.S.C. § 381 (1982) (discussing President's right to implement public ships to counter piracy).

85. *Id.*

86. 1958 Geneva Convention, *supra* note 74, art. 15. Article 101 of the 1982 Law of the Sea Convention has similar provisions on piracy. 1982 Law of the Sea Convention, Dec. 10,

the following:

> (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: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) Against a ship, aircraft, person or property in a place outside the jurisdiction of any State;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[87]

Scholars have argued that the language "for private ends" does not necessarily require an intent to rob.[88] Yet, questions remained whether this term "was intended to exclude all acts done for political purposes or only acts committed by unrecognized insurgents that would be lawful if committed by recognized belligerents."[89] Answers to these questions seem to be pronounced in the affirmative by the International Law Commission's comments on the draft 1958 Geneva Convention.[90] More specifically, the comment concluded that "the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bonds."[91]

Despite apparent exemption of terrorist acts from the elements of piracy, Article 16 of the 1958 Convention on the High Seas stipulates, "[t]he provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high seas, when such measures are not based upon jurisdiction over piracy."[92] The comments to this article explain that this provision stands for the proposition that acts having the characteristics of piracy would be deemed unlawful if carried out by the unrecognized belligerent, while the same acts committed by revolutionaries would be legal.[93] More simply, only when insurgents' piratical activities are aimed at a nation whose govern-

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1982, UN Doc. A/CONF. 62/122, art. 101, *reprinted in* 21 I.L.M. 1261 (1982).

87. *Id.*

88. Halberstam, *supra* note 75, at 278.

89. *Id.*

90. *Id.*

91. Harvard Research in International Law, Comment to the Draft Convention on Piracy, 26 AM. J. INT'L. L. SUPP. 749, 786 (1932) [hereinafter Harvard Research].

92. 1958 Geneva Convention, *supra* note 74, art. 16. *See* Halberstam, *supra* note 75, at 278-79 (discussing implications of art. 16).

93. Harvard Research, *supra* note 91, at 857; Halberstam *supra* note 74, at 279 (reviewing analysis of comments).

ment they want to replace, will the attack be defined as non-piracy.[94]

Although international law often differentiates between soldiers and insurgents, an exemption from liability due to an insurgent's arguable piratical actions hurts the world community's fight against terrorism.[95] After all, language by one author describing the insurgent who commits "piracy" as "not the enemy of the human race, but he is the enemy solely of a particular state" is preposterous.[96] Such an "escape" enables the terrorist/insurgent to be absolved of his crimes if he is conveniently labeled an "insurgent."[97] After all, Articles 15 and 16 of the 1958 Geneva Convention provide that the distinguishing characteristic, given the same facts, between piracy and other crimes depends on whether the activities are for political ends.[98] Thus, by excluding political acts from this international criminal designation, the world community is, in essence, approving of many national liberation movements' crimes.[99] Such distinctions in the 1958 Geneva Convention must be reexamined since "personal security of life and property far outweigh the need for radical groups to prey upon the innocent."[100]

In conclusion, since international law is forever evolving, its metamorphosis must include "[an] exemption for insurgents [which] would not exclude present-day terrorists, since it applied only to insurgents who confined their attacks to a particular state."[101] Furthermore, as Sir Lauterpacht explained, "it would not seem improper to describe and treat as piratical such acts of violence on the high seas which by their ruthlessness and disregard of the sanctity of human life invite exemplary punishment and suppression."[102]

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94. Halberstam, *supra* note 75, at 279.

95. W. HALL, INTERNATIONAL LAW 234 (1st ed. 1884).

96. *See* Halberstam, *supra* note 75, at 279. *See generally* TERRORISTS OR FREEDOM FIGHTERS, (E. Tavin and Y. Alexander eds. 1986); Rubin, *Terrorism and the Laws of War*, 12 DEN. J. INT'L L. & POL'Y 219 (1983); Bouffard, *Extradition — Political Offense Exception — United States Court Creates A New Definition for Use Against International Terrorists*, 6 SUFFOLK TRANSNAT'L L.J. 197 (1982).

97. *See* Halberstam, *supra* note 75, at 288. "Insurgents who did not confine their attacks to ships and property of the government they sought to overthrow . . . were considered pirates." *Id. See also* The Magellan Pirates, 164 Eng. Rep. 47 (1853) (discussing that depending on whom they attack, persons may be considered pirates or insurgents).

98. McCredie, *Contemporary Uses of Force Against Terrorism: The United States' Response to Achille Lauro — Questions of Jurisdiction and Its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 448 (1986).

99. Crockett, *Toward a Revision of the International Law of Piracy*, 26 DE PAUL L. REV. 78, 87, 92 (1976). *See*, Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y.B. INT'L L. 496 (1961); Vali, *The Santa Maria Case*, 56 NW. U.L. REV. 968 (1961) (providing overview of seizure of luxury ship in Caribbean by "pirates"/"rebels" opposing Portuguese government).

100. McCredie, *supra* note 98, at 449.

101. Halberstam, *supra* note 75, at 289.

102. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 307-08 (1968).

IV. FACTS SURROUNDING THE ACHILLE LAURO INCIDENT: A CASE STUDY

On October 7, 1985, four armed men, allegedly members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO), seized an Italian registered cruise ship, the Achille Lauro, in Egyptian territorial waters.[103] The PLO hijackers, posing as passengers, managed to board the vessel without any opposition.[104] At the time of the seizure, approximately one hundred passengers, including twenty-eight Americans, and a crew of 350 were aboard.[105]

According to some accounts, the seizure and terrorist activity on the Achille Lauro, some thirty miles off Port Said, Egypt, was not supposed to occur.[106] Instead, the hijackers were part of a team, masterminded by Mohammed Abu Abbas, who intended to launch an attack in Ashdod, Israel.[107] Apparently, as the terrorists were in their cabin taking stock of their weapons, other passengers entered their room. Consequently, the cadre was exposed, and the terrorists then decided to take control of the ship.[108]

Upon securing control of the vessel, the PLO terrorists stated that they would blow up the Achille Lauro unless the Israeli government released fifty Palestinians held in Israeli jails.[109] Although the terrorists probably foresaw Israeli nonacquiescence, they nevertheless stressed the seriousness of their demands.[110] To underscore the ramifications of an Is-

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103. Tagliabue, *Ship Carrying 400 Seized: Hijackers Demand Release of 50 Palestinians In Israel*, N.Y. Times, Oct. 8, 1985, A1, at col. 6. The seizure of the Achille Lauro occurred while the ship was sailing between two Egyptian cities, Port Said and Alexandria. The Egyptians could assert jurisdiction over the incident since according to the Law of the Sea, Egypt has a contiguous zone measuring twenty-four nautical miles from its shores. Third United Nations Conference on the Law of the Sea, 37 U.N. GAOR Annexes (Agenda Item 28), U.N. Doc. A/conf.62/122 (1982).

The Palestine Liberation Front is a radical splinter group of the PLO, which broke away from the umbrella group in 1982. The group is led by Abu Nidal. Bergen, *Even With A Name It's Hard To Know Who The Hijackers Are*, N.Y. Times, Oct. 9, 1985, at A9, col. 2. "Abu Nidal may be the deadliest terrorist alive . . . Over the past twelve years [he] has molded his organization . . . into a fanatical, amorphously structured terrorist band with between 200 and 500 adherents." *Master of Mystery and Murder*, TIME, Jan. 13, 1986, at 31. The PLF is composed of both pro-Arafat and anti-Arafat sections. N.Y. Times, Oct. 10, 1985, § 1, at 7, col. 2.

For an overview of PLF's background and activities, see Y. ALEXANDER & J. SINAI, TERRORISM: THE PLO CONNECTION 43, 212-13 (1990) [hereinafter PLO CONNECTION]. For an in-depth analysis of the PLO's structure, relations with other states, and activities see J. BECKER, THE PLO: THE RISE AND FALL OF THE PALESTINE LIBERATION ORGANIZATION (1984).

104. *The Voyage of the Achille Lauro*, TIME, Oct. 21, 1985, at 30-31 [hereinafter TIME].

105. *Id.*

106. Tagliabue, *supra* note 103; N.Y. Times, Oct. 11, 1985, § 1, at 1, col. 3.

107. *Id.*; N.Y. Times, Oct. 18, 1985, § 1, at 1, col. 6; McCredie, *supra* note 98, at 436.

108. McGinley, *supra* note 75, at 692.

109. Tagliabue, *supra* note 103, at A1, col. 6; Friedman, *Jailed Palestinians: Hundreds Held*, N.Y. Times, Oct. 8, 1985, at A10, col. 1.

110. Prial, *Israel Firm on Terror Policy, But Seems Willing to Help*, N.Y. Times, Oct. 9, 1985, at A8, col. 1 [hereinafter *Israel Policy*]; *We Are Losing Patience*, N.Y. Times, Oct.

raeli refusal to release the jailed Palestinians, the hijackers brutally murdered an elderly, disabled American, Leon Klinghoffer.[111] This unprovoked shooting, and subsequent discard of Mr. Klinghoffer (and wheelchair) overboard, marked the only fatality during the incident.[112]

Negotiations attempted to find a resolution to the incident. Participants in the talks were Abu Abbas of the PLF, Ani el-Hassan, an adviser to PLO Chairman Arafat, Egyptian authorities, and the hijackers.[113] On October 9, 1985, when the terrorists understood that the Israelis would not negotiate, and upon obtaining a guarantee of their immediate release, Egyptian authorities allowed Abbas to remove his comrades and accompany them off the ship.[114] The terrorists were then taken into custody by Egyptian authorities, although they were not arrested.[115] The following day, the Egyptian government claimed that it no longer knew the whereabouts of the Palestinian hijackers.[116] Despite these assurances by the Egyptians, various intelligence sources obtained convincing evidence that the terrorists had boarded an Egypt Air 737 flight to Tunisia.[117] Following this exposition, the Egyptians argued that the hijackers were sent to Tunisia to stand trial before the National Ruling Council of the PLO.[118] Additionally, the purpose of the proposed transfer from Egyptian to PLO forces was, according to Egyptian President Hosni Mubarak, an opportunity for Yasir Arafat to reiterate his denunciation of terrorism.[119]

While the aircraft was in flight to Tunisia, President Reagan put pressure on the Tunisian government, causing the latter to deny the Egyptian plane the right to land.[120] More specifically, President Reagan communicated to Tunisia that "the United States ha[d] reason to believe . . . that the hijackers were on board an EgyptAir plane headed for Tunis [Tunisia] . . . [and][that] the terrorists should not be allowed to land."[121] The Tunisians agreed. At the same time, U.S. Navy F-14 fighter planes

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9, 1985, at A9, col. 45 [hereinafter *Patience*].

111. Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 Are Safe; U.S. Assails Deal With Captors*, N.Y. Times, Oct. 10, 1985, at A1, col. 6.

112. *Id.*, N.Y. Times, Oct. 11, 1985, § 1, at 1, col. 6. At a 1988 press conference in Algiers, Algeria, Abu Abbas, jokingly remarked that Mr. Klinghoffer "was trying to swim for it." Memorial Foundation, *infra* note 266, at 2.

113. Sacerdofi, *States' Agreements With Terrorists in Order to Save Hostages: Non-Binding, Void or Justified by Necessity?*, MARITIME TERRORISM, *supra* note 25, at 25-26.

114. *Israel Policy*, *supra* note 110; Gwertzman, *State Department Angry At Speedy Accord With Gunmen*, N.Y. Times, Oct. 10, 1985, at A1, col. 3; Schumacher, *Arafat Asks That Gunmen Be Turned Over To PLO*, N.Y. Times, Oct. 10, 1985, at A11, col. 2.

115. TIME, *supra* note 104, at 33.

116. *Getting Even*, NEWSWEEK, Oct. 21, 1985, at 22 [hereinafter *Getting Even*].

117. *Id.* at 20, 22-23.

118. *You Can Feel The Damage*, TIME, Oct. 28, 1985, at 26.

119. Kifner, *Mubarak, Furious at U.S., Demands a Public Apology*, N.Y. Times, Oct. 15, 1985, at A10, col. 1. "If Arafat didn't punish them, then he would be responsible before the whole world." *Id.*

120. *The U.S. Sends A Message*, TIME, Oct. 21, 1985, at 22 [hereinafter *U.S. Message*].

121. *Getting Even*, *supra* note 116, at 24.

forced the Egyptian aircraft to land at a North Atlantic Treaty Organization (NATO) air base in Sigonella, Sicily.[122] At the tarmac in Sigonella, the U.S. Navy tried to obtain custody of the terrorists in order to transfer them to the U.S. to stand trial.[123] Italian authorities intervened and the hijackers were ultimately taken into custody by the Italians.[124] Subsequently, the Italian government asserted jurisdiction over the terrorists, and thus denied a United States request for extradition.[125] While some of the hijackers were awaiting trial in Spolet, Italy, the Italians allowed Abbas to leave by way of Yugoslavia.[126] Following his departure, Italian prosecutors issued arrest warrants for him. Although three of the thirteen individuals ultimately indicted in Italy in connection with the hijacking were given life sentences in absentia, the three other convicted hijackers were sentenced to 15, 24, and 30 years.[127]

V. CIVIL SUITS ARISING OUT OF THE ACHILLE LAURO INCIDENT

A. *Klinghoffer Causes of Action Against Various Actors in the Achille Lauro Incident*

The Klinghoffer family has at different periods and in various manners, sued the PLO and other parties based on the Achille Lauro attack.[128] More specifically, Mrs. Klinghoffer brought suits on behalf on herself and her husband in both the Supreme Court of New York and a federal district court, the Southern District of New York. Following her death, Mrs. Klinghoffer's daughters maintained these suits in both jurisdictions on behalf of their parents and in their own privilege.[129]

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122. *U.S. Message*, *supra* note 120 at 22; Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base in Italy; Gunmen Face Trial In Slaying of Hostage*, N.Y. Times, Oct. 11, 1985, at A10, col. 6. "President Reagan . . . ordered the dramatic military action after hearing that Egypt had turned down repeated American pleas to prosecute the four gunmen and was flying them to freedom." *Id.* (providing quote of Mr. Larry Speaks, White House spokesman). See McGinley, *supra* note 75 at 708-713 (discussing jurisdictional claims of PLO to prosecute Achille Lauro hijackers).

123. Apple, *Change In Course, This Time Reagan Let His Actions Do His Thinking*, N.Y. Times, Oct. 13, 1985, § 4, at 1, col. 2.

124. *Id.*

125. N.Y. Times, July 11, 1986, at A6, col. 4. *See generally* Fuller, *Extradition of Terrorists: An Executive Solution to the Limitations of the Political Offense Exception in the Context of Contemporary Judicial Interpretations of American Extradition Law*, 11 SUFFOLK TRANSNAT'L L.J. 351 (1988).

126. Tagliabue, *Italians Identify 16 in Hijacking of Ship*, N.Y. Times, Nov. 20, 1985, at A3, col. 4; *Hijacker To Be Tried As Minor*, N.Y. Times, Nov. 21, 1985, at A10, col. 3; Philadelphia Inquirer, Oct. 27, 1985, at 3A, col. 3; See McGinley, *supra* note 75, at 713-15 (discussing jurisdictional claims of PLO to prosecute Achille Lauro hijackers).

127. Suro, *Italian Jury Gives Cruise-Ship Killer 30-Year Sentence*, N.Y. Times, July 11, 1986, at A1, col. 4; Suro, *Hijacking Verdicts Appealed*, N.Y. Times, July 12, 1986, at 3, col. 1.

128. *See infra* note 171 and accompanying text. Goldie, *Legal Proceedings Arising From The Achille Lauro Incident in the United States of America*, MARITIME TERRORISM, *supra* note 25, at 107-27.

129. Goldie, *supra* note 128, at 107.

To get a better understanding of the scope of the *Klinghoffer v. PLO* litigation, it is important to review the various suits brought against other actors in the Achille Lauro incident.[130]

1. All Klinghoffer Suits Except Those in Which the PLO is a Defendant

a. Suit by Mrs. Klinghoffer

This suit, filed in November 1985, alleged various grounds for recovery from the travel and transportation actors involved in the Achille Lauro incident.[131] More specifically, Mrs. Klinghoffer brought causes of action against: Commissaria of the Flotta Achille Lauro in Amministrazione Straordinara; S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria (jointly referred to as "Lauro"); Port of Genoa, Italy ("Genoa"); Club ABC Tours, Inc. ("ABC"); Chandris (Italy) Inc. ("Chandris"); and Crown Travel Service.[132]

In her complaint, Mrs. Klinghoffer set out the events on the Achille Lauro.[133] Moreover, she described in graphic detail the harsh treatment which she (and other passengers) received.[134] Specifically, she claimed that while on the Achille Lauro she was battered, assaulted, falsely imprisoned, and threatened with death.[135] As a result of this harsh treatment, Mrs. Klinghoffer asserted that she should recover damages arising from acute pain and mental anguish, humiliation, anxiety, fright, depression, and the subsequent physical ramifications.[136]

Mrs. Klinghoffer proffered two theories for relief against Lauro, the owner of the ship.[137] First, due to Lauro's wrongful acts, recklessness, and negligence, she suffered the aforementioned injuries and damages.[138] More specifically, Mrs. Klinghoffer noted that Lauro had failed to offer its passengers sufficient security (i.e., it failed to provide a thorough check and search of passengers, including their passports and belongings, during initial boarding in Genoa (October 3, 1985) as well as during subsequent stops).[139] Second, Mrs. Klinghoffer alleged that Lauro caused her severe emotional distress by negligently permitting the terrorists to threaten her life.[140]

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130. *Id.* at 107-27.
131. *Id.* at 107.
132. No. 85 Civ. 9803 (LLS); *Id.* at 107-08.
133. *Id.* at 108.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

b. *Estate of Mr. Klinghoffer v. Lauro*

Pursuant to the Death on High Seas Act,[141] Mrs. Klinghoffer, on behalf of her husband, initiated suit against Lauro.[142] In that litigation she asserted that her husband's death was a consequence of neglect, wrongful acts, and recklessness of Lauro.[143] In claiming damages, including those to cover funeral expenses, the plaintiff asserted that during the takeover of the ship, Mr. Klinghoffer suffered severe emotional distress and physical pain, particularly when he was shot. Also, Mrs. Klinghoffer claimed recovery based on general maritime survival statutes and maritime wrongful death legislation.[144]

c. *Mrs. Klinghoffer v. ABC*

In this cause of action, Mrs. Klinghoffer insisted that ABC Tours breached its contractual obligations by failing to provide safe passage on the Mediterranean cruise.[145] Such wanton behavior, Mrs. Klinghoffer asserted, was coupled with negligent security measures.[146]

d. *Estate of Mr. Klinghoffer v. ABC*

The plaintiff herein alleged that ABC breached its contractual obligations and failed to comply with warranty provisions.[147] As in Mrs. Klinghoffer's case against ABC, plaintiff asserted that the travel agent failed to arrange an adequately safe voyage and thereby acted outrageously and wantonly.[148] Also, a negligence claim was brought stating that ABC knew or should have comprehended that the cruise had insufficient security.[149] Lastly, this action rested on the allegation that ABC did not sufficiently explicate the limited liability asserted on the cruise tickets.[150]

e. *Mrs. Klinghoffer v. Chandris*

In this suit against the charterer and common carrier of passengers on the Achille Lauro, Mrs. Klinghoffer stressed that Chandris was negligent in its failure to provide stringent inspection of persons, luggage, passports, and other security items.[151] Furthermore, Mrs. Klinghoffer alleged that the negligent acts of Chandris were directly responsible for the emotional distress she suffered.[152]

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141. 46 U.S.C. §§ 761-66 (1982).
142. No. 85 Civ. 9303 (LLS); Goldie, *supra* note 128, at 109.
143. *Id.*
144. *Id.*
145. No. 85 Civ. 9303 (LLS); *Id.* at 109-10.
146. *Id.*
147. No. 85 Civ. 9303 (LLS); *Id.* at 110.
148. *Id.*
149. *Id.*
150. *Id.*
151. No. 85 Civ. 9303 (LLS); *Id.* at 110-11.
152. *Id.*

f. *Estate of Mr. Klinghoffer v. Chandris*

In this cause of action, the Estate of Klinghoffer alleged that the death of Mr. Klinghoffer occurred as a result of wrongful acts, recklessness, and neglect by Chandris.[153] This suit was also based on the Death on the High Seas Act.[154]

g. *Mrs. Klinghoffer v. Port of Genoa, Italy*

Mrs. Klinghoffer alleged that the port was negligent in not providing appropriate security.[155] More emphatically, there was insufficient inspection of luggage, passports, and passengers when boarding of the Achille Lauro.[156] Furthermore, this subpar inspection led to the emotional distress which the plaintiff suffered.[157]

h. *Estate of Mr. Klinghoffer v. Port of Genoa, Italy*

The Estate of Mr. Klinghoffer as in other causes of action, claimed recovery pursuant to the Death on the High Seas Act.[158] Also, the Estate sought compensation for pain and distress caused by the terrorists.[159] Additionally, the Estate appended claims for recovery claiming wrongful death, pursuant to general maritime legislation.[160]

2. *Klinghoffer v. PLO:* Suits in the Supreme Court of New York and Federal District Court (Southern District of New York)

The Estate of Mr. Klinghoffer also sued the PLO pursuant to the Death on the High Seas Act.[161] Several other theories for recovery were also proffered: (1) recovery pursuant to the wrongful death precept in New York's Estates Powers & Trusts Law;[162] (2) maritime wrongful death, pursuant to general maritime law;[163] (3) a tort claim of assault, based on the PLO's intentional acts;[164] (4) a battery claim;[165] (5) an allegation of false imprisonment;[166] (6) claims of intentional and negligent infliction of emotional distress.[167]

Mrs Klinghoffer asserted similar claims against the PLO, except for

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153. *Id.* at 111.
154. *Id.*
155. *Id.* at 112.
156. *Id.*
157. *Id.*
158. *Id.* at 112-13.
159. *Id.*
160. *Id.*
161. Supreme Court of New York, New York County, Civil Action No. 27801/85.
162. New York Estates Powers & Trusts Law §§ 5-4.1 [hereinafter NYEPTL].
163. Goldie, *supra* note 128, at 114.
164. *Id.*; NYEPTL, *supra* note 164, §11-3.2.
165. *Id.*
166. *Id.*
167. *Id.*

those based on wrongful death.[168]

B. *Third Party Complaint of Chandris Against the PLO and the Port of Genoa, Italy*

In response to the suits filed against it by the Klinghoffers, Chandris filed third-party complaints, in which it sought indemnity or contribution, from the PLO and the Port of Genoa, Italy.[169] In this third-party complaint, Chandris sought contribution or indemnity from the PLO, based on its negligence, intentional conduct, wrongful acts, and recklessness.[170]

In classifying the PLO as an unincorporated association, Chandris further stated that the terrorist organization "conceived, conspired, organized, authorized and directed its agents, servants, officers, employees and operatives to willfully, wantonly and maliciously" capture the Achille Lauro, and subsequently caused Mr. Klinghoffer's death.[171] Additionally, Chandris proffered that the PLO's activities in the Achille Lauro affair constituted a crime, an intentional tort, and an activity *hostis humani generis*, thereby making the PLO responsible for damages in excess of $10,000.[172]

Three jurisdictional prongs were used in this case: 28 U.S.C. section 1331 (providing federal jurisdiction due to federal question), 28 U.S.C. section 1332 (establishing federal jurisdiction based on diversity of citizenship), and 28 U.S.C. section 1333 (fixing federal jurisdiction due to admiralty and maritime laws).[173]

Lastly, Chandris stated that the Port of Genoa, Italy does not possess the sovereign immunity defense, and consequently should indemnify or contribute for its failure to sufficiently inspect the passengers of the Achille Lauro.[174]

VI. THE JUNE 1990 ORDER OF THE SOUTHERN DISTRICT OF NEW YORK IN *KLINGHOFFER V. PLO*

A. *Introduction*

Passengers on the Achille Lauro, filed suits in federal district court in New York, alleging that "the owner and charterer of the Achille Lauro, travel agencies and various other entities" failed to notify passengers or thwart the attack.[175] Among these suits was one brought by Mrs. Marilyn

168. Goldie, *supra* note 126, at 114-15.
169. *Id.* at 113.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854, 857 (S.D.N.Y. 1990).

Klinghoffer.[176]

In the Klinghoffer action, jurisdiction was proffered on several prongs: the Death of the High Seas Act,[177] diversity of citizenship, and state law.[178] In response to the suit, the Crown Service Travel, Inc. and Chandris, Inc. impleaded the PLO, calling for contribution or indemnification for reparations imposed against them based on the passengers' suits as well as for punitive and compensatory damages for the PLO's "tortious interference with their businesses."[179]

The PLO moved to dismiss the suit. They asserted that: (1) there was no subject matter jurisdiction because this case presents a nonjusticiable political question; (2) there was no personal jurisdiction over the PLO; (3) the PLO, assuming that it is an unincorporated association, lacked the capacity to be sued; and (4) service of process on Mr. Terzi, PLO Permanent Observer, in New York was insufficient.[180]

Judge Stanton, in a pithy ten-page order, denied the PLO's motion to dismiss. He first ruled that the PLO is not a foreign state, but rather an unincorporated association. Next, the court concluded that the subject matter of the case includes tort claims arising from federal admiralty law and, as a result, the political question doctrine is inapplicable.[181] Additionally, the court determined that section 301 of New York's Civil Practice Law and Rules (C.P.L.R.) granted it jurisdiction over the PLO, which according to the statute was "doing business" in the state.[182] Furthermore, because "substantial, continuous, and purposeful contacts with New York could be attached to PLO activity, the exertion of jurisdiction over the terrorist organization amply accords due process.[183] The court denied PLO claims that its U.N. Observer status accorded it diplomatic immunity under the U.N. Headquarters Agreement.[184]

Next, since the suit was brought under federal maritime law, federal law is applicable for substantive issues, rather than the state law of where the court sits.[185] Finally, the court upheld the service of process upon Mr. Terzi finding that his position in the U.N. classified him as an agent of the PLO under section 301 of New York C.P.L.R.[186]

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176. *Id.* at 856 n.1. The court noted that upon Mrs. Marilyn Klinghoffer's death, her daughters Ilsa Klinghoffer and Lisa Klinghoffer Arbitter, were substituted as plaintiffs. *Id.*

177. 46 U.S.C. App. §§ 761-767 (1982).

178. *See S.N.C. Achille*, 739 F. Supp. at 857 (citing various bases of jurisdiction in Klinghoffer action). "Later, other Achille Lauro passengers filed two actions directly against the PLO alleging diversity of citizenship jurisdiction." *Id.*

179. *Id.* at 857.

180. *Id.* at 858.

181. *Id.* at 858-60.

182. *Id.* at 860-63.

183. *Id.* at 865.

184. *Id.* at 863-5.

185. *Id.* at 865-6.

186. *Id.* at 867.

B. *The Nature of the PLO*

Concerning its classification for litigation, the PLO implored the court to adopt its self-description as a state.[187] More specifically, the PLO characterized itself as "the nationhood and sovereignty of the Palestinian people."[188] Consequently, the PLO sought designation as a sovereign nation. Nevertheless, the court found the PLO to be an unincorporated association.[189] Support for this classification was articulated through the citation of *Motta v. Samuel Weiser, Inc.*[190] and *Health Care Equalization Comm. v. Iowa Medical Soc'y.*[191]

More persuasive than the court's finding that the PLO was an unincorporated association, however, was the court's finding that the PLO was not a sovereign state.[192] The court determined that the PLO lacked the key elements of nationhood, as articulated by international law. International law requires that a state must be "an entity that has a defined territory, and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."[193] Because the PLO does not comport with the standard definition of a state, for purposes of this litigation, the PLO was classified as an unincorporated association.[194]

C. *Subject Matter Jurisdiction*

The court found subject matter jurisdiction on several bases.[195] Admiralty jurisdiction was established since the Achille Lauro incident involved torts, including wrongful death, on the high seas.[196] As 28 U.S.C. section 1333 provides: "district courts shall have original jurisdiction, exclusive of the courts of the States of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases and all other remedies to which they are otherwise entitled."[197] Further support for the court's

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187. *Id.* at 857-8.

188. *Id.* at 857, (citing Affidavit of attorney for PLO Ramsey Clark sworn to April 27, 1987, ¶ 6).

189. *Id.* at 858.

190. Motta v. Samuel Weiser, Inc., 768 F.2d 481, 485 (1st Cir. 1985)(citing Black's Law Dictionary 111 (5th Ed. 1979)), *cert. denied*, 474 U.S. 1033, 106 S. Ct. 596, 88 L.Ed. 2d 575 (1988). "An unincorporated association is defined as a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise." *Id.*

191. Health Care Equalization Comm. of Iowa Chiropractic Soc'y v. Iowa Medical Soc'y, 501 F. Supp. 970, 976 (S.D. Iowa 1980), *aff'd*, 851 F.2d 1020 (8th Cir. 1988).

192. *S.N.C. Achille*, 739 F. Supp. at 858.

193. *Id.* (citing National Petrochemical Co. of Iran v. MIT Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987), *cert. denied*, 489 U.S. 1081, 109 S. Ct. 1535, 103 L.Ed.2d 840 (1989).

194. *S.N.C. Achille*, 739 F. Supp. at 858.

195. *Id.* at 158-59.

196. *Id.* at 859.

197. 28 U.S.C. § 1333 (1982). Also, the court determined that pursuant to the "savings to suitors" clause (§ 1333), plaintiff can bring a cause of action for maritime torts in federal

finding admiralty jurisdiction was provided by *American Hawaiian Ventures, Inc. v. M.V.J. Latuharhory*[198] which noted that "every seizure by force on the high seas is prima facie piracy, and hence, a maritime tort."[199] The court also determined subject matter jurisdiction exists over the Klinghoffers' suits since the Death on the High Seas Act provides jurisdiction over causes of actions for wrongful death on the high seas.[200]

D. *The Political Question Doctrine*

The PLO also argued that this suit was not justiciable because it involved foreign policy questions which are outside the court's jurisdiction; such issues, the PLO continued, are best left to other sectors of government.[201] To support this political question argument, the PLO relied upon *Tel-Oren v. Libyan Arab Republic*.[202] In *Tel-Oren*, the D.C. Circuit dismissed civil suits arising from attacks on civilians by the PLO, other Palestinian organizations, and Libya.[203] The *Tel-Oren* court determined that such suits would require political evaluations of "terrorism's place in the international order" and therefore must be dismissed. The D.C. Circuit reasoned that a judgment on the activities of Libya and the PLO could interfere with U.S. foreign policy, an area exclusively controlled by the President and Congress.[204]

However, Judge Stanton distinguished the facts of *Tel-Oren* from the Achille Lauro setting, by noting that the potential harmful effects of assessing the justiciability of the Achille Lauro suit were minimal.[205] Moreover, Judge Stanton explained that simply because political ramifications and foreign affairs are involved does not mean that political questions exist.[206] In sum, Judge Stanton held that seizure of the Achille Lauro, resulted in non-political personal and property tort claims. Therefore, the

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or state court. *Id.*, *citing* Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1321 (11th Cir. 1989).

198. 257 F.Supp. 622 (D.N.J. 1966).

199. *Id.* at 627.

200. *S.N.C. Achille*, 739 F. Supp. at 859.

201. *Id.* The political question precept was well-described in *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L.Ed.2d 663 (1962).

202. 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003, 105 S. Ct. 1354, 84 L.Ed.2d 377 (1985). In *Tel Oren*, 726 F.2d at 775, the suits were brought pursuant to 28 U.S.C. § 1350 (1982) which provided aliens with jurisdiction over torts committed by aliens in circumvention of international law or U.S. treaties. *See generally International Terrorism: Beyond the Scope of International Law: Tel-Oren & Libyan Arab Republic*, 12 BROOKLYN J. INT'L L. 505 (1986).

203. 726 F.2d at 823.

204. *Id.* at 824-25.

205. *S.N.C. Achille*, 739 F. Supp. at 860. "None of those considerations [of those listed in *Tel-Oren*] is present here. The PLO has condemned the Achille Lauro seizure and stated that it was an act of piracy. It was not at war with either Italy or the United States. No party asserts that the Achille Lauro seizure was legitimate." *Id.*

206. *Id.* at 860. To support this argument, Judge Stanton cited *Baker v. Carr*, 369 U.S. at 212, 82 S. Ct. at 710 ("The doctrine of which we treat is one of political questions, not one of political cases.").

"policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch"[207] would not be disturbed.

E. *Personal Jurisdiction*

The Southern District of New York has stated several times that, in admiralty claims, personal jurisdiction is set according to state law. Consequently, Judge Stanton explained that New York C.P.L.R. section 301 could legitimately confer personal jurisdiction over the PLO.[208] Although no court had specifically applied section 301 to an unincorporated association, nonresident individuals doing business in New York had been subjected to jurisdiction under this section by a federal district court.[209] Additionally, New York general associations law permits suits against unincorporated associations by designation of either its treasurer or president.[210] This vital precept, in conjunction with reports that New York C.P.L.R. 301 jurisdiction could be expanded, even to non-corporate defendants "doing business" in New York, lends support to Judge Stanton's subject matter jurisdiction determination.[211]

Judge Stanton set out the relevant legal precedent prior to determining the applicability of section 301 and whether the PLO was "doing business" in the state.[212] As described in *McGowan v. Smith*,[213] defendants who engage in continuous and systematic conduct may be classified as "doing business" under section 301.[214] Furthermore, *Andrulonis v. United States*[215] illustrated that should a court determine that, under section 301, a defendant is doing business in New York, suits may arise on claims whether or not they are connected to the New York activities.[216] In the present case, the court determined that the PLO's contacts with New York are constant and substantial.[217] More specifically, the court noted that the PLO: owns a building in New York City, utilized both as an office and residence; maintains bank accounts; has a telephone listing; owns automobiles; and has employees in Manhattan.[218] Such purposeful and significant connections with New York adequately abide with

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207. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230, 106 S. Ct. 2860, 2865-66 (1988). *S.N.C. Achille*, 739 F.Supp. at 860. Bachrach v. Keaty, 698 F. Supp. 461, 463 (S.D.N.Y. 1988); Cutco Industry, Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986).

208. *S.N.C. Achille*, 739 F. Supp. 861.

209. *Id.*; *See* Diskin v. Starck, 538 F. Supp. 877, 880 (E.D.N.Y. 1982).

210. *Id.*; N.Y. Gen. Ass'ns Law § 13 (McKinney 1942 & Supp. 1990).

211. *S.N.C. Achille*, 739 F. Supp. at 862; 1 Weinstein, Korn & Miller, New York Civil Practice ¶ 301.15, at 3-30 through 31.

212. *S.N.C. Achille*, 739 F.Supp. at 862.

213. 52 N.Y.2d 268, 437 N.Y.S. 2d 943, 419 N.E.2d 321 (Ct. App. 1981).

214. *S.N.C. Achille*, 739 F. Supp. at 861.

215. 526 F. Supp. 183, 190 (N.D.N.Y. 1981).

216. *S.N.C. Achille*, 739 F. Supp. at 862.

217. *S.N.C. Achille*, 739 F. Supp. at 863.

218. *Id.*

the standards set out in section 301.[219]

F. *PLO's Claim of Immunity*

The court did not accept the PLO's claims of immunity from suit due to its position as a U.N. Observer.[220] The PLO's suggestion that its actions are immune from scrutiny because of section 15 of the U.N. Headquarters Agreement was rejected.[221] As the court explained, section 15 of the Headquarters Agreement applies only to United Nations members; the PLO is not such a member. Also, other immunities and privileges accorded U.N. representatives and their staffs are limited to those "performed in the exercise of the [PLO's] observer function" not "to [those] matters completely unrelated to the presence."[222] Consequently, the PLO's immunity defense was rejected.[223]

G. *Due Process*

Regarding due process implications of New York C.P.L.R. section 301, the PLO was deemed to have sufficient contacts with New York.[224] Thus, the causes of action initiated by plaintiffs in New York would not infringe upon the standard of "traditional notions of fair play and substantial justice," the precept enunciated in *International Shoe Co. v. Washington.*[225]

H. *Capacity to be Sued*

Because these maritime tort suits are based on either admiralty or diversity jurisdiction, federal maritime statutes, not state legal precepts, are applicable.[226] Consequently, jurisdiction over the PLO is available since case law provides that plaintiffs have a cause of action against an unincorporated association in its own name, despite the lack of provisions by state law.[227] Furthermore, Federal Civil Procedure Rule 17(b) allows both plaintiffs to initiate suit against the PLO in its own name.[228]

I. *Service of Process*

The last issue before Judge Stanton was whether Federal Civil Procedure Rule 4 guidelines were followed during service of process on the

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219. *Id.*
220. *Id.* at 863-64.
221. *Id.*
222. *Id.* at 864.
223. *Id.*
224. *Id.* at 865.
225. 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95 (1945).
226. *S.N.C. Achille*, 739 F. Supp. at 865-66.
227. *Id.* at 866 (citing Busby v. Electric Utilities Employees Union, 323 U.S. 72, 73-74, 65 S. Ct. 142, 143-44, 89 L.Ed. 78 (1944).
228. *S.N.C. Achille*, 739 F.Supp. at 866 n. 9.

PLO's agent Mr. Terzi.[229] First, Judge Stanton stated that Rule 17(b)(1) permits the cause of action against the PLO to be designated in its common name.[230] Second, Rule 4(d)(3) authorized Mr. Terzi to receive service process.[231] Furthermore, federal law stipulates that "service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable, and just to imply the authority on his part to receive service."[232] Therefore, the court observed, since Mr. Terzi was responsible for the PLO's extensive New York functions, service upon the PLO complied with Rule 4(d)(3).[233]

VII. ANALYSIS OF *KLINGHOFFER V. PLO*

In the Klinghoffer litigation, Judge Stanton ruled that the Death on the High Seas Act was an appropriate springboard to obtain subject matter jurisdiction.[234] Yet, complex arguments regarding the role of state law in Death on the High Seas Act cases demonstrate the need for further development of the law concerning this issue.[235] Section 7 of the Death on the High Seas Act provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."[236]

Recent cases have ascribed that even if the Death on the High Seas Act applies, state courts may have concurrent subject matter jurisdiction.[237] More specifically, in *Lowe v. Trans World Airlines, Inc.*,[238] the Southern District of New York determined that, in causes of action involving suits when deaths take place beyond territorial waters, the Death on the High Seas Act is not the sole jurisdictional statute.[239] In fact, the court in *Lowe* acknowledged that a plaintiff can bring suit based on state law.[240] Similarly, in *Rairigh v. Erlbeck*,[241] the court determined that federal and state courts have concurrent jurisdiction in wrongful death suits.[242] Support providing states with jurisdiction for wrongful death suits on the high seas was provided by a recent U.S. Supreme Court deci-

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229. *Id.* at 866.

230. *Id.* at 867.

231. *Id.* at 867 (*citing* Montclair Elecs., Inc. v. Electra Midland Corp., 326 F. Supp, 839, 842 (S.D.N.Y. 1971) *quoting* American Football League v. National Football League, 27 F.R.D. 264, 269 (D.Md. 1961)).

232. *S.N.C. Achille*, 739 F.Supp. at 867. Once again, the Court also cited C.P.L.R. § 301, to emphasize that the PLO was "doing business" in the state. *Id.*.

233. *Id.*

234. *See supra* notes 192-93 and accompanying text.

235. Goldie, *Excurus of the Current State of the Admiralty Law on Wrongful Death in the United States of America*, MARITIME TERRORISM, *supra* note 25, at 129-37.

236. 46 U.S.C. § 767 (1982).

237. Goldie, *supra* note 235, at 129.

238. 396 F. Supp. 9 (S.D.N.Y. 1975).

239. *Id.*

240. *Id.*

241. 488 F. Supp. 865 (S.D.N.Y. 1980).

242. *Id.*

sion.[243] More specifically, in *Morange v. State Marine Lines, Inc.*,[244] the Supreme Court of the U.S. concluded that general maritime law acknowledges a cause of action for wrongful death on all navigable waters, including a state's territorial and internal waters, and on the high seas.[245]

Despite the apparent breadth of concurrent jurisdiction, Justice O'Connor in 1986 reiterated the role of section 7 in the Death on the High Seas Act.[246] More particularly, the U.S. Supreme Court advocated in *Offshore Logistics v. Tallentire*[247] that "the language of section 7 and its legislative history, as well as the congressional purposes underlying DOHSA, mandate that section 7 be read not as an endorsement of the application of state wrongful death statutes to the high seas, but rather as a jurisdictional saving clause.[248] Viewed in this light, section 7 serves not to destroy the uniformity of wrongful death remedies on the high seas but to facilitate the effective and just administration of those remedies."[249] This pronouncement supports Judge Stanton's finding of federal jurisdiction pursuant to the Death on the High Seas Act.[250]

VIII. U.S. LEGISLATIVE RESPONSES TO TERRORISM

A. *Introduction*

A bill recently considered by Congress, S. 2465, for the first time creates a civil cause of action for U.S. victims of international terrorist incidents against the perpetrators of this violence.[251] Support for S. 2465 was fervently expressed by two senators who introduced the bill in April 1990, Senator Charles E. Grassley and Senator Howell Heflin.[252] At the Senate Subcommittee hearing on July 25, 1990, Senator Grassley explained that the impetus for S. 2465 was the outrage and tragedy faced by families of American victims of terrorism.[253] Namely, Senator Grassley stated:

> We must understand that the victims of Pan Am 103, Mr. Klinghoffer, and others, were victims because they were Americans; they died because they were Americans. We must do all we can to assist and

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243. 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970); Goldie, *supra* note 235, at 130.
244. 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1979).
245. *Id.*
246. DOHSA, *supra* note 235, at 131-34.
247. 477 U.S. 207, 91 L.Ed.2d. 174, 106 S. Ct. 2485 (1986).
248. *Id.* at 231-32.
249. *Id.*
250. *See supra* notes 192-94 and accompanying text.
251. Anti-Terrorism Act of 1990, 136 CONG. REC., Apr. 19, 1990, No. 43, at 54592.
252. Hearing On The Anti-Terrorism Act of 1990, (S. 2465), Senate Judiciary Subcommittee On Courts and Administrative Practice, July 25, 1990 (statement of Sen. Charles E. Grassley) [hereinafter Grassley]; Hearing On The Anti-Terrorism Act of 1990, July 25, 1990 (statement of Sen. Howell Heflin) [hereinafter Heflin]. The bill was co-sponsored by 13 senators including: Sen. Hatch, Sen. Humphrey, Sen. Biden, Sen. Specter, Sen. Simon, Sen. Levin, Sen. Lieberman, Sen. Murkowski, Sen. Deconcini, Sen. Coats, Sen. Boschwitz, Sen. Metzenbaum, and Sen. Helms. Grassley, *supra* note 252, at 2.
253. Grassley, *supra* note 252, at 2.

> comfort the family of American victims. And it also seems to me that we ought to make it clear to the world how we feel about the taking of American lives.[254]

While acknowledging that United States law, including 18 U.S.C. section 2331 (1988), allows for extraterritorial criminal jurisdiction for acts of international terrorism, Senator Grassley pointed out that legislation providing comparable civil remedies do not exist.[255] The Senator concluded by stating that S. 2465 would provide a legislative tool by which American victims of terrorist incidents could have a cause of action against their attackers.[256]

> [S. 2465] sends a strong and clear message to the world on how the American legal system deals with terrorists . . . . S. 2465 empowers the victims of terrorism to seek justice. It. gives them the right to have their day in court to prove who is responsible for all the world to see. S. 2465 is clear, express and equivocal: this legislation reaffirms our commitment to the rule of law. With this law, the people of the United States will be able to bring terrorists to justice the "American Way." By using the framework of our legal system to seek justice against those who follow no framework and defy all notions of morality and justice.[257]

Additionally, Senator Grassley agreed with the June 7, 1990, court order in *Klinghoffer v. PLO* in which Judge Stanton held that the American judicial system has personal jurisdiction over the PLO.[258] While noting that this case is a landmark event, the Senator declared his concern that Klinghoffer might not be followed.[259] Subsequently, Senator Grassley opined that federal legislation, particularly S. 2465, was the only manner in which to empower Americans with litigate responses to terrorism.[260] In this way, "a strong warning to terrorists [is sent] to keep their hands off Americans and an eye on their assets!"[261]

Senator Heflin, co-sponsor of the bill, similarly stated his support for S. 2465.[262] Pointing to the past decade of American victimization by international terrorists, Senator Heflin pronounced that U.S. criminal sanctions must be complemented with civil remedies.[263] Consequently, Senator Heflin claimed that by amending 18 U.S.C. section 2331, S. 2465 would provide American plaintiffs civil causes of action in U.S. federal

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254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 3.
258. *Id.* at 2.
259. *Id.* at 2-3.
260. *Id.* at 3.
261. *Id.*
262. Heflin, *supra* note 252, at 2.
263. *Id.* at 1.

courts, for injuries sustained during a terrorist act.[264] Only in this manner, Senator Heflin added, can victims of terrorism obtain some monetary compensation for their physical and mental injuries.[265]

B. *Comments on S. 2465 Before the U.S. Senate Judiciary Committee, Subcommittee on Courts and Administrative Practices*

1. Terrorist Victims' Families

Adding some pathos and personal experience to the terrorism debate, family members of victims of international terrorist activities were provided with a forum to express their views on S. 2465.[266] The first panel included Lisa Klinghoffer, daughter of Leon and Marilyn Klinghoffer, victims of the Achille Lauro incident.[267] Speaking on behalf of the Leon and Marilyn Memorial Foundation of the Anti-Defamation League, Ms. Klinghoffer stated that S. 2465 serves both symbolic and practical purposes.[268] On a global arena, the bill would support criminal sanctions for international terrorist acts against U.S. citizens, while at the same time, send a clear signal that Americans will not tolerate being the victims of terrorism.[269] Additionally, the bill would exhibit the legislature's commitment to fighting terrorism.[270] On a practical level, the bill would provide U.S. plaintiffs with clear statutory solutions.[271]

Ms. Klinghoffer reviewed the difficulties which her family had in filing suit against the PLO.[272] Since U.S. statutes did not provide an explicit civil cause of action against terrorists, the Klinghoffers were forced to litigate numerous procedural issues.[273] The Klinghoffers finally obtained a ruling allowing for jurisdiction over the terrorist group, but only after much difficulty.[274] The aforementioned bill would cure present deficiencies in U.S. law by also allowing civil suits against state-sponsors of terrorism.[275] Additionally, the bill would provide recovery of treble damages as well as permit the recovery of attorney fees.[276]

The next family member of a victim of terrorism to testify on S. 2465

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264. *Id.*
265. *Id.* at 2.
266. Hearings on The Anti-Terrorism Act of 1990, Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice, July 25, 1990, (statement of the Leon and Marilyn Klinghoffer Memorial Foundation of the Anti-Defamation League) [hereinafter Memorial Foundation]; Statement of Rosemary Wolfe, [hereinafter Wolfe]; and Statement of Paul S. Hudson [hereinafter Hudson].
267. Memorial Foundation, *supra*, note 266, at 1.
268. *Id.* at 1-2.
269. *Id.* at 2.
270. *Id.*
271. *Id.*
272. *Id.* at 2.
273. *Id.* at 4.
274. *Id.*
275. *Id.* at 4.
276. *Id.*

was Rosemary Wolfe.[277] Ms. Wolfe was the stepmother of Miriam Wolfe, a twenty-year-old college student who was one of the 269 passengers aboard Pan Am 103 when it blew up over Scotland in 1988.[278] In Ms. Wolfe's view, prosecution and punishment of terrorists and their state-sponsors are often not pursued by the U.S. government for political reasons.[279] For instance, Ms. Wolfe noted that although the "smoking gun" from Pan Am 103 can be traced to both the government of Iran and Ahmed Jibril, it is a lack of political resolve which prevents these terrorist perpetrators from being brought to justice.[280] The lack of faith in the U.S. government's will to adequately punish terrorists led her to conclude that "[f]amilies of the victims of terrorism need . . . civil recourse in the courts. For this may be our only recourse."[281]

Another group representing the families of victims of Pan Am 103 described their support for S. 2465.[282] Mr. Paul Hudson testified on behalf of the families and noted that S. 2465 would empower victims of terrorism and break down the shields which have protected terrorists from U.S. civil justice.[283] Furthermore, Mr. Hudson stressed his concern that the U.S. government should act as co-plaintiff in civil litigation against terrorists, although control of the suit should remain with the victims' families.[284] Without the strict support of this legislation, as well as U.S. government approval, subsequent suits against extra-legal force could yield "tragedy as well as frustration."[285]

2. Department of State

The Department of State's position on S. 2465 was presented by Mr. Alan J. Kreczko, Deputy Legal Advisor.[286] Mr. Kreczko noted that the benefits of the Grassley-Heflin bill are manifold.[287] First, the legislation will give victims of terrorism civil remedies in U.S. courts, and present

277. Wolfe, *supra* at 266.

278. *Id.* at 1.

279. *Id.* at 2-3.

280. *Id.* "Mr. Sofaer, legal adviser to the Secretary of State from June of 1985 until last month, acknowledges that Iran had responsibility in the bombing of Pan Am 103 over Lockerbie on December 21, 1988. Yet, for the past year and a half our government has refused to point the finger of blame. The madmen who murdered our precious children and all our love ones, including my stepdaughter Miriam Wolfe, go free and unpunished. In the process, we refuse to deal with Iran's involvement. Can Iran's involvement in the bombing of Pan Am 103 be acknowledged by U.S. officials only once they have resigned?" Letter to the Editor, Wolfe, *Denying Iran's Role in Pan Am Flight 103*, Wash. Post, July 13, 1990, at A20.

281. Wolfe, *supra* note 266, at 3.

282. *See* Hudson, *supra* note 266.

283. *Id.* at 1.

284. *Id.* at 2.

285. *Id.*

286. Hearing on the Anti-Terrorism Act of 1990, Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice, July 25, 1990, Alan J. Kreczko, Deputy Legal Advisor [hereinafter Kreczko].

287. *Id.* at 5.

disincentives for terrorists.[288] Consequently the breadth of statutory tools against terrorism would be augmented. Second, the potential of civil liability and asset confiscation could deter terrorist groups from both soliciting and maintaining assets in the U.S.[289] Third, the Grassley-Heflin bill could be mimicked by other national legislatures, thereby expanding international resolve against terrorism.[290] Fourth, this civil cause of action could be pursued in instances when criminal prosecution, due to a higher evidentiary standard, would be precluded.[291]

While acknowledging general support for this legislation, Mr. Kreczko asserted that further revisions were needed before the State Department could fully support the bill.[292] More specifically, Mr. Kreczko expressed his doubts about the practicability of the legislation, since he believes that few terrorists could be caught travelling to the U.S. or holding assets in U.S. based banks.[293]

The major concerns, as expressed by Mr. Kreczko, are credible and weighty.[294] Serious concern exists regarding the possibility that the Grassley-Heflin bill would be used in suits against sovereign nations and their officials.[295] Thus, the State Department favored the addition of a provision, section 2336(b), which would prohibit the bill from applying to foreign states, defined under the Foreign Sovereign Immunities Act as well as "any offices or employees thereof."[296] The State Department's rationale was several fold.[297] Most obviously, the feasibility of civil suits in U.S. courts against foreign countries or officials, based on their alleged terrorist acts, could generate severe terrorism against U.S. interests, including U.S. allies.[298] A pronouncement by U.S. courts over foreign states would be highly disfavored by a majority, if not all, of the foreign states.[299] Moreover, Mr. Kreczko argued that such jurisdiction is violative of the international principle of sovereign immunity recognized by U.S. law.[300] He similarly argued that a provision must be placed in the Grassley-Heflin bill which would prevent plaintiffs from skirting through suits against foreign government officials.[301]

Another argument voiced against a change in the sovereign immunity precept vis-a-vis the Grassley-Heflin bill stems from the reciprocity of

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288. *Id.*
289. *Id.* at 5-6.
290. *Id.*
291. *Id.*
292. *Id.* at 5-6.
293. *Id.* at 6.
294. *See infra* notes 295-307 and accompanying text.
295. *Id.* at 6.
296. *Id.*
297. *Id.* at 7.
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 7-8.

other legislation.[302] For instance, foreign countries, or their citizens, as defendants to potential S. 2465 claims could respond with reciprocal statutory schemes which would ultimately serve to label the U.S. or its citizens as terrorists.[303] Another drawback to allowing civil suits in U.S. courts against nations or their officials charged with being terrorists is that such strategic and highly sensitive positions should be articulated by the U.S. government, rather than by private individuals.[304]

Finally, Mr. Kreczko explained the State Department's uneasiness with the possibility that frivolous and gadfly suits could arise based on alleged terrorist activities by foreign officials and their governments.[305] For instance, this tool could be utilized by dissident groups and others to gain publicity while at the same time harming U.S. relations with other governments.[306] Also, numerous lengthy suits initiated against foreign governments and their officials could ultimately cause a severe financial strains on them.[307]

3. Department of Justice

The Department of Justice ("DOJ") also provided its view on S. 2465.[308] Mr. Steven R. Valentine, Deputy Assistant Attorney General, Civil Division, explained that the DOJ generally supported S. 2465's design to redress harms to Americans caused by terrorists through civil litigation.[309] Yet he stated that the DOJ also had reservations concerning several provisions of the Grassley-Heflin bill.[310] This apprehension dealt with those suits that could result in conflicts between civil actions by private citizens and the law enforcement efforts of the United States.[311]

The DOJ feared that civil suits proposed under 18 U.S.C. section 2333 of the bill would obstruct criminal litigation.[312] Civil suits under the bill would involve the testimony of vital government witnesses who could compromise ongoing investigations or prosecutions.[313] Moreover, during discovery proceedings, delicate information could be exposed, and prose-

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302. *Id.* at 8.
303. *Id.*
304. *Id.* at 8-9.
305. *Id.* at 9.
306. *Id.*
307. *Id.*
308. Hearings on the Anti-Terrorism Act of 1990, Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice, Steven Valentine, Deputy Assistant Attorney General, Civil Division, July 25, 1990 [hereinafter Valentine].
309. *Id.* "We support the major concepts embodied in S. 2465. The Department [of Justice] supports legislation to provide a new civil remedy against terrorists and a federal forum for the families and relatives of victims to pursue claims for compensatory damages. Such a cause of action will assist in compensating victims, and have a deterrent effect on the commission of acts of international terrorism against Americans." *Id.* at. 6.
310. *Id.* at 7.
311. *Id.* at 7.
312. *Id.*
313. *Id.*

cutors would be forced to reply to time consuming civil discovery requests.[314] Thus, the DOJ proposed that a provision be included in the bill to allow "the Attorney General to certify that discovery of the government's criminal investigative file in a terrorist incident . . . will compromise the criminal investigation or national security interests."[315] Such a certification would be forwarded to the court where the civil suit would be pending and thus preclude the discovery of such information.[316]

Further safeguards proposed by the DOJ include amendments which would insure that, if a civil cause of action interferes with national security interests or a returned indictment concerning the same amendment as the civil action, "the Attorney General can, upon good cause shown, request the court were [sic] the civil litigation is pending to stay that litigation until completion of the criminal proceedings or the elimination of the predicate national security interest concern."[317] The DOJ also recommended that the Attorney General should have the authority to serve complaints and summons in civil suits.[318] Potential detriment could result, however, since the Attorney General's participation in civil suits would be limited. A stay of civil litigation would not exclude the commencement of a lawsuit within the statute of limitation period proposed in 18 U.S.C. section 2335.[319] Additionally, a stay of the civil suit would actually assist the U.S. plaintiff because he could take advantage of proposed estoppel terms of 18 U.S.C. section 2333(b).[320]

Furthermore, the DOJ echoed the State Department's position that the bill should neither apply to governments nor their officials.[321] The DOJ also stated that S. 2465 provisions which permit jurisdiction against foreign nation's officials to sue derivatively for acts of the foreign state must be modified. The DOJ also shares the State Department's concern about the potential for reciprocal action by other nations.[322]

The DOJ proposed two other minor additions. First, it recommended that district courts should have original and exclusive jurisdiction in suits falling under 18 U.S.C. section 2333.[323] Second, it proposed to modify 18 U.S.C. section 2333 to permit the decedents, survivors, and heirs of terrorist victims, as well as those individually injured, to bring suit.[324]

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314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 8.
318. *Id.*
319. *Id.*
320. *Id.* at 9.
321. *Id.* The Foreign Sovereign Immunities Act limits federal court jurisdiction against foreign countries, based on tort damages, only if they arise from "personal injury, or death. . . occurring in the United States." 28 U.S.C. § 1605(a)(5) (1988).
322. Valentine, *supra* note 308, at 9.
323. *Id.* at 10.
324. *Id.*

4. Academic Testimony

Further comments on S. 2465 were provided by Professor Wendy Perdue of Georgetown University Law Center.[325] Prof. Perdue's comments centered on jurisdictional issues.[326] This technical advice focused on defendants in litigation, venue, and *forum non conveniens*.[327] Prof. Perdue noted that recovery of damages from terrorists will be related to the scope of reachable assets in the United States.[328] She stated that if a reasonable recovery is envisioned, liability must reach "foreign governments or government run enterprises that engage in or support terrorism," rather than just the individual terrorist perpetrators.[329] Prof. Perdue acknowledged that such a scenario would require modifications to the Foreign Sovereign Immunities Act.[330]

Prof. Perdue further remarked that suits could be brought, *inter alia*, where "all plaintiffs reside."[331] Since a provision could result in duplicate cases being tried separately, Prof. Perdue recommended that a preferable venue scheme would be "where any plaintiff resides."[332] Similarly, she found fault in the bill's language that "[venue is proper where] the defendant resides, is found, or has an agent."[333] She suggested that jurisdiction should be defined as the place "where any defendant resides or is found."[334] Prof. Perdue explained that there is a lack of clarity in the language relating to where the terrorist would be served with process.[335] Furthermore, she suggested that the service of process provision would be amended to read as follows: Proper service exists in any district where the defendant resides, is found, or has an agent.[336] Finally, Prof. Perdue stated that the *forum non conviens* provision, section 2334(c), would revise the confusing alternative forum guidelines ("mere convenient or more appropriate") to the standards proffered in *Gulf Oil Corp. v.*

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325. Hearing on the Anti-Terrorism Act of 1990, Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice, Professor Wendy Perdue, July 25, 1990.

326. *Id.* at 6-8.

327. *Id.*

328. *Id.* at 6.

329. *Id.* at 7.

330. *Id.*

331. *Id.*

332. *Id.* at 8. "Suppose, for example, a passenger from New York and one from New Jersey are both injured in the same hijacking incident. It would seem sensible and efficient for these two passengers to join together in one suit and if they did join into one suit there is no reason why they should not be able to sue in either New York or New Jersey but only where "the defendant resides, is found, or has an agent." This means that if the defendant were not in the United States then it would be impossible for the New Jersey and New York passengers to join together in one suit because there would be no place where venue was proper."

333. *Id.*

334. *Id.* at 9.

335. *Id.*

336. *Id.*

Gilbert.[337]

C. *S. 2465 as Passed in October 1990*

On October 1, 1990, the Senate unanimously passed the revised version of S. 2465, discussed on July 25, 1990, at the Senate Subcommittee on Courts and Administrative Practice.[338] The bill was passed as an amendment to the Military Construction Appropriations Bill.[339]

As the preamble to S. 2465 indicates, the bill "provide[s] a new civil cause of action in federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals."[340] The bill supplements existing legislation which extends criminal sanctions to international terrorist activities.[341] Specifically, proposed 18 U.S.C. section 2333(a), would permit U.S. nationals, or their estates, survivors, or heirs, whose person, business, or property has been hurt due to an international terrorist incident, to sue in federal district court and obtain treble damages, as well as the cost of the litigation, in conjunction with attorney's fees.[342] Moreover, special maritime or territorial jurisdiction is provided through 18 U.S.C. section 2334(b).[343]

The bill provides that proper venue over potential defendants is "where any plaintiff resides or where any defendant resides or is served, or has an agent."[344] The bill also states that service of process may occur "where the defendant resides, is found, or has an agent."[345] Witnesses in a 18 U.S.C. section 2333(a) cause of action could also be served in the same procedure as the defendant.[346] These broad provisions would substantially ease prospective plaintiff's jurisdictional and venue problems.[347] Moreover, said provisions address Prof. Perdue's concerns with the ambiguous language of early versions of the Grassley-Heflin bill regarding service of process.[348]

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337. *Id.* at 10; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L.Ed.2d 1055 (1947).

338. *See* Press Release, Sen. Grassley, "Grassley Anti-Terrorism Bill Clears Senate," Oct. 2, 1990 [hereinafter Press Release]; Letter from W. Lee Rawls, Assistant Attorney General to Rep. Bill Lowery (Oct. 17, 1990) at 1-2 [hereinafter Rawls]; Letter from Richard G. Darman, Director, Office of Management and Budget to Rep. Silvio Conte (Oct. 12, 1990) at 2 [hereinafter Darman].

339. *Id.*

340. Anti-Terrorism Act of 1990, S. 2465, as passed Senate, Oct. 1, 1990, preamble. Obtained from Senate Judiciary Committee, Subcomm. on Courts and Administrative Practice [hereinafter Antiterrorism Act].

341. *See supra* notes 255, 263 and accompanying text.

342. Anti-Terrorism Act, *supra* note 340, §2333(a).

343. *Id.* §2334(b).

344. *Id.* §2334(a).

345. *Id.* §2334(c).

346. *Id.* §2334(a).

347. Once venue difficulties are lessened, fewer obstacles will exist to U.S. nationals who sue terrorists in the U.S. as the Anti-Terrorism Act of 1990 would have provided.

348. *See supra* notes 335-67, and accompanying text.

Prof. Perdue's misgivings relating to *forum non conveniens* also appears to have been addressed by proposed section 2334(d).[349] For instance, this provision would provide that a court not dismiss a section 2333 action merely because a plaintiff chose an inappropriate or inconvenient forum.[350] However, if the court determines that three thresholds have been met, then dismissal is proper.[351] The circumstances which justify expulsion of the suit include: "(1) The action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants; (2) the foreign court is significantly more convenient and appropriate; and (3) [the] foreign court offers a remedy which is substantially the same as the one available in the courts of the United States."[352] It is necessary to note that proposed sections 2334(d)(1)-(3) are drafted in a highly pro-plaintiff, anti-case dismissal approach. A case in point is present under section 2334(d)(3)'s language that would not permit dismissal unless the plaintiff could obtain similar remedies elsewhere.[353] At the same time, it is unlikely that U.S. nationals could receive civil damages for acts of international terrorism committed against them, their property or business.[354] Additional ammunition to a plaintiff's cause of action is available under 18 U.S.C. section 2333(a). That provision prevents a defendant from disclaiming culpability relating to essential elements of a criminal charge, once he has been found guilty in a criminal proceeding.[355] This benefits plaintiffs by using criminal actions to strengthen civil suits.[356]

The revised Senate bill tried to sooth some of the concerns regarding possible foreign reciprocal legislation as well as foreign sovereign immunity.[357] For instance, in order to quell fears that S. 2465 would be utilized by some parties with suits alleging "war crimes," proposed 18 U.S.C. section 2337 did not permit proposed suits "for injury by reason of an act of war."[358] Also to avoid potential difficult foreign policy concerns in suits against the U.S. government, its officials, foreign governments and its officers, proposed section 2337 provides a blanket provision denying suits against government officials.[359] It provides in pertinent part:

> No action shall be maintained . . . against (1) the United States, or an

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349. *See supra* note 338 and accompanying text; Anti-Terrorism Act, *supra* note 340, § 2334(d).

350. Antiterrorism Act, *supra* note 340, §§ 2333, 2334(d).

351. *Id.*

352. *Id.* § 2334(d).

353. *Id.* § 2334(d)(3).

354. *See supra* notes 302-3 and accompanying text. Since the Department of State fears that the U.S. (or its officials) will be sued under reciprocal legislation, and such an existing foreign law was not cited, it is presumed that they do not exist.

355. Anti-Terrorism Act, *supra* note 340, § 2333(a).

356. *Id.*

357. *See supra* notes 302-3, 321-2, 354 and accompanying text.

358. *Id.*; Anti-Terrorism Act, *supra* note 340, § 2337.

359. Anti-Terrorism Act, *supra* note 340, § 2337.

> officer or employee of the United States or any agency thereof acting within his official capacity or under color of legal authority; or (2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his official capacity or under color of legal authority.[360]

Notwithstanding the fact that the Bush Administration agreed with the basic thrust of the Grassley-Heflin bill in October 1990, it repeated concerns expressed by the Department of Justice and Department of State officials.[361] After S. 2465 was incorporated into the Military Construction Appropriations Act, the Department of Justice reiterated its opposition to the proposed anti-terrorism legislation.[362]

These sentiments were expressed by Assistant Attorney General Rawls, reaffirming Deputy Assistant Attorney Valentine's testimony in calling for a provision in the bill permitting the Attorney General certificate to preempt discovery of prosecution files on terrorist incidents when disclosure would compromise an investigation.[363] Furthermore, the Assistant Attorney General Rawls suggested adding a provision permitting the Attorney General, upon good cause, to request a judge to delay a civil suit until the summation of the criminal case.[364] Indeed, such a stay would be requested only when the criminal case is based on the same terrorist incident as the civil suit.[365]

The House of Representatives version of S. 2465 was introduced by Rep. Feighan and Rep. Hyde.[366] Due to sharp objections by Rep. Brooks, Chairman of the House Judiciary Committee, "the Anti-Terrorism Act of 1990" was abandoned in committee.[367] Despite this defeat and some shortcomings,[368] another legislative measure, encompassing similar components of S. 2465, will likely be introduced in the next Congress.[369]

IX. RECENT INTERNATIONAL RESPONSE TO MARITIME TERRORISM

Following the grave attack of the Achille Lauro, governmental discussions commenced to establish another response to international terrorism, an agreement on maritime terrorism.[370] Rather than mimicking the defi-

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360. *Id.*

361. *See* Rawls, *supra* at 339; Farman, *supra* at 339.

362. Rawls, *supra* note 339, at 1-2.

363. *Id.*

364. *Id.* at 2.

365. *Id.*

366. Undated and untitled synopsis of status of S. 2465 and House of Representatives version of The Anti-Terrorism Act of 1990. Obtained from Senate Judiciary Committee, Subcomm. on Courts and Administrative Practice.

367. *Id.*

368. For strengths and weaknesses of legislation *see supra* notes 251-360 and accompanying text.

369. Telephone interview with Diane Cohen, Minority Counsel, Senate Judiciary Comm., Subcomm. on Courts and Administrative Practice (Oct. 17, 1990).

370. Treves, *The Rome Convention for the Suppression of Unlawful Acts Against the*

nitional focus of piracy in the 1958 Geneva Convention and the 1982 Law of the Sea Convention, the I.M.O. Convention outlined the arena in which states should have jurisdiction.[371] The I.M.O. Convention also outlined the activities that individual states had to sanction,[372] and provided the rule that required states, upon finding a maritime offender, to either prosecute or extradite.[373]

The preamble to the I.M.O. Convention stipulates that the document is drafted in order "to develop international cooperation between States in devising and adopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators."[374] Article 3 of the I.M.O. Convention sets out the offenses by first describing the substantive offense and then establishing a secondary list which includes threatening, attempting, and being an accomplice or an abettor to the defined offenses.[375] Article 3 of the I.M.O. Convention states:

> 1. Any person commits an offence if that person unlawfully and intentionally:
>
> (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
>
> (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
>
> (c) destroy a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
>
> (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
>
> (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
>
> (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
>
> (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (a) to (f).[376]

Article 3, paragraph 1, subparagraph g, would apply to the Achille Lauro case, in light of the brutal murder of Mr. Klinghoffer. Such an

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Safety of Maritime Navigation, MARITIME TERRORISM, *supra* note 25, at 69-90; Halberstam, *supra* note 75, at 270.

371. I.M.O. Convention, *supra* at 75.

372. *Id.*; Treves, *supra* note 370, at 70-1.

373. Treves, *supra* note 370, at 79.

374. I.M.O. Convention, *supra* note 75, at preamble.

375. *Id.* art. 3.

376. *Id.*

international legal framework to fight maritime terrorism is indeed important.

With reference to the location of the ship during a terrorist attack, article 4 provides that the I.M.O. Convention is triggered "(1) if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States . . . [or] (2) when the offender or the alleged offender is found in the territory of a State party other than the State referred to in [the earlier portion of the sentence]."[377] Thus, the international nature of a voyage, as well as its direction pursuant to article 4 of the I.M.O. Convention, is established by the overall itinerary of its voyage.[378] Additionally, paragraph 2 provides that an alleged criminal is located on a vessel which is "navigating (or is scheduled to navigate) at the time the offence was committed."[379]

Another pertinent article of the I.M.O. Convention is article 6, which outlines when a state has jurisdiction over the offender. This Article provides:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence was committed:
>
> (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
>
> (b) in the territory of that State, including its territorial sea; or
>
> (c) by a national of that State.
>
> 2. A State Party may also establish its jurisdiction over any such offence when:
>
> (a) it is committed by a stateless person whose habitual residence is in that State; or
>
> (b) during its commission a national of that State is seized, threatened, injured or killed; or
>
> (c) it is committed in an attempt to compel that State to do or abstain from doing any act.[380]

Article 6 of the I.M.O. Convention provides use of several of the five bases of jurisdiction available in international law, namely: nationality, ("determining jurisdiction by reference to the nationality of the offence"); territoriality ("determining jurisdiction by reference to the place where the offence is committed"); protective principle ("determining jurisdiction by reference to the national interest injured by the offence"); passive personality ("determining jurisdiction by reference to the nationality or national character of the person injured by the offence"); and universality

377. *Id.* art. 4; Treves, *supra* note 370, at 73-4.
378. *Id.*
379. *Id.*
380. I.M.O. Convention, *supra* note 75, art. 6.

principle ("determining jurisdiction by reference to the custody of the person committing the offence").[381] In article 6, paragraphs 1(a) through (b) and 2(a), it appears that the territoriality principle is cited. In contrast, it seems that the nationality concept is enunciated in article 6, paragraph 1(c). Also, in article 6, paragraph 2(b) the passive personality precept is utilized. Lastly, in article 6, paragraph 2(c), the protective principle is implemented.[382] It must be remembered that the crime of piracy, although not mentioned by the I.M.O. Convention, is viewed by most nations as affording universal jurisdiction.[383]

Turning again to the Klinghoffer case, under article 6, paragraph 2(b), the U.S. would have jurisdiction over the Achille Lauro.[384] Thus, the I.M.O. Convention greatly strengthens government responses to maritime terrorism by providing a means for criminal prosecution of the perpetrators of such acts.[385]

Also, article 8 of the I.M.O. Convention deals with the obligation or authorization of a nation to establish jurisdiction over an incident.[386] Article 8 provides that "[t]he master of the ship of a State Party (the "flag State" may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offenses set forth in article 3."[387] Despite hortatory language, this provision codifies the requirement that alleged offenders be handed over to proper authorities for prosecution. Furthermore, article 8 describes that refusal to accept delivery of the offender must be explained in full by either the flag nation or receiving nation.[388]

As in article 7 of the Hague Convention on Suppression of Unlawful Seizure of Aircraft and the Montreal Convention Against the Taking of Hostages, article 10 provides that a State in which an offender is found must either extradite him or immediately initiate prosecution.[389] As a result, the obligations of a state signatory to the I.M.O. Convention would be to either commence criminal proceedings against a terrorist offender or extradite to a nation which would prosecute. If the I.M.O. Convention would have been in force at the time of the Achille Lauro incident, and had Egypt been a signatory, then Egypt's obligations under international law would have been strictly set out.[390] Keeping in line with the provisions of article 10, article 11 states that extradition can occur either with or without an extradition treaty.[391]

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381. Halberstam, *supra* note 75, at 296 n. 12.
382. *Id.*
383. *See generally* McCredie, *supra* note 98, at 443-5.
384. I.M.O. Convention, *supra* note 75, art. 6.
385. *See generally id.*
386. *Id.* art. 8; Treves, *supra* note 370, at 81.
387. I.M.O. Convention, *supra* note 75, art. 6.
388. *Id.*
389. Treves, *supra* note 370, at 81-2.
390. I.M.O. Convention, *supra* note 75, art. 11.
391. *Id.*

In sum, the I.M.O. Convention is a vital and necessary step that the world community has taken to demonstrate its resolve against terrorism.

X. CONCLUSION

The foregoing discussion and analysis leads to several conclusions. First, the increasing role of civil litigation to respond to terrorism is both real and vital. As the *Klinghoffer* litigation illustrates, terrorist groups' accountability can be set forth effectively through the civil courts. Second, U.S. legislative proposals, such as S. 2465, will certainly strengthen the legal tools available to the victims of terrorism. Third, multilateral legal instruments such as the I.M.O. Convention, are additional guidelines which can be used to combat terrorism. In sum, national and multilateral legislation, rooted at decreasing the specter of terrorism, must continue to flourish in the 1990's. Otherwise, the perpetrators of extra-legal violence will continue to carry out their destructive activities, and thereby threaten the fabric of modern society.