Taking and Killing of Hostages: Coercion and Reprisal in International Law

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The Taking and Killing of Hostages: Coercion and Reprisal in International Law

I. Introduction

The taking and killing of hostages has long been an accepted component of armed conflict. Because the taking of hostages has recently become a primary component of politically motivated terrorism, a cogent overview on an international scale of the legal consequences of such actions by belligerents, pursuant not only to a state of war (international armed conflict), but to status mixtus (armed conflict in which some aspects of peaceful relations remain extant), and to internal armed conflict (revolution, insurgency, or belligerency) is essential to the development and application of remedial or preventative measures by belligerents and non-belligerents alike. These consequences are delineated with some particularity in the rules and principles of international customary law as it is applied to conflict conceded by the combatants to be international in scope. Status mixtus and internal armed conflict, which are mutant types of armed conflict spawned by the nuclear age with its attendant paranoia concerning universal annihilation and which are not classified as major wars, are also amenable to an efficacious application of the international law of war and neutrality.¹

In order to lay a foundation on which legal conclusions may validly be predicated, this discussion begins with a synopsis of the historical development of the practice of taking hostages and continues with an analysis of Russian, Arab, Israeli, German, Italian and American experiences in light of their teleological bases, their ideological foundations, and their psychological orientation with regard, not to the victims per se, but to the victims in the larger sense, i.e., the populace to be terrorized and influenced. This tripartite discussion will show both that the denomination of violence as terrorism presently assumes political considerations as a primary rationale for that violence and that terrorism is merely a different form of “criminal” violence which its perpetrators try to ennoble by recourse to social theorization, political philosophizing, or fierce dedication to the necessity of resort to ideologically symbolic duress. It is at this point that the “necessities” of war and the “rights of humanity” conflict. It is here that the laws of war and neutrality and socio-political concerns are juxtaposed. The result is all too often violence against civilians who are neither individually nor solidairement² responsible for the situation which has precipitated their detention or execution. Power is thus established by horrifying the populace, by shocking the sensibilities of civilized peoples. Force is effectively exercised against many by the victimization of a few. To deny that this is negative utilitarianism and

¹ The decisions of post-World War II war crimes tribunals are examples of derivative and concretized application of international rules and principles. Such remedial steps are post facto because such decisions rendered during the course of an ongoing conflict would be without the requisite jurisdiction.

² Solidairement is a French term connoting joint and several liability.
true military economy is to be naive. The only possible grounds for condemnation of these acts derive from those elusive quanta, morality and legality.

In analyzing the validity and effectiveness of the reactions of civilized people to these terroristic activities, the same criteria must be employed. Although it is fortunate that people do react, it is unfortunate that the reaction is not always equal and opposite in nature, but rather equal or greater and similar. In short, violence very consistently does beget violence. Morality and legality at this point are problematical.

For the purposes of this note, it is the non-violent, i.e., the systematized and self-styled legal reactions, that must be scrutinized to determine the state of international law with regard to the taking and killing of hostages. Consensual agreement among civilized nations which are considered declaratory of international customary law will be one of the primary focal points of this investigation. Because such consensual agreements regarding armed conflict go back to the beginnings of written history, an arbitrary selection of the years 1899 to 1949 has been made. This time span encompasses three sets of conventions of unquestionable importance and timely relevance: the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949. In addition, the internationally "criminal" nature of the taking and killing of hostages will be evaluated with reference to the proceedings of the International Military Tribunal (I.M.T.) at Nuremberg—specifically the French presentation by Monsieur De Menthon and Monsieur Dubost (Deputy Chief Prosecutors for the French Republic) of the prosecution's case on the counts of war crimes stricto sensu and crimes against humanity—and with reference to the proceedings of the United States Military Tribunal (U.S.M.T.) at Nuremberg in the Hostages Trial.

Finally, the state of the law today will be discussed from the following vantage points: (1) the relative universality of the Nuremberg Principles as indicated by the relevant 1946 resolutions of the General Assembly of the United Nations, the Genocide Convention of 1948, the codification of those principles by the International Law Commission of the United Nations, modifications introduced in the military law of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America, and courses of action followed in subsequent military conflicts; and (2) the major relevant consensual agreements entered into from 1948 to 1973 bearing on the protection

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3 J. B. Scott, The Hague Conventions and Declarations of 1899 and 1907 (1915).
4 Conventions for the Protection of War Victims, Cmdn. 550 (1953).
5 Stricto sensu in this context refers to war crimes which, in general, would also be regarded as crimes in municipal law, i.e., murder. A war crime may also be a crime against humanity if it is perpetrated on a large scale, i.e., mass murder.
6 5&6 United Kingdom, H.M.S.O., The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg (1946) [hereinafter cited as I.M.T., Nuremberg].
9 Id. at 528.
10 Id. at 530.
11 Id. at 534.
12 Id. at 539.
of the innocent individual from detention or death at the hands of belligerents or political terrorists.

II. Historical Background

The practice of taking or exchanging hostages is an ancient one and was originally "a means of insuring the execution of treaties, armistices, and other agreements" or a punishment or reprisal. The feature common to all types of hostages is that individuals who are not themselves responsible for the action or omission at issue are made to suffer restrictions of their personal freedom.

The Roman historian Livy mentions the taking of hostages in the course of the very early Roman campaigns against neighboring Italian cities. Although the accuracy of detail in Livy's account is suspect, the general theory of the taking of hostages on both a unilateral and a consensual basis at that early date is evidently reliable. One of the stories, particularly interesting for its humanitarian sensibilities, details the refusal of a prominent Roman general to accept as hostages young boys traitorously offered to the Romans by their tutor. When the tutor pointed out to the general that the detention of the boys would ensure the fall of their parents' besieged city, the general replied by freeing the boys with the statement, "We bear not our arms against children." This is one of the earliest written evidences of a conflict between the standard of civilization and military necessity being resolved in favor of the former.

Professor Khadduri spoke of the practice of taking hostages in antiquity in his treatise on Islamic law. He stated that to ensure the execution of the terms of treaties, hostages (rahā'in) were often given or exchanged. The system of hostages was common among the nations of antiquity and was practiced in ancient Greece and Rome. Ancient practice was such that, if the treaty obligations were fulfilled, the hostages were returned unharmed to their country. If, however, the treaty was violated, the hostages were regarded as prisoners of war and sometimes were subjected to certain measures of hardship. The Muslims regarded hostages as inviolable and were treated with consideration and kindness. If the treaty was violated and war was declared the Muslims sent back the hostages to their country; but if war was not declared the hostages were either kept at hand or sent back home.

As in the Roman example, the avowedly consensual and strictly utilitarian nature of the hostage taking tradition seems, in its ultimate application, i.e., the killing of the hostages for "contractual" breaches, to have been limited by humanitarian concerns. This, too, is early evidence of an exemplary restraint in the practice, if not the theory, of hostage treatment.

Until the middle of the eighteenth century hostage taking remained preponderantly consensual in nature. The Peace Treaty of Aix-la-Chapelle of 1748

15 Id.
16 Livy, *The History of Rome*.
was the last time that the exchange of hostages between European powers was consensually ritualized. The British and French colonial frontiers, however, were the scenes of such continued stipulations for another century. This frontier phenomenon is predicated directly on the inherent nature of mercantilism coupled with colonial expansion. Investment required protection, as did colonists, against the depredations of native populations which often had the untoward inclination to refuse to take to heart the appeal of foreign based imperialism or the religious proselyting which followed hard on its heels. The teleology of the English and French activity was to take and hold the colonies with a minimum of European bloodshed for the greater pecuniary glory of their respective monarchs. Ideologically, the colonizers were well-armed with the two-pronged spear of laissez-faire and Christianity. The subjugation of the native population in accordance with this prevailing ideology was achieved in part by hostage taking. Although consensual elements remained in these frontier hostage transactions, the embryonic stages of politically motivated duress which developed into hostage taking qua terrorism as it is today can be clearly detected.

As the consensual element of the transaction was dwindling in importance, the killing of the hostages was increasingly regarded as barbaric. The failure of this practice to prevent breaches of agreements led rapidly to its obsolescence as an effective pressure point in international bargaining. Declarations of war, reprisals or national action under the rubric of self-defense, all of which invariably led to the unilateral taking of hostages, became the order of the day in reaction to or in avoidance of such breaches, but the killing of the hostages taken was avoided. For example, Napoleon unilaterally took hostages during his Italian campaigns as a politically expedient means of insuring the allegiance of the Italians, but deportation to France seems to have been the only adverse action taken against the hostages in cases of civil resistance. In this century, however, the Russian revolution and the ensuing totalitarian state, the Arab-Israeli conflict, the German aggressions in World Wars I and II, the Symbionese Liberation Army, and the Italian Brigante Rosse are concrete examples of the proliferation of the taking and killing of hostages as a tool of political coercion and convenience used by groups which meet concerted opposition to the goals and ideologies they have espoused.

Solzhenitsyn, in his book *The Gulag Archipelago*, paints a vivid picture of the brutal excesses committed by the Soviet regime, particularly under Lenin, including indiscriminate arrests which amounted to hostage taking. This and subsequent judicial murders were calculated to intimidate vocal intellectuals. The taking of peasant hostages from communal farms ensured good harvests. All of these excesses prevented the "wrecking" of the Soviet economy and social structure. He emphasizes repeatedly that Lenin espoused a policy of terrorism as the most effective form of political manipulation of the psychology of a populace. Any who attempted to derogate their allegiance to the Party on account of this strategy were not merely *persona non grata*, but enemies of the state.

18 See Schwarzenberger, supra note 8, at 235 n.6.
19 Id. at 235.
20 Id.
21 See Garner, supra note 13, at 305.
par excellence. Lenin indulged in the paradox of nominating such dissenters both naive and criminal. The teleology of this attitude was professed to be the dictatorship of the proletariat. In actual fact, it was simply the aggrandizement and consolidation of power in one man. The ideological basis for this wholesale terrorization lies in the Communist theory that revolution (and the attendant violence) are not only to be condoned, but to be considered necessary to achieve the "true" world order. The psychological effect on the intellectuals and on the peasants is a study in the dichotomy of human nature. The intellectuals continued to be vocal and turned to Western society for a hearing. The peasant population, on the other hand, neither worked harder in the fields to produce the required good harvests nor retaliated. The effectiveness of hostage taking in the U.S.S.R., therefore, seems to have been limited.22

The Arab-Israeli conflict provides an even more illustrative example of political terrorism in an armed conflict not characterized as an international war. In their struggle for supremacy, both Arab nationalists (the Palestinian Liberation Organization) and Zionists (the Yishuv or Jewish community in Palestine) supplement their frontal attacks with international airline hijacking and internal disruption of public and private transport. The taking and killing of hostages characterize these activities. In this conflict, well-developed and self-righteous teleological attitudes are accompanied by appropriately self-serving condemnations of terrorist actions by both sides. Two short quotations will be illustrative. In the first, a Zionist speaks for the Jews and their homeland: "After all it is the relentless and indiscriminate waves of terrorism initiated, planned and executed by the the PLO and other extremist Palestinian Arab nationalists that have consistently and massively blocked any attempt at rapprochement between the antagonists, let alone a durable peace."22

In the second, an equally righteous Arab nationalist postulates that: "the continuance of indiscriminate murder and condoned terrorism can only lead to forfeiture by the community24 of all right in the eyes of the world to be numbered among civilized people."26 The basic premise of both quotations—that terrorism is barbarous—makes both statements acceptable. Much of the remaining language is, however, self-serving and inflammatory. The word of most interest in both statements is "indiscriminate" as a modifier of "terrorism." This attempt to recognize and articulate degrees of violence and relativity in terroristic activity is extremely significant as an indication of a trend on the part of the wrongdoers themselves to formulate a doctrine of "responsible violence."26 The importance

22 The relevance of Soviet hostage taking may not be readily apparent because of the internal police nature of the steps taken. The Soviet government, however, pursues these measures against ostensible "counter-revolutionaries" and "wreckers" and, though both categories are transparent fabrications, any nation should be bound to apply international customary law to its treatment of its own citizens as objects of that law when the government itself has alleged the violent (armed conflict) nature of the activities of its detainees.


24 Here the Jewish community.

25 Keesing's Contemporary Archives 6 (1946-48) 9238.

26 The concept of "responsible violence" is not a strict legal doctrine although it does suggest an alternate approach to resolving the problem of hostage taking. In essence, "responsible violence" connotes a modification of the terrorists' philosophy based on political expedience and not morality. In order for terrorism to be effective it must at the same time
of "honor among thieves" must never be underestimated. It may, in the end, be the ultimate solution; to shame a kidnapper into releasing his hostage is just as effective as to do so by force of law.

During World War I, the Germans took hostages on an "unprecedented scale" from the civilian inhabitants of the territories occupied by their forces in order to prevent civilian uprising. One typical order was promulgated in 1914 following the German defeat in the battle of the Marne.

In order adequately to assure the safety of the troops and to guarantee a calm attitude on the part of the population of Rheims, the persons named below have been taken as hostages by the German High Command. These hostages will be hanged if the least attempt is made to create a disturbance, and if any infraction of what has been laid down has been committed, the town will be wholly or partially burned and the inhabitants hanged. On the other hand if the town keeps absolutely peaceful and calm the hostages and inhabitants will be taken under the protection of the German Army.28

In both Belgium and France, numerous hostages were taken to insure that requisitions were met, to insure that contribution demands were met, to insure shock and elicit respect based on fear. The dedication of the terrorists to their ideals must always be prominent and is the single aspect of their activity which will allow them to rationalize the auto-abortion of any single episode of planned violence—for instance the release of a hostage before demands are met or refusal to kill a hostage in spite of the failure of specified conditions. A quotation from Arafat will illustrate the position.

The overwhelming majority of the masses believe that Fateh is wise and objective. Wisdom means such proper conduct of affairs that the attainment of the objective is guaranteed. And if in saying "Fateh is moderate" some people imply that it uses violence with responsibility, this would be a source of pride to us and it would be an honor to us to be dubbed "moderate" in that sense.

We in Fateh believe that hope is one thing and reality another. Our masses cannot anymore tolerate an extremist demagogue who does nothing to change the status quo. That's why Fateh's Command always tackles matters seriously and refuses to embark on adventures. If you followed closely our march since the beginning of our armed struggle, you would note that we never relinquished any of the positions we were able to reach. Nevertheless, while holding to and safeguarding the gains we achieved, we study our next step thoroughly. We are a revolution which cannot afford a setback at present.

Some people who want to distinguish themselves from us by acting in such a way as to make the people believe that they are extremists, do so while realizing that mass reaction will be limited. We, on the other hand, are responsible for the masses. We refuse to drive the masses into positions where they cannot secure new mass gains.

We are proud of the fact that despite the world's knowledge that force has its basic role on the Arab-Palestinian field, we were able to convince the world that ours is a human revolution which respects the human being, wherever he is. I think it is about time to start speaking of responsible violence which respects the human being and which is exerted for his sake.

RECORD OF THE ARAB WORLD at 3882 (June, 1970).

Although such a concept may seem to many as much a contradiction in terms as the phrase "laws of war," it is an attempt to mitigate the negative externalities of a practice as old as history and so efficient that the U.S.M.T. took judicial notice of that very barbarous efficacy. Alleviation of the problem may come from three possible sources: the victims, the onlooking world, or the perpetrators. With the victims finding themselves between Scylla and Charybdis and the rest of the world so disorganized and timid about taking a stand against so effective a weapon, the terrorists appear to be an equally fruitful source of ameliorating activity. Even if the only step the terrorists take is to withdraw from themselves the carte blanche method, the rest of the world would find it much easier to understand and perhaps even sympathize with their goals. Abandonment of wholesale slaughter of innocents, being the forsaking of a primary weapon, might conceivably lead to a willingness to accept compromise or at least to a more civilized method of achieving the goals of war and politics.

27 See Garner, supra note 13, at 298.
28 Id. at 303.
that fines levied against communities were paid, to prevent civilian espionage, and to prevent the destruction of railways, bridges, and other strategic installations. In some instances, the hostages were marched in front of German columns to insure that the troops would not be fired upon.\textsuperscript{29} This positioning of hostages at column heads extended to protecting German troops from being fired upon by both civilian and regular military forces of the enemy. Such actions brought the Hague Regulations regarding the propriety of taking hostages for use as military deterrents directly into issue. That "the whole German policy in respect to the taking of hostages . . . was contrary to the most elementary notions of humanity and justice"\textsuperscript{30} seems evident. More specifically, that policy was based on "entire disregard of the well-established distinction between the rights of non-combatants and those of lawful belligerents and resulted in the punishment of innocent persons for acts for which they could in no way have been justly held responsible."\textsuperscript{31} The stage was thus set for the trials of the German major war criminals following World War II.

The increasing danger that hostage taking poses for modern society, and in particular for those persons in positions of wealth, influence, or notoriety, is evidenced by the Symbionese Liberation Army-Hearst incident and the Brigante Rosse-Moro incident. Societal splinter groups infatuated with radical philosophies are tempted by their smallness and lack of publicity to victimize individuals whose fame will accrue to the crime and, hopefully, to the philosophy itself. In such cases the consequent publicity and recognition attained through communications with high officials and the press make actual demands and threats and, more importantly, the fate of the hostage largely irrelevant to the perpetrators. The individual thus becomes correspondingly more vulnerable. Although these two examples are admittedly within the jurisdiction of the nations whose misfortune it is to be the situs of the crimes, the trend illustrated may well affect the philosophy and practice of hostage taking on an international scale.

A foundation having been laid by this brief synopsis of the history of hostage taking, the state of international law today as it has evolved in reaction to this sort of activity, both in consensual agreements and international judicial practice, may profitably be examined.

III. The Reaction: Consensual Agreements and International Judicial Practice—1899 to 1949

A. The Hague Conventions of 1899 and 1907

In August of 1898, the Russian minister of foreign affairs, Count Mouraviëff, circulated a proposal for discussions to limit the development of armaments and to ensure peace. A second written message indicated the Czar's desire to make use of the Naval War stipulations of the Geneva Convention of 1864 and the Land Warfare stipulations of the Declaration of Brussels of 1874. The conference, composed of delegates from twenty-six nations, met in the sum-

\textsuperscript{29} Id. at 304.
\textsuperscript{30} Id. at 311.
\textsuperscript{31} Id.
mer of 1899 at the Hague. The product of this conference was three conventions for the pacific settlement of international disputes. It was assumed that the conference would be called annually, but the fine irony of history found the prime mover, Russia, embroiled in the Russo-Japanese war in 1904. President Roosevelt’s intervention in that conflict hastened its termination and the Czar felt free to propose the second conference at the Hague. At this conference, the original three conventions were revised and ten more adopted. In addition, the final act included numerous declarations, resolutions, recommendations, and voex of moral but not legally binding force.

In the interpretation of these conventions and signed declarations Professor Scott points out that most of the conventions and signed declarations concerning war contain a clause to the effect that they only bind belligerents who have ratified them and then only if all the belligerents are contracting powers. It is therefore necessary to ascertain whether all belligerents have ratified a particular convention before pronouncing it to be in effect as regards them. It should, however, be pointed out that the failure of a belligerent to ratify a particular convention as such is not binding upon it; it does not and cannot mean that the principles of law contained in the convention may not bind the conduct of the parties. It is therefore necessary still further to ascertain whether the provisions of the convention are merely a codification of international law, although the convention itself, or this part of it may be ineffective. A careful examination of the conventions of the two conferences will show that most of their provisions are declaratory, not amendatory, of international law, and that the failure of one power or of any number of powers to ratify them is merely to be regarded as a rejection of a codified text, not as the rejection of principles of international law, which no power can reject without excluding itself from the society of nations.33

This interpretation has been subsequently endorsed by the majority of legal writers and the International Military Tribunals which handed down their judgments after World War II. The Hague Conventions are therefore declaratory rather than constitutive treaties in spite of the general participation clauses.34

The Hague Convention IV of 1907 (which was substituted for the Hague Convention III of 1899) respecting the laws and customs of war on land is the convention which is pertinent to this discussion. The preamble sets out the object of the treaty as being, inter alia, the desire to serve “the interests of humanity and the ever progressive needs of civilization.”35 Further, they specify that the document is meant “to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible.”36 With reference to interpretation of the treaty language, the preamble specifies that the wording which “has been inspired by the desire to diminish the evils of war, as far as military requirements permit, [is] intended to serve as a general rule of

32 Voex is a French term signifying "wishes" or "hopes."
33 See Scott, supra note 3, at xi et seq.
34 See Schwarzenberger, supra note 8, at 21.
35 See Scott, supra note 3, at 100.
36 Id.
conduct for the belligerents in their mutual relations and in their relations with the inhabitants."  

Finally, with regard to interpretation of the treaty in circumstances arising in the field or otherwise during the course of war, the drafters, realizing that the convention could not specifically deal with all conceivable contingencies, stated that "the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgement of military commanders."  

The de Martens Clause, a caveat re-emphasizing the inexhaustive nature of the Regulations, follows. It looks forward to the formulation of an improved set of regulations and states that until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

Articles 46 and 50, the two articles bearing directly on the issue of the taking and killing of hostages, can be examined in the context of these defined parameters.

Article 46, on which the illegality of killing hostages may be precisely based, reads in full as follows: "Family honor and rights, the lives of persons, and private property as well as religious convictions and practice must be respected. Private property can not be confiscated." Not much evaluation is needed here. If the lives of persons must be respected, killing of hostages, who by definition are not personally responsible for the incidents (whether committed or anticipated) which constitute the grounds for their arrest, is undoubtedly forbidden.

The real issue under the Regulations is the taking of hostages. The basis for a prohibition of such action is found in Article 50 which states that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible." Assuming in the first instance the drafters' intent to define such a prohibition by reference to the parameters of joint and several liability, the requisite degree of stringency with which the occupying army must examine the ostensible responsibility of the individuals in question must be determined. This standard would dictate when the occupier may validly regard the populace as closely enough connected to the acts complained of to justify their detention. Obviously an army in the field will wish to submit that any cursory evaluation of the relationship between populace and offense is sufficient to satisfy the letter of the law, or alternatively, that any act on the part of any member of the populace of the occupied nation is an automatic indication of the fact that the populace is solidairement responsible. These arguments do have superficial validity if they are considered as interpretations of Article 50.

37 Id. at 101.
38 Id.
39 Id. at 102.
40 Id. at 123.
41 See Schwarzenberger, supra note 8, at 241.
42 See Scott, supra note 3, at 124.
made in a vacuum. Fortunately those portions of the preamble quoted above refute any such "arbitrary judgment of military commanders." Mere self-serving conjecture will not suffice. A solid evidentiary base is required.

A belligerent accused of a breach of this article is likely to put forward self-defense, military necessity, reprisal, or coercion as justifications for taking hostages on the basis of a tenuous connection with the alleged offense precedent or the anticipated offense subsequent. If military necessity is urged, the provisions of the preamble provide a succinct and powerful argument against its acceptance, even without resort to the arguable contention that the contracting Parties meant to create a rule of *jus strictum* which would preclude the necessity defense entirely. The concept of reprisals and closely related *tu quoque* defense could be excluded on the basis of the interpretation that the contracting Parties intended to create consensual *jus cogens* which of course precludes resort to reprisals. Again, this is merely rebuttable speculation concerning the intent of the drafters. The justifications of self-defense and coercion can be met only by general policy considerations, i.e., the necessity for maintaining the standard of civilization against a reversion to barbarism, and not by the letter of the convention. Although it seems logical and desirable to construe the intent of the drafters to support a finding that the taking of hostages is illegal, the articles of the convention *per se* do not specifically and absolutely mandate this conclusion. The conditional inference that may be drawn from Article 50 is less than satisfactory as a legal basis for preventative or remedial action.

B. International Judicial Practice

Essential to the understanding of the Nuremberg Major War Criminals Trials is the nature of war crimes jurisdiction. Such jurisdiction is premised on the concept of reprisals and is optional, i.e., there is no international criminal code which mandates punishment of crimes perpetrated on an international scale or with international impact. Punishment of any kind may be meted out by the juridical body involved with the proviso that it must not be cruel and inhuman; and, unless pursuant to *deballatio* or agreement otherwise, peace terminates the jurisdiction.

The enabling act of the Nuremberg International Military Tribunal

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43 Id.
44 *Jus Strictum* is law which is to be applied rigorously and literally.
45 *Tu quoque* is the basis for the concept of reciprocity in international law. It allows one belligerent to act as the other belligerent has done.
46 *Jus cogens* refers to certain postulated, overriding principles of international law such as prohibitions against slave trade, the waging of aggressive war, etc.
47 See Scott, supra note 3, at 454.
48 Id. at 455. With regard to the interpretation of war crimes which equates them to crimes in the municipal (national) sense a caveat is in order.

Compensation under Article 3 of Hague Convention IV of 1907 and the punishment of war crimes are occasionally likened to civil and criminal sanctions of the laws of war. On the level of international law as applied in unorganised or loosely organised international society, this terminology is misleading. It suggests the existence of an international public order which is never more remote than in a state of war. Moreover, this distinction encourages illusions: it suggests the existence of a machinery of justice and specialised remedies, certainly not to be found in unorganised society.

*Id.*
(I.M.T.) was the London Charter drafted by the Allies in 1945.\(^49\) It catalogued war crimes, crimes against humanity, crimes against peace, and multiple crimes which were the result of membership in any of the organizations denominated criminal. Article 6(b) specifically lists the killing of hostages as a war crime,\(^50\) but leaves the issue of hostage taking open. In explanation of this position, the chairman of the London Conference stated, "We declare what the international law is so that there won't be any discussion on whether it is international law or not."\(^51\)

In spite of the failure of the London Charter to evidence any disapprobation of hostage taking, Messrs. De Menthon and Dubost, deputy chief prosecutors for the French Republic, on 17 January 1946 and again on 24 January 1946, alleged that the taking of hostages was a crime under Hague Regulation 46. \(^52\) M. de Menthon stated that the German crimes against the person were "all . . . linked to a policy of terrorism. Such a policy permits the subjugation of occupied countries without involving a large deployment of troops and their submission to anything that might be demanded of them."\(^53\) The prosecution goes on to condemn the German endeavor to "legalise such criminal practices. Thus seeking to have them recognised by the populations as the right of the occupying power. Veritable 'codes for hostages' were promulgated by the German military authorities."\(^54\) The most notorious of the orders was that issued by defendant Keitel on 30 September 1941 calling for a fixed ratio or quota of 100 hostages to be killed for each German soldier murdered and 50 hostages for each German wounded as a reprisal of appropriate proportions for each type of incident. Further, he ordered that all Frenchmen already in detention for whatever reason were henceforth to be considered hostages.\(^55\) Subsequently 310 hostages were executed in Chateaubriant, Nantes, Monvalerian, Romainville, Bordeaux, and Paris as a reprisal for the murder of three German officers.\(^56\)

M. de Menthon, in discussing the history and legal significance of war crimes, follows the evolution and articulation of the concepts from Grotius through the Hague Conventions to the list of war crimes compiled by the Commission of Fifteen.\(^57\) Some of the first ten items on the list are of direct relevance.

1. Murders, massacres, systematic terrorism
2. Killing of hostages
3. Torture of civilians
4. Confinement of civilians in inhuman conditions
5. Forced labor of civilians in connection with military operations of the enemy\(^58\)

\(^{49}\) I.M.T., NUREMBERG, supra note 6, at 1.
\(^{50}\) Id. at 3.
\(^{51}\) JACKSON REPORT, MINUTES OF CONFERENCE SESSION OF JUNE 29, 1945 at 99.
\(^{52}\) 5 & 6 I.M.T., NUREMBERG, supra note 6, at 399-427, 119-149.
\(^{53}\) 5 I.M.T., NUREMBERG, supra note 6, at 399.
\(^{54}\) Id.
\(^{55}\) Id. (emphasis added).
\(^{56}\) Id. at 400.
\(^{57}\) This list was the basis for Articles 227 et sequitur of the Peace Treaty of Versailles.
\(^{58}\) 5 I.M.T., NUREMBERG, supra note 6, at 414, 415.
Because this list fails as well to address the legality of the taking of hostages, the deputy prosecutor closed with an eloquent and morally but not legally compelling statement: "The true plaintiff in this court is civilisation."  

M. Dubost, in his presentation, read to the court Article 50 of the Hague Convention stating that it prohibits the taking of hostages. He then discussed, in detail, the German "pseudo-law" on hostages including the killings of hostages in the cities previously listed (in particular the killings in Chateaubriant and Bordeaux). The general tenor of the German attitude toward hostages is evident in one of their ordinances.

If acts of violence are committed by inhabitants of the country against members of the occupation forces, if offices and installations of the Armed Forces are damaged or destroyed, or if any other attacks are directed against the security of German units and service establishments, and if, under the circumstances, the population of the place of the crime or of the immediate neighborhood can be considered as jointly responsible for these acts of sabotage, measures of prevention and expiation may be ordered by which the civil population is to be deterred in future from committing, encouraging, or tolerating acts of that kind. The population is to be treated as jointly responsible for individual acts of sabotage, if by its attitude in general towards the German Armed Forces, it has favored hostile or unfriendly acts of individuals, or if by its passive resistance against the investigation of previous acts of sabotage, it has encouraged hostile elements to similar acts, or otherwise created a favorable atmosphere for opposition to the German occupation. All measures must be taken in a way that it is possible to carry out. Threats that cannot be realized give the impression of weakness.

The consequences of this general policy are amply illustrated by a second document introduced into evidence giving a statistical and regional breakdown of French civilian executions. "Region of: Lille, 1,143; Laon, 222; Rouen, 658; Angers, 863; Orleans, 501; Reims, 353; Dijon, 1,691; Poitiers, 82; Strasbourg, 211; Rennes, 974; Limoges, 2,863; Clermont-Ferrand, 441; Lyons, 3,647; Marseilles, 1,513; Montpellier, 785; Toulouse, 765; Bordeaux, 806; Nancy, 571; Metz, 220; Paris, 11,000; Nice, 324; total, 29,660." Ironically, this massive documented evidence of hostage killing allowed the Tribunal to bypass a ruling on the legality of the mere taking of hostages.

It would seem at this juncture, given the Hague Regulations as a codification of international customary law, the report of the Commission of Fifteen, the London Charter, and the Judgement of the I.M.T. at Nuremberg, that the killing of hostages is criminal in the international sense of the word. The phenomenology of juridical pronouncements being what it is, however, one turns with disappointment but not surprise to the judgment of the United States Military Tribunal at Nuremberg in *The Hostages Trial* which held that "the killing of hostages was not in itself and in the abstract contrary to the inter-

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59 Id. at 425.
60 6 I.M.T., NUREMBERG, supra note 6, at 120.
61 Id. at 137.
62 Id. at 122.
63 Id. at 135.
64 Judgment of the International Military Tribunal at Nuremberg, CMND. 6964 (1946).
national law of war." In indulging in this view, the Tribunal flagrantly ignored the provision of its own enabling act (Control Law No. 10) which specifically outlaws the killing of hostages.

The co-defendants at the trial were charged as follows:

that defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian population of Greece, Yugoslavia, and Albania by troops of the German Armed Forces; that attacks by lawfully constituted enemy military forces and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of non-combatants, arbitrarily designated as "partisans," "Communists," "Communist suspects," "bandit suspects," were terrorized, tortured and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed, and executed orders for the execution of 100 "hostages" in retaliation for each German soldier killed and fifty "hostages" in retaliation for each German soldier wounded.

The indictment stated further that

the acts charged in each of the four counts are alleged to have been committed wilfully, knowingly, and unlawfully and constitute violations of international conventions, The Hague Regulations, 1907, and the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and were declared, recognised and defined as crimes by Article II of Control Council No. 10 adopted by the representatives of the United States of America, Great Britain, the Republic of France and the Soviet Union.

In its Judgment, however, the Tribunal delimited the field of inquiry to a "discussion of the right to take hostages from the innocent civilian population of occupied territory as a guarantee against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guarantee is violated." Upon this narrow issue the Tribunal opined that "hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility."

The court then listed measures that must be taken before such taking and killing is justified, eliminating out of hand mere military expediency. To maintain order, the occupying army should initially pursue such steps as registration of the inhabitants, issuance of identification cards, establishment of restricted areas, adoption of curfews, prohibition of assembly and communication, or de-

65 U.N. War Crimes Commission, supra note 7, at vii.
66 Id. at 35.
67 Id. at 36.
68 Id. at 60.
69 Id. at 61 (emphasis added).
struction of property in proximity to the crime. The eminent judges generously required "some connection between the victimized populace and the crime." Quota reprisals, characterized by inversely proportional ratios of numbers and severity, were proscribed. These modest circumscriptions of the basic holding do little to protect the innocent hostage who, notwithstanding the strict application of the above preliminaries, finds himself on the wrong end of a rope or a gun.

The ultimate hypocritical, albeit eloquent, juridical nod to the efficacy of barbarism, cruelty, and inhumanity in furthering the political terrorism of war is the following statement made by the Tribunal in the course of its Judgment.

It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of a law abiding occupant. The fact that the practice has been tortured beyond recognition by illegal and inhuman application cannot justify its prohibition by judicial fiat.

The only consolation to be gained from an opinion evidencing such reactionary views is that no finding of "not guilty" made in The Hostages Trial can be attributed to the Tribunal's sentiments on the taking and killing of hostages. Fortunately, the U.S.M.T. at Nuremberg and its Judgment do not have the international significance of those of the I.M.T. The U.S.M.T., however, did represent a nation having a legal system characterized by advanced and sophisticated structure, and thus its decisions may have more impact on international law than the opinion warrants.

C. The Geneva Red Cross Convention IV of 1949

The Geneva Convention of 1949 took the next obvious step with regard to the international law concerning hostages: it unequivocally (in Article 34) prohibited the taking of hostages. It thus purported to answer the question which the I.M.T. did not wish to reach, and hopefully it counteracted much of the damage done in The Hostages Trial Judgment.

Article 3 of the four Geneva Conventions contains a proviso that broadens the scope of the prohibition by extending minimum standards of humane treatment to internal as well as to international armed conflict involving one of the Contracting Parties. Article 3 of Convention IV relative to the protection of civilian persons in time of war reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed

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70 Id. at 62.
71 Id.
72 Id. at 65 (emphasis added).
73 Id. at 79.
74 CMND. 550, supra note 4, at 234.
hors de combat by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.\textsuperscript{75}

This article was a major step forward in the humanitarian law of armed conflict.

IV. The State of the Law Today

A. Applicability of Nuremberg Principles\textsuperscript{76}

Within three months of the rendering of the Nuremberg Judgment, the United Nations General Assembly passed two resolutions one of which approved the London Charter and the Judgment, with respect to the enunciated principles of international law, and directed the International Law Commission (I.L.C.) to model those principles into an international criminal code.\textsuperscript{77} The second resolution specified genocide to be a crime under international law and initiated the processes necessary to the preparation of a draft convention on the subject.\textsuperscript{78} These two resolutions were the initial approbative measures taken in response to the Nuremberg experience by a body representing an international quasi-order.\textsuperscript{79}

The formulation of the Nuremberg Principles\textsuperscript{80} by the I.L.C. appears to be more valuable as a cogent restatement of law by an important body of drafters with international pretensions than a truly useful criminal war code. The I.L.C. also attempted a draft code on offenses against the peace and security of mankind, but because there are no international organs to punish the crimes codified, the code must be considered as merely "a set of internationally postulated rules of municipal law."\textsuperscript{81}

\begin{thebibliography}{99}
\bibitem{75} Id. at 216 (emphasis added).
\bibitem{76} \textit{See Schwarzenberger, supra} note 8, at 526.
\bibitem{77} U.N.Y.B. 1946-47 at 254.
\bibitem{78} U.N.Y.B. 1946-47 at 255 & 256.
\bibitem{79} The Genocide Convention of 1948 is of interest to this discussion primarily because of its general reassertion of the standard of civilization without the operation of which hostage taking in its most barbaric forms takes place. Very often the intent to destroy a national, ethnic, racial, or religious sector of the population is exhibited by occupying armies in their patterns of hostage killing. One must keep in mind that due to the political, i.e. state-oriented nature of genocidic ideology, this document is more valuable as a statement of \textit{lex ferenda} than as an effective policing medium.
\bibitem{80} Nuremberg Principles (1949) Y.B. Int'l. L. Comm'n 129.
\bibitem{81} \textit{See Schwarzenberger, supra} note 5, at 532.
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Considering the magnitude, virulence, and scope of the second World War and the relatively rapid, moderately severe, and legalistic reprisals at Nuremberg, one would expect that military law would formally reflect the Nuremberg Principles. This has not been the case in the Soviet Union, the United Kingdom or the United States.\textsuperscript{82} The Soviet Military Code of 1952 gives only the most skeletal consideration to war crimes. In the United States, as well, no formal change has been made, although the Army and Navy manuals do reflect the Charter and the Principles. The Army has, commendably, recognized all three types of war crime, but the Navy discussion is limited to war crimes \textit{stricto sensu}. The United Kingdom \textit{Manual of Military Law} also considers only war crimes \textit{stricto sensu}. Because hostage taking and killing may fall under the war crimes or the crimes against humanity category (depending on the scale of the offense), there is some hope that military theory may be modified at least with regard to the killing of hostages on the basis of the informal references in these manuals.

The applicability of the Nuremberg Principles has also been limited because armed conflict since World War II has consistently refused to call itself war, much less international war. In a typical bloody and nameless penumbra like Viet Nam, though atrocities were frequent occurrences and the innocent suffered as much as innocents have ever suffered in a recognized war, the only way the Nuremberg Principles could be brought into play, barring drastic change in military theory, was by way of blatant reprisals without benefit of international juridical authority.\textsuperscript{83} Any adverse judgments against prisoners of war were bound to be viewed, and certainly publicized, as juridical murder by the “other side” and reacted to accordingly. It seems, then, that in modern times a nation’s refusal to declare or acknowledge a state of war, even though actively waging war, may preclude the application of the Nuremberg Principles during the conflict for practical reasons. After the close of the hostilities, the application may be precluded by the lack of the proper theoretical basis for establishing international jurisdiction. The only limitation on this intermediate sort of conflict lies in the minimum standard of civilization requirements of the Geneva Conventions of 1949.

\textbf{B. Relevant Consensual Agreements 1948 to 1973}

With the increasing awareness that political terrorism is an adjunct not only to armed conflict but to radical activism on both intra- and international levels has come an increasing number of consensual attempts to cope with the problem. Three illustrative groupings of these treaties are: (1) the general humanitarian documents, (2) the documents formulated under the auspices of the International Civil Aviation Organization (I.C.A.O.), and, (3) the documents aimed at the protection of diplomats and other protected persons.

The two most important general human rights documents are the 1948 Universal Declaration of Human Rights\textsuperscript{84} and the European Convention on

\textsuperscript{82} These are three of the four nations who drafted the London Charter.
\textsuperscript{83} The Tokyo and Nuremberg I.M.T.’s were constituted pursuant to unconditional surrender in the first case and deballatio in the second, i.e. after the close of the war.
\textsuperscript{84} I. \textsc{Brownlie}, \textit{Basic Documents on Human Rights} 106 (1971).
Human Rights and its Five Protocols of 1950. Both are concerned with the individual's right to life, limb, freedom of movement, belief, education, and freedom from arbitrary oppression. The Convention is self-regulatory with applications (complaints) being handled and authoritatively decided by the European Commission on Human Rights and the European Court of Human Rights. This has proved an effective peacetime enforcement system; however, the possibility of derogating from the Convention under Article 15 limits application of the general principles in wartime or other emergencies threatening the existence of the nation in question.

The three pertinent I.C.A.O. Conventions are: (1) the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft, (2) the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, and (3) the 1971 Convention for the suppression of Unlawful Acts Against the Safety of Civil Aviation. Article 1 of each convention defines those acts which constitute offenses. The Tokyo Convention prohibits acts "jeopardizing the safety of persons." The Hague Convention defines a wrongdoer under the article as one who "unlawfully by intimidation exercises control of" an aircraft, while the Montreal Convention defines a wrongdoer as one who "performs an act of violence against a person on board" an aircraft. Hostage taking is the underlying, though unspecified theme.

The conventions dealing with diplomats and other protected persons are more specific in listing offenses. Both the 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance and the 1971 Rome Draft Convention specify murder and kidnapping as breaches of the conventions. The 1972 Draft Articles on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons states in Article 2 that "[t]he intentional commission, regardless of motive, of a violent attack upon the person or liberty of" included persons is forbidden as it in the 1973 U.N. Resolution 3166 (XXVIII) and Annex: Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

The primary short-term flaw in these conventions is their narrow scope as far as protected persons as a class are concerned. What is needed are "measures to prevent international terrorism which endangers or take[s] innocent human lives or jeopardizes fundamental freedom, and study of the underlying causes of
those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.\footnote{94} It seems, however, that the piecemeal approach to the problem of terrorism and hostage taking is more acceptable to those nations whose ratifications are important\footnote{95} than is a general and potentially restrictive convention drafted in broad language with the possibility of even broader interpretation. Augmenting the class of protected persons by the treatment of easily recognized, highly defined groups in separate conventions seems to be a workable long-range approach to the utilization of consensual agreements to control hostage taking. Self-policing systems and strict limitations on, if not elimination of, the possibility of derogation, would be of undeniable usefulness as well. In essence, restricted \textit{ratione personae} and \textit{ratione materiae} are quite often the key to a successful treaty.

V. Conclusion

With the exception of the anomalous decision in the \textit{Hostages Trial}, all international authority discussed above, i.e. the Hague Conventions, the Nuremberg Principles, the Geneva Red Cross Conventions, outlaw the killing of hostages. The uncertainty lies with the legality of taking hostages.

As far as prevention of coercion (the taking and killing of hostages) is concerned, the consensual agreements discussed above and military law must be scrutinized. The lack of an effective policing structure, the possibility of derogation, and the sharply circumscribed scope of recent conventions all combine to seriously weaken the immediate efficacy of consensual agreements. The blurred or nonexistent reflection of the Nuremberg Principles in modern military manuals evidences the status quo orientation of military methodology, in which ends too often justify the means. Prevention of coercion is, then, predicated on the good faith of the contracting parties and some modification of armed forces teleological orientation—weak foundations at best.

Reprisals seem even today the most powerful weapons in the international legal arsenal. War crimes jurisdiction, however, which is grounded on this concept is terminated by peace in the absence of \textit{deballatio} or agreement otherwise. This means that unacknowledged wars, \textit{status mixtus}, and internal armed conflict will, for lack of the theoretical basis of jurisdiction, remain unpoliced, because prevention is unlikely and warlike reprisals will merely accelerate and escalate the violence.

The seemingly inescapable treadmill of coercion and reprisal brings to mind the myth of Sisyphus. The ability of the nations of the world to push the stone to the top of the mountain and leave it may very well lie with the hostage takers themselves.

\textit{Mary Kay Mattson}

\footnote{95} Those nations that make use of terroristic tactics are extremely reluctant to ratify treaties or conventions which would limit or preclude the use of such effective combat techniques. These nations have typically unstable governments and are often classified as third world nations.