

# WHAT PRICE PEACE: FROM NUREMBERG TO BOSNIA TO THE NOBEL PEACE PRIZE

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In the fifty years that have elapsed since the Nuremberg Trials, we have made tremendous progress in the development of human rights. The Genocide Convention,<sup>1</sup> the Convention on Civil and Political Rights,<sup>2</sup> the Convention on the Elimination of Racial Discrimination,<sup>3</sup> the Convention on the Elimination of Discrimination Against Women,<sup>4</sup> and the Convention Against Torture<sup>5</sup> have all been adopted by the United Nations and ratified by the vast majority of states in the world.<sup>6</sup>

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1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

2. International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

3. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

4. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), *reprinted in* 19 I.L.M. 33 (1980).

5. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1987).

6. Some of these are now considered to be binding under customary law and even to constitute *jus cogens*. See Jordan J. Paust, *The Significance and Determination of Customary International Human Rights Law: The Complex Nature, Sources and Evidence of Customary Human Rights*, 25 GA. J. INT'L. & COMP. L. 147, 153 (1996) (noting that the prohibition of genocide is a well-recognized peremptory norm of *jus cogens*); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, and cmts. d, f (1987) [hereinafter RESTATEMENT]; Jordan J. Paust, Symposium, *The Ratification of the International Covenant on Civil and Political Rights: Avoiding 'Fraudulent' Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1274 (1993) (explaining that certain rights reflected in the Covenant on Civil and Political Rights have now become peremptory norms of *jus cogens*); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 817 (1990) (noting that human rights values embodied in the U.N. Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights are all elements of customary international law that are rapidly

Treaties prohibiting various aspects of terrorism, such as hostage taking,<sup>7</sup> airplane hijacking,<sup>8</sup> sabotage,<sup>9</sup> seizure of ships on the high seas,<sup>10</sup> and attacks on diplomats,<sup>11</sup> have also been ratified by a large number of states.<sup>12</sup> These Conventions, not only prohibit the conduct, but make it criminal<sup>13</sup> or require states parties to make the conduct criminal under their internal laws,<sup>14</sup> punishable by "severe penalties,"<sup>15</sup> and require any state in which an alleged offender is found to either prosecute or extradite him.<sup>16</sup> In one respect, however, we have not progressed, and seem to have regressed: those responsible for war crimes, crimes against humanity and terrorism, still go unpunished. They walk free, with impunity, and in some cases are even courted by heads of state and honored with the most prestigious awards that the international community can bestow.

In the case of the former Yugoslavia, an International Criminal Tribunal has been established to try those responsible for war crimes and

establishing themselves as *jus cogens*); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than the States*, 32 AM. U. L. REV. 1, 11-12 (1982) (noting that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as about fifty additional declarations and conventions concerning issues such as discrimination against women and racial discrimination, have become a part of international customary law).

7. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081, 1315 U.N.T.S. 205 [hereinafter Hostage Convention].

8. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hijacking Convention].

9. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177, *reprinted in* 10 I.L.M. 1151 [hereinafter Sabotage Convention].

10. Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 (1988) [hereinafter Maritime Terrorism Convention].

11. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Internationally Protected Persons Convention].

12. As of January 1, 1996, 157 States had ratified the Hijacking Convention, *supra* note 8; U.S. DEP'T OF STATE, TREATIES IN FORCE 326-27 (1996); 157 States had ratified the Sabotage Convention, *supra* note 9, at 327-28; 94 States had ratified the Internationally Protected Persons Convention, *supra* note 11, at 441-42; 76 States had ratified the Hostage Convention, *supra* note 7, at 442; and 32 States had ratified the Maritime Terrorism Convention, *supra* note 10, at 398.

13. *See* Hijacking Convention, *supra* note 8, art. 2; Sabotage Convention, *supra* note 9, art. 1; Hostage Convention, *supra* note 7, art. 1; Maritime Terrorism Convention, *supra* note 10, art. 3.

14. *See* Internationally Protected Persons Convention, *supra* note 11, art. 2.

15. *See e.g.*, Hijacking Convention, *supra* note 8, art. 2, 22 U.S.T. at 1646, 860 U.N.T.S. 110.

16. *See* Hijacking Convention, *supra* note 8, art. 7; Sabotage Convention, *supra* note 9, art. 7; Internationally Protected Persons Convention, *supra* note 11, art. 7; Hostage Convention, *supra* note 7, art. 8; Maritime Terrorism Convention, *supra* note 10, art. 10.

crimes against humanity.<sup>17</sup> A number of persons, including prominent leaders in the conflict, responsible for unspeakable atrocities, have been indicted.<sup>18</sup> But, they have not been apprehended and brought to trial.<sup>19</sup> There appears to be great reluctance to do so.<sup>20</sup> Although they have been barred from running for office, and display of their pictures has been prohibited, those seeking office showed empty frames to convey the message that they identify with and have the support of these leaders whose image was barred.<sup>21</sup>

The question of whether the leaders should be prosecuted has been the subject of scholarly debate, with some commentators taking the position that perhaps we should forego prosecution.<sup>22</sup> For example, Professor Ruth Wedgwood stated,

[i]t may not be possible to bring about a peace settlement in the former Yugoslavia if the Tribunal is going forward with active prosecutions of the state leaders of the belligerent parties . . . . You may need to accept a *punto final*, and sacrifice the prosecutorial interest in general deterrence for the sake of future peace.<sup>23</sup>

She suggests that "the slow start of the Tribunal reflects a fear that the Tribunal's work could impede the peace process."<sup>24</sup>

The picture is even bleaker with respect to those responsible for terrorist acts. No international tribunal has been established to try terrorists who have killed innocent men, women, and children. Although

17. See U.N. SCOR, Res. 827, May 25, 1993, reprinted in 32 I.L.M. 1203.

18. See William Drozdiak, *Top Serbs Charged With War Crimes*, WASH. POST, July 26, 1995, at A1 (reporting the tribunals indictment of Bosnian-Serb leader Radovan Karadzic and his top military commander, Ratko Mladic).

19. See Robert Marquand, *Bosnia War Crimes Judge Talks of Quitting*, CHRISTIAN SCIENCE MONITOR, Oct. 22, 1996, at 1 (noting that only seven of 74 people indicted by the tribunal for war crimes are in custody, none of whom are leaders).

20. See Philip Shenon, *Mixed Signals on Bosnia War Crime Issue*, N.Y. TIMES, June 4, 1996, at A1 (discussing statements by Pentagon officials that NATO commanders are reluctant to step up efforts to capture accused war criminals because arrests might endanger peacekeeping forces).

21. See Chris Hedges, *Karadzic Is Out of Sight, But Not Out of Voters Minds*, N.Y. TIMES, Sept. 3, 1996, at A10.

22. See Ruth Wedgwood, Symposium, *War Crimes Bosnia and Beyond: War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 273 (1994); Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500 (1994).

23. Wedgwood, *supra* note 22, at 274-75.

24. *Id.*

an International Criminal Court may finally be established, its jurisdiction may not include the acts made criminal by the various terrorist conventions. The draft statute provides for such jurisdiction,<sup>25</sup> but the United States is apparently opposed,<sup>26</sup> notwithstanding that in the Antiterrorism Act of 1986 Congress urged the President to work towards "establishing an international tribunal for prosecuting terrorists."<sup>27</sup>

Not only is there no international tribunal to try those responsible for major terrorist attacks but, unlike the situation in Bosnia, they continue in leadership positions. Let me give you two examples.

On the evening of March 1, 1973, Cleo A. Noel, Jr., the United States Ambassador to the Sudan, and George C. Moore, the United States Chargé d'Affaires, were taken hostage at a reception at the Saudi Arabian embassy in Khartoum.<sup>28</sup> Late the following night they were brutally beaten and machine-gunned to death.<sup>29</sup> A Belgian diplomat, Guy Eid, was also killed. A Jordanian diplomat who had been taken hostage was released.<sup>30</sup> The President of the Sudan immediately made public evidence showing that the operation had been carried out by Fatah (the Palestine Liberation Organization faction founded and headed by Yasir Arafat), including a written copy of the plans for the operation, which had been found in the desk drawer of the top Fatah official in Khartoum.<sup>31</sup>

In 1985, it was reported that the United States had information from reliable sources that Yasir Arafat played a key role in orchestrating the operation and gave his personal approval for the execution of Noel and Moore. According to these sources, Arafat and other Palestine Liberation Organization officials were directing the assassins from Fatah headquarters

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25. Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute of an International Criminal Court, 2 May C 22 July 1994, at 51, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10, Art. 20(e) and Annex. See also, Forty-Sixth Session, Draft Statute of an International Criminal Court, 2 May C 22 July 1994, at 51, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10, Art. 20(e) and Annex. See also, *id.* at Appendix II.

26. *Id.*

27. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, §1201(d), 100 Stat. 853, 896 (1986) (*codified at* 18 U.S.C. §2331).

28. See Joshua Muravchik, *Arresting Arafat: A Warrant for the PLO Chief?*, THE NEW REPUBLIC, Dec. 30, 1985, at 12.

29. *Id.*

30. Richard Lyons, *President Declares Killers Must Be Brought to Justice*, N.Y. TIMES, Mar. 3, 1973 at A1-A2. WASH. POST, Mar. 4, 1973, at A1, A22-A23.

31. See Muravchik, *supra* note 28.

in Beirut, and those holding Noel and Moore did not kill them "until receiving specific code-worded instructions" from Beirut.<sup>32</sup>

It was further reported that "United States intelligence possessed a taped intercept of Arafat personally ordering the Khartoum murders."<sup>33</sup> Walter Vernon, then United States ambassador to the United Nations and deputy director of the Central Intelligence Agency at the time of the Khartoum murders, stated in an interview in 1985, that he had been told of the existence of such a tape. Although he did not know Arabic and had not personally heard the tape, he said the existence of the tape "was common knowledge at the time, among all sorts of people in the government."<sup>34</sup>

Charles Lichtenstein, deputy United States representative to the United Nations under Jean Kirkpatrick<sup>35</sup> and others urged the Attorney General to issue a warrant for Arafat's arrest. Arafat was, however, not indicted by the United States, nor did the United States seek his extradition.<sup>36</sup> The Justice Department took the position that because the United States legislation giving United States federal courts jurisdiction to try someone for the murder of United States diplomats abroad was adopted *after* the Khartoum killings, prosecution of Yasir Arafat in the United States was barred by the *ex post facto* clause of the United States Constitution.<sup>37</sup>

The validity of that conclusion is open to serious questions. The United States Supreme Court has interpreted the *ex post facto* clause to bar prosecuting a person for an act that was "innocent when [it was] done."<sup>38</sup> The killing of Noel and Moore was clearly not "innocent when it was

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32. Gaylord Shaw, *U.S. Urged to Seek Arafat's Indictment*, L.A. TIMES, Dec. 13, 1985, at part I, p.4.

33. See Muravchik, *supra* note 28.

34. *Id.*

35. See Shaw, *supra* note 32.

36. President Reagan did threaten to boycott the United Nations 40th Anniversary commemoration in 1985 if Yasir Arafat was invited. See Elaine Sciolino, *Reagan May Boycott Fete at U.N. if Arafat Shows Up*, N.Y. TIMES, Oct. 12, 1985, at A10; Elaine Sciolino, *U.N., Facing Boycott Threat, Drops Effort to Invite Arafat*, N.Y. TIMES, Oct. 15, 1985 at 1. In 1988 and 1990 the United States denied Arafat visas to enter the United States to address the U.N. See Laurence McQuillan, *U.S. Visa Denial For Arafat Sparks Fight Over U.N.*, REUTERS, Jan. 27, 1988; Paul Lewis, *Arafat Seeks to Attend U.N. Council Debate*, N.Y. TIMES, May 22, 1990, at C12.

37. Letter from John R. Bolton, Assistant Attorney General, to Senator Orrin G. Hatch, (Apr. 21, 1986), reprinted in ROBERT A. FRIEDLANDER, *GLOBAL TERRORISM IN THE DANGEROUS DECADE*, 335-36 (1992).

38. See *e.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

done.” It was a crime under the municipal law of the Sudan<sup>39</sup> and a violation of one of the oldest and most fundamental principles of international law: that the person of the ambassador is inviolate.<sup>40</sup> The Supreme Court has also stated that the *ex post facto* clause applies to substantive rules, not to procedural rules.<sup>41</sup> Although the Supreme Court has never decided whether jurisdiction is substantive or procedural, an analysis of the cases and of the policies underlying the *ex post facto* clause leads to the conclusion that jurisdiction is procedural. The appropriate action, if the United States wanted to prosecute Arafat, would have been to obtain the indictment and to let the Court decide whether the prosecution was or was not barred by the *ex post facto* clause.

International law clearly does not consider it a violation of *ex post facto* to try a person before a court that did not have jurisdiction at the time the act was committed. Neither the Nuremberg Tribunal, which tried persons charged with committing war crimes during WWII, nor the recently established Yugoslavia and Rwanda War Crimes Tribunals even existed at the time the acts for which the accused were or will be prosecuted were committed.

Not only did the United States fail to indict Arafat or to request his extradition, but in September 1993 the President of the United States, whose ambassador he ordered murdered, welcomed Arafat to the White

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39. Section 246 of the Sudan Penal Code of 1974 (Act No. 64), Offenses Against the Person, defines culpable homicide as follows:

Whoever causes death by doing an act:

(a) with the intention of causing death or such bodily injury as is likely to cause death, or (b) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide . . . . To be deemed murder, the death of the deceased must have been the probable consequence of the act . . . . Murder is punished with death of [sic] imprisonment for life, with the possibility of a fine.

CARLETON W. KENYON, *THE SUDAN: LAW OF CRIMINAL PROCEDURE*, 23-24 (1984).

40. This rule is codified in the Vienna Convention on Diplomatic Immunity, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95, which has been ratified by 175 States. U.S. Dept. of State, *Treaties in Force* 324 (1994). Article 29 provides: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take appropriate steps to prevent any attack on his person, freedom, or dignity.” See also, *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 114, 119 (Pa. 1784); *Legal Mechanisms to Combat Terrorism: Hearings Before the Subcommittee on Security and Terrorism of the Committee on the Judiciary of the United States Senate*, 99th Cong., 2d Sess. 10 (1986) (the statement of Harris Weinstein). Weinstein stated that in his view, “substantial authority supports the view that *ex post facto* clause would not bar prosecution.”

41. See e.g., *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“No *Ex Post Facto* violation occurs if the change in the law is merely procedural”).

House<sup>42</sup> and on December 10, 1994 he was awarded the Nobel Peace Prize.<sup>43</sup> Mr. Kare Kristiansen resigned from the Nobel Peace Prize Committee in protest. He said, "[H]is past is too filled with violence, terrorism and bloodshed . . . . It will give the wrong signal to other violent organizations . . . ." But, the propriety of the award did not give rise to a great deal of diplomatic or scholarly debate.

The other example involves Abu Abbas, who masterminded the seizure of the *Achille Lauro*, an Italian flag ship.<sup>45</sup> Several hundred passengers were held hostage and one, a crippled American man in a wheelchair, was killed and thrown overboard.<sup>46</sup> The hijackers eventually surrendered in Egypt.<sup>47</sup> Contrary to its obligations under the Hostage Convention<sup>48</sup> to either extradite or prosecute the offenders,<sup>49</sup> Egypt permitted them to leave and even provided them with an Egyptian military airplane for that purpose.<sup>50</sup>

At President Reagan's direction, United States military airplanes forced the Egyptian plane carrying the hijackers to land at a United States military base in Italy.<sup>51</sup> The United States wanted to transfer the hijackers

42. *Statements by Leaders at the Signing of the Middle East Pact*, N.Y. TIMES, Sept. 14, 1993, at A12. Arafat has been welcomed to the White House on several occasions since then.

43. John Darnton, *P.L.O. Leader and 2 Israelis Share Award*, N.Y. TIMES, Dec. 11, 1994, at A8.

44. *Nobel Panelist Resigns Over Arafat Award*, THE TIMES-PICAYUNE, Oct. 15, 1994, at A17.

45. John Tagliabue, *Ship Carrying 400 Is Seized*, N.Y. TIMES, Oct. 8, 1985, at A1. The Achille Lauro seizure was the subject of numerous legal articles. For a discussion of whether the seizure constituted piracy even though the motive was not monetary, see Gerald P. McGinley, *The Achille Lauro Affair - Implications for International Law*, 52 TENN. L. REV. 691 (1985) (piracy); Gregory v. Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158 (1987) (piracy); Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723 (1986) (not piracy); see also, Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269 (1988); Malvina Halberstam, *Terrorist Acts Against and on Board Ships*, 19 IS. YB. H. RTS. 331 (1989); Jordan J. Paust, *Extradition and the U.S. Prosecution of the Achille Lauro Hostage Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235 (1987).

46. William E. Smith, *The Voyage of the Achille Lauro*, TIME, Oct. 21, 1985, at 30-31.

47. *Id.*

48. Egypt ratified the Convention on December 17, 1979. See TREATIES IN FORCE, *supra* note 12, at 432.

49. Hostage Convention, *supra* note 7, art. 8(1), 18 I.L.M. at 1460.

50. George Russell, *The U.S. Sends a Message; A Bold, Nonviolent Stroke Ends Four Days of Horror and Humiliation*, TIME, Oct. 21, 1985, at 22.

51. *Id.* For a view highly critical of the United States action, See ANTONIO CASSESE, TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR (1989). Casseese characterized the United States action as "an act of shameless arrogance and a sign of political ineptitude," *id.*

to a United States plane and to take them to the United States for trial, but Italy refused to permit the United States to do so and also refused United States extradition requests. However, all the perpetrators, except Abu Abbas were tried, convicted and imprisoned in Italy. Abu Abbas, who carried a diplomatic passport and, at the time, denied his involvement in the *Achille Lauro* seizure, and claimed to be the one who negotiated the release of the hostages, was permitted to leave Italy despite United States protests.<sup>52</sup> He was later tried *in absentia* in Italy, convicted and sentenced to life in prison.<sup>53</sup> A 115 page report prepared by the Italian magistrates stated that the evidence against him was "multiple, unequivocal, and overwhelming."<sup>54</sup> It found that "Abbas conceived the action, selected its actors, trained them for the specific enterprise, financed them" and "provided them with the arms to conduct the action . . . ."<sup>55</sup> He was never apprehended, however.

On April 22 of this year, Reuters reported that Abu Abbas, "emerging from hiding for the first time since the 1985 hijacking,"<sup>56</sup> held a press conference in Gaza, surrounded "by some of his old fighters and by armed bodyguards,"<sup>57</sup> in which he acknowledged his role in the *Achille Lauro* seizure and referred to the murder of Klinghoffer as a "mistake."<sup>58</sup> The following day, Congressman Saxton and several other members of Congress wrote to the Attorney General urging the extradition of Abu Abbas for trial in the United States.<sup>59</sup> On April 30, the Senate passed a resolution, ninety-nine to zero, also urging the Attorney General to seek

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at 78, and refers to the United States request for the provisional arrest of Abu Abbas as "how the super power 'bullied' Italy." *Id.* at 88. For a review of the book, taking issue with Cassese's positions, see Malvina Halberstam, 85 AM. J. INT'L L. 410 (1991).

52. See George Russell, *The Price of Success; Reagan's Coup Breeds Anger in Egypt, Crisis in Italy, Disarray in Diplomacy*, TIME, Oct. 28, 1985, at 22.

53. Andrew Hurst, *Three Life Sentences in Achille Lauro Verdict*, REUTERS, July 10, 1986.

54. From letter by Congressmen Saxton, Forbes, Ackerman, and Engel, to U.S. Attorney General Janet Reno (on file with the author).

55. *Id.*

56. Wafa Amr, *Palestinian Achille Lauro Mastermind Favours Peace*, REUTERS, Apr. 22, 1996.

57. *Id.*

58. *Id.*

59. Letter from Congressman Jim Saxton, Michael P. Forbes, Gary L. Ackerman, and Eliot L. Engel to Attorney General Janet Reno, dated Apr. 23, 1996 (copy on file with the author).

his extradition to the United States for trial for the murder of Klinghoffer.<sup>60</sup> Three months later, the Attorney General's Office sent a reply to Congressman Saxton. After apologizing (but giving no reason for the three-month delay in responding), the letter from an Assistant Attorney General, stated:

The applicable statute of limitations at the time of the crime was 5 years. Further, we are unable to meet the standard for flight from justice necessary to stay the statute of limitations. The United States, consequently, does not have a basis to seek the extradition of Abu Abbas for trial in this country.<sup>61</sup>

While the Justice Department is correct that the applicable statute of limitations for hostage taking at the time was five years,<sup>62</sup> the law also provides that "[n]o statute of limitations shall extend to any person fleeing from justice."<sup>63</sup> The letter does not indicate the basis for the Justice Department's conclusion that it is "unable to meet the standard for flight from justice to stay the statute of limitations." However, earlier statements by the Justice Department suggested that the tolling statute did not apply because there was no outstanding arrest warrant or indictment.

There is no requirement that there be an outstanding arrest warrant or indictment for the statute of limitations to be tolled. Numerous cases, spanning over 150 years, have held that a person may be *fleeing from justice*, even though no process was issued against him.<sup>64</sup> A memorandum prepared by the Congressional Research Service, also disagreed with the Attorney General's conclusion that the tolling provision was inapplicable. After reviewing the applicable law on this point, the memorandum concluded, "[f]rom this, it would appear that section 3290 would operate

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60. S. Res. 253, 104th Cong. 2d Sess., Apr. 30, 1996. A similar resolution, introduced in the House of Representatives, was referred to the Committee on International Relations. H. Res. 444, 104th Cong. 2d Sess., May 29, 1996.

61. Letter from Andrew Fois, Assistant Attorney General, to Congressman Saxton (July 23, 1996) (copy on file with the author).

62. 18 U.S.C.S. §3282 (Law. Co-op. 1993), *amended by* 18 U.S.C.S. §3286 (Law. Co-op. Supp. 1996). The statute of limitations for hostage taking is now eight years. 18 U.S.C.S. §3286 (Law. Co-op. Supp. 1996). Moreover, if a hostage is killed, the penalty is life imprisonment or death. 18 U.S.C. §1201(a) (Law. Co-op. Supp. 1996). There is no statute of limitations for capital crimes. 18 U.S.C.S. §3281 (Law. Co-op. Supp. 1996). However, the longer statute of limitations and increased penalty cannot be applied to crimes committed earlier as that would violate the *ex post facto* clause.

63. 18 U.S.C. §3290.

64. See *e.g.*, *United States v. White*, F. Cas. No. 16675 (CC Dist. Col. 1836); *United States v. Fonseca-Machado*, 53 F.3d 1242 (11th Cir. 1995).

to toll the statute of limitations in Abbas' case."<sup>65</sup> The memorandum further stated:

The hijackers forced the *Achille Lauro* to sail to Egypt rather than Israel. Abbas' failure to turn himself over to Italian authorities would probably be sufficient to trigger 3290 by itself. Moreover, he could hardly be ignorant of American efforts to arrest him. The plane on which he was a passenger was forced to land at a NATO base in Sicily by American fighter planes and American authorities only reluctantly allowed Italian authorities to take custody of him there. There is no evidence Abbas has made any effort to make himself available to American or Italian authorities since his departure from Italy, in fact the opposite seems to [be] more readily apparent.<sup>66</sup>

To the best of my knowledge neither Italy nor the United States has requested the Palestinian Authority to hand over Abu Abbas, and he continues as a member of the Palestine National Council.

A number of others responsible for terrorist attacks on innocent civilians, including some who have been convicted, serve in high positions in the Palestinian Authority. Abu Eain, convicted and sentenced to life imprisonment for placing a bomb in a trash can near a bus stop in Tiberias, Israel that killed two sixteen year-old boys and injured thirty-six other children and adults,<sup>67</sup> was released by Israel, pursuant to an undertaking in the Oslo Accords, and is now the Comptroller for the Palestinian Authority.<sup>68</sup>

The mother of Nachshon Wachsmann, who was kidnapped and tortured by terrorists before he died, wrote:

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65. Memorandum from Charles Doyle, Senior Specialist, Congressional Research Service, to Congressman Jim Saxton 9(CRS/7) (Sept. 27, 1996) (on file with the author).

66. *Id.*

67. Following the attack, he fled to the United States and was arrested in Chicago. The extradition proceedings, in which he was represented by Ramsey Clark, a former United States Attorney General, took over two years, including a hearing before a United States magistrate and a United States district court, *Eain v. Adams*, 529 F. Supp. 685 (N.D. Ill. 1980), and review by the Court of Appeals, *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981). For a discussion of the anti-American atmosphere that prevailed at the U.N. at the time and led to a General Assembly Resolution condemning the United States for extraditing Abu Eain, see Allan Gerson, *The Kirkpatrick Mission: Diplomacy Without Apology — America at United Nations 1981-1985* (1991), at 77-78, quoted in, Malvina Halberstam, Book Review, 14 CARDOZO L. REV. 407, at 409 (1992).

68. Alon Liel, *An Impossible Question*, JERUSALEM POST, Feb. 17, 1995, at 5.

In October 1994, after being kidnapped and held hostage for six days by Hamas terrorists, our third son Nachshon was murdered. The man who masterminded our son's kidnapping walks the streets of Gaza freely. Indeed, he was a member of the Palestinian Authority negotiating team who met with the approval of our government. This is an obscenity, a mockery, and a travesty of justice. It is a distortion of the concept of peace.<sup>69</sup>

Of course there are differences between the prosecution of those responsible for war crimes and crimes against humanity in Bosnia and those responsible for terrorist acts. But, 1) both involve conduct that is criminal under international law and that states are required to prosecute and punish with severe penalties, and 2) both involve offenders in a position to further or impede a precarious peace process.

While the legal obligation to prosecute and the desirability of such prosecution has been the subject of scholarly debate in the context of the conflict in Bosnia,<sup>70</sup> and with respect to repressive regimes replaced by more democratic governments,<sup>71</sup> there has been almost no discussion of the desirability or legal obligation to prosecute terrorists who can effect the peace negotiations.<sup>72</sup> Should we prosecute those responsible for war crimes, crimes against humanity, or terrorism when doing so may impede the peace process?

It is not an easy question. It can be argued, with some force, that it is more important to establish peace than to pursue those responsible for past crimes. We should be aware, however, that a decision not to prosecute those in a position to influence the peace negotiations will not foreclose prosecution in a few isolated cases *only*. Those responsible for war crimes, crimes against humanity, or major terrorist acts will generally be in leadership positions and, absent complete surrender, as was true for Nazi Germany after World War II, will generally be in a position to further or impede the peace. Thus, a decision to forego prosecution when

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69. Esther Wachsman, *And Justice Wept*, JERUSALEM POST INT'L ED., Mar. 30, 1996, at 10.

70. See Wedgwood, *supra* note 22; D'Amato, *supra* note 22; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POLICY, 499 (1994); Jordan J. Paust, *Letter to the Editor*, 88 AM. J. INT'L L. 715 (1994).

71. See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti*, 31 TEX. INT'L L. J. (1996); Diane F. Orentlicher, Symposium, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991).

72. But see Louis Rene Beres, *International Law Requires Prosecution, Not Celebration of Arafat*, 71 U. DET. MERCY L. REV. 569 (1994).

it might endanger the peace process would preclude most prosecutions, or at least, the most important prosecutions. Permitting those responsible for war crimes, crimes against humanity and terrorism to go unpunished will undermine the moral force and the deterrent effect of those laws; it will effectively vitiate those laws.

It is a question that should engage the attention of scholars and statesmen, not be decided by default, as is being done in Bosnia by the failure to apprehend those charged, and as is being done with Yasir Arafat and Abu Abbas, by reliance on dubious technical arguments to justify the failure to indict and seek extradition. Supreme Court Justice Breyer recently stated that the importance of Nuremberg was that it established the principle "that persons responsible for inhumanity toward man will be held accountable for their crimes and brought to justice."<sup>73</sup> What we do about bringing to trial Radovan Karadzic, Ratko Mladic, Yasir Arafat and Abu Abbas, will determine our continued commitment to that principle.

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73. Justice Stephen Breyer, Address Before the International Association of Jewish Jurists and Lawyers (June 20, 1996), in *NEWSLETTER*, Fall 1996, at 2.