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Use of Force for the Protection of Nationals Abroad: The Entebbe Incident

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NOTES

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INTRODUCTION

ON SUNDAY, June 27, 1976, an Air France jetliner with 256 passengers and a crew of 12, en route from Tel Aviv to Paris via Athens, was hijacked after taking off from Athens. After refueling at Benghazi in Libya, the four hijackers, claiming to be members of the Popular Front for the Liberation of Palestine, ordered the plane to Entebbe Airport in Uganda, where it was given permission to land.[1] Thus began an act of air piracy that was to end 7 days later on July 4, 1976, with the successful Israeli airborne commando raid on Entebbe Airport freeing 105 hostages held by the hijackers. All of the 105 hostages were Israeli nationals or dual nationals.[2]

This is the most recent example of unilateral military action by a State to protect the lives and/or property of its nationals abroad. Between the years 1813-1927, the United States alone employed military force on at least 70 occasions to protect American citizens abroad.[3] Several other Powers, including Great Britain, also landed forces in foreign countries for the same purpose on a number of occasions.[4] In a few cases, notably the Boxer Rebellion in China in 1900 and the Congo Action in 1964, there was collective intervention to protect nationals of several countries.

This note will examine the Israeli commando raid on Entebbe Airport in light of the historical development of the principle of forcible self-help by an individual State (or group of States) for

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[1] N.Y. Times, June 28, 1976, at 1, cols. 2-4.

[2] N.Y. Times, July 4, 1976, at 1, cols. 7-8. The hijackers released a total of 147 non-Israeli passengers in two groups on June 30 and July 1 prior to the Israeli action. Three hostages were killed in the raid and one was left behind in a Ugandan hospital, later presumed killed by Ugandan authorities. The casualties also included one Israeli soldier, seven terrorists, and between 20-30 Ugandan soldiers killed.

[3] D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 97 (1958).

[4] For several notable examples, *see* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 290-98 (1963) and BOWETT, *supra* note 3, at 100.

the protection of nationals abroad. The general acceptance of this principle during the 19th century reflected the decentralized state of international law in which each State held itself free to decide when particular circumstances warranted seeking its own remedy by armed force.[5] However, the law governing recourse to forcible self-help has been radically affected by the development of new rules beginning with the League Covenant in 1920. Accordingly, the history of this doctrine can be divided into two rather distinct periods: (1) Its formulation and application during the 19th and early 20th centuries; and (2) its increasingly questionable legality since 1920 with the signing of the League Covenant, the Kellogg-Briand Pact (1928) and the United Nations Charter (1945). From this framework, the precedential value of the Israeli rescue action will be weighed and its implications for the legality of future forcible self-help to protect nationals abroad will be discussed.

NINETEENTH CENTURY DOCTRINE AND APPLICATION

According to the traditional doctrine of state responsibility, individuals were to be considered as objects rather than subjects of international law. A State was generally free to treat persons within its borders as it wished. However, an exception arose when the persons being injured were nationals of another State. As Vattel wrote in 1758:

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[6]

Because the individual had no rights under international law, the nationals of a State were considered an extension of the State itself. Thus, a wrong committed on an alien was considered an injury to the State to which the alien owed allegiance. The "injured" State therefore had standing to seek redress under international law, and the measures available for obtaining redress ranged from diplomatic notes through forcible self-help to actual war.[7]

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[5] C. Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT'L L. 645, 647 (1945).

[6] Cited in W. BISHOP, INTERNATIONAL LAW 848 (3rd ed. 1971).

[7] E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 448-53 (1915), and A. THOMAS and A. THOMAS, NON-INTERVENTION 307 (1956).

Customary international law has long sanctioned the use of armed force by a State to protect the lives and property of nationals abroad. Numerous publicists, among them Oppenheim,[8] Bowett,[9] Hyde,[10] Dunn,[11] and Jessup,[12] have recognized this right of forcible self-help. This right was reaffirmed immediately before World War I at the Hague Convention No. II of 1907 as well as in the arbitration between Great Britain and Spain in 1925, known as the *Spanish Moroccan Claims.* In the former, the major powers insisted on retaining undiminished their right of forcible self-help with one exception, that being the case of contract debts.[13] In the latter, Judge Huber, as rapporteur of the arbitration commission, stated:

> However, it cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions. This right of intervention has been claimed by all states; only its limits are disputed.[14]

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[8] "The right of protection over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned." 1 L. OPPENHEIM, INTERNATIONAL LAW § 135, at 309 (8th ed. H. Lauterpacht 1955).

[9] "The right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writing of jurists and in the practice of states." BOWETT, *supra* note 3, at 87.

[10] "When, however, in any country, the safety of foreigners in their persons and property is jeopardized by the impotence or disposition of the territorial sovereign to afford adequate protection, the landing or entrance of a foreign public force of the State to which the nationals belong, is to be anticipated." 1 C. HYDE, INTERNATIONAL LAW § 202, at 647 (2nd rev. ed. 1947).

[11] "It is only occasionally, when aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some other reason is believed to be useless, that forceful intervention is apt to take place." F. DUNN, THE PROTECTION OF NATIONALS 19 (1932).

[12] "Traditional international law has recognized the right of a state to employ its armed forces for the protection of the lives and property of its nationals abroad in situations where the state of the residence, because of revolutionary disturbances or other reasons, is unable or unwilling to grant them the protection they are entitled." P. JESSUP, A MODERN LAW OF NATIONS 169 (1949).

[13] C. H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS (Hague Academy of International Law) 467-68 (II-1952).

[14] Beni-Madan, Rzini Claim, Anglo-Spanish Arbitrations, 2 U.N.R.I.A.A. 616 (1925).

Nevertheless, the right of forcible self-help for the protection of nationals abroad did not develop unrestrained. It was opposed by the equally well recognized principle of nonintervention. Intervention, defined as the dictatorial interference in the domestic or foreign affairs of another State which impaired that State's independence,[15] was generally condemned as contrary to international law.[16] In an attempt to reconcile the doctrine of nonintervention with the right of forcible self-help to protect nationals abroad, the softer term "interposition" was introduced in the early part of the 20th century. Interposition has been defined as "justifiable action undertaken by a State to induce another State to respect its rights under international law, including the rights of its nationals."[17] At the Sixth International Conference of American States held in Havana in 1928, the United States, through Secretary of State Hughes, endorsed the distinction between intervention and interposition. Secretary Hughes contended that forcible self-help to protect the lives and property of a State's nationals was not a case of intervention, but was rather justifiable as "interposition of a temporary character."[18] This distinction, however, was sharply criticized as artificial and unnecessary[19] and consequently never became a part of customary international law. Hence, the right of forcible self-help to protect the lives of nationals of the intervening State either was not intervention at all,[20] or, if it was, then a legally justifiable exception.[21]

THE STATUS OF THE CUSTOMARY RULE IN MODERN LAW

The customary principles of forcible self-help short of war — including protection of nationals abroad — were sharply curtailed

[15] J. L. BRIERLY, THE LAW OF NATIONS 402 (6th ed. 1963).

[16] *Id.*

[17] E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 2 (1921).

[18] *See* 1 D. O'CONNELL, INTERNATIONAL LAW 303 (2nd ed. 1970).

[19] Waldock, *supra* note 13, at 467. *But see* Fawcett, *Intervention in International Law, A Study of Some Recent Cases*, 103 RECUEIL DES COURS (Hague Academy of International Law) 370 (II-1961).

[20] "Traditionally international law allowed individual States or groups of States to take appropriate measures in the territories of other States for protection and enforcement of their rights. Such action was not technically intervention." D. O'CONNELL, INTERNATIONAL LAW 326 (1965).

[21] "To attempt to limit the meaning of intervention to exclude such action may not be warranted. The dispatch of forces to another nation would seem to be an arrogation of the sovereign attributes of that state and, if done without its consent, an intervention. . . . Nevertheless, such intervention may be legally justifiable." A. THOMAS and A. THOMAS, THE DOMINICAN REPUBLIC CRISIS 1965 — LEGAL ASPECTS 13 (Hammarskjold Forum 1966).

by the combined effects of the League Covenant (1920) and the Pact of Paris of 1928 (hereafter the Kellogg-Briand Pact). The Covenant, through Articles 12-15, regulated resort to war by making the legitimacy of war dependent on prior efforts to reach a settlement through pacific means. The renunciation of war under these Articles was nonetheless not total. The members of the League remained at liberty to resort to war in certain strictly defined situations: (1) If the other State failed to carry out an award, judgment, or unanimous report of the Council; (2) if the Council failed to arrive at a unanimous report; and (3) if a plea of domestic jurisdiction was upheld.[22] Moreover, the Covenant had no decisive effect on the use of force short of war. The use of the phrase "resort to war" in the document created a loophole through which arguments were made that hostilities short of full-dress war were not prohibited by the Covenant.[23]

The Kellogg-Briand Pact was an attempt to plug these so-called "gaps." Concluded outside the League, the Pact prohibited any resort to war for purely national objects, except in self-defense.[24] However, as in the Covenant, the Kellogg-Briand Pact failed to explicitly prohibit recourse to armed force short of war. The express prohibitions of both instruments applied only to

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[22] Waldock, *supra* note 13, at 471.

[23] For example, in the Corfu incident, in 1923, just such a contention was made. In this incident, Italy bombarded and occupied Corfu, claiming this action to be a legitimate reprisal for the murder of General Tellini by extremists on Greek territory while he was acting as chairman of the Greek-Albanian boundary commission. The Council of the League referred the incident to a committee of jurists to report whether measures of coercion not intended to constitute acts of war were consistent with Articles 12-15 of the Covenant, when taken without prior recourse to arbitration, judicial settlement or conciliation. Unfortunately, the committee simply reported that such coercive measures might or might not be consistent with the Covenant depending on the circumstances of the case. 1 F. P. WALTERS, HISTORY OF THE LEAGUE OF NATIONS ch. 20 (1952). *See* BROWNLIE, *supra* note 4, at 298, and Waldock, *supra* note 13, at 471-72. *But see* BRIERLY, *supra* note 15, at 378, 408, and BOWETT, *supra* note 3, at 124, where it is noted that these "gaps" in the Covenant were often exaggerated, with very little indication that they would be responsible for any case of a lawful resort to war.

[24] The brief provisions of the Pact stipulate the following: (1) The Parties in the name of their respective peoples condemn recourse to war for the solution of international controversies and renounce it as instrument of national policy in their relations with one another; and (2) the Parties agree that all disputes between them of whatever nature or origin shall never be sought except by pacific means. Although self-defense was not mentioned in the Pact (or in the League Covenant), it was universally agreed that any use of force, including resort to war, in self-defense was not restricted by either instrument. Waldock, *supra* note 13, at 476-78.

"resort to war." Hence, it was still arguable that they did not forbid the customary right of intervention for the protection of nationals. This resulted in the persistence for some years of justifiable intervention in both theory and practice. Nevertheless, after the Pact was signed, the trend in state practice[25] and the views of a number of jurists[26] created a strong presumption that in the period 1920-1945, the legality of the customary rule permitting resort to force for the protection of nationals was highly questionable. This view would find increased support with the signing of the United Nations Charter and in the decision of the International Court of Justice in the *Corfu Channel* case.

The U.N. Charter and Matters of Interpretation

The two basic provisions of the U.N. Charter regulating resort to force by individual States in their international relations are Articles 2(4) and 51. In the former, all members renounce "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."[27] The latter preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a Member . . ."[28] Clearly, the Charter remedied the apparent defects of the League by explicitly dealing with "resort to force" and not "resort to war." As the Preamble to the Charter states, the aim of the United Nations is "to ensure, by acceptance of principles, and the institution of methods, that *armed force* shall not be used, save in the common interest."[29] [Emphasis added.] It has therefore been asserted by some that henceforth, any armed intervention is illegal, except in self-defense or in execution of collective measures under the Charter for maintaining or restoring peace.[30] The Charter would

[25] For a detailed discussion of the developments in state practice since 1920, *see* BROWNLIE, *supra* note 4, at 55-111, 216-250.

[26] For example, Professor Charles de Visscher, a member of the Committee of Jurists formed after the Corfu incident, argued that even if forcible reprisals are not regarded as a recourse to war, they are nonetheless inconsistent with the observance in good faith of the express obligations in the Covenant to submit all disputes "likely to lead to rupture" to pacific settlement. 5 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 213-30, 377-96 (3rd ser. 1924). *See also* J. L. Brierly, *International Law and Resort to Armed Force*, 4 CAMBRIDGE L.J. 309-19 (1932).

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

[28] U.N. CHARTER art. 51.

[29] U.N. CHARTER preamble, para. 1.

[30] "The broad effect of Article 2(4) is . . . that it entirely prohibits the use

thus appear to bar forcible self-help to protect nationals. This view was reinforced in the General Assembly Declaration of Nonintervention (1965).[31] Although a Declaration of the General Assembly is not binding, it nevertheless can shed some light on what States think is the meaning of Article 2(4). In that Declaration, intervention for any reason is condemned as illegal; there is no exception for protection of nationals abroad. Nevertheless, one writer suggests that the final answers to this interpretive problem should be more "controversial" than those given so far.[32]

There are basically two schools of thought as to the interpretation of Articles 2(4) and 51.[33] The so-called "restrictionist" view asserts that resort to force by a Member is unlawful, regardless of any wrongs or dangers which provoked it, unless (1) it is for self-defense against an armed attack, or (2) as collective action pursuant to competent decisions of the United Nations organs. Thus, if neither of these forms of relief are available, the Member may have to submit indefinitely without redress to the continuance of these wrongs.[34] The "realist" view, on the other hand, argues in favor of the availability of individual intervention to uphold a right illegally denied when collective forms of relief are unavailable.[35] In the context of the legitimacy of the use of force, both views appear to endorse the principle of nonintervention. The disagreement is as to whether contemporary international law imposes an absolute duty of nonintervention on individual States, as the "restrictionists" would assert.[36] As Vincent points out, this remains a disputed question:

> If the principle of nonintervention retains a place in contemporary international law, it is not, if it ever has been, as a clear injunction against a particular act. The values it draws attention to and protects are those included under the rubric of the principle of state sovereignty, such as the rights of a state

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or threat of armed force against another state except in self-defense or in execution of collective measures authorized by the Council or Assembly." BRIERLY, *supra* note 15, at 415. *See* Wright, *The Legality of Intervention Under the United Nations Charter*, 51 AM. SOC'Y INT'L L. PROCEEDINGS 88 (1957), and JESSUP, *supra* note 12, at 169-170.

[31] G.A. Res. 2131, 20 U.N. GAOR, Supp.(No.14) 11 U.N. Doc. A/6014 (1965).

[32] R. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 334 (1967).

[33] R. J. VINCENT, NONINTERVENTION AND INTERNATIONAL ORDER 310 (1974).

[34] J. STONE, AGGRESSION AND WORLD ORDER 94-95 (1958).

[35] *Id.* at 96.

[36] VINCENT, *supra* note 33, at 314.

> to territorial integrity and political independence. Standing guard over such imprecisely defined rights and requiring respect for them in a sort of legal shorthand, the principle appeals more perhaps to governments than it does to jurists.[37]

The interpretive disagreements between the restrictionists and the realists over Articles 2(4) and 51 are two-fold. The first involves the position of wronged States when the collective means of determining and assuring "the common interest," as recited in the Preamble, do not work. The restrictionists argue that the Charter rules out the individual use of force, even in the absence of collective response and notwithstanding the present defects in U.N. organs. On the other hand, Stone, a leading advocate of the realist view, argues that any renunciation of individual force in the Charter is dependent upon the effective establishment of "collective institutions and methods; and this has not occured."[38] In the Preamble to the Charter, the determination "to save succeeding generations from the scourge of war" is coupled with that of establishing "conditions under which justice and respect for the obligations" arising under international law can be maintained. Stone contends that application of the "extreme" (restrictionist) view requiring law-abiding Members to abstain from the use of force even in the face of persistent violations of rights is inconsistent with the stress on the requirements of justice and on the principle of "the sovereign equality of all its Members." To say that resort to force has been outlawed absolutely when the collective means of relief are not working is to place a greater premium on peace than justice.[39] The practical effect of such a maximum principle, as two writers point out, would be a U.N. Charter which "encumbers rather than advances the human rights and fundamental freedoms involved in the protection of aliens abroad."[40]

The second point of contention is the precise scope of the right of self-defense under the Charter. Some contend that the combined effect of Articles 2(4) and 51 is to cut down the right of self-defense to cases falling precisely within the words in Article 51, "if an armed attack occurs." These writers[41] assert that Ar-

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[37] *Id.* at 310.

[38] STONE, *supra* note 34, at 96.

[39] *Id.* at 97.

[40] THOMAS and THOMAS, *supra* note 7, at 312.

[41] Two prominent examples are I. BROWNLIE, *supra* note 4, at 290-98, and H. KELSEN, LAW OF THE UNITED NATIONS 791-800 (1950).

ticle 51 is the exclusive source of the authority to have recourse to self-defense. Any "threat or use of force" not amounting to self-defense with reference to an armed attack is automatically a violation of Article 2(4). Once again, arguing from the "realist" point of view, Stone asserts that such an "extreme" interpretation would lead to absurd results.[42] Stone and others view the phrase "nothing in the present Charter shall impair the inherent right of individual or collective self-defense" in Article 51 as showing a clear intention not to impair the natural right of self-protection, rooted in general international law, against a forcible threat to a State's legal rights. As Waldock asserts, "To read Article 51 otherwise is to protect the aggressor's right to the first stroke."[43]

The Corfu Channel Case

The differences between the realist and restrictionist schools of thought are illustrated in the *Corfu Channel* case.[44] The material facts are these. In May 1946, Albanian shore batteries fired on two British warships without warning as they were sailing through Albanian territorial waters in the North Corfu Strait by a channel swept through a minefield. Through diplomatic correspondence Albania denied that foreign warships had a right of innocent passage through her territorial waters without her authorization. The United Kingdom, on the other hand, asserted that she had a right of innocent passage and that any further firing on British warships would be replied to with force. In October 1946, two British cruisers and two destroyers were sent through the Strait from Corfu to assert their right of passage and to test Albania's reaction. The crews were at action stations with instructions to fire back if attacked. Two ships struck mines within the channel. The United Kingdom strongly suspected this was the work of Albania and that the mining of the ships was no accident. However, the United Kingdom did not at once appeal to the Security Council, fearing that a veto would be applied to any pro-

[42] " . . . suppose military intelligence at the Pentagon received indisputable evidence that a hostile State was poised to launch intercontinental ballistic missles, at a fixed zero hour only 24 hours ahead, against New York, Boston, and Washington, would it be an aggressor under the Charter if it refused to wait until those cities had received the missles before it reacted by the use of force?" STONE, *supra* note 34, at 99.

[43] Waldock, *supra* note 13, at 496-99. *But see* BROWNLIE, *supra* note 4, at 299, who asserts that the customary scope of the right of self-defense has probably narrowed since 1920.

[44] [1949] I.C.J. 4.

posal that the area should be swept to ascertain who laid the mines. Instead, it entered Albanian waters with a large force of minesweepers and swept the channel, discovering a number of newly laid mines. The United Kingdom soon thereafter referred the matter to the Security Council which recommended that the dispute be submitted to the International Court of Justice.

The acts of the United Kingdom raised directly the issues of self-defense and self-help. The Court found permissible the October passage of the warships as an exercise of a right of innocent passage through an international strait in time of peace. The Court declared:

> The legality of this measure . . . cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The mission was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.[45]

But with regard to the subsequent minesweeping operation, the Court rejected the argument of the United Kingdom that a State must be allowed a strictly limited right of self-help to investigate the cause of its injury and preserve the evidence. The Court asserted:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.[46]

The Court thus attempts to distinguish a forcible affirmation of legal rights (that is, the right of innocent passage), which is legitimate, and forcible self-help to obtain redress for rights already violated (that is, the minesweeping operation), which is illegal. The Court could not accept the particular plea of self-help by the United Kingdom because "between independent states, respect for territorial sovereignty is an essential foundation of international relations."[47] The Court continued:

> The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic Notes, are extenuating cir-

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[45] [1949] I.C.J. 28.

[46] *Id.* at 35.

[47] *Id.*

> cumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.[48]

Thus, this opinion would seem to confirm the restrictionist view of the right to use force: The right of one State to intervene was not superior to the right of another to territorial sovereignty, "whatever be the present defects in international organization." But in its support of a right of forcible affirmation of legal rights, the Court fails to justify such measures by specific reference to the U.N. Charter. It relies instead on general principles of international law. Unfortunately, then, by its generality and ambiguity, and the absence of any reference to Articles 2(4) and 51 of the Charter, the value of the Court's judgment is decreased.[49]

THE ENTEBBE INCIDENT: A QUESTION OF PEACE OR JUSTICE?

The Israeli commando raid at Entebbe Airport raises anew the particular difficulties faced by a national decision-maker who looks abroad and sees a sizable group of nationals of his country in grave danger of loss of life. Indeed, the Entebbe incident exemplifies the prototypical situation involving a State's use of limited force for the protection of its nationals from an imminent threat of injury or death, where the State in whose territory they are located either is unwilling or unable to protect them. Uganda's behavior between 28 June and 4 July strongly suggests that it, at least tacitly, supported and collaborated with the hijackers. Although the Ugandan authorities helped secure the release of non-Israeli passengers,[50] they otherwise assisted the hijackers in maintaining control over the aircraft, its crew, and the remaining passengers for the purpose of compelling the release of certain terrorists in custody in Israel and elsewhere.[51] Thus, the separation and release of the non-Israeli passengers and the apparent unwillingness of the Government of Uganda to take any steps necessary to pro-

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[48] *Id.*

[49] For an excellent critique of the Corfu Channel case, *see* BROWNLIE, *supra* note 4, at 283-89. *See also* Waldock, *supra* note 13, at 499-503 and BRIERLY, *supra* note 15, at 421-430.

[50] *See* note 2 *supra.*

[51] N.Y. Times, July 5, 1976, at 1, cols. 2-3. Several of the released hostages reported that when President Amin arrived on the scene, he and the purported leader of the hijackers embraced. Further, it was reported that Ugandan soldiers intermittantly took over the hijackers' guard functions so that they could rest, and, that other Palestinians were permitted to join the hijackers at the airport.

tect the remaining Jewish hostages except through the satisfaction of the hijackers' demands, were compelling arguments to the Government of Israel that failure to meet the hijackers' demands would result in the death of the Israeli hostages. As Mr. Scranton, former U.S. Ambassador to the United Nations, remarked to the Security Council:

> Israel had good reason to believe that at the time it acted Israeli nationals were in imminent danger of execution by the hijackers. Moreover, the actions necessary to release the Israeli nationals or to prevent substantial loss of Israeli lives had not been taken by the Government of Uganda, nor was there a reasonable expectation such actions would be taken.[52]

Israel also asserted[53] that Uganda's behavior constituted a flagrant violation of Uganda's obligations under the 1970 Hague Convention for the Supression of Unlawful Seizure of Aircraft.[54] Both Uganda and Israel are signatories to this Convention. However, even if the validity of this assertion is assumed *arguendo*, under the *Corfu* doctrine, any failure of duty on the part of Uganda — either in its failure to protect Israeli nationals within its territory, or its putative violation of the 1970 Hague Convention — would merely be considered "extenuating circumstances" that cannot excuse Israel's violation of Uganda's territorial sovereignty. As with the particular plea of self-help made by the United Kingdom in the *Corfu Channel* case, the International Court of Justice would reject any argument for a strictly limited right of self-help to protect nationals because such an "alleged right of intervention . . . has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."[55]

The apparent effect of *Corfu Channel* is to limit severely the options available to a head of government. A national decision-

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[52] 31 U.N. SCOR (1941st mtg.) 31, U.N. Doc. S/p.v. 1941 (1976).

[53] 31 U.N. SCOR (1939th mtg.) 51, U.N. Doc. S/p.v. 1939 (1976).

[54] 22 U.S.T. 1641, T.I.A.S. No. 7192. Under Article 9 of the Convention, parties are required, in the event of an unlawful seizure of an aircraft in flight, to "take all appropriate measures to restore control of the aircraft to its lawful commander. . . .", to "facilitate the continuation of the journey of the passengers and crew as soon as practicable . . ." and to "without delay return the aircraft and its cargo to the persons lawfully entitled to possession." Any party in whose territory a hijacker is found is required under Article 6 "upon being satisfied that the circumstances so warrant . . ." to "take him into custody or take other measures to ensure his presence . . .", and under Article 7 either to extradite or prosecute him.

[55] [1949] I.C.J. 35.

maker may have at his command the military forces capable of rescuing a group of nationals in imminent danger abroad in a relatively short period of time. In addition, he knows that the capacity of the United Nations to deal with situations of this sort is virtually nil. Therefore, he will decide either that it is more important to respect the territorial sovereignty of the foreign State — even at the expense of human life (*fiat carta ruant homines*); or he will not be deterred by questions of state sovereignty and will use the force necessary to the protection of the endangered nationals. A decision-maker faced with this dilemma would have cogent humanitarian reasons for acting, and he would also be under very great political pressure. Certainly both of these considerations were evident in Jerusalem. To require a State to sit back and watch the murder of innocent nationals in order to avoid violating blanket prohibitions against the use of force is, as Lillich points out, "to stress blackletter at the expense of far more fundamental values."[56] The fact that Israel might have secured the release of its nationals by complying with the terrorists' demands, and thereby avoiding any use of force, will not alter the humanitarian considerations that prompted the rescue raid. Moreover, it would be a self-defeating policy for Israel to yield control over persons convicted of earlier acts of terrorism in order to placate the demands of the hijackers.

Two arguments have been advanced to provide a legal basis for a narrow right of forcible self-help to protect nationals abroad within the framework of the Charter. The first rests upon the belief that the territorial integrity or political independence of a State is not impaired by an emergency action solely to rescue nationals from a danger which the territorial State cannot or will not prevent. Such a limited action, it is asserted, would not violate Article 2(4) of the Charter.[57] A second argument, adopted by Waldock[58] and Bowett,[59] equates the protection of nationals with the preservation of the State itself. This controversial[60] approach asserts that armed intervention solely to suppress imminent danger to nationals and not as a reprisal may be classified as self-defense under Article 51.[61] Both of these arguments attempt

[56] Lillich, *supra* note 32, at 344.

[57] THOMAS and THOMAS, *supra* note 21, at 11-18.

[58] Waldock, *supra* note 13, at 466-67.

[59] BOWETT, *supra* note 3, at 87-105.

[60] For critical views of this argument, *see* BROWNLIE, *supra* note 4, at 299-300 and Lillich, *supra* note 32, at 337.

[61] Fitzmaurice, who supports the right to intervene for the protection of

to circumvent the maximum principle of nonintervention enunciated in the *Corfu Channel* case. Both are applicable to the Entebbe incident. Yet, the failure of the Security Council to pass a resolution after 4 days of debates,[62] either condemning or condoning the Israeli action, reflects the continuing legal uncertainty in this area.

What is clear, however, and has been for some time, is the inability of the United Nations to maintain peace and act within a relatively short period of time. Acknowledgment of this reality suggests that the old customary doctrines regarding forcible self-help are not to be completely discarded. Jessup raised this issue shortly after the establishment of the United Nations. He states:

> It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take some time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international actions shall be timely as well as powerful.[63]

Obviously, Jessup's expectations have not materialized. The Security Council has become virtually paralyzed; a filibuster will permit a military operation to be completed within a relatively short period of time.[64] Hence, as Lillich notes,[65] Jessup's "only possible argument" can be raised today with some justification.

During the Entebbe incident, peace and justice, both important objectives of international law, appeared to be in conflict. The failure of the Members of the United Nations to create effective international machinery to govern the remedial use of force sowed the seeds of this conflict. As Waldock warned, any law "which prohibits resort to force without providing a legitimate

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nationals in foreign territory on the ground of self-defense, notes that such right is controversial "because the right is liable to abuse, and may be made the pretext for politically motivated intervention. . . ." Nevertheless, he justifies the right because its object is protective and its basis is humanitarian. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS (Hague Academy of International Law) 5, 172-74 (II-1957).

[62] 31 U.N. SCOR (1939th-1943rd mtgs.), U.N. Docs. S/p.v. 1939-1943 (1976).

[63] JESSUP, *supra* note 12, at 170-171.

[64] *See* T. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 810-812 (1970).

[65] Lillich, *supra* note 32, at 335.

claimant with adequate alternative means of obtaining redress, contains the seeds of trouble."[66] Therefore, in an effort to provide an alternate basis upon which to justify a right to take limited measures of forcible self-help, Professor Lillich advocates humanitarian grounds as a better justification.[67] Under customary international law, the primary purpose of the doctrine of humanitarian intervention was the protection of individuals against their own State.[68] This went beyond the protection of nationals doctrine in that the link between the injured individuals and the protecting State was not required. Rather, use of forcible self-help was sanctioned "in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind."[69] Hence, the result was a diminishing of the doctrine of absolute sovereignty by requiring of the State a minimum respect for human rights. As two writers observed:

> Notwithstanding the fact that such intervention impinged upon state independence, the right of independence gave way when it was abused. That is, in international law there are no perfect rights, no absolute rights. All rights must be exercised prudently with ordinary precautions without abusing them or exceeding their equitable limits. When a state abuses its right of sovereignty by permitting within its territory the treatment of its own nationals or foreigners in a manner violative of all universal standards of humanity, any nation may step in and exercise the right of humanitarian intervention.[70]

Notwithstanding the oblique references to human rights in the United Nations Charter,[71] the basic U.N. instruments on human rights[72] call for individual and collective action to carry out their

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[66] Waldock, *supra* note 13, at 455.

[67] Lillich, *supra* note 32, at 342.

[68] *Id.* at 332.

[69] H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 32 (1950).

[70] THOMAS and THOMAS, *supra* note 21, at 19.

[71] In the Preamble, determining the "ends" of the United Nations, it speaks of "fundamental human rights"; in Article 1, "encouraging respect for human rights" is provided for as a means of achieving economic and social cooperation; and in Articles 13 and 62, the Charter speaks of "human rights" and "fundamental freedoms for all" in determining the competence of certain organs for the achievement of economic and social cooperation. In addition, the Charter does not impose upon the Members a strict obligation to grant the rights and freedoms mentioned in the Preamble or in the text of the Charter. KELSEN, *supra* note 41, at 29.

[72] Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Proclamation of Teheran; the International Convention

purposes. To create or confirm obligations on the part of States to respect "human rights" without providing for an effective remedy would be a useless exercise. Therefore, the failure of the international community to establish effective collective enforcement machinery must presumably leave enforcement measures to States or groups of States acting on their own discretion.[73]

Given the lack of effective international machinery to govern the remedial use of force, it is this writer's contention that intervention justified upon humanitarian grounds is a more desirable rationale than self-defense. First, a self-defense justification would permit forcible self-help only where the nationals of the acting State were the objects of protection. This is based upon the premise that only threat of injury to the acting State's nationals could be considered a threat to that State's security. The scope of humanitarian intervention recognizes no distinction between nationals of different States and hence would provide broader limits upon the availability of remedial use of force. Another advantage of a humanitarian rationale is that it would require the State to exercise the right using only the most limited amount of force required by the particular situation. A self-defense rationale, by its very nature, would encourage the use of greater force by the intervening State.[74]

CONCLUSION

An assessment of the legality of Israel's actions at Entebbe must inevitably rest upon the particular circumstances involved. No blanket approval can be given to this practice for, like most justifications of the use of force, it is open to abuse.[75] Certainly, effective international machinery to govern when remedial use of force is to be employed would be preferable. However, the endemic failure of U.N. enforcement machinery makes it a solu-

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on the Elimination of All Forms of Racial Discrimination; the Convention on the Prevention or Punishment of Genocide; the Convention on the Political Rights of Women; and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

[73] M. McDougal and M. Reisman, *Response*, 3 INT'L LAW. 438 (1969), 442-44. *Cf.* T. Franck and N. Radley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 299-302 (1973).

[74] Lillich, *supra* note 32, at 337.

[75] "Maximum particularization of inquiry is necessary. General observations are no guide. There is only one valid focus: *What kind of interference, for what purposes, under what relevant conditions and with what probable consequences.*" Falk, *The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States*, 5 How. L. J. 163 (1959).

tion for the future. The present international situation is further complicated by the lack of an effective international fact-finding system to establish who did what, when, and where. This is especially acute in a situation such as has occurred at Entebbe in which the only available sources of information are news accounts and self-serving statements of the involved States. Therefore, Lillich proposes several "objective" criteria by which "the international validity of a state's resort to forcible self-help should be judged . . ."[76] They include: (1) The immediacy of violation of human rights; (2) the extent of violation of human rights; (3) an invitation to use forcible self-help from the territorial State; and (4) the degree of coercive measures employed.[77]

Applying this framework to the Entebbe incident, several observations can be made. First, where the danger to the individuals is imminent and the State whose duty it is to protect them is unable or unwilling to do so, then forcible self-help is permissible. There is no question in the present case as to the imminence of the threat of death facing the hostages. Further, the strong evidence of Ugandan sympathy and complicity with the terrorists made impracticable any cooperation with or reliance on Ugandan authorities in rescuing the hostages.

The requirement of proportionality also appears to have been met by Israel. The measures of protection it undertook were proportional to the imminent threat of death hanging over the nationals. The amount of force used by Israel and its duration were reasonably calculated to accomplish the objective of the rescue: The killing of the terrorists for obvious reasons; the firing on Ugandan troops because of their resistance to the rescue attempt; and the destruction of Ugandan aircraft to eliminate the possibility of pursuit of the Israeli force.

Finally, Lillich discounts as a valid criteria the "relative disinterestedness" of the acting State: "Generally, a state only resorts to force to protect its own nationals, most certainly the prime instance of self-interest."[78] Hence, where the overriding motive is humanitarian, the presence of self-interest should not preclude resort to forcible self-help.

The terrorists who hijacked the Air France jetliner recognized no law and were apparently ready to kill innocent people if their demands were not met. The humanitarian considerations involved

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[76] Lillich, *supra* note 32, at 345, 347-351.

[77] *Id.*

[78] *Id.* at 350.

in this particular case justify the temporary breach of Ugandan territorial sovereignty, especially in light of the separation of Jewish hostages reminiscent of the Nazi selection process. Certainly, the unusual circumstances of this specific case limit its precedential value. However, for those rare occasions, such as at Entebbe, where a violation of human rights will prompt extraordinary measures, their legitimacy can only be condemned, as Falk has emphasized, "by a too vigorous waving of the banners of sovereignty."[79]

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[79] Falk, *supra* note 75, at 167.

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