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Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression?

. . . [I]nternational organizations are proving unable in this age—as are many national organizations—to cope with the new format of conflict within borders—subversion, terror, insurgency, the whole catalogue of conflict types which so far have baffled the international community. I think there is a serious question whether constitutionally or unconstitutionally the United Nations or any international organization is capable of coping with many problems of internal insurgency. This may be our single most unsolvable problem in the field of conflict control.

Arms Control for the Late Sixties
Lincoln P. Bloomfield

On July 10, 1976, an emergency meeting of the United Nations Security Council was convened in response to a demand by the Ugandan Foreign Minister, Juna Oris, that the Council condemn Israel for “barbaric, unprovoked and naked aggression” against his country. He was referring, of course, to the Israeli rescue of 104 hijacked passengers from the Entebbe Airport in Uganda on July 4. During the course of the rescue, seven of the hijackers, twenty of the guards at the airport, three passengers and one of the Israeli commandos lost their lives. One must take note of the bizarre context of this complaint by the Ugandan representative; not one word was mentioned by him concerning the connivance and covert assistance to the hijackers afforded by the President of Uganda, Idi Amin.

It is ironic that a former Wehrmacht officer who now serves as a United Nations Secretary General should have characterized Israel’s action at Entebbe as “a violation of the sovereignty of a member [U.N.] state.” Dr. Kurt Waldheim might at least have, under the circumstances, maintained a discreet

*The author acknowledges the assistance of Irving Karg, Esquire, of the Boston Bar, who did some research in Tel Aviv on the new Israeli theory of extraterritorial jurisdiction.

silence, instead of volunteering a legal condemnation in disregard of his obligations as an impartial administrator. Senator William Brock (R-Tenn.) characterized Waldheim's remark as "disgusting and irresponsible."

The words of the charge are "barbaric, unprovoked and naked aggression." Is there anything "barbaric" in rescuing innocent voyagers who had been hijacked aboard a commercial plane on its journey from Athens to Paris? Or is the situation one which is more properly characterized as humanitarian intervention? For the hijackers had proclaimed that unless some thirty-five political prisoners in jail in Israel, England, France and Germany were returned, the hostages would be executed.

In a thoughtful article entitled *Retaliation and Irregular Warfare in Contemporary International Law*, J. L. Taulbee¹ emphasizes, as others have also, that self-defense is the only lawful use of force permitted under the Charter² apart from Security Council action authorized under Chapter VII.³ Before an international tribunal it is suggested that the following arguments could be invoked to defend the Israeli rescue operation:

1. It can well be argued that the rescue at Entebbe, under the circumstances of imminent extinction, was a humanitarian act. Professors Myres McDougal and Michael Reisman of the Yale Law School faculty⁴ have insisted that humanitarian intervention in a situation such as the one under discussion is lawful. McDougal and Reisman claim that since humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved, it is not only not inconsistent with the purposes of the United Nations, but rather is in conformity with the most fundamental norms of the Charter. It is, consequently, a distortion to argue that it is prohibited by Article 2(4). This is a modern, sustainable position in a problem which has had its share of controversy in the past. P.H. Winfield, writing on the subject of intervention, observed that it was one of the vaguest branches of international law.⁵ He considered that intervention had been the rule since the French Revolution and set out a detailed history of the question of the validity of intervention. At one time termed "interference," and later "intervention" as a technical term, it became a word of art from 1817 to 1830. Yet, since the independence of states

¹7 INT'L LAW. 195 (1973).

²U.N. CHARTER, Art. 2, Par. 4.

³Hague Hijacking Convention (Convention For The Suppression Of Unlawful Seizure Of Aircraft) 64 DEP'T OF STATE BULL. 50 (1971) Treaty, signed December 16, 1970 subject to ratification. 65 DEP'T OF STATE BULL. 371 (1971) Ratification deposited September 14, 1971. See Derek Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AM. J. OF INT'L L. 1 (1972). "Few propositions about international law have enjoyed more support than the proposition that under the Charter of the United Nations, the use of force by way of reprisals is illegal."

⁴*Memorandum on Humanitarian Intervention to Protect Ibo* in Lillich, ed., HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, (University Press of Va., 1968).

⁵Winfield, *The History of Intervention in International Law*. BRIT. Y.B. INT'L. L. 130 (1922-23).

was the foundation of modern international law, non-intervention was the rule, intervention the exception. In the nineteenth century, few writers upheld the right to intervene by force in the affairs of another country, as a principle of law.

"The essence of intervention," wrote Lawrence in his work on international law, "is force or the threat of force in case the dictates of the intervening power are disregarded . . . There can be no intervention without, on the one hand, the presence of force, naked or veiled, and on the other hand the absence of consent on the part of the combatants."⁶ On the other hand, there is no question that a state has a right as well as a duty to protect its own nationals whether at home or in another country.⁷

It is true that the Israelis were entitled to ask for a privileged position by the rules of international law, for if a state's standard of justice with respect to its own nationals is so low that it fails to measure up to a general norm governing members of the family of nations, the alien is granted the right to appeal to the average norm rather than the lower norm prevailing in the state.

The question of humanitarian intervention has a long and checkered history. Grotius was an early subscriber to the principle that every human society and the laws that govern that society are limited by a universally recognized principle of humanity; and when a government, although acting within its rights of sovereignty, violates the rights of humanity, the right of intervention may be lawfully exercised.⁸ As pointed out by Professor Richard Lillich, the United Nations efforts in Palestine, the Congo and Cyprus may be considered as expressions of humanitarian intervention despite the fact that they were also complicated by an imminent threat to the peace of either regional or global scope.⁹

In 1877, the United States Department of State announced, curiously, that it could not tender a protest on humanitarian grounds without the permission of the government in question. A year later, upon a request to protest harassment of Jews in Barbary, the Department stated to its local representative, "that there might be cases in which humanity would dictate a disregard of technicalities, if your personal influence would shield Hebrews from oppression." Thereafter, the consul at Tangier was advised to act in such cases so far as may be consistent with his international obligations. Other examples abound in diplomatic history.

This rather tentative approach offers a stark contrast to the evolving course of the law since World War II. Human rights and freedoms, wrote Sir Hersch Lauterpacht, having become the subject of a solemn international obligation

⁶LAWRENCE, *PRINCIPLES OF INTERNATIONAL LAW* (5th ed. 1913) p. 124.

⁷THOMAS & THOMAS, *NON-INTERVENTION* (Southwestern Methodist Univ. Press, 1956) p. 303.

⁸THOMAS & THOMAS, *supra* note 7, at 373.

⁹Lillich, *supra* note 4, at 184.

and one of the fundamental purposes of the Charter, are no longer a matter which is essentially within the domestic jurisdiction of the members of the U.N.¹⁰ There is precedent in the Congo case. In 1964, rebels in the Congo seized thousands of non-belligerents and held them as hostages for concessions from the central government. When the concessions were not forthcoming, forty-five of the civilians were killed and threats were made that the rest would be massacred. A Belgian paratroop battalion, transported in American planes and through British facilities, was flown in as an emergency rescue effort in which 2,000 people were rescued in four days.¹¹

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.¹²

This provides a necessary perspective for the Entebbe raid. No redress for the voyagers could be obtained, in view of the recent history of Uganda in the civil rights area. (See below.) It would therefore appear that the Israelis would be left to exercise whatever rights they could to save their nationals within the exigencies of the time allowed. And here a distinction drawn by Professor Derek Barnett is highly relevant, between territorial *integrity* and territorial *inviolability*, with the former being subject to the rights of other states.¹³

2. Where law fails to protect members of a society against violent wrongs, they can hardly be expected, when provocation is unbearable, not to have recourse to "self-help," particularly in situations where "self-help" was recognized action in the pre-Charter period of international law.¹⁴ Self-help covers such responses as reproach, retribution, self-defense and the like. As Professors McDougal and Reisman have put it:

[I]f a state is grievously injured but the organized international community is incapable of affording timely redress, the injured party may take necessary and proportionate measures to protect itself and its nationals.

A state may resort to self-defense against states or individuals in response to the illegal and aggressive acts they have committed.¹⁵ The well-known *Caroline* and McLeod incidents¹⁶ involved certain Americans who invaded Canada, being supplied by an American vessel, the *Caroline*. In reprisal, the Canadians came over to the American side, set fire to the vessel and sent her over Niagara Falls. The British Minister in Washington later supported this action as jus-

¹⁰H. LAUTERPACHT, *INTERNATIONAL LAW & HUMAN RIGHTS* (1950) p. 178.

¹¹Lillich, *supra* note 4, at 185.

¹²Lillich, *supra* note 4, at 171.

¹³Bowett, *supra* note 3.

¹⁴Myres McDougal and Michael Reisman, Letter to the N.Y. Times, July 16, 1976.

¹⁵C.F. RHYNE, *INTERNATIONAL LAW*, (Washington, D.C.: C.B. Publishers, 1971) p. 428.

¹⁶See 2 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 409, 412, 906.

tified by principles of necessity and proportionality as set out in the *Caroline* case.

[W]hile it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹⁷

The principles of necessity and proportionality which have been confirmed in the reported judgments of the military tribunals in Nuremburg and Tokyo,¹⁸ would not appear to have been violated by the kind and degree of the Israeli measures at Entebbe, given the nature of the outrage and the lives in jeopardy.

3. There is a close analogy between the hijacking of the Air France plane under discussion and piracy.¹⁹ "Hot pursuit" is undertaken against forces using neutral territory as a base for recurring raids. Although one can say that these particular guerrillas had not been guilty of previous attacks on Israel (one of them may have been involved in a previous incident), the internecine ideological bitterness between the Arabs and the Israelis has been of long duration. Recurring raids had been initiated by the PLO and various Arab guerrilla organizations. One can validly argue that since 1948 there have been four wars against Israel launched by its neighbors or that there was one continuous war in four phases. Israel has literally been in a state of siege since its conception.²⁰

Norman Podheretz, writing in *Commentary*,²¹ points out that the United Nations resolution (1975) equating Zionism with racism branded the state of Israel as an illegitimate entity, denying the right of a sovereign Israeli state of any size or shape to exist in the Middle East. But since the essential character of the Israeli nation had not changed since its admission to the United Nations Organization, with its implicit acceptance as a "peace-loving" nation, that resolution can hardly be viewed as anything other than an extra-legal action, itself violative of the Charter's precepts, and an unconstitutional attempt to nullify the rights of Israel as a legal entity under the law of nations.

There are solid grounds in law and history, it is submitted, for contending that hot pursuit is a matter of self-defense where the neutral state (Uganda) has allowed its territory to be used as a refuge by military elements of one of the combatant parties.

In 1814, United States forces pursued the Seminole Indians into what was Spanish territory in order to punish them for various depredations on American

¹⁷29 BR. & FOR. ST. PAPER 1129, 1138.

¹⁸See *International Military Tribunal* (Nuremberg Judgment and Sentences) 41 AM. J. OF INT'L LAW, 172, 205-7 (1947).

¹⁹*International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COL. L.R. 1127.

²⁰G. F. Will, NEWSWEEK, June 14, 1976.

²¹July, 1973, p. 23.

territory.²² It was contended by the United States, in defense of its action, that the Spaniards had failed to keep their part of the bargain and that the United States had to use self-help.²³ It is axiomatic that the first duty of any government is to protect its citizens and territory. The danger to both is apparent when bands of insurgents or bandits regularly cross the border into neutral territory in order to evade government forces, re-arm and re-group. The danger is exacerbated if either the central government or the neutral state or its political and military representatives, at border areas (whether they sympathize with the cause of the rebels or due to inability to properly police its territory adjacent to the border), permit the insurgents to use this territory with impunity. Thus, self-defense under the circumstances of modern guerrilla warfare should be given an expanded meaning to permit the pursuit of retreating forces where there is reason to believe that they are using neutral territory for bases of operations and future attack.²⁴ Accordingly, the sovereign state of Uganda forfeited its right to territorial integrity by failing to take reasonable measures to prevent the use of its territory by belligerent forces.²⁵

Let us assume *arguendo* that the Arab nations contend that they are still in a state of war with Israel. Let us further assume (a justified assumption in view of the deeds and utterances of its president) that Uganda sides with the Arab countries. Uganda's failure to release the captured civilians was a violation of the Hague Convention on hijacking of 1970.²⁶ And, this failure could certainly be construed as an act of belligerency against Israel. The late Joseph L. Kunz in an essay entitled *The Causes of War* declared, "Laws of war if to be accepted and applied in practice must strive for the correct and just balances between on the one hand, the principles of humanity and chivalry and on the other hand, military interests."²⁷ One may risk to inquire what military interests of Uganda (or by adoption, any of the Arab countries) were involved in the hijacking of the voyagers on the Air France plane bound for Paris?

4. Only a limited invasion of Ugandan territory occurred in this intervention. No nation has the privilege of violating the territorial integrity of another nation, under international law. No action should be taken by one nation against the territorial integrity and political independence of another nation. Did the action of the commandos in freeing the hijacked passengers in any way threaten the territorial integrity and political independence of Uganda? Since

²²The Spaniards had undertaken to keep the Indians at peace with the United States were unable to control the marauding bands of Indians.

²³*International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COL. L. REV. 1127.

²⁴*Supra* note 23, at 1134.

²⁵*Supra* note 23, at 1139.

²⁶See HAGUE CONVENTION, Art. 9, §§ 1 and 2 *supra* note 3.

²⁷THE CHANGING LAW OF NATIONS (Columbus: Ohio State Univ. Press., 1968) pp. 868, 873.

the entire escapade lasted less than one hour,²⁸ and its objective was solely to liberate imprisoned civilians whose lives were in danger, merely to pose the question provides the answer. There was nothing in that country that the Israelis wanted except the return of the captives delivered there by the hijackers. Nor did it appear to the Ugandans at any time that the rescue party had any other interests in mind.

5. Both Israel and Uganda (1972) have adhered to the Hijacking Treaty,²⁹ which required Uganda to take action against the hijackers. In this the treaty differs from the Tokyo convention³⁰ (which became effective in December, 1969), which does not make hijacking an international crime, but leaves that determination to the discretion of the individual states. The evidence essentially supports the view that the escapade had been planned with Entebbe as the destination of the hijackers. Daniel P. Moynihan, former United States Ambassador to the United Nations,³¹ claims that Amin met the plane, embraced the terrorists, arranged for his soldiers to guard the hostages and supplied the hijackers with everything they required.

Israel now claims jurisdiction over an act abroad "which would be an offense if it had been committed in Israel and which harmed or was intended to harm, the life, person, health, freedom or property of a national or resident of Israel."³² The rationale behind this new theory of expanded jurisdiction is based on the inadequacy of national legislation in punishing offenses committed within the territory against the vital interests of a foreign state.³³ Here, there is no question that no redress could be obtained in view of the recent history of Uganda in the civil rights area. It would therefore appear that the Israelis would be left to exercise whatever rights they could to rescue their nationals within the exigencies of the time allowed.

6. Collateral to the central issue of the legitimacy of the Israeli action is whether it violated the United States Foreign Military Sales Act of 1961 by employing three C-130 military transports to carry the assault party to Entebbe and return the hostages to Israel. Although this relates more to whether a national statute was disregarded, the question of self-defense is inevitably raised by it. The pertinent portion of the statute reads as follows:³⁴

²⁸See W. STEVENSON, *NINETY MINUTES AT ENTEBBE* (NY: Bantam 1976).

²⁹The United States ratified it in 1971.

³⁰*The Tokyo Convention On Offenses And Other Acts Committed On Board Aircraft*, 2 INT'L L. MAT. 1042 (1963); see RHYNE, *supra* note 15, at 113.

³¹*The Totalitarian Terrorists*, 9 NEW YORK MAGAZINE (July 26, 1976) p. 38.

³²Section 2B Amendment to the Offenses Committed Abroad Law 5716-1955 (see note 16 in INTERNATIONAL LAW, *supra* note 23).

³³See *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, Note in 72 MICH. L. REV. 1087 (1974).

³⁴22 U.S.C. § 2754.

Defense articles and defense services shall be sold by the United States Government under this chapter to friendly countries solely for internal security, for legitimate self-defense, to permit the recipient country to participate in regional or collective arrangements.

Although the purpose to which the military transports were put was not, strictly speaking, "internal security," it does not stretch the context of the phrase too far to say that the errand they were sent on involved external security. On that basis, a case can be made that legitimate self-defense was involved in this project.

It appears that the final decision to attempt the rescue was approved by the Israeli Government only twenty-four hours before the daring rescue took place. It could be argued that there was, under the circumstances of the case, insufficient time to obtain approval from the United States.³⁵ If there had been, it is by no means clear that the United States would have condemned the use of the American-built Hercules cargo planes and the Boeing 707 jets, one of which was a hospital plane, for the purpose contemplated.

The record of Idi Amin's monstrous treatment of his own subjects, from the heartless expulsion of 80,000 Asians³⁶ and the spoliation of their possessions,³⁷ to the official assassinations of dissidents and potential rivals (to say nothing of the recently reported genocidal campaign against thousands of minority tribes-people in Uganda), left little reason for the Israeli Government to rely on Amin's humane impulses. That conviction was, of course, confirmed by the subsequent murder of a hospitalized hostage whose body was never found. His conduct mocks Ugandan adherence to the Charter of the Organization of African Unity (Amin was president of that organization), which articulates the Universal Declaration of Human Rights in its Preamble and in Article 2. This compact explicitly condemns in Article 3 all forms of political assassination. *A fortiori*, the assassination of a group for political reasons would be included.

A basic principle of law is that he who comes into court should come with clean hands. Idi Amin, whose country has violated the principles of Article 6 of the United Nations Charter, is subject to expulsion by the General Assembly upon the recommendation of the Security Council. Yet this statesman condemns Israel for what is argued here as a proper and humane act under the principles of international law, recognized by all peoples with a vestigial sense of humanity and justice.

³⁵The Israeli Cabinet gave official approval on Saturday, July 3rd and Sunday, July 4th.

³⁶See Frank Wooldridge and Vishnu D. Sharma, *Expulsion Of Ugandan Asians*, 9 INT'L L. 30, 48 (1975). The Ugandan Asians were not allowed to submit reasons against their expulsion or to have their cases reviewed by any competent legal authority.

³⁷K. C. Kotecha, *The Shortchanged: Uganda Citizenship Laws and How They Were Applied to Its Asian Minority*, 9 INT'L LAW. 1, 25 (1975).