Entebbe and Self-Help: the Israeli Response to Terrorism

JORDAN J. PAUST*

Congratulations Jeffrey Sheehan! Mr. Sheehan's interesting paper has not only started the debate about Entebbe in the periodicals but has offered a new approach to inquiry and decisional guidance (i.e., "rectification").[1] If I may, however, I would like to outline additional features of the controversy in the hope that future efforts to analyze the legality of the Israeli response will benefit from a slightly different focus. Of primary concern, of course, is Mr. Sheehan's general focus on the legality of self-help. Also relevant, however, are general effects upon U.N. viability and the overall relation of the Israeli evacuation effort to internationally permissible responses to terrorism.

When Israeli commandos freed the hostages of radical terrorists world opinion seemed divided between open pride and open condemnation. As some talked about a successful military raid, a thwarting of safe haven strategy for any future terrorist avoidance of legal sanction, others condemned the Israeli response as an act of aggression and a violation of international law.[2]

Stressing only one norm of international law, U.N. Secretary General Kurt Waldheim labeled the Israeli operation "a serious violation of the sovereignty

* The author is Assoc. Prof. at the University of Houston Law School; Chairman of the A.B.A. Committee on International Law and the Use of Force; and a member of the American Society of International Law Working Group on International Terrorism.

1. *See* J. Sheehan, "The Entebbe Raid: The Principle of Self-Help In International Law as Justification for State Use of Armed Force," 1 *The Fletcher Forum* 135 (1977).

2. *See* N.Y.T, July 13, 1976, at 1, col. 1 (U.S. and U.K. supported the raid, some African states denounced it); L.A. Times, July 13, 1976, at 9, col. 5 (Mexico denounced the raid). *See also* M. McDougal. W. M. Reisman, "The Entebbe Rescue and International Law," letter, N.Y.T., July 16, 1976, at 20, col. 5.

of a member state of the United Nations."[3] Perhaps in response, Israel declared its willingness to defend the rescue operation before the United Nations. The politico-legal debate which followed has revived an interest in legal responses to terrorism, state initiated rescue operations *a la Mayaguez* and some of the socio-political machinations that have beset the new, interdependent world. Such claims and counterclaims pose a critical problem for a United Nations that seeks to survive in an evermore frequently politicized clash of Norniks and Souniks, Eastniks and Westniks or what have you; but for humankind and the authority of law survival is also at stake.

Not only is the law of the U.N. Charter at stake, but also the interrelated problem posed by illegal terrorism. As Mr. Sheehan would seem to agree, the Entebbe evacuation mission involved no ordinary "intervention." It was a response to illegal terrorism and the imminent threat of death. Terrorism, as an intensely coercive strategy utilized to manipulate or alter human behavior and attitudes through extreme fear and anxiety, is generally proscribed by law. International law prohibits relevant strategies of governmental or private torture; cruel, inhumane or unnecessary death, injury or suffering; and the intense coercion of attitudes or behavior by threat or use of force. Domestic law in nearly all nation-states proscribes similar conduct or outcomes by constitutional or legislative prescription against assault, torture, murder, bombings and the taking of hostages. Almost all of the civilized states of the world, and not too few others, are bound by treaty law to respect and ensure respect for fundamental human rights, and most are signators to treaties that proscribe the very act of terror hijacking carried out by extremist elements of the PLO. Why, then, is there even a hint of illegality in the Israeli promotion of international laws that proscribe terrorist strategy and protect the fundamental human rights of hostages and others? Is stability to be preferred over a relative freedom of thought and behavior that stands in opposition to terrorist control — indeed, over the very lives of hostages to terror?

As Mr. Sheehan's article demonstrates, part of the problem is that the United Nations has not explicitly recognized the continuation of a right of nation-states to sanction violations of international law by using force abroad without U.N. approval.[4] Customary international law had permitted states to engage in certain forms of extraterritorial self-help and still recognizes the right of states to sanction certain violations of international law on their own (i.e., war crimes or acts of genocide); but many have argued that if the U.N. permits either a continuation of the customary use of permissible self-help or enforcement action such forms of state initiated violence will dissipate the

3. *See* N.Y.T., July 9, 1976, at 2, col. 1; and L.A. Times, July 9, 1976, at 16, col. 4.

4. *See also* J. Paust, "A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action," 5 *Ga. J. Int'l & Comp. L.* 431, 462-467 (1975).

authority of the United Nations as a peace-keeping institution, will be difficult to judge after the fact and might even lead to a spiraling process of violence and counterviolence that will lead to war and the breakdown of law. Others have argued that when the United Nations is shown to be ineffective, or will be predictably ineffective in sanctioning violations of international law, that customary norms regulating the forms of state responsive action should be retained — it is unrealistic and unresponsive to the policies that law seeks to serve to leave the state of the world to U.N. ineffectiveness in time of necessity. Indeed, others argue, it will eventually undermine the efficacy of the U.N. if states are unable lawfully to counter the illegality of others, for the fundamental basis of peace, as our Revolutionary forefathers would remind, is inherently tied to a respect for the rights of others and the authority of law. Stability or non-war was as threatening to Tom Paine and Jefferson as the deprivations themselves.

It is, perhaps, ironic that the initial debate about Entebbe took place over acts that occurred during our Bicentennial celebrations. The complexities of threats to peace, human rights, the authority of law and the U.N. are gleaned among celebrations of revolution and declarations of the Rights of Man. During further debates, which promise to divide scholars, politicians and others, it would seem appropriate to look back and into the future with some notion of the goals at stake (the values we seek to serve) and to refrain from simplistic approaches to a human problem of increasing complexity. An awareness of generally shared goals among all peoples and the complexities thrust upon us in an interdependent world, it is alleged, will cause objective decision-makers and observers to support the claim of nation-states to engage in certain forms of self-help and sanction strategy. In my opinion, such self-help responses should be conditioned by customary international law and should remain legally viable alongside the difficult efforts of a United Nations that seeks peace as well as the guarantee of basic human rights. For me, the alternative is unacceptable.

What sorts of criteria should condition future debate? Although a few tend to disagree, *customary* international law allowed the use of certain forms of extra-territorial self-help or sanction response for at least four purposes:

- in self-defense,
- in defense of one's own nationals abroad from imminent threat of death or serious bodily harm,
- in an effort to engage in humanitarian evacuation and protection of one's nationals or others in cases similar to the defense of nationals situations, and
- in the case of self-help responses designed to provide sanctions against certain violations of international law.

Mr. Sheehan might place "reprisals" and "retorsions" under the latter, even his own sub-set category "rectification."

In my opinion, Mr. Sheehan is unnecessarily restrictive in arguing that traditional forms of self-help which involve humanitarian "intervention" or humanitarian evacuation missions necessarily involve a "violation of another State's territorial sovereignty"[5] or a violation of the U.N. Charter in cases where justification under Article 51 ("self-defense") is not possible.[6] The *Lotus* case is really not determinative either way, since, within its language, one finds a highly relevant exception ("a permissive rule derived from international custom").[7] Similarly, prohibitions of "intervention" into internal "affairs" of a state are relevant but not dispositive per se without begging the very question at stake (i.e., what *is* an internal affair of a state versus a matter of international concern). Clearly the threatened murder of ("attack" on) aliens, the threatened deprivation of significant human rights, is not an "internal affair" of the state in question. Additionally, if one distinguishes between permissible and impermissible intervention by utilizing the criterion of "dictatorial interference" (Lauterpacht's oft cited phrase), then it seems highly probable that reasonably necessary and proportionate evacuation missions will be permissible in any given case. Such evacuation missions would involve a temporary and proportionate use of military force in order to withdraw the victims, not a use of force that "dictated" or violated "sovereignty" as such.

In my opinion, it is incorrect to state that the only permissible use of force in the post-Charter period is that which conforms to Article 51 or a Security Council authorization.[8] Article 2(4) of the Charter does *not* prohibit all forms

5. *See supra* note 1, at 136.

6. *See id.* at 138.

7. *See id.* at 137-138.

8. *See* M. McDougal, W.M. Reisman, *supra* note 2; J. Paust, "International Law and Economic Coercion: 'Force,' the Oil Weapon and Effects Upon Prices," 3 *Yale Studies in World Pub. Order* 213 (1976); J. Paust, "The Seizure and Recovery of the Mayaguez," 85 *Yale L.J.* 774, 800 (1976); J. Paust, A. Blaustein, "The Arab Oil Weapon — A Threat to International Peace," 68 *A J I L*. 410, 415-417 (1974); W. M. Reisman, *Nullity and Revision* 836-858 (1971); J. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter," 4 *Cal. West. Int'l L.J.* 203(1974); J. Bond, "A Survey of the Normative Rules of Intervention," 52 *Mil.L.Rev.* 51, 59-63 (1971); R. Lillich, "Forcible Self-Help Under International Law," 22 *Naval War Coll. Rev.* 56(1970); R. Lillich (ed.), *Humanitarian Intervention and the United Nations* (U.Va. 1973), especially M. McDougal, W.M. Reisman, "Memorandum on Humanitarian Intervention to Protect the Ibos," *id.* at 167; and J. Fonteyne, *id.* at 197; R. Lillich, "Forcible Self-Help by States to Protect Human Rights," 53 *Iowa L.Rev.* 325, 347-51(1967); B. Harlow, "The Legal Use of Force Short of War," 1966 *U.S. Naval Institute Proc.* 88(Nov. 1966). D. O'Connell, *International Law* 326(1965); D. Bowett, *Self Defense in International Law* 87 (1958); J. Stone, *Aggression and World Order* 96-97, *passim.* (1958). See also D. Gordon, "Use of Force for the Protection of Nationals Abroad: The Entebbe Incident," 9 *Case W. Res. J. Int'l L.* 117 (1977); *See also* L. Salter, "Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression?," 11 (ABA) *Int'l Lawyer* 331(1977); A. Thomas & A. Thomas, *Non-*

of transnational coercion. It only proscribes three types of coercion:

(1) that employed against the territorial integrity of a state,
(2) that employed against the political independence of a state, or
(3) that employed in any other manner inconsistent with the purposes of the Charter (i.e., to thwart self-determination, human rights and fundamental freedoms).

An evacuation mission designed to assure fundamental human rights would not appear to be inconsistent with the purposes of the Charter nor the employment of force against territorial integrity or political independence. A reasonably necessary and proportionate evacuation mission then should be permissible under the Charter since it is *not* prohibited by Article 2(4).

Although *all* of the relevant facts are not known yet, it appears that Israel would have little difficulty in justifying its response to extremist terrorism under the Charter and customary international law. If decision-makers in the United Nations are willing to take a more realistic and policy-serving approach to the problem, it appears that Israel could justify its claim to engage in a military rescue operation on Ugandan soil, notwithstanding the early remark of the Secretary General. As far as one can tell, the threat to Israeli and other hostages was real, serious and imminent. No other alternative seemed available to Israel, faced with a suspiciously complicitious effort by Uganda, nearly a week long effort to free the hostages through peaceful means, and a United Nations that had united more often against Israeli self-help measures than the precipitating violations of international law and had never condemned any form of PLO terrorism. There seems little doubt that the Israeli evacuation mission *was* reasonably necessary to save the lives of the hostages, and that necessity seems underlined by the fact that Uganda had not only provided a safe haven for the terrorist effort but weapons and man-power as well. There also seems little doubt that the Israeli evacuation mission was proportionate to the threat posed. There was no attempt to control territory in Uganda and the amount and effects of the force utilized were not excessive under the circumstances. Indeed, the objectives of the mission — protection and evacuation — do not raise serious threats to the territorial integrity or political independence of another state.[9] The evacuation mission is but a temporary inconvenience to the state involved and is not thwarting of overall legal policies at stake but, in balance, a serving of *all* legal policies at stake (not merely territorial integrity). An evacuation mission is, indeed, the least destructive form of any of the self-help or sanction responses mentioned above.

Intervention 303 ff. (1956); L. Sohn, T. Buergenthal, *International Protection of Human Rights* 137-211 (1973).

9. Concerning several points made above, *see also* M. McDougal, W. M. Reisman, letter, N.Y.T., *supra* note 2; and L. Salter, *supra* note 8.

Israel will no doubt also justify its protection and evacuation mission under U.N. Charter law, law that supplements customary law. The U.N. Charter allows a reasonably necessary and proportionate use of force as a self defense strategy in the case of armed attack. Customary law supplements a proper interpretation of the Charter to include the permissibility of the defense of a state's own nationals abroad who are subject to an armed attack — the defense of one's nationals in such a case is an equivalent form of *self* defense.[10] As Mr. Sheehan demonstrates, the claim was made that the hijacking at gun point constituted an armed attack on Israeli nationals and that the threat of imminent execution added to a terroristic process of "attack." The U.S. intervention into Cambodia posed an interesting precedental twist. In that case, the United States attacked enemy forces inside of a neutral Cambodia when it was clear that Cambodia could not or would not carry out its international responsibilities as a neutral to assure that its territory was not used by enemy forces to attack U.S. and allied troops inside of South Vietnam. Customary law authorized such forms of selective self-defense inside neutral territory,[11] although scholars still debate the viability of such action under U.N. Charter law. In this case, Israel may also claim that it was engaging in a self-defense operation *à la* Cambodia.

Furthermore, since the founding of the United Nations, there is precedent for the type of evacuation mission that Israel recently engaged in. In the late 1950's and early 1960's there were evacuation and protection efforts engaged in by the United States in Lebanon and by the U.S. and others in the Congo. The United States recently engaged in another evacuation mission in Lebanon and was prepared to do so during the Bangladesh war of independence. Some may have considered the rescue of the crew of the *Mayaguez* to have been a permissible form of self-help, but the *Mayaguez* operation involved an impermissible use of force under the circumstances because of the lack of necessity for such an operation and the disproportionate amount of force utilized.[12] Many argue that subsequent action by the U.N. during the Congo crisis sanctified the state response actions.[13]

Whatever the outcome of future debate, we should recall the warning of the

10. *See also supra* note 2 (U.S. position before the U.N. Security Council); and authorities cited *supra* note 8.

11. *See, e.g.*, L. Salter, *supra* note 8, at 334-335; R. Lillich, *supra* note 8; J. Stevenson, 62 *Dep't State Bull.* 765 (June 22, 1970); J.N. Moore, "Legal Dimensions of the Decision to Intercede in Cambodia," symposium, *65 AJIL* 38 (1971); *c.f.*, R. Falk, *id.* at 1; note, "International Law and Military Operations Against Insurgents in Neutral Territory," 68 *Col. L. Rev.* 1127 (1968).

12. *See* J. Paust, "The Seizure and Recovery of the Mayaguez," *supra* note 8; and J. Paust, letter, 86 *Yale L.J.* 207 (1976).

13. *See e.g.*, R. Lillich, *supra* note 8; L. Sohn, T. Buergenthal, *supra* note 8, at 195-211.