

FORCIBLE SELF-HELP UNDER INTERNATIONAL LAW

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My job today is to fill you in on some of the problems about the use of force that are not directly taken up by a discussion of the general problem of conflict management. As you see from the introduction on the lecture, I am to talk about such things as forcible self-help to protect nationals, humanitarian intervention, reprisals, retorsion, and similar doctrines. As Professor Moore undoubtedly pointed out yesterday, the general view is that the United Nations Charter permits the use of force in two areas. One of these is individual or collective self-defense, and the second is the implementation of a decision by a competent international organization. This generally, of course, would be the United Nations, but in some instances it might be a regional organization such as the Organization of American States.

Professor Lissitzyn has this to say in his book, *International Law Today and Tomorrow*, "It is generally agreed that these restrictions apply to all interstate

uses of force, whether they are called war or force short of war." In other words, what I'm talking about today is covered in the same way that the actual use of warfare would be covered. He goes on to say that "forcible reprisals [and presumably other uses of self-help] are apparently no longer lawful." This quotation is an indication, of course, that we international lawyers like to avoid saying yes or no and would generally prefer to say maybe. The conclusion seems to be that they are no longer lawful. Therefore, what I want to discuss today in rather pinpointed fashion are four particular areas: retorsion, reprisal, the use of force to protect nationals, and, finally, humanitarian intervention. Hopefully, we will first determine what their standing was under customary international law, and secondly, what impact, if any, the United Nations Charter has had upon this. The interesting fact is that, despite the literature you read on the charter saying

that force is restricted to the two instances that I mentioned before, all of these four doctrines are still dealt with by international law. They are obviously concepts that states deem to be necessary; at least they are invoked constantly in situations that technically, if you apply the charter rigidly, would not be deemed applicable.

I think here we have to realize that the U.N. Charter was originally interpreted as a rather absolutist document. The idea was that force, and particularly aggressive force, was to be eliminated. Warfare was to be eliminated except for the two instances that I have pointed out. But we are gradually beginning to realize that certain other of the sanctions that were built into the United Nations Charter, or were to be implemented through the United Nations Charter, have not actually been implemented. The charter is not wholly effective. Thus, in certain areas we may want to consider whether, in effect, some of these previous precharter doctrines could not be revised. For instance, in Professor Falk's recent book, *Legal Order in a Violent World*, he is very critical of American use of force in any of these less-than-warfare situations. But even he, in his book and in a recent article, has said that the elimination of violence from international life is not an absolute value. Nor is it separable from other questions at issue in international society. He points out that while the United Nations Charter does legislate against not only the use but also the threat of force, it was also designed to protect human rights and to establish and create a viable world order. Both of these are objectives which may require the use of coercion in a given instance to protect the overall objectives of the charter. If this is a valid conclusion and if the United Nations itself has not implemented all the powers that are found in the charter, then I think one has to consider whether or not some of these traditional doctrines still have

validity and, if so, whether we may want to redefine them in certain ways.

The first of these foundations is retorsion. I take this doctrine first because it is generally listed as number one in all the legal literature, probably because it can be disposed of most rapidly. Retorsion consists of a legal but unfriendly act taken with a retaliatory or coercive purpose.* Generally, it does not involve the use of force, but it may. Now the emphasis here is upon doing something unfriendly but legal. What would an example of this be?

Well, suppose, for instance, a country tinkers around with its tariff rate to the great detriment of the United States. The United States may respond by adopting a discriminatory tariff rate against the other country. We have done nothing illegal, we have just responded. It is certainly an unfriendly act, but it does not involve the use of force. The idea is based on the old concept of an eye for an eye. We are adopting a sanction equal to what was done against us in the hope that the first nation will relent on a quid pro quo basis. Unfortunately, it rarely operates that way, but this is the theory behind it.

Another example might be the discrimination situation. A country refuses to let certain American goods be imported. The United States might respond by revoking that country's privilege, previously granted by the United States, of fishing within the 12-mile limit. Once again this is quite permissible, even though it may involve the use of force if that country then sent fishing boats within the particular area. This is an example of retorsion which could involve the use of force.

One of the retorsions that is of primary concern now—and very topical in respect to Peru, Bolivia, Chile, and other countries—is the reduction of

*Bruce Harlow, "The Use of Force . . . Short of War," *United States Naval Institute Proceedings*, November 1966, p. 89.

foreign aid or the termination of foreign aid. We have a statute called the Hickenlooper amendment which requires the President to cut off foreign aid after 6 months if American property is taken without payment of adequate compensation. This, I would say, is an act of retorsion.

Now I just want to emphasize in ending this discussion of retorsion what I said before. It involves a legal act, something that is quite permissible and quite unfriendly, but which is not predicated upon a prior illegal act by another country such as self-defense is. You can only respond by self-defense if the other party has broken the provisions of the United Nations Charter and engaged in armed attack or otherwise committed aggression. Then it is the prior illegal act which makes your conduct legal. But in this situation, of course, your conduct is legal to start with. Because it is a legal act, it is not affected by the charter at all, so therefore, what learning we have on retorsion from before 1945 can be carried over and applied to today as well.

Now reprisals are a different matter. This is an area where, with the exception of Commander Harlow's piece, there has been very little writing recently, although I must say there was a very useful article published this past summer which I will refer to in the course of my remarks. Now reprisals constitute an action involving the use of force against another state which has violated international law. The idea of reprisal in international law is not to punish the first state for the particular illegal act but to encourage it to conform to international law.

Here you have a contrast with retorsion, which is a legal act from the beginning. Reprisal is only legal in response to a prior illegal act by another country. There are also certain limitations upon reprisal, at least under traditional international law. I'll give you three of these. First of all, as I have said,

there must be an illegal act by the other foreign state. Secondly, the state that is going to take the reprisal must request from the initial wrongdoing state some kind of reparation—give them an opportunity, in effect, to make right their international wrong. And then, thirdly, and this limitation is something that runs through the entire question of self-help and, indeed, of self-defense, the measures that must be adopted in carrying out a reprisal must be proportionate to the original provocation. In other words, if some infiltrator comes over your border and shoots one of your sentries, you cannot A-bomb the capital of the other country.

Classical examples of reprisals, most of which were in the area of naval warfare, would involve an embargo of the ships of an offending state, seizure of ships on the high seas, and pacific blockade. More recently it has been suggested that the right of reprisal could be invoked, and indeed to some extent it was invoked, in the original response in the Gulf of Tonkin in 1964 when there was an airstrike at the oil installations immediately after the alleged attack on the American ship.

Also, during last winter, just before the release of the *Pueblo* crew, it was suggested that seizure of a North Korean fishing boat that had been built in Europe and which was being towed across the Atlantic could have been utilized as a form of reprisal. The efficacy of that is something I will leave to your speculation. In any event, it is a live doctrine and, as I am sure you are aware, it is one that the Israelis rely upon almost every day. I have not had the opportunity to see today's *New York Times*, but there was another "retaliatory raid" announced in yesterday's *New York Times*.

This brings us to the question of what is the impact of the United Nations Charter upon this doctrine of reprisal? Article 2(4) of the charter, as Professor Moore told you, prohibits the

threat or the use of force. The question is, does this really mean that a state, even a state that is trying to follow the dictates of the United Nations Charter, must refrain from any use of force whatsoever when another state is violating the provisions of the charter and when the United Nations either cannot act or refuses to act in a given situation? I must say that the general view which is advanced by such people as Brownlie in his book on this subject, by Commander Harlow, by Professor Lissitzyn, and most others is that the charter prohibits all reprisals involving use of force. Professor Brierly in his book *The Law of Nations* says,

today it is beyond argument that armed reprisals . . . would be a flagrant violation of international law. Equally, it is also clear that Article 2 does not preclude a state from taking unilaterally economic or other reprisals not involving the use of armed force in retaliation for a breach of international law by another state.

There is a lot of support for this, not only among the textwriters, but also in the United Nations itself. In 1964 the Security Council censured Great Britain for carrying out a reprisal against Yemen. This was allegedly in retaliation for the Yemini support of guerrillas in Aden. You recall that the British were having great difficulty in that former colony at the time. This resolution passed the United Nations Security Council, nine votes to none, with two abstentions, and it "condemns reprisals as incompatible with the purposes and principles of the United Nations." This is a pretty general statement. It is not only condemning a specific action, as the United Nations has done in many instances with respect to Israeli retaliatory actions, but it is saying that reprisals themselves are incompatible with the purposes and principles of the

United Nations Charter. Many scholars like Professor Falk go even beyond that. They conclude that the charter prohibits all forms of forcible self-help other than the exercise of self-defense within article 51 of the charter.

This raises some questions about which we may want to speculate. I am not sure it points to many answers, but at least you can see the problem. Today, most retaliatory claims are made by Israel, but they are made by other states as well. Should we condemn a country like Israel merely by applying the conventional wisdom that reprisals have been outlawed by the United Nations Charter and, therefore, are no good—that Israel is engaging in acts that would have constituted reprisals and is therefore violating international law? What alternatives are available to Israel? I think it is proper to assume an unwillingness on the part of at least certain Arab governments to negotiate. Negotiations under the United Nations Charter in this situation, as you know, are required by article 33. Cannot it be read, cannot it be interpreted, that what Israel is doing is, as I suggested before, obviously taking actions that she thinks she has to take for her national security but also, in a broader sense, highlighting a defect in the operations of the United Nations or perhaps in the machinery of the United Nations? In other words, in a broader context, cannot it be argued that Israel is making, really, a plea for the cooperative type of law enforcement that the charter originally envisaged?

Professor Falk wrote his article to which I referred in the *American Journal of International Law* last July. It is an analysis of the Beirut raid and its relation to the international law of retaliation. You recall that this occurred a little over a year ago. An El Al plane had been shot up in Greece, and as retaliation, Israeli commandos in helicopters landed at the Beirut airport and destroyed all the Arab planes that were

there. Unfortunately, two-thirds of those planes were not owned by anyone in Arab countries—they were owned by American businessmen. The Israelis thus destroyed about some \$33 million worth of property, most of which was subsequently compensated for by Lloyds of London. In any event, Professor Falk goes through a very detailed and, I think, quite correct analysis, but he comes out saying that the raid seems illegal, which is in contrast to his view that all kinds of forcible self-help are impermissible. One would expect him to say that it *definitely* was illegal. He goes on to express his dissatisfaction with this conclusion in this very interesting paragraph. "It seems clear that on the doctrinal level Israel is not entitled to exercise a right of reprisal in modern international law. Such clarity," he goes on to say, "however, serves mainly to discredit doctrinal approaches to legal analysis." And not only in international law, I might point out, but in other areas of law as well. You just cannot read the text isolated from the complexities of certain situations. He goes on to say, "International society is not sufficiently organized to eliminate forcible self-help in either its sanctioning or its deterrent role. Therefore each reprisal claim needs to be appraised by reference to these two roles, namely sanctioning and deterrence." At the end of the article is listed a variety of criteria, and he then says that even if these criteria were being applied and even if there was a right of reprisal in international law which earlier he suggests there is not, Israel would not have met the test because its response was not proportional to the original wrong and because there was no evidence that these people who originally did the wrong to Israel came from Lebanon. They may have come from some other Arab country. But the whole question is left open, I think, at the end of the article, and the best I can do is to leave the question open today. I stated the arguments on

both sides; I have indicated that there has been a valid erosion away from the original interpretation of the charter that says reprisals are entirely out; and I think perhaps we international lawyers and Government officials are rethinking the entire problem. There is a need, perhaps, for some kind of reinstatement of reprisal—if not in the most classical sense, then in a more limited sense—as some kind of sanctioning instrument under international law.

Now, in the last third of my time, I'd like to take up the other two topics, which are interwoven. These are intervention to protect nationals and intervention on humanitarian grounds. These have been very topical things in recent years, as you will see, and they are going to continue to be so. Now, insofar as protection of nationals is concerned, you recall that in today's reading there is a mention of certain Navy Regulations. I am writing a Naval War College International Law "Blue Book"—one of the delightful obligations of the chairholder. I am writing it on this topic, and when I started to write on this topic, about three and a half years ago, there was almost no writing on it at all. If you want to refer to the original interpretation of the United Nations Charter or to some of the original books, indicating what customary law said, you could refer back to Westlake or Lawrence or early Oppenheim, but there is very little information on what the situation is today. Your present Navy Regulations I was able to trace in Washington back to 1893. They are almost *in haec verba* now with what they were in 1893. Since then we have had the Hague Conventions, the League of Nations, the Kellogg-Briand Pact, and the United Nations Charter. I gently suggested that it might be a good idea to reassess these sections of the Navy Regulations to see whether they were in conformity with international law, and I was assured that we always had an on-going reassessment of these regulations. In any event, they

bear up fairly well, because they were obviously drafted by excellent lawyers who put enough ambiguities into them so that one could construe them in a variety of ways without doing too much injustice to their original.

If you go back to the first instances in which the United States sought to protect nationals by the use of contingents, ashore, you will find about 188 cases in which these forces allegedly protected the lives and the property of American citizens, mostly in Latin America but in the East and the Near East as well. It was deemed to be permissible under international law, there was nothing wrong with this as states could legally use forces to protect the lives and property of their citizens abroad. It was forcible self-help, but it was a permissible sanction to protect the human rights of your citizens, including their property rights. There was no doubt that it was not deemed to be intervention under customary international law. Even those people who said it was intervention would then go on to say it was permissible intervention because it was for a permissible purpose.

Now the other concept, humanitarian intervention, is slightly different. Humanitarian intervention allows a state or a group of states to intervene in a country to protect not only its own nationals, but also to protect nationals of either third states or nationals of the country in which the intervention is made. For instance, the phrase was always stated that if the treatment of a state to its nationals shocks the conscience of mankind, as did the treatment of the Jews in Russia and various Christians in Turkey during the last century, then generally the great powers would mount some kind of expedition that would intervene and attempt to bring an end to what they deemed to be a shocking violation of human rights. Now note that here there is not a connection based upon nationality. There is a connection here based upon

the need to protect individuals under a certain international law standard. So the doctrine of humanitarian intervention goes beyond the protection of nationals and actually protects not only foreigners without a country, but also the citizens of the country itself.

This is a difference not really in kind, but a difference in approach. Generally, humanitarian intervention was exercised by a group of states and not a single state as was generally the case in the protection of nationals. Humanitarian intervention was justified on the ground that although it obviously was an interference with the sovereignty of the invaded state, it was a permissible one. Sovereignty was not absolute, and when a state did reach this threshold of shocking the conscience of mankind, intervention was legal.

Now, what is the impact of the United Nations Charter on these two doctrines? If one takes a look at the discussions of the charter immediately after its adoption in 1945, for instance in Judge Jessup's excellent book, one sees quite clearly that the charter supplanted these individual measures—protection of nationals and humanitarian intervention which had been approved by customary international law. In other words, they were no longer permissible. And almost all of the writers concur in this. Some say it's very doubtful whether it still exists. Brierly, for instance, very delicately says that it is a delicate question. The Thomases, who did an excellent study in the Dominican Republic crisis, cannot effectively come to grips with the issue, but they indicate that probably only non-forcible measures, in other words, not actual force, could be used in the situation to protect human rights of either nationals or in a humanitarian context.

I do think here you have to reassess the interpretation of the charter based on the experience of the last 25 years. You need not rely exclusively upon the

charter. Jessup in his book adds a very interesting caveat which, I think, has been overlooked by many people. In it he affirmed that these traditional doctrines have been replaced by the charter, but he went on to say that if the Security Council, with its Military Staff Committee, was unable to act with the requisite speed to preserve life, then forcible self-help might be allowed. And, of course, it is not a question of their acting fast enough; they do not have any contingents, they are not established, and they are unlikely to act at all. It is not a question of rapidity of the action; it is a question of getting some action initially.

It would be quite all right to forbid forcible self-help under the charter under the assumption, such as Jessup was making, that the United Nations or a regional organization such as the OAS or the Organization of African Unity had either established collective machinery to handle these situations or could act quickly on an ad hoc basis. As a matter of fact, we know that they have not. Let me give you two examples.

The first is the Congo in 1964. In the Congo situation there were several thousand foreigners and Congolese captured by the Gizenga government. It was, of course, the rebel faction that really was not a government in the legal sense, but it did occupy a portion of the country and was in rebellion against the central authority. These people were kept as hostages. There was no doubt that this constituted a violation not only of the United Nations Charter, but also of the Geneva Conventions. No one really took issue with that at all. But the United Nations got bogged down in debate upon it. They finally decided to let the Organization of African Unity attempt to do something; they tried and were very, very unsuccessful. Why should Gizenga, on his last legs, give up these hostages? He made the maximum propaganda use of them. There were

broadcasts indicating they would skin these people alive and do all kinds of other horrendous things unless peace was made on his terms. These propaganda statements were not exaggerated, for it was discovered later when the United Nations did go into Stanleyville that orders had been issued and were outstanding to shoot the hostages if there was any bombing in the area. This is a violation of international law, to say the least. As a result of this, the United States, cooperating with Belgium and Britain, mounted an airdrop which, as you know, landed at Stanleyville and rescued these people. There was a tremendous sparing of life, and I think it is reasonable to assume and reasonable to conclude that this was a valid exercise, at least in the classical sense, of humanitarian intervention.

As Professor Falk points out, this really brought down the fury of the radical African governments upon the United States in the United Nations. In fact, as a result, the United States took a horrible propaganda beating. Professor Schwebel, who was here last year, was at the United Nations for the United States at that time, and he said that the United States, and Ambassador Stevenson in particular, was amazed at this fact. It was not couched in terms that this was a violation of article 2(4), it was strictly on political lines, without using legal argument except to the extent that the argument was made in very general terms that the charter forbids this type of humanitarian intervention at all.

Let me give you another example. This was the Dominican Republic in 1965. This is a lot more controversial, as I am sure many of you realize, for a variety of reasons. But at least initially, in the perception of the U.S. Government and, I think, even the strongest critics of the American action, like Professor Falk or Professor Friedmann of Columbia, the introduction of 400 or 500 marines into a crisis situation to

gather, protect, and withdraw American nationals, and also the nationals of other countries that wanted to be taken out of the Dominican Republic, was allegedly a valid act of protection of nationals by the use of force overseas. Certainly this was true under customary international law. Whether it was true, of course, under the United Nations Charter and whether humanitarian intervention is valid under the charter gets us into an entirely different game.

As in the case of reprisals, certain things that were supposed to be set up have not become effective, therefore we find it necessary not to reinterpret arbitrarily the provisions of the charter but to read experience into it. I suppose, to some extent, it is like the Supreme Court, which some people feel is the Constitution by its interpretation. It is perfectly permissible to amend the charter by interpreting it differently, depending upon the expectations of the parties and the practice over the years. The argument has been made that there is no violation of the charter under article 2(4) or in its humanitarian or protection of nationals provisions because what is forbidden is the use or threat of force that would impair the territorial integrity or political independence of a state. Now in both the Congo and the Dominican Republic there was certainly nothing that impaired the territorial integrity of the states involved. The political independence of the state was not directly affected in the Congo, and, although the United States went on to introduce additional troops, it was an entirely different situation when we kept staying in the Dominican Republic under OAS authorization. At least initially, we were not attempting in any way to interfere with the political independence of the state. In fact, we were trying to find some state with which we could deal. You could also read this against the broader interpretation. It is not necessary to take a narrow reading of article 2(4). You can say that

this interpretation is consistent with the general principles of the charter. I would say that the two big things in the charter are the prevention of aggressive war and the protection of human rights. And, certainly, if a construction of one section of the charter, namely article 2(4), will further human rights, it is a proper construction. When I started out doing this research, no one supported this view. Since then I have found that Professors Reisman and McDougal of Yale now take this view. A thesis was written by, surprisingly enough, a Nepalese graduate law student in Canada last year who took this position, and I think even Professor Falk and some of the other critics of American interventionary actions are taking it as well. Now, if you can make a valid case for the right of forcible self-help in these two instances—the protection of nationals and humanitarian intervention—then I think it becomes an obligation on the part of international lawyers and the military. Let me say that this is not something that is entirely abstract because, as I'm sure some of you are aware, there will soon be exactly the same situation in Haiti that occurred in the Dominican Republic, and the United States will suffer once again an adverse political reaction if we take interventionary action. There may even be what you refer to as an Op-Order outstanding on this right now. Nobody will tell me. In any event, this type of thing will occur in the future, so we are not dealing only with the theoretical.

There are various criteria for such interventions proposed by a Professor Nanda in an article which he wrote several years ago on the Dominican Republic. For instance, he says you must have a specific limited purpose such as rescue. You cannot intervene because they are Communists or you think they are Communists or you do not like them or you want to protect your foreign investment. If possible,

you should have an invitation by a recognized government. If you have an invitation, of course, it is not even a question of intervention. Thirdly, he refers to the limited duration of the mission. You cannot intervene as we did in Haiti in 1914 and stay 20 years—at least not on the rationale of protection of nationals. You also have to use a limited amount of coercion. You don't bring tanks into Santo Domingo if small arms will do the job. And fifth, you have to have no other recourse; it has to be *in extremis*, and this, of course, is pointed out quite correctly by your Navy Regulations.

I have also attempted to set some standards in my article and another piece that also was published this past summer. Of the criteria that I have stressed, one or two of them are variations on Professor Nanda's, but in addition to that, I have considered such things as the immediacy of the violation of human rights. Is a massacre really imminent, or are rumors the only source of information? For instance, the State Department said in 1965 that there was blood flowing in the streets of Santo Domingo. This was an accurate statement but in the general context in which it was issued you were left with the impression that there were rivers of blood: statements were made about heads being cut off and put on pikes. There was a lot of informal retaliation among the people in the Dominican Republic, which was revealed by the Inter-American Commission on Human Rights in its investigations after 1965. I think, however, there is a question in this instance about the immediacy of the violation of human rights. I think your Navy Regulations indicate that it has to be a very immediate and very severe human rights violation to permit this type of intervention.

I also think that it certainly helps if you have an invitation either from the recognized government or at least from some authority that appears to have a

reasonable basis for making the request. Once again, the intervenor must limit the coercive measures involved and must also be relatively disinterested. Someone in the *Harvard Law Review* suggested that any state that has an interest in the outcome should not be able to intervene. Well, if you intervene to protect your nationals, how can you intervene without an interest? In fact, some of the leading advocates of the human rights aspects have suggested that it is most difficult to get people to express concern, particularly concern expressed in action, because of human rights deprivations in other countries, like the situation in Biafra and the situation several years ago in Indonesia. People are only concerned, unfortunately, when they have some interest in it themselves, and the interest, of course, is generally based upon their own nationals.

I think, in conclusion, that we can see that the Congo airdrop was a classic occasion of humanitarian intervention, and the Dominican Republic, at least initially, was a classic case of forcible self-help. I think an argument can be made for the permissibility of both these types of actions under the United Nations Charter. I think, in general, you will find that as time passes, more and more people will take a stand against an absolute prohibition of the use of force in international law in the situations that I've been discussing today.

I'd like to close by recalling a lecture given here 2 years ago by Professor McDougal in which he, in effect, admitted that he had reconsidered some of his earlier views. In particular, he said,

I am ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that article 2(4) and article 51 must be interpreted differently.

He goes on and lists his reasons, coming to the conclusion that in the absence of collective machinery to protect people against attack and deprivation, in other words in the absence of machinery as noted by Judge Jessup many years ago, the principle of major purposes requires an interpretation which would honor self-help against a prior unlawfulness.

The subsequent conduct of the parties to the U.N. Charter certainly confirms this. Many states of the world have used force in situations short of the requirements of self-defense to protect their national interests. That includes the United States, Great Britain, Israel, and also many other countries. I will just end with a conclusion: a

prohibition of violence is not an absolute virtue, for we may well want to use violence with respect to Rhodesia, or we may want to use violence with respect to other areas of Southern Africa. As I say, it is not an absolute virtue; it has to be weighed against other values as well. And this leads me to a statement by Secretary of State Dulles that he made about 12 years ago. I disagreed with him on many things, but I do agree with him on this statement. He said, "Peace is a coin which has two sides; one is the avoidance of the use of force, and the other is the creation of conditions of justice. In the long run, you cannot expect one without the other."

