

EDITORIAL COMMENTS

COERCION AND SELF-DETERMINATION: CONSTRUING CHARTER ARTICLE 2(4)

The letter killeth; the spirit giveth life.
2 Corinthians 3:6

Until 1945, there was no customary international prohibition on the unilateral resort to force. If the circumstances warranted it, and, for signatories to particular instruments, if certain preliminary procedures had been exhausted, states reserved the right to resort to force. The United Nations Charter introduced to international politics a radically new notion: a general prohibition of the unilateral resort to force by states. The principle was enshrined, in its most authoritative form, in Article 2(4) of the Charter.¹

International law had tolerated unilateral resort to coercion for a simple and ineluctable reason. In the absence of organized community structures for enforcing international rights and, where appropriate, changing them, aggrieved states had no alternative but recourse to their own means. Many of those who had deplored this situation acknowledged that there was, alas, no alternative other than self-help, conducted with the level of coercion the self-helper deemed appropriate. In this setting, an injunction like Article 2(4) would have been an implausible utopian expression had it stood by itself.

The United Nations Charter identified the structural defect of the international political system and created a network of institutions and procedures. Rather than standing by itself, Article 2(4) was part and parcel of a complex collective security system. Chapter VI of the Charter established procedures for pacific settlement of disputes. Chapter VII conferred on the Security Council a broad competence to act on behalf of the international community with respect to varying characterizations of unlawful unilateral resorts to force: threats to the peace, breaches of the peace and acts of aggression. Confronted with such violations, the Security Council could respond with force, either by calling on other members or by mobilizing forces that were to be made available to it under institutional arrangements and with contingency plans devised by a "Military Staff Committee" advising and assisting the Council. Thus, Article 2(4) was never an independent ethical imperative of pacifism. In the instrument in which it appears, there is full acknowledgment of the indispensability of the use of force to maintain community order. It is in the context of the Organization envisaged by the Charter and not as a moral postulate that Article 2(4) acquired its cogency. If the Organization operated according to its terms, it would have obviated the need for unilateral recourse to force. Claims worthy of international protection would have received it from the international community.

¹ Article 2(4) provides: "All Members shall refrain in their international relations from 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."

There is no need to recite yet again the desuetude of the collective security arrangements envisioned in the Charter. Intractable conflicts between contending public order systems with planetary aspirations paralyzed the Security Council. The UN Charter's mechanisms often proved ineffective. The situation was reminiscent of the standard American morality play: a town in the "Wild West" in the 19th century without a sheriff, good people, perforce, carrying their own weapons and protecting their rights as they see fit. A sheriff comes to town, announcing that he brings with him law and order. As he will henceforth enforce the law, individuals no longer need carry weapons and the town need not tolerate individual resort to force to protect personal rights. Presumably, all good people would be delighted by this constitutional change and would accept the new norm prohibiting the unilateral use of force. Suppose, however, that within six months it becomes clear that the sheriff is utterly incapable of maintaining order. The rule against unilateral force that he has installed may continue on the books, but it is difficult to believe that even the best of citizens will refrain from the techniques of self-help that prevailed before the sheriff's arrival.

This, indeed, is what happened in the international system. Within 5 years of the creation of the Organization, a pattern, to be reflected thereafter, was established according to which unilateral violations of Article 2(4) might be condemned but to all intents and purposes validated, with the violator enjoying the benefits of its delict. A curious legal gray area extended between the black letter of the Charter and the bloody reality of world politics. While the general Charter prohibition against unilateral action continued, and appropriate organs of the United Nations frequently condemned such action, nothing was done beyond verbal condemnation. In many cases, the party subject to the condemnation, and hence in violation of international law, was permitted to continue to benefit from the fruits of its illegal action.

If some unilateral coercions are effectively treated as legitimate, the challenge to contemporary lawyers is not to engage in automatic indiscriminate denunciations of unilateral resorts to coercion by states as violations of Article 2(4). They must begin to develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion.

A sine qua non for any action—coercive or otherwise—I submit, is the maintenance of minimum order in a precarious international system. Will a particular use of force enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics: the enhancement of the ongoing right of peoples to determine their own political destinies. That obvious point bears renewed emphasis for it is the main purpose of contemporary international law: Article 2(4) is the means. The basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them.

Article 2(4), like so much in the Charter and in contemporary international politics, rests on and must be interpreted in terms of this key postulate of political legitimacy in the 20th century. Each application of Article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions

are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure. Others have the manifest objective and consequence of doing exactly the opposite. There is neither need nor justification for treating in a mechanically equal fashion Tanzania's intervention in Uganda to overthrow Amin's despotism, on the one hand, and Soviet intervention in Hungary in 1956 or Czechoslovakia in 1966 to overthrow popular governments and to impose an undesired regime on a coerced population, on the other. Here, as in all other areas of law, it is important to remember that norms are instruments devised by human beings to precipitate desired social consequences. One should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and with appropriate regard for the factual constellation in the minds of the drafters.

This point bears emphasis. Legal statements, like all others, are made in a context whose features are part of the expectations of speaker and audience. The expression of Article 2(4), in the form of a rule, is premised on a political context and a technological environment that have been changing inexorably since the end of the 19th century. The rule assumes that the only threat of usurpation of the right of political independence of a people within a particular territorial community is from external, overt invasion. It makes a historicist assumption as well: internal changes are deemed to be personnel changes in the composition of an elite which do not bring about basic changes in systems of public order within the country or in its external political alignments; governments come and go, but the life of the people continues in its traditional fashion. Most important, it does not presuppose division, maintained by a precarious nuclear equipoise, between two contending public order systems, either of which might find itself substantially disadvantaged and pressed to intense coercion by the defection of a particular community from its critical defense zone.

The rule formulation of Article 2(4) is oblivious to these factors. Hence, its purpose notwithstanding, it has been unable to provide would-be strict applicers with a legal characterization consistent with the relevant international policies for what are, alas, all too familiar scenarios. In communities without established or durably institutionalized procedures for the transfer of power, a group of military officers, without a base of popular support, seizes the government. In an equally familiar variation of this scenario, the putsch itself is externally inspired, encouraged and/or financed. As their control is precarious, the officers immediately seek the support of an outside superpower; it responds by providing military and administrative assistance within the country and material help and support in external political arenas. Because of this foreign reinforcement, what would probably have been an evanescent violation of the popular will persists. Ironically, most of the sequences of this scenario are compatible with traditional international law and Article 2(4) as it has been mechanically applied. The usurpers of power may be recognized as a government if they appear to have effective control, a doctrine established clearly since Chief Justice Taft's holding in *Tinoco*. As such, the new "government" is entitled to request assistance from abroad. Other governments responding to it are not deemed to be "intervening";

yet if another foreign force entered the country, put the mutinous military back in the barracks and reinstalled the ousted government and the former constitutional procedures, it would violate the terms of Article 2(4). The net effect of a mechanical interpretation of Article 2(4) may be to superimpose on an unwilling polity an elite, an ideology and an external alignment alien to its wishes. This may entail far-reaching social and economic changes and grave deprivations of human rights for substantial numbers and strata of the population. Recall that all of this occurs in a century whose politics are marked by relentless mass mobilization, with frequent, radical and far-reaching intervention by the apparatus of the state.

In consequential terms, the scenarios we have rehearsed are as destructive of the political independence of the community concerned as would be a massive invasion by the armed forces of another state. To characterize the second form of intervention as unlawful and the first as lawful or at least not cognizable by international law violates the basic policy that international law seeks to achieve and rapes common sense. No international theory of interpretation worthy of the name can do this. Plainly, it is necessary to keep in the forefront the basic policy that animates Article 2(4) and in each case in which its invocation is appropriate to try to secure an outcome as consistent as possible with it.

Coercion should not be glorified, but it is naive and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law. The critical question in a decentralized system is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order.

Interpretation of a constitutive instrument requires principles and procedures that achieve, in ways appropriate to the context and consistent with the need for community order, the fundamental policies of the instrument as a whole. In the construction of Article 2(4), attention must always be given to the spirit of the Charter and not simply to the letter of a particular provision.

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THE LEGALITY OF PRO-DEMOCRATIC INVASION

In the preceding editorial, *Coercion and Self-Determination*,¹ Professor Reisman forcefully argues for the right of a state to use armed force to overthrow a despotic government in another country. He considers it a "rape of common sense" to deny the right of forcible intervention in such cases while allowing foreign aid to repressive regimes that have imposed themselves on an unwilling populace. His condemnation of external support for repressive governments

* This Editorial Comment was submitted to the *Journal* while the author was a member of the Board of Editors. A fuller examination of this thesis, with a review of decisions, will appear in the 1984 ASIL *Proceedings*.

¹ See p. 642 *supra*.