THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD: A NEW OUTLOOK

BY

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A SUB-THESIS SUBMITTED IN PARTIAL FULFILLMENT
FOR THE MASTER OF INTERNATIONAL LAW DEGREE AT
THE AUSTRALIAN NATIONAL UNIVERSITY

DECEMBER 1983

ACKNOWLEDGEMENTS

I WOULD LIKE TO EXPRESS MY DEEP-FELT GRATITUDE TO:-

MY FATHER, DR. U SAN BAW AND MY MOTHER, DR. DAW MYINT MYINT KHIN, FOR MAKING IT POSSIBLE FOR ME TO STUDY IN AUSTRALIA

THE AUSTRALIAN NATIONAL UNIVERSITY FOR AWARDING ME A SCHOLARSHIP TO PURSUE MY STUDIES

DR. J-P L. FONTEYNE, SENIOR LECTURER AND COORDINATOR, GRADUATE INTERNATIONAL LAW PROGRAMME, FACULTY OF LAW, AUSTRALIAN NATIONAL UNIVERSITY, FOR SUPERVISING MY THESIS

TO ALL WHO HAVE HELPED ME THROUGHOUT MY EDUCATION IN AUSTRALIA, I AM FOREVER GRATEFUL.

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INTRODUCTION

This thesis studies the subject of protection of nationals abroad by force from legal, historical and functional viewpoints. It deals with the subject from the nineteenth century to the present day.

The first Chapter traces the historical development of the subject up to the emergence of the United Nations Charter. The rationale that was put forward as a general justification for the protection of nationals by force, legal concepts such as self-preservation, self-defense and self-help that had been used in postulating a right to use force on behalf of a State's nationals in customary international law is analysed in perspective. The nature and scope of the doctrine and State practice in this area is discerned by reference to the nationality link, by reference to the goals of the State using force and by reference to the nature of the action taken. This analysis is made primarily to indicate the amorphous nature of the doctrine and the excesses that had often occurred during the period. The possible impact of the Hague Conventions of 1907, the Covenant of the League of Nations and the Kellogg-Briand Pact on the subject is also discussed in this Chapter.

The second Chapter analyses the changes that have taken place in theory and State practice in this area since the emergence of the United Nations Charter. The impact of Articles 2 (4) and 51

of the UN Charter on the subject is discussed. A contextual analysis of the subject is made to determine the status of protection of nationals by force in Contemporary International Law. The analysis includes a review of the United Nations Charter norms concerning the use of force as well as other international instruments such as the Declaration of Friendly Relations Resolution, Definition of Aggression Resolution and Declaration of non-interference in the internal or external affairs of State inasmuch as it relates to protection of nationals by force. A brief appraisal of State practice in the post-UN Charter period where claims were made that force was used to protect nationals (1956 Suez crisis, 1965 Dominican Republic intervention and the 1964 Stanleyville operations) is made to discern the trend of State practice and the reactions of the international community in each case. After an integrated analysis, a limited right to use force in the protection of nationals is advocated as permissible in Contemporary International Law where there are gross violations of their fundamental human rights.

The third Chapter develops guidelines and criteria to determine the permissibility of the use of force on behalf of nationals in current times. Substantive, procedural and preferential criteria are stated and elaborated as 'frames of references' to assess the legality of the forcible protection of nationals in each case.

The final Chapter analyses three specific instances involving

the use of force on behalf of nationals in recent times by using the criteria developed in the preceding Chapter. The incidents that are analysed are: (1) The *Mayaguez* incident where United States forces landed on Cambodian territory to rescue the crew of the ship *Mayaguez* who were detained by the Cambodians a few days earlier in May 1975, (2) The Israeli use of force in the Entebbe airport incident to rescue its nationals hijacked by the terrorists to Uganda in July 1976 and (3) The unsuccessful attempt by the United States to rescue its diplomats held hostage by Iran in April 1980.

The Conclusion suggests that even though there has been excesses and abuses in this area, in the past, there should not be an absolute prohibition on the use of force to protect nationals in Contemporary International Law. A proposal is made for a new outlook on the subject of forcible protection of nationals abroad. This new view is based on the need to protect the fundamental human rights of nationals or prevent them from being violated in times of crisis. The lack of an effective international machinery to prevent or stop such violations calls for the need to permit a limited unilateral use of force on behalf of nationals in Contemporary International Law inasmuch as inaction on the part of the protecting State would amount to foregoing the human rights of its nationals.

CHAPTER I

ANALYSIS OF LEGAL DOCTRINES AND STATE PRACTICE REGARDING PROTECTION OF NATIONALS BY FORCE IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES

The use of force in the protection of nationals abroad was virtually taken for granted as legal in classical international law up until at least the early twentieth century.[1] However, the justifications given for the right of a State to use force were varied and amorphous[2] which warrants a treatment of the subject in historical perspective. Therefore, the moral and philosophical reasons[3] as well as the legal concepts that had been put forward to justify a State's resort to force and the definition, scope and modalities of force that have been used to this end need to be analysed. This chapter will study the doctrine and State practice in this area from the nineteenth century up to the emergence of the United Nations Charter.

RATIONALE PUT FORWARD FOR THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD

The general background behind the concept of the right to use force in the protection of nationals abroad in the nineteenth century and earlier was the rationale that an injury to the nationals of a State constituted an injury to

the State itself. Vattel formulated this thesis when he wrote:

> Whoever wrongs the State, violates its rights, disturbs its peace, or injures it in any manner becomes its declared enemy and is in a position to be justly punished. Whosoever illtreats 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.[4]

Apparently, Vattel's statement seemed to have been based on "[his] personification of the State as an organic unity made up of the sovereign and his subjects [from which he derived his thesis] that an injury to a citizen is an injury to the State".[5] This, in turn, could have been derived from the presumption that:

> the citizen is the essence of the State, and reason of its being; citizens are a constitutive element of the State.[6]

Several factors could have contributed to the development of such ideas. Borchard linked the idea that injury to the nationals of a State being considered an indirect injury to the State itself as an instance exemplifying the protective function of a State and the political philosophies that embodied it.[7] He traced the evolution in political thought from the times of ancient Greece where the State was regarded "as the ultimate aim of human life... where individual rights and welfare were recognised only to the extent it was servicable to the State" to the "modern theory, entirely individualistic and utilitarian, supported by Macaulay, Bentham and

John Stuart Mill [which] regarded the State as a means only to insure and increase the sum of private happiness".[8] While noting the "one-sidedness of each of these views" Borchard nevertheless concluded that:

> The assurance of the welfare of individuals therefore is a primary function of the State, accomplished internally by the agency of municipal public law, and externally through the instrumentalities of international law and diplomacy. The establishment of the machinery to insure the object constitutes an essential function of State activity within, protecting every member of society from injustice or oppression by every other member; without protecting its citizens from violence and oppression by other States.[9]

The influence of the doctrine that injury to the nationals could be considered as injury to the State itself could also be discerned in the legal claims made by governments and decisions given by Arbitration Commissions of the nineteenth and early twentieth centuries.[10] It is noteworthy that during this period most of the claims for damages for injury to nationals were made as *national claims* - though theoretically the claimant State is intervening on behalf of its nationals it is making the claim on its own for ostensibly affecting the State's interests through injury to its nationals. The supremacy of a State's interest over the injured national's interest (notwithstanding the fact that the State is claiming on behalf of its nationals) is also underlied by the statement that "when the claim is taken up and pressed diplomatically, it is against the foreign government a *national claim*. Over

such claim the prosecuting government has full control; it may as a matter of pure right, refuse to present them at all; it may surrender a compromise without consulting the claimants"[11] And again:

> Ordinarily a nation will not espouse a claim on behalf of its nationals against another nation unless requested to do so by such national. When such a request is made, a claim is espoused... {which is governed} not only by the interests of the particular claimant but by the large interests of the whole people of the nation and {the claimant State} must exercise its untramelled discretion in determining when and how the claim will be presented and pressed or withdrawn or compromised, and the private owner will be bound by the action taken.[12]

The above statement would generally indicate a nation's exclusive and absolute right to determine whether a claim should be made on behalf of a national and the exercise of such a discretion being governed "by the large interests of the whole people of the nation". This would point to the fact that an injury to the national *inasmuch as it affects the State* and not the injury of the national *per se* is the principal factor in the making of a claim for damages in the legal claims and decisions made regarding this matter in the nineteenth and early twentieth centuries.[13]

This further illustrates the underlying philosophy of equating (or identifying) injury to nationals as injury to the State. And notwithstanding the fact that a State's interest affected was the main cause that could give rise to such a claim, it points out that at a certain point -

as determined by the State - injury to nationals would be identified as injury to the State. This theory could be said to have been the basis in both the diplomatic claims made on behalf of nationals and the use of force in protection of them in the nineteenth and early twentieth centuries.

ANALYSIS OF LEGAL CONCEPTS UNDERLYING THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES

Self-preservation and Self-defense

Legal concepts and terminology such as self-preservation, the right of self-defense and self-help were given among others, to justify the use of force in the protection of nationals abroad. To a certain extent, the definition and application of the above concepts were not altogether clear or unambiguous and they were used interchangeably.[14] Hence, the legal justifications for which these concepts were used vis-a-vis protection of nationals abroad could also be deemed to be amorphous. Moreover, the concepts were phrased in a broad and all-encompassing manner. Westlake, for instance, defined "the true international right of self-preservation" in these terms:

> What we take to be pointed out by justice as the true international right of self-preservation is namely that of self-defence. A State may defend itself by preventive means if in its

> conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing it will be acting in a manner intrinsically defensive even though externally aggressive. In attack, we include violations of the legal rights of itself or of its subjects, whether by the offending State or by its subjects without due repression by it or ample compensation when the nature of the case admits compensation.[15]

Hence, the protection of nationals inasmuch as it involved assertion of legal rights, could be considered as tied in with the fundamental right of self-preservation.

Self-preservation as mentioned earlier was widely defined by the eighteenth and nineteenth century jurists. Rivier, for example, asserted that:

> The right of self-preservation is the first, foremost of essential rights. It subsumes them all... in fact there is for States which are natural and necessary entities one essential right only... the right to exist.[16]

This rather broad description of the right of self-preservation led some authors of the period to claim that a State, in a situation of necessity may as a matter of self-preservation:

> transgress the borders of its neighbours' territories in time of peace, not as an act of hostility, but as a kind of pacifico-belligerent right of territorial violability; pacific with respect to the State whose territory is invaded and belligerent with respect to the particular powers and places destroyed.[17]

The permissibility of such situations was explained by stating

that:

> International law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter.[18]

Even more restricted views of self-preservation covered the use of force in the protection of nationals abroad under the rubric of self-preservation.[19]

Parallel to the right of self-preservation was the right of self-defense which was often equated with self-preservation or treated as an aspect, or sub-division of it and also as application of the right of self-preservation in case of attack or apprehended attack.[20] Though self-preservation and self-defense had been used interchangeably by the authors of the period, some writers (e.g., Halleck) considered self-defense as an aspect of self-preservation when the latter was defined as involving "all other incidental rights which are essential as means to give effect to the principal end"[21] which would include "the erection and arming of fortifications which are essentially means of defence".[22] He further stated that the above means of self-preservation "which may also be regarded as offensive" must be distinguished from "preparations for self-defence which are exclusively defensive";[23] whereas Westlake was content to define the true international right of self-preservation as *merely* that of self-defence.[24]

At the risk of being incautious - for the dichotomy of self-preservation/self-defense was more often than not, during

the 18th and 19th centuries, a matter of terminological confusion rather than of a conceptual nature[25] - it could be said that some writers assumed the right of self-defense arose where a State was under attack and that right was equated to or considered as an offshoot of the "fundamental" right of self-preservation. And the majority of jurists of the period[26] were of the opinion that the protection of nationals abroad was justified, among others, under the right of self-preservation or self-defense of the State whose interests had been affected through injury to its nationals.[27]

Self-help and the Lesser Forms of Use of Force

The doctrine of self-help was also employed to justify the protection of nationals by force. The doctrine could be traced to or was intermingled with the dichotomy of a right of a State to go to war and hostile measures short of war - uses of a minor coercion - which operated ostensibly in cases where the right of self-preservation of a State was not directly affected. Brownlie asserted that "the right of war, as an aspect of sovereignty...existed in the period before 1914, subject to the doctrine that war was a means of last resort in the enforcement of legal rights".[28] Indeed, the right of a state to go to war could be traced back to the writings of Vattel himself:

> In dealing with the right to security, we have shown that nature gives man the right to use force wherever necessary for his security and for the preservation of his rights.[29]

Hall justified the "right" of a State to go to war, among others, on the following grounds:

> As international law is destitute of any judicial or administrative machinery it leaves States, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction to exact redress themselves by force. It thus recognises war as a permitted mode of giving effect to its decisions.[30]

Apart from the apparently pragmatic rationalization of the right of recourse to war, it was also mentioned among others as means of "litigation of nations"[31] or as a means of "reparation of injury, the reestablishment of right, the restoration of order in the mutual relations of States."[32] These rationalizations would indicate that States were reluctant to rely openly on the general right to resort to war. Consequently, States and writers of the period tried to rationalize recourse to war by invoking various legal, moral and political justifications.[33] Still, Brownlie is of the view that "In the latter part of the nineteenth century there appeared a view that ... war was stated to be a means only of last resort, after recourse to available means of peaceful settlement had failed"[34] Be that as it may, it could perhaps be generalized that the reluctance of States to rely on an arbitrary right to resort to war together with the stigma and attendant encumbrances that a formal State of war could create in nations[35] might probably have contributed to the develop-

ment of other forms of coercion not amounting to war. These forms of coercion were known under various legal terms such as self-help, intervention, interposition, etc. in nineteenth century legal literature and State practice.

However, it could be said that the use of force in the protection of nationals abroad was rarely dealt with under the "right to resort to war."[36] Instead, it was more likely to be connected with doctrines which dealt with lesser uses of force such as self-help and reprisals. Hence, it would be appropriate to consider the subject of protection of nationals more under the nineteenth century "international law of peace" then under international law of war.[37] Therefore, theories dealing with forcible measures of self-help (not amounting to war) that have been employed in the nineteenth century will be briefly mentioned in this context.

Though Brownlie is of the opinion that "there is no clear distinction between exercise of a right to go to war in exercise of the right of self-preservation and its alter egos on the one hand and hostile measures short of war on the other"[38]it is worthwhile to review the attempts of some writers to analyse the concepts underlying the 'hostile measures short of war' in perspective. Waldock noted that "forcible measures of self-help were generally discussed by jurists under the titles retorsion, reprisals, embargo, pacific blockade and intervention... which were only descriptive labels and did not represent a scientific

division of forcible measures short of war".[39] In spite of the confusion over the scope, terms and extent of the right of self-help certain criteria were formulated which "included reference to the nature and scope of the force used, degree of resistance of the offending State, and intention of the coercing State" to "distinguish the use of force in times of peace... from war".[40] Waldock considered that in nineteenth and early twentieth century doctrine

> .... the general position in regard to forcible self-help was clear enough. It was recognised to be unexceptionable in law if it was (1) a retorsion, (2) a legitimate reprisal, (3) a legitimate intervention, (4) a legitimate act of self-defence or self-protection.[41]

In other words, it could be generally said that nineteenth century doctrine regarded self-help as a form of redressing wrongs and enforcing State's rights.[42] It could therefore be distinguished from self-defense in that:

> The right of self-help is a secondary right which comes into play only if a previous wrong has been committed, and the tort-feasor State refuses to make reparation prescribed by international law. Thus, reprisals are sanctions of international law by which, if need be, an international duty may be embraced. By way of contrast self-defence is a primary right of a preventive and repressive character.[43]

Apart from the above-mentioned modes of self-help which essentially had a punitive and remedial nature, there would also have existed a more restrictive right of self-help which dealt with the prevention or stoppage of

violations of existing legal rights.[44] In other words, instances of self-help where force was used ostensibly to protect lives and property[45] of nationals abroad whose existing legal rights have been violated need to be distinguished from incidents where the nature and objective of the use of force was to punish the State or people concerned for acts already done to nationals residing abroad. The line between the two as far as nineteenth and early twentieth century practice was concerned, is indeed a thin one for it is hard to pinpoint cases where the latter element- the intention to punish or inflict measures which had the nature of reprisals - is absent. Even in some cases where the display or use of force was to prevent or stop harm done to nationals currently and at the time when force was employed, elements of punishment cannot fail to be detected.[46] This fact, however, is not inconsistent with the doctrines of the period, for the legality of such modalities of force as reprisals, sending of punitive expeditions, etc. were inherent in the legal doctrine and State practice of self-help during that period.[47]

Therefore, it could perhaps be generalized that during the nineteenth and early twentieth centuries, whatever the mode of intervention used, it was justified variously under the doctrines of self-preservation and self-defense as a broad general theory; and in cases not amounting to war it was justified under the doctrine of State self-help which would include

both the prevention or stoppage of harm done to nationals and reprisals for injury already done. Protection of nationals would have included the lives, honour and property of nationals abroad. Both theory and State practice would indicate a large degree of permissibility in this regard which remained virtually unregulated by any international norm.

SCOPE OF THE TRADITIONAL DOCTRINE, FACTORS ON WHICH IT OPERATES AND THE NATURE OF FORCE USED IN PROTECTION OF NATIONALS

By Reference To The Nationality Link

As a doctrine dealing with the protection of nationals it is advisable to analyse why the nationality link could give rise to protection by force. A State might adopt laws concerning the gain or loss of nationality which would give rise to protection, as it deems fit, under the doctrine.[47a] This is generally determined by a process or Municipal Law[48] than that of International Law.[49] Therefore, nationality basically could be considered as the main reason for protection and the underlying reason for that was generally already described.[50]

> Citizenship is membership of a political society and implies duty and allegiance on the part of the members and a duty of protection on the part of the society.[51]

Hence, membership of a society requiring the nationality of a certain country gave rise to a duty of allegiance on the part of the subject and a duty of protection on the part of a State. Nevertheless, no citizen abroad has by International Law a right to demand protection from his home State,

although he may have such a right by Municipal Law.[52] The discretion of the State in its exercise of protection may, among others, depend on political factors as well as on the determination of the extent to which its interests had been affected through injury to its nationals. Still, it is apparent that the nationality link was an integral, though not exclusive, factor in a State's decision to employ force. The nationality link, however, was not an absolute factor for it was still possible for a State to refuse protection where the correlation or protection that gave rise to citizenship has been broken by the existence of allegiance to another State[53] and non-fulfillment of the duties of citizenship.[54]

Be that as it may, the nationality link had not always been a necessary factor to give rise to protection by force during the period. This was indicated by the instances of intervention by foreign powers in exceptional cases which was not based exclusively on the nationality link.

In the nineteenth century, there were a few instances where 'intervention' against another State was made due to "the tyrannical conduct of a State toward its own subjects (which) might directly affect a numerous class of subjects of another State, who were connected by blood with the victims of another State".[55] In similar cases, during the period, affinity with religious, race or other factors were cited as reasons to justify the right of intervention on behalf of

the persecuted 'nationals' of another State.[56] Though it would be more appropriate to classify such actions under the separate doctrine of "humanitarian intervention", the linkage by such factors as racial and religious connections to justify the protection of 'nationals' of another State should provide an interesting sidelight to the nineteenth century doctrine of protection of nationals itself. Perhaps, the right of humanitarian intervention of the nineteenth century itself could be considered an extension or offshoot of the principle of protection of nationals by force.[57] Hyde exemplified this type of justification when he wrote that:

> It is conceivable... that the tyrannical conduct of a State towards its own subjects might directly affect numerous class of subjects of another state, who were connected by blood with the victims of ill-treatment. If the injuries thus sustained were of periodic recurrence and felt by large numbers of the population of the outside State, the latter would doubtless assert the right to intervene. In so doing, it *would find justification for its action on grounds closely analogous to those of self-defence*.[58]

The use of category "self-defense" which more often than not was used in relation to protection of nationals abroad - in a case which predominantly had the character of 'humanitarian intervention' would suggest that the nineteenth century doctrine of 'protection of nationals' was not always and exclusively based on the conventional doctrine of nationality alone. However, a cautious approach should be taken in considering this matter for the above cited instances would *primarily* be treated as

instances of the exercise of right of 'humanitarian intervention' rather than under the doctrine of protection of nationals. Moreover, in the twentieth century, the mere connection by blood, race or religious affinities would not readily give rise to an exercise of protection of nationals as it had in the nineteenth century, though it is arguable that after the emergence of the UN Charter and due to the emphasis on human rights given in it, notions of protecting human rights could be asserted as much as the link of nationality in considering the use of force in the protection of nationals.[59]

By Reference to the Purpose of Intervention

Protection of Life, Liberty, Property and Honour of Nationals

As stated earlier, the protection of nationals include not only the lives, but also the property, liberty and honour of these nationals. Again, not only the danger and injury to property of nationals abroad but also the mere default or non-payment of public debts could give rise to the employment of force. At least this was the general rule until the Hague Convention in 1907, which prohibits the use of force in the collection of debts.

The permissibility of the use of force for the protection of property *and* the collection of debts could be seen in incidents that had occurred in the Island of Johanna in 1851, Nicaruagua-1854, Japan-1864, Haiti-1888 and also the occupation by French marines in 1901 of part of the Turkish

island of Mitylene as a measure designed to obtain payment of claims of Lorando and Tubini.[60] Borchard classified these actions under (1) the use of force for the collection of indemnities, either with or without delivery of a previous ultimatum, (2) for the seizure of custom houses, as security for the payment of claims.[61]

The wide ranging grounds which gave a State the right to use force was illustrated in a Memorandum issued by the United States Department of State in 1912.[62] The Memorandum listed numerous instances where force had been used in protection of nationals and classified these instances according to the purpose of the intervention. In addition to the instances enumerated by Borchard wherein the use of force in the collection of debts - and *a fortiori* protection of nationals' property - was justified, there were also instances where it could be said that force was used for the protection or vindication of 'honour'. Such incidents were classified under the category, "Punishment for *insults* or injuries to American citizens or American officers, such injuries not resulting in death."[63] Even though this classification could be considered primarily under the doctrine of reprisals, it is also presumable that such actions constituted the use of force to vindicate the 'honour' of a State's nationals which were violated by 'insults' of natives. For example, the action of the United States in"August, 1851 when its sloop of war *Dale*...visited the island of Johanna

and obtained under threat of bombarding the town, $1,000 as a means of redress for the unlawful imprisonment of and detention on the island of Captain Moores"[64] could be considered as an attempt to vindicate the 'honour' of a national whose right to liberty was violated.

Similarly, the protection of 'liberty' - widely defined and expansively interpreted - could be discerned in the wirtings of jurists as well as State practice during the period. Pradier-Fodéré postulated:

> It is the duty of all States to protect their nationals in foreign countries by all means which International Law authorizes... It owes them such protection, for example, if the foreign State has stopped travelers without reason... if it has despoiled them of their property... if it has violated with respect to them the treaties of commerce and free establishment.[65]

The justification to use 'all means to prevent travelling nationals from being stopped by another State' could generally be considered as protecting the right of liberty of nationals. However, the fact that the mere 'stopping without reason' of nationals possibly gives rise to use of force by States - without any elaboration of the circumstances giving rise to the use of force - would indicate the looseness and the tendency of abusive doctrine and State practice of that period.

In short, both doctrine and State practice during the period indicated an open and expansive implementation[66] of the following statement by Oppenheim:

> The right of protection of nationals which a State holds may cause an intervention which the other party is legally bound to submit. And it matters not whether the protection of life, security, honour or property of a citizen abroad is concerned.[67]

By Reference to the Nature of the Action Taken

1. Intervention/Interposition

Intervention has been defined by Oppenheim as a 'dictatorial' interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things."[68] Hall stated that "Intervention takes place when a State interferes in relations of two other States without the consent of both or either of them, or when it interferes in the domestic affairs of another State irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it."[69]

Due to the generally stigmatic terms[70] attached to the notion of intervention, jurists of the period preferred to consider the subject of protection of nationals under the concept of 'interposition'.[71]

The difference between intervention and interposition is that the former "includes interference with the political concerns of another State", whereas "the latter is confined solely to the protection of the persons or interests of the interposing State."[72]

Be that as it may, instances of interposition had occurred

not only in the limited context of protection of nationals, but also in such activities as (1) reestablishment of American legation and protection of the Minister, (2) preservation of order during the interregnum between control by the regular government and by revolutionary government, (3) establishment of a presumed regular government.[73] Indeed, there had been several instances where United States forces landed on foreign soil in times of revolution with or without the invitation of either faction to support one group or interfere in the fighting.[74]

Incidents involving the landing of American forces in time of war between two foreign nations had also occurred such as in Korea (1874), Honduras (1907).[75] Therefore, even though there had been categorical attempts and statements that the landing forces on behalf of nationals is merely non-political intervention or interposition[76] the actual events would indicate that the distinction between the two concepts is mainly in theory only and not in State practice.[77]

2. Retorsion

Retorsion has been defined as "non-amicable measures being evidence of unfriendliness [which] are not coercive in the sense that resort is had to the use or display of force."[78] Thus Retorsion consitituted "unfriendly but legal acts between States"[79] which "signifies retaliation in kind."[80] Retorsion is more often used in cases where a country is under a general disability, e.g., exclusion from its ports of the

vessels of a certain nation; the exclusion of products of a certain country by differential import duties or the enactment of discriminatory laws against the citizens of one particular country compared with aliens generally.[81]

There are a few instances where Retorsion was used in the context of protection of nationals. Borchard cited as example "the stoppage by the King of Prussia in 1753 of the interest due to the British subjects on the Silesian loan, until he obtained the indemnities for the unjust capture of certain Prussian vessels and their condemnation by British prize courts" as a form of Retorsion.[82] The incident in which the American Minister was instructed "to resort to the measure of withholding duties to the amount of the claim" upon the refusal of China in 1855 to pay a claim for personal injuries to an American citizen - was also regarded as a form of Retorsion.[83]

Under the international law of the period Retorsion was considered a "non-amicable" measure which did not involve the use of force and was therefore different from reprisals which were coercive measures having in some cases a "dangerous proximity to war measures."[84]

3. Reprisals

Reprisals has been defined as "retaliatory measures of self-help taken by States as a last resort to obtain redress for an injury"[85] or "to prevent recurrence of acts or omissions which, under international law, constitute international

delinquency."[86] Therefore, reprisals were a form of self-help which were taken generally *after* the injury has been done in contrast to actions aimed at stopping or preventing ongoing violations to national's lives, property or honour.[87]

Until the scope of reprisals was narrowed by developments such as the Covenant of the League of Nations and the Kellogg-Briand Pact, the application of reprisals for harm *already* done to national's lives, property or honour was widespread and considered legal. The Memorandum of the United States, State Department "Right to Protect Citizens in foreign countries by landing forces",[89] (first published in 1912) included "the punishment of natives for insults or injuries to American citizens or American officers, such injuries not resulting in death" as grounds for using force.[90] The open acknowledgement that actions taken were for the purpose of 'punishment' of natives as well as the disproportionality and excesses that often occurred[91] would indicate the expansive nature of the doctrine of reprisals in theory[92] and State practice during the period.

4. War

War had rarely been undertaken in its full sense... as a mode of redress for the failure to extend local protection to nationals.[93] This was so because of the reluctance of governments to assert the right to go to war in most cases, preferring to justify the protection of nationals under the doctrine of self-help.[94] This reluctance would also be based on a desire of

States "to avoid a construction of its acts which might entail all the legal consequences of war, particularly in its relation with third States."[95]

There were, however, a few instances where the protection of nationals led to the taking of war measures. Borchard listed, among others, that (1) one of the causes of the war of 1812 between the United States and Great Britain was Britain's continued interference with American vessels and the removal of American seamen alleged to be British subjects, (2) Italy alleged that the principal reason for its declaration of war against Turkey in 1912 was the non-payment of Italian pecuniary claims, (3) the claims of citizens of the United States against "grievous wrongs perpetrated by Mexico" was cited by President Polk in his special message of May 11, 1846 as one of the causes which required the adoption of war measures.[96]

In short, various forms of coercion from Retorsion to War had been used in the protection of nationals. The concepts of self-preservation, self-defense and self-help were used interchangeably to justify such actions. The protection of nationals include the lives, liberty, property and honour of them and these were widely defined. Both theory and State practice during the period (and especially before the emergence of the League of Nations and the Kellogg-Briand Pact) justified not only forced use to stop ongoing harm done to nationals but also reprisals taken in revenge after an injury already was done, which generally was out of proportion to the original

incident that prompted such acts.

The emergence of the Hague Conventions of 1907, the Covenant of the League of Nations and the Kellogg-Briand Pact had some impact on the doctrines regarding use of force of that period. The effect these instruments have had on the notion of protection of nationals by force is stated in the next section.

IMPACT OF THE HAGUE CONVENTIONS, THE COVENANT OF THE LEAGUE OF NATIONS AND THE KELLOGG-BRIAND PACT ON NORMS REGARDING PROTECTION OF NATIONALS ABROAD BY FORCE

The Hague Conventions

Some formal restrictions on the right of forcible self-help by States were already formulated even before the emergence of the League of Nations. A development in this matter was the regulation of the prohibition of use of force in the collection of debts due from one State to the nationals of another State in Hague Convention No. II of 1907.[97] (Perhaps this development would indicate that before 1907 it was legal for States to have recourse to armed force in the collection of debts and therefore *a fortiori* to use armed force in the protection of life and property of nationals.)

Yet, even this restriction on the use of force would not be applicable if the debtor State declined an offer of arbitration or, after arbitration, refused to execute the award.[98] Hence, even though in the nature of a relatively minor development an inroad was made - as far as contractual

debts were concerned - into the virtually absolute doctrine of the justification of use of force in the protection of nationals and their property abroad. Under Hague Convention II of 1907, therefore, a State had an obligation to resort to peacable means (such as arbitration) before resorting to the use of force in the collection of contractual debts due to its nationals.[99]

The Covenant of the League of Nations

The emergence of the League of Nations Covenant further restricted the right of States to go to war although only in a qualified manner.[100]

> Article II of the League Covenant made any war, legal or illegal and any threat of war a matter of concern to the whole League... The combined effect of Articles 12-15 was to impose on Members of the League a partial, but only partial, renunciation of war - under Article 12 they undertook to submit all disputes "likely to lead to a rupture" to arbitration, judicial settlement or conciliation by the Council and not to go to war until three months after the arbitration's award, the court's decision or the Council's report.[101]

The impact of the provisions of the Covenant on the lesser forms of coercion or self-help short of 'resort to war' was not as unequivocal or unambiguous as the Covenant's qualified prohibition of war. Therefore, the status of various forms of self-help, such as reprisals, remained largely unaffected by the League's Covenant. At least it could be stated that no unequivical restriction of forcible measures short of war could be read into the Covenant's

provisions concerning war. The loophole which gave rise to this ambiguity could be the amorphous nature of the concept 'resort to war' which was only explicitly prohibited by the Covenant subject to certain conditions.[102]

> If resort to war in the Covenant had its general meaning of a full-dress war, grave acts might occur in breach of the Covenant. But the word, "war" is not an absolute term in law and any resort to hostilities other than perhaps very minor acts of armed force could perfectly have been interpreted as falling, for the purposes of the Covenant, within the meaning of resort to war... however it was argued that hostilities not established to amount to full-dress war, were outside the province of the Covenant. Another case was armed reprisals which, being classified in customary law as measures short of war could be said with considerable force not to fall within the meaning of resort to war.[103]

The Kellogg-Briand Pact

The Kellogg-Briand Pact went further than the Covenant of the League of Nations in that it "condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in the relations of States with one another."[104] It also stipulated that "the parties to the Pact agreed that the settlement or solution of all disputes between them of whatever nature or origin shall never be sought except by pacific means."[105]

From these positions it could be postulated that at least a technical restriction in the form of seeking to solve disputes by pacific means was made a prerequisite before States could lawfully resort to armed force and war. Nevertheless, it is

necessary not to overemphasise the provision that recourse be made to peaceful means, for it was merely stated in the nature of a general provision and would not necessarily entail 'all peaceful means'. It is therefore pertinent to consider whether a State which *bona fide* had attempted to solve the dispute (such as mistreatment of its nationals by another State) initially, through peaceful means (like diplomatic contacts) but had no effect would be entitled to use force without necessarily infringing the provisions of the Pact. Considering the principle articulated in the *Naulilaa*[106] case where reprisals initiated which remained unredressed through peaceful means were considered permissible, the same principle *mutatis mutandis* could be said to be applicable regarding other forms of self-help in the protection of nationals. Be that as it may, some jurists postulated that the combined impacts of the Covenant of the League of Nations and the Kellogg-Briand Pact might have the effect of prohibiting recourse to self-help without a prior effort to settle the dispute peacefully.[106a]

The customary international law doctrine of reprisals was also refined and elaborated during the period of the Covenant of the League of Nations and the Kellogg-Briand Pact. The ambiguity of the Covenant of the League of Nations vis-a-vis concept of reprisals was illustrated in the reply given to the League Council by Committee of jurists in relation to the Corfu incident of 1923 in which Italy bombarded and occupied Corfu, allegedly in reprisal for the murder of the Italian General

Tellenic on Greek territory:

> Coercive measures which are not intended to constitute acts of war may or may not be consistent with provisions... of the Covenant, and it is for the Council when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of measures adopted, whether it should recommend the maintenance or withdrawal of such measures.[107]

It is noteworthy that the reprisal by Italy was taken for the loss of a single national and that the Committee did not make an unequivocal statement that it was illegal. Even then it would be misleading to conclude that the legal subject of reprisals as it was understood and practiced in the nineteenth century remained fully intact after the emergence of the Covenant of the League of Nations and the Kellogg-Briand Pact. The decision of the special arbitration tribunal in the *Naulilaa* case (1928)[108] illustrates this point. The tribunal rejected the plea of Germany which was based on legitimate reprisals stating that:

> Reprisals are acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends... They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending State reparation for the offense, the return to legality and the avoidance of new offense.[109]

Therefore, it should be concluded that after the emergence of the Covenant of the League of Nations and the Kellogg-Briand Pact, the following pertinent observations could be made

on the subject of reprisals: If there had been (1) a previous violation of International Law by the other party, (2) which remains unredressed by peaceful means, reprisals could be initiated against the offending State provided they were reasonably proportionate to the wrong previously committed by the offending State.[110]

It is therefore submitted that 'legitimate reprisals' in accordance with the above conditions inasmuch as it relates to protection of nationals could also be deemed to be permissible. *A fortiori* other forms of forcible self-help to stop the injury or rescue the lives and property of nationals in danger abroad could also be deemed to be permissible during the period. In short, it could be stated that, even though the League Covenant and the Kellogg-Briand Pact regulated the hitherto wide right of the use of force by States in various forms, the right of protection of nationals by force continued to exist during that period. The right, however, became more restricted than before, in the sense that the prevailing legal as well as political atmosphere no longer made it expedient for States to exclusively rely on the amorphous and extensive right of self-preservation, as asserted in the nineteenth century. But forcible forms of self-help in the protection of nationals abroad could continue to be discerned in both theory and State practice during the period that followed the League of Nations and the Kellogg-Briand Pact.[111]

The impact of the United Nations Charter and Contemporary International Law on the concept of the forcible protection of nationals is discussed in Chapter II that follows.

CHAPTER II

THE IMPACT OF NORMS OF THE UNITED NATIONS CHARTER AND OTHER UN INSTRUMENTS ON THE CONCEPT OF PROTECTION OF NATIONALS BY FORCE

This chapter examines the impact of United Nations Charter norms, especially Articles 2 (4) and 51, on the use of force in the protection of nationals abroad. The general effect of other relevant UN resolutions and declarations in this area will also be considered.

THE IMPACT OF ARTICLES 2 (4) AND 51 ON THE CONCEPT OF FORCIBLE PROTECTION OF NATIONALS

The emergence of the United Nations Charter brought forth significant and extensive changes in the International Law regarding the use of force by States. Formerly under the League of Nations System and the Kellogg-Briand Pact only 'war' was outlawed as a national policy.[1] The restrictions regarding the use of force, however, becomes much more comprehensive in the United Nations Charter. UN Charter Article 2 (4) provides that:

> 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.

Moreover, the right of self-defense which many nations assert but which hitherto remained unmentioned - and undefined -

in other international instruments such as the Kellogg-Briand Pact[2] was also stated in Article 51 of the United Nations Charter.

> Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The impact of these two articles on the international law relating to the use of force by States has been and still is a subject of controversy among jurists and States.[3] A background analysis of the views regarding these two articles on the concept of self-defense and generally the use of force by States needs to be made in a contextual perspective.

Article 2 (4) & Article 51 - The Absolute and the Less Restrictive Views

Two different views developed among jurists on the possible impact the U.N. Charter norms, mainly Article 2 (4) and Article 51, have had on contemporary international law regarding use of force. The views could, for the sake of clarity, be classified as (1) the Absolute View, and (2) the Less Restrictive View of the prohibition resulting from two articles considered together.

The absolute or classic view of the Charter prohibition on the

threat or use of force in inter-State relations interprets *Article 2 (4)* in a *broad* way "intended to encompass the entire range of possible situations".[4] Concomitantly, it takes a *restrictive* view of *Article 51* interpreting it as limiting "the rights of individual and collective self-defense to the cases where an *armed* attack has occurred"[5]

The less restrictive view interprets *Article 2 (4)* more narrowly, i.e., it postulates that basically *all* use of force is *not* prohibited but that only the use of force which violates "the territorial integrity or political independence of States" and is not consistent "with the purposes of the United Nations," is prohibited. At the same time the less restrictive view takes a broader or more flexible interpretation of the principle of self-defense vis-a-vis Article 51 in asmuch as it asserts *inter alia* that:

> ...the very wording of the article supports the position that a borad scope was intended: "*[n]*othing in the present Charter shall impair the inherent right of individual or collective self-defense..." Both the negative formulation and term "inherent right" tend to indicate that the clause is declaratory of an existing natural right of States, founded in international law and independent of the Charter.[6]

1. Arguments in Favor of the Absolute View

The main contentions of the advocates of the Absolute view are partly based on interpreting the UN Charter by reference to the *travaux prepartoires*.

It is asserted that the phrase, "against territorial

integrity or political independence" in Article 2 (4) was by no means intended to restrict or qualify the 'absolute' nature of the prohibition intended by the Charter.

> ...At the San Francisco Conference, that portion of the sentence referring to "the territorial integrity or the political independence" was added to the text merely to satisfy the small Powers who wished to see the guarantee of Article 10 of the Pact of the League of Nations[177] restated in the Charter, and not to restrict the scope of prohibition of recourse to force.[8]

Brownlie also delved and discussed in detail the *trauvaux prepatoires*[9] and asserted:

> The conclusion warranted by the *travaux prepatoires* is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small States and that it cannot be interpreted as having a qualifying effect... be that as it may, the phrase 'political independence and territorial integrity' has been used on many occasions to epitomize the *total* of legal rights which a State has.[10]

While postulating an 'absolute' prohibition of Article 2 (4), those who endorsed this view interpret Article 51 as it relates to self-defense in a restrictive manner.

> Article 51 was put in unambiguous terms and specifically limited the right of individual or collective self-defense to a response to a prior armed attack. The traditional broad scope of this right had been deliberately curtailed by the framers of the Charter, whose provisions, furthermore, in accordance with Article 102, prevailed over any prior norm of customary or conventional international law. Consequently, any threat or use of force which was not intended merely to repel a prior unlawful attack was itself an unjustifiable violation of the Charter.[11]

The principle of effectiveness in interpreting treaties and other

international documents is also referred to in support of the 'restrictive' interpretation of Article 51.

> It is submitted that a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and that even as a matter of 'plain' interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defense[12]

Lastly, it was contended that even if the word 'inherent right' in Article 51 could be interpreted as referring to the 'customary international law' of self-defense, the 'customary international law' that exists prior to the UN Charter must be considered.

> Those writers who assert that Article 51 does not deny members 'the customary right of self-defense' assume that the customary law became static by 1920 or earlier, and ignore the possibility that the customary right may have received some more precise delimitation in the period between 1920 and 1945. It seems to the present writer that to regard any form of action formerly held to be self-defense, at a time when self-defense was a phrase regarded as interchangeable, with 'self-preservation' and necessity, as within a surviving 'customary right' is a very arbitrary process. To go further, and assert that the Charter obligations are qualified by this vague customary right, is indefensible... It is submitted that Article 51 is not subject to the customary law and that, even if it were, this customary right must be regarded in the light of State practice up to 1945.[13]

2. Arguments in Favor of the Less Restrictive View

Extensive arguments have also been given in support of the less restrictive view of the Charter provisions regarding noninstitutionalized use of force by States. Those who adhere to the less restrictive view argued that:

> Article 2 (4) does *not* forbid "the threat or use of force" *Simpliciter*; it forbids it only when directed "against the territorial integrity political independence of any State" or in any other manner inconsistent with the purposes of the United Nations.[14]

At the same time it was argued that if the right of self-defense can be exercised only in case of armed attack, it would be tantamount to arguing that:

> the Charter imposes upon a wronged State, be its wrongs ever so grave and threatening to its survival, so long as it is not actually subject to armed attack, the absolute duty to refrain from threat or use of force.[15]

In relation to this interpretation of Article 51, it was further asserted that a broad interpretation was also intended by the framers of the United Nations Charter. Reliance was - again - placed on the *travaux prepartoires* of the San Francisco Conference of 1945.

> It is clear that in the Report of Committee I to the Commission I it was mentioned that ... "the use of arms in legitimate self-defense remains unimpaired", using a formula which, in debates of the thirties certainly has a meaning wider than the limited notion of defense against "armed attack against a member" now embodied in Article 51.[16]

From this and other arguments,[17] Stone deduced:

> ...The position is that Article 51 is only intended to save that part of the right of self-defense which would otherwise conflict with the Charter. As to the remaining range of the historically given license of legitimate self-defense at customary international law, the *travaux* indicated that it was intended to be preserved so far as consistent with other provisions of the Charter.[18]

In support of the proposition that the UN Charter preserves

the customary international law right of self-defense unimpaired, it was contended that:

> It is erroneous to conclude...that the right of self-defense has no other content than the one determined by the Charter. The right of self-defense belongs to member states not by grant, but by virtue of a preexisting customary and natural right long recognized by international law. Further, insertion of the word 'inherent' in Article 51 indicates a clear intent to preserve the traditional right of self-defense.[19]

It was further contended that Article 51 of the UN Charter was not included in the original Dumbarton Oaks proposals but was inserted at the San Francisco Conference for the purpose of "fitting regional arrangements and particularly the Inter-American System, into the general international organization"[20]

> Article 51...was not inserted for the purpose of defining the individual right of self-defense but of clarifying the position in regard to collective understandings for mutual self-defense, particularly the Pan-American treaty known as the Act of Chapultepec. These understandings are concerned with defense against... external aggression and it was natural for Article 51 to be related to defense against "attacks". Article 51 also has to be read in the light of the fact that is part of Chapter VII. It is concerned with defense to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere implications as forbidding forcible self-defense in resistance to an illegal use of force not constituting an "armed attack".[21]

Also, it was argued that, in the age of nuclear weapons, it would be tantamount to inviting destruction of a nation if it is to wait for an actual 'armed attack' to occur against itself.[22] Again, the words contained in Article 51, "until the

Security Council has taken measures necessary to *maintain* international peace and security" were also cited as indicating:

> ...that acts of self-defense may also be taken in anticipation of an attack. Were actions limited to cases in which an attack had already occurred, the word "restore" probably would have been used instead of maintain.[23]

These are but a selected few major claims made for and against the absolute and less restrictive readings of Articles 2 (4) and 51 considered concomitantly. A considerable number of Western jurists such as Stone,[24] McDougal,[25] Bowett,[26] Waldock,[27] Schwarzenberger,[28] etc. generally take - with some slight variations - the less restrictive view of the UN Charter norms concerning use of force.

Judging from the claims and counterclaims of both schools on the impact of Articles 2 (4) and 51, it would seem that mere academic discussion of the absolute and less-restrictive view of the UN Charter would not bring forth a clear indication which of these two views is the accurate interpretation. Both views place certain reliance on the *travaux prepartoires* which would corroborate their own viewpoints. Advocates of both views has also been rather selective in their interpretations. For example, Stone, while advocating a flexible approach in interpreting Article 2 (4) may have deemphasized (in his own words) "the very substantial support of the expanded interpretation of Article 2 (4) ... drawn by the holders of the absolute view from the *travaux prepartoires* of the San Francisco Conference relating to

Article 2 (4)."[29] He acknowledges, "It is clear that in the Report of Committee I, it was affirmed that under Article 2 (4) the unilateral use of force... remains legitimate only to back up positions of the Organization."[30] Similarly, it has been contended that Brownlie does not apply the 'principle of effectiveness' in interpreting Article 2 (4) in the same manner as he does when interpreting Article 51.[31] In this context, this remark by Kunz is pertinent:

> Historical background is not necessarily decisive for the judicial interpretation of Article 51 as it stands. The Permanent Court of International Justice held that where a text is clear and unambiguous no resort should be made to *travaux prepartoires* for its interpretation.[32]

Yet, even though a literal interpretation provides self-consistent results when applied separately to Articles 2 (4) and 51, the resulting interpretations taken together of these two articles are not fully consistent. For example, Article 2 (4) taken at its plain meaning would support the 'less-restrictive view' (i.e., prohibiting the use of force only to those instances when it is used against the territorial integrity of political independence of a State or inconsistently with the principles and purposes of the United Nations). Conversely, if Article 51 is taken at its plain meaning, it would support the absolute view's position that self-defense is legitimate only in those cases where an armed attack occurs.

Therefore, not only the *travaux prepartoires* relating to Articles 2 (4) and 51 but also subsequent State practice (verbal

as well as actual), other United Nations resolutions, declarations and attitudes expressed through its various organs need to be considered in a comprehensive manner to discern the status of Contemporary International Law in this area.

CONTEXTUAL ANALYSIS OF LEGAL NORMS REGARDING THE USE OF FORCE BY STATES IN THE POST-CHARTER PERIOD

As made clear above, even though there are disagreements among jurists and States alike in interpreting the relevant UN Charter provisions on the use of force, they are agreed on one fact: that the UN Charter is the main - though not exclusive, as some would suggest[33] - international document in which the permissibility and legality of the use of force by States in Contemporary International Law is to be judged. As a matter flowing from this premise, two further issues could possibly be discerned and discussed. One would be the

> fundamental question as to whether the *[UN]* Charter must be construed as abolishing all pre-existing norms of customary international law which it does not specifically and explicitly save, or has left unaffected those traditional rules which are not necessarily in contradiction with its own provisions and purposes.[34]

Another approach would be to determine the legality or permissibility of the use of force by reference to a policy-oriented analysis of the UN Charter itself. The analysis, further, would be a general overall review of the Charter without necessarily regarding the combined effect of Article 2 (4) and Article 51 as the *only* criterion for determining the legality of the various permutations of force that could be justifiably used under various

situations and in conformity with the provisions of the UN Charter. It needs to be mentioned, though, that analysis of the use of force in Contemporary International Law in general and protection of nationals in particular by employing the above two approaches will not necessarily be exclusive and will overlap. A combined consideration and analysis using both the above two factors will be attempted to discern the position of the subject of protection of nationals by force in Contemporary International Law.

There is no argument that those customary international laws which are in plain conflict with the UN Charter are invalid in the post-Charter period. This determination is based on the provisions of Article 108 of the United Nations Charter which states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

However, the question would arise whether those rules which are *not prima facie* in conflict with the Charter are still valid. It could be argued that the residual parts of customary international law which have remained unaffected after the supersedure or abolition of those rules which are in conflict with each other, could still be regarded as permissible in Contemporary International Law. This is based on

> the widely shared principle of interpretation in domestic law... in that the technique of implicit repeal of pre-existing laws must be restrictively interpreted, and applied only when contradiction with the new rules is unavoidable.[35]

Such customary rules whose status in Contemporary International Law is uncertain would include those rules where the status of the rule itself vis-a-vis the UN Charter is a subject of controversy among jurists;[36] in contrast to those rules for which there is unanimous or near-unanimous opinion that they are clearly illegal in the light of the provisions of the UN Charter. Then recourse could be made to one of the principles of treaty interpretation: "a treaty should be interpreted according to the intention of its framers and that it necessarily follows that such intention must be estimated against the background of events that existed at the time the treaty was made."[37] Yet even this approach is not fully free from ambiguities as the preceding review of both the Absolute and the less-restrictive views has attempted to demonstrate. Both schools have found substantial support for the proposition that *their* interpretation of the Charter reflects "the intention of the framers of the Charter"[38] and is in accord with and can be tested against "the background of events that existed at the time the UN Charter was formualted."[39]

A comparison of the views of both schools is appropriate in this context. The Absolute school contends that Article 2 (4) prohibition of the use of force against the territorial integrity and political independence "was not intended by the original framers to qualify the prohibition of the use of force" but to restrict its effect "on Article 2 paragraph 4... and indeed it was probably meant to *reinforce* the prohibition of paragraph 4."[40] On the other hand advocates of the less-restrictive view argue that Article

51 was incorporated in the UN Charter not with the intention of limiting the customary international law regarding self-defense but to accommodate regional security arrangements within the United Nations system.[41]

Be that as it may, it will be appropriate to discern the position of those rules of customary international law regarding use of force which are alleged (by those who support the less-restrictive view) not to have been affected by the UN Charter. In so doing, however, it must be borne in mind that even those provisions that arguably survive the emergence of the UN Charter always need to be assessed in the light of the values and norms embodied in it. Even though an alleged customary international law rule may *prima facie* not conflict with the UN Charter, due care should be taken to ensure that in determining the legality of any action, in the exercise of such a right, the limits as set forth in the norms and values of the UN Charter not be violated. To elaborate further on this theme it would be presumed that 'anticipatory self-defense' is one of those rights which may under certain conditions continue to be exercised in present times. Yet, the exercise of such a right must be strictly within the bounds permitted by various United Nations norms (not exclusively the UN Charter) to be judged permissible under Contemporary International Law. Applying this principle to the concept of anticipatory self-defense, a State may, when it is in imminent danger of being attacked initiate anticipatory self-defense but may not

indefinitely retain the territories seized from the enemy State once the threat of attack has been effectively removed. Greig's views on the Israeli action of anticipatory self-defense in the Arab-Israeli war of 1967 and the subsequent occupation of Arab territory by Israel is noteworthy. He writes, "the preemptive attack launched by Israel principally against the United Arab Republic in June, 1967, is an excellent illustration of the circumstances... in which a right of anticipatory self-defense might still be claimed."[42] Nevertheless, he qualified that "a plea of anticipatory self-defense even if it could legally justify the temporary retention of threatening neigbours' territories (a possibility which is doubtful enough in itself) could never justify a State incorporating such territories permanently under its sovereignty."[43] This exemplifies the proposition that customary international law rights (e.g., anticipatory self-defense) even when it survives the UN Charter need to be exercised in strict conformity with United Nations norms (i.e., inadmisibility of occupation of territory by force).

Additionally, in analysing the legality of customary international rules vis-a-vis the UN Charter, an effort should be made not to assume an attitude which regards either

1) that whatever is not specifically prohibited under international law [and the UN Charter] is permitted,

or

2) that whatever is not specifically authorized under international law [and the UN Charter] is prohibited.[44]

Nanda stated that:

The blanket application of either one of the approaches

> suggested in these statements to every situation does not provide a meaningful answer. Both of these approaches are rigid and doctrinaire and are unrelated to the context of a situation. Perhaps the best approach is to test the permissibility of a State's action to use coercive measures by the related criteria of necessity and proportionality.[45]

Apart from the basic criteria of necessity and proportionality, which need to be strictly conformed to in the application of an exercise of right at customary international law (which may not expressly be prohibited or authorized by the UN Charter), the determination of the permissibility should also depend upon other factors such as the number and types of UN Charter goals affected and the extent to which these are affected.

Taking these broad outlines into consideration, it is plausible to presume that the United Nations Charter did *not* eradicate *all* norms or rules of customary international law and provide a *tabula rasa* where tests of legality of any action concerning the use of force can be made only by reference to what is explicitly written in the Charter. In this regard, portions of the judgment of the International Court of Justice in the *Corfu Channel* case[46] would appear to indicate that relevant customary rules of international law which are in accordance with the principles of the Charter could not be taken as inapplicable in the composition and operation of post-Charter norms regarding the use of force. In the *Corfu Channel* case the International Court of Justice *inter alia* ruled that the *first* operation of the United Kingdom of "sending a squadron of naval vessels through the straits with their crew at action stations"[47] "to assert the right of innocent [passage through the Corfu Straits] and to test the reaction of

Albania"[48] "after Albanian shore batteries fired on two British warships without warning which were sailing in Albania territorial waters while making passage through the North Corfu Strait"[49] was in conformity with international law. The World Court stated that:

> ...the object of sending the warship through the Strait was not only to carry out a passage for purposes of navigation, but also to test Albania's attitude... the legality of this measure taken by the government of the United Kingdom 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 to passage which the Albania government had illegally denied.[50]

It has been claimed by some jurists, that the relevant portions of the judgment of the *Corfu Channel* case implicitly "permits acts of forcible self-help when necessary to the enjoyment of an existing international legal right."[51] Moreover, nondiscussion - indeed the almost total silence - by the International Court of Justice of the events vis-a-vis UN Charter norms[52] in making the above statements, could be interpreted as indicating that even in the post-United Nations Charter period the permissibility of the use of force could still be ascertained with reference to other factors apart from (or in addition to) the norms embodied in Articles 2 (4) and 51 of the UN Charter.

It needs to be mentioned that the inference drawn by some jurists that the *Corfu Channel* case implicitly permits forcible self-help for the purpose of "current assertion of a right [as opposed to] remedying a wrong already committed" (thus, further inferring that customary international law doctrines which do not

conflict with the Charter are still operative in the post-UN Charter period), would not be totally free from ambiguity.[53] Notwithstanding these criticisms,[54] it is submitted that the nonreference to UN Charter norms in affirming the legality of the *first* operation of the United Kingdom in the *Corfu Channel* case would suggest that customary international law rules of self-help are still applicable in the post-Charter period.[55]

The inference drawn from a judgment of the International Court of Justice from a single case should not necessarily be seen as conclusive as to the status of customary international law regarding the use of force. Other United Nations declarations and resolutions need to be further analysed to discern the trends and policies regarding the use of force, to determine the validity of relevant customary international rules in this area and to qualify and restrict these rules by the new norms of Contemporary International Law.

PROGRESSIVE INTERPRETATION OF THE CHARTER NORMS REGARDING USE OF FORCE AND THE PROTECTION OF NATIONALS

This section analyses the protection of nationals through progressive interpretation of the United Nations' elaborations, restrictions and qualifications of the Charter norms regarding use of force as expressed in its resolutions, declarations and in State practice. The United Nations resolutions analysed in this section would include 1) the Declaration on Principles of

International Law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations[56] (Hereafter quoted as Declaration of Friendly Relations), (2) Definition of Aggression Resolution.[57]

Declaration of Friendly Relations

The Declaration of Friendly Relations adopted by the General Assembly of the United Nations elaborates the principle contained in Article 2 (4) of the United Nations. Inasmuch as one of the principles of the Declaration of Friendly Relations virtually repeats the provision of Article 2 (4), it could not shed light on whether the Declaration has explicitly made the protection of nationals by force even in emergency situations impermissible. Some of the provisions such as "Every State has the duty to refrain from the threat or use of force to violate international boundaries of another State or as a means of solving international disputes..." and "[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the Charter"[58] may *prima facie* suggest that protection of nationals by force is not permissible under the Declaration. On the other hand, the prohibition of acts which in some instances could give rise to the forcible exercise of protection of nationals is also mentioned in the Declaration.

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts referred to in the present paragraph involve a threat or use of force.[59]

To exemplify a possible ambiguity that could arise in regard

to the statements in the above paragraphs consider the claims and counterclaims made by Israel and Uganda in the Entebbe airport incident. Israel claimed that Uganda had violated the above principle by its support of the hijackers of the plane. Uganda claimed that Israel violated the prohibition of the Friendly Relations Declarations "not to violate international boundaries of other States... as a means of solving international disputes."[60] The question could arise whether the prior violation by Uganda of one of the principles of the Declaration (i.e., support of terrorist activities) could estop her from claiming that Israel had violated another principle of the Declaration (i.e., violation of Uganda's territorial integrity). Presuming that Uganda had indeed collaborated with the hijackers could Israel's action be justified because of a prior Ugandan violation of one of the principles contained in the Declaration? The absence of a definite answer to such issues is further indicated by the provision in the Friendly Relations Declaration which states that:

> Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.[61]

This is a provision open-ended enough to be used by both schools of thought who either endorse or deny the right of protection of nationals by force.[62]

Therefore, it would seem that even if the Declaration can be considered as "authoritative interpretation of the Charter provisions"[63] it would be hard to state that the Declaration provides unambiguous guidance in the interpretation of the UN Charter

regarding the use of force. One such ambiguity - or if not an ambiguity, at least a trend that appears to be remarkable in the light of the prevalance of the view of the absolute prohibition of force in the verbal practice of the United Nations - is the discrepancy between the apparently absolute prohibition of the use of force, and the right of peoples in colonial areas to use force in the pursuit of their right to self-determination. The Delcaration of Friendly Relations states:

> Every State has the duty to refrain from any forcible action which deprives... peoples [referred to above in the elaboration of thepresent principle] of their right to self-determination and freedom and independence. In their actions against resistance to such forcible action in pursuit of their exercise of the right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the United Nations.[64]

The above statement in the Declaration of Friendly Relations would indicate a development of a new trend among members of the United Nations where a creeping and implicit exception could be read into the otherwise 'absolute' prohibition of force, in situations involving self-determination in a colonial or para-colonial context.[65] Especially in resolutions by the General Assembly and Security Council condemning the South African and Rhodesian governments, it is fairly clear that the United Nations regarded the use of force in these struggles as legal.[66]

Moreover, it can also be inferred that the General Assembly regards itself as having the right to support 'national liberation movements' and the recognition it accorded to various peoples who are struggling"to regain [their] rights by *all means* in

accordance with the purposes and principles of the United Nations."[67] This passage, quoted from a General Assembly resolution considering the Palestinian problem, reflects the trend of the General Assembly to give at least theoretical support to the notion that certain peoples (under colonial and para-colonial domination) are entitled to receive any assistance from the United Nations which does not necessarily exclude armed force. Even though there is the requirement that it must be according to principles and purposes of the United Nations it is arguable that since the United Nations view the struggle for self-determination as legal it would consider the use of force in exercising it as being consistent with the purposes of the United Nations. Therefore, it could be generalized that in the present day UN theory and practice the use of force and the right by other nations to support (if necessary by force) struggles for self-determination in colonial or para-colonial situations is fast developing towards forming a new exception to the 'absolute' view regarding use of force which otherwise considered the use of force not *expressly* excepted in the Charter as unlawful.

This exception to the absolute view regarding the UN Charter's provisions on the use of force in the struggle for self-determination has been explained on the ground that peoples who are subject to 'racist or colonial domination' are under armed attack by those regimes forcibly occupying their territories and denying them their right of self-determination.[68] Based on this premise, it is arguable that just as the denial of the right of self-determination of a

people has been construed as a form of 'armed attack' on them which could give rise to a use of force in self-defense, the denial of the most fundamental rights (such as the right to life of nationals) should also be given a limited right of self-defense.

On this basis of 'creeping exceptions' where the use of force in the pursuit of a right of self-determination in a colonial or para-colonial setting is deemed permissible, it could be queried whether other exceptions which are justified on moral or on grounds of human rights should be permissible.[69] Even if it is not expressly considered as being permissible, it is appropriate to query whether the trend of State practice would suggest - though admittedly not as strongly as the exception to the use of force in cases of the exercise of the right of self-determination in a colonial or non-colonial setting - that the use of force in such cases as in the protection of nationals would constitute a valid exception in cases where it did not involve an armed attack *per se*.[70] Just as proponents of the legality of the use of force in the exercise of self-determination could contend that such use of force is lawful for it is not inconsistent with the purposes of the UN (namely self-determination and human rights), the proponents of the limited right to use force in the protection of nationals abroad could argue that such use of force is not inconsistent with the purposes of United Nations (namely prevention of violation of human rights).[71]

The Definition of Aggression Declaration

The 1974 Consensus Definition of Aggression[72] by the UN General Assembly will be briefly considered vis-a-vis protection of nationals.

Article I of the Definition defined Aggression "the use of *armed* force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." This article is a virtual repetition of Article 2 (4) of the United Nations Charter, the main difference being that the word *armed* force was used instead of merely 'force' as in Article 2 (4).

Article 2 of the Consensus Definition states that "The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." But the phrase "in contravention of the Charter" does not give a clear guidance regarding the legality of use of force in the protection of nationals inasmuch as there is no *a priori* agreement that such actions consititute a *prima facie* contravention of United Nations Charter. It is true that the use of force in the protection of nationals could result *prima facie* in the

first use of 'armed force'. Nevertheless, it is not altogether clear whether it would be - and indeed in the light of the reluctance of the UN on previous occasions to condemn the concept of use of force in protection of nationals *per se* - regarded as constituting aggression. In any case, the proviso in Article 2 that "the Security Council may decide that an act of aggression has been committed would not be justified in the light of relevant circumstances" indicates that in practice there is little possibility that a genuine case of limited unilateral use of force to protect nationals would be decided as consitituting aggression.[73]

The provision in Article 3 that "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation" as consitituting aggression can likewise be subject to the same qualifications as in Article 2.

"No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression" in Article 5 may suggest to some that the use of force in protection of nationals is covered by this prohibition. Yet, Article 6 and the requirement that "In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions" would make the validity of such assertions questionable. For, Article 6 also states that "Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful." Harris is of the opinion that

"Article 6 has in mind, but carefully avoids defining, the right of self-defense".[74] And since the content of the right of self-defense is disputed as regards whether or not it contains protection of nationals, the unequivocal determination that an 'aggression' has taken place against the State where the nationals have been rescued could not possibly be made. Hence, it is reasonable to state that no unilateral and unambiguous determination that an act of aggression has taken place could be made in cases of limited use of force to protect or save nationals of a State from immediate danger to their lives. This could be as much due to the inherent ambiguities of the Consensus Definition[75] as to the possibility that an integrated analysis of the Consensus Definition vis-a-vis use of force in the protection of nationals abroad in real danger would not reasonably yield to the conclusion that an aggression has been committed.

THE NON-INTERFERENCE NORMS OF THE UN CHARTER, HUMAN RIGHTS AND THE PROTECTION OF NATIONALS BY FORCE

It has been asserted by some writers that "*[t]*he protection of aliens abroad is part of the more general goal of promoting the protection of human rights and fundamental freedoms."[76] Some even felt that "Although *[the]* traditional method of protecting nationals was a very modest one, it has nevertheless been an important means of protecting human rights"[77] by requiring that "a State accord a minimum standard of treatment of aliens, international law provided some protection for the human rights of

individuals when abroad"[78] In the light of these statements it is appropriate to consider concomitantly two cardinal and at times parallel principles of the UN Charter, viz the protection of Human Rights and the non-interference in the internal affairs of a State, especially the provisions of Article 2 (7) of the UN Charter.[79]

It is appropriate to consider whether the principle of non-interference in the internal affairs of a State would constitute a barrier in cases of implementation - and in some cases - enforcement of human rights. It is now generally accepted that the United Nations does not consider questions concerning human rights as essentially within the domestic jurisdiction of a State[80] and "[a]s a consequence - human rights have been placed outside the reach of the Article 2 (7) intervention ban, *even in cases not amounting to a threat to the peace.*[81] (The prohibition in Article 2 (7) is inapplicable in cases amounting to a threat to the peace - actions taken under Chapter VII.) Hence, States can no longer shield themselves from international scrutiny and action implemented through the United Nations in cases of gross violations of Human Rights.

It is true that according to the language of the UN Charter the principle of domestic jurisdiction as embodied in Article 2 (7), and the fact of the Article 2 (7) prohibition not being applicable in cases of human rights violations, are *mainly* concerned with relations among member States and the United Nations in contrast to a principle to be adhered to in intra-State relations.[82] Nevertheless, it should be further discerned whether

the principle of non-interference in the 'internal and external' affairs of a State, which is also a subject of a UN Declaration,[83] would necessarily act as a hindrance in the limited right of a State to use force to protect its own nationals.

As far as the United Nations is concerned, it has been submitted that a violation of human rights cannot be shielded from international scrutiny and enforcement action[84] under the plea of Domestic Jurisdiction and/or non-interference in the affairs of a State. It is debatable however whether a State, whose nationals' fundamental human rights (such as the right to life) are being threatened, should be expected to consider itself barred from taking any action because of the principle of domestic jurisdiction and non-interference in the affairs a State.[85] It is submitted that non-interference of the United Nations would not bar a State from taking limited unilateral action in exceptional situations involving the threat to life or gross mistreatment of its nationals.

If the territorial State has been grossly mistreating[86] nationals of other State(s) and *if* all peaceful efforts have failed to stop these violations, then the territorial State could not claim the protection of the non-intervention norms to further mistreat another State's nationals. There would seem to be no reason to regard that deliberate and gross maltreatment of another State's nationals is an 'internal or external' affair of the territorial State. Since the protection of the lives and fundamental human rights of its nationals are endangered, the aggrieved

State whose nationals are in peril should not be prevented from taking limited unilateral action. The reasons to take such unilateral action becomes all the more urgent when the United Nations or other international organizations are impotent to act on behalf of the intervening State. In that case, the intervening State would have no choice but to protect its nationals to whom it owes the duty of protection of their fundamental human rights. Provided that the basic criteria developed in the next chapter are met, a *bona fide* limited unilateral use of force in emergency situations involving the threat to the lives of nationals could not be considered as an "interference or attempted threats against the personality of a State or against its political, economic and cultural elements."[87]

After considering the trends of this area of the law in terms of development of United Nations norms it is useful to further analyse trends of actual State practice and the reactions of the international community to instances which could be said to have constituted the use of force in the protection of nationals after the emergence of the United Nations Charter.

STATE PRACTICE AND UNITED NATIONS REACTION TO INSTANCES OF PROTECTION OF NATIONALS BY FORCE

Before discussing State practice in this field, it is appropriate to consider the reasons given during the earlier UN years as to why the practice should be impermissible under the UN Charter. Jessup wrote in 1947 that:

> The landing of armed forces of one State in another is a "breach of the peace" or "threat to the peace" even though under traditional international law, it is a lawful act. It is a measure of forcible self-help, legalized by international law because there has been no international organization competent to act in an emergency. The organizational defect has now been at least partially remedied through the adoption of the Charter and a modernized law of nations should insist that the collective measures envisaged by Article 1 of the Charter shall supplant the individual measures approved by traditional international law.[88]

However, Jessup admitted that the fact of individual measures being supplanted by the collective measures is contingent upon the Security Council effectively discharging its functions collectively in cases of emergency.

> 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,[89] but the Charter contemplates that international actions shall be timely as well as powerful.[90]

Hence, the nonfulfillment of an organizational machinery within the United Nations which collectively would provide a prompt and effective substitute to these 'individual measures' is cited by a number of jurists to claim that:

> Before the unilateral use of force can be totally outlawed, the United Nations must develop effective methods for dealing with any and all international disturbances. Until that time, States necessarily must retain the right to use such force in instances of threat to life.[91]

Indeed, State practice after the emergence of the UN Charter indicates that nations have continued to claim the right to use unilateral forcible measures for the affirmation of 'rights',

the prevention of violation of nationals' rights, or indeed on the ground of threats to their 'territorial integrity' or 'political independence' - even though the unilateral use of force had not been in reaction to an 'armed attack' as such.

Instances where force has been used in situations where there appears to have been no armed attack (on the nation[s] using force) would include the Suez expedition (1956), the Stanleyville crisis (1964), and the Dominican intervention (1965). These were cases where claims were also made that one of the primary reasons for intervention was the protection of nationals. A brief analysis of the claims made and of the responses of the international community as mainly articulated through the organs of the UN in these cases will be made, not with a view towards determining the legality or illegality of the actions taken in these specific situations, but primarily with a view towards discerning trends in State practice.

1956 Suez Crisis

The nationalization of the Suez Canal by Egypt in July, 1956 and the invasion of Egypt by Israel on 29 October 1956 were the causes that led to the deployment of French and British troops in the Suez Canal area on... 31 October 1956.[92] The British government partly justified the use of its forces on the ground of protection of nationals. In the House of Commons debate, Foreign Secretary Eden stated:

In the present international system, where the

> Security Council is subject to the veto, there must be the right for individual countries to defend their own nationals and their own interests... We have got to reserve to ourselves the right to take the necessary action in an emergency at the time we think fit.[93]

In the United Nations, the British representative asserted the right of protection of nationals as a justification, though this was not the case with the French representative's statements.[94] The United Nations, however, did not have an occasion to pass on the validity of the British claim, the main reasons being the multiplicity of other important claims involved in the conflict, such as the claims to prevent the Egyptian-Israeli conflict from spreading further, to protect the canal and its valuable installations from possible harm, and to remove the risk to free passage through the canal.[95]

Nevertheless, the joint British-French expedition in the Sinai was not favorably looked upon by jurists. Bowett, even though agreeing with the general principle that the use of force for the protection of nationals, if properly exercised, in cases of real danger "is in accordance with customary international law and Article 51 of the Charter,"[96] is of the opinion that:

> The defect of this argument of British claims of protection of nationals lays *not in the principle it assumed*, but in the application of principles to the facts. There was, prior to the intervention of the United Kingdom and French forces, no evidence that the Egyptian government had failed to protect foreign nationals from acts of violence.[97]

And again: "The Suez action was regarded with such

disfavor by a majority of the international community that its legality is difficult to justify."[98] The unfavorable attitude of the international community could lead to the question:

> [W]hether it [the Anglo-French Suez operations] is illegal because the justification of the protection of nationals was regarded as bogus? Or was it that even if there had been a genuine risk to life and property, the action would still have been irreconcilable by the provision of the UN Charter?[99]

It is submitted that the censure of the international community was based more on the manipulation or the pretext that was used by the British government to justify its actions and possibly the disproportionality of "a large-scale invasion with its consequential destruction and loss of life which could not be legitimately excused on the [unfounded] ground of the danger to British and French lives and property"[100] than on the rejection of the doctrine of protection of nationals' lives in cases of real and imminent danger.[101]

In short, though the Suez operations received much criticism in the international community, it was mainly on the pretext of using the doctrine of protection of nationals rather than on the rejection of the validity of the doctrine itself[102] as indicated by the lack of formal statements of illegality of the doctrine in the United Nations.

The Dominican Republic Intervention

Among the many claims made by the United States for its intervention in the Dominican Republic in April, 1965,

was that the intervention had to be made in order to protect its nationals.[103] A United States Department of State memorandum entitled, "Legal Basis for U. S. Actions in the Dominican Republic" suggested the same arguments.[104]

However, there were contentions that no real danger to the lives of American nationals existed, and that the justification was given merely as a pretext for American intervention in the Dominican Republic for other reasons, most importantly the prevention of a Communist takeover of that country.[105] Moreover, arguments were also put forward that, even if the initial stages of the Dominican crisis could be considered chaotic enough to warrant such intervention, the subsequent expansion of American troops' involvement as well as their prolonged stay in the Dominican Republic long after the threat to the lives of foreign nationals had abated, is tantamount to ignoring the requirements of proportionality.[106] Significantly, even the Soviet representative's statement in the Security Council merely accused the United States of intervening in the Dominican Republic " *on the pretext* of protecting American lives" while its real reason lay in other political objectives.[107] As such, there was no direct challenge to the *concept* of protection of nationals itself - only the accusation that the concept had been used as a pretext for intervention.

Both the Suez crisis of 1956 and the Dominican Republic crisis of 1965 would admittedly indicate that the concept of protection of nationals by force had to a certain degree been utilized by major powers for political purposes. Yet, it is

submitted that the *abuse* of the concept should not necessarily obscure the permissibility of the doctrine when it is strictly applied in accordance with the requirements of necessity and proportionality. Moreover, the international community's rejection of, or reluctance to accept, these pretexts of protection of nationals would indicate that a State cannot reasonably expect to abuse the right without incurring the disapproval of the international community. The failure on the part of the organs of the United Nations notwithstanding these illegal 'abuses', to *formally* condemn or declare the doctrine of protection of nationals to be illegal as such is of significant interest.[108]

The Stanleyville Operations

The Stanleyville operations were conducted jointly by the British, United States and Belgian governments in 1964 when "the rebel movement in the Congo seized several thousand innocent persons and held them hostage... to obtain concessions from the Congo's recognized government."[109] In a sense, the Stanleyville operations were justified both by protection of nationals (i.e., the nationals of the intervening powers: Belgium, Britain and the United States) and humanitarian intervention (i.e., the rescue of nationals of other states).[110] The rescue operation was justified by the States that conducted it on the following grounds:

1) Since several foreign nationals had already been killed before the rescue operation began and others taken as hostages and threatened, *the danger was real and urgency great.*

2) The United Nations, Organization of African Unity, the International Red Cross had all been repeatedly approached to help relieve the situation but had failed to provide any assistance because of the intransigence of the rebels, thus these *States had exhausted every other means before resorting* to their emergency rescue mission.

3) The object of the operation was "solely one of saving lives" and the troops involved were withdrawn *immediately after the objective had been achieved.*

4) The action was "justified by its objectives: to frustrate the perpetration of a crime under international law - the use of innocent civilians as hostages, as a bargaining point in war time."

5) The legitimate government of the Congo has authorized the operation.[111]

If the conditions as enumerated above, especially the requirements of emergency, exhaustion of all peaceful means and proportionality had existed, as indeed it had,[112] then it is submitted that the Stanleyville operation would constitute a valid exercise of protection of nationals by force after the emergence of the UN Charter. And despite the fact of the condmenation of the Stanleyville rescue operation by several States on various grounds, " i*[t]*is noteworthy that the Security Council resolution adopted on December 30, 1964, does not mention the operation itself; it merely reiterates its prior request that all States should 'refrain or desist from intervening in the domestic affairs of the Congo.'"[113]

Therefore, State practice after the emergence of the UN Charter would indicate the sporadic assertion[114] of the right of protection of nationals by force. It is true that

in some cases, the doctrine of protection of nationals has been 'abused' or used as a 'pretext' for other, mostly politically motivated, interventions. But it is equally significant that criticism of such actions has been mainly on the basis that the doctrine has been 'abused' or used as a 'pretext', and this could be taken - albeit not unequivocally - as an implicit admission that the doctrine, inasmuch as it adheres to the requirement of necessity and proportionality, is valid under Contemporary International Law.

The appraisal of United Nations Charter norms regarding use of force as well as the progressive interpretation of the subject through United Nations resolutions, declarations and State practice indicated that customary international laws regarding the protection of nationals by force is not altogether extinct in the post-Charter period. However, the customary international law in this area needs to be delimited, qualified and elaborated accordingly to conform to the norms of the United Nations Charter and other international instruments. These criteria to be employed in determining the legality of instances of protection of nationals by force is developed in the next chapter.

CHAPTER III

DEVELOPMENT OF CRITERIA TO ASSESS THE LEGALITY OF ACTIONS IN THE PROTECTION OF NATIONALS ABROAD BY FORCE

The previous chapter has attempted to discern primarily whether and to what extent UN Charter norms have replaced or modified the customary international law right regarding the use of force in the protection of nationals abroad. In this connection, an absolute and less-restrictive view of the UN Charter norms regarding the use of force have been discussed. It was inferred that more than academic discussion of the interpretation of Article 2 (4) and Article 51 is necessary to determine the permissibility of the use of force in the protection of nationals vis-a-vis the UN Charter. An analysis as to whether these customary international laws regarding the use of force in the protection of nationals which are not in conflict with the Charter would be deemed to be permissible or operable in the post-Charter period has been made. An evaluation - and in some instances reformulation - of customary international law rules in the subject has been made, juxtaposing, as it were UN Charter norms - not merely limited to the use of force but also other norms such as human rights and other documents as 'frames of reference' within which the protection of nationals abroad operate. A brief appraisal of State practice in separate instances, as well as the action of the United Nations organs was

also made. After an appraisal of the above factors, not strictly from a legal point of view, but also from a functional [1] and human rights[2] point of view, it is submitted that the protection of nationals in genuine cases is, or should be, regarded as permissible in the post-UN Charter period.

In this regard, if a limited right to use force in the protection of nationals abroad is stated as permissible in Contemporary International Law, it needs to be further queried on what conditions and under what circumstances could the right be exercised legally. A fairly specific set of norms and guidelines needs to be formualted to test and evaluate the legality of any use of force which is claimed to have been used for the protection of nationals abroad.

Conversely, and primarily from a functional point of view, one could rely on the 'double-level' legality approach[3] where one asserts or imputes the permissibility or nonillegality, as it were, of certain actions regarding the use of force by its *de facto* occurences and by the lack of formal condemnation and censure by the world community and the United Nations.

This approach has been adopted by some jurists in view of their appraisal that notwithstanding the prevalence of the absolute view regarding use of force vis-a-vis UN Charter, episodes occur which do not strictly confirm to this prohibition. Falk postulated that this "inability of the United Nations to impose its views of legal limitation upon States lead to a kind of second-order level of legal inquiry that is guided

by the more permissive attitudes toward the use of force to uphold national interests that is contained in customary international law."[3a] Significantly this 'second-order' legality approach was postulated in the context of a more archaic subject than the protection of nationals[4] viz: The customary international law regarding reprisals.[5] Therefore, it would seem that this second-order approach could also be applied to the doctrine of protection of nationals.[6]

The 'double-level legality' approach views that the formal prohibition of use of force should be absolute; the only exceptions being individual and collective self-defense (as strictly interpreted by the absolute school) and actions taken under Chapter VII of the United Nations Charter. However, the proponents of the 'double-level' approach acknowledges that "this absolute interpretation of Charter prohibition on use of force by States is an unworkable and unacceptable restrictions upon last resort unilateral action in case of extreme violations of the most fundamental human rights."[7] Despite this fact, proponents of the double level approach are reluctant to allow a formal and *explicit* exception to the absolute prohibition of force due to their allegiance to the goal of minimization of force among States. Still, taking into account "the lack of formal condemnation or criticism *on principle* in the United Nations... in such cases as the Stanleyville operation... they conclude that in circumstances of extreme gravity the world community by its lack

of adverse reaction condones conduct which although a formal breach of positive legal norms, appears acceptable because of higher motives of a moral, political humanitarian or other nature."[8] Hence, due to this lack of adverse reaction on the part of the international community the actions taken would assume "the Charter of some kind of second-tier or sub-legality."[9]

In this context the 'double level' approach could be considered as being twofold. The first approach is to view the operation in issue involving the use of force is *prima facie* illegal but obtains its 'second-order' legality by reference to compelling circumstances that necessitates action and by lack of disapproval in general. The categorization of selective instances involving customary international law of reprisals, especially in the context of the Arab-Israeli conflict as constituting second-tier legality could generally be considered as falling within the ambit of this approach.[10] The second approach is to consider the operation in issue as permissible because the world community has not censured it formally without *a priori* postualation that these actions are *prima facie* illegal. In contrast to the approach on the subject of reprisals, the treatment of the protection of nationals vis-a-vis 'double-level' legality could be considered as falling within this ambit. For, "reprisals... have been time after time censured by UN practice... there has never been a censure of any State's invocation of arguments to protect its nationals

by humanitarian intervention."[11]

The application of the 'double-level' approach - regardless of the fact that either or both of the above two methods is used could be fraught with difficulties. Among others, the application of the 'double-level' approach in the protection of nationals abroad could possibly preclude the formulation of guidelines to determine the legality of each case in contextual, comprehensive and policy-oriented manner.[12] Additionally, it would to a large degree deprive this area of the law of its certainty and even, in some cases, increase the chances and possibility of abuses occurring by reference to this theory.[13]

Moreover, lack of censure or approbation by the world community (which is articulated through the organs of the United Nations) could be due as much to a genuine belief that the actions concerned are permissible as to political factors which prevent the relevant UN organs from expressing their disapproval.[14] Therefore, an expressly stated right of protection of nationals subject to certain conditions and rules would be more acceptable than to rely on a theory which lacks certainty and specificity, and which, to a considerable extent, is subject to arbitrary political factors.

In attempting to formulate these rules, it is realized that they would represent merely proposals *de lege feranda,* and also the parallel fact of the remoteness of the UN and other international bodies *formally* adopting any sort of rules where the exercise of force in the protection of nationals would deem to be

permissible. Notwithstanding the ostensible defects and lack of consistency, it is possible that the practice of UN would continue along the lines similar to that of the 'double-level' approach in such 'gray' areas of uncertainty regarding the use of force as in the protection of nationals. However, for the sake of determining, with sufficient clarity and consistency, the legality of such uses of force in the protection of nationals abroad, it is desirable that proposals or guidelines be formulated. It is in this sense and not with an intention of stating the *lex lata* of the law in the subject that these 'frames of reference' are postulated. (These frames of references are an integration and combination of guidelines proposed by various jurists such as Lillich,[15] Nanda,[16] Moore[17] in the broader context of intervention to protect human rights in various situations. It needs to be mentioned that the application of these criteria should not be made in an *a priori*, wholly positivist approach but in an overall policy-oriented basis.)

SUBSTANTIVE CRITERIA

Nationality of the Persons Protected

Most writers are agreed that as a 'condition precedent' for a State to exercise the right of protection by force the persons protected must have an allegiance to the State exercising its protection.[18] However, there could be some procedural or substantive problems, in this regard, to ascertain what exactly are the requirements that could establish a

connection between the protected persons and the protecting State. Bowett suggested that when the "allegiance [of a national of a potential protecting State] has been broken by the existence of allegiance to another State [and also when there is] nonfulfillment of the duties of citizenship" the right to protection would be forfeited.[19] As a mode of determining this 'link' between the State and the persons which would give rise to such exercise of protection, Behuniak suggests that "It [the right and duty of protection by the State] normally arises out of the citizenship or nationality of the persons protected."[20]

The exclusive reliance on citizenship and nationality, however, could pose difficulties in some cases where the citizenship or nationality of the persons on whose behalf force is used is uncertain. For example,it could raise the query as to whether the State of ethnic or racial ties could afford protection to residents of another State who are not *formally* citizens of the State in which they reside (which, in some cases, may have been for generations).

An example that could be projected in this regard is one of the underlying reasons behind the Sino-Vietnamese conflict. Most of the ethnic Chinese living in Vietnam either are formally citizens of Vietnam or have no Vietnamese citizenship. Granted, once allegiance from the mother country has shifted in the form of acquiring a new citizenship would forfeit the right of protection of these ethnic Chinese by China; but would that be the

same case with those ethnic Chinese residing in Vietnam who have no *formal* Vietnamese citizenship? In cases *ex hypothesi* of gross maltreatment of the ethnic Chinese by the Vietnamese would China be excluded from its right of protection on the ground that they have resided in another country and have forfeited their right to protection from the country to which it had racial and ethnic ties?[21]

In the light of such possible issues, it would seem that even though the link by nationality or citizenship should be made an important, pivotal factor in the exercise of protection by force, it is desirable that it be not made an exclusive factor as a condition precedent that is necessary for the right of protection. In the present day atmosphere, the primacy of the issue of the violation of human rights should also be given consideration; the 'link' of the protecting State by nationality or racial ties being an additional and compelling factor which would give impetus for the protecting State to act. This is not to deny the relevance of the link of nationality, nor to equate the protection of nationals with the wider (in scope) doctrine of humanitarian intervention but to submit that notions of human rights be also considered as a factor which is at stake in any mistreatment of a group of people which may happen to be the nationals of the intervening State.[22] Moreover, the excessive reliance on the doctrine of nationality could also result in a revival of the theory which previously was relied on in the protection of nationals

abroad - that of equating the injury to the nationals' as injury to the State itself.[23]

Therefore, the nationality of the persons threatened or injured in a foreign State certainly needs to be mentioned as an important factor in permitting the right to use force[24] but it should not be made an exclusive factor which would bar other cogent considerations such as human rights to be an additional factor also in the exercise of such a right.

Fundamental Character of the Rights Involved

In order to avoid reverting back to the practice of the pre-UN Charter period where merely a minor infringement of rights of even a very small group of nationals could give rise to intervention,[25] it is necessary to delimit the right of intervention to cases "where there is a threat to, or deprivation of the most fundamental types of human rights [of the intervening State's nationals] such as the right to life or the freedom from torture."[26] A careful balancing of the amount of destruction that could arise from the use of force and the importance of primacy of the rights of persons (nationals) to be protected[27] must be weighed in judging the legitimacy of the mission to protect nationals. It would be reasonable to delimit the use of force to threats and actions to life, injury and deprivation of liberty of nationals and not to property rights. Hence, damage to property alone should not necessarily give rise

to the exercise of force. Some jurists such as Bowett would like to make the use of force permissible in cases of damage to property, which involves an 'irremedial and serious injury' directly to the nationals involved, and indirectly to the State affording them protection.[28] In the light of increasing role of foreign investment and property in many countries, it is worth considering whether an exception to use force in the case of damage to property *alone* should give rise to the use of force.[29] The determination that a threat to property constitutes an essential and irreparable injury to the State and its nationals would, to a large extent, be subjective. It could among others give rise to a pretext for governments to intervene in defense of property rights of nationals in cases of nationalization of foreign assets by countries and those factors should be considered in postulating a right to use force for the defense of property even though it is limited by the proviso that such damage to property be of irreparable nature.[30]

This is not to deny the permissibility of use of force in cases of real danger to lives *as well as* property of nationals. What is stated is that the use of force to protect property when there is no significant peril to lives of nationals should hardly be justifiable in present times.

Extent of Violation

Since the main purpose of protection of nationals is regarded as an "exceptional measure, available as a last resort

to prevent irreparable injury"[31] or to stop an ongoing deprivation of human rights violations of a group of nationals, it should be made permissible only when the violations or threatened violations are great enough both in type[31a] and in extent.[32] In determining the substance and the extent of violations of the rights of the nationals, the mere process of counting heads is not sufficient though "the number of [nationals] affected by the human rights violations is not completely irrelevant".[33] On the other hand, it has been suggested that:

> ...the larger the number of people involved, the more readily will a deprivation of a lesser fundamental human right provide sufficient justification for intervening.[34]

Bowett suggests that the extent and substance of the violation of rights of nationals be determined by having

> ...recourse to the principle of relativity of rights which demands a weighing of the one State's right of territorial integrity against the other State's right of protection. This is also demanded by the requirement of proportionality... The measures of protection must be proportionate to the danger, actual or imminent to the nationals in need of protection.[35]

In that it could be summarized:

> ...One must examine the type as well as the extent of the violation [in a contextual perspective] before determining whether forcible action is warranted in a particular situation. This approach has been declared preferable to a prior attempt to catalogue those rights to be protected and those rights to be left unprotected by the sanction of self-help.[36]

Immediacy of Violation

The test of the *Caroline* incident vis-a-vis the violation or illegal violation of the rights of nationals would

prove to be a reasonable though not exclusive criterion in determining the immediacy of violations of the fundamental rights of nationals. In doing so, it is not imputed here that the protection of nationals falls exclusively under the rubric of self-defense.[37] Though the immediacy of violation of rights of nationals can be judged by the events that had already occurred (such as the actual killing or injury of its nationals), it should not always be mandatory for a State "to wait for an actual violation before taking protective function"[38]

Additionally, the use of force should not only be limited to cases where the territorial government (where the nationals of another State reside) itself infringes the fundamental human rights of nationals or where it is unwilling to give protection. The immediacy of violation test should also be applicable to cases where the territorial government is *not* perpetrating these human rights violations but is *unable* or is incapacitated to stop or prevent these violations. As Root had written, "force can be justified only by the unquestionable facts which leave no practical doubt of the incapacity of the government of the country to perform its national duty of protection."[38a] The incapacity of a government to give protection could be seen in such cases when the government does not have full control over the territory where the nationals are endangered or in cases where there is conflicting authorities over the control of a territory and where none of these

authorities could provide adequate protection.

Any preventive action taken by the intervening State should be subject to an overall contextual analysis. In all cases the measures employed should not continue once the danger to nationals has been removed.

Degree and Mode of Coercion Used

This is in reference to the principles of proportionality and necessity. The acting State should employ only an amount of force that is proportional and reasonably calculated to accomplish its objectives.

It could be further queried between what situations and actions is there a need for proportionality in the context of intervention on behalf of nationals. For example, should the proportionality be between the injury (both in type and extent) or the imminent danger of injury and the *actual* damage inflicted by the protective action? Or should there be proportionality between the *importance* of the right of nationals and the types and modalities of force used to protect or prevent them from being vioalted?

It is submitted that proportionality should not merely mean the relative balance between the two sets of values postulated above.

Regarding the first query, there is reason to believe that even though there is proportionality between the injury to nationals and the *actual* harm that resulted from the employment of force to stop or prevent these injuries, the operation is

nevertheless impermissible. Mere qualitative or quantitative balance between the orginal injury or the actual damage done by the intervention should not be made the main criterion to determine the-legality of the use of force to protect nationals. If such a criterion is postulated, the legality of a State using excessive and unnecessary force would remain unquestioned merely because there is a balance between original injury and the damage done by the intervention. *Ex hypothesi* such a postulation could legalize instances where a State deliberately increases the damage done (to the State intervened in) to equate the "original injury" and the resulting harm done by the intervention even though such use of force is not necessary to prevent its nationals' human rights violations. For example, suppose State A sends a rescue mission to save one hundred of its nationals who have been wrongfully imprisoned for a prolonged period of time in State B. When the time the rescue operation was launched suppose that ten of State A nationals had already been killed by authorities of State B. In such a case, if State A could rescue its nationals without endangering any of the lives of the nationals of State B, it should not be permitted to use excessive force or to kill in retaliation ten of State B nationals on the ground of equating the original injury and the damage done by intervention. It is realized that the act of deliberately killing ten nationals of State B by State A is an illegal reprisal - a separate issue than that of protection of nationals. The example is only given to illustrate that if proportionality between original injury and

the actual harm done is carried *reductio ad absurdum* it could legalize such a situation.

Regarding the second query, the sole reliance on the proportionality between the importance of the rights injured and the types and modalities of force used could also be open to abuse. For example, suppose that there are two fact situations involving the unjustified and prolonged incarceration of nationals of a State using force. In the first situation, only prolonged inceration of nationals is involved. Hence, the violation herein is the violation of the right of freedom of these nationals. In the second situation, suppose that there is also torture of the nationals as well as illegal incarceration of them. *If* the same type and modalities of force could be used to rescue nationals from both situations, then the use of additional force in a second situation should not be made permissible on the ground that the *second* situation involved an infringement of a more fundamental and important right (i.e., right of freedom from torture) than the *first* situation (right of liberty). Ironically, the concept of proportionality between importance of rights injured and the modalities of force used could legalize such a situation.

These ambiguities arise because the drift of the idea of proportionality has been based more on the injury to nationals and the resultant harm or the amount of force used. Proportionality should not be measured exclusively based on the balance between means used and the original injury; it should

mainly be between the types and modalities of force used and the goal/objective - in most cases saving the lives or preserving the freedom of nationals.[39] Furthermore, proportionality should not only be between "the modality of coercion required for the achievement of humanitarian objectives... but also using only the amount of troops reasonably necessary to accomplish the objective."[40]

The application of the modality of the use of force is not limited to *armed* force but also economic measures. Though the use of economic force has generally become so vital an issue in present day,[41] it is sufficient to say that in a contextual situation which would justify the use of *armed force*, it would *a fortiori* justify the use of lesser forms of force provided, always, that such use of economic measures is also strictly in accord with the guidelines suggested.[42]

Limited Duration of Protective Action and Specific Limited Purpose

It is essential that any action taken should be limited to preventing, stopping the human rights violations of nationals or rescuing the nationals and not be continued further after these objectives have been achieved. The purpose of the operation should also be limited to protection of nationals. If the main aim of the operation is political where the protection of nationals is only used as a pretext, then the employment of force is impermissible.[43] Once the danger to nationals has been removed troops should be withdrawn.

Nonaffectation of Authority Structures

Unlike humanitarian intervention where the government of a State itself could occasionally be the violator of human rights and "where the overthrow of the government in power or even secession of a part of a population appears to be the only available means of putting an end to ongoing or threatened human rights violations of particular gravity,"[44] the use of force in protection of nationals would not have any compelling reasons to interfere in the authority structures of the State intervened in. For, in most cases, the number of persons to be rescued would not be so numerous that it would necessitate the forcible change of a government; and therefore, the effect on the authority structures of a State intervened in should be as limited as possible.

The avoidance of affecting the authority structures of a State is possible only if the requirement for a limited protective action is met. A prolonged stay of forces in the country intervened in could affect authority structures of it, thus making the mission impermissible.

PROCEDURAL CRITERIA

Exhaustion of Remedies; Pacific Means

Every effort should be made in accordance with Articles 1 (1), 2 (3) and 33 of the United Nations Charter before taking any action involving the use of force. Peaceful efforts should not only be attempted through the United Nations, but also "through bilateral

or multilateral contacts or resort to international organizations, including eventually non-governmental ones unless there is clearly no time left for this type of procedures because of the imminence of the violation."[45]

These criteria for the exhaustion of peaceful means should be decided in the light of reasonableness in its context and not by referring to any specified factor of duration, (e.g., of the negotiations to settle peacefully) or procedures that should be followed.

Lack of Any Other Recourse

Protective action should be taken only as a last resort. Every reasonable effort should be made to solve the problem peacefully. However, where delay in taking action is intolerable and a timely response by an international body is unlikely, or where it is obvious that effective action by such a body would not be forthcoming, a State need not stand by hopelessly but may take action that the situation demands.[46]

Report of Actions by the Intervening State

In order to reveal that the actions taken have no other motive and is merely intended for the purpose of rescuing the nationals, the State intervening should report any action it has taken "to an appropriate body, such as the UN Security Council, for review, apprisal and world community reaction.[47]

PREFERENTIAL CRITERIA

Priority of Collective Action

If possible, and in order to suplement the lack of institutionalised community action, collective measures are preferred over unilateral recourse to force by a single State.

> While action does not gain legitimacy by being collective rather than individual, there is a presumption that collective action is more likely to promote relative disinterestedness and genuine humanitarian concern.[48]

The preference for collectivity should not be made an absolute criteria, however, in the light of the fact that States resort to force mostly when they have a vested interest to do so. Therefore, in cases of emergency where timely action is necessary to protect the lives and fundamental human rights of nationals, preference for collectivity should not be made an absolute criteria.

Invitation to Use Force

If possible, the invitation from the target State to use force should be sought. Indeed, if the legitimate (*de jure*) government *voluntarily* gives permission to use force, the operation is deemed permissible in International Law.[49] However, when there is a conflict of authority between "various groups purporting itself to be the 'legitimate' government... especially in cases of civil strife"[50] the need for 'consent' from the 'legitimate' government could not be applied as an unambiguous criteria. The tests for legality of intervention in this case should be based more on the fact of whether the factioning authorities realistically have the capacity to protect the lives of nationals,

the genuine permission given by the *de jure* or *defecto* authority being an additional factor in examining the permissibility of each case.

The invitiation to use force would not be applicable when the government of the target State itself is committing the violations of the fundamental human rights of nationals or when the situation is so imminent as to allow no consultation to be possible without endangering the lives of nationals.

In short, all the above factors need to be considered in each case involving the use of force to protect nationals in its contextual perspective. A selected analysis of three cases which could be regarded as constituting the use of force in the protection of nationals abroad in recent times is made in the following Chapter IV, taken into consideration the guidelines suggested and contextually relevant factors.

CHAPTER IV

ANALYSIS OF INCIDENTS CONSTITUTING THE USE OF FORCE IN THE PROTECTION OF NATIONALS ABROAD IN RECENT TIMES

This chapter analyses three selected instances which could be deemed to be considered as constituting the use of force in the protection of nationals abroad in relatively modern times. The instances that will be analysed are (1) The *Mayaguez* incident where United States armed forces landed on Cambodian territory to recover the merchant ship *Mayaguez* and their crew seized by the Cambodians a few days earlier in May 1975; (2) The rescue of the Israeli hostages held by the hijackers at Entebbe Airport in Uganda by the Israeli armed forces in July 1976; and (3) The unsuccessful attempt by the United States to rescue its diplomats held hostage by Iranian 'militants' in Teheran in April 1980. In analysing these incidents only the legal issues that have been raised concerning the use of force in the protection of nationals will be considered. The analysis will be based on the criteria developed in Chapter III to assess the validity of actions taken in each incident. Necessity, proportionality, exhaustion of peaceful means, and conformity with relevant norms of the United Nations Charter will be the main factors in judging the legality of each instance. It is realised that in certain cases there could be disputes as to the *facts* that surround each case, and hence, the submissions and the opinions suggested as to the permissibility of such actions will, to a

certain extent be based on the presumption that a particular contextual situation had existed. However, even if there could be disputes as to the actual situation, an attempt is made to base the analyses on the least disputed facts surrounding each case. Occasionally, it is inferred that a different legal opinion could be postulated if the factual situation had been different.[1]

THE MAYAGUEZ INCIDENT

Factual Situation

On May 12, 1975, the U. S. merchant ship, the *Mayaguez* was seized by a Cambodian gunboat[2] at about six and one half miles from the Poulo Wai islands, the sovereignty of which, though disputed by three nations, could be said to be Cambodian.[3] The crew members and the ship were taken by the Cambodian patrol guard to Poulo island.[4] Informed of the incident, the White House announced that "[t]he President... considered the seizure of the *Mayaguez* an act of piracy. He has instructed the State Department to demand the immediate release of the ship. Failure to do so would have the most serious consequences."[5] Also, on May 12, "Ambassador Huang Chen, head of the Chinese liaison office in Washington... was given a diplomatic note conveying a 24-hour ultimatum from the United States for communication to the Cambodians."[6] Meanwhile, United States Air Force planes sighted the *Mayaguez*, and when the *Mayaguez* was moved towards mainland Cambodia...

> [s]ix United States Jet fighters appeared and attempted to turn the gunboats around...Failing to stop them, the jets attacked the gunboats and sank them. During the interdiction operation, ordered by President Ford, another gunboat was sunk off Koh Tang island and four others were strafed and injured in the vicinity of the island.[7]

Fourteen hours after the first raid and attack on the Cambodian vessels which were taking the *Mayaguez* to the Cambodian mainland, "the United States turned for the first time to the existing United Nations machinery for handling international disputes... in a letter to United Nations Secretary General Waldheim which asked him to help obtain the release of the crew and the ship".[8] The letter also... "reserved the right to take such measures as may be necessary to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter."[9] At 7:20 P. M., Washington time on May 14, 1975, a "Marine assault force landed on [Tang island where the *Mayaguez* was kept] under heavy fire.[10] This attack took place *after* the announcement "of the Cambodians... on local radio that the crew and ship were being released (7:07 P. M., Washington time).[11] In fact, the crew was released just as the United States Marines were landing on Tang island. Even after the news of the release of the crew was known, "a second attack was launched from the Coral Sea [which] hit an oil depot in the part of Kompongsom."[12] Also in the second operation

United States planes and the destroyers Holt and

> Wilson joined in laying down a rain of suppressive fire on suspected Cambodian positions and a C-130 gunship from Thailand dropped America's largest conventional bomb--a 15,000 pounder--on the island to clear alternate landing area for the chopper and to create panic and divert the attention of the Cambodians when the evacuation efforts were in trouble.[13]

Only over twelve hours after the release of the crew, the Marines left the island.[14]

Appraisal of the U. S. Action

There is no doubt that the citizens of the United States were detained by the Cambodian authorities. Without delving into - and giving a definitive judgment on whether the Cambodian authorities were justified in detaining the ship and its crew[15] - it should be discerned if there is a real and imminent danger to the lives of the American nationals during the period of their detention. Paust is of the opinion that "There was never any showing that the lives of the crew were in danger, nor were there any reasonable grounds for believing that they were; after all, the crew of the Panamanian vessel seized by Cambodia a few days previously had been released unharmed. Since United States citizens were part of that Panamanian crew, it would not seem reasonable for any United States decision maker to assume that the crew of the *Mayaguez* would be physically harmed."[16] But the more important issue here is even presuming that there had been a real threat to the lives of the *Mayaguez* crew, had the United States exhausted all peaceful means before resorting to unilateral use of armed force, and is that use of

force necessary and proportional to the alleged danger to the lives of its nationals? It can be inferred that the United States did not genuinely attempt to exhaust peaceful means before resorting to armed action. The delivery of the ultimatum by President Ford to release the *Mayaguez* and crew would appear that "he left no room for negotiation for a release of the crew and detention of the ship, for a reasonable questioning of the crew or for a search of the ship."[17] Paust further added that "*[s]*uch an ultimatum was not in reasonable conformity with Articles 2 (3) and 33 (1) of the United Nations Charter" and "was, in reality, a hollow gesture without substance *[*inasmuch as*]* some seven hours before the ultimatum was returned unanswered, American planes had fired warning shots across the bow of the *Mayaguez*, then in Cambodian territorial waters off Tang island... These actions, in addition to the terms of the ultimatum itself, were hardly conducive to the peaceful settlement of a dispute about the propriety of the detention of the *Mayaguez*."[18] Moreover, the fact of the United States requesting the Secretary General of the United Nations to intercede only *after* the destruction of six or more Cambodian patrol boats and *after* a four-hour bombing of Cambodian seas would indicate that the United States did not firstly attempt to settle the dispute through peaceful means.[19] And despite the appeal of the UN Secretary General (following the U. S. decision to seek his good offices) to "refrain from further acts of force in order to facilitate the process of

peaceful settlement", the U. S. decided to send in the Marines - thus abandoning all hopes of peaceful settlement - only four hours after the appeal by the Secretary General was made.

It now needs to be analysed whether the U. S. response to the seizure of the ship and the crew of *Mayaguez* was in accordance with the principles of necessity and proportionality. Force in cases of protection of nationals should only be used as a last resort. It has been submitted that the United States did not make all attempts to exhaust peaceful means. Though there might be some justification in the contention that "Cambodia's behavior generated fears of prolonged detention and harsh treatment for the crew, as well as humiliating negotiations for their release"[21] thus prompting the necessity for swift unilateral action by the U. S., it is hard to justify the extent and proportion of the United States action and the continuation of attacks on Cambodian territory after it was known that the crew of the *Mayaguez* had already been released.[22] Indeed, it could even be argued that the actions taken before the crew were released could be considered as increasing rather than diminishing the chances of endangering their lives. Armed intervention by the United States in the circumstances presented a more objective threat to the safety of the crew rather than did the Khmer Rouge.[23] Also, the U. S. action could not have been proportionate to the danger posed to the crew. Granted the landing of a large number of Marines was necessary to overcome the resistance of the Cambodians, the bombing of

Ream Airport on the Cambodian mainland after it was learned that "a small boat was approaching the destroyer *Wilson* with a white flag"[24] and the continued bombing of an oil refinery and dropping of a 15,000 ton bomb - the largest conventional bomb in the United States arsenal - on a small Cambodian island[25] would indicate that the U. S. response in the case was disproportionate to the danger posed to its nationals, and not strictly limited to the sole purpose of rescuing the nationals from imminent danger.

Other factors such as the fundamental character of the rights involved (in the use of force for the protection of nationals), extent of violation, immediacy of violation, and relative disinterestedness of the acting State should be briefly considered. Behuniak in his article gives extensive arguments stating that the U. S. action conforms to the above requirements. But even if the seizure and detention for two and a half days of the *Mayaguez* and its crew by the Cambodians could be deemed a gross illegality, the unilateral, hasty and disproportionate response of the U. S. would lessen the degree of justification the U. S. may have had on these grounds. Moreover, the contextual circumstances surrounding the incident such as the difficulty to state unequivocally that the *Mayaguez* seizure was unwarranted and illegal,[26] the lack of evidence that the lives of the crew were in danger,[27] and the situation and attitudes prevailing in South East Asia after the end of the war in that region[28] needs to be taken into account in the

overall consideration of the *Mayaguez* incident.

The disproportionate response of the United States in this incident should not lead to a strengthening of the idea that since these excesses had occurred there should be a blanket prohibition of any use of force in the protection of nationals regardless of the circumstances. As will be elaborated in subsequent cases, the use of force which in its contextual situation meets the requirement of necessity and proportionality and other cardinal factors should be considered as permissible.

THE ENTEBBE INCIDENT

Factual Situation

On Sunday, June 27, 1976, an Air France jet bound for Paris from Israel was hijacked over Athens, minutes after take off from a stop over there. The hijackers ordered the pilot to redirect the plane southward over the Mediterranean toward Africa. They reached the Libyan coast late in the day and stopped in Benghazi for refueling, after which they resumed their flight and arrived the next day at Uganda's Entebbe airport.[29] On Tuesday, June 29, the hijackers announced through President Amin of Uganda that they were members of the Popular Front for the Liberation of Palestine and demanded that 43 "freedom fighters" imprisoned in various countries be freed in exchange for release of the hostages. Forty of these prisoners were in Israeli jails.[30] They gave a deadline of 2:00 P. M., Thursday, July 1, and threatened to

kill the hostages and blow up the jet if the demand was not met. Eventually, some of the hijacked hostages, women, children and ill passengers, and later hostages who were not Israeli nationals or dual nationals were released.[31] The deadline for releasing the prisoners demanded by the hijackers was extended to July 4. Throughout the ordeal it appeared from eyewitness accounts and from other sources that the government of Uganda gave protection and aid to the hijackers or at least showed sympathy with and passive acquiescence in the demands and activities of the hijackers.[32] On the morning of July 4 - the day of the extended deadline - Israeli commandos raided the Entebbe airport. They arrived in three Israeli C-130 Hercules transport planes. One group of commandos went directly to the old terminal to rescue the hostages; another group destroyed as much Ugandan military equipment, especially fighter planes, ~~as much~~ as possible,[33] before finally rescuing the hostages and bringing them back to Israel. During the incident, three hostages, one Israeli soldier, seven terrorists, and between 20 to 30 Ugandan soldiers were killed.[34]

As a result of this incident, the United Nations Security Council met to consider a claim made by the Prime Minister of Mauritius, the Chairman of the Organization of African Unity, regarding what was termed an act of aggression allegedly committed by Israel against the Republic of Uganda.[35] Two draft resolutions were circulated as a result of the four-day debate. One sponsored by Benin, Libya and Tunisia condemned the Israeli

attack and called upon Israel to make full compensation to Uganda. This was withdrawn prior to the voting when it became apparent that it would not draw strong support.[36] The other co-sponsored by the United Kingdom and the United States, condemned hijacking and other acts endangering civil aviation, but took no firm stance on the legality of the Israeli action. It failed to pass by a vote of six for, none against, and two abstentions, with seven States not voting.[37] This brief comment will attempt to discuss the Israeli action on behalf of protection of nationals taking into consideration the guidelines formulated earlier.

Appraisal of Israeli Action

In contrast to other incidents like the *Mayaguez* where the State whose 'territorial integrity' has been violated was alleged to have been responsible for the danger to the nationals directly, Entebbe involved a case where Uganda - the State whose territorial integrity had been temporarily infringed - was not the original perpetrator of the hijacking, posing a *direct* threat to the Israeli nationals. However, there is substantial evidence that at the very least the Ugandan government was unable and - more relevantly - *unwilling* to mitigate the imminent threat to the danger of Israeli nationals. Instead, there were indications that Uganda was highly sympathetic to the hijackers' cause and afforded them protection. Such inferences could reasonably be drawn from the eyewitness reports of the events that occurred during the ordeal. Evidence

of Uganda's acquiescence in the act could be inferred *inter alia* from the fact that: (1) when the hijacked plane landed at Entebbe the skyjackers immediately put aside their weapons, sat down together in the front of the plane, and relaxed their previously strict discipline;[38] (2) during the first 24 hours Ugandan soldiers stood guard over the hostages, permitting the terrorists to rest;[39] (3) President Idi Amin was present when the hijacked plane arrived and he embraced the terrorists as they emerged from the plane;[40] (4) President Amin described the demands of the hijackers as "very reasonable" and advised the Israeli hostages "to tell your government to solve the Palestinian problem";[41] (5) President Amin insisted on serving as an intermediary and refused to permit either the French Ambassador or a special French envoy to negotiate directly with the hijackers.[42] From these facts it became apparent that at the very least the Ugandan government was unwilling to alleviate the plight of the hostages and quite probably contributed to the necessity of the Israeli operation by acquiescence in and covert cooperation with the hijackers. Therefore, the relevance of Uganda not being an original perpetrator of the hijacking itself and its possible impact on the analysis of the Israeli action is, to an extent, diminished by the acquiescing conduct of the Ugandan government in the incident. Even if the above presumptions could not unequivocally be presumed as establishing Uganda's acquiescence with the actions of the hi jackers, Israel could still rely on the fact that its temporary

violation of the territorial integrity was justified on the ground that Uganda was 'unable' to protect its nationals from imminent danger. Knisbasher justified the Israeli action on the ground that an "armed attack"-even though in the form of "armed bands" - had taken place against Israeli nationals and the "target of the attacked [State] by these armed bands is permitted to take action against such armed bands within the territory of the State from which they are operating if the latter is either unable or unwilling to control them."[43] He cited several historical incidents where a State has violated another State's territory, where the armed bands were active and where the State these armed bands were located in was either unwilling or unable to suppress them.[44] In short, the customary international law doctrine of self-help was relied upon to justify the Israeli action on the grounds that Uganda was unable or unwilling to control the "armed bands" (terrorists) which were threatening the lives of Israeli nationals. To further discern the validity of the claims justifying the Israeli action, a contextual analysis taking into account the guidelines proposed earlier should be made.

1. Nationality of the Persons Protected

As all of the persons rescued by the Israeli action were either Israeli nationals or dual nationals, it is obvious that the government of Israel has the right to protect them.

2. Fundamental Character of the Rights Involved, Extent of Violation and immediacy of violation

The right to life - the most fundamental human right - of the hostages had been threatened. In contrast to the *Mayaguez* case where the lives of the detained crew were not explicitly threatened by the authorities concerned there was clearly a threat by the hijackers that the lives of the hostages would be endangered if the prisoners held in Israel were not released. Moreover, the nature and the circumstances leading to the violation of the rights of the *Mayaguez* crew and the Israeli hostages were also different. In the *Mayaguez* case not only was the ship seized on territory which was arguably Cambodian; the circumstances prevailing at the seizure of the *Mayaguez* could also probably be taken as suggesting reasonable suspicions for the Cambodian authorities to seize it.[45] Whereas, in the Entebbe incident, the hostages held by the terrorists were totally innocent people who had been illegally seized in what is a universally recognized crime in International Law.[46] The extent of violation was also grave in that not only did it involve hijacking, which itself is a crime, it involved the threat of the lives of a large gathering of people. The immediacy of violation should also not be in any doubt for the hijackers had given a deadline and the Israeli government had every reason to presume that if the demands were not met at least some of the hostages would be executed. The fact that the Israeli government could have secured the hostages' safety and release

by releasing the prisoners demanded by the hijackers would not in any way mitigate the extent of the violation of the rights of the Israeli nationals by the hijackers nor lessen the necessity of the rescue mission. For, a State is not required to yield to illegal demands to release prisoners with criminal records. It would also be tantamount to an unacceptable interference in Israel's domestic jurisdiction. As the United States representative asserted in the debates of the Security Council regarding the Israeli raid:

> [T]hat Israel might have secured the release of its nationals by complying with the terrorists' demand does not alter these conclusions. No State is required to yield control over persons in lawful custody in its territory under criminal charges. Moreover, it would be a self-defeating and dangerous policy to release prisoners, convicted in some cases of earlier acts of terrorism, in order to accede to the demand of terrorists.[47]

Therefore, it could be said that the fact of the hijackers demanding the release of convicted prisoners, which could be considered a threat against the "political independence" of Israel, would be an additional fact which enhanced the extent of the violation of rights of Israeli nationals as well as the Israeli government's right to political independence rather than as an argument against the permissibility of Israel's rescue action.

3. Degree and Mode of Coercion Used

The Israeli use of force in response to the hijacking of the airplane and the holding of hostages is also proportionate to the harm threatened. The killing of the hijackers is an

almost inevitable result which should be expected in such a rescue action. Inasmuch as the Ugandan soldiers resisted the rescue of the Israeli hostages, Ugandan casualties could not be avoided. Indeed, it has been claimed that "the Israeli commandos were specifically ordered to try to avoid Ugandan casualties."[47a] "[Also] the initial diversion which was created on the far edge of the airport drew many of the Ugandan soldiers away from the primary area of battle."[48] The destruction of Ugandan aircraft could be justified on the ground that "it was necessary to prevent subsequent [possible] pursuit of slow Israeli transports by the supersonic Ugandan jet fighters."[49] Also, for the above reasons such as the fundamental character of the rights involved and the immediacy of violation of the human rights of Israeli nationals, the Israeli action was in basic conformity with the doctrine of necessity.

4. Limited Duration of Protective Action

The entire rescue operation lasted less than an hour.[50] Hence, the rescue action also conformed to this criterion.

5. Nonaffectation of Authority Structures

It is also evident that Uganda's authority structures were not affected by the Israeli action.

5. Exhaustion of Remedies and Lack of Any Other Recourse

It is arguable that Israel should wait for more time and continue to negotiate peacefully with the hijackers. However, Israel could not have meaningfully expected to achieve the release of the hostages without giving up its principles. Again,

unlike the *Mayaguez* case where no demands or conditions were made by Cambodian personnel who seized the ship and crew, and where subsequent negotiations could have achieved the release of the ship and the crew, the terrorists were making an unacceptable demand which the Israeli government need not accede to. Moreover, "intelligence reports indicated that the hostages would not be released if the terrorist demands were not met."[51] Referral to the United Nations would not have useful results.[52] Time constraints made such a peaceful solution impossible. The longest period of time available before either of the two deadlines announced by the terrorists was three days, which would not have been long enough for the Security Council to devise a solution to this problem. By the time Israel deployed its forces, the threat of the safety of nationals was critical and made any other approach to the problem extremely risky.[53] It could not be said that Israel could have made any other recourse without the lives of the hostages being put in jeopardy or at least subject them to uncertain and indefinite detention. Therefore, Israel could also be said to have taken the action as a last resort when no other recourse seemed available.[54]

6. Report of Actions by the Intervening State

Israel did report its actions to the Security Council.[55] Although the report was made five days after the attack it would not in any significant way affect the permissibility of the Israeli action.

> The requirement of immediacy is designed to ensure the earliest Security Council consideration of any

> such incident so that any action necessary to prevent the eruption or widening of hostilities may be taken immediately. In the present case, the Israeli operation was complete within a matter of minutes and, with its forces withdrawn, the possibility of a renewal of hostilities was almost nonexistent.[56]

7. Priority of Collective Action

The foregoing features preclude the possibility of a collective raid. The decision and the actual rescue itself had to be made within a very narrow time limit - before the end of the second deadline - which made it impossible for collective action. Moreover, only Israeli nationals were held by the hijackers - other nationals being released - it is also unlikely that other governments will participate in such actions.

8. Invitation to Use Force

Uganda itself, to all extent and purposes, was sympathetic to the hijackers' demands. Hence, the invitation to use force criterion would not be applicable in the assessment of any action taken in the present context.

In short, the fundamental rights involved, the immediacy of violation, the lack of any reasonable recourse to secure the release of the hostages, the acquiescence of Uganda in the hijackers' actions and the proportionality and the short duration of the Israeli response would justify the Israeli use of force. On a humanitarian basis also, when the temporary infringement of Uganda's 'territorial integrity' (but by no means its 'political independence') and the need to preserve the sanctity of the basic human rights of numerous Israeli nationals are

considered side by side, the consideration of the Israeli nationals' human rights would seem to have superceded Uganda's right to territorial integrity, especially when its action and recourse at the time the incident occurred do not substantially suggest a deference to human values.[57]

THE IRANIAN RESCUE MISSION

Facts of the Case

On November 4, 1979, during the course of a demonstration by about 3,000 persons, the United States Embassy Compound in Teheran was overrun by several hundred of the demonstrators. The Iranian government's security personnel on duty at the Embassy compound apparently made no effort to deter or discourage the demonstrators from the Embassy takeover.[58] Though the Embassy takeover, at first, appeared to be the action of a group of student militants, later events clearly indicated that the government of Iran did nothing to prevent the Embassy takeover, nor subsequently attempt to make any effort to secure the release of the U. S. diplomatic personnel held hostage.[59] It even defended, encouraged and endorsed the demands of the student militants that the former Shah of Iran, who was hospitalized in the United States, be returned to Iran before the hostages could be released.[60] The hostages were in the initial stages of the Embassy takeover "paraded in sight of the crowd outside, blindfolded and hands bound, in full hearing of menacing, chanting crowds... Inside the buildings the hostages

have been kept bound, often by hand and foot, forced to remain silent, subject to other forms of coercion and denied communication with their families and U. S. officials."[61] As a result of this incident, intense negotiations to get the release of the U. S. diplomats and personnel held hostage took place in the United Nations. The United Nations Security Council in its resolution 457/1979 called upon "[t]he government of Iran to release immediately the personnel of the Embassy of the United States of America being held in Teheran, to provide them protection and to allow them to leave the country."[62] The International Court of Justice, in response to an application by the United States for interim measures of protection, ordered that "The government of the Islamic Republic of Iran should immediately ensure that the premises of the United States Embassy, Chancery and Consulates be restored to the U. S. Embassy... and to ensure the immediate release, without any exception, of all persons who are or have been held in the Embassy of the United States of America in Teheran."[63] A second Security Council resolution 461/1979 of December 31 "[d]eplores the continued detention of the hostages contrary to Security Council Resolution 457/1979 and the order of the International Court of Justice of December 15, 1979"[64] However, no positive developments emerged despite the order of the International Court of Justice, appeals by the Security Council, and appeals by international organizations and head of States[65] to the government of Iran to release the hostages. In March 1980, UN Secretary General Kurt Waldheim

sent a five-member commission to Iran to negotiate the release of the hostages. His mission as well as many other efforts to affect the release of the hostages did not produce any results.[66] The student militants who held the hostages as well as the authorities concerned repeatedly threatened to put the hostages on trial. Eventually, it was discovered that some of the hostages were held in solitary confinement and subject to physical and emotional abuses in varying degrees by their captors.[67]

After about six months of fruitless negotiations to get the release of the hostages, the United States launched a mission inside Iran to rescue its diplomats held hostage by the student militants. The mission took place on the night of April 24 and morning of April 25, 1980. However, the mission sent by President Carter to rescue the hostages was cancelled three hours after the task force of helicopters and C-130 transport planes carrying a 90-man strike team landed under cover of darkness in a desert area 250 miles southeast of Teheran. The plan was for the helicopters to fly into the Teheran area where an operation would have been launched to free the Americans in the Embassy and fly them to a second designated point. However, enroute to the desert point three helicopters were rendered inoperable because of mechanical troubles and subsequently it was decided to terminate the mission. In the attempt to evacuate the planes and helicopters from Desert One, one of the five operational RH-53 helicopters crashed into one of the six C-130 transport planes while attempting to take off, and both aircraft

burst into flames. As a result, eight crewmen were killed and four suffered burns. President Carter, in explaining his actions soon after the failed rescue attempt was made public, stated that the rescue operation "became a necessity and a duty" and that he ordered the rescue "to safeguard American lives, to protect America's national interests and to reduce the tensions in the world that have been caused among many nations as this crisis continued". The Administration also announced that the rescue was a "humanitarian effort and should not be regarded as a military operation" which is not directed against the people of Iran but solely for the release of the hostages.[68]

Appraisal of the U. S. Rescue Mission

In analysing the American rescue mission into Iran, it must be noted that the United States relied and justified its actions both on humanitarian grounds[69] and on grounds of self-defense.[69a] For the reasons stated previously - such as that of the controversy over scope of Article 51 and Article 2 (4) and inasmuch as an *exclusive* reliance on the interpretation of these articles could possibly exclude other contextually relevant and policy-oriented matters - the approach of this analysis would be based more on the human rights issues of U. S. nationals detained and the balancing of other factors such as Iran's right to territorial integrity as in its contextual situation, i.e., analysing the mission *as it had occurred*.[70] This approach, to an extent, avoids the dichotomy of self-defense vis-a-vis protection of nationals, which largely equates the protection of nationals with self-defense.

Rather, it places more reliance on the fundamental nature of the human rights of the persons involved and the fact that the protecting State has the motivation and duty to protect the persons who are nationals of the State.[71]

1. Fundamental Nature of the Rights Involved and Extent of Violation

One of the most fundamental principles in international relations - that of diplomatic immunity - has been violated by the Iranian authorities. Hence, one of the most important rights - that of a right of inviolability of diplomats - [72] were being affected by the actions of the Iranian authorities. Unlike other cases such as the *Mayaguez* where the role of the higher authorities in the seizure could not be said to have been certain, it is absolutely clear in this case that the Iranian authorities themselves were involved in this violation of International Law of which the International Court of Justice had classified as a violation by the government of Iran of "obligations owed by it to the United States of America under international conventions in force between the two countries [which] engage the responsibility of the Islamic Republic of Iran under International Law."[73] And unlike the *Mayaguez* where there could be possible justifications for detaining the ship and crew, such as the suspicion that the ship was on an espionage mission inside Cambodian territorial waters, a violation of diplomats' personal sanctity is a violation in International Law which admits of no exception.[74] Moreover, at least some of the hostages had been subjected to solitary

confinement, psychological conditioning, mock executions, etc. which are fundamental assaults against human dignity. It is submitted that even if the hostages held were not diplomats, the extent of violation against U. S. nationals' human rights - right to freedom, right from threats and attacks against the human person - was such that the Iranian government could not escape international responsibility.[75] The fact that the hostages were diplomatic personnel completely vindicates the illegality of such detention and makes the treatment accorded to the hostages all the more unjustifiable.

2. Immediacy of Violation

The violation of the right to freedom and liberty and the right from threats to its dignity of diplomatic personnel has been a long ongoing process for over five months when the rescue action took place. It is arguable that since the threat to life of the diplomats was not so immediate as in the *Entebbe* case - though there were indeed threats to the lives of the diplomats held hostage - the United States should have refrained from making the rescue action. But only a slightly less important right than the right to life - that of right of human liberty - was being continuously violated and it is submitted that prolonged detention of diplomats with attacks on their human dignity is an immediate violation which might justify limited action to rescue the hostages from such infringements of their fundamental human freedoms.

3. Exhaustion of Peaceful Means

It would be fair to say that prior to the rescue action, the United States did make reasonable efforts at negotiating the release of the hostages. Soon after the Embassy takeover, "on 7 November, a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini". However, "while he was enroute, Teheran radio broadcasted a message from the Ayatollah Khomeini dated 7 November solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives."[76] Likewise, repeated appeals from the Security Council,[77] mediation by the Secretary General of the United Nations, and the five-member commission appointed by him did not bring any fruitful result.[78] (This is in sharp contrast to the action of the United States in the *Mayaguez* where appeals for help to the United Nations Secretary General were made only fourteen hours after the attack on Cambodian vessels and the taking of unilateral large-scale military action only four hours after the appeal by the Secretary General for restraint.)[79] A State, when over a period of five months had tried consistently all the possible avenues for peaceful release of the hostages could reasonably have believed that it had exhausted its possibility for the peaceful release of the hostages and the only way left was to save the lives of the hostages and to stop the detention of its diplomats by limited unilateral action.[80]

One possible point that needs to be mentioned, however, is that the U. S. action to rescue the hostages may have indicated a nonadherence to the request made in the Order of the International Court of Justice (in making an interim judgment on 15 December 1979 which asked Iran to immediately release the hostages) to *all* parties not to take action "which may aggravate the tension between the two countries or render the existing dispute more difficult of solution."[81] The International Court of Justice, therefore, did "express its concern in regard to the United States' incursion into Iran" in its final judgment though it stated that "the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding the resolutions of the Security Council as well as the Court's own order of 15 December 1979 calling expresslyfor their immediate release."[82] Reisman responded to this that "*[i]*f Iran had complied with the Court's 'interim measures' and released the hostages, any U. S. action would plainly have been unlawful. Since Iran ignored the directive, Washington, after waiting a reasonable interval to see if compliance would be forthcoming, was probably entitled to undertake self-help measures."[83] Though this statement seems plausible in the light of the futile efforts at negotiations to release the hostages, it should be admitted that it can only partially diminish the possibility of "aggravating the tension between the two countries" or of "rendering the dispute more difficult of solution". It is submitted that it is in this

sense of increasing the tension between two countries and a possible technical violation of the World's Court Order of 15 December 1979, that the criticism of United States action could be made than on the ground of accusing the United States of not genuinely exercising to settle the problem by peaceful means. Moreover, even if the nonadherence to the I. C. J.'s recommendation to "avoid action which might aggravate the tension" be considered as a factor mitigating the legality of the U. S. action, it should be noted that most other criteria such as proportionality and necessity have been met. Still, the fact that no Iranian lives were lost could, considering from a functional basis, lessen the chances - on the ground of nonexhaustion of peaceful means - of categorizing the rescue operation as illegal in its contextual perspective.[84]

4. Degree of Coercion and Force Used

Though the case has been considered under the category of "the use of force in the protection of nationals" it is proper to expound that the Iran rescue mission as it had occurred - apart from the technical incursion of Iran's territory by U. S. planes and forces - did not involve the use of force as such against any Iranians.[85] Degree of force, depending on the circumstances, would inevitably have taken place *if* the mission went ahead but even then it is clear that no other use of force other than those necessary to effect the release of the hostages had been intended.[86]

5. Priority of Collective Action

In the absence of an effective international machinery and the manifest powerlessness of the United Nations to use force to stop these violations of human rights of its diplomats, the U. S. could not have effectively counted on collective action with U. N. or other countries. Indeed, there was even a reluctance on part of the West European allies to apply economic sanctions against Iran.[87] The fact that all the hostages detained were U. S. nationals would also practically bar any involvement of other nations in a rescue operation taken the political volatility of the issues and the power-politics involved.

6. Reporting of the Action to the Security Council

The Untied States immediately reported its rescue action to the Security Council stating that it had acted according to its "inherent right of self-defense."[88] No resolution regarding the legality of the U. S. rescue mission was put into vote, once again indicating the Security Council's reluctance to deal with a controversial issue - the protection of nationals - and *a fortiori* to pass judgment on the legality of the doctrine itself.

However, the International Court of Justice did briefly mention the U. S. rescue mission in its final judgment of May 24, 1980. Characteristically, the Court avoided passing judgment on the "question of legality of the operation of 24 April 1980, under the Charter of the United Nations and under general International Law, nor any possible question of responsibility

flowing from it" since the issue is not "before the Court."[89]

Though the facts are radically different, it would not be totally irrelevant to contrast the position of the Court vis-a-vis U. S. rescue mission into Iran with that the Court took in the *Corfu Channel* (Merits) case of 1949. In that case the International Court of Justice unanimously decided that the mine sweeping operation by the United Kingdom in Albanian territorial waters to preserve evidence of Albanian responsibility in an earlier incident where British seamen died and British destroyers were damaged was an act that violated Albania's sovereignty.[90] From this analogy, Crown and Fried suggested that U. S. action in Iran would *a fortiori* be also illegal since no U. S. lives were endangered or lost as in the *Corfu Channel* case.[91] Yet, the International Court of Justice did not in any way indicate that the U. S. act consitituted a violation of Iran's sovereignty.[92] However, the present case could be distinguished from the *Corfu Channel* case on the technical ground that Albania *did* participate in the arguments of the *Corfu Channel* (Merits) case and did raise the issue of whether the "United Kingdom under International Law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd, October and on the 12th and 13th, November and is there any duty to give satisfaction?"[93] In the present case Iran - apart from sending two letters to the International Court of Justice basically stating that the hostage-taking was one aspect of the Islamic Revolution and hence an internal affair of Iran -[94]

did not participate in the case. Had Iran participated in the case, it could have raised the legality of the U. S. operation in the International Court of Justice which would have been bound to give a decision on the matter. The rescue operation by the United States could be said to have been the closest case which falls within the broader concept of protection of nationals by force which has come - albeit as a side issue - before the World Court. It is to be regretted that a technical (i.e., nonparticipation by the other party) factor possibly had precluded the Court from giving a definitive legal evaluation of the U. S. action.

As a whole, however, the U. S. action does not, by any means, seem to have been a disproportionate, unnecessary or excessive use of force and "it is virtually impossible on the evidence now available to say that the U. S. effort in Iran was aimed at anything other than securing the release of illegally detained U. S. diplomats, after moderate means had failed."[95] The other requirements, such as exhaustion of peaceful means and proportionality also essentially have been met. The only possible criticisms that could have been made of the U. S. would be (1) of an extra legal nature based on "disturbing questions about technical feasibility, international political wisdom and constitutional propriety;"[96] and (2) the criticism that it undermines the International Court of Justice request not to "take any measures which might aggravate the tensions between the two parties" and which as a result of the mission's failure prolonged

rather than expedited the release of the hostages which the United States had intended to seek.

SOME LEGAL POSTULATIONS THAT COULD BE MADE REGARDING THE CONCEPT OF FORCIBLE PROTECTION OF NATIONALS IN INTERNATIONAL LAW

It should be emphasised that the contextual analysis of the three incidents is made less with an intention to elicit the status of the law *lex lata* than with a view to analyse, taking into account the postulations formulated, the permissibility of each action as it had occurred in each occasion. Thus, some of the postulations and conclusions derived would be more of a nature *de lege feranda* than statements *lex lata*. This could possibly be due to the fact that the status of the law regarding protection of nationals itself is by no means unequivocally clear and well-defined in Contemporary International Law. Moreover, it should be realised that political and extra legal issues are intermingled in all the above cited cases that it would be inappropriate to take a strictly legalist or positivist approach[97] of the matter.

The cases discussed were also to an extent controversial in that each contains powerful, volatile political issues. There have also been cases of use of force regarding protection of nationals in recent times, which had not been as controversial as the present cases. One example would be the successful raid of a West German airliner hijacked to Mogadishu, Somalia in October 1977 by West German commando units with the consent of the

Somalian government.[98] No controversy regarding the legality of the Mogadishu raid arose for indeed the territorial government had given permission. The crux of the controversy in modern day, therefore, lies in whether unilateral (or in some cases collective) limited action of force is justified to save or prevent the gross violations of human rights of the intervening State's nationals when the territorial State does not give its consent, or when the territorial State itself is perpetrating these violations or acquiescing in it. Just as it is unreasonable to give a judicial *carte blanche*, as it were, to a protecting State to intervene whenever it deems fit without defining the situations where such actions would be permissible it would be unfair and - in the light of sporadic instances of use of force to protect nationals which still occurs in modern times - unrealistic to require a State to forego its rights of protection under any circumstances whatsoever. In determining the permissibility of each action - of protection of nationals - no *a priori* positivist approach which totally ignores the relevant contextual factors in each case would be sufficient, nor a random and extreme functional approach which solely based its analysis on the success or failure of the action itself and the reaction of prevalent opinions of the international community without postulating any prior rules would be proper. It is with these factors in consideration that the analyses in this chapter had been made, which could also possibly provide general frames of reference to

analyse the legality of any action falling in whole or in part within the doctrine of the protection of nationals by force on future occasions.

CONCLUSION

The concept of using force in the protection of nationals has undergone significant changes during the past 35 years or so that it would be futile to consider on the same basis the rationale and functions and practice in this field of the pre-United Nations Charter years to those of the present day. Whatever had been the rationales used to justify the protection of nationals by force in the eighteenth, nineteenth, and early twentieth centuries, it cannot be denied that the doctrine of the period did at least partly reflect and was to a certain extent based on protecting the colonial interests and property which the European powers then had in various parts of the world.[1] As far as the frequency and extent of the practice is concerned, it is also evident that the cases of use of force for protection of nationals were much less during the past 35 years than any similar time period preceding the adoption of the United Nations Charter.[2] The disintegration of a substantial part of the basic structure (that of colonialism and classical international law rules which reflect this interest) of the past could perhaps be considered a major cause for the paucity of such uses of force in the modern era. Another important factor contributing to this situation would be the emergence of new norms of the United Nations Charter with its attendant general consensus at least in theory of the international community that force should be employed only in exceptional situations for the preservation of the basic values of

world minimum public order. Therefore, any consideration of the concept of the protection of nationals by force in the present day must necessarily involve a departure from the framework of the past. In other words, a reformulation of the rationale and theory of this part of law is necessary in analysing it from a modern perspective. Inasmuch as this reformulation involves the rejection of old notions and postulation of new principles regarding the protection of nationals it could indeed be considered as a new outlook.

Nevertheless, the changes from the past should not altogether negate the right to use force in the protection of nationals under certain conditions in accordance with the principles formulated earlier. Admittedly, as an ideal goal the norms embodied in the United Nations Charter would have postulated the elimination of such uses of force which could create international tensions. But it should be conceded that the optimistic expectations of many people during the initial years of the United Nations that it would provide a sufficient and overarching mechanism that would substitute for all other traditional forms of use of force by individual nations has not been realised.[3] Moreover, recent trends in UN theory and indeed in Contemporary International Law have increasingly come to consider human rights issues as sacrosanct and could even be interpreted as having the effect of sanctioning - albeit in selective areas - the use of force to implement and enforce human rights.[4] These trends, it is submitted, should strengthen the appropriateness of limited use of force in genuine

cases where the fundamental human rights of nationals are being adversely affected.

The scope of this thesis has attempted to deal with the issue and has postulated that in the event of the inability of the international community to prevent the abuse of human rights of nationals and in the light of increasing emphasis accorded to human rights under Contemporary International Law, a limited right to use force in the protection of nationals should in accordance with the principles submitted be made permissible. It is with this view in mind that the theme for a new outlook in the use of force in the protection of nationals has been developed in this thesis.

FOOTNOTES

CHAPTER I

[1] *See generally* H. Wheaton, *Elements, the Classics of International Law* No. 19 (1866) 106; E. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), 445-456; L. Oppenheim, *International Law* Vol I (3rd ed.) 1916) 309; W. Hall, *International Law* (8th ed.) (1924) 331 ; F. Dunn, *The Protection of Nationals* (1932) 46. *See also* Brownlie, *International Law and the Use of Force by States* (1963) 289-301.

[2] *Compare* Brownlie's statement that "Protection of lives and property of nationals abroad is one of several justifications offered by a State resorting to force and the justifications are framed so widely that their legal content is obscured by general considerations of national policy." Brownlie, *id.* 290.

[3] *See generally* texts accompanying footnotes 4 to 9 *infra* .

[4] Vattel, *Le Droit des Gens* , Bk II, Ch vi 71, quoted in Dunn, *supra* note 1 at 48.

[5] Dunn *supra* note 1 at 52.

[6] E. Pittard, *Protection des Nationaux* (1896), quoted in D. Bowett, *Self-Defence in International Law* (1958) 91 (translated from French)

[7] Borchard, *supra* note 1 at 30-32.

[8] *Id.* 30-31.

[9] *Id.* 31.

[10] *See*, e.g., letter of U. S. Secretary of State Frelinghusyen to Messrs. Mullar and King quoted in Moore, *A Digest of International Law*, Vol. VI (1906) 616. *See also* statements in *Mavrometis Palestine Concessions Case* (Greece v U. K.) (1924) PCIJ Rep. Series A, No. 2; Administrative Decision No. V, U. S. v Germany (1924) cited in Harris, *International Laws: Cases and Materials* (1978) 421-423.

[11] Letter of U. S. Secretary of State, *supra* note 10 at 616.

[12]Umpire Parker, speaking for the Mixed Claims Commission (United States and Germany), Administrative Decisions and Opinions of a General Nature and Opinions in Individual Lusitania Claims and other cases of June 30, 1925, quoted in Bishop, *International Law: Cases and Materials* (2nd ed., 1962 - 631, 632.)

[13]A possible exception to this theory - as indicated in terms of practice - would be the fact that whereas the claim for damages to the national is made as a claim by the State, the amount of damages awarded was more often than not determined by the injury sustained by the national and not by the overall effect it may have had on the State itself. *See also* the reliance on the fact of whether or not the 'international minimum standard" has been accorded to the alien in determining the damages claim made by the mistreated alien's government in arbitration tribunals in the early 20th century. The amount of damages in several cases would depend on the extent and degree of derogation from the international minimum standard by the mistreating State in its treatment of the alien and the injuries he suffered thereby. *See* the judgments in *Roberts* claim, *Faulkner* claim, 4NNRIAA 77 and 67 respectively for decisions reflecting this attitude. *See also* Harris *supra* note 10 at 423.

[14]See Brownlie *supra* note 1 at 40-50 and also at 289.

[15]J. Westlake, *International Law*, Part I (1904) 299.

[16]Quoted in *id.* 308. (translated from French)

[17]H. Halleck, *International Law* (1861) 95.

[18]*Ibid.*

[19]Text accompanying *supra* note 15. *See also* Hall, *International Law supra* note 1 at 331-336 who discussed the issue of protection of nationals under the heading of self-preservation.

[20]Brownlie, *supra* note 1 at 46.

[21]Halleck, *supra* note 17 at 92.

[22]*Id.* 93.

23 *Ibid.*

[24]Westlake, *supra* note 1 at 312. (emphasis added) *But compare*:

> ...a right of self-preservation is a much wider concept than a right of self-defence. It leads too easily to the doctrine of necessity - *salus populi Suprema lex* - and the doctrine of necessity

> is a rejection of law. Self-preservation might allow one State to do a grave wrong to another on the plea of saving its own military, economic or political interests.

Quoted from Waldock, "The Regulation of the Use of Force by Individual States in International Law" in (1952-II) Hague Academy *Recueil des Cours* , 461,462.

[25] *Compare* the observation of Brownlie:

> Writers have failed to give a logical exposition of the customary law because they have assumed an orderly use of categories which were not generally accpeted in State practice and because they refused to admit the hopeless confusion of terminology present in State practice and legal literature.

Brownlie, *supra* note 1 at 45.

[26] While the majority of English and Continental writers were firm in their assertions that there exists various legal grounds where a right to use force in the protection of nationals is sanctioned, Latin American writers such as Calvo, "expressed strong opposition to 'intervention on behalf of citizens' or their property interests abroad. While he was obviously thinking primarily of armed intervention, he appeared to include diplomatic interposition in his strictures as well." (Quoted from Dunn, *Protection of Nationals Abroad supra* note 1 at 52.)

[27] See generally works cited *supra* note 1. There is a need, though, for a qualification to be made regarding the general statement argued throughout that the right of self-defense was widely defined and amorphous in nineteenth century legal literature and practice. For, as early as 1841 U. S. Secretary of State Daniel Webster in relation to the *Caroline* incident formulated "a principle on which the legitimacy of an act of self-defence, instant, overwhelming leaving no choice of means and no moment for deliberation." (Quoted from Ross, *A Textbook of International Law* (1947) 249.)

However, even during the time the principle was formulated it could only be specifically applicable to a situation of "self-defence" in particular cases of a State instrumentality being threatened in a limited context (like in the actual incidents of the *Caroline* case). In fact, it could generally be said that the above criteria would appear to be primarily relevant in situations of self-help rather than across the board reference to self-defence (for the difference between the two concepts, see discussions *supra* notes 42, 43). Whether the principle formulated in the incident would be applicable to cases of defensive war in modern times is questioned by some modern writers. *See also* the

observations of Mallison, "Limited Blockade or Quarantine Interdiction: National and Collective Self-Defence Claims Valid Under International Law," (1962) 31 George Washington Law Review 335, 348. *See also*, Greig, *International Law* (2nd ed., 1976) at 883-886.

Similarly, the principle seems rather inapposite to a situation of protection of nationals where mistreatment of nationals may have gradually built up over a period of time, ultimately reaching a state where action becomes necessary. However, intervention in cases of nationals being immediately threatened such as in widespread riots directed at particular nationals, which the host government is unable or unwilling to control, the principles of the *Caroline* incident appears to have more relevance in exercising protection over them by the protecting State.

[28]Brownlie, *supra* note 1 at 41.

[29]Vattel, *Le Droitdes Gens*, quoted in Brownlie *id*. 41.

[30]Hall, *International Law supra* note 1, 81-82.

[31]T. Holland, *Studies in International Law* (1898) 163.

[32]Phillimore, *International Law* (Vol III 2nd ed., 1875) 78.

[33]*Compare* "There is during the nineteenth century a dislike by governments for open reliance on an arbitrary right to resort to war. As a result there was a practice of relying on vaguely defined grounds justifying the use of force." (Brownlie, *supra* note 1 at 47.)

[34] *Id* 21.

[35]In the words of Brownlie, *id*. 27:

> In the view of most of the governments there were substantial reasons of policy for avoiding a state of war while at the same time using the desired amount of coercion. In the era of constitutional government the executive was usually bound to observe time-consuming and politically embarrassing procedures before recourse to 'war' ...Recourse to 'war' incurred a certain odium; war was a term which had acquired a deep psychological and emotional significance which offended pacific sentiment and was wasteful of lives and a nation's resources. Furthermore, if a government admitted the existence of a state of war, third states could without embarrassment demand observance of

neutral rights and were themselves under various legal duties.

[36]For a listing of the few instances where 'war measures' were taken in the context of protection of nationals, *see* text accompanying note 96 *infra*.

[37]*See* Treatment of Oppenheim on the subject of protection of nationals in his treatise *International Law of Peace* under the heading "Intervention". Oppenheim, *supra* note 1 at 309.

[38]Brownlie, *supra* note 1 at 47.

[39]Waldock, *supra* note 24 at 457.

[40]A. Hindmarsh, *Force in Peace* (1933, Reissued 1973) 92.

[41]Waldock, *op cit* . 458.

[42]"Self-help is, like self-defence, dependent on a prior illegal act by the State against which it is directed ...In essence, the right of self-defence operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable; its function is to preserve or restore the legal status quo, and not to take a remedial or repressive character in order to enforce legal rights. This the latter function is the function of self-help." Bowett, *Self-Defence in International Law*(1958) 11.

[43]Schwarzenberger, "The Fundamental Principles of International Law," (1955, I) Hague Academy, 195, 343. Even though Schwarzenberger was writing in 1955 there are assertions by some writers whether self-help in the form of *remedying a wrong which had already been committed* is legal in *Contemporary International Law* in the light of relevant provisions of the UN Charter. However, there is reasonable cause to presume that the International Court of Justice in the *Corfu Channel* case implicitly accepts the permissibility of the use of force in the assertion of an existing legal right (though not *any* right) in contrast to actions taken to remedy a wrong already committed.

> The court naturally distinguished clearly between this case - that is the use or threat of force in (and where necessary for) the active and current assertion of a right, and its use to remedy a wrong *already committed* (other of course than one itself involving the illegitimate use of force). The Court thus differentiated the cases in which forcible self-help is justified from those in which it is not. The test seems to be, broadly, whether self-help is

> analogous to self-defence, because used defensively to counter or prevent an attempt by force to deny a right; or whether on the other hand, it takes the form of punishment or coercion carried out in cases where it is alleged that a wrong has already been committed. (Fitzmaurice, "The General Principles of International Law Considered From the Standpoint of the Rule of Law" (1957, II) Hague Academy *Recueil des Cours* 5, 172.

Contra, Brownlie, *supra* note 1 at 283-289.

[44]The purpose of discussing the role and relevance of the principle of self-help in Contemporary International Law is to derive the theory that self-help in the nineteenth century not only would have comprised reprisals, etc., but would have also accommodated the doctrine of more restrictive right of self-help which deals with situations affecting *existing* legal rights. This conclusion is derived *a posteori* that since the doctrine of self-help dealing with the existing legal rights is considered (by some writers) to have been implicitly accepted by the International Court of Justice in the *Corfu Channel* (merits) case, it must all the more form part of the doctrine of self-help of the pre-UN Charter and pre-League of Nations period where more expansive doctrines such as reprisals were considered to be legal.

[45]As will be discussed in due course, nineteenth centrury doctrine includes the right of protection and the right to use force not only for the protection of the lives but also for the property of nationals abroad.

[46]*See* text and comments accompanying notes 85-89 *infra*.

[47]For a treatment of the doctrine of self-help in nineteenth and early twentieth centuries, see Hindmarsh, *Force in Peace Supra* note 40 at 57-108.

[47a]*Compare* Borchard *supra* note 1 at 487 " ... *[A]*mong the attributes of sovereignty is the right of a government to determine the conditions and qualifications of citizenship and to decide who shall be deemed citizens."

[48]*Compare* the practice of "International commissions in cases concerning diplomatic claims on behalf of nationals freely assuming the right to pass upon the citizenship of a claimant, testing it in the first instance by the municipal law of the claimant's country." Borchard *id.* 486-487.

[49]It is not inferred that International Law has little role to play in determining the nationality of persons in the context of the

protection of nationals through diplomatic claims or by the use of force. It is stated that the determination of nationality that would give rise to protection is made mainly through the mechanism of Municipal Law during the period. *Compare* Borchard *id.* 487:

> In a few cases international commissions have essayed to determine a claimant's citizenship by rules of international law of either the claimant or defendant country, as, for example in cases where trade domicile has been held to confer nationality for international purposes.

[50] *See supra* notes 7-10.

[51] *Luriav* v *U. S.*, 231 U. S. 9,233 (1913). Cited in Bowett, *supra* note 6 at 95.

[52] Oppenheim, *supra* note at 688-689.

[53] Hackworth, *Digest of International Law* (Vol III) 360. Quoted from Bowett, *supra* note 6 at 95.

[54] *id.* 285, 315.

[55] Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its current validity under the UN Charter" (1974) 4 California Western International Law Journal, 203, 204.

[56] *See generally* the classification of cases of humanitarian intervention in the nineteenth century where religious, racial ties of 'brotherhood' were partly given as justifications for intervention in the treatment of citizens of *another State* cited in Fonteyne, *id.* 207-213.

[57] *See* The observation of A. Thomas and A. Thomas, *The Dominican Republic Crisis* (1965) at 20. (Quoted in Fonteyne, *id.* 251.)

> A plea can be made that where it is legal to intervene to protect one's own nationals, it is an extension of this legality to protect the nationals of others. The so-called principle of nationality is not inflexible.

[58] Hyde, "Intervention in Theory and Practice" (1911-12) 6 Ill L Review 1 & 6 (quoted in Fonteyne, "Humanitarian Intervention" note 55 at 224). (Emphaisis added.)

[59] *See* Discussions in Chapter II, text and comments accompanying notes 69-71 *infra*.

[60] Borchard, *supra* note 1 at 449, footnote 6.

[61] *Id.* 449.

[62] Clark, "Right to protect citizens in Foreign countries by landing forces," *Memorandum of the Department of State* (3rd revised ed., 1934) 24-35.

[63] *Id.* 35. (Emphasis added)

[64] *Id.* 57

[65] Pradier-Fodéré, *Traité de droit international public* 614 Quoted in *Memorandum id.* 30.

[66] *See also* text and notes accompanying footnotes 2 and 5

[67] Oppenheim, *supra* note 1 at 309.

[68] Oppenheim, *supra* note 1 at 305.

[69] Hall, *supra* note 1 at 278

[70] Oppenheim wrote "That intervention is, as a rule, forbidden by International law which protects the international personality of the State there is no doubt." Oppenheim *loc cit.*

[71] *See* Memorandum *supra* note 62 at 24-25; M. Offutt *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928) 2-4. For the application of the concept of 'interposition' in the collection of debts *see* Borchard *supra* note 1 at 310-313. *But compare* Dunn *supra* note 1 at 20 where he stated that only "*[r]*epresentations or demands through diplomatic channels which do not involve the use of armed force will be spoken of as interposition."

[72] Offutt, *supra* note 71 at 2.

[73] Borchard *supra* note 1 at 449.

[74] *Memorandum, supra* note 62 at 35-36.

[75] *Id.* 36.

[76] "Non political intervention need not have, and as a matter of fact almost never has so far as our precedents go, any reference to the internal politics of the invaded country in the matter of either supporting or changing the particular government" Memorandum *id.* 24. *But compare* comments of Borchard in *infra* note 77.

[77] Borchard wrote that "while these operations (to protect nationals) have in origin practically always had the character of non-political intervention they have at times resulted in an actual interference in the internal affairs of another country." (Borchard *supra* note 1 at 58.)

[78]Hindmarsh, *supra* note 40 at 58.

[79]*Ibid.*

[80]Borchard *op cit.* 445.

[81]*Ibid.*

[82]*Id.* 446

[83]*Ibid.* (Citing the letter of Mr. Marcy, Secretary of State to Mr. Parker, Oct 5, 1855 in Moore's Digest VII, 106).

[84]Borchard *id.* 453.

[85]*Ibid.*

[86]Hindmarsh *loc cit.*

[87]*See* texts and notes accompanying footnotes 41-46

[88]*See* texts accompanying notes 108-109

[89]Memorandum *supra* note 62 at 34-35

[90]*Ibid.*

[91]*See*, for example, Britain's armed expedition against Abyssnia in 1867 on account of the imprisonment and detention of several British subjects; the British bombardment of Samoa in 1873; U. S. bombardment of Greytown in 1854 for non-payment of debts cited in Borchard *op cit.* 454. These would indicate the excesses and unproportionality of the actions taken involving the use of force for protection of nationals during the period.

[92]*See* text and notes accompanying footnotes 37-41 *supra* for exposition of the concept of reprisals mainly before the emergence of the League Covenant and the Kellogg-Briand Pact. For the possible effect the above two instruments might have had on the traditional notion of reprisals *see* texts accompanying notes 106-110 *infra.*

[93]Borchard *op cit.* 455

[94]*See* tex[t] and notes accompanying *supra* notes 33-35.

[95]Borchard *loc cit.*

[96]*Ibid.*

[97]The relevant passage reads:

> The Contracting Powers agree not to have

> recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. (Quoted from Borchard, *supra* note 1 at 131.)

98 This undertaking was, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any *Compromis* from being agreed on, or after the arbitration, fails to submit to the award. (Quoted from *Ibid.*)

99 This regulation of a prohibition of resort to force (in cases of minor self-help, like collection of debts) seem to act as a forerunner of the regulations in the League of Nations Covenant where "express obligations to employ pacific means of settling disputes and not resort to war without first exhausting those pacific means." (Quoted from Waldock, *supra* note 24 at 469) were made obligatory for League Members before resorting to war.

100 "The Covenant in no sense 'abolished' war. The nearest it came to such a proscription was in Article 10 whereby members of the League undertook to respect and preserve as against external aggression the territorial integrity and existing political independence of members of the League." D. Greig, *International Law* (2nd ed. 1976) 868.

101 Waldock, *supra* note 24 at 470.

102 *Ibid.*

103 *Id.* 471-472. *But compare* J. Brierly, *Law of Nations* (6th ed.) 411-412.

104 Article I of the Kellogg-Briand Pact, August 27, 1928, 46 Stat 2343.

105 Article II of the Kellogg-Briand Pact.

106 *Naulila Incident Arbitration* (1928) Portugese-German Arbitration Tribunal. (Quoted from Bishop *supra* note 12.)

106a *See* Brierly, *supra* note 103 at 415. *See also* De Visscher's views cited in Waldock *op cit.* 475-476.

107 Briely *id.* 414.

108 *Naulila* incident *supra* note 106. The summary of the incident is:

> In the autumn of 1914 three German officials

> were killed and two others interned in the Portugese port of Naulila. As a reprisal, and acting on orders of the governor of South West Africa, German forces attacked and destroyed several positions in the Portugese colony of Angola. The arbitrators found that the conditions for the legality of reprisals had not been satisfied by the German expedition. (Quoted from Brownlie *supra* note 1 at 139)

It should be noted that the actual incident leading to the Arbitration occurred in 1914 before the emergence of the Covenant of the League of Nations and the decision was given in 1928 after the emergence of the League of Nations and contemporaneously with the Kellogg-Briand Pact.

[109]Quoted from Brownlie *ibid.*

[110]Waldock, *supra* note 24 at 460.

[111]*See* the numerous incidents involving the landing of United States forces in this context during the period of 1899-1927 in Offutt, *supra* note 71 at 82-140. *See also, Memorandum supra* note 62 at 81-130 for a listing of United States troops involvement in other countries up to 1933.

CHAPTER II

[1]*See* discussions in Chapter I, notes 100-105 *supra*. Though 'war' as a national policy was condemned by the Kellogg-Briand Pact," it was universally agreed that resort to war - and therefore any lesser use of force - in self-defence was not restricted by either instrument. Indeed, the Assembly of the League of Nations considered self-defence to be a duty as much as a right. In the negotiations leading to the Pact of Paris several States made declarations that self-defence is a natural right inherent in every State and untouched by the Pact." Quoted from Waldock, "The Regulation of the Use of Force by Individual States in International Law" (1952, II) Hague Academy, *Recueil des Cours* 455, 477.

[2]*See* discussions in *supra* note 1.

[3]For relatively recent views among States' representatives in the United Nations on the scope and effects of Article 2 (4) and Article 51 vis-a-vis the concept of the use of force *See* Fonteyne "Forcible self-help by States to Protect Human Rights: Recent Views from the United Nations" in R. Lillich (ed.) *Humanitarian Intervention and the United Nations* (1973) 209-216. Hereafter, cited as Fonteyne,

"Forcible Self-help".

[4]Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: It's current validity under the UN Charter" (1974) 4 California Western International Law Journal 203, 22. Hereafter cited as Fonteyne "Humanitarian Intervention".

[5]Fonteyne, "Forcible Self-help" *supra* note 3 at 2. Emphasis added

[6]Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action" (1977) 12 Journal of International Law and Economics 57.

[7]Footnote inserted. Article X of the League of Nations states:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which the obligation shall be fulfilled.

[8]Giraud, *Interdiction du Recours à la Force-- La Théorie et la Pratique des Nation Unes* 67, Rev Gendr Int'l Publ 501, 512-413 (1963) (Quoted in Fonteyne "Humanitarian Intervention" *supra* note 5 at 243.)

[9]I. Brownlie, *International Law and the Use of Force By States*(1963) 265-268.

[10] *Id.* 267-268. (Emphasis in original.)

[11]Summary of statements made by a majority of representatives in the United Nations mainly during 1965-1969, on discussions relating to the scope of Article 51 on various occasions (Quoted from Fonteyne), "Forcible Self-help" *supra* note 3 at 211-212.

[12]Brownlie *supra* note 9 at 273. However, Brownlie, while insisting on 'the principle of effectiveness' in interpreting *Article 51*in its plain meaning, categorically rejected the provisions of Article 2-(4) relating to 'territorial integrity or political independence' be interpreted restrictively. For a criticism that Brownlie's own insistence on 'the principle of effectiveness' is not applied in his interpretation of Article 2-(4)*See* Knisbacher *supra* note 6 at 63 footnote 28.

[13]Brownlie,*supra* note 9 at 275.

[14]J. Stone, *Aggression and World Order*(1958) 95.

[15] *Id.* 94.

[16] *Id.* 77.

[17] *See generally* Stone, *op cit* 77-98.

[18] *Id.* 98 footnote 11

[19] Harlow "The Legal Use of Force Short of War" (1966) 92 U. S. Navy Institute Proceedings 93.

[20] Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations" (1947) 41 American Journal of International Law 877-878.

[21] *Ibid.* Interestingly, Brownlie in his refutation of the reasons in favor of less-restrictive view put forward by the less-restrictive school did not mention or refute the reason put forward here that Article 51 was included in the UN Charter with the primary aim of accommodating regional security arrangements such as The Act of Chaputelepec (See Brownlie, *op cit.* at 276-278.)

[22] McDougal &. Feliciano, *Law and Minimum World Order* (1961) 238-241.

[23] Knisbacher, *supra* note 6 at 65.

[24] Stone, *Aggression op cit.* 98.

[25] McDougal and Feliciano *op cit.* 218.

[27] Waldock *supra* note 1 at 495.

[28] Schwarzenberger 'The Fundamental Principles of International Law" (1955, I) Hague Academy *Recueil des Cours* 195, 338.

[29] Stone, *op cit.* 97-98.

[30] *Ibid.*

[31] *See supra* notes 12 and 21.

[32] Kunz *supra* note 20 at 872.

[33] *See e.g.* comment by Harlow in text accompanying note 19 *supra.*

[34] Fonteyne, "Humanitarian Intervention" *supra* note 4 at 244 footnote 183. The contention that the UN Charter has left the customary International Law regarding the use of force which it does not explicitly abolish can generally be found in most of the writings cited in notes 24-28 *supra*

[35] Fonteyne "Humanitarian Intervention" *supra* note 4 at 244 footnote 183.

[36] Such rules would include, for example, the right of anticipatory self-defense where jurists such as Greig (D. Greig, International Law, 2nd ed. 1976, 893-894) asserts by implication, that this 'right'

if properly exercised is not in conflict with the UN Charter. Contrarily, some jurists are emphatic in their statements that 'anticipatory self-defense' is not in conformity with the Charter. (*See* Brownlie *op cit.*258-261.)

[37]Greig, *id.* 483.

[38]*Ibid.*

[39]*Ibid.*

[40]Brownlie, *op cit.* 268. (Emphasis added)

[41]*See* text accompanying note 21 *supra.*

[42]Greig op cit. 892-894.

[43]*Id.* 896.

[44]Nanda, "The United States Action in the 1965 Dominican Crisis: Impact on World Order" Part I (1966) 43 Denver Law Journal 439, 478.

Nanda was referring to the statement made by the Permanent Court of International Justice in the *SS Lotus Case* (1927).

[45]*Ibid.*

[46]*Corfu Channel (Merits)*Case. *ICJ Reports 4*

[47]Knisbasher *supra* note 6 at 66.

[48]Waldock *supra* note 1 at 495.

[49]*Ibid.*

[50]*Corfu Channel* (Merits) case *op cit.* 4,30.

[51]Knisbasher *op cit.* 68. *See also* Fitzmaurice, "The General Principles of International Law considered from the standpoint of Rule of Law" (1957, II) 92 Recueil de Cours (Hague Academy) 1-171. *Compare* Schwarzenberger "Report on Some Aspects of the Principle of Self-Defence in the Charter of the United Nations and the Topics covered by the Dubrovinik Resolution" (1958) 48 *International Law Association Reports* 550, 573. *See also* Waldock *supra* note 1 at 499-501.

[52]"Only in two of the Disenting Opinions ... reference is made to some of the relevant articles of the Charter." (Quoted from Schwarzenberger, *Id.* 585.)

[53]Looking at the *Corfu Channel* case on a functional basis it should be noted that Article 59 of the Statute of the International Court

of justice stipulates that "The decision of the Court has no binding force except between the parties and in respect of that aprticular case." Nevertheless as the highest court in the area of International Law even though its decisions are not binding to other parties the trends enunciated in the decisions of the World Court should be taken into account in considering the subject.

[54] *See* Brownlie *op cit.* 285-287 for criticism of the majority judgment regarding forcible self-help in the *Corfu Channel* case.

[55] This inference can be made notwithstanding the objection by Brownlie that the Court's nonadherence to the norms of the UN Charter was largely due to a technicality. He writes (Brownlie *supra* note 9 at 289 footnote 1): "Albania was not a member of the United Nations *[*at the time the *Corfu Channel* case was decided*]* and this may explain the absence of references to the UN Charter ." This contention, it is submitted, is not compelling. For, Article 2 (6) of the UN Charter states, "The Organization shall ensure that States which are not members of the United Nations act in accordance with those principles so far as may be necessary for the maintenance of international peace and security." Thus, the mere fact that Albania was not a Member of the United Nations would not necessarily deter the International Court of Justice from referring to relevant portions of the United Nations Charter norms regarding use of force, if it had deemed necessary for these norms are primarily concerned with "maintenance of international peace and security."

[56] General Assembly Resolution 2625 (XXV) of 24 October 1970.

[57] General Assembly Resolution 3314 (XXIX) of 14 December 1974.

[58] Declaration of Friendly Relations *op cit.* These principles are stated in the Declaration under the sub-heading which elaborates Article 2 (4).

[59] Declaration of Friendly Relations *id.*

[60] The claims and counter claims in the Entebbe incident are discussed in Chapter IV

[61] Declaration of Friendly Relations. *Op cit.*

[62] Since the subject of protection of nationals vis-a-vis UN Charter norms could be interpreted differently by those who hold the 'absoute' or the 'less-restrictive' views and since the statement doesn't give a clear indication which view is correct, substantive guidance on the subject cannot be derived by a reading of the Resolution.

[63] Paust and Blaustein "The Arab Oil Weapon: A Threat to International Peace" (1974) 68 American Journal of International Law, 410, 414.

But compare the statements of the UN representatives of Hungary and the United States regarding the legal status of the Declaration in Rosenstock "The Declaration of Principles of International Law concerning Friendly Relations: A Survey" (1971) 65 American Journal of International Law 713, 714 footnote 4.

[64]Declaration of Friendly Relations *op cit.*

[65]"The term" 'para-colonial' is used here to indicate the *[former]* situation in Rhodesia *[Zimbabwe]* or South Africa where black-white racism is a remnant of a colonial past as opposed to 'colonial' which indicates an overseas government situation, or 'racial' which indicates a situation of racism lacking colonial origin." (Fonteyne *supra* note 4 at 237 note 147).

[66]For example, the General Assembly in its resolution concerning the presence of South Africa in South West Africa (Namibia) requested

> ...all States ...within the United Nations system, in cooperation with the Organization of African Unity, to render to the Namibian people all moral and *material* assistance necessary to continue their struggle for the restoration of their inalienable rights to self-determination.

General Assembly Resolution 2871 (XXVI). (Emphasis added).

[67]General Assembly Resolution 3236, UN Document GA/5194 (1974)

[68]*See generally* Bowett, "The Interrelation of Theories of Intervention and Self-Defence" in Moore (ed.) *Law and Civil War in the Modern World* 45-46.

[69]It is submitted that even though the implicit exception in UN theory regarding the legality of the use of force in the exercise of self-determination of peoples under colonial and para-colonial regimes may be politically motivated it also expresses the humane concern of the international community to the plight of such peoples.

[70]This is somewhat similar to the 'double-level' approach to UN Charter norms concerning the use of force which is elaborated in Chapter III texts accompanying notes 3-9 *infra*.

[71]It is realized that the analogy could not be carried too far. For it could be asserted on behalf of the proponents of those who upheld the legality of the use of force in struggles for self-determination that the use of force is exercised on behalf of a nation or peoples collectively whereas 'beneficiaries' of the use of force in the protection of nationals are relatively few. Morevoer, the politically charged and volatile issue of self-determination against colonial domination has an expedient and added advantage over that of

protection of nationals which could be contended as remnants of old colonial attitudes.

[72]General Assembly Resolution 3314 (XXIX) GAOR 29th Session (1974).

[73]For example, *See* the noncondemnation of Israel by the Security Council as an aggressor in the Entebbe airport incident in Harris, *International Law: Cases and Materials* (2nd ed. 1978) 685-686. *See also* Boyle "International Law in Times of Crisis: From the Entebbe Raid to the Hostages Convention" (1980) 75 North Western Law Review 769, 816-817.

[74]Harris *id.* 694.

[75]"The Consensus Definition has had a mixed reception. It glosses over or avoided many disputed points in the interest of agreement." *Id.* 693.

[76]Behuniak "The Seizure and Recorvery of the Mayaguez: A Legal Analysis of United States Claims" (Part II) (1979) 83 Military Law Review 59, 91

[77]Lilich "Forcible Self-help to Protect Human Rights' (1967) 53 Iowa Law Review 325, 343-344.

[78]*Id.* 327.

[79]Article 2 (7) of the UN Charter:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the Domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

[80]*See generally* Lauterpacht, *International Law and Human Rights* (1950) 177 *et seq*; Ermarcora, "Human Rights and Domestic Jurisdiction" Hague Academy (1968) *Recueil des Cours* 375 *et seq*. *See also* McDougal and Reisman "Rhodesia and the United Nations: The Lawfulness of International concern" (1968) 63 American Journal of International Law 1 *See also* the General Assembly resolutions and declarations regarding the right of the United Nations to assist in the struggle to enhance the human rights of colonial peoples cited *supra*.

[81]Fonteyne, "Humanitarian Intervention" *supra* note 4 at 240.

[82]Note the difference in the wording of Article 2 (4) which states "All *member States* ..."and Article 2 (7) "Nothing contained in the present Charter shall authorize the *United Nations* to intervene ...

[83]Declaration on the Inadmissibility of Intervention in the Domestic Affairs of a State and the Protection of their Independence and

Sovereignty. Resolution 2132 (XX) (1965) of the General Assembly.

[84]Admittedly, there has been no employment of armed force *per se* by the United Nations in enforcing human rights, the closest being the use of 'economic force' in the form of sanctions against South Africa and Rhodesia. The point here is to illustrate the increasing potential on part of the United Nations to consider human rights issues as no longer protected by the Domestic Jurisdiction clause and may, if it deem fit, take appropriate enforcement action to protect and promote human rights.

[85]It is realised that the comparison between the United Nations as a whole and a particular State taking action to 'enforce' human rights cannot always be considered as being the same force of legality. For, intervention by the UN is preferrable to that of unilateral action or even by a Regional Organization as the UN could play a more disinterested role. *See* Note, "A Proposed Resolution Providing for the Authorization of Intervention by the United Nations in a State Committing GrossViolations of Human Rights" (1973) 13 Virginia Journal of International Law. However, in the event of UN inaction and ineffectiveness and when the group of persons whose fundamental human rights are being violated has the nationality link with the intervening State that State should not be banned from taking limited unilateral action to stop or prevent the abuse of its nationals' human rights.

[86]Gross maltreatment does not cover minor infringement of nationals' rights but would cover such actions like that of the rebels in Stanleyville (*See* text and notes accompanying footnotes 109-112 *infra*) who deliberately and unlawfully violated the most fundamental human rights. It would also cover cases where the authorities of the territorial State themselves resort to such violations or when they are unwilling or unable to stop the violations against another State's nationals by its citizens.

[87]Delcaration of nonintervention *op cit.* There is a need to strictly abide by this provision. If a State's use of force on behalf of nationals extend beyond its objectives and did affect the personality of a State and its culture and economic elements, the action of the intervening State would be impermissible. *Compare* discussion regarding U. S.intervention in the Dominican Republic in text accompanying footnotes 105, 106 *infra*.

[88]Jessup, *A Modern Law of Nations* (1949) 169-170.

[89]Footnote inserted. It is now known that the military Staff Committee and the pledged national contigents have not emerged as a *permanent force* where collective measures can be taken by the United Nations for 'threats against the peace' except possibly in the case of Korea.

[90]Jessup, *op cit.* 172-173.

[91]Krift, "Self-Defense and Self-Help: The Israeli Raid on Entebbe" (1977) 4 Brooklyn Journal of International Law. *See also* Stone, *Aggression supra* note 14 at 96. *Compare* Fonteyne "Humanitarian Intervention" *supra* note 4 at 245-246.

[92]Harris, *supra* note 73 at 976.

[93]Quoted from Fawcett "Intervention in International Law" (1961) 103 *Recueil des Cours* 347, 400.

[94]UNGA Official Records (1956) 1st Emergency Special Session, 561st plenary meeting at para 73.

[95]Nanda, *supra* note 44 at 451.

[96]Bowett, *Self-Defence in International Law*(1958) 104.

[97]*Ibid.* (Emphasis added)

[98]Greig, *supra* note 36 at 880.

[99]*Ibid.*

[100]*Ibid.*

[101]Reservations should be made on the contention that threats to British *property* only would give rise to the use of force for it is doubtful whether the protection of property alone could justify the use of force. *See* Greig *id.* 880 and comments on this issue in Bowett *supra* note 96 at 103.

[102]When discussing the 'doctrine of protection of nationals' it is used in the sense in which the doctrine permissibly operate under the UN Charter in strict adherence to the principles of necessity and proportionality.

[103]Nanda, *supra* note 44 at 443, 444.

[104]*Ibid.*

[105]*See generally* Nanda *id.* 464-473.

[106]*Id.*468-471. *See also* Lillich *supra* note 77 at 343-344.

[107]2 UN Monthly Chronicle 374 (No. 6, 1965) cited in Nanda *op cit.* 464.

[108]It should also be noted that in both the Suez and Dominican crisis the protection of nationals was only one of the many claims made to justify the intervention in those countries. Even if *arguendo* the protection of nationals is formally declared impermissible the intervening nations could still have justified their actions on other grounds.

[109]Lillich, *op cit.*338-339.

[110]*Compare* the statement of the U. S. State Department that the rescue operation was taken "in exercise of our clear responsibility to protect U. S. citizens under the circumstances existing in the Stanleyville area" and the statement of U. S. Ambassador Stevenson to the United Nations that" while our primary obligation was to protect the lives of American citizens, we are proud that the mission rescued so many innocent people of 18 other nationalities from their predicament." Quoted from *id.* 339-340.

[111]Nanda note 44 at 477. (Emphases added) It is arguable that because the legitimate government of the Congo had authorized the rescue operation it is different than other cases where such permission was not obtained from the territorial government. Some African States did dispute the authority of the Congolese government. It would, however, seem that if the territorial government's authority is undisputed and the permission given by the territorial government to intervene is given voluntarily without being pressured then there would be no doubt that the operation is legal in Contemporary International Law. *See also* comments about the Mogadishu raid in Chapter IV text accompanying footnote 98 *infra.*

[112]The extreme urgency of the situation necessitating the use of force was made manifest when "in a period of several weeks nineteen Belbians and sixteen others were actually slaughtered by their rebel captors. The grim prospect that other hostages would meet a similar fate wasstrengthened by a captured telegram ...'In case of bombing region, exterminate all without requesting further orders'." (Lillich *id.* 339).

The inability of the United Nations and the Organization of African Unity to take any action to save lives would point to the necessity of the operation. The withdrawal of foreign troops once the hostages had been rescued also meets the requirement of proportionality.

[113]UN Monthly Chronicle (No. 1, 1965) 22-23.

[114]Admittedly, the assertion of a right to protect nationals by force has not been prevalent and uniform as it was in pre-UN Charter era, but the paucity of the exercise of a right of customary International Law which is not in basic conflict with the norms of *Contemporary* International Law should not necessarily act as a ground for denying its permissibility. "It does not seem that International Law requires constant, faultless utilization to avoid automatic abolition of a customary rule; many rarely used institutions of customary International Law would otherwise have to be considered invalidated for lack of sufficiently frequent application" Fonteyne "Humanitarian Intervention" *supra* note 4 at 234.

CHAPTER III

[1]The functional analysis include such factors as the non-emergence of the Military Staff Committee and the employment of UN troops under the supervision of the Security Council; the lack of prompt and effective action of the Security Council on emergency situations when the lives of nationals of a State are threatened and the continuing State practice of using force to protect nationals and the lack of formal condemnation *on principle* of such a right by UN organs notwithstanding the prevelence of the restrictive view of the Charter provisions concerning use of force among members of the United Nations.

[2]Analysis based on 'human rights' norms include comparing in terms of values, outcomes and effects of preserving human rights norms with other norms such as non-interference in internal affairs, friendly relations among States and minimum world public order.

[3]*See* text and notes accompanying footnotes 3a - 14 *infra*.

[3a]Falk, "The Beirut Raid and the International Law of Retaliation" (1969) 63 American Journal of International Law 415, 430 note 39.

[4]*See* statement of Lillich discussing the double level approach vis-a-vis reprisals and protection of nationals in Lillich (ed.) *Humanitarian Intervention and the United Nations* (1973) 61, 62. (Herafter cited as *Humanitarian Intervention and UN*.)

[5]Falk *supra* note 3 at 430. *See also* Bowett "Reprisals involving Recourse to Armed Force" (1972) 66 American Journal of International Law 1, 10-11 and 26.

[6]*See* discussions in *Humanitarian Intervention and UN op cit* by Franck (*id.* 107-108).

[7]Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: It's current validity under the UN Charter" (1974) 4 California Western International Law Journal 203, 247. (Hereafter cited as Fonteyne, "Humanitarian Intervention")

[8]*Ibid.* (Emphasis in original)

[9]*Ibid.* (Emphasis in original)

[10]*Compare* the euthanasia example provided by Brownlie, "Thoughts on Kind Hearted Gunmen" in *Humanitarian Intervention and UN supra* note 4 at 146:

> The father who smothers his severely abnormal child after several years of devoted attention may not be sent to prison

> but he is not immune from prosecution and punishment. In international relations a difficulty arises in that "a discretion not to prosecute" is exercisable by States collectively, and in the context of practice of States, mitigation and acceptance in principle are not always easy to distinguish. However, the euthanasia parallel is useful since it indicates that moderation is allowed for in social systems even when the principle remains firm. Moderation in application does not necessarily display a legislative intent to cancel the principle so applied.

See also Falk *op cit.* 428-431; Bowett *op cit.* 11.

Compare Review of the Israeli action in the Entebbe incident by Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box" (1980) 10 Georgia Journal of International Law 62-63.

[11]Comments by Lillich in *Humanitarian Intervention and UN supra* 62. Lillich's statement in effect means that there has never been a condemnation *on principle* of the concept of protection of nationals as opposed to the *principle* of reprisals.

[12]Generally, it can be stated that the main guidline taken by the 'double level' legality approach would be the reaction of the international community and United Nations. The approval or rejection of the United Nations is based on a variety of extra-legal factors (veto, political blocs, etc.) that uniform rules of conduct could not be rationally formulated based on UN reaction alone without considering other factors. *See* note 14 *infra.*

[13]Fonteyne "Humanitarian Intervention" *supra* note 7 at 249.

[14]For example, even though the majority of the Members of the Security Council are of the opinion that certain actions taken by a State is impermissible this expression could still be prevented from being formally adopted by a single veto. Moreover, the position taken by Members of the Security Council and the General Assembly of the United Nations could be motivated by political factors and self-interest - and cannot be considered as fully reflecting principles of law and justice. *Compare* the inconsistent stand taken by the majority of Members of the United Nations regarding human rights violations in colonial and paracolonial regimes v non-colonial regimes. (For a criticism of inconsistent United Nations attitude towards self-determination and violation of human rights in a *non colonial* setting *see* Salzberg "UN Prevention of Human Rights Violations: The Bangladesh Case" (1973) 27 International Organization 121.)

[15]Lillich, "Forcible Self-help to Protect Human Rights" (1967) Iowa Law Review 325, 334 (Hereafter Lillich "Self-help"); Lillich, "Intervention to protect Human Rights" (1969) 15 McGill Law Journal 155-210 (Hereafter, Lillich "Intervention").

[16]Nanda, "United States Action in the Dominican Crisis: Impact on World Order" (Part I) (1966) 43 Denver Law Journal 453-460, 473-479.

[17]Moore, "The Control of Foreign Intervention in Internal Conflict" (1969) Virginia Journal of International Law 263-364.

[18]*See* Bowett, *Self-Defence in International Law* (1958) 94-96. *See also* Behuniak, "The Seizure and Recovery of the SS Mayaguez: A Legal Analysis of United States Claims" (1979) Military Law Review 59, 79.

[19]Bowett, *Self-Defence, id.*95.

[20]Behuniak, *op cit.* 79.

[21]For an account of some of the problems between Vietnam and China in relation to this issue *see generally* , Desai "Vietnam's quest for Security"in Chawla and Desai (Eds.) *Changing Patterns of Security and stability in Asia*(1980) 236. *See also* M. Tsemanyi, *Vietnamese Boat People and International Law* (1981) 5-6.

[22]This is written keeping in consideration the preferable but as yet idealistic goal of nations and governments taking active and uniform actions for the implementation of human rights. The realities of State practice are such that even though a State may profess concern for human rights, it is unlikely to intervene in another State unless it has some self-interest to act. (*Compare* the impracticality of making 'absolute disinterestedness' a criteria in judging the permissibility of humanitarian intervention in Fonteyne. "Humanitarian Intervention" *supra* note 7 at 261). What is in effect submitted is that instead of relying solely on the link of nationality which could revive, the artificial equation of nationals' injury as a State injury, reliance should also be placed on the fact of implementation and enforcement of human rights of persons with whom the protecting State has a link and therefore an interest to act.

[23]*See generally, Self-Defence Supra* note 18 at 92-94.

[24]Incidental to this issue is treating the right of protection of nationals as self-defense. Such treatment indicates an almost exclusive reliance on the less-restricted view of the UN Charter shorn of other considerations. A policy-oriented approach of the subject requires that norms not directly dealing with use of force also be taken into consideration.

[25]*Compare* statements made by Farer and Nanda in *Humanitarian Intervention* and the UN *supra* note 4 at 7, 8.

[26]Fonteyne, "Humanitarian Intervention" *supra* note 7 at 259.

[27]*Ibid.*

[28]Bowett, *supra* note 18 at 102. *But compare* Waldock "The Regulation of the use of Force by Individual States in International Law" (1952, II) Hague Academy *Recueil des Cours* 454,457 where the enumeration of conditions governing the right of protection include *only* an imminent threat of injury to nationals.

[29]*Compare* statement of Farrer in *Humanitarian Intervention* and UN *op cit.* 155.

[30]*See* the reasons given by the British regarding its intervention in Suez in 1956 on grounds of threat to British property and the nationalizing of the Suez Canal (text accompanying Chapter II note 92 *supra*). The subjectiveness of the test of 'irreparability of damage to property is indicated by different interests of the nationalizing State and the State using force to protect its property.

[31]Bowett, *op cit.* 98.

[31a]Thus a wrongful incarceration of a few nationals for several days would not justify the use of force. However, a prolonged incarceration without any cause under threat of injury of a sufficiently large group of nationals would suggest a violation substantive enough to apply unilateral use of force which also accord with other criteria presented.

[32]The extent to which a State's nationals are subjected to threats, torture, and deprivation of liberty of a gross nature.

[33]Fonteyne "Humanitarian Intervention" *supra* note 7 at 259.

[34]*Ibid.* However, the statement needs to be elaborated. A State should not be allowed to use force merely because of the sheer quantity of its nationals' *property* affected, in case of nationalization of its nationals' property in another State. This use of force should be impermissible because deprivation of property *alone* could *not* be considered a breach of fundamental rights regardless of the fact that large groups of people are affected.

[35]Bowett, *op cit.* 93. A further elaboration of the principle of proportionality is made in the section dealing with 'Degree and Mode of Coercion Used'.

[36]Lillich"Self-help" *supra* note 15 at 349.

[37]The trend that is developed here avoids an exclusive reliance on a particular theory. Exclusive reliance on the theory of self-defense in the protection of nationals by force would, to

an extent smack of the traditional notion of equating the injury of nationals as injury to the State. (In this context it is preferrable to rely on the relevant portions of the doctrine of self-help of customary international law which should still be operable in emergency situations subject to the qualifications and criteria developed.)

[38]Behuniak *op cit.* 72.

38aCited in Lillich "Self-Help" *supra* note 15 at 335.

[39]It is realised that, at times, even allocating proportionality between goals and force used could not always be an equitable criteria. In certain cases a great amount of force disproportionate to the violation may have to be used. Again, an overall contextual analysis is required to determine the 'proportionality' of force used in each instance.

[40]Foneyne "Humanitarian Intervention" *op cit* 260.

[41]*See generally* Lillich (ed.) *Economic Coercion and the New International Economic Order* (1976) regarding the use of economic force in the present day.

[42]For example, a crippling trade embargo which causes starvation in the State to which the embargo is directed, because the target State incarcerated or mistreated a few nationals of the State which uses economic coercion would not be justified.

[43]*See* criticism of United States action in the Dominican Republic intervention in *supra* note at 16 at 458.

[44]Fonteyne "Humanitarian Intervention" *op cit.* 263.

[45]*id.* 264

[46]Behuniak *supra* note 18 at 101

[47]*id.* 102.

[48]*id.* 103.

[49]*See* Chapter IV text accompanying note 98 *infra.*

[50]Fonteyne "Humanitarian Intervention" *op cit* 264.

CHAPTER IV

[1]Disputes over facts would include, for example, the claims and counter claims of whether the *Mayaguez* was seized in international waters. In this case a determination is made in light of the twelve mile territorial sea claim by Cambodia since 1969 and the fact that *Mayaguez* was seized six and a half miles from an island where Cambodia exercised authority - that the ship was *not* seized in the High Seas. (*See* e.g. Paust, "The Seizure and

Recovery of the Mayaguez" (1976) 85 Yale Law Journal 774, 782-784.

Similarly, an even more compelling case could be made that Ugandan President Amin collaborated with or at least did not make any attempt to stop the illegal action of the hijackers in the Entebbe airport incident. The passengers' account of the incident, Uganda's action and attitude during the crisis would strongly indicate that the facts concerning the Ugandan authorities acquiescence in the illegal conduct did take place. *See* text accompanying notes 40-44 *infra*.

[2]For a detailed statement regarding the circumstances of the *Mayaguez* seizure *see* Behuniak, "The Seizure and Recovery of the SS Mayaguez" Part I (1978) 82 Military Law Review 41, 46-51.

[3]Paust, *supra* note 1 at 784.

[4]Behuniak, *supra* note 2 at 50.

[5]72 Department of State Bulletin 719 (1975)

[6]Paust *supra* note 1 at 778-779. *See also* discussion of Paust as to the issue whether the diplomatic note was an 'ultimatum' in Paust *id.* 779 footnote 24. *But compare* Behuniak *supra* note 1 at 779-780.

[7]Behuniak *supra* note 2 at 63. *But compare* Paust *supra* note 1 at 779-780.

[8]Paust *supra* note 1 at 780.

[9]*Ibid.*

[10]*Id.* 781. *See also* Behuniak *op cit.* 74.

[11]*Ibid.* *See also* Behuniak *op cit.* 76.

[12]Behuniak *id.* 80.

[13]*Id.* 81

[14]*Ibid.*

[15]For a statement that the Cambodian authorities acted reasonably in initially seizing the ship see Paust *supra* note 1 at 792-795. He writes (at 794) "considering the alternative measures available for coastal State protection, Cambodia did not have any option [in seizing the Mayaguez] more reasonable and proportionate to the threat." *Contra* Behuniak *supra* note 2 at 104.

[16]Paust *id.* 800. Paust also cited facts (776-778) which indicated

that in no time were the crew of the *Mayaguez* in real danger to their lives. *See also* Behuniak 104. As the issue of whether the lives of the crew were really in danger is a subjective fact - open to various views, great reliance will not be placed on this fact.

[17]Paust *id.* 78.

[18]*Ibid.*

[19]The facts as to the timing of these events were mainly taken from Paust's article which in turn was based on newspaper and periodical accounts and R. Rowan, *The Four Days of Mayaguez* Citing *New York Times* report of 18 May 1975 Paust stated that the United States turn to the United Nations only 14 hours after the initial use of force.

[20]Paust *supra* note 1 at 798.

[21]Behuniak *supra* note 2 at 104.

[22]Even Behuniak who, on the whole, justified the U. S. action in the Mayaguez incident is of the opinion that the mainland bombing which took place after the crew of the Mayaguez was already boarding the *U. S. S. Wilson* was "a pressure tactic [and] has a punitive aspect. This causes it to look more like a forcible reprisal than a measure of self-defense directly and immediately related to the rescue of nationals" (Behuniak *supra* note 2 at 109)

[23]Paust, *supra* note 1 at 801.

[24] *Id.* 802

[25]*Ibid.*

[26]*See* Paust *id.* 785-795 for a discussion of legal issues and facts mainly pertaining to the relevant conventions of the Law of Sea and State practice. Paust concluded that the initial Cambodian seizure of the Mayguez was not totally unwarranted. The fact that there could be no unequivocal determination as to the legality of the initial act which prompted the use of force in the incident would indicate that such actions may not be based on firm grounds. This is in contrast to the Entebbe incident and the Iran mission where the use of force was in response to an initial action which was *clearly* illegal in International Law. (The hijacking of aircraft and the prolonged detention of diplomats as hostages.)

[27]It is generally known that "the Administration did not fear excertion [of the Mayaguez crew] but lengthy detention and

negotiations [which subsequently proved not to be the case]."

[28] *See* observations of Paust *id.* 792.

[29] *New York Times* 28 June 1976, Page 1, Column 4. [Quoted in Krift, "Self-defense and Self-help: The Israeli Raid on Entebbe" (1977) 4 Brooklyn Journal of International Law 43)

[30] *Ibid.*

[31] *Id.*

[32] *Ibid.* *See also* text accompanying notes 40-44.

[33] Krift *supra* note 29 at 44.

[34] Comment, "Use of Force in the Protection of Nationals Abroad" (1977) Case Western reserve Journal of International Law.

[35] Knisbacher "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action" (1977) 12 Journal of International Law and Economics 64.

[36] *Id.* 68

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

[40] Krift *supra* note 29 at 44.

[41] *Id.* 45

[42] Knisbacher *supra* note 35 at 72.

[43] *Ibid.*

[44] *Ibid.*

[45] *See generally* text accompanying notes 15-16 *supra.*

[46] Various international conventions such as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft makes hijacking a crime. Both Uganda and Israel are parties to the treaty. Under Article 9 of the Convention parties are required to "take all appropriate measures to restore control of the aircraft to its lawful commander" to "facilitate the continuation of the journey of 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 to take other measures to insure his presence". Article 7 states the duty to extradite or prosecute the hijackers by the territorial State.

[47] 31 UNSCOR (1941st meeting) Para. 31, UN Doc. S/P.V 1941 (1976). Quoted in Knisbacher *supra* note 35 at 72.

47a Knisbacher *id.* 73.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.* *See also* Stevenson, *Ninety Minutes at Entebbe* (New York 1976)

[51] Knisbacher *op cit.* 71.

[52] Krift *supra* note 29 at 55. This view is further reinforced by the previous inability of the United Nations to take appropriate action in emergency circumstances like in the Stanleyville operation and the subsequent powerlessness of the United Nations to solve the Iranian hostage crisis.

[53] *See* Krift *id.* 53-54.

[54] *Compare* account of the decision-making process in Israeli governmental departments in Boyle "International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention" (1980) 75 North Western University Law Review 769, 791-796. Boyle stated that Israel made detailed arrangements in order not to harm the hostages as well as to minimize conflict with Ugandan soldiers who were guarding the hostages.

[55] Knisbacher *supra* note 35 at 79.

[56] *Ibid.*

[57] *Compare* Comment *supra* note 34: "The terrorists who hijacked Air France jetliner recognized no law and were apparently ready to kill innocent people if their demands were not met. The humanitarian consideration in this particular case justify the temporary breach of Uganda's 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 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.."

[58] Statement of facts in application of the U. S. to the International Court of Justice concerning the United States Diplomatic

and Consular Staff in Teheran, reported in (1980) 75 American Journal of International Law, 258.

[59]For accounts of the events during the initial stages of the seizure of the U. S. Embassy *see* judgment of the International Court of Justice in *Case concerning United States Diplomatic and Consular staff in Teheran* cited in (1980) 18 International Legal Materials 558-559.

[60]*See id.* 569 where the International Court of Justice in ascribing responsibility to the Iranian government for the seizure of the U. S. Embassy and the taking of U. S. diplomats as hostages observed that "the seal of official approval was finally set on this situation by a decree issued on 7 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was a 'centre of espionage and conspiracy' and that 'those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect'. He went on expressly to declare that the premise of the Embassy and the hostages would remain as they were until the United States handed over the former Shah and returned his property to Iran."

[61]Application of U. S. to the International Court of Justice note 58 at 259.

[62]UN Security Council Resolution S-457/1979 (4 December 1979)

[63]Order of 15 December 1979 by the International Court of Justice in *United States of America* v *Iran* (Request for indication of provisional measures) cited in (1980) 19 International Legal Materials 146.

[64]UN Security Council Resolution 461/1979. (31 December 1979)

[65]*See for example* UN Security Council Documents S/13648, S/13667, S/13648, S/13667, S/13668 for records of various Heads of States expressing grave concern regarding the violation of diplomatic immunities and requesting the Iranian government to release the hostages.

[66]*See* "Khomeini Supports Militants ... UN Enquiry leaves Iran" *New York Times* (11 March 1980)

[67]*See* "Grim Tales of Horror" *Newsweek*, 5 February 1981 where the released hostages recounted how they had been physically mistreated and put under various psychological pressures.

[68]The version of events is excepted from the *New York Times*, 26, April 1980. President Carter's report to Congress about the rescue mission indicated that "in carrying out this operation, the United States was acting wholly within its rights, in accordance with

Article 51 of the United Nations Charter" (Quoted from Crown and Fried "A Legal Disaster" *Nation* 24 May 1980) 614. The report by the United States to the Security Council on 25 April 1980 also stated that "the mission had been carried out in accordance with the inherent right of self-defense." (Quoted from dissenting opinion of Judge Morozov in *U. S. Diplomatic and Consular Staff in Teheran* note 59 at 580).

Perhaps the exclusion of humanitarian grounds in the U. S. report to the UN Security Council could be based on the desire to employ the concept of self-defense expressly stated in the UN Charter - even if the scope of self-defense is controversial-rather than on the doctrine of humanitarian intervention which is not specifically mentioned in the UN Charter.

69, 69a *Compare* President Carter's speech to the nation, justifying the rescue mission on humanitarian grounds and the U. S. representative's report to the UN Security Council on the grounds of self-defense cited in *id*.

70 Admittedly this functional analysis could possibly result in a different conclusion *if* the U.S. rescue mission went ahead and *if* the actual rescue of the hostages had resulted in the deaths of a large number of hostages and their captors. The modified judgment regarding the legal issues - if such consequences had occurred - regarding the U. S. mission, would be based on determining the proportionality between the objective (the rescue of the hostages from illegal detention) to the results of that action (destruction of lives grossly disproportionate to the original values sought to be preserved).

Compare a similar query regarding the Entebbe incident "What would be the Security Council's vote on this admittedly high-risk operation if the mission had failed and most or all of the hostages were killed together with substantial loss of life on the part of the Israeli and Ugandan soldiers?" (Boyle, *supra* note 54 at 822-823). A response to such queries would be that inasmuch as a functionalist analysis take into consideration the appropriate criteria of necessity, proportionality and contextually relevant factors it should not be assailed on the ground that had the actual results of the case been different, different postulations regarding the legality of the mission could possibly be made.

71 This approach is not exactly the strict doctrine of humanitarian intervention where, according to Oppenheim, "intervention in the interest of humanity is legally permissible when a State renders itself guilty of cruelties against persecution of *its [own] nationals* in such a way as to deny their fundamental human rights and to shock the conscience of mankind" (Oppenheim, *International Law* Volume I, 309, Emphasis added). On this ground Crown and Fried (*supra* note 68) claimed that the justification of the U. S. rescue

mission by Reisman in "Humanitarian Intervention", *Nation* 24 May 1980, 612-613 is untenable (as 'humanitarian intervention' strictly defined include only intervention on behalf of nationals of *other* States). It seems that Crown and Fried's argument is more of a definitional nature than a substantive one. It should be queried why the protection of *a State's own nationals* be considered less 'humanitarian' than the *strict* definition of 'humanitarian intervention' which allows a State to intervene on behalf of nationals of *another* State. Indeed it could be considered that the customary international law doctrine of humanitarian intervention is an offshoot of the principle of protection of nationals by force (*See* Chapter I text accompanying *notes* 57-59 *supra*). If, as Crown and Fried inferred (*Id.* 614) the strict doctrine of humanitarian intervention is still permissible in current times the protection of nationals by force *a fortiori* should be permissible in view of the fact that (a) States have more self-interest to act on behalf of its *own* nationals than on behalf of *another* State's nationals (b) The pivotal nature of human rights issues in Contemporary International Law have become pervasive breaking down barriers which have formerly been under the exclusive jurisdiction of States. (*See* Chapter II, texts accompanying footnotes 77-81 *supra* .)

[72]"Among the hostages held were at least 28 persons having the Status, duly recognized by the government of Iran 'of members of diplomatic staff' within the meaning of the Vienna Convention, at least 20 persons having the status, similarly recognized, of 'members of the administrative and technical staff'." (Quoted from *Order of International Court of Justice, supra* note 63 at 145.)

[73]Judgment of the International Court of Justice *supra* note 59 at 574.

[74]The judgment of the International Court of Justice stated: "The Court finds that no circumstances exist in the present case which are capable of negativing the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter." (*Id.* 572).

[75]Even if the hostages detained were not diplomats, the treatment of the hostages falls short of 'international minimum standard' treatment of aliens.

[76]Excepted from Judgment of the International Court of Justice note 59 at 559.

[77]*See* texts accompanying *supra* notes 62-64.

[78]*See* text accompanying *supra* note 68.

[79]*See* text accompanying *supra* notes 8, 9.

[80]Crown & Fried *supra* note 68 at 614 suggested that "the urgency of the case was lacking" inferring that the United States should, as

it had done in the *Pueblo* case, whose crew was held captive for almost a year, continue to negotiate for the release of its diplomats held hostage by Iran. But the *Pueblo* case was different from the present case. To all extent and purpose the Pueblo was a spy ship operating in or near North Korean waters where the North Korean authorities might be justified in detaining them. The crew of the Pueblo in addition to possibly being guilty of espionage were not internationally protected persons as diplomats. Moreover, the United States could have reasonably presumed that Iran would not voluntarily free the hostages thus necessitating the rescue mission.

[81] Judgment of the International Court of Justice *supra* note 59 at 573.

[82] *Ibid.* It should be noted that the Court did not comment on the legality of the rescue action stating that "neither the question of the legality of the operation under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It [the Court] must also point out that this question can have no evaluation on the conduct of the Iranian government over six months earlier, on 4 November 1979, which is the subject matter of the United States application."

[83] Reisman "Humanitarian Intervention" *supra* note 71 at 613.

[84] *Compare* the *Mayaguez* mission where casualties of U. S. troops approximate the number of hostages rescued and where many more Cambodian lives were lost as a result of the incident.

[85] A marginal exception to the non-employment of force against Iranian nationals would be the temporary detention of some persons by the United States troops while passing in a bus near Desert One where the planes and helicopters of the rescue mission was located. *See New York Times*, 26 April 1980, 7.

[86] U. S. Defense Secretary Brown announced in a press conference that had the rescue mission proceeded, the plan was to temporarily inactivate the Iranian guards holding the hostages by using a form of gas and not to use any deadly weapons to the extent applicable. (*New York Times* 26 April 1980). Even imagining the worst case scenario, disproportional and excessive use of force could not have occurred when no mass landing of troops, bombings, etc. - like in the *Mayaguez* incident - could have taken place. In any case, the Iranian rescue operation as it had occurred did not in any way - by intention or by actual effects - involve the excessive use of force.

[87] A draft resolution of the Security Council calling for economic sanctions against Iran was vetoed by the Soviet Union on 13 January 1980. (Quoted from *Los Angeles Times* 14 January 1980).

[88] *See* text accompanying *supra* note 68.

[89] Judgment of the International Court of Justice *supra* note 59 at 573.

[90] *Corfu Channel Case*, quoted from (1949) 43 American Journal of International Law 558, 581-583.

[91] Crown & Fried, "A Legal Disaster" *supra* note 68 at 614.

[92] Only Judge Morozov in his dissenting opinion (*supra* note 61 at 579) stated that "the United States committed an invasion of the Islamic Republic of Iran." He further objected that the Court should not have limited itself to merely expressing its concern of the United States action undermining international relations. And even though Judge Tarazi classified the U. S. rescue operation "as the gravest encroachment upon the Court's exercise of its power to declare the law in respect of the dispute laid before it," nevertheless stated: "It is not my intention to characterize that operation nor to make any legal value judgment in its respect, but only to allude to it in connection with the case before the Court." (Separate opinion of Judge Tarazi *id.* 594)

[93] *Corfu Channel* case *supra* note 90 at 561.

[94] *See* letter of the Minister of Foreign Affairs of Iran to the International Court of Justice cited in International Legal Materials *supra* note 59 at 556.

[95] Reisman "Humanitarian Intervention" *supra* note 71 at 613.

[96] *Id.* 612.

[97] For an exposition of a functional in contrast to a positivist approach of International Law *See* Boyle *supra* note 54 at 777.

[98] *See* Boyle *Id.* 835-836.

CONCLUSION

[1] *See generally*, Falk, "Historical Tendencies, Modernizing Nations and the International Legal Order" (1962) 8 Howard Law Journal 75 *par tim.*

[2] *Compare* the list of numerous incidents involving the use of force by the *United States alone* from the period of 1899 - 1927 in M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928) 82-140. It is believed that a majority of incidents involving the forcible protection of nationals abroad *by various*

countries, after the emergence of the United Nations Charter has been mentioned in this thesis: Suez, 1956; Stanleyville, 1964; Dominican Republic, 1965; Cambodia (*Mayaguez*), 1975; Entebbe, 1976; Iran, 1980. Even if this list is incomplete, it is obvious that the frequency of incidents involving forcible protection of nationals abroad during the last 35 years would not approach the frequency of such incidents that had occurred during the 35 years that precede the UN Charter.

[3] *See generally,* text and notes accompanying Chapter II, footnotes 89-91 *supra.*

[4] *See generally,* text and notes accompanying footnotes 69-71, 76-87 *supra,* Chapter II.

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