

## The Right of Intervention for the Protection of Nationals : Reassessing the Doctrinal Debate

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Article abstract

The legality of a forceful intervention by a state to protect its nationals has been the subject of a continuing controversy over the past 15 years. Many see it as an unlawful use of force prohibited by the *Charter of the United Nations*, others see it as a lawful exercise of a self-standing right recognized under contemporary international law, some finally claim it falls under the scope of self-defence. The author proposes not to restate that debate, but more to reassess it, examining and challenging some of the arguments raised on both sides of the question. Within that debate, it will be concluded that the international legal order does indeed recognize the validity of the use of force for such a purpose : if the avenue of self-defence is rejected, for conceptual as well as practical reasons, the right of intervention to protect nationals is indeed, for the author, part of the contemporary international legal order. Then, the author wishes to broaden the debate and proposes another option, which has not been explored by scholars and publicists but which is found more satisfactory than any other approach : intervention to protect nationals can be justified under international law because of the existence, in a particular case, of a "state of necessity" as defined by the International Law Commission.

# The Right of Intervention for the Protection of Nationals : Reassessing the Doctrinal Debate

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Jean RABY \*

*La légalité de l'intervention armée d'un État pour protéger ses ressortissants a fait l'objet, depuis plus d'une quinzaine d'années, d'un débat virulent. Plusieurs soutiennent qu'un tel usage de la force est prohibé par la Charte des Nations-Unies, d'autres au contraire considèrent qu'il s'agit là de l'exercice d'un droit reconnu par le droit international, certains croient enfin qu'un tel usage de la force est justifié à titre de légitime défense.*

*L'auteur se propose, non pas de relater le débat, mais bien de le replacer dans son véritable contexte, en réexaminant et remettant en question plusieurs des arguments soulevés d'un côté ou de l'autre. Ceci l'amène à conclure que l'ordre juridique international reconnaît en fait l'usage de la force dans un tel but : si la légitime défense est rejetée à titre de solution, tant pour des raisons d'ordre théorique que pratique, l'usage de la force afin de protéger ses ressortissants demeure, pour l'auteur, l'exercice d'un droit reconnu par le droit international contemporain.*

*L'auteur entend par ailleurs élargir le débat afin d'explorer une option qui n'a pas été considérée jusqu'à maintenant par la doctrine mais qui fournirait une solution plus satisfaisante que toute autre approche : l'intervention d'un État pour protéger ses ressortissants peut se justifier en droit international par l'existence, dans un cas particulier, d'un « état de nécessité » tel que défini par la Commission du droit international.*

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*The legality of a forceful intervention by a state to protect its nationals has been the subject of a continuing controversy over the past 15 years. Many see it as an unlawful use of force prohibited by the Charter of the United Nations, others see it as a lawful exercise of a self-standing right recognized*

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*under contemporary international law, some finally claim it falls under the scope of self-defence. The author proposes not to restate that debate, but more to reassess it, examining and challenging some of the arguments raised on both sides of the question. Within that debate, it will be concluded that the international legal order does indeed recognize the validity of the use of force for such a purpose : if the avenue of self-defence is rejected, for conceptual as well as practical reasons, the right of intervention to protect nationals is indeed, for the author, part of the contemporary international legal order. Then, the author wishes to broaden the debate and proposes another option, which has not been explored by scholars and publicists but which is found more satisfactory than any other approach : intervention to protect nationals can be justified under international law because of the existence, in a particular case, of a "state of necessity" as defined by the International Law Commission.*

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For the past twenty years, use of force in international law has been one of the areas most frequently discussed by international lawyers. This abundance of literature is due not only to pure scholastic interest but more to the realities of the international society, which has witnessed numerous instances of actual resort to force. In some of these cases, a state used armed force into another state's territory, unilaterally and without seeking consent from the territorial authorities, for the alleged purpose of rescuing its nationals facing an imminent and grave danger. The legal validity of such a rescue operation will be the subject of this paper.

This analysis will be divided in three parts. First, we will study the state of international customary law before 1945, demonstrating that intervention to protect nationals was considered legal.

Second, we will study the status of intervention to protect nationals, seen as a self-standing right, in the post-*Charter* era. In that respect, the analysis will begin by a review of the arguments raised on both sides of the question; thereafter, I will attempt to demonstrate that the main arguments raised to deny the existence of the right are incorrect and that, in the end, the present nature of the international community and the behaviour of its members all point to the necessity of recognizing such a limited right to use force in international relations.

The third and last chapter will deal with intervention to protect nationals as a justification for an otherwise illegal use of force. The concept of self-defence will be rejected for theoretical as well as practical reasons: if force used in a rescue operation is to be seen as an exception to the general prohibition of armed coercion in the international arena, the best concept which could embody and justify it is "necessity". The latter concept has been

studied recently by the International Law Commission, and its conclusions will be referred to at considerable length.

## 1. Intervention to Protect Nationals before 1945

### 1.1. Intervention to Protect Nationals in Traditional Customary Law

There seems to be little doubt that traditional customary international law recognized the legal validity of an armed intervention by a state into another state's territory in order to protect its nationals: today, there is almost unanimity among writers that it was valid under international law before 1945<sup>1</sup>.

Seen either as a self-standing right, as part of the loosely defined concept of self-help, or as a legitimate exercise of a broad right of self-defence, the right of intervention to protect nationals was subject to certain clearly defined parameters: there had to be an imminent threat of injury to nationals, a failure or inability on the part of the territorial sovereign to take appropriate measures, and rescue operations strictly confined to the object of protecting them from injury<sup>2</sup>. The best evidence of the existence of the right lies in its frequent invocation by states as a justification for the use of their armed forces abroad<sup>3</sup>.

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1. See, for example, H. LAUTERPACHT (ed.), OPPEHEIM'S, *International law*, 8th ed., vol. I, London, 1955, p. 309; I. BROWNLIE, *International Law and the Use of Force by States*, Oxford, 1963, p. 289; P. JESSUP, *A Modern Law of Nations*, New York, MacMillan, 1948, p. 169; D. BOWETT, *Self-Defence in International Law*, 1958, p. 87; R. LILICH, "Forcible Self-help by States to Protect Human Rights", (1967-68) 53 *Iowa L. Rev.* 325, p. 329-330; C. JOYNER, "The United States Action in Grenada: Reflections on the Lawfulness of Invasion", (1984) 78 *A.J.I.L.* 131, p. 134; M. KNISBACHER, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action", (1977) 12 *J.I.L.Econ.* 57, p. 59; N. RONZITTI, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, Martinus Nijhoff Publishers, 1985, p. 21; H. WALDOCK, "The Regulation of the Use of force by Individual States in International Law", (1952-II) 81 *R.C.A.D.I.* 455, p. 466-7; J.E.S. FAWCETT, "Intervention in International Law", (1961-II) 103 *R.C.A.D.I.* 344, p. 404; C. HYDE, *International Law*, 2nd ed., vol. I, Boston, Little Brown and Company, 1945, p. 647.
  2. WALDOCK, "Use of Force in International Law", *supra*, note 1, p. 467; JESSUP, *A Modern Law of Nations*, *supra*, note 1, p. 169; O. SCHACTER, "The Right of States to Use Armed Force", (1984) 82 *Mich. L.R.* 1620, p. 1629-30; JOYNER, "U.S. Action In Grenada", *supra*, note 1, p. 135.
  3. WALDOCK, "Use of Force in International Law", *supra*, note 1, p. 466-7; see also BROWNLIE, *Use of Force by States*, *supra*, note 1, p. 290-1; N. RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 21.

Some writers, however, have denied that traditional international law regulated the right of intervention to protect nationals. Their main argument is based on the absence, until 1945, of any meaningful restrictions on the ultimate right to go to war. The League of Nations itself did not outlaw war, but only war undertaken without following the procedures set up in the *Covenant*<sup>4</sup>. War being legal, there was thus no need for legal concepts such as self-defence and right of intervention to protect nationals: the rationale of these concepts is, essentially, to provide states with justifications for an otherwise illegal use of force. These concepts were merely political or moral justifications to which one should not attach any significance in the development of international customary law<sup>5</sup>.

It certainly seems strange that international law regulated the use of force short of war before achieving the regulation of the ultimate right to go to war. However, this absence of a prohibition of the right to go to war should not be interpreted in that way. As Dr. Jessup says:

this apparent paradox should not cause surprise; it is illustrative of the manner in which international law has developed over the centuries in a world of sovereign states. The regulation of the resort to war itself constitutes the ultimate problem toward the solution of which the world has been groping. Along the way it has been possible to secure a measure of agreement on lesser problems.<sup>6</sup>

One must remember that if the ultimate right to go to war was left unrestricted, international law had nevertheless attached legal consequences to the existence of a state of war between two or more sovereign states. The extensive development of the law of the rights and duties of neutral states in one vivid example. On the other hand, self-defence, right of intervention for the protection of nationals, self-help were concepts developed to respond to certain situations arising in time of *peace*, in the absence of a legal state of war. A use of force in time of peace, which did not respect the conditions elaborated by international law, would have been illegal.

These concepts therefore did have a legal significance, and to try to establish a direct and necessary correlation between the prohibition of war and the existence of justifications for a limited use of force would be an

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4. D. BOWETT, *The Law of International Institutions*, 4th ed., London, 1982, p. 17.

5. J. ZOUREK, "La notion de légitime défense en droit international", (1975) 56 *A.I.D.I.* 1, p. 24; J. DE ARECHAGA, "General Course in Public International Law", (1978-1) 159 *R.C.A.D.I.* 1, p. 96-7; J. DELIVANIS, *La légitime défense en droit international public moderne*, Paris, 1971, p. 62; J.P. COT and A. PELLET, *La Charte des Nations Unies*, Paris, Éditions Economica, 1985, p. 771; R.W. TUCKER (ed.), H. KELSEN, *Principles of International Law*, 2nd. ed., New York, 1966, p. 73.

6. JESSUP, *A Modern Law of Nations*, *supra*, note 1, p. 157.

unfortunate misreading of the evolution of international law. The tests and conditions which international law established to assess the propriety of conduct involving a limited use of force should not be disregarded.

## 1.2. The Impact of the Kellogg-Briand Pact

If, for many publicists, the conclusion of the *Charter of the United Nations* in 1945 represents a turning point in the development of the law of the use of force, others maintain that, by 1945, customary international law had already undergone profound modifications, especially with regards to the right of intervention for the protection of nationals. As the prime argument for their position, these scholars invoke the conclusion, in 1928, in Paris, of the *Kellogg-Briand Pact* banning war as an instrument of national policy. For Prof. Brownlie, “after the Kellogg-Briand Pact and the instruments and practice related to it, a resort to force, whether a state of war existed or not, ..., was of very doubtful legality”<sup>7</sup>.

Such an interpretation of the *Pact*, however, is neither supported by a reading of the document itself, nor by the interpretation given to it by the signatories. If one considers the right of intervention for the protection of nationals as a limited measure short of war, it was therefore outside the scope of the *Pact*: what is limited is actual resort to war and not instances of limited use of force. The distinction between an act of war and limited use of force had already been pointed out in the practice of the League of Nations<sup>8</sup>. Indeed, the United States, the opinion of which should be given great weight because it was the leading force behind the signature of the *Pact*, stated at the sixth international conference of American states held in Havana in 1928, that...

it is a principle of international law that [...] a government is fully justified in taking action — I would call it interposition of a temporary character — for the purpose of protecting the lives and property of its nationals.<sup>9</sup>

Moreover, after 1928, there were renewed instances when the right of intervention to protect nationals was invoked to justify an armed intervention<sup>10</sup>.

Furthermore, if one considers the right of intervention to protect nationals as part of the right of self-defence, then there is ample evidence that

7. BROWNIE, *Use of Force by States*, *supra*, note 1, p. 298.

8. ZOUREK, “La notion de légitime défense”, *supra*, note 5, p. 27-8.

9. As quoted in R. FALK, “The United States and The Doctrine of Nonintervention in the Internal Affairs of Independent States”, (1959) 5 *How. L.J.* 163, p. 177.

10. See RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 22.

this right was not modified in any way by the *Kellogg-Briand Pact*<sup>11</sup>. One need only look at the statements of states such as France, Germany, Great Britain, Japan, South Africa, Poland, Czechoslovakia, all parties to the *Pact*, and which demonstrate, without any doubt, that they considered that the scope of the right had not been restricted<sup>12</sup>.

Having thus concluded that an intervention to protect nationals was valid under traditional customary international law, we now must consider the impact of the *Charter of the United Nations*. Since an intervention to protect nationals is seen by some as a self-standing right and by others as a justifiable use of force, both conceptual approaches will be studied, with the objective of determining their validity in contemporary international law.

## 2. The Right of Intervention to Protect Nationals and Art. 2(4) of the Charter

### 2.1. The Doctrinal Controversy

The enactment of the *Charter of the United Nations* in 1945 proved to be the most important event in contemporary international law. Established, as it was, at the end of the most devastating conflict in history, the United Nations Organization was bound to have as its fundamental objective the maintenance of international peace and security. To achieve that end, states assumed many obligations, one of which has been at the root of a considerable doctrinal controversy: article 2(4) of the *Charter*, which reads as follows:

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 manner inconsistent with the purposes of the United Nations.

The effect of this provision has been widely discussed. For some, art. 2(4) has established a total and complete prohibition of force in international relations. For others, art. 2(4) is a qualified prohibition, which has left untouched the right of intervention to protect nationals. We will review briefly the arguments raised by both sides. Thereafter, we will examine more closely certain legal arguments which demonstrate that intervention to

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11. D. BOWETT, "The Use of Force For the Protection of Nationals Abroad", in A. CASSESE (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986, 39, p. 39; Lord MCNAIR, *Law of Treaties*, Oxford, 1961, p. 209-10; DELIVANIS, *La légitime défense*, *supra*, note 5, p. 61; J. STONE, *Aggression and World Order*, London, 1958, p. 32; B.V.A. ROLING, "On the Prohibition of the Use of Force" in A.R. BLACKSHIELD (ed.), *Legal Change: Essays in Honour of Julius Stone*, Sydney, 1983, 274, p. 277; WRIGHT, "The Meaning of the Pact of Paris", *infra*, note 12, p. 54-5.

12. As quoted in Q. WRIGHT, "The Meaning of the Pact of Paris", (1933) 27 *A.J.I.L.* 39, p. 42-3.



protect nationals, as a self-standing right, is or ought to be recognized in contemporary international law.

### 2.1.1. Art. 2(4) as an Absolute Prohibition of the Use of Force

Art. 2(4) of the *Charter* is seen by many authors as having laid down a general prohibition of the use of force in international relations. The only exceptions tolerated by international law are the right of self-defence as defined by art. 51 of the Charter, and the use of force undertaken pursuant to the collective security system set up in Chapter VII of the *Charter*.

The legal arguments raised to support this conclusion can, we believe, be summarized as follows. First, there is an emphasis on the need to interpret art. 2(4) in its context<sup>13</sup>. Art. 2(4) is the fundamental provision of an organization established “to save succeeding generations from the scourge of war”<sup>14</sup> and is part of an elaborate set of provisions, the objective of which is the maintenance of international peace and security<sup>15</sup>. Being a general principle, it cannot suffer a restrictive and literal interpretation which would negate its true meaning and content, and which would run counter to the evolution of international law since the beginning of the XX<sup>th</sup> century<sup>16</sup>.

The conclusion that art. 2(4) was intended to prohibit the use of force in any manner is further reinforced by a careful examination of the *travaux préparatoires* leading to the drafting of art. 2(4). In his treatise *International Law and the Use of Force by States*, Prof. Brownlie rejects any attempt to find in the words “against the territorial integrity or political independence of any state” a qualified prohibition which would leave open a resort to force not infringing these rights.

The conclusion warranted by the *travaux préparatoires* 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.<sup>17</sup>

13. J.P. COT and A. PELLET, *La Charte des Nations-Unies*, Paris, 1985, p. 115; K. SKUBISZEWSKI, “Use of Force by States” in M. SORENSEN, (ed.), *Manual of Public International Law*, London, 1968, 739, p. 746.

14. *The Charter of the United Nations*, preamble.

15. COT and PELLET, *La Charte*, *supra*, note 5, p. 114-5; A. VON VERDROSS, “Idées directrices de l’Organisation des Nations Unies”, (1953-11) 83 *R.C.A.D.I.* 1, p. 10.

16. N. RONZITTI, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, 1985, p. 18; J. DE ARECHAGA, “General Course in Public International Law”, (1978-1) 159 *R.C.A.D.I.* 1, p. 87-8; SKUBISZEWSKI, “Use of Force by States”, *supra*, note 13, p. 745-6.

17. BROWNLIE, *International Law and the Use of Force by States*, Oxford, 1963, p. 267.

Support is also found in the celebrated judgment of the International Court of Justice in the *Corfu Channel Case*. The government of the United Kingdom argued that its use of force in the territorial waters of Albania was consistent with its *Charter* obligations since it “threatened neither the territorial integrity nor the political independence of Albania”<sup>18</sup>. Publicists often refer to the following dictum of the Court as clear evidence that this qualified interpretation of art. 2(4) was rejected<sup>19</sup>.

To ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.<sup>20</sup>

Examination of numerous resolutions<sup>21</sup> of the United Nations General Assembly reinforces the position adopted by those who have been called “the restrictionists”<sup>22</sup>. The most famous and most important is certainly *Res. 2625-XXV(1970)*, the latter “devant être considérée comme une interprétation de la Charte”<sup>23</sup>, which states in its first point :

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state [...]<sup>24</sup>

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18. As quoted in DE ARECHAGA, “General Course in Public International Law”, *supra*, note 5, p. 90.
  19. See, *inter alia*, A. PELLET, *Droit international public*, Paris, L.G.D.J., 1981, p. 123; C. ROUSSEAU, “Principes de droit international public”, (1958-I) 93 *R.C.A.D.I.* 371, p. 539; DE ARECHAGA, “General Course in Public International Law”, *supra*, note 5, p. 90; B.V.A. ROLING, “The Ban on the Use of Force and the U.N. Charter”, in A. CASSESE (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986, 3, p. 4; H. WALDOCK, “The Regulation of the Use of Force by Individual States in International Law”, (1952-II) 81 *R.C.A.D.I.* 455, p. 493.
  20. *Corfu Channel Case*, [1949] *I.C.J. Rep.* 3, p. 35.
  21. See, *inter alia*, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131, *U.N.G.A.O.R.*, 20th session, Supp. no. 14, A/6014, p. 11; *Strict Observance of the Prohibition of the Threat or the Use of force in International Relations, and of the Right of Peoples to Self-determination*, G.A. Res. 2160, *U.N.G.A.O.R.*, 21st session, Supp. no. 16, A/6316, p. 4; *Declaration on the Strengthening of International Security*, G.A. Res. 2734, *U.N.G.A.O.R.*, 25th session, Supp. no. 28, A/8028, p. 22.
  22. J. D’ANGELO, “Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law”, (1981) 21 *Virg. J. Int. Law* 485, p. 487.
  23. J. ZOUREK, *L’interdiction de l’emploi de la force en droit international*, Genève, Institut Henry Dunant, 1974, p. 78; see also R. ROSENSTOCK, “The Declaration of Principles of International Law Concerning Friendly Relations”, (1970) 64 *A.J.L.L.* 719; COT and PELLET, *La Charte*, *supra*, note 5, p. 137.
  24. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, *U.N.G.A.O.R.*, 25th session, Supp. no. 28, A/8028, p. 121.

*Res. ES-G/2* (1980), adopted by the General Assembly in January 1980 with regards to the Soviet invasion of Afghanistan, seems even more comprehensive on this point:

Respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which on any pretext whatsoever is contrary to its aims and purposes.<sup>25</sup>

Furthermore, a qualified interpretation of art. 2(4) would introduce a notion of intention which is neither present in the wording and intent of the provision nor desirable in the present state of international relations<sup>26</sup>. *Res. 3314-XXIX* (1974), which defined the concept of "aggression", is seen as supporting that view<sup>27</sup>:

Art. 1. Aggression is the use of force by a State against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations.

...

Art. 5. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.<sup>28</sup>

The addition of the term sovereignty, alongside the terms "territorial integrity" and "political independence", is interpreted as putting an end to the controversy<sup>29</sup>: it "represents an additional safeguard which could compel even a mere entry into foreign territory to be considered as an act of aggression"<sup>30</sup>.

The final words of art. 2(4), "or in any manner inconsistent with the purposes of the United Nations" are also denied any qualifying effect. Prof. Brownlie again points out that, according to the *travaux préparatoires*, the phrase was not intended to have any restrictive meaning<sup>31</sup>: "indeed it was probably meant to reinforce the prohibition of paragraph 4"<sup>32</sup>. In that

25. As quoted in G. CAJA, "Jus Cogens Beyond the Vienna Convention", (1981-III) 172 *R.C.A.D.I.* 271, p. 294.

26. DE ARECHAGA, "General Course in Public International Law", *supra*, note 5, p. 89 and p. 91; P. REUTER, *Droit international public*, 5th ed., Paris, 1976, p. 440.

27. C. EUSTATHIADÈS, "La définition de l'agression adoptée aux Nations-Unies et la légitime défense", (1975) 28 *R. hell. Dr. Int.* 5, p. 52.

28. *Definition of Aggression*, G.A. Res. 3314, *U.N.G.A.O.R.*, 29th session, Supp. no. 31, A/9631, p. 142.

29. COT and PELLET, *La Charte*, *supra*, note 5, p. 124.

30. RONZIITI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 8.

31. BROWNLIE, *Use of Force by States*, *supra*, note 1, p. 268, note 6.

32. *Id.*, p. 268.

respect, Prof. Wehberg recalls the declaration of the American delegate at the San Francisco Conference :

On peut enfin se référer aux déclarations du délégué américain [...] selon lesquelles l'intention des auteurs de la Charte fut "de déclarer, dans les termes les plus généraux, une interdiction absolue et sans restriction"; pour le délégué américain, la phrase "ou de toute autre manière" devait garantir... "qu'il n'y aurait pas de lacunes".<sup>33</sup>

One should also take into account the fact that the prime purpose of the United Nations is the maintenance of international peace and security: any unilateral use of force is contrary to the purposes and objectives of the United Nations<sup>34</sup>, is a breach of the peace and entails the possibility of a generalized conflict<sup>35</sup>.

Finally, if human rights are of a prime interest for the United Nations, it must be remembered that their promotion and protection are nevertheless best ensured through respect for the fundamental objective of the *Charter*<sup>36</sup> :

The primary place ascribed to international peace and security is natural, since the fulfillment of the other purposes will be dependent upon the attainment of that basic condition.<sup>37</sup>

### 2.1.2. Art. 2(4) as a Qualified Prohibition of the Use of Force

If a great number of international lawyers consider that the right of intervention for the protection of nationals has been prohibited by the enactment of art. 2(4), numerous other publicists have adopted a different position. For these publicists, art. 2(4) has laid down a qualified prohibition of the use of force: the right of intervention to protect one's nationals would not contravene that provision if it is kept within the conditions for its exercise.

[...] it may be noted that Article 2, paragraph 4, is not an absolute prohibition of the use of force. If force can be used in a manner which does not threaten the territorial integrity or political independence of a state, it escapes the restriction of the first clause.<sup>38</sup>

33. H. WEHBERG, "L'interdiction du recours à la force", (1951-I) 78 *R.C.A.D.I.* 1, p. 70.

34. P. JESSUP, *A Modern Law of Nations*, New York, 1948, p. 169.

35. ROLING, "The Ban on the Use of Force", *supra*, note 11, p. 7; WEHBERG, *supra*, note 5, "L'interdiction du recours à la force", *supra*, note 33, p. 71.

36. DE ARECHAGA, "General Course in Public International Law", *supra*, note 5, p. 91.

37. *Advisory Opinion concerning Certain Expenses of the United Nations*, [1962] *I.C.J.Rep.* 151, p. 168.

38. JESSUP, *A Modern Law of Nations*, *supra*, note 1, p. 162.

The use of force is not condemned *per se*<sup>39</sup>, “mais en raison des fins poursuivies”<sup>40</sup>, i.e. against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations. Such interpretation is much more consistent with the text of art. 2(4)<sup>41</sup>; as Prof. Schacter said, “if these words are not redundant, they must qualify the all-inclusive prohibition against force”<sup>42</sup>. Indeed, it can even be maintained that such an approach to the interpretation of art. 2(4) is also “consonant with the historical development of attempts to limit the right of States to resort to war”<sup>43</sup> and the intention of the drafters.

We know that the principle [art. 2(4)] was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory or other benefits from another state.<sup>44</sup>

The interests protected by article 2(4) are “territorial integrity” and “political independence”. Political independence refers to the freedom enjoyed by states in their decision-making; territorial integrity refers to the control a state exercises over a geographical area<sup>45</sup>. The use of force against these interests suggests the deployment of an important contingent of armed forces, to which it is difficult to resist<sup>46</sup>.

What is therefore protected by art. 2(4) is not territorial inviolability<sup>47</sup>: “integrity may be preserved even though there is a limited armed foray into a state’s territory by another state”<sup>48</sup>. The intervention by a state to protect its nationals is, in essence, an intervention limited in time, in purpose and in scope. Thus, it cannot, assuming it stays within the limits and conditions set

39. D. W. BOWETT, “The Use of Force in the Protection of Nationals”, (1957) 43 *Grotius Society* 111, p. 113; J. STONE, *Aggression and World Order*, London, 1958, p. 43; D. P. O’CONNELL, *International Law*, 2nd ed., vol. I, London, 1970, p. 307.

40. M. VIRALLY, “Panorama de droit international” (1983-V) 183 *R.C.A.D.I.* 13, p. 102.

41. STONE, *Aggression and World Order*, *supra*, note 39, p. 95; L. C. GREEN, “Humanitarian Intervention — 1976 Version”, (1976) 24 *Chitty’s L.J.* 217, p. 222; M. KNISBACHER, “The Entebbe Operation: A Legal Analysis of Israel’s Rescue Action”, (1977) 12 *J.I.L. Econ.* 57, p. 60; A. JEFFERY, “The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions”, (1981) 30 *I.C.L.Q.* 717, p. 725.

42. O. SCHACTER, “The Right of States to Use Force”, (1984) 82 *Mich. L. Rev.* 1620, p. 1625.

43. JEFFERY, “The American Hostages in Tehran”, *supra*, note 41, p. 726; GREEN, “Humanitarian Intervention”, *supra*, note 41, p. 219.

44. SCHACTER, “Right of States to Use Force”, *supra*, note 42, p. 1624.

45. M. MCDUGAL and F. FELICIANO, *Law and Minimum World Public Order*, New Haven, 1961, p. 177.

46. VIRALLY, “Panorama de droit international”, *supra*, note 40, p. 102.

47. A. D’AMATO, *International Law: Process and Prospect*, New York, 1987, p. 37; L. SALTER, “Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression”, (1977) 11 *Int. Lawyer* 331, p. 334.

48. D’AMATO, *International Law*, *supra*, note 47, p. 37.

out by international law, violate the territorial integrity or political independence of any state<sup>49</sup>. Prof. Leonard Salter, who applied this statement to the rescue operation by Israeli forces at Entebbe airport, in 1976, concluded :

Since the entire escapade lasted less than one hour, and its objective was solely to liberate imprisoned civilians whose lives were in danger, merely to pose the question provides the answer. There was nothing in that country that the Israelis wanted except the return of the captives delivered there by the hijackers. Nor did it appear to the Ugandans at any time that the rescue party had any other interests in mind.<sup>50</sup>

In that respect, it is striking to note than none of the proponents of the restrictionist view have denied that proposition. What restrictionists argue is that force is prohibited *per se*: they do not say that intervention to protect nationals, implying as it does the use of armed force on another state's territory, violates the territorial integrity and/or political independence of that state.

Moreover, intervention to protect nationals is not only compatible with the purposes of the United Nations, but also constitutes an upholding of them<sup>51</sup>. The preamble of the *Charter* as well as art. 1, 55, 56 underline that respect for human rights is a fundamental objective that every member should promote<sup>52</sup>. Indeed, some authors argue that the protection of human rights is

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49. O'CONNELL, *International Law, supra*, note 39, p. 304; R. LILLICH, "Forcible Self-Help by States to Protect Human Rights", (1967-8) 53 *Iowa L. Rev.* 325, p. 336; D'ANGELO, "Resort to Force by States to Protect Nationals", *supra*, note 22, p. 499; J.N. MOORE, "Grenada and the International Double Standard", (1984) 78 *A.J.I.L.* 145, p. 154; E. PÉREZ-VERA, "La protection d'humanité en droit international", [1969] *R.B.D.I.* 401, p. 420-1; D'AMATO, *International law, supra*, note 47, p. 37; D. BOWETT, "The Use of Force for The Protection of Nationals Abroad", in A. CASSESE, (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986, 39, p. 40; JEFFERY, "The American Hostages in Tehran", *supra*, note 41, p. 725; S. DAVIDSON, *Grenada: A study in Politics and the Limits of International Law*, Aldershot, 1987, p. 113; VON VERDROSS, "Idées directrices de l'ONU", *supra*, note 15, p. 14; JESSUP, *A Modern Law of Nations, supra*, note 1, p. 169. It should be noted that Dr. Jessup and Dr. Von Verdross nevertheless conclude that the use of force to protect nationals is inconsistent with the purposes of the United Nations.

50. SALTER, "Commando Coup at Entebbe", *supra*, note 47, p. 336-7.

51. MOORE, "Grenada and the International Double Standard", *supra*, note 49, p. 154; PEREZ-VERA, "La protection d'humanité en droit international", *supra*, note 49, p. 415; JEFFERY, "The American Hostages in Tehran", *supra*, note 41, p. 726.

52. D'ANGELO, "Resort to Force by States to Protect Nationals", *supra*, note 22, p. 493-4; C. DE VISSCHER, *Théories et réalités en droit international public*, 3rd ed., Paris, 1960, p. 158-68; O'CONNELL, *International Law*, vol.1, *supra*, note 39, p. 318.

now an active duty for every member of the international community<sup>53</sup>. It is therefore possible, as Prof. Julius Stone does, to argue that...

a threat or use of force employed consistently with these purposes, and not directed against the "territorial integrity or political independence of any state", may be commendable rather than necessarily forbidden by the Charter.<sup>54</sup>

An intervention to protect nationals is justified by the sheer urgency of the situation and its purpose is solely to protect innocent lives<sup>55</sup>. As Prof. Bowett writes :

in a treaty which is marked by its affirmation of faith in human rights, it would be a curious conclusion if State action to protect the lives of its nationals, even within the boundaries of another State, were inconsistent with the purposes of the treaty.<sup>56</sup>

Finally one should consider also the context in which such interventions take place. Experience shows that they usually become necessary when terrorists are threatening the lives of innocent people, their only flaw being citizens of a particular state. International terrorism represents today the greatest threat to international peace and security : as it will be shown later on, any action which is in keeping with the struggle against international terrorism can only, in the long term, be beneficial to the maintenance of world peace.

## 2.2. Interpretation of Art. 2(4)

### 2.2.1. Rules of Interpretation and Art. 2(4)

We have seen that one of the main controversies surrounding the interpretation of art. 2(4) lies in the significance to be given to the words "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The chief argument for supporting the restrictionist view lies in historical considerations : recourse to the *travaux préparatoires* enable these scholars to interpret the wording of art. 2(4) in a more liberal way than the text would normally allow for.

53. T. SCHWEISFURTH, "Operations to Rescue Nationals in Third States involving the Use of Force in Relation to the Protection of Human Rights", (1980) 23 *German Y.B.I.L.* 159, p. 170-2, p. 179; M. McDUGAL and S. REISMAN, "Response by Professors McDougal and Reisman", (1968-9) 3 *Int. Lawyer* 438, p. 444; F. TESON, "Le peuple c'est moi ! The World Court and Human Rights", (1987) 81 *A.J.I.L.* 173, p. 175.

54. STONE, *Aggression and World Order*, *supra*, note 39, p. 43.

55. SCHACTER, "Right of States to Use Force", *supra*, note 42, p. 1632; BOWETT, "The Use of Force For the Protection of Nationals Abroad", in Cassese, *supra*, note 11, p. 40.

56. BOWETT, "The Use of Force in the Protection of Nationals", in *Grotius Society*, p. 114.

À la vérité, l'interprétation non seulement *plausible*, mais *normale* du texte de la Charte selon laquelle l'emploi de la force reste licite s'il n'est pas dirigé "contre l'intégrité territoriale ou l'indépendance politique" d'un État n'a pas été retenue. La raison en est que cette interprétation ne concorde pas du tout avec les intentions des auteurs de la Charte.<sup>57</sup> (My underlines)

The use of the *travaux préparatoires* is recognized as a legitimate technique of interpretation in public international law: but the relevance of the historical considerations surrounding the drafting of the provision is to be questioned in the case of art. 2(4). This will become evident after examining the following propositions: the secondary character given by international law to the use of *travaux préparatoires* when compared with other methods of interpretation, the inadequacy of recourse to preparatory work when interpreting a document such as the *Charter*, and the application of other methods of interpretation to art. 2(4) itself.

### 2.2.1.1. Secondary Role of the *travaux préparatoires*

In the *Case concerning Conditions of Admission of a State to Membership in the United Nations* (1948), the International Court of Justice discussed the use of the *travaux préparatoires* as a tool of interpretation.

The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.<sup>58</sup>

The secondary character given by the Court to the use of *travaux préparatoires* as a tool of interpretation was recognized by the *Vienna Convention on the Law of Treaties* (1969)<sup>59</sup>. Both the *Convention* and the jurisprudence of the International Court of Justice therefore relegate the *travaux préparatoires* to a secondary role<sup>60</sup>. If the fundamental objective of any method of interpretation remains the ascertainment of the intention of the parties, its focus lies in the determination of the parties' intentions as *expressed* in the document<sup>61</sup>: "the text is the expression of the intention of the

57. E. GIRAUD, "L'interdiction du recours à la force: la théorie et la pratique des Nations-Unies", (1963) *R.G.D.I.P.* 501, p. 512.

58. [1947-8] *I.C.J. Rep.* 57, p. 63; see also *Advisory Opinion concerning the Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] *I.C.J.* 4, p. 8.

59. (1980) 1155 *United Nations Treaty Series* 332.

60. I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester, p. 141.

61. I. BROWNLIE, *Principles of Public International Law*, 3rd ed., Oxford, 1979, p. 624; P. REUTER, *Introduction au droit des traités*, Genève, Librairie Armand Colin, 1986, p. 85.



parties ... and it is to that expression of intent that one must first look”<sup>62</sup>. The use of *travaux préparatoires* is ancillary<sup>63</sup>: “il faut faire autant que possible abstraction des travaux préparatoires”<sup>64</sup>. Therefore, contrary to the approach adopted by restrictionists, recourse to the *travaux préparatoires* cannot take precedence over an analysis of the text of art. 2(4) itself.

### 2.2.1.2. The *travaux préparatoires* and the *Charter*

The interpretation of an international document like the *Charter* raises additional particular considerations. When one deals with a bilateral treaty, a *traité-contrat*, the interpretation method is more subjective, and greater recourse will be made to elements outside the text of the treaty.

However, the *Charter* is not a *traité-contrat*: it is more in the nature of a *traité-loi*<sup>65</sup>, as it was negotiated by a great number of states and it has established elaborate and far-reaching rules designed to have universal relevance and to attract general acceptance by the community of states<sup>66</sup>. Because of the very nature of a general multilateral convention as a *traité-loi*, the ascertainment of the original intention of the drafters is a much more arduous task and is not as relevant as in a bilateral treaty. Indeed, it may very well be impossible to determine an intention common to all the parties: a compromise is reached, not on the basis of wishes expressed by the parties, not on a “meeting of the minds”, but through the actual text of a provision. The text thus becomes the only objective element which has created a consensus and by which states have agreed to be bound<sup>67</sup>.

Moreover, a *traité-loi* like the *Charter* appeals to universal adherence. Can we oppose the *travaux préparatoires* to states which did not participate in the drafting of the provisions? States which, in fact, acceded to the *Charter* “not on the basis of what the original negotiators intended but rather on the basis of what the text actually says and means”<sup>68</sup>.

I would quote to the same effect Judge Sir Percy Spender, who delivered a separate opinion in the *Advisory Opinion concerning Certain Expenses of*

62. SINCLAIR, *Vienna Convention*, *supra*, note 60, p. 131; see also Lord McNAIR, *The Law of Treaties*, Oxford, 1961, p. 365.

63. NGUYEN Q.D., P. DALLIER, A. PELLET, *Droit international public*, 2nd ed., Paris, 1980, p. 249; REUTER, *Droit des traités*, *supra*, note 61, p. 85-6; BROWNLIE, *Public International Law*, *supra*, note 61, p. 627-8.

64. P. GUGGENHEIM, *Traité de droit international public*, vol. I, Genève, 1953, p. 133.

65. C. ROUSSEAU, *Droit international public*, vol. I, Paris, Sirey, 1971, p. 68-9.

66. M. SHAW, *International Law*, 2nd ed., Cambridge, 1986, p. 78-81.

67. ROUSSEAU, *Droit international public*, *supra*, note 65, p. 294.

68. SINCLAIR, *Vienna Convention*, *supra*, note 60, p. 130-1.

the *United Nations* (1962), and who discussed specifically this question of recourse to *travaux préparatoires* in the interpretation of the *Charter*:

It is hardly the intention of those States which originally framed the Charter which is important except as that intention reveals itself in the text. What is important is what the Charter itself provides; what — to use the words of Article 4 [of the Charter] — is “contained in [...] the Charter”.<sup>69</sup>

Of course, one could point out that states should consult the preparatory work before acceding to a multilateral treaty. But other shortcomings flow from the character of the *travaux préparatoires* itself. Preparatory documents are not clearly defined, are not authentic documents and are often confused and deficient<sup>70</sup>. Being not integrated, extending over a long period of time, they sometimes ignore in a later phase of the negotiations motives, intentions, declarations which were, at the outset of the negotiations, of extreme importance for the drafting of a particular provision. If these shortcomings are of the essence of preparatory documents, they are more acute in the case of multilateral treaties, because of the number of states involved in the negotiating process<sup>71</sup>.

In the interpretation of art. 2(4), it therefore seems clear that the *travaux préparatoires* should not be given the importance attributed to them by the restrictionists. Reliance on the text is to be preferred, and even the subsequent attitude of the parties is to be given more weight. Let us apply these methods to art. 2(4).

### 2.2.1.3. Application of the Methods of Interpretation to Art. 2(4)

A provision in an international document is to be interpreted by “first consider[ing] the terms of that article”<sup>72</sup>; “if the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter”<sup>73</sup>. Applying this principle to art. 2(4), one cannot but give to the words “territorial integrity or political independence” a significance: otherwise, they would be redundant<sup>74</sup>.

69. *Expenses Case*, p. 184-5.

70. REUTER, *Droit des traités*, *supra*, note 61, p. 86; NGUYEN and al., *Droit international public*, *supra*, note 63, p. 249; SINCLAIR, *Vienna Convention*, *supra*, note 60, p. 142.

71. BROWNLIE, *Public International law*, *supra*, note 61, p. 627-8.

72. *Advisory Opinion concerning Conditions of Admission of a State to Membership in the United Nations*, [1948] *I.C.J. Rep.*, 4, p. 62.

73. *Advisory Opinion concerning the Competence of the General Assembly for the Admission of a State to the United Nations*, [1950] *I.C.J. Rep.* 4, p. 8; see also *Advisory Opinion concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, [1950] *I.C.J. Rep.* 221, p. 227; *Asylum Case*, [1950] *I.C.J. Rep.* 266, p. 279.

74. SCHACTER, “Right of States to Use Force”, *supra*, note 42, p. 1625.

As article 31 of the *Vienna Convention* also provides, the interpretation must take into account the subsequent practice of the parties. We will see later on that the practice of the members of the United Nations is, to a great extent, consistent with this interpretation.

Does this lead to an absurd, obscure or ambiguous result, which would therefore open the recourse to the *travaux préparatoires*? We think not. Of course, one could argue that whenever there is a dispute, this is because there is an ambiguity<sup>75</sup>. But, if that were so, there would be not point in restricting recourse to the *travaux préparatoires* to the existence of an ambiguity or an unreasonable result: recourse to interpretation rules only becomes relevant when there is a disagreement. The ambiguity or absurdity must therefore still be prevailing after step one, i.e. interpreting the text of the provision in good faith, by attributing to the words their ordinary and natural sense. The qualified interpretation of art. 2(4) leads neither to an absurd result nor does it lead to an ambiguous situation: force is to be prohibited when directed against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.

Of course, there could be an ambiguity arising from the particular application of this rule to the right of intervention for the protection of nationals. But, as we have seen, even the restrictionists generally have not denied that the use of force for the protection of nationals, if kept within the limits defined by international law, does not contravene these attributes. The ultimate conclusion must therefore be that restrictionists cannot rely on the *travaux préparatoires* to justify their interpretation of art. 2(4).

Moreover, some scholars rely on the so-called principle of effectiveness, to justify their interpretation of art. 2(4)<sup>76</sup>. This principle requires one to give every word in a provision its full meaning, *but not to extend it*. Applying it to art. 2(4), the words "territorial integrity", "political independence", "purposes of the United Nations" are to be given their full meaning, but nothing more. This is exactly the result of the qualified view of art. 2(4).

### 2.2.2. Contemporary Interpretation of the Charter

In analysing the relevancy of preparatory works in the interpretation of art. 2(4), the rules of treaty interpretation which international law has developed were briefly reviewed. In this sub-chapter, however, I wish to emphasize a more global vision of the *Charter*.

75. THIERRY and al., *Droit international public*, 4<sup>e</sup> éd., Paris, Montchrestien, 1984, p. 165; BROWNLIE, *Use of Force by States*, *supra*, note 1, p. 267.

76. See, *inter alia*, SKUBISZEWSKI, "Use of Force by States", *supra*, note 13, p. 746; BROWNLIE, *Use of Force by States*, *supra*, note 1, p. 268.

The drafters of the *Charter* had no intention of putting together a constitutional document which would be frozen in time. Far from that, they recognized that the *Charter* should not be established in a vacuum, cut off from the anarchical international order it attempts to regulate. They had more a vision of a pact between members of the international society, an understanding which would both influence and respond to their needs and the needs of the international community as a whole.

Being a constitutional document, the *Charter* is a "living" treaty, which evolves with time and in accordance with the developments of the international order. Far from being static, the *Charter* can be adapted to new circumstances, so that it can be made to respond to situations that were unforeseen at the time of its enactment. These are considerations to keep in mind when one analyses the content of the norms contained in the *Charter*.

In the interpretation of a multilateral treaty such as the Charter [...] there are particular considerations to which regard should [...] be had [...] Its provisions were of necessity expressed in broad and general terms. It attempts to provide against the unknown, the unforeseen and, indeed, the unforeseeable. Its text reveals that it was intended [...] to endure, at least it was hoped it would endure, for all time. It was intended to apply to varying conditions in a changing and evolving world community and to a multiplicity of unpredictable situations and events. Its provisions were intended to adjust themselves to the ever changing pattern of international existence.<sup>77</sup>

The International Court of Justice has recognized the importance, in the interpretation of international legal instruments, of giving specific attention to the conditions prevailing in the contemporary international legal order. In the *Advisory Opinion concerning the Legal Consequences of the Continued Presence of South Africa in Namibia* (1971), the Court was called upon to interpret the *Covenant of the League of Nations*, drafted in 1919-20.

[...] the Court is bound to take into account the fact that the concepts embodied [...] were not static [...] [A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation<sup>78</sup>.

When interpreting the *Charter*, one must thus take into account the global legal framework regulating international society at the time of the interpretation. Prof. Schwarzenberger, discussing the interpretation to be given to article 51 of the *Charter*, emphasized this point:

[...] any interpretation of Article 51 must take into consideration the actual state of this [international] quasi-order in the concrete circumstances which may fall

77. *Expenses Case*, p. 185 (Individual opinion of Judge Sir Percy Spender).

78. *Advisory Opinion Concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, [1971] *I.C.J.Rep.* 16, p. 31; also the *Aegean Sea Continental Shelf Case*, [1978] *I.C.J.Rep.* 4, p. 33.

for consideration and, accordingly, must vary in strictness and liberality of construction.<sup>79</sup>

It is submitted that this consideration of the existing international legal order cannot but lead one to the conclusion that the right of intervention for the protection of nationals is consistent with art. 2(4). The arguments behind both positions have been reviewed and it has been shown that the arguments supporting the vision of art. 2(4) as an absolute prohibition of the use of force are, as a matter of pure legal analysis, incorrect. I now wish to show that the qualified interpretation of art. 2(4) is the *preferable* one, because of the present state of the international legal order.

We do not deny that, *as a matter of exegesis*, the extreme view of the prohibition of force in Article 2(4) is possible. We *do* question whether, even in terms of exegesis, it is the *only possible*, or even the more likely view; and whether in the light of the absurdities and injustice to which it would lead, it must not be regarded as an incorrect one.<sup>80</sup>

### 2.2.2.1. The Absence of an Effective Collective Security System

To interpret art. 2(4) as an absolute prohibition of the use of force is very simple and very easy. It may be true that, in the logic of the United Nations, unilateral use of force should be unnecessary and illegal, because the *Charter* has set up a collective security system which deprives it from any usefulness. However, such a conclusion is no longer valid, since the system has so blatantly failed to fulfill its promises.

If states agreed, in 1945, to renounce the right to use force under art. 2(4), they did so on the understanding that a centralized collective security system would be set up and would effectively punish any violation of the international order. There was an indivisible link between what Prof. Combacau has called the “rule”, art. 2(4), and the “guarantee”, the collective security system: they went together, “and the success of the latter was a necessary condition for respect of the former”<sup>81</sup>. To interpret art. 2(4) without considering and giving due weight to that factual situation, is, as Prof. Stone said, a position which “makes [n]either moral, political or even legal sense”<sup>82</sup>.

La démarche n'est pas seulement curieuse; elle est aussi erronée, tant il est impossible de construire l'interdiction du recours à la force, et les exceptions

79. G. SCHWARZENBERGER, “Fundamental Principles of International Law”, (1955-I) 87 *R. C. A. D. I.* 191.

80. STONE, *Aggression and World Order*, *supra*, note 11, p. 97.

81. J. COMBACAU, “The Exception of Self-Defence in U.N. Practice”, in A. CASSESE, (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986, p. 30.

82. STONE, *Aggression and World Order*, *supra*, note 11, p. 100.

qu'elle autorise, en fonction d'un mécanisme de sécurité dont l'expérience a prouvé qu'il était sans efficacité.<sup>83</sup>

This absence of an effective collective security system in the contemporary international order becomes an even more compelling justification when one considers the prime purpose lying behind the existence of the right of intervention to protect nationals, i.e. the safeguarding of human lives. Protecting human rights is now a prime concern for the international community. But international organization has proved unable to provide a mechanism which would act with the speed and efficiency requisite to save threatened lives and uphold fundamental human rights. We need, now, in 1988, to interpret (or reinterpret) the *Charter* in a way which would ensure at least a measure of unilateral resort to force by a state for the purpose of safeguarding the lives of its nationals<sup>84</sup>. Indeed, as far back as 1948, Prof. Jessup wrote :

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<sup>85</sup>.

It would be ironic, indeed, if human rights are less protected after the enactment of the *Charter* than before it. But this is exactly the result to which an absolute view of article 2(4) leads :

[...] from a practical point of view it would seem that the Charter encumbers rather than advances the human rights and fundamental freedoms involved in the protection of aliens abroad.<sup>86</sup>

Since there is no effective international machinery, and since self-defence is being restricted to the existence of an armed attack, an *aggression armée*, states face the cruel dilemma of having to choose between a respect of inflexible and utopian rules of law which offer no immediate solution, passivity which "would be politically foolish and unrealistic"<sup>87</sup>, and the more compelling duty that every state would feel towards its threatened nationals.

Surely to require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress blackletter [sic] at the expense of far more fundamental values.<sup>88</sup>

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83. J. VERHOEVEN, "Le droit, le juge et la violence", (1987) 91 *R.G.D.I.P.* 1159, p. 1220.

84. O'CONNELL, *International Law*, *supra*, note 39, p. 304.

85. JESSUP, *A Modern Law of Nations*, *supra*, note 11, p. 170 ; see also H. WALDOCK (ed.), J. BRIELY, *The Law of Nations*, Oxford, 1963, p. 428.

86. A. THOMAS and A. THOMAS, *Non-intervention*, Dallas, 1956, p. 312.

87. BOWETT, "Use of Force for the Protection of Nationals Abroad", *supra*, note 11, p. 45.

88. LILLICH, "Forcible Self-help", *supra*, note 1, p. 344.

The right of intervention to protect nationals, if exercised within the limits recognized by international law, becomes the only means by which a state can effectively bring assistance to its citizens facing an imminent danger. It is a rational response, proportionate and legitimate, which is morally right and politically realistic, and, by upholding fundamental rights, can only benefit the entire international community in the long term.

#### **2.2.2.2. The Accomplishment of the Purpose of the United Nations**

One should also consider the context in which the right to protect nationals is usually exercised. As we have pointed out previously, these operations usually take place where international terrorism has struck. International terrorism was a phenomenon unknown in 1945. Since the drafting of the *Charter*, the advent of the nuclear era has brought stability between the main players in the international game. However, the necessary restraint that states possessing nuclear weapons have manifested, because of the consequences of their use, has enabled third states to challenge the stability of the international order through the use of a different form of warfare: terrorism. State-sponsored terrorism has thus flourished, protected as it was from effective retaliatory responses from the target states because of the consequences of any attempt by them to react.

Indeed, those states involved in terrorist activities, which are now the less respectful members of the international legal order, have found comfort in that same legal order they seek to destroy. Through an idealistic interpretation of international law in general and the *Charter* in particular, they can condemn any rational attempt by the victim states to react and discourage such actions, victim states which are then faced with an interpretation of the *Charter* which leaves them no alternative and which "may result in turning the right of political independence into little more than a sham"<sup>89</sup>.

It cannot be stated too emphatically that international terrorism today represents the greatest threat to international peace and security. One needs only to follow the course of contemporary events to realize that it contains the seeds of a generalized conflict. Any action which tends to discourage such behaviour, if it can present some immediate risks for the stability of the international order, can only, in the long term, be beneficial for the maintenance of international peace and security, which is the fundamental purpose of the United Nations.

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89. R. W. TUCKER, "Reprisals and Self-Defense: The Customary Law", (1972) 66 *A.J.I.L.* 586, p. 594.

To conclude, we would simply restate the dilemma which Prof. Brownlie formulated in 1963. For him, forcible intervention was to be outlawed, because...

[...] the possible risks of denying the legality of action in a case of such urgency, an exceptional circumstance, must be weighted against the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in the pursuit of national rather than humanitarian interests.<sup>90</sup>

In 1988, in the light of the contemporary events, the dilemma should be reformulated otherwise. The possible risks to the stability of the international order, in the short term, of allowing such an intervention must be weighted against the benefits which will accrue in the long term to the maintenance of international peace and security if the struggle against international terrorism is successful.

### 2.3. The Position of the International Court of Justice

#### 2.3.1. The Corfu Channel Case

Scholars who maintain that art. 2(4) has prescribed an absolute prohibition of the use of force refer to the judgment of the International Court of Justice in the *Corfu Channel Case* (1949). I will try to demonstrate that the correct interpretation to be given to that judgment is not as clear cut as the restrictionists maintain.

In that judgment, the Court was asked to ascertain the legality of a forcible intrusion by British ships into the territorial waters of Albania. This minesweeping operation was undertaken after British ships had been struck by mines while crossing the Corfu Channel. The British government first argued that its intervention was made necessary in order to secure evidence to determine whether the mines were actually laid by Albania<sup>91</sup>. In addition, the British government maintained that such an operation was justified as a measure of *auto-protection* or self-help. The oft-quoted answer of the Court :

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. ... Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government.

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90. BROWNIE, *Use of Force by States*, *supra*, note 1, p. 301.

91. *Corfu Channel Case*, p. 34.



But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.<sup>92</sup>

This dictum has been interpreted by many scholars as clear evidence that the *Charter* abolished the alleged right of forceful intervention, and that there cannot be any exception to the prohibition of the use of force other than those explicitly provided in the *Charter*. But the application of this judgment to the present situation is not as clear as some pretend.

First, it is somewhat surprising that the Court did not make any reference at all, in its opinion, to the *Charter*<sup>93</sup>. One could have expected at least a reference to art. 2(4), even if Albania was not a member of the United Nations. Judge Ecer, in its dissenting opinion, even criticised the majority judgment for not having mentioned any *Charter* provision<sup>94</sup>.

Moreover, the general language used by the Court is also a source of ambiguity.

It is not clear whether the "alleged right of intervention" refers to intervention generally or to intervention "in the particular form" adopted by the United Kingdom.<sup>95</sup>

Indeed, the Court's qualification of the actions by the United Kingdom as "intervention" should be restricted to the particular facts in that case. The Court mentioned that the Albanian attitude was an extenuating factor in the case, thereby recognising that circumstances should be taken into account when assessing the legality of a use of force. Logically, this can only mean that, in certain situations, circumstances exclude the wrongfulness of an action qualified as "intervention".

The judgment in the *Corfu Channel Case* should also be analysed in the light of its context. The intervention by the United Kingdom had, as its object, the collection of elements of proof (i.e. mines) and was not justified by any sense of urgency. The intervention to protect nationals has, as its prime objective, the rescue of human lives, and speed of action is essential if the operation is to be successful and lives safeguarded:

le passage précité de la Cour de La Haye n'est qu'un *obiter dictum* inclus dans un arrêt dont le contexte seul peut préciser la portée; et il est évident que les

92. *Id.*, p. 35.

93. G. SCHWARZENBERGER, *International Law*, vol. II, London, 1968, p. 55; BROWNLIE, *Use of Force by States*, *supra*, note 1, p. 289; D'ANGELO, "Resort to Force by States to Protect Nationals", *supra*, note 22, p. 502; MCDUGAL and FELICIANO, *Law and Minimum World Order*, *supra*, note 45, p. 276.

94. *Corfu Channel Case*, p. 130.

95. H. LAUTERPACHT (ed.), OPPENHEIM'S, *International Law*, 8th ed., London, 1955, p. 311, note 2; see also BROWNLIE, *Use of Force By States*, *supra*, note 1, p. 289.

questions posées par l'affaire du *détroit de Corfou* se trouvent très loin du droit humanitaire.<sup>96</sup>

Finally, one may point out that the Court was also asked to ascertain the legality of Britain's assertion of its right of innocent passage through the straits. After upholding the legality of Britain's affirmation of its right of innocent passage<sup>97</sup>, the Court analysed the manner, i.e. the use of four warships at action stations, with which this assertion of a legal right took place.

The intention must have been, not only to test Albania's attitude but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case ... the Court is unable to characterise these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.<sup>98</sup>

For Prof. Waldock, the Court thus not only recognized that force may be used in affirmation of legal rights unjustly denied, but also "to test the attitude of the wrongdoer and to coerce it into future good-behaviour ... this seems to go close to allowing forcible self-help"<sup>99</sup>. It seems that the Court distinguished between a use of force for the purpose of countering or defensively preventing an attempt by force to deny a right and a use of force carried out in cases where the wrong has already been committed or a right denied<sup>100</sup>.

It may be possible to argue that this "theory" of a forceful affirmation of a legal right unjustly denied must be limited to the particular facts of the case<sup>101</sup>. Nevertheless, the decision of the Court regarding the use of force by the British ships in the assertion of its rights of innocent passage attenuates the interpretation given to the *Corfu Channel Case* by restrictionists: the Court has accepted that force can be legally used in situations other than those specifically mentioned in the *Charter*. Indeed, the Court's judgment leads one to conclude that art. 2(4) is not an absolute prohibition of the use of force in international law and the legality of a use of force can be ascertained with regard to, *inter alia*, the purpose for which it is used.

96. PEREZ-VERA, "La protection d'humanité", *supra*, note 49, p. 415; see also O'CONNELL, *International Law*, *supra*, note 39, p. 303.

97. *Corfu Channel Case*, p. 30.

98. *Id.*, p. 31.

99. WALDOCK, "Regulation of the Use of Force in International Law", *supra*, note 1, p. 501.

100. *Id.*, p. 502; H. WALDOCK, "General Course on Public International Law", (1962-II) 106 *R.C.A.D.I.* 1, p. 240; G. FITZMAURICE, "The General Principles of International Law", (1957-II) 92 *R.C.A.D.I.* 1, p. 172.

101. M. SORESENSEN, "Principes de droit international public", (1960-III) 101 *R.C.A.D.I.* 1, p. 240-1.

### 2.3.2. The Case Concerning United States Diplomatic and Consular Staff in Tehran

The Court, in the *Case concerning United States Diplomatic and Consular staff in Tehran* (1980), did not rule on the legality of the right of intervention to protect nationals: it specifically pointed out that the question of the validity of the American rescue operation was not in issue and could “have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on November 4, 1979”<sup>102</sup>.

This failure of the Court to condemn the rescue mission is, nevertheless, significant. If art. 2(4) has laid down an absolute prohibition of the use of force, then there would be no need to qualify or attach importance to the purposes of a use of force, as it would always be illegal. Had the Court adopted such reasoning, it would have been easy, without entering into a factual detailed analysis, to categorize the action as an unlawful use of force, save for the right of self-defence as explicitly safeguarded by art. 51 of the *Charter*. Instead, the Court refused to adjudicate on the issue, even if it was perfectly aware of a State practice and a doctrine which assert the lawfulness of such actions. This demonstrates that the Court has not adopted, *per se*, the restrictionist view, that its judgment in the *Corfu Channel Case* did not adjudicate on the point, contrary to what the restrictionists maintain, and that the issue is still unsettled.

Indeed, the use of the word “incursion”<sup>103</sup>, instead of “intervention” as used in the *Corfu Channel Case* or “invasion”, suggests the idea of a use of force of lesser gravity, which reinforces the contention that art. 2(4) is a qualified prohibition of the use of force.

[...] the use of a narrower term supports the claims made by the realists [...] that the use of force to protect nationals, if properly exercised, does not impair the territorial sovereignty and political independence of a nation.<sup>104</sup>

This judgment therefore demonstrates the Court’s unwillingness to condemn such rescue operations outright. In that respect, it represents a setback for the restrictionist view, whose absolutist and categorical interpretation of art. 2(4) would not even permit such leeway. The analysis of the recent judgment of the Court in the *Nicaragua Case* reinforces this conclusion.

102. *Tehran Case*, p. 43-4, para. 94.

103. *Id.*, p. 43, para. 93.

104. D’ANGELO, “Resort to Force by States to Protect Nationals”, *supra*, note 22, p. 517.

### 2.3.3. The Case Concerning Military and Paramilitary Activities in and against Nicaragua

On June 27 1986, the International Court of Justice delivered one of the most important judgments by an international tribunal in the post-Charter era. I will now demonstrate, in the foregoing analysis, that the Court has put to rest most of the major arguments raised by those who see in art. 2(4) an absolute prohibition of the use of force.

The Court was called upon to assess the legality of the involvement of the United States in guerilla activities directed against the Nicaraguan government. Because of a reservation made by the United States regarding its acceptance of the jurisdiction of the International Court of Justice, the Court could not directly refer to the Charter and had to rely specifically on international customary law. It therefore had to pronounce itself on the contents of customary international law.

As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, ..., by no means covers the whole area of the regulation of the use of force in international relations.<sup>105</sup>

The argument raised against the proposition that art. 2(4) is a qualified prohibition of force is that the *Charter*, through art. 2(4), has abolished the pre-existing customary law with regards to the use of force, and that no exception can be found, except in an explicit provision of the *Charter*. The Court, by specifying that the *Charter* does not cover "the whole area of the regulation of the use of force", rejected that view: there are other rules of international law, besides the *Charter*, which come into play when one assesses the legality of a use of force. Thus, rights to use armed coercion can be found in international customary law.

The Court then considered the content of the principle of the non-use of force in international law.

What is unlawful, in accordance with that principle, is recourse to either the threat or the use of force against the territorial integrity or political independence of any state.<sup>106</sup>

This statement of the Court demonstrates that the words used in art. 2(4) are to be given a real meaning. The Court has defined the principle of the prohibition of the use of force by referring explicitly to the concepts of

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105. *Case concerning Military and Paramilitary Activities in and Against Nicaragua*, [1986] *I.C.J. Rep.* 3, p. 94, para. 176.

106. *Id.*, p. 118, para. 227.

territorial integrity and political independence : they can no longer be brushed away on the argument that the *travaux préparatoires* show they were not intended to qualify the prohibition of the use of force. *A contrario*, this statement shows that a use of armed force which does not violate the territorial integrity or political independence of a state is valid in international law. Hence the legitimacy of a use of force for the protection of nationals.

The Court's ruling brings support to the "realist" position in another way. It accepted "as established the fact that certain transborder military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua"<sup>107</sup>. Further on, however, the Court declared itself unable to adjudicate on the legality of these "transborder military incursions":

Very little information is however available to the Court as to the *circumstances* of these incursions or their possible *motivations*, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an "armed attack" by Nicaragua on either or both States.<sup>108</sup> (My underlines)

The Court thus considers that the purposes, the intentions, the "motivations" of the acting state are relevant considerations in assessing the legality of a use of force. This means that the qualified interpretation of art. 2(4), which recognizes as relevant the intentions of the acting state in ascertaining the legality of a use of force, is the appropriate one.

The Court was also called upon to assess the legal consequences of the supply of arms and logistical support to armed forces within another state's territory. If such actions by one state cannot be interpreted as an "armed attack" against another state, the Court nevertheless concluded that these "activities may well constitute a breach of the principle of the non-use of force..."<sup>109</sup>, which could justify "proportionate counter-measures on the part of the State which had been the victim of these acts..."<sup>110</sup>. Could these "counter-measures" include a limited use of force?

Even if the Court ultimately found it unnecessary to decide the issue with regard to the response by the victim state<sup>111</sup>, a logical assumption flowing from its answer concerning collective "counter-measures" suggests they could. At paragraph 249, the Court explicitly stated that collective counter-measures cannot be undertaken<sup>112</sup>. The Court then specified, in addition, that such counter-measures by third states could not involve a use of force.

107. *Id.*, p. 87, para. 164.

108. *Id.*, p. 120, para. 231.

109. *Id.*, p. 127, para. 247; see also p. 104, para. 195.

110. *Id.*, p. 127, para. 248-9.

111. *Id.*, p. 110, para. 210.

112. *Id.*, p. 127.

a use of force of a lesser degree of gravity [than an armed attack] cannot, ..., produce any entitlement to take collective counter-measures involving the use of force. The acts ... could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts. ... They could not justify counter-measures taken by a third State, and particularly could not justify intervention involving the use of force.<sup>113</sup>

If the use of force otherwise than in self-defence is now illegal under international law, why then did the Court explicitly add that counter-measures undertaken by a third state could not include a use of force? Putting it the other way around, after having denied that a third state could take counter-measures, this latter precision by the Court is unnecessary and irrelevant, unless one concludes that individual counter-measures involving a use of force could be legal. Prof. Hargrove comes to the same conclusion:

The Court strongly suggested [...] that the victim state's "proportionate counter-measures" might themselves include the use of force.<sup>114</sup>

Indeed, the concept of "proportionate counter-measures" could very well be developed to include the right of intervention for the protection of nationals<sup>115</sup>. Such is not, however, the objective of this analysis and my conclusions will be limited to those previously developed.

#### 2.4. State Practice

We have reviewed extensively both sides of the question of the relationship between art. 2(4) and the right of intervention to protect nationals. We have analysed the doctrine, the jurisprudence of the International Court of Justice, and the rules of treaty interpretation. Arguments have been raised to support a qualified view of art. 2(4). But, in the final analysis, "the acid test of such arguments is, ..., state practice"<sup>116</sup>. It is thus necessary, at this point, to put aside the writings of the commentators and to reaffirm that international law is, in essence, the reflection of state practice. And state practice since 1945 demonstrates that the right of intervention to protect nationals is alive and well.

It will not, however, be our task to review the actual instances when states have either contemplated or actually used force for the declared purpose of rescuing their nationals. Other scholars have done so, in such an

113. *Id.*, p. 127, para. 249.

114. J.L. HARGROVE, "The Nicaragua judgment and the Future of the Law of Force and Self-Defense", (1987) 81 *A.J.I.L.* 135, p. 138; see also T.J. FARER, "Drawing the Right Line", (1987) 81 *A.J.I.L.* 112, p. 113.

115. HARGROVE, "The Nicaragua Judgment", *supra*, note 114, p. 143.

116. DAVIDSON, *Grenada*, *supra*, note 49, p. 121.

elaborate fashion that any study on our part of this question would turn out to be a very pale analysis in comparison. I will limit myself to a few specific considerations.

The analysis has been divided into two broad categories. Later on, we will study the lessons to be drawn from the actual instances where force was used on that justification. But first, I would like to review the work of the United Nations, work which can be seen, in so far as it is evidence of the opinion of the community of states, as a form of state practice. In that respect, we will concentrate on certain resolutions of the United Nations General Assembly which have often been quoted by some to support the view that art. 2(4) is an absolute prohibition of the use of force.

#### 2.4.1. The Work of the United Nations

The principle embodied in art. 2(4) has been the subject of more resolutions of the United Nations General Assembly than any other principle contained in the *Charter*. Because of the great number of resolutions, it would be tiresome to review and analyse them all. Only those which are most often quoted by the restrictionists to support their position will be analysed.

What is striking about those resolutions which have restated the principle of the non-use of force in international relations is that they have never rephrased it. Restrictionists contend that the words "territorial integrity", "political independence", "or in any manner inconsistent with the purposes of the United Nations" are not to be given any qualifying meaning. According to that interpretation, art. 2(4) could very well be read without mentioning those last 23 words. If that was the correct interpretation to be given to art. 2(4), why then has the General Assembly constantly defined the prohibition of use of force as force directed against the territorial integrity or political independence of a state? What is usually condemned by the institutions of the United Nations is not resort to force *per se*, but more the violation of the territorial integrity and/or political independence of a particular state. This demonstrates a willingness to attribute to these words a meaning, a purpose, which is in sharp contrast with the restrictionist attitude.

It is also striking to note the very broad terms used in these resolutions to define the principle of the use of force. Only one resolution, *Res. 2625-XXV* (1970), tries to define in more precise terms the content of art. 2(4). In that respect, the fact that there is no mention, at any point, even implicitly, of the right of protection of nationals, is very surprising: states had asserted it on many occasions in the years preceding the adoption of the resolution and it was an item already hotly debated among scholars.

this total silence on the protection of nationals abroad stands in marked contrast to the express denunciation of reprisals involving the use of force.<sup>117</sup>

It is not my intention to interpret this silence of *Res. 2625-XXV* (1970) on the protection of nationals as clear evidence that the use of force for such a purpose does not contravene art. 2(4). A variety of different circumstances may explain this omission. This shows, however, that *Res. 2625-XXV* (1970) cannot be interpreted as evidence that the community of states regard the right of intervention for the protection of nationals as illegal.

The other resolution often alluded to by restrictionists to demonstrate that the right of protection over nationals is prohibited by art. 2(4) is *Res. 3314-XXIX* (1974), otherwise known as the *Definition of Aggression*. Again restrictionists invoke broad, general statements in this resolution to support their view of art. 2(4). They point out in particular to art. 5 of the resolution which states that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression": for the restrictionists, this demonstrates that the intention of the acting state is irrelevant in appreciating if a use of force is aggression or not.

This qualification of the exercise of the right of intervention to protect nationals as an aggression does not withstand close analysis.

First, the comments made concerning the generality of *res. 2625-XXV* (1970), and its abstention from an implicit or explicit reference to the right of protection of nationals are equally applicable to *Res. 3314-XXIX* (1974). In fact, they are even more powerful in this case. The quest for a definition of aggression has been a concern for both the league of Nations and the United Nations and dates back to the 1920's. In that respect, it is interesting to recall the definition submitted by the Soviet Union to the 1933 disarmament conference in Geneva. After enumerating certain acts which constituted aggression, the definition specified :

2. No considerations whatsoever of a political, strategical, or economic nature, ..., shall be accepted as justification of aggression as defined... In particular, justification for attack cannot be based upon ... possible danger to life or property of foreign residents.<sup>118</sup>

This definition was submitted to a committee under the chairmanship of Mr. Nicolas Politis. This committee studies the Soviet proposal and adopted a different definition, which became known as the Politis definition : and it is interesting to note that the specific mention of the danger to foreign citizens as

117. BOWETT, "Use of Force for the Protection of Nationals", in Cassese, *supra*, note 11, p. 40.

118. As quoted in S.M. SCHWEBEL, "Aggression, Intervention and Self-Defense", (1972-II) 136 *R.C.A.D.I.* 411, p. 440-1.



a non-justifiable use of force was dropped. The Politis definition kept only a broad statement similar to art. 5 of *Res. 3314-XXIX* (1974)<sup>119</sup>. In its proposal to the United Nations in January 1952, the Soviet Union again included in its definition a clause specifying that “may not be used as justification for attack ... any danger which may threaten the life ... of aliens”<sup>120</sup>. And again it was dropped.

Leaving the protection of nationals out of the final draft may be due to a variety of reasons. However, the fact that an explicit mention of the right was twice considered but later dropped certainly shows that the question is not settled: restrictionists cannot maintain that the right of intervention to protect nationals is aggression according to the *Res. 3314-XXIX* (1974).

Second, art. 5 of the resolution is too broad, too general and irrelevant to the present issue. Nobody denies that an aggression cannot be justified on economic or political considerations: the real issue is to determine which acts constitute aggression.

Moreover, all the acts defined as aggression in the resolution are subject to an attenuating clause:

#### Article 2

[...] 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.

This criterion of gravity can certainly apply to the right of intervention to protect nationals<sup>121</sup>. But, more importantly, this consideration of “other relevant circumstances” brings into the appreciation of a use of force the question of the aggressive intention<sup>122</sup>.

The relevance of the intention of the acting state has been a much debated item for the past five decades. Essential in the eyes of Western countries, the question of aggressive intention had been the stumbling block for all the attempts to adopt a definition of aggression. Can the absence of any specific mention of the question of intention in *Res. 3314-XXIX* (1974) be interpreted as a rejection of intention as a relevant consideration? The answer must be “no”.

119. As quoted in GIRAUD, “L’interdiction du recours à la force”, *supra*, note 57, p. 508-9.

120. *Question of Defining Aggression: USSR Draft Resolution, U.N.G.A.O.R.*, 6th session, Annexes, A/C.6/L.208.

121. GREEN, “Humanitarian Intervention”, *supra*, note 41, p. 219-220; JEFFERY, “The American Hostages in Tehran”, *supra*, note 41, p. 727.

122. J. ZOUREK, “Enfin une définition de l’agression”, (1974) 20 *A.F.D.I.* 9, p. 26.

Both sides maintained that their respective and diametrically opposed positions represented the correct (and the only correct), meaning of the slightly amended Article 2 of the Consensus Definition. So that on this point the definition remains subject, after the consensus, to the same conflicting state positions which had been officially reported shortly before as barring consensus; namely, whether the *prima facie* stigmatized external acts would cease to be so because of the non-aggressive intention or purpose with which they were committed.<sup>123</sup>

I have emphasized this continuing debate over the question of aggressive intention to demonstrate that its relevance in deciding whether an act contravenes art. 2(4) has not been rejected outright by international law. Indeed, states which have been opposed to it have found it desirable to introduce into the definition of aggression some leeway which enables intention to be considered as an important element in the appreciation of the legitimacy of a use of force.

#### 2.4.2. Instances of Actual Intervention by States

There are numerous instances in which force was threatened to be employed, or employed in fact by states with the declared objective of rescuing their nationals. Prof. Bowett<sup>124</sup> and Prof. Ronzitti<sup>125</sup> have drawn up an impressive list: the Arab States' and Israel's justification of their resort to force in 1948, the United Kingdom's threatened intervention in Iran in 1946 and 1951, and in Egypt in 1952, the British and French joint intervention at Suez in 1956, the 1960 Belgian intervention in the Congo, the United States intervention in the Dominican Republic in 1965, the "Mayaguez" incident between the United States and Cambodia in 1975, the Israel intervention at Entebbe Airport, in Uganda, in 1976, the 1978 Egyptian raid on Larnaca Airport, in Cyprus, the American rescue attempt in Iran in April 1980, and the American intervention in Grenada in 1983.

If states have often invoked the right of intervention to protect nationals, the basis on which they have done so has not always been the same. Some states see it as part of the right of self-defence, others, as a self-standing right. A particular state may declare at one time that intervention is part of the right of self-defence, but on another occasion be at pains to demonstrate that it is a self-standing right. For example, the United States argued in 1980 that its rescue mission in Iran was undertaken pursuant to art. 51 of the *Charter*<sup>126</sup>.

123. J. STONE, "Hopes and Loopholes in the Definition of Aggression", (1977) 71 *A.J.I.L.* 224, p. 229.

124. BOWETT, "Use of Force for the Protection of Nationals Abroad", in Cassese, *supra*, note 31, p. 41-4; RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 26-52.

125. RONZITTI, *supra*, note 1, p. 26-49.

126. JEFFERY, "The American Hostages in Tehran", *supra*, note 41, p. 723.

In 1983, the United States justified their actions in Grenada in part on the right of intervention to protect nationals but its legal basis for doing so was totally different.

Protection of nationals is a well-established, narrowly drawn ground for the use of force which has not been considered to conflict with the U.N. Charter. ... We did not content that the action on Grenada was an exercise of the inherent right of self-defense recognized in Article 51 of the U.N. Charter. ... We relied instead on the narrower, well-established ground of protection of U.S. nationals.<sup>127</sup>

Does this ambivalence affect the probative value of the state practice? I believe not: it goes to show that there is some disagreement on the conceptual basis of the right, but not on its existence. I believe personally that the self-defence theory is to be discarded, as will be shown later on.

It has often been pointed out that this list of actual cases of intervention for the protection of nationals demonstrates that only Western countries have resorted to it to justify a use of force. Invariably, the victim states have been third world states which were not powerful enough to resist the intervention, and which have denounced the action. Indeed, the debates in the Security Council show that, generally, the majority of the third world states and the Soviet bloc deny the legitimacy of the use of force for that purpose. Therefore, it is alleged that the state practice is not generalized and universal enough to bring the right of intervention to protect nationals into the body of international customary law. I disagree with this conclusion, for the following reasons.

First of all, it is very interesting to note that, more often than not, states reject the legitimacy of a state's intervention, not by denying the existence of the right, but by denying the existence of the factual circumstances giving rise to the right. After a thorough analysis of state practice after 1945, Prof. Ronzitti observed that...

As a matter of fact, those States which consider intervention as unlawful have often preferred to question whether the nationals of the intervening State had actually been mistreated, without taking a stance over the existence of the right to intervene to protect nationals.<sup>128</sup>

The denial of the application of a rule to a particular situation, by alluding only to the factual circumstances on which recourse to the rule is

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127. U.S. Department of State, "Organisation of Eastern Caribbean States: Grenada 1983" in M.N. LEICH, "Contemporary Practice of the United States Relating to International Law", (1984) 78 *A.J.I.L.* 655, p. 664-5.

128. RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 53; see also KNISBACHER, "The Entebbe Operation", *supra*, note 1, p. 78, where the author, after reviewing the Security Council debates following the 1960 Belgian intervention, the 1965 American intervention, and the 1976 Israeli raid on Entebbe, arrives at the same conclusion.

conditioned, implies logically an acceptance of the existence of the rule. Or it is at least "a demonstration of the lack of conviction on the part of these States as to the illegality of action aimed at rescuing human lives"<sup>129</sup>. As a matter of fact, that lack of conviction may be due to the fact that those states do not want to reject now the existence of a right of which they might be forced to avail themselves in the future, if faced with a similar situation.

It is also too radical to assert that only the big Western powers have recognized the existence of the right. During the 1960 debates in the Security Council on the Belgian intervention in Congo, several Latin American countries, whose opinion is highly relevant because they have themselves often been subjected in the past two centuries to such interventions by the United States, did not condemn the Belgian rescue operation<sup>130</sup>. For instance, the Argentine government, during the Security Council debates on July 21st, 1960, clearly stated its support of the Belgian government.

Now, we are convinced that the protection of the life and honour of individuals is a sacred duty to which all other considerations must yield. We cannot reproach the Belgian government for having assumed this duty when Belgian nationals were in danger. Any other state would have done the same.<sup>131</sup>

In 1965, Taiwan and the Netherlands acknowledged as legitimate the landing of troops by the United States in the Dominican Republic<sup>132</sup>. In 1980, the U.S. attempted rescue operation was "fully endorsed ... by the E.E.C. countries, Canada, Australia, Japan, Israel and Egypt"<sup>133</sup>. The case of Egypt is particularly interesting. Before 1978, Egypt had been traditionally opposed to any intervention on its soil for the purpose of protecting foreigners. However Egypt's attitude changed radically in 1978, after Egyptian citizens had been killed or taken hostages in Cyprus. The Egyptian military aircraft received permission from the Cypriot government to land on Larnaca Airport; the Cypriot government had, however, forbidden any military action. The Egyptians nevertheless intervened militarily and, if they did not specifically invoke the right of intervention to protect nationals, they nevertheless believed their action was lawful. And, indeed, in 1980, after the aborted American rescue operation in Iran, Egypt offered its help for an eventual second rescue mission by the United States<sup>134</sup>.

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129. RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 67.

130. *Id.*, p. 56.

131. *U.N.S.C.O.R.*, 15th year, S/PV. 878, 878th meeting, p. 24, para. 118.

132. RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 56.

133. *Id.*, p. 57.

134. *Id.*, p. 47.

The Egyptian example brings us to another, more fundamental consideration, i.e. the extent to which state practice must be generalized and universal enough to support the view that the right of protection over nationals is part of international law. I do not wish to enter into an in-depth analysis of the proof of a customary rule of international law: extensive treatises have been written on the subject, and it would be beyond the scope of this essay. But I would emphasise a few considerations.

First, I am not trying to prove the *establishment* of a customary rule of law: such a rule was recognized in pre-1945 days. I am only trying to demonstrate, through an extensive and repeated state practice, that this rule has not been *extinguished* by the enactment of the *Charter*. The burden of proof and the consistency of state practice needed to support the former is much heavier than the latter.

One must also remember that, when considering the extent of state practice related to a particular rule, greater weight must be given to the opinion of interested states<sup>135</sup>. In the case of the right of intervention to protect nationals, the interested states are mostly Western powers because of the context in which these interventions take place and the nature of the intervening states themselves. A rescue operation becomes necessary when foreigners are faced with extreme danger, when the territorial state is either unwilling or unable to protect them. It therefore implies a breakdown of law and order which usually happens only either in third world states insufficiently developed to exercise proper control over their territory, or in states unwilling to do so because they are sponsoring terrorism and international blackmail. In both cases, the target of these actions are usually citizens of the Western countries, because of the antagonism which exists towards these states. To put it bluntly, it is not Canada or Mexico against which hatred is directed and which is blamed for the problems of the world, it is the United States, France, the United Kingdom, ... .

In addition, these states are the ones invoking the right of intervention to protect nationals because of the nature of their internal society. These states have been the pioneers of the protection and promotion of human rights both on the international and on the municipal level. They are more responsive to threats directed against their own citizens, because of that general concern for human rights and because they are infinitely more sensitive to their internal public opinion: opinion which is bound to pressure their government into action, since it is morally, politically — if not legally — right to do so.

Since the Western states are more likely to be faced with such imperative situations, their opinion is to be given more weight in analysing the existence

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135. SHAW, *International Law*, *supra*, note 66, p. 66.

of the rule. In that respect, the Egyptian example is highly relevant. We have seen that the Egyptian government changed its attitude towards the existence of the right, and it did so because it was faced with a situation which made the intervention compelling: its own citizens were now victims of international terrorism. One should therefore not weight as heavily the opinion of states which have never been faced with situations of this kind; the opinion of the states which did is to be given a greater regard.

To conclude, it is believed that state practice since 1945, when analysed in the light of the considerations mentioned, can only point out to the existence of a right of intervention to protect nationals. And this conclusion becomes all the more imperative when state practice is analysed in a global context, together with the legal arguments developed previously. I do admit, however, that an intervention to protect nationals could be seen as a use of force *prima facie* prohibited by international law. In that case, I believe that it could be justified, provided the appropriate factual circumstances are proven, not as an exercise of the right of self-defence, but because of the existence of a "state of necessity".

### **3. Intervention for the Protection of Nationals as a legitimate Exception to the Prohibition of the Use of Force**

If one school of thought has adopted the concept of a self-standing right, there is a considerable number of scholars who prefer to see in the right of intervention to protect nationals a use of force that is *prima facie* prohibited by international law. Such use of force would be illegal unless it falls within a recognized exception to the general prohibition of the use of force.

Two such exceptions can be identified: the right of self-defence under art. 51 of the Charter, and the state of necessity as defined by art. 33 of the draft articles on state responsibility drawn up by the International Law Commission. The former has been extensively discussed, and it is not my intention to restate the arguments raised on both sides. I would rather demonstrate that the right of self-defence is not conceptually applicable to the factual situations in which a rescue operation usually takes place.

I will thereafter concentrate my energies on the analysis of a concept that has not been developed by the doctrine in the context of the right of intervention to protect nationals: necessity. Provided the right factual circumstances are present, a rescue operation can be found legitimate by reason of the existence of a state of necessity.

### 3.1. Self-Defence and Intervention to Protect Nationals

The right of self-defence has been part of the general body of international law since the beginning of the XIX<sup>th</sup> Century. Up until 1945, the right of self-defence had a broad connotation, and armed force could be used for such purpose to repel not only direct armed invasion against the territory of a state but also attacks against what a state considered to be its vital interests. The protection of nationals was generally considered to fall within the purview of these "vital" interests.

After the enactment of the *Charter*, the circumstances in which the right of self-defence could be used, and the definition of the interests to be upheld through its exercise, became the subject of another doctrinal controversy, one which surrounds art. 51. Proponents and adversaries of the legality of intervention to protect nationals argue over the correct interpretation of this provision. Two questions are at the heart of the debate : whether the existence of an armed attack is a necessary pre-condition to the exercise of the right of self-defence ; and, if so, whether an attack against nationals can be equated with an armed attack in the sense of article 51.

One could certainly maintain that the recent judgment of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), has put an end to part of the debate. If the Court recognized that art. 51 of the *Charter* was referring to international customary law, it nevertheless pointed out that the present content of article 51 "has been confirmed and influenced by the Charter"<sup>136</sup>. This "influence" of the *Charter* is clearly stated by the Court: the exercise of the right of individual self-defence "is subject to the State concerned having been the victim of an armed attack"<sup>137</sup>. Later on, while talking of the right of collective self-defence, the Court characterized the existence of an armed attack upon the victim State as a *condition sine qua non*<sup>138</sup> for its lawful exercise.

If one can no longer deny that an armed attack is necessary for the exercise of the right of self-defence, the debate is not entirely closed as it is bound to shift to a definitional approach. The question now is the determination of the meaning of armed attack in the context of article 51. Can an attack upon nationals abroad be said to be an armed attack against a state ?

One could say that, in certain circumstances, it would be plausible to maintain that an attack against nationals is an attack against the state. This

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136. *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, [1986] I.C.J. Rep. 3, p. 94, para. 176.

137. *Id.*, p. 103, para. 195.

138. *Id.*, p. 122, para. 227.

could be the case, for example, when nationals are directly attacked by a state because of political antagonism toward their particular government. The overall difficulty lies, nevertheless, in the determination of the threshold needed to transform an attack against individuals into an armed attack against a state. Moreover, an armed intervention can become necessary in situations other than this one: self-defence thus represents an unsatisfactory solution to the problem of how to justify such rescue operations.

This inability of self-defence to justify the use of armed force in situations when rescue operations must be undertaken is due, in addition, to the existence of a conceptual problem linked with the essence of the right of self-defence. Even if we accept a broader view of the right of self-defence, its exercise implies a previous international delict, i.e. "la violation d'un droit"<sup>139</sup>: there must be a breach of a legal duty owed to the state acting in self-defence.

In the era of international terrorism and of indirect and covert aggressions, antagonistic acts directed towards the nationals of a particular state are usually not undertaken by state officials, but are more likely to be acts of private individuals. To attribute their actions to a state entity, a very high degree of control by the state over these individuals has to be shown. Imputability is established only if the individuals have acted in the name of and on behalf of the state authorities, if "in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the [...] State to carry out a specific operation"<sup>140</sup>.

The Court has taken the view ... that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.<sup>141</sup>

Indeed, the assistance given by the state to the individuals has to be of such a magnitude as to amount to an outright and direct attack by one state against another. Such is the lesson to be drawn from the Court's judgment in the *Nicaragua Case*<sup>142</sup>.

139. NGUYEN, Q.D., "La légitime défense d'après la Charte des Nations-Unies", (1948) 52 *R.G.D.I.P.* 223, p. 242.

140. *Case concerning United States Diplomatic and Consular Staff in Tehran* [1980] *I.C.J. Rep.* 3, p. 29, para. 58.

141. *Nicaragua case*, *supra*, note 136, p. 64, para. 115.

142. *Id.*, p. 104, para. 195; p. 119, para. 230; p. 122, para. 237; see also T.J. FARER, "Drawing the Right Line", (1987) 81 *A.J.I.L.* 112, p. 113.



Therefore, it can sometimes happen that the state on whose territory foreign nationals are facing an extreme danger has not committed any international delict: the offensive acts are not attributable to it and it has respected its obligation of due diligence in the protection of the life and liberty of aliens. In those situations, the right of self-defence cannot be invoked because of the absence of its very essence: the prior existence of a delict.

Time has come to relieve an otherwise overburdened theory of self-defence and to rely on another concept. A concept which is better suited to respond to the different situations in which an intervention to protect nationals becomes necessary; a concept which will be adaptable to the ever-changing international society: a concept which will take into account what Prof. Bowett called "the principle of the relativity of rights", according to which one state's right to territorial sovereignty must be weighed against the other state's right to protection of its nationals<sup>143</sup>: that is, the concept of "necessity".

### 3.2. Necessity and Intervention to Protect Nationals

#### 3.2.1. Necessity as a Circumstance Precluding Wrongfulness

In its 1980 report dealing with its work on state responsibility, the International Law Commission adopted a comprehensive definition of what constitutes a state of necessity:

The term "state of necessity" is used by the Commission to denote the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another state.<sup>144</sup>

The state of necessity is, in essence, an excuse precluding wrongfulness of an otherwise illegal act; it provides a justification for "the non-observance of international obligations ... if the excuse is valid, it excludes international responsibility"<sup>145</sup>.

Necessity is not to be confused with the concepts of *force majeure* or *cas fortuit*. These concepts imply an irresistible force, an unforeseen external circumstance outside the control of the state, making it materially impossible

143. D. BOWETT, *Self-defence in International Law*, Manchester, 1958, p. 93.

144. Report of the Commission to the General Assembly on the work of its 32nd session, *Yearbook of the International Law Commission*, 1980, vol. II, part. 2, A/35/10, p. 34, para. 1.

145. G. SCHWARZENBERGER, "Fundamental Principles of International Law", (1955-I) 87 *R.C.A.D.I.* 191, p. 343.

for a state to act in conformity with international law. On the contrary, the state of necessity "implique un comportement librement et volontairement adopté"<sup>146</sup>, a voluntary choice, even if more theoretical than practical, made by the acting state whereby the upholding of essential interests is found to be preferable to the respect of another state's rights<sup>147</sup>.

Thus, necessity calls for "une comparaison des valeurs respectives des intérêts en présence"<sup>148</sup>

[necessity] is a factual situation in which a state asserts the existence of an interest of such vital importance to it that the obligation it may have to respect a specific subjective right of another state must yield because respecting it would, in view of that circumstance, be incompatible with safeguarding the interest in question.<sup>149</sup>

One should also make a clear distinction between the state of necessity and self-defence. First, the state of necessity is not a right but a factual circumstance precluding wrongfulness: indeed, the absence, *prima facie*, of any right to act in a certain fashion by the state invoking necessity is the *raison d'être* of the concept of necessity.

Second, but most importantly, necessity differs from self-defence in that the essence of the latter concept implies a breach of a legal duty owed to the State acting in self-defence. On the other hand, the state invoking necessity may violate rights of an innocent state which has not committed any internationally wrongful act.

La notion se distingue de la légitime défense en ce qu'elle ne présuppose pas un acte illicite de la part d'un autre État, et la mesure prise ne se dirige pas nécessairement contre quelqu'un qui a provoqué le péril.<sup>150</sup>

Unlike self-defence, writers have not discussed to any great extent necessity as a circumstance precluding wrongfulness of an intervention undertaken for the purpose of rescuing nationals. This is all the more surprising since the concept of necessity has been repeatedly reviewed by numerous scholars. Classical writers such as Grotius, Wolff and Vattel had

146. J. SALMON, "Faut-il codifier l'état de nécessité en droit international", in J. MAKARCZYK (ed.), *Essays in International Law In Honor of Judge Manfred Lachs*, The Hague, 1984, 235, p. 236.

147. G.M. BADR, "The Exculpatory Effect of Self-defense in State Responsibility", (1980) 10 *Georgia J.I. Comp.L.* 1, p. 9.

148. C. DE VISSCHER, *Théories et réalités en droit international*, 3rd ed., Paris, 1960, p. 339.

149. Report of Prof. Ago, *Yearbook of the International Law Commission*, 1980, vol. II, part 1, A/CN.4/318, ADD. 5-7, p. 18, para. 10.

150. M. SORENSEN, "Principes de droit international public", (1960-III) 101 *R.C.A.D.I.* 1, p. 219-20.

explicitly accepted the concept of necessity as justifying conduct contrary to international obligations<sup>151</sup>.

In the XIX<sup>th</sup> century and XX<sup>th</sup> century, states frequently invoked "necessity", to justify either repudiations of financial obligations or violations of territorial obligations<sup>152</sup>. It is true that in most of the cases in which necessity was invoked, states raised numerous objections to it. However, according to Prof. Ago, these objections were usually limited to a denial of the existence of a state of necessity in the particular case, thereby admitting implicitly the validity of the principle *per se*<sup>153</sup>. Sir Francis Vallat, a member of the International Law Commission, came to the same conclusion and noted "that in many cases the parties had agreed in recognizing the validity of the principle of state of necessity, irrespective of whether they accepted or rejected its application to the particular dispute between them"<sup>154</sup>.

Moreover, it was explicitly mentioned in a few international judgments<sup>155</sup>, the most notable of which is the *Oscar Chin Case* (1934). If the Permanent Court of Justice abstained in its judgment from taking a specific position on it, the question was, however, considered in the individual opinion of Judge Anzilotti:

The situation would have been entirely different if the Belgian government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations.<sup>156</sup>

For Prof. Zourek, this recognition of the concept of necessity by international tribunals is the best evidence of its place in international law.

Comme la notion de nécessité a été admise par des tribunaux internationaux ... il ne semble plus possible de lui dénier une place dans le système de droit international.<sup>157</sup>

151. For an extensive review, see Report of the Commission to the General Assembly, p. 47, para. 29 and Report of Prof. Ago, p. 46, para. 71.

152. Report of the Commission to the General Assembly, pp. 35-45, para. 6-25; Report of Prof. Ago, p. 22-37, para. 21-55; C. ROUSSEAU, *Droit international public*, vol. V, Paris, 1983, p. 92-5; SALMON, "État de nécessité", *supra*, note 146, p. 240-2, p. 248-50.

153. R. AGO, "Le délit international", (1939-II) 68 *R.C.A.D.I.* 419, p. 544; see also Report of Prof. Ago, p. 39, para. 57; P. GUGGENHEIM, *Traité de droit international public*, vol. II, Genève, 1954, p. 62; ANZILOTTI, *Cours de droit international*, vol. I, Paris, 1929, p. 510.

154. Summary records of the meetings of the 32nd session, *Yearbook of the International Law Commission*, 1980, vol. 1, 1618th meeting, p. 180, para. 21.

155. ROUSSEAU, *Droit international public*, t. V, *supra*, note 65, p. 92-4.

156. *Oscar Chinn Case*, P.C.I.J. Series A/B, No. 63, 65, p. 113.

157. J. ZOUREK, "La notion de légitime défense en droit international", (1975) 56 *A.I.D.I.* 1, p. 66.

But, along with an increased recourse by states to necessity to justify their actions, a doctrinal controversy developed as to whether the concept has any place in international law. But this denial of necessity as a valid concept in international law is unfounded, for the following reasons.

First, the mere fact that the International Law Commission, after reviewing extensively the arguments raised by the publicists, decided to include necessity as a circumstance precluding wrongfulness in its draft articles on state responsibility should convince even its most vehement opponents that the concept is indeed recognized in international law. As a matter of fact, the universality, either in terms of geographical repartition or in terms of legal traditions, of the members of the International Law Commission and the high reputation which follows each and every member of the Commission individually, ensure that its conclusions are the reflection of the general status of international customary law.

Second, the arguments raised by the opponents of the concept appear to be irrelevant when one considers the state of necessity as defined by the Commission. After noting that a considerable number of publicists have taken a position either for or against the existence of a state of necessity in international law, the Commission resumed the position of XX<sup>th</sup> century scholars opposed to the notion :

[they] are opposed to recognizing the ground of necessity as a principle of general international law because States use and abuse that so-called principle for inadmissible and often unacknowledgeable purposes, but [they] are ultimately prepared to grant it a limited function in certain specific areas of international law less sensitive than those in which the deplored abuses usually occur.<sup>158</sup>

This fear of its abuse by states which leads scholars to rebut the legitimacy of the state of necessity was due to the absence of specific and restrictive conditions surrounding the actual finding of a state of necessity.<sup>159</sup> It was with this concern in mind that the International Law Commission presented and finally adopted an exhaustive definition of the state of necessity. Indeed, some members of the Commission who had been reluctant to approve the concept of necessity because of the very possibility of abuse changed their minds and recognized its place in international law. And they did so precisely because necessity is now, under the draft article of the Commission, very well circumscribed and its conditions of application are restrictively defined<sup>160</sup>.

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158. Report of the Commission, p. 48, par. 30.

159. SORENSEN, "Principes de droit international public", *supra*, note 150, p. 220.

160. J. SALMON, "État de nécessité", *supra*, note 146, p. 244.

### 3.2.2. Conditions for the Existence of a State of Necessity

A considerable number of publicists and scholars have defined the conditions required for the existence of a state of necessity. Whatever the individual merits of each and every opinion, I prefer to rely instead on the definition adopted in 1980 by the International Law Commission.

#### Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless :
  - (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril ; and
  - (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness :
  - (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law ; or
  - (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation ; or
  - (c) if the State in question has contributed to the occurrence of the state of necessity.

Each of these constituent elements will be reviewed, after which they will be applied to the case of an intervention to protect nationals.

#### 3.2.2.1. Lack of other Means

The state invoking necessity must have found itself in a situation which left no other effective means of action <sup>161</sup>. For the Commission,

... the adoption by that State of conduct not in conformity with an international obligation binding it to another State must definitely have been the only means of warding off the extremely grave and imminent peril which it apprehended ; in other words, the peril must not have been escapable by any other means, even a more costly one. <sup>162</sup>

The means chosen must not only be the only one available but it must also be strictly limited to what is necessary to safeguard the interest <sup>163</sup>.

161. SALMON, "État de nécessité", *supra*, note 146, p. 245.

162. Report of the Commission, p. 48, par. 33.

163. Report of Prof. Ago, p. 20, para. 14 ; Report of the Commission, p. 48, par. 33.

### 3.2.2.2. The Quality of the Interest to be Safeguarded

The quality of the interest to be safeguarded was the subject of greater disagreement among scholars. Most of the definitions presented in the doctrine seem to link the interest to be protected with the existence, the survival *per se* of the acting state<sup>164</sup>. Prof. Ago, in his report to the Commission, declined to adopt that view, because it is too restrictive<sup>165</sup> and reminiscent of the confusion between the concept of necessity and the concept of self-preservation<sup>166</sup>. The Commission agreed with Prof. Ago and decided to reject the concept of “vital interests” or “interest in the existence of the state itself”, but its main reason for doing so was expressed differently.

[The Commission] has made it quite clear in its review of practice that the cases in which a state of necessity has been invoked in order to safeguard an interest of the state other than the preservation of its very existence ultimately proved more frequent and less controversial than the cases in which a State has sought to justify itself on the ground of a danger to its actual existence.<sup>167</sup>

The Commission, while adopting the term “essential interest”, declined to spell out precisely what an essential interest is and to lay down specific categories. It will all depend “on all the circumstances in which the State is placed in different specific situations”<sup>168</sup>. This approach allows for the flexibility and the adaptability which are so much needed in a constantly evolving international scene. Far from being static, the concept of necessity is allowed to evolve with the international community and will thus be able to respond to new and varied situations.

### 3.2.2.3. The Nature of the Right Infringed

The relationship between the interest to be upheld and the international obligation which is infringed is the quintessential problem of the appreciation of the validity of necessity as an excuse in a particular case. Traditionally, that relationship had been expressed in hierarchical terms: the interest to be safeguarded had to be superior to the right infringed. Prof. Ago himself saw the problem in this light<sup>169</sup>.

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164. For a partial enumeration of the definitions advanced by publicists, see SALMON, “État de nécessité”, *supra*, note 146, p. 247-8.

165. Summary records of the meetings of the 32nd session, 1612th meeting, p. 154, para. 43.

166. Report of Prof. Ago, p. 19, para. 12.

167. Report of the Commission, p. 49, par. 32.

168. *Id.*

169. Report of Prof. Ago, p. 20, para. 15.

However, in the final draft of article 33, the Commission preferred not to specifically mention the notion of hierarchy. Nevertheless, it pointed out in its commentary that “the interest sacrificed on the altar of necessity must obviously be less important than the interest it is thereby sought to save”<sup>170</sup>. This interpretation is certainly not self-evident from the text of the provision. In fact, it seems that the right violated by the acting state can be as “essential” as the interest safeguarded, or even more so, as long as the right affected has not been “seriously” infringed.

It is possible, however, to reconcile the interpretation given by the Commission and the text of article 33. One can give due weight to both considerations by recognizing that, in the appreciation of the relationship between the interest safeguarded and the right infringed, the extent of the infringement in a particular situation is an important consideration. In practice, the more important the right infringed, the less the actual infringement should be in order to find that “necessity” is not a sufficient justification in a particular case.

### **3.2.3. Intervention to Protect Nationals as Justified by Necessity**

The Commission considered the application of the state of necessity in a few hypothetical situations. One of its overall concerns was to emphasize that the state of necessity was to be invoked very rarely, and that it should remain exceptional.

As regards the wording of the article, the Commission chose to adopt a negative form, ... ; this was done so in order to show, by formal means also, that the case of invocation of the state of necessity as a justification must be considered as really constituting an exception.<sup>171</sup>

Such an exceptional situation arises when a state is forced to resort to armed force in order to rescue its nationals facing extreme danger abroad. In such a case, a state will often have no other means of action but an armed intervention. Experience shows that consent of the territorial state is sought whenever the circumstances demonstrate that the governmental authorities will be receptive to the request or that, at least, they have not themselves participated in any way in the threat to foreigners. If such consent can or could have been obtained, then an eventual unilateral intervention will not be justified on the ground of necessity.

But when authorization to intervene militarily is refused, when the circumstances demonstrate that obtaining such consent is futile, or when the

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170. Report of the Commission, p. 50, para. 35.

171. *Id.*, p. 51, para. 40.

governmental authorities are no longer in effective control of their territory, a state is often left with no other practical alternative but to intervene. In such a case, the critical question is not whether judicial proceedings are available, but whether the nationals are in imminent danger<sup>172</sup>:

In a case involving imminent danger to the lives of captured persons, it would be unreasonable to maintain that the continued pursuit of peaceful measures must preclude armed rescue action.<sup>173</sup>

Moreover, the time factor in such operations is of extreme importance: speed of action is essential if the operation is to be successful and lives to be preserved.

[...] a failure of peaceful attempts to bring about a solution, leading to a delay in the rescue operation, might actually jeopardize it or increase the cost in human lives of both combatants and non-combatants. [...] The longer one allows for peaceful negotiations [...] the greater the cost of the operation will be.<sup>174</sup>

Nor is the United Nations an alternative: it has proved unable to act with the speed requisite to save human lives. In such a situation, a state must either sit back and remain idle because of abstract rules of law which prevent any forceful action, or undertake a rescue operation, limited in time, in scope and in purpose, whereby the means employed are restricted to the elimination of the actual danger.

But, can it be said that the relationship between the interest safeguarded and the right infringed is such that it respects the conditions required for necessity to preclude wrongfulness of the infringement? Of course, this question will always be a matter of appreciation in each individual case. However, it is believed that certain fundamental considerations will result in a favorable finding in most cases.

It cannot be denied that a state which intervenes militarily to safeguard the life of its threatened nationals is preserving one of its essential interests: "population is an essential ingredient of the State"<sup>175</sup>. This is all the more true when international terrorism is behind the threat to a state's nationals: blackmail can be directed towards the very survival of the state as a truly

172. O. SCHACHTER, "The Right of States of Use Armed Force", (1984) 82 *Mich. L. R.* 1620, p. 1631.

173. *Id.*, p. 1637.

174. J. WEILER, "Armed Intervention in a Dichotomized World: The Case of Grenada", in A. CASSESE (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986, 247, p. 250-1.

175. D. BOWETT, "The Use of Force for the Protection of Nationals Abroad", *supra*, note 11, p. 41.



independent political entity. As a matter of fact, the risks involved and the political costs linked with such an intervention ensure that a rescue operation will be undertaken only in the most extreme cases, when a state considers it of paramount importance to do so.

But, more importantly, such an operation has as its purpose the safeguarding of human rights, a consideration which is of utmost concern to the international community. There is no higher value than safeguarding human lives<sup>176</sup>.

The existence of a true state of necessity becomes even more undeniable when one considers the disparity between the interest upheld and the right infringed. Of course, one cannot deny the paramount importance of the abstention from the use of force: respect for the territorial integrity and political independence of all states is the cardinal rule of the international order. But in the present case, the infringement, if infringement there is, is minimal, accidental, temporary and without lasting effect.

The history of international relations exhibits many instances in which intervention was prompted by humanitarian considerations that one can condemn only by a too vigorous waving of the banners of sovereignty.<sup>177</sup>

The lasting benefits of an intervention designed to save lives and uphold human rights outweigh any temporary impairment of the territorial integrity of a state.

In the case of action, assuming it to be successful, the value "human rights" is restored and preserved; the values "international relations free of violence" and "territorial integrity" are indeed infringed, but as all the rescue actions mentioned in the introduction have demonstrated, it is only a temporary infringement, a very short-term use of armed force and on a small scale. After the end of the rescue action, not only is the territorial integrity of the target state restored, but the international relations are also free of violence again. In respect to these values there will be a complete *restitutio in integrum*.<sup>178</sup>

I therefore come to the conclusion that an intervention to protect nationals, if it stays within certain well-defined parameters, can be justified by the existence of a state of necessity. And none of the situations which, under the Commission's draft article 33(2), exclude the possibility of resorting to necessity apply in this case. The most relevant for the purpose of our analysis is the one dealing with *jus cogens*.

176. SORENSEN, "Principes de droit international public", *supra*, note 101, p. 220; W. WENGLER, "L'interdiction de recourir à la force", [1971] *R.B.D.I.* 401, p. 417.

177. R. FALK, "The United States and the Doctrine of Nonintervention in the Internal Affairs of Independent States", (1959) 5 *How. L.J.* 163, p. 167.

178. T. SCHWEISFURTH, "Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights", (1980) 23 *G.Y.I.L.* 159, p. 177-8.

Under the definition of art. 53 of the *Vienna Convention on the Law of Treaties* (1969)<sup>179</sup>, a rule of *jus cogens* in a norm accepted by the international community of states as a whole and recognized as a norm from which no derogation is permitted. The international community as a whole, i.e. the “Western, Communist, Afro-Asia and Latin-American countries”<sup>180</sup>, must therefore be convinced that the rule is binding on all states and that it cannot suffer any derogation.<sup>181</sup> Judging by the considerable number of States which claim that the right of intervention is valid, as well as the numerous writers who think likewise, this condition is certainly not fulfilled.

Since the entry into force of the U.N. Charter, we can count a dozen cases in which force has been exerted or at least threatened for the purpose of rescuing nationals abroad. Thus, even if one assumes, as we do, that this kind of intervention is prohibited by the customary rule forbidding the use of force, it cannot be regarded as being in breach of the peremptory rule banning the use of force.<sup>182</sup>

The International Law Commission seems to be of the same opinion. If it recognized as a peremptory rule of international law the prohibition of aggression, it nevertheless made a clear distinction between aggression and conduct by a state “which need not be considered as an act of aggression, or not, in any case, as a breach of an international obligation of *jus cogens*”<sup>183</sup>. The Commission had in mind...

[...] certain actions by States in the territory of other States which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression.<sup>184</sup>

Then, the Commission specifically pointed out that intervention to protect nationals could fall in that category :

These would include, for instance, some incursions into foreign territory ... to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State.<sup>185</sup>

Finally, another argument which shows that an intervention to protect nationals does not violate a rule of *jus cogens* lies in the logical outcome

179. (1980) 1155 *United Nations Treaty Series* 332.

180. N. RONZITTI, “Use of Force, Jus Cogens and State Consent”, in A. CASSESE (ed.), *The Current Regulation of the Use of Force*, Dordrecht, 1986, 147, p. 149.

181. N. RONZITTI, *Rescuing Nationals Abroad through Military Coercion and Intervention of Grounds of Humanity*, Dordrecht, 1985, p. 75.

182. RONZITTI, “Use of Force”, *supra*, note 180, p. 153.

183. Report of the Commission, p. 44, par. 23.

184. *Id.*

185. *Id.*

linked with the opposite conclusion. A preemptory rule of international law cannot be derogated from: consent of the state whose rights have been violated cannot operate as a circumstance precluding wrongfulness.<sup>186</sup> Therefore, if an intervention to protect nationals constituted a violation of a rule of *jus cogens*, the territorial state's consent to it would be an irrelevant consideration in the assessment of the legality of the operation. However, there is unanimity among states and writers that an intervention by consent is legal, by virtue of that consent alone<sup>187</sup>. It therefore goes to show that the exception contained in art. 33(2)(a) is not applicable to force used to protect nationals.

Nor is art. 33(2)(b), which stipulates that necessity will not apply if it is expressly or implicitly prohibited by a treaty. Some scholars have often maintained that force can be legitimately used in international law only if it is expressly authorized by the *Charter*. Could it therefore be maintained that necessity as a justification for the use of force is implicitly prohibited by the *Charter*, because of the absence of any specific mention of it?

The International Court of Justice's decision in the *Nicaragua Case* (1986) has demonstrated that this reasoning is incorrect. As we have mentioned previously, the Court examined the relationship between the *Charter* and customary international law regarding the use of force. And the Court found that the "United Nations Charter [...] by no means covers the whole area of the regulation of the use of force in international relations"<sup>188</sup>. Since the *Charter* does not represent the whole body of law regulating use of force, its failure to refer explicitly to necessity does not mean that necessity cannot legitimize a use of force: the exception found in art. 33(2)(b) is therefore not applicable in the present case.

### 3.2.4. Necessity and State Practice

Overall, the concept of necessity as applied to armed intervention remains very abstract, since relevant state practice is nearly non-existent. The majority of cases when states have actually invoked necessity as an excuse for the violation of their international obligations have been linked mostly with financial obligations, or with the use of force. Most of the latter cases are,

186. RONZITTI, "Use of Force", *supra*, note 180, p. 148.

187. See, *inter alia*, C. ROUSSEAU, *Droit international public*, vol. IV, Paris, 1980, p. 47; R. LILICH, "Forcible Self-Help by States to Protect Human Rights", (1967) 53 *Iowa L. R.* 325, p. 349; I. BROWNLIE, *International Law and the Use of Force by States*, Oxford, 1963, p. 317; RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 84.

188. *Case concerning United States Military and Paramilitary Activities in and against Nicaragua*, [1986] *I.C.J. Rep.* 3, p. 94, para. 176.

however, irrelevant for the purposes of our analysis, since they represented outright acts of aggression in pre-*Charter* days.

When it comes to intervention to protect nationals, state practice is abundant, but confusing. Sometimes, states refer to a right of self-defence to justify their actions, sometimes they refer to a self-standing right. In only one case, the 1960 Belgian intervention in Congo, has a state mentioned necessity as a justification for its action<sup>189</sup>. And even in that case, the statements of the Belgian government were not precise, were confused, and alluded more to the self-standing right approach than to the concept of necessity: the term "necessity" was used more in its ordinary meaning than as a legal concept.<sup>190</sup>

Statements by third states about necessity as a justification for a rescue operation are just as scarce. In 1976, the government of the Netherlands found that the Israeli rescue operation in Uganda was justified by what the Dutch Foreign Minister called "a state of emergency"<sup>191</sup>, but with no further explanation. And during the debates in the General Assembly sixth committee concerning the draft articles on state responsibility submitted by the International Law Commission, very few precise comments were made on the relationship between intervention to protect nationals and necessity. It seems that only Rumania clearly stated its position, refusing to allow necessity as an excuse to a rescue operation<sup>192</sup>.

Nevertheless, it is believed that necessity as a legal concept has a place in international law and should be invoked by states, whenever the right factual circumstances are present, to justify use of force to rescue their nationals facing an imminent danger. Necessity as a legal concept overcomes not only the difficulties raised by relying on a vision of self-defence which seems overstretched, out-dated and conceptually incorrect: it also seems preferable to the concept of intervention as a self-standing right.

The concept of intervention for the protection of nationals as a self-standing right will always remain subject to criticism because of its very reliance on a textual interpretation of the *Charter*. Necessity, on the other hand, recognizes that certain international obligations are violated whenever

189. Report of the Commission, p. 45, para. 25.

190. See the statement of the Belgian Prime Minister, Mr. Eyskens, to the Belgian Senate, on July 12th 1960, as quoted in SALMON, "État de Nécessité", *supra*, note 146, p. 252; see the statements of the Belgian representative to the Security Council in *U.N.S.C.O.R.*, 15th year, 1960, S/PV. 873, 873rd meeting, p. 34, para. 182-4, p. 35, para. 192-3 and S/PV. 877, 877th meeting, p. 30, para. 142.

191. As quoted in K. SIK and R. SIEKMAN, "Netherlands State Practice for the Parliamentary Year 1976", (1978) 9 *Neth. Y.I.L.* 191, p. 234.

192. RONZITTI, *Rescuing Nationals Abroad*, *supra*, note 1, p. 51.

a state uses force onto another state's foreign territory ; but, at the same time, it takes into account the fact that, in certain situations, a state has no other choice but to act in disregard of international law. Indeed, necessity is a concept closer to the present reality of the international legal order and more in conformity with state behaviour since 1945. Moreover, necessity possesses the undisputable advantage of being a flexible concept, which will adapt itself to the varying circumstances of an ever changing international community.

## Conclusion

In this article, it has been demonstrated that intervention to protect nationals has a place in international law, may it be as a self-standing right or as an exception to the prohibition of the use of force. Studying the concept of self-standing right, I have shown that the arguments supporting intervention to protect nationals are preponderant, since those negating its existence rest on tenuous grounds.

Recognizing, however, that there is no clear-cut conclusion to that doctrinal controversy, attention has been turned to the view that intervention to protect nationals constitutes an illegal use of force, which is nevertheless exceptionally justified. In that respect, self-defence has been ruled out as a solution, in spite of the state practice related to it : it is preferable to rely on another concept, "necessity", which provides an excuse precluding wrongfulness of the action.

However, in the end, whatever concept one chooses to espouse, either the self-standing right approach or the state of necessity approach, it all boils down to an overriding concern of bringing international law closer to the reality of the international community.

It cannot be denied that states do use force to protect nationals ; and they do it because they have no other choice. This is not to say that art. 2(4) of the *Charter* is a dead letter ; however we need to recognize that the whole system of the regulation of the use of force set up by the *Charter* is very ill. And it is not by maintaining an idealistic vision of a contemporary world ruled by a legal order prohibiting unilateral recourse to forceful coercion that one will bring back life into it.

Of course, I share the same desire of every individual of peace and harmony between nations. And international law can play a role in the fulfillment of that objective by setting up rules which represent ways to attain it. However, one could do no greater disservice to the advancement of the international legal order than to set up the content of these rules in such an abstract way that they become mere ideals : ideals to which states will pay lip-service, but which do not in any way take into account the state of the

international community. By maintaining that any unilateral use of force is prohibited, the *Charter* system and the whole body of international law itself is and will be brought into disrepute. I cannot but agree with Prof. Stone's conclusion :

If we persist in representing to the ordinary people of the world that the Charter contains strict and firm rules of law forbidding war, then insofar as daily events show these rules to be illusory, we invite a massive impatience and cynicism not only with these supposed rules, but with other United Nations functions and organs and with international law generally.<sup>193</sup>

As I said, states do it and they will keep on doing it because they have no other choice. International law, and the international community in general, will be better served by a legal regime of the use of force which allows for unilateral use of armed coercion in certain well-defined situations. This will correspond much more to the present needs of the international community and its members, and will ensure that respect for the rule of law is enhanced. Indeed, in the long run, international law will be better equipped to influence state behaviour in such a way as to bring about its most fundamental, but up to now very illusive, objective : the establishment of a world in peace and truly free from violence.

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193. J. STONE, *Of Law and Nations*, Buffalo, 1974, p. 36-7.