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THE 'PROTECTION OF NATIONALS' DOCTRINE REVISITED

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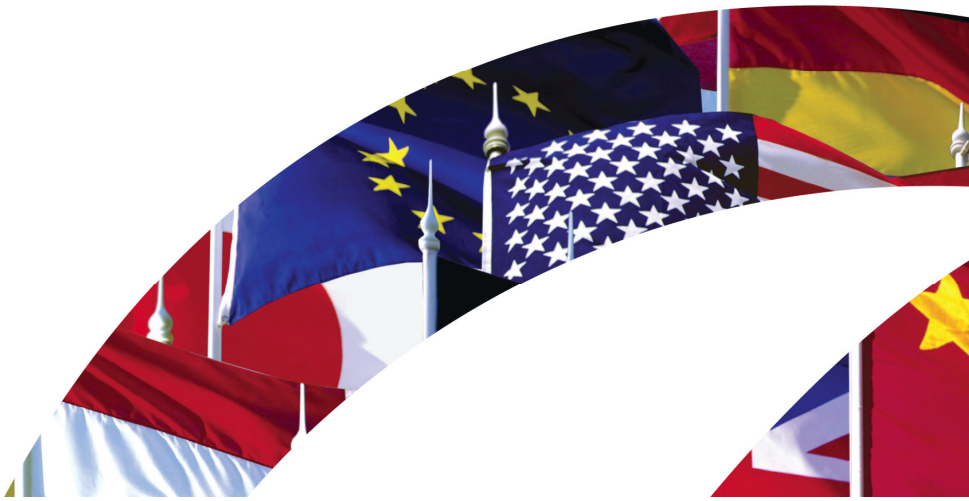

THE 'PROTECTION OF NATIONALS' DOCTRINE REVISITED

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ABSTRACT:
Legal scholars as well as States have long disagreed on the compatibility with the UN Charter of the so-called 'protection of nationals' doctrine.
This doctrine suggests that States are allowed to forcibly intervene in other countries for the protection of their nationals abroad, subject to the following (cumulative) conditions: (1) there is an imminent threat of injury to nationals; (2) a failure or inability on the part of the territorial sovereign to protect them, and; (3) the action of the intervening State is strictly confined to the objective of protecting its nationals.
The present article re-examines the available evidence in customary practice, while taking account of two new elements: on the one hand, the increased tolerance on behalf of the international community vis-à-vis unauthorized evacuation operations, and, on the other hand, the critical attitude of many States throughout the UN General Assembly debate on diplomatic protection in 2000.
After finding that customary evidence fails to offer conclusive answers, the author makes some tentative suggestions de lege ferenda to find a way out of the existing legal impasse.

KEY WORDS:

Protection of nationals
Non-combatant evacuation
Self-defence
Intervention
Diplomatic protection

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CONTENTS

I. INTRODUCTION

For decades, a debate has been raging as to the legality of so-called 'forcible protection of nationals abroad'. A number of States have occasionally asserted a right to intervene in other States in order to protect nationals in mortal danger. Throughout various UN Security Council and General Assembly debates, however, these claims have been decried by others as mere pretexts to intervene in States' domestic affairs and as a modern version of the 19th century 'gunboat diplomacy.' The academic community has remained equally divided. Proponents and opponents have invoked a variety of legal arguments (primarily based on the UN Charter and its *travaux*) which tend to cancel each other out. Thus, the inconclusiveness of customary practice appears to be matched by a doctrinal dead-end.

More recently, several authors have identified a growing tendency to condone (unauthorized) operations aimed at the evacuation of nationals threatened by a breakdown of law and order in their host State.[1] This new element in State practice is, however, again counterbalanced by a relatively novel element in *opinio iuris*, namely the negative or at least skeptical attitude vis-à-vis protection of nationals expressed by many States throughout the General Assembly debate on diplomatic protection in 2000.[2] The implication is that customary international law as it stands arguably fails to clarify in what exceptional circumstances the recourse to force is permitted to protect or rescue nationals abroad. To break the impasse, it is suggested to abandon the discredited 'protection of nationals' discourse and instead shift attention to the concept of 'non-combatant evacuation operations' (NEOs), which surfaces in several military manuals (cf. *infra*) and would seem less prone to abuse.

Part 1 provides a brief overview of the academic debate and the main arguments employed. Parts 2 and 3 subsequently turn to the concrete and abstract customary evidence respectively. A fourth part analyzes the available customary evidence from a *lege lata* perspective. Part 5 offers some tentative suggestions *de lega ferenda*.

II. THE DOCTRINAL DEBATE

'Protection of nationals' is a concept which refers to the conducting of a military intervention in the territory of a third State aimed at the protecting and/or rescuing of threatened nationals of the intervening State. This type of operation bears some resemblance to so-called 'humanitarian intervention', in the sense that both involve the use of force to prevent harm or additional harm to individuals or groups in the territory of another State.[3] On the other hand,

[1] See in particular: T. Gazzini, *The changing rules on the use of force in international law* (Manchester: Manchester University Press) (2005), at 170-171; C. Gray, *International Law and the Use of Force* (Oxford: OUP) (2004; 2nd e.d), at 129.

[2] See in particular: O. Corten, *Le droit contre la guerre; l'interdiction du recours à la force en droit international contemporain* (Paris: Pedone) (2008), at 774-777.

[3] K.E. Eichensehr, 'Defending nationals abroad: assessing the lawfulness of forcible hostage rescues', (2007-08) 48 *Virginia J.I.L.*, pp. 451-484, at 462.

while some authors and States have occasionally stressed the 'humanitarian' nature of operations of the former type, it is generally agreed that, from a legal perspective, the two must be kept separate.[4] The primary reason is that humanitarian intervention essentially aims at protecting the territorial State's population against massive human rights abuses, whereas protection of nationals is geared towards the well-being of the intervening State's own nationals (even if nationals of third States may be rescued incidentally (cf. *infra*)).

States and scholars tend to define 'protection of nationals' in terms of the three cumulative conditions spelled out by Sir Humphrey Waldock. According to the latter author: (1) there must be an imminent threat of injury to nationals; (2) a failure or inability on the part of the territorial sovereign to protect them, and; (3) the action of the intervening State must be strictly confined to the object of protecting its nationals against injury.[5] There is little doubt that before 1945 interventions of this type were permitted.[6] Similarly, it is accepted in the Charter era that rescue or evacuation can lawfully be undertaken when the territorial State consents. Problems arise, however, when no such approval is given, or when the approval is of questionable validity (*e.g.*, when the territorial State is plagued by civil strife or anarchy).[7] Indeed, whether or not *forcible* protection of nationals is compatible with the UN Charter provisions on the recourse to force is one of the most hotly debated issues of the *Ius ad Bellum*.[8] Both legality and legal basis are strongly contested.

Those scholars supporting the 'protection of nationals' doctrine invoke a wide variety of legal bases in support of their view.[9] A first group contends that this type of operation does not infringe the prohibition on the use of force of Article 2(4) UN Charter,[10] since it does not impair the 'territorial integrity or political independence' of a State; it merely rescues nationals from a danger which the territorial State cannot or will not prevent.[11] A second and probably more widespread approach holds that it constitutes an exercise of the right of self-defence.[12]

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[4] *Ibid.*, at 461-463.

[5] C.H.M. Waldock, 'The regulation of the use of force by individual states in international law', (1952-II) 81 *Receuil des Cours*, pp. 451-517, at 467.

[6] See *Ibid.*, at 467; I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press) (1963), at 289 *et seq.*

[7] See on this: L. Doswald-Beck, 'The legal validity of military intervention by invitation of the government', (1985) 56 *B.Y.B.I.L.*, pp. 189-252.

[8] See in particular: N. Ronzitti, *Rescuing nationals abroad through military coercion and intervention on grounds of humanity* (Dordrecht: Martinus Nijhoff) (1985), at 1-88.

[9] For a discussion hereof see: *Ibid.*, at 1-23; R.J. Zedalis, 'Protection of nationals abroad: is consent the basis of legal obligation?', (1990) 25 *Texas J.I.L.*, pp. 209-270, at 221-244.

[10] According to Article 2(4) UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[11] *E.g.*, R.B. Lillich, 'Forcible self-help to protect human rights', (1967) 53 *Iowa L.Rev.*, pp. 325-351, at 336-337; J.J. Paust, 'Entebbe and self-help: the Israeli response to terrorism', (1978) 2 *Fletcher Forum*, pp. 86-91, at 89-90; L. Henkin, *How Nations Behave. Law and Foreign Policy* (New York: Columbia University Press) (1979; 2nd ed.), 145; R. Higgins, *Problems and process: international law and how we use it* (Oxford: Clarendon Press) (1994), at 220-221.

[12] *E.g.*, D.W. Bowett, *Self-defence in international law* (Manchester: Manchester University Press) (1958), at 87-105; L. Doswald-Beck, 'The legality of the United States intervention in Grenada', (1984) 31 *Netherlands Int'l L.Rev.*, pp. 335-377, at 360; C. Greenwood, 'International law and the United States air operation against Libya', (1986-87) 89 *West Virginia L.Rev.*, 933-960, at 941; G. Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law', (1957-II) 92 *Recueil des Cours,* pp. 1-227, at 172-173; A. Gerard, 'L'Opération Stanleyville-Paulis devant le Parlement belge et les Nations Unies', (1967) 3 *Revue belge de*

Under this heading, a two-fold argument is put forward. Firstly, Bowett and several others claim that the inclusion in the UN Charter of the *inherent* right of self-defence has left unabridged the broader pre-existing customary right of self-defence, which *inter alia* extended to the protection of nationals. Secondly, it is argued that nationals abroad form part of a State's population and are therefore one of its essential attributes, implying that an attack against nationals abroad can be equated to an attack against the State itself, thus triggering Article 51 UN Charter.[13] Other justifications which have on occasion been raised but which have generated little imitation include the state of 'necessity'[14] or the growing importance attached to humanitarian considerations and human rights norms.[15] Last but not least, several authors, observing that protection of nationals is difficult to fit into predetermined legal categories, have argued that it constitutes an autonomous exception to Article 2(4), separate from Article 51 UN Charter, and grown out of customary practice.[16]

Against this, however, it must be recalled that a considerable group of scholars regard 'protection of nationals' as incompatible with Articles 2(4) and 51 UN Charter, and therefore unlawful.[17] Both opposing tendencies include prominent authorities. Various scholars have on occasion claimed belonging to the majority group, but it appears difficult to determine which side constitutes the majority or minority.[18]

While an exhaustive analysis of the various legal arguments 'pro' and 'con' is beyond the scope of the present paper, it is submitted that several can be discarded. First, the idea that the 'state of necessity' can justify certain recourses to force appears to be based on a misinterpretation of Article 25 of the International Law Commission's Draft Articles on State

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Droit international, pp. 242-269, at 254-255; O. Schachter, 'The right of States to use armed force', (1983-84) 82 *Michigan L. Rev.*, pp. 1620-1646, at 1632; O. Schachter, 'In defense of international rules on the use of force', (1986) 53 *Univ. of Chicago L.Rev.*, pp. 113-146, at 139; R.B. Lillich, 'Forcible protection of nationals abroad: the Liberian 'incident' of 1990', (1993) 35 *German Y.B.I.L.*, pp. 205-223, at 216.

[13] According to Article 51 UN Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

[14] See: J. Raby, 'The state of necessity and the use of force to protect nationals', (1988) 26 *Canadian Y.B.I.L.*, pp. 253-272.

[15] *E.g.*, 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.*, pp. 159-180, at 161 *et seq.*; D.J. Gordon, 'Use of force for the protection of nationals abroad: the Entebbe incident', (1977) 9 *Case Western Res. J. Int'l L.*, pp. 117-134, at 132.

[16] *E.g.*, N. Ronzitti, 'The expanding law of self-defence', (2006) 11 *J.C.S.L.*, pp. 343-359, at 354; T. Gazzini, *op. cit.*, supra n. 1, at 173; E. Giraud, 'La théorie de la légitime défense', (1934-III) 49 *Recueil des Cours*, pp. 687-868, at 738.

[17] Regarding protection of nationals as unlawful: *e.g.*, J. Mrazek, 'Prohibition on the use and threat of force: self-defence and self-help in international law', (1989) 27 *Canadian Y.B.I.L.*, pp. 81- 111, at 97; I. Brownlie, 'The principle of non-use of force in contemporary international law', in W.E. Butler (ed.), *The non-use of force in international law* (Dordrecht: Kluwer) (1989), pp. 17-27, at 23; A. Randelzhofer, 'Article 51', in B. Simma *et al.* (eds.), *The Charter of the United Nations: a Commentary. Vol. I* (New York: OUP) (2002), pp. 788-806, at 798-799; U. Beyerlin, 'Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht', (1977) 37 *Z.a.ö.R.V.*, pp. 213-243; M. Bothe, 'Friedenssicherung und Kriegsrecht', in W. Graf Vitzthum (ed.), *Völkerrecht* (Berlin: de Gruyter) (2007; 4th ed.), pp. 637-725, at 656; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Dunker un Humblot) (1984; 3rd ed.), at § 1338; J. Quigley, 'The legality of the United States invasion of Panama', (1990) 15 *Y.J.I.L.*, pp. 276-315, at 287, 292-294. Zedalis argues that the legality of protection of nationals is "strained at best." R.J. Zedalis, *loc. cit.*, supra n. 9, at 248.

[18] However: cf. *infra* for the views of the Members of the International Law Commission.

Responsibility (2001),[19] incompatible with that provision's *travaux*.[20] Second, the suggestion that forcible rescue operations fall outside the scope of Article 2(4) is difficult to reconcile with the provision's comprehensive nature, as supported by the Charter's *travaux*, the ICJ's *Corfu Channel* case, and a majority of scholars.[21] Third, nothing in the Charter's preparatory works suggests that the word 'inherent' was inserted in Article 51 UN Charter to assert that the pre-existing customary right of self-defence was left unabridged.[22] Conversely, while some consider it wholly artificial to expand the concept of 'armed attack' of Article 51 to cover attacks against nationals abroad,[23] the present author does not believe that this interpretation can be ruled out *per se*. Several scholars have emphasized the omission in the UN General Assembly Definition of Aggression of a reference to 'attacks against nationals abroad' in the enumeration of Article 3.[24] Contrasting this lacunae with the inclusion of attacks "on the land, sea or air forces, or marine and air fleets of another State" (Article 3(d)), these authors conclude that the Definition discards the admissibility of self-defence in the former case.[25] Against this, it can be argued that the list of Article 3 is not exhaustive, and that paragraph (d) discards the view, upheld by some authors, that the 'armed attack' concept is strictly confined to attacks against a State's territory.[26] Furthermore, it should be noted that since the Definition formally defines 'acts of aggression' instead of 'armed attacks', it can only provide circumstantial evidence vis-à-vis the scope of self-defence,[27] evidence which must at all times be tested against the resolution's *travaux* (cf. *infra*).

In the end, while the aforementioned considerations admittedly do not fully do justice to the complexity of some of the main academic controversies regarding Articles 2(4) and 51, it is submitted that the Charter provisions neither authorize nor definitively rule out protection of nationals as such. In this context, after reviewing the legal cases *pro* and *contra*, Ronzitti rightly suggests that we must look to customary practice for answers.[28]

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[19] (2001-II) *Y.B.I.L.C.*, Part Two, at 80 *et seq.*

[20] See the various arguments spelled out in O. Corten, 'L'état de nécessité peut-il justifier un recours à la force non constitutif d'agression?', (2004) 1 *Global Community*, pp. 11-50. Also: Y. Dinstein, *War, aggression and self-defence* (Cambridge: CUP) (2005: 4th ed.), at 246-247.

[21] The *travaux* indicate that the phrase 'or in any other manner…' was designed to insure that there should be no loopholes (*U.N.C.I.O.* Vol. 6, at 334-335). In accordance herewith, most authors accept that the article is not limited to attacks which affect a State's territorial integrity or political constellation. See *e.g.*: T.M. Franck, *Recourse to Force: State action against threats and armed attacks* (Cambridge: CUP) (2002), at 12; L. Henkin, *International law: politics and values* (Dordrecht: Martinus Nijhoff) (1995), at 115-116; Y. Dinstein, *War, aggression and self-defence* (Cambridge: CUP) (2005: 4th ed.), at 87. See also: ICJ, *Corfu Channel* (United Kingdom v. Albania), Judgment of 9 April 1949, (1949) *I.C.J. Rep.*, pp. 4-38, at 33-35.

[22] See in particular: US Department of State, *Foreign Relations of the United States, Diplomatic Papers (1945) General: the United Nations* (1967), at 670, 818. The word 'inherent' was included without any debate taking place as to its meaning. Also: R. Ago, 'Addendum to the 8th Report on State Responsibility', (1980-II) 32 *Y.B.I.L.C.*, Part One, at 63; Y. Dinstein, *op. cit.*, supra n. 21, at 96

[23] J.E.S. Fawcett, 'Intervention in international law: a study of some recent cases', (1961-II) 103 *Recueil des Cours*, pp. 343-423, at 404. Also: R.J. Zedalis, *loc. cit.*, supra n. 9, at 236-237.

[24] GA Res. 3314 (XXIX), 14 December 1974.

[25] See N. Ronzitti, *op. cit.*, supra n. 8, at 11.

[26] See *e.g.*, O. Corten, *op. cit.*, supra n. 2, at 614-615 (footnotes 20 and 24).

[27] Article 6 of the Definition. Also: UN Doc. A/AC.134/SR.110-113, at 39 (UK).

[28] *E.g.*, N. Ronzitti, *op. cit.*, supra n. 8, at 19.

III. OVERVIEW OF CONCRETE INVOCATIONS OF THE DOCTRINE AFTER 1945

Although cases whereby States have relied on the 'protection of nationals' doctrine have become less frequent after 1945, a good deal of relevant practice can still be found.[29] For present purposes, we will confine ourselves to a synopsis of the various cases, with an emphasis on those which have resulted in an exchange of explicit claims and counter-claims.[30] At the outset, it should be noted that purely *consensual* operations are excluded from the analysis. By contrast, interventions whereby the validity of the consent was contested and where 'protection of nationals' was invoked as a supplementary legal justification do merit closer scrutiny.

Early Cases: the Suez Canal (1956), Lebanon (1958) and the Congo (1960 and 1964)

The first country to rely on the 'protection of nationals' doctrine after 1945 was the United Kingdom,[31] which invoked it to justify the Anglo-French intervention during the 1956 Suez crisis.[32] British authorities pointed to the need to safeguard British lives, arguing that "self-defence undoubtedly includes a situation in which the lives of a State's nationals abroad are threatened and it is necessary to intervene on that territory for their protection."[33] Interestingly, Foreign Secretary Selwyn Lloyd expressly claimed that protection of nationals constituted an exercise of self-defence under Article 51 UN Charter, and defined this concept by reference to the three criteria spelled out by Waldock.[34] On the other hand, while the doctrine was staunchly defended at the domestic level, it was raised only once in the margin of the Security Council debate.[35] Rather, the UK consistently maintained that its core objectives concerned the safeguarding of the freedom of navigation in the Suez Canal, coupled with the restoration of peace between Egypt and Israel.[36] France did not make any reference to the doctrine whatsoever. A considerable number of States took a negative stance to the intervention.[37] It was also generally agreed that the British justification lacked

[29] For relevant overviews of these interventions, see: *Ibid.*, at 26-49; ; T.C. Wingfield and J.E. Meyen, 'Lillich on the forcible protection of national abroad', (2002) 77 *Naval War College – Int'l Law Studies*, 282 p.

[30] Cf. ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, (1986) *ICJ Rep.*, pp. 14-150, at § 207: "Reliance by a State on a novel right or an unprecedented exception (…) might, if shared in principle by other States, tend towards a modification of customary international law." As this *dictum* illustrates we must look for State practice as well as *opinio iuris*. On the application of the process of custom-formation to the Ius ad Bellum, see: O. Corten, 'Breach and evolution of customary international law on the use of force', in E. Cannizzaro and P. Palchetti (eds.), *Customary international law on the use of force: a methodological approach* (Dordrecht: Martinus Nijhoff) (2005), pp.119-144.

[31] Remark: already in 1946, 1951 and 1952, the UK hinted at the possibility of interventions to protect British residents in Iran and Egypt. See N. Ronzitti, *op. cit.*, supra n. 8, at 26-28; I. Brownlie, *op. cit.*, supra n. 6, at 296-297.

[32] See quotes in N. Ronzitti, *op. cit.*, supra n. 8, at 29.

[33] *Ibid.*

[34] Text reproduced in G. Marston, 'Armed intervention in the 1956 Suez crisis: the legal advice tendered to the British government', (1988) 37 *I.C.L.Q.*, pp. 773-817, at 800-801.

[35] UN Doc. S/PV.749, at § 141: "[W]e should certainly not want to keep any forces in the area for one moment longer than is necessary to protect our nationals (…)."

[36] *Ibid.*, at § 139; UN Doc. S/PV.750, at § 64-67; UN Doc. S/PV.751, at §§ 45-50.

[37] See the opinions expressed by the USSR, Egypt, Iran, Yugoslavia and others in UN Doc. S/PV.751.

any foundation in fact:[38] British lives were not imminently threatened, and, even if one would hold otherwise, the bombing of Egyptian airports and the continued occupation of key positions along the Canal clearly went beyond what was necessary for the protection of British residents. It is little surprising then that the British justification was "dismissed by almost all commentators as utterly without merit and illustrative of how the right of forcible protection may be open to abuse."[39]

When, two years later, around 10.000 US servicemen landed in Lebanon, President Eisenhower also made cursory reference to the need to protect US citizens.[40] However, after some initial press releases, this rationale was abandoned. Instead, the US declared that its forces were in Lebanon "for the sole purpose of helping the government of Lebanon, *at its request*, in its efforts to stabilize the situation brought on by threats from the outside (…)."[41] The subsequent Security Council debates focused mainly on whether or not the US intervention constituted a proper exercise of collective self-defence.[42] Nonetheless, some States apparently took a negative stance with regard to the 'protection of nationals' rationale before the General Assembly.[43] The Ethiopian representative, for example, accepted that the US intervention was validly requested by the Lebanese government, but added that:

> *"Ethiopia strongly opposes any introduction or maintenance of troops by one territory within the territory of another country under the pretext of (…)* protection of lives of citizens *or any other excuses. This is a recognized means of exerting pressure by stronger Powers against smaller ones for extortion advantages. Therefore, it must never be permitted."*[44]

A more significant precedent concerns the Belgian intervention following Congolese independence in 1960. *In casu*, mutinying Congolese troops committed atrocities on Belgian residents and other European nationals. In response, Belgian paratroopers entered the country to protect and evacuate the threatened foreigners. Foreign Minister Wigny declared that Belgium "had a right to intervene when it was a question of protecting our compatriots, our women, against such excesses."[45] He explained that the operation was strictly proportionate and that troops would be withdrawn as soon as the UN effectively ensured the safety of all foreigners.[46] France, Italy and the UK expressed sympathy for what the French representative labeled 'an intervention on humanitarian grounds'.[47] The Argentinian representative declared that: "[T]he protection of the life and honour of individuals is a sacred duty to which all other considerations must yield. We cannot reproach the Belgian

[38] *E.g.*, I. Brownlie, *op. cit.*, supra n. 6, at 297.
[39] T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 98.
[40] See *Ibid.*, at 42-47.
[41] (1958) *U.N.Y.B.*, at 38.
[42] See *Ibid.*, at 38-40.
[43] UN Doc. A/PV.738, at § 116 (India); UN Doc. A/PV.739, at § 76 (Albania); UN Doc. A/PV.740, at § 84 (Poland).
[44] UN Doc. A/PV.742, at § 75.
[45] UN Doc. S/PV.877, at 18.
[46] *Ibid.*, at 29-30 (esp. § 142); UN Doc. S/PV.879, at § 149.
[47] UN Doc. S/PV.873, at 22-28 (esp. §§ 121 (Italy); 130 (United Kingdom); 144 (France)). Also: UN Doc. S/PV.879, at §§ 10-12 (Italy), 26 (UK), 31 ((Republic of) China), 52-60 (France).

government for having assumed this duty when Belgian nationals were in danger. Any other State would have done the same."[48] On the other hand, the Soviet Union and several other States, including Tunisia and Poland, condemned the intervention as an outright 'aggression'.[49] According to these States, the protection of nationals was a mere pretext to mask an illegal intervention aimed at influencing Congolese domestic affairs. Ultimately, the Security Council adopted a number of resolutions which called upon Belgium to withdraw its troops and which requested that all States refrain from actions that might undermine Congo's territorial integrity and political independence.[50]

Four years later, Belgium and the United States launched another intervention in Congo, when rebel forces fighting the Tshombe government seized control of Stanleyville and Paulis.[51] Foreign residents were not allowed to leave the areas, and were in fact held hostage. In a few weeks time, 35 were killed, including 19 Belgians and 2 Americans.[52] Against this backdrop, the two countries initiated a large-scale evacuation operation, which was explicitly authorized by the Congolese government. Belgium and the United States both justified their actions on a twofold basis, *i.e.*, on the one hand, the consent of the legitimate Congolese authorities, and, on the other hand, the responsibility to protect their nationals abroad.[53]

A number of States, including the UK, France, Bolivia, Nigeria, Brazil, and (the Republic of) China expressed cautious support for the operation, accepting that the intervention aimed solely at saving lives and/or recognizing that consent had been given by the Congolese government.[54] However, despite the relatively limited nature of the operation, the Soviet Union, Yugoslavia and twenty-one Afro-Asian States accused Belgium and the US of 'premeditated aggression', in flagrant violation of the UN Charter.[55] Many States argued that the Tshombe government was not the 'legal' government of Congo, but a mere puppet regime imposed by force. The so-called 'rescue operation' was again considered a pretext for intervening in Congolese politics. In addition, numerous delegations criticized the racist nature of the mission, which had only aimed at saving white hostages, as well the lack of respect for ongoing mediation efforts by the Organization for African Unity.[56] In the end, the

[48] Quoted in N. Ronzitti, *op. cit.*, supra n. 8, at 32.
[49] (1960) *U.N.Y.B.*, at 63 *et seq.*
[50] SC Res. 143 (1960) of 13 July 1960; SC Res. 145 (1960) of 22 July 1960.
[51] For an analysis of the legality of the intervention, see: A. Gerard, *loc. cit.,* supra n. 12.
[52] See T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 50-51.
[53] UN Doc. S/6062; UN Doc. S/6063; S/PV.1174, at 13; A. Gerard, *loc. cit.,* supra n. 12, at 243-245.
Remark: While Belgium did not make explicit any distinct legal basis of the 'protection of nationals' doctrine, Senator Rolin, a renowned international lawyer, couched his support for the intervention in a broad interpretation of the right of self-defence. Quote in: A. Gerard, *loc. cit.,* supra n. 12, at 254.
[54] UN Doc. S/PV.1175, at 4 (UK); UN Doc. S/PV.1176, at 3 (Nigeria), 15 (France); UN Doc. S/PV.1177, at 19 (Brazil), 26 (China); UN Doc. S/PV.1183, at 10 (Norway); at 14 (Bolivia).
[55] (1964) *U.N.Y.B.*, at 95 *et seq.*.
[56] See T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 53-57; A. Gerard, *loc. cit.,* supra n. 12, at 249-251, 258-259, 261.

Council, '[deplored] the recent events in [Congo]', and [requested] all States to refrain or desist from intervening in its domestic affairs.[57]

Leaving aside the mixed international reactions, Belgium's invocation of the 'protection of nationals' doctrine (once as a principal and once as a supplementary justification) would seem to indicate that it regarded such forcible interventions as lawful. Nonetheless, when, upon the request of the Zairian authorities, France and Belgium in 1978 launched a comparable evacuation operation in the Katanga province, Belgium apparently regarded the territorial State's authorization as a legal prerequisite.[58] Indeed, speaking before the Belgian Parliament, Prime Minister Tindemans posed the following rhetorical question:

> *"Must one add that Zaire is a sovereign State where Belgium cannot simply intervene and that, consequently, an authorization of the Zairian authorities was required to conduct a rescue operation."*[59] (author's translation)

The US interventions in the Dominican Republic (1965), Grenada (1983) and Panama (1989)

The latter statement casts doubt upon the consistency of Belgium's practice. The United States, on the other hand, has relied on the 'protection of nationals' doctrine on several occasions after the Stanleyville Operation. The legal significance of the cases concerned nonetheless varies strongly. In 1965, when fighting between rival factions in the Dominican Republic plunged the country into anarchy, the US sent in some 1.700 troops. According to a statement submitted to the Security Council, "[t]he [US] Government have been informed by military authorities (…) that American lives are in danger. These authorities are no longer able to guarantee their safety and have reported that the assistance of military personnel is now needed (…)."[60] In the absence of governmental authority, American troops had gone ashore "to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back [to the US]." In the course of the debates, the US added a supplementary justification, namely the need "to give the inter-American system [*i.e.*, the OAS] a chance to deal with the situation."[61] After the adoption of an OAS resolution creating an Inter-American force, the US expanded its military presence on the island to around 22.000 forces and put increasing emphasis on the OAS legal umbrella as justification for its continued presence.[62] Ultimately, the precedential value of the US plea is difficult to evaluate. First, the 'protection of nationals' rationale was not used as an exclusive legal argument, but was combined with the idea of 'regional peacekeeping' under the auspices of the OAS, which gradually became the principal justification. The appraisal of third States was mixed. A

[57] SC Res. 199 (1964) of 30 December 1964.
[58] See T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 101.
[59] Quoted in (1980) 15 *Revue belge de Droit international*, at 632.
[60] UN Doc. S/6310.
[61] See: UN Doc. S/PV.1196, at §§ 67-71 (remark: while the US did not claim that this was a 'consensual' intervention, it did mention in the margin that there had been "a request for assistance from those Dominican authorities still struggling to maintain order." See: UN Doc. S/PV.1200, at §§ 16-17; UN Doc. S/PV.1212, at § 149.
[62] T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 62.

number of States expressed understanding for the operation, with the UK and the Netherlands conveying their gratitude for the saving of their nationals.[63] France in principle accepted that States concerned with the safety of their nationals abroad could organize their evacuation, but insisted that such operations should be limited in their objective, duration and scope.[64] Although it refrained from condemning the operation, France implied that – taking into account the 'considerable number of US troops' – the operation exceeded these parameters and constituted a "genuine armed intervention the necessity of which is not apparent." Several Latin American and other States explicitly denounced the operation as a violation of the UN Charter.[65] The Soviet Union and Cuba in particular spared no effort to clarify that the 'protection of nationals' was nothing but a pretext for intervention.[66] As both countries pointed out, the duration and size of the operation clearly exceeded what was needed for a quick evacuation mission. Moreover, despite US claims that it was not taking sides in the Dominican conflict,[67] many indications pointed to the contrary. President Johnson partially justified the expansion of the US force by asserting that the Dominican revolution had been "seized and placed in the hands of a band of Communist conspirators (…)."[68] The US moreover openly declared before the Security Council that it could not permit "the establishment of another communist government in the western hemisphere."[69] Most scholars[70] agreed with Senator Fullbright that the "danger to American lives was more a pretext than a reason for the massive US intervention."[71] The reverse side is that it is difficult to determine whether States denouncing the action were opposed to 'protection of nationals' *per se* or saw the intervention as an abusive application thereof (only Cuba explicitly rejected the doctrine as such).[72]

For broadly analogous reasons, it is difficult to deduce convincing evidence from the US interventions in Grenada in 1983 and in Panama in 1989. First, in both cases, multiple justifications were put forward. In the former, the US held, on the one hand, that those responsible for the military coup "might decide at any moment to hold hostage the 1.000 American citizens on [the] island",[73] and, on the other hand, contended that the presence of the 8.000 US troops had been requested by the Organization of Eastern Caribbean States

[63] UN Doc. S/PV.1198, at § 57 (United Kingdom); UN Doc. S/PV.1202, at § 19 (Republic of China); UN Doc. S/PV.1203, at § 4 (Netherlands).
[64] UN Doc. S/PV.1198, at §§ 111-112.
[65] See: UN Doc. S/PV.1196, at §§ 47-50 (Soviet Union, referring to denunciations of the operation by Peru, Venezuela, Chile and Colombia); UN Doc. S/PV.1198, at § 8 (Uruguay); UN Doc. S/PV.1202, at § 7 (Malaysia, but very cautious); UN Doc. S/PV.1214, at § 116 (Jordan).
[66] See *e.g.*, UN Doc. S/PV.1196, at §§ 15 *et seq.*, 191-193 (Soviet Union), 100 *et seq.* (Cuba); UN Doc. S/PV.1203, at § 51 (Cuba); UN Doc. S/PV.1212, at §§ 94 *et seq.* (Soviet Union). Remark: a Soviet draft resolution which condemned the intervention was defeated by a majority of Council members.
[67] See *e.g.*, UN Doc. S/PV.1196, at § 89; UN Doc. S/PV.1200, at § 53; UN Doc. S/PV.1212, at § 144.
[68] Quoted in T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 62.
[69] UN Doc. S/PV.1196, at § 81.
[70] *E.g.*, T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 63; V.P. Nanda, 'The United States' action in the 1965 Dominican crisis: impact on world order – Part I', (1966) 43 *Denver L.J.*, pp. 439-479, at 464-472; W. Friedman, 'United States policy and the crisis of international law', (1965) 59 *A.J.I.L.*, pp. 857-871, at 867.
[71] Quoted in T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 63.
[72] UN Doc. S/PV.1200, at §§ 79-83.
[73] UN Doc. S/PV.2491, at §§ 66-68.

(OECS).[74] In addition, the US emphasized that the OECS action had actually been invited by the Governor-General of Grenada, "the sole remaining symbol of governmental authority on the island."[75] Following General Noriega's refusal to accept his electoral defeat in 1989, the United States explicitly relied on Article 51 UN Charter to justify its intervention in Panama. In essence, the actions were presented as an exercise of self-defence designed to protect the lives of around 35.000 American nationals and to defend the integrity of the Panama Canal Treaties.[76] Several other arguments were raised, including the need to tackle drug-trafficking, as well as the fact that the actions were approved by the new democratically elected leaders of Panama.[77]

A second binding factor is the incompatibility of both interventions with the basic tenets of 'protection of nationals'. As for Grenada, dozens of UN Member States pointed out that: the Revolutionary Military Council of Grenada had assured that American citizens would not be harmed and were free to leave the country; that the Vice Chancellor of the Medical School where most US nationals were based had stressed that they were not in danger, and; that there was not a single press report that suggested otherwise.[78] In relation to Panama, there had been actual violence against US nationals, including the killing of an unarmed American serviceman en the mistreating of another.[79] The result was that *in casu* the 'protection of nationals' argument met with greater understanding.[80] Still, as in 1983, the large-scale and prolonged intervention undoubtedly exceeded the objective of protecting US citizens.[81] Consequently, both operations were generally condemned by the international community.[82] While scholars generally agree that the interventions went beyond what is envisaged under the 'protection of nationals' doctrine,[83] the problem remains that an analysis of the Security

[74] *Ibid.*, at §§ 69-75. Also: UN Doc. S/16076. Remark: at its height the intervention involved some 8.000 US troops as well as 300 troops from OECS Member States ((1983) *U.N.Y.B.*, at 215).
[75] UN Doc. S/PV.2491, at § 74.
[76] UN Doc. S/PV.2899, at 31-36.
[77] *Ibid.*
[78] *E.g.*, UN Doc. S/PV.2487, at §§ 74-75 (Guyana); 90-93 (Grenada); 118 (Cuba), 146 (Libya), 160 (Soviet Union); UN Doc. S/PV.2489, at §§ 36 (Poland), 170 (Laos); UN Doc. S/PV.2491, at §§ 38 (Zimbabwe), 256 (Afghanistan), 340 (Mongolia), 356 (Mozambique).
[79] UN Doc. S/PV.2902, at 13.
[80] Cf. Compare for instance the reaction of France vis-à-vis Grenada (UN Doc. S/PV.2489, at § 146) and Panama (UN Doc. S/PV.2899, at 22-23). Compare also the UK reaction vis-à-vis Grenada (UN Doc. S/PV.2491, at §§ 205-206) and Panama (UN Doc. S/PV.2899, at 26-27).
[81] As a result of the intervention in Panama, for example, several hundred of Panamanians were killed, three thousand civilians were wounded, and approximately 18.000 lost their homes (R. Wedgwood, 'The use of armed force in international affairs: self-defense and the Panama invasion', (1991) 29 *Columbia J. of Transnat'l L.*, pp. 609-628, at 621-622). See *e.g.*, UN Doc. S/PV.2900, at 14-15 (Finland), 22-23 (Malaysia).
[82] For Grenada, see UN Doc. S/PV.2487, UN Doc. S/PV.2489; UN Doc. S/PV.2491. A draft Security Council resolution, which 'deplored' the intervention as a "flagrant violation of international law" gained 11 votes, but was vetoed by the United States. A comparable resolution was adopted by the UN General Assembly with 108 votes against 9, and 27 abstentions. GA Res. 38/7 of 31 October 1983.
For Panama, see: UN Doc. S/PV.2899, UN Doc. S/PV.2900 and UN Doc. S/PV.2902. A draft Council resolution 'deploring' the intervention as a "flagrant violation of international law" gained 10 votes, but was vetoed by the US, the UK and France. A largely identical resolution was adopted by the UN General Assembly with 75 votes against 20, and 40 abstentions. GA Res. 44/240 of 29 December 1989.
[83] See *e.g.*, on Grenada: L. Doswald-Beck, *loc. cit.*, supra n. 12, at 362, 373-374; C. Joyner, 'Reflections on the lawfulness of invasion', (1984) 78 *A.J.I.L.*, pp. 131-144, at 134-135; D.F. Vagts, 'International law under time pressue: grading the Grenada take-home examination', (1984) 78 *A.J.I.L.*, pp. 169-172, at 170; F.A. Boyle, A. Chayes *et al.*; 'International lawlessness in Grenada', (1984) 78 *A.J.I.L.*, pp. 172-175, at 172; V.P. Nanda, 'The

Council debates yields little in terms of explicit *opinio iuris* relating to the lawfulness of 'protection of nationals' as such.

More limited US operations: Mayaguez (1975), Tehran (1980), Libya (1986) and Sudan/Afghanistan (1998)

The 'protection of nationals' rationale also surfaces in relation to a number of more limited US incursions, such as the 1975 *Mayaguez* incident, the 1980 *Tehran* hostage situation, the 1986 air strikes against several Libyan targets, and the 1998 air strikes in Sudan and Afghanistan. In each case, the US invoked Article 51 of the UN Charter to 'protect American lives'.[84] The incidents reaffirm the US' broad interpretation of the 'armed attack' concept and its support for the 'protection of nationals' doctrine. At the same time, several factors mitigate their potential impact. A first element is the different nature of the operations. The two former incidents concerned rescue/recovery operations: the first secured the recovery of the *Mayaguez* – a US-flagged vessel which, according to the US, had been unlawfully seized by Cambodian authorities in the high seas – and the liberation of its crew; the second failed to free the hostages in the US embassy in Tehran. The two other operations, on the other hand, did not aim at the rescuing and/or evacuating of nationals abroad, but at the preventing/deterring of future terrorist attacks following the bombing of a discotheque in West Berlin frequented by US servicemen (1986) and the attacks against the US embassies of Nairobi and Dar Es Salaam (1998) respectively. It must also be emphasized that we are not dealing with attacks against US nationals *simpliciter*. Rather, the incidents involved alleged attacks against US embassies, US servicemen and a US-flagged vessel, *i.e.* units that could otherwise be qualified as external manifestations of the State for purposes of Article 51 UN Charter – implying that an attack against these targets may under certain conditions be equated to an 'armed attack' against the State –, without need for recourse to the controversial protection of nationals doctrine.[85] Furthermore, the exchange of views following

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United States armed intervention in Grenada – impact on world order', (1984) 14 *California Western I.L.J.*, pp. 395-424, at 410-411.
See *e.g.*, on Panama: V.P. Nanda, 'The validity of United States intervention in Panama under international law', (1990) 84 *A.J.I.L.*, pp. 494-503, at 497; T.J. Farer, 'Panama: beyond the Charter paradigm', (1990) 84 *A.J.I.L.*, pp. 503-515, at 506, 513; L. Henkin, 'The invasion of Panama under international law: a gross violation', (1991) 29 *Columbia J. of Transnat'l L.*, pp. 293-317, at 296-297, 308; J. Quigley, *loc. cit.*, supra n. 17, at 294-297.

[84] See UN Doc. S/11689; UN Doc. S/13908; UN Doc. S/17990; UN Doc. S/1998/780.

[85] *E.g.*, C. Greenwood, *loc. cit.*, supra n. 12, at 941-942 (re. the US strikes against Libya in 1986).
(1) As for attacks against military units and military installations abroad, this position is uncontroversial. Support for the view that such attacks may amount to 'armed attacks' can be found in Article 3(d) of the Definition of Aggression or Article 6 of the North Atlantic Treaty (Washington, 4 April 1949, 34 *U.N.T.S.* 243). Also: UN Doc. S/PV.1140, at §§ 33-74 (US), 78-81 (UK), 83 (Republic of China); (1981) *U.N.Y.B.*, at 360-361 (re. the Gulf of Sirte incident); UN Doc. S/14632 (US). Authors supporting this view: *e.g.*, A. Randelzhofer, *loc. cit.*, supra n. 17, at 797; I. Brownlie, *op. cit.*, supra n. 6, at 305; Y. Dinstein, *op. cit.*, supra n. 20, at 200; T. Gazzini, *op. cit.*, supra n. 1, at 136; P. Malanczuk and M. Akehurst, *Akehurst's modern introduction to international law* (L.ondon: Routledge) (1997; 7th ed.), at 315; M. Hakenberg, *Die Iran-Sanktionen der USA während der Teheraner Geiselaffäre aus völkerrechtlicher Sicht* (Frankfurt am Main: Verlag Peter Lang) (1988), at 226; C. Westerdiek, 'Humanitäre Intervention und Maßnahmen zum Schutz eigener Staasangehöriger im Ausland', (1983) 21 *Archiv des Völkerrechts*, pp. 383-401, at 396; O. Corten, *op. cit.*, supra n. 2, at 614, footnote 21.
(2) As for attacks against embassies, a number of scholars reject that these can be regarded as 'armed attacks', on the grounds that they lack the quasi-territorial nexus to the State that military units abroad are endowed with

the various interventions (again) sheds little light on State's positions regarding the inclusion of attacks against nationals abroad in the scope of Article 51 UN Charter. In relation to the 1986 air strikes against Libya, third State reactions mainly focused on the lack of evidence of Libyan involvement in attacks against US targets abroad, on the punitive character of the expedition, as well as its disproportionate nature.[86] For present purposes, the only explicit fragment of *opinio iuris* concerns the claim of Ghana that "the fact that a national or nationals of [a] State became victims of the incidents could (…) not be sufficient to trigger the use of force in the name of self-defence."[87]

The Tehran rescue operation, the 1998 air strikes in Sudan and Afghanistan, and the *Mayaguez* incident were not discussed in the Security Council. A number of States labeled the forcible recovery of the *Mayaguez* as an armed aggression since the vessel had been seized in Cambodia's territorial waters and because Cambodia had already begun

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(*e.g.*, M. Hakenberg, *op. cit.*, supra n. 85, at 226; A. Randelzhofer, *loc. cit.*, supra n. 17, at 798; T. Schweisfurth, *loc. cit.*, supra n. 15, at 164). On the other hand, it could be argued that the reference to 'marine and air fleets' in Article 3(d) of the Definition of Aggression indicates that a territorial nexus is not a *sine qua non*. Moreover, the ICJ in the *Tehran* case repeatedly used the phrase 'armed attack' to label the seizure by Islamic militants of the US embassy in Tehran and the hostage-taking of its staff (ICJ, *Case concerning United States diplomatic and consular staff in Tehran (United States v. Islamic Republic of Iran)*, Judgement of 24 May 1980, at §§ 57, 64, 91). It could also be noted that the US' qualification of the terrorist attacks against its embassies in Nairobi and Dar Es Salaam in 1998 as 'armed attacks' (UN Doc. S/1998/780) was not as such rebutted by any other State (see (1980) *U.N.Y.B.*, at 185, 1219-1220). In light hereof, it seems plausible that at least large-scale attacks against embassies can be considered as 'armed attacks' in the sense of Article 51 UN Charter. In similar vein: *e.g.,* O. Schachter, 'International law in the hostage crisis: implications for future cases', in W. Christopher *et al.*(eds.), *American hostages in Iran: the conduct of a crisis* (New Haven: Yale University Press) (1985), pp. 325-373, at 328; Y. Dinstein, *op. cit.*, supra n. 20, at 197-198; T. Gazzini, *op. cit.*, supra n. 1, at 137; I. Seidl-Hohenveldern, *Völkerrecht* (Köln: Carl Heymans Verlag) (1984; 5th ed.), at § 717; T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 73. See also: G. Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen aan de Rijn: Sijthoff) (1979), at 105.

(3) As for attacks against civilian aircraft and merchant vessels, several authors contend that these can only qualify as 'armed attacks' in the sense of Article 51 UN Charter in case of a 'massive attack against a State's entire merchant fleet' (*e.g.*, A. Constantinou, *The right of self-defence under customary international law and Article 51 of the UN Charter* (Brussels: Bruylant) (2000), at 82. Also, more moderately: Y. Dinstein, *op. cit.*, supra n. 20, at 200). This approach is based on the reference to 'marine and air *fleets*' in Article 3(d) Definition of Aggression. However, several elements suggest that such an approach is overly restrictive: the *travaux* of Article 3(d) indicate that the phrase 'fleets' was inserted to clarify that the provision did not cover law enforcement measures by coastal States; Article 6 NATO Treaty simply refers to 'vessels or aircraft'; during the 1980-1988 Iran-Iraq War, several western flag States sent warships to the Persian Gulf to protect their merchant vessels from attack. Some *dicta* in the *Oil Platforms* case also seem to imply that deliberate unlawful attacks against merchant vessels may sometimes be equated to an 'armed attack' against the flag State (ICJ, *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, (2003) *I.C.J. Rep.*, pp. 161-219, at §§ 64, 72). In light hereof, the present author believes that – subject to the necessity and proportionality criteria – Article 51 UN Charter permits on-the-spot defensive measures by the flag State to protect merchant vessels and civilian aircraft from unlawful attacks. In many cases, the mere interposition of warships, without actual recourse to force, will probably suffice. Authors rejecting the restrictive approach as incompatible with customary practice: C. Greenwood, 'Comments', in I.F. Dekker and H.H.G. Post (eds.), *The Gulf War of 1980-1988: the Iran-Iraq War in legal perspective* (Dordrecht: Martinus Nijhoff) (1992), pp. 212-216, at 213-214. Also: D. Raab, '"Armed attack" after the Oil Platforms case', (2004) 17 *Leiden J.I.L.*, pp. 719-735, at 726-727; N. Ronzitti, *op. cit.*, supra n. 8, at 148; A.V. Lowe, 'Self-defence at sea', in W.E. Butler (ed.), *op. cit.*, supra n. 17, pp. 185-202, at 188; C. Gray, 'The British position with regard to the Gulf conflict (Iran-Iraq): Part 2', (1991) 40 *I.C.L.Q.*, pp. 464-473, at 469; I. Brownlie, *op. cit.*, supra n. *op. cit.*, supra n. 6, at 305.

[86] Negative reactions: UN Doc. S/PV.2674-2683. *E.g.*, UN Doc. S/PV.2675, at 18 (Syria), 24-25 (Oman); UN Doc. S/PV.2677, at 6-8 (Qatar), 12-13 (Madagascar); UN Doc. S/PV.2678, at 31 (Sudan); UN Doc. S/PV.2680, at 31 *et seq.* (Ghana); UN Doc. S/PV.2682, at 32 (Denmark). However, stressing that there existed convincing evidence of Libyan involvement in the alleged attacks: UN Doc. S/PV.2676, at 18 (Australia); UN Doc. S/PV.2679, at 19-20 (UK). Remark: a draft Security Council resolution condemning the US operation obtained nine votes in favour, but was vetoed by France, the UK and the US. A comparable resolution was subsequently adopted by the UN General Assembly by 79 votes against 28, with 33 abstentions (GA Res. 41/38 of 20 November 1986).

[87] UN Doc. S/PV.2680, at 32.

preparations for the release of the vessel and its crew.[88] As for the 1998 strikes in Sudan and Afghanistan, international reaction was generally muted,[89] and criticism focused on the lack of involvement of Afghanistan and Sudan in the embassy bombings, as well as on the targeting of a pharmaceutical plant in Sudan.[90] Finally, the Tehran rescue attempt met with mixed reactions. Many European States, as well as Australia, Israel, Japan, Canada and Egypt expressed understanding and/or approval.[91] On the other hand, the Soviet Union, China, Saudi Arabia, Pakistan, India and Cuba labeled it as unwarranted military adventurism and/or as a violation of international law.[92] The ICJ in the *Tehran* case refrained from explicitly ruling on the legality of the operation. It instead confined itself to expressing understanding for the US preoccupation with the well-being of its nationals, while stressing that the conducting of such an operation at a time when the Court was preparing its judgement, tended to undermine respect for the judicial process.[93]

Entebbe (1976) and Larnaca (1978)

A particularly interesting incident, which scholars have often identified as the textbook example of the doctrine under discussion,[94] concerns the Israeli Entebbe raid of 1976. *In casu*, terrorists had hijacked a French aircraft and diverted it to the Ugandan airport of Entebbe, where non-Israeli passengers were released. It was threatened that the remaining hostages would be killed if Israel failed to comply with the hijackers' demands. Without authorization by Uganda, an Israeli aerial commando stormed the plane, resulting in the killing of the hijackers as well as a small number of hostages. Several Ugandan soldiers were also wounded and about ten Ugandan aircraft were destroyed.[95] Before the Security Council, Israel justified the operation as an application of "the right of a State to take military action to

[88] See N. Ronzitti, *op. cit.*, supra n. 8, at 36 (in particular the statements of China and Cambodia). Also: UN Doc. S/PV.1941, at § 39 (Somalia). Remark: Paust takes the view that the operation did not in any event meet the criteria of the 'protection of nationals' doctrine, since "there was never any showing that the lives of the crew were in danger," and since "[th]e bombing of the Cambodian mainland an the landing of Marines on a Cambodian island were completely disproportionate responses to a dispute concerning the seizure of a merchant vessel and the detention of her crew." Paust moreover finds that the US failed to exhaust peaceful means, since negotiations on the crew's release were ongoing. See: J.J. Paust, 'The seizure and recovery of the *Mayaguez*', (1975-76) 85 *Y.L.J.*, pp. 774-806, at 800-802.

[89] See: J. Lobel, 'The use of force to respond to terrorist attacks: the bombing of Sudan and Afghanistan', (1999) 24 *Y.J.I.L.*, pp. 537-557; O. Corten, *op. cit.*, supra n. 2, at 692; R. Wedgwood, 'Responding to terrorism: the strikes against bin Laden', (1999) 24 *Y.J.I.L.*, pp. 559-576, at 564; T. Franck, *op. cit.*, supra n. 21, at 94-96.

[90] See *e.g.*, (1980) *U.N.Y.B.*, at 185, 1219-1220. Also: UN Doc. S/1998/786.

[91] See N. Ronzitti, *op. cit.*, supra n. 8, at 44-47.

[92] See *Ibid.*, at 47-48.

[93] ICJ, *Tehran case*, *loc. cit.*, supra n. 85, at §§ 93-94. See on this: T.L. Stein, 'Contempt, crisis, and the Court: the World Court and the hostage rescue attempt', (1982) 76 *A.J.I.L.*, pp. 499-531, at 500-501. Remark: two Judges nonetheless took the view that the occupation of the US embassy did not constitute an 'armed attack': Dissenting Opinion of Judge Morozov, at 57; Dissenting Opinion of Judge Tarazi, at 64-65. Remark: dependent on their diverging views vis-à-vis the protection of nationals doctrine, scholars have adopted different approaches regarding the legality of the rescue attempt. Different opinions have moreover been expressed as to whether the lives of the US hostages were in 'imminent danger'. See the authors cited in: T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 67-73. Also: O. Schachter, *loc. cit.*, supra n. 12, at 1631; K.E. Eichensehr, *loc. cit.*, supra n. 3, at 470 *et seq.*

[94] *E.g.*, Y. Dinstein, *op. cit.*, supra n. 20, at 233; O. Schachter, *loc. cit.*, supra n. 12, at 1630. Also: D.J. Gordon, *loc. cit.*, supra n. 15, at 133; J.J. Paust, *loc. cit.*, supra n. 11, at 90; K.E. Eichensehr, *loc. cit.*, supra n. 3, at 478.

[95] Fatalities reportedly included three hostages, one Israeli commando, seven terrorists, and between twenty and thirty Ugandan soldiers. R.J. Zedalis, *loc. cit.*, supra n. 9, at 220.

protect its nationals in mortal danger."[96] This right was allegedly recognized "by all legal authorities in international law", and was regulated by the criteria of the *Caroline* case:

> *"What mattered to [Israel] (…) was the lives of the hostages, in danger of their very lives. No consideration other than this (…) motivated the government of Israel. Israel's rescue operation was not directed against Uganda (…). They were rescuing nationals from a band of terrorists and kidnappers who were being aided and abetted by the Ugandan authorities."*[97]

Israel's reasoning was accepted and copied by the United States, which argued that:

> *"there is a well established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. This right, flowing from the right of self-defence, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury."*[98]

In light of the 'unusual circumstances of this specific case', including the reproachable attitude of the Ugandan authorities, the US concluded that "the requirements of this right (…) were clearly met."[99]

Despite the staunch support of the US and despite the fact that at least two of Waldock's criteria – namely the imminent threat to the lives of nationals and the limited nature of the operation – would *prima facie* seem to be complied with, it is striking that the US was the only country to explicitly support Israel's legal case. A number of countries adopted an ambiguous position. Sweden for instance, "while unable to reconcile the Israeli action with the strict rules of the Charter, [did] not find it possible to join in a condemnation."[100] Japan found that the actions violated the sovereignty of Uganda, but 'reserved' its opinion as to whether the situation met the conditions required for the exercise of self-defence.[101] France noted that "if there was a violation of the sovereignty of Uganda, it was not in order to infringe the territorial integrity or the independence of that country but exclusively to save endangered human lives, and this in an extremely particular and special situation."[102] Germany and the UK simply expressed relief at the successful ending of the rescue attempt.[103] A broad majority of States denounced the operation as a violation of international law.[104] Many were convinced that Uganda had in fact played a positive role in negotiating with the hijackers (*inter alia* by securing the release of a number of passengers).[105] This may

[96] See UN Doc. S/PV.1939, at §§ 105-121.
[97] *Ibid.*, at § 121.
[98] UN Doc. S/PV.1941, at §§ 77-81.
[99] *Ibid.*
[100] UN Doc. S/PV.1940, at §§ 122-123.
[101] UN Doc. S/PV.1942, at §§ 57-58.
[102] UN Doc. S/PV.1943, at § 45.
[103] UN Doc. S/PV.190, at § 92 (UK); UN Doc. S/PV.1941, at §§ 51-54 (Federal Republic of Germany). Also: UN Doc. S/PV.1943, at § 174 (UK).
[104] See UN Doc. S/PV.1939-1943 (including China, the Soviet Union, Pakistan, India, Yugoslavia, Kenya, etc.).
[105] *E.g.*, UN Doc. S/PV.1939, at §§ 34 (Uganda), 44 (Mauritania), 170 (Qatar), 185 (France), 215 (Cameroon); UN Doc. S/PV.1940, at §§ 33-35 (Guinea), 57 (Mauritius); UN Doc. S/PV. 1941, at §§ 127-130 (Pakistan); UN Doc.

imply that those countries did not consider the third of Waldock's prerequisites – vis-à-vis the inability or unwillingness of the territorial State to protect foreign nationals – to be fulfilled. On the other hand, many of those condemning the raid relied on more principled arguments to do so. Thus, it was claimed that (1) Israel had not been the subject of an armed attack; (2) that terrorist kidnappings and hijackings, reprehensible as they were, had to be tackled through negotiations; (3) that operations such as the Entebbe raid irresponsibly jeopardized the lives of innocent passengers, and; (4) that 'protection of nationals' was nothing but an excuse of powerful States to engage in 'gunboat diplomacy'.[106] These statements suggest that many States reject the admissibility of forcible 'protection of nationals' abroad in response to terrorist kidnappings, hijackings and the like, irrespective of the precise factual circumstances. In this regard, it is worth noting the declaration submitted by Italy to the Security Council.[107] Italy recognized that States held different views in respect of the use of limited and localized force to protect endangered nationals in the territory of a State which proved unable to ensure their protection. Each view was supported "by the citation of prominent jurists or of the Charter of the United Nations." Given this lack of agreement, and given the configuration of the Council as an essentially political body, Italy wondered "if we could not agree at least on having it referred to the International Law Commission in order to lay the groundwork for the adoption of a universally accepted doctrine on the matter and avoid (…) a repetition of the differences which have emerged in this debate." As a result of the conflicting views of the Security Council members, no resolution was adopted.[108]

In 1978, two years after the Israeli operation, it became clear what could have gone wrong in Entebbe when a similar commando raid carried out by Egyptian forces at the Cypriotic airport of Nicosia turned into a complete disaster.[109] *In casu*, Palestinian terrorists had taken several hostages, including a number of Egyptian nationals. Fearing that the Cypriotic authorities would let the terrorists go in return for the release of the hostages, Egypt flew an aircraft carrying a 75-man commando unit to Nicosia. Cyprus was told that the plane carried officials which would participate in the hostage negotiations, and consequently authorized its landing. When Egyptian soldiers suddenly emerged from the plane and started firing, the Cypriot national guard intervened, killing several Egyptian commandos and taking others prisoners. During the fighting, the Cypriots arrested the terrorists while the hostages managed to escape.

S/PV.1943, at § 85 (Cuba). Remark: several countries also considered the wounding of Ugandan troops and the destruction of Ugandan aircraft as an aggravating factor: *e.g.*, UN Doc. S/PV.1939, at §§ 43 (Mauritania), 210 (Cameroon), 224 (China); UN Doc. S/PV.1940, at §§ 65 (Mauritius), 77 (Guyana); UN Doc. S/PV. 1941, at §§ 132 (Pakistan), 152 (Soviet Union).

[106] *E.g.*, UN Doc. S/PV.1939, at §§ 49 (Mauritania), 148 (Kenya), 225 (China); UN Doc. S/PV.1941, at §§ 67 (Yugoslavia), 102, 109 (Tanzania); UN Doc. S/PV. 1942, at §§ 27 (Panama), 30-31 (Panama), 39 (Romania), 145-146 (India); UN Doc. S/PV.1943, at § 87 (Cuba).

[107] UN Doc. S/PV.1943, at § 56.

[108] (1976) *U.N.Y.B.*, at 319-320.

[109] See: N. Ronzitti, *op. cit.*, supra n. 8, at 40-41; (1978) *Keesing's*, at 29305; 'Murder and Massacre on Cyprus', *Time Magazine*, 6 March 1978.

The incident at Larnaca airport resulted in a significant deterioration of diplomatic relations between the two countries. Cyprus described the Egyptian intervention as a violation of its sovereignty. Egypt, on the other hand, claimed to have acted lawfully, and demanded the repatriation of the Egyptian prisoners and the extradition of the two terrorists. While the characteristics of the incident are reminiscent of the Entebbe raid, it must be noted that Egypt did not invoke the 'protection of nationals' doctrine, but merely referred to its commitment 'to fight terrorism and to bring all those who used such methods to justice.'[110]

A new element in State practice?

Apart from the aforementioned cases, reference must briefly be made to a number of invocations/applications of the 'protection of nationals' doctrine which have not been reported to the Security Council, and which by and large escaped international scrutiny. A majority of these concern French military operations in various African countries, namely: the operations in Mauritania in 1977-79; in Chad in 1978, 1979 and 1990; in Gabon in 1990 and 2007; in Rwanda in 1990-1994; in the Central African Republic in 1996 and 2003; in Ivory Coast in 2002-2003; in Liberia in 2003, and; the operations conducted together with Belgium in (then) Zaire in 1978, 1991 and 1993.[111] On several occasions it appears that the 'protection of nationals' rationale was primarily used as a pretext to use force in support and at the request of the territorial State against rebel groups.[112] As for those interventions that were actually confined to the evacuation of French nationals, it appears that these too were in general approved or even requested by the territorial State.[113] The implication is that, even if France used language reminiscent of the 'protection of nationals' doctrine, these operations hardly constitute relevant State practice for present purposes. Of greater interest are the handful of evacuation operations which were launched throughout the 1990s and beyond, and which were carried out without apparent approval. Thus, when in 1990, President Habré was overthrown by Idriss Déby, France flew in troops to Chad to ensure the security of French citizens and to organize their repatriation.[114] No attempt was made to oppose Déby or to otherwise intervene in internal Chadian matters. In similar vein, following the overthrowal of

[110] See: N. Ronzitti, *op. cit.*, supra n. 8, at 41.
[111] See: T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 99-108; N. Ronzitti, *op. cit.*, supra n. 8, at 40. Also: (1990) *Keesing's Record of World Events*, at 37765-37766; (1990) 94 *R.G.D.I.P.*, at 1071; (1991) 95 *R.G.D.I.P.*, at 746; (1993) *Keesing's*, at 39305; (1994) *Keesing's*, at 39443-39944; (1996) *Keesing's*, at 41080-41081; (2002) *Keesing's*, at 44968, 45026, 45131; (2003) *Keesing's*, at 45276, 45230-45231, 45452; (2007) *Keesing's*, at 47793.
[112] This appears to have been the case *inter alia* with regard to the French operations against the Polisario Front in Mauritania in 1977-1979. Similarly, in 1978, France helped the Chadian army against the Frolinat rebels by means of air cover, without making an effort to evacuate French nationals. See: T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 100-102. Similar indications exist with regard to the interventions in the Central African Republic in 1996 ((1996) *Keesing's*, at 41081), and Ivory Coast in 2002 ((2002) *Keesing's*, at 44968, 45026, 45131).
[113] Examples are: the French-Belgian intervention in Zaire in 1978 and the French evacuation operation in Gabon in 1990. See: T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 101, 103-104.
[114] *Ibid.*, at 105. Se also on the French operation in Zaire in 1993, *Ibid.*, at 106-107.

President Patasse by General Bozzize in 2003, France deployed some 300 soldiers to the Central African Republic to evacuate foreign nationals.[115]

Apart from France, numerous other countries have organized the evacuation of nationals from countries plagued by violent unrest, or by internal or international conflicts. These operations have often assumed large-scale dimensions involving a considerable number of States.[116] While reliable information is often difficult to obtain, it appears that the evacuations have frequently met with the approval of the territorial State. On the other hand, some operations were probably carried out without such approval – sometimes due the complete breakdown of governmental authority. Where such actions have been confined to the actual protection and repatriation of nationals, without engaging in active combat on either side of the conflict, they have not been the subject of international criticism. Examples are the evacuation of US nationals during the civil war in Lebanon 1976[117] and in Liberia in 1990.[118] The latter operation was undertaken in response to threats by one rebel leader to arrest US nationals and other foreigners, as well as in response to the general deterioration of security in Liberia. As Lillich observes, there was a "near-complete absence of legal or other criticism" of the operation.[119] The evacuation operations by several western States in Albania in March 1997 – in particular the German operation Libelle – could possibly be cited as another example.[120] These operations were launched after the collapse of a fraudulent pyramid finance scheme caused large numbers of Albanians to lose their life savings, spurring an armed rebellion in large parts of the country and resulting in a complete breakdown of governmental authority. Furthermore, when Thai nationals were attacked by angry crowds in Cambodia following heightened political tension between the two countries

[115] (2003) *Keesing's*, at 45276 (Chad also flew in about 100 soldiers). See also: 'CAR coup strongly condemned', *BBC News*, 17 March 2003.

[116] Examples are the multinational evacuation operation in Rwanda in 1994 (see: T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 107), the evacuation of foreign nationals from Lebanon during the Israeli-Lebanese conflict in the summer of 2006 ('At a glance: Lebanon evacuations', *BBC News*, 30 January 2003), or the evacuation of foreign nationals from Indonesia in 1998 ('Foreign exodus under way', *BBC News*, 15 May 1998; 'Foreign countries evacuate citizens from Indonesia', *BBC News*, 15 May 1998). Also: 'Australia begins Solomons rescue', *BBC News*, 8 June 2000.

[117] On 28 June 1978, the US evacuated several nationals by means of a warship, seemingly without requesting the permission of the Lebanese authorities. As for a later evacuation operation on 27 July, the US government did not contact the Lebanese authorities, but rather the Palestinian organizations in control of the area where the evacuation took place. See: N. Ronzitti, *op. cit.*, supra n. 8, at 36-37.

[118] *In casu*, the US landed 255 Marines in Monrovia to evacuate US and other nationals desiring to leave the country without seeking or receiving permission from President Doe or either of the rival rebel faction leaders. T.C. Wingfield, *loc. cit.*, supra n. 12, at 460. Remark: Ronzitti also refers to the evacuation of British citizens from Zanzibar in 1964. See: N. Ronzitti, *op. cit.*, supra n. 8, at 32.

[119] See R.B. Lillich, *loc. cit.*, supra n. 12, especially at 208-213, 221-223.

[120] See (1997) *Keesing's*, at 41556-41558; J. Perlez, 'Albania Chief's Associates Flee; gunfire halts evacuation by U.S.', *New York Times*, 15 March 1997; F. Schorkopf, *Grundgesetz und überstaatlichkeit: Konflikt und Harmonie in den Auswärtigen Beziehungen Deutschlands* (Tübingen: Mohr Siebeck), at 129-133. See in particular: C. Kreß, 'Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völker- un verfassungsrechtlicher Sicht', (1997) 57 *Z.a.ö.R.V.*, pp. 329-362. It remains unclear whether or not there was a valid consent for the evacuation operations. Apparently, the Albanian President called upon European States to intervene 'to restore law and order' in his country. It is also suggested that the Italian evacuation operation was approved by the (remaining) Albanian authorities. The latter fact was raised during the debate within the German Bundestag regarding the legality of 'operation Libelle'. Kreß suggests that the operation was lawful on the basis of the implied consent of the Albanian government (which "was not given in an entirely unambiguous manner"), yet at the same time suggests that it adds to State practice in support of the exercise of self-defence for the protection of nationals abroad (at 337-339, 347-349, 361).

in 2003, Thailand sent military transport planes to Phnom Penh to evacuate several hundreds of Thai citizens. Even if the operation was carried out with the cooperation from the Cambodian army, the Thai Prime Minister had earlier threatened to send in troops to protect its citizens.[121]

IV. CUSTOMARY EVIDENCE IN ABSTRACTO

The Definition of Aggression and the 1979 Hostage Convention

Before attempting to draw conclusions, it is worth looking at the relevant General Assembly debates for abstract statements indicating States' approval or denunciation of the protection of nationals doctrine. At the outset, it must be noted that there has been no direct attempt to adopt 'a universally accepted doctrine' on the matter, as was suggested by the Italian representative during the Entebbe debate.[122] Still, the issue was raised on several occasions,[123] in particular during the *travaux* of the Definition of Aggression, the 1979 International Convention against the Taking of Hostages,[124] and, most recently, the ILC Draft Articles on Diplomatic Protection.[125] Each of these instruments will be addressed in turn.

As far as the negotiations on the Definition of Aggression are concerned, it must be noted that the Soviet Union in its 1950 draft provided both a list of acts of aggression, as well as a series of motives which could not be considered as a valid excuse for launching an attack. One such inadmissible 'excuse' concerned 'any danger which may threaten the life or property of aliens'.[126] The Belgian representative objected that "[this] meant that a State might, with impunity, threaten the life and property of another State (…)."[127] UK representative Fitzmaurice declared that:

> *"by mistreating foreigners on its own territory, a State committed an act of aggression against the country of which the foreigners were nationals: and in defending itself, the State concerned was exercising its right of self-defence."*[128]

Recourse to force was not always justified in such cases, Fitzmaurice admitted, yet, it could certainly not be ruled *ex ante*.[129] Greece and the Netherlands took the view that a State could lawfully use force to protect its nationals abroad from 'genocide' or 'massacres'.[130]

On the other hand, a number of non-Western countries concurred with the Soviet Union. Egypt, for instance, found that the ill-treatment of a country's nationals by a foreign State

[121] See: (2003) *Keesing's*, at 45196; 'Panicked Thais flee Cambodia', *BBC News*, 30 January 2003.
[122] UN Doc. S/PV.1943, at § 56.
[123] See *e.g.,* UN Doc. A/C.1/20/1396, at § 23 (Cuba); UN Doc. A/C.6/35/SR.50, at § 3 (Romania).
[124] International Convention against the Taking of Hostages, 17 December 1979, GA Res. 34/146 (adopted by consensus), 1316 *U.N.T.S.* 205.
[125] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, 2006, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.
[126] USSR Draft Resolution on the definition of aggression, 4 November 1950, UN Doc. A/C.1/608.
[127] UN Doc. A/C.6/6/SR.287, at § 43.
[128] UN Doc. A/C.6/6/SR.292, at § 38.
[129] *Ibid.*
[130] Quoted in: N. Ronzitti, *op. cit.*, supra n. 8, at 50.

should be dealt with by arbitration or by the ICJ, and could not, in any event, justify the use of force.[131] Iran also expressed its 'warm support' for the Soviet draft.[132] Referring to British threats of intervention during the Anglo-Iranian Oil Company dispute, Iran emphasized that Fitzmaurice's argument was "erroneous both in fact and law." In Iran's view, protection of nationals was a mere pretext to mask underlying political, strategic and economic considerations.[133]

After the establishment of the Fourth Special Committee, some countries again stressed that the use of force to protect nationals abroad was unlawful. Mexico affirmed that the 'excuse of self-defence' could not be invoked in the case of 'danger to life or property' of nationals abroad.[134] Cyprus observed that the invasion of foreign territory with the object of protecting nationals constituted aggression.[135] At the same time, contrary to the 1950 Soviet draft, none of the proposals pending before the Special Committee made express mention of the issue,[136] and most participants refrained from explicitly pronouncing on the matter. In other words, taking into account the diverging statements as well as the end-product of the debates,[137] it can be inferred that States simply agreed to disagree.

Shortly after the adoption of the Definition of Aggression, the controversy was again raised during the negotiations on an International Convention against the Taking of Hostages. Inspired by the Entebbe raid, Algeria and Tanzania submitted a draft amendment according to which "States shall not resort to the threat or use of force against the sovereignty, territorial integrity or independence of other States as a means of rescuing hostages."[138] Some States expressed sympathy for the proposal, while others considered it as irrelevant or superfluous.[139] Syria submitted a slightly different version, which provided that "[n]othing in this Convention can be construed as justifying in any manner the threat or use of force or any interference whatsoever against the sovereignty, independence or territorial integrity of peoples and States, under the pretext of rescuing or freeing hostages."[140] In the end, a much more neutral provision was used in the final text. Article 14 simply states that "[n]othing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations." In other words, by neither authorizing nor specifically prohibiting the recourse to force to secure the release of nationals that are taken hostage abroad, the Convention left the conundrum

[131] UN Doc. A/C.6/6/SR.293, at § 12.
[132] UN Doc. A/C.6/6/SR.293, at §§ 19-20.
[133] *Ibid.* See also UN Doc. A/C.6/7/SR.330, at § 50 (Iran).
[134] UN Doc. A/AC.134/SR.15, at 146. See also UN Doc. A/C.6/18/SR.806, at § 12 (Mexico).
[135] UN Doc. A/AC.134/SR.46, at 208, 211.
[136] N. Ronzitti, *op. cit.*, supra n. 8, at 50.
[137] Cf. *supra*, Section I.
[138] UN Doc. A/AC.188/L.7.
[139] *E.g.*, UN Doc. A/AC.188/SR.12, at §§ 14 (US), 15 (Federal Republic of Germany); UN Doc. A/AC.188/SR.13, at §§ 11 (Federal Republic of Germany), 12 (Sweden: regarding it as superfluous); UN Doc. A/AC.188/SR.15, at §§ 7 (US: regarding it as irrelevant), 14 (Mexico: expressing support).
[140] UN Doc. A/AC.188/L.11.

exactly where it was before its adoption.[141] No conclusive solution is therefore to be found in the Convention or its *travaux*.[142]

The ILC Draft Articles on Diplomatic Protection

The most recent and arguably most interesting exchange of views vis-à-vis forcible protection of nationals concerns the negotiation process within the ILC and within the General Assembly's Sixth Committee on the issue of diplomatic protection in 2000. The immediate cause was the proposal of Special Rapporteur John Dugard to include a specific provision on the matter in the ILC draft Articles.[143] Dugard disagreed with his predecessors García Amador and Bennouna, who had wished to explicitly assert that the use of force is prohibited as a means of diplomatic protection.[144] In his view, this approach took little account of contemporary practice, which allowed for the recourse to force in exceptional circumstances. Dugard framed this as an application of the right to self-defence.[145] He sympathized with the idea that Article 51 preserved pre-existing custom and drew attention to the "amount of State practice since 1945 in support of military intervention to protect nationals abroad in time of emergency and the failure of courts and political organs of the United Nations to condemn such action." While conceding that the doctrine had been greatly abused in the past, he did not regard this as a reason to ignore its existence. Rather, he considered it wiser to recognize the right, but to prescribe severe limits. Founding himself mainly on the parameters of the Entebbe precedent, Dugard identified several criteria which closely ressembled those listed decades earlier by Waldock. Draft Article 2 read as follows:

> "The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:
>
> (a) The protecting State has failed to secure the safety of its nationals by peaceful means;
>
> (b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;
>
> (c) The nationals of the protecting State are exposed to immediate danger to their persons;
>
> (d) The use of force is proportionate in the circumstances of the situation;

[141] *E.g.*, R. Rosenstock, 'International Convention against the taking of hostages: another international community step against terrorism', (1980) 9 *Denver J. of Int'l L. & Policy*, pp. 169-195, at 186; F.A. Boyle, 'International law in the time of crisis: from the Entebbe raid to the hostages convention', (1980) 75 *Northwestern Univ. L.Rev.*, pp. 768-856, at 846.
[142] *E.g.*, N. Ronzitti, *op. cit.*, supra n. 8, at 51-52.
[143] See Special Rapporteur John Dugard, 'First Report on Diplomatic Protection', 7 March 2000, UN Doc. A/CN.4/506, at §§ 46-60; statement by John Dugard during the 2617th meeting of the ILC, 9 May 2000, (2000-I) *Y.B.I.L.C.*, Part I, at 39-40.
[144] UN Doc. A/CN.4/506, at §§ 49-51.
[145] *Ibid.*, at §§ 57- 58.

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued."[146]

As Dugard probably expected,[147] support for his proposal was extremely scarce. Within the ILC, only two delegates accepted in principle that the use of force in the exercise of diplomatic protection could constitute a form of self-defence. According to Lukashuk, the concept of 'armed attack' in Article 51 UN Charter encompassed not only the State's territory, but also its population. He therefore agreed that the draft provision should reflect the practice of States, be it that 'protection of nationals should be restricted to extreme cases'.[148] Rosenstock believed that the Special Rapporteur "was correct both in law and in terms of the view that States would take if their nationals' lives were at stake."[149] All other delegates opposed draft Article 2.

Numerous delegates strongly denounced the proposal, stressing that the doctrine had often been used as a pretext for intervention in another State's domestic affairs, and asserting that the exception of Draft Article 2 constituted a dangerous expansion of the rules on the use of force, incompatible with the provisions of the UN Charter.[150] Several ILC Members called for an express provision prohibiting the use of force as a means of diplomatic protection.[151] According to Hafner, the "notion of self-defence could not be stretched to cover also the protection of [nationals]."[152] And in the words of Economides: "A small minority of writers maintained that force might be permissible to rescue nationals in danger. It was time to put an end to that theory."[153]

At the same time, not all Members necessarily agreed that 'it was time to put an end' once and for all to the protection of nationals doctrine. Several delegates rejected the draft Article while seemingly reserving their opinion on the doctrine *per se*.[154] Some thought it unwise from a policy perspective to explicitly 'legalize' the doctrine.[155] Others merely observed that the topic lay outside the Commission's mandate: firstly, diplomatic protection was essentially concerned with peaceful methods, and; secondly, the issue could not be considered in

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[146] *Ibid.*, at § 46.
[147] See (2000-I) *Y.B.I.L.C.*, Part I, at 39, § 23.
[148] 2618th meeting of the ILC, 10 May 2000, (2000-I) *Y.B.I.L.C.*, Part I, at 53, §§ 54-55.
[149] 2619th meeting of the ILC, 11 May 2000, (2000-I) *Y.B.I.L.C.*, Part I, at 57, § 8.
[150] 2617th-26220th meetings of the ILC, 9-12 May 2000, (2000-I) *Y.B.I.L.C.*, Part I, at 42 *et seq.*: *E.g., Ibid.*: Baena Soares (at 43, § 58); Economides (at 44, § 65); Illueca (at 47-48: on the abuse of the doctrine vis-à-vis the US intervention in Panama in 1989); Kabatsi (at 48; § 17); Pellet (at 50, § 25); Idris (at 51, § 32); Rodriguez Cedeno (at 53, § 61); Kateka (at 54, § 68); Hafner (at 55, 75); Galicki (at 56, § 3); He (at 58, § 23); Pambou-Tchivounda (at 59, § 33); Candioti (at 59, § 40).
[151] *E.g., Ibid.*: Economides (at 44, § 65); Candioti (at 59-60); Opertti Badan (at 64, § 2); Goco (at 65, § 11).
[152] *Ibid.*, at 55, § 75.
[153] *Ibid.*, at 60, § 53. See also the statement of Kabatsi, at 48, § 17.
[154] *E.g.*, According to Tomka, the "actions referred to by the Special Rapporteur might be justified or excused on the basis of other principles of international law, such as necessity, but like humanitarian intervention, those were controversial issues." (*Ibid.*, at 45, § 73). Chairman Kamto observed that "[w]hether the use of force to protect a national formed part of self-defence was a matter that could be debated at length" (at 61, § 62). Momtaz wondered "whether it would not be useful to pay a bit more attention to article 2 (…), and specifically to a situation where a State was unable to provide diplomatic protection, even though it wished to do so, for example, in what was unfortunately becoming an increasingly frequent situation where the structure of a State collapsed" (at 68, § 29).
[155] *Ibid.,* Kateka (at 54, § 68).

isolation from the whole question of the Charter rules on the use of force.[156] Distinguished members such as Brownlie, Pellet and Simma opposed the insertion of an express prohibition the use of force as a means of diplomatic protection, instead preferring to avoid the issue altogether.[157]

The debates within the UNGA Sixth Committee[158] – all the more relevant since they reflect States' *opinio iuris* – show a broadly similar picture. Only one State implicitly supported the legality of forcible protection of nationals: Italy stressed that Article 2 should state explicitly that the forcible protection of nationals abroad should be limited to highly exceptional circumstances in which their lives were in imminent danger.[159] Against this, numerous States in general terms rejected the legality of the use of force as a means of diplomatic protection. China, for instance, declared that "[i]n order to prevent power politics (…) the use or threat of force in exercising [the right to diplomatic protection] should be prohibited."[160] The Polish representative stated somewhat obscuringly that the "threat or use of force in the exercise of diplomatic protection could not be justified even if it could be characterized as self-defence."[161] Recalling 'past abuses', Slovenia denounced that Article 51 UN Charter could be used "as a legal basis for armed intervention to protect nationals."[162] Other countries that expressed themselves negatively on the protection of nationals and/or called for an express prohibition on the threat or use of force as an instrument of diplomatic protection were Mexico, Argentina, Venezuela, Iran, Iraq, Jordan, Libya, Colombia, Burkina Faso and Cuba.[163]

As with the ILC debate, however, many States refrained from taking sides. South Africa, Indonesia, France, the United Kingdom, Bosnia-Herzegovina, Cyprus, Japan and Portugal simply claimed that the issue fell outside the scope of the topic, which was concerned only with peaceful procedures of diplomatic protection.[164] According to Switzerland, "[i]t was open to question whether the use of force was legitimate even in the cases provided for in draft Article 2. However, the issue was irrelevant, since the threat or use of force was not an instrument of diplomatic protection (…)."[165] The Nordic countries noted that the question was highly controversial, yet they favoured the deletion of draft Article 2 because the issue was

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[156] *Ibid.,* Gaja (at 44, § 62); Goko (at 45, § 73); Addo (at 57, § 11); Simma (at 66-67, § 22). Also, combining this with other arguments: Brownlie (at 42, § 49); Idriss (at 51, § 32); Rodriguez Cedeno (at 54; § 61); Rosenstock (at 57, § 8); He (at 58, § 23); Pambou-Tchivounda (at 59, § 33).

[157] *Ibid.*, Pellet (at 60, § 49); Brownlie (at 60, § 51); Lukashuk (at 61, § 56); Simma (at 66, § 22).

[158] See UNGA, 55th Session, 6th Committee, 15th to 24th meetings, 24 October – 3 November 2000, UN Docs. A/C.6/55/SR.15-A/C.6/55/SR.24.

[159] UN Doc. A/C.6/55/SR.19, at § 15.

[160] UN Doc. A/C.6/55/SR.19, at § 30

[161] *Ibid.*, at § 56.

[162] UN Doc. A/C.6/SR.20, at § 16.

[163] *Ibid.*, at §§ 47 (Mexico), 52 (Argentina), 78 (Venezuela), 85 (Iran), 90-91 (Iraq); UN Doc. A/C.6/55/SR.21, at § 7 (Jordan), 55 (Libya); UN Doc. A/C.6/55/SR.23, at § 5 (Colombia, on behalf of the Rio Group); UN Doc. A/C.6/55/SR.24, at § 55 (Burkina Faso), 71 (Cuba). More ambiguously: UN Doc. A/C.6/55/SR.19, at §§ 5 (Spain), 38-39 (India); UN Doc. A/C.6/55/SR.23, at § 69 (Romania).

[164] UN Doc. A/C.6/SR.15, at § 68 (South Africa); UN Doc. A/C.6/55/SR.18, at §§ 39 (Indonesia), 108 (France); UN Doc. A/C.6/55/SR.19, at §§ 23 (UK), 51 (Bosnia-Herzegovina); UN Doc. A/C.6/55/SR.21, at § 2; UN Doc. A/C.6/55/SR.23, at § 80 (Japan); UN Doc. A/C.6/55/SR.24, at § 22 (Portugal).

[165] UN Doc. A/C.6/55/SR.21, at § 20.

not part of the topic of diplomatic protection, and because they considered the introduction of a rule permitting or justifying the use of force in that context 'could easily prove dangerous'.[166] Finally, the German representative, "[w]ithout ruling out any use of force in the context of diplomatic protection, [doubted] whether a discussion of the use of force was warranted in [this] context."[167]

In light of the foregoing, it was eventually agreed to abandon draft Article 2 and to stress instead that diplomatic protection concerns the invocation of State responsibility "through a diplomatic action or other means of peaceful settlement" (Article 1).[168] The negative attitude and/or suspicion of many States and ILC delegates is nonetheless reflected in the ILC Commentary to Article 1, which states (somewhat circularly) that "[t]he use of force, prohibited by Article 2, paragraph 4 of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection."[169]

V. EVALUATION *DE LEGE LATA*: RUNNING AROUND IN CIRCLES?

What may be concluded from our overview of (abstract and concrete) customary evidence? Those scholars who support the legality of forcible protection of nationals abroad in exceptional circumstances, primarily point to the considerable number of interventions which were (at least partially) justified by reference to this doctrine and which escaped condemnation by the Security Council. The cases mentioned indeed leave little doubt that the US, the UK, France and Israel regard military action as a permissible means to protect nationals abroad.[170] Between these countries there appears to be agreement that forcible intervention is governed by the three preconditions enumerated by Waldock: (1) nationals abroad are exposed to 'an imminent threat of injury'; (2) the local sovereign is unable or unwilling to guarantee protection, and; (3) the intervention is strictly confined to the object of protecting the nationals. On most occasions, the alleged right has been framed as an application of the right of self-defence, enshrined in Article 51 UN Charter,[171] even if it was sometimes argued that protection of nationals, because of its 'humanitarian' nature, does not violate the territorial State's integrity or political independence and therefore falls beyond the scope of Article 2(4) UN Charter.[172] The doctrine under discussion has also on occasion

[166] UN Doc. A/C.6/55/SR.19, at § 48.
[167] *Ibid.*, at § 64.
[168] See ILC, *loc. cit.*, supra n. 125.
[169] *Ibid.*, at § 8.
[170] Remark: reference to 'protection of nationals' can also be found in the US Commander's Handbook of the Law of Naval Operations', July 2007, NWP 1-14M, available at http://www.nwc.navy.mil/cnws/ild/documents/1-14m_(jul_2007)_(nwp).pdf, at 3-10.
[171] This argument was *inter alia* used by the UK in relation to the Suez crisis, by Israel vis-à-vis the Entebbe raid, and by the US vis-à-vis the intervention in Panama, the Entebbe raid, the Mayaguez incident, the Tehran rescue operation, the 1986 strikes against Libya and the 1998 strikes against Sudan and Afghanistan. See: *supra* footnotes 34, 76, 84, 97, 98. Cf. Lillich notes "an almost uniform reliance on the self-defence argument." R.B. Lillich, *loc. cit.*, supra n. 12, especially at 217.
[172] This line of reasoning was mainly followed by France: *e.g.*, *supra* footnotes 47 (the Belgian intervention in Congo in 1960), 102 (Entebbe). However, the argument also surfaced in the US justification for the intervention in the Dominican Republic: UN Doc. S/PV.1198, at §§ 155-156 ("The United States has not violated Article 2,

met with the support or at least understanding of a handful of other States, such as Belgium and Italy, be it that these States' attitudes have often been inconsistent and ambiguous.[173]

Is this sufficient evidence to attest to the existence in customary international law of a (limited) right of forcible protection of nationals? At closer sight, this would not appear to be the case. The suggestion of Dugard and others that the lack of condemnation by the UN's political bodies transmutes these incidents into norm-changing precedents cannot be upheld. First, while Dugard correctly observes that "[i]n all instances in which force has been used to rescue or protect nationals the Security Council has been unable to reach a decision",[174] he forgets to add for instance that the US interventions in Grenada and Panama were condemned by the General Assembly.[175] Furthermore, even assuming that the intervention would have evaded a General Assembly reprimand, the vetoeing by the US of a Security Council resolution which 'deplored' the intervention in Grenada in 1983 (and which gained 11 positive votes and 3 abstentions), for example, certainly did not mean that its actions were somehow cloaked in legitimacy. Such an approach is short-sighted, since it completely passes over the positions taken during the debates within the UN political bodies vis-à-vis the alleged precedents, and which, as we have seen, have been predominantly negative.

Still, it could be objected that third States' criticism of the various interventions was directed against the abusive application of the 'protection of nationals' doctrine, rather than against its admissibility *as such*.[176] There is some value in this, in the sense that the British intervention in the Suez crisis and the US interventions in Grenada and Panama in all likelihood went beyond a limited operation aimed at the rescuing of nationals in mortal danger. Similarly, the debates relating to the Belgian operations in Congo in 1960 and 1964 indicate that negative reactions were to a large degree inspired by the conviction that Belgium was merely using the opportunity to intervene in Congo's domestic affairs. However, even if the opposition of many developing countries to the doctrine probably results from their fear that it constitutes a facile pretext for powerful States to promote their political and economic interests abroad, or

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paragraph 4 (…). The United States is not employing force against the territorial integrity of the Dominican Republic (…), nor is the United States employing force against the political independence of the Dominican Republic."). See also: French Ministry of Defense, *Manuel de droit des conflits armés*, available at http://www.defense.gouv.fr/defense/enjeux_defense/defense_et_droit/droit_des_conflits_armes/manuel_de_droit_des_conflits_armes (see under 'Evacuation de ressortissants').

[173] These States are: Belgium (*supra* footnote 45 (Congo 1960), footnote 127 (the Definition of Aggression)); however: *supra* footnote 59 (the 1978 French-Belgian intervention in Congo)); Argentina (*supra* footnote 48 (Congo 1960); however: footnote 163 (the ILC Draft Articles on diplomatic protection)); Italy (*supra* footnote 47 (Congo 1960), footnote 160 (the ILC Draft Articles on diplomatic protection)); Greece (*supra* footnote 130 (the Definition of Aggression)); the Netherlands (*supra* footnote 63 (the Dominican Republic 1965), footnote 130 (the Definition of Aggression)). See also below for the position of Canada and Australia on evacuation operations.

[174] UN Doc. A/CN.4/506, at § 58, footnote 90.

[175] See GA Res. 38/7 of 31 October 1983; GA Res. 44/240 of 29 December 1989. The argument was also raised by Brownlie during the ILC debate ((2000-I) *Y.B.I.L.C.*, Part I, at 42, § 50).

[176] See *e.g.*, on Grenada: L. Doswald-Beck, *loc. cit.*, supra n. 12, at 361: "[i]t is significant that generally speaking the States which condemned the US intervention in the debates of the Security Council did not appear to doubt the legal validity of this legal defence as such, but instead went into detail as to why they thought it manifest that the [US] students were not in danger." Also: O. Schachter, *loc. cit.*, supra n. 12, at 1632; K.E. Eichensehr, *loc. cit.*, supra n. 3, at 478; R.J. Zedalis, *loc. cit.*, supra n. 9, at 245.

a more politically correct packaging of the 19th century 'gunboat diplomacy', the following considerations must be kept in mind:

- In the course of the debates within the Security Council and the General Assembly dealing with various concrete interventions, several non-Western States *in general terms* rejected the 'protection of nationals doctrine'.[177]
- Even with regard to the Entebbe raid, *i.e.*, the only relevant intervention addressed by the Security Council where there was no suspicion of a 'hidden agenda', a majority of States still took the view that Israel's actions violated international law.[178] Instead of agreeing with Dugard and others that the Entebbe operation serves as a model for the doctrine under consideration,[179] the present author is therefore more inclined to concur with Brownlie that the international community did not 'positively approve of the action as being lawful.'[180] At best, the slow and unequivocal condemnation by third States signals a tendency to 'waive illegality' in the case at hand.[181]
- Finally, during the debate within the UNGA Sixth Committee on the issue of diplomatic protection in 2000, a considerable group of States again took an explicit negative stance in relation to forcible protection of nationals.[182]

The various findings *pro* and *contra* leave us with, on the one side, a small group of States which have occasionally applied and/or supported the protection of nationals doctrine, and, on the other side, a somewhat broader group of States which appear to reject the doctrine. The former group is made up virtually exclusively of Western States;[183] the latter of developing countries. A third group – probably the larger one – consists of those States that have refrained from directly pronouncing on the matter.

While recognizing the long-standing disagreement between States and scholars, Gazzini and Gray find that 'recent' State practice, such as the US intervention in Liberia in 1990 or the French intervention in Chad the same year, offers a "significant quantity of cases of military interventions aimed at rescuing foreigners abroad."[184] "In contrast with the past," Gazzini continues, "these interventions have gone entirely unchallenged."[185] He concludes that "[a]fter decades of opposition by the majority of the international community, the claim seems to have eventually overcome any resistance," and subsequently spells out a list of conditions

[177] *E.g.*, UN Doc. A/PV.742, at § 75 (Ethiopia, vis-à-vis the Suez crisis); UN Doc. S/PV.1200, at §§ 79-83 (Cuba, vis-à-vis the Dominican Republic); UN Doc. S/PV.2680, at 32 (Ghana, vis-à-vis the strikes against Libya in 1986); UN Doc. S/PV.1943, at § 87 (Cuba vis-à-vis Entebbe).
[178] See reference *supra* footnote 106.
[179] *E.g.*, UN Doc. A/CN.4/506, at § 59.
[180] (2000-I) *Y.B.I.L.C.*, Part I, at 42, § 50 (Brownlie). Also: at 49, § 18 (Kabatsi).
[181] *Ibid.*, at § 50 (Brownlie).
[182] See *supra* footnotes 160, 161, 162, 163.
[183] The rare exceptions which the present author stumbled upon concern the Egyptian commando raid at Larnaca airport in 1978 and the Thai threat to send troops to Cambodia in 2003 (cf. *supra*). However, in the former case, Egypt did not rely on the 'protection of nationals' doctrine, but instead referred to the need to 'fight terrorism'. Moreover, in the past, Egypt appeared to rejected the doctrine (UN Doc. UN Doc. A/C.6/6/SR.293, at § 12). As for the latter case, the threat of intervention did not materialize and Thailand and Cambodia in fact cooperated in the evacuation of Thai nationals.
[184] T. Gazzini, *op. cit.*, supra n. 1, at 170-171; C. Gray, *op. cit.*, supra n. 1, at 129.
[185] T. Gazzini, *op. cit.*, supra n. 1, at 170-171.

drawing on those of Waldock and others.[186] Gray proceeds more cautiously. Finding that issues of legality were not raised in the United Nations in relation to these episodes and acknowledging that many of these cases occurred when there was no effective government in the territorial State, she notes a certain willingness of third States to 'acquiesce in the forcible evacuation of nationals' in such situations.[187]

Although both authors are right to draw attention to this alleged new element in State practice, its importance should probably not be overstated. First, as Gray admits, none of the episodes was addressed by the Security Council or General Assembly, or otherwise sparked an exchange of legal claims, implying that it is difficult to distill relevant *opinio iuris*. Second, several of the cases listed concern operations that were actually approved by the territorial State and which can therefore not be regarded as genuine examples of protection of nationals.[188] In other cases, it remains unclear whether consent was given or not. Thirdly, most of the precedents cited actually pre-date the UNGA debate on diplomatic protection, during which many States denounced the protection of nationals doctrine (cf. *supra*), so that it is hard to regard these cases as the dominant trend in customary practice.

In light hereof, the present author finds it impossible to assert that there exists *de lege lata* a customary right of forcible protection of nationals, as defined by Waldock, Dugard and others.[189] More generally, if the idea that attacks against nationals abroad could never trigger the right of self-defence seems counter-intuitive, customary practice as it stands fails to clarify in what exceptional circumstances recourse to force would be permitted.

VI. DE LEGE FERENDA: TIME FOR A CHANGE OF DISCOURSE?

De lege ferenda, a way out of this impasse may begin with the identification of a number of agreed 'baselines' and the acceptance that 'protection of nationals' is not a 'one size fits all' doctrine. Three basic propositions could provide a valuable point of departure for a more neutral debate. First, as a matter of principle armed force cannot be employed for the protection of public or private property abroad. Admittedly, certain limited exceptions exist: subject to the criteria of necessity and proportionality, recourse to self-defence is permitted in

[186] *Ibid.*, at 171-172.

[187] C. Gray, *op. cit.*, supra n. 1, at 129: "[Third States'] concern is roused only with regard to those rescue missions where the territorial State objects to the intervention or where the protection of the nationals was just a pretext for an invasion with wider objectives." Several authors have observed a tendency towards 'political tolerance' of relatively straightforward applications of the 'protection of nationals' doctrine. *E.g.*, A. Verdross and B. Simma, *op. cit.*, supra n. 17, at 906, § 1338.

[188] See *supra* footnote 113. See also: T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 103-104 (the French intervention in Gabon), 104-105 (the French-Belgian intervention in Rwanda in 1990), 108 (the French intervention in the Central African Republic in 1996).

[189] In similar vein: A. Cassese, 'Article 51', in J.-P. Cot and A. Pellet, *La Charte des Nations Unies* (Paris: Economica) (1991: 2nd ed.), pp. 771-795, at 786-787. Randelzhofer observes that there is a "considerable reluctance to qualify rescue operations involving the use of force as in any case unlawful." While conceding that this may possibly give rise to "a corresponding rule of customary international law *in statu nascendi*," he concludes that "as the law stands at present, (…) no rule of international law allows rescue operations for the protection of a State's own nationals." A. Randelzhofer, 'Article 2(4)', in B. Simma *et al.* (eds.), *op. cit.*, supra n. 17, pp. 114-137, at 133.

response to (1) attacks against military installations and military equipment abroad, (2) large-scale attacks against embassies, and, finally, (3) deliberate, unlawful, and ongoing attacks against civilian aircraft and merchant vessels of the flag State.[190] In other cases, however, States will have to settle for a recourse to non-forcible countermeasures and other means of peaceful dispute settlement (possibly a recourse to the UN Security Council). The axiom that Article 51 in general does not extend to the protection of property is accepted by the overwhelming majority of legal doctrine and there appears to be no credible contradictory evidence in customary practice after 1945.[191] Second, the debates in the Security Council unequivocally certify that, unless the host States consents or the Security Council authorizes the operation, attacks against nationals abroad or threats thereof can never justify a prolonged or very large-scale military presence. Third and last, in accordance with the ILC Draft Articles, diplomatic protection in essence involves the use of *peaceful* means to halt or remedy alleged wrongful conduct against a State's national abroad. This is true for example both with regard to the seizure of a ship carrying the State's flag – even if the legality of the seizure is contested –, as well as when, for example, a national abroad is mistreated and/or arrested (even if the person is sentenced to death).

Having spelled out these parameters, what room could possibly be left for the recourse to force? Given the impasse of the debate at the State level and in academic circles, it might be useful to abandon the 'one size fits all' approach and instead differentiate between different factual contexts. Two main types of situations can be identified. First, the context in which the doctrine is most frequently invoked arguably relates to situations where foreigners are threatened by internal unrest, or by an actual (generally non-international) armed conflict in the territorial State. Relevant examples are the Belgian operations in Congo in 1960 and 1964, the US intervention in Liberia in 1990 and the French interventions in Chad and in the Central African Republic in 1990 and 2003 respectively. As mentioned before, several authors have observed that there is a tendency to tolerate interventions in such situations in recent decades, if and to the extent that they are limited to the actual evacuation of nationals (and possibly also other foreigners) without active combat engagement.[192] Thus, while the Belgian operations in 1960 and 1964 met with strong international censure, there has been a 'near-complete absence of legal or other criticism'[193] with regard to more recent incidents. Moreover, even with regard to the contested Stanleyville operation of 1964, third States did not denounce the evacuation of foreign nationals as such, but rather what they saw as an attempt to intervene in Congolese domestic affairs.

[190] See *supra* note 85.
[191] *E.g.*, J. Dugard, *International Law: a South African perspective* (Cape Town: Juta) (2001, 2nd ed.), at 422; M. Shaw, *International Law* (Cambridge: CUP) (2003, 5th ed.), at 1034. Shaw regards this principle as 'universally accepted.'
[192] T. Gazzini, *op. cit.*, supra n. 1, at 170-171; C. Gray, *op. cit.*, supra n. 1, at 129.
[193] See R.B. Lillich, *loc. cit.*, supra n. 12, at 208-213, 221-223.

Interestingly, a number of countries such as Canada, the United States, the United Kingdom and Australia have adopted technical guidelines to regulate so-called 'Non-Combatant Evacuation Operations' (NEOs).[194] According to the Canadian NEO doctrine, these operations are "fundamentally defensive in nature. They are conducted to reduce to a minimum the number of [nationals] at risk and to protect them during the evacuation process. They are not an intervention in the issues in the host nation."[195] NEOs are launched in a variety of life-threatening circumstances, ranging from natural disasters to internal unrest or even all-out war. The various NEO doctrines distinguish between three types of threat environments:

- In a 'permissive' environment, the host nation has control such that law and order are upheld in the intended area of operations, and the government has both the intent and capability to assist the NEO.
- In an 'uncertain' environment, the host nation, whether opposed to or supportive of the NEO, does not have total effective control of the territory and population in the intended area of operations. Host nation governmental cooperation and host nation support may be limited or non-existent. Further escalation is possible.
- In a 'hostile' environment, the host nation's civil and military authorities have lost control or have ceased to function altogether and there is a general breakdown in law and order. Potential evacuees may be directly targeted and their lives increasingly threatened. The host nation's security forces cannot be expected to support, and may even obstruct, the operation.[196]

As can be inferred from the list of threat environments, host State consent is not always considered a *sine qua non* for conducting a NEO. Indeed, although the regulations commend the possible contribution of host State support in logistical and security terms and examine the possibility of concluding 'Status of Forces Agreements' (SOFAs) with the latter State, they also envisage exceptional situations where no consent is given. US JP 3-68, for example, states that an NEO must "not violate the sovereignty of any nation *other than* the

[194] US Department of the Army, Field Manual FM 90-29, 17 October 1994, available at http://www.globalsecurity.org/military/library/policy/army/fm/90-29/index.html; US Joint Chiefs of Staff, Joint Publication JP 3-68 on Noncombatant Evacuation Operations, 22 January 2007, available at http://www.fas.org/irp/doddir/dod/jp3-68.pdf; Canadian Joint Doctrine Manual on Non-Combatant Evacuation Operations, B-GJ-005-307/FP-050, 16 October 2003, available at http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfda/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-307%20FP-050%20-%20NEO%20Ops%20-%20EN%20(16%20Oct%2003).pdf; UK Joint Warfare Publication 3-51, August 2000, available at http://www.mod.uk/NR/rdonlyres/D0302742-2103-4C9D-9CE8-D6F2E6B1860F/0/20071218_jwp3_51_U_DCDCIMAPPS.pdf; Australian Defence Doctrine Publication ADDP 3.10, Evacuation Operations, April 2004. Also: French Manual on the Law of Armed Conflict also refers to 'évacuation de ressortissants', *loc. cit.*, supra n. 172. See also: F. Naert, 'Juridische aspecten van non-combatant evacuation operations (NEOs)', paper presented during a conference of the Koninklijk Hoger Instituut voor Defensie, Brussels, 29 April 2005, 11 p. (sanitised version on file with the author).

[195] B-GJ-005-307/FP-050, *loc. cit.*, supra n. 194, at § 101(4).

[196] *Ibid.*, at § 102 (1). See also: UK JWP 3-51, *loc. cit.*, supra n. 194, at §§ 105-107; US FM 90-29, *loc. cit.*, supra n. 194, section on 'NEO Environments'; US JP 3-68, *loc. cit.*, supra n. 194, at I-3; ADDP 3.10, *loc. cit.*, supra n. 194, at 1/2-1/4.

host nation."[197] The Canadian doctrine provides that "*whenever possible* it will be the Canadian Government's intention to conduct evacuations with the agreement and assistance of the host nation government."[198] The French Manual on the Law of Armed Conflict observes that evacuation operations may constitute an infringement of the host State's sovereignty and should therefore be strictly limited in objective, time and means.[199]

While the aforementioned regulations do not pronounce on the international legal basis for the operations, the UK doctrine finds that legal justification may arise in different ways:

> *"(a) Explicit permission to enter for extraction purposes may be given by the receiving State authorities and in certain circumstances a SOFA may even be concluded.*
>
> *(b) Where there has been a breakdown in law and order and there no longer exists a coherent government, or where such government exists but it is unable or unwilling to protect UK nationals, intervention to protect UK nationals may be justified on grounds of self-defence (Article 51 of the UN Charter)."*[200]

In similar vein, the Australian doctrine explains that:

> *"The legal basis (…) for an [Australian Defence Forces] deployment into the sovereign territory of a foreign nation to conduct evacuation operations is likely to be one of the following:*
>
> *a) the consent of the foreign nation;*
>
> *b) the exercise of Australia's inherent right of self-defense to protect its nationals (Australia may agree to the rescue of nationals of other countries in certain circumstances); or*
>
> *c) in accordance with a resolution of the [UN] Security Council."*[201]

Interestingly, the document adds that: "The preferable basis for the [Australian Defence Forces] to enter a foreign nation to conduct [a NEO] is either with the consent of the [host nation] or with the authority of the UN. Military deployments into foreign nations to conduct evacuation operations without such consent or authority have varying degrees of international acceptance."[202]

As official documents of the concerned States' executive branches, the various NEO guidelines cited above represent instances of customary practice which (implicitly or explicitly) spell out the States' *opinio iuris*. Obviously, not every interpretation of the Charter rules on the use of force laid down in national military and/or security doctrines must automatically be qualified as accepted customary law. For this to be true, State

[197] US JP 3-68, *loc. cit.*, supra n. 194, at I-3, Appendix 2 'Legal Considerations', at B-3.
[198] B-GJ-005-307/FP-050, *loc. cit.*, supra n. 194, at § 403 (1)(a).
[199] *Manuel de droit des conflits armés, loc. cit.*, supra n. 172.
[200] UK JWP 3-51, *loc. cit.*, supra n. 194, Annex 4A 'Legal issues and Rules of Engagement', at 4A2.
[201] ADDP 3.10, *loc. cit.*, supra n. 194, Annex B to Chapter 5, 'legal considerations', at 5B/1.
[202] *Ibid.*

practice must be sufficiently 'extensive', 'uniform' and 'constant' – *i.e.*, three conditions which the legal considerations in these doctrine not always live up to.[203] As the Australian doctrine implicitly concedes, and as was extensively discussed in Sections 2 and 3, there is *de lege lata* no legal consensus within the international community as to the admissibility of evacuation operations not authorized by the host State or the Security Council. Still, taking account of the increasing recourse to such operations without apparent international criticism, as well as the fact that opponents of the 'protection of nationals' doctrine are mainly concerned with avoiding interference with the host State's domestic affairs, one may wonder whether it would not be possible to overcome the current legal impasse by abandoning the concept of 'protection of nationals' and replacing it by the language of 'non-combatant evacuation'. Indeed, by explicitly tying the recourse to force to *evacuation* purposes, this concept seems much less prone to abuse than the much more indeterminate 'protection of nationals' language, thus mitigating the major concern of those States that have traditionally rejected the latter doctrine. It is evident, for example, that when a country first confers its citizenship on a large number of people outside its borders, and then claims that it is entitled to intervene coercively for their protection – a reasoning hinted at by Russian officials to justify the intervention in Georgia's breakaway regions of South-Ossetia and Abchazia –,[204] this will have little to do with an 'evacuation' operation.

A possible compromise would start from the premise that NEOs in principle require the approval of the host State and that reasonable demands of the latter State vis-à-vis the implementation of the operation must be complied with.[205] This premise is not only inspired by the imperative of respecting the host State's sovereignty, but also by the fact that such consent will generally facilitate an efficient evacuation. In legal terms, operations of the former type qualify as 'interventions by invitation'. If the consent is valid, there will no breach of the prohibition of Article 2(4) of the UN Charter. On the other hand, as the quote from the UK guidelines suggests, there will be situations where there has been a breakdown of law and order, and where governmental authorities have

[203] One particularly notorious example is the very broad interpretation of self-defence vis-à-vis non-imminent threats of armed attack (so-called preventive self-defence) set forth in the 2002 US National Security Strategy (The National Security Strategy of the United States of America, Washington, 17 September 2002, available at http://www.whitehouse.gov/nsc/nss.pdf, at 13-16), which was widely denounced throughout the international community. It may also be noted, for instance, that the Netherlands Defence Doctrine explicitly affirms that humanitarian intervention could constitute a legal justification for the use of force (Dutch Ministry of Defence, Netherlands Defence Doctrine, September 2005, available at http://www.mindef.nl/binaries/defence_doctrine_eng_tcm15-47566.pdf, at 33). Again, this is an approach which is probably rejected by the majority of UN Members. See *e.g.*, O. Corten, *op. cit.*, supra n. 2, at 737-805.

[204] In an interview with the BBC, Russian Foreign Minister Lavrov declared that: "[Under] the Constitution [the President] is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. (…) This is the area, where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise [our] responsibility to protect." The statement mixes up two distinct rationales, namely the 'protection of nationals' doctrine on the one hand, and, the concept of 'responsibility to protect' (closely related to the concept of humanitarian intervention) on the other hand. See: International Crisis Group, 'Russia vs. Georgia: the fallout', Europe Report N. 195, 22 August 2008, available at http://www.crisisgroup.org/home/index.cfm?id=5636, at 28.

[205] See on this: US JP 3-68, *loc. cit.*, supra n. 194, at II-9.

collapsed, or are unable or unwilling to protect foreign nationals. In such situations, NEOs may exceptionally be carried out without host State approval to guarantee the safety of threatened nationals. They could then be regarded as a special application of the right to self-defence, enshrined in Article 51 UN Charter. In order to be lawful, the operations should in principle be limited to the evacuation of nationals abroad, although, as practice indicates,[206] they may extend to the evacuation of other threatened foreigners, as long as the preponderance of threatened persons are nationals of the intervening State.[207] A second limitation, which is duly reflected in the ROE sections of the aforementioned guidelines, holds that reasonable force may be used only when necessary to protect the lives of persons entitled to evacuation as well as the personnel involved in the operation. Whenever possible, the operation should be completed without any bullet being fired. Nonetheless, when persons awaiting evacuation are being attacked, the use of lethal force may be justified (especially, but not exclusively, when nationals are attacked because of political antagonism to their government).[208] Finally, even if this requirement was not implemented in recent practice,[209] it must be stressed that NEOs conducted without host State approval must – like all applications of the right of self-defence – be reported to the Security Council.[210] Failure to comply with this procedural obligation will not only constitute a technical violation of the UN Charter, but will also, as indicated by the ICJ,[211] provide an indication that the State does not consider itself to be acting in self-defence.[212] In general, the submission of a report to the Security Council may render credibility to the claim of the intervening State that it has no other

[206] See *e.g.*, T.C. Wingfield and J.E. Meyen, *loc. cit.*, supra n. 29, at 105 (the French intervention in Gabon (1990)), 108 (the French intervention in the Central African Republic (1996)).
[207] This is the formula used by Special Rapporteur Dugard, UN Doc. A/CN.4/506, at § 60. Also: T. Gazzini, *op. cit.*, supra n. 1, at 174. Remark: Insofar as sizeable numbers of nationals of third States are evacuated, and certainly when non-nationals constitute the majority of the evacuees (as during Operation Libelle: C. Kreß, *loc. cit.*, supra n. 120, at 331), the evacuation arguably constitutes an application of the right of *collective* self-defence. The implication is that, in accordance with the ICJ *Nicaragua* Judgement (ICJ, *loc. cit.*, supra n. 30, at §§ 195, 199, 232), a formal request from the third State would normally be required. While Gray agrees that State practice generally supports this precondition, she notes that the ICJ did not construe this as a *sine que non* obligation (C. Gray, *op. cit.*, supra n. 1, at 152-153), an interpretation which is also subcribed to by Greig (D.W. Greig, 'Self-defence and the Security Council: what does Article 51 require?', (1991) 40 *I.C.L.Q.*, pp. 366-402, at 378). An argument could indeed be made that the requirement of a request essentially aims at ensuring that collective self-defence is not exercised without the approval of the third State, and may therefore be construed in a more flexible and less formalistic manner. If a formal request is lacking but other elements (e.g., consultation, press statements) explicitly or implicitly illustrate the approval of the State, there would not necessarily be a violation of Article 51 UN Charter.
[208] *E.g.*, T. Gazzini, *op. cit.*, supra n. 1, at 174.
[209] The US operation in Liberia in 1990, the French operation in Gabon in 1990 and the French operation in the Central African Republic in 2003, for example, were not reported to the Council.
[210] Also: T. Gazzini, *op. cit.*, supra n. 1, at 174; T. Farer, 'The regulation of foreign intervention in civil armed conflict', (1974-II) 142 *Recueil des Cours*, pp. 291-406, at 394.
[211] ICJ, *loc. cit.*, supra n. 30, at §§ 200, 235.
[212] In light of the ICJ's *Nicaragua* judgement, most authors agree that compliance with the reporting obligation is not a *sine qua non* for the application of the right of self-defence. Nonetheless, while a failure to report does not as such invalidate a self-defence claim, it does weaken the intervening State's legal case. See *e.g.*: D.W. Greig, *loc. cit.*, supra n. 207; R. Higgins, *The development of international law through the political organs of the United Nations* (Oxford: OUP) (1963), at 207; Y. Dinstein, *op. cit.*, supra n. 21, at 217-218; C. Gray, *op. cit.*, supra n. 1, at 102. This approach appears to be supported in State practice. States have occasionally raised the absence of a report to the Security Council to discredit self-defence claims by other States. On the other hand, the absence of a report has never been regarded as invalidating a self-defence claim *per se*. *E.g.*: (1964) *U.N.Y.B.*, at 148; UN Doc. S/PV.2187, at 3; (1980) *U.N.Y.B.*, at 300; UN Doc. S/PV.2671, at 38.

objectives than the evacuation of the threatened nationals. Additionally, it enables a review by the UN Security Council when there are indications to the contrary.

The second type of situation that surfaces in customary practice concern operations aimed at the rescuing of hostages. Examples are the Israeli raid at Entebbe (1976) and the Egyptian raid at Larnaca (1978). The different factual circumstances that may arise, make it difficult to pronounce in a general way on the legality of these operations. On the whole, however, terrorist hijackings, contested seizures of merchant vessels and contested detentions of nationals abroad are virtually always dealt with through negotiations and other peaceful means of diplomatic protection. A considerable group of States stressed during the UNGA debate on diplomatic protection that recourse to force cannot be an option. Similarly, during the Security Council discussion on the Entebbe raid a majority of States condemned Israel's intervention. Conversely, in the former debate, only one State (Italy) supported the protection of nationals doctrine as defined by Special Rapporteur Dugard;[213] in the latter, only one State (the US) explicitly supported Israel's legal case.[214] In light hereof, and even though proposals to include an express prohibition in the 1979 Hostage Convention were not upheld, it cannot be argued that there exists a legal right permitting States to rescue nationals taken hostage abroad.[215] The Entebbe debate[216] and the Larnaca case suggest that there are good policy reasons not to recognize such a right: rescue operations unapproved by the host State may result in significant loss of life; they may make it more difficult to find a negotiated solution in future cases, and; they may lead to a marked deterioration of diplomatic relations between the territorial State and the intervening State. The Egyptian raid in Cyprus (1978), through which Egypt wanted to prevent the hijackers from escaping, cannot honestly be regarded as a lawful use of force. No western or other State is likely to condone a similar, unapproved operation within its territory. The starting point is that it falls within the competence of the territorial State to deal with hostage-takings on its soil,[217] in accordance with the applicable international obligations enshrined in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1979 International Convention against the Taking of Hostages, etcetera. A military operation by a State whose nationals are held hostage is only admissible when the territorial State consents (as was the case with the German raid on a hijacked plane in Mogadishu in 1977 and the

[213] UN Doc. A/C.6/55/SR.19, at § 15 (Italy).
[214] UN Doc. S/PV.1941, at §§ 77-81.
[215] Contra, *e.g.*, K.E. Eichensehr, *loc. cit.*, supra n. 3.
[216] See footnote 106.
[217] Article 3 of the 1979 Hostage Convention provides that "the State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure." 1316 *U.N.T.S.* 205.

Indonesian raid against a hijacked plane in Bangkok in 1981),[218] or when authorized by the UN Security Council.[219] The Entebbe incident illustrates that hard cases can and do occur, yet it must be emphasized that hard cases eventually make bad law. In sum, while there may be unique factual circumstances that would exceptionally favour a waiver of illegality, it seems unwise from a policy perspective to turn the exception into a rule.

VII. CONCLUSION

In conclusion, we have seen that, *de lege lata*, the long-standing controversy over the legality of forcible protection of nationals remains unresolved. The new element in State practice, namely the increased political tolerance vis-à-vis limited evacuation operations, is arguably counterbalanced by the negative *opinio iuris* reflected in the UNGA debates on diplomatic protection. *Ergo*, in the final analysis, United Nations practice is and remains inconclusive,[220] implying that it is virtually impossible to deduce from customary practice to what extent attacks or possible attacks against nationals abroad may trigger the right to self-defence.

From a policy perspective, several scholars find that the exceptional tolerance by the international community of limited interventions is preferable "to a solution which generally permits this forcible intervention practice, risking thereby its misuse especially by powerful States and undermining the strict regime of the prohibition of the use of force."[221] Others object that the *bona fide* exercise cannot be ruled out and insist that the necessity and proportionality criteria provide sufficient protection against abuse.[222] The present author finds that the continuing legal uncertainty is hardly satisfactory and therefore agrees with Lillich that the increased political tolerance of evacuation operations should lead "both academic and government lawyers to renew their efforts to develop and refine the various criteria by which a State's forcible protection claim may be judged."[223] *De lege ferenda*, it would seem useful to abandon the 'one size fits all' approach to the 'protection of nationals' doctrine. First, since a significant part of the international community (understandably) continues to associate the doctrine with 'gunboat diplomacy' and great power interests, any way out of the impasse is excluded as long as the 'protection of nationals' discourse is being used. Second, as defined by Waldock, Dugard and others, the doctrine potentially covers an overly broad array of possible situations that cannot be adequately governed by the same three preconditions. Instead, a new focus on behalf of State officials and international lawyers on so-called

[218] See: N. Ronzitti, *op. cit.*, supra n. 8, at 79-81.
[219] A possible example is resolution 1816 (2008) of 2 June 2008, dealing with acts of piracy and armed robbery against merchant vessels off the coast of Somalia.
[220] Also: R.J. Zedalis, *loc. cit.*, supra n. 9, at 248.
[221] U. Beyerlin, *loc. cit.*, supra n. 17, at 243.
[222] *E.g.,* G. Fitzmaurice, *loc. cit.*, supra n. 12, at 173; C. Greenwood, *loc. cit.*, supra n. 12, at 941.
[223] R.B. Lillich, *loc. cit.*, supra n. 12, at 220.

non-combatant evacuation operations (NEOs) – which may either constitute an application of so-called 'intervention by invitation', or, exceptionally, an application of the right of self-defence – could offer a valuable alternative. This suggestion – admittedly in need of further refinement – is more than an exercise in semantics. By explicitly linking the concept to the 'evacuation' objective, it is arguably less prone to abuse, and may defuse the need for a broad 'protection of nationals' doctrine. In situations where it is not clear whether an operation was actually approved by the host State and/or whether consent was valid, it may moreover provide a more suitable standard to scrutinize the intervening State's conduct. On the other hand, the refusal to recognize a right to rescue nationals *taken hostage abroad* may exceptionally lead to results that are hardly satisfactory. Yet, it should be noted that some of the more controversial incidents listed above, such as the Tehran hostage situation, can at times be regarded as 'armed attacks' against various types of 'external manifestations of the State'[224] and can therefore be tackled without any need to rely on the 'protection of nationals' rationale.

[224] See footnote 85.

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