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Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation

Andrew W. R. Thomson
Office of the Judge Advocate General

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DOCTRINE OF THE PROTECTION OF NATIONALS ABROAD: RISE OF THE NON-COMBATANT EVACUATION OPERATION

ANDREW W.R. THOMSON*

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* The author, Andrew Thomson, LL.B., is a member of the Office of the Judge Advocate General and an officer in the Canadian Forces. He has served as a legal advisor on missions to Bosnia in 2003–2004, as well as to Afghanistan where he served as the Deputy Task Force Legal Advisor in 2009–2010 advising on a range of operational law issues. He is recently served in the Directorate of International and Operational Law, and is now a Special Assistant to the Judge Advocate General of the Canadian Forces. While he expresses his gratitude to a number of his colleagues within the Office of the Judge Advocate General who took the time to review and provide comments on this Article, the opinions expressed or implied in this Article are those of the author, and they do not necessarily reflect, nor should they be taken to reflect, the views of the Government of Canada, the Department of National Defence, the Canadian Forces or the Office of the Judge Advocate General.

I. INTRODUCTION

On August 8, 2008, Russian tanks, troops, and aircraft crossed the border into South Ossetia, a region in the Republic of Georgia in the Caucasus.¹ On July 19, 2006, the Government of Canada commenced the evacuation of approximately 14,000 of its citizens from Lebanon in the midst of an armed conflict between Israel and Hizbollah.² These two seemingly disparate incidents share one characteristic: they were military operations launched by states with the common justification of rendering assistance to their citizens in a foreign state. History is replete with instances of various forms of military assistance being provided on this basis. Frequently, assistance actually provided has been minimal or inconsequential in comparison to the other types of military activity occurring concurrently.

The legal justification for military assistance to a state's citizens outside of its borders is encapsulated in the legal doctrine of the "protection of nationals abroad" ("doctrine").³ It is submitted that the protection of nationals abroad involves an intervention by one state, represented by its armed forces, into another state for the purpose of protecting the lives of its own citizens.⁴ This Article argues that this right is generally accepted, subject to the fulfillment of three conditions, as expressed by the British jurist Sir Humphrey Waldock:

- (1) an imminent threat of injury to nationals,
- (2) a failure or inability on the part of the territorial sovereign to protect them and

1. Kevin O'Flynn & Martin Fletcher, *Russia Turns Might of Its War Machine on Rebel Neighbour Georgia*, LONDON TIMES, Aug. 9, 2008, at 1.

2. Robert Fife, *Canadian Evacuation from Lebanon Cost \$85M: CTV*, CTV NEWS (Sept. 20, 2006), http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060919/evacuation_tab_060919?s_name. Hizbollah (also known as Hezbollah, which means "Party of God"), according to the Government of Canada, is a radical Islamic terrorist organization based in Lebanon. The objectives of Hizbollah, as derived from its February 16, 1985 political manifesto, include removing all Western influences from Lebanon and from the Middle East, as well as destroying the state of Israel and liberating all Palestinian territories and Jerusalem from what it sees as Israeli occupation. See *Currently Listed Entities*, PUBLIC SAFETY CANADA, <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx#Hizballah> (last visited on Apr. 7, 2009).

3. Tom Ruys, *The "Protection of Nationals" Doctrine Revisited*, 13 OXFORD J. CONFLICT & SECURITY L. 233, 234 (2008).

4. *Id.*

(3) measures of protection strictly confined to the object of protecting them against injury.⁵

In recent years, a number of states' armed forces have removed their citizens, and sometimes other states' citizens, from states in turmoil. The military doctrine related to many of these operations has evolved. Over the past decade, it has become more codified and generally referred to as the doctrine of Non-Combatant Evacuation Operations ("NEO").⁶

The purpose of this Article is to show that the doctrine of the protection of nationals abroad exists within the right of self-defense; with contours of the doctrine shaped in recent years by the practice of states in their conduct of NEO. This right is limited to the removal of the intervening state's citizens abroad through the use of force subject to necessity and proportionality in order to move the foreign nationals to a safe location, Part II discusses the origin of the doctrine of protection of nationals abroad and the legal bases that have been used to justify that protection. It also considers the impact of the misuse of the doctrine throughout its evolution. This explanation includes the claim that the protection of nationals abroad does not impugn Article 2(4) of the U.N. Charter which prohibits a state's use of force against another state and the justification that the protection of nationals is an exercise of the right of self-defense which complies with a state's right of self-defense enshrined in Article 51 of the UN Charter. It assesses the doctrine's place in self-defense at customary international law. Furthermore, this Article reviews state practice and the debate that has ensued among states and academics when states have asserted the doctrine to justify their use of force abroad. This Article also assesses the difficulties in determining the legality of the doctrine based upon the divided opinion of states. Part III surveys the military operational doctrine pertaining to NEO. Part IV assesses the recent invocation of the doctrine by the Russian Federation in its conflict in South Ossetia. Part V provides an analysis of the how NEOs as state practice have acted to limit the extent of protection to nationals abroad. Finally, in Part VI this Article concludes with an assessment of the state of the doctrine in contemporary international law.

5. Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECEUIL DES COURS 455, 467 (1952).

6. DEP'T OF NAT'L DEFENCE, *Joint Doctrine Manual: Non-Combatant Evacuation Operations*, B-GJ-005-307/FP-050 (Ottawa: National Defence, Can., 2003) (discussing Canadian Forces' Non-Combatant Evacuation Operations).

II. PROTECTION OF NATIONALS ABROAD DOCTRINE

Before the U.N. Charter, and particularly prior to the World War I, there were comparably few restraints on the waging of wars and use of force in international relations.⁷ There was widespread acceptance of the right of a state to protect its nationals abroad.⁸ One storied operation was the successful expedition led by Sir Robert Napier to rescue a group of Englishmen detained by the emperor of Abyssinia (modern day Ethiopia) in 1867.⁹ In referring to this operation, British Prime Minister Disraeli remarked that the “standard of St. George was hoisted upon the mountains of Rasselas.”¹⁰ This reputed comment is illustrative of the central and controversial feature of this doctrine: the collision between the principle of protection of nationals and the principle of state sovereignty. Disraeli’s remark raises a question that accompanies a state’s application of this doctrine: what is the true purpose of the intervention? Is it for the purpose of protecting a state’s citizens or is it the pretext for an intervention different in kind and longer in duration?

The doctrine of the protection of nationals has existed in some form throughout history. Hugo Grotius, a fifteenth century Dutch jurist and early international law scholar, has been quoted as saying: “Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects. . . . War is lawful against those who offend nature.”¹¹

The origin of the protection of nationals abroad lies in the comparatively permissive history of the right of states to use force, which

7. Waldock observes that the prevailing restriction—the justness of the cause—was of little practical value by the late nineteenth century, and that the “recourse to war, the most extreme use of force, was not regulated by international law.” Waldock, *supra* note 5, at 457.

8. For example, “[t]he jurists of the nineteenth century universally considered as lawful the use of force to protect lives and property of nationals.” IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 289 (1963). See, e.g., Leslie Green, *Rescue at Entebbe: Legal Aspects*, 6 *ISR. Y.B. HUM. RTS.* 312, 323 (1976).

9. See Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 *AM. J. INT’L L.* 503 (1990).

10. HISTORIANS’ HISTORY OF THE WORLD, XXI, 635 (Henry Smith Williams ed., 1904–05).

11. Green, *supra* note 8, at 323. A discussion of the origins of *jus ad bellum* is not within the scope of this Article. It is acknowledged that caution must be taken in evaluating the current state of modern international law based upon established treaty law and “embodying a form of centralized machinery,” including the United Nations and the International Court of Justice with natural law where “the rightness of a state’s action in resorting to self-defence could not be determined otherwise than by the state itself, relying on its conscience in the matter.” DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 6–8 (1958). Nonetheless, writers like Bowett recognize natural law as a “guide to the elements of self-defence” or as the “fount of the right to self-defence.” YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 179 (4th ed. 2005). As Dinstein writes however, the character of modern self-defense must exist within the “compass of positive international law.” *Id.* at 180.

existed prior to the adoption of the U.N. Charter in 1945. Grotius, for example, did not suggest that the scope of a response to an injury against a subject was explicitly limited by the requirement that the act be necessary and proportionate, as does the modern right of self-defense.¹² Though the use of force by states in international relations was comparatively unrestrained from antiquity through the First World War, this has changed following the Pact of Paris in 1928.¹³ Prior to the treaty, as John Currie writes, in the early twentieth century “international law had been evacuated of any content that would hinder resort to force by states.”¹⁴ This non-aggression treaty between the United States and France was eventually ratified by sixty-three states.¹⁵ It renounced recourse to war as “an instrument of national policy.”¹⁶ Its impact was to reverse “the presumption in favour of the right to war.”¹⁷

Historically, a rescue mission of a state’s citizens or a monarch’s subjects was a response to injury or insult. It was cloaked in terms of the maintenance of national honor and, as such, was used to justify a wide range of action, including the use of force. Within this historical origin, there is a concept still discussed today: the relationship between a state and its citizens abroad. However, it is not as clear whether a comparable transgression would allow the impugned state to respond with force today.¹⁸

12. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 120 (2d ed. 2004); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 122 (June 27) (separate opinion of President Singh).

13. LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 4–10 (3d ed. 2008) (quoting Hugo Grotius). Green presents a survey of nineteenth and twentieth century developments in the “criminalizing of war,” including the defeat of Napoleon and the Treaty of Versailles. BROWNLIE, *supra* note 8, at 298, suggests that, after the “Kellogg-Briand Pact [Pact of Paris] and instruments and practice related to it, a resort to force, whether a state of war existed or not, otherwise than in defence against an attack or by virtue of Article 16 of the Covenant [of the League of Nations], was of doubtful legality.” *Id.*

14. JOHN CURRIE, *PUBLIC INTERNATIONAL LAW* 619 (2d ed. 2008), at 452–53.

15. *Id.* at 456.

16. *Treaty for the Renunciation of War as an Instrument of National Policy*, Aug. 27, 1928, 94 L.N.T.S. 57.

17. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 289, 92 (1963).

18. The question of whether or not an armed attack on a citizen is an attack on the state has attracted considerable debate. For example, Derek Bowett cautioned against a reflexive acceptance of the identification of the interests of the state and the interests of its nationals: “in practice it cannot be said that a threat to the safety of nationals abroad constitutes a threat to the security of the state.” BOWETT, *supra* note 11, at 92–93. He argued for a relative balancing of a state’s right to protect its nationals against another state’s right to territorial integrity. The U.N. General Assembly sets out those acts that qualify as an act of aggression. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3314 (Dec. 14, 1974). Although actions against citizens are not enumerated, Article 4 notes that the list is “not exhaustive and the Security Council may determine that other acts constitute aggression.” *Id.*

Since the adoption of the U.N. Charter, there has been debate as to whether the right to protect nationals abroad remains extant. There are a number of states which have argued this justification in varying forums in the ensuing years: the United Kingdom in relation to the Suez crisis in 1956;¹⁹ the United States consistently asserted this right from 1958 until 1989 during its incursion into Lebanon²⁰ and Panama,²¹ respectively; Belgium in Congo in 1960 and 1964;²² France in Mauritania in 1977;²³ and Russia in regard to its conflict with Georgia in 2008.²⁴ Similarly, there are numerous incidents of states using military assets to mount or attempt to mount rescues or evacuations in foreign states, such as France in Gabon and Chad in 1990²⁵ and reputedly in Colombia in 2003 in an attempt to secure the release of dual French citizen and former Colombian presidential candidate Ingrid Betancourt.²⁶

Although its acceptance as a part of international law is contentious, the content of the doctrine—set out by Waldock—is generally agreed upon.²⁷ The terminology has varied. For example, it is referred to as a “right to rescue”²⁸ or as the “right of forcible protection of nationals

19. U.N. SCOR, 11th Sess., 749th mtg. at 24, U.N. Doc. S/PV.749 (Oct. 30, 1956).

20. 39 DEP'T ST. BULL., 1958, 181, available at <http://archive.org/stream/departmentofstat391958unit#page/180/mode/2up>. President Eisenhower announces the deployment of a contingent of U.S. military to “protect American lives” as a part of the justification.

21. See George Bush Presidential Library and Museum (Dec. 20, 1989), http://bushlibrary.tamu.edu/research/public_papers.php?id=1356&year=1989&month=12.

22. In regards to Belgium’s intervention in 1960, see U.N. SCOR, 15th Sess., 877th mtg. at 18, U.N. Doc. S/PV.877 (July 20, 1960). The Belgian Minister of Foreign Affairs Paul-Henri Spaak outlined the legal basis for the 1964 intervention to the Chamber of Representatives; it was humanitarian for the evacuation of European and American population, Alain Gerard, *L’Operation Stanleyville-Paulis Devant le Parlement Belge et les Nations Unis*, 3 REVUE BELGE DE DROIT INTERNATIONAL 244 (1967).

23. The Permanent Representative to the United Nations of France wrote to the President of the Security Council explaining the basis for its intervention: “in the face of the persistent threats directed against our compatriots in undisputed Mauritanian territory . . . it is the duty of the French Government, as it would be the duty of any Government with respect to its nationals abroad, to provide protection for them.” Permanent Rep. of France to the U.N., Letter dated Dec. 22, 1977 from the Permanent Rep. of France to the United Nations addressed to the President of the Security Council, U.N. Doc. S/12503 (Dec. 22, 1977).

24. See *Transcript of the Meeting with the Participants in the International Club Valdai*, PRESIDENT OF RUSSIA (Sept. 12, 2008), http://archive.kremlin.ru/eng/speeches/2008/09/12/1644_type82912type82917type84779_206409.shtml.

25. Richard B. Lillich, *Lillich on the Forcible Protection of Nationals Abroad*, 77 INT’L L. STUD. 103–05 (2002).

26. Philip Jacobson, *Failed Rescue Leaves French Red-Faced*, THE AGE (Aug. 4, 2003), <http://www.theage.com.au/articles/2003/08/03/1059849276062.html>.

27. For example, scholar Ian Brownlie observes that the attempt to provide a basis for the doctrine in modern law in self-defense is based upon the conditions set out by Waldock. BROWNIE, *supra* note 8, at 199; TOM RUYTS, ARMED ATTACK AND ARTICLE 51 OF THE UN CHARTER 213 (2010).

28. Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible*

abroad.”²⁹ More controversially, it has been referred to as “humanitarian intervention.”³⁰ Humanitarian intervention, which gained prominence in the Kosovo air campaign, is a different doctrine, notwithstanding that a humanitarian element may be present within the doctrine of protection of nationals. Whereas humanitarian intervention usually refers to the protection of human rights of individuals in another state’s territory, the doctrine of the protection of nationals relates to a state’s protection of its citizens beyond its borders.³¹

A. *Legal Doctrine of the Protection of Nationals Abroad*

Writing in regard to episodes of nineteenth and early twentieth century intervention, Brownlie made the following comments, which remain applicable to many incidents of armed intervention in the twentieth century: “[w]hat is characteristic of these and other examples of

Hostage Rescues, 48 VA. J. INT’L L. 451, 459 (2008).

29. *Lillich*, *supra* note 25, at xxvii, 1.

30. Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT’L & COMP. L. REV. 365, 367 (1995); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628–29 (1984) (placing the protection of nationals within the ambit of “humanitarian intervention”).

31. For example, Nikolai Krylov suggested that “[s]ometimes humanitarian intervention is enlarged, including the use of armed force either for protection of nationals abroad or with respect to rescuing nationals.” Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT’L & COMP. L. REV. 365, 367 (1995). It is suggested that this fails to differentiate between two related but distinct doctrines, particularly in the aftermath of the defining instance of humanitarian intervention—the NATO air campaign in Kosovo. John Currie, *NATO’s Humanitarian Intervention in Kosovo: Making or Breaking International Law?*, 36 CAN. Y.B. INT’L L. 303 (1998) (discussing humanitarian intervention, particularly its post-U.N. Charter evolution). Subsequent international response to the Kosovo campaign led to the codification of the doctrine of Humanitarian Intervention in the Responsibility to Protect World Summit Outcome Document by the U.N. General Assembly, which states:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

G.A. Res. 60/L.1, ¶ 138–39, U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1, at 31 (Sept. 15, 2005).

intervention is that protection of lives and property of nationals is one of several justifications offered and the justifications are framed so widely that their legal content is obscured by general considerations of national policy.”³²

There are generally two legal bases cited for the protection of nationals:

(i) it does not constitute a use of force prohibited by Article 2(4) of the U.N. Charter; or

(ii) it is a legitimate exercise of a state’s right of self-defense.³³

The following sections explore both of these legal bases.

1. An Exception to the Prohibition on the Use of Force Under Article 2(4)

The legal restrictions on the use of force in international relations grew markedly throughout the twentieth century, culminating in the treaty establishing the U.N.³⁴ The provision encapsulating the established prohibition of the use of force in international relations is Article 2(4) of the U.N. Charter. It states that “[a]ll 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.”³⁵

The fact that this is both customary law³⁶ and a *jus cogens* norm is generally accepted.³⁷ The International Court of Justice (“ICJ”) considered the restraints on the use of force in international relations in

32. BROWNIE, *supra* note 8, at 290. He refers, amongst other instances, to the U.S. engagement in Cuba in 1898 and China in 1900. *Id.*

33. See Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?*, 25 TEX. INT’L L.J. 209, 221 (1990) (providing a survey of this basis); see also Paul Stoffa, *Special Forces, Counterterrorism, and the Law of Armed Conflict*, 18 STUD. CONFLICT & TERRORISM 47, 54 (1995); GREEN, *supra* note 13, at 11.

34. Waldock refers to it as the “cornerstone of peace.” Waldock, *supra* note 5, at 492; see also BROWNIE, *supra* note 8, at 112.

35. U.N. Charter, art. 2(4).

36. JOHN CURRIE, PUBLIC INTERNATIONAL LAW 619 (2d ed. 2008), *supra* note 14, defines this as “a source of international law predicated upon general state practice accompanied by the conviction that such practice is required as a matter of international law. See the *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Ice.), 1969 I.C.J. 3 (Feb. 20), for a review of the components of customary international law. “[I]t is based upon the work done in this field by international legal bodies, State practice . . . the claim being that these various factors have cumulatively evidenced or been creative of the *opinio juris necessitatis*, requisite for the formation of new rules of customary international law.” *Id.* at 29.

37. GRAY, *supra* note 12, at 29.

the *Corfu Channel* case, and in response to British claims that they used forcible intervention to gather evidence for the tribunal, the ICJ stated:

The Court can not accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.³⁸

The extent of this prohibition has been the subject of debate. It is beyond the scope of this Article to review the nature and scope of Article 2(4) in detail. However, those who support a broad restriction generally start with a plain reading of the provision itself coupled with a contextual review of the provision within the scheme of the U.N. Charter.³⁹ For instance, Article 2(4) does not merely prohibit the use but also the *threat* of the use of force. Furthermore, the Charter obligates members to settle international disputes “by peaceful means”⁴⁰ and it contains controlling mechanisms for when force may be authorized.⁴¹ The combination of the prohibition with pacific obligations strictly regulates the use of force by states in international relations.

Subsequent developments in international law have reinforced the prohibition on the use of force in international relations. The Declaration Concerning Friendly Relations⁴² prohibits intervention in other states and has been accepted as customary international law by the ICJ.⁴³ This has further restricted legal recourse to the use of force.⁴⁴

38. *Corfu Channel Case (U.K. & Ir. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9).

39. See DINSTEIN, *supra* note 11, at 87–88.

40. U.N. Charter art. 2, para. 3.

41. U.N. Charter arts. 42, 51. In addition, the customary right of self-defense and the right for a state to consent to the use of force by a foreign state in its territory exists as distinct legal bases for the use of force.

42. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971).

43. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 191 (June 27).

44. Oscar Schachter writes:

article 2(4) has a reasonably clear core meaning. That core meaning has been spelled out in interpretive documents such as the Declaration of Principles of International Law, adopted unanimously by the General Assembly in 1970. The International Court and the writings of scholars reflect the wide area of agreement on its meaning. It is therefore unwarranted to suggest that article 2(4) lacks the determinate content necessary to enable it to function as a legal rule of restraint.

Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633 (1984). Zedalis explains the link:

The language of elaboration contained in the Declaration Concerning Friendly Relations is attached to principle number three [of the Declaration], which imposes a duty not to intervene in “matters within domestic jurisdiction” of another state. . . . Maltreatment of

As Article 2(4) of this declaration relates to the doctrine of the protection of nationals, the reference to “territorial integrity or political independence” is central. In general, these words are cited as the basis for the view that the application of the doctrine to protect, and the exercise of the underlying state right, does not impugn this provision. Leslie Green suggests that where a use of force does not violate those aspects of a state’s sovereignty, it may not breach this prohibition.⁴⁵ According to this view, the use of force is not prohibited because it is not the intention of the intervening state to usurp the sovereign government or annex its territory; it is instead focused on the rescue of its citizens in accordance with the doctrine of protection of nationals abroad.⁴⁶

A contrary position has been put forward by Brownlie in response to the suggestion that this wording effectively places a further condition on the application of the prohibition as “the conclusion warranted by the travaux préparatoires is that [Art. 2(4)] was not intended to be restrictive but . . . to give specific guarantees to small states and that it cannot be interpreted as having a qualifying effect.”⁴⁷

Perhaps the most well-known modern example of the application of the doctrine of the protection of nationals involves the actions of the Israel Defense Force (“IDF”) in Entebbe, Uganda. It is also a reference point to consider the question of whether an intervention for the protection of a state’s nationals violates the “territorial integrity” of a state for the purposes of Article 2(4).

The Israeli operation arose from the hijacking of an Air France passenger jet, originating in Tel Aviv, by an assortment of Arab and European nationals en route to Paris from Athens.⁴⁸ The flight was subsequently diverted to Entebbe Airport in Uganda, where all passengers, with the exception of those carrying Israeli passports, were released.⁴⁹ After a week of negotiations for the release and return of the Israeli captives that included, among others, representatives from the governments of Israel and Uganda, Israel launched a military intervention

foreign nationals threatens international peace and creates an international problem, thereby causing the situation to fall beyond the domestic jurisdiction of the maltreating state. . . . [M]altreatment of foreign nationals should not result in the sanction of unilateral action prohibited by article 2(4), but rather trigger the powers of the United Nations to take corrective action.

Zedalis, *supra* note 33, at 231.

45. GREEN, *supra* note 13, at 9.

46. Zedalis, *supra* note 33, at 221.

47. BROWNLIE, *supra* note 8, at 267; *see also* Doc. 442, III/3/20, 12 U.N.C.I.O. Docs. 342–46.

48. WILLIAM STEVENSON, 90 MINUTES AT ENTEBBE 3–5 (1976).

49. MARTIN GILBERT, ISRAEL: A HISTORY 471 (2001).

into Uganda with aircraft belonging to the Israeli Air Force and commandos.⁵⁰ The duration of the military operation Thunderbolt on Ugandan soil lasted approximately ninety minutes.⁵¹ It resulted in the rescue and removal of the remaining hostages (except for one taken earlier to a local hospital) and the deaths of one IDF member, several members of the Ugandan military, and a number of the hostage takers.⁵²

The Israeli ambassador to the United Nations, Chaim Herzog, adopting the writing of New Zealand legal scholar D.P. O'Connell, asserted that Article 2(4) is not violated if the state intervening is doing so for the "protection of a state's own integrity and its nationals' vital interests, when the machinery envisaged by the United Nations Charter is ineffective in the situation."⁵³

In contrast, the United States argued that while "normally such a breach would be impermissible under the [Charter]," it was acceptable in the context of the protection of nationals threatened with injury.⁵⁴ France addressed the link between intent and sovereignty, suggesting that if there was a violation, it was not done to infringe the territorial integrity or the independence of Uganda, but rather to "save endangered human lives."⁵⁵

While a number of states at the Security Council adopted ambiguous positions on the doctrine of the right to protect nationals per se, the proposition that the Israeli operation did not violate Article 2(4) was met with wide disagreement.⁵⁶ For example, Sweden was "unable to reconcile the Israeli action with the strict rules of the Charter" but did "not find it possible to join in condemnation in this case."⁵⁷

50. STEVENSON, *supra* note 48, at 103; GILBERT, *supra* note 49, at 471.

51. STEVENSON, *supra* note 48, at vii.

52. See GILBERT, *supra* note 49, at 471–73, for a brief description of the subject, and STEVENSON, *supra* note 48, at 99–125, for a thorough review of the event, specifically for an account of the execution of the operation.

53. U.N. SCOR, 31st Sess., 1939th mtg. at 13, U.N. Doc. Sp/PV.1939 (July 9, 1976).

54. Schachter, *supra* note 44, at 1630–31.

55. U.N. SCOR, 31st Sess., 1943d mtg. at 7, U.N. Doc. Sp/PV.1943 (1976).

56. GRAY, *supra* note 12, at 31.

57. U.N. SCOR, 31st Sess., 1940th mtg. at 14, U.N. Doc. Sp/PV.1940 (1976). Similarly, Mauritius deemed the Israeli action aggression, *id.* para. 70. Guyana said this was a breach of Article 2(4), *id.* paras. 80–81, and Yugoslavia called the raid a "flagrant violation of the sovereignty and territorial integrity of an independent and non-aligned country." U.N. SCOR, 31st Sess., 1941st mtg. at 65, U.N. Doc. Sp/PV.1941 (1976). The Soviet Union stated that it "fully shares the views expressed by 48 African countries in the unanimously adopted resolution of the Conference of Heads of State and Government of the Organization of African Unity, which roundly condemns Israel's aggression against the sovereignty and territorial integrity of Uganda." *Id.* at 155. The United Kingdom seemed to acknowledge a breach of Article 2(4), but noted that there was a state right and "perhaps [a] duty" to protect its people. U.N. SCOR, 31st Sess., 1940th mtg. at 107, U.N. Doc. Sp/PV.1940 (1976).

While there is some debate among academics as to the existence of an exception to the prohibition on the use of force in Article 2(4) for the exercise of a state's right to protect its nationals abroad, Oscar Schachter has written in support of this,⁵⁸ it is limited.⁵⁹ It is submitted that the preponderance of opinion, and the response of other states to Israel's invocation of this exception, demonstrates that Article 2(4) does not permit the use of force for the purpose of the protection of nationals.

2. Article 51: Self-Defense

Unlike Article 2(4), which does not provide viable justification for the protection of nationals, Article 51 is a viable justification. Indeed, the protection of nationals abroad generally relies on claims of self-defense.

Article 51 of the U.N. Charter states that nothing "shall impair the inherent right of individual or collective self-defence if an armed attack

58. *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628 (1984) ("Humanitarian Intervention as a 'broad exception to the prohibition in article 2(4)."). He writes that in the case of the protection of nationals this contains three elements "(1) an emergency need to save lives; (2) legitimate self-defense; and (3) non-derogation of territorial integrity or political independence of the state in whose territory the action occurred." *Id.* at 1629. It is the third strand of his argument that seeks to justify the use of force to protect nationals abroad by expressly excluding it, through his use of the qualifying term "non-derogation" from Article 2(4) of the U.N. Charter, the language he references in his position.

59. More common are those scholars who have relied upon the ICJ decision in *Corfu Channel* case (U.K. & Ir. v. Alb.), 1949 I.C.J. 4, 34 (Apr. 9), which rejected U.K. claims that their use of force inside Albanian waters to gather evidence did not threaten Albanian "territorial integrity, nor . . . political independence" for the interpretation that Article 2(4) should not be read restrictively permitting uses of force, subject to its "qualifying language." See BROWNIE, *supra* note 8, at 266-67; CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 33 (3d ed. 2008) notes that the "overwhelming majority of states speaking in the [U.N. Security Council] debate [on Entebbe] regarded Israel's action as a breach of Article 2(4). Those who did not condemn Israel did not expressly defend the legality of its action in terms of a narrow interpretation of Article 2(4)." *Id.* A similar assessment is made by NOAM LUBELL, *EXTRA-TERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 27 (2010). Lubell concludes that

while there are ongoing attempts to find interpretations to legitimize humanitarian intervention, the prevalent view does not seem currently to support interpreting Article 2(4) of the Charter in such a way that unilateral (without Security Council authorization) humanitarian intervention would be a legitimate exception to the ban on the use of force.

Id. at 29. More generally, JOHN CURRIE, *PUBLIC INTERNATIONAL LAW* 470 (2d ed. 2008), reviews the academic debate surrounding the interpretation of Article 2(4), specifically the existence, if any, of internal limitations on the scope of the prohibition on the use of force it contains. He considers the views of the "maximalists" as those who argue the prohibition should be read broadly and the "minimalists" as those who suggest that the "additional language found in Article 2(4) plays an important role in limiting its scope." *Id.* at 470-71. While not addressing the doctrine of the protection of nationals specifically, he observes that it would be "difficult to conclude that Article 2(4) prohibition is limited by a right of states to use force unilaterally in the name of promoting or encouraging respect for human rights." *Id.* at 483.

occurs against a Member of the United Nations.”⁶⁰ When considering this legal justification, it is necessary to discern whether the inherent right of self-defense includes the protection of nationals. The content of the inherent right of self-defense, as intended during the course of negotiating the U.N. Charter, was to mirror the customary right of self-defense that existed in international law at the time of the U.N. Charter’s adoption.⁶¹ The ICJ affirmed the relationship between the U.N. Charter provision on self-defense and its customary antecedent:

Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having recognized the existence of this right, does not go on to regulate directly all aspects of its content.⁶²

3. The Doctrine of the Protection of Nationals Abroad as Self-Defense in Customary International Law

Customary international law may be defined “as a source of international law predicated upon general state practice accompanied by the conviction that such practice is required as a matter of international law.”⁶³ The first line of inquiry is whether the doctrine of the protection of nationals abroad, as it existed at the time of the adoption of the U.N. Charter, was found in the right of self-defense in customary international law. While the existence of a right to protect nationals was not controversial at the time, the precise legal basis for it was less certain. This debate includes proponents of an expansive view of self-defense: that the right to protect nationals, then and now, is contained in the inherent right of self-defense as it existed in customary international law at the time the U.N. Charter came into force. Therefore it is captured within the ambit of Article 51. On the other hand, it can be argued that the doctrine of the protection of nationals was not an example of self-defense and instead was a separate unjustified use of force or part of a former doctrine

60. U.N. Charter, art. 51.

61. Doc.885, I/1/34, 6 U.N.C.I.O. Docs 400 (1945); Zedalis, *supra* note 33, at 238.

62. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 122, 94 (June 27) (separate opinion of President Singh).

63. JOHN CURRIE, PUBLIC INTERNATIONAL LAW, *supra* note 36, at 578; *see also* North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), [1969] I.C.J. Rep 3, at 29.

of self-help, in which case the existence of this right after the adoption of the U.N. Charter is unlikely.

The protection of nationals abroad doctrine has origins in a somewhat murky well of legal justification. Lillich traces the development of justification for the modern protection of nationals doctrine to the “classical publicists” of the seventeenth and eighteenth centuries.⁶⁴ Grotius held that a sovereign’s concern and responsibility for his subjects gave rise to a “certain necessity,” which Lillich deemed a sovereign right of self-help to justify the use of force to protect them.⁶⁵ Subsequent writers, including Wolff and Vattel, wrote of the state’s obligation to defend its nationals, a right Lillich traced to a state’s right of self-defense or self-help.⁶⁶

The distinctions between the doctrine of self-defense and the doctrines of self-help, self-preservation, and necessity, as the doctrines existed in the nineteenth and early twentieth-centuries, are not clear. Bowett suggests that it was doubtful that self-preservation and necessity could have “any meaning as a legal concept apart from a generic term for self-defence, self-help and necessity.”⁶⁷ Brownlie writes that “self-preservation is regarded as identical with that of self-defence” in the period before the First World War and that it was the “greatest obstacle to adequate legal regulation of the use of force [because it was] too vague and susceptible to selfish interpretation to provide a basis for a legal regime.”⁶⁸ Furthermore, in his view the predominant reliance upon it by writers and states meant that it obscured the “juridical value of a doctrine of self-help.”⁶⁹ Bowett distinguished self-help from self-defense as follows:

[T]he right of self-defence operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable; its function is to preserve the legal status quo, and not to take on a remedial or repressive character in order to enforce legal rights. This, the latter function, is the function of self-help, and, in a legal system which by its degree of centralization confines the task of law enforcement to collective organs, the positive, remedial role of self-help may well be taken

64. Lillich, *supra* note 25, at 1.

65. *Id.* at 2.

66. *Id.* at 2–4.

67. BOWETT, *supra* note 11, at 10

68. BROWNLIE, *supra* note 8 at 46–48.

69. *Id.* at 48.

from the individual states, leaving to them only the protective right of self-defence. This, it is believed, is the position which the United Nations Charter intended to achieve.⁷⁰

Interestingly, even Brownlie concedes that after the Pact of Paris, which he views as having narrowed the right of “legitimate self-defence” to the “military necessity of meeting force with force,” there was a “certain ambiguity in the attitude of League organs toward the Japanese plea of legitimate defence for the purpose of protecting lives and property of nationals: it is not clear whether the facts or the law told against Japan.”⁷¹ Brownlie notes that in the beginning of Japan’s conflict with China, the Council of the League of Nations was “equivocal” in response to assertions by Japan that it was intervening to protect its nationals.⁷² The resolution of the Council of the League of Nations noted the Japanese assertion that it would withdraw its troops “in proportion as the safety of the lives of and property of Japanese nationals is effectively assured.”⁷³ The Chinese expressed satisfaction with the resolution and, by reasonable inference, the proposition that the protection of Japanese nationals was linked to an orderly withdrawal of Japanese forces.⁷⁴ It was only after it was clear that there was no factual basis to the assertion that Japan was intervening to protect its nationals that condemnation of its actions was made by the United States and the Assembly of the League.⁷⁵

The terminology and justifications used in support of instances of the protection of nationals have not always been clear. However, the challenges in separating the concepts of self-defense, self-preservation, and self-help from pre-U.N. Charter international law, as seen in the writings of Bowett and Brownlie, is not limited to assessing the basis for the doctrine of the protection of nationals.⁷⁶ These are criticisms applicable to the development of the concept of self-defense itself. Both positions have supporters; among the early respected international

70. BOWETT, *supra* note 11, at 11.

71. BROWNLIE, *supra* note 8, at 242.

72. *Id.* at 294.

73. League of Nations, 7th mtg., Official Journal 2307 (Dec. 1931); *see also* BROWNLIE, *supra* note 8, at 295.

74. In the debate prior to the passage of the Council Resolution the Chinese representative noted with satisfaction that, by the terms of the proposed resolution, the Council was conscious of its responsibility for helping both parties to secure the complete and prompt withdrawal of the armed forces of Japan and the full re-establishment of the *status quo ante*, and would remain in session until that responsibility was fully discharged.

League of Nations, 7th mtg., Official Journal 2308 (Dec 1931).

75. BROWNLIE, *supra* note 8, at 294.

76. BOWETT, *supra* note 11; BROWNLIE, *supra* note 8.

scholars who characterized the doctrine as a component of self-defense are Waldock and Bowett.⁷⁷ Brownlie is skeptical of this view.

Waldock, writing about the *Corfu Channel* case,⁷⁸ acknowledged that the Court interpreted the right of self-defense as being narrow.⁷⁹ However, he said that the “long established right” of intervention for the protection of nationals remained.⁸⁰ The right was restricted in his view; it would be for the “sole purpose of securing the safe removal of nationals.”⁸¹

Similarly, Bowett wrote, “[t]he right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writings of jurists and in practice of states.”⁸²

In contrast, Brownlie considered the classic definition of self-defense arising from the *Caroline* incident,⁸³ and Waldock’s conditions for intervention suggested that they were “not to be found in the state practice or works of jurists of the nineteenth century. States merely referenced the need to protect citizens and their interests.”⁸⁴

Prior to the enactment of the U.N. Charter, and even the Kellogg-Briand Pact,⁸⁵ discussions of a state’s right of self-defense, particularly in instances where states used force in support of nationals abroad, was often

77. Waldock, *supra* note 5, at 467; BOWETT, *supra* note 11, at 87.

78. *Corfu Channel Case* (U.K. & Ir. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9); Waldock, *supra* note 5.

79. Waldock, *supra* note 5, at 502.

80. *Id.* at 503.

81. *Id.* at 502–03.

82. BROWNLIE, *supra* note 8, at 87.

83. The discussion flowing from the *Caroline* case refers to the communication between the United States and Great Britain following the British sinking of the U.S. ship the *Caroline* on Navy Island, a U.S. territory in the Niagara River, on the basis that the ship was being used in support of the rebel faction led by MacKenzie during the Rebellion in Upper Canada on December 29, 1837. See 2 MOORE DIGEST OF INTERNATIONAL LAW 409 (1906); see also Louis-Philippe F. Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1 MISKOLC J. INT’L L. 104, 106–12 (2004). By correspondence on July 27, 1842, Secretary of State Daniel Webster wrote to U.K. Special Minister Ashburton about the concept of self-defense: “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.” *Id.* at 104–20. While oft cited as the touchstone for the discussion of the modern position on self-defense, the *Caroline* case is not without its criticisms, including that it more properly relates to the doctrine of anticipatory self-defense or that it is an example of the sort of “self-help” which belongs to a former period that pre-dates the emergence of twentieth century restrictions on the use of force. See GRAY, *supra* note 12, at 121.

84. BROWNLIE, *supra* note 8, at 299.

85. Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57. This is also referred to as the Pact of Paris. It is named for its chief negotiators—the U.S. Secretary of State and the French Foreign Minister, respectively. It sought to “condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” GREEN, *supra* note 13.

bundled with concepts of self-help and self-preservation. This raises some issues. Did the customary right of self-defense, which existed in a comparatively unregulated international legal environment prior to World War I, include the right to protect nationals abroad? Is it possible to trace the existence of self-defense in situations where states deployed their forces to protect their nationals abroad?

The word “inherent” in Article 51 of the U.N. Charter reflects the existence of a scope in which force may be used by a state, notwithstanding the prohibitive nature of the U.N. Charter as a whole, anchored in the broad prohibition on the use of force found in Article 2(4) of the U.N. Charter.⁸⁶ Even Ian Brownlie, who doubts the existence of the right to protect nationals abroad under modern law,⁸⁷ acknowledges that the right to protect nationals abroad, argued in terms of self-defense, was not rejected when considered by the League of Nations prior to World War II.⁸⁸ The excesses of historical episodes of “gunboat diplomacy” should not obscure the relationship between a state and its nationals and the enduring interests states have in protecting their nationals abroad. Bowett writes that under international law, a right to protect nationals abroad crystallizes when a foreign state has breached its duty to safeguard the lives within its territory from infringement.⁸⁹ Not all infringements allow the use of force—only those which carry the “immediate threat of irreparable injury to the life” of nationals.⁹⁰ He recounts that military interventions by the United States in Cuba in 1898 and Haiti in 1915 were justified in part by the imminent danger to U.S. citizens.⁹¹ This was a defensive measure, although he acknowledges the questionable propriety of other acts committed by the United States when U.S. forces arrived in

86. See JOHN CURRIE, PUBLIC INTERNATIONAL LAW 484 (2d ed. 2008) (“[T]he very broad scope of the Article 2(4) prohibition and its customary analogue must be understood in the other U.N. Charter provisions that qualify it . . . there are essentially two in number: 1) [Security Council authorization under Chapter VII of the U.N. Charter]; and 2) even in the absence of Security Council authorization, states may use armed force, individually or collectively, in self-defence.”).

87. BROWNLIE, *supra* note 8, at 301.

88. *Id.* at 242.

89. BOWETT, *supra* note 11, at 89.

90. *Id.* His formulation included property; however, he subsequently writes that the protection of property by military force “can rarely, if at all, be extended to property rights of nationals abroad.” *Id.* at 101.

91. President McKinley addressed Congress on the intervention in Cuba and provided a number of different justifications including: “We owe it to our citizens in Cuba to afford them the protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.” Message from the President to the Congress, [1898] Foreign rel. U.S. 750, 757–58 (1901), <http://www.academicamerican.com/progressive/worldpower/docs/McKCuba.htm>.

Haiti. He also excludes reprisals in the case of a number of European states in the eighteenth century from falling within the concept of self-defense.⁹²

There are challenges in isolating the exercise of a right of self-defense from among other objectives where states acted forcibly to protect their nationals. Nonetheless, the belief in a right of self-defense has motivated states to intervene, at least in part. Therefore, it is suggested that the justification for forcible or military intervention to protect nationals abroad has roots in a right of self-defense.

In the *Nicaragua* case, the ICJ recognized that there is a customary nature to the right of states to use force in self-defense, and that the U.N. Charter does not regulate “all aspects of its content.”⁹³ It was further noted during negotiations for the U.N. Charter that “self-defense remains admitted and unimpaired.”⁹⁴ As has been shown in its interventions in Cuba and Haiti, the United States relied upon this right. The Council of the League of Nations’ response to Japan’s invocation of the doctrine in their forcible intervention in China and for China’s condonement of the link between the withdrawal of Japanese troops and the protection of its nationals, further indicates the right to forcibly protect nationals abroad was in accordance with established order. It is submitted that the inference to be drawn is that such armed intervention to protect a state’s nationals was itself recognized as part of a state’s right of self-defense under the customary law in the time before the enactment of the Charter.

4. *State Practice Until the End of the Cold War*

Since the adoption of the U.N. Charter, state practice of the doctrine of the protection of nationals has defied facile description. It is difficult to discern state practice in regards to the existence of the doctrine in international law to protect nationals abroad. There have been a number of incidents, described above, where the U.N. Security Council proposed resolutions addressing situations where the doctrine has been invoked—notably when the United States and Israel have been involved.⁹⁵ While

92. BOWETT, *supra* note 11, at 98–99.

93. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 122, 94 (June 27) (separate opinion of President Singh).

94. Zedalis, *supra* note 33, at 238; Doc. 885, I/1/34, 6 U.N.C.I.O. Docs 400 (1945).

95. See U.N. SCOR, 31st Sess., 1941st mtg. at 11–14, U.N. Doc. S/PV.1941 (July 12, 1976); Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT’L L. 496 (1990).

there has been no resolution speaking to the legality of the doctrine, the debate at the U.N. Security Council has been divided.

The need for separating different legal bases from each other and for separating legal from non-legal justifications for an intervening state entering another state's territory to protect its nationals is required and at times difficult. Similarly, states' views of the practice, particularly condemnations of specific incidents, do not necessarily clearly condemn the existence of the doctrine of protection of nationals itself, but rather its application in any given case.

Attempts to firmly establish the doctrine of protection in treaty law have not been successful. The International Law Commission undertook a review of the subject of diplomatic protection.⁹⁶ Special Rapporteur J.R. Dugard submitted his *First Report on Diplomatic Protection* on March 7, 2000 ("Dugard Report").⁹⁷ This was a review of the history and scope of diplomatic protection, coupled with recommendations about how the right of diplomatic protection could be employed consistent with the objectives of advancing "the protection of human rights in accordance with the values of the contemporary legal order."⁹⁸ Ancillary to this purpose, Dugard considered the protection of foreign nationals abroad, and his report proposed the use of force as an acceptable means of diplomatic protection for the purpose of the "rescue of nationals."⁹⁹ The draft article he proposed modified the Waldock criteria.¹⁰⁰ Dugard specifically reviewed the history and controversy surrounding the doctrine of protection of nationals. He noted that his predecessors in the role of Special Rapporteur had taken a contrary view in that the use of force

96. Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996).

97. Special Rapporteur on Diplomatic Protection, *First Report on Diplomatic Protection*, Int'l Law Comm'n, U.N. Doc. A/CN.4/506 (Mar. 7, 2000) (by John R. Dugard) [hereinafter Dugard Report].

98. *Id.* at 4.

99. *Id.* at 16–17. Draft Article 2 states:

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of the 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;
- (e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Id.

100. Waldock, *supra* note 5.

under the rubric of diplomatic protection should be specifically prohibited.¹⁰¹ He placed this right within the inherent right to self-defense preserved from customary law and rejected the premise that it can be justified as an exception to Article 2(4).¹⁰²

Tellingly, he implied that state practice since 1945 in support of military intervention to protect nationals abroad (in particular the “failure of courts and political organs of the United Nations to condemn such action”) indicated its acceptance.¹⁰³ In the period since the adoption of the U.N. Charter, there has been no treaty, no U.N. Security Council Resolution, nor any judgment from the ICJ condoning or condemning the legality of protection of nationals abroad.¹⁰⁴ As a result, statements on the legality of the doctrine of the protection of nationals abroad are supported by references to speeches at the U.N. Security Council in limited occasions where the doctrine was invoked, and with reference to U.N. General Assembly votes in response to these situations.¹⁰⁵

Furthermore, justifications for what appears to be forcible intervention to protect nationals abroad are not always provided, nor are the incidents necessarily subject to Security Council debate, let alone resolution or ICJ consideration. This is particularly evident, as discussed later, in more recent situations of NEO. Dugard infers from this that states condone the doctrine.¹⁰⁶

Gray, specifically referencing the U.S. interventions in Grenada and Panama, writes that the response of states, notably in the U.N. General Assembly, to various interventions shows a deep division between states, with few states according a right to protect nationals.¹⁰⁷ Indeed, only two delegates, Igor Lukashuk and Robert Rosenstock, to the International Law Commission supported the draft articles in the Dugard report, and many “strongly denounced the proposal.”¹⁰⁸ However, it is suggested that

101. Special Rapporteur on Diplomatic Protection, *Preliminary Report on Diplomatic Protection*, Int’l Law Comm’n, U.N. Doc. A/CN.4/484, ¶ 11 (Feb. 4, 1998) (by Mohamed Bennouna).

102. Dugard Report, *supra* note 97, at 20.

103. *Id.* at 21.

104. The ICJ limited its comments on the failed U.S. attempt to rescue the U.S. nationals being held hostage in Tehran, noting that it was not required to “settle the legality of the [rescue mission] under the Charter of the United Nations and under international law”; however, they noted that the United States may have had “understandable feelings of frustration.” United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 64, ¶ 93–94 (May 24). The Court did criticize the United States on the basis that the operation would “undermine respect for the judicial process in international relations.” *Id.* ¶ 93.

105. *See supra* notes 53–57 and accompanying text.

106. Dugard Report, *supra* note 97, at 21.

107. GRAY, *supra* note 12, at 127.

108. Ruys, *supra* note 3, at 257.

caution must be taken in ascribing custom to state practice founded upon speeches in the General Assembly for matters of *jus ad bellum*.¹⁰⁹ General Assembly member states have effectively delegated primary responsibility to the Security Council for the maintenance of international peace and security.¹¹⁰

During the Cold War there were notable examples of the application of the doctrine, specifically by states who asserted it as justification for their actions. Examples since the adoption of the Charter include the United Kingdom in the Suez in 1956,¹¹¹ the United States in Lebanon in 1958,¹¹² Grenada in 1983 and Panama in 1989,¹¹³ Belgium in Congo in 1960,¹¹⁴ and again in 1964, with the United States¹¹⁵ and Israel as described previously.¹¹⁶

The British justification for their joint intervention with France and Israel in Egypt is perhaps the first clear and detailed reliance on the doctrine of the protection of nationals after the U.N. Charter. The defense of the Suez Canal was a British responsibility; in July of 1956 Egyptian President Nasser nationalized the Canal.¹¹⁷ There were negotiations with Egypt, whose objective was to restore international control over the Canal, but these were unsuccessful.¹¹⁸ Contemporaneously, the United Kingdom and France were clandestinely discussing the possibility of Israeli involvement in a military action to recover the control of the Canal from Egypt.¹¹⁹ Israel was supportive, owing to its pre-existing tensions with Egypt that had resulted in a number of military incidents between the two countries.¹²⁰ Accordingly, on October 31 of the same year, British and

109. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 9 (2d ed. 2004).

110. U.N. Charter art. 24.

111. U.N. SCOR, 11th Sess., 749th mtg. at 24, U.N. Doc. S/PV.749 (Oct. 30, 1956).

112. 39 DEP'T ST. BULL. 181 (1958), available at <http://archive.org/stream/departmentofstat391958unit#page/180/mode/2up>. President Eisenhower announced the deployment of a contingent of U.S. military to "protect American lives" as a part of the justification.

113. U.S. Ambassador to the United Nations, Jeane Kirkpatrick, asserted a number of justifications for the U.S. action in Grenada, noting that there was an invitation from the Organization of Eastern Caribbean States, and a "danger to innocent U.S. nationals." U.N. SCOR, 38th Sess., 2491th mtg. ¶ 65, U.N. Doc. S/PV.2491 (Oct. 27, 1983). For justification for the intervention in Panama, see George Bush Presidential Library and Museum (Dec. 20, 1989), http://bushlibrary.tamu.edu/research/public_papers.php?id=1356&year=1989&month=12.

114. U.N. SCOR, 15th Sess., 877th mtg. at 18, U.N. Doc. S/PV.877 (July 20, 1960).

115. See, e.g., Ruys, *supra* note 3, at 257; GRAY, *supra* note 12; Lillich, *supra* note 25.

116. U.N. SCOR, 31st Sess., 1939th mtg. at 13, U.N. Doc. S/PV.1939 (July 9, 1976).

117. GILBERT, *supra* note 52, at 312.

118. *Id.*

119. *Id.*

120. Gilbert recounts that Israeli forces had come into contact with Egyptian forces since 1948 in the period surrounding the state of Israel. *Id.* at 233. The Egyptian Army "lay astride the road leading

French forces launched Operation Musketeer to wrest control of the Canal back from Egypt.¹²¹

In discussions at the Security Council, in addition to arguing that it was concerned with maintaining the freedom of navigation of the canal, the United Kingdom stated that “British and French lives must be safeguarded. . . . [W]e should certainly not want to keep any forces in the area for one moment longer than is necessary to protect our nationals.”¹²² This line of argument was expanded upon by Prime Minister Eden and the Foreign Secretary in the House of Commons where they relied upon Article 51 of the U.N. Charter, as well as by the Lord Chancellor in the House of Lords.¹²³ The British reliance on the doctrine was heavily criticized, especially that country’s assertion that the lives of their nationals were in imminent risk.¹²⁴

In 1960, Belgium intervened in Congo to rescue a number of its nationals in the violent aftermath of that state’s independence.¹²⁵ In an address to the State Senate, the Belgian Prime Minister justified the sending of paratroopers into Congo to “protéger la vie de ses ressortissants.”¹²⁶ This position was confirmed at a subsequent U.N. Security Council meeting.¹²⁷ Reaction to Belgium’s move was mixed and included the Soviet Union condemning Belgium;¹²⁸ however, a subsequent draft resolution was voted against by the United States, Italy, France, the United Kingdom, and Argentina. The latter state advised that the protection of individuals is a “sacred duty to which all other considerations must yield.”¹²⁹

The Israeli intervention at Entebbe was justified primarily on the basis of self-defense of nationals in accordance with Article 51.¹³⁰ There were two resolutions proposed to the U.N. Security Council, one condemning Israel and deeming its actions in contravention of international law and

into [Israeli] settlements in the Negev.” *Id.* at 221. As recently as April of 1956, artillery fire launched from Egyptian positions in Gaza landed on Israeli settlements in Negev. *Id.* at 311.

121. GILBERT, *supra* note 52, at 312–28.

122. NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 28 (1985).

123. *Id.* at 29.

124. Ruys, *supra* note 3, at 239.

125. RONZITTI, *supra* note 122, at 30.

126. *Id.*

127. *Id.*

128. *Id.* at 31–32.

129. *Id.*

130. U.N. SCOR, 31st Sess., 1939th mtg. at 14, U.N. Doc. S/PV.1939 (July 9, 1976).

the other condemning the hijacking (although it was silent on the question of legality). Neither was adopted.¹³¹

The anti-hijacking resolution received votes from France, Italy, Japan, Sweden, and the United Kingdom; the United States, Panama, and Romania abstained; the remaining seven members, including China and the Soviet Union, did not take part in the vote.¹³²

States' response to this action and the resulting interpretation of the legality of the doctrine has been described in a variety of ways. Zedalis characterized those who voted in favor of the resolution as implicitly accepting Israel's actions as lawful, while judging the U.N. practice as a whole as inconclusive in relation to the doctrine of the protection of nationals.¹³³ His observation underlines the risk in evaluating speeches to the Security Council related to this incident as determinative of the view of states as to the existence of the doctrine of protection of nationals as a right of self-defense. While Israel asserted self-defense as a basis for its actions and the United States endorsed both the legal basis and the application to the circumstances, the positions of other nations were not as clear.

While there were states who condemned the Israeli intervention and deemed it a violation of Article 2(4) of the U.N. Charter, this did not challenge the principle that the right to protect nationals in foreign states existed within the right of self-defense.¹³⁴ Certainly it is possible to infer states' rejection of the doctrine from certain comments. For example, Tanzania did not think that the Israeli action was conducted "for the purpose of self-defence," but was silent on whether the Ugandan authorities were complicit with the hostage takers.¹³⁵ More representative were the comments of Pakistan, which characterized the Israeli action as "aggression" but challenged the Israeli conduct rather than the underlying doctrine of the protection of nationals abroad.¹³⁶ A plausible conclusion, upon close review of the criticism of the Pakistani ambassador, is that the condemnation of Israel was conditioned upon Israel's failure to

131. Zedalis, *supra* note 33, at 247.

132. Green, *supra* note 8, at 317.

133. Zedalis, *supra* note 33, at 247–48.

134. See U.N. SCOR, 31st Sess., 1939th mtg.-1943d mtg., U.N. Doc. Sp/PV.1939-1943 (July 9, 1976).

135. U.N. SCOR, 31st Sess., 1941st mtg. at 11–14, U.N. Doc. S/PV.1941 (July 12, 1976).

136. *Id.* A similar assessment of the U.N. debate was made by Canada's Department of Foreign Affairs and International Trade [DFAIT] in official correspondence compiled by the Legal Advisor to DFAIT Allan Kessel. Allan Kessel, *Canadian Practice in International Law*, 45 CAN. Y.B. INT'L L. 413 (2009) ("[The] debate—long on expressions of concern, but short on outright questioning of the right of states to protect citizens abroad, including through use of force.").

demonstrate that it complied with the requirements it put forward as being part of a lawful right of rescue, which as a result meant that their action was an unlawful use of force.¹³⁷

Ruys suggests that only the United States explicitly supported Israel's legal arguments and a "broad majority of states denounced the operation as a violation of international law."¹³⁸ Irrespective of criticisms of Israel's conduct, this denunciation is not necessarily a condemnation of the right of self-defense extending to the protection of nationals abroad, but rather the condemnation of the application of the right in these circumstances.

In 1978, Egyptian commandos landed at Larnaca in Cyprus where a number of delegates of the Afro-Asian Peoples Solidarity Organization, including Egyptians, were being held hostage in an airplane by a Palestinian dissident movement.¹³⁹ In the midst of negotiations between the Cypriots and the captors, the Egyptians assaulted the aircraft, and in the course of doing so, were engaged by the Cypriot National Guard.¹⁴⁰ A number of Egyptian commandos were killed, the hostage takers were arrested, and the hostages were freed.¹⁴¹ While not specifically raising the protection of nationals doctrine, Egypt maintained that it had acted lawfully.¹⁴² It was not raised at the U.N. Security Council.

Two military interventions by the United States into Central America in the 1980s that relied upon the doctrine of the protection of nationals ignited a significant number of comments on the doctrine from academics.¹⁴³ The U.S. intervention in Grenada in 1983 was justified on several grounds in early communications from the Department of State, including its right under customary international law to protect its nationals. There were a number of other justifications advanced as well,

137. *Id.* at 15, ¶¶ 127, 132.

138. Ruys, *supra* note 3, at 249.

139. *Terrorists: Murder and Massacre on Cyprus*, TIME MAGAZINE (Mar. 6, 1978), <http://www.time.com/time/magazine/article/0,9171,915969-1,00.html>.

140. RONZITTI, *supra* note 122, at 41.

141. *Id.* at 40–41.

142. Ruys, *supra* note 3, at 251.

143. See, e.g., Oscar Schachter, *In Defence of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 118 (1986); Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 496 (1990); Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation?*, 25 TEX. INT'L L.J. 209, 218 (1990); Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-defense and Panama Invasion*, 29 COLUM. J. TRANSNAT'L L. 609 (1991); Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991). For a legal defense of U.S. conduct in Panama from former Legal Advisor to the U.S. Department of State see Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281–92 (1991).

including invitation or consent.¹⁴⁴ Similarly, President Bush ordered the 1989 U.S. intervention in Panama to “protect the lives of American citizens in Panama.”¹⁴⁵

In both cases, the United States was criticized for its actions.¹⁴⁶ However, much of this criticism was arguably directed at the validity of the application of the doctrine rather than its existence; typical was the view that the U.S. invocation of the protection of nationals as the basis for its intervention was inaccurate because it did not adhere strictly to the doctrine’s requirements.¹⁴⁷ In the case of Grenada, it was not clear whether in fact there was valid invitation, as the invitation came from that state’s Governor General, a largely ceremonial post.¹⁴⁸ The General Assembly condemned the U.S. intervention into Grenada for violating “international law and the independence, sovereignty and territorial integrity of that state.”¹⁴⁹ It also condemned the U.S. intervention in Panama; however, these condemnations were not necessarily repudiations of the doctrine because the U.S. interventions were merely protecting their nationals and resulted in a prolonged presence in those states.¹⁵⁰ Furthermore, these condemnations were not “overwhelming.”¹⁵¹

As to whether or not an attack on nationals abroad constitutes an “armed attack” under Article 51 (thus allowing the maligned state to

144. Oscar Schachter, *In Defence of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 118 (1986).

145. See George Bush, *Address to the Nation Announcing United States Military Action in Panama*, Presidential Library and Museum (Dec. 20, 1989), http://bushlibrary.tamu.edu/research/public_papers.php?id=1356&year=1989&month=12.

146. In the case of Grenada, see G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp. No. 47, U.N. Doc. A/Res/38/7, at 19–20 (Nov. 3, 1983). In regards to U.S. intervention in Panama, see G.A. Res. 44/240, U.N. GAOR, 44th Sess., U.N. Doc. A/Res/44/240 (Dec. 29, 1989).

147. Typical of the critiques leveled against the U.S. reliance on the doctrine of the protection of nationals in the case of Panama can be seen in statements like those made by Ved P. Nanda, who stated that “notwithstanding the lack of agreement on the proper interpretation of Article 51 of the UN Charter, while rescue operations of one’s nationals might be considered permissible, the U.S. invasion of Panama does not satisfy the minimum required standards.” Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT’L L. 494, 496 (1990). Similarly, Farer wrote,

rescue missions cannot be persuasively indicted as violations of international law, as long as they comply with the principles of proportionality and necessity and are not tainted by ulterior motives. The normative problem with Bush’s Panamanian end game is precisely his difficulty in demonstrating compliance with the limiting conditions for lawful rescue.

Farer, *supra* note 9, at 505–06.

148. GRAY, *supra* note 12, at 77.

149. G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp. No. 47, U.N. Doc. A/Res/38/7, at 19–20 (Nov. 3, 1983). The General Assembly did not cite the specific article violated. See *id.*

150. RUY, *supra* note 27, at 223.

151. GRAY, *supra* note 12, at 128.

respond), there is no conclusive answer from state practice. When there is discussion of the doctrine of protection of nationals at the United Nations, it is generally not about the content or the mechanics of the doctrine, nor about its theoretical legality.¹⁵² The discussion is about the application of doctrine in a specific instances or circumstances. In debates at the U.N. Security Council, support or condemnation of the doctrine of protection of nationals is generally cloaked in terms of approval or disapprobation of the actions of the intervening state.¹⁵³

As noted earlier, the link between subjects and sovereigns in antiquity would seem to justify the proposition that an insult to one is an insult to the other. If such a link exists, one writer suggested that:

[p]eople being a necessary condition for the existence of a state, the protection of nationals can be assimilated without great strain to the right of self-defense explicitly conceded in the text of the Charter.¹⁵⁴

This raises the question of whether a state can use force in self-defense to protect its nationals abroad in response to an armed attack in accordance with Article 51 of the U.N. Charter. As Tom Ruys queried, “[C]an an attack against nationals abroad be equated with an attack on the state itself?”¹⁵⁵ The definition of “aggression,” which was the subject of a resolution in the General Assembly, does not include attacks against nationals abroad as an act of aggression.¹⁵⁶ However, it notes that the list is not exhaustive.¹⁵⁷ It is suggested that the question of whether or not such an attack includes or excludes a state’s citizens abroad is not answered.¹⁵⁸

5. *State Practice from the U.N. General Assembly*

While it has been noted that the U.N. General Assembly has passed resolutions condemning some instances where the doctrine has been invoked by states,¹⁵⁹ it is suggested that they should not be viewed as

152. RONZITTI, *supra* note 122 with S/PV.1941.

153. *Id.*

154. Farer, *supra* note 9, at 505.

155. RUY, *supra* note 27, at 214.

156. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, art. 3, U.N. Doc. A/Res/3314 (Dec. 14, 1974).

157. U.N. GAOR, 29th Sess., 2319th mtg. at Annex art. 1, U.N. Doc. A/3314 (Dec. 14, 1974).

158. RUY, *supra* note 27, at 216 (“[T]he Charter provisions neither authorize nor definitively rule out protection of nationals per se.”).

159. See discussion *supra* note 146.

persuasive evidence of state practice for a number of reasons. As discussed previously, there are valid concerns in discerning state practice from the stated positions of members of the General Assembly on matters of peace and security given the United Nations' very limited jurisdiction in those areas. An additional cautionary note with the weight given to General Assembly positions on matters of *jus ad bellum* relates to the context in which the position is provided. Gray writes:

[T]here are problems in assessing the question how far what states say in these debates is significant. They may change their views; clearly their views at any particular time are influenced by disputes in which they are directly involved or in which they are interested. Typically states may attack each other and set out their own justifications for force during the general debates . . . it is important to see the statements in the context of the time in which they were made. Views expressed in debates on the adoption of declarations may be modified later in response to particular conflicts.¹⁶⁰

It has been suggested that limited weight should therefore be attributed to positions of General Assembly members. On the one hand, there are a group of states, such as the United States, the United Kingdom, France, Belgium, Israel, and Egypt who have relied (albeit sometimes vaguely) on some formulation of this doctrine.¹⁶¹ Similarly, there are a number of states, including the Soviet Union, the former Eastern Bloc states, as well as some developing nations, that have consistently criticized episodes where states have invoked the doctrine but not necessarily the existence of the right of protection of nationals as a component of self-defense in some cases.¹⁶²

6. *State Practice Post Cold War: The Rising Prominence of NEO*

Throughout the 1990s and during the last decade there have been a number of situations where states have deployed their forces to assist in the removal of nationals from states where there was unrest.¹⁶³ In contrast

160. GRAY, *supra* note 12, at 9.

161. See generally NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 63 (1985). For the United States, see *supra* notes 113, 114; the United Kingdom, see *supra* note 112; France, see *supra* note 23; Belgium, see *supra* notes 23, 43; Israel, see *supra* note 52; and Egypt, see *supra* note 143.

162. Krylov, *supra* note 31, at 379.

163. See generally Richard B. Lillich, *Lillich*, *supra* note 25, at 105, 107, 243; see also Canada in Lebanon, *supra* note 2.

to the episodes discussed earlier, these instances did not result in discussion at the Security Council.¹⁶⁴ Generally, these instances of intervention accompanied consent of the state where the intervention occurred; however, the validity of this consent may be questionable given the state of unrest.¹⁶⁵ Nonetheless, there was no protest from the target state nor was there a report of the act of self-defense by the state using force to the Security Council as required by the U.N. Charter. A typical example is the U.S. intervention in Liberia in 1990.¹⁶⁶ Similarly, there was no clear indication that positive consent was given by the target state.¹⁶⁷

III. NON-COMBATANT EVACUATION OPERATIONS (“NEO”)

The increasing frequency of situations where foreign militaries have deployed, with arguable or even no consent of the receiving state in order to remove their nationals, has given rise to a distinct type of military operation. These situations have been labeled Non-combatant Evacuation Operations, commonly known as NEOs, by most notable practitioners of the doctrine—namely, the United Kingdom and the United States.¹⁶⁸ While the term “non-combatant evacuation operation” has been around for some time,¹⁶⁹ its wider acceptance as a formal national doctrine is more recent. It was noted in the United Kingdom that in the three years since the establishment of its Permanent Joint Headquarters (“PJHQ”) in 1994, it conducted eleven NEOs, including five in Sierra Leone, and “[g]iven the relative high frequency of NEOs and the absence of any endorsed doctrine, PJHQ produced the [first official planning guidance] in early 1998 with the aim of providing guidance for the planning and execution of a NEO.”¹⁷⁰

A state’s military doctrine draws on a number of sources; however, its authority originates from the state. In Canada, for example, military

164. *Id.*

165. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 159 (3d ed. 2008) writes that “many of these cases occurred when there was no effective government.” *Id.*

166. GRAY, *supra* note 12, at 129. For a review of the situation in Liberia, see Lillich, *supra* note 25, at 243.

167. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 159 (3d ed. 2008) writes that “it seems that third states were willing to acquiesce in the forcible evacuation of nationals.” *Id.*

168. MINISTRY OF DEFENCE, *Joint Warfare Publication 3–51* (2000); CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *Joint Pub 3-07.5*, at vii (1997).

169. *See, e.g.*, U.S. ARMY, *NONCOMBATANT EVACUATION*, AR 525–12 (1973).

170. MINISTRY OF DEFENCE, *JOINT WARFARE PUBLICATION 3–51*, iii (2000), available at http://www.mod.uk/NR/rdonlyres/D0302742-2103-4C9D-9CE8-D6F2E6B1860F/0/20071218_jwp3_51_U_DCCIMAPPS.pdf.

doctrine at a national level is approved by the Chief of Defence Staff, who, “[u]nless the Governor in Council otherwise directs,” is responsible for “all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister.”¹⁷¹

In 2003, Canada issued the *Joint Doctrine Manual Non-Combatant Evacuation Operations*.¹⁷² The preface states that the “Government of Canada bears a fundamental responsibility for the safety and well being of all Canadians.”¹⁷³ It acknowledges that abroad this responsibility is assumed by Department of Foreign Affairs and International Trade (“DFAIT”);¹⁷⁴ however, it then recognizes that due to the “uncertainties under which evacuations are normally conducted,” assistance may be required from the Canadian Forces.¹⁷⁵ In “extreme circumstances,” the Canadian Forces may be required to assume full responsibility for the evacuation.¹⁷⁶

The Canadian doctrine for NEOs is similar to that of the United States and the United Kingdom. The U.S. publication *Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations* notes that such operations are conducted to “assist the Department of State.”¹⁷⁷ The British document *Non-combatant Evacuation Operations*, was promulgated by the Chiefs of Staff of the British Armed Forces in 2000.¹⁷⁸ It states: “[Her Majesty’s Government] discharges responsibility for the protection of British citizens overseas through the Foreign and Commonwealth Office . . . assisted by the Ministry of Defence . . . as required.”¹⁷⁹

The North Atlantic Treaty Organization (“NATO”) recognizes a NEO as a military operation other than war, which it deems a small scale contingency operation conducted nationally, bilaterally or multinationally.¹⁸⁰ The description given a NEO by these states is similar.

171. National Defence Act, R.S.C. 1985, c. N-5, ss.18(2).

172. DEP’T OF NAT’L DEFENCE, *supra* note 6.

173. Cdn Manual (i).

174. *An Act respecting the Department of Foreign Affairs and International Trade*, R.S.C., 1985, c. E-22 at s.2, available at <http://laws-lois.justice.gc.ca/PDF/E-22.pdf>.

175. Cdn Manual (i).

176. DEP’T OF NAT’L DEFENCE, *supra*, note 6, at i.

177. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, Joint Pub 3-07.5, at vii (1997); *see also* Exec. Order No. 12656, s.1301(2)(f) (1988), charging the Department of State with “[p]rotection or evacuation of United States citizens and nationals abroad and safeguarding their property abroad, in consultation with the Secretaries of Defense and Health and Human Services.”

178. MINISTRY OF DEFENCE, *supra* note 170.

179. *Id.*

180. North Atlantic Treaty Organization (NATO) & Research and Technology Organization

Canada deems it a “military operation conducted to assist Department of Foreign Affairs and International Trade [DFAIT] in evacuating Canadians and selected non-Canadians from threatening circumstances in a foreign [host nation] and moving them to a safe haven.”¹⁸¹

For the United Kingdom, it is an “operation conducted to relocate designated non-combatants threatened in a foreign country to a place of safety.”¹⁸² The U.S. doctrine holds that NEOs are performed to evacuate “non-combatants, nonessential military personnel, selected host-nation citizens, and third country nationals whose lives are in danger from locations in a host foreign nation to an appropriate safe haven and/or the United States.”¹⁸³ Regarding the nature of the operation in Canada as “fundamentally defensive in nature,”¹⁸⁴ in the United Kingdom it is a “limited intervention operation”¹⁸⁵ and in the United States, it usually involves “swift insertions of force, temporary occupation of an objective, and a planned withdrawal upon completion of the mission.”¹⁸⁶ The doctrine classifies the threat environment for the conduct of the operation in a foreign state as permissive, uncertain or hostile.¹⁸⁷

The degree of explicit legal justification for these operations varies. While they all acknowledge consent of the host nation as one basis, the United Kingdom explicitly states that it “may be justified on grounds of self-defence (Article 51 of the UN Charter).”¹⁸⁸ The Australian doctrine includes the “inherent right of self-defence to protect its nationals.”¹⁸⁹ The Canadian document, in contrast, states that the “legal status of the NEO and the [Task Force] conducting it must be established prior to entry” in the host nation, however, however it is silent on the legal basis for hostile NEOs.¹⁹⁰ It cites criteria for Canadian Forces involvement as “the agreement of the recognized host nation authorities (with some significant exceptions).”¹⁹¹ It is suggested that this doctrine implies that a hostile NEO could have a legal basis other than consent. This inference is

(RTO), *Handbook on the Analysis of Smaller-Scale Contingency Operations in Long Term Defence Planning* (Feb. 2005), available at [http://ftp.rta.nato.int/public//PubFullText/RTO/TR/RTO-TR-SAS-027//TR-SAS-027-\\$\\$ALL.pdf](http://ftp.rta.nato.int/public//PubFullText/RTO/TR/RTO-TR-SAS-027//TR-SAS-027-$$ALL.pdf).

181. DEP’T OF NAT’L DEFENCE, *supra* note 6, at GL-3.

182. MINISTRY OF DEFENCE, *supra* note 170, at 1-1.

183. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, Joint Pub 3-07.5, *supra* note 177, at vii.

184. DEP’T OF NAT’L DEFENCE, *supra* note 6, at 1-1.

185. MINISTRY OF DEFENCE, *supra* note 170, at 1-1.

186. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, Joint Pub 3-07.5, *supra* note 177, at vii.

187. *Id.* at 1-2-1-3; GILBERT, *supra* note 52, at 1-1; RONZITTI, *supra* note 125, at I-3-I-4.

188. MINISTRY OF DEFENCE, *supra* note 170, at 4A-1.

189. ADDP 3.10, n.194, ch. 5, Annex B, *Legal Considerations*; Ruys, *supra* note 3, at 17.

190. DEP’T OF NAT’L DEFENCE, *supra* note 6, at 2B-6.

191. *Id.* at 4-3.

buttressed by record of Canadian Practice in International Law compiled by the Legal Advisor to DFAIT on the subject of the “Protection of Nationals Abroad.”¹⁹² He states that the right to use force in these circumstances stems from the inherent right of self-defense.¹⁹³ The U.S. doctrine does not specify the legal basis for entry into host nations where there is no consent or United Nations Security Council resolutions.

The United States acknowledged that Operation Sharp Edge, carried out from June 1990 to January 1991, was an NEO.¹⁹⁴ It was launched to rescue U.S. and other foreign nationals threatened by the Liberian civil war between factions loyal to President Samuel Doe and rebel leader Prince Johnson.¹⁹⁵ It was accomplished without seeking or receiving express permission from either of the Liberian leaders.¹⁹⁶ This led one writer to conclude that the “international community, now more than ever in the post-Cold War period, is prepared to accept, endorse, or, at the very least, tolerate the forcible protection of nationals abroad in appropriate cases.”¹⁹⁷

France was involved in evacuation operations in the Central African Republic in 1996 and 2003, in Gabon in 1990 and 2007, in Rwanda in 1990 to 1994, in the Ivory Coast in 2002 to 2003 and jointly with Belgium in Zaire in 1991 and 1993.¹⁹⁸

In addition, there were a number of nations that evacuated their nationals from Lebanon during the Israeli-Hizbollah armed conflict in 2006.¹⁹⁹ It is not clear that the Canadian effort was classified as a NEO,

192. Allan Kessel, in the *Canadian Practice in International Law*, XLVII CANADIAN YEARBOOK OF INT'L LAW 411–47 (2009).

193. Kessel states:

The right of states to use force in the protection of nationals abroad flows from the universally accepted principle of international law that injury to a state's national may be considered injury to the State itself; as such it is properly accommodated within the inherent right to self-defense including as exercised against non-state actors. The right arises in situations where nationals are at risk of death or grave injury, and the host (territorial) state is unwilling or unable to secure their safety, or otherwise take necessary action in compliance with its obligations under international law.

Id. at 412.

194. Sherrod L. Bumgardner, *A NEO is More than a Maneuver*, MARINE CORPS UNIVERSITY COMMAND AND STAFF COLLEGE 5 (1992), available at <http://www.globalsecurity.org/military/library/report/1992/BSL.htm>.

195. *Id.* Bumgardner notes that despite the intensity of the civil conflict, during the main evacuation effort over a few weeks there were no weapons fired by the U.S. Marines.

196. Lillich, *supra* note 25, at 243.

197. *Id.* at 244.

198. Ruys, *supra* note 3, at 251. Zaire is the former name of the Democratic Republic of Congo.

199. The United States evacuated nearly 15,000 American citizens. GOVERNMENT ACCOUNTABILITY OFFICE, *State Dep't: The July 2006 Evacuation of American Citizens from Lebanon*, June 7, 2007, available at <http://www.gao.gov/products/GAO-07-893R>. The United

however, as it involved a Canadian military operation in Lebanese territory. The Minister of Foreign Affairs and International Trade stated that:

[T]here is no higher priority or obligation for a nation. The safe return of Canadian citizens was our only motivation and goal from the beginning of this crisis . . . the work undertaken by officials in Foreign Affairs and International Trade Canada (DFAIT) and numerous other departments including . . . the Department of National Defence (DND) . . . Canadian officials in Lebanon and Israel and throughout the Middle East, as well as in Ottawa, were mobilized to react as effectively and efficiently as possible No one—not even the Lebanese government—foresaw the events and violence erupting so quickly or having such grave consequences for civilians as we have seen in the last three weeks.²⁰⁰

In a number of situations, there has been limited information publicly available to confirm whether consent was given and whether there was an effective government capable of providing this consent.²⁰¹ These recent cases have not received consideration at the U.N. Security Council because they have not been raised there.²⁰² It has been observed that recent practice of states removing nationals from threatening circumstances abroad may mean that many states, perhaps even some of those who have protested past episodes of intervention to protect foreign nationals, have “acquiesce[d] in the forcible evacuation of nationals.”²⁰³

Throughout the 1990s and in the past decade, a number of states have deployed their military forces to assist in the repatriation of their nationals. The NEO is well established in both doctrine and practice.

Kingdom evacuated 4,600 people in the course of Operation Highbrow. MINISTRY OF DEFENCE, *The Historical Characteristics of Non-combatant Evacuation Operations*, July 2011, available at https://www.dstl.gov.uk/downloads/04-05_Sam_Dudin.pdf.

200. Canada, House of Commons, Standing Committee on Foreign Affairs and International Development, 1st Session, 39th Parliament, Evidence of Minister of Foreign Affairs, Hon. Peter MacKay, at 2 (minutes 1020). <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2323940&Language=E&Mode=1&Parl=39&Ses=1>.

201. See Ruys, *supra* note 3, at 252.

202. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 159 (3d ed. 2008).

203. GRAY, *supra* note 12, at 129.

IV. THE RUSSIAN GEORGIAN CONFLICT—AUGUST 2008

The doctrine of the protection of nationals abroad was asserted by representatives of the Russian Federation in the summer of 2008 amid the conflict with Georgia.²⁰⁴ The conflict arose against a backdrop of simmering tensions between the two states. This confrontation was the result of Russian support for semi-autonomous regions in Georgia and Georgia's increasingly western-oriented alignment and integration, notably the results of a national referendum in which voters gave approval to their government to seek NATO membership.²⁰⁵

This view of Russia on the doctrine of protection of nationals is particularly significant since its predecessor, the Soviet Union, consistently condemned Western nations who purported to exercise the right to protect nationals abroad.²⁰⁶

In 1960, the Soviet Union likened claims made by Belgium that it was protecting its nationals in Congo to discredited imperial power doctrine from the nineteenth century.²⁰⁷ At the U.N. Security Council it deemed the Israeli raid on Entebbe “an act of direct, flagrant aggression and an outright violation of the Charter, especially Article 2, paragraph 4.”²⁰⁸

There is little evidence that Russia adopted the position of the Soviet Union on the doctrine of the protection of nationals abroad after the end of the Cold War and the dissolution of that state. In 1993, the enactment of the Russian Federation Constitution included a responsibility for the state to “guarantee to its citizens protection and patronage abroad.”²⁰⁹ As the U.N. Security Council met in response to the unfolding armed conflict in South Ossetia, Russian Ambassador Churkin stated:

The President of the Russian Federation today unambiguously emphasized that Russia will not allow the deaths of our compatriots to go unpunished, and that the lives and dignity of our citizens, wherever they are, will be protected, in accordance with the

204. See *supra* notes 210, 211.

205. *World: Countries and Territories: Georgia*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/georgia/index.html> (last visited Apr. 5, 2011).

206. RONZITTI, *supra* note 122, at 63.

207. *Id.* at 60.

208. *Id.* at 39.

209. KONSTITUTSIIA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 61(2) (Russ.), <http://www.constitution.ru/en/10003000-01.htm> (last visited Mar. 30, 2009).

Constitution of Russia and in accordance with the laws of the Russian Federation and international law.²¹⁰

Separately, he said that “[t]he aim of that operation is to ensure that we protect Russian citizens who are in that region Force will be used only in accordance with Article 51 of the Charter, in exercise of the right of self-defence by the Russian Federation.”²¹¹

In the course of U.N. Security Council speeches, only three states made reference to the legal justification advanced by Russia. Croatia expressed particular concern that statements “can have far-reaching ramifications not limited to the present conflict.”²¹² The United Kingdom suggested that the difference between Russian rhetoric at the Security Council and the comments and actions of Russian officials and military outside of it cast “doubt on Russia’s claims that their actions are humanitarian.”²¹³ Most compelling were the comments of the Panamanian representative Ambassador Arias, stating that Panama condemned “the entirely disproportionate, and therefore illegitimate, use of force by the Russian Federation with the stated aim of protecting its citizens and peacekeeping forces.”²¹⁴

This is interesting given the controversial application of the doctrine of protection of nationals to Panama in 1989 because it suggests that it is the application and not the right of protection of nationals abroad which they condemn.

Russia maintained their position in a number of venues. In an opinion published in the *Rossiiskaia Gazeta*, Chief Justice Zorkin of the Constitutional Court of the Russian Federation, the highest arbiter for the interpretation of the Russian Constitution, wrote approvingly of the Russian military engagement, declaring that the government was obligated to “ensure compliance with article 61 of the Constitution, which in black and white record that Russia guarantees its citizens’ protection and patronage outside its boundaries.”²¹⁵

210. U.N. SCOR, 63d Sess., 5922 mtg. at 5, U.N. Doc. S/PV.5952 (Aug. 8, 2008).

211. U.N. SCOR, 63d Sess., 5953 mtg. at 9, U.N. Doc. S/PV.5953 (Aug. 10, 2008).

212. U.N. Doc. S/PV.5952, *supra* note 210, at 6–7.

213. U.N. Doc. S/PV.5953, *supra* note 211, at 12.

214. *Id.* at 15.ee.

215. See *Walking the Razor’s Edge, Peace Enforcement and Human Rights*, ROSSIISKAIA GAZETA, <http://www.rg.ru/2008/08/13/zorkin.html> (last visited Mar. 30, 2009). For an analysis of the legalities of the campaign, see Peter Roudik, *Russia: Legal Aspects of War in Georgia*, THE LAW LIBRARY OF CONGRESS, 2008-01474, at 9 (Sept. 2008), <http://www.loc.gov/law/help/russian-georgia-war.pdf>. He notes that the *Rossiiskaia Gazeta* is the “official government-owned daily newspaper.” *Id.*

In a speech to the Valdai International Discussion Club on September 12, 2008, President Medvedev said:

Of course we will defend our interests, but most important of all, we will protect our citizens. I have said this before and I want to emphasize it now. The world changed practically straight away following these events. It occurred to me that for Russia, August 8, 2008 is almost like September 11, 2001, for the United States. A lot of people are making this comparison now. Someone here also made this comparison, I think. I think it is quite accurate, in application to the situation in Russia, at least.²¹⁶

Georgia made application to the ICJ on August 12, 2008 under the 1965 *Convention for the Elimination of All Forms of Racial Discrimination* to establish Russian responsibility for its actions in Georgian territory.²¹⁷ In a preliminary proceeding the Russian advocate submitted that:

It was a massive, well-planned attack with the involvement of aviation and tanks, artillery and multiple launch rocket systems. It immediately resulted in numerous casualties among civilians and the Russian peacekeepers. This attack left the Respondent no other option than to use military force in self-defence. Russia's use of force prevented greater losses among the Russian peacekeepers, civilians, mass deaths among the non-Georgian population of South Ossetia or their eviction from the territory of South Ossetia.²¹⁸

The Russian representative did not expressly cite the doctrine of protection of nationals in oral arguments. Instead, he spoke in terms of preventing death among "Russian peacekeepers, civilians, mass death among the non-Georgian population."²¹⁹ In light of the fact that a number of the non-Georgian population held Russian passports,²²⁰ it is suggested that this reference may be interpreted as an assertion of protection of Russian citizens as a basis for their military intervention.

216. See *Transcript of the Meeting with the Participants in the International Club Valdai*, PRESIDENT OF RUSSIA (Sept. 12, 2008), http://www.kremlin.ru/eng/text/speeches/2008/09/12/1644_type82912type82917type84779_206409.shtml.

217. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), 2008 I.C.J. 2, at 4, para. 12 (Sept. 8), <http://www.icj-cij.org/docket/files/140/14657.pdf>.

218. *Georgia v. Russian Federation* CR 2008/23, VERBATIM RECORD (Sept. 8, 2008, 3:00 PM), <http://www.icj-cij.org/docket/files/140/14713.pdf>.

219. *Id.* at 12.

220. Roudik, *supra* note 215, at 10–11.

The position of Russia, as discerned from its constitution and the collective comments of its officials and representatives, is that the doctrine of the protection of nationals abroad exists as a right of self-defense in international law. The response from the members of the Security Council to this justification, with the exception of Croatia, has not been condemnatory; rather it seems that there is acquiescence to the doctrine with criticism directed at the sincerity of Russian motives and the conduct of its armed forces. The legality was suspect by the disproportionate use of force, rather than the simple fact of it being exercised. It is acknowledged that this is not a strong endorsement of the doctrine; however, it seems that at this point the response of the U.N. Security Council states should be construed as a tacit acknowledgement of the existence of the doctrine of the protection of nationals abroad.

The enduring criticism of the invocation of the doctrine since the enactment of the U.N. Charter has been that it is often a pretext for measures beyond the protection of nationals, rather than for ends which are achieved by means disproportionate to those required to merely protect nationals. By this interpretation, it would seem that Russia leveraged acceptance of the doctrine of the protection of self-defense for the justification of a use of force that was disproportionate and contrary to the third Waldock criterion and not strictly confined to the object of protecting its citizens against injury.

V. THE DOCTRINE OF THE PROTECTION OF NATIONALS: TOWARDS A RIGHT OF REMOVAL

A framework for the doctrine of the protection of nationals abroad is emerging from the fusion of NEO and their corresponding acceptance by states. This has been recognized by a number of writers, although there are still debates on the boundaries of this doctrine. Tom Ruys suggests that “*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 abroad’ is not a ‘one size fits all doctrine.’”²²¹

Ruys observes that Article 51 of the U.N. Charter cannot be used to justify a prolonged stay in a foreign state, and that the doctrine does not cover the protection of property.²²² He then cited the draft International

221. Ruys, *supra* note 3, at 16.

222. *Id.* at 264.

Law Commission articles on diplomatic protection for the proposition that diplomatic protection is limited to peaceful means of protection.²²³

He then notes the increasing prevalence of evacuation operations which have not occasioned protest, and he concludes that the NEO operations provide a basis for a “special right of self-defence enshrined in Article 51 of the U.N. Charter.”²²⁴ He suggests it would arise in those situations where there is a breakdown of law and order or a collapse in government.²²⁵ This could include non-consent evacuation where lethal force may be authorized. It would exclude hostage rescue missions, which he suggests are typified by the Entebbe Raid and the Egyptian raid in Lanarca.²²⁶

While the framework he provides is for the most part well reasoned, it is suggested that distinction between acceptable evacuation rescues and non-acceptable hostage rescue missions is problematic. If international law allows for an evacuation operation, then it is suggested a properly applied test for the exercise of the right to protect nationals abroad would permit the rescue of hostages as well.

A. *The Waldock Criteria and the NEO Limits of Protection*

Ruys distinguishes between evacuation operations and hostage rescue operations.²²⁷ The difference between a NEO where there is no host nation consent and where it may be justifiable to use lethal force, according to Ruys “especially, but not exclusively, when nationals are attacked because of political antagonism to their government,”²²⁸ and a situation where hostages are rescued is not fundamental insofar as the application of the protection of nationals doctrine.

The second strand of the Waldock test requires that prior to an exercise of a right of self defense to protect nationals is a “failure or inability on the part of a territorial sovereign to protect them.”²²⁹ This requirement is formulated in the legal justification for a NEO in the British doctrine as when a state is “unable or unwilling to protect.”²³⁰ It would seem that Ruys distinguishes between instances where there is a failure and

223. *Id.*

224. *Id.* at 268.

225. *Id.*

226. *Id.* at 270.

227. *Id.* at 269–70.

228. *Id.* at 17.

229. Waldock, *supra* note 5, at 467.

230. MINISTRY OF DEFENCE, *supra* note 170, at 4A-2(b).

unwillingness to protect from those where there is an inability to protect. The latter gives rise to the right to protect; the former does not.

The inability may be causally linked to the host government's collapse. Ruys states that the Israeli raid at Entebbe and the Egyptian raid at Larnaca would thus not be lawful applications of the doctrine of protection.²³¹ Following his rationale, one would infer that he assessed a failure or unwillingness on the part of the Ugandan or Cypriot governments to act, as opposed to their inability to do so.²³² He further suggests that the potential for injury, as shown at Larnaca, militates away from including hostage rescue in the right of protection.²³³ While a potential for injury is an appropriate consideration for a purposeful evaluation of the validity of a law that allows the use of force, it is suggested that such an evaluation should also consider the potential of injury to the hostages if they are not protected by their state.

There are challenges with these distinctions. First, determining whether or not a government has collapsed, or whether it is capable of giving consent to an evacuation operation could be very controversial in its own right. As Bowett wrote in response to the concerns that recognition of a right of protection of nationals is open to abuse:

[S]ince the exercise of the right depends upon the international legal system it must be capable of evaluation in the light of the standards imposed by that system. This is particularly so where the right to resort to these extreme forms of protection is dependent upon a prior breach of the standards of state responsibility imposed by the system. If the question of breach is capable of being objectively determined, then the reaction to that breach must equally be so. Any state invoking the right of self-defence must be

231. Ruys, *supra* note 3, at 270.

232. As seen in the U.N.S.C. debates arising out of the Israeli raid on Entebbe, the question of whether Uganda was collaborating with the hijackers was very contentious. See U.N. Doc. S.PV/1939-1943 generally for this discussion, a portion of which was found in the initial debate on 9 July 1976, where Uganda's representative stated his government's position on this:

I should like to make it clear that Uganda has never condoned and never will condone international piracy. It is not therefore true to say, as has been alleged by the ruling circles in Israel that Uganda collaborated with the hijackers. The Ugandan Government got involved in this affair accidentally and purely for humanitarian reasons.

U.N. Doc. S.PV/1939, para.34. Israel's representative took a different view: "The weight of evidence before us reveals 'prior knowledge and active connivance on the part of the Government of Uganda in this whole episode.'" *Id.* para. 90.

233. Ruys, *supra* note 3, at 270.

prepared to justify the measures it takes in pursuance of that right before an impartial tribunal.²³⁴

Larnaca would have failed on the second prong of the test enunciated by Waldock. The evidence suggests that the Cypriot Government was able and willing to protect, and was in the process of negotiating the release of the hostages. Therefore this requirement is not met.²³⁵ The third criterion of the Waldock test requires that the measures of protection be strictly confined to protecting the nationals against injury. It is not clear that the Egyptian forces complied with this requirement when they left their aircraft at Larnaca. In contrast, there is little evidence of negotiations between the Ugandan government and the hostage takers at Entebbe.

The requirement that the exercise of any right of self-defense be necessary and proportionate means that the scale of response to circumstances jeopardizing a state's nationals abroad must be commensurate with the nature and extent of the threat of injury to those nationals. This would make unlawful any ill-conceived expeditions to inflict injury on a state in reprisal for harm to the intervening state's nationals.

Hostage rescue situations cause a conundrum for some writers who take the position that they are not comprised within the right of self-defense. Attempts are made to reconcile the Israeli raid at Entebbe with a doubtful view of the doctrine of protection. Ruys suggested that it would be appropriate to have a "waiver of illegality."²³⁶ Daudet writes that even in case of very serious actions, including hostage-taking, the "rule of non-intervention is paramount . . . regardless . . . of the feeling of frustration which can result from the obligation to refrain from using violence."²³⁷ Nonetheless, he states that in instances such as Entebbe, the intervening state is usually "exonerated, or at least its responsibility is diminished" on the basis of the *Corfu Channel* case, where the court noted that liability for the British intervention was attenuated by the Albanian failure to exercise its sovereign powers.²³⁸

It is suggested that such approaches to hostage rescues are no more consonant with the objective of reconciling an unsettled area of the international law than the inclusion of hostage rescue within the doctrine

234. BOWETT, *supra* note 11, at 105.

235. See *Terrorists*, *supra* note 139, at 1.

236. Ruys, *supra* note 3, at 270.

237. Yves Daudet, *The Limits of State Action*, in *TERRORISM AND INTERNATIONAL LAW* 206 (Higgins & Flory eds., 1997).

238. *Id.* at 207.

of protection of nationals abroad.²³⁹ It seems from the practice of states, particularly more recently from Security Council debate in the Russian Georgian conflict, that the right of protections of nationals exists at law, notwithstanding that it remains contentious in its application to real world events. In his first report Dugard explained the rationale for his attempt to codify the doctrine of protection:

This seems to reflect State practice more accurately than an absolute prohibition on the use of force (which is impossible to reconcile with actual state practice) . . . From a policy perspective it is wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which will permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse.²⁴⁰

VI. CONCLUSION

The evolution of the doctrine of the protection of nationals abroad has been marked by the corresponding maturation of international law as it relates to the use of force throughout the twentieth century. The roots of the doctrines reach into antiquity and it has emerged true to its origins within the right of self-defense, refined and articulated by Waldock. In the modern era, signaled by the creation of the U.N. and the codification and restrictions on the use of force by states contained within its Charter, the doctrine of the protection of nationals abroad has, at times stubbornly, held fast. The doctrine has been used in the past by governments to justify some military incursions which did not satisfy the doctrine's criteria. A careful review of the response to these episodes suggests that much of the criticism is directed at the use of force itself, not the doctrine.

The non-response of states and third parties to the instances of NEO has led a number of recent observers to conclude there is a level of state acquiescence to the practice.²⁴¹ Certainly, many observers maintain that the doctrine of the protection of nationals abroad, including hostage rescue, is acceptable at law as an exercise of the right of self-defense.²⁴²

239. Ruys, *supra* note 3, at 270, summarizes that “the longstanding controversy over the legality of forcible protection of nationals remains unresolved.” *Id.* at 270. He finds this unsatisfactory and writes that it is preferable to refine the criteria by which the doctrine of the protection of nationals must be judged. *Id.* at 271.

240. Dugard report, *supra* note 97, at 59.

241. See GRAY, *supra* note 12, at 129; Ruys, *supra* note 3, at 18.

242. See Dinstein, *supra* note 11, at 234. See also the proposition that Entebbe “is regarded as

The author suggests that NEO, through its application and broad acceptance in states' practice, has carefully circumscribed the right of a state to use force to protect nationals abroad.

While many states condemned Russian actions in South Ossetia, the muted response to the legal principle underlying their justification suggests that the legal doctrine is less controversial and more established than before.

It is suggested that the growing acceptance of NEO has contributed to this state. The military doctrine of a number of states and the application of that doctrine in the cases of NEO within states suggest that states believe that they are acting in accordance with international law. NEO have come to embody a broadly accepted state's practice; the application of a state's right to protect its nationals abroad. The doctrine of the protection of nationals has been invoked as a pretext for many different and expansive interventions into foreign states, which were clearly disproportionate to the use of force required to protect nationals. In situations where NEOs have been launched, the force used has been proportionate to the objective of protecting nationals abroad, through their removal from the receiving state.

Sometimes, the intervening state has the receiving nation's consent to intervene. However, it is submitted that the legal basis in situations where there is no consent from the host nation, it is in the right of self-defense for the protection of nationals abroad in accordance with criteria laid down by Waldock.

States which have launched NEO have in effect exercised the legal right of a state to protect its nationals. A NEO objective is to protect nationals, not to infringe upon the sovereignty of the state in which the nationals are facing a threat. As such, particularly after the more controversial invocations of the doctrine by the United States in Grenada and Panama, the acceptance of the doctrine of the protection of nationals has been shaped by the corresponding acceptance of the practice of NEO. This is particularly relevant to the third criterion of Waldock, the content

having contributed decisively to a limited extension of the right of self-defence to include the protection of nationals abroad." Michael Byers, *Not Yet Havoc: Geopolitical Change and the International Rules on Military Force*, 31 REV. OF INT'L STUD. 51, 53 (2005). Then interestingly he implicitly fuses NEO within the protection of nationals legal doctrine: "When civil strife elsewhere threatens a country's citizens, whether in Haiti, Liberia or Sierra Leone, sending soldiers to rescue them has become so commonplace that the issue of legality is rarely raised." *Id.* at 53. In addition, there are a number of American authors who have concluded that this right exists, including Schachter, *supra* note 44, at 1629; Eichensehr, *supra* note 28, at 484; and Lillich, *supra* note 25, at 97 (in his observation of international practice of states).

of the measures of protection. The protection involves removal of the foreign nationals, not the establishment of order out of chaos. The intervening state is not able to establish a non-consensual presence in the host state for any longer than is required to remove its citizens.²⁴³ It is appropriate to include the hostage rescue situations within the ambit of this doctrine.

Finally, for the reasons of policy described by Dugard it is important to regulate uses of force within accepted bounds of international law. The intersection of the military doctrine of NEO with the legal doctrine of the protection of nationals abroad provides such an opportunity. Greater clarity in the use of force may contribute to greater influence on the conduct of states. Absent a clearly defined right of self-defense as described by Waldock, the doctrine of the protection of nationals is more susceptible to the abuse in application which has long been associated with it.

243. Schachter observed

[I]t may be noted that in three of the other cases, Stanleyville, the Dominican Republic, and Grenada, questions were raised whether the interventions, though originally justified by necessity, became tainted with illegality through subsequent interference in the affairs of the territorial state . . . clearly, an action that may be legal in its inception could become illegal through prolonged intervention.

Schachter, *supra* note 44, at 1630–31.