Radosław Fordoński

Unilateral use of force under Article 2(4) of the UN Charter : hostage-rescue operations

Polski Rocznik Praw Człowieka i Prawa Humanitarnego 4, 133-157

2013

UWM w Olsztynie 2013 ISSN 2082-1786

Radosław Fordoński
Katedra Praw Człowieka i Prawa Europejskiego UWM w Olsztynie

Unilateral Use of Force under Article 2(4) of the UN Charter: Hostage-Rescue Operations

Keywords: prohibition of use of force in international relations, forcible protection of nationals abroad, trans-border hostage-rescue military operations

Introduction

The prohibition of threat or use of force in international relations as enshrined in Article 2(4) of the Charter of the United Nations[1] is no doubt the most important principle that emerged in the last century to govern inter-state conduct.[2] It is considered as a principle of 'jus cogens,' a peremptory norm of general international law from which no derogation is permitted.[3]

By means of the UN Charter, 193 governments have made the following pledges to each other and thereby to all mankind: (1) the pledge not to use force in international relations;[4] (2) the pledge to settle disputes by peaceful means;[5] (3) the pledge to refer disputes not settled by peaceful means to the Security Council;[6] (4) the pledge to use force only pursuant to orders of the Security Council,[7] and; (5) the pledge to carry out the decisions of the

[1] United Nations Charter and Statute of the International Court of Justice, 26.06.1945, 1 UNTS xvi, Art. 2(4) ('All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.').

[2] N. Elaraby, 'Some Reflections on The Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2(4) Revisited in Light of Recent Developments', available at: www.mefacts.com/cache/pdf/icj/11449.pdf (last accessed 15 September 2013), 41, 41.

[3] *Legal consequences of the construction of a wall in the Occupied Palestinian Territory* (Advisory Opinion), 9.07.2004, 9 July 2004, ICJ Rep 136, 246, p. 254, para. 3.1. (Separate Opinion of Judge Elaraby); *Case concerning military and paramilitary activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits), 27.06.1986, ICJ Rep 14, para. 190.

[4] UN Charter, Art. 2(4).

[5] Ibidem, Arts. 2(3), 33.

[6] Ibidem, Art. 37.

[7] Ibidem, Art. 42.

Security Council.[8] Subsequently, the Charter reserves the use of military force to the Security Council,[9] while it prohibits use of force by individual Member States,[10] unless such State has suffered an armed attack, against which the inherent right of self-defense may be used[11] or targeted State consents to use of force on its territory.[12]

Nevertheless, implementation of Article 2(4) of the UN Charter has not terminated unilateral use of force by States. According to the 2004 UN study: 'For the first 44 years of the United Nations, Member States often violated these rules and used military force literally hundreds of times, with a paralysed Security Council passing very few Chapter VII resolutions and Article 51 only rarely providing credible cover.'[13] W. Reisman describes nine

---

[8] Ibidem, Art. 25. See also J. C. Sweeney, *The Just War Ethic in International Law*, "Fordham International Law Journal (2003), vol. 27, 1865, p. 1867.

[9] UN Charter, op. cit., Art. 42.

[10] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), para. 6.12. („For the UN to function effectively as a law-enforcing collective security organization, states must renounce the unilateral use of force for national purposes."). See also J. C. Yoo and W. Trachmann, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, "Chicago Journal of International Law" (2004), vol. 4, 379, p. 382 (stating that aims of the UN Charter 'are to prevent the use of force between nations except in self-defense, and to promote peace and international security by creating a system of collective self-defense in which UN members-when authorized by the Security Council-resort to the use of force to prevent threats to the international system.'); M. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York/ Hampshire: Palgrave, 2001), p. 3 ('It is widely agreed that the most important rules are rules governing use of force; the most important obligation is the obligation not to use force unless in self-defense or pursuant to approval by the United Nations Security Council.'); *Oppenheim's International Law*, 9th ed., vol. 1, R. Jennings and A. Watts (eds.) (Oxford: Oxford University Press, 1996), p. 422 (stating that the use of armed force and in violation of another's state's sovereignty may be justified in international law only if: (1) an armed attack is launched, or is immediately threatened, against a state's territory or forces; (2) there is an urgent necessity for defensive action against the attack; (3) there is no practicable alternative to action in self-defense, and in particular another state or other authority which has the legal powers to stop or prevent the infringement does not, or cannot, use them to that effect; (4) the action taken by way of self-defense is limited to what is necessary to stop or prevent the infringement, i.e. to the needs of defense; and (5) in the case of collective self-defense, the victim of armed attack has requested assistance.); W. Michael Reisman, *Coercion and Self Determination: Construing Charter Art. 2(4)*, "American Journal of International Law" (1984), vol. 78, 642, p. 642 ('The United Nations Charter introduced to international politics a radically new notion: a general prohibition of the unilateral resort to force by states.').

[11] UN Charter, op. cit., Art. 51.

[12] UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, 28 May 2010, UN Doc. A/HRC/14/24/Add.6, para. 34. See also E. Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, "Boston University International Law Journal" (2011), vol. 29, 337, p. 350.

[13] Report of the UN Secretary-General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2 December 2004, UN Doc. A/59/565, para. 13.

major categories of unilateral use of force practiced by States since 1945 outside the strict scheme of the UN Charter: «quite broadly constructed» self-defense; self-determination and decolonization; humanitarian intervention; intervention by the military instrument to replace an elite in another state; uses of the military instrument within spheres of influence and critical defense zones; treaty-sanctioned interventions within the territory of another state; use of the military instrument for the gathering of evidence in international proceedings; use of the military instrument to enforce international judgments; and forcible countermeasures such as reprisals and retorsions.[14] Furthermore he states that this 'partial revival of unilateral *jus ad bellum*' could be permissible under Article 2(4) as long as relates to the vindication of rights which the international community recognizes but has, in general or in a particular case, demonstrated an inability to secure or guarantee due to the deterioration of the Charter security regime.[15]

This article identifies an additional category of unilateral uses of force consisting of trans-border hostage-rescue by military means and addresses question of its conformity to prohibition on use of force constituted by Article 2(4).

Unilateral use of force to rescue nationals taken hostage abroad lacks legal definition or explicit regulation. The International Convention Against the Taking of Hostages was adopted by the UN General Assembly on 17 December 1979 defines act of hostage-taking[16] and requires Parties to take 'all practicable measures' to prevent preparations for hostage-taking, in particular measures 'to prohibit the illegal activities of those who encourage, instigate, organise or engage in hostage-taking',[17] including 'exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.'[18] Forcible hostage-rescue measures are *prima facie* excluded, the relevant provision of the Convention seems inconclusive, though. Article 14 confirms that nothing in the Convention justifies violation of the territorial integrity or political independence of a State in contravention of the UN Charter.[19] The

---

[14] W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, "Yale Journal of International Law" (1984), vol. 10, 279, pp. 280–81; W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, "Proceedings of the American Society of International Law"(1984), vol. 78, 74, pp. 77–81.

[15] Reisman, 'Criteria for the Lawful Use of Force in International Law', pp. 280–1.

[16] International Convention Against the Taking of Hostages, 17.12.1979, 1316 UNTS 205, Art. 1(1) ('Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the „hostage") in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.').

[17] Ibidem, Art. 4(1).

[18] Ibidem, Art. 4(2).

[19] Ibidem, Art. 14 ('Nothing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations.').

understanding of the clause as explicit prohibition of hostage-rescue use of force is weakened by the addition of the reference to the text of the Charter as a whole.[20] The latter includes Article 51 which confirms the inherent right of a State to defend itself in case of armed attack, and this extends to the use of force in another State for the purpose of protecting one's nationals when the other State is unable or unwilling to take the necessary action.[21]

As the Convention does not exclude *a priori* permissibility of unilateral hostage-rescue military operations, this paper adopts a working definition of such undertaking based on the definition of hostage-taking from Article 1 of the Convention. The working definition is as follows: 'use of force without prior UN Security Council authorization to rescue nationals seized or detained abroad by State or non-State actor as hostages in the meaning given such term of Article 1 of the 1979 Hostage Convention and remaining in direct danger of life'.

Multiple cases of use of force since 1945 fulfill these characteristics. They include a Belgian-US operation in the Democratic Republic of Congo (1964),[22] a Israeli operation in Entebbe (Uganda, 1976),[23] a German operation in Mogadishu (Somalia, 1977),[24] Egyptian rescue attempts in Cyprus (1978)[25] and Malta (1985),[26] the US operation in Iran (1980),[27] or recently, British operation *Barras* in Sierra Leone (2000)[28] and US and French operations in Somalia (2008-13).[29]

---

[20] Ibidem, *in fine*.

[21] J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge: Grotius Publishers, 1990), pp. 313–4.

[22] Part I of the text.

[23] Part II of the text.

[24] E. Meyr, *Aircraft Hijacking: The Mogadishu Rescue*, "Law and Order" (2001), vol. 49, 97 (discussing the Mogadishu rescue of a hijacked Lufthansa airliner in 1977).

[25] T. Ruys, *The "Protection of Nationals" Revisited*, Katholike Universiteit Leuven Centre for Global Governance Studies Working Paper No. 17, October 2008, p. p. 17.

[26] C. M. Pérez, *Anatomy of Hostage Rescue: What Makes Hostage Rescue Operations Successful*, Naval Postgraduate School thesis, September 2004, p. 162.

[27] Part III of the text.

[28] L. J. Woods and T. R. Reese, *Military Interventions in Sierra Leone: Lessons From a Failed State* (Fort Leavenworth, Kansas: US Army Combined Arms Center Combat Studies Institute Press, 2008), pp. 65-71.

[29] 'Hostage captain rescued; Navy snipers kill 3 pirates', CNN, 12 April 2009, available at: http://www.cnn.com/2009/WORLD/africa/04/12/somalia.pirates/ (accessed 6 October 2013) (concerning rescue of Richard Philips, captain of the vessel *Maersk-Alabama*, attacked by pirates 500 kilometers off the coast of Somalia); 'US navy Seals who killed Bin Laden rescue two hostages from Somalia', Guardian, 25 January 2012, available at: http://www.theguardian.com/world/2012/jan/25/us-navy-seals-freed-somalia-hostages (accessed 6 October 2013) (describing rescue of US citizen Jessica Buchanan and Danish citizen Poul Hagen Thisted were captured by Somali pirates in October 2011 while working on a demining project); 'Hunt for missing soldier after failed hostage rescue', Telegraph, 12 January 2013, available at: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/9797626/Hunt-for-missing-soldier-after-failed-hostage-rescue.html (accessed 6 October 2013) (discussing the French rescue operation north of Mogadishu to free a national known under the code-name 'Denis Allex' from Islamist militant group Al-Shabaab).

The article consists of two parts. The first discusses three selected cases-studies to present State practice regarding this kind of forcible measure. Review includes cursory presentation of military activities, review of legal justifications pursued by acting States and reactions of international community to the uses of force.

The following legal analysis discusses both legal bases of permissibility invoked in contemporary debate: (1) argument that this type of operation does not infringe the prohibition on the use of force since it does not impair the 'territorial integrity or political independence' of a State, merely rescuing nationals from a danger which the territorial State cannot or will not prevent; and (2) that it constitutes an exercise of the right of self-defense under Article 51 of the UN Charter.

1. Congo (1964)

The crisis that led to hostage-taking of 1600 white foreigners in eastern Congo started on 1 July 1960 when the Democratic Republic of the Congo was granted independence from Belgium. It was done without the benefit of a transitionary period during which the former colonial power might have educated and trained the Congolese for their future roles. Chaos reigned within a few days, after the lack of effective civil authority became manifest. The soldiers of the *Congolese Force Publique*, a Belgian-officered security force, mutinied and, aided by civilian mobs, raped the white settlers, especially Belgians, and plundered. As the turmoil intensified, the United States evacuated several hundred missionaries and other American citizens living in the Congo and prepared forces to intervene if necessary. In the meantime, however, the United Nations acted by deploying a task force to the troubled land on 16 July 1960. The UN force's presence helped the Republic of the Congo to establish some measure of stability, and many of the evacuated missionaries and businessmen returned. But in March 1964, when plans for the withdrawal of the UN mission by the end of June were announced, tribal rivalries and the lack of firm central governmental control led to revolts in outlying areas against the duly constituted government.[30] Consequently, a third of the Congo was controlled by a rebel group led by Christopher Gbenye, called the *Conseil National de Liberation* (CNL) despite the apparent leadership of President Kasavubu and Prime Minister Tshombe.[31] In early August, Gbenye, with aid from the United Arab Republic (UAR),

[30] W. H. Glasgow, 'Operations Dragon Rouge and Dragon Noire', US Army in Europe Headquarters Operations Division Historical Section paper, 1965, available at: http://www.history.army.mil/documents/glasgow/glas-fm.htm (last accessed 25 September 2013).

[31] E. Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil War*, "International Law and Politics" (2003), vol. 35, 795, 802 (quoting S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2002), pp. 66–7).

Algeria, Ghana, the Sudan, and Kenya, seized Stanleyville, the capital of Haut Congo Province, and the third largest city in Congo, and proclaimed himself President of a Provisional Revolutionary Government.[32]

After years of civil and inter-tribal war and recent defeats at the hands of various rebel factions, the Congolese army was weak and demoralized. Kasavubu and Tshombe contracted with white mercenaries from South Africa, Rhodesia, and Europe to help reconquer lost territory. They hired Maj. Mike Hoare, a South African, to lead the mercenaries.[33]

Six weeks later, he tide of war began to turn. In response, Gbenye announced on 26 September that the approximately 1,600 foreigners remaining in the Stanleyville area, made up of '500 Belgians, 700 people of other European nationalities and 400 Indians and Pakistanis',[34] would not be allowed to leave; his intention obviously was to use them as hostages for political bargaining purposes.[35] With the rebels thus holding 'sixteen hundred trump cards',[36] a feverish round of negotiations began involving not only the rebels and the central government, but also the United States, Belgium, Kenya, an Ad Hoc Commission on the Congo of the Organization of African Unity (OAU) and the International Committee of the Red Cross (ICRC).[37]

During October 1964, Congolese government troops and mercenaries won control of Bukavu, Beni, and Bumba, liberating Belgian Roman Catholic priests and nuns and clearing the way for an offensive against the rebel capital. the plight of the hostages worsened still further, with Gbenye proclaiming that 'all Belgian and American civilians would be treated as 'prisoners of war' in retaliation for the bombing of our liberated territory'.[38] On 11 November, during a radio broadcast, Gbenye stated that 'the British, Americans, Belgians and Italians must get ready to dig their own graves.'[39] Three days later, utilizing the rebel newspaper *Le Martyr*, he threatened that 'we will make our fetishes with the hearts of the Americans and Belgians, and we will dress ourselves with the skins of the Americans and Belgians.'[40]

---

[32] Lumsden, op. cit., p. 803 (quoting M. A. Weisburd, *Use of Force: The Practice of States since World War II* (University Park, PA: Pennsylvania State University Press, 1997), p. 266).

[33] D. L. Haulman, 'Rebellion in the Congo: Operation Dragon Rouge', in A. T. Warnock, (ed.), *Short of War: Major USAF Contingency Operations* (Maxwell Air Force Base, AL.: Air University Press, 2000) 53, p. 55.

[34] *Lilich on the Forcible Protection of Nationals Abroad, International Law Studies*, vol. 77, T. C. Wingfield and J. E. Meyen (eds.), (Newport, RI: US Naval War College Press, 2002), p. 50 (quoting D. Reed, *111 Days in Stanleyville* (New York: Harper and Row, 1965), p. 8).

[35] Ibidem.

[36] Ibidem.

[37] Ibidem.

[38] Ibidem (quoting I. G. Colvin, *The Rise and Fall of Moise Tshombe* (London: Frewin, 1968), p. 190).

[39] Ibidem.

[40] Ibidem (quoting UN Doc. S/PV.1174, p. 15 (quoting the statement of the US Ambassador Stevenson).

The above threats, moreover, were not just rhetoric. By mid-November the number of hostages murdered while in captivity «amounted to 35 foreigners, including 19 Belgians, 2 Americans, 2 Indians, 2 Greeks, 1 Englishman, 1 Italian, 2 Portuguese, 2 Togolese and 4 Dutch, many of them missionaries who had spent their lives in helping the Congolese people.»[41] The grim prospect that other hostages would meet a similar fate was strengthened by a captured telegram from a rebel general to an officer in charge of the hostages that had been held in Kindu. It ended: 'In case of bombing of region, exterminate all [Americans and Belgians] without requesting further orders'.[42] Fortunately, the mercenary-led column captured the city, 300 miles south [of Stanleyville], «just in time to prevent the mass murder of twenty-four Europeans.»[43]

At the news of the rebel defeat at Kindu, Gbenye announced that Belgian and American civilians would be treated as 'prisoners of war'. The Belgian and American consuls at Stanleyville, including Hoyt, were imprisoned and beaten. The rebels refused to allow International Red Cross representatives to examine the condition of the hostages. On 16 November, the rebels announced that Dr. Paul Carlson, an American Protestant missionary who had been in the country three years and whose wife and children had recently fled the country, would be executed as a spy. When government troops took the town of Kibombo, they found three dead European civilians.[44]

At this point, the United States and Belgium began to fear that the overland advance of the Congolese army and its mercenaries would not be rapid enough to save the hostages. With the approval of Premier Tshombe, they began preparing a contingency rescue mission called *Dragon Rouge*.

Prime Minister Tshombe, in a note to the United States dated 21 November 1964, stated that the Congo Government had decided 'to authorize the Belgian government to send an adequate rescue force to carry out the humanitarian task of evacuating the civilians held as hostages by the rebels, and to authorize the United States Government to furnish necessary transport for this humanitarian mission. I fully appreciate that you wish to withdraw your forces as soon as your mission is accomplished.'[45]

Three days later the Belgian paratroops flown in by twelve US airplanes[46] landed at Stanleyville at dawn on 24 November and undertook an emergency rescue mission, evacuating an estimated 2,000 people over

---

[41] Ibidem (quoting UN Doc. S/PV.1174, pp. 15-6 (quoting the statement of the US Ambassador Stevenson).

[42] Ibidem.

[43] Ibidem (noting that «[h]undreds of Congolese 'intellectuals' had already been burned alive there by the... [rebels]).') See *ibid.*, p. 79, footnote 85 (quoting W. Attwood, *The Reds and the Blacks* (London: Hutchinson, 1967), p. 207).

[44] Haulman, op. cit., p. 56.

[45] Lillich, op. cit., p. 93 (quoting UN Doc. S/6062, pp. 187-8).

[46] Haulman, op. cit., p. 57.

a four-day period.[47] Included in this number were several hundred foreigners rescued during a follow-up landing at Paulis, 225 miles to the north.[48] The evacuees included 'Americans, Britons and Belgians; Pakistanis, Indians, Congolese, Greeks, French, Dutch, Germans, Canadians, Spaniards, Portuguese, Swiss, and Italians; as well as citizens of Ghana, Uganda, Ethiopia, and the United Arab Republic.'[49]

To justify US participation in the rescue operation,[50] the Department of State initially expressed the view that the action was taken 'in exercise of our clear responsibility to protect United States citizens under the circumstances existing in the Stanleyville area.'[51] During his statement at the Security Council meeting Ambassador Stevenson extended the rationale behind the action stating that, '[w]hile our primary obligation was to protect the lives of American citizens, we are proud that the mission rescued so many innocent people of eighteen other nationalities from their dreadful predicament.'[52] Finally, President Johnson put the case in its broadest humanitarian terms when he assumed 'full responsibility for those [decisions] made for our planes to carry the paratroopers in there in this humanitarian venture. We had to act and act promptly in order to keep hundreds and even thousands of people from being massacred.'[53]

Replying to accusations in the Security Council, US permanent representative to the UN, Ambassador Stevenson flatly stated that: '. . . [w]e have no apologies to make to any state appearing before this Council. We are proud of our part in saving human lives imperiled by the civil war in the Congo. The United States took part in no operation with military purposes in the Congo. We violated no provision of the United Nations Charter. Our action was no threat to peace or to security; it was not an affront-deliberate or otherwise-to the OAU and it constituted no intervention in Congolese or African affairs.'[54]

While Belgium did not make explicit any distinct legal basis of the 'protection of nationals' doctrine, Senator Rolin, a renowned international lawyer, couched his support for the intervention in a broad interpretation of the right of self-defense.[55]

International reaction to the operation was sharply divided, however, with international responses ranging from 'outright condemnation in

---

[47] Lillich, op. cit., p. 52.

[48] Ibidem, p. 52 (quoting UN Doc. S/6068, p. 195 (quoting (Letter from Ambassador Stevenson to the President of the Security Council)).

[49] Ibidem.

[50] Ibidem.

[51] Ibidem (quoting UN Doc. S/6062, p. 188).

[52] Ibidem (quoting UN Doc. S/P.V. 1174, p. 13).

[53] Ibidem.

[54] Ibidem, pp. 55-6 (quoting UN Doc. S/PV. 1174, p. 13).

[55] Ruys, *The "Protection of Nationals" Revisited*, op. cit., p. 9 (quoting A. Gerard, *L'Opération Stanleyville-Paulis devant le Parlement belge et les Nations Unies*, "Revue belge de Droit international" (1967), vol. 3, 242, p. 254).

Moscow, Peking, Belgrade, and many African capitals to qualified acceptance in a number of other African capitals and approval in Western countries.'[56] President Ben Bella of Algeria, Prime Minister Aklilou Habte Wold of Ethiopia, President Nkrumah of Ghana, Presidents Kenyatta of Kenya and Nyerere of Tanzania, and the government of Tunisia condemned the operation. In addition, the OAU Conciliation Commission met 27–28 November 1964, and adopted a resolution strongly condemning Britain, Belgium and the US for their involvement in the affairs of the Congo. On December 18, the OAU adopted a resolution (20 in favor, 0 against, with 10 abstentions) officially condemning the intervention.[57] The members of the organization felt the intervention was overly hasty and should not have occurred without the consultation of other regional actors in Africa.[58] African countries not opposing the intervention included Nigeria, Sierra Leone, Togo, and Madagascar.[59]

The intervention was initially brought to the attention of the Security Council by Afghanistan, Algeria, Cambodia, Indonesia, the Sudan, the United Arab Republic, and 15 sub-Saharan African States, all of whom characterized the US and Belgian operation as a flagrant violation of the UN Charter.[60] Sub-Saharan African States, however, while targeting Belgium and the U.S., also claimed that Algeria, the Sudan, Ghana, the UAR, the People's Republic of China (PRC) and the Soviet Union were illegally intervening in the Congolese conflict.[61]

The US justification for the use of force in Congo received support from Belgium[62] and the UK,[63] with Bolivia,[64] Brazil,[65] and the Republic of China[66] also approving this instance of forcible protection. The twenty-two states attacking the operation denied the legitimacy of the Tshombe

---

[56] Lumsden, op. cit., p. 804.

[57] Ibidem.

[58] Ibidem.

[59] Ibidem.

[60] Ibidem.

[61] Ibidem.

[62] Lilich, op. cit., p. 56 (quoting UN Doc. S/PV. 1173, pp. 3–10).

[63] Ibidem, p. 56 (quoting UN Doc. S/PV. 1175, pp. 3–4).

[64] Ibidem (quoting UN Doc. S/PV. 1177, p. 14 ('Bolivia thinks that this was clearly a rescue operation, regrettable from the political point of view of sovereignty, but essential morally and duly authorized by the legally responsible Government of the Congo.').

[65] Ibidem (quoting UN Doc. S/PV. 1177, pp. 19-20 ('Such an operation finds its justification in the very objective which inspired it, which was to frustrate the perpetration of a crime, recognized as such by international law and by all the norms of conduct governing relations among States, which consists in the use of innocent civilians as hostages, as a bargaining point in wartime. . . . Therefore the humanitarian action taken to save the lives of the hostages seems legitimate to the delegation of Brazil, both in regard to its means and to its motivations.').

[66] Ibidem (quoting UN Doc. S/PV. 1177, p. 26 ('In the circumstances, my delegation is fully satisfied with the statements made in this Council by the repesentatives of Belgium and the United States that the operation was necessary to save the lives of the hostages, and that it was a humanitarian mission, and nothing more.').

government, claimed that the invitation extended by it was invalid, and claimed that the intervention was no mere rescue operation, but a calculated plot to further the intervening states' ideological interests in the conflict. This position was supported in the Council by the Soviet Union and Czechoslovakia.[67]

The vague resolution finally adopted by the Security Council, 'deploring the recent events in [the Congo]',[68] contains no formal condemnation of either Belgium or the United States.[69]

2. Entebbe (1976)

A particularly interesting incident, which scholars have often identified as the textbook example of the practice under discussion concerns the rescue raid on Entebbe.

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. The hijackers were two Germans and two Palestinians, later identified as members of an extremist Palestinian organization headed by W. Hadad, a former deputy of G. Habbash of the Popular Front for the Liberation of Palestine.[70]

The aircraft was forced to fly to Benghazi, Libya, where it was refueled. Only one passenger, a pregnant woman, was allowed to leave the aircraft. After six hours on the ground it resumed flight.[71]

The next day the aircraft landed in Entebbe, Uganda, where six Palestinians, again members of one or more divisions of the PLO, joined the hijackers.[72] Their demands were announced on Tuesday, 29 June, and included the release of 52 Palestinians held in prisons in Israel, West Germany, Kenya, and France, by Thursday, 1 July, at 2:00 PM (local time). The decision makers had little doubt regarding the credibility of the hijackers' threat to execute hostages if their demands were not met by the time the ultimatum expired. In a previous incident involving Hadad's people in 1974, the American ambassador to Sudan was killed even before the expiration of the ultimatum.[73]

On 29 June, all Israelis were segregated in another part of the airport. The next day, forty-seven non-Israeli women and children were released and allowed to go to Paris. On 1 July, 100 French hostages were released and

---

[67] Lumsden, op. cit., pp. 804–5.

[68] Lilich, op. cit., p. 56 (quoting SC Res. 199 of 30 December 1964).

[69] Ibidem.

[70] Z. Maoz, *The Decision to Raid Entebbe: Decision Analysis Applied to Crisis Behavior*, "Journal of Conflict Resolution", (1981), vol. 25, 677, p. 687.

[71] J. A. Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, "Fletcher Forum of World Affairs" (1977), vol. 1, 135, p. 146.

[72] Ibidem, pp. 146–7.

[73] Maoz, op. cit., p. 688.

allowed to leave the country. The ninety-six Israelis remained under the guard of the hijackers with the apparent collaboration of the Ugandan armed forces.[74] Although Ugandan President Amin stated on several occasions that he was doing everything within his power to liberate the hostages, It appeared to the hostages and crew that the Ugandan armed forces were aiding the hijackers.[75]

The evening of 3 July, Israeli commandos stormed the main terminal at the Entebbe airport. Killed were all of the terrorists who were holding 96 Israelis hostage, along with several hostages who stood up in the middle of the melee, a number of Ugandan soldiers, and one Israeli commando. To prevent pursuit, the Israelis also destroyed the operational Ugandan fighters (approximately 10) on the tarmac.[76]

Israel made a forceful case for its rescue mission at a meeting of the Security Council on 9 July 1976. The Israeli ambassador to the United Nations, C. Herzog justified the operation as an application of 'the right of a State to take military action to protect its nationals in mortal danger.'[77] This right, Israel claimed, was based on the inherent right of self-defense, 'enshrined in international law and the Charter of the United Nations', and supported by state practice.[78] Furthermore, it was allegedly recognized 'by all legal authorities in international law', and was regulated by the criteria of the *Caroline* case: 'Necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation.'[79] Finally, Israel explained that the use of force was not directed at Uganda per se, and employed only as much force as was necessary to secure and extract its nationals: 'What mattered to [Israel] (...) was the lives of the hostages, in danger of their very lives. No consideration other than this (...) motivated the government of Israel. Israel's rescue operation was not directed against Uganda (...). They were rescuing nationals from a band of terrorists and kidnappers who were being aided and abetted by the Ugandan authorities.'[80]

Consequently, Israel 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.'[81]

---

[74] Sheehan, op. cit., p. 147.

[75] Ibidem, pp. 146-7.

[76] T. C. Wingfield, 'Forcible Protection of Nationals Abroad' in *Lilich on the Forcible Protection of Nationals Abroad*, International Law Studies, vol. 77, T. C. Wingfield and J. E. Meyen (eds.), (Newport, RI: US Naval War College Press, 2002) 229, p. 239.

[77] Ruys, 'The "Protection of Nationals" Revisited', *op. cit.*, pp. 15-6 (quoting UN Doc. S/PV.1939, paras. 105–121).

[78] Wingfield, op. cit., p. 239.

[79] Ruys, 'The "Protection of Nationals" Revisited', *op. cit.*, pp. 15–6 (quoting UN Doc. S/PV.1939, para. 121).

[80] Ibidem.

[81] A. W R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, "Washington University Global Studies Law Review" (2012), vol. 11, 627, p. 637 (quoting UN Doc. Sp/PV.1939, p. 13).

The United States was one of two UN Member States making a clear statement supporting the legality of the Israeli raid. At the same Security Council meeting, the US first stated that the intervention was 'a temporary breach of the territorial integrity of Uganda.'[82] 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.[83] 'There is a well-established right', the statement argued, 'to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them.'[84] The US stated that this right flows from the inherent right of self-defense and allows 'necessary and appropriate' force to protect a nation's own citizens.[85]

By these criteria and in light of the 'unusual circumstances of this specific case', including the reproachable attitude of the Ugandan authorities, the US concluded that 'the requirements of this right (...) were clearly met.'[86]

France also supported the Israeli intervention, in a manner of speaking. While stating that 'at first sight . . . the surprise attack by an armed force on a foreign airport for the purpose of achieving by violence an objective' appeared to violate international law, the Israeli action had not been designed to infringe the territorial integrity or political independence of Uganda, but merely to save lives.[87] The French brought up an additional legal point, that the UN General Assembly's Resolution on the Definition of Aggression listed acts which were only *prima facie* evidence of acts of aggression, and that it was up to the Security Council to determine if, 'in the light of other relevant circumstances', aggression had actually been committed.[88]

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.[89] 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.'[90] Mauritius deemed the Israeli action

---

[82] Wingfield, op. cit., p. 239 (quoting UN Doc. S/PV. 1941, p. 31).

[83] O. Schachter, *The Right of States to Use Armed Force*, "Michigan Law Review" (1984), vol. 82, 1620, pp.1630–1.

[84] Ibidem.

[85] Ruys, 'The "Protection of Nationals" Revisited', p. 16 (quoting UN Doc. S/PV.1941, paras. 77–81).

[86] Ibidem.

[87] Wingfield, op. cit., p. 240 (quoting N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht: Martinus Nijhoff Publishers, 1985), p. 38).

[88] Ibidem.

[89] Thomson, op. cit., p. 637 (quoting C. Gray, *International Law and the Use of Force* (New York: Oxford University Press, 2004), p. 31).

[90] Ibidem (quoting UN Doc. Sp/PV.1940, p. 14).

aggression.[91] Guyana said this was a breach of Article 2(4).[92] 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.[93] Yugoslavia called the raid a 'flagrant violation of the sovereignty and territorial integrity of an independent and non-aligned country.'[94] 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.'[95] 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.[96]

Two draft resolutions were proposed to the Security Council proposed after the Ambassador of Mauritius placed the issue of the Israeli commando raid before the Council. One draft, sponsored by Benin, Libya, and Tanzania, condemned the raid as a flagrant violation of international law,[97] while the other resolution, sponsored by the United States and the United Kingdom, condemned hijacking and other matters, but did not explicitly deal with the legality of Israel's rescue effort.[98] Neither of the two proposals was adopted.[99] The draft condemning hijacking failed to obtain the necessary two-thirds vote,[100] while the other draft was never submitted for a vote.[101]

The Security Council's lack of comment on the raid on Entebbe prompted Israel to conclude that the Council recognized that the action was consistent with international legal principles.[102] However, as with Security Council Resolution 199 addressing the Congo intervention in 1964, the Council's failure to voice any opinion on the Israeli operation could be seen as expressing no opinion at all on whether the Security Council viewed the traditional right to protect nationals as having survived the adoption of Article 2(4) of the UN Charter. Only six states had supported the hijacking resolution, which had implicitly seemed to accept Israel's action as lawful,[103] while the seven states that refused to participate contended that in addressing the hijacking itself the draft resolution went far beyond the scope

---

[91] Ibidem (quoting UN Doc. Sp/PV.1940, para. 70).
[92] Ibidem (UN Doc. Sp/PV.1940, paras. 80–1).
[93] Ibidem, p. 649 (quoting UN Doc. S/PV.1941, pp. 11–4).
[94] Ibidem (quoting UN Doc. Sp/PV.1941, p. 65).
[95] Ibidem, p. 637 (quoting UN Doc. Sp/PV.1941, p. 155).
[96] Ibidem (quoting UN Doc. Sp/PV.1940, p. 107).
[97] R. J. Zedalis, *Protection of nationals abroad: is consent the basis of legal obligation?*, "Texas International Law Journal" (1990), vol. 25, 209 p. 247 (quoting UN Doc. S/12139, pp. 15–6).
[98] Ibidem (quoting UN Doc. S/12138, p. 15).
[99] Ibidem (quoting UN Doc. S/PV.1941, pp. 1–21).
[100] Ibidem (quoting UN Doc. S/PV.1943, p. 81).
[101] Ibidem.
[102] Ibidem.
[103] Ibidem.

of the matter being considered.[104] During the Security Council debates, several of the same seven states strongly criticized the Israeli commando operation (Benin, Libya, and Tanzania). That criticism was never converted into an official Security Council position, since the other draft resolution that would have accomplished that objective was withheld from formal vote. Israel's conclusion, therefore, would seem incorrect because the resolution implicitly embracing the idea of the continuation of the traditional right to protect nationals was formally rejected. It would also be incorrect to conclude that the rejection of that draft resolution demonstrated Security Council disapprobation of the survival of the right to protect nationals abroad. The states supporting that approach did not take the opportunity provided by the draft proposed by Benin, Libya, and Tanzania to establish that position in the official record of the Security Council. Consequently, practice of the UN Security Council on the matter is inconclusive.[105]

3. Iran (1980)

The US Embassy hostage crisis began on 4 November 1979 when a mob of students stormed the embassy compound in Tehran.[106] On November 18 and 20, the students released thirteen hostages, while threatening to try and execute the other. In response, President Carter issued a strong statement suggesting that the United States would undertake military action against Iran if the hostages were harmed; in the wake of this pronouncement, the threats against the hostages ceased.[107]

From the first day of the crisis, the Carter's administration discussed military options such as the seizure of Iranian oilfields, retaliatory bombing, mining of harbors, total blockade, various covert operations, and a rescue attempt. President Carter eventually decided to go with the rescue attempt. This decision caught the US military by surprise. The United States lacked bases and other resources in the area. Intelligence sources in Iran had disappeared after the revolution.[108] Furthermore both adversaries were pushed toward negotiation by the Soviet invasion of Afghanistan in December 1979, which threatened the United States because of the balance of power, and Iran because of refugee flows and the threat of further Soviet expansion. With French and Argentine intermediaries, negotiations for the hostages' release continued into the spring, but then collapsed.[109] On 7 April

[104] Ibidem (quoting UN Doc. S/PV.1943, pp. 78–80).

[105] Ibidem, pp. 247–8.

[106] K.E. Eichensehr, 'Defending nationals abroad: assessing the lawfulness of forcible hostage rescues', "Virginia Journal of International Law" (2007), vol. 48, 451, p. 453.

[107] Ibidem.

[108] E. T. Russell, 'Crisis in Iran: Operation Eagle Claw', in *Short of War*, op. cit., 125, p. 128.

[109] Ibidem.

1980, President Carter stepped up the economic embargo on Iran, and attention returned to military options. Early in the hostage crisis, the Secretary of Defense consulted an Israeli official involved in the Entebbe hostage rescue in 1976, but the rescue plan for the Iranian hostages was even more complex than the Entebbe rescue.[110] Nevertheless, a complicated operational rescue plan emerged after five months of intensive preparation. It involved eleven groups of men drawn from the US Army, Navy, Air Force, Marine Corps, and Central Intelligence Agency. President Carter approved the plan and ordered its execution.[111]

While this mission and other efforts to secure the return of the hostages were under way, the United States requested that the UN Security Council meet to discuss ways to obtain the hostages release. The latter delivered on 4 December unanimously approving a resolution that called for the hostages immediate release.[112] When this resolution went unheeded by Iran, the Council met again and on 31 December, adopted another resolution demanding that Iran should free the hostages.[113] It also decided to reconvene in January 1980, in the event of continued Iranian non-compliance, to discuss the imposition of sanctions under Articles 39 and 41 of the UN Charter. The Council met again on 13 January 1980, to consider a US draft resolution that would have mandated broad economic sanctions against Iran. A veto cast by the Soviet Union prevented its adoption and effectively removed the Security Council from the settlement process.[114]

In the meantime, the United States on 29 November 1979, instituted proceedings against Iran before the International Court of Justice, requesting the Court, pending its final Judgment in the case, to indicate certain provisional measures, first and foremost being that 'the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances.'[115] Acting with commendable alacrity, the Court took the case, heard oral argument by the United States (Iran did not appear at the hearing),[116] and on 15 December unanimously ordered Iran to restore the Embassy to US control and to ensure the 'immediate release, without any exception, of all persons of United States nationality who are or who have been held in the Embassy . . . or have been held as hostages elsewhere, and afford full

---

[110] Ibidem.

[111] Ibidem.

[112] SC Res. 457 of 4 December 1979.

[113] SC Res. 461 of 31 December 1979.

[114] Lilich, op. cit., p. 64 (noting ten States voted for the resolution, the Soviet Union and the German Democratic Republic voted against it, Bangladesh and Mexico abstained, and China did not participate). *Ibidem*, p. 91, footnote 224.

[115] *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)* (Order of Provisional Measures), 15.12.1979, ICJ Rep 7, p. 12.

[116] Lilich, op. cit., p. 65.

protection to all such persons, in accordance with the treaties in force between the two States, and with general international law.'[117] The Court also enjoined both the United States and Iran not to take any action 'which may aggravate the tension between the two countries or render the existing dispute more difficult of solution.'[118]

As it had in the case of the two Security Council resolutions,[119] Iran refused to obey the Court's Order.[120]

On the evening of 24–25 April, 1980, the United States launched a commando raid into Iran to rescue 50 hostages remaining in captivity. The raid ultimately failed due to weather, equipment malfunction, and bad luck.[121]

In the aftermath of the rescue attempt, the hostages were dispersed to remote sites and were held in increased discomfort and danger.[122]

From the failure of the rescue mission on April until the hostages' release, further military options were not considered. Final negotiations for the hostages' release began in September 1980, with Algerian officials acting as the official intermediaries. After protracted negotiations about the hostages and claims in US courts on Iranian assets, the hostages were released and landed in Algeria on 20 January 1981.

The rescue mission was supported after the fact by the United Kingdom, Italy, West Germany, the European Economic Community, Australia, Israel, and Egypt; it was condemned by the Soviet Union, China, Saudi Arabia, India, Cuba, and Pakistan.[123]

In the case of Iran, however, unlike the other incidents discussed in this Chapter, the International Court of Justice had the opportunity to consider, at least in passing, the question of what legal arguments, if any, were available to support such rescue operations. The Court specifically pointed out that the question of the validity of the American rescue operation was not in issue and could 'have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on November 4, 1979'.[124] Nevertheless it was in no position to refrain from formulating any comment on the action as it was a matter of necessity to defend its own credibility. This necessity arose from the fact, as will be recalled, that in its Order on provisional measures of 15 December 1979, the ICJ had instructed both Iran and the United States not to take any action that might exacerbate the dispute between the two countries.[125] The attempted rescue operation, of

[117] *US v. Iran* (Provisional Measures), p. 21.
[118] Ibidem.
[119] Lilich, *o*p. cit., p. 65.
[120] Ibidem.
[121] Wingfield, op. cit., p. 241.
[122] Eichensehr, op. cit., pp. 455-6.
[123] Ibidem, p. 456.
[124] *US v Iran* (Merits), para. 94.
[125] Lilich, op. cit., p. 67.

course, took place on 24 April 1980, over a month after the Court had held three days of hearings on the merits of the case and while it was in the course of preparing its Judgment issued exactly a month later. Thus, it could be argued that the operation constituted the international law equivalent of contempt of court, especially if the Court were to have found that it violated the UN Charter.[126]

While stating that it could not 'fail to express its concern in regard to the United States' incursion into Iran', the ICJ nevertheless pointedly passed up the opportunity to question its legality, noting merely that it considered itself 'bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations'.[127] Thus, it «left to another day, a day one suspects will never come, a definitive statement of its views regarding the law governing the use of force in defense of the lives of nationals abroad.'[128]

Legal Analysis

Does forcible hostage rescue constitute a distinct and consistent practice of unilateral use of force in UN Charter-regulated international relations? Is it permissible under Article 2(4) of the Charter?

Affirmative answer to the first question produces no controversy.

The second question requires addressing of two separate legal problems: permissibility of unilateral use of force to rescue hostages abroad under UN Charter, and, in case of conformity to Article 2(4), subsequent determination of legal title to such use under the UN Charter regime on recourse to forcible measures in international relations.

Opinio juris mentioned above indicates that any trans-border use of force to rescue nationals held hostage is *prima facie* illegal. Negative reactions to the 1964 US-Belgian operation in the Congo in 1964 and the 1980 US mission in Iran were to a large degree inspired by the conviction that interventing powers were merely using the opportunity to meddle in the affected State's domestic affairs.[129] However, even if the opposition of many developing countries to the doctrine results from their fear that it constitutes a facile pretext for powerful States to promote their political and economic interests abroad, or a more politically correct

---

[126] Ibidem.

[127] *US v Iran* (Merits), para. 94.

[128] Lilich, op. cit., p. 68 (quoting T. L. Stein, Contempt, *Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, "American Journal of International Law" (1982), vol. 76, 499, p. 500, footnote 7).

[129] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge/New York: Cambridge University Press, 2010), p. 241.

packaging of the 19th century 'gunboat diplomacy', such considerations are followed today.[130]

With regard to the Entebbe raid, the only relevant intervention addressed by the Security Council where there was no suspicion of a 'hidden agenda', a majority of States still took the view that Israel's actions violated international law.[131] Subsequently it is possible to say that the international community did not 'positively approve of the action as being lawful'.[132] At best, the slow and unequivocal condemnation by third States signals a tendency to 'waive illegality' in the case at hand.[133]

Keeping it in mind, one should acknowledge the following indications supporting existence of the right to rescue hostages under Article 2(4).

First, some of States contesting the right have been reluctant to deny the existence of the right when it has been exercised by others.[134] When States have tried to justify uses of force on the grounds that they were acting to protect their nationals in mortal danger in another State, 'countries condemning these cases of intervention have always preferred to deny the existence of a situation of danger, rather than deny the very existence of the right to use force.'[135] The Pakistan stance toward the Entebbe raid is illustrative of such approach. Pakistan characterized the Israeli action as 'aggression' but challenged the Israeli conduct rather than the underlying doctrine of the protection of nationals abroad.[136] Subsequently, the condemnation of Israel was conditioned upon Israel's failure to 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]

This half-hearted criticism resurfaced during negotiations on the 1979 Hostages Convention. Inspired by the Entebbe raid, Algeria and Tanzania submitted a draft amendment according to which 'States shall not resort to the threat or use of force against the sovereignty, territorial integrity or

---

[130] Ibidem (noting that a considerable group of States again took an explicitly negative stance vis-ŕ-vis forcible protection of nationals during the debate within the UN General Assembly's Sixth Committee on the issue of diplomatic protection in 2000. It was made up of Poland, Slovenia, Mexico, Argentina, Venezuela, Iran, Iraq, Jordan, Libya, Colombia, Burkina Faso and Cuba. Slovenia, for instance, Slovenia denounced that Article 51 of the UN Charter could be used 'as a legal basis for armed intervention to protect nationals', recalling 'past abuses'). Ibidem, p. 238.

[131] Ibidem, p. 241.

[132] Ibidem (quoting «2619th meeting of the International Law Commission, 11 May 2000», "Yearbook of International Law Commission" (2000), vol. 1, Part I, p. 42, para. 50).

[133] Ibidem (quoting YBILC 1 (2000), Part I, p. 42, para. 50 (statement of I. Brownlie)).

[134] Eichensehr, op. cit., p. 460.

[135] Ibidem (quoting A. Tanca, *Foreign Armed Intervention in Internal Conflict* (Dordrecht/Boston/London: Martinus Nijhoff, 1993), p. 119).

[136] Ibidem.

[137] Ibidem (quoting UN Doc. S/PV.1941, p. 15, paras. 127, 132).

independence of other States as a means of rescuing hostages'.[138] Some States expressed sympathy for the proposal, while others considered it as irrelevant or superfluous.[139] Syria submitted a slightly different version, which provided that '[n]othing in this Convention can be construed as justifying in any manner the threat or use of force or any interference whatsoever against the sovereignty, independence or territorial integrity of peoples and States, under the pretext of rescuing or freeing hostages'.[140] In the end, a much more neutral provision was used in the final text. Article 14 simply states that '[n]othing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the [UN] Charter'.[141]

Second, the UN Security Council has never condemned practice of trans-border hostage rescue. Indeed, some commentators have actually suggested that the resolution 199 constitutes an implied if not an express approval of the rescue operation. According to H. Weisberg, «After the Congo debates, the legal principle of Article 2(4) remains, but what that Article means has been altered by political evaluation. There is now an unwillingness on the part of the world community to read Article 2(4) as an absolute prohibition on the use of force in humanitarian intervention.'[142]

Such interpretation of the resolution 199 is rejected by T. Farer, arguing that 'Security Council condemnation' of 'Humanitarian Intervention as such or the United States and Belgium' was not 'a conceivable option in the world of 1964',[143] and R. Zedalis. The latter states that the pertinent language of the Resolution was not designed to address anything more than intervention by outside forces to assist the warring parties in the Congolese internal conflict. Intervention to rescue nationals was not addressed, as the invitation from the Central government eliminated the need to do so. The unanimous adoption of the resolution supports this reading, in that Security

---

[138] Ruys, *'Armed Attack' and Article 51 of the UN Charter*, *op. cit.*, pp. 234-5 (quoting Working Paper submitted by Algeria and Tanzania to the Ad Hoc Committee on the drafting of an International Convention against the Taking of Hostages, 12 August 1977, UN Doc. A/AC.188/L.7)

[139] Ibidem, p. 235 (quoting Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages, 12th meeting, 16 August 1977, UN Doc. A/AC.188/SR.12, para. 14 (statement of the US), para. 15 (statement of the Federal Republic of Germany); 13th meeting, 17 August 1977, UN Doc. A/AC.188/SR.13, para. 11 (statement of the Federal Republic of Germany), para. 12 (statement of Sweden, regarding it as superfluous); 15th meeting, 18 August 1977, UN Doc. A/AC.188/SR.15, para. 7 (statement of the US, regarding it as irrelevant), para. 14 (statement of Mexico, expressing support)).

[140] Ibidem (quoting Working Paper submitted by Syria to the Ad Hoc Committee on the drafting of an International Convention against the Taking of Hostages, 16 August 1977, UN Doc. A/AC.188/L.11).

[141] 1979 Hostage Convention, op. cit., Art. 14.

[142] H. L. Weisberg, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, "Virginia Journal of International Law" (1972), vol. 12, 261, p. 274. See also Lilich, op. cit., p. 56.

[143] T. J. Farer, *The Regulation of Foreign Intervention in Civil Armed Conflict*, "Recueil des Cours de l'Academie de droit international" (1974), vol. 142, 297, pp. 396–7.

Council members with diametrically opposed views on the lawfulness of the operation joined in agreement on the phraseology of a particular resolution.[144]

Criticism by both authors sounds unconvincingly. According to R. Lilich, «The fact that the Security Council condemned neither the operation nor the States undertaking it certainly has some relevance. Even in "the world of 1964" the censure of a permanent member of the Security Council for an illegal use of force was not out of the question, as witness the formal condemnation of Great Britain the same year for a reprisal it had undertaken against Yemen.'[145] He also denounces implied silence of the Security Council over the question of the rescue operation, quoting a reply of the US representative to the Security Council, Ambassador Stevenson to a suggestion by the Ghanaian delegate that the resolution impliedly condemned the rescue operation, 'I think it is quite clear from the statements made during this debate that the overwhelming majority of the members of this Council do not so interpret that paragraph of the resolution. The fact that my delegation has voted for the resolution as amended makes it perfectly clear that we do not so interpret it.'[146]

Last but not least, the ICJ's position on the matter in question delivered in the 1980 *US v Iran* case judgment seems more outspoken than the inconclusive practice of the Security Council. While stating that it could not 'fail to express its concern in regard to the United States' incursion into Iran', the Court nevertheless pointedly passed up the opportunity to question its legality, noting merely that it considered itself 'bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations'.[147] This «mild slap on the wrist was coupled with an express disavowal of any finding that the rescue attempt was unlawful.'[148] While the Court did not expressly find the rescue operation to be lawful, a slight tilt towards the recognition of a right of forcible protection of nationals abroad may be discernible, at least to some observers, from its failure to condemn the US action *per se*.[149] In view of the Dissenting Opinions of Judges Morozov and Tarazi that condemned and challenged its legality respectively, one might have expected the Court to have denounced the rescue operation had a substantial number of the 13 judge majority believed that it violated the UN Charter. Thus, it is reasonable to say that '[t]he silence of the Court .... does not imply that it acquiesces in the theory

[144] Zedalis, op. cit., p. 246.

[145] Lilich, op. cit., p. 84, footnote 132. See also SC Res. 188 of 9 April 1964.

[146] Lilich, op. cit., p. 84, footnote 132.

[147] *US v Iran* (Merits), para. 93.

[148] Lillich, op. cit., p. 67 (quoting T. L. Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, "American Journal of International Law" (1982), vol. 76, 499, p. 500).

[149] Ibidem, p. 93, footnote 245 (quoting Ronzitti, op. cit., p. 61).

of the legality of a rescue mission through the use of force. However, the Court did not block the process leading to the creation of a new rule legitimizing recourse to force to protect nationals abroad, which would have been the case if it has censured the use of force in those circumstances.'[150]

Summing up the question of permissibility of use of force to rescue nationals taken hostage abroad under Article 2(4), one should acknowledge lack of definite statement of law on the matter in question. Nevertheless implied conformity could be presumed, both regarding existing law and *de lege ferenda*.

The remaining problem refers to legal qualification of such use of force under the UN Charter, that is, whether the forcible rescue of nationals abroad is a proper exercise of the inherent right of self-defense against armed attack authorized by Article 51 of the UN Charter, or such operations constitute an exception to the prohibition against the use of force found in Article 2(4).

Concerning the Congo rescue operation, the US Department of State reiterated several times that the operation was carried out 'with the authorization of the Government of the Congo',[151] and hence, technically, was neither a case of unilateral forcible protection nor self-defense on the ground of Article 51.[152] Moreover, viewing the use of force in its total context, it is hard to avoid the conclusion that the United States treated the Congolese invitation more as an additional argument justifying its action than as the *sine qua non* of its legitimacy.[153] The following statement of the Department of State clearly was designed to show not only reliance upon an express invitation by the central government of the Congo, but also in compliance with all the requirements of the traditional nationals protection doctrine: 'This operation is humanitarian-not military. It is designed to avoid bloodshed-not to engage the rebel forces in combat. Its purpose is to accomplish its task quickly and withdraw-not to seize or hold territory. Personnel engaged are under orders to use force only in their own defense or in the defense of the foreign and Congolese civilians. They will depart from the scene as soon as their evacuation mission is accomplished. We are informing the United Nations and the Ad Hoc Commission of the Organization of African Unity of the purely humanitarian purpose of this action and of the regrettable circumstances that made it necessary.'[154]

If does so, the Belgian-US hostage-rescue in the Congo could be qualified as implementation of the right to protect nationals abroad recognized by customary international law.[155] The latter does not operate

---

[150] Ibidem (quoting Ronzitti, *op. cit.*, pp. 67—8).

[151] Ibidem, p. 52 (quoting UN Doc. S/6062, p. 188).

[152] Ibidem (quoting I. Brownlie, 'Thoughts on Kind-Hearted Gunmen', in *Humanitarian Intervention and The United Nations,* op. cit., 139, pp. 143–44).

[153] Ibidem, p. 52.

[154] Ibidem, pp. 52-3 (quoting UN Doc. S/6062, p. 189).

[155] Eichensehr, op. cit., p. 459 (quoting T. J. Farer, *Panama: Beyond the Charter Paradigm*, "American Journal of International Law" (1990), vol. 84, 503, pp. 503–4; Brownlie, *International Law and the Use of Force by States*, op. cit, p. 289).

requirement of armed attack recognized as the *sine qua non* of forcible response under Article 51. Thus, its presumed permissibility is based on an exception to the prohibition against the use of force found in Article 2(4).

Such justification for the Israeli rescue mission in Entebbe is even less controversial and in fact, without alternative, as many of States commenting on the raid claimed that Israel had not been the subject of an armed attack and terrorist kidnappings and hijackings, reprehensible as they were, had to be tackled through negotiations.[156]

The case of the US incursion into Iran in April 1980 seems more complex. The day following the failed rescue attempt President Carter stated: 'I ordered this rescue mission prepared in order to safeguard American lives, to protect America's national interests, and to reduce the tensions in the world that have been caused among many nations as the crisis continued. . . . The mission . . . was a humanitarian mission. It was not directed against Iran; it was not directed against the people of Iran. It was not undertaken with any feeling of hostility toward Iran or its people.'[157]

In his report to Congress, Carter declared: 'In carrying out this operation, the United States was acting wholly within its right, in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unwilling or unable to protect them.'[158]

It remains unclear how the ICJ addressed the question, whether the forcible rescue of nationals abroad is a proper exercise of the inherent right of self-defense against armed attack authorized by Article 51 of the UN Charter, or such operations constitute an exception to the prohibition against the use of force found in Article 2(4).

The Court refers twice to the 'armed attack on the United States Embassy'[159] and the 'armed attack by the militants ... and their seizure of Embassy premises and staff'.[160] In the following comment Stein notes the Court's 'tantalizing suggestions that the category of "armed attacks" under Article 51 of the UN Charter extends well beyond major armed assaults. .... If, indeed, the Court's references to "armed attack" were studied rather than casual, operations such as the rescue mission are lawful not because the right of self-defense under the UN Charter is coextensive with the preexisting customary law right of self-defense, which extended beyond defense against 'armed attack' ..., but because the right of self-defense against armed attack has arisen.'[161]

---

[156] Ruys, 'The "Protection of Nationals" Revisited', *op. cit.*, p. 17 (quoting UN Doc. S/PV.1939, paras. 49 (statement of Mauritania), 148 (statement of Kenya), 225 (statement of China); UN Doc. S/PV.1941, paras. 67 (statement of Yugoslavia), 102, 109 (statement of Tanzania); UN Doc. S/PV. 1942, paras. 27, 30-31 (statement of Panama), 39 (statement of Romania), 145-146 (statement of India); UN Doc. S/PV.1943, para. 87 (statement of Cuba).

[157] Wingfield, op. cit., p. 241.

[158] Ibidem.

[159] *US v Iran* (Merits), paras. 57-8.

[160] Ibidem, para. 91.

[161] Lillich, op. cit., p. 68 (quoting Stein, *op. cit.*, pp. 500-1, footnote 8).

The two dissenting judges in the *US v Iran* case appear to have accepted the presumed analytical framework as well.[162] Judge Morozow, after criticizing 'the so-called rescue operation', which he labeled 'an invasion of the territory of the Islamic Republic of Iran',[163] maintained that the Court should have drawn attention to the undeniable legal fact that Article 51 of the Charter establishing [sic] the right of self-defense, may be invoked only 'if an armed attack occurs against a member of the United Nations.'[164] It should have added that . . . there is no evidence that any armed attack had occurred against the United States.'[165]

Judge Tarazi prefaced his remarks on this score with the observation that '[i]t is not my intention to characterize [the rescue] operation or to make any legal value judgment in this respect.'[166] He reflected however some of Judge Morozov's concerns about attempts to treat the operation as a self-defense response to an armed attack: 'One can only wonder, therefore, whether an armed attack attributable to the Iranian Government has been committed against the territory of the United States, apart from its Embassy and Consulates in Iran.'[167]

On the other hand, the use of the word 'incursion',[168] instead of 'intervention' as used in the *Corfu Channel* case[169] or 'invasion' used in the dissenting opinion of Judge Morozov,[170] suggests some kind of the Court's acceptance for the idea of a use of force of lesser gravity, which reinforces the contention that Article 2(4) is a qualified prohibition of the use of force.[171] In effect, the use of a narrower term «supports the claims ... that the use of force to protect nationals, if properly exercised, does not impair the territorial sovereignty and political independence of a nation.'[172]

While reactions of States to the US operation shed little light on their views regarding the legal basis of the action, the following comment on the Italian position, authored by Ronzitti seems an appropriate conclusion for analysis of qualification of use of force for hostage rescue under Article 2(4) and the whole paper: «The Charter does not abrogate a State's right to resort to self-help, including the use of armed force, which belongs to it under customary international law. The Charter simply suspends the right

---

[162] Ibidem.

[163] *US v Iran* (Merits), Dissenting Opinion of Judge Morozov, 51, pp. 52, 56.

[164] Ibidem, pp. 56–7.

[165] Ibidem, p. 57.

[166] *US v Iran* (Merits), Dissenting Opinion of Judge Tarazi, 58, p. 64.

[167] Ibidem, pp. 64–5. See also Lillich, op. cit., p. 69.

[168] *US v Iran* (Merits), para. 93 ('the incursion into the territory of Iran made by United States rnilitary units on 24–25 April 1980').

[169] *Corfu Channel* (*United Kingdom v. Albania*), 9.04.1949, (1949) ICJ Rep 4, p. 35.

[170] See footnote 151 and accompanying text.

[171] J. Raby, *The Right of Intervention for the Protection of Nationals : Reassessing the Doctrinal Debate*, "Les Cahiers de droit" (1989), vol. 30, 441, p. 466.

[172] Ibidem (quoting J. D'Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law*, "Virginia Journal of International Law" (1981), vol. 21, 485, p. 517).

to resort to self-help, since it entrusts the Security Council with the task of safeguarding the rights of member States. Whenever this mechanism does not function, for example when the action of the Security Council is paralysed by veto, the States are free to resort to self-help, under the terms permitted by customary international law.'[173]

Conclusion

The article has discussed permissibility of forcible rescue of nationals taken hostage abroad under general prohibition of threat or use of force in international relations constituted in Article 2(4) of the UN Charter. According to the regulation force could be used unilaterally in self-defense against armed attack or with authorization of the affected State. Both justifications were advanced concerning forcible hostage-rescue of nationals abroad. In addition the Belgian-US hostage-rescue in the Congo was qualified as implementation of the customary right to protect nationals abroad. The latter justification was abandoned in favour of self-defense argument based on Article 51 of the UN Charter (operations in Entebbe, and especially in Iran in April 1980). Those and recent developments in State practice add one more potential justification for hostage-rescue under the UN Charter regime on trans-border use of force. While Article 2 para. 4 constitutes a qualified prohibition of the use of force, the right of intervention to rescue one's nationals taken hostage abroad would not contravene that provision if 'force can be used in a manner which does not threaten the territorial integrity or political independence' of a targeted State.[174] Following this logic, the recent French and US hostage-rescue missions in Somalia, being 'the unilateral action taken without the [Somali] Government «s knowledge',[175] attracted no justification based on Article 51 of the UN Charter.[176]

---

[173] Lillich, op. cit., p. 92, footnote 241 (quoting Ronzitti, op. cit., pp. 46-7).

[174] Raby, op. cit., p. 451 (quoting P. Jessup, *A Modern Law of Nations* (New York, MacMillan, 1948), p. 162).

[175] *Federal govt condemns France military operation in Somalia*, Garowe Online, 13 January 2013, available at: http://www.garoweonline.com/artman2/publish/Somalia_27/Federal_govt_condemns_France_military_operation_in_Somalia.shtml (accessed 6 October 2013).

[176] *Letter to Congressional Leaders Reporting on U.S. Military Support for a French Rescue Operation in Somalia*, 13 January 2013, available at: http://www.gpo.gov/fdsys/pkg/DCPD-201300014/pdf/DCPD-201300014.pdf (accessed 6 October 2013); *Letter to Congressional Leaders Reporting on the Rescue of Jessica Buchanan*, 26 January 2012, available at: http://www.presidency.ucsb.edu/ws/?pid=99002#axzz2h95uSNeY (accessed 6 October 2013).

UNILATERALNE UŻYCIE SIŁY W ŚWIETLE ART. 2 (4) KARTY NARODÓW ZJEDNOCZONYCH: OPERACJE RATOWANIA ZAKŁADNIKÓW

Słowa kluczowe: zakaz użycia siły w stosunkach międzynarodowych, użycie siły w celu ochrony obywateli znajdujących się w stanie zagrożenia zagranicą, transgraniczne operacje wojskowe ratowania zakładników

Streszczenie

Artykuł analizuje legalność użycia siły w celu ochrony obywateli przetrzymywanych w charakterze zakładników na terytorium innego państwa w kontekście zakazu użycia siły w stosunkach międzynarodowych, konstytuowanego przez artykuł 2 (para. 4) Karty Narodów Zjednoczonych. Opracowanie identyfikuje ponad dziesięć takich sytuacji po 1945 r. Podstawę analizy stanowi studium trzech operacji ratowniczych zakładników: misji sił zbrojnych Belgii oraz USA w Demokratycznej Republice Konga w 1964 r., akcji sił zbrojnych Izraela w Ugandzie w 1976 r. oraz próby uwolnienia obywateli USA przetrzymywanych na terenie ambasady tego państwa w Iranie w 1980 r. Celami analizy są: sformułowanie ogólnego sądu w przedmiocie dopuszczalności ratowniczego użycia siły na tle art. 2 para. 4 Karty oraz kwalifikacja operacji ratowniczych na tle wyjątków od zakazu użycia siły, potwierdzonych w prawie i praktyce międzynarodowej.