

# Chapter II

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## The Traditional Writers on International Law

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The classical writers were followed by the “traditional writers” on international law of the Nineteenth and early Twentieth Centuries, they include Phillimore, Bluntschli, Bonfils, Pradier-Fodere, Westlake, Oppenheim, Moore, Stockton, Clark, Hodges, Borchard, Fauchelle, Hyde, Winfield, Offutt, Dunn, Hindmarsh and Accioly.

These writers witnessed the developing State practices which provided an interesting counterpoint to the theoretical foundations developed by the earlier classical scholars.

A. *Phillimore*. Phillimore, an English publicist writing in 1854, buttressed the theoretical premises of the “classical” textwriters with the actual practice of States as it had developed by the mid-Nineteenth Century. The general conclusion he reached was that “[t]he state, to which the foreigner belongs, may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice in the foreign country.”<sup>1</sup> However, Phillimore specified certain preconditions that must be met before such self-help could be undertaken. “[I]t behoves the interfering State to take the utmost care,” he cautioned, first, that the commission of the wrong be clearly established; second, that the “denial of the local tribunals to decide the question at issue be no less clearly established.”<sup>2</sup> In addition to citing Grotius, Phillimore supported his assertion with a reference to the reply of Great Britain to the King of Prussia in 1753, wherein it was maintained that a State may exercise protection only “in cases of violent injuries directed or supported by the State; and justice absolutely denied . . . by all the tribunals, and afterwards by the Prince.”<sup>3</sup>

Phillimore also distinguished between domiciliary and transient nationals in foreign countries. The essence of the distinction was that, while a national of one State who becomes domiciled in another State accepts conditions in that State for what they are, the transient national does not. According to Phillimore, the domiciliary

“must be held to have considered the habits of the people, the laws of the country, and their mode of administration, before he established therein his household gods [sic] and made it the principal seat of his fortunes. He cannot therefore expect, that every complaint, which he may be disposed to urge upon his native Government, with respect to these matters, will of necessity be considered as requiring national interposition.”<sup>4</sup>

Phillimore devoted an entire chapter to the then topical aspect of the protection and collection of debts owed by one State to another State’s nationals. Citing Vattel, Phillimore stated that “[t]he right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon an unquestionable foundation, when the foreign state has become itself the debtor of these citizens.”<sup>5</sup>

Building upon this theoretical foundation, Phillimore invoked relevant State practice, exemplified by the famous Palmerston Circular of 1848.<sup>6</sup> This statement of policy by the British government recognized that it had the right to bring claims on behalf of British subjects who held public bonds and money securities of defaulting foreign States, but that the decision whether or not to assert such a claim was entirely within its discretion. “It is therefore simply a question of discretion with the British Government,” wrote Palmerston, “whether [a] matter should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations.”<sup>7</sup> The circular suggested that only in exceptional cases would the government’s discretion be exercised in the subject’s favor.

Phillimore, drawing upon the theoretical foundations of Grotius and Vattel, substantiated his assertions with examples from ongoing State practice. From his discussion, it would seem that Phillimore was contemplating primarily the diplomatic protection of nationals abroad. In any event, he considered that a principle of international law had developed, both in theory and in practice, which justified a State’s protection of the lives, property and debts owed its nationals living abroad, perhaps even by the use of forcible measures.

B. *Bluntschli*. To Bluntschli, writing in 1874, the right of a State to protect its nationals abroad appeared unquestionable. Bluntschli wrote:

The state has the right and the duty to protect its nationals abroad by all the means authorized by international law:

- a) When the foreign state has proceeded against them in violation of the principles of this law.
- b) When ill treatment or injuries received by one of its nationals was not caused directly by the foreign state, but it did nothing to oppose such ill treatment or injuries.

Each state has the right to request reparation for the injustice, reimbursement for the injuries caused, and to demand, according to the circumstances, guarantees against the commission of similar acts.<sup>8</sup>

Bluntschli illustrated this principle with several examples, including a State's enslaving of another State's nationals, depriving them of their religion, destroying their goods, treating them with cruelty, violating treaties of commerce, and not respecting the law of nations governing the relations between States.<sup>9</sup> As an example of State practice in this regard, Bluntschli cited the British military expedition against the King of Abyssinia in 1867 who refused to free British nationals whom the king illegally held.<sup>10</sup> According to Bluntschli, this example involved an exercise of the right of forcible protection *par excellence*.

Bluntschli expanded his examination to the situation where the foreign State citizen, and not the State itself, commits the injurious act. In such a case, he argued, the allegedly injured person or persons first must seek a remedy in the courts of the State in which the injury occurred. However, if that State refuses or otherwise fails to render justice, the State of which the injured party is a national may intervene.<sup>11</sup>

At the same time, Bluntschli limited the principle of protection—at least non-forcible protection—to times where there was no internal strife or civil war in the foreign State.<sup>12</sup> His rationale for this position appears to be that a State should not be held responsible for acts over which it has no control, as is likely to be the case in such circumstances. As is apparent, this reasoning illustrates Bluntschli's assumption of the inseparability of the corollary principles of the right of diplomatic protection and State responsibility.

In support of this limitation upon the right of protection, Bluntschli cited several examples, including the *Don Pacifico* case in 1849; the notes of Prince Schwarzenberg on 24 April 1850 and Prince Nesselrode on 2 May 1850, to the effect that a State forced by revolution to take one of its cities controlled by

insurgents should not be obliged to indemnify foreigners who by chance are injured in the process; the refusal of the United States to indemnify Spanish nationals injured in New Orleans in 1851; the U.S. Civil War; and the decision of the Great Powers in resolving the Greek-Turkish conflict on 15 January 1869.<sup>13</sup>

In contrast to Phillimore, Bluntschi made no reference to the “classical” writings of Grotius and Vattel. Instead, he merely stated that a right and duty of protection existed and cited several supporting examples. As can be seen from the above discussion, however, Bluntschli—like Phillimore—apparently viewed the right of protection as involving principally diplomatic, rather than forcible, measures.

C. *Bonfils*. Writing in 1894, the Frenchman Bonfils similarly recognized the right of a nation to protect its nationals abroad stating, “To recommend its nationals to the authorities of the country in which they have established their residence, to defend their interests in diplomatic notes, to demand reparation for the wrongs which they have suffered . . . is not to intervene; on the contrary, it is to recognize the sovereignty of the State addressed.”<sup>14</sup>

Although the above formulation may appear to support only the principle of diplomatic protection, it is clear from Bonfils’ description of State practice that his principal concern lay with forcible protection. As examples, Bonfils cited the French blockade of Argentine ports in 1838-1840,<sup>15</sup> as well as the initial stages of the combined action of England, Spain, and France against Mexico in 1861.<sup>16</sup> According to Bonfils, this latter example began as a joint effort to obtain reparation for damages to nationals of the three States and to ensure Mexico’s compliance with its international agreements. When the effort turned into an attempt by Napoleon to install an empire under Maximilian of Austria, the character of the action changed from the protection of nationals to that of flagrant intervention.<sup>17</sup>

Turning to the question of the right to protect nationals who are creditors of foreign governments, Bonfils again relied on State practice, citing the Palmerston Circular.<sup>18</sup> He observed that “[i]n fact, the European Governments have intervened in favor of their nationals who had lent money to foreign governments, against weak states, incapable of resisting, but not against strong States. . . .”<sup>19</sup> As an example of such intervention, Bonfils cited the control exerted by France and Britain over Egypt in 1876 to protect the investments of their nationals.<sup>20</sup> Clearly, for Bonfils the right of forcible protection extended to both creditor and property rights of a State’s nationals as well as the protection of their lives.

D. *Pradier-Fodere*. The Frenchman Pradier-Fodere, writing in 1885, described the right of forcible protection of nationals and their property abroad as rooted in the writings of the “classical” publicists, particularly Vattel. According to Pradier-Fodere, “[i]t is the duty of all states to protect their nationals in foreign countries by all means which international law authorizes.”<sup>21</sup> Citing Vattel, he stated further that States possess “the right to obtain justice by force, if it cannot be done otherwise.”<sup>22</sup>

Pradier-Fodere, however, recognized certain restrictions upon the exercise of the right of protection. Thus, a foreigner who had become domiciled in a State had less justification to call upon his government for protection than a transient foreigner.<sup>23</sup> In addition, he observed that in most cases protection was accomplished more effectively by diplomatic demands for compensation than by forcible self-help.<sup>24</sup> Nevertheless, he pointed to certain examples where resort to force or the threat thereof was justified as a protective measure. In this regard he cited the Anglo-French control of Egypt in 1876 to protect the interests of British and French creditors,<sup>25</sup> as well as the threatened Anglo-French intervention in the Ottoman Empire in 1859 to remodel its financial laws.<sup>26</sup>

E. *Westlake*. Westlake, an Englishman writing in 1904, offered an extensive discussion of the right to protect nationals abroad under the heading of “denial of justice.” “If [foreign States] are wanting either to the judicial or to the administrative department,” he argued, “the state to which a foreigner belongs has a claim to step in for his protection which often has this in common with political claims, that the justice which the foreign power demands for its subject is not measurable by definite rules.”<sup>27</sup> In support of this somewhat amorphous proposition, Westlake cited Vattel,<sup>28</sup> the “general conscience of the peoples of European civilization,”<sup>29</sup> and several statements by officials of the U.S. government.<sup>30</sup> Westlake, like Bluntschli, recognized an important limitation on the right to protect nationals abroad. “During an insurrection,” he stated,

“the best will on the part of the state government, backed by the best laws, is often unable to prevent or to punish regrettable occurrences. In those circumstances it is not usual for a state to indemnify its own subjects, and foreigners can have no better claim than nationals in a matter not generally recognized as one for indemnity. . . .”<sup>31</sup>

Westlake also considered the right of protection in the case of contractual claims. Examining, first, U.S. practice in this regard, he noted the adoption of a cautious policy. Citing statements by Secretary of State Seward in 1866 and

Secretary of State Fish in 1870, Westlake concluded that U.S. nationals investing in foreign States had “assumed the risk” of such ventures, and that the U.S. government normally would not intervene on their behalf.<sup>32</sup> Here can be seen the development of the concept that in financial matters, (contracts, debtor-creditor relationships) that States would not intervene with force on behalf of a national who had contracted with a foreign State or one of its citizens.

F. *Oppenheim*. Oppenheim, another Englishman writing in 1905, recognized the validity of the right of forcible protection. According to Oppenheim, “[b]y a universally recognized customary rule of the “Law of Nations” every State holds a right of protection over its citizens abroad. . . .<sup>33</sup> In his view, this right was discretionary, not obligatory.<sup>34</sup> Oppenheim recognized several means by which the right might be enforced, including diplomatic notes, retortion and reprisals, and intervention or war where necessary.<sup>35</sup>

Oppenheim offered little guidance about which protective technique was appropriate in a particular case. Instead, he merely stated that “[e]verything depends upon the merits of the individual case and must be left to the discretion of the State concerned.”<sup>36</sup> However, he did mention certain criteria that a State might consider in exercising its discretion, including “whether the wronged foreigner was only traveling through or had settled down in the country, whether his behavior has been provocative or not, how far the foreign Government identified itself with the acts of officials or subjects, and the like.”<sup>37</sup>

G. *Moore*. Writing in 1905 on the subject of U.S. diplomacy, John Bassett Moore also addressed the question of whether forcible self-help could be used to protect nationals and their property abroad.<sup>38</sup> Underlying his discussion was the proposition that “[a]mong the rules of conduct prescribed for the United States by the statesmen who formulated its foreign policy, none was conceived to be more fundamental or more distinctively American than that which forbade intervention in the political affairs of other nations.”<sup>39</sup> However, Moore maintained that “[t]he right of the government to intervene for the protection of its citizens in foreign lands and on the high seas never was doubted; nor was such action withheld in proper cases.”<sup>40</sup> Moore supplemented this brief analysis with a careful description of a large number of instances of intervention for such protective purposes.<sup>41</sup>

H. *Stockton*. A brief discussion of the right of forcible protection of the lives and property of nationals abroad is afforded by the work of Charles H. Stockton, a U.S. naval officer and legal scholar writing in 1911. Departing from the

traditional emphasis upon diplomatic pressures to protect nationals abroad, Stockton proposed that special measures be utilized in situations involving “weak states with unstable governments.” In such situations, he argued, “it at times occurs that citizens abroad must be protected at once, not by diplomatic representation; there is not time for that, but by the employment of naval force.”<sup>42</sup> Stockton invoked as authority for his position the appropriate Navy regulations governing the use of naval force.<sup>43</sup> Stockton also discussed briefly measures that might be justified in the case of another class of governments, the “semi-civilized or barbarous.” In these situations, “intervention by force on behalf of citizens domiciled or sojourning there is a more common matter. In these countries the employment of naval forces is the principal means of such protection, added thereto at times by landing of military detachments.”<sup>44</sup>

I. *Clark*. The right of a State to protect its nationals and their property abroad was spelled out in considerable detail by J. Reuben Clark, writing as Solicitor for the U.S. Department of State in 1912.<sup>45</sup> According to Clark, the existence of such a right often was obscured by the tendency that many international law writers exhibited to apply the same strictures to the protection of nationals abroad that they applied to political interventions.<sup>46</sup> When a State’s motive in employing forcible self-help was simply “the protection of citizens or subjects. . . until the government concerned is willing or able itself to afford the protection,”<sup>47</sup> he believed it not subject to the same criticisms as a purely political intervention. From an analysis of the writings of the many authorities cited in his study,<sup>48</sup> Clark concluded that:

There is considerable authority for the proposition that such interposition by one State in the internal affairs of another State for the purpose of affording adequate protection to its citizens resident in the other, as well as for the protection of the property of such citizens, is not only not improper, but, on the contrary, is based upon, is in accord with, and is the exercise of a right recognized by international law.<sup>49</sup>

The remainder of Clark’s study comprises an extensive listing of instances in which the United States had acted in accordance with this right of forcible protection.

J. *Hodges*. Henry Hodges, a U.S. author writing in 1915, discussed the right of forcible protection under the rubric of “non-political intervention.”<sup>50</sup> His justifiable rationales for such intervention consisted of the protection of citizens, the denial of justice and the protection of missionaries. All three of these

categories include situations, which could fall within the principle of forcible protection.

Regarding his rationale for the protection of citizens, Hodges stated that “[w]hen order is neglected by, or is impossible for the foreign government, then the more advanced state has a right to intervene for the protection of the life and property of its citizens.”<sup>51</sup> According to Hodges the measures a protecting State could take might involve, “the establishment and enforcement of some degree of law and order in that community.”<sup>52</sup>

With reference to the “denial of justice” justification for intervention, Hodges adopted the view of Secretary of State Bayard, who had stated “[t]hat the State to which a foreigner belongs may intervene for his protection when he has been denied ordinary justice in a foreign country, and also in the case of a plain violation of the substance of natural justice is a proposition universally recognized.”<sup>53</sup> In contrast to the protection of citizens justification, Hodges’ discussion of denial of justice appears to be geared more to diplomatic than to forcible measures of protection.<sup>54</sup>

“Respecting the protection of missionaries,” Hodges noted, “the United States shows about the same consideration as she does in respect to other classes of citizens resident abroad.”<sup>55</sup> Thus, according to Hodges, “[t]he United States does not go so far in these matters as do some of the European states which undertake to assume a limited protectorship over Christian communities, especially in Turkey.”<sup>56</sup> In addition, the examples cited by Hodges in this regard, such as the *Caroline* case and Pelew Islands dispute in 1893,<sup>57</sup> suggest that such protection under those facts is limited to diplomatic as opposed to forcible measures.<sup>58</sup>

K. Borchard. In discussing U.S. practice, Edwin Borchard observed in 1915 that “[t]he army or navy has frequently been used for the protection of citizens or their property in foreign countries in cases of emergency where the local government has failed, through inability or unwillingness, to afford adequate protection to the persons or property of the foreigners in question.”<sup>59</sup> His analysis consisted primarily of a description of U.S. practice with a minimum of theoretical discussion. The closest he came to justifying such forcible protection under international law was to cite the Memorandum of J. Reuben Clark which stated that “when confined to the purpose of assuring the safety of citizens abroad, or exacting redress for a delinquent failure to afford local protection, the action must be considered not as a case of intervention, but as non-belligerent interposition.”<sup>60</sup>

Borchard listed at least five purposes for which U.S. military personnel had been landed for “non-belligerent interposition” reasons: (1) the protection of U.S. citizens in “disturbed localities”; (2) the punishment of natives for injuries to U.S. citizens; (3) the suppression of local riots; (4) the collection of indemnities; and (5) the seizure of custom houses as security for the payment of claims.<sup>61</sup> He observed that most of these landings had occurred in Latin America as the result of the “hegemony of the United States on this continent and the force of the Monroe Doctrine. . . .”<sup>62</sup> Borchard indicated that such landings had not always been against the will of the local government; indeed, sometimes they actually had been carried out in response to an express invitation.<sup>63</sup>

As examples of “non-belligerent interposition” involving the use of force, Borchard cited the joint action of the United States and other nations in China in 1900 at the time of the Boxer Rebellion,<sup>64</sup> as well as the landing of American troops in Nicaragua in 1910.<sup>65</sup> He maintained, however, that such interventions were “by accident or unavoidable consequence. . . , rather than by principal design.”<sup>66</sup> This statement however, seems to be more political than legal pronouncement.

Borchard concluded his analysis with an examination of whether congressional action was required to authorize the use of the armed forces for the protection of U.S. citizens abroad.<sup>67</sup> His conclusion was that such authorization was unnecessary given the then-predominant view that “the Executive has unlimited authority to use the armed forces of the United States for protective purposes abroad in any manner and on any occasion he considers expedient.”<sup>68</sup> Thus, in contrast to most of the writers discussed previously, Borchard avoided any detailed justification of the right of protection under international law. Instead, he analyzed U.S. practice as it had developed and attempted to draw generalizations therefrom. What emerged was the view that forcible protection was justified, at least for certain “non-belligerent” objectives.

L. *Fauchille*. In a discussion of intervention and international law, the Frenchman Fauchille, writing in 1922, noted that the use of force to protect nationals abroad was a recognized exception to the established principle of international law condemning intervention. He noted that many writers thought it not intervention “to force a state, either by reprisals or the force of arms, to fulfill its international obligations or to compensate for an injustice or an insult. There is, then, according to these writers, coercion, violence, but not intervention.”<sup>69</sup>

As an example of such use of force, Fauchille cited the combined action of Great Britain, Spain and France against Mexico in 1861 to obtain compensation for injuries to their nationals and to ensure the fulfillment by Mexico of

contractual obligations vis-à-vis the respective governments.<sup>70</sup> In addition, Fauchille cited the combined action against the Chinese during the Boxer Rebellion in 1900 to protect the diplomatic representatives and nationals of the countries concerned,<sup>71</sup> as well as the 1902 blockade of Venezuela by Great Britain, Germany and Italy to obtain payment on behalf of their nationals who were victims of civil wars in Venezuela.<sup>72</sup> Thus the views of Fauchille represent a further recognition of the right of forcible protection at the levels of both theory and State practice.

M. Hyde. Recognition of the right of forcible protection is evident in the work of Charles Cheney Hyde, writing in 1922.<sup>73</sup> Starting from the premise that forcible intervention by one State in the affairs of another was illegal, Hyde recognized several exceptions, including self-defense and the protection of nationals.<sup>74</sup> With reference to the latter principle, Hyde wrote that “[i]f it can be shown . . . that . . . acts [of a foreign State] are immediately injurious to the nationals of a particular foreign State grounds for interference by it might be acknowledged.”<sup>75</sup> It is interesting to note, however, that Hyde seemed to prefer collective, rather than individual, measures to accomplish such interference. “It is the mode of collective interference, through an established agency . . . which characterize[s] the existing tendency and afford[s] hope of the development of a sounder practice than has hitherto prevailed.”<sup>76</sup> Hyde’s principle of “collective interference” proved to be the cornerstone of present day United Nations and NATO actions throughout the world.

Hyde noted several instances in which U.S. military forces have engaged in such interference for the protection of nationals, notably the collective measures in the Boxer Rebellion in 1900,<sup>77</sup> the unilateral action of U.S. naval forces in the punishment of natives on Formosa in 1867,<sup>78</sup> and the landings of U.S. forces in Nicaragua and Honduras in 1910 and 1911.<sup>79</sup> A common element present in most of the cases noted by Hyde was that such landings were on “foreign territory which, in most instances, has been that of a country not familiar with European civilization, and not, at the time, recognized for all purposes as a member of the family of nations.”<sup>80</sup> This comment suggests that, in Hyde’s view, forcible protection was easier to justify in instances involving acts in States not adhering to the standards of conduct observed by the more “advanced” European States.

N. Winfield. In his discussion in 1924 of both valid and invalid grounds for intervention in international law, Winfield, an Englishman, rejected as unsound the use of nationality as a justification for intervention. He observed that such

arguments tend to present themselves in two forms: "(i) Where the interveners are of a nationality identical with that of the party for whose benefit they intervene . . . [and] (ii) Where the grievance is not that there exists such an identity as between the interveners and the party, but that it is lacking as between the latter and the State of which it forms a constituent part and from which it seeks violently to dissociate itself."<sup>81</sup>

As to the first, Winfield saw only a moral justification, as international practice did not recognize any legal justification. He cited the intervention of Victor Emmanuel II and Garibaldi in Sicily in 1860 in this regard.<sup>82</sup> As to the second, Winfield similarly saw no legal justification, citing two serious objections to its validity. The first was that, if admitted "war might be raised in every corner of the world in its vindication."<sup>83</sup> Second, Winfield argued, "[i]t is problematical whether a single one of the above interventions would . . . benefit any of the assisted races, much more whether the remote and doubtful good to be derived from them would outweigh the evils of what must almost certainly prove a long and bloody struggle."<sup>84</sup>

Thus, while it is somewhat unclear whether the situations posited by Winfield exactly correlate with the right of protection situations discussed by other writers, his general conclusion as to the doctrine's invalidity certainly is in marked contrast to their views.

O. *Offutt*. In his study of instances in which the armed forces of the United States have been used for the protection of U.S. nationals and their property abroad, Milton Offutt, writing in 1928, offered a brief discussion of the international legal principles justifying such use of force. He began by noting the obvious, namely, that "[t]he right of a state to protect by force its citizens living in a foreign country when sudden disturbances in the foreign state threaten the safety of their lives and property, and when the government under whose jurisdiction they reside has shown itself unable or unwilling to afford them reasonable protection, is a question which has engaged the attention of most writers on international law."<sup>85</sup>

His analysis, like that of most previous writers,<sup>86</sup> concluded that, when viewed as "non-political" intervention, the use of force for the protection of nationals may be justified. Thus, Offutt observed that "[w]hen, however, the distinction between political and non-political intervention has been appreciated, some authorities have held that the use of force for the protection of its citizens abroad becomes not only a right but, in certain cases, a duty of a sovereign state; and that the state against which such force is used may not justly consider itself aggrieved."<sup>87</sup> In support of this assertion, he relied upon a number of the

authorities discussed previously in this chapter, including Oppenheim, Bonfils, and Pradier-Fodere.<sup>88</sup>

P. *Dunn*. Frederick Dunn, writing in the decade preceding World War II, offered another perspective on the right of forcible protection.<sup>89</sup> Although the central focus of his work was on a State's right to protect its nationals abroad diplomatically, he did recognize the existence of a right to forcible protection in certain circumstances. "It is only occasionally," observed Dunn, "where aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some other reason is believed to be useless, that forceful intervention is apt to take place."<sup>90</sup>

Although there can be detected in Dunn's work an undercurrent of disapproval of this type of forcible self-help, he recognized its validity given the existing international legal and political context. According to Dunn, "[i]n the present stage of organization of the international community, the enforcement of legal obligations is still left in large measure to the individual states, i.e., to what is called 'self-help' (a situation that naturally favors the stronger as against the weaker states). Armed intervention is only one of various means of enforcement that have been developed."<sup>91</sup>

Thus, although the primary focus of Dunn's work was on the right to diplomatic protection, he recognized the existence of a right of forcible protection in cases where the former proved ineffective. It is important to note, however, that Dunn viewed this right not as an absolute one, but as one formed from the exigencies of the existing international legal and political system.

Q. *Hindmarsh*. Representative of the thought on forcible protection of nationals abroad in the decade preceding World War II are the observations of Hindmarsh writing in 1933.<sup>92</sup> His analysis was two-fold, the first step being a recognition of the frequent use of military and naval forces to accomplish such protection, and the second step being an exposition and critique of the international legal principles allegedly justifying such actions.

Hindmarsh recognized that "[t]he use of military or naval force against an offending state to compel recognition of alleged international obligations has been a frequent practice of powerful states."<sup>93</sup> As examples, he singled out as representative a number of instances of forcible protection by the United States, particularly those instances analyzed by Offutt.<sup>94</sup> In addition, however, Hindmarsh pointed to the actions of other powerful States of the day, including the Italian bombardment of the Greek island of Corfu in 1923<sup>95</sup> and the

Japanese occupation of Chinese territory in Manchuria in 1931.<sup>96</sup> Hindmarsh concluded his survey of State practice with the sound observation that “[only] in a very primitive stage of law can such self-help sanctions be tolerated. Their exercise permits the confusion of law and vengeance, evades impartial judgment, and retards the free development of an international legal system. The continuation of self-help in modern international law is as much an anachronism as private vengeance in the legal relations of individuals.”<sup>97</sup>

Hindmarsh’s analysis of the legal underpinnings of the right of protection was characterized by his rejection of precedent as a justification for the continued validity of the right of protection in the modern international political and legal system.

Measures of force short of war were constantly employed during the Nineteenth Century and were justified as reprisals. Thus, after a century of practice the validity of such measures became recognized as part of customary international law. States which employed reprisals defended them as necessary, ultimate sanctions, short of war, for the enforcement of international rights. Finally, the practice of reprisals received some support from vague theoretical concepts such as the rights of existence, self-defense, and independence. Thus custom, necessity, and fundamental right were appealed to in order to justify continued resort to State self-help in time of peace. Little thought was given by jurists to the possibility that new conditions of international life might render custom obsolete and devoid of practical justification, that new and more effective means of enforcing law might be found, and further, that fundamental rights are always conditional upon fundamental duties.<sup>98</sup>

Hindmarsh argued that such a rationale, while applicable to the Nineteenth Century system of independent political units, was no longer appropriate in a System increasingly characterized by interdependence rather than independence among States. Accordingly, in his view, the development of an international organization to settle disputes among States, rather than the Nineteenth Century principles of unilateral forcible self-help, would best serve modern international legal and political conditions.<sup>99</sup>

R. *Accioly*. Yet another pre-World War II view of the right of protection was that of the Brazilian jurist *Accioly*, writing in 1940.<sup>100</sup> Following a traditional exposition of the right of a State to protect its nationals abroad through diplomacy, *Accioly* proceeded to discuss a State’s remedies when such diplomatic efforts fail. “Should the local authorities declare themselves powerless to grant the claimed protection or demonstrate their indifference to the claims, an international conflict may arise; and if there is shown the impossibility of an

amicable solution to the dispute, the claimant State has the right of recourse to coercive measures.”<sup>101</sup>

Thus, Accioly, on the eve of World War II, demonstrated the continued acceptance of the broad right to use forcible protection, not limited to situations wherein the lives and property of a State’s nationals were immediately at risk.

As the preceding discussion reveals, the juridical underpinnings of international legal principles justifying the use of force to protect nationals and their property abroad are rooted in the writings of the “classical” writers on international law, given the many references to the views of Grotius relative to the importance of the citizen to the State and the right of one State to enforce its rights against another State, by force if necessary.<sup>102</sup>

Similarly, Wolff’s thoughts, particularly with reference to the validity of the use of force to enforce a State’s rights,<sup>103</sup> also have influenced many of the later writers on the subject of forcible protection.<sup>104</sup> Vattel’s position on the State’s obligation to protect its citizen, albeit limited by a concern for the rights of other States,<sup>105</sup> finds restatement in the views of subsequent writers on the protection of nationals abroad.<sup>106</sup>

From this cursory survey of some of the leading publicists, there can be seen the gradual development of a principle justifying the forcible protection of nationals and their property abroad. Nevertheless, by the outbreak of World War II the desirability of forcible protection was being questioned by a growing number of writers.

## NOTES

1. 2 R. Phillimore, *International Law* 24 (1854).
2. *Id.* at 25.
3. *Id.*
4. *Id.* at 26. See the similar views of Pradier-Fodere at note 21 *infra*.
5. *Id.*
6. 42 Brit. & For. State Papers 385 (1852).
7. *Id.*
8. J. M. Bluntschli, *Le Droit International Codifié* 223 (1874) (author’s translation).
9. *Id.* at 223 n.1.
10. *Id.* See the discussion of this incident at page 27 *infra*.
11. *Id.*
12. *Id.* at 224.
13. *Id.* at 224 n.1.
14. H. Bonfils, *Manuel de Droit International Public* 159 (1894) (author’s translation).
15. *Id.* at 158. See discussion of this incident at page 25 *infra*.
16. *Id.* See the discussion of this incident at page 26 *infra*.
17. *Id.* at 158-59.

18. *Id.* at 159. See note 6 *supra*.
19. *Id.*
20. *Id.* See the discussion of this incident at page 29 *infra*.
21. F. Pradier-Fodere, *Traite de Droit International Public* 614 (1885) (author's translation).
22. *Id.* at 615.
23. *Id.* at 619. See the similar views of Phillimore at note 1 *supra*.
24. *Id.* at 620.
25. *Id.* at 629-30. See the discussion of this incident at page 29 *infra*.
26. *Id.* at 630.
27. 1 J. Westlake, *International Law* 313 (1904).
28. *Id.* at 314.
29. *Id.*
30. *Id.* at 314-15.
31. *Id.* at 216. For the views of Bluntschli, see note 8 *supra*.
32. *Id.* at 317-18.
33. 1 L. Oppenheim, *International Law* 374 (1905).
34. *Id.* at 374 n.3.
35. *Id.* at 375.
36. *Id.*
37. *Id.*
38. J.B. Moore, *American Diplomacy* (1905).
39. *Id.* at 131.
40. *Id.*
41. *Id.* at 132-67.
42. C. Stockton, *A Manual of International Law for the Use of Naval Officers* 143 (1911).
43. *Id.* at 139-41. For a more detailed discussion tracing the development of United States Navy Regulations authorizing the use of force to protect United States nationals abroad, see Appendix II *infra*. The regulations in force at the time Stockton published his book may be found at pages 210-12 *infra*.
44. *Id.* at 143. For a similar discussion justifying forcible protection in underdeveloped countries, citing the examples of the Boxer Rebellion and revolutionary disturbances in Latin America, see Root, *The Basis of Protection to Citizens Residing Abroad*, 4 *Am. J. Int'l L.* 517 (1910).
45. J. Clark, *Right to Protect Citizens in Foreign Countries by Landing Forces* (3d rev. ed. 1934) (quotes identical to 1912 edition).
46. *Id.* at 24.
47. *Id.* at 25.
48. Authorities relied upon by Clark include Bluntschli, Bonfils, Pradier-Fodere, Phillimore, Oppenheim and Westlake. See *id.* at 25-34.
49. *Id.* at 25.
50. H. Hodges, *The Doctrine of Intervention* 58 (1915).
51. *Id.* at 58-59.
52. *Id.* at 58.
53. *Id.* at 66.
54. *Id.* at 65-74.
55. *Id.* at 74 (emphasis deleted).
56. *Id.* at 74-75.

57. *Id.* at 78-80.
58. *Id.* at 75-80.
59. E. Borchard, *The Diplomatic Protection of Citizens Abroad* 448 (1915).
60. *Id.* See J. Clark, *supra* note 45, at 24.
61. E. Borchard, *supra* note 59, at 449.
62. *Id.* at 451.
63. *Id.* at 450.
64. *Id.* at 452. See the discussion of this incident at pages 31-32 and 141-42 *infra*.
65. *Id.* This incident is discussed in Appendix I, at page 149 *infra*.
66. *Id.*
67. *Id.*
68. *Id.*
69. 1 P. Fauchille, *Traite de Droit International Public* 582 (1922) (author's translation).
70. *Id.* See the discussion of this incident at page 26 *infra*.
71. *Id.* at 583. See the discussion of this incident at pages 31-32 and 141-42 *infra*.
72. *Id.* See the discussion of this incident at page 33 *infra*.
73. 1 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922).
74. *Id.* at 117.
75. *Id.* at 121.
76. *Id.* at 118.
77. *Id.* at 350-51. See the discussion of this incident at page pages 31-32 and 141-42 *infra*.
78. *Id.* at 352 n.1.
79. *Id.* at 352 n.2. This incident is discussed in Appendix I, at pages 149-50 *infra*.
80. *Id.* at 351-52.
81. Winfield, *The Grounds of Intervention in International Law*, 5 *Brit. Y.B. Int'l L.* 149, 160 (1924).
82. *Id.*
83. *Id.*
84. *Id.*
85. M. Offutt, *The Protection of Intervention in International Law*, 5 *Brit. Y.B. Int'l L.* 149, 160 (1924).
86. *Id.* at 160 n.2.
87. *Id.* at 2-3.
88. *Id.* at 3.
89. F. Dunn, *The Protection of Nationals* (1932).
90. *Id.* at 19.
91. *Id.*
92. A. Hindmarsh, *Force in Peace: Force Short of War in International Relations* (1933).
93. *Id.* at 75.
94. *Id.* at 75 n.1.
95. *Id.* at 79. See the discussion of this incident at pages 33-34 *infra*.
96. *Id.* at 80. See the discussion of this incident at pages 35-36 *infra*.
97. *Id.* at 82.
98. *Id.* at 85.
99. *Id.* at 107-08.
100. H. Accioly, *Traite de Droit International* (1940).
101. *Id.* at 289-90 (author's translation).

102. See e.g., R. Phillimore, *supra* note 1, at 24; J.B. Moore, *supra* note 38, at 131; F. Dunn, *supra* note 89, at 46-48; and A. Hindmarsh, *supra* note 92, at 87 n.1.

103. Wolff, *Jus Gentium* 138-39 (J. Scott ed. 1934).

104. Although not cited directly, Wolff's justification for the use of force finds support in the works of Bonfils, Pradier-Fodere, and Oppenheim, among the authors discussed in this chapter.

105. E. Vattel, *The Law of Nations* 161 (J. Chitty ed. 1883).

106. See e.g., F. Pradier-Fodere, *supra* note 21, at 615; 1 J. Westlake, *supra* note 27, at 314; J.B. Moore, *supra* note 38, at 131-32; F. Dunn, *supra* note 89, at 48-53; and A. Hindmarsh, *supra* note 92, at 87 n.1.