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## Foreword

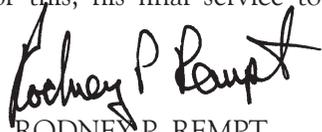
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The International Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises, and articles that contribute to the broader understanding of international law. With this, the seventy-seventh volume of the historic series, we honor the late Professor Richard B. Lillich by publishing his final book, a long-awaited volume on the use of force in the protection of nationals abroad.

Professor Lillich is part of the Naval War College family. He held the Charles H. Stockton Chair of International Law from 1968-1969, and continued to support the Naval War College after his tenure. He was the co-editor of Volumes 61 and 62 of the Blue Book series: *Readings in International Law from the Naval War College Review 1947-1977, vols. 1 & 2*. As the Stockton Professor, he would engage his colleagues in discussions of the proper use of the U.S. Navy and Marine Corps in one of their most enduring missions, ensuring the safety of U.S. citizens overseas. This volume experienced a long gestation since then, with years of meticulous research and thoughtful analysis culminating in a manuscript shortly before Professor Lillich’s untimely death in 1996. His conclusions, while not necessarily official positions of the United States Government, are firmly supported by exhaustive historical research and clearly presented case studies, and are an invaluable contribution to the field.

On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend to the family, friends and colleagues of Professor Lillich, our gratitude for this, his final service to his country.



RODNEY P. REMPT  
Rear Admiral, U.S. Navy  
President, Naval War College



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## Introduction

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The Charles H. Stockton Chair of International Law was established at the Naval War College in 1951. Over the past half-century, the Stockton Chair has been held by many esteemed professors of international law. Professor Richard B. Lillich was one such Chairholder. Volume 77 of the International Law Studies (the “Blue Book”) series, *Lillich on the Forcible Protection of Nationals Abroad*, memorializes Professor Lillich and his work. The commentary and case studies he wrote clearly show that foreign intervention to protect one’s citizens has always been a relevant and dynamic part of international law, and will continue to be so.

This volume was made possible only through the efforts of its principal editor, Lieutenant Commander Thomas Wingfield, U.S. Navy Reserve. Tom was in the right place at the right time at the Naval War College while serving his annual active duty stint as a reservist. He shepherded the process of turning rough notes, documents and papers into a published book. Working closely with Tom as the co-editor was Lieutenant Colonel James Meyen, USMC, of our International Law Department.

Funding for this book was made possible by Dean Alberto Coll, Center for Naval Warfare Studies of the Naval War College. His leadership and support are key to the Blue Book Series. Invaluable contributions were also made by retired Professor Emeritus Jack Grunawalt and Captain Ralph Thomas, JAGC, USN, (Ret.), who volunteered many hours of their personal time in reviewing manuscripts and offering advice. Further assistance was provided by the rest of the staff of the International Law Department.

Volume 77 will serve as a standard reference work of case studies in this area, continuing the solid, scholarly tradition of the “Blue Books.” The series is published by the Naval War College and distributed throughout the world to academic institutions, libraries, and both U.S. and international military commands.

DENNIS MANDSAGER  
Professor of Law  
Chairman, International Law Department



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## Preface

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*“It was only one life. What is one life in the affairs of a state?”*

Benito Mussolini, after running down a child in his automobile (as reported by General Smedley Butler, 1931)<sup>1</sup>

Richard Bonnet Lillich—lawyer, professor, human rights expert and advocate—spent his life answering that question. The results of his life’s work have proven very troubling for the Mussolinis of the world, in that no one has done more to chart the limits to which a State may go in protecting its citizens.

This particular work, Professor Lillich’s last, had an unusually long gestation. As early as 1980, he wrote in the introduction to another volume in this series, *Readings in International Law from the Naval War College Review 1947-1977, vol. 2: The Use of Force, Human Rights, and General International Legal Issues*: “[t]his Introduction is not the place to discuss the Entebbe Raid in detail. Interested readers will find it considered at some length in my forthcoming monograph in the “Blue Book” series—*Forcible Self-Help to Protect Nationals Abroad*.”<sup>2</sup> As Professor Lillich continued writing through the 1980s and into the 1990s,<sup>3</sup> he kept this manuscript close at hand, continually revising and updating the text to reflect each new example of State practice. With his untimely death in 1996, his colleagues gathered the largely complete but uncompiled work, and set about preparing it for its long-awaited publication.

It was my honor to be entrusted with overseeing this task during the last two years. Long a student of Professor Lillich’s work (if, sadly, not the Professor himself), I had already published two articles based on his work in this area.<sup>4</sup> The first begins with a statement of why Professor Lillich’s work in this particular area mattered so much:

[P]erhaps the best criterion for discriminating tyrannies from democracies is the sincere, proven emphasis placed upon the value of a single human life. The forcible protection of nationals abroad, when undertaken for non-pretexual reasons, is the clearest expression of that distinction in state practice. The academic challenge in evaluating such uses of force is to distinguish such protection from other legitimate uses of force, and then to distinguish the uses from other, illegitimate uses of force.<sup>5</sup>

In this volume, Professor Lillich rose to this challenge, and set the standard for future scholars to match. It was decided against including additional case studies covering the post-1996 period to “update” his work. Their academic value did not justify making the text not purely Lillich. Without them, every word, except for the Conclusion, is Professor Lillich’s, which is more appropriate for a memorial volume such as this one. To say more about the text which follows is unnecessary, as its scope, depth, and clarity speak for themselves. There is also no need to say more about Professor Lillich himself, because Professor Robert Turner, also of the University of Virginia, has written movingly about his lost friend and colleague in the personal memorial which follows.

Editing a Blue Book is as far from a solo undertaking as any could be. I wish to thank first Professor Michael N. Schmitt, now of the George C. Marshall European Center for Security Studies, for introducing me to the world of the Naval War College, allowing me to assist him in the editing of an earlier Blue Book, and advocating to the College’s Oceans Law and Policy Department (now the International Law Department (ILD)) that I be given a crack at this project. Mike is one of the finest men I know, and to the extent that any of us can approach the level of his intellect, passion, humor, and thoughtfulness, we do so only asymptotically. The College was indeed lucky to have him, as the George Marshall Center is lucky now.

I would also like thank Commander Dean Markussen, USNR, who, in a burst of academic insight, set this chain of events in motion by dispatching me to the College for a two-week period of active duty training as a reservist. Great thanks are also due to the faculty of ILD—particularly Professor Emeritus Jack Grunawalt, his successor, Professor Dennis Mandsager; Captain Ralph Thomas, JAGC, USN (Ret.), his successor, Colonel Frederic Borch, USA; and Lieutenant Colonel James Duncan, USMC, and *his* successor, Lieutenant Colonel James Meyen, USMC, for accepting me into the ILD family and providing all the support and guidance an editor could need. Their faith in this project, and in me, is greatly appreciated.

Professor Robert Turner, author of this text's true introduction, is deserving of special praise. Given his already hectic schedule of writing, teaching, and speaking—made all the more demanding in wake of the recent attacks on our nation—he could have declined this writing project with a clear conscience. However, drawing on his limitless reserves of energy, he made time to honor his friend with the thoughtful tribute which follows. Bob Turner is living proof of Professor Lillich's talent for friendship.

No acknowledgments would be complete without thanking the people who actually undertook the steps to physically produce a hardcover book. First is LtCol Jim Meyen, my official co-editor and whom I mentioned above, for taking the finished manuscript through the process of publication in Newport. The sheer number of steps in such a task—from word processing to proofreading, from indexing to printing—make their coordination a challenging, time-consuming, and sometimes frustrating task. For handling the entire project with grace under pressure, Jim is to be sincerely complimented. An enormous debt is also owed to Captain Donald C. Hill, USNR, who spent a two-week training period, and a considerable amount of his own time, in organizing Professor Lillich's manuscript. The book's current organization is a result of Captain Hill's vision, and it is no overstatement to say that the project could not have moved forward without his dedication and patient work. Ms Patricia Goodrich, of the Naval War College Press, is also to be commended for her professional editorial assistance; as is the technically adept staff in the Publications Office, who made this volume a reality. Last, but certainly not least, is Lieutenant David Poff, USNR, who put considerable time and effort into updating Professor Lillich's work for publication. His contribution, completed after his recall to active duty in the current hostilities, may be seen throughout this text.

Finally, I would like to thank my friends and colleagues at Aegis Research Corporation, Georgetown University Law Center, and the University of Virginia School of Law for their patience, understanding, and support. Working and studying with such fine people is one of life's greatest rewards, and one that I now know was enjoyed just as deeply by Professor Richard Bonnet Lillich.

THOMAS C. WINGFIELD  
Counsel and Principal National  
Security Policy Analyst  
Aegis Research Corporation

## NOTES

1. Benito Mussolini, *quoted by* Gen. Smedley Butler, *reprinted in* THE POCKET BOOK OF QUOTATIONS 379 (Henry Davidoff ed., 1952).
2. READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1947-1977 (v. 2), THE USE OF FORCE, HUMAN RIGHTS AND GENERAL INTERNATIONAL LEGAL ISSUES (NAV. WAR C. INT'L L. STUD., v. 62, Richard B. Lillich & John Norton Moore eds. 1980), at xi.
3. For the most complete listing of Professor Lillich's writings, see Samuel Pyeatt Menefee, *A Tribute to Richard B. Lillich: a Bibliography of the Legal Publications of Professor Richard B. Lillich (1933-1996)*, 38 VA. J. INT'L L. 85 (1997).
4. See Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439 (2000) [*hereinafter* FORCIBLE PROTECTION], and Thomas C. Wingfield, *Lillich on Interstellar Law: U.S. Naval Regulations, Star Trek, and the Use of Force in Space*, 46 S. D. L. REV. 72 (2001) [*hereinafter* INTERSTELLAR LAW].
5. See Wingfield, *Forcible Protection*, *supra* note 4, at 439.

# RICHARD B. LILICH (1933-1996):

## A Tribute

**Robert F. Turner**

Richard Bonnot Lilich was born in Amherst, Ohio, on January 22, 1933. After undergraduate training at Oberlin College, he earned his LL.B. at Cornell and went on to earn his LL.M. and S.J.D. (academic law doctorate) at New York University. He served ten years on the faculty of Syracuse University, where he was Director of International Legal Studies. During 1968-69, he held the prestigious Charles H. Stockton Chair of International Law at the U.S. Naval War College. He then joined the faculty of the University of Virginia School of Law, where he served as the Howard W. Smith Professor of Law until his untimely death twenty-seven years later, from a heart attack at the age of sixty-three.

To that, one might add his Ford Foundation and Guggenheim Fellowships in London; service as Thomas Jefferson Visiting Fellow at Downing College, Cambridge; other fellowships at Oxford and the Max Planck Institute in Heidelberg; and assorted short-term teaching assignments at Indiana, Georgia, St. Louis, and Florida State—where at the time of his death he also served part-time as the Edward Ball Eminent Professor of International Law.

We can't forget his leadership positions: a dozen years on the Executive Council of the American Society of International Law, twenty-six years on the Editorial Board of the *American Journal of International Law*, founding member of The Procedural Aspects of International Law (PAIL) Institute, founder of the Washington, DC-based International Human Rights Law Group; just to mention some of the highlights. He was also a prolific writer, co-editing the nation's first law school casebook on human rights law among his more than forty books, sixty chapters in books edited by others, and more than one hundred published articles.

Then there was his role as valued adviser to the Office of the Legal Adviser at the State Department and to numerous non-governmental organizations in the United States and around the globe. As an advocate, he was often called upon by the United States Government and by numerous private clients to argue before international tribunals.

These are the data that inevitably make their way into *New York Times* obituaries, and they are important. They tell us that Professor Richard Lilich was a man of remarkable professional accomplishment and ability. But they don't capture the full measure of the man whose early experiences as an adopted child may have contributed to the loyalty and friendship he displayed to colleagues as an adult. In a tribute that appeared in the *American Journal of International Law*, University of Iowa Law School Professor Burns Weston recalled approaching Professor Lilich about sharing some materials he had collected for an unwritten study of the British Foreign Compensation Commission:

[H]e not only said yes, but invited me to Syracuse where he was then teaching, provided me free room and board at home with his family, found me a quiet office, gave me all his research cards and notes to examine, and authorized me to Xerox whatever I needed, asking only that I put things back in the order that I found them. And I barely knew him! Richard Lilich always defied the conventional wisdom of jealously guarding one's hard-won unpublished research. He was uniquely generous and trusting in a profession not known for its deference to could-be rivals.

I first met Dick Lilich while a student in his first seminar on international human rights at the University of Virginia School of Law. The assigned text—*International Human Rights: Problems of Law and Policy*, the casebook he had just co-authored with Judge Frank C. Newman—did not arrive from Little-Brown until several weeks into the term.

I enrolled in that seminar with some trepidation. Even then, Dick had established a well-deserved reputation as one of the nation's foremost authorities on both international claims and human rights law. But he had also been a vocal opponent of U.S. involvement in Vietnam, and my involvement on the other side of that debate was no secret. Never one to withdraw from a good argument, I anticipated that our different perspectives would surface and I was unsure of the potential effect on my grade point average.

I was right about one thing. Not only in his human rights seminar, but in two other courses I later took from him, our divergent points of view surfaced—repeatedly. He was outraged over human rights abuses in South Korea, and I responded that cutting aid could play into the hands of the regime in Pyongyang,

whose human rights record was incomparably worse across the board. In retrospect, perhaps we were just describing opposite ends of the same elephant. While it seemed to me that we disagreed about everything of significance, I knew even then that we were both deeply committed to the cause of human rights and human dignity.

When the time came to pick topics for our research papers, I informed the Director of the International Human Rights Law Group, who was assisting Dick in the seminar, that I was leaning towards doing a comparative piece on human rights in the two Koreas. She cautioned me that might be a mistake in view of Professor Lillich's strong views on the topic. I guess my passions were a bit intense, too, as I wrote instead about human rights in the two Vietnams. Given my views on the issue, I can only imagine the impact it had on poor Dick Lillich's blood pressure.

I knew Dick would get the last shot in our duel, and when grades arrived I was hoping for an "A-" and convinced that if he gave me below a "B" it would reflect his political biases. To my shock, in that seminar and the two subsequent courses I took from him, Dick gave me "A"s. At the time, Virginia was on a strict 3.0 curve, and to give an "A" required a professor to award another student a "C" or to downgrade several papers to balance off the 4.0. "A"s were thus uncommon. I honestly don't think I *earned* three "A"s from Dick Lillich, and my only explanation for his behavior is his strong sense of professional honor. He wanted there to be no question that he was not penalizing me for our strong disagreements in class. When I applied for admission to the graduate law program, Dick served on the admissions committee that decided to waive the LL.M. requirement and admit me directly into the S.J.D. program, even though I still think he viewed us as being at opposite ends of the political spectrum on key issues.

After several years working in Washington, I returned to Virginia in 1987, and as an additional duty volunteered to teach the introductory international law course in the Department of Government and Foreign Affairs until they could fill that faculty vacancy. When it came time to discuss international human rights, I asked Dick if he would come over as a guest lecturer—neither of us realizing that I had scheduled him for Wednesday of Thanksgiving week. He accepted, and year after year he returned on the same day to share his vast knowledge of international human rights law with a couple of hundred undergraduates. He never received a penny for his efforts, and twice he brought his young daughter with him so they could head off on the brief vacation he had delayed to do me a favor.

We talked a lot over the years, until I departed in 1994 for Newport to occupy the Stockton Chair that Dick had held twenty-five years earlier. We also took part in several conferences where I could hear his views as a colleague. The more I listened to him, the fewer points of disagreement I could find. His knowledge of the law was superb. As the present volume reflects, he shared my strong belief in the importance of using original sources, of understanding the historical development of legal rules through the writings of people like Grotius and Vattel, and the importance of careful research. The values he expressed as I grew older were largely my own. And on issue after issue, our bottom-line conclusions were fully in accord.

To this day, I do not pretend to know what happened. Perhaps the change was within me, and as I matured over the years my own views moved gradually towards where Dick had always been. Perhaps the end of the Cold War removed some filters that had influenced our vision during that controversy. Perhaps Dick changed. I don't know, but, in the end, my perception of him gradually changed. The man who at first appeared to be an exceptionally able teacher who was wrong on the issues but honorable and fair almost to a fault, had become a cherished friend and colleague—a world-class scholar—whose policy preferences on more and more issues I strongly shared.

Dick Lillich was perhaps best known for his work on international claims and State responsibility. I thought of him as a “Liberal” and on occasion, in the early days, a man of the “Left.” But, in retrospect, he did not champion radical positions in either of these fields. Dick believed that it was important for States to be held responsible for their conduct, irrespective of any perceived injustices in their past, and he believed that when they took the property of others they had a duty to pay fair compensation.

Few issues have more divided international lawyers than that of unilateral intervention by one State in the territory of another for the purpose of protecting nationals. Once again, Dick Lillich rejected the “anti-imperialist” orthodoxy of the Left, arguing that when one State violated the clear rights of foreign nationals and endangered their safety, in the absence of an effective multinational remedy the victim State had a legal right to use necessary and proportional force to safeguard its nationals. This was clearly the majority view of the pre-Charter era, and I share Dick's view that the doctrine survived Article 2(4). Whether one reasons that an intervention limited to protecting the safety of one's own nationals is not a use of force against the territorial integrity or political independence of the host State, or argues that the rights set forth in 2(4) are predicated upon the host State abiding by its own duties not to threaten or

use force improperly and are qualified by the right of self-defense, the outcome is the same.

Dick also did groundbreaking work on the issue of humanitarian intervention. He understood that human dignity and human freedom are of fundamental importance, and that people needed to be protected against at least the most flagrant abuses of internationally recognized human rights norms. Ideally, this should be done by a united world community under the leadership and direction of the United Nations Security Council. But Dick understood that the Security Council could be blocked from acting by the negative votes of any of five Permanent Members. And when the United Nations was unwilling or unable to act, Dick understood that individual States—or, preferably, multinational coalitions—had a right and duty to act to prevent the most egregious violations of human rights.

Another dear friend, Professor R. J. Rummel, has in recent years called attention to the problem he defines as “democide”—the slaughter of human beings outside of war by their own governments. I first learned of this theory in 1987 while serving as the first President of the congressionally-created United States Institute of Peace. Part of our statutory mandate was to make grants to institutions and scholars to do research and write books; and when I first read Rudy Rummel’s initial proposal I could not believe his thesis. Surely, if he was right, we would have known this before now. But as I examined his preliminary work and contemplated his thesis over time, I became persuaded that he was correct and was delighted when our Board of Directors voted to support his research. Quite properly, he was nominated for the Nobel Peace Prize for his groundbreaking scholarship on Democide and the Democratic Peace.

Rudy Rummel has argued—very persuasively, in my view—that during the Twentieth Century, at least three times as many people were killed by their own governments unrelated to war than were killed in every war across the globe during the same period. This includes Stalin’s purges of class enemies, Mao’s land reform and other campaigns to kill class enemies, Hitler’s Holocaust, Pol Pot’s butchery of an estimated two million Cambodians, and assorted lesser crimes. And very importantly, Rummel has shown that there is a tremendous inverse correlation between democide and democratic governance. The mega-murderers are all totalitarian tyrants.

Arguably the two most important developments in international law during the Twentieth Century were the outlawing of aggressive war through the Kellogg-Briand Treaty and UN Charter, and the recognition in the Charter and subsequent instruments that sovereign States have a duty to protect certain human rights of both their own nationals and aliens who are under their

control. In both categories, the primary violators have been the world's totalitarian regimes—whether from “Left” or “Right.”

The world's leading scholars of international law are very much divided on whether it is permissible for any State, or any group of States in the absence of Security Council authorization, to use lethal force inside the territory of another State to protect human rights—even if the alternative is massive genocide. This debate is much like the dispute over the scope of the right of self-defense under Article 51 of the Charter, and for much the same reason. The scholars who oppose “humanitarian intervention” do so not because they favor genocide, but because they fear that if left unconstrained sovereign States will use the excuse of such intervention to justify aggression. Thus, in August 1990, Saddam Hussein could easily have pointed out human rights shortcomings in Kuwait to excuse his desire to take control of that country. For similar reasons, they want to narrow the right of States to use lethal force in “self-defense” because they recall that when Hitler went into Poland, and Kim Il Sung invaded South Korea, both told the world they had been attacked first.

One can acknowledge and even share these concerns and yet still recognize that States must be able to defend themselves when attacked—even when the attack is masked by the use of paramilitary forces and accompanied by propaganda designed to mislead the world. Ultimately, the world community can usually ascertain the facts and pass judgment upon the resort to lethal force. And, similarly, the world should be able to tell between genuine humanitarian intervention and the use of that doctrine as a façade to mask aggression.

At its core, the theory that there can be no lawful exercise of humanitarian intervention places international law on the wrong side. Its primary purpose is to promote peace and justice. If it holds that the world community must sit back in silence if another Hitler surfaces and begins slaughtering millions of innocent people because of their race, religion, or similar factors, then international law has become part of the problem and must be changed. For no set of rules that preordains such a result deserves the respect of civilized men or women. Dick Lillich understood this.

I am honored to be able to write a few words in tribute to this great man—a friend and colleague who, in retrospect, was throughout our years of friendship also a cherished mentor. I commend the Naval War College for its decision to bring out this important volume even after the untimely death of its author. Like so many other volumes in this extraordinary series, it will be a valuable tool for legal scholars for generations to come. Finally, I am deeply indebted to my friend Tom Wingfield, who agreed to undertake the important task of

completing this manuscript when it became apparent to everyone that my own schedule would preclude my doing so.

Dick Lillich was a remarkable man to whom all who cherish the rule of law are indebted. His untimely death by heart attack on August 3, 1996, left the world poorer for the loss. But those of us who knew and admired him can take solace in the knowledge that his scholarship and ideas will live on both through the work of his former students and in the remarkable body of professional literature he has left behind. This will presumably be his final publication, and it reflects the exceptional talents that helped make Dick Lillich such a remarkable scholar and human being. As with all of us who have had the distinction to hold the Charles H. Stockton Chair of International Law at the Naval War College, Dick cherished that association. I am confident that he would be delighted to know that the commitment he made more than three decades ago to write a Blue Book has been satisfied. I am all the more certain that this fine work will be welcomed by scholars around the globe.

*Charlottesville, Virginia  
November 21, 2001*



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## Author's Note

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**T**he development and implementation of the State's *right of forcible protection*, is the primary focus of this document.

As with many international law norms, the juridical origins of a State's right to protect the lives and property of its nationals abroad may be traced to the views of the early, classical publicists. Their writings routinely included a State's right of *diplomatic* protection of its nationals abroad. The validity of a State's right of forcible protection of its nationals abroad necessarily grew out of the practical aspects of the right of diplomatic protection of a State's nationals. Although often addressing the subject indirectly, the classical publicists had a significant impact upon the development of the State's right of forcible protection of its citizens abroad.

To the contributions of the classical writers, the later traditional writers on international law added descriptions of the evolving practice of States intervening to protect their nationals transiting or living in other States. One group of writers, including Phillimore, Bluntschli and Westlake, viewed the right of protection as limited primarily to the use of diplomatic measures. Recognizing the justifications offered by the classical writers, as well as the developing State practices, a second group of writers, including Bonfils, Pradier-Fodere, Oppenheim and Fauchille, asserted an established principle justifying forcible measures of protection as well. A third group of writers, primarily from the United States, including Moore, Stockton, Clark, Hodges, Borchard, Hyde and Offutt, also recognized the then established principle of using forcible measures, supplementing their theoretical reasoning with extensive appendices detailing instances of such protection, primarily in the form of prior US practice.

A fourth group of traditional writers, including Dunn and Hindmarsh, with world crisis imminent, grudgingly admitted the existence of the principle of forcible protection, but made clear their disapproval of its exercise in an increasingly interdependent international community.

Following the summary of the classical and traditionalist historical views on the State's right of forcible protection of its nationals abroad prior to the signing of the United Nations Charter, the impact of post-World War II State practice will be discussed.

With the signing of the United Nations Charter and its broad prohibition of the use of force found in Article 2(4), the right of forcible, as opposed to diplomatic, protection entered a new phase as the provision seriously questions the concept of forcible protection of nationals abroad. However, the human experience in dealing with the practicalities of traversing a foreign State having different laws, socio-economic experience and political differences, will no doubt keep the issue of the State's protection of its representatives and nationals abroad, a very timely and dynamic topic for some time to come.

Richard B. Lillich