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## Urgency of Boundary Maritime Management: Strategies to Prevent Conflicts

Josina Augustina Yvonne Wattimena

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# THE LEGALITY OF INTERVENTION FOR PROTECTION OF NATIONAL ABROAD IN ORDER TO SOLVE PIRACY AND HOSTAGE

(A Study of Law Concerning the Possible Use of Armed Force to Release Hostages Detained by Abu Sayyaf Armed Group)

**Syofirman Syofyan\***

\*The Department of International Law, Faculty of Law, Andalas University  
Correspondence: [syofirman\\_syofyan@yahoo.com](mailto:syofirman_syofyan@yahoo.com)

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## Abstract

*Until now hijacking or taking crew as hostage including the people who have Indonesian nationality has been repeatedly done by a group of suspected Abu Sayyaf rebel group. The use of non-violent efforts as negotiations have been conducted. There were failure and it resulted in the execution of the hostages. But some of them were successful to release the hostages allegedly after approving the fulfillment of the demands of the hostage-takers i.e. paying the ransom. However this did not stop the subsequent hostage-taking incident. This is clearly an injury for the country of origin of the crew or people who are taken hostage. When the non-violent efforts failed to stop acts of piracy and hostage then the use of force is logically expected to be used for such purposes. Yet international law prohibits this intervention as contrary to Article 2 para 4 of the UN Charter and does not meet the criteria of Article 51 of the UN Charter. Despite that this intervention can still be legalized if they meet the concept of R to P which can be adjusted or modified with this intervention and it is accepted by the people of ASEAN. Besides that these interventions also fulfill the qualification of necessity and proportionality.*

**Keywords:** *hijacking, hostage-taking, Intervention for Protection of National Abroad, the use of force, territorial sovereignty and human rights.*

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## I. INTRODUCTION

In the middle of this year, there has been a series of hijacking and hostage Indonesian citizens who are carried out by Abu Sayyaf armed group. This incident started on March 26, 2016 when a group of armed men hijacked tugboat Brahma 12 and Barge Anand 12 as well as took 10 Indonesian crew as hostages,<sup>1</sup> (confirmed by a video broadcasting announcement by the Indonesian Foreign Minister Retno Marsudi). Through negotiating with the alleged payment of ransom to the pirates,

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<sup>1</sup> This news was confirmed in a video broadcasting announcements on piracy by Indonesian Foreign Minister Retno Marsudi in “Indonesia Khawatir Perairan Filipina Jadi Somalia Baru”, online at <http://www.dw.com/id/indonesia-khawatir-perairan-filipina-selatan-jadi-somalia-baru/a-19202911>

but the Indonesian government has denied this allegation, the hostages were eventually released on May 1, 2016.<sup>2</sup> On April 2016 15th the group took the same action against tugboat Henry and Barge Christy and 4 Indonesian crews. By negotiating with the alleged payment of ransom to the pirates for 100 Million Pesos the hostages were released on May 11, 2016.<sup>3</sup> Like the people who are addicted, on June 20th 2016, the group did the third hijack against its victims i.e. tugboat Charles 001 and barge Robby 152 in the Sulu Sea followed by hostaging of 7 Indonesian crews.<sup>4</sup> Two of the hostages was successful to escape and the others have been being still sought a peaceful release until now.<sup>5</sup> Most recently, on July 9, 2016, the group hijacked a ship in the waters of Lahad Datu, part of Malaysian Borneo, and took 3 Indonesian crews as hostage.<sup>6</sup> The release of five other hostages has been being pursued by peaceful means until now.

The frequent repetition of these accidents and the ongoing hostage of 8 Indonesian citizens shows that peaceful means chosen are not able to prevent or solve the piracy problem permanently. Therefore it is interesting to discuss “whether forceful action such as intervention for protection of national abroad can prevent and overcome piracy and hostage permanently (no longer repeatedly) and whether this intervention has legality, especially in efforts to prevent and overcome

<sup>2</sup> The police chief of Ulu province, Inspector Wilfredo Cayat. As quoted by Philippine Daily Inquirer, declared that the liberation of the crew Brahma was caused by the ransom was paid on 29 April 2016 and then by Patria Maritime Lines, the company where the crews work, amounting to US \$ 1 million (“Culik WNI Lagi, Abu Sayyaf Coba Pecundangi Indonesia” online at <http://fokus.news.viva.co.id/news/read/790427-culik-wni-lagi-abu-sayyaf-coba-pecundangi-indonesia>

<sup>3</sup> See “Menhan tak tahu soal uang Rp 28 miliar untuk tebus 4 WNI” online at <https://www.merdeka.com/peristiwa/menhan-tak-tahu-soal-uang-rp-28-miliar-untuk-tebus-4-wni.html> ) see also “Setahun Tiga Kali WNI Disandera Abu Sayyaf, Artinya??” Online at <http://www.jejaktapak.com/2016/06/24/setahun-tiga-kali-wni-disandera-abu-sayyaf-artinya/>

<sup>4</sup> These events are also reported in a video broadcasting the announcement of Indonesian Foreign Minister Retno Marsudi about this event, (see “7 Indonesian crew of the Abu Sayyaf kidnapped”, online at <http://www.dw.com/id/lagi-7-awak-kapal-Indonesia-gray-Sayyaf-kidnapped/a-19352586>)

<sup>5</sup> “Menteri Retno: 2 WNI Telah Bebas dari Abu Sayyaf” online at <http://news.liputan6.com/read/2580279/menteri-retno-2-wni-telah-bebas-dari-abu-sayyaf>

<sup>6</sup> “Indonesia Benarkan Pelautnya Diculik lagi Oleh Abu Sayyaf” online at <http://www.dw.com/id/indonesia-benarkan-pelautnya-diculik-lagi-oleh-abu-sayyaf/a-19392731>

this matter.”

## **II. THE ADVANTAGE OF INTERVENTION FOR PROTECTION OF NATIONAL ABROAD IN RELATION TO THE EFFORT OF PREVENTING AND OVERCOMING PIRACY**

In accordance with its title, Intervention for Protection of National Abroad is the use of armed force intended to rescue the citizens of the state which intervenes from the danger being faced in the country where they are. Based on some cases happened the danger include, among other, containment, hijacking, hostage-taking, torture and killing of them.<sup>7</sup> Particularly with regard to piracy which is followed by hostage, it is known in Mayaguez Incident (1975), The Entebbe Raid (1976) and The Larnaca Incident (1978).<sup>8</sup>

The rescue means that the nationals are released from danger. The release can be done with or without crippling the personnel harmful, depending on the current situation. For example if the citizens of the country are under heavy guard, then inevitably the guard personnel should be incapacitated. Furthermore, the citizens saved must be moved from the territory of the country where their life was endangered.<sup>9</sup> The restrictions of the intervention goal, i.e. to move the citizens, is also accepted by countries like Belgium in its intervention in Zaire in 1978 and France in its intervention in Chad in 1992.<sup>10</sup> Achieving this goal is going to save the lives and property of the citizens from the dangers.

The next advantage of this intervention is to prevent the recurrence of the acts that could endanger the citizens. The existence of the right to carry out this intervention will cause the perpetrators of the crime to

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<sup>7</sup> See T. C. Wingfield, J. E. Meyen (eds), “Lillich on the Forcible Protection of Nationals Abroad”. *International Law Studies*. Vol 77. Newport, Rhode Island: U.S. Naval War College 2002 , p. 51.

<sup>8</sup> See Mari Alavare, “The Use of Armed Force and Protecting Nationals Abroad in Light of The Crimean Crisis”, Master’s Thesis, Tartu, 2015, pp. 31-33. online at [http://dspace.ut.ee/bitstream/handle/10062/47781/alavere\\_mari.pdf?sequence=1&isAllowed=y](http://dspace.ut.ee/bitstream/handle/10062/47781/alavere_mari.pdf?sequence=1&isAllowed=y)

<sup>9</sup> See Anthony Clark Arend and Robert J Beck, 1993. “International Law and the use of force”, Routledge, London, p 94.

<sup>10</sup> Christine Gray, “International Law and the Use of Force”, Third Edition, Oxford University Press, 2008, p. 89

think long to perform the actions that endanger the citizens because he can no longer hide behind the shield of the sovereignty of their state. The endangering actions that they commit, which is not unwilling or unable to halt by their state, can be terminated by the actions of the armed forces of the original country of the citizens endangered and the state sovereignty can not become an obstacle for the entry of foreign troops.

Another advantage of this intervention is that it can be realized the responsibility of state to protect its citizens when other means fail to use. Each country has a responsibility to protect people wherever he is. When the citizens are in the territory of another country, the responsibility to protect them is in the hands of the another country , but if the country is unable or unwilling to carry out its responsibility to protect, then the responsibility should be ideally re-run by the country of origin of such citizens ,

In the context of piracy and hostage citizens of Indonesia above, Intervention For Protection of National Abroad means that the use of military forces are to the region Philippines, where the armed group has been hostage, the citizens, to save them, either with or without crippling their personnel guard, and move out from the Philippine territory. This is expected to give deterrent effect to the armed gangs and at same time realizing the state's responsibility of Indonesia to protect its citizens.

### **III.LEGALITY INTERVENTION FOR PROTECTION OF NATIONAL ABROAD**

Despite this intervention has advantages, it should be taken into account the aspects of its legality assessed based on the relevant international law. Article 2 paragraph 4 of UN Charter expressly forbids the threat or use of force against the territorial integrity or political independence of other countries. Furthermore, Article 51 of the UN Charter says that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack Occurs against a Member of the United Nations.

There are two understandings that could arise from these two

chapters. Firstly, Article 51 is an exception of Article 2 paragraph 4 and secondly, article 51 is not an exception of Article 2 paragraph 4 because there is no relationship between the two articles. If Article 51 is said as the exception of Article 2 paragraph 4, the threat or use of force against the territorial integrity or political independence of other countries are allowed provided that for self-defense. Consequently armed attack Occurs a member of the United Nations may be considered to occur in the territory of other countries and the use of armed force may be carried out in the territory of the country concerned. as the subsequent result, intervention for protection of national abroad may be called self defense. Conversely, if it is said that Article 51 is not an exception to Article 2 paragraph 4 that this would be that the use of armed force only in the territory of the country concerned, not in the territory of other countries, and armed attack is something that happens in or enter into the territory of the country concerned.

Unfortunately, there are no words in this charter which states that Article 51 is the exception of Article 2 para 4 of the Charter. Therefore, to determine the understanding which is used, it needs to know first what is meant by the armed attack as the cause of self-defense, to what of the affected countries (whether just the region, the people, the government or its sovereignty or all of them) the attack is committed, where it happened, and who was the actor..

Article 51 of the UN Charter has no further instructions regarding the armed attack except that the victim is a state (UN members). Therefore we need to refer to other legal sources, i.e.

#### **A. CAROLINE INCIDENT WHICH THEN CONSIDERED BECOMING INTERNATIONAL CUSTOMARY LAW (1837)**

This event is related to the British attack against the steamboat of United States (US) “Caroline” which was moored in the US territory on the night of December 29<sup>th</sup> to 30<sup>th</sup> 1837. The attack was carried out because previously a group of US citizens who support the Canadian rebels in their battle against the rulers of Canada which is under British colonial domination at that time had repeatedly sent weapons and manpower for the rebels. They were sent by steamboat “Caroline”

from US to Canada territory. The boat was allegedly going to retry the same support in the future. To stop it, British conducted an attack to destroy the boat and its personnel including insurgents and weapons that existed on it. Such actions was called by the British as self-defense. US Secretary of State, Daniel Webster, only respont by asking for proof of this by saying;

*“It will be for it to show, Also, that the local authorities of Canada, ... .., did nothing unreasonable or excessive; since the act justified by the necessity of self defense, must be limited by that necessity, and kept Cleary within it.”<sup>11</sup>*

When such an event repeatedly carried out by a handful of specific countries, like the US and Israel, and is recognized as self-defense, it is considered then raising customary international law i.e. that self-defense includes the use of armed force against another party (including non-state actors) in the territory of the another countries to stop the armed attack which is believed that it will soon arrive because of being a part of the series of previous attacks. This action that is more accurately described as a preemptive action shows that the definition of armed attacks include attacks committed by non-state actors that will soon arrive from outside of the country into the territory of the country doing self-defense. Based on these events, it is showed that armed attacks was aimed at the British authorities who control Canadian. Whether this definition of armed attacks is acceptable or not, will depend on the extent to which the international community actually recognizes customary international law that accepts this.

## **B. THE 1974 UNGA RESOLUTION ON AGGRESSION**

In the Article 1 of the Definition of Aggression adopted by the Sixth (Legal) Committee, and adopted by the General Assembly by consensus on 14 December 1974 in Resolution 3314 (XXIX), aggression is defined as follows;

*“Aggression is the use of armed force by a State against the sovereignty,*

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<sup>11</sup> Parliamentary Papers (1842), Vol. LXI in British and Foreign State Papers Vol. 30. p. 201

*territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations”.*

The use of armed force which is aggression includes, according to article 3 of this resolution;

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, the resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State roomates are within the territory of another State with the agreement of the receiving State, in contravention of the conditions Provided for in the agreement or any extension of Reviews their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, the which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, the which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement Therein.

It is clear that none of the indications showing that aggression, something that at least armed attack is a part of it, does not include the use of armed force by a State against the citizen of another state abroad as an aggression.

### **C. CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (NICARAGUA CASE), 1986.**

This cases is related to the attacks by the United States to the region of Nicaragua that caused Nicaragua submitted a claim against US to the ICJ. US defends its actions as legitimate on the grounds of self-defense because It considered that there was armed attacks from Nicaragua to the territory of its allies, El-Salvador. Concerning the definition of armed attack, the court stated that;

*“An armed attack must be understood as Including not Merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, the which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.”<sup>12</sup>*

This statement indicates that an armed attack occurs if;

- i. There is an entry of the armed forces of other countries or armed groups sent by or on behalf of another country into the territory of a country doing self-defense. This understanding is in accordance with what Christine Gray said i.e. the armed attack is clearly patterned on “an invasion by the regular armed force of one state into the territory of another state.”<sup>13</sup>
- ii. The actor of attack is the regular armed forces or attacking state or armed groups sent by or on behalf of the attacker into the territory of a country that doing self-defense.

Thus, armed attacks is the use of armed force coming from the outside into the territory of the parties conducting self-defense. The use of armed force against elements of the state like citizens residing abroad is not included in the meaning of armed attack. Therefore the use of the reason of self-defense to legalize intervention for protection of national abroad is unacceptable and it becomes part of the ban on the use of force which is governed by Article 2 paragraph 4 of UN Charter.

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<sup>12</sup> ICJ, “Case Concerning Military and Para Military Activities in and Against Nicaragua, Nicaragua v United States Of America”, Judgment of 27 June 1986, para 195 online at <http://www.icj-cij.org/docket/files/70/6503.pdf>

<sup>13</sup> Christine Gray, Op cit. p. 128.

Before the idea that intervention for protection of national abroad is regarded as self-defense, this intervention is considered as a part of self-help. In 1949 there was a case i.e. the Corfu Channel Case, which indicates that the Self Help is not accepted as legal by the ICJ. The British action which enters the waters of Albania and minesweeping by its warship without permits was issued as self-help, but the court rejected the validity of this action by saying;

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.<sup>14</sup>

With the rejection of self-help by ICJ, then the intervention for protection of national abroad, as an act recognized as part of self-help, is also rejected. But there is something a bit different in this case i.e. if the cause of self-help is a violation of the rights of innocent passage of Britain by landmines spread by Albania, the cause of intervention for the protection of national abroad is a danger to the soul and body of citizens. The cause of the latter is clearly more sensitive and humanitarian nature. Therefore it is necessary to review the legality of this intervention from the side of humanity.

From the human side, the legality of this intervention may be analyzed from the perspective of human rights from which there is a state's responsibility to protect. In this issue there are two countries that have the possibility to be responsible for protecting the human rights of foreign nationals abroad i.e. the country where they are located and the country of origin. Therefore, first of all it must be seen whether the danger being experienced by citizens abroad can be categorized as human rights violations.

The Legality of the intervention from the human side may arise, because there is a recognition and respect for human rights in some of the rules of international law and then the development of the concept of responsibility to protect (R to P) in the international community at this time especially to increase the legality of humanitarian intervention. The Recognition and respect for human rights can be found, among others;

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<sup>14</sup> [1949] I.C.J. 28 at 35

The United Nations Charter (UN Charter), the Universal Declaration of Human Rights and several other International instruments of human rights and also the instrument related to ASEAN such as the ASEAN Charter of 2007 and the ASEAN Human Rights Declaration (AHRD) 2012

#### **D. UN CHARTER**

In the UN Charter, as previously mentioned, article 2 paragraph 4 prohibits the threat or use of force against the territorial integrity or political independence of another country. This prohibition is reinforced by UN General Assembly Resolution No. 2625 issued on 24 October 1970. This prohibition is in fact also a manifestation of a very high respect towards the sovereignty of a country in its region. But it should be remembered that this ban is very concerned to maintain international peace and security as mentioned in article 1 paragraph 1 UN Charter.

In addition to the goal of maintaining international peace and security, there is another purpose in article I paragraph 3 the UN Charter i.e.; *“to achieve international co-operation in .... promoting and encouraging respect for human rights ....”* The core of this goal is to create respect for or protection of Human Rights by the international community. This goal is reinforced by the emergence of several international instruments that regulate and protect human rights. For instance, the Universal Declaration of Human Rights, its Article 3 recognizes the right of every person to life, liberty and security. Its article 5 acknowledges that everyone should be free from torture, degrading punishment or treatment, inhuman and cruel.

In a given situation, it is very possible that the two goals collide, causing a dilemma, for example, massive violations of human rights violations occurs in a country, and the government is unwilling or unable to cope. But the armed force of another country would be shut out to address human rights violations because of the ban on entering the territory of another country and respect for the territorial sovereignty of the country. Conversely, if it is not entered then the respect for human rights protection will be blocked.

Thus it became the fight between the respects for state sovereignty on the one hand and the respect for human rights on the other hand, as

depicted in the two tables below.

**To Maintain International  
Peace and Security**



**Respect for State  
Sovereignty**



**Prohibition to intervene Although  
The Human Rights Violation Occurs**



**To Respect / Protect  
Human Right**



**Reduction of Respect to  
State Sovereignty Where  
Human Rights Are Breached**



**Permissibility of intervention  
To Stop Human Rights Abuses**



**Human Rights is Not Respected/ The  
International Peace and Reserved  
Security May be Disrupted if The  
intervened State defends**

**Its territorial and prevents attempts  
of the cessation of human rights  
violations**

## **E. ASEAN CHARTER OF 2007**

Article 1 of the charter mentions 10 goals, two of them are;

- a. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region; (Para 1)
- b. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN; (Para 7)

It is somewhat similar with the UN Charter because two purposes above are also contended in the UN Charter. But the elaboration of these objectives into principles is different. In chapter 2 it is mentioned some of the principles that outline the first goal, including renunciation of aggression and the threat or use of force or other actions in the form of anything that is contrary to international law (paragraph (c), but unlike the UN charter which does not mention the principle outlines the objectives relating to respect for human rights, the ASEAN Charter

precisely describes the purpose of promoting and protecting human rights in a principle i.e. the principle of respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice (Article 2 para (i)).

The aim of maintaining and enhancing peace, security and stability of ASEAN is supported by the existence of the 1971 Zone of Peace, Freedom and Neutrality Declaration and the Treaty of Amity and Cooperation in Southeast Asia, as Amended by the First Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, 1987, the Second Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, in 1998 and the third Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, in 2010, both of which prohibit any intervention by outside parties (paragraph 1 The 1971 ZOPFAN, and article 2 of the Treaty of Amity). On the other hand, the aim of respecting or protecting human rights is supported by the ASEAN Human Rights Declaration (ahrd) 2012 in which the Member States of ASEAN recognizes that every person has the right to life (paragraph 11), the right to liberty and security of person (paragraph 12) and the right to be free from torture or to cruel, inhuman or degrading treatment or punishment (paragraph 14). If the rules on human rights in ASEAN is not a lip service or a complement, it is also a fight between the maintenance of peace and security or respect for state sovereignty on the one side and respect for human rights on the other side in the region.

To be able to promote human rights, today the concept of Responsibility to Protect (R to P) is being developed. This concept is originated from Francis Deng's theory of responsibility in relation to sovereignty.<sup>15</sup> According to him if a country is not able to determine its internal policies in accordance with international standards recognized, the other countries have the right and also responsibility to intervene.<sup>16</sup>

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<sup>15</sup> See Lesza Leonardo Lombok, "Kedaulatan Negara Vis a Vis Keistimewaan dan Kekebalan Hukum Organisasi Internasional Dalam Sebuah Intervensi Kemanusiaan", in Denny Ramdhany at al, "Konteks dan Perspektif Politik Terkait Hukum Humaniter Internasional Kontemporer," PT. RajaGrafindo Persada, Jakarta, 2015, hal. 36

<sup>16</sup> Francis Deng et al, "Sovereignty as Responsibility: Conflict Management in Africa", 1996, in Amitai Etzioni, 2005, "Sovereignty as Responsibility", Foreign Policy Research Institute, Elsevier Limited, p. 71 online at <https://www.gwu.edu/~ccps/etzi->

Deng et al say that the government who does not fulfill their responsibilities to the people loses their sovereignty. As a result, the definition of sovereignty should be changed to be the responsibility to protect its people in a particular region.<sup>17</sup>

This concept was then elaborated by the report of the International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* is issued in August 2001, in response to Millienium Report of the UN Secretary General.<sup>18</sup> The report was further reformulated by the International Commission on Intervention and State Sovereignty, 2001, which states that there are three meanings of sovereignty as responsibility namely; First, the state authorities are responsible for the function of protecting the safety and the life of citizens and the promotion of their welfare; second, The nationally political authority is accountable to the citizens internally and to the international community through the UN and; third, the state agency is responsible for their actions either an execution or omission.<sup>19</sup>

The Accountability for the failure to carry out the functions of protection of people shakes the sovereignty held by government authorities so that they can invite outside intervention to restore protection for these people. Therefore, the Commission supports an intervention for human protection purposes, when a great danger to civilians is occurred or visible immediately, and the state authorities are unable or unwilling to end it or they themselves become the culprit.<sup>20</sup>

Based on the explanation above, this concept clearly puts forward the matter of respect for and protection of human rights and reduces the respect for the sovereignty when it is not used as a responsibility to protect the people but misused to condone or participate in human rights abuses against its people. The reduction of the sovereignty causes the intervention to restore the protection of people became legal.

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[oni/.../A347a-SoverigntyasResponsibility-orbis.pdf](#)

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> International Commission on Intervention and State Sovereignty, “The Responsibility to Protect”, Report of the International Commission on Intervention and State Sovereignty, the International Development Research Centre, Ottawa, 2001, p. 13, Online at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

<sup>20</sup> Ibid p. 16

The concept of R to P is basically aimed to stop the massive violation of human rights which is manifested as an international crime, and is aimed to legalize humanitarian intervention. To be able to apply the intervention for the protection of national abroad, the concept must be modified, by way of proving that the danger to citizens abroad is a violations of human rights.

The violation of Human rights is different from ordinary crimes. Violation of human rights is an extraordinary crime that is typically marked with special characteristics namely the existence of the following elements;

1. The involvement of state or government.

The involvement of Government is recognized by Muladi by stating that in essence the violations of human rights have a special nuance i.e. the abuse of power, in the sense that the perpetrator acts in the context of government and the action is facilitated by the government.<sup>21</sup> The involvement of Government is confirmed by Thomas Buergenthal who said that;

International human rights law is the law that offer section with the protection of individuals and groups against violations by government of internationally Guaranteed Reviews their rights and with the promotion of Reviews These rights.<sup>22</sup>

2. The involvement of government is a violation of the obligation to meet international human rights norms.

It is like Victor Conde said;

Violation (of a norm / treaty): a failure of a conduct of another party legally obligated to comply with international human rights norms. Failure to fulfill an obligation is a violation of that obligation. A violation Gives rises to domestic or international remedies for such state conduct “.<sup>23</sup>

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<sup>21</sup> Muladi, “Demokrasi, Hak Asasi Manusia dan Reformasi Hukum Indonesia”, The Habibie Center, 2002, as quoted in Andrey Sujatmoko, “Hukum HAM dan Hukum Humaniter”, RajaGrafindo Persada, Jakarta, hal. 31

<sup>22</sup> Thomas Buergenthal, “International Human Rights”, West Publishing Co., St. Pul Minn, 1995, p. 1

<sup>23</sup> H. Victor Conde, “A Handbook of International Human Rights Terminology”, Lincoln NE: University of Nebraska Press, 1999, p. 156.

3. The involvement of state or government can be actively or passively. The active involvement can occur when;
  - a. Government officials act based on the decision of government (either executive and legislative) or judicial bodies, or
  - b. Non-state apparatus act on the order of state or to exercise the authority given by state or government.

The passive involvement arises when the omission of the violation conducted by state officials and non-state apparatus occurs. The omission can be in the sense of failing to prevent or halt the violations or punish the perpetrators of these violations whether committed by officials or non-state apparatus. The omission occurred because the state is unwilling or unable to prevent or stop the human rights violations or to punish the perpetrators of such violations.

If the violations of human rights and the involvement of government above happens, the country fails to carry out its responsibility to protect citizens including foreign nationals in its territory. The failure causes the intervention can be allowed to be done.

In relation to the hostage incident suffered by Indonesian nationals in Philippines, the Indonesian government should certainly be looking for certainty whether there has been a violation of human rights to its citizens hijacked and taken hostage or simply just a regular crime. Philippines is a member of the United Nations which means that the state accepts the United Nations Charter, including the goal of promoting and encouraging respect for human rights as stipulated in article 1 of the Charter. Besides that, the Philippines is also a member of the United Nations General Assembly accepting the Universal Declaration of Human Rights on December 10, 1948 by resolution 217 A (III). The Philippines is also bound by the International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 as well as several other international treaties that contain about the protection of human rights including, for example, the ASEAN Human Rights Declaration and the ASEAN Charter. Therefore, Philippines has the international responsibility and right to protect human rights in the territory of his country, both the human rights of its citizens and the

human rights of foreign nationals because the responsibility applies to all mankind.

Especially in relation to foreign nationals, the obligation to protect their human rights means that the Philippines, besides may not order its apparatus or non-apparatus to commit human rights violations against foreign nationals, also should not let them to perform actions that violate the human rights of the foreign nationals. If Philippines lets them, either being unable or unwilling to prevent or stop or punish such violations, then foreign countries, especially countries whose nationals are harmed can ideally act to intervene for saving the endangered citizens. These are the things that must be considered by the Indonesian government as to whether the Philippines has let the piracy or hostage, either because they were unable or unwilling to prevent or stop or punish the perpetrators. If it is proven, based on the concept of R to P, there is a gap for Indonesia to pass intervention for protection of its national abroad. However, it must be noted that the intervention must fulfill two conditions namely necessity and proportionality.

Necessity means that intervention is a last resort because other efforts such as negotiations with the captors for the release of those taken hostage were fruitless so that the lives of hostages threatened. Proportionality means; First, interventions must be solely aimed at saving and evacuate the citizens as soon as possible from the country's territory together with the rescue troops; second, the intervention must not result in casualties of innocent enemy civilians, because it is unfair to save the lives of its own citizens by sacrificing the lives of innocent civilians from other countries.

#### **IV. CONCLUSION**

Based on the explanation above it can be said that the intervention for the protection of national abroad is helpful to save the citizens and could prevent the repetition of the crime by a deterrent effect for the perpetrators. But legality is still in question because the intervention is prohibited by the UN Charter and is not included within the meaning of self-defense. Nevertheless, these interventions can be legalized by the concept of R to P which has been specially modified for this intervention

and the majority of the international community to accept it.

In connection with the hijacking and taking Indonesian citizens as hostage by Abu Sayyaf armed group, it can be said that the intervention for protection of national abroad can provide advantage in the release of the remaining hostages and the prevention of repetition of these crimes. In terms of legality, these interventions can be legalized if the concept of R to P modified is fulfilled in the sense that the hijacking and hostage-taking is considered a human rights violation that is if the Philippine government is proved not to protect human rights of Indonesian citizens hijacked and taken hostage. The meaning of not protecting is that the Philippine government ordered its officials or non-apparatus to commit human rights violations against the Indonesian citizens or let its apparatus or non-apparatus (the perpetrators of piracy and hostage) to commit the acts violating the human rights of Indonesian citizens because of unable or unwilling to prevent or stop the violation or punish the actors. Beside the reasons above, the legality of interventions is also determined by the condition namely whether the principles of necessity and proportionality is fulfilled so as to minimize the evil effect of the intervention, especially against innocent civilians.

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