Rescue of nationals

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The Handbook of the International Law of Military Operations

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Edited by
TERRY D. GILL AND DIETER FLECK

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PART III MILITARY OPERATIONS WITHIN THE CONTEXT OF THE RIGHT OF SELF-DEFENCE AND OTHER POSSIBLE LEGAL BASES FOR THE USE OF FORCE

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Chapter 12

RESCUE OF NATIONALS

12.01 States may rescue their nationals when their lives or physical safety are directly threatened and the State in which this occurs is either directly responsible, or is unable or unwilling to provide security. Rescue of nationals is generally referred to as ‘non-combatant evacuation’ in military doctrine.

12.02 Action undertaken in this context must be directly aimed at ending the threat to the safety of the victims and evacuating them as quickly as possible from the State where they are located with the force strictly necessary to achieve these objectives. It is not prohibited under such circumstances to additionally evacuate the nationals of third States when their lives or safety are also directly threatened and circumstances allow for their evacuation along with the rescuing State’s nationals, insofar as they wish to be evacuated.

1. The right of States to protect their nationals abroad in situations where their lives or physical safety are directly threatened was well established as part of the customary right of self-defence before the Second World War. Rescue of nationals requires a genuine link of nationality between the persons to be rescued and the rescuing State which has been conferred in accordance with international law. It does not allow for military action based solely on common ethnicity, language, race, or religion in the absence of established grounds for the granting of nationality. However, there is no reason why a State conducting an operation to rescue its own nationals may not evacuate the nationals of a third State possibly at that State’s request if the circumstances objectively require this and the nationals of that State wish to be evacuated. It should be stressed that such rescue and evacuation operations, when undertaken in the absence of the consent of the State where the nationals are located, may only be undertaken when there is a clear and direct threat to their lives or physical safety and when other means of providing for the safe exit of foreign nationals are no longer feasible.

1 In this context see D.W. Bowett, Self-Defence in International Law (New York: Praeger, 1958), 87 et seq., where he cites numerous arbitral awards, State practice, and the position taken in international law writings of the nineteenth and early twentieth centuries in support of this position. See also S. Alexandrov, Self-Defense Against the Use of Force in International Law (The Hague: Kluwer International, 1990), 189.
Since the introduction of the Charter regime governing the use of force, the legal basis of this right has been the subject of vigorous legal debate and contending views amongst States. One body of opinion takes the position that this right still forms part of the customary right to self-defence, subject to the conditions of necessity, proportionality, and immediacy, while another position held by a substantial number of States and by legal scholars adhering to a more restrictive interpretation of self-defence, is that such action is no longer legal under contemporary international law. The reasons underlying this position vary, but one of the most frequently cited is the fact that the exercise of this right is subject to abuse and in fact has been abused on a number of occasions since 1945. Finally, there is a middle position, which while denying that the rescue of nationals (still) forms part of the right of self-defence, holds that such rescue can be justified under strict limitations within the context of 'necessity' as a general ground for precluding wrongfulness, or even as a separate exception to the prohibition of force under customary international law.2

3. While not wishing to ignore the complexity of the doctrinal debate surrounding this issue, the position taken here is that the rescue of nationals under the conditions already stated is justifiable under international law and that the most logical and coherent legal basis for this justification is that it forms part of the right of self-defence under customary international law. The reasons underlying this position are briefly the following. Firstly, that, as stated, the protection of nationals was well established under the customary law relating to self-defence prior to the adoption of the Charter. Secondly, that nothing in the terms of either the relevant provisions of the Charter, or the preparatory work leading to the adoption of the Charter excludes such actions as no longer falling within the ambit of self-defence. Thirdly, that States have frequently continued to carry out such action since the Charter came into force, sometimes justifiably and sometimes not; but that the fact that the right has been undeniably abused on certain occasions does not, in and of itself, vitiate the existence of such a right in abstracto, notwithstanding the undeniable illegality of certain actions put forward under the guise of protection of

12.02 nationals. Fourthly, despite the numerous occasions on which the issue has come before the Security Council and to a lesser extent before the International Court of Justice, neither organ has ever taken the position as a general statement of the law, that the right has ceased to exist, or even condemned a specific invocation of the right as being illegal. Fifthly, and finally:

(i) since an attack against a State's nationals with a view to obtaining concessions from a State or affecting its policy can credibly be seen as an attack upon a State and its interests;

(ii) the vast majority of incidents relating to the protection of nationals in post-1945 State practice have been justified on the basis of self-defence, irrespective of whether such actions were or were not justifiable under the specific circumstances; and

(iii) the Charter legal regime relating to the use of force logically permits only two recognized exceptions to the prohibition of the use of force (aside from consent) and that the other 'candidates' for a legal basis for rescuing nationals look on balance to be neither persuasive, nor would they logically fit into the system without opening the door to other pretended exceptions, thereby undermining the Charter legal regime relating to the use of force.

4. Consequently, the most logical and persuasive legal position is that action taken by a State to protect its nationals against a clear and immediate threat to their lives or physical safety can only be justified on the basis of self-defence, or the consent of the State where the threat occurs, in which case no violation of the prohibition of force or of the State's sovereignty would occur and any action undertaken with consent of the State where the nationals were located would have to conform to the conditions posed by that State. In any situation where consent was not forthcoming from the State where the nationals were located, the conditions of necessity, proportionality, and immediacy which are part of the right of self-defence would require that there was a clear and unequivocal threat to the lives and safety of the intervening State's citizens, that the State where the threat occurred was either complicit or directly involved, or was unable to take the necessary action to end the threat and meet its responsibility under international law to protect foreign nationals and their parent States. A justification of necessity could conceivably be invoked in situations where the State where the nationals were located was in no way involved

6. Necessity is an exceptional plea of duress of strict conditions. It presupposes that there is that there are no feasible alternatives to the task which necessity is invoked in no way compounding peril, that the action undertaken does not involve the State against which necessity is invoked or is a whole 'in other words the interest relied on the point of view of the acting State but on a re a re are individual or collective', (2) Yearbook

5. Brownlie, International Law and the Use of Force, 299–301 and others rightly point out that the right is subject to abuse and it has both historically and more recently been abused on numerous occasions. So far that matter have many other rights, including self-defence in general, without that leading to the vitiation of the right.

in any threat to the safety of foreign nationals and where as a result of a general breakdown in law and order, it was not able to either provide protection or grant consent to any parent State to evacuate its nationals and a serious threat to their safety existed which could not be addressed by any other means. In either case, conditions of necessity, proportionality, and immediacy would require that any action undertaken either in self-defence, or under the justification of necessity would be limited in scale and duration to what was strictly required to end the direct threat to the safety of the intervening State’s nationals and bring about their safe and speedy evacuation, with as little possible collateral effect upon the State where the incident took place. As a final remark, it is obvious that a clear, unambiguous, and genuine link of nationality is required between the persons threatened and the intervening State in order for there to be a legitimate claim of self-defence, or necessity by the intervening State on their own behalf. However, it would be spurious to conclude that this would preclude the evacuation of third State nationals in an emergency situation if their safety were also threatened, as a side effect of the evacuation of the State’s own nationals, if this were possible under the circumstances and if they wished to be taken out.

6 Necessity is an exceptional plea of duress under international law and is subject to a number of strict conditions. It presupposes that there is a grave and imminent peril to an essential State interest, that there are no feasible alternatives to the taking of a particular course of action, that the State against which necessity is invoked is in no way complicit or responsible for the existence of the grave and imminent peril, that the action undertaken does not compromise an equally or more essential interest of the State against which necessity is invoked or those of any other State or the international community as a whole ‘in other words the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective’; 2(2) Yearbook of the International Law Commission (2001), 83–6.

7 This is in fact a paraphrase of the Carnell criteria relating to self-defence, tailored to the issue of rescue of nationals, as put forward by Wallick in his still influential and authoritative Hague Academy course of 1952 (The Regulation of the Use of Force’, 467). These were: (1) an imminent threat of injury to nationals; (2) a failure or inability on the part of the territorial sovereign to protect them; and (3) measures of protection strictly confined to the object of protecting them.