

## **Forcible Protection of Nationals Abroad - A Troubling Legacy Under International Law**

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### **Abstract**

The rules related to the applicability of *jus ad bellum* particularly the right to exercising self-defense has largely remained controversial under international law. The question that has often troubled the international order is with respect to ascertaining what threshold of violence is required before the right to self-defense can be exercised. Within the wider context of the right to self-defense and particularly bearing in mind the twin concepts of 'necessity' and 'proportionality' that are associated with the use of defensive force, this paper highlights the international concern and debate over the use of defensive force extra-territorially for the purpose of safeguarding one's nationals. This paper uses examples of State practice to highlight the existing debate on protecting nationals abroad considering the application of both twin requirements of 'necessity' and 'proportionality' which continue to remain contingent on the facts of each case.

**Keywords:** Self-defense, Use of force, Necessity, Proportionality, United Nations

### **Introduction**

The use of military force by States in order to protect nationals abroad is a highly contentious issue under the realm of international law. The reason for the same is often attributed to claims of violation of 'territorial integrity and political sovereignty' made by less powerful States. It is to be noted that, in the post UN Charter era, the right to use force in order to protect nationals has been mainly used by powerful States under the scope of Article 51. Powerful States like, United States of America and Israel have used force in a number of instances by arguing that the same is permissible under the scope of self-defense. Apart from being unfavorable to the territorial integrity and political independence of a state, the use of force by certain States has also stirred a controversy mainly because such operations have drifted a great deal from their main purpose i.e. protecting nationals. Before going further, a distinction has to be borne in mind that when States make a claim of self-defense they are not arguing on the lines of humanitarian intervention because the issue here is the protection of one's own nationals in another territory and not the nationals of a foreign state.

Questions have always been raised vis-a-vis the level of force used in a particular situation which often indicates towards the hidden political agenda behind these operations. The following are some of the main issues in this area: whether the use of force is necessary in the first place considering the fact that the level of threat varies; whether the use of force is the only option available to solve a situation wherein the lives of individuals are at risk and

whether every situation qualifies to be brought within the ambit of the right to use force in order to protect one's national abroad. 'There are a number of instances in this area which highlight the international practice of States using military force on the territory of another to protect nationals. Some of such operations are United States intervention in the Dominican Republic (1965), Grenada (1983) and Panama (1989) and by Israel in Entebbe (1976).' These rescue operations in most cases have gone too far from their main function and have become a catalyst in the failure of law and order in a particular given territory or even in the toppling of local governments. Such incidents have raised serious questions on the legality of these operations firstly because of the disproportionate use of military force and secondly because of the illegal occupation of such territories even after the completion of the main objective which in turn goes against the sovereignty of the States. Though, certain States have voiced their opinion about the methods adopted in freeing nationals in another territory or have even condemned operations on the ground of they being politically driven, yet the principle per se has not been challenged by States before the Security Council. The major controversy in this area has always been about the disproportionate use of force and other issues related to protection of nationals and not about States questioning the act of freeing nationals in itself as illegal because it is argued that current state practice offers enough examples of such military interventions.

At this juncture it is necessary to outline the debate regarding the use of military force to rescue nationals as part of the right to self-defense under international law.

### ***I. Legality of the Use of Force?***

According to D.W. Bowett, 'the right to protect nationals by using force in another territory forms part of the customary international law.' Traditionally, States used force to protect life and property of their nationals situated abroad in cases where sufficient protection was denied to them. As per Article 2(4) of UN Charter, members are to refrain themselves from using force in any manner inconsistent with the territorial integrity and political independence of a state. The Charter places limitations on the use of force by members in order to maintain international peace and security and emphasizes more on prevention rather than the use of force. However, Article 2(4) only places a limitation on members and not completely restricts them from using force in exceptional cases. The UN Charter recognizes the right of self-defense and allows member States to defend themselves by using force in a manner which is not inconsistent with the purposes of the Charter. Protection of nationals forms a vital part of a state's duty to protect. To safeguard the life and property of its citizens is understood to be no different than the state's concern for its own security. Thus, when States use force to protect their nationals in another territory, they do not violate international law nor act in a manner which goes against the territorial integrity of another state because it would be illogical for a state to do so when its nationals are not guaranteed minimum safety in another territory. Ian Brownlie, argues that the protection of nationals cannot be a component of the right of self-defense as understood under the Article 51 of UN Charter. Under Article 51, the right to self-defense exists only when an armed attack occurs against a member of the United Nations. An attack on nationals abroad does not fall within the ambit of Article 51 as the attack is not on a state per se. However, it can also be argued that, Article 51 does not grant the right of self-defense to member States but merely recognizes a pre-existing right of self-defense and places restriction on such a right. 'The members of the United Nations when exercising their inherent powers do so not by grant but by already existing right. The Charter limits the sovereign rights of the States; it is not a source of those rights. There is nothing in the *travaux préparatoires* to support the view that only in cases of armed attack could the right of self-defense be exercised.'

Brownlie contests the same by remaining doubtful of the view that the customary right of self-defense, which existed prior to the UN Charter, included the right to protect nationals abroad. According to him, the justification provided for protection of nationals, i.e., self-defense, does not adequately reflect a legal basis as the same is loosely termed and more inclined towards national policies. Brownlie 'considered the classic definition of self-defense arising from the *Caroline* incident and Sir Humphrey Waldock's conditions for intervention (there must be an imminent threat of injury to nationals; a failure or inability on the part of the territorial sovereign to protect them and the action of the intervening state must be strictly confined to the object of protecting its nationals against injury) and suggested that they were not to be found in the state practice.' Nevertheless, going by the prominent view in international law, an action taken by a state to protect its nationals on foreign soil is not provided as an exception either under the UN Charter or under customary international law; still, the certainty of the right of self-defense has been taken as a valid justification by some States to cover actions undertaken by state to protect their nationals. Another complex issue associated with the concept of protection of nationals abroad is equating the threat to a few to a threat to the entire state. Defending a state and protecting its nationals is not one and the same thing under international law. It is difficult to determine when and how, a threat to few individuals constitutes a major security issue for a state. Also, there is no clarity as to what the criteria are for determining in what situations the threat of danger is great enough in order to claim the right to protect under the ambit of self-defense.

Having briefly outlined the important aspects related to the doctrine of protection of nationals abroad, the following section will focus on the significance of necessity and proportionality in the use of force while rescuing citizens in another territory.

## ***II. Assessing Necessity and Proportionality***

While attempting to save lives of their citizens, States use military force for a quick and effective solution. From deploying troops on the foreign territory to using a small number of highly trained military commandos, States view the use of force as the first and foremost answer to any situation which threatens either the security of the state or the lives of its citizens irrespective of the threat being within the borders or beyond. So, when States take to using force, the issue of necessity and proportionality gains immense importance because the use of force under the UN Charter in relation to self-defense should inevitably meet these twin criteria. Even when States claim that the act of using force falls within the scope of the customary right to self-defense and not under Article 51 of the UN Charter per se, under international law it is a well-recognized rule that the force being used has to be necessary and proportional.

The interplay between necessity, proportionality and the use of force can at best be explained by referring to the 'Caroline' incident because the 1837 formulation of necessity and proportionality is reflected as the current position in the Charter system. In the backdrop of the 1837 Canadian uprising against the British, a steamer named the 'Caroline' was attacked in United States territory by British forces and sent over the Niagara Falls in which two U.S. nationals were killed. The British attacked the steamer in order to prevent it to supply materials to the rebels located in Canada, many of whom were American citizens. What is significant in relation to the concept of the use of force is the correspondence between US Secretary of State Daniel Webster and Lord Ashburton (on behalf of British government) that followed the incident. Webster wrote that, 'in order for Britain to claim that it had a legal right to attack the steamer, Britain must show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.' As per the rulings in *Nicaragua* and the *Nuclear Weapons case*, the International Court of Justice

has held that, the twin conditions of necessity and proportionality are well recognized rules under customary international law and they are also applicable to Article 51 of the UN Charter. Moreover, necessity and proportionality become all the more pertinent because States carry out military operations on foreign soil and for a specific purpose. It is necessary to note that, in most cases, the use of force by the intervening state to protect its own citizens is done without the consent of the state against which the force is to be used.

It is imperative for the States carrying out such rescue missions not to use excessive force which results in damaging or destroying the lives and property or is seen as an act of aggression on the territory of another state in the process. Although, there are no set measures which can be followed in hostage situations, yet, actions taken by States has to be measured against the objective sought to be achieved. Any unwarranted action in the process of achieving the main purpose is said to be an infringement. But as is the case in most of these military operations, the force used by the intervening States goes beyond the required limit irrespective of the claims made by the States in order to justify their actions. The following sections will focus on few examples wherein States have claimed self-defense as a protection while rescuing nationals abroad.

### ***III. Proving Necessity and Proportionality***

#### ***Entebbe (1976)***

The Entebbe incident is one of the most prominent examples used while discussing the doctrine of protection of nationals abroad. On June 27, 1976, terrorists hijacked an Air France Flight flying from Tel Aviv to Paris and diverted the plane to fly to Uganda and made it land at the Entebbe Airport. Over 250 passengers along with the crew were held hostage and the terrorists threatened to kill them unless their demands were met. The terrorists had asked for the release of prisoners from a prison in Israel. On July 1, terrorists released non-Israeli hostages following negotiations from Israel. On July 4, only hours before the expiry of deadline to give away the prisoners to the terrorists, Israeli military personnel without the authorization of Uganda landed at Entebbe Airport and opened fire at the terrorists in an attempt to free the hostages. The operation lasted for about an hour in which the hostages were freed, some terrorists were killed and a section of the airport where Ugandan planes were stored was damaged by the Israeli commandos. One Commando was killed and several Ugandan soldiers along with three hostages were fatally wounded during the rescue operation.

Only days after the rescue operation at Entebbe airport, the UN Security Council met in order to decide upon the legality of the operation carried out by Israeli commandos on Ugandan soil which was alleged to be an act of aggression. The incident sparked off a debate at the Security Council. It was claimed by Uganda that, the rescue operation carried out by the Israeli forces constituted an act of aggression and violated the territorial integrity and sovereignty of Uganda. Israel deliberately took the decision to attack Uganda and put in risk lives and property. Israel violated Article 2(4) of UN Charter by using force against Uganda. Israel's action went against international peace and security as it failed to solve the situation through peaceful means. On the other hand, Israel claimed that the action taken by it was valid under international law as there was enough proof of Uganda's involvement with the terrorists as well as Uganda had failed to provide adequate protection to Israeli nationals within its territory. It was also argued on behalf of Israel that, when the United Nations fails to take action at the appropriate time, the duty shifts on the concerned state to make quick decisions and such decision then, cannot be termed contrary to an act of self-defense by other governments. Two draft resolutions were circulated as a result of the deliberation at the UN

Security Council; one of such resolutions condemned the Israeli attack but was withdrawn prior to voting. The other resolution condemning the act of hijacking failed to gather enough votes. In spite of United States supporting the Entebbe operation, majority of States chose not to either explicitly support or condemn the rescue attempt thereby adopting an unclear position. For instance, States like, Sweden, did not join others in condemning the Israeli action as it was unable to decide whether or not the rescue operation fitted within the parameters of the UN charter.

Japan on the other hand, held in reserve its opinion on whether the operation fell within the ambit of self-defense irrespective of stating that there had been a violation of Uganda's sovereignty. France referred the incident as a special case and pointed out that, in special circumstances there can be no violation of territorial sovereignty. It is important to note that, during the debate in the Security Council, no state argued that there was no minimum code of conduct when it comes to a foreign military intervention. But, despite a majority of States not supporting the Entebbe incident, the right to use force in order to protect one's nationals abroad is recognized by a majority of legal scholars in international law. It is argued that, even applying a strict interpretation, Israel's actions did not violate Article 2(4) of the Charter because the operation was solely aimed at rescuing the hostages and the entire rescue mission lasted not more than an hour. Also, the military personnel left without leaving behind a force for occupying the territory. Thus, Israeli forces had no other intention but to save the lives of their citizens.

### **Grenada (1983)**

On 25 October 1983, United States attacked the island of Grenada. The invasion was justified on the following grounds by the U.S.: protecting the lives of its nationals and maintaining law and order in the region by controlling the situation in Grenada. The decision to invade Grenada was heavily criticized by the international community. The criticism was directed towards not adhering to the requirements of Waddock's condition for intervention. The military intervention by the U.S. was strongly condemned by the General Assembly. As per General Assembly Resolution A/RES/38/7, 'the armed intervention in Grenada, constituted a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State.' Despite the all-round criticism of the invasion by the General Assembly, the resolution by the Security Council condemning the action did not come into force as it was vetoed by the United States.

A brief account of the events leading up to the invasion is necessary to analyze its validity under international law. After its independence in 1974, Eric Gairy became the first Prime Minister of Grenada. Following a coup against the Gairy administration in 1979 by the New Jewel Movement, Maurice Bishop was made the new Prime Minister. Bishop suspended the Constitution adopted in 1974 because of which people's rights started to deteriorate. The government took complete control over mass media as a result of which reports of human rights abuses during Bishop's tenure were silenced. The USA-Grenada relationship started to decline soon after the coup of 1979. The reason for the same was attributed to Bishop's friendship with Fidel Castro of Cuba. Even the economic aid by the US to Grenada was stopped by President Carter because of Bishop's communist oriented policies. US-Grenada ties hit a new low when Bishop announced that Fidel Castro would be helping Grenada to build a new international airport at Port Salines. During 1983, there appeared a rift in the Bishop's administration when Bishop was accused by the New Jewel Movement Central Committee of falsely implicating the Deputy Prime Minister, Bernard Coard of plotting to

kill him. Bishop along with his ministers were put to house arrest by his party. When Bishop and his loyalist tried to regain power, it is said that as per the direction of the senior party leaders, army personnel opened fire killing Bishop and his supporters. A curfew was then put in place to stop the occurrence of any violence.

Coming to the issue of protection of nationals which was one of the prime justifications for the attack, it was argued by the United States that Grenada was unable to protect the lives of approximately 1,000 United States students on the island. Even President Reagan admitted that although there were other objectives involved in the American invasion, the main purpose was to protect the lives of nationals. As per U.S. diplomats, during the curfew, the airport was shut and travelling in and out of Grenada was not possible. Also, when the request to evacuate U.S. citizens out of Grenada was made by the diplomats the same was rejected by the Grenada authorities. It was also argued by the U.S. that the evacuation was deliberately slowed down as a result of which there was danger to the lives of U.S. citizens on the island. In light of the events in Grenada, U.S. concluded that the only way to ensure the safety of American citizens was to launch a rescue operation in Grenada.

Despite the claims made by the United States, the arguments advanced were weak. United States did not make any argument of there being a clear threat to the lives of the students. No proof was shown by the U.S. of any violence towards the student community. It was found out that, the Grenada authorities themselves had assured of the safety of the students on the island. Even the Chancellor of the medical school confirmed that there was no threat issued by anyone. The claim that the lives of students were in danger can therefore be said to be based on a presumption that the people responsible for the military coup might target the student or take them as hostages. Another point made by the U.S. was the inability of the Government of Grenada to protect its nationals as there was no effective government present at that time in Grenada. This argument was seen by many as an excuse to go ahead with the invasion as U.S. was highly opposed to Grenada becoming a socialist state. What the United States failed to understand was that Grenada had the inalienable right to govern itself in the manner it liked. Grenada was free to determine with which nations it could maintain cordial relations and take aid in terms of boosting its economic or infrastructural growth. Under international law, any sovereign state has the right to take its own decisions and govern its territory in the manner it deems fit without the interference of a foreign state. What decisions a state takes in terms of its policies or what political system it chooses to adopt for the benefit of its citizens remains its sole prerogative and not of anyone else.

## **Panama (1989)**

The United States of America invaded Panama on December 20, 1989, in order to oust General Manuel Antonio Noriega. U.S. advanced the following justifications for the invasion: self-defense, safeguarding the lives of U.S. citizens, protecting democracy, fighting drug trafficking, and defending the integrity of the Panama Canal Treaties. But this military intervention was strongly criticized by the international community as the reasoning provided by the United States contradicted the norms under international law. The Panama invasion by U.S. is also said to be one of the largest in terms of military force, involving almost 24,000 troops. The protection of lives of its nationals in Panama was one of the rationales presented by the United States for justifying its use of force. However, United States failed to cite enough instances to show that there was an imminent threat to the lives of its nationals in Panama. Only after the United States' failed coup attempt to oust General Noriega, just two instances of violence against United States military personnel were reported. Thus, the

argument that the lives of U.S. nationals in Panama were in danger based upon two incidents of violence was not accepted as a valid reason to launch a full-scale invasion. Even if, these two incidents were taken to be good enough reasons to go ahead with a military intervention, still, protecting nationals on a foreign soil does not encompass overthrowing the local government, which was done by the U.S. during the operation. The incident was also heavily criticized as the force used was not necessary in relation to the level of threat. As per President Bush the action to invade was taken only after coming to a conclusion that there was no possibility to negotiate as all options to do so were closed and there was enough proof to show that there was imminent threat to the lives of U.S. citizens. It was also said that all avenues to solve the situation diplomatically were completely exhausted as efforts to do the same were being blocked by Noriega himself. But, according to many within the U.S. administration, diplomatic means to solve the dispute had been stopped by the United States in February 1988. More importantly, as per the requirement under Article 51 of the UN Charter, there has to be an armed attack on a state in order for the exercise of the right to self-defense, which was not the case here. There was no attack on U.S. nationals even to equate the same with an attack on U.S. and therefore make a controversial claim of acting in self-defense.

## Conclusion

Having briefly gone through the above examples on the issue, the answer to the question, whether international law allows States to use force to protect their nationals on foreign soil appears not to be an easy one to answer. On one hand, States taking matters in their own hands citing some grounds or other and giving orders for military intervention to save their citizens is seen as a clear indication of international law having accepted to some extent the notion of using force to protect nationals. But, on the other hand, using force unless authorized is also understood to be in direct conflict with the international law principle of territorial inviolability of sovereign nations. It is vital to note that, for a state to safeguard the lives of its citizens may seem normal at first but, the issue gets complicated when a territory of other state is involved or when there is a grave threat to the life of citizens. The incidents of Entebbe, Grenada and Panama discussed above have to be seen in light of the problem of coinciding a state's duty to protect on one hand and another state's right to territorial integrity on the other. More importantly, as mentioned above, several of these incidents vary from one another (especially in terms of the scale of operation, intensity of threat, number of nationals involved etc.) thereby making it difficult for the international community to adopt a single approach towards overcoming such situations.

The situation on the ground also becomes critical when States try to assess the condition before deciding to go for a military intervention. For example, whether or not the government of the state where nationals are being held is capable enough to resolve the hostage situation. It is crucial that a rescue operation with the permission of the host state should last as long as the objective is not fulfilled i.e., to ensure the safety of the nationals. As soon as the objective is achieved, the intervening state should withdraw its military force from the territory of the host state. However, this has not been the case as States have stationed their troops long after the fulfillment of the objective under some pretext or other. Intervening States have taken upon themselves duties like, ensuring law and order, protection of democracy etc., which is certainly beyond the scope of any rescue mission. Recent state practice shows that many States have relied on multiple grounds for their operations, with the protection of nationals being the first ground on the list. It is because of such problems associated with the doctrine of protection of nationals abroad that these 'rescue operations'

have been subject to criticism. Hence, it is necessary that there be certain restrictions on the method in which these missions are conducted.

Article 51 of UN Charter lays down certain conditions that have to be met in order to claim the right of self-defense under international law. The test is that an armed attack should take place. When States take the defense of Article 51, they fail to show how an attack on few nationals can be equated with the term 'armed attack' in the Charter. Moreover, States struggle to show that it was lawful self-defense because Article 51 is subjected to the rules of necessity and proportionality. It is required on part of States to prove that the nationals have either been subjected to an armed attack or threatened with an impending armed attack. The attack or threatened attack must reach the requirements of constituting a grave use of force. Only when this requirement is satisfied then a state's action will be seen as lawful. But, as discussed in the above sections, proving that the threat to nationals is the same as threat to a state is difficult. There appears to be no definite answer to this issue. A reason for the same can be attributed to the point that there are only few cases wherein States have used force on another's territory to protect its nationals which are not enough to conclude that attack on nationals can be seen as an armed attack on a state. On the other hand, it cannot be denied that, since there is no rule which permits such forceful intervention, powerful States are prone to misuse the exception to the use of force. While it would be highly unreasonable to adopt an approach where the forcible protection of nationals abroad goes completely unchecked because there are no set rules present under international law to restrict such actions. It is also not correct to completely neglect the fact that States do have a duty to protect the lives of their citizens.

According to Tom Ruys, 'the continuing legal uncertainty is hardly satisfactory, and therefore the increased political tolerance of evacuation operations should lead to efforts of developing and refining the various criteria by which a state's forcible protection claim may be judged.' Considering the problems associated with the doctrine, it can be concluded that the issue of forcible protection of nationals on foreign territory is far from getting resolved. It can be said that, since it is difficult to formulate a rule to deal with such military intervention in the near future, the criteria of necessity and proportionality can only be relied upon in the meantime. As has been the practice among States, the focus of every debate on the use of force to protect nationals on another's territory has always revolved around the criteria of necessity and proportionality. But the application of this criteria could only act as a guideline for judging the legality of the methods. This approach, however, is far from providing a framework of rules which can help comprehend all controversial situations, as it can only help in judging the objectives behind rescue missions. Questions like the following remain unanswered; who should judge and how that a hostage situation requires only a military action and not any other? How to decide whether or not the government where the citizens are held hostage is capable enough to deal with the situations on its own? At what moment force can be used to deal with the threat? Do all threats qualify as 'armed attack' for States to take the protection of self-defense? As the law on the issue remains unclear because of its inability to take into consideration some of the problems mentioned in the above sections, the controversy in this area remains unresolved. The opinion stays divided as to whether international law allows for force to be used to protect nationals abroad. Therefore, it would be ideal for the international community to adopt an outlook that allows States to defend their nationals without deserting obligations to maintaining peace and security.



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