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Forcible protection of third-country nationals abroad in international law

ABSTRACT

In our fragile world order, there is a growing need to conduct evacuation operations. Legal theory approaches these operations mostly through the protection of nationals doctrine. However, there are many evacuation operations in which states also rescue foreign nationals. The aim of this publication is to introduce the basic practical characteristics and legal issues related to these events. To this end, firstly, the practices and doctrines of states and international organisations are examined. After this, the possible legal titles for such actions are assessed. These include UN Security Council authorisation, host state consent, the protection of nationals abroad doctrine, the non-refoulement principle, asylum (etc.). The conclusion of the paper is that there is no general legal justification for the forcible protection of nationals abroad, and that legal theory should focus more on evacuation operations such as the 2021 Kabul evacuation than on Entebbe-style hostage rescues.

KEYWORDS: evacuation; foreign nationals; *jus ad bellum*; protection of nationals, hostage rescue

I. INTRODUCTION

There is a fiery debate among international law scholars about the doctrine of protection of nationals abroad.¹ This controversial theory assumes that states can protect their nationals who are in danger in a foreign country, even if this action is not approved by

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¹ T. Ruys, The 'Protection of nationals' doctrine revisited, (2008) 13 (2) *Journal of Conflict & Security Law*, 233. DOI: <https://doi.org/10.1093/jcsl/krn025>; F. Grimal and G. Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? A Commentary, (2012) 16 (3) *Journal of Conflict & Security Law*, 542. DOI: <https://doi.org/10.1093/jcsl/krr021>; S. E. Salako, Forcible Protection of Nationals Abroad and Humanitarian Intervention: Might or Right?, (2016) 5 (1) *International Law Research*, 154–155. DOI: <https://doi.org/10.5539/ilr.v5n1p152>; K. E. Eichensehr, Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues, (2008) 48 (2) *Virginia Journal of International Law*, 452–453.; R. Alcalá and H. Nasu: The Protection of Nationals Abroad

the host state or authorised by the UN Security Council.² It is hard to assess whether scholars who are for or against this theory form the majority,³ but it is safe to say that during these debates, the Entebbe incident became the textbook example of this doctrine.⁴

A lot has happened since the raid on the Entebbe airfield in 1976.⁵ For example, in recent years, there has been a growing need to conduct evacuation operations, or more specifically, non-combatant evacuation operations. From the perspective of international law, these operations lead to many intriguing, often interrelated issues. One of these is the fact that, as will be discussed in more detail later, states often evacuate foreign nationals alongside their own citizens. For example, during the recent 2021 Afghanistan evacuation, host state nationals made up the majority of the evacuees.⁶ This is an important observation that can have a profound impact on how the protection of nationals abroad doctrine should be approached.

Upon closer examination, the evacuation of foreign nationals is a complex topic in and of itself. For example, these nationals can range from the citizens of allied or third countries to host state nationals. There are even examples of the protection or evacuation of persons due to national or religious ties to the evacuating state. Although this topic has not been subject to more serious legal scrutiny, it has clear connections to other international law subjects, such as humanitarian intervention or refugee law.

The purpose of this publication is to provide an introduction to the basic practical characteristics and legal issues concerning situations in which states protect foreign nationals abroad. To this end, it first examines the practice and doctrine of states and international organisations. Then, the relevant dogmatic questions will be assessed, and the topic's relation to other international law issues will be identified. In this part, the possible legal titles for such actions will be elaborated. Finally, the implications of the previous conclusions will be reflected in the debate, centring around the protection of nationals abroad theory.

and Non-Combatant Evacuation Operations in Times of Crisis, (2024) 14 (1) *Journal of National Security Law & Politics*, 1–2.

² Grimal and Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? 546.

³ Ruys, The 'Protection of nationals' doctrine revisited, 236.

⁴ D. J. Gordon, Use of force for the protection of nationals abroad: The Entebbe incident, (1977) 9 (1) *Case Western Reserve Journal of International Law*, 127.; Ruys, The 'Protection of nationals' doctrine revisited, 248.; Eichensehr, Defending Nationals Abroad, 478.; Salako, Forcible Protection of Nationals Abroad and Humanitarian Intervention: Might or Right?, 159.; Alcalá and Nasu, The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis, 4.

⁵ See further: Britannica: *Entebbe raid*, <https://www.britannica.com/event/Entebbe-raid> (last accessed: 31.12.2024.).

⁶ A. Dawl, The Massive, Costly Afghan Evacuation in Numbers, *VOA News*, (18 February 2022), <https://www.voanews.com/a/the-massive-costly-afghan-evacuation-in-numbers/6449553.html> (last accessed: 31.12.2024.).

1. Terminology

Due to the novel nature of the topic, clear terminology needs to be established.

This article will focus mainly on the evacuation of third-state and host-state nationals. The ‘host state’ is the country on whose territory the operation is taking place. The term ‘third-state national’ means persons who are neither the nationals of the country conducting the evacuation nor the host state. ‘Host-state nationals’ are the citizens of the host state. The term ‘foreign nationals’ can be easily misunderstood, as it can be interpreted from the perspective of the host state or the state conducting the operation. In this article, the term will be used from the perspective of the state conducting the operation, thus including both host-state and third-state nationals.

This publication uses the protection of nationals doctrine in a more restrictive sense. Some scholars (e.g., Tom Ruys,⁷ Kristen E. Eichensehr⁸ and Natalino Ronzitti⁹) use the term in a more general sense to refer to cases in which states generally protect their nationals endangered in a foreign country. This interpretation does not address the possible legal justification for such operations. It does not distinguish the situations in which the host state or the UN Security Council consents to the operation from controversial cases, such as when the state conducting the operation bases its actions on self-defence (or another possible legal basis). It is the present author’s opinion that the restrictive approach, which excludes the undoubtedly lawful cases (host state consent and UN SC authorisation), is more appropriate because it provides a clearer way to approach the topic.

Additionally, the terms ‘citizen’ and ‘national’ are used interchangeably.

II. STATE PRACTICE

Investigating the relevant state practices associated with topics like this is a challenging endeavour. Publicly available information is often limited, and the resources available are frequently not specific or detailed enough. However, the military doctrines of certain states and historical examples provide ample material to create well-founded observations. In other cases, concrete examples are known when states (or international organisations) have evacuated persons who were not their citizens (or citizens of their member states). The subsequent analysis will be based on the available information.

⁷ Ruys, The ‘Protection of nationals’ doctrine revisited, 234.

⁸ Eichensehr, Defending Nationals Abroad, 463.

⁹ N. Ronzitti, Rescuing Nationals Abroad Revisited, (2019) 24 (3) *Journal of Conflict & Security Law*, 432. DOI: <https://doi.org/10.1093/jcsl/krz030>

1. Historical examples

Evacuation operations are not new challenges. Indeed, there have been numerous instances in the past when states have conducted such operations, even for safeguarding persons who were not their own nationals.¹⁰ The following is a summary of such events. These cases were selected to illustrate certain recurring or special characteristics, not to provide an exhaustive list.

Although its combat troops left Vietnam in 1973, by 1975, due to the North Vietnamese advance, the United States started evacuation operations. Firstly, some 2,600 Vietnamese orphans were transported to the United States under ‘Operation Babylift’. Concurrently, the evacuation of US citizens and their Vietnamese-born dependents commenced. As the situation deteriorated, the President of the United States authorised the evacuation of at-risk Vietnamese individuals. Following April 29, in the dramatic last two days of the American involvement in Vietnam, only helicopters could be used to conclude the evacuation. This operation became known as ‘Operation Frequent Wind’. Ultimately, thousands of American citizens and tens of thousands of Vietnamese individuals, in total more than 50,000 people, were evacuated.¹¹

In 1978, the French Foreign Legion launched an airborne assault on the city of Kolwezi (located in the Democratic Republic of Congo). The city, with more than 2,000 Europeans inside it, had been captured by rebels just a few days prior. The operation was successful, resulting in the rescue of the majority of the Europeans by the French troops.¹² Although this operation was conducted with the consent of the legitimate government, it is one of the rare examples of a hostage rescue (or evacuation) operation that involved direct assault on the actors endangering the foreigners. The author is only aware of a few similar operations, although all of them were much smaller in scale. The Entebbe raid (1976) is a notable example of a successful operation, while the Larnaca incident (1978)¹³ and Operation Eagle Claw (1980)¹⁴ ended in failure. The

¹⁰ G. Fuentes, Afghanistan Exit Latest in Long History of U.S. Noncombatant Evacuation Missions, *USNI News*, (17 August 2021), <https://news.usni.org/2021/08/17/afghanistan-exit-latest-in-long-history-of-u-s-noncombatant-evacuation-missions> (last accessed: 31.12.2024.).

¹¹ Air Force Historical Support Division, 1975 – Operation Babylift and Frequent Wind, <https://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458955/1975-operation-babylift-and-frequent-wind/> (last accessed: 31.12.2024.).

¹² Foreign Legion Info, 1978 Battle of Kolwezi, (19 May 2024), <https://foreignlegion.info/battle-of-kolwezi/> (last accessed: 31.12.2024.).

¹³ The Larnaca Incident, *The Washington Post*, (23 February 1978), <https://www.washingtonpost.com/archive/politics/1978/02/24/the-larnaca-incident/7193e2e0-62d9-4031-9206-dfb812fabb8e/> (last accessed: 31.12.2024.).

¹⁴ L. Lambert, Operation Eagle Claw, *Britannica*, (14 December 2024), <https://www.britannica.com/event/Operation-Eagle-Claw> (last accessed: 31.12.2024.).

Mayaguez incident (1975) nearly resulted in disaster, too.¹⁵ As the primary focus of all four of these operations was the protection of the implementing states' own nationals, a more detailed examination of them is beyond the scope of this study.

Another example of an evacuation operation conducted exclusively to help foreign nationals is the story of the Ethiopian Jews. The ancient Jewish community, known as 'Beta Israel', was in danger during the Ethiopian Civil War. Many of its members fled to Sudan, where they faced terrible conditions in refugee camps. Israel started evacuating these refugees in secret from 1979, and in 1984, a decision was made to scale up the operation. This required the assistance of the United States and the consent of the Sudanese government. In 1985, after the airlifts had carried 7,800 people to safety, Sudan halted the evacuation. Later in the same year, after successful negotiations, approximately 500 remaining Jews were airlifted to Israel by the United States.¹⁶ In 1991, the Israeli Air Force successfully airlifted over 14,000 Jews directly from Ethiopia in just 48 hours. This operation had the support of the United States, which convinced Ethiopia to authorise the airlifts.¹⁷

A salient feature of these operations is that Israel and the United States orchestrated the airlifts exclusively for individuals who were not their nationals. Clearly, these operations were executed due to the religious affiliations of the evacuees with the Jewish state.

In the early months of 2011, when Libya descended into a state of civil war, the United Kingdom deployed its military forces to evacuate civilians who were in danger. A part of this operation was executed in secrecy, involving special forces travelling around the country and extracting British and foreign nationals.¹⁸ During the course of this operation, a frigate belonging to the Royal Navy was also deployed to pick up civilians. In the end, hundreds were rescued, the majority of whom were not citizens of the United Kingdom.¹⁹ Officially, no questions were raised about the legality of these

¹⁵ National Museum of the United States Air Force, *Final Combat: The Mayaguez Incident at Koh Tang*, <https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/196018/final-combat-the-mayaguez-incident-at-koh-tang/> (last accessed: 31.12.2024.).

¹⁶ M. Bard and H. Lenhoff, Ethiopian Jewry: America's Role in the Rescue of Ethiopian Jewry, *Jewish Virtual Library*, <https://www.jewishvirtuallibrary.org/america-s-role-in-the-rescue-of-ethiopian-jewry> (last accessed: 31.12.2024.).

¹⁷ Operation Solomon: Israel airlifts 14,000 Ethiopian Jews to safety in unparalleled mission, *World Jewish Congress*, (24 May 2023), <https://www.worldjewishcongress.org/en/news/this-week-in-jewish-history--operation-solomon-israel-airlifts-14000-ethiopian-jews-to-safety-in-unparalleled-mission-5-3-2020> (last accessed: 31.12.2024.).

¹⁸ Grimal and Melling, The Protection of Nationals Abroad: Lawfulness or Toleration? 541. and 544.

¹⁹ Ministry of Defence, Prime Minister praises military effort in Libyan evacuations, *UK Government's official website*, (28 February 2011), <https://www.gov.uk/government/news/prime-minister-praises-military-effort-in-libyan-evacuations> (last accessed: 31.12.2024.).

operations, and both Libya and the international community tolerated the British actions.²⁰

Nearly 20 years of US involvement in Afghanistan came to a chaotic end in August 2021. The Taliban quickly and successfully gained ground, and the Afghan state and its security forces collapsed.²¹ Tens of thousands of desperate Afghans tried to get to safety, and many states started evacuation operations. Some states (like Switzerland, Türkiye, Ireland, and India) mainly evacuated their own citizens who were in the country. However, states that had been militarily involved in the conflict mostly evacuated foreign (specifically host state) nationals. Some examples include the USA, Italy, France and Hungary.²²

In the case of the United States, the evacuees were mainly persons who, in some capacity, worked for the US government, as well as their families. This included interpreters, embassy staff, and even intelligence operatives. However, a significant number of Afghans who had no prior connection with the US managed to board the planes leaving the country.²³

One of the latest examples we must take into consideration is the evacuation operation codenamed 'Operation Sagittarius'. This operation was conducted in 2023 by the French military during the Sudanese Civil War. As violence erupted in April, many foreigners had no way to escape the country. In this situation, France, after consulting the two sides involved in the conflict, secured the Wadi Seidna airfield and airlifted civilians out of the country. France evacuated these civilians regardless of their nationality. Individuals from many different African and European countries were evacuated by French aircraft. The secured airstrip was also utilised by different countries (like Spain, Britain, Türkiye, etc.) to conduct their own evacuations. During the operation, France in total airlifted 538 people, out of whom only 209 were French nationals.²⁴

This summary has mainly focused on evacuation operations conducted for the purpose of safeguarding foreign nationals. There are other examples of more general evacuation operations or the invocation of the protection of national doctrine that are not addressed here.²⁵

²⁰ Grimal and Melling, *The Protection of Nationals Abroad: Lawfulness or Toleration?* 545.

²¹ J. B. Murtazashvili, *The Collapse of Afghanistan*, (2022) 33 (1) *Journal of Democracy*, 40., <https://www.journalofdemocracy.org/articles/the-collapse-of-afghanistan/> (last accessed: 31.12.2024.).

²² *Evacuations from Afghanistan by country*, *Reuters*, (30 August 2021), <https://www.reuters.com/world/evacuations-afghanistan-by-country-2021-08-26/> (last accessed: 31.12.2024.).

²³ G. Kessler, *Numbers behind Afghanistan evacuation come into focus*, *The Washington Post*, (25 May 2022), <https://www.washingtonpost.com/politics/2022/05/25/numbers-behind-afghan-evacuation-come-into-focus/> (last accessed: 31.12.2024.).

²⁴ S. Pedder, *How France led the evacuation of foreigners from Khartoum*, *The Economist*, (3 May 2023), <https://www.economist.com/sudanrescue> (last accessed: 31.12.2024.).

²⁵ See e.g. Ruys, *The 'Protection of nationals' doctrine revisited*, 238–253.

2. State doctrines

a) United States

The United States has extensive experience in conducting evacuation operations. Therefore, it is not a surprise that this state has established detailed regulations dealing with this subject. The two main sources that should be referenced are the Department of Defense Directive 3025.14²⁶ and the US military's official doctrine on non-combatant evacuation operations (NEO).²⁷

The provisions of DoD Dir. 3025.14 provide comprehensive regulation for the different personal categories of evacuees, which include non-US citizens. These persons may include civilian employees of US government agencies and their dependents, as well as foreign national dependents of US citizens.²⁸ It should also be noted that, based on the NEO doctrine, host-country and third-country nationals are evacuated on a case-by-case basis at the discretion of the US government.²⁹

This can be interpreted in a way that there are predetermined personal categories that define which foreign nationals can be evacuated. However, based on a political or diplomatic decision, additional foreign nationals (such as the nationals of allied nations) can also be evacuated.

The JP 3-68 doctrine also includes provisions regarding refuge or asylum requests:

“International law and customs have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger. It is the policy of the United States to grant temporary refuge in a foreign country to nationals of that country or to TCNs solely for humanitarian reasons when extreme or exceptional circumstances put in imminent danger the life or safety of a person, such as pursuit by a mob. The officer in command of an aircraft, ship, station, or activity decides which measures can prudently be taken to provide temporary refuge.”³⁰

b) United Kingdom

The NEO doctrine of the United Kingdom (UK) explicitly states that foreign nationals may be eligible for evacuation if the UK government or the most senior diplomat in the country accepts responsibility for them. The eligibility of these persons is assessed by

²⁶ Department of Defense Directive 3025.14, Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad, 2013, the version in force from 2017. 11. 30. (hereinafter: DoD Dir. 3025.14).

²⁷ Joint Publication 3-68, Joint Non-combatant Evacuation Operations, 2022 (hereinafter: JP 3-68).

²⁸ DoD Dir. 3025.14, 13.

²⁹ JP 3-68, I-1. a.

³⁰ JP 3-68, VI-16. d.

the Foreign, Commonwealth & Development Office or the Border Force.³¹ Consequently, under this doctrine, the evacuation of foreign nationals is mainly a political decision. Furthermore, the document also addresses the political and logistical challenges posed by allied evacuees.³²

This doctrine also states that, based on experiences gained in past operations (for example, in Kabul), during NEOs it is unlikely that states will be acting independently. Therefore, coordination between the various states conducting an evacuation is imperative.³³

c) Brazil

The NEO doctrine of Brazil has some of the most detailed rules regarding the evacuation of foreign nationals. In the document, the definition of non-combatants clearly states that previously designated foreign nationals can be evacuated.³⁴ The different statuses of the evacuees are also specifically characterised. According to this, the prioritisation of the evacuees is the following:

1. Brazilian citizens.
2. Non-Brazilians who are close relatives of Brazilian citizens.
3. Non-Brazilians working for the Brazilian government.
4. Non-Brazilians who are seriously sick or wounded, or whose lives are in imminent danger.
5. Others (as indicated by the Ambassador or the Commander of the Joint Command).³⁵

These rules are similar to the ones previously mentioned for the United States. Brazil primarily evacuates foreign nationals who have some connection to the country. This may include foreign nationals working for Brazil or the relatives of its citizens. However, based on the decision of the ambassador or the military leader, additional persons can also be evacuated.

An interesting addition is Category 4, which includes foreign nationals not affiliated with Brazil yet facing imminent danger. This situation may be similar to granting asylum; however, the doctrine does not include more specific rules on this topic.³⁶

³¹ Joint Doctrine Publication 3-51, Non-combatant Evacuation Operations, (3rd Edition, dated 2023) 1.2.

³² JDP 3-51. 4.11.

³³ JDP 3-51. 3.27

³⁴ MD33-M-08 Manual De Operações De Evacuação De Não Combatentes (hereinafter: MD33-M-08), 64.

³⁵ MD33-M-08 5.5.1. TABELA 1. (translated using DeepL).

³⁶ Political asylum is referenced as a planning question in one of the annexes, without further elaboration. MD33-M-08, Annexe D, 2.30.

d) Spain

Similarly to the already mentioned states, the NEO doctrine of Spain differentiates between Spanish nationals, citizens of the European Union, and other persons authorised by the diplomatic staff.³⁷

The Spanish doctrine also addresses the question of asylum seekers, making reference to international law and customs and specifically stating that asylum seekers can be transported to Spain. However, until this decision is made, they must be given assistance and cannot be released to another country.³⁸ This last part could be included to comply with the non-refoulement principle, which will be discussed later in greater detail.

e) Other states

Many states do not have publicly available doctrines or other documents regulating evacuation operations. However, this does not mean that they have not conducted such operations or rescued foreign nationals.

For instance, both China and Russia have evacuated foreign nationals. During the Yemen civil war in 2015, 279 foreign nationals were saved by Chinese forces.³⁹ Furthermore, Russian soldiers took part in the 2021 Kabul evacuation, alongside Russian citizens, evacuating people from Afghanistan, Belarus, Kyrgyzstan, Tajikistan, Uzbekistan and even Ukraine.⁴⁰

In 2011, during Operation Mobile, Canada also evacuated foreign nationals. This evacuation was conducted in Libya and resulted in the evacuation of 61 Canadians alongside 130 people from different states. After the UN Security Council established a no-fly zone over Libya, this NEO transitioned into a real combat mission.⁴¹

Although Hungary does not have an official doctrine on non-combatant evacuation operations, Hungarian forces participated in both the 2021 Afghanistan and 2023 Sudan evacuations. In Afghanistan, the Hungarian Defence Forces airlifted 540 individuals, predominantly Afghan nationals, but the Hungarian aeroplanes also carried citizens of the United States and Austria. The evacuated Afghans had worked

³⁷ PDC-3.4.2., 0102.

³⁸ PDC-3.4.2 0519-0521.

³⁹ C. Hurst, Compelling Reasons for the Expansion of Chinese Military Forces, (2017) (November–December) *Military Review*, <https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/November-December-2017/Compelling-Reasons-for-the-Expansion-of-Chinese-Military-Forces/> (last accessed: 31.12.2024.).

⁴⁰ Russia flies nationals out of Afghanistan on Putin's orders, *Reuters*, (25 August 2021), <https://www.reuters.com/world/asia-pacific/russia-evacuate-more-than-500-citizens-afghanistan-interfax-2021-08-25/> (last accessed: 31.12.2024.).

⁴¹ Operation MOBILE, *Official website of the Government of Canada*, (22 January 2024), <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/recently-completed/operation-mobile.html> (last accessed: 31.12.2024.).

for the Hungarian forces previously, for example, as interpreters or security guards.⁴² In 2023, Hungary also participated in the evacuation of civilians from Sudan, with a total of 32 individuals being evacuated, of whom only 7 were Hungarian nationals.⁴³

3. International Organisations

a) NATO

A joint doctrine is dedicated to the specialised category of non-combatant evacuation operations by NATO. These operations ultimately fall under the responsibility of the member states, so this doctrine's principal role is to regulate a theoretical NATO-led operation and to provide guidance to member states.⁴⁴

Although this document does not explicitly regulate the evacuation of non-NATO nationals, there are relevant provisions in the text concerning foreign nationals. For example, the definition of the term 'evacuation contingency plan' clearly states that it is the diplomatic mission's responsibility to create a plan for the evacuation of citizens and designated foreign nationals.⁴⁵

Additionally, the doctrine contains provisions about considerations in cases of requests for political asylum or temporary refuge. These provisions stipulate that, in accordance with the rules of international law, there is a practice to provide temporary refuge to anyone who is in clear danger. If temporary refuge is granted, that individual may only be released with the authorisation of the Supreme Allied Commander Europe. However, political asylum can only be granted by a head of mission.⁴⁶

b) European Union

During the 2021 Afghanistan evacuation, even the EU played an active role, with the deployment of a crisis cell to Kabul and the provision of assistance to the evacuations conducted by the member states. The crisis cell assisted the evacuation of 13,400 Afghan and 4,100 EU nationals. Hundreds of local EU staff were also successfully evacuated, with the assistance of the member states.⁴⁷

⁴² Szórád T., Várd a váratlant, *Air Base Blog*, (30 November 2021), https://airbase.blog.hu/2021/11/30/var_d_a_varatlant_128 (last accessed: 31.12.2024.).

⁴³ Antal F., Szalay-Bobrovniczky K.: 32 embert, köztük 7 magyart sikerült kimenekíteni Szudánból, *Honvédelem.hu*, (27 April 2023), <https://honvedelem.hu/hirek/szalay-bobrovniczky-kristof-32-embert-koztuk-7-magyart-sikerult-kimenekiteni-szudanbol.html> (last accessed: 31.12.2024.).

⁴⁴ AJP-3.4.2 Allied Joint Doctrine for Non-combatant Evacuation Operations 2013, (hereinafter: AJP-3.4.2.) 1010 b.

⁴⁵ AJP-3.4.2. Part II., Terms and Definitions.

⁴⁶ AJP-3.4.2., 0504. I.

⁴⁷ Evacuation of Afghan nationals to EU Member States, *Think Tank: The European Parliament's official website*, (8 November 2021), https://www.europarl.europa.eu/thinktank/en/document/EPRS_

4. Summary of state practice

Chart 1. Summary of state practice⁴⁸

States and organisations	Evacuation of foreign nationals	Reference to refugee law
EU	Based on practice	
NATO	Case-by-case decision	Temporary refuge and political asylum
USA	Designated statutes and case-by-case decisions	Temporary refuge and political asylum
China	Based on practice	
Russia	Based on practice	
UK	Based on practice	
Canada	Yes	
Brazil	Designated statutes and case-by-case decisions	
Spain	EU citizens and a case-by-case decision	Political asylum
Hungary	Based on practice	
France	Based on practice	

Although the analysis of each and every relevant operation that has occurred in the past is beyond the scope of this article, it is safe to say that evacuation operations (which evacuate foreign nationals) are far more common than hostage rescue operations, such as the Entebbe incident. While there are multiple examples of states evacuating foreign nationals alongside their own citizens, there are only a handful of examples of kinetic hostage rescues. It is also important to note that the majority of the mentioned operations were conducted with the specific consent, or at least the knowledge, of the host state.

Additionally, based on the official documents and practical examples, each studied state is ready to evacuate foreign nationals with whom they have a connection. This can include both host state and third state nationals. The evacuation of specific persons can be based on predetermined categories and diplomatic or political decisions made on a case-by-case basis.

BRI(2021)698776 (last accessed: 31.12.2024.).
⁴⁸ The author’s own chart.

A categorisation of the evacuated foreigners reveals three distinct categories. Firstly, it is clear practice to save foreigners working for the state conducting the evacuation. Secondly, the evacuation of the dependents of nationals is also a standard practice. Thirdly, the evacuation of the nationals of allied states is well-established.

It is evident that the evacuation of both host state nationals and third-country nationals is a well-established practice. Furthermore, as was demonstrated in the preceding paragraph, these persons often form the majority of the evacuees.

III. LEGAL JUSTIFICATIONS FOR THE PROTECTION OF FOREIGN NATIONALS

The most important dogmatic issue raised by the evacuation of foreign nationals is that of the possible legal justification for such operations. From a *jus ad bellum* perspective, these justifications traditionally include host state consent, authorisation by the UN Security Council, the ‘protection of nationals doctrine’, and humanitarian intervention. However, as can be seen in the relevant doctrines, there are subtle references to refugee law, diplomatic asylum and the non-refoulment principle in state practice. The present analysis will examine these issues.

The legal assessment of these possibilities is dependent on the precise characteristics of a particular evacuation mission. Specifically, whether foreigners are protected in conjunction with the intervening state’s own citizens, or whether the operation is exclusively conducted for their protection. Where relevant, this issue will be addressed.

1. Host state consent and UN SC authorisation

It is not contested that a state can give its consent to another state to conduct an evacuation operation on its territory.⁴⁹ Additionally, the UN Security Council, acting on its powers enshrined in Article VII, Paragraph 42 of the UN Charter, can authorise an evacuation operation, although there is currently no example of such a decision.⁵⁰ These cases can also provide a legal basis for the evacuation of foreign nationals, provided that the consent or authorisation includes them. Therefore, the real question arises when none of these possibilities is available.

⁴⁹ Ruys, *The ‘Protection of nationals’ doctrine revisited*, 235.

⁵⁰ Ronzitti, *Rescuing Nationals Abroad Revisited*, 445.

2. Protection of (foreign?) nationals abroad

The notion of expanding the protection of nationals abroad concept to include foreign nationals may appear irrational at first. Yet, considering the analysed state practice, it becomes evident that there is a substantial rationale for addressing this subject. There are a few prior references to the protection of foreign nationals in relation to this doctrine. For instance, Special Rapporteur Dugard wrote during the drafting of the Articles on Diplomatic Protection that:

“(…) In an emergency situation, it will be both difficult and unwise to distinguish sharply between nationals and non-nationals. There should be no objection to the protecting State rescuing non-nationals exposed to the same immediate danger as its nationals, provided the preponderance of threatened persons are nationals of that State. (...)”⁵¹

Based on this, Tom Ruys, as a *de lege ferenda* proposal, states that:

“[non-combatant evacuation operations] may extend to the evacuation of other threatened foreigners, as long as the preponderance of threatened persons are nationals of the intervening state.”⁵²

Other authors have also made reference to the fact that states often evacuate foreign nationals alongside their own. However, they also consider a state's own nationals to be the primary focus of the protective actions.⁵³ In essence, the idea is that when a state launches an operation to protect its nationals, it may incidentally rescue a few others.

There is an important starting point before it can be determined whether the current understanding of the ‘protection of nationals abroad’ doctrine can be expanded enough to provide the necessary legal title for the protection of foreign nationals. In principle, the ‘protection of nationals’ doctrine must be regarded as lawful in its own right.

The protection of nationals abroad is a highly debated concept. There are many different legal rationales that try to support the lawfulness of this doctrine, with the expansion of the right of self-defence established in Article 51 of the UN Charter arguably being the most popular.⁵⁴ However, there are two distinct approaches through which the concept of self-defence can be expanded to encompass this doctrine.

⁵¹ J. R. Dugard, *First report on diplomatic protection (Document A/CN.4/506 and Add. 1.)*, 220., https://web.archive.org/web/20241125055135/https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf (last accessed: 31.12.2024.).

⁵² Ruys, The ‘Protection of nationals’ doctrine revisited, 268.

⁵³ Eichensehr, *Defending Nationals Abroad*, 462.; Ronzitti, *Rescuing Nationals Abroad Revisited*, 432.

⁵⁴ Ruys, The ‘Protection of nationals’ doctrine revisited, 235–236. and 259–260.

The starting point of the first approach is the specific wording of Article 51 of the UN Charter, more specifically the term ‘inherent right’. Before the UN Charter, actions undertaken to protect nationals abroad were undoubtedly lawful; therefore, this doctrine states that they still fall under the scope of self-defence as an inherent right. Consequently, this view is based on customary international law.⁵⁵ A popular argument used to reinforce this claim suggests that states were mostly protesting the specific invocations of the right, rather than its general existence.⁵⁶

However, a more thorough analysis of the issue reveals that the validity of these arguments is questionable. While a few – mostly Western – states have consistently invoked this doctrine, at least the same number of states are against the protection of nationals abroad. Even more, there are instances when states raised their voices against the doctrine. Examples of this include the deliberations surrounding the drafting of the Articles on Diplomatic Protection, and debates in the UN Security Council and General Assembly. Based on these circumstances, the protection of nationals abroad cannot be considered a customary right.⁵⁷

There is another approach that seeks to expand the boundaries of self-defence. This logic suggests that an armed attack can be committed not only against a state’s territory but also against its nationals.⁵⁸ However, for a situation to be considered this way, a number of prerequisites must be met. For example, the nationals must be endangered because of their ties to their respective state. Even more, the attack on them must be grave enough, based on the International Court of Justice’s Nicaragua judgment.⁵⁹

The primary issue with this concept is its ill-defined nature. The prohibition on the use of force is the cornerstone of international peace and security, a *jus cogens* norm of international law. However, when authors attempt to expand the concept of armed attack, they fail to provide aptly clear boundaries for doing so. For example, they reference Derek Bowett,⁶⁰ who writes: “there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately constructed as an attack on the state itself”.⁶¹ However, this reasoning can hardly be considered a clear legal argument; it appears to be more of an interesting thought experiment, as it is difficult to imagine a situation in which this

⁵⁵ Ibid., 235–236.

⁵⁶ Eichensehr, *Defending Nationals Abroad*, 460.

⁵⁷ See Ruys, *The ‘Protection of nationals’ doctrine revisited*, 256–264.

⁵⁸ Ibid., 235–236.

⁵⁹ Grimal and Melling, *The Protection of Nationals Abroad: Lawfulness or Toleration?* 549.; Eichensehr, *Defending Nationals Abroad*, 467–470.

⁶⁰ Eichensehr, *Defending Nationals Abroad*, 468.; Ronzitti, *Rescuing Nationals Abroad Revisited*, 468–470.; Gordon, *Use of force for the protection of nationals abroad*, 129.; Alcalá and Nasu, *The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis*, 18.

⁶¹ D. W. Bowett, *Self-defense in international law* (Praeger, New York, 1958) 93.

threshold could be undoubtedly met. Additionally, there is no documented instance of such a characterisation being generally accepted by the international community.⁶²

Therefore, as the protection of nationals doctrine is not a lawful principle under international law, it cannot provide a legal basis for any type of military operation.

Obviously, the protection of a state's own citizens is a key feature of this doctrine. As demonstrated, the different legal arguments that try to establish the legality of the protection of nationals abroad rely heavily on the relationship between a state and its own nationals. Consequently, even if the protection of nationals doctrine is deemed lawful, it could only be used for the protection of foreign nationals when the intervening state's own citizens form the majority of the rescued persons. While this consideration may appear self-evident, it will have significant implications later.

3. Humanitarian intervention

Some authors consider the protection of nationals abroad to be a type of humanitarian intervention. However, these are two completely different concepts, and they should not be confused. The aim of humanitarian intervention is to protect foreigners who are being persecuted in their home countries. Doing so often involves a regime change in the targeted country.⁶³ Therefore, humanitarian intervention is mostly driven by humanitarian intentions, while the protection of nationals abroad is aimed at protecting a state's own interests.

However, in situations when a state is aiming to protect mostly foreign nationals, more specifically the nationals of the host country, this clear difference could seem somewhat blurred. A good example of this is the evacuation of the Ethiopian Jews that has already been mentioned. Nevertheless, the interests of the intervening state, namely the protection of persons that are somehow related to the latter, usually outweigh humanitarian intentions in most of the discussed cases. Therefore, it is possible to separate the two concepts even in these situations.

Although the legality of humanitarian intervention is a fiercely debated topic, it is also challenging to establish a clear right for this type of action in international law.⁶⁴ Therefore, as proposed by some scholars, the international community should move towards peaceful means, such as the responsibility to protect.⁶⁵

⁶² O. Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, Oxford, 2021) 400–401. DOI: <https://doi.org/10.1093/ejil/chr088>

⁶³ Eichensehr, *Defending Nationals Abroad*, 461–463.

⁶⁴ A. Ryniker, 'The ICRC's position on "humanitarian intervention"', (2001) 83 (842) *International Review of the Red Cross*, 530. DOI: <https://doi.org/10.1017/S1560775500105826>

⁶⁵ G. Sulyok, 'Understanding the Responsibility to Protect: Textual Anomalies and Interpretative Challenges in the 2005 World Summit Outcome', (2014) *Hungarian Yearbook of International Law and European Law*, 207–208.

4. Refugee law

The question of whether refugee law can be applied to the protection of foreign nationals is a complex one. Based on the 1951 Refugee Convention, only a person outside of their country of nationality can be entitled to refugee status.⁶⁶ Therefore, this definition cannot be expanded to include host country nationals while they are still awaiting evacuation. The inclusion of third-country nationals is also not a viable proposition, since the definition of a refugee also includes that the person in question is “unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (the country of nationality).⁶⁷

While there may be some theoretical cases in which this convention could be applied, the protection of refugees cannot provide a legal basis for an intervention. Of course, once the foreign nationals are evacuated to another country, they can apply for refugee status or complementary protection there.⁶⁸

5. Diplomatic and naval asylum, human rights and the non-refoulment principle

As the highly debated concept of diplomatic asylum is featured in some of the analysed military doctrines, it is also necessary to discuss this topic.

The 1975 report of the Secretary General on diplomatic asylum defines this concept as follows:

“The term »diplomatic asylum« in the broad sense is used to denote asylum granted by a State outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships in the territorial waters of another State (naval asylum), and also on board its aircraft and of its military or para-military installations in foreign territory.”⁶⁹

This definition is of particular interest, as it includes concepts such as naval asylum, which could be tailor-made for the protection of foreign nationals through military means. However, this report, while it provides a detailed collection of state practices

⁶⁶ The 1951 Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, Article 1 Paragraph 2., see further at *A guide to international refugee protection and building state asylum systems* (UNCR, 2017) Chapter 6.

⁶⁷ The 1951 Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951, Article 1, Paragraph 2.

⁶⁸ *A guide to international refugee protection and building state asylum systems*, 147.

⁶⁹ Part II. Report of the Secretary-General Prepared Pursuant to Operative Paragraph 2 of General Assembly Resolution 3321 (XXIX) (1975), <https://www.unhcr.org/publications/question-diplomatic-asylum-report-secretary-general-0> (last accessed: 31.12.2024.).

relevant at that time, was never elaborated further by the United Nations and consequently lacked legal authority.⁷⁰

The concept of naval asylum is reliant on the theory of extraterritoriality, a legal fiction that posits a warship as constituting the territory of its flag state. Prior to 1945, scholars accepted this theory, and there are even practical cases (mainly from the 19th century⁷¹) for its application.⁷² However, contemporary international law no longer considers state vessels to be an extraterritorial extension of the flag state; rather, they merely enjoy immunity.⁷³

It is important to note that the 1954 Caracas Convention on Diplomatic Asylum⁷⁴ includes provisions pertaining to asylum granted by a foreign military entity. Article I of the convention explicitly stipulates that:

“Asylum granted in legations, war vessels, and military camps or aircraft, to persons being sought for political reasons or for political offenses shall be respected by the territorial State in accordance with the provisions of this Convention.”⁷⁵

This definition is not limited to ‘war vessels’ but also includes military camps and aircraft. This is important because, as has been seen, warships are no longer the most common military asset deployed for evacuation operations. Therefore, diplomatic asylum can provide a legal basis for the protection of foreign individuals during an evacuation operation in relation to South American states that are party to this convention.

However, there is an important and relevant limitation to this right. Diplomatic asylum is a strictly limited concept; it cannot involve the use of force or an intervention in the territory of the host country.⁷⁶ Therefore, this article can only be applied when an evacuation, with the necessary legal prerequisites, is already underway and a person at risk for political reasons seeks refuge with the military units conducting the operation.

For states that are not a party to this convention, the legality of diplomatic asylum cannot be established by customary international law.⁷⁷ However, some authors

⁷⁰ P. Behrens, *The Law of Diplomatic Asylum – a Contextual Approach*, (2014) 35 (2) *Michigan Journal of International Law*, 323.

⁷¹ Part II. Report of the Secretary-General Prepared Pursuant to Operative Paragraph 2 of General Assembly Resolution 3321 (XXIX) (1975), 17–21.

⁷² *Ibid.*, 328–336.

⁷³ The 1982 United Nations Convention on the Law of the Sea, signed in Montego Bay, on 10 December 1982, Articles 32., 96. and 236.

⁷⁴ Signed in Caracas on 28 March 1954.

⁷⁵ Convention on diplomatic asylum, signed in Caracas on 28 March 1954, Article I.

⁷⁶ Behrens, *The Law of Diplomatic Asylum*, 357.

⁷⁷ S. K. Banton, *Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights: Balancing the Vienna Conventions with Human Rights Concerns*, (2022) 54 *Journal of International Law and Politics*, 1048.

have pointed to the fact that states are bound by different obligations under international law, which could come into play in a situation when an individual seeks protection for political reasons at a diplomatic mission.⁷⁸ In the present author's opinion, these positions can be expanded, with the necessary caution, to include situations arising during evacuation missions.

Diplomatic asylum is specifically assessed in relation to the provisions outlined in the 1961 Vienna Convention on Diplomatic Relations, notably, in relation to the prohibition of interference in the internal affairs of the host state and the rule that the premises of diplomatic missions cannot be utilised in a manner that is incompatible with their functions.⁷⁹ These provisions are hardly applicable if a threatened person seeks protection from military personnel conducting an evacuation operation. Still, general rules of international law, such as territorial sovereignty⁸⁰ and the principle of non-intervention⁸¹ do apply in these cases, even if the evacuation itself is lawful.

This view is further reinforced by the International Court of Justice's judgement in the Asylum case when it states that:

"In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."⁸²

The basic premise is that, during a request for asylum, two conflicting interests come into play. Firstly, the prohibition of intervention and the territorial sovereignty of the host state are implicated, as granting asylum can violate these principles.⁸³

On the other hand, however, the sending state (or the state conducting the evacuation) may be subject to *erga omnes* legal obligations (self-determination⁸⁴ or human rights obligations such as the non-refoulment principle⁸⁵). These obligations may compel the state to protect individuals facing prosecution for political reasons.⁸⁶

⁷⁸ Behrens, *The Law of Diplomatic Asylum*, 324.

⁷⁹ *Ibid.*, 325–327.

⁸⁰ *Ibid.*, 351.

⁸¹ M. Wood, Non-Intervention (Non-interference in domestic affairs), *Encyclopedia Princetoniensis*, <https://pesd.princeton.edu/node/551> (last accessed: 31.12.2024.).

⁸² *Asylum case (Colombia v Peru)*, Judgment, 20 November 1950, International Court of Justice, 12–13.

⁸³ Banton, *Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights*, 1042. and 1047.

⁸⁴ Behrens, *The Law of Diplomatic Asylum*, 337–338.

⁸⁵ Banton, *Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights*, 1042

⁸⁶ Behrens, *The Law of Diplomatic Asylum*, 324., 336–341.

Furthermore, states may have additional obligations under specific human rights regimes, particularly if they apply extraterritorially.⁸⁷

Again, this concept can only be applied to evacuation operations if specific conditions are met. Firstly, the evacuation operation must already be in progress, as humanitarian reasons cannot provide a justification for armed intervention. Secondly, the individual in question must be under the effective control of the state conducting the evacuation operation.⁸⁸ Thirdly, the specific conditions of the prevailing obligation must also be fulfilled.

Furthermore, even if all the prerequisites are established, the conflict with the prohibition of intervention remains unresolved. International law is currently unable to provide a solution to this conflict. In relation to diplomatic asylum, some scholars have proposed different methods, but these cannot be considered part of the law.⁸⁹

This finding is of particular pertinence given that, in accordance with a case-by-case analysis, the strict conditions may be applicable. As demonstrated in the section addressing state practice, doctrines recognise the possibility that a prosecuted national of the host country may seek assistance from the military personnel conducting an evacuation operation. This could result in obligations, including the non-refoulement principle, being triggered.

IV. CONCLUSIONS

More than forty years have passed since the Entebbe incident. It is easy to understand why this gripping event attracted so much legal scrutiny in the past. However, things have changed since then, and it can be questioned whether similar hostage rescue operations are still common in state practice. Based on previous analysis, it can even be argued that the few similar operations were just extraordinary events, and never the norm.

The Entebbe incident is the most clear-cut example of a hostage rescue operation conducted for the protection of a state's own citizens. However, based on the analysis of state practice, it is concluded that evacuation operations are more common than hostage rescue operations, and states often evacuate foreign nationals alongside their own. These types of operations are well established both in military doctrine and actual state practice. The operations in Kabul or Wadi Seidna are just two current examples.

It is evident that the protection of nationals abroad doctrine is not applicable in cases where a state seeks to protect foreign citizens. It should be noted that the doctrine's

⁸⁷ Ibid., 341–343.

⁸⁸ Banton, *Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights*, 344–348.

⁸⁹ See: Banton, *Diplomatic Asylum as a Tool for Extraterritorial Protection of Human Rights*, 352–364.

intention has never been to achieve this outcome; however, this remains a significant argument supporting its illegality.

For example, in relation to the customary law argument, it can be demonstrated that this hypothetical customary right is not in conformity with a significant portion of real state practice. Indeed, evacuation operations are considerably more complicated than the more straightforward protection of nationals rationale. Secondly, this assessment complicates the expansion of the definition of armed attack to a state's citizens. This theory is dependent on the idea that nationals form an immanent part of a state.⁹⁰ However, this logic cannot incorporate the protection of foreign nationals, even in instances where they are somehow connected to the intervening state. Clearly, both of these rationales must be taken into consideration along with the previously mentioned arguments, and they can provide a potential explanation why only a few states have previously referred to this doctrine.⁹¹

It is this author's opinion that the idea that an operation can also save foreign nationals if most of the evacuees are from the intervening state is not a satisfactory solution to the problem. This argument cannot be applied to most of the cases that have been mentioned, because state practice has a completely different logic. The fact that foreign nationals often form the majority of the evacuees is merely the tip of the iceberg. More importantly, states do not just incidentally evacuate third-country nationals who are in danger. Quite the opposite is true, as their protection is often the objective of these operations from the start.

In the majority of cases, the application of alternative legal titles is not possible. The 1954 Caracas Convention can be invoked in certain circumstances, but this is subject to significant constraints. Apart from the authorisation of the UN Security Council or the consent of the host state, no other general alternative can be identified to provide a legal basis. However, this does not necessarily constitute a problem. In reality, these findings highlight the shortcomings of the discourse on the protection of nationals doctrine. State practice deviates to a certain extent from legal theory, and scholars should focus more on issues other than the *jus ad bellum* questions of forcible actions taken in Entebbe-style hostage rescues. It is therefore recommended that the debates on the protection of nationals doctrine move away from the Entebbe-style approach and focus more on Kabul or Wadi Seidna-style evacuations.⁹²

A clearer framework should be established to address the main questions of evacuation operations, including the protection of foreign nationals. It is essential to distinguish between the legality of an operation and any potential legal challenges that may arise on the ground during its execution. Firstly, much more attention should be

⁹⁰ Ruys, The 'Protection of nationals' doctrine revisited, 235–236.

⁹¹ Ibid., 259–263.

⁹² Cf. Ruys, The 'Protection of nationals' doctrine revisited, 263–270.

shifted towards host state consent and UN Security Council authorisation for such operations. As evidenced by historical operations, securing host state consent is, in reality, less challenging than the protection of nationals doctrine suggests. Evacuation operations are much more tolerated by the international community than hostage rescues; therefore, securing consent is a viable possibility.⁹³

If the host state does not provide consent for the operation, the UN Security Council can still authorise forcible action based on its powers stipulated in Article 42 of the UN Charter. Clearly, a healthy scepticism can be raised against this solution, and it might take the Security Council an unnecessary amount of time to act.⁹⁴ This legal basis, however, creates clear legitimacy for an operation and can lawfully enable the protection of foreign nationals.

Secondly, much more attention should be paid to the possible issues that may be raised by foreign nationals on the ground. These issues encompass third-country nationals needing an evacuation, as well as host-country nationals seeking asylum. Legal scholarship should direct its focus to these issues by establishing clear frameworks, given that the decision to evacuate an individual can only be made on the basis of the particular circumstances of the operation in question. The exact legal foundation (i.e. the extent of the host state's consent or the mandate of the UN Security Council) serves as the starting point of every case-by-case analysis. Without these sources, the obligations of the intervening state under international or human rights law must be considered. It can be established that, apart from the application of the 1954 Caracas Convention, diplomatic (or naval) asylum cannot be considered lawful under international law. However, the non-refoulement principle or other *erga omnes* obligations may be invoked, depending on the particular circumstances of each case.

⁹³ Ibid., 264.

⁹⁴ See e.g.: Gordon, Use of force for the protection of nationals abroad, 130–131.