ARTICLES

The Protection of Nationals Abroad and Non-Combatant Evacuation Operations in Times of Crisis

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I. INTRODUCTION

Non-combatant evacuation operations (NEO) are a type of military operation conducted to rescue a state's nationals (together with other designated civilians) and deliver them from harm's way when they are *in extremis* abroad. Although reliant on military forces, a NEO's focus on protection and evacuation can obscure the significance of military presence on foreign soil. Historically, NEOs have elicited few objections from the international community. Consequently, few states have felt compelled to legally justify them, either beforehand or after the fact. Deploying military forces to the foreign state, however, is an extraordinary step, and understanding the legal basis for such action is critical to appreciating the legal environment in which NEO forces must operate. Especially in uncertain environments, understanding the legal framework for the operation can help military forces better prepare to counter threats, determine when lethal force may be lawfully employed, and recognize the implications of any resort to force abroad.

The legality of deploying military forces to protect nationals abroad has been a subject of debate for decades, and the international community has yet to reach a consensus on the issue.[1] Broadly described as the "protection of nationals abroad" doctrine, the use of military forces to protect a state's nationals can encompass a

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1. *See generally* Mathias Forteau, *Rescuing Nationals Abroad*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 947-61 (Marc Weller ed., 2014); Tom Ruys, *The "Protection of Nationals" Doctrine Revisited*, 13 J. CONFLICT & SEC. L. 233 (2008); Thomas C. Wingfield & James E. Meyen, *Lillich on the Forcible Protection of Nationals Abroad*, 77 INT'L L. STUD. 1 (2002); STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 188-204 (1996); ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 93-111 (1993); NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY (1985).

wide range of military operations conducted in foreign territory, including forcible rescue or recovery operations and other military interventions. NEOs represent a subset of these protective operations but are impacted by many of the same legal considerations. Clearly articulating the legal foundations for NEOs and disentangling NEOs from other protective operations can help set the parameters for lawful action in these often complex and changeable environments.

This article begins with an overview of the traditional and still unresolved debate regarding the legal bases for the deployment of military forces to protect nationals abroad (Section II). The article then describes the operational concept of NEOs, using current U.S. doctrine as a guide, and examines the legality of NEOs in the context of the wider legal debate surrounding the protection of nationals abroad (Section III).[2] After examining the potential legal justifications for NEOs, the article analyzes the legal constraints that may hinder or restrict the freedom of action of evacuation forces engaged in a NEO (Section IV). The article concludes that clarity of the legal basis for evacuation operations, and the applicable legal framework under which the operation must be conducted before committing troops to the task, can help evacuation forces better prepare for and respond lawfully to threats that arise in theater.

II. THE LEGAL BASIS FOR THE PROTECTION OF NATIONALS ABROAD

The deployment of military forces on foreign soil may constitute a violation of sovereignty.[3] At the same time, it may amount to a use of force prohibited under Article 2(4) of the UN Charter and as established by customary international law, unless it is legally justifiable.[4] Accordingly, any justification for such a deployment must overcome these twin legal obstacles.

Arguably, the deployment of military forces for the sole purpose of rescuing and evacuating nationals does not amount to a use of force if it is not directed against the territorial integrity or political independence of any state or is not in any manner inconsistent with the purposes of the United Nations as described in Article 2(4) of the UN Charter.[5] Indeed, such an argument has been offered on various occasions. For example, such a justification was proposed when the United States launched Operation Eagle Claw to rescue American hostages in Iran in 1980, which was conceived to be limited in scale and duration but was

2. JOINT CHIEFS OF STAFF, JOINT PUBL'N 3-68, NONCOMBATANT EVACUATION OPERATIONS (2015) [hereinafter JOINT PUB. 3-68].

3. Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665 ¶ 93 (Dec. 16); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 ¶ 165 (Dec. 19); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 35 (Apr. 9).

4. UN Charter, art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); Nicar. v. U.S., 1986 I.C.J. at 99-100 ¶¶ 188-90.

5. *See* AREND AND BECK, *supra* note 1, 108 (providing examples of such positions); Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1628–33 (1984); JULIUS STONE, AGGRESSION AND WORLD ORDER 95–96 (1958).

eventually aborted due to technical failure.[6] The Independent International Fact-Finding Mission on the Conflict in Georgia also alluded to such a restrictive reading, stating that a military action with a strictly focused mission of limited duration "is lawful if it does not fall under the scope of the prohibition on the use of force, because it remains below the threshold of gravity, and/or because it is not 'directed against the territorial integrity or political independence' of a state, as formulated in Art. 2(4) of the UN Charter."[7]

However, this negative understanding of the deployment of military forces abroad—i.e., deployments do not violate the UN Charter when they are not directed against a state's territorial integrity or political independence—is not widely endorsed.[8] It also runs contrary to state practice. Indeed, the United States justified its rescue operation in Iran as an "exercise of its inherent right of self-defense, with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy."[9] As the International Court of Justice affirmed in *Nicaragua v. Costa Rica*, even the mere presence of military forces in the territory of another state involves a violation of the latter's sovereignty without justification.[10]

Arguably, the violation of sovereignty itself may be justified when there are no other means available to safeguard a state's nationals facing extreme dangers abroad, including threats to life.[11] Under the law of state responsibility, the plea of necessity may be invoked as a circumstance precluding the wrongfulness of an act in breach of international law under exceptional circumstances.[12] Necessity may be invoked when an act is the only means to safeguard an essential interest of the state against a grave and imminent peril and it does not seriously impair an essential interest of the state or states toward which the obligation exists, or the international community as a whole.[13] Potentially, threats of violence directed against a state's nationals abroad could constitute a grave and imminent peril to its essential interest when "the peril is clearly established on the basis of the

6. *See* Mathias Forteau & Alison *See* Ying Xiu, *The US Hostage Rescue Operation in Iran – 1980*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 306, 312–13 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018) and literature cited therein.

7. II REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 286 (2009) [hereinafter CONFLICT IN GEORGIA REPORT].

8. Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, *in* I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 215–16 (3d ed. Bruno Simma et al. eds., 2012); Tom Ruys, *The Meaning of "Force" and the Boundaries of the* Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?* 108 AM. J. INT'L L. 159 (2014).

9. Letter dated 25 April 1980 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/13908 (Apr. 25, 1980).

10. Nicar. v. Costa Rica, 2015 I.C.J. at 703 ¶ 93. The Court, however, abstained from examining whether the presence of military forces constituted an unlawful use of force. *Id*. at 704 ¶97.

11. *See, e.g*., Jean Raby, *The State of Necessity and the Use of Force to Protect Nationals*, 26 CAN. Y.B. INT'L L. 253 (1988).

12. G.A. Res. 56/83 Articles on Responsibility of States for Internationally Wrongful Acts, art. 25, (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

13. *Id.*

evidence reasonably available at that time."[14] In a previous report, the International Law Commission alluded to the possibility that the plea of necessity might preclude the wrongfulness of "certain actions by States in the territory of other States which, although they may sometimes be coercive in nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression."[15] The report was referring specifically to the protection of "the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State."[16]

Roberto Ago, the Rapporteur of the International Law Commission report, conceded that the plea of necessity has rarely been invoked as a justification for the protection of nationals abroad in state practice.[17] Satisfying the strict conditions for necessity by demonstrating that the lives of nationals at risk outweigh the sovereign rights to territorial integrity and political independence is inherently difficult. The International Law Commission ultimately concluded that the legality of military action abroad was a matter regulated by the primary obligations, rather than the secondary rules of state responsibility.[18] Relying on the plea of necessity is not a substitute for establishing a justifiable legal basis for a military intervention to protect nationals abroad, especially when such an action would otherwise constitute a use of force prohibited under customary international law.[19]

For these reasons, states have relied on two legal grounds to justify military deployment for the protection, rescue, and evacuation of nationals abroad: host state consent and the right of self-defense. These two justifications are often conflated and couched in political language in official pronouncements, which tends to obscure the exact legal basis for the operation.[20] For example, in justifying the deployment of military forces to Panama in December 1989, the U.S. Government invoked both consultation with the duly elected government and the right of self-defense as the basis for its action to protect American lives, among other objectives.[21] As this example

14. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. GAOR Supp. No. 10, at 83, U.N. Doc. A/56/10 (2001) [hereinafter ILC Commentaries].

15. *Addendum to the Eighth Report on State Responsibility by Mr. Roberto Ago*, II(1) Y.B. Int'l L. Comm'n, at 38 ¶ 56, UN Doc. A/CN.4/318/Add.5-7 (1980).

16. *Id.*

17. *Id.* at 43-44 ¶ 65. By contrast, there are a few occasions where the plea of necessity was invoked in respect of humanitarian intervention. *See e.g.* Legality of Use of Force (Serbia and Montenegro v. Belgium), Oral Pleading, at 17-18, Verbatim Record 1999/15 (May 10, 1999); S/PV.3988, 12 (Mar. 24, 1999); S/PV.873 ¶¶ 182, 192 (July 13, 1960); S/PV.877, ¶ 142 (July 20, 1960).

18. ILC Commentaries, *supra* note 14, at 84. *See also* CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART, at 315 (2013).

19. *See generally* Schacter, *supra* note 5.

20. *See, e.g.*, Wingfield & Meyen, *supra* note 1, at 46 (Lebanon in 1958), 52 (the Congo in 1960), 61–62 (Dominican Republic in 1965), 100 (Mauritania in 1977), 101 (Zaire in 1978).

21. *See* Letter dated 20 December 1989 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/21035; Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 547–48 (1990).

illustrates,[22] the conflation of different legal justifications is often reflective of multiple objectives and motives that underscore the political decision to commit military forces for overseas deployment. Masked in the use of opaque language are the problems with each of these grounds as the sole justification for rescue and evacuation operations.

A. State Consent

Host state consent is the first port of call when it is issued by a lawful governmental authority. This is because international law has long recognized consent as a key manifestation of state sovereignty whereby the requesting state agrees to an exercise of forcible measures by another subject of international law on its own territory.[23] Host state consent validates the deployment of foreign forces which would otherwise amount to a breach of sovereignty.[24] Consent is also established as one of the circumstances precluding wrongfulness that excuses non-performance of relevant obligations, such as respect for sovereignty and the prohibition of the use of force.[25]

To be effective, host state consent must be valid. This means that consent must be given by those who have the authority to do so and that consent must be clearly established.[26] The authority to consent is not clearly defined, but in general, the relevant considerations for determining validity will depend on the legal context in which the issue arises.[27] Nevertheless, consent must be indicated in an official manner and may not simply be presumed.[28] If, for example, local authorities assist foreign troops with their rescue or evacuation efforts, that conduct would constitute evidence of consent even if such consent is not expressed verbally or in writing.[29] In this respect, consent must be distinguished from mere acquiescence on the part of the territorial state. The failure to protest when circumstances call for some reaction cannot be construed as consent.[30]

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22. The U.S. objectives of this operation were: (1) to protect American lives, (2) to assist the lawful and democratically elected government in Panama, (3) to seize and arrest General Noriega for drug trafficking offences, and (4) to defend its rights under the Panama Canal Treaties. *See* Nicholas Tsagourias, *The US Intervention in Panama – 1989*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 426 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018) (providing detailed analysis).

23. ERIKA DE WET, MILITARY ASSISTANCE ON REQUEST AND THE USE OF FORCE 1 (2020).

24. *See* Nicar. v. Costa Rica, 2015 I.C.J. at 665 ¶ 93; Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 168 ¶ 52; U.K. v. Alb., 1949 I.C.J. at 4, 35.

25. Articles on State Responsibility, *supra* note 12, at art. 20. For debates regarding the legal nature of consent, *see* CRAWFORD, *supra* note 18, at 288-89 (2013); Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. J. INT'L L. 1, 16–18 (2013).

26. Articles on State Responsibility, *supra* note 12, commentary to art. 20.

27. CRAWFORD, *supra* note 18, at 285-86; Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT'L & COMP. L. Q. 211, 213 (2004).

28. CRAWFORD, *supra* note 18, at 284–85; Affeff Ben Mansour, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 439, 441–43 (James Crawford, Alain Pellet, & Simon Olleson eds., 2010).

29. *See* Savarkar (Fr. v. Gr. Brit.), XI R.I.A.A. 243, 254 (Perm. Ct. Arb. 1911).

30. The absence of protest may be of probative value as a constituent element of prescription for sovereign title or estoppel as a general principle of law. *See* Temple of Preah Vihear (Cambodia v.

Furthermore, uncertainty regarding the legitimacy of the host state government can pose a significant challenge to securing valid consent. In uncertain or hostile environments in particular, questions of legitimacy and authority can complicate determinations of consent and the establishment of a legal basis to proceed with a NEO. This was indeed the case in Grenada in 1983 when the United States deployed military forces to the island nation at the request of the Governor-General, whose validity was questioned due to a constitutional crisis triggered by a coup d'état.[31] Under international law, the authority of a host state government to request military assistance rests exclusively with the de jure government—the local regime that is recognized as the sovereign authority with legal capacity to represent its own state in international relations.[32] The validity of host state consent is open to serious questions when there is instability created by the collapse of or challenge to governmental authority, which is often the very reason why military intervention is required.

Host state consent may also impose limits on the scope and duration of the activities that are authorized to take place on the host state's territory. Moreover, the consent of one state cannot preclude the wrongfulness of an act in relation to another state.[33] For example, a host state's consent to the deployment of military forces in its territory does not constitute consent to deploy forces to another state; dispatching forces to a separate state on the basis of another host state's consent would be an act of aggression.[34] In *Armed Activities in the Congo*, the International Court of Justice noted that the Congo's consent to Uganda's military presence was limited in terms of geographic location and objectives to actions "against rebels on the eastern border and in particular to stop them from operating across the common border."[35] Accordingly, the Court found that military action outside of the terms of the consent could not be justified on the basis of host state consent.[36]

When host state consent serves as the basis for the deployment of foreign forces to that host state, the terms of consent determine what actions a sending state's military forces can lawfully conduct in the territory. The terms of consent are a critical condition of the sending state's presence in the host state. Significantly, terms of consent that do not authorize the use of force or expressly

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Thail.), Judgment, 1962 I.C.J. 6, 39-43 (separate opinion by Alfaro, J.), 62-65 (separate opinion by Fitzmaurice, J.). *See also* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Points of Substantive Law Part II*, 32 BRIT. Y.B. INT'L L. 20, 59-60 (1955–56) (identifying four different legal effects).

31. For details, *see* Nabil Hajjami, *The Intervention of the United States and Other Eastern Caribbean States in Grenada – 1983*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 383, 393 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018) and literature cited therein.

32. DE WET, *supra* note 23, at 21–22; STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 5 (1998).

33. *See, e.g.*, ILC Commentaries, *supra* note 14, at 73–74.

34. G.A. Res. 3314 (XXIX), art. 3(e) (Dec. 14, 1974).

35. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 198–99 ¶ 52.

36. *Id.* at 215 ¶ 112, 224 ¶ 149.

deny such authorization could become an impediment to the protection of a state's nationals abroad. The protection of nationals under such terms of consent can create legal problems when, for example, the sending state's forces are at risk of confronting belligerent forces engaged in combat or encountering recalcitrant actors committing acts of violence against civilians. Arguably, a military deployment conditioned on abstention from the use of force that results in a breach of this condition, analogous to failure to pay rent for the use of the host state's facilities, does not necessarily fall outside of the limits of consent.[37] However, such a position cannot be maintained when the condition forms the very basis upon which the host state decided to issue its consent. The territorial state may have withheld consent if, for example, there are concerns about interference with its own efforts to suppress rebel movements.

B. The Right of Self-Defense

The right of a state to intervene for the protection and evacuation of its nationals abroad is deeply rooted in nineteenth-century doctrines of self-protection, self-help, and self-preservation.[38] However, opinions differ as to whether the right to intervene to protect nationals survived the codification of the right of self-defense in Article 51 of the UN Charter as an independent legal basis for intervention, or whether the right of self-defense encompasses the protection of nationals abroad.[39] The distinction between these concepts is somewhat nebulous. Derek Bowett suggested that the exercise of self-defense is intended to preserve the status quo and does not serve a remedial function.[40] By contrast, self-help does take on a remedial character, and it is this enforcement role that, under the UN Charter system, is entrusted to collective security organs.[41] Andrew Thomson concludes that before the adoption of the UN Charter, armed intervention to protect nationals abroad was a recognized part of self-defense under customary international law.[42] Whether the doctrines of self-help or self-defense may legally justify a state's deployment of military forces to protect its nationals abroad remains somewhat controversial today, and this uncertainty affects how the legal basis for NEOs may be evaluated.

In an influential essay, Sir Humphrey Waldock suggested that military intervention to protect one's nationals abroad might be justified as an exceptional measure of self-protection if three conditions were met: (1) an imminent threat of injury to nationals exists; (2) the territorial sovereign fails or is unable to protect them; and (3) measures of protection are strictly confined to the object of

37. ILC Commentaries, *supra* note 14, at 74 n.327.

38. *See* Wingfield & Meyen, *supra* note 1, at 1-4.

39. For a review of this debate, *see, e.g.*, Andrew W.R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operations*, 11 WASH. UNIV. GLOB. STUD. L. REV. 627, 639-44 (2012); Ruys, *supra* note 1, at 234-38.

40. DEREK W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 11 (1958).

41. *Id.*

42. Thomson, *supra* note 39, at 644.

protecting them against injury.[43] Drawing from the *Caroline* principles,[44] Waldock observed that this justification was based on the instant and overwhelming need for action to save the lives of nationals and "remain[ed] untouched by the Charter."[45] A competing position holds that military intervention for the protection of nationals is incompatible with the general prohibition on the use of force under Article 2(4) of the Charter and any attempt to adopt it as an aspect of self-defense lends itself to abuse.[46] Indeed, the protection of nationals has been used as a pretext for military intervention in various post-Charter cases, such as the 1956 British intervention in the Suez,[47] the 2008 Russian intervention in Georgia,[48] and the 2022 Russian invasion of Ukraine.[49] However, the fear that the protection of nationals abroad doctrine may be subject to abuse is a policy concern, not a legal argument that undermines the validity of military intervention to protect nationals as an exercise of the right of self-defense.

Meanwhile, debates over self-defense as a legal justification stem from concerns that military operations to protect nationals abroad do not meet the requisite conditions for the exercise of self-defense.[50] Is a threat of violence directed against nationals residing in a foreign country sufficient to qualify as an "armed attack" against the state of their nationality? Would such a threat satisfy a condition precedent to the exercise of the right of self-defense, and is the threat incapable of being addressed by non-forcible means? The mere risk of violence to nationals stretches the notion of an "armed attack" too broadly, as does a general threat of violence that is not directed against any particular group of people. As in many other contexts, the gravity of physical violence and imminence with which it is likely to materialize are key considerations in determining when the right of self-defense may be invoked.

Additional questions arise in circumstances where the host state is not responsible for the imminent threat of violence against foreign nationals in its territory. In its advisory opinion on the *Legal Consequences of the Construction of a Wall*

43. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 467 (1952).

44. II JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW §217 (1906).

45. Waldock, *supra* note 43, at 503.

46. *See* Ruys, *supra* note 1, 236 n.17 for a list of publicists who adopt this position.

47. *See* Geoffrey Marston, *Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government*, 37 INT'L & COMP. L. Q. 773 (1988).

48. *See* James A. Green, *Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence*, *in* CONFLICT IN THE CAUCASUS: IMPLICATIONS FOR INTERNATIONAL LEGAL ORDER 54-79 (James A. Green & Christopher P.M. Waters eds., 2010); CONFLICT IN GEORGIA REPORT, *supra* note 7, at 288–89.

49. *See* Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, ARTICLES OF WAR (Feb. 28, 2022), https://perma.cc/ETZ2-9MGK; *see also* Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2022/154 (Feb. 24, 2022).

50. *See e.g.*, Rex J. Zedalis, *Protection of Nationals Abroad: Is Consent the Basis of Legal Obligation*, 25 TEXAS INT'L L.J. 209, 235-38 (1990); Josef Mrazek, *Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law*, 27 CANADIAN Y.B. INT'L L. 81 (1989); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 300 (1963).

in the Occupied Palestinian Territory, the International Court of Justice hinted that an inherent right of self-defense is recognized only in cases of an armed attack launched by one state against another.[51] Under this interpretation, the right of self-defense would not apply to situations where non-state actors, such as insurgents or opposition forces, rather than the territorial state are the cause of the imminent threat of violence. An increasing number of states, however, have adopted a more expansive view by extending the right to act in self-defense against non-state actors,[52] especially when the host state is unwilling or unable to prevent such attacks.[53]

The key to this doctrinal problem, as Dame Rosalyn Higgins has put it, is whether "self"-defense does in fact apply to civilian nationals abroad.[54] There is strong support for the view that the right of self-defense can be invoked against an actual or imminent danger to government agencies or the life of their own nationals that constitute an "armed attack" upon the state.[55] According to this view, an attack on foreign nationals as a means of retaliation or to exact concessions from the state of their nationality amounts to an armed attack on the state itself.[56] An illustrative case in point is Israel's Entebbe raid of 1976,[57] which Israel justified as an exercise of "the right of a state to take military action to protect its nationals in mortal danger."[58] The U.S. supported this plea of self-defense against "an imminent threat of injury or death" where the local authority was either unwilling or unable to provide effective protection.[59]

How far the notion of "self" extends within the context of a state's inherent right of self-defense can have serious implications for the use of force to protect nationals abroad. An isolated incident of violence against individuals or their rights can hardly be equated to an attack against the state of their nationality. In contrast, massive and systematic attacks against groups of individuals because of their nationality could satisfy the requisite condition for the exercise of the right

51. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 135, 194 ¶ 139 (July 9).

52. See various views expressed in the Arria-formula meeting convened by Mexico, annexed to Letter dated 8 March 2021 from the Permanent Representative of Mexico to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2021/247 (Mar. 16, 2021).

53. *See e.g.*, Jutta Brunnée & Stephen J. Toope, *Self-Defense against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?*, 67 INT'L & COMP. L. Q. 263 (2018); Elena Chachko & Ashley Deeks, *Which States Support the "Unwilling and Unable" Test?*, LAWFARE (Oct. 10, 2016), https://perma.cc/DN7B-RHAB.

54. Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, 37 BRIT. Y. B. INT'L L. 269, 316 (1961).

55. *See e.g.*, Quincy Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L.112, 117 (1959).

56. Terry D. Gill & Paul A.L. Ducheine, *Rescue of Nationals*, *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 2nd ed. 240, 242 (Terry D. Gill & Dieter Fleck eds, 2016).

57. *See e.g.*, David J. Gordon, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 CASE W. RESERVE J. OF INT'L L. 117, 127–32 (1977).

58. U.N. SCOR, 31st sess., 1939th mtg. at ¶ 106, U.N. Doc. S/PV.1939 (July 9, 1976).

59. U.N. SCOR, 31st Sess., 1941st mtg. at ¶ 77, U.N. Doc. S/PV.1941 (July 12, 1976).

of self-defense.[60] The notion of "self" could also extend to third-party nationals when they are designated for protection and evacuation, especially in the context of multi-national coordination of evacuation efforts.[61] Alternatively, the protection of third-party nationals could be justified on the basis of collective self-defense upon request from their states of nationality.

However, state practice and reaction to military interventions for the protection of nationals abroad have been fragmented and divisive, and no clear standard has been applied to answer these threshold questions.[62] John R. Dugard, acting as the Special Rapporteur for the International Law Commission, attempted to clarify a standard by proposing certain criteria, similar to Waldock's aforementioned conditions, to justify the use of force as a means of diplomatic protection in the rescue of nationals.[63] The proposal received little support, however, and it was eventually abandoned.[64] Thus, under modern international law, the legality of the use of force by a state to protect its own nationals in a foreign country without the latter state's consent remains unsettled.

III. NON-COMBATANT EVACUATION OPERATIONS

As noted above, NEOs are a subset of military operations conducted to protect nationals abroad. Unlike forcible rescue or recovery operations and military interventions, NEOs have elicited relatively little legal scrutiny or criticism. The lack of pushback may be due to their apparent reliance on host state consent and their relatively short durations.[65] Whatever the reasons, establishing the legal basis for a NEO operation is critical to ensuring evacuation forces understand the legal operating environment in theater. This includes recognizing when, if at all, they may lawfully use force to respond to threats as they arise and the legal implications of any such use of force. This section describes how NEOs are viewed from an operational planning perspective using current U.S. doctrine as a framework.

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60. Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 215–16 (1999).

61. Yoram Dinstein emphasizes that the rationale of self-defense is founded in the nexus of nationality, distinguishing the protection of non-nationals as a "by-product" of the rescue of own nationals from the protection of non-nationals who are connected by historical or ethnic ties to the intervening State: YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 279 (6th ed. 2017).

62. *See e.g.*, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 165–66 (4th ed. 2018); TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 213–43 (2011); OLIVIER CORTEN, THE LAW AGAINST WAR 534–37 (2010); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 78–96 (2002).

63. John R. Dugard (Special Rapporteur), *First Report on Diplomatic Protection*, U.N. Doc. A/CN.4/506 and Add. 1, at 218–20 (Apr. 20, 2000) (proposing the right be narrowly formulated so that (i) it may not be invoked to protect the property of nationals abroad; (ii) it may only be invoked in emergencies in which nationals are exposed to immediate danger; and (iii) it may only be invoked when the territorial state lacks the capacity or willingness to protect them).

64. Ruys, *supra* note 1, at 256–59.

65. For example, during the evacuation of U.S. embassy personnel from Khartoum, Sudan in April 2023, evacuation forces reportedly spent less than an hour on the ground before transporting evacuees to safety. Jim Garamone, *U.S. Forces Evacuate Americans from Khartoum Embassy*, DOD NEWS (Apr. 23, 2023), https://perma.cc/VBN6-9JAA.

A. Operational Concept

Under U.S. doctrine, not every operation to protect, rescue, or evacuate non-combatants abroad is considered a "NEO." As a matter of policy, a NEO is defined more specifically as "an ordered departure for personnel under chief of mission (COM) authority and assisted evacuation for other U.S. citizens and designated personnel from a threatened area abroad that is carried out with the assistance of DOD [Department of Defense]."[66] Here, the term "ordered" is used in the sense of "directed" or "mandated" rather than "orderly" or "controlled." Orderly withdrawals are difficult under the tense, often frenetic circumstances that give rise to NEOs. Moreover, the U.S. NEO definition includes two important qualifications. First, the operation must be directed by the Chief of Mission (COM)—a diplomatic representative from the Department of State (DOS). Second, the operation must involve DOD assets, such as personnel and equipment.

Without commenting on the international legal basis for the protection of nationals abroad, U.S. doctrine alludes to the authority vested in the Secretary of State to provide for the evacuation of designated non-combatants.[67] The official most commonly associated with the decision to order a NEO is the senior U.S. diplomatic agent assigned in the host nation, usually the ambassador, who acts as COM.[68] When an ambassador is not assigned, the highest ranking DOS agent in the post—for example, the chargé d'affaires or consul general—serves as the COM.[69] As the President's personal representative to the host nation, the COM is "the lead federal official for the protection and evacuation of all U.S. civilians designated as noncombatant evacuees, including DOD dependents."[70]

The second qualification of a NEO is the involvement of military forces under DOD authority. Ordered departures of personnel from a host nation that take place without DOD assistance are not NEOs.[71] These evacuations may be

66. JOINT PUB. 3-68, *supra* note 2, at I-1.

67. Memorandum of Agreement between the Departments of state and Defense on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons from Threatened Areas Overseas, ¶ c.2.b, (July 1998) [hereinafter Memorandum of Agreement].

68. Formally, the Under Secretary of State for Management possesses the authority to approve the ordered departure of U.S. government personnel and dependents other than uniformed personnel of the U.S. Armed Forces and designated emergency-essential DOD civilians who are not under the authority of the COM. *See* 1 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, § 044.1(11) (June 7, 2011, updated June 6, 2023). The COM must request an ordered departure (including a NEO) through the Under Secretary of State for Management, except when circumstances do not permit. *See* Memorandum of Agreement, *supra* note 67, at ¶ D.1.a (stating that "[w]hen hostilities or disturbances occur with complete surprise or appear imminent," the COM may invoke elements of an emergency evacuation plan "while simultaneously informing the Department of State").

69. JOINT PUB. 3-68, *supra* note 2, at I-3.

70. *Id*. at I-1 to I-2.

71. 3 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 3771 (Sept. 24, 2018, updated Apr. 19, 2021). The *Foreign Affairs Manual* explains that an "ordered departure" is "[a]n evacuation procedure by which the number of U.S. government employees, eligible family members, or both, at a Foreign Service post is reduced. Ordered departure is mandatory and may be initiated by the chief of mission or the Secretary of State." *Id*. By comparison, an "authorized departure" is "[a]n evacuation procedure,

accomplished through commercial or chartered transportation rather than the use of military assets and are far more common than NEOs.[72] For example, a 2017 Government Accountability Office (GAO) study on embassy evacuations and emergency preparedness found that between October 2012 and September 2016, DOS evacuated post staff and their families from 23 U.S. embassies and consulates as a result of various overseas threats.[73] None of those evacuations involved DOD assistance. More recently, in the lead-up to Russia's invasion of Ukraine in February 2022, DOS both authorized the voluntary departure of some U.S. government employees and ordered the departure of dependent family members from its embassy in Kyiv.[74] U.S. military assets were not requested to accomplish these evacuations, and therefore, it did not constitute a NEO.

U.S. doctrine cautions that because the COM's decision to evacuate will be driven not only by the nature of the threat, but also by diplomatic and political considerations, "[t]he order to evacuate may not be given at the most opportune time."[75] Accordingly, an evacuation order "may be delayed until the last possible moment to avoid actions that may be viewed as a tacit admission of diplomatic and/or political failure or lack of USG [U.S. Government] confidence in the HN [Host Nation] government."[76] The decision to act at "the last possible moment" reflects the self-defense calculus at play during a NEO, though, as discussed in Section II, the right of self-defense as a justification for the protection of nationals abroad remains unsettled under modern international law.

B. Operational Environment

As the 2021 Afghanistan NEO underscored, evacuation takes place in a dynamic environment that can change rapidly.[77] Adaptability, therefore, has been

short of ordered departure, by which post employees and/or eligible family members are permitted to leave post in advance of normal rotation when U.S. national interests or imminent threat to life requires it. Departure is requested by the chief of mission (COM) and approved by the Under Secretary for Management (M)." *Id.*

72. *See* JOINT PUB. 3-68, *supra* note 2, at I-1 (contrasting NEOs with "ordered departures that do not require DOD assistance, but are carried out using commercial or chartered transportation").

73. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-714, EMBASSY EVACUATIONS: STATE DEPARTMENT SHOULD TAKE STEPS TO IMPROVE EMERGENCY PREPAREDNESS 1 (2017).

74. *See* Press Release, U.S. Embassy in Ukraine, Department of State Authorizes Departure for U.S. Government Employees, Orders Departure for Family Members (Jan. 24, 2022), https://perma.cc/FM89-UT6T.

75. JOINT PUB. 3-68, *supra* note 2, at I-3.

76. *Id.*

77. In May 2021, the Taliban launched an intense summer offensive that wrested much of the country from government control. Taliban forces swept through district after district in an inexorable march toward the capital, and on August 15, 2021, the Afghan government collapsed when Taliban forces finally entered Kabul. Due to the rapidly deteriorating security situation, the U.S. announced the commencement of a non-combatant evacuation operation (NEO) on August 14, with the deployment of more than 5,000 troops. Several other nations followed suit but struggled to coordinate evacuation efforts with full capacity. For details, *see* S. COMM. ON FOREIGN RELS., MINORITY REP., 117TH CONG., LEFT BEHIND: A BRIEF ASSESSMENT OF THE BIDEN ADMINISTRATION'S STRATEGIC FAILURES DURING THE AFGHANISTAN EVACUATION (Feb. 2022), https://perma.cc/KYM7-CYWG; FOREIGN AFFAIRS COMMITTEE, MISSING IN ACTION: UK LEADERSHIP AND THE WITHDRAWAL FROM AFGHANISTAN, 2022-3,

a hallmark of most successful NEOs. Broadly speaking, NEOs may take place in three general types of operational environments: permissive, uncertain, and hostile.

A permissive environment is one in which the host nation maintains control over the area and is willing and capable of assisting evacuation operations.[78] Under these circumstances, no resistance to the evacuation is expected. Accordingly, the NEO "would require little or no assembly of combat forces in country."[79] Military forces' immediate concerns may center on logistical challenges, transportation questions, or administrative processing, but security should always remain a primary consideration. Even in permissive environments, threats may necessitate a response by military forces.[80]

An example of a NEO that might take place in a permissive environment is a NEO ordered in response to a natural disaster.[81] Evacuations resulting from natural disasters include Operation Fiery Vigil following the 1991 eruption of Mount Pinatubo in the Philippines[82] and Operation Pacific Passage following the 2011 earthquake and tsunami that severely damaged the Fukushima Daiichi nuclear power plant in Japan.[83] Though technically not NEOs under U.S. doctrine—because they were mandated by DOD, not DOS—both operations occurred where host country military and law enforcement agencies exercised control and were supportive of U.S. evacuation efforts. Security can always become an issue in the aftermath of a natural disaster. Hurricane Katrina, which occurred on U.S. soil, provides a stark reminder of this.[84] Even in permissive environments, therefore, NEO forces must be prepared for military action to protect designated persons as necessary.

By comparison, in uncertain environments, the host nation's ability to control territory and the population, regardless of whether the host state supports a potential NEO, is tenuous at best. In these situations, the obscurity of the operational picture militates in favor of a larger military force capable of responding to potential dangers. Additional security forces may be co-located with the evacuation force, or they may be positioned further afield, within a reasonable range to

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HC 169/685 (UK); SENATE, AUSTRALIA'S ENGAGEMENT IN AFGHANISTAN: INTERIM REPORT (Jan. 2022) (AUS); Junnosuke Kobara, *Afghanistan Turmoil: Japan Evacuation from Afghanistan Foiled by Foot-Dragging*, NIKKEI ASIA (Aug. 28, 2021), https://perma.cc/FA9X-6ZX9.

78. JOINT PUB. 3-68, *supra* note 2, at IV-14 to IV-15.

79. *Id.* at IV-14.

80. *Id.* at IV-1 to IV-15 ("While a minimum number of security forces may be used, prudent preparations should be in place to enable the force conducting the NEO to respond to threats as required.").

81. *See, e.g.*, Ryan Eyre, *Complexities in Non-Combatant Evacuation Operations* 2 (2011), https://perma.cc/6AAW-57NX (citing Canada's operation to evacuate Canadian citizens following the January 12, 2010 earthquake in Haiti). *See generally* C. R. ANDEREGG, THE ASH WARRIORS (2000).

82. *See, e.g.*, Philip Shenon, *20,000 Ordered Back to the U.S., Fleeing Volcano*, N.Y. TIMES (Jun. 17, 1991).

83. *See, e.g.*, NORAD and USNORTHCOM Public Affairs, *USNORTHCOM Announces Operation Pacific Passage* (Mar. 22, 2011), https://perma.cc/GCP4-ZC8G.

84. *See generally* JAMES A. WOMBWELL, ARMY SUPPORT DURING THE HURRICANE KATRINA DISASTER (2009).

react.[85] Options include positioning reaction forces at sea or at an intermediate staging base.[86] Examples of NEOs that occurred in uncertain environments include the 1996 evacuation of U.S. nationals from Liberia, the 2021 Afghanistan NEO,[87] and the 2023 evacuation of U.S. embassy personnel from Sudan. During Operation Assured Response (the Liberia NEO), U.S. forces established an intermediate staging base in Freetown, Sierra Leone, approximately 190 nautical miles from Liberia's capital of Monrovia.[88]

NEOs that take place in hostile operational environments require the most intensive use of military assets. Hostile environments could include situations involving civil disorder, terrorist activity, or full-fledged armed conflict.[89] Under these circumstances, Joint Publication 3-68 advises that military forces "may be required to conduct a forcible entry operation, establish defensive perimeters, escort convoys, participate in PR [personnel recovery] operations, and perform the screening of evacuees normally accomplished by DOS."[90] The dangers inherent in hostile environments will generally demand the deployment of the most sizable security elements of their kind.[91] As with uncertain environments, these forces may be co-located with the evacuation force, or they may be positioned at an intermediate staging base. Operation Frequent Wind, the dramatic U.S. evacuation from Saigon at the end of the Vietnam War, is a prominent example of a NEO that occurred in a hostile operational environment.

C. Challenges of Uncertain Operational Environments

The 2021 Afghanistan NEO illustrates the unpredictability of uncertain operational environments and the importance of understanding the legal basis for evacuations under uncertain conditions. Operation Allies Refuge, the name of the U.S. military operation to support the relocation of Afghan nationals and their families, began under the dynamic circumstances of an ongoing armed conflict. In the summer of 2021, a devastating offensive by Taliban forces solidified the group's hold on the country and eventually precipitated the collapse of the Afghan

85. *See* JOINT PUB. 3-68, *supra* note 2, at IV-15.

86. *See id.* An intermediate staging base or "ISB" is "a temporary location used to stage forces prior to inserting the forces into the HN [host nation]." *Id.* at V-1.

87. The 2021 Afghanistan NEO is best described as having occurred in an uncertain, rather than a hostile, environment because U.S. evacuation efforts did not meet with the type of resistance characteristic of a hostile environment even though it transpired under the dynamic circumstances of an ongoing armed conflict and the civil disorder that followed the fall of Kabul. *See infra* notes 113–115 and accompanying text.

88. *See* John W. Partin & Rob Rhoden, *Operation Assured Response: SOCEUR's NEO in Liberia, April 1996*, U.S. SPECIAL OPERATIONS COMMAND, HISTORY AND RESEARCH. OFFICE (Sept. 1997), https://perma.cc/R4EH-JDJ8.

89. *See, e.g.*, JOINT PUB. 3-68, *supra* note 2, at IV-15.

90. *See id.*

91. *Id.* French forces came under fire while conducting a NEO in Sudan as the conflict between government forces and a paramilitary group intensified in April 2023. Both parties blamed each other for the deaths caused as a result. *See* Eliza Mackintosh, *Foreign Powers Rescue Nationals While Sudanese Must Fend for Themselves*, CNN (Apr. 24, 2023), https://perma.cc/N47G-JJDB.

government.[92] At the time, few anticipated the swiftness of the Taliban's advance or its ultimate outcome.[93] By June, the Taliban controlled nearly a quarter of Afghanistan's 400 district centers.[94] By July, the Taliban controlled over half. In early August, the Taliban captured its first provincial capital.[95] By mid-August, half of Afghanistan's provincial capitals had fallen to the Taliban.[96] As the security situation crumbled, President Ashraf Ghani fled the country, later claiming that he left in order to save Kabul from destruction.[97] Kabul fell that same day, August 15, 2021, less than 45 days after U.S. forces withdrew from their main military base at Bagram airfield.[98]

The State Department officially declared the Afghanistan NEO on August 14, weeks after the July 17 start of Operation Allies Refuge and mere hours before the Taliban entered Kabul.[99] It is worth emphasizing that the Afghanistan NEO and Operation Allies Refuge were not synonymous or coextensive. The decision to ultimately declare the NEO was heavily influenced by diplomatic and political considerations, as various government officials made clear. For example, Secretary of Defense Lloyd Austin explained that DOS officials "were being cautioned by the Ghani administration that if they withdrew American citizens and SIV [Special Immigrant Visa] applicants at a pace that was too fast, it would cause a collapse of the government that we were trying to prevent."[100]

92. *See* CLAYTON THOMAS, U.S. MILITARY WITHDRAWAL AND TALIBAN TAKEOVER IN AFGHANISTAN: FREQUENTLY ASKED QUESTIONS 10 (2021). The U.S. and the Islamic Republic of Afghanistan agreed to a timeline for the withdrawal of all U.S. troops from Afghanistan following negotiations between the U.S. and the Taliban in February 2020. In accordance with the U.S. Afghanistan joint declaration, the U.S. agreed to a complete withdrawal of its forces by May 1, 2021. President Joseph R. Biden later pushed back the withdrawal date to September 11, 2021. Joint Declaration between the Islamic Republic of Afghanistan and the United States for Bringing Peace to Afghanistan, pt. 2(2), Feb. 29, 2020, https://perma.cc/7ES5-ARLW; President Joseph R. Biden, REMARKS BY PRESIDENT BIDEN ON THE WAY FORWARD IN AFGHANISTAN (Apr. 14, 2021), https://perma.cc/U93R-9SPK; *see also* Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States, Feb. 29, 2020, https://perma.cc/CGQ4-6789; *see also* Mujib Mashal, *Taliban and U.S. Strike Deal to Withdraw American Troops from Afghanistan*, N.Y. TIMES (Feb. 29, 2020).

93. *See, e.g.*, Dan De Luce, Mushtaq Yusufzai, & Saphora Smith, *Even the Taliban Are Surprised at How Fast They're Advancing in Afghanistan*, NBC NEWS (June 25, 2021), https://perma.cc/Q9Y2-7CNR.

94. *See, e.g.*, Thomas Gibbons-Neff and Eric Schmitt, *Security in Afghanistan Is Decaying, U.S. General Says as Forces Leave*, N.Y. TIMES (June 29, 2021).

95. *See* Adam Nossiter, Taimoor Shah, & Fahim Abed, *Taliban Seize Afghan Provincial Capital Just Weeks Before Final U.S. Withdrawal*, N.Y. TIMES (Aug. 6, 2021).

96. *See, e.g.*, Clarissa Ward, Brad Lendon, & Rob Picheta, *The Taliban Now Control Half of Afghanistan's Provincial Capitals*, CNN (Aug. 13, 2021), https://perma.cc/EF8M-3E6V.

97. *See* Sharif Hassan, *Former Afghan President Says He Fled Nation to 'Save Kabul'*, N.Y. TIMES (Dec. 30, 2021) (quoting Ghani as stating "I had to sacrifice myself in order to save Kabul").

98. THOMAS, *supra* note 92, at 12–13.

99. *See* C. Todd Lopez, *DOD Leaders Address Bagram Departure, Noncombatant Evacuation Operation Timing*, DOD NEWS (Sept. 29, 2021), https://perma.cc/K2TA-NRU5; *see also* S. COMM. OF FOREIGN RELS., 117TH CONG., MINORITY REPORT, LEFT BEHIND: A BRIEF ASSESSMENT OF THE BIDEN ADMINISTRATION'S STRATEGIC FAILURES DURING THE AFGHANISTAN EVACUATION 20 (Comm. Print 2022).

100. Lopez, *supra* note 99.

Accordingly, the delay in declaring the NEO, though not optimal from an operational standpoint, reflected a conscious effort not to undermine the Afghan government at a particularly vulnerable moment. The decision to finally evacuate, therefore, can be seen as evidence that the protection of nationals had become urgent and the need to act had truly become instant and overwhelming.

The volatility of the environment became tragically apparent when a suicide bomber detonated an explosive that killed 170 Afghan civilians and 13 U.S. service members outside the Abbey Gate of Hamid Karzai International Airport.[101] U.S. forces subsequently responded by targeting the individual whom officials believed was responsible for the bombing.[102] The operation, initially deemed a success, involved hours of surveillance and a drone-fired missile.[103] Later investigation revealed that the target worked for a non-governmental organization with no ties to the Islamic State of Iraq and Syria–Khorasan (ISIS-K), the group blamed for the attack.[104] The tense final days of the NEO serve as a reminder that uncertain operational environments are fragile and demand the vigilance of military forces in the execution of all military operations. The Afghanistan NEO officially ended on August 30, 2021, simultaneously concluding the U.S.'s two-decades-long involvement in Afghanistan. The NEO represented the largest non-combatant evacuation operation ever conducted by the United States, involving 5,000 service members to evacuate more than 79,000 civilians.[105]

D. The Legality of NEOs

In recent practice, states have stayed silent on the legal ground for NEOs. Indeed, NEOs have been carried out in the absence of legal or other criticism, for example, in Liberia (1990),[106] Albania (1997),[107] Libya (2011),[108] and Afghanistan (2021).[109] It remains to be seen if the general acquiescence to the recent NEOs in practice serves as evidence that the right to use force to evacuate non-combatants is

101. Brigadier General Lance G. Curtis, Report of Investigation on Attack against U.S. Forces Conducting NEO at Hamid Karzai International Airport on 26 August 2021 (2021); *see also* Jim Garamone, *U.S. Central Command Releases Report on August Abbey Gate Attack*, DOD NEWS (Feb. 4, 2022), https://perma.cc/U3RN-DN5V (stating that forty-five U.S. service members were also wounded in the attack).

102. *See, e.g.*, Matthieu Aikins, *Times Investigation: In U.S. Drone Strike, Evidence Suggests No ISIS Bomb*, N.Y. TIMES (Sept. 10, 2021).

103. *See id.* (stating military officials at first characterized the response as a "righteous strike.").

104. *Id.* The strike reportedly involved the killing of 10 civilians. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 73 (Oct. 30, 2021), https://perma.cc/S7KM-ZPER.

105. Jim Garamone, *Military Phase of Evacuation Ends, As Does America's Longest War*, DOD NEWS (Aug. 30, 2021), https://perma.cc/QTX5-6TUW.

106. *See* Wingfield & Meyen, *supra* note 1, at 205.

107. *See* Stefan Talmon, *Changing Views on the Use of Force: The German Position*, 5 BALTIC Y.B. INT'L L.41, 71–74 (2005).

108. *See* Francis Grimal & Graham Melling, *The Protection of Nationals Abroad: Lawfulness or Toleration? A Commentary*, 16 J. CONF. & SEC. L. 541 (2011).

109. *See* Ruys, *supra* note 1, at 251–53; *see also* TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 170–71 (2005).

emerging as customary international law, separate from the right of self-defense. Mere inaction is insufficient to constitute evidence of state practice or its acceptance as law. Instead, inaction must be established as a deliberate choice of abstention from acting in circumstances where states consider such practice to be consistent with international law.[110]

Alternatively, the absence of any controversy or objections to the recent practice of NEOs might suggest that states are content with military deployment for NEOs as an exercise of the right of self-defense to a limited extent that is necessary to rescue and evacuate foreign nationals and proportionate to the degree of risk to their lives. It may form part of a broader shift in state practice, as discussed earlier, with greater support for the idea that the right of self-defense may be invoked against a non-state actor without the consent of the territorial state from which an armed attack originates, in cases where the territorial state is either unwilling or unable to suppress it.[111] Although still evolving, the idea has rendered further support to the justification of rescue and evacuation operations conducted by military forces as an exercise of the right of self-defense, especially when the territorial state is either unwilling or unable to provide effective protection for foreign nationals.

The Afghanistan NEO demonstrated that host state consent could be vulnerable even in an uncertain, rather than a hostile, operational environment. Despite the armed conflict that raged at the start of Operation Allies Refuge and the civil disorder that followed the fall of Kabul, U.S. evacuation efforts did not meet with the type of resistance characteristic of a hostile operational environment. While in power, the Afghan government of Ashraf Ghani did not resist or oppose U.S. or other national evacuation efforts. For example, in addition to Operation Allies Refuge, the Afghan government allowed the United Kingdom to conduct its own evacuation operation, known as Operation Pitting.[112]

Later, after seizing the capital, the Taliban continued to permit evacuation efforts.[113] At a meeting in Doha, Qatar a day after Kabul's fall, the Taliban pledged not to interfere with evacuations from Hamid Karzai International Airport and agreed to a "deconfliction mechanism" to facilitate further

110. *See* Draft Conclusions on Identification of Customary International Law, with Commentaries, 133, Conclusion 6 Commentary ¶3, UN Doc. A/73/10 (2018); *see also* Third Report on Identification of Customary International Law, by Michael Wood, Special Rapporteur, ¶¶20-21, UN Doc. A/CN.4/682 (Mar. 27, 2015).

111. *See* Elena Chachko & Ashley Deeks, *Which States Support the "Unwilling and Unable" Test?*, LAWFARE (Oct. 10, 2016) (providing a survey of official positions among States). *But see* Ntina Tzouvala, *TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures*, 109 AJIL UNBOUND 266 (2015).

112. *See* U.K. Ministry of Defence, *Military Operation Established to Support the Drawdown of British Nationals from Afghanistan*, GOV.UK (Aug. 13, 2021), https://perma.cc/ZNA4-VWQK.

113. For example, in addition to Operation Allies Refuge and Operation Pitting, the Taliban allowed India's non-combatant evacuation operation, known as Operation Devi Shakti, to proceed. *See, e.g.*, *India's Afghanistan Evacuation Mission Termed 'Operation Devi Shakti'*, TIMES OF INDIA (Aug. 24, 2021, 3:00 PM), https://perma.cc/YD2T-82NC.

evacuations.[114] However, as discussed earlier, host state consent must be officially indicated by the de jure government, for example, in facilitating the landing of rescue aircraft. Mere acquiescence or failure to protest on the part of a de facto regime is insufficient to qualify as consent. The political agreement was also precarious in that despite these guarantees, General Frank McKenzie, the Commander of U.S. Central Command, felt compelled to warn the Taliban that "any attack would be met with overwhelming force in the defense of our forces."[115] Although the agreement forestalled an immediate onset of hostile resistance, the operational environment remained rife with uncertainty and negated host state consent as the legal basis for intervention.

The United Kingdom and the United States have adopted the position that the right of self-defense may include the rescue of nationals where the territorial state is unable or unwilling to protect them.[116] However, the doctrinal issues discussed earlier remain a bottleneck for the theoretical compatibility of this practice with the law of self-defense due to indeterminacy of the boundary of "self" as the object of protection within the inherent right of the state as a potential justification for the use of force in the territory of a host state without its consent.

Sir Derek Bowett suggested a pragmatic approach to this issue of indeterminacy. According to his view, no "counting heads" would serve any useful purpose in deciding at what stage a threat to nationals amounts to an armed attack against the state of their nationality.[117] Instead, one state's right of protection in self-defense must be weighed against the other state's right of territorial integrity as demanded by the requirements of necessity and proportionality.[118] This pragmatic consideration is also reflected in the U.S. doctrine on NEO, which states that "the NEO planners are aware of sovereignty of other foreign nations and the constraints and restraints on violating the sovereignty."[119]

The consideration of sovereignty is likely to be the focal point of judicial assessment. In the *Tehran Hostage* case, the International Court of Justice refrained from ruling on the legality of the attempted rescue operation, which the U.S. justified as an exercise of the right of self-defense under Article 51 of the Charter.[120] The Court made an observation that "an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine

114. Joseph Choi, *US Reaches Deal with Taliban on Evacuations: Report*, THE HILL (Aug. 16, 2021, 11:09 AM), https://perma.cc/L582-Q7DX.

115. U.S. Central Command Public Affairs, *Statement from Commander, U.S. Central Command, Gen Frank McKenzie*, Aug. 17, 2021.

116. U.S. DEP'T OF DEF., OFF. GEN. COUNS., LAW OF WAR MANUAL §1.11.5.3 (June 2023) [hereinafter U.S. DOD LAW OF WAR MANUAL]; U.K. MIN. DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 1.5 (2004).

117. BOWETT, *supra* note 40, at 93.

118. *Id*.

119. JOINT PUB. 3-68, *supra* note 2, App. B Legal Considerations ¶ f(2).

120. Letter from the Permanent Representative of the United States to the United Nations to the President of the Security Council, UN Doc. S/13908 (Apr. 25, 1980).

respect for the judicial process in international relations."[121] Its concern was rather directed at the contempt of court, expressing its displeasure about the U.S. action adopted in disregard of the order that the Court issued earlier requiring both parties to "ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution."[122] The Court did not address the legality of military intervention for the protection of nationals by simply noting that the question was not before the Court,[123] which meant that the issue was "left to another day."[124]

As the day has not yet come, it remains to be seen how the restrictive approach the Court subsequently adopted to the right of self-defense might be applied to determine the legality of NEOs. In *Nicaragua*, the Court defined an armed attack restrictively as "the most grave forms of the use of force,"[125] distinguishing it from less grave forms, such as the use of force to violate the existing international boundaries of another state, acts of reprisal, and organizing or encouraging the organization of irregular forces for incursion into the territory of another state.[126] Although the United States does not share this understanding,[127] its implications for the use of force to protect nationals abroad are worth noting. On the one hand, this indicates the possibility that the Court may not uphold the claim of self-defense as a justification for the use of force to protect nationals abroad, especially in situations where their lives are not in danger. But on the other hand, it signals the Court's reticence to characterize such deployment of troops as amounting to an armed attack, denying the territorial state's entitlement to the claim of self-defense in return.

At any rate, international courts and tribunals are unlikely to challenge a state's own assessment of the need for military deployment to protect its nationals abroad when there is a credible threat to their lives or risk of violence emerging in the host country. What remains unknown is whether military deployment based on such an assessment is going to be accepted within the purview of self-defense, stretching its scope to attacks directed against nationals, or as a separate legal basis analogous to "proportionate defensive measures" that Judge Simma alluded to in his separate opinion in *Oil Platforms* as defensive military action short of

121. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 43 ¶ 93 (May 24).

122. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979 I.C.J. 7, 21 ¶ 47 (Dec. 15).

123. U.S. v. Iran, Judgment, 1980 I.C.J. at 43–44 ¶ 94. *Cf. id*. at 55–57 (Judge Morozov dissenting opinion); 64–65 (Judge Tarazi dissenting opinion). *See also* Wingfield & Meyen, *supra* note 1, at 67–69 (discussing academic commentaries made at that time).

124. Ted L. Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, 76 AM. J. INT'L L. 499, 500 n.7 (1982).

125. Nicar. v. U.S., Judgment, 1986 I.C.J. at 101 ¶ 191.

126. Referring to G.A. Res. 2625 (XXV) (Oct. 24, 1970).

127. U.S. DOD LAW OF WAR MANUAL, *supra* note 116, §1.11.5.2.

full-scale self-defense.[128] Even though the burden of proof rests on the state seeking to justify the use of force,[129] there is a tendency among international adjudicative bodies to avoid ruling on subjective decisions such as whether the victim state "was faced with a necessity of reacting" or those involving an evaluation of military considerations.[130] In the practice of the International Court of Justice, the focus of judicial scrutiny has instead been directed to the factual evidence as the basis for supporting self-defense claims,[131] or the necessity and proportionality of the measure adopted.[132]

In academic commentary, criticisms against military intervention for the protection of nationals on the basis of self-defense tend to be levelled at the massive build-up and continued presence of military forces as failing to satisfy the requirement of proportionality.[133] The primary concern behind these criticisms is the perceived ulterior motive of military intervention (such as staging a regime change) rather than the availability of alternative options or the size of troops deployed or the scale of its operation.[134] As the local security condition deteriorates, there is a great deal of uncertainty as to how the situation might develop and what operational capabilities are required due to an unexpected shift in armed confrontation, the risk of criminal violence, and a breakdown of law and order, among other factors.[135] The assessment of necessity and proportionality must therefore take account of practical considerations for military planning and operational requirements under precarious circumstances.

IV. LEGAL RESTRICTIONS ON NON-COMBATANT EVACUATION OPERATIONS

The legal basis that a state relies on to conduct a NEO results in different legal constraints for how its military forces may engage in rescue and evacuation operations. Although each state is responsible for the determination and execution of its own plan to evacuate nationals, multiple countries are likely to coordinate their operations according to their own legal framework and operational capabilities.

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128. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, 331–32 (Nov. 6).

129. *Id.* at 189 ¶ 57; Nicar. v. U.S., Judgment, 1986 I.C.J. at 437 ¶ 101.

130. Nicar. v. U.S., Judgment, 1986 I.C.J. at 27–28 ¶ 35. For further analysis, see HITOSHI NASU, THE CONCEPT OF SECURITY IN INTERNATIONAL LAW chs. 3, 5 (2023).

131. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 222–23 ¶¶ 143-47; Iran v. U.S., Judgment, 2003 I.C.J. at 187–90 ¶¶ 52–61, 195–96 ¶¶ 71–72; Nicar. v. U.S., Judgment, 1986 I.C.J. at 119–22 ¶¶ 231–36.

132. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 223 ¶ 147; Iran v. U.S., Judgment, 2003 I.C.J. at 198-99 ¶¶ 76-77; Nicar. v. U.S., Judgment, 1986 I.C.J. at 122–23 ¶ 237.

133. *See, e.g.*, CONFLICT IN GEORGIA REPORT, *supra* note 7, at 285; Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494, 496–97 (1990); WILLIAM C. GILMORE, THE GRENADA INTERVENTION 63–64 (1984); Ved P. Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order – Part I*, 43 DENV. L.J. 439, 472 (1966).

134. GRAY, *supra* note 62, at 168–69; Thomson, *supra* note 39, at 627, 651 (2012); Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT'L L. 476–78 (2008); Ruys, *supra* note 1, at 261; BROWNLIE, *supra* note 50, at 299–301.

135. Joseph H.H. Weiler, *Armed Intervention in a Dichotomized World: The Case of Grenada*, *in* THE CURRENT REGULATION OF THE USE OF FORCE, DORDRECHT 247, 250–51 (Antonio Cassese ed., 1986).

Multinational coordination is likely to pose practical challenges because of the differences in what each state considers to be acceptable as the legal basis and legal risks upon which evacuation operations are to be conducted. Each state, for example, may rely on a different legal basis for the operation, adopt a different set of criteria to identify individuals designated for evacuation, and prescribe different rules of engagement to deal with potential threats posed to them or evacuation forces.

The complex environment in which NEOs take place could create difficult choices for military forces in determining which legal regime governs their conduct and imposes legal restrictions on the use of force. Depending on the causes of the emergency situation, there could be a risk of terrorist attacks or the possibility of being caught in crossfire in times of armed conflict. Understanding the legal constraints imposed on evacuation forces must begin with an appreciation of the situation on the ground: Is there an ongoing armed conflict in the anticipated area of operations? If so, is the conflict an international armed conflict or non-international armed conflict? Additionally, because engaging forces, whether fielded by a state or non-state actor, in the operational area could inadvertently elevate the sending state to the status of a co-belligerent, evacuation forces must be cognizant of, and must be careful not to cross, the relevant thresholds for international and non-international armed conflict during a NEO. Whether the existing thresholds for armed conflict apply, or should apply, to NEOs is another matter. If, as some scholars have argued, peacekeeping operations should be subject to a higher threshold for international armed conflict, perhaps some higher threshold should apply to NEOs as well.[136] In general, the applicability of the law of armed conflict (LOAC) to NEO forces must be considered according to the following three scenarios: (1) no ongoing conflict in the operational area, (2) an ongoing international armed conflict in the operational area, and (3) an ongoing non-international armed conflict in the operational area.

A. Belligerency

Joint Publication 3-68 observes that NEOs typically occur "during times of escalating confrontation short of armed conflict."[137] When there is no ongoing armed conflict in the operational area, the law of armed conflict will not apply to the conduct of evacuation forces. Nevertheless, the potential for lawlessness, disorder, and violence should not be discounted, and how NEO forces react in these situations could become the trigger that initiates an armed conflict.

Armed conflict is said to exist "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between armed groups within a state."[138] In

136. *See* Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT'L L. 185 (1996).

137. JOINT PUB. 3-68, *supra* note 2, app. B-2, ¶ 2(f)(1).

138. Prosecutor v. Tadić, IT-94-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Appeals Chamber, Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

accordance with Common Article 2 to the Geneva Conventions of 1949, international armed conflict consists of "declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them."[139] By comparison, non-international armed conflict is defined by Common Article 3 to the Geneva Conventions of 1949 as "armed conflict not of an international character."[140] These basic definitions, however, shed little light on when armed conflict can begin, leaving the question of threshold somewhat obscure and ill-defined.

The International Committee of the Red Cross's (ICRC) 2020 commentary to Common Article 2 suggests the threshold for international armed conflict is low and the use of armed force need not meet any minimum requirement of intensity or duration to trigger an international armed conflict.[141] Quoting Jean Pictet's earlier 1958 commentary, the ICRC's commentary remarks, "It makes no difference how long the conflict lasts, or how much slaughter takes place."[142] The ICRC commentary also warns that a state's characterization of a use of armed force as something short of armed conflict—for example, a border incursion, naval incident, clash, or other armed provocation—is not necessarily determinative.[143] The commentary emphasizes that "[t]he existence of an armed conflict must be deduced from the facts"[144] and reiterates that there is "no requirement of a specific level of intensity of violence to trigger an international armed conflict."[145] This approach has the benefit of being objective and unambiguous, making the application of the LOAC "virtually automatic any time there is an armed clash between two (or more) States."[146] On the other hand, as Terry Gill observes, "the low threshold approach makes a mere violation of territorial sovereignty by State agents an international armed conflict, even if they are not members of the armed forces, as long as they are acting on State instructions and are armed."[147]

This low threshold for international armed conflict could have serious implications for NEO forces operating abroad. It suggests that even in the absence of an ongoing armed conflict in the NEO operational area, any "occurrence of hostilities against the population, armed forces or territory of another State, carried out by State agents acting in an official capacity and under instructions or by other

139. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

140. *See, e.g.*, *id.* art. 3.

141. INT'L COMM. OF THE RED CROSS, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*, at ¶ 269 (2020) [hereinafter 2020 ICRC Commentary].

142. *Id.* (quoting COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20–21 (Jean S. Pictet ed.,1958)).

143. *Id.* at ¶ 276.

144. *Id.* at ¶ 274. *See also* Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 174 (Int'l Crim. Trib. for the former Yugoslavia, July 10, 2008).

145. 2020 ICRC Commentary, *supra* note 141, ¶ 276.

146. T.D. Gill, *Some Reflections on the Threshold for International Armed Conflict and on the Application of the Law of Armed Conflict in any Armed Conflict*, 99 INT'L L. STUD. 698, 702 (2022).

147. *Id.* at 701.

persons specifically instructed to carry out such hostilities by State agents or organs, and not done in error," could trigger an international armed conflict.[148] In comparison, the trigger for non-international armed conflict is more stringent, requiring hostilities to reach a certain level of intensity before the armed conflict threshold can be said to have been crossed. In its famous *Tadić* judgment, the International Criminal Tribunal for the former Yugoslavia articulated a test for determining the existence of a non-international armed conflict.[149] The *Tadić* case indicated that intensity of the conflict and organization of the parties are critical to distinguishing non-international armed conflicts from other forms of internal violence, such as "banditry, unorganized and short-lived insurrections, or terrorist activities."[150]

When a NEO is conducted pursuant to host state consent, the authority to use force is limited below the threshold of an armed conflict, or outside of the context of a local armed conflict. Evacuation forces may be granted the authority to use force in self-defense, including the defense of their own units, and even to act for law enforcement purposes, within the scope of the host state's consent. The limited authority to use force on these grounds can be incorporated into the rules of engagement (ROEs) issued to evacuation forces. However, restrictions on the use of force for self-defense and law enforcement purposes would deprive evacuation forces of their ability to intervene in local disputes in the course of protection and evacuation of designated civilians, even in cases where they believe they have sufficient capability to do so.[151]

In cases where the host state is engaged in an international armed conflict, any act of violence committed against foreign government forces would make evacuation forces a belligerent party to the conflict.[152] But even in the absence of such direct military confrontation, NEO forces may well become a belligerent party when they engage in combat support activities, such as intelligence sharing and logistical support, which are integral to the conduct of hostilities. As the Yugoslav Tribunal pronounced, an international armed conflict occurs when there is a "resort to armed forces between States."[153] Although material support for general war efforts falls short of resorting to armed forces, there is a certain point where support to a belligerent will make the supporting state a party to the conflict.

148. *See* 2020 ICRC Commentary, *supra* note 141, ¶ 274 (indicating that hostilities resulting from mistake or individual *ultra vires* acts would not necessarily trigger international armed conflict).

149. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the former Yugoslavia, Oct. 2, 1995).

150. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia, May 7, 1997) ("The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.").

151. Eyre, *supra* note 81, at 25.

152. *See supra* notes 141–147 and accompanying text.

153. Tadić, Case No. IT-94-1-AR72, at ¶ 70.

The belligerent status of a supporting state depends on the factual assessment of various factors such as the domestic policies of the state and the nature of assistance relative to the act of hostility.[154] Among different factors, the direct nexus of support with hostile activities is widely considered critical to this determination.[155] The United States did not consider third-party states as a belligerent party to the 2003 conflict in Iraq when their "specific contribution ha[d] no direct nexus with belligerent or hostile activities."[156] Third country forces conducting a NEO could thus become a legitimate military target by providing direct support for belligerent activities. For example, NEO forces could be considered a belligerent party to an international armed conflict if they were to declare and enforce a no-fly zone to secure passage for logistical transports, with the use of armed force to enforce it.[157] In cases where the secured passage facilitates the movement of belligerent troops, the no-fly zone would be considered military support directly assisting a belligerent party's conduct of hostilities. On the other hand, deploying military forces for the sole purpose of ensuring the safety of an evacuation control center would not amount to direct support with belligerent nexus.

Similarly, in cases where the local situation is a non-international armed conflict (NIAC), NEO forces may become a party to the conflict when they conduct military operations in support of government forces. Here again, the provision of support must have a direct nexus with the belligerent's ability to conduct hostilities.[158] NEO forces would not become a party to the conflict by providing indirect forms of support that might benefit local government forces in their overall efforts to suppress insurgency. There is no need for the level of violence they engage in to reach a certain threshold because the pre-existing situation would have already satisfied the requisite degree of violence and the organizational

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154. *See, e.g.*, Australian Defence Headquarters, ADDP 06.4, Law of Armed Conflict, ¶ 11.35 (May 11, 2006); Chief of the Defence Staff (Can.), B-GJ-005-104/FP-021, Law of Armed Conflict at the Operational and Tactical Levels, ¶ 1303 (Aug. 13, 2001); DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS, at 62 (2016) [hereinafter DANISH MANUAL]; 4 NEW ZEALAND DEFENCE FORCE MANUAL OF ARMED FORCES LAW: LAW OF ARMED CONFLICT, ¶ 16.24 (Aug. 7, 2017); U.S. DOD LAW OF WAR MANUAL, *supra* note 116, ¶ 15.4.1.

155. *See e.g.*, Alexander Wentker, *At War? Party Status and the War in Ukraine*, 36 LEIDEN J. INT'L L. 643, 648-50 (2023); Hitoshi Nasu, *The End of the United Nations? The Demise of Collective Security and Its Implications for International Law*, 24 MAX PLANCK Y.B. U.N. L. 110, 133-34 (2021); Michael N. Schmitt, *Ukraine Symposium – Are We at War?*, ARTICLES OF WAR (May 9, 2022), https://perma.cc/6V9F-QYAY.

156. Jack L. Goldsmith III, *Memorandum Opinion for the Counsel to the President: "Protected Person" Status in Occupied Iraq under the Fourth Geneva Convention*, 28 Op. O.L.C. 35, 45 (Mar. 18, 2004).

157. *See* Michael N. Schmitt, *Providing Arms and Material to Ukraine: Neutrality, Co-Belligerency, and the Use of Force*, ARTICLES OF WAR (Mar. 7, 2022), https://perma.cc/76UU-J5KT.

158. *See e.g.*, Tristan Ferraro, *The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict*, 97 INT'L REV. OF THE RED CROSS 1227, 1231–34 (2015); Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT'L REV. OF THE RED CROSS 561, 585–86 (2013).

structure on the part of a non-state armed group to qualify as a NIAC.[159] The question is rather whether the NEO forces' actions are of a nature that makes them indistinguishable from local government forces in their collective engagement in the conduct of hostilities.

When the local armed conflict has evolved to compel the transition of the government in power, continued evacuation operations may run counter to the will of the newly formed government. NEO forces engaged in direct support of the previous government will then face the prospect of a change to the conflict classification into an international armed conflict in which they are involved as a belligerent party. This prospect was a real possibility for the U.S. and allied forces that had been involved in a NIAC in Afghanistan since 2002 after the Taliban regime was ousted and a democratically elected government was established.[160] As discussed previously, host state consent became precarious as the legal basis for conducting military operations in the country after the collapse of the Ghani government.

Continued evacuation operations in the absence of the newly formed government's consent are analogous to foreign intervention against a non-state armed group without the consent of the host state. One could argue that the availability of host state consent is not relevant to the classification of armed conflict. According to this view, continued evacuation operations will not trigger an international armed conflict with the host state in the same way as fighting an insurgency group in the territory of another state does not.[161] In the context of non-consensual foreign intervention, an alternative view has emerged to suggest that the use of force within the territory of another state without its consent triggers an international armed conflict.[162] However, this view conflates the legal basis for military operations on a foreign soil (as discussed in Section II above) with the classification of armed conflict for the application of LOAC.[163] As such, this position is difficult to sustain as the reason why LOAC applies to

159. INT'L COMM. OF THE RED CROSS, 32nd International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 22, 32IC/15/11 (Dec. 8-10, 2015).

160. *See e.g.*, Shane R. Reeves, Winston Williams, & Amy H. McCarthy, *How Do You Like Me Now? Hamdan v. Rumsfeld and the Legal Justification for Global Targeting*, 41 U. PA. J. INT'L L. 329, 334-45 (2019); Robin Geiß & Michael Siegrist, *Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?* 93 INT'L REV. OF THE RED CROSS 11, 15-16 (2011). *Cf.* Yoram Dinstein, *Terrorism and Afghanistan*, 85 INT'L L. STUD. 43, 51-53 (2009).

161. *See e.g.*, DANISH MANUAL, *supra* note 154, at 47.

162. INT'L COMM. OF THE RED CROSS of the Red Cross, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field*, Commentary of 2016, ¶¶ 260-62 (2016) [hereinafter 2016 ICRC Commentary]; Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INT'L L. & THE CLASSIFICATION OF CONFLICTS 32, 74 (Elizabeth Wilmshurst ed., 2012).

163. For further criticisms, see Kenneth Waitkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SEC. (Aug. 30, 2016), https://perma.cc/DV6H-XBB9.

non-consensual NEOs, particularly when there is no belligerent intent directed against the host state.[164]

B. Application of LOAC to Evacuation Operations

The application of LOAC to evacuation operations during an armed conflict may pose practical difficulties due to the complexity of the situation on the ground. Consider, for example, a situation where the evacuation force comes under attack from a group of armed individuals in civilian clothing from an office building while escorting a group of designated nationals to an evacuation control center on a surface transport mission. In the context of a non-international armed conflict, the issue is whether those individuals are identified as members of an organized armed group or otherwise qualify as civilians taking a direct part in hostilities, which renders them legitimate military targets under LOAC.[165] If, on the other hand, the evacuation force has identified that the attackers are local criminal gangs without belligerent nexus, LOAC rules do not apply.

Any engagement with members of foreign military forces, militia or voluntary corps of another state, or non-state entities acting under the overall control of its authority,[166] would constitute an international armed conflict to which LOAC rules apply. This means that the evacuation force is under the obligation to verify legitimate military targets,[167] to exercise all feasible precautions in the choice of means and methods of attack to minimize incidental civilian harm,[168] and to refrain from or stop executing an attack if it is reasonably expected to cause excessive incidental civilian harm relative to the concrete and direct military advantage anticipated (which is, in this case, to secure the passage through the street).[169] For states that are party to Additional Protocol I, those attackers will need to be treated as civilians unless their belligerent nexus with the hostilities is positively identified, due to the presumption of civilian status.[170]

Forcible intervention against local criminal gangs is an exercise of law enforcement authority when they are merely committing physical violence against civilians. In such situations, force may be employed only "when strictly

164. Pauline Lesaffre, *Classification of Non-Consensual State Interventions Against an OAG*, ARTICLES OF WAR (Aug. 11, 2022), https://perma.cc/QW9L-K2Q5.

165. *See, e.g.*, SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 359-72 (2012).

166. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 541 (and cases cited at n. 1649) (Mar. 14, 2012); 2016 ICRC Commentary, *supra* note 162, ¶ 273.

167. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 57(2)(a)(i), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; U.S. DOD LAW OF WAR MANUAL, *supra* note 116, at § 5.2.3; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 55-56 (2005) [hereinafter ICRC CUSTOMARY IHL STUDY].

168. Additional Protocol I, *supra* note 167, at art. 57(2)(a)(ii); U.S. DOD LAW OF WAR MANUAL, *supra* note 116, at § 5.11; ICRC CUSTOMARY IHL STUDY, *supra* note 167, at 56-58.

169. Additional Protocol I, *supra* note 167, at art. 57(2)(a)(iii), (b); U.S. DOD LAW OF WAR MANUAL, *supra* note 116, at § 5.12; ICRC CUSTOMARY IHL STUDY, *supra* note 167, at 51-55, 60-62.

170. Additional Protocol I, *supra* note 167, at art. 50(1); U.S. DOD LAW OF WAR MANUAL, *supra* note 116, at § 5.4.3.2.

unavoidable in order to protect life."[171] This also means that the use of force may be authorized against those who are considered to pose threats to their own units or those under their protection, on the basis of self-defense or necessity in the sense of domestic criminal law, even though such conduct is not justifiable under the LOAC. Practical difficulties arise where it is hard to distinguish legitimate military targets involved in the armed conflict from those who are merely committing criminal activities without any belligerent nexus.[172]

Further problems may arise where evacuation forces from multiple countries are operating under different legal regimes or with national caveats reflective of their domestic law or policy constraints. It is conceivable that evacuation efforts are coordinated between those involved in the local armed conflict, to which LOAC applies, and other countries deploying military forces for the sole purpose of rescuing and evacuating their nationals and other designated non-combatants. Evacuation forces from the latter countries are likely to be operating under stricter rules of engagement that restrain the use of physical force unless a hostile act or intent is directed against them or individuals under their protection.[173] Operating outside of LOAC, they may find themselves in a situation where they are unable to secure escape routes without combat support from a belligerent party who has taken control of the air space. In such a situation, as discussed above, evacuation forces operating outside of LOAC will have to tread carefully so as not to become a co-belligerent when calling in close air support to ensure safe passage.

V. CONCLUSION

The legal basis for conducting a NEO is often shrouded in ambiguity. This ambiguity can create uncertainty regarding the rules and restraints under which evacuation forces must conduct their operations. Although states are not required to publicly declare the legal grounds for their NEO, clarifying the legal basis could help stem much of the confusion. In practice, however, accomplishing this seemingly straightforward task is likely to be complicated by the same concerns that informed the decision-making process in the first place; diplomatic, political, and operational considerations could influence how states seek to portray their NEO to the world.

The two bases most commonly relied upon in practice to justify military intervention to protect nationals abroad are host state consent and the right of self-defense. Operating with the agreement of a host state can be appealing because it

171. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force by Law Enforcement Officials*, UN Doc. A/CONF.144/28/Rev.1, at ¶ 9, (1990).

172. Kenneth Watkins, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 28 (2004).

173. See, for example, the legal and policy constraints under which Japan's Self-Defense Forces will have to operate as discussed in Hitoshi Nasu, *Japan's Legal Readiness in the Event of Hostilities on the Korean Peninsula*, *in* STRENGTHENING THE U.S.-JAPAN ALLIANCE: PATHWAYS FOR BRIDGING LAW AND POLICY 100, 108–09 (Nobuhisa Ishizuka, Masahiro Kurosaki, and Matthew C. Waxman eds., 2021).

acknowledges the host state's authority while yielding to the comity of nations. However, host state consent can be precarious in uncertain situations or when the operational environment has the potential to turn hostile. Under these circumstances, relying on the terms of the host state's consent could significantly restrict the operational options available to evacuation forces.

The right of self-defense provides a more flexible and expansive justification for the implementation of a NEO—although the implication that a host state is considered unable to protect foreign nationals may be one that states wish to avoid for diplomatic or political reasons. Relying on self-defense can give evacuation forces more latitude to respond to changing operational conditions, including the ability to operate within the framework of LOAC if required. Operating under LOAC presents its own practical difficulties. Evacuation forces must ensure they properly distinguish legitimate military targets involved in an armed conflict from individuals engaged in criminal activities, to whom law enforcement rules must be applied. The use of force in self-defense also risks the possibility that evacuation forces may trigger an armed conflict with a belligerent party to the local conflict either through military confrontation or due to direct support for the conduct of hostilities.

The decision to declare a NEO is not strictly an operational imperative. As the NEO conducted in Afghanistan demonstrated, many considerations factor into the decision-making process. Whatever the political motives, states should be attentive to the applicable legal framework and transparent about the legal basis for their evacuation operations before committing troops to the task, especially in uncertain or hostile operational environments. Understanding the legal justification can help military forces better anticipate how they may respond as contingencies arise in the dire and often unstable circumstances of a non-combatant evacuation operation.