

The Military Evacuation from Afghanistan by the German Armed Forces: A Change in Germany's Legal Position?

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I. Introduction

The twenty-year war in Afghanistan ended in the summer of 2021, when the Taliban eventually recaptured the whole country, including the capital Kabul. The takeover forced foreign States to hastily organise a chaotic military evacuation operation. From 16-26 August 2021, Germany participated in this operation with several military planes and helicopters as well as up to 600 armed soldiers.¹ In its largest evacuation mission to date, the German Armed Forces (*Bundeswehr*) evacuated a total of 5,347 persons, including German and Afghan citizens as well as nationals of third States.² The evacuation operation was remarkable not only in terms of its size and the dramatic circumstances surrounding it, but also from a legal point of view: In its explanatory memorandum accompanying the draft mandate for the operation, the Federal Government (*Bundesregierung*) for the first time explicitly relied on ‘the customarily recognised right [of a State] to evacuate its citizens [abroad]’³ as one of two legal bases to justify its use of force under international law.

This contribution begins by tracing the evolution of the German legal position concerning military evacuations abroad up to the 2021 operation (II.). Following this, I will analyse the legal justification for the Afghanistan operation and argue that it in fact constitutes a new element of German practice and *opinio juris* (III.). Against the background of this finding, I will point to two problematic aspects of this justification that also became relevant in the context of the Afghanistan operation: the issue of the legally permissible material scope of military evacuations, i.e., the scale of operations and the level of force that can be used (IV.A.), and the issue of their personal scope, more precisely, whether and to what extent it is permissible to also rescue nationals of other States as a measure of ‘incidental humanitarian assistance’ (IV.B.). A brief conclusion follows (V.).

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¹ German Armed Forces (*Bundeswehr*), *Evakuierung aus Afghanistan 2021* (2022), available at <https://www.bundeswehr.de/de/aktuelles/meldungen/evakuierung-afghanistan>.

² *Ibid.*

³ German Parliament (*Bundestag*), Einsatz bewaffneter deutscher Streitkräfte zur militärischen Evakuierung aus Afghanistan, 18 August 2021, *Bundestagsdrucksachen* (BT-Drs.) 19/32022, available at <https://dserver.bundestag.de/btd/19/320/1932022.pdf>, at 1-2.

II. Evolution of the German Legal Position Concerning Military Evacuations Abroad

In order to analyse Germany's legal position concerning military evacuations up to the 2021 Afghanistan operation, this section will examine Germany's past State practice and other relevant aspects establishing its *opinio juris* regarding military evacuations. Up until 2021, there had been two instances in which the Bundeswehr was deployed to evacuate German citizens abroad by military means: The 1997 *Operation Libelle* ('Dragonfly'), which took place in the context of the Albanian Civil War, and the 2011 *Operation Pegasus*, the military evacuation from Libya during the initial phase of the civil war at that time.⁴

Following the collapse of a series of financial pyramid schemes that caused many Albanians to lose their savings, widespread protests and riots had escalated into a situation of outright civil war in Albania.⁵ On 14 March 1997, in its first unilateral deployment since the Second World War, the Bundeswehr evacuated 20 German citizens and 100 other nationals from the capital Tirana.⁶ During the course of *Operation Libelle*, German soldiers exchanged fire with Albanian insurgents, wounding one of them.⁷ Minister of Defence Volker Rühle had given the initial order for the operation.⁸ It received parliamentary assent by the Bundestag only after its completion.⁹ The explanatory memorandum accompanying the mandate for *Operation Libelle* merely referred to 'imminent danger'¹⁰ and the Bundestag Legal Affairs Committee expressed its opinion that the operation was 'justified as governmental emergency assistance'¹¹. The term

⁴ In 1994, initial considerations for a military evacuation from Rwanda became unnecessary when Belgian paratroopers already deployed to Kigali also evacuated the German nationals, see Hans-Georg Franzke, 'Schutz von deutschen Staatsbürgern im Ausland durch die Bundeswehr?', 38 *Neue Zeitschrift für Wehrrecht (NZWehrR)* (1996) 189; a 2016 evacuation from South Sudan was considered a 'diplomatic evacuation', for which the South Sudanese authorities had granted overflight rights and in which the *Bundeswehr* only supported the Federal Foreign Office with aircraft and unarmed personnel, see *Bundestag*, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Omid Nouripour, Agnieszka Brugger, Annalena Baerbock, weiterer Abgeordneter und der Fraktion Bündnis 90/Die Grünen, 19 August 2016, BT-Drs. 18/9457, available at <https://dserver.bundestag.de/btd/18/094/1809457.pdf>.

⁵ On the situation in Albania at the time, see Bernd J. Fischer and Oliver Jens Schmitt, *A Concise History of Albania* (2022), at 341-347.

⁶ For more detailed accounts, see Willibald Hermsdörfer, 'Einsatz deutscher Streitkräfte zur Evakuierung deutscher Staatsbürger aus Albanien', 129 *Bayerische Verwaltungsblätter* (1998) 652; Claus Kreß, 'Die Rettungsoperation der Bundeswehr in Albanien am 14. März 1997 aus völker- und verfassungsrechtlicher Sicht', 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1997) 329, at 330-331.

⁷ Karl Feldmeyer, 'In Tirana mußte die Regierung handeln Der Segen des Bundestages kommt später', *Frankfurter Allgemeine Zeitung (FAZ)*, 17 March 1997, at 2.

⁸ Kreß, *supra* note 6, at 330.

⁹ *Bundestag*, Stenographischer Bericht 166. Sitzung, 20 March 1997, Plenary Protocol No. 13/166, available at <https://dserver.bundestag.de/btp/13/13166.pdf>, at 14989C.

¹⁰ *Bundestag*, Einsatz deutscher Streitkräfte zur Evakuierung deutscher Staatsbürger und unter konsularischer Obhut befindlicher Staatsangehöriger anderer Nationen aus Albanien, 18 March 1997, BT-Drs. 13/7233, available at <https://dserver.bundestag.de/btd/13/072/1307233.pdf>, at 2.

¹¹ *Bundestag*, Einsatz deutscher Streitkräfte zur Evakuierung deutscher Staatsbürger und unter konsularischer Obhut befindlicher Staatsangehöriger anderer Nationen aus Albanien, Beschlußempfehlung und Bericht des Auswärtigen Ausschusses (3. Ausschuß), 19 March 1997, BT-Drs. 13/7265, available at <https://dserver.bundestag.de/btd/13/072/1307265.pdf>, at 4.

'imminent danger' can be understood to invoke an exception from the requirement of prior parliamentary consent to the deployment of the armed forces outside of Germany, as set out by the Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*).¹² By contrast, the latter formulation used by the Legal Affairs Committee does not seem to entail any legally relevant justification. Nonetheless, at the time, Foreign Minister Klaus Kinkel boldly claimed that the operation was in conformity with both constitutional and international law.¹³ In the scholarly debate that ensued, the main argument for the operation's legality under international law was that Albanian President Sali Berisha had (at least implicitly) also consented to evacuation operations by requesting military assistance from other States to 'restore law and order'¹⁴ in Albania.¹⁵ While some authors concluded that the operation had in fact been compliant with international law based on this argument,¹⁶ others raised a considerable amount of critical questions in that regard.¹⁷ Lersner and Fastenrath, for instance, questioned whether the request for military assistance could really be interpreted as 'blanket consent' to all kinds of military interventions, including evacuations.¹⁸ The parliamentary debate too showed some parliamentarians' doubts as to the conformity of the operation with international law.¹⁹ In sum, scholars came to differing conclusions on the consent argument as well as on the permissibility of military evacuations as a matter of customary international law.²⁰ The Federal Government itself, however, merely asserted the operation's legality and did not put forward any specific legal reasoning. Thus, it avoided to clearly position itself in terms of international

¹² In its 1994 'out-of-area' decision, the *BVerfG* had ruled that the deployment of the armed forces outside of Germany would, in principle, presuppose the constitutive consent of the *Bundestag*, see Federal Constitutional Court (*Bundesverfassungsgericht*), *BVerfGE* 90, 286, 381-390. According to the Court, the Federal Government could only temporarily deploy the *Bundeswehr* without prior parliamentary consent in situations of imminent danger, see *Bundesverfassungsgericht*, *BVerfGE* 90, 286, 388. Cf. also the statement by Minister Rühle in the debate about *Operation Libelle*, *Bundestag*, *supra* note 9, at 14981D.

¹³ *Bundestag*, *supra* note 9, at 14970B.

¹⁴ See 'Tirana bittet die Europäer um eine Intervention', *FAZ*, 14 March 1997, at 1; Kreß, *supra* note 6, at 337.

¹⁵ Kreß, *supra* note 6, at 337; Yorck von Lersner, 'Der Einsatz von Bundeswehrsoldaten in Albanien zur Rettung deutscher Staatsangehöriger', 12 *Humanitäres Völkerrecht – Informationsschriften (HuV-I)* (1999) 156, at 161.

¹⁶ Quite assertive, albeit without critically engaging with possible arguments to the contrary, Hermsdörfer, *supra* note 6, at 652; for a more differentiated analysis, see Kreß, *supra* note 6, at 337-339.

¹⁷ See Lersner, *supra* note 15, at 161-162; Ulrich Fastenrath, 'Neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage?', *FAZ*, 19 March 1997, at 8; Volker Epping, 'Die Evakuierung deutscher Staatsbürger im Ausland als neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage? – Der Tirana-Einsatz der Bundeswehr auf dem rechtlichen Prüfstand –', 124 *Archiv des öffentlichen Rechts* (1999) 423, at 466.

¹⁸ Lersner, *supra* note 15, at 161; Fastenrath, *supra* note 17, at 8.

¹⁹ See, e.g., the statements by Andrea Gysi, *Bundestag*, *supra* note 9, at 14878 et seq., by Gregor Gysi, *id.*, at 14984, by Eberhard Brecht, *id.*, at 14984, and, most emphatically, by Uwe-Jens Heuer *id.*, at 14988 et seq.

²⁰ For discussions of the latter point, see Klaus Dau, 'Die militärische Evakuierungsoperation «Libelle» – ein Paradigma der Verteidigung?', 40 *NZWehrR* (1998) 89, at 91 (footnote 16); Epping, *supra* note 17, at 460-462; Franzke, *supra* note 4, at 193-200; Hermsdörfer, *supra* note 6, at 652-653; Kreß, *supra* note 6, at 340-349; Lersner, *supra* note 15, at 165-166.

law. Rather, as becomes apparent from the discussions at the time, the decision to evacuate seems to have been very much a pragmatic one, with legal considerations playing only a subordinate role, if any at all.

In February 2011, the situation in Libya became increasingly dangerous, as violent clashes between protesters and the *Gaddafi* regime's security forces intensified, rebel groups took over parts of the country, and air attacks were carried out against the civilian population.²¹ Even before the United Nations (UN) Security Council imposed a no-fly zone and authorised military action to enforce it,²² the Federal Government made the decision to deploy the Bundeswehr to evacuate German and other citizens.²³ After the end of the operation, the Government took the position that it was not necessary to seek parliamentary assent, and thus did not set out its legal views in the usual process.²⁴ Subsequently, it became clear that although the Libyan authorities had been informed, they had not expressed their consent before the operation commenced.²⁵ Yet, the government argued that it had received signs from Libyan diplomatic contacts that the operation would be tolerated and could thus assume Libya's tacit consent.²⁶ This argument does not seem particularly convincing as it rests on a rather bold interpretation of ambiguous circumstances.²⁷ In an area of the law as fundamental as the law on the use of force there should be more clarity. However, although the consent argument stood on even shakier grounds this time, the government still did not rely on a customary international law right to military evacuations.

In determining Germany's past State practice and *opinio juris*, it is important to widen the scope of inquiry and assess practice and opinions from all branches of government beyond

²¹ Mehrdad Payandeh, 'Evakuierungseinsätze der Bundeswehr und Parlamentsbeteiligung', 126 *Deutsches Verwaltungsblatt (DVBl)* (2011) 1325; see also the factual findings in *Bundesverfassungsgericht*, BVerfGE 140, 160, 161-164.

²² See United Nations Security Council Res. 1973, 17 March 2011 (acting under Ch VII of the Charter).

²³ As this was once again considered a situation of imminent danger, the order was given by the Minister of Defence, see *Bundesverfassungsgericht*, *supra* note 21, at 165. For a detailed account of the operation see Dieter Wiefelspütz, 'Die Bundeswehr in Libyen – Operation Pegasus aus Sicht des Völker- und Staatsrechts', 25 *HuV-I* (2012) 56.

²⁴ This view was challenged by the parliamentary group *Bündnis 90/Die Grünen* before the *BVerfG*, which ultimately decided that an *ex-post* decision by the *Bundestag* had not been necessary, see *Bundesverfassungsgericht*, *supra* note 21.

²⁵ *Bundestag*, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Sevim Dağdelen, Christine Buchholz, Wolfgang Gehrcke, weiterer Abgeordneter und der Fraktion Die Linke, 4 April 2011, BT-Drs. 17/5359, available at <https://dserver.bundestag.de/btd/17/053/1705359.pdf>, at 7.

²⁶ *Ibid.*

²⁷ See also Christian Marxsen, *Völkerrechtsordnung und Völkerrechtsbruch* (2021), at 432-433; Payandeh, *supra* note 21, at 1325; Christian Schäfer, 'Militärische Rettungseinsätze auf ausländischem Territorium aus völkerrechtlicher Perspektive', 137 *DVBl* (2022) 689, at 693; Claus Kreß, *On the Principle of Non-Use of Force in Current International Law*, 30 September 2019, available at <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>.

these two operations as they too can play a role in the process of creation of customary international law.²⁸

The ILC's first report on diplomatic protection in 2000 included a later abandoned provision that would have acknowledged the use of force as a means of diplomatic protection in the case of the rescue of nationals, provided certain conditions be met.²⁹ When the report was discussed in the General Assembly's Sixth Committee, the German representative stated that exceptions to the prohibition on the use of force could only be permitted on legitimate grounds recognised by international law and expressed doubt whether a discussion of the use of force was warranted in the context of diplomatic protection, albeit without ruling out any use of force in that context.³⁰

Interestingly, the Act on Participation of Parliament in Decisions Concerning the Deployment of Armed Forces Abroad, adopted in 2005, contains a provision that explicitly mentions military evacuations abroad.³¹ However, this provision refers to such operations only in a general manner, and thus cannot be taken as evidence that it is the Bundestag's view that a free-standing customary international law right to evacuate citizens abroad exists.³² For instance, an evacuation conducted with the clear prior consent of the territorial State in question would be lawful under the doctrine of intervention by invitation irrespective of the (non-) existence of a right to evacuate. Moreover, as far as is apparent, Germany has not protested against recent military evacuations by other States.³³ Of course, one cannot automatically infer from a State's silence its view as to the legality of a practice,³⁴ but this is noteworthy, nonetheless.

²⁸ See International Law Commission (ILC), 'Draft conclusions on identification of customary international law, with commentaries', UN Doc. A/73/10, (2018), at para. 66 (particularly Draft Conclusions 5, 6, and 10 and commentary thereto).

²⁹ ILC, 'First report on diplomatic protection', UN Doc. A/CN.4/506, 7 March 2000, at para. 46 (Draft Article 2). For context on the debate see Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd ed., 2021), at 514-516.

³⁰ Sixth Committee of the United Nations General Assembly, 'Summary record of the 19th meeting', UN Doc. A/C.6/55/SR.19, 13 November 2000, at para. 64.

³¹ § 5(1) of the Act on Participation of Parliament in Decisions Concerning the Deployment of Armed Forces Abroad (*Parlamentsbeteiligungsgesetz*), 18 March 2005, *Bundesgesetzblatt I*, at 775.

³² Talmon has also pointed to this provision but concluded that the government had already in 2005 adopted the right to rescue nationals abroad as a distinct legal basis for the use of force, see Stefan Talmon, 'Changing Views on the Use of Force: The German Position', 5(1) *Baltic Yearbook of International Law* (2005) 41, at 73-75.

³³ A comprehensive analysis of Germany's (lack of) reaction to other States' military evacuations is, of course, beyond the scope of this contribution but warrants further investigation, the limited explanatory value of state silence (see *infra* note 34) notwithstanding.

³⁴ On the difficulties entailed in interpreting state silence in the context of the use of force, see Paulina Starski, 'Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility', 4(1) *Journal on the Use of Force and International Law* (2017) 14. The

In light of these observations,³⁵ one can conclude that there has been a certain reluctance in past German State practice to explicitly acknowledge or even rely on an autonomous customary international law right to conduct military evacuations abroad. Prior to the 2021 operation, the Federal Government had always phrased its legal positions exclusively in terms of consent and, in other contexts, Germany likewise avoided clearly positioning itself in the ongoing debate about the (non-)existence of such a right.

III. The Novelty of the Legal Justification for the Afghanistan Operation

Having established Germany's past legal position, this section now turns to the legal justification put forward by the Federal Government for the 2021 Afghanistan military evacuation. Regrettably, the explanatory memorandum does not go into a lot of detail as far as the legal basis for the operation under international law is concerned:

The deployment of German armed forces is based on the continuing consent of the Government of the Islamic Republic of Afghanistan to the deployment of German armed forces for the purpose of evacuating German nationals, personnel belonging to the international community, and further designated persons, as last confirmed by exchange of notes on 15 August 2021, as well as on the customarily recognised right [of a State] to evacuate its citizens [abroad].³⁶

As this passage shows, there are two elements to the Federal Government's legal reasoning: The consent of the Afghan Government and a customary international law right to evacuate citizens abroad. As shown in the previous section, the former element is very much in line with the legal arguments brought forward to justify previous German military evacuations. By contrast, the latter element had not been relied upon so far. In analysing the legal position regarding the Afghanistan operation, it seems pertinent to first ascertain the precise relationship between these two elements of the government's argument. This is important for two reasons: First, if the evacuation of nationals is invoked only as one particular instance of an intervention by invitation (i.e., portrayed as an evacuation conducted *because* of the invitation of the government of the territorial State), the argumentative force really stems from the consent of that government and not from an autonomous right to evacuate.³⁷ Second, even if the argument

issue is further complicated by the fact that protest, if it occurs, might also be directed at the way the right has been exercised in a specific case and not against the right's existence as such, see Marxsen, *supra* note 27, at 65.

³⁵ For additional (less recent) examples of German practice and opinions, see Talmon, *supra* note 32, at 71-73.

³⁶ *Bundestag*, Einsatz bewaffneter deutscher Streitkräfte zur militärischen Evakuierung aus Afghanistan, 18 August 2021, BT-Drs. 19/32022, available at <https://dserver.bundestag.de/btd/19/320/1932022.pdf>, at 1-2.

³⁷ Mathias Forteau, 'Rescuing Nationals Abroad', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 947, at 951. Cf. also the method adopted by Tom Ruys, 'Armed Attack' and

denotes a free-standing right to evacuate, it might still make a difference whether the right to evacuate is the sole justification being invoked or if, in addition to it, the government in question also relies on a more recognised legal basis for the use of force. In the latter case, the invocation of a right to evacuate would arguably be less forceful and thus a less compelling proof of *opinio juris* regarding the existence of an independent right to conduct military evacuations.

When one applies these tests to the case at hand, it becomes apparent from the formulation of the passage, particularly from the connecting phrase 'as well as on [...]'³⁸, that the government did not seek to portray the evacuation as an instance of intervention by invitation and that it also went beyond merely reinforcing the consent argument. Rather, the 'customarily recognised right [of a State] to evacuate its citizens [abroad]'³⁹, despite being mentioned only in second place and without any further clarifications, can only be understood to serve as an autonomous legal basis for the operation.⁴⁰ As for the second test, it can be observed that the government relied on the customary international law right only in addition to the traditional consent argument, perhaps indicative of a rather cautious approach.⁴¹

There is a consensus in international legal practice and scholarship that if the territorial State in question has validly given its consent to the military presence of another State on its territory, there is no breach of Article 2(4) Charter of the United Nations (UN Charter)⁴² from the outset.⁴³ Therefore, the valid consent of the Afghan Government would render the second element of the Federal Government's legal justification obsolete. Why, then, did the Federal Government consider it necessary to also rely on a customary international law right? This question warrants a closer look at the consent argument in the Afghanistan context. In 2014, the government of President Ghani consented to the ongoing presence of foreign military forces

Article 51 of the UN Charter: Evolutions in Customary Law and Practice (2010), at 216, who excludes such cases from his analysis for lack of contention.

³⁸ In the German original, the relevant words are 'sowie aufgrund'.

³⁹ In German: 'd[as] gewohnheitsrechtlich anerkannt[e] Rech[t] zur Evakuierung eigener Staatsangehöriger'.

⁴⁰ Claus Kreß, *Evacuating Nationals – A Noteworthy New Element of German Practice and Opinio Juris*, 14 January 2022, available at <https://www.justsecurity.org/79847/evacuating-nationals-a-noteworthy-new-element-of-german-practice-and-opinio-juris/>, has reached the same conclusion.

⁴¹ It has been noted that states generally (tend to) invoke such a right only in addition to other, more recognised legal grounds, see Corten, *supra* note 29, at 523-525; Forteau, *supra* note 37, at 953.

⁴² Charter of the United Nations (UN Charter) 1945, 1 UNTS XVI.

⁴³ International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14, at para. 246; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, 168, at paras. 42-53; Georg Nolte, *Eingreifen auf Einladung* (1999); Forteau, *supra* note 37, at 952; on differing legal conceptions in this regard, see Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation', 66(1) *Netherlands International Law Review* (2019) 21.

in Afghanistan as part of *Operation Resolute Support*.⁴⁴ The phrase ‘as last confirmed by exchange of notes on 15 August 2021’ in the 2021 explanatory memorandum shows that the Federal Government had assured itself of this consent also for the purposes of the military evacuation. However, the circumstances of the consent referred to raise some complicated questions: The date of the exchange of notes, 15 August 2021, indicates that the ‘continuing consent’ was once again reaffirmed by the Ghani government, which was forced to flee into exile on the very same day after the capture of Kabul by the Taliban.⁴⁵ Hence, did the consent lapse with the fall of the Ghani government? Who was the competent authority to consent to such an operation? Did this authority change over the course of the ten-day evacuation operation? While this brief note cannot give detailed answers to these questions, it already becomes clear that the continued validity of the consent was not beyond doubt.⁴⁶ In light of these circumstances, it seems appropriate to characterise the second element of the Federal Government’s legal reasoning – the customary law right to evacuate citizens abroad – as a ‘fallback option’.⁴⁷

To conclude, as was the case with previous German military evacuations, one can legitimately question the validity of the consent argument in the Afghanistan case. Only this time, the Federal Government felt the need (or, for the first time, saw the possibility?) to explicitly assert its position that, in its view, it had an independent right to (militarily) evacuate its citizens abroad under customary international law – a change in German practice and *opinio juris*.

IV. Problematic Aspects of the Newly Asserted Legal Position in the Afghanistan Case

Whether military evacuations are in fact permissible under international law even in the absence of consent of the territorial State continues to be a highly controversial issue, which this note cannot explore in depth.⁴⁸ However, given the different legal conceptions and the at times contrasting terminology at play, it seems necessary to briefly make two clarifications:

⁴⁴ See Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan, 30 September 2014, available at https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_topics/20141216_140913-SOFA-en.pdf.

⁴⁵ See, e.g., Matthew Rosenberg and Adam Nossiter, *After 7 Years of Failing to Fix Afghanistan, Ghani Makes a Hasty Escape*, 16 August 2021, available at <https://www.nytimes.com/2021/08/16/world/asia/afghanistan-president-ashraf-ghani.html>.

⁴⁶ Schäfer, *supra* note 27, at 693, addresses these questions in more detail, arguing that the Ghani government at the time could still be recognised as the *de jure* government. See also the discussion of concurrent governments in the context of intervention by invitation by Corten, *supra* note 29, at 278-291.

⁴⁷ Kreß, *supra* note 40.

⁴⁸ State practice is of particular importance in that regard, as international case law is largely inconclusive, see Forteau, *supra* note 37, at 947-949. Cf. the comprehensive surveys of State practice by Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985), at 26-

First, the key question here is whether there still is room for such military evacuations after the inception of the UN Charter system with the prohibition on the use of force at its core.⁴⁹ Some have argued – on the basis of a now outdated interpretation of Article 2(4) UN Charter – that such operations would generally fall outside the scope of this prohibition.⁵⁰ The debate today revolves around the question of how to determine when military evacuations constitute a use of force in that sense and when they do not.⁵¹ This is also where the argument in favour of a standalone exception from the prohibition on the use of force for the evacuation of nationals abroad comes in.⁵² Supposing, however, one views military evacuations not to be exempt from the scope of Article 2(4) UN Charter, there are then two different legal arguments advanced for their justification: While some authors rely on a state of necessity,⁵³ the larger group considers these operations an instance of self-defence.⁵⁴ Finally, there are those who maintain that military evacuations in such circumstances are simply not permitted.⁵⁵

Second, if one were to accept the legality of military evacuations of nationals abroad as such, significant uncertainties would remain concerning their permissible material and personal scope. In the following sections, this contribution highlights these two problematic aspects that also became relevant in the context of the Afghanistan military evacuation.

52; Natalino Ronzitti, 'Rescuing National Abroad Revisited', 24(3) *Journal of Conflict and Security Law* (2019) 431, at 435-440; Ruys, *supra* note 37, at 216-239; Thomas C. Wingfield and James E. Meyen, *Lillich on the Forcible Protection of Nationals Abroad: In Memory of Professor Richard B. Lillich* (2002), at 41-114.

⁴⁹ In the pre-Charter era, there was little doubt that the use of force to protect nationals abroad was lawful, see Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, *supra* note 48, at 21-23; Claud Humphrey Meredith Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *Recueil des Cours* (1952) 451, at 467.

⁵⁰ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed., 1979), at 145; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), at 220-221; Richard B. Lillich, 'Forcible Self-Help to Protect Human Rights', 53 *Iowa Law Review* (1967) 325, at 336-337.

⁵¹ See generally on a possible *de minimis* threshold to the prohibition on the use of force, 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(2) *American Journal of International Law* (2014) 159-210. For a discussion of this issue in the specific context of military evacuations, see Corten, *supra* note 29, at 91-94.

⁵² Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)', in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, vol. 1 (2012), at para. 60; Ronzitti, 'Rescuing National Abroad Revisited', *supra* note 48, at 445-446.

⁵³ See, e.g., Jean Raby, 'The State of Necessity and the Use of Force to Protect Nationals', 26 *Canadian Yearbook of International Law* (1988) 253-272.

⁵⁴ Derek W. Bowett, *Self-Defence in International Law* (1958), at 91-94; Kirsten E. Eichensehr, 'Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues', 48(2) *Virginia Journal of International Law* (2008) 451, at 484; Christopher Greenwood, 'Self-Defence', in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law* (online ed., 2011), at para. 24.

⁵⁵ Ian Brownlie, 'The United Nations Charter and the Use of Force, 1945-1985', in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986) 491, at 497-498; Corten, *supra* note 29, at 538-540; Albrecht Randelzhofer, 'Article 2(4)', in Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, vol. 1 (2002), at paras. 59-60.

A. Material Scope: Overall Scale of Operations and Level of Force Permissible

The first aspect concerns the material scope of such a right, i.e., questions concerning the overall scale of the operation and the level of force that would be permitted as part of it.

During the German military evacuation, for instance, heavily-armed Bundeswehr special forces repeatedly went outside the secure perimeter of Kabul Airport in nightly covert operations to pick up evacuees at different locations in Kabul.⁵⁶ Such operational practices, while perfectly understandable from a moral and practical point of view, did substantially increase the likelihood of German soldiers being forced to engage in active combat with Taliban fighters. Meanwhile, it has been put forward that the reference to no more than 'evacuation' in the explanatory memorandum might suggest that the Federal Government did not intend to include military action beyond what has been termed a 'non-combatant evacuation'⁵⁷ in the mandate.⁵⁸ These circumstances certainly raise the question of whether such potential combat elements would still fall within the scale of operations and level of force permissible under international law as part of a military evacuation.

There is a general consensus that, given the exceptional character of such operations, the force used must be limited to the amount absolutely necessary and the operation must not severely impact the other State's territory. It is also clear that a prolonged and/or large-scale military presence would not be permissible.⁵⁹ Apart from that, however, there do not seem to exist any criteria generally agreed-upon.⁶⁰ Given the disagreement about the permissibility *per se* of such operations, this is not particularly surprising. Also, one must perhaps concede that given the extraordinary circumstances and varying operational settings in which military evacuations take place, it might simply not be possible to establish in the abstract criteria for the scale of operations and level of force that can be universally applied to all military evacuations.

Nonetheless, there recently have been some attempts to define more clearly the permissible material scope of military evacuations. For example, Ruys has suggested abandoning the relatively broad notion of 'protection of nationals' in favour of the concept of non-combatant

⁵⁶ Markus Tiedke, *Nachtschicht für das KSK – Kommandosoldaten retten Zivilisten*, 22 September 2021, available at <https://www.bundeswehr.de/de/aktuelles/meldungen/ksk-rettet-deutsche-in-kabul-5221178>; see also the extensive English-language reporting by Matthias Gebauer and Konstantin von Hammerstein, *Escape from Afghanistan, Part III: 'Children Were Disposed of Like Garbage'*, 2 September 2022, available at <https://www.spiegel.de/international/world/the-germans-dramatic-escape-from-afghanistan-in-2021-a-8fe92f07-c18a-4ebd-97c4-dd6761ba1d68>.

⁵⁷ On the concept, see Ruys, *supra* note 37, at 247-248. It will be discussed in further detail below.

⁵⁸ Kreß, *supra* note 40.

⁵⁹ Ruys, *supra* note 37, at 244.

⁶⁰ The often-referenced criteria established by Waldock, *supra* note 49, at 467, also do not provide much clarity in terms of the material scope of military operations for the protection of nationals abroad.

evacuations.⁶¹ In exceptional situations, these could be carried out without the approval of the territorial State concerned as a special case of self-defence under Article 51 UN Charter, triggering also a requirement to notify the Security Council.⁶² Under this concept, military deployment would be strictly limited to the purpose of evacuating designated persons, reasonable force could only be used when necessary to protect the lives of the evacuees and of the military personnel involved, and the operation would have to be followed by a swift withdrawal.⁶³

Setting aside the question of whether self-defence could form the legal basis for such non-combatant evacuations, this concept arguably establishes some useful criteria against which future operations could be assessed and could provide a starting point for further discussions of the issue of the permissible material scope of military evacuations.

B. Personal Scope: Permissibility of Incidental Humanitarian Assistance?

The second aspect pertains to the personal scope of military evacuations, i.e., the question of whether and to what extent such operations can also include 'incidental humanitarian assistance' in the form of evacuating nationals either from third States or from the territorial State where the evacuation takes place.⁶⁴ The theoretical underpinning for all arguments around the permissibility of military evacuations abroad is the personal jurisdiction of the State of nationality over its citizens.⁶⁵ Thus, the right to evacuate citizens abroad is developed out of the obligation of a State towards its citizens.

Nonetheless, many examples from State practice show an element of pragmatism and cooperation in these situations. States regularly evacuate substantial numbers of nationals of third States, as well. For example, during *Operation Libelle*, Germany evacuated 21 Germans and 95 other nationals from 23 different States.⁶⁶ The military evacuation from Afghanistan is particularly notable in this regard: The 5,347 persons evacuated by the Bundeswehr included nationals of more than 45 different States, with more than 4,100 Afghan citizens as the main

⁶¹ Ruys, *supra* note 37, at 243-249.

⁶² *Ibid.*, at 247-248.

⁶³ *Ibid.*

⁶⁴ Touching upon this issue also Helmut Aust, 'Evakuierung ohne Rechtsgrundlage?', 74(36) *NJW-aktuell* (2021), at 13. From the perspective of German constitutional law see Moritz Barth and Jeannine Drohla, 'Verfassungsrechtliche Zulässigkeit der Evakuierung ausländischer Staatsangehöriger durch die Bundeswehr', 5 *Zeitschrift für das Gesamte Sicherheitsrecht* (2021) 232.

⁶⁵ Forteau, *supra* note 37, at 948.

⁶⁶ Epping, *supra* note 17, at 424-425.

group.⁶⁷ These particularly high numbers of non-German nationals among the evacuees, of course, stemmed from the need of Western States to evacuate local staff, who had previously assisted Western forces, and other Afghan nationals in need of protection. Therefore, the Afghanistan evacuation is a case in point for what could be termed 'incidental humanitarian assistance'⁶⁸.

When examining its permissibility, it might be useful to distinguish between three different groups of evacuees:

First, there do not seem to be convincing arguments against the incidental evacuation of nationals of third States, especially if those States also participate in an internationally coordinated evacuation effort, and, in turn, also evacuate non-nationals.

Second, the evacuation of dual citizens, i.e., persons possessing the nationality of both the evacuating and the territorial State. Here, the principle of predominant nationality has been discussed.⁶⁹ Article 7 of the Draft Articles on Diplomatic Protection declares that a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant.⁷⁰ The provision only concerns State claims in the area of diplomatic protection and not executive action,⁷¹ but Forteau has posed the question of whether an argument could be made that, by way of analogy, the evacuating State can only legitimately evacuate dual citizens if its nationality is their predominant one.⁷²

Third, evacuating persons who are nationals solely of the territorial State. This is certainly the group of persons whose evacuation is most difficult to legally construe under the doctrine of evacuation of nationals abroad. This is because in situations where the vast majority of evacuees are nationals of the State where the evacuation takes place, it becomes difficult to differentiate between the legal categories of evacuation (of nationals) abroad, on the one hand, and humanitarian intervention on the other. Some perceive the incidental evacuation of non-nationals as a 'quasi-humanitarian intervention' and hold it not to be permissible.⁷³ Others have instead pointed to the non-discriminatory nature of humanitarian assistance or the argument that all States are affected by situations of imminent serious human rights violations

⁶⁷ *Bundeswehr*, *supra* note 1; *Bundesregierung*, Evakuierung aus Afghanistan: Mehr als 5.300 schutzbedürftige Personen ausgeflogen (2021), available at <https://www.bundesregierung.de/breg-de/suche/afghanistan-aktuell-1951410>.

⁶⁸ See, similarly, Forteau, *supra* note 37, at 951.

⁶⁹ *Ibid.*, at 950.

⁷⁰ ILC, 'Draft articles on diplomatic protection, with commentaries', UN Doc. A/61/10, 2006, at 43.

⁷¹ *Ibid.*, at 24-28 (Article 1 and commentary thereto).

⁷² Forteau, *supra* note 37, at 950.

⁷³ Schäfer, *supra* note 27, at 694-695.

irrespective of the nationality of the persons concerned.⁷⁴ So far, though, this issue does not seem to have been extensively discussed in international legal literature.

This brief overview shows that the question of whether or to what extent it is permissible for military evacuations to also include an incidental element of humanitarian assistance is still unresolved. It warrants further attention as it touches upon the connection between a State and its citizens that lies at the core of the argument for military evacuations abroad, and also raises interesting questions of distinction between the legal categories of evacuation of nationals abroad and humanitarian intervention.

V. Conclusion

The permissibility of military evacuations under the *jus ad bellum* and, specifically, the existence of an independent customary international law exception to the prohibition of the use of force for such operations have been a matter of contentious debate since the very beginning of the UN Charter System. As the International Law Association's Committee on Aggression and the Use of Force has concluded in 2018, '[t]he rescue of nationals abroad has long presented a challenge to the application of the rules on the use of force. It is the subject of contrasting opinions, numerous cases of inconsistent State practice, and ambiguous case-law.'⁷⁵ With the reliance on a customarily recognised right to evacuate its citizens abroad in the Afghanistan case,⁷⁶ Germany has now surprisingly firmly positioned itself within this ongoing debate. At the same time, the circumstances of the Afghanistan military evacuation also show some of the problems that exist in precisely delimitating the permissible material and personal scope of such operations.

⁷⁴ Forteau, *supra* note 37, at 951.

⁷⁵ Committee on Aggression and the Use of Force, 'Final Report on Aggression and the Use of Force', International Law Association (2018), at 17.

⁷⁶ After work on this note had been completed, another military evacuation by the *Bundeswehr* became necessary. In the explanatory memorandum accompanying the mandate for the evacuation from Sudan in April 2023, the *Bundesregierung* once again invoked a customary international law right to evacuate citizens abroad, see *Bundestag*, Einsatz bewaffneter deutscher Streitkräfte zur militärischen Evakuierung aus Sudan, 25 April 2023, BT-Drs. 20/6528, available at <https://dserver.bundestag.de/btd/20/065/2006528.pdf>, at 2.