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Defending Nationals Abroad: Assessing  
the Lawfulness of Forcible Hostage  
Rescues

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## Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues

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## INTRODUCTION

On March 23, 2007, Iranian forces captured fifteen British sailors who were on patrol in the Persian Gulf.<sup>1</sup> After extended negotiations, the hostages were released on April 4, touted as an Easter gift to Britain from Iranian President Mahmoud Ahmadinejad.<sup>2</sup> The soldiers' two weeks in captivity, though substantial, pale in comparison to the fourteen and a half months of captivity suffered by those taken hostage at the American Embassy in Tehran in November 1979.<sup>3</sup> The fifty-two American hostages were released after 444 days in captivity when Ronald Reagan took office as President in January 1981.<sup>4</sup>

Hostage-taking of this sort, and hostage-taking more generally, such as that practiced by terrorist groups, is unfortunately frequent in the world today.<sup>5</sup> Though diplomacy eventually resolved both Iranian hostage standoffs, a military rescue mission was attempted to free the American hostages<sup>6</sup> and a similar effort was at least mentioned for the recent British hostages.<sup>7</sup> While international consensus condemns the act of hostage-taking, opinion is sharply divided over the legality of forceful rescue missions by the hostages' national state. The "right to rescue" or "defense of nationals" justification for the use of force engenders strong support from some and strong condemnation from others, but receives only brief commentary in academic literature. Using the two Iranian hostage situations, this Note provides a fuller evaluation of the legality of forcible rescue missions by analyzing the necessary

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1. See, e.g., *Iran Dismisses Sailors' Accounts*, BBC, Apr. 6, 2007, [http://news.bbc.co.uk/1/hi/world/middle\\_east/6533907.stm](http://news.bbc.co.uk/1/hi/world/middle_east/6533907.stm).

2. John Ward Anderson, *Freed Britons Return Home as Calls for Probe Intensify; Blair Says No Deal Was Made with Iran for 15 Naval Personnel*, WASH. POST, Apr. 6, 2007, at A12.

3. See Michael B. Farrell, *444 Days in Captivity as the World Watched*, CHRISTIAN SCI. MONITOR, June 27, 2006, at 17.

4. Richard Harwood & T.R. Reid, *U.S. Announces Resolution of Dispute Blocking Return of Hostages From Iran; U.S. Announces Accord on Item That Had Snagged Hostage Release*, WASH. POST, Jan. 20, 1981, at A1.

5. See, e.g., *Kidnapping in Iraq Aimed at Germans in Afghanistan*, CNN, Mar. 10, 2007, <http://edition.cnn.com/2007/WORLD/meast/03/10/iraq.kidnapped.germans/index.html>; Daniel Dombey, *Kidnapped Europeans Set Free 'With Eritrea's Help'*, FIN. TIMES (London), Mar. 14, 2007, at 7; Khaled Abu Toameh & Mark Weiss, *Hamas Threatens Not To Free Gilad Schalit If Israel Assassinate Its Leaders*, JERUSALEM POST, May 27, 2007, at 1.

6. See Gary Sick, *Military Options and Constraints*, in AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS 144, 144 (Paul H. Kreisberg ed., 1985) [hereinafter AMERICAN HOSTAGES IN IRAN].

7. See, e.g., Julian Borger, *Iranian Crisis: Britain's Options: From Softly-Softly to Sanctions, How Pressure on Iran May Be Increased*, THE GUARDIAN (London), Mar. 29, 2007, at 5; Gregory Katz, *Britons Split on How To Win Sailors' Release*, HOUSTON CHRON., Apr. 1, 2007, at A23 (discussing various options open to Britain).

triggers for the right to rescue and the limits placed on the right by the customary international law requirements of necessity, immediacy, and proportionality. The Note then examines the lawfulness of forcible rescue missions, offering criteria that should be analyzed *ex ante* to determine whether a contemplated rescue mission—legal or not—should be considered lawful.

## I. IRANIAN HOSTAGES AND THE RESPONSES OF NATIONAL STATES

Iran has been responsible for several dramatic hostage situations. This Section gives an overview of the 1979 U.S. Embassy hostage crisis and the attempted rescue as well as the 2007 detention of British military personnel.

### A. *American Embassy Hostages: 1979-1981*

The U.S. Embassy hostage crisis began on Sunday, November 4, 1979 when a mob of students stormed the U.S. Embassy compound in Tehran.<sup>8</sup> The Embassy also had been stormed by an armed mob on February 14, 1979, shortly after the Iranian revolution. But in that instance the militants quickly surrendered, and the Embassy was returned to the United States within a matter of hours.<sup>9</sup> After the February 14 incident, U.S. officials decided to keep the Embassy open because of Iran's strategic importance, but they reduced the embassy staff<sup>10</sup> and took additional security measures.<sup>11</sup> On November 4, however, even the additional security proved insufficient, and embassy staff surrendered within two hours, exiting the Embassy into the mob of students.<sup>12</sup> Thus began the 444-day saga during which the American hostages became pawns in a domestic Iranian power struggle between secularists in government and the religious revolutionary leaders<sup>13</sup> and in an international power play by Iran against the United States.

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8. Harold H. Saunders, *The Crisis Begins*, in AMERICAN HOSTAGES IN IRAN, *supra* note 6, at 35, 35–36.

9. *Id.* at 41.

10. *Id.* at 54.

11. *Id.* at 57.

12. *Id.* at 41. The U.S. Chargé d'Affaires, Bruce Laingen—the highest ranking U.S. Embassy official since Iran refused to approve a U.S. ambassador—was at the Foreign Ministry when the seizure occurred. He immediately began lobbying Iranian Foreign Minister Yazdi to send help to the embassy, but though Yazdi had been helpful in ending the February 14 incident, his position within his government had been weakened, leaving him unable or unwilling to help in November 1979. *Id.* at 42–43.

13. *See id.* at 59.

Carter Administration officials considered a number of responses to the hostage-taking. First, and most obviously, they demanded the immediate release of the hostages. They also imposed tough economic sanctions on Iran and on November 29, 1979, filed a case against Iran in the International Court of Justice.<sup>14</sup> From the moment of the seizure, the administration also actively considered military responses. The Joint Chiefs of Staff presented President Carter with several military options, including a rescue mission and a retaliatory strike to cripple the Iranian economy, in addition to scenarios for a U.S. response if the Iranian government disintegrated, succumbing to further revolution.<sup>15</sup> In case any or all of the hostages were killed, the military planned several contingencies, including conducting a punitive strike, seizing an Iranian island, mining Iranian harbors, or instituting a naval blockade.<sup>16</sup>

On November 18 and 19, the students released thirteen hostages, but Iran threatened to try and execute the other hostages.<sup>17</sup> In response, President Carter issued a strong statement suggesting that the United States would undertake military action against Iran if the hostages were harmed; in the wake of this pronouncement, the threats against the hostages ceased.<sup>18</sup> Iran and the United States were both pushed toward negotiation by the December 27, 1979, Soviet invasion of Afghanistan, which threatened the United States because of the balance of power, and Iran because of refugee flows and the threat of further Soviet expansion.<sup>19</sup> With French and Argentine intermediaries, negotiations for the hostages' release continued into the spring, but then collapsed. On April 7, 1980, President Carter stepped up the economic embargo on Iran, and attention returned to military options.<sup>20</sup> On March 22, Carter and his top advisors had received a briefing on a possible rescue mission.<sup>21</sup> Early in the hostage crisis, the Secretary of Defense consulted an Israeli official involved in the Entebbe hostage rescue in 1976,<sup>22</sup> but the rescue plan for the Iranian hostages was even more complex than the Entebbe rescue.

The United States launched a rescue mission on April 24, 1980. The mission was extremely high-risk, and according to one official, "the

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14. Roberts B. Owen, *The Final Negotiation and Release in Algiers*, in AMERICAN HOSTAGES IN IRAN, *supra* note 6, at 297, 301.

15. Sick, *supra* note 6, at 144.

16. *Id.* at 145–46.

17. *Id.* at 147–48.

18. *Id.* at 148.

19. *Id.* at 151.

20. *Id.*

21. *Id.*

22. *Id.* at 145.

very improbability of attempting to extract more than fifty prisoners from a well-guarded site in the center of a major, hostile city halfway around the globe and more than 500 miles from the nearest available military facility was a factor in the plan's favor."<sup>23</sup> That is, the necessary complexity of the plan led the Iranians to believe that the United States was unlikely to attempt such a rescue, thereby increasing the element of surprise when the United States did try to rescue its hostages. The plan called for eight helicopters and six C-130 aircraft to fly to an airstrip five hundred miles inland (Desert I). There, helicopters would be refueled and loaded with the men and equipment transported by the C-130s, which would then fly out of Iran.<sup>24</sup> The helicopters would next proceed to a remote site in the mountains outside Tehran (Desert II), where they would be camouflaged to wait out the next day. During the next night, the troops would enter Tehran in local vehicles, enter the Embassy, and rescue the hostages. The helicopters would transport the hostages back to Desert II, where they would meet the transport aircraft and be flown out of Iran under heavy U.S. air cover.<sup>25</sup> The plan failed. One helicopter landed because of a warning light, and its crew was picked up by another helicopter. Flying through a large and unanticipated dust cloud, another helicopter malfunctioned and turned back. Another had hydraulic problems and was abandoned on arrival at Desert I. A minimum of six helicopters were needed for the mission, and only five were left. With approval from the White House, the rescue mission was abandoned. During refueling, one helicopter collided with a C-130, and eight crew members died. The remaining would-be rescuers withdrew from Iran on the C-130s.<sup>26</sup>

In the immediate aftermath of the attempted rescue, the Carter Administration worried that Iran would discover the incursion, believe the United States had tried to invade, and then retaliate against the hostages. To dispel this belief, the White House issued a statement in the middle of the night on April 25 announcing that a rescue mission had been attempted. Soon after, President Carter took personal responsibility for the failure in a televised message. According to available evidence, Iran only learned of the abortive rescue from the White House announcements.<sup>27</sup> In the aftermath of the rescue attempt, the hostages were dispersed to remote sites and were held in increased discomfort and dan-

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23. *Id.* at 154.

24. *Id.* at 154–56.

25. *Id.*

26. *Id.* at 158–59.

27. *Id.* at 157.

ger.<sup>28</sup> The rescue mission was supported after the fact by the United Kingdom, Italy, West Germany, the European Economic Community, Australia, Israel, and Egypt; it was condemned by the Soviet Union, China, Saudi Arabia, India, Cuba, and Pakistan.<sup>29</sup>

From the failure of the rescue mission on April 25 until the hostages' release, further military options were not considered.<sup>30</sup> Final negotiations for the hostages' release began in September 1980, with Algerian officials acting as the official intermediaries.<sup>31</sup> After protracted negotiations about the hostages and claims in U.S. courts on Iranian assets, the hostages were released and landed in Algeria on January 20, 1981.<sup>32</sup>

### B. *British Military Hostages: 2007*

Almost twenty-eight years later on March 23, 2007, Iran sparked another international incident when Revolutionary Guard forces seized fifteen British military personnel in the Shatt al Arab, the disputed waterway that separates Iran and Iraq.<sup>33</sup> The eight sailors and seven marines were on a routine UN- and Iraqi-authorized patrol and had boarded an Indian-flagged vessel to search for smuggled goods.<sup>34</sup> Upon returning to their small patrol boats, the British naval personnel were confronted by heavily armed Iranian gunboats and surrendered without a fight.<sup>35</sup> Iran claimed that the patrol boats were in Iranian territorial waters at the time of their capture, but Britain vigorously denied that allegation, claiming instead that the military personnel were 1.7 nautical miles within Iraqi waters.<sup>36</sup>

Iran soon announced that the British captives had been interrogated and had confessed to trespassing in Iranian waters.<sup>37</sup> Britain protested to the Iranian ambassador, and Foreign Secretary Margaret Beckett said, "We are leaving them in no doubt that...we want the immediate and

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28. *Id.* at 162.

29. See NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON THE GROUNDS OF HUMANITY* 45–48 (1985).

30. Sick, *supra* note 6, at 164.

31. Owen, *supra* note 14, at 297, 306–07.

32. *Id.* at 322–23.

33. Alan Cowell, *Iran Cites 'Aggression' in Case of Captured British Personnel*, N.Y. TIMES, Mar. 25, 2007, § 1, at 4.

34. *Id.*; Alan Cowell, *Britain Freezes Business Ties with Iran; Tehran Broadcasts Video of Captured Britons*, N.Y. TIMES, Mar. 29, 2007, at A16.

35. Cowell, *supra* note 33, § 1, at 4.

36. See, e.g., Alan Cowell, *Blair Pushes Iran for Release of Captive Service Members*, N.Y. TIMES, Mar. 28, 2007, at A10; Cowell, *supra* note 34.

37. Cowell, *supra* note 33, § 1, at 4.

safe return of our personnel and their equipment.”<sup>38</sup> On Saturday, March 24, 2007, the European Union also demanded the hostages’ release, only hours before a UN Security Council vote regarding Iran’s development of nuclear capabilities.<sup>39</sup> On Tuesday, March 27, 2007, British Prime Minister Tony Blair announced in an interview, “I hope we manage to get [the Iranian leaders] to realize they have to release [the hostages].... If not, then this will move into a different phase, but at the moment what we’re trying to do is make sure that that diplomatic initiative works.”<sup>40</sup> Other government officials clarified that Blair was referring to a more robust diplomatic posture, and not the use of force.<sup>41</sup> U.S. State Department officials added their own demands for the hostages’ release.<sup>42</sup> The diplomatic standoff dragged on, with Iran continuing to deny consular access to the captives and threatening to put them on trial for illegally entering Iranian waters<sup>43</sup>—a threat of trial not unlike that made against the American hostages in 1980.<sup>44</sup> In the face of Iranian provocation and failure to resolve the crisis quickly, the Blair government came under criticism for, in the words of *The Times of London*, “the pusillanimous timidity of British officials and politicians, who have failed disgracefully to confront Iran with the ultimatum this flagrant aggression demands.”<sup>45</sup>

The British response escalated on Wednesday, March 28, when Britain froze “bilateral business” with Iran.<sup>46</sup> Iran also began showing videos on Iranian state television of individual hostages praising their Iranian captors and apparently confessing to the alleged trespass.<sup>47</sup> Lacking access to the captives or even knowledge of their location, Britain continued to demand their release and even published charts, photos, and navigational coordinates as evidence that the personnel were in Iraqi waters at the time of their capture.<sup>48</sup>

On the seventh day of the detention, Iran repeated its threats to try the sailors.<sup>49</sup> Britain asked the UN Security Council to “deplore” the Iranian

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38. *Id.*

39. *Id.*

40. Cowell, *supra* note 36.

41. *Id.*

42. *Id.*

43. *Id.*

44. Sick, *supra* note 6, at 147.

45. *Id.* (quoting Editorial, *Britain’s Hostage Crisis*, *TIMES* (London), Mar. 27, 2007, at 14).

46. Cowell, *supra* note 34.

47. *Id.*

48. *Id.*

49. Alan Cowell, *Tehran Levels New Charges About Britons Seized at Sea*, *N.Y. TIMES*, Mar.

actions. However, due to Russian and Chinese opposition, the final Security Council press statement expressed only “grave concern” and asked for the release of the prisoners, rather than demanding their immediate release.<sup>50</sup> A break occurred on April 3 with assurances from an Iranian official that the British soldiers would not be put on trial, though Iran still requested that Britain admit that the soldiers had violated Iranian territorial waters.<sup>51</sup> Iranian security official Ali Larijani stated, “Our priority would definitely not be a trial, unless the U.K. insists on not solving this problem through diplomatic channels.”<sup>52</sup> The denouement of the crisis occurred on April 5 when Iranian President Mahmoud Ahmadinejad released the sailors as an “Easter present” to the British people.<sup>53</sup> The surprising release sparked speculation of a secret deal, but Prime Minister Blair clarified:

I think what has actually happened is that we have managed to secure the release of our personnel more quickly than many people anticipated, and have done so—and I want to make this very, very clear—without any deal, without any negotiations, without any side agreement of any nature whatever.<sup>54</sup>

Ultimately, the marines and sailors were released unharmed, though after their release they reported having been interrogated, lined up against a wall by Iranian guards with cocked guns, and hit at least once.<sup>55</sup>

The peaceful and relatively swift resolution of the crisis is rather remarkable given the drastic possibilities for escalation. The personnel were detained in an environment where the United States and Britain were accusing Iran of funding and supplying terrorist fighters in Iraq, the Western powers and the United Nations were challenging Iranian development of nuclear capabilities, the United States was running large-scale military exercises in the Persian Gulf off the Iranian coast, and the British government was facing great domestic pressure to secure the hostages’ release. After the fact, reports emerged that the United

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30, 2007, at A12.

50. *Id.*; Tim Shipman & Gethin Chamberlain, *Faye Turney's Words Show Her Spirit but Iran's Defiance Makes Britain Look a Waning World Power*, SUNDAY TELEGRAPH (London), Apr. 1, 2007, at 8.

51. Daniel Dombey, *Tehran Rules Out Trial for Sailors*, FIN. TIMES (London), Apr. 3, 2007, at 8.

52. *Id.*

53. Anderson, *supra* note 2.

54. *Id.*

55. Steven Morris & Ewen MacAskill, *Someone Said, 'Lads, I Think We're Going To Be Executed': Sailors Tell of 'Psychological Torture': US Offered Military Action To Free 15*, GUARDIAN (London), Apr. 7, 2007, at 1.

States had offered military options, including buzzing Iranian installations with fighter jets or launching aerial patrols over Revolutionary Guard bases—actions that, at Britain’s request, were not taken.<sup>56</sup> British government sources told British newspapers that a military rescue was never seriously considered<sup>57</sup>—though this was likely the case because Britain was unaware of the hostages’ location or locations.

## II. THE DEBATE OVER THE LEGALITY OF THE RIGHT TO RESCUE

In hostage situations, hostages engender great sympathy as innocent victims of an illegal act by the detaining state or non-state actor, and the hostages’ national state often faces enormous domestic political pressure to do something to free the hostages. In 1980, the United States attempted to forcibly rescue its hostages in Iran, and, in 2007, the British government suffered criticism for not acting more forcefully to secure the release of its nationals from the Iranian regime. But legal scholars and states debate the origins and even existence of a legal right to carry out the forcible rescues demanded by the publics in the nationals’ home states.<sup>58</sup>

In the pre-UN Charter era, the right to rescue nationals abroad was widely recognized and was exercised by certain powerful states.<sup>59</sup> Even those who argue that the right no longer exists concede that “[t]he jurists of the nineteenth century universally considered as lawful the use of force to protect the lives and property of nationals. The generous doctrines of the time accommodated such a right.”<sup>60</sup> Dispute arises, however, over whether the right to rescue nationals in danger abroad survived the adoption of the UN Charter. Article 2(4) of the UN Charter states, “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.”<sup>61</sup> The only exceptions to Article 2(4)’s

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56. *Id.*

57. Shipman & Chamberlain, *supra* note 50.

58. Ronzitti concedes that there are significant—and a significant number of—states on each side of this debate, but then concludes that, as a result, state practice is not sufficiently uniform for the right to rescue to be part of customary international law. RONZITTI, *supra* note 29, at 63–64.

59. See Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT’L L. 503, 503–04 (1990) (describing an 1867 British military expedition to rescue Europeans held by the Ethiopian emperor).

60. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 289 (1963).

61. U.N. Charter art. 2, para. 4.

prohibition on the use of force that are explicitly mentioned in the Charter are forcible action in self-defense when an armed attack occurs<sup>62</sup> and action authorized by the UN Security Council.<sup>63</sup> However, powerful states, including the United States, the United Kingdom, Israel, France, and Belgium have consistently asserted that the defense of nationals remains an acceptable justification for the use of force,<sup>64</sup> and they have sometimes acted on this belief.<sup>65</sup>

Even states that have not overtly claimed a right to rescue nationals have been reluctant to deny the existence of the right when it has been exercised by others. When states have tried to justify uses of force on the grounds that they were acting to protect their nationals in danger in another state, “countries condemning these cases of intervention have always preferred to deny the existence of a situation of danger, rather than deny the very existence of the right to use force.”<sup>66</sup> In other words, condemning states have questioned the threat actually posed to the nationals who were supposedly in danger or questioned whether the claim of defense of nationals served as a mere pretense for other ambitions by the intervening state.<sup>67</sup> Thus, despite the fact that a right to rescue nationals is not explicitly mentioned in the UN Charter, the existence of only two narrow and ex-

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62. *Id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

63. *Id.* art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”).

64. Farer, *supra* note 59, at 504–05.

65. See, e.g., Eleanor C. McDowell, *United Nations: Security Council Debate and Draft Resolutions Concerning the Operation To Rescue Hijacked Hostages at the Entebbe Airport*, 15 I.L.M. 1224 (1976) (discussing the Israeli rescue of Israeli and Jewish hostages at Entebbe, Uganda).

66. ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 119 (1993); see also Farer, *supra* note 59, at 505 (“On those occasions when the member states of the United Nations have glossed the text of the Charter, as in the Declaration on Friendly Relations and the Definition of Aggression, they have not repudiated the claim.”).

67. These charges were leveled at the United States when it claimed its invasion of Panama was to protect U.S. nationals in the country. See, e.g., Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT’L L. 494 (1990) (discussing and rejecting the multiple rationales advanced by the United States to justify its intervention in Panama).

PLICIT exceptions to the use of force has been challenged, and, as Oscar Schachter put it, “Reality seems to mock them.”<sup>68</sup>

A. *Differentiation from Humanitarian Intervention*

Before launching into the debate between those who hold narrow and broad views of the right to self-defense and opposing views about whether that right encompasses a right to rescue nationals, it is necessary to identify precisely what is meant by “defense of nationals” or a “right to rescue.” Some commentators have argued that defense of nationals is a type of humanitarian intervention.<sup>69</sup> For instance, Schachter has argued that the right to rescue is often glossed as part of the right to self-defense because of “a reluctance to rely solely on the argument of humanitarian intervention as an exception to article 2(4), or on the related point that such intervention is not ‘against the territorial integrity or political independence’ of the territorial state and not inconsistent with the Charter.”<sup>70</sup> Such reluctance, however, is well-founded.

Most scholars argue that a right to rescue nationals is an exercise of the right to self-defense, not a type of humanitarian intervention. This position has been expressed most eloquently by Derek Bowett:

Political theories of the social contract gave rise to the view that protection, as the duty of the state, afforded the consideration of the *pactum subjectionis*, and that protection of the nationals of the state was, in effect, protection of the state itself. Within the definition of the state the requirement of a community is essential, and without nationals, without the community, the state ceases to exist.<sup>71</sup>

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68. Oscar Schachter, *The Right of States To Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

69. See Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT’L & COMP. L. REV. 365 (1995) (discussing the right to rescue in an article about humanitarian intervention); see also Schachter, *supra* note 68, at 1628–33.

70. Schachter, *supra* note 68, at 1632.

71. D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 91 (1958) [hereinafter BOWETT, SELF-DEFENCE]; see also *id.* at 95–96 (“Given the nationality of the subject, it is commonly supposed that the state has not only a right but a duty to extend its protection to that subject.” (citing EMMERICH DE VATTEL, *LE DROIT DES GENS* (1733), and the U.S. Supreme Court in *Luria v. United States*, 231 U.S. 9 (1913), and referencing the House of Lords in *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347 (H.L.), which relied on *Calvin’s Case*, (1608) 7 Co. Rep. 1a at 5a, (1608) 77 Eng. Rep. 377 (K.B.) (“[B]ecause they are bound to obey and serve him he is called their liege lord, because he *should* maintain and defend them.”))); BROWNLIE, *supra* note 60, at 289 (“The theory behind [the nineteenth century acceptance of protection of nationals as a lawful use of force] seems to be that the nationals of a state are an extension of the state itself, a part as

The right to rescue as a type of self-defense bears one major similarity to humanitarian intervention: both involve a state using force to prevent harm or additional harm to individuals or groups in the territory of another state. This attribute can be characterized as the “humanitarian component” in both types of action.<sup>72</sup> But the two types of forceful action can be differentiated on several grounds, though there may be some overlap at the margins.<sup>73</sup> First, the right to rescue is exercised on behalf of nationals of the intervening state, though nationals of other states (often allies of the intervening state) may incidentally be rescued as well. Humanitarian intervention, on the other hand, is carried out without regard to the nationality of those to be protected, though such individuals are often nationals of the state targeted by the intervention.<sup>74</sup> Second, the right to rescue is usually exercised on behalf of a small number of individuals, for example, the fifty-two American hostages in Iran in 1980 or the roughly one hundred hostages held by Palestinian terrorists at the Entebbe Airport in 1976.<sup>75</sup> Humanitarian intervention, on the other hand, is usually carried out on behalf of large groups of people, such as the Kosovar Albanians.<sup>76</sup> Finally, the intended scope of a use of

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vital as the state territory, and that the *raison d'être* of the state is the protection of its citizens.”); Derek W. Bowett, *The Use of Force for the Protection of Nationals Abroad*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 39, 40–41 (A. Cassese ed., 1986) [hereinafter Bowett, *Use of Force*] (“[I]t is perfectly possible to treat an attack on a State’s nationals as an attack on the State, since population is an essential ingredient of the State.”); Farer, *supra* note 59, at 505 (“People being a necessary condition for the existence of a state, the protection of nationals can be assimilated without great strain to the right of self-defense explicitly conceded in the text of the Charter.”).

72. See Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT’L L. 337, 357 (2005) (noting the potential “humanitarian component” in rescue operations, but arguing that rescues are a species of self-defense rather than humanitarian intervention).

73. An example of such overlap would be forceful actions by states in defense of diaspora communities of their nationals. Examples of such potential action could include forceful action by Russia in defense of Russian diaspora communities in the Baltic states or Turkish Kurds becoming forcibly involved in Iraq in defense of the Iraqi Kurds. Actions of this type are a hybrid of humanitarian intervention and rescue missions. They involve large numbers of and defined groups of people, like most humanitarian interventions, but, like rescue missions, the intervention is undertaken by the state of nationality (or ethnic linkage) of the group that is to be protected. This Note excludes such actions from its analysis based on the fact that their scope is more similar to that of typical humanitarian interventions, suggesting that they should be analyzed based on the criteria that others have set out for humanitarian intervention, rather than based on the self-defense criteria this Note employs for the right to rescue.

74. Bowett, *Use of Force*, *supra* note 71, at 49.

75. McDowell, *supra* note 65, at 1224.

76. See TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 173 (2005) (“[R]escue operations normally concern small groups of individuals and imply the engagement of strictly limited force, in terms both of means and time,

force to rescue nationals is usually limited to removing the nationals from danger, and does not extend to changing the policy of the government detaining the nationals. In contrast, humanitarian intervention typically aims to change the actions of the territorial government in order to end the persecution of a particular group; sometimes the goal extends to a complete change of regime as a means to change widespread policy.<sup>77</sup> To encapsulate these differences, Arend and Beck have offered a concise definition of the use of force for the defense of nationals: “the use of armed force by a state to remove its nationals from another state where their lives are in actual or imminent peril.”<sup>78</sup> This Note adopts Arend and Beck’s definition, and the Note’s analysis extends only to a state’s right to rescue, not to humanitarian intervention.<sup>79</sup>

### B. *Contrary Views of the Right to Rescue*

The debate over the legality of the right to rescue nationals is part and parcel of the debate between those who hold narrow and broad views of the right to self-defense under Article 51 of the UN Charter. Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>80</sup> As in other debates over the scope of the right to self-defense, such as those regarding anticipatory self-defense and targeted killings, the dispute over the right to rescue focuses on the meaning of the word “inherent.”

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whereas humanitarian intervention, being directed at putting an end to massive and widespread violations of human rights, might involve military operations of significant proportions and duration.”).

77. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 94 (1993) (“Humanitarian intervention involves the use of force by a state to protect the citizens of *another state* from threatening situations within their own state,” and “typically involves a prolonged military action that results in a new government in the target state.” (citing RONZITTI, *supra* note 29, at xv)); GAZZINI, *supra* note 76, at 173 (“[H]umanitarian interventions normally target that Government and are aimed at compelling it to change its attitude in the exercise of its sovereign powers upon essentially its own nationals.”); Bowett, *Use of Force*, *supra* note 71, at 49 (arguing that with humanitarian intervention “the degree of interference with the authority of that State is therefore greater than in the case of the protection of nationals who are aliens *vis-à-vis* the territorial State.”).

78. AREND & BECK, *supra* note 77, at 94.

79. Bowett, *Use of Force*, *supra* note 71, at 49 (“The reason for insisting upon the separation of the right of protection from the right of humanitarian intervention is that, as we shall see, the legality of the latter is far more controversial than the legality of the former.”).

80. U.N. Charter art. 51.

Those who ascribe to a narrow view of Article 51's self-defense exception argue that the word "inherent" encompasses very little because the goal of the UN Charter's drafters, as evidenced by Article 2(4), was to restrict severely the right of states to use force absent Security Council authorization. In other words, they claim that the narrow reading of Article 51 "appears most accurately to reflect both the intentions of the Charter's framers and the 'common sense' meaning of the Charter's text."<sup>81</sup> A major expositor of this view is Ian Brownlie, who argues, "[T]hose instruments expressly prohibiting intervention both before and after 1945 may be considered to have rendered intervention for the protection of nationals illegal. Moreover, the United Nations Charter, Article 2, paragraph 4, together with the exceptions provided in Articles 39 and 51, prohibits this and other forms of intervention."<sup>82</sup> For authors with a narrow view of Article 51, the right to rescue nationals does not rise to the level of an inherent, or preexisting, right of states that would have been sufficiently obvious to the Charter's framers to be automatically included under the term "inherent" at the time of the Charter's codification. Such authors argue that "[t]he instances in which states have purported to exercise [the right to use force to protect nationals], and the terms in which [the right] is delimited, show that it provides infinite opportunities for abuse."<sup>83</sup>

However, unlike in other debates over the scope of self-defense, such as the debate over the legality of anticipatory self-defense, even authors who perceive the right to rescue to be outside the bounds of permissible legal action express some sympathy for the state whose nationals are being held hostage and that is under pressure to attempt a forceful rescue. Brownlie writes, "It is true that the protection of nationals presents particular difficulties and that a government faced with a deliberate massacre of a considerable number of nationals in a foreign state would have cogent reasons of humanity for acting, and would also be under very great political pressure."<sup>84</sup> But he tempers this statement with the conclusion that allowing the right to rescue is too dangerous and subject to exploitation: "The possible risks of denying the legality of action in a case of such urgency, an exceptional circumstance, must be weighed against the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in pursuit of national rather than

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81. AREND & BECK, *supra* note 77, at 110.

82. BROWNIE, *supra* note 60, at 298 (citations omitted).

83. *Id.* at 301 (citation omitted).

84. *Id.* (citation omitted).

humanitarian interests.”<sup>85</sup> Others recognize Schachter’s point that reality mocks the narrow interpreters’ position because “a substantial gap separates the *restrictionist views* of most states and legal scholars and the consistent *practice* of those ‘states whose interests [have been] specially affected.’”<sup>86</sup>

To counter claims that the narrow view is broadly accepted,<sup>87</sup> those who maintain a broad view of Article 51 claim that their position is dominant.<sup>88</sup> Major proponents of the broad view of Article 51’s self-defense exception argue that the right forcibly to rescue nationals is long-standing. Derek Bowett argues:

There is ample evidence that, prior to 1945, States assumed the right to use force abroad for the protection of their nationals when their lives or their property were in imminent danger, and whether this danger emanated from the acts of mobs or of the authorities of the States in which these nationals resided.<sup>89</sup>

Thus the right to rescue nationals was part of the pre-Charter understanding of self-defense, and because of the use of “inherent” in Article 51, “if the right to protect nationals was part of the pre-1945 customary right of self-defence, one starts from the premiss [sic] that it remains part of the post-1945 right to self-defence.”<sup>90</sup> Proponents of the broad view of self-defense therefore argue that “an armed rescue action to save lives of nationals (whether or not diplomats) is not prohibited by Article 2(4) when the territorial government is unable or unwilling to protect them and the need for instant action is manifest.”<sup>91</sup> The proponents recognize, however, that since all uses of force in self-defense are subject to the limits of customary international law, particularly necessity and proportionality,<sup>92</sup> the right to rescue, as a subset of the right of self-defense, is also subject to customary limits.

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85. *Id.*

86. AREND & BECK, *supra* note 77, at 110 (citing North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 4, 73, 74 (Feb. 20)).

87. *See, e.g., id.* at 105 (asserting that the “majority of states and the majority of scholars appear now to embrace the ‘restrictionist’ theory which holds that such intervention is *not* permissible” (citations omitted)).

88. BOWETT, SELF-DEFENCE, *supra* note 71, at 87 (“The right of the state to intervene by the use or threat of force for the protection of its national suffering injuries within the territory of another state is generally admitted, both in the writing of jurists and in the practice of states.”).

89. Bowett, *Use of Force*, *supra* note 71, at 39 (citation omitted).

90. *Id.* at 40.

91. Oscar Schachter, *International Law in the Hostage Crisis: Implications for Future Cases*, in AMERICAN HOSTAGES IN IRAN, *supra* note 6, at 325, 332.

92. *See* Farer, *supra* note 59, at 505–06 (“[R]escue missions cannot be persuasively indicted

Whereas the proponents of the narrow view merely note the divergence of actual state practice from their asserted prohibition on the right to rescue, proponents of a broad view of self-defense (and thus of a right to rescue) argue that instances in which states have claimed and exercised force in defense of nationals in danger demonstrate that the right exists as part of customary international law. The paradigm case cited in support of this proposition is that of the Israeli rescue of over one hundred Israeli and Jewish individuals taken hostage by Palestinian militants who had hijacked an airplane and diverted it to Entebbe, Uganda.<sup>93</sup> The rescue operation resulted in the death of the hostage-takers and some Ugandan soldiers and the destruction of a large part of the Ugandan Air Force. But the forceful rescue was not condemned in the Security Council. In fact, several powerful countries, including the United States, supported the action as a necessary and proportionate response to the hostage-taking and the unwillingness of Idi Amin's government to assist in securing the hostages' release.<sup>94</sup>

In a survey of more recent state practice, Christine Gray noted that the United States deployed troops on rescue missions to Liberia in 1990, the Central African Republic in 1996, and Sierra Leone in 1997, while France and Belgium sent troops on rescue missions to Rwanda in 1990, 1993, and 1997.<sup>95</sup> She notes that none of these uses of force were challenged as illegal in the United Nations; nor were they challenged by individual states.<sup>96</sup> She concludes from these examples that at least in instances where the government is in disarray, other states are willing to acquiesce in forcible actions to protect nationals as long as the force is limited in scope to providing such protection.<sup>97</sup> Given the at least ambiguous nature of the UN Charter's application to the right of defense of nationals and state practice exercising and failing to condemn the exercise of the right to rescue, the legality of uses of force in defense of nationals abroad is at least plausible. From this premise, the next Section analyzes how the traditional limits on self-defense—the requirement of an armed attack, necessity, immediacy, and proportionality—apply in the context of a contemplated use of

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as violations of international law, as long as they comply with the principles of proportionality and necessity and are not tainted by ulterior motives.”).

93. McDowell, *supra* note 65, at 1224–25.

94. *See, e.g.*, RONZITTI, *supra* note 29, at 37–40 (describing the UN Security Council debate over Israel's actions); McDowell, *supra* note 65, at 1224–25.

95. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 129 (2004).

96. *Id.*

97. *Id.*

force for the protection of nationals abroad. The limits are then applied to two Iranian hostage case studies.

### III. LEGAL LIMITS ON THE USE OF FORCE TO DEFEND NATIONALS ABROAD

As a subset of the right to self-defense, the right to use force in defense of nationals abroad must be subject to the same limits as self-defense.<sup>98</sup> In the UN Charter era, Article 51 introduced the concept of an armed attack as a necessary predicate to a right to self-defense; this requisite of magnitude joins the customary requirements of necessity, immediacy, and proportionality as the legal limits on forcible defense of nationals.<sup>99</sup> While these concepts are highly contested in debates over self-defense, such as that over anticipatory self-defense, their requirements in the right to rescue context are not just contested, but are also unclear. This Section explores ways to apply the essence of the requirements to the use of force to defend nationals abroad.

#### A. *Requisite Magnitude: The “Armed Attack” Precondition*

Article 51 of the UN Charter grounds the right to self-defense on the occurrence of an armed attack; that is, self-defense is only permissible in response to an armed attack.<sup>100</sup> But what constitutes an armed attack? Debate has raged over this question from academic quarters, to national governments, to the International Court of Justice (ICJ).<sup>101</sup> Most basically, the requirement of an armed attack to justify self-defense was intended to establish a magnitude of harm that a state must suffer before resorting to force in response. The debate has centered on the necessary magnitude required to maintain a balance between the victim state not having to suffer passively and the goal of the UN Charter to reduce uses

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98. BOWETT, SELF-DEFENCE, *supra* note 71, at 96 (“[T]he exercise of [the right to rescue nationals abroad] is conditioned by the same requirements which international law imposes upon any exercise by the state of its right of self-defence.”).

99. These categories essentially parallel those outlined by Jeremy Waldock in 1952, but I will argue that there should be some modifications and additions. *See* Schachter, *supra* note 68, at 1629–30 (“Waldock, writing in 1952, formulated the conditions under which a state may use force in another state, ‘as an aspect of self-defense,’ as follows: There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury.”).

100. U.N. Charter art. 51.

101. *See, e.g.,* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (opinion of the court and dissenting opinions).

of force. De minimis uses of force—even if repeated—have been held insufficient to constitute an armed attack and thus to engender a right to self-defense. For example, the ICJ in the *Nicaragua* case held that “a mere frontier incident” is insufficient to justify forceful self-defense.<sup>102</sup>

Perhaps the magnitude requirement, symbolized by the requirement of an armed attack, reduces to a numerical measure of deaths or injuries. Such a measure seems horribly callous and doubtless would be inherently arbitrary. Bowett suggests, “[C]ertainly there is no basis for assuming some arbitrary number as a pre-condition to protection. The problem—if such there be—is adequately covered by the requirement of proportionality inherent to self-defence. Thus the numbers to be protected will affect the judgment of what is proportionate and necessary....”<sup>103</sup> Indeed, even in the traditional self-defense context, number of deaths is not the measure of an armed attack. An attack in which no shot is fired but which captures a significant part of a state’s territory would constitute an armed attack, even absent any deaths.

A better measure for an armed attack is the character of the thing attacked. In the previous example, a state’s land is fundamental to the state’s being; similarly, “without nationals, without the community, the state ceases to exist.”<sup>104</sup> The fundamental nature of the state component attacked comes closer to pinning down the essence of the magnitude requirement for self-defense or defense of nationals. “Obviously to imperil the safety of a single national abroad is not to imperil the security of the state,”<sup>105</sup> so instead the close relationship between a state and its citizens, not necessarily the sheer number of citizens involved, makes an attack on a state’s citizens an affront to the state. Whether an attack on a state’s citizens can constitute an armed attack against the state, however, must still depend on a magnitude evaluation because an action against a state, such as a single minor border skirmish, does not always constitute an armed attack. However, it is possible that harm to a state’s citizens could reach the level of armed attack: “there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself.”<sup>106</sup> Thus, the magnitude requirement in the end

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102. *Id.* at 103.

103. Bowett, *Use of Force*, *supra* note 71, at 43.

104. *See supra* note 71 and accompanying text.

105. BOWETT, SELF-DEFENCE, *supra* note 71, at 93.

106. *Id.* at 93. *But see* RONZITTI, *supra* note 29, at 69 (“[I]t is a mere pretext to consider an attack against nationals abroad as an attack on the State itself of which the nationals are citizens, even when State organs such as diplomatic envoys are involved.”).

rests, unsatisfyingly, on a case-by-case determination. Certainly there is a magnitude requirement comparable to the armed attack requirement, but its satisfaction depends on a variety of factors, including the number of hostages, though the number of hostages can also be incorporated into a proportionality calculation.<sup>107</sup> The position of the hostages might also be important; one might say that a government owes additional duties to those in its employ, such as embassy staff, military personnel, or government officials on an official trip. Whether the hostage-taking constitutes a treaty violation might be an added consideration. For example, the seizure of U.S. Embassy personnel violated the Vienna Convention on Diplomatic Relations.<sup>108</sup> Such an added violation would add weight to a claim regarding the magnitude of the harm from the hostage-taking. An additional factor might be the reason for which the hostages were targeted; if they were targeted because of their nationality, as proxies for their national government, perhaps a hostage-taking can more easily be construed as an attack on the state itself.

By these measures, both the U.S. Embassy hostages and the British military hostages are good candidates to satisfy the magnitude requirement. The U.S. hostages were U.S. citizens and embassy personnel who were seized after an attack on the embassy compound itself—a clear symbol of the U.S. government. Not only were they government employees, but they were attacked while performing their governmental functions, in a country the U.S. government knew to be volatile, and as an overt proxy for the U.S. government. Similarly, the British sailors were military officials, seized in the course of their official duties. The motivations for the seizure by the Revolutionary Guard are somewhat less clear than those of the revolutionary students, who announced that they were out to attack the United States when they attacked the U.S. Embassy, but given the fact that the British hostages were uniformed military personnel, any attack on them must be seen as an attack on the British military, and thus the British state.

More difficult cases for the magnitude requirement arise when hostages are unaffiliated with their national state except by nationality and are seized while acting as individuals or on behalf of their non-government employers.<sup>109</sup> In such instances, it is less clear that

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107. Bowett, *Use of Force*, *supra* note 71, at 43; *see also infra* Section III.D.

108. Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 500 U.N.T.S. 95 (“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.”); *see also id.* arts. 22, 26.

109. *See, e.g., Dombey*, *supra* note 5 (discussing British embassy workers who were kidnapped while on a sightseeing trip, rather than on official business).

an attack on individual nationals is intended to be a proxy attack on their national state. At that point, the responsibility of the national state and its possibility for claiming a right to use force rests solely on the bonds of nationality. Such a justification rests only on Bowett's rather poetic idea that an attack on any of a state's nationals is an attack on the state itself, tantamount to an anthropomorphic injury suffered by the state. This is not to say that such hostages could not satisfy the magnitude requirement, but merely that the hostages' lack of official employment or treaty-based ties to their national state would be one factor to weigh in considering whether the magnitude of harm to the state is sufficient to justify forcible action.

*B. Necessity: Certainty and Absence of Non-Forceful Options*

For the use of force in defense of nationals to be legal, the use of force must be necessary. The necessity requirement has two prongs: first, certainty of the threat of irreparable harm to the hostages, and second, lack of non-forceful options for preventing harm to the hostages.<sup>110</sup>

*1. Certainty*

For use of force in defense of nationals to be necessary, the nationals' state must be certain about the harm being done to its nationals or about the high likelihood that they will suffer harm in the immediate future if action is not taken. In a normal self-defense action, "certainty" refers to the certainty of an attack taking place; in the defense of nationals context, certainty of harm could have several meanings. Unlawful detention would itself be considered a harm in the domestic setting, where unlawful confinement is routinely compensated through monetary damages. The hostages have been detained and imprisoned without due process, which is itself a compensable harm in the United States and in international law as well.<sup>111</sup> Though detention is itself harmful, the fact of detention is insufficient to justify a use of force in response. The extraordinary nature of a forceful response suggests that it should be permitted only when the wrong it seeks to prevent is irreparable injury; despite de-

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110. See Kristen Eichensehr, Comment, *Targeting Tehran: Assessing the Lawfulness of Pre-emptive Strikes Against Nuclear Facilities*, 11 *UCLA J. INT'L L. & FOREIGN AFF.* 59, 65-73 (2006).

111. See, e.g., International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

tention's inherent severity,<sup>112</sup> the United States and other legal systems routinely treat wrongful detention as a *compensable* harm.

An alternate conception of harm to justify forceful action in defense of nationals is actual physical harm, which is more analogous to the idea of an armed attack. Requiring actual or threatened physical harm, whether from misfeasance or malfeasance, injects consideration of forceful defense of nationals with the same urgency as considerations of actions in self-defense to counter a military attack. In delimiting the bounds of the right to defend nationals abroad, Schachter emphasizes the type of wrong to be redressed:

The illegality of [the hostages'] detention and the failure of international organs to obtain their release should not be enough to legitimize the use of force to effect their release. To allow the use of force in the absence of imminent peril would imply a 'necessity' to use force to redress a legal wrong. It would be significantly different from the necessity of self-defense to repel an attack or to save lives.<sup>113</sup>

Even if clear in theory, in practice the certainty prong of the necessity requirement is further complicated when the national state attempts to determine whether its nationals are in imminent physical danger. If hostages have been taken, then the national state obviously is not dealing with a friendly or law-abiding opposing party, thus making the actions of that party likely unpredictable. This type of confusion about the opposing party's intent is present in all types of self-defense analysis. According to Grotius, "[I]n order that a self-defence may be lawful, it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbour, but also regarding his intention."<sup>114</sup> To counter the inherent uncertainty, Schachter argues that the national state should have "wide latitude" to decide whether its nationals are in imminent peril,<sup>115</sup> which would "place the burden on the state responsible for the illegal act of hostage taking to demonstrate that the hostages are not in grave danger," which it might do "by assurances made pub-

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112. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

113. Schachter, *supra* note 91, at 332.

114. STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 7 (1996) (quoting Grotius).

115. Of course, the national state's "wide latitude" would also be cabined by the necessity of presenting the action to the UN Security Council for evaluation after the fact. *See* U.N. Charter, art. 51.

licly and to international organs and by placing the hostages under the authority and control of disciplined military or police units.”<sup>116</sup>

In the case of the U.S. Embassy hostages, Schachter concluded that Iran had taken none of these steps to assure the United States of the hostages’ safety, and thus, “[t]he pertinent point is whether, at the time, the U.S. government had reason to fear that in the emotional atmosphere of Iranian revolutionary ferment the hostages would be executed, with or without a trial.”<sup>117</sup> The Iranian government had in fact threatened to try and execute the hostages,<sup>118</sup> though those threats had ceased—at least from official government sources—several months prior to the rescue attempt. But the hostages remained in the hands of the militant students who had seized the Embassy, leaving at least a reasonable fear that the hostages were insecure and could be subject to abuse or execution at the whim of the students. Similar threats, at least of trial, were lodged against the British military hostages. Though they were not detained by militant students, they were seized and held by the Revolutionary Guard—an irregular military group reporting to some faction of the Iranian clerics and accused of supporting terrorist groups in Iraq. Certainly, Iranian actions with regard to the hostages gave reason to fear for their safety, and Britain could have made a case for a reasonable fear for the hostages’ safety, though the country’s claims would have only questionably satisfied the certainty prong of necessity.

## 2. *Lack of Non-Forceful Options*

The second prong of the necessity requirement is a lack of non-forceful options for resolving the threat of harm to the hostages. Viewing forceful action in hostages’ defense as lawful “presupposes the inadequacy of any other means of protection against some injury, actual or imminent.”<sup>119</sup> Of course, non-forceful means of terminating the threat to the hostages must be unavailable for forceful means to be legal. But what non-forceful means and what constitutes unavailability? First, “[a]s a matter of principle, exhaustion of remedies cannot be required when the ‘remedies’ are likely to be futile.”<sup>120</sup> If non-forceful remedies are likely to be unsuccessful, then states cannot be asked to pursue them to the exclusion of forceful remedies to prevent irreparable harm to hos-

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116. Schachter, *supra* note 91, at 334.

117. *Id.*

118. Sick, *supra* note 6, at 147.

119. BOWETT, SELF-DEFENCE, *supra* note 71, at 88.

120. Schachter, *supra* note 68, at 1631.

tages. Beyond this principle, diplomatic contacts with the hostage takers or the state sheltering them at least should be attempted. This may be more or less desirable depending on the character of the hostage-takers. If they represent a state with which the national state already has diplomatic contacts, then a diplomatic approach will be normal business; if the hostage takers are terrorists who do not represent any state, then any contact and certainly any negotiation is likely to be distasteful and discouraged, so as not to encourage hostage-taking as a means to gain status and voice in the international system. If direct diplomatic contacts are undesirable or unavailable, then back-channel negotiations through a third party may be possible.

The national state should also have recourse to the international community. Such recourse can be had on the basis of bilateral contacts whereby the national state requests third states to pressure the hostage-taking or -sheltering state; multilateral fora might also be used. Given the widespread international condemnation of hostage-taking, as embodied in the International Convention Against the Taking of Hostages,<sup>121</sup> the national state likely could obtain statements of support for itself and the hostages and/or statements of condemnation of the hostage-takers or hostage-taker sheltering-state from bodies including the UN Security Council. This does not mean that specific authorization from the UN Security Council would be necessary prior to commencing forceful action if non-forceful means proved ineffective. A condemnation of the hostage-taking—what is advocated here—would demonstrate the despicable nature and illegality of the act of hostage-taking; the Security Council would later have the opportunity to review any forceful action taken to rescue the hostages because, as an act of self-defense, such action would have to be reported to and evaluated by the Security Council after the fact.<sup>122</sup> While ideally the legality of a rescue attempt would be decided in an international forum prior to the use of force, that type of evaluation is impossible because it would jeopardize or destroy the element of surprise necessary for any prospect of success in a rescue action.

In the non-diplomatic realm, the national state might also utilize the economic instrument, imposing targeted sanctions on the hostage-takers or the groups or states that shelter them. Such sanctions could be unilat-

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121. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205.

122. States that take action in self-defense must immediately report such action to the Security Council. *See* U.N. Charter art. 51.

eral or multilateral, including through the UN Security Council. The national state might also turn to judicial remedies by filing suit in the ICJ or other relevant international court to obtain orders of release for the hostages. However, it is possible that the hostage-taking state or group would be unresponsive to all of these forms of pressure. At that point, if the national state believes that there is an imminent threat of irreparable harm to the hostages, it may legally undertake forceful action in defense of the hostages, provided that it does so in conformity with the requirement of proportionality.

In the U.S. Embassy hostage situation, the United States had undertaken all of these non-forceful measures. The Security Council condemned the seizure and called for the hostages' release, the ICJ ordered their release, negotiations via third countries had failed, a UN commission had failed to gain access to the hostages, and the United States had imposed economic sanctions on Iran.<sup>123</sup> Some criticized the United States for instigating the rescue attempt while the merits of the case were still pending before the ICJ,<sup>124</sup> but given that Iran had already ignored an ICJ provisional order for the hostages' release, it seems unlikely that a final judgment against Iran in the ICJ would have caused Iran to release the hostages.<sup>125</sup> Exercises in non-forceful futility must not be required to continue if doing so would put hostages in imminent danger of irreparable harm. At least, forceful means must become legal alongside non-forceful means when there is a credible threat to hostages and non-forceful means do not seem likely to eliminate the threat. In other words, "necessity cannot be assumed as long as" non-forceful means present "credible hope of solution and there is no manifest need for instant rescue action."<sup>126</sup> The standard for evaluating non-forceful means should be one of reasonableness: do non-forceful means have a reasonable chance of removing the threat to the hostages?<sup>127</sup>

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123. See, e.g., Schachter, *supra* note 68, at 1631.

124. Ronzitti, for example, writes, "it is almost certain that a State is committing an international wrongful act whenever it intervenes in foreign territory while the case is pending before an international judicial body," subject to a single exception, "in which, *pendente lite*, the violence against foreign nationals has so escalated that their death would be *inevitable* without armed action by the national State." RONZITTI, *supra* note 29, at 72 (second emphasis added).

125. Schachter, *supra* note 91, at 342-43; Schachter, *supra* note 68, at 1631.

126. Schachter, *supra* note 91, at 333.

127. In evaluating the threat to the U.S. Embassy hostages, Schachter wrote, "Insofar as the government considered the matter in legal terms..., it presumably took the position that force was not needed as long as there appeared to be a reasonable chance to obtain the release of the hostages by negotiation or third-party efforts." *Id.* at 329.

Given the multiplicity of non-forceful avenues it pursued in advance of the forceful rescue attempt, the United States has a good case for the lack of non-forceful options prong of the necessity requirement. Britain had used many of the non-forceful means, but had not exhausted them, when the hostages were released by Iranian President Ahmadinejad. Britain had attempted to engage Iran diplomatically, and it also used statements in the media to communicate with Iran. After the sailors were seized, Britain immediately reached out to the European Union, which called for the hostages' release, and it negotiated with members of the UN Security Council to secure a statement condemning the hostages' detention. It had not attempted judicial proceedings before the ICJ, but it had begun to institute economic sanctions against Iran—or at least a ratcheting up of the sanctions already in place due to Iran's recalcitrance about its nuclear program. It is unlikely that these measures, standing alone, however, could satisfy the necessity standard to justify a forcible rescue attempt. The hostages had been held for just under two weeks at the time they were released; at the time of the American rescue attempt, the embassy hostages had been detained for over four months. Given that diplomatic engagement was continuing between Iran and Britain during the entire detention, at no point did a diplomatic resolution seem impossible. Ahmadinejad was at times obstinate and the release was delayed, but engagement and talks between the two countries continued. Diplomacy had not become futile, and thus force was not necessary.

### *C. Immediacy*

The requirement of immediacy is related to the necessity requirement. That is, a use of force can only be necessary if the threat posed is immediate. Immediacy answers the question "Why now?" There are two major answers to this question in a hostage situation. First, the immediacy requirement is satisfied if the threat to the hostages is going to be carried out imminently—the harm itself is immediate, and the harm is physical injury, not just continued detention. Second, the immediacy requirement can be satisfied if some change in circumstances that would make rescue action later difficult or impossible is about to or is likely to occur. The analogue to this explanation for immediacy in the anticipatory self-defense context is illustrated by Israel's claim regarding the timing it chose for bombing Iraq's Osiraq nuclear reactor in 1981. Israel claimed that it bombed the reactor just before it was to become operational, and that had it waited until the threat posed by the reactor was

more realized (the reactor was producing nuclear fuel), it would have been impossible to destroy the reactor without releasing radiation, which could have harmed many Iraqis.<sup>128</sup>

For the embassy hostages, the precipitating event for the rescue attempt seems to have been the breakdown of third-party negotiations. Though not as dramatic as an overt renewed threat to try and execute the hostages, the U.S. government might have feared that in the absence of ongoing negotiations government officials would allow harm to the hostages or would lose control of the militants detaining the hostages. For the British hostages, there was no precipitating event once the detention had commenced that was sufficient to cause Britain to react forcefully. One can speculate about events that could have transpired to provoke a forceful rescue attempt. For example, in the videos of the hostages shown on Iranian television, the hostages appeared physically unharmed. Had the videos instead shown evidence of abuse, perhaps Britain would have reacted forcefully. Another change that could have provoked a rescue attempt might have been learning where the hostages were detained, but the hostages' location remained unclear<sup>129</sup>—a major deterrent for mounting a rescue hunt that would have inevitably had to include an extensive search even to discover the hostages' whereabouts.

#### D. *Proportionality*

The proportionality requirement means that the quantum of force used must be the least amount necessary to secure the nationals' freedom and that the force must be used for the sole purpose of securing the nationals' freedom. Little debate arises over the first of these requirements, which requires a fairly standard international legal assessment of whether the force was proportionate to the harm. But much debate arises over the second requirement. The purity of the national state's intentions has been questioned in instances where uses of force have been claimed by the national state to be in defense of its nationals, and this is the ground upon which exercises of the right to rescue are often condemned. The U.S. interventions in Grenada and Panama fell prey to this

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128. TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 105 (1996) (discussing the Israeli claim that bombing the reactor once it was operational would have released radioactive material that would have contaminated Baghdad). The veracity of the Israeli claim about the scope of the possible contamination is disputed. *See id.* at 301.

129. *See, e.g.*, Cowell, *supra* note 34.

criticism. In both instances, defense of nationals was among the reasons that the United States gave for using force against the state, but in both instances the United States supervised a major intervention that resulted in a change of government in the country intervened in from one hostile to the United States to one friendly to the United States. In both instances, it is unlikely that a change of government was necessary to protect the U.S. nationals in the state.<sup>130</sup> It is not clear that the medical students in Grenada or the military and canal personnel in Panama could not merely have been evacuated. The United States was accused in both interventions of using the sympathetic claim of defense of nationals to cloak an illicit motive to overthrow the governments of foreign states.<sup>131</sup>

Allegations of cloaking or using the right to use force in defense of nationals as a pretext for illegal aims constitute the most prevalent objection to the right to rescue. The possibility for abuse, or, as Brownlie put it, “the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in the pursuit of national rather than humanitarian interests,”<sup>132</sup> is indeed a serious concern.<sup>133</sup> The objection and in turn the objections to it boil down to a fundamental question: if states are going to undertake forcible interventions to protect their nationals whether or not such force is explicitly legalized by the UN Charter, should the law forbid the uses of force—a prohibition that seems unlikely to change state behavior—because of the possibility for exploitation or should the law embrace the claimed justification and then attempt to regulate its use? In theory, good arguments can be advanced for either position, and the prohibit-versus-legalize-and-regulate debate undoubtedly produces different results in different contexts. But for the right to rescue, the legalize-and-regulate proponents have the stronger argument given the demonstrated willingness of powerful and an expanding number of states to claim and exercise the right and the humanitarian motivation underlying non-pretextual uses of the defense of nationals justification for force. The possibility of abuse is not unique to the right to rescue, but is instead endemic to all considerations of self-

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130. See Johnstone, *supra* note 72, at 359.

131. See generally Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT’L L. 131 (1984); Nanda, *supra* note 67.

132. BROWNLIE, *supra* note 60, at 301.

133. Even proponents of the right to rescue recognize that it is open to abuse. See BOWETT, SELF-DEFENCE, *supra* note 71, at 104–05 (“It is inevitable that this exercise of the right of self-defence, being initially based on a subjective evaluation of the interests to be protected, should be subject to the abuses so often involved in an individual measure for the protection of rights. The likelihood of such a measure becoming a mere cloak for intervention needs no stress; such is the inherent danger of ‘diplomacy of the quarter-deck.’”).

defense.<sup>134</sup> According to Bowett, what “lies behind a refusal to recognize the defence of nationals abroad as within the concept of self-defence is that this recognition would permit large-scale intervention totally unrelated to the danger to which the nationals are exposed. This cannot be so if the requirement of proportionality is complied with . . . .”<sup>135</sup> Thus, proportionality as judged by an international body and the international community after the fact is no less a stricture binding claims to defend nationals abroad, and if “[s]tates accept that they have the same obligation to report action taken, and the [Security Council] has the same power of review, in relation to protection of nationals as with any other claim of self-defence there seems no reason to isolate this particular form of self-defence for special condemnation.”<sup>136</sup> Thus a finding of disproportionality offers an appropriate means to condemn a use of force that is claimed to be for the protection of nationals, but in reality has other, broader aims. Reliance on proportionality allows condemnation of pretextual claims to protect nationals abroad, while also permitting meritorious claims of proportionate action to protect nationals.

The condemnations of the U.S. invasions of Grenada and Panama should have been part of a proportionality inquiry because if the United States had instead used force just to evacuate its nationals, it is likely that it would not have been condemned. Lack of pure intentions makes a use of force that does rescue nationals, but also topples a government, look gravely disproportionate. Conversely, forceful rescues that have been strictly limited to extricating endangered nationals from captivity have received a far less negative, and even an understanding or supportive, response from the international community. The gold standard for such an exercise of proportionate force is the Israeli rescue at Entebbe, where Israeli commandoes landed at the Entebbe airport, released the hostages, and immediately returned to Israel, leaving the government of Idi Amin in power (despite the human rights violations it committed).<sup>137</sup>

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134. See Bowett, *Use of Force*, *supra* note 71, at 45 (“[I]t is clear that this argument could equally be applied against any form of self-defence.”); Johnstone, *supra* note 72, at 359 (“As a general matter, the law of self-defence to protect nationals is open to abuse (as are all laws relating to the use of force). But the self-defence concept and its limiting conditions do provide a framework for assessing the merits of particular claims. If rescue or protection of nationals is seen as a pretext for invasion with wider objectives, then the claim has rightly been rejected. But when the facts are compelling and the case is well-made, international law does support the exercise of self-defence in these circumstances.”).

135. BOWETT, SELF-DEFENCE, *supra* note 71, at 104–05.

136. Bowett, *Use of Force*, *supra* note 71, at 46.

137. See, e.g., RONZITTI, *supra* note 29, at 37–40; McDowell, *supra* note 65, at 1224–25; see

The U.S. rescue attempt in Iran does not fall far short of the Entebbe standard. Whatever else the United States might have done to interfere in Iran preceding the 1979 revolution, there is no suggestion that the rescue attempt was anything more than what it purported to be: a mission to extricate the hostages from the Embassy and from Iran. If the United States had attempted to invade and overthrow the ayatollahs while claiming to be interested only in rescuing the U.S. hostages, its actions would have certainly been disproportionate. But the rescue attempt itself was carefully calculated (or rather miscalculated) to extricate the hostages with as minimal a loss of life as could be achieved, that is, loss of life only through hand-to-hand, focused force against the hostage-takers in the embassy compound.

Conversely, a British invasion to conduct a full country sweep in search of the British military hostages would have been disproportionate and would have been condemned as an attempt to overthrow Ahmadinejad. A targeted military raid to extricate the hostages, however, might not have been disproportionate in aim. Given that Britain did not know the hostages' detention location, however, and since apparently Faye Turney, the lone female hostage, was detained separately from her male counterparts,<sup>138</sup> the scope of any raid to find, much less actually rescue the hostages might have had to be quite broad. One can imagine that significant numbers—hundreds or thousands—of troops would have been required to swiftly arrive at and search prime possible detention locations. An unfocused raid begins to look a lot like an invasion, which has the potential to violate proportionality in two ways. First, increasing the number of troops and the number or possible number of detention sites also increases the potential for civilians to be caught in cross-fire. Second, an invasion would also be a disproportionate response to the legal wrong, that is, it goes beyond what is proportionate to the legal harm that has been done by the taking of the hostages. To justify an all out invasion, the precipitating armed attack would have to be far greater than hostage-taking.

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*also* THE LAST KING OF SCOTLAND (DNA Films 2006) (showing a dramatized version of Idi Amin's reign in Uganda).

138. Morris & MacAskill, *supra* note 55, at 1.

#### IV. BEYOND LEGALITY: CONSIDERATIONS OF LAWFULNESS

Even if a rescue attempt could successfully extricate hostages, the question remains whether it is wise to do so. This question could be answered from a policy perspective, which would depend very much on the particular facts of each situation and thus would not be generalizable. The question could also be answered, however, from the perspective of whether the existence of a right to rescue, rather than individual rescue attempts, is lawful. The previous Sections have analyzed the *legality* of a forceful rescue attempt in two different hostage situations, that is, whether the rescue attempt can be consistent with the legal texts and precepts governing the use of force in self-defense. The remainder of this Section analyzes whether a right to rescue can be *lawful*—whether the existence of a right to use force in defense of nationals abroad promotes the legal system and whether it is consistent with the goals the legal system is meant to serve.

Two major arguments support the lawfulness of a right to rescue. First, the humanitarian premise of a right to rescue is consonant with the goals of the international legal system, which increasingly has begun to valorize the rights of individuals. As the development of the human rights regime in recent decades has shown, international law is increasingly willing to regard the individual, rather than just the state, as the bearer of rights and responsibilities. Allowing national states to have a right to rescue their nationals in certain limited circumstances furthers this goal by protecting individuals when they are placed in situations where the territorial state is unable or unwilling to offer the protection that it is obligated to offer under international law. Rather than leaving hostages helpless and abandoned, empowering their national state with a right to rescue them provides a forceful means to enforce the basic rights that the territorial state is supposed to uphold. As Bowett has explained:

[A]t a time when international society is moving towards a wider and more effective acceptance of basic human rights, it would be distinctly incongruous to deny the continuing validity of measures to protect nationals against arbitrary violence and threats to their lives. The values protected by the right of protection are the same values as are inherent in the promotion of human rights.<sup>139</sup>

Though uses of force to rescue nationals abroad are sometimes criticized for violating the sovereign rights of the hostage-taking state,

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139. Bowett, *Use of Force*, *supra* note 71, at 44–45.

viewed differently the right can be seen as supportive of the state-based Westphalian system: the right enshrines in law a method of redress for states whose nationals are taken hostage, empowering the national state at the same time as it protects the individual human rights of the hostages.

The right to rescue has been criticized as a tool used by the powerful against the weak because only militarily advanced states have the capacity to mount a forceful rescue in a foreign state with any hope of success. While this criticism does ring true to some extent, not only powerful Western states have claimed or used a right to rescue. For example, on February 19, 1978, Egypt landed a plane of commandoes in Larnaca, Cyprus, with the goal of rescuing Egyptian and other passengers who had been taken hostage on an airplane that had landed in Larnaca. In contrast to the success of the Entebbe raid, Egypt's attempted rescue was botched because Cyprus was in the midst of successfully negotiating the hostages' release when the Egyptians, who had been given permission to land, but not to attack, decided to attack, prompting an exchange of fire with Cypriot troops.<sup>140</sup> Egypt attempted to use force to free hostages, though it previously had opposed the existence of such a right, lending credence to the claim that "if it should happen that nationals of a State which is, at present, against intervention were in mortal danger, in all probability that State would not hesitate to intervene."<sup>141</sup>

Even if only powerful states could exercise the right, the incapacity of other states would not be a reason to deny the right's existence. To deny the right's existence because of the military capabilities required to put it to use "would be tantamount to saying that because all foreigners in peril of their life and safety abroad cannot be rescued, none shall."<sup>142</sup> Hostage-taking is illegal no matter who does it, and in theory powerful states that have the capacity to rescue their nationals abroad would also be subject to intervention if they were to engage in hostage-taking. States that conduct or tolerate hostage-taking cannot claim an exemp-

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140. See Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 454–55 (2000); see also TANCA, *supra* note 66, at 124–25 ("Given recourse to this plea by countries such as Egypt, one can also conclude that the original 'colonialistic' flavour of such intervention—aimed at preserving western interests abroad in spite of the possible cost in terms of local human lives—is starting to fade.")

141. RONZITTI, *supra* note 29, at 65.

142. Bowett, *Use of Force*, *supra* note 71, at 45; see also TANCA, *supra* note 66, at 119 ("Now that even 'less suspect' countries behave in the same way, it can tentatively be asserted that, given the technical capabilities, every country would resort to such action if the situation required. The fact that not every country has the technical means seems not to be a good reason to deny this right to everyone else.") (citation omitted).

tion from intervention because they happen to be militarily weaker than the state whose nationals they are detaining.

The humanitarian premise of the right to rescue is fundamentally supportive of the international human rights regime, but to remain lawful in practice, rescue actions must not violate the human rights regime they are intended to serve. Thus, as discussed above with regard to legality, rescue actions must adhere to a strict proportionality standard, avoiding civilian deaths, and must also follow the principles of international humanitarian law, including never deliberately targeting civilians or civilian objects in the course of attempted rescues. The U.S. Embassy hostage rescue attempt met this criterion for lawfulness. No Iranians were harmed in the course of the rescue attempt, and thus no human rights violations occurred that would have to be weighed against the hostages' human rights, which the mission was undertaken to restore. In contrast, severe human rights problems could have resulted from an attempt to rescue the British sailors. Britain would have had to conduct a massive search to discover the hostages' location, which could have resulted in injury to substantial numbers of Iranian civilians in areas covered by the search or in close proximity to detention facilities. Such an incursion could have been illegal because it might have violated the proportionality requirement, but it also could have been unlawful because it could have done more harm to civilian human rights than good to the human rights of the hostages.

Second, the existence of a right to rescue is lawful because it can be preservative of world public order—the fundamental goal of the international system. Allowing national states to take forceful action in defense of their nationals will serve as a deterrent to those who take hostages, or at least to states that may harbor terrorists because the states will open themselves to forcible military intrusion into their territory, which, if successful, could make the government look weak and ineffectual. If the legal order recognizes a right to use force to protect nationals subject to the strict legal rules described above, then stable expectations will be created, allowing (hopefully rational) actors to make more fully informed decisions about the costs of taking hostages or sheltering hostage-takers.

While recognition of the right to rescue will in theory reduce violence by stabilizing expectations and allowing more accurate cost-benefit analyses (that presumably would weigh against hostage-taking), actual rescue attempts pursuant to the right could in some instances cause an escalation of violence. Recognition of a right to rescue has its greatest

power to support public order by deterring hostage-taking. Once hostages are taken, then the right to rescue can be used as a bargaining chip to pressure the country harboring the hostage-takers, but if the right is actually used, then the implementation of the right to rescue may provoke further violence sufficient to render the rescue attempt unlawful. For example, fearing a military incursion, the hostage-holding state could preemptively fire on ships of the national state that are patrolling near its shore—an attack that could provoke a response and thus an escalation in violence. If a further escalation in violence is likely to result from the attempt or carrying out of a forcible rescue, then regardless of its legality, the attempted rescue might be unlawful. It might undermine public order by igniting a military conflict far more damaging than the initial hostage situation the rescue was intended to resolve. The right to rescue is not an absolute right. States considering its use must consider the consequences of their contemplated forcible rescue and analyze whether the risk of an expanded conflict is sufficiently low to justify attempting the rescue.

If the lawfulness analysis were applied to the U.S. rescue attempt *ex ante*, it is not clear whether the ultimately peaceful aftermath of the attempt could have been sufficiently clearly foreseen to justify the risk that the rescue attempt entailed. President Carter went on television and announced that a rescue had been attempted in order to quell any possible Iranian assumptions that the United States had tried to invade Iran. If Iran had discovered the U.S. military incursion while it was in progress, it might have been reasonable for Iran to assume that the United States was invading and to retaliate based on that assumption. The United States likely then would have retaliated against targets in Iran, which in turn could have prompted Soviet offers to assist Iran, given its close proximity to the Soviet military forces occupying Afghanistan, and thus the conflict could have broadened dramatically. Similarly, it is unlikely that a contemplated forcible British rescue attempt could have satisfied a lawfulness analysis. If Britain had used force, or allowed the United States to use force against Iran, Iran could have retaliated against U.S. or British forces in the Persian Gulf—the location where it captured the hostages initially—or by proxy forces in Iraq. Given that tensions are already high over the Iranian nuclear program, further increased tensions and aggression by Iran might have given the United States or Israel impetus to bomb Iranian nuclear sites particularly and major Iranian military and government sites more generally. The potential for escalation of violence in reaction to a forcible rescue attempt

would have been high, thereby suggesting that a forceful rescue could not have been justified as lawful, even if it could have satisfied the legality criteria, which is doubtful.

## V. CONCLUSION

This Note has argued that hostages' national states have a carefully limited right to use force to rescue their nationals held and in danger abroad as part of the states' inherent right of self-defense under Article 51 of the UN Charter. As a type of self-defense, forceful actions to rescue hostages are subject to the magnitude, necessity, immediacy, and proportionality requirements for all forceful self-defense actions and must satisfy these requirements in order to be legal. The U.S. attempt to rescue its embassy hostages satisfied these criteria; a British military action to rescue its sailors from Iran would have satisfied the magnitude requirement, but likely could not have satisfied the necessity, immediacy, and proportionality requirements.

Beyond the legality requirements, contemplated rescue attempts should also be analyzed to determine whether they are lawful—whether they further the human rights and public order goals the right to rescue is meant to support. From an *ex ante* perspective, the U.S. hostage rescue attempt probably could have been justified in furtherance of human rights. But given the volatility of the Iranian regime and the Soviet Union's proximity to Iran after its invasion of Afghanistan, it is unclear whether the U.S. officials evaluating the rescue mission could have known that the attempt would not spark serious and potentially wide-ranging violence. For the British hostages, uncertainty over the hostages' location and the potential for a forceful reaction by Iran suggest that a rescue attempt could have undermined both human rights and public order.

Sadly, future hostage situations are certain to occur. When a state considers its response, it should proceed with the knowledge that a forceful rescue could be legal, but even if legal, to be consonant with international law, such a rescue attempt must also be lawful, furthering the goals of the international legal system, not undermining them.