Center on Law, Ethics and National Security

Essay Series
Number 25
March 27, 2024

Reviving the Right to Rescue: Analyzing International Law on the Use of Force for Hostage Rescue in the 21st Century

By Katherine K. French

DUKE LAW

REVIVING THE RIGHT TO RESCUE: ANALYZING INTERNATIONAL LAW ON THE USE OF FORCE FOR HOSTAGE RESCUE IN THE 21ST CENTURY

KATHERINE K. FRENCH[†]

ABSTRACT

The capture of foreign nationals is becoming an increasingly popular strategy for bad actors seeking global attention or change. The recent practices of Hamas, Russia, Iran, and other enemies of the rules-based international order demonstrate this trend. While States universally recognize the illegality of hostage-taking, they fail to reach a consensus regarding how they may respond. The choice to use force to bring these nationals home is the most controversial of all. The so-called "right to rescue" was once standard practice, but its support has faded since the signing of the United Nations Charter, which reset the guidelines on uses of force. Nevertheless, the right to rescue has not gone away. This paper explains how international law continues to support States' legitimate ability to use force to rescue nationals held abroad by governments or non-state actors. Such a right is not only legally permissible but morally and practically desirable, as no end to the upsetting practice of hostage-taking is in sight.

[†] Duke University School of Law, J.D. expected May 2025; Princeton University, A.B. 2022. Thank you to Major General Charles J. Dunlap, Jr. USAF (Ret.) for his guidance throughout this writing process.

INTRODUCTION

What are a nation's leaders to do when hundreds of people are gone in the relative blink of an eye? Searching for a solution to this chaos is the reality Israel currently faces after Hamas terrorists captured over 200 people in less than a week, including men and women, young and old, of various nationalities.[1] While some were released, many were killed, and efforts to get these hostages back are slowing Israel's forceful response to the overall military threat.[2]

Though this scenario may seem unimaginable, it is not unique. The United States' own Office of the Special Presidential Envoy for Hostage Affairs was handling almost 40 active cases as of July 2023.[3] The problem is so rampant that President Biden designated the wrongful detention of Americans abroad as a national emergency.[4] So why doesn't the United States—home to the most powerful military in the world—just get its nationals and bring them home? The answer is, most fundamentally, that the legal foundation for doing so is complicated.

While nations universally condemn the taking of hostages, they remain divided on their ability to rescue these abductees forcefully.[5] The so-called "right to rescue" (also referred to as the "defense of nationals" or "protection of nationals" doctrine) was standard practice before the end of World War II, but has virtually disappeared in post-United Nations ("U.N.") Charter times.[6] The reasons for this shift are not clear. There has been no fundamental change in circumstances indicating the removal of such a right, and in fact, hostage-taking has become more prevalent than ever with the rise of non-state actor groups.[7]

This paper discusses why the right to rescue does and should still exist in the 21st century. It summarizes the applicable international law on the topic by drawing from the U.N. Charter, treaty law, and state practice. It then explains why a right to rescue remains possible within these guidelines and introduces policy considerations that support such an interpretation.

---

[1] *See* Jamie Ryan & Emma Pengelly, *Hamas Hostages: Stories of the Hostages Taken by Hamas from Israel*, BBC (Nov. 27, 2023, 6:30 AM), https://www.bbc.com/news/world-middle-east-67053011 (identifying hostages taken).

[2] *See* David Rutz, *Former Israeli Soldier Suggests Hostage Rescue Operations Behind Delay in Ground Invasion of Gaza*, FOX NEWS (Oct. 16, 2023, 9:21 AM), https://www.foxnews.com/media/former-israeli-soldier-suggests-hostage-rescue-operations-behind-delay-ground-invasion-gaza ("The delay of [Israel's] operation was ostensibly weather-related, but Cohen said he believed it was tied directly to Israel's efforts to rescue as many hostages and preserve as many lives as possible.").

[3] Caitlin Yilek, *Number of U.S. Nationals Wrongfully Held Overseas Fell in 2022 for the First Time in 10 Years, Report Finds*, CBS NEWS (Sep. 13, 2023, 8:00 AM), https://www.cbsnews.com/news/wrongfully-detained-americans-report-james-foley-foundation/.

[4] Exec. Order No. 14,078, 87 Fed. Reg. 43389 (July 21, 2022), https://ofac.treasury.gov/media/924551/download?inline.

[5] Kristen E. Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT'L L. 451, 452 (2008).

[6] *Id.* at 459.

[7] *See id.* at 452 ("Hostage-taking of this sort, and hostage-taking more generally, such as that practiced by terrorist groups, is unfortunately frequent in the world today.").

I. LEGAL BACKGROUND

International law is primarily based on the consent of States, as evidenced by their joining of treaties.[8] Other principal sources include customary law (as created by state practice and *opinio juris*) and the judicial decisions of international bodies. The international law on hostage rescue is not codified in one place, requiring it to be stitched together from these sources. Because "there has been no direct attempt to adopt 'a universally accepted doctrine' on the matter," scholars disagree on how to interpret the relevant materials.[9] Two primary views have emerged—the "restrictionist" theory, which believes using force for the protection of nationals is not permitted, and the "counter-restrictionist" theory, which believes it is.[10]

A. Applicable International Law

Hostage-taking is the "seiz[ing] or detain[ing] and threaten[ing] to kill, to injure or to continue to detain another person."[11] The ability to use force to rescue these hostages was allowed without question until the adoption of the U.N. Charter (the "Charter") in 1945.[12] Once the Charter came into force, though, international action had a new regulator, and it did not directly address the issue of hostage-taking and rescue. The most important Charter rules on the use of force are Articles 2(4)[13] and 51.[14] Article 2(4) articulates one of the most fundamental *jus cogens* norms, the general prohibition on the use of force. This provision establishes the equilibrium state in which States may not unilaterally attack one another. Article 51 lays out the only exceptions to the prohibition against using force: acts in self-defense and an attack authorized by the Security Council. While some scholars suggest rescue operations might be better understood as limited police actions, this paper will frame rescues as a use of force under the Charter.[15]

---

[8] *How International Law Works*, IR. DEP'T OF FOREIGN AFFAIRS, https://www.dfa.ie/our-role-policies/international-priorities/international-law/how-international-law-works/ (last visited Oct. 19, 2023).

[9] Tom Ruys, *Protection of Nationals*, *in* THE 'ARMED ATTACK' REQUIREMENT *RATIONE MATERIAE* 213, 233 (Cambridge Univ. Press 2011).

[10] *See* Joseph Eldred, *The Use of Force in Hostage Rescue Missions*, 56 NAVAL L. REV. 251, 253–59 (2008) (describing the two competing theories).

[11] *U.N. International Convention Against the Taking of Hostages*, G.A. Res. 34/146, art. 1, ¶ 1 (Dec. 17, 1979).

[12] Mathias Forteau, *Rescuing Nationals Abroad*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INT'L LAW 947, 954 (Marc Weller ed., 2015).

[13] "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." U.N. Charter art. 2, ¶ 4.

[14] "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 . . . ." U.N. Charter art. 51 (emphasis added).

[15] *See* Forteau, *supra* note 12, at 950 ("[I]t could be argued that (in some circumstances at least) forcible action to rescue nationals abroad can be viewed as a (legal) limited 'police action' rather than as a (prohibited) use of force."); *see also* Ugale Anastasiya & Osman Alice, *Police Powers*

Interpretive differences exist regarding whether the *inherent* right of self-defense in Article 51 encapsulates all existing customary law at the time of the Charter's writing or if it aims to limit these customs in some way.[16] Those who view the exception narrowly do not think the right to rescue "r[o]se to the level of an inherent, or preexisting, right of states that would have been sufficiently obvious to the Charter's framers,"[17] and thus, it did not persist. Those who view the exception broadly point to the widespread state practice of hostage rescue in the preceding centuries as a basis for the right's inherent nature.

Related international discussions are informative for this debate. The first is the negotiation of the Definition of Aggression in the 1950s. The Soviet Union's draft proposal provided an exhaustive list of acts of aggression and motives that would excuse such an act.[18] A "danger which may threaten the life or property of aliens" was one suggested excuse[19] and sparked disagreement among other States. For instance, Belgium argued the excuse would be abused as a basis for attacking another nation, while the United Kingdom argued threatening the life of a foreigner within one's own territory was an attack on that foreigner's home State.[20] Other States disagreed on what gravity of harm might trigger such a justification.[21] Overall, the parties could not agree on this issue, with many not weighing in at all,[22] and self-defense for protecting nationals abroad did not explicitly appear in the ultimate Definition.[23]

The next applicable international discussion on the right to rescue arose out of the negotiations for the International Convention against the taking of hostages. The Convention aimed to address the rising number of hostages captured in the 1970s and, for the first time, hostage-taking outside a time of conflict.[24] Tanzania, joined by several other States, proposed an explicit ban on the use of force for hostage rescue.[25] The remaining nations responded with mixed feelings, including questioning the wording of the prohibition.[26] Ultimately, the Convention adopted

---

Doctrine, JUS MUNDI (Nov. 21, 2023), https://jusmundi.com/en/document/publication/en-police-powers-doctrine (explaining the police powers doctrine gives States "an inherent right to regulate in protection of the public interest").

[16] *See* Eldred, *supra* note 10, at 254 (introducing the interpretive dilemma); *see also infra* Section I(b).

[17] Eichensehr, *supra* note 5, at 464.

[18] USSR Draft Resolution on the Definition of Aggression, U.N. Doc. A/C.l/608, at 1–3 (Nov. 4, 1950), https://digitallibrary.un.org/record/775019?ln=en.

[19] *Id.* at 2.

[20] *See* Ruys, *supra* note 9, at 233–34 (discussing Definition of Aggression debates).

[21] *Id.* at 234.

[22] *Id.*

[23] *See* G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974), http://hrlibrary.umn.edu/instree/GAres3314.html.

[24] Ben Saul, *International Convention Against the Taking of Hostages*, AUDIOVISUAL LIBR. OF INT'L L. (Feb. 2014), https://legal.un.org/avl/ha/icath/icath.html.

[25] *See* Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages, 11th meeting, U.N. Doc. A/AC.188/SR.ll, at 58 ¶ 43 (Aug. 12, 1977) ("States shall not resort to the threat or use of force against the territorial integrity and independence of other States as a means of rescuing hostages."), https://legal.un.org/avl/pdf/ha/icath/A3239.pdf.

[26] *See, e.g.*, Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages, 12th meeting, U.N. Doc. A/AC.188/SR.ll, at 63 ¶ 14 (Aug. 12, 1977) (United States

relatively uneventful language in Article 14: "[n]othing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations,"[27] which left things exactly where they stood.

The final international debate that informs modern customary international law on the right to rescue is the International Law Commission ("ILC") Draft Articles on Diplomatic Protection. In 2000, Special Rapporteur John Dugard proposed an explicit allowance of force for diplomatic protection.[28] He noted that, rather than ignoring the right to rescue's existence, "it [was] wiser to recognize the right, but to prescribe severe limits."[29] Only two ILC delegates agreed with Dugard.[30] The others argued the proposed article would be the basis for unwanted violations of State sovereignty and was incompatible with the U.N. Charter.[31] Finally, some delegates "thought it unwise from a policy perspective to explicitly 'legalize' the doctrine."[32] This position demonstrates the unease with which many international scholars approach the right to rescue. While they recognize the practice of the right, they refuse to acknowledge its legal basis. However, this is counterintuitive in the international context, where state practice directly impacts the development of law.[33] The Draft Articles ultimately removed Article 2's language and instead pointed back to the U.N. Charter Article 2(4) prohibition.[34]

The three deliberations discussed above involved constructive debate but ended in little progress. Some countries advocated for a right to protect their citizens abroad, while others expressed fear of unwelcome foreign intervention. Notably, most of those in the former category were powerful Western States, and

---

suggesting that "some better wording could perhaps be found"); *id.* at ¶ 15 (German representative sharing "reservations as to whether such wording was comprehensive and whether it was wise to include such a definition in a: document which, in his opinion, should be self-explanatory").

[27] G.A. Res. 34/146, art. 14, at 8 (Dec. 17, 1979), https://treaties.un.org/doc/Treaties/1979/12/19791218%2003-20%20PM/Ch_XVIII_5p.pdf.

[28] The proposed Article 2 read:

> The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where: (a) The protecting State has failed to secure the safety of its nationals by peaceful means; (b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State; (c) The nationals of the protecting State are exposed to immediate danger to their persons; (d) The use of force is proportionate in the circum- stances of the situation; (e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

John R. Dugard (Special Rapporteur on Diplomatic Protection), *First Report on Diplomatic Protection*, U.N. Doc. A/CN.4/506, art. 2 (Mar. 7, 2000), https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf.

[29] Ruys, *supra* note 9, at 236.

[30] *Id.* at 236–37.

[31] *Id.* at 237.

[32] *Id.*

[33] *See* Ronald Alcala, *Opinio Juris and the Essential Role of States*, ARTICLES OF WAR (Feb. 11, 2021), https://lieber.westpoint.edu/opinio-juris-essential-role-states/ ("[C]ustomary international law, is commonly agreed to develop from *a general and consistent practice of States* followed by them from a sense of legal obligation" (emphasis added)).

[34] Ruys, *supra* note 9, at 239.

those in the latter were developing countries.[35] This divide helps to explain some of the hesitations to authorize an explicit right to rescue. By legalizing the practice, those nations that can rescue (due to resources, military capabilities, etc.) will, and those that cannot rescue gain no tangible benefit and face invasion by others.

One way to fill this gap is to place limits on the right to rescue. Humphrey Waldock proposed limitations on the right to self-defense for a State's nationals, requiring "(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."[36] These elements mimic those more generally applicable to self-defense, as laid out in the *Caroline incident*.[37] Several nations relied on Waldock's formula in post-Charter times to prove their actions were internationally legal.[38] The limits provide an acknowledgment of the seriousness of violating another nation's sovereignty while also allowing for a recognition that the initial seizure of a foreign citizen is just as severe.

Scholars reference a right to rescue in a few other notable situations that are materially different than a hostage rescue and thus lay primarily beyond the scope of this paper. Firstly, "armed force cannot be employed for the protection of public or private property abroad," except for attacks on things like military bases or embassies.[39] Because property is not a foreign national (setting aside corporations), this is an improper application of the right to rescue. Secondly, many countries invoke the right to rescue to justify the "evacuation of nationals from countries plagued by violent unrest, or by internal or international conflicts."[40] While this is closer to the envisioned rescue of nationals, the right to rescue better applies to discrete rescue missions rather than a full-scale military invasion, which would be better described as humanitarian intervention.[41]

The right to rescue remains a hotly contested principle in international law, leading States to rarely invoke it as a stand-alone ground for entering another State's territory.[42] However, practice clearly indicates that States do not think it is

---

[35] *Id.* at 242.

[36] Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUIEL DES COURS 451, 467 (1952).

[37] *See generally* Michael Wood, *The Caroline Incident*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 5 (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018) (providing an overview of the Caroline Incident and its resulting formula that self-defense must be a "[necessary], instant, overwhelming, leaving no choice of means, and no moment for deliberation").

[38] *See, e.g.,* Ruys, *supra* note 9, at 217 ("[British] Foreign Secretary Selwyn Lloyd expressly claimed that protection of nationals [in the Suez Canal] constituted an exercise of self-defence under Article 51 UN Charter, and defined this concept by reference to the three criteria spelt out by Waldock.").

[39] Ruys, *supra* note 9, at 244 & n.605.

[40] *Id.* at 230.

[41] *See* Eichensehr, *supra* note 5, at 462 ("[T]he right to rescue is usually exercised on behalf of a small number of individuals . . . . Humanitarian intervention, on the other hand, is usually carried out on behalf of large groups of people . . . .").

[42] Forteau, *supra* note 12, at 953.

prohibited outright.[43] This contradiction begs the question of why the right to rescue is not more widely accepted.

B. Competing Interpretations: Restrictionst & Counter-Restrictionist Theory

Incompatibility with Article 2(4) of the U.N. Charter remains the right to rescue's most frequent critique. Those who believe the two are irreconcilable are known as "restrictionists," and those who believe the two are intertwined are known as "counter-restrictionists."

Restrictionists view the U.N., particularly the Security Council, as the only arbiter of what counts as a lawful use of force.[44] This means that States must consult with international partners outside an obvious, immediate, self-defense response to a direct attack on their territory. Such an interpretation emphasizes the U.N.'s ultimate aim of "maintain[ing] international peace and security," as laid out in the Charter's preamble.[45] Restrictionists anticipate a recognized right to rescue transforming into a tool for meddling in the affairs of other States.[46] This worry is unsupported, though, as the State entered is the true meddler that initiated conflict with the rescuing State by taking their national. It would be counterintuitive to leave this first illegal act[47] unpunished given restrictionists' strong belief in the international legal system's goal of minimizing multinational conflict.

In contrast, counter-restrictionists rely on custom, Article 51 self-defense, the scope of Article 2(4), and the importance of human rights in finding that protection of nationals is permitted.[48] Pre-1945 state practice evidences the existence of a customary right to rescue, so it was brought into the post-Charter era by including the *inherent* right to self-defense in Article 51.[49] Inherent refers to the "essential character of something : belonging by nature or habit."[50] Because a right to rescue was a habitual practice of States at the time of the Charter's writing, it should be considered inherent to the codified concept of self-defense. Additionally, nationals abroad are still a part of a State's population, so an attack on them should be considered an attack on the State itself, opening the door to self-defense actions.[51] Counter-restrictionists further argue that rescue operations fall outside the prohibited use of force in Article 2(4).[52] A rescue does not threaten the

---

[43] *Id.* at 947; *see also* Ruys, *supra* note 9, at 216–29 (describing "concrete invocations of the doctrine after 1945").
[44] Eldred, *supra* note 10, at 254.
[45] U.N. Charter pmbl.
[46] Eldred, *supra* note 10, at 254–55.
[47] *See infra* Section II(a).
[48] Eldred, *supra* note 10, at 255.
[49] *Id.* at 256; Ruys, *supra* note 9, at 214.
[50] *Inherent,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/inherent (last visited Oct. 20, 2023).
[51] Ruys, *supra* note 9, at 214; *see also Frequently Asked Questions (FAQs) About International Individual Tax Matters*, INTERNAL REVENUE SERV. (Jun. 14, 2023), https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-about-international-individual-tax-matters (explaining that even American citizens living abroad are subject to U.S. income tax).
[52] Ruys, *supra* note 9, at 214.

"territorial integrity or political independence of any state"[53] because the entering State does not aim to take down the hostage-holding nation. Instead, it seeks to retrieve its nationals and withdraw soon after. This view interprets the U.N. Charter as not "protect[ing] the inviolability of the State,"[54] and therefore the Charter is compatible with a right to rescue. Finally, counter-restrictionists rely on a normative human rights justification for a right to rescue.[55] The U.N. aims to "reaffirm faith in fundamental human rights,"[56] so it should permit States to address urgent needs to protect from violations.

Joseph Eldred proposes a "medium-restrictionist" theory in between the existing interpretations. This approach relies solely on Article 51's self-defense justification for rescues, determined on a case-by-case basis, and imposes seven restrictions on the right's use.[57] This approach aims to normalize the right to rescue while recognizing its inherent dangers and thus is a promising compromise among the competing theories.

II. DOES THE RIGHT TO RESCUE STILL EXIST?

The right to rescue is no longer widely recognized. However, ignoring a reality of international law does not make it disappear. When viewing all applicable instruments together, it becomes clear that the protection of nationals is a permitted grounds for invoking limited self-defense uses of force. Furthermore, the right to rescue is needed now more than ever. "Americans being held hostage by states has risen in the last eight [years] by more than 500%."[58] In response, state practice has overwhelmingly demonstrated endorsement of a right to rescue. The rise of non-state actors also complicates the legal issues of using force. Nonetheless, States' frequent failure to meet their due diligence obligations regarding suppressing bad actors within their territory permits others to conduct interventions as usual.

---

[53] U.N. Charter art. 2, ¶ 4.

[54] Eldred, *supra* note 10, at 258 (internal quotations omitted).

[55] *Id.*

[56] U.N. Charter pmbl.

[57] The proposed restrictions are as follows:

> First, a use of force can only be used if the hostages are in imminent danger of loss of life or limb. Second, there must be no other feasible "non-force" options such as diplomatic efforts or economic sanctions. Third, the State where the hostages are being held must be unwilling or unable to protect the hostages or effectively assist in their release. Fourth, the use of force cannot be punitive in nature nor with the purpose of reprisal. Fifth, wherever and whenever possible, the consent of the territorial sovereign should be requested prior to the use of force. Sixth, no additional force may be used beyond that which is required to rescue the hostages. Seventh, and finally, the purpose of any use of force by a state must be strictly limited to rescuing its hostages and be "proportional" to the mission of rescuing the hostages; consequently, force cannot be used as a pretext for any other activities in the target State.

Eldred, *supra* note 10, at 268.

[58] *Jason Rezaian: The Rise of Hostage Taking, Babel: Translating the Middle East*, CTR. STRATEGIC & INT'L STUDIES (July 25, 2023), https://www.csis.org/analysis/jason-rezaian-rise-hostage-taking.

A. Abductions as a Use of Force

The right to rescue is most directly supported by the U.N. Charter's self-defense exception to the prohibition of force. Because Article 51 self-defense is triggered only in response to an "armed attack," an important initial question is whether the abduction of a national is an armed attack against that person's home State. The armed attack requirement is essentially a magnitude requirement that prevents a full-scale war from arising out of minor attacks.[59] The Geneva Conventions explicitly prohibit hostage-taking during times of conflict.[60] Outside of ongoing war, though, there is not a direct answer to whether hostage-taking is a *casus belli*.

There is no clear test for an armed attack in international law. The extent of deaths or injuries cannot serve as the basis for the calculation as this fails to consider the more complex interests at play between nations.[61] For instance, a cyber-attack in which the victim State experiences no physical harm may still constitute an armed attack.[62] A sounder basis for analyzing attacks is "the character of the thing attacked."[63] In the case of hostages, this character is the essential relationship between a State and its citizens.

Any unjustified taking of foreign nationals should meet the magnitude requirement of an armed attack.[64] Though the loss of a single individual likely does not threaten the "territorial integrity or political independence of any state,"[65] it attacks the principal relationship of world order (that of a State and its citizens). While social contract theory is beyond the scope of this paper, it is relevant to note the traditional belief that "[m]an's preservation could only be ensured with an unconditional contract with the sovereign, wherein the sovereign promised internal civil order and protection from external threat."[66] The international community must give the State-citizen relationship adequate reverence by recognizing that an attack on a national is an attack on the nation.

Use of force against nationals by abduction also falls within the U.N. Charter's catch-all phrase in Article 2(4), "any other manner inconsistent with the

---

[59] *See* Eichensehr, *supra* note 5, at 467 (characterizing the Charter's armed attack language as a "requisite of magnitude").

[60] *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(1)(b), Aug. 12, 1949, 75 U.N.T.S. 287.

[61] *See* Eichensehr, *supra* note 5, at 468 ("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.").

[62] *See* Matthew C. Wazman, *Cyber Attacks as "Force" Under UN Charter Article 2(4)*, 87 INT'L L. STUD. 43, 47 (2011) ("Statements by senior US government officials have either hinted that the United States would regard some cyber attacks as prohibited force or declined to rule out that possibility.").

[63] Eichensehr, *supra* note 5, at 468.

[64] *But see* Eichensehr, *supra* note 5, at 468–69 ("[T]he magnitude requirement in the end rests, unsatisfyingly, on a case-by-case determination.").

[65] *Cf.* Forteau, *supra* note 12, at 955 ("Since states are composed of a territory and a population, it could indeed be argued that an armed attack (provided that it fits the criteria of 'armed attack' under Art 51) against the population is like an attack against the territory of the state, each of them being constitutive elements of a state.").

[66] Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2032–33 (2003).

Purposes of the United Nations."[67] In particular, the abduction of foreigners undermines "respect for the principle of equal rights and self-determination of peoples" in Article 1(2).[68] Self-determination includes people's ability to decide which country they want to be associated with. These associations are primarily evidenced through citizenship, which is internationally recognized as a human right.[69] Because hostage-taking threatens these guarantees, they should be considered an illegal use of force amounting to an armed attack.

The United States should consider these abductions actionable armed attacks. For quite some time, American officials have "taken the position that the inherent right of self-defense potentially applies against *any* illegal use of force."[70] This perspective views the armed attack requirement as a characterization issue, as this paper advocated for above,[71] rather than one of counting bodies. Importantly, the U.S. position is caveated with conducting only a necessary and proportional response.[72]

Rescue as self-defense is subject to the same limitations as traditional self-defense: necessity, immediacy, and proportionality.[73] These requirements are not a bar to finding a right to rescue but rather parameters under which it may be exercised. Necessity is a two-part analysis, including certainty of harm and lack of other prevention methods.[74] Certainty can never truly be reached, especially when the opposing party has already shown itself not to be law-abiding through the initial abduction. Some scholars advocate for States to have "wide latitude to decide whether its nationals are in imminent peril" to counteract this ambiguity.[75] Regardless, the realities of being a hostage suggest harm of some kind is inevitable. Even if a captive is released unharmed (which happens more often than one might expect),[76] they will likely face psychological difficulties—such as post-traumatic stress disorder—for years to come. Unless the abductor provides direct and reliable evidence that it is treating the hostage well, States should be free to assume harm is inevitable.

The availability of non-forceful means is also needed to find necessity. Complete exhaustion of other methods is not required, though, if they are anticipated to be fruitless.[77] Government officials, such as the Special Presidential Envoy for Hostage Affairs in the U.S. State Department, often attempt to bargain.

---

[67] *Supra* note 13.
[68] U.N. Charter art. 1, ¶ 2.
[69] *E.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 15 (Dec. 10, 1948) ("Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.").
[70] Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks at U.S. CYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012) (emphasis in original).
[71] *See supra* note 59 and accompanying text.
[72] Koh, *supra* note 70.
[73] *See supra* note 36 and accompanying text.
[74] Eichensehr, *supra* note 5, at 470.
[75] *Id.* at 471 (internal quotations omitted).
[76] *See* Brian Michael Jenkins, *Hostage Survival: Some Preliminary Observations*, RAND CORP. 1 (Apr. 1976), https://www.rand.org/content/dam/rand/pubs/papers/2008/P5627.pdf ("[A]pproximately 72 percent of the total . . . were released unharmed.").
[77] Eichensehr, *supra* note 5, at 472.

Talks are, of course, complicated when the captors are terrorists with whom some governments will not negotiate.[78] Another avenue is the international community, which might have closer relations with the bad actor than the home State. However, international help often relies on so-called naming-and-shaming, which has limited efficacy.[79] Once reasonable attempts to induce release have failed, necessity should be found.

Immediacy is satisfied when harm to the hostage is imminent or future circumstances may not allow rescue.[80] In the domestic kidnapping context, the first few days after a person goes missing are the most important.[81] While the leverage international hostages provide differs from domestic kidnappings and thus might not have as high a risk of quick harm, similar time restraints likely apply. As time goes on, the hostage must undergo further suffering and trauma. Additionally, operational success depends on many circumstances—security presence, weather, moonlight, etc.—so States should seize any viable opportunity for rescue.

Finally, rescue attempts must follow the principle of proportionality. To be proportional, "[t]he force used, taken as a whole, must not be excessive in relation to the need to avert or bring the attack to an end."[82] Proportionality exists throughout international law, so it should not be too hard for States to analyze. For hostage rescues, force is somewhat limited because it is often quick. Rescue teams, such as military special operations units, may be in and out of a site within minutes.[83] Also, harm is done only to those participating or complacent with the detention.[84]

Another concern regarding proportionality is that a hostage rescue might be a means for further intervention in a country or "cloaking."[85] This fear cannot negate a right to rescue, though. Potential for abuse exists within many aspects of

---

[78] *See* Rachel Briggs, *'We Don't Negotiate with Terrorists' – But Why?*, CHATHAM HOUSE (Jan. 13, 2022), https://www.chathamhouse.org/2022/01/we-do-not-negotiate-terrorists-why ("For decades, politicians in the US and the UK have regularly stated that 'we do not negotiate with terrorists', arguing that it is both morally indefensible and impractical – likely to encourage more terrorism and legitimize terrorist aims.").

[79] *See* Rochelle Terman, *Why "Naming and Shaming" Is a Tactic That Often Backfires In International Relations*, PUBLIC SEMINAR (Mar. 11, 2021), https://publicseminar.org/essays/why-naming-and-shaming-is-a-tactic-that-often-backfires-in-international-relations/ ("Shaming aimed at rivals and adversaries . . . is ubiquitous but often backfires by stimulating defiance in the target country.").

[80] Eichensehr, *supra* note 5, at 475.

[81] Julia Jacobo, *Why the First 72 Hours in a Missing Persons Investigation are the Most Critical, According to Criminology Experts*, ABC NEWS (Oct. 8, 2018, 5:21 AM), https://abcnews.go.com/US/72-hours-missing-persons-investigation-critical-criminology-experts/story?id=58292638.

[82] Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence*, CHATHAM HOUSE 10 (Oct. 2005), https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpforce.doc.

[83] *See 60 Minutes: The Rescue of Jessica Buchanan*, CBS (May 12, 2013, 7:07 AM), https://www.cbsnews.com/news/the-rescue-of-jessica-buchanan/ (describing Buchanan's rescue from Somalia).

[84] *See id.* ("The only thing left in the camp were nine dead bandits.").

[85] Eichensehr, *supra* note 5, at 477.

international interaction, such as humanitarian interventions, and this potential is not used to outlaw those practices completely.[86] If anything, these problems are deviations from the rule rather than a demonstration that the rule does not exist.

The right to rescue fits squarely within the framework of self-defense, triggered by an initial violation of the prohibition on using force at the time of the abduction. While the protection of nationals is subject to the described limitations, it did not disappear with the drafting of the U.N. Charter.

B. Lessons from State Practice

The overwhelming conduct of States further evidences the continuation of a right to rescue in modern times. In the same way that state practice evidences the existence of an international customary rule, state practice should also indicate the absence of a rule. Here, the "rule" that does not exist is a prohibition on forceable hostage rescues. Additionally, how other States respond to a nation claiming the right to rescue is informative of the current norm.

Early post-Charter invocations of the right to rescue indicated the international community's misapplication of the right. During the 1956 Suez crisis, the United Kingdom invoked the protection of nations, saying "that self-defen[s]e undoubtedly includes a situation in which the lives of a State's nationals abroad are threatened and it is necessary to intervene on that territory for their protection."[87] The underlying facts of the situation did not support a finding that there was an imminent danger to British citizens, though, and thus the justification was rejected.[88] In the 1960s, Belgian troops entered the Congo when an ongoing mutiny harmed Belgian nationals.[89] Critics viewed the intrusion as a cover for Belgium's meddling in Congolese affairs rather than a rescue operation. However, these evacuation efforts are better characterized as a large-scale humanitarian intervention rather than an exercise of the right to rescue.[90] The first invocations of the right to rescue post-Charter misunderstood the doctrine and thus cannot be strong indications of state practice.

Later uses of the right to rescue were more aligned with the proper understanding of its use. The 1975 *Mayaguez Incident* involved the capture of forty American crewmembers onboard a ship by Cambodia. President Ford explicitly pointed to Article 51 self-defense in his request for help from the U.N. Secretary-General.[91] After attempted diplomatic means proved unhelpful, President Ford ordered a military operation to retrieve the ship and crew.[92] At the same time,

---

[86] *See generally* Chantal de Jonge Oudraat, *Humanitarian Intervention: The Lessons Learned*, 99 CURRENT HIST. 419 (Dec. 2000), https://carnegieendowment.org/2000/11/30/humanitarian-intervention-lessons-learned-pub-565 ("Every approach that would allow for humanitarian intervention contains possibilities for abuse.").

[87] Ruys, *supra* note 9, at 216–17 (internal quotations omitted).

[88] *Id.*

[89] *Id.* at 218.

[90] *See supra* notes 40–41 and accompanying text.

[91] Eldred, *supra* note 10, at 261.

[92] *See* LTC Michael Hunter, *Defining a War: Indochina, the Vietnam War, and the* Mayaguez *Incident*, 6 MARINE CORPS HIST. 72, 77 (Winter 2020),

unknown to Ford, the crew had been released from Cambodian custody. Once Ford knew the crew was safe, he called off the ongoing operation.[93] While Cambodia characterized the United States' actions as piracy, American leaders doubled down on the legitimacy of their justification.[94] Overall, the international community was neutral on the events,[95] indicating at least a tolerance for the invocation.

One year later, the Entebbe Raid again invoked the protection of nationals doctrine. After a plane with 96 passengers heading from Tel Aviv to Paris was hijacked and rerouted to Uganda, Israeli soldiers raided the plane and killed all the hijackers.[96] The United States was the only country to overtly support Israel's actions, with the rest of the world condemning the raid as a violation of Ugandan sovereignty.[97] This event posed relatively novel legal questions because of the involvement of non-state actors. However, as will be discussed more in the next Section, the right to rescue may still justify invasion without the consent of the nation in which the abduction occurred.[98] Given the international split, no action was ultimately taken against Israel, and scholars describe the raid as a clearcut application of the counter-restrictionist theory.[99]

In the 21st century, rescue missions are relatively common and conducted by several countries.[100] This pattern demonstrates an international belief that States can (or maybe just should be able to) temporarily intrude upon another State's territory to retrieve citizens. Additionally, while state practice and *opinio juris* are separate elements of customary international law, the lack of punishment for States that conduct rescue missions indicates there is not a clear legal obligation being violated. States' behavior post-1945 mimics the pre-1945 customary international law permitting rescue operations. No evident change in circumstances materially altered States' position regarding this doctrine, so there is no evidence that the right ever went away.

---

https://www.usmcu.edu/Portals/218/MarineCorpsHistory_vol6no2_Winter2020_web.pdf ("Portions of two U.S. Marine battalions, supported by Navy and Air Force elements, assaulted both the *Mayaguez* and Koh Tang Island in the early morning hours of 15 May 1975.").

[93] *Id.* ("The *Mayaguez* was unguarded. But tragically, by the time the Marines on the island received this report, several helicopters lay burning in the water and some Marines had already given their lives.").

[94] *See* Eldred, *supra* note 10, at 263 ("[I]n the United States presidential election of 1976, Democratic candidate Jimmy Carter seemed to endorse President Ford's actions in the *Mayaguez* incident.").

[95] Robert Joe Mahoney, *The 1975* Mayaguez *Incident: An Analysis of its Historical and Strategic Significance* 230 (Jan. 31, 2009) (Ph.D. dissertation, George Washington University) (available at https://scholarspace.library.gwu.edu/downloads/6m311p58m?locale=zh) ("Basically, the American allies supported the US, while others publicly ignored the event and some condemned it.").

[96] Eldred, *supra* note 10, at 263.

[97] *Id.* at 263–64.

[98] *See infra* Section II(c).

[99] Eldred, *supra* note 10, at 264–65.

[100] *See* Forteau, *supra* note 12, at 957–58 (recounting many rescue operations since 2000 involving France, the UK, Korea, and others).

C. Non-State Actors' Impact

Most of this paper has considered a right to rescue when another State abducts a national. Today, though, non-state actors are often the ones conducting these captures rather than a sovereign government.[101] The U.S. government uses the term hostage to refer exclusively to those detained by non-state actors, while unlawful detainee is the term for those held by a foreign government.[102] While the legal analysis is slightly different when the captors are non-state actors (because a foreign State has not itself committed a violation warranting incursion onto its territory), the same result permitting rescue is usually reached.

States can become responsible for the conduct of non-state actors by failing to meet their due diligence obligations. General due diligence is the idea "that States must make sure that their territory is not used for the purposes of activities involving the violation of the territory of another State," and, though debated, exists in a variety of areas in international law.[103] In the terrorism context, due diligence means "a State has the duty not to tolerate the use of its territory by private individuals as a base of hostile military operations against a belligerent State."[104] If a state fails to use its domestic legal mechanisms to curtail these violent acts, the conduct of the non-state actors is imputed onto the State as a whole. Once attribution is achieved, a rescuing State may conduct the right to rescue analysis in the same manner as if the State were the abductor.

Similarly, States may determine another State is "unable or unwilling" to intervene against a non-state actor operating from within its borders. Scholars confirm that "either a state's unwillingness to take steps against a belligerent or its lack of capacity to do so [are] sufficient grounds for an offended belligerent to

---

[101] *See, e.g.*, *Iraq: Release Kidnapped Scholar*, AMNESTY INT'L (Sept. 8, 2023), https://www.amnesty.org/en/latest/news/2023/09/iraq-release-kidnapped-scholar/ (calling for release of a duke Russian-Israeli citizen held in Iraq); Yahel Gerlic, *The War Crimes of Hamas: Hostage-Taking in International Law*, JURIST (Oct. 9, 2023, 9:44 AM), https://www.jurist.org/commentary/2023/10/the-war-crimes-of-hamas-hostage-taking-in-international-law/ (describing hostages taken by Hamas in Israel/Palestine); *Family Renews Calls to Free South African Hostage in Mali*, VOICE OF AM. NEWS (Mar. 25, 2023, 6:42 PM), https://www.voanews.com/a/family-renews-calls-to-free-south-african-hostage-in-mali-/7021548.html ("The family of a South African held hostage by jihadis in Mali for more than five years launched a fresh appeal for his release.").

[102] *See* Office of the Press Secretary, *Presidential Policy Directive – Hostage Recovery Activities*, WHITE HOUSE (June 24, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/06/24/presidential-policy-directive-hostage-recovery-activities ("This directive does not apply if a foreign government confirms that it has detained a U.S. national"); *see also* Press Statement, Antony J. Blinken, U.S. Sec'y of State, Russia's Continued Wrongful Detention of Brittney Griner (Nov. 9, 2022), https://www.state.gov/russias-continued-wrongful-detention-of-brittney-griner/ (terming Russia's holding of American basketball player Brittney Griner a "wrongful detention").

[103] Maria Flemme, Due Diligence in International Law 3 (Spring 2004) (Master Thesis, Univ. of Lund Faculty of Law) (available at https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1557482&file).

[104] *Id.* at 35–36.

act."[105] This test has widespread acceptance—potentially even as a rule of customary international law—but no concrete definition.[106] Importantly, the victim State (here, the home State of a hostage) has relative freedom to decide whether a territorial State has met this standard.[107] Failure to exercise the due diligence described above might be one measure of unwillingness. Once the territorial State evidences it will not help the victim State remedy a wrong or prevent future harm, the victim State may proceed as usual in self-defense without the express consent of the State whose territory it will enter.

Both the due diligence obligation and unable or unwilling standard inform the availability of other means that go into a victim State's certainty calculation.[108] The hostage's home State should always seek out diplomatic solutions before resorting to force. Failure of these efforts would serve as evidence that the territorial State will not be helpful, though, and thus military action could be needed. A right to rescue is arguably even more necessary in the non-state actor context where some countries cannot negotiate directly with the captors themselves, but only these other governments as often uninterested intermediaries.

Some of the examples of state practice mentioned above were non-state actor situations. For instance, the Entebbe Raid involved hijackers unaffiliated with the Ugandan government. The hijackers were not even based in Uganda, so the unable and unwilling analysis is more applicable than a due diligence obligation. There, Israel tried using diplomatic channels to negotiate the hostages' release but received no help from Uganda's leaders.[109] Once these efforts failed and knowing the hijackers had set a deadline for meeting demands, Israel was able to determine a forceful attack was necessary and justified. This exhibited the necessity and immediacy required for force, with proportionality being a separate issue.

While non-state actors are distinct from States themselves under international law, their growing impact has led the international community to find ways to fold them into existing frameworks. In the context of using force, States are likely wary of permitting any further allowance for violating territorial sovereignty. However, they can easily prevent unwanted interventions simply by working with other States to recover nationals.[110] Such collaboration realizes a

---

[105] Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499 (2012).

[106] *See id.* at 503–04 ("[T]here is little question that the test exists as an internationally-recognized norm governing of the use of force . . . [but] states[] generally recite the test without discussing its meaning."); *but see generally id.* (proposing a developed framework for applying the "unable and unwilling" test).

[107] *Id.* at 495.

[108] *See supra* notes 77–79 and accompanying text (explaining availability of nonforceful means requirement for finding necessity).

[109] *See Vindication for the Israelis*, TIME (Jul. 26, 1976), https://web.archive.org/web/20070930121748/http://www.time.com/time/magazine/article/0,9171,914380,00.html (Israel argued "Uganda's Idi Amin Dada had compromised his own country's rights by aiding the skyjackers.").

[110] *See* Deeks, *supra* note 105, at 496 ("The territorial state [] has some measure of control over the victim state's decision whether to use force, either because it decides to act to suppress the threat or because it produces timely information to address the victim state's concerns.").

stated purpose of the U.N. to "achieve international co-operation in solving international problems."[111]

III. POLICY CONSIDERATIONS & CONCLUSION

The right to rescue is not only legal but also desirable. First and foremost, it is the "right" thing to do. Over one hundred years ago, the United States exhibited its strong belief in protecting nationals by a willingness to use force to rescue even a not-yet-fully naturalized citizen.[112] Being an American (or citizen of any State) means receiving all the benefits, including safety, that accompany it. The military's "no man left behind" principle further exhibits an inclination to protect fellow citizens. While not enshrined in an official doctrinal policy, it is widespread in military culture and recognized by the highest levels of leadership.[113] The concept is essential for service members, ensuring they will not be forgotten and bonding them to one another.[114] It is puzzling why a similar mentality should not also apply to civilians. When a citizen is unlawfully taken abroad, they should be able to rely on their government to at least attempt to return them home. As Jessica Buchanan, a hostage in Somalia, stated, "[she had] never in [her] life been so proud and so very happy to be an American," as when she was rescued from her captors.[115] A rescue policy could also encourage beneficial activities like humanitarian work and developmental aid in the highest-risk areas. Buchanan herself was involved in this work when she was abducted.[116] Like "no man left behind," the right to rescue eases concerns about engaging in helpful, though dangerous, conduct.

Second, advocating for the right to rescue serves a deterrence function. Knowing a State will quickly respond with force to save its citizens will make bad actors think twice before engaging in the initial abduction.[117] Recent Biden administration actions have undermined the deterrence function of the right to rescue. For instance, in exchange for the release of five Americans, the United States permitted Iran access to $6 billion in frozen funds.[118] Additionally, senior

---

[111] U.N. Charter art. 1, ¶ 3.

[112] In re Neagle, 135 U.S. 1, 64 (1890) ("Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that [a not yet fully naturalized American citizen] had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with.").

[113] *See* Charles Bausman, *Leave No Man Behind- Implications, Criticisms, and Rationale*, MOUNTAIN TACTICAL INST. (Sep. 2, 2016), https://mtntactical.com/knowledge/leave-no-man-behind-implications-criticisms-rationale/ ("Leave No Man Behind" is a creed and ethos often repeated and adhered to by various units and soldiers.); *see also* Christopher Hurd, *No Man Left Behind*, U.S. ARMY (Mar. 3, 2023), https://www.army.mil/article/264519/no_man_left_behind (describing a Medal of Honor recipient's actions to save his fellow wounded soldier).

[114] Bausman, *supra* note 113.

[115] *60 Minutes: The Rescue of Jessica Buchanan*, *supra* note 83.

[116] *Id.*

[117] *See generally* Michael K. Mazarr, *Understanding Deterrence*, RAND CORP. (2018), https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE295/RAND_PE295.pdf (providing an overview of the theory of deterrence under international law).

[118] Henry Rome, *The Iran Hostage Deal: Clarifying the $6 Billion Transfer*, WASHINGTON INST. NEAR EAST POL'Y (Sep. 18, 2023), https://www.washingtoninstitute.org/policy-analysis/iran-hostage-deal-clarifying-6-billion-transfer.

administration officials took force off the table for rescuing Americans held by Hamas.[119] US special forces admit consulting with Israel on intelligence and planning for rescue missions, but operational involvement is firmly denied.[120] Without the threat of force, captors face little risk when taking a hostage and may reap significant rewards through potential monetary payments or exchanges for persons held in the hostage's home nation. It is never wise to show your hand to someone across the table, and public statements undermining the right to rescue do just this for America's adversaries.

International law provides a well-founded framework for continuing the right to rescue in post-Charter times. Changing circumstances, such as the rise of non-state actors, indicate we should move towards embracing the right rather than removing it from international custom, as many scholars suggest. Furthermore, the many precursors to using force serve as a check on the right that can ease the concerns of those who fear unlawful violations of territorial sovereignty when adequately understood. U.S. foreign policy must reflect this inherent legal right moving forward and serve as an example for other nations in placing its citizens first.

---

[119] *See* Brett Samuels, *US 'Not Contemplating' Using American Troops for Hostage Rescue Operations, Biden Aide Says*, THE HILL (Oct. 12, 2023, 9:58 AM), https://thehill.com/homenews/administration/4251892-us-not-contemplating-using-american-troops-for-hostage-rescue-operations-biden-aide-says/ ("[W]e are not contemplating U.S. boots on the ground involved in that mission."); Bill Whitaker, *Vice President Kamala Harris on Israel, Ukraine, Gun Violence and the 2024 Election*, CBS NEWS (Oct. 29, 2023, 7:40 PM), https://www.cbsnews.com/news/kamala-harris-interview-60-minutes-transcript/ ("We have absolutely no intention nor do we have any plans to send combat troops into Israel or Gaza, period.").

[120] MJ Lee, Zachary Cohen, Evan Perez & Jennifer Hansler, *Behind the Effort to Rescue American Hostages From One of the Most Dangerous Places on Earth,* CNN (Oct. 11, 2023, 6:14 PM) ("But US sources stressed to CNN that those forces are not engaged in any mission to physically extract American hostages at the moment.").