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Rescuing Policy and Terror Victims: A Concerted Approach to the Ransom Dilemma

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NOTE

RESCUING POLICY AND TERROR VICTIMS: A CONCERTED APPROACH TO THE RANSOM DILEMMA

C. Elizabeth Bundy*

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THE VALUE OF A HOSTAGE: PROFITABLE TRADE, PRECIOUS TREASURE¹

After months in captivity with twenty-two other hostages, journalist James Foley became the first to be publicly beheaded by the Islamic State

* J.D., May 2016, University of Michigan Law School. Along with the MJIL editorial members and J.D. Andrew Sand, I would like to thank Professors Bromberg, Hakimi, and Ratner for their insightful comments, and Francisco Ceballos for his continued support and encouragement. All views expressed herein (along with any errors) remain my own.

1. Nasser al-Wuhayshi, Al-Qaida Papers: How to Run a State, Second Letter from Abu Basir to Emir of Al-Qaida in the Islamic Maghreb, http://hosted.ap.org/specials/interactives/_international/_pdfs/al-qaida-papers-how-to-run-a-state.pdf (“Kidnapping hostages is an easy spoil, which I may describe as a profitable trade and a precious treasure.”). Al-Wuhayshi, leader of al-Qaida in the Arabian Peninsula, also wrote that “most of the battle costs, if not all, were paid from through the spoils,” and that “almost half the spoils came from hostages,” indicating the importance of kidnapping operations to the organization’s funding.

group (Daesh)² on August 19, 2014.³ His death was preceded by extended negotiations for the release of fifteen other captives;⁴ shortly thereafter, most of Foley's hostage-mates were freed in exchange for substantial and varying, though largely undisclosed, amounts.⁵ What is striking about this group is that, of at least twenty-three hostages from twelve states held together over fourteen months, only the captives of countries refusing to concede ransoms were ultimately executed.⁶

This tragic chapter demonstrates the difficulties underlying states' divergent approaches to hostage situations. The execution of several nationals of no-concessions states on the one hand, together with the ransomed release of their fellow hostages on the other, call into question the effectiveness of the United States' and United Kingdom's strict no-concessions approach in deterring kidnappings of their own nationals. Conversely, the payment of ransoms by states favoring a more flexible approach reinforces the ability of perpetrators to carry out further kidnapping operations.

From a legal standpoint, ransoms have never been explicitly prohibited through the terrorist financing regime following September 11, 2001 or under any of the relevant multilateral Conventions. Beginning in 2014, however, the United Nations Security Council issued several resolutions to address Daesh, some of which specifically provided for restrictions on ransom payments.⁷ Although the resolutions call on states to prevent the benefits accruing "from using kidnapping to raise funds or gain political concessions,"⁸ the absence of an overt prohibition on such payments themselves injects a measure of ambiguity into the framework governing the flow of finances to terrorist organizations. Furthermore, continued payments by certain states undercut the view that the sanctions regime prohibits ransoms to non-state terrorist actors.

2. For an explanation of why "Daesh" is used over other terms (e.g., ISIS, ISIL, Islamic State), see Nike Ching, *Why Kerry Calls Terror Group 'Daesh,' Not Islamic State*, VOICE OF AMERICA (Jan. 15, 2016), <https://www.bostonglobe.com/opinion/2014/10/09/words-matter-isis-war-use-daesh/V85GYEuasEEJgrUun0dMUP/story.html>; Faisal Irshaid, *Isis, IS or Daesh? One group, many names*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-27994277>; Zeba Khan, *Words matter in 'ISIS' war, so use 'Daesh'*, BOSTON GLOBE (Oct. 9, 2014), <https://www.bostonglobe.com/opinion/2014/10/09/words-matter-isis-war-use-daesh/V85GYEuasEEJgrUun0dMUP/story.html>.

3. See, e.g., Rukmini Callimachi, *Militant Group Says it Killed American Journalist in Syria*, N.Y. TIMES (Aug. 19, 2014), <http://www.nytimes.com/2014/08/20/world/middleeast/isis-james-foley-syria-execution.html>.

4. See Rukmini Callimachi, *The Horror Before the Beheadings: ISIS Hostages Endured Torture and Dashed Hopes, Freed Cellmates Say*, N.Y. TIMES (Oct. 25, 2014), <http://www.nytimes.com/2014/10/26/world/middleeast/horror-before-the-beheadings-what-isis-hostages-endured-in-syria.html>.

5. *Id.*

6. *Id.*

7. See, e.g., S.C. Res. 2133 (Jan. 27, 2014); S.C. Res. 2160 (June 17, 2014); S.C. Res. 2161 (June 17, 2014); S.C. Res. 2199 (Feb. 12, 2015).

8. S.C. Res. 2133, ¶ 3 (Jan. 27, 2014).

At the practical level, terrorist kidnappings call for a more nuanced response by affected states. Daesh's most recent kidnappings demonstrate not only the limited effectiveness of a no-concessions policy in deterring terror-driven kidnappings, but also the potential for pro-ransom policies to fund terrorist actors. Moreover, states that are unwilling to engage in negotiations themselves effectively delegate that role to a less capable private sector and often leave insurers and families in a legally tenuous position in their efforts to secure ransomed release. Finally, the general lack of a coordinated effort during rescue attempts many times results in failed hostage rescue operations or the unintended deaths of those held captive.

Such problems lead firstly to the question of the legality of ransoms under international law and, secondly, to the role states can and should play in addressing hostage situations. In surveying these problems, Part I of this Note will analyze the current framework governing hostage situations to determine the permissibility of ransom payments under international law. Part II will examine the two dominant positions that have developed among states and identify the justifications and shortcomings of each. Part III will conclude, firstly, that for states to develop a multilateral approach to hostage situations, they must take the lead within their respective domestic spheres and, secondly, that the option to negotiate for ransomed release should be preserved as an essential tool for confronting terrorist organizations.

In examining these points, analysis may draw from piracy-driven kidnappings because of the substantial similarities they bear to hostage situations involving non-state terrorist groups.⁹ Although the former category is frequently distinguished as falling within a less egregious branch of criminal enterprise, perpetrators in both contexts pose significant risk to captives and may operate through diffuse international networks.¹⁰ Similarly, to maintain a narrow focus on the permissibility of ransoms, other forms of concessions such as prisoner exchanges are considered to fall outside the scope of this Note. Instead, this Note will focus narrowly on the issue of kidnappings facilitated by non-state groups that have been designated as terrorists under the auspices of the United Nations.¹¹

9. See, e.g., Lucas V.M. Bento, *Preserving Negotiation Whilst Promoting Global Order: Should We Bargain with Salt-Water Devils?*, 19 HARV. NEGOT. L. REV. 285, 301 (2014). But see *id.* at 301–04; Lawrence Rutkowski et al., *Mugged Twice?: Payment of Ransom on the High Seas*, 59 AM. U. L. REV. 1425, 1431–32 (2010).

10. See Bento, *supra* note 9, at 301.

11. There is currently no internationally agreed upon definition of “terrorist” or “terrorism.” See, e.g., Ben Saul, *Attempts to Define ‘Terrorism’ in International Law*, 52 NETH. INT’L L. REV. 57 (2005). For purposes of the present analysis, this Note will therefore only refer to parties included on the Consolidated List of individuals and entities associated with al-Qaida and the Taliban, which is maintained by the U.N. al-Qaida Sanctions Committee. See Consolidated United Nations Security Council Sanctions List, <https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/consolidated.pdf> (last updated May 13, 2016). For additional material on the Sanctions Committee and the listing procedures more generally, see Lisa Ginsborg, *The United Nations Security Council’s Counter-Terrorism Al-Qaida Sanctions*

Finally, despite the numerous non-state groups that fit this category, this Note will draw primarily upon examples provided by the recent kidnappings and executions perpetrated by Daesh. Although reference may be made to other groups or historical examples, the kidnappings that occurred during the 2014-2015 period are particularly relevant. Not only were they the catalyst that sparked recent developments concerning the lawfulness of ransoms, but they also prompted at least one country to undergo substantial revision of its policy on this issue.¹²

I. AN INTERNATIONAL LEGAL FRAMEWORK FOR TERROR-DRIVEN KIDNAPPINGS

Before examining the policy divide over ransom payments to terrorist organizations, a preliminary question pertains to the permissibility of such payments under international law. Accordingly, this Section provides a brief historic overview of the current legal regime governing hostage situations, before surveying recent resolutions issued by the Security Council. The following analysis demonstrates that contemporary developments, while preserving a measure of flexibility for private parties responding to hostage situations, simultaneously inject uncertainty regarding the lawfulness of ransoms into the existing legal framework.

A. Terrorist Financing: An International Offense

Historically, the instruments that bear most directly on the question of kidnapping are the 1979 International Convention Against the Taking of Hostages (Hostages Convention)¹³ and the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention).¹⁴ Adopted in response to earlier kidnappings including the OPEC siege, the Entebbe hijacking, and the Iran hostage crisis,¹⁵ the Hostages Convention defines the offense of hostage-taking and obliges states to cooperate in arresting, prosecuting, and punishing perpetrators.¹⁶ Despite a strict approach to kidnappers with “no exception for any actor (State or non-State) or cause,”¹⁷ the treaty does not specify measures ap-

Regime: Resolution 1267 and the 1267 Committee, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 608, 608-25 (Ben Saul ed., 2014).

12. See discussion *infra* Part III.B.

13. 1979 International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 (entered into force June 3, 1983) [hereinafter Hostages Convention].

14. 1999 International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13075, 2178 U.N.T.S. 229 (entered into force Apr. 10, 2002).

15. Ben Saul, *Introductory Note to the International Convention Against the Taking of Hostages*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW 1, 1 (2014), http://legal.un.org/avl/pdf/ha/icath/icath_e.pdf.

16. Hostages Convention, *supra* note 13, T.I.A.S. No. 11081 at 4–8, 1316 U.N.T.S. at 207, 208 (arts. 1–2, 4, 6).

17. Saul, *supra* note 11, at 3. Article 12 of the Hostages Convention does, however, provide for the application of humanitarian law for incidents of hostage-taking that occur

plicable to the ransoms they collect or their financiers.¹⁸ Although Article 4 provides preventive methods for hostage-taking incidents, it also mandates that States “tak[e] all practicable measures to prevent preparations in their respective territories for the commission of those offences,”¹⁹ resulting in a narrow targeting of the demand side of ransom situations while preserving states’ discretion to engage in negotiations.²⁰

The Terrorist Financing Convention ventures further in addressing the supply side by requiring states to criminalize the offense of terror financing and to freeze and seize funds intended for terrorist activities.²¹ The Convention’s definition of terrorist financing as the provision or collection of funds “by any means, directly or indirectly, unlawfully and willfully . . . with the intention . . . or in the knowledge that they are to be used” in furtherance of terrorist acts²² might be read broadly to encompass finances exchanged for hostage release.²³ However, the provision’s application only to persons providing funds “unlawfully and wilfully” distinguishes the deliberate financing of known terrorist activities, prohibited under the Convention, from the legitimate interests of humanitarian undertakings.²⁴ The exemption of the latter category of activities reflects

during the exercise of the right of self-determination. *See* Hostages Convention, *supra* note 13, T.I.A.S. No. 11081 at 10, 1316 U.N.T.S. at 210; *see also* Saul, *supra* note 11, at 3–4, 6 (discussing the drafting history related to this exception).

18. *See* Saul, *supra* note 11, at 5; Human Rights Council, Human rights and issues related to terrorist hostage-taking: Report of the Human Rights Council Advisory Committee, ¶ 50, U.N. Doc A/HRC/24/47 (July 4, 2013) [hereinafter HRC Report].

19. Hostages Convention, *supra* note 13, T.I.A.S. No. 11081 at 5, 1316 U.N.T.S. at 207.

20. Saul, *supra* note 11, at 7; *see also* U.N. SCOR, 69th Sess., 7101st mtg. at 2, U.N. Doc. S/PV.7101 (Jan. 27, 2014) (emphasizing the need to account for individual circumstances in each hostage situation “as provided for by the International Convention against the Taking of Hostages, given that the Convention does not necessarily penalize the payment of ransom”).

21. 1999 International Convention for the Suppression of the Financing of Terrorism arts. 2, 4, 8, Dec. 9, 1999, T.I.A.S. No. 13075, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

22. *Id.*, T.I.A.S. No. 13075 at 3, 2178 U.N.T.S. at 230.

23. *See* HRC Report, *supra* note 18, ¶¶ 52–53.

24. *See* Andreas S. Kolb et al., *Paying Danegeld to Pirates—Humanitarian Necessity or Financing Jihadists*, 15 MAX PLANCK Y.B. U.N. L. 105, 133–38 (2011) (concluding that Article 2’s prohibition of only those funds that were “unlawfully” provided operates to exclude ransom payments from the scope of the Terrorist Financing Convention). This seems to be the dominant interpretive position among states and legal scholars. *See, e.g.*, Mauro Miedico, Implementation Support Section III Chief, UN Office on Drugs and Crime, Remarks at the Special Meeting of the Counter-Terrorism Committee on Kidnapping for Ransom and Hostage-Taking Committed by Terrorist Groups 6 (Nov. 24, 2014), http://www.un.org/en/sc/ctc/docs/2014/Mr%20Mauro%20Miedico%20Int%20Legal%20Framework%20speech_KFR.pdf (highlighting the legal challenges to prosecuting a ransom financier under the Convention and other areas of international law); CLIVE OLIVER, *TERRORISM AND THE LAW* 390 n.26 (2011) (noting the discrepancy of *mens rea* requirements between Section 15(1)(a) of the United Kingdom’s Terrorism Act 2000 and the Terrorist Financing Convention).

the drafters' intent to preserve, among other humanitarian endeavors, the ability to negotiate for the freedom and safety of hostages.²⁵

Even if ransom payments *per se* are not proscribed under existing multilateral agreements,²⁶ the Security Council has issued several resolutions that prohibit terrorist financing more generally. Resolution 1373, adopted in the immediate aftermath of the 11 September 2001 attacks, employs broad language to compel states to prevent and suppress the financing of terrorist acts and to refrain from providing support to any entities or persons involved.²⁷ Like the Terrorist Financing Convention from which it is modeled,²⁸ Resolution 1373's provisions do not expressly contemplate ransom payments but focus more generally on the suppression of terrorist financing as a necessary step in preventing further attacks. In language very similar to that of the Convention, the mandate requires states to criminalize "the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."²⁹ While ransom payments are generally considered to fall outside the intended scope of the criminal sanctions mandated,³⁰ the comprehensive (but non-criminal) prohibition on nationals from "making any funds, financial assets or economic resources . . . available" in subparagraph (d)³¹ operates broadly to subject ransom financiers to additional measures and serves as a foundation for further developments on the issue.³²

The Security Council also reinforced the regime on counter-terrorist financing by imposing a freeze on the assets of listed al-Qaida and Taliban

25. See Kolb et al., *supra* note 24, at 136 n.109.

26. See Bento, *supra* note 9, at 299; HRC Report, *supra* note 18, ¶ 65.

27. S.C. Res. 1373, ¶ 1 (Sept. 28, 2001).

28. The Terrorist Financing Convention was not yet in force at the time Resolution 1373 was adopted. To provide for immediate implementation of the relevant state duties, which were viewed as a matter of urgency following the September 11 attacks, the Security Council incorporated many of the Convention's central obligations into Resolution 1373. See Pierre Klein, *Introductory Note to the International Convention for the Suppression of the Financing of Terrorism*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW 1, 4 (2009); Kolb et al., *supra* note 24, at 139.

29. S.C. Res. 1373, ¶ 1(b) (Sept. 28, 2001).

30. A primary difficulty with applying the criminal sanctions provision to ransom financiers is that of satisfying the *mens rea* requirement and overcoming the defense of duress. Whether the financier *knows* the funds will be used to carry out terrorist acts is a factual inquiry for which the subjective element of intent may be difficult to establish. Similarly, the conduct of those who pay ransoms in response to threats against the hostage may be excused by the duress defense. For more resources discussing the difficulties imposed by intent and duress, see Kolb et al., *supra* note 24, at 145; Yvonne M. Dutton & Jon Bellish, *Refusing to Negotiate: Analyzing the Legality and Practicality of a Piracy Ransom Ban*, 47 CORNELL INT'L L.J. 299, 315–22 (2014) (applying criminal law's retributive principles to those who make payments in response to ransom demands, extortion threats, and bribes and concluding that the defense of duress precludes liability in the first two categories).

31. S.C. Res. 1373, ¶ 1(d) (Sept. 28, 2001).

32. See discussion *infra* Sections I.B, I.C.

members beginning with Resolution 1267 (1999). In the years since, both the sanctions regime and the list of individuals to whom it applies³³ have been expanded and now contemplate funds conveyed in exchange for hostages. However, no resolution explicitly designates ransom payments as a form of terrorist financing or provides for their criminalization, signifying that ransoms are not necessarily prohibited under international law. Furthermore, both a higher tolerance of ransoms by the international community and states' evolving interpretations of their role in confronting hostage situations indicate an emerging trend in that direction. Accordingly, the following Section will review the most recent Security Council resolutions to determine the status of ransom payments under the international counterterrorism regime.

B. Implications of the Assets Freeze: Ransom as a Form of Terrorist Financing?

In part to supplement the regime contemplated by the Terrorist Financing Convention, the Security Council passed several resolutions beginning in 1999 that impose sanctions against specific terror-sponsoring entities and their affiliates (the Consolidated List).³⁴ Issued under Chapter VII of the U.N. Charter, each resolution carries binding authority and applies the Convention's commitments against terrorist financing to al-Qaida and the Taliban.³⁵ One such commitment, aimed at the assets of both regimes, was a mandate that states

[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory.³⁶

33. Consolidated United Nations Security Council Sanctions List, (last updated Mar. 2, 2016) <https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/consolidated.pdf>.

34. See Kolb et al., *supra* note 24, at 151–54 for a brief history of the UN Sanctions Regime established to target al-Qaida and the Taliban.

35. See ISIL (Da'esh), Al-Qaida Sanctions Committee, *Sanctions List Materials*, U.N.S.C. (Mar. 28, 2016); Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, https://www.un.org/sc/suborg/en/sanctions/11267/aq_sanctions_list.

36. S.C. Res. 1822, ¶ 1(a) (June 30, 2008). Resolutions 1267, 1333, and 1390 collectively established the list of individuals targeted by the assets freeze. Further resolutions periodically extended the mandate of the Sanctions Committee to maintain that list; with each extension, both the assets freeze and its application to listed entities were reaffirmed. For the text of the original assets freeze implemented in 1999, see S.C. Res. 1267, ¶ 4(b) (Oct. 15, 1999).

Reaffirmed in subsequent resolutions,³⁷ the assets freeze is the primary financial weapon against individuals on the Consolidated List and thus establishes a foundation for prohibiting funds transferred on hostages' behalf. However, the drafting history and delegates' statements indicate that ransoms were not a focal point of concern at the time of the adoption. Instead, the purpose of the original assets freeze of Resolution 1267 (1999) was to target members of the Taliban elite who were materially supporting Osama bin Laden, while early adjustments expanded the scope of the freeze to include members of al-Qaida and other "associated" individuals.³⁸ Without further indication regarding the substance of the assets freeze, its application to ransom payments remained tenuous during the first decade of the sanctions regime.

Resolution 1904 (2009), adopted against a backdrop of increased terror- and piracy-driven kidnappings,³⁹ resolved this ambiguity by confirming that the assets freeze measure "shall also apply to the payment of ransoms to individuals, groups, undertakings or entities"⁴⁰ on the Consolidated List. Its provisions were approved unanimously under Chapter VII of the U.N. Charter and are legally binding on states. The effect is to partially fill the gaps of both the Terrorist Financing Convention and Resolution 1373: by specifically providing for ransoms as subject to the assets freeze, it is possible to read 1904 as designating ransom payments as a form of terrorist financing.⁴¹

Yet unlike Resolution 1373, Resolution 1904 falls short of requiring states to enforce the prohibition through domestic criminal sanctions, indicating a distinction between ransoms and other forms of terrorist financing. Instead, the two-pronged assets freeze extended by Resolution 1904 directs states to "freeze without delay" such payments and to ensure that

37. See S.C. Res. 1988, ¶ 1(a) (June 17, 2011); S.C. Res. 1989, ¶ 1(a) (June 17, 2011); S.C. Res. 2082, ¶ 1(a) (Dec. 17, 2012); S.C. Res. 2083, ¶ 1(a) (Dec. 17, 2012); S.C. Res. 2160, ¶ 1(a) (June 17, 2014); S.C. Res. 2161, ¶ 1(a) (June 17, 2014).

38. Lisa Ginsborg, *The United Nations Security Council's Counter-terrorism Al-Qaida Sanctions Regime: Resolution 1267 and the 1267 Committee*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 608, 609-10 (Ben Saul ed., 2014).

39. S.C. Res. 1904, at 1 (Dec. 17, 2009) ("Expressing concern at the increase in incidents of kidnapping and hostage-taking by individuals, groups, undertakings and entities associated with Al-Qaida, Usama bin Laden or the Taliban with the aim of raising funds, or gaining political concessions."). The passing of Resolution 1904 coincided with a parallel rise of kidnappings in the piracy context, which was an issue of contention during Security Council debates and may have contributed to the inclusion of ransom payments in Resolution 1904. See, e.g., U.N. SCOR, 64th Sess., 6221st mtg., U.N. Doc. S/PV.6221, (Nov. 18, 2009) ("[W]e are concerned that ransom payments have contributed to the recent increases in piracy, and encourage all States to adopt a firm no-concessions policy when dealing with hostage-takers, including pirates."). For a discussion of Somali piracy kidnappings, which were at their height between 2008-2011 and figured prominently in Security Council Resolutions during that period, see generally Kolb et al., *supra* note 24.

40. S.C. Res. 1904, ¶ 5 (Dec. 17, 2009). This language was also incorporated into subsequent resolutions. See S.C. Res. 1988, ¶ 7 (June 17, 2011); S.C. Res. 1989, ¶ 8 (June 17, 2011); S.C. Res. 2082, ¶ 6 (Dec. 17, 2012); S.C. Res. 2083, ¶ 6 (Dec. 17, 2012).

41. See Kolb et al., *supra* note 24, at 153-54.

ransom funds are not “made available” for the benefit of persons on the Consolidated List.⁴² In a statement explaining the terms of the assets freeze, the al-Qaida Sanctions Committee identified the purpose of the measure as “deny[ing] listed individuals, groups, undertakings and entities the means to support terrorism,”⁴³ suggesting an emphasis on the denial of funds rather than the targeting of funders themselves.⁴⁴ Moreover, the broad scope of individuals encompassed by the assets freeze, together with its application either before or pending criminal proceedings, demonstrates the preventive rather than punitive purpose of the measure.⁴⁵

More recently, the growth of organizations such as Daesh has prompted a string of Security Council resolutions addressing ransom payments in greater detail. Resolution 2133 (2014), proposed by the United Kingdom and unanimously adopted, was the first devoted to the question of ransom payments to terrorist actors.⁴⁶ Its provisions call upon states firstly to “prevent terrorists from benefitting directly or indirectly from ransom payments or from political concessions,” secondly, to “secure the safe release of hostages,” and thirdly, to “encourage private sector partners to adopt or follow relevant guidelines and good practices for preventing and responding to terrorist kidnappings without paying ransoms.”⁴⁷

Resolution 2133 appears to be a step toward prohibiting ransoms, but again falls short of imposing a punishable offense for the payment thereof. The Resolution’s emphasis on denying the *benefits* of ransoms⁴⁸ echoes the obligation first articulated in Resolution 1904 of state intervention to

42. S.C. Res. 1904, ¶ 1(a) (Dec. 17, 2009).

43. See Al-Qaida Sanctions Comm., Assets Freeze: Explanation of Terms, ¶ 2 (Feb. 24, 2015), https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/eot_assets_freeze_-_english.pdf [hereinafter Al-Qaida Sanctions Committee].

44. This position seems to have attracted the support of the Group of Eight in 2013, which issued a statement expressing its unequivocal rejection of ransom payments to terrorists and interpreting the resolution to “require[] that Member States prevent the payment of ransoms, directly or indirectly, to terrorists designated under the UN Al Qaeda sanctions regime” G-8 Leaders Communiqué, *The Threat Posed by Kidnapping for Ransom by Terrorists and the Preventive Steps the International Community Can Take*, ¶ 76, (June 18, 2013), http://www.francophonie.org/IMG/pdf/lough_erne_2013_g8_leaders_communique.pdf [hereinafter G-8 Communiqué].

45. See Ilias Bantekas, *The International Law on Terrorist Financing*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 132 (Ben Saul ed., 2014) (“Freezing and confiscation aim to deter the use of assets for the perpetration of criminal offences by the owner or other persons. Therefore, they are not forms of punishment, especially given that freezing and confiscation can take place prior to the suspect’s criminal trial.”). This interpretation is supported by the Al-Qaida Sanctions Committee’s clarification that, in conformity with paragraph 31 of Resolution 2161, the assets freeze requirements are “preventative in nature and are not reliant upon criminal standards set out under national law.” Al-Qaida Sanctions Comm., *supra* note 43, ¶ 26.

46. *Kidnap for Ransom: To Pay or Not to Pay?*, ORG. FOR SEC. AND CO-OPERATION IN EUR. (OSCE) (Dec. 1, 2014), <http://www.osce.org/secretariat/128071>.

47. S.C. Res. 2133, ¶¶ 3, 10 (Jan. 27, 2014). The resolution also calls for interstate cooperation during hostage situations as well as further expert discussion within the United Nations and among the relevant counter-terrorism bodies. *Id.* ¶¶ 4, 6, 11, 12.

48. See, e.g., *id.* ¶ 6.

intercept funds.⁴⁹ Moreover, the reference to prior resolutions 1904, 1989, and 2083 to impose only the assets freeze rather than criminal sanctions against financiers themselves⁵⁰ reiterates the Council's distinction between ransoms and terrorist financing. The Security Council can and has referred to prior resolutions to impose older requirements onto new subjects;⁵¹ its failure to mention the criminal sanctions of Resolution 1373 in this instance confirms ransoms as falling outside the scope of the terrorist financing regime. Finally, the call upon states merely to "encourage" private sector cooperation through "guidelines and good practices"⁵² detracts from any previous interpretation of Resolution 1373 or its progeny as extending the criminal sanctions associated with terrorist-financing sanctions to ransom financiers. Instead, by encouraging participation among private sector partners rather than mandating state control, the Security Council preserves flexibility to engage in negotiations at the private level.

Further resolutions have addressed ransoms with greater specificity. Resolutions 2160 and 2161 were passed in June 2014 to renew the assets freeze and other measures targeting Taliban and al-Qaida associated entities on the Sanctions List.⁵³ Both resolutions expand the range of ransoms subject to the assets freeze, which applies to the "direct or indirect payment of ransoms to . . . entities on the List, *regardless of how or by whom the ransom is paid.*"⁵⁴ The inclusive language indicates a shift toward more vigorous targeting of funds and may reflect concerns raised by growing reports of hostages held by Daesh and other terrorist groups at that time. However, as neither Resolution addresses the domestic criminalization or permissibility of paying a ransom, it would appear that ransom financiers are still subject to only the general assets freeze rather than some broader-reaching prohibition on the act itself.

49. The Argentinian delegate's statement following the adoption of Resolution 2133 upholds this conclusion by rejecting any possibility that the resolution could undermine permissive payments for hostage release. *See* U.N. SCOR, 69th Sess., 7101st mtg. at 2, U.N. Doc. S/PV.7101 (Jan. 27, 2014) ("[B]eyond not establishing new legal obligations for Members, the resolution has the symbolic value of reflecting the Council's unanimous agreement that dialogue should be initiated on ways of combating this particular form of financing for terrorism."); *see also* Press Release, Council of the European Union, Council Conclusions on Kidnap for Ransom (June 23, 2014), <http://www.gr2014.eu/sites/default/files/FAC%20Conclusion%205.pdf> (welcoming the adoption of Resolution 2133 as reaffirming states' "political commitment" to "prevent terrorists from benefiting from ransom payments").

50. *See* S.C. Res. 2133, at 2, (Jan. 27, 2014) ("*Recalling* its resolutions 1904 (2009), 1989 (2011) and 2083 (2012), which, *inter alia*, confirm that the requirements of operative paragraph 1 (a) of these resolutions, also apply to the payment of ransoms to individuals, groups, undertakings or entities on the Al-Qaida Sanctions List . . .").

51. *See id.* For a discussion of the Security Council's treatment of prior resolutions when reaffirming or recalling their provisions, *see* Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. OF U.N. L. 73, 87 (1998).

52. S.C. Res. 2133, ¶ 10 (Jan. 27, 2014).

53. S.C. Res. 2160, ¶ 1 (June 17, 2014); S.C. Res. 2161, ¶ 1 (June 17, 2014).

54. S.C. Res. 2160, ¶ 7 (June 17, 2014) (emphasis added).

Resolution 2199 of February 2015 is perhaps most illuminating: it reaffirms the application of the assets freeze to Daesh,⁵⁵ but ventures further by distinguishing between ransoms and external donations and setting forth different requirements for each.⁵⁶ For the former, it repeats Resolution 2133's call upon states to "prevent" terrorists from reaping the benefits of kidnapping schemes and to "encourage" private sector participation but, in keeping with prior resolutions, fails to address ransom financiers themselves.⁵⁷ For external donations, however, the resolution mentions states' "obligation to ensure that their nationals and persons within their territory *do not make donations*" to the designated entities.⁵⁸ By highlighting the obligatory nature of states' duties toward donations but omitting to do the same for ransoms, the Security Council creates a distinction between the two and implies a stricter approach to the former.⁵⁹ The phrasing of the duty in the active voice reinforces this interpretation: the assets freeze applicable to ransoms requires only that ransom funds not be "made available" (avoiding discussion of ransom financiers), whereas the phrasing of operative provision 21 highlights the duty to confront not just the availability of donations, but also the donors themselves.

The Security Council thus has constructed an increasingly restrictive framework for addressing hostage situations, but stopped short of mandating a prohibition on the act of paying ransoms or specifying sanctions for states that facilitate payments. All resolutions discussed within this Section were passed unanimously and, with the exception of Resolution 2133, under binding authority, indicating the Council's authoritative consensus on the measures adopted. A principled interpretation of their provisions suggests that states are under an affirmative obligation to ensure that ransom funds do not reach their intended recipients, yet bear no duty to apprehend, criminally or otherwise, ransom financiers themselves. Instead, the decision to subject such payments to only the assets freeze weighs against a consideration of ransoms as a form of unlawful terrorist financing as defined by the Convention and prohibited under Resolution 1373. Unfortunately, the resulting framework—denying the benefit of ransoms but declining to prosecute those who provide them—renders the lawfulness of ransom payments unclear. The following Section will therefore address the state practice and policies that have developed in the absence of a clear legal standard.

55. S.C. Res. 2199, ¶ 19 (Feb. 12, 2015); *see also* S.C. Res. 2170 (Aug. 15, 2014).

56. *See* S.C. Res. 2199, ¶¶ 18–22 (Feb. 12, 2015).

57. *Id.* ¶¶ 19–20.

58. *Id.* ¶¶ 21–22 (emphasis added). This language originally appears in Resolution 2170, which addresses donations in less detail. *See* S.C. Res. 2170, ¶ 15 (Aug. 15, 2014).

59. This dichotomy may reflect an understanding of the differences of *mens rea* between donors, acting of their own volition and with the intent to finance terror, and those who exchange funds for the humanitarian release of a hostage. It is unlikely, however, that the measures stipulated for either ransoms or donors would be enforceable through domestic criminal sanctions against individuals. *See* S.C. Res. 2199, ¶¶ 18–22 (Feb. 12, 2015); Al-Qaida Sanctions Comm., *supra* note 43, ¶ 26.

II. STATE PRACTICE: POLICY-ORIENTED APPROACHES AND SHORTCOMINGS

In light of the uncertainty of the international legal framework governing ransom payments to terrorist non-state actors, two dominant domestic approaches have emerged in response to hostage situations. The no-concessions position, traditionally embraced by such countries as the United States and the United Kingdom, rejects ransom payments as a permissible means of securing the freedom of hostages.⁶⁰ Instead, this approach equates payments with the unlawful financing of terrorist organizations as defined under the relevant international agreements and emphasizes the propensity of ransoms to incentivize further kidnappings. Conversely, the no-concessions theory justifies non-payment on grounds of deterrence through suppression of funding and operational capacity.⁶¹ In its strictest form, this policy is instituted in both the public and private domains, and the payment of ransoms by families or employers may be criminalized to better achieve the goals of national policy.

At the opposite end of the spectrum are states that either (1) publicly defend a permissive approach to ransom payments or (2) engage in or otherwise permit unofficial negotiations for hostages' release, notwithstanding an official policy to the contrary. Defenders of a permissive approach envisage the state as fulfilling its fundamental duty to protect its nationals, which, some argue, can be accomplished most securely through the payment of ransoms.⁶² International human rights law is also sometimes relied upon to emphasize the hostages' right to life, liberty, and security of person, and the prohibition on torture and cruel, inhuman, or degrading treatment.⁶³ Although the permissive approach may incentivize future kidnapping operations, its proponents advocate for prioritizing the immediate threat to the individual life of an identifiable hostage over the more tenuous possibility of future attacks.⁶⁴

The dominant positions are not easily reconciled. While the two policies may reflect competing considerations between counterterrorism strategy and humanitarian values, states embracing either position are united by common interests: preserving the life and welfare of victims, deterring kidnapping schemes, and confronting and bringing perpetrators to justice. Accordingly, a unilaterally executed ban on ransom payments that fails to deter kidnappings of other nationals does not address the underlying issue; similarly, a permissive approach to payments that other states have prohibited would also fall short of addressing the broader problem. This Sec-

60. See *infra* Section II.A.

61. See *infra* Section II.A.

62. See *infra* Section II.B.

63. See *infra* notes 102–04 and accompanying text.

64. See Rivka Weill, *Exodus: Structuring Redemption of Captives*, 36 CARDOZO L. REV. 177, 213–14 (2014) (discussing the psychological phenomenon whereby “people prefer to save the life of a known single victim over the lives of a group, even if the individuals of the group are identified”).

tion will therefore analyze the strengths and shortcomings of each position and suggest that a more nuanced approach is required to effectively confront hostage situations.

A. “Hard” Policy: No Concessions

At the forefront of the no-concessions policy approach, the United States and the United Kingdom have traditionally been steadfast defenders of ransom prohibitions as the long-term solution to the kidnapping dilemma.⁶⁵ Until the change in policy announced by the Obama administration in June 2015,⁶⁶ the official U.S. policy following the September 11 terror attacks was “to deny hostage-takers the benefits of ransom, prisoner releases, policy changes, or other acts of concession,” but to simultaneously exhaust every other remedy available to secure the release of U.S. nationals.⁶⁷ The United Kingdom similarly declares ransom payments to designated terrorist organizations to be illegal under international law and in contravention of its domestic policy.⁶⁸ Their policies seem to reflect the predominant view of terrorist organizations as illegitimate and unlawful actors, which is generally accompanied by a concern that any attempt to negotiate might be perceived as indirectly condoning the actions of the perpetrators.⁶⁹ While many states may share this assessment,⁷⁰ several U.S. and U.K. officials ventured further and contemplated criminal sanctions against ransom financiers in an effort to implement the ban at the domestic level.⁷¹

65. See, e.g., Bento, *supra* note 9, at 317–19.

66. In late 2014, President Obama ordered a comprehensive review of the existing policy for terrorist-related kidnappings as a direct result of the “increased frequency of hostage-taking of Americans overseas, and the recognition of the dynamic threat posed by specific terrorist groups.” Letter from Under Sec’y of Def. for Policy Christine E. Wormuth to U.S. House Representative Duncan Hunter (Nov. 11, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1363080/scan001-1.pdf>; see also Statement by President Obama on the U.S. Government’s Hostage Policy Review (June 24, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/24/statement-president-us-governments-hostage-policy-review>.

67. Press Statement by Richard Boucher, U.S. Dep’t of State, International Terrorism: American Hostages (Feb. 20, 2002), <http://2001-2009.state.gov/r/pa/prs/ps/2002/8190.htm>.

68. See, e.g., Home Office (U.K.), Factsheet: kidnap and ransom, Part of Counter-Terrorism and Security Bill: factsheets (Dec. 3, 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382438/CTS_Bill_-_Factsheet_9_-_Kidnap_and_Ransom.pdf.

69. See Bento, *supra* note 9, at 315.

70. *Id.*

71. See, e.g., Brian Ross, James Gordon Meek & Rhonda Schwartz, ‘So Little Compassion’: James Foley’s Parents Say Officials Threatened Family Over Ransom, ABC NEWS (Sept. 25, 2014), <http://abcnews.go.com/International/government-threatened-foley-family-ransom-payments-mother-slain/story?id=25453963> (discussing at least one U.S. official’s statements to the Foley family regarding prosecution as a possible consequence for making a ransom payment to Daesh); Counter-Terrorism and Security Act, 2015, c. 6, § 42 (U.K.) (creating a punishable offense for the reimbursement of ransom payments where the underlying payment by the insured party is made to persons involved in or suspected of terrorist activi-

Proponents of the no-concessions position argue that refusing to pay ransoms deters kidnappings;⁷² recent data supports this hypothesis where financial gains are the dominant considerations driving kidnapping operations.⁷³ A recent investigation by the New York Times found that only three of fifty-three hostages held by al-Qaida and its affiliates between 2009-2014 were American and that the majority of those kidnapped were nationals of countries known to pay ransoms.⁷⁴ Similar studies suggest that other hostage-taking groups have consciously targeted nationals of states that had paid ransoms in the past.⁷⁵ Those promoting the no-concessions position assert that, were more countries to adopt this policy approach, a universal ban on negotiations with the offending organizations would inhibit not only the funding for future kidnapping operations, but also the operational ability to carry out further acts of terrorism.⁷⁶

In practice, the limited number of nations that adhere to the no-concessions position translates into a much narrower impact on the operations of terror groups. Instead of deterring kidnapping schemes or inhibiting funding at a broad-reaching level, the prohibitions have merely shifted organizational efforts toward kidnapping nationals of countries that are known to make payments.⁷⁷ While the non-targeting of nationals may be hailed as a domestic victory for no-concessions nations, the redirection of kidnapping efforts toward foreign nationals accomplishes little toward deterrence of hostage situations on a broader scale. Moreover, critics point out that even if all nations were to adopt a policy against ransom payments, the differential abilities of states to enforce a ransom prohibition and monitor private parties⁷⁸—who sometimes arrange payments without

ties). The United States has since disclaimed such a policy and has declared its intent not to pursue criminal prosecutions. *See infra* note 162 and accompanying text.

72. *See, e.g.*, David S. Cohen, U.S. Under Sec'y for Terrorism and Financial Intelligence, *Kidnapping for Ransom: The Growing Terrorist Financing Challenge* 6 (Oct. 5, 2012) (“Refusing to pay ransoms or to make other concessions to terrorists is, clearly, the surest way to break the cycle, because if kidnappers consistently fail to get what they want, they will have a strong incentive to stop taking hostages in the first place.”).

73. Rukmini Callimachi, *Paying Ransoms, Europe Bankrolls Qaeda Terror*, N.Y. TIMES (July 29, 2014), http://www.nytimes.com/2014/07/30/world/africa/ransoming-citizens-europe-becomes-al-qaedas-patron.html?_r=0.

74. *See id.* *But see* John W. Rollins & Liana Rosen, *U.S. Citizens Kidnapped by the Islamic State*, Congressional Research Service Reports, Feb. 13, 2015, <http://www.fas.org/sgp/crs/terror/IN10167.pdf> (reporting that at least 72 U.S. citizens have been kidnapped by terrorist groups between 2005 and 2013).

75. *See* Cohen, *supra* note 72; Callimachi, *supra* note 73 (quoting Jean-Paul Rouiller, director of Geneva Center for Training and Analysis of Terrorism: “[I]t’s obvious that Al Qaeda is targeting [the hostages] by nationality . . . Hostages are an investment, and you are not going to invest unless you are pretty sure of a payout.”).

76. *See, e.g.*, G-8 Communiqué, *supra* note 44, ¶¶ 75–81.

77. *See, e.g.*, Cohen, *supra* note 72 (discussing a general shift of hostage targeting to Europeans rather than American or British citizens as a result of the U.S. and U.K. non-payment policy).

78. *See* Dutton & Bellish, *supra* note 30, at 328.

the knowledge or involvement of their governments—would render an effective ban nearly impossible to implement.

Moreover, there are considerable limitations on the ability to deter kidnappings motivated in part or whole by *political*, rather than solely financial, considerations. Unlike purely profit-driven kidnapping operations, hostage situations in the terrorism context are often characterized by a higher degree of ideological or political demands that, if not met, may result in the hostage's prolonged detention or execution.⁷⁹ Particularly where a state's national is kidnapped in retaliation against military intervention, a non-payment policy is of little consequence. This was the case in the string of kidnappings and executions across the Middle East during the early 2000s; the beheadings of U.S. nationals in retaliation for prisoners held at Guantanamo Bay and Abu Ghraib demonstrate the degree to which political purposes can influence the outcomes of hostage situations.⁸⁰ More recently, the non-payment policies of the United States and the United Kingdom failed to deter the kidnappings of Americans James Foley, Steven Sotloff, and Abdul-Rahman Kassig and Britons David Haines and Alan Henning. Although the latter hostages were killed following a series of political *and* financial demands,⁸¹ their deaths demonstrate the limitations of a non-payment policy in deterring hostage situations that arise in highly politicized circumstances.

The fate of the American and British hostages also demonstrates what is perhaps the most disturbing shortcoming of the no-concessions stance in its strictest form: its limited ability to address hostage situations that arise notwithstanding the deterrence effect. For states equating a ban on concessions with a ban on negotiations, any engagement with hostage-takers risks undermining the state's credibility and weakening their bargaining positions.⁸² Absent an option to negotiate directly or through intermediaries, the remaining method of extraction is through military inter-

79. See Bento, *supra* note 9, at 303–04 (distinguishing between terrorism as a “form of political and/or religious activism that uses violence in seeking to promote ideological or religious beliefs and/or to obtain desired outcomes that are fundamentally based on or motivated by such beliefs” and piracy as a crime of opportunity “that uses the *threat* of violence, or in some cases violence per se, for private ends”).

80. See, e.g., *U.S. Journalist Daniel Pearl Is Dead, Officials Confirm*, CNN (Feb. 22, 2002), <http://edition.cnn.com/2002/WORLD/asiapcf/south/02/21/missing.reporter/>; Sewell Chan & Ariana Eunjung Cha, *American Beheaded on Web Video: Militants Say Killing was Revenge for U.S. Abuses at Iraqi Prison*, WASH. POST (May 12, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A19048-2004May11.html>; Niel Macfarquhar, *Acting on Threat, Saudi Group Kills Captive American*, N.Y. TIMES (June 19, 2004), <http://www.nytimes.com/2004/06/19/world/acting-on-threat-saudi-group-kills-captive-american.html?ref=topics>.

81. Mixed motives underlying kidnappings further complicate this analysis. See Rollins & Rosen, *supra* note 74 (discussing Daesh's operational inconsistencies and widely disparate ransom demands as “raising questions regarding its fundraising motivations”); see also Rukmini Callimachi, *For James Foley's Family, U.S. Policy Offered No Hope*, N.Y. TIMES (Sept. 15, 2014), http://www.nytimes.com/2014/09/16/us/for-hostages-family-us-policy-offered-no-hope.html?_r=0 (detailing Daesh's early political demands of Foley's family before settling on the figure of \$130 million USD [originally _100 million EUR] as a ransom demand).

82. Weill, *supra* note 64, at 205–06.

vention. The rigidity of this approach renders it understandably less appealing to states lacking the military capacity to execute such an operation or to those that would otherwise find such operations crippling burdensome.⁸³ The executions of the American and British nationals by Daesh following the ransomed release of fifteen others held in the same group are widely cited as demarcating the consequences that can attach to no-concessions policies.⁸⁴

To mitigate the effects of non-payment, the United States and the United Kingdom usually attempt, and have at times successfully executed, military interventions to rescue hostages. Their approach is frequently referenced as another reason that kidnappers avoid American and British nationals, as “the threat of military intervention without ransom payments appears to be a disincentive for terrorists.”⁸⁵ Notwithstanding some measure of success in achieving their objectives, rescue operations pose significant risks to both rescuers and hostages and may be associated with a high rate of failure.⁸⁶ Particularly where hostages of ransom-paying and non-ransom-paying states are held together, one country’s decision to intervene by force may subject all hostages to the military risks following from that decision.⁸⁷ The recent deaths of two hostages held by Daesh—one American and one South African—during an attempted rescue operation⁸⁸ demonstrate the danger that, in situations involving hostages of different nationalities, “the citizens of multiple countries could suffer as a result of one country’s ban on ransom payments.”⁸⁹

In conclusion, the no-concessions stance has only a limited ability at best to address kidnapping operations in the terrorism context. While the policies currently in place may sometimes deter the taking of American or British hostages, a non-universal ban merely redirects kidnappers’ efforts

83. See discussion *infra* Sections II.B, III.A.

84. See Callimachi, *supra* note 4; Karen Yourish, *The Fates of 23 ISIS Hostages in Syria*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/10/24/world/middleeast/the-fate-of-23-hostages-in-syria.html> (last updated Feb. 10, 2015) (detailing the differences of outcome among hostages held by Daesh according to nationality).

85. CENTER FOR SECURITY STUDIES (CSS), *Kidnapping for Ransom as a Source of Terrorism Funding*, No. 141 in CSS ANALYSIS IN SECURITY POLICY, 4 (2013).

86. See, e.g., David Martin & Debora Patta, *U.S.-Led Hostage Rescues Rarely Successful, Always Dangerous*, CBS NEWS AP (Dec. 8, 2014), <http://www.cbsnews.com/news/u-s-led-hostage-rescues-rarely-successful-always-dangerous/>; Rahul Radhakrishnan, *A Brief History of Failed US Rescue Bids*, AL JAZEERA (Dec. 6, 2014), <http://www.aljazeera.com/news/americas/2014/12/brief-history-failed-us-rescue-bids-2014126155330464788.html>.

87. Dutton & Bellish, *supra* note 30, at 324.

88. See, e.g., Kareem Fahim & Eric Schmitt, *2 Hostages Killed in Yemen as U.S. Rescue Effort Fails*, N.Y. TIMES (Dec. 6, 2014), <http://www.nytimes.com/2014/12/07/world/middleeast/hostage-luke-somers-is-killed-in-yemen-during-rescue-attempt-american-official-says.html>. Exacerbating the situation was evidence that the South African hostage was to be released the next day, as his ransom had already been negotiated and a convoy deployed to secure his release. See Rukmini Callimachi, *At 6, Awaiting Hostage’s Release. After 8, Learning That He’s Dead*, N.Y. TIMES (Dec. 7, 2014), <http://www.nytimes.com/2014/12/08/world/middleeast/hostage-nearly-free-on-ransom-killed-during-seal-raid.html>.

89. See Dutton & Bellish, *supra* note 30, at 324.

toward other states' nationals and does not prevent kidnappings or inhibit funding at a broader level.⁹⁰ A ransom prohibition may have even less impact where hostages are taken for political rather than purely financial purposes. Finally, given the risks of military interventions and the unlikelihood of unanimous collaboration in implementing a prohibition, a unilateral ban poses a real threat to hostages taken without providing a corresponding benefit of deterrence.

B. "Soft" Policy: A Permissive Approach, or Concealing Concessions?

The second category can generally be described as comprising states that (1) engage in ransom negotiations at the official level or (2) preserve the ability of individuals or corporations to do so in the private sphere.⁹¹ This position has been attributed to France,⁹² Spain,⁹³ Italy,⁹⁴ Switzerland,⁹⁵ Israel,⁹⁶ and others. Far from openly defending such practices, many states in this category publicly endorse and claim to implement the no-concessions stance articulated in the Group of Eight communiqué of 2013.⁹⁷ Yet evidence of communications through intermediaries and, in some instances, the release of hostages in exchange for payments⁹⁸ indicates that the no-concessions standard is not uniformly implemented and, more fundamentally, that it may not represent all states' views.

Because many states in this category do not seek to justify or even publicize ransoms paid, their underlying policy positions are sometimes difficult to substantiate. Defenders of a permissive policy often portray the state as undertaking the more humanitarian approach to hostage situations, which, they argue, may be more effectively confronted through negotiations.⁹⁹ This stance is often reinforced by domestic pressure in favor of such a response: where a victim's family garners substantial support and sympathy, democratically elected officials may be especially sensitive to

90. See *id.* at 322–28 for a discussion of the impracticalities of a unilateral ransom ban in the piracy context and its inability to deter future criminal acts absent universal commitment.

91. A third category comprises states that endorse the no-concessions standard but lack the resources to fully monitor its implementation at the private level. Discussion of this category is beyond the scope of this section, but see *infra* Section III.A for further discussion of the proper role of states in conflict resolution.

92. See, e.g., Callimachi, *supra* note 73; Ellen Knickmeyer, *Al Qaeda-Linked Groups Increasingly Funded by Ransom*, WALL ST. J. (July 29, 2014), <http://www.wsj.com/articles/ransom-fills-terrorist-coffers-1406637010>.

93. Callimachi, *supra* note 73.

94. *Id.*

95. *Id.*

96. See Weill, *supra* note 64, at 190.

97. G-8 Communiqué, *supra* note 44, ¶ 6 (“We unequivocally reject the payment of ransoms to terrorists and call on countries and companies around the world to follow our lead and to stamp this out as well as other lucrative sources of income for terrorists.”).

98. See Callimachi, *supra* note 73.

99. See Bento, *supra* note 9, at 311, 325–26.

powerful political pressure on the victim's behalf.¹⁰⁰ The resulting domestic consensus in favor of negotiating for a hostage's release may overcome international pressure to the contrary and lead states to engage in or otherwise allow covert negotiations notwithstanding a strict non-payment policy.¹⁰¹

Relatedly, a no-ransom policy that results in the deaths of nationals may be construed as a violation of the state's core duty to protect under international human rights law. In its most rigid form of implementation, a complete prohibition at both the public and private level might violate the hostage's right to life and freedom from torture and cruel, inhuman or degrading treatment as enshrined in the International Covenant on Civil and Political Rights and other relevant instruments.¹⁰² As the primary duty-holder under international law, the state's responsibilities toward its citizens might be conceptually extended to require the state to confront, where possible, a group holding its citizens as hostages, or to permit others to do so in its place.¹⁰³ Thus by preserving the ability to engage kidnappers through negotiations at the public or private level, states maintain a space for these transactions to occur while fulfilling their own international legal obligations.¹⁰⁴

Proponents of the permissive approach also cite a higher level of security and likelihood of success relative to the no-concessions strategy of military intervention.¹⁰⁵ While rescue operations have achieved hostage extraction on many occasions, the dangers such operations pose to rescuers and hostages weigh heavily against this option as an alternative to negotiations.¹⁰⁶ Moreover, the domestic political barriers that sometimes impede states' abilities to stage military interventions might render ransom payments a practical alternative.¹⁰⁷ Even for those that do wield strong military capabilities, an inquiry into the financial costs and risks

100. See, e.g., Weill, *supra* note 64, at 188–90.

101. See Bento, *supra* note 9, at 323; see also Weill, *supra* note 64, at 188–92 (discussing victims' families as a powerful source of political pressure during the negotiations process).

102. See Bento, *supra* note 9, at 311–12; International Covenant on Civil and Political Rights arts. 6–7, *opened for signature* Dec. 16, 1966, S. TREATY DOC. NO. 95–20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

103. See Sofia Galani, Are Hostages Victims of the 'War on Terror' or 'Victims of Doctrine'? Constitutional Responses to the Gaps of the Human Rights Protections of Hostages 18 (unpublished note), <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws1/w1-galani.pdf> for a discussion of the current system's shortcomings in addressing the human rights of hostages held by non-state actors.

104. A complete prohibition on ransoms might also interfere with states' ability to fulfill domestic legal obligations. See Weill, *supra* note 64, at 208 for a discussion of states whose constitutions would mandate involvement in the case of a kidnapping, even by a non-state perpetrator, and for a discussion of the Colombian Supreme Court's invalidation of a law banning ransoms on the grounds that it would deny the hostage's constitutional rights.

105. See *id.* at 185.

106. See *supra* notes 85–89 and accompanying text.

107. See CENTER FOR SECURITY STUDIES (CSS), *supra* note 85.

associated with each option reinforces ransom payments as the more feasible strategy.

An additional concern relates to the lawfulness of military interventions and the political strain they exert on the countries involved. The permissiveness of rescue operations staged with both knowledge and cooperation of the territorial state is generally accepted;¹⁰⁸ in contrast, covert operations undertaken without host state consent raise both legal and political concerns. Some states advocate a permissive approach to military intervention where the host state is “unwilling or unable” to confront the threat emanating from within its borders.¹⁰⁹ However, the U.N. Charter expressly prohibits the use of force absent sanctions by the Security Council or an armed attack justifying the use of self-defense,¹¹⁰ and the lawfulness of such operations under customary international law is far from settled.¹¹¹ Unless the hostage rescue attempt can be construed as an act of self-defense under the Charter,¹¹² the lawfulness of such an operation may still be rigorously contested. Finally, whatever the legal doctrine, states are also sensitive to the political consequences that attach to military interventions: where an operation might contribute to regional instability or escalate into an interstate conflict, government officials may be inclined to negotiate a ransom rather than risk broader political repercussions.

At the same time, the strongest criticism of the permissive approach to ransom payments centers on its ability to subsidize terror.¹¹³ Each successful transaction incentivizes further operations as ransom payments generate revenue that may be reinvested for future kidnapping endeavors.¹¹⁴ Successive payments may generate a market price, which would allow terrorist organizations to measure the prices governments are willing to pay for hostages and to increase their ransom demand figures.¹¹⁵ More fundamentally, payments may fund other terrorist activities and thus pose risks toward not only potential kidnapping victims, but also the targets of terrorism on a broader scale. The dilemma, as articulated by one government official, is shared by governments, employers, and families of hostages alike: “Not to pay ransoms . . . is to jeopardize innocent lives. But to pay

108. See, e.g., Mathias Forteau, *Rescuing Nationals Abroad*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 952 (Marc Weller et al. eds., 2015).

109. See, e.g., Andrew W.R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 *WASH. U. GLOBAL STUD. L. REV.* 627, 663 (2012); Tom Ruys, *The ‘Protection of Nationals’ Doctrine Revisited*, 13 *J. CONFLICT & SEC. L.* 233, 249 (2008).

110. U.N. Charter arts. 2(4), 42, 51.

111. See *infra* text accompanying notes 137–43.

112. *Id.*

113. See Callimachi, *supra* note 73.

114. Cohen, *supra* note 72, at 5.

115. See Weill, *supra* note 64, at 211.

ransoms is to help sustain terrorist groups that are dedicated to taking many other innocent lives.”¹¹⁶

An additional criticism is leveled at the shortcomings of a permissive approach in safeguarding the interests of the private sector. Because many states in this category do not publicize or defend their policies,¹¹⁷ the lack of official procedure may translate into a lack of legal clarity for private actors—families, insurers, and other interested parties—involved in the negotiations process. Although some states do coordinate with private parties for the release of hostages, states that permit but do not themselves engage in hostage negotiations submit their private-sector parties to the same legal risks as those in non-concessions states.¹¹⁸ Ultimately, the combination of an increasingly restrictive international regime against ransom payments and domestic permissive policies in favor of them translates into a lack of sufficient guidance to private entities regarding the legality of their acts. Although binding Security Council resolutions are generally only applicable against states rather than corporations or individuals,¹¹⁹ insurers or private entities working with intermediaries may be subject to the domestic laws of other states which prohibit such transactions.

C. Bridging the Gap: A Deep Divide

As it currently stands, both approaches to hostage situations are overly simplistic as applied to the broader, multifaceted problem that non-state terrorist actors pose to the international community. While the non-concessions approach does not in itself further terrorist activities, neither does it deter political kidnappings or terrorist operations on a broader level. By contrast, a permissive approach to ransoms may be more effective in securing the safe return of hostages, but it directly contributes to terrorist activities and creates incentives for further kidnapping operations. The deep divide between two policy approaches gives rise to “a collective action problem where refusing to negotiate may be in the interests of the world community as a whole, but paying a ransom may be in the interest of some states or individuals.”¹²⁰

In addressing this problem, a necessary first step requires that states rather than private-sector entities take the lead in confronting hostage situations, which are often effectively delegated to the private sector. Rather than instituting a national prohibition on ransom payments or leaving the private sector to address kidnappings which it lacks meaningful resources to confront, this Section will argue that states should take a more active

116. Cohen, *supra* note 72, at 7.

117. See Callimachi, *supra* note 73.

118. States that prohibit ransoms or do not themselves engage in negotiations effectively leave the private sector and/or family members to their own devices in navigating the negotiations process. See, e.g., Callimachi, *supra* note 81; Callimachi, *supra* note 88.

119. See BRUNO SIMMA ET AL., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 800–03 (3d ed. 2013) (detailing the limited circumstances under which Security Council resolutions have been directed at non-state actors, including individuals).

120. Dutton & Bellish, *supra* note 30, at 324.

role to arrive at a more coherent and coordinated approach. The following analysis will therefore address the interests of the state in taking the lead on hostage situations as well as the options available to states considering negotiations as an alternative to military interventions.

III. THE WAY FORWARD

A necessary first step toward developing a multilateral approach to international kidnappings for ransom is for states to take the lead from private actors in addressing hostage situations within their domestic spheres. A state-centered model holds substantial implications for private-sector entities, whose interests are many times overlooked. At one end of the current spectrum, states that institute a complete ban on negotiations may leave victims' families, employers, and insurers to fend for themselves while risking exposure to criminal sanctions. On the opposite end, states permitting or ignoring private-sector negotiations effectively delegate the burden of protective responsibility to non-state actors. In both instances, a lack of state responsibility at the national level leads the private sector to take up a position that it is not only ill-equipped to fill, but which in some instances may be illegal to pursue.

Accordingly, this Section will argue for a state-centered model which shifts primary responsibility for responding to kidnapping incidents to the state while preserving the collaborative capabilities of families and private actors. As a key component of strategy, this Section will also argue that while coordinated state action, including a collaborative military response, should be the preferred *modus operandi*, the ability to negotiate should remain a permissible alternative to military action.

A. *State-centered Model: Responsibility-Shifting to the States*

States have a particularly strong interest in taking the lead to address hostage situations given the political and ideological motivations underpinning terrorist kidnappings. Because terrorist-designated groups embrace extremist ideologies that undermine international security, kidnapping operations in furtherance of those ideologies are best addressed through the coordinated response of governments rather than private actors.¹²¹ This shifting of responsibility to the states accounts for national interests in confronting the broader issue of terrorism and recognizes that "the decision to undertake high-risk rescue operations is within the domain and, therefore, the responsibility of the political leadership."¹²² Similarly, by placing the option to negotiate solely within the state's domain, a state-centered model would also mitigate the risk of working at cross purposes with the private sector, as may occur when, for

121. See J. PAUL DE B. TAILLON, *HJACKING AND HOSTAGES: GOVERNMENT RESPONSES TO TERRORISM* 159 (2002) (describing key elements associated with successful hostage rescues).

122. *Id.*

example, a private actor facilitates a ransom payment to the very entity whose funding the state endeavors to suppress.

Relatedly, kidnapping operations carried out by terrorist-designated groups often entail an international dimension more aptly addressed by states than individuals or other private entities. Where intergovernmental communications are necessary for intelligence-sharing and military cooperation,¹²³ states are uniquely positioned to confront such threats. The dangers of delegating this role to the private sector are perhaps best illustrated through reference to the attempted rescue and simultaneous ransom of U.S. citizen Luke Somers and South African Pierre Korkie, both held by al-Qaida in the Arabian Peninsula (AQAP) in Yemen. There, South Africa upheld its ransom prohibition and refrained from officially engaging in negotiations; instead, an African NGO reached an agreement on a ransom amount for Korkie's release.¹²⁴ Unaware of the covert U.S. operation to rescue Somers, the NGO had already sent a convoy to complete the transaction; when AQAP militants noted the approaching U.S. rescue team instead of the South African convoy, they shot and killed both hostages.¹²⁵

Moreover, a state-centered model accounts for states that cannot themselves engage in military interventions, a situation which can only be addressed through multilateral action. The G8 declaration pledge of mutual assistance supports this point¹²⁶ and reflects Japan's quandary in early 2015: barred by its constitution from exercising military action and faced with a ransom demand of \$200 million for two Japanese hostages,¹²⁷ Japan first called upon leaders of Jordan, Turkey, and Egypt to assist in negotiation.¹²⁸ Prime Minister Shinzo Abe then coordinated with Jordanian officials to attempt a hostage exchange through the latter's release of captured Iraqi militant Sajida al-Rishawi.¹²⁹ Japan is not the only state

123. See *id.* at 161–66 for a discussion of the importance of intelligence in staging a hostage rescue operation.

124. The NGO had already secured the release of Yolande Korkie, held with her husband for over seven months. For further details regarding Pierre Korkie's planned release, which was scheduled for the same day as the U.S. rescue of Luke Somers, see Callimachi, *supra* note 88; Fahim & Schmitt, *supra* note 88.

125. Callimachi, *supra* note 88.

126. G-8 Communiqué, *supra* note 44, ¶ 79 (“[W]hen the worst happens, we agree to provide mutual assistance to States responding to terrorist kidnaps including, as appropriate and feasible, through information sharing and specialist expertise or assistance, or the provision of resources related to hostage rescue.”).

127. *Japan Outraged at IS ‘Beheading’ of Hostage Kenji Goto*, BBC (Feb. 1 2015), <http://www.bbc.com/news/world-middle-east-31075769>.

128. *A Timeline of Japan’s Islamic State Hostage Crisis*, JAPAN TIMES (Jan. 28, 2015), <http://www.japantimes.co.jp/news/2015/01/28/national/timeline-japans-islamic-state-hostage-crisis/#.VjOPYGSRs2w> [hereinafter *A Timeline of Japan’s Crisis*].

129. The attempt was ultimately unsuccessful and both Japanese hostages were executed. Japan, facing a 72-hour ransom deadline, requested the assistance of Jordan, Turkey, and Egypt in negotiating for the release of its nationals. The deadline passed with no indication of whether Japan had made payment; two days later, in a video of what appeared to be hostage Kenji Goto holding the decapitated head of fellow hostage Haruna Yukawa, Daesh

that lacks an option to stage a rescue operation; countries such as Panama, Costa Rica, Iceland, and others who either lack militaries or whose constitutions prohibit them from having one, share Japan's predicament. Hence, the need to not only share relevant information but also coordinate military cooperation upholds the utility of a state-centered model.

The corresponding inability of private actors not only to engage terrorists militarily but also to maneuver the communications process weighs in favor of states taking the role of facilitators. Where even establishing communications ties is prohibited, as it was, for example, under the older U.S. regime, families may be left disconnected from the political process and yet unable to pursue their own strategies for hostage relief. The frustrations of the Foley family,¹³⁰ whose complaints regarding their treatment by U.S. officials garnered public attention and eventually led to a substantial change in policy, serve as a pertinent example of the obstacles families of hostages may face. Likewise, in states imposing criminal sanctions, private actors face an additional risk of prosecution if they facilitate payments to listed organizations.¹³¹ Insurers are a particularly vulnerable group in this last category; whatever the dictates of domestic law, the issue of whether ransoms violate Security Council resolutions has led to uncertainty as to the lawfulness of pro-payment policies.

The current policies of the United States and certain European nations may serve as a useful model for facilitating public-private cooperation. In the former case, the presidential order to review a decade's worth of restrictive ransom policies¹³² led to substantive changes that harken back to the pre-9/11 era.¹³³ Like the framework of the 1990s and early

demanding the release of Iraqi failed-bomber Sajida al-Rishawi, captured by Jordan in 2005, within 24 hours in exchange for Japan's remaining hostage. Japan requested Jordan's assistance, but at that time, Daesh also held Jordanian pilot Moaz al-Kasasbeh, the release of whom Jordan hoped to secure. Hence, Jordan was faced with the option of exchanging al-Rishawi for the release of the Japanese hostage but not for the Jordanian pilot. In Japan and Jordan's failure to reach an agreement, Japan's deadline passed and Goto was executed. No further ransom demand was made for the Jordanian pilot before his execution in January 2015. In retaliation, Jordan, which had prohibited the death penalty in 2006, lifted its moratorium and executed al-Rishawi immediately thereafter. For further details on this sequence of events, see *A Timeline of Japan's Crisis*, *supra* note 128; Jason Hanna & Greg Botelho, *ISIS Claims It's Beheaded One Japanese Hostage, Offers a Swap for the Other*, CNN (Jan. 24, 2015, 11:19 PM), <http://www.cnn.com/2015/01/24/world/isis-japan-hostages/>; *Japan Outraged at IS 'Beheading' of Hostage Kenji Goto*, *supra* note 127; Ray Sanchez, *Who Was Sajida al-Rishawi? And Why Did ISIS Care About Her?*, CNN (Feb. 4, 2015, 8:12 AM), <http://www.cnn.com/2015/01/24/world/isis-jordan-sajida-al-rishawi/>.

130. See Callimachi, *supra* note 81.

131. *Id.*

132. See Michelle Kosinski, *Obama Seeks Review of Government Response to Hostage-Taking*, CNN (Nov. 18, 2014), <http://www.cnn.com/2014/11/17/politics/obama-hostages-review/>.

133. See *infra* Section III.B. In those times, government officials reportedly engaged in negotiations where the process promised to yield valuable intelligence that could be used to prevent further terrorist activities. See Shane Harris, *'No One's Really in Charge' in Hostage Negotiations*, FOREIGN POL'Y (Oct. 9, 2014), <http://foreignpolicy.com/2014/10/09/no-ones-really-in-charge-in-hostage-negotiations/>. The shift in policy, which occurred during the mid-

2000s, the federal policies enacted now similarly allow for collaboration between the state and family members and even establish an inter-departmental action committee to facilitate the process.¹³⁴ As of this writing, the practicalities of the program are still in the development stage;¹³⁵ as a future model, however, the structure holds promising potential.

In sum, it is only once states adopt this role within their respective domestic spheres that they may begin to coordinate a multilateral approach to hostage situations and terrorism more broadly. A key element of the state-centered approach will likely center on ransoms as an alternative to military action; accordingly, the following Section will address the legitimacy of ransoms as a permissive approach to kidnappings.

B. Ransom or Rescue?

Once states have taken up their proper roles, the question remains as to whether and to what extent ransoms remain a legitimate strategy to pursue. To the extent that state practice indicates an increasing tolerance for negotiating for hostage release,¹³⁶ this Section will argue that the option to facilitate ransoms should be preserved as a permissible alternative to military action.

A preliminary matter relates to the lawfulness of military rescue operations under international law. Governed by the “protection of nationals” doctrine,¹³⁷ the legality of such operations is far from settled.¹³⁸ Perhaps the strongest argument in favor of the permissiveness of military action would be that such action constitutes an exercise of self-defense under Article 51 of the U.N. Charter,¹³⁹ which provides for the “inherent right of individual or collective self-defense if an armed attack occurs against a

to-late 2000’s, led to not only a general refusal to pay ransoms, but a more fundamental refrainment from even communicating with kidnappers or, in some instances, intermediaries. See Rukmini Callimachi, *The Cost of the U.S. Ban on Paying for Hostages*, N.Y. TIMES (Dec. 27, 2014), http://www.nytimes.com/2014/12/28/world/middleeast/the-cost-of-the-us-ban-on-paying-for-hostages.html?_r=0.

134. See *infra* Section III.B.

135. See Exec. Order No. 13,698, 3 C.F.R. § 5 (2015) [hereinafter E.O. 13,698] (prescribing a six-month period for a status report assessing the establishment of the policy provisions).

136. This Section does not purport to argue that ransoms are a permissible response to kidnappings under customary international law, but rather acknowledges that such a norm would likely fail for lack of the requisite *opinio juris*. See *infra* note 151 and accompanying text.

137. See Ruys, *supra* note 109, at 234 (defining “protection of nationals” as “a concept that refers to the conducting of a military intervention in the territory of a third state aimed at the protection and/or rescuing of threatened nationals of the intervening state”).

138. See *id.* at 234–38.

139. Kristen E. Eichensehr, Note, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT’L L. 451, 461–63 (2008) (endorsing the right of self-defense over the concept of humanitarian intervention as the proper legal basis for the ability of the state to rescue nationals held overseas); but see Ruys, *supra* note 109, at 235 (introducing an alternative argument that, far from constituting an exercise of self-defense, rescue operations do not even reach the threshold of the use of force prohibited under Arti-

Member of the United Nations.”¹⁴⁰ Where kidnappings amount to proxy attacks on the hostage’s state of nationality, proponents argue, the requirement that there be an “armed attack” may be satisfied such that the state is justified in defending itself within the limitations prescribed by the Charter.¹⁴¹ Ultimately, however, the potential for the doctrine’s abuse has remained a barrier to its recognition,¹⁴² and the widespread resistance to such an ILC provision on diplomatic protection during the U.N. General Assembly’s 2000 debates has been cited as sufficient evidence of *opinio juris* to counterbalance any state practice to the contrary.¹⁴³

Yet, in practice, it may be that international tolerance for a more limited version of rescue missions justifies this strategy in certain instances. To support such a view, scholars have pointed to operations focusing narrowly on the rescue and evacuation of nationals as distinguished from any further attempt to influence the injuring state’s domestic affairs.¹⁴⁴ As a doctrinal matter, rescue operations in the first category may comprise a subset of the “protection of nationals” doctrine;¹⁴⁵ this may be especially so where the operation is limited to extracting hostages from non-state operatives who either vie with the state for control of the territory or thrive in the absence of an effective state government.¹⁴⁶ States’ reactions to such operations have ranged from mild to supportive,¹⁴⁷ indicating a tentative tolerance for limited intervention. In contrast, the fierce backlash against states engaging in more involved rescue operations has been primarily aimed at “those rescue missions where the territorial State objects to the intervention or where the protection of nationals was just a pretext for an invasion with wider objectives.”¹⁴⁸ It is this latter category of opera-

cle 2(4) on the basis that such operations do not violate the “territorial integrity or political independence” of the injuring state).

140. U.N. Charter art. 51.

141. See Eichensehr, *supra* note 139, at 468–69 (“[I]t 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.’”). This prong is arguably met when, as occurred in the case of Daesh, kidnappers emphasized the nationalities of certain hostages taken as symbols of their countries. Among the limitations to the right of self-defense, however, the necessity requirement would likely be the more difficult to satisfy. The principle of necessity requires a “lack of non-forceful options for preventing harm to the hostages” and would be difficult to establish if engagement in negotiations is preserved as an alternative.

142. See, e.g., *id.* at 464, 477.

143. See Ruys, *supra* note 109, at 256–59, 270.

144. See *id.* at 262–63, 263 n.187.

145. *Id.*

146. For a discussion of the doctrine’s application to non-state hostage-takers, see *id.* at 263, 265, 266, 268.

147. See *id.* at 262–63, 263 n.187.

148. *Id.* at 263 n.187 (quoting CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 129 (2d ed. 2004)).

tions that is sometimes accused of undermining the legitimacy of the “protection of nationals” doctrine.

Even if the legal doctrine governing rescue operations is unclear, states’ more recent responses to hostage situations demonstrate an increasing preference for ransoms over rescues. Notwithstanding what was formerly a widespread condemnation of states accused of facilitating payments,¹⁴⁹ some governments’ recent retreat from ransom bans may highlight a shift in strategy.¹⁵⁰ This position, adopted by such states as Spain, Australia, France, Italy, and others indicates a willingness, at least in the West, to consider the alternative of ransom negotiations. As states frequently faced with kidnappings, their actions constitute meaningful state practice in favor of the permissibility of such payments.¹⁵¹ Even the United States, formerly among the most vocal critics of ransom payments to terrorist actors, seems to have displayed a retreat from its former hardline position by establishing inter-departmental bodies to supervise hostage recovery efforts.¹⁵²

This shift in strategy lays the groundwork for recognizing (even if not officially sanctioning)¹⁵³ an option to negotiate in response to kidnapping situations. The Security Council resolutions discussed earlier call for increased cooperation among states to confront such situations;¹⁵⁴ however, negotiated release should remain a permissible alternative in the event that such cooperation proves elusive. This option would account for the inability of some states to partake in military operations, which weighs against rescue missions as the only permissible response to hostage situations.¹⁵⁵ Instead, states should retain the ability to engage kidnappers in dialogue, with the possibility to undertake ransom negotiations on a case-by-case basis, as an alternative to forcible rescue. Such an option would

149. See *supra* Section II.B.

150. Callimachi, *supra* note 73.

151. However, it remains doubtful that the requisite *opinio juris* is established (as required for the development of a norm of customary international law) given many states’ denial of facilitating ransom payments when accused of having done so. See, e.g., Callimachi, *supra* note 73. It is also important to note the reactions of other stake-holding states, even if their own nationals may not face such kidnappings. This is particularly true for the states in which hostage-takers operate: their opposition to ransoms on the grounds that such payments strengthen terrorist groups weighs heavily against the emergence of a permissive norm. See, e.g., African Union [AU], *Decision to Combat the Payment of Ransom to Terrorist Groups*, ¶¶ 2, 8-9, Thirteenth Ordinary Session, Assembly/AU/Dec.256(XIII) (July 3, 2009) (expressing its consideration of ransom payments as a form of terrorist financing); HRC Report, *supra* note 18, ¶¶ 27-35 (detailing the impact of ransom payments on the local communities in which terrorist hostage-takers operate).

152. See E.O. 13,698, *supra* note 135 (establishing the Hostage Recovery Fusion Cell, the Hostage Response Group, and the Special Presidential Envoy for Hostage Affairs).

153. See *infra* note 171.

154. See, e.g., S.C. Res. 2133, ¶¶ 4, 11 (Jan. 27, 2014).

155. As discussed in Section III.A, the prohibition of some states from holding militaries would preclude them from engaging in rescue operations absent multilateral action; for states in this category, a ransom prohibition would prevent them from addressing hostage situations altogether. See *supra* notes 126–29 and accompanying text.

preserve the ability of states to gather information about their opponents through the negotiations process and would uphold the fundamental interest in protecting their nationals against threats.¹⁵⁶

As a practical matter, the structural changes implemented in the United States' hostage strategy in response to Executive Order 13698 (2015) may prove a promising model for other states considering a permissive approach. The changes account for various issues raised in previous Sections: firstly, the establishment of a permanent and interdepartmental body to respond to hostage-takings ensures a streamlined rather than ad hoc involvement by the state.¹⁵⁷ The Order also provides for increased coordination with hostage families¹⁵⁸ and private-sector parties,¹⁵⁹ as well as enhanced transparency through proactive declassification of hostage-related information.¹⁶⁰ Finally, the establishment of a special envoy to coordinate diplomatic engagements on hostage-related matters demonstrates a commitment to interstate cooperation.¹⁶¹ In a statement released the same day, the Department of Justice confirmed that it had never prosecuted a ransom financier and expressed its intent to refrain from doing so.¹⁶²

It is important to note, however, that the changes in U.S. strategy do not officially detract from its policy against concessions;¹⁶³ instead, the decision not to prosecute those accused of paying ransoms merely mitigates the risk facing family members for making such concessions. While this distinction preserves the option of negotiating at the private level, the ability to do so at the governmental level will depend on the interpretation of a key provision in the Presidential Policy Directive. The provision, which specifies that the no-concessions policy "does not preclude engaging in communications with hostage-takers,"¹⁶⁴ diverges from the developed

156. See *infra* notes 166–70 and accompanying text.

157. E.O. 13,698, *supra* note 135, § 2 (establishing the Hostage Recovery Fusion Cell).

158. *Id.* § 2(c) (providing for a Family Engagement Coordinator).

159. Presidential Policy Directive/PPD-30: Hostage Recovery Activities (June 24, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/24/presidential-policy-directive-hostage-recovery-activities> (providing for coordination with private entities to "locate and recover Americans held hostage abroad").

160. E.O. 13,698, *supra* note 135, § 2 (d)(iv); see also Presidential Policy Directive 30, *supra* note 159.

161. E.O. 13,698, *supra* note 135, § 4 (establishing the Special Presidential Envoy for Hostage Affairs).

162. Dep't of Justice Office of Public Affairs, Statement on U.S. Citizens Taken Hostage Abroad (June 24, 2015), <https://www.justice.gov/opa/pr/department-justice-statement-us-citizens-taken-hostage-abroad>; see also Press Release, Statement by the President on the U.S. Government's Hostage Policy Review (June 24, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/24/statement-president-us-governments-hostage-policy-review>.

163. Presidential Policy Directive 30, *supra* note 159.

164. *Id.* (authorizing dialogue with hostage-takers and intermediaries in order to assist private efforts or secure the hostage's release).

practice of refusing to engage in dialogue¹⁶⁵ and opens the door to state-led negotiations. First authorized under the still-classified 2002 presidential directive,¹⁶⁶ the permission to communicate with hostage-takers was at that time interpreted broadly to permit ransoms negotiated either as a lure¹⁶⁷ or where the process promised to yield valuable intelligence that could be used to prevent further terrorist activities.¹⁶⁸ By using ransoms to further state interests, officials operating under this policy recognized that an option to negotiate does not signal the acknowledgment of non-state actors as on equal footing with states. Far from somehow legitimizing their actions or existence,¹⁶⁹ such negotiations instead open the door to strategic gathering of information that may lead to the identity of the perpetrators, the whereabouts of the victims, or other essential intelligence typically sought by the state.¹⁷⁰

When viewed in light of prior practices, the U.S. changes indicate a significant shift toward a permissive policy on ransom payments and serve as a valuable model for future development among states. The structural changes address many of the issues raised in Section II pertaining to interstate coordination and lack of transparency, while the shift in policy provides enhanced clarity surrounding the lawfulness of ransoms negotiated at the private level. While the lawfulness of state-initiated negotiations is perhaps less clear, the ability to communicate with hostage-takers may

165. See Harris, *supra* note 133. The practice of refusing to communicate with hostage-takers was at odds with the 2002 presidential directive, which governed hostage situations until its replacement in 2015. According to former chief of the FBI's Crisis Negotiation Unit Gary Noesner and others who read the directive, the change in FBI and DOJ operations was not due to the state of the law, but the practices that arose in implementing it. See Callimachi, *supra* note 129 ("The policy of no concession has always been there, but we used to interpret it in a much more flexible way.").

166. Harris, *supra* note 133.

167. Callimachi, *supra* note 133.

168. Harris, *supra* note 133. This approach demonstrated some measure of achievement: former chief of the FBI's Crisis Negotiation Unit Gary Noesner estimates a success rate of 90% during the 1990s and early 2000s, and a similar tactic has been credited with securing the more recent release of U.S. hostage Peter Theo Curtis (originally "Theo Padnos"); his release from al-Nusra Front in Syria was brokered by Qatar in 2014. See Harris, *supra* note 133; Callimachi, *supra* note 133; Rukmini Callimachi, *U.S. Writer Held by Qaeda Affiliate in Syria Is Freed After Nearly 2 Years*, N.Y. TIMES (Aug. 24, 2014), <http://www.nytimes.com/2014/08/25/world/middleeast/peter-theo-curtis-held-by-qaeda-affiliate-in-syria-is-freed-after-2-years.html>. Not all such efforts involving ransoms have ended in success, however. For details surrounding a failed attempt to use ransom funds to lure hostage-takers in the Philippines, see Jane Perlez, *Muslims' U.S. Hostage Is Killed in Gun Battle in the Philippines*, N.Y. TIMES (June 8, 2002), <http://www.nytimes.com/2002/06/08/world/muslims-us-hostage-is-killed-in-gun-battle-in-the-philippines.html>; Callimachi, *supra* note 133.

169. See Guy Olivier Faure, *Negotiating with Terrorists: A Discrete Form of Diplomacy*, 3 HAGUE J. DIPL. 179, 187 (2008) (discussing the decision to negotiate as potentially implying a "de facto recognition" or legitimization of a terrorist group); Bento, *supra* note 9, at 334 (concluding that "[d]ialogue [with hostage-takers] does not mean endorsement, or legitimization, of the unwanted act; it merely seeks to resolve the dispute at hand").

170. See, e.g., Faure, *supra* note 169, at 185; Harris, *supra* note 133.

provide a basis for the strategic use of ransoms in pursuance of state interests.

The similarly permissive approach to negotiations adopted by other Western states likewise demonstrates a growing regional consensus in favor of such methods. Whereas the U.S. model previously restricted its use of ransom payments to only those instances in which valuable information could be extracted, other states have demonstrated a willingness to negotiate for humanitarian purposes more broadly, with the hostage's release as the only known justification for such payments. Still, countries' continued denial of facilitating payments renders it unlikely that they would *officially* authorize ransoms via international agreement or Security Council resolution;¹⁷¹ however, the increasing willingness to negotiate ransoms may serve as a basis for state practice in favor of this option.

CONCLUSION

In sum, the international legal framework governing hostage situations, far from providing much-needed clarity and guidance, instead generates uncertainty as to the lawfulness of ransom payments. Whereas the Terrorist Financing Convention and Resolution 1373 subject those accused of terrorist financing to both the assets freeze and criminal penalties, more recent resolutions impose only the former sanction against those who pay ransoms. Moreover, given the preventive rather than punitive purpose of the assets freeze,¹⁷² the lawfulness of ransoms under international law remains unclear.¹⁷³

171. The lack of domestic provisions explicitly permitting ransoms (in contrast, for example, with an option to *communicate* with hostage-takers, as provided for in Presidential Policy Directive 30) highlights the unlikelihood that states would enshrine a permissive policy in an international agreement. No state has adopted legislation permitting ransom payments in response to hostage situations; instead, the covert negotiations undertaken by states alleged to pay ransoms, together with their general denial of having done so, may indicate states' understanding of "the difference between *promoting* . . . versus *preserving* negotiation in difficult contexts." Bento, *supra* note 9, at 332. While an agreement permitting ransoms might be interpreted as a promotion thereof, the subtler ability to "communicate" preserves negotiation as a permissible option and avoids legitimizing terrorist actors or endorsing their activities. For an argument in favor of enacting a national law permitting ransoms, see Weill, *supra* note 64, at 217–34. For the potential of such an approach to be perceived as legitimizing or acknowledging terrorist actors, see Faure, *supra* note 169, at 187–89; Bento, *supra* note 9, at 288–89, 313–17, 323–24.

172. See *supra* note 45 and accompanying text.

173. As of this writing, it is too early to observe the effects of the most recent resolutions on national legal systems. The reporting mechanism of Resolution 2199, which requires states to report to the U.N. al-Qaida Sanctions Monitoring Team on actions to counter terrorist-financing, may shed light on states' policy changes (if any) with regard to ransom financiers. S.C. Res. 2199, ¶ 29 (Feb. 12, 2015); Procedural Note: Member State Reporting Requirements of Resolution 2199 (Mar. 27, 2015), <http://www.un.org/sc/committees/1267/pdf/Res2199ProceduralNote.pdf>. At the international level, the failure of the GTCF, CTC, the FATE, or the Sanctions Committee to suggest sanctions against ransom financiers points toward the permissiveness of such payments during the present period.

We have also seen that the divergent positions states have adopted in response to the ransom dilemma mirror the uncertainty at the international level. No sanctions have yet been imposed against any nation for facilitating ransom payments;¹⁷⁴ instead, some states continue to negotiate or preserve the ability of private sector partners to do so, even when publicly advocating for the no-concessions stance. The inability of this position to account for the interests of the private sector or confront the challenge of terrorism more broadly confirms the limitations inherent in the permissive approach. On the other hand, the limited effectiveness of a ransom prohibition in deterring kidnappings and the increased risk this approach poses to hostages weighs against the ban as a desirable alternative.

Instead, it has been argued that states should adopt a more dominant role in their domestic spheres to confront hostage situations while coordinating with the private sector to streamline the response process. Where rescue operations are contemplated, states should collaborate to avoid conflicts and to facilitate multilateral action, particularly in cases involving states without armed forces at their disposal. Where such operations pose substantial risk to the hostage, however, the ability to negotiate a ransom should be preserved as a permissible alternative. As states endeavor to overcome their differences of approach to hostage situations, it is important to recognize that the response to kidnapping is but one part of the overarching problem that terrorist organizations represent to the international community. Any attempt to confront kidnappings must consider that collective component of counterterrorism.

174. See Tom Keatinge, *The Price of Freedom: When Governments Pay Ransoms*, FOREIGN AFFAIRS (Aug. 13, 2014), <https://www.foreignaffairs.com/articles/europe/2014-08-13/price-freedom>.