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ILIAS BANTEKAS

Hamad bin Khalifa University, ibantekas@hbku.edu.qa

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ARTICLES

NO-CONCESSIONS POLICIES AND THE 2023 ISRAEL-HAMAS MEDIATION IN CONTEXT

BY ILIAS BANTEKAS*

Most states in the Western world maintain a no-concession policy towards terrorist groups, pirates, criminal organizations, and rogue entities, on the basis of which they refuse ransom payments, political concessions, and in many cases even direct engagement. The United States and the United Kingdom are the strictest in this regard, with many European states demonstrating a wavering stance. Even so, the United States has on several occasions since the late 1970s deviated from its strict no-concessions policy. This article suggests that since the late 2000s, the United States foresaw that dialogue and engagement with some (but not all) terrorist groups and rogue entities was inevitable to serve its foreign policy pursuits, while avoiding being seen as bending its hardline against such groups. As a result, it requested Qatar, which aspired to a regional mediator role, to allow both the Taliban and Hamas to set up representative offices on its territory and thus to open channels of communication with the United States and its allies. This is despite the fact that the United States and the U.N. Security Council had sanctioned both groups. This led to a U.S.-Taliban agreement in 2020 that allowed for an orderly withdrawal of U.S. forces and a subsequent rapport between the two states. It also allowed Qatar to successfully mediate four ceasefires between Hamas and Israel from 2014 until 2023. The paper suggests that this represents a paradigmatic shift from the strict no-concessions policy, suggesting that powerful states have an interest in structured

* Professor of International Law, Hamad bin Khalifa University (Qatar Foundation) and Adjunct Professor of Law at Georgetown University, Edmund A Walsh School of Foreign Service; Senior Fellow at the Institute of Advanced Legal Studies of the University of London.

(i.e., not ad hoc) mediated engagement with terror groups and rogue states, at least for short-term targets. It is hoped that such a process may be adapted for longer-term, lasting, peace agreements.

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I. INTRODUCTION

Until the early 1980s, most states were generally comfortable conversing with what today one could call “terrorist organizations” and rogue¹ entities. The terrorist organizations of the time were

1. See Meghan L. O’Sullivan, *Replacing the Rogue Rhetoric: A New Label Opens the Way to a Better Policy*, BROOKINGS INST. (Sept. 1, 2000), <https://www.brookings.edu/articles/replacing-the-rogue-rhetoric-a-new-label-opens-the-way-to-a-better-policy> (explaining that the term “rogue” state was abandoned in the early 2000s by the Clinton administration in favor of “states of concern,” the latter being used to describe states “that exhibit a chronic inability to engage constructively with the outside world.” In this article the term “rogue” is used to describe non-state entities, such as the Taliban (while not in government)).

secretive and operating in small cells and effectively “communicated” with the outside world through “op eds” sent to the media, most of which were subsequently published.² Although their demands were addressed to states, they had no intention of actually discussing or engaging with officials from their target states.³ During this time, however, numerous organizations aspired or in fact committed acts of violence against civilians or state objects, mainly in the form of terrorist bombings, taking of hostages and hijacking of aircraft.⁴ Although governments were hostile to these terrorist entities, evidence suggests that they employed negotiators to reach some sort of agreement, especially where law enforcement was no longer possible.⁵ Such negotiations took place either directly or through the medium of a third entity with whom the terror group felt affiliated or which it trusted.⁶ This could not be considered mediation because this third party merely served the role of a conduit, or an agent, through whom the negotiation was conducted and was not mandated to produce a middle position that the main parties could accept or reject.⁷ During this time, it was also established practice by many European governments to make formal declarations of government recognition, as distinct from recognition of statehood.⁸ This was intended to

2. See Jessica White, *TERRORISM AND THE MASS MEDIA* 8–9 (2020), https://static.rusi.org/terrorism_and_the_mass_media_final_web_version.pdf (noting the symbiotic relationship between the media and terrorism).

3. AUDREY K. CRONIN, *WHEN SHOULD WE TALK TO TERRORISTS?* 1, 3–4 (2010).

4. See Maurice Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 VA. L. REV. 509, 556 (1976) (showing that in the 1960s, the focus shifted to the *root causes* of terrorism, such as racism, colonialism, occupation, and apartheid, which should not be differentiated from action undertaken by national liberation movements).

5. See Rachel Briggs & Jon Wallace, *‘We Do Not Negotiate with Terrorists’ – But Why?*, CHATHAM HOUSE (Jan. 13, 2020), <https://www.chathamhouse.org/2022/01/we-do-not-negotiate-terrorists-why> (noting that several countries including Spain and France have paid millions of euros to bring home their respective citizens).

6. See Robert Suro, *PLO Persuades Hijackers of Jet to Back Off Threat of Massacre*, N.Y. TIMES (Apr. 11, 1988), <https://www.nytimes.com/1988/04/11/world/plo-persuades-hijackers-of-jet-to-back-off-threat-of-massacre.html> (showing as evidence that Arafat’s Palestine Liberation Organization (PLO) intervened on many occasions to steer splinter factions against acts of terrorism).

7. See *id.* (noting that the ‘mediators’ in such cases were not neutral but were clearly aligned with terrorist groups).

8. HANNA PFEIFER ET AL., *THE POLITICS OF RECOGNITION, ARMED NON-STATE*

convey the notion that no direct negotiations would take place between the respective governments, and any acts undertaken by the non-recognized government would be given no credence or legitimacy.⁹ This practice ultimately fizzled out because it became clear that national courts distinguished between the non-recognition of a state as such from the legality of day-to-day administrative acts adopted by non-recognized states (e.g., divorces),¹⁰ as well as because constant coups in the developing world became a distinct feature, which ultimately rendered government recognition futile and embarrassing.¹¹

From the mid-1980s onwards, western governments began a process of identifying and sanctioning terrorist¹² and criminal groups¹³ and made it clear that they were not in any way open to negotiate with them. Going a step further, by the early 1990s the so-called political offence exception to terrorism (i.e. the notion that legitimate political motivations underlying an otherwise terrorist offence shielded the culprit from criminal liability) had been abandoned by all Western governments¹⁴ who were now designing sophisticated anti-terror and

ACTORS, AND CONFLICT TRANSFORMATION 2, 10, 13 (2022).

9. See Peter R. Neumann, *Negotiating with Terrorists*, 86 COUNCIL ON FOREIGN RELS., 128, 130 (2007), <https://www.jstor.org/stable/pdf/20032216.pdf> (noting the efforts taken to not lend credence or legitimacy to non-state groups like Al Qaeda).

10. *Hesperides Hotels v. Aegean Holidays* [1978] 1 All ER 207, 211–12 (U.K.); see *Emin v. Yeldag*, [2002] 1 FLR 956 (U.K.) (concerning a divorce granted by the courts of the so-called Turkish Republic of Northern Cyprus (TRNC), which the applicant sought to enforce in England. The United Kingdom does not recognize the TRNC or its government, but English courts are sophisticated enough to distinguish between (and enforce) personal transactions without this entailing recognition of the TRNC or its government).

11. See Colin Warbrick, *The New British Policy on Recognition of Governments*, 30 INT'L COMPAR. L.Q. 568 (1981) (noting an aversion against government recognition for the first time).

12. See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 270 (1988) (coinciding roughly with the Achille Lauro incident, which concerned a wanton act of violence against a Jewish-American disabled cruise ship passenger).

13. See Emmanouela Mylonaki, *The Manipulation of Organized Crime by Terrorists*, 2 INT'L CRIM. L. REV. 213, 227 (2002) (demonstrating in the early 2000s the difficulties governments faced to make clear cut distinctions between the two phenomena).

14. Since, in many countries the characterization of a criminal offence as a political one traditionally tended to remove personal culpability, this so-called

organized crime treaties, particularly the Terrorist Bombings Convention¹⁵ and its Terrorist Financing counterpart.¹⁶

By the late 1990s there was a shift in the growth of terrorist and criminal dynamics, and it was not always easy to distinguish the two.¹⁷ Large and sophisticated criminal enterprises, such as narcotics cartels, yielded political and military power in Mexico and Colombia, and former terrorist outfits such as the FARC guerillas were now financing their operations from the sale of narcotics.¹⁸ At the same time, there was concrete evidence that certain states were supporting terrorist activities, and others, including Afghanistan, whose territories had been partially occupied by terrorist organizations, such as Al-Qaeda.¹⁹ What is more important, unlike the small terror groups of the 1960s and 1970s that operated in secrecy and sought public sympathy, the terrorists emerging after the 1990s attracted large numbers of adherents. They were fairly open and communicated widely through

“political offence exception” to terrorist offences may in fact turn out to negate terrorist criminality altogether. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 795, 795–96 (D.C. Cir. 1984) (noting that an action for tort against an alleged terrorist attack on a bus in Israel was dismissed). Edwards J. noted the lack of international consensus on terrorism and stated that besides those acts which are already prohibited by international conventions no other terrorist action can be regarded as a crime under international law; S.C. Res. 1373, ¶ 2(e), (Sept. 28, 2001) (showing abandonment); *see also* Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, art. 4(2), U.K.-U.S., Mar. 31, 2003, T.I.A.S. no. 07-426 [hereinafter U.K.-U.S. Extradition Treaty]; International Convention for the Suppression of the Financing of Terrorism art. 6, Dec. 9, 1999, T.I.A.S. no. 13075, 2178 U.N.T.S. 197.

15. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, T.I.A.S. no. 02-726, 2149 U.N.T.S. 256 [hereinafter ICSTB].

16. International Convention for the Suppression of the Financing of Terrorism, *supra* note 14.

17. *See* Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT’L L. 315, 316 (2003) (following the adoption of the 1999 Terrorist Financing Treaty, but mostly in the aftermath of the 9/11 attacks and the adoption of terrorist financing resolutions by the UNSC, it became clear that terror organizations were funded through predicate offences (e.g., drug trafficking), as well as otherwise lawful activities, chiefly charitable donations by donors that were generally unaware of the destination of their donations).

18. *See* Mylonaki, *supra* note 13, at 234–35 (stating that terrorist groups have been financing their activities through organized crime since the early 2000s).

19. *See id.* at 221 (noting Afghanistan’s occupation by the Taliban).

the Internet, and were less concerned with appealing to general public sentiment, focusing instead on specific target groups.²⁰ This is true of the Islamic State of Iraq and Syria (ISIS) and Al-Qaeda.²¹ Overtly, and as a matter of regional or unilateral Western governments forbade any direct contact or negotiation with terrorist and criminal groups, irrespective of the consequences on the target state.²² However, public pressure must have been unbearable, especially in situations of mass hostages, in which case governments authorized private or other intermediaries to negotiate on their behalf. While it would have been an affront on these governments to be seen as caving to terrorist demands—as this would have fueled synallagmatic (i.e., bargaining) terrorism—there was equally a certain degree of unease by the spectacle of dead hostages on account of a state's refusal to sit at the negotiating table.²³ This practice was perfected in the 2000s and 2010s during a surge of piracy attacks in the Gulf of Aden and the seas off the Somalian coast.²⁴ While Western governments were adamant that they would not release hostages through the payment of ransom, pirate demands were effectively met through the triggering of insurance clauses related to maritime commerce, whereupon insurance companies negotiated (through specialist intermediaries) with the pirates and made airdrops with cash in exchange for the civilian hostages.²⁵ Although European Union (EU) states sent warships to the

20. See Tomáš Zeman et al., *Role of Internet in Lone Wolf Terrorism*, 7 J. SEC. & SUSTAINABILITY ISSUES 185, 186 (2017) (noting the broad range of communication that terrorist groups employ).

21. See *id.* at 187 (noting the use of the internet to spread radical sentiment and publish instruction manuals on terroristic activities like bomb making).

22. Carl Miller, *Is it Possible and Preferable to Negotiate with Terrorists?*, 11 DEF. STUD. 145, 145 (2011) (noting multiple examples of Western leaders forbidding negotiations with terrorists).

23. See C.J. Atkins, *Israeli Peace Movement Demands: Free All Hostages on Both Sides, Remove Netanyahu*, PEOPLE'S WORLD (Nov. 27, 2023), <https://www.peoplesworld.org/article/israeli-peace-movement-demands-free-all-hostages-on-both-sides-remove-netanyahu> (illustrating the demands of the so-called Israeli Peace Movement, that the Netanyahu government to do whatever it takes (which includes negotiation and mediation) to return all hostages taken by Hamas).

24. 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, 305 (2014) (describing the process of handing physical cash over to pirates, as well as the roles played by parties in the process on both sides in detail).

25. See *id.* at 303 (claiming that a piracy ransom ban, under the no-concession

region, private ransom payments were not outlawed.²⁶ As a result, governments could still save face by claiming they did not negotiate with pirates; the public was appeased with the return of the hostages; pirates were more than pleased to make a good profit and; insurance companies ultimately learned how to reduce their losses through a new generation of piracy-related clauses in maritime contracts²⁷ and the recruitment of specialist piracy negotiators by which to reduce the amount of the ransom.²⁸

By the mid-2010s the policy of outlawing all entities employing violence, who violated human rights (otherwise owed by states), or otherwise committed acts that were criminalized (e.g., money laundering or terrorist financing) entailed that Western governments were not on speaking terms with these entities through the adoption of no-concession policies.²⁹ This was becoming a serious problem because many of these outfits had, by this time, assumed partial governmental control, enjoyed public legitimacy in certain places (e.g., the Catalanian movement in Catalonia and the political wing of Hamas in Gaza following the Israeli disengagement),³⁰ and some

to pirates and terrorists policy of western governments, would likely be inconsistent with the retributive principles of criminal law, since it would punish innocent victims who pay ransoms under duress).

26. See *id.* at 312 (explaining the legality of ransom paying techniques, such as private payments, from the EU).

27. See D.R. Thomas, *Insuring the Risk of Maritime Piracy*, 10 J. INT'L MAR. L. 358, 364 (2004) (explaining that the nature of most insurance contracts constitutes a significant factor in the under-reporting of piratical attacks, since they generally tend to exclude all instances of theft that do not involve actual force or threat of force, thus providing little incentive to ship owners to report incidents that do not entail substantial losses); Soumyajit Dasgupta, *Marine Insurance for Piracy Attacks: Necessities and Benefits*, MARINE INSIGHT (Jan. 5, 2019), <https://www.marineinsight.com/marine-piracy-marine/marine-insurance-for-piracy-attacks-necessities-and-benefits>.

28. Robyn Hunter, *How Do You Pay a Pirate's Ransom?*, BBC (Dec. 3, 2008), <http://news.bbc.co.uk/2/hi/africa/7752813.stm> (citing the responsibilities of ransom negotiators among other parties).

29. See Malkhadir M. Muhumed, *Middlemen with a Specialty: Negotiate Pirate Ransoms*, THE SEATTLE TIMES (May 14, 2010), <https://www.seattletimes.com/nation-world/middlemen-with-a-specialty-negotiate-pirate-ransoms> (noting the pseudo-neutral position middlemen attempt to occupy by distancing themselves from the 'criminal' activities of pirates).

30. See Safaa S. Jaber & Ilias Bantekas, *The Status of Gaza as Occupied Territory under International Law*, 72 INT'L COMPAR. L.Q. 1069, 1069 (2023)

ultimately became entrenched governments, as was the case with the Taliban in Afghanistan in 2021.³¹ Although Western governments would still deny any benefit to negotiating with entities against whom international treaties were targeted and U.N. Security Council (UNSC) sanctions imposed, the reality was that structured mediation was a desired outcome for reasons that will be discussed in the course of this article.³² The problem was how Western governments could reach out and interact with entities they had long targeted militarily and with whom they had severed all cultural and communication ties and avenues without losing too much face. As this article will go on to demonstrate, from the late 2000s onwards there is a paradigmatic shift in hardline no-concessions policies. The United States envisioned the necessity of conversing with some (but not all, such as ISIS) powerful terror groups and rogue entities, but not through a channel of direct communication and negotiation.³³ Rather, it *requested* Qatar to allow the Taliban and Hamas to set up embassy-like stations on its territory and serve as mediator between these groups and the United States.³⁴ As the article will go on to show, it was on the basis of this structured mediation that a comprehensive U.S.-Taliban agreement was reached in 2020 and at least four major ceasefires between Israel and Hamas from 2014 until 2023.

This article is organized as follows. Section II explores the theoretical and practical framework of no-concession policies from the perspective of collective practice, as well as on the basis of individual

(showing among others that Hamas had established internal administrative authority in Gaza following the Israeli disengagement and provided all such services that ordinary states are supposed to offer to their citizens, such as healthcare, education, utilities and public works).

31. See Ben Saul, *Recognition and the Taliban's International Legal Status*, INT'L CTR. FOR COUNTER-TERRORISM (Dec. 15, 2021), <https://www.icct.nl/publication/recognition-and-talibans-international-legal-status> (noting the Taliban's rise to de-facto power in Afghanistan over time).

32. See Miller, *supra* note 22, at 145 (noting multiple examples of Western leaders forbidding direct negotiations with terrorists).

33. See *id.*

34. See Nadeen Ebrahim, *How the Tiny Arab State of Qatar Became Indispensable in Talks with Hamas*, CNN (Nov. 2, 2023), <https://www.cnn.com/2023/11/01/middleeast/qatar-mediation-israel-hamas-intl/index.html> (noting Qatar's significance to American interests in diplomacy, making the country one of the United States' closest allies in the region).

state practice through the adoption and enforcement of pertinent policies. The United States features heavily in this section, followed by the practice of a select number of industrialized states. Section III examines the mediation process through which the United States engaged with the Taliban as a rogue entity from 2013 until 2021. Section IV delves into the October 2023 Israel-Hamas crisis and the subsequent conflict in Gaza and examines the mediatory background and context of the ceasefire agreement between the two. Section V explains why mediation is not always panacea and in what manner domestic (chiefly) in concert with international politics determines whether parties are even willing to negotiate or mediate.

II. NEGOTIATIONS AND MEDIATION BETWEEN STATES AND NON-STATE ACTORS

The international law literature on non-binding dispute settlement, particularly negotiation, mediation, and conciliation, is exclusively focused on inter-state processes.³⁵ There are several reasons for this. The first is that inter-state dispute settlement is generally in the public domain.³⁶ Secondly, while states may and do engage with non-state actors in their territory, doing so with foreign state actors may be viewed as interference in the domestic affairs of other states,³⁷ and cannot lead to any meaningful outcome without the intervention of the non-state actor's host state.³⁸ To be sure, state practice, broadly speaking, comprises both overt and secretive acts. The former includes not only treaties, public statements, and actual practice, but also

35. See JOHN MERRILLS & ERIC DE BRABANDERE, *MERRILL'S INTERNATIONAL DISPUTE SETTLEMENT* 38–83 (7th ed. 2022). There is no reference to a non-state actor. It is only in the so-called transitional law literature that one finds peace negotiations between states and non-state actors.

36. See ISABELLA RISINI, *THE INTER-STATE APPLICATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 5 (Lindy Melman ed., 2018) (noting European examples of dispute settlement existing within the public domain).

37. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 37 (June 27); G.A. Res. 2625 (XXV) (Oct. 24, 1970); U.N. Charter art. 2, ¶ 7.

38. See Oona A. Hathaway et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 *TEX. L. REV.* 540, 542 (2017) (citing the importance of involvement from the state in whose territory the non-state actor exists).

silence, which is generally positive in nature.³⁹ Secretive practices, particularly treaties, is not a remnant of past times.⁴⁰ States generally keep their negotiations confidential, regularly enter into private contracts or memoranda of understanding (MoU)⁴¹ with confidentiality clauses,⁴² and there have been reports of secret bilateral agreements dealing with sensitive law enforcement.⁴³

The various no-concession policies analyzed in the next sections give rise to serious implications. Diplomats or state agents dispatched to hostile environments with a high likelihood of violence or kidnapping will demand some degree of assurance that their government will do its utmost to release them, which entails some

39. See Helene Quane, *Silence in International Law*, 84 BRITISH Y.B. INT'L L. 240, 245 (2014) (using the term "silence" to denote the absence of normative regulation, whether by positive or negative conduct, much in the way that this discussion came about, even if confusingly, in the *Lotus* case).

40. See Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 1994 I.C.J. 112, ¶ 29 (July 1, 1994) (showing that secret agreements were frequent in the Middle East and certainly in the pre-U.N. Charter era); see also Danai Azaria, *Secret Treaties in International Law and Faith of States in Decentralized Enforcement*, 111 AM. J. INT'L L. UNBOUND 469, 469 (2018) (citing the frequency of secret agreements in the region); Megan Donaldson, *Textual Settlements: The Sykes-Picot Agreement and Secret Treaty-Making*, 110 AM. J. INT'L L. 127, 129 (2016) (tracing the rationale for the secrecy of the agreement and its legality under international law at the time).

41. See Case C-258/14, Florescu v. Sibiu, ECLI:EU:C:2017:448, ¶ 36 (June 13, 2017) (concluding that MoU concluded under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under Art 267(1)(b) TFEU, and therefore are susceptible to interpretation by the Court. The IMF and the EuroGroup, an unofficial grouping of EU finance ministers, had consistently predicated most bail-out agreements to Greece in the post-2008 crisis on MoU with a view to bypassing serious parliamentary scrutiny); see also Case C-8/15, Ledra Advert. Ltd. v. Eur. Comm'n, ECLI:EU:C:2016:701, ¶¶ 58–59 (Dec. 20, 2017) (holding that where the European Commission is involved in the signing of MoU within the framework of the European Stability Mechanism it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoU that are inconsistent with EU law, including the EU Charter of Fundamental Rights).

42. See BCB Holdings Ltd. v. Att'y Gen. of Belize, No. CV 7 of 2012, Caribbean Court of Justice [CCJ] 5 (AJ), ¶¶ 1, 5, 7 (July 26, 2013) (repudiating an earlier tax concession granted to a group of companies because it had not been approved by the Belize legislature and was confidential).

43. See EFTHYMIOS PAPASTAVRIDIS, *THE INTERCEPTION OF VESSELS ON THE HIGH SEAS: CONTEMPORARY CHALLENGES TO THE LEGAL ORDER OF THE OCEANS* 286–88 (2013) (referring to secret enforcement agreements against trafficking and piracy between certain EU states and Morocco and Mauritania).

degree of negotiation with terrorists or their intermediaries.⁴⁴ On the other end of the spectrum, however, meeting terrorist demands not only breeds further hostage-taking, but seriously undermines a state's foreign policy given that a good part of it is henceforth dictated by the terrorists themselves.⁴⁵ To make matters more complicated, even when a state maintains a strict no-concession policy, other states may well satisfy the underlying demand, in which case the terrorists will be tempted to believe that the latter state served as a proxy to its no-concession counterpart.⁴⁶

This concern can also be applied in turn to states' policies and practices in the payment of ransoms to terrorist groups. As will be addressed further below, the ransom-specific aspect of no-concession (or qualified-concession) policies have in recent history been the subject of some states' flexible approach to no-concessions.⁴⁷ The willingness of governments to pay ransoms to terrorist groups is a particularly threatening prospect for states wherein kidnapping for ransom has become a popular financing activity among growing terrorist groups that pose increasing threats to domestic peace and stability.⁴⁸ Indeed, kidnapping for ransom has proven to have a significant return for groups such as Al Qaeda,⁴⁹ empowering state

44. See Guy O. Faure, *Negotiating with Terrorists: The Hostage Cases*, 8 INT'L NEGOT. 469, 475 (2003) (outlining the necessity of having to negotiate with terrorists in particular circumstances).

45. See Peter R. Neumann, *Negotiating with Terrorists*, 86 FOREIGN AFF. 128, 128–29 (2007); Faure, *supra* note 44 (outlining the downsides of terrorist negotiations).

46. See Andrew R. Schindler, *Allied Pressure: Enforcing International Obligations Forbidding the Payment of Ransoms for Kidnapped Western Nationals*, 5 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 206, 209 (2014) (emphasizing the loopholes in a no-concession policy).

47. See *id.* (identifying the divergence of approaches to no-concessions).

48. See Rukmini Callimachi, *Paying Ransoms, Europe Bankrolls Qaeda Terror*, N.Y. TIMES (July 29, 2014), <https://www.nytimes.com/2014/07/30/world/africa/ransoming-citizens-europe-becomes-al-qaedas-patron.html> (emphasizing the growing risks to internal stability posed by compliance with ransom demands).

49. See Mylonaki, *supra* note 13, at 221, 231–32 (identifying the benefits Al Qaeda has reaped from kidnappings); Gail Wannenburg, *Links Between Organised Crime and Al-Qaeda*, 10 S. AFR. J. INT'L AFF. 77, 77, 84–85 (2003) (noting that the financing of terror through criminal activities is a common occurrence); see also Yvonne M. Dutton, *Funding Terrorism: The Problem of Ransom Payments*, 53 SAN DIEGO L. REV. 335, 338, 340–41 (2016) (noting the problematic relationship

opposition and encouraging more kidnappings. Further still, the ransom practice has evolved such that certain states have arisen on the radar of terror groups states that tend to pay ransoms, making their citizens more likely targets.⁵⁰ Although the state practice of ransom payment can differ significantly from the indirect (and/or third-party) engagement in negotiation and mediation with non-state actors,⁵¹ this serves to highlight the importance of this distinction and the drawing of clear practical lines, especially in the context of practice straying (to whatever extent) from policy.

What remains unclear is whether developed states have any tangible interest to interact with terrorists and how rogue states perceive the political cost of such interaction. While there does not seem to exist any hard and intractable rule under international law that prevents a state from conversing with terrorists and rogue states in order to save human life, several states have set out rules and policies at the domestic level that prohibit such interaction.⁵² Even so, powerful countries such as the United States have set out so-called “no-concessions” policies in absolute terms, which have been followed by allies in varying degrees, at least as policy objectives, even if not always adhered to in practice.⁵³ This is the focus of the next subsection.

A. NO-CONCESSION POLICIES UNDER GENERAL INTERNATIONAL LAW

There is no clear consensus concerning the ambit of no-concession

between criminal and terror activities).

50. Callimachi, *supra* note 48.

51. Dutton, *supra* note 49, at 344.

52. Sima Kazmir, *The Law, Policy, and Practice of Kidnapping for Ransom in a Terrorism Context*, 48 N.Y.U. J. INT'L & POL. 325, 337–38 (2015). Countries such as the United States and the United Kingdom prohibit paying ransoms, whereas countries like Germany and France support such payments. Such vastly different national policies highlight the lack of uniformity in addressing hostage taking and ransom payments.

53. See Navin A. Bapat, *State Bargaining with Transnational Terrorist Groups*, 50 INT'L STUD. Q. 213, 213–14 (2006) (noting that the bulk of the literature suggests that negotiations with terrorists are futile because they are outside of the framework of law); Isabelle Duyvesteyn & Bart Schuurman, *The Paradoxes of Negotiating with Terrorist and Insurgent Organisations*, 39 J. IMPERIAL & COMMONWEALTH HIST. 677, 678; Kazmir, *supra* note 52, at 337–39.

policies. In its narrowest sense, it forbids any reward to terrorists, whereas in its widest it encompasses any interaction or engagement, including negotiation without the prospect of a financial, political, or other concession.⁵⁴ It is important to emphasize that terrorist demands are addressed to governments and their instrumentalities, but not necessarily to private entities negotiating the release of their loved ones.⁵⁵ While there are several variations of no-concession policies, for example to terrorists and organized crime groups, as a matter of domestic practice, it stretches the imagination to find a coherent and uniform no-concession norm as a matter of international law.⁵⁶ There is no anti-terrorist treaty that specifically forbids states from engaging with terrorists in order to mitigate an extenuating circumstance and it is probably impossible for all states, even likeminded, to adopt such a stringent position on the basis of a treaty.⁵⁷ Pertinent treaties, the majority of which were adopted prior to 9/11, oblige states to prevent and confiscate tools of terrorism (e.g., terrorist financing) and suppress this phenomenon by expanding their jurisdictional powers and enforcing their criminal laws.⁵⁸ Nonetheless, none of these obligations forbid states from articulating their interest through some kind of concession.⁵⁹ Even so, in 2014, the UNSC adopted Resolution 2133, in which operative paragraph 3 introduced a new dimension by calling “upon all Member States to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages.”⁶⁰

This Resolution sets forth two concrete elements for a global no-

54. See Dutton, *supra* note 49, at 345; see also Marc J. Randazza, *Getting to Yes with Terrorists*, 2002 MICH. ST. L. REV. 823, 827–28, 833 (2002) (providing examples of instances where concessions cannot be made to terror groups).

55. See Rivka Weill, *Exodus: Structuring Redemption of Captives*, 36 CARDOZO L. REV. 177, 208 (2014) (claiming that Israel is similar to the United States when it comes to hostage negotiations, where concessions can be extracted from the public rather than private entities, such as the direct families as in Italy).

56. See Dutton, *supra* note 49, at 338, 345, 350 (commenting on multiple no-concession campaigns from the United Nations, United States, and Britain).

57. *Id.* at 338–40.

58. *But see* Ben Brandon, *Peaceful Strategies in the “War against Terror”*, 47 AMICUS CURIAE 20, 21–22 (2003).

59. *Id.* at 21 (explaining the differences in response to acts of terrorism pre- and post- September 11, 2001).

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

concession policy, namely ransom payments and political concessions. If U.N. member states are called upon to “secure the safe release of hostages” without concessions, then presumably this is to be achieved through negotiation and mediation (in addition to force), albeit without providing any material incentives. This line of thinking was reiterated in subsequent UNSC resolutions⁶¹ and it was emphasized that funds destined to pay ransom would be seized as material support to terrorism.⁶² This position came at the back of several other initiatives, principally a Group of Eight (G8) pledge in 2013 to stop paying ransom to terrorist groups, where it was noted that although the United States, United Kingdom, and Canada had assumed firm positions, all other members continued to be ambivalent.⁶³ Even the Non-Aligned Movement subscribed to the prohibition of material support and political concessions to terrorist kidnappings in its Final Document of the 16th Summit of the Heads of State or Government in 2013.⁶⁴ It is clear from this discussion that there is nothing in general international law that prevents or prohibits states from engaging with terror groups, whether through negotiation or mediation, with a view to achieving mutually acceptable short or long-term goals.

B. INDIVIDUAL STATE PRACTICE

As a matter of customary practice, with the exception (perhaps) of the United States and the United Kingdom,⁶⁵ other states routinely negotiate, or seek mediation, with terrorist groups, whether by means

61. See S.C. Res. 2199, ¶¶ 18–19 (Feb. 12, 2015).

62. See S.C. Res. 2161, ¶¶ 1(a), 7 (June 17, 2014).

63. George Parker, *G8 Leaders Pledge to Stop Paying Ransoms to Terror Groups*, FIN. TIMES (June 18, 2013), <https://www.ft.com/content/10cc2546-d832-11e2-b4a4-00144feab7de>.

64. *Final Document of the 16th NAM Summit*, ¶ 225.6, UNIDIR (Aug. 31, 2012) [hereinafter *Final Document*], https://app.unidir.org/sites/default/files/2020-10/2012_NAM%20Summit%20final%20doc.pdf.

65. See Sam Jones, *Somali Pirates Demand \$7m to Release British Hostages*, THE GUARDIAN, (Oct. 30, 2009), <https://www.theguardian.com/world/2009/oct/30/somalian-pirates-yacht-couple-hostages> (demonstrating the British Government’s policy to “not make substantive concessions to hostage takers, including the payment of ransoms”); see also Briggs & Wallace, *supra* note 5 (commenting on the moral rationales behind not negotiating with terrorists).

of ransom payments, prisoner exchanges, or political concessions.⁶⁶ This is true even of Israel, which routinely converses with groups characterized as terrorist, chiefly through prisoner exchange agreements.⁶⁷ Evidence suggests, however, that the United States has reneged on its own no-concession policy on certain occasions, most notably in the early 1980s when it secretly sold arms to Iran in exchange for that country's influence with Hezbollah-affiliated armed groups to release U.S. hostages in Lebanon.⁶⁸ During the Tehran hostage crises following the ascent to power of Ayatollah Khomeini in Iran in 1979, U.S. President Carter had little political space but to bypass his country's earlier no-concession policy.⁶⁹ This was despite the fact that the United States had made a serious effort at diplomacy, subsequently cutting off diplomatic ties with Iran and then attempting a unilateral rescue mission (Operation Eagle Claw) which resulted in American military deaths.⁷⁰ In a desperate attempt to show some kind of solution, President Carter allegedly paid seven billion USD in seized Iranian assets for the release of the remaining hostages.⁷¹ It is also reported that when persons are kidnapped in the United States,

66. See Neumann, *supra* note 45, at 128–29 (commenting on the back-alley communications between the British Government and the IRA); see also Callimachi, *supra* note 48 (stating that Al-Qaeda has taken in \$125 million in kidnapping revenues since 2008).

67. See Shelly A. Yeini, *Weighing Lives: Israel's Prisoner-Exchange Policy and the Right to Life*, 27 MINN. J. INT'L L. 493, 494–95 (2018) (referring to two important exchanges, namely the Jibril and Shalit prisoner exchanges, of which the negotiations for the release of Shalit went on for five years).

68. See Lisa M. Hailey, *The Double-Edged Sword: Democratic Histories and Methods of Negotiating with Terrorists*, 21 ILSA J. INT'L & COMPAR. L. 61, 66–69 (2014).

69. See H. Lee Hetherington, *Negotiating Lessons from Iran: Synthesizing Langdell & MacCrate*, 44 CATH. U. L. REV. 675, 680, 691, 701 (1995) (recognizing it was politically understood that the outcome of the 1980 Presidential Election would hinge on a resolution, or lack thereof, to return the hostages).

70. See Hetherington, *supra* note 69, at 697–98 (providing details surrounding President Carter's decisions in a no-negotiation reality during the Iran Hostage Crisis).

71. See *444 Days: Selected Records Concerning the Iran Hostage Crisis 1979-1981*, NAT'L ARCHIVES [hereinafter *444 Days*], <https://www.archives.gov/research/foreign-policy/iran-hostage-crisis>; see also Hetherington, *supra* note 69, at 697–98 (commenting on the Carter Administration's understanding that another term was dependent upon resolution of the crisis and that at one point they were willing to offer \$7.3 billion to the Iranian request of \$9.3 billion).

their families routinely negotiate with and pay ransom to kidnapers with some degree of assistance from the Federal Bureau of Investigation (FBI).⁷²

1. U.S. National Policy: An Overview

By the late 1960s, there is no record of a U.S. national policy that prevented the state apparatus from conversing with terrorists.⁷³ This changed in 1973 with the abduction of the U.S. ambassador in Khartoum, Sudan, whereupon the United States set out its first no-ransom policy.⁷⁴ In the 1980s, the Reagan Administration expanded upon the U.S. anti-terrorism policy through the National Security Decision Directive (NSDD) 138 and 207, though the tone of each differs significantly.⁷⁵ While NSDD-138 emphasized a phased approach to refining the country's anti-terrorism efforts through enhanced intelligence, policy and diplomacy, and strengthened response protocols, NSDD-207 took a notably solidified stance on the U.S. position against ransom payments, prisoner releases, policy changes, and agreements to "other conditions" in response to terrorist threats or that could motivate more acts of terrorism in the future.⁷⁶ The Reagan Administration's practical application of its directives

72. See John Parachini, *Foreword to BRIAN M. JENKINS, DOES THE U.S. NO-CONCESSIONS POLICY DETER KIDNAPPINGS OF AMERICANS?* iii, viii (2018) (stating that U.S. families will negotiate with kidnapers with the help of the FBI).

73. See OFFICE OF THE HISTORIAN, FOREIGN RELATIONS OF THE UNITED STATES, DOCUMENTS OF AMERICAN REPUBLICS, 1969–1972 Doc. 123 (Douglas Kraft et al. eds., vol. E-10 2009); see also Carlos Osorio & Marianna Enamoneta, *To Save Dan Mitrione Nixon Administration Urged Death Threats for Uruguayan Prisoners*, NAT'L SEC. ARCHIVE (Aug. 11, 2010), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB324/index.htm> (recounting the 1987 Mitrione Kidnapping in Uruguay).

74. See *The Terrorist Attack on the Saudi Embassy – Khartoum, 1973*, ASS'N DIPLOMATIC STUD. & TRAINING, <https://adst.org/2013/02/the-terrorist-attack-on-the-saudi-embassy-khartoum-1973> [hereinafter *Terrorist Attack*] (recounting that the Black September Organization stormed the Saudi Arabian embassy, kidnapping for ransom U.S., Saudi, Belgian, and Jordanian officials).

75. See THE WHITE HOUSE, NAT'L SEC. DECISION DIRECTIVE 138: COMBATting TERRORISM 1, 2 (1984) [hereinafter NSDD 138] (stating that the manner of dealing with terrorists will include all possible channels of communication); see also THE WHITE HOUSE, NAT'L SEC. DECISION DIRECTIVE 207: THE NATIONAL PROGRAM FOR COMBATting TERRORISM 1, 2, 4 (1984) [hereinafter NSDD 207] (taking a hard stance against engaging with terrorists when it comes to ransoms or prisoner swaps).

76. NSDD 138, *supra* note 75; NSDD 207, *supra* note 75, at 2.

may be said to have been a somewhat cloudy reflection of their terms, though from a policy perspective, the country's commitment to no-concession was established.⁷⁷

That early policy was later refined under the Clinton Administration and effectively set out a zero-tolerance target, whereby any possible source of material support to terrorists was *ab initio* non-negotiable.⁷⁸ This line of thinking has eroded several entrenched civil liberties. In *Holder et al. v. Humanitarian Law Project et al.*, the plaintiffs had sought to provide human rights training, advocacy, and peacemaking to the Kurdistan Workers' Party (PKK) in Turkey and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, both of which had already been designated terrorist organizations in the United States.⁷⁹ Under a federal U.S. statute, it was a crime to "knowingly provide material support or resources to a foreign terrorist organization."⁸⁰ The term "material support" meant, among other things, "training, expert advice or assistance."⁸¹ The U.S. government construed the statute as prohibiting all types of training to designated terrorist organizations, including human rights training that was meant to promote non-violence within these organizations, as well as helping a proscribed organization to petition international bodies to end violent conflicts.⁸² The plaintiffs argued that the statute was unnecessarily vague thereby violating the Fifth Amendment of the U.S. Constitution, which

77. In the context of this article, it is interesting to note that the so-called 'Iran-Contra Affair' coincided with the efforts of the Reagan administration in solidifying its strict no-concessions policy. In an argument perhaps to be further developed by future research, the maneuvering and strategic framing of the shipment of arms to Iran as other than a goods-for-hostages transaction could be seen as a (though notably more duplicitous) foreshadowing of the current trend toward tactical circumvention of no-concession. See NSDD 207, *supra* note 75, at 2.

78. See Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process, Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995). The Order was expanded by subsequent orders, such as Executive Order 13099, imposing sanctions on any person or entity dealing with designated terrorist organizations. See Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process, Exec. Order No. 13099, 63 Fed. Reg. 45167 (Aug. 20, 1998) (amending the list of terrorists that transacting with are prohibited).

79. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 9–10 (2010).

80. 18 U.S.C. § 2339B(a)(1) (1996).

81. *Id.* § 2339A(b)(1).

82. *Holder*, 561 U.S. at 14–15.

protects against abuse of government authority in a legal procedure.⁸³ They also claimed a violation of the First Amendment which protects the freedom of speech.⁸⁴ The Supreme Court, however, with a majority of six to three, declared that the provision of intangibles such as human rights training allowed a proscribed organization to free resources for other illegal purposes (i.e., fungibility), which it was in the interests of the executive to curtail.⁸⁵ As a result, the prohibition of free speech was justified under the circumstances.⁸⁶

The Bush Administration brought National Security Policy Directive 12 (NSPD-12), the first of its kind to address the U.S. response to hostage situations, though it did not effectively set forth a framework for government-wide cooperation in this context.⁸⁷ The U.S. hostage-recovery policy and practice was further developed by the Obama Administration, along with other notable shifts in position on no-concession.⁸⁸ President Obama seemingly moved away from the strict no-concession policy of his predecessors in an Executive Order adopted in 2015.⁸⁹ While emphasizing the commitment not to provide any material or political benefits, it stressed that:

83. *Id.* at 8; U.S. CONST. amend. V.

84. *Holder*, 561 U.S. at 8; U.S. CONST. amend. I.

85. *Holder*, 561 U.S. at 30–31.

86. *Id.* at 40.

87. Cynthia Loertscher, *Bringing Americans Home 2021: A Nongovernmental Assessment of U.S. Hostage Policy and Family Engagement*, NEW AMERICA (June 9, 2021) [hereinafter *Bringing Americans Home*], <https://www.newamerica.org/future-security/reports/bringing-americans-home-2021> (noting that NSPD-12 was unique because it addressed hostage-taking separately from counterterrorism strategy for the first time and “attempted to generate a framework to pull the different agencies and departments of the U.S. government together for a whole-of-government response to hostage-taking events”).

88. See *Presidential Policy Directive – Hostage Recovery Act*, THE WHITE HOUSE, (June 24, 2015) [hereinafter *PPD 30*], <https://obamawhitehouse.archives.gov/the-press-office/2015/06/24/presidential-policy-directive-hostage-recovery-activities>. For an analysis of the policies leading up to PPD 30, see Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121 (2007).

89. Hostage Recovery Activities, Exec. Order No. 13698, 80 Fed. Reg. 37131 (June 29, 2015) (establishing, under the Obama Administration, a U.S. operational body to explicitly deal with terrorism and kidnappings).

This policy does not preclude engaging in communications with hostage-takers. For example, when appropriate the United States may assist private efforts to communicate with hostage-takers, whether directly or through public or private intermediaries, and the United States Government may itself communicate with hostage-takers, their intermediaries, interested governments, and local communities to attempt to secure the safe recovery of the hostage.⁹⁰

This is a clear and emphatic policy turn signifying that strict no-concession policies had not provided the dividends expected and equally that the victims' families were far from happy with the outcomes. It is no accident that in 2020 Congress adopted the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act (the Levinson Act), named in memory of the longest-serving U.S. hostage.⁹¹ The Act set out a number of innovative institutions, including a Special Envoy for Hostage Affairs, a Hostage Recovery Fusion Cell, and a Hostage Response Group (HRG).⁹² In 2022, President Biden adopted Executive Order No. 14078.⁹³ Despite its otherwise hardline no-concessions language, two sections stand out. In particular, Section 3(b)(ii) calls on the Special Envoy to “coordinate diplomatic engagements and strategy regarding hostage and wrongful detention cases, in coordination with the HRFC and relevant agencies, as appropriate and consistent with policy guidance communicated through the HRG.”⁹⁴

In addition, Section 4 of Executive Order 14078, in calling on the three institutions in the Levinson Act to deter kidnappings, demands that this be achieved through “cooperation with like-minded foreign governments and organizations.”⁹⁵ The latter is a direct call for

90. *PPD 30*, *supra* note 88 (explaining that the U.S. stance towards hostages will include assisting private efforts to communicate with hostage takers).

91. Robert Levinson Hostage Recovery and Hostage-taking Accountability Act, Pub. L. No. 116-260, § 301–08, 134 Stat. 1182, 3091–99 (2021); Assistance of United States Nationals Unlawfully or Wrongfully Detained Abroad, 22 U.S.C. §1741 (2020).

92. § 301–08, 134 Stat. 1182, 3091–99.

93. Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home, Exec. Order No. 14078, 87 Fed. Reg. 43389 (July 21, 2022) [hereinafter Exec. Order No. 14078].

94. *Id.*

95. *Id.*

mediation through states or non-state entities that yield sufficient influence to release hostages without providing any sort of material support.⁹⁶ These orders implicitly recognize that terrorist organizations do not always seek financial means as their key demands.⁹⁷ If this was not so, then no negotiation or mediation entailing a *quid pro quo* could possibly produce meaningful outcomes. A list of non-financial and acceptable political concessions seems to include recognition as an equal negotiating partner and showcasing humanitarian plight of underlying people.⁹⁸

The most recent Executive Orders and their emphasis on victims and their families suggest that the older policy where it was illegal for U.S. citizens to negotiate or pay ransom⁹⁹ is no longer good law.¹⁰⁰ It is equally questionable whether the prohibition in the U.K. 2000 Terrorism Act of paying private ransom to terrorists stands to reason.¹⁰¹ The absurdity of this illegality was removed by the British Parliament in a recent discussion of this issue.¹⁰²

2. *No-Concession Policies of Other States*

Though this article aims to focus much of its weight on the implications of the U.S. involvement in the 2023 Israel-Hamas mediation, it does add to the wider paradigmatic scope to consider briefly the patterns of other G8 countries in the context of their own policies. Japan, for example, has demonstrated a similarly staunch position on negotiation and ransom payments to terrorist groups, evidenced by its refusal to pay a ransom demanded by ISIS in 2015

96. *Id.*

97. *Id.*

98. *See id.* (noting that strategies include cooperating with like-minded foreign governments and organizations).

99. *See* Hailey, *supra* note 68, at 69 (referencing an old policy whereby the United States gives terrorists no rewards, guarantees, concessions, nor deals).

100. 18 U.S.C. § 2339A; 18 U.S.C. § 2339B; *see* Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 586 (2011) (noting that several former HLF officers and directors were indicted of charges of conspiracy to provide material support to Hamas).

101. Terrorism Act 2000, 2001, 11, §15.3.

102. *See Money Laundering and the Financing of Terrorism*, U.K. PARLIAMENT [hereinafter *U.K. Ransom*], <https://publications.parliament.uk/pa/ld200809/ldselect/lducom/132/9031112.html> (holding that payment of ransom is not *per se* illegal).

that led to the widely publicized execution of two Japanese citizens.¹⁰³ In the same year, international and domestic media outlets accused Italy of paying a twelve million euro ransom to Al Qaeda to secure the safe release of two Italian hostages in Syria, though this was not publicly addressed by the Italian authorities.¹⁰⁴ Also in 2015, Canada refused to not only pay ransom but also to negotiate with Philippine terrorist group Abu Sayyaf after the kidnapping of two Canadian citizens who were subsequently killed by the group.¹⁰⁵ In contrast, France has demonstrated a more flexible approach to terrorist negotiation and ransom payments; for example, France reportedly paid a \$17 million ransom for the release of four hostages held by Al Qaeda in 2013, though this was denied by French authorities.¹⁰⁶ France has also recently adopted an Orientation and Programming Law that

103. However, somewhat in reflection of the strategy taken by the United States as detailed in this article, it was reported by Japanese officials that it had attempted to contact ISIS through third-party regional state governments and tribe leaders, though they were not successful. See Antoni Slodkowski & Kiyoshi Takenaka, *Japan Urges Jordan's Help in ISIS Hostage Crisis After Video*, REUTERS (Jan. 27, 2015), <https://www.reuters.com/article/uk-mideast-crisis-japan-video-idUKKBN0L01Z520150128> (reporting that Japan pressed Jordan for help in securing the release of Kenji Goto, insisting that Jordan frees would-be suicide bomber Sajida al-Rishawi from death row); Steve Almasy, *ISIS: Japanese Hostage Beheaded*, CNN (Feb. 3, 2015), <https://www.cnn.com/2015/01/31/middleeast/isis-japan-jordan-hostages/index.html> (describing how the Japanese journalists' decapitated body was distributed).

104. A question was posed to the European Parliament on the propriety of the reported payment, though the provided answer falls short of addressing the substance of the question. See Question for Written Answer E-001589-15, *Payment of Ransoms to Secure the Release of Greta Ramelli and Vanessa Marzullo* (Jan. 30, 2015) [hereinafter Question for Answer], https://www.europarl.europa.eu/doceo/document/E-8-2015-001589_EN.html.

105. See Peter Zimonjic, *Trudeau Says Canada 'Does Not and Will Not Pay Ransom to Terrorists'*, CBC NEWS (Apr. 26, 2016), <https://www.cbc.ca/news/politics/trudeau-kananaskis-cabinet-retreat-1.3553768> (quoting Canadian Prime Minister Justin Trudeau who said "I do . . . want to make one thing perfectly, crystal clear: Canada does not and will not pay ransom to terrorists, directly or indirectly.").

106. See Abdoulaye Massalatchi & Nicholas Vinocur, *France Denies Paying Ransom as Sahel Hostages Return*, REUTERS (Oct. 30, 2013), <https://www.reuters.com/article/world/france-denies-paying-ransom-as-sahel-hostages-return-idUSBR E99T092> (noting that the ransom was paid by France's intelligence services, although the French government insists François Hollande banned paying hostage-takers).

provides insurability of ransom payments arising from cyberattacks.¹⁰⁷ Without entering a detailed analysis of policy-practice discrepancies, the foregoing serves to highlight that countries that purportedly subscribe to no-concession policies may, as a general trend, take a somewhat more flexible practical approach upon closer scrutiny.

What may be gleaned from this analysis is that while it is prohibited for states to directly or indirectly offer any material support to terrorists and pirates, there is no general norm that prevents states from negotiating, engaging, or mediating with them in order to defuse a crisis or resolve a hostage situation.¹⁰⁸ As to whether or not states are allowed to pay ransom or enter into prisoner-exchange agreements, there is equally no general rule, and states do so on a unilateral basis as guided by available national no-concession policies.¹⁰⁹ Western governments are under significant internal pressure to negotiate the release of hostages and most of their actions are covered in secrecy and may in fact collide with their official positions.¹¹⁰

III. ENGAGING WITH ROGUE ENTITIES: THE TALIBAN PARADIGM

The Taliban is credited with a checkered history. In its first post-

107. See Magalie Dansac Le Clerc & Remy Bricard, *France Confirms the Principle of Insurability of Cyber-Ransom with Prompt Complaint Filing Requirement*, CONNECT ON TECH BLOG (Apr. 11, 2023), <https://www.connectontech.com/france-confirms-the-principle-of-insurability-of-cyber-ransoms-with-prompt-complaint-filing-requirement> (stating that this new provision was to come into force on April 24, 2023).

108. S.C. Res. 2462 (Mar. 28, 2019).

109. See Zimonjic, *supra* note 105 (stating that Canada would be working with the Philippines to bring the hostages' killers to justice after refusing to pay any ransom to release the hostages); *U.K. Ransom*, *supra* note 102 (noting that payments of a ransom are not an offense, but HMG will not make or facilitate a ransom payment); Massalatchi and Vinocur, *supra* note 106 (reporting that four French hostages were released and flown home after secret negotiations were conducted by the government of Niger).

110. See Adam Ciralsky, *Exclusive: Embedding with America's Top Hostage Negotiator*, VANITY FAIR (May 29, 2024), <https://www.vanityfair.com/news/story/americas-top-hostage-negotiator-exclusive> (describing how Jasmin was "putting in long hours" as her brother's advocate in Washington to get him released from captivity in Venezuela); Slodkowski & Takenaka, *supra* note 103 (citing several instances of intense public pressure on governments to facilitate the release of their loved ones that had been taken hostage).

Soviet rule of Afghanistan, it was portrayed as a medieval, trigger-happy group of fighters out of touch with the modern world.¹¹¹ But even as Al-Qaeda settled in Afghanistan in the late 1990s following its exile from Sudan—and elsewhere—there was never any suggestion that the Taliban controlled it other than allowing a fellow Muslim group to take sojourn on its territory.¹¹² That is exactly why in the aftermath of 9/11, the United States and its allies clearly distinguished between Al-Qaeda and Taliban.¹¹³ Since the Taliban takeover of Afghanistan in 2021, once again its relationship with the outside world has become the subject of renewed attention.¹¹⁴ More specifically, this section will examine how the Taliban conversed with the world in the years prior to its takeover, as well as slightly after that. The position of the Taliban is very much different to Daesh (ISIS). The latter has always been a designated terrorist group,¹¹⁵ and has never been interested to converse with the international community, its only aim

111. See *Who are the Taliban?*, BBC (Aug. 12, 2022), <https://www.bbc.com/news/world-south-asia-11451718> (stating that the Taliban supported public executions and amputations and that they banned television, music and cinema, and disapproved of girls aged ten and over going to school).

112. See James Astill, *Osama: The Sudan Years*, THE GUARDIAN (Oct. 16, 2001), <https://www.theguardian.com/world/2001/oct/17/afghanistan.terrorism3> (noting that the United States still considered Bin Laden a friendly mujahid when he first flew to Sudan from Afghanistan in early 1991); George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 891 (2017) (noting that the Taliban continued to give sanctuary to the leaders of Al Qaeda within the territory of Afghanistan).

113. See Aldrich, *supra* note 112, at 891–92 (noting that the treatment of prisoners of war applies to the armed conflict between the Taliban and the United States, but not the armed conflict between Al Qaeda and the United States).

114. See Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Jan. 19, 2023), <https://www.cfr.org/background/taliban-afghanistan> (reporting that the Islamic fundamentalist group returned to power in Afghanistan in 2021 after waging an insurgency against the U.S.-backed government in Kabul since 2001); see also Press Release, Security Council, Security Council Emphasizes that Punitive Restrictions on Women's Rights, Escalating Hunger, Insecurity Taking Devastating Toll in Afghanistan, U.N. Press Release SC/15222 (Mar. 8, 2023) [hereinafter SC/15222] (noting that U.N. Security Council members were stressing how the Taliban decrees were causing one of the world's largest humanitarian crises).

115. *Foreign Terrorists Organizations*, BUREAU OF COUNTERTERRORISM [hereinafter *FTO Designation*], <https://www.state.gov/foreign-terrorist-organizations> (reporting that ISIS was designated a foreign terrorist organization on December 17, 2004).

being to establish an Islamic caliphate across various states through violence against all those standing in its way.¹¹⁶

In the summer of 2013, the Taliban opened an office in Doha, with its flag flying high on the flagpole.¹¹⁷ Given that the United States maintains one of its largest military bases in Qatar, this was clearly achieved with its blessing.¹¹⁸ At the time, the Taliban was effectively under the patronage of Pakistan's Inter-Services Intelligence (ISI), the country's best sourced intelligence agency, with the Taliban leadership living in Karachi.¹¹⁹ This made President Karzai, then-leader of Afghanistan, furious, influencing him to make ground negotiations with the Taliban and put on hold the long-term strategic agreement with the United States on a mutual post-2014 security relationship.¹²⁰ It is clear, therefore, that since 2013, the United States and its allies foresaw the likelihood of a Taliban-ruled Afghanistan (and perhaps even parts of Pakistan), and the necessity of having to converse with the Taliban in a manner that befitted its domestic (chiefly) and its international image.¹²¹ Its *de facto* recognition in an inconspicuous country like Qatar that was, at the time, aspiring to a key mediator role in the region¹²² was an ideal opportunity.

116. See Daniel Byman, *ISIS Goes Global: Fight the Islamic State by Targeting Its Affiliates*, 95 FOREIGN AFFS. 76, 76–79 (2016) (discussing a Russian passenger plane crash caused by an ISIS caliph).

117. Bruce Riedel, *Why Karzai Suspended Negotiations After Taliban Opened Doha Office*, BROOKINGS (June 20, 2013), <https://www.brookings.edu/articles/why-karzai-suspended-negotiations-after-taliban-opened-doha-office> (noting that the Qatari government, following a request by the USA, allowed the Taliban to open an office in Doha).

118. See *id.* (commenting that the Qatari government allowing the Taliban to open an office in Doha was blessed by Washington); Jonathan Landay & Kanishka Singh, *U.S. Reaches Deal to Extend Military Presence at Qatar Base*, REUTERS (Jan. 2, 2024), <https://www.reuters.com/world/middle-east/us-reaches-deal-extend-military-presence-qatar-base-source-2024-01-02> (stating that the “United States reached a deal to extend its military presence at a base in Qatar for another 10 years”).

119. See Riedel, *supra* note 117 (describing the Taliban's patrons as the Pakistani army and its notorious ISI intelligence service).

120. See *id.* (noting that the Afghanistan President Hamid Karzai took the symbolism of the Taliban flag flying outside the offices in Doha as an affront and offensive symbol of statehood).

121. See *id.* (describing how the flags and the signs brought the Taliban unwanted legitimacy).

122. See MEHRAN KAMRAVA, QATAR: SMALL STATE, BIG POLITICS 46–50 (2015) (observing that Qatar has emerged as an influential regional and international

Henceforth, the Taliban would possess an internationally recognized voice under the mediating control of Qatar, and it was through the latter that the United States would ultimately interact in respect of the Taliban, even if at the same time it was fighting the group on Afghan territory.¹²³

Since 2013, the United States has paved the eventual peace process that ultimately came to being in 2021.¹²⁴ Qatar mediated not only between the Taliban and the United States (and the world at large), but also other Arab states, particularly the Gulf Cooperation Council (GCC).¹²⁵ Many countries in the GCC viewed the Taliban presence in Doha as “soft normalization,” despite reservations about the power vacuum in the country after the fall of the Karzai government.¹²⁶ It was clear by the late 2010s that the Karzai government was close to collapse and Qatar successfully mediated U.S.-Taliban talks, which culminated in a oddly worded agreement.¹²⁷ Its title was “Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a State

player); John E. Peterson, *Qatar and the World: Branding for a Micro-State*, 60 MIDDLE E. J. 732, 746–48 (2006) (noting how Qatar has established a high-profile independent stance within the Gulf Cooperation Council by hosting major international conferences and enhancing its involvement with international organizations).

123. See Dawood Azami, *How Qatar Came to Host the Taliban*, BBC NEWS (June 22, 2013), <https://www.bbc.com/news/world-asia-23007401> (commenting that over the past two years, the Taliban has sent representatives from Qatar to conferences on Afghanistan in Japan, France, Germany, and Iran).

124. See Azami, *supra* note 123 (stating that after nearly twelve years of bloodshed in Afghanistan, peace talks with the Taliban are set to begin).

125. See MATTHEW GRAY, *QATAR: POLITICS AND THE CHALLENGES OF DEVELOPMENT* 185–188 (2013) (describing that Qatar is seeking to build regional ties with the GCC, where these deliver commercial and other benefits, and sound links with larger regional actors such as Iran and Iraq).

126. See Leonardo Jacopo et al., *Saudi Arabia and Qatar are Cooperating with the Taliban. But Their Approaches to Afghanistan are Different*, ATL. COUNCIL (Jan. 12, 2023) (noting that Gulf Arab governments are moving towards a path of partial recognition as well of the Taliban regime).

127. Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, U.S.-Islamic Emirate of Afghanistan, Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [hereinafter Agreement for Bringing Peace to Afghanistan].

and is known as the Taliban and the United States of America.”¹²⁸ This is a rare occasion, and perhaps unique example, in international affairs where a major power enters into a treaty-like agreement with an entity with which it is still technically at war with and which it has always considered as a rogue government. The fact that the United States was aware of the impending downfall of the Karzai government at least a year in advance and was subsequently eager to converse with the Taliban is evident from Article 2 of Part III of the 2020 Agreement, which reads as follows:

The United States and the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban seek positive relations with each other and expect that the relations between the United States and the new post-settlement Afghan Islamic government as determined by the intra-Afghan dialogue and negotiations will be positive.¹²⁹

There is a clear correlation between the refusal of the United States to characterize the Taliban as a terrorist group and the mediatory role of Qatar to facilitate engagement of the Taliban with the United States. From the perspective of domestic U.S. politics, and in line with its no-concessions policy, a direct engagement with the Taliban would have entailed withdrawal of support from the Afghan government and in the process would have instilled fear in its population and demoralized U.S. military forces in the country.¹³⁰ In turn, the fact that U.S. forces were stationed in Qatar allowed the Taliban to build a constructive relationship with the United States with the knowledge that it will not be attacked, and that the United States supports the transition from rogue movement to legitimate would-be government.¹³¹ Between 2013

128. *Id.*

129. *Id.*

130. See CLAYTON THOMAS, CONG. RSCH. SERV., R45122, AFGHANISTAN: BACKGROUND AND U.S. POLICY, 2–3 (2023) (stating that the Biden Administration and many in Congress “seek to ameliorate humanitarian and economic conditions in Afghanistan, but without taking any action that boosts the Taliban’s position or that may be perceived as doing so”).

131. See *United States Signs Agreement with the Taliban, but Prospects for Its Full Implementation Remain Uncertain*, AM. J. INT’L L. 529, 534 (2020) [hereinafter *Treaty Implementation*] (discussing the U.S. issuing a Joint Declaration which “takes note of the U.S.-Taliban agreement” and “affirms the readiness” of Afghanistan “to participate in intra-Afghan negotiations and its readiness to

and 2021, the United States was able to secure the release of a U.S. prisoner by the Taliban, in exchange for five Taliban fighters held at Guantanamo Bay.¹³² Analysts note that a Quadrilateral Coordination Group consisting of the United States, China, Pakistan, and Afghanistan failed to make any tangible gains during this period, thus demonstrating that multilateral diplomacy absent a mediating force allowing a rogue entity to establish some kind of presence is seldom effective.¹³³

Ultimately, while the Afghan peace process descended into chaos following the withdrawal of U.S. forces from the country,¹³⁴ one may wonder whether Qatari mediation did in fact play any meaningful role. Apart from the fact that the Taliban and the United States engaged with each other at least since 2013, it should not be forgotten that the two sides agreed that United States and NATO forces would be allowed to withdraw in relative safety.¹³⁵ For Qatar, this was a first attempt at high-stakes, top-level mediation diplomacy.¹³⁶ While some critics suggested that Qatar was inexperienced for this kind of diplomatic upheaval,¹³⁷ it is unlikely that a reproachment between the

conclude a ceasefire with the Taliban”).

132. See Steve Brooking, *Why Was a Negotiated Peace Always Out of Reach in Afghanistan? Opportunities and Obstacles, 2001–21*, U.S. INST. PEACE 13 (2022) (noting that U.S.-Taliban contacts continued even after the abortive opening of the Taliban office in Doha).

133. See Marc Grossman, *Talking to the Taliban 2010 – 2011: A Reflection*, 4 PRISM 21, 25–26 (2014) (discussing how the international and regional consultations always started and ended with discussions with Kabul).

134. See JAMES DOBBINS ET AL., CONSEQUENCES OF A PRECIPITOUS U.S. WITHDRAWAL FROM AFGHANISTAN 7 (2019), <https://www.rand.org/pubs/perspectives/PE326.html> (considering several consequences of a complete U.S. withdrawal, including the government in Kabul beginning to lose influence and legitimacy).

135. See Mujib Mashal, *Taliban and U.S. Strike Deal to Withdraw American Troops From Afghanistan*, N.Y. TIMES (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/world/asia/us-taliban-deal.html> (stating the safe withdrawal of American troops is dependent on the Taliban).

136. See Afsana Bibi, *Qatar’ Mediation in Afghan Peace Process*, SADIQ J. PAK. STUD. 8, 15–17 (2023) (noting that Qatar considers their reputation of global peacemaker “culture, a moral and a religious duty”).

137. See Mirwais Balkhi, *Between Success and Failure in Afghanistan: Advice for Qatar*, FAIR OBSERVER, <https://www.fairobserver.com/world-news/afghanistan-news/between-success-and-failure-in-afghanistan-advice-for-qatar> (providing that Qatar’s “mediation efforts in international diplomacy have largely been

United States and the Taliban would have occurred through traditional diplomatic channels.¹³⁸ It also paved the way for a serious learning curve so that Qatar's mediation would ultimately prove useful in the post-October 7, 2023 hostage negotiations between Israel and Hamas.¹³⁹

IV. THE NOVEMBER 2023 MEDIATION FOR THE RELEASE OF ISRAELI HOSTAGES BY HAMAS

Neither negotiation nor mediation are self-evident in international affairs. The parties have competing interests and who may serve as the most appropriate mediator may end up being a vexing issue. A study encompassing 434 international crises between 1918 and 2001 concluded that reaching a formal agreement between the relevant parties was roughly five times higher where the crisis was ultimately mediated (48.35%) than not (9.97%).¹⁴⁰ Since 1945, only a third of violent military conflicts have been successfully resolved through third party mediation.¹⁴¹ Hamas is generally defined as an Islamist

unsuccessful”).

138. In a discussion on the normalization (however soft) of relations with the Taliban and the context of the U.S. withdrawal from Afghanistan, it should be noted that the present analysis is policy-focused and does not purport to include an analysis of frontline or civilian-level impact of these developments. The author asserts that such an analysis, although worthy, would be more appropriately considered in an independent piece. Nonetheless, the author notes that what may be considered a policy and strategy-level success also has continued impact on civilian life and implications on human rights. *See* ORG. FOR POL'Y RSCH. & DEV. STUD., SHADOW REPORT: A RESPONSE TO THE UNITED NATIONS SECURITY COUNCIL'S INDEPENDENT ASSESSMENT REPORT ON AFGHANISTAN 9–15 (2023) [hereinafter *Shadow Report*] (citing a United Nations Security Council assessment report which concluded that the “status quo of international engagement is not working”).

139. *See* Vassilis K. Fouskas, *Gaza War: How Qatar Used its Business Connections to Become a Leading Mediator in the Middle East*, THE CONVERSATION (Nov. 29, 2023), <https://theconversation.com/gaza-war-how-qatar-used-its-business-connections-to-become-a-leading-mediator-in-the-middle-east-218461> (crediting the temporary ceasefire negotiated between Israel and Hamas and the release of 81 hostages to the mediation of the Qatar government).

140. *See* Hans J. Giessmann & Oliver Wils, *Seeking Compromise? Mediation Through the Eyes of Conflict Parties*, in THE BERGHOF HANDBOOK FOR CONFLICT TRANSFORMATION 183, 184 (Beatrix Austin et al. eds., 2011) (noting that “one in every four conflicts was constructively transformed with the help of mediation”).

141. *See* Lesley G. Terris & Zeev Maoz, *Rational Mediation: A Theory and a Test*, 42 J. PEACE RSCH. 563, 563 (2005) (specifying that thirty-five percent of

organization, albeit its organization is complex and is largely driven by the goal of Palestinian independence.¹⁴² Islamic groups have accounted for roughly five violent conflicts, which is an increase of about 8% since 1989.¹⁴³ Islamist groups are largely designated as terrorist, which in turn renders any association like mediation politically injurious, and therefore, mediation efforts have decreased considerably.¹⁴⁴ This is despite the fact that the U.N. has sought to decriminalize and de-politicize mediation, even in respect to rogue entities.¹⁴⁵ In 2011, the U.N. General Assembly issued Resolution 65/283 titled “Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention, and Resolution.”¹⁴⁶ It called upon the U.N. Secretary-General to develop guidelines to enhance mediation effectiveness, and in response, the Secretary-General adopted the “Guidance for Effective Mediation.”¹⁴⁷

As a brief introduction to understand how conflict-related mediation might work, it is important to note the existence of a basic model where conflict appears in incremental deviations that tend to expand into various stages of escalation that follow a normal distribution curve.¹⁴⁸ As in the Israeli-Palestine conflict, conflict develops in several incremental stages. The first stage corresponds with the expression of varying views between the conflicting parties, which then escalates into contradiction and powerful argument.¹⁴⁹ This

militarized disputes since World War II involved mediation).

142. See Kali Robinson, *What Is Hamas?*, COUNCIL ON FOREIGN RELS. (Apr. 18, 2024), <https://www.cfr.org/backgrounder/what-hamas> (stating that Hamas’ purpose originally was to engage in violence against Israelis as a means of restoring Palestinian backing for the Brotherhood).

143. See Magnus Lundgren & Isak Svensson, *The Surprising Decline of International Mediation in Armed Conflicts*, 7 RSCH. & POL. 1, 3–4 (2020) (describing how Islamist conflicts are extremely under-mediated).

144. See *id.* at 4 (noting the prevailing norm of “not talking to terrorists”).

145. U.N. Dep’t of Pol. and Peacebuilding Aff., United Nations Guidance for Effective Mediation, U.N. Doc A/RES/65/283 (July 28, 2012) [hereinafter *Mediation Guidance*].

146. *Id.*

147. See *id.* (explaining that effective mediation requires impartiality, inclusivity, and national ownership).

148. See HUGH MIALLE ET AL., CONTEMPORARY CONFLICT RESOLUTION 9, 17 (1st ed., 1999) (theorizing how it is easy for a spiral of hostility and escalation to develop through positive feedback where two parties are reacting to each other’s actions).

149. Thomas Jordan, *Glasl’s Nine-Stage Model of Conflict Escalation*,

is a recurrent theme in this conflict that began a short while after the issuance of the 1917 Balfour Declaration.¹⁵⁰ Unresolved arguments subsequently escalate into hostility, polarization, and ultimately to violent confrontation.¹⁵¹ Where mediation has been employed with a relative degree of success, a violent conflict may descend into a ceasefire (one general ceasefire or several fragmented ceasefires) and ultimately into a peace agreement.¹⁵² Even so, conflicts, such as the present, that intersect sensitive cultural, political, and religious ideologies are far more complex, and therefore it is extremely difficult to achieve a single, universal, and mutually acceptable formal accord.¹⁵³

The following subsection explores the characteristics of all stakeholders and their complex relationships. It sets the stage to better understand the terms of the role of the mediator and its outcome, which is the subject matter of a distinct subsection.

A. THE BACKGROUND OF THE STAKEHOLDERS AND THE MEDIATOR

On October 7, 2023, the Palestinian organization Hamas, which has

MEDIATE.COM (Oct. 10, 2000), <https://mediate.com/glasls-nine-stage-model-of-conflict-escalation> (“The first stage of conflict escalation develops when a difference over some issue or frustration in a relationship proves resilient to resolution efforts.”).

150. See Nicole Narea, *A Timeline of Israel and Palestine’s Complicated History*, VOX (Oct. 19, 2023), <https://www.vox.com/world-politics/23921529/israel-palestine-timeline-gaza-hamas-war-conflict> (stating that the 1917 Balfour Declaration—backed by the Allied Powers—called for the establishment of a “national home for the Jewish people” in Palestine).

151. See Narea, *supra* note 150 (highlighting that the 1917 Balfour Declaration failed to specify the civil and religious rights of non-Jewish communities, or how they would be protected, or how their land should be used. In fact, while Palestinians accounted for almost 93% of the territory’s population, they were called “non-Jewish population,” rather than Palestinians).

152. See *Mediating a Ceasefire*, OSCE (July 23, 2019), <https://www.osce.org/magazine/426329> (explaining that every ceasefire is different but ultimately tends to generate a space for the parties to negotiate).

153. See Giessman & Wils, *supra* note 140, at 187 (“Protracted conflicts over resources or territory, over the type and forms of rule, over cultural, national, political or religious identity are often too complex and intertwined to be nailed together in a formal agreement.”).

been designated as a terrorist group in many countries,¹⁵⁴ launched a surprise attack inside the Israeli security barrier.¹⁵⁵ The attack resulted in the death of around 1,200 Israelis (the vast majority being innocent civilians) and the taking of more than 200 hostages by Hamas.¹⁵⁶ In response, the Israeli Defense Forces (IDF) initiated a military operation against Hamas and other resistance groups, which effectively entailed the indiscriminate bombardment of Gaza as a whole.¹⁵⁷ The stated goals of the IDF were the dismantling of Hamas, establishing a weapon-free zone, altering the political landscape in Gaza, and securing the release of Israeli hostages taken on October 7.¹⁵⁸ By early December 2023, the IDF had caused approximately 15,000 civilian deaths, of which seventy percent were women and children.¹⁵⁹ Over sixty percent of infrastructure and homes were either

154. Exec. Order 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001). Hamas is listed by the U.S. State Department as a Foreign Terrorist Organization (FTO) and separately listed by the Treasury Department under Executive Order 13224 as a Specially Designated Global Terrorist entity.

155. Center for Preventive Action, *Israeli-Palestinian Conflict*, COUNCIL ON FOREIGN RELS. (July 13, 2024), <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict> (“Hamas launched its deadly attack on Israel on October 7, 2023, prompting the Israel Defense Forces (IDF) to engage in aerial campaigns and ground operations within the Gaza Strip.”).

156. See *2023-24 Hostilities and Escalating Violence*, DIAKONIA INT’L HUM. L. CTR. (Jan. 12, 2024), <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events> (asserting that Israeli sources estimated more than 1,200 Israeli and foreign nationals in Israel were killed, and around 5,400 more injured; more than 200 were abducted to Gaza).

157. See Justin Salhani, *What Does Israel Want in Gaza?*, AL JAZEERA (July 4, 2024), <https://www.aljazeera.com/news/2024/7/4/what-does-israels-want-gaza> (stating that the Israeli government has insisted that the fighting will not end until Hamas is “fully defeated”).

158. See *Israel Aims to End its Responsibility for Gaza as Ground Offensive Looms*, AL JAZEERA (Oct. 20, 2023) [hereinafter *Gaza Ground Offensive*], <https://www.aljazeera.com/news/2023/10/20/israel-aims-to-end-its-responsibility-for-gaza-as-ground-offensive-looms> (stating that Israel has since bombarded Gaza relentlessly, killing more than 4,000 people and destroying entire neighborhoods, and imposed a “complete siege” on the territory, cutting supplies of food, water, and fuel).

159. *Twenty Thousand Palestinians Believed to be Killed in Israel’s Genocide of Gaza*, EURO-MED HUM. RTS. MONITOR (Nov. 18, 2023) [hereinafter *Euro-Med Human Rights*], <https://euromedmonitor.org/en/article/5957/Friday-17-November:-Twenty-thousand-Palestinians-believed-to-be-killed-in-Israel%E2%80%99s-genocide-of-Gaza> (“Euro-Med Monitor estimated that at least 15,271 Palestinians in Gaza have been killed, including 3,561 women and 6,403 children.”).

totally or partially destroyed, in addition to the displacement of more than 1.7 million Gazans from the North to the South of the Gaza Strip.¹⁶⁰ The ICJ Advisory Opinion, in very clear terms, emphasized in its 2024 Advisory Opinion that Gaza, the West Bank and East Jerusalem are the subject of an illegal occupation¹⁶¹ and Palestinian people are not only denied their right to self-determination, but are subjected to illegal practices, including apartheid.¹⁶²

What is of interest in this paper is the use of the negotiation or mediation process of to return Israeli hostages. Although we have already stated that Israel routinely negotiates prisoner exchanges, the post-October 7 hostage situation represents a shift from the traditional paradigm.¹⁶³ In the latter, states claimed to follow a no-concessions policy, yet when confronted with mounting pressure they succumbed to terrorist demands, and in the process either refused to accept the payment of ransom or meeting terrorist demands, or attempted to justify why this was an exceptional event.¹⁶⁴ In the case at hand, the creation of the popular movement “Bring Them Home Now”¹⁶⁵ has reversed public sentiment on the Israeli government’s engagement with terror groups.¹⁶⁶ At the same time, however, the Netanyahu

160. *Occupied Palestinian Territory*, U.N. OFF. COORDINATION HUM. AFF., <https://www.ochaopt.org>.

161. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion* (19 July 2024), ¶¶ 103–56, <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>. The Court also spelt out the consequences arising from the illegal Israeli occupation.

162. *Id.* ¶¶ 108–43.

163. See Anna Teran, *Handling Israel-Hamas War Mediation: The Role of Qatar*, UNIVERSIDAD DE NAVARRA GLOBAL AFF. (May 25, 2024), <https://www.unav.edu/web/global-affairs/handling-israel-hamas-war-mediation-the-role-of-qatar> (stating that the negotiations between the two parties cover a wide range of humanitarian concerns in addition to prisoner exchanges).

164. See Sam Magdy & Drew Callister, *Here’s What’s on the Table for Israel and Hamas in the Latest Cease-Fire Plan*, ASSOCIATED PRESS (May 7, 2024), <https://apnews.com/article/israel-hamas-war-gaza-ceasefire-negotiations-7cec005cd59dbd817ef9614a8611ca4> (highlighting Israeli Prime Minister Netanyahu’s insistence on refusing to let Hamas restore its regime and military capabilities in the Gaza Strip).

165. See *Bring Them Home Now*, <https://stories.bringthemhomenow.net>.

166. See Rory Jones & Anat Peled, *Netanyahu Fights for His Political Survival*, WALL ST. J. (Oct. 30, 2023), <https://www.wsj.com/world/middle-east/netanyahu-israel-gaza-war-political-survival-809a165d> (emphasizing Prime Minister

government is facing an existential threat to its political survival on account of its intelligence and strategic failure to foresee and prevent the Hamas attack in the first place.¹⁶⁷ Hence, any analysis of a potential negotiation with Hamas must overcome the following conflicting hurdles: a) the Israeli popular movement of doing whatever it takes for Hamas to release the hostages, including negotiating with Hamas and meeting its demands, and b) the Netanyahu all-out offensive in Gaza, including a refusal to agree to a humanitarian ceasefire, which is counter-productive to the “Bring Them Home Now” movement.¹⁶⁸ It should be noted that while the latter movement is a popular voice in Israel, hardline nationalist and Zionist elements in the Netanyahu coalition government are pushing towards solution (b), which conforms to a long-standing goal of Gaza’s annexation upon removal of its Palestinian population.¹⁶⁹ Even so, this is one of the first times in modern history, if not the only, where a government is pressured by public opinion to openly engage with a terrorist group and meet its demands.¹⁷⁰

When the crisis broke out, it was clear to all stakeholders, including the United States, Israel, and Gulf states, that Qatar was willing to mediate.¹⁷¹ It is not clear why Qatar volunteered in the first place and

Netanyahu’s struggle to rally the public on his side as Israelis have blamed him in eulogies for the dead and shouted at his ministers publicly).

167. See *id.* (noting that Netanyahu’s apology in which he blamed the security failures on Israel’s defense and intelligence services for the Hamas attacks was eventually deleted).

168. *Id.*

169. Toi Staff & Jacob Magid, *Netanyahu Says IDF Will Control Gaza after War, Rejects Notion of International Force*, TIMES OF ISR. (Nov. 10, 2023), <https://www.timesofisrael.com/netanyahu-says-idf-will-control-gaza-after-war-rejects-notion-of-international-force> (noting that Netanyahu told ABC News that Israel will have “overall security responsibility” over the Gaza Strip “for an indefinite period” after the war against Hamas ends).

170. See *Why are Thousands Protesting Against Netanyahu’s Government in Israel?*, AL JAZEERA (Apr. 2, 2024), <https://www.aljazeera.com/news/2024/4/2/israels-protests-amid-mounting-pressure-on-benjamin-netanyahu-all-to-know> (stating that protesters are calling for the release of Israeli hostages and for the resignation of Prime Minister Netanyahu).

171. See Anchal Vohra, *How Qatar Became the Middle East’s Indispensable Mediator*, FOREIGN POL’Y (Oct. 28, 2023), <https://foreignpolicy.com/2023/10/28/qatar-middle-east-israel-hostages-hamas-gaza-mediator> (noting that Qatar—which has hosted Hamas on multiple occasions—currently occupies a position where it can

what made it an ideal mediator in the dispute. After all, it was the only country in the Gulf that did not subscribe to the Abraham Accords that normalized relations with Israel.¹⁷² Qatar had long aspired to be the key mediating voice in the Gulf, the Middle East, Asia (and beyond), and in the last two decades, it had carefully erected a dynamic foreign policy and diplomacy infrastructure.¹⁷³ Despite its small size, Qatar effectively thwarted the blockade against it, which was instituted by Saudi Arabia, UAE, Egypt, and others, demonstrating major diplomatic skills.¹⁷⁴ It is also one of the biggest donors to the U.N.¹⁷⁵ Its experience with the U.S.-Taliban negotiations has given its diplomats valuable experience, along with other less high-profile mediations concerning hostages.¹⁷⁶ Much like its other neighbors in

facilitate a mediation between Israel and Palestine).

172. *The Abraham Accords Declaration*, U.S. DEP'T OF STATE, <https://www.state.gov/the-abraham-accords>.

173. See *In Focus: Foreign Policy*, GOV'T COMMC'N OFF., QATAR, <https://www.gco.gov.qa/en/focus/foreign-policy-en> (noting “mediating disputes between conflicting parties to achieve peaceful resolutions” is a stated priority in Qatar’s official foreign policy); *Trump Praises Qatar’s Efforts on Combating Terrorist Financing*, BBC (Apr. 11, 2018), <https://www.bbc.com/news/world-middle-east-43724576> (noting that President Trump in 2018 praised Sheikh Tamim Al Thani for becoming a “big advocate” of combating terrorist financing).

174. See KRISTIAN COATES ULRICHSEN, QATAR AND THE GULF CRISIS: A STUDY OF RESILIENCE 68 (2020) (explaining how Qatar won in the court of international political opinion after restructuring its trading arrangements and sought redress for the losses inflicted by a blockade through international arbitration); NICHOLAS FROMM, CONSTRUCTIVIST NICHE DIPLOMACY: QATAR’S MIDDLE EAST DIPLOMACY AS AN ILLUSTRATION OF SMALL STATE NORM CRAFTING 49 (2019) (stating that several scholars have maintained that Qatar it has positioned itself as a key “norm entrepreneur” in international affairs); KRISTIAN COATES ULRICHSEN, QATAR AND THE ARAB SPRING 67 (2014) (stating that Qatar came to prioritize diplomatic mediation as a constitutionally mandated core of its regional and foreign policy due to a desire for regional autonomy and international protection).

175. *Qatar Announces Half a Billion USD in Funds to U.N. Agencies*, DOHA F., <https://dohaforum.org/press-releases/2019/04/28/qatar-announces-half-a-billion-usd-in-funds-to-un-agencies> (“Qatar is ranked as the first Arab and sixth international contributor to global joint funds.”).

176. Crises in Lebanon, Yemen, Eritrea/Djibuti and Darfur were key mediating battlegrounds for Qatar in the 2010s. See Mehran Kamrava, *Mediation and Qatari Foreign Policy*, 65 MIDDLE E. J., 539, 539 (2011) (noting Qatar’s active mediation efforts in many conflicts, including in Lebanon, Sudan, Yemen, Djibouti-Eritrea); Sultan Baraqat, *Qatari Mediation: Between Ambition and Achievement*, BROOKINGS INST. (Nov. 12, 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/final-pdf-english.pdf> (highlighting that Qatar chooses to mediate nearby

the Gulf, Qatar is caught between a modernist and liberal trend juxtaposed against more traditional voices.¹⁷⁷ This explains why Qatar seeks global attention, which in turn puts it in the spotlight for issues such as labor abuses, which is part and parcel of its aspired global role.¹⁷⁸

It is in light of these underpinnings—and consistent with its Taliban-related experience—that Qatar consented to the opening of a representative Hamas office in Doha in 2012, following a *direct* request from the United States with a view to keeping communications channels open.¹⁷⁹ Hence, while the United States was putting Hamas on its list of terror groups, it nonetheless tweaked its no-concession policy with the knowledge that Hamas was a key stakeholder in Middle Eastern politics.¹⁸⁰ Even so, it did not want to be viewed to be directly engaged with this organization, and so Qatar, a country that was relatively unknown to the U.S. public, could undertake this role

conflicts to promote greater stability); Kristian Coates Ulrichsen & Giorgio Cafiero, *Qatar's Role in Sudan's Crisis: Limited Influence and Humanitarian Engagement*, GULF INT'L F., <https://gulff.org/qatars-role-in-sudans-crisis-limited-influence-and-humanitarian-engagement> (pointing out that in the post-2021 Sudan crisis Qatar's involvement reflects its limited influence amidst competing regional powers; Qatar's focus on post-conflict recovery and investment positions it for bigger role in Sudan's future when peace is achieved).

177. See Mehran Kamrava, *Royal Factionalism and Political Liberalization in Qatar*, 63 MIDDLE E. J. 401, 401–03 (2009) (arguing that Sheikh Hamad bin Khalifa [the father Emir] instituted a whirlwind of reforms and set up new and modern institutions, despite the fact that the state remained autocratic in the internal political domain).

178. See PAUL MICHAEL BRANNAGAN & DANYEL REICHE, QATAR AND THE 2022 FIFA WORLD CUP: POLITICS, CONTROVERSY, CHANGE, 1–4 (2022) (pointing out that Qatar's joy of hosting the event was overshadowed by the intense international scrutiny over its human rights and labor record).

179. See Meshal bin Hamad Al-Thani, *Qatar Is the Mideast's Honest Broker*, WALL ST. J. (Oct. 29, 2023), <https://www.wsj.com/articles/qatar-is-the-mideasts-honest-broker-hamas-israel-america-middle-east-conflict-peace-19e3cc0f> (noting that the Hamas political office in Qatar was opened in 2012 after a request from Washington to establish indirect lines of communication with Hamas in order to de-escalate conflicts in Israel and Palestinian territories).

180. See Kali Robinson, *What is Hamas?*, COUNCIL ON FOREIGN RELS. (Apr. 18, 2024), <https://www.cfr.org/background/what-hamas> (noting governments including the United States and European Union have designated Hamas a terrorist organization over its attacks against Israel).

under the (false) guise of intra-Islamic relations.¹⁸¹ Even so, and despite the fact that Qatar made it clear that it does not endorse Hamas¹⁸² (while fully in support of Palestinian self-determination), the United States seems to be distancing itself from its request to Doha to host a representative Hamas office on its territory.¹⁸³ This has led to unfounded accusations (which not even the U.S. government supports) of links between Hamas and Qatar, many of which are nonetheless widespread in U.S. media,¹⁸⁴ and Israeli-backed think tanks in the United States.¹⁸⁵ It was clear to all that Qatar's past mediatory role was successful, particularly since it had brokered at least three ceasefires between Hamas and Israel in 2014, 2021, and 2022.¹⁸⁶ It was in light of this background that Qatar was the obvious and only choice for mediator; that negotiations between Hamas and Israel had long been taken off the table; and that the process of mediation itself had been pre-destined for the eventuality of such a circumstance.

181. See Al-Thani, *supra* note 179 (noting that the United States asked Qatar to remain in contact in hostages with Hamas to secure the release of more hostages).

182. *Id.* (“The presence of the Hamas office [in Qatar] shouldn’t be confused with endorsement but rather establishes an important channel for indirect communication.”).

183. *Id.*

184. See Kate Havard & Jonathan Schanzer, *By Hosting Hamas, Qatar is Whitewashing Terror*, NEWSWEEK (May 11, 2017), <https://www.newsweek.com/qatar-hosting-hamas-whitewashing-terror-606750> (reporting that Qatar essentially provides financial funding for Hamas).

185. See Richard Goldberg, *How America and its Allies Can Stop Hamas, Hezbollah, and Iran from Evading Sanctions and Financing Terror*, FOUND. DEF. DEMOCRACIES (Oct. 25, 2023), <https://www.fdd.org/analysis/2023/10/25/how-america-and-its-allies-can-stop-hamas-hezbollah-and-iran-from-evading-sanctions-and-financing-terror> (suggesting that U.S. policy in coordination with Israel has encouraged or enabled countries like Qatar and Turkey to become state sponsors of Hamas).

186. See *Palestinian Joy as Israel Agrees Gaza Truce*, AL JAZEERA (Aug. 27, 2014), <https://www.aljazeera.com/news/2014/8/27/palestinian-joy-as-israel-agrees-gaza-truce> (noting that Qatar was one of the mediators in the conflict between Israel and Hamas in 2014); *Statement by President Biden and the Ceasefire in Gaza*, THE WHITE HOUSE (Aug. 7, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/07/statement-by-president-biden-on-the-ceasefire-in-gaza> (noting that Qatar was one of the mediators in the conflict between Israel and Hamas in 2022).

B. THE ISRAEL-HAMAS MEDIATED CEASEFIRE AGREEMENT

Although Qatar led the mediated talks, Egypt maintained a limited presence, and of course the United States was the “glue” between all parties.¹⁸⁷ No deal could be struck without approval from the United States, and this was clear since the ceasefire issue had been stalled (if not effectively killed) at the UNSC level.¹⁸⁸ It is not absolutely clear what the text of the ceasefire agreement entailed, or if there was such an agreement in writing, but it is clear that the chief mediator was Qatar’s Prime Minister (and a seasoned former foreign minister), Sheikh Mohammed bin Abdulrahman Al-Thani, while Hamas was represented by its leader, Ismail Haniyeh (who was assassinated by Israel in Iran in the summer of 2024).¹⁸⁹ Al-Thani was apparently assisted by a team of fifteen Qatari mediators,¹⁹⁰ which demonstrates the complexity as well as the multiplicity of the issues involved on both sides. No credible information is available about the head of the Israeli delegation, although this is consistent with Israeli practice.¹⁹¹

187. See *Egypt, US, Israel Spy Chief to Attend Gaza Truce Talks in Doha*, REUTERS (July 9, 2024), <https://www.reuters.com/world/middle-east/egypts-sisicias-burns-discuss-gaza-ceasefire-efforts-2024-07-09> (noting that U.S. officials are pushing for a ceasefire while Egypt and Qatar have been spearheading mediation in the none-month-conflict).

188. See *U.N. Security Council Stalls at Loggerheads over Pause Versus Ceasefire after Gaza Meet*, TIMES OF ISR. (Nov. 7, 2023), <https://www.timesofisrael.com/un-security-council-still-at-loggerheads-over-pause-versus-ceasefire-after-gaza-meet> (highlighting that ultimately, the UNSC adopted a lukewarm resolution, 2712, on 15 November 2023, which instead of “demanding” it merely “urged” the parties to respect IHL and commit to a ceasefire and pauses as well avoid targeting civilians and civilian objectives).

189. *Hamas Accepts Qatari-Egyptian Proposal for Gaza Ceasefire*, AL JAZEERA (May 6, 2024), <https://www.aljazeera.com/news/2024/5/6/hamas-accepts-qatari-egyptian-proposal-for-gaza-ceasefire>.

190. See *Qatar PM Says Only ‘Minor’ Challenges to Israel-Hamas Captive Deal*, AL JAZEERA (Nov. 20, 2023), <https://www.aljazeera.com/news/2023/11/20/qatar-pm-says-only-minor-challenges-to-israel-hamas-captive-deal> (reporting that Qatari mediators had been seeking a deal between Israel and Hamas to exchange 50 captives in return for a three-day ceasefire that would help boost emergency aid shipments to Gaza civilians).

191. See Dan Sabbagh et al., *CIA and Mossad chiefs fly to Qatar for talks on extending Gaza truce amid further hostage releases*, THE GUARDIAN (Nov. 28, 2023), <https://www.theguardian.com/world/2023/nov/28/cia-and-mossad-chiefs-fly-to-qatar-for-talks-on-how-to-extend-gaza-truce> (showing an Israeli representative but no confirmation if this is the “head or leader” of the Israeli faction in truce talks,

On November 20, 2023, Al-Thani announced that only minor differences remained between the parties,¹⁹² confirmed by the Hamas leader, who added that negotiations were being focused on the “duration of the truce, details of aid delivery to Gaza and the exchange of hostages and prisoners.”¹⁹³ Although Haniyeh called the process “negotiation,” there is no evidence that at any time Hamas actually sat across the table from the Israelis.¹⁹⁴

The ceasefire agreement was announced on November 22, 2023.¹⁹⁵ We only know its content through the various piecemeal announcements and the actions that followed.¹⁹⁶ This is evidence that the parties and the stakeholders were not comfortable about issuing a joint communication and that of the many demands put on the negotiating table, there was a significant back and forth on both sides.¹⁹⁷ Ultimately, Hamas must have seen the ceasefire as beneficial for Palestinian civilians in southern Gaza and would buy some military respite and secure the release of some of its members, while to the Israeli side this was a clear political victory that addressed the “Bring Them Home Now” movement, even if it slowed its military advance into Gaza.¹⁹⁸

While the United States and the international community

but obviously a major player).

192. *Qatar PM Says Only ‘Minor’ Challenges to Israel-Hamas Captive Deal*, *supra* note 190.

193. Zoran Kusovac, *Analysis: How Israel Could Gain from a Pause in the Gaza War*, AL JAZEERA (Nov. 21, 2023), <https://www.aljazeera.com/news/2023/11/21/analysis-how-israel-could-gain-from-a-pause-in-the-gaza-war>.

194. *See id.* (Hamas leader Ismail Haniyeh told Reuters that the parties are “close to reaching a truce agreement”).

195. *Israel, Hamas Agree to Truce, Paving Way for Some Captives’ Release*, AL JAZEERA (Nov. 22, 2023), <https://www.aljazeera.com/news/2023/11/22/israel-agrees-to-ceasefire-deal-paving-way-for-some-captives-release> (“Israel and Hamas have agreed to a temporary pause in the war that will enable the release of about 50 people who have been held captive in Gaza since the Hamas armed group stormed southern Israel on October 7, in exchange for Palestinians held in Israeli jails.”).

196. *See id.* (revealing that the information is only known through news releases and not through official press statements).

197. *See* Kusovac, *supra* note 193 (noting contradicting claims from multiple sources regarding a potential ceasefire deal).

198. *See generally* Nadeen Ebrahim, *Hamas has Offered a Ceasefire Deal. Here’s Why that Won’t Bring an Immediate End to the War in Gaza*, CNN (May 8, 2024), <https://www.cnn.com/2024/05/06/middleeast/hamas-ceasefire-offer-gaza-war->

acknowledged the key mediatory role of Qatar, Israel only praised the United States for refining the agreement.¹⁹⁹ President Netanyahu put it before his Cabinet, which deliberated on it for five hours and approved it only after Netanyahu consulted with U.S. President Biden.²⁰⁰ The agreement seems to have been incremental in nature and conditional on appropriate action by Hamas. During its first phase, Hamas agreed to release fifty women and children, while Israel from its part agreed to release around 150 Palestinian prisoners.²⁰¹ There was also agreement on a four-day ceasefire from both sides.²⁰² In addition, during this four-day ceasefire, Israel agreed to allow 300 daily trucks carrying humanitarian aid supplies from Egypt's side of the Rafah crossing to enter Gaza.²⁰³ The ceasefire was extended a few more times for one or two days upon the release of ten or more hostages by Hamas.²⁰⁴ Additional releases were part of the incremental option of the original ceasefire agreement, and as it turned out, it was successful in extending the ceasefire.²⁰⁵ In fact, on the second day of

mime-intl/index.html (referencing the political pressure both sides are facing to secure a ceasefire); see also *Bring Them Home Now*, *supra* note 165 (describing the mission of “Bring Them Home Now” as “increas[ing] diplomatic efforts and international support to help save all hostages taken by Hamas”).

199. See *Israel and Hamas Reach Hostage Deal, Temporarily Halt Fighting in Gaza*, OPEN ACCESS GOV'T (Nov. 22, 2023), <https://www.openaccessgovernment.org/israel-and-hamas-reach-hostage-deal-temporarily-halt-fighting-in-gaza/170502> (acknowledging that after reaching a deal for a four-day pause in conflict in November, Prime Minister Netanyahu did not mention Qatari-led mediation).

200. See *id.* (reporting that Prime Minister Benjamin Netanyahu secured U.S. support in refining the agreement after consulting with President Biden).

201. See *Israel, Hamas Agree to Truce, Paving Way for Some Captives' Release*, *supra* note 195 (reporting a statement from Hamas in which it confirmed 50 hostages would be released from its territory).

202. See *Israel and Hamas Reach Hostage Deal, Temporarily Halt Fighting in Gaza*, *supra* note 199 (relating the news of a deal between Israel and Hamas on November 22, 2023).

203. See *id.* (increasing fuel flow into Gaza was also allowed during this first phase of the deal).

204. See Scott Neuman et al., *Israel and Hamas Extend Temporary Truce for Another Day*, NPR (Nov. 30, 2023), <https://www.npr.org/2023/11/29/1215762834/hostages-israel-hamas-ceasefire-truce-gaza-war> (noting the specific dates, conditions, and timing of each additional ceasefire).

205. See Summer Said & Dov Lieber, *Israel, Hamas Agree to Extend Truce by Two Days*, WALL ST. J. (Nov. 27, 2023), <https://www.wsj.com/world/middle-east/talks-to-extend-israel-hamas-truce-go-down-to-the-wire-8f1cbba9> (reporting an agreement for a two-day extension the truce in Gaza to allow for the release of

the first two-day cease-fire extension, ten more hostages were freed by Hamas in exchange for thirty Palestinians held in Israeli prisons, according to Qatar's foreign ministry.²⁰⁶

Ultimately, on December 1, 2023 the ceasefire agreement was not extended.²⁰⁷ Both sides have their own interpretation, but it is clear that Israel had no further tactical military advantage, further considering that it had done enough to quell the public tide seeking the return of hostages.²⁰⁸ For the purposes of this paper, it is significant to note that despite Israeli antipathy against Qatar, its best ally, namely the United States, had constructed a medium of communication with Hamas through Qatar, which Israel had no qualms relying on.²⁰⁹ These delicate balances necessitated a limited type of agreement, as opposed to a wholesale resolution of the parties' grievances. Qatar alone was unlikely to convince Israel to converse with Hamas had it not been for the dominating role of the United States, which relied on the goodwill of Gulf states and Egypt as stakeholders in the process.²¹⁰

more Israeli hostages).

206. See *id.* (describing the specific conditions that led to ceasefire extensions).

207. See Suhaib Salem & Nidal Al-Mughrabi, *Scores Reported Killed in Gaza as Fighting Shatters Israel-Hamas Truce*, REUTERS (Dec. 1, 2023), <https://www.reuters.com/world/middle-east/gaza-negotiators-try-get-israel-hamas-agree-extend-truce-again-2023-12-01> (reporting Israeli warplanes bombed Gaza on December 1, 2023).

208. See *Poll: Israelis Conflicted, but Prioritize Destroying Hamas over Releasing Hostages*, TIMES OF ISR. (Feb. 14, 2024), <https://www.timesofisrael.com/israelis-would-choose-to-destroy-hamas-over-releasing-hostages-poll-finds> (detailing the Jewish People Policy Institute's monthly Israel society index poll, which indicated that the plurality of Israelis believe that, if forced to choose, the country should opt to dismantle Hamas over getting back the hostages held in Gaza).

209. See MJ Lee et al., *Inside the Painstaking Negotiations Between Israel, Hamas, the U.S., and Qatar to Free 50 Hostages*, CNN (Nov. 22, 2023), <https://www.cnn.com/2023/11/21/politics/negotiations-israel-hamas-hostages/index.html> (detailing President Biden's and CIA Director Burns' communications with Qatar).

210. See Karen DeYoung, *U.S. Close to Deal with Israel and Hamas to Pause Conflict, Free Some Hostages*, WASH. POST (Nov. 18, 2023), <https://www.washingtonpost.com/national-security/2023/11/18/us-israel-hamas-reach-tentative-deal-pause-conflict-free-dozens-hostages> (recounting that the deal was put together after weeks of negotiations in Doha, Qatar, among Israel, the United States and Hamas, which was ultimately represented by Qatari intermediaries).

V. MEDIATION IS NOT PANACEA AND INTERNAL POLITICS PREVAIL OVER SENSITIVE MEDIATION PROCESSES

There are limitations to the inter-state mediation between rogue states and designated terror groups. This was clearly evident in early February 2024, by which time the Israeli offensive in Gaza had reached a relative stalemate: no new hostages had been released, and global public opinion, at least in Europe (but probably also in Africa and South America) had certainly taken a strong stance in favor of Palestine,²¹¹ and most importantly, the International Court of Justice (ICJ) had issued an order against Israel compelling it to take measures to prevent what it saw as *prima facie evidence* of genocide.²¹² Four months into the same conflict, it is evident that the dynamics between the parties have changed: there is no longer a strong enthusiasm for mediation because Israeli government cannot see any positive political outcomes from a potential mediation outcome.²¹³ This is perhaps a critical lesson for future mediation efforts in the course of an ongoing crisis.

Although the parties' proposals were never made public, it is clear from the media that Hamas requested an indefinite cessation of Israeli intervention in Gaza, the release of Palestinian political prisoners, and

211. See Janina Comboye & Alan Smith, *How Public Opinion on the Israel-Hamas War has Shifted*, FIN. TIMES (Nov. 21, 2023), <https://www.ft.com/content/6bf4f6ed-b705-4e66-ac6f-59b5ef6c0c77> (showing that public support in favor of Palestine had increased significantly both in Europe and the USA, just a month and a half after the Hamas attack and before the ICJ's order); see also Edward Wong & Matina Stevis-Gridneff, *Over 800 Officials in U.S. and Europe Sign Letter Protesting Israel Policies*, N.Y. TIMES (Feb. 2, 2024), <https://www.nytimes.com/2024/02/02/us/politics/protest-letter-israel-gaza.html> (reporting that a significant number of senior civil servants from the United States and Europe signed a letter distancing themselves from the pro-Israeli support of their country's leaders in early February 2024).

212. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order for Provisional Measures, (Jan. 2024).

213. See *Poll: Israelis Conflicted, but Prioritize Destroying Hamas over Releasing Hostages*, *supra* note 208 (recording the results of a survey which found that forty percent of Israelis prioritized eradicating Hamas, while thirty-two percent preferred the release of the hostages).

unrestricted humanitarian access to the Palestinian people.²¹⁴ There was also a hint that this was an opportune time for a serious re-thinking of a viable two-state solution.²¹⁵ By this time, a large portion of Israeli public opinion had embraced the underlying rationale of the invasion,²¹⁶ even if Netanyahu was hugely unpopular.²¹⁷ Although Israel continued to remain a party to Qatar's ongoing mediation efforts, it vociferously attacked Qatar as being a supporter of Hamas²¹⁸

214. See Samia Nakhoul et al., *Netanyahu Calls Hamas Ceasefire Proposal 'Delusional' but Blinken Sees Scope for Progress*, REUTERS (Feb. 7, 2024), <https://www.reuters.com/world/middle-east/gaza-mediators-search-final-formula-israel-hamas-ceasefire-2024-02-07> (reporting that Hamas propositioned a ceasefire of four and a half months, during which all hostages would go free, Israel would withdraw its troops from Gaza and an agreement would be reached on an end to the war).

215. See Jacob Magrid, *Hamas, Responding on Hostage Deal, Demands an End to the War – A Non-Starter for Israel*, TIMES OF ISR. (Feb. 6, 2024), <https://www.timesofisrael.com/hamas-finally-responding-to-hostage-deal-framework-insists-israel-end-its-war> (conveying that Hamas said in a statement it had responded to negotiations in, “in a positive spirit, ensuring a comprehensive and complete ceasefire, ending the aggression against our people, ensuring relief, shelter, and reconstruction, lifting the siege on the Gaza Strip, and achieving a prisoner swap”).

216. See Anna Gordon, *What Israelis Think of the War with Hamas*, TIME MAG. (Nov. 10, 2023), <https://time.com/6333781/israel-hamas-poll-palestine> (referring to a poll conducted by the Israel Democracy Institute in the aftermath of the Hamas attack, only ten percent of Israeli Jews supported a pause in fighting in order to exchange hostages. By the end of January 2024, the situation had not incurred significant changes); Estelle Shirbon, *Enduring Pain Keeps Public Support for Gaza War Strong in Israel*, REUTERS (Jan. 18, 2024), <https://www.reuters.com/world/middle-east/enduring-pain-keeps-public-support-gaza-war-strong-israel-2024-01-18> (remarking that enduring pain from October 7, 2023, is a key reason why polls in Israel show consistently high support for its military actions in Gaza).

217. See Benjamin Hart, *Why Israel Won't Forgive Benjamin Netanyahu*, N.Y. MAG. (Dec. 7, 2023), <https://nymag.com/intelligencer/2023/12/why-israel-wont-forgive-benjamin-netanyahu.html> (referencing an interview by Anshel Pfeffer, a journalist from Haaretz and an expert on Netanyahu, in which he suggested: “So there’s a war that almost all Israelis fully support, and they don’t see Netanyahu as in any way connected to the war efforts. Eighty-four percent of Israelis are in favor of continuing the war as it is, and at the same time, there are polls saying that seventy percent, seventy-five percent of Israelis want Netanyahu to resign”).

218. See Jeremy Sharon & Michael Bachner, *Amid Widening Spat, Smotrich Accuses Qatar of Impeding Hostage Talks to Serve Hamas*, TIMES OF ISR. (Jan. 25, 2024), <https://www.timesofisrael.com/amid-widening-spat-smotrich-accuses-qatar-of-impeding-hostage-talks-to-serve-hamas> (noting that Israeli Finance Minister Bezalel Smotrich accused Qatar of obstructing hostage talks, and further stated:

and chastised the United States for maintaining a large military contingent in the country.²¹⁹ Such animosity against one's mediator suggests that, from the outset of this round, Israel was unwilling to decrease its military force in Gaza in order to achieve the release of the held hostages by Hamas.²²⁰ Discrediting the mediators was an ingenious way of persuading Israeli public opinion that the mediators were in fact on the side of Hamas. That this could not be further from the truth is attested by the fact that the United States continued to declare Qatar and Egypt as strategic partners and renewed the lease of its military base in Qatar for another decade.²²¹ Moreover, in 2012, the United States requested Qatar to host a Hamas delegation in Doha, which could not but have been vetted by Israel in advance.²²² By the time Qatar conveyed Hamas' proposal to Israel, Saudi Arabia refused to "normalize" its relations with Israel until Israel not only ceased hostilities in Gaza but also finalized a two-state solution in occupied

"Qatar encourages terrorism, finances terrorism, pushes terror and is playing a double game").

219. See *Qatar Appalled by Netanyahu's Criticisms, Calls it Destructive to Hostage Deal Efforts*, TIMES OF ISR. (Jan. 24, 2024), https://www.timesofisrael.com/liveblog_entry/qatar-appalled-by-netanyahus-reported-criticism-calls-it-destructive-to-hostage-deal-efforts (reporting that Prime Minister Netanyahu said he was "very angry recently with the Americans" for extending the U.S. military presence at a base in Qatar for ten more years).

220. See *Israel Truce Team Leaves Doha, Official Blames Hamas for 'Dead End'*, REUTERS (March 26, 2024), <https://www.reuters.com/world/middle-east/israel-truce-team-leaves-doha-official-blames-hamas-dead-end-2024-03-26> (revealing that Israel is treating ceasefire talks as optional and is unwilling to come to non-military resolutions and as evidenced by its military offensive throughout).

221. See Alex Marquardt & Natasha Bertrand, *U.S. Quietly Reaches Agreement with Qatar to Keep Operating Largest Military Base in Middle East*, CNN (Jan. 2, 2024), <https://www.cnn.com/2024/01/02/politics/us-qatar-agreement-largest-base-middle-east/index.html> (noting that the Biden Administration has kept this agreement quiet, despite the fact that the U.S. base houses 10,000 U.S. military personnel, fully paid by Qatar). But see *Austin Lauds Key Partnerships in Middle East*, U.S. DEPT OF DEFENSE (Dec. 19, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3622360/austin-lauds-key-partnerships-in-middle-east> (praising the agreement on the Department of Defense website).

222. See Nima Elbagir et al., *Qatar Sent Millions to Gaza for Years – With Israel's Backing*, CNN (Dec. 12, 2023), <https://edition.cnn.com/2023/12/11/middleeast/qatar-hamas-funds-israel-backing-intl/index.html> (noting that Qatar has close diplomatic ties with the US, however; it also maintains ties with Hamas, as evidenced by Qatar allowing Hamas to establish a political office in Doha, beginning in 2012).

Palestinian territories.²²³

With this situation in mind, and with U.S. presidential elections looming in the background, the fragile Israeli coalition in government made it impossible for Prime Minister Netanyahu to agree to any further agreement with Hamas.²²⁴ The call for the return of Israeli hostages fell far short politically from the Israeli public opinion support for the elimination of Hamas from Gaza, and even the best mediation outcome for Israel would have signaled a political defeat for Netanyahu and an end to this alliance with his far-right political allies in government.²²⁵ The ICJ interim relief order, which was a clear political defeat, further compounded this state of affairs.²²⁶ As a result, the momentum had been lost and further mediation was fruitless. No doubt, given that the Qatari mediation is in the spotlight it makes it difficult, if not impossible, for Israel to make any overt promises.²²⁷ If, however, the mediation was outshone by other events, it is likely that better progress could be made, as long as it did not upset the fragile

223. See *Arab Foreign Ministers Discuss Gaza in Riyadh Following Blinken Visit to the Region*, REUTERS (Feb. 9, 2024), <https://www.reuters.com/world/middle-east/arab-foreign-ministers-discuss-gaza-riyadh-following-blinken-visit-region-2024-02-09> (calling attention to the importance of this meeting because it called for an immediate ceasefire and a two-state solution, but also because Saudi Arabia is assuming a key role on Palestine in the Gulf and Arab world, despite being a strategic ally to the United States).

224. See *Poll: Israelis Conflicted, but Prioritize Destroying Hamas over Releasing Hostages*, *supra* note 208 (reporting that trust in the government is declining and sixty-three percent of Israelis believe that new elections should be held before their scheduled date in 2026).

225. See *id.* (recording that most Israelis across religious groups prioritize destroying Hamas over releasing hostages).

226. See Jacob Magrid, *After ICJ Ruling, Israel Says it 'Has Not and Will Not' Destroy Rafah's Civilian Population*, TIMES OF ISR. (May 24, 2024), <https://www.timesofisrael.com/after-icj-ruling-israel-says-it-has-not-and-will-not-destroy-rafahs-civilian-population> (stating "Israel must immediately halt its military offensive, and any other action in the Rafah governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part").

227. See Nabih Bulos & Tracy Wilkinson, *Qatar's Mediation Efforts in Israel-Hamas War Come under Fire*, L.A. TIMES (Apr. 30, 2024), <https://www.latimes.com/world-nation/story/2024-04-30/qatars-gaza-mediation-effort-in-the-israel-hamas-war-comes-under-fire> (noting that the Qatar's limited success in mediating an agreement to stop the fighting and release Israeli hostages has led to widespread scrutiny).

political situation in Israel and assuming the United States was in support of the outcome. It is difficult to see any further progress from Qatar's mediation in the current political climate that has created a stalemate. Even so, given that politics can change or adapt at any time, it is likely that an Israeli failure to achieve its stated military objectives in Gaza may well bring the parties back to the negotiating table.

VI. CONCLUSION

In a dramatic plea made on December 6, 2023, the U.N. Secretary-General invoked Article 99 of the U.N. Charter, which allows his Office to bring any matter to the attention of the UNSC that threatens international peace and security.²²⁸ The inability of the UNSC to take action to avert a humanitarian disaster relating to the Gaza crisis, as well as other similarly politicized conflicts and crises involving terrorists and rogue entities, suggests that UNSC permanent members are unlikely to use the Council to adopt hard decisions.²²⁹ The pertinent stakeholders, including the parties directly involved and their super-power allies or foes, clearly believe that inter-state diplomacy is unable to resolve such disputes and that instead the way forward is through incremental agreements (i.e., pauses, ceasefires etc.) negotiated among the feuding parties or mediated by a third party.²³⁰ This is especially the case where one of the direct participants is a rogue entity or terrorist group of considerable size and prowess. This allows the pertinent states to seemingly abide with their no-concession policy—and thus appeasing domestic policy pursuits—while at the same indirectly speaking to terrorists and rogue entities through

228. See *Gaza: Guterres Invokes 'Most Powerful Tool' Article 99, in Bid for Humanitarian Ceasefire*, U.N. NEWS (Dec. 6, 2023), <https://news.un.org/en/story/2023/12/1144447> (stating the U.N. Chief invoked Article 99, which says the Chief “may bring to attention of the Security Council any matter which in his opinion, may threaten the maintenance of international peace and security”).

229. See Press Release, Security Council, Security Council Demands Immediate Ceasefire in Gaza for Month of Ramadan, Adopting Resolution 2728 (2024) with 14 Members Voting in Favour, United States Abstaining, U.N. Press Release SC/15641 (Mar. 25, 2024) [hereinafter *Security Council Demands Ceasefire*] (demonstrating the fact that it took the UNSC 171 days to deliver statement on longevity of war and the aim of a sustainable ceasefire).

230. See Bulos & Wilkinson, *supra* note 227 (indicating the preferred resolution method for this war is the utilization of mediators and third parties).

processes and platforms that do not directly implicate them.

This article has traced the development of no-concession policies at multilateral level, as well as at the level of individual state practice. While European states have demonstrated a wavering attitude to ransom payments and general engagement with terror groups and rogue entities, the United States and United Kingdom have in principle adopted hardline no-concession policies.²³¹ These were so strict that until the mid-2010s it was considered a serious offence for the victim's families to interact with terrorists or pirates, let alone pay ransom.²³² Even so, these two states, chiefly the United States, have exhibited a high degree of exceptionalism to their no-concession policies.²³³ This erosion of principle demonstrates that no issue is beyond debate and no actor considered unworthy of engagement and discussion.

It is in this light that the Israel-Hamas ceasefire agreement unfolded. The two parties would never have been able to approach each other in the first place, let alone agree to discuss a compromise on hostages, especially at a time of flaring passions.²³⁴ Since the late 2000s, the United States, while enforcing anti-terrorist legislation targeting a plethora of groups to which it imposed severe sanctions, realized that engagement with powerful terror groups and rogue entities was inevitable. In particular, it foresaw that unless it maintained open channels of communication through third parties, and without being seen as endorsing or recognizing these entities, it could not resolve incremental issues as and when they arose.²³⁵ Such a policy must have also been favored by its allies, even if they acted unilaterally on several

231. See, e.g., Dutton & Bellish, *supra* note 24, at 309 (recalling the general U.S. policy to make no concessions to groups that take its citizens hostage, including an official policy to deny benefits of ransom, prisoner releases, policy changes, or other similar acts).

232. *But see id.* at 312 (explaining that both the United States and United Kingdom counsel their citizens against paying ransoms, but neither country outright bans the practice).

233. See Hailey, *supra* note 68, at 69 (explaining that President Reagan conducted multiple arms exchanges with Iran, but no hostages were released).

234. See Azami, *supra* note 123 (providing an example of the United States engaging in talks with the Taliban over prisoner exchanges).

235. See Briggs & Wallace, *supra*, note 5 (arguing the United States understands it must maintain some level of communication with terrorist organizations as evidenced by various negotiations across different presidential administrations with terrorist organizations despite the 'no tolerance' policy).

occasions in pursuit of their own personal interests.²³⁶ Ultimately, the United States conceptualized a diversion from its no-concessions policy by encompassing a mediator that would either host the aforementioned hostile entities on its territory in the form of a representative/ambassadorial office—and with whom it would establish a rapport—or maintain sufficient political presence in conflict zones that it could tap into the local stakeholders at any time and establish firm dialogue.²³⁷ While both options have come into play, in the case of the Taliban and Hamas, the United States preferred the nurturing of relations through the mediating force of Qatar and the establishment of representative offices.²³⁸ All evidence suggests that the U.S. State Department *requested* Qatar to facilitate this arrangement.²³⁹ This coincided with Qatar’s foreign policy vision as a credible mediator of conflicts, so it turned out to be an ideal marriage. From the perspective of U.S. foreign policy, this must count as a successful experiment. It culminated in a U.S.-Taliban agreement that facilitated an orderly U.S. withdrawal from Afghanistan—compared to the chaotic Vietnam and Somalia evacuations²⁴⁰—and a subsequent dialogue with the Taliban as government of that country. In regard to Hamas, Qatar mediated at least four rounds of ceasefires in 2014, 2021, 2022, and the Israel-Hamas agreement in late November 2023.²⁴¹ From a political point of view, this was important to all participants and no doubt the fine line between no-concession and

236. See *id.* (highlighting the United Kingdom’s interactions with terror organization as sufficient evidence).

237. See Azami, *supra* note 123 (demonstrating that both the Taliban and the United States saw Qatar as a neutral location with balanced relations among all sides).

238. See *id.*; see also Al-Thani, *supra* note 179 (observing that the Hamas office Qatar was opened at the request of the United States to create ancillary lines of communication with Hamas).

239. See *id.* (remarking the Hamas office in Qatar has been used numerous times for meditation efforts).

240. See Gary J. Ohls, *Eastern Exit . . . Rescue from the Sea*, 61 NAVAL WAR COLL. REV. 1, 5 (2008) (explaining the United States’ hasty military evacuation from Somalia at the request of the Ambassador due to chaos and violence was codenamed ‘Eastern Exit’).

241. See generally Giorgio Cafiero, *The Future of Hamas in Qatar*, STIMSON (Nov. 2, 2023), <https://www.stimson.org/2023/the-future-of-hamas-in-qatar> (reiterating Qatar’s history as a mediator in the Middle East and its broad diplomatic connections).

engagement has been blurred beyond distinction. Even so, as a matter of policy, it is highly unlikely that hardline no-concession positions will be swayed as a result of the Taliban and Israel-Hamas paradigms. These types of mediations have proven useful and will be supported in the future. At present they have only procured fleeting victories. If they are poised to promise the eventuality of comprehensive peace agreements (a viable two-state solution for Israel and Palestine), then they must be adapted and re-aligned to reflect the exigencies of such a purpose.