

### **Hostage negotiations with terrorists: How and when is it justified?**

On 24 June 2015, President Obama approved Presidential Policy Directive (PPD) 30, “U.S. Nationals Taken Hostage Abroad and Personnel Recovery Efforts”. Under this policy, the U.S. Government is now enabled to collaborate with private actors to track down and rescue American hostages. This was accomplished without change to the long-standing position that no concessions should be made to hostage-takers, through a distinction between “no concessions” and “no communication”. Previously, Obama had asserted that he has “never support engagement with extremists”.<sup>1</sup> As dramatic ISIS kidnappings, sensationalized by graphic videos of subsequent beheadings, continue to dominate media headlines, it is timely to review traditional consensus about non-negotiation with terrorists in hostage-taking situations.

Before this policy shift, the U.S. State Department’s public stance was that it would “make no concessions to terrorists and strike no deals”.<sup>2</sup> As President Reagan eloquently argued during the American hostage crisis in Lebanon, “Freedom, democracy and peace have enemies. They must also have steadfast friends. The United States gives terrorists no rewards and no guarantees. We make no concessions. We make no deals”.<sup>3</sup> In 2002, President Bush expressed similar sentiments, that “no nation can negotiate with terrorists. For there is no way to make peace with those whose only goal is death”.<sup>4</sup> More specifically, a spokesperson from the State Department, Harf, reiterated that it is illegal for any American citizen to pay ransom to a group

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<sup>1</sup> Carl Miller, *Is it Possible and Preferable to Negotiate with Terrorists?*, 11 DEF. STUD. 145 (2011), at 145

<sup>2</sup> Lisa M. Hailey, *The Double-Edged Sword: Democratic Histories and Methods of Negotiating with Terrorists*, 21 ILSA J. INT’L & COMP. L 61 (2014) at 69

<sup>3</sup> *Id.*

<sup>4</sup> *Extracts from Bush’s speech*, BBC NEWS, Apr. 4, 2002

designated a terrorist organization.<sup>5</sup> The change in policy is therefore notable; yet, little ink has been spilled on this subject, at least in the public academic sphere.

Many other governments have also adopted a similar position that “one should not deal with the devil without the risk of losing one’s soul”.<sup>6</sup> This principle has thus been promulgated in international law through United Nations Security Council Resolutions, and enshrined in domestic legislation around the world. Western countries have signed numerous agreements calling for an end to ransom paying, including, as recently as last year, at a Group of 8 summit, where some of the biggest ransom payers in Europe signed a declaration to stamp out the practice. This is backed by Guelke’s finding that negotiated endings to campaigns of violence tend to be the exception rather than the rule, which debunks the strategic rationalization that negotiations with terrorists can be productive.<sup>7</sup>

Yet, governments in Europe, especially France, Spain and Switzerland, continue to be responsible for some of the largest payments. Just last fall, a ransom of 30 million euros was paid last fall to free four Frenchmen held in Mali. Negotiation theorists have proffered many strategic arguments to defend these nations’ actions. However, resorting to these functional considerations does not yet adequately address the moral and legal reasons grounding this legal position.

This essay thus seeks to re-evaluate traditional diplomacy theory on state negotiations with terrorists in hostage-taking situations. Firstly, I will address the existing legal and moral arguments against negotiations. Next, I will demonstrate the weakness of these reasonings against negotiations by breaking down the concept of terrorism into various types of terrorist organizations, and making parallels with governments and their actions. I argue that within these lines of argument, there is no substantial difference between “no concessions” and “no

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<sup>5</sup> Karen DeYoung and Adam Goldman, *After Foley Killing, U.S. defends refusal to pay ransom to terrorist groups that kidnap*, THE WASHINGTON POST, Aug. 21, 2014

<sup>6</sup> Guy O. Faure, *Negotiating with Terrorists: The Hostage Case*, 8 INT’L NEGOTIATION 469 (2003), at 476

<sup>7</sup> Adrian Guelke, *Talking to terrorists (part 95)*, 472 FORTNIGHT 4 (2010), at 4

communication.” As such, I conclude that the PPD-30 does not go far enough in negotiations, and recommend countries take further action in allowing for negotiations with terrorists.

### **Part I: The traditional school of thought**

Diplomacy theory has customarily advocated avoiding talking to terrorists entirely. Generally, this has applied to an array of negotiation tools - amnesties, treatment of arrested terrorists, negotiations during terrorist events and campaigns, negotiations in larger political contexts, bargaining about types and targets of action, and effects of other policies on terrorism. Between state actors, this would be viewed through the lens of diplomacy, or “the conduct of relations between states and other entities with standing in world politics by official agents and by peaceful means.”<sup>8</sup> This is distinguished from dialogue, which is seen more as an informal conversation, and “Track Two diplomacy” which may encompass negotiations, but is generally seen as an unofficial, informal interaction.<sup>9</sup> However, with a non-state actor, such as a terrorist group,<sup>10</sup> it would fall within the broader categorization of negotiation, which Michael Hardy defines as “the conduct, through representative organs and by peaceful means, of the external relations of any subject of international law.”<sup>11</sup>

#### **A) Legal justifications for negotiating with terrorists**

Most recently, UNSC Resolution 2199 (2015) passed on 12 February reaffirmed the international law condemnation of terrorist kidnapping for ransom, specifically reiterating that Member States should actively “prevent terrorists from benefitting directly or indirectly from ransom payments or from political concessions” during kidnapping and hostage-taking incidents committed by terrorist groups. Resolution 2199 thus establishes an international legal norm in

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<sup>8</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 156, (3rd ed 2002)

<sup>9</sup> Joseph V. Montville, *Transnationalism and the Role of Track Two Diplomacy*, in Willard Scott Thompson and Kenneth M. Jensen (eds) *Approaches to Peace: An Intellectual Map* (2nd ed 1991)

<sup>10</sup> Terrorists as a group are difficult to define, but they are often seen as actors that commit violent or criminal acts designed to create a state of terror in the general public, according to the UNSC Resolution 1373 (2001)

<sup>11</sup> Michael Hardy, *Modern Diplomatic Law*, 1, (1st ed 1968)

line with the stand against negotiating with terrorists, by condemning the ability of terrorists to obtain fruits from negotiations governments undertake with terrorists. This does not prevent governments from engaging in broader negotiations with terrorists, only to prohibit them from enabling terrorist to reach their desired outcome of the negotiations. However, there is also a strong case that this imposes a legal duty on governments to actively prevent other parties from aiding terrorist to achieve their aims of obtaining ransom or political concessions.

Although this resolution may not necessarily have strict and immediate legal binding effect on its domestic jurisdictions, depending on the state in question, its soft law impact cannot be overlooked nor underestimated. From the legal functional standpoint, Neumann points out that talking to terrorists could “undercut international efforts to outlaw terrorism and set a dangerous precedent.”<sup>12</sup> Opening negotiations with al-Qaeda, for instance, would not only provide the organization political legitimacy, but also undermine both moderates across the Muslim world, and the negotiating governments themselves.

Furthermore, Resolution 2199 reaffirms the original anti-terrorism measure first put forth in UNSC Resolution 1373 (2001), which requires countries to make adjustments to their domestic laws to criminalize and punish terrorist acts, including participation in the “financing, preparation or perpetration of terrorist acts”. Negotiating with terrorists could conceivably fall within the broad notion of “perpetration of terrorist act”, and therefore become illegal. Moreover, should negotiations result in some financial incentive for terrorist groups, through paying ransom for kidnapped hostages for example, then governments would arguably be committing a crime as well. Following the French President Francois Hollande’s payment of \$3.2 million in ransom for the release of a French family of seven to Boko Haram, the Islamic jihadist organization in northern Nigeria became more financially equipped to conduct complex military maneuvers. Its

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<sup>12</sup> Peter R. Neumann, *Negotiating with Terrorists*, 86 FOREIGN AFF. 128 (2007), at 129

more frequent strikes in neighboring countries resulted in the death of several hundreds. It is also believed that Al-Qaeda finances the bulk of its recruitment, training and arms purchases from ransoms, amounting to \$125 million in the time from 2008-2015, that were paid to free Europeans. On the whole, according to David Cohen, the Treasury Department's Under-Secretary for Terrorism and Financial Intelligence, kidnapping for ransom has become today's most significant source of terrorist financing.<sup>13</sup> Negotiating with terrorists to provide them ransom money would thus be illegal, in domestic and international law, because of its perpetuation of terrorist acts.

The U.S. Supreme Court has also provided a far-reaching interpretation of the U.S. "material support law", in the *Holden v. Humanitarian Law Project* (2010) case. Any interaction of third parties with designated foreign terrorist organizations, including training, advocacy, and expert advice, is therefore illegal. It remains to be seen how PPD-30 would pre-empt this Supreme Court holding. In addition, the law makes a controversial claim of extraterritorial jurisdiction, which raises the possibility that acts committed by non-U.S. citizens and those occurring outside U.S. territory are punishable under this law.<sup>14</sup>

In addition, since terrorist organizations are illegal, negotiating with them is a non-starter, because that would tarnish the government's own legality. Arguably, recognizing terrorists as an equal partner by going to the bargaining table has a negative effect on the sanctity of the domestic justice system. For governments to ensure the integrity and coherency of their domestic legal system, terrorism has to be processed by the criminal justice system in the same way as other crimes. Negotiating with them only invites the criticism that governments are being legally inconsistent, thereby undermining the rule of law.

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<sup>13</sup> Rukmini Callimachi, *Paying Ransoms, Europe Bankrolls Qaeda Terror*, THE NEW YORK TIMES, Jul. 29, 2014

<sup>14</sup> 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), at 121

Government negotiators are representatives of legitimate organizations whose actions are supposed to abide by the letter of the law. Governments have to undertake firm and decisive positions against individuals convicted of specific criminal acts, without engaging in arbitrary actions that impact others, particularly innocent members of society. Tough policies are needed, but the rule of law must visibly prevail. As Martha Crenshaw argues, the power of terrorism is through political legitimacy, winning acceptance in the eyes of a significant population and discrediting the government's legitimacy".<sup>15</sup> Even the appearance of arbitrary behavior must therefore be avoided if the terrorists are to be isolated from popular sympathy and support.

The problem of a lack of legal enforcements for terrorists to be accountable for their commitments also lends itself to the legal argument against negotiating. Because terrorists already exist outside of the legal order, any attempts to exert institutional control would be futile.<sup>16</sup> In this asymmetric relationship, governments are legally constrained by both domestic and international law, but terrorists do not abide by such rules or codes. Neither legal norms nor territorial basis are binding or even important considerations for terrorists, whereas states are deeply constrained by them as a legal matter of sovereignty. Moreover, there are legal precedents in the U.S. establishing that promises made to hostage-takers during negotiations are not legally binding contracts (*United States v. Crosby*, 1983; *State v. Sands*, 1985). Thus, both sides have no compelling legal reasons for commitments agreed upon in such a set-up to be enforced.

Informal enforcement mechanisms relating to reputational effects, relied upon heavily in international law for countries to pressure other countries, would also be ineffective on terrorists, because terrorist groups may not have any indefinite lifespan, so they lack the incentives to "invest in a trustworthy reputation."<sup>17</sup>

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<sup>15</sup> Martha Crenshaw, *Terrorism, Legitimacy, and Power: The Consequences of Political Violence*, 25, (1st ed 1983)

<sup>16</sup> Navin A. Bapat, *State Bargaining with Transnational Terrorist Groups*, 50 INT'L STUD. Q. 213 (2006), at 214

<sup>17</sup> Alex P. Schmid & Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (1st ed 1988)

Another crucial legal problem is that of according terrorist groups legitimacy. In the words of Henry Kissinger, legitimacy implies the acceptance of the framework of the international order by all major powers. The idea of legitimacy, as a “generalized perception of assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs and definitions” is thus a vital condition for diplomacy to operate.<sup>18</sup>

A key term of Hardy’s definition of negotiation is “representation”. Langhorne’s understanding of “representation” as “the reciprocal recognition of an actor as a legitimate party with the power to influence both the flow of affairs and the functioning of a given system”<sup>19</sup> suggests that negotiations automatically accords terrorists the legitimacy as an appropriate participant on the world stage they do not deserve. Customary international law, as enshrined in the Vienna Convention on Diplomatic Relations, recognizes the state as the exclusive, sovereign actor in international relations, predicated on the notion that the state should be considered the primary building block of international relations. Terrorist groups, not being legitimate representatives of a physical territory or population, are therefore legally inappropriate partners under the VCDR. Arguably, their contestation of the vital norms and conventions on which existing structure of diplomacy is built upon prevents the proper functioning of diplomacy. It is thus arguable that the failure of terrorists to abide by the rules and norms of international society indicates they give up their right to deal and be dealt with in a traditional way, triggering the “no-negotiation” doctrine.

Admittedly, this Westphalian conception of state sovereignty has been subject to immense critique, with the recognition that political power is being repositioned, recontextualized and, to a

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<sup>18</sup> Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571 (1995), at 574

<sup>19</sup> Richard Langhorne, *The diplomacy of non-state actors*, 16 DIPL. & STATECRAFT 331 (2005), at 333

degree, transformed by the growing importance of other less territorially based power systems. Still, Bull maintains contemporary international politics is composed of states that whilst not sharing complete identity of interest all seek “to ensure that life will be in some measure secure against violence.”<sup>20</sup> This minimum criterion bars terrorists as legitimate negotiating partners.

In addition, terrorists substitute violence against innocent civilians for the rule of law, which fundamentally threatens the government’s constitutional monopoly of the legitimate use of violence, a basic characteristic of a nation-state.<sup>21</sup> Negotiating with terrorists implies that the violent means they employ are acceptable; yet, these are individuals who have rejected the rules and norms of international society. This thus represents a betrayal of fundamental values and principles. As Duyvesteyn and Schuurman argue, “talks appear to legitimize the aims and strength, if not the methods, of terrorist groups, thus elevating their status from violent criminals to potent political activists.”<sup>22</sup> Furthermore, by engaging in violence against civilians, Paul Gilbert argues that “groups forfeit their legitimacy by breaching ‘the conventions of debate required for negotiations.’”<sup>23</sup> Because terrorists put themselves in a Hobbes’ state of nature with respect to governments, Jan Narveson argues for the disqualification of terrorists from the negotiating table.<sup>24</sup>

The problem of sovereignty is also an important one given the transnational nature of terrorists. If governments directly discuss with terrorist groups and pay them a ransom to get

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<sup>20</sup> Bull, *supra* note 8, at 157

<sup>21</sup> James K. Wither, *Selective Engagement with Islamist Terrorists: Exploring the Prospects*, 32 *STUD. CONFLICT & TERRORISM* 18 (2009), at 23

<sup>22</sup> Isabelle Duyvesteyn and Bart Schuurman, *The Paradoxes of Negotiating with Terrorist and Insurgent Organizations*, *J. IMPERIAL & COMMONWEALTH HIST.* 677 (2011), at 678

<sup>23</sup> Paul Gilbert, *Terrorism, Security and Nationality: An Introductory Study in Applied Political Philosophy*, 169, (1st ed 1994)

<sup>24</sup> Jan Narveson, *Terrorism and Morality*, in Raymond Gillespie Frey & Christopher Morris (eds), *Violence, Terrorism and Justice*, 161, (1st ed 1991)



their own people free, this undermines the sovereignty of the host nation of these terrorist groups, creating legal problems between states, in contravention of international legal principles.

## **B)Moral justifications**

The problem of negotiating with terrorists is compounded by the moral dimension to this issue. Governments are often keen to assert their legal and moral high ground over terrorists, and negotiating with terrorists compromises both. As Neumann summarizes, governments believe that “democracies must never give in to violence, and terrorists must never be rewarded for using it”.<sup>25</sup> After all, as Shell puts it, the decision to negotiate “is more than just consequences - it is a form of self-expression that says something about who we are, who we are willing to be seen as, and ultimately, who we are willing to become.”<sup>26</sup> Margalit points out that “compromises tell us who we are”, more so than our expressed ideals and norms.<sup>27</sup> Compromising to negotiate with terrorists is perhaps an undesirable reflection of the moral character of a state. The hardline position is embodied in Zulaika and Douglass’s statement that “since terrorism is unspeakable Evil, you must avoid any contact with it or even contemplation of it, let alone projecting yourself into the terrorist’s subjectivity.”<sup>28</sup>

By implicitly recognizing that terrorist groups can utilize illegal and violent means to achieve their objectives, governments are, even if indirectly, condoning violence for their people, which is morally problematic. Hostage takers appropriate the lives of innocent people by violent means and are essentially intending to use these lives as a currency of exchange, an entirely illegal and immoral endeavor. Margalit argues that negotiating with terrorists thus produces “rotten compromises”, which are agreements to establish or maintain an inhuman regime, a

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<sup>25</sup> Neumann, *supra* note 12, at 128

<sup>26</sup> G.Richard Shell, *The Morality of Bargaining: Identity versus Interests in Negotiating with Evil*, 26 NEGOTIATION J. 453 (2010), at 455

<sup>27</sup> Avishai Margalit, *On Compromise and Rotten Compromise* (1st ed 2009)

<sup>28</sup> Joseba Zulaika and William A. Douglass, *The terrorist subject: terrorism studies and the absent subjectivity*, 1 CRITICAL STUD. TERRORISM 27 (2008), at 32

regime of cruelty and humiliation.<sup>29</sup> Such inhumane regimes erode the foundation of morality, which rests on treating humans as humans.

Functionally, terrorists may also be emboldened by what they perceive as government appeasement and weakness, which may lead to an increase in violence, a moral problem for governments who are supposed to be protecting the security of its people as well.<sup>30</sup> As Bapat argues, “if groups believe they can accomplish their goals through violence, terrorists will continue to use violence in the future.”<sup>31</sup> Laquer suggests compromising with terrorists gives “full recognition to terrorist groups”, which in turn leads to increased attacks.<sup>32</sup> Negotiating with them also indicates setting aside the extremists’ ideology and record of violence in the interests of political expediency, a deeply unethical trade-off.<sup>33</sup> Indeed, Menkel-Meadow cautions against substituting a universal moral imperative for a simple and moral immoral self-interest<sup>34</sup>, despite the razor-thin distinction Margalit makes between “political necessity” and “expediency.”<sup>35</sup>

Another moral problem arises in the process of negotiation with terrorists. An extremely negative representation of the counterpart may authorize behaviors that would otherwise not be so present in a negotiation, such as lying, playing tricks, manipulating and using deception devices.<sup>36</sup> These methods certainly do not go so far as to be considered crimes, and governments may choose not to use them for purely functional reasons that it may undermine their legitimacy. At a high level of generality, perhaps this scenario can be analogized to that of using torture to procure information from captured high-level targets, in that an illegitimate means is being used for legitimate purposes.

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<sup>29</sup> Margalit, *supra* note 27, at

<sup>30</sup> Wither, *supra* note 21, at

<sup>31</sup> Bapat, *supra* note 16, at 214

<sup>32</sup> Walter Laquer, *The Age of Terrorism* (2nd ed 1987)

<sup>33</sup> Wither, *supra* note 21, at

<sup>34</sup> Carrie Menkel-Meadow, *Compromise, Negotiation, and Morality*, NEGOTIATION J. 483 (2010), at 488

<sup>35</sup> Margalit, *supra* note 27, at

<sup>36</sup> Guy O. Faure, *Negotiating with Terrorists: A Discrete Form of Diplomacy*, 3 HAGUE J. DIPL. 179 (2008), at 193

However, here, the dilemma is permanent, because what should not be done could save lives. Is moral judgment, as Mnookin suggests, a luxury of the “after-the-fact” analysts who have never felt forced to make a “deal with the devil” to even live to tell the tale?<sup>37</sup> Is a negotiation compromise perhaps morally justified as part of the human survival process? Malhotra argues that the purist position of non-negotiation “has the virtue of ideological purity but the vice of impracticality.”<sup>38</sup> Perhaps here, the ends may justify the means, but by using all means to destroy the position of the other, one may end up destroying something in oneself, disqualifying the task.

Fundamentally, this assumes an inherent morality in state behavior. Yet, Machiavelli has argued that moralistic attitudes on the part of rulers may bring ruin upon their states, and a statesman deserving of the name must be prepared to break moral norms if the protection of the state requires it. Particularly in the field of diplomacy, some have argued for a “moral exemption”. As Ryn argues, a democracy which genuinely aspires to civilized values will promote adherence to the law and due process.<sup>39</sup>

## **Part II: Re-evaluating traditional diplomacy theory**

However, governments are simply not adhering to this principled stance. From 1968 to 1991, negotiation was attempted in over half of the cases of terrorist events involving hostage taking.<sup>40</sup> For example, even after the 1991 mortar attack by the Irish Republican Army (IRA) on 10 Downing Street that almost eliminated the British cabinet, the British government preserved the secret back channel to the IRA. Likewise, the Spanish government came to the negotiating table with separatist group Basque Homeland and Freedom (ETA) a mere six months following

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<sup>37</sup> Robert H. Mnookin, *Bargaining with the devil: When to negotiate, when to fight* (2nd ed 2010)

<sup>38</sup> Deepak Malhotra, *Without Conditions: The Case for Negotiating with the Enemy*, 88 FOREIGN AFF. 84 (2009), at 89

<sup>39</sup> Claes G. Ryn, *The Ethical Problem of Democratic Statecraft*, in Jeffrey Salmon, James P. O’Leary & Richard Schultz (eds), *Power, Principles, and Interests: A Reader in World Politics*, 109-24 (1st ed 1985)

<sup>40</sup> Edward Mickolus, Todd Sandier, Jean Murdock and Peter Fleming, *International Terrorism: Attributes of Terrorist Events* (2000)

the group's supermarket bombing, which killed 21 civilians. Even Israel, with its tough stance on terrorism, secretly negotiated the Oslo Accords, despite the Palestinian Liberation Organization's continuing terrorist campaign, and persistent refusal to recognize Israel's statehood.

These perhaps indicate the moral and legal foundations of negotiations with terrorists are not as strong as required. Acknowledging the different functional and strategic considerations weighing on both sides of the negotiations argument, I focus on exposing the weakness of the moral and legal arguments, through an analysis of terrorist organizations and states.

### **A) Disaggregating terrorist groups**

Across the legal and academic fields, definitions of terrorism abound. The FBI sees terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."<sup>41</sup> The Department of Defense's definition is "the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."<sup>42</sup> All these definitions generally include that violence is used as a means (and sometimes as an end) against noncombatant targets to intimidate or to coerce, for ideological or political imperatives.

Based on these characteristics, the understanding of terrorists can be broken down into three categories that Donohue proposes - nationalist-separatists, social revolutionists and religious fundamentalists.<sup>43</sup> The moral and legal questions of negotiating with terrorists may, in fact, yield different answers for the different types of terrorist organizations.

### **A1) Nationalist-separatists and social revolutionists**

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<sup>43</sup> William A. Donohue, *Testing the Role Effect in Terrorist Negotiations*, 8 INT'L NEGOTIATION 527 (2003), at 533

Nationalist-separatists seek to establish a geographically separate political state based on ethnic or political criteria. Among political groups, one may find the Revolutionary Armed Forces of Columbia (FARC), the Tamil Tigers in Sri Lanka, the Red Brigades in Italy, the Kurdistan Workers' Party (PKK) in Turkey, the ETA in Spain, Al-Aqsa Martyrs brigades (Palestinian nationalist movement), the Nepalese Maoists or the IRA in Northern Ireland. Similarly, social revolutionists use terrorism as a way of drawing attention and applying pressure on the authorities, but to effect changes in social or economic order. These social revolutionists fundamentally accept the domestic political and legal order, and work within this structure in order to achieve socio-political change, albeit through violent means.

However, the line distinguishing “terrorist” groups from opposition political parties can be very much blurred, depending on how the political incumbents use their power. This exposes the circularity of the legal logic inherent in the argument that states have a monopoly over the use of force. Bhatia suggests that the state referring to its opponents as “subversive elements”, “terrorists” and “extremists” is an attempt at “denying the legality of their opponents and emphasizing the need to maintain law and order.”<sup>44</sup> As the identification of the ‘core purpose’ of the violent acts constitutes the substance of violence’s legitimacy, the desire here is to assert immediately that violence against the state is not legitimate, well-founded or justified, but driven by subsidiary and less noble motives. The description or ‘reduction’ of a revolutionary movement to that of a terrorist group removes the political or anti-occupation core of its actions, relegating it to a position of lawlessness and labelling it an agent of disorder. As Helgesen argues, measures taken against terrorism have not sufficiently differentiated between global terrorism and the use of violence in national contexts, which has had an adverse impact on

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<sup>44</sup> Michael V. Bhatia, *Fighting Words: naming terrorists, bandits, rebels and other violent actors*, 26 THIRD WORLD Q. 5 (2008), at 14

conditions for peace negotiations.<sup>45</sup> Instead, many internal, asymmetrical conflicts should be seen as cases of unfinished or incomplete state-building processes, and the international response should be one of supporting restructuring of the state to ensure all parts of society are included. This would require willingness from governments to engage in asymmetrical diplomacy, implying negotiation with terrorists. Similarly, Richard Jackson points out designating a group “terrorist” can thus be seen as part of a totalising and legitimising discourse, that makes a violent counter-terrorism response appear natural while ruling out the possibility of negotiation.<sup>46</sup>

Gross argues that the language and mindset of counterterrorism is an impediment to the U.S. ability to analyze the likelihood that Maoists could moderate and evolve into a legitimate political party. Notably, Nelson Mandela, Yasir Arafat and Gerry Adams are among those who were once branded terrorists, whom the U.S. and other countries have engaged in the hopes of bringing a lasting peace to strife-torn lands. The Moro Islamic Liberation Front (MILF) is another example. The group has waged a secessionist campaign for an Islamic state since 1978, but the roots of the campaign date back 300 years with opposition to Spanish and later, American colonial rule. The MILF’s nationalist goals are at odds with Al-Qaeda regional affiliate Jemaah Islamiyah (JI)’s vision of a pan-Islamic caliphate in Southeast Asia. This proscription, Toros argues, limits how the state can engage with such groups, putting decision makers in a policy straightjacket.<sup>47</sup>

There is often a bifurcation that relegates terrorism into the realm of “unredeemable atrocity like no other.” There are often uncritical constructions of the terrorist as an aberration, as unquestionably illegitimate, evil, even mad, and the construction of state as unquestionably

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<sup>45</sup> V Helgesen, *How Peace Diplomacy Lost Post 9/11. What Implications are there for Norway*, OSLO FILES ON DEFENSE AND SECURITY (2006), at 6

<sup>46</sup> Richard Jackson. *Writing the war on terrorism: language, politics and counter-terrorism*, 9 (1st ed 2005)

<sup>47</sup> Harmonie Toros, *Terrorists, scholars and ordinary people: confronting terrorism studies with field experiences*, 1 CRITICAL STUD. TERRORISM 279 (2008)

reasonable, rational and good.<sup>48</sup> Yet, many of these nationalist-separatist groups also demonstrate rationality in their actions such that enforcement mechanisms can have effect without compromising the rule of law. For example, the British government was able to broker peace with the IRA without undermining democratic principles. The former insisted that the latter relinquish violence as a precondition for political participation, which ensured the democratic framework was not jeopardized by negotiations. Likewise, the MILF's leadership, unlike JI, has been willing to negotiate with the government of the Philippines over regional autonomy. The principle that violence for political ends retained its meaning and the government continued to be seen as committed to upholding the legal system, and without being morally discredited. The purported lack of enforcement mechanisms to hold terrorists to their negotiated settlements is therefore not an intrinsic character of terrorist organizations and cannot stand as a justifiable legal argument against negotiations with terrorists. Indeed, Bapat seeks to push back against the inherent assumption within terrorist literature that terrorists operate free from any institutional constraints, pointing out that terrorists do still have incentive structures which variations in constraints can affect.<sup>49</sup>

In addition, if the use of force is manifested to the same degree and intensity by the government and the "terrorist" organization, and for the same political purposes, why should one be considered legal and the other illegal? The means that governments have used to quash such separatist groups also undermines the moral claim that governments should not sanction violence. As Wither notes, "the experience of numerous counterterrorist campaigns suggests that it is very difficult, especially for democratic states, to defeat extremist groups that enjoy a measure of popular support by military or law enforcement means alone, unless governments are prepared to tolerate significant human rights abuses by their security forces and the erosion of

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<sup>48</sup> Miller, *supra* note 1, at 147

<sup>49</sup> Bapat, *supra* note 16, at

core democratic and constitutional values.”<sup>50</sup> The moral high ground governments claim to have over terrorists crumbles in the face of the repressive measures governments similarly employ to deal with these groups.

Furthermore, the link between legitimization and negotiation must be questioned. According to Michael Ignatieff, an engagement can involve the state acknowledging that the terrorist group represents a valid claim, even though its means are unacceptable.<sup>51</sup> Engaging with a group based on the legitimacy of its grievances and goals is far more legally and morally acceptable, but still problematic in that it risks marginalizing actors that have struggled for the same goals without engaging in violence. As Toros argues, the state’s acceptance of a party as a legitimate interlocutor does not automatically confer upon the latter broader legitimacy.<sup>52</sup> This requires the congruence highlighted by Suchman between the behavior of an entity and the shared beliefs of the community in question.<sup>53</sup>

## **A2) Religious fundamentalists / absolute terrorists**

Religious fundamentalists can be classified as absolute terrorists if we refer to the definition given by Zartman - those who action is “non-instrumentalist, a self-contained act that is completed when it has occurred and is not a means to obtain some other goal.”<sup>54</sup> The moral problem of endorsing violence is most relevant here, because these terrorists’ strategy generally exemplify the phrase “unlimited ends lead to unlimited means.” As Hoffmann argues, their greater use of violence is both a necessary expedient for the attainment of their goals, and is, in itself, morally justified.<sup>55</sup> Indeed, in a study by Marascuilo and McSweeney, it was found that

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<sup>50</sup> Wither, *supra* note 21, at

<sup>51</sup> Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, 88 (1st ed 2004)

<sup>52</sup> Toros, *supra* note 47, at

<sup>53</sup> Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571 (1995), at 574

<sup>54</sup> William Zartman, *Negotiating with Terrorists*, 8 INT’L NEGOTIATION 443 (2003), at 444

<sup>55</sup> Stanley Hoffmann, *The Political Ethics of International Relations* (1st ed 1988)



religious fundamentalists used significantly higher levels of aggression than social-revolutionists, and higher but non-significant levels of aggression compared to nationalist-separatists <sup>56</sup>.

In addition, Primoratz argues that terrorists do not recognize and respect certain basic human rights of every human being, which safeguard a certain area of personal freedom. Persons are to be respected as holders of rights, but terrorists see the right to kill or maim in order that their cause be promoted as justified. However, principle prohibits persons to be used as mere means. The Kantian account, at minimum, requires the other person to be able to “share in the end” of one’s action, that is, to at least consent to it. Clearly, terrorism, as an attack on illegitimate targets, with the aim of intimidation and coercion, is morally impermissible <sup>57</sup>.

With terrorists, democracies are faced with a dilemma. Should they abandon their people to a potential terrible fate of humiliation, torture, dehumanization or horrendous death? Should they remain motionless, facing unbearable situations, such as the prospect of having some of their own nationals beheaded or throats cut? Governments are faced with the unhappy choice between upholding its responsibility to protect victims, and its duty to maintain particular policy principles. Should the government capitulate to rescue hostages, it is confronted with criticism of lack of resolve. On the other hand, if the government adopts an unyielding position that results in hostages’ deaths, it will be deemed callous and inhumane.<sup>58</sup>

However, is negotiating with terrorists necessarily being morally complicit in their violence? If a war or revolution is morally justified in its character and goals, such attacks will themselves be morally legitimate. Since governments are seeking to prevent violence, even if violence is produced as a byproduct of this aim, it is arguably justified in its character and goals.

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<sup>56</sup> Leonard A. Marascuilo, and Maryellen McSweeney, *Nonparametric and distribution-free methods for the social sciences* (1st ed 1977)

<sup>57</sup> Igor Primoratz, *The Morality of Terrorism*, 14 J. APPLIED PHIL. 221 (1997), at 230

<sup>58</sup> Nehemia Friedland, *Fighting Political Terrorism by Refusing Recognition: A Critique of Frey’s Proposal*, 9 J. PUB. POL’Y 207 (1989), at 213

Just war theory makes a distinction between combatants and noncombatants, but it perhaps requires some amount of updating to include terrorists within a broader conception of combatants. In determining the morality of government action against terrorism, one should therefore take into account not only the consequences of the action judged, but also who brought them about, in what way, and what the deliberation behind the deed was.

The further problem of enforcement and compliance is exacerbated with this group of terrorists. In the Marascuilo and McSweeney study, it was found that religious fundamentalists are significantly less likely to release hostages compared to nationalist-separatists and social revolutionists, indicating they are far less willing to conciliate, even if there were no significant differences across the three ideologies in the willingness to use negotiation. Hardline terrorist groups also completely reject the existing political order, making it all the more problematic to negotiate with them without undermining one's own democratic system. For instance, al-Qaeda ideologue, Ayman al-Zawahiri, has proscribed democratic elections as blasphemous because they place human choices above those of God.<sup>59</sup>

However, this does not necessarily reduce such absolutist terrorists to irrational actors. Robert Pape argued that the peculiar brand of Islamic suicidal terrorism should be viewed not as a religious or cultural aberration, but rather as a rational strategy to attain the independence of Moslem people, property, and way of life from foreign influence and control. A recent study of suicide bombings during the second intifada appears to support Pape's argument, as it found that Palestinian militant leaders had only given a religious justifications in 7% of such attacks. Similarly, religious zeal and martyrdom does not appear to have been the primary motivation of Chechen suicide bombers.<sup>60</sup> As Miller argues, we see such absolutist terrorists as using rational political goals as a convenient means to inflict violence against innocent civilians, rather than

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<sup>59</sup> Wither, *supra* note 21, at

<sup>60</sup> *Id.*

using violence against innocent civilians to accomplish rational political ends. However, instead of pathological explanations, Miller argues that we must be sensitive to contextual pressures as drivers of terrorism.<sup>61</sup> As H.A. Cooper argues, the selection of terrorism as a tactic is not determined by the pathology of the actor, but rather access to conventional military means.<sup>62</sup>

### **Part III: Extending to states**

Extending the disaggregation, we might find similarities between a terrorist group and a rogue government. One might instinctively balk at labelling a government a terrorist organization. However, if we can find key similarities between a terrorist organization and a state government, this establishes the perfunctoriness of the label “terrorist”. If governments are perfectly willing to negotiate with rogue governments, why then should negotiations with terrorists have such a stigma attached to them?

This example is clear when we examine the structure of ISIS. With its aim of establishing a caliphate, ISIS has a remarkably similar administrative structure to many governments. It has various Councils such as the Security and Intelligence Council, Military Council, Provincial Council, Financial Council and Media Council, which are reminiscent of conventional state apparatus. Furthermore, as pointed out in a study of the reports issued by ISIS, ISIS demonstrates the long-term planning and preparation behind the capture of Nineveh Province and its capital Mosul in June 2014. It also has a monopoly of services - the Islamic Administration of Public Services (also known as General Services Committee) looks after the region’s infrastructure, including electricity, sanitation, water, agricultural irrigation systems, cleaning and repairing roads and other essential services, such as the production of bread. However, ISIS, for its radical violence, has been labelled a terrorist organization.

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<sup>61</sup> Miller, *supra* note 1, at

<sup>62</sup> *Id.* at 159

Similarly, the Taliban employed very violent means, but the U.S. was willing to negotiate with the Taliban following the bombings of the U.S. embassies in Kenya and Tanzania during August 1998. Most recently, the U.S. also negotiated the Bowe Bergdahl prisoner swap for five Afghan Taliban prisoners held at Guantanamo Bay.

Conversely, states have threatened international security while trampling the rights of their own people. These states have been identified as rogue ones, because of a combination of internal characteristics they possess, and external actions they undertake which violate the conventions, understandings and rules that currently prevail about good international conduct.<sup>63</sup>

Yet, negotiations have gone on, despite the fact that some of these states have showed little trustworthiness. These actors who flout the rules and break their promises, are still assumed to be actors susceptible to sanctions and incentives, who vary along a continuum in this regard between smart and dumb, not good and evil, as terrorists are presumed to be. Leaders of these nations are seen as merely states for whom the right mix of incentives and sanctions have yet to be achieved. The possibility of an opening or a breakthrough always seems to exist just around the corner<sup>64</sup>. For example, President Reagan negotiated an arms exchange with Iran in August 1985. However, after the U.S. gave Iran 96 TOW missiles, Iran still failed to release any hostages. Subsequently, after the U.S. sent another 408 TOW missiles, Iran released Benjamin Weir, an American hostage in September 1985. However, in the month following that, 1000 TOW missiles were sent to Iran, but no hostages were released.<sup>65</sup>

Sakharov argues that the good of protecting humanity from nuclear war outweighs any harm for human rights that ensues from legitimizing or perpetuating a cruel regime.<sup>66</sup> Ultimately,

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<sup>63</sup> Paul Sharp, *Diplomatic Theory of International Relations* (1st ed 2009)

<sup>64</sup> *Id.*

<sup>65</sup> Hailey, *supra* note 2, at 69

<sup>66</sup> Walter C. Clemens Jr., *Can - Should - Must We Negotiate with Evil?*, 26 PAC.FOCUS 316 (2011), at 321

what extent do we have to go to, to exterminate a clear and present evil? Are concessions that may violate our own principles permissible? The compelling security interests are clear.

State sovereignty and national identity have become a costly categorization for addressing the problems posed by a plural world of separate identities. The challenge now is to develop ideas about how the multitude of identities which now populate contemporary world politics are to be represented without posing existential threats to one another.<sup>67</sup>

#### **Part IV: Recommendations**

In my opinion, PPD-30 is therefore a step in the right direction, but it does not go far enough. This Directive undermines the democratic principles of transparency and accountability in working through private entities and using families. From the perspective of terrorist organizations, communicating through these other entities is not substantially different from communicating directly with state governments. Knowing that the government lurks in the shadow of negotiations, terrorists retain their incentive to make ransom or political demands. In the public eye, these other private actors are likely to be viewed as proxies for the government, and their successes and failures are therefore foisted onto the government's report card as well. I would argue therefore that "no communication" be extended to include the states as well. Furthermore, when "no communication" is abolished, it creates a dent in the principle of "no concession" and in order to maintain the consistency and coherency of this principle, I would argue that it is a better decision to simply engage with terrorists at the negotiating table.

Hayes et al point out that governments can employ legal means of engaging with terrorist groups by seeking to decouple the policies from the terrorist campaign and to stress the illegal nature of the behavior.<sup>68</sup> The government's leadership in delegitimizing violence and ensuring

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<sup>67</sup> Sharp, *supra* note 63, at

<sup>68</sup> Richard E. Hayes, Stacey R. Kaminski & Steven M. Beres, *Negotiating the Non-Negotiable: Dealing with Absolutist Terrorists*, 8 INT'L NEGOTIATION 451 (2003)

the availability of alternative ways for responsible dialogue is arguably a more powerful instrument in responding legally and morally to the social revolutionists' demands, to shape people's attitudes toward terrorism as a political tool.

Toros suggests that negotiating with terrorists can indeed lead to their legitimation, but through this very legitimation, it may offer terrorists an alternative path and the chance to transform into nonviolent actors.<sup>69</sup> While legitimacy and trust are vital characteristics of any negotiating partner, they are arguably some things that can develop during negotiation itself. Whilst diplomacy relies on certain conventions and values, it also promotes them; it is both a civilized and civilizing institution. We should not be too hasty to dismiss negotiation on the question of trust and legitimacy alone.

Policymakers, by examining terrorists' thinking on the utility of violence, can negotiate with terrorists legitimately. He proposes that governments carefully assess whether a critical mass within the terrorist organization questions the utility of violence, and when the politically minded members of the terrorist group have the balance of influence in their favor, governments should begin formal negotiations. This should, however, only take place after the group has declared a permanent cessation of violence, which represents a public commitment to which the terrorists can be held and for whose breach they can be sanctioned. In this manner, the democratic protocol is maintained, establishing in the minds of the terrorists (and of all others who consider the political use of violence) that the government will not allow major outcomes to be influenced by the use of violence.

Perhaps the legal rules underpinning the prohibition on negotiations with terrorists should thus be re-looked. As Glennon points out, we should avoid allowing what were once working rules to become paper rules, by adapting institutions and states to the new realities and new

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<sup>69</sup> Toros, *supra* note 47

relations of the world. After all, international legal regimes and rules pertaining to international security are, at best, epiphenomenal, rather than autonomous and independent determinants of state behavior. Instead, they are the products of broader influences that mould behavior.<sup>70</sup>

The question of whether there has been a reification of state security in much of terrorism scholarship that has come at the expense of communication and negotiation addressing actual or perceived grievances<sup>71</sup> can perhaps be addressed by UN Resolution in March 1987. The moral duty not to legitimize violence is counter-balanced by the moral duty of intervening, as articulated in the Resolution. This Resolution categorically condemned all hostage-taking regardless of the motivation, but also asked governments to take all necessary measures to put an immediate end to confinement of victims. This is also a legal solution to the legal problems created by countries trying to comply with UNSC Resolution 1373 and 2199, because this legal duty to intervene has been formalized by a UN Resolution in March 1987. This resolution not only condemns hostage-taking, whatever the motivations may be, but requires governments to take all necessary measures to put an immediate end to the confinement.

Indeed, Israel has utilized this notion of a moral duty to justify its large prisoner exchanges. The Israeli Ministry of Foreign Affairs has argued that doing so is “an expression of Israel’s deep reverence for human life and of its respect for the fallen. This principle stems from Israel’s sense of morality as well as from Jewish ethics. It is a demonstration of Israel’s moral and physical strength.” Clearly, the moral dilemma is not one-dimensional, but is a complex confluence of many flows of moral beliefs that may produce different moral outcomes. As Miller argues, “negotiating with terrorists is an ethical perspective that is based on humanistic precepts that place the saving of lives and the cessation of bloodshed as the highest priority.”<sup>72</sup>

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<sup>70</sup> Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (2003), at 30

<sup>71</sup> Harmonie Toros and Ioannis Tellidis, *Editor’s introduction: Terrorism and peace and conflict studies: investigating the crossroads*, 6 CRITICAL STUD. TERRORISM 1 (2013), at 3

<sup>72</sup> Miller, *supra* note 1, at 177

As Ryn articulates, “beyond all good laws and rules may be discerned the transcendental purpose of civilization.” That end has to be respected and furthered even in the most foreboding and adverse context. Under such circumstances, a legalistic obedience to law and due process may not be the best option for those who seek to defend that civilization, on moral grounds. On the contrary, in high-risk hazardous situations, government leaders may be compelled by a moral imperative to “break the law to better protect the state”, but with at least some semblance of “lawabidingness”, so that the centrally importance principle will not be undercut too much. To continue to honor the rule and letter of the law, even under the pressures of war or espionage, the society may therefore anticipate and outline the conditions under which certain laws can be set aside for a higher moral purpose. It may be difficult to encapsulate all moral needs within the network of rules that a body of law establishes, but this does not make the endeavor any less necessary.<sup>73</sup>

## **Part V: Conclusion**

What this essay has demonstrated is that diplomacy theory should adopt a more nuanced stance toward the issue of negotiating with terrorists. Instead of taking a blanket position against negotiations, governments can have more measured responses, that are morally and legally coherent.

By only providing functional and strategic reasonings to shore up the claim to negotiate, governments do themselves a disservice, because they are then susceptible to claims of opportunism. A Machiavellian conception of states would not care for this consideration, but as shown in the moral and legal reasonings provided for not negotiating with terrorists, states have at minimum an interest in appearing to abide by some form of moral conduct. Instead of

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<sup>73</sup> Ryn, *supra* note 39, at



demarcating superficial limits to ethical behavior in foreign policy, this essay provides a moral and legal rationale for negotiating with terrorists.