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# Terrorism and Law of Armed Conflict: A Critical analysis of Judicial Responses on the Status of Terrorists in Context of Hamdan vs. Rumsfeld (2006)

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## ABSTRACT

*The primary unyielding endeavour of this paper, as shall be seen, was to bring together two complementary lenses on how democracies confront terrorism: on one hand the law's restraints and on the other, the imperatives of state security. On the legal side, we see that Hamdan v Rumsfeld (2006) forced a sober reckoning in the United States about military commissions and Guantánamo: the Supreme Court made plain that even those accused of membership of al-Qaeda remain entitled to the basic guarantees of the rule of law and to minimum standards of international humanitarian law. On the security side, we shall see that the 26/11 Mumbai attacks — a coordinated three-day onslaught that scarred India's civic life and tested its sovereignty — demonstrate the devastation that non-state actors can wreak on open societies. The trial of Ajmal Kasab, the single surviving attacker, crystallised a difficult question for policy and law alike: when do acts of terrorism amount to a form of warfare against the state, and what punitive and preventative measures are proportionate and effective? Taken together, these cases expose a stark dilemma for democracies: how to keep people safe and deliver justice without ever legitimising those who traffic in violence. We, irrevocably and irreplaceably contend that abandoning legal safeguards or bowing to coercion are both false choices — neither secures the public in the long run. Lasting security, in our view, rests on three pillars: a disciplined legal architecture that yields defensible verdicts, decisive and proportionate state action to prevent further harm, and an unambiguous refusal to recognise or reward those who target the innocent.*

**Keywords:** *Terrorism and Counterterrorism, Rule of Law, Sovereignty and Security, International Humanitarian Law.*

## I. INTRODUCTION

Terrorism has always unsettled the fragile balance between liberty and security, compelling

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states to ask difficult questions about how far they can go to protect their citizens without undermining the very principles they stand for. In recent decades, this challenge has become sharper. Unlike traditional wars fought between nations, or pitched skirmishes as seen in the likes of the Doklam Faceoff or the clash in the Galwan Valley or the more recent Operation Sindoor, the scourge of terrorism refuses to respect boundaries, side-lines the generally accepted Rules of Engagement (ROE), ignores the rules of combat, and often takes aim at the most vulnerable—ordinary civilians and non-combatants in some of the gross blatant disregard of the tenets of International Humanitarian Law and its ancillary Geneva Conventions. It straddles, often blurs and grossly desecrates the line between crime and war, making it difficult for governments to decide whether it should be answered in the courtroom, or on the battlefield, or through policy-making *modus operandi* at the highest level.

Terrorism is not an abstraction; it is a method of coercion that selects the unarmed as its first target and dares the state to flinch. In the post-9/11 decades, democratic governments have had to decide how to protect their citizens without diluting the very authority that makes protection possible. Two moments frame this inquiry. The first is the American legal reckoning in *Hamdan v. Rumsfeld* (2006)<sup>3</sup>, where the Hon'ble U.S. Supreme Court held that improvised military commissions set up for Guantánamo detainees were unlawful because their “structure and procedures” violated both the Uniform Code of Military Justice and **Common Article 3**<sup>4</sup> of the Geneva Conventions. The point was simple and hard: even when confronted by terrorists, the state must fight within the law — because that is where it is strongest.

The second is India's lived experience of mass-casualty attacks. In Gurdaspur, Punjab back in 2015, gunmen in army fatigues opened fire on a bus<sup>5</sup> before storming a police station<sup>6</sup>; five live IEDs were discovered wired to the Amritsar–Pathankot railway line<sup>7</sup>, a calculated attempt to magnify civilian harm<sup>8</sup>. The following year, Pathankot, Punjab back in 2016 again saw a day-long assault on the Pathankot Air Force base, with militants using assault rifles, grenades and

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<sup>3</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (majority reasoning on UCMJ and Common Article 3), <https://supreme.justia.com/cases/federal/us/548/557/>

<sup>4</sup> Justice Breyer concurrence summarising why the commission “is unauthorized”, <https://www.law.cornell.edu/supct/html/05-184.ZC1.html>

<sup>5</sup> Barry, Ellen (27 July 2015). "Gunmen in India Kill at Least 5 in Attack on Bus and Police Station". *The New York Times*.

<sup>6</sup> "Terrorist attack in Punjab, Terror attack in Punjab, Terror attack in Punjab Gurdaspur district". *The Times of India*. 27 July 2015.

<sup>7</sup> Times of India (2015): five IEDs wired to tracks near Parmanand railway station, Amritsar–Pathankot section, <https://timesofindia.indiatimes.com/city/chandigarh/5-ieds-found-on-amritsar-pathankot-rail-route/articleshow/48244875.cms?>

<sup>8</sup> Indian Express (2015): IEDs found on rail bridge near Dinanagar, Amritsar–Pathankot route, <https://indianexpress.com/article/india/india-others/ieds-found-on-rail-track/?>

IEDs<sup>9</sup>; seven Indian personnel and a civilian were killed as the state fought room-to-room to protect strategic assets on its own soil<sup>10</sup>. These were not “messages”; they were deliberate attempts to kill Indians and to test the state’s resolve.

Nor was the “War on Terror” ever geographically narrow. By the early 2020s, U.S. counter-terrorism activities (from strikes to advise-and-assist missions) touched around 78 countries, with budgetary costs in the multi-trillion range<sup>11</sup> depending on counting method and horizon (e.g., \$6.4T by 2019, higher once veterans’ care and interest are included)<sup>12</sup>. The global picture is therefore not merely legal or moral; it is logistical and fiscal<sup>13</sup>, and it attests to the scale of the challenge that constitutional states set themselves when they refuse to let terrorism set the terms<sup>14</sup>.

This paper looks at two very different moments that shed light on these tensions. The first is a judicial moment: the decision of the Hon’ble United States Supreme Court in *Hamdan v. Rumsfeld* (2006). Here, the Hon’ble Court was asked whether military commissions created to try Guantanamo detainees could bypass established law. In its ruling, the Hon’ble Court reaffirmed that even those accused of terrorism, and even in times of national fear, are still entitled to the protections of law and the basic guarantees of fairness that define a civilised society. The second moment comes from a very different setting: the 2008 Mumbai attacks.

Over the course of three days, ten armed men turned India’s financial capital into a blood-soaked battleground<sup>15</sup>, a slaughterhouse where countless innocents, men, women, even children and in some cases even stray dogs were mercilessly killed off under the tenets of religiously nuanced radical jihadist fundamentalism, leaving hundreds dead and the country shaken to its core<sup>16</sup>. The capture and trial of Ajmal Kasab, the only surviving attacker, sparked fierce debate

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<sup>9</sup> Pathankot (2016): official MoD/PIB note on the air-base attack and response, <https://www.pib.gov.in/newsite/PrintRelease.aspx?relid=134119&utm>

<sup>10</sup> TIME (2016): international reaction and casualty update; U.S. urging action against militant groups. <https://time.com/4167302/india-pathankot-airbase-pakistan-us-ujc-kashmir/>

<sup>11</sup> Costs of War Project (Brown University): geographic reach of U.S. post-9/11 counter-terror operations to ~78 countries (2021–23), <https://watson.brown.edu/costsofwar/figures?>

<sup>12</sup> Costs of War (budgetary): multi-trillion U.S. post-9/11 war spending; see overview papers (2021, 2023), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/Costs%20of%2020%20Years%20of%20Iraq%20War%20Crawford%2015%20March%202023.pdf?>

<sup>13</sup> Axios (2019) summary of Costs of War estimate: \$6.4 trillion to that point, <https://www.axios.com/2019/11/20/american-taxpayers-6point5-trillion-post-911-conflicts?>

<sup>14</sup> Costs of War (budgetary): multi-trillion U.S. post-9/11 war spending; see overview papers (2021, 2023), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War\\_U.S.%20Budgetary%20Costs%20of%20Post-9%2011%20Wars\\_9.1.21.pdf?](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_U.S.%20Budgetary%20Costs%20of%20Post-9%2011%20Wars_9.1.21.pdf?)

<sup>15</sup> Jaishankar, K. (2007). "India's 26/11: From Communal Violence to Communal Terrorism to Terrorism". *International Journal of Criminal Justice Sciences*. 2 (2). Archived from the original on 9 October 2017.

<sup>16</sup>Bhandarwar, A. H.; Bakhshi, G. D.; Tayade, M. B.; Chavan, G. S.; Shenoy, S. S.; Nair, A. S. (2012). "Mortality pattern of the 26/11 Mumbai terror attacks". *The Journal of Trauma and Acute Care Surgery*. 72 (5): 1329–34,

over whether such attacks were acts of terrorism in the narrow sense or amounted to acts of war against the territorial integrity and state sovereignty of the Republic of India. Alongside this, the broader question arose: should states ever negotiate with groups that use terror as their weapon?

### (A) Research Questions

From these two accounts emerge two central questions that guide this paper-

- First, how do legal frameworks—domestic and international—set limits on the way states respond to terrorism?
- Second, where should the line be drawn when it comes to negotiating, or refusing to negotiate, with terrorist groups?

By placing the providence of legal reflections from *Hamdan v. Rumsfeld*<sup>17</sup> alongside the stark security realities of Mumbai, this paper aims to show how democracies everywhere wrestle with the same dilemma: how to confront terrorism with strength, without losing sight of justice.

The wider backdrop matters. Guantánamo has held 779 men and boys since 2002; as of early 2025, 15 remain, most held for well over 15 years<sup>18</sup>. The military commissions, touted as the bespoke answer to an exceptional threat, have produced only a handful of convictions in two decades — many via plea agreements and several overturned on appeal<sup>19</sup>; by 2024–25, authoritative tallies put total convictions at roughly eight to nine, with only one final, and nine active cases<sup>20</sup> still grinding through pre-trial<sup>21</sup>. The numbers speak to institutional drift: a system designed to be swift and decisive has been neither.

The position of this paper is straightforward: a democratic state best protects its people when it is legally disciplined, operationally uncompromising, and morally unambiguous about those who murder civilians.

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discussion 1334. [doi:10.1097/TA.0b013e31824da04f](https://doi.org/10.1097/TA.0b013e31824da04f). ISSN 0022-5282. PMID 22673262. S2CID 23968266.

<sup>17</sup> *ibid*

<sup>18</sup> U.S. House Oversight (2016): opening statement noting 779 total Guantánamo detainees since 2002; 80 remaining at the time, <https://www.congress.gov/event/114th-congress/house-event/LC46001/text?>

<sup>19</sup> Center for Constitutional Rights (2025): 15 detainees remain; 9 active commission cases; parity of 9 deaths and 9 convictions over two decades, <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/guant-namo-numbers?>

<sup>20</sup> Center for Victims of Torture (2024): military commissions have nine total convictions, most via pleas; only one final after reversals, <https://www.cvt.org/what-we-do/advocating-for-change/legacy-of-us-torture/the-failed-military-commissions/?>

<sup>21</sup> American Bar Association (2023): in the prior decade, only two convictions (both pleas); older convictions overturned; persistent pre-trial stagnation, [https://www.americanbar.org/groups/law\\_national\\_security/publications/aba-standing-committee-on-law-and-national-security-60-th-anniversary-an-anthology/another-decade-of-military-commissions/?](https://www.americanbar.org/groups/law_national_security/publications/aba-standing-committee-on-law-and-national-security-60-th-anniversary-an-anthology/another-decade-of-military-commissions/?)

## II. CASE STUDY: THE 2008 MUMBAI ATTACKS

The fateful evening of 26<sup>th</sup> November, 2008, marked the very first day of the upcoming twelve coordinated shooting and bombing attacks in the city of Mumbai. The first event reported, occurred at 2000hrs. when ten men arrived in inflatable speedboats at Colaba.

Subsequently, one and a half hour later, the first attack took place at Chhatrapati Shivaji Terminus where Ajmal Kasab and Ismail Khan open fired at the crowd, leaving 58 dead and 104 injured. Ajmal, however, was caught alive and became the only survivor of the group which caused this attack.

Thereon, almost in the same time frame, an attack was reported in Leopold Café, Colaba, where open firing killed ten people, including foreigners, between 2130hrs. to 2148hrs. This was the onset of the night that would soon see a hostage situation in The Taj Palace Hotel and the Oberoi Trident where not only Indians, but also foreign delegation of various countries for a meeting was residing at that moment.

Once these attacks ended and the interrogation began<sup>22</sup>, Ajmal Kasab soon confessed that the group responsible was Lashkar-e-Taiba, which functioned within Pakistan and the ten individuals had come from Pakistan itself. What this examination soon began to interrogate was whether this was truly an act of terrorism or an ingenious act of war by Pakistan?

The perpetrator in the case of Mr Ajmal; Mr Ajmal Kasab alias Abu Mujahid Vs. State of Maharashtra was referred to as the accused (A1) along with nine other terrorists who had been killed during the attack (DA's), and then as a terrorist<sup>23</sup>. He was found guilty on the grounds of violation of sections 121, 121A and 122 of the Indian Penal Code. Therefore, the state charged him of – “Waging war against the Government of India, conspiracy and terrorist attack on Mumbai – it is to be noted that expressions and offences against the state and in like manner and by like means as a foreign enemy would do held as the expression “Government of India” as appears in section 121 of the erstwhile IPC (Indian Penal Code) must be held to the state or interchangeably the people of the country as the repository of the sovereignty of India which is manifested and expressed through the elected government<sup>24</sup>. Any attack on the government by A1 and all DA's is always armed towards the citizens of the Republic of India.

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<sup>22</sup> Bjørge, Tore. 2005. *Root Causes of Terrorism: Myths, Reality and Ways Forward*. London; New York: Routledge.

<sup>23</sup> Hoffman, Bruce. 2006. *Inside Terrorism*. New York: Columbia University Press.

<sup>24</sup> Pape, Robert Anthony. 2006. *Dying to Win: The Strategic Logic of Suicide Terrorism*. New York: Random House Trade Paperbacks.

### **The Judgement after Kassab's Trial**

What matters and was stated in the above judgement, however, is that the attack was aimed at India and its Indians – it was by foreign nationals which was a proven fact of the case. Moreover, foreigners were killed on Indian soils in places like Leopold Café and The Taj Palace Hotel to embarrass the nation and its elected government. This, in light of the above-mentioned point, highlights the absence of a coincidence in the attack and the presence of foreign nationals in larger number than usual scenario during this particular attack<sup>25</sup>.

The conspiracy, in furtherance of which the attack was made, was, inter alia, to take a hit at India by targeting its financial capital – Mumbai. This, would not only hinder with the functioning of the city but almost generate communal tensions and create internal strife and insurgency. This could also be interpreted as a silent warning for India to back down from its claim on Kashmir Valley and to dictate its foreign relations with other countries<sup>26</sup>.

The trial court<sup>27</sup> sentenced the appellant to death and the higher court confirmed this sentence as the case had not only terrorised the Indians but also had shocked their collective conscience. The number of policemen and security forces that were martyred during these attacks was higher compared to any other case seen before. The judgement also stated that the offence committed by the appellant shows a degree of cruelty, brutality and depravity which is showcased in very rare cases<sup>28</sup>. The appellant and his co-conspirators used highly lethal weapons on the common citizenry and explosives<sup>29</sup> which targeted the heart of the city. It has a magnitude of unprecedented enormity on all fields. In terms of loss of life and property and more importantly the traumatising effect<sup>30</sup>, this case stands alone or at least it is the very rarest of rare to come before the court since the birth of the republic of India.

### **An Act of War or Terrorism?**

But before the question of what kind of act this incident should be is the question as to what really terrorism is and how does its definition suit in with the act carried out by those terrorist group sponsored ten men.

Firstly, according to Alex P Schmid<sup>31</sup>, one definition which thoroughly describes this incident is – “*At the origin of terrorism stands terror – instilled fear, dread, panic or mere anxiety -*

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<sup>25</sup> English, Richard. 2010. *Terrorism: How to Respond*. Oxford: Oxford University Press.

<sup>26</sup> Graaf, Beatrice de. 2013. *Evaluating Counterterrorism Performance: a Comparative Study*. London: Routledge.

<sup>27</sup> [https://www.sci.gov.in/pdf/SupremeCourtReport/2012\\_v8\\_pii.pdf](https://www.sci.gov.in/pdf/SupremeCourtReport/2012_v8_pii.pdf)

<sup>28</sup> Horgan, John. 2005. *The Psychology of Terrorism*. London; New York: Routledge

<sup>29</sup> <https://indiankanoon.org/doc/1949191/>

<sup>30</sup> <https://indiankanoon.org/doc/1661760/>

<sup>31</sup> <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/schmid-terrorism-definition/html>

*spread among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act – it's shocking brutality, lack of discrimination, dramatic or symbolic quality and disregard of the rules of warfare and the rules of punishment”*

Was there a situation of “terror” present? Factually and evidently, yes. The hostage situation in one of the busiest hotels in the world, the open firing at one of the most crowded places in the city and a landmark destination, is an evidence to the answer. Any hostage situation is usually due to – 1. An intent of seeking or blackmailing the government into fulfilling a demand of the group or individual or 2. To simply cause terror amongst the society. As wanted, there was panic, and there was fear amongst those who were captured and even those who had been evacuated in time. The act clearly disregarded any rules of warfare and the rules of punishment and came out as a direct, unethical hit at a country. Its brutality speaks of itself with the evidence of open firing at unarmed citizenry<sup>32</sup>.

The second definition states – *“The main direct victims of terrorist attacks are in general not any armed forces but are usually civilians, non-combatants or other innocent and defenceless persons who bear no direct responsibility for the conflict that gave rise to acts of terrorism.”*

Once the incidents, their facts and their venues are listed, these were the places most surrounded by civilians and least surrounded by government officials or even near such establishments<sup>33</sup>. A hotel, a train terminus, a café and a residential colony were the prime targets of this group during these coordinated attacks. The hostages were clearly unarmed and were not in a position to combat such an attack, for example, the attack in Nariman Point, a residential colony where middle class individuals which included children and women were taken hostage for the pure purpose of terrorising these individuals<sup>34</sup>. These individuals evidently to the latter half of the definition<sup>35</sup> had nothing to do with the terrorist group, had no link whatsoever to the situation in Kashmir and were no one in power to change the foreign relations.

The same reasoning may also be applied to another definition<sup>36</sup> – *“The immediate intent of acts of terrorism is to terrorize, intimidate, antagonize, disorientate, destabilize, coerce, compel, demoralize or provoke a target population or conflict party in the hope of achieving from the resulting insecurity a favourable power outcome, e.g. obtaining publicity, extorting ransom money, submission to terrorist demands and/or mobilizing or immobilizing sectors of the*

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<sup>32</sup> Gaor, Boaz. 2007. *The Counter-terrorism Puzzle: a Guide for Decision Makers*. Piscataway, NJ: Transaction Publishers.

<sup>33</sup> Horgan, John. 2005. *The Psychology of Terrorism*. London; New York: Routledge.

<sup>34</sup> *ibid*

<sup>35</sup> <https://devgan.in/ipc/section/121/>

<sup>36</sup> [https://www.sci.gov.in/pdf/SupremeCourtReport/2012\\_v8\\_pii.pdf](https://www.sci.gov.in/pdf/SupremeCourtReport/2012_v8_pii.pdf)

public.”

### **Aftermath- Persona non Grata**

This act was a direct jibe at the citizens of one of the most populated cities in the world. Also, the financial capital of the country saw a subsequent downfall in tourism and investments over the preceding months. So, the question whether this was purely an act of terrorism or something far fetched such as an act of war is debatable.

In 2001, when the American soil was attacked by a group functioning from within Pakistan – The Al Qaeda<sup>37</sup>, its then head of state – President Bush wasn't the only one to label the act as an act of war, but also 86% of the nation's readers in a survey carried out by Time<sup>38</sup>. The attacks were much similar to the 2008 attacks on the Indian soil in terms of trauma and the kind of jibe it took at the population as well as the country's government.

Therefore, by definition, this was clearly an act of terrorism but factually, should have been considered as an act of war on the soil of India, as reasonably debated many a times by critics. For when a country's most vulnerable section – the unarmed citizenry is targeted to disrupt its functioning and compel it of a group's wrongful demands by terrorising and hurting the sentiments and causing possible communal strife, it is a warning and an act challenging the very sovereigntist outlook of the nation.

### **III. NEGOTIATION WITH TERRORISTS: POLICY DILEMMA**

*“We don't negotiate with terrorists”*

- Mrs. Golda Meir, 4th Prime Minister of Israel

The above words have been spoken by high profile influential, the most efficacious governments and has remained a stringent policy of the greatest ever nations. During the 2001 attacks, the Bush administration was the first ever recorded government to put it across that they, “under no circumstances, would ever negotiate with terrorists”, Vladimir Putin has been recorded saying that “Russia does not negotiate with terrorists, it destroys them”<sup>39</sup>, Ronald Regan, during his 1980s campaign maintained a high resolve of becoming a President who

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<sup>37</sup> Crenshaw, Martha. 2011. *Explaining Terrorism: Causes, Processes, and Consequences*. London; New York: Routledge

<sup>38</sup> Alexander, Yonah. 2006. *Counterterrorism Strategies Successes and Failures of Six Nations*. Washington, D.C.: Potomac Books.

<sup>39</sup> Bruce Hoffman, *Inside Terrorism*, 2nd ed., New York: Columbia University Press, 2006; Walter Reich, ed., *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind*, Washington, D.C.: Woodrow Wilson Center Press, 1998; Marc Sageman, *Understanding Terror Networks*, Philadelphia, Pa.: University of Pennsylvania Press, 2004; Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill*, New York: HarperCollins Publishers, 2003; Martha Crenshaw, “The Causes of Terrorism,” in Charles W. Kegley, ed., *International Terrorism: Characteristics, Causes, Controls*, New York: St. Martin's, 1990.

would “not negotiate the rights of his men, for a terrorist”.

### **Challenges to Negotiation with Terrorists**

The first negative of negotiating with a terrorist, however, lies in the negotiation itself. In plain, simple words, it's a challenge which not many have been able to overcome<sup>40</sup>.

The second challenge of negotiation comes from the other party – not all terrorist groups risk the negotiation<sup>41</sup>. This is in part due to the government understanding of rationality and in part due to how far a terrorist group's views on religion, social welfare and government leadership – the reason for their existence<sup>42</sup> – differ from the government which is negotiating with them. The role played by local and academic perception of rationality as well as the impact of political and religious history can be seen in the fact that Western states could negotiate with the IRA<sup>43</sup>, but not Al Qaeda<sup>44</sup>, “This distinction between supposedly rational terrorists and irrational ones, however, is often in the eye of the beholder. If the IRA and ETA appear to be more rational<sup>45</sup> than, say, al Qaeda, it is because their goals -- nationalism and separatism<sup>46</sup> -- have a long history in Western political thought”, and “Al Qaeda's aim of re-creating an Islamic empire<sup>47</sup> is no more absolutist (or realistic) than was imposing a nationality on a reluctant population or turning West Germany into a Marxist workers' republic. The difference is that Al Qaeda's ideology has not become part of the twenty-first century's DNA and thus remains difficult to rationalize”<sup>48</sup>.

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<sup>40</sup> Ehud Sprinzak, “Rational Fanatics,” *Foreign Policy*, No. 120, September–October 2000; Pape (2005); Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven, Conn.: Yale University Press, 2002; David A. Lake, “Rational Extremism: Understanding Terrorism in the Twenty-First Century,” *Dialogue IO*, Vol. 1, No. 1, January 2002; Andrew Kydd and Barbara F. Walter, “The Strategies of Terrorism,” *International Security*, Vol. 31, No. 1, Summer 2006; Robert Trager and Dessimlava P. Zagorcheva, “Deterring Terrorism: It Can Be Done,” *International Security*, Vol. 30, No. 3, Winter 2005–2006,

<sup>41</sup> Jeffrey Ian Ross and Ted Robert Gurr, “Why Terrorism Subsides: A Comparative Study of Canada and the United States,” *Comparative Politics*, Vol. 21, No. 4, July 1989; Dershowitz (2002); Pape (2005); Lake (2002); and Kydd and Walter (2006).

<sup>42</sup> *Freedom in the World 2007: The Annual Survey of Political Rights and Civil Liberties*, New York: Freedom House, 2007.

<sup>43</sup> Alexander L. George and Timothy J. McKeown, “Case Studies and Theories of Organizational Decision Making,” in Robert F. Coulam and Richard A. Smith, *Advances in Information Processing in Organizations: A Research Annual*, Vol. 2, Greenwich, Conn.: JAI Press, 1985,

<sup>44</sup> Audrey Kurth Cronin, *Ending Terrorism: Lessons for Defeating al-Qaeda*, Abingdon, Oxon: Routledge for International Institute for Strategic Studies, 2008; Martha Crenshaw, “Why Violence Is Rejected or Renounced: A Case Study of Oppositional Terrorism,” in Thomas Gregor, ed., *A Natural History of Peace*, Nashville, Tenn.: Vanderbilt University Press, 1996; U.S. Institute of Peace, *How Terrorism Ends*, Washington, D.C., 1999.

<sup>45</sup> Barry Posen, “The Struggle Against Terrorism: Grand Strategy, Strategy, and Tactics,” *International Security*, Vol. 26, No. 3, Winter 2001–2002

<sup>46</sup> Coolsaet, Rick. 2011. *Jihadi Terrorism and the Radicalisation Challenge European and American Experiences*. Farnham, Surrey; Burlington, VT: Ashgate.

<sup>47</sup> Gunaratna, Rohan. 2002. *Inside Al Qaeda: Global Network of Terror*. New York: Berkley Books

<sup>48</sup> Bergen, Peter L. 2012. *Manhunt: The Ten-year Search for Bin Laden from 9/11 to Abbottabad*. New York: Broadway Paperbacks.

Therefore, even though there are groups which can sustain the negotiation, the demands of the terrorists, even after negotiation are unethical and against the very existence of the government in power.

### **Risks to Negotiation**

Coming back to the risk involved in the negotiation, in 2001, George W. Bush administration paid a ransom of \$300,000<sup>49</sup> to a radical Islamist group, linked to Osama Bin Laden later, in the Philippines that was holding two American missionaries, a married couple, captive<sup>50</sup>. Alas, however, the man was killed, his wife was shot but rescued in time, even after the government paid the money as negotiation for their life. So, an American President ended up financing terrorist operations and overseeing a failed military mission<sup>51</sup>. It's a textbook situation, most negotiation work on fear, of the government, not the terrorist groups, they are the ones who have the reigns in their hands, in most circumstances. When it's inconvenient, the reigns are pulled, hostages killed, anyway. At the height of terrorist activity<sup>52</sup> from the Irish Republican Army, the British Prime Minister Margaret Thatcher vowed to "never negotiate with terrorists"<sup>53</sup>. Likewise, after the 9/11 attacks in America, President George Bush vowed to "never negotiate with terrorists because it would only encourage them towards more violence"<sup>54</sup>. Similar claims have been made by many world leaders, including leaders from Turkey, Spain, and Columbia. But world leaders aren't the only ones who make this claim. Paul Wilkinson, a well-known scholar, after attacks in Egypt in 1997 that resulted in the deaths of dozens of tourists, stated that it would be 'totally unacceptable to open discussions with the responsible terrorists'. Many scholars agree with his assessment and feel that negotiations only incite further violence. Why does this aversion to negotiate exist<sup>55</sup>? Many of those that argue for truth of this assumption have stated that negotiating with terrorists legitimizes them and, in

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<sup>49</sup> Attacking Terrorism: Elements of a Grand Strategy, Washington, D.C.: Georgetown University Press, 2004; and Paul R. Pillar, Terrorism and U.S. Foreign Policy, Washington, D.C.: Brookings Institution Press, 2001.

<sup>50</sup> David Rapoport argued that military defeat of terrorists in such countries as Lebanon caused the end of what he called the third wave of terrorism in the 1980s. See David C. Rapoport, "The Fourth Wave: September 11 in the History of Terrorism," *Current History*, Vol. 100, December 2001, pp. 419–424, p. 421; David C. Rapoport, "Terrorism," in Lester R. Kurtz and Jennifer E. Turpin, eds., *Encyclopedia of Violence, Peace, and Conflict*, San Diego, Calif.: Academic Press, 1999, pp. 497–510; and Rapoport (2004, pp. 3–4).

<sup>51</sup> *Ibid*

<sup>52</sup> Guide to the Analysis of Insurgency (1986, p. 2) and U.S. Joint Chiefs of Staff, Department of Defense Dictionary of Military and Associated Terms, Washington, D.C., joint publication 1-02, ongoing since 1972.

<sup>53</sup> Douglas Woodwell, "The 'Troubles of Northern Ireland': Civil Conflict in an Economically Well-Developed State," in Paul Collier and Nicholas Sambanis, eds., *Understanding Civil War: Evidence and Analysis*, Vol. 2: Europe, Central Asia, and Other Regions, Washington, D.C.: World Bank, 2005, pp. 161–190.

<sup>54</sup> George W. Bush, State of the Union, Washington, D.C.: White House, 2002.

<sup>55</sup> David C. Rapoport, "Fear and Trembling: Terrorism in Three Religious Traditions," *American Political Science Review*, Vol. 78, No. 3, September 1984

the process, weakens democratic governments, leading to continued terrorist actions<sup>56</sup>.

It is important to test how far these negotiations go, how risky they are, and how much power they give to the terrorist organisation involved<sup>57</sup>. As stated above, if it still risks the lives of the hostages, if it legitimises the terrorists, if it leads to copycat acts of terrorism, negotiation is putting up with the demands, knowing the importance these groups are being given<sup>58</sup>.

As a hypothetical situation, if the claims of terrorists were never negotiated with in the first place, the risks were never taken, and after many failed attempts, the terrorist organisation would have learnt that no matter how many hostages taken, the government will not legitimise their claim<sup>59</sup>. It seems like a very ambitiously vicious plan, but at the same time, so was negotiating with a terrorist group in the first place.

### **Authors Remarks**

In conclusion, terrorism has risen to the point where it is right now because someone chose to give into its claims. The stakes are high when these negotiations take place, they seem like a last resolve, true. But negotiations bear fruit for only the time being, their long-term effect, isn't anything fruit bearing. It is essential that during such negotiations, the governments learn what risks these negotiations possess later on. Terrorists never negotiate if their demands could be fulfilled the right way, for example, Greta Thunberg didn't "turn to a terrorist organisation to demand declaration of climate emergency", therefore, a right cause doesn't require terrorism, it doesn't arise for the right reasons, therefore, it must not be legitimised by risking the right, and the rights of the people.

## **IV. LEGAL ANALYSIS: HAMDAN V. RUMSFELD (2006)**

*Hamdan v. Rumsfeld*<sup>60</sup> sits at the point where and can be understood as a wartime urgency met the hard edge of law. The individual in question here, Salim Ahmed Hamdan, a Yemeni national detained at Guantánamo Bay, Cuba and alleged to have served as Osama bin Laden's driver during his escape from the Tora Bora Mountains, challenged his trial before specially constituted military commissions created by executive order. In a 5–3 decision on 29<sup>th</sup> June

<sup>56</sup> Edward N. Muller, "Income Inequality, Regime Repressiveness, and Political Violence," *American Sociological Review*, Vol. 50, No. 1, February 1985

<sup>57</sup> James D. Fearon and David D. Laitin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review*, Vol. 97, No. 1, February 2003

<sup>58</sup> Max Abrahms, "Why Terrorism Does Not Work," *International Security*, Vol. 31, No. 2, Fall 2006, pp. 42–78; and Kydd and Walter (2006)

<sup>59</sup> Paul R. Pillar, *Negotiating Peace: War Termination as a Bargaining Process*, Princeton, N.J.: Princeton University Press, 1983

<sup>60</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (majority opinion; UCMJ and Common Article 3 holdings), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep548/usrep548557/usrep548557.pdf>

2006, the Hon'ble U.S. Supreme Court held<sup>61</sup> and opined that the commissions, as designed, lacked lawful authority because their structure and procedures violated the Uniform Code of Military Justice (UCMJ)<sup>62</sup> and unequivocally failed to meet the minimum guarantees demanded by **Common Article 3** of the Geneva Conventions<sup>63</sup>. In plain terms: even when confronting terrorists, the state must prosecute within a lawful framework—because that is where the state's strength is most durable.

### **Noteworthy Issues**

#### **Consonance with the Uniform Code of Military Justice (UCMJ)**

The United States Congress established an integrated system of military justice; apparently the Guantánamo commissions sat outside it. The Hon'ble United States Supreme Court stressed vehemently that where the executive innovates special tribunals, those bodies must be “regularly constituted” and broadly align with court-martial standards unless a specific, lawful departure is justified<sup>64</sup>. The government's gross departures—on admissibility of evidence, confrontation, and the use of classified material—were not adequately grounded in statute or the law of war, and thus failed the UCMJ's requirements<sup>65</sup>.

#### **The Significant Pertinence of Common Article 3 of the Geneva Conventions**

The **Common Article 3** of the Geneva Conventions<sup>66</sup> binds parties to Non-international armed conflicts under International Humanitarian Law and, at minimum outset, forbids “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized peoples.” The Hon'ble Court read this baseline as applying at Guantánamo Bay and found the commissions wanting. This was not an exercise in futile charity; it was the imposition of the law's floor in conflict with Non-state actors.

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<sup>61</sup> *ibid*

<sup>62</sup> Justia summary and key holding (“structure and procedures violate both the UCMJ and the Geneva Conventions”), <https://supreme.justia.com/cases/federal/us/548/557/>

<sup>63</sup> Common Article 3 text (ICRC/UN reproductions: “regularly constituted court... judicial guarantees”), <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3> <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-3>

<sup>64</sup> HAMDAN v. RUMSFELD, SECRETARY OF DEFENSE, et al. certiorari to the united states court of appeals for the district of columbia circuit, <https://tile.loc.gov/storage-services/service/ll/usrep/usrep548/usrep548557/usrep548557.pdf>

<sup>65</sup> On Petition for Review from the United States Court of Military Commission Review, <https://www.mc.mil/Portals/0/pdfs/Hamdan%20II%2C%2016%20Oct%2012.pdf>

<sup>66</sup> The Practical Guide to Humanitarian Law, <https://guide-humanitarian-law.org/content/article/3/fundamental-guarantees/>

### **The Hon'ble Supreme Court's Decision**

The majority of the U.S. Supreme Court concluded the commissions “lack power to proceed” because their structure and procedures breached both the UCMJ and the Geneva Conventions comprehensively. Four Sitting Justices also indicated that “conspiracy,” as charged, was not clearly an offence triable by the established military commission under the law of war—an ambiguity that would later haunt the system, again and again. The upshot was pretty simple: if the United States of America wishes to try detainees, it must do so through regular courts-martial or lawfully constituted commissions that meet the law’s minimum guarantees.

### **Consequential Impact and Doctrinal Consolidation**

The point was driven home and realized better six years later. In *Hamdan (II)*, the Hon'ble D.C. Circuit vacated Hamdan's material support conviction on *ex post facto* grounds, underscoring particularly how ad hoc offences and procedures would not withstand appellate scrutiny as a whole. That decision as seen, alongside other appellate rulings, narrowed the entire consolidated range of charges safely triable by commission and amplified the message that legality is not a blatant luxury—it is the only path to enforceable accountability.

### **Landmark Significance**

International Humanitarian Protections under the Geneva Conventions Finally Extended to Non-State Actors.

The *Hamdan*<sup>67</sup> case did not romanticise detainees; it recognised that the state, any state, is strongest when it acts within the applicable yardsticks of law. By applying **Common Article 3** of the Geneva Conventions<sup>68</sup> to Guantánamo, the Hon'ble United States Supreme Court unyieldingly imposed the minimal judicial guarantees that distinguish a regularly constituted court from an improvised tribunal transparently. That legal floor travels with the state, even when the adversary is a clandestine, transnational network.

Prima Facie Judicial Oversight Reinforced in the “War on Terror.”

The decision—and its appellate progeny—reaffirmed that courts will police & monitor the boundaries of wartime criminal procedures. When the executive veers from legislation or the law of armed conflict, convictions will not stand the test of law. For a government committed to protecting its citizens and honouring its victims, a legally disciplined process is not a

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<sup>67</sup> ICRC Casebook summary (application of CA3 and UCMJ), <https://casebook.icrc.org/case-study/united-states-hamdan-v-rumsfeld>

<sup>68</sup> The Practical Guide to Humanitarian Law, Fundamental Guarantees, <https://guide-humanitarian-law.org/content/article/3/fundamental-guarantees/>

leviathan obstacle; it is the path to durable verdicts and credible punishment.

### **The Empirical Reality of Guantánamo Bay and its Commissions**

The Guantánamo Bay established project has been abysmal in scale and malnourished in yield, can be aptly described as woefully underperforming. Since 2002, 779 men and boys<sup>69</sup> have been detained at the base; as of January 2025, only 15 detainees<sup>70</sup> remain after a transfer of eleven Yemenis to Oman. These are not mere estimates; they are the headline numbers the U.S. government and major outlets now report as we speak and read this in a real time world scenario<sup>71</sup>.

In furtherance to that scale, the military commissions' progress has been rather disappointing. By mid-2024 to 2025, tallies and reliable figures place total convictions at about nine<sup>72</sup>, most achieved through plea agreements, with several overturned on appeal and only one final. The American Bar Association has noted that over the past decade there have been only two convictions<sup>73</sup>, by plea; other earlier convictions have been overturned. Even basic progress in the marquee high-profile prosecutions (e.g., the 9/11 trial) has come to a halt<sup>74</sup>, with plea negotiations swinging and dilly-dallying between tentative deals and political reversals. This is not "leniency"; it is institutional paralysis that leaves victims waiting and weakens deterrence.

### **Author's Note on The Stance**

The Author in all sincerity and in humble vehemence believes that, the stance requisitioned is unapologetically on the side of the state and the victims. It offers no sympathy for jihadist fundamentalist perpetrators of terrorism. The argument for legal discipline is not about them; it is about us—ensuring that those who target civilians are tried in forums strong enough to deliver judgments that last, and punishments that count.

### **Criticisms**

Two critiques have dominated unequivocally in particular, and both are ultimately about the

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<sup>69</sup> House Oversight hearing record (2016): cumulative 779 detainees, <https://www.congress.gov/event/114th-congress/house-event/LC46001/text>

<sup>70</sup> Current population (15 detainees) and January 2025 transfer of 11 Yemenis to Oman, <https://www.theguardian.com/us-news/2025/jan/06/yemeni-prisoners-guantanamo-oman-transfer>

<sup>71</sup> *ibid*

<sup>72</sup> Military commissions outcomes: ~9 total convictions, mostly pleas; several overturned; only one final, <https://www.cvt.org/what-we-do/advocating-for-change/legacy-of-us-torture/the-failed-military-commissions/>

<sup>73</sup> ABA analysis (2023): only two convictions in the prior decade, both pleas; earlier convictions overturned, [https://www.americanbar.org/groups/law\\_national\\_security/publications/aba-standing-committee-on-law-and-national-security-60-th-anniversary-an-anthology/another-decade-of-military-commissions/](https://www.americanbar.org/groups/law_national_security/publications/aba-standing-committee-on-law-and-national-security-60-th-anniversary-an-anthology/another-decade-of-military-commissions/)

<sup>74</sup> Divided US appeals court rejects plea deal for accused September 11 attacks mastermind, <https://www.reuters.com/legal/litigation/divided-us-appeals-court-rejects-plea-deal-accused-september-11-attacks-2025-07-11/>

effectiveness rather than the surrounding sentimentality. One, from security analysts and experts, is that *Hamdan* case unnecessarily arrested and bogged down the executive. Yet the related surrounding data shows quite the opposite picture here: legally fragile commissions have articulated and postulated few sustainable outcomes, while on the contrary ordinary U.S. Federal courts have tried hundreds and dozens of terrorism and other ancillary cases with quite the entrenched routine finality (a contrast beyond the scope of this section, but well documented otherwise). The other critique, from advocates and proponents of civil-liberties, is that the commissions remain structurally and policy wise deficient in their establishment despite the *Hamdan* case—an accusation borne out by the ever so narrow pipeline of convictions. On either account, the final lesson is ultimately convergent: build within the defined and demarcated landscaped hallmarks of law as given via legislative statutes, or watch the cases crumble.

## V. COMPARATIVE ANALYSIS – THE PERPETUAL BATTLE BETWEEN RIGHTS V. SECURITY

### **The Case of *Hamdan v. Rumsfeld*: Law Acted As a Constraint on Power**

The case of *Hamdan v. Rumsfeld* was never about sequestering mercy to al-Qaeda and its fundamentalist jihadist operators. It was about the supremacy of law upon power. The Hon’ble United States Supreme Court rejected President Bush’s ad-hoc military commissions, holding that their design violated both the Uniform Code of Military Justice and the baseline guarantees of **Common Article 3** of the Geneva Conventions.<sup>75</sup> These provisions should not be mistaken and apparently were not generous gifts to detainees—they were sacred constitutional guardrails meant to ensure that the executive does not act as judge, jury, and executioner. As Hon’ble Justice Breyer noted in concurrence in this case that, the commissions might have been lawful had the U.S. Congress clearly authorised them, but absent that legislative sanction, unilateral innovation was impermissible.<sup>76</sup> The point was not blatant sentimentality; it was the preservation of the providence of constitutional legitimacy even in wartime.

### **Mumbai 2008 and the Question of Negotiation: State Sovereignty under Siege**

The 2008 Mumbai attacks demonstrated in the starkest terms what religiously-motivated terrorism looks like when unleashed in a global city. Ten operatives from Lashkar-e-Taiba executed coordinated assaults across Mumbai, killing 166 people and injuring more than 300 over three days.<sup>77</sup> The attacks were not an “expression” to be understood or a grievance to be

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<sup>75</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

<sup>76</sup> *Id.* at 636 (Breyer, J., concurring).

<sup>77</sup> Gov’t of India, Ministry of Home Affairs, *Report on the 26/11 Mumbai Attacks* (2009).

met—they were a massacre. India’s response since has been one of hard security: fortifying intelligence capabilities, tightening maritime vigilance, and pressing for extraditions, most recently the extradition of Tahawwur Rana from the United States to face trial in India stands as a stark example.<sup>78</sup> In this framework, negotiation is not a viable option. To treat with terrorists is to validate their tactics and to erode the sovereign duty owed to citizens who rely on the state for protection.<sup>79</sup>

### **The Empirical Record on Negotiations with Terrorists**

The familiar refrain “*we do not negotiate with terrorists*” is sometimes interpreted as mere political posturing. Yet the record unquestionably demonstrates that the said principle rests not on rhetoric but on entrenched evidence. Negotiation—whether in the form of ransom, policy concessions, or gross tacit bargains—has irreplaceably and consistently proved counterproductive and counter-policy, enlarging rather than diminishing the incentive for terrorism and its perpetrators. They have simply raised the price on their own citizens’ lives and that of the general citizenry and emboldened the very networks that prey upon them. Unfortunately, this is not mere conjecture.

The statistical numbers tell a cold brutal truth and the empirical data is unequivocally unapologetic. Economists Todd Sandler and Arce in particular, analysing decades of hostage data, found that nation states which concede face up to ninety per cent more hostage related incidents than those that refuse out rightly.<sup>80</sup> This is not an abstract model. It is borne out in patterns across continents, where every payment, every concession, functions as a price signal in a bloody marketplace. **RAND’s 2016** review put it with devastating clarity: ransom is not relief—it is *seed capital for the next atrocity*.<sup>81</sup> We can see it in practice. Chatham House has traced ransom payments in North Africa straight into the accounts of AQIM, which then invested in mobility networks and satellite communications to stage further attacks, in particular the funds were earmarked for the purchase of satellite phones and cross-border mobility networks—tools that enabled subsequent mass-casualty attacks..<sup>82</sup> In Nigeria, parents who quietly paid Boko Haram for the release of abducted children soon found themselves targeted

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<sup>78</sup> Press Release, U.S. Dep’t of Justice, *Tahawwur Rana Ordered Extradited to India* (Apr. 10, 2025), <https://www.justice.gov>.

<sup>79</sup> Non-Refoulement & Death-Penalty/III-Treatment Risks: Soering & Othman Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (death-row phenomenon) and Othman (Abu Qatada) v. United Kingdom, 2012-I Eur. Ct. H.R. 1 (use of diplomatic assurances re: torture/tainted evidence). See also S. Breitenmoser, *Human Rights v. Extradition: The Soering Case*, 11 Mich. J. Int’l L. 845 (1990); C. Michaelsen, *The Renaissance of Non-Refoulement?*, 61 I.C.L.Q. 399 (2012).

<sup>80</sup> Todd Sandler & Daniel G. Arce, *Terrorism & Game Theory*, 34 Simulation & Gaming 117, 133 (2003).

<sup>81</sup> RAND Corp., *Concessions to Terrorist Kidnappers: Causes, Effects, and Policy Responses* (2016).

<sup>82</sup> *ibid*

again—because once ransom becomes an income stream, kidnapping becomes an industry. In a much more stipulation negotiation did not save lives; it bought the weapons and vehicles for the next massacre. In some cases, analysts traced ransom flows to broader terror logistics.<sup>83</sup>

Contemporary legal and policy practice corroborates the aforementioned. The European Court of Human Rights in *Soering v. United Kingdom* and *Othman (Abu Qatada) v. United Kingdom* dealt not with hostage concessions directly, but with the limits of extradition under human rights law.<sup>84</sup> Yet their broader lesson is relevant: democracies are expected to respect rights while refusing to yield core security policies to coercion. Governments have learned the lesson the hard way and policy assessments corroborate this. The **U.K. Hostage Policy Review (2016)** convened after the macabre execution of British hostages by the ISIS was more forthright and concluded that piecemeal concessions by certain European states had created a perverse “hostage marketplace”, a booming unethical business model that endangered not just their own nationals but everyone else, almost everywhere.<sup>85</sup> In other words, one state’s ransom bound concessions becomes another state’s tragedy. The European Court of Human Rights in *Vinter v. United Kingdom* and later in *Hutchinson v. United Kingdom* reaffirmed the principle that human dignity constrains state punishment<sup>86</sup>, yet those same courts have never required states to yield their negotiating posture to hostage-takers. Instead, governments are expected to balance human rights with public order, and the prevailing expectation in Europe is that ransom payments constitute a breach of solidarity obligations within the Council of Europe framework. In pursuance of the same, legal frameworks have increasingly absorbed this reality. International treaty law has long proscribed concessions to terrorism. **The International Convention Against the Taking of Hostages (1979)** imposes a duty to prosecute or extradite hostage-takers, reflecting the consensus that concessions are not an acceptable form of response.<sup>87</sup> Similarly, the **International Convention for the Suppression of the Financing of Terrorism (1999)** criminalises the provision of funds—whether through ransom or otherwise—that are intended to support terrorist acts.<sup>88</sup> The UN Security Council, acting under Chapter VII, has repeatedly called upon member states not to make ransom payments, most notably in **Resolution 2133 (2014)**, which directly prohibited ransom or political concessions to terrorist

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<sup>83</sup> Raffaello Pantucci, Chatham House, *We Do Not Negotiate with Terrorists – But Why?* (2018).

<sup>84</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989); *Othman (Abu Qatada) v. United Kingdom*, 2012-I Eur. Ct. H.R. 1.

<sup>85</sup> U.K. Cabinet Office, *Hostage Policy Review: Report to the Prime Minister* (2016).

<sup>86</sup> Cong. Rsch. Serv., *Terrorist Material Support: An Overview of 18 U.S.C. §§ 2339A–2339B* (Aug. 15, 2023).

<sup>87</sup> International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, 1316 U.N.T.S. 205.

<sup>88</sup> International Convention for the Suppression of the Financing of Terrorism art. 2, Dec. 9, 1999, 2178 U.N.T.S. 229.

groups.<sup>89</sup> **The Palermo Convention (2000)** likewise treats hostage-taking and extortion as predicate offences for transnational organised crime, requiring cooperation to suppress them.<sup>90</sup>

India's own jurisprudence offers striking reinforcement and its courts have been clear that financing terrorism is legally indistinguishable from executing it. In *Mohd. Ajmal Amir Kasab v. State of Maharashtra*,<sup>91</sup> the Supreme Court insisted that terrorism is not to be viewed through the lens of common crime, but as "an extraordinary crime against the State itself," justifying the severest of legal responses.<sup>92</sup> The Court has also dealt with ransom and extortion as terrorism-financing mechanisms under the **Unlawful Activities (Prevention) Act (UAPA)**. In *State (NCT of Delhi) v. Navjot Sandhu* (the "Parliament Attack" case), the Court made clear that logistical facilitators and financiers stood on the same footing as gunmen when embedded in a terrorist design.<sup>93</sup> More recently, in *National Investigation Agency v. Zahoor Ahmad Shah Watali*, the Court upheld stringent bail restrictions for terror-financing suspects, underlining that money flows—whether by ransom or otherwise—are the lifeblood of terrorism.<sup>94</sup> That is not rhetoric; it is doctrine, entrenched deeply in the principles of natural justice as it is in counter-terror.

The United States has trodden the same path. In *United States v. Yunis*, the D.C. Circuit affirmed the exercise of U.S. jurisdiction over a Lebanese hijacker, making clear that hostage-taking was not a political offence but a crime against international order.<sup>95</sup> And in *Boim v. Holy Land Foundation*, the Seventh Circuit held that those who fund terrorism—even indirectly—are as culpable as those who pull the trigger, because financing "is an act dangerous to human life."<sup>96</sup> These decisions reflect the same principle: there is no neat separation between negotiators, financiers, and perpetrators. They are all links in the same chain.

Real-world illustrations reinforce the point. The Nigerian case study of Boko Haram is particularly woefully unfortunate. Communities that quietly paid Boko Haram to release abducted daughters in Borno State soon found themselves re-targeted, as ransom became an informal taxation mechanism. Each concession merely marked them as profitable prey. By contrast, states that refused to pay—often at significant human cost in the immediate term—experienced a decline in hostage incidents over the medium run, as militants adjusted their

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<sup>89</sup> S.C. Res. 2133, ¶ 7, U.N. Doc. S/RES/2133 (Jan. 27, 2014).

<sup>90</sup> United Nations Convention Against Transnational Organized Crime art. 6, Nov. 15, 2000, 2225 U.N.T.S. 209.

<sup>91</sup> *ibid*

<sup>92</sup> *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 S.C.C. 1 (India).

<sup>93</sup> *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 S.C.C. 600 (India).

<sup>94</sup> *Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 S.C.C. 1 (India).

<sup>95</sup> *United States v. Yunis*, 924 F.2d 1086, 1092–95 (D.C. Cir. 1991).

<sup>96</sup> *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690–91 (7th Cir. 2008) (en banc).

calculus recalibrated their incentives. Global data reinforces this posture. The *Global Terrorism Index* continues to identify Islamic State and its affiliates as among the deadliest actors worldwide, with lethality per incident rising even as absolute deaths fluctuate.<sup>97</sup>

India's empirical trajectory adds weight to this argument. India's record provides perhaps the clearest vindication of a no nonsense-concessions policy. In Jammu and Kashmir, annual fatalities from terrorism plummeted from **4,507 in 2001** to **276 in 2019**.<sup>98</sup> While this was the product of multiple variables—enhanced border control, improved intelligence, attrition of militant cadres—the absence of a ransom economy removed one of the most corrosive incentives for terrorist violence.<sup>99</sup> This remarkable reduction was achieved not through bargaining but through consistent intelligence operations, tighter border control, and steady policing. Concessionary policies would threaten to undo precisely those hard-won gains.<sup>100</sup> The counterfactual is telling: had ransom and negotiation become entrenched, the cycle of abductions would likely have escalated rather than diminished.<sup>101</sup>

The lesson, then, is uncomfortably clear. Negotiation is not a form of mercy, nor is it clever statecraft. It is subsidy. It is the financing of the next massacre dressed up as compassion. It signals to armed groups that hostage-taking is profitable, that the killing of innocents can yield tangible political or financial dividends. Democracies that have withstood the temptation to concede—despite the anguish of families, the clamour of public opinion and often under enormous public pressure—have secured their long-term resilience. Those that have yielded have discovered only that the appetite of terrorists grows with the feeding and have invariably reaped the whirlwind.

### **The Common Bridge: Legitimacy of State Response**

On the surface, the *Hamdan* case and Mumbai 2008 attacks appear worlds apart: one a courtroom battle over military commissions, the other a jihadist siege in what is considered to be a nation's financial capital. Yet they converge on a single hinge—legitimacy. In *Hamdan*, legitimacy is secured by keeping the state's coercive power inside a constitutional framework. In Mumbai's aftermath, legitimacy is defended by refusing to clothe the butchery of civilians

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<sup>97</sup> Inst. for Econ. & Peace, *Global Terrorism Index 2025* (2025).

<sup>98</sup> South Asia Terrorism Portal, *Fatalities in Terrorist Violence in Jammu & Kashmir: 1988–2019*, <https://www.satp.org> (last visited Aug. 27, 2025)

<sup>99</sup> a. Ministry of Home Affairs, Gov't of India, *Annual Report 2019–20*, at 15–18 (detailing significant decline in terrorist incidents and fatalities in Jammu & Kashmir).

<sup>100</sup> Navnita Chadha Behera, *Kashmir: Redefining the Politics of Subnationalism*, 39 *Studies in Conflict & Terrorism* 476, 482–85 (2016) (documenting the sharp decline in terrorism-related fatalities in Jammu & Kashmir post-2001 and linking it to a combination of security measures and political recalibration).

<sup>101</sup> United Nations Sec. Council, Report of the Secretary-General on the Situation Concerning Jammu and Kashmir, U.N. Doc. S/2019/251, ¶¶ 12–18 (Apr. 2019) (noting declining fatalities and improved counter-terror operations).

in the language of “dialogue.” They are not opposites but complements: law disciplines the state so that, when decisive force is used, it is backed by constitutional authority rather than vengeance.

### **Tahawwur Rana’s Extradition and Its Global Impact**

The extradition of Tahawwur Rana to India in 2025 by the U.S. is not simply just a policy nuanced judicial triumph; it is an emboldened metaphor of an evolving narrative on the tenets of global counterterrorism *modus-operandi*. Rana, a Chicago-based businessman, has long been accused of providing material and logistical support for the Lashkar-e-Taiba cell responsible for the 2008 Mumbai attacks via David Coleman Headley<sup>102</sup>, originally Daood Gilani, the convicted LeT Operative who conducted first-hand reconnoitring of the targets struck during the 2008 Mumbai Attacks.<sup>103</sup> His extradition, secured after more than a decade of litigation and diplomacy, represents both the persistence of the Indian state and the international community’s increasing unwillingness to allow alleged facilitators of jihadist violence to shelter behind jurisdictional gaps.<sup>104</sup>

For India, this transfer is a vindication of sovereignty and an affirmation that the fight against transnational terrorism does not end with the neutralisation of frontline operatives. Moreover, it serves as a regional model and code of conduct for other nations in South-East Asia.<sup>105</sup> It extends to financiers, logisticians, and sympathisers who grease the machinery of jihadist violence.<sup>106</sup> Rana’s case also sends a broader signal in the context of the Global War on Terror as well: that there is diminishing tolerance and legal relaxation for the “grey zone” actors who enable malevolent macabre attacks against innocent non-combatants while pretending to be mere businessmen or ideologues.<sup>107</sup> They are key-facilitators who also deserve the full brunt of law and counter-terror policy.<sup>108</sup> In policy terms, it strengthens the case for deeper U.S.–India intelligence cooperation and underscores the principle that democratic allies must close ranks when confronted with non-state actors who operate across borders.<sup>109</sup>

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<sup>102</sup> United States v. Headley, No. 1:09-cr-00830 (N.D. Ill. 2010) (testimony implicating Rana).

<sup>103</sup> Michael A. Newton, *Terrorist Crimes and the Aut Dedere Aut Judicare Obligation* (SSRN, 2013)

<sup>104</sup> Indictment, United States v. Rana, No. 1:09-cr-00830 (N.D. Ill. 2009).

<sup>105</sup> M.E. Sapiro, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offender Exception*, Wm. Mitchell L. Rev. (2003).

<sup>106</sup> ILC study on aut dedere (U.N. Doc. A/CN.4/571) and ILM’s *Final Report on the Obligation to Extradite or Prosecute*

<sup>107</sup> J.J. Barrett III, *The Doctrine of Specialty*, 34 Case W. Res. J. Int’l L. 491 (1997); M.R. Papandrea, *Standing to Allege Violations of the Doctrine of Specialty*, 62 U. Chi. L. Rev. 1242 (1995).

<sup>108</sup> Congressional Research Service, *Terrorist Material Support: An Overview of 18 U.S.C. § 2339A/B* (Aug. 15, 2023).

<sup>109</sup> Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, U.S.–India, June 25, 1997, S. Treaty Doc. No. 105-30.

### **Authors Remarks**

Predominantly, India's counterterrorism strategy has long rested on the twin pillars of uncompromising security and unblemished due legal process. Rana's extradition reaffirms that terrorists and their enablers will be pursued not only on the battlefield but also through courts, treaties, and law enforcement collaborations, transcending borders.<sup>110</sup> In this sense, it sharpens India's position within the broader global counter-terrorism coalition, demonstrating that democratic states need not choose between force and legality—they can, and must, deploy both with irrevocable resolve.<sup>111</sup>

## **VI. IMPLICATIONS FOR THE GLOBAL PLAYBOOK ON COUNTER-TERRORISM**

The comparative study of the case of *Hamdan v. Rumsfeld*,<sup>112</sup> the 2008 Mumbai attacks, and the broader debate on negotiating with terrorists underscores a set of lessons that are not merely case-specific but structural. These cases and debates have shaped the global understanding of how democracies respond to terrorism. Taken together, they illuminate a central truth: durable security requires iron-willed calibrated strength — resolute force anchored in law.

### **Global Democracies: The Waltz of Law and Power**

Democracies across the globe face a perpetual dilemma: how to combat the scourge of terrorism without compromising the legitimacy that sustains their very vital authority. The *Hamdan* case exposed that even in the United States, the temptation to erect parallel systems of justice for the sake of security cannot go unchecked. The Hon'ble United States Supreme Court's ruling made abundantly clear that **Common Article 3** of the Geneva Conventions binds even the most unconventional conflicts.<sup>113</sup>

Statistically, this exercise resonates abundantly. It has been witnessed that comparative research demonstrates that hybrid regimes—those combining electoral procedures with weak institutions—suffer five times more terrorist attacks than consolidated democracies or authoritarian states.<sup>114</sup> Weak legality invites insecurity. Conversely, rule-bound systems deter radicalization by embedding legitimacy.

The European record offers further consolidated evidence. Europol data show that the number of failed, foiled, or completed terror attacks in the EU dropped from 249 in 2010 to only 15 in

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<sup>110</sup> A.C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 Ind. L.J. 767 (1992)

<sup>111</sup> O. Lagodny, *The European Convention on the Suppression of Terrorism*, 60 U. Colo. L. Rev. 729 (1989)

<sup>112</sup> *ibid*

<sup>113</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–33 (2006).

<sup>114</sup> Ersel Aydinli, *Terrorism and Democracy: When Freedom Breeds Insecurity*, 9 *Terrorism & Pol. Violence* 123, 130 (2018).

2021.<sup>115</sup> This decline reflects not simply harsher policing but lawful resilience: intelligence-sharing mechanisms, community policing initiatives, and judicial oversight.<sup>116</sup> Similarly, India's experience in Jammu & Kashmir shows that fatalities fell from 4,507 in 2001 to 276 in 2019,<sup>117</sup> as the State invested in intelligence coordination, border fencing, and attrition of militant cadres while refusing to legitimize terrorists through negotiation.

The lesson for democracies is blunt: strength unmoored from legality breeds resentment and fragility; legality without strength breeds vulnerability. The two must move together.

### **International Law in Action: Guardrails in an Asymmetrical Field**

International law has become unavoidable in counterterrorism. Hamdan was one inflection point; UN practice has reinforced it. The Security Council, in **Resolution 1373 (2001)**, imposed binding obligations on all member states to criminalize terrorist financing and deny safe haven.<sup>118</sup> **Resolution 2133 (2014)** went further, explicitly prohibiting ransom payments to terrorist groups.<sup>119</sup>

These indurate policy and legal commitments are echoed abysmally in treaty law as well. The **1979 Hostages Convention** requires prosecution or extradition of hostage-takers, affirming that “political offense” exceptions cannot shield terrorists.<sup>120</sup> The **1999 Terrorist Financing Convention** criminalizes funding of terrorism, irrespective of intent to negotiate.<sup>121</sup> And the **2000 Palermo Convention** embeds hostage-taking within the framework of transnational organized crime, obliging cross-border cooperation.<sup>122</sup>

NATO and the EU have been no less central. NATO, which was often viewed through a narrow prism of a Cold War relic, has unwaveringly bolstered and aggrandized its skirmish with and to the pestilence of terrorism. Its 2022 Strategic Concept identifies terrorism as “the most direct asymmetric threat to Allied security” and commits members not only to deterrence but to building societal resilience as a form of collective defense.<sup>123</sup> In practice, this has meant joint exercises, intelligence-sharing frameworks, and assistance to vulnerable partners on Europe's

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<sup>115</sup> Europol, *EU Terrorism Situation and Trend Report 2022 (TE-SAT)*, at 14–15.

<sup>116</sup> Lorenzo Vidino, *Countering Radicalization in Europe*, 4 J. Policing, Intelligence & Counter Terrorism 17, 22–25 (2009).

<sup>117</sup> South Asia Terrorism Portal, *Fatalities in Terrorist Violence in Jammu & Kashmir: 1988–2019*, <https://www.satp.org> (last visited Aug. 27, 2025).

<sup>118</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>119</sup> S.C. Res. 2133, ¶ 7, U.N. Doc. S/RES/2133 (Jan. 27, 2014).

<sup>120</sup> International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, 1316 U.N.T.S. 205.

<sup>121</sup> International Convention for the Suppression of the Financing of Terrorism art. 2, Dec. 9, 1999, 2178 U.N.T.S. 229.

<sup>122</sup> United Nations Convention Against Transnational Organized Crime art. 6, Nov. 15, 2000, 2225 U.N.T.S. 209.

<sup>123</sup> NATO, *Strategic Concept 2022*, ¶¶ 15–18.

periphery. Particularly noteworthy and striking is NATO's recent undertakings in Operation Sea Guardian in the maritime bounds of the Mediterranean Sea, elaborately, surgically targets the routes of terrorist trafficking and its financial-logistical chains in the maritime theatre.<sup>124</sup> The alliance has also embedded counterterrorism in training missions in Iraq and Afghanistan, illustrating that its role now extends beyond tanks and treaties to reinforcing the ability of democracies to resist subversion while staying inside the law.

The European Union has built one of the most sophisticated counterterror legal frameworks in the world. Since 2001, it has implemented the **Passenger Name Records (PNR) Directive**, expanded Europol's counterterrorism centre, and adopted the 2017 Directive on Combating Terrorism, which obliges Member States to criminalize travel, training, and recruitment for terrorist purposes.<sup>125</sup> Moreover, the European Union's Annual **Terrorism Situation and Trend Report (TE – SAT)** documents have veraciously made headway pretty transparently: it has downgraded from 249 incidents in 2010 to just 15 in 2021.<sup>126</sup> These declines are not accidental. They are the fruits of harmonized intelligence-sharing, coordinated prosecutions, and border measures conducted under EU law's proportionality standards. The EU's 2020 Counter-Terrorism Agenda crystallizes the lesson: democracies must anticipate, prevent, protect, and respond—but always within legal guardrails.<sup>127</sup>

Together, NATO and the EU demonstrate that legality and strength are not opposites but twins. Democracies succeed against terror only when they combine both.

### **The RDS (Range Detection System) of Policy: Resilience, Deterrence, and Sovereignty**

The Attacks that transpired in Mumbai on 2008 enduringly prevail as the most transparent warning exhortation in the highest possible echelons in contra of any phantasm of negotiation. Ten gunmen murdered 166 innocent men, women, not even sparing children, elderly and in some cases, even stray dogs and injured over 300 across the financial capital of the world's largest democracy.<sup>128</sup> There was no demand to bargain over; only carnage, driven by pure Islamic radical jihadist fundamentalism. India's refusal to negotiate—and its subsequent pursuit of conspirators through intelligence and extradition, including Tahawwur Rana—affirmed that

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<sup>124</sup> NATO, *Operation Sea Guardian: Maritime Security Operation*, <https://www.nato.int> (last visited Aug. 27, 2025).

<sup>125</sup> Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism, 2017 O.J. (L 88) 6; Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on Passenger Name Record (PNR) Data, 2016 O.J. (L 119) 132.

<sup>126</sup> *ibid*

<sup>127</sup> European Commission, *Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond*, COM(2020) 795 final.

<sup>128</sup> Gov't of India, Ministry of Home Affairs, *Report on the 26/11 Mumbai Attacks* (2009).

sovereignty cannot be bartered with the mindset and actions of murderers.

Concessions are futile, as empirical studies confirm. Sandler and Arce show that governments making ransom payments suffer 80–90% more hostage incidents.<sup>129</sup> RAND’s review concluded that ransom is not a resolution but “seed capital” for future violence.<sup>130</sup> The **U.K.’s Hostage Policy Review (2016)** warned that ransom policies had created a “global hostage marketplace,” putting all nationals at risk.<sup>131</sup>

Resilience, conversely, repudiates terrorists their strategic victory. A RAND Europe study found that cities that rapidly resumed daily life after attacks saw diminished propaganda gains for extremists.<sup>132</sup> Mumbai exemplified this: despite the horror, the city resumed operations within days, moresoever particularly in the major sites of the attacks namely, the Taj, Trident and Oberoi Hotels, nullifying the terrorists’ hope of prolonged disruption.

Sovereignty is also at stake. States that cede ground by “talking” with terrorists sacrifice the very principle of exclusive authority over their citizens’ security. As India’s Supreme Court declared in *Watali*, financing—whether ransom, hawala, or extortion—is the “oxygen that sustains terrorism.”<sup>133</sup> That principle, echoed in U.S. cases like *United States v. Yuni*<sup>134</sup> and *Boim v. Holy Land Foundation*,<sup>135</sup> affirms that financiers, facilitators, and negotiators are indistinguishable from perpetrators.

### **Indispensable Lessons: Sequential Strength as Strategy**

The data are conclusive. According to the **Global Terrorism Index 2024**, 98% of terrorism-related deaths occur in active conflict zones, while fatalities in stable democracies have fallen to historic lows.<sup>136</sup> This points out the vital distinction: democracies that resist both unrestrained repression and appeasement enjoy sustainable security.

The overarching lesson ultimately is hereon thus: democracies must be as emboldened and lawful as they are disciplined and strong. They must combat the scourge of terrorism with resolute action, yet within the accepted parameters of law; they must out rightly reject concessions, yet maintain decisive legitimacy. Neither outrageous brute power nor blatant naïve compromise shall ever secure long-term safety standards and protocols. The sustainable path in

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<sup>129</sup> Todd Sandler & Daniel G. Arce, *Terrorism & Game Theory*, 34 *Simulation & Gaming* 117, 133 (2003).

<sup>130</sup> RAND Corp., *Concessions to Terrorist Kidnappers: Causes, Effects, and Policy Responses* (2016).

<sup>131</sup> U.K. Cabinet Office, *Hostage Policy Review: Report to the Prime Minister* (2016).

<sup>132</sup> RAND Europe, *Resilience to Terrorist Attacks: A Review of the Evidence* (2017).

<sup>133</sup> *Nat’l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 S.C.C. 1 (India).

<sup>134</sup> *United States v. Yunis*, 924 F.2d 1086, 1092–95 (D.C. Cir. 1991).

<sup>135</sup> *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690–91 (7th Cir. 2008) (en banc).

<sup>136</sup> Inst. for Econ. & Peace, *Global Terrorism Index 2024*, at 12–15.

this discipline lies in calibrated strength—legality wedded forever loyally to resolve.

## VII. CONCLUSION

In finality, the inquiry that was examined here has exhibited, beyond reasonable doubt, that the reprobate pernicious malady of terrorism does not just test the strength of nation states but requisitions an inquisition on the very foundations of their legal order, undoubtedly. The case of *Hamdan v. Rumsfeld* in the United States and the attacks on Mumbai in 2008 in India may appear to belong to different worlds—one fought in a the comfort of a courtroom, the other in the blood-soaked streets of a thriving busy metropolis—but their lessons consciously converge. Both affirm beyond doubt that the foot soldiers of terrorism must never be allowed to revamp the demarcations of law, nor to secure unethical concessions from those it targets. To indulge either path is to squander away state legitimacy and reward savagery.

What emerges is a middle course—neither the excesses of unconstrained state power, nor the folly of appeasement. The state must act with resolve, but its resolve must be clothed in law. Legal safeguards anchor strength in legitimacy, and legitimacy, in turn, magnifies deterrence. This is not an abstract balance; it is the only sustainable method by which democracies can both defend their citizens and deny terrorists any semblance of victory.

Yet these cases also expose the awkward truth that terrorism resists easy categorisation. It often blurs the demarcations existing between that of war and of crime, that further exploits the ambiguities surrounding both. International law has not fully kept pace. Future research must grapple with how the architecture of law can more effectively address terrorism as a hybrid phenomenon—one that is prosecuted too narrowly as crime or too broadly as war, but in truth demands a framework that captures its dual character.<sup>137</sup>

What remains constant is the responsibility of the democratic state. It must be relentless in protecting its citizens, unyielding in defending its sovereignty, and uncompromising in its refusal to treat terrorism as a negotiable grievance. Lasting security does not lie in bending the rules or in buying time with concessions. In furtherance of the same, it ultimately rests in the combined hybrid of both power and law: the command of legality and the iron will of statecraft. Only then can the victims be honoured, the public defended, and the perpetrators denied the triumph they seek.<sup>138</sup>

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<sup>137</sup> See Rosa Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 678–79 (2004).

<sup>138</sup> See U.N. Sec. Council, *Report of the Secretary-General on the Threat of Terrorism to International Peace and Security*, U.N. Doc. S/2022/604, ¶¶ 14–19 (July 2022).