



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE 2008 MUMBAI ATTACKS - AN ACT OF WAR OR TERRORISM ALONGWITH NEGOTIATING WITH TERRORIST GROUPS, A PRACTICE IN VAIN.

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I. Abstract

The coordinated attacks that engulfed Mumbai on 26th November 2008 remain among the most harrowing episodes of contemporary India, not only for the scale of devastation but also for the unsettling questions they posed regarding the nature of modern violence. Were these assaults to be understood solely as acts of terrorism, intended to sow fear amongst civilians, or could they be more appropriately characterised as acts of war, executed by foreign operatives under the shadow of state complicity? This paper revisits the trial and conviction of Ajmal Kasab, the sole surviving perpetrator, to examine how the judiciary construed his actions within the ambit of the Indian Penal Code, specifically the provisions addressing the waging of war against the Government of India. By situating this legal discourse alongside international definitions of terrorism, the analysis exposes the tensions inherent in labelling mass violence and the far-reaching implications that such terminology carries for both domestic and international law.

The second strand of this study interrogates the deeply contested practice of negotiating with terrorist groups. Drawing upon historical instances, ranging from the Irish Republican Army to Al Qaeda, it explores the uneasy balance between pragmatic considerations and principled statecraft. Governments often justify non-negotiation policies as essential to preserving legitimacy and deterring future violence, yet history records moments where states have wavered under the weight of humanitarian crises.

This paper considers the risks of such engagements — legitimisation of non-state actors, the financing of further violence, and the erosion of sovereign authority — and contrasts them with the limited, often ephemeral, gains that negotiations sometimes produce. In combining these two inquiries — the juridical characterisation of the Mumbai attacks and the ethical-political

dilemma of negotiation — the paper argues that the path to durable security lies neither in semantic equivocation nor in tactical appeasement. Rather, it demands a disciplined legal framework, a firm political resolve, and a refusal to cede moral or sovereign ground to those who employ terror as a weapon.

Keywords: Mumbai attacks, Terrorism, Act of War, Negotiation, Sovereignty.

II. Introduction

26th 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 began¹, 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 terrorist². He was found guilty on the grounds of violation of sections 121, 121A and 122 of the Indian Penal Code. Therefore, the state charged

¹ Bjørgo, Tore. 2005. *Root Causes of Terrorism: Myths, Reality and Ways Forward*. London; New York: Routledge.

² Hoffman, Bruce. 2006. *Inside Terrorism*. New York: Columbia University Press.

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 IPC 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 government³. Any attack on the government by A1 and all DA’s is always armed towards the citizens of the Republic of India.

III. The Judgement

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 attack⁴.

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 countries⁵. tence 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 cases⁶. The appellant and his co-conspirators used highly lethal weapons on the common citizenry and explosives⁷ 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 effect⁸, this case stands alone or at least it is the very rarest

³ Pape, Robert Anthony. 2006. *Dying to Win: The Strategic Logic of Suicide Terrorism*. New York: Random House Trade Paperbacks.

⁴ English, Richard. 2010. *Terrorism: How to Respond*. Oxford: Oxford University Press.

⁵ Graaf, Beatrice de. 2013. *Evaluating Counterterrorism Performance: a Comparative Study*. London: Routledge.

⁶ Horgan, John. 2005. *The Psychology of Terrorism*. London; New York: Routledge

⁷ <https://indiankanoon.org/doc/1949191/>

⁸ <https://indiankanoon.org/doc/1661760/>

of rare to come before the court since the birth of the republic of India.

IV. 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 Schmid⁹, one definition which thoroughly describes this incident is –

“At the origin of terrorism stands terror – instilled fear, dread, panic or mere anxiety - spread among those identifying, or sharing similarities, with the direct victims, generated by some of the modalities of the terrorist act – its 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 citizenry¹⁰.

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 establishments¹¹. A hotel, a train terminus, a café and a residential colony were the prime targets of this group

⁹ <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/schmid-terrorism-definition/html>

¹⁰ Gaor, Boaz. 2007. *The Counter-terrorism Puzzle: a Guide for Decision Makers*. Piscataway, NJ: Transaction Publishers.

¹¹ Horgan, John. 2005. *The Psychology of Terrorism*. London; New York: Routledge.

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 individuals¹².

These individuals evidently to the latter half of the definition¹³ 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 definition¹⁴ –

“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 public.”

V. 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 Qaeda¹⁵, 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 Time¹⁶. 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.

¹² *ibid*

¹³ <https://devgan.in/pc/section/121/>

¹⁴ https://www.sci.gov.in/pdf/SupremeCourtReport/2012_v8_pii.pdf

¹⁵ Crenshaw, Martha. 2011. *Explaining Terrorism: Causes, Processes, and Consequences*. London; New York: Routledge

¹⁶ Alexander, Yonah. 2006. *Counterterrorism Strategies Successes and Failures of Six Nations*. Washington, D.C.: Potomac Books.

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.

VI. Negotiating with Terrorist Groups- Introduction

“We don't negotiate with terrorists”

- Mrs. Golda Meir, former 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”¹⁷, Ronald Regan, during his 1980s campaign maintained a high resolve of becoming a President who would “not negotiate the rights of his men, for a terrorist”.

A. 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 overcome¹⁸.

The second challenge of negotiation comes from the other party – not all terrorist groups risk the negotiation¹⁹. 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

¹⁷ 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.

¹⁸ 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,

¹⁹ 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).

– the reason for their existence²⁰ – 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 IRA²¹, but not Al Qaeda²², “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 rational²³ than, say, al Qaeda, it is because their goals -- nationalism and separatism²⁴ -- have a long history in Western political thought”, and “Al Qaeda's aim of re-creating an Islamic empire²⁵ 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”²⁶.

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.

B. Risks to Negotiation

Coming back to the risk involved in the negotiation, in 2001, George W. Bush administration paid a ransom of \$300,000²⁷ to a radical Islamist group, linked to Osama Bin Laden later, in the Philippines that was holding two American missionaries, a married couple, captive²⁸. Alas,

²⁰ Freedom in the World 2007: The Annual Survey of Political Rights and Civil Liberties, New York: Freedom House, 2007.

²¹ 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,

²² 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.

²³ Barry Posen, “The Struggle Against Terrorism: Grand Strategy, Strategy, and Tactics,” *International Security*, Vol. 26, No. 3, Winter 2001–2002

²⁴ Coolsaet, Rick. 2011. *Jihadi Terrorism and the Radicalisation Challenge European and American Experiences*. Farnham, Surrey; Burlington, VT: Ashgate.

²⁵ Gunaratna, Rohan. 2002. *Inside Al Qaeda: Global Network of Terror*. New York: Berkley Books

²⁶ Bergen, Peter L. 2012. *Manhunt: The Ten-year Search for Bin Laden from 9/11 to Abbottabad*. New York: Broadway Paperbacks.

²⁷ *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.

²⁸ 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).

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 mission²⁹. 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 activity³⁰ from the Irish Republican Army, the British Prime Minister Margaret Thatcher vowed to "never negotiate with terrorists"³¹. 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"³². 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 exist³³? Many of those that argue for truth of this assumption have stated that negotiating with terrorists legitimizes them and, in the process, weakens democratic governments, leading to continued terrorist actions³⁴.

It is important to test how far these negotiations go, how risky they are, and how much power they give to the terrorist organisation involved³⁵. 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 given³⁶.

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

²⁹ *Ibid*

³⁰ 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, on going since 1972

³¹ 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.

³² George W. Bush, *State of the Union*, Washington, D.C.: White House, 2002.

³³ David C. Rapoport, "Fear and Trembling: Terrorism in Three Religious Traditions," *American Political Science Review*, Vol. 78, No. 3, September 1984

³⁴ Edward N. Muller, "Income Inequality, Regime Repressiveness, and Political Violence," *American Sociological Review*, Vol. 50, No. 1, February 1985

³⁵ James D. Fearon and David D. Laitin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review*, Vol. 97, No. 1, February 2003

³⁶ Max Abrahms, "Why Terrorism Does Not Work," *International Security*, Vol. 31, No. 2, Fall 2006, pp. 42–78; and Kydd and Walter (2006)

would have learnt that no matter how many hostages taken, the government will not legitimise their claim³⁷. It seems like a very ambitiously vicious plan, but at the same time, so was negotiating with a terrorist group in the first place.

VII. Conclusion

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.



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³⁷ Paul R. Pillar, *Negotiating Peace: War Termination as a Bargaining Process*, Princeton, N.J.: Princeton University Press, 1983