

A Human Rights Perspective on the Question of an Appropriate International Response to Ransom Payments to Terrorist Kidnappers

By

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I. Introduction:

Excellencies, ladies and gentlemen, let me begin by thanking the Counter-Terrorism Committee Executive Directorate for their invitation to present this paper, and for the opportunity to infuse into the extant discussion the carefully deliberated perspective of the Human Rights Council Advisory Committee (HRCAC), on which I sit. As that committee has done significant work fairly recently on the human rights dimensions of the problem of terrorist hostage-taking or kidnapping, this invitation was a well-considered and relevant one.¹ Many of my own personal thoughts will also be offered here.

The more specific goal of this paper is to reflect on the question of an appropriate international response to ransom payments to terrorist kidnappers and the human rights imperatives that need to be weighed and factored into the decision-making process. This is important if the responses that are ma

being subjected to these harms. In many instances, the harm suffered will include the impairment or violation of their rights to: life; liberty and the security of the person; freedom from torture or other forms of cruel, inhuman or degrading treatment; freedom of movement; freedom of thought/religion; freedom of association; privacy; work; favorable conditions of work; rest and leisure; food, shelter and clothing; health care; education, etc.² As is well known, all of these rights are guaranteed in the UDH and/or in the two international human rights covenants.³ It is also important, as the HRCAC has also noted, to consider the gender dimensions of this sort of harrowing experience, and the additional or peculiar harms to which female victims of terrorist kidnapping may be subjected to or placed at risk of suffering.⁴

There is also a widespread realization that communities affected by terrorist kidnapping live in constant and incessant fear or terror of these harms being visited upon one or more or a host of the individuals who constitute them.⁵ In some cases, the terrorists even seize and hold territory; effectively kidnapping whole communities or areas within a country. This is currently the case in parts of Syria, Iraq, Afghanistan, Colombia, North Africa, and the Sahel region of West Africa.⁶ The effect on communities which have been either completely occupied by terrorists or which are chronically affected by frequent incidents of terrorist kidnapping is highly traumatic as well. The enjoyment of the various human rights mentioned already can be seriously restricted or even denied to the individuals who live in such communities, and their right to social and economic development is invariably impaired.⁷

Another key point here, on which there is little if any debate, is the fact that such terrorist kidnapers usually demand ransom payments from the victims and their families, which leads to a “vicious cycle” in which such funds end up strengthening the operational capabilities of terrorists by allowing them to take care of their own socio-economic needs, including through enabling them to arm, re-arm or better arm themselves. It is in this sense that the suggestion that some have made that such ransom payments may be *impliedly* caught by certain laws and treaties that bar the financing of terrorism, begins to appear plausible.⁸ Importantly, such ransom payments also encourage or incentivize further terrorist kidnappings, imperiling many more individuals and communities, and continuing the cycle of violence and gross human rights violation. As the Security Council has itself shown in the resolution that mandated this special meeting, there is hardly any disagreement or room for reasonable doubt about these facts.⁹ There is also a

² See A/HRC/24/47, *supra* note 1, at paragraph 25.

³ See the *Universal Declaration of Human Rights*, 10 December 1948, UN Doc. A/811, Articles 3-28; the *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171; and the *International Covenant on Economic, Social and Cultural Rights*

are unable to attend school due to a fear of being killed or kidnapped (a denial of their education rights). These are but a few examples of the rights that large numbers of people within these communities are either denied of, or chronically placed at risk of being deprived of. In addition, the community's right to socio-economic development is often imperiled. Here, the point that advocates of a ban would make is that in the interest of others in the community, whose fundamental human rights are foreseeably threatened with impairment, and are in fact all-too-often impaired, by the payment of ransoms to terrorist kidnapers, i.e. in the interest of public safety and the greater good of society, the rights of presently kidnapped persons to "purchase" their own safety through the payment of ransoms to terrorist kidnapers should be abridged or in some cases completely negated.

These kinds of public safety arguments for the abridgement or even negation of the human rights of a few in society in order to protect the rights of the many, such arguments in favor of the justifiability of measures which are considered to be in the interest of the greater good, are well recognized and even internalized by international human rights law, although only in a narrower sense and subject to certain strict conditions. International human rights law would recognize such arguments in two broad types of situations: (a) in the course of the interpretation of certain human rights provisions themselves (depending on their wording), even in "normal" times, and (b) in permitting strictly limited derogations from some human rights in times of declared public emergency. In the first type of case, it should be noted that human rights provisions do not tend to be couched in absolute terms (although some are). Many a human rights provision is explicitly subjected to the content of laws passed to limit them in the interests of public safety, public welfare, and so on. In the second type of case, it should be noted that the relevant treaties, such as the International Covenant on Civil and Political Rights (ICCPR) (under its Article 4), do make explicit (and strictly limited) provisions for derogations from their provisions to be made by states in situations in which they face a public emergency that threatens the survival of the state. In both types of cases, before the restriction on the rights of the individual is deemed lawful under International human rights law, the rights of the directly affected individual are balanced in the treaty provision itself, or have to be *balanced* by the courts/quasi-judicial bodies, in a systematic and thoughtful way against the rights of others in the community who might be affected by terrorist kidnapping. More will be said on this question of balancing in section III(C) below.

B. The human rights argument against a ban on ransom payments to terrorist kidnapers:

The human rights argument against a ban on ransom payments is that the rights of the kidnapped individuals to life, liberty and the security of the person, and so on, are directly and immediately imperiled, and are –in at least one respect – likely to be rendered illusory by the failure to concede to the ransom demands of the terrorist kidnapers; and that one or two of these rights (especially the right to life) are so fundamental in value that their protection should usually take priority over the foreseeable, but nevertheless statistical, possibility of the impairment of the rights of other persons in the community. It is based on this kind of human rights argument that the Constitutional Court of Colombia annulled aspects of *Colombia's Act No.40 of 1993* which would have permitted the government to, among other things, freeze the assets of victims of kidnappings and

their families in order to prevent the payment of ransoms to kidnappers.¹⁴ This provision had been copied from the Italian version of the same law.¹⁵

Again, international human rights law clearly admits of this kind of argument; one that seeks (in general) to prioritize the protection of *individual* rights, over the interest of the group, while still taking into account the interests of other persons in society. What is more, certain individual rights (such as the right to life and freedom from torture) that would likely be impaired if the demanded ransom payments are not made and the terrorist kidnappers of the day carry out their usual threats to kill or harm kidnapped persons in respect of whom they do not receive a ransom are, at least under the ICCPR, couched in ways that do not appear to explicitly permit any restrictions on their enjoyment *in the interest of public safety*. These particular set of rights are listed as *totally*

bodies may make more moderate interpretive allowances in the interest of public safety is when they consider that interest in a conscious or unconscious way when setting the lower threshold as to what constitutes torture (as in the instance of the question of the solitary confinement of certain prisoners). This point must therefore be kept in mind.

C. Balancing competing human rights considerations – an analytical approach:

In any case, the overarching point here is that – at a minimum – the competing human rights considerations that favor either the protection of the vast majority of the other individuals in the community (on the one hand) or the directly affected individual (on the other hand) must be balanced against each other to arrive at an appropriate, human rights-proof, solution to the problem of the negative impact of the payment of ransoms to terrorist kidnappers.

This kind of balancing occurs in two broadly different kinds of contexts: namely, in “normal” times or in situations of properly declared public emergencies.

Balancing in “normal” times

Depending on how a human rights provision is phrased, it may be that it is possible to restrict its application in the interests of public safety without resort to the official declaration of a public emergency. For, as has been noted already, although under the ICCPR, the rights to life and to be free from torture cannot be easily restricted or limited (since the language in which these particular provisions are couched admits of no limitations that are relevant to our purposes, the courts may nevertheless interpret such provisions in a somewhat more flexible

In the Canadian context, which is instructive for present purposes, the Supreme Court of Canada has developed a systematic and rigorous general way of balancing the community's interests in public safety (etc) vs. the individual's human rights.²¹ The so-called *Oakes test* is applied whenever it is necessary to limit individual rights to advance certain collective goals of fundamental importance, such as the choking-off of the supply of funds to terrorists and the like. And so in Canada, before a limitation on individual rights can be justified, two things must be clearly shown:

- (a) That the objective of the proposed limitation is related to concerns which are pressing and substantial in a free and democratic society, and;
- (b) That the means chosen is reasonable and demonstrably justified. To show this, the measures adopted must be carefully designed to achieve the objective (and not be a blunt instrument). The means chosen must also impair as little as possible the human right in question. There must also be proportionality between the effects of the measures limiting the right and the objec

security of the person) may be lawfully derogated from in such an emergency. However, the proper substantive and procedural restrictions must be observed (including immediately informing other states parties via the UN Secretary-General; ensuring that the measures taken are strictly required by the exigencies of the situation, and ensuring that those measures are applied/implemented in a non-discriminatory manner). The position is similar under the European Convention on Human Rights.²⁴

Interestingly, there is no general derogation clause in the African Charter on Human and Peoples' Rights,²⁵ and so all its provisions are, on their face, non-derogable.²⁶ However, as held by the African Commission on Human and Peoples' Rights in *Media Rights Agenda v. Nigeria*, these rights are all subject to the duties to the community and the state and to the necessity of exercising su

usually less able to muster large ransom payments than most states. BY contrast, the ban that is issued in African Union Decision 256 (XIII) is *total*: the African Union “strongly condemns the payment of ransom to terrorist groups for hostages to be freed” (paragraph 7) and “requests the international community to consider the payment of ransom to terrorist groups a crime” (paragraph 8). Yet, it must be noted that although the good intentions of the African Union here are unassailable, and such total bans or near-total bans (such as non-concession policies) may have worked certain places such as Italy, they have not always worked everywhere (either because they have been declared unconstitutional as in Colombia, or they have been difficult to implement as in the USA).³⁰

to any ransom demand. This will serve as a