

# WHERE IS NEGOTIATION IN HYBRID WARFARE?

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## I. INTRODUCTION

The question of what negotiation has to do with hybrid warfare was the starting point for Project Seshat<sup>1</sup>, a project gathering a global group of academics and practitioners from many walks of life. Their shared interest is in exploring what the fields that fit generally within the concepts of “security” and “dispute resolution” have to offer each other in the context of hybrid warfare / grey zone conflict, and how these two “sets” of fields interconnect. In trying to better understand what hybrid warfare is, how it works, and how best to respond to it, negotiation and dispute resolution academics have been led to question some of the core assumptions and theories they generally rely on.

These reflections, we believe, raise a set of specific questions when we consider, as a focus point, how lawyers consider and practice negotiation. Calvin Chrustie is a critical risk management expert for a private firm specializing in asymmetrical problem-solving in crisis negotiations, conflict management, intelligence, security, and acute risks management. He often intervenes in hybrid warfare settings.<sup>2</sup> In a recent discussion with the head of the cyber response group for a global law firm, that person told Mr. Chrustie that they “never negotiate with cybercriminals.” When asked whether this stance was short-sighted resulting in missed opportunities, the lawyer refused to move off his/her no-negotiation stance as if negotiation was incongruent with the means of handling these situations. Mr. Chrustie’s experience is discordant with the responses from the “cyber lawyer” and many other individuals he has encountered in his professional career dealing with corporate

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<sup>1</sup> *Project Seshat*, <https://www.project-seshat.org/> [<https://perma.cc/S88J-22B5>] (last visited Feb. 26, 2023).

<sup>2</sup> Among the hybrid conflict matters that Mr. Chrustie regularly consults on are cyber-crime matters, foreign nation-state interference, suspicious mergers and acquisitions, and suspicious activities of business leaders, political leaders, and lawyers. *See generally* Calvin Chrustie, TISAMAYO INT’L CONSULTANCY, <https://tisamayo.com/calvin-chrustie> [<https://perma.cc/GC77-SM8U>] (last visited Feb 23, 2023).

board rooms, legal offices, senior government, and, at times, diplomats. His continued practical experiences of engaging in negotiation in these contexts has resulted in positive outcomes and is one of several reasons the authors wish to explore the idea of negotiation in hybrid warfare in a more thorough and comprehensive way that includes practice and academia.

This led us to consider this no-negotiation stance in the perspective of both hybrid warfare and negotiation. The fact that targets of hybrid warfare attacks refuse to negotiate with their attackers does not mean that negotiation, as a process and as a set of skills, does not play a central role, as we will demonstrate in this essay.

Lawyers are trained to assess legal risk, which for the purposes of this essay we can oversimplify as determining or predicting the potential liability associated with certain courses of action in issues presented to them. It leads them to offer insight as to how real or potential adversaries can resolve their real or imagined dispute(s) through the application of law by a third party.<sup>3</sup> Lawyers understand the law and counsel clients on the risks associated with different situations. One regular course of action lawyers recommend and assist clients with is negotiation. But when presented with hybrid warfare<sup>4</sup> scenarios (including but not limited to cybercrimes, illicit finance, espionage, mergers, and acquisitions including adversarial State actors, State kidnappings and illegal detentions), where the aggressor/attacker (at least the true decision-maker) may be unknown, how can one negotiate? Is it off the table since there is no apparent negotiation partner?

We submit that Mr. Chrustie's experience is not unusual and flows from what Leonard Riskin calls the "Lawyers' Standard Philosophical Map," a cognitive system that leads lawyers to see the world through a specific lens and encourages certain types of actions.<sup>5</sup> The Lawyer's Standard Philosophical Map is based on two underlying assumptions—disputants are adversaries, and their disputes should be resolved according to the application of law to

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<sup>3</sup> Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO L. J. 29, 44 (1982).

<sup>4</sup> The terms "hybrid warfare" and "grey-zone conflict" are often used interchangeably. See Project Seshat homepage at <https://www.project-seshat.org/>. See also Anne Leslie, *Know Thyself—Embracing the Ambiguity of War by Other Means*, 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023); Nancy A. Welsh, Sharon Press & Andrea Kupfer Schneider, *Negotiation Theories for Hybrid Warfare*, 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023); Christopher A. Corpora, *How to Undermine a Nation-State in 120 Days: Mediation and Negotiation in a Hybrid Warfare World*, 24 CARDOZO J. CONFLICT RESOL. (forthcoming 2023).

<sup>5</sup> Riskin, *supra* note 3, at 43–44.

fact.<sup>6</sup> Using strong cognitive capabilities, lawyers put people and actions into legally relevant categories and think in terms of legal rights and duties established by rules.<sup>7</sup> And when it comes to negotiation, the Lawyers' Standard Philosophical Map does not fade away, it simply moves into a different space, what Robert Mnookin and Lewis Kornhauser identified as "bargaining in the shadow of the law."<sup>8</sup> In other words, bargaining based on predicted potential legal outcomes.

In Riskin's eyes, the Lawyers' Standard Philosophical Map leads to standardized reasoning methods, not only within lawyers' core business (contracts and disputes) but in everything they get involved with: "The lawyer's standard philosophical map is useful primarily where the assumptions upon which it is based—adversariness and amenability to solution by a general rule imposed by a third party—are valid . . . The problem is that many lawyers, because of their philosophical maps, tend to suppose that these assumptions are germane in nearly any situation that they confront as lawyers."<sup>9</sup>

One of the most difficult issues in the lead-up to writing this paper has been understanding the concept of hybrid warfare—at least for those of us to whom the idea is new. It is hard to define in a concrete and judicious manner, which means that when most lawyers are presented with a hybrid warfare situation, they spend a lot of time trying to understand the concept. Once they have some grasp on it, they start doing what lawyers do—assess risk. In other words, if a hybrid warfare attacker is unknown, most lawyers would focus on mitigating potential losses resulting from the attack. Social science calls this cognitive bias "the law of the instrument," summarized with the popular saying: "If the only tool you have is a hammer, it is tempting to treat everything as if it were a nail."<sup>10</sup> Thus, the Lawyers' Standard Philosophical map appears to be unproductive when it comes to hybrid warfare.

The rest of this essay will address traditional legal negotiation theory and how it may fail lawyers in hybrid warfare situations, leading them to believe that there is no place for negotiation in

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<sup>6</sup> *Id.* See also Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 155 (2001).

<sup>7</sup> Riskin, *supra* note 3, at 45; see also Guthrie, *supra* note 6, at 155.

<sup>8</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L. J. 950, 950 (1979).

<sup>9</sup> Riskin, *supra* note 3, at 45.

<sup>10</sup> ABRAHAM MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* x (1966).

such situations. We will point out that this belief is unfounded, ultimately leading to the conclusion that we need to move on from the Lawyers' Standard Philosophical Map and take a better look at concepts like conflict management where the negotiation action is taking place when hybrid warfare is involved.

## II. THE FAILURE OF TRADITIONAL NEGOTIATION THEORY

Negotiation theory has remained relatively static for the last forty years, in part because the classic negotiation book *Getting to Yes: Negotiating Agreement Without Giving In*<sup>11</sup> ("GTY") has offered several concepts that have become part of the negotiation cannon. They have proven time and time again to be an excellent guide to negotiation preparation and strategy leading to success or failure of the negotiation and the implementation of the negotiated outcome. Yet, these theories do not hold within the hybrid warfare context.

### A. Classic Negotiation Theory

There are many negotiation concepts, such as information exchange and reservation points, to name a few, that are undoubtedly important in negotiation. However, there are four that serve as the foundation of negotiation theory—the negotiator's dilemma, interests and positions, objective criteria, and best alternative to a negotiated agreement. We will touch on each briefly.

#### i. The Negotiator's Dilemma

The Negotiators' Dilemma, at its essence, is the inescapable fact that negotiators engage in two separate but complimentary tasks in every negotiation. Before any negotiation, negotiators need to recognize that an exchange has the potential for a better result than doing nothing at all.<sup>12</sup> And once together, the negotiators endeavor to determine the value the negotiation opportunity presents including uncovering more value than initially met the

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<sup>11</sup> See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3d ed. 2011).

<sup>12</sup> See James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 MGMT. SCI. 18, 28 (Jan. 1992).

eye.<sup>13</sup> This is called creating value. Creating value requires openness, communication, and listening.<sup>14</sup> The other side of the coin is claiming value, determining who gets what from the negotiation. Claiming value involves shaping others' impressions of the bargaining range, manipulating alternatives and aspirations, and engaging in other kinds of dissembling.<sup>15</sup> The dilemma results in the tension between these two tasks as the approaches that tend to be effective for claiming value tend to be harmful to its creation, causing negotiators to be protective of information for fear of exploitation.<sup>16</sup> In other words, distributive actions (and fear of distributive actions) keep parties from engaging in value creation.<sup>17</sup>

## ii. Interests and Positions

The book *Getting to Yes* may be best known for its advice to focus on interests instead of positions. Positions are what negotiators say they want or need.<sup>18</sup> Interests are the motivations underlying the position.<sup>19</sup> They define the problem that the negotiation is attempting to solve, the conflict between the parties' respective needs, desires, concerns, and fears.<sup>20</sup> When reconciling interests, there may be several possible means of solving the issue at hand, and some that may meet both parties' respective interests.<sup>21</sup> Yet, this simple advice is more difficult than anticipated, as most parties negotiate through offers and counter-offers—the trading of positions.

## iii. Objective Criteria

Objective criteria are best understood as independent external standards that help negotiators exhibit and determine reasonableness in the distributive phase of negotiations.<sup>22</sup> They help negotiators create offers when determining targets and reservation points as well as counteroffers, thereby determining the parties' bargaining range. Examples of objective criteria include market value, precedent, professional standards, costs, moral standards, and tra-

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<sup>13</sup> *See id.*

<sup>14</sup> DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR* 154 (1986).

<sup>15</sup> *Id.*

<sup>16</sup> *See* Sebenius, *supra* note 12, at 30.

<sup>17</sup> *See id.*

<sup>18</sup> ART HINSHAW ET AL., *NEGOTIATION AND LAWYERS* 15 (2021).

<sup>19</sup> *Id.*

<sup>20</sup> FISHER ET AL., *supra* note 11, at 40.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.* at 84

dition.<sup>23</sup> Oftentimes, negotiations can be described as a battle of which objective criteria will control in forming the basis for a deal.<sup>24</sup>

#### iv. Best Alternative to a Negotiated Agreement

A negotiator's best alternative to a negotiated agreement (BATNA) is essentially the best option the negotiator has going forward if the negotiation fails.<sup>25</sup> In other words, what is the negotiator's plan B? That, according to *Getting to Yes*, is the standard against which any proposed agreement should be measured.<sup>26</sup> Parties should reject offers that are less favorable than their BATNAs and should seriously consider offers that are better than their BATNAs.<sup>27</sup> BATNA is closely associated with leverage in negotiation, as the more attractive one's BATNA is, the less they need to reach an agreement.<sup>28</sup>

In dispute settings, the parties' BATNA may be the outcome of the trial minus the associated costs of the trial.<sup>29</sup> Hence, the parties will assess the quality of their negotiation outcome, as well as the favorableness of their position at the table, with what their lawyers say would be the outcome of the trial, should they decide to go through with it. For most lawyers, negotiation is about finding solutions that would be less expensive or more financially rewarding than trial.

### B. *Engaging with Hard Bargaining*

The extremely adversarial negotiation style is known as "hard bargaining," and those who engage in it are known to use extreme value-claiming negotiation strategies and tactics, including potentially unethical conduct, to ensure that they can walk away, claiming that they have won the negotiation. The difficulty with hard bargaining is that it restricts the ability to create value, typically by hiding information or taking advantage of information asymme-

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<sup>23</sup> *Id.* at 86.

<sup>24</sup> See MARTIN E. LATZ, *GAIN THE EDGE: NEGOTIATING TO GET WHAT YOU WANT* 140–41 (1st ed. 2004).

<sup>25</sup> FISHER ET AL., *supra* note 11, at 105.

<sup>26</sup> *Id.* at 102.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See HINSHAW ET AL., *supra* note 18, at 26 (discussing what constitutes a BATNA in the litigation framework).

tries, thereby restricting one's responses to walking away from the negotiation or playing the distributive game, feeling one step behind.<sup>30</sup> It makes sense that when faced with hybrid warfare, negotiators would instinctively look for strategies for dealing with hard bargaining. Some tactics for negotiating with hard bargainers, like relying heavily on objective criteria, are discussed earlier in this essay and therefore, will not be addressed further here.

The classic strategy for dealing with hard bargainers is mostly doubling down on the basics of good negotiation practice. For example, Professor Peter Reilly has suggested that negotiators focus on creating a personal relationship with the hard bargainer, as people are generally less inclined to take advantage of those with whom they have relationships.<sup>31</sup> Furthermore, he suggests spending a lot of time asking questions to seek information and confirm the information provided, as hard bargainers are known to take advantage of information asymmetries.<sup>32</sup> Other suggestions include working on changing the specific negotiation counterpart or the structure of the negotiation, like using mediation. Among the best suggestions in this realm is working on improving one's BATNA, as leaving the negotiation for one's BATNA is one way to avoid entering a bad deal.<sup>33</sup>

Two important books have added to these strategies. William Ury's *Getting Past No: Negotiating Your Way From Confrontation to Cooperation*<sup>34</sup> provides a clear framework for reframing hard bargaining tactics into value-creation tactics. Most notably, this strategy focuses on keeping one's own emotions in check, understanding the other's needs, and framing offers in ways that appeal to their interests.<sup>35</sup> It also focuses on educating the other side about the impact of a failed negotiation as opposed to escalating any conflict,<sup>36</sup> in other words reframing their tactics in terms of engaging with value creation. Robert Mnookin's *Bargaining with the Devil: When to Negotiate, When to Fight* adds to this literature by bringing the moral issues of engaging with hard bargainers or

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<sup>30</sup> See generally *id.* at 99–100.

<sup>31</sup> Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. DISP. RES. 481, 527–28 (2009), [https://kb.osu.edu/bitstream/handle/1811/76898/OSJDR\\_V24N3\\_481.pdf?sequence=1&isAllowed=Y](https://kb.osu.edu/bitstream/handle/1811/76898/OSJDR_V24N3_481.pdf?sequence=1&isAllowed=Y) [<https://perma.cc/S3EV-E72D>].

<sup>32</sup> *Id.*

<sup>33</sup> FISHER ET AL., *supra* note 11, at 100, 103–05.

<sup>34</sup> See generally WILLIAM URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (1991).

<sup>35</sup> *Id.* at 11–13, 31–105.

<sup>36</sup> *Id.* at 130–56.

bad faith actors into the equation, but it still emphasizes leaning into negotiation.<sup>37</sup>

C. *The Problem with Traditional Negotiation Theory in Hybrid Warfare Situations*

There are several issues that prevent the application of such traditional negotiation theory in hybrid warfare situations. First, traditional negotiation theory works under the assumption of a bilateral negotiation, where the negotiating parties are clearly identified and “meet.” Traditionally, negotiation always took place face-to-face, through emissaries, and/or via an exchange of letters; information technology has made it possible for negotiation to take place at a distance through phones, emails, texts, and videoconferencing. Hybrid warfare settings are characterized by the fact that the head of the attacking party acts in the shadows and may not even be known of the attacker.

Second, in hybrid warfare, negotiations can only take place after the attack has occurred. Targets tend to learn late in the game that they are being targeted and may not even know who the attacker is. Without an adversary, the Lawyers’ Standard Philosophical Map fails because the precondition of knowing with whom to negotiate is not met. Thus, as the lawyer mentioned in the introduction, lawyers often think negotiation is not available to them. However, one exception to the adversary precondition must be noted. In ransomware cases, a small minority of hybrid warfare cases and maybe the most well-known, parties have some idea of who the aggressor is and may be able to engage in negotiation with them. We will discuss in the following sections what the object of such negotiations may be.

Third, the traditional view of interests is that they can be communicated (usually if the right question is asked). This may not be the case when we are dealing with criminal enterprises. When the objective of the attacker is to block essential services to destabilize a government, the attacking party may be reluctant to state what their true purpose is, and if they reveal it, this may not prove to be useful material in the exchanges with the target. Either the true purpose is clearly stated (e.g., collect a ransom), or it is hidden (the

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<sup>37</sup> ROBERT H. MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* 264-266 (1st ed. 2010).



ransom request is a diversion from darker motives): in both cases, these rarely are sources of value creation for the target party.

Fourth, the theory of the ratio of forces based on the parties' respective BATNAs suggests some form of balance in the distribution of power at the table. For negotiation to take place, both parties must retain at least a small portion of decision capability. Classical negotiation theory has been vague, at best, about what can be done when one party holds the existence of the other in his palm. Hybrid warfare offers a specific scenario here: the attack has already taken place, and the target has suffered a severe blow. The attacker may not have other goals than see the attack succeed – which may mean they have already attained their objective. The target may not have another option than to give in to the demands of the aggressor. In other words, this conduct is on the very edge of what constitutes negotiation and what is not negotiation.

Finally, “it takes two to tango.” We may here be in a situation where the other party, the attacker, is just not interested in negotiating at all, once again because the success of the attack is the only thing they want. The attack may even be a diversion to hide their true purpose. Discussing interests and objective criteria may, therefore, not be on their agenda and will never be.

Traditional negotiation theory, therefore, hits its limit if applied, through the Lawyers' Philosophical Map, to hybrid warfare negotiations between the target and their attacker. The rest of this essay will change perspective and state how, through a different lens, negotiation has a central role to play in hybrid warfare situations.

### III. NEGOTIATION THEORY IN THE SOCIAL SCIENCES

One way to break the legal profession's traditional approach to negotiation may be to adopt a broader vision of what negotiation is. It may therefore be interesting to look toward the social sciences. Over time, negotiation has become a major focus of research in the social sciences, especially in the field of organizational behavior. There, negotiation is commonly defined as “a form of decision making in which two or more parties talk with one another in an effort to resolve their opposing interests.”<sup>38</sup> With such a broad definition, the social sciences view negotiation to include

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<sup>38</sup> DAN PRUITT, NEGOTIATION BEHAVIOR XI (1981).

many activities that lawyers might not consider to be negotiation, such as conflict management and its processes and strategies,<sup>39</sup> social dialogue,<sup>40</sup> sales and purchasing,<sup>41</sup> as well as everyday decision-making (both in management and at home within one's family).<sup>42</sup> Applied to hybrid warfare, this enables us to loosen the traditional lawyer's assumptions toward negotiation in three different yet complementary ways.

### A. *The Parties in a Negotiation*

Lawyers tend to traditionally conceptualize negotiation as taking place between the parties in the dispute and through their attorneys acting as their agents.<sup>43</sup> Therefore, for a simple dispute involving two parties, it makes it a four-player game: two attorneys and two clients, resulting in six possibly negotiated relationships.<sup>44</sup> A broader view of negotiation allows for more complexity, with the addition of both a macro and a micro perspective.

The micro perspective is about disentangling the notion of "client" into different people with potentially different perspectives on the issue. One such effort leads to assessing the specific role of the General Counsel as a bridge between the C-suite and the law firm.<sup>45</sup> This vision exhibits the fact that within a party in negotiation or conflict, the various people coming from different areas of the firm with different functions may have different perspectives, interests, and priorities. For example, in a cyber ransom setting, individuals from information technology, public relations, internal communications, and production may see the event differently and have different interests, such as limiting public exposure, restoring operations quickly, ensuring data confidentiality, etc.

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<sup>39</sup> See STEPHAN PROKSCH, *CONFLICT MANAGEMENT* (2016).

<sup>40</sup> See RICHARD WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (1965).

<sup>41</sup> See, e.g., NEIL RACKHAM, *SPIN SELLING* (1988); GLENN EISEN AND WAYNE BARLOW, *PURCHASING NEGOTIATIONS* (1983).

<sup>42</sup> See generally ROY LEWICKI ET AL., *NEGOTIATION* (2019).

<sup>43</sup> ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 69–92 (2000).

<sup>44</sup> See *id.* at 5.

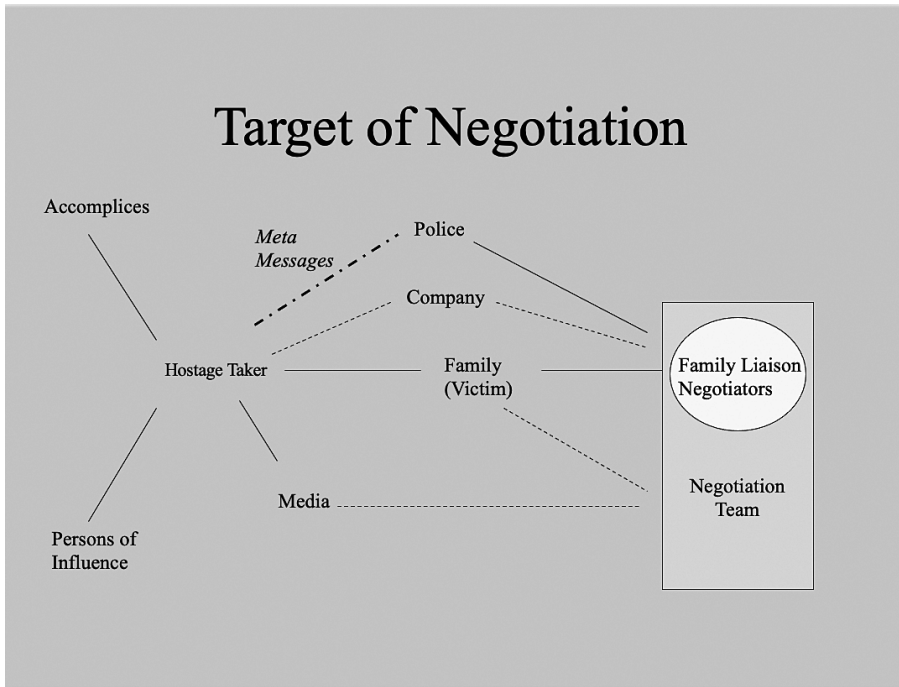
<sup>45</sup> Adrian Borbély, *Agency in Conflict Resolution as a Manager–Lawyer Issue: Theory and Implications for Research*, 4 *NEGOT. & CONF. MGMT. RSCH.* 2, 129 (2011).

This is even truer in crisis situations, which is a good characterization of hybrid warfare events. Crisis response may require organizations to break traditional hierarchies and put people at the forefront who are not used to working together. Legally speaking, a hybrid warfare act is often *force majeure*, i.e., an event people could not anticipate and hence fully plan for. While one may engage in some preparations in case of an attack, it is rare that targets are fully prepared; even worse, most of the time, attackers will target the least prepared organizations (e.g., hospitals). Therefore, new relationships will be created in such events. For example, this may be the first direct interaction between a CEO and the head of cybersecurity, and they may have never met before. Although the CEO may be the ultimate decision-maker, the traditional chain of command has been set aside, and the different actors will try to influence decisions the best they can, usually through internal negotiations.

From a macro perspective, there may be more “stakeholders” or “constituents” than just the parties involved. Law enforcement, in their will to help solve the issue, may position themselves on the target’s side without falling within the same hierarchical chain. Politicians, NGOs, and competitors may play similar roles. External consultants may be hired to help respond to the crisis. Insurance companies may also get involved. All these (potentially new) relationships will need to be managed efficiently, despite the crisis setting.

Since traditional notions of a negotiation counterpart do not fit into hybrid warfare, we need to look elsewhere for help. One place is a simplistic map illustrating the complexity of negotiating parties in a kidnap situation that Mr. Chrustie uses in practice. In this rendering, the hostage taker is negotiating with several parties—the police, the victim’s employer (typically a company with deep pockets), victimized family, and the media. The negotiation team is working with all of these groups. See Figure 1 below.

FIGURE 1



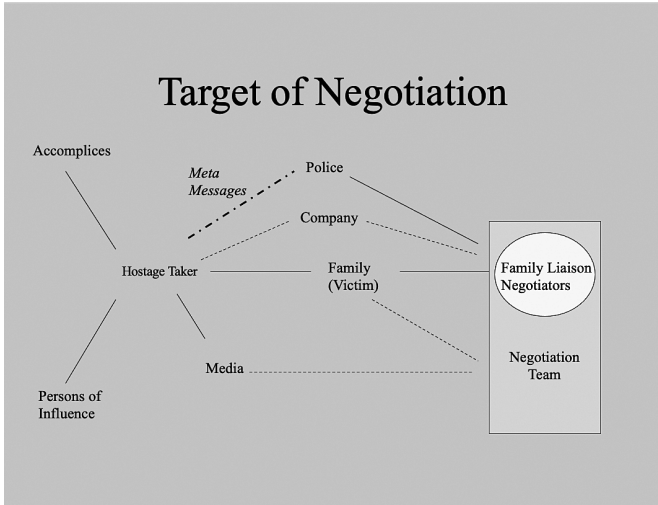
Some of what this illustration is describing is akin to what in negotiation theory is known as “behind-the-table negotiations.” This concept has been popularized in conjunction with principals negotiating through agents, where the principal and the agent must negotiate all kinds of things relating to their working relationship for a successful outcome for the principal.<sup>46</sup> Here there are a number of entities or groups on the target’s side of the equation with whom the target company and its CEO will have to negotiate. No matter the means of attack, the target’s information technology team is likely to be key in working on the issue, as are the target’s in-house counsel, insurers, customers, and maybe various others such as the FBI or other governmental agencies or diplomats, all of whom may be critical in addressing the situation.<sup>47</sup> Additionally, the executives within the C-Suite will likely be negotiating amongst themselves about what to do next, all the while looking for scape-

<sup>46</sup> See MNOOKIN ET AL., *supra* note 43, at 69–92.

<sup>47</sup> MotyCristal, NEGOTIATION WITH CYBER CRIMINALS, YOUTUBE, <https://www.youtube.com/watch?v=ZK0vuDaPVco> [<https://perma.cc/25ZW-G7M4>] (last visited Feb. 16, 2023).

goats to blame for the attack. To illustrate this concept, see Figure 2 below.

FIGURE 2



This is what is commonly known as a “stakeholder map,” a graphic representation in which the obvious parties are placed in the middle, with all other stakeholders positioned around.<sup>48</sup> In this diagram, A is the attacker, and T is the target. The arrows in both directions from the target with the groups mentioned above symbolize the back and forth of the behind-the-table negotiations.

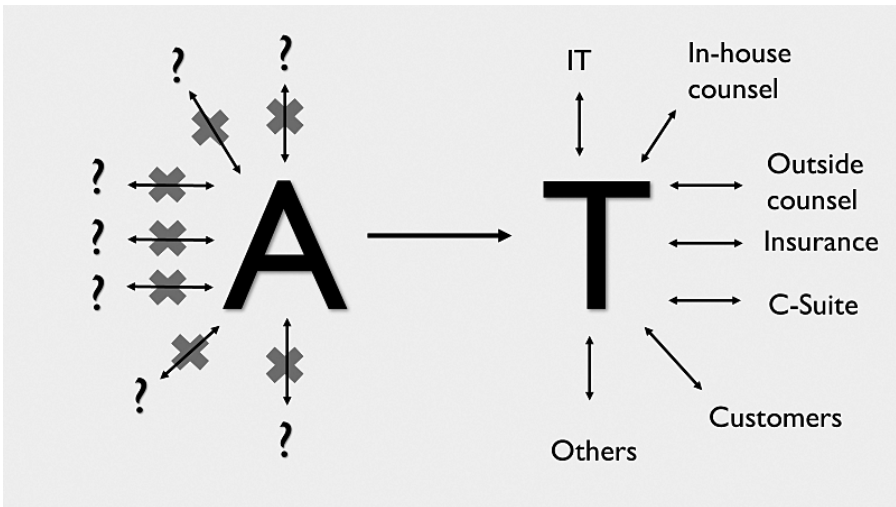
This micro perspective may also lead to constructing a second stakeholder map, with the aim of fluidifying information circulation and decision-making. Who knows whom? Who has already worked with whom? Who are the bystanders, and how could they help? Such behind-the-table interactions are complex but key to success. They often trigger a series of negotiations: for resources, expertise, personnel, and information, to name a few. Together, these relationships constitute the team and its internal processes, all of which are necessary to carry one’s negotiation strategy to fruition.

Another interesting aspect of the behind-the-table negotiation is thinking about what is going on with A. Presumably, there are behind-the-table negotiations going on within that side of the equa-

<sup>48</sup> LEMPEREUR & COLSON, THE FIRST MOVE: A NEGOTIATOR’S COMPANION (2010).

tion as well. For example, a Nation-State actor may be funding the A's organization, or there may exist a complex web of business-like relationships among different dark and hidden organizations.<sup>49</sup> Figure 1 suggests this very phenomenon with reference to "Persons of Influence" and "Accomplices." Although it may not be easy to identify these parties when one is not sure who an attacker is, might it be possible that T can somehow interfere with or otherwise disrupt such relationships? To illustrate this concept, see Figure 3 below.

FIGURE 3



This diagram builds on Figure 2 by adding question marks for the entities engaged in behind-the-table negotiations with A, and their negotiations are illustrated by the arrows in both directions from A to the question marks. The Xs on the diagram indicate places where T may be able to disrupt A's behind-the-table negotiations if it were able to identify or correctly guess which groups or entities are working with A.

Additionally, some actors may stand in between the aggressor and the target; one may want to approach these people and try to lobby them to become allies. This may be the case for the Government of the country where the aggressor is located if this is not the attacking country. For example, when Iran uses resources based in

<sup>49</sup> See MotyCristal, *supra* note 47.

Pakistan to destabilize the peacebuilding efforts in Afghanistan, the US may try to entice Pakistan to assist them in their efforts to neutralize the threat.

### B. *Communication in Negotiation*

Lawyers usually consider negotiation as the series of formal communications that take place between the parties through their attorneys. There is therefore, only one communication channel (between attorneys), and communication moves can be formally identified: a phone call, a videoconference, emails, or letters, etc. The social sciences, on the other hand, consider other activities to be part of negotiation. Much like a chess game where every move needs to be taken into consideration, in negotiation we are not talking about “moves” per se, but things like actions taken to secure an advantage at the negotiation table (such as making our BATNA more attractive). These activities are observed and analyzed by our negotiation partners, which makes them part of the negotiation. In other words, we not only negotiate through words, but we also negotiate through deeds. Ertel gives the example of a Chilean electricity company negotiating for transmission capabilities. Fearing its dependence on the national electricity carrier, they very publicly developed their own plans for transmission lines. This move was meant to affect the balance of power at the negotiation table and to impact the other party’s position.<sup>50</sup>

Hence, the target organization communicates its actions in response to the attack through actions such as moving assets around, deciding to move to its data backup system, giving up on its new data system, or publicly firing its head of cybersecurity. The number of examples is endless. Any such actions will be analyzed and interpreted by the attacker, as well as those who pull the attacker’s strings in the shadows. Thus, all subsequent actions must be carefully planned to impact the negotiation in accordance with the objectives one pursues. In brief, public relations actions and pronouncements, as well as attack response strategies, impact the “main” negotiation with the attacker.

Negotiation takes place before and after the formal negotiation moments; also, in parallel to it. When a company hires a consultant to help them, someone that the attacker knows, at least

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<sup>50</sup> Danny Ertel, *Turning Negotiation into a Corporate Capability*, HARV. BUS. REV. 69 (May-June, 1999).

from reputation, it sends a signal that will color the exchanges to come. The negotiation strategy is not only about the message to be delivered to the other side but how our behaviors will change going forward. All of this needs to be embedded within “negotiation” as a whole.

### *C. Topics of Discussion*

Lawyers tend to restrict the discussion to the sole elements of a legal claim and their financial consequences. Their focus is on the dispute and the way to solve it. The Lawyers’ Standard Philosophical Map may lead them to only consider money as a negotiation variable and to fail to look at all of the conflict’s variables. In hybrid warfare, with such a vision, topics would be restricted only to rescinding the attack and limiting its financial impact (the amount of the ransom, for example).

However, there are other elements that could be negotiated across the table. First, to decide on a course of action, the target needs to know the exact extent of the attack or the exact capabilities of the attacker if only at threats level. Here, the negotiation is about information. In a cyberattack scenario, before considering paying a ransom, the target may want to ascertain which information has been collected and whether it has been deciphered (so that it may be sold to a third party). The target may therefore request for file trees or samples of the seized files (much like requesting a proof of life in a hostage-taking situation). Furthermore, one may want guarantees that paying the ransom (or freeing the prisoners) will have the full promised effect (e.g., destruction of the seized data or the compromising photos in case of a kompromat).

Such information may also serve to identify the threat actor, who may, until then, act undercover. This information would be most helpful, especially when outside experts are involved, including government actors. As repeat players, they may have dealt with this group in the past, know how they function, and which arguments may have an impact on them. For example, cyber criminality may be the actions of lay people or true professionals. Such threat actors may be private capitalistic enterprises or armed groups functioning much like an army (with ranks, orders, and sanctions to undisciplined agents). Knowing the “counterpart” is valuable information for strategizing one’s response.



One may also want to negotiate for time. The threat actor may want to keep deadlines short to prevent the target from organizing its defense or counterattack or to move on to the next attack. The target may want to gain time to diagnose the situation properly and collect the ransom money from their own cash flow or from their insurance company. With more time to respond, more responses become possible. For example, the target may want to give their public relations team as much time as possible to organize a cogent messaging strategy before the target goes public with the breach.

Finally, and more traditionally, the target may be able to negotiate what most people think of in a negotiation of this sort—a discount on the ransom amount. In cyber-criminality cases, it has sometimes been possible to reduce the amount of the ransom request to liberate the target's computer systems.

When including behind-the-table negotiations, numerous other topics may also be negotiated beyond those mentioned earlier in this section. Examples include the allocation of the necessary resources to the technical line of response, overtime payment promises for the people involved in the crisis response, the involvement of experts, rapid and proper contribution from the insurer, just to name a few. Another critical negotiation will be whether to include risk advisors, intelligence and research expertise, or government-law-enforcement, which may require a subsequent negotiation about the extent of their involvement and the limits to their infringement on the organization's decision sphere.

It is important to note that most of the discussion up to this point has been about negotiating urgent actions in response to the attack. For example, amid the crisis, do we divert resources toward trying to understand how the attack was made possible in the first place? There are long-term items to negotiate as well. Mr. Chrustie has observed a host of diverse questions, induced by hybrid warfare, where negotiation and conflict management approaches were of significant relevance. Examples include a mining company's exploratory project met with protester resistance, which may be fueled by disinformation or bad information from foreign actors; foreign hostile actors using proxies to enter sensitive natural resource sectors such as rare earth minerals, technology, or energy through a merger and acquisition process. These common ongoing situations require acute negotiation and conflict management approaches. While preventing further attacks is an integral element of the response to hybrid warfare, most issues are outside the arena

of crisis situations. The most pressing issues may not be considered a priority until the immediate threat has been resolved. Once the crisis has passed, executives may want to unveil the weak links in their organization's security and act to resolve them. These would be topics of numerous subsequent negotiations: purchasing the right technical solutions, reinforcing personnel on key issues, spreading awareness training to the whole staff, renegotiating insurance policies, etc.

#### D. *Negotiation Permeates Hybrid Warfare*

Such a broader view of negotiation leads to the conclusion that hybrid warfare intervenes in a web of relationships that may be subject to negotiation on various topics. We propose that hybrid warfare be considered "negotiation situations," meaning situations that may require negotiation efforts, where conflict needs to be managed through negotiations with third parties, especially within certain relationships and on some specific topics. Whether negotiation takes place or is replaced by another form of decision-making (an authoritarian unilateral decision or a neutral's decision), negotiation skills remain useful. Therefore, we invite lawyers involved in hybrid warfare events to employ a set of negotiation skills (individual and organizational), which will improve the quality of the response.

### IV. THE RESPONSE: A SKILLS-BASED APPROACH

In the web of relationships induced by the hybrid warfare situation, there will be negotiations here and there, some with the attacker but mostly behind the table. Whether formal across-the-table negotiations will take place or not, negotiation skills will be of the utmost importance. In other words, hybrid warfare requires victims and responders to be good negotiators in order to respond to the crisis in a cogent and strategic manner. We choose to split what we mean by negotiation skills into two broad categories: individual skills and collective abilities. We will address each in the coming sections.

A. *Individual Negotiation Skills Necessary to Survive a Hybrid Warfare Attack*

There are a number of negotiation skills that come into play in the hybrid warfare environment. In this section, we will provide brief descriptions of the ones we believe to be most important in this space: empathy, situational awareness, regulating emotions, and understanding and prioritizing interests. While these skills are often characterized as leadership skills, they are generally taught in negotiation courses, especially in business schools.

i. Empathy

Among the skills we teach in negotiation class, empathy may be key. Empathy is the ability to see the situation from the other party's perspective and is also described as simply understanding a counterpart.<sup>51</sup> The attacker is an agent, usually embroiled in a complex web of relationships that hides the true master pulling the strings. The attacker(s) have personal interests that are at play. In the case of a ransom for example, those interests may be satisfied through a small cut of the requested sum. They may be seasoned professionals or scared amateurs, but if we can make an educated guess as to their interests and motivations and get confirmation of it, then the target's response will be more efficient.

Furthermore, experienced negotiators can humanize the situation, i.e., demonstrate the human consequences of the attack and act upon the human aspects on the attacker's side. A bizarre incident in Canada supports this: Toronto's Hospital for Sick Kids was hit by a ransomware attack in December 2022. Noticing this, the organization that provided the software used in the attack made the decipher software available for free to the target and severed their links with the attacker.<sup>52</sup> This would not happen if one actor on the "dark side" did not acknowledge the human consequences of the attack—and deemed them unethical enough to act upon them.<sup>53</sup>

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<sup>51</sup> Mnookin et al., *supra* note 8, at 46-47.

<sup>52</sup> Andrea Fox, *LockBit Ransomware Group "Apologizes" for Children's Hospital Attack*, HEALTHCARE IT NEWS (Jan. 4, 2023), <https://www.healthcareitnews.com/news/lockbit-ransomware-group-apologizes-childrens-hospital-cyberattack> [https://perma.cc/KU9D-DZD2].

<sup>53</sup> Talking about ethical behavior on the part of an agent of hybrid warfare may sound out of place; however, this example demonstrates the fact that people within the attacker organization are human too; in this case, they had felt that this attack went too far.

This event also illustrates the “business” approach that some of the attackers may have. One may notice how they function as a business and rely on a vocabulary that is close to what we would be used to in regular business organizations, speaking of “business associates” and “bottom line.” Once we know they function more as a business than an army corps, we can adapt to their language, their reflexes, to build rapport (if possible) or at least to increase our understanding of their strategic choices.

## ii. Situational Awareness

Another set of negotiation skills have to do with situational awareness, defined as the ability to perceive elements from our environment, make sense of them and their implications.<sup>54</sup> Simply put, the ability to take a broader perspective on an issue. William Ury’s first advice, when hitting a hurdle in a negotiation, is to “go to the balcony”.<sup>55</sup> This simply means watch the events unfold before you as if you were watching a performance.<sup>56</sup> It helps create distance with the matter and helps negotiators reflect on what is happening and what it means. The ability to diagnose a situation in its full complexity is a key capability to plan for and be efficient in negotiation.

In order to see the big picture, negotiators should map all of the stakeholders, like in Figures 2 and 3, and identify the different terrains for negotiation and how they impact one another. Larry Crump coined the term “linkages” to point at the possible impacts one negotiation may have on another.<sup>57</sup> The most classical link is when one negotiation is used as the best alternative to a negotiated agreement for a different negotiation.<sup>58</sup> In other terms, if I fail in my negotiation to purchase this car, I can simply negotiate with another seller. Or, I may engage in parallel negotiations for the car and ultimately go with the better deal. In hybrid warfare settings, the negotiation with the target’s insurer may impact the negotiation efforts toward the attacker. If the insurer is not willing to contribute to the ransom, the stakes for the negotiation with a bank to borrow the ransom money will be higher and maybe lessen the target’s willingness to pay the full ransom.

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<sup>54</sup> A term coined by Mika Endsley. See Mika Endsley, *Toward a Theory of Situation Awareness in Dynamic Systems*, 37 *HUM. FACTORS* 1 (1995).

<sup>55</sup> Ury, *supra* note 34, at 37-39.

<sup>56</sup> *Id.*

<sup>57</sup> Larry Crump, *Strategically Managing Negotiation Linkage Dynamics*, 3 *NEGOT. & CONFLICT MGMT. RSCH.* 3-27 (2010).

<sup>58</sup> Fisher et al., *supra* note 11, at 103-04.

In short, this is one of the most critical skill areas, one that Mr. Christie refers to as “the analytical requirements of negotiations.” In hybrid warfare contexts, where information is used as a primary influencer through misinformation, disinformation, and malign information, analytical or situational awareness may require significantly extra effort to research, verify and clarify information and facts. This includes the possibility of involving experts and using tools such as artificial intelligence, big data, and machine learning in the negotiation process to guide and assist in mitigating risks and developing corresponding strategies.

### iii. Emotional Regulation

Another negotiation skill has to do with regulating emotion. Negotiators are trained to control their emotions while involved in conflict-prone conversations, which is very difficult to do. Discussions do not always go smoothly—especially when the parties are in crisis-management mode. Hybrid warfare situations qualify as intractable negotiations, defined as situations that are divisive, intense, pervasive, and complex.<sup>59</sup> As the stakes are very high (a ransomware attack can lead to bankruptcy for a company), they put people under tremendous pressure. People may therefore not control their emotions and act brutally, making communication tense, sometimes even impossible. Some people will later be blamed for letting the incident happen but need to be at their best to control the consequences of the attack and prepare for restoring operations.

### iv. Prioritizing Interests

Finally, the target of a hybrid warfare effort needs to be able to prioritize their interests. Working on the relative importance of different and sometimes conflicting interests and how to make trade-offs between different types of interests is a key element in negotiation preparation. When hit with a ransomware, does the target choose to prioritize a quick recovery, or saving on the ransom? What if the ransom has been negotiated down by 50%: is it better to keep negotiating it down, at the risk of losing time, or to settle in order to resume operations swiftly?

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<sup>59</sup> Linda Putnam and Julia Wondolleck, *Intractability: Definitions, Dimensions, and Distinctions*, MAKING SENSE OF INTRACTABLE ENVIRONMENTAL DISPUTES (Island Press ed. 2003).

B. *From Individual Skills to Organizational Capability:  
Experience and Structure*

There is little in the law and social science literature discussing organizational capacity with respect to negotiation, as these disciplines remains mostly centered on the negotiator as an individual. However, negotiation should also be viewed as an organizational capability,<sup>60</sup> particularly in hybrid warfare situations. From other professions' point of view (e.g., law enforcement), negotiation is mixed with crisis and high intensity conflict management. This perspective has produced a significant number of the crisis management experts that now sell their service to targets of hybrid warfare efforts (either once they have been hit, or in prevention). This mix of sources has led Mr. Chrustie to consider the organizational response capability as detrimental in scenarios involving cyber-attacks and counter foreign intelligence influence operations.

Developing an organization's response capability comes through anticipation. If we follow Mr. Chrustie's 3-S model,<sup>61</sup> one issue he speaks of is "structure": the negotiation team that is charged to engage in what is expected to be harsh negotiation circumstances.<sup>62</sup> The right team must be assembled with the necessary expertise, and they must create efficient communication and decision channels among team members. Creating such teams during a crisis is difficult, although common. In an ideal world, potential targets would build such a structure before the hybrid warfare situation develops. Through his interaction with States and agencies on the frontline of global conflicts and disputes and his work with academia, Mr. Chrustie has found huge value in various theoretical models including Systems Theory, Complexity Theory and Chaos Theory. While the scope of this paper will not allow for a meaningful exploratory discussion on these topics, the authors hope to explore these in further writings.

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<sup>60</sup> Adrian Borbely and Andrea Caputo, *Approaching Negotiation at the Organizational Level*, 10 NEGOT. & MGMT. RSCH. 4, 306–323 (2017).

<sup>61</sup> The Negotiations Podcast, *A Systems Approach to Negotiations: The 3 S's*, Negotiations Ninja (June 24, 2019), <https://negotiations.ninja/podcast/a-systems-approach-to-negotiations-the-3-ss/> [<https://perma.cc/Y4YZ-ZH2K>].

<sup>62</sup> See Calvin Chrustie, Jayne Seminare Docherty, Leonard Lira, Jamil Mahuad, Howard Gadlin & Christopher Honeyman, *Negotiating Wicked Problems: Five Stories*, THE NEGOTIATOR'S DESK REFERENCE (Christopher Honeyman & Andrea Schneider eds., 2017).

One of the highly interesting training methods for crisis negotiation is called “red teaming.”<sup>63</sup> It consists of splitting a negotiation team into two groups: the blue team must respond to the threat, while the red team plays the attacking party’s role. Red teaming enables participants to experience the role of the threat actor, which develops empathy for and understanding of the attacker from seeing the situation from the other party’s perspective. This perspective helps the team gain understanding about how the attacker may function, and therefore provide insight for how best to respond. This practical training should also mix substance expertise with interpersonal (i.e., negotiation) skills, so that the behind the table structure is ready when an attack materializes. Doing so enables participants from the same organization to start building a response structure: assign roles for who will do what, build strategic alliances, determining which subject matter experts and negotiation consultants to engage, and determine how behind the table exchanges will take place, how resources will be collected, and who will handle which stakeholder, to name a few. The focus is displaced from the individual negotiator to the team. It is no longer about how good the negotiator is, but what structure she benefits from to carry out her mission. Some crisis negotiators, much like the military, place logistics and operations at the heart of their thought processes; for them, the structure enables the response strategy, including negotiations, to be operationalized.

Since structure may not be a topic that organizations want to invest in, the role of crisis response experts becomes even more critical. Most victims of hybrid warfare are like people in disputes: they do not have real-life experience with what they are experiencing. This is one of the reasons why they turn to attorneys: not only because of their knowledge of the law, but also because of their experience (real or perceived) in such situations. The same is true for security, risk, and intelligence experts. The fact that they are repeat-players in cyberattacks, or hostage-taking, makes their intervention highly valuable. More importantly, because they are familiar with low trust interactions, polarized engagements, and deceptive tactics as well as with research, analysis, and other critical intelligence capabilities, they can assist and support lawyers, business leaders and politicians to first “identify” and then navigate this increasing popular disputes and situations in society.

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<sup>63</sup> Mike Fenton, *Restoring Executive Confidence: Red Team Operations*, 11 NETWORK SEC. (2016).

## V. CONCLUSION

This paper has argued that hybrid warfare is a ripe source of negotiation, especially when one thinks in terms of conflict management, but is outside the norm for legal negotiators. The blinders provided by the Lawyers' Standard Philosophical Map keep them from seeing those interactions as negotiations. Much of the internal negotiations we have identified will be about designing and coordinating a response to an attack, including creating a decision-making system (since it will rarely be preexistent). For example, how much involvement would an insurer have in the response to an attack? How much legal work is done in-house or through outside counsel, and who gets to do which work? These are items to be negotiated. Efficiency should be at the forefront for all of the behind the table negotiations as the target is likely playing catch-up and needs to design a decision-making framework.

We did not spend much time in this essay discussing the negotiations that should be taking place now, before a potential target is attacked or clients find themselves in the subtleties of a hybrid warfare-related situation, as they most often are disguised and difficult to distinguish without experience and expertise. These *a priori* behind the table negotiations should be about staging defensive exercises such as stress-tests and simulation-based training on how to address an attack beforehand. Particular attention should include building teams and capabilities to identify these situations and to build the expertise on how to navigate them and mitigate their associated risks and threats. The importance of intelligence-led strategies and decision making is not something most legal professionals Chrustie has met view as a common approach, as the legal community generally prefers “*evidence-based*” approaches. Unfortunately, as a former senior Israeli security official years ago shared with Mr. Chrustie during his work, “*if we relied on evidence for our decisions, we would not exist beyond 1949*”. In a society like many *NATO* and *5 Eye*<sup>64</sup> countries, where peace and security has been a staple for decades, the luxury of the culture of “*evidence-based decisions*” may need to be complemented or replaced with “*intelligence-based decisions*”. One that has more uncertainty but one that often is more effective in predicting, avoiding, and managing threats. Including more planning and exercises should

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<sup>64</sup> See generally Five Eyes Intelligence Oversight and Review Council (FIORC) at <https://www.dni.gov/index.php/nscsc-how-we-work/217-about/organization/icig-pages/2660-icig-fiorec> [<https://perma.cc/R9Z2-XVHA>] (last visited Apr. 23, 2023).



lead to more efficiency, less stress, and fewer conflicts among the behind the table players when a real encounter occurs.

Above all, to make responses to hybrid warfare threats efficient, the different actors, especially the risk and security advisors and the lawyers, need a congruent vision of what negotiation is, and how it works within a conflict management strategy. This compatibility will facilitate working together so negotiators and lawyers do not act like ships passing in the night, much like Mr. Chrustie's experience with the law firm detailed in the introduction of this essay. The different language that these experts use and the different things they see as negotiation may result in real world consequences for clients, both financial, legal, and reputational. Even if "one should not negotiate with threat actors," this stance is a public deterrent, not as a pragmatic advice.

